

ADEQUATE PREPAREDNESS AND RESPONSE TO FUTURE PANDEMICS THROUGH THE CREATION OF A REGIONAL FRAMEWORK FOR HEALTH GOVERNANCE WITHIN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM– AGENDA FOR FUTURE RESEARCH: AN INTRODUCTION¹

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I. BACKGROUND AND OBJECTIVES

The SARS-CoV-2 (“Covid-19”) pandemic, which first emerged in Wuhan, China, in late 2019, exposed gaps and fault lines in national, regional, and global health governance frameworks.² The pandemic overwhelmed global political deliberations, claimed lives, endangered public health, ravaged livelihoods, and eroded social cohesion on every continent, in every country. Within the Inter-American Human Rights System (“IAHRS”) the pandemic made glaring the need for a clear framework for the mobilization of member states who must act in solidarity in public health emergency prevention, preparedness, and response. This framework is suggested as the best way to address a transnational human rights problem with regional measures. Yet, the lessons of the pandemic may be lost without strengthening existing institutional frameworks for collective action in the Inter-American System (“IAS”), imagining and creating new governance and legal frameworks for cooperation and coordination in future pandemic prevention, preparedness, and response.

At the onset of the pandemic, significant disparities in the capacities of national health systems of member states of the IAHRS to respond to the pandemic became evident.³ For instance, there were disparities at the regional level in the roll out of Covid-19 vaccines, where, as of July 2021, North American countries had a vaccination schedule with approximately 49.3% coverage.⁴ By contrast, in Latin America and the Caribbean the rate was

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² Maciej F. Boni et al., “Evolutionary Origins of the SARS-CoV-2 Sarbecovirus Lineage Responsible for the COVID-19 Pandemic (2020) 5 Nature Microbiology 1408, 1408.

³ Anna Coates et al., *Just Societies: A New Vision for Health Equity in the Americas After COVID-19*, 44 PAN AMERICAN J. OF PUBLIC HEALTH 1-10 (2020).

⁴ *Id.*

16.8%, with South America at 17.2%, Central America at 7.4%, and the Caribbean at 10%, with some countries not even reaching 1% vaccination rate.⁵ This situation was compounded by a complex mix of factors such as missteps in the management of the pandemic by many national health systems which gave rise to high public scepticism towards vaccines; the absence of vaccination plans and roadmaps for immunization; and delays in implementation of existing plans and roadmaps in some countries of the region.⁶ Furthermore, in some countries in the region, acts of corruption in procurement for vaccine acquisitions and in the immunization process came to light where access to vaccines were irregularly prioritised for political personalities, public officials, and well-known business people, together with their close relatives, to the detriment of priority groups.⁷

In the global context, the protection of intellectual property rights of pharmaceutical companies gained prominence over human rights considerations for vaccine equity.⁸ Calls by South Africa and India for waivers to the IP rights regime at the WTO to allow the manufacture of cheaper Covid-19 vaccines for distribution in low-and middle-income countries were resisted at the most critical moments of the pandemic when such interventions would have significantly shored up the global response to the pandemic.⁹ Even though progress was eventually made in negotiating terms of a waiver, it came at significant costs to many low and middle-income

⁵ Press release, Org. of American States, The IACHR and REDESCA Express their Concern over the Lack of Universal and Equitable Access to COVID-19 Vaccines in the Americas, Calling for Regional Solidarity with Low-income Countries,(Oct. 25, 2021), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/282.asp.

⁶ Zakiya Whatley & Titilayo Shodiya, *Why So Many Americans are Skeptical of a Coronavirus Vaccine*, SCIENTIFIC AMERICAN (Oct. 12, 2021), <https://www.scientificamerican.com/article/why-so-many-americans-are-skeptical-of-a-coronavirus-vaccine/>; Sabrina Tavernise, "Vaccine Skepticism was Viewed as a Knowledge Problem. It's Actually About Gut Beliefs" *The New York Times* (Apr. 29, 2021) online: <https://www.nytimes.com/2021/04/29/us/vaccine-skepticism-beliefs.html>;

Press release, Org. of American States, The IACHR and REDESCA Express their Concern over the Lack of Universal and Equitable Access to COVID-19 Vaccines in the Americas, Calling for Regional Solidarity with Low-income Countries,(Oct. 25, 2021), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/282.asp.

