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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
HRCR2010	HRC Resolution: Human rights and access to safe drinking water and sanitation (2010) A/HRC/RES/15/9
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
UNGAR2010	UNGA Resolution: The human right to water and sanitation (2010) A/RES/64/292
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 Nations 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

¹ Art. 11 United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

² Art. 6 United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

³ Art. 26 United Nations General Assembly Universal Declaration of Human Rights (UDHR), 10 December 1948.

⁴ UNICEF and World Health Organization 2015 'Progress on sanitation and drinking water – 2015 update and MDG assessment' (2015) 7, <http://www.who.int/water_sanitation_health/monitoring/jmp-2015-update/en/> accessed 29.07.2015.

⁵ United Nations Development Programme 'Human Development Report 2006, Beyond Scarcity: Power, Poverty and the Global Water Crisis' (2006) 2.

⁶ TS Bulto 'The Emergence of the Human Rights to Water in International Human Rights Law: Invention or Discovery?' Melbourne Journal of International Law Vol. 12 (2011) 2.

⁷ LY Huang 'Not Just Another Drop in the Human rights Bucket: The Legal Significance of a Codified Human Right to Water' Florida Journal of International Law Vol. 20 (2008) 353.

⁸ United Nations General Assembly Resolution 'United Nations Millennium Declaration' A/Res/55/2, September 2000.

⁹ *Ibid.* para. 19.

improved source of water.¹⁰ Altogether, 2.6 billion people gained access to an improved drinking water source between 1990 and 2012.¹¹ 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,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,¹³ the global water crisis still remains evident, especially amongst poor populations in rural areas.¹⁴ This issue is multifaceted and does not only relate to personal use and need of water.¹⁵ It is apparent in the drying up and shrinking of rivers and lakes.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.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.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

¹⁰ UNICEF and WHO 'Progress on sanitation and drinking water' (2015) 29.

¹¹ *Ibid.* 7.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ See United Nations 'The Millennium Development Goals Report 2015' (United Nations New York 2015) 59 <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20%28July%201%29.pdf> accessed: 11.09.2015.

¹⁵ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 1.

¹⁶ United Nations Development Programme 'Human Development Report' (2006) 141.

¹⁷ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 1.

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.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.²⁰ This is because only few international human rights instruments mention a right to water explicitly.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.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.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

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.

²⁰ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 11.

²¹ See UNGA 'Convention on the Rights of the Child' (CRC) A/44/25 adopted on 20 November 1989, entered into force 1990; UNGA 'Convention on the Elimination of Discrimination against Women' (CEDAW), A/34/180 adopted on 18 December 1979, entered in to force 1981.

²² *Ibid.*

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.²⁴ 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.²⁵ 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,

²⁴ HLF Saeijs and MJ van Berkel 'The Global Water Crisis: The Major Issue of the Twenty-first Century, a Growing and Explosive Problem' in EHP Brans, EJ De Haan, A Nollkaemper, J Rinzema (ed) *The Scarcity of Water, Emerging Legal and Policy Responses* (1997) 3.

²⁵ B Hartley and HJ van Meter 'The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach' *Willamette Journal for International Law & Dispute Resolution* Vol. 19:66 (2011) 70.

unsustainable consumption patterns, low efficiency in water-use, poor management practices and inadequate investment in infrastructure.²⁶ It is estimated that 1.8 billion people will be living in countries with absolute water scarcity by 2025.²⁷

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.²⁸ Only a small percentage, around five to 10 per cent, of the total water consumption can be allotted to household uses,²⁹ including non-essential uses such as watering lawns, car-washing or filling swimming-pools.³⁰ Other sectors such as industry and agriculture use a much greater amount of water than private households.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."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.³³ In those industrialised societies most people take access to clean

²⁶ UN News Centre 'Ban Ki-moon urges greater efforts to tackle 'silent crisis' of safe water for all' (24 October 2007)
<<http://www.un.org/apps/news/story.asp?NewsID=24397#.VfvdKZePzUc>> accessed: 18.09.2015.

²⁷ UN International Decade for Action 'Water for Life' 2005-2015, Water Scarcity
<<http://www.un.org/waterforlifedecade/scarcity.shtml>> accessed 03.08.15.

²⁸ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 7.

²⁹ United Nations Development Programme 'Human Development Report 2006, Beyond Scarcity: Power, Poverty and the Global Water Crisis' (2006) 2.

³⁰ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 7.

³¹ *Ibid.*

³² United Nations Development Programme 'Human Development Report' (2006) 2.

³³ D Donoho 'Some Critical Thinking about a Human Right to Water' ILSA Journal of International & Comparative Law Vol. 19:1 (2012-2013) 92.

water and sanitation for granted.³⁴ However, in most parts of the world and for a huge number of people clean water is a scarcity.³⁵

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.³⁶ A huge issue are the inequalities that govern access to water worldwide.³⁷ 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.³⁸ However, not even the minimum standard can be assured for half of the world's population.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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.*

³⁶ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 2.

³⁷ *Ibid.* 3.

³⁸ S Malz / U Scheele 'Wasserbedarf und Wasserverbrauch privater Haushalte und der Industrie nach Ländern' in J L Lozán, P Graßl, P Hupfer, L Karbe & C.-D. Schönwiese (eds), Warnsignal Klima: Genug Wasser für alle? (2011) 142 <http://www.climate-service-center.de/imperia/md/content/csc/warnsignalklima/warnsignal_klima_wasser_kap2_2.2_malz_scheele.pdf> accessed: 10.09.2015.

³⁹ *Ibid.* 142.

⁴⁰ *Ibid.*

⁴¹ United Nations Development Programme 'Human Development Report' (2006); IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 3.

⁴² AK Biswas 'Water Management for Major Urban Centres' (2006) Vol. 22 International Journal of Water Resources Development 190 *et seq.*

forced to use water from unsafe sources.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.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.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.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.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.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.⁴⁹ Nearly 4000 children die every day of the consequences of such water-related diseases.⁵⁰ Drinking untreated, unsafe water causes water-borne diseases, such as diarrhoea, typhoid and cholera.⁵¹ The most common disease is diarrhoea; estimated to account for 21 per cent of all deaths of children under the age of

⁴³ C Tortajada 'Water Management in Mexico City Metropolitan Area' (2006) 22 International Journal of Water Resources Development 361.

⁴⁴ *Ibid.*

⁴⁵ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 4.

⁴⁶ UNICEF and WHO 'Progress on sanitation and drinking water' (2015) 4.

⁴⁷ United Nations Development Programme 'Human Development Report' (2006) 22.

⁴⁸ CW Bryant 'How Long Can You Go Without Food and Water?' HOWSTUFFWORKS.COM <<http://health.howstuffworks.com/diseasesconditions/death-dying/live-without-food-and-water.htm>> accessed: 17.09.2015.

⁴⁹ World Water Assessment Programme 'United Nations Water Development Report 2: Water a Shared Responsibility' (2006) 204.

⁵⁰ *Ibid.*

⁵¹ B Hartley and HJ van Meter 'The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach' (2011) 68.

five in developing countries.⁵² This results in 1.5 million deaths of children under the age of five each year.⁵³ On a daily basis, a lack of safe drinking-water and adequate sanitation claims about 6,000 lives, most of them children.⁵⁴ This amounts globally to more people dying from diarrhoea than from tuberculosis or malaria⁵⁵ and more people dying from water-related diseases than in armed conflicts.⁵⁶

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.⁵⁷ 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-Saharan African population indicates that girls and women are primarily responsible for such water collection.⁵⁸ 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.⁵⁹ 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.⁶⁰

⁵² World Water Assessment Programme 'United Nations Water Development Report 2' (2006) 210.

