The Human Right to Water and its Status in International Law

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Thesis in Public International Law, 30 HE credits
Examiner: Pål Wrange
Stockholm, Spring term 2018
Abstract

A global water crisis is around the corner. Due to climate change, a growing world population and increasing demand for water, more and more countries are facing situations where water supplies are not adequate to satisfy even the minimum needs of the people. While international regulation of water has traditionally operated from the perspective of the state, recent human right instruments have shifted the debate. Despite the lack of a universal treaty containing an explicit human right to water, the UN General Assembly has adopted resolutions expressly recognising the human right to water, and the right is furthermore incorporated in the new Sustainable Development Goals.

In this context, the aim of this study is to examine the present status of the right to water in international law. The study is conducted using a classical legal method to examine and interpret the sources of international law. The study explores the historical development and conceptual origin of water rights within various areas of international law, such as international environmental law, international water law and international humanitarian law. The study moreover examines the legal basis of the right to water within international human rights law, considering the possibilities of construing an independent right to water within existing instruments or as a customary norm, and elaborates the legal consequences thereof.

The study shows that there is evidence of growing support and recognition for the independence of the right, both through new interpretations of existing human rights instruments, in state practice and in the doctrine of international law. Examples of national legislation and jurisprudence, however, demonstrate that the right to water is subject of enormous complexity. The overall analysis ultimately makes it plain that despite recent developments, the right to water cannot yet be said to have reached the status of an established independent human right, either as implied in existing instruments, or as a new customary norm.
Abbreviations

ACHPR African Charter on Human and Peoples’ Rights
ACHR American Convention on Human Rights
CCPR UN Human Rights Committee
CEDAW Convention on the Elimination of All Forms of Discrimination Against Women
CESCR Committee on Economic, Social and Cultural Rights
CHR UN Commission on Human Rights
CIL Customary International Law
CP-rights Civil and political rights
CRC Convention on the Rights of the Child
Earth Summit II 2002 UN Summit on Sustainable Development, Johannesburg
ECHR Convention for the Protection of Human Rights and Fundamental Freedoms
ECI European Citizens Initiative
ECOSOC UN Economic and Social Council
ESC-rights Economic, social and cultural rights
EU European Union
GC15 General Comment No. 15 of the CESCR
HLPF High Level Political Forum on Sustainable Development
HRC Human Rights Council
IACHR Inter-American Court of Human Rights
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic, Social and Cultural Rights
ICESCR-OP Optional Protocol to the ICESCR
ICJ International Court of Justice
ICJ Statute Statute of the International Court of Justice
IEL International Environmental Law
IHL International Humanitarian Law
IWL International Water Law
MDGs Millennium Development Goals
OHCHR Office of the UN high Commissioner for Human Rights
Revised ESC Revised European Social Charter
RIO + 20 2012 UN Summit on Sustainable Development, Rio de Janeiro
SDGs Sustainable Development Goals
Stockholm Conference 1972 UN Conference on the Human Environment
UN United Nations
UN GA General Assembly of the United Nations
UDHR Universal Declaration of Human Rights
WHO World Health Organisation
# Table of Cases

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Table of Content

Abstract .......................................................................................................................... 2
Abbreviations .................................................................................................................. 3
Table of Cases ................................................................................................................... 4
Introduction ..................................................................................................................... 8
Scene Setter .................................................................................................................... 8
Purpose and Research Questions .................................................................................. 9
Method and Materials ..................................................................................................... 9
Delimitations and Scope of the Study ......................................................................... 11
Outline ......................................................................................................................... 12

Chapter 1 – The History of a Right to Water .................................................................. 13
1.2 The Early Development of Water Rights ............................................................... 13
1.3 The Turning Point and Current Endeavour ............................................................ 14

Chapter 2 – A Right to Water Implied in Existing International Law Instruments ..... 17
2.2 Water as a Common Denominator ........................................................................ 17
  2.2.2 International Environmental Law ................................................................. 17
  2.2.3 International Water Law .............................................................................. 19
  2.2.4 International Humanitarian Law ................................................................. 21
  2.2.5 Summary .................................................................................................... 23
2.3 International Human Rights Law .......................................................................... 24
  2.3.2 Nature of Obligations ................................................................................ 24
  2.3.3 Explicit References to a Right to Water ..................................................... 26
  2.3.4 Implied References to a Right to Water ..................................................... 27
  2.3.5 A Right to Water under ICCPR ................................................................. 29
  2.3.6. A Right to Water under ICESCR .............................................................. 32
2.4 Appraisal ............................................................................................................... 39

Chapter 3 – Right to Water as an Independent Right in Current International Law .... 42
3.2 Latest Developments ............................................................................................ 44
  3.2.2 UN GA 2010 Resolution on “The Human Right to Water and Sanitation” ............. 44
  3.2.3 HRC Resolution on “Human Rights and the Access to Safe Drinking Water and
       Sanitation” ........................................................................................................... 45
  3.2.4 Renewal of the Mandate of the Independent Expert as Special Rapporteur ............ 47
  3.2.5 Sustainable Development Goals .................................................................. 47
  3.2.6 UN GA and HRC Resolutions on “The Human Right(s) to Water and Sanitation” .... 49
  3.2.7 Regional and National Perspectives on Water Rights .................................. 51
3.3 Assessment of the Current Situation ...................................................................... 60

Chapter 4 – The Present Status of the Right to Water in International Law .............. 63
4.2 The Need for a Human Right to Water ................................................................. 63
4.3 Possibilities and Difficulties With a Right to Water ............................................ 63
4.4 The Present Status of the Human Right to Water ............................................... 64
4.5 General Conclusions and Future Prospects of the Right to Water ....................... 65

Bibliography ............................................................................................................... 67
Books .......................................................................................................................... 67
Articles ....................................................................................................................... 68
Bilateral and Multilateral Agreements ....................................................................... 69
United Nations Documents ...................................................................................... 70
Introduction

Scene Setter

Water is an increasingly scarce resource and due to several factors, such as a growing world population, climate change and increased demand for water, a global water crisis is around the corner. More and more countries are facing situations where water supplies are unable to satisfy even the minimum needs of the people. Still, water is just like air, essential to human life. It is necessary for ensuring well-being and human dignity, vital for education and development and a basic requirement for the healthy functioning of the environment and all of the world’s ecosystems. A lack thereof has severe effects on human health and exacerbates poverty. Over 800 million people live without access to safe water every day, and every 20 seconds a child dies from a water related illness due to inadequate access to safe water.¹

International regulation of water resources has traditionally operated from the perspective of the state and in accordance with the general doctrine regarding natural resources measured through parameters of territoriality and state sovereignty.² Nevertheless, as water issues have climbed upwards on the international agenda, the idea of water rights has arisen and developed internationally. This has created a shift in focus regarding water resources, from the state towards the individual. The development of water rights has taken place within several different instruments and various areas of international law. The question is thus whether an independent human right to water can be said to exist and what the consequences regarding its normative content are.

Purpose and Research Questions
The purpose of this study to examine whether we can speak of a right to water as a human right in the current international law. This entails also addressing the question whether such a right exists as an independent human right.

In order to fulfil this objective, an examination and analysis of the status of the right to water within international law will be conducted. This is done by focusing the analysis on the following sub questions:

- Where within International Law can a right to water possibly be found?
- How does the right to water relate to other human rights?
- What are the consequences of a possible independent human right to water?

Method and Materials
This study is written using the classic analytical legal method to examine and analyse the formally recognised sources of international law. These sources are set out and listed in Article 38 of the Statute of the International Court of Justice, hereinafter ICJ Statute. This provision directs the judges of the ICJ on where they should turn when deciding a dispute brought before them. However, it has long been accepted as providing the authoritative statement of the sources of International law, and consist of:

a. international conventions, (treaties);
b. international custom;
c. general principles of law;
d. judicial decisions and doctrine, seen as subsidiary means for the determination of rules of law.

International human rights law is special, and in some ways, fundamentally different from other areas of international law. Human rights law expands the scope of international law in obliging state parties to respect human rights vis-á-vis persons within their jurisdiction, rather than vis-

\[\text{3 United Nations, Statute of the International Court of Justice, 18 April 1946, Article 38.}\]
\[\text{4 I. Brownlie, Principles of Public International Law, 7th edition, Oxford University Press, 2008, p. 5.}\]
á-vis other states. Still, it forms a part of the general system of international law.\textsuperscript{5} The legal analysis is therefore based on and focused on the sources and interpretative methods normally applicable within the area of international law.

**A word on interpretation**

Using a classical legal method, the interpretation of the relevant treaties adheres to the Vienna Convention on the Law of the Treaties,\textsuperscript{6} hereinafter VCLT. This entails a treaty being interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.\textsuperscript{7} If the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to results which are manifestly absurd or unreasonable, supplementary means of interpretation, such as the preparatory works (travaux préparatoires), can be resorted to.\textsuperscript{8} However, preparatory works is an aid that should be treated with discretion since its use may detract from the textual approach of natural and ordinary meaning. This is particularly common in the case of multilateral agreements, such as human rights instruments, where the final adopted treaty may differ tremendously from conference proceedings or treaty drafts due to the political compromises that may has to be made.\textsuperscript{9}

**Secondary norms and non-binding instruments**

Materials that are not considered to be a part of the formal sources of international law will also be elaborated on. Case law from international, regional and national courts will be discussed to support the study and to define the purported content of the right to water. Resolutions, general comments and publications of United Nations bodies and international organisations further contribute to the interpretations of the primary sources. These soft law instruments have great value to the assessment and analysis of the questions posed in the study, and act as important sources of development of international law. The Human Rights Council and the Committee of Social, Economic and Cultural Rights have individual complaint mechanisms in which they communicate their views. These views are not legally binding per se according the classic


\textsuperscript{7} *Ibid*, Article 31.

\textsuperscript{8} *Ibid*, Article 32.

\textsuperscript{9} I. Brownlie, p. 634.
analytical method but are commonly influential in bringing about legislative or administrative changes.

Doctrine as a source, is widely used and has shown to have formative influence.\textsuperscript{10} Although it is important to be cautious and aware of the subjective factors that can enter into any assessment of juristic opinion, doctrine is of great value for constituting evidence of the law. Thus, the analysis of views of leading scholars offers a solid ground for assessing the relevance of primary or secondary sources in relation to any international law issue including a possible human right to water

**Delimitations and Scope of the Study**

International Law is an area where it occurs widespread views among scholars depending on their approach to the field, inter alia positivists, pragmatics or naturalists. This study does not make a claim to be exhaustive in the area of human rights law and water rights but is aimed to provide an overview of international human rights law and international law relating to the status of right to water.

The subject of water rights may reach into and cover various areas and aspects of international law. Due to restrictions concerning the length of, and the time allowed for this study, the research is focused on the area of international human rights law, with a few exceptions. Other areas of international law, like International Water Law, International Environmental Law and Humanitarian Law will be elaborated on when needed to, for the purpose of broaden the perspective and get a comprehensive picture of the right to water in current international law.

Delimitations have also been made in regard to certain aspects of the right to water. This study will focus on the right to water as including drinking water and water for personal and domestic use. A right to water in the broader sense, that may include water for agricultural, commercial or industrial uses, will not be dealt with. The study will also not deal with issues related to private sector participation in water services. Furthermore, the right to water has been developed with, and along, the right to sanitation. Sanitation has sometimes been considered a part of the right to water and vice versa. Therefore, there will be necessary to mention the right to sanitation to understand the right to water. Although, in the more recent literature and also

\textsuperscript{10} I. Brownlie, p. 24–25.
within human rights law, sanitation is now considered to be a self-standing right, separate but interconnected with the right to water.

**Outline**

Since many legal dilemmas can be understood in the light of its historical development, the study will begin with providing a historical background of the right to water and how it emerged into the international agenda. Both binding and non-binding instruments will be explored and explained, in order to show how perspectives have changed over time. This chapter has a descriptive approach. A human rights perspective will be applied throughout the study.

Chapter two will adhere to the legal basis of the right to water as implied in existing international law instruments and is theoretical and normative in nature. The chapter explores the conceptual origins of the right to water within different areas of international law that has a connection with the right to water and human rights. Both formal sources and influential soft law instruments will be analysed to determine the status within international human rights law.

In chapter three, the possibilities of determining an independent right to water in current international law will be examined by analysing the recent developments that speak for and support the view of water as a self-standing, thus independent right. The recent developments are enshrined in soft law and to determine their implications of a crystallisation of an independent right, national legislation and jurisprudence is further analysed as interpretive sources to extract evidence of state practice and *opinio juris*. This chapter is both normative and analytical in the way that it attempts to determine the status of the right to water in international law.

Every chapter will at the end be summarised. Chapter four, will provide an overall analysis of the present status of the right to water in international law, in which conclusions will be drawn from previous chapters in regard to the study’s main research questions.
Chapter 1 – The History of a Right to Water

Water was for a long time, at best, a side issue on the International agenda. And as for the human rights agenda, even less mentioned. Fundamental human rights documents such as the Universal Declaration of Human Rights of 1948, hereinafter UDHR,\(^1\) as well as the two covenants of 1966\(^2\) do not explicitly refer to a right to water.