⁷ Press release, Org. of American States, The IACHR and REDESCA Express their Concern over the Lack of Universal and Equitable Access to COVID-19 Vaccines in the Americas, Calling for Regional Solidarity with Low-income Countries,(Oct. 25, 2021), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/282.asp.

⁸ Press release, Pharma, Pharma Statement on WTO TRIPS Intellectual Property Waiver (May 5, 2021), <https://www.phrma.org/coronavirus/phma-statement-on-wto-trips-intellectual-property-waiver>; Brink Lindsey, *Why Intellectual Property and Pandemics Don't Mix*" BROOKINGS (June 3, 2021), <https://www.brookings.edu/blog/up-front/2021/06/03/why-intellectual-property-and-pandemics-dont-mix/>.

⁹ The original communication from India and South Africa was tabled on October 2, 2020. WORLD TRADE ORG., WTO DOC IP/C/W/669, WAIVER FROM CERTAIN PROVISIONS OF THE TRIPS AGREEMENT FOR THE PREVENTION, CONTAINMENT AND TREATMENT OF COVID-19,(2020). A revised communication with several other countries and the African group joining was tabled on May 25, 2021. WORLD TRADE ORG., WTO DOC IP/C/W/669/REV.1, WAIVER FROM CERTAIN PROVISIONS OF THE TRIPS AGREEMENT FOR THE PREVENTION, CONTAINMENT AND TREATMENT OF COVID-19,(2021).

countries.¹⁰ The consequence was that in the pandemic recovery efforts, two different realities emerged for high-income countries and low and middle-income countries, respectively.¹¹

It is against this background that an international research symposium around the theme “Adequate Preparedness and Response to Future Pandemics through the Creation of a Regional Framework for Health Governance Within the Inter-American Human Rights System” was convened at the University of Dayton School of Law, Ohio, United States of America, on the 28th of September 2022. The overall objective of this scholarly conference was to connect with scholars/students/practitioners who are interested in generating discourse around creating pathways for strengthening the IAHRs to position itself for regional health governance to protect the right to health across the Americas; identifying structural, systemic, and regional barriers to the creation of a regional framework for health governance; engaging appropriately with theoretical approaches that underpin health cooperation and solidarity in the IAHRs; and laying the foundation for a future research agenda, so as to enable, heighten and/or deepen a series of interdisciplinary and trans-occupational conversations on this theme. The expectation was that forging these connections will contribute (albeit in a preliminary way) to the effort to close the identifiable and important gap in knowledge identified here. The symposium was also expected to provide impetus for increased academic and practical collaboration in the near future towards the same goal.

II. RESEARCH QUESTIONS/ISSUES DISCUSSED AT THE SYMPOSIUM

The theme of the symposium called upon participants to engage with the literature, extant laws, institutions, and mechanisms of the IAHRs and sketch an agenda for future research that engaged the following overarching questions/issues:

¹⁰ It is worth noting that what has been negotiated bears little resemblance to the proposal India and South Africa tabled before the WTO in October 2020 (and in the revision of 25 May 2021). *See supra* note 12. In the original version of the proposal, India and South Africa called for the waiver of patents, industrial designs, copyrights, and trade secrets that are guarded by WTO agreement on TRIPS. *Id.* The compromise proposal that emerged indicates “some attempt to ease the burden of compulsory license mechanism for those supplying medicines and those importing medicines”. *Id.* The proposal will allow eligible members issue a single authorisation to waive multiple patents, including on ingredients and processes, without fear of a challenge from the patent holders. *Id.* In the compromise, all countries that exported less than 10% of the world’s vaccines in 2021 are eligible, which appears to exclude only China, the U.S., and the EU. *Id.* It will also allow countries to export products to other eligible nations. *Id.* A timeline for the length of the waiver remains to be decided. *See* Andrew Green, *TRIPS Waiver Compromise Draws Mixed Response*, <https://www.devex.com/news/trips-waiver-compromise-draws-mixed-response-102860> (last visited 1 July 2022).

