

## EDITORIAL

# Interrogating the Role of Human Rights in Remediating Global Inequities in Access to COVID-19 Vaccines

LISA FORMAN, CARLOS CORREA, AND KATRINA PEREHUDOFF

## Introduction

Access to safe and effective COVID-19 vaccines is central to controlling the global COVID-19 pandemic. It is also an essential element of advancing universal health coverage under the Sustainable Development Goals and realizing a range of human rights related to health. Yet disparities in access to COVID-19 vaccines in low and middle-income countries (LMICs) have emerged as this pandemic's singular human rights and equity challenge. In high- and upper-middle-income countries, almost two-thirds of people are fully vaccinated, while in low-income countries, this figure falls to under 20%.<sup>1</sup> Disparities in global distribution are starkest when it comes to Africa, where in some countries access falls well under 10%–15%.<sup>2</sup> Many countries have administered third and fourth booster shots at the same time that vast swathes of the global population do not have access to first doses.

These disparities have life-and-death consequences for millions of people in LMICs and threaten global control of COVID-19. They hamper the realization of universal health coverage and other Sustainable Development Goals, create major human rights challenges, and threaten access to vaccines and other pharmaceuticals in future global health emergencies. It is not surprising, then, that United Nations Secretary-General Antonio Guterres sees vaccine equity as “the biggest moral test before the global community,” World Health Organization Director-General Tedros Ghebreyesus calls it a “catastrophic moral failure,” and UNAIDS Executive Director Winnie Byanyima describes it as “global vaccine apartheid.”<sup>3</sup>

Underlying these disparities is a tangled web of international law regimes that significantly shape related policy, from the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which governs intellectual property rights, including for pharmaceutical patents, to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which governs the human rights to health and to benefit from scientific progress.<sup>4</sup> These fragmented legal regimes are the legal determinants of vaccine- and medicine-related policy responses in key domains of what is in-

---

LISA FORMAN, SJ.D, is an associate professor and Canada Research Chair in Human Rights and Global Health Equity at the Dalla Lana School of Public Health, University of Toronto, Canada. She is affiliated with the World Health Organization Collaborating Centre for Governance, Accountability, and Transparency in the Pharmaceutical Sector at the University of Toronto, Canada, and the Global Health Law Consortium.

CARLOS CORREA, PhD, is executive director of the South Centre, Geneva, Switzerland, and a former member of the UK Commission on Intellectual Property Rights, the Commission on Intellectual Property Rights, Innovation and Public Health, and the FAO Panel of Eminent Experts on Ethics in Food and Agriculture.

KATRINA PEREHUDOFF, MSc, LL.M, PhD, is an assistant professor at the Faculty of Law, University of Amsterdam, Netherlands. She is affiliated with the Amsterdam Institute of Global Health & Development, Netherlands; the World Health Organization Collaborating Centre for Governance, Accountability, and Transparency in the Pharmaceutical Sector at the University of Toronto, Canada; and Medicines Law & Policy, Amsterdam, Netherlands.

creasingly known as global health law (an emerging field that explores diverse international law regimes governing health).<sup>5</sup> As the COVID-19 vaccine crisis underscores, these fragmented state duties can create conflicting policy imperatives that impede universal health coverage and deepen global health inequities. Legal conflicts demand legal solutions, illustrated in the spillover of key debates on vaccine access into the negotiation of a new international World Health Organization pandemic treaty and in the much-debated proposal by prominent LMICs early in the pandemic for a partial waiver of TRIPS for the duration of the pandemic. These debates come as international institutions such as the COVAX Facility and ACT-Accelerator have failed to prevent or resolve global inequities in vaccine access.

Disparities are the central focus of this special section on COVID-19 vaccine equity and human rights, which brings together a diverse group of scholars and practitioners to consider pressing questions about the status, force, and impact of human rights law and discourse in this domain.

