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Article

Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach

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ABSTRACT

This article develops and discusses an altered conceptualization of the human right to water. Previously the right has been seen as derived from Article 11 of the International Covenant on Economic, Social and Cultural Rights and considered *not* to be part of international custom. The article's alternative conceptualization builds upon and alters these two existing assumptions. It conceptualizes the right on the one hand as a right derived from several (rather than one) treaty-based rights. On the other hand, it refutes the widespread assumption that the right is not part of international custom. It will be argued that the right to water's multi-faceted nature (relating to several civil-political and socio-economic rights such as life, health and an adequate standard of living) and its consideration under flexible approaches to the notion of custom support these conclusions. Taken together, the suggested 'hybrid' conceptualization offers several advantages in securing the right's practical implementation.

KEYWORDS: right to water, treaty law, customary law, legal derivation, reflective equilibrium, hybrid rights

1. INTRODUCTION

Few rights have kept international legal scholars as occupied over the past years as the human right to water.[1] Some have called it a right of a 'unique

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1 Out of many, some of the most important contributions include Anonymous, 'What Price for the Priceless? Implementing the Justiciability of the Right to Water' (2007) 120 *Harvard Law Review* 1067; Cahill, 'The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *The International Journal of Human Rights* 389; Kiefer and Brölmann, 'Beyond State Sovereignty: The Human Right to Water' (2005) 5 *Non-State Actors and International Law* 183; Langford, 'Ambition That Overleaps Itself? A Response to Stephan Tully's "Critique" of the General Comment on the Right to Water' (2006) 26 *Netherlands Quarterly of Human Rights* 433; Langford, 'Expectation of Plenty: Response to Stephan Tully' (2006) 26 *Netherlands Quarterly of Human Rights* 473; McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 *Georgetown*

status';[2] others have claimed that its status in international law remains 'unclear'.[3] At least in international politics, it is widely assumed that the right to water now exists as a human right.[4] Very little attention, however, has been dedicated to the important legal question of how exactly this could be so.[5]

This article fills this void by exploring different ways as to how a right to water could be conceptually understood in international law. First, the right could be seen as a derivative right and as such part of treaty law: a right that is inferred from another right which is explicitly accepted in international legal treaties. In this traditional account, the 'source right'[6] of the right to water is usually the right of an adequate standard of living (Article 11 of the International Covenant on Economic, Social and Cultural Rights[7] (ICESCR)). According to this view, the right to water simply stands in line with other rights listed in Article 11 of the ICESCR, such as the right to food, clothing and housing, which (unlike the right to water) are listed in Article 11 of the ICESCR explicitly. While the account I offer in this article accepts this reliance on Article 11 of the ICESCR, it suggests at the same time an alteration. As will be explained, the lack of an explicit treaty recognition allows us to view the right to water as—what I will call—an amalgamated derivative right, covering different elements of other accepted treaty law rights (rather than only one).

A second way to conceptualize the right to water is to emphasize its by now invigorated status as part of international custom. The customary law status of the right to water has in recent years certainly been steadily strengthened. The prevailing opinion in the scholarship, however, still assumes that the right to water does not yet form part of international custom, mainly due to the lack of consistent state practice

International Environmental Law Review 1; Murthy, 'The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy over Privatization' 2013 31 *Berkeley Journal of International Law* 89; Riedel and Rothen (eds), *The Human Right to Water* (2006); Thielbörger, *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (2013); Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23 *Netherlands Quarterly of Human Rights* 35; Tully, 'Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford' (2006) 24 *Netherlands Quarterly of Human Rights* 461; Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (2012).

2 Cahill, ibid.

3 Kirschner, 'The Human Right to Water and Sanitation' (2011) 15 *Max Planck Yearbook of United Nations Law* 445 at 486.

4 Out of many, see GA Res 64/292, The Human Right to Water and Sanitation, 28 July 2010, A/RES/64/292; HRC Res 15/9, Human Rights and Access to Safe Drinking Water and Sanitation, 30 September 2010, A/HRC/RES/15/9. See also EU High Representative Ashton, Declaration on Behalf of the EU to Commemorate the World Water Day, 22 March 2010, Doc 7810/10 (Press 72); Gorbachev, 'The Right to Water', *New York Times*, 17 July 2010, available at: www.nytimes.com/2010/07/17/opinion/17iht-edgorbachev.html [last accessed 27 January 2015].

5 Also the UN High Commissioner of Human Rights suggested that the question of the right's legal status requires further scrutiny, see for instance HRC, Annual Report of the High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and the Secretary-General, 16 August 2007, A/HRC/6/3 at para 21.

6 I avoid in this article two formulations that are also suitable, but might be confusing. First, on the one hand, 'parent(al) rights' usually refer to the rights of parents towards their children (for example, in educational terms); secondly, 'core rights' are too close to the concept of 'minimum core' as developed in particular in the arena of socio-economic rights to describe a minimum level of rights' protection that states must adhere to under all circumstances.

7 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

(*consuetudo*). In the account offered here, I argue that, while a consistent state practice is currently still the right's weakness, applying more flexible approaches to the notion of custom (in particular the model of custom as a reflective equilibrium as suggested by Anthea Roberts) may change our view. The much strengthened legal conviction (*opinio juris*) of states in favour of a right to water enables us today to understand the right as part of customary international law.

This article suggests that we should not reinvent the wheel or conjure up new modes of rights-creation, but alter the way we apply the two concepts of derivation from treaty and custom to the case of the right to water. It combines and develops both existing discourses on the right to water—one on treaty law, one on custom—and elaborates why an altered approach is the most fruitful path for the future of the right to water. It also emphasizes how these two recognitions of the right to water in treaty and custom are related: they do not stand separately from each other, but are rather mutually reinforcing.

To this end, identifying an appropriate and more comprehensive legal concept for the human right to water is not a purely academic exercise, but a means of 'cutting through' the considerable confusion surrounding the right to water's legal source. To continue to sweep the conceptual shortcomings of this increasingly discussed right under the carpet would, in the long run, undermine its legal credibility. For those who seek to promote and defend a comprehensive right to water, it is high time to define the more coherent and precise legal concept underlying it. This article should thereby be seen as an attempt to place legal 'flesh' on the bones of a right that to date has often carried more rhetorical than legal value.

2. THE STARTING POINT: THE 'OMITTED' HUMAN RIGHT TO WATER

Why is there a lack of clarity about the concept of a right to water in international law in the first place, and why does its conceptualization need more attention?

The primary problem stems from the 1960s when the International Covenant on Civil and Political Rights (ICCPR)[8] and the ICESCR—the two most important documents of substantive human rights treaty law on the global scale—were drafted. The right to water is, perhaps surprisingly, not mentioned in either of these Covenants.

Two contrasting conclusions could be drawn from this fact. The omission could either be seen as the expression of a deliberate silence[9] expressing the states' (unspoken) consensus that there should not be such a thing as a human right to water; or, alternatively, as a negligent silence[10] meaning that the human right to water was simply forgotten at the time of drafting the two Covenants. The evidence in the preparatory work (*travaux préparatoires*) of the two Covenants and the circumstances of the drafting processes is ambivalent.

8 International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

9 Tully, supra n 1 at 37–8.

10 Cf. Craven, 'Some Thoughts on the Emergent Right to Water' in Riedel and Rothen, supra n 1 at 37; Langford supra n 1 at 439.

While a global *food* crisis was foreseen already in the middle of the twentieth century (when the drafting processes of the ICESCR and the ICCPR started), drinking water was rather considered, by international actors in general and the drafting committee of the ICESCR in particular,[11] to be a plentiful and renewable natural resource. A need to protect the human right of access to water did not seem as pressing at the time as the need to fight global hunger by the means of establishing a human right to food. This line of argument suggests interpreting the omission of the right to water as a negligent silence.

There is also, however, some contrary evidence to such an assumption. During the drafting process of the ICESCR, a proposal to include a human right to water was in fact brought up and briefly discussed.[12] However, the proposal did not eventually find its way into the final draft of the ICESCR. This must be taken as a hint towards a more deliberate silence—that the right to water was omitted on purpose.

Exactly this ambiguity within the relevant international treaty law and the conflicting evidence in the drafting process of the Covenants have made the right to water a true conundrum in international law. Most writers agree on the existence of such a right; yet its explicit legal basis remains unclear.

3. THE RIGHT TO WATER AS PART OF TREATY LAW

A. Current Approach to the Right to Water as Part of Treaty Law

The approach that can by now be considered the prevailing opinion[13] in legal scholarship is to see the right to water as a derivative treaty right. The technique of legal derivation is not much examined from a conceptual perspective;[14] it must, however, in essence be understood as the process by which one right is inferred from another.[15] From a conceptual perspective, the 'derivative right' (the right that is created by the means of derivation) must logically share the legal features of its 'source right'

11 Riedel, 'The Human Right to Water and General Comment No 15 of the CESCR' in Riedel and Rothen, supra n 1 at 19. Some authors explain the non-mentioning of water also by arguing that food (as mentioned in Article 11 ICESCR) was meant to include liquid food, such as water, see Galtung, *Lawyers or Liars? Is World Hunger Suable in Court?* (2011) at 141.