¹¹ While the bulk of the population of Global North States were fully vaccinated with some getting booster shots, many Global South States struggled to get first doses out to their population. *See* Simar Singh Bajaj et al., *Vaccine Apartheid: Global Cooperation and Equity* 399 *LANCET* 1452–53 (2022). The result was that Global North States shifted gears and were ready to welcome a post-pandemic world with an emphasis on a return to ‘new normal’ while Global South States continued to battle the adverse impacts of the Covid-19 pandemic. *Id.*

Main research question: What adjustments should the IAS undergo to assist their member states to be appropriately prepared for a new pandemic?

Sub-questions:

- What strategies should the Inter-American Commission develop for creating a common Inter-American framework for the right to health that can assist preparation for a new pandemic?
- How can this framework be developed? By the Rapporteurship on Economic and Social Rights? By improving the monitoring function of the Commission? By creating awareness and dialogue between groups of states (the Caribbean? CICA? Etc).
- Should a new institutional framework be created, or can existing institutional frameworks be strengthened to bring about better coordination between all entities within the OAS whose activities impact on health?
- How should the Commission deal with the clash between the right to health and IP domestic and international legal frameworks?

III. THE SYMPOSIUM DISCUSSIONS

The papers in this special journal issue speak for themselves, but it is worth noting that in discussing the results of their literature reviews and attempting to set an agenda for future research based on the symposium's theme, the participants focused the discussion on a number of major substantive issues highlighted below.

A. *The Intersectional, Interdependent, and Indivisible Lenses Approach*

While drawing attention to the systemic challenges, inequalities, and inequities that faced the Americas at the onset of the pandemic, Soledad García Muñoz and Jenina Heller identified the value of institutional cooperation between the IACHR, and the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (“REDESCA”) in framing the response to the pandemic.¹² Notably, REDESCA approached the pandemic not only as a right to health issue, but also a poverty and inequality issue which were key determinants in assessing the impacts of the pandemic

¹² Soledad García Muñoz & Jenina Heller, *The Inter-American System's Efforts to Tackle the COVID-19 Pandemic: The Intersectional, Interdependent, and Indivisible Lenses Approach*, U. DAYTON L. REV. (forthcoming).

in the Americas. Engaging the interdependent, indivisible and intersectional lenses, Muñoz and Heller emphasize the pandemic did not only severely affect the right to health, but also other human rights, including the right to life, right to work, right to social security, right to education, right to food, water, housing and other economic social cultural and environmental rights.¹³ Additionally, the impact of the pandemic on these rights was more severe for historically disadvantaged and high-risk groups including elderly people, people with pre-existing medical conditions, persons deprived of liberty, women, indigenous peoples, persons in a state of human mobility, children and adolescents, LGBTQIA+ people, people living in poverty and extreme poverty, etc.¹⁴

B. Mainstreaming “One Health” in the IAS Future Pandemic Response Efforts

In his paper, Christopher Campbell-Durufié points out that the IAS has only started integrating the health-environment nexus in its effort to address the devastating impacts of the pandemic on human rights.¹⁵ An approach he argues is consistent with WHO’s “One Health” approach, envisions the health of people, animals, and the environment as fully integrated.¹⁶ Campbell-Durufié argues that there is considerable opportunity for the IAS to mainstream the One Health approach in its pandemic prevention, preparedness, and response efforts.¹⁷ He points to two dimensions of the health-environment nexus that necessitate the One Health approach: first, how environmental degradation increases the risk of future pandemics by increasing opportunities for animal-human transmission; and second, the possibility of environmental degradation magnifying the impacts of pandemics, once declared, especially for vulnerable groups in the context of climate change.¹⁸ Campbell-Durufié expressed concerns that a systematic examination of the legal implications of the One Health approach from the perspective of human rights instruments in the IAHRs remains lacking. Nonetheless, he identifies the normative foundations for this approach as grounded in the Inter-American Court of Human Rights’ growing jurisprudence on the right to a healthy environment, life, and health.¹⁹

¹³ *See id.*

¹⁴ *See id.*

¹⁵ Christopher Campbell-Durufié, *Mainstreaming “One Health” in the Inter-American System’s Pandemic Prevention, Preparedness, and Response Efforts*, U. DAYTON L. REV. (forthcoming).

