The Right to Health as a Human Right: Learning Session for Advocacy and Policy Analysis in Kenya and Beyond

Training organised for the East African Center for Human Rights (EACHRights)

(hybrid)

11 – 12 August 2022

Held by: Dr. Rossella De Falco, Ph.D., LL.M., M.A.

Programme Officer on the Right to Health at the Global Initiative for Economic, Social and Cultural Rights

The Global Initiative *for* Economic, Social and Cultural Rights

Training Programme

August 11

10 – 12 EAT: The Right to Health as a Human Right under International Human Rights Law, Africa Human Rights System and Kenyan National Law

2-3pm EAT: Healthcare Systems' Typologies, with a focus on how the Kenyan system compares to others

2-4pm EAT: Private Actors in Healthcare: Definitions and Human Rights Implications

August 12

10 – 12 EAT: Stakeholder Mapping & Advocacy Opportunities: Current Thematic Debates within Civil Society, Research and Institutional Debates

2 - 4pm EAT: Open Discussion

Definitions: Health as a Human Right under IHRL

- Human rights are globally legitimised legal standards. Out of these standards derive obligations, entailing accountability and monitoring.
- International human rights law poses obligations on states and obliges governments to act to advance human rights. These positive or negative duties descend from legally binding international treaties as well as customary law.
- The distinguishing character of human rights, which sets it apart from other sources of international law, is the fact that they are inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, citizenship or any other status.

Sources of International Human Rights Law

TREATIES, CHARTERS AND PROTOCOLS	ADOPTED	MONITORING BODY
Charter of the United Nations	1945	
Universal Declaration of Human Rights (UDHR)	1948	
International Covenant on Economic, Social and Cultural Rights (ICESCR)*	1966	CESCR
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	2008	CESCR
International Covenant on Civil and Political Rights (ICCPR)*	1966	HRC
Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR)	1966	HRC
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	1989	HRC
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	1969	CERD
Convention on the Elimination of all Forms of Discrimination against Women (ICEDAW)	1979	CEDAW
United Nations Convention against Torture (UNCAT)	1987	CAT
Convention on the Rights of the Child (CRC)	1990	CRC
International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW)	1990	CMRW
Convention on the Rights of Persons with Disabilities (CRPD)	2006	CRPD

Definitions: The Right to Health under International Human Rights Law

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"
(Constitution of the WHO 1946, preamble).

The right to health is codified in numerous legally binding international and regional human rights treaties (Hunt 2006), as well **as more than one hundred constitutions** around the world (Backman et al. 2008; Hunt 2006).

International sources:

- UDHR (1948), Art. 25
- ICESCR (1966), Article 12.
- CRC (1990), Art. 24
- ICEDAW (1969), Arts. 10(h), 11.1(f), 11.2, 12 and 14.2(b)
- CRPD, 25
- ICERD Art. 5 e (iv)

Regional:

- African Charter on Human and People's Rights (1981)
- European Social Charter
- American convention on Human Rights
- European Convention for the Promotion of Human Rights and Fundamental Freedoms

Article 12 ICESCR (1966)

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of ***physical and mental health.***

2. The steps to be taken by the States Parties to the present Covenant to achieve the ***full realization*** *of this right shall include those necessary for:*

