

## Symposium

# Global Health “With Justice”: The Challenges and Opportunities for Human Rights in Global Health Law

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### Abstract

Human rights offer to ground global health law in equity and justice. Human rights norms, advocacy, and strategies have proven successes in challenging private and public inequities and in realizing more equitable domestic and global health governance. However, mobilizing human rights within global health law faces enormous political, economic, technological, and epidemiological challenges, including from the corrosive health impacts of power, politics, and commerce. This article focuses on what human rights could bring to three major global health law challenges — health systems strengthening and universal health coverage, the commercial and economic determinants of health, and pandemic disease threats. We argue that human rights offer potentially powerful norms and strategies for achieving equity and justice in these and other key global health domains. The challenge for those working in human rights and global health law is to work nimbly, creatively, and courageously to strengthen the contribution of these instruments to health justice.

**Keywords:** global health law; human rights; international law; commercial determinants of health; pandemics

### Introduction

The novel emergence of “global health law” within international law is responsive both to rampant exogenous global health threats and the endogenous weak capacity of the fragmented domains of international law to respond to these threats. If global health law is itself an attempt at taxonomic coherence, then human rights offer the potential to harmonize this body of law with an authoritative and binding legal framework rooted in equity and justice. It is no surprise, then, that global health law scholars see human rights law and the right to health as offering “a core, unifying standard,”<sup>1</sup> a “pillar,”<sup>2</sup> and a “bridge”<sup>3</sup> within global health law, as well as “a foundation for advancing global health with justice.”<sup>4</sup>

These foundations of global health “with justice” reflect the growing capacity of international human rights law to respond to key political, economic, and social determinants of global health. Since the 1990s, advocacy around HIV/AIDS and sexual reproductive health have catalyzed a global “health and human rights” movement, and pushed human rights to the rhetorical forefront of global health law, from the 2003 Framework Convention on Tobacco Control, to the 2005 International Health Regulations, to the 2015 Sustainable Development Goals.<sup>5</sup> There has been exponential growth in the clarity and justiciability of the right to health within domestic and supranational law.<sup>6</sup> Human rights are seen as core legal determinants of health,<sup>7</sup> and as central norms to realize equity in health systems,<sup>8</sup> universal health coverage,<sup>9</sup> and the

social determinants of health.<sup>10</sup> They are key tools of civil society throughout the world in challenging discriminatory, irrational, abusive, and negligent state and non-state actors in the health domain— from India, South Africa, Canada, and the Netherlands, to Thailand, Peru, and Mexico.

Yet mobilizing human rights within global health law faces colossal political, economic, epidemiological, and technological challenges, both perennial and novel. Human rights and international law are under threat from a growing populist backlash against “globalism,”<sup>11</sup> rampant and weaponized misinformation,<sup>12</sup> a continuous global retreat from democracy,<sup>13</sup> and a waning liberal internationalism.<sup>14</sup> Human rights law has not yet been able to adequately address diverse commercial and economic determinants that increasingly shape global health outcomes and which require responsive global health policies — from access to medicines to environmental protection. The success of human rights campaigns around HIV did not successfully translate into equitable responses to novel pandemic threats like COVID-19 nor mitigate the rampant human rights violations that frequently accompany pandemic responses, including when it came to equitable access to COVID-19 vaccines.<sup>15</sup> Nor has human rights law yet mounted a nimble response to the tectonic geopolitical and societal challenges posed by new technologies — from social media to artificial intelligence. While human rights strategies have been able to achieve some transformative health outcomes, they have been less effective in addressing the corrosive systemic health impacts of power, politics, and commerce, including in drafting responsive global health laws. We are facing multiple major shocks to multiple major systems, placing human rights and global health law at an inflection point toward an uncertain future.<sup>16</sup>

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Against this complex backdrop, this article analyzes the role of human rights in three major global health law challenges — strengthening health systems and realizing universal health coverage, addressing key commercial and economic determinants of health, and responding to pandemic disease threats including through global health law reform. This article concludes by making a case for the global health law community to build on the success of human rights in global health law to better advance equity and justice in global health.

