

## The Human Right to Water and Sanitation

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*“The water is not good in this pond. We collect it because we have no alternative. All the animals drink from the pond as well as the community. Because of the water we are also getting different diseases.”*

Zenebech Jemel, Chobare Meno, Ethiopia (cited in Human Development Report 2006)

*“The conditions here are terrible. There is sewage everywhere. It pollutes our water ... Our children suffer all the time from diarrhoea and other diseases because it is so filthy.”*

May Akinyi, Kibera, Nairobi, Kenya (ibid.)

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## I. Introduction

Living in Western Europe we tend to take it for granted that we have access to safe water and hygienic sanitary facilities wherever and whenever we might need them.<sup>1</sup> Likewise the issue of a human right to water and sanitation (RTWS) might appear kind of remote. Yet in other parts of the world where people are forced to travel long distances for water, especially clean water and have no choice other than to relieve themselves in the open,<sup>2</sup> a RTWS can prove to be a valuable tool to help improve their situation. This article offers a comprehensive overview of the RTWS. Following a short introduction and preliminary remarks regarding the chosen approach, in Part II. the genesis of the debate on a RTWS shall be outlined before then examining under Part III. the legal framework and under Part IV. implications of this right.

### 1. Water and Sanitation Crisis

Unsafe water and inadequate sanitation cost millions of lives every year.<sup>3</sup> The crisis claims in fact more lives than violence and war.<sup>4</sup> In November 1980 the UN General Assembly expressed its concern “that a large part of the world’s population does not have reasonable access to safe ... water ... and that an even larger part is without adequate sanita-

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<sup>1</sup> Cf. C. Albuquerque, “Sanitation as a Human Right”, in: H. Smets (ed.), *L'accès à L'assainissement, un Droit Fondamental – The Right to Sanitation in National Laws*, 2010, 15 et seq. (15).

<sup>2</sup> According to a report issued by WHO and UNICEF more than a quarter of the population in several Sub-Saharan African states take longer than 30 minutes to make one water collection trip and 1.1 billion people still defecate in the open, WHO and UNICEF, *Progress on Sanitation and Drinking Water 2010 Update*, 2010, 22, 28, available at <<http://www.who.int>>.

<sup>3</sup> Children are especially vulnerable. According to the WHO and UNICEF diarrhoea is the second largest cause of death among children under five. The death toll is higher than the death toll from AIDS, malaria and measles combined, cf. WHO Fact Sheet No. 330 “Diarrhoeal Disease” of August 2009, available at <[www.who.int](http://www.who.int)>; UNICEF/WHO, *Diarrhoea: Why Children are Still Dying and What Can be Done*, 2009, 5 et seq.

<sup>4</sup> UNDP, *Human Development Report 2006, Beyond Scarcity: Power, Poverty and the Global Water Crisis*, 2006, 1, available at <<http://hdr.undp.org>>.

tion facilities.”<sup>5</sup> Almost 20 years later, in July 2010 the UN General Assembly issued a new resolution in which it again expressed its deep concern that “approximately 884 million people lack access to safe ... water and that more than 2.6 billion do not have access to basic sanitation.”<sup>6</sup> Reading this is more than alarming and even harder to believe. Certainly one aspect of this development is owed to continuing population increase and rapid urbanization, but there is no doubt that this development constitutes one of the major failures of governments and the international community in recent history.<sup>7</sup>

## 2. Approach

Here the right to drinking water (RTW) and the right to sanitation (RTS) are regarded as two distinct (but also complementary) components of the Right to Water and Sanitation (RTWS). As can already be inferred from the title of the article, it treats the right to water and sanitation as one single right. Recent calls for treating the RTS as a distinct right are mainly based on the argument that sanitation issues reach far beyond the linkage to water.<sup>8</sup> Whereas this cannot be completely denied and there are indeed essential differences between both rights, a total separation between the RTS and the RTW is not advisable,<sup>9</sup> as it neither does reflect the current trend in international practice, nor is it rational. Both rights are closely related normatively and by matter-of-fact. As will be shown later, they are grounded on the same legal basis.<sup>10</sup> More-

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<sup>5</sup> A/RES/35/18 of 10 November 1980.

<sup>6</sup> A/RES/64/292 of 28 July 2010.

<sup>7</sup> See also J. Scanlon, “Water as a Human Right?”, in: A. Postiglione (ed.), *The Role of the Judiciary in the Implementation and Enforcement of Environmental Law*, 2008, 183 et seq. (184).

<sup>8</sup> See A. Khalfan/ T. Kiefer, *The Human Right to Water and Sanitation: Legal Basis, Practical Rationale and Definition*, available at <<http://www.cohre.org>>, 6. Moreover, the CESCR recently acknowledged in its “Statement on the Right to Sanitation” that sanitation has distinct features that call for a separate treatment from water in some respects, cf. CESCR, *Statement on the Right to Sanitation*, 45th Sess., 19 November 2010, Doc. E/C.12/2010/1, para. 7.

<sup>9</sup> G. Payen/ T. Van Waeyenberge, “The Need to Define the Right to Sanitation in Order to Promote its Implementation”, in: Smets, see note 1, 57 et seq. (68).

<sup>10</sup> Cf. Doc. E/C.12/2010/1, see note 8. See also under III. 1. below.

over from a more practical perspective it is not possible to provide clean and safe water without finding solutions for waste water treatment and the disposal of excreta. In other words, sanitation aspects always have a direct impact on water and its quality.<sup>11</sup> Unfortunately both components have not (yet) received the same amount of attention and sanitation has for long been a largely neglected topic.<sup>12</sup> Instead of only highlighting this disparity, the present article seeks to take a more balanced approach. It should be noted, however, that this question must not be confused with the question of whether the RTWS is to be regarded as an independent right on its own. The question of the status has so far not been entirely answered and there is still some confusion on the issue.<sup>13</sup> As will be explained later the RTWS is regarded as holding a sort of unique status since it is considered as an independent right which has, however, developed from other rights it is closely related to.<sup>14</sup>

## II. Genesis

Water, not to mention sanitation, was, for a long time, at best a side issue on the international agenda, let alone the international debate about human rights. International human rights documents such as the Universal Declaration of Human Rights of 1948 as well as the two Covenants of 1966<sup>15</sup> do not explicitly refer to the RTW or the RTS. It was not until the 1970s that the international community even started to realize that it needed to address water resources problems and related issues.<sup>16</sup> More precisely the issue first came to the fore in 1977 at the UN

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<sup>11</sup> Payen/ Van Waeyenberge, see note 9, 68.

<sup>12</sup> Doc. E/C.12/2010/1, see note 8, para. 1.

<sup>13</sup> See Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General, Doc. A/HRC/6/3 of 16 August 2007, 21.

<sup>14</sup> See under III. 2. below. This is also argued by A. Cahill, "The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water", *The International Journal of Human Rights* 9 (2005), 389 et seq.

<sup>15</sup> International Covenant on Civil and Political Rights (ICCPR), UNTS Vol. 999, 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), UNTS Vol. 993, 3.

<sup>16</sup> S.M.A. Salman/ S. McNerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions*, 2004, 7.

Conference on Water in Mar del Plata, Argentina. The Conference was devoted to discussing emerging water resources problems, “which would help the world to avoid a water crisis of global dimensions.” Participating states claimed in their final Declaration, the *Mar del Plata Action Plan*, that “all peoples ... have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”<sup>17</sup>

Next to frequently being considered as a milestone in the history of water development and management, this was also the first time that the issue of a right to water was brought to the international agenda.<sup>18</sup> Another outcome of the conference was the recommendation to proclaim the period 1981-1992 as the International Drinking Water Supply and Sanitation Decade.<sup>19</sup> The idea was to draw international attention to the fact that a large part of the world’s population did not have access to safe water and adequate sanitation facilities, as well as to mobilize governments to take action and respond to this situation.<sup>20</sup>

Unfortunately at the time many countries were faced with a rapid population growth and urbanization which made it very difficult for them to maintain their efforts.<sup>21</sup> In sum, little progress was achieved and actions proved insufficient so that states eventually failed to meet their goals.<sup>22</sup> It must, however, be acknowledged that without the proclamation of the Decade progress in this area would probably have been even less.<sup>23</sup>

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<sup>17</sup> UN Water Conference “Mar del Plata Action Plan” (14-25 March 1977) Doc. E/CONF.70/29. Formulated as a collective and not an individual right.

<sup>18</sup> A.K. Biswas, “From Mar del Plata to Kyoto: an Analysis of Global Water Policy Dialogues”, *Global Environmental Change* 14 (2004), 81 et seq. (82); Salman/ McInerney-Lankford, see note 16, 9.

<sup>19</sup> See Report of the United Nations Water Conference, Mar del Plata, see note 17, UN Publications Sales No. E.77.II.A.12 and Corrigendum, Chapter 1, para. 15.

<sup>20</sup> Cf. A/RES/35/18, see note 5, preamble.

<sup>21</sup> Report of the Secretary-General on Achievements of the International Drinking Water Supply and Sanitation Decade, Doc. A/45/327 of 13 July 1990, paras 13 et seq.

<sup>22</sup> O. Lohse, *Das Recht auf Wasser als Verpflichtung für Staaten und nicht-staatliche Akteure: Art. 11 Abs. 1, Art. 12 Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte*, 2005, 28.

<sup>23</sup> Biswas, see note 18, 2.

Following the Mar del Plata Conference it took another 15 years until the international community convened to take up the issue again at the International Conference on Water and the Environment which took place in 1992 in Dublin, Ireland. The conference adopted the so-called Dublin Statement where it reads in Guiding Principle No. 4 that “it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.”<sup>24</sup> By including the wording “affordable price” the statement proclaims that the right to water does not imply that water should be provided for free.<sup>25</sup> This has to be read in the context of considering water as an economic good, which pervades the Dublin Statement and has been heavily criticized by NGOs.<sup>26</sup>

The Dublin Statement was commended to the partakers of the UN Conference on Environment and Development, held in Rio de Janeiro four months later (Rio Summit). Chapter 18 of Agenda 21, on fresh water resources, adopted at the Rio Summit, however, failed to address the issue of a right to access fresh water.<sup>27</sup> The same is true for the Rio Declaration on Environment and Development which does not even contain a reference to the resource.<sup>28</sup> Two years later at the International Conference on Population and Development in Cairo participating states restated their commitment to the RTWS by claiming that individuals “have the right to an adequate standard of living ... including adequate food, clothing, housing, *water* and *sanitation*.”<sup>29</sup> This time, without a supplement regarding “affordability”.

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<sup>24</sup> International Conference on Water and the Environment, Dublin Statement on Water and Sustainable Development of 31 January 1992, Principle No. 4.

<sup>25</sup> Salman/ McInerney-Lankford, see note 16, 9, who also note that the Dublin Principles do not yet explain the concept of “affordability”.

<sup>26</sup> B. Rudolf, “Menschenrecht Wasser – Herleitung, Inhalt, Bedeutung und Probleme”, in: B. Rudolf (ed.), *Menschenrecht Wasser?*, 2007, 15 et seq. (17); cf. International Conference on Water and the Environment, see note 24.

<sup>27</sup> UN Conference on Environment and Development Agenda 21 of 3-14 June 1992, Doc. A/CONF.151/26/Rev. 1 Vol. I, 9.

<sup>28</sup> UN Conference on Environment and Development “Rio Declaration on Environment and Development” of 14 June 1992, Doc. A/CONF.151/26/Rev. 1 Vol. I, 3.