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

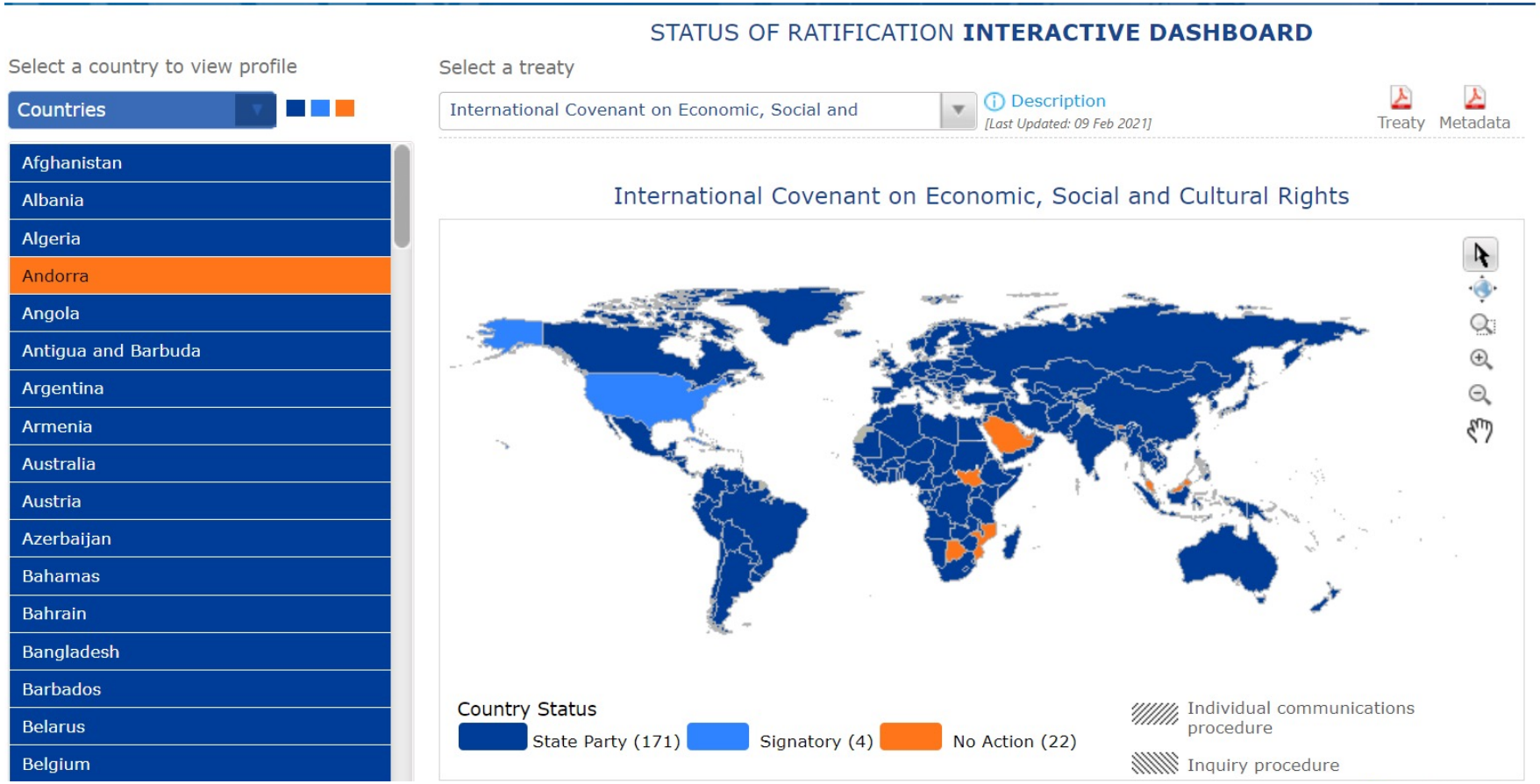
(d) The creation of conditions which would assure to all ***medical service and medical attention*** *in the event of sickness."*

Progressive realisation under maximum available resources

'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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures' (ICESCR Art. 2.1.)

Legal Framework:
The Right to Health as a Social Right under International Human Rights Law

