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# The Right to Health in International Law



John Tobin

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JOHN TOBIN



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## *Preface*

In 2008 my partner, Lorraine, gave birth to twins, Will and Tess, in a private hospital. Five midwives, an obstetrician, and a paediatrician assisted her. She was administered with a cocktail of drugs to prevent haemorrhaging and the resuscitation equipment was present just in case the twins suffered any complications. After the birth Lorraine was provided with 24-hour care from midwives for five days and the twins, who were too small and weak to feed from the breast or bottle, were placed in the special care nursery for 16 days, where they fed via a gastric nasal tube.

As I reflected on this experience, it reminded me how access to effective health care is a lottery. But for living in a developed country like Australia, Lorraine, Will, and Tess may well have been deprived of the medical care necessary to meet their health needs. It forced me to recall an experience 20 years earlier when, volunteering in Tanzania, I watched a woman in the back of truck lie in a pool of her own blood as she was rushed to a community hospital. My colleagues told me that her condition was most likely the result of a 'backyard' abortion. Naively, I recalled seeking their assurance that the woman would be okay. She was after all going to a hospital. 'Unlikely' was the reply as the hospital had no medicine to stop the haemorrhaging.

The WHO estimates that every day approximately 1000 women<sup>1</sup> and over 17,000 infants under five die due to complications that could have been prevented or treated with simple medical interventions.<sup>2</sup> A child born in a developing country is over 10 times more likely to die within the first five years of life than a child born in an industrialized country like Australia.<sup>3</sup> In sub-Saharan Africa a woman's risk of dying from treatable or preventable complications of pregnancy and childbirth over the course of her lifetime is 1 in 22 compared to 1 in 7,300 in the developed regions.

There is no equity in global health.<sup>4</sup> In 2007 the world spent US\$5.3 trillion on health. Of this expenditure, 86 per cent was spent on OECD countries, which represent 18 per cent of the world's population. In 40 WHO member States, total health spending by the state, households, the private sector, and external donors was less than US\$46 per year per person—the minimum spending per person per year to provide basic life saving services.<sup>5</sup> Of course, the health divide is not simply between developed and developing states, and within developed states there remain huge gaps

<sup>1</sup> WHO, UNICEF, UNFPA and World Bank, *Trends in Maternal Mortality 1990 to 2008* (WHO, 2010).

<sup>2</sup> WHO, 'Children: Reducing Mortality' (WHO Fact Sheet 178, November 2009) <<http://www.who.int/mediacentre/factsheets/fs178/en/index.html>> accessed 14 June 2011.

<sup>3</sup> *ibid.*

<sup>4</sup> See: World Bank, *World Development Indicators 2011* (World Bank, 2011) 94–97 (provides comparative figures for states in relation to health expenditure, number of health workers, and hospital beds which illustrates the level of inequity between states).

<sup>5</sup> WHO, 'Spending on Health 2007—Global Update' (WHO Fact Sheet, 2010) <[http://www.who.int/nha/use/global\\_fact\\_sheet\\_2007-Jun\\_2010.pdf](http://www.who.int/nha/use/global_fact_sheet_2007-Jun_2010.pdf)> accessed 14 June 2011.

in access to affordable and accessible health care and the social determinants of health.

These problems are not unknown. Globally they have inspired the Millennium Development Goals (MDGs) to reduce infant mortality, improve maternal health, and combat HIV/AIDS, malaria, and other diseases. Locally, sophisticated and effective measures are being taken by States, households, civil society, medical professionals, health economists, bioethicists, policy makers, and the private sector to improve health outcomes. Indeed, the photo on the cover of this book captures an example of a collaborative initiative to provide primary health care to Ghanaian women and their children. But there is still considerable distance to be travelled. Globally, none of the health MDGs are on track to be met by 2015<sup>6</sup> and within Ghana itself, notwithstanding examples of good practice, the malaria infection rate is 48 per 100,000, only 28 per cent of females between 15–24 have comprehensive knowledge of HIV/AIDS, the maternal mortality ratio is 350 per 100,000 live births, and the probability of dying under age five is 69 per 1000 live births.<sup>7</sup> And for just about every country in the world there is a series of statistics that paint a depressing picture with respect to various health indicators. Indeed, in my own country, Australia, the state of indigenous health remains appalling, the level of childhood obesity remains a grave concern, as do unwanted teenage pregnancies and sexually transmitted diseases, and mental health is only starting to receive the funding it has long been denied.