<sup>29</sup> Report of the International Conference on Population and Development, 5-13 September 1994, Doc. A/CONF.171/13/Rev. 1 (hereafter: Cairo Declaration), Principle 2. Emphasis added.

In 1999, the UN General Assembly reaffirmed the right to clean water in its resolution on the right to development.<sup>30</sup> The significance of this resolution though is considered to be fairly low, since it was adopted mostly by developing countries under abstention and even some dissenting votes by industrialized countries.<sup>31</sup> It has been speculated that the reason behind this reluctance is most likely due to their refusal to recognize a right to development, and not necessarily to water.<sup>32</sup> Unfortunately this nevertheless ushered in a new era of indecision and the issue of a RTWS was not revived at subsequent international conferences relating to water and development.

Neither at the Johannesburg Summit on Sustainable Development (2002)<sup>33</sup> nor at the World Water Forum in Kyoto (2003)<sup>34</sup> and Mexico City (2006)<sup>35</sup> did states reaffirm the RTW or RTS.<sup>36</sup> Overall, the human rights perspective played only a small role in all these conferences and for quite some time this did not change. The issue of a RTW on the international political agenda was significantly boosted by the UN Committee on Economic Social and Cultural Rights (CESCR) and its General Comment No. 15 in 2002.<sup>37</sup> The General Comment stated that the “human right to water is indispensable” and provided guidelines for the interpretation of the RTW under arts 11 and 12 of the Covenant.

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<sup>30</sup> A/RES/54/175 of 17 December 1999, para. 12 (a).

<sup>31</sup> Rudolf, see note 26, 17; see also: General Assembly Official Records 54th Sess., 83rd Plenary Mtg, Doc. A/54/PV/83, 24.

<sup>32</sup> Rudolf, see note 26, 17 et seq.

<sup>33</sup> Report of the World Summit on Sustainable Development of 26 August – 4 September 2002, Doc. A/CONF.199/20.

<sup>34</sup> 3rd World Water Forum, Ministerial Declaration of 23 March 2003, reprinted in: *Environmental Policy and Law* 33 (2003), 172 et seq.

<sup>35</sup> 4th World Water Forum Ministerial Declaration of 22 March 2006, available at <[www.worldwaterforum4.org.mx/home/%5Cfiles%5CDeclaraciones%5CMinisterialDeclaration.pdf](http://www.worldwaterforum4.org.mx/home/%5Cfiles%5CDeclaraciones%5CMinisterialDeclaration.pdf)>.

<sup>36</sup> It should be noted that at the 2002 Johannesburg World Summit on Sustainable Development, states amended Millennium Development Goal Seven (ensure environmental sustainability) by extending the commitment to “halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation” (Target 7 c), cf. World Summit on Sustainable Development Report, see note 33, para. 25. Whereas this might underscore the importance of the issue, it is no recognition of a RTWS.

<sup>37</sup> CESCR General Comment No. 15: The Right to Water (arts 11 and 12), Doc. E/C.12/2002/11 of 20 January 2003.

Unfortunately except for an occasional reference to the need for sanitation to ensure water quality,<sup>38</sup> access to sanitation was not covered and adequately dealt with.

It was under the auspices of the United Nations that the debate about a RTWS then gradually accelerated. In 2005 the Sub-Commission on the Promotion and Protection of Human Rights adopted *Guidelines on the Realization of the Right to Drinking Water and Sanitation* stating therein that the RTWS “is unquestionably a human right.”<sup>39</sup> The Guidelines were based on a 2004 report of the Special Rapporteur Mr. *El-Hadji Guissé* on the “relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation.”<sup>40</sup> The Guidelines were intended to provide assistance on how to implement the RTWS and do so by highlighting the main and most urgent components. With regard to the RTW they adopted the definition provided by the CESCR in General Comment No. 15,<sup>41</sup> whereas contrary to the General Comment with regard to the RTS they offer a definition. The RTS is seen as the right of everyone “to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.”<sup>42</sup>

Similarly in 2007 the Office of the United Nations High Commissioner for Human Rights conducted a study upon a request of the Human Rights Committee (HRC) on the scope and content of the obligations related to the access to safe drinking water and sanitation.<sup>43</sup> In her conclusion the High Commissioner<sup>44</sup> notes that she “believes that it is now time to consider access to safe drinking water and sanitation as a human right” and that states should dedicate their attention to the realization of this right since “this issue is currently being neglected.”<sup>45</sup> Furthermore, the study also stresses the “need for further elaboration of

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<sup>38</sup> General Comment No. 15, see note 37, paras 1, 29, 37 (i).

<sup>39</sup> Doc. E/CN.4/Sub.2/2005/25 of 11 July 2005, preamble.

<sup>40</sup> Final Report of the Special Rapporteur Guissé, Doc. E/CN.4/Sub.2/2004/20 of 14 July 2004.

<sup>41</sup> See under III. 3.a. aa. below.

<sup>42</sup> Doc. E/CN.4/Sub.2/2005/25, see note 39, 1.2.

<sup>43</sup> Doc. A/HRC/6/3, see note 13.

<sup>44</sup> Louise Arbour, who was UN High Commissioner from 2004-2008.

<sup>45</sup> Doc. A/HRC/6/3, see note 13, paras 66, 69.

certain aspects of human rights obligations attached to access to safe drinking water and sanitation.”<sup>46</sup>

This was closely followed by a resolution of the HRC on Human Rights and Access to Safe Drinking Water and Sanitation,<sup>47</sup> expressly taking up the High Commissioner’s point regarding the need to further clarify the human rights obligations related to the RTWS.<sup>48</sup> This resolution marks the beginning of the so-called Geneva Process,<sup>49</sup> comprising the appointment of an Independent Expert “on the issue of human rights obligations related to access to safe drinking water and sanitation” whose tasks shall *inter alia* be to prepare a study to further clarify the content of human rights obligations.<sup>50</sup> Six months later the HRC appointed the first Independent Expert on the Right to Water and Sanitation (Ms. Catarina de Albuquerque),<sup>51</sup> whose mandate was only recently renewed in March 2011 for another three years.<sup>52</sup> Also the UN General Assembly declared the year 2008 as an International Year of Sanitation,<sup>53</sup> to raise awareness and highlight the issue on the international agenda. Across the globe this inspired quite a few deliberations and conferences finally according the subject more attention and calling for higher levels of investment in sanitation.<sup>54</sup>

It is against this background that the UN General Assembly adopted Resolution 64/292 of 28 July 2010 expressly declaring the RTWS as a human right.<sup>55</sup> For the first time the General Assembly de-

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<sup>46</sup> Ibid., para. 68.

<sup>47</sup> Resolution 7/22 Human Rights and Access to Safe Drinking Water and Sanitation of 28 March 2008, Doc. A/HRC/7/22.

<sup>48</sup> Ibid., paras 1, 2.

<sup>49</sup> L. Furch, “Menschenrecht auf Wasser - und Sanitärversorgung: UN Resolutionen als Schlüssel zum Paradies?“, *European Journal of Transnational Studies* 2 (2010), 26 et seq. (33).

<sup>50</sup> Doc. A/HRC/7/22, see note 47, para. 2.

<sup>51</sup> See Report of the Human Rights Council of its Ninth Session of 2 December 2008, Doc. A/HRC/9/28, Annex IV.

<sup>52</sup> Doc. A/HRC/16/L.4 of 18 March 2011, para. 4.

<sup>53</sup> A/RES/61/192 of 20 December 2006.

<sup>54</sup> See in particular: “Message from Beppu” adopted at the first Asia-Pacific Water Summit of 3-4 December 2007, Beppu (Japan); other selected Conferences on the issue: Third South Asian Conference on Sanitation (SACOSAN III) of 16-21 November 2008, New Delhi, India; Second African Conference of Sanitation and Hygiene (AfricaSan) of February 2008, Durban, South Africa.

<sup>55</sup> A/RES/64/292, see note 6.

bated the issue of water and sanitation. The HRC at its 50th session re-affirmed its earlier commitment and underscored the existence of a RTWS in a new resolution.<sup>56</sup> Finally in November 2010 the CESCR issued a Statement on the Right to Sanitation<sup>57</sup> confirming that “the right to sanitation is an essential component of the right to an adequate standard of living” and “is fundamental for human survival and for living a life in dignity.”<sup>58</sup> Unfortunately the statement only affirms the right but takes no steps as to further defining its content and scope.<sup>59</sup>

### III. Legal Framework

The following section provides an overview of the legal framework of the RTWS. Apart from the legal sources on which the right is based (1.), this includes the question of its status in international law (2.) and an outline of the substantive content and duties it imposes (3.), as well as finally its enforcement (4.).

#### 1. Legal Basis

##### a. International Agreements

Unfortunately the RTWS has so far not been explicitly recognized. Several international (human rights) agreements, however, stipulate specific obligations with regard to access to water and sanitation. For instance, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>60</sup> 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*, transport and communications.”<sup>61</sup> Notwithstanding the restricted scope of article 14, applying only to women

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<sup>56</sup> Doc. A/HRC/RES/15/9 of 30 September 2010.

<sup>57</sup> Doc. E/C.12/2010/1, see note 8, para. 7.

<sup>58</sup> Ibid.

<sup>59</sup> H. Smets, “Le droit de l’homme à l’eau et à l’assainissement est finalement reconnu”, *Revue Juridique de L’Environnement* 1 (2011), 79 et seq., (85).

<sup>60</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), UNTS Vol. 1249, 13.

<sup>61</sup> Article 14 para. 2 (h) CEDAW, see note 60. Emphasis added.

living in rural areas, it is a noteworthy development with regard to the advancement of a RTWS<sup>62</sup> as CEDAW makes an explicit reference to water supply and sanitation. This differentiation not only very well illustrates the change in perception with regard to water and sanitation, as mentioned earlier, but also underlines the individual importance of access to adequate sanitation alongside water.<sup>63</sup>

The Convention on the Rights of the Child (CRC)<sup>64</sup> in article 24 (2)(c) stipulates the requirement “to combat disease and malnutrition, ..., through, inter alia, ... *the provision of ... clean drinking water.*”<sup>65</sup> The supply of clean water is regarded as an essential aspect for the full implementation of the highest attainable standard of health. Whereas this is certainly true, it is far from being comprehensive since it only relates to a certain aspect of water, namely its quality.<sup>66</sup> Moreover, sanitation is only referred to as an issue of health education under article 24 (2)(e). A clear reference to access to sanitation is missing.

The Convention on the Rights of Persons with Disabilities (CRPD)<sup>67</sup> came into force in 2008. The Convention makes explicit reference to access to clean water in its article 28 (2) by stating, that State Parties shall take appropriate steps “(a) to ensure equal access by persons with disabilities to *clean water services ...*”.<sup>68</sup> A separate reference to sanitation is missing.

Next to the Human Rights treaties the Geneva Conventions of 1949 and the Additional Protocols of 1977 underline the vital importance of water and sanitation for health and survival, by obliging State Parties to fulfill the respective obligations. According to the Third Geneva Convention relative to the Treatment of Prisoners of War, State Parties shall provide prisoners of war with sufficient access to water and sanitary fa-

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<sup>62</sup> Lohse, see note 22, 55. This gets clear when comparing it to previous human rights treaties/ documents stipulating the right to an adequate standard of living. See, for example, article 25 para. 1 Universal Declaration of Human Rights and article 11 ICESCR.

<sup>63</sup> Lohse, see note 22, 56.

<sup>64</sup> Convention on the Rights of the Child (CRC), UNTS Vol. 1577, 3.

