

# Why Canada must Recognise the Human Right to Water and Sanitation

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Since 2002, the Canadian government has taken a position at the United Nations stating that it did not accept that there was a right to water and sanitation.<sup>2</sup> A Foreign Affairs Spokesperson was recently quoted as stating that there is no human right to water elaborated in international human rights law.<sup>3</sup> At informal open sessions at the Human Rights Council in March 2008, at which governments and non-governmental organisations, including COHRE, were present, Canada's diplomatic representatives repeatedly stated that there was no right to water and sanitation, nor were there any human rights obligations related to access to drinking water and sanitation under international law

Canada's current government has not put on record the reasons for its opposition to the right to water and sanitation. It may be that it shares the concern expressed by the previous Liberal government and the current Liberal water critic, Francis Scarpaleggia, who was recently quoted as saying: "The security of our own water vis-a-vis the United States is not settled, so we don't want to make any symbolic gestures which could embarrass us in the future when private enterprise in the United States come knocking at our door for bulk water....That doesn't mean that we shouldn't adhere to the principle of water as a human right in practice and make it a greater part of our overseas development assistance programs."<sup>4</sup> The previous Liberal administration had stated that one reason for its reluctance to recognise the right to water was the alleged concern that that the right to water might allow other countries to lay claim to Canada's freshwater reserves.<sup>5</sup>

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<sup>2</sup> Explanation of vote by Canadian representative Marie Gervais-Vidricaire, Official Records of the Commission on Human Rights, 58th session, 22 April 2002. The following year, a Canadian representative was on record as stating that Canada does not accept the notion that there is a right to water, particularly between States, Official Records of the Commission on Human Rights, 59th session, 22 April 2003.

<sup>3</sup> Mike De Souza, 'Government stalling access to water pact, critics charge' CanWest News Service Wed 19 March 2008.

<sup>4</sup> Ibid.

<sup>5</sup> Statement by DFAIT spokesperson, Reynald Doiron recorded in The National Catholic Register, 19 October 2003.

## EXECUTIVE SUMMARY

### 1. The right to water and sanitation is already legally recognised in international law

The Canadian government is incorrect in stating that there is no right to water and sanitation in international law. In Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – a human rights treaty ratified by 157 countries, including Canada – the ratifying States “recognize the right of everyone to an adequate standard of living for himself and his family, *including* adequate food, clothing and housing and to the continuous improvement of living conditions.” At two UN world conferences, the International Conference on Population and Development, Cairo, 1994 (in which 177 States participated) and the Second United Nations Conference on Human Settlements (Habitat II), Istanbul, 1996 (in which 171 States participated), the community of States – the community of States - including Canada - unanimously adopted international declarations which state that the right to an adequate standard of living includes water and sanitation, in addition to food, clothing and housing. It would be inconsistent and amount to bad faith for Canada to ignore the two declarations that to which it previously signed up and to deny that the right to an adequate standard of living recognised in the ICESCR includes water and sanitation. In addition, Canada has ratified, among other relevant treaties, the Convention on the Rights of the Child which provide for obligations to ensure water and sanitation to children. See Section 1 of the detailed response to the Canadian government’s position for further analysis of the legal basis for the right to water and sanitation.

### 2. The right to water and sanitation does not require Canada to share its water resources with other countries

The Liberal water critic is incorrect in stating that the right to water might permit private enterprises in the United States to make claims on Canada’s water resources. This concern is based on a misunderstanding of the implications of the right to water and sanitation and of the obligations of the International Covenant on Economic, Social and Cultural Rights (ICESCR). No private investor from the United States or elsewhere, could make a valid claim upon Canada’s water on the basis of the right to water and sanitation. The right to water and sanitation does not in any way limit Canada’s territorial sovereignty, including sovereignty over its national resources.

Canada ratified the ICESCR in 1976 and there have never been any claims made upon Canada for specific resources. For example, even though Canada has ample grain reserves, there has never been a claim by any person suffering malnutrition, American or otherwise, for free provision of these grain reserves on the basis of the right to food which Canada has recognised. Canada and the United States have consistently stated that they are not bound by legal obligations to provide international assistance to people in other countries. The right to water and sanitation does **not** provide for access to water used for agricultural or commercial purposes. It does **not** provide for non-essential water needs, such as car-washing or maintaining lawns. The international definition of the right to water and sanitation limits the right to water to basic personal and domestic uses such as drinking, food preparation, washing of clothes, personal sanitation, personal and household hygiene. Such uses typically account for approximately 5% of overall water use. Thus, even if an American could make a human rights claim upon Canada’s water resources, he or she could only make a claim upon water for their personal and domestic uses. Such a claim would be extremely far-fetched – for example, a homeless person in Denver or Chicago arguing that Canada should directly provide water from the Great Lakes to him in order to realise the right to water and sanitation. Such a claim could be

rebutted on the basis that the United States has ample water resources to satisfy all residents' basic personal and domestic needs.