¹⁶ *Id.* Newsroom, World Health Organization, ONE HEALTH (Sept. 17, 2021), <https://www.who.int/news-room/questions-and-answers/item/one-health>. *See also* Benjamin Capps, *One Health Ethics*, 36 *BIOETHICS* 348 (2022).

¹⁷ Christopher Campbell-Durufié, *Mainstreaming “One Health” in the Inter-American System’s Pandemic Prevention, Preparedness, and Response Efforts*, U. DAYTON L. REV. (forthcoming).

¹⁸ *Id.*

¹⁹ *Id.*

C. *Intellectual Property, Access to Medicines and Regionalism*

Olasupo Owoeye's contribution dwells on the extent to which flexibilities available under the Trade Related Aspects of Intellectual Property Rights (TRIPS) can facilitate access to medicines and the extent to which regional cooperation and human rights may enhance such flexibilities.²⁰ Owoeye identifies how two of the flexibilities enshrined in the TRIPS Agreement—the provisions on exhaustion of intellectual property rights, and compulsory patent licensing—can usefully be deployed to enhance the right of access to medicines, particularly in the least developed countries.²¹ Additionally, he argues that regional trade organisations can use the regional trade framework to promote the use of TRIPS flexibilities within their region to promote access to medicines and vaccines. Regrettably, he notes that while this flexibility also applies at the regional level under the TRIPS Agreement, it remains a grossly under-utilized option.²²

IV. PRELIMINARY OUTLINE FOR FUTURE RESEARCH

At the conclusion of the research symposium a lot of thought has gone into distilling and refining the outlines of the agenda for future research. Emerging from that process, we have formulated four lines of enquiry to inform future research undertakings on this theme: (1) Is the existing institutional framework offered by the Inter-American Human Rights System ("IAHRS") adequately situated to chart a pathway for future pandemic prevention, preparedness, and response in the IAS? (2) How could the IAS catalyse regional cooperation and solidarity in bringing about a regional health governance framework for better coordination of prevention, preparedness, and response to future pandemics? (3) Assuming the case for establishing a regional health governance framework is accepted by the Organization of American States (OAS) that make up the IAS, where should such a framework be situated—within the IAHRS, the Pan-American Health Organization (PAHO), or an altogether new institution—and how should it be funded? (4) Is there opportunity for institutionalizing coordination efforts during a pandemic, or other health emergency, between the various institutions and mechanisms within the IAS whose activities impact on health in the Americas? Hereinafter we will refer to these core questions, respectively, as the (1) the adequacy question, (2) the Inter-American cooperation framework question, (3) the institutional question, and (4) the coordination question.

Practically, the adequacy question invites consideration of the capacity of the IAHRS to serve as a rallying hub for the normative work of

²⁰ Olasupo Owoeye, *Intellectual property, Access to Medicines and Regionalism*, U. DAYTON L. REV. (forthcoming).

²¹ *Id.*

²² *Id.*

pandemic prevention, preparedness, and response. Although the IAHRHS has made significant inroads in deepening human rights normativity within the IAS, it is not plain to see how this translates into a capacity to provide the framework for member States to act in cooperation towards common goals around pandemic prevention, preparedness, and response. This is particularly the case as the work of human rights protection makes a different kind of demand on the IAHRHS than what is demanded by the work of coordinating pandemic prevention, preparedness, and response in the IAS. Theoretically, the adequacy question invites us to interrogate the assumptions informing our understanding of what an “adequately situated” institutional framework for pandemic prevention, preparedness, and response looks like.

The Inter-American cooperation framework question has practical and theoretical implications. On a practical level, the question requires consideration of the mechanisms that need to be emplaced to bring about cooperation in the IAS and deepen solidarity oriented towards establishing a regional health governance framework that serves the goal of pandemic prevention, preparedness, and response. On a theoretical level, the question invites clarification of how we view cooperation and solidarity, respectively: what potentials stem from the deployment of these concepts in the context of regional health governance in the IAS; and what pitfalls arise from the distortion or abusive deployment of these concepts.