Given the vast and complex nature of these issues, the question I found myself asking as I set about the task of writing this book was, what role, if any, can the right to health play in contributing to effective health outcomes?

Professor Bryan Stevenson, the Director of the Equal Justice Initiative in New York, has said that ‘words can save lives’.<sup>8</sup> As a lawyer, I have professional inclination to embrace this sentiment. But I am acutely aware of the limitations of my profession and recognize that it is the actions of doctors and the provision of medicine and the social determinants of life, that actually save lives. Words do, however, have a role to play. But it is the meaning we give them and the actions that are inspired by their meaning that have the capacity to determine whether lives will be saved or, indeed, lost. Thus, the right to health in international law remains a benign idea unless it can be animated with a meaning that persuades those with the capacity to improve the health of individuals to take appropriate measures to achieve this end. It is my hope that this book might make a modest contribution to developing such an understanding of the right to health in international law.

<sup>6</sup> World Bank (n 4) 5–6.

<sup>7</sup> WHO, *World Health Statistics 2011* (WHO, 2011) 24, 26, 34, 36.

<sup>8</sup> Bryan Stevenson, ‘Confronting Injustice’ (Public Lecture, NYU Law School, 23 September 2009) <<http://www.youtube.com/watch?v=EVD9Zdz8NBo>> accessed 14 June 2011.



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Aspects of this book have appeared in other publications. Chapter 3 is largely based on J Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) Harv Hum Rts Rev 1, and Chapter 8 is largely based on J Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9 HRL Rev 373. A special thanks to the editors of these journals for allowing the publication of these articles in this book.

