

# Troubling Waters: Recent Developments in Canada on International Law and the Right to Water and Sanitation

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*In less than a decade, Canada has moved from resisting the recognition of the human right to water and sanitation in international law to explicitly recognizing the right. This paper reviews how Canada and, tangentially, other countries, have not only agreed that the right is derived from international treaties, but have also demonstrated through statements and behaviour their acceptance of the human right to water and sanitation and the conviction that they are legally obliged to act to respect, protect and fulfil that right. These indicators assist in the recognition of the right in customary international law. Underpinning this review is consideration of the deplorable state of water and sanitation access in many First Nations reserves in Canada.*

*En moins de dix ans, le Canada est passé de la réticence à reconnaître le droit fondamental à l'eau potable et à l'assainissement dans le domaine du droit international à la reconnaissance explicite de ce droit. Cet article traite de la façon dont le Canada et, indirectement, d'autres pays en sont venus non seulement à convenir que ce droit découle de traités internationaux, mais également à démontrer, au moyen de déclarations et d'actions, à la fois leur acceptation du droit humain à l'eau et à l'assainissement et leur conviction qu'ils sont légalement tenus de le respecter, de le protéger et de le réaliser. Ces indicateurs aident à la reconnaissance de ce droit dans le droit international coutumier. L'étude se fonde en outre sur un examen de la situation déplorable de l'accès à l'eau et à l'assainissement dans de nombreuses réserves des Premières Nations au Canada.*

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[The General Assembly] [r]eaffirms the recognition of the right to safe drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights ...<sup>1</sup>.

[The Human Rights Council] [r]eaffirm[s] that the human right to safe drinking water and sanitation entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity ...<sup>2</sup>.

## I. Introduction

Daily access to clean water is necessary to satisfy basic needs of drinking, cooking, personal hygiene and washing. Proper sanitation is similarly essential for public health and personal dignity. Yet significant inequalities persist around the world regarding access to clean water and sanitation. Poor water access and sanitation is associated with water-related illnesses, food insecurity, lost productivity, poor school attendance and stigma, especially for women and girls. About one billion people practice open defecation<sup>3</sup> and an estimated four thousand five hundred children die each day from sanitation-related causes, a death rate higher than HIV/AIDS, malaria and tuberculosis combined.<sup>4</sup>

Lack of access to water and sanitation is not only a problem in developing countries. More than 10,000 people living on First Nations reserves in Canada live in homes that do not have running water or functional toilets.<sup>5</sup> At any given time over the last few years, more than 100 of these communities were

<sup>1</sup> *The Human Right to Safe Drinking Water and Sanitation*, GA Res 68/157, UNGAOR, 68th Sess, Supp No 49 (vol I), UN Doc A/RES/68/157 (2013) 583 at 585 [2013 GA resolution].

<sup>2</sup> Human Rights Council, *The Human Right to Safe Drinking Water and Sanitation*, HRC Res 27/7, UNHRCOR, 27th Sess, UN Doc A/HRC/RES/27/7 (2014) at 3 [2014 HRC resolution].

<sup>3</sup> "Progress on Sanitation and Drinking-Water - 2013 Update", World Health Organization & UNICEF (2013) at 6, online: <[apps.who.int/iris/bitstream/10665/81245/1/9789241505390\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/81245/1/9789241505390_eng.pdf)>.

<sup>4</sup> Malcolm Langford, Jamie Bartram & Virginia Roaf, "Revisiting Dignity: The Human Right to Sanitation" in Malcolm Langford & Anna Russell, eds, *The Human Right to Water: Theory, Practice and Prospects*, Cambridge [forthcoming].

<sup>5</sup> *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report* (Orangeville, ON: Neegan Burnside for the Department of Indian Affairs and Northern Development, 2011) at 4, online: <[www.aadnc-aandc.gc.ca/eng/1313770257504/1313770328745](http://www.aadnc-aandc.gc.ca/eng/1313770257504/1313770328745)> [2011 INAC Report]. The report indicated there were 1,880 households with no water service. When multiplied by the average household size of 4.3 individuals (*ibid* at 3), there were approximately 8,000 people with no water service at all, not including homes where water is delivered in a barrel. When those 3,410 barrel-delivery homes are included in the tally, almost 15,000 First Nations people had no running water in 2010. Helen Falding, "High & Dry: First Nations an Hour from Winnipeg Face Third World Conditions", *Winnipeg Free Press* (30 October 2010), online: <[www.winnipegfreepress.com/no-running-water/without/high--dry-first-nations-an-hour-from-winnipeg--face-third-world-conditions-106365403.html](http://www.winnipegfreepress.com/no-running-water/without/high--dry-first-nations-an-hour-from-winnipeg--face-third-world-conditions-106365403.html)>. That number is dropping, as some homes are retrofitted.

under drinking water advisories.<sup>6</sup> A 2011 national study commissioned by the Department on Indian Affairs and Northern Development measured the risk to human health and found that of 807 water systems on First Nations reserves, 314 (39%) were a high overall risk; 278 (34%) were a medium overall risk; and only 215 (27%) were a low overall risk.<sup>7</sup> Of the 532 wastewater systems inspected, 72 (14%) were a high overall risk; 272 (51%) were a medium overall risk; and only 188 (35%) were a low overall risk.<sup>8</sup> Another 2011 report revealed that water quality testing was performed far less often than recommended.<sup>9</sup> In addition to poor water and sanitation infrastructure and problems with water quality testing, other studies show that there are source water protection issues,<sup>10</sup> serious water quality problems,<sup>11</sup> accessibility issues,<sup>12</sup> high rates of waterborne disease<sup>13</sup> and spiritual and cultural impacts<sup>14</sup> related to lack of

<sup>6</sup> Over the last six years my colleagues and I have periodically monitored the number of drinking water advisories reported on the Health Canada website and, to our recollection, the number has not been lower than 100 within this time period. This website does not maintain an archive so we cannot confirm our recollections more rigorously. “First Nations & Inuit Health: Drinking Water Advisories in First Nations Communities”, Health Canada, online: <[www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-dwa-eau-aqep-eng.php](http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-dwa-eau-aqep-eng.php)> [“Drinking Water Advisories”]; “Environmental Health”, First Nations Health Authority, online: <[www.fnha.ca/what-we-do/environmental-health](http://www.fnha.ca/what-we-do/environmental-health)> [“Environmental Health”].  
<sup>7</sup> 2011 INAC Report, *supra* note 5 at ii.

<sup>8</sup> *Ibid.*

<sup>9</sup> Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada*, ch 4 (Ottawa: OAG, 2011) at 24–34, online: <[www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201106\\_e\\_35354.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_e_35354.html)> [Auditor General Report].

<sup>10</sup> See e.g. Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation), *Submission to the Committee on Economic, Social and Cultural Rights re: 55 Pre-Sessional Working Group (09 Mar 2015 – 13 Mar 2015), Consideration of List of Issues, Sixth Periodic Report, Canada* (2 February 2015), online: <[tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT\\_CESCR\\_ICO\\_CAN\\_19434\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT_CESCR_ICO_CAN_19434_E.pdf)>; Athabasca Chipewyan First Nation, *UPR Submission re: Canada* (8 September 2008), online: <[lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/ACFN\\_CAN\\_UPR\\_S4\\_2009\\_AthabascaChipewyanFirstNation.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/ACFN_CAN_UPR_S4_2009_AthabascaChipewyanFirstNation.pdf)>.

<sup>11</sup> See e.g. “Drinking Water Advisories”, *supra* note 6; “Environmental Health”, *supra* note 6; 2011 INAC Report, *supra* note 5; “Episode 29, Kitigan Zibi: Recovers from Water Drinking Bans”, *Samaqan Water Stories*, Season 3 (23 September 2013), online: <[www.samaqan3.ca/?p=644](http://www.samaqan3.ca/?p=644)>; M Limson Zamora et al, “Chronic Exposure of a Canadian Aboriginal Community to Uranium in Drinking Water: Chemical Toxicity and Radiation Dose Radiation”, Radiation Protection Bureau, Health Canada (2004), online: <[irpa11.irpa.net/pdfs/1e12.pdf](http://irpa11.irpa.net/pdfs/1e12.pdf)>.

<sup>12</sup> See e.g. Helen Fallding, “New Research Supports Urgent Need for Aboriginal Drinking Water Progress”, *UM Today* (4 June 2015), online: <[news.umanitoba.ca/new-research-supports-urgent-need-for-aboriginal-drinking-water-progress/](http://news.umanitoba.ca/new-research-supports-urgent-need-for-aboriginal-drinking-water-progress/)>; Eco-Health Learning Circle, “Wasagamack: Living Without Running Water and Sewage Service” (9 June 2015), online: YouTube <[www.youtube.com/watch?v=N6qPQYfNavY](http://www.youtube.com/watch?v=N6qPQYfNavY)>; Kazi Stastna, “Clean Running Water Still a Luxury on Many Native Reserves: About 39% of First Nations Water Systems Deemed ‘High Risk’”, *CBC News* (30 November 2011), online: <[www.cbc.ca/news/canada/clean-running-water-still-a-luxury-on-many-native-reserves-1.1081705](http://www.cbc.ca/news/canada/clean-running-water-still-a-luxury-on-many-native-reserves-1.1081705)>.