### Human rights, trade rules, and accountability

A key question conjured by the COVID-19 pandemic and the global need for vaccines is whether a stand-alone “right to medicines” can be read into the right to health enshrined in the ICESCR (article 12) and, as a binding legal norm, be a more powerful call to remedy global inequalities in COVID-19 vaccine access. Lisa Forman, Basema Al-Alami, and Kaitlin Fajber’s paper examines 22 years of United Nations General Assembly resolutions spanning several global health crises to attempt to answer this question. They conclude that there is limited evidence of subsequent state agreement and practice to formally read a “right to medicines” into the ICESCR. Nonetheless, this research illustrates that state support has grown for the nonbinding norm of access to medicines as a prioritized component of the right to health in the ICESCR. This finding corroborates the limited legal force that access to medicines as a right has enjoyed in the face of

trade-related intellectual property (IP) rights, in contrast to its social and discursive force as a soft law norm.

Nevertheless, access to medicines as a human rights claim has served an important discursive function in the COVID-19 vaccines IP debate. Katrina Perehudoff, Heba Qazilbash, and Kai Figueras de Vries examine whether, why, and how human rights framing was used by representatives of WTO members (i.e., negotiators for governments) in WTO debates about COVID-19 vaccine IP. Human rights language was instrumentalized by some WTO negotiators for three purposes: one, to persuade colleague negotiators at the WTO to support the waiver proposal by appealing to previously agreed state duties (e.g., in the ICESCR); two, to serve some members’ own interests in creating coherence between their domestic values and policy (e.g., a constitutional right to health) and their policy positions at WTO; and three, to catalyze external public support for the waiver proposal.

Meanwhile, outside of the WTO, a human rights rationale was a major justification given by civil society organizations calling on WTO members to support the waiver proposal. Jillian Kohler, Anna Wong, and Lauren Taylor’s investigation into the reactions and rationales of a broader set of stakeholders within and outside the WTO (including WTO members, civil society, and research-based pharmaceutical companies) found that of all the stakeholders, civil society consistently drew parallels between global COVID-19 vaccine inequity and human rights violations. Among their rationales, civil society urged WTO members to support the waiver proposal as part of their international human rights obligations, invoking a range of human rights, from health to access to information, to education, to culture and science. These papers illustrate that the human rights narratives of WTO negotiators and civil society mutually influence one another, possibly with consequences for the interpretation of the TRIPS Agreement in global health crises. In this way, access to medicines as a soft human rights norm *can* wield discrete power over harder trade and IP norms with regards to vaccines.

Beyond human rights discourse, this special

section also reveals how civil society is mobilizing and pressuring governments for more equitable governance of medicines in “radically different ways than previously.” Sharifah Sekalala and Belinda Rawson argue that civil society is moving away from a “charity discourse” that has characterized relationships between the Global North and South in recent decades, toward human rights-inspired demands for empowerment (through the scale-up of vaccine manufacturing globally), coupled with greater participation of and “meaningful representation” of LMICs in global policymaking. Sekalala and Rawson contend that there is reason for optimism: the WHO pandemic treaty is a crucial opportunity to realize some of these demands, and this shift in civil society mobilization promises more sustainable solutions for equitable access to pharmaceuticals in future global health threats.

Faced with the weak legal force of access to medicines and vaccines in international human rights law, and the scarcity of mechanisms to hold global actors to account to this informal norm, human rights experts and advocates have taken some innovative steps and encountered missed opportunities on the path toward greater accountability of state *and* nonstate actors for the unjust global distribution of COVID-19 vaccines. The United Nations Committee on Economic, Social and Cultural Rights has an instrumental role in clarifying the normative standards of ICESCR rights that states ought to strive for (through general comments, among other means) and in monitoring and guiding states’ progress toward these standards (through the regular evaluation of state reports). Perehudoff and Jennifer Sellin’s analysis of the committee’s concluding observations regarding the right to science illustrate that the committee, at times, seems to have neglected its own recommendations in General Comment 25 on the right to science regarding medicines and IP. This is a missed opportunity given the lack of global fora for monitoring individual state action and the global solidarity of such states for equitable access to the benefits of scientific progress, to which many taxpayers globally have contributed (namely through COVID-19 vaccines) as part of human rights.