<sup>65</sup> Emphasis added.

<sup>66</sup> Cahill, see note 14, 391.

<sup>67</sup> Convention on the Rights of Persons with Disabilities (CRPD), GAOR 61st Sess. Suppl. 49 Vol. 1, 65.

<sup>68</sup> Emphasis added.

ILITIES.<sup>69</sup> Similar obligations can also be found in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>70</sup> Moreover, both additional Protocols declare drinking water installations to be objects indispensable for the survival of the civilian population, which needs to be protected in times of conflict.<sup>71</sup>

Next to the explicit references there also exist a number of implicit references. The most prominent example is the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The CESCR, when adopting General Comment No. 15, stated that article 11 (1) specifies a number of rights “emanating from, and indispensable for, the realization of the right to an adequate standard of living.” The RTW “clearly falls within the category of guarantees essential for securing an adequate standard of living” and is also “inextricably related to the right to the highest attainable standard of health” enshrined in article 12 (1).<sup>72</sup> The Committee also mentioned access to sanitation in para. 37 (i) of General Comment No. 15, as part of the core obligations pertaining to the right to water. Although General Comments are not binding, they are regarded as an authoritative interpretation of the Covenant.<sup>73</sup> The General Comment has received wide acceptance<sup>74</sup> and

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<sup>69</sup> Arts 20, 26, 29, 46 Geneva Convention III (Geneva Convention relative to the Treatment of Prisoners of War), UNTS Vol. 75, 135.

<sup>70</sup> Arts 85, 89, 127 Geneva Convention IV (Geneva Convention relative to the Protection of Civilian Persons in Time of War), UNTS Vol. 75, 287.

<sup>71</sup> Article 54 Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), UNTS Vol. 125, 3); article 14 Additional Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), UNTS Vol. 125, 609).

<sup>72</sup> General Comment No. 15, see note 37, para. 3.

<sup>73</sup> M. Craven, *The International Covenant on Social, Economic and Cultural Rights. A Perspective on its Development*, 1995, 91.

<sup>74</sup> This is at least indicated by the fact that, with the exception of Canada (cf. Concluding Observations CESCR Canada, Docs E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 of 22 May 2006, paras 30, 64), no State Party voiced an objection to the CESCR interpretation of article 11 and article 12 of the ICESCR; M. Langford, “Ambition that Overleaps itself? A Response to Stephen Tully’s Critique on the General Comment on the Right to Water”, *NQHR* 24 (2006), 473 et seq. (475). Moreover, this is underscored by the fact that all states which have ratified the ICESCR have also stated earlier in the Cairo Declaration, (see above note 29), that the right to an adequate

it is interesting to note that the General Assembly, when adopting the above mentioned resolution, made explicit reference to General Comment No. 15.<sup>75</sup> According to article 11 (1) of the Covenant, State Parties “recognize the right of everyone to an adequate standard of living ..., *including* adequate food, clothing and housing ...”.<sup>76</sup> The CESCR states, that by using the expression “including” article 11 (1) indicates that the right to an adequate standard of living is not necessarily limited to the catalogue of rights enlisted therein. It goes on by stating, that “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions of survival.”<sup>77</sup>

Even though it can hardly be denied that access to water, just as to food, is quintessential for an adequate standard of living, this interpretation has been criticized.<sup>78</sup> Not only do critics consider it as an attempt to revise article 11 of the Covenant by reading new rights into the provision,<sup>79</sup> but they also fear that this deconstruction leaves room for speculation about other characteristics being essential for an adequate standard of living, possibly heralding other possible rights like the access to electricity or even the internet.<sup>80</sup>

The claim of exceeding its authority is largely based on the argument that the drafters of the Covenant discarded the inclusion of a right to water.<sup>81</sup> The object and purpose of article 11 ICESCR though is to secure the provision and maintenance of a standard of living that is ade-

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standard of living includes water and sanitation, Khalfan/ Kiefer, see note 8, 2 et seq.

<sup>75</sup> A/RES/64/292, see note 6, para. 3 preamble.

<sup>76</sup> Article 11 ICESCR. Emphasis added.

<sup>77</sup> General Comment No. 15, see note 37, para. 3.

<sup>78</sup> See for example M.J. Dennis/ D.P. Stewart, “Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?”, *AJIL* 98 (2004), 462 et seq. (493 et seq.); S. Tully, “A Human Right to Access Water? A Critique of General Comment No. 15”, *NQHR* 23 (2005), 35 et seq. (35-63).

<sup>79</sup> According to Tully, it is “the responsibility of governments to pursue the article 29 amendment procedure if the Covenant is adjudged (by them) to be inadequate” rather than leaving the issue to the Committees for extensive interpretation, Tully, see note 78, 37.

<sup>80</sup> On the Human Right to Electricity see Tully, see note 78.

<sup>81</sup> Craven, see note 73, 25.

quate for human well-being.<sup>82</sup> This must consequently include a minimum of basic needs for the individual.<sup>83</sup> While food, clothing, and housing are certainly essential components of this right they do not suffice. A living without access to safe water (and sanitation) cannot possibly be considered an adequate standard.<sup>84</sup>

Moreover, treaty interpretation requires the adjustment of treaty provisions to today's circumstances. Societies and circumstances change, whereas access to water might not have been an issue in 1966 it had certainly come to the fore by 2002. Just because the drafters did not expressly include water it does not mean that they wanted to exclude it. Finally with regard to the charge that the CESCR's reading of article 11 would open the door to a flood of new rights, it must be said that this ignores the underlying aspect of the CESCR's reasoning, attributing a special status to the fundamental need for water.<sup>85</sup> It is simply not comparable to electricity or internet access.<sup>86</sup>

The second legal basis which the General Comment cites is article 12 of the Covenant, the right to the highest attainable standard of health.<sup>87</sup> As the CESCR has already stated in its General Comment No. 14 on the Right to Health, access "to safe and potable water and adequate sanitation" is fundamental for realizing the highest attainable standard of health.<sup>88</sup> According to the CESCR the Right to Water is "inextricably related to the right to the highest attainable standard of health"<sup>89</sup> and "environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (b) ... encompasses taking steps ... to prevent

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<sup>82</sup> Cf. C.M. Peter, "Promotion of Standard of Living", in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2011, paras 4, 6.

<sup>83</sup> Craven, see note 73, 305.

<sup>84</sup> Khalfan/ Kiefer, see note 8, 2.

<sup>85</sup> Langford, see note 74, 437. The special status is clearly expressed through para. 3 of General Comment No. 15, "The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."

<sup>86</sup> Langford, see note 74, 437.

<sup>87</sup> Article 12 ICESCR states that "[t]he State Parties to the present Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

<sup>88</sup> CESCR General Comment No. 14, The Right to the Highest Attainable Standard of Health, Doc. E/C.12/2000/4 of 11 August 2000, para. 11.

<sup>89</sup> General Comment No. 15, see note 37, para. 3.

threats to health from unsafe and toxic water conditions.”<sup>90</sup> The CESCR failed to include a clear reference regarding the relationship between clean water and sanitation. However, the reference to article 12 ICESCR at least shows that the CESCR recognizes the link and has kept this issue in mind.<sup>91</sup>

Finally, the General Comment also refers to the right to life and human dignity. Although these rights are not part of the family of economic and social rights they are considered as a point of reference.<sup>92</sup> A life in human dignity clearly encompasses access to basic human needs such as water and sanitation. Evidently without water there can be no life. However, an issue of contention is whether the right to life shall be interpreted narrowly, thus only protecting against arbitrary deprivation of life, or broadly, so that it functions as a guarantee against death from such causes as lack of water e.g.<sup>93</sup> By its very nature, the right to life is first and foremost a civil right, securing the freedom of the individual.<sup>94</sup> Accordingly, it is argued that a state does not need to provide for appropriate means of subsistence to adhere to its obligation stemming from article 6 of the ICCPR.<sup>95</sup> Thus the acceptance of death from such causes as lack of water would under this interpretation not be regarded as a violation of the human right to life.<sup>96</sup>

Conversely in its interpretation of article 6 the HRC stressed the fact that the right to life has been too often narrowly interpreted and requires states to adopt positive measures for its protection.<sup>97</sup> It goes on by stating that, besides providing protection against the arbitrary depri-

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<sup>90</sup> General Comment No. 15, see note 37, para. 8. See also General Comment No. 14, see note 88, para. 12.

<sup>91</sup> E. Riedel, “The Human Right to Water and General Comment No. 15”, in: E. Riedel/ P. Rothen (eds), *The Human Right to Water*, 2006, 19 et seq. (27).

<sup>92</sup> Rudolf, see note 26, 25.

<sup>93</sup> S.C. McCaffrey, “The Human Right to Water”, in: E. Brown-Weiss/ L. Boisson de Chazournes/ N. Bernasconi-Ostwalder (eds), *Fresh Water and International Economic Law*, 2005, 94 et seq. (97).

<sup>94</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005, article 6 reference note 3.

<sup>95</sup> Y. Dinstein, “The Right to Life, Physical Integrity, and Liberty”, in: L. Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights*, 1981, 114 et seq. (115).

<sup>96</sup> Dinstein, see note 95, who refers to the toleration of malnutrition.

<sup>97</sup> HRC General Comment No. 6, The Right to Life (Article 6), Doc. HRI/GEN/1/Rev.9 (Vol. I) of 30 April 1982, paras 1, 5.

vation of life, states shall also provide protection from other threats to human life such as malnutrition and epidemics.<sup>98</sup> This interpretation suggests that states need to ensure that every human being has access to appropriate means of subsistence.<sup>99</sup> Accordingly, this would encompass the RTWS since the lack of water is just as severe a threat to human life as malnutrition. Nevertheless it is most questionable whether this goes as far as creating a right to sustenance under the right to life.<sup>100</sup> It is, however, clear that since without water there is no life, the right to life should include the protection against arbitrary and intentional denial of access to water.<sup>101</sup>

## b. Regional Agreements

At the regional level there are a series of references to access to water and sanitation. They are of interest as they can provide support for a broad acceptance and common understanding of a RTWS.

### aa. Africa

In the African region, two human rights instruments explicitly refer to water and its access. Similar to the CRC, States Parties to the African Charter on the Rights and Welfare of the Child (1990)<sup>102</sup> shall take measures to ensure the provision of safe drinking water in order to implement the right to health.<sup>103</sup> Also, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2003)<sup>104</sup> contains the explicit obligation to provide women with clean drinking wa-

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<sup>98</sup> Ibid., para. 5.

<sup>99</sup> Cf. S.C. McCaffrey, "A Human Right to Water: Domestic and International Implications", *Geo. Int'l Envtl. L. Rev.* 5 (1992), 1 et seq. (10 et seq.).

<sup>100</sup> McCaffrey, see note 99, 11.

<sup>101</sup> J. Scanlon/ A. Cassar/ N. Nemes, "Water as a Human Right?", IUCN Environmental Policy and Law Paper No. 51, 2004, 4.

<sup>102</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>103</sup> Article 14 African Charter, see note 102. Unfortunately it also lacks a reference to sanitation.