An investor wishing to access Canada's water resources would aim to rely on the North American Free Trade Agreement which includes some protections for the commercial interests of investors, rather than on human rights. In such a circumstance, the human right to water and sanitation (and the right to food) would be a hindrance rather than a help to the investor. Canada can claim as a defence to investor claims that it cannot share its water resources as these are required in order for Canada to meet its obligations under the ICESCR towards current and future generations of Canadian households and farmers.

In addition, there are more subtle and constructive ways for the Canadian government to express its concerns about transboundary issue than simply opposing the right. Canada could deal with the issue by stipulating what it understands to be the limits of the right, and by working with other countries to find a common understanding which safeguards Canada's interests. The 2008 UN Human Rights Council resolution proposed by Germany and Spain attempted to allay concerns regarding potential implications of the right to water and sanitation for transboundary issues. It stated in the Preamble: "*Affirming* the need to focus on a local and national perspective in considering the issue, leaving aside questions of international watercourse law and all transboundary water issues." It should be noted that Canada's diplomatic representatives at the Human Rights Council continued to oppose reference to the right to water and sanitation in spite of the inclusion of this phrase.

### **3. The Canadian government's position undermines the efforts of people without access to water and sanitation to hold their governments to account**

Even if Canada were correct to say that there was insufficient legal basis for the right to water and sanitation, it would still have to answer the question as to **why** it accepts other economic, social and cultural rights - such as the human rights to health, food, housing, clothing and social security - but is opposing the recognition of this important human right, which clearly is no less important than the other rights for any person's survival and dignity. Diseases caused by poor water and sanitation services kill 10,000 people every day, including 5,000 children under the age of five. Lack of access to basic services reinforces gender inequalities and seriously undermines all development efforts.

Canada's opposition to the right to water and sanitation - in spite of the fact that the 2008 Human Rights Council resolution on this subject explicitly leaves aside transboundary issues - strongly suggests that the Canadian government's opposition to the right to water and sanitation is motivated by reasons the government has chosen not to make public. Almost all countries in Africa, Latin America, Asia and the Pacific and Europe have been party to resolutions in the last seven years recognising the right to water (See Section 1.2 below). Canada is internationally viewed as the primary State opposed to the right to water and sanitation. This position undermines Canada's international image.

References to the human right to water and sanitation are not solely symbolic. It is important for civil society and communities without access to water and sanitation to be able to refer to the right to water and sanitation in order to hold governments to account for ensuring such access. Treating water and sanitation as a human right helps empower marginalised groups, and allows them to access human rights institutions at the national and international level in support of their struggles. Recognition and advocacy of the right to water and sanitation can help to generate the political will

required to make the necessary reforms to water and sanitation laws, policies and practices; increase pressure to raise the necessary resources, both at domestic and international level for basic water and sanitation and ensure that such resources are utilised in a manner that focuses on the needs and aspirations of the poor and marginalized. The human right to water and sanitation can be used to promote accountability in decision-making, focus on the needs of the most vulnerable and marginalised groups and help increase participation in decision-making by traditionally excluded communities.

Because the right to water and sanitation is only implicit, rather than explicit, in the International Covenant on Economic, Social and Cultural Right, some governments can try to argue that there is no human right to water and sanitation in international law, and that access to water and sanitation is a privilege rather than a right. Canada has either intentionally or unwittingly allied itself to such governments by helping to deprive the marginalised and vulnerable of one of their most powerful tools. Canada may be taking its position out of caution, but this position is strikingly negligent in a situation in which more than one billion people who do not have access to clean water and more than 2.6 people who do not have access to a clean and safe toilet.

The suggestion by the Liberal water critic Canada refuse to recognise the right to water, but consider water as a human right in Canada's development assistance programmes does not sufficiently meet this concern. By denying recognition for water and sanitation at the international level, Canada is making it more difficult for people without access to water and sanitation to hold their governments to account. Canada's position is therefore doing a significant amount of damage to the prospects of poor people in developing countries – damage that far outweighs the impact of whatever development assistance Canada might provide.

