THE RIGHT TO HEALTH: THE STATE'S INTERNATIONAL OBLIGATIONS

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"It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for."
Kofi Annan
(the former secretary-general of the United Nations)[1]

1. INTRODUCTION

On the 4th of October 2010 the dams of the alumina plant of MAL Zrt. at the Ajkai Timföldgyár (Hungary) burst releasing a caustic red sludge. It was approximated that 700,000 cubic meters of waste sludge was flooded into the surrounding areas and villages.[2] In about an hour the caustic red sludge had spilled into three villages but predominantly affecting Kolontár and Devecser[3] due to their immediate proximity to the alumina site.[4] As a result of the spill an estimate of 120 people received treatment for burns, 123 were injured and tragically 10 people were killed.[5]

Initial health worries relating to the very high alkaline of the red sludge (which if it comes into contact with skin can damage lungs, the digestive system if ingested and in the worst case scenarios remove the top layer of the skin) were later waylayed by the fact that the caustic pH levels were not as high as first feared.[6] However, these initial fears were dispelled and 11 days after the disaster residents of the village(s) affected were bused back to their villages[7] once it was established that the red mud sludge was much less worrying and threatening to human health than first thought.[8] The ability for the villagers to be able

1 25 Questions 2003, 4. p.
2 *The Kolontár Report* 2011, 13. p.
3 *Vörösiszap: Újabb mérések, jobb eredmények*, 26th of November 2010 http://greenpeace.hu/kereses/p1/t287. (Accessed: 2011.06.22.)
4 *How Toxic is Hungary's Red Sludge?*, 7th of October 2010 http://www.bbc.co.uk/news/ world-europe–11492387. (Accessed: 2011.06.04.)
5 GELENCSÉR 2011, 1608–1615. p.
6 *The Kolontár Report* 2011, 54–55. p.
7 "Villagers return home after Hungarian Toxic Mud Disaster.' 15th of October 2010 http://www.terradaily.com/reports/Villagers_return_home_after_Hungarian_toxic_mud_disaster_999.html. (Accessed: 2011.06.04.)
8 See: http://www.euro.who.int/en/who-we-are/policy-documents/protocol-on-water-and-health-to-the–1992-convention-on-the-protection-and-use-of-transboundary-watercourses-and-international-lakes. (Accessed: 2011.06.25.)

to be commuted back into their villagers was met with some opposition as there were divided opinions over the suitability of the living conditions of their homes. However, this is an issue, which is outside the scope of this paper. It could be stated that the fact that the villages were deemed habitable is due in part to the fact that there was a very rapid response by the international community with the World Health Organization (WHO) sending a team of experts to help assist the Hungarian authorities in the monitoring of the response and clear up operation of the red sludge spill.[9] This report and other findings of the WHO will be discussed in more detail below when discussing the right to health with a more specific reference to the right to mental and psychological health.[10]

In the aftermath of the "red sludge" disaster much has been said about the legal culpability of the alumina plant, the Hungarian Government, the environmental consequences to both animals and the crops in the area as well as the medical response teams to the villages. Both environmentalists and those working in the health services concerning the response to the red sludge disaster have mounted much criticism.

However, none of these issues will be the focus of discussion for this paper rather this paper will seek to discuss the right to health with a specific reference to the right to mental and psychological health.

This paper will discuss and provide a working definition of what the right to health is as well as an overview of the international framework in the context of the right to health. It is in this international framework that the obligations of States will be assessed. In order to help us with this assessment two seminal reports will be contrasted and compared as a means to highlight the progress that has been made in elevating the right to mental health to an equal status to that of physical health. The two reports which will be considered are the recent WHO reports of 2010 which were complied in the immediate aftermath of the red sludge disaster and the United Nations Environment Programme (UNEP) and the Office for the Co-ordination of Humanitarian Affairs (OCHA) report of June 2000 which investigated the cyanide spill in Baia Mare, Romania. The UNEP/OCHA report into the Romanian disaster has been selected because of its similarity in circumstances and type to the red sludge event in Hungary as well as the fact that both countries are geographically located in Europe. The two reports span 10 year gap which helps to illustrate the developments in the right to health movement. The additional fact that the events are 10 years apart provides us with an illustrative time scale for comparing the progress that has or has not been made in the field of ensuring the right to health.

2. THE RIGHT TO HEALTH

The right to health is the shortened form of the expression, 'The right to the highest attainable standard of health', which was formulated by the UN Committee on Economic, Social and Cultural Rights (CESCR).[11] This expression was first used in the CESCR's

9 *Main Findings,* 2010. 2. p.

