

CHILD-PROOFING GLOBAL PUBLIC HEALTH IN ANTICIPATION OF EMERGENCY

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I. THE TRAGIC RESPONSE TO COVID-19

To put things in perspective, the human race has made considerable progress. The first outbreak of the Black Death or bubonic plague in mid-1300s Europe killed an estimated 30–50% of Europe's population, tens of millions of people, in about four years.¹ By that standard, the international community as a whole has done a pretty great job responding to COVID-19, which as of February 11, 2021, has killed 2,362,735 people according to Johns Hopkins data.² That is about 0.03% of a global population of 7.8 billion people.³ We do better than the middle ages.

By almost any other assessment methodology, we are hard-pressed to give the international community high marks. The response has been characterized by a lack of transparency, substantial gaps in scientific understanding, inconsistent communication, lack of capacity for the manufacture of vaccines, substantial gaps in preparedness for diagnostics and personal protective equipment, absence to date of an effective treatment, and political conflict.⁴ What makes most of these problems the more glaring is that we understood the gaps well in advance, but we were not prepared to address them. This may be a general problem with low-probability, high-risk events because competition for resources within government budgets gives an advantage to immediate needs.⁵ For each government administration, the hope is that tenure in office will pass

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1 Sharon N. DeWitte, *Mortality Risk and Survival in the Aftermath of the Medieval Black Death*, 9 PLOS ONE 1–3 (2014), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0096513>. The Black Death was one of the most devastating epidemics in human history. It was the first outbreak of medieval plague in Europe, and it killed tens of millions of people, an estimated 30–50 percent of the European population, between 1347–1351.

2 Covid-19 Dashboard, JOHNS HOPKINS UNIV., <https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6> (last visited Feb. 11, 2021).

3 *Current World Population*, WORLDOMETER, <https://www.worldometers.info/world-population/> (last visited Feb. 11, 2021) (total population approximately 7,845,273,300).

4 See INDEP. PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE, SECOND REPORT ON PROGRESS (Jan. 2021), https://theindependentpanel.org/wp-content/uploads/2021/01/Independent-Panel_Second-Report-on-Progress_Final-15-Jan-2021.pdf [hereinafter INDEP. PANEL, SECOND REPORT].

5 Olga B. Jonas, *Pandemic Risk*, WORLD BANK, (Oct. 2013), http://www.worldbank.org/content/dam/Worldbank/document/HDN/Health/WDR14_bp_Pandemic_Risk_Jonas.pdf.

without a public health crisis. That potential for crisis is passed on to the next administration.

Regrettably for the international community, the pandemic struck during a confluence of political trends that culminated in strong nationalist and anti-science political movements.⁶ It remains hard to explain the ascendancy of Donald Trump to the apex of political power in the United States, and his continuing support from a large segment of the US population, notwithstanding that he has been voted out of office. The leader of the most militarily powerful nation on earth, still a dominant force from an economic standpoint, used his office – and the capitulation of his political party – to deliberately subvert measures to curtail the spread of the virus, publicly rejecting science along the way.⁷ He was not alone. In late November it was reported that President Bolsonaro in Brazil announced that he would refuse to be vaccinated, potentially undermining a vaccine roll-out in that country.⁸

At the other end of the political spectrum, we have governments, such as in China, that have done well in their internal control of the coronavirus through the imposition of strictly enforced social control measures,⁹ but where concerns are raised regarding the longer-term consequences from the standpoint of individual rights involving privacy, family life, speech, and freedom of movement.¹⁰ This entails the delicate boundary between elevated government authority during a health emergency, and assurance that individual rights are restored as exigent circumstances dissipate.

6 See, e.g., Peter J. Hotez, *Combating Antiscience: Are We Preparing for the 2020s?*, 18 PLOS BIOLOGY (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7141687/>; Frederick M. Abbott, *Confronting COVID-19 In A World Without WHO – Seriously?*, HEALTH POL’Y WATCH (Apr. 14, 2020), <https://www.healthpolicy-watch.org/confronting-covid-19-in-a-world-without-who-seriously/>.

7 See, e.g., Daniel Victor, Lew Serviss & Azi Paybarah, *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html>; Peter Baker & Nicholas Fandos, *House Managers Rest Their Case Against Trump, but Most Republicans Are Not Swayed*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/trump-impeachment-trial.html>. Privately, of course, Donald Trump was the first in line to engage with doctors employing every scientifically advanced treatment available when he was infected with the virus. Noah Weiland, Maggie Haberman, Mark Mazzetti & Annie Karni, *Trump Was Sicker Than Acknowledged with Covid-19*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/trump-coronavirus.html>.