⁵³ United Nations Children's Fund and World Health Organisation 'Diarrhoea: Why Children are still dying and what can be done' (2009) 1.

⁵⁴ UN News Centre 'Ban Ki-moon urges greater efforts to tackle 'silent crisis' of safe water for all' (24 October 2007).

⁵⁵ United Nations Development Programme 'Human Development Report' (2006) 42.

⁵⁶ *Ibid.* 1; R Norton-Taylor 'Global armed conflicts becoming more deadly, major study finds' <<http://www.theguardian.com/world/2015/may/20/armed-conflict-deaths-increase-syria-iraq-afghanistan-yemen>> accessed: 02.02.2016.

⁵⁷ *Ibid.* 6.

⁵⁸ United Nations 'Millennium Development Goals Report 2012' (2012) 54 <<http://www.un.org/millenniumgoals/pdf/MDG%20Report%202012.pdf>> accessed 2009.2015.

⁵⁹ United Nations Development Programme 'Human Development Report (2006) 6.

⁶⁰ IT Winkler 'The Human Right to Water, Significance, Legal Status and Implications for Water Allocation' (2012) 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.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.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.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.⁶⁴ This means that right holders would not be able to exercise their rights, therefore, violations would remain without remedy.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."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 derivative right.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.

⁶² C Dubreuil 'The Right to Water, From Concept to Implementation' World Water Council Marseilles (2006) 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.*

⁶⁶ O O'Neill 'The Dark Side of Human Rights' *International Affairs* 81 (2005) 430.

⁶⁷ S. Scheuring 'Is there a Human Right to Water in International Law?' *UCL Jurisprudence Review* (2009) 149.

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

⁶⁸ South Africa has ratified the ICESCR on 12 January 2015 See for the ratification status: United Nations Treaty Collection, 3. 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&chapter=4&lang=en> accessed: 21.09.2015.

⁶⁹ United Nations Development Programme 'Human Development Report (2006) 6.

⁷⁰ The International Statistical Institute <<http://www.isi-web.org/component/content/article/5-root/root/81-developing>> accessed: 31.07.15.

⁷¹ CNN Money, World's largest economies

<http://money.cnn.com/news/economy/world_economies_gdp/> accessed 31.07.15.

⁷² South African Human Rights Commission: Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014 (2014) 14

<<http://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20%282%29.pdf>> accessed: 26.09.2015.

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 Thielbörger 'The Right(s) to Water' (2014) 56.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ A Cahill 'The Human Right to Water – A Right of Unique Status': The Legal Status and Normative Content of the Right to Water' *The International Journal of Human Rights* Vol. 9:3 (2005) 391.

standing right and not only another claim under an already existing explicit human right, can it be taken seriously.⁷⁷ The key to a comprehensive protection of the right requires governments to enforce such a right by providing and protecting access to water.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.⁷⁹ Hence, justiciability is more difficult and complicated if a right is not explicitly codified.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.⁸¹ Furthermore, the right to water is mentioned in Art. 24 (2) (c) of the Convention on the Rights of the Child (CRC).⁸² States parties are mandated to implement children's rights to health by taking appropriate measures to combat diseases and malnutrition through *inter alia* the provision of clean drinking-water.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.

⁷⁷ P Thielbörger 'The Right(s) to Water' (2014) 57.

⁷⁸ Unknown 'What Price for the Priceless?: Implementing the Justiciability of the Right to Water' Harvard Law Review Vol. 120 (2006) 1072.

⁷⁹ See Part A. Chapter I: III.

⁸⁰ *Ibid.*

⁸¹ UNGA CEDAW, A/34/180 (1979).

⁸² UNGA CRC, A/44/25 (1989).

⁸³ *Ibid.* Art. 24 (2) (c).

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.⁸⁴ On the other hand, the provisions are far from comprehensive in terms of being self-standing.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.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.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),⁸⁸ ICCPR⁸⁹ nor the ICESCR⁹⁰ 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,⁹¹ the right to the highest attainable standard of physical and mental health⁹² or an adequate

⁸⁴ P Thielbörger 'The Right(s) to Water' (2014) 58.

⁸⁵ A Cahill 'The Human Right to Water – A Right of Unique Status': The Legal Status and Normative Content of the Right to Water' (2005) 391.

⁸⁶ *Ibid.*

⁸⁷ P Thielbörger 'The Right(s) to Water' (2014) 58.

⁸⁸ UNGA UDHR (1948).

⁸⁹ UNGA ICCPR (1966).

⁹⁰ UNGA ICESCR (1966).

⁹¹ Art. 6 (1) UNGA ICCPR (1966).

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 Thielbörger ‘The Right(s) to Water’ (2014) 88.

⁹⁵ Art. 25 (1) UNGA UDHR (1948).

⁹⁶ P Gerber and B Chen ‘Recognition of the Human Right to Water. Has the Tide Turned?’ *The Alternative Law Journal* 36 (2001) 21.

⁹⁷ *Ibid.*

⁹⁸ B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 73.

(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 UNGAR2010 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

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.

¹⁰² B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 73.

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.*

¹⁰⁶ B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 74.

¹⁰⁷ United Nations Treaty Collection, 3. International Covenant on Economic, Social and Cultural Rights, Chapter IV Human Rights.

¹⁰⁸ Art. 11 (1) UNGA ICESCR (1966).

everyone to the enjoyment of the highest attainable standard of physical and mental health.”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.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.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.¹¹² Since, the right to water is essential to achieve the human rights to “an adequate standard of living”¹¹³ and “the enjoyment of the highest attainable standard of health”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.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

¹⁰⁹ Art. 12 (1) UNGA ICESCR (1966).

¹¹⁰ L. Watrous ‘The Right to Water – From Paper to Practice’ Regent Journal of International Law Vol. 8 (2011-2012) 115.

¹¹¹ *Ibid.*

¹¹² P Gerber and B Chen ‘Recognition of the Human Right to Water. Has the Tide Turned?’ (2001) 21.

¹¹³ Art. 11 (1) UNGA ICESCR (1966).

¹¹⁴ Art. 12 (1) UNGA ICESCR (1966).

¹¹⁵ B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 74.

2013 to create an individual complaint process.¹¹⁶ However, only 45 states have signed it and 21 states have ratified it. With neither Germany nor South Africa having signed nor ratified it.¹¹⁷ 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.¹¹⁸

2. 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.

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.”¹¹⁹ 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.”¹²⁰ In its Agenda 21 the UN Conference on Environment and Development reaffirmed the Mar del Plata Declaration provisions in the early 1990s.¹²¹ Moreover, the Programme of Action of the International Conference on Population and Development in Cairo,

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.

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.

¹¹⁸ B Hartley and HJ van Meter ‘The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach’ (2011) 74 *et seq.*

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/71UN77-161.6.pdf>> accessed 15.09.2015.

¹²⁰ *Ibid.* 67.

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.

which was attended by almost 180 states,¹²² stated that people have a right to an adequate standard of living including adequate water and sanitation.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.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).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.”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.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 2013.¹²⁸ 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.¹²⁹ The resolutions also understand the right to be comprehensive in terms of being applicable to all humans.¹³⁰ However, these resolutions are only political affirmations. They may be called “declarations of intent” or “global

¹²² Report on the International Conference on Population and Development, Cairo 5-13 September 1994, A/CONF.171/13, 18 October 1994, Attendance p. 117 *et seq.* <https://www.unfpa.org/sites/default/files/event-pdf/icpd_eng_2.pdf> accessed: 15.09.2015.

