

# Human Rights and the Global Fund to Fight AIDS, Tuberculosis and Malaria



**MEETING REPORT**

March 3–4, 2011 — New York



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# Introduction

On March 3–4, 2011, 42 key stakeholders comprising Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) Secretariat staff and Board Members, technical and development partners including the UN Special Rapporteur on the Right to Health, foundations, civil society, the United Nations Development Programme (UNDP) HIV Group and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS), met in New York to discuss how the Global Fund might best operationalize the promotion of human rights and equitable access as one of the five strategic objectives of the 2012–2016 Global Fund strategy.

The meeting covered the following human rights issues related to the Global Fund’s 2012–2016 strategy:

- Scope and content of the Global Fund’s human rights commitment and obligation;
- Promoting human rights in Global Fund-supported programs and advocacy;
- Oversight and monitoring and evaluation of the Global Fund’s portfolio according to human rights criteria; and
- Addressing human rights risks and violations associated with Global Fund grants.

Discussion papers on each of these issues, as well as a paper exploring the relationship between human rights and equity, were prepared for the meeting. These are attached as *Annexes* to this report.

# Meeting Objectives and Participants

The objectives of the meeting were to:

- Further build commitment to protecting and promoting human rights as a corporate priority for the Global Fund;
- Discuss and debate the benefits, challenges, and risks of giving greater attention to human rights in the Global Fund's business model; and
- Develop and agree on a set of recommendations on human rights for the Global Fund Board and Secretariat as they develop a strategic framework and operational plan for 2012–2016.

The meeting was convened by the Open Society Foundations, UNDP, Ford Foundation, and UNAIDS.

## List of Participants

Name	Organization	Position
Joe Amon	Human Rights Watch	Director, Health and Human Rights Division
Anurita Bains	Global Fund	Senior Advisor
Lefetogile Bogosing	National AIDS Coordinating Agency, Botswana	Program Officer
Thomas Cai	AIDS Care China	Director
Robert Carr	ICASO	Director, Policy and Advocacy
Michaela Clayton	AIDS and Rights Alliance for Southern Africa	Director
Jonathan Cohen	Open Society Foundations	Project Director, Law and Health Initiative
Mandeep Dhaliwal	UNDP	Cluster Leader: HIV, Health, Human Rights & Governance
Ade Fakoya	Global Fund	Senior Advisor, HIV/AIDS
Nadia Fuleihan	UNDP	Policy Specialist, HIV/AIDS
Anne Gathumbi	Open Society Initiative for Eastern Africa	Program Manager, Health and Rights
Francoise Girard	Open Society Foundations	Director, Public Health Program

Name	Organization	Position
Anand Grover	Lawyers Collective HIV/AIDS Unit	Director; UN Special Rapporteur on the Right to the highest attainable standard of physical and mental health
Ralf Jürgens	HIV/AIDS, health, policy and human rights	Consultant
Montasser Kamal	Ford Foundation	Senior Program Officer
Karyn Kaplan	Thai AIDS Treatment Action Group (TTAG)	Director, Policy and Development
Jimmy Kolker	UNICEF	Chief, HIV/AIDS; Associate Director, Programs
Shannon Kowalski	Open Society Foundations	Senior Program Officer, Global Health Financing
Maksut Kulzhanov	Kazakhstan School of Public Health	Rector
Ken Legins	UNICEF	Senior Advisor, HIV Policy and Evidence
Terry McGovern	Ford Foundation	Senior Program Officer, HIV/AIDS Human Rights
Shaun Mellors	Global Fund Communities Delegation	Alternate Board Member
Anja Nitzsche-Bell	UNAIDS	Team Leader, Global Financing Mechanisms and Impact Unit
Jeffrey O'Malley	UNDP	Director, HIV/AIDS Practice
Nadia Raff	ALCS Marrakesh	Executive Director and CSAT MENA Coordinaton
Toni Reis	Brazilian Gay, Lesbian, Bisexual, Transvestite and Transexual Association	President
Asia Russell	Health GAP (Global Access Project)	Director, International Policy
Owen Ryan	Bill & Melinda Gates Foundation	Program Officer, HIV/TB
Andy Seale	Global Fund	Senior Advisor, Gender: Sexual and Gender Diversity
Rebecca Schleifer	Human Rights Watch	Advocacy Director, Health and Human Rights Program
Christine Stegling	International HIV/AIDS Alliance	Associate Director: Best Practice Unit and Senior Adviser
Todd Summers	ONE Campaign	Senior Adviser Global Health
Javid Syed	Treatment Action Group	TB/HIV Project Director
Susan Timberlake	UNAIDS	Senior Human Rights and Law Adviser
David Traynor	AFAO International	Program and Policy Manager
Marijke Wijnroks	Ministry of Foreign Affairs, the Netherlands	Ambassador for HIV/AIDS
Daniel Wolfe	Open Society Foundations	Director, International Harm Reduction Development Program
Malini Aisola	Lawyers Collective HIV/AIDS Unit	
Mihir Mankad	Lawyers Collective HIV/AIDS Unit	
Ji Eun Seong	UNDP	
Xin Xin	Open Society Foundations	

## Strategic Conclusions and Recommendations

Participants agreed that the Global Fund has distinguished itself as a multilateral financing mechanism that has made immense contributions to protecting, promoting and fulfilling human rights through scaling up prevention, treatment, care, and support for HIV, tuberculosis and malaria. The Global Fund's partners have similarly developed new strategies or action plans that prominently address human rights, such as the UNAIDS "Getting to Zero" Strategy 2011–2015, the WHO HIV/AIDS Strategy 2011–2015, and Stop TB Partnership's Global Plan to Stop TB: 2011–2015.

Participants also agreed that the Global Fund has played a vital role both in supporting interventions to overcome stigma, discrimination and other human rights-related barriers to health, as well as in using its unique position to promote positive legal and policy change, which support better HIV and health outcomes. The evidence is clear that such investments are critical to ensuring an effective, efficient and sustainable response to the three diseases, and to achieving the Global Fund's objectives to save lives, prevent infections, and maximize impact and value for money.

The main theme emerging from the meeting was that the Global Fund should adopt a business model that ensures Global Fund resources support the "*right interventions, for the right people, in the right place, at the right price.*" Participants agreed that promoting and protecting human rights is essential to this approach. Accordingly, participants recommended that the Global Fund strategy:

- Reaffirm the Global Fund's commitment to human rights and acknowledge its distinct role as a catalyst for improving legal, policy and social environments that hinder scale-up of effective responses to HIV, tuberculosis and malaria.
- Encourage increased investment in key programs that increase effectiveness and efficiency by addressing human rights-related barriers to HIV, tuberculosis and malaria responses.
- Commit to evaluating programs according to whether they meet key elements of the right to the highest attainable standard of health, including availability, accessibility, acceptability and quality, and whether they meet the needs of key populations, including criminalised populations.
- Explicitly state that the Global Fund will not support programmatic interventions that violate or contribute to the violation of human rights and commit to creating mechanisms which facilitate constructive dialogue with countries in order to ensure this.

Meeting participants also concluded that addressing human rights considerations is integral to discussions related to the Global Fund's Reform Agenda. In particular:

- Poor and inequitable targeting of programs, discriminatory social and legal environments, and human rights violations significantly undermine the impact of the Global Fund's investments and its objectives to ensure increased value for money, efficiency and effectiveness; and
- The reputational risks arising from allegations of funding human rights violations, or contributing to such violations, should be considered in the Funds' enhanced fiduciary oversight and risk management efforts.

# Operational Conclusions and Recommendations

Participants concurred that strengthening the attention to human rights at the operational level was crucial to taking forward strategic objective on human rights and equity. Meeting participants recommended that the Global Fund Secretariat develop and implement a Human Rights Framework for Action. The Human Rights Framework for Action would, broadly speaking, reconcile the Global Fund’s commitment to human rights with its country-driven approach, so as to ensure that human rights function as a principle of effective participation and programming rather than a “conditionality” of funding. In particular, participants recommended that the Framework should include the following:

## 1. Mitigating the Risk of Human Rights Violations

- **Establish minimum standards for the respect for and protection of human rights in Global Fund-supported programs, including confidentiality, consent, and freedom from cruel, inhuman and degrading treatment; establish mechanisms for monitoring implementation of these standards; and define consequences for programs if these standards are not met.**
- **Establish mechanisms to identify and systematically respond to the risk of human rights violations**
  - Develop and maintain a country Human Rights Risk Profile using existing information, including from United Nations treaty bodies and Special Mechanisms and the Universal Periodic Review, as part of the Global Fund’s risk management framework in order to enable the Global Fund to assess human rights risks, monitor changes in the legal or policy environment that could contribute to risks, and develop strategies to address different levels of risk.
  - Prioritize countries with “high” levels of human rights risk for the roll-out of the “country team approach” to ensure stronger capacity from the Global Fund Secretariat to address human rights risks. This should include engaging in systematic dialogue with CCMs and Principal Recipients (PRs) with regard to human rights concerns.

- Require the development of human rights protection plans, in countries where human rights risk is high, that include measures to protect key populations, including criminalised populations and those who work with them, and programming to fulfil human rights.
- Use available “flexibilities” including conditions precedent, management actions, and partial disbursements, as tools to address human rights problems.
- Create a human rights alert (“whistleblowing”) mechanism to allow for confidential, multilingual reports of rights violations and investigation of such allegations.
- Publicly, and consistently, respond to relevant human rights and public health developments.

## 2. Human Rights Programming

- **Mainstream human rights through all phases of the grant cycle. This should include establishment of a more iterative proposal development and grant negotiation process that allows for greater dialogue between the Technical Review Panel (TRP), fund portfolio managers and countries, including on human rights issues. To mainstream human rights in current application and grant negotiation processes, the following were suggested:**

- *Proposal guidelines:*

- Provide simple guidance on promoting and protecting human rights, including through addressing the underlying determinants of health, ensuring that the needs of key populations are met, and ensuring the accessibility, availability, acceptability and quality of programs, in an information note to applicants, based on existing guidance from technical and development partners, including WHO and UNAIDS.
- Clarify that key human rights programs<sup>i</sup>, including catalytic multi-country activities such as south-south police trainings, can be considered “high-impact interventions” and encourage proposals for such activities through the Global Fund’s “targeted pool.”

- *Proposal:* Require a simple, standardized human rights analysis to be completed by CCMs and submitted as part of proposals. The analysis should examine the legal, policy and social environment, as well as national disease responses, and the extent to which they include key human rights programs. This should be used as a baseline for future review.

- *Technical Review:* Further clarify review criteria on human rights for the TRP and ensure TRP members’ access to appropriate resources and capacity on the protection and promotion of human rights in responses to the three diseases.

- *Grant negotiation:*

- Ensure that human rights activities included in initial proposals are included in grant agreements, performance frameworks, negotiated work plans, and budgets.
- Ensure these processes are monitored and that the documented attrition of human rights-related activities ceases.

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i. Such programs comprise but are not limited to the following: stigma reduction, legal literacy, law reform, legal aid, human rights training of police and health care workers, reduction of harmful gender norms and violence against women.

— *Periodic review/phase 2 renewal:*

- Ensure that evaluation of human rights programs, contexts, and barriers are a part of the periodic review process.
- Develop clear guidance for reprogramming where necessary to address human rights issues in the second phase of the grant.

### 3. Civil Society Participation

- **Clarify guidance for multi-country and non-CCM submissions, especially for human rights advocacy.**
- **Strengthen participation of key populations in proposal development and implementation.**
  - Continue to encourage the use of the community systems strengthening and dual track financing mechanisms to increase participation, capacity of, and access for key populations, including criminalised populations, as well as human rights programs and advocacy.
  - Continue to strengthen participation of key populations on CCMs by requiring rather than encouraging membership of key populations (depending on the country's epidemiological profile), such as women, young people, men who have sex with men, transgender people, people who use drugs, sex workers, prisoners, the indigent, and others, except in circumstances where doing so may result in harm to the individual or affected community.

### 4. Accountability and Oversight

- **Strengthen monitoring and evaluation systems to ensure greater promotion and protection of human rights.**
  - Convene a working group of key technical, community and development partners to develop a set of output, process, outcome, and impact indicators to effectively monitor key human rights programs, the extent to which key populations are being reached by programs, as well as accessibility, availability, acceptability and quality issues in Global Fund-supported programs. Subsequently, update and disseminate the Monitoring and Evaluation Toolkit, encourage the use of the recommended indicators, and ensure that they are included in performance frameworks.
  - Encourage CCMs and PRs to include activities to monitor human rights aspects of Global Fund-supported programs, including accessibility, availability, acceptability and quality, in proposals and budgets.
- **Strengthen capacity and increase accountability of key Global Fund structures.**
  - Assign responsibility for overseeing protection of human rights and responding to human rights concerns to Fund Portfolio Managers (FPMs), country teams, and the Director of Country Programs, and hold them accountable for their work in this area. In addition, provide specific guidance and funding to CCMs to assist them to fulfil their oversight role with respect to human rights.

- Strengthen the Global Fund’s Secretariat’s capacity on human rights. This should include: a compulsory human rights training for country teams to empower them to be able to identify and respond to human rights risks and possibly exploring the hiring of a Senior Human Rights Advisor. Solicit TRP briefings from human rights experts, including the UN Office of the High Commissioner on Human Rights and relevant UN Special Rapporteurs, in order to enable the TRP to assess whether proposals effectively address issues of human rights and their underlying determinants in line with the panel’s Proposal Review Criteria.
- Hold regular briefings for the Board to increase their knowledge and capacity on human rights and the three diseases, and periodically report on human rights issues to relevant Board committees.

## 5. Partnerships and Advocacy

- **Clearly define the roles and responsibilities of Global Fund structures and partners in supporting human rights programming and advocacy.**
- **Adopt a coordinated approach with partners to address countries where need is greatest for human rights programming and advocacy.**
  - Establish a reference group comprising key technical and other partners to advise the Global Fund Board and Secretariat on human rights issues and responses.
  - Work with partners to ensure that human rights contexts and programs are assessed as part of the Joint Assessment of National Strategies (JANS) and that relevant questions are included in the JANS tool.
  - Work with partners to proactively support the development of Global Fund proposals that include appropriately targeted human rights programming, strengthen civil society participation on Country Coordinating Mechanisms (CCMs) and support leadership on human rights issues at a national level.
- **Develop and implement a human rights advocacy and communications strategy.**

# Moving Forward

Key outcomes from the meeting and follow up actions include:

- Recommendations of the meeting were formally circulated to relevant stakeholders including the Global Fund Executive Director, Michel Kazatchkine, the members of the Global Fund Board's Policy and Strategy Committee (PSC), the Comprehensive Reform Working Group and the Global Fund Secretariat. These informed the endorsement of the Global Fund draft Strategy Framework, including human rights and equity as a strategic objective, at the May 2011 Global Fund Board Meeting held in Geneva, Switzerland.
- Discussions and recommendations from the meeting also informed the framing of an e-discussion question on human rights, which was held in May 2011 as part of the preparations for the 2011 Global Fund Partnership Forum.
- This Report will be translated into multiple languages and disseminated along with the background papers prior to the Partnership Forum. These materials will also inform critical capacity building sessions throughout the event.

This report was disseminated along with the background papers to participants prior to the Partnership Forum that was held in Sao Paulo, Brazil from June 28–30, 2011. The Partnership Forum's theme this year was "Accountability, Access and Rights" and focused on putting into operation the new Global Fund Five Year Strategy Framework. Human Rights was one of five key topics for the proceedings of the conference and the Open Society Foundations, UNDP, and the UNAIDS Secretariat worked to support the Global Fund in these deliberations through the March consultation recommendations, other resource materials and critical capacity building sessions throughout the event.

In addition, the recommendations gleaned from the March consultation were used in early June to guide discussions in the Technical Review Panel consultation on the strategy development process. The meeting conveners are continuing to support the Global Fund Secretariat in the formulation of the final draft of the overall Strategy Framework. It is expected that this will be endorsed by the Global Fund Board at its next meeting in Accra, Ghana in November 2011.

# Annexes

## **Annex 1**

Strengthening the Global Fund's Commitment to Human Rights  
*Anand Grover, Brian Citro, Fiona Lander, and Mihir Mankad*

## **Annex 2**

Integrating Human Rights into the Global Fund's Programming  
*Michaela Clayton and Jonathan Cohen*

## **Annex 3**

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## **Annex 5**

Framing Human Rights alongside Equity in the context of the Global Fund  
*Andy Seale*

## Annex 1:

# Strengthening the Global Fund's Commitment to Human Rights

*Anand Grover, Brian Citro, Fiona Lander, and Mihir Mankad*

This paper was drafted for discussion at a consultation on human rights and the Global Fund in March 2011. It represents the views of the authors only, not of their organizations, the meeting organizers or the Global Fund itself.

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## 1. Introduction

Promotion and respect for human rights is essential in the fight against HIV and AIDS, tuberculosis, and malaria. The Global Fund has demonstrated its commitment to human rights principles since its foundation—one of the few major donors in the world to do so—yet, it still lacks a clear strategy that guides its action. In the words of Executive Director Michel Kazatchkine: “The lack of support for programs that protect and promote human rights is one of the failures in the response to AIDS,”<sup>1</sup> this is no less true for tuberculosis and malaria. The Global Fund must continue to take concrete steps to strengthen its commitment to human rights, and particularly the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the right to health).

