Northwestern | Center for International and Area Studies
WEINBERG COLLEGE OF ARTS & SCIENCES

*This essay is part of a symposium published in January 2021 as part of the **Global Governance in the Age of COVID** research project at the Center for International and Area Studies, Weinberg College of Arts and Sciences, Northwestern University.*

Pandemic Politics, Law, and the Re-Negotiation of the Human Right to Health

Anna Holzscheiter

Professor of International Politics, TU Dresden. Head, Governance for Global Health Research Group, WZB Berlin Social Science Center.

In spring 2006, a few days after successfully defending my PhD, I travelled to South Africa for two months. I was starting my postdoctoral research on global health governance with a first field trip. I talked to various AIDS-activists in South Africa, observing their struggle to halt the incomprehensible death toll that AIDS had caused in their country and on their continent, particularly among young people. AIDS activists in South Africa fought as much for de-stigmatization of HIV-infected persons and vulnerable groups as they fought for wide access to antiretroviral treatment ("roll out") that was, of course, already offered to HIV-infected persons in the Global North.

After years of insecurity with regards to the 'optimal' moment to start anti-retroviral therapy, scientific opinion became unequivocal that ART therapy should start as early as possible after HIV-infection. From then on, access to anti-retroviral treatment in low- and middle-income countries depended on how governments and international institutions defined the critical threshold of CD4-cells (also called T helper cells). At the time of my visit, the World Health Organization (WHO) recommended that anti-retroviral therapy should be offered to all patients with a CD4 count less than or equal to 200/mm3. By 2009, it was raised to 350/mm3.

The political struggle revolving around the CD4 threshold as a 'ticket' for ART exemplifies how the metrics of a disease, public and private funding for treatment and access to that treatment have been deeply intertwined. The metrics of HIV-infections were decisive for who was considered as being sick with AIDS, eligible for treatment and deserving of international funding and solidarity.

At the time this essay is being written – December 2020 – a very similar dynamic is observable with regard to vaccines against Covid-19. The metrics of the disease – this time centering on old age (who is old enough?) and risk groups (who has enough co-morbidities? which professions are particularly exposed to the virus?) – will determine access to vaccines for the time being. In rich countries fortunate enough to have secured generous bilateral deals with pharmaceutical companies, debates on access are, so far, disturbingly inward-looking and nationalist. Poorer countries, though, depend on international cooperation and institutions when it comes to hard distributive choices on funding and access.

In this think piece I want to reflect on the varying ways in which human rights have informed global governance of Covid-19. I put forward two propositions, which will need further and more systematic exploration: first, that there is a troublesome disconnect between mounting support for social and economic rights in advocacy for global inequality and redistribution in some parts of the UN system; and second, that there is a complete absence of human rights as a perspective and normative referent in those institutions, such as the ACT Accelerator Partnership, where hard distributive choices concerning global health are being made – decisions on ***access*** *to medication, diagnostics and treatment;* ***funding****; and* ***metrics****.*

In recent months, a number of scholarly contributions have analyzed human rights issues in the context of the Pandemic – both in terms of how human rights should inform

pandemic responses by governments, courts and societies at large and in terms of when, where and how they actually matter in politics and law surrounding the pandemic (Forman & Kohler, 2020; Sekalala, Forman, Habibi, & Meier, 2020; Wong & Wong, 2020). In their article in *BMJ Health*, Sekalala et.al. discuss the centrality of human rights in three interrelated domains of responses to Covid-19: the restriction of individual rights in the name of public health; the realization of the right to health, based on other social rights such as housing, water, education, food and social security; as well as the fulfilment of "international obligations of collaboration and assistance" (Sekalala et al., 2020: 1).