<sup>13</sup> See e.g. S Michelle Driedger et al, “Communicating Risk to Aboriginal Peoples: First Nations and Metis Responses to H1N1 Risk Messages” (2013) 8:8 *PLoS One* e71106; Sue L Pollock et al, “Investigation of a Pandemic H1N1 Influenza Outbreak in a Remote First Nations Community in Northern Manitoba, 2009” (2012) 103:2 *Can J Public Health* 90.

<sup>14</sup> See e.g. Aimée Craft, “Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders”, University of Manitoba’s Centre for Human Rights Research & Public Interest Law Centre (Revised Spring 2014), online: <[chrr.info/images/stories/ANL\\_Gathering\\_Report\\_-\\_June24.pdf](http://chrr.info/images/stories/ANL_Gathering_Report_-_June24.pdf)>; Kim Anderson, Barbara Clow & Margaret Haworth-Brockman, “Carriers of Water: Aboriginal Women’s Experiences, Relationships, and Reflections” (2013) 60 *J Cleaner*

access to water and sanitation. The marked difference between access to safe water and sanitation on and off reserves in Canada has been noted by the United Nations Committee on Economic, Social and Cultural Rights (2005, 2016), United Nations Human Rights Council (2013) and the Auditor General of Canada (2011).<sup>15</sup>

In this paper, I consider the establishment of the human right to water and sanitation in international human rights law with a particular emphasis on developments in Canada. This work is part of a broader research partnership considering advocacy strategies that could support action by First Nations peoples who live on reserves where water and sanitation problems persist.<sup>16</sup> One branch of this project considers the strategic potential of various legal frameworks including Indigenous laws, treaties between First Nations and colonial or Canadian governments, Canadian constitutional law and international law.<sup>17</sup> Rights-based claims, especially litigation, are always only partial strategies; some would say it is a last resort.<sup>18</sup> The goal of clean water and adequate sanitation for every individual in Canada will only be realized through technological innovations, community organizing<sup>19</sup> and

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Production 11.

<sup>15</sup> Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNESCOR, 36th Sess, UN Doc E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5 (2006) at 4; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNESCOR, 56th Sess, UN Doc E/C.12/CAN/CO/6 (2016) at 8; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UNHRCOR, 24th Sess, UN Doc A/HRC/24/11 (2013) [2013 UPR Report]; Auditor General Report, *supra* note 9. For a discussion on Canada's Universal Periodic Review, see text accompanying notes 110–19.

<sup>16</sup> The research was funded by a Social Sciences and Humanities Research Council partnership development grant which considered not only legal strategies, but also how Canadians responded to different types of messages on First Nations water issues. Additionally, the research analyzed the benefits and costs of improving First Nations water and wastewater systems. Research partners included the Assembly of Chiefs and the Manitoba Keewatinowik Okimakanak.

<sup>17</sup> This work complements and adds to the recent work of other legal scholars, including Lynda Collins, "Environmental Rights on the Wrong Side of History: Revisiting Canada's Position on the Human Right to Water" (2010) 19:3 RECIEL 351; Nathalie J Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 RGD 183; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81 [Boyd, "No Taps"]; David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *Revolution*]; Constance MacIntosh, "The Right to Safe Water and Crown-Aboriginal Fiduciary Law: Litigating a Resolution to the Public Health Hazards of On-Reserve Water Problems" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2013) 281.

<sup>18</sup> Inga T Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Oxford: Hart Publishing, 2012) at 229. For summaries of cases where rights-based water and sanitation claims were made, see "The Human Rights to Water And Sanitation in Courts Worldwide: A Selection Of National, Regional And International Case Law", WaterLex & WASH United (2014), online: <[http://portal.org/wp-content/files/Human-rights-to-water-and-sanitation-in-courts\\_WEB\\_2015.pdf](http://portal.org/wp-content/files/Human-rights-to-water-and-sanitation-in-courts_WEB_2015.pdf)>.

<sup>19</sup> Gordon McGranahan cautions that "[l]ess likely under a rights-based approach, however, would be efforts by the residents of deprived communities themselves to organize their own sanitation improvements, work closely with local authorities to produce mutually acceptable solutions, prioritize affordability over acceptability to achieve scale, or use sanitation improvement as a means of achieving stronger communities

other advocacy strategies, such as reliance on UN review mechanisms and lobbying campaigns. Nonetheless, the potential for litigation both legitimizes claims and encourages states to be proactive in meeting their obligations. A focus on international law is useful because its recognition of an interest as a “human right” brings forward the potential to hold states legally accountable. The international human rights legal framework requires that states

assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.<sup>20</sup>

Thus, the recognition of a human right in international law requires states to adopt action plans towards the protection and progressive realization of the right, prioritize the needs of the most marginalized and disadvantaged and give human rights priority over other considerations, such as economic development.<sup>21</sup> States must also respect core principles of non-discrimination, transparency and accountability; move towards progressive realization of international legal norms; encourage participation by those who are vulnerable to a rights infringement; and ensure effective remedies for breaches. These core principles, coupled with substantive obligations, differentiate human rights claims from other normative claims. In a separate paper, I consider the scope of the right to clean water and the application of the obligations and principles to water and sanitation issues on First Nations reserves.<sup>22</sup>

## II. Status of International Law in Canada

International treaties and conventions that are signed and ratified by Canada have direct legal effect once they have been incorporated into domestic

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capable of engaging more effectively with local authorities.” Gordon McGranahan, “For Sanitation, a ‘Rights-Based Approach’ May Be the Wrong Strategy”, *Open Democracy* (10 April 2015), online: <[www.opendemocracy.net/openglobalrights/gordon-mcgranahan/for-sanitation-%E2%80%9Ccrightsbased-approach%E2%80%9D-may-be-wrong-strategy](http://www.opendemocracy.net/openglobalrights/gordon-mcgranahan/for-sanitation-%E2%80%9Ccrightsbased-approach%E2%80%9D-may-be-wrong-strategy)>.

<sup>20</sup> “International Human Rights Law”, Office of the High Commissioner for Human Rights, online: <[www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx)>.

<sup>21</sup> 2014 HRC Resolution, *supra* note 2. See also Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art 2, Para 1, of the Covenant)*, UNESCOR, 5th Sess, Annex III, UN Doc E/1991/23 and E/C.12/1990/8 (1990) 83 at para 10; Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 29th Sess, UN Doc E/C.12/2002/11 (2003) at para 37 [General Comment 15]; “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, reprinted in (1998) 20:3 Hum Rts Q 691 at para 6; M Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2003).

<sup>22</sup> [Still under review.]

legislation, but “[i]t is an oversimplification to say that treaties are of no legal effect unless implemented by legislation.”<sup>23</sup> The presumption of conformity requires decision makers to interpret domestic laws in a manner that respects Canada’s international legal obligations.<sup>24</sup> For example, the Supreme Court of Canada recently stated that

in interpreting the *Charter*, the Court “has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other”: [*Hape*, *infra* note 28 at] para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”.<sup>25</sup>

Customary international law is binding on states if it is “based on widespread, representative and virtually uniform practice”.<sup>26</sup> As Marcia Kran has noted, “[h]uman rights norms which are of customary nature do not require legislative action in order to be adopted and directly applied by domestic courts. They can be relied on by national courts so long as there is no valid legislative provision in direct conflict with them.”<sup>27</sup> The Supreme Court of Canada stated in *R v Hape* that “[a]ccording to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts of the customary rule.”<sup>28</sup>

Justice LeBel of the Supreme Court of Canada has observed that the Canadian approach to the reception of customary international law is that “[b]y and large, customary international law is now directly incorporated into the common law of Canada and is effective immediately without the need for further legislative or executive action.”<sup>29</sup> (Some note that customary international law has been recognized by the common law as far back as Lord Mansfield’s 1767 comment that “the law of nations [customary international law] will be carried as far in England, as anywhere.”<sup>30</sup>) Thus conventional

<sup>23</sup> *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 188, 81 DLR (3d) 609.

<sup>24</sup> See Gilbert Van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008); Armand de Mestral & Evan Fox-Decent, “Implementation and Reception: The Congeniality of Canada’s Legal Order to International Law” in Oonagh E Fitzgerald, ed, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) 31.

<sup>25</sup> *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64, [2015] 1 SCR 245.

<sup>26</sup> Marcia VJ Kran, “The Relevance of International Human Rights Law for Lawyers in Manitoba” in *Isaac Pitblado Lectures: Human Rights Challenges & Achievements* (Winnipeg: Law Society of Manitoba, 2013) IV at IV-3.

<sup>27</sup> *Ibid* at IV-5.

<sup>28</sup> *R v Hape*, 2007 SCC 26 at para 36, [2007] 2 SCR 292, citing Ian Brownlie, *Principles of Public International Law*, 6th ed (Oxford: Oxford University Press, 2003) at 41.

<sup>29</sup> Hon J Louis LeBel, “A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law” (2014) 65:1 UNBLJ 3 at 4.