## 2. The Right to Health Framework

The right to health is enshrined in numerous international and regional human rights treaties and in several national constitutions.<sup>2</sup> It is an inclusive right, extending not only to timely and appropriate health care, but also to access to information, and participation of the population in all health-related decision-making. Underlying determinants of health such as access to clean water and sanitation, adequate housing and nutrition, and social determinants, including non-discrimination on the grounds of gender, racial, ethnic, sexual orientation, and health status, are also part of the right to health. The right to health framework further requires that all health services, goods and facilities be available, accessible, acceptable and of good quality.

### Obligations: States and Non-State Actors

States are legally obligated to respect, protect, and fulfill the right to health.<sup>3</sup> The obligation to protect requires States to prevent third parties, including non-state actors (of which the Global Fund is an example), from interfering with the right to health.<sup>4</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) calls for progressive realization of the right,<sup>5</sup> but there are obligations that have immediate effect upon States. These include non-discrimination in access to health care and the underlying determinants of health; implementation of concrete steps toward the full realization of the right to health; and the guarantee that States will not take retrogressive measures.<sup>6</sup> Moreover, in many domestic jurisdictions, including India,

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1. Michel Kazatchkine, Executive Director of the Global Fund, “Time to Redouble Our Efforts on AIDS and Human Rights.” Statement to the Canadian HIV/AIDS Legal Network 2<sup>nd</sup> Annual Symposium on HIV, Law and Human Rights. Toronto, June 11, 2010.
  2. The right to health was first addressed in the 1948 Universal Declaration of Human Rights. It is established under article 12 of the International Covenant on Economic, Social and Cultural Rights, to which there are 160 State Parties, and is also recognized in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Among the countries which grant constitutional protection of the right to health are India, Brazil and South Africa.
  3. General Comment 14 (E/C.12/2000/4), para 33.
  4. Ibid, para. 35.
  5. The concept of progressive realization constitutes recognition of the fact that full realization of all economic, social and cultural rights (including the right to health) will generally not be able to be achieved in a short period of time. CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (E/1991/23), para. 9.
  6. E/C.12/2000/4, paras 30–31.

Brazil and South Africa, the right to health is an immediately enforceable constitutional right no longer subject to progressive realization. States also have international obligations to respect the right to health, and prevent violations of the right, in other States.<sup>7</sup> This includes a responsibility to collectively address the problem of diseases, which are easily transmissible beyond borders; economically developed States have a special responsibility toward less developed States in this respect.<sup>8</sup>

Non-state actors, such as the Global Fund, cannot be parties to the ICESCR and thus do not have the same legal obligations as States. However, the Committee on Economic, Social and Cultural Rights' General Comment 14 directs non-state actors capable of providing economic and technical assistance to cooperate effectively with States in order to realize their legal obligation to maintain an effective and integrated national health system.<sup>9</sup>

The Global Fund may also be held to an implicit legal obligation vis-à-vis the explicit obligations of donor and recipient States. If donor States have an obligation to prevent the use of their funds from infringing upon the right to health of peoples located outside their borders, and if recipient States have a converse obligation to prevent donors from interfering with the right to health in their jurisdictions, it follows that the Global Fund as a funding intermediary has an implicit obligation to prevent the use of its funds from infringing human rights. It would be illogical to expect States to protect the right to health in their own activities, while allowing them to circumvent this obligation through funding an intermediary. We do not hold law enforcement officers responsible for enforcing traffic laws while imposing no obligation on drivers to obey the speed limit. It is therefore unwise and counterproductive to hold donor and recipient States legally responsible for protecting the right to health from infringement by institutions to which they donate, or from which they receive funding, while imposing no concomitant responsibility on the donor institutions themselves not to infringe on the right, even if that responsibility is not coextensive with the obligation incurred by States.

One approach taken is the Protect, Respect, and Remedy (PRR) framework, endorsed by the Human Rights Council,<sup>10</sup> which seeks to address human rights abuses committed by businesses.<sup>11</sup> This framework is instructive as applied to a variety of non-state actors, including public-private partnerships like the Global Fund. To respect human rights involves a duty not to infringe on rights of others—to do no harm—and to

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7. E/CN.4/2004/49/Add.1, para. 28 (Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, on His Mission to the World Trade Organization).

8. E/C.12/2000/4, para. 40.

9. Ibid, para. 64.

10. A/HRC/11/13, 22, para. 1.

11. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework* (forthcoming). Accessed at: <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>. The Framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access for victims to effective remedy, judicial and non-judicial.

address any adverse impacts that may occur as a result of one's actions.<sup>12, 13</sup> Toward this end, non-state actors must assess, track and publicly communicate actual and potential human rights impacts,<sup>14</sup> and establish effective remedial mechanisms accessible to those adversely impacted.<sup>15</sup> Additionally, the Global Fund should take measures to ensure that its funding is not complicit in human rights violations, but rather is used as a positive force for the realization of the right to health, including when partnering with private enterprise, in order to: align itself with the human rights-respecting positions of its major donor countries; preserve the reputation of the institution; and avoid publicly condoning governments and corporations that engage in human rights abuses.<sup>16</sup> The Global Fund can avoid facilitation of these violations, and further, actively achieve realization of the right to health rather than just good health outcomes, through comprehensive incorporation of the right to health framework into its processes and activities.

### 3. Incorporating the Right to Health in Global Fund Operations

#### Participation

The right to health framework requires participation of the population in all health-related decision-making at the community, national, and international level. The Global Fund recognizes this principle of participation, and has taken significant steps toward promoting transparent, participatory processes, including participation of the communities most affected by the diseases; however, there is more work to be done. A truly democratic, fully participatory process requires that the constitution of all Country Coordinating Mechanisms (CCMs) include the communities that will be affected by its programs. There is no substitute for direct participation and empowerment of affected communities, as compared to civil society representation, in combating HIV and AIDS, tuberculosis, and malaria. The unique structure of the Global Fund suggests a number of points at which community and civil society participation could be increased, both as part of the structure of CCMs, and in the development and implementation of project proposals. The Global Fund has already begun to undertake some of these measures with positive results, but community and civil society participation could be further strengthened. People living with illness constitute only 8% of CCMs globally, while key affected

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12. Ibid., para. 12.

13. The trend toward NSA recognition of the responsibility to respect human rights is also illustrated by the operation of the UN Global Compact, which includes 8,000 participants spread across 130 countries. The Compact's first principles affirm that "businesses should support and respect the protection of internationally proclaimed human rights and make sure that they are not complicit in human rights abuses." Accessed at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

14. Above n 12, paras 15 and 19.

15. Ibid, para. 27. Operational-level grievance mechanisms, like the World Bank's Inspection Panel, can provide a means to enable individuals and communities, who may be adversely impacted by a non-state actor, to raise concerns when they believe they are being or will be harmed. They are administrated by the non-state actor and support due diligence through the tracking of human rights performance and early remediation.

16. A/HRC/8/5. In the corporate context, John Ruggie states that "[c]laims of complicity can impose reputational costs and even lead to divestment, without legal liability being established;" he notes that the Norwegian Government's pension fund excludes and has divested from companies for complicity in human rights violations.

populations constitute a mere 1%;<sup>17</sup> a 2008 study of eight CCMs indicated that none included persons living with tuberculosis or malaria—core areas of the Fund’s work.<sup>18</sup>

Alongside increased participation at the CCM level, there must also be an increase in participation at the level of implementation and service delivery, namely by increasing the participation of civil society and community groups as primary and sub-recipients, and in monitoring and evaluation of Global Fund-supported programs. Affected communities are in the best position to provide informed feedback on programs of which they are the intended beneficiaries. Dual-track financing (DTF) and community strengthening systems (CSS) have been partially successful toward this aim, but these mechanisms must be further evaluated to determine whether they are effective in strengthening and empowering civil society and community groups to deliver good quality programs that meet the needs of affected communities. In this context, Peru is an excellent example.<sup>19</sup> While none of the Global Fund’s primary recipients are government actors, and in some States that can give rise to issues concerning accountability, implementation has nonetheless been successful due to clearly established stakeholder roles, and community strengthening and engagement.

## Underlying Determinants of Health

At the moment, the majority of Global Fund-supported programs do not address the underlying determinants of health. Addressing these underlying determinants is essential both as part of the right to health and to ensure long-term, sustainable control of the systemic problems that drive the spread of HIV and AIDS, tuberculosis, and malaria. The Global Fund should consider methods to proactively encourage funding proposals concerning these underlying determinants. For example, insofar as populations live in overcrowded, poorly constructed shelters in close proximity to inhospitable and unsanitary mosquito breeding areas, they remain vulnerable to and are much more likely to contract and transmit malaria than those with access to appropriate housing, adequate sanitation, and a healthy living environment. While insecticide-treated bed-nets are extraordinarily valuable for those in living situations that cannot be immediately remedied, nets alone will not lead to the near or complete eradication of malaria. The targeted draining of reservoirs containing stagnant water, and other mosquito breeding areas (if environmentally sustainable), along with appropriate sanitation and housing measures, is necessary in order to achieve steep declines in the prevalence of malaria.

Equally important are social determinants of health, such as poverty and discrimination.<sup>20</sup> HIV and AIDS, tuberculosis and malaria are disproportionately concentrated in, and driven by, poverty and inequality. Deficiencies in the underlying determinants discussed above often result from direct and indirect

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17. Global Fund, *CCM Sector Composition for QTR 2, 2010*. Accessed at: <http://www.theglobalfund.org/documents/ccm/CCMgraphs/CCM%202010%20QTR%202%20Sector%20Composition%20Global%20and%20Regional.pdf>.

18. Global Fund, *Country Coordinating Mechanisms: Governance and Civil Society Participation*, p. 8. Accessed at: <http://www.theglobalfund.org/documents/ccm/CCMThematicReporto2-CivilSocietyParticipation.pdf>.

19. Global Fund, *Civil Society Success on the Ground Community Systems Strengthening and Dual-track Financing: Nine-Illustrative Case Studies*. Accessed at: [http://www.theglobalfund.org/documents/publications/progressreports/Dual-Track\\_Report\\_en.pdf](http://www.theglobalfund.org/documents/publications/progressreports/Dual-Track_Report_en.pdf).

20. Commission on Social Determinants of Health (CSDH), *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health: Final Report of the Commission on Social Determinants of Health* (Geneva, Switzerland: World Health Organization, 2008). Accessed at: [http://www.who.int/social\\_determinants/final\\_report/en](http://www.who.int/social_determinants/final_report/en).

discrimination against vulnerable and marginalized groups, including the poor, women, children, refugees, criminalized populations and others. For instance, discrimination may force poorer populations to seek shelter in hazardous areas, substantially increasing the likelihood of contracting malaria. And upon contraction, they are much more likely to suffer and ultimately die due to other factors related to poverty and inequality, including lack of access to medicines and health services. For example, in the context of HIV and AIDS, India has rightly recognized that poverty is a barrier to the implementation of effective treatment initiatives and now provides nutritional supplements, temporary lodging, and funding for transportation to and from several testing and treatment centers for people living with HIV and AIDS.<sup>21</sup> As these underlying determinants underpin nearly all epidemic and endemic diseases to some extent, including neglected tropical diseases, increased efforts to address these determinants may signal a watershed point for the Global Fund to consider expanding its operations beyond that of HIV and AIDS, tuberculosis, and malaria. However, this is beyond the scope of this report.

### **Availability, Accessibility, Acceptability and Quality**

States have an obligation under the right to health to ensure the availability, accessibility, acceptability, and quality of health goods, services, and facilities. Possibly the best example of the Global Fund's unique position to assist States in meeting this obligation is with respect to access to medicines, as it is a major funder of drug procurement programs. As such, it is well placed to negotiate lower prices for essential medicines, and engage in a productive dialogue with both donor and recipient States when they fail to provide access to medicines. States often fail to meet this obligation by entering into trade agreements that compromise the supply of generic medicines, thus undermining affordability.<sup>22</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allows World Trade Organization member States certain "flexibilities" in adopting the provisions of the convention, including the opportunity to take "measures necessary to protect public health" when formulating or amending their patent laws.<sup>23</sup> As a result of the use of such flexibilities in India and Brazil, Indian generic anti-retrovirals (ARVs) account for more than 80% of the global market,<sup>24</sup> and Brazilian-produced generics supply 40% of all ARVs for domestic use.<sup>25</sup> The Global Fund should not remain a mute spectator in this area; it should promote use of such flexibilities, and engage in critical discourse concerning trade policies and agreements that reduce competition from generic producers in the drug market, which is the key to providing affordable medicines.

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21. See e.g. National AIDS Control Organization, *Policy Guidelines*. Accessed at: [http://www.nacoonline.org/About\\_NACO/Policy\\_Guidelines/](http://www.nacoonline.org/About_NACO/Policy_Guidelines/).

22. See e.g. A/HRC/11/12.

23. Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 8.

24. B. Waning et al., "A Lifeline to Treatment: The Role of Indian Generic Manufacturers in Supplying Antiretroviral Medicines to Developing Countries." *Journal of the International AIDS Society*, Vol. 13 (2010), p. 35.

25. World Health Organization, "Access to AIDS Medicines Stumbles on Trade Rules." *Bulletin of the World Health Organization*, Vol. 84, No. 5.

## Freedoms and Entitlements

Enjoyment of the right to health includes both freedoms and entitlements, including freedom from torture, non-consensual medical treatment and experimentation.<sup>26</sup> Informed consent is the core component of the freedom from non-consensual medical treatment. Some of the most egregious violations of the right to health occur within compulsory detoxification centers for drug dependence. These facilities claim to fulfill a public health purpose, but little or no evidence exists to support this contention. The Global Fund has financed HIV and AIDS interventions in such centers. Although the Global Fund has recommended that these facilities close, it has taken the position that detainees should be provided with access to HIV and AIDS prevention and treatment services as long as the centers remain open.<sup>27</sup> However, even de facto support for such centers represents a major stumbling block for the integration of human rights into Global Fund operations. If the Global Fund continues to fund the implementation and delivery of certain health services in compulsory detoxification centers, such as provision of antiretroviral treatment, it must ensure the decision is a result of robust deliberation involving all relevant, affected stakeholders. It is equally important for the Global Fund to ensure that the delivery of such services is consistent with human rights. For instance, service providers should be wholly independent from the State, and not confer legitimacy on the coercive nature of the centers. It should be a threshold requirement for approval by the TRP that any service that will be delivered in a contentious human rights context—as identified by a human rights impact assessment—must specify a reputable non-government agent to deliver the proposed services. Moreover, preferential support should be given to proposals that present human rights-respecting alternatives to compulsory drug treatment, including harm reduction programs.<sup>28</sup>

## Vulnerable Groups

The right to health requires that health facilities, goods, and services be accessible to all people without discrimination, with particular attention paid to the most vulnerable and marginalized groups.<sup>29</sup> States must take special measures vis-à-vis such groups to prevent infringement of their rights, and to ensure they have equal access to health services and information, e.g., through ensuring that health care staff recognize and respond to their unique needs. However, as a result of stigmatization and criminalization these groups are often disempowered and prevented from accessing health goods and services.<sup>30</sup> The Global Fund encourages

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26. E/C.12/2000/4, para. 12 (d).

27. Michel Kazatchkine, “Time to Redouble Our Efforts on AIDS and Human Rights.” Statement to Canadian HIV/AIDS Legal Network 2<sup>nd</sup> Annual Symposium on HIV, Law and Human Rights. Toronto, June 11, 2010. Accessed at: [http://www.theglobalfund.org/documents/ed/keynote\\_address\\_toronto\\_100611.pdf](http://www.theglobalfund.org/documents/ed/keynote_address_toronto_100611.pdf).

28. Ibid.; Global Fund Executive Director Michel Kazatchkine has noted that “it can no longer be disputed that harm reduction measures such as needle and syringe programs are essential health services and are key to realizing the human right of all persons to enjoy the highest attainable standard of health.”

29. E/C.12/2000/4, para 12(b).

30. These groups include, *inter alia*: sex workers; men who have sex with men (MSM); lesbian, gay, bisexual and transgender individuals (LGBTI); drug users; prisoners; and migrants.

the participation of vulnerable groups in CCMs,<sup>31</sup> but it must go further and require CCM membership for the most relevant at-risk populations (as determined by the particular country's illnesses profile), such as men who have sex with men, drug users, and sex workers, except in circumstances where doing so may result in harm to the individual or affected population. Moreover, participation by these groups must not be tokenistic. Whether these groups can access funding, however, depends heavily on the social, political and legal context of the State.<sup>32</sup> For example, nearly 70% of Global Fund grants are awarded to government principal recipients; however, where the activities of a group are criminalized, representative civil society organizations and community groups are less likely to receive funds as sub-recipients.

Engaging marginalized groups through existing health care services and systems is often difficult. Providing support for programs that promote participation and strengthen the operational capacity of affected communities has proven to be effective. For instance, evidence indicates that community organizations are the most effective providers of services such as peer outreach, condom or needle and syringe distribution.<sup>33</sup> Community organizations are also best situated to engage in critical “watch dog” activities and to facilitate programs, which tackle stigma and discrimination. The Sonagachi Project in India, run by sex workers, used community mobilization and self-organization to achieve empowerment of sex workers, high levels of condom use, and consequently lowered levels of HIV and AIDS infection among sex workers and their clients.<sup>34</sup> The Global Fund should prioritize support for such projects, and further, require disaggregated data be included in funding proposals in order to ensure its interventions adequately address the needs of marginalized groups.