12 Craven, *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995) at 25; Riedel, 'The Human Right to Water' in Dicke et al. (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005) at 595, n 34; Riedel, supra n 11 at 24 (n 19).

13 See, for example, Bulto, 'The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discover?' (2011) 12 *Melbourne Journal of International Law* 290 at 314; Cavallo, 'The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?' (2012) 3 *Pace International Law Review Online Companion* 136 at 199–200; McGraw, 'Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence' (2010–11) 8 *Loyola University Chicago International law Review* 127 at 133; Murthy, supra n 1 at 109 and 147.

14 A noteworthy exception is Sinnott-Armstrong, 'Two Ways to Derive Implied Constitutional Rights' in Goldsworthy and Campbell (eds), *Legal Interpretation in Democratic States* (2002) at 231, focusing on legal derivation in (US and Australian) constitutional law. See also Thielbörger, supra n 1 at 109–11.

15 Cahill, supra n 1 at 391; Thielbörger, supra n 1 at 109. See also with regard to the right to water, Bulto, supra n 13 at 304-5; Salman and McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (2004) at 56–8. See also on creating new and extending existing rights on the basis of human dignity, McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *The European Journal of International Law* 655 at 721–2; and on the general legitimacy of derivation from a national law perspective, Sinnott-Armstrong, supra n 14.

(the right it is inferred from).[16] In this way, civil and political rights can only create civil and political rights, whereas socio-economic rights can only generate socio-economic rights.[17] Legal derivation is in some ways a natural part of treaty interpretation that the broadly worded and non-exclusive language of human rights often makes necessary.

The Committee on Economic, Social and Cultural Rights ('ESCR-Committee'), the body of international independent experts tasked with monitoring the implementation of the ICESCR by State Parties[18] as well with developing general interpretations of the ICESCR's provisions (General Comments),[19] declared in 2002 in its General Comment No 15 (on '[t]he right to water')[20] that such a right should be derived from Article 11 of the ICESCR, the right to an adequate standard of living.[21] The wording of Article 11 of the ICESCR—that States Parties recognized an adequate standard of living for everyone '*including* adequate food, clothing and housing'[22]—was to be understood in a way that such a list was not exhaustive, but rather exemplary.[23]

While the ESCR-Committee mentions links to other human rights—in particular, the right to the highest attainable standard of health (Article 12 ICESCR), the right to housing and adequate food (Article 11 ICESCR), the right to life and human dignity[24]—it is clear from the wording of General Comment No 15 that the Committee considered the right to an adequate standard of living as the source right for the right to water. The other rights are rather mentioned as complementary or supporting sources. The Committee concluded that the right to water 'falls within the category of guarantees essential for securing an adequate standard of living'.[25] This understanding of the right to water is further affirmed in the recent United Nations (UN) Human Rights Council (HRC) Resolution 15/9 on '[h]uman rights access to safe drinking water and sanitation' of 30 September 2010. Therein the HRC affirmed 'that the human right to safe drinking water and sanitation is "*derived from*" the right to an adequate standard of living, while being (only) "*inextricably related to*" the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity'.[26]

16 Thielbörger, supra n 1 at 169.

17 Ibid. at 69.

18 Economic and Social Council (ECOSOC) Res 1985/17, 28 May 1985, E/RES/1985/17; Riedel, 'Committee on Economic, Social and Cultural Rights (CESCR)' in Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn) at para 4.

19 See ECOSOC supra n 18 at para (f); Kälin and Künzli, *The Law of International Human Rights Protection* (2009) at 211; Riedel, supra n 18 at paras 11–4. The Committee has so far published 21 General Comments, available at: www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx [last accessed 27 January 2015].

20 ESCR-Committee, General Comment No 15: The right to water (arts 11 and 12) 11 - 29 November 2002, E/C.12/2002/11 (2003).

21 Ibid. at para 3.

22 Emphasis added.

23 Ibid. at para 3, sentence 2; cf. also Langford, supra n 1 at 437–8.

24 ESCR-Committee, supra n 20 at para 3, sentences 5 and 6. On the issue of human dignity as part of the right to water, see also Thielbörger, supra n 1 at 112–3 and 122; Thielbörger, 'Wasser und Würde' in Gröschner, Kapust and Lembcke (eds), *Wörterbuch der Würde* (2013) at 324.

25 ESCR-Committee, supra n 24, sentence 3.

26 HRC Res 15/9, 'Human Rights and Access to Safe Drinking Water and Sanitation', 30 September 2010, A/HRC/RES/15/9 at para 3 (emphasis added).

Much has been said about the validity or non-validity of legal derivation as carried out by General Comment No 15. Some have heavily criticized the ESCR-Committee for creating an entirely new right.[27] Going back to the warning expressed by Philip Alston 30 years ago against conjuring up an ever-expanding list of new human rights,[28] some authors have cautioned against reading the right to water into Article 11 of the ICESCR lest this opens the floodgates for other less important rights.[29] Furthermore, the Committee has been accused of exceeding its interpretative—non-legislative—competence,[30] as Committee members lack the capacity to create international law: a capacity that lies with states alone (as Article 38 Statute of the International Court of Justice (ICJ Statute)[31] clearly evidences). It has been argued that an amendment of the ICESCR according to the procedure laid out in Article 29 of the ICESCR would have been needed to alter the Covenant[32] and that Article 11 of the ICESCR should not have been the sole basis for the legal derivation.[33] However, these concerns were mainly raised by academics and other observers: states that were criticized for having violated the human right to water after the adoption of General Comment No 15 have not denied that the right is inherent in the provisions of the ICESCR.[34]

These critiques of General Comment No 15 have been fervently rejected by others.[35] These voices in the literature have argued that the ESCR-Committee fulfilled precisely its task by developing a fuller appreciation of State Parties' obligations under the ICESCR.[36] General Comments, so it is argued, are the (only) suitable source for such an 'authoritative' interpretation of the Covenant.[37] Authors have pointed out that, while the explicitly mentioned facets of an adequate standard of living are of utmost importance to the realization of that right, access to water is equally vital.[38] Treaty interpretation should involve, so it is argued, understanding a treaty in

27 Dennis and 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?' (2004) 98 *American Journal of International Law* 462 at 494–9; Tully, supra n 1 (2005) at 37.

28 Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607 at 607.

29 Tully, supra n 1 (2005) at 37, comparing the right to water to a right to electricity, postal service or accessing the Internet. See on the latter most recently, Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights Law Review* 175.

30 Tully, supra n 1 (2005) at 35, referring to Dennis and Stewart, supra n 27 at 462.

31 Statute of the International Court of Justice 1945, 33 UNTS 993.

32 Tully, supra n 1 (2005) at 35.

33 Tully, supra n 1 (2006) at 461.

34 Bulto, supra n 13 at 306; Langford and King, 'Committee on Economic, Social and Cultural Rights' in Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Economic Law* (2008) at 509–14. Bulto also remarks that the ESCR-Committee has taken this silence of states as indicative of their tacit assent to the right to water; Bulto himself, however, remains sceptical about this conclusion due to the non-binding nature of the Committee's actions and the states' knowledge thereof.

35 Bulto, supra n 13 at 300–3; Langford, supra n 1 (both articles).

36 Cf. ECOSOC Res 1990/45, 25 May 1990, E/RES/1990/45 at para 10.

37 Craven, supra n 12 at 91.

38 Khalfan and Kiefer, 'The Human Right to Water and Sanitation: Legal Basis, Practical Rationale and Definition', 26 March 2008, at 2, available at: www.wsscc.org/sites/default/files/publications/cohre_legal_basis_for_right_to_water_and_sanitation_2008.pdf [last accessed 27 January 2015].

today's conditions and circumstances rather than in those of the time of its genesis.[39] In this way, the broad wording of human rights implies that they are evolutionary in nature so that legal derivation is just a natural part of treaty interpretation.

On a conceptual level, the problem at hand is where the line between (legitimate) treaty interpretation and (illegitimate) creation of a new right can be drawn. Generally speaking, it appears appropriate to have this line determined by the gravity and importance the derived right has for the realization of the source right (as this was the right that states had agreed upon in the first place). If a derivative right is a *conditio sine qua non* for the realization of the source right, there can be no objection to the derivative right's creation; otherwise the recognition of the source right itself would become void (I call this 'indispensable derivation').[40] An indispensable derivation must be distinguished from a scenario where it is merely favourable for the realization of the source right for that right to be supplemented by another right or where the underpinning justification of the source right would be strengthened by another derivative right (I call this 'favourable derivation').[41] In such cases, engaging in the practice of legal derivation is much more problematic, allowing 'quasi-judges'[42] to more easily exceed their mandates. The principal difference from an indispensable derivation is that in the case of a favourable derivation there are several imaginable ways in which the source right can meaningfully exist. Creating a derivative right might be one option that maximizes the realization of the source right. However, it is not the task of the ESCR-Committee to decide whether the right should be realized in one way or another. Rather, such decision—of how a source right may best be achieved—remains in the hands of the states, which have agreed upon these rights in the first place and are the ones responsible for their realization.

