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ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

Applying human rights to maternal health: UN Technical Guidance on rights-based approaches

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ABSTRACT

In the last few years there have been several critical milestones in acknowledging the centrality of human rights to sustainably addressing the scourge of maternal death and morbidity around the world, including from the United Nations Human Rights Council. In 2012, the Council adopted a resolution welcoming a Technical Guidance on rights-based approaches to maternal mortality and morbidity, and calling for a report on its implementation in 2 years. The present paper provides an overview of the contents and significance of the Guidance. It reviews how the Guidance can assist policymakers in improving women's health and their enjoyment of rights by setting out the implications of adopting a human rights-based approach at each step of the policy cycle, from planning and budgeting, to ensuring implementation, to monitoring and evaluation, to fostering accountability mechanisms. The Guidance should also prove useful to clinicians in understanding rights frameworks as applied to maternal health.

1. Introduction

It is a global scandal that an estimated 287 000 women and girls continue to die each year of maternal causes, and between 10 and 15 million more suffer debilitating complications annually [1,2]. The World Health Organization (WHO) estimates that as much as 98% of maternal mortality is preventable [2], and human rights advocates have long insisted that failures to prevent the grave suffering wrought by maternal mortality and morbidity (MMM) constitute breaches of States' human rights obligations [3–6].

Millennium Development Goal (MDG) 5 has focused the world's attention on the magnitude of maternal mortality around the world and, as technocratic approaches have failed to advance maternal health, a greater understanding has emerged in recent years that the underlying causes of MMM lie in denials of women's human rights and compounded discrimination against women [7]. Approaches that fail to address these underlying causes, including the underprioritization and even criminalization of services that are needed only by women, are unlikely to be sustainable, nor to shift the power relations that deny women the ability to control their own lives and well-being.

In the last few years there have been several critical milestones in acknowledging the centrality of human rights to sustainably addressing the scourge of maternal death and morbidity around the world [1,7,8]. Perhaps none has been more important than the work of the United Nations Human Rights Council (the Council), which has had an extraordinary level of engagement with the issue of maternal mortality and human rights. The Council has played a fundamental role in forging linkages between the human rights and health fields on this topic, and in highlighting the importance of issues relating to voice, gender equality, and accountability.

In 2010 and 2011, reports prepared for the Council by the Office of the High Commissioner for Human Rights (OHCHR) made very clear that women and girls are continuing to die in massive numbers because they still face discrimination in their households, communities, and societies, and because their voices are not listened to and their lives are not valued. In 2011, the Council took a bold step in requesting that OHCHR prepare a "Technical Guidance on the Application of a Human Rights Based Approach to the Implementation of Policies and Programmes for the Reduction of Preventable Maternal Mortality and Morbidity" (Technical Guidance).

In 2012, the Council adopted a resolution welcoming this Technical Guidance and calling for a report on its implementation in 2 years. In so doing, the Council signaled its historic intention to move beyond a human rights analysis of the problem of maternal mortality and morbidity, in order to offer concrete guidance on putting human rights into practice. This is the first time that the Council has adopted anywhere near the level of specificity about what a human rights-based approach requires in terms of a social development issue, and as a result its importance extends beyond maternal health and women's health more widely.

The present paper provides an overview of the contents and significance of the Technical Guidance. It reviews how the Technical Guidance can assist policymakers in improving women's health and

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their enjoyment of rights by setting out the implications of adopting a human rights-based approach (HRBA) at each step of the policy cycle, from planning and budgeting, to ensuring implementation, to monitoring and evaluation, and fostering accountability mechanisms in accordance with human rights standards. The Technical Guidance has the potential to be used by a wide variety of stakeholders, and should prove a useful tool to clinicians in understanding HRBAs, as applied to maternal health.

2. General principles

The Technical Guidance begins with general principles about HRBAs, including that an HRBA is premised upon empowering women to claim their rights, including their sexual and reproductive health and rights, and not merely avoiding maternal death or morbidity. This is crucial to understand, as human rights cannot be seen merely as instrumental to enhance existing maternal health programs.

