

# THE HUMAN RIGHTS TO WATER AND SANITATION

Overview of the September 2014 Resolution of the Human Rights Council

The human rights to water and sanitation<sup>1</sup> are a remarkable success story of international human rights law: The speed with which the recognition and understanding of the rights have developed since General Comment 15 is likely unprecedented. So is the reception of the human rights to water and sanitation by practitioners from the WASH sector.

Resolutions by the UN Human Rights Council (HRC) and General Assembly (GA) are an important indicator of the development of the rights, as they illustrate how UN Member States interpret the human rights to water and sanitation.

This briefing paper on Human Rights Council Resolution A/HRC/27/7<sup>2</sup> of September 2014 gives an overview of the topics included in the resolution that are particularly relevant for the WASH sector. Like previous Human Rights Council Resolutions, the resolution was adopted by consensus of all Member States of the Human Rights Council. It was co-sponsored by 74 States.<sup>3</sup>

The paper highlights the progress as well as the concessions that were made during the negotiations in order to reach consensus on the resolution. For every topic summarised in the paper, a reference to the relevant paragraph of the resolution is included, referring to Preambular Paragraphs (PP) or Operative Paragraphs (OP).

<sup>1</sup>) WASH United advocates for interpreting water and sanitation as two distinct, closely related human rights. This is not yet consensus and resolutions use the term 'human right to safe drinking water and sanitation'. In this paper, we use the plural unless we directly quote from the resolution text.

<sup>2</sup>) Available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/27/7](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/27/7)

<sup>3</sup>) The resolution was adopted by consensus, so that there was no vote and therefore no voting record. In the absence of a vote, States can declare their support for a resolution by co-sponsoring it. The number of co-sponsors is an indicator of the overall support that a resolution receives.

## Violations of the human rights to water and sanitation

This year's report of the Special Rapporteur on the human right to safe drinking water and sanitation focuses on violations of the rights to water and sanitation, a controversial topic. The resolution contains a number of strong paragraphs on violations, with some exceptions where the text was weakened during the negotiations in order to reach consensus.

### + The resolution calls on States to identify patterns of failures to respect, protect and fulfil the right and to address structural causes of such failures

By referring to all three duties of states (respect, protect, fulfil), the resolution clearly implies that not only retrogression or slippage can violate rights, but also failure to move forward in realising (fulfil) rights progressively. Coupled with the call to address structural causes of violations, this paragraph can form a strong advocacy argument for focusing on those who are marginalised from service provision based on legal, policy, societal or any other grounds.

→ See OP 11 (b)

### + Remedies for violations are addressed in several paragraphs in the resolution

The resolution underlines the need for an effective remedy through judicial, quasi-judicial and other procedures. This clarifies that there should be procedures to remedy violations throughout the system of service provision, so that complaints can be resolved before they have to go to court. The resolution further underlines the importance of claims on behalf of individuals or groups of individuals. This can allow for procedures that assess the wider structural problem for a violation, and can therefore serve as precedent for a wider group of affected people.

→ See PP 5, OPs 10 and 11 (c)

### - The capacity of judges and human rights institutions to identify and remedy violations is addressed in the resolution

Unfortunately, the resolution only calls for the »promotion« of access to trainings for judges, prosecutors and decision makers and for the »promotion« of the ability of human rights institutions to work on violations. In previous drafts, the language was much stronger: **ensuring** that human rights institutions have an **explicit mandate** to receive complaints and to identify and address violations and **ensuring** that judges and others have relevant training. Unfortunately, »promotion« alone might mean that institutions, judges and others are indeed encouraged – but cannot make a case for the necessary resources to follow through.

→ See OP 11 (d) and 11 (e)

## **The legal basis and definition of the human rights to water and sanitation**

The resolution contains paragraphs on both the legal basis of the rights to water and sanitation and the definition of these rights. Although these topics were included in previous resolutions, there were controversies again this year. Including these topics in this year's resolution is therefore important to consolidate and build consensus.