1.2 The Early Development of Water Rights

Until the 1970s no multilateral instrument, except for the Geneva Conventions,\(^3\) contained any provisions or references to water access. Nevertheless, since the 1970s when topics such as natural resources, environmental protection and sustainable development started to enter the international agenda, several international instruments of different legal value and importance have been adopted, relating both to the need to grant access to water and to a right to water. Various international conferences made significant advances in furthering the links between water access and human rights, gradually starting to call attention to both duties and responsibilities of states. One of the first relevant acts was the 1972 Stockholm Declaration, whose principle 2 mentioned the importance of water for present and future generations.\(^4\)

Just a few years later, in 1977, the UN Conference on Water in Mar del Plata, Argentina, took place. The conference was devoted to discussing emerging water problems. The purpose of the Conference, as spelled out in its final result, the so-called Mar del Plata Action Plan, was to “help the world to avoid a water crisis of global dimensions”. The Action Plan actually stated that ”all people have the right to have access to drinking water in quantities and of a quality equal to their basic needs".\(^5\) Although formulated as a collective and not an individual right, it was the first time a right to water was clearly mentioned in an international law document. 15 years after the Mar del Plata Conference, the International conference on Water and the Environment was held in Dublin, and the so-called ‘Dublin Statement’ was adopted. It reads in its Guiding Principle No. 4 that” it is vital to recognise first the basic right of all human beings

\(^{13}\) See section 2.2.3.
to have access to clean water and sanitation at an affordable price”. The inclusion of the wording ‘affordable price’ implies that the right to water doesn't have to be provided for free. This has to do with the way that water was considered as an economic good throughout the Dublin statement. The Dublin statement was passed on to the partakers of the UN Conference on Environment and Development, hereinafter the Earth Summit I, held later the same year where chapter 18 of Agenda 21 relating to freshwater, stated that “water should be regarded as a finite resource having an economic value with significant social and economic implications regarding the importance of meeting basic needs”, thus failing to address the issue of a right to water.

Two years later, at the International Conference on population and development in Cairo participating states restated their commitment to the right to water by underlining that individuals "have the right to an adequate standard of living … including adequate food, clothing, housing, water and sanitation". Here the right to water was seen as a derived right under the right to an adequate standard of living. The notion of water as a derived right was further supported in 1999 when the UN General Assembly, hereinafter UN GA, reaffirmed the right to water in its resolution on the right to development. In 2000 the Millennium Development Goals, hereinafter MDGs, were adopted and, with an emphasis on Goal No. 7 which aimed “to reduce by half the proportion of people without sustainable access to safe drinking water by 2015”, acted as a catalyst in generating debate on the right to water.

1.3 The Turning Point and Current Endeavour

As seen above, human rights played only a part in the development of a right to water for a long time, and references to the right was made within several different areas of law. But in 2002, the issue was again brought up significantly by the UN Committee on Economic, Social and Cultural Rights, hereinafter CESCR. The committee, which is the supervisory organ of the 1966

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18 Agenda 21: Programme of action for sustainable development, para. 18. The agenda was adopted with the Rio Declaration on Environment and Development, and the statement of principles for the sustainable management of forests at the Earth Summit I.
Covenant, was invited to draft and adopt a general comment specifically on the right to water in order to clarify its content, and the result was the adoption of General Comment No. 15, hereinafter GC15. For the first time the content of the right to water and related obligations arising for state parties to the ICESCR were identified. The committee stated that the “human right to water is indispensable” and provided a wide range of guidelines for the interpretation of the right to water under Articles 11 and 12 of the covenant relating to the right to an adequate standard of living and the right to health.

In March 2008, the Human Rights Council, hereinafter referred to as HRC, adopted a resolution expressing deep concern about the fact that over one billion people lack access to safe drinking water. This resolution was the beginning of the so called “Geneva Process” and led to the creation of the mandate of an independent expert on the issue of human rights obligations attached to access to safe drinking water and sanitation.

Against this background, significant developments were further made with the resolutions from the UN GA in July 2010 and from the HRC later in September expressly recognising the human right to water and sanitation. The mandate of the independent expert was in 2011 both renewed and given a new name. It was renamed “Special rapporteur on the human right to water and sanitation”, making the subject of the mandate now termed in direct human rights language.

Moreover, in 2015 the Sustainable Development Goals, SDGs, were adopted as successor to the MDGs. Despite the political strength of the Millennium Declaration, the goals did fall short of realisation of human rights, leaving 800 million people still without sustainable access to water. The new SDGs have, unlike the MDGs, universal applicability and contain targets written in clear direct human rights language. In December the same year, a new resolution was adopted by the UN GA clarifying the human rights to water and sanitation, making it clear that there is an established distinction between the right to water and the right to sanitation, although they are dependent on each other. This resolution was followed by a HRC resolution in

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September 2016 reaffirming the statement on the right to water and right to sanitation as separate rights, while also extending the mandate of the special rapporteur for another three years. The developments have been quick and intensive during the last few years, but questions still remain. What legal implications do all these various instruments have? and can one now say that an independent human right to water exists in international law?

Chapter 2 – A Right to Water Implied in Existing International Law Instruments

2.2 Water as a Common Denominator

According to Pierre Thielbörge: “Hardly any person, nor any state, refutes the normative claim that all humans should have a right to water of sufficient quantity and quality”. Nevertheless, to determine the existence of such a right, an examination of the sources of international law needs to be conducted. The following chapter will examine the legal framework of the right to water, as implied in existing international law instruments. As seen in the previous chapter, a large part of the development of the right to water has taken place outside the strict human rights law sphere. Therefore, it seems logical to begin briefly mentioning other areas of law before determining the legal basis in human rights law.

2.2.2 International Environmental Law

Water issues have commonly been addressed in relation to international environmental law, hereinafter IEL, which in turn has a strong connection to human rights law. Several human rights are affected by environmental degradation and issues regarding water is no exception. An evident example is environmental contamination of water, which directly affects the right to health. The right to information and to participate in decisions that directly or indirectly affect the habitat of individuals are also affected in situations where water has been the key factor, such as exploitation of indigenous people’s ancestral lands. An expressed right to water is not easy to find in IEL treaties. Instead, it has been developed in several soft law instruments. Many of these non-binding instruments have accepted that fundamental human rights such as the right to life, health and well-being are dependent upon the premise that people are guaranteed access to sufficient quality and quantity of water.

The Stockholm Declaration from 1972 is one of the earliest environmental instruments which recognises the fundamental right to “…an environment of a quality that permits a life of dignity

28 P. Thielbörger, The right(s) to water – The multilevel governance of a unique human right, Springer Verlag Berlin Heidleberg, 2014, p.73.
29 ICJ Statute, Article 38.
and well-being…” 31 The declaration is moreover one of the very first instruments referring to water in a right based way. Principle 2 of the declaration mentions that “… water … must be safeguarded … for present and future generations”. Principle 21 of the declaration stipulates that “states have the sovereign right to exploit their own resources pursuant to their own environmental and development policies.” As regarding the right to water, this may imply that, subject to its international engagements, each state may authorise or not export of drinking water and consent or not to supply water to neighbouring populations. This is a clear example of water regulation written during a period when the state was still in the foreground. The principle although continues to explain that states have “…the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction”.

In 1977, the aforementioned Mar del Plata Action Plan made the very first reference to a right to water by stating that “all people have the right to have access to drinking water in quantities and quality equal to their basic needs”. 32 In 1992, the Agenda 21, of the Earth Summit I, further recognised that all people, whatever their stage of development and their social and economic conditions have the right to have access to drinking water in quantities and of quality equal to their basic needs. 33 The Rio Declaration, also of the Earth Summit I, reaffirmed the Stockholm Declaration and its principle 21 in its Principle 2. This principle has become known as the no-harm rule and is today widely recognised as a rule of international customary law. 

Noteworthy is also the Gabcikovo-Nagymaros Case, between Hungary and Slovakia, which was decided by the ICJ in 1997. It was one of the first cases in which the ICJ considered issues of IEL in depth, but important for this study, it constitutes a great example of how IEL links strongly to human rights law. Judge Weeramantry wrote in a separate opinion that “the protection of the environment is… a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights, such as the right to health and the right to life itself…

31 Stockholm Declaration, Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment…”.
damage to the environment can impair and undermine all the human rights spoken of in the UDHR and other human rights instruments”.  

All these declarations have, amongst other, recognised or at least called for the recognition of a right to water, and many of them have great political value. However, they are in nature not directly binding on states due to their status as soft law instruments. This does not mean they do not matter, but rather that it is hard to argument for a recognised right to water with soft law as the sole legal source.  

2.2.3 International Water Law

Related to IEL is International Water Law, hereinafter IWL. Different from the aim of environmental protection in IEL, IWL focuses on non-navigation and development of international water courses. Although, the two areas of law are concerned with the same object, namely water resources, and do sometimes overlap each other. The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, hereinafter Watercourse Convention, contains the obligation of states to use an international watercourse in an equitable and reasonable manner, with the view to attaining optimal and sustainable utilisation. In case of disputes between two states on different uses of an international watercourse, states shall give special regards to “the requirement of vital human needs”. This is obviously no explicit recognition of a right to water, but according to a statement by the committee that negotiated the Watercourse Convention, “in determining vital human needs, special attention is to be paid to providing sufficient water to sustain life, including drinking water...”. Thus, it is nevertheless an implicit reference to the fundamental importance of access to water, which must constitute the basis of every decision that state parties are making while dealing within the Watercourse Convention’s application. Consequently, the principle of ‘equitable utilisation’ in article 5 of the Watercourse Convention is evaluated through the lens of the “vital human needs”.  

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36 P. Theilbörger, p. 59.
38 Ibid, Article 10, para. 2.
Also reflected in the Watercourse Convention is the aforementioned no-harm rule developed within IEL.\textsuperscript{41} Article 7 of the convention stipulates that states shall “take all appropriate measures to prevent the causing of significant harm to other watercourse states”. Uses of international watercourses are subject to regulation by the state, but in water scarce areas actions by or within one state may directly or indirectly affect individuals living in another state, including the realisation of their human rights. Examples could include pollution of an international watercourse by a state facility, construction of a dam withholding water and so on. Important to note is that the no harm rule is not an absolute prohibition on transboundary harm, rather a due diligence obligation of prevention, and compliance is thus determined by a state’s reasonable conduct to avoid the harm. This was confirmed in the rather recent \textit{Pulp Mills Case}, between Argentina and Uruguay, in which both states argued over the use of the Uruguay River.\textsuperscript{42} The no-harm rule does however not work as a legal ground for the people affected to claim violations of their human rights due to the fact that the subject of the Watercourse convention is the relation between the co-riparian states themselves and not between the state and the individual. In the Pulp mills case the ICJ referred to the rights of the riparian states rather than individuals but did further argue that the “environment is not an abstraction but represents the living space, the quality of life and the very health of human beings”.\textsuperscript{43} The fact that the court emphasised the need to protect the environment and the water of the river shows how both IWL, IEL and human rights are strongly connected. Thielbörger even argues that the statement of the court constitutes an indirect reference to the right to water.\textsuperscript{44}

On the European level, although not an explicit recognition of the right to water, the 1999 Protocol on Water and Health\textsuperscript{45} to the 1992 United Nations Economic Commission for Europe Convention on the Use of Transboundary Watercourses and International Lakes\textsuperscript{46} is an example of the right to water’s indirect incorporation into treaties. The protocol specifically states that “parties shall, in particular, take all appropriate measures for the purpose of ensuring adequate

\textsuperscript{41} I. Brownlie, p. 275–285.
\textsuperscript{43} Case concerning the Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 113, para. 72.
\textsuperscript{44} P. Thielbörger, p. 64.
supplies of wholesome drinking water and adequate sanitation”. It mentions the three central aspects of a human right to water, stating that “…equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer in a disadvantage or social exclusion.”. Access to water and sanitation services are reinforced in article 6.1 which provides that the parties shall pursue the aims of access to drinking water and sanitation for everyone in the region. A year later, The European Council of Environmental Law, hereinafter ECEL, adopted a resolution on the right to water, which forms yet another definitive and explicit link between human rights, environment and water. The resolution considers that access to water is a part of a sustainable development policy which cannot be regulated by market forces alone, and also that the right to water cannot be dissociated from the right to food and the right to housing, which are recognised as human rights and that the right to water is also closely linked to the right to health”. Article 1 of the resolution states that ”each person has the right to water in sufficient quantity and quality for his life and health”.

2.2.4 International Humanitarian Law

International humanitarian law, hereinafter IHL, applies in all situations of international and non-international armed conflicts and has, amongst other, a purpose of ensuring normal living conditions for populations affected by armed conflict. Normal living conditions can only be upheld if basic needs, such as access to water, are guaranteed. Although, it is important to note that the purpose of IHL is consequently not to protect water or water facilities per se, but to protect the human population dependent upon the water for survival.