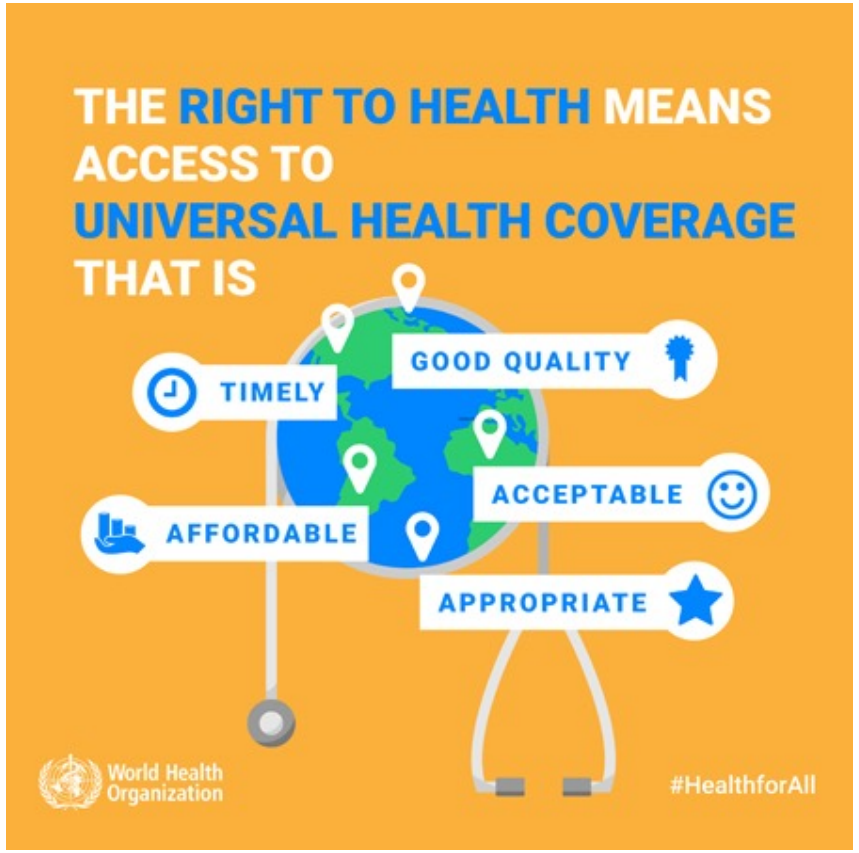
- It is not a right to be healthy!!
- Progressive Realisation under Maximum Available Resources (Art. 2.1. ICESCR)
- Prohibition of Deliberative Retrogressive Measures (CESCR GC 3 para 9)
- Minimum Core Obligations (CESCR GC 3 para 10)
- Non-discrimination and equality (art. 2.2. ICESCR)
- Participation
- Accountability
- International cooperation
- Justiciability and redress
- AAAQ Framework (GC 14 CESCR)
- Underlying Determinants of Health (GC 14 CESCR)



Signature and ratification status of the ICESCR

The interactive map is available here: UN OHCHR Dashboard.

Health services are a fundamental component of the right to health



A useful tool for policy analysis: the AAAQ in GC14

- **AAAQ Framework**: a tool to undestand and operationalise the right to health.
- *Availability* relates to the existence of healthcare facilities and essential medicines in proper quantity and of acceptable quality
- *Accessibility*, instead, is a multidimensional principle composed of the following elements: *physical* accessibility; economic accessibility (*affordability*); non-discrimination; and information accessibility.
- *Acceptability* translates in the public duty to guarantee medical ethics and culturally appropriate.
- *Quality* means that all healthcare goods and services must be of good quality, as well as in line with the last scientific and medical standards.
- Question for debate: is Universal Health Coverage the expression of the right to health? The importance of being critical.

The Right to Health and Human Rights Regional Systems

- African Charter on Human and People's Rights (1981)
- European Social Charter
- American convention on Human Rights
- European Convention for the Promotion of Human Rights and Fundamental Freedoms

The Right to Health within the EU (as an example)

- Charter of Fundamental Rights of the European Union (CFR), Article 52.
- European Social Charter (ESC), Art. 3 (health and safety at work), Arts. 7 and 17 (childen and adolescents' health), Art. 8 and 17 (sexual and reproductive rights), Art. 23 (elderly).
- The ESC has been signed by 47 member states of the Council of Europe and ratified by 40 of them.
- Anglo-american vs European model of social rights.

