

Vaccine Diplomacy: A Gift and a Curse to the Human Right to Health

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I. INTRODUCTION

It has been more than a year since the “World Health Organization (WHO) [] declared the novel coronavirus acute respiratory disease (2019-nCoV ARD) health event as a public health emergency of international concern[,]” following an emergency committee convened on 30 January 2020, in Geneva, Switzerland.¹

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The world crumbled in the face of a global health catastrophe.

As of 29 October 2021, global confirmed cases stood at 245,373,039, including 4,979,421 deaths.²

In the Philippines, as of 23 September 2021, there were 1,149,925 confirmed cases of COVID-19, ranking the country twenty-seventh out of 192 countries “based on the number of confirmed COVID-19 positive cases.”³ According to the Johns Hopkins University COVID-19 tracker, on 9 September 2021, the reported new cases reached their peak at 27,887.⁴

Throughout the course of this global ordeal, have nations and governments complied with their obligations to respect, protect, and fulfill the people’s human right to health,⁵ or has the human population been deprived of this fundamental right? This Article presents a multi-disciplinary analysis of how the international legal framework has been impacted by socio-economic and socio-political forces in relation to the fulfillment of the human right to health. It will be demonstrated that the ideology, institutions, structures, and cultures constituting the paradigm are in themselves “immunocompromised.” Unless the underlying causes are duly diagnosed and immediately treated, the world remains a viable and willing host for this global pandemic.

ATENEO L.J. 81 (2013) & *Copycat No More: A Legal Framework Extending Copyright Protection to Famous Movie Lines by Celebrities*, 60 ATENEO L.J. 1071 (2016).

Cite as 66 ATENEO L.J. 415 (2021).

1. Press Release by Department of Health, *WHO Declares 2019-nCoV ARD ‘Public Health Emergency of International Concern’; Phil Gov’t Issues Travel Ban* (Jan. 31, 2020) (on file with the Department of Health).
2. World Health Organization, WHO Coronavirus (COVID-19) Dashboard, available at <https://covid19.who.int> (last accessed Nov. 30, 2021) [<https://perma.cc/32CM-J2G6>].
3. Gozalo, et al., COVID-19 Philippines: Tracking SARS-CoV-2 Cases in the Philippines, available at <https://web.archive.org/web/20210923003427/https://covid19stats.ph/stats> (last accessed Nov. 30, 2021).
4. Johns Hopkins University & Medicine Coronavirus Resource Center, Philippines, available at <https://coronavirus.jhu.edu/region/philippines> (last accessed Nov. 30, 2021) [<https://perma.cc/3TUS-ZAZU>] (select “Past Day”).
5. United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

II. COVID-19 AS AN ECONOMIC CRISIS

The global economic backlash and its domino effect are undisputable — an unprecedented plummet in international trade even larger than the \$4 trillion fall during the 2009 recession;⁶ the “largest monthly outflow of portfolio investment” consisting of “\$69.4 billion of emerging market stocks and bonds [] sold by non-residents[]” in March 2020;⁷ a “substantial increase in hard currency bond spreads[]” that signaled a pushback on government “access to international capital markets” during a crucial period of “large emergency spending needs[;]”⁸ and a sustained yield decline despite a strong economy and rising inflation.⁹

In an effort to contain the spread of the virus and ultimately reduce the death toll, the world turned inwards as States resorted mainly to restricting population mobility.¹⁰ “Governments worldwide took steps to restrict exports of medicines and medical equipment, close borders, and otherwise privilege domestic industry.”¹¹ These were implemented alongside other measures described by Dr. Holly Jarman as “non-pharmaceutical interventions (NPIs) in [both the] public and private life[of citizens, i.e.,] quarantine[,] physical distancing requirements[,] bans on large gatherings[,] stay-at-home orders[,] closures of schools, businesses, and public transport[,] masking requirements[,]

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6. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, IMPACT OF THE COVID-19 PANDEMIC ON TRADE AND DEVELOPMENT: TRANSITIONING TO A NEW NORMAL 13 & 60 (2020).
 7. Pinelopi Koujianou Goldberg & Tristan Reed, *The Effects of the Coronavirus Pandemic in Emerging Market and Developing Economies: An Optimistic Preliminary Account*, BROOKINGS PAPERS ON ECON. ACTIVITY, COVID-19 and the Economy: Part One (Summer 2020), at 190.
 8. *Id.* at 191.
 9. Patti Domm, *The Mystifying Bond Market Behavior Could Last All Summer*, CNBC, July 16, 2021, available at <https://www.cnbc.com/2021/07/16/the-mystifying-bond-market-behavior-could-last-all-summer.html> (last accessed Nov. 30, 2021) [<https://perma.cc/GB27-GA9H>] & Jeff Cox, *The Bond Market Is Torn Over the Potential for Higher Inflation and Lower Growth*, CNBC, July 21, 2021, available at <https://www.cnbc.com/2021/07/21/the-bond-market-is-torn-over-the-potential-for-higher-inflation-and-lower-growth.html> (last accessed Nov. 30, 2021) [<https://perma.cc/U3KT-L66Q>].
 10. See Aravind Gandhi Periyasamy & U Venkatesh, *Population Mobility, Lockdowns, and COVID-19 Control: An Analysis Based on Google Location Data and Doubling Time from India*, 27 HEALTH INFORMATICS RES. 325, 326–28 (2021).
 11. Julian Arato, et al., *The Perils of Pandemic Exceptionalism*, 114 AM. J. INT’L L. 627, 627 (2020).

and other measures.”¹² The United Nations Conference on Trade and Development (UNCTAD) expressed serious reservations and warned that “[w]hile these measures have saved countless lives, they have also created the worst recession since the Great Depression of the 1930s.”¹³

The economic cost could prove more disastrous for emerging economies “with huge foreign debt and limited foreign exchange reserves[.]”¹⁴ By 2023, the United States (U.S.) Federal Reserve System may already start “withdrawing the huge injection of monetary stimulus that was deployed at the onset of the pandemic.”¹⁵ Once interest rates are lifted, higher borrowing costs and massive capital flights are expected to result.¹⁶

In a region where tourism is a particularly important sector, lockdown measures enforced by the governments of Association of Southeast Asian Nations (ASEAN) members¹⁷ like Malaysia, the Philippines, and Thailand had the effect of “slowing down or even stopping economic activities in certain sectors,” effectively creating a “ripple effect[.]”¹⁸

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12. Holly Jarman, *State Responses to the COVID-19 Pandemic: Governance, Surveillance, Coercion, and Social Policy*, in *CORONAVIRUS POLITICS: THE COMPARATIVE POLITICS AND POLICY OF COVID-19* 51 (Scott L. Greer, et al. eds., 2021).
 13. Mukhisa Kituyi, *A New Take on Trade*, available at <https://unctad.org/news/new-take-trade> (last accessed Nov. 30, 2021) [<https://perma.cc/9G7G-QL2Y>].
 14. Beatrice M. Laforga & Luz Wendy T. Noble, *Central Bank Chief Says Fed Rate Hike Not a Threat to PHL*, *BUSINESSWORLD*, June 22, 2021, available at <https://web.archive.org/web/20211024082555/https://www.bworldonline.com/central-bank-chief-says-fed-rate-hike-not-a-threat-to-phl> (last accessed Nov. 30, 2021).
 15. Colby Smith & James Politi, *Hawks vs Doves: US Federal Reserve Divided Over When to Dial Back Economic Support*, *FIN. TIMES*, July 26, 2021, available at <https://www.ft.com/content/33e420c1-9220-49c0-bc06-105eb921dfd3> (last accessed Nov. 30, 2021) [<https://perma.cc/BW9D-YYKB>].
 16. See Laforga & Noble, *supra* note 14.
 17. See Riyanti Djalante, et al., *COVID-19 and ASEAN Responses: Comparative Policy Analysis*, *PROGRESS DISASTER SCI.*, Volume No. 8, at 2.
 18. Organisation for Economic Co-operation and Development, *COVID-19 Crisis Response in ASEAN Member States (OECD Policy Responses to Coronavirus (COVID-19))*, at 4, available at <https://www.oecd.org/coronavirus/policy-responses/COVID-19-crisis-response-in-asean-member-states-02f828a2> (last accessed Nov. 30, 2021) [<https://perma.cc/MQG2-B7VT>]. See also Djalante, et

As for the Philippines, “the pandemic erased three-quarters of [gross domestic product or] GDP growth that had been even faster than that of China, so that it experienced essentially [zero] percent year-on-year growth.”¹⁹ The domestic economic outlook for 2021 remains gloomy. Bloomberg data shows that the “Philippine[s]’ 2021 GDP outlook has [] lowered the most among [the] A[SEAN]-6[,]” suffering the deepest cut due to the COVID-19 crisis.²⁰ On 10 March 2020, it was reported that “[Philippine stocks] plunged by nearly seven percent ... , [their] biggest decline in more than a decade[,] setting the stage for a return to bear market territory.”²¹

To contain the virus, the Philippines had to implement a series of quarantine and lockdown measures, leading to further business closures and loss of employment.²² Moreover, the rise of COVID-19 cases following the emergence of the Delta variant again forced the imposition of a series of subsequent lockdowns.²³

The COVID-19 crisis has been an eye-opener — only when public health and human lives are protected can economic recovery be possible. This should

al., *supra* note 17, at 7-9 (providing a comparison of the measures implemented by ASEAN governments).

19. Goldberg & Reed, *supra* note 7, at 198. Pinelopi Koujianou Goldberg and Tristan Reed noted that as early as July 2020, data showed “year-on-year changes in real GDP[.]” *Id.* at 198 & 199 fig. 9.
20. Siegfried Alegado & Andreo Calonzo, *Philippine Economy Cools as Lockdowns Linger to Halt Virus*, BLOOMBERG, Aug. 10, 2021, available at <https://www.bloomberg.com/news/articles/2021-08-10/philippine-economy-contracts-in-second-quarter-as-covid-lingers> (last accessed Nov. 30, 2021) [<https://perma.cc/BY7B-4D5N>].
21. Denise A. Valdez, *Philippine Stocks Slide Into Bear Market Territory*, BUSINESSWORLD, Mar. 10, 2020, available at <https://www.bworldonline.com/philippine-stocks-slide-into-bear-market-territory> (last accessed Nov. 30, 2021) [<https://perma.cc/HPP4-QH2U>].
22. See Anna Gravois, *How the Pandemic Is Affecting Small Businesses in the Philippines*, available at <https://www.kiva.org/blog/how-the-pandemic-is-affecting-small-businesses-in-the-philippines> (last accessed Nov. 30, 2021) [<https://perma.cc/UZA4-HPKS>].
23. Rebecca Ratcliffe, *Manila in Lockdown as Delta Cases Soar in Philippines*, GUARDIAN, Aug. 9, 2021, available at <https://www.theguardian.com/world/2021/aug/09/manila-covid-lockdown-delta-cases-philippines> (last accessed Nov. 30, 2021) [<https://perma.cc/RDS9-9UZ3>].

have naturally put the human right to health at the forefront — a topmost agenda and a priority above anything else. Moving forward, containment and, if possible, eradication of the virus attacking world health and gradually killing the economy are crucial and primary challenges. This realization has paved the way for global health cooperation amidst widely criticized misuse and abuse of vaccines as a diplomatic tool to advance selfish nationalistic interests.²⁴

The goal is largely hinged on the world's obligation to respect, protect, and fulfill the human right to health.²⁵ Inextricably connected thereto is the obvious panacea to the virus — vaccines. Views on a global health diplomacy framework have, however, been varied, with government responses worldwide indicating an apparent tug-of-war between the fulfillment of the human right to health and the pressure of economic recovery, further complicated by the geopolitical agenda.²⁶

III. THE INTERNATIONAL FRAMEWORK ON VACCINATION

Health is a political choice that can and must transcend geopolitics.

— Tedros Adhanom Ghebreyesus²⁷

The global predicament is a mess. Since the COVID-19 outbreak, there has been a sudden reversal of fortune, triggering power shifts and a global “race to the bottom” among countries competing “with each other only by degrees of under-performance.”²⁸ Moreover, “[d]ivergent national responses to COVID-19 have sharpened the contrasts — and narrowed the power

24. *Contra Deth Sok Udom, With Great Power Comes Great Responsibility? Diplomatic Battle Amidst the Covid-19 Pandemic*, in *THE IMPACT OF COVID-19 PANDEMIC: NATIONAL & REGIONAL IMPLICATIONS* 21 & 30 (Pich Charadine & Robert Hör eds., 2020).

25. United Nations Committee on Economic, Social and Cultural Rights, *supra* note 5, ¶ 33.

26. *See generally* Eastspring Investments, *A Global Tug-of-War Match*, available at <https://www.eastspring.com/vn/en/insights/a-global-tug-of-war-match> (last accessed Nov. 30, 2021) [<https://perma.cc/WT5Y-YG4U>].

27. Tedros Adhanom Ghebreyesus, Director-General, World Health Organization, *Opening Remarks at the Launch of “A Guide to Global Health Diplomacy”* (Feb. 18, 2021) (transcript available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-launch-of-a-guide-to-global-health-diplomacy> (last accessed Nov. 30, 2021) [<https://perma.cc/PH6W-ETCM>]).