## 4. The Global Fund's Human Rights Dilemma?

### Human Rights and Country Ownership

The Global Fund is committed to funding “programs that reflect national ownership and respect country partnership-led formulation and implementation processes.”<sup>35</sup> This approach strengthens local governance and capacity building while respecting national sovereignty. However, the Global Fund has competing commitments and, as a result, institutional tensions exist, including between country-driven processes

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31. Global Fund, *Country Coordinating Mechanisms: Governance and Civil Society Participation*. Accessed at: <http://www.theglobalfund.org/documents/ccm/CCMThematicReporto2-CivilSocietyParticipation.pdf>.

32. One review of 65 Country Coordinating Mechanisms (CCMs) found that only 5 had representatives of easily identifiable LGBTI organisations as members. S. Fried and S. Kowalski-Morton, “Sex and the Global Fund: How Sex Workers, Lesbians, Gays, Bisexuals, Transgender People and Men Who Have Sex with Men Are Benefitting from the Global Fund or Not,” *Health and Human Rights*, Vol. 10, No. 2 (2008), pp. 127–136.

33. *Ibid.*, p. 3.

34. Sarkar, S. (2010). “Community Engagement in HIV Prevention in Asia: Going from ‘for the Community’ to ‘by the Community’—Must We Wait for More Evidence?” *Sexually Transmitted Infections*, Vol. 86, pp. 2–3.

35. Global Fund, *The Framework Document of the Global Fund to Fight Aids, Tuberculosis and Malaria*, Section III(C), p. 1. Accessed at: [http://www.theglobalfund.org/documents/TGF\\_Framework.pdf](http://www.theglobalfund.org/documents/TGF_Framework.pdf).

and the Global Fund's performance-based funding model.<sup>36</sup> Tension also exists between a country-driven approach and the implementation of human rights standards in Global Fund operations. This dilemma is most pronounced when funded programs risk violating human rights or have been shown to do so.<sup>37</sup> The Global Fund must navigate a course that goes beyond passive acceptance of human rights abuses and one that falls short of hard conditionality;<sup>38</sup> the choice presented is not a binary one.

The Global Fund should establish a minimum threshold for the recipient State's respect for human rights below which the Global Fund will consider reevaluating funding arrangements. This minimum threshold should be determined with reference to the Global Fund's obligations under international human rights law and the technical merit of employing the right to health framework. For example, at a bare minimum, the Global Fund should explicitly deny funding for programs that threaten to violate the right to life.<sup>39</sup> The Global Fund should incorporate a mandatory human rights impact assessment into its proposal process, which will allow this "minimum threshold" test to be incorporated into its procedures. Should a proposal fail to meet this threshold, the Global Fund should engage in a feedback and dialogue procedure that will build the capacity of CCMs to recognize and avoid human rights violations. That process should, of course, involve affected communities at all stages. Implementation of this process, in and of itself, will further the Global Fund's incorporation of the right to health framework into its own operations. The Global Fund should also require funding proposals involving the distribution of medicines to directly address the principle of nondiscrimination in order to increase program efficacy and comply with the right to health. These efforts must be coupled with incorporation of the principle of participation, as discussed above.

The Global Fund must establish operational human rights standards at least commensurate with those that the recipient State has otherwise bound itself to under international law. Holding a recipient State to such standards is not an exercise of conditionality; it is a decision to actively assist the State in meeting its human rights obligations, including building human rights capacity for medium to long-term interventions. Moreover, this is in line with the Global Fund's express commitment to funding proposals that are consistent with international law and agreements.<sup>40</sup>

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36. Focus on country ownership results in increased risk margins for interventions absent a country-level Global Fund presence, particularly with relation to monitoring of performance. Macro, *The Five-Year Evaluation of the Global Fund to Fight AIDS, Tuberculosis, and Malaria: Synthesis of Study Areas 1, 2 and 3* (March, 2009) p. 48. Accessed at: [http://www.theglobalfund.org/documents/terg/TERG\\_Synthesis\\_Report.pdf](http://www.theglobalfund.org/documents/terg/TERG_Synthesis_Report.pdf).

37. However, it exists in establishing funding proposal requirements or in providing funding for programs that attempt to affect social or legal change, which may be prudent from a technical standpoint, but which is at odds with existent State policies.

38. In international development, the term "conditionality" refers to the use of conditions attached to a loan, debt relief, bilateral aid, or membership in international organizations.

39. The right to life is generally interpreted to be the most important human right. See e.g., CCPR General Comment No. 06: The right to life (art. 6): 04/30/1982. Accessed at: <http://www.unhchr.ch/tbs/doc.nsf/0/84ab969occd81fc7c12563edo046fae3>.

40. Global Fund, *The Framework Document of the Global Fund To Fight Aids, Tuberculosis And Malaria*, Section III(H)(8), p 3. Accessed at: [http://www.theglobalfund.org/documents/TGF\\_Framework.pdf](http://www.theglobalfund.org/documents/TGF_Framework.pdf).

## Human Rights and Evidence-Based Research

The Global Fund is dedicated to a model of “evidence-based” funding. This approach is beneficial for predicting and assessing the technical effectiveness of funded programs; however, it can jeopardize support for programs that should form part of a comprehensive human rights-based response, but which are inherently difficult to evaluate with the same level of rigor associated with evidence-based evaluation. A greater variety of evidence gathering techniques should be utilized to avoid strategies driven solely by narrow conceptions of evidence-based research, particularly where such evidence is limited.<sup>41</sup> Encouraging attempts have been made in this vein, which apply more rigorous evaluation techniques to social interventions.<sup>42</sup> The Global Fund should actively encourage the development and use of such tools not only to evaluate existing programs, but also to develop new interventions that place human rights and the underlying determinants of health at the heart of Global Fund interventions.<sup>43</sup>

## 5. Recommendations for the Implementation of Human Rights

In order to more fully integrate human rights standards and principles into its work and to increase the effectiveness of its funding, the Global Fund must take concrete steps toward incorporating human rights, and particularly the right to health, into all levels of its operations. The following recommendations present specific actions the Global Fund can take in order to institutionalize its commitment to human rights, thereby advancing the fight against HIV and AIDS, tuberculosis and malaria.

The Global Fund should:

- Establish a mechanism, such as a body within the Secretariat, which monitors and publicly responds to relevant human rights and public health developments, in line with the Global Fund’s public response to the murder of human rights activist David Kato.
- Strengthen participation of affected communities on CCMs by requiring rather than encouraging membership of relevant vulnerable groups (depending on the country illness profile), such as men who have sex with men, transgender people, drug users, sex workers, prisoners, the indigent, and others, except in circumstances where doing so may result in harm to the individual or affected population.

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41. P. Gready, “Reasons to Be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation,” *Journal of Human Rights Practice*, Vol. 1, No. 3 (2009), p. 380.

42. Esther Duflo has promoted the use of randomized controlled trials (RCTs) to empirically determine the effectiveness of social interventions, including remedial education programs in urban slums in India, and the use of non-financial incentives to increase participation in immunization programs in rural India. Lynn Lawry has also conducted studies evaluating interactive health education tools for health care workers in rural Afghanistan. These studies have been subject to criticism. See Angus Deaton, “Instruments, Randomization, and Learning about Development,” *Journal of Economic Literature*, Vol. 48, No. 2 (2010) p. 424.

43. We note that ethical concerns have been raised regarding applying RCTs to social interventions and we encourage further investigation in order to ensure such testing aligns with relevant human rights standards.

- Require funding applicants to submit human rights impact assessments as part of their proposals, which indicate how the proposed program will impact relevant human rights and ensure that a minimum human rights threshold is respected, including guaranteeing protection of the right to life.
- In the event that certain human rights impact assessments fail to meet this threshold, and reviewers consider elements of the proposal pose a risk in respect of human rights, the Global Fund should establish a mechanism that respects the integrity of the CCMs but allows for feedback and constructive dialogue with the funding applicants, to allow for amendments that improve proposal quality and simultaneously build capacity of providers vis-à-vis human rights.
- Provide guidance to funding applicants, including best-practice examples, clarifying that the Global Fund will provide funding for and prioritize programs directly addressing the underlying determinants of health, such as access to adequate housing and sanitation, health living environment, and the social determinants.
- Include human rights experts on the Technical Review Panel (TRP), if this is not already done, and solicit TRP briefings from human rights experts, including the UN Office of the High Commissioner on Human Rights and relevant UN Special Rapporteurs, in order to enable the TRP to assess whether proposals effectively address issues of human rights and their underlying determinants in line with the panel's Proposal Review Criteria.
- Support and incorporate a broad range of empirical research on human rights-based approaches to determine how and where they increase effectiveness of funded interventions; this may include establishing an internal body, which draws on the resources of the TRP to conduct and evaluate such research.
- Engage in constructive dialogue surrounding trade policies and agreements that negatively impacts access to medicines; prioritize proposals directed toward implementing TRIPS flexibilities; and encourage CCMs to seek funds for advocacy and litigation for affordable medicines.
- Explore mechanisms through which assistance can be provided to funding applicants who lack the financial and technical capacity to navigate the Global Fund application process and submit successful proposals, in order to attract a diverse pool of applicants, including community groups who would otherwise be excluded.

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## Annex 2:

# Integrating Human Rights into the Global Fund's Programming

*Michaela Clayton and Jonathan Cohen*

This paper was drafted for discussion at a consultation on human rights and the Global Fund in March 2011. It represents the views of the authors only, not of their organizations, the meeting organizers or the Global Fund itself.

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Human rights programming and advocacy have long been acknowledged as an important part of advancing public health goals, including responses to HIV/AIDS, tuberculosis and malaria. In his report to the 21<sup>st</sup> Global Fund on HIV/AIDS, Tuberculosis and Malaria (Global Fund) Board Meeting in April 2010, Executive Director Michel Kazatchkine noted that “[a] *supportive social, legal, and policy environment is a prerequisite of a successful and sustainable response to HIV*” (Kazatchkine, 2010). Drawing on substantial work connecting human rights and HIV/AIDS, the Joint United Nations Program on HIV/AIDS (UNAIDS) has recommended the following seven key human rights programs for inclusion in all national AIDS strategies (UNAIDS, 2010) and Global Fund HIV proposals (UNDP, 2010):

- 1) HIV-related legal services
- 2) Legal audits and/or law reform
- 3) Legal literacy through “Know your rights/laws” programs
- 4) Training of health care workers on HIV-related human rights issues
- 5) Training and sensitization of police, other law enforcement agents, lawyers and/or judges on HIV-related human rights issues
- 6) Stigma and discrimination reduction programs
- 7) Programs that seek to empower women by reducing harmful gender norms and gender-based violence and increasing equality in the economic, social and legal spheres

Human rights programming in the context of HIV, tuberculosis and malaria is not limited to these seven key approaches. A human rights approach also includes integrating patient protections into biomedical interventions, such as consent procedures in the context of HIV and tuberculosis counseling and testing, and non-discrimination policies in the provision of treatment. Perhaps most importantly, a human rights approach requires that independent nongovernmental organizations have the political space in which to operate, as well as the capacity to effectively plan and implement human rights programs and to hold governments accountable for the realization of rights.

Greater action by the Global Fund is needed in all these areas. Three recent reviews of Global Fund portfolios have concluded that support for the seven UNAIDS-recommended programs remains weak (Csete, 2010; UNDP, UNAIDS and the Global Fund, 2010; Technical Review Panel, 2010). In its review of Round 10 Global Fund proposals, the Technical Review Panel (TRP) stated:

The TRP is concerned with the limited inclusion in proposals of existing human rights instruments and measures to address stigma and discrimination. The TRP maintains that issues of stigma and discrimination must be addressed together and complementary to gender. As demonstration of their commitment to this issue, applicants should include interventions (and the necessary budget) to address stigma and discrimination rather than making token mention of these within the proposal text. The TRP also urges applicants to address the criminalization of key and vulnerable populations where applicable, and to demonstrate the role of civil society organizations in the social de-criminalization of these populations (Technical Review Panel, 2010).

That the Global Fund’s institutional commitment to human rights programming and advocacy has not translated into robust funding on the ground is not surprising. Human rights work can be controversial, risky and difficult to implement. Independent nongovernmental organizations and communities who are often best positioned to propose and implement human rights programs face perennial challenges of funding and capacity, especially in closed societies where it is difficult for them to operate at all. Public health authorities and health providers do not uniformly espouse a human rights-based approach to the three diseases.

Yet the reality is that unless the Global Fund proactively addresses barriers to the implementation of human rights programming and advocacy, its commitment will remain largely rhetorical. A portfolio that does not contain robust human rights programming and advocacy targeted to benefit those populations most at risk of or vulnerable to HIV, tuberculosis or malaria cannot be considered “country-owned,” in that such a portfolio is owned only by a *part* of the country that does not represent independent civil society or populations who may be marginalized by country coordinating mechanisms or other Global Fund processes. Such proposals do not meet the standard for genuine civil society engagement that is central to Global Fund operations. As the TRP’s report implies, these proposals are also not technically sound, since engagement on human rights is critical for effectiveness of all interventions seeking to improve responses to the three diseases, including, for example HIV prevention or treatment.

## **Barriers to Supporting Human Rights Programming and Advocacy**

Although the TRP echoed multiple analyses in concluding that Global Fund Round 10 proposals lacked budgeted interventions in the area of human rights and stigma, it did not analyze why this might have been so. Among the reasons for this are: the lack of human rights guidelines on the Global Fund’s application forms; the composition of Country Coordinating Mechanisms (CCMs); the general lack of capacity on the part of civil society organizations as well as on the part of CCMs to develop and plan human rights programs, which is exacerbated by a similar lack of capacity on the part of technical support providers; and the reluctance by governments and CCMs to budget for human rights work. Each of these is discussed briefly in turn.

### **Lack of Attention to Human Rights in Proposal Guidelines**

With the notable exception of the request that proposals include analysis of the impact of proposed work on women at risk for or living with HIV and on reduction of stigma and discrimination, the current Global Fund application does not do enough to signal the essential importance of human rights programming. This is unfortunate given that the TRP itself, in reviewing the soundness of proposals, is instructed to consider “whether proposals address issues of human rights and gender equity and uses human rights-based approaches to address the three diseases, including by contributing to the elimination of stigmatization of and discrimination against those infected and affected by TB and HIV/AIDS, especially populations that are marginalized or criminalized, such as injection drug users, men who have sex with men, transgender communities, sex workers and other key populations” (Global Fund, 2010). In noting the weakness of Round 10 proposals in the area of human rights, the TRP recommended that all applicants be informed “that failure to provide a complete and appropriate discrimination analysis as part of their proposal may compromise its quality.” We would go further to propose the following recommendations for discussion:

- The Global Fund should develop and adopt a human rights strategy, building on the existing Gender and Sexual Orientation and Gender Identity (SOGI) strategies.
- As part of this strategy, the Fund should include additional questions on human rights analysis in its application, along with an accompanying guidance note. The guidance note should draw on the UNAIDS and WHO Guidance Notes on stigma and discrimination and human rights and law.
- In addition, the Global Fund's Portfolio and Implementation Committee should provide additional detail to the TRP on what it should be looking for with respect to human rights, including the elements of the discrimination analysis referred to in the TRP statement above.

## Composition of CCMs

The meaningful participation of nongovernmental organizations (NGOs), including those representing marginalized groups and bringing human rights expertise, in CCM processes is an obvious precondition for the inclusion of human rights programming and advocacy in country-driven proposals. Particularly in less democratic states where human rights advocacy is needed most, government-dominated CCMs are naturally disinclined to apply for funding for human rights activities that they perceive as a potential threat to their sovereignty. More broadly, human rights interventions such as legal empowerment and human rights training are most likely to be identified and carried out by nongovernmental organizations working directly with communities (ideally as part of a national program). It is thus unfortunate that NGOs representing the populations most likely to be affected by AIDS-related human rights abuses have faced significant and perhaps disproportionate barriers to CCM participation (Csete, 2010).

In a detailed discussion of this subject, Csete provides the example of the only NGO working on lesbian, bisexual, gay, transgender and intersex (LBGTI) rights in Botswana that has been prevented by government from registering as a legal entity, thus precluding it from receiving donor funding, making access to Global Fund resources and participation in the CCM near impossible (Csete, 2010). A similar example was documented in Cambodia, where the concerns of people who use drugs were not adequately addressed by the CCM, and NGOs on the CCM reported that they were fearful of raising controversial or sensitive issues (Csete, 2010). Such exclusion creates a vicious circle whereby programs to address HIV-related human rights abuses such as criminalization are precisely less likely to appear in proposals from countries where such criminalization occurs. It is noteworthy that recently revised CCM guidelines restate the Global Fund's commitment to human rights and contain strong provisions on civil society engagement, including that of marginalized groups. To build on this, we propose the following recommendations for discussion:

- The Global Fund board should adopt proposed guidelines for strengthening CCMs.
- These guidelines should be urgently implemented together with capacity building for CCMs and communities to improve meaningful participation.