In the following, I will contrast these strong expectations on human rights as a normative referent in global governance of Covid-19 with the actual impact that human rights have had, so far, on debates, policies and actions of international institutions. I will highlight the inexistence of all three dimensions of human rights – including the 'international obligations' frame – in those powerful global public-private institutions governing the distributive aspects of universal access to healthcare. I conclude that, unless human rights obligations do reach out to public-private global health institutions and to private for-profit and not-for-profit actors contributing to them, human rights will remain a toothless formula in the international response to Covid-19. A comparison with the HIV Pandemic in the 1990s and 2000s is particularly compelling because of the catalytic effect that the global HIV health emergency had on the institutionalization of the human right to health.

Health and human rights then and now

The onset of the HIV/AIDS pandemic coincided with the end of the Cold War and a strong support for liberal human rights, democracy and the rule of law. The highly vocal and successful movements organizing around HIV/AIDS were a showcase for the wave of human rights activism that was closing in on many parts of the world. Movements for civil and political rights around the globe coincided with a major health crisis, itself an expression of discrimination, stigmatization and inequality (Feinberg, 1988). Much has been written about the further institutionalization and concretization of the 'human right to health' that followed these developments and resulted in the steady diffusion of human rights-based approaches to health (London, 2008). At the time, questions of non-discrimination, political representation and voice were deeply intertwined with debates on the right to life, the right to health and the question of equitable access to health systems, health services and medication. The language of the epoch was the language of human rights on all fronts.

Do we see similar developments in 2020? I would answer yes and no. Yes, because in the context of the Covid-19 pandemic we can observe more clearly than ever how human rights, political as well as social and economic rights, have diffused across all United Nations bodies and organizations and to other global and regional institutions.[1] No, because we can observe that those institutions at the center of global health governance – notably the WHO, the World Bank and newer public-private institutions – remain strangely silent on human rights issues in comparison with other international organizations. In an impressively long and comprehensive list of all resolutions, press releases and statements from human rights bodies and their intergovernmental parent organizations compiled by the International Justice Resource Center, the WHO appears only twice: during the whole year 2020, it has contributed to a joint statement with UNODC, UNAIDS and OHCHR with regard to the vulnerability of persons deprived of liberty and to a joint statement on the rights and health of refugees. Apparently, the human rights frame and language does not reach out to those institutions that make the most powerful choices on global health, including distributive ones.

The institutional landscape in which global health governance takes place has changed dramatically since the global HIV/AIDS emergency in the 1990s and 2000s. To a large part, the opening up of intergovernmental institutions such as the WHO to private actors was a consequence of the devastating death toll of AIDS and the social and economic repercussions of the HI-virus for which, to date, no 'easy' solution in the form of a vaccine could be found. A massive increase in resources – before all money but also in-kind donations and expertise – was necessary in order for the UN to live up to its promises in reducing the number of HIV infections. Global health governance in 2020 is virtually unimaginable without the contribution of private actors partnering with traditional global health institutions such as WHO, UNICEF, UNFPA or the World Bank. The Global Fund to Fight AIDS, Malaria and Tuberculosis (GFATM), GAVI, the Vaccine Alliance, the Global Financing Facility for Women Children and Adolescents (GFF), the G7/8 and the World Economic Forum have moved to the center of hard choices on funding priorities in global health.

Multinational companies (MNCs), especially pharmaceutical and biomedical industries, as well as private philanthropies, constitute the financial backbone of global health governance. This profound transformation of the landscape of international institutions and initiatives working on global health has been accompanied by a shift in organizational culture and the wider norms defining public-private collaboration on health matters. Scholarship on the frames governing global health governance has brought to light that "the relationship between the moral-legal rhetoric of human rights and global health is highly contested", that there are different perceptions of how human

rights and health are related and that human rights perspectives and norms vary between institutions (McInnes et al., 2012: S89). What then does the Covid-19 pandemic tell us about the status of human rights in global health governance?