In this pandemic, we have also seen civil society assume the role of “watchdog” over the fulfillment of the pharmaceutical industry’s human rights responsibilities toward medicines. Rosalind Turkie outlines the Pharmaceutical Accountability Foundation’s monitoring and evaluation framework of pharmaceutical companies’ compliance (the *Fair Pharma Scorecard*) with Paul Hunt’s *Human Rights Guidelines for Pharmaceutical Companies* during the development and marketing of COVID-19 vaccines.<sup>6</sup> The scorecard demonstrates the need for stronger regulation in the pharmaceutical field if human rights are to be realized. Turkie proposes the Dutch legal standard of a duty of care as an avenue for enforcing the pharmaceutical industry’s human rights responsibilities.

When it comes to protecting and advancing human rights in trade rules, prominent scholars suggest that TRIPS itself may offer solutions beyond flexibilities like compulsory licensing. In this light, Ellen ‘t Hoen considers conflicts between human rights and intellectual property rights from the perspective of underutilized aspects of the TRIPS Agreement. She argues that when TRIPS was adopted, the promised trade-off was that the higher levels of IP protection would lead to technology transfers from high-income to lower-income countries and that the benefits of this technology transfer would outweigh the cost of expanded levels of IP protection. ‘t Hoen points out that TRIPS’s codified objectives and principles could enable WTO members to better protect public health and human rights, including through enhanced technology transfer.

While most of this section’s papers consider vaccine equity from the perspective of international law, policy, and politics, Paul Hunt and Sophie Bradwell-Pollack localize these discussions in the context of New Zealand’s distinctive approach to human rights through Te Tiriti o Waitangi, the nation’s foundation document. They acknowledge that the government’s rollout of vaccines sometimes failed to adequately account for the needs of Māori and Pacific people. Nonetheless, they point out the potential for more equitable outcomes through

New Zealand's unique conception of human rights, which emphasizes the indivisibility of rights, the imperative to balance competing rights, and the importance of human rights responsibilities and entitlements.

Finally, Kaitlin Fajber's student essay examines the extent to which the COVAX mechanism has successfully advanced global COVID-19 vaccine equity and the right to health. She outlines how COVAX has been hampered in practice by vaccine nationalism, a lack of transparency, funding shortfalls, unreliable donations, inadequate civil society participation, and inequitable resource allocation. She argues that COVAX upholds a largely market-oriented approach and that it could be a more effective mechanism for vaccine equity and global health if it were grounded in human rights.

## Conclusion

The papers in this special section underscore considerable progress in the development and uptake of a human right to vaccines and medicines. International human rights law is increasingly specific about a fundamental human right to vaccines and medicines deriving from ICESCR rights to health and science, which impose clearer and more specific duties on state and nonstate actors alike. Growing legal and political uptake of this right is reflected in international law, policy, and politics, as well as in the discourse of key political and social actors during the COVID-19 pandemic. Yet despite discrete past achievements (most notably around affordable antiretrovirals), this right remains a largely soft law norm and discursive device. Global political and institutional failures to remediate vaccine inequity during the pandemic underscore the imperative for a human right to vaccines and medicines to be more firmly located within hard binding international law and to be subject to binding enforcement. In the absence of this kind of systemic reform, access disparities are likely to continue to characterize global responses in future health emergencies.

## Dedication

We dedicate this special section to the memory of Professor Paula Braitstein, a dear friend, renowned global health scholar, and co-investigator on this grant.

## Funding

This work has been supported through a generous grant from the University of Toronto Connaught Global Challenge Research Program.

## References

1. Our World in Data, <https://ourworldindata.org/covid-vaccinations>.
2. Ibid.
3. "COVID-19 Vaccination 'Wildly Uneven and Unfair': UN Secretary-General," *UN News* (February 17, 2021), <https://news.un.org/en/story/2021/02/1084962>; "COVID-19 Vaccine: WHO Warns of 'Catastrophic Moral Failure'," *BBC* (January 18, 2021), <https://www.bbc.com/news/world-55709428>; W. Byanyima, "A Global Vaccine Apartheid Is Unfolding. People's Lives Must Come before Profit," *UNAIDS* (February 3, 2021), [https://www.unaids.org/en/20210203\\_oped\\_guardian](https://www.unaids.org/en/20210203_oped_guardian).
4. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1896 U.N.T.S. 299 (1994); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (1966).
5. L. O. Gostin, J. T. Monahan, J. Kaldor, et al. "The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development," *Lancet* 393/10183 (2019).
6. United Nations General Assembly, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/63/263 (2008).