<sup>30</sup> *Heathfield v Chilton* (1767), 4 Burr 2015, 98 ER 50.

and customary law are norm-setting in at least four ways. First, norms can be established through the United Nations' own accountability mechanisms, such as periodic reviews. Second, conventional and customary law can be important interpretive sources for understanding domestic Canadian legislation, such as the *Safe Drinking Water for First Nations Act*.<sup>31</sup> Third, they can also assist in the interpretation of constitutional provisions such as the right to life in section 7 of the *Canadian Charter of Rights and Freedoms*<sup>32</sup> and the commitment "to provide essential services of reasonable quality to all Canadians"<sup>33</sup> in section 36 of the *Constitution Act, 1982*. Finally, customary international law, the rules of which bind states even if they have not ratified substantively relevant treaties, may also provide a stand-alone cause of action.

### III. Conventional Sources

Most international law, including international human rights law, is anchored in state governance. States take on certain obligations once they expressly consent to a particular course of conduct. Typically the states join international organizations, such as the United Nations, and agree to follow all of the rules, laws and guidelines established by those organizations. States also participate in debates concerning the language to be used in conventions, resolutions or other instruments and, if they ratify these instruments, are bound to certain obligations.

Canada, like most countries, has ratified conventions that have express provisions on water and sanitation. The *Convention on the Elimination of All Forms of Discrimination Against Women* provides that:

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ...

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.<sup>34</sup>

The *Convention on the Rights of the Child* provides that:

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

<sup>31</sup> *Safe Drinking Water for First Nations Act*, SC 2013, c 21.

<sup>32</sup> *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

<sup>33</sup> *Constitution Act, 1982*, supra note 32, s 36.

<sup>34</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 14.2 (entered into force 3 September 1981) [CEDAW].

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures ...

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution[.]<sup>35</sup>

The *Convention on the Rights of Persons with Disabilities* provides that:

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs[.]<sup>36</sup>

The aim of each of these conventions is the elimination of discrimination and the rectification of inequality. For this reason, the focus of the water-related provisions in each one is slightly different. The *CEDAW* focuses on adequate living conditions for women and girls; the *CRC* focuses on the right to health for children; and the *CRPD* (which does not expressly mention sanitation) focuses on ensuring the universality of water accessibility regardless of ability. However, all of these conventions implicitly presuppose that there is a right to water and two presuppose the right to sanitation. Therefore, according to Inga Winkler, each of these provisions has significance beyond its actual scope.<sup>37</sup>

At least two other widely ratified conventions have articles that support a broadly applicable implied right to water and sanitation. The *International Covenant on Economic, Social and Cultural Rights* provides that everyone has the “right to an adequate standard of living”<sup>38</sup> and the right to the highest attainable standard of physical and mental health.<sup>39</sup> The *International Covenant on Civil and Political Rights* provides that “every human being has the inherent right to life.”<sup>40</sup>

The United Nations General Assembly unanimously recalled all of the above-mentioned conventions in its 2013 resolution on the right to water

<sup>35</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 24 (entered into force 2 September 1990) [CRC].

<sup>36</sup> *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 art 28.2(a) (entered into force 3 May 2008) [CRPD].

<sup>37</sup> Winkler, *supra* note 18 at 60–62.

<sup>38</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 11 (entered into force 3 January 1976) [ICESCR].

<sup>39</sup> *Ibid*, art 12.

<sup>40</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 6.1 (entered into force 23 March 1976) [ICCPR].



and sanitation, which reaffirmed the human right to safe drinking water and sanitation. It went on to state that the right to water and sanitation is derived from the right to an adequate standard of living and is inextricably linked to “the right to the highest attainable standard of physical and mental health, as well as to the right to life and human dignity”.<sup>41</sup> While the human right to water and sanitation is drawn normatively from the human right to life (protected by the *ICCPR*) and an adequate standard of living and health (protected by the *ICESCR*), it is now seen as an independent human right. As such, the issue shifts from a focus on political aspirations to legal accountability.

Treaty compliance bodies, such as the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, are made up of independent experts. The bodies monitor implementation of the core international human rights treaties and publish interpretations of the substantive provisions of their respective human rights treaties in the form of General Comments. They also hear individual complaints using the procedures set out in the Optional Protocol. The Human Rights Committee published General Comment 6 in 1982 on the right to life contained in article 6 of the *ICCPR*, which stated that “[t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of the right requires that States adopt positive measures.”<sup>42</sup> The Committee on Economic, Social and Cultural Rights’ 2002 General Comment 15 on the right to water in the *ICESCR* emanating from adequate housing and health is much more specific and comprehensive than General Comment 6, setting out the normative content of the right to water, concerns about non-discrimination and equality, the nature of the states’ obligations and other implementation expectations.<sup>43</sup> This committee also issued a statement on the right to sanitation in 2010.<sup>44</sup>

General Comments, while not legally binding, are highly respected. Although states

have an obligation to engage with the Committee’s views and interpretation in good faith and give it important weight, states are not bound by General Comments or their applications in concluding observations or individual complaints procedures and will not necessarily be in breach of their treaty obligations if they reject an interpretation adopted by a UN Committee.<sup>45</sup>

Nonetheless, General Comment 15 provided the foundation for a broad

<sup>41</sup> 2013 GA resolution, *supra* note 1 at 3.

<sup>42</sup> Human Rights Committee, *General Comment No. 6: Article 6 (The Right to Life)*, UNCCPROR, 16th Sess, UN Doc HRI/GEN/1/Rev.1 (1982) at para 5.

<sup>43</sup> General Comment 15, *supra* note 21.

<sup>44</sup> Committee on Economic, Social and Cultural Rights, *Statement on the Right to Sanitation*, UNESCOR, 45th Sess, UN Doc E/C.12/2010/1 (2010).

<sup>45</sup> Sabine Michalowski, “Research Note: The Legal Status of General Comments”, Essex Autonomy Project (23 May 2014) at 3, online: <autonomy.essex.ac.uk/wp-content/uploads/2014/07/Legal-status-of-General-Comments-.pdf>.

discussion on the right to water and sanitation and has been widely influential.

The most significant and comprehensive United Nations instruments on human rights as they relate to water and sanitation are resolutions adopted in 2010, 2013 and 2014. In July 2010, the General Assembly, by Resolution 64/292, recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”.<sup>46</sup> The 2010 GA resolution was co-sponsored by 33 states,<sup>47</sup> but did not attract a consensus; while no countries voted against it, 41 states abstained from voting and 29 states were absent. Many states, including abstaining Canada, nonetheless expressed opposition to it.

In a dramatic turnaround, the 2013 GA resolution enjoyed consensus. The preambular paragraphs indicated only that it was “recalling” the 2010 GA resolution and instead the resolution spoke of “reaffirming” the human right to safe drinking water and sanitation as set out in previous Human Rights Council<sup>48</sup> resolutions including HRC resolution 24/18 in 2013.<sup>49</sup> (Annually since 2008, the HRC has adopted progressively more detailed resolutions on human rights and water and sanitation.<sup>50</sup>) The 2013 GA resolution asserts that the right is derived from and inextricably linked to treaties and calls upon states to undertake specific actions in order to ensure the progressive realization of this human right. Ninety states co-sponsored the 2013 GA resolution and no country abstained or called for a vote. The United States joined the international consensus after successfully restricting the scope of the right during preliminary negotiations.<sup>51</sup> Consensus adoption without

<sup>46</sup> *The Human Right to Water and Sanitation*, GA Res 64/292, UNGAOR, 64th Sess, Supp 49 (vol III), UN Doc A/RES/64/292 (2010) at 2 [2010 GA resolution].

<sup>47</sup> Co-sponsorship indicates very strong support by a state.

<sup>48</sup> The Human Rights Council (“HRC”) should be distinguished from the Human Rights Committee (“CCPR”). The HRC is made up of 47 United Nations Member States who are elected by the UN General Assembly and members sit in a representative capacity. The CCPR, the treaty body responsible for interpretation of the *ICESCR*, is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights. Members serve in their personal capacity.

<sup>49</sup> Human Rights Council, *The Human Right to Safe Drinking Water and Sanitation*, HRC Res 24/18, UNHRCOR, 24th Sess, UN Doc A/HRC/24/18 (2013).

<sup>50</sup> Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation*, HRC Res 7/22, UNHRCOR, 7th Sess, UN Doc A/HRC/RES/7/22 (2008) [2008 HRC Resolution]; Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation*, HRC Res 12/8, UNHRCOR, 12th Sess, UN Doc A/HRC/RES/12/8 (2009); 2010 GA Resolution, *supra* note 46; Human Rights Council, *Human Rights and Access to Safe Drinking Water and Sanitation*, HRC Res 15/9, UNHRCOR, 15th Sess, UN Doc A/HRC/RES/15/9 (2010); Human Rights Council, *The Human Right to Safe Drinking Water and Sanitation*, HRC Res 21/2, UNHRCOR, 21st Sess, UN Doc A/HRC/RES/21/2 (2012); Human Rights Council, *The Human Right to Safe Drinking Water and Sanitation*, HRC Res 24/L.31, UNHRCOR, 24th Sess, UN Doc A/HRC/24/L.31 (2013); 2013 GA Resolution, *supra* note 1; Human Rights Council, *The Human Right to Safe Drinking Water and Sanitation*, HRC Res 27/L.11/Rev.1, UNHRCOR, 27th Sess, UN Doc A/HRC/27/L.11/Rev.1 (2014).