The global governance of Covid-19 and the (ir-)relevance of human rights

Looking to those international institutions that are in the spotlight of a global response to Covid-19, it appears that human rights – as a language, perspective and normative referent – have, so far, played a varied role in the guidance and recommendations of international organizations (von Bogdandy & Villareal, 2020; Wong & Wong, 2020). First assessments of the WHO's stance on human rights throughout the year 2020 indicate that the WHO "has been relatively silent on human rights" in its recommendations and technical guidance (Wong & Wong, 2020: 575). It has though, on various occasions, discussed the implications of a derogation of human rights to public health with regard to the proportionality of measures undertaken in the name of collective security (i.e. public health), before all with regard to vulnerable populations. In April 2020 it issued a brief on "Addressing Human Rights as Key to the Covid-19 response" – a document that discusses various implications of human rights in the context of the pandemic but does not give any guidance as to how to address challenges related to human rights (WHO, 2020).

However, even though WHO Director-General Dr Tedros Adhanom has been particularly vocal on the need for international assistance and cooperation to low and middle-income countries, human rights as the origin of Member States' obligations have not been part of his repertoire. Norm collisions between the right to health, including the right to be protected from pandemics on the one hand and civic liberties on the other are at the heart of public debates on the proportionality of pandemic policies. WHO chose a cautious strategy, refraining from any recommendations as to how to resolve such conflicts or from giving advice on mass quarantines as the "most dramatic human rights restrictions" are justified or not (von Bogdandy & Villareal, 2020: 21). For the time being, WHO has chosen an a-political stance towards human rights in the COVID-19 pandemic.

While human rights did only marginally inform WHO's response to the pandemic so far, a rights perspective is completely absent in those global initiatives and institutions most central to distributive questions on access to diagnostics, treatment and vaccines – in particular the ACT Accelerator Partnership. None of the three dimensions of human rights outlined by Sekalala et.al. informs the actions and policies of those public-private

partnerships that are crucial of determining issues of access, funding and metrics, particularly for people in low- and middle-income countries. COVAX – the Vaccine Pillar of the ACT Accelerator – rationalizes the need for international assistance and cooperation on equitable access with the mitigation of the public health and economic impact of the pandemic. The traditional language of needs rather than rights and self-interested risk reduction rather than international obligations dominates these institutions and their policies. COVAX is advertised to richer countries in the world as a "insurance policy":

> "For the wealthiest self-financing countries, some of which may also be negotiating bilateral deals with vaccine manufacturers, it serves as an invaluable insurance policy to protect their citizens, both directly and indirectly. On the one hand it will provide direct protection by increasing their chances of securing vaccine doses."[2]

In the light of scholarship on public-private collaboration in global health governance, the absence of human rights as a perspective and normative referent seems little surprising. As Fejerskov has impressively shown through his field work,

> "rights as an abstract concept whose somewhat inherent immeasurability (or perhaps just complexity of measurability) makes it difficult for it to penetrate an organizational culture build up around measurement and evidence, like that of the Gates Foundation" (Fejerskov, 2018: 134).[3]

A number of studies have shown that the increasing involvement of the for-profit sector and philanthropies has constituted a neoliberal turning-point in global health, dominated by a culture of absolute numbers (as in 'five million lives saved'), value for money, "smart financing"[4], evidence-based policy, risk-sharing, investment, innovation and technological 'solutions' to individual health problems (McCoy & Lindsey, 2011; Reubi, 2018; Storeng, 2014). There is a persistent tendency within these newer public-private institutions to de-politicize health in the name of maximum value-for-money. The absolute value of 'lives saved' through specific policies and interventions has been perhaps the strongest governance rationale in global health, long before the contemporary pandemic. The politics of public-private institutions in terms of how policy choices on specific diseases and health problems are made or whose lives are prioritized is guarded for the sake of presenting health governance as problem-solving based on partnership, evidence and efficiency (Buse & Harmer, 2004; Friedman & Mottiar, 2005).

The absence of human rights seems to be a logical consequence of this de-politicization of global health.

