2002

Introduction to Written Symposium on Public Health and International Law

David P. Fidler
Indiana University Maurer School of Law, dfidler@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the Health Law and Policy Commons, International Law Commons, and the International Public Health Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/426

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
I. INTRODUCTION

Public health has emerged as one of the most important issues of our global age. Despite health improvements and gains in life expectancy around the world in the twentieth century, the twenty-first century begins with developed and developing countries confronting a host of threats to, and controversies about, human health. The HIV/AIDS pandemic is wreaking enormous damage in the developing world, especially in sub-Saharan Africa, and this plague has yet to run its devastating course. Other infectious diseases, such as malaria, tuberculosis, and diarrheal diseases, are growing as public health threats around the world. A pandemic of non-communicable diseases related to tobacco consumption is underway, with enormous morbidity and mortality in developing countries expected in the coming decades. Science—one of the engines of public health progress—confronts a controversial future as scientific developments become tools of malevolent behavior, as with bioterrorism, and the focus of hopes and fears about the future shape of health and human nature, as reflected by debates about genetic engineering.

In the face of these challenges, the adequacy of national and international governance for public health is currently under intense scrutiny. Long a neglected aspect of the study of international relations and international law, public health has

*Professor of Law and Ira C. Batman Faculty Fellow, Indiana University School of Law, Bloomington, Indiana.


become prominent and hotly debated within and among states, international organizations, and global civil society. States have come face-to-face with new disease threats and the weaknesses of their public health systems to respond effectively. In the United States, for example, public health now registers in debates about both national security and homeland defense. Existing international organizations, such as the United Nations and the World Bank, spend significant time and money on public health issues. Sensing the challenges globalization poses to public health, the World Health Organization ("WHO") has attempted to revitalize its ability to fulfill its mandate. New institutions, such as the World Trade Organization ("WTO"), have become embroiled in debates about the impact of international trade rules on public health in developing countries, debates to which non-governmental organizations ("NGOs") have contributed. New global public health regimes are in gestation, including the Global Fund to Fight AIDS, Tuberculosis, and Malaria and the Framework Convention on Tobacco Control. Initiatives to underscore the role of public health in economic development and to create increased flows of public health funds from rich to poor countries attempt to elevate public health on national and international agendas.

Reflecting on the growing prominence of public health in world politics and international law, the Chicago Journal of International Law has chosen to devote attention to the dynamic relationship that exists between public health and international law today. This symposium provides a glimpse of the scope and diversity of areas in which international law and public health intersect, but it does not exhaust the public health/international law discourse. One theme the symposium pursues is the controversy regarding the impact that international legal protections for pharmaceutical patents have had on the access of developing countries to drugs and medicines. The symposium also reflects the contributors' interest in national and global public health problems posed by infectious diseases, though this emphasis does

4. See Overview: Global Fund to Fight AIDS, Tuberculosis, and Malaria, available online at <http://www.globalfundatm.org/overview.html> (visited Mar 24, 2002) (describing itself as "a new public-private partnership that will make a sustainable and significant contribution to the reduction of infections, illness and death" caused by AIDS, tuberculosis, and malaria in poor nations).


Introduction to 'Written Symposium on Public Health and International Law

not suggest that non-communicable diseases represent insignificant global public health problems that do not bear on the use or study of international law. CJIL hopes that the symposium not only focuses international legal analysis on the contributors' topics, but also conveys the importance of international law and legal analysis to the current policy debates concerning how nations, international institutions, and global civil society work to improve human health globally.

II. BIOTERRORISM

The perpetration of bioterrorism in the United States in 2001 has been singularly important in raising awareness about the national and global importance of public health. My contribution analyzes the interaction between bioterrorism and public health before and after the 2001 anthrax attacks in the US, and the possible impact of the attacks on international law. The international legal analysis sets up a policy-oriented discussion of how bioterrorism in the United States might affect global public health efforts. The anthrax attacks have already caused a radical change in US domestic politics toward the long-neglected public health sector, but I raise concerns that the attacks will divert US energies and resources away from global public health needs.

III. TRIPS AND ACCESS TO DRUGS AND MEDICINES IN DEVELOPING COUNTRIES

The next three contributions take up perhaps the most controversial international legal issue in the context of infectious diseases—the impact of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") on developing countries' access to drugs and medicines. Ellen 't Hoen reviews the problem TRIPS poses for developing countries' access to new drugs and medicines. She discusses the TRIPS debate by looking at key developments, including the role played by NGOs pushing for greater access for developing countries. The article then analyzes the "breakthrough" event of the WTO Declaration on TRIPS and Public Health adopted at the November 2001 WTO ministerial meeting in Doha, Qatar ("Doha Declaration"). Arguing that the Doha Declaration represents a victory for developing-country access, 't Hoen looks ahead to the post-Doha agenda, which includes implementing the Doha victory and advocating for more research and development for drugs and vaccines to fight infectious diseases.