Water was mentioned as early as in the Geneva Conventions from 1949, which are the core instruments of IHL. Water and facilities that supply water are protected through both general and particular rules set out in the Geneva conventions and the additional protocols from 1977. The third Geneva convention, which is related to the treatment of prisoners of war stipulates

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47 UNECE Protocol on water and health, Article 4.1.
48 ibid, Article 5.1.
that prisoners of war shall be supplied sufficient drinking water\textsuperscript{52} and be provided with sufficient water and soap for their baths, showers and personal toilet.\textsuperscript{53} Prisoners who are being evacuated shall be supplied with sufficient food and potable water\textsuperscript{54} and during transfer drinking water shall also be provided to keep prisoners of war in good health.\textsuperscript{55} The fourth Geneva Convention relates to the protection of civilian persons in times of war and contains very similar provisions relating to sufficient drinking water,\textsuperscript{56} water for personal baths, toilet and laundry\textsuperscript{57} and sufficient drinking water during transfer for good health.\textsuperscript{58}

Both the first and second protocol from 1977,\textsuperscript{59} relating to the protection of victims of international and non-international armed conflicts, also contains references to water. Article 54 of Protocol I states that it is prohibited to “attack, destroy, remove or render useless (…) drinking water installations and supplies, and irrigation works” in international armed conflicts. The same rule applies to non-international armed conflicts pursuant to article 14 of the second Protocol.

However, these water-related provisions are not consolidated in a section devoted to explicitly water and there is also no specific reference of a right to water, even though a number of provisions state that water is indispensable for the basic needs of protected persons. Contrary to human rights law, IHL does not bestow subjective rights upon individuals, rather sets out obligations addressed to be upheld by the parties to the conflict. Nevertheless, the absence of an explicit mentioning of a right to water does not mean that such a right does not exists under IHL. There is an important distinction, between \textit{needs} and \textit{rights}. IHL contains obligations aiming at securing peoples’ basic \textit{needs} of water, so that people are able to live under normal living conditions and thus live a life of dignity. Human dignity is one of the most fundamental human rights and the obligations to ensure the basic \textit{needs} of water, can therefore be seen as a

\textsuperscript{52} Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS vol. 75 p. 135, Article 26.
\textsuperscript{53} Ibid, Article 29.
\textsuperscript{54} Ibid, Article 20.
\textsuperscript{55} Ibid, Article 46.
\textsuperscript{56} Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, UNTS vol. 75 p. 287, Article 89.
\textsuperscript{57} Ibid, Article 85.
\textsuperscript{58} Ibid, Article 127.
requisite and somewhat equal to ensuring the rights of the people to water. Nevertheless, A need for something does not coincide with an entitlement to claim a right, and when talking about needs there will always be ways of categorising and measure how apparent the need is for different individuals, groups and communities. A right on the other hand, call for a universal entitlement that entails that everyone can expect the same level of realisation of that right.

2.2.5 Summary

As seen above, water is an important and integral part of several different areas of law that in many cases intertwine and connects to human rights law. It was within the framework of IEL that the first reference to a right to water took place and also where the right to water evolved for quite some years. IEL protects water as an environmental resource and the quality aspect water can be safeguarded through environmental provisions. Although, even if IEL indirect protects several human rights such as the right to life and the right to health, it does not directly safeguard a right to water as a human right. However, for the realisation of a human right to water to be possible, the environment and water resources has to be protected. Thus, IEL and human rights law can in a way reinforce one another.

Furthermore, it can be said that elements of a right to water also exist in both the principle of equitable utilisation in IWL and in the customary no harm rule. While the provisions aim to safeguard the water resources, and thus not individuals right to the water resources, human vital needs, such as safe, clean accessible water, are considerations that has to be taken into account by the states before engaging in activities that might directly or indirectly affects individuals. When it comes to human rights law and IHL, they have several common aims, like protecting individuals from harm, to respect individuals’ human dignity and also to satisfy individuals’ basic needs. Both legal frameworks are also based on the common principle of non-discrimination.

However, when examining the related water references in these areas of law, the need for a right to water within the human rights catalogue becomes apparent. Neither IEL, IWL or IHL contains any provisions that could constitute a human right to water. These areas of law all operates in the traditional sense of international law, where the obligations set out are to be upheld by the state parties and does thus not have the horizontal effect that bestow individuals with rights that can be claimed and enforced. This chapter show that, in a way, water is protected
and regulated interdisciplinary but ultimately, is there no human right to water within these areas of law.

2.3 International Human Rights Law

2.3.2 Nature of Obligations
The holistic perspective of considering all human rights to be indivisible, interdependent and interrelated that has grown over time and can be said to have become a leading axiom in the international human rights discourse.¹⁰⁰ This has not always been the case and traditionally human rights have been categorised and given different status and values. One of the most common ideas is that economic, social and cultural rights, hereinafter ESC-rights, are fundamentally different from civil and political rights, hereinafter CP-rights. The latter are usually seen as negative rights in the sense that their realisation only require state parties to cost-free refrain from actions that would violate such rights. ESC-rights have instead been considered “welfare-rights” and that their realisation generally relies upon resource-intensive positive measures taken by the state. For this reason, CP-rights have been considered to be more capable of immediate realisation while ESC-rights have been perceived as long-term goals. This dichotomy has been widely contested, and even if human rights may be categorised into CP-rights versus ESC-rights, rights of individuals versus rights of collectives or core- or non-core rights, one must still recognise the fact that all human rights must be treated in a fair and equal matter, on the same footing and with the same emphasis.⁶¹

Typically, states are supposed to ‘respect and ensure rights to all individuals’.⁶² However, this is a rather broad obligation and therefore UN human rights treaty bodies have adopted a tripartite typology of obligations applicable to all human rights.⁶³ First and foremost, states have a duty to respect human rights. This is a negative obligation which requires states to abstain

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¹⁰⁰ *International Human Rights Law*, p. 147-148. Some examples of the mentioning of the interdependence and indivisibility in human rights instruments are the Proclamation of Tehran, adopted at the first world conference on human rights in 1968 stating that ‘all human rights and fundamental freedoms are indivisible’ or the second world conference held in Vienna in 1993 stating that ‘all human rights are universal, indivisible, and interdependent and interrelated’.

⁶¹ This was stated by the UN GA when establishing the HRC in 2006. See UN GA Resolution, *Human Rights Council*, 15 March 2006, UN Doc. A/RES/60/251, preamble para. 3.

⁶² Eg ICCPR Article 2.

from interference with the freedoms and rights of the individual. This is perhaps the most classical obligation.\textsuperscript{64}

In addition, states have an obligation to protect individuals from human rights violations. This refers to the states duty to ensure that persons within its jurisdiction do not suffer from violations at the hands of third parties. The state thus has an obligation to create an environment in which rights can be enjoyed. Needless to say, the state does not become liable for every interference with individual’s rights, but for those failures that can be traced back to the states shortcomings in protecting individuals or failing to take an action that would have prevented the violation from happening.\textsuperscript{65}

Finally, there is an obligation to fulfil human rights. This is to be understood as taking positive steps that have the consequences of greater enjoyment of rights. The obligation to fulfil can be divided into obligations to facilitate and to provide. Facilitating entails that states must create opportunities for individuals to realise their rights by themselves. An example may be that the right to vote cannot be realised if the state does nothing to implement it. So even if the right to vote is a CP-right, which the state shall abstain from interfering with, the state has to take positive action to make sure all people can vote. Measures can involve the use of police forces making sure the area for voting is safe so that all people have the opportunity to go vote or that there is access for everyone, also for individuals with physical disabilities. Another part of fulfilling is that sometimes individuals can be unable, for reasons beyond their control, to realise their rights and then there is an obligation for the state to provide, or in other words bring about the realisation of a right.\textsuperscript{66}

In practice, this typology to respect, protect and fulfil are closely interrelated and it can be difficult to make clear distinctions between these different aspects.\textsuperscript{67} Nevertheless, it has become a basic analytical tool for the understanding of state obligations to international human rights law. It also brings about the conclusion that if the obligations to respect, protect and fulfil arise from every human right, the categorical distinction between ESC-rights and CP-rights

\textsuperscript{64} International Human Rights Law, p. 102.
\textsuperscript{65} This is known as the \textit{indirect horizontal effect} of human rights and to illustrate, states have been found liable for failing to protect demonstrators from third parties, for failing to protect individuals from murder, despite the fact that the police knew the victim had been threatened, in cases of domestic violence etc.
\textsuperscript{66} International Human Rights Law, p. 103.
\textsuperscript{67} Ibid, p. 104.
cannot be uphold. Consequently, it also rebuts the alleged non-justiciability or aspirational character of ESC-rights.68

If the right to water is to be concluded as an independent human right, it has to fulfil or meet certain criteria. Firstly, the right has to be generally applicable to all human beings, not only to particular groups or individuals. In other words, the right has to be universal and comprehensive. The right also has to be accepted by states as binding upon them to some degree, thus meeting the criteria of having a legally binding effect. A human right must be legally binding in order to be relied on and enforced, compared to political goals or moral claims that generally lack this kind of legal obligations. Lastly, the right to water has to be considered a right of its own in order to be self-standing or independent.

2.3.3 Explicit References to a Right to Water

A clear and explicit right to water is hard to find in any international human rights treaty. However, explicit references and specific obligations regarding access to water exists under the international human rights framework. For instance, the Convention on the Elimination of all Forms of Discrimination against Women, hereafter CEDAW,69 obliges state parties to take all appropriate measures to ensure that women living in rural areas can "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply…".70 This explicit recognition of water is viewed as a testament to the uneven burden traditionally placed on women in developing counties to collect water over long distances and represents an attempt to redress this burden.71 Despite the explicit wording of water, it has to be concluded that water is here only an element required for the realisation of the right to adequate living conditions. Another reference can be found in the Convention on the Rights of the Child, hereinafter CRC.72 Article 24 recognises a child’s right to enjoy the highest attainable standard of health in order to "combat disease and malnutrition, …, through, inter alia, … the provision of … clean drinking water".73 Another emphasis is made in this convention, compared to the CEDAW. The pressing water issue for children is related to the right to health, hence the quality of the water is emphasised. In CEDAW water is instead emphasised as a requirement to an adequate

70 Ibid, Article 14.2.
73 Ibid, Article 24.2 (c).
standard of living and hence to accessibility of the water rather than the quality. In the relatively new Convention on the Rights of Persons with Disabilities, hereinafter CRPD, an explicit reference to access to clean water is made in article 28 by stating that state parties shall take appropriate steps "to ensure equal access by persons with disabilities to clean water services …". Here the emphasis is also on the accessibility to water, in a similar way as in the CEDAW.

The above-mentioned references to water only address the needs of specific categories of persons, therefore limited ratione personae. There are also few instruments which contain explicit references to water that apply within a restricted geographical scope, thus instead limited ratione loci. These are the African Charter on the Rights and Welfare of the Child, which requires states to take measures to “ensure the provision of adequate nutrition and safe drinking water” with the aim to achieve the right of every child to enjoy the best attainable standard of physical, mental and spiritual health. Also there is the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa considers water as an element necessary to achieve the right to food security, and recently, in November 2017 at the Social Summit in Gothenburg, the European Pillar of Social Rights was adopted. It sets out 20 principles and rights to support fair and well-functioning labour markets and welfare systems. Principle 20 explicitly states that “everyone has the right to access essential services of good quality, including water”.

2.3.4 Implied References to a Right to Water

The explicit references under human rights treaties are few, and as seen above there is no reference to a right to water with universal applicability. This means that the references to water does not meet the criteria of comprehensiveness. Therefore, it must be examined whether a right to water can be implied under other existing human rights instruments.

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75 Ibid, Article 28.2 (a).
77 Organisation of African Unity, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003, Article 15: “States parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to: (a) Provide women with access to clean drinking water […]”.
78 European Pillar of Social Rights, proclaimed at the Social Summit for fair Jobs and Growth, 17 November 2017, Gothenburg.
A right to water has for instance been implied under the African charter on Human and peoples’ rights, hereinafter ACHPR, which broadly notes that "all peoples shall have the right to a general satisfactory environment favourable to their development" and under the relatively new Arab Charter on Human rights. Its article 38 provides for the right to an adequate standard of living that ensures well-being and a decent life, including inter alia food, housing, services and the right to a healthy environment, in which the reference to ‘services’ has been understood as to include water services. Article 39 explicitly lists the provisions of safe water and proper sanitation systems as measures necessary to realise the right to the highest attainable standard of health. The American Convention on Human Rights, hereinafter ACHR, focuses on CP-rights. It includes a relevant guarantee of the right to life in article 4 that has been interpreted as to imply a right to water. Moreover, article 11 of the additional protocol to the ACHR in the Area of Economic, Social and Cultural rights, hereinafter Protocol of San Salvador, provides that "everyone shall have the right to live in a healthy environment and to have access to basic public services". It is certain that basic public services include water supply and sanitation. A report made by the Inter-American Commission on the human rights situation of Brazil proves this by stating that "there was inequality in the access to basic services: 20.3 % of the population had no access to potable water and 26.6 % lack access to sanitary services…".

The Convention for the Protection of Human Rights and Fundamental Freedoms from 1950, hereinafter ECHR, focuses on the protection of CP-rights, similar to the ACHR. Against this background the Revised European Social Charter from 1996, hereinafter Revised ESC, was adopted and aims to protect ESC-rights. However, the charter is formulated in terms of policy aims instead of individual rights and states are only bound by a certain number of articles or

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87 Council of Europe, European Social Charter, (revised), 3 May 1996.
provisions, which they can select themselves. Article 11 of the charter guarantees the right to health, listing the removal of causes of ill-health as one appropriate measure to be undertaken by states. Since unsafe water is one of the main causes of ill-health the provision may also be understood as to include safe drinking water.\textsuperscript{88} In sum, all these references implied in both the ACHR, ECHR and the Arab Charter all have a limited scope \textit{ratione loci}, thus lacking the universal applicability needed for the recognition of a human right to water.