## Level of Support to Civil Society

In part to remedy the deficit in civil society participation in some CCMs, direct support to civil society coalitions to develop proposals or sections of proposals has proven an effective strategy for including meaningful human rights programming in Global Fund applications. This has been the case both in non-CCM proposals such as those put forward for people who use drugs in Thailand and Russia (Round 3 and 5, respectively), regional proposals such as that developed by the Naz foundation in Round 9 for men who have sex with men in South Asia, as well as sections of country proposals developed by civil society coalitions. In addition to establishing Community Systems Strengthening and Dual Track Financing mechanisms to channel support to civil society, the Global Fund has gone further to, for example, support community consultations in Eastern Europe and Southeast Asia on key elements of harm reduction proposals. However, mechanisms for Global Fund support of such community engagement remain unclear, perhaps discouraging civil society organizations from accessing such support. In addition, in some cases CCMs do not effectively do their job of incorporating civil society contributions into proposals, as occurred in the case of a proposal to fund women’s rights work in Swaziland in Round 7. Since civil society is the likeliest implementer of human rights programs, meaningful engagement by civil society in proposal preparation is critical. We therefore propose the following recommendations for discussion:

- **The Global Fund should clarify the grounds for non-CCM submissions, especially for human rights advocacy, and encourage the use of the community systems strengthening and dual track financing mechanisms.**
- **The Global Fund’s partners should explore ways to buttress direct support to civil society coalitions to develop whole or partial proposals on human rights themes.**
- **In addition, the guidance note recommended above should ask applicants to articulate how civil society consultation on human rights programming and accountability was realized, and in particular what outreach was undertaken to ensure participation in proposal development by as broad a range of civil society organizations as possible.**

## Reluctance to Propose and Budget for More Controversial Elements of Human Rights Programs

The conclusion by the TRP that “token mention” of stigma and discrimination is substituting for meaningful proposals for human rights programming is echoed by a systematic analysis by UNDP, UNAIDS and the Global Fund of successful HIV proposals from Round 6 and 7. According to this study, only one (Malawi) of the fifty-nine HIV proposals in Round 6 and 7 contained all of the key human rights programs recommended by UNAIDS (UNDP, UNAIDS and the Global Fund, 2010).<sup>1</sup> Even where human rights programs were included in proposals, the planned activities tended towards the uncontroversial. In Malawi, for example, where a number of punitive laws impede access to HIV prevention, treatment, care and support services, the focus under the proposed legal audit and/or law reform program was on “advocacy for political commitment and support for enforcement of existing laws for protection of young people’s and women’s rights,” with no mention at all of reforming laws, such as the law that criminalizes sex between men, that act as barriers to

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1. This analysis only examined the first six of the seven key programs listed in this paper.

access. More palatable and generic “stigma and discrimination reduction” programs, such as broad public awareness campaigns, were by far the most common of the six key human-rights programs in Round 6 and 7 (appearing in 95% of proposals) and received the most funds, while “know your rights/laws” programs were least common (appearing in 29% of proposals). This may reflect reluctance at the country level to implement programs that empower individuals to claim their rights and in-so-doing challenge the adequacy of the national HIV response and other government policies. Interestingly, countries that criminalize HIV transmission were found by UNDP, UNAIDS and the Global Fund to support considerably fewer “HIV-related legal services” and “know your rights” programs than countries that do not. Finally, according to the UNDP analysis, even where human rights programs did appear in Round 6 and 7 proposals, as many as one quarter of these programs were not included in work plans and thus had no budget. In the case of Malawi, of the six key programs proposed, the only two that were not provided for in the work plan and budget were the “HIV-related legal services” and “know your rights/laws” programs, indicating a preference for programs that are not likely to precipitate human rights challenges to the national response. This situation may also be exacerbated by the fact that there are only a limited number of Service Delivery Areas that speak to human rights programming beyond general stigma and discrimination programs. To address this we propose the following recommendations for discussion:

- **As recommended in the UNDP, UNAIDS and Global Fund report (2010), the Global Fund should implement a system to identify and respond to the attrition of key human rights programs between the proposal and implementation stage.**
- **Also as recommended in the UNDP, UNAIDS, and Global Fund report (2010), the Global Fund should encourage applicants to include a comprehensive technical support plan for the development, implementation and monitoring of key human rights programs in the overarching technical support plan included in the proposal.**
- **During the grant negotiation process, the Global Fund should pay particular attention to the inclusion in work plans and allocation of funds to human rights programming beyond broad anti-stigma campaigns.**
- **The Global Fund should continue collaborating with UNAIDS on ongoing efforts to define, cost and evaluate key human rights programs.**

## **From Programming to Accountability**

As noted above, a human rights-based response to HIV at the country level requires not only that the Global Fund support specific human rights programs, but also that it invest in strengthening independent nongovernmental organizations with the mandate and capacity to monitor and hold their governments accountable to their human rights commitments, including progressive realization of the right to health. Since human rights challenges change with modes of service delivery, trends in HIV infection and treatment, and the enactment of new laws and policies, flexibility in accountability work is particularly important. Provision of unrestricted core grants for human rights monitoring to organizations that can demonstrate strong organizational and financial management and plan for the future is thus particularly effective (OSI and OSISA, 2008).

Perhaps even more than with the implementation of human rights programming described above, human rights accountability work faces funding barriers. The Global Fund’s interest—shared by other donors—in “value for money” can be difficult to operationalize through accountability work, since impact is difficult to quantify. Human rights documentation, shadow reporting, citizen report cards, budget and expenditure tracking, and community monitoring do not seek to improve health outcomes directly, but rather to apply pressure on governments and other duty-bearers, including principal recipients of Global Fund funds, to do so. Yet this does not diminish their contribution to an effective HIV response. HIV advocacy organizations rightly lament that the quantitative monitoring and evaluation indicators for prevention, treatment and care required by their CCMs fail to capture the contribution of their work to a comprehensive HIV response (Braam, 2009), including to the “community systems strengthening” prioritized by the Global Fund itself.<sup>2</sup> An additional, important barrier to funding advocacy is that many independent nongovernmental organizations and networks of people living with HIV have, in the process of becoming Global Fund implementers, been forced to turn from human rights advocacy to overseeing program implementation. It would be unfortunate if this were the result of their having to “follow the money” because funds are limited for accountability work; regardless, it is critical that their or others’ accountability and watchdog functions be preserved one way or another. To address these challenges, we propose the following recommendations for discussion:

- **The Global Fund should provide clear guidance on the types of organizations and human rights-related activities that are eligible for funding under various funding streams and window, such as the Community Systems Strengthening (CSS) window.**
- **The Global Fund should develop appropriate indicators for advocacy and accountability work as well as for organizational development of advocacy and human rights organizations.**

Finally, in addition to civil society, the Global Fund has proven to be a strategic human rights advocate in its own right (Csete, 2010, UNDP, UNAIDS and the Global Fund, 2010). Important examples of this have included the Global Fund’s intervening against police violence against vulnerable groups in Senegal, protesting the enforcement of sodomy laws in Malawi, making timely interventions on harm reduction at the Commission on Narcotic Drugs, taking a position against drug detention centers, and others. The TRP recommends that “the Office of the Executive Director and the Board leverage [the Global Fund’s] influence at the global level and in specific national contexts where there is a clear discrimination against vulnerable populations [including] addressing legal environments that criminalize vulnerable populations.” To make this and other recommendations in this paper possible, we propose for discussion the overarching recommendation that the Global Fund **create a human rights unit at the Secretariat, led by a senior advisor, charged with proactively identifying advocacy opportunities that would protect its investment and implementing the human rights strategy recommended in this paper.**

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2. This is further addressed in the Fuleihan, Kowalski and Stegling discussion paper on monitoring and evaluation.

## Conclusion

Recent investments and statements by the Global Fund indicate a striking openness to supporting a human rights-based HIV response. To translate this openness into action, the Global Fund should proactively identify and address the many barriers to funding and implementing human rights programs and advocacy at the country level. While support for human rights is currently inadequate as noted by the TRP and others, we would not go as far as to recommend a quantitative target for what percentage of Global Fund investments should support human rights interventions, either in specific countries or globally. Rather, consistent with a meaningful and robust country-owned approach, we suggest that the proactive removal of barriers to full inclusion of human rights programs and advocacy ought to be a priority for the Global Fund, and that it is then up to proposal drafters and CCMs to design a human rights-based response suited to their epidemic and based on an appropriate human rights analysis of the epidemic. To complement this, the Global Fund should consider creating an operational advocacy arm with the mandate of identifying and addressing human rights abuses that undermine its salutary investments and ultimately worsen health.

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## Annex 3:

# Monitoring Human Rights in Global Fund-Supported Programs

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This paper was drafted for discussion at a consultation on human rights and the Global Fund in March 2011. It represents the views of the authors only, not of their organizations, the meeting organizers or the Global Fund itself.

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It is well established that human rights are central to an effective response to HIV/AIDS, tuberculosis and malaria. When human rights are respected, civil society organizations are better able to respond to the prevention and treatment needs, barriers to accessing services are reduced, people living with and communities affected by the diseases are better able to cope, and ultimately, fewer people are infected. Governments have committed to protecting and promoting human rights in responses to the three diseases and most countries identify some HIV-related human rights issues as obstacles to universal access to HIV prevention, treatment, care and support or to effective national HIV responses.<sup>1</sup> But this has not yet translated into adequate programming<sup>2</sup> and systems for monitoring, evaluating and overseeing the protection of human rights in the response to the three diseases are particularly weak.

When it comes to human rights, ongoing monitoring, evaluation and oversight is essential for three reasons:

- To forestall and respond to potential rights abuses;
- To assess and document the impact that human rights programs have on the three diseases, in terms of increasing access to services, improving quality of life, and reducing infections; and
- To ensure that services are acceptable, accessible, available, and of high quality.

When intentional monitoring systems are in place, institutions are also more likely to have systematic means of assessing human rights risks and responding to violations, if they occur. For a performance-based funding mechanism, like the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), which links grant disbursements to progress towards achieving time-bound targets, the question of how to monitor and evaluate human rights in its programs is critical.

We propose that the Global Fund consider monitoring, evaluation and oversight on human rights on three levels. First, the Global Fund and its partners should conduct ongoing monitoring and evaluation of key human rights programs in order to track their implementation and assess their impact on the three diseases. Second, the Global Fund Secretariat, Principal Recipients (PRs) and Country Coordinating Mechanisms (CCMs) should monitor the environment in which programs are being implemented in order to identify potential or actual risks of human rights violations that are likely to impede an effective response to the three diseases and ensure that adequate strategies and programs to protect human rights are in place. Third, the Global Fund and its partners should conduct ongoing oversight to ensure that human rights are respected in the delivery of services or implementation of programs, particularly when the beneficiaries belong to groups that experience marginalization, stigmatization, discrimination or criminalization. The Global Fund already has many layers of monitoring and oversight built into its model, which could be used to more systematically monitor human rights (see Annex A). We propose a number of enhancements to existing processes, as well as outline some areas for additional work.

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1. International HIV Alliance and UNAIDS (August 2009). *Addressing Human Rights Issues in National Responses to HIV: A review of programmes to reduce stigma and discrimination and increase access to justice, Discussion Paper*; and UNAIDS (2010), *Report on the Global AIDS Epidemic*, UNAIDS: Geneva.

2. UNAIDS (2010) *Ensuring Non-discrimination on Responses to HIV*, Report to the 26th meeting of the UNAIDS Programme Coordinating Board. Available at: [http://data.unaids.org/pub/BaseDocument/2010/20100526\\_non\\_discrimination\\_in\\_hiv\\_en.pdf](http://data.unaids.org/pub/BaseDocument/2010/20100526_non_discrimination_in_hiv_en.pdf).

## 1. Monitoring the Legal, Policy and Social Context

Legal, policy and social environments have a great impact on the implementation of programs to fight AIDS, tuberculosis and malaria, and particularly on programs that are specifically focused on meeting the health needs of most at risk populations. They can either be enabling, and facilitate greater access to care and promotion and protection of human rights, or they can create barriers to care. While there is evidence that a majority of proposals to the Global Fund neglect human rights programming, and in particular key populations, where there have been well-intended attempts at inclusion, these issues become more complex at the implementation stage.<sup>3</sup> Monitoring the legal, policy and social environment over the course of grant implementation can (1) ensure that planned programs are adequately addressing human rights barriers in the national disease responses, and (2) alert implementers and the Global Fund to potential and emerging risks to human rights, or to program implementation or effectiveness, and allow rapid responses. This is particularly important given that implementers are not always able to control for changes in political and social contexts that can undermine program effectiveness and because political and social environments can change rapidly from empowering to endangering. We propose two tools that could be used to assist in monitoring these contexts.

### 1.1 Human Rights Analyses

A **baseline human rights analysis** should be part of the proposal development process and be submitted by CCMs to be considered as part of the Technical Review Panel's (TRP) assessment of the proposed program. It is important to note that without a baseline human rights analysis of national disease responses, including the enabling environment and implementation of key human rights programs, it is not possible for CCMs, the TRP, the Global Fund Secretariat or other stakeholders to adequately assess the sufficiency of the human rights programs included in Global Fund proposals and grants in line with “know your epidemic, know your response” principles. A human rights analysis of national disease responses would not only provide essential information for the Global Fund to improve the efficiency and effectiveness of its investments, it would also provide valuable information for other key stakeholders at the country level including technical and development partners.

This analysis for HIV proposals should examine the legal and policy environment, social and cultural environment, other HIV-related human rights, and whether there are specific human rights programs as part of the HIV response.

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3. In a recent survey of Alliance members, a majority of organizations reported that discriminatory and penalizing laws and policies create a major obstacle to implementing sound human rights based HIV programs. International HIV/AIDS Alliance “Advancing Human Rights: Responding to HIV—Report on the findings of a human rights survey among Alliance partners” (<http://www.aidsalliance.org/Publicationsdetails.aspx?Id=503>); The UNDP, UNAIDS, Global Fund study (2010) “Analysis of Key Human Rights Programs in Global Fund-Supported Programs” found that 23 percent of the key human rights programs in successful HIV proposals from Rounds 6 and 7 were not included in work plans (Available at: <http://content.undp.org/go/cms-service/download/publication/?version=live&id=3107370>).

### ***Legal and Policy Environment (Laws, Law Enforcement, Policies and Access to Justice)***<sup>4</sup>

A holistic assessment of the legal and policy environment is paramount to fully understand the range of factors that impact the acceptability, accessibility, availability, and quality of health services, including law enforcement and access to justice. An analysis of the legal and policy environment should answer the following questions:

- Is there legislation in place that protects people living with HIV or TB from discrimination? Are there laws that specifically protect vulnerable subpopulations from discrimination?
- Are there any punitive laws that could present obstacles for people living with HIV or TB and key populations to access prevention, treatment and care services?
- Is HIV transmission criminalized?
- Are there laws that criminalize homosexuality or sex work or that prescribe compulsory detention for people who use drugs and provide the death penalty for drug offences?
- Do key populations have access to free legal services?
- Are there programs in place to increase rights/legal literacy of people living with HIV and other key populations (e.g. “know your rights” campaigns)?
- Do key populations report (formally or informally) harassment by police or other government officers?
- Do laws exist to protect women from violence, including in the home, and ensure equal access to education, housing and health services?

It is important for legislation to be a primary focus of such an analysis, in order to emphasize the importance of the legislative protections for human rights. While it is politically easier for governments to put in place policies that address human rights at the national level, these policies are not enforceable in the courts and are therefore often ignored, for example by the private sector.<sup>5</sup> However, policies are critical in ensuring whether or not human rights are ultimately protected: good laws can be undermined by weak implementing policies and conflicting policies, for example between public health and law enforcement, can be particularly harmful.

### ***Social and Cultural Environment***

CCMs should consider social and cultural norms, and in particular public or religious commentary and the media. Questions to consider include:

- Is there inflammatory rhetoric about men who have sex with men, people who use drugs or other marginalized groups in the press?
- Is there controversy about public health or other programs targeting marginalized groups?

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4. Most of this data is available for all countries for HIV responses through the HIV National Composite Policy Index (NCPI) and other sources (see [http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728\\_HR\\_Poster\\_en-1.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en-1.pdf)).

5. UNDP, UNAIDS and the Global Fund on HIV/AIDS, Tuberculosis and Malaria (2010). *Analysis of Key Human Rights Programs in Global Fund-Supported Programs*, UNDP: New York. Available at: <http://content.undp.org/go/cms-service/download/publication/?version=live&id=3107370>.

In such environments, additional vigilance is necessary to ensure that programs that target marginalized groups do not also put them at risk of violence or arrest.

### *HIV-related Human Rights*

CCMs should also consider the wider human rights situation of the country. For example:

- Is the right to freedom of association protected and has it resulted in the ability of key populations—including criminalized populations—to organize formally?
- Are these groups able to participate effectively in the CCM and in other national institutions?
- Is the right to access to information respected and protected?

Linking participation of key populations at these national structures to the legislative context provides better information than just an assurance that indeed they are present in national meetings. It will, for example, highlight the fact that while governments may be increasingly addressing men who have sex with men in national HIV policies, laws criminalizing these groups may not only prevent them from registering their own associations and engaging openly, freely and safely in national policy spaces, but also prevent them from accessing services.<sup>6</sup> Similarly, the extent to which civil society is in a position to request aggregated, up-to-date and relevant data on access to health services and government health spending, for example, is an indication of whether civil society is able to hold the state and donor organizations accountable.