To what extent then can a right to water be derived from the right to an adequate standard of living? The answer can be taken directly from the language of the Committee in General Comment No 15 itself, which calls the right to water a prerequisite and fundamental condition for the fulfilment of Article 11 of the ICESR;[43] the right to an adequate standard simply cannot be achieved without access to water. If one imagines a life without sufficient or safe access to water for drinking, preparing food or cleaning oneself—how could such life be described as a life meeting a 'minimum', not to speak of an 'adequate' standard of living? In this way, the Committee has performed an indispensable derivation from Article 11 of the ICESCR: a

39 Kirschner, supra n 3 at 459.

40 Sinnott-Armstrong, supra n 14 at 233, calls a very similar way of deriving constitutional rights 'necessary condition derivation': a right is inferred because without its derivation the source right would become 'less meaningful or secure'.

41 Sinnott-Armstrong, supra n 14 at 236, calls a similar (but at the same time different) way of deriving constitutional rights 'best justification derivation': an underlying right or principle that provides the best or most coherent justification of other accepted rights.

42 Alston, 'The Committee on Economical, Social and Cultural Rights' in Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992) at 490; Salman and McInerney-Lankford, supra n 15 at 39. See also regarding the HRC, Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2013) at para 1.39; Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005) at 668.

43 ESCR-Committee supra n 20 at paras 1 (the right to water as 'a prerequisite for the realization of other human rights') and 3 ('one of the most fundamental conditions for survival').

derivation that does not involve an illegitimate 'stretching' of the Committee's mandate, but is a natural part of necessary treaty interpretation.

B. Altered Approach to the Right to Water as Part of Treaty Law

Deriving the right to water from other human rights was legitimate—however, was the right to an adequate standard of living the proper right from which the right to water should be derived? I suggest understanding the right to water as derived from three source rights (rather than only one). I call this an amalgamated derivative approach: a right is derived from different treaty-based rights.[44]

To identify other crucial human rights elements combined in the right to water, General Comment No 15 is, again, an appropriate starting point.[45] According to General Comment No 15, the right to water entitles everyone to 'sufficient, safe, acceptable, physically accessible and affordable' water for personal and domestic use.[46] These are criteria the ESCR-Committee regularly employs in its General Comments when defining the normative content of socio-economic rights.[47] These five attributes—sufficient, safe, acceptable, physically accessible and affordable—closely correspond with the three main characteristics of the normative content of the right developed in the General Comment: availability, quality and accessibility.[48] These three characteristics indicate exactly which human rights claims the right to water in fact unites: claims relating to the right to life; claims relating to the right to the highest attainable standard of health; and claims relating to an adequate standard of living.

First, the grossest offence violating the right to water is human death caused through the complete denial of access to water. The link between life and water could not be more apparent and crucial: human life without basic access to water is simply unthinkable. Thus, a human right to water certainly includes essential human rights claims that stem from the right to life (Article 6 ICCPR). General Comment No 15 mirrors this strong link in the criterion of 'availability' (in some ways the nucleus of the right to water). Before any other questions like quality or accessibility even arise, drinking water must be available in sufficient quantities to sustain human life. As the right's legal nature is often associated mainly with an adequate standard of living (Article 11 ICESCR), the strong link of the right to water to the right to life has often been underrated in recent academic debates;[49] however, any derivation of the right to water that does not emphasize the right to life is incomplete.

44 I have previously called for a 'more integrated approach' to the derivation of the human right to water from civil–political and socio-economic rights, see at Thielbörger, supra n 1 at 112–9.

45 While General Comment No 15 is not a legally binding document *per se*, the therein suggested structure and content of the right is coherent and balanced. Thus, I see no harm in using the General Comment as a tool to identify those elements that the right covers.

46 ESCR-Committee supra n 20 at para 2.

47 For example, ESCR-Committee, General Comment No 4: The right to adequate housing (art. 11 (1)), 1991, E/1992/23, reprinted in HRI/GEN/1/Rev.9 (Vol I) (2008), 11 at para 8; ESCR-Committee, General Comment No 12: The right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5 at paras 7–13; ESCR-Committee, General Comment No 13: The right to education (art. 13), 8 December 1999, E/C.12/1999/10 at para 6.

48 ESCR-Committee supra n 20 at para 12; Thielbörger, supra n 1 at 112.

49 Notable exceptions include Gleick, 'The Human Right to Water' (1998) 1 *Water Policy* 487 at 491–3; Laskowski, *Das Menschenrecht auf Wasser* (2010) at 158–61; McCaffrey, supra n 1 at 9-11.

Secondly, General Comment No 15 furthermore refers to an elevated 'quality' that water must meet. Water must be safe, thus 'free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health' and additionally acceptable in colour, odour and taste.[50] The quality element to which the ESCR-Committee refers, links the right to water to the right of the highest attainable standard of health (Article 12 ICESCR). Already in General Comment No 14, the direct predecessor to the General Comment dedicated to water, the ESCR-Committee had emphasized many important links between water and health.[51] The fact that the right to water was not mentioned directly in paragraph 3 of General Comment No 14 (the paragraph which outlines the human rights relating to human health) must simply be explained by the fact that the recognition of the right to water through the ESCR-Committee was, at the time, yet to come.

Thirdly, the ESCR-Committee proscribes not only water's 'availability' and 'quality', but also its 'accessibility'. According to the ESCR-Committee, accessibility has two elements: it means both physical and economic accessibility.[52] Physical accessibility implies that water must be within physical reach for each part of the population and in the immediate vicinity of each household; economic accessibility requires water to be affordable for each household.[53] This accessibility element speaks directly to the third source right of the right to water: the right to an adequate standard of living (Article 11 ICESCR). With regard to physical accessibility, the ESCR-Committee had recognized the close link between housing (as explicitly recognized in Article 11 ICESCR) and water in an earlier General Comment.[54] This close connection was also confirmed by the UN Special Rapporteur on adequate housing.[55] With regard to economical accessibility, access to water would impede the realization of other Covenant rights if, for example, paying the water bill consumes too large a part of the overall household income.[56] The right to water is thus violated if the costs of accessing drinking water constrain a household in a way that the realization of other rights is severely impeded or entirely hindered.

Altogether, we have now identified three specific facets of the right to water rather than only one: the right to life, constituting the right's core link to ensuring human survival; the right to the highest attainable standard of health, establishing the necessary water quality to protect human well-being, and the right to an adequate standard

50 ESCR-Committee supra n 20 at para 12(b). For an extensive account on the requirement of water quality, see also World Health Organization, *Guidelines for Drinking-Water Quality* (2011).

51 ESCR-Committee, General Comment No 14: The right to the highest attainable standard of health (art. 12), 11 May 2000, E/C.12/2000/4 at paras 4, 11, 12(a), 12(b), 12(d), 15, 34, 36, 40, 43(c), 51 and 65.

52 The third element of accessibility as outlined by General Comment No 15, non-discrimination, is equally important, but does not help identifying the legal sources of the right to water.

53 ESCR-Committee, General Comment No 15, supra n 20 at paras 12 (c)(i) and (ii).

54 ESCR-Committee, General Comment No 4, supra n 47 at para 8(b) states: 'An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to … safe drinking water.'

55 See, for instance, Kothari, Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, 8 March 2004, E/CN.4/2004/48 at para 4.

56 UN Development Programme, *Human Development Report*, 2006, at 66 ('One rule of thumb is that no household should be spending more than 3% of its income on water and sanitation'), available at: hdr.undp.org/en/content/human-development-report-2006 [last accessed 8 April 2015].

of living, dealing with adequate accessibility, both physical and economic. The synthesis of these elements suggests an amalgamated right—a form of threefold derivation creating an amalgamated right rather than derivation that focuses only on the right to an adequate standard of living alone. We will see in the last part of this article the important practical advantages such an altered approach could bring.

4. THE RIGHT TO WATER AS PART OF CUSTOMARY LAW

A. Current Approach to the Right to Water as Part of Customary Law

According to Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), international custom requires two distinct elements: a general practice (*consuetudo*) and the conviction that this practice is accepted as law (*opinio juris sive necessitatis*). While the differentiation between the one and the other can be difficult at times, I assume in this article that state practice mainly corresponds with a state's behaviour (be it action or inaction).[57] *Opinio juris,* however, is evidenced mainly by states' public statements (declarations, etc) reflecting a belief to be legally bound (even if no such treaty obligation exists).[58] To show custom, multiple evidence must usually be given; no single incident can create custom, as this would result in 'instant custom':[59] a notion the ICJ has explicitly rejected on several instances.[60] Instead, the creation of custom is better understood as an evolutionary process.