\subsection*{2.3.5 A Right to Water under ICCPR}

Evidently no-one can live without water. A basic supply of water is indispensable for the very sustenance of human life. It is therefore interesting to examine whether the right to life under the ICCPR can be considered to imply a right to water.

Article 6 of the ICCPR stipulates that everyone has the inherent right to life. The right has been described as the “supreme human right” due to the fact that all other human rights would be devoid of meaning unless the right to life is guaranteed.\textsuperscript{89} The special status of article 6 is emphasised both with respect to its wording and to its position in the covenant,\textsuperscript{90} but also because it is one of the provisions from which no derogation is permitted, not even in times of public emergency.\textsuperscript{91} Furthermore, most scholars seems to accept that the right to life has become a part of international customary law, and some argue it has even gained the status of a peremptory norm of international law (\textit{jus cogens}).\textsuperscript{92}

The right to life is a civil right, and compared to article 2.2 in the ICESCR, which provides for the \textit{progressive realisation} of ESC-rights and acknowledges the constraints due to limits of resources, the parallel article 2.2 ICCPR does not contain any such qualification. The ICCPR generally imposes an \textit{immediate} obligation to the state parties to respect and to ensure the rights in the covenant.\textsuperscript{93} In addition, state parties implementation of the right to life is subject to rather

\begin{itemize}
  \item \textsuperscript{88} I. Winkler, p. 58.
  \item \textsuperscript{89} M. Novak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2\textsuperscript{nd} edition, Kehl Germany, Arlington VA USA, Engel Publishers, 2005, Article 6.
  \item \textsuperscript{90} The right to life is the first substantive right to be listed in the covenant and it is also the only right described with the adjective ”inherent” (M. Novak article 6, reference note 5).
  \item \textsuperscript{91} ICCPR, Article 4.1.
  \item \textsuperscript{92} See among others B.G Ramcharan, “the right to life”, Netherlands International Law Review vol. 30 issue 3, 1983, pp. 297-329. Also, the Human Rights Committee has in its General Comment No. 29: Article 4: Derogations during a state of Emergency, recognised the right to life (and also the prohibition of torture) as \textit{jus cogens}.
  \item \textsuperscript{93} International Human Rights Law, p. 144.
\end{itemize}
well developed international supervisory mechanisms. If a right to water would be implied under the right to life, scholars argue that the norm would have considerable legal weight and thus also give rise to a forceful set of immediate state obligations. Since legal consequences would be far-reaching, the arguments supporting a right to water under the right to life needs to be clear and conclusive.

Article 6 stipulates that the right to life shall be protected by law and no-one shall be arbitrary deprived of one’s life. Since the right is a CP-right, not a ESC-right like the right to an adequate standard of living or right to health, it is first and foremost about securing the freedom of the individual. Scholars like Dinstein for example, argue that the right to life has a rather restrictive scope and explains that while human beings need certain essentials like food, clothing, housing and medical care – in order to stay alive – these are aspects of social rights like the right to an adequate standard of living and the right to health and not part of the right to life. Dinstein further argues that the right to life per se is a civil right that does not guarantee any person against death from famine or cold or lack of medical attention. A state’s toleration of malnutrition or dehydration would therefore not be regarded as a violation of the right.

This kind of narrow interpretations has been widely challenged. Scholars like Trindade, judge of the IACHR, supports a more wide and positive interpretation of the right to life. He holds that article 6 compromises both the right of every human being not to be deprived of one’s life (right to life), and also the right to have the appropriate means of subsistence (right to living), however the latter he argues to be a part of the realm of ESC-rights. He considers that view as an illustration of the indivisibility and interrelatedness of all human rights. Still, this theory does not suggest that article 6 contains any positive sustenance rights.

Ramcharan takes the right to life one step further and believes that what is enshrined in article 6 is the duty of the state to assure satisfaction of the survival requirements of every person

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94 The ICCPR provides for a system of state reporting (Article 40), inter-state complaints (Articles 41–43) and the first optional protocol allows the Human Rights Committee to review individual petitions. Also, Article 6 ICCPR is generally understood as to be justiciable within national legal orders.


96 M. Novak, Article 6 reference note 3.


within its jurisdiction. Thus, according to Ramcharan the right to life does contain positive obligations, such as access to basic water supplies.\textsuperscript{99} Also supporting a more positive view of article 6 is the Human Rights Committee and their interpretation in its GC No. 6. The committee stated that the right to life should not be interpreted narrowly, and that the expression "inherent right to life" couldn't be understood properly in a restrictive manner. The right to life does require state parties to adopt not only negative, but also positive measures. Inter alia, the committee stated that it is desirable for state parties to take all positive measures to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.\textsuperscript{100} Since lack of water is just as severe a threat to life as malnutrition, a broader understanding of the right to life would maybe by the committee’s interpretation entail that the right is covering protection, not only from arbitrary deprivation of life, but also acts as a guarantee against death from other causes, perhaps such as lack of water. However, Kiefer and Bröllmann argues that the use of the word “desirable” in the general comment implies that it is unlikely that the committee would find a violation under article 6 in the case a state party fails to ensure survival requirements like water.\textsuperscript{101} Questions regarding survival requirements have been raised by the committee repeatedly, but has not yet been found to constitute violations of article 6.\textsuperscript{102} This view is also partly supported by Scholars like Kirschner. She argues that the right to life, interpreted as in the general comment, probably doesn’t entail a right to water as a positive sustenance right, but at least includes the protection against arbitrary and intentional denial of access to water.\textsuperscript{103}

A right to water has not directly been dealt with under the jurisprudence of the ICCPR, but courts have been creative in their interpretations of existing provisions. In the \textit{Port Hope Case},\textsuperscript{104} a complaint was alleged that the dumping of nuclear wastes within Port Hope in Ontario, Canada, was causing large scale pollution of residences thus threatening the lives of the people affected. This case was cleared inadmissible due to failure to exhaust national remedies, but the UN Human Rights Committee, hereinafter CCPR, which is the supervisory

\textsuperscript{100} CCPR General Comment No. 6: The right to Life (Article 6), 30 April 1982.
\textsuperscript{101} T. Kiefer and C Bröllmann, p. 189.
\textsuperscript{102} See among others the concluding observations of the CCPR in UN Doc. CCPR/C/79/Add.30 of 5 November 1993, in respect of infant mortality in Romania, or UN Doc. CCPR/C/79/Add.105 of 7 April 1999 regarding homelessness in Canada.
organ of the ICCPR still observed that the case “raised serious issues under article 6 of the ICCPR, with regard to the state’s water-related obligation to protect life”.105

It can be concluded that there is a widely accepted view that certain positive measures, such as maintenance and training of police forces or investigations of cases concerning missing persons that may indicate violations of the right to life, fall within the obligations under article 6,106 but besides that, the analysis of doctrine and practice of the Human Rights Committee shows little support for the conclusion that the right to life would entail a positive right of access to life sustaining means such as water.

2.3.6. A Right to Water under ICESCR

If the right to water is not implied under ICCPR, the question is whether a human right to water exists under the ICESCR. This was exactly the purpose of the aforementioned General Comment No. 15 of the Committee on Economic, Social and Cultural Rights or CESCR, which is the supervisory organ of the Covenant, to clarify the normative content of the right to water under articles 11 and 12 of the covenant. One has to keep in mind that General Comments have the purpose to set out the understanding of the treaty language and are thus an authoritative, but not legally binding interpretations of the ICESCR. Still, these comments are willingly cited by advocates as sources of human rights law and may also be relied upon by decision makers. However, any statement of their legally binding effect depends on whether states consent to their terms due to the lack of law-making competence of the treaty bodies. On the other hand, scholars have argued that the comments can be seen as a form of secondary treaty law, deriving its authority from the binding nature of the treaty and the implied consent of states to it.107

The GC15 states in its first paragraph that water is fundamental for life and health and indispensable for leading a life in human dignity. It continues with explaining that water is a prerequisite for the realisation of other human rights and that state parties have to adopt

105 Ibid, para. 8.
106 CCPR, General Comment No. 6, The right to Life (Article 6), note 4.
107 C. Chinkin, in International Human Rights Law, p. 81. An example to illustrate this view is CEDAW’s General Recommendation No.19. The committee asserted that, even though the convention did not contain any provision addressing gender-based violence, the convention did prohibit such violence as a form of discrimination against women. The committee required state parties to include measures to combat violence against women in their reports, and the states responded positively to this recommendation and engaged in dialogue on the issue. It can be interpreted that the state parties thus consented to such an interpretation of the CEDAW.
effective measures to realise, without discrimination the right to water. Article 11 of the ICESCR provides for the recognition of the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It does not refer explicitly to water, but the word ‘including’ has been interpreted as meaning that the article is not exhaustive and does indeed include a right to water. GC15 explains that water is a fundamental condition for survival and therefore an element for securing an adequate standard of life.\(^{108}\)

Concerning adequate housing, the CESCR holds that the right is to be seen as the right to live in security, peace and dignity. This includes that all beneficiaries of the right to adequate housing should have access to safe drinking water, sanitation and washing facilities.\(^{109}\) Since any dwelling arguably becomes unliveable without any access to water, it seems logic to understand that the right to housing encompasses a right to access to water.

Article 11 also provides that everyone has the right to adequate food. This may have implications for water in several ways. Water can be considered as liquid food, an essential element in food preparation and also a necessary factor in the production of food. The UN Special Rapporteur on the right to food, Jean Ziegler, equals water with liquid food and thus derives a right to water from the right to food.\(^{110}\) This is somewhat debatable, and it is not a view that has been given much further support.\(^{111}\) On the other hand, water has a strong connection to the right to food in the sense of water for food preparation. In certain cases, food have to be prepared with the use of water. A clear example is dried milk, which is a widely used baby food. If it is not prepared with water of adequate quantity and quality, this type of food become inadequate and can result in serious diseases among the babies who relies on this source of food. This is a strong argument for considering a right to water under the right to food.\(^{112}\)

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\(^{108}\) CESCR, GC No. 15 para. 3.


\(^{112}\) CESCR, GC No. 15 para. 12 (a) also holds that water for food preparation is part of the right to water.
When it comes to food production, water is of outmost importance. For example, to grow one kilo of wheat, 1400 litres of water are required, but to conclude that everyone therefore has a right to no less than 1400 litres of water seems rather unrealistic and defining the scope of the right to water in relation to food production has been difficult. In GC15 the committee notes “the importance of ensuring sustainable access to water resources for agriculture to realise the right to adequate food and that attention should be given to ensuring that disadvantaged and marginalised farmers… have equitable access to water…”. The committee also took note of the duty in article 1 of the covenant which provides that a people may not “be deprived of its means of subsistence” and that state parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous people. It is clear that water for food production and agriculture is a crucial issue, but it is also evident that many of the concerns relating to this type of issues could be raised under the right to food directly, instead of the right to water. Scholars like Alvarez argue for that, although previously conceived as an integral part of food, the right to water should be recognised separately. He gives the examples of that in the CRC, the codification of the right to water makes a difference between water and food, and that under the UN Standard Minimum Rules for the Treatment of Prisoners article 20, entitled ‘food’, has two separate paragraphs: paragraph 1 on food and paragraph 2 which deals with water. He concludes that even though the right to water is located under the title of food, it is construed in a paragraph different to the one dealing with the right to food and that this could be another display of the fact that it is not clear whether the right to water is comprised in the right to food under article 11 of the ICESCR. This view further supported by Cahill who also argues that a separation would allow for a more optimal realisation and implementation of both rights.

Moreover, Article 12 of the ICESCR provides for the recognition of the right to the enjoyment of the highest attainable standard of physical and mental health – attainable both in terms of the individual’s potential, the social and environmental conditions affecting the health of the individual, and in terms of health services. Even though the right to health may be viewed as a right with an obvious link to the right to water, article 12 does not contain a notion of water. In

113 CESC, GC No. 15 para. 7.
114 I.J. Alvarez, The Right to Water as a Human Right, in Picolotti and Taillant, pp. 75-76.
general comment No. 14, the CESCR had already stated that the right to health must not be understood as a right to be healthy, but neither limited to a right to healthcare. Rather, it embraces numerous socio-economic factors that promote condition in which people can live a healthy life and mentions access to safe and potable water and adequate sanitation as underlying determinants of health. The committee concludes that ensuring access to adequate water is one of the core obligation incumbent upon state parties under the right to health.116 This view has wide support amongst scholars117 and the CG15 confirms this further and states that the right to water is inextricably related to the right to the highest attainable standard of health.118 As mentioned before, millions of deaths occur every year due to water-related diseases, which ranks among the top ten risk factors for death.119 Thus, the right to health cannot be guaranteed without adequate water, and are therefore dependent on the right to water.