¹²³ *Ibid.* Principle 2 p. 11.

¹²⁴ UNGA ‘The Right to Development’ A/RES/54/175 (2000) para.12 (a).

¹²⁵ UNGA ‘The human right to water and sanitation’ A/RES/64/292 (2010).

¹²⁶ *Ibid.* para 1.

¹²⁷ P Gerber and B Chen ‘Recognition of the Human Right to Water. Has the Tide Turned?’ (2001) 21.

¹²⁸ United Nations General Assembly Resolution ‘The Human Right to Water and Sanitation’ A/RES/68/157, adopted 18 December 2013.

¹²⁹ P Thielbörger ‘The Right(s) to Water’ (2014) 59.

¹³⁰ *Ibid.*

appeals”,¹³¹ 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.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).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.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.”¹³⁵ However, this statement can be easily misunderstood and must be read with caution.¹³⁶ Since Art. 10 and Art. 14 of the UN Charter refer to UNGA resolutions as “recommendations”¹³⁷ it is well established in international law that UNGA resolutions are of no legally binding character.¹³⁸ The same applies to resolutions of the HRC, which was founded as a subsidiary organ of the UNGA.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.*

¹³⁵ UN Office of the High Commissioner for Human Rights ‘UN united to make the right to water and sanitation legally binding’ Geneva 1 October 2010
<<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10403&LangID=E>>
accessed: 25.09.2015.

¹³⁶ P Thielbörger ‘The Right(s) to Water’ (2014) 59.

¹³⁷ Art. 10 and 14 United Nations ‘Charter of the United Nations’ 24 October 1945.

¹³⁸ P Thielbörger ‘The Right(s) to Water’ (2014) 59.

¹³⁹ UNGA ‘Human Rights Council’ A/RES/60/251 (2006) op par. 1.

ICESCR.¹⁴⁰ 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.¹⁴¹ 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.¹⁴²

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 2002.¹⁴³ There it was determined that:

[t]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.¹⁴⁴

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.¹⁴⁵ GC No. 15 has established a moral obligation and potential violations of states parties to the right to water have been determined.¹⁴⁶ 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."¹⁴⁷ The Committee linked the human right to water to two provisions of the

¹⁴⁰ P Thielbörger 'The Right(s) to Water' (2014) 60.

¹⁴¹ *Ibid.*

¹⁴² *Ibid. et seq.*

¹⁴³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The right to water, (2002) UN Doc. E/C.12/2002/11.

¹⁴⁴ *Ibid.* para. 2.

¹⁴⁵ A Cahill 'The Human Right to Water – A Right of Unique Status': The Legal Status and Normative Content of the Right to Water' (2005) 391.

¹⁴⁶ *Ibid.*

¹⁴⁷ UN Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 1.

ICESCR: the “right to an adequate standard of living (...) including adequate food, clothing and housing (...)” under Art. 11 ICESCR¹⁴⁸ 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”.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. 14.¹⁵⁰ 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.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.¹⁵² However, the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.¹⁵³ Another prerequisite is that it must be available on a non-discriminatory basis.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.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.¹⁵⁶ What is more, water must be accessible, which calls for access to water within safe physical reach for every human being.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.¹⁵⁸ Finally, the requirement of affordable water does not entail that water should be

¹⁴⁸ Art. 11 (1) UNGA ICESCR (1966).

¹⁴⁹ Art. 12 (1) UNGA ICESCR (1966).

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.

¹⁵¹ General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 3.

¹⁵² *Ibid.* para. 12.

¹⁵³ General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 2.

¹⁵⁴ *Ibid.* para. 12 (a) – (c).

¹⁵⁵ *Ibid.* para. 12 (a).

¹⁵⁶ *Ibid.* para. 12 (b).

¹⁵⁷ *Ibid.* para. 12 (c) (i).

¹⁵⁸ P Thielbörger ‘The Right(s) to Water’ (2014) 66.

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 non-discriminatory 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.

¹⁵⁹ General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 12 (c) (ii).

¹⁶⁰ *Ibid.* para 20-29.

¹⁶¹ *Ibid.* para 37.

¹⁶² *Ibid.* para 37 (f-i).

¹⁶³ D Otto and D Wiseman 'In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' Australian Journal of Human Rights 7 (2001) 9.

¹⁶⁴ P Thielbörger 'The Right(s) to Water' (2014) 67 *et seq.*

Such interpretations must, therefore, be regarded as very valuable and influential.¹⁶⁵ 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. 15.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

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.*

¹⁶⁶ S Tully ‘A Human Right to Access Water? A Critique of General Comment No. 15’ *Netherlands Quarterly of Human Rights* Vol. 23/1 (2005) 37.

¹⁶⁷ General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para 3.

¹⁶⁸ S Tully ‘A Human Right to Access Water? A Critique of General Comment No. 15’ (2005) 37

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² MJ Dennis and DP Stewart ‘Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to adjudicate the Rights to Food, Water, Housing and Health?’ *American Journal of International Law* Vol. 98 (2004) 494.

and thus it was omitted deliberately.¹⁷³ The deliberate omission of circumstances must in Tully's opinion weigh more than arguments suggesting that water was understood to be implicitly included.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.¹⁷⁵ The right to water was briefly alluded during the drafting process of the ICESCR but in the end not incorporated.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.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.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. 15.¹⁷⁹ In addition, it has been argued, that in some respect, GC No. 15 has also brought some disadvantages for the human right to water.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

¹⁷³ S Tully 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 37.

¹⁷⁴ *Ibid.*

¹⁷⁵ P Thielbörger 'The Right(s) to Water' (2014) 70.

¹⁷⁶ *Ibid.*

¹⁷⁷ S Tully 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 44.

¹⁷⁸ M. Langford 'Ambition that Overleaps itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water' *Netherlands Quarterly of Human Rights*, Vol. 24/3 (2006) 445 *et seq.*

¹⁷⁹ A Cahill 'The Human Right to Water – A Right of Unique Status': *The Legal Status and Normative Content of the Right to Water* (2005) 391.

¹⁸⁰ P Thielbörger 'The Right(s) to Water' (2014) 75.

relation to other human rights, such as the right to life and human dignity.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.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.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.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 Statute¹⁸⁵ 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.¹⁸⁶ Generally customary international law arises when states behave in a certain pattern of practice consistently over a period of time.¹⁸⁷ Furthermore, the practise has to go along with *opinio juris*, which is the states' sense that they were legally bound to conduct the practice.¹⁸⁸

¹⁸¹ *Ibid.*

¹⁸² General Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 3.

¹⁸³ *Ibid.* 11.

¹⁸⁴ P Thielbörger 'The Right(s) to Water' (2014) 75.

¹⁸⁵ Art. 38 1. b. UN Statute of the International Court of Justice (ICJ Statute), 18 April 1946.

¹⁸⁶ P Thielbörger 'The Right(s) to Water' (2014) 76.

¹⁸⁷ TW Bennett and J Strug 'Introduction to International Law' (2013) 14.

¹⁸⁸ *Ibid.*

1. UNGA Resolution 2010¹⁸⁹

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.¹⁹⁰ 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*.¹⁹¹ The resolution was adopted with 122 states in favour, no votes against it, 41 abstentions and 29 states not being present at the vote.¹⁹² With 192 UNGA members at the time of the vote, this makes a two third majority.¹⁹³ 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.¹⁹⁴ Certain states even made clear that their abstention should not be confused with an actual acceptance of a human right to water.¹⁹⁵ 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.¹⁹⁶ Since too many states pointed out that they did not understand the resolution to create a new right or any legal obligations,¹⁹⁷ *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 UNGAR2010.¹⁹⁸

¹⁸⁹ UNGA Resolution, A/RES/64/292, 3 August 2010.