### Human Rights, Health Systems, and Universal Health Coverage

Soft and hard global health law instruments have long focused on ways to develop adequate and accessible health systems and health care, from the 1946 Constitution of the World Health Organization, to the 1978 Declaration of Alma-Ata, to the 2015 Sustainable Development Goals. These global health law instruments recognize that health policies, budgets, and programs are shaped by the political and fiscal priorities set by domestic and international laws and policies.<sup>17</sup> Yet it was only with the 2015 Sustainable Development Goals (SDGs) that health system improvement and financing became a global health priority under the aegis of universal health coverage (UHC).<sup>18</sup> SDG 3.8 aims to achieve UHC through “financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable medicines and vaccines for all.”<sup>19</sup> While UHC is not explicitly rooted in human rights, its focus on universality and affordability in health care has been seen as a “practical expression” of the right to health,<sup>20</sup> and states have affirmed the right to health as a core principle underlying UHC.<sup>21</sup>

Yet erratic progress on UHC animates the complexity of the political, epidemiological, and economic headwinds faced by domestic efforts to advance the right to health: Countries across income levels face logistical and resource challenges in implementing UHC, despite needing the kind of sustained funding that UHC can offer to help strengthen health systems.<sup>22</sup> UHC has been hampered by global recessions and resulting austerity measures, which have shrunk public spending on health,<sup>23</sup> widened socioeconomic gaps, and exacerbated health inequities.<sup>24</sup> COVID-19 deeply disrupted UHC progress, stalling efforts to reduce maternal mortality, causing major declines in childhood vaccination, and increasing tuberculosis and malaria deaths.<sup>25</sup> Inadequate progress on UHC is also being driven by rising nationalist populism, reflecting how “democratic erosion” reduces governmental willingness and ability to respond to public health needs.<sup>26</sup> This public health failure amid democratic backsliding was seen in a marked correlation between countries led by populist leaders during COVID-19 (including the United States, Brazil, Russia, India, and the United Kingdom) and poor COVID-19 performance.<sup>27</sup>

Human rights offer normative and legal mechanisms for bolstering core components of UHC including health financing and equitable and affordable access to health care services and medicines. In many instances where state action has been lacking, human rights litigation has served as an effective tool for making claims on state resources and to compel policy changes. In this manner, rights-based claims have been powerful tools for accountability and action in health.<sup>28</sup> In South Africa in 2001, the Constitutional Court upheld a civil society human rights challenge against government failures to provide medicines to prevent mother-to-child transmission of HIV,<sup>29</sup> with the case having broad health

system impacts. In Uganda in 2020, the Constitutional Court found the government’s failure to provide adequate maternal health services to violate diverse human rights and ordered that maternal health care funding be prioritized.<sup>30</sup> These outcomes are not unique to interpretations of justiciable health rights: Indian courts have asserted the centrality of health to the enjoyment of the right to life,<sup>31</sup> and the UN Human Rights Committee has recognized that the right to life requires that governments provide emergency and essential health care and medicines.<sup>32</sup>

Beyond litigation, the right to health offers a foundational legal and normative framework capable of advancing UHC goals including through providing operational indicators for its achievement.<sup>33</sup> For example, the International Covenant on Economic, Social and Cultural Rights’ duties of international assistance and cooperation and to realize rights to the maximum of available resources offer to frame global efforts to advance UHC.<sup>34</sup> The core right to health obligation to assure access to essential medicines and realize essential primary health care equally grounds the development of health facilities to deliver these services.<sup>35</sup>

However, while rights-based laws, advocacy, and litigation have produced important normative and material health equity gains, they have also been critiqued for failures to deliver sufficient material benefits and for amplifying health inequities.<sup>36</sup> Paradoxically, countries with the strongest legal protection of health rights have sometimes shown inadequate material improvements in socioeconomic indicators including health.<sup>37</sup> These are weaknesses that human rights law must contend with if it is to better address the root causes of health inequities within and beyond health systems and achieve progress in realizing UHC. Yet even as tools with a sometimes admittedly limited scope, human rights offer civil society and policymakers alike potentially powerful social and legal mechanisms for meaningfully protecting marginalized and oppressed groups and for guiding more equitable health laws and policies.

### Human Rights, Commercial Determinants of Health (CDOH), and International Trade Law

The rapid globalization of international economic rules focused on trade liberalization and the proliferation of multinational corporations have had increasingly negative health impacts. As such, commercial actors — particularly multinational corporations who produce commodities like tobacco, alcohol, unhealthy food, and fossil fuels — bear significant responsibility for planetary degradation, human rights violations, and avoidable ill health.<sup>38</sup> Even industries that should promote health, such as pharmaceutical companies, may undermine it by making medicines unaffordable and inaccessible, buttressed by international and regional trade laws that have frequently subverted domestic health regulations to legal imperatives around intellectual property rights and trade in health-related goods and services in international economic law.<sup>39</sup> Urgent human rights action is required to advance global health law to respond to the health impacts of these CDOH and international trade rules.<sup>40</sup>