Some authors have emphasized the more important role of state practice, whereas others focus on the essential role of *opinio juris*. Anthea Roberts has called these approaches 'traditional' and 'modern' forms of custom.[61] Following Anthea Roberts' distinction, traditional custom puts an emphasis on a general, consistent state practice that is, only in a second step, motivated by a sense of legal obligation. The ICJ has supported such an approach for instance in its *North Sea Continental Shelf* case[62] and in its *Right of Passage over Indian Territory* case.[63] Custom is primarily inferred

57 D'Amato, *The Concept of Custom in International Law* (1971) at 89–90 and 160; Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757 at 757. See also Wood and Sender, 'State Practice' in Wolfrum, supra n 18 at paras 6–20.

58 D'Amato, ibid. at 89–90 and 160; Roberts, ibid. at 757; but see Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Yearbook of International Law* 1 at 35; Treves, 'Customary International Law' in Wolfrum, supra n 18 at para 26 (citing official statements as evidence of state practice).

59 Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23 at 23–48; D'Amato, supra n 57 at 58; but see Akehurst, supra n 58 at 12–19 and 31–42; Shaw, *International Law*, 6th edn (2008) at 78–9.

60 *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* Judgment, ICJ Reports 1969, 3 at para 73; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, 14 at para 184.

61 Roberts, supra n 57 at 758 (and all through her essay). What Roberts calls 'modern' custom is very similar to what before her was termed 'contemporary' custom (Stein, 'Remarks on Custom' in Cassese and Weiler (eds), *Change and Stability in International Law-Making* (1988) at 12–13 or 'new' custom (Bradley and Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815 at 838).

62 *North Sea Continental Shelf* case, supra n 60 at 44–5 (paras 77–81).

63 *Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment, ICJ Reports 1960, 6 at 42–3.

from observed state practice;[64] *opinio juris* is a secondary element, inferior to the element of state practice. Modern custom, to the contrary, emphasizes *opinio juris* as the decisive element for identifying custom. It starts with examining general statements of rules, rather than specific practices.[65] This approach stresses rather the deduction from statements instead of the induction of state behaviour.[66] Whether the content of these non-legally binding statements evolves into rules of custom depends also on various other factors surrounding and following these statements, for example, the number of supportive states and the obligatory or recommendatory wording of the resolutions.[67] State practice takes a secondary role in this approach. A prominent example from the ICJ's case law is its argumentation in the *Nicaragua* case[68] in which the Court heavily relied on a General Assembly (GA) resolution[69] to argue in favour of a customary ban on the use of force and the principle of non-intervention, making few references to state practice.[70]

These two approaches have both been extensively criticized.[71] The essence of the criticism is that they both over-emphasize one element of custom while neglecting the other. However, despite these two different focuses, most authors would assume that both elements, *opinio juris* and state practice, are equally indispensable and must both be clearly identifiable, before we can claim a new norm of customary law has arisen.[72]

This is exactly the reason why the authors who have so far explicitly assessed the status of the right to water in customary law have concluded that the right has not yet materialized as custom: in particular, it is often argued that the non-proven state practice would hinder such an assumption.[73] While, for example, Philip Alston

64 Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 *Harvard Law Review* 539 at 566–70; Schwarzenberger, *The Inductive Approach to International Law* (1965) at 33; for more contemporary assessments, see Chodosh, 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1991) 26 *Texas International Law Journal* 87 at 102; Schachter, *International Law in Theory and Practice* (1991) at 35–6.

65 See on this Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988–9) 12 *Australian Yearbook of International Law* 82; Cheng, supra n 59.

66 De Schutter, International Human Rights Law, 2nd edn (2014) at 64.

67 Charney, 'Universal International Law' (1993) 87 *American Journal of International Law* 529 at 544–5. See also Akehurst, supra n 58 at 6–7; Roberts, supra n 57 at 758.

68 *Nicaragua* case, supra n 60 at 93–4 (para 195).

69 GA Res 3314 (XXIX), Definition of Aggression, 14 December 1974, A/RES/3314 (XXIX).

70 See, for instance, GA Res 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the UN, 24 October 1970, A/RES/2625 (XXV).

71 See, for example, Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 *German Yearbook of International Law* 198 at 216-31; Kelly, 'The Twilight of Customary International Law' (2000) 40 *Virginia Journal of International Law* 449 at 451; Simma and Alston, supra n 65 at 88 and 96; Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' (1996) 39 *German Yearbook of International Law* 198 at 216–31; similarly, Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (1999) at 156-62; Charney, supra n 67 at 543; D'Amato, supra n 57 at 56–66; Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1 at 6.

72 Crawford, *Brownlie's Principles of Public International Law*, 8th edn (2012) at 23; Shaw, supra n 59 at 72; Treves, supra n 58 at para 8.

73 Rudolf, 'Menschenrecht Wasser: Herleitung, Inhalt, Bedeutung Probleme' in Rudolf (ed.), *Menschenrecht Wasser?* (2007) at 34. See also Dubreuil, *The Right to Water: From Concept to Implementation*, 2006, at 7,

argued in the middle of the 2000s for Millennium Development Goal (MDG) No 7 (*inter alia* to halve the population living in global thirst by 2015)[74] to be a 'strong candidate' as customary law,[75] this claim was heavily contested.[76] The prevailing opinion in the legal literature until today appears to be that the right to water has not reached customary law status.

B. Altered Approach to the Right to Water as Customary Law

I question this opinion on two grounds: one being of a conceptual and one being of a factual nature.

(i) Conceptual consideration

Starting with the conceptual objection, in recent times convincing alternatives have been suggested to the rigid and dichotomous approaches to the notion of custom depicted above. These more flexible alternative approaches have not yet been sufficiently considered for the specific case of the right to water, and doing so will lead us to quite different conclusions.

Several authors have argued for more flexible and balanced approaches. Some have compared the two requirements of custom to a 'sliding scale':[77] if one element, either state practice or *opinio juris*, is weak, it can be made up for by the other. In an extreme scenario, each element could even become entirely dispensable (as long as the other is sufficiently strong).[78] In a slightly different and more nuanced manner, Anthea Roberts has suggested to that the interplay of state practice and *opinio juris* should be understood as a—what she calls—(Rawlsian) 'reflective equilibrium' emphasizing that any observation of state practice necessarily involves interpretation.[79] Where several interpretations of state practice are possible, a strong *opinio juris* takes the central role in interpreting the state practice in question.[80]

available at: www.worldwatercouncil.org/fileadmin/wwc/Library/RightToWater_FinalText_Cover.pdf [last accessed 27 January 2015]; Kirschner, supra n 3 at 46. Cavallo, supra n 13 at 200, calls the customary right to water *in statu nascendi*.

74 GA Res 55/2, UN Millennium Declaration, 8 September 2000, A/RES/55/2 at para 19.

75 Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27 *Human Rights Quarterly* 755 at 774.

76 Gualtieri, 'Right to Food, Food Security and Food Aid Under International Law, or the Limits of a Right-Based Approach' (2013) 1 *Future of Food: Journal on Food, Agriculture and Society* 18 at 22 ('no substantial evidence of a solid *opinion iuris* [*sic*]'). See also UN Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach*, 2008, at 3 ('generally viewed as political goals'), available at: www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf [last accessed 27 January 2015]; Azzam, 'Reflections on Human Rights Approaches to Implementing the Millennium Development Goals' (2005) 2 *SUR: International Journal on International Law* 23 at 26; Pleuger, 'United Nations, Millennium Declaration' in Wolfrum, supra n 18 at para 4.

77 De Schutter, supra n 66 at 66; Kirgis, 'Custom on a Sliding Scale' (1987) 81 *American Journal of International Law* 146; Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85. For the main reasons of critique such an approach tries to create the 'right' results, see Simma and Alston, supra n 65 at 83.

78 Roberts criticizes this facet of the sliding scale approach, see Roberts, supra n 57 at 789.

79 Ibid. at 774.

80 Ibid. at 774–9.

Why should we follow such a flexible model when analysing the customary status of a potential human right? It is clear at least that we need to identify the reasons for relying on such a theory in a general manner before applying it to the example of the right to water specifically. Otherwise, we would end up with a tautological argument: a theory of custom promoted simply because the outcome for the right to water is the most favourable.

On the one hand, traditional custom, with its strong focus on practice, allows custom to become just another—in the words of Martti Koskenniemi—apology for state power in international law.[81] Other potentially relevant factors, such as the action of international organizations or non-state actors, remain entirely outside of this assessment. By focusing all too much on state practice, and thus making it hard for change in international norms to occur, traditional custom is also unreflective of the reality that customary law is by its nature a fluid source of law.[82] It often simply means the perpetuation of the *status quo*. Given the increasing number of states, and the occurrence of ever more frequent global problems requiring international legal answers, traditional custom appears to be an inappropriate fit for this new global reality.[83]

On the other hand, modern custom with its focus on *opinio juris* is prone to mix up *lex ferenda* (what the law should be) and *lex lata* (the law as it exists)—or even disguise the former as the latter. It runs the danger of creating—again in Koskenniemi's words—utopian norms that may be morally 'correct' in the eyes of their creators, but at the same time unable to regulate real global conditions.[84] Modern custom in this sense runs the risk of legal and political abuse[85] and even the potential erosion of customary law as a legitimate source of international law.