¹⁹⁰ P Thielbörger 'The Right(s) to Water' (2014) 78.

¹⁹¹ *Ibid. et seq.*

¹⁹² UNGA 'General Assembly adopts resolution recognizing access to clean water, sanitation as human right' Press release GA/10967, 28 July 2010

<<http://www.un.org/press/en/2010/ga10967.doc.htm>> accessed: 25.09.2015.

¹⁹³ P Thielbörger 'The Right(s) to Water' (2014) 79.

¹⁹⁴ *Ibid.* for a more detailed analysis of the drafting process.

¹⁹⁵ *Ibid.* 80.

¹⁹⁶ *Ibid.* 81.

¹⁹⁷ United Nations General Assembly 'Summary of the 108th plenary meeting of the sixty-fourth General Assembly' A/64/PV.108, 28 July 2010, see statement of the Guatemalan and Egyptian representative, 10

<http://www.un.org/en/ga/search/view_doc.asp?symbol=A/64/PV.108> accessed: 25.09.2015.

¹⁹⁸ P Thielbörger 'The Right(s) to Water' (2014) 81.

2. HRC Resolution 2010¹⁹⁹

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.*

²⁰⁵ For an overview of the goals see: United Nations 'The Millennium Development Goals Report 2015' (United Nations New York 2015).

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.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ Therefore, MDG No. 7 should not, and cannot be regarded as an appropriate basis for a human right to water under customary law.²¹⁰

4. State Practice

The affirmations mentioned in this section provide reason to the assumption that there is a growing *opinio juris* in terms of the recognition of a human right to water.²¹¹ 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.²¹² 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.²¹³ 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 water²¹⁴ or have national plans to provide access to water and sanitation to everyone in their jurisdiction.²¹⁵ Even though state practice is not sufficient enough to support a human right to water

²⁰⁷ C Tomuschat 'Human Rights, Between Idealism and Realism' (2004) 35.

²⁰⁸ P Thielbörger 'The Right(s) to Water' (2014) 78.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.* 84.

²¹² *Ibid.*

²¹³ B Hartley and HJ van Meter 'The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach' (2011) 84.

²¹⁴ 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.

²¹⁵ B Hartley and HJ van Meter 'The Human Right to Water: Proposal for a Human Rights-Based Prioritization approach' (2011) 85.

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”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, *opinio juris* and state practise, was accepted.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.

²¹⁸ *Ibid.*

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 day²²² 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

²²⁰ Germany Federal Ministry of the Environment, Nature Conservation, Building and Nuclear Safety 'Drinking Water' <<http://www.bmub.bund.de/en/topics/water-waste-soil/water-management/drinking-water/>> accessed: 13.10.2015.

²²¹ S Malz / U Scheele 'Wasserbedarf und Wasserverbrauch privater Haushalte und der Industrie nach Ländern' (2011) 142.

²²² *Ibid.*

²²³ Germany Federal Ministry of the Environment, Nature Conservation, Building and Nuclear Safety 'Drinking Water'.

countries.²²⁴ 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.²²⁵ 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.²²⁶ 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.²²⁷

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.²²⁸ 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.²²⁹ Over the past decade South Africa has invested greatly in water infrastructure.²³⁰ 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 2009.²³¹ Access to sanitation improved from 34 percent to 76 percent during the same period.²³² This means South Africa has met the MDG targets for water supply

²²⁴ S Malz / U Scheele 'Wasserbedarf und Wasserverbrauch privater Haushalte und der Industrie nach Ländern' (2011) 142.

²²⁵ P Thielbürger 'The Right(s) to Water' (2014) 10.

²²⁶ Branchenbild der deutschen Wasserwirtschaft, 2015 Kurzfassung, 2 *et seq.*
<[https://www.bdew.de/internet.nsf/res/836B821BCEFA789C1257E1200438BD8/\\$file/Branche_nbild_Wasserwirtschaft_2015_Kurzfassung_Einzels.pdf](https://www.bdew.de/internet.nsf/res/836B821BCEFA789C1257E1200438BD8/$file/Branche_nbild_Wasserwirtschaft_2015_Kurzfassung_Einzels.pdf)> accessed: 13.10.2015.

²²⁷ *Ibid.*

²²⁸ World Wildlife Fund (WWF) 'WWF-South Africa Water Balance Programme' (2012)
<http://awsassets.wwf.org.za/downloads/water_balance_2012_e_booklet_1.pdf> accessed: 13.10.2015.

²²⁹ South African Government 'Water Affairs' <<http://www.gov.za/about-SA/water-affairs>> accessed: 13.10.2015.

²³⁰ WWF 'Water Balance - Freshwater in South Africa'
<http://www.wwf.org.za/what_we_do/freshwater/water_balance/> accessed: 13.10.2015.

²³¹ African Ministers' Council on Water (AMCOW) 'Water Supply and Sanitation in South Africa: Turning Finance into Services for 2015 and Beyond' (2015) 8

<<https://wsp.org/sites/wsp.org/files/publications/CSO-SouthAfrica.pdf>> accessed: 13.10.2015.

²³² *Ibid.*

and sanitation.²³³ 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.²³⁴ 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.²³⁵ 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.²³⁶

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.²³⁷ 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.²³⁸

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

²³³ *Ibid.*

²³⁴ The Water Project 'Water in Crisis – South Africa' <<http://thewaterproject.org/water-in-crisis-south-africa>> accessed: 14.10.2015.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ L Watrous 'The Right to Water – From Paper to Practice' Regent Journal of International Law Vol. 8 (2011-2012) 119.

²³⁸ *Ibid.*

and thus bound to respect, protect and fulfil the rights set out in these conventions. They are also parties to CEDAW²³⁹ and CRC²⁴⁰ 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 UNGAR2010²⁴¹ 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.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.

²³⁹ United Nations Treaty Collection, 8. Convention on the Elimination of All Forms of Discrimination against Women, Chapter IV Human Rights <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> accessed: 13.10.2015.

²⁴⁰ United Nations Treaty Collection, 11. Convention on the Rights of the Child, Chapter IV Human Rights <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en> accessed: 13.10.2015.

²⁴¹ UNGA 'General Assembly adopts resolution recognizing access to clean water, sanitation as human right' Press release GA/10967, 28 July 2010.

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.²⁴³ 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)²⁴⁴ by the Council of Europe, the Charter of Fundamental Rights²⁴⁵ of the EU nor the European Social Charter (Revised) (ESC)²⁴⁶ 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.²⁴⁷ 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.²⁴⁸

The ECHR embodies in Art. 2 the right to life.²⁴⁹ Water is not explicitly mentioned, but since life cannot exist without access to safe and clean water,

²⁴³ European Union, EU Member Countries <<http://europa.eu/about-eu/countries/member-countries/>> accessed: 13.10.2015.

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.

²⁴⁵ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

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

²⁵⁰ *Ibid.* Art. 3.

²⁵¹ See for example European Court of Human Rights, *Tadevosyan v Armenia*, Application No. 22387/05, Judgment of 27 October 2009; European Court of Human Rights, *Ostrovar v. Modova*, Application No. 35207/03, Judgment of 13 September 2005.

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.

²⁵⁴ V Deloge ‘Road to 2015: The European Union and the Realisation of the Human Rights to Water’ *New Zealand Journal of Environmental Law* (2012) 9.

²⁵⁵ Art. 5 Council of Europe, European Charter on Water Resources, adopted by the Committee of Ministers on 17 October 2001.