10 WHO/Europe concludes mission, 2010, 3. p.

11 Gruskin – Mills – Tarantola 2007, 449–455. p.

General Comment No. 14 2000 (discussed below).[12] Since 2002 there has been a UN Special Rapporteur on the Right to Health).[13] This is an interesting fact to note when considering the report produced about the environmental disaster in Romania as both events occurred in 2000. It was at the same time that the conceptualization of health as a human right was being formulated and it is now in 2011 that we can see the journey that the international community has taken in realizing the importance of the right to health. It is in the last three years with the advent of the International Convention on the Right of Persons with Disabilities,[14] that those with mental health problems have had their right (formally) to be recognized at rights holders appreciated. It is now that the right to health movement should be working in relation with the disabilities movement to recognize that an individual is a holistic being who should be guaranteed the whole spectrum of rights.

International human rights law is a set of legal standards to which governments have agreed with the purpose of promoting and protecting these rights. International treaties not only prohibit direct violations of human rights but also hold governments directly responsible for progressively ensuring conditions enabling individuals to realist their rights as fully as possible. Every country is now party to at least one treaty encompassing health-related rights and is therefore responsible for reporting periodically to an international monitoring body on its compliance.[15] The right to health i.e. the right to the highest attainable standard of health,[16] makes governments responsible for prevention, treatment and control of diseases and the creation of conditions to ensure access to health facilities, goods and services required to be healthy.[17] Because all human rights – economic, social, cultural, civil and political – are considered interdependent and indivisible,[18] governments are accountable for progressively correcting conditions that may impede the realization of the "right to health", as well as related rights to education, information, privacy, decent living and working conditions, participation, and freedom from discrimination.[19] Systematic attention to this range of rights by the health sector can provide a coherent framework for a focus on conditions that may limit people's ability to achieve optimal health and to receive health services.[20]

The concept of the right to health actually existing as a right is definitely a moot point with several theorists asserting the fact the *right to health does not actually exist but rather a right to health care does*.[21] Especially with those in the medical health care profession arguing for more precise definitions and it is here where the two professions of the legal and the medical quite substantially diverge.[22]

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12 The Right to Health, http://www.ifhhro.org/health-a-human-rights/the-right-to-health. (Accessed: 2011.06.23.)

13 Annad Grover was appointed to this position in 2008, See: http://www2.ohchr.org/english/issues/health/right/SRBio.htm. (Accessed: 2011.07.02.)

14 See: http://www.un.org/disabilities/default.asp?id=150. (Accessed: 2011.07.02.)

15 Braveman – Gruskin 2003, 19., 20. pp.

16 *Op. cit.,* 21–23. p.

17 *Op. cit.,* 24., 25. pp.

18 *Op. cit.,* 26. p.

19 *Op. cit.,* 27. p.

20 *Op. cit.*,, 28., 540. pp.

21 Barlow 1999, 320. p.

22 *Op .cit.*

Corollaries have been drawn between comparing the right to a fair trial in ensuring a fair court systems being similar to having access to a health care system, which in turns strengthen and ensures the right to health.[23] In Hungary and Romania, unlike in developing countries there is an existing and functioning health care system that provides health care. So, the question here is not so much about access and the government keeping its commitment to provide the highest attainable standard of health but rather about how health is conceived and ensuring that the individuals' right to health is secured in its entirety. It is to this point of securing the right that we now turn by outlining those international instruments, which are instrumental in laying the foundations for achieving the highest attainable standard of health. These instruments also specify in detail what exactly constitutes the right to health.

3. INTERNATIONAL PROVISIONS

The right to health, despite the contentious over its basis can be found in several international instruments. It has been argued that the right to health can be found in amongst all of the international covenants. The most relevant of these are the following:

3.1. The Universal Declaration on Human Rights (UDHR) (1948)

At article 25 paragraph 1 the UDHR states that:

> *"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*

This provision even though it is contained in a declaration which was established in 1948 is not legally binding provided the foundation for which 18 years later the right to health was formally enshrined and recognized as a right in the International Covenant on Economic, Social and Cultural Rights.

3.2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

At article 12 the ICESCR sets out that:

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

23 Hunt – Backman 2008, 41–42 p.

Hungary became a signatory to the ICESCR on the 25th of March 1969 and ratified it on the 17th of January.[24] Romania ratified the ICESCR on the 9th of December 1974.[25]

It is recognized that article 12 of the ICESCR is the most comprehensive provision on the right to health. The wording in article of 12, which is of particular interest, is "*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*."

The provision of article 12 is much broader than then WHO definition, which sees health as being: "*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*."[26] Article 12 does not define the right to health purely in terms of the right to health care but also to take into consideration other factors such as socio-economic factors that enable or protect someone from being able to access health care.

The article is about providing the opportunity for people to have access to the highest attainable standard of health care. The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 14 provided guidance to states (such as Romania and Hungary) as to what this '*highest attainable standard*' should like.