<sup>104</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), OAU Doc. CAB/LEG/66.6 reprinted in: *African Human Rights Journal* 1 (2001), 53 et seq.

ter.<sup>105</sup> Moreover, although a regional instrument concerning environmental protection rather than human rights law, the so-called Maputo Convention,<sup>106</sup> a revised version of the African Convention on the Conservation of Nature and Natural Resources from 1968 (Algiers Agreement),<sup>107</sup> stipulates in its article VII that State Parties “shall endeavor to guarantee for their populations a sufficient and continuous supply of suitable water.”<sup>108</sup> Noteworthy in this respect is the Senegal River Charter,<sup>109</sup> a vanguard agreement at least in the setting of transboundary fresh water resources, which was signed in 2002 by Mauritania, Mali and Senegal, since it explicitly refers to the right to water as a fundamental human right.<sup>110</sup> Finally in 2008 the nine riparian states of the river Niger signed the so-called Charter on the Waters of the Niger Basin<sup>111</sup> which not only repeatedly refers to the right to water, but also obliges states to act accordingly and pay special attention to basic human needs.<sup>112</sup>

*bb. Americas*

Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

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<sup>105</sup> See article 15 (a) Protocol to the African Charter on Human and Peoples’ Rights, see note 104.

<sup>106</sup> Revised African Convention on the Conservation of Nature and Natural Resources of 2003, available at <<http://www.au.int>> (Maputo Convention), not yet entered into force.

<sup>107</sup> African Convention on the Conservation of Nature and Natural Resources (with Annexed List of Protected Species), UNTS Vol. 1001, 3. The African Convention was the first Convention dedicated to the conservation of the environment and natural resources on the African continent cf. *IUCN Environmental Policy and Law Paper No. 56: An Introduction to the African Convention on the Conservation of Nature and Natural Resources*, 2004, ix.

<sup>108</sup> Article VII (2) Maputo Convention, see note 106.

<sup>109</sup> Charte des Eaux du Fleuve Sénégal (2002), available at <<http://www.ecolex.org/server2.php/libcat/docs/TRE/Multilateral/Other/mul71173.pdf>>, Senegal River Charter.

<sup>110</sup> See article 4 of the Senegal River Charter, see note 109.

<sup>111</sup> La Charte de L’eau du Bassin Niger, signed 30 April 2008, Niger River Charter, available at <<http://www.abn.ne/index.php/fre/Vision-Partagee/Etudes-majeures/Charte-de-l-eau>>.

<sup>112</sup> See preamble and arts 1, 4, 15, Charte de l’Eau Niger Bassin, see note 111.

(Protocol of San Salvador 1988)<sup>113</sup> provides that “everyone shall have the right to live in a healthy environment and to have access to basic public services.”<sup>114</sup> It can hardly be contended that basic public services should not include access to water and sanitation. This understanding is also supported by a report from the Inter-American Commission on Human Rights, delivered in 1997 on the human rights situation in Brazil. It criticized that there existed an inequality in the access to basic public services, as roughly 20 per cent of the population had no access to potable water and roughly 26 per cent lacked access to sanitary services.<sup>115</sup>

*cc. Europe*

Under the auspices of the United Nations, Member States of the Economic Commission for Europe signed the so-called Protocol on Water and Health<sup>116</sup> to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) in 1999.<sup>117</sup> Even though the Protocol is not a human rights instrument, its aim is to provide access to drinking water and sanitation for everyone.<sup>118</sup> It contains no explicit reference with regard to a RTWS, nevertheless it can still be read as a tool for the implementation and practical enhancement of the RTWS.<sup>119</sup>

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<sup>113</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), *ILM* 28 (1989), 156 et seq.

<sup>114</sup> Article 11 Additional Protocol to the American Convention, see note 113.

<sup>115</sup> Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Brazil*, Doc. OEA/Ser.L/V/II.97, Doc. 29 Rev.1 of 29 September 1997, Chapter II.

<sup>116</sup> UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *ILM* 38 (2005), 1708 et seq.

<sup>117</sup> UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, UNTS Vol. 1936, 269. In context with the RTWS see A. Tanzi, “Reducing the Gap between International Water Law and Human Rights Law: The UNECE Protocol on Water and Health”, *International Community Law Review* 12 (2010), 267 et seq.

<sup>118</sup> Article 6 (1) UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, see note 116.

<sup>119</sup> Tanzi, see note 117, 283.

### c. Customary International Law

Rules of customary international law are a source of general international law binding upon states.<sup>120</sup> There is a growing international consensus in support of the RTWS which can be observed in the recent boost regarding the issuance of international legal documents, treaties and declarations,<sup>121</sup> alongside the increasing incorporation of the RTWS into national laws.<sup>122</sup> In particular, A/RES/64/292, which was adopted by a majority of 122 Member States, with no votes against, marks a new era in this respect.<sup>123</sup> As stated above, this was the first time that the UN General Assembly 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. It might be concluded though that the RTWS has passed the age of an “emerging right.”<sup>124</sup> Nevertheless one should not forget that the resolution was adopted with 41 abstentions, including countries like Austria, the Czech Republic, Denmark, Greece, Ireland, Sweden, Turkey and the United Kingdom as well as e.g. Canada, Japan and the United States.<sup>125</sup>

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<sup>120</sup> As defined by Article 38 (1)(b) of the ICJ Statute, listing the sources of international law, customary international law is “evidence of a general practice accepted as law”.

<sup>121</sup> Cf. Council of Europe Parliamentary Assembly Resolution 1809 (2011): “Water - a Source of Conflict” adopted by the Assembly on 15 April 2011 (18th sitting); HRC Doc. A/HRC/RES/15/9, see note 56; Doc. E/C.12/2010/1, see note 8; A/RES/64/292, see note 6; Doc. A/HRC/7/22, see note 47; Doc. A/HRC/6/3, see note 13.

<sup>122</sup> Cf. most recently article 43 (1) (b) and (d) of the new Constitution of Kenya of 28 August 2010. See also under III.1.d. below.

<sup>123</sup> Although not legally binding it has a great political impact, which signals the importance of this issue to Member States.

<sup>124</sup> On an “emerging” right to water see M. Craven, “Some Thoughts on the Emergent Right to Water”, in: Riedel/ Rothen, see note 91, 37 et seq.; Salman/ McInerney-Lankford, see note 16, 85 et seq.; Rudolf, see note 26, 35.

<sup>125</sup> Cf. General Assembly Press Release, GA/10967 of 28 July 2010. Several of the abstaining countries explained their decision with the fear that the resolution might be undermining the ongoing Geneva Process (see in particular Turkey and the United States). In this regard the US Representative stated that “[i]t [the resolution] described the right to water and sanitation in a way not reflected in existing international law since there was no ‘right to water and sanitation’ in an international legal sense, as described by the resolution” (Explanation of Vote on Resolution A/64/L.63/Rev.1 of 28 July 2010. Conversely Ms. Catarina de Albuquerque expressly welcomed the

Moreover, the RTWS is largely still ill-defined and there is much stronger support for the RTW than the RTS. This is for the most part due to the lack of clarity regarding the obligations related to the latter, posing a problem to its practical utilization and implementation.<sup>126</sup> However, even if one considers this as sufficient *opinio juris*, the existence of a respective state practice is still highly questionable.<sup>127</sup> With regard to the RTWS state practice would need to manifest itself in a “uniform” manner so as to “show a general recognition that a rule of law or legal obligation is involved.”<sup>128</sup> Although it would go beyond the scope of this article to fully analyze this issue, already the study of various reports examining the implementation of the RTWS shows that even though a legal framework exists, the RTWS is not applied and implemented consistently,<sup>129</sup> due to multiple reasons ranging from lack of resources to the plain absence of political will.<sup>130</sup> Moreover, existing state practice with regard to access to water and sanitation is so far not perceived as evidence that states respect the core obligations of the RTWS independently from the obligations imposed by the Covenant.<sup>131</sup> It has to be concluded that the RTWS has not yet fully been enshrined in customary international law.

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resolution stating that “the right to water and sanitation, is contained in existing human rights treaties and is therefore legally binding”, OHCHR Press Release of 1 October 2010.

<sup>126</sup> Payen/ Van Waeyenberge, see note 9, 59. On the issue of defining sanitation in human rights terms: COHRE/ WaterAid/ SDC/ UN-HABITAT, *Sanitation: A Human Rights Imperative*, 2008. Moreover, sanitation is one of the most off-track targets of the Millennium Development Goals (MDG), Doc. E/C.12/2010/1, see note 8, para. 3. At the current rates of progress the MDG target for sanitation in sub-Saharan Africa will not be met until 2076, COHRE/ WaterAid/ SDC/ UN-HABITAT, *Sanitation: A Human Rights Imperative*, 2008, 1.

<sup>127</sup> Rudolf, see note 26, 35.

<sup>128</sup> *North Sea Continental Shelf case*, ICJ Reports 1969, 3 et seq. (para. 74).

<sup>129</sup> C. Dubreuil, “The Right to Water: from Concept to Implementation”, World Water Council 2006, 7; B. Björklund/ J. Sjödin (eds), “The Human Right to Water and Sanitation: Securing Access to Water for Basic Needs”, Swedish Water House Policy Brief No. 8, 2010, 7 et seq.

<sup>130</sup> Dubreuil, see note 129, 7.

<sup>131</sup> Rudolf, see note 26, 34.

#### d. National Constitutions and Legislations

When examining national law one will quickly observe a clear trend towards recognition of the RTWS. Several national legal systems have developed legislation that recognizes and protects the RTWS.<sup>132</sup> In part, states have also enshrined the RTWS in their constitutions. This is particularly true for developing countries with constitutions of a more recent date. Noteworthy are *inter alia* the new Kenyan Constitution of 2010 which explicitly includes the right to “clean and safe water in adequate quantities” and the right to a “reasonable standard of sanitation”, article 43 (1) (d), (b) in its bill of rights, and the South African Constitution of 1996 where article 27 (1) (b) reads as follows: “everyone has the right to have access to ... sufficient ... water.”

In South America, both the new Bolivian and the Uruguayan Constitution stipulate that access to drinking water and sanitation is a human right.<sup>133</sup> Apart from these few selected examples, various other constitutions also include direct or indirect references with regard to the RTWS or at least impose obligations to ensure the access to water and/or sanitation.<sup>134</sup>

When it comes to implementing the RTWS, South Africa is one of the pioneers.<sup>135</sup> With article 27 (1) (b) of the Constitution as a point of departure, it has in the meantime established a comprehensive legal framework to implement the RTWS. This comprises *inter alia* the so-called Water Services Act (1997)<sup>136</sup> and National Water Act (1998).<sup>137</sup>

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<sup>132</sup> For a comprehensive overview see: COHRE, *Legal Resources for the Right to Water and Sanitation, International and National Standards*, 2nd edition 2008.

<sup>133</sup> Article 20 Constitution of Bolivia 2009; article 47 Constitution of the Republic of Uruguay. It is noteworthy that the RTW was inserted in the Uruguayan Constitution after a successful referendum in 2004, Constitución de la República Oriental del Uruguay (adopted 27 November 1966, entered into force February 1967) reprinted in: G.H. Flanz (ed.) *Constitutions of the Countries of the World*, Vol. 19, Suppl. 98-3, 1–121 as amended 31 October 2004.

<sup>134</sup> Cf. *inter alia* Constitutions of Ecuador, Ethiopia, Gambia, Uganda, Venezuela and Zambia.

<sup>135</sup> On the RTW in South Africa see C. Human, “The Human Right to Water in Africa: The South African Example”, in: Riedel/ Rothen, see note 91, 83 et seq.

<sup>136</sup> Republic of South Africa, Water Services Act, Act No. 108 of 1997, Government Gazette No. 18522, Vol. 390, 1997.