### **✚ The resolution recalls that the human right to water and sanitation is derived from the right to an adequate standard of living**

As a 'derived' right, water and sanitation are recognised as part of the right to an adequate standard of living, which is enshrined in legally binding treaties.<sup>4</sup> The reaffirmation of the derived right is of crucial importance: If the right was not recognised as derived from another treaty-right – and instead recognised in resolutions only – the right would not form part of legally binding international law. The affirmation of the legal basis is particularly relevant in countries where the rights are not well reflected in national legal frameworks, as international obligations can then be used for advocacy at the national level and may even be useful for claiming rights.

→ *See OP 1*

### **✚ The resolution for the first time contains the full definition of water and sanitation in human rights terms, in the wording that was developed by the Committee on Economic, Social and Cultural Rights and the Special Rapporteur.<sup>5</sup>**

Including the full definition in the resolution strengthens consensus and provides much needed clarity, guidance and additional political support for the use of the rights to water and sanitation in practice, including with regards to the post-2015 development agenda. The definition has gained considerable support in recent sessions and is therefore an important indicator of how the understanding of the rights has advanced at the Human Rights Council. However, some States remain sceptical whether the rights to water and sanitation should be defined to such level of detail. The USA is the only country that therefore disassociated from the paragraph.<sup>6</sup>

→ *See PP 21*

<sup>4</sup>) The right to an adequate standard of living is contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by 162 States, and in the Convention on the Rights of the Child (CRC), which has been ratified by 194 states.

<sup>5</sup>) Preambular Paragraph 21: Reaffirming 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 [emphasis added]

<sup>6</sup>) See for example the United States' Explanation of Position on preambular paragraph 21 and other issues, available at: <https://geneva.usmission.gov/2014/09/25/explanation-of-position-the-human-right-to-safe-drinking-water-and-sanitation/>

## **Menstruation, stigma, human rights and gender inequality**

Menstruation and the importance of menstrual hygiene management (MHM) is a neglected issue and a taboo in many parts of the world. This neglect and widespread stigma has a profound impact on human rights, including the rights to water and sanitation, health, privacy, dignity, education and work.

**+** For the very first time in resolutions on the human rights to water and sanitation, a paragraph that highlights menstruation as a human rights issue is included

The resolution explicitly links lack of adequate water and sanitation services to MHM and highlights the stigma often associated with menstruation. Including this topic in the resolution supports the dialogue between the human rights' and WASH' sectors. It supports political dialogue to ensure that menstruation and MHM no longer impede the realisation of human rights of women and girls.

→ See PP 14

## **WASH sector challenges and human rights**

There is an increasing willingness in the WASH sector to understand and use the human rights to water and sanitation in practice, as a tool to improve the realisation, operation, maintenance and monitoring of water and sanitation service provision. The resolution includes several paragraphs that support an all-important dialogue between the human rights and WASH sectors:

**+** The resolution reflects the concern that current monitoring' figures underestimate the true scale of the problem

The WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation (JMP) has addressed that its current monitoring does not reflect human rights challenges such as inequalities, safety and affordability of services.<sup>7</sup> The resolution reflects this concern by stating that figures do not fully capture these dimensions of water and sanitation, and highlighting the need for adequate monitoring. Like previous resolutions, this year's text focuses on the progress made towards the Millennium Development Goals (MDGs) in the WASH sector. Importantly, this year's resolution highlights more challenges than it celebrates achievements.

