

## COVAX: A Primer to International Efforts in Vaccine Distribution and Inequities

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## COVAX: A Primer to International Efforts in Vaccine Distribution and Inequities

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I have a slightly different view from Dr. Oke in regard to his doubts regarding the utility of a waiver. To the extent that the precedent that we are looking at is whether or not there could be a waiver for countries that lack domestic manufacturing capabilities, to instead import a cheaper generic drug of the Covid vaccines that could be produced in other countries, mainly the particular hubs, such as in India and China, that is still an open question, and part of the proposal that is up before the TRIPS council involves that dimension and that aspect of the waiver as well.

But I want us to take a step back and focus on where we are at the moment with respect to the negotiations and deliberations that states are undertaking with respect to the possibilities of such a waiver, and the relaxation generally of intellectual property rules. If we look internally to intellectual property law, it might seem that there are quite insurmountable political differences, as well as legal hurdles, to carry us over the threshold to a waiver. My source for looking at this, these particular obligations on the part of states as they undertake negotiations like these, emanate primarily from two fundamental norms, both in treaty law and in the Charter of the United Nations, and I am talking about the obligations on non-discrimination and the obligations on equality that are enshrined in both in the Charter of the United Nations, as well as in the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights.

Before I elaborate on these two norms and explain why they should be the predicate basis for how states are negotiating solutions in regard to the TRIPS framework and vaccine distribution, I would like to show you some data from the Civic tracker. The civic freedom

tracker was set up in concert and in collaboration with the Commission of The Office of the High Commissioner for Human Rights and you can see that basically the entire world is almost under a state of emergency with varying degrees of lockdowns and measures that are in place and affect privacy, freedom of assembly and expression. This is what makes the situation radically different from previous pandemics. In this pandemic, along with an attempt to try and make determinations for the effectiveness of vaccines, and the equitableness of the distribution, we have a climate with relative non transparency as a result of prevailing restraints on Civil and Political freedoms and simultaneous challenges with respect to the evaluation of compliance with economic, social, cultural rights. At the outset this should make it eminently clear that even trying to make a legal assessment of what is equitable, what is non-discriminatory, what is equal, within the requirements of international law is difficult to do in a climate where information is purposely suppressed; where transparency, either from the private sector distributors of the vaccine, or from host governments that are purchasing the vaccine, or even from a facility such as Covax, transparency is not really forthcoming. In this particular climate we have to acknowledge that many states are making decisions, largely out of some sense of either state driven interests or vaccine nationalism, but also under a climate of lack of data.

In regard to what the particular vulnerabilities are, region to region, country to country, county to county, I want to move to this other chart which tells us the number of people who have been fully vaccinated against covid 19 on a worldwide basis. If we see in particular where the gray areas are, these are areas, particularly in the developing world, in Sub Saharan Africa, in South and Southeast Asia, and East Asia, as well as parts of Latin America, the data is not forthcoming as to who has actually received the vaccine, and the extent to which there has been uniform, transparent reportage and exchange of information in regard to the efficacy of the vaccine and whether or not we're dealing with variants. The same website also gives a relatively clear picture of why it is hard to try and make out a case of non-discrimination in regard to vaccine policies, and why there is also a challenge in regard to equality as a norm of international law under human rights law when we are talking about access to vaccines. It is the assessment of vulnerabilities that determines whether or not certain populations get access to the vaccine faster than other populations, and that assessment of vulnerability is contentious. To begin with, the assessment cuts across different healthcare systems, different systems with respect to

the multi-dimensional aspects of health, with respect to social determinants of health, as well as physical, physiological, and medical determinants of health. These systems vary country to country, and yet we are proceeding on a premise that if we look at the hard numbers as to which countries have been getting doses of the vaccine, that is enough to frame our understanding of whether the legal criteria for non-discrimination and equality are being met.

It is not just about the raw numbers of whether vaccines are being allocated, but in targeting access for the vaccines, how are vulnerabilities being assessed consistent with the right to the highest attainable standard of physical and mental health, consistent with our understanding of the overall determinants, social as well as physiological, of the right to health. Is it enough to say that if we look at the number of covid fatalities vis-a-vis the number of covid incidences, that is enough for policymakers to determine what vaccines should go to a certain quantum or to a particular area? A lot of the policy making, unfortunately, has come after the fact of law, and law has largely been left at the wayside when it comes to the framework and the distribution and development of vaccines, and the ongoing assessment of whether or not we are looking at short, medium or long-term distribution of these vaccines, which is why I think it is perfectly relevant to think about a waiver at this time.