Whereas the latter governs integrated water resource management, the former was drafted to regulate the provision of water services throughout the country and its first and main objective is to give effect to the constitutional guarantee and to ensure that everybody has access to basic water supply and sanitation services.<sup>138</sup> In 2002 South Africa adopted the Free Basic Water Implementation Strategy devising a free minimum amount of 6,000 liters of safe water per household per month.<sup>139</sup> Likewise it also adopted a Free Basic Sanitation Implementation Strategy in 2009, with the express aim to guide water service authorities in providing all citizens with free basic sanitation by 2014.<sup>140</sup>

## 2. The Status of the RTWS

After having examined the legal basis and sources of the RTWS, the issue of its status within human rights law remains.<sup>141</sup> The RTWS is frequently referred to not as an independent right on its own which can be claimed as such, but as a right which can solely be claimed in connection with other human rights, especially the right to health and the right to an adequate standard of living.<sup>142</sup> One may wonder if it makes a dif-

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<sup>137</sup> Republic of South Africa, National Water Act, Act No. 36 of 1998, Government Gazette No. 19182, Vol. 398, 1998.

<sup>138</sup> Cf. Human, see note 135, 84 et seq.

<sup>139</sup> Republic of South Africa, Department of Water Affairs and Forestry, Free Basic Water Implementation Strategy, version 2 of August 2002, available at <<http://fbs.dplg.gov.za/fbs/site/docs/DocumentLibrary/FBW/FBWImplementationStrategyAug2002.pdf?PHPSESSID=4ff7407c9b0a1e8b99ae70b097632b94>>.

<sup>140</sup> Republic of South Africa, Department of Water Affairs and Forestry, Free Basic Sanitation Implementation Strategy, final version of 1 October 2008, available at <[http://www.dwaf.gov.za/dir\\_ws/waterpolicy/vdFileLoad/file.asp?ID=556](http://www.dwaf.gov.za/dir_ws/waterpolicy/vdFileLoad/file.asp?ID=556)>. According to the Strategy the provision of basic sanitation requires access to basic sanitation services which are defined as “the provision of a basic sanitation facility which is easily accessible to members of the household, has the necessary operational support for safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices”.

<sup>141</sup> This question was noted as an issue requiring further elaboration in the OHCHR Report, Doc. A/HRC/6/3, see note 13, 21.

<sup>142</sup> See for example HRC Doc. A/HRC/RES/15/9, see note 56, para. 3; water has also been seen as part of the right to food, both as “liquid food”, cf. J.

ference whether one considers it as an independent right or not. But the problem with treating the RTWS as a right derived from other rights is that this can, in certain circumstances, limit the scope of afforded protection. With a derivative right, protection would only be granted for certain aspects of the RTWS, in particular those which are related to the right it is derived from (e.g. the right to an adequate standard of living). A comprehensive protection covering all issues related to the RTWS could thus not be provided. Access to water may, for example, be discriminatory without in any way affecting the individual's health.<sup>143</sup> It is, however, not only the scope of protection that is limited but also the difference regarding state obligations related to this right, and hence, the different methods used to enforce it.<sup>144</sup>

Unfortunately recent developments concerning the RTWS, such as the recognition of the RTWS by the UN General Assembly and the HRC, have not made things clearer. Whereas the General Assembly resolution explicitly recognizes the RTWS as "a human right that is essential for the full enjoyment of life and all human rights", the HRC has taken up the wording of General Comment No. 15, stating that the RTWS "is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of ... health, as well as the right to life and human dignity."<sup>145</sup> Although it cannot be denied that the issuance of these documents provides in itself strong support for the recognition of an independent right, they are still not explicit.

Apart from providing greater legal certainty there are several other reasons that warrant a treatment of the RTWS as a distinct right. First of all, water and sanitation are undoubtedly primary vital needs. They should not be subordinated under the rights to health, housing or an adequate standard of living, but be given the "prominence and visibility

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Ziegler, *UN Special Rapporteur on the Right to Food, Day of General Discussion on Draft General Comment on the Right to Water*, CESCR 29th Sess. of 22 November 2002 and as a necessity for food. On the right to food in general see S. Skogly, "Right to Adequate Food: National Implementation and Extraterritorial Obligations", *Max Planck UNYB* 11 (2007), 339 et seq.

<sup>143</sup> Cahill, see note 14, 395.

<sup>144</sup> I.J. Alvarez, "The Right to Water as a Human Right", in: R. Piccolotti/ J.D. Taillant (eds), *Linking Human Rights and the Environment*, 2003, 71 et seq. (72).

<sup>145</sup> Doc. A/HRC/RES/15/9, see note 56, para. 3.

of a distinct right.”<sup>146</sup> Secondly, as explained in the previous section, effective implementation of the RTWS on a national level is extremely important. If the RTWS is, however, connected to other rights protecting, for example, adequate housing and health, this can cause problems that might again impede implementation. In practice, authorities being responsible for the implementation of rights related to health and housing will generally be different from those being responsible for water and sanitation. This could lead to an overlap of responsibilities or, even worse, incapacity on the part of the authorities to handle the issue.<sup>147</sup>

In sum, although it is warranted to lift the RTWS “from the shadow of other related human rights”, the obligations it imposes on states still raise some questions. For the time being one can only concur with *Cahill* that the RTWS holds a “unique status” in a situation somewhere between a derivative and independent right.<sup>148</sup>

### 3. Content and Corresponding State Duties

The RTWS is an entitlement held by all people,<sup>149</sup> but what does it entail? How much water are individuals entitled to? What quality does water need to have? What responsibilities does the RTWS entail for states? These and other questions shall be explored in the following section while taking a closer look at the content and obligations imposed by the RTWS.

General Comment No. 15 and the Guidelines of the Sub-Commission both closely define and develop the content and scope of the RTWS. Taken together they are the primary basis for the RTWS establishing criteria that states need to meet in order to properly fulfill the right. Whereas the Sub-Commission Guidelines are consistent with General Comment No. 15 with regard to the RTW, they include more details on the RTS when it comes to the normative content and scope, so that they complement each other in a way.

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<sup>146</sup> Khalfan/ Kiefer, see note 8, 6.

<sup>147</sup> Ibid.

<sup>148</sup> Cahill, see note 14, 395.

<sup>149</sup> COHRE/AAAS/SDC/UN-HABITAT, *Manual on the Right to Water and Sanitation*, 2007, 11.

### a. Content

Since the components of the RTWS are unequally developed, it is hard to distinguish the content at large. For this reason the content of RTW and the RTS shall be, in each case, examined separately.

#### *aa. The Right to Water*

The core message which General Comment No. 15 provides is that, “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”<sup>150</sup> As mentioned earlier, the CESCR derives the right to water from the right to an adequate standard of living, article 11 (1) of the Covenant, and the right to the highest attainable standard of health, article 12 (1). The right to water is clearly essential for securing an adequate standard of living “including adequate food, clothing and housing” and likewise without clean water none of these rights can be properly realized.<sup>151</sup> The CESCR relies on three factors that need to be achieved in order to realize the right to water, namely availability, quality and access.<sup>152</sup>

Availability requires water supplies to be sufficient and continuous for personal and domestic uses.<sup>153</sup> Regarding the quantity of water required, the CESCR refers to the WHO guidelines for drinking water quality that were designed to guide governments to develop national standards for safe water quality.<sup>154</sup> According to the WHO basic (minimum) access requires at least 20 liters of water per person per day. Optimal access would, however, be at least 100 liters.<sup>155</sup>

Providing access to sufficient amounts of water is largely futile if the water is of poor quality. States are thus required to develop procedures and standards to ensure drinking-water safety.<sup>156</sup> Good quality drinking

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<sup>150</sup> Cf. General Comment No. 15, see note 37, para. 2.

<sup>151</sup> *Ibid.*, para. 3.

<sup>152</sup> *Ibid.*, para. 12.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> WHO Guidelines for Drinking-Water Quality, 3rd edition, Vol. I, 2008, 91. The average daily water consumption in Europe is more than 200 liters – in the United States more than 400 liters, UNDP, Human Development Report 2006, see note 4, 5, 34.

<sup>156</sup> WHO Guidelines, see note 155, xvi.

water requires water to be safe i.e. “free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person’s health.”<sup>157</sup> Water should be of an “acceptable colour, odour and taste”<sup>158</sup> and water and water facilities need to be accessible to everyone.

According to the CESCR accessibility has several dimensions: water and water facilities must be physically and economically accessible and must be granted without discrimination.<sup>159</sup> In particular, physical accessibility requires water and water facilities to be within safe physical reach i.e. “within, or in the immediate vicinity, of each household, educational institution and workplace.”<sup>160</sup> It should be noted that women and children are especially vulnerable in this regard. When, for example, a school lacks access to drinking water children may be prevented from attending classes. Also the burden of collecting water often rests upon women who run the risk of being attacked if required to travel long distances alone to reach a water source.<sup>161</sup> Water and water services must be affordable, in order to be economically accessible.<sup>162</sup> Accordingly states are under an obligation to ensure that individuals are not denied access to water because they cannot afford related costs and charges. Besides, as already stated, accessibility requires access without discrimination. This requires states to ensure that all people especially “the most vulnerable or marginalized sections of the population” are granted access to water “in law and in fact”.<sup>163</sup> No person may be denied access to water on grounds of *inter alia* “race, colour, sex, age, language, religion, political or other opinion, national or social origin.”<sup>164</sup>

Finally the CESCR refers to “information accessibility”, meaning that everyone shall be granted “the right to seek, receive and impart information concerning water issues.”<sup>165</sup>

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<sup>157</sup> General Comment No. 15, see note 37, para. 12 (b). Emphasis in original.

<sup>158</sup> *Ibid.*, article 12 (b).

<sup>159</sup> *Ibid.*, para. 12 (c).

<sup>160</sup> *Ibid.*, para. 12 (c)(i).

<sup>161</sup> Riedel, see note 91, 19 et seq. (29).

<sup>162</sup> General Comment No. 15, see note 37, para. 12 (c)(ii).

<sup>163</sup> *Ibid.*, para. 12 (c)(iii).

<sup>164</sup> *Ibid.*, para. 13.

<sup>165</sup> *Ibid.*, para. 12 (c)(iv).

*bb. The Right to Sanitation*

The sanitation component of the RTWS has received considerably less attention than the water component. Despite the fact that the issue of sanitation was discussed by the CESCR in the course of its deliberations regarding General Comment No. 15, it lacks precise and detailed references in this respect.<sup>166</sup> The CESCR's approach was explained by the fact that sanitation was too large an issue to be comprehensively included without overloading the General Comment and that it would be very difficult to keep the General Comment practical and as simple as possible.<sup>167</sup> It is thus not surprising that a lot more uncertainties exist regarding its content.<sup>168</sup> This imbalance was also highlighted by the High Commissioner in her report, when she stressed that the normative content of the RTS required further elaboration.<sup>169</sup> In 2008 the HRC issued Resolution 7/22 and in 2009 Ms Catarina de Albuquerque submitted a report to the HRC offering a definition along with obligations that arise from the RTS.<sup>170</sup> Next to the report of the Special Rapporteur,<sup>171</sup> in which she draws on the rights and obligations contained in General Comment No. 15 with regard to RTW and argues that these provisions apply equally for the RTS, this is the most recent and comprehensive document addressing the RTS.