And yet, the rise in power of public-private institutions has been accompanied by an ever-increasing mindfulness towards the human rights obligations of business actors, including attempts to institutionalize such obligations, as well as by a never-ending struggle for access to essential medicines in the name of the right to life and health within the confines of the World Trade Organization.[5] Support among high-ranking officials of international organizations is increasing for the claim that "the pandemic did not occur in a vacuum" but exacerbated due to social and economic determinants of health, such as poor housing, unsafe working conditions or gender inequalities. As a consequence, demands for socio-economic justice and accountability for violations of social and economic rights resound widely among non-governmental organizations and a number of high-ranking UN officials.[6] In November 2020, UN Human Rights Experts issued a statement in which they unmistakably point their finger at the "systemic inequalities" that have accelerated the pandemic and not only at governments but also "business enterprises" that have undermined human rights commitments. They explicitly call on pharmaceutical companies, particularly those that have received public funding for research and development, to accept their "responsibility to support the right to health", pointing to Human Rights Guidelines for Pharmaceutical Companies issued by the Special Rapporteur on the right to health.[7] In sum, they remind governmental and private actors of their obligations in a global social contract based on the right to life and health (Santoro & Shanklin, 2020).

Conclusion

The ongoing struggles within the WTO over waiving intellectual property rights on vaccines against Covid-19 present a widely open 'window of opportunity' for the strengthening of the right to life and health and a human rights perspective on access to essential medicines. This window of opportunity extends not only to those WTO Member States that represent the interests of the pharmaceutical sector, but also to business actors themselves, who are expected to grant the widest possible access to public goods that are co-financed through government spending.

As contemporary debates on global inequality and the 'human right to health' as the most fundamental of all social and economic rights show, human rights obligations must reach out to institutions and governance actors beyond governments or States Parties to human rights treaties. But as long as the contribution of richer countries and the for-profit sector

to worldwide accessibility of diagnostics, treatment and vaccines is justified by cost-benefit-calculations rather than obligations towards an international social contract, the Covid-19 pandemic will not be comparable to HIV in its transformative impact – it will not push our understanding of human rights as a key determinant in responses to global health crises any further. Distributive choices on funding and access taking place in global health institutions are visibly oriented towards the status quo and those most in need. A profound transformation of the global determinants of health and well-being, and in particular questions of global (re-)distribution and social justice, requires to acknowledge health as a human right.

References

Buse, K., & Harmer, A. (2004). Power to the Partners?: The politics of public-private health partnerships. *Development*, 47(2), 49-56.

Feinberg, H. (1988). The Social Dimensions of AIDS. *Scientific American*, 259(4), 128-135.

Fejerskov, A. M. (2018). Development as resistance and translation: Remaking norms and ideas of the Gates Foundation. *Progress in Development Studies*, 18(2), 126-143.

Forman, L., & Kohler, J. C. (2020). Global health and human rights in the time of COVID-19: Response, restrictions, and legitimacy. *Journal of Human Rights*, 19(5), 547-556. doi:10.1080/14754835.2020.1818556

Friedman, S., & Mottiar, S. (2005). A Rewarding Engagement? The Treatment Action Campaign and the Politics of HIV/AIDS. *Politics & Society*, 33(4), 511.

London, L. (2008). What Is a Human-Rights Based Approach to Health and Does It Matter? *Health and Human Rights*, 10(1), 65-80.

McCoy, D., & Lindsey, M. (2011). Global Health and the Gates Foundation — In Perspective. In S. Rushton & O. D. Williams (Eds.), *Partnerships and Foundations in Global Health Governance*. London: Palgrave Macmillan.