²⁵⁶ V Deloge ‘Road to 2015: The European Union and the Realisation of the Human Rights to Water’ (2012) 9.

²⁵⁷ Council of the European Union, Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption (European Drinking Water Directive).

water.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰

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).²⁶¹ 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”.²⁶² 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”.²⁶³ Germany implemented this EU Directive in its national law by passing the Federal Water Act (“Wasserhaushaltsgesetz” WHG) in 2009.²⁶⁴

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.²⁶⁵

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’

²⁵⁸ European Commission, Environment, Legislation – The Directive Overview
<http://ec.europa.eu/environment/water/water-drink/legislation_en.html> accessed: 19.10.2015.

²⁵⁹ Art. 288 European Union ‘Consolidated version of the Treaty on the Functioning of the European Union’ (TFEU), 13 December 2007, 2008/C 115/01.

²⁶⁰ Bundesrecht ‘German Ordinance on the Quality of Water intended for Human Consumption’ date of issue 21.05.2001 (Trinkwasserverordnung – TrinkWV2001), Non-Official Translation (as of 29-01-2014).

²⁶¹ European Union ‘Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy’.

²⁶² Preamble para. 1 EU ‘Directive 2000/60/EC.

²⁶³ Art. 1 EU ‘Directive 2000/60/EC.

²⁶⁴ Bundestag ‘Gesetz zur Ordnung des Wasserhaushalts’ (Wasserhaushaltsgesetz - WHG) date of issue: 31.07.2009, BGBl. 2009 Nr. 51, S. 2585 ff.

²⁶⁵ P Thielbörger ‘The Right(s) to Water’ (2014) 33.

Initiatives (ECI) (Water is a Human Right)²⁶⁶ invited the European Commission to initiate legal acts to implement a human right to water and sanitation in the EU.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)²⁶⁸ and refined by regulation 211/2011.²⁶⁹ 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.²⁷⁰ Art. 11 (4) TEU was not designed to challenge this monopoly.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.²⁷² Subsequently, this support was confirmed when on 8 September 2015 the European Parliament voted for the Right to Water in its plenary vote.²⁷³

The European Parliament adopted a “Resolution on the follow-up to the European Citizens’ Initiative Right2Water”,²⁷⁴ by 363 votes to 96, with 231 abstentions.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.²⁷⁶ The Parliament’s resolution stated that, as declared in the

²⁶⁶ ECI ‘Water is a Human Right’ <<http://www.right2water.eu/>> accessed: 20.10.2015.

²⁶⁷ See for more background information on the Citizens Initiative: European Commission ‘European Citizens Initiative’ information <<http://ec.europa.eu/citizens-initiative/public/welcome?lg=en>> accessed: 20.10.2015.

²⁶⁸ Art. 11 (4) European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01.

²⁶⁹ European Union ‘Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative.

²⁷⁰ C Vedder ‘Commentary on article 11 TEU’ Art. 11 para. 3, in C Vedder, W Heintschel von Heinegg (eds.) *Europäisches Unions Recht: Handkommentar* (2012).

²⁷¹ *Ibid.*

²⁷² European Water Movement ‘European Parliament Committee supports the human right to water’ 25 June 2015 Press release <<http://europeanwater.org/news/press-releases/573-european-parliament-committee-supports-the-human-right-to-water>> accessed: 20.10.2015.

²⁷³ European Water Movement ‘The European Parliament votes for the Right to Water in Europe!’ 8 September 2015 Press release <<http://europeanwater.org/news/press-releases>> accessed: 20.10.2015.

²⁷⁴ European Parliament Resolution, Follow up to the European Citizens’ Initiative Right2Water’ of 8 September 2015 (2014/2239(INI) P8_TA-PROV(2015)0294.

²⁷⁵ European Parliament / Legislative Observations 2014/2239(INI) 08 September 2015, adopted by Parliament, single reading <<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1401540&t=e&l=en>> accessed: 20.10.2015.

²⁷⁶ *Ibid.*

WFD, “water is not a commodity but a public good” that is essential to human life and dignity.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.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.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).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.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

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ See Art. 1-19 Basic Law for the Federal Republic of Germany (German Basic Law) 23 May 1949, Translated <http://www.gesetze-im-internet.de/englisch_gg/index.html> accessed: 21.10.2015.

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

²⁸² SR Laskowski 'Das Menschenrecht auf Wasser: die rechtlichen Vorgaben zur Sicherung der Grundversorgung mit Wasser und Sanitärleistungen im Rahmen einer ökologisch-nachhaltigen Wasserwirtschaftsordnung (2010) 905.

²⁸³ Wasserhaushaltsgesetz – WHG (2009), BGBl. 2009 Nr. 51, S. 2585 ff.

²⁸⁴ K Tiroch und A Kirschner 'Überblick über das Wasserrecht der Bundesrepublik Deutschland' <http://www.mpfpr.de/fileadmin/media/Water_Law/Nationales_Recht/Treaties_Germany/Kirschner-Tiroch_Ueberblick_ueber_das_Wasserrecht_der_Bundesrepublik_Deutschland_REVISIED_2012.pdf> accessed: 21.10.2015.

²⁸⁵ BVerwG Case No. 4 C 30/88, 17 March 1989, BVerWGE 81, 347, 350.

²⁸⁶ Bundestag, Infektionsschutzgesetz, G. v. 20.07.2000 BGBl. I S. 1045.

²⁸⁷ *Ibid.* Section 7.

²⁸⁸ *Ibid.* § 37 (1).

²⁸⁹ Trinkwasserverordnung – TrinkWV (2001).

²⁹⁰ Bundesumweltamt 'Trinkwasser - Rechtliche Grundlagen, Empfehlungen und Regelwerk' 10.02.2015 <<https://www.umweltbundesamt.de/themen/wasser/trinkwasser/rechtliche-grundlagen-empfehlungen-regelwerk>> accessed: 21.10.2015.

governmental control of water resources, standards for drinking water quality and general planning, while implementing EU demands.²⁹¹ To find legal approaches to a individual right to water, it is necessary to have a closer look at more general legal concepts in German law.²⁹²

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.²⁹³ 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”.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ Thus, the concept focuses on the state’s responsibilities and does not award individual rights.²⁹⁷

Furthermore, the concept of “Anschluss- und Benutzungszwang” (compulsory connection and usage), which is incorporated in several municipal laws,²⁹⁸ guarantees compulsory connection to the water supply and sewage system. The concept’s aim is to increase water supply coverage.²⁹⁹ However, it is intended as a duty, especially for real estate proprietors to get connected to

²⁹¹ P Thielbörger ‘The Right(s) to Water’ (2014) 12.

²⁹² *Ibid.*

²⁹³ *Ibid.* 12.

²⁹⁴ *Ibid.* 13.

²⁹⁵ *Ibid.* 13.

²⁹⁶ J Kersten ‘Die Entwicklung des Konzepts der Daseinsvorsorge im Werk von Ernst Forsthoff’ *Der Staat* 44 (2005) 543 *et seq.*

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.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 Law³⁰¹ and understood as one of the fundamental principles of the German constitution.³⁰² The principle itself again does not generate rights, it has to be regarded rather as guidelines for the state’s political and legal actions.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.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”).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.³⁰⁶ However, the Constitutional Court has so far only decided about questions on financial aid to ensure the

³⁰⁰ *Ibid.*

³⁰¹ Art. 20 German Basic Law (1949).

³⁰² R Herzog, B Grzeszick ‘Commentary on Art. 20’ in: Maunz T, Dürig G (eds.) Grundgesetz: Kommentar (2012) Art. 20 para. 2.