<sup>51</sup> “United Nations: General Assembly Makes Progress on the Human Rights to Water and Sanitation, but only so far as the USA Permits”, Amnesty International (26 February 2013), online: <<https://www.amnesty.org/en/latest/news/2013/02/un-general-assembly-makes-progress-on-the-human-rights-to-water-and-sanitation-but-only-so-far-as-the-usa-permits/>>

abstentions or absences indicates that the 2013 GA resolution goes beyond a political statement and may, as will be discussed, help establish the customary right to water and sanitation as part of a legally binding international human rights law framework.

The 2013 GA resolution was subsequently complimented by the adoption of the 2014 HRC resolution, which delineated the normative content and steps for realization of the human right to water and sanitation. Seventy-four countries co-sponsored the 2014 HRC resolution. Only the United States dissociated itself from the expansive way the right was articulated in the 2014 HRC resolution in particular but even it affirmed the basic human right to water and sanitation.<sup>52</sup> The 2014 HRC resolution is by far the most comprehensive and detailed document on the source, normative content and realization of the human right to water and sanitation. The unanimous support for recognition of the human right to water and sanitation as demonstrated by adoption of the 2013 GA resolution and the 2014 HRC resolution provide a sound basis for concluding that the human right to water and sanitation can be derived from treaty-protected rights to life, health and adequate housing.<sup>53</sup>

#### IV. Customary International Law

Rules recognized by customary international law apply to all states, including those that have not ratified associated conventions (unless those states acted as persistent objectors in the process of formation). Thus, it is important to consider whether the human right to water and sanitation is solely derived from treaties, as the discussion so far suggests, or whether it also exists independently under customary international law. A rule becomes part of customary international law if that rule is based on widespread, representative and uniform state practice that demonstrates that states accept the rule and believe or recognize that they are legally obliged to act in a particular way (the latter criteria is referred to as *opinio juris*). There must be convincing evidence of acceptance and a sense of legal obligation. State practice is established by considering both statements made by state actors and their actual behaviour.

Statements can include assent to or commentary on General Assembly resolutions or resolutions made by other United Nations bodies where

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[amnesty.org/en/documents/IOR40/005/2013/en/](http://amnesty.org/en/documents/IOR40/005/2013/en/)>.

<sup>52</sup> The US dissociated from paragraph 21, the text of which is in the prologue to this article. See “Explanation of Position: The Human Right to Safe Drinking Water and Sanitation”, Statement of the Delegation of the United States of America as Delivered by Ambassador Keith Harper (25 September 2014), online: <<https://geneva.usmission.gov/2014/09/25/explanation-of-position-the-human-right-to-safe-drinking-water-and-sanitation/>>.

<sup>53</sup> States also need to take care to ensure that the burdens of limited access do not disproportionately affect women, children and people living with disabilities.

members represent states, such as the HRC. General Comments, on the other hand, involve interpretation of treaty law and therefore are of limited use in determining customary international law. Additionally, treaty body committee members sit in an individual capacity, not a representational one, and therefore their opinions are not evidence of state practice.

The first international instrument to explicitly recognize water as a universal “right” was the Action Plan developed at the United Nations Water Conference held in Mar del Plata in 1977, which declared that all people “have the right to have access drinking water in quantities and of a quality equal to their basic needs.”<sup>54</sup> Since then, the often contested concept of a human right to water and sanitation has been the subject of various instruments including covenants, declarations, comments, reports, resolutions and declarations emanating from United Nations bodies, member states and events organized by the United Nations or other organizations.<sup>55</sup> Actual behaviour in the peculiar context of human rights can be drawn from “whether States regard their acts as legally justified and legitimate State policy, or whether they consider them human rights violations.”<sup>56</sup> Proof of widespread actual state behaviour regarding legal obligation can be difficult to discern. The adoption of norms in national constitutions and domestic legislation is one indicator.

## A. Academic Opinion

Academics have expressed a range of opinions in the last decade on whether the right to water and sanitation has become part of customary international law. Some are of the view that the rules on the formation of customary international law are inapplicable to human rights law. The weight of early academic opinion focused on the 2002 General Comment 15 and concluded that this comment could not and did not create customary international law. Matthew Craven, for example, asserted in 2006 that access to water was “an interest to be protected, but not a right as such.”<sup>57</sup> He and other academics, including Stephen Tully, noted that the comment was insufficiently clear on the subject of privatization.<sup>58</sup> Eibe Riedel noted that the comment and other documents could only be described as soft law or non-legal declarations.<sup>59</sup>

<sup>54</sup> United Nations, Report of the United Nations Water Conference, Mar del Plata (14–25 March 1977), UN Doc E/CONF.70/29 at 66, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N77/114/97/PDF/N7711497.pdf?OpenElement>>.

<sup>55</sup> For a comprehensive summary of instruments implicitly or explicitly touching on water and sanitation rights, see Winkler, *supra* note 18.

<sup>56</sup> *Ibid* at 70.

<sup>57</sup> Matthew Craven, “Some Thoughts on the Emergent Right to Water” in Eibe H Riedel & Peter Rothen, eds, *The Human Right to Water* (Berlin: Berliner Wissenschafts-Verlag, 2006) 37 at 42.

<sup>58</sup> Stephen Tully, “A Human Right to Access Water? A Critique of General Comment No. 15” (2005) 23:1 *Neth QHR* 35.

<sup>59</sup> Eibe Riedel, “The Human Right to Water and General Comment No. 15 of the Committee on Economic, Social and Cultural Rights” in Riedel & Rothen, *supra* note 57, 19 at 35.

Amanda Cahill criticized the comment, noting that the document internally contradicted itself on the status of the right to water.<sup>60</sup> Paula Berger and Bruce Chen, writing in 2011, acknowledged that the normative content of the asserted right was not clear, but also acknowledged that “the precise content of a norm does not have to be completely finalised before a right is recognised as being part of international human rights law.”<sup>61</sup> Berger and Chen went on to observe that “the existence of the right to water in international law has been expressly recognised since at least 2003, when the ESC Committee published General Comment 15”;<sup>62</sup> however, they also noted that “it is doubtful that the right to water has yet reached the status of customary international law.”<sup>63</sup>

By the end of the decade, and especially immediately after the 2010 GA resolution, academic opinion started to divide. Joyeeta Gupta, Rhodante Ahler and Lawal Ahmed asserted in 2010 that “although there [was] growing consensus on the human right to water, the fragmentation of water governance implies that the impact of the consensus is limited.”<sup>64</sup> Takele Soboko Bulto called the right to water a “discovery [rather] than an invention” but noted that although soft law instruments on a right to water possibly comprised a nascent *opinio juris* and there was a burgeoning trend in state practice to recognizing the right to water, he was nonetheless unwilling to conclude that there is an existing international customary law.<sup>65</sup> Sharmila Murthy observed that “[w]hile they do not give the human right to water and sanitation the status of customary international law, taken together, [the 2002] Comment 15 and the [2010] General Assembly and Human Rights Council resolutions have arguably brought the right to water and sanitation within the scope of the rights recognized under the ICESCR.”<sup>66</sup> In her 2012 book, Inga Winkler considered amongst other things political statements by state actors at international fora recognizing the human right to water and sanitation. Her comprehensive analysis concluded that such statements were not yet consistent.<sup>67</sup> However,

<sup>60</sup> Amanda Cahill, “‘The Human Right to Water – A Right of Unique Status’: The Legal Status and Normative Content of the Right to Water” (2005) 9:3 Intl JHR 389 at 395. Cahill opines that there is a human right to water, but is critical of the deficiencies in its drafting, noting that “even though the General Comment 15 does represent legal standards under the authority of the CESCR, the status of the right to water would seem to be contradictory both within the document itself and within international human rights law in general. This results in the right to water being of ‘unique status’ – in a situation between a derivative right and an independent right, a status that is unclear and requires clarification” (*ibid.*).

<sup>61</sup> Paula Gerber & Bruce Chen, “Recognition of the Human Right to Water: Has the Tide Turned?” (2011) 36:1 Alternative LJ 21 at 26.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* at 23.

<sup>64</sup> Joyeeta Gupta, Rhodante Ahler & Lawal Ahmed, “The Human Right to Water: Moving Towards Consensus in a Fragmented World” (2010) 19:3 RECIEL 294 at 294.

<sup>65</sup> Takele Soboko Bulto, “The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?” (2011) 12:2 Melbourne J of Int’l L 290 at 314, 311.

<sup>66</sup> Sharmila L Murthy, “The Human Right(s) to Water and Sanitation: History, Meaning and the Controversy Over-Privatization” (2013) 31:1 BJIL 89 at 105.