8 Mauricio Savarese, *Brazil’s Bolsonaro Rejects COVID-19 Shot, Calls Masks Taboo*, AP NEWS, (Nov. 27, 2020), <https://apnews.com/article/pandemics-brazil-health-coronavirus-pandemic-latin-america-0295d39d3032aa14c6675b8b4080e8cc>.

9 Talha Burki, *China’s Successful Control of COVID-19*, 20 LANCET (Nov. 2020).

10 See, e.g., Yaqiu Wang, *The Human Toll of China’s Coronavirus Control Efforts*, HUM. RTS. WATCH (Mar. 12, 2020), <https://www.hrw.org/news/2020/03/12/human-toll-chinas-coronavirus-control-efforts>.

Nationalist trends and political conflict have dramatically affected international institutions – a case in point being the World Health Organization. Yes, an imperfect institution, but it plays a key role in facilitating cooperation, particularly for those countries and governments with limited capacity to develop their regulatory framework and to create robust health infrastructures without assistance.

Where does international law fit into this maze? Realistically, international law does not remove ineffective or even malevolent national leaders from political office except in the most extreme circumstances following armed conflict. But can international law provide a more resilient framework in which the decisions of national leaders during crisis are less likely to cause harm? A framework in which we are less susceptible to *ad hoc* and incoherent decision making?

In a way we are asking whether international law can child-proof the working space of global public health, making it less susceptible to the transient ebb and flow of national political leaders. A fully functioning global public health system would prepare us in advance to address viral and other pathogenic outbreaks in terms of robust R&D platforms and sound manufacturing infrastructure; it would alert us to an outbreak at the earliest possible date; and it would instruct us regarding the appropriate interim protective measures to take,¹¹ all without triggering perceptions of personal insecurity that lead to social unrest and conflict.¹²

If the international architecture worked properly, we would not get to where we reached during the COVID-19 pandemic. Of course, we face similar questions in other domains. If the IMF worked better, recessions might be avoided and countries would be less likely to default on their debts. If the World Bank worked better, more countries would move from low to middle-income, and from middle to high.

Business and economics perhaps more than disease and death may cause the international community and the governments within it to address pandemic preparedness more seriously. Widespread economic recession, unemployment, diminished trade, and ballooning government deficits worldwide seem more likely to capture the attention of budget drafters and

¹¹ See, e.g., INDEP. PANEL, SECOND REPORT, *supra* note 4.

¹² See generally HAROLD D. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (McGraw Hill 1935) on the economic and social insecurity that affected individual psychology and facilitated the rise of the National Socialist Party in Germany in the 1930s, culminating in the Second World War.

to encourage additional financing for urgent needs like vaccine production capacity.

Perhaps the idea of a child-proofed global public health system is a fantasy, and we accept continuing to be knocked around. But we might at least consider the question whether an improved international framework could be developed.

II. AN INTERNATIONAL CONVENTION ON PANDEMIC PREPAREDNESS AND RESPONSE

We know from prior experience that negotiation of international treaties or conventions is a difficult undertaking. Many obstacles stand in the way. There are a wide variety of stakeholder interests, ranging from governments at all levels of development, to industries likely to be affected, to consumer interest groups, to existing international institutions, and so on. The negotiations ultimately culminating in the Pandemic Influenza Preparedness Framework at the WHO are emblematic.¹³ Whatever ambitions there might have been for a comprehensive agreement that would have addressed the problems of *demandeurs* in securing low-cost access to vaccines and treatments were ultimately diluted so as to address a rather limited part of the problem set. With some of the potential obstacles flagged, it is nevertheless worth considering the possibility for a comprehensive international arrangement to prepare for and address future pandemic outbreaks.