The Right to Health under the African Human Rights' System

- The **African Charter on Human and Peoples' Rights** (ratified in 1992 in Kenya), Art. 16: *'States Parties shall take the necessary measures to protect their people's health and ensure that they receive medical attention when they are sick'.*
- The **African Charter on the Rights and Welfare of the Child** (entered into force 1999 in Kenya) Art. 14 commits States *'to ensure the provision of necessary medical assistance and healthcare to all children with an emphasis on the development of primary healthcare*'.
- The **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa** (the Maputo Protocol) Article 5, 14 & 18 Interestingly, note that Article 14.2.c obliges states to take appropriate measures to:'*protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.'* Also note that Art. 14.1 (a) enshrines the right to access *'adequate, affordable and accessible health services'.*

The Right to Health under the African Human Rights' System & Private Actors

- Furthermore, in 2019 and 2020, **the African Commission on Human and Peoples' Rights**, which monitors the implementation of the African Charter, issued two landmark resolutions addressing the role of private actors in health and education.
- The **2019 Resolution** states that the African States are '*the duty bearers for the protection and fulfilment of economic, social and cultural rights, in particular the rights to health and education without discrimination, for which quality public services are essential*'. It also calls on States to '*consider carefully the risks for the realisation of economic, social and cultural rights of public-private partnerships and ensure that any potential arrangements for public-private partnerships are in accordance with their substantive, procedural and operational human rights obligations*' (African Commission on Human and Peoples' Rights, 'Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services' (2019) Res. 420 (LXIV) https://www.achpr.org/sessions/resolutions?id=444).

The Right to Health in Kenya

- Art. 43 of **the Kenyan Constitution** (2010) provides that *'every person has the right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health care'* and that *'no one shall be denied* ***emergency medical treatment'.***
- The **2017 Health Act** reaffirms Kenya's duty to *'protect, respect, promote, and fulfil the health rights of all persons'* and to *'develop health policies, laws and administrative procedures and programmes […] for the progressive realisation of the highest attainable standards of health.'* It also states that *'the public and private health services and facilities shall complement each other in the provision of comprehensive and accessible health care to the people.'*
- *Hospitals that prioritize monetary security prior to admission can also be held in violation of the Constitution as well as the* ***Kenya National Patients' Rights Charter.*** *The liability of the government, on the other hand, arises from its duties as stipulated in the Constitution as well as* ***sections 15 and 112 of the 2017 Health Act.***

Regulation and Monitoring of Private Providers in Kenya

- Under human rights law, States have an obligation to protect everyone's right to health when non-state actors provide medical services or are involved in other forms of activities related to healthcare. This means that States must enact clear and implement regulation and monitoring frameworks to ensure the realisation of the right to health.
- Under the 2017 Health Act, the Ministry of Health is responsible for the regulation, monitoring and inspection of all health facilities, including private ones. Specifically, the Health Act establishes the Kenya Health Professions Oversight Authority as the main body responsible for the regulation of all healthcare facilities, in coordination with the Cabinet Secretary of the Ministry of Health and a wide range of pre-existing professional regulatory bodies, such as the Nursing Council of Kenya, the Clinical Officers Authority and the Medical Practitioners and Dentists Board.

Regulation of health facilities in Kenya

- The 2017 Health Act also specifies that private facilities and professionals must obtain a license, meeting certain standards to operate. The Kenya Ministry of Health has developed clear guidelines on the accreditation procedure in the Kenyan health system. At the time of writing, the most recent and comprehensive policy document outlining such framework is the 2020 Quality of Care Certification Manual, which specifies how to conduct the registration, licensing, accreditation and inspection of health facilities and providers as well as clarifying the responsibilities of the different regulatory bodies.

Resources

- GI-ESCR, 'Compendium of United Nations Treaty Bodies Statements on Private Actors in Healthcare' (2021)
- ISER, GI-ESCR, Essex Human Rights Clinic, 'Private Actors in Health Services: Towards a Human Rights Impact Assesment Framework' (2019)
- CESCR. 1990. 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), E/1991/23'. https://www.refworld.org/docid/4538838e10.html.
- CESCR, 2000. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)'. Committee on Economic, Social and Cultural Rights (CESCR) https://www.refworld.org/pdfid/4538838d0.pdf.
- Alston, Philip, and Gerard Quinn. 1987. 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights'. *Hum. Rts. Q.* 9: 156.