<sup>67</sup> Winkler, *supra* note 18 at 69.

she noted that “it is not too optimistic to assume that the right to water can be regarded as a customary human right in *statu nascendi*. If the developments on the right to water continue at their current rate, its recognition may be expected to reach fruition.”<sup>68</sup>

The list of academics asserting that the human right to water had now become part of international customary law started to grow after the 2010 GA resolution. George McGraw asserted in 2011 that “state practice, legal opinion and treaty interpretation all currently point toward the existence of an independent, universal right to water in international law”<sup>69</sup> and that both treaty and customary international law points to the existence of a positive right to water. Rebecca Bates, writing in 2010, opined that “the right to water is a principle of customary international law as a result of its repeated direct and indirect recognition in international agreements and the practices of States therefore satisfying the requirements of usage and *opinio juris*.”<sup>70</sup> Her opinion was echoed by Benjamin Mason Meier and Yuna Kim in 2012 when they asserted that the 2010 HRC Resolution on water “has given political recognition to the establishment of an independent right to water and sanitation, supporting the reasoning of General Comment 15 and declaring a state obligation that many now consider to bind all nations under customary international law.”<sup>71</sup> In what could be described as a thorough review, Gonzalo Aguilar Cavallo concluded in 2012 that

[t]here is no explicit conventional recognition of the right to water and sanitation, but there is enough evidence to argue that the first steps to establish a customary rule have already taken place. Indeed, the right to safe drinking water and sanitation has developed enough to reach the point where its status can be considered an international customary rule in *statu nascendi*. There is abundant, albeit scattered, international conventional law and international soft law that upholds this assertion. There are also relevant international judicial decisions that are considered to be subsidiary means to determine a rule of international law that recognizes the right to access to safe drinking water and sanitation. Additionally, international human rights quasi-judicial decisions support this conclusion.<sup>72</sup>

Academic opinion, especially after 2010, is evenly divided. However, the two most comprehensive reviews, by Winkler and Cavallo, come to similar conclusions that sometime in the not too distant future the right to water and

<sup>68</sup> *Ibid* at 97 [footnotes omitted].

<sup>69</sup> George S McGraw, “Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence” (2011) 8:2 Loy U Chicago LJ 127 at 137.

<sup>70</sup> Rebecca Bates, “The Road to the Well: An Evaluation of the Customary Right to Water” (2010) 19:3 RECIEL 282 at 293.

<sup>71</sup> Benjamin Mason Meier & Yuna Kim, “Human Rights Accountability through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation” (2015) 26:1 Duke J Comp & Intl L 139 at 165, n 113.

<sup>72</sup> Gonzalo Aguilar Cavallo, “The Human Right to Water and Sanitation: From Political Commitments to Customary Rule?” (2012) 3:5 Pace Intl L Rev Online Companion 136 at 199–200.

sanitation will emerge as part of customary international law.

## B. Tipping Point on Customary Law?

Four recent developments may have now tipped the balance in favour of recognition of customary law on water and sanitation: the overwhelming support by states for the 2013 GA resolution and the 2014 HRC resolution; recent political declarations; the relatively new Universal Periodic Review (“UPR”) process; and developments flowing from the recognition of water and sanitation—implicit or explicit—in national constitutions and related jurisprudence. The first two sources provide solid data on widespread and uniform declarations of state acceptance and the last two are evidence of states’ behaviour related to legal conviction.

No academic opinion has yet been published following the unanimous 2013 GA resolution (co-sponsored by 90 countries and which was adopted by consensus with no abstentions) or the 2014 HRC resolution (co-sponsored by 74 countries). As Winkler presciently noted in 2012, “if the [2010 GA resolution] had been adopted by consensus, this would have reinforced its implications for the emergence of the right to water as a customary human right.”<sup>73</sup> Michael Scharf, commenting on the role of General Assembly resolutions in the formation of customary international law, observes that it is important to ask questions about the precise language of the resolution.<sup>74</sup> Is it a mere recommendation, a declaration or an affirmation, the latter indicating codification or crystallization of the law? Does the resolution use the language of firm obligation or the language of aspiration? Are there indications, especially if the resolution was adopted by consensus, that states regard the text as a mere political statement which was not justiciable? Applying these considerations to the 2013 GA resolution, it can be observed that it uses the strong language of “reaffirms” whereas the 2010 GA resolution uses the weaker language of “recognizes”. The 2013 GA resolution does not merely contain the language of aspiration but, unlike the 2010 GA resolution, sets out states’ duties in some detail. As noted earlier, only one state issued a statement limiting their support for the 2013 GA resolution.<sup>75</sup> Contrast this silence with, for example, Canada’s abstention from the 2010 GA resolution, which was accompanied by a strong statement asserting the lack of international consensus.<sup>76</sup> Thus, as none of Scharf’s caveats respecting

<sup>73</sup> Winkler, *supra* note 18 at 79.

<sup>74</sup> Michael P Scharf, “Accelerated Formation of Customary International Law” (2014) 20:2 ILSA J Intl & Comp L 305 at 324–29. See also “What We Do: The General Assembly”, United Nations Foundation, online: <[www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html](http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html)>.

<sup>75</sup> The United States thought the scope of the right was somewhat too broad.

<sup>76</sup> Government of Canada, *Explanation of Position* (3 March 2008), cited in Standing Senate Committee on Human Rights, “Canada and the United Nations: A Time for Serious Re-Evaluation”, by Hon Raynell Andreychuk & Hon Mobina SB Jaffer (June 2008) at 17, online: <[www.parl.gc.ca/Content/SEN/](http://www.parl.gc.ca/Content/SEN/)

reliance on General Assembly resolutions are present, the 2013 GA resolution is indicative of widespread state acceptance of the norm.

Winkler also notes that political declarations and other statements of recognition, as of 2011, were not consistent enough to provide sufficient support for the emergence of the human right to water as customary international law.<sup>77</sup> Other game-changing events, such as the declarations recognizing the human right to water and sanitation emerging from the 2012 United Nations Rio+20 conference and the 2015 World Water Forum (discussed in the next section) may have also contributed to the solidification of acceptance of the human right to water and sanitation as customary law.

A comprehensive and well-documented source for determining state behaviour may have emerged through the relatively new UPR process. Most states have now participated in two UPR cycles. As of July 2015, 59 states have raised water issues and 81 states have received water recommendations.<sup>78</sup> More than 88 percent of the recommendations were accepted by the receiving state and action was taken by states on more than 92 percent of these recommendations.<sup>79</sup> The frequency with which states have raised and responded to water and sanitation issues in both cycles of the UPR and the far greater willingness of states to accept water-related recommendations in the second round may also provide evidence of widespread, representative and virtually uniform state practice demonstrating the conviction that they are legally obliged to act in a particular way.

In the context of international human rights law, national constitutions may be evidence of a widespread belief of legal obligation, as can, arguably, judicial interpretations of these constitutions. According to David Boyd, writing in 2012, constitutions in 147 of the 193 countries in the world include explicit references to protection of the environment.<sup>80</sup> Over the last two decades, at least 15 countries<sup>81</sup> have adopted explicit provisions in their national constitutions to protect the right to water and, sometimes, sanitation. For example, the 2013 *Constitution of the Republic of Fiji* has provisions on water and sanitation that reflect the core principles of international human rights law:

35.-(1) The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to accessible and adequate housing and sanitation.

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Committee/392/huma/rep/rep13jun08-e.pdf>.

<sup>77</sup> Winkler, *supra* note 18 at 87.

<sup>78</sup> "Database of UPR Recommendations", UPR Info, online: <[www.upr-info.org/database/](http://www.upr-info.org/database/)> [UPR Database].

<sup>79</sup> *Ibid.*

<sup>80</sup> Boyd, *Revolution*, *supra* note 17 at 47.

<sup>81</sup> South Africa, Niger, Ecuador, Uruguay, Libya, Democratic Republic of Congo, Maldives, Kenya, Fiji, Zimbabwe, Dominican Republic, Uganda, Nicaragua, Mexico and Solomon Islands. For more details, see WaterLex Legal Database, online: <[www.waterlex.org/waterlex-legal-database/](http://www.waterlex.org/waterlex-legal-database/)>.



(2) In applying any right under this section, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available.

36.–(1) The State must take reasonable measures within its available resources to achieve the progressive realisation of the right of every person to be free from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate quantities.

(2) In applying any right under this section, if the State claims that it does not have the resources to implement the right, it is the responsibility of the State to show that the resources are not available.<sup>82</sup>

Some countries have provisions that protect the right to adequate housing or public services. Case law in some of these countries has interpreted these provisions as supporting an implied right to water and sanitation rights.<sup>83</sup> For example, article 366 of the *Constitution of Colombia*, under the heading “Concerning the Social Purpose of the State and of the Public Services”, provides that “[t]he general welfare and improvement of the population quality of life are social purposes of the state. A basic objective of the state’s activity will be to address unsatisfied public health, educational, environmental, and potable water needs.”<sup>84</sup> Colombian courts have found that, pursuant to this article, “public authorities and public water companies have the obligation to, in settlements that have already been legalised, provide water and sanitation services efficiently and in a timely manner.”<sup>85</sup> Similarly, courts in Argentina have found that the government is obliged to provide minimum essential levels of drinking water to its population. This obligation flows from section 75, *bis* 19 of the *National Constitution of Argentina* which “empowers” the Argentinian national congress “[t]o provide everything relevant to human development, economic progress with social justice, the growth of the national economy, the creation of jobs, the professional training of workers, the defense of the currency value, the scientific and technological research and development, their overall diffusion and beneficial use.”<sup>86</sup>

Finally, most, if not all, national constitutions protect the right to life,

<sup>82</sup> *Constitution of the Republic of Fiji* (2013), arts 35–36, online: <[www.paclii.org/fj/Fiji-Constitution-English-2013.pdf](http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf)>.