→ See PPs 10, 11, 12, and OP 3

<sup>7</sup>) JMP (2014) Progress on Drinking Water and Sanitation 2014 Update. UNICEF, New York and World Health Organization, Geneva, p. 32. Available at <http://www.wssinfo.org/>

**+** The resolution includes the concern that **inequalities persist between formal and informal areas in cities**

By including a focus on inequalities between formal and informal areas within cities, next to other common persisting inequalities, the resolution can support arguments for adequate service provision in informal settlements in urban areas. Inequalities between rural and urban areas are widely known. However, studies show that inequalities within urban areas warrant greater attention, as these inequalities are often overlooked and progress is not adequately monitored.<sup>8</sup>

→ See PP 13

**+** The resolution encourages all stakeholders, including States and international organisations, to **approach sanitation in a much broader context, including hygiene promotion, the provision of basic services, sewerage and wastewater treatment and reuse in the context of integrated water management**

This stems from the recommendations of the wastewater report of the Special Rapporteur to the General Assembly.<sup>9</sup> States have welcomed the Special Rapporteur's report, and recalled the need to approach sanitation in a broader context. Including this holistic approach to sanitation is important: only when all aspects of sanitation are considered, efforts to realise the right to sanitation will be effective and sustainable.

→ See PP 16, OP 6

## **The Special Rapporteur's handbook for realising the rights**

The Special Rapporteur launched her handbook<sup>10</sup> on realising the human rights to water and sanitation during the Human Rights Council session in September 2014. The handbook explains the meaning and legal obligations that arise from the rights to water and sanitation, translating the often complex technical and legal language into accessible information.

**+** The resolution encourages governments and other stakeholders to use the **Special Rapporteur's Handbook as a tool for the progressive realisation of the right to water and sanitation**

<sup>8</sup>) I.T. Winkler, M. L. Satterthwaite, C. de Albuquerque, Measuring What We Treasure and Treasuring What We Measure: Post-2015 Monitoring for the Promotion of Equality in the Water, Sanitation, and Hygiene Sector, New York University School of Law, Working paper No. 14-48, September 2014. P. 36

<sup>9</sup>) The Special Rapporteur on the human right to safe drinking water and sanitation, C. de Albuquerque, Wastewater management in the realisation of the rights to water and sanitation, A/68/264, 5 August 2013. Available at: <http://www.ohchr.org/en/Issues/WaterAndSanitation/SRWater/Pages/AnnualReports.aspx>

<sup>10</sup>) Available at: <http://www.righttowater.info/handbook/>

This is an important success in the negotiation process. A number of delegations were sceptical about the Special Rapporteur's decision to work on a handbook, as they considered the work to fall outside the scope of the mandate. Last year's resolution for example only »noted with interest« the Special Rapporteur's plans for the handbook.<sup>11</sup> This year's resolution together with detailed references to the scope of the mandate<sup>12</sup> will be important to ensure that the new mandate holder can take a progressive approach to his/her tenure.

→ See PP 13

## References to the post-2015 development agenda

The resolution contains relatively progressive language on the importance of the rights to water and sanitation for the post-2015 development agenda. While this will not determine the positions that States will take during the negotiations at the General Assembly later this year, this resolution still serves as an important indicator that the rights to water and sanitation are seen as important and beneficial for future development planning.

### **+** The resolution welcomes the goal and targets on water and sanitation proposed by the Open Working Group on Sustainable Development Goals in its outcome document<sup>13</sup>

Welcoming these proposals was controversial. It is therefore a success that the proposed goal and targets are welcomed, as the outcome document reflects at least some important aspects of the rights to water and sanitation, including universal access and some content categories such as safety and affordability of water and adequacy of sanitation.

→ See OP 4

### **-** The resolution affirms the need to adequately consider the human right to water and sanitation in the post-2015 development agenda

The language on the rights in the post-2015 development agenda was significantly weakened during the negotiations. Paragraphs in previous drafts reaffirmed the need to integrate the rights to water and sanitation in the future development framework. Many States fear that strong language from the Human Rights Council may prejudice the determination of their own position as well as the negotiations at the General Assembly. It is unfortunate that States used rather weak language, when

<sup>11</sup>) See HRC Resolution 24/18, Operative Paragraph 6

<sup>12</sup>) See Operative Paragraph 13

<sup>13</sup>) Available at: <http://sustainabledevelopment.un.org/focussdgs.html>

the role of the Human Rights Council should be to contribute to the discussion of the post-2015 development agenda from the human rights perspective, without prejudging the discussions at the General Assembly.

