COVID-19 Symposium: The Right to Enjoy the Benefits of Scientific Progress at the Time of the COVID-19 Pandemic

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[Margherita Melillo is a Research Fellow at the Max Planck Institute Luxembourg for Procedural Law, and a PhD candidate at the European University Institute.]

Introduction

With the return to our normal lives depending on the development of an effective treatment and/or a vaccine for COVID-19, science has never seemed so important. The paradox has been brilliantly encapsulated by an unnamed Spanish researcher that became immediately widely popular on social media. Feeling pressured to give an answer about a possible timeline for a vaccine for COVID-19, she reportedly affirmed: 'you have given millions of euros to football players, and only 1300 euros a month to biologists; now go to Ronaldo to find a cure for Corona'.

In international law, much of the discussion on science usually revolves around the role of scientific expertise in law-making and adjudication. Significantly, human rights have been relatively absent in discourses on science. Yet, the human rights repertoire encompasses the right to 'enjoy the benefits of scientific progress and its applications' (Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights, ICESCR). This right has enjoyed only limited attention (with the most important exception being, at least from my own personal perspective, Thérèse Murphy, who looks at it from a health and human rights perspective; but also Audrey Chapman, Olivier de Schutter,

and the 2012 report of Farida Shaheed, Special Rapporteur in the field of cultural rights).

Perhaps in an effort to draw attention to the human rights dimension of science, on 2 January 2020 the Committee on Economic, Social, and Cultural Rights published the Draft General Comment on Science (the Draft), with a focus on Article 15(1)(b). While we wait for the final text, this is a good time to take a first look at the Draft. Accordingly, this post first reviews some of its main features, before turning to examine whether the Draft can provide any guidance on how to tackle any of the issues that are emerging in the COVID-19 pandemic.

Before proceeding, it is important to clarify that this blogpost does not endeavour to provide answers to all the human rights questions that may, and will, arise in this context. Several competing human rights are, in fact, at stake in the COVID-19 pandemic – many of which have already been discussed in this Symposium.

Draft General Comment on Science

Given the constraints of space, this Section only sketches out answers to two questions.

1. *What constitutes science and scientific applications?*

Lawyers love definitions, and hence it seems appropriate to start with this question. The Draft begins by defining these terms too. It does so by endorsing UNESCO's definition of science, updated in a recommendation of 2017, where 'sciences' are defined as 'a complex of knowledge, fact and hypothesis, in which the theoretical element is capable of being validated in the short or long term, and to that extent includes the sciences concerned with social facts and phenomena' (para 6).

This is a traditional, method-based definition of science, broadened to include (some) social sciences. However, this definition does not correspond to the modern understanding of science as a social phenomenon, where scientific consensus (along with its best personification: peer review) is seen as a central element. Most importantly, it does not offer any elements in distinguishing between good and junk science, even though this has arguably become one of the most pressing challenges of our times.

What does the right to enjoy the benefits of scientific progress and its applications entail?

In addition to laying down the general elements of Article 15(1)(b), the Draft clarifies that the obligations are of 'progressive realization'. Nonetheless, it also demands that 'legislative and budgetary measures' be adopted 'immediately or within a reasonably short period of time' (para 31). Even more poignantly, the Draft provides a list of 'core obligations' of 'immediate realization' (para 54). The list is drawn from human rights texts, case-law and practice, among which the 'recommendations adopted by UNESCO play a very important role' (para 55).

The COVID-19 pandemic has brought into sharp focus the importance of research, and there are encouraging signs that it is going to be well-funded and prioritised. This observation could lead us, *prima facie,* to say that States are fulfilling their obligations under Article 15(1)(b). But is this enough to ensure the right of everyone to enjoy the benefits of this research? As you can guess, the short answer is no.

The right to enjoy the benefits of scientific progress and the COVID-19 pandemic

Scientific laboratories are now working frantically to develop a vaccine. As The Atlantic reports, this effort is proving challenging because we have never developed vaccines for any previous coronavirus. But let's forget about these problems, and fast-forward to the moment when we will have a vaccine that is safe, approved, and reproduced on a large scale. Even at that moment, we will probably not be able to make vaccines for the almost 8 billion people on Earth. The global vaccine production capacity is simply not sufficient to vaccinate everyone in the event of a pandemic, as Laurence Gostin has remarked (p. 370).

At the time of writing, the situation of low- and middle-income countries in the face of the COVID-19 pandemic is garnering only limited attention. However, the number of confirmed cases is growing in all regions of the world. Low- and middle-income countries have on average a younger population which could be spared from the worst consequences of COVID-19. However, the prevalence of HIV/AIDS and other diseases, combined with a structural weakness of the health systems, can make the same young populations no less vulnerable. Reports of what has happened in Ecuador in the last few days are not encouraging. At some point, it is possible that low- and middle-income countries will need the vaccine against COVID-19 as much as high-income countries.