<sup>83</sup> For more detail, see WaterLex & WASH United, *supra* note 18; Boyd, *Revolution*, *supra* note 17.

<sup>84</sup> *Constitution of Columbia* (1991), art 366.

<sup>85</sup> *Dagoberto Bohorquez Forero c/ EAAB Empresa de Acueducto y Alcantarillado de Bogota y Otros* [2012] Tribunal Administrativo (Cundinamarca) 11001-33-31-003-2007-00186-01, cited in WaterLex & WASH United, *supra* note 18 at 104.

<sup>86</sup> *National Constitution of Argentina* (1991), s 75(19), online: <[www.parliament.am/library/sahmanadrutyunner/argentina.pdf](http://www.parliament.am/library/sahmanadrutyunner/argentina.pdf)>. See *Defensor del Pueblo de la Nación c/ Estado Nacional y Provincia del Chaco* [2007] Suprema Corte D.587.XLIII, online: <[odhpi.org/wp-content/uploads/2012/07/Fallo-Chaco-defensor-del-pueblo](http://odhpi.org/wp-content/uploads/2012/07/Fallo-Chaco-defensor-del-pueblo)>, cited in WaterLex & WASH United, *supra* note 18 at 67; *Asociación Civil por la Igualdad y la Justicia c/ Gobierno de la Ciudad de Buenos Aires* [2007] Cámara de Apelaciones en lo Contencioso Administrativo y Tributario (Ciudad Autónoma de Buenos Aires), cited in WaterLex & WASH United, *supra* note 18 at 70. See also Boyd, *Revolution*, *supra* note 17 at 2.

security of the person and freedom from inhumane treatment and, in at least nine countries,<sup>87</sup> courts have used these provisions to constitutionalize water and sanitation rights. For example, while the human right to water and sanitation is not explicitly mentioned in the *Constitution of India*, case law from Indian courts since 1980, at both the state and federal levels, interprets article 21 of that constitution—the right to life—as encompassing the right to safe and sufficient water and sanitation.<sup>88</sup> Two Canadian legal scholars, Nathalie Chalifour and David Boyd, have concluded that the provisions on the right to life and the right to equality in the *Charter* could similarly be used to establish a right to water.<sup>89</sup>

Provisions in national constitutions do not ordinarily contribute to the formation of customary international law. Nonetheless, as both international human rights law and national constitutions pertain to the same relationship (i.e. as between the state and the individual), provisions in national constitutions on human rights may be relevant for the formation of customary international law on the issue of state practice.<sup>90</sup> Even if constitutions are relevant, Winkler was of the opinion, writing in 2011, that “despite the increasing number of constitutional provisions on the right to water ... the number of States incorporating such provisions is relatively small compared to the total number of States. Thus, it is impossible to speak of a general practice in this regard that would support a customary human right to water.”<sup>91</sup>

It is not clear what the tipping point would be to establish widespread acknowledgement or belief in a binding norm. Since Winkler noted the “relatively small” number of states incorporating explicit provisions, more countries, including Mexico, the Solomon Islands and Fiji, have amended their constitutions to explicitly protect the right to water and sanitation. Moreover, Winkler did not include in her count countries which have constitutional provisions touching on the environment (almost 75 percent of the countries in the world by Boyd’s count) or provisions on services from which an implied right to water and sanitation might be drawn. For example, she does not include section 36 of the Canadian *Constitution Act, 1982* in her analysis, nor is it mentioned in other international compilations of water and sanitation related instruments. The oft-overlooked section 36(1)(c) provides that governments in Canada are “committed to... providing essential public services of reasonable

<sup>87</sup> India, Pakistan, Bangladesh, Nepal, Botswana, Costa Rica, Venezuela, Indonesia and Israel.

<sup>88</sup> *Municipal Council, Ratlam v Shri Vardhichand & Ors*, 1980 AIR 1622, 1981 SCR (1) 97, (Supreme Court of India); *Attakoya Thangal v Union of India* (1 January 1990) (Kerala High Court), online: <[www.indiankanoon.org/doc/1980528/](http://www.indiankanoon.org/doc/1980528/)>. The High Court relied on Article 21 of the *Constitution of India* (1950), which protects the right to life, to make orders concerning the management of groundwater resources. The Court reasoned that water was fundamental for sustaining life and that the right to life entailed the need to protect water resources and to manage them sustainably.

<sup>89</sup> *Supra* note 17.

<sup>90</sup> Winkler, *supra* note 18 at 90–93.

<sup>91</sup> *Ibid* at 93.

quality to all Canadians.”<sup>92</sup> As I argue elsewhere, while the *Charter* could be said to be Canada’s domestic response to its ratification of the *ICCPR*, it may also be said that section 36(1) was Canada’s domestic response to the ratification of the *ICESCR*.<sup>93</sup> More recently, Canada itself, in its submissions during its periodic review by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, noted that “[section 36] provisions are particularly relevant in regard to Canada’s international obligations for the protection of economic, social and cultural rights”.<sup>94</sup>

## V. Canada’s Evolving Position on the Human Right to Water

In this section, I review how Canada’s position on the recognition of the international human right to water and sanitation has shifted in the last decade from resistance to acceptance. If the shifts in the Canadian acceptance of the rule and conviction of legal obligation through declarations and behaviours are mirrored in other countries, the widespread and virtually uniform state practice respecting the right to water and sanitation in customary international law will have been established. I begin by chronologically reviewing Canada’s position at or before UN events or bodies and then look at its position in the UPR process.

### A. Position in International Fora

For many years the Canadian government refused to recognize the human right to water and sanitation under international law. It blocked even modest steps toward international recognition before various UN bodies and worked behind the scenes to derail advancement toward a binding instrument. In 2008, the HRC considered the first of its now annual resolutions on the human right to water.<sup>95</sup> When Canada and other states expressed dissatisfaction, the resolution was stripped of human rights language. Federal officials stated that Canada wanted to ensure the meeting’s outcome reflected the fact that access to water is not formally recognized as a human right in international law and that this resolution did not create a human right to water.<sup>96</sup>

The 2008 resolution originally called for the appointment of a Special Rapporteur on water and sanitation, who would consider, among other things, the possible scope of a human right to water and sanitation. Canada

<sup>92</sup> *Constitution Act, 1982*, *supra* note 32, s 36(1)(c).

<sup>93</sup> Possible interpretations of this section are explored more fully in Karen Busby, “‘Providing Essential Services of Reasonable Quality to All Canadians’: Understanding Section 36(1)(c) of the Constitution Act, 1982” *Rev Const Stud* [forthcoming in 2016].

<sup>94</sup> *Core document forming part of the reports of States parties: Canada*, HRI/CORE/CAN/2013 (2013) at para 169.

<sup>95</sup> 2008 HRC Resolution, *supra* note 50.

<sup>96</sup> *Explanation of Position*, *supra* note 76. For a more detailed discussion, see Collins, *supra* note 17.

successfully spearheaded the call to downgrade this appointment from Special Rapporteur to Independent Expert.<sup>97</sup> Special Rapporteurs have broad powers to conduct fact-finding missions and investigate allegations of human rights violations. In contrast, an Independent Expert's more limited role is to develop a dialogue with states and other bodies, undertake studies and make recommendations. By the 2011 resolution on water and sanitation, the HRC reversed this position and changed the appointment, held by Catarina de Albuquerque, from Independent Expert to Special Rapporteur.

Prior to the July 2010 General Assembly vote on the 2010 GA resolution, Lawrence Cannon, then Foreign Minister, stated that the Canadian government did not support the resolution.<sup>98</sup> While no countries voted against the resolution, 41 countries, including Canada, abstained from voting. During the General Assembly proceedings, the Canadian representative stated that:

The Government of Canada is of the view that a general right to safe and clean drinking water and sanitation is not explicitly codified under international human rights law, and there is currently no international consensus among States regarding the basis, scope and content of a possible right to water. It is premature to declare such a human right in the absence of a clear international consensus, and the lack of international consensus is exemplified by the fact that a vote was called on this resolution.<sup>99</sup>

The report on the General Assembly vote noted that

[t]he representative of Canada said his delegation had joined the consensus on the resolution that had created the mandate of the independent expert. The work of that mechanism was expected to further promote study of the issue of access to water and sanitation as a human right and, as such, the text was premature. The non-binding resolution appeared to determine that there was indeed a right without setting out its scope. Since there was no consensus on the matter it was premature to declare such a right in the absence of clear international agreement, he said, adding that he had abstained from the vote.<sup>100</sup>

Some commentators were of the view that Canada's official statements objecting to the 2010 GA resolution as premature and unclear masked a deeper opposition to recognizing the right. Some thought it was an attempt to avoid censure for the deplorable conditions on First Nations reserves, some thought Canada wanted to avoid having to assume international aid obligations, and

<sup>97</sup> "Update: Canada Undermines the Right to Water and Sanitation", The Council of Canadians (16 March 2012), online: <canadians.org/fr/node/8347> [Council of Canadians].