McInnes, C., Kamradt-Scott, A., Lee, K., Reubi, D., Roemer-Mahler, A., Rushton, S., . . . Woodling, M. (2012). Framing global health: The governance challenge. *Global Public Health*, 7(sup2), S83-S94. doi:10.1080/17441692.2012.733949

Reubi, D. (2018). Epidemiological accountability: philanthropists, global health and the audit of saving lives. *Economy and Society*, 47(1), 83-110. doi:10.1080/03085147.2018.1433359

Santoro, M., & Shanklin, R. (2020). Human rights obligations of drug companies. *Journal of Human Rights*, 19(5), 557-567. doi:10.1080/14754835.2020.1820315

Sekalala, S., Forman, L., Habibi, R., & Meier, B. (2020). Health and human rights are inextricably linked in the COVID-19 response. *BMJ Health*.

Storeng, K. T. (2014). The GAVI Alliance and the 'Gates approach' to health system strengthening. *Global Public Health*, 9(8), 865-879. doi:10.1080/17441692.2014.940362

von Bogdandy, A., & Villareal, P. A. (2020). *Critical Features of International Authority in Pandemic Response*. Retrieved from Heidelberg:

WHO. (2020). *Addressing Human Rights as Key to the COVID-19 Response*. Geneva: WHO.

Wong, W. H., & Wong, E. A. (2020). What COVID-19 revealed about health, human rights, and the WHO. *Journal of Human Rights*, 19(5), 568-581. doi:10.1080/14754835.2020.1819778

Notes

[1] International Justice Resource Center, "Covid-19 Guidance from Supranational Human Rights Bodies", available at: https://ijrcenter.org/covid-19-guidance-from-supranational-human-rights-bodies, last update on November 12, 2020.

[2] GAVI (2020), "COVAX explained", available at https://www.gavi.org/vaccineswork/covax-explained), last access 15 December, 2020.

[3] See also Fejerskov, A.M. 2015: From unconventional to ordinary? The Bill and Melinda Gates Foundation and the homogenizing effects of international development cooperation. Journal of International Development, 2, 1098–12

[4] See GFF „Financing Model", available at: https://www.globalfinancingfacility.org/financing-model, last access 14 December 2020.

[5] Priti Patnaik, "The re-emergence of the WTO as a key forum for global health", Geneva Health Files, Blog, August 6, 2020, available at: https://genevahealthfiles.wordpress.com/2020/08/06/the-re-emergence-of-the-wto-as-a-key-forum-for-global-health/, last access 15 December, 2020.

[6] See for instance the various speeches by Achim Steiner, UNDP Administrator in the context of the pandemic: https://www.undp.org/content/undp/en/home/news-centre/speeches/2020/human-rights-and-rule-of-law-.html, last access 15 December, 2020.

[7] See UN Human Rights Council (2020), "Universal access to vaccines is essential for prevention and containment of COVID-19 around the world", 9 November 2020, available

at https://reliefweb.int/report/world/statement-un-human-rights-experts-universal-access-vaccines-essential-prevention-and, last access 15 December 2020.

Anna Holzscheiter is Professor of International Politics at the Technische Universität Dresden (TU Dresden) and Head of the Governance for Global Health Research Group at WZB Berlin Social Science Center. Previously, she was a John F. Kennedy Memorial Research Fellow at Harvard University (2014-15), Research Fellow at the London School of Hygiene and Tropical Medicine (2007-2010), Research Associate at the Center for Transnational Relations, Foreign and Security Policy, Freie Universität Berlin (2006-2015), and Assistant Professor of International Relations at FU Berlin (2015-2019). She has published widely on global health governance, non-state actors in international politics, international human rights (particularly those of children and young persons), discourse analytical methods, and the turbulent biographies of norms in international relations.

This essay is part of a symposium published in January 2021 as part of the ***Global Governance in the Age of COVID*** *research project at the Center for International and Area Studies, Weinberg College of Arts and Sciences, Northwestern University.*

The essay can be found online at:

https://wccias.northwestern.edu/covid-19-research/pandemic-politics,-law,-and-the-re-negotiation-of-the-human-right-to-health.html

The ***Global Governance in the Age of COVID*** *essay symposium can be found online at:*

https://wccias.northwestern.edu/covid-19-research/essay-symposium.html