Keeping this in mind speaks in favour of an approach that adequately addresses *both* elements without ranking one considerably over the other. But what then specifically speaks in favour of Anthea Roberts' theory of a reflective equilibrium, rather than the model of a sliding scale as suggested by Frederic Kirgis, John Tasouilas and others?

By contrast with the sliding scale, Anthea Roberts' reflective equilibrium approach attaches very distinct roles to 'practice' and '*opinio juris*'. Thus, rather than weighing them against each other—an exercise that has made international law somewhat indeterminate and malleable[86]—it gives both elements a distinct and more fitted place in the process of identifying new custom. Practice is the starting point: without it, there can be no custom. In this way, the argument in Anthea Roberts' theory is, and must be, partly descriptive in nature: it looks at developments of state practice such as changing public policies or recent national court decisions. The theory of custom suggested here allows us in a second normative step to choose a specific interpretation of that practice, namely the one most in line with an also expressed *opinio*

81 Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) at 2; Roberts, supra n 57 at 773.

82 Roberts, supra n 57 at 784.

83 Charney, supra n 67 at 543.

84 Koskenniemi, supra n 81 at 2; Roberts, supra n 57 at 760 and 774.

85 Ibid. at 759.

86 Kelly, supra n 71 at 451; Roberts, supra n 57 at 770.

juris. This incorporates a more expansive understanding of the substantive aims of international law, such as the protection of human rights when identifying custom.[87] While one might critique the inclusion of such value judgments in the process of identifying custom as somewhat arbitrary and open for abuse, this critique is much less applicable where these value judgments have been accepted by a majority of states (as in the case of human rights).[88] By contrast with the theory of a sliding scale, both elements remain indispensable for custom in Roberts' model. While in extreme cases, under the sliding scale model the total lack of the one could be made up for by the abundance of the other, this is not possible in Roberts' model: only where some state practice is present, is there room for interpretation of that practice. This way, the model of a sliding scale must also be confronted with the critique of apology (like the critique expressed above against traditional custom) or utopia (like that expressed against modern custom).[89] A sliding scale model would simply allow us to choose the theory—traditional or modern—which we deem more desirable in a given situation. It is thus a far more normative approach than the one here advocated. Anthea Roberts' approach to the contrary combines and balances descriptive accuracy and normative appeal to explain and justify the formation of new international law norms.[90] This is the main reason why Roberts' account of a reflective equilibrium is so compelling.

Turning to the specific case of the right to water, the prevailing assumption that the right is not customary law (yet) places a strong emphasis on the element of state practice. It does not sufficiently take into account the potential interplay of both elements, as, in particular, the reflective equilibrium theory for which I have argued above would suggest. If we follow Anthea Roberts' conceptual model of a reflective equilibrium, as I suggest here, state practice would not become irrelevant, but a strong *opinio juris* would become crucial under the condition that state practice is strong enough to allow for different interpretations.

Thus, to reject the right to water as part of customary international law solely on the grounds that a sufficiently uniform state practice is not (yet) identifiable is an incomplete assessment. Under more flexible readings of the idea of custom, the analysis of the right's customary law status cannot stop at such a rather simplified analysis of state practice. The analysis must go deeper into recent events relating to the right to water.

(ii) Factual consideration

This in turn leads directly to the second part of my argument. If we follow Anthea Roberts' notion of a (Rawlsian) reflective equilibrium, what factual reasons could allow us to see the right to water differently from currently prevailing opinion, as part of international customary law? Starting with the element of state practice, one must acknowledge that things are changing noticeably with regard to states' practical implementation of the right to water.

87 Roberts, supra n 57 at 789.
88 Ibid. at 789.
89 Ibid. at 773.
90 Ibid. at 760.

First, we have seen over the last years that more and more states have inserted provisions on the right to water into their laws, be it on the level of constitutional or ordinary law.[91] This inclusion of the right to water in constitutional or other legal texts indicates (at least potentially) state practice, assuming that states make this voluntary legal commitment to fulfil this self-proscribed legal commitment later on in their corresponding policies.

Secondly, the Special Rapporteur on the human right to safe drinking water and sanitation has identified in her work 'good practices' of different states (even if such identification of practices is always exemplary rather than comprehensive). She has, for instance, recently praised Namibia's national sanitation strategy, Kenya's water sector reform and Egypt's water loan system, just to name a few.[92] A variety of practices for the protection and promotion of the human right to water are already shared between different states.[93] It is also part of her mandate—renewed in 2011 for three more years[94] and generally extended even beyond that time in 2013[95]—to promote the sharing of good practices.[96] In this way, the uniformity of (good) state practice is feasibly growing.

Thirdly, the MDG No 7C (to halve the proportion of the population without sustainable access to safe drinking water and basic sanitation by 2015) was, regarding drinking water, already met by the international community in 2010.[97] According to the latest report on the fulfilment of the MDGs, over 2.3 billion more people gained access to an improved source of drinking water between 1990 and 2012.[98] Thus, while we may not find a uniform practice of states fulfilling obligations under the right to water, we do see a clear trend in this direction.

Significantly improving state practice in ensuring access to water (as shown above) can be interpreted in various ways. Only one of these interpretations is to assume that states do so because they feel legally bound by an emerged human right (rather than being only morally compelled). However, if we apply Anthea Roberts' approach of the reflective equilibrium, we would favour such an interpretation of state practice provided that we find a particular strong spelled-out *opinio juris* that would suggest exactly this interpretation.

I argue that such *opinio juris* has recently significantly evolved. Some cornerstones as evidence for such an *opinio juris* include the UN GA Resolution 64/292 of July 2010 on '[t]he human right to water and sanitation',[99] the HRC Resolution 15/9 on

91 For an overview, see *The Rights to Water and Sanitation in National Law*, at 7, available at: www.righttowater.info/progress-so-far/national-legislation-on-the-right-to-water/ [last accessed 27 January 2015].

92 De Albuquerque, *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation*, 2012, at 64, 65–6, and 89, respectively, available at: www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf [last accessed 27 January 2015].

93 Ibid. at 13.

94 HRC Res 16/2, The Human Right to Safe Drinking Water and Sanitation, 24 March 2011, A/HRC/RES/16/2 at para 4.

95 HRC Res 24/18, The Human Right to Safe Drinking Water and Sanitation, 27 September 2013, A/HRC/RES/24/18 at para 16.

96 HRC Res 7/22, Human Rights and Access to Safe Drinking Water and Sanitation, 28 March 2008, A/HRC/RES/7/22 at para 2a.

97 UN, *The Millennium Development Goals Report* (2014) at 44.

98 Ibid. at 44. Admittedly, the same can unfortunately not be said with regard to sanitation, see ibid. at 45.

99 GA Res 64/292, supra n 4.

'[h]uman rights and access to safe drinking water and sanitation' of September 2010[100] and the re-appointment of the Independent Expert as Special Rapporteur on the human right to safe drinking water and sanitation in April 2011.[101] Let us consider each of these events in turn.[102]

First, in July 2010 GA Resolution 64/292[103] recognized 'the right to safe and clean drinking water and sanitation as a human right essential for life and all human rights'. While GA resolutions are legally non-binding,[104] and states often vote on GA resolutions for political rather than legal reasons,[105] it is widely accepted that GA resolutions can have significant meaning for the identification of custom, in particular the identification of *opinio juris*.[106] Their suitability as evidence for identifying an *opinio juris* must thus be judged on a case-by-case basis.

In the case of GA Resolution 64/292, many states complained initially of the non-inclusive drafting process,[107] as the resolution was pushed through mainly by one state alone: Bolivia,[108] a government that was particularly opposed to the idea of water privatization due to its own bad experiences in this field.[109] Many suggestions, especially from European states,[110] were not taken into account.[111] Similarly, the inclusive so-called 'Geneva Process', as informally undertaken within the framework of

100 HRC Res 15/9, supra n 4.

101 HRC Res 16/2, supra n 94 at para 4.

102 See also Thielbörger supra n 1 at 75–86. These events are considered here in chronological order as there is significant development from one to the other. The order is not meant as an order of significance: certainly, the 2010 GA and HRC resolutions are more significant than the 2011 renaming of the mandate.

103 GA Res 64/292, supra n 4.

104 Articles 10 and 14 Charter of the United Nations 1945, 1 UNTS XVI, leave no doubt about this conclusion. See also Tomuschat, 'United Nations, General Assembly' in Wolfrum, supra n 18 at para 22.

105 Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 *European Journal of International Law* 879 at 902 (with further references). See also Joyner, *International Law in the 21st Century: Rules for Global Governance* (2005) at 94; Treves, supra n 58 at para 44.

106 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 at para 70; Tomuschat, supra n 104 at para 22; Treves, supra n 58 at paras 44–6.

107 See GA, 108th plenary meeting, 28 July 2010, A/64/PV.108 at 4–20. Therein, see the statement of the Hungarian representative (at 7) expressing concerns about the negotiating process in general, the statement of the US representative, criticizing that the Resolution had not been drafted in a transparent and inclusive manner, and the statements of the New Zealand and Japanese representatives (at 11, 14), both critiquing that the Resolution was tabled too early without sufficient time for the delegations to consider it properly.