<sup>98</sup> *Ibid.*

<sup>99</sup> UNGAOR, 64th Sess, 108th Plen Mtg, UN Doc A/64/PV.108 (2010) at 17 [2010 GA Meeting].

<sup>100</sup> "General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions", General Assembly Meetings Coverage, 64th Sess, 108th Plen Mtg, UN Doc GA/10967 (2010), online: <www.un.org/press/en/2010/ga10967.doc.htm>. See also Bruce Pardy, "The Dark Irony of International Water Rights" (2011) 28:3 Pace Env'tl L Rev 907.

others suggested that Canada wanted freedom to control commodification of water free from human rights norms.<sup>101</sup>

In March 2011, on the first United Nations-declared World Water Day, after the General Assembly vote on the 2010 GA resolution, Canada again refused to recognize the human right to water and sanitation in public statements. Bev Oda, then Minister of International Cooperation, eschewed rights-based language, asserting simply that “access to clean water and basic sanitation is fundamental to human health and sustainable development.”<sup>102</sup>

The World Water Forums, organized by the industry-dominated World Water Council and the host states, have been held triennially since 1997. These events bring together various organizations to discuss water access issues. Ministerial meetings, held at the same time as the main forum, issue consensus-based Ministerial Declarations. An alternative forum is often held in the same or a nearby city. At the sixth World Water Forum held in Marseille in March 2012, the Canadian delegation led the effort to have language affirming the UN resolutions removed from the forum’s Ministerial Declaration.<sup>103</sup> Canada successfully pressed for weaker language that simply acknowledges, rather than affirms, the 2010 GA and (the then most recent) HRC resolution, and only commits signatories to implement “human rights obligations relating to equitable access to safe drinking water and sanitation.”<sup>104</sup> Following the conference, Minister Oda again said that “access to clean water and basic sanitation is fundamental to human health and sustainable development,”<sup>105</sup> but stopped short of affirming access to water and sanitation as a human right.

A few weeks after the Marseilles forum, de Albuquerque critiqued countries and notably singled out Canada for spearheading a move to eliminate references to the human right to water and sanitation in the United Nations document that would frame negotiations at the upcoming Rio+20 UN Conference on Sustainable Development in June 2012. de Albuquerque

<sup>101</sup> See Collins, *supra* note 17 *passim*; Council of Canadians, *supra* note 97; Pardy, *supra* note 100; Maude Barlow & Anil Naidoo, “A Human Right Canada Rejects: Access to Clean Water”, *Toronto Star* (13 July 2010), online: <[www.thestar.com/opinion/editorialopinion/2010/07/13/a\\_human\\_right\\_canada\\_rejects\\_access\\_to\\_clean\\_water.html](http://www.thestar.com/opinion/editorialopinion/2010/07/13/a_human_right_canada_rejects_access_to_clean_water.html)>. On the American position, see “Explanation of Vote by John F. Sammis, U.S. Deputy Representative to the Economic and Social Council, on Resolution A/64/L.63/Rev.1, the Human Right to Water”, United States Mission to the United Nations (28 July 2010), online: <[usun.state.gov/remarks/4749](http://usun.state.gov/remarks/4749)>. Germany stated during the debate that “we would have appreciated a clearer message on the primary responsibility of States to ensure the realization of human rights for all those living under their jurisdiction, complemented, if needed, by external support coming from the region or other parts of the world.” (2010 GA Meeting, *supra* note 99 at 6).

<sup>102</sup> Stephen Eldon Kerr, “Canada Tries to Remove Human Right to Water and Sanitation”, *Alternatives International Journal* (30 March 2012), online: <[www.alterinter.org/spip.php?article3785](http://www.alterinter.org/spip.php?article3785)>.

<sup>103</sup> Council of Canadians, *supra* note 97.

<sup>104</sup> “Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level”, Amnesty International & WASH-United (2015) at 3, online: <[www.righttowater.info/wp-content/uploads/Al-and-WASH-United-States-Recognition-of-HRWS-2015.pdf](http://www.righttowater.info/wp-content/uploads/Al-and-WASH-United-States-Recognition-of-HRWS-2015.pdf)>.

<sup>105</sup> Kerr, *supra* note 102.

stated that “some States, including Canada and the United Kingdom, are apparently proposing the removal of an explicit reference to the right to water and sanitation for all, from the first draft of the ‘Rio+20 UN Conference on Sustainable Development’ outcome document.”<sup>106</sup> Canada became increasingly isolated in the Rio+20 negotiations as one of the only western countries calling for deletion of the human right to water and sanitation claiming that there is no legal basis for the right.

Just one week before the Rio+20 gathering, in an unexpected political turnaround, then Environment Minister Peter Kent signaled the federal government’s willingness to recognize water and sanitation as a basic human right. At the beginning of the conference, Canada’s permanent representative to the UN wrote to the Secretary-General of the Conference to advise that:

Canada is pleased to join consensus on the outcome document of the United Nations Conference on Sustainable Development (Rio+20). Canada remains fully committed to sustainable development and to the promotion of an economically, socially and environmentally sustainable future. Canada also recognizes that water is fundamental to sustainable development.

Canada recognizes the human right of everyone to safe drinking water and basic sanitation as essential to the right to an adequate standard of living, and therefore, implicit under article 11 of the International Covenant on Economic, Social and Cultural Rights. Canada interprets the right to safe drinking water and basic sanitation as the right to a sufficient quantity and safe quality of reasonably affordable and accessible water for personal and domestic uses (i.e., for drinking, cooking and for personal and household hygiene), and to basic sanitation that is safe and hygienic. Water and sanitation services should be physically and economically accessible on an equal and non-discriminatory basis.

Canada further recognizes that the right to safe drinking water and basic sanitation does not encompass transboundary water issues, including bulk water trade, nor any mandatory allocation of international development assistance.

Canada undertakes to continue efforts towards the progressive realization domestically of the human right to safe drinking water and basic sanitation through national and subnational actions, with a particular emphasis on people living in vulnerable situations.

It is with this understanding that Canada joins consensus on the outcome document.<sup>107</sup>

This letter signals an about-face for Canada. The Outcome Document of the

<sup>106</sup> “Rio+20: ‘Do Not Betray Your Commitments on the Human Right to Water and Sanitation’, United Nations Water and Sanitation Expert Catarina de Albuquerque”, United Nations Regional Information Centre (23 March 2012), online: <[www.unric.org/en/latest-un-buzz/27436-rio20-do-not-betray-your-commitments-on-the-human-right-to-water-and-sanitation-united-nations-water-and-sanitation-expert-catarina-de-albuquerque](http://www.unric.org/en/latest-un-buzz/27436-rio20-do-not-betray-your-commitments-on-the-human-right-to-water-and-sanitation-united-nations-water-and-sanitation-expert-catarina-de-albuquerque)>.

<sup>107</sup> “Outcome Document: Letter dated 22 June 2012 from the Permanent Representative of Canada to the United Nations addressed to the Secretary-General of the United Nations Conference on Sustainable Development”, UN Doc A/CONF.216/12 (2012) at 2.

UN Rio+20 Conference notes that states agreed to reaffirm their commitments “regarding the human right to safe drinking water and sanitation, to be progressively realized for our populations, with full respect for national sovereignty.”<sup>108</sup>

The seventh World Water Forum was held in Daegu and Gyeongbuk, Korea in April 2015. In contrast to the language used in the 2012 Marseille Ministerial Declaration, the 2015 Gyeongbuk Ministerial Declaration states that “[w]e reaffirm our commitment to the human right to safe drinking water and sanitation and ensuring progressive access to water and sanitation for all.”<sup>109</sup> While the declaration does not go as far as the 2014 HRC resolution on the scope of the right, the 2015 declaration, unlike the 2012 declaration, uses the language of human rights. However, for the first time, no minister or other representative from Canada attended the forum.

## B. Position During Universal Periodic Review

Since 2008, United Nations member states are invited to participate in a UPR on a rotating basis, with each cycle being completed in just over three years.<sup>110</sup> Such reviews provide an opportunity for each state to declare what actions they have taken to improve the human rights conditions in their country. It is one of the key processes used by the HRC, which is made up of the member states themselves, not independent experts, to remind states of the responsibility to fully protect and implement all human rights. The reviews are conducted by the UPR Working Group but any UN member state can take part in the discussion/dialogue with the state under review. The reviews are based on 1) information provided by the state under review, which can take the form of a “National Report”; 2) information contained in the reports of independent human rights experts and groups; and 3) information from other stakeholders including civil society organizations. Following receipt of the documents, the state under review and other UN member states engage in an interactive dialogue both on paper and in person, and an Outcome Document is prepared. During subsequent reviews, the state is expected to provide information on what it has been doing to implement recommendations made during prior reviews.

Canada participated in its first UPR in 2009. The Working Group’s notes included concern regarding Canada’s stance on water, stating it “regretted that Canada did not recognize the right to water as a legal entitlement and

<sup>108</sup> *The Future We Want*, GA Res 66/288, UNGAOR, 66th Sess, Supp No 49 (vol III), UN Doc A/RES/66/288 (2012) 48 at para 121.

<sup>109</sup> “Ministerial Declaration”, 7th World Water Forum, Ministerial Process (13 April 2015), online: <eng.worldwaterforum7.org/introduce/program/political.asp>.

