THE RIGHT TO “THE HIGHEST ATTAINABLE STANDARD OF HEALTH”: TRADE AGREEMENTS AND THE RIGHT TO HEALTH IN AFRICA

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Constitution of the World Health Organisation: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”¹

Marrakesh Agreement Establishing the WTO: “[…] their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living […]”²

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1. Context: The Tension between the Right to Health and Trade Agreements

An indication of the value of human rights approaches to health can be found in the age-old wisdom that is embedded in the socially and economically holistic definition of health offered in the Constitution of the World Health Organisation (hereafter “WHO”). There health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. This is complemented by that document’s framing of public health in persuasive human rights language, as follows:

“the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the full cooperation of individuals and States”.

Although, since the Universal Declaration of Human Rights (hereafter “UDHR”) 1948, a host of human rights treaties and norms have adopted similar language in the context of formulations of the right to health, a conspicuous – if not dominant - school of thought has long existed within human rights discourse and activism that dichotomises so-called civil and political rights from so-called Economic, Social and Cultural (ESC) rights. This dichotomy has often treated ESC rights (the category to which the right to health belongs) as the so-called “second generation rights”. The implication of this is that civil and political rights are considered “first generation” rights, and are deemed “justiciable” because their violation by the State or agencies of the State has been constructed as eminently remediable.

3 Preamble to the Constitution of the World Health Organisation, supra note 1.
4 Ibid.
5 See Brigit Toebes, “Towards an Improved Understanding of the International Human Right to Health”, Human Rights Quarterly 21 (1999) 3, p. 661 (arguing that although it is often asserted that all human rights are interdependent, interrelated, and of equal importance, in practice, Western states and NGOs have tended to treat economic, social and cultural rights as if they were less important than civil and political rights).