It is tempting to focus on the World Health Organization as the locus for negotiations since the WHO has a global mandate to address matters involving public health. And, no doubt, much of the subject matter that would be covered by a comprehensive agreement to address pandemic outbreak would be within the subject matter parameters of WHO. But this holds true only to a point. Financing is a key element in addressing pandemic response, including preventive and other advance work. This would entail institutions like the World Bank and its affiliated International Finance Corporation (IFC).¹⁴ Moreover, the International Monetary Fund

13 Frederick M. Abbott, *An International Legal Framework for the Sharing of Pathogens: Issues and Challenges*, 30 ICTSD PROGRAMME ON INTELL. PROP. RTS. & SUSTAIN. DEV. 1 (2010), <https://ssrn.com/abstract=1704522>.

14 See, e.g., World Bank Group, *Saving Lives, Scaling-up Impact and Getting Back on Track: World Bank Group COVID-19 Crisis Response Approach Paper*, (June 2020), <http://documents1.worldbank.org/curated/en/136631594937150795/pdf/World-Bank-Group-COVID-19-Crisis-Response-Approach-Paper-Saving-Lives-Scaling-up-Impact-and-Getting-Back-on-Track.pdf>.

(IMF) plays a very significant role in the current response to the COVID-19 pandemic,¹⁵ and an even more comprehensive role could be envisaged involving monetary injections needed to maintain employment and economic stability in a crisis situation. While perhaps not as central, the World Trade Organization,¹⁶ the World Intellectual Property Organization,¹⁷ the Food and Agriculture Organization,¹⁸ and other multilateral organizations are responsible for elements of the pandemic preparedness and response equation. Finally, and certainly not least, the United Nations umbrella covers not only the fundamental issue of threats to peace and security, but includes within its various agencies, such as UNDP, a range of activities designed to meet the needs of the poor and marginalized.

Given the many interests implicated by pandemic outbreaks – which COVID-19 reminds us can have extensive and devastating impacts around the world – it might be well to envisage a self-standing regime, or a regime negotiated under the auspices of the United Nations, rather than within the WHO. This would take into account the “political equality” of the principal multilateral institutions. Governments negotiating the new treaty or convention could establish among themselves whatever adjustments might need to be made with respect to the operating charters of the various institutions involved.

Though the institutional framework is certainly an important element, the fundamental questions go to the substance of a new convention; that is, what would it address?

A. *Surveillance, Reporting, and Transparency*

The International Health Regulations (IHR 2005) of the WHO place obligations on Member States to provide information regarding disease outbreaks. But the IHR are not a strong instrument, at least in the sense of permitting external inspections and verification of data.¹⁹ Moreover, it is not

15 See generally *The IMF and COVID-19*, INT’L MONETARY FUND (CORONAVIRUS), <https://www.imf.org/en/Topics/imf-and-covid19> (last visited Feb. 11, 2021).

16 See, e.g., *WTO Maps Out Trade Issues Related to COVID-19 Vaccine Rollout*, WORLD TRADE ORG. (Nov. 20, 2020), https://www.wto.org/english/news_e/news20_e/covid_20nov20_e.htm.

17 See, e.g., *WIPO’s COVID-19 Response*, WIPO, <https://www.wipo.int/covid-19/en/>, (last visited Feb. 12, 2020).

18 See, e.g., *Novel Coronavirus (COVID-19)*, FOOD & AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/2019-ncov/en/> (last visited Feb. 11, 2021).

19 See INDEP. PANEL, SECOND REPORT, *supra* note 4; Gian Luca Burci, *The Legal Response to Pandemics: The Strengths and Weaknesses of the International Health Regulations*, 11 J. INT’L HUMANITARIAN LEGAL STUD. 204, 204–17 (2020).

specifically directed toward sharing of biological samples, which is covered by the PIP Framework, but in a narrow context. The WHO itself is reviewing (again) the efficacy of the IHR 2005.²⁰ Regardless of the specific details, it seems clear that surveillance and reporting, which include the obligation of transparency, would be incorporated in a comprehensive framework.

B. Travel and Trade Measures

One of the most problematic aspects of the COVID-19 pandemic response involved travel restrictions. The WHO has been extremely wary of recommending travel bans.²¹ There are at least two reasons for this. One has been the scientific objection that travel bans are ineffective because they are not able to fully contain the movement of persons, so that they are not worth the economic price. The second objection is more of a political/economic nature. Because travel bans immediately affect tourism and related consumer spending, they may have a significant impact on the economies of shuttered countries.

The notion that banning travel does not materially affect the spread of pandemic disease does not make intuitive sense, and the COVID-19 pandemic may have turned around thinking on this issue. But it still remains politically and economically problematic for countries to shut their borders, which means that policymakers are likely to delay travel bans until evidence is clear that there is imminent danger.