In accordance with the Sub-Commission Guidelines and the independent experts report, sanitation must be safe, physically accessible, affordable and culturally acceptable.<sup>172</sup> Corresponding to General Comment No. 15 this comprises the aspects of availability, quality and

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<sup>166</sup> Cahill, see note 14, 402. Both paras 29 and 37 (i) of General Comment No. 15, see note 37, refer to "access to adequate sanitation" as a prerequisite for protecting the quality of water resources (cf. para. 29) as well as a method to prevent and control water related diseases (cf. para. 37 (i)).

<sup>167</sup> E. Riedel/ J. Moss, *Day of General Discussion on the Draft General Comment on the Right to Water*, CESCR 29th Sess. of 22 November 2002, cited by Cahill, see note 14, 402 et seq.

<sup>168</sup> Payen/ Van Waeyenberge, see note 9, 67.

<sup>169</sup> Doc. A/HRC/6/3, see note 13, paras 19, 49.

<sup>170</sup> According to Ms. Albuquerque sanitation is frequently defined as "a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene", Doc. A/HRC/12/24 of 1 July 2009, para. 63.

<sup>171</sup> Doc. E/CN.4/Sub.2/2004/20, see note 40.

<sup>172</sup> "In many cultures, to be acceptable, construction of toilets will need to ensure privacy", Doc. A/HRC/12/24, see note 170, para. 80.

accessibility. This means that sanitation facilities must not only be sufficiently available in terms of quantity,<sup>173</sup> but also of a sufficient and culturally acceptable quality, i.e. hygienically and technically safe to use.<sup>174</sup> In this respect it is crucial for ensuring sustainability and continued access that sanitation facilities are cleaned and maintained regularly.<sup>175</sup> Regarding the aspect of accessibility, it requires physical access to sanitation facilities in a location where physical security can be guaranteed.<sup>176</sup> Again this is especially crucial for women since sanitation facilities in far away and unsafe locations are a major source of insecurity for women.<sup>177</sup> Furthermore, accessibility must be reliable, meaning access night and day.<sup>178</sup> As has been outlined in General Comment No. 15 and the Sub-Commission Guidelines with regard to access to water, sanitation facilities must also be “supplied at a price that everyone can afford”<sup>179</sup> and services should be accessible without discrimination.<sup>180</sup> Finally, reference is also made to participatory rights entailing the entitlement to “seek, receive and impart information” regarding sanitation issues.<sup>181</sup>

## b. Corresponding State Duties

After having determined the content of the RTWS the question of corresponding duties arises: what steps are states obliged to take in order to fulfill their duties?

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<sup>173</sup> The Independent Expert Ms. Albuquerque highlights that this also requires states to ensure that waiting times are not unreasonably long, *ibid.*, para. 70.

<sup>174</sup> Cf. Doc. E/CN.4/Sub.2/2004/20, see note 40, para. 49 and Doc. A/HRC/12/24, see note 170, paras 72, 73.

<sup>175</sup> Doc. A/HRC/12/24, see note 170, para. 72.

<sup>176</sup> This means that sanitation facilities should be within the vicinity of the household, educational institution, work place or health institution, Doc. E/CN.4/Sub.2/2004/20, see note 40, para. 49.

<sup>177</sup> Cf. Doc. E/CN.4/Sub.2/2004/20, see note 40, para. 50.

<sup>178</sup> Doc. A/HRC/12/24, see note 170, para. 75.

<sup>179</sup> Doc. E/CN.4/Sub.2/2005/25, see note 39, para. 1.3 (d); cf. General Comment No. 15, see note 37, para. 12 (c)(ii). A price is considered affordable if it does not limit people’s capacity to acquire other basic goods and services, Doc. A/HRC/12/24, see note 170, para. 77.

<sup>180</sup> Cf. Doc. E/CN.4/Sub.2/2004/20, see note 40, para. 46.

<sup>181</sup> Cf. *ibid.*, para. 46. Doc. E/CN.4/Sub.2/2005/25, see note 39, paras 1.3 (d), 8.

The obligations related to the realization of a right largely depend on how a right is categorized.<sup>182</sup> International human rights law has developed different categories of rights. Basically it differentiates between civil and political (or liberty rights) and economic, social and cultural rights (or welfare rights).<sup>183</sup> The RTWS is generally categorized as a welfare right since its primary legal basis is (still) regarded to be ICESCR. States are required to fulfill economic, social and cultural rights (mostly)<sup>184</sup> in a progressive rather than an immediate manner.<sup>185</sup> This is laid down in article 2 ICESCR which stipulates that State Parties shall take steps to progressively achieve the full realization of the rights, using their maximum available resources.<sup>186</sup> According to the CESCR this entails three types of obligations (on State Parties), namely the obligations to respect, protect and fulfill.<sup>187</sup> Hence the CESCR also notes in General Comment No. 15 that the RTW imposes this type of obligation on States Parties.<sup>188</sup> On the same line Ms Albuquerque stated in her report that “states are obliged to respect, protect and fulfil human rights as they relate to sanitation.”<sup>189</sup>

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<sup>182</sup> Cf. A. Hardberger, “Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates”, *Northwestern Journal of International Human Rights Law* 4 (2005), 331 et seq. (353).

<sup>183</sup> Cf. S. Moller Okin, “Liberty and Welfare: Some Issues in Human Rights Theory”, in: J.R. Pennock/ J.W. Chapman (eds), *Human Rights Nomos XXIII*, 1981, 230 et seq. (237).

<sup>184</sup> It should be noted that according to the CESCR some economic, social and cultural rights contain certain elements which can and thus are to be fulfilled immediately, cf. E. Riedel, “International Covenant on Economic, Social and Cultural Rights (1966)”, *Max Planck Encyclopedia of Public International Law*, see note 82, para. 7. See also: CESCR General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant), Docs E/1991/23, E/C.12/1990/8 of 14 December 1990 Annex III, paras 1, 5.

<sup>185</sup> CESCR General Comment No. 3, see note 184, para. 9. With regard to the RTWS this would imply that a state is not necessarily violating the right if it cannot provide its entire population with sufficient access to water and sanitary facilities, as long as it is making every effort in order to realize the right (cf. Tanzi, see note 117, 278) “to the maximum of its available resources”, article 2 (1) ICESCR.

<sup>186</sup> Cf. article 2 ICESCR; General Comment No. 3, see note 184.

<sup>187</sup> Riedel, see note 184, para. 15.

<sup>188</sup> General Comment No. 15, see note 37, para. 20.

<sup>189</sup> Doc. A/HRC/12/24, see note 170, para. 64.

*aa. Respect*

The obligation to respect requires states to refrain from any direct or indirect interference with the enjoyment of the RTWS.<sup>190</sup> In particular this entails refraining *inter alia* from measures that limit or deny (equal) access to adequate water/sanitation or water/sanitation services and infrastructure.<sup>191</sup>

*bb. Protect*

Regarding the obligation to protect, states are required to ensure that corporations, groups or individuals do not in any way interfere with the right to water. This requires the development of effective legislative measures to particularly avert the danger that non-state actors, such as private enterprises, might deprive people of their access to water.<sup>192</sup> With regard to sanitation, governments must equally establish an effective regulatory framework to prevent any negative impacts on sanitation services through private service providers.<sup>193</sup> Concomitantly states must also ensure compliance with this framework through, for example, the introduction of penalties for non-compliance.<sup>194</sup>

*cc. Fulfill*

The duty to fulfill requires states to take measures that provide individuals with the opportunity to obtain satisfaction of those needs which cannot be secured by their own personal efforts.<sup>195</sup> More specifically the obligation to fulfill is made up of three constituent parts: the obligation to facilitate, the obligation to promote and the obligation to provide.<sup>196</sup> With regard to the RTWS this means, that states are obliged to (1) “take positive measures to assist individuals and communities to en-

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<sup>190</sup> Cf. respectively for the RTW General Comment No. 15, see note 37, para. 21.

<sup>191</sup> Cf. General Comment No. 15, see note 37, para. 21; Doc. A/HRC/12/24, see note 170, para. 64.

<sup>192</sup> General Comment No. 15, see note 37, paras 23, 24.

<sup>193</sup> Doc. A/HRC/12/24, see note 170, para. 64.

<sup>194</sup> General Comment No. 15, see note 37, para. 24.

<sup>195</sup> A. Eide, “Economic, Social and Cultural Rights as Human Rights”, in: A. Eide/ C. Krause/ A. Rosas (eds), *Economic, Social and Cultural Rights*, 2nd edition, 2001, 24 et seq.

<sup>196</sup> General Comment No. 15, see note 37, para. 25.

joy the right”; (2) “to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage”; (3) to make sure that the RTWS is realized in cases where individuals or groups are unable to enjoy the RTWS by the means at their disposal and for reasons beyond their control.<sup>197</sup> Accordingly, in cases where individuals/groups can for example not afford service provision, a state would be required to adopt measures to alleviate the problem. Such measures could include the installation of low cost service technologies, provision of income supplements or even free water.<sup>198</sup>

#### 4. Accountability and Implementation

The true value of a human right lies in its effective implementation.<sup>199</sup> Apart from a comprehensive regulatory framework, this requires the establishment of accountability mechanisms especially including means of judicial or quasi-judicial implementation. Thus having had a look at the development, scope, content and the legal basis of the RTWS, the following section will turn to more practical questions: in particular, can individuals hold their states accountable for violations of the RTWS? Can the RTWS be subject to litigation and is there an effective complaints procedure? These are crucial questions for ensuring that states respect their obligations with regard to the RTWS and that recognition is not just plain rhetoric. More precisely, right-holders should be authorized to make special claims if the right is threatened or denied.<sup>200</sup>

Apart from individual complaints procedures available for victims of human rights violations, there are also other means to monitor state compliance with the RTWS. The following section shall give a short overview of the judicial and quasi-judicial methods as well as other oversight mechanisms existing on a national and international level that could help ensure the effective implementation of the RTWS.

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<sup>197</sup> Ibid.

<sup>198</sup> Ibid., para. 27.

<sup>199</sup> Cf. P. Gleick, “Implementing the Human Right to Water”, in: Riedel/Rothen, see note 91, 143 et seq. (146).

<sup>200</sup> Cf. J. Donnelly, *Universal Human Rights in Theory and Practice*, 1989, 1.

### a. Enforceability on an International Level

The ICESCR draws upon a reporting system in order to monitor the implementation of the rights.<sup>201</sup> State Parties are obliged to submit periodic reports for consideration.<sup>202</sup> The CESCR then drafts and adopts a set of Concluding Observations in which it lays out the principal subjects of concern and any recommendations it might have in this respect.<sup>203</sup> The reporting system is often criticized for its non-binding nature and total reliance on cooperation of State Parties as well as its inability to respond to specific individual claims.<sup>204</sup> So far the ICESCR lacks an individual or inter-state complaint mechanism.<sup>205</sup> Apart from issuing Concluding Observations the CESCR can resort to General Comments,<sup>206</sup> by offering an authoritative interpretation of the Covenant rights, thereby contributing to a better understanding of treaty obligations. These Comments not only render the reporting procedure more effective but also concomitantly add to a better implementation of the Covenant.<sup>207</sup> In relation to compliance with the RTWS, it is General Comment No. 15 which marks the yardstick against which state actions must be measured. Since its adoption the CESCR has continually reminded State Parties of their treaty obligations pressing them to live up to these commitments.<sup>208</sup> Again this does not directly help the individual suffering from a violation of the RTWS.<sup>209</sup>

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<sup>201</sup> Article 16 (1) ICESCR.

<sup>202</sup> Article 16 (2) ICESCR.