<sup>110</sup> “Basic Facts about the UPR”, Office of the High Commissioner for Human Rights, online: <www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

strongly recommended that it ensure equal and adequate access to water.”<sup>111</sup> Canada concluded it could not accept these recommendations.

However, when Canada participated in its second UPR in 2013, its approach changed. The National Report stated that:

37. The Government of Canada also supports First Nations governments in the delivery of clean drinking water and affordable and adequate housing, through significant investments in First Nations water and wastewater infrastructure and on-reserve housing. Bill S-8, *Safe Drinking Water for First Nations Act*, was introduced in the Senate in February 2012. The enabling bill would allow the Government to work with First Nations to develop federal regulations for access to safe drinking water, and ensure the effective treatment of wastewater and the protection of sources of drinking water on First Nation lands. The Government provides an annual allocation to First Nations for housing, which supports the construction of new homes and renovations to existing units. Over 2009–2010 and 2010–2011, an additional \$400 million was provided for on-reserve housing to help address issues of overcrowding and disrepair.<sup>112</sup>

Various stakeholders, including the Council of Canadians and Amnesty International, again raised the issue of poor water quality and sanitation services on First Nations reserves and called upon Canada to expressly acknowledge the human right to water and sanitation and to provide adequate resources to realize this right on First Nations reserves.<sup>113</sup> In the Outcome Document, some countries recommended that Canada recognize the human right to water and sanitation in domestic law. In particular, Ecuador called on Canada to “[r]ecognize in the national legislation access to water and sanitation as a human right, and develop a national plan to guarantee it, in consultation with indigenous peoples and the society in general, in order to reduce the gap in access to this right between indigenous peoples and the rest of society”.<sup>114</sup> Spain recommended that Canada “[s]trengthen the guarantees for access to drinking water and sanitation for the entire population, especially for indigenous populations and the most remote areas”,<sup>115</sup> and Germany, Spain and Norway all recommended that Canada recognize the human right to water and sanitation.<sup>116</sup>

In its response, Canada no longer explicitly rejected water as a human right; rather it stated that it now accepted these recommendations in principle.

<sup>111</sup> Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1*, UNHRCOR, 4th Sess, UN Doc A/HRC/WG.6/4/CAN/2 (2009) at para 35.

<sup>112</sup> Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Canada*, UNHRCOR, 16th Sess, UN Doc A/HRC/WG.6/16/CAN/1 (2013) at para 37.

<sup>113</sup> Amnesty International, *supra* note 51.

<sup>114</sup> 2013 UPR Report, *supra* note 15 at para 128.123.

<sup>115</sup> *Ibid* at para 128.132.

<sup>116</sup> *Ibid* at paras 128.130–33. See also UPR Database, *supra* note 78.



More specifically, it stated that:

32. Canada accepts in principle recommendations 123, 130, 131, 132 and 133 [made by Ecuador, Germany, Spain, Spain and Norway, respectively]. Governments in Canada have various legislative and regulatory measures in place governing drinking water, the treatment of wastewater and sanitation. Further, the recently enacted *Safe Drinking Water for First Nations Act* will enable the Government of Canada to work with First Nations to develop federal regulations to ensure they have access to safe, clean and reliable drinking water, effective treatment of wastewater and the protection of sources of water on their lands.<sup>117</sup>

Note that although the act referred to in Canada's response might address the regulatory gap, it is otherwise severely deficient. It does not address the infrastructure or funding gap and does not contain any of the core principles of a human rights framework.<sup>118</sup> Canada also explicitly rejected recommendations touching on the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>119</sup> But all in all, while Canada's endorsement for the human right to water and sanitation could have been stronger, it did accept "in principle" the calls to recognize the right and agreed to take steps to improve access to water and sanitation.

<sup>117</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UNHRCOR, 24th Sess, Addendum, UN Doc A/HRC/24/11/Add.1 (2013) at para 32.

<sup>118</sup> Catarina de Albuquerque, *Realising the Human Rights to Water and Sanitation: A Handbook, Legislative, Regulatory and Policy Frameworks*, vol 2 (2014), online: <[www.ohchr.org/Documents/Issues/Water/Handbook/Book2\\_Frameworks.pdf](http://www.ohchr.org/Documents/Issues/Water/Handbook/Book2_Frameworks.pdf)> has a checklist for provisions which should be included in legislative frameworks to ensure compliance with international law. Few, if any, of these features are contained in the *Safe Drinking Water for First Nations Act*, *supra* note 31. For critiques of the *Safe Drinking Water for First Nations Act*, see "Bill S-8: Safe Drinking Water for First Nations Act", Assembly of First Nations, Submission to the Standing Senate Committee on Aboriginal Peoples (16 May 2012), online: <[www.afn.ca/uploads/files/water/senatestandingcommitteebill\\_s-8.pdf](http://www.afn.ca/uploads/files/water/senatestandingcommitteebill_s-8.pdf)>; "Water Legislation Progresses Despite Failure to Address Needs and Concerns of Aboriginal Women", Ontario Native Women's Association (16 July 2012), online: <[www.onwa.ca/upload/documents/water-s-8-media-release-final.pdf](http://www.onwa.ca/upload/documents/water-s-8-media-release-final.pdf)>; Allison A Thornton, "Implications of Bill S-8 and Federal Regulation of Drinking Water in First Nation Communities", OFNTSC Water Symposium (20-21 March 2012), online: <[www.afn.ca/uploads/files/parliamentary/legalanaylis.pdf](http://www.afn.ca/uploads/files/parliamentary/legalanaylis.pdf)>; "Federal Bill S-8 Fails to 'Protect' Drinking Water for First Nations", Chiefs of Ontario, online: <[www.chiefs-of-ontario.org/node/233](http://www.chiefs-of-ontario.org/node/233)>; Shawn Bell, "Water Quality Act Flawed, says NAN", *Wawatay News Online* (1 December 2015), online: <[www.wawataynews.ca/home/water-quality-act-flawed-says-nan](http://www.wawataynews.ca/home/water-quality-act-flawed-says-nan)>; Boyd, "No Taps", *supra* note 17; Laura Eggertson, "Legislation Introduced to Regulate Water Quality on Reserves" (2010) 182:10 CMAJ E435, online: <[www.cmaj.ca/content/182/10/E435.full.pdf](http://www.cmaj.ca/content/182/10/E435.full.pdf)>; Constance MacIntosh, "Public Health Protection and Drinking Water Quality on First Nation Reserves: Considering the New Federal Regulatory Proposal" (2009) 18:1 Health L Rev 5. Finally, it should be noted that some have raised concerns about derogation of Aboriginal rights; see "Position Paper on Bill S-11 - Safe Drinking Water for First Nations Act", Indigenous Bar Association, Submitted to the Senate Aboriginal Peoples Committee (3 March 2011), online: <[www.indigenoubar.ca/pdf/IBA%20Submissions%20on%20Bill%20S11%20Drinking%20Water.mar%203%202011.pdf](http://www.indigenoubar.ca/pdf/IBA%20Submissions%20on%20Bill%20S11%20Drinking%20Water.mar%203%202011.pdf)>.

<sup>119</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 (vol III), UN Doc A/RES/61/295 (2007) 15.

## VI. Conclusion and Next Steps

In less than a decade, Canada has moved from resisting the recognition of the human right to water and sanitation in international law to explicitly recognizing the right. It supported the declaration emanating from the UN's 2012 Rio+20 conference having expressed only minor reservations and it joined the consensus on the 2013 GA resolution and the 2014 HRC resolution affirming the right as derived from international treaties. Canada has also accepted in principle criticisms and suggestions made during its second UPR process in 2013, including that it explicitly recognize the right, after having outright rejected the same criticisms and suggestions during the first UPR round in 2009. Canada has finally introduced, albeit flawed, legislation to regulate drinking water on First Nations reserves. Additionally, in a manner similar to other national constitutions which have been interpreted as protecting the right to water and sanitation, the *Constitution Act, 1982* provides that governments are "committed to ... providing essential public services of reasonable quality to all Canadians."<sup>120</sup> These developments indicate that in addition to accepting that the human right to water and sanitation is derived from treaties, Canada has, by its statements and behaviour, demonstrated acceptance of the human right to water and sanitation and the conviction that Canada is legally obliged to act in a particular way. These indicators also assist in the recognition of the right in customary international law.

Having examined the status and sources for the human right to water and sanitation in international law, I conclude by setting out the next set of issues that need to be considered before strategic questions about the utility of relying on international law to address the state of water and sanitation on reserves can be considered. What is the scope or normative content of the human right to water and sanitation? Has the human right to water and sanitation been realized in Canada without discrimination, with particular attention paid to those who are at risk of a rights violation? Do the substantive obligations (to respect, protect and fulfil) operate in Canada? Do the core principles that underpin human rights protection (participation, transparency and accountability, progressive realization, non-discrimination and effective complaint mechanisms and remedies) operate in Canada? These matters will be more fully developed in a separate paper.<sup>121</sup>

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<sup>120</sup> *Constitution Act, 1982*, *supra* note 32, s 36(1)(c).

<sup>121</sup> This manuscript is still a work in progress.