Yet adopting and implementing human rights-based reforms to regulate and control the CDOH under global health law is complex given political and legal power asymmetries and sophisticated corporate influence and strategies.<sup>41</sup> Corporate actors have a long history of instrumentalizing and weaponizing human rights to protect their interests against public health regulation, such as tobacco and food industries’ invocations of free speech rights to

oppose warning labels and marketing restrictions.<sup>42</sup> Additionally, international human rights law is limited by the “state-citizen paradigm,” as international treaties cannot impose positive obligations on private actors — and policy-makers are frequently either unwilling or unable to fulfill their duty to protect human rights from corporate harm.<sup>43</sup>

While few governments explicitly invoke human rights language when regulating CDOH policies, human rights — and specifically the right to health — could be used to hold states accountable for failures to adequately regulate corporations and to hold corporations responsible for failure to “respect” human rights once violations have occurred.<sup>44</sup> We have seen citizens hold corporations directly accountable for human rights violations through judicial action: In South Africa, class action litigation on the basis of the right to food have been brought against major food companies (like Tiger Brands) for price fixing and unsafe foods.<sup>45</sup> In the Netherlands in 2021, a court extended to the Shell corporation governmental human rights obligations to prevent dangerous climate change.<sup>46</sup>

Responding to the health impacts of international trade law, civil society has also used domestic courts to successfully challenge corporate actors and policymakers on drug pricing sustained under international trade-related intellectual property rights,<sup>47</sup> including in human rights actions in South Africa and Kenya.<sup>48</sup> These actions achieved small but impactful changes to intellectual property rights under the World Trade Organization in the context of HIV/AIDS and COVID-19, with the 2001 Doha Declaration on Public Health and the 2022 limited waiver of intellectual property rights expanding human rights to access essential medicines.<sup>49</sup> While imperfect, human rights remain an important tool to support global health action on CDOH and international trade laws. It is imperative to continually develop human rights law to respond to new global health threats.

### Human Rights and Pandemics

Some of the earliest iterations of global health law responded to the age-old threat of pandemic disease. The first international sanitary conferences in the 1800s culminated in the 1951 International Sanitary Regulations under World Health Organization (WHO) governance, amended in 1969 to become the International Health Regulations (IHR) — albeit with a narrow disease scope, inadequate mechanisms for accountability, and no acknowledgement of human rights.<sup>50</sup> The 2003 SARS outbreak catalyzed a WHO reform process that produced the IHR (2005), the primary global health law instrument that governed state responses to the COVID-19 pandemic. While the IHR (2005) contained unprecedented references to human rights, it proved inadequate to the task of effectively coordinating global responses to COVID-19 — from discriminatory and punitive travel restrictions to failed efforts to realize solidarity, cooperation, and assistance as gross disparities in access to COVID-19 vaccines quickly emerged.<sup>51</sup>

The inadequacies of the IHR during the COVID-19 pandemic have prompted parallel reform efforts to strengthen the IHR and create a new pandemic treaty to assure more effective global governance and cooperation in future pandemics. Thus far, IHR reforms have fared better than the pandemic agreement. Member States of the World Health Assembly adopted a substantial package of IHR amendments by consensus in June 2024.<sup>52</sup> These reforms have made promising additions to the IHR including in relation to equity, solidarity, access to vaccines, financing, and pandemic

preparedness. While these reforms say remarkably little about human rights, they may nonetheless help better balance sovereign considerations of power, security, and commerce with human rights, equity, and solidarity in future disease outbreaks. While human rights are recognized as an underpinning principle of the pandemic agreement, successive negotiations have eroded much of its human rights content and opposing economic and political priorities have led to a breakdown of consensus in the bid for a global pandemic preparedness framework. Without consensus on the pandemic agreement, the World Health Assembly has resolved to continue pandemic agreement negotiations until May 2025. The future of human rights in this crucial new global health law instrument hangs in the balance.

### Conclusion

In an increasingly multipolar world, global solidarity is not assured, and polarizing ideological differences are themselves becoming determinants of ill health. These divisions will determine how access to and rights to health care are defined. Notions of rights are being criticized from all sides of the political spectrum as unwieldy, inequitable, and insufficient, while rights claims are being weaponized to protect economic rather than social interests. Yet even as contested norms, human rights offer an authoritative, determinable, and frequently binding set of norms capable of grounding global health law within social justice and equity. To achieve this vision of global health with justice, human rights norms, laws, and institutions must be strengthened and more effectively integrated into the key domains of global health law.

The challenge of doing so is enormous in the ordinary course and perhaps inconceivable in this time of crisis. Yet it is worth recalling Oona Hathaway’s cogent observation that major shifts in human rights practices have often occurred because of major systemic shocks and the limited windows of opportunity they offer for effecting large systemic changes.<sup>53</sup> Those working in human rights law and global health law must face these crises nimbly, creatively, and courageously — recognizing the challenges and opportunities they create for improving the capacity of these legal instruments to better advance health justice.

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