International financial institutions might here be of service in terms of making available substantial capital infusions that countries imposing bans at an early stage – call them precautionary – could draw on to offset income lost as a result of a ban.²² If the cost of a ban were low, governments might be more willing to impose them before the necessity became absolutely clear.

²⁰ WHO Review Committee on the Functioning of the International Health Regulations (2005) during the COVID-19 Response, WHO, <https://www.who.int/teams/ihr/ihr-review-committees/covid-19> (last visited Feb. 15, 2021).

²¹ See PowerPoint presentation by Helene de Pooter, Panel on International Law and Global Health Emergencies: the teachings of COVID-19, 79th Kyoto Conference of the International Law Association (Dec. 9, 2020) (on file with the author).

²² The Independent Panel appears to have taken up the idea of employing a precautionary approach, which was suggested by de Pooter. *Id.* The concept of a link to financing from the IMF was raised by this author during the Panel proceeding, *id.*, though doubtless not a “novel” idea.

C. R&D and Cost Sharing

The traditional Pharma R&D business model does not work in the development of pandemic vaccines or treatments. As witnessed in response to the COVID-19 pandemic, push and pull mechanisms such as subsidies and advance purchase commitments are needed.

This, however, raises new questions about how the results of public subsidization should be used. That is, should individual private sector companies ultimately be making the decisions about where products are produced, who gets them, and at what price?

A better system would involve contribution of the technological products of subsidization into pools from which producers could draw.²³ Rather than relying on elevated selling prices as the means to return capital and future R&D funding to the developers of the products, payment could be made through royalties from the producers back into the pool from where it would then be distributed to the providers of the technology. The idea is that those conducting R&D would be reasonably compensated – sufficiently to provide an incentive – while the benefits of the R&D could be widely shared. Levels of royalties paid by producers could be scaled to the income level in the country where the products are provided.

D. Production and Distribution of Health Products

One of the biggest gaps in vaccine preparedness is the absence of adequate production capacity worldwide. One of the lessons of COVID-19 is that there is a queue for the availability of vaccines, and that under the current global system a country's place in the queue is determined by wealth and the pre-existence of localized manufacturing facilities. There is nothing new about wealthy nations doing better than less wealthy nations in terms of public health. But it is also possible for vaccine manufacturing facilities to be established where they can prioritize national or regional supply.²⁴ In terms of aggregate global spending, the funds needed to build out twenty or thirty large scale vaccine manufacturing facilities are relatively inconsequential. The IMF, World Bank, or another international institution

²³ See Frederick M. Abbott & Jerome H. Reichman, *Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic*, 23 J. INT'L ECON. L. 555, 555–61 (2020), <http://dx.doi.org/10.2139/ssrn.3656725>.

²⁴ See F. Abbott, R. Abbott, J. Fortunak, P. Gehl Sampath & D. Walwyn, *Opportunities, Constraints and Critical Supports for Achieving Sustainable Local Pharmaceutical Manufacturing in Africa: With a Focus on the Role of Finance*, Final Report, March 18, 2021 (Nova Worldwide), https://nova-worldwide.com/OSF-PHP_report.

could readily facilitate a program to accomplish this within the framework of an international convention.

Another lesson, not only of the pandemic, but of pharmaceutical markets more generally, is that market demand is necessary to make a business attractive to investors. Putting more money into hospitals, training of doctors, and infrastructure for health systems more generally would help to create the demand for pharmaceutical products that would support local production.

Vaccines are not a typical market commodity. The necessary R&D and buildout of manufacturing facilities require public funding commitment. An international convention to develop, procure, and supply vaccines to address a pandemic must provide the public funding to support this activity.

E. Protection of Human Rights

One of the most difficult aspects of pandemic response is the need for mechanisms to control human behavior in ways that are inconsistent with certain fundamental human rights.²⁵ This includes quarantines, travel bans, mandatory testing and/or tracking and tracing, and so forth. In addition, the risks created by disinformation are substantial, and control of information dissemination may be needed in times of pandemic outbreak.²⁶

An international convention could define the circumstances under which derogations from customary human rights obligations are permissible and the temporal limits of such derogations.