The material limits of global vaccine production will likely require us to make a choice as to who gets the vaccine first. Put in these terms, the choice seems ethically challenging. But the answer will most likely be technical: those who patent the vaccine(s) or, alternatively, those who have financed the development of the patented vaccine, will choose who will get it first. In all likeliness, the vaccine(s) will be produced by a laboratory in an advanced economy, such as the US, Israel, Germany, or China. The situation is similar for the existing drugs that can be used to treat COVID-19. There are material limits to the global production of drugs, and, moreover, these drugs have patent protection.

The challenges that intellectual property rights pose to the accessibility of drugs and vaccines in low- and middle-income countries are well-known problems (for a recent contribution, see Sharifah Sekalala). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides some 'flexibilities', but they are hardly enough to solve this much deeper and complex problem. The experience with the 2009 H1N1 influenza pandemic demonstrates that intellectual property rights can pose the same problems in the event of a pandemic. In that case (which, it is worth recalling, concerned a much less pathogenic disease), high-income countries rushed to conclude advance purchase agreements for all the available vaccines, and international solidarity

seemed particularly scarce (see Fidler for a fuller account). After that event, and extended negotiations, the WHO agreed on a Pandemic Influenza Preparedness Framework (WHO PIP), which, in principle, provides that States should contribute to a 'benefit-sharing system' that includes drugs and vaccines. This framework, however, has some clear limitations (see Gostin, p. 373-377). First, it only outlines some principles, and it is far from constituting a clear and fair distribution plan for drugs and vaccines among countries. Second, it is not directly applicable to COVID-19 (which is not an influenza virus).

The Draft acknowledges the challenges that intellectual property rights pose to the enjoyment of Article 15(1)(b), analysing it as a 'special topic of broad application' (Section V(C)). Unfortunately, however, the Draft falls short of fully analysing the topic, and of referring to the pandemic scenario. Instead, the Draft limits itself to a generic reaffirmation of the ICESCR Committee's view that States should seek a balance between intellectual property rights and sharing of scientific knowledge (para 66). Worryingly, the Draft does not even acknowledge that there is an important North/South dimension to this issue. This amounts to an unfortunate lack of guidance at a time when it is most needed.

In fairness, the Draft's disregard of the WHO PIP is mirrored by the WHO PIP's disregard of the human rights dimensions of international cooperation in the event of a pandemic. For those familiar with the WHO, this is hardly surprising. Traditionally, the WHO has been populated by a 'transnational Hippocratic society' that sees its role in purely medical-technical terms. Whilst there has been an effort to reinforce synergies with human rights (see for example the Global Action Plan on Non-Communicable Diseases, but also the International Health Regulations of 2005), it seems that the WHO's work on pandemic preparedness remains mostly detached from these developments.

Thus far, the WHO's work on the COVID-19 pandemic has confirmed this approach. The WHO sees its role as that of a 'scientist-in-chief', coordinating international research efforts, and even launching an international clinical trial across several countries. On 23 March Costa Rica wrote to the Director-General, to ask him to take efforts to 'develop an initial concise memorandum of understanding on the intent to share rights in technologies funded by the public sector and other relevant actors'. The Director-General has welcomed this proposal, but so far no steps have yet been taken. Despite the calls for solidarity made in many of the Director-General's speeches, the WHO has not (at least to my knowledge) made any proposals on how to concretely address the problem of the distribution of existing drugs or of future vaccines.

Conclusions

The Draft addresses a highly complex and controversial topic. In this regard, it seems clear that it cannot go into depth on all relevant aspects. It is, however, also clear that, at least at this stage, the Draft does not bring particular clarity on much-needed topics. One example is the method-based definition of what constitutes science, which fails to address the very relevant topic of what constitutes junk science. The other example,

illustrated by the case of the COVID-19 pandemic, is the problem of accessibility to drugs and vaccines, not only during ordinary times, but also in the event of a pandemic (which, we have all learnt by now, was not so remote).

In this regard, a reference to the 'benefit-sharing system' outlined in the WHO PIP could have perhaps provided some guidance on the major challenge of the distribution of COVID-19 drugs and vaccines that we are probably going to face. The fact that the Draft does not offer any solutions to these issues suggests that there are structural obstacles to the enjoyment of the right to benefit from scientific progress that it cannot, or does not try to, address. At the same time, the WHO's persistence on adopting a purely technical-medical approach to the problem of distribution of drugs and vaccines is certainly not helping to affirm the right enshrined in Article 15(1)(b) of the ICESCR.

As it is in the nature of a blogpost on moving targets (in this case, both the Draft and the COVID-19 pandemic), these comments are only preliminary and provisional. We shall have to wait for the publication of the final draft of the General Comment on Science to draw more definitive and in-depth conclusions. And, naturally, only the evolution of the COVID-19 pandemic will be able to tell us whether, and to what extent, States will be willing to share the benefits of scientific progress going forward.