An HRBA further underscores the importance of the social determinants of women's sexual and reproductive health, such as education, access to employment, access to land, and inheritance laws, which can perpetuate discrimination against women and exacerbate women's inequality across many spheres of life. Law is an important social determinant of health, as for example, in the case of criminalization of reproductive health services that are only needed by women, such as abortion.

An HRBA is concerned with the principle of equality and nondiscrimination, as well as special concern for marginalized groups, which requires investment in addressing and redressing historic confluences of discrimination and exclusion, even if there may be trade-offs in aggregate advances for the overall population.

Two other key principles of an HRBA, which are set out in the Technical Guidance, relate to women's active participation and accountability. In an HRBA, women are not passive targets of public health programming. Rather, they are active agents who are entitled to participate meaningfully in decisions that affect their sexual and reproductive health and in turn their lives.

The Technical Guidance emphasizes that accountability is a thread that runs throughout the application of an HRBA. Thus, remedies are essential to failures of accountability, but true accountability changes the process of decision making at multiple levels of government throughout and beyond the policy cycle, as described below. Also, States are accountable for ensuring that third parties do not interfere with the enjoyment of sexual and reproductive health rights.

The Technical Guidance further notes the centrality of a just, as well as effective, health system. Health systems are not merely collections of goods and services; they are core social institutions, which are part of the fabric of any society [9]. Thus, the application of an HRBA to health systems means that claims for sexual and reproductive health goods, services, and information are understood as rights, not commodities or matters of charity. Within health systems, human rights law requires that sexual and reproductive health goods, services, and information are available, accessible (physically, financially affordable, on a basis of nondiscrimination and with respect to information), acceptable (ethically and culturally), and of good quality [10].

3. Applying human rights across the policy-making cycle

Even with the greatest political will, policy makers within and beyond the health sector must be able to understand how a rights-based approach would be different from a conventional public health approach to maternal mortality at every stage of the policy-making cycle, from a situational analysis to national planning processes, to budget formulation and allocation, to implementation of programs, to monitoring and evaluation, to remedies. The innovation and significance of the Technical Guidance is that it does just that.

3.1. Planning and budgeting

The Technical Guidance states: "Public health planning traditionally begins with the acknowledgement of a maternal mortality and morbidity problem, and then goes on to propose how to address it within the current societal framework. Rights-based planning goes further by also examining the dominant assumptions underlying the structural determinants of women's health, and then includes strategies to address those factors, to reshape the possibility frontier for advancing maternal health. A human rights-based approach therefore changes decision-making processes, and the issues and actors included in those processes, as well as outcomes" [11] (para. 24). Thus, planning is not a technocratic exercise in an HRBA; rather, it is far broader in that it calls for examining what assumptions and institutional arrangements are taken for granted, which may in fact not be meeting women's needs or rights.

In an HRBA there is necessarily a multisectoral approach to economic and social planning and budgeting, including, at a minimum, coordination among a variety of government ministries and departments, as well as with other key actors, such as the private sector, development partners, and civil society, and the need to devise the plan in consultation with, and with the full participation of, affected populations. In addition, the Technical Guidance points to measures to address discrimination, and to strengthen capacities of multiple duty bearers [11] (para. 10,14,41,42).

However, the Technical Guidance balances broad principles with specificity about what interventions are required to be prioritized. Noting that adopting a national plan of action or strategy on health is a core obligation in the realization of the right to health, the Technical Guidance provides details on what should be included in a national action plan from a human rights perspective, including essential medicines and services, defined in accordance with the latest technical guidelines from international agencies [11] (para. 26–43). It notes that "appropriate" measures under international law are evidence-based measures, and that governments must justify any departure from international standards through relevant reasons, which do not include religious or cultural beliefs [11] (para. 31,32).

With respect to budgeting, the Technical Guidance breaks new ground for a UN document. Under human rights law, States are obliged to devote the "maximum of available resources" [12] to the realization of the right to health, including sexual and reproductive health. Based upon an exhaustive evaluation of statements by human rights treaty monitoring bodies (TMBs) as well as some leading national constitutional jurisprudence, the Technical Guidance offers specific advice on assessing whether the "maximum available resources" are being allocated and on ensuring transparent and participatory budgetary processes [11] (para. 21). For example, in keeping with international law, it states: "The budget should ensure that financing is not borne disproportionately by the poor." It then clarifies that "out-of-pocket costs cannot impede accessibility of care, irrespective of whether services are provided by public or private facilities" [11] (para. 46), [13]. In other words, if user fees present a barrier to women accessing sexual and reproductive health care, a state is not complying with its obligations under international law.