# Detailed response to the Canadian government's position on the right to water and sanitation

This document provides further substantiation on three main points made in the Executive Summary.

## 1. The right to water and sanitation is already recognised in international law

The human right to water and sanitation is included in a number of international treaties and declarations.

### 1.1 Treaties and their interpretation

The right to water and sanitation is implicitly included in a range of international human rights treaties. The Convention on the Elimination of All Forms of Discrimination against Women (ratified by Canada), for example, obliges States parties in article 14 (2) (h) on the specific needs of rural women to ensure “the right to enjoy adequate living conditions, particularly in relation to housing, *sanitation*, electricity and *water supply*, ...”. The Convention on the Rights of the Child (CRC, ratified by Canada) requires States parties in art. 24 (2) (e) to ensure that all segments of society “are informed, have access to education and are supported in the use of basic knowledge of ... hygiene and *environmental sanitation*.” Furthermore, article 27 (1) recognizing the right of every child to an adequate standard of living has consistently been interpreted by the Committee on the Rights of the Child, the treaty body in charge of monitoring and interpreting the CRC, to include access to *clean drinking water and latrines*.<sup>6</sup> In the recently adopted Convention on the Rights of Persons with Disabilities (signed by Canada), States recognise in Article 28 “the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and resolve to take appropriate steps to safeguard and promote the realization of this right, including measures to ensure equal access by persons with disabilities to *clean water*.”

Entitlements to access to water and sanitary facilities can also be found in the Geneva Conventions (ratified by Canada). The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III, 1949) provides under Article 29 that: “The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics. Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them. Also, apart from the baths and showers with which the camps shall be furnished, prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.” The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV, 1949) in article 85 contains analogous entitlements for civilian internees.

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<sup>6</sup> See, for example, Concluding Observations of the Committee on the Rights of the Child: Ethiopia. U.N. Doc. CRC/C/ETH/CO/3 (2006), at para 61.

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by 157 States, including Canada, stipulates that:

The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, *including* adequate food, clothing and housing and to the continuous improvement of living conditions.

The ICESCR does not explicitly refer to water or sanitation. However, by using the word ‘including’, Article 11 (1) lists food, clothing and housing as components of the right to an adequate standard of living, rather than an exhaustive statement as to what the right to an adequate standard means. While adequate food, clothes and shelter are all basic human needs that are indispensable for an adequate standard of living, they are not sufficient. In light of the fundamental importance of water for human survival, well being and dignity, it would be impossible to maintain that an individual lacking access to minimum supplies of safe water for basic needs could enjoy an adequate standard of living. Similarly, it is impossible to say that a person who does not have access to a safe and adequate toilet or latrine, and therefore has to defecate in the open has an adequate standard of living.

It is therefore sound to conclude that the right to an adequate standard of living recognized under article 11(1) ICESCR includes the right to water and sanitation. More precisely, the right to water and sanitation should be understood as a distinct right that forms a distinct normative component of the right to an adequate standard of living, exactly like the rights to food, clothing and housing.

Virtually all States that have ratified the ICESCR have stated twice that the right to an adequate standard of living implicitly includes water and sanitation. The Programme of Action of the 1994 Cairo Conference on Population and Development, endorsed by 177 States participating in the conference (including Canada), recognises in Principle 2 that:

Countries should ensure that all individuals are given the opportunity to make the most of their potential. They have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, *water and sanitation*.<sup>7</sup>

The Habitat Agenda, adopted in the framework of the Second United Nations Conference on Human Settlements (Habitat II) held in Istanbul in 1996, endorsed by 171 States participating in the conference (including Canada), provides in almost identical terms in Principle 11 that:

Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, *water and sanitation*, and to the continuous improvement of living conditions.<sup>8</sup>

Canada did not raise any objections to the inclusion of water and sanitation within the right to an adequate standard of living at either of these two conferences.

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<sup>7</sup> Available at: [http://www.unfpa.org/icpd/icpd\\_poa.htm](http://www.unfpa.org/icpd/icpd_poa.htm). For a list of participating countries, see the Report of the International Conference on Population and Development, A/CONF.171/13, 18 October 1994, available at: <http://www.un.org/popin/icpd/conference/offeng/poa.html>.