Normative content as implied under articles 11 and 12

Concluding that there is indeed a right to water implied under both article 11 and 12 of the ICESCR, the GC15 attempts to clear the normative content of the right to water and states that the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”. Everyone is entitled to an adequate amount of safe water to prevent death from dehydration and to reduce risk of water-related diseases and to provide for consumption, cooking and personal and domestic hygiene requirements.120 The committee notes that water is required for a range of different purposes, as mentioned above, like food production, securing livelihoods and to enjoy cultural practices but that priority must be given to personal and domestic uses.121 The committee further concludes that the right to water contains both freedoms and entitlements and that the elements of the right needs to be adequate for human dignity, which means that the right cannot be interpreted narrowly. Adequacy may vary according to different situations but the GC15 states that certain factors always apply.122

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118 CESC, CG No. 15, para. 3.
120 GC No. 15 para. 2.
121 Ibid, para. 6.
122 Ibid, para. 10.
First, the right to water must meet the criteria of *availability*. The water supply needs to be sufficient and continuous and should cover the need for drinking, sanitation, washing of clothes, food preparation, personal and household hygiene. The *quantity* should correspond to WHO guidelines, with the notion of that some individuals and groups may need additional water due to reasons like health or climate. Moreover, the water must be of a certain *quality*, meaning it is safe and thus free from micro-organisms, chemical substances and radiological hazards that constitutes a threat to one’s health. Further, the water should be of acceptable colour, odour and taste. Lastly, water must be *accessible*. The accessibility has four dimensions: *physical, economic, non-discrimination and information* accessibility. Physical accessibility means that water facilities and services must be within safe physical reach for all sections of the population. The water supply needs to be accessible within, or in the immediate vicinity, of each household, educational institution and workplace. The physical security should not be threatened during access to water facilities and services, taken into consideration aspects of culture, gender and privacy. Economic accessibility stands for *affordability* and means that the direct and indirect costs associated with securing water must be affordable and should not threaten the realisation of other covenant rights. The non-discrimination is about making sure that water facilities and services are accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact. The last dimension is information-accessibility and it includes the right to seek, receive and impart information concerning water issues.

**Legal obligations**

States have both general, specific and core obligations with respect to the right to water. In the sense that the right to water exists as implied under the ICESCR, the states’ general obligations is thus determined by article 2 of the covenant, according to which states have to take steps to their maximum available resources to achieve *progressively* the full realisation of the rights in the covenant. States do however also have some immediate obligations, that are not subject to progressive realisation such as the obligation to take deliberate, concrete and targeted steps towards full realisation of the right and to guarantee that the right to water will be exercised without discrimination.

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123 *Ibid*, para. 11-12 a.
125 *Ibid*, para. 12 c.
The specific obligations adhere all human right and refers to the aforementioned tripartite typology, to respect, protect and fulfil human rights. Respecting the right to water has been interpreted as an obligation for states to refrain from engaging in any activity that leads to the denial or that limits access to water. States shall also refrain from interfering with customary or traditional arrangements for water allocation, unlawfully polluting water or destroying water services. This relates mainly to punitive measures, for examples during armed conflicts in violation with IHL. Protecting the right to water require states to prevent third parties, including individuals, groups, corporations and other entities, from interfering in any way with the enjoyment of the right to water. Preventive measures could be to adopt necessary and effective legislative and other measures to, inter alia, restrain third parties from denying access to water. Where water services are operated by third parties, state parties must ensure the adequacy in form on preventing the third parties from compromising the equal, affordable and physical access to safe water. In order to fulfil the right to water, states are obligated to facilitate, promote and provide the right to water. Facilitating requires states to assist individuals and communities to enjoy the right and promoting require states to take steps to ensure education about hygienic water use, protection of water sources and methods to minimise water wastage. States are also obliged to provide the right when individuals or a group are unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. This could include installations of low cost service technologies, provisions of income supplements or even free water.

The general comment further identifies a number of core obligations that has to be satisfied immediately and thus prioritised, since non-compliance with these obligations could have severe short-term repercussions. These obligations are; ensuring non-discrimination relating to water access, ensuring access to the minimum essential amount of safe water needed for personal and domestic uses and to prevent disease, ensuring access within reasonable distance from the household, ensuring equitable distribution of available water facilities and to monitor the extent of the realisation or non-realisation of the right.

127 Ibid, para. 20–22.
128 Ibid, para. 23–34.
130 Ibid, para. 37.
International and extraterritorial obligations

The covenant requires states to recognise the role of international cooperation and assistance and the GC15 recommends that states facilitate the right to water in other countries. Unlike the ICCPR, the ICESCR lacks an explicit jurisdiction clause limiting its application, thus opening up for an extraterritorial scope. The right to water entails an international obligation to refrain from interference, in other words respect, another country’s enjoyment of the right to water. The application of these duties in the case of transboundary watercourses strongly connects to the discussed Watercourse Convention of IWL, where an extraterritorial aspect of obligations is already established within the responsibilities of riparian states, including the principle of equitable utilisation and the no harm rule.

Core content

Overall, the GC15 seems to give and comprehensive analysis of the right to water under the covenant. Despite explaining the obligations and normative content of the right to water, scholars have criticised the Committee for not stating the core content of the right to water specifically. If the core content cannot be determined, how is one to how to establish the actual scope of the right. The committee does for example refrain from indicating a specific figure for what would constitute adequate availability for consumption. The only principal guide was the pointer to WHO guidelines. The relationship between the related rights is not fully explained and makes it debatable as to whether the right to water is to be concluded a derived or independent right.131

An independent or derived right to water

Rights can be either independent or derived from another related or dependent right. It is important to establish this, since it makes a difference for the perception and potential enforcement of the right to water. At a first glimpse, the right to water under the ICESCR gives a confident impression of being a right derived from the right to an adequate standard of living, food, housing and the right to health, thus a part of these rights and not a right of its own. The committee notes i.e. the requirement of water to realise these related rights but does not mention that the realisation of the right to water is necessary for fulfilment of the related rights. Although there are some factors implicating that the right to water could be an independent right implied in the covenant. First it is the release of a self-standing general comment explicitly named ‘the

131 A. Cahill, p. 393.
right to water'. Also, there is the argument that water is essential for survival, thus fundamental, and it would seem contradicting that rights less essential for survival, such as the right to work or the right to take part in cultural life, would have the status of independent right while the right to water would not.

On the other hand, there are strong arguments for considering the right to water under ICESCR as a derived right. To begin with, the task of the CESCR is to oversee and interpret existing legal rights and that means it does not have any legislative competence to create new rights. Moreover, it is evident that the right to water is almost exclusively mentioned in connection with other rights and values such as life, dignity, health and education. Thielbörger supports this argument by saying that in order to justify the right to water, one needs to refer it to values outside the right itself, meaning deriving the right from rights that corresponds to these values.132 Cahill elaborates further and argues that the GC15 leaves much unsaid and that the right to water has a unique status, somewhere between that of a derived right and an independent right.133

2.4 Appraisal
It is of principal importance to distinguish where in the legal framework the right to water exists in order to determine what the state’s obligations are related to the right to water, and thus which methods and mechanisms that will be applicable for the implementation and enforcement of the right. As established above, access to water is both explicitly and implicitly guaranteed in a broad range of human rights treaties, and moreover in several other areas of law connected to human rights. All these provisions show the wide range of interests that comes along with water, but more importantly, how these all provisions are interrelated and need water for their realisation.

The explicit references to water in human rights law, such as in CEDAW or the CRC, show different ways of articulating water needs into human rights instruments and thus water rights. Most of these recognitions meet the criteria of independence since they are not only impliedly but explicitly recognised within these provisions. All the recognitions are also legally binding, due to the states’ ratifications of the treaties they are part of. Although, since they are operating

132 P. Thielbörger, p. 111.
133 A. Cahill, p. 404.
within a restricted scope and apply to only those who are covered by the treaties, they have limited applicability, either *ratione loci* or *ratione personae*. This means that the criteria of comprehensiveness cannot be fulfilled. However, it is still a noteworthy development on the right to water and shows that water is of outmost importance through the merely all stages of human life and for several different purposes.\(^{134}\)

Nevertheless, it can be concluded that there is a right to water existing under both articles 11 and 12 of the ICESCR. Here, the criteria of comprehensiveness and legally binding effect are both met since the convention is a binding treaty with universal applicability, ratified by the majority of states. However, divided opinions exist on whether the right to water under the ICESCR can be said to be self-standing, thus constitute an independent right. Considering the main critique as to the lack of definition of both scope and core content of the right to water, the prevailing view is that the right has to be further clarified before it reaches the status of a self-standing and thus independent right under existing international law instruments. Ultimately, it has to be concluded that the right to water under existing international law is a derived right.

*Enforceability of the right to water*

The ability to claim that the right to water has been violated, is an important part of the protection and realisation of the right. Generally, The ICESCR draws upon a reporting system in order to monitor the implementation of the rights and state parties are obliged to submit periodic reports for consideration. The CESCR lays out their principal subjects of concern and their recommendations in a set of Concluding Observations. This system in criticised for its non-binding nature which relies on voluntary participation of the state parties.\(^{135}\)

Nevertheless, in 2013 the optional protocol to the ICESCR adopted by the UN GA, hereinafter ICESCR-OP, entered into force and provides for the right to petition by individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the covenant by a state party that has accepted the ICESCR-OP.\(^{136}\) Since a right to water is implied in the ICESCR it gives individuals the possibility to claim their right to water under articles 11 and

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135 ICESCR, Articles 16 and 17.  
12 of the covenant, but as a derived right there are risks of the right to water being only partly protected. To determine a violation of the right to water there has to be a strong connection between water and the related rights, meaning that a violation of the right to water has to also be a violation of the right it is derived from. Thus, all elements of the right to water will change depending on which right one derives it from in that particular situation. Considering health for example, one can have sufficient, safe and accessible water and still suffer poor health as a result of other factors. On the other hand, lack of access or maybe discriminatory access to water may not have to result in affecting an individual’s health. The right to water may thus in reality be impaired without it affecting any of the related rights. This complicates the proof of a violation and if the impairment cannot be linked to article 11 or 12 of the covenant the right to water cannot be claimed under the covenant. Even if these scenarios are unusual it is a risk that comes with the right to water being derived ad therefore not possible to claim of its own.

Accountability for extraterritorial violations of the right to water

According to the international obligations of the right to water and the extraterritorial applicability of the ICESCR the right to water may entail obligations towards individuals in other states. The tripartite typology requires states not only to respect, but to also protect and fulfil the right to water. It has been argued that if a state fails to protect the right to water for individuals in another country by not ensuring that third parties also respect the right to water, the state could be responsible for a violation of the right to water and thus under an obligation to regulate the conduct of that third party.137 In terms of international cooperation and assistance and in the context of transboundary waters, the obligation to fulfil could entail an obligation to assist co-riparian states to realise their right to water. This is however still debatable.

In conclusion, there is an established right to water derived from articles 11 and 12 of the ICESCR which entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. The right can thus be claimed and enforced. Unfortunately, the optional protocol has so far received 45 signatories and 23 state parties.138 Nevertheless, it can contribute to the strengthening of the right to water due to the possibility of development of case law of ESC-rights.

Chapter 3 – Right to Water as an Independent Right in Current International Law

As shown in chapter two, various references to water can be found in existing international law instruments, but it takes some effort to construct an independent right to water as part of these existing international law instruments. Rather, it could only be determined that the right to water exists and operates as a right derived from other rights under existing instruments. The most recent developments with respect to the right to water have taken place in a number of soft law instruments which have shown support for the view of the right to water as constituting an independent right. The following chapter will therefore examine these instruments and analyse the possibility of crystallisation of the right to water as a independent right in current international law.

Soft law is a rather complex phenomenon which serves several purposes and takes different forms. According to Boyle and Chinkin soft law has at least five different purposes: 1) as an alternative to treaty law; 2) as an authoritative interpretation of treaties; 3) as a guidance on the implementation of a treaty; 4) as a step in the development of international legal principles; 5) as evidence of opinion juris in the formation of international customary norms.139

There is no absolute definition of what customary international law is. However, the International Law Commission has in its second report on identification of customary international law identified it through the “two element approach” which requires practice of states (usus) and a belief that such a practice is required as a matter of law (opinio juris sive necessitatis).140 According to Brownlie, “when resolutions are concerned with general norms of international law, acceptance by a vast majority constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions”.141 This effect was affirmed by the ICJ already in 1996 when the court in an advisory opinion noted that “General assembly resolutions can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of opinio juris”.142 Examples of such resolutions are inter alia the resolution which affirmed ‘the principles of international law recognised by the

141 I. Brownlie, p. 15.
Charter of the Nuremberg Tribunal and the judgement of the Tribunal\textsuperscript{143} and the Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes.\textsuperscript{144} Many of the provisions in the Universal Declaration of Human Rights are also widely accepted as norms of customary law, although less accepted for many ESC-rights in the UDHR.\textsuperscript{145} A another clear example is also the no harm rule with its origin in both the Stockholm and Rio Declaration.\textsuperscript{146} It should be underscored that each individual resolution must be assessed in the light of all the circumstances and also by reference to other evidence of the opinions of states on the point of the issue. Besides examining soft law instruments, this chapter will also see to regional and national legislation and jurisprudence to both create a deeper understanding of the peculiarities of different legal orders and the way water has been interpreted into a subject of rights and to analyse this in relation to whether there is support for an independent right to water.