The institutional question tackles two practical considerations, first, the location of the regional health governance framework being advocated. Second, the mode of funding of the framework. With the former, the choice is either to situate it within one of the existing institutions of the IAS, namely the IAHRHS or the PAHO, or to develop an altogether new institution. The evaluation of these choices requires careful deliberation and engagement with stakeholders for clarity around how best to resolve the question. With the latter consideration, the way the regional health governance framework will be funded is a vital component of its viability and capacity to deliver on the goals of pandemic prevention, preparedness, and response. Concerns about funding arrangements stem from the implicit understanding that poor funding of existing institutions in the IAS have hampered their ability to effectively deliver on their mandate. Theoretically, the institutional question invites our clarification of the factors that in our view inform the decision of where best to situate the regional health governance framework and its funding arrangements.

The coordination question stems from experiences during the Covid-19 pandemic where member states and the institutional frameworks within the IAS had to resort to ad hoc arrangements to coordinate their pandemic response. Given perceived impracticalities of leaving things this way, the coordination question invites our consideration of what steps are required to

be taken to consolidate on experiences from Covid-19 and build on those experiences such that better institutional synergies for responding to pandemics and other health emergencies within the IAS will be created. At a theoretical level, the coordination question leads us to enquire if coordination is possible, and the implications and requirements for coordinating pandemic response at an institutional level in the IAS.

THE INTER-AMERICAN SYSTEM'S EFFORTS TO TACKLE THE COVID-19 PANDEMIC: THE INTERSECTIONAL, INTERDEPENDENT, AND INDIVISIBLE LENSES APPROACH

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I. INTRODUCTION

The Americas region has been heavily impacted by the COVID-19 pandemic due to its deep structural challenges.¹ In this context, it is important to note that the Americas continent “is the most unequal region on the planet, characterized by deep social gaps in which poverty and extreme poverty constitute a cross-cutting problem for all the States of the region.”² The pandemic further increased poverty levels and widened the inequality gap in the Americas region.³ According to the Pan American Health Organization (hereinafter “PAHO”), there has been “an upward trend [in poverty levels], rising from 27.8% in 2014 to 33.7% in 2022, representing 22 million more people living below the poverty line of whom 8 million (36%) are in extreme poverty”⁴ in Latin America and the Caribbean. In addition to poverty, the Americas region also faces other socio-economic, cultural and environmental challenges, such as the “lack of poor access to drinking water and sanitation, food insecurity, environmental pollution and the lack of adequate housing”, as well as “high rates of informal sector jobs and meager incomes.”⁵ Such structural challenges pose challenges to many people’s ability to protect themselves against the COVID-19 and contribute to stopping its spread with a particular effect on vulnerable peoples.⁶ Further, States in the Americas face challenges in adopting measures to protect their people due to their health policies and measures, as well as their economic capacities.⁷

* This text, prepared by Soledad García Muñoz, Special Rapporteur on Economic, Social, Cultural and Environmental Rights (SRESCER) of the Inter-American Commission on Human Rights (IACHR) together with Janina Heller (REDESCA fellow) is a work of a strictly academic nature and does not reflect the position of the IACHR.

¹ Special Rapporteurship on Economic, Social, Cultural and Environmental Rights [REDESCA], Fourth Annual Report of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights, ¶1146 (Mar. 30, 2021) (hereinafter “Annual Report of 2020”).

² *Id.*

³ Pan American Health Organization [PAHO], *Health in the Americas 2022, Overview of the Region of the Americas in the Context of the COVID-19 Pandemic*, at 3, PAHO/EIH/HA/22-0024 (Sep. 27, 2022).

⁴ *Id.*

⁵ Inter-American Commission on Human Rights [IACHR] & Special Rapporteurship on Economic, Social, Cultural and Environmental Rights [REDESCA], *Pandemic and Human Rights in the Americas*, Res. 1/2020, at 1 (Apr. 10, 2020) (hereinafter “Res. 1/2020”).

⁶ *Res. 1/2020, supra* note 5.

⁷ *Res. 1/2020, supra* note 5.