28. HERVÉ LEMAHIEU & ALYSSA LENG, *LOWY INSTITUTE ASIA POWER INDEX: KEY FINDINGS 2020* 3 & 7 (2020).

differential — between the United States and China.”²⁹ Meanwhile, inequality in access has likewise presented a major challenge to worldwide vaccination.³⁰

A. A Weak “One Health for All” Advocacy

The United Nations (UN), in its General Assembly Resolution 74/270 dated 3 April 2020, called upon “the United Nations system, under the leadership of the Secretary-General, to work with all relevant actors in order to mobilize a coordinated global response to the pandemic and its adverse social, economic[,] and financial impact on all societies.”³¹

Moreover, in response to a call from G20 leaders in March 2020, the Access to COVID-19 Tools (ACT) Accelerator was launched by the WHO, the European Commission, France, and the Bill & Melinda Gates Foundation a month later.³² The initiative represents a new “global collaboration to accelerate the development, production, and equitable access to COVID-19 tests, treatments, and vaccines.”³³ Acting in service of this cause as a pillar of the ACT is the COVID-19 Vaccines Global Access (COVAX), which looks “to accelerate the development and manufacture of COVID-19 vaccines, and to guarantee fair and equitable access for every country in the world.”³⁴

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29. *Id.* at 7. The short summit in Geneva between the United States (U.S.) and Russia on 16 June 2021 likewise gave no hint of joint efforts to fight the pandemic. See Statement by The White House, *U.S.-Russia Presidential Joint Statement on Strategic Stability* (June 16, 2021) (on file with The White House).
30. Bloomberg, More Than 12.7 Billion Shots Given: Covid-19 Tracker, *available at* <https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/> (last accessed Nov. 30, 2021) [<https://perma.cc/GK8Z-FW6M>].
31. Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19), G.A. Res. 74/270, ¶ 9, U.N. Doc. A/RES/74/270 (Apr. 3, 2020).
32. World Health Organization, G20 Leaders Boost Support of the Access to COVID-19 Tools (ACT) Accelerator But Urgent and Immediate Action is Needed to Maintain Momentum, *available at* [https://www.who.int/news/item/21-05-2021-g20-leaders-boost-support-of-the-access-to-covid-19-tools-\(act\)-accelerator-but-urgent-and-immediate-action-is-needed-to-maintain-momentum](https://www.who.int/news/item/21-05-2021-g20-leaders-boost-support-of-the-access-to-covid-19-tools-(act)-accelerator-but-urgent-and-immediate-action-is-needed-to-maintain-momentum) (last accessed Nov. 30, 2021) [<https://perma.cc/8ZSY-ZRUF>].
33. World Health Organization, COVAX: Working for Global Equitable Access to COVID-19 Vaccines, *available at* <https://www.who.int/initiatives/act-accelerator/covax> (last accessed Nov. 30, 2021) [<https://perma.cc/ZT7W-KH6Q>].
34. *Id.* “COVAX is co-led by [the Coalition for Epidemic Preparedness Innovations (CEPI)], Gavi[,], and [the World Health Organization (WHO)], alongside key

Almost a year after, on 18 February 2021, the Global Health Centre of the Graduate Institute of International and Development Studies published “A Guide to Global Health Diplomacy,” which was authored by experts Ilona Kickbusch, Haik Nikogosian, Michel Kazatchkine, and Mihály Kökény.³⁵ The publication echoes the advocacy of the WHO³⁶ and uses as a blueprint the role of health in the UN’s Sustainable Development Goals (SDGs),³⁷ which were adopted in 2015.³⁸

In support of the proposal for an international pandemic treaty advanced by the European Council, a Joint Statement dated 30 March 2021 was issued and signed by 28 heads of government and international agencies.³⁹ The intended international pandemic treaty will be “rooted in the constitution of the [WHO],” and founded on “[e]xisting global health instruments, especially the International Health Regulations[.]”⁴⁰ There is expected involvement of other relevant organizations key to the endeavor “in support of the principle of health for all.”⁴¹ The WHO reiterated this call by pointing out not only “the lack of international solidarity and sharing[, including] the sharing of

delivery partner [United Nations International Children’s Emergency Fund (UNICEF)].” *Id.*

35. Ilona Kickbusch, et al., *A Guide to Global Health Diplomacy*, available at <https://www.graduateinstitute.ch/sites/internet/files/2021-02/GHC-Guide.pdf> (last accessed Nov. 30, 2021) [<https://perma.cc/F2KE-NQRE>]. The book serves as a sequel to “the first systematic introduction to the field of global health diplomacy,” which was titled “Global Health Diplomacy: Concepts, Issues, Actors, Instruments, Fora and Cases” and published in 2013. *Id.* at 13. *See also* GLOBAL HEALTH DIPLOMACY: CONCEPTS, ISSUES, ACTORS, INSTRUMENTS, FORA AND CASES (Ilona Kickbusch, et al. eds., 2013).

36. *See* Kickbusch, et al., *supra* note 35, at 13–14.

37. Kickbusch, et al., *supra* note 35, at 14.

38. *See* Transforming Our World: The 2030 Agenda for Sustainable Development, G.A. Res. 70/1, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

39. J. V. Bainimarama, et al., COVID-19 Shows Why United Action is Needed for More Robust International Health Architecture, available at <https://www.who.int/news-room/commentaries/detail/op-ed---COVID-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture> (last accessed Nov. 30, 2021) [<https://perma.cc/42WJ-J4UN>].

40. *Id.*

41. *Id.*

pathogen data[and] epidemiological information,” but also “resources, technology[,] and tools[,] such as vaccines.”⁴²

Amidst a “climate of growing suspicion, rivalry[,] and infighting among nations,” there is a call for global health diplomacy that emphasizes “the need to work together at a multilateral level to ensure health for all countries” and aims to achieve global cooperation.⁴³ For some, the pandemic serves as “a touchstone for international actors in coordinating the efforts in similar future crises[]” that “cannot be resolved except through joint international cooperation, global cohesion, and multilateralism.”⁴⁴ The *Frontiers in Public Health* article “COVID-19 Pandemic as an Excellent Opportunity for Global Health Diplomacy” explained how countries can help each other through global health diplomacy

by assisting wherever possible[,] by supplying the essential personal protective equipment ([i.e.,] masks, gloves, disposable gowns, disinfectants, etc.), essential drugs, [and] health care resources, working together for new diagnostics, vaccines, etc. as done by some nations through [the following:] ‘mask diplomacy’ [—] by sending the face-masks, e.g., China, Taiwan; medical diplomacy [—] through doctors[or]health care staff[;] and vaccine

42. Tedros Adhanom Ghebreyesus, Director-General, World Health Organization, Opening Remarks at President of the United Nations General Assembly Meeting on IPPPR (July 28, 2021) (transcript *available at* <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-president-of-the-un-general-assembly-meeting-on-ipppr> (last accessed Nov. 30, 2021) [<https://perma.cc/RD6Q-M2AJ>]).

Dr. Mike Ryan, Executive Director of the agency’s Emergencies Programme, spoke on behalf of WHO Director-General, Tedros Adhanom Ghebreyesus. The countries were enjoined to design, own, and implement as a complete package any international structure, framework, or mechanism, and to engage in the process of developing a “WHO convention, agreement[,] or other ... international instrument on pandemic preparedness and response[]” at a special session to be convened in November 2021 by the World Health Assembly, the WHO’s decision-making body. *Id.*

43. Kickbusch, et al., *supra* note 35, at 14.

44. Sanaz Taghizade, et al., *COVID-19 Pandemic as an Excellent Opportunity for Global Health Diplomacy*, *FRONTIERS PUB. HEALTH*, Volume No. 9, July 2021, at 1.

See also Ghebreyesus, *supra* note 27. Considered as “the most outstanding example of health diplomacy was when the Soviet Union and the [U.S.] worked together at the height of the Cold War to eradicate smallpox, which had killed an estimated 300 million people during the [20th] century.” Ghebreyesus, *supra* note 27.

diplomacy, e.g., India by sending vaccines to other nations to gain the goodwill.⁴⁵

However, the very backbone of state obligations is not well-defined in the blueprint itself — the Sustainable Development Goals.⁴⁶ It was observed that the UN General Assembly lacked cogency relative to the position of the human right to health in the UN SDG resolution.⁴⁷ Writers worry that this “will continue to blur[,] if not divest[,] human rights’ (and specifically the right to health’s) integral relationship [with] high-level development planning, implementation[,] and SDG monitoring and evaluation efforts[,]”⁴⁸ which, unless addressed head-on, will most likely determine the future direction of global health diplomacy.⁴⁹

It will be difficult for governments to be held accountable for their SDG 3 policy commitments without cogent domestic right to health law and corresponding remedies. Therefore, sewing into SDG 3 a legal obligation to further press countries to implement the necessary domestic policy changes and investment strategies to reflect the health goal’s content is important. Express inclusion of the right to health in SDG 3 could add a legal safety net to catch and protect the most marginali[z]ed who would otherwise fall between the cracks of any global health and SDG policy.

A ‘principal value add’ of inserting the right to health in the SDGs would be one of accountability: ‘Because it converts passive beneficiaries into claim[s] holders[,] and [S]tates and other actors as duty-bearers that can be held to account for their discharge of legal, and not merely moral, obligations.’ The use of both legislation and litigation as strategic tools to hold governments and inter-related non-[S]tate actors accountable for their right to health and post-2015 health goal commitments is appealing as part of a broader public health advocacy strategy. However, litigation is not the only tool at [the] citizens[’] and ... health advocates[’] disposal; it should be the last resort. As Forsythe states, ‘the optimum situation is for legal standards to be internali[z]ed by individuals to such an extent that court cases are unnecessary.’

45. Taghizade, et al., *supra* note 44, at 4.

46. See generally United Nations Development Programme, *The SDGs in Action*, available at <https://www.undp.org/sustainable-development-goals> (last accessed Nov. 30, 2021) [<https://perma.cc/5YNF-4ML6>].

47. Claire E. Brolan, et al., *Did the Right to Health Get Across the Line? Examining the United Nations Resolution on the Sustainable Development Goals*, BMJ GLOBAL HEALTH, Volume No. 2, Issue No. 3, at 1.

48. *Id.*

49. *Id.*

Yet[,] if SDG 3 is to have any bite, it needs *legal* teeth: ‘Rights remove discretion from development and provide a framework of accountability[.]’ The right to health underpins global development policy, planning[,] and implementation with a normative basis rooted in law, allowing development to become a process by which people can progressively reali[z]e their human rights. Thus, achievement of the content of SDG 3 by the international community of [S]tates (and their partners) between 2016 and 2030 should not be based solely on [S]tate commitments engendered by a[n] SDG global health policy. *Rather, UN Member State commitments must be combined with [S]tates obligations under international law, and complemented by the consequential government accountability mechanisms and legal remedies that surround this. It is the right to health in international law, liked or not, which is the gold standard for health that all UN Member States have adopted (in some form) to respect, protect[,] and fulfil[.].*⁵⁰

B. The Misplaced Agenda of Vaccine Diplomacy

The Harvard International Review cited that

50. *Id.* at 2–3 (citing Alicia Ely Yamin, *Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health*, HEALTH & HUM. RTS., Volume No. 10, Issue No. 2, at 1; Diana Bontá, et al., *New Perspectives on Litigation and the Public’s Health*, 30 J. L., MED., & ETHICS 33, 33 (2002); Gihan Barsoum, et al., *The Pros and Cons of Litigation in Public Health*, J. L., MED., & ETHICS, Special Supplement: The Public’s Health and the Law in the 21st Century, at 42–44; Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J. L., MED., & ETHICS 224, 235 (2002); João Biehl, et al., *Between the Court and the Clinic: Lawsuits for Medicines and the Right to Health in Brazil*, HEALTH & HUM. RTS., Volume No. 14, Issue No. 1, at 49; Hans V. Hogerzeil, et al., *Is Access to Essential Medicines as Part of the Fulfilment of the Right to Health Enforceable Through the Courts?*, 368 LANCET 305 (2006); DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 14 (2000); Michel Sidibé & Kent Buse, *Global Health Governance After 2015 — Author’s Reply*, 382 LANCET 1018, 1018 (2013); Stefan Bernard Baumrin, *Why There Is No Right to Health Care*, in MEDICINE AND SOCIAL JUSTICE: ESSAYS ON THE DISTRIBUTION OF HEALTH CARE (Rosamond Rhodes, et al. eds., 2012); Gunilla Backman, et al., *Health Systems and the Right to Health: An Assessment of 194 Countries*, 372 LANCET 2047 (2008); Eleanor D. Kinney & Brian Alexander Clark, *Provisions for Health and Health Care in the Constitutions of the Countries of the World*, 37 CORNELL INT’L L.J. 285, 305–55 (2004); & S. Katrina Perehudoff, *Health, Essential Medicines, Human Rights & National Constitutions*, available at https://web.archive.org/web/20200212120525/https://www.who.int/medicines/areas/human_rights/Perehudoff_report_constitutions_2008.pdf (last accessed Nov. 30, 2021)) (emphases supplied).

as of February 2021, 130 countries have yet to administer a single dose of the vaccine, according to UNICEF. This leaves 2.5 billion people excluded from the global vaccination campaign, many of whom will likely wait another year or two before receiving inoculation. A recent study from the People's Vaccine Alliance finds that nine out of 10 people in poorer countries are set to miss out on the COVID-19 vaccine in 2021.⁵¹

This means that

four months since the first mass vaccination campaigns began in December 2020[,] ... approximately 450 million people had been vaccinated worldwide, while many African nations, for example, had yet to administer a single dose. While in North America[,] 23 COVID-19 vaccine doses have been administered per 100 hundred people, with the number standing at 13/100 in Europe, the ratio decreases dramatically in the Global South with 6.4/100 in South America, 3.8/100 in Asia, 0.7/100 in Oceania[,] and a mere 0.6/100 in Africa.⁵²

The evolving epistemology of vaccine diplomacy as part of the penumbral global health diplomacy also stands susceptible to the uncertainties of geopolitics. To borrow Neil Stammers' description of the beginning of a fundamental historical transformation, "neither the trajectory of that transformation nor its endpoint [is] predetermined."⁵³ It is believed that countries use this as a tool for the demonstration of soft power.⁵⁴ Admittedly, to a large extent, vaccine diplomacy is shaped by State interest, or in Machiavellian terms, an amoral means to a nationalistic agenda; obviously not due to any altruistic intention to save humanity.⁵⁵

51. Salomé Garnier, *Filling the Void: Vaccine Diplomacy and Shifting Global Health Dynamics*, available at <https://hir.harvard.edu/vaccine-diplomacy> (last accessed Nov. 30, 2021) [<https://perma.cc/4BBA-99FP>] (emphases omitted).