### *Programs to Address Human Rights Issues in the Context of HIV*

Finally, the analysis should include a review of national HIV/AIDS strategies and the extent to which human rights are included in the strategy, as well as the scope, scale and rate of implementation for these programs designed to address the legal, policy and social context and create enabling environments (see below). Programs need to be monitored against indicators that reflect this human rights analysis and the analysis needs to be revisited on a regular basis to understand whether the general human rights situation has changed, whether this change has an impact on programming, or whether commitments to protect and promote human rights translate into measurable improvements in the human rights landscape. We suggest that PRs, CCMs and Fund Portfolio Managers reassess the environment periodically, and at a minimum, during periodic reviews.

## **1.2 Human Rights Risk Profiles**

In addition to ongoing monitoring at the country level, the Global Fund should consider conducting its own human rights assessments of the countries in which it is supporting an HIV, tuberculosis or malaria program on a periodic basis, as part of its menu of risk management tools. One way of doing this may be to create

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6. See for example: UNAIDS (2008), *Global Report on the AIDS Epidemic*, which contains data that suggests that in countries that do not recognize and protect key populations' right to non-discrimination, discriminatory social and legal environments impede their access to essential prevention services (<http://www.unaids.org/en/dataanalysis/epidemiology/2008reportontheglobalaidsepidemic/>); a listing of legal provisions on homosexuality in the Commonwealth where to this date 41 out of 53 countries criminal codes punish adult, private, consensual homosexual acts. Commonwealth HIV/AIDS Action Group & International HIV/AIDS Alliance, *Enabling legal environments for effective HIV responses: A leadership challenge for the Commonwealth*. Available at: <http://www.aidsalliance.org/Publicationsdetails.aspx?Id=496>.

a *Human Rights Risk Profile*<sup>7</sup> that draws upon substantive indexes monitoring different aspects of human rights.<sup>8</sup> These profiles could be used to supplement the information provided by CCMs, give the Global Fund Secretariat and TRP additional contextual information about the human rights situation in a country, and highlight potential risks that may undermine the effectiveness of programs.

One approach could be to develop a set of comparative indexes based on the human rights component of the HIV National Composite Policy Index (NCPI),<sup>9</sup> data on national legislative status,<sup>10</sup> and the human rights component of the Failed State Index.<sup>11</sup> As an example, an analysis of the human rights context in Malaysia shows that it has an average NCPI index score (4.12) based on reporting of a generally favorable set of policies, laws and regulations to protect human rights in relation to HIV, and some positive efforts to enforce them (as reported by the government). But, Malaysia also has a comparatively weak legislative score (7.81) due to non-ratification of key UN/ILO protocols and national laws criminalizing PLHIV and/or LGBTI. Note that the indexes are constructed from 0–10, with 0 being the “best” value.<sup>12</sup> The results in Malaysia highlight the need to ensure that their HIV programs address structural barriers (such as stigmatizing laws, and obstacles to accessing effective prevention, treatment and care services for marginalized groups), which can have a negative impact on public health programs. A more comprehensive understanding of the human rights situation in which programs are planned and implemented, using an index such as this, will alert the Global Fund to possible human rights risks and should be seen as an entry point to a more in-depth analysis. For example, while Brazil has a good NCPI (1.33) and Legislative Ranking (2.69), reference to US State Department Country Specific Human Rights Report in the index will reveal substantial violence against sexual minorities.<sup>13</sup> In this example, discrepancies in rankings on different indexes are a good “warning beacon” of potential human rights risks, allowing the TRP and Fund Portfolio Managers to seek further clarification from CCMs about how they plan to mitigate these risks and ensure protection for human rights. An approach that makes use of indexes such as this should be updated periodically (the NCPI is completed every two years, for example).

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7. The Global Fund Secretariat currently uses country profiles in the areas of Procurement and Monitoring and Evaluation as part of their risk management efforts.

8. The approach described below is based on a concept currently under development by the International HIV/AIDS Alliance to better understand the political environment in which Alliance members work, alongside the development of key human rights indicators within the Alliance Monitoring and Reporting System.

9. The National Composite Policy Index is completed every two years by countries as part of their HIV UN General Assembly Special Session reporting requirements.

10. The Alliance is developing two legislative sub-indexes: Adherence to key UN conventions and optional protocols, and the criminalization of HIV and LGBTI by data derived from GNP+ and the International Lesbian, Gay Bisexual, Trans and Intersex Association.

11. The Failed State Index is a pre-existing index, for which the human rights component has been isolated. This ranking is based on an analysis of the emergence of undemocratic governance, politically inspired violence, political prisoners and abuses of legal, political and societal rights.

12. Please see the Draft Composite Human Rights Index in Annex B.

13. The United States of America State Department Country Report on Human Rights report for Brazil, 2009 notes: “Between January and September, the NGO Bahia Gay Group received 115 reports of killings in the country based on sexual orientation and gender identity, a decrease from 186 during the same period in 2008. Gay men were the most affected group, followed by transvestites and lesbians. During the year Parana State had the most cases of killings of gay men (19), followed by the states of Bahia (18) and Sao Paulo (10). Activist groups claimed that violence against gay, lesbian, and transgender persons and, in particular, transvestites was underreported.” Available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136103.htm>.

## 2. Monitoring Human Rights Programs

UNAIDS recommends that national HIV strategies include a package of seven key human rights programs.<sup>14</sup> Yet, while countries are recognizing the need to address human rights in order to increase the impact of their disease programs, the implementation of human rights-focused activities is lagging. For example, a study carried out by the UNAIDS Secretariat and the International HIV/AIDS Alliance (2008–2009)<sup>15</sup> covering the national AIDS planning documents of 56 countries—including any successful Round 6 and 7 HIV proposals to the Global Fund from those 56 countries—found that although about 90% of country activity plans included key human rights programs, fewer than 50% of countries actually budgeted for such programs. Further, a UNDP, UNAIDS and Global Fund (2010)<sup>16</sup> study has shown that even when programs are included in proposals to the Global Fund (successful HIV proposals contained on average 3 of the 6 key human rights programs), they are not necessarily implemented: 23% of the human rights programs included in successful Global Fund Round 6 and 7 HIV proposals were not ultimately included in the agreed grant. Hence, unless alternate funding sources were subsequently identified, almost one quarter of the key human rights programs identified by CCMs as necessary for an effective HIV response were not implemented. The observed attrition of human rights programs highlights the urgent need to strengthen capacity and technical support for human rights, especially at the country level. In addition, due to the crosscutting and often catalytic benefits of human rights programs, this loss is likely to have a negative impact on the other programs implemented under the Global Fund grant, and indeed on the national HIV response.

### Seven Key Human Rights Programs

1. Programs to reduce stigma and discrimination;
2. Programs to sensitize police and judges;
3. Legal services;
4. Programs to train health care workers in nondiscrimination, confidentiality and informed consent;
5. Programs to monitor and improve the impact of the legal environment on HIV;
6. “Know your rights/laws” campaigns or other legal literacy programs; and
7. Programs to counter harmful gender norms and empower women and girls.

Even when they are included in a grant agreement, these programs are not routinely monitored: only 34% of key human rights programs from proposals were tracked by an indicator in the Performance Framework. Importantly, more than one third of these indicators linked to human rights programming were too broadly framed to meaningfully monitor the implementation or outcomes of the specific human rights programs. In addition, of the 62 human rights programs that were tracked by an indicator, only 13 were tracked by one of the Global Fund-suggested indicators contained in the Global Fund’s Monitoring and Evaluation Toolkit (2009). This points to the vital need for the Global Fund to ensure that human rights programs included in successful proposals are ultimately fully funded, implemented and adequately monitored and evaluated.

14. It is important to note that this is not an exhaustive list of human rights programming in the context of HIV and does not preclude the importance of other types of rights based programs in the context of HIV—for example: HIV workplace programs, programs for orphans and caregivers, programs for the rehabilitation for rape survivors.

15. International HIV Alliance and UNAIDS (2009). Report: *Exercise to map HIV related human rights issues as obstacles, priorities, programmes and activities within selected data sources relating to the national response to HIV in 56 countries.*

16. UNDP, UNAIDS and the Global Fund on HIV/AIDS, TB and Malaria (2010), *Analysis of Key Human Rights Programs in Global Fund-Supported HIV Programs.* Above Endnote 5.

The low number of human rights programs tracked by indicators in the Performance Framework is likely to be the result of a combination of factors, including the fact that the Global Fund tries to limit the number of indicators in the Framework. Indicators that measure key human rights programs may not be considered as important for grant monitoring purposes as other indicators, such as the Top Ten outcome/impact indicators. Stakeholders may also have difficulty identifying indicators for these programs that meet the Global Fund criteria of relevant, easily verifiable and/or standardized; indeed the Global Fund’s Monitoring and Evaluation Toolkit contains few indicators that could be used to measure the impact of these programs. Generally, “Training and sensitization of police, other law enforcement agents, lawyers and/or judges on HIV-related human rights issues” and “stigma and discrimination reduction” programs were found to be the most likely programs followed up by an indicator. Yet, given the evidence that addressing social, legal and structural barriers and protecting human rights increases overall program effectiveness, and that monitoring and evaluation is critical to the success of any program, more priority should be given to tracking the implementation and impact of these programs.

The Global Fund and technical partners should identify a number of indicators that can be used to effectively monitor these programs at the output, process, outcome, and impact levels. While it is difficult to formulate indicators for some of the key human rights programs that meet the Global Fund’s criteria of being relevant, easily verifiable, and/or standardized, until a set of indicators is developed, monitoring of these programs will continue to lag and lessons learned from implementation will not be adequately captured. A set of indicators could be developed based on the 7 key programs recommended by UNAIDS for all HIV responses. This may include the following:

- Output Indicators:
  - Number of referrals to mediation services (including legal, social and medical)
  - Number of individuals from key populations receiving legal services
  - Number of police/judges/law enforcement attending sensitization and training on human rights and HIV
  - Number of health workers receiving training on human rights and HIV
  - Number of people reached by campaigns on the rights of people living with HIV or key populations
  - Number of defensive and offensive legal challenges brought by PLHIV and members of key populations
- Outcome level:
  - There is positive protection against discrimination for PLHIV and key populations
  - Legislation is in place to ensure access to information is guaranteed to all stakeholders
  - Reduction in the number of individuals from key populations reporting incidences of harassment/abuse from law enforcement agencies
  - Level of meaningful participation of PLHIV and individuals from key populations in policymaking fora

The Global Fund is in a position to send a strong message to countries regarding the importance of these programs. The Global Fund should work with countries, with support from technical partners, to ensure the adequate inclusion of key human rights indicators in the Performance Framework of Global Fund grants and should assess the outcomes and impact of human rights programming vis-à-vis the national disease responses during Periodic Reviews.

### 3. Overseeing the Protection of Human Rights in Program Implementation

The question of whether programs are being implemented with attention to the four elements of the right to health—acceptability, accessibility, availability, and quality—is critical when assessing whether programs are effective, have the desired outcomes, and protect the human rights of beneficiaries. For example, ensuring that programs are acceptable by protecting the rights to confidentiality and ensuring counseling and informed consent create optimal conditions for the uptake of services, especially for people seeking HIV testing, women seeking prevention of mother to child transmission (PMTCT) services, and adolescents seeking sexual and reproductive health and HIV care. Substantial evidence has been collected that when human rights are violated in health care settings, initial uptake is poorer and loss to follow-up occurs more frequently.

Yet, this is where the Global Fund’s systems for monitoring and oversight are weakest. Principal Recipients are charged with ensuring that the programs get implemented as planned, conducting site visits with sub-recipients, and assessing the quality of programs. CCMs have a similar oversight role, one step removed. While Fund Portfolio Managers have the capacity to respond to challenges in program implementation, through condition precedents or requirements linked to funding disbursements, they do not always become aware of them. There are currently no requirements that data on the acceptability, accessibility, availability or quality of programs is reported to anyone and the indicators that are most often used—those that capture the number of people reached, the number of people trained, or the number of commodities distributed—fall significantly short in measuring these elements.

Monitoring the extent to which human rights are protected in the delivery of programs in terms of acceptability, accessibility, availability and quality is more difficult, but just as necessary. In order to do so effectively, the Global Fund must explicitly define expectations about how human rights should be protected in service delivery; service providers should understand how they will be held accountable for protecting human rights of beneficiaries; and beneficiaries should understand what their rights are and the duties of various actors including, but not limited to, government. It also requires the meaningful engagement of communities that are being targeted by programs in designing monitoring systems and empowered to report problems that they observe. While CCMs and PRs must take leadership in developing, budgeting for, and supporting ongoing monitoring and oversight in this area, the Global Fund should explicitly encourage this type of monitoring and require reporting on a periodic basis and institute independent means of verification.

There are a number of oversight tools and best practices that CCMs and PRs can use to ensure ongoing oversight of the acceptability, accessibility, availability and quality of programs. For example, in order to monitor the acceptability of programs, community councils, which involve representatives of people living with or affected by the diseases and representatives of service delivery organizations, have been an effective mechanisms for monitoring, discussing and ultimately addressing human rights violations in the delivery of services. Unannounced site visits and “mystery patient” programs are other mechanisms that could, and should, be used to assess quality and protection of human rights in all Global Fund-supported HIV programs. Third-party observation of service delivery, including exit interviews or focus groups with beneficiaries of services, can also be a particularly effective tool. Mechanisms should be considered to allow for anonymous reporting of rights violations or concerns in the delivery of services, such as hotlines or ombudsmen. The development and implementation of such monitoring programs could and should be incorporated into all national HIV programs that receive Global Fund support.

While the Global Fund has established Local Fund Agents (LFAs) to conduct independent verification of financial reports and reporting on progress against indicators, it has no such systems in place to assess the acceptability, accessibility, availability or quality of programs. It could consider expanding the mandate of LFAs to conduct spot checks of the quality of services (much as it does data verification), with the first step being assessment by the Secretariat of whether LFAs have the capacity or skills to be able to perform this task, and if not, what additional training and financial support would likely be necessary. At a minimum, the Global Fund should draw on its extensive network of technical partners to play this role and encourage CCMs to do the same.

#### **4. Strengthening the Capacity of Key Global Fund Structures to Monitor, Evaluate and Oversee Human Rights**

The Global Fund needs to support capacity development within its key structures to better oversee the protection of human rights. Recent studies<sup>17</sup> conclude that strategically strengthening attention to human rights in key processes, such as the CCMs, LFAs and the Technical Review Panel (TRP), would contribute to three things: ensuring that resources are directed to those who need them most according to epidemiological criteria; increasing rights-based programming, especially for criminalized and other key populations; and increasing the overall effectiveness of all programming. Policies to meaningfully involve representatives of key populations on CCMs and the Global Fund Board have represented significant steps towards institutionalizing partnership with stakeholders. With greater inclusiveness and attention to the importance of human rights programming, CCMs and PRs will be better positioned to track implementation of these important programs as part of the Global Fund grant. By including more members on the TRP with human rights and legal experience and expertise, the TRP will be strengthened in its ability to adequately assess rights-based programming in Global Fund proposal requests.

The Global Fund should also strengthen the Secretariat's capacity on human rights. The Global Fund Secretariat has a critical role to play in overseeing the implementation of policies and processes within the Global Fund, including portfolio analysis. Whilst external observers can and do contribute to the analysis of the Global Fund's performance, the Secretariat should play a key role in implementing systems to monitor and strengthen the Global Fund's role in protecting and promoting human rights over the period of the next strategic plan and beyond. The Country Programs Team needs to be fully enrolled in this process and it should be integrated firmly in the Country Team Approach as well as during Periodic Reviews.

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17. Csete, J. (2011). *Human Rights and the Global Fund on HIV/AIDS, Tuberculosis and Malaria*. Open Society Institute (OSI) and Canadian HIV/AIDS Legal Network (CHLN); New York; UNDP, UNAIDS, and the Global Fund (2010), *Analysis of Key Human Rights Programs in Global Fund-Supported HIV Programs*.

## Key Recommendations

### 1. Strengthen systematic human rights analysis of national disease responses

- a) CCMs should conduct a human rights analysis of the legal, policy and social environment, as well as national disease responses, and the extent to which they include key human rights programs as an essential part of the Global Fund proposal development process. The Global Fund should require all applicants to submit this baseline analysis as a part of proposals. The Joint United Nations Programme on HIV/AIDS and other development and technical partners of the Global Fund should provide technical support to national stakeholders in order to do this effectively.
- b) The Global Fund Secretariat should review achievements against this baseline during Periodic Reviews in determining continuation of funding for grants.
- c) The Global Fund should develop and maintain a country Human Rights Risk Profile as part of its risk management framework in order to assess human rights risks, monitor changes in the legal or policy environment that could contribute to risks, and develop strategies to address different levels of risk.

### 2. Improve monitoring and evaluation

- a) The Global Fund should convene a working group of key technical and development partners to develop a set of output, process, outcome, and impact indicators to effectively monitor key human rights programs and, subsequently, encourage their use through the updating and dissemination of the Monitoring and Evaluation Toolkit.
- b) Global Fund Portfolio Managers should facilitate the inclusion of relevant and specific indicators for key human rights programs in the Performance Framework; and/or ensure that such meaningful indicators for key human rights programs are included in agreed work plans, tracked by CCMs and reported back to the Global Fund on a regular and appropriate basis.
- c) Technical partners of the Global Fund at the country level should work with Principal Recipients and CCMs to include in proposals activities for the strengthening of monitoring and evaluation systems for key human rights programs including appropriate indicators to use, as well as for overseeing the quality of programs, and should ensure that these monitoring and oversight activities are costed and included in budgets.