When it comes to the requirements of state practice and \textit{opinio juris} both conditions have to be fulfilled in order to establish a customary norm. State practice is the general and consistent behaviour of states while \textit{opinio juris} means that the practice is accompanied by a sense of legal obligation.\textsuperscript{147} Cassese argues that “for a rule to take root in international dealings, it is sufficient for a majority of states to engage in a consistent practice corresponding to the rule, and to be aware of its imperative need”.\textsuperscript{148} Some scholars have instead argued that this is a traditional conception of custom and that there is also a modern concept of custom that relies more on \textit{opinio juris} as the decisive element. Thus, development of custom starts with general statements of rules rather than with a certain practice, even if both elements have to be fulfilled in the end.\textsuperscript{149}

\begin{thebibliography}{9}
\bibitem{143} UN GA Resolution No. 95, \textit{Affirmation of the Principles of International Law recognised by the Charter of the Nurnberg Tribunal}, 11 December 1946, UN Doc. A/RES/1/95. Adopted Unanimously.
\bibitem{144} UN GA Resolution No. 1653 (XVI), \textit{Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons}, 24 November 1961. Adopted by 55 votes to 20; 26 abstentions.
\bibitem{147} \textit{I. Brownlie}, pp. 6–12.
\end{thebibliography}
3.2 Latest Developments

3.2.2 UN GA 2010 Resolution on “The Human Right to Water and Sanitation”

This was the first time that the GA held an entire debate on the issue of a human right to water, declaring as its outcome the access to clean water and sanitation as a human right. In the resolution equitable access to water is acknowledged as an integral component of the realisation of all human rights. The right to water is worded as the right to safe and clean drinking water and recognised as essential for the full enjoyment of life and all human rights. However, resolutions of the UN GA are in nature not directly legally binding upon states, and the UN Charter refers to them as “recommendations”.\(^\text{150}\) Instead they can be said to be political affirmations, declarations of intent or global appeals. Nevertheless, many resolutions are major political achievements, but they cannot in themselves function as the sole legal source for the right to water.

Still, these resolutions can be an expression of a customary norm. This resolution was adopted by a high number of votes (122 in favour, 41 abstentions and no vote against). 29 states were absent at the time of voting.\(^\text{151}\) With 192 members of the UN GA in 2010, a three quarters majority of states present, and about two thirds of all 192 states, expressed a positive opinion to recognise water and sanitation as a human right. It is rather notable that no state voted against the resolution, especially since states like the USA, Canada and UK had been very sceptic of a human right to water. However, abstention does not necessarily equal a consent and looking at the process towards the adoption of the resolution, the US had stated that there had been no consulting process to find opinio juris to be expressed in the resolution and that the right to water was not reflected in international law.\(^\text{152}\) The UK expressed similar views by stating that there was no sufficient basis for recognising water as a freestanding human right,\(^\text{153}\) and Canada meant that the text of the resolution was premature.\(^\text{154}\) Moreover, it is argued that the resolution had one-sided support, rather than universal acceptance due to the fact that the resolution was largely co-sponsored be developing states, mainly African or South American.\(^\text{155}\) Despite the

\(^{150}\) Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Articles 10 and 14.


\(^{153}\) Ibid, Statement by the UK representative, p. 12.

\(^{154}\) Ibid, Statement by the Canadian representative, p. 17.

\(^{155}\) Thielbörger, p. 80.
high number of votes in favour, a strong *opinio juris* is hard to assume with many abstentions and cautioning statements. It should also be said that several states that did vote in favour for the resolution also expressed their approach to the status of the right to water. Germany did for example declare that it still considers the right to be “a component of the right to an adequate standard of living”\(^{156}\) whereas Hungary “attached great importance to access to safe drinking water and sanitation, which is closely connected to … the right to life and human dignity”.\(^{157}\)

The Netherlands abstained from voting but made a clear statement: “we firmly believe in the right to access to clean affordable drinking water and good sanitation, and we underline that this right should be recognised as such”. However, they considered that the resolution was unsatisfactory, as it lacked a strong affirmation concerning the responsibility of governments towards their own citizens.\(^{158}\)

The Dutch statement about the resolution being unsatisfactory can be explained both by the rather weak language the resolution and its lack of clear content. The right to water is worded as the *right to safe and clean drinking water* and recognised as essential for the full enjoyment of life and all human rights. The recognition of the right is suggested in an explicit way by singling it out. Compared with earlier resolutions where the right has always been explicitly derived from other rights, this wording can be interpreted as the UN GA identifying the right as self-standing. However, the resolution does not outline any clear content of the right, leaving the scope still undefined. Furthermore, there is no reference to any obligations directed to the states. Considering all the mentioned hesitation and critique as to the adoption of the resolution, it is clear that this resolution alone cannot be considered as a strong evidence of the existence of *opinio juris* or consistent state practice of all the UN members.

**3.2.3 HRC Resolution on “Human Rights and the Access to Safe Drinking Water and Sanitation”**

On 30 September 2010, the HRC adopted a resolution recalling the aforementioned resolution by the UN GA and affirmed 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

\(^{156}\) *Ibid*, Statement by the German representative, p. 6.


\(^{158}\) *Ibid*, Statement by the Dutch representative, p. 16.
health, as well as the right to life and human dignity”. 159 Whereas the UN GA did explicitly recognized the right to water as a human right that is essential for the full enjoyment of life and all human rights, this resolution took up the wording of GC15 reaffirming the view of the right as a derived right. Thus, it cannot be excluded that the mere adoption of these two resolutions and their combined effect may provide the necessary support for the recognition of an independent right.

Notable with this resolution is that it was adopted by consensus. Even the US and UK, who had earlier been sceptical to the right to water, declared that they were willing to take the significant step of joining consensus on the resolution. 160 The resolution, which was adopted without a vote, is an extraordinary achievement and implies that we are witnessing a change of attitude from the part of states towards the right to water. The adoption of the resolution instigated the special rapporteur to issue a press release stating that “this means that for the UN, the human right to water and sanitation is contained in existing human rights treaties and is therefore legally binding”. 161 It should nevertheless be underlined that HRC is a subsidiary organ of the UN GA, and its resolutions have the same recommendatory nature as those of the GA itself. They have formally no legal binding force similar to treaties. One must also have in mind the composition of the HRC, which is limited to 47 member states. Accepting a HRC resolution as binding for the whole UN would mean forcing states to accept resolutions on which they did not have the opportunity to vote. This is in turn incompatible with some of the most fundamental principles of international law, such as “free consent” i.e. expressed in the preamble of the VCLT. 162 Nevertheless, some authors have argued that the UN itself, given that the resolution has been adopted without a vote, would not contest the right to water in the future since if it did, it could be considered “venire contra factum proprium” or “estoppel”, 163 meaning a behaviour inconsistent with previous behaviour, which is something the UN most likely aim to

162 VCLT, preamble, para. 3: “Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized”.
avoid.\textsuperscript{164} Observing that 47 states cannot speak for all states, a strong \textit{opinio juris} and consistent state practice, cannot be evidenced by solely this resolution. In conclusion, it still has to be said that the resolution did mark a new trend. States have begun to change their voting behaviour and attitude towards the right to water and it shows that the right to water is moving in the direction of gaining \textit{opinio juris}.

\textbf{3.2.4 Renewal of the Mandate of the Independent Expert as Special Rapporteur}
There were no major objections to the HRC resolution. On the contrary, states welcomed the resolution and took another step towards the recognition of the right to water by the renewal of the mandate of the Independent Expert. Not only was the mandate renewed, it was renamed “Special Rapporteur on the human right to water and sanitation”. Even though there might not be a significant legal difference between the titles “Independent Expert” and “Special Rapporteur”, it is of great importance that the subject of the mandate in now termed directly in human rights terms. It shows that those who have opposed the term “human right to water and sanitation” have either given up or changed their opinion. Moreover, there is an apparent change in the terms of the mandate of the Special Rapporteur. The first mandate was to elaborate the content of human rights obligations relating to water,\textsuperscript{165} while the Special Rapporteur’s mandate is inter alia to promote the full realisation of the right to water and to identify challenges on practical implementation of the right.\textsuperscript{166} This change in language evidently shows how the HRC has mowed forward and now views the right to water as a recognised human right for sure. Thielbörger even argues that the right to water now exists and is based on \textit{opinio juris} of at least the member states of the HRC.\textsuperscript{167}

\textbf{3.2.5 Sustainable Development Goals}
The SDGs were adopted as the successor of the MDGs by the UN GA in September 2015 with unanimous votes of the 193 UN member states.\textsuperscript{168} The Agenda contains 17 goals with 169 targets that is to be achieved by 2030 for all the worlds populations. The SDGs are both broader in scope and go further than the MDGs by addressing root causes for poverty and inequality.

\begin{footnotesize}
\textsuperscript{164} P. Thielbörger, p. 61.
\textsuperscript{165} HRC, \textit{Human rights and access to safe drinking water and sanitation}, UN Doc. A/HRC/RES/7/22, adopted on 28 March 2008, para. 2(b).
\textsuperscript{166} HRC, \textit{The human right to safe drinking water and sanitation}, UN Doc. A/HRC/RES/16/2, 8 April 2011, para. 5(a) and 5(c).
\textsuperscript{167} P. Thielbörger, p. 84.
\end{footnotesize}
and the universal need for development that works for all people. Several targets are also written in clear human rights language and the goals are all universal and apply to all countries, whereas the MDGs were intended for action in developing countries only. The theme of water has a rather central role in the agenda’s different goals and targets. The human right to water is explicitly referred to in the final document, named *Transforming Our World*, that explains the commitments for the states.\(^169\) The SDG No. 6, called Clean Water and Sanitation, has the objective of guaranteeing the availability and sustainable management of water for all. Among the targets, target 6.1 addresses the elements of the right to water and reads as follows; “by 2030 achieve universal and equitable access to safe and affordable drinking water for all. But except achieving the goal of access to water, the SDGs does unfortunately not reflect the rest of the substance of the right to water. Generally, the SDGs avoid using language that can be read as lying down legally binding commitments that prescribe a way in which the targets should be achieved but rather let the states prepare the necessary actions to take in order to realising the targets. It states in the preamble that all countries *will implement* this plan. However, it is formulated in a way that no legal obligation for realisation of the right to water as well as other goals and targets may be discerned.

The SDGs are drafted as an action plan, contained in a legally non-binding resolution of the UN GA, just like two 2010 resolutions. From a purely formal perspective, this means that there are no legal obligations based directly on the SDGs. Since states did not formally express consent at the time of adoption of the goals to be legally bound by the goals and the commitments, the goals are formally adopted as political aspirations. The goals can, as previously observed and explained, be used to affirm an already evolving customary practice. The MDGs, which were also adopted by a UN GA resolution, had large influence on human rights law and have been used by many states as a basis for their national development frameworks.\(^170\) The fact that the SDGs were adopted by consensus contributes to the possibility of considering them as evidence of opinio juris. However, it may be difficult to argue that the states, when voting for the adoption of the SDGs as a whole, not just goals 6, expressed support for the recognition of an independent right to water. As to the mechanisms for implementation and review of the agenda and its goals, they are predominantly political and, to a large extent, left to national and subnational levels. Concerning global review, it is left to states in the High

\(^{169}\) *Ibid*, para. 7.

Level Political Forum on Sustainable Development, hereinafter HLPF, which functions under the auspices of the UN Economic and Social Council, hereinafter ECOSOC. The assessment of the effective implementation is being done through global, regional and national indicators. The global indicator framework was recently adopted in a resolution by the UN GA in July 2017.\textsuperscript{171}

In sum, one can say that the SDGs have a rather authoritative character due to the unanimous adoption by states. The fact that the adoption took place in high-level meetings does not add explicit legal value but underlines the importance attached to the document in terms of legitimacy of the commitments it is engaged in. The follow-up is nevertheless uncertain since, even if there are high specificity of targets, there is little specificity in expected behaviour. Accountability and justiciability of the SDGs are mainly weak and mostly political, although it may be supported by the inclusion of goal 16, which aims to “provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.\textsuperscript{172}

3.2.6 UN GA and HRC Resolutions on “The Human Right(s) to Water and Sanitation”

In December 2015 the UN GA adopted a new resolution on the \textit{rights to safe drinking water and sanitation}. This time, UN GA declared that the right to water and the right to sanitation are closely related, but they have distinct features, which warrant their separate treatment. The resolution recognised that the human right to safe drinking water ensures everyone, without discrimination, access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. It takes up the wording from GC15 when explaining the components of the right.\textsuperscript{173} The resolution further welcomes Goal No 6 of the SDGs and states that the goal includes important dimensions of the right to water.

This resolution was adopted without a vote. It should be compared with the previous resolution from 2010 that had 42 abstentions. This may be an indication of growing support for a general recognition of the right to water. However, by an examination of the resolution itself and the

\textsuperscript{171} UN GA Resolution on Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, 6 July 2017, UN. Doc.A/RES/71/313.

\textsuperscript{172} Target 16.3 aims to promote the rule of law at the national and international levels and ensure equal access to justice for all. Target 16.6 aims to develop effective, accountable and transparent institutions at all levels. Target 16.7 aims to ensure responsive, inclusive, participatory and representative decision-making at all levels. Target 16.b aims promote and enforce non-discriminatory laws and policies for sustainable development.