52. Tim Fish Hodgson & Rossella De Falco, *Human Rights and Universal Access to COVID-19 Vaccines: Does the Human Rights Council Resolution Go Far Enough?*, available at <http://opiniojuris.org/2021/03/23/human-rights-and-universal-access-to-COVID-19-vaccines-does-the-human-rights-council-resolution-go-far-enough> (last accessed Nov. 30, 2021) [<https://perma.cc/Y9ZC-RFQA>].

53. Neil Stammers, *Social Movements and the Social Construction of Human Rights*, 21 HUM. RTS. Q. 980, 1001 (1999).

54. Yossi Mekelberg, *Why COVID-19 Vaccine Diplomacy Is Both Moral and Expedient*, available at <https://trendsresearch.org/insight/why-COVID-19-vaccine-diplomacy-is-both-moral-and-expedient> (last accessed Nov. 30, 2021) [<https://perma.cc/4EBA-2Q9H>].

55. *Id.*

It is believed that for “leading economic powers[,]” vaccine diplomacy is as much in “self-interest” as it is a “moral imperative[.]”⁵⁶ International Monetary Fund chief Kristalina I. Georgieva considers vaccine policy to be an economic policy “that in its contribution to hastening the end of this health crisis could add almost \$9 trillion to the global gross domestic product (GDP) by 2025.”⁵⁷ In other words, due to the “inequity of access to vaccines[,]” they have been transformed from an “essential life-saving commodity” into leverage — “a diplomatic bargaining chip.”⁵⁸ Peter J. Hotez wrote —

An underlying theme of both vaccine and vaccine science diplomacies is that vaccines are unique in comparison to other medical or public health interventions. By some estimates, vaccines are the single most powerful intervention ever developed by humankind in terms of the lives that they save. By one estimate, modern vaccines have saved more lives than those that were lost in the world wars during the 20th century.⁵⁹

Yossi Mekelberg pointed out that “China, India, and Russia have seen the potential for advancing their position globally and have capitalized on the opportunity to use their [COVID-19] vaccines to reward friends and deprive rivals and foes.”⁶⁰ In the case of China, vaccine diplomacy is seen as a strategy to “bolster its diplomatic ties abroad[,]”⁶¹ and as a reinforcement to its “far-reaching soft power policies to increase its prestige and influence, including the Belt and Road Initiative (BRI)[,]” which complements “its hard power through creating the world’s biggest navy and its growing military engagements globally[.]”⁶² India’s public diplomacy initiative utilized its Serum Institute, which “revolutionized the production of AstraZeneca vaccines and increased the production by millions[.]”⁶³ Russia’s Sputnik V

56. *Id.*

57. *Id.*

58. *Id.*

59. Peter J. Hotez, ‘Vaccine Diplomacy’: *Historical Perspectives and Future Directions*, PLOS NEGLECTED TROPICAL DISEASES, Volume No. 8, Issue No. 6, at 2 (citing PETER J. HOTEZ, APPEASING WILSON’S GHOST: THE EXPANDED ROLE OF THE NEW VACCINES IN INTERNATIONAL DIPLOMACY (HEALTH AND SECURITY SERIES) (2002); Peter J. Hotez, *The “Biblical Diseases” and U.S. Vaccine Diplomacy*, 12 BROWN J. WORLD AFF. 247, 254 (2006); & Peter J. Hotez, *Peace Through Vaccine Diplomacy*, SCI. MAG., Mar. 12, 2010, at 1301).

60. Mekelberg, *supra* note 54.

61. Garnier, *supra* note 51.

62. Mekelberg, *supra* note 54.

63. Garnier, *supra* note 51.

vaccine is seen more as a new weapon against the West, and as a means of “projecting influence more widely.”⁶⁴ Cuba’s agenda is more self-serving, as it stepped up with its “homegrown vaccine” as a potential end to decades of the “greatest domestic economic crisis[.]”⁶⁵

Notably, there is a manifest trade-off to these countries’ methods of vaccine diplomacy — their own unvaccinated populations. Professor David Ellwood noted that “a million Chinese government-backed doses” were sent to “[a]t least 69 countries ... in the Middle East, Europe, Latin America, [and] even Oceania[.]” in the week of 21 February 2021.⁶⁶ However, among China’s own population, “only 3.65% ... had been vaccinated by the end of February” in 2021.⁶⁷ It was further reported that Russia’s “clients had requested 1.2 billion doses [of Sputnik] by the end of February [2021,]” which were “forecast to be used across Latin America, and in places [such] as Belarus, Algeria[,] and Nigeria.”⁶⁸ Meanwhile, “a mere 4.57% of the population had been vaccinated by the end of February [2021].”⁶⁹ After being labeled the “pharmacy of the world[,]” India was described to be in doubtful position to “fully vaccinate its population by early 2022” due to vaccine shortage.⁷⁰

The responses to the COVID-19 crisis from certain major powers may not only be viewed as a demonstration of the influence of soft power in the world, but more so prove that the human right to health is seriously misplaced in their national agendas.⁷¹ The prestige that comes with vaccine diplomacy could prove to be more fleeting than expected, especially when the human right to health is not prioritized.

64. David Ellwood, *Vaccine Diplomacy: A New Chapter in the Story of Soft Power*, available at <https://uscpublicdiplomacy.org/blog/vaccine-diplomacy-new-chapter-story-soft-power> (last accessed Nov. 30, 2021) [<https://perma.cc/HL5V-ZUU9>].

65. Garnier, *supra* note 51.

66. Ellwood, *supra* note 64.

67. *Id.*

68. *Id.*

69. *Id.*

70. R. Ramakumar, *India’s ‘Arbitrary and Irrational’ Vaccine Policy Spells Trouble*, available at <https://www.eastasiaforum.org/2021/07/27/indias-arbitrary-and-irrational-vaccine-policy-spells-trouble> (last accessed Nov. 30, 2021) [<https://perma.cc/NM6M-YG2T>].

71. See Mekelberg, *supra* note 54 & Garnier, *supra* note 51.

C. Incentivized Vaccine Profiteering

Meanwhile, the propensity of wealthy nations to move ahead of poorer neighbors has disrupted the goal for equitable access to vaccines worldwide.⁷² This vaccine nationalism, while prejudicing less wealthy nations, has incentivized non-State actors, such as pharmaceutical companies, to profit from the process.⁷³

For instance, the COVAX initiative’s “goal of supplying vaccines to 20[%] of the world’s population by the end of 2021[]” was not only hampered by the “lack of funds and supplies[,]” but also by the “difficulty of making contractual arrangements with [profit-oriented] vaccine manufacturers [that would] generally favor the bilateral deals ... with wealthy nations.”⁷⁴ This “lack of cooperation from nations and companies who continue to prioritize bilateral deals, driving up prices and pushing other nations to the back of the queue[,]” is leading to a global health disaster.⁷⁵ WHO Director-General Dr. Tedros Adhanom Ghebreyesus “warned that wealthy nations’ ‘me-first’ approach has brought the world ‘on the brink of a catastrophic moral failure,’ the price of which ‘will be paid with lives and livelihoods in the world’s poorest countries.’”⁷⁶

Activists including the People’s Vaccine campaign have lamented the “disastrous state of COVID-19 vaccine production and distribution throughout the world[,] and even within particular countries where vaccines are available[,]” characterizing the same “as ‘vaccine nationalism’ and profiteering[,] which has produced a ‘vaccine apartheid[.]’”⁷⁷

In addition, these acts of States and non-State business organizations are in direct contravention of the “Maastricht Principles on Extra-Territorial Obligations” of the right to health in the “Area of Economic, Social and

72. Garnier, *supra* note 51.

73. Press Release by Oxfam International, *Vaccinating Poorest Half of Humanity Against Coronavirus Could Cost Less Than Four Months’ Big Pharma Profits* (May 14, 2020).

74. Garnier, *supra* note 51.

75. *Id.*

76. *Id.* “As of now, the Pfizer and Moderna vaccines have already sold 96[%] and 100[%], respectively, of their doses to rich countries.” *Id.*

77. Hodgson & De Falco, *supra* note 52.

Cultural Rights” (Maastricht Principles) in the universal human rights protection system.⁷⁸

It may be argued that these extant practices thrive in the nuances created by minimalist corporate obligations under the three core principles — protect, respect, and remedy — advanced by John G. Ruggie, UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises.⁷⁹ It is believed that

Ruggie’s framework[,] ... particularly his reduction of corporate obligations to a ‘responsibility to respect’ [(relative to the respect, protection, and fulfillment of obligations under international human rights instruments),] could threaten the reali[z]ation of fundamental rights (particularly in the developing world)[,] and imperil the development of a more adequate framework for the protection of fundamental rights in the longer term.⁸⁰

The world turned to the UN Human Rights Council, but even the latter’s Resolution “[e]nsuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease” was seen by many as lacking emphasis on vaccine access.⁸¹

With regard to ensuring equitable, affordable, timely[,] and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic, *the Council urged States to immediately take steps to prevent, within their respective legal frameworks, speculation and undue export controls and stockpiling that may hinder affordable, timely, equitable[,] and universal access for all countries to COVID-19 vaccines[,] and strongly urged all States to refrain from taking any economic, financial[,] or trade measures that may adversely affect equitable, affordable, fair, timely[,] and universal access to COVID-19 vaccines, in particular in developing*

78. See Armin von Bogdandy & Pedro A. Villareal, *The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative*, 81 HEIDELBERG J. INT’L L. 89, 113-14 (2021).

79. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development (Protect, Respect and Remedy: A Framework for Business and Human Rights)*, ¶ 9, Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

80. David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, SUR INT’L J. HUM. RTS., Volume No. 7, Issue No. 12, at 200.

81. Hodgson & De Falco, *supra* note 52. See also *Ensuring Equitable, Affordable, Timely and Universal Access for All Countries to Vaccines in Response to the Coronavirus Disease (COVID-19) Pandemic*, Human Rights Council Res. 46/14, U.N. Doc. A/HRC/RES/46/14 (Mar. 23, 2021).

countries. The Council also decided to hold, at its [49th] session, a half-day panel discussion on the matter and requested the Office of the High Commissioner to make the discussion fully accessible to persons with disabilities.⁸²

Writers observe that the “tepid approach” to this critical issue on “vaccine access is inconsistent with the Resolution’s otherwise firm grounding of vaccine access in human rights. It therefore remarkably even falls short of insisting that States comply with their own long-established international human rights obligations.”⁸³ Obviously, there is more to the people’s right to health than an agenda for global health diplomacy, or a commodity for vaccine diplomacy. The obligation to respect, protect, and fulfill the people’s right to health⁸⁴ is innately premised on its nature as a human right.

IV. THE RIGHT TO HEALTH IN THE TIME OF THE PANDEMIC

“No country is safe unless all are safe.”⁸⁵

A. An International Framework Evasive of the Human Right to Health

The legal definition of the human right to health was first found in the preamble of the WHO Constitution of 1946 — “[h]ealth is a state of complete physical, mental[,] and social well-being and not merely the absence of disease or infirmity.”⁸⁶

Additionally, there was recognition that the right “is fundamental to the attainment of peace and security[,] and is dependent upon the fullest [cooperation] of individuals and States[,]” and moreover that “[i]nformed opinion and active [cooperation] on the part of the public[,]” as well as the

82. Press Release by Human Rights Council, *Human Rights Council Adopts 10 Resolutions, Renews Mandates on Cultural Rights, Albinism, Privacy, Democratic People’s Republic of Korea and Islamic Republic of Iran* (Mar. 23, 2021) (on file with Office of the United Nations High Commissioner for Human Rights) (emphasis supplied).