³⁰³ P Thielbörger ‘The Right(s) to Water’ (2014) 14.

³⁰⁴ R Herzog, B Grzeszick ‘Commentary on Art. 20’ in: Maunz T, Dürig G (eds.) Grundgesetz: Kommentar (2012) Art. 20 para. 28.

³⁰⁵ P Thielbörger ‘The Right(s) to Water’ (2014) 15.

³⁰⁶ BVerfG 1 BvL 10/10 (BvL 2/11) Urteil vom 18. Juli 2012 para 2.

“Existenzminimum”.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.³⁰⁸ Additionally, the Federal Administrative Court followed a similar opinion. It acknowledged water as an important common good³⁰⁹ and acknowledged that the principle of “Daseinsvorsorge” entails the supply of water infrastructures and services to huge parts of the population,³¹⁰ determining, however, an obligation for the state rather than individual rights.

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.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 2008,³¹² 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.³¹³ What is noteworthy is that, no EU state has incorporated the right to water in its constitution yet.³¹⁴ An introduction of a

³⁰⁷ BVerfG-Beschluß vom 29.5.1990 (1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86) BStBl. 1990 II S. 653.

³⁰⁸ BVerfG 1 BvL 77/78, 15 July 1981, BVerfGE 58, 300, 344.

³⁰⁹ BVerwG 6 C 2/97, 17 December 1997, BVerwGE 106, 64.

³¹⁰ *Ibid.*

³¹¹ P Thielbörger ‘The Right(s) to Water’ (2014) 16.

³¹² Federal Foreign Office ‘Human right to water and sanitation’ Last updated 22.04.2014 <http://www.auswaertiges-amt.de/EN/Aussenpolitik/Menschenrechte/MRVN-Wasser_node.html> accessed: 22.10.2015.

³¹³ World Water Council ‘Right to Water: Moving towards a Global Consensus? (2007) 4 <http://www.worldwatercouncil.org/fileadmin/wwc/Programs/Right_to_Water/Pdf_doct/Story_RTW_CD_March07_compressed.pdf> accessed: 22.10.2015.

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.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,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.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.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.³¹⁹ However, at AU level a right to water is only explicitly mentioned in treaties dealing with the

³¹⁵ *Ibid.* 17.

³¹⁶ See ‘Wasserhaushaltsgesetz - WHG’ (2009) and ‘Trinkwasserverordnung - TrinkWV’ (2001).

³¹⁷ P Thielbörger ‘The Right(s) to Water’ (2014) 18.

³¹⁸ *Ibid.*

³¹⁹ African Union ‘Member States’ <http://www.au.int/en/member_states/countryprofiles> accessed: 26.10.2015.

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).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 *inter alia* the provision of safe drinking water for children.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.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.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,³²⁴ the right to dignity³²⁵ and the right to health.³²⁶

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

³²⁰ African Union ‘African Charter on the Rights and Welfare of the Child’ (AfCRC) OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

³²¹ *Ibid.* Art. 14.

³²² Art. 15 (a) African Union ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000), entered into force 25 November 2005.

³²³ TS Bulto ‘The human right to water in the corpus and jurisprudence of the African human rights system’ African Human Rights Law Journal (2011) 345.

³²⁴ Art. 4 African Union ‘African (Banjul) Charter on Human and Peoples’ Rights’ (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³²⁵ *Ibid.* Art. 5.

³²⁶ *Ibid.* Art. 16.

³²⁷ African Commission on Human and Peoples’ Rights, 300: Resolution on the Right to Water Obligations - ACHPR/Res.300 (EXT.OS/XVII) 20.

conscientiously cooperate in the management and protection of water resources.”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”.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.³³⁰ In addition, resolutions by the Commission are comparable to UN General Comments, and are, therefore, not legally binding on member states.³³¹ General Comments are authoritative interpretations of treaty provisions only,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.³³³ Amongst them is South Africa, that states a right to water in Sec. 27 1 (b) of its Constitution.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.

³²⁸ *Ibid.*

³²⁹ *Ibid.* para 2 and 5.

³³⁰ TS Bulto ‘The human right to water in the corpus and jurisprudence of the African human rights system’ (2011) 343.

³³¹ African Commission on Human and Peoples’ Rights ‘Resolutions by the African Commission’ <<http://www.achpr.org/resolutions/about/>> accessed: 26.10.2015.

³³² D Otto and D Wiseman ‘In Search of “Effective Remedies”: Applying the International Covenant on Economic, Social and Cultural Rights to Australia’ Australian Journal of Human Rights 7 (2001) 9.

³³³ See for a list of those countries: P Thielbörger ‘The Right(s) to Water’ (2014) 39 *et seq.*

³³⁴ Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

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.³³⁵ 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)³³⁶ 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 [...]”.³³⁷ 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”.³³⁸ 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 ICESCR³³⁹, as water scarcity demands time for organisation and thus realisation of the right to water.³⁴⁰ 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.³⁴¹ To elaborate on

³³⁵ GJ Pienaar and E Schyff ‘The Reform of Water Rights in South Africa’ Law, Environment and Development Journal Vol. 3/2 (2007) 183.

³³⁶ Sec. 7 (2) Constitution of the Republic of South Africa (1996).

³³⁷ *Ibid.* Sec. 27 (1) (b).

³³⁸ *Ibid.* Sec. 27 (2).

³³⁹ See p. 20 of this dissertation.

³⁴⁰ Unknown ‘What Price for the Priceless?: Implementing the Justiciability of the Right to Water’ Harvard Law Review Vol. 120 (2006) 1088.

³⁴¹ *Ibid.*

these constitutional obligations the South African Water Services Act of 1997³⁴² and the National Water Act of 1998³⁴³ were passed.

The Water Services Act states that “[e]veryone has a right of access to basic water supply and basic sanitation.”³⁴⁴ And that “[e]very water services institution must take reasonable measures to realise these rights”.³⁴⁵ 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.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸ 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”.³⁴⁹

The other important law concerning water in South Africa is the National Water Act.³⁵⁰ It sets out responsibilities of the national government, as the legal framework for the sustainable and effective management of South Africa’s water resources.³⁵¹ 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.³⁵² This was a new approach, since under the old

³⁴² Republic of South Africa ‘Water Services Act’(Act No. 108 of 1997).

³⁴³ Republic of South Africa ‘National Water Act’ (Act No. 36 of 1998).

³⁴⁴ Sec. 3 (1) Water Services Act (1997).

³⁴⁵ *Ibid.* Sec. 3 (2).

³⁴⁶ P Thielbörger ‘The Right(s) to Water’ (2014) 41.

³⁴⁷ Sec. 11 (2) (g) Water Services Act (1997).

³⁴⁸ *Ibid.* 4 (3) (a) and (c).

³⁴⁹ Department of Water Affairs and Forestry, Republic of South Africa ‘Water Supply and Sanitation Policy, White Paper, Water – an indivisible national asset’ (1994) 15.

³⁵⁰ Republic of South Africa ‘National Water Act’ (Act No. 36 of 1998).

³⁵¹ Department of Water Affairs and Forestry, Republic of South Africa ‘Guide to the National Water Act’, 3, 8

<<https://www.dwa.gov.za/Documents/Publications/NWAguide/NWAguideToC.pdf>> accessed: 29.10.2015.

³⁵² Republic of South Africa ‘National Water Act’ (Act No. 36 of 1998), Preamble.