<sup>8</sup> The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action, available at: [http://www.unhabitat.org/downloads/docs/1176\\_6455\\_The\\_Habitat\\_Agenda.pdf](http://www.unhabitat.org/downloads/docs/1176_6455_The_Habitat_Agenda.pdf). For a list of participating countries, see <http://daccessdds.un.org/doc/UNDOC/LTD/I96/051/56/PDF/I9605156.pdf?OpenElement>.

The Vienna Convention on the Law of Treaties represents the international standard for the interpretation of treaties, one rule of which in Article 31 states: “There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions...” As all States parties to the ICESCR were party to the Cairo Declaration and Habitat Agenda, there is a strong case for arguing that the provision of the ICESCR relating to the right to an adequate standard of living should be interpreted as including water and sanitation.

In 2002, the Committee on Economic, Social and Cultural Rights (CESCR), the body of independent experts responsible for interpreting and monitoring implementation of the ICESCR by States parties, adopted General Comment No. 15 on the right to water,<sup>9</sup> in which it states:

Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living, including adequate food, clothing and housing. The use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

Although some may question the correctness of ‘reading in’ water and sanitation into the ICESCR, it should be noted that this is precisely the approach taken by the Supreme Court of Canada in determining what are the grounds of discrimination that are prohibited under the Canadian Charter of Rights and Freedoms. Section 15 (1) states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Supreme Court has held that ‘analogous grounds’ of discrimination in addition to those listed in Section 15 (1), such as sexual orientation and citizenship, are also prohibited even if they are not explicitly mentioned as they are similar in character to other grounds mentioned in the Charter.<sup>10</sup>

Access to water and sanitation for all is also required in order to realise other human rights explicitly contained in the ICESCR, including the right to the highest attainable standard of health (article 12 (1))<sup>11</sup> the right to adequate housing (article 11 (1))<sup>12</sup> and the right to education (article 13(1)),<sup>13</sup> as well as the right to life contained in the International Covenant on Civil and Political Rights (article 6 (1)).

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<sup>9</sup> General Comment No. 15 is not legally binding per se, but it constitutes an authoritative interpretation of the provisions of the ICESCR by the competent body. General Comment No. 15 has received wide acceptance by States parties.

<sup>10</sup> See *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143, *Egan v. Canada* [1995] 2 S.C.R. 513.

<sup>11</sup> A core obligation of the right to health is for the State to ensure access to basic sanitation, and an adequate supply of safe and potable water, see Committee on Economic, Social and Cultural Rights, General Comment No. 14: *The right to the highest attainable standard of health*, UN ESCOR, 2000, para. 43 (c). See also paras. 11, 12, 15, 36.

<sup>12</sup> Access to safe drinking water and sanitation is an element of the right to adequate housing, see Committee on Economic, Social and Cultural Rights, General Comment No. 4: *The right to adequate housing*, UN ESCOR, 1991, UN Doc. E/1992/23, para. 8 (b).

<sup>13</sup> Sanitation facilities for both sexes and safe drinking water are required in schools as part of the right to education, see Committee on Economic, Social and Cultural Rights, General Comment No. 13: *The right to education*, UN ESCOR, 1999, UN Doc. E/C.12/1999/10, para. 6 (a).

## 1.2. International declarations

Virtually all States have recognised the right to water and sanitation in at least two political declarations. As noted in Section 1.1 above, the Programme of Action of the 1994 Cairo Conference on Population and Development and the 1996 Habitat Agenda, endorsed respectively by 177 and 171 States (representing all the States represented at the conferences), including Canada, recognises that the right to an adequate standard of living encompasses access to both water and sanitation. In addition, the Mar del Plata Declaration of the UN Water Conference, 1977, provides that, “all peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.”<sup>14</sup>

It should also be noted that all developing countries and all European countries (including Russia) have been party to further declarations on the right to water. The Non-Aligned Movement, which consists of 118 countries (including all of Latin America, Africa and most of Asia), also recognised the right to water.<sup>15</sup> In Europe, the Committee of Ministers to Member States on the European Charter of Water Resources, declared that, “Everyone has the right to a sufficient quantity of water for his or her basic needs. International human rights instruments recognise the fundamental right of all human beings to be free from hunger and to an adequate standard of living for themselves and their families. It is quite clear that these two requirements include the right to a minimum quantity of water of satisfactory quality from the point of view of health and hygiene.”<sup>16</sup>

In December 2007, 37 countries from the Asian-Pacific region (including, among others, India, China and Japan) at the 1<sup>st</sup> Asia-Pacific Water Summit endorsed the “Message from Beppu”, which recognizes “the people’s right to safe drinking *water and basic sanitation* as a basic human right.”<sup>17</sup>

Such declarations are not binding in that they do not directly give rise to individual rights and legally binding State obligations. However, they represent State recognition of an existing right created by legally binding treaties and the principle of good faith in international law requires that States act in accordance with the recognition of this right. Furthermore, such declarations provide important precedent for the actions of the United Nations, including the UN Human Rights Council.