83. Hodgson & De Falco, *supra* note 52.

84. United Nations Committee on Economic, Social and Cultural Rights, *supra* note 5, ¶ 33.

85. Kickbusch, et al., *supra* note 35, at 14.

86. Constitution of the World Health Organization pmbl., para. 1, signed July 22, 1946, 14 U.N.T.S 185 (entered into force Apr. 7, 1948).

“provision of adequate health and social measures[]” as a responsibility of the Government, are equally fundamental for its fulfillment.⁸⁷

The 1948 Universal Declaration of Human Rights (UDHR)⁸⁸ also defined the right to health —

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care[,] and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age[,] or other lack of livelihood in circumstances beyond his control.⁸⁹

The human right to health was later codified as a treaty obligation under the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁰ to wit —

Article 12

- (1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality[,] and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment[,] and control of epidemic, endemic, occupational[,] and other diseases; [and]
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.⁹¹

In more particular terms,

[t]he Committee on Economic, Social and Cultural Rights has also stressed that States have a core minimum obligation to ensure the satisfaction of

87. *Id.* pmb., paras. 3, 8, & 9.

88. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

89. *Id.* art. 25 (1).

90. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

91. *Id.* art. 12.

minimum essential levels of each of the rights under the Covenant. While these essential levels are, to some extent, resource-dependent, they should be given priority by the State in its efforts to realize the rights under the Covenant. With respect to the right to health, the Committee has underlined that States must ensure [the following]:

- The right of access to health facilities, goods[,] and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- Access to the minimum essential food which is nutritionally adequate and safe;
- Access to shelter, housing[,] sanitation[,] and an adequate supply of safe drinking water;
- The provision of essential drugs; [and]
- Equitable distribution of all health facilities, goods[,] and services.⁹²

At the outset, theorists have looked to resolve the confusing and unnecessary distinction between the two types of human rights, arguing that civil and political rights under the International Covenant on Civil and Political Rights (ICCPR),⁹³ on one hand, and economic, social, and cultural rights under the ICESCR,⁹⁴ on the other, are both genuine rights that “require positive action or inaction” by the government.⁹⁵ This view is consistent with the basic characteristics of human rights as indivisible and interdependent, among others.⁹⁶

As a social right, the right to health is covered by progressive realization in Article 2 of the ICESCR —

92. Office of the United Nations High Commissioner for Human Rights & World Health Organization, *The Right to Health* (Fact Sheet No. 31), at 25, *available at* <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf> (last accessed Nov. 30, 2021) [<https://perma.cc/8HAS-8Q5C>] (emphases omitted).

93. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

94. ICESCR, *supra* note 90.

95. MICHAEL FREEMAN, *HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH* 76 (2d ed. 2011).

96. INTER-PARLIAMENTARY UNION & OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *HUMAN RIGHTS: HANDBOOK FOR PARLIAMENTARIANS* 22 (2016).

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and [cooperation], especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁹⁷

The Committee on Economic, Social and Cultural Rights (CESCR) has recognized that “[i]ndeed, the right to health being subject to progressive realization, what is expected of a State will vary over time. So[,] a State needs a device to monitor and measure these variable dimensions of the right to health.”⁹⁸ It is believed that these structural and process indicators, as well as outcome indicators, “especially when disaggregated, [can] provide useful information on how the right to health is realized in a particular country.”⁹⁹

Progressive realization is “an implicit recognition that States have resource constraints[,] and that it necessarily takes time to implement the treaty provisions.”¹⁰⁰ Thus,

[n]ot all aspects of the rights under the Covenant can or may be realized immediately, but at a minimum[,] States must show that they are making every possible effort, within available resources, to better protect and promote all rights under the Covenant. Available resources refer to those existing within a State[,] as well as those available from the international community through international cooperation and assistance, as outlined in [A]rticle 2 (1).¹⁰¹

Despite the efforts of the CESCR during the pandemic, and notwithstanding the leniency afforded by the principle of progressive realization, it was noted that “in many countries[,] governments continue to fail to make provision[s] to meet their minimum core obligations under the right to health.”¹⁰² The International Commission of Jurists cited the

97. ICESCR, *supra* note 90, art. 2 (1) (emphasis supplied).

98. Office of the United Nations High Commissioner for Human Rights & World Health Organization, *supra* note 92, at 24.

99. *Id.*

100. *Id.* at 23.

101. *Id.*

102. International Commission of Jurists, Statement to the Committee on Economic, Social and Cultural Rights on the Opening of Its 69th Session, ¶ 3, *available at* <https://www.icj.org/wp-content/uploads/2021/02/ICJ-CESCR-Opening->

following failures of States to fulfill their obligations towards the peoples' right to health: Tanzania, on State obligations to procure vaccines;¹⁰³ Zimbabwe and South Africa, on State obligations to produce and implement comprehensive roll-out plans;¹⁰⁴ South Africa, Mexico, Colombia, and Israel

Statement-Final.pdf (last accessed Nov. 30, 2021) [<https://perma.cc/5A7Q-P3H6>].

The International Commission of Jurists (ICJ) applauds the concerted efforts of the Committee on Social, Economic and Cultural Rights (CESCR) to provide guidance to States about the fulfillment of their obligations under the ICESCR in responding to the COVID-19 pandemic. Both the *CESCR's statement on COVID-19 and ESCR (April 2020)* and its subsequent *statement on universal and equitable access to COVID-19 vaccines (Dec 2020)* have fast become rallying points for human rights defenders around the world working to enforce human rights under trying circumstances.

Id. ¶ 1 (citing Committee on Economic, Social and Cultural Rights, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2020/1 (Apr. 17, 2020) & Committee on Economic, Social and Cultural Rights, *Statement on Universal and Equitable Access to Vaccines for the Coronavirus Disease (COVID-19)*, U.N. Doc. E/C.12/2020/2 (Dec. 15, 2020)) (emphases supplied).

103. International Commission of Jurists, *supra* note 102, ¶ 5 (citing Nicholas Bariyo, *Tanzania Shunned Lockdowns. Now It's Rejecting Covid-19 Vaccines*, WALL ST. J., Feb. 3, 2021, available at <https://www.wsj.com/articles/tanzania-shunned-lockdowns-now-its-rejecting-covid-19-vaccines-11612364606> (last accessed Nov. 30, 2021) [<https://perma.cc/3KFK-7NMF>]).

104. International Commission of Jurists, *supra* note 102, ¶ 7 (citing Miriam Mangwaya, *ZimRights Demands COVID-19 Vaccine Roll-Out Plan*, NEWSDAY, Feb. 5, 2021, available at <https://www.newsday.co.zw/2021/02/zimrights-demands-covid-19-vaccine-roll-out-plan> (last accessed Nov. 30, 2021) [<https://perma.cc/46BU-B3R3>]; ZimRights, @ZimRightsLIVE, Tweet, TWITTER, Feb. 10, 2021: 5:44 p.m., available at <https://twitter.com/ZimRightsLIVE/status/1359437954331140096?s=20> (last accessed Nov. 30, 2021) [<https://perma.cc/E73H-A8ZJ>]; Independent Online Staff Reporter, *State's Vaccine Plans Could Be Challenged by Health Justice Initiative*, available at <https://www.iol.co.za/pretoria-news/news/states-vaccine-plans-could-be-challenged-by-health-justice-initiative-9c351278-7630-4cof-95c9-499f31f127c0> (last accessed Nov. 30, 2021) [<https://perma.cc/FZU5-NVWK>]; Health Justice Initiative, HJI's Commentary on the 3rd January 2021 Presentation by National Minister of Health, Dr. Zweli Mkhize; Professor Barry Schoub (MAC Vaccine Committee Chair) and DDG Anban Pillay (National Department of Health NDoH) on the 'COVID-19 Vaccine Rollout Strategy' of the SA Government, available at

on non-discriminatory access to vaccines;¹⁰⁵ and New Zealand, Malawi, Kosovo, South Africa, Namibia, Colombia, Australia, and Canada, on “[c]hallenges to the legality of ‘lockdown’ regulations” in violation of access to effective remedies, including those of a judicial nature.¹⁰⁶

content/uploads/2021/04/HJI-Commentary-on-Vaccine-Strategy-7-Jan-2021-.pdf (last accessed Nov. 30, 2021) [https://perma.cc/E823-EMZW]; & Arnold Tsunga, et al., *Vaccine Procurement and Distribution — The Continent’s Next Big Covid-19 Test*, DAILY MAVERICK, Feb. 9, 2021, available at https://www.dailymaverick.co.za/article/2021-02-09-vaccine-procurement-and-distribution-the-continents-next-big-covid-19-test (last accessed Nov. 30, 2021) [https://perma.cc/X8N5-7TGD]).

105. International Commission of Jurists, *supra* note 102, ¶¶ 8–9 (citing Patrick Egwu, *Migrants in SA Fear Being Excluded from the Vaccination Campaign*, DAILY MAVERICK, Feb. 5, 2021, available at https://www.dailymaverick.co.za/article/2021-02-05-migrants-in-sa-fear-being-excluded-from-the-covid-19-vaccination-campaign (last accessed Nov. 30, 2021) [https://perma.cc/4A2V-KPNQ]; Dewa Mavhinga, *Ensuring Equitable Covid-19 Vaccine Distribution in South Africa*, available at https://www.hrw.org/news/2021/02/03/ensuring-equitable-covid-19-vaccine-distribution-south-africa (last accessed Nov. 30, 2021) [https://perma.cc/P2UZ-2NLH]; Tshegofatso Mothapo, *South Africa Belongs to All Who Live in It, and So Does the Right to be Vaccinated Against Covid-19*, DAILY MAVERICK, Feb. 10, 2021, available at https://www.dailymaverick.co.za/article/2021-02-10-south-africa-belongs-to-all-who-live-in-it-and-so-does-the-right-to-be-vaccinated-against-covid-19 (last accessed Nov. 30, 2021) [https://perma.cc/2AQQ-9BE2]; Press Release by Amnesty International, *Mexico: Vaccination Registry Excludes Important Sectors of the Population by Requesting CURP and Jeopardizes Public Health* (Feb. 5, 2021) (on file with Amnesty International); Joe Parkin Daniels, *Alarm at Colombia Plan to Exclude Migrants from Coronavirus Vaccine*, GUARDIAN, Dec. 22, 2020, available at https://www.theguardian.com/global-development/2020/dec/22/colombia-coronavirus-vaccine-migrants-venezuela-ivan-duque (last accessed Nov. 30, 2021) [https://perma.cc/V77R-2D86]; Joint Press Release by United Nations High Commissioner for Refugees & International Organization for Migration, *UNHCR and IOM Welcome Colombia’s Decision to Regularize Venezuelan Refugees and Migrants* (Feb. 8, 2021) (on file with the United Nations High Commissioner for Refugees); & Reality Check, *Covid-19: Palestinians Lag Behind in Vaccine Efforts as Infections Rise*, BBC NEWS, Mar. 22, 2021, available at https://www.bbc.com/news/55800921 (last accessed Nov. 30, 2021) [https://perma.cc/8KQP-2JC5]).

106. International Commission of Jurists, *supra* note 102, ¶ 18 (citing *Borrowdale v. Director-General of Health*, [2020] NZHC 2090 (N.Z.); Tim Fish Hodgson, *COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 1)*, available at

The term “progressive realization” was not frequently mentioned in international instruments tackling the right to health in relation to the COVID-19 crisis. The UN CESCR’s General Comment No. 14 on “The Right to the Highest Attainable Standard of Health (Art. 12),”¹⁰⁷ covered the “progressive realization” principle only in broad and general terms —

General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States [P]arties various obligations which are of immediate effect. States [P]arties have immediate obligations *in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind ([A]rt. 2.2) and the obligation to take steps ([A]rt. 2.1) towards the full realization of [A]rticle 12. Such steps must be deliberate, concrete[,] and targeted towards the full realization of the right to health.*

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States [P]arties’ obligations of all meaningful content. Rather, *progressive realization means that States [P]arties*

<http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-1> (last accessed Nov. 30, 2021) [<https://perma.cc/8C9Z-LATW>]; Tim Fish Hodgson, COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2), *available at* <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2> (last accessed Nov. 30, 2021) [<https://perma.cc/LC9A-9B24>]; Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020, Case No. KO54/20 (Kos.); Duwayne Esau and Others v. Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020), [2021] ZASCA 9 (S. Afr.); Vimbai Mutandwa, COVID-19 and Africa Symposium: Lockdowns, the Right to Work and the Rule of Law in Namibia, *available at* <http://opiniojuris.org/2020/12/08/lockdowns-the-right-to-work-and-the-rule-of-law-in-nambia> (last accessed Nov. 30, 2021) [<https://perma.cc/EZ8F-37QN>]; Esteban Hoyos-Ceballos & Rodrigo Uprimny-Yepes, Separated, Locked Down, and Unequal: The Grey Hair Revolution’s Resistance to Draconian Quarantine in Colombia, *available at* <https://ohrh.law.ox.ac.uk/separated-locked-down-and-unequal-the-grey-hair-revolutions-resistance-to-draconian-quarantine-in-colombia> (last accessed Nov. 30, 2021) [<https://perma.cc/F789-6SFY>]; Loielo v. Giles, [2020] VSC 722 (Aus.); & Taylor v. Newfoundland and Labrador, [2020] NLSC 125 (Can.)).