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.³⁵³ However, the disadvantaged majority of the population did not own land and thus did not have unhindered or assured access to water.³⁵⁴ This unequal, discriminatory approach was finally abolished with the new Water Act in 1998.³⁵⁵ 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.”³⁵⁶ In Chapter five the Act established a system of pricing that allows for different charges to achieve social equity.³⁵⁷ This means, it allows for different pricing structures based on the consumer’s economic situation.³⁵⁸ According to the “Free Basic Water Policy”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”.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.

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.³⁶¹

³⁵³ Department of Water Affairs and Forestry, Republic of South Africa ‘Guide to the National Water Act’ 9.

³⁵⁴ *Ibid.*

³⁵⁵ Republic of South Africa ‘National Water Act’ (Act No. 36 of 1998), Preamble.

³⁵⁶ *Ibid.* Chapter 1, 3(1).

³⁵⁷ *Ibid.* Chapter 5, Part I.

³⁵⁸ P Thielbörger ‘The Right(s) to Water’ (2014) 42.

³⁵⁹ Department of Water Affairs and Forestry, Republic of South Africa ‘Free Basic Water - Implementation Strategy 2007: Consolidating and maintaining’ Version 4 April (2007).

³⁶⁰ *Ibid.* 5.

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 too late and the court had no mandate to interpret the content of a right to water in the Water Services Act, see: *Manqele v. Durban Transitional Metropolitan Council*, 2002 6 SA 423(D) High Court (Durban and Coast Local Division) of South Africa.

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

³⁶² Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others*, CCT11/00, (2000).

³⁶³ *Ibid.* para. 4.

³⁶⁴ *Ibid.* para. 20.

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).

³⁶⁷ *Ibid.* para. 26.

³⁶⁸ *Ibid.* para. 27.

³⁶⁹ *Ibid.* para. 20.

³⁷⁰ T Humby and M Grandbois 'The Human Right to Water in South Africa and the Mazibuko Decision' *Les Cahiers de Droit*, Vol. 51 (2010), 521.

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.

³⁷² *Ibid.* 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,³⁷³ which is also not lawful when the consumer is not able to pay for his “normal metered” water supply.³⁷⁴ 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.³⁷⁵ 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.³⁷⁶

In the appeal decision the Supreme Court confirmed the findings of the High Court on the pre-paid meters being unlawful.³⁷⁷ 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.³⁷⁸

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.³⁷⁹ 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.³⁸⁰ 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”.³⁸¹ This means sufficient water cannot be claimed from the state immediately, and thus the Court found the City’s free water policy was reasonable.³⁸² 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

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.*

³⁷⁷ Supreme Court of Appeal of South Africa, *The City of Johannesburg and Others v. Lindiwe Mazibuko and Others*, 489/08, Judgment of 25 March 2009.

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”.³⁸³ 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.³⁸⁴ 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.³⁸⁵ 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.³⁸⁶ 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.³⁸⁷ 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.³⁸⁸ 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.³⁸⁹ The introduction of the fundamental right to water in the South African Constitution has greatly improved the situation. Particularly

³⁸³ *Ibid.* para. 60.

³⁸⁴ Unknown ‘What Price for the Priceless?: Implementing the Justiciability of the Right to Water’ Harvard Law Review Vol. 120 (2006) 1082.

³⁸⁵ P Thielbörger ‘The Right(s) to Water’ (2014) 48.

³⁸⁶ T Humby and M Grandbois ‘The Human Right to Water in South Africa and the Mazibuko Decision’ (2010) 537.

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.³⁹⁰ 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.

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.³⁹¹ In comparison, South Africa pursues a rights-based approach by acknowledging the right to water as a right through incorporating it in its Constitution.³⁹² 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

³⁹⁰ *Ibid.*

³⁹¹ P Thielbörger 'The Right(s) to Water' (2014) 30.

³⁹² *Ibid.* 55.

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.³⁹³ However, through the global trend of water privatisation these state obligations may be eluded; with states handing over their obligations to private companies.³⁹⁴ Water is submitted to the logic of the market, therefore, it is often considered an economic good solely which opens the door for infringements.³⁹⁵ In addition, companies may get involved in the sphere of the right to water in other ways than 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,³⁹⁶ 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";³⁹⁷ including "transnational corporations" and "other business enterprises" as defined by the UN in its Norms on the Responsibilities of Transnational Corporations and Other

³⁹³ C Dubreuil 'The Right to Water, From Concept to Implementation' World Water Council Marseilles (2006) 14.

³⁹⁴ V Petrova 'At the Frontier of the Rush for the Blue Gold: Water Privatization and the Human Right to Water' Brooklyn Journal of International Law, Vol. 31:2 (2006) 578.

³⁹⁵ GA Cavallo 'The Human Right to Water and Sanitation: Going Beyond Corporate Social Responsibility' Merkourios Utrecht Journal of International and European Law Vol. 29:76 (2013) 41.

³⁹⁶ See *Ibid.* 581 *et seq.*

³⁹⁷ Business Dictionary, Definition Company

<<http://www.businessdictionary.com/definition/company.html>> accessed 05.01.2016.

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,

³⁹⁸ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³⁹⁹ 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.

⁴⁰⁰ *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".

particularly private, users over the water available.⁴⁰¹ 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 2003.⁴⁰² Another scenario was reported by the non-governmental organisation FIAN International: Coca Cola bottling plants led to depletion and contamination of groundwater in Kerala, India.⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵

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.⁴⁰⁶ 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.⁴⁰⁷ Since then, oil from oil spills oozes into the Delta's soil and water sources every year.⁴⁰⁸ Most of the Delta's population has limited access to adequate clean water. They rely on boreholes and the nearby streams and

⁴⁰¹ A Gaughran 'Business and Human Rights and the Right to Water' American Society of International Law Proceedings 106 (2012) 53.

⁴⁰² FIAN 'Identifying and Addressing Violations of the Human Right to Water, Applying the Human Rights Approach', Author: Maïke Gorsboth, 01.01.2006, 11 <http://www.fian.org/en/news/article/identifying_and_addressing_violations_of_the_human_right_to_water/> accessed: 06.01.2016.

⁴⁰³ FIAN 'Identifying and Addressing Violations of the Human Right to Water, Applying the Human Rights Approach', revised and updated edition 2008, 13 <http://www.fian.org/library/publication/identifying_and_addressing_violations_of_the_human_right_to_water-1/> accessed: 06.01.2016.

⁴⁰⁴ *Ibid.* 13.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ A Gaughran 'Business and Human Rights and the Right to Water' (2012) 53.

⁴⁰⁷ *Ibid.* 53, Amnesty International 'The price of oil: the impact of oil pollution on Niger Delta communities' 3 November 2015 <<https://www.amnesty.org/en/latest/news/2015/11/human-face-oil-pollution-niger-delta/>> accessed: 05.01.2016.

⁴⁰⁸ A Gaughran 'Business and Human Rights and the Right to Water' (2012) 53.

rivers.⁴⁰⁹ 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.⁴¹⁰

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.⁴¹¹ One example for this scenario is the “Cochabamba water war” in Bolivia. Water prices increased after water privatisation in 1999.⁴¹² 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.⁴¹³

Such company involvement leads to the logical assumption that companies must be legally responsible for their actions. The question 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.⁴¹⁴ Yet, states remain to be the primary subjects responsible to guarantee human rights.

⁴⁰⁹ Amnesty International ‘The price of oil: the impact of oil pollution on Niger Delta communities’ 3 November 2015.

⁴¹⁰ *Ibid.*

⁴¹¹ P Thielbörger ‘The Right(s) to Water’ (2014) 147 *et seq.*

⁴¹² FIAN ‘Identifying and Addressing Violations of the Human Right to Water’ (2008) 14 *et seq.*

⁴¹³ *Ibid.* 124.