### 3. Increase capacity

- a) The Global Fund Secretariat should hire a Senior Human Rights Advisor to lead the work on indicator development, help establish a monitoring system to keep track of progress in incorporation of human rights programs in proposals and grant agreements, as well as to monitor the appearance of program elements or contextual factors that raise human rights concerns.
- b) The Global Fund should also assign responsibility for overseeing protection of human rights and responding to human rights concerns that arise during program implementation to a high-level individual within the Country Programs Cluster.
- c) The Global Fund Secretariat should provide specific guidance to CCMs, and partners should provide technical support, to assist them to fulfill their oversight role with respect to human rights.

- d) The Global Fund should ensure adequate human rights programming expertise on its TRP in order to more effectively fulfill its obligation to ensure that proposals “address issues of human rights and gender equity and use human-rights based approaches to address the three diseases.”<sup>18</sup>

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18. The Global Fund to Fight AIDS, Tuberculosis and Malaria (2010), *Terms of Reference for the Technical Review Panel* (Global Fund: Geneva).

## Annex A: The Global Fund's Monitoring, Evaluation and Oversight Model

Performance-based funding is one of the core principles underlying the Global Fund model. Grant recipients must show that their programs are having an impact and meeting peoples' needs in order to be able to access continued funding. As a result, the Fund has built multiple levels of monitoring, evaluation, and oversight into its structures and processes.

*Existing monitoring, evaluation and oversight tools:*

**Proposal**—provides contextual information, including epidemiological data, the legal and policy environment, and information on equity, as well as information about proposed strategies and activities. The review conducted by the TRP is an important first step in highlighting human rights concerns or ensuring rights-based approaches.

**Performance Framework**—establishes baselines, indicators, and targets that is the basis against which performance is measured throughout the life of the grant. CCMs prepare a version to accompany the proposal, which is later refined through grant negotiations between the Principal Recipient(s) and Global Fund Secretariat. At this stage attention should be given to ensuring that output indicators on human rights programs, as well as relevant human-rights focused outcome and impact indicators are included.

**Progress Update/Disbursement Request**—a quarterly, semi-annual or annual progress report on the disbursement period just completed and a request for funding for the next disbursement period. It provides information on programmatic results, as well as financial accounting, and updates on the fulfillment of conditions precedent or other requirements as specified in the grant agreement. This could be an opportunity to report on routine indicators, but to assess any environmental changes that may impact the protection or promotion of human rights in Global Fund grants.

**Grant Performance Reports**—prepared by Fund Portfolio Managers (FPMs), grant performance reports provide a summary of grant progress over its lifetime and includes summaries of grant agreements, condition precedents, intended results and results achieved to date. It is updated periodically, including when there are important contextual changes at the country level (such as change in governments or other conditions that could impact grant implementation). Grant performance reports could be used by FPMs to track progress on human rights programs, identify human rights concerns that could impact implementation of programs, etc. A specific section of the report could be dedicated to human rights and equity issues, for example.

**Requests for Continued Funding/Periodic Reviews**—Prepared by CCMs before the end of the first phase of funding (currently two years and soon to be up to three years with the new grant architecture), this request gives CCMs and the Secretariat the opportunity to assess changes in country and epidemiological contexts and program performance to date, reflect on lessons learned, and elaborate new workplans and performance frameworks for the remaining three years of the grant.

After requests for continued funding are received, a panel at the Global Fund Secretariat reviews the request and provides a recommendation to the Board whether additional funding should be committed and how much, as well as condition precedents for grant renewal. Human rights and equity should be given meaningful consideration by the Secretariat during Phase Two reviews (soon to be Periodic Reviews), and conditions precedent to improve the protection of human rights may at times be necessary in order to improve the effectiveness of the grants. Additional scrutiny might be given to ensure that key human rights that enhance

access and quality are protected (such as the right to information and knowledge, informed consent, bodily integrity, and confidentiality); or where programs are being implemented in places or situations of high human rights risk.

As the Global Fund begins to implement changes to its grant making practices to increase efficiency, CCMs will be asked to conduct periodic reviews of grant performance (up to every three years). The periodic reviews will be performed to assess progress by disease, and all country disease PRs will be assessed at the same time. While the scope and content of periodic reviews are still being defined, this is an opportunity for CCMs, other country stakeholders, and the Global Fund Secretariat to meaningfully report on the progress that has been made, challenges in implementation, and strategies to improve implementation. A thorough assessment should be made of the extent to which issues of equity and rights are addressed through program implementation. This could be an opportunity to assess the accessibility, availability, appropriateness and quality of services; ensure that programs are addressing epidemiological realities and meeting the needs of criminalized and marginalized groups; assess laws and policies, particularly vis-à-vis criminalized or marginalized groups and the extent to which they facilitate or hamper program implementation; and to assess other contextual factors.

**Grant Scorecards**—Published after the Global Fund Board makes a decision about Phase Two renewals, these scorecards include information on program performance and ratings, contextual information performance indicators and budget. Information about the human rights context in countries and areas where additional oversight are needed should be included in these scorecards.

**Ongoing CCM Oversight**—Country Coordinating Mechanisms have an important oversight function and are responsible for ensuring that PRs are implementing the grant as planned. Because they are on the ground, they have the opportunity to exercise closer scrutiny over the way in which programs are implemented and the extent to which the human rights of beneficiaries are protected. Site visits are important opportunities for such oversight. CCMs are also requested to perform at least annual reviews of program implementation and reflect on lessons learned. Tools should be developed to help CCMs include thoughtful consideration of human rights impact and programs in this review process.

**Country visits by Secretariat Staff**—Fund Portfolio Managers and other staff visit countries on a regular basis. Asking questions about human rights could be an important way to exercise oversight, while reminding implementing partners of their responsibilities to protect and promote human rights. A checklist could be developed to facilitate this sort of oversight by FPMs.

**Technical Evaluation Reference Group (TERG)**—The TERG is an advisory body providing independent assessment and advice to the GF Board and has been tasked to examine specific programmatic aspects of the Fund. The TERG provided oversight for the Five Year Evaluation of the Global Fund and advises the Global Fund Secretariat on evaluation approached and practices, independence, reporting procedures and other technical and managerial aspects of monitoring and evaluation at all levels. As such, the TERG is well-placed in its role to consider how the Global Fund can more effectively monitor and evaluate human rights programming in Global Fund grants, and provide advice to both the GF Secretariat and GF Board in this regard.

## Annex B: (Draft) V2 Composite Human Rights Index 2010

Country	NCPI Index 2010	Legislative Index 2010	Fund for Peace Failed State Index 2010 Ranking (Human Rights Sub Component) *	Composite Human Rights Index
Brazil	1.33	2.69	5.4	3.14
Ethiopia	2.01	6.06	8.7	5.59
Kenya	6.13	5.36	8.0	6.50
Malaysia	4.12	7.81	6.8	6.24
Ukraine	5.35	4.19	5.3	4.95

\* [http://www.foreignpolicy.com/articles/2010/06/21/2010\\_failed\\_states\\_index\\_interactive\\_map\\_and\\_rankings](http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings)

# Annex 4:

## Strengthening Global Fund Protections Against Human Rights Abuses

*Daniel Wolfe and Robert Carr*

This paper was drafted for discussion at a consultation on human rights and the Global Fund in March 2011. It represents the views of the authors only, not of their organizations, the meeting organizers or the Global Fund itself.

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Viewed from the perspective of human rights, the Global Fund's strengths can also represent vulnerabilities. The Fund supports programs based on greatest need, including in closed societies that set little store in human rights. Two of the three diseases on which the Fund focuses, HIV and tuberculosis, are often concentrated in groups particularly vulnerable to rights abuses, including those deprived of liberty and criminalized populations such as sex workers, people who inject drugs, and men who have sex with men. Health interventions are often blurred with law enforcement for these populations and run the risk of further marginalizing them unless implemented with attention to consent, confidentiality, and other features of an enabling legal environment that protects and fulfills human rights.

This discussion paper seeks to balance the realities of fundraising and grant making at the Fund with its commitment to human rights and protection against discrimination. Specifically, we consider three areas: 1) past Global Fund engagement on human rights; 2) countries, populations and settings where Global Fund support poses a particular risk for perpetrating human rights violations; and 3) mechanisms to help the Global Fund strengthen protections against human rights risks and address violations if they occur.

Because human rights protections are essential to successful implementation of HIV programs, we start from the premise that perceived tensions between country-driven approaches to the three diseases and measures to mitigate human rights risk exist in theory, but not in practice. Clearer guidelines on how and when the Global Fund responds to human rights risks and violations will strengthen the work of the Secretariat and the programs that it funds at country level. They will also protect against direct or indirect support for abuses, insulating the Fund against reputational risk and helping to protect and fulfill human rights of the many who are vulnerable both to infection and abuse. Due diligence by the Board and Secretariat to protect against charges that the Global Fund supports rights violations is particularly important.

## 1. Past Global Fund Engagement on Human Rights Issues

The Global Fund's Board and Technical Review Panel (TRP) have both noted the centrality of human rights protections. In 2010, the Global Fund identified human rights and equity as one of six strategic objectives of its forthcoming strategic plan,<sup>1</sup> and the TRP urged applicants to articulate antidiscrimination measures and budgets to support them.<sup>2</sup> Michel Kazatchkine, the Global Fund's Executive Director, has highlighted protection of human rights and evidence-based approaches as core commitments of the Fund.<sup>3</sup> In recent years, the Board has adopted strategies (such as the gender strategy and the strategy on sexual orientation and gender identities) and initiatives (such as the ongoing initiative focusing on people who inject drugs) to ensure equitable access to services for key affected populations. More broadly, these efforts have sought to increase participation of these populations in Global Fund processes, and to highlight the importance of rights protections as part of effective health programming.

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1. GFATM (13–15 December 2010). "Report of the Technical Review Panel and the Secretariat on Round 10 Proposals." Retrieved 12 February 2011, from [http://www.theglobalfund.org/documents/board/22/BM22\\_13TRPRound10\\_Report\\_en.pdf](http://www.theglobalfund.org/documents/board/22/BM22_13TRPRound10_Report_en.pdf), Page 22.
  2. GFATM (2010). Board Chair's Summary: Board Retreat December 10-11. Sofia, Bulgaria, Global Fund to Fight AIDS, Tuberculosis and Malaria
  3. Kazatchkine M (11 June 2010). Time to redouble our efforts on AIDS and human rights. *Keynote address at the Canadian HIV/AIDS Legal Network 2nd annual symposium on HIV, law and human rights*. Toronto.

These are confirmations of direction rather than a change of course. The Global Fund has distinguished itself as a donor with an explicit commitment to civil society participation, engagement of directly affected populations with government authorities, and transparency and accountability. When civil society engagement is constrained, when leading HIV activists are imprisoned, or when governments restrict freedom of information or access to affordable, high quality prevention and treatment, civil society has looked to the Global Fund for leadership.<sup>4</sup> At times the Secretariat has answered this call publicly, ceasing operations in countries where independent visits or evaluation of services was impossible (as with Myanmar),<sup>5</sup> using grant renewal or new grant agreements to urge service improvements and protection against police abuses (as with methadone in Ukraine), and speaking out from the office of the Executive Director against criminalization of key affected vulnerable groups and rights abuses (as with MSM in Senegal<sup>6</sup> and Malawi<sup>7</sup> and drug detention centers in Asia).<sup>8</sup> In other cases, as with the arbitrary detention of HIV advocates in China,<sup>9</sup> the abrupt discontinuation of methadone programs by the government of Uzbekistan,<sup>10</sup> or mass detention of sex workers meant to be beneficiaries of GFATM-supported initiatives in Vietnam,<sup>11</sup> the Secretariat has not publicly weighed in.

## 2. Human Rights Risks for the Global Fund: Countries, Populations, Settings

In our review of Global Fund grantmaking, three types of support seem to pose particular human rights risks. The first occurs when the Global Fund supports programs in **closed societies with a record of systematic human rights abuses**. In these countries, the Global Fund has limited ability to act against spending of funds in a manner that works against the commitments to evidence-based programming and civil society engagement that the Global Fund regards as central. Second, support for **interventions to benefit criminalized populations** without attention to rights protections may, irrespective of the country context, expose these populations to police harassment, detention, incarceration, and deprivation of services. Third, **funding in institutional settings where abuses are routine**, including in penal institutions, detention centers, drug rehabilitation centers and some health clinics, can create ethical and human rights dilemmas for the Global Fund.

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4. For a general call by civil society to the Fund to increase commitment and funding for human rights, see “A call for political leadership: community sector recommendations for the UN Political Declaration of HIV/AIDS,” by 253 civil society organizations, May 2006 (ICASO, 2006). More targeted communications to the Secretariat have been sent regarding police interference with HIV programs, detention of AIDS service providers and advocates, concern with drug detention centers, and multiple other issues.
  5. GFATM (19 August 2005). “The Global Fund Terminates Grants to Myanmar.” *The Global Fund to Fight AIDS, Tuberculosis and Malaria*. Retrieved 10 February 2011, from [http://www.theglobalfund.org/en/pressreleases/?pr=pr\\_050819](http://www.theglobalfund.org/en/pressreleases/?pr=pr_050819).
  6. GFATM (16 January 2009). “The Global Fund expresses concern about arrests and convictions in Senegal (media release).” Retrieved 22 February 2011, from [http://www.theglobalfund.org/en/announcements/?an=an\\_090116](http://www.theglobalfund.org/en/announcements/?an=an_090116).
  7. GFATM (21 May 2010). “Malawi sentence will set back AIDS response (press statement).” Retrieved 22 February 2011, from [http://www.theglobalfund.org/en/pressreleases/?pr=an\\_100521b](http://www.theglobalfund.org/en/pressreleases/?pr=an_100521b).
  8. Kazatchkine M (11 June 2010). Time to redouble our efforts on AIDS and human rights. *Keynote address at the Canadian HIV/AIDS Legal Network 2nd annual symposium on HIV, law and human rights*. Toronto.
  9. Davis, S. (2005). *Restrictions on AIDS activists in China*, Human Rights Watch.
  10. Rhodes, T., A. Sarang, et al. (2010). “Policy resistance to harm reduction for drug users and potential effect of change.” *British Medical Journal* 341 (July 13 1): c3439.
  11. Socialist Republic of Vietnam (2010, p. 11). The Fourth Country Report on Following Up the Implementation to the Declaration of Commitment on HIV/AIDS. Hanoi: 11.

## 2.1 Societies with a Record of Systematic Human Rights Abuses

Risk of human rights abuses is high when the Global Fund supports proposals in countries that are home to patterns of rights violations, weak rule of law and restrictions on free flow of information and on the legitimate activities of nongovernmental organizations. In such contexts, risks include the possibility that governments will improperly assess needs, distribute funds inequitably, prohibit the formation of independent nongovernmental organizations (NGOs), or fail to accurately identify and report epidemiological developments, problems with service access, or obstacles to program effectiveness. North Korea (recipient of grants in Rounds 8 and 9) and Myanmar (Rounds 2, 3 and 9), for example, have been widely reported to ration aid for political ends, to restrict movement of international monitors unaccompanied by government minders, and to prohibit independent NGO engagement.<sup>12, 13</sup> Reports of detention of AIDS activists and restrictions on NGOs in China<sup>14</sup> (recipient of grants in Rounds 1, 3, 4–9); closure of NGOs<sup>15</sup> and imprisonment of those working with key affected populations on trumped up charges in Uzbekistan<sup>16</sup> (Rounds 3, 4, 8 and 10); and the denial of foreign aid to NGOs<sup>17</sup> and access to health care for persons deemed to be associated with opposition political parties in Zimbabwe<sup>18</sup> (Rounds 1, 5, and 8), all raise similar concerns.

Dynamics in these closed societies may accelerate severe epidemics and thus appear to increase the need for Global Fund support.<sup>19</sup> Without critical scrutiny of the terms of engagement, however, Global Fund support risks legitimizing systems that claim to be effectively addressing AIDS even as they use foreign funds to consolidate their own power and deny or discontinue services to the most vulnerable.

## 2.2 Abuses of Key Affected/Criminalized Populations

The Global Fund often supports efforts focused at key affected and/or criminalized populations among whom HIV and tuberculosis is concentrated. Criminalization is a particularly pervasive form of marginalization, in that it can be both *de jure* (expressly in the law, as with sodomy laws or with laws criminalizing drug use or possession of injecting paraphernalia or sex work) and *de facto* (as with sex workers or men who have sex with men subject to routine police abuses despite the legality of prostitution or homosexual activity). In

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12. Amnesty International (28 November 2006). “North Korea: Human Rights Concerns.” *Amnesty International*. Retrieved 10 February 2011, from <http://www.amnesty.org.au/news/comments/304/>.

13. Sollom, R., A.K. Richards, et al. (2011). “Health and Human Rights in Chin State, Western Burma: A Population-Based Assessment Using Multistaged Household Cluster Sampling.” *PLoS Med* 8(2): e1001007.

14. Asia Catalyst (1 December 2009). “Short Report: Restrictions on AIDS NGOs in Asia.” Retrieved 22 February 2011, from <http://www.asiacatalyst.org/news/restrictionsAIDSngos1209.pdf>, pp. 9–13.