108 George, Nhlapo and Waldorff, 'The Politics of Achieving the Right to Water', 28 April 2011, *Transnational Institute*, available at: www.tni.org/article/politics-achieving-right-water [last accessed 27 January 2015]. See also Solón, 'Intervention of the Permanent Representative of the Plurinational State of Bolivia: "The Human Right to Water and Sanitation"', 28 July 2010, available at: pwccc.wordpress.com/2010/07/28/speech-the-human-right-to-water-and-sanitation/ [last accessed 27 January 2015].

109 See Olivera and Lewis, *Cochabamba! Water War in Bolivia* (2004); Perreault, 'State Restructuring and the Scale Politics of Rural Water Governance in Bolivia' (2005) 37 *Environment and Planning* 263 at 280; Public Citizen, 'Water Privatization Fiascos: Broken Promises and Social Turmoil' (March 2003) at 5, available at: www.foodandwaterwatch.org/doc/Fiascos.pdf [last accessed 27 January 2015]; Spronk, 'Roots of Resistance to Urban Water Privatization in Bolivia: The "New Working Class," the Crisis of Neoliberalism, and Public Services' (2007) 71 *International Labor and Working-Class History* 8 at 14–24.

110 GA supra n 107, see, for instance, statements of the German representative (at 6), the Spanish representative (at 6) and the Belgian representative (at 15).

111 GA supra n 107, see in particular the statement of the Colombian representative (at 13), claiming that certain proposals were not considered for inclusion and that the draft remained insufficiently discussed.

the HRC to promote the right to water and sanitation,[112] was largely ignored.[113] Thus, there was initially only a weak deliberative process from which to determine a shared *opinio juris*.

On the contrary, the high number of almost 40 co-sponsors[114] is remarkable and emphasizes the resolution's broad support. Even more, the result of the vote is noteworthy with 122 nations in favour, 41 abstentions, 29 absent votes and not a single nation voting against.[115] Certainly silence, be it through abstention or absence, cannot without cautious scrutiny be equated with positive agreement,[116] particularly given that some states emphasized that their abstention should not be mistaken for positive agreement on a new customary right to water.[117] Some emphasized that the resolution, in their view, did not create any new right or legal obligation.[118] Nevertheless, the voting resulted in a surprisingly clear result of a vast three quarters majority of present states, equivalent to a two-thirds majority of all (at the time) 192 UN Member States. All these states expressed their positive attitude towards the right in GA Resolution 64/292. Not a single state voted against the resolution. Previous outspoken sceptics like the USA, Canada and the UK abstained from the vote rather than voting against the resolution. Each country stressed in their statements that their voting behaviour was not to be understood as a vote against the right to water *per se*, but rather against the non-inclusive process of drafting the resolution and against the fact that the resolution did not convincingly explain the legal basis for the right to water.[119]

Soon after the GA resolution, the HRC released Resolution 15/9 on '[h]uman rights and access to safe drinking water and sanitation' in which the Council derived the right explicitly from the right to an adequate standard of living. Certainly, a shared *opinio juris* among (almost) all states cannot be evidenced by a resolution of a body with only 47 members, where the rest of the (at the time) 192 UN Member States were given the chance neither to speak nor vote. Just like GA resolutions, HRC resolutions are legally non-binding.[120]

112 See, for a brief overview of the Geneva Process, Furch, 'Menschenrecht auf Wasser- und Sanitärversorgung: UN-Resolutionen als Schlüssel zum Paradies?' (2010) 2 *European Journal of Transnational Studies* 26 at 33–4.

113 See GA supra n 107, therein for instance the statement of the UK representative (at 12–13) and the statement of the Brazilian representative (at 5).

114 See Solón, supra n 108 (naming all co-sponsoring countries in its presentation of the 'historic resolution').

115 See GA, Press Release: General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favor, None Against, 41 Abstentions, 28 July 2010, GA/10967.

116 See generally D'Amato, 'Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law' (1969) 10 *Virginia Journal of International Law* 1; MacGibbon, 'Customary International Law and Acquiescence' (1957) 33 *British Yearbook of International Law* 115. As an example of acquiescence, see *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment, ICJ Reports 1962, 6 at 23 and 31.

117 See GA supra n 107, therein the statements of the Australian (at 11), UK (at 12), US (at 7–8), and Canadian (at 17) representatives.

118 See GA supra n 107, therein the statements of the representatives of Guatemala, Egypt (both at 10), and Liechtenstein (at 17).

119 See GA supra n 107, US (at 8) and UK (at 12).

120 Rudolf, 'United Nations Commission on Human Rights/United Nations Human Rights Council' in Wolfrum, supra n 18 at para 20.

On the contrary, a remarkable trend became apparent in the few months between the two resolutions. Human Rights Council Resolution 15/9 was adopted without a vote (with no state demanding that such a vote be held). Both the UK and the USA were now explicitly positive towards the HRC resolution in their statements[121] and were willing to give up their previous opposition.[122] Only a few months after the GA resolution 64/292, which was still marked by a high number of abstentions, states now expressed a unanimously *positive* attitude towards the right. HRC Resolution 15/9 is also far more precise in its wording than GA Resolution 64/292, emphasizing the origins of the right in the right to an adequate standard of living,[123] while the GA Resolution had not identified such a source at all. HRC Resolution 15/9 seems a much stronger hint towards states' positive *opinio juris* in favour of a human right to water.

Thirdly, in 2011, the mandate of the Independent Expert came up for renewal. In Human Rights Council Resolution 16/2, the participating states decided to redesign and rename it: the 'Independent Expert on the issue of human rights obligations relating to access to safe drinking water and sanitation' became the 'Special Rapporteur on the human right to safe drinking water and sanitation'. There are two significant changes marked by this new mandate. The first is the mandate's new title. Although there is no significant difference in the title of 'Independent Expert' and 'Special Rapporteur',[124] the new title is phrased in human right terms, while the complicated original title of 2008 wilfully avoided the term 'human right to water'. By 2011, opposition to using the term 'human right to water and sanitation' seemed to have eroded significantly. Similarly, all other Special Rapporteurs that carry a specific human right in their title[125] deal with rights accepted, rather than contested, in international law. A second innovation of the second term of the mandate is its new tasks. Previously, the Independent Expert largely had to elaborate the right's normative content,[126] including identifying gender-specific vulnerabilities and including the views of a variety of stakeholders such as civil society organizations.[127] The renewed mandate of 2011 is rather to focus on the implementation and realization of the right rather than to further elaborate its content.[128] The changed tasks for the mandate must logically be based on the following assumption: if the Special Rapporteur is now mandated with improving implementation and realization, this presupposes the

121 See the statements of the representatives in the archived webcast of the HRC, available at: www.un.org/webcast/unhrc/index.asp [last accessed 3 August 2014].

122 See the statement of the US representative (ibid.), who expressed happiness that his country could join in the unanimous Resolution. However, the UK representative expressly disagreed with respect to that part of the Resolution which relates to sanitation (which lies outside the scope of this study).

123 HRC Res 15/9, supra n 26 at para 3.

124 OHCHR, *Fact Sheet No 27: Seventeen Frequently Asked Questions about United Nations Special Rapporteurs*, 2001, at 6, available at: www.ohchr.org/EN/PublicationsResources/Pages/ArchivesFS.aspx [last accessed 27 January 2015].

125 See the list at: www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx [last accessed 27 January 2015].

126 HRC, Res 7/22, supra n 96 at para 2(b) ('[clarify] the content of human rights obligations . . . in relation to access to safe drinking water and sanitation').

127 Ibid. at para 2(d) and (e).

128 HRC, Res 16/2, supra n 94 at paras 5(a) and 5(c) ('to give particular emphasis to practical solutions with regard to its implementation' and 'to work on identifying challenges and obstacles to the full realization of the . . . right . . . , and to continue to identify good practices').

(by now accepted) positive assumption of the existence of such a right in the first place.

What do these three recent events—GA Resolution 64/292, HRC Resolution 15/9 and HRC Resolution 16/2—mean with regard to a customary right to water?

They evidence—despite the drawbacks I have depicted—that there is now a clear *opinio juris* in favour of a right to water. States have over the last four years—with increasingly clear wording and against steadily decreasing opposition—emphasized their commitment to guarantee water access to their populations. They have done so not only as a matter of courtesy or morality, but as a legal commitment, as evidenced by the wording of all three resolutions. This *opinio juris* must by now be considered as clear and unambiguous.

This commitment provides us with precisely the tool to interpret state practice that we had previously found less clear in favour of a right to water. Out of the several interpretations that the observed state practice would allow for, we should then choose the one which is most in line with the strong *opinio juris* that states have over the last years repeatedly expressed. These two elements taken together allow us to find a human right to water—not only as previously assumed as part of treaty law, but by now also as part of custom. In this way, the right can be called a hybrid right: a right that is significantly derived from both treaty and customary law. Only reading these two elements together allows the full picture of the right to evolve.