3.3. The General Comment No. 14 of the Committee on Economic, Social and Cultural Rights

The Committee set out in its General Comment No. 9 paragraph 2 how the Covenant should be applied in the domestic legal systems:

> *"The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."*[27]

Paragraph 43 of General Comment No. 14 reiterates the responsibilities of member states (which was outlined in General Comment No. 3 which relates specifically to state obligations[28]) to the ensuring the basic requirement of rights.[29] The Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care.[30] Read in conjunction with more contemporary instruments, such as the Programmer of Action of the International Conference on Population and

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24 See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV–3&chapter= 4&lang=en. (Accessed: 2011.07.02.)

25 *Op. cit.*

26 See: http://www2.ohchr.org/english/law/cescr.htm. (Accessed: 2011.07.02.)

27 On the domestic application of the Covenant: 12/03/1998. E/C.12/1998/24, CESCR General comment 9. http://www.unhchr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument. (Accessed: 2011.07.03.)

28 'The nature of States parties obligations (Art 2, par. 1): 12/14/1990.' See: http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument. (Accessed: 2011.07.03.)

29 See: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En. (Accessed: 2011.07.03.)

30 *Op. cit*.

Development, the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12.[31] Accordingly, in the Committee's view, these core obligations include at least the following obligations: "(e) [t]o ensure equitable distribution of all health facilities, goods and services".[32]

Paragraph 45 emphasizes that it is particularly incumbent on States parties and other actors in a position to assist, to provide "*international assistance and cooperation, especially economic and technical"* which enable developing countries to fulfill their core and other obligations.[33]

It can be seen from the ICESCR and the General Comment No. 14 that the right to the highest attainable standard is not a question of, *physical or mental health* but rather one of *physical and mental health.*

3.4. The Declaration of Alma-Ata

In 1978 the Declaration of Alma-Ata, which came out of the International Conference on Primary Health Care in Alma-Ata, USSR further reiterated that the right to health encompasses as well as includes mental health amongst the right to health assurances.[34]

The Declaration of Alma-Ata grew out of the recognized need for action by all of the governments in the world community to both protect and promote the health of all the people of the world.[35]

At paragraph 1 of the Declaration it is stated that:

> *"The Conference strongly reaffirms that health, which* is a state of complete physical, mental and social wellbeing*, and not merely the absence of disease or infirmity,* is a fundamental human right *and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector."*[36]

In May 1998 at the 51st World Health Assembly (WHA) the World Health Declaration was signed in which the policy was to further continue the vision of the Alma-Ata Declaration's, Health for All in the 21st Century.[37] In addition to these declarations and covenants the preface of the WHO constitution, reiterates the importance of states to secure the individual's "state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity" and that "the highest attainable level of health is the fundamental right of every human being."[38]

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31 See: http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf. (Accessed: 2011.07.03.)

32 See: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En. (Accessed: 2011.07.03.)

33 *Op. cit*.

34 See: http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf. (Accessed: 2011.07.03.)

35 *Op. cit*.

36 *Op. cit*. (Emphasis added by me: S.C.)

37 UN Declarations & Treaties. See: http://www.ifhhro.org/health-a-human-rights/un-declarations-a-treaties. (Accessed: 2011.07.03.)

38 Gruskin – Mills – Tarantola 2007, 449–455. p.

These declarations and covenants make up the mosaic, which is the foundational bedrock for securing the right to health. It is on the basis of this foundation that states can be held to account and reminded of their obligations. It is these very instruments, which help to form the links and understanding between human rights and health.[39]

It is in light of these obligations that the environmental disasters of Hungary and Romania will be discussed.

4. COMPARATIVE ANALYSIS

It can be seen from the above listed international requirements that there is indeed a recognized importance of mental health assurance in the international community. However, this recognition was not something that was at the forefront in 2000.

On the 30th of January 2000 in Baia Mare, Romania, a pipe burst and poured 100,000 cubic meters of liquid of which suspended waste contained about 50 to 100 tonnes of cyanide into the Luper, Somes and the Tisza and Danube rivers.[40] The Tisza was the most visibly affected. The function of this mine was to provide rocks containing metal ores to three parts foreign-owned firms in Baia Mare. Three countries were predominantly affected by the spill; Hungary, Romania and The Federal Republic of Yugoslavia. The dust pollution, which was a result of the burst pipe, weakened the immune system leaving young people susceptible to other illnesses and diseases.[41] The similarities between the two disasters (of Baia Mare and the caustic spill in Hungary) are that they both occurred in large agricultural communities and each event involved a large industrial plant, which had substantial amounts of toxic waste. Unlike, in Hungary the WHO identified the plant in Romania as being a health risk hot spot.[42] Fortunately, there were no human fatalities caused by the spill of the cyanide in Baia Mare, Romania.[43] As in both cases international teams were deployed to not only help but to assess the situation and report back on their findings. It is these reports that highlight the progress, which has been made in the last 10 years with regards to the recognition for the need for mental and psychological care as well as physical care.