15. Eulen, N. (6 June 2006). “Closure of NGOs in Uzbekistan.” *New Eurasia*. Retrieved 22 February 2011, from <http://www.neweurasia.net/politics-and-society/91/>.

16. U.S. Department of State (11 March 2010). “2009 Human Rights Report: Uzbekistan.” *2009 Country Reports on Human Rights Practices*. Retrieved 22 February 2011, from <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136096.htm>.

17. Government of Zimbabwe (2004). “Non-governmental Organisations Bill, H.B. 13, 2004.” from [http://www.sarpn.org.za/documents/d0000905/P1024-Zimbabwe\\_NGO-bill\\_2004.pdf](http://www.sarpn.org.za/documents/d0000905/P1024-Zimbabwe_NGO-bill_2004.pdf), pp. 10–11.

18. World Medical Association (WMA) (2007). “WMA Resolution on Health and Human Rights Abuses in Zimbabwe.” Retrieved 22 February 2011, from <http://www.wma.net/en/30publications/10policies/a29/index.html>.

19. Cohen, J. and J. Amon “Governance, human rights and infectious disease: theoretical, empirical and practical perspectives.” *Social Ecology of Infectious Diseases*.

some countries, governments adopt top-down approaches to containing disease that involve frank violations of the human rights of the criminalized, as with the mandatory detention and HIV testing of sex workers or the requirement that all known users of illicit drugs and methadone patients have their names added to police registries and have their status as people who use drugs coded on their national identity cards. In other instances, interventions targeting key affected and criminalized groups may have unintended consequences, as when men who have sex with men or people who inject drugs are exposed to heightened police surveillance and abuse at or near health facilities supported by the Global Fund.

- In Ukraine, patients in Global Fund-supported methadone treatment programs have been pressed to provide their names and HIV status to police.<sup>20</sup> In one city, police informed neighbors and employers when they found patients who were HIV positive.<sup>21</sup>
- In China, approval of a Global Fund proposal including sex workers in Round 6<sup>22</sup> coincided with widespread reports of “shame parades,” (banned in 2010), in which police rounded up alleged sex workers and paraded them down the streets for public ridicule.<sup>23, 24</sup>
- In Kyrgyzstan, at the same time as a Round 2 Global Fund grant supporting programs for sex workers,<sup>25</sup> government doctors and police joined in “medico-militia” raids on saunas and sex worker “dens.” Alleged sex workers were required to submit to mandatory HIV and STI tests.<sup>26</sup>
- Uzbekistan’s successful Round 3 application proposed provision of condoms and lubricant to MSM<sup>27</sup> at the same time that independent monitors were reporting police harassment, rape, imprisonment, and torture for homosexual activity in the country.<sup>28</sup> Uzbekistan received a Round 10 grant<sup>29</sup> despite abrupt

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20. International HIV/AIDS Alliance of Ukraine (January 2011). “Take Action for the Ukrainian Government to Stop its Crackdown on HIV Programmes.” Retrieved 10 February 2011, from <http://www.aidsalliance.org/includes/document/UkraineGovMoreInfo2.pdf>.

21. Danilova, M. (15 February 2011). HIV patients out of drugs, harassed in Ukraine. *The Washington Times*. Kiev, Ukraine, Associated Press.

22. Country Coordinating Mechanism PR China (2006). “Mobilizing Civil Society to Scale Up HIV/AIDS Control Efforts in China.” Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/6CHNH\\_1291\\_o\\_full.pdf](http://www.theglobalfund.org/grantdocuments/6CHNH_1291_o_full.pdf), p. 9.

23. Watts, J. (2006). “Outrage at Chinese Prostitutes’ shame parade.” from <http://www.guardian.co.uk/world/2006/dec/06/china.jonathanwatts>.

24. Tucker, J., X. Ren, et al. (2010). “Incarcerated sex workers and HIV prevention in China: Social suffering and social justice countermeasures.” *Social Science & Medicine* 70(1): 121–129.

25. Coordination Committee of the Kyrgyz Republic on Control of HIV/AIDS Tuberculosis and Malaria (2002). “Development of preventive programmes on HIV/AIDS, tuberculosis and malaria aimed at reduction of social and economic consequences of their spread.” Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/2KGZH\\_94\\_178\\_full.pdf](http://www.theglobalfund.org/grantdocuments/2KGZH_94_178_full.pdf), p. 3.

26. Wolfe, D., R. Elovich, et al. (2008). “HIV in Central Asia: Tajikistan, Uzbekistan and Kyrgyzstan.” *Public Health Aspects of HIV/AIDS in Low and Middle Income Countries*: 557–581.

27. Giyasova, G. (2004). “Scaling up the Response to HIV/AIDS: A Focus on Vulnerable Populations in Uzbekistan.” Retrieved Round 3, from [http://www.theglobalfund.org/grantdocuments/3UZBH\\_757\\_295\\_full.pdf](http://www.theglobalfund.org/grantdocuments/3UZBH_757_295_full.pdf), pp. 31–32.

28. Immigration and Refugee Board of Canada (6 March 2007). “Uzbekistan: Treatment of homosexuals by society and by government authorities; legal recourse and protection available to homosexuals who have been subject to ill-treatment (2003–2007).” Retrieved 12 February 2011, from <http://www.unhcr.org/refworld/docid/46fa537c28.html>.

29. Multisectoral Expert Council to Ensure Close Cooperation and Coordination with International and Foreign Organisations in the Response to HIV Tuberculosis and Malaria and Mobilizing Donor Funding for Activity Implementation (MEC) (2010). “Strengthening systems and capacity for universal access to HIV prevention, diagnosis, treatment and care in Uzbekistan.” Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/10UZBH\\_2144\\_o\\_full.pdf](http://www.theglobalfund.org/grantdocuments/10UZBH_2144_o_full.pdf), p. 22.

termination of the country's methadone program, cessation of outreach in needle exchange programs, and the arrest and sentencing to seven years in prison of an AIDS worker on trumped up charges of fiscal misconduct and for distribution of educational materials reported (albeit erroneously) to be supported by the Fund.<sup>30</sup>

- Vietnam's Round 8 proposal identified sex workers as beneficiaries for services and offered support to the Ministry of Labor, Invalids, and Social Affairs<sup>31</sup> even as a division of that Ministry, the Department of Social Evils, subjected sex workers to long-term detention, forced HIV testing, and forced labor in the name of "rehabilitation."<sup>32</sup>
- In Cambodia, efforts to implement a 100 percent condom program among sex workers supported by a Round 7 grant<sup>33</sup> coincided with reports of increased police enforcement, forced HIV and STI testing of sex workers, and confidentiality violations.<sup>34</sup>

The patterns of rights abuses perpetuated against key affected and criminalized populations obligates the Global Fund to minimize the risk that HIV interventions result in greater threats to security, liberty, and autonomy of either their focus population or those working with them.

### 2.3 Funding in Institutional Settings Where Abuses Are Routine

In addition to focusing on vulnerable groups, many applications to the Global Fund propose work in institutional settings where those with or at risk for HIV experience particular vulnerability to human rights violations.

- **Prisons and pre-trial detention facilities.** Multiple Global Fund grants seek to ensure continuity of prevention and treatment by engaging with those accused or convicted of criminal offenses. Those in penal institutions are frequently subject to abuses including denial of or forced medical treatment, breaches of confidentiality and consent, cruel, inhuman or degrading punishment, and torture.

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30. Rhodes, T., A. Sarang, et al. (2010). "Policy resistance to harm reduction for drug users and potential effect of change." *British Medical Journal* 341 (July 13 1): c3439. On the arrest of Maxim Popov, see, e.g., Elovich, R. (2010). "From the American People: Prison and No Backup from the US Government for Work on AIDS." *Huffington Post*. Retrieved 12 February, 2011, from [http://www.huffingtonpost.com/richard-elovich/from-the-american-people\\_b\\_651479.html](http://www.huffingtonpost.com/richard-elovich/from-the-american-people_b_651479.html).

31. Viet Nam Country Coordinating Mechanism (2008). "HIV and drug relapse prevention, linked to HIV/AIDS care and treatment in high HIV burden provinces in Viet Nam." Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/8VTNH\\_1777\\_0\\_full.pdf](http://www.theglobalfund.org/grantdocuments/8VTNH_1777_0_full.pdf), p. 19.

32. Viet Nam Country Coordinating Mechanism (2008). "HIV and drug relapse prevention, linked to HIV/AIDS care and treatment in high HIV burden provinces in Viet Nam." Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/8VTNH\\_1777\\_0\\_full.pdf](http://www.theglobalfund.org/grantdocuments/8VTNH_1777_0_full.pdf), Page 19. On forced labor, see interviews with recently released detainees from Vietnamese O5/06 centers, March 2010. Notes on file with the author.

33. Country Coordinating Mechanism Cambodia (CCC) (2007). "Scaling up Interventions for HIV Prevention, Treatment, Care and Mitigation for Vulnerable and Marginalized Populations at Risk." Retrieved 22 February 2011, from [http://www.theglobalfund.org/grantdocuments/7CAMH\\_1481\\_0\\_full.pdf](http://www.theglobalfund.org/grantdocuments/7CAMH_1481_0_full.pdf), p. 44.

34. David Lowe Consulting (2002). "Documenting the experiences of sex workers: report to the Policy Project." Retrieved 11 February 2011, from <http://plone.nswp.org/resources/content/documenting-the-experiences-of-sex-workers-draft-report-to-the-policy-project/view>. As cited by Csete, J. (2010). *Commitments and conundrums: Human rights and the Global Fund to Fight AIDS, Tuberculosis and Malaria*. New York, Open Society Foundations/ Canadian HIV/AIDS Legal Network.

- In Zambia, for example, where a Round 8 grant includes support for HIV-related work in prisons,<sup>35</sup> those awaiting disposition of their cases are detained for up to a year. Detainees are subject to beatings, cells so crowded that they must sleep in shifts, after food shortages, and to a variety of degrading punishments and torture including immersion in feces or water and beatings by guards and other inmates to coerce confession.<sup>36</sup>
- In Ukraine, where Global Fund grants support goes to improve law enforcement and to supply HIV treatment in penal institutions, police use threat of painful withdraw from opiate dependence to coerce confessions from drug-dependent detainees. Methadone patients in pre-trial detention (SIZO) or police interrogation facilities (IVS) are denied continued treatment or any medications for their ensuing sickness and distress. Police have also removed ARVs from drug users, claiming that the medications are illicit.<sup>37</sup>
- **Detention in the name of treatment/rehabilitation.** Detention centers where sex workers and people who use drugs are sent for “rehabilitation” are another site of frequent and multiple abuses of human rights. More than 400,000 are estimated to be detained in such facilities in East and Southeast Asia where they are held, without judicial process, right of appeal, or medical evaluation, for as long as five years. HIV testing is mandatory, though detainees are not told of their results. Treatment for tuberculosis and HIV is largely unavailable.
  - Global Fund applications from Vietnam and China have sought and received support for HIV-related work in drug detention centers where people who use drugs are beaten, starved, and forced to work without pay in the service of private companies in the name of “rehabilitation.”<sup>38, 39</sup>
  - In Kenya, where a Round 5 grant supports community-based tuberculosis outreach and the construction of an institution for patients with multi-drug resistant TB,<sup>40</sup> two patients were ordered incarcerated for eight months following charges that they had defaulted on their treatment and were exposing the public to infection. No medical evidence of their infectiousness was presented, and the prison to which they were sent contained no facilities for appropriate isolation and treatment of patients. Despite allegations of infectiousness, they were held with other prisoners.<sup>41</sup>

35. Country Coordinating Mechanism Zambia (2008). “Scaling-up prevention and impact mitigation and strengthening health systems.” Retrieved 23 February 2011, from [http://www.theglobalfund.org/grantdocuments/8ZAMH\\_1781\\_o\\_full.pdf](http://www.theglobalfund.org/grantdocuments/8ZAMH_1781_o_full.pdf), p. 65.

36. Human Rights Watch (2010). *Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons*.

37. Human Rights Watch (2006). *Rhetoric and Risk: Human Rights Abuses Impeding Ukraine’s Fight Against HIV/AIDS*.

38. For descriptions of abuses in Chinese detoxification centers, see Human Rights Watch (2010): Human Rights Watch (2010). *Where Darkness Knows No Limits: Incarceration, Ill-Treatment and Forced Labor as Drug Rehabilitation in China*. New York, Human Rights Watch.

39. Wolfe, D. and R. Saucier (2010). “In Rehabilitation’s name: Ending institutionalised cruelty and degrading treatment of people who use drugs.” *Int J Drug Policy* 21(3): 145–148.

40. Country Coordinating Mechanism Kenya (2005). “Strengthening DOTS and Mitigating the Impact of TB/HIV Co-infection in Kenya “. from <http://portfolio.theglobalfund.org/Grant/Index/KEN-506-G07-T?lang=en>.

41. Kenya Legal and Ethical Issues Network on HIV & AIDS (2010). *Legal Memorandum C/K/Kelin to Hon. Beth Wambui Mugo E.G.H., Minister for Public Health and Sanitation*. Nairobi. September 10. On file with author.

- In Thailand, where a Global Fund grant supports work to reach people who inject drugs,<sup>42</sup> the Thai government holds alleged people who use drugs in prisons while they await evaluation by a medical commission. Periods of imprisonment often exceed length of treatment when recommended.<sup>43</sup> In February 2010, the Thai government announced plans to round up and forcibly treat all drug users in the country.<sup>44</sup>
- **Health settings.** Hospitals and health clinics can also be places of profound vulnerability, particularly for those already regarded as marginal or undesirable in society.
  - Implementers of Global Fund-supported prevention of vertical transmission programs in Namibia have performed coerced or forced sterilizations on women living with HIV receiving Caesarean sections to reduce risk of infection to the infant. Some of the victims were never told the sterilization procedure had been performed.<sup>45</sup>
  - In Russia, AIDS treatment centers receiving Global Fund support require that applicants are reviewed by commissions that decide who will receive treatment and who will not. In a recent survey, commissions in more than half of cities used drug use as grounds for denial of treatment.<sup>46</sup>

In some instances, as with drug detention centers, the Executive Director of the Global Fund has clarified the Global Fund’s position, calling for closure of the centers, emphasizing the dilemma posed by such facilities, and asking Local Fund Agents to ensure that Global Fund support is used only for lifesaving HIV prevention and treatment rather than for capacity building or infrastructure.<sup>47</sup> The China team at the Global Fund Secretariat subsequently worked with authorities receiving Round 9 support for tuberculosis to reprogram some funds designated for infrastructural improvement at drug detention centers, and to ensure that no programmed funds went to legitimize or perpetuate center operations.

Similarly clear guidance, and work to operationalize it, is required to safeguard work supported by the Global Fund in prisons and pre-trial detention facilities, in centers where sex workers or people who use drugs are arbitrarily detained, and in health settings where the Global Fund supports HIV testing campaigns, treatment for the socially marginalized, and prevention vertical transmission. Given the frequency with which consent and confidentiality are breached, it falls to the Global Fund Secretariat to underscore the centrality and ensure the implementation of these approaches to HIV prevention and treatment in any programming supported by the Global Fund.

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42. National Country Coordinating Mechanism Thailand (2008). “Comprehensive HIV Prevention Among MARPs by Promoting Integrated Outreach and Networking (CHAMPION).” Retrieved 23 February 2011, from [http://www.theglobalfund.org/grantdocuments/8THAH\\_1768\\_o\\_full.pdf](http://www.theglobalfund.org/grantdocuments/8THAH_1768_o_full.pdf), p. 17.

43. Pearshouse, R. (2009). *Compulsory drug treatment in Thailand: observations on the Narcotic Addict Rehabilitation Act* B.E. 2545. Toronto, Canadian HIV/AIDS Legal Network.

44. The Nation (22 February 2011). “Human Rights NGOs to Thai government: Do not repeat history!” Retrieved 23 February 2011, from <http://www.nationmultimedia.com/2011/02/22/national/Human-Rights-NGOs-to-Thai-government-Do-not-repeat-30149211.html>.

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46. Maron, E. (2009). “The Point of No Return: Simona+ Report on Implementation of the Project to Monitor and Evaluate The Accessibility and Quality of Governmental Health Care (in Russian).” *Astra Foundation*.

47. Kazatchkine, M. *Global Fund: Proving Impact, Promoting Rights*. Remarks at the XV International AIDS Conference, Vienna. July 21. Available at, [http://www.theglobalfund.org/documents/ed/remarks\\_iac\\_proving\\_impact\\_promoting\\_right\\_100721.pdf](http://www.theglobalfund.org/documents/ed/remarks_iac_proving_impact_promoting_right_100721.pdf).

### 3. Mechanisms to Help the Global Fund and Strengthen Protections Against Human Rights Risks and Address Violations If They Occur

In many of the instances cited here, the relationship between Global Fund support and rights violations may be indirect—that is, Global Fund financial support may have gone to the same ministry or government department that perpetuated the rights violations, rather than to pay for the abuses themselves. In other cases, the Global Fund itself may not easily be able to determine how sub- or sub-sub recipients are putting the Global Fund’s money to use. The essential point is that greater guidance from the Global Fund is needed to clarify what practices it will not pay for, when additional oversight by the Secretariat on human rights grounds is justified, and how to ensure a process of critical reflection to safeguard against the kinds of rights violations that past experience suggests are likely with certain governments, certain populations, or in particular settings. There are those who will argue that open discussion of human rights violations may expose the Global Fund to additional criticism at a time when its reputation is already damaged by allegations of corruption. In fact, contemporary questions about the Global Fund’s ethical compass makes it particularly important, as noted earlier, for the Board and Secretariat to ensure due diligence to protect against charges that the Global Fund supports rights violations.