8. See, for example, George Alberti, Noncommunicable Diseases: Tomorrow's Pandemics, 79 Bull of World Health Org 507 (2001) (urging that non-communicable diseases are "the new pandemics of the 21st century [that] threaten to swamp the meager health care resources of many countries.").
predominantly suffered in developing countries. She suggests an international treaty fostering research and development on these neglected diseases as a way to advance this agenda.

Alan Sykes also takes up the patents/access dispute analyzed by ‘t Hoen, but he seeks to show that the Doha Declaration may adversely affect public health in developing countries. Using legal and economic analysis, Sykes argues that the Doha solution of encouraging developing states to engage in compulsory licensing and parallel importation of pharmaceuticals may actually harm those same developing countries by reducing not only pharmaceutical innovation but also access to affordable drugs. In addition, Sykes acknowledges that more empirical research on the access/patents issue is needed, but suggests that the Doha Declaration may move the global community in the wrong public health direction.

Carlos Correa deepens the controversy over the relationship between TRIPS and access to pharmaceuticals in developing countries by analyzing the scope of the protection afforded to test data (for example, efficacy, effectiveness, and safety information from animal studies and clinical trials) submitted to drug regulatory agencies in connection with product approval and registration. Pharmaceutical companies, supported by the United States, want test data protected from subsequent use by government authorities and companies relating to the subsequent registration of similar products, such as generics. Developing countries believe that this "exclusivity model" would force local generic drug companies to complete costly and redundant trials and studies. Undertaking a close analysis of TRIPS through the Vienna Convention on the Law of Treaties, Correa concludes that TRIPS does not enshrine the exclusivity model. He argues, rather, that it allows developing countries discretion in how they treat test data on pharmaceutical products, creating more opportunities for competition from generic products and thus, potentially, more affordable access in developing countries.

IV. GLOBAL HEALTH GOVERNANCE IN A MULTI-CULTURAL WORLD

Obijiofor Aginam focuses on multilateral governance initiatives on malaria, and how these initiatives neglect to seek input from communities that suffer from

He reviews WHO's Roll Back Malaria ("RBM") program and the Medicines for Malaria Venture ("MMV"), which both represent new efforts to address malaria's impact around the world, especially in sub-Saharan Africa. While praising these initiatives, Aginam argues that they nonetheless represent "globalization-from-above" because they ignore indigenous approaches to treating malaria in Africa. He cites the tension between Western medicine and traditional medicine as one reason underlying the failure of RBM and MMV to include input from the "peripheries" or "the voices of rural populations" in Africa. He urges that RBM and MMV should involve more "globalization-from-below" in order to ensure that global governance on malaria is multi-cultural. He concludes this task would require: (1) the "scientification" of traditional medical therapies for malaria; (2) global governance mechanisms that respect globalization-from-below; and (3) the protection of traditional medical knowledge from "biopiracy" within international intellectual property law.

V. HUMAN RIGHTS AND PUBLIC HEALTH

The final two contributions highlight the importance of international human rights law to national and global public health issues. Mary Ann Torres analyzes access to HIV/AIDS therapies in Venezuela within the framework of the human right to health. Her focus is on a Venezuelan Supreme Court case in which the Court held that HIV+ Venezuelans had the right to receive antiretroviral therapy from the government under the human right to health enshrined in the Venezuelan constitution, as well as under treaties Venezuela has ratified. Torres illustrates the importance of national implementation of human rights and the need for local action to make the right to health more real. The case also raises difficult questions about the role of national courts in connection with the right to health and governmental efforts to prevent and control HIV/AIDS. The Venezuelan Supreme Court ordered the Ministry of Health to supply HIV+ persons with antiretroviral therapy, even when the legislature had not allocated sufficient funds to enable the Ministry to undertake such an effort. This case further highlights the difficulty of progressively realizing the right to health in developing countries that have limited public health budgets.

Stephen Marks's paper analyzes international law as it relates to human genetic manipulation and concentrates on the human rights issues that such manipulation
C(icago Journal of International Law

raises. Genetic engineering has created hopes about the health benefits biotechnology may produce, such as finding ways to eliminate life-threatening diseases. It has also generated fears about the dangers of tinkering with the human genome. Marks outlines two perspectives that animate debates about human genetic manipulation—the essentialist, welfare-state position and the utilitarian, neoliberal position. These perspectives support two bodies of international law that are in tension—human rights law and the law that protects intellectual property rights. Marks then discusses human genetic manipulation in connection with three categories of human rights present in international law: (1) rights that relate to the nature and autonomy of the human person; (2) rights that relate to physical and mental integrity and well-being; and (3) rights dealing with social relations and participation. He concludes by looking at non-governmental and intergovernmental proposals for treaties that would regulate human genetic manipulation, including a European effort at the United Nations advocating a convention banning human cloning. Where human genetic manipulation takes human health, Marks argues, remains uncertain, as does the extent to which international law will be used to encourage or restrain the biotech Prometheus.

VI. Conclusion

From the moment public health became a matter of international diplomacy in the mid-nineteenth century, international law has been a tool both used and ignored in the global efforts against disease. The contributions in this symposium suggest that the future of national and global governance of public health in the twenty-first century involves a significant role for international law. How the role of international law in this realm is shaped deserves heightened attention from the international legal community.