107. United Nations Committee on Economic, Social and Cultural Rights, *supra* note 5, ¶ 33.

have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of [A]rticle 12.

32. As with all other rights in the Covenant, there is a strong presumption that *retrogressive measures taken in relation to the right to health are not permissible*. If any deliberately retrogressive measures are taken, the State [P]arty has the burden of proving that they have been introduced after the most careful consideration of all alternatives[,] and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State [P]arty's maximum available resources.

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: *the obligations to respect, protect[,] and fulfil[[]]*. In turn, *the obligation to fulfil[[]] contains obligations to facilitate, provide[,] and promote*. *The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health*. *The obligation to protect requires States to take measures that prevent third parties from interfering with [A]rticle 12 guarantees*. *Finally, the obligation to fulfil[[]] requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional[,] and other measures towards the full realization of the right to health.*¹⁰⁸

Despite these international instruments, “[m]any States, [] by their actions or omissions, continue to impede global access to vaccines[]” in violation of State Parties’ obligations to realize the right to health individually and through international assistance and cooperation.¹⁰⁹

B. The Domestic Paradigm on the Human Right to Health

The 1987 Constitution¹¹⁰ recognizes the people’s right to health with utmost regard.¹¹¹ In fact, the highest law of the land mentions the word “health” 12 times in its entirety.¹¹² The Declaration of State Policies states as follows —

108. *Id.* ¶¶ 30–33 (citing United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Article 13 of the Covenant)*, ¶¶ 43–45, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) & United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990)) (emphases supplied).

109. International Commission of Jurists, *supra* note 102, ¶ 11 (citing Press Release by Obiora C. Okafor, United Nations Independent Expert on Human Rights and International Solidarity (Jan. 22, 2021) (on file with United Nations Office of the High Commissioner for Human Rights)).

110. PHIL. CONST.

111. PHIL. CONST. art. II, § 15.

112. *See generally* PHIL. CONST.

SECTION 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

SECTION 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.¹¹³

Such is the importance of public health as to limit the people's right to travel under the Bill of Rights, to wit —

SECTION 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.¹¹⁴

Moreover, a separate section is devoted to “Health” under the Article on Social Justice and Human Rights —

SECTION 11. The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health[,] and other social services available to all the people at affordable cost. There shall be priority for the needs of the underprivileged[,] sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.

SECTION 12. The State shall establish and maintain an effective food and drug regulatory system and undertake appropriate health manpower development and research, responsive to the country's health needs and problems.

SECTION 13. The State shall establish a special agency for disabled persons for rehabilitation, self-development[,] and self-reliance, and their integration into the mainstream of society.¹¹⁵

In upholding the legal standing of petitioner minors to file a class suit for the protection of natural resources, the Supreme Court in *Oposa v. Factoran, Jr.*¹¹⁶ interpreted the right to a balanced and healthful ecology as an “intergenerational responsibility,”¹¹⁷ to wit —

Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for

113. PHIL. CONST. art. II, §§ 15-16.

114. PHIL. CONST. art. III, § 6.

115. PHIL. CONST. art. XIII, §§ 11-13.

116. *Oposa v. Factoran, Jr.*, G.R. No. 101083, 224 SCRA 792 (1993).

117. *Id.* at 802-03.

themselves, for others of their generation[,] and for the succeeding generations, file a class suit. *Their personality to sue [on] behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.* Such a right, as hereinafter expounded, considers the ‘rhythm and harmony of nature.’ Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal[,] and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas[,] and other natural resources to the end that their exploration, development[,] and utilization be equitably accessible to the present as well as future generations. *Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology.* Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.¹¹⁸

A close reading of this decision by the highest court demonstrates that the ruling preceded from the theory that the rights to a balanced and healthful ecology and to health are both basic natural rights —

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. *As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the [S]tate a solemn obligation to preserve the first and protect and advance the second,* the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.¹¹⁹

118. *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1508 (1986) & Instituting the “Administrative Code of 1987” [ADMIN. CODE], Executive Order No. 292, bk. IV, tit. XIV (1987)) (emphases supplied).

119. *Oposa*, 224 SCRA at 804-05 (emphases supplied).

If only to underscore the importance given to this constitutional right, the Supreme Court further explained that even the non-impairment clause under Article III, Section 10 of the Constitution¹²⁰ must yield to “the exercise of the police power of the [S]tate for the purpose of advancing the right of the people to a balanced and healthful ecology, promoting their health and enhancing the general welfare.”¹²¹ Thus,

[t]he reason for this is emphatically set forth in *Nebbia v. New York*, quoted in *Philippine American Life Insurance Co. v. Auditor General*, to wit [—]

‘Under our form of government[,] the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.’¹²²

In another case, *Laguna Lake Development Authority v. Court of Appeals*,¹²³ the Supreme Court upheld

the power and authority [of the Laguna Lake Development Authority] to issue a ‘cease and desist’ order under Republic Act No. 4850 and its amendatory laws, on the basis of the facts presented in this case, enjoining the dumping of garbage in Tala Estate, Barangay Camarin, Caloocan City.

...

*As a constitutionally guaranteed right of every person, it carries the correlative duty of non-impairment. This is but in consonance with the declared policy of the [S]tate ‘to protect and promote the right to health of the people and instill health consciousness among them.’ It is to be borne in mind that the Philippines is [a] party to the Universal Declaration of Human Rights and the Alma Conference Declaration of 1978 which recognize health as a fundamental human right.*¹²⁴

120. PHIL. CONST. art. III, § 10.

121. *Oposa*, 224 SCRA at 813.

122. *Id.* (citing *Nebbia v. People of State of New York*, 291 U.S. 502, 523 (1934) & *Phil. American Life Ins. Co. v. Auditor General*, G.R. No. L-19255, 22 SCRA 135, 146 (1968)).

123. *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, 231 SCRA 292 (1994).

124. *Id.* at 305 & 307-08 (citing PHIL. CONST. art. II, § 15 & 3 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 52, at 119 (1986)).

Whether these ideals can be translated into equitable access to vaccines during the COVID-19 crisis remains to be seen. For sure, people need more than legal abstractions to achieve the fulfillment of their human right to health.

V. THE CHALLENGE TO PRIORITIZE THE HUMAN RIGHT TO HEALTH

The foregoing discussion shows a vulnerable international framework still in transition to the new normal. A weak legal landscape nurtures a global environment that neither asserts the human right to health in strong and concrete terms, nor prevents the misuse of vaccine diplomacy disguised under the cloak of global health diplomacy and profit from bilateral deals between rich nations and private corporations. Further, forecasts on economic recovery have been conditioned on countries' capacities to "flatten the curve."¹²⁵ This raises the question of how to actually do so.

Authorities are in agreement that developing countries "have been "hardest hit[, not only] relative to their growth paths prior to the pandemic[.]" as pointed out by the Lowy Institute,¹²⁶ but also due to their vulnerabilities to spillovers from the global recession, as in previous public health crises.¹²⁷ Developing countries that are reliant on external markets also stand to lose from the changes in "trade and immigration policies [] in advanced economies in the coming years."¹²⁸ The preliminary study by Pinelopi Koujianou Goldberg and Tristan Reed¹²⁹ on "public health and short-run economic effects of the COVID-19 crisis" provides some degree of optimism for developing countries, albeit temporary and conditional.¹³⁰ The evidence as of July 2020¹³¹ showed a "lower death toll per capita [for most low- and middle-

125. See generally International Labour Organization & Organisation for Economic Co-operation and Development, *The Impact of the COVID-19 Pandemic on Jobs and Incomes in G20 Economies*, at 36-40, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_756331.pdf (last accessed Nov. 30, 2021) [<https://perma.cc/6C36-S7TJ>].

126. LEMAHIEU & LENG, *supra* note 28, at 11.

127. See Goldberg & Reed, *supra* note 7, at 163.

128. Goldberg & Reed, *supra* note 7, at 166.

129. Pinelopi Koujianou Goldberg is the Elihu Professor of Economics and Global Affairs at Yale University and a non-resident senior fellow at the Peterson Institute for International Economics (PIIE), while Tristan Reed is an economist for the World Bank's Development Research Group.

130. Goldberg & Reed, *supra* note 7, at 205-206.

131. *Id.* at 164. The article by Goldberg and Reed highlighted deaths per one million people as of 15 July 2020 in several selected developed and developing countries:

income countries] than richer countries,” although “within municipalities, ... the socioeconomically disadvantaged groups [were shown to] suffer the most.”¹³²

In the face of a renewed surge caused by COVID-19 variants and delayed inoculation due to lack of access to vaccines,¹³³ the economic fallout could turn out to be more severe for developing countries like the Philippines. “In the long run, the highest costs may be due to the indirect effects of virus containment policies on poverty, health, and education[,] as well as the effects of accelerating deglobalization on [emerging markets and developing economies].”¹³⁴

The note “COVID-19 and ASEAN Responses: Comparative Policy Analysis”¹³⁵ is instructive on country-specific responses among the individual ASEAN members.¹³⁶ Narrating the divergent government responses taken, it identified the three core elements of the Philippines’ official COVID-19 response: “(i) granting ‘special temporary power’ to the President by Congress[;] (ii) imposing a lockdown on the entire island of Luzon[; and] (iii) employing the military and police to enforce the President’s orders and lockdown measures.”¹³⁷

United States (423), United Kingdom (664), France (461), Brazil (355), Mexico (282), South Africa (75), Nigeria (4), India (18), Indonesia (14), Philippines (15), and Vietnam (zero). *Id.* at 164.

132. *Id.* at 161 & 164. The term “developing countries” was defined to include the “emerging market and developing economies (EMDEs)[.]” with “an important qualifier: EMDEs include an enormously diverse set of societies and economies.” *Id.* at 163.

133. See generally Yen Nee Lee, *3 Charts Show How Far Covid Delta Variant Has Spread Around the World*, CNBC, Aug. 5, 2021, available at <https://www.cnbc.com/2021/08/06/covid-charts-show-how-far-delta-variant-has-spread-around-the-world.html> (last accessed Nov. 30, 2021) [<https://perma.cc/BGF7-RNC8>].

134. Goldberg & Reed, *supra* note 7, at 161-62.

135. Riyanti Djalante, et al., *COVID-19 and ASEAN Responses: Comparative Policy Analysis*, PROGRESS IN DISASTER SCI., Volume No. 8.

136. *Id.* at 4-7.

137. *Id.* at 6 (citing Office of the President, Stringent Social Distancing Measures and Further Guidelines for the Management of the Coronavirus Disease 2019 (COVID-19) Situation (Mar. 13, 2020)).

In the course of the pandemic, the Philippines has lost its global reputation as the next Asian Tiger Economy.¹³⁸ Given the economic downturn, rising cases due to the Delta variant, and possible future variants as lurking threats, the Philippines is doubly pressured to recover economically.¹³⁹ Similar to policies across ASEAN governments, the Philippines has resorted to the whole gamut of country responses to the current health crisis, i.e., “aggressive contact tracing, lockdowns[,] and social distancing measures[.]”¹⁴⁰ Yet, it seems that the country is nowhere near recovery.

A. Economic Recovery Through Laws and Lockdowns

The country’s central monetary authority met the outbreak of COVID-19 head-on with “robust macroeconomic fundamentals and regulatory buffers, products of a long history of structural reforms,”¹⁴¹ together with pivotal congressional measures in its arsenal.¹⁴² “Central banks slashed interest rates to record lows to keep their economies afloat during the crisis by injecting liquidity in the financial markets and encouraging banks to lend.”¹⁴³ The *Bangko Sentral ng Pilipinas* Governor similarly displayed little apprehension over the impending monetary policy tightening by the U.S. Federal Reserve System, expressing confidence in the country’s “sound fundamentals[, i.e.,] hefty GIR (gross international reserves), low debt-to-GDP (gross domestic product) ratio, sound and resilient banking system, ... structural reforms[,]” and “[a]mple foreign exchange buffers [to] protect the country from market

138. Ronald U. Mendoza, *The Philippine Economy Under the Pandemic: From Asian Tiger to Sick Man Again?*, available at <https://www.brookings.edu/blog/order-from-chaos/2021/08/02/the-philippine-economy-under-the-pandemic-from-asian-tiger-to-sick-man-again> (last accessed Nov. 30, 2021) [<https://perma.cc/G5NA-AG9H>].

139. *Id.*

140. Djalante, et al., *supra* note 17, at 7.

141. Benjamin E. Diokno, *Foreword* to BANGKO SENTRAL NG PILIPINAS, *BSP UNBOUND: CENTRAL BANKING AND THE COVID-19 PANDEMIC IN THE PHILIPPINES* xiv (2020). See also *id.* at 76.

142. BANGKO SENTRAL NG PILIPINAS, *supra* note 141, at 76-81. “Key legislative initiatives” included Republic Act No. 11469, or the Bayanihan to Heal as One Act, and Republic Act No. 11494, or the Bayanihan to Recover as One Act. *Id.* at 76-79.

