

GLOBAL FUND EAI REPORT

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Universal Human Rights

In approaching the adoption of any formulation which will, immediately or at least in the long run, affect the availability of funds (in nations generally or in particular nations) for expenditure on health care for individuals, it is essential to do so in ways consistent with universal principles of human rights. These principles embrace the obligations for governments to gradually realise the goal of access for essential health care for all of its people. This principle of human rights law (reflected in the UDHR and expressed in ICESCR) is now reinforced by the UN Sustainable Development Goals, Goal 3 (September 2015). That Goal embraces the idea that no nation and no individual will be left behind. Unfortunately, it is not realistic to leave the health care of individuals to be disposed of by countries on their own or countries acting in concert with international organisations. The rep of the World Bank (Dr Grant-Craus) suggested that the EAI should ask the countries what they thought of any re-expressed initiative. However, the experience of recent decades (outlined in the report of the UNDP Global Commission on HIV and the Law, July 2012) shows that countries are *not* necessarily vigilant, or even adequate, guardians of the human rights of their citizens, least of all vulnerable, minority citizens. Sometimes national governments will sell out the interests of their citizens to access to essential health care in order to acquire other perceived benefits (e.g. trade benefits) governments are occasionally part of the problem.

Agreements between national governments and international institutions (including UN agencies) may sometimes be part of the problem. That is why the issues presented by the EAI are not wholly technical questions. They are not wholly matters for technicians or experts. Such people may overlook, undervalue or even have contempt for the human rights of human beings. However, by international law, upholding universal human rights is a fundamental objective of the United Nations (Preamble, Charter 1945). They have been brought into force as part of international law by UN treaties (relevantly to access to essential care, ICESCR). UN agencies have no option to ignore them, still less to make agreements that ignore them.

This is not something to be regretted or evaded. On the contrary the consideration of obliging the action of UN bodies to conform with international human rights law (on the human right to access to essential health care) can be a formidable reason for departing from earlier statist, technical or expert formulations. And embracing a formulation that is respectful of human rights. These can provide a justification for replacing a formulation *agreed* by the World Bank with participating countries (GNI per capita) to a new formulation that pays appropriate respect to the relevant and applicable rule of a universal human right (access to essential health care as an individual human right). The World Bank, which was established by its Articles in 1944, is before the establishment of the United Nations. It is not, as such, an agency of the United Nations (nor, for that matter, are the World Trades Organisation or the Global Fund). This may, or may not, mean that such bodies escape the structures of the Charter and international law of human rights. However, there is no doubt that the United Nations agencies *are* so bound. And they are the majority of the co-sponsors of the EAI.

Effectively, that means that the final recommendation of the EAI will be measured against the standards of the human rights instruments, to the extent that they apply to the problem in hand.

But, in terms, does the international law of human rights have anything to say to the EAI in reworking the formula for global expenditures, including on health care? Seemingly, the two considerations are interrelated. The formula will impact on the funds available and thus influence (at the least) the expenditures on health care available to the individual presenting with a health condition. Those funds could have consequences for saving lives; reducing pain and disability; enhancing quality of life.

It will not be possible to ensure that everybody in every country at all times can have access to essential health care. So the universal right of access to essential health care is not an absolute right for anyone. It must be possible to adopt the individual right to available funds, to the costs of medication that differ in different countries over time; to the availability of useful medications/drugs/vaccines and other therapies; to the possibility of access to genetics and experimental drugs. The human right to health care must adapt to such competitive factors. The need for a triage is not therefore incompatible with the international law of human rights. However, what is not compatible is totally ignoring this consideration and giving it no weight at all. Especially on the assumption that it can be left to UN member states to look after, efficiently and effectively, the human right of individuals in that country to access to health care.

If it was understandable for nations to ignore universal human rights at the time of the foundation of the World Bank or even of the United Nations in 1945, such an attitude has become less tolerable with the adoption of binding rules of international law (UDHR and ICESCR). Least of all is it acceptable given two relevant developments that occurred in 2015, namely (1) the adoption of the SDGs in September 2015 by the General Assembly of the United Nations; and (2) the establishment in November 2015 of the UNSG's High Level Panel on access to essential healthcare with a mandate to address 'policy incoherence' that prevent or frustrate access to essential health care. These developments, which provide a context for the EAI oblige the High Level Panel, working on the EAI, to take into account the existence and goal of international human rights norms on access to essential health care. By analogy, it is essential for the EAI also to address risks of policy incoherence. Otherwise, the EAI and the SG's HLP will not be on the same page in making their recommendations. At the very least, it is desirable that the EAI and the HLP should be on the same page. At the very least, it is important that the EAI should share the language and rhetoric that will necessarily be deployed by the HLP in discharging its mandate. If the EAI is completed and presented in a report that ignores or overlooks altogether the language of human rights in its reasoning it is likely to be contrasted with the other reports in this general area – including the anticipated report of the UNSG's HLP. Necessarily, and by reason of its mandate, the HLP will be using human rights discourse as a starting point for its reasoning. It would, if at all possible, be highly desirable that both contemporaneous reports should be on the same page.