## 1.3. United Nations expert reports

The right to water and sanitation was recognised in the 2006 Guidelines for the realization of the right to drinking water and sanitation adopted by the Sub-Commission on the Promotion and

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<sup>14</sup> The UN Water Conference, Mar del Plata Declaration (1977), preamble.

<sup>15</sup> The Non-Aligned Movement acknowledged the right to water in September 2006: “The Heads of State or Government recalled what was agreed by the UN Committee on Economic, Social and Cultural Rights in November 2002, recognised the importance of water as a vital and finite natural resource, which has an economic, social and environmental function, and acknowledged the right to water for all” (14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Final Document, 16 September 2006, NAM 2006/doc.1/rev.3, para. 226).

<sup>16</sup> Council of Europe, Recommendation of the Committee of Ministers to Member States on the European Charter on Water Resources, Recommendation 14 (2001) para. 5. This decision was made by representatives of Foreign Ministers of the 43 states that are members of the Council of Europe.

<sup>17</sup> [http://www.apwf.org/archive/documents/summit/Message\\_from\\_Beppu\\_080130.pdf](http://www.apwf.org/archive/documents/summit/Message_from_Beppu_080130.pdf). The list of participating countries is available at: [http://www.apwf.org/archive/documents/summit/071204\\_List\\_of\\_summit\\_participants\\_of\\_the\\_1st\\_APWS\\_rev.pdf](http://www.apwf.org/archive/documents/summit/071204_List_of_summit_participants_of_the_1st_APWS_rev.pdf)

Protection of Human Rights.<sup>18</sup> In addition, the legal basis for this right was set out in the 2004 report of the UN Sub-Commission on the Promotion and Protection of Human Rights Special Rapporteur on the Right to Drinking Water Supply and Sanitation<sup>19</sup> and the 2007 Report of the UN High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to drinking water and sanitation (OHCHR Report). The OHCHR Report concluded that “it is now time to consider access to safe drinking **water and sanitation** as a human right.”<sup>20</sup> The OHCHR report was based on an explicit mandate of the Human Rights Council in a decision taken without a vote to carry out: “a detailed study on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.”<sup>21</sup>

## **2. The right to water and sanitation does not require Canada to share its water resources with other countries**

The right to water and sanitation cannot be interpreted in such a manner that would require Canada to share its water resources internationally. No private investor from the United States or elsewhere, could make a valid claim upon Canada’s water on the basis of the right to water and sanitation.

First, Canada, the United States and many developed countries consistently reject any interpretations of international human rights law that they bear any legal obligations to provide international assistance with regard to any economic, social and cultural rights to people in other countries. The International Covenant on Economic, Social and Cultural Rights (ICESCR) does indicate that international assistance and cooperation is required in order to ensure the realisation of economic, social and cultural rights.<sup>22</sup>

In the 21 years of its work, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), which monitors State performance under the ICESCR, has never called on any country to assist another specific country nor has it recommended that any State provide a specific form of assistance to others. According to Philip Alston, a leading scholar in this field and former member of the CESCR, no UN body nor any group of governments has claimed that any given country is obligated under the ICESCR to provide specific assistance to any country.<sup>23</sup> The CESCR’s statements in relation to international assistance have been to request States to ensure that such assistance is provided in a manner consistent with human rights standards and to request developed countries to reach the 0.7% of GNP target for development assistance as quickly as possible. Canada ratified the ICESCR in 1976 and there have never been any claims made upon Canada for specific

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<sup>18</sup> Available at: <http://www2.ohchr.org/english/issues/water/index.htm>.

<sup>19</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Final report of the Special Rapporteur on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation*, 14 July 2004, E/CN.4/Sub.2/2004/20, paras. 40-44.

<sup>20</sup> Available at: [http://www2.ohchr.org/english/issues/water/docs/HRC\\_decision2-104.pdf](http://www2.ohchr.org/english/issues/water/docs/HRC_decision2-104.pdf). At para 66. Emphasis added.

<sup>21</sup> UN Doc. A/HRC/2/L.3/Rev.3.

