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responding to needs or playing COVID-19 geopolitics?

Briefing

The WHO pandemic treaty: responding to needs or playing COVID-19 geopolitics?

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The coronavirus (COVID-19) crisis has ignited eagerness in some circles for new binding instruments in the global health arena. This is an unexpected development, in many ways: health policy arrangements are mostly grounded on soft norms, and the World Health Organization (WHO) has adopted binding agreements only twice in its 76 years of history. On several occasions, a clear message of opposition to treaty proposals in past negotiations at the WHO² had been manifested by those very influential member states that are now spearheading the idea of a binding treaty for pandemic preparedness and response. The emergency scenario triggered by SARS-CoV-2 has apparently healed the treaty fatigue symptoms – particularly after the laborious negotiations on the Framework Convention on Tobacco Control (FCTC)³ – that several multilateral public health actors had maintained was the source of their reluctance to binding norm-setting. The proclaimed intention now is to build a more robust global health architecture that will protect future generations.⁴ The recognition is that there will be other pandemics and major health emergencies in the future, which no single government or multilateral agency can tackle alone.

A catastrophe that should not have happened

There is no doubt that COVID-19 and other recent health emergencies (in August 2021, national authorities confirmed the first ever case of the highly infectious Marburg virus in West Africa) have shown that the world is still not effectively able to prepare for, predict, prevent, respond to and recover from a multi-country outbreak or pandemic. The fact is, as the WHO Independent Panel for Pandemic Preparedness and Response has reminded us in its outspoken report⁵ on the woeful reality of COVID-19, that the pandemic should never have occurred in the first place. Not only did the new coronavirus arrive in a world that had ignored warnings coming from public health officials, infectious disease experts, and the majority of recommendations from previous international commissions and organizations, but the international community had all the technical knowledge and tools to confine the viral evolution and make SARS-CoV-2 a geographically controlled epidemic. It simply did not do it. The WHO Director-General declared that the outbreak constituted a Public Health Emergency of International Concern (PHEIC) on 30 January, when there were already 98 cases in 18 countries outside China.⁶ But his declaration was

1 A summary of this Briefing Paper has been published in Spotlight on Sustainable Development 2021 (<https://www.2030spotlight.org/en>).

2 The rejection of a WHO treaty on needs-driven research and development (R&D) is a contentious case in point: <https://www.twn.my/title2/health.info/2016/h1160601.htm>

3 https://www.who.int/fctc/text_download/en/

4 <https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty>

5 COVID-19: Make it the Last Pandemic, Report of the Independent Panel for Pandemic Preparedness and Response, May 2021, <https://theindependentpanel.org/>

6 WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV), Geneva, 30 January 2020, [https://www.who.int/director-general/speeches/detail/who-director-general-sstatement-on-ih-er-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-sstatement-on-ih-er-emergency-committee-on-novel-coronavirus-(2019-ncov))

not followed by forceful and immediate emergency responses in most countries, despite the mounting evidence that a highly contagious new pathogen was spreading around the planet. “For a strikingly large number of countries, it was not until March 2020, after COVID-19 was characterized as a ‘pandemic’, and when they had already seen widespread cases locally and/or reports of growing transmission elsewhere in the world, and/or their hospitals were beginning to fill with desperately ill patients, that concerted government action was finally taken.”⁷ In this way, COVID-19 has comfortably become a pandemic of inequalities and inequities:⁸ those with less or no social protection were more exposed to the new virus, at times because of pre-existing health conditions that made them more vulnerable to it, more often because of the nature of their work and their living conditions, or due to the risk of losing their daily *hand-to-mouth* income.

The COVID-19 slide from an outbreak into a pandemic, with its social and economic crises attached, is the consequence of failed government leadership and cooperation at national and international levels. But another part of the story has to do with the difficulties in which countries found themselves as they scrambled to get hold of suddenly needed medical equipment and supplies: masks, diagnostic tests, ventilators, personal protective equipment (PPE), and so on. They also needed funds and an expanded workforce to respond to the exponentially growing COVID-19 caseload. No international system existed that had created accessible stockpiles sufficient for the scale of country needs, or that could trigger the flow of resources and intervene to regulate and manage orderly access. “It is clear,” as the Independent Panel reports, “that the combination of poor strategic choices, unwillingness to tackle inequalities and an uncoordinated system created a toxic cocktail which allowed the pandemic to turn

into a catastrophic human crisis.”⁹

In this second year of SARS-CoV-2, there is no lack of international meetings around the global health emergency. Yet, the ever-increasing fragmentation of initiatives on the one hand, and the vaccine apartheid story on the other – the entire continent of Africa has only fully immunized 2 percent of its population against COVID-19 – reconstitute a disheartening sense of reality: 17 months after the WHO declared a pandemic, the global divisions solidified by the no longer novel coronavirus are starker than ever.