143. Laforga & Noble, *supra* note 14.

volatility and ensure the country can pay its debts in the event of an economic downturn.”¹⁴⁴

As an “economic stimulus[.]” Republic Act No. 11469,¹⁴⁵ or the *Bayanihan* to Heal as One Act, was legislated, providing a “\$3.9 billion social protection program to aid poor families, earners in the informal sector, health workers who contracted [COVID]-19, and families of health workers who died from the disease.”¹⁴⁶ Moreover, a “*Bayanihan* Grant to Cities and Municipalities” worth \$610 million was extended “to assist local government units in responding to the health crisis[.]”¹⁴⁷ In addition, “a \$1 billion wage subsidy package [was allotted] to support social security and workers of small businesses[.]”¹⁴⁸ Disaster financing tools, such as the Calamity and Quick Response Funds, were also made accessible to the government after the country was placed under a “State of Calamity.”¹⁴⁹

Notwithstanding encouraging signals from the country’s monetary and fiscal policy, and from heterogeneity across emerging markets and developing economies due to the spillover effects of foreign economic policy, the Philippines was still no exception to the economic downturn.¹⁵⁰

In addition, the Philippine government implemented a protracted containment strategy and tough lockdowns.¹⁵¹ At the time of writing, the Philippines’ National Capital Region remains under Modified Enhanced Community Quarantine (MECQ) until the “pilot implementation of the

144. *Id.*

145. An Act Declaring the Existence of a National Emergency Arising from the Corona Virus Disease 2019 (COVID-19) Situation and a National Policy in Connection Therewith, and Authorizing the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and for Other Purposes [Bayanihan to Heal as One Act], Republic Act No. 11469 (2020).

146. Djalante, et al., *supra* note 17, at 6 (citing Press Release by Department of Budget and Management, *DBM Releases ₱30.8 Billion for Bayanihan Grant to Cities and Municipalities to Address COVID-19* (Apr. 13, 2020) (on file with the Department of Budget and Management)).

147. Djalante, et al., *supra* note 17, at 6.

148. *Id.*

149. *Id.*

150. See generally Mendoza, *supra* note 138.

151. Mendoza, *supra* note 138 & Alegado & Calonzo, *supra* note 20.

General Community Quarantine (GCQ) with Alert Levels System[.]”¹⁵² with granular lockdown, or “a smaller-scale quarantine [for] villages, streets, or houses tagged as ‘critical zones,’ or high-risk for COVID-19[.] by the local government unit.”¹⁵³

The pandemic has thus forced the national government into the middle of an apparent clash between two major stakeholders on lockdown measures — the business community and the healthcare sector.

Economists and analysts express aversion thereto. The series of instinctive general and prolonged lockdowns are seen to have precipitated the decline of the country’s economy, which is highly dependent on physical mobility.¹⁵⁴ The health sector differs in opinion. In a meeting of the Inter-Agency Task Force for the Management of Emerging Infectious Diseases (IATF-EID), Dr. Maricar B. Limpin, President of the Philippine College of Physicians, and Dr. Antonio Dans, leader of the Healthcare Professionals Alliance Against COVID-19,

appeal[ed] to the group to put the National Capital Region (NCR) back under a stricter quarantine lockdown. Limpin told the group that shifting back to GCQ would mean COVID-19 cases would continue to rise and the healthcare system would not be able to handle the situation[, pleading for them to] place the NCR and other places [] in the Philippines [back under] Enhanced Community Quarantine (ECQ)[.]¹⁵⁵

The appeal came on the heels of the surge in COVID-19 Delta variant cases. Department of Health (DOH) data shows that as of 14 September 2021,

152. Krissy Aguilar, *NCR Stays Under MECQ Until Sept. 15; Pilot Granular Lockdown Deferred*, PHIL. DAILY INQ., Sept. 7, 2021, available at <https://newsinfo.inquirer.net/1484740/metro-manila-stays-under-mecq-until-sept-15-pilot-granular-lockdown-deferred> (last accessed Nov. 30, 2021) [<https://perma.cc/C5M6-M28D>].

153. CNN Philippines Staff, *Sudden Granular Lockdown Possible in Areas With Cluster Infections — DILG*, CNN PHIL., Sept. 13, 2021, available at <https://cnnphilippines.com/news/2021/9/13/Sudden-granular-lockdowns-.html> (last accessed Nov. 30, 2021) [<https://perma.cc/7B25-4V2X>].

154. See Mendoza, *supra* note 138.

155. Oscar P. Lagman, Jr., *Harry Roque’s Rant a Political Stunt?*, BUSINESSWORLD, Sept. 13, 2021, available at <https://www.bworldonline.com/harry-roques-rant-a-political-stunt> (last accessed Nov. 30, 2021) [<https://perma.cc/3MT9-SPWQ>]. Harry L. Roque’s rant was in response to Dr. Maricar Limpin, President of the Philippine College of Physicians, and Dr. Antonio Dans, Leader of the Healthcare Professionals Alliance Against COVID-19. *Id.*

“[t]he occupancy rate of intensive care unit beds for COVID-19 patients in the National Capital Region [] climbed to 79%,” putting the NCR and the region at high risk.¹⁵⁶

Dean Ronald U. Mendoza of the Ateneo School of Government shared insight explaining the failure of lockdown measures.¹⁵⁷ First, the Philippine economic model is one “built around the mobility of people[—] tourism, services, and remittances-fed growth [—] all vulnerable to pandemic-induced lockdowns and consumer confidence decline.”¹⁵⁸ Second, there is the failure to maximize lockdowns as “time to strengthen health systems and test-trace-treat systems” due to problematic pandemic-handling, leading to a forced cycle of draconian mobility restrictions in the event of COVID-19 variants, with eventual failure to flatten the curve.¹⁵⁹ Third, there are delays in vaccination rollout initially due to staggering “implementation and supply issues,” as well as another problem in the form of “vaccine hesitancy” among the public.¹⁶⁰

B. The Human Right to Health and the Vaccination Crisis

The Philippines, with a population of more than 100 million people, is the “second-most populous country” among the ASEAN members.¹⁶¹

The government reported the first imported C[OVID]-19 case in January 2020 and confirmed the first case of local transmission by early March. By April, Luzon, the largest and most populous island in the country placed under enhanced community quarantine (ECQ), accounted for around 91% of the 6710 confirmed cases and 87% of reported deaths (WHO). As of 22 September, Luzon remains the most C[OVID]-19 affected area, making up about 75% of the 291,789 confirmed cases and 62% of reported deaths (WHO).¹⁶²

The country has been on the receiving end of vaccine diplomacy since the COVID-19 outbreak. It must be recalled that the Philippines’ first supply

156. Joahna Lei Casilao, *DOH: ICU Occupancy Rate in NCR Rose to 79%*, GMA NEWS, Sept. 14, 2021, available at <https://www.gmanetwork.com/news/news/nation/803275/doh-icu-occupancy-rate-in-ncr-rises-to-79/story> (last accessed Nov. 30, 2021) [<https://perma.cc/N6FC-35YK>].

157. Mendoza, *supra* note 138.

158. *Id.*

159. *Id.*

160. *Id.*

161. Djalante, et al., *supra* note 17, at 5.

162. *Id.* at 5-6.

of COVID-19 vaccines — “one million doses of Sinovac and 10,000 shots of Sinopharm” — was donated by China.¹⁶³ The Philippine government took political flak for receiving vaccines from China despite tension between the two countries over the West Philippine Sea.¹⁶⁴ On 19 August 2021, it was reported that the Chinese government was giving the Philippines an “additional donation of one million doses of COVID-19 vaccines developed by [S]tate-owned Sinopharm.”¹⁶⁵

On 16 July 2021, “[t]he Philippines received [] an initial delivery of over 1.6 million doses of Johnson & Johnson’s Janssen vaccine donated by the [U.S.] Government through the COVAX Facility. A second delivery, expected to arrive on 17 July 2021, will complete the donation of around 3.2 million doses.”¹⁶⁶

The most recent arrival [on 3 August 2021] brings the total of COVAX donations to the Philippines to 13.2 million doses of COVID-19 vaccines. Of these, [six] million doses were donated by the [U.S.] Government as part of its global vaccine-sharing strategy, which aims to provide at least 80 million vaccine doses to countries most affected by the COVID-19 pandemic.¹⁶⁷

163. CNN Philippines Staff, *China Donates 1M Sinopharm Shots to PH, Vaccines to Arrive This Week*, CNN PHIL., Aug. 19, 2021, available at <https://www.cnnphilippines.com/news/2021/8/19/China-Sinopharm-COVID-19-vaccine-donation-Philippines.html> (last accessed Nov. 30, 2021) [<https://perma.cc/5XP8-WHBH>].

164. See, e.g., CNN Philippines Staff, *Lawmakers Raise Concerns About China’s Vaccine Donations Amid New Tensions in West Philippine Sea*, CNN PHIL., Mar. 24, 2021, available at <https://cnnphilippines.com/news/2021/3/24/China-s-vaccine-donation-West-Philippine-Sea-incursion.html> (last accessed Nov. 30, 2021) [<https://perma.cc/8H8J-LZPR>].

165. CNN Philippines Staff, *supra* note 163.

166. World Health Organization, *Philippines Receives Over 3.2M Vaccines Donated By the US Government Through the COVAX Facility*, available at <https://www.who.int/philippines/news/detail/16-07-2021-philippines-receives-over-3.2m-vaccines-donated-by-the-us-government-through-the-covax-facility> (last accessed Nov. 30, 2021) [<https://perma.cc/6DUD-EG6H>]. As of 16 July 2021, “the Philippines has received about 10 million vaccine doses from the COVAX Facility.” *Id.*

167. Joint Press Release by Department of Health, et al., *3M Moderna Vaccines from US Government Arrive Through COVAX Facility* (Aug. 3, 2021) (on file with United Nations International Children’s Emergency Fund).

From a political perspective, the vaccine donation from the U.S., a former colonial power, may be perceived as a tool for rebalancing global power in Southeast Asia.¹⁶⁸

The ASEAN Briefing website provides ASEAN Coronavirus live updates by country. As of 3 November 2021 —

The Philippines aims to commence vaccinations from June 2021 and expects to inoculate about 25 million people (about 25[%] of its population) over the course of the year. The country has been badly affected by the virus and has the second-highest rate in Southeast Asia. The business community has reacted, more than 30 local companies signed an agreement to purchase at least 2.6 million vaccine doses from AstraZeneca in the country's first such deal to secure coronavirus vaccines, ten days ago. They plan to donate a large part of the doses to the government for its planned vaccination program and use the rest to inoculate their employees.

- The Philippines reported 1,591 new cases and 186 deaths on November 3, taking the tallies to 2,793,898 cases and 43,586 deaths.
- The Philippines recorded 2,303 new cases and 128 deaths on November 2, bringing the totals to 2,792,656 cases and 43,404 deaths.
- The Philippines saw 3,117 new cases and 104 deaths on November 1, taking the tallies to 2,790,375 cases and 43,276 deaths.¹⁶⁹

Thus, by far, what may be inferred from the government's decision on vaccine diplomacy is its positioning in terms of international relations with the countries in question. The human right to health may have faded in the background of politicking and kowtowing. Like the disregarded populations of the vaccine donors, full vaccination nationwide remains a challenge.¹⁷⁰ In

168. See Eduard Soler i Lecha, *Pandemic, Vaccines and Power*, CIDOB OPINION, No. 660, March 2021, at *2. "In this competitive system, which is in the process of being rebalanced, the re-emerging powers have unashamedly added vaccines to their toolkit for projecting their status, and maintaining and extending their areas of influence." Lecha, *supra* note 168, at *2.

169. Dezan Shira & Associates, COVID-19 Vaccine Roll Outs in ASEAN & Asia — Live Updates by Country, available at <https://web.archive.org/web/20211103155206/https://www.aseanbriefing.com/news/COVID-19-vaccine-roll-outs-in-asean-asia-live-updates-by-country/> (last accessed Nov. 30, 2021).

170. Statista, Number of Coronavirus (COVID-19) Vaccine Doses Administered in the Philippines as of October 14, 2021, available at <https://web.archive.org/web/20211021122300/https://www.statista.com/statistics/1236727/philippines-coronavirus-covid19-vaccine-rollout/> (last accessed Nov. 30, 2021).

fact, the COVID-19 surge has been described by the government as an “epidemic of the unvaccinated.”¹⁷¹ Meanwhile, doubts linger over the integrity of the COVID-19 vaccines roll-out received through inherently politicized vaccine diplomacy.

It is believed that the country is now facing a “health and human rights crisis [more than] one year into the COVID-19 pandemic” based on the critical state of healthcare access, the safety and well-being of health workers, greater health risks to the marginalized sector, and continued red-tagging amid the pandemic.¹⁷²

Amnesty International called upon authorities to “provide healthcare without discrimination using their maximum available resources[,]” stressing that “[s]pecific measures to protect those most affected, including health workers and those most at-risk, must be taken without further delay. Furthermore, the government must stop attacking human rights defenders and activists, a practice that only makes a dire situation worse.”¹⁷³ Health workers also staged separate protests due to unpaid benefits, sharing that “many of [them had] died, many of [them] became sick, and many [had] resigned or opted to retire early, yet [they were] still kneeling before the DOH to give [them their] benefits[.]”¹⁷⁴

There were also several obstacles that hindered the government at the onset of the pandemic, which may have impacted its response to the crisis.