When the latest estimates say that we will not receive global herd immunity until at least 2023, and when most of the world is under a state of emergency, we have to remember that not everybody is experiencing Covid-19 in the way that the United States is experiencing it. We are looking at protracted situations of lockdowns, protracted vulnerabilities in health care systems and infrastructures, protracted situations of extreme poverty where we now have 290 million people being pushed further into extreme poverty and being told to wait their turn simply because that is how it is in the international system; that is not in itself a situation that comports with the legal criteria for non-discrimination and equality.

So let me turn to the legal criteria. Why do I focus on non-discrimination and equality? If we think of the non-discrimination norm, which is present within Charter law, specifically in article 55 of the Charter of the United Nations, and in article 1 of the Covenants on Civil and Political Rights and article 2 the Covenant on Economic, Social, Cultural rights, and which calls for all member states to respect human rights and fundamental freedoms. There are four essential criteria to determine non-discrimination, and I have argued

in previous work that this is just supposed to be the floor. When it comes to the intersectional understanding of compliance with human rights, non-discrimination requires proof of differential treatment. Further, that differential treatment should be based on a prohibited ground of discrimination, which include race, sex, gender, education, birth status, language, religion, among others. The third element is that that differential treatment which is based on a prohibited ground of discrimination must result in the deprivation of the enjoyment of a certain human right. And lastly, there must be specific discriminatory intent in the measure. This last aspect, the discriminatory intent, is often the most difficult to prove, which is why in circumstances when you have non-discrimination taking place, especially in the climate that I have laid out where there are states of emergency, difficulty of access to human rights defenders, difficulty of access to courts, let alone leaving one's house given multiple checkpoints, it is difficult to exact accountability through the non-discrimination norm by going to court. If we were to think about it at the individual or community level where inter-sectional disparities occur, where those who are most affected by Covid-19 cut across many of the markers of discrimination, women, women of color, children, persons with disabilities, these are entities that are the least empowered to be able to seek access to courts before their own jurisdictions, let alone courts in other jurisdictions to gain redress for the discriminatory treatment in regard to the provision of health services, and specifically access to Covid-19 vaccines.

If we can already see that it will be a futile exercise on the part of individuals to try and seek recourse under this climate of states of emergency around the world, what, then, is the counterpart obligation of these states that are tasked to respect the duty of non-discrimination? I argue that that duty of non-discrimination imposes deeper burdens on them when they are negotiating at the World Trade Organization in regard to this particular appeal for waivers. Because in this sense, we're not just looking at trade law, we're looking at their existing duties of cooperation under the Charter of the United Nations, their existing duties of cooperation and non-discrimination, as well as equality, under human rights law, to which all, or at least 175 countries in the world, including all the vaccine producing states are a party to these treaties, as well as to the counterpart obligations *erga omnes* and *jus cogen* norms that may be verily associated with human rights norms. And yet, it is hard to make the case, as it stands, because everybody is living in a state of emergency and to the extent that governments have been appealing to a wider sense of executive discretion during a state of emergency, it

is easy to compartmentalize the debate and think about this as just a question of whether or not TRIPS and the requirements for a waiver are met. It is easy to compartmentalize that and think that participation in an international organization should only be about the founding treaties, or the organic treaties, the *lex specialis* that governs that particular international organization. But this is why I go back to the Charter of the United Nations and the fundamental duties to cooperate, that exist regardless of what the *lex specialis* is: these are continuing obligations.

Unlike in previous pandemics and previous epidemiological situations, the unique challenge to Covid-19 is that the assessments of vulnerability are taking place at a time when information is not open, when information is hard to obtain on the ground and when assessments of vulnerability can very readily differ jurisdiction to jurisdiction. If this is the situation that we have before us, why are we not in thinking about creating proposals, such as Covax, which aims to have at least 20% of populations in the developing world vaccinated; Why are we thinking of these programs quite hermetically, in isolation from the continuing general international law obligations of states? It makes it look like vaccine development and distribution is more of a humanitarian act, rather than an international legal obligation that is not optional on the part of states. So much of the framing of the entire issue of vaccine distribution is a framing of equity for the sake of equity, not as a legal norm but as an appeal to aid on the part of the developing world. This, however, should be an appeal to the rule of law, which has been left by the wayside with the kind of rhetoric that we have seen in the framing of vaccine development, distribution and access.