5. INTERCONNECTEDNESS OF BOTH APPROACHES AND PRACTICAL IMPLICATIONS

How are the two approaches in treaty and custom related to each other? In what sense is this approach different from the way the right to water is currently conceptualized? And which difference would the suggested alterations make in practice?

By identifying two altered approaches to the right to water—one concerning treaty law and the other concerning custom—not much is yet said about how these two approaches relate to each other. Generally speaking, treaty and custom are not mutually exclusive. Quite to the contrary, they often complement each other. This is why some of the most important human rights find recognition both in treaty law and custom[129]—which, according to my account offered here, is also true for the right to water. While both observations about treaty law and custom are, and must be, separate from one another in some ways, they are also closely related. I argue they are even mutually reinforcing.

First, civil–political rights are still more accepted by states than socio–economic rights.[130] This also holds true in so far as they are accepted to mirror custom: while

129 See, for example, Buergenthal, 'Human Rights' in Wolfrum, supra n 18 at para 9; Shelton, *Advanced Introduction to International Human Rights Law* (2014) at 77; see further, Simma and Alston, supra n 65 at 90–106.

130 While the First Protocol to the ICCPR (establishing an individual complaint mechanism) entered into force in the 1970s (entry into force on 23 March 1976), the Protocol to the ICESCR (establishing an equivalent mechanism) entered into force only in 2013 (entry into force on 5 May 2013). See also, critically on socio-economic rights, Dennis and Stewart, supra n 27 at 514; Sunstein, 'Against Positive Rights' (1993) 2 *East European Constitutional Review* 35; Vierdag, 'The Legal Nature of the Rights

the customary law status of many civil–political rights is widely accepted, the same does not easily hold true for many socio–economic rights.[131] Thus, recognizing that part of the right to water is partly rooted in civil–political rights makes the recognition of the right to water as custom even more convincing. Secondly, the realization that the right to water is a synthetic product that draws its substance from a range of civil–political and socio–economic rights enables us to be more precise about the extent to which its normative content is accepted as custom. It allows us, for instance, to stress that while the customary status of some parts of the right's normative content might still be in some ways disputable, other parts cannot be so easily contested. The right's normative content relating to 'water availability', for instance, which is derived from the right to life as I have shown above, must surely be understood also to be part of custom—just as its parent right, the right to life, itself is firmly believed to exist in international custom.[132]

Another implication of such a synthetic conceptualization is the further reach it gives to the right to water. Incorporating civil and political rights, like the right to life, into the right to water makes the right itself partially a civil–political right. If we understand, to the contrary, the right to water as one of the 'including' rights of Article 11 of the ICESCR alone, it would remain a purely socio–economic right. In practical terms, this distinction is very important. If seen as part of the ICESCR, only ICESCR contracting parties are bound by a right to water. This is an increasingly large number (currently 163 states);[133] yet important states, in particular the USA[134] and, until very recently, the Republic of South Africa,[135] have shown significant hesitance to ratify the Covenant. Furthermore, socio-economic rights are enforceable for individuals on the international level only by the procedure laid down in the Optional Protocol to the ICESCR.[136] By contrast to the equivalent mechanism for the ICCPR, the ICESCR-mechanism has only recently been elaborated[137] with the

Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69 at 102–5.

131 Cf., for example, Crawford, supra n 72 at 642; Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–96) 25 *Georgia Journal of International and Comparative Law* 287 at 340–51 and in particular at 348 (stating that the economic, social and cultural rights of the Universal Declaration of Human Rights are not part of custom).

132 Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (2006) at 18, available at: www.ispionline.it/it/documents/wp_7_2006.pdf [last accessed 27 January 2015]; Ramcharan, 'The Concept and Dimensions of the Right to Life' in Ramcharan (ed.), *The Right to Life in International Law* (1985) 1 at 3; see, further, Case 11.436, *Victims of the Tugboat '13 de Marzo' v Cuba* Rep No 47/96 (1996) at para 79 (declaring the right to life to be a norm of *jus cogens*).

133 For a list of the current status of signatures and ratification of the ICESCR, available at: treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en [last accessed 27 January 2015].

134 For a summary of the US reasons not to ratify the ICESCR, even under the Obama government, see for instance the speech of (former) US Assistant Secretary of State for Democracy, Human Rights, and Labor: Posner, 'Four Freedoms in the 21st Century', 24 March 2011, available at: iipdigital.usembassy.gov/st/english/texttrans/2011/03/20110328131142su0.167867.html#axzz2gq1PRkbu [last accessed 27 January 2015].

135 After several decades of hesitation, the RSA ratified the ICESCR on 12 January 2015.

136 See, for the text of the Protocol, the annex of GA Res 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, A/RES/63/117.

137 De Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the

critical number of ratifications[138] only very recently being reached.[139] So far, individual communications can only be addressed to the ESCR-Committee from individuals in a very limited number of states. Acknowledging that the right to water has some of its origins also in the right to life (Article 6 ICCPR) would open up the gates for the complaints procedure of the ICCPR—at least for the most fundamental violations of the right to water relating to its 'availability'.

Another practical implication is that a customary law right might even go beyond the reach of a treaty-based right. While promoting the right to water *only* as a customary right would create uncertainties about its content[140] and status[141] in international law and would also exclude the right from both the treaty reporting mechanisms under Article 16 of the ICESCR[142] and Article 40 of the ICCPR,[143] promoting it *also* as part of custom widens its reach. As part of customary law, the right to water would entail legal effects also for those states that are not parties to either the ICESCR (like the USA) or the ICCPR (like China). Such responsibility could even extend in individual cases to international organizations, which can at the moment not become party to most human rights treaties, but which are nevertheless bound by customary law.[144] To exclude legal effects as part of customary law, states would need to claim the status of a persistent objector.[145] Given the invigorated

International Bill of Human Rights' (2010) 32 *Human Rights Quarterly* 144; Hamm and Kocks, '40 Jahre UN-Sozialpakt: Bilanz und Perspektiven' (2006) 81 *Die Friedens-Warte: Journal of International Peace and Organization* 87 at 103; Sepúlveda, 'Obligations of International Assistance and Cooperation in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 *Netherlands Quarterly of Human Rights* 271.

138 Article 18 Optional Protocol to the ICESCR 2008.

139 For the status of number of ratifications (currently 19), see the UN webpage at: treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3-a&chapter=4&lang=en [last accessed 27 January 2015]; currently the Optional Protocol has 45 signatories and 18 parties.

140 Cf. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *European Journal of International Law* 523; Shaw, supra n 59 at 73–4. That is also why the International Law Commission's permanent task is to codify existing customary law, see Article 13 Charter of the UN 1945, supra n 104; and GA Res 94 (I), Progressive Development of International Law and its Codification, 11 December 1946, A/RES/94 (I) at para (a).

141 Some authors suggest that treaty law ranks higher in the hierarchy of international law, whereas most authors reject such hierarchy. See as opponents of a hierarchy: International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 13 April 2006, A/CN.4/L.682 at 47–9 with further references; Thirlway, 'The Sources of International Law' in Evans (ed.), *International Law*, 4th edn (2014) 91 at 109; and as proponent of a general hierarchy: *Right of Passage over Indian Territory (Portugal v India)*, Merits, Judgment, ICJ Reports 1960, 6 at 44; Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211.

142 ESCR-Committee, General Comment No 1: Reporting by States Parties, 17 February 1989, E/1989/22(SUPP), annex III; Kretzmer, 'Human Rights, State Reports' in Wolfrum, supra n 18; Riedel, supra n 18 at paras 4–10.

143 See CCPR-Committee, General Comment No 30: Reporting Obligations of States Parties under Article 40 of the Covenant, 16 July 2002, CCPR/C/21/Rev.2/Add.12; Kretzmer, supra n 142; Nowak, supra n 41 at 712–52; Tomuschat, 'Human Rights Committee' in Wolfrum, supra n 18 at paras 10–11.

144 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* Advisory Opinion, ICJ Reports 1980, 73 at para 37; De Schutter, supra n 66 at 68.

145 Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law* 1; Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457.

opinio juris I have discussed before and given the fact that no state has in the last years publicly objected to the right, no state can claim such a status with respect to the right to water with much credibility.

Finally, the approach to the right to water that I suggest here can also have beneficial implications for the status of the right to water in domestic law. The ranking and validity of international law at the national level is largely determined by the rules of the domestic legal system.[146] Domestic law sometimes distinguishes the legal status of a norm depending on whether an international norm emerges from treaty or customary law. In selected national legal regimes, customary law even ranks higher than international treaty law. In the German constitutional system, for instance, customary international law enjoys higher ranking than treaty law; even more, customary rules do not, contrary to international treaties, need to be transformed into domestic law to be applicable.[147] If an international customary right clashes, in a German context, with a sub-constitutional law, the international customary rule must prevail, whereas an international treaty provision would *not*. To make this scenario more concrete, we can imagine a German domestic law that would allow water companies to shut down the supply to a household in case of continued non-payment. We have seen similar cases over many years in countries such as the Republic of South Africa[148] and most recently in the USA in the city of Detroit.[149] Such a potential German law would be in violation of a human right to water (and would thus not be applied) if, and only if, such a contradicting right stemmed from the sphere of international custom. If the right was understood only as part of international treaty law, it would hold only the same rank as the national law allowing the practice of disconnection. Basing the right to water, as I suggest, not only on treaty but also on customary law, can thus strengthen the right to water's rank and status in some domestic legal systems.