Meanwhile, COVID-19 continues to rage with its pedagogy of new variants: as we write, China has ordered mass testing in Wuhan after an unusually wide series of COVID-19 outbreaks in the city where the disease was first detected in late 2019.¹⁰ Cases, hospitalizations and deaths are spiking in many parts of the world. At the beginning of August 2021, the 200 millionth case of COVID-19 was reported to WHO, only six months after the world passed 100 million reported cases¹¹ – and we know that the real number of cases is much higher. The question is: would a new international pandemic treaty be the missing tool required to overcome the identified gaps and legal constraints, and garner stronger political commitment from WHO member states against infectious disease outbreaks?

Why should a pandemic treaty proposal have become a priority at the WHO?

The pandemic treaty debate originated at the 148th session of the WHO Executive Board in January 2021. The proposal was first announced by the President of the European Council, Charles Michel, at the Paris Peace Forum in November 2020, and then

7 COVID-19: Make it the Last Pandemic, May 2021, p. 28, https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf

8 N. Maani, A.M. Abdalla, S. Galea, Avoiding a legacy of unequal non-communicable disease burden after the COVID-19 pandemic, *Lancet Diabetes & Endocrinology*, 2021; 9(3):133–135, [https://www.thelancet.com/journals/landia/article/PIIS2213-8587\(21\)00026-7/fulltext](https://www.thelancet.com/journals/landia/article/PIIS2213-8587(21)00026-7/fulltext)

9 COVID-19: Make it the Last Pandemic, p. 43.

10 https://apnews.com/article/health-china-coronavirus-pandemic-wuhan-8fa8edb073629c692ac51772e5e9d775?utm_source=Saithru&utm_medium=email&utm_campaign=Aug3_MorningWire&utm_term=Morning%20Wire%20Subscribers

11 WHO DG opening remarks, WHO press conference, Geneva, 11 August 2021, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-august-2021>

championed among a handful of reforms floated at the Geneva agency. It received the immediate enthusiastic welcome from the WHO Director General: in his quest for political cooperation around the pandemic or, quite as likely, in his quest for his prospective re-election in 2022. As mentioned, ever since the COVID-19 pandemic started, governments have continued to flout WHO's guidance; one of the reasons, according to accredited experts, is WHO's feeble legal mandate in responding to a pandemic scenario.¹²

It is worth noting that an instrument of international law that provides the WHO with the framework for emergency coordination and countries' response has existed for some time. This is the International Health Regulations (IHR) document¹³ adopted by the World Health Assembly (WHA) in 1969. In 2005, in the wake of the SARS outbreak (2002-2003), the 58th WHA unanimously agreed on the revision of the IHR with the task to "prevent, protect against, control, and provide a public health response to the international spread of disease...". The IHR were then adapted to the exponential increase in international travel and trade, resulting in the emergence of international disease threats and other health risks. Since it entered into force in June 2007, the IHR 2005 has been the core tool to regulate disease outbreaks with an international dimension. The treaty's approach was innovative in many ways;¹⁴ "It was meant to usher an era of rules-based disease surveillance and response, where state sovereignty gives in to shared goals of the international community. Its obligations and protocols reflect a condensed understanding of best practices developed through many decades of diplomatic negotiations, expert input, and also

on-the-ground-operations in health campaigns".¹⁵ However, the COVID-19 emergency has disclosed the not-so-hard side of the IHR. The repeated breaches of legal obligations have mirrored a number of problematic features in the existing framework, including the weak system of accountability, the lack of a process for independent verifications and compliance evaluation, along with ambiguities in relation to travel restrictions.