→ See PP 17, OP 4

## Non-State actors, including business enterprises

Non-State actors, including business enterprises and private service providers, have a great impact on the realisation of the human rights to water and sanitation. Irrespective of the duty of the State to regulate these actors, these actors themselves also bear responsibilities.

**+/-** The resolution calls upon non-State actors to comply with their responsibility to respect the human right to water and sanitation, and to cooperate with State investigations into allegations of abuses, and in detecting and remedying such abuses

Although it is important that responsibilities of non-State actors are addressed, the resolution unfortunately does not mention due diligence measures that non-State actors should put in place to identify, prevent and address abuses themselves.<sup>14</sup> The responsibilities of non-State actors should extend beyond mere cooperation with State investigations.

→ See OP 12

## Urging development partners to adopt a human rights-based approach

This resolution, like previous resolutions, urges development partners to adopt a **human rights-based approach** when designing and implementing development programmes. The concept of a human rights-based approach is controversial. Many developing countries in particular would rather see a reference to the right to development instead.<sup>15</sup>

→ See OP 9

<sup>14</sup>) The UN »Protect, Respect and Remedy« Framework for Business and Human Rights, 2010, available at: <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>

<sup>15</sup>) See the statement of South Africa at: UN Web TV, Vote on draft resolution A/HRC/27/L.11/Rev.1, 39th meeting 27th Regular Session Human Rights Council, 25 September 2014. Available at: <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/watch/ahrc27l.11rev.1-vote-item3-39th-meeting-26th-regular-session-human-rights-council/3806242330001> and <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15102&LangID=E>

## The way forward

The Human Rights Council will remain instrumental in consolidating the consensus and further developing the understanding of the human rights to water and sanitation. In the resolutions to come, WASH United considers defining water and sanitation as distinct rights of great importance.

Currently, resolutions refer to 'the human right to safe drinking water and sanitation'. This is problematic in two ways: Firstly, including 'safe drinking' water does not correspond with the agreed definition of the right to water, which includes water 'for personal and domestic use' – encompassing more than just water for drinking, but also for food preparation and personal and domestic hygiene. Secondly, it will be important to build consensus on water and sanitation as two distinct, closely related human rights, for the following reasons:

- The human rights to water and sanitation are no doubt closely related. However, there are also important differences to consider in defining adequate water and sanitation service provision in human rights terms. Most importantly, privacy and dignity are of paramount importance for the right to sanitation. When people do not feel that a toilet or latrine ensures that they can urinate, defecate and take care of menstrual hygiene in privacy and with dignity, it is highly likely that they will not use them and resort to – at worst – open defecation. Similarly, sanitation facilities that are not socially and culturally acceptable for the people they are intended to serve will likely not be used. Furthermore, sanitation has distinct features and not all sanitation solutions rely on water-borne systems.
- Sanitation remains a neglected topic. For example, according to a 2012 report, 73% of spending in the WASH sector was devoted to water and only 27% to sanitation.<sup>16</sup> Defining sanitation as a distinct human right can contribute to ensuring the political prioritisation that is needed to drive progress for the benefit of those suffering the indignity of a lack of adequate sanitation.

<sup>16</sup>) As indicated in the WHO - UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS) Report of 2012, only 27% total WASH funds is spent on sanitation, with 73% of it spent on water. These numbers include those countries with approximately 990 million people who do not have access to improved sanitation, compared with 190 million people who do not have access to an improved source of drinking-water.

WASH United is an international non-profit organisation that combines a strong background in international human rights law with WASH sector expertise and creative talent to tackle the global WASH crisis through the promotion of the rights to water and sanitation, advocacy campaigns and behaviour change interventions. Our human rights work aims to strategically influence the legal development of the human rights to water and sanitation and to support the integration of the rights into the work of WASH sector organisations.

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