146 On the general relationship of the human right to water and national recognitions of the right to water, see Thielbörger, 'The Right to Water: Effective Multi-Level Protection of a Multi-Faceted Human Right? An Application of the Kadi and Medellin Approaches to the Case of the Right to Water' in Cremona et al. (eds), *Reflections on the Constitutionalization of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (2013) 553.

147 See Articles 25 ('The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory') and 59(2) ('Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law') of the German Basic Law. The English translation by Tomuschat and Currie used here is available at: www.gesetze-im-internet.de/englisch_gg/ [last accessed 27 January 2015]. See also, out of many, Herdegen, 'Art. 25 GG' in Herzog et al. (eds), *Grundgesetz-Kommentar* (2013) in particular at paras 3–5.

148 See sections 11(2)(g), 4(3)(a) and (c) Water Services Act (No 108) 1997, available at: ielrc.org/content/e9705.pdf [last accessed 27 January 2015]. See also Thielbörger, supra n 1 at 40–50, on the right to water in South African law.

149 See the most recent practice of the Detroit Water and Sewerage Department (DWSD), detailed reports at: 'UN: Detroit violating human rights by turning off residents' taps', *The Guardian*, 25 June 2014, available at: www.theguardian.com/world/2014/jun/25/un-detroit-human-rights-taps; and Chapman, 'Hundreds in Detroit Protest over Move to Shut Off Water', *New York Times*, 18 July 2014, available at: www.nytimes.com/2014/07/19/us/protesters-picket-detroit-over-move-to-shut-off-water.html?_r=0 [both last accessed 27 January 2015]. This practice was criticized by several UN Special Rapporteurs as an affront to the human right to water, see 'Widespread Water Shut-offs in US City of Detroit Prompt Outcry from UN rights experts', *UN News Centre*, 25 June 2014, available at: www.un.org/apps/news/story.asp?NewsID=48129#.U-Ek6KCSW3V [last accessed 27 January 2015].

6. CONCLUSION

While a consensus has been achieved on accepting a human right to water in international politics, the question of how such a right must be legally conceptualized has so far been insufficiently examined. This article has presented and discussed two alterations to the existing conceptualization of the human right to water in international law. It suggests that the right to water should be understood on the one hand as an amalgam of several (rather than a single) treaty-based rights; on the other hand, it introduces an approach allowing us to understand how the right can also be understood as part of international custom.

Traditionally, in treaty law the right to water is seen as a derivative right that finds its legal anchor and *raison d'être* first and foremost in Article 11 of the ICESCR (and is only linked to several other human rights). This was already suggested in 2002 by the ESCR-Committee in its then ground-breaking General Comment No 15. The 2010 HRC resolution 15/9—one of the biggest political successes relating to the right to water of most recent years—also emphasizes that the right is 'derived from the right to an adequate standard of living'.[150] Following this line of argument, water would thus be a right like food, clothing or housing. The fact that it is not explicitly mentioned in Article 11 of the ICESCR would not make any significant legal difference. In this article, I have agreed with the assumption that the right is a derivative right; I have at the same time suggested altering the understanding of *how* we conceptualize the derivation of the right to water from other rights. The fact that the right is not explicitly mentioned in Article 11 of the ICESCR (like food or housing) is a virtue as much as a flaw; it does not tie the right necessarily to the right to an adequate standard of living alone, but leaves room for the multi-faceted nature that in fact characterizes the right to water. It finds parts of its origin in the right to life (as reflected in the requirement of water 'availability'), but also combines elements of the right to the highest attainable standard of health (mirrored in a required water 'quality') and the right to an adequate standard of living (in the sense of physical and economic water 'accessibility').

With regard to customary law, numerous affirmations of the right to water in political declarations—in particular, the UN resolutions of the year 2010[151]—are a hint of a by now clearly evolved *opinio juris*. However, this is only one part of customary law. To identify a consistent state practice, as also required under Article 38(1)(b) of the ICJ Statute, is far more difficult. That is why most authors have so far concluded that the right does not form part of international custom. I have elaborated in this article that this conclusion is not cogent. If one allows for more flexible approaches to custom—in particular the concept of a reflective equilibrium as suggested by Roberts, for which I have presented several justifications—one can well conclude that a norm of custom has arisen. The clearly evolved *opinio juris* in favour of a right

150 HRC Res 15/9, supra n 26 at para 3.

151 UN, Report of the United Nations Water Conference, Mar del Plata, 14–25 March 1977, 1977, E/CONF.70/29; Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century, 31 January 1992, available at: www1.umn.edu/humanrts/instree/dublinwater1992.html [last accessed 27 January 2015]; GA Res 54/175, The Right to Development, 17 December 1999, A/RES/54/175 (2000) at para 12(a); GA Res 64/292, supra n 4; HRC Res 15/9, supra n 26.

to water must be used as a tool to interpret the ambivalent state practice. State practice is not yet quite so clear as the corresponding *opinio juris*; it is, however, by now at least strengthened enough to allow for different interpretations, including the one that states improve access to water for their populations not out of courtesy, but following an accepted legal obligation. I have also argued that these two recognitions in treaty and custom do not stand separately from each other, but are mutually reinforcing.

This article has attempted to explain a suitable conceptualization for the right to water consistent with the parameters of international law. It is often simply presupposed that there is such a thing as a human right to water. To make this claim convincing, however, one must also specify in which way one believes this to be the case. Only then can the right to water be credibly promoted in international law.

An entirely alternative way, of course, in which a right to water could be promoted is its explicit codification in a separate international water treaty or as a protocol or annex to an existing international treaty. Certainly, a codified human right to water would carry significant advantages,[152] in particular by ensuring that states' obligations and individual entitlements are spelled out more clearly. However, such considerations are largely normative and have little grounding in the current realities of international politics. States would in the foreseeable future most likely not commit to such an explicit and newly codified right to water. First, states tend to prefer open obligations over concrete ones (as indeterminate obligations leave them more discretion). Agreeing on concrete obligations is even more difficult on an issue that is potentially costly for states to realize (like universal access to water). Secondly, the increased recognition that the human right to water has experienced over the past years is a welcome reason for states to argue against its further explicit codification. In the recent past, more and more states have also included explicit codified recognitions of the right to water in their constitutions[153] or ordinary domestic law.[154] In this way, the right's recent political success is also its curse: if the right to water is already recognized implicitly in international law and even more explicitly on the national level, why do we need an explicit international recognition—at least so the argument goes.

One question remains: if all elements assembled in the right to water exist already under other human rights and in custom, is the right itself maybe redundant or

152 See an elaboration of the advantages of a codified right to water at Huang, 'Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water' (2008) 20 *Florida Journal of International Law* 353, in particular at 361–9; and Klein, 'A Legally Binding Instrument on the Human Right to Water?' in Riedel and Rothen, supra n 1, 209 at 213.

153 For example, Article 48 Constitution of the Democratic Republic of the Congo 2006, available at: www.constitutionnet.org/files/DRC%20-%20Congo%20Constitution.pdf; Article 79 Constitution of the Arab Republic of Egypt 2014, available at: www.sis.gov.eg/Newvr/Dustor-en001.pdf; Section 27.1(b) Constitution of the Republic of South Africa 1996, available at: www.constitutionalcourt.org.za/site/theconstitution/thetext.htm; Article 35(2) Transitional Constitution of the Republic of South Sudan 2011, available at: www.sudantribune.com/IMG/pdf/The_Draft_Transitional_Constitution_of_the_ROSS2-2.pdf; or Article 127 Constitution of the Bolivarian Republic of Venezuela, 1999, available at: venezuelanalysis.com/constitution [all last accessed 27 January 2015].

154 For example, in France, Article 1 Loi No 2006-1772 sur l'eau et les milieux aquatiques 2006, available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000649171 [last accessed 27 January 2015].

superfluous? Does the creation of ever new rights like the right to water, in the way Philip Alston predicted some 30 years ago, not erode the very idea of human rights?[155]

To argue in such a manner for the case of water appears almost cynical. The human rights-related water needs of the global population are so multiple and pressing that clear and spelled-out answers are certainly desirable. A topic as complex and important as that of the human right to water deserves a meaningful and clear recognition (even if other rights of similar urgency and complexity also still lack sufficient recognition in international law). However, if such recognition is to be granted—as now seems increasingly accepted in the case of the human right to water—it must be legally sound. Only a legally justified right to water can also be politically compelling.

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155 Alston made this comment at the time in the abstract, or at least with a view to other human rights. He would certainly agree that the critique he formulated at the time does not apply for the case of the human right to water today.