\textsuperscript{173} UN GA Resolution, \textit{The human rights to safe drinking water and sanitation}, 17 December 2015, UN Doc./A/RES/70/169.
statement from the voting states one may question whether this resolution can be seen as a progress or not. The language of the resolution is rather weak, and this was noted by the Spanish representative who mentioned that the drafters of this resolution had chosen a cautious approach in order to preserve consensus on the important issue of the human right to water.174 South Africa criticised this approach especially regarding the absence of the notion of justiciability of ESC-rights from the text and meant that the resolution had been watered down.175

On the other hand, some countries were critical of the resolution and meant that it had gone too far. The biggest opponent was Kyrgyzstan who opposed the international and extraterritorial scope of ESC-rights and stated that the country’s intention is to carry out the human rights to safe drinking water and sanitation at the national level, adding that human rights to water and sanitation could not be considered an obligation of one state to another and should be limited to the national framework.176 Argentina made a similar statement affirming its position that the right to water is a right each state must ensure to subjects under its jurisdiction and not to other states.177

In September 2016 the HRC adopted a similar resolution.178 This resolution was however not adopted unanimously like its predecessor of 2010, but by a high number of votes (42 in favour, 4 abstentions and 1 vote against). Kyrgyzstan, who was the only one voting against the resolution, again opposed the language of the resolution relating to states’ international and extraterritorial obligations.179 The extraterritorial scope is, as mentioned in chapter 2, still debatable when it comes to the obligations to fulfil the right to water and may therefore be a sensitive subject for states. The language in this resolution is stronger than the language in the UN GA resolution and may also be the reason to the abstentions. The paragraph explaining the states’ obligations in the UN GA resolution provides that states have the responsibility to “endeavour to take steps … to the maximum of their available resources, with a view to

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175 Ibid, statement of the South African representative.
176 Ibid, statement of the Kyrgyzstani representative.
177 Ibid, statement of the Argentinian representative.
progressively achieving the full realisation ... by all appropriate means, including, ... the adoption of legislative measures", \textsuperscript{180} while the HRC resolution declares that states “must take steps, to the maximum of their available resources, to achieve progressively the full realisation... by all appropriate means, including ... the adoption of legislative measures in the implementation of their human rights obligations”. The HRC resolution furthermore decides to extend once again the mandate of the special rapporteur and encourages the special rapporteur to promote the full realization of the right to water and to contribute to the implementation of Goal No 6 of the SDGs. \textsuperscript{181}

\textbf{3.2.7 Regional and National Perspectives on Water Rights}

As mentioned above, national legislation and jurisprudence should evidently be examined when analysing the possibilities of the existence of an independent right to water. National legislation and jurisprudence are, like soft law instruments, not formal sources of international law per se but are essential since they also act as evidence of state practice and \textit{opinio juris}. By examining how the right to water has been interpreted, recognised and implemented nationally one can analyse the recent developments in the UN with a deeper understanding and with more clarity regarding states general behaviour.

\textit{Europe}

In chapter two, the European legal framework regarding water law showed that some elements of a right to water are implied in several existing instruments and part of existing rights. However, these provisions cannot be considered as evidence of an independent right to water. In October 2009, before the adoption of the 2010 UN GA and HRC resolutions, the Parliamentary Assembly of the Council of Europe declared “that access to water must be recognised as a fundamental human right because it is essential to life on earth and is a resource that must be shared by humankind”. \textsuperscript{182} Following this, in 2013 a European Citizens initiative, \textsuperscript{183} hereinafter ECI, called “Right2Water” was submitted to the European commission to initiate legislation “to implement a human right to water and sanitation, as recognised by the United

\textsuperscript{180} UN GA Resolution, \textit{The human rights to safe drinking water and sanitation}, para. 9.
\textsuperscript{181} HRC Resolution, The human rights to safe drinking water san sanitation, para. 11-12.
\textsuperscript{182} Resolution No 1693/2009 of the parliamentary Assembly of the Council of Europe, 2 October 2009.
\textsuperscript{183} The European Citizens Initiative, was introduced by the Lisbon treaty and allows one million citizens of the EU, coming from at least seven Member states, to call on the European commission to propose legislation on matters of EU competence.
The ECI received the support of over 1.6 million citizens and in 2014 the Commission adopted a communication setting out the actions it intends to take in response to the initiative. The communication stated that it would inter alia bring about a more structured dialogue between stakeholders on transparency in the water sector, launching a consultation of the drinking water directive to improve access to quality water and advocating the universal access to water as priority area for the SDGs. This response was criticised by both the European Economic and Social Committee and the European parliament for not putting forward a new proposal for an EU instrument recognising the human right to water. Despite the critique, the initiative has still been influential in regard towards the recognition of an independent right to water. In February 2018 the Commission adopted a proposal for the revision of the Directive on Drinking water. This proposal foresees inter alia an obligation for member states to improve access to water and ensure access for vulnerable and marginalised groups. Even though it is not a recognition of an independent right to water, it is a step towards the practical realisation of the right, and the initiative itself is an important manifestation of the willingness and support for an independent right to water in Europe. Nationally has the right to water been dealt with very differently throughout Europe. Examples from France, Belgium and Germany will illustrate this.

In France, there is an outspoken protection of the right to water. A recently new law from 2006 named *Law on Water and Aquatic Environments*, hereinafter LEMA, was a reaction to the EU Water Framework Directive. Article 1 of the LEMA states that the use of water is a right of everyone, and that every person has the right to have access to drinking water for drinking and hygiene under economically acceptable and universal conditions. LEMA also provides for a minimum access to drinking water under all circumstances which includes priority of use as drinking water over other uses.

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185 Communication from the Commission on the European Citizens’ Initiative Water and sanitation are a human right! Water is a public good, not a commodity! COM (2014) 177 final, Brussels.
186 Opinion of the European Economic Social Committee on the Communication from the Commission on the European Citizens’ Initiative Water and sanitation are a human right! Water is a public good, not a commodity! NAT/644, 15 October 2014, Brussels.
In 2005, the federal parliament of Belgium adopted the so called “water resolution” which recognised access to safe drinking water as a human right that should be included in the constitutional text. In the time of writing this amendment has not been reached, but if passed it would make Belgium the first European country to include the right to water explicitly in its constitution. The courts in Belgium have been receiving some attention for protecting the right to water even where the law is ambiguous, and a right to water has been interpreted to exist under article 23 of the constitution which states that all citizens should be able to live in a dignified manner and therefore have the right to the protection of a safe environment and health.

Germany does not have an explicit or implied right to water under the constitution, or in ordinary law like France, but a legal basis for a right to water can be found in general principles as the principle of the Social State, enshrined in article 20 of the constitution, or the principle of “Daseinsvorsorge” approximately translated to “services of general (economic) interest”. The principle of the social state does not create entitlements of its own; it is rather a guideline for the political and legal actions of the state. “Daseinsvorsorge” can be understood as a part of the state’s welfare, which provided the individual with basic goods and services. Neither this principle grants an individual any entitlements on its own but acts as responsibility for the state. The judiciary has been given many freedoms and powers to give vague terms legal content. Even without an explicit recognition, the right to water can receive effective legal protection through these principles.

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188 Belgian Court of Arbitration, Commune de Wemmel, Case No. 36/1998, 1 April 1998, quoted in Thielbörger, p. 23.
191 Thielbörger, p. 12.
192 Ibid, p. 16.
Several states in Africa have enshrined the right to water in their constitutions such as inter alia Congo, Ethiopia, Gambia, the Maldives and it is especially true for countries with relatively new constitutions. Noteworthy is the Kenyan Constitution which was adopted in 2010 and explicitly includes the right to “…clean and safe water in adequate quantities…” The 2011 Transitional Constitution of South Sudan and the 2012 constitution of Egypt both guarantee a right to water and the constitution of Zimbabwe after the referendum in March 2013 now grants “the right to safe, clean and potable water.”

The South African Constitution from 1996 also contain a right to water which entitles everyone to the “right to have access to … sufficient food and sufficient water” and by taking several steps to make the right to water concreate, inter alia by implementing a policy on effective access to water, the country has been considered a major advocate of a right to water. In the Mazibuko Case, the high court of South Africa ruled that the City of Johannesburg’s practice of forced installation of pre-paid water meters in poor neighbourhoods was both discriminatory and unconstitutional and stated that the city should provide the residents with the option of a normal metered water supply, which was common in the wealthier neighbourhoods. The court also ordered the city to provide residents with 50 litres of free water per person and day. This was a large increase since each household, with an average of 16 persons, was provided with 200 litres per day. The case was appealed against in the High Court of Appeals which confirmed...
the findings of the first judgment with respect to the unlawful practices of the pre-paid water meters.\textsuperscript{203} However, with respect to the Free Water Policy,\textsuperscript{204} did the high court reduce the suggested minimum of free water from 50 to 42 litres. The case was once again appealed. The Constitutional Court of South Africa came to a different conclusion than both the High Court and the High Court of Appeal.\textsuperscript{205} The court found that section 27 of the constitution only entailed an obligation to take reasonable measures to seek progressive realisation of the right to water and that the Free Water Policy only needed to pass a “test of reasonableness”.\textsuperscript{206} The Court further concluded that it was inappropriate for the lower courts to state a specific quantity of what constitutes “sufficient water” since that was a task of the legislators and accepted the government’s decision of 25 litres per person daily, or 6 Kilolitres per household monthly.\textsuperscript{207} Finally, the court found that the city’s by-laws regarding pre-paid meters was authorised and had not been discriminatory.

Despite that the right to water in South African law is phrased as an explicit fundamental constitutional right, the judiciary has obviously limited the scope of the realisation of the right to water. The original judgment of the Mazibuko Case promoted awareness for social and economic context and tried to argument for the effective protection of the right to water by annulling the pre-paid meters for the poor and increasing the free amount of water. However, this kind of judicial activism was only temporary since the Constitutional Court strongly denied this role. The judicial instance seems therefore to restrict itself to control whether a practice allowed for in the law is generally reasonable.

Another African case, where the judiciary had a much more active role, is the Kalahari Bushmen Case from January 2011.\textsuperscript{208} This case is a clear example on how the 2010 resolution by UN GA and HRC have influenced national jurisprudence and thus had effect on domestic level. For decades, the government of Botswana had been forcibly evicting the Kalahari Bushmen from their traditional lands in the Central Kalahari Game Reserve. In 2002, the

\begin{footnotesize}
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  \item \textsuperscript{203} Supreme Court of Appeal of South Africa, (The City of Johannesburg and Others v. Lindiwe Mazibuko and Others), Case No. 489/08, Judgment of 25 March 2009.
  \item \textsuperscript{205} Constitutional Court of South Africa, Lindiwe Mazibuko and Others v. City of Johannesburg and Others, Case No. CCT 39/09, Judgment of 8 October 2009.
  \item \textsuperscript{206} Ibid, paras. 50–60.
  \item \textsuperscript{207} Ibid, para. 62.
  \item \textsuperscript{208} Court of Appeal of the Republic of Botswana, civil appeal No. CACLB-074-10, high court Civil Case No. MAHLB-000393-09. 27 January 2011.
\end{itemize}
\end{footnotesize}
government smashed the Bushmen’s only water borehole, which led to the final eviction of those who remained behind. Diamonds had been found in the area and the government gave priority for land and water access to the mining companies. In 2006, the Bushmen were allowed to return to their ancestral lands after taking their government to court. However, they did not win back the rights to their water sources. An appeal was lodged but a high court judgment again denied the Bushmen their water rights. Nevertheless, in January 2011, the Botswana Court of Appeal unanimously quashed the earlier ruling and found that the Bushmen had the right to use their old borehole as well as the right to sink new boreholes. The court called the governments treatment of the Kalahari Bushmen “degrading” and stated that in order to exercise a value judgment it is “entitled to have regard to international consensus on the importance of access to water”, then cited the UN resolution of 2010 and the GC15. De Vido calls this judgment one of the most comprehensive recognitions of the human right to water. This is mainly because the court could have based their reasoning on the right of the indigenous people to use their natural resources or have limited the analysis to the violation of the norm prohibiting torture. The outcome would have been the same for the applicants.209

Asia

India accounts for 4 % of the world’s water resources. Still, water is a scare resource in India due to both a growing population and contamination of water resources. India has no justiciable right to water either in its constitution or in ordinary law. Therefore, the Indian judiciary became active and derived a right to water from article 21 of the constitution, which recognises the right to life.210 The Indian constitution contains both “fundamental rights” and “directive principles of state policy” where the former covers CP-rights and the latter ESC-rights. Only the CP-rights are justiciable where the ESC-rights act as guidance for the legislator. The right to life has been given a wide and expansive scope in the case law. In the Francis Coralie Mullin Case from 1981, the Indian Supreme Court declared the right to life to include the right to live with human dignity and “all that goes with it”.211 This implied at least the bare necessities of life such as adequate nutrition, clothing and shelter. In 1990 and especially related to the right to water, the court stated in the Attakoya Thangal Case that the right to drinking

209 S. De Vido, p. 552–553.
water and the right to fresh air were attributes of the right to life. In a recent case, the Supreme Court had to decide in a decision concerning 3000 dams on the Narmada River. Here the court confirmed that “water is the basic need for survival of human beings and is part of the right to life and human rights as enshrined in article 21 of the Constitution of India”. The court also stated that there is a positive obligation for the state to “provide a source of water where there is none”.