<sup>22</sup> « Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant, including particularly the adoption of legislative measures.” Article 2 (1).

<sup>23</sup> P Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate as Seen Through the Lens of the Millennium Development Goals’ (2005) 27 Human Rights Quarterly 755, 777.

resources. For example, even though Canada has ample grain reserves, there has never been a claim by any person suffering malnutrition, American or otherwise, for free provision of these grain reserves on the basis of the right to food which Canada has recognised.

It is inconceivable that the CESCR would ever request Canada to share its water resources with other countries. Canada can fulfil any international cooperation obligations solely through the provision of financial or technical assistance to developing countries. Should Canada choose to assist other countries realise the right to water for their people, it would have the discretion to decide on the means used to provide such assistance. Such assistance would most practically be provided by sharing technological information and funding programmes, for example, to build water delivery infrastructure, to promote technology that efficiently uses water in households, industry and agriculture and to support the development of effective and accountable governance structures in the relevant sectors. Any suggestion that Canada would assist developing countries achieve the right to water through bulk water transfers belongs in the realm of science fiction.

Second, the United States, unlike Canada, has not ratified the International Covenant on Economic, Social and Cultural Rights. It is inconceivable that the United States would make a claim upon Canada's water resources based on the right to water and sanitation. If the United States did adopt such a position, it would open the United States up to analogous claims by other countries, in particularly developing countries, upon its own financial, technological (including intellectual property) and water resources. It is in fact likely that the United States would firmly oppose any claims by individual Americans upon Canada's water resources based on human rights arguments.

Third, in the unlikely event that it were possible for individuals from another country to make claims upon Canada's water resources, the right to water and sanitation applies only to the use of water for personal and domestic uses, which ordinarily include: "drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene."<sup>24</sup> Thus, an American individual could claim only the amount of water needed for household uses. Such a claim would be extremely far-fetched – for example, a homeless person in Denver or Chicago arguing that Canada should directly provide water from the Great Lakes to him in order to realise the right to water and sanitation. Such a claim could be rebutted on the basis that the United States has ample water for priority household needs, and that such an individual should be make a claim against his own government. As household water use (including non-essential use) normally constitutes no more than eight per cent of total water use in any country, it would be extremely difficult to show that the United States cannot not meet household water from its own water resources available to it.

It should be noted that according to United Nations figures, 100% of people in the United States have access to safe water, provided through household connections.<sup>25</sup> There may be a very small – less than 1% proportion of people who cannot afford water services. However, the problem there is

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<sup>24</sup> The footnote in General Comment No. 15 following this sentence states the following: "In this context, "drinking" means water for consumption through beverages and foodstuffs. "Personal sanitation" means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. "Food preparation" includes food hygiene and preparation of food stuffs, whether water is incorporated into, or comes into contact with, food. "Personal and household hygiene" means personal cleanliness and hygiene of the household environment. UN Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water, U.N. Doc. E/C.12/2002/11, paras. 2 and 12 (a).

<sup>25</sup> WHO and UNICEF, *Meeting the MDG Drinking Water and Sanitation Target: The Urban and Rural Challenge of the Decade*, 2006, p. 38.

a lack of a social safety network, which should be addressed by the United States, rather than by Canadian exports of bulk water.

The right to water and sanitation does **not** provide for access to water used for agricultural or commercial purposes, which normally comprises 90% or more of water use. Personal and domestic uses of water account for less than ten per cent of the total amount of water used in human activities,<sup>26</sup> although essential uses require a significantly lower percentage. Therefore, an investor wishing to make a claim upon Canada's water resources using human rights would have a marginally better claim based upon the right to food, which Canada has recognised. It is, however, questionable whether such a claim would be recognised – given that the United States has more than sufficient water to grow food for its population, and sufficient financial resources to import food for its own use as necessary. It is worth noting in this line that one of the Canadian activist groups motivated by strong opposition to bulk water transfers to the United States - the Council of Canadians - has in fact firmly embraced the human right to water, does not share the concerns expressed by the Liberal critic and has describes Canada's concerns about the implications of the right to water for Canada's water resources as “false fears.”<sup>27</sup>

An investor wishing to gain access to Canada's water resources would aim to rely on provisions in the North American Free Trade Agreement which protects commercial interests of investors. Such a claim would be based on commercial interests, rather than human rights. In such a circumstance, the human right to water and sanitation (and the right to food) would be a hindrance rather than a help to the investor. As one of several potential defences to such an investor claim under NAFTA, Canada can in fact argue that it cannot share its water resources as these are required in order for Canada to meet its obligations under the ICESCR towards current and future generations of Canadian households and farmers. UN General Comment No. 15 states: “Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.”<sup>28</sup>