## Table of Cases

<i>Alex, Re</i> (2004) 180 FLR 89 (FamCt, Aust) . . . . .	149
<i>Alyne de Silva Pimental v Brazil</i> CEDAW/C/49/D/17/2008 (10 August 2011) . . . . .	222, 228, 289
<i>Asylum Case (Colombia v Peru)</i> [1950] ICJ Rep 266 (ICJ) . . . . .	91
<i>B (a Minor), Re</i> [1988] 1 AC 199 (HL, UK) . . . . .	153, 157
<i>Bellotti v Baird</i> , 443 US 622 (1979) (SC, USA) . . . . .	148
<i>Buck v Bell</i> , 274 US 200 (1927) (SC, USA) . . . . .	153
<i>Chan v Korean Airlines Ltd</i> , 490 US 122 (1989) (SC, USA) . . . . .	115
<i>City of Akron v Akron Center for Reproductive Health Inc</i> , 462 US 416 (1983) (SC, USA) . . . . .	148
<i>Consumer Education and Research Centre v Union of India</i> (1995) 1 SCR 626 (SC, India) . . . . .	187, 203
<i>D v United Kingdom</i> ECHR 1997–III (ECtHR) . . . . .	204
<i>DAS v Victorian Human Rights and Equal Opportunity Commission</i> (2009) 24 VR 415 (VSC, Aust) . . . . .	72, 183
<i>Drug Action Forum v Union of India</i> (1997) 6 SCC 609 (SC, India) . . . . .	203
<i>Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, Inter-Am Ct HR (Ser A) No 2 (1982) (Inter-Am Ct HR) . . . . .</i>	92
<i>Eve, Re</i> [1986] 2 SCR 388 (SC, Canada) . . . . .	153, 156
<i>Exchange of Greek and Turkish Populations under the Lausanne Convention VI</i> [1925] PCIJ (ser B) No 10 . . . . .	177
<i>Francis Mullin v Administrator, Union of Delhi</i> (1981) 2 SCR 516 (SC, India) . . . . .	187, 203
<i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i> [1997] ICJ Rep 7 (ICJ) . . . . .	107
<i>General Secretary, West Pakistan Salt Miners Labour Union, Khewra, Jhelum v Director Industries and Mineral Development, Punjab Lahore</i> [1994] SCMR 2061 (SC, Pakistan) . . . . .	203
<i>Gillick v West Norfolk and Wisbech Area Health Authority</i> [1986] 1 AC 112 (HL, UK) . . . . .	139
<i>Government of the Republic of South Africa v Grootboom</i> [2001] 1 SA 46 (CC, Sth Afr) . . . . .	97, 240, 245
<i>Henao v The Netherlands</i> App No 13669/03 (ECtHR, 24 June 2003) (ECtHR) . . . . .	204
<i>International Centre for the Legal Protection of Human Rights 'Interights' v Croatia, Decision No 45/2007 (30 March 2009) (European Committee of Social Rights) . . . . .</i>	201
<i>Interpretation of Peace Treaties (Second Phase) (Advisory Opinion)</i> [1950] ICJ 221 (ICJ) . . . . .	91
<i>Ireland v United Kingdom</i> (1978) Series A no 25 (ECtHR) . . . . .	92
<i>Judgment No SU-225/98 (1998) (CC, Columbia) . . . . .</i>	2, 205
<i>Judgment No SU-337/99 (1999) (CC, Columbia) . . . . .</i>	147
<i>Judgment No T-551/99 (1999) (CC, Columbia) . . . . .</i>	147
<i>Kjeldsen Busk Madsen and Pedersen v Denmark</i> (1976) Series A no 23 (ECtHR) . . . . .	142
<i>KNLH v Peru</i> , Communication No 1153/2003, UN Doc CCPR/C/85/1153/2003 (22 November 2005) (HRC) . . . . .	143, 164, 204
<i>Konrad v Germany</i> ECHR 2006-XIII (ECtHR) . . . . .	142
<i>Land Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment) [1992] ICJ Rep 351 (ICJ) . . . . .</i>	90
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)</i> [1971] ICJ Rep 16 (ICJ) . . . . .	104

