Reviewer’s report

Title: Limitations on Universality: The "Right to Health" and the Necessity of Legal Nationality

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Reviewer: Lisa Forman

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Major compulsory revisions (author must respond to before a decision on publication can be reached)

The paper is well-argued and well written. It addresses an important problem of considerable relevance to a broader health research community, and if the weaknesses identified in this review are addressed, it could make a significant scholarly contribution. My primary critique of the paper is the limited nature of its exploration of the international human right to health and any other international law relating to statelessness. This is a critical flaw in a paper that advances an argument that the right to health has limited universality because of an implicit requirement of legal nationality and ergo, lack of applicability to stateless people.

I believe the paper would be greatly strengthened by 1) exploring the extent (limited or otherwise) to which international law addresses the legal requirement of nationality for the enjoyment of rights generally and the right to health in particular, 2) the extent to which international law explicitly addresses statelessness and 3) the extent to which international legal bodies have interpreted the right to health. These lacunae leave the analysis of international law and the right to health conceptually limited, potentially inaccurate and inappropriately referenced.

The authors’ argument may well stand irrespective of what these other aspects of international law have to say. However without acknowledging or addressing them, the article loses considerable persuasiveness and legitimacy from the perspective of accurately addressing a gap in international law. Other components of the paper which should be considered are addressed in addition below.

1) Nationality in human rights treaties

The authors accurately identify some of the key international instruments which provide a legal basis for the right to health in international law, including the UDHR and ICESCR. However they do not refer to other relevant provisions within these treaties that speak specifically to the question of nationality. For example, each of the international human instruments in which the right to health appears also contains provisions intended to expand the operation of its provisions beyond citizens alone. Article 2 of the UDHR states that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without
distinction of any kind, such as …. national or social origin… birth or other status.” Similarly, in article 2.2 of the International Covenant on Social, Economic and Cultural Rights, states undertake to guarantee the Covenant’s rights without discrimination of any kind as to … national or social origin… birth or other status.”

These provisions make the following statement seem less accurate: “Most discussions of the human right to health assume that every human being has legal nationality (p12).” This may be true if the authors are talking about academic commentary, but is not necessarily true if they are talking about sources of international human rights law.

These provisions may in fact suggest that the Social Rights Covenant does not de jure restrict the operation of its rights to citizens. If this restriction nonetheless occurs in fact (as appears to be the case in many countries), this is certainly a different scenario from that painted in the article. These provisions should be considered and addressed.

2) Right to Health analysis

There is also no reference to important developments in relation to the right to health such as the Committee on Economic, Social and Cultural Rights’ General Comment 14, the leading authoritative interpretation of article 12 of the International Covenant on Social, Economic and Cultural Rights. This comment has considerably advanced conceptual determinacy and elaborated state duties under the right to health. Instead, the authors reference secondary sources and transnational actors to illustrate how the right to health has been given more determinate content (for example, the Brysk article in footnote 12 on page 7 is used to indicate the potential conceptual content of the right). The following paragraph on page 7 also fails to mention general comment 14, and instead limits its identification of responses to indeterminacy to transnational actors and advocates, professional associations, intergovernmental organizations, patient networks and human rights organizations and individuals like Paul Farmer.

In addition, the authors correctly identify the respect, protect and fulfil duties that all governments hold under the right to health, but reference Gostin (p8) as the source of these duties rather than the legal texts which produced these ideas (a reference to general comment 14 would be sufficient).

I am not suggesting general comment 14 provides any definitive response to the question of nationality or statelessness (it is in fact largely silent on these issues). However it should be acknowledged, referenced and considered.

3) International law relating to statelessness

There is also no reference to a larger body of international law relating to statelessness, which may be of relevance. For example, there is no mention of the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness, nor to the provisions in other legal instruments relating to duties to ensure statelessness (see for example the sources listed in David Weissbrodt and Clay Collins, “The Human Rights of

4) First and second generation rights:
On p7, the authors speak of civil and social rights as first and second generation rights respectively: these terms are widely seen in the human rights community as outdated and inaccurate because of the implicit hierarchy between these rights that they suggest.

Level of interest: An article of importance in its field

Quality of written English: Needs some language corrections before being published

Statistical review: No, the manuscript does not need to be seen by a statistician.

Declaration of competing interests:
I declare that I have no competing interests