There is precedent for human rights to be used as a defense to investor claims by investor-State tribunals established by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). This occurred in a dispute between Argentina and Aguas Argentinas, a consortium that was managing the water and sewerage system in Buenos Aires until 2005.<sup>29</sup> The dispute related to a tariff freeze imposed by the government after the devaluation of the peso. A coalition of NGOs applied for permission to submit an amicus curiae (i.e. a third party submission) brief to the panel arguing that “*by virtue of fundamental democratic principles that lead to the enjoyment of human rights, the public decisions that affect millions of people cannot be adopted in secrecy nor exclude the opinion of the affected population.*”<sup>30</sup> While the Argentine government welcomed the participation of the NGOs,

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<sup>26</sup> UNDP, *Beyond Scarcity: Power, poverty and the global water crisis: UNDP Human Development Report 2006* (New York, 2006), p. 138. Available at <http://hdr.undp.org/hdr2006/>

<sup>27</sup> Maude Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water* (Toronto, McClelland and Stewart, 2007) see p. 164-174. Barlow is the National Chairperson of the Council of Canadians.

<sup>28</sup> General Comment No. 15, para. 11.

<sup>29</sup> Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. vs. the Argentine Republic, ICSID Case No. ARB/03/19.

<sup>30</sup> Submitted on January 28, 2005 by Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria and Unión de Usuarios y Consumidores. See [www.cels.org.ar](http://www.cels.org.ar).

the investor was opposed, thus requiring the arbitration panel to make a decision. The panel recognised that: “*the dispute centres around the water distribution and sewage systems of a large metropolitan area, and as a result may raise a variety of complex public and international law questions, including human rights considerations.*” On this basis the tribunal allowed the NGO coalition to submit the amicus brief.<sup>31</sup>

Fourth, and finally, there are more subtle and constructive ways for the Canadian government to express its concerns about transboundary issue than simply opposing the right. Canada could deal with the issue by stipulating what it understands to be the limits of the right, and by working with other countries to find a common understanding which safeguards Canada’s interests. The 2008 UN Human Rights Council resolution proposed by Germany and Spain attempted to allay concerns regarding potential implications of the right to water and sanitation for transboundary issues. It stated in the Preamble: “*Affirming* the need to focus on a local and national perspective in considering the issue, leaving aside questions of international watercourse law and all transboundary water issues.” It should be noted that Canada’s diplomatic representatives at the Human Rights Council continued to oppose reference to the right to water and sanitation in spite of the inclusion of this phrase. This suggests that the Canadian government’s opposition to the right to water and sanitation is motivated by reasons the government has chosen not to make public.

### **3. The Canadian government’s position undermines the efforts of people without access to water and sanitation to hold their governments to account**

Even if Canada were correct to say that there was insufficient legal basis for the right to water and sanitation, it would still have to answer the question as to **why** it is opposing the recognition of the right. Canada accepts other economic, social and cultural rights, such as the human rights to health, food, housing, clothing and social security, and it therefore inconsistent for it to oppose the right to water and sanitation, which cannot be said to be any less important than the other rights for any person’s survival and dignity. Both water and sanitation are listed as key Millennium Development Goals, accepted by Canada, alongside primary education and health care. Nearly half the population of developing countries is suffering from diseases linked to inadequate water and sanitation.<sup>32</sup> It has been calculated that 443 million school days are lost each year to water-related illness.<sup>33</sup> The financial cost of treating such diseases goes far beyond the cost of ensuring access to water and sanitation services for all. While the diseases described above are not always life threatening, they can have negative life-long consequences, reducing a person’s ability to learn effectively at school, continuing poverty into adulthood.<sup>34</sup> Poor water and sanitation services are a significant factor in high infant mortality rates in developing countries.<sup>35</sup>

Canada’s opposition to the right to water and sanitation - in spite of the fact that the 2008 Human Rights Council resolution explicitly leaves aside transboundary issues - strongly suggests that the Canadian government’s opposition to the right to water and sanitation is motivated by reasons the government has chosen not to make public. As listed in Section 1.2 above, most countries have been

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<sup>31</sup> Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, Case No. ARB/03/17, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005 and Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission of February 12, 2007 at <http://www.worldbank.org/icsid/cases/pending.htm>

<sup>32</sup> Ibid., p.6.