In June 2000 the joint investigative team of (involving 20 scientists) UNEP/OCHA produced a report, which stated that a marked improvement could be noted in the environmental condition of the Baia area could be noted.[44] It was noted in the report that both the company and the local authorities had inadequate plans to deal with the event of an accident at the plant.[45] The UNEP/OCHA report mainly focused on the environmental and ecological damage with the issue of health featuring in the recommendations section of the report where it was stated that:

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39 *Op .cit*.
40 Cságoly 2000, 2. p.
41 *Op. cit.,* 3. p.
42 *Op. cit.,* 2. p.
43 Balkau 2005, 3–4. p.
44 Cságoly 2000, 6. p.
45 *Op. cit.,* 3. p.

"3. Health
The long-term effects of mining activities on public health, especially cyanide and heavy metals, is a key concern, especially in Bozanta and Baia Mare, as are dust problems in the summer."[46]

There were no further recommendations made in the report concerning the physical and mental health of the inhabitants of the Baia Mare area in Romania.

In 2010 a somewhat similar disaster besieged Hungary, which has come to be known as the "red sludge" disaster. In its midst the WHO Regional Office for Europe deployed an international team to Hungary from the 12th to the 16th of October 2010. Their mandate was to support the Hungarian government in dealing with the medium and long-term health effects of the spill at the alumina plant.

However, what is of importance is the follow up report of the WHO on the 20th of October 2010 which outlined what had been achieved and examined in the four-day WHO expert field mission.[47] It was stated that the team had focused on "*public health aspects of the event, complementing the work of a European Union Mission.*"[48] Particular space was given to this discussion of the impact upon the resident populations in the villages most affected and how:

"*As the psychological effects of the disaster are recognized, a specialized team of Hungarian psychologists is providing support on site to people who have been evacuated, suffered injuries and/or deaths in their families, and/or sustained losses of and damage to property. This need will persist for both the short and medium terms*."[49]

The Directorate for Disaster Management, in light of the recognized need to help with the mental health care of the occupants of the villages sent four members from its Crisis Intervention Team to help provide this care as well as support and help manage the rescue operation.[50] In addition to the WHO Report into the disaster there was a report commissioned by the European Free Alliance Parliamentary Group in the European Parliament and Politics Can Be Different Group (LMP).[51] This Report highlighted that among the harmful physical effects of the red sludge disaster the psychological repercussions should not be forgotten.[52] It was noted that the psychological shock due to the fact that livelihoods have been put at peril as well as homes destroyed was also an important health issue.[53] The importance of this paragraph cannot be underestimated. It is the recognition of the fact that disasters of the magnitude (both in Hungary and Romania) have far reaching repercussions on the mental health of those directly affected.

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46 Cságoly 2000, 5. p.
47 *Main Findings,* 2010, 1. p.
48 *Op. cit.*
49 *Op. cit.*
50 *Kolontár Report,* 2011, 49. p.
51 *Op. cit.,* 8. p.
52 *Op. cit.,* 146. p.
53 *Op. cit.*

What is interesting about these two reports is the shift in emphasis and the realization upon the international community that not only must those companies who breach internationally recognized standards be held to account and that the medical community must be supported in their work to help those affected by the disaster (which is the legal obligations of states as we have seen from the international conventions) but also that *mental and psychological health 11 years on from the Romanian cyanide incident have been realized as of equal importance*.

5. CONCLUSION

In the last 10 years the international community has made great strides in its quest to assure the right to health for all, as the Alma-Ata Declaration set out to do in 1978. Despite the increase in awareness of the right to health as a right there is still need for greater recognition of the need and equal importance of mental/psychological health and physical health. As both the reports highlighted there has been a realization that the right to the health does indeed mean striving for the highest attainable standard. States should be encouraged to see this standard not only as the bare minimum that they should provide but just the beginning from which they should aim to base their foundations. Both Hungary and Romania are signatories to the ICESCR, which means that there are certain obligations placed upon them which they must observe when protecting the right to health. These member states should be encouraged to adopt a holistic approach to ensuring the right to physical and mental health. A holistic approach should be recognized as being the most efficient method to be adopted by not only the medical services but also the legal framework. The reason for this dual approach is so that both systems can work together to reflect the duality of this right.

The international community should not come complacent, as much work is still needed to educate not only the medical but also the legal profession as well of the equal importance of physical and mental health. In line with the objectives of the Alma-Ata Declaration stated above States should be encouraged to see health as a fundamental human right, which is to be secured and given a place of prominence in society. Just Kofi Annan stated at the beginning of 2000, *the right to health should not just be an aspiration but a human right for all.*