F. Governance

A fundamental question is whether an international convention would have the power to modify the behavior of national or regional governments, even if they can be persuaded to negotiate and sign-on. The answer to improving the possibilities for compliance may lie in the extent of the benefits that may be created. In other words, rather than imposing a cost, if

²⁵ See, e.g., Brigit Toebeles, Lisa Forman & Giulio Bartolini, *Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?*, 22 HEALTH & HUM. RTS. J. 1 (2020).

²⁶ See INDEP. PANEL, SECOND REPORT, *supra* note 4.

compliance with an overall scheme created a benefit, that could certainly encourage compliance.²⁷

G. *Whistling in the Wind?*

A more serious objection to negotiation of a new international convention is that the institutional framework already exists and that adding another layer of governance may cause more inefficiency and inter-institutional conflict. This concern surfaced already in 2015 at a meeting convened in Geneva by the ILA Global Health Law Committee as the Ebola outbreak unfolded.²⁸ The suggestion was that coordinating existing preparedness and response mechanisms would be more productive than establishing a new framework, since the existing mechanisms would be required even under a new international institutional arrangement.

The response to that objection is “it depends.” Establishing better coordination implies largely working with the status quo and tinkering around the edges. A new international convention that includes substantial obligations and rights by implication might do more than that. It would elevate the priority of pandemic response.

The second objection is that in the current state of international relations it is hardly worth considering a new international convention. Perhaps it is worth noting that on December 3, 2020, the President of the European Council proposed an international treaty on pandemics within the framework of the WHO.²⁹ The proposal did not include detailed specifics, but referred to risk monitoring, better financing and coordination of research, a more efficient system of alerts and information sharing, improving access to healthcare, and resilience (strengthening healthcare

²⁷ Recall that one of the policy concepts underlying negotiation of the Convention on Biological Diversity was that governments would be encouraged to protect biological resources if a system of benefit sharing based on access to those resources was established. See Frederick M. Abbott, *Preservation and Use of Genetic Resource Assets and the International Patent System* (Mar. 31, 2005), reprinted in F. ABBOTT, T. COTTIER & F. GURRY, *INTERNATIONAL INTELLECTUAL PROPERTY IN AND INTEGRATED WORLD ECONOMY* 185–89 (4th ed. 2019).

²⁸ Glob. Health L. Comm. of the Int’l L. Ass’n and the Glob. Health Programme of the Graduate Inst. Geneva, *Global Health Security Challenges: Towards Strengthening Global Governance: Summary of Feb. 19, 2015, Meeting* (Mar. 6, 2015), https://frederickabbott.com/sites/default/files/Report%20on%20Global%20Health%20Security%20Meeting%20GHLC-GHP_0.pdf.

²⁹ European Council Press Release 860/20, President Charles Michel on an International Treaty on Pandemics (Dec. 3, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/12/03/press-release-by-president-charles-michel-on-an-international-treaty-on-pandemics/>.

systems and securing supply chains). Not so different than what is discussed above, though proposed within the existing WHO structure.

Does a reference by the President of the European Council suggest a potential political reality? On its own, perhaps not. But the economic devastation caused by the current pandemic has the potential to “make this time different.” One thing the COVID-19 pandemic seems to have taught is that governments can spend, and central banks can expand balance sheets, without dire consequences. That should help.

III. INTERNATIONAL LAW AND ESSENTIAL SECURITY INTERESTS

It remains to ask the question whether the international legal system is sufficiently robust to constrain government behavior in the face of dire health emergencies. The answer is “probably not.” Why? Because governments are elected by national constituencies or are otherwise empowered through support of local populations (or military factions within them). For this reason, given a choice between international cooperation and meeting the needs of the national population, the latter will take priority.

This reinforces the notion that an international convention or other mechanism to address a pandemic must create winners. It cannot be perceived as depriving Party A to satisfy the needs of Party B.

The dark skeleton underneath all of this is the possibility of the deliberate initiation of biological warfare.³⁰ COVID-19 has demonstrated the terrible potential of biological warfare to military planners. A government equipped with a deadly pandemic virus and its own vaccine could inflict enormous damage on an enemy, while suffering limited consequence. As serious as may be the need to address a next pandemic that comes from natural sources, the need to address a next pandemic that may be deliberately initiated is just as serious. We end this Essay on that frightful note.

³⁰ See, e.g., Jan van Aken & Edward Hammond, *Genetic Engineering and Biological Weapons*, 4 EMBO REPORTS 57 (2003).