Together, the EU and WHO managed to mobilize the backing of 25 heads of State of both high-and-low income countries to a global call on 30th March for the creation of an international pandemic treaty to make the world better prepared to react to future health crises, and strengthen global capacity to predict, prevent and respond to pandemic threats.¹⁶ The proposal, we are told, aims to ensure long-term political commitment; to define clear processes and tasks; to ensure long-term public and private sector support at all levels.¹⁷ Moreover, as we read, the international pandemic treaty "would make it possible to integrate the One Health approach in the international health architecture, thereby connecting the health of humans, animals and the planet".¹⁸ The focus would be on enhancing the "sharing of information", the "sharing of pathogens" and the "sharing of technologies", as highlighted by the WHO Director General Dr Tedros Adhanom Ghebreyesus when presenting the call at the WHO with EC President Charles Michel.¹⁹

The proposal is light on details, but the notion of a new pandemic treaty seemingly seeks to avoid the attitudes of secrecy and health nationalism that have hampered the containment of the SARS-CoV-2

12 S. L. Vijav, WHO's Legal Mandate Is Weak In Responding to COVID-19 Emergency; But Changes Are Up To Member States, Health Policy Watch, 23 April 2020, <https://healthpolicy-watch.news/whos-legal-mandate-is-weak-in-responding-to-covid-19-emergency-but-changes-are-up-to-member-states/>

13 <https://www.who.int/publications/i/item/9789241580410>

14 D.Fidler, From International Sanitary Conventions to Global Health Security: The New International Health Regulations, Chinese Journal of International Law, Volume 4, Issue 2, November 2005, pp. 325-392, <https://doi.org/10.1093/chinesejil/jmi029>

15 A. Von Bogdandy and P.A. Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis, MPIL Research Paper Series, No 2020-07, Max Planck Institute for Comparative Public Law and International Law, March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650

16 <https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture>

17 <https://www.consilium.europa.eu/en/infographics/towards-an-international-treaty-on-pandemics/>

18 Ibid.

19 <https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty>

contagion, and it could capture many ideas spelled out in the Independent Panel report. The initiative stems from a European demarche directed at keeping EU geopolitical clout, in the wake of the political and financial leadership exercised by France and Germany in building the 2020 coalition of the support to the WHO²⁰ against former US President Trump's hazardous departure from the organization. The EU is also actively fashioning its strategic position in the face of China's ascending global health hegemony,²¹ not only in Geneva. According to Germany, a pandemic treaty negotiated "under the roof of the WHO" is the preferred approach to strengthen the multi-lateral health architecture. Since the beginning, the response to COVID-19 has been a political plaything both domestically and internationally, and had indeed put serious strains on existing frameworks of global governance. Global support for the treaty is a far-reaching goal;²² so far, the circumstance that China, the US and Russia have shown no appetite for the proposal is a fact that cannot be ignored.

The pushed-for recommendation of a new pandemic treaty made its way to the 74th WHA in May 2021. The issue triggered great interest during the assembly. Indeed, numerous member states had raised concerns about it in the lead up to and during the WHA. They had expressed hesitance on starting discussions about a treaty to avoid future pandemic *right in the middle of the COVID-19 crisis*: "Only once COVID has been defeated will it be appropriate for us to consider fundamental changes to the way WHO works and new treaties or conventions. We must understand why the instruments we have are not working. Is the problem with the instruments themselves? Or the way they are being used? Only a multi-faceted analysis involving all states could allow us to draw conclusions on that and to develop a future health

architecture," the Russian representative said during the WHA debate.

In the end, the 74th WHA resolved to postpone the potentially polarizing discussion until a special session of the WHA (WHASS) is convened for "considering the benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and response",²³ 29 November-1 December 2021. The WHASS will have to establish "an intergovernmental process" to draft and negotiate this instrument, "taking into account the report of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies".²⁴

Some experts and countries view the creation of a pandemic treaty as a means to strengthen the role of the WHO and the implementation of the International Health Regulations. They also interpret the treaty as a strategy to ascribe responsibilities to other stakeholders beyond governments, in a whole-of-society approach that mainly winks at the private sector: "the safety of the world's people cannot rely solely on the goodwill of governments", said the WHO Director General, Tedros Adhanom Ghebreyesus when closing the 74th WHA.