Moreover, while acknowledging that certain obligations do not have budgetary implications (such as eliminating harmful traditional practices), the Technical Guidance notes that addressing maternal health as a human rights issue in budget formulation confers added protection for resources allocated to related programs at both the national and subnational levels. Thus, if the overall available budget increases, "resources for maternal health should increase accordingly insofar as significant need in that area remains"; if the overall budget of the State decreases, "resources for sexual and reproductive health programmes should not be decreased unless the Government demonstrates that it has taken all reasonable measures to avoid such reductions" [11] (para. 47a,c). Further, reducing budgets for programs

directed at low-income and marginalized women may constitute retrogression—or backsliding—and therefore Governments bear a special burden in demonstrating the need for such cuts [11] (para. 47). Throughout the section on planning and budgeting, the Technical Guidance emphasizes the governmental obligation to publicly justify its decisions.

3.2. Ensuring implementation

Despite elaborate national planning and policies, implementation often falls short. According to the Technical Guidance, identifying the barriers to effective implementation requires "periodic, bottom-up, local diagnostic exercises to ascertain and provide feedback on what is happening to whom and where; why it is happening (what factors are preventing women, or certain women, from safely experiencing pregnancy and childbirth and enjoying their sexual and reproductive health rights more broadly?); who or what institution is responsible for such factors, and for addressing the problem; and how action should be taken (what do different duty-bearers need to do to address each factor?)" [11] (para. 53). Further, accountability requires follow-up on any problems and responses proposed from the identified duty bearers. Too often in public health, such a bottom-up diagnostic exercise, which would allow critical thought and deliberation, is not performed. Even when it is there is some form of multistakeholder gap assessment, there is rarely the necessary follow-up.

The Technical Guidance examines two concrete examples of identified problems in implementation: (1) women arriving late or failing to arrive at emergency obstetric care, and (2) high rates of maternal mortality among adolescents.

In walking through these two examples, the Technical Guidance points out that an HRBA: "requires simultaneous attention to immediate health interventions and the longer-term social transformation required to reduce maternal mortality and morbidity" [11] (para. 65). That is, the diagnostic exercise facilitates a critical thought process with respect to ensuring access to all essential interventions, supplies, and medicines. At the same time, however, that exercise should go beyond the conventional public health responses and also consider what efforts are needed to address broader social issues that are contributing to MMM, such as the underlying reasons for adolescent pregnancy, which will require efforts beyond the health sector.

Importantly, the Technical Guidance also underscores health workers' rights, which are all too often trampled in the name of greater efficiency of implementation. Thus, while "any form of abuse, neglect or disrespect of health system users undermines their rights…it is also true that health workers are rights-holders as much as duty-bearers. Therefore, "[e]nsuring adequate working conditions and treatment of health workers, including salary and benefits, disciplinary processes and voice, is necessary to respect their rights and, in turn, to promote health system effectiveness in addressing maternal mortality and morbidity" [11] (para. 66).

3.3. Accountability

Accountability is the keystone of a human rights-based approach, and the Technical Guidance emphasizes that a "circle of accountability" must be integrated throughout all of the stages of planning and implementation, as well as monitoring in order to be transformative [5].

Effective monitoring, including the use of appropriate indicators to assess whether States are complying with their human rights obligations, is critical to ensuring accountability. While national availability of data is an important consideration, the MDGs have shown that more robust data collection can be undertaken when there is a demand. The WHO Accountability Commission specifically called for enhancements of health information systems [8]. From a human rights perspective, as the Technical Guidance points out, it is important for indicators to be programmatically relevant to show whether states are adopting appropriate priorities, objective and comparable across time and space, frequently measurable to hold specific administrations accountable, subject to disaggregation to reveal potential discrimination, and, ideally, subject to local audit [11] (para. 71), [14].