<sup>203</sup> M. Craven, "The International Covenant on Economic, Social and Cultural Rights", in: R. Hanski/ M. Suksi (eds), *An Introduction to the International Protection of Human Rights*, 1997, 99 et seq. (112); CESCR, Report of the Eighth and Ninth Session, Doc. E/1994/23, para. 35.

<sup>204</sup> Cf. Craven, see note 203, 112 et seq.

<sup>205</sup> It should, however, be noted that in December 2008 the General Assembly adopted an Optional Protocol to the Covenant establishing an individual and inter-state complaints mechanism, see A/RES/63/117 of 10 December 2008. The protocol was opened for signature in 2009. It is not yet in force since it still lacks the sufficient number of ten ratifications according to article 18 (1) of the Optional Protocol.

<sup>206</sup> Cf. CESCR, Rules of Procedure of the Committee on Economic Social and Cultural Rights, Doc. E/C.12/1990/4/Rev. 1 of 1 September 1993, Rule 65.

<sup>207</sup> Riedel, see note 91, 19 et seq. (35 et seq.).

<sup>208</sup> OHCHR, "The Right to Water", Human Rights Fact Sheet No. 35, 2010, 44, available at <<http://www.ohchr.org/Documents/Publications/Fact>

## b. Enforceability on a National Level

A precondition for bringing individual claims before national courts is that states have incorporated the RTWS into their national legislation. As noted above, the RTWS is enshrined in the laws of quite a few countries and even several constitutions. Different analysis of case law on the subject shows that the RTWS is in many instances quite effectively enforced.<sup>210</sup> Court cases protecting the RTWS can be observed worldwide throughout different legal systems.<sup>211</sup> These cases address a broad range of aspects relating to the RTWS ranging from service disconnection over tariff structures and questions of accountability to pollution activities.<sup>212</sup> Nevertheless the amount of cases also demonstrates that the issue is complex and there are still a lot of practical problems opposed to effective national implementation. These are caused *inter alia* by uncertainty due to a lack of proper definition of the scope of the right or determination of the authority responsible to oversee implementation. Frequently the implementation is also impeded by insufficient alloca-

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Sheet35en.pdf>; Annual Reports of the CESCR available at <<http://tb.ohchr.org/default.aspx?ConvType=18&docType=36>>.

<sup>209</sup> It can, however, help to underscore their claim, as is demonstrated by the following example from Kathmandu (Nepal): according to WaterAid, a community of slum dwellers who had heard about General Comment No. 15 approached the Nepal Water Supply Cooperation with a copy of the General Comment lobbying for their right. Their campaign proved successful and resulted in the installation of six water standpipes for their informal settlement, D. Morley, “The Right to Water: a Step in the Right Direction”, in: Riedel/ Rothen, see note 91, 181 et seq. (183); see also: Dubreuil, see note 129, 26.

<sup>210</sup> For an overview and analysis of South African, Argentine and Indian case law see, for example, I. Winkler, “Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India”, *Law, Social Justice and Development Journal* 1 (2008), stating that the case in these three countries could be used as orientation for courts in other countries.

<sup>211</sup> Winkler, see note 210, 2.

<sup>212</sup> See e.g. on the issue of tariff structures: *Lindiwe Mazibuko and others v. City of Johannesburg and others*, Case CCT 39/09 [2009] ZACC 28, Constitutional Court of South Africa, 8 October 2009, reprinted in *Buffalo Criminal Law Review* 3 (2010), 239 et seq.; or on accountability with regard to pollution caused through open sewers: *Municipal Council Ratlam v. Vardichand and others*, AIR 1980 DC 16222194 – discussed in Dubreuil, see note 129.

tion of adequate human and financial resources.<sup>213</sup> Regarding the latter, the Supreme Court of India, for instance, ordered a municipal council to construct drainpipes to address a sanitation problem which was caused by open sewers, thereby overruling the municipal council's objection based on lack of finances.<sup>214</sup> A prominent and frequently cited case which was lately decided by the Constitutional Court in South Africa, the so-called *Mazibuko et al. v. City of Johannesburg* case is also noteworthy.<sup>215</sup> Unlike the High Court in first instance as well as the Supreme Court of Appeal, which both considered the amount of free basic water provided per household as insufficient and demanded that it be raised to a specified amount,<sup>216</sup> the Constitutional Court judges held that the policy was not in conflict with Section 27 of the Constitution and that it was moreover not for a court to "specify what quantity of water is *sufficient water* within the meaning of section 27 of the Constitution" and that this decision should rather be left to the executive.<sup>217</sup> In this regard the Court highlighted the fact that the RTW is to be real-

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<sup>213</sup> Dubreuil, see note 129, 24.

<sup>214</sup> *Municipal Council Ratlam v. Vardichand and others*, see note 212.

<sup>215</sup> *Lindiwe Mazibuko and others v. City of Johannesburg and others*, see note 212. In 2006 the residents of Phiri, a community in Soweto, brought a claim before the South Gauteng High Court challenging Johannesburg's Free Basic Water policy. In particular, they challenged the allegedly insufficient amount of 6,000 liters of free water provided monthly for all households in Johannesburg, as well as the installation of pre-paid water meters, automatically cutting off the water supply when the limit was reached. The applicants based their claim on Section 27 of the Constitution and succeeded. The Court declared the city's Free Basic Water policy to be unreasonable and ruled that it should instead provide 50 liters of free basic water daily. It also declared the installation of pre-paid water meters to be unlawful, since it did, for example, not consider the number of persons living in each household (cf. Media Summary of the Constitutional Court of South Africa on the Case of *Lindiwe Mazibuko and others v. City of Johannesburg and others*, see note 212, available at <<http://www.saflii.org>>; *Mazibuko v. City of Johannesburg* High Court of South Africa Witwatersrand Local Division (30 April 2008) (2008) ZAGPHC 106, available at <<http://www.saflii.org>>).

<sup>216</sup> See *Lindiwe Mazibuko and others v. City of Johannesburg and others* (South Gauteng High Court 06/13865), see note 212; *Lindiwe Mazibuko and others v. City of Johannesburg and others* (Supreme Court of Appeal 498/08) [2009] ZASCA 20 (25 March 2009), available at <<http://www.saflii.org>>.

<sup>217</sup> *Lindiwe Mazibuko*, see note 212, emphasis added, paras 159, 161.

ized progressively and this necessarily implies that it takes time to be fully realized and cannot be put into action immediately.<sup>218</sup> Despite this “negative” outcome for the applicants the judgment nevertheless mobilized a strong movement campaigning for effective realization of water rights in South Africa.<sup>219</sup> Moreover, as the Court states itself, the entire litigation has led the city of Johannesburg to thoroughly review and revise its water policies with regard to ensuring progressive achievement of the right of access to sufficient water.<sup>220</sup>

Finally, it must be acknowledged that the success of judicial mechanisms is largely dependent on the level of governance, adherence to the rule of law and institutional capacity of each country.<sup>221</sup> In a country used to corruption, inefficient judiciaries and poor governance, the incorporation of the RTWS into national legislation is often no more than lip-service. A functional judicial system is, however, not the only solution. Even where the RTWS is successfully protected it still requires strengthening at national level since many individuals are often unaware of their rights.<sup>222</sup> As already stressed above, awareness raising, access to information and education are important tools that must not be forgotten on the road to the effective implementation of the RTWS.<sup>223</sup>

Apart from judicial or quasi judicial enforcement mechanisms there are also other ways to compel a state to explain its actions and how it is moving towards the realization of the RTWS.<sup>224</sup> Such complementary mechanisms include *inter alia* political instruments such as monitoring and advocacy by independent actors or the development of national policies. In particular, monitoring through benchmark setting or impact assessments by civil society organizations is a promising alternative towards pressuring governments to live up to their obligations. Moreover, the development of national water and sanitation policies linked to ac-

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<sup>218</sup> Ibid., para. 50.

<sup>219</sup> E.g. the Coalition Against Water Privatization (CAWP) which closely followed and reported on the *Mazibuko* proceedings, is still strongly campaigning for effective implementation of the RTWS in South Africa, see under <<http://apf.org.za/spip.php?rubrique41>>.

<sup>220</sup> *Lindiwe Mazibuko*, see note 212, paras 40, 95, 97, 168.

<sup>221</sup> Björklund/ Sjödin, see note 129, 12.

<sup>222</sup> Dubreuil, see note 129, 40 et seq.

<sup>223</sup> Ibid.

<sup>224</sup> Cf. OHCHR, see note 208, 38.

tion plans helps to monitor the progress of implementation on a national as well as an international level.<sup>225</sup>

#### IV. Implications of the RTWS

Before concluding, the following section will briefly explore the implications of a RTWS. This includes the RTWS's influence on the highly contentious issue of (1) privatizing<sup>226</sup> public utilities and (2) on interstate relations with regard to sharing freshwater resources.

##### 1. Privatization and the RTWS

The primary responsibility pertaining to the provision of water and sewerage networks lies with the state. Nevertheless each country is generally free to choose its form of service provision.<sup>227</sup> The last two decades have witnessed an increase in private sector participation with regard to the operation of public utilities.<sup>228</sup> In particular, the privatization of water and sewerage services as well as networks is a very contentious issue that has caused and still causes quite some social unrest in many countries.<sup>229</sup> Privatization is deemed to entail price rises due to

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<sup>225</sup> Ibid., 39.

<sup>226</sup> Privatization entails the partial or total dissolution of state ownership, W. Vandenhoele/ T. Wielders, "Water as a Human Right – Water as an Essential Service: Does it Matter?", *NQHR* 26 (2008), 391 et seq. (408 et seq.).

<sup>227</sup> On the different forms of service provision see, for example: Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Doc. A/HRC/15/31 of 29 June 2010, para. 4.

<sup>228</sup> S. Alam/ P. Mukhopadhaya/ D. Randle, "The General Agreement on Trade in Services (GATS), Water, and Human Rights from the Perspective of Developing Countries", *NILR* 58 (2011), 43 et seq. (52).

<sup>229</sup> A prominent and frequently cited example is the so-called *Cochabamba-Case* from Bolivia, where the Bolivian government granted a forty-year concession for water and waste-water services to a private company. The company *inter alia* significantly raised the rates for water which large parts of the population were already struggling with. This was followed by strong and widespread protests from the civil society eventually forcing the Bolivian government to cancel the contract, see E.J. Woodhouse, "The 'Guerra del Agua' and the Cochabamba Concession: Social Risk and For-

the introduction of cost recovery measures (through user fees) and the removal of subsidies.<sup>230</sup> Moreover, it is feared that in consequence large parts of the population will be faced with disconnections because they can no longer afford the market rate for service provision.<sup>231</sup> Albeit this danger has several reasons,<sup>232</sup> it can be counteracted by introducing mechanisms such as *inter alia* public income supplements or sliding tariff scales, according to which users are charged with respect to their income.<sup>233</sup> But what role does the RTWS now have to play in this regard, does it support or oppose privatization?

Human rights are generally neutral with regard to political and economic systems.<sup>234</sup> Accordingly they do not predicate a particular form of service provision.<sup>235</sup> This approach is also reflected by international declarations and legal material pertaining to the RTWS, all taking a quite neutral stance when it comes to the question of privatization. However, they emphasize the fact that governments cannot rid themselves of their human rights obligations,<sup>236</sup> in this case of the obligations related to the RTWS. Thus when governments decide to place water and sanitation services into the hands of private actors they must ensure

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eign Direct Investment in Public Infrastructure”, *Stanford J. Int’l L.* 29 (2003), 295 et seq.

<sup>230</sup> Vandenhole/ Wielders, see note 226, 409.