The final decision reflects what the USA had advocated for, but rather than sealing the pandemic treaty negotiation roadmap in March 2022, as planned by the EU-WHO treaty paladins, the current administration of President Biden would still set that date for convening a high-level ministerial meeting to examine and consider the pathway of an international instrument or treaty,²⁵ outside of the WHO. Differences of opinion remain on whether the route for the new binding instrument ought to be devised within

20 <https://www.france24.com/en/20200625-germany-and-france-shore-up-support-for-who-seek-global-answer-to-covid-19> and also <https://healthpolicy-watch.news/germany-france-push-for-more-power-funding-for-who/>

21 L. Husain and G. Bloom, Understanding China's growing involvement in global health and managing processes of change, *Globalization and Health*, 1 May 2020, 16: 39, <https://doi.org/10.1186/s12992-020-00569-0>

22 <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/>

23 WHA decision on convening a special session of the World Health Assembly to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response: [https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74\(16\)-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74(16)-en.pdf)

24 https://apps.who.int/gb/ebwha/pdf_files/EB148/B148_18-en.pdf

25 E.R. Fletcher, Exclusive – United States Holds Back on Bold Move Toward Pandemic Treaty, *Health Policy Watch*, 21st May 2021, <https://healthpolicy-watch.news/exclusive-us-still-holding-back-on-bold-move-toward-pandemic-treaty/>

the context of the UN General Assembly in New York or as an agreement negotiated in Geneva. It is a fact, however, that the WHO Independent Panel for Pandemic Preparedness and Response, the G20 Global Health Summit, the 74th World Health Assembly and the G7 (in June 2021) have all endorsed the idea of an international negotiation on this field, now.

Dwindling perplexities about the pandemic treaty

The landscape of global health governance has undergone a radical and uncontrolled transformation since the end of the 1990s. The appearance of private actors on the global health scene and their incorporation into what was previously a publicly dominated health governance system is the most striking phenomenon that has literally revolutionized the governance architecture in health. In a rather short time, this has gradually lost its lines of authority and responsibility, both politically and legally. Across this shift, major traditional institutions remained underfunded, often contested, and forced to adapt to the new reality – as is the case for the WHO – of overlapping and competing mandates.

The COVID-19 crisis has exasperated this pandemic governance complexity in many ways. It has crept into the ambiguous relationship between economics and science and it has increased scepticism concerning medical science. COVID-19 has come at a time of a dramatic decline of substantive democracy and a rise of authoritarianism, contributing to the potential long-term risks of the reshaping of state power.²⁶ The virus continues to sweep the world in the flare-up of big-powers' rivalry and in the scenario of the broken threads of multilateralism.²⁷ Meanwhile, the empty seats of the new online diplomacy imposed by COVID-19 pose additional problems for the multilateral machinery, deepening power imbalances in decision-making dynamics, albeit under the presumption

of an extended participation capacity.²⁸ Against this backdrop, a good many questions about the breathing catastrophe triggered by the virus remain unanswered. We do not know yet how the outbreak originated, or why some regions have had less devastating epidemics than others. What we know instead, from a global study published in April by the Initiative for Policy Dialogue at Columbia University,²⁹ is that most governments are imposing budget cuts precisely at a time when their citizens and economies are in greater need of public support. Analysis of IMF fiscal projections shows that budget cuts are expected in 154 countries this year, and as many as 159 countries in 2022. This means that 6.6 billion people, or 85 percent, of the global population will be living under austerity conditions by next year, a trend likely to continue at least until 2025. The high levels of expenditures needed to cope with the pandemic have left governments with growing fiscal deficits and debt, but instead of exploring financing options to provide direly needed support for socio-economic recovery, governments – advised by the IMF, the G20 and other institutions – persist in opting for austerity. Meanwhile, the reality of hunger is growing in “rich” countries, alongside the poor ones.³⁰

In this arena, it is no wonder that key questions should start to arise in various circles, as the debate about the pandemic treaty unfolds. For example: are we sure it is a good idea to kickstart global negotiations on a new treaty in this conjuncture of multilateral stress, and deepened decline of international cooperation? What is the core justification for another treaty to move forward, while we remain in this emergency, with many countries overwhelmed and Ministries of Health stretched to their limits? Why this rushed process? Some experts simply do

26 <https://www.voanews.com/covid-and-democracy>

27 C.F. Pereira Da Silva Gama, Broken Threads: Reshaping Multilateralism with COVID-19 Under Way, E-International Relations, 10 May 2021, <https://www.e-ir.info/2021/05/10/broken-threads-reshaping-multilateralism-with-covid-19-under-way/>

28 We have directly witnessed at the 74th WHA last May, and in the previous governing bodies' meeting of the WHO since the beginning of the pandemic, that the current adoption of resolutions is deprived of any substantive negotiations among member states. The overall dynamic of these meetings, more often than not, results in a performance of ceremonial deliberations, or conventional statements on what individual member states have done.

29 <https://policydialogue.org/files/publications/papers/Global-Austerity-Alert-Ortiz-Cummins-2021-final.pdf>

30 <https://www.hrw.org/world-report/2020/country-chapters/global-4>

not find the idea so alluring. Others have started to interpret it as a major distraction from the current challenges.³¹ The world is not short of treaties and binding frameworks, they say, the international community has enough mechanisms to enable it to act, if it wanted to.³² What is the benefit of yet another instrument? The global health community rather needs to focus on reforming the tools that exist already, so that they serve their purpose better. Concerns also arise over the WHO's ability to tackle critical areas such as finance, trade, supplies, law enforcement, and the broader economic and social disruptions that are usually caused by a pandemic.

The International Health Regulations (IHR) cannot be ignored any longer, as they have largely been obscured during COVID-19, including by the WHO. There is no doubt that the IHR must be revised and improved again – as happened after SARS – in the light of the pandemic event, but a deep understanding of the shortcomings in their implementation in 2020 needs to happen. Some failures are patently related to geopolitics and the absence of a sanctioning mechanism, as well as to the new articulations between States, societies and institutions that COVID-19 has pushed for, setting alternative priorities. Lack of national capacities and resources in countries³³ is yet another Achilles' heel to IHR implementation that cannot be sidelined. If this is the scenario, how would a new treaty on the same operational arena help governments deal with the preparedness and response to pandemics? Would it not enhance legal fragmentation instead? And what juridical interaction would ultimately exist between the two normative tools? While this remains unclear,

the frequently asked questions (FAQ) prepared by the Group of Friends of the Treaty states that “with respect to the IHR, it is important to note that the treaty would not replace the IHR – on the contrary, the IHR would be a cornerstone of the treaty. The treaty would recognize the central role played by the IHR as the only international legal framework for preparedness and response to the international spread of disease at a technical level, and measures to further strengthen the IHR could be included in the treaty, without having to re-open the IHR themselves”.³⁴

It is useful to recall that art. 57 of the IHR grants legal space for negotiating “special treaties and arrangements in order to facilitate the application of the Regulations”. The “all hazards approach” of the IHR is properly suited to most events of international spread of diseases, except for pandemics, some analysts have commented, taking for granted that these would require a dedicated tool.³⁵ Their interpretation is that “the treaty should overtake the IHR once the international spread of disease reaches pandemic potential and is formally declared as such. The criteria and modalities of declaring a public health emergency of pandemic potential (not merely of international concern as in the current IHR), should therefore be a core provision of the future treaty, with further measures “triggered” to prevent the event reaching pandemic proportions, and to respond should prevention and containment fail”.³⁶ The assumptions about the current international treaty on pandemics as insufficient to tackle future infectious disease outbreaks seem to lack scientific evidence and rather sound instrumental to the propaganda supply engineered for the treaty. Likewise, the WHO reports which provide the rationale for the treaty contain remarkably insufficient analysis on the far-reaching and multidimensional negative effects that the WHO and national governments' responses to the viral

31 N. Ramakrishnan, K.M. Gopakumar, S. Shashikant, WHO: Should Members Pursue a Pandemic Treaty, in the Midst of a Global Pandemic?, TWN Info Services on Health Issues, 12 May 2021, Third World Network, <https://www.twn.my/title2/health.info/2021/hi210507.htm>; N. Ramakrishnan and K.M. Gopakumar, Proposal for a WHO treaty on pandemics raises concerns, Third World Network Report, 14 July 2021, <https://www.twn.my/title2/health.info/2021/hi210702.htm>

32 S. L. Vijay, Global Health Is In Disarray: But Is A Pandemic Treaty a Way Out?, Health Policy Watch, 23 April 2021, <https://healthpolicy-watch.news/global-health-is-in-disarray-but-is-a-pandemic-treaty-the-way-out/>

33 <https://www.graduateinstitute.ch/covid-webinar-law>

34 Ramakrishnan and Gopakumar, Proposal for a WHO treaty on pandemics raises concerns, p. 14.

35 H. Nikogosian and I. Kickbush, How would a pandemic treaty relate with the existing IHR (2005)?, BMJ Global Health, 23 May 2021, <https://blogs.bmj.com/bmj/2021/05/23/how-would-a-pandemic-treaty-relate-with-the-existing-ih-2005/>

36 Ibid.

waves of COVID-19 have had and continue to have on peoples' health, the social fabric and lives around the planet.³⁷

According to the institutional lobbying carried out by the European Union, the pandemic treaty proposal – which seems to be the geopolitical reverberation of having finally reached some commonality in vaccine distribution and economic aid in Europe after that COVID-19 had inflicted a number of communitarian blows in 2020 – will enhance international efforts to reinforce global health security.³⁸ The question is: security for whom? Some expert opinions contend that the pandemic treaty discussions should impose an opportunity and an imperative “to rethink the paradigm of global health security that has shaped the current international response to the COVID-19 pandemic. The prevailing paradigm is antithetical to the core purpose of global pandemic preparedness and response”.³⁹ The notion of “global health security” that emerged with the international spread of diseases in the context of neoliberal economic globalization, the structural phenomenon of migrations mostly due to armed conflicts, economic instability and climate change “led to the reframing of infectious diseases as a *national security* threat, bringing the language and thinking of the security sector, concerned with defending national borders, not human health”.⁴⁰ It is problematic that the focus in current debates about the proposed pandemic treaty should insist “on enforceability in relation to the willingness of governments of the Global South to share information and materials with the WHO and other governments, and to allow independent verification”: with

the somewhat implicit assumption that pandemic risks originate in poorer regions of the world.⁴¹

The truth about pandemic preparedness and response, please

In 2020, three historic trajectories of incremental crises have come together, taking the world's breath away: the COVID-19 pandemic, the planet's shifting climate and rising inequalities. The most immediate of these forces is the novel coronavirus, which has magnified the systemic frailties of political arrangements and of the value frame of neoliberal globalization, including in the ‘advanced’ democracies, in collectively terrifying ways. The health emergency that we are facing is deeply connected with the health emergency the earth is facing, as the latest IPCC report illustrates.⁴² Humans have so brutally altered the environment that we have become agents of transformations we cannot reliably control. But new trends emerge in global health after COVID-19, accelerated by the considerable transformations in 2020. These are increasingly defined by aspirations that aim to expand the notions of health and social justice to encompass planetary, racial, gender and digital justice.⁴³

With diligent nonchalance, governments have marginalized human rights in the past decades. They can ill afford to continue doing so after COVID-19.⁴⁴ It seems obvious that a new set of organizing principles, institutions and norms will have to stem from the current conjuncture, if the international community wants to project the possibility of survival

37 S. Behrendt and A. Mueller, Why the rush? A call for critical reflection on the legal and human rights implications of a potential new international treaty on pandemics, EJIL:Talk!, blog of the European Journal of International Law, 29 July 2021, <https://www.ejiltalk.org/why-the-rush-a-call-for-critical-reflection-on-the-legal-and-human-rights-implications-of-a-potential-new-international-treaty-on-pandemics/>

38 <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/>

39 S. Fukuda-Parr, P. Buss, A.E. Yamin, Pandemic Treaty needs to start with rethinking the paradigm of global health security, BMJ Global Health, 25h May 2021, <https://gh.bmj.com/content/bmjgh/6/6/e006392.full.pdf>

40 Ibid.

41 Ibid.

42 J.Tollefson, IPCC climate report: Earth is warmer than it's been in 125,000 years, Nature, 9 August 2021, https://www.nature.com/articles/d41586-021-02179-1?utm_source=Nature+Briefing&utm_campaign=13115e4795-briefing-dy-20210816&utm_medium=email&utm_term=0_c9dfd39373-13115e4795-44824705

43 N. Dentico, The Breathing Catastrophe: COVID-19 and Global Health Governance, Development 64, 13 July 2021, <https://link.springer.com/article/10.1057%2Fs41301-021-00296-y>