An HRBA calls for greater investment in vital registration systems, given the right to an identity, as well as in monitoring access to emergency obstetric care, which is a core obligation under human rights law and the only major indicator related to maternal health that addresses the functioning of the health system [11] (para. 72).

In explaining the concept of accountability, the Technical Guidance also sets out several forms of review and oversight, which include such mechanisms as maternal death reviews but go beyond the health sector. Social accountability and civil society mobilization is essential. But specified forms of accountability also include administrative accountability, political accountability, national legal accountability, and international accountability, which calls for the systematic integration of information on efforts to reduce MMM into reports submitted to international human rights monitoring bodies, together with the implementation of their recommendations. [11] (para. 74). The Technical Guidance further stipulates various levels of accountability and actors who should be held accountable, including health professionals, health facilities and institutions, health systems at regional and national levels, private actors including corporate enterprises, and donors [11] (para. 75).

Finally, without effective remedies, accountability is incomplete. Although remedies are critical for providing restitution to an individual or family, they also have the potential to address structural causes behind the violation and lead to necessary legal and policy changes. Remedies can be used to reform laws and policies, to redress systematic violations of sexual and reproductive rights in practice, and to guarantee non-repetition [5,6,15–17].

4. International assistance and cooperation

Ninety-nine percent of maternal mortality occurs in developing countries [1]. However, the decisions taken in the economic North often affect the abilities of states in the global South to respect, protect, and fulfill women's sexual and reproductive health and rights, including in relation to maternal health. Although international assistance and cooperation and extraterritorial obligations are not as developed as national duties with respect to human rights, the Technical Guidance describes the requirements of policy coherence and predictable, harmonious, and transparent economic assistance [11] (para. 85,88,89).

The Technical Guidance is also consistent with calls for a progressive post-2015 global development framework that moves beyond mobilization of aid from North to South, which was the basis for the MDGs. Echoing language from Article 28 of the Universal Declaration of Human Rights [18], the Technical Guidance underscores that: "All development partners should contribute to the creation of a social and international order in which human rights, including women's sexual and reproductive health rights, may be realized. Human rights obligations with regard to advancing global health, including sexual and reproductive health, call for shared approaches and systems of collective responsibility together with a global development agenda that centrally reflects issues of social and environmental sustainability, equality and respect, and the fulfilment of human rights. Underlying issues concerning maternal mortality and morbidity, such as gender equality and sustaining [an] effective and an equitable health system, are challenges faced in countries of all income levels" [11] (para. 81). This approach is consonant with that advocated for by civil society groups, as well as the UN Task Team report, with respect to a post-2015 framework that sees development as a universal challenge based upon universal rights, equality, and sustainability, and not merely a matter of aid for economic development [19–21].

5. Conclusion

At the high-level panel launch of the Technical Guidance in September 2012, Navi Pillay, the UN High Commissioner for Human Rights stated: "too often, human rights are seen only as standards contained in treaties and declarations—indeed, these are our grounding framework. However, human rights have concrete contributions to make in guiding policy formulation and implementation, and constructively addressing some of the major challenges of our day. Without bringing human rights into how we develop policies and implement programmes, they remain far away and difficult to claim" [22]. The significance and promise of the Technical Guidance is that it provides an opportunity to integrate an HRBA into national initiatives, and to educate duty bearers about their obligations and how to meet them. In so doing, it can bring human rights much closer to home, much closer to the realities of policy makers and practitioners, and ultimately women, in countries around the world.

That the Technical Guidance has benefitted from extensive interagency consultations, along with expert advice from academics, civil society advocates, and practitioners was critical to the reception it received at the Council, and will be equally crucial to its successful implementation [11] (para.2). The commitment of WHO, UNFPA, as well as an array of civil society actors to pilot aspects of the Technical Guidance and create tools to support its implementation are promising developments indeed with respect to the meaningful operationalization of a human rights frameworks in the context of maternal health.

Conflict of interest

Dr Ely Yamin served as the lead consultant in the preparation of the Technical Guidance for the UN Office of the High Commissioner for Human Rights. The author has no conflicts of interest to declare.

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