Currently, according to the World Health Organization, there are 2,853,417 COVID-19-related cumulative deaths in the Americas.⁸ Although the pandemic effects has been broadly felt by the general population, it has had a differential and disproportionate impact in certain groups.⁹ The Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (hereinafter “REDESCA”) has identified several groups that were in a position of heightened vulnerability during the pandemic, including people living in poverty or extreme poverty; people living on the streets or living in informal settlements; people who work in the informal sector; workers in the health sector and essential sectors; and peasant populations.¹⁰ The pandemic has also affected historically discriminated groups, such as indigenous peoples and people of African descent.¹¹

In response to this unprecedented health crisis, the Inter-American Commission on Human Rights (hereinafter “IACHR”) along with its REDESCA have taken several actions, including but not limited to monitoring region conditions, providing recommendations to member States, launching SACROI-COVID, a rapid and integrated response coordination unit, publishing several practical guides, and adopting resolutions to address the human rights issues involved in the pandemic.

As a result of its mandate, REDESCA has particularly centered economic, social, cultural, and environmental rights (hereinafter “ESCER”) in its COVID response. More notably, REDESCA has approached the COVID-19 crisis as not only a right to health issue, but also a poverty and inequality issue, which were key determinants in assessing the impacts of COVID-19 in the Americas. As such, this Article will analyze the IACHR and REDESCA pandemic crisis efforts through an independent, indivisible, and intersectional lenses.

In Part II, this Article aims to provide a background of the role of REDESCA and of the IACHR’s in the setting of regional health policies, as well as to highlight their corresponding efforts during the pandemic. In Part III, this Article will discuss REDESCA’s indivisible, interdependent, and intersectional approach to the pandemic. Moreover, in Part IV, REDESCA’s pandemic challenges will be identified. Lastly, in Part V, concluding remarks will provide a reflection on what were the lessons learned from the COVID-19 crisis that may help strengthen the future pandemic responses from the IACHR and REDESCA.

⁸ *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORGANIZATION, <https://covid19.who.int/table> (last visited Oct. 26, 2022).

⁹ *Annual Report of 2020*, *supra* note 1, at ¶1160.

¹⁰ *Annual Report of 2020*, *supra* note 1.

¹¹ *Annual Report of 2020*, *supra* note 1, at ¶¶1173-1776.

II. BACKGROUND

A. *Role of REDESCA and the IACHR in the setting of regional health policies*

The IACHR is a principal and autonomous organ of the Organization of American States (OAS) and it is in charge of promoting and protecting human rights in the Americas.¹² The IACHR created several thematic rapporteurships to further protect vulnerable groups who have been historically discriminated against.¹³ The IACHR currently has 11 Rapporteurships and 2 Special Rapporteurships, including the Special Rapporteurship on Economic, Social, Cultural, and environmental rights (REDESCA).¹⁴

REDESCA was created particularly to support the IACHR, the OAS, and the Inter-American System in the promotion and protection of ESCER in the Americas. REDESCA has several functions, including the following: (1) promote and protect ESCER in the Americas; (2) work on the ESCER case system and review precautionary measures and petitions; (3) engage in activities and draft documents monitoring the ESCER situation in the region; (4) provide technical advice on ESCER issues; (5) participate in the working group of San Salvador.¹⁵ Moreover, REDESCA currently has seven strategic lines of action focusing on the following issues: (1) climate emergency and the human rights to water; (2) human mobility and ESCER; (3) business and human rights; (4) labor and union rights; (5) fiscal and economic policies: corruption and human rights; (6) education, science and technology: academic freedom and university autonomy; and (7) right to health and its social determinants: pandemic and food crisis.¹⁶ Accordingly, the COVID-19 crisis falls under REDESCA's mandate.¹⁷

B. *REDESCA and IACHR efforts during the COVID-19 pandemic*

REDESCA played a key part in the Inter-American system efforts to address the pandemic as it was able to provide specialized-advice to the IACHR on ESCER issues, including the right to health and its social determinants. In conjunction with the IACHR, REDESCA undertook several efforts to address the global crisis, including monitoring the health situation

¹² *What is the IACHR?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> (last visited Oct. 26, 2022).