<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)</i> [2004] ICJ Rep 136 (ICJ) . . . . .	325
<i>Loizidou v Turkey</i> ECHR 1996–VI 2220 (ECtHR) . . . . .	93
<i>Maharjan v His Majesty of Government NKP</i> , 2053, vol 8, 627 (SC, Nepal) . . . . .	203
<i>Marion (No 2), Re</i> (1992) 17 FamLR 336 (FamCt, Aust) . . . . .	153, 156
<i>Minister of Health v Treatment Action Campaign (No 2)</i> [2002] 5 SA 721 (CC, Sth Afr) . . . . .	2, 97, 99, 240
<i>Mohiuddin Farooque v Bangladesh</i> (1996) 48 DLR 438 (HC, Bangladesh) . . . . .	203
<i>Olga Tellis v Bombay Municipal Corporation</i> [1986] AIR SC 180 (SC, India) . . . . .	187
<i>Osman v United Kingdom</i> ECHR 1998–VIII 3124 (ECtHR) . . . . .	192
<i>P v P</i> (1994) 181 CLR 583 (HC, Aust) . . . . .	153
<i>Paschim Banga Khet Majoor Samity v State of West Bengal</i> (1996) 4 SCC 37 (SC, India) . . . . .	203
<i>Pharmaceutical Manufacturers' Association of South Africa v President of the Republic of South Africa</i> , Notice of Motion, Case Number 4183/98 (February 1998) (HC, Sth Afr) . . . . .	355
<i>Planned Parenthood v Danforth</i> , 428 US 52 (1976) (SC, USA) . . . . .	139
<i>R v Momcilovic</i> (2010) 25 VR 436 (VSCA, Aust) . . . . .	72, 183
<i>R v Oakes</i> [1986] 1 SCR 103 (SC, Canada) . . . . .	72, 182–3
<i>Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights)</i> , Advisory Opinion OC-8/83 of 8 September 1983, Inter-Am Ct HR (Ser A) No 3 (1983) (Inter-Am Ct HR) . . . . .	92
<i>Rights of Nationals of the United States of America in Morocco (France v United States of America)</i> [1952] ICJ Rep 176 (ICJ) . . . . .	90
<i>Secretary, Department of Health and Community Services v JWB &amp; SMB (Marion's Case)</i> (1992) 175 CLR 218 (HC, Aust) . . . . .	148, 149, 153, 155
<i>Selmouni v France</i> (2000) 29 EHRR 403 (ECtHR) . . . . .	64, 75
<i>Skinner v Oklahoma</i> , 316 US 535 (1942) (SC, USA) . . . . .	153
<i>Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria</i> , Communication No 155/96 (27 October 2001) (African Commission on Human and Peoples' Rights) . . . . .	185, 240
<i>Soobramoney v Minister for Health</i> [1998] 1 SA 765 (CC, Sth Afr) . . . . .	85, 102, 205–6, 218, 241
<i>South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice)</i> [1962] ICJ Rep 465 (ICJ) . . . . .	79
<i>Szijjarto v Hungary</i> , Communication No 4/2004, UN Doc CEDAW/C/36/D/4/2004 (14 August 2006) annex (CEDAW Committee) . . . . .	154, 163
<i>The Amiable Isabella</i> , 19 US (6 Wheat) 1 (1821) (SC, USA) . . . . .	115
<i>The Rainbow Warrior (New Zealand v France)</i> (1990) 82 ILR 449 (France–New Zealand Arbitration Tribunal) . . . . .	332
<i>The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law</i> , Advisory Opinion OC-16/99 of 1 October 1999, Inter-Am Ct HR (Ser A) No 16 (1999) (Inter-Am Ct HR) . . . . .	93
<i>Tyrer v United Kingdom</i> (1978) Series A no 26 (ECtHR) . . . . .	93
<i>Vincent Panikulangura v Union of India</i> (1987) 2 SCC 165 (SC, India) . . . . .	203
<i>Waite and Kennedy v Germany</i> App No 26083/94 (ECtHR, 18 February 1999) (ECtHR) . . . . .	338
<i>Wemhoff v Germany</i> (1968) Series A no 7 (ECtHR) . . . . .	93
<i>Yanomami v Brazil</i> , Resolution No 10/85, Case No 7615 (1985) (Inter-American Commission on Human Rights) . . . . .	202



# *Table of Treaties*

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (San Salvador, 17 November 1988, entered into force 16 November 1999, OAS Treaty Series No 69 (1988), 28 ILM 156) . . . . .	19, 123, 263, 265, 267, 292, 326, 356, 380
African Charter on Human and Peoples' Rights (African Charter) (Banjul Charter) (Nairobi, 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217) . . . . .	8, 19, 123, 262, 326, 379
African Charter on the Rights and Welfare of the Child (Addis Ababa, 11 July 1990, entered into force 29 November 1999, OAU Doc CAB/LEG/24.9/49) . . . . .	19, 123, 256, 262, 263, 379
American Convention on Human Rights (Pact of San José, Costa Rica) (San José, 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123) . . . . .	326
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (New York, 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13) . . . . .	18, 60, 134, 137, 168, 185, 255, 262, 288-9, 291-2, 299, 300, 304, 377
Convention on the Rights of Persons with Disabilities (CRPD) (New York, 30 March 2007, entered into force 3 May 2008, UN Doc A/RES/61/106) . . . . .	18, 59, 109, 123-4, 154, 157, 161, 168, 169, 172, 215, 255, 262, 326, 377
Convention on the Rights of the Child (CRC) (New York, 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3) . . . . .	7, 12, 18, 24, 56, 59, 66, 69, 83, 85, 95, 105, 112, 123, 131-2, 140, 144, 146-7, 176, 178-9, 186-9, 191, 194, 198, 204, 212, 214, 219, 224, 231, 242, 247-9, 254-6, 262-3, 267, 286, 288, 291-2, 293, 297, 299-300, 305-9, 325-30, 341, 347-8, 376
European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950, entered into force 3 September 1953, 213 UNTS 221) . . . . .	75, 93, 142, 313, 356
European Social Charter (Turin, 18 October 1961, entered into force 26 February 1965, 529 UNTS 89) . . . . .	19, 123, 202, 255, 267, 291-2, 379
International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (New York, 21 December 1995, entered into force 4 January 1969, 660 UNTS 195) . . . . .	18, 168
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMWF) (New York, 18 December 1990, entered into force 14 March 2003, 2220 UNTS 3) . . . . .	18, 168, 255, 378
International Covenant on Civil and Political Rights (ICCPR) (New York, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) . . . . .	31, 72, 84, 106, 141, 144, 157, 162, 164-5, 175, 181, 188, 191, 215, 240, 286, 305
International Covenant on Economic, Social and Cultural Rights (ICESCR) (New York, 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) . . . . .	6, 12-13, 18, 24, 31-2, 51, 56, 58-60, 66, 72, 85, 95, 97, 105, 108-9, 112, 114, 123-6, 130-4, 144, 167, 175-81, 187, 194, 198-9, 204, 212, 215, 222, 224, 225, 237-49, 254-63, 267-8, 281, 286-92, 297, 301-2, 303-6, 325-30, 339-48, 356-70, 371

International Health Regulations . . . . .	343
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3) annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights). . . . .	352
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol to the ICESCR) (New York, 24 September 2009, UN Doc A/63/435) (not yet in force) . . . . .	179, 234–5, 340
Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883, entered into force 26 April 1970, 828 UNTS 305) . . . . .	356
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo, 13 September 2000, entered into force 25 November 2005, OAU Doc CAB/LEG/66.6) . . . . .	134, 166, 318, 322
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952, entered into force 18 May 1954, 213 UNTS 262) . .	141
Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331). . . . .	76–7, 86–100, 104–8, 118–119, 177, 277, 240, 242, 373
WHO Framework Convention on Tobacco Control (Geneva, 21 May 2003, entered into force 27 February 2005, 2302 UNTS 166). . . . .	343

## *List of Abbreviations*

A Fem LJ	Australian Feminist Law Journal
A J Primary Health	Australian Journal of Primary Health
Ahfad J	Ahfad Journal
AIPJ	Australian Intellectual Property Journal
AJIL	American Journal of International Law
AJLM	American Journal of Law and Medicine
Am J Bioethics	American Journal of Bioethics
Am J Psych	American Journal of Psychiatry
Am J Pub Health	American Journal of Public Health
Annals Am Acad Pol & Soc Sci	The Annals of the American Academy of Politics and and Social Science
ASIL	The American Society of International Law
Aus Dis Rev	Australian Disability Review
Aus J Primary Health	Australian Journal of Primary Health
Aus J Pub Health	Australian Journal of Public Health
Aust	Australia (jurisdiction)
BMJ	British Medical Journal
Buff L Rev	Buffalo Law Review
Bull WHO	Bulletin of the World Health Organization
BYBIL	British Year Book of International Law
Cam Q Health Ethics	Cambridge Quarterly of Healthcare Ethics
CAT	Convention against Torture
CC	Constitutional Court (South Africa)
CEC	Commission for Environmental Cooperation of North America
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
Chi-Kent L Rev	Chicago-Kent Law Review
Child Dev	Child Development (journal)
Child	Child: Care Health and Development (journal)

CIS	International Occupational Safety and Health Information Centre
CJLJ	Canadian Journal of Law and Jurisprudence
CMAJ	Canadian Medical Association Journal
CMWF	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CO CAT	Concluding Observations of the CAT Committee
CO CEDAW	Concluding Observations of the CEDAW Committee
CO CRC	Concluding Observations of the CRC Committee
CO ESC	Concluding Observations of the ESC Committee
CO HRC	Concluding Observations of the Human Rights Committee
Cochrane Database Syst	Cochrane Database of Systemic Reviews Rev
COE	Council of Europe
Colum L Rev	Columbia Law Review
Copyright Bull	Copyright Bulletin
Cork OL Rev	Cork Online Law Review
Cornell Intl LJ	Cornell International Law Journal
CRC Committee	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRR	Center for Reproductive Rights
CSDH	Commission on Social Determinants of Health
Dev Pol'y Rev	Development Policy Review
DFID	Department for International Development (UK)
Duke LJ	Duke Law Journal
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EIA	Ethics and International Affairs (journal)
EJIL	European Journal of International Law
Emory Intl L Rev	Emory International Law Review
Enviro Health Perspectives	Environmental Health Perspectives (journal)
ESC Committee	Committee on Economic, Social and Cultural Rights
Eur Psych	European Psychiatry (journal)
Expert Op Therapeutic	Expert Opinion on Therapeutic Patents Patents

FamCt	Family Court (Australia)
FAO	Food and Agriculture Organization
GA	United Nations General Assembly
Geo LJ	Georgetown Law Journal
GNP	Gross National Product
Harv Hum Rts J	Harvard Human Rights Journal
Harv L Rev	Harvard Law Review
HC	High Court
Health & Hum Rts	Health and Human Rights (journal)
Health Matrix	Health Matrix: Journal of Law and Medicine
Health Pol'y & Planning	Health Policy and Planning (Journal)
HELI	Health and Environment Linkages Initiative
HL	House of Lords
HRC	United Nations Human Rights Committee
HRL Rev	Human Rights Law Review
HRLJ	Human Rights Law Journal
Hum Rts Brief	Human Rights Brief
Hum Rts Q	Human Rights Quarterly
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICDC	International Child Development Centre
ICESCR	International Covenant on Economic Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICPD	International Conference on Population and Development
IDS Bull	IDS Bulletin
IILJ	<i>Institute of International Law and Justice</i> (New York University School of Law)
ILC	International Law Commission
ILO	International Labour Organization
IMCI	Integrated Management of Childhood Illness (WHO)
IMF	International Monetary Fund

Ind Intl & Comp LR	Indiana International and Comparative Law Review
Inter-Am Ct HR	Inter-American Court of Human Rights
Intl Affairs	International Affairs (journal)
Intl J Child Rts	International Journal of Children's Rights
Intl J Gyn & Obs	International Journal of Gynecology and Obstetrics
Intl J Health Services	International Journal of Health Services
Issues L & Med	Issues in Law and Medicine (journal)
J Contemp'ry HL & Pol	Journal of Contemporary Health Law and Policy
J Cultural Div	Journal of Cultural Diversity
J Dis Pol'y Studies	Journal of Disability Policy Studies
J Epidemiology	Journal of Epidemiology and Community Health & Comm Health
J Fam L	Journal of Family Law
J Generic Med	Journal of Generic Medicines
J Health Econ	Journal of Health Economics
J Hum Dev	Journal of Human Development
J Hum Lactation	Journal of Human Lactation
J Hum Rts Practice	Journal of Human Rights Practice
J Med Ethics	Journal of Medical Ethics
J Med Phil	Journal of Medicine and Philosophy
J Pediatrics	Journal of Pediatrics
J Pub Health Pol'y	Journal of Public Health Policy
J Transnat'l L & Pol'y	Journal of Transnational Law and Policy
J World Invest & Trade	Journal of World Investment and Trade
J World Trade	Journal of World Trade
JL Med & Ethics	Journal of Law, Medicine and Ethics
JLM	Journal of Law and Medicine
JWIP	Journal of World Intellectual Property
LJIL	Leiden Journal of International Law
LON	League of Nations
LS	Legal Studies (journal)
MDG	United Nations Millennium Development Goal
Med & L	Medicine and Law (journal)
Med L Rev	Medical Law Review
Ment Retard Dev Disabil	Mental Retardation and Developmental Disabilities
Res Rev	Research Reviews



Mich J Intl L	Michigan Journal of International Law
MJIL	Melbourne Journal of International Law
Mt Sinai J Med	Mount Sinai Journal of Medicine
New Eng J Med	New England Journal of Medicine
NILR	Netherlands International Law Review
NQHR	Netherlands Quarterly of Human Rights
NZAID	New Zealand Agency for International Development
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Ohio NUL Rev	Ohio Northern University Law Review
OJLS	Oxford Journal of Legal Studies
PAHO	Pan American Health Organization
PCH	Primary Health Care
PHAST	Participatory Hygiene and Sanitation Transformation Approach
PHE	Public Health Ethics (journal)
Phil & Pub Aff	Philosophy and Public Affairs
Phil Q	The Philosophical Quarterly
Pol & Life Sci	Politics and the Life Sciences (journal)
Pol Theory	Political Theory (journal)
Prim'ry HCR & Dev	Primary Health Care Research & Development (journal)
PSRH	Perspectives on Sexual and Reproductive Health (journal)
RCADI	Recueil des Cours de l'Académie de Droit International
Reg & Governance	Regulation and Governance (journal)
SAJ Hum Rts	South African Journal of Human Rights
Sask L Rev	Saskatchewan Law Review
SC	Supreme Court
Soc Sci & Med	Social Science and Medicine (journal)
Stan L Rev	Stanford Law Review
Sth Afr	South Africa (jurisdiction)
Stud Transnat'l Legal Pol'y	Studies in Transnational Legal Policy
SUL Rev	Southern University Law Review
Syd LR	Sydney Law Review

TRIPS	Trade-Related Aspects of Intellectual Property Rights
U Pa L Rev	University of Pennsylvania Law Review
UC Davis L Rev	UC Davis Law Review
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNC	United Nations Charter
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
UNSWLJ	University of New South Wales Law Journal
VSC	Victorian Supreme Court (Australia)
VSCA	Victorian Supreme Court of Appeal (Australia)
Wake Forest L Rev	Wake Forest Law Review
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMA	World Medical Association
Yale J Intl L	Yale Journal of International Law
Yale JH Pol L & Eth	Yale Journal of Health Policy, Law, and Ethics
Yale JL & Hum Rts	Yale Journal of Law and Human Rights
Yale JL & Human	Yale Journal of Law and the Humanities
YB Intl L Comm'n	Yearbook of the International Law Commission
Youth Studies Aus	Youth Studies Australia

# Contents

<i>Table of Cases</i>	xiv
<i>Table of Treaties</i>	xvi
<i>List of Abbreviations</i>	xviii
Introduction	1
I Clarifying expectations	6
II Constructing a meaning for the right to health	8
A The history of the right to health	8
B The conceptual foundations of the right to health	9
C The need for a persuasive methodology	10
D The meaning of health	11
E The obligation of states to recognize the right to health	11
I Charting the History of the Right to Health	14
I Introduction	14
II From invisible to inalienable: the recognition of the right to health	16
III The origins of the right to health	19
A The need to navigate the dangers of excessive liberalism and collectivism	19
B The nexus between war, rights, health, and peace	23
C The WHO and the right to the highest attainable standard of health	27
D The adoption of the UDHR and its aftermath—a common enemy unites then the Cold War divides	30
E Using history to understand the meaning of the right to health	33
IV The role of public health in delivering the right to health	34
A The ancient commitment to collective action to protect health	34
B The reality of mixed motivations underlying collective health measures	35
C The rise and fall of the Enlightenment	36
D State expansion and the Industrial Revolution—towards an instrumentalist vision of public health	37
E The rebirth of rights and the struggle for justice	38
F Transforming national differences into an international commitment	39
V Conclusion: looking into and beyond the history of the right to health	41