⁴¹⁴ GA Cavallo ‘The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 40.

However, there is no insinuation in international law that denies such responsibility regarding companies.⁴¹⁵ 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.⁴¹⁶ The state has to ensure that companies as third parties do not take actions that result in violations of the right to water.⁴¹⁷ 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 obligate companies to comply with these provisions.⁴¹⁸ 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".⁴¹⁹ In addition, a state's constitution, if it has included the right to water, may be a source for company responsibility at national level.⁴²⁰ 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.⁴²¹ Therefore, the horizontal approach includes the obligations of private actors to respect the human rights of each another.⁴²² It is interesting to mention that the German and the South African jurisdiction both provide for such a direct horizontal application.⁴²³

⁴¹⁵ *Ibid.* 39.

⁴¹⁶ C Dubreuil 'The Right to Water, From Concept to Implementation' World Water Council Marseilles (2006) 8.

⁴¹⁷ UNESCO 'Outcome on the International Experts' Meeting on the Right to Water' (2009) <<http://unesdoc.unesco.org/images/0018/001854/185432e.pdf>> accessed: 06.01.2016

⁴¹⁸ JL Černič 'Corporate Obligations under the Human Right to Water' Denver Journal of International Law and Policy Vol. 39:2 (2010-2011) 321.

⁴¹⁹ *Ibid.*

⁴²⁰ JL Černič 'Corporate Obligations under the Human Right to Water' (2010-2011) 320.

⁴²¹ *Ibid.* 332.

⁴²² *Ibid.*

⁴²³ *Ibid.*

Human rights obligations for companies could also derive from the international level.⁴²⁴ However, this raises the question of the ongoing debate of whether companies can have direct or only indirect legal obligations under international law.⁴²⁵ 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.⁴²⁶ 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.⁴²⁷

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.⁴²⁸ Černič argues that “articulating direct human rights obligations of [...] companies should not depend on establishing a jurisdiction of implementing them”.⁴²⁹ 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,⁴³⁰ recognising that individuals have duties towards each other.⁴³¹ These terms surely include juridical persons, like companies, as well.⁴³² However, a preamble exists of explanatory notes only that are non-binding and other operational paragraphs do not address company responsibility explicitly.⁴³³ Concluding, it does not seem as if the international human rights instruments impose direct legal company responsibilities.

⁴²⁴ *Ibid.* 324.

⁴²⁵ UN General Assembly, Report of the Special Representative of the Secretary General, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/035 (2007) para. 35 *et seq.*

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.

⁴³¹ UN GA, Report U.N. Doc. A/HRC/4/035 (2007) para. 38.

⁴³² L Henkin ‘The Universal Declaration at 50 and the Challenge of Global Markets’ Brooklyn Journal of International Law (1999) 25.

⁴³³ UN GA, Report U.N. Doc. A/HRC/4/035 (2007) para. 38.

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

⁴³⁴ UN General Assembly, Report of the Special Representative of the Secretary General, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, U.N. Doc. A/HRC/4/035 (2007) para. 35 *et seq.*

⁴³⁵ See for an overview V Petrova ‘At the Frontier of the Rush for the Blue Gold: Water Privatization and the Human Right to Water’ (2006) 603 *et seq.*

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

⁴³⁷ See for example Shell <<http://www.shell.com/sustainability/transparency/human-rights.html>> or Coca Cola <<http://www.coca-colacompany.com/our-company/human-workplace-rights/>>.

⁴³⁸ F Tuodolo, ‘Corporate Social Responsibility: Between Civil Society and the Oil Industry in the Developing World’ (2009) 8 ACME: An International E-Journal for Critical Geographies 530.

⁴³⁹ *Ibid.*

may be an essential tool in promoting compliance with human rights obligations amongst companies.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.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."⁴⁴²

Another UN initiative, were the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Corporations and Other Business Enterprises with Regard to Human Rights.⁴⁴³ These UN norms state that companies are required to promote, respect and protect "human rights recognised in international as well as national law"⁴⁴⁴ and contain direct obligations and direct attributions of responsibility to companies.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.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".⁴⁴⁷ However, the norm's legal authority was contested and it was soon

⁴⁴⁰ GA Cavallo 'The Human Right to Water and Sanitation: Going Beyond CSR' (2013) 51; JL Černič 'Corporate Obligations under the Human Right to Water' (2010-2011) 330.

⁴⁴¹ See generally U.N. Global Compact, The Ten Principles of the UN Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed: 06.01.2016.

⁴⁴² UN 'CEO Water Mandate' <<https://www.unglobalcompact.org/take-action/action/water-mandate>> accessed: 06.01.2016.

⁴⁴³ UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

⁴⁴⁴ *Ibid.* para. 1.

⁴⁴⁵ GA Cavallo 'The Human Right to Water and Sanitation: Going Beyond CSR' (2013) 59.

⁴⁴⁶ *Ibid.* 59.

⁴⁴⁷ UN Norms (2003) U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, para. 12.

determined by the Commission on Human Rights that they had “no legal standing”.⁴⁴⁸

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.”⁴⁴⁹ 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.⁴⁵⁰ 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.”⁴⁵¹

The responsibility for companies to respect human rights is described as a “minimum standard”, which is not legally binding.⁴⁵² 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.⁴⁵³ 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.⁴⁵⁴

⁴⁴⁸ S Deva ‘Guiding Principles on Business and Human Rights: Implications for Companies’ *European Company Law* Vol. 9 (2) (2012) 102.

⁴⁴⁹ ECOSOC, Commission on the Promotion and Protection of Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/ CN.4/2005/L.87 (2005) para. 11 (a).

⁴⁵⁰ A Gaughran ‘Business and Human Rights and the Right to Water’ (2012) 52.

⁴⁵¹ GA Cavallo ‘The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 59.

⁴⁵² A Gaughran ‘Business and Human Rights and the Right to Water’ (2012) 52.

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.”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 *opinio juris*, which is what is needed now.⁴⁵⁶

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.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.

⁴⁵⁵ GA Cavallo ‘The Human Right to Water and Sanitation: Going Beyond CSR’ (2013) 63.

⁴⁵⁶ *Ibid.* 64.

⁴⁵⁷ JL Černič ‘Corporate Obligations under the Human Right to Water’ Denver Journal of International Law and Policy Vol. 39:2 (2010-2011) 307.

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.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.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.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.⁴⁶¹ However, there is hope that when improvement shows more and more in states that have included the right to water in their national laws, other states will follow to incorporate it in their own laws.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 provide government assistance where part of the population is

⁴⁵⁸ L. Watrous 'The Right to Water – From Paper to Practice' *Regent Journal of International Law* Vol. 8 (2011-2012) 122 *et seq.*

⁴⁵⁹ *Ibid.* 123.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

simply too poor to afford water services; an example where government assistance is needed would be South Africa.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”.⁴⁶⁴ Privatisation of water does not always seem to comply with this state obligation.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:

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.⁴⁶⁶

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.

⁴⁶³ *Ibid.* 124.

⁴⁶⁴ UN Comment No. 15 (2002) UN Doc. E/C.12/2002/11, para. 23.

⁴⁶⁵ L. Watrous ‘The Right to Water – From Paper to Practice’ *Regent Journal of International Law* Vol. 8 (2011-2012) 122 *et seq.*

⁴⁶⁶ PH Gleick ‘The Human Right to Water’ Pacific Institute (2007) 5
<http://www2.pacinst.org/reports/human_right_may_07.pdf> accessed: 18.09.2015.

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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