Indonesia does not have an explicit right to water in its constitution from 1945 but its article 33 states that “all vital sources of production and those essential for the lives of the people must be controlled by the state” and also that “the land and water as well as the natural riches therein are to be controlled by the state to be used to the greatest benefit of the people. Water is thus seen as a common good essential for human life that the state has a responsibility to protect. In a very recent ruling form October 2017, Indonesia’s Supreme Court approved a cassation appeal filed by a coalition of Jakarta residents demanding the annulment of a 1997 agreement between the city administration and two private water service companies. The residents described how the companies provided only sporadic water service, mostly limited to evening hours. The companies were also implicated in denying water access services to residents unable to pay their bills and then forced to buy expensive drinking water from street vendors and bathe in polluted public wells. The court ordered the government to restore public water services to residents in Jakarta after finding that private companies “failed to protect their right to water”, and to immediately revoke its contract with the two private water utilities and hand responsibility for public water supply services back to a public water utility.

The Americas

In Latin America, the right to water is often closely linked to water management and the protection of constitutional rights. In recent years, several Latin American countries have reformed their constitutions to enshrine explicitly the right to water. Examples are Bolivia in

214 Putusan Mahkamah Aung, Nomor 31 K/Pdt/2017, NURHIDAYAH, DKK vs PT AETRA AIR JAKARTA, https://putusan.mahkamahagung.go.id/putusan/090b7f1adc70b7a4251d3556ed64aa5f (Accessed 20 February 2018).
2009, Ecuador in 2008 and Uruguay in 2004 whose article 47 of the constitution states that “water is an essential resource for life” and that “access to water and sanitation” are human rights. Other Latin American constitutions include an indirect recognition of the right. These are inter alia Guatemala, Chile, Venezuela, Argentina and Colombia.

In Argentina, the right to water is not explicitly recognised but considered as a part on the right to a healthy environment, protected in article 41 of the Constitution. Additionally under article 75, the main international and regional human rights treaties enjoy constitutional hierarchy. The right to water is further guaranteed in national law and the right can be claimed before national courts. In a recent case before the Supreme Court, dealing with water pollution in a specific watershed, the court stressed the need to defend the “collective common and indivisible use of the environment”. In 1999 several courts of the Neuquén Province stressed the importance of “granting effective protection to the human right to water” after the health of children had been at stake due to a pollution incident. The protection of the right to water in Colombia is in a way similar to the recognition in Argentina since the right is also here implied under the right to a healthy environment in article 79 of the constitution. Also, according to article 366 in the constitution, water supplies belong to the category of public service to be provided by the state. In Colombia, the jurisprudence on the right to water has been rather consistent. The courts have relied mainly on the jurisprudence of the Inter-American Court of Human Rights and also on the interpretation in GC15.

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222 B. Olmos Guipponi, M. Paz, p. 343-344.
Summary

All examples of national perspectives on the right to water show that the right to water is protected in several states’ national legislation and within the jurisprudence, although in many different ways and through various systems with more or less reliable legal protection. Some counties have references to a right to water within national laws and some countries have even placed the right within their constitutions, both explicitly and implicitly. All the recognitions are not supporting an independent right to water. Several recognitions of a right to water derives from another right such as a right to health, the right to life or a right to a healthy environment. There are even examples where states like Colombia have chosen to directly use the interpretation of the GC15. Furthermore, the right to water is also not just geographically focused to a certain part of the world but is recognised in states across all continents. On the other hand, most states across the globe have not formally, and in a legally binding form, recognised a right to water. Important to note is that it does not lie within the reach of this study to empirically asses the present practice of all states in detail. It is, inter alia for the special rapporteur to investigate that kind of practice in all the different countries. Rather, in regard to this study the national examples show if and how states have been influenced by the international development. A strong example is the mentioned Kalahari Bushmen Case where the court made explicit references to the recent UN resolutions.

According to Thielbörger, the differences in state practice are due to both political and legal constraints that legislators and judges have to handle when responding to the needs and particularities of the legal system they operate in. Nevertheless, there is an apparent upswing in recognition of a right to water in recent years and the right to water has started to become a component of these various legal orders across the globe. This can be interpreted as a response to the recent developments in international law, but also as a result of the emerging water crisis and the increased focus on water as a finite resource. The recent recognitions have taken place in both developed and developing countries, in countries where water is either more and less scarce and in countries where the realisation of the right seems more easily reached or severely difficult. The examples show that a strong recognition does not automatically mean that there is a strong protection for the individual. In Germany for example water is not considered a scarce resource, and the lack of an explicit recognition of the right to water is not apparently worrisome. In South Africa, on the other hand, water is extremely scarce and considered a very

223 Thielbörger, p. 87.
sensitive issue. The country has recognised an explicit right to water, but jurisprudence of the courts has shown that this does not automatically solve the water problems or even create a fair water distribution among the population.

In conclusion, there are many examples of national legislation and jurisprudence that show strong evidence for both state practices that are in line with the recognition of an independent right to water and of a growing *opinio juris* on the same matter. The fact that national courts have made references directly to the recent resolutions show that the legitimacy of an instrument does not have not be determined by its formal legal value. Still, it cannot be concluded that an independent right to water is the majority view concerning the status of the right to water in the international community as a whole.

### 3.3 Assessment of the Current Situation

In this chapter the recent soft law developments show certain evidence and support of the emerging crystallisation of an independent right to water, by both the continuing of adoption of resolutions and the clearer references about the right to water being important for the realisation of the right to life and other all human rights. The resolutions also affirm the holistic perspective of all human rights being universal, interdependent, indivisible and interrelated. The recognition of the right is also suggested in an explicit way by singling it out, and the wording can be interpreted as identifying the right as independent. The fact that specific resolutions related to a human right to water are adopted by both the UN GA and in the HRC, with both majority votes and unanimously, strengthens the assumption that there is an increased support by states for an independent right to water. Thielbörger calls the developments in the UN GA and HRC resolutions as “encouraging signals” for the emergence of an independent right to water.\(^{224}\) Further evidence is the fact that states are beginning to change their voting pattern more and more towards the support of the right.

However, the instruments all share the previous established opinion of the right to water being related to the right to health and an adequate standard of living and the fact that all state obligations with respect to a right to water are related to the sphere of ESC-rights. There are many components of the right that are not yet elaborated on and the core content of the right as well as its scope are not further defined in these resolutions compared with what has already

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\(^{224}\) *Ibid*, p. 87.
been in the existing international law instruments as explained in chapter 2. The language of the resolutions is overall vague and does not imply much evidence of having authority. Even more worrisome is the latest resolution of the UN GA where the language was both weak and almost showed a regressive move relating to the states’ obligations relating to the right to water. The statements leading up to the adoption also show the hesitation and critique that still exist regarding states’ obligations to fulfil the right to water, especially in the extraterritorial and international sense. Focusing only on the HRC there is a slightly different picture. Even though the latest resolution was not adopted unanimously, the council kept the language clear, stating that all parties must take concrete and deliberate steps to realise the right to water. Ultimately, it is difficult to conclude that all these instruments constitute a convincing evidence of a firm *opinio juris* in regard to an independent right to water.

The unanimous adoption of the SDGs does not change the fact that there is opposing opinions on the right to water, especially since goal 6 only covers the accessibility element of the right to water. At the same time, if states are influenced by the SDGs when applying provisions of human rights related to water, it constitutes relevant subsequent practice in the application of that convention or treaty. Whether there is established state practice equal to the aims and objectives in the SDGs, in relation to the right to water, is too early to say since the goals are recently adopted and are to be realised by 2030.

**Conclusions**

When determining if a customary rule has emerged there are certain factors that need to be taken into account such as uniformity, consistency, duration and generality of state practice. It is evident that the uniformity of the practice of all UN members regarding the right to water is not complete. Statements, voting patterns and the national perspectives are examples that illustrate that the right to water is seen and treated diversely and there is no general pattern in state practice regarding the independence for the right to water. Consistency and duration is difficult to establish since the time frame for considering those factors is very short.

Even if there is only a minority if states that have references to the right to water as an independent right, there are clear evidence of the influence that the resolutions have had and the growing trend of incorporating a right to water into national legislation and even into the constitutions. It is interesting to see that the recognition of the right to water is growing all
across the globe, not just where water is a scare resource but also in countries that does not suffer from water shortages, such as many countries in Europe.

Ultimately, there are signs of the right to water evolving. However, the right cannot be said to have developed fully through these recent instruments, even if the international community and states are starting to respond to the right to the water more and more positively.
Chapter 4 – The Present Status of the Right to Water in International Law

4.2 The Need for a Human Right to Water

The concept of a right to water is not new, it can be traced in several areas of law on both international, regional and national levels. It was within the framework of IEL that the first international reference to a right to water took place and at the national level there are clear trends in the way several states are connecting environmental concern with fundamental rights, for example by having the right to water being protected through provisions regarding the environment, health or resource management. At the same time, there are similar connections between a right to water, national legislation on water and IWL. Since water is an element in various areas of law and has been regulated in ways specific to the objectives and aims central to those areas, it is a subject of enormous complexity.

A human rights approach to water must be considered as necessary. As seen in the earlier chapters, neither IEL, IWL, or IHL, nor certain national legislation has been able to guarantee access to clean and safe water for all. A human rights approach to water creates the possibilities of transforming water needs into water rights. Both academics, human rights experts and states have promoted a right to water, and often their statements are based on the premise that various human rights cannot be realised in the absence of a right to water. A legal basis of a right to water creates a legal ground or base that functions as a minimum standard. A human right to water also creates the possibility for individuals to claim their right to water without having to modify their claim to fit under another right. As Scanlon notes, “by making water a human right, it cannot be taken away from the people”.225

4.3 Possibilities and Difficulties With a Right to Water

Human rights are dynamic values changing and evolving over time. There is a great dilemma regarding the development of human rights and there are arguments for and against. On the one hand, one may argue that the early conventions have significant authority and status as they are, and that there is a risk in creating new rights. Alston argues that one should not conjure up new

225 J. Scanlon, p. 21.
rights for each and every scenario. Only if a right cannot be reflected as a combination of existing rights and only if a right brings something new to the table, is there a need for the creation of a new independent right.226 On the other hand, there is the risk of treaties becoming outdated. Kirschner argues that treaty interpretation requires the adjustment of treaty provisions to today’s circumstances.227 Societies and circumstances change, and the global water crisis is a clear example of this. I believe that it is right to be cautious in accepting more and more new rights. An inclusion of a right that lacks substantiated value could lead to the weakening of the concept of human rights as carefully chosen rights that are fundamental and have inherent value. Nevertheless, the law is supposed to be a reflection of the reality and not the other way around. It cannot thus be said that recognition of a right to water, essential for the very existing of all life, would lead to the weakening of the concept of human rights itself.

4.4 The Present Status of the Human Right to Water

The core human rights instruments do not recognise a human right to water explicitly, but it can be implied in already recognised rights. The existing provisions that do recognise the right to water explicitly do so only with a limited applicability, ratione loci or ratione personae. A universal right to water may be implied in the ICESCR under the right to an adequate standard of living and the right to health. Whether the right to water under the ICESCR is an independent or derived right has been debated even though the majority supports the view of the right to water as a derived right. This achievement, although important one, can be argued insufficient since the true value of a human right lies in its effective implementation. Thus, due to the fact that there are states that have not ratified the covenant, there are states who are not bound by the right to water.

While the right to water under ICESCR is binding upon the parties to the convention, an independent right to water enshrined in customary law would have universal applicability and thus binding upon all states regardless of ratification of the ICESCR. Such a norm may also allow courts to directly apply the right to water, without having to refer to and be bound by other human rights. This would further allow for the development of a more comprehensive system of protection.228 It was argued in the previous chapter that despite the recent

227 J. Kirschner, p. 458.
228 S. De Vido, p. 564.
developments in soft law, an independent right to water has not yet been developed either as a new interpretation of existing rights or as a new customary norm. The present status of the right to water has to be considered as still implied in the ICESCR. The definition of such a right, which has been repeatedly affirmed, is:

“The human right to water entails everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.  

4.5 General Conclusions and Future Prospects of the Right to Water

If the right to water in the future becomes accepted as an independent human right, several problems remain. First and foremost, a definition of the full scope and core content of the right to water has to be elaborated. Given the fact that the right to water has connections and is interrelated with several other rights might make the task of defining it more precisely rather difficult. Even though the UN GA has repeatedly declared the indivisibility, interdependence, interrelatedness and universality of all human rights, the possibility of collision or conflict with other rights cannot be avoided. A codified and written right to water would give coherence and create stronger possibilities for implementation and enforcement of the right, while at the same time it risks losing the flexibility that might be desired for making the right fit into various different legal systems, traditions and cultures. Since water is of utmost importance in all areas of law, it should, in the best of worlds, not be compromised in relation to any area or subject.

The greatest difficulties may lie in the fact that the right to water is an important subject in different areas of law. Nevertheless, it is apparent that recent instruments regarding water issues are connecting these different areas of law and creates a larger web of goals and principles, almost like the building of a bridge, with water as the common denominator. This is especially evident looking at the recently adopted SDGs. The goals are universally applicable, and the agenda has a holistic perspective that touch upon both development, environment and human rights. The potential state practice that will follow and the attitude of states toward the SDGs will be decisive when in the future the legal value of the right to water in international law is clarified.

229 UN GA Resolution, The human rights to water and sanitation, para. 2.
Despite all the challenges that lie ahead, it is of importance to also see the progress that has been made, particularly over the last ten years, in both accelerating international recognition, discussion and reflection on the subject of a right to water. There are elements touched upon in this study that indicate that the right to water could be subject for a future customary norm or even a general principle of law and thus, become an independent human right.
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