<sup>231</sup> See M. Kothari, “Obstacles to Making Water a Human Right”, in: Riedel/ Rothen, see note 91, 150 et seq. Similar concerns have also been expressed by the CESCR in its considerations of state reports, cf. CESCR, Concluding Observations: Morocco, Doc. E/C.12/MAR/CO/3 of 4 September 2006, para. 26; CESCR, Concluding Observations: Benin, Doc. E/C.12/1/Add.78 of 5 June 2002, para. 22.

<sup>232</sup> Specifically, the connection of impoverished (remote) areas without sufficient existing infrastructure to the water and sewerage network is a cost-intensive measure that could quickly deter private investors from this undertaking, cf. E.B. Bluemel, “The Implications of Formulating a Human Right to Water”, *Ecology Law Quarterly* 31 (2004), 957 et seq. (964).

<sup>233</sup> Cf. McCaffrey, see note 93, 106 et seq.; H. Smets, “Economics of Water Services and the Right to Water”, in: Brown-Weiss et al., see note 93, 173 et seq. (179), who gives the example of Chile and Belgium where the prices are held low through subsidies (Chile) and cross-subsidies (Belgium).

<sup>234</sup> CESCR, General Comment No. 3, see note 186, para. 8.

<sup>235</sup> Doc. A/HRC/6/3, see note 13, para. 52.

<sup>236</sup> Cf. General Comment No. 15, see note 37, para. 23; Doc. A/HRC/6/3, see note 13, para. 52; Doc. A/HRC/15/31, see note 227, para. 18.

that the RTWS is safeguarded.<sup>237</sup> This has also been underscored by the CESCR in its General Comment No. 15 where it reads that the “failure to effectively regulate and control water services providers” is qualified as a violation of the RTW[S].<sup>238</sup>

Generally what happens with regard to state obligations is a shift in emphasis from the obligation to fulfill towards the obligation to protect.<sup>239</sup> Where the provision of public utilities is operated or controlled by private actors, states are required to establish an effective regulatory system, “which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance”.<sup>240</sup> In essence, privatization and the RTWS are reconcilable and there is at least no formal contradiction between them.<sup>241</sup> On the contrary, General Comment No. 15 as well as the Guissé’s and Albuquerque’s Reports openly address the issue of privatization.<sup>242</sup> What seems to be clear is that service provision needs to be measured against the obligations set out by the RTWS and that it is because of the RTWS that a state must ensure that its population has access to basic water and sanitation facilities.

## 2. Transboundary Waters and the RTWS

Generally speaking human rights have no extraterritorial impact and can only be invoked by individuals in respect of the conduct of their own government.<sup>243</sup> Nevertheless, although it might seem odd at first glance, the developments regarding the RTWS have to a certain extent

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<sup>237</sup> Cf. McCaffrey, see note 93, 104.

<sup>238</sup> CESCR, General Comment No. 15, see note 37, para. 44 (b)(ii). General Comment No. 15 only refers to violations of the RTW. The RTS can, however, be infringed on equal grounds.

<sup>239</sup> Vandenhole/ Wieters, see note 226, 410.

<sup>240</sup> General Comment No. 15, see note 37, para. 24.

<sup>241</sup> J. Budds/ G. McGranahan, “Are the Debates on Water Privatization Missing the Point? Experiences from Africa, Asia and Latin America”, *Environment & Urbanization* 15 (2003), 87 et seq. (95).

<sup>242</sup> General Comment No. 15, see note 37, para. 24; Final Report of the Special Rapporteur Guissé, Doc. E/CN.4/Sub.2/2004/20, see note 40, para. 57; Doc. A/HRC/15/31, see note 227, paras 6 et seq.

<sup>243</sup> McCaffrey, see note 99, 19. On this issue in general see: N. Wenzel, “Human Rights, Treaties, Extraterritorial Application and Effects”, *Max Planck Encyclopedia of Public International Law*, see note 82.

influenced inter-state relations specifically with regard to the sharing of transboundary freshwater resources. International water law provides for a safeguard against neglecting the vital importance of water for humans when states negotiate a water sharing agreement.<sup>244</sup> For instance, the 1997 U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses<sup>245</sup> calls upon states, when reconciling a conflict between different uses, to give “special regard ... to the requirements of vital human needs.”<sup>246</sup> Even though the rules governing this particular field of law have not been devised as individual rights, but relate to obligations of governments, they do express the basic idea behind the RTWS, that is, in making allocation decisions states should pay attention to vital human needs.<sup>247</sup> In fact one can perceive a new tendency in younger international (sharing) agreements to even explicitly refer to the RTWS. As mentioned earlier in this article,<sup>248</sup> the river charters of the Senegal and Niger rivers<sup>249</sup> are particularly noteworthy in this respect since they both incorporate the RTW into the respective sharing agreement. Similarly the UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes has the declared aim of providing access to drinking water and sanitation for everyone.<sup>250</sup>

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<sup>244</sup> McCaffrey, see note 93, 100 et seq. On the issue of international water law in general see id., *The Law of International Watercourses*, 2007.

<sup>245</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, not yet entered into force, reprinted in *ILM* 36 (1997), 700 et seq. The Convention was based on a draft prepared by the ILC (cf. ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereto, 1994, GAOR 49th Sess., Suppl. 10, 195 et seq.) and is a framework agreement which was adopted by A/RES/51/229 of 21 May 1997. It has so far not entered into force but large parts of its provisions seem to reflect customary law in the field of the law of international watercourses, S.C. McCaffrey, “International Watercourses”, *Max Planck Encyclopedia of Public International Law*, see note 82, para. 10.

<sup>246</sup> Watercourse Convention, see note 245, article 10 (2).

<sup>247</sup> McCaffrey, see note 93, 100 et seq.

<sup>248</sup> See III. 1. b. aa. above.

<sup>249</sup> Charte des Eaux du Fleuve Sénégal, Senegal River Charter, see note 109; La Charte de L'eau du Bassin Niger, Niger River Charter, see note 111.

<sup>250</sup> UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, reprinted in: *ILM* 38 (1999), 1708, article 6 (1).

Moreover, under the title “international obligations” the CESCR has also taken up this issue in its General Comment No. 15 in which it instructs states to “ensure that the right to water is given due attention in international agreements ...”.<sup>251</sup> Furthermore, it calls on states “to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries ...” and that “[a]ny activities taken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”<sup>252</sup>

In sum, being a human right, the RTWS cannot be invoked between co-riparians. Thus it does not give one state (or respectively the individuals of that state) the right to claim a sufficient quality and quantity of water from another state. Nevertheless, the RTWS is making its way into modern international water law, thereby increasing its impact on inter-state relations.

## V. Conclusion

The RTWS is clearly guaranteed under international human rights law. It is primarily rooted in the ICESCR but also finds support in various other international (legal) documents, as shown above.<sup>253</sup>

A new development, however, is the increasing attention that has lately been accorded to this issue, alongside the new frequency with which it is being addressed.<sup>254</sup> While the RTWS was barely an issue until the breakthrough of General Comment No. 15 in 2002, it has managed to hold something of a place on national and international agendas ever since.

Yet a new impulse was recently provided by A/RES/64/929 which was closely followed by HRC Resolution 15/9 of 6 October 2010.<sup>255</sup> For the time being one can only speculate about the impact of these

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<sup>251</sup> CESCR, General Comment No. 15, see note 37, para. 35.

<sup>252</sup> *Id.*, see note 37, para. 31.

<sup>253</sup> As already stated by Rudolf, see note 26, 42.

<sup>254</sup> See e.g. International Year of Sanitation, see note 50; Doc. A/HRC/15/31, see note 227; Doc. A/RES/64/292, see note 6; Doc. A/HRC/RES/15/9, see note 56; Doc. E/C.12/2010/1, see note 8; Doc. A/HRC/16/L.4, see note 52; Council of Europe, Parliamentary Assembly Resolution on Water, Resolution 1809 of 15 April 2011.

<sup>255</sup> Dubreil, see note 129.

resolutions. In the light of HRC Resolution 16/L.4 of 18 March 2011,<sup>256</sup> which renewed Ms. Albuquerque's mandate as an independent expert,<sup>257</sup> it would certainly go too far to assume that these resolutions should have marked the end of a process regarding the RTWS on UN level.<sup>258</sup> Whether they will conversely speed up implementation efforts can at present not be foreseen. With regard to the 884 million people lacking access to drinking water and 2,6 billion lacking access to sanitation this can, however, only be hoped. The renewal of Ms. Albuquerque's mandate is welcomed since there are still a lot of unanswered questions surrounding the RTWS which impede its effective implementation.

First and foremost, the imbalance between the two components of the RTWS (RTW and RTS) needs to be adjusted. Even if the parameters of a RTS can for a great part be determined in analogy to General Comment No. 15 and recourse to the Sub-Commission Guidelines, they have so far not been clearly enough defined. There is no document comparable to General Comment No. 15 which exists for the RTS. Although the CESCR issued a Statement on the Right to Sanitation in November 2010<sup>259</sup> this is far from being comprehensive and certainly does not have the same authoritative weight as a General Comment. Also the question of the status of the RTWS remains unclear – can the RTWS be regarded as a right on its own? Closely related to this question is the debate spurred especially by NGOs some years ago about a human rights Convention codifying the RTWS.<sup>260</sup> Specifically, a binding treaty would provide the RTWS with a clear and firm legal basis.

Next to deciding the question of status, such a Convention would also underscore that states are genuinely committed towards implementing the RTWS. Nevertheless, this campaign needs to be treated

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<sup>256</sup> Doc. A/HRC/16/L.4, see note 52.

<sup>257</sup> *Ibid.*, para. 4.

<sup>258</sup> See, for instance, Furch, see note 49, 45.

<sup>259</sup> Doc. E/C.12/2010/1, see note 8.

<sup>260</sup> See for example: Blue Planet Project, "The Right to Water: The Campaign for a United Nations Treaty", available at <[www.blueplanetproject.net](http://www.blueplanetproject.net)>; Friends of the Right to Water, "Key Principles for an International Treaty on the Right to Water", 2005, available at <[www.blueplanetproject.net](http://www.blueplanetproject.net)>; Alliance Sud, "Why we need an International Water Convention", 2004, available at <<http://www.alliancesud.ch>>; Green Cross International, "Fundamental Principles for a Framework Convention on the Right to Water", 2005, available at the Peace Palace Library under <[www.ppl.nl/bibliographies/water/files/4648.pdf](http://www.ppl.nl/bibliographies/water/files/4648.pdf)>.

with caution.<sup>261</sup> The drafting of a human rights treaty has never been easy and its outcome is often not what was initially envisaged.<sup>262</sup> States are often very reluctant when it comes to legally binding obligations and a treaty could in the end be less precise than General Comment No. 15.<sup>263</sup> Whatever will happen, the implementation of the RTWS has to be expedited and strengthened. It is an undeniable fact that “the violation of the human right to clean water and sanitation is destroying human potential on an epic scale.”<sup>264</sup> States should thus stop merely expressing their concern when faced with the alarming figures and instead take action. In this respect General Assembly Resolution 64/292 certainly marks a historic step in the right direction, which needs further action.

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<sup>261</sup> Cf. Riedel, see note 91, 33-35; Rudolf, see note 26, 42.

<sup>262</sup> *Id.*, see note 91, 33-35.

<sup>263</sup> Rudolf, see note 26, 42.

<sup>264</sup> UNDP, Human Development Report 2006, see note 4, 1 et seq. (27).