For one, there was the negative perception of a persistent “militariz[ed] pandemic response” that triggered “unwanted fear and panic among the public during the lockdown.”¹⁷⁵ This was a consequence of early efforts targeting

171. CNN Philippines Staff, *NTF Adviser Sees ‘Epidemic of the Unvaccinated’ in NCR*, CNN PHIL., Aug. 18, 2021, available at <https://www.cnnphilippines.com/news/2021/8/18/unvaccinated-epidemic-herbosa.html> (last accessed Nov. 30, 2021) [<https://perma.cc/45ZF-54FR>].

172. Press Release by Amnesty International, *Philippines: Country Faces Health and Human Rights Crisis One Year Into the COVID-19 Pandemic* (Apr. 26, 2021) (on file with Amnesty International).

173. *Id.*

174. Adrian Portugal, *Philippines Health Workers Protest Neglect as COVID-19 Strains Hospitals*, REUTERS, Sept. 1 2021, available at <https://www.reuters.com/world/asia-pacific/philippines-health-workers-protest-neglect-covid-19-strains-hospitals-2021-09-01> (last accessed Nov. 30, 2021) [<https://perma.cc/X92W-ZNRC>].

175. Djalante, et al., *supra* note 17, at 6.

national security over disaster management and public health,¹⁷⁶ which manifested in the form of government threats to put behind bars those who refused to have themselves vaccinated.¹⁷⁷ At some point, this “command and control” strategy¹⁷⁸ even increased vaccination hesitancy and may have even stymied efforts at an aggressive inoculation program, leading to the vicious cycle of rising COVID-19 cases and vaccination slowdowns.¹⁷⁹

On the other hand, the COVID-19 crisis reveals a pressing need for a more transparent realignment of appropriations that directs due attention to research on and development of medicine. The Philippines is rich in human resources — scholars, intellectuals, and scientists — and natural resources that remain untapped.

C. A Problem of Governance During the Pandemic

In terms of structures and mechanisms, the national government utilized the IATF-EID, which was established in 2014 and tasked with responding to epidemics nationwide.¹⁸⁰ The IATF-EID “worked alongside a National Task Force in charge of commanding operations[,]” while “the Office of Civil Defense, the implementing arm of the National Disaster Risk Reduction and Management Council, [supported] the National Task Force in coordinating

176. *Id.*

177. See, e.g., Karen Lema & Stephanie van den Berg, *Philippines’ Duterte Threatens Vaccine Decliners With Jail*, *Animal Drug*, REUTERS, June 22, 2021, available at <https://www.reuters.com/world/asia-pacific/philippines-duterte-threatens-those-who-refuse-covid-19-vaccine-with-jail-2021-06-21> (last accessed Nov. 30, 2021) [<https://perma.cc/MR3S-EH2E>].

178. Chantana Wun’Gaeo & Surichai Wun’Gaeo, *Thailand and COVID-19: Institutions and Social Dynamics from Below*, in *COVID-19 AND GOVERNANCE: CRISIS REVEALS* 88 & 95 (Jan Nederveen Pieterse, et al. eds., 2021).

The success of command-and-control strategies in relation to crisis management was highlighted through a discussion of Thailand’s own response to the pandemic. *Id.*

179. See Daphne Galvez, *Rising Infections, Lockdowns Have Slowed Down COVID-19 Vaccination — Galvez*, *PHIL. DAILY INQ.*, Aug. 17, 2021, available at <https://newsinfo.inquirer.net/1474559/ph-COVID-19-vaccination-slowed-down-amid-rising-infections-lockdowns> (last accessed Nov. 30, 2021) [<https://perma.cc/LHW6-NDU8>].

180. Office of the President, *Creating the Inter-Agency Task Force for the Management of Emerging Infectious Diseases in the Philippines*, Executive Order No. 168, Series of 2014 [E.O. No. 168, s. 2014], whereas cl. para. 6 (May 26, 2014).

operations in regions outside the capital through their field offices.”¹⁸¹ The local governments, in comparison, are in charge of responding to the crisis at the local level.¹⁸²

The local government is “an important point of contact between the [S]tate and citizens, where public services are generally exchanged and where local norms and by-laws regulate citizens’ quotidian habitat: their home, their street, their neighborhood, [and] their city.”¹⁸³ This is especially true during pandemics.

According to [United Cities and Local Governments Asia Pacific (UCLG ASPAC)], the role of local leaders has been extremely vital in determining how well cities have responded since the start of the outbreak.

Among the examples it cites are Indonesia’s Governor of Central Java, Ganjar Pranowo, who personally took to communicating with the public through social media since the start of the pandemic to provide up-to-date information and ensure prevention measures are promoted and understood. And the Governor of Jakarta, Anies Baswedan, called on the private sector early on to allow employees to work from home so they would not feel pressure to show up to the office.

At the institutional level, local governments also mobilized their resources to shore up support for health services and facilities, and extended assistance to the most vulnerable to stay safe and healthy.

*At the same time, many mayors and local governments felt overwhelmed and unsure [about] what steps to take next in order to prevent and[,] hopefully, put a stop to the spread of this new pandemic.*¹⁸⁴

181. Djalante, et al., *supra* note 17, at 6.

182. See generally Antonio G.M. La Viña & Jayvy R. Gamboa, *Decentralization of What? Thoughts on a Legally Permissible and Necessary Decentralization of Power to Local Government Units*, 65 ATENEO L.J. 1179, 1180-81, 1224, & 1231-34 (2021) & Ernesto P. Maceda, Jr., *Preemption in the Philippines: Illuminating an Opaque Doctrine*, 65 ATENEO L.J. 1235, 1245-50 (2021).

183. Iñaki Albisu Ardigó, *Local Government Accountability Mechanisms*, at 2, available at <https://www.u4.no/publications/local-government-accountability-mechanisms.pdf> (last accessed Nov. 30, 2021) [<https://perma.cc/TC89-EG8E>].

184. United Nations Office for Disaster Risk Reduction, *Role of Local Governance in Responding to COVID-19 in Asia-Pacific*, available at <https://www.undrr.org/news/role-local-governance-responding-COVID-19-asia-pacific> (last accessed Nov. 30, 2021) [<https://perma.cc/ERU7-L5BC>] (emphases supplied).

The Economic and Social Council recognizes that increased concerted action has become indispensable —

*The pandemic has increased the need for concerted action at the local, national[,] and international levels, global cooperation, peace and solidarity, respect for human rights, fostering the rule of law at the national and international levels, equal access to justice for all, proper management of public affairs and public property, good governance and leaving no one behind, especially as trends of institutional digitization continue, as well as promoting and enforcing non-discriminatory laws and policies for sustainable development. Achieving sustainable development and strengthening resilience require a long-term engagement[,] together with building effective, accountable[,] and transparent institutions at all levels, based on responsive, inclusive, participatory[,] and representative decision-making for sustainable development[,] and a commitment to peaceful, just[,] and inclusive societies that are based on respect for human rights and equal access to justice, including through the promotion and enforcement of non-discriminatory laws and policies. Inclusive and equitable delivery and access to public services, including health care, education[,] and social services, including through digital cooperation, is key to building greater public confidence and trust in government.*¹⁸⁵

Republic Act No. 7160, or the Local Government Code of 1991,¹⁸⁶ was enacted to “provide for a more responsive and accountable local government

As the leading association of local authorities in the Asia-Pacific region, the United Cities and Local Governments Asia Pacific (UCLG ASPAC) organization has been working closely with its member cities since the onset of the pandemic.

Its main contributions have been in highlighting and sharing among members good practices and emerging lessons of how local authorities have managed the response and recovery phases.

Id.

185. United Nations Economic and Social Council, *Ministerial Declaration of the High-Level Segment of the 2021 Session of the Economic and Social Council and the 2021 High-Level Political Forum on Sustainable Development, Convened Under the Auspices of the Council, on the Theme “Sustainable and Resilient Recovery from the COVID-19 Pandemic That Promotes the Economic, Social and Environmental Dimensions of Sustainable Development: Building an Inclusive and Effective Path for the Achievement of the 2030 Agenda in the Context of the Decade of Action and Delivery for Sustainable Development”*, ¶ 21, U.N. Doc. E/2021/L.26-E/HLPF/2021/L.2 (July 9, 2021) (emphasis supplied).

186. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160 (1991).

structure instituted through ... decentralization.”¹⁸⁷ The idea was to bring the State closer to the public.¹⁸⁸ Under a system of decentralization, public participation ought to be promoted in local democratic structures and through greater accountability,¹⁸⁹ although accountability in government may not necessarily result from the decentralization thereof.¹⁹⁰ Transparency International observed —

Yet decentrali[z]ation did not have uniform effects in terms of governance: while many local governments saw a rebirth of local politics and renewed synergy between local governments and their constituents, other areas saw a rise of corruption in the form of clientelism, [S]tate capture[,], and illicit rent-seeking. These areas also saw a decrease in the quality of public services and trust in government[,], and a rise in negative development indicators. Many countries now show a significant gap in the quality of governance between their national and local governments.¹⁹¹

Best practices from neighboring States have therefore become practical references for more responsive governance. For instance, the United Cities and Local Governments Asia Pacific (UCLG ASPAC) may serve as a local government accountability mechanism. It was observed that

[t]he significant increase in Voluntary Local Reviews (VLRs) highlights the importance of engagement at all levels of governance for global progress and showcases the willingness and ability of local governments to serve as actors of change. It was noted that support for further advancement of SDG localization supports attainment of the SDGs also nationally and globally. For example, at the national level, aggregation of local data and information can reveal inconsistencies in SDG implementation, policy gaps nationwide, and areas for data improvements. VLRs can also feed into [voluntary national reviews] and provide a much fuller picture of the realities on the ground[,], as well as enhance a dialogue between different levels of government.¹⁹²

187. PHIL. CONST. art. X, § 3.

188. Gregorio Rafael P. Bueta & Katrina Isabelle G. Pimentel, *Do the LOCALmotion: Local Government Powers and Climate Change in the Philippines*, 65 ATENEO L.J. 1294, 1311 (2021) (citing LOCAL GOV'T CODE, § 16).

189. See Maceda, Jr., *supra* note 182, at 1240.

190. See Ardigó, *supra* note 183, at 2.

191. Ardigó, *supra* note 183, at 2-3 (citing Transparency International, Working Paper 05/2009: Corruption and Local Government, available at https://images.transparencycdn.org/images/LocalGovernmentWP_23_Oct_2009.pdf (last accessed Nov. 30, 2021) [<https://perma.cc/J6XR-NKSH>]).

192. President of the Economic and Social Council, Summary by the President of the Economic and Social Council of the High-Level Political

While some LGUs in the Philippines participate in the UCLG ASPAC,¹⁹³ it appears that membership is purely voluntary. Since many countries are likewise struggling with how to effectively respond to the crisis, local governments can maximize memberships in similar international groups. Best practices or strategies employed by other countries could aid in the “National Action Plan and nationwide C[OVID]-19 tracking process” relied on by the national government as “main tools [] to support evidence-based decision-making processes and to decentralize the management of responses across the archipelago.”¹⁹⁴

It should be noted that even if the “territorial and political subdivisions [of the Philippines] enjoy local autonomy[,]”¹⁹⁵ local governments remain subject to the general supervision of the President.¹⁹⁶ Moreover, it was held that the “*administrative* autonomy” guaranteed for provinces, cities, municipalities, and *barangays* is “less” than the “*political* autonomy” granted to autonomous regions,¹⁹⁷ but the latter nevertheless remain “within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.”¹⁹⁸

Forum on Sustainable Development Convened Under the Auspices of the Council at Its 2021 Session, at 15, *available at* https://sustainabledevelopment.un.org/content/documents/29282POEs_summary_of_2021_HLPF.pdf (last accessed Nov. 30, 2021) [<https://perma.cc/J4CK-3M48>].

193. United Cities and Local Governments Asia-Pacific, List of Members & Profiles, *available at* <https://web.archive.org/web/20191107132106/https://uclg-aspac.org/en/members/list-of-members-profiles> (last accessed Nov. 30, 2021). Philippine members include Baguio City, Catbalogan City, Iriga City, League of Cities of the Philippines (LCP), League of Municipalities of the Philippines (LMP), Makati City Government, Philippine Councilors League, Surigao City, and Vigan City. *Id.*

194. Djalante, et al., *supra* note 17, at 6 (citing Bayanihan to Heal as One Act).

195. PHIL. CONST. art. X, § 2.

196. PHIL. CONST. art. X, §§ 4 & 16.

197. *Cordillera Broad Coalition v. Commission on Audit*, G.R. No. 79956, 181 SCRA 495, 506 (1990) & JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 1113 (2009) (citing 3 RECORD, PHIL. CONST., NO. 59, at 435-36). *See generally* BERNAS, *supra* note 197, at 1113 (citing *Limbona v. Mangelin*, G.R. No. 80391, 170 SCRA 786, 794-95 (1989) (citing Joaquin G. Bernas, S.J., *Brewing Storm Over Autonomy*, MANILA CHRON., Jan. 10, 1989, at 4-5)).