<sup>33</sup> *Beyond Scarcity*, see note 2, p. 6.

<sup>34</sup> Ibid., p. 45.

<sup>35</sup> UN HABITAT, *Water and Sanitation in the World's Cities*, see note 8, p.74.

party to resolutions in the last seven years re-affirming the right to water. These include the Non-Aligned Movement (composed of 118 countries covering most of Africa, Asia and Latin America), the Council of Europe (composed of 43 European countries) and 37 countries in the Asia-Pacific region. Canada is internationally viewed as the primary State opposed to the right to water and sanitation. This position undermines Canada's international image.

Canada, together with the United States, has worked hard at the United Nations to prevent references to the right to water and sanitation. Such references are not purely symbolic. It is important for civil society and communities without access to water and sanitation to be able to refer to the international right to water and sanitation in order to hold governments to account for ensuring such access. Treating water and sanitation as a human right helps empower marginalised groups, and allows them to access human rights institutions at the national and international level in support of their struggles. However, because the right to water and sanitation is only implicit, rather than explicit, in the International Covenant on Economic, Social and Cultural Right, governments can try to argue that there is no human right to water and sanitation in international law, and that access to water and sanitation is a privilege rather than a right. They can, for example, try to argue that people living in informal settlements should not be provided water services and the government will make no effort to provide drainage channels for wastewater.

Canada has either intentionally or unwittingly allied itself to such governments by helping to deprive the marginalised and vulnerable of one of their most powerful tools. Canada may be taking its position out of caution, but this position is strikingly negligent in a situation in which more than one billion people who do not have access to clean water and more than 2.6 people who do not have access to a clean and safe toilet. The suggestion of the Liberal critic that Canada refuse to recognise the right to water, but treat water to be treated as a human right in Canada's development assistance programmes is not satisfactory. By denying recognition for water and sanitation at the international level, Canada is making it more difficult for people without access to water and sanitation to hold their governments to account. Canada's position is therefore doing a significant amount of damage to the prospects of poor people in developing countries – damage that far outweighs the impact of whatever development assistance Canada might provide.

It should be emphasised that treating water and sanitation as not a symbolic matter, but rather can make a major difference in addressing the global water and sanitation deficit. For the last few decades, water and sanitation has been seen as a purely development or technical issue, with the legal and political dimensions underplayed. Yet, as shown in the UNDP Human Development Report 2006 – Beyond scarcity: Power, poverty and the global water crisis, lack of access to basic levels of water and sanitation is primarily due to exclusion and neglect of the poor and not, as commonly assumed, lack of sufficient water resources or lack of technical solutions.

If implemented properly in national and international governance frameworks, the right to water and sanitation can help to generate the political will required to make the necessary reforms to laws, policies and practices; increase pressure to raise the necessary resources, both at domestic and international level for basic water and sanitation; ensure that such resources are utilised in a manner that focuses on the needs and aspirations of the poor and marginalized.

The human rights to water and sanitation has three features that can make a real – and not symbolic – addition to current development efforts: it can be used to promote accountability in decision-

making, to focus on the needs of the most vulnerable and marginalised groups and help increase participation in decision-making by traditionally excluded communities.

First, the right to water and sanitation can improve accountability in the water and sanitation sector as access to water and sanitation is viewed as a legal entitlement, rather than only a moral priority. National mechanisms, such as human rights commissions and courts, and international human rights mechanisms can identify and address deficiencies in the implementation of water and sanitation policies, and recommend or require improvements. Communities and other organisations can also use the right to raise the political profile of the importance of access to water and sanitation and can lobby the responsible agencies for improvements.

Second, the right to water and sanitation can increase the focus on groups that have been traditionally discriminated against or historically neglected, such as persons living in informal settlements. It obliges governments to use available resources in a manner that prioritises the extension of access to basic water and sanitation services to all their people. This is in contrast to common practice where significant amounts of public resources are often used for the construction of infrastructure and provision of subsidies that benefit upper and middle-income groups to the exclusion of the poor.

Third, treating water and sanitation as rights implies that there must be genuine consultation and participation of communities in decision-making on service delivery and management of water resources. Although participation is now acknowledged as a development best practice, centralised planning processes remain prevalent, and can neglect the input of various users. The right to water and sanitation can help empower and enable communities to organise themselves and legitimately seek to take part in decision-making processes.