44 S. Davies (on behalf of signatories), “An international pandemic treaty must centre on human rights, The BMJ opinion, 10 May 2021, <https://blogs.bmj.com/bmj/2021/05/10/an-international-pandemic-treaty-must-centre-on-human-rights/>

for humankind and other living beings. But will the hasty pandemic treaty address the systemic pathologies of an international (dis)order rooted in the universalization of the Western neoliberal ideologies?⁴⁵ The narrow window of the policy areas that the pandemic treaty is expected to be dealing with – “research, innovation, financing and transport”⁴⁶ – will arguably be directed to building resilience and mitigating future risks, while the planetary and governance plundering by global economic actors will most likely be excluded from the content and process-organization of the diplomatic route. This separation of the health crisis from the socio-economic and environmental crises looks anything but promising: the asphyxiation that has facilitated and ultimately produced the conditions for the pandemic crisis will have to be addressed, while other sources of asphyxiation are in the making.

The pandemic crisis has to do with the right to development. The development myth, one of the expressions of the Western attempt at extending its own episteme to the world and today one of the unchallengeable norms of human progress, had already manifested its profound limits well before COVID-19. Its hegemonic affirmation, however, has severely eroded the capacity for most countries to determine alternative political and economic avenues, with an immense impact on health rights. Now that COVID-19 imposes the need for rethinking the economic sphere and the models of globalization, if we are to avoid future spillovers and pandemics, the WHO negotiation on the treaty will have to come to terms with the ongoing consultations, and the complicated discussions concerning the new draft Convention on the Right to Development⁴⁷ released – with symbolic coincidence – in January 2020 by the UN Office of the High Commissioner for Human Rights. The health emergency offers a unique opportunity for all States and international organizations to take the right to development seriously, and for several

reasons. In particular, the right to development is “a *bridging right* because it connects the rights of individuals (citizens) with those of groups and peoples, including indigenous peoples”.⁴⁸ It is a fact that several human rights are mainly experienced in community, as part of a group or population, while they also have meaning for each individual. This is certainly the case for the right to health, as we are potently experiencing with SARS-CoV-2.

One of the principles included in the debate on the Right to Development embraces the notion of sharing economic and technical resources as a mandatory principle, to sustain global equity. Everyone should have the right to the benefits of scientific progress and its application, not only to better prepare for health emergencies. As the international community toys with the idea of a pandemic treaty, COVID-19 vaccine distribution continues to reflect a tale of global inequality, with systemic hoarding from a bare handful of high-income countries⁴⁹ – 4.8 billion doses have been administered globally, but only 1.3 percent of people in low-income countries have received at least one dose (as of 18 August 2021).⁵⁰ Shameless enough to continue preaching the “leave no one behind” mantra in international circles,⁵¹ several wealthy nations have now announced plans to give their citizens a COVID-19 booster in a bid to help increase the protection of their most vulnerable citizens – even though the science is not clear on whether this third vaccine strategy will be effective or indeed necessary.⁵²

Those same countries and institutions, particularly in Europe, are propelling the pandemic treaty idea while consistently blocking – for ten months now – the possibility of temporarily waiving the pharma companies’ intellectual property rights (IPRs) to

45 F. Sarr, *Afrotopia*, MLA Univocal Series, December 2019, <https://www.upress.umn.edu/book-division/books/afrotopia>

46 <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/>

47 https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf

48 N. Schrijver, A new Convention on the human right to development: Putting the cart before the horse? *Netherland Quarterly of Human Rights*, 11 June 2020, <https://journals.sagepub.com/doi/full/10.1177/0924051920924547>

49 <https://www.nytimes.com/interactive/2021/03/31/world/global-vaccine-supply-inequity.html>

50 <https://ourworldindata.org/covid-vaccinations>

51 <https://www.nytimes.com/interactive/2021/05/15/world/covid-inequality-vaccines.html>

52 <https://www.nature.com/articles/d41586-021-02158-6>

expand access to medical knowledge and enhance decentralized production capacity for essential medical remedies against the contagion. The adoption of this legal provision was advanced to the World Trade Organization (WTO) by India and South Africa in October 2020, in compliance with Art. IX (4) of the Marrakesh Agreement.⁵³ The proposal has received support from over 100 WTO member states and from UN agencies, from the European Parliament and national parliaments in Europe, from a wide range of economists, jurists and public health experts, as well as from over 1,000 civil society organizations around the world.⁵⁴ The EU's resistance to the IP waiver, resulting in several diplomatic initiatives in Geneva, only shows to what extent the European Commission is ready to override democracy, to make sure IPRs and their monopolies are not touched.⁵⁵