198. PHIL. CONST. art. X, § 15.

Socio-economic disparities among local governments and their impact on local fiscal autonomy must be equally acknowledged and addressed. Despite LGUs' fiscal autonomy under the Local Government Code of 1991,¹⁹⁹ some localities have been left cash-strapped, not only by lockdowns, but also by calamities, forcing them to depend on the Internal Revenue Allotment (IRA) from the national government.²⁰⁰ Such fiscal limitations would naturally constrain LGUs in their pandemic responses. Transparent realignment of appropriations must take into account this emerging trend to give priority to LGUs as frontliners for their constituents, especially during a pandemic.

D. Philippine Constitutional Mandates

While a climate of mistrust may have serious bearing relative to a perceived lack of accountability, socio-economic inequality has also “affected the spread of COVID-19 and divergent responses to its containment.”²⁰¹ It was shown that poverty was among the reasons why the Philippines could not implement a strict lockdown.²⁰² This could explain the “shortage of medical professionals and underfinanced health infrastructure[,]” making it extremely difficult for the national public health system to cope with the continuous surge in COVID cases.²⁰³

Criticism of the “U.S. national government’s poor pandemic response” under former President Donald J. Trump brought up “unsettling questions about the overall health of the administrative state[, i.e.,] the agencies, people, and processes of the [E]xecutive [B]ranch of the [F]ederal government.”²⁰⁴ The article “Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?” by David E. Lewis concluded that “[y]ears of neglect have culminated in vulnerabilities manifesting themselves in increasingly regular and severe administrative failures[]” that put citizens at risk.²⁰⁵

199. LOCAL GOV'T CODE, § 129.

200. Aika Rey, *2021 for LGUs: Cash-Strapped in the Middle of a Pandemic*, RAPPLER, Dec. 21, 2020, available at <https://www.rappler.com/newsbreak/in-depth/cash-strapped-lgus-during-pandemic-budget-covid-19-series-year-end-2020> (last accessed Nov. 30, 2021) [<https://perma.cc/54M6-QAYR>].

201. Djalante, et al., *supra* note 17, at 7.

202. *Id.*

203. *Id.* at 6.

204. David E. Lewis, *Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?*, DAEDALUS, Volume No. 150, Issue No. 3, at 69.

205. *Id.* at 81.

What is noteworthy is that it is not so much the workforce’s “lack of capacity” as it is a failure of public trust.²⁰⁶ A “poor pandemic response boils down to bad management characterized by a lack of trust between the administration and civil servants[,] and an unwillingness to rely on data and science in decision-making.”²⁰⁷

Thus, it could be that the country’s capacity to conduct mass testing and systematic tracking was hamstrung by either or both lack of accountability and fiscal constraints at the national and local levels. Consequently, this prevented the quick identification and neutralization of emerging disease hot spots, prompting an extended declaration of a “State of Calamity” throughout the country for another year.²⁰⁸ Yet, the basic and ideal concept of a democratic and republican State includes accountability as an indispensable feature of a representative form of government²⁰⁹ that the Philippines ought to embody, and not only during a pandemic.

The intended purpose is “to [guard] against two extremes: on the one hand, against monarchy and oligarchy, and on the other, against pure democracy.”²¹⁰ An equally invaluable element of representative government is public trust under Article XI of the Constitution —

SECTION 1. Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.²¹¹

The same is expected of the heads of LGUs under Article X —

SECTION 3. The Congress shall enact a local government code which shall provide for a more responsive and accountable local government structure instituted through a system of decentralization with effective mechanisms of recall, initiative, and referendum, allocate among the different local government units their powers, responsibilities, and resources, and provide

206. *Id.* at 78.

207. *Id.*

208. Office of the President, Further Extending the Period of a State of Calamity Throughout the Philippines Due to Corona Virus Disease 2019 Declared Under Proclamation No. 1021, S. 2020, Proclamation No. 1218, Series of 2021 [Proc. No. 1218, s. 2021] (Sept. 10, 2021).

209. *See Belgica v. Ochoa, Jr.*, G.R. No. 208566, 710 SCRA 1, 295 (2013) (J. Leonen, concurring opinion).

210. BERNAS, *supra* note 197, at 56.

211. PHIL. CONST. art. XI, § 1.

for the qualifications, election, appointment and removal, term, salaries, powers and functions[,] and duties of local officials, and all other matters relating to the organization and operation of the local units.²¹²

Fr. Joaquin G. Bernas, S.J. explains that the “notion of a public trust connotes accountability[,]” and that the constitutional provisions in Article XI are “designed to exact accountability from public officers.”²¹³ Accountability is said to exist “when there is a relationship where an individual or body[] and the performance of tasks or functions by that individual or body[] are subject to another’s oversight, direction[,] or request that they provide information or justification for their actions.”²¹⁴

Local governments’ crucial role during the pandemic stems from their sensitivity to the needs of the members of their respective jurisdictions.²¹⁵ Decentralization and democratization ought to broaden the base of stakeholder participation, promoting transparency and facilitating resource mobilization.²¹⁶ Dr. Emma E. Porio, however, offers a thought-provoking view that apart from weak institutional apparatus, “emphasis on [civil society] participation and accountability has not led to the redistribution of power[.]”²¹⁷ She further argues that collaborative partnership between mayors and government officials, on one hand, and civil society organizations and the private sector, on the other, only serves to create a superficial notion of “accountable, participatory[,] and empowered governance structure” that in reality defeats the purpose of decentralization and democratization.²¹⁸

212. PHIL. CONST. art. X, § 3.

213. BERNAS, *supra* note 197, at 1148.

214. Ardigo, *supra* note 183, at 3 (citing Rick Stapenhurst & Mitchell O’Brien, Accountability in Governance, available at <https://web.archive.org/web/20101106005939/https://www.siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (last accessed Nov. 30, 2021)).

215. See generally La Viña & Gamboa, *supra* note 182, at 1180–81 & Maceda, Jr., *supra* note 182, at 1245–46.

216. EDMUND BARROW, ET AL., ANALYSIS OF STAKEHOLDER POWER AND RESPONSIBILITIES IN COMMUNITY INVOLVEMENT IN FOREST MANAGEMENT IN EASTERN AND SOUTHERN AFRICA 22 (2002).

217. Emma Porio, *Citizen Participation and Decentralization in the Philippines*, in CITIZENSHIP AND DEMOCRATIZATION IN SOUTHEAST ASIA 31 (Ward Berenschot, et al. eds., 2017).

218. *Id.* at 32.

This is done through ... ‘networked governance practices’ [—] the practice of incorporating civil society organizations by giving them a role in city governance (and thus access to budgets of local government units (LGUs)) in exchange for political support during elections. Unlike the earlier centralized period, the above-mentioned governance reforms open up spaces for local chief executives to create legitimate networks and alliances with civil society organizations and the private sector, so that they engage in implementing their priority [programs]. Through these mechanisms, the power of the local chief executive (including that of his family and allied social, political[,] and economic networks) is socially produced and reinforced in governance structures and practices.²¹⁹

Justice George A. Malcolm, in his article “Constitutional History of Philippines,”²²⁰ traced landmarks on the Filipino march towards the attainment of a representative government, with one such milestone being the inauguration of the Philippine Assembly in 1907.²²¹ He echoed this in a decision penned in the same year, *Cornejo v. Gabriel and Provincial Board of Rizal*,²²² to wit —

The basic idea of government in the Philippine Islands, as in the United States, is that of a *popular representative government, the officers being mere agents and not rulers of the people*, one where no one man or set of men has a proprietary or contractual right to an office, but *where every officer accepts office pursuant to the provisions of the law and holds the office as a trust for the people whom he represents*.²²³

Aristotle highlighted the distinction between governments “carried on ‘with a view to the common interest’” and “those that serve private interests, whether of one, of few, or of many.”²²⁴ Moreover, “[o]f true governments, there are three: kingship, aristocracy, and constitutional government. Each form has its perversion, of which there are also three: tyranny, oligarchy, and democracy[.]”²²⁵ It is distressing that common interest, even in a pandemic, has remained illusory, with the human right to health becoming stagnant as a legal abstraction.

219. *Id.*

220. George A. Malcolm, *Constitutional History of Philippines*, 6 A.B.A. J. 109 (1920).

221. *Id.* at 11-12.

222. *Cornejo v. Gabriel and Provincial Board of Rizal*, 41 Phil. 188 (1920).

223. *Id.* at 194 (emphases supplied).

224. WILLIAM EBENSTEIN, INTRODUCTION TO POLITICAL PHILOSOPHY 27 (1952).

225. *Id.*

VI. CONCLUSION

Far from being purely a health crisis, COVID-19 has challenged the resilience of developed and developing countries alike.²²⁶ The pandemic has disrupted well-established norms and policies of social, economic, and political institutions, unveiling the structural weaknesses of both global and domestic governance. Now more than ever, human rights and the rule of law, operating within the dynamics of a globalized world, have been put to the test: the human right to health remains vaguely positioned in the global agenda,²²⁷ and loopholes in the human rights framework for obligations of non-State actors remain open to profiteering at the expense of public health. State obligations at the domestic level are also shackled by politicking through vaccine diplomacy, relative local autonomy, and questioned accountability and transparency in both national and local governance.

Resort to global health diplomacy is explicable, and perhaps even inevitable, in neutralizing the nationalist tendencies of sovereigns, the selfish agendas of populist state leaders, and the geopolitics pervading the international community. The move to embark on the process of entering into an international pandemic treaty²²⁸ was likewise seemingly made on instinct to enact a binding instrument in the hopes that States would perform their obligation to respect, protect, and fulfill their citizens' human right to health.

The notion that States are primary duty bearers²²⁹ is quite problematic and, not to mention, antithetical to the basic principle that everyone, not only sovereigns, has a right and an obligation under the respect-protect-fulfill framework of human rights.²³⁰ Historically, and even during a global pandemic, it is apparent that reliance cannot be placed on governments alone.²³¹ It may even be argued that regulation through international agreements, institutional innovations, and vaccine diplomacy might provide hollow basis for domestic governance sufficient to protect a population's right

226. *But see* Goldberg & Reed, *supra* note 7, at 162-63.

227. *See generally* Brolan, et al., *supra* note 47, at 5-6.

228. Bainimarama, et al., *supra* note 39.

229. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD 71 (Gordon Brown ed., 2016).

230. United Nations Committee on Economic, Social and Cultural Rights, *supra* note 5, ¶ 33.

231. Peter G. Danchin, et al., *The Pandemic Paradox in International Law*, 114 AM. J. INT'L L. 598, 607 (2020).

to health. Moreover, while the United Nations system is crucial, it is certainly not the only important group of institutions that impacts human rights in the world order, especially in the context of a global health crisis.²³²

Despite these challenges, “the legitimacy of human rights is sufficiently strong” such that pressure from legitimate stakeholders, governments, and non-government actors like non-governmental organizations (NGOs) “can lead to improvements in the human rights performance” by States.²³³ The “moral appeal of human rights” feeds the “desire of governments to benefit economically and politically from ‘good standing’ in the international community[.]”²³⁴

So far, engraving the human right to health in the international and domestic legal landscape has only “focus[ed] on the ‘instrumental’ side of social struggle and social change,” as described by Neil Stammers.²³⁵ The expressive side of embedding the value of the right to health into social and cultural life is equally fundamental.²³⁶

It is suggested that in a developing country mired by socio-economic ills and by predicaments in accountability and transparency, legitimate stakeholders should take an active role in safeguarding this fundamental right. Economic recovery and maintenance of public health must not be seen as conflicting. The latter is a pre-requisite to the former, and this apparent tug of war only prevents its attainment. Indeed, during a pandemic, politicking and business interests must yield to the expertise of the medical profession and the calls of the health sector. It may be easier said than done, but the void in the international framework can only be remedied through genuine fulfillment of this human right.

Retired Supreme Court Justice Adolfo S. Azcuna proposed that readers “consider the idea of fundamental human rights as a framework of rules and principles that has the force of *jus cogens* in a democratic society.”²³⁷ The applicability of the arguments may be explored to support a stronger basis for domestic compliance. All the same, learning from the lessons of regulatory

232. *But see* Oona A. Hathaway, et al., *The COVID-19 Pandemic and International Law*, 54 CORNELL INT’L L.J. 149, 223–24 (2021).

233. FREEMAN, *supra* note 95, at 157.

234. *Id.*

235. Stammers, *supra* note 53, at 1000.

236. *Id.*

237. Adolfo S. Azcuna, *The Constitutional Function of Human Rights Principles Within the Context of Private Law in the Philippines*, 3 PHIL. J. LEGAL EDUC. 51, 51 (2016).

state models, the legalese and its accompanying crisis of legalization may be too short-sighted without considering broad support from stakeholders.²³⁸ Besides, the concept of human rights is primarily concerned with the misuse of power,²³⁹ and power, using Paul-Michel Foucault's analysis, is "relational and 'circulates' throughout all networks of social relations[.]"²⁴⁰

Whether vaccine diplomacy is a gift or a curse is largely determined by how social actors on the domestic and international levels act in coordination towards upholding the human right to health. Before that can happen, the components and working definitions of the international framework and of national and local governance must realign towards this objective. Moving past the pandemic, however, may not only mean saving lives. Looking forward, healing as an international community means curing the long-standing illness of distrust in and between governments.

238. *See generally* SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANIZING BUSINESS 162 (2012).

239. FREEMAN, *supra* note 95, at 201.

240. Stammers, *supra* note 53, at 982-83.