At the same time, increased attention to human rights must make the Global Fund work better, not increase bureaucratic burdens. The Board and Secretariat have invested significant effort in increasing speed and ease of grant disbursement; responding to the threat of human rights violations should involve selective analysis, rather than subjecting all portfolio managers or grant recipients to new reporting burdens. In the case of China and Russia, the Fund is in the particularly delicate position of monitoring program implementation in the same countries from which it solicits financial support. Again, articulation of guidelines will help to minimize the risk that individual countries feel singled out for scrutiny, or the dynamic that finds Secretariat staff reluctant to raise sensitive issues for fear of undermining support for the Global Fund.

#### Recommendations

- Produce a **brief, clear policy guidance articulating minimum human rights standards** for services/ interventions that can be endorsed by the Global Fund and implemented with grant funds—including confidentiality, consent, and freedom from cruel, inhuman and degrading treatment—and abusive practices that the Global Fund will under no circumstances support. Such a document is necessary for entities submitting proposals, for the Technical Review Panel and for Secretariat staff responsible for various levels of grant oversight. Applicable to existing and new grants, the guidance should encourage support to human rights-based programming, spell out vetting processes for portfolio managers where proposed activities appear to risk perpetration of rights abuses, and response procedures following receipt of reports of abuses committed with Global Fund support or by entities receiving Global Fund support.
- **Include human rights standards in the Implementer’s Code of Conduct.** The code of conduct should tie principal, sub-recipients and sub-sub-recipients to adherence to the Global Fund human rights policy (see #1), and spell out required responses to reports of abuses and consequences for breaches of the code.

- **Require human rights protection plans for CCMs and non-CCM applicants** proposing work with criminalized and key affected populations, in settings where people are deprived of liberty, and in countries restricting NGO freedom, free movement of evaluators, or free flow of information about the three diseases. These plans should include measures to protect beneficiaries and those who work with them, and programming to fulfill human rights (e.g., access to justice interventions, police training, etc.). To minimize deterrent effects, the Global Fund should continue to incentivize work with vulnerable populations through the *Most At Risk Populations Reserve* and emphasize that approval of applications depends on accurate analysis of the epidemic and proposals addressing those at greatest risk.
- **Train TRP members and Secretariat staff on human rights, and institute periodic processes (e.g, case studies) for ethical reflection and review.** The TRP and Secretariat Staff need to be able to understand and operationalize the Global Fund policy guidance on human rights. Core competencies include identification of human rights risks, assessment of measures to protect against threats to security, liberty, and autonomy, and understanding of programming to promote the rights of target populations and those working with them. For the TRP, assessment should also include comparison of resources allocated to working in closed settings to those spent seeking to keep those at risk from being imprisoned or institutionalized in the first place.
- **Ensure that Fund Portfolio Managers recognize implementation and monitoring of human rights protections as a core part of their responsibilities.** Human rights protection plans must be put in place during workplan and budget negotiations for Phase 1, and evaluated prior to Phase 2 renewal. When credible reports of abuses exist, assessment prior to Phase 2 should include triangulation where possible with independent sources to confirm data or activities reported by principal recipients. Use of Global Fund support for abusive practices should result in cancellation of those activities that are in breach of the Global Fund’s human rights policy; depending on the scale of the breach, cancellation of the grant should be an option at the discretion of Secretariat staff.
- **Appoint a senior advisor on human rights** to be consulted by Secretariat staff on questions of human rights abuses and approaches to promote an enabling human rights environment. The senior advisor should monitor health and human rights developments in countries receiving Global Fund support, serve as a resource for the Secretariat in identifying approaches that respect, protect and fulfill human rights commitments in health programming, and support Fund Portfolio Managers in assessing compliance of implementers with human rights protections plans and in investigating reports of abuses.
- Create a **human rights alert (“whistleblowing”) mechanism** to allow for confidential, multilingual reports of rights violations and investigation of allegations.

## Annex 5:

# Framing Human Rights Alongside Equity in the Context of the Global Fund

*Andy Seale*

This paper was drafted for discussion at a consultation on human rights and the Global Fund in March 2011. It represents the views of the authors only, not of their organizations, the meeting organizers or the Global Fund itself.

**Andy Seale** Global Fund to Fight AIDS, Tuberculosis and Malaria

## Overview

Achieving a shared understanding of equity and human rights among Global Fund stakeholders globally and in country presents both challenges and opportunities. In considering equity and human rights, participants at the New York meeting will be asked to reflect on (A) other papers presented at the meeting in the context of the Global Fund and (B) the interactions and tensions present in the six areas identified for focus in the 2011–2016 outline Strategy.

The session will introduce an overview of work underway at the Secretariat to support the 2011–2016 strategy development which combines equity and human rights into one area for strategic focus. It will also outline work underway to strengthen an equity focus at key stages of the grant management cycle.

The session, supported by this discussion paper, introduces some tentative working definitions for equity that have been identified to guide an equity focus for the Global Fund.

A SWOT analysis exercise drawing on the expertise and insights of meeting participants will follow a short introduction—based on the following questions:

- What opportunities and strengths are afforded by a combined human rights and equity strategic focus and approach in the context of the Global Fund?
- What weaknesses and challenges of combining a human rights and equity focus should be taken into consideration as the Global Fund progresses its 2011–2016 Strategy?
- How can human rights objectives be supported through the introduction of an equity principle or focus? Can an equity focus ever undermine human rights objectives? If so what actions can be taken to ensure this does not happen?

## Working Definitions of Equity

Work underway at the Secretariat positions an understanding of equity as both a principle to guide decisions making around the allocation and distribution of resources and as a way to shift a programmatic focus, particularly in the context of HIV, towards the structural and social determinants of health. Achieving equity means that those most in need are able to access the services they require.

The work to support an equity focus at key stages of the Global Fund grant cycle has identified the following useful definitions and framings of equity:

**Equity as it relates to health** has been usefully defined as “the absence of systematic disparities in health (or in the major social determinants of health) between social groups who have different levels of underlying social advantage/disadvantage.”<sup>1</sup>

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1. Braveman, P. and S. Gruskin. “Defining Equity in Health,” *J Epidemiol Community Health* 2003; 57: 254–258.

The concept of equity in a health context is a normative, value-based idea which rests on the principle of rights, justice, impartiality and fairness in the design and implementation of health programs. Achieving equity means that those most in need are able to access the services they require. It is useful to appreciate equity in the context of avoidable disparities. Inequity can arise when disparities in health status occur as a result of an unfair distribution of social determinants of health between different populations.

Although there can be differences in health between men and women because of biology, inequities in the health of men and women are triggered by differences in the social determinants of health, including different access to health services, education or the legal system. When stigmatized, marginalized or excluded subgroups of a population seek health services they can face barriers, including a lack of information to make them aware that they need certain health services, which make health care less effective. The resulting worsening of their health outcomes (in comparison to the mainstream population) can be described as health inequity.

Applying the concept of equity to development policies and programs in a specific country context can involve difficult choices and require challenging dominant ideologies or re-focusing priorities. The following key areas of intervention can serve as a guide to achieve equity in development efforts:<sup>2</sup>

- Providing universal access to public services for fair treatment;
- Targeted action for disadvantaged groups; including efforts to empower these groups;
- Social protection; to ensure that nobody drops below a minimum level of wellbeing;
- Redistribution; and
- Challenging embedded power imbalances.

The ODI paper (see footnote) goes on to describe how applying ideas of equity in a specific country context involves hard choices and the need to embed discussions of distributive justice into domestic political and policy debates with three priority principles emerging to guide decisions:

1. *Equal life chances*: There should be no differences in outcomes based on factors for which people cannot be held responsible.
2. *Equal concern for people's needs*: Some goods and services are necessities, and should be distributed according solely to the level of need.
3. *Meritocracy*: Positions in society and rewards should reflect differences in effort and ability, based on fair competition.

An equity focus by nature helps to shift investments to look beyond the health sector and to the supportive and enabling environment yet it also introduces the concept of decisions and choices that need to be made when matching limited resources to need.

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2. Overseas Development Institute (2009) <http://www.odi.org.uk/resources/download/4239.pdf>.

According to the World Health Organization efforts to promote equity should focus on reducing disparities in the availability and utilization of health services, in addition to focusing on health outcomes. In monitoring progress towards achieving universal access to HIV services, WHO<sup>3</sup> defines three dimensions of “access”:

- Availability; or the reachability (physical access in terms of location and timeliness), affordability (economic access) and acceptability (sociocultural access) of services that meet a minimum standard of quality;
- Coverage, or the proportion of a population needing an intervention who receive it, influenced by supply (provision of services) and by demand from people in need of services;
- Outcomes and impact in terms of reduced new infection rates or improvements in health status and survival.

## Equity and Human Rights in the New Global Fund Strategy

A short draft Strategy Framework discussion document for the 2011–2016 Global Fund Strategy is currently being finalized by the Secretariat to be reviewed by the Board in May. Equity and human rights is the fifth of six strategic areas for consideration:

- Tripling the number of lives saved annually between 2011 and 2016
- Tripling the number of infections averted annually between 2011 and 2016
- Leveraging the impact of investments to achieve broader health gains, especially for women and children
- Ensuring efficiency, effectiveness and value for money
- Increasing the Fund’s focus on equity and human rights
- Increasing resource mobilization efforts to ensure sustainability

There are a number of dynamic tensions between the six focus areas. In addition to retaining a discrete strategic focus, as described above, early discussions within the Secretariat also recommend that equity and human rights principles should be applied to the Strategy as a whole.

Early drafts of discussion papers and internal brainstorming sessions (see Annex A) encourage a focus on the tensions that will arise during the strategy development process between the six focus areas. In recognizing the tensions that will need to be acknowledged, equity and human rights has been framed in the following way: *increase focus on efforts to ensure protection of human rights and access to prevention, treatment, care and support for all, including the poorest and most marginalized populations—recognizing that the Fund must balance efficiency and equity and a focus on human rights.*

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3. WHO (2007). Framework for monitoring progress towards universal access, defined in Towards Universal Access: Scaling up priority HIV/AIDS interventions in the health sector.

The combined equity and human rights focus helps ensure that critical tensions and important considerations are built in at the outset of the strategy development process to help guide strategy discussions—particularly around value for money, efficiency, effectiveness, resource mobilization and achieving targets.

## Equity Principles Underpin the Global Fund Model

The Global Fund is committed to ensuring that the basic principle of equity that underpins its Framework Document remains a core principle of its funding model. The Global Fund Secretariat conducts (and has supported) routine and ad-hoc analyses to assess progress and challenges in its efforts to promote equity through Global Fund supported programs. For example it has analysed:

- The allocation of Global Fund financing across the portfolio by region, by population, by disease burden, by country income level, by country situation and by implementing entity;
- The scope and nature of activities reaching target populations, including targeted service delivery (for example mobile HIV testing for sex workers, harm reduction for injecting drug users or malaria prevention in pregnancy), health and community systems strengthening, or efforts to reduce structural barriers;
- Budgetary allocations for targeted activities for human rights activities, most at risk groups in relation to the epidemiological profile, and need;
- The composition of CCM leadership and membership by sex, participation of members representing people affected and/or infected by the disease, and inclusion of expertise in gender or related issues;
- Grant and/or program results for key populations and contributions to overall achievement of Millennium Development Goals.

Such analyses are used for annual reporting of Global Fund results, monitoring the implementation of the Gender Equality and the SOGI strategies, providing reports to the Board and responding to requests from stakeholders.

It is important to stress that the Global Fund has and does fund human rights work; community strengthening; advocacy and policy change; and socio-political change initiatives. Numerous resources exist to help strengthen Health Information Systems and other data gathering initiatives, including formative research to help identify, quantify and better understand the service needs of vulnerable and most at risk populations.

Furthermore the Global Fund’s advocacy and communications efforts promote clear messaging around evidence-based and rights-based approaches in the response to the three diseases, and the Secretariat provides leadership, internally and externally, to integrate human rights principles and other principles outlined in the Gender Equality and SOGI strategies into all aspects of Global Fund structures and operations.

The Global Fund recognizes that some population groups may require extra attention and encourages countries to “know your epidemic” (epidemiological analysis by age, sex, populations at risk, rural-urban and socio-economic status) and “know your response” (coverage and outcomes by age, sex, populations at risk, rural-urban and socioeconomic) (UNAIDS, 2007) as a key approach in addressing equity.

**The burden of disease caused by HIV, TB and Malaria is distributed differentially across regions and population groups, which has implications for program planning and design.**

- Young women are more likely to have HIV than young men in many countries in Africa, and the levels of HIV among most-at-risk populations including men who have sex with men (MSM), transgender people, sex workers and injecting drug users (IDUs) are much higher than in the general population in all types of epidemic (general, low and concentrated)
- More men are diagnosed with tuberculosis (TB) than women; but among women, TB is found most among those of reproductive age
- Populations in rural areas may be at greater risk of malaria transmission, and children account for the majority of malaria deaths

The Global Fund supports multiple approaches to promote equity through its financing, both across the portfolio and among different subpopulations within a country. These approaches include linking eligibility criteria to the country's disease burden and income level; implementing specific strategies to address the needs of different population groups (e.g., gender equality with a focus on women and girls, and equity in relation to sexual orientation and gender identities); supporting the scale-up of targeted interventions for different population groups; integrating human rights and equity messaging into Global Fund advocacy; and strengthening health and community systems to improve access to services.

Equity arguments have also been used as an important argument to ensure that as the Global Fund continues to evolve that it remains global and is able to invest in all key regions of the world.

## **Equity: Emerging Areas of Focus**

The working groups set up to strengthen the equity focus within the Global Fund grant cycle have identified five main factors—also considered to be the main contributors to inequities—for consideration in an approach to equity:

- Age
- Sex
- Belonging to/association with a marginalized population
- Socio-economic status (poverty)
- Geographical location (rural/urban)

## Equity Opportunities at Key Stages of the Global Fund Grant Life Cycle

Work to strengthen an equity focus at all key stages of the Global Fund grant cycle has identified four critical stages for particular attention:

1. Proposal Stage
2. Grant Negotiation
3. Grant Implementation/CCM Program Oversight
4. Phase 2/Periodic Review

At present this evolving work is exploring a number of issues including the need to ensure that:

- From Round II applicants incorporate health equity assessment results into their work plans as part of the application process that address differences in age, sex, risk group, poverty and geography
- The grant negotiation stage ensures that activities to promote equity which are approved by the Technical Review Panel are adequately carried forward into work plans and budgets
- The CCM works to ensure that activities and program elements important to equity are not overlooked during or following grant negotiation
- The Phase 2/Periodic Review grant renewal process includes opportunity for a CCM-driven equity assessment

## Working with Partners

In moving forward an understanding of the Global Fund as a unique partnership model is crucial in optimizing solutions to addressing inequities and promoting and upholding human rights principles. For example the Global Fund actively works with external partners to effectively support programs that address inequities as an integral part of responses to the three diseases. The Secretariat promotes technical partnerships to ensure that countries can appropriate normative guidance and technical assistance for proposal development, implementation and capacity building to respond to the needs of key population groups.

The Global Fund collaborates with civil society organizations, such as networks of people living with the diseases, women's groups and networks of men who have sex with men, and sex worker populations, to raise awareness, generate demand and build organizational capacity so that they can participate fully in program design and delivery.

Activities related to community systems strengthening are currently being supported through a number of grants and are part of the solution to mitigate some barriers for equitable access such as structural and social barriers.

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## Annex A:

### Selected Key Messages from Internal Brainstorming Discussions

- A focus on equity and human rights can ensure that Global Fund investments make an effective contribution to health by matching resources to need.
- The equity and human rights focus is good value for money—addressing barriers can lead to the greatest impact for money spent.
- A strategic focus on equity and human rights can contribute to long-term, systemic and sustainable change in recipient countries.
- The Global Fund model has produced gaps and missed opportunities—for example in Round 8 (Phase 1), only about 30% of HIV grant budgets specifically addressed most-at-risk populations in countries with concentrated epidemics.
- We need to ensure better use of evidence to optimize program design—for example the use of evidence to fight discrimination.
- Global Fund provides an opportunity to invest in surveillance, M&E (including disaggregation capacity), operations research, qualitative research (including on stigma).
- The Global Fund model could provide an opportunity to convene country stakeholders around equity and rights gap analyses to improve programs (in connected with Phase 2 requests/Periodic Reviews).
- The Global Fund needs to ensure more effective integration of equity and rights into performance-based funding model –optimize targets and indicators in Performance Frameworks.

- There is a need to safeguard equity and rights interventions by preventing attrition from proposals to work plans and budgets.
- There is an opportunity to use an equity focus to also help improve country level oversight and ownership by empowering CCM members representing key affected populations and CSOs to understand and engage around equity and rights.
- There is a need to build Secretariat capacity to address equity and rights throughout the grant lifecycle.
- There is a need for a better definition/standardization of key packages of activities with proven effectiveness to promote equity and human rights that can be costed and monitored.
- It would be helpful to identify investments at “high risk” in relation to equity and human rights objectives.
- It is critical that the Global Fund is able to measure equity- and human rights-related results and outcomes.