The hypothesis of COVID-19 forcing the international community to rethink the IP monopoly capitalism⁵⁶ engineered over 25 years ago as quintessential to neoliberal globalization would not serve the access to medicines purpose alone,⁵⁷ but also serve the need of upholding digital rights in a digital age. The boom of digital health during the pandemic has incrementally enhanced the need, and the demand, for universal access to the internet and the digital technology, while upholding rights to digital privacy and non-discrimination, linked to strict regulations for the use of health data⁵⁸ – at this point of the international debate, a pandemic treaty cannot afford to ignore the

knowledge economy that rules, and ruins, the world.

Finally, as financing is one of the treaty's pillars, pandemic preparedness and response do indeed require constant strategic investment in health prevention and public healthcare. COVID-19 has shown the numberless drawbacks produced by austerity measures and financial cuts on health expenditures even in wealthy countries, endowed with health systems. To avoid future crises, how will most governments in the global South contribute to the effort if they continue to be trapped by debt service? There is a constant overlap between vulnerable or non-existent public healthcare systems and debt in low- and middle-income countries: 64 countries spend more on external debt payments than on public healthcare. Debt is *their* virus.

When talking about pandemic preparedness and response debt relief gains new meaning, as Western creditor countries have accumulated enormous ecological debts towards nations in the global South, via their economic recipes and transnational corporations. Creditors' ecological debt is indeed intertwined with sequential zoonotic events of the past, and with the predictions of future spillovers, as deforestation increases⁵⁹ and global ice loss is catching up to worst-case scenario forecasts.⁶⁰ How does the pandemic treaty idea situate itself vis á vis the fact that the international community refuses to untangle such key financial impediments to universal public health provision as debt cancellation, illicit financial flows, and only limits itself to promoting very meagre and time-bound debt service suspensions in the face of COVID-19?

Conclusions

Whatever the route of the pandemic treaty, it will not be possible for negotiators to sideline how deeply unjust the international order is, and to avoid positioning themselves vis á vis this conjuncture. The process set in place so far is such that the striking lack of public consultations makes everyone a mere

53 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True>

54 https://www.twn.my/title2/intellectual_property/trips_waiver_proposal.htm

55 <https://msfaccess.org/msf-analysis-eu-communications-trips-council-covid-19-ip-waiver-proposal>

56 U. Pagano, *The Crisis of Intellectual Monopoly Capitalism*, Cambridge Journal of Economics, Volume. 38, 13 November 2014, pp. 1409-1431, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537972

57 E. T'Hoen, *Covid shows the world it needs new rules to deal with pandemics*, Medicine Law and Policy, 21st May 2021, <https://medicineslawandpolicy.org/2021/05/covid-shows-the-world-it-needs-new-rules-to-deal-with-pandemics/>

58 S. Davies (on behalf of signatories), *An international pandemic treaty must centre on human rights*, The BMJ opinion, 10 May 2021, <https://blogs.bmj.com/bmj/2021/05/10/an-international-pandemic-treaty-must-centre-on-human-rights/>

59 <https://www.un.org/en/desa/global-forest-goals-report-2021>

60 <https://www.arcus.org/sign/sea-ice-outlook/2021/june>

spectator. In 2020, the international community decided with ACT-Accelerator to entrust the organizational setup and the operational management of the first viral pandemic in human history to public and private partnerships. In 2021, the pandemic treaty idea may purposely use the joint effort by the WHO and these multistakeholder alliances – the launching pad for the new global governance of the pandemic – to overrun power asymmetries and define the eve of a new normative era: one in which “*everybody should be in from the very beginning*”.⁶¹ Not merely a recontextualization of multilateralism, but the setting of novel criteria for shaping international law through the inclusion and involvement of corporate actors’ vested interests, in their metamorphic disguise. The COVAX Facility may indeed be the model that the few promoters have in mind for their pandemic treaty. If that were the case, we can be sure of one thing: we shall have nastier pandemics in the future and, once again, we shall not get it right.

61 C.F. Pereira Da Silva Gama, Broken Threads: Reshaping Multilateralism with COVID-19 Under Way, E-International Relations, 10 May 2021, <https://www.e-ir.info/2021/05/10/broken-threads-reshaping-multilateralism-with-covid-19-under-way/>, p. 5.

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