¹³ *Thematic Rapporteurships*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/t/default.asp> (last visited Oct. 26, 2022).

¹⁴ *Thematic Rapporteurships*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/t/default.asp> (last visited Oct. 26, 2022).

¹⁵ *Mandate and Functions*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/functions.asp> (last visited Oct. 26, 2022).

¹⁶ Inter-American Commission on Human Rights [IACHR], Strategic Plan, at 19–23, Doc. 27/17 (Mar. 20, 2017).

¹⁷ See *supra* notes 12–13.

and other ESCER of populations in the Americas, launching of the SACROI-COVID, as well as publishing of several practical guides, resolutions, and press releases relating to the theme.¹⁸

The IACHR created SACROI-COVID, a Rapid and Integrated Response Coordination Unit to respond to the COVID-19 pandemic, with the goal of straightening its own institutional capacities to effectively protect and defend fundamental freedoms and human rights, particularly the right to health and other ESCER, in the context of the global health crisis.¹⁹ The unit worked along with a crisis response team “coordinated by the Executive Secretary and will be made up of the heads of the Special Rapporteurships”²⁰, including REDESCA and the Office of the Special Rapporteur for Freedom of Expression (hereinafter “RFOE”). SACROI-COVID-19 closely monitored the human rights situation in the region during the pandemic.²¹ The unit’s activities are categorized in six different areas: (1) monitoring and analysis of the impact of state measures; (2) developing precautionary measures; (3) handling individual petitions and cases of human rights violations; (4) promoting and training; (5) providing public communication, and (6) promoting inter-institutional and social articulation.²² The SACROI COVID-19 website is a great source of information about its activities as it centralizes relevant information about the pandemic, featuring measures and a timeline of the pandemic, practical guides, and other online capabilities like webinar, bulletins, and links to social networks.²³

IACHR, in conjunction with REDESCA and RFOE, issued four practical guides about different pandemic issues. One of the practical guides addresses human mobility and is named “How can family unit protection and family reunification be made more effective in situations of human mobility

¹⁸ See e.g., *IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (Mar. 20, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/060.asp; *IACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS & SPECIAL RAPPORTEURSHIP ON ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS (Feb. 5, 2021), https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/027.asp; *States in the Americas Must Take Urgent Action to Effectively Protect Mental Health and Ensure Universal Access to It in the Context of the COVID-19 Pandemic*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS & SPECIAL RAPPORTEURSHIP ON ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS (Oct. 2, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/243.asp.

¹⁹ See *SACROI-COVID-19 Rapid and Integrated Response Coordination Unit*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/sacroi_covid19/default.as (last visited Oct. 26, 2022).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/iachr/> (last visited Oct. 26, 2022).

and mixed movements, and in the context of the pandemic?”²⁴ Subsequently, IACHR issued Rapid Integrated Response Coordination Units to dealing with the COVID (RIRCU COVID-19) practical guides with policy recommendations to States named:

- 01) What are the standards for ensuring respect for the grieving, funeral rites, and memorials for those who died during the COVID-19 pandemic?; 02) How to ensure access to the right to education for children and adolescents during the COVID-19 pandemic?; 03) How to promote universal internet access during the COVID-19 pandemic?²⁵

Furthermore, IACHR with the support of its REDESCA and RFOE approved three resolutions concerning pandemic-related issues.²⁶ REDESCA, in particular, led the process of elaboration of the three resolutions, providing a holistic response with a strong focus on the right to health and other ESCERs.²⁷ Moreover, the resolutions underwent a serious drafting process and had the contribution of technical experts to ensure rigorosity and pertinence of the document²⁸. The first resolution, Resolution 1/2020, “Pandemic and Human Rights in the Americas,” highlights the Inter-American human standards relating to the pandemic, provides recommendations to States on COVID-19 treatment through a human rights approach, and addresses plans for social recovery and economic post-pandemic.²⁹ In particular, resolution 1/2020 calls for States to take urgent measures to protect human rights, such as the right to life, health, and personal integrity, “on the basis of the best scientific evidence, in accordance with the International Health Regulations (IHR), and the recommendations of the WHO and PAHO as applicable.”³⁰

The second resolution, Resolution 4/2020, “Human Rights of Persons with COVID-19,” is innovative as it places the right to health and care at the

²⁴ *Practical Guides*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/sacroj_covid19/guias.asp (last visited Oct. 26, 2022); *How can family unit protection and family reunification be made more effective in situations of human mobility and mixed movements, and in the context of the pandemic?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, https://www.oas.org/en/iachr/reports/pdfs/guia_practica_migracion_ing.pdf (last visited Oct. 26, 2022).

²⁵ Press Release, Inter-American Commission on Human Rights (Mar. 28, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/063.asp.

²⁶ See *supra* note 23.

²⁷ *Resolutions*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/decisions/resolutions.asp> (last visited Oct. 26, 2022).

²⁸ *The IACHR and REDESCA publish Resolution on Climate Emergency and Human Rights in the Americas*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS & SPECIAL RAPPORTEURSHIP ON ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL RIGHTS (Mar. 4, 2022), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/045.asp.

²⁹ *Res. 1/2020*, *supra* note 5.

³⁰ Inter-American Commission on Human Rights [IACHR] & Special Rapporteurship on Economic, Social, Cultural and Environmental Rights [REDESCA], *Rights of Persons with COVID-19*, Res. 4/2020, at 1 (July 27, 2020) (hereinafter “Res. 4/2020”).

center of the state's response towards the pandemic. Resolution 4/2020 also introduces novel concepts, including the right of families to mourn, right to culturally appropriate healthcare, and expands the definition of persons in the COVID-19 context.³¹ According to Resolution 4/2020, the definition of "persons with COVID-19" reflects not only persons infected with COVID-19, but also "persons at a pre-symptomatic phase of the disease, those with (light, moderate, severe, or critical) symptoms, persons who are asymptomatic who undergo medical research testing, and those who die from the pandemic, as well as their family members and/or care-givers."³²

These Resolutions provide a set of guidelines on the treatment of people infected with COVID according to a multidisciplinary and intersectional approach. For instance, it discusses guidelines on bereavement and the right of next of kin of persons who have passed away due to COVID-19.³³ The guidelines highlight the right of family members to mourn and perform their mortuary rite "in accordance with their own traditions and world view."³⁴ Such rights can only be restricted in response to specific circumstances and recommendations based on the available scientific evidence.³⁵ In terms of culturally appropriate healthcare, the resolution provides that "consideration must be given to those communities" right to receive culturally appropriate health care that is mindful of their preventive health care, curative practices, and traditional medicines.³⁶ Likewise, States must ensure an appropriate intercultural approach when treating and attending to Afro-descendent tribal communities.³⁷ Furthermore, the resolution provides recommendations regarding the need for recognition and prioritization of the right to life with people with COVID-19 within public policies, the provision of resources and cooperation, as well as the protection of their right to health, right of care, the right to mourn and the right of relatives of the victims who died of COVID-19.³⁸

Additionally, Resolution 1/2021, "COVID-19 Vaccines and Inter-American Human Rights Obligations," addresses the international obligations of States to make decisions about vaccinations in order to protect human rights, including the right to health and life.³⁹ The Resolution highlights the adverse impact that public health measures has had in ESCER rights, particularly in vulnerable groups and persons with COVID-19 and their next

³¹ *Res. 4/2020, supra note 29.*

³² *Res. 4/2020, supra note 29.*

³³ *Res. 4/2020, supra note 29, at ¶¶ 50–52.*

³⁴ *Res. 4/2020, supra note 29, at ¶52.*

³⁵ *Res. 4/2020, supra note 29.*

³⁶ *Res. 4/2020, supra note 29.*

³⁷ *Res. 4/2020, supra note 29, at ¶17.*

³⁸ *See generally Res. 1/2020, supra note 5.*

³⁹ *See generally Res. 1/2020, supra note 5.*

to kin.⁴⁰

Lastly, REDESCA discussed at length the COVID-19 crisis in its latest annual reports of 2020 and 2021.⁴¹ The 2020 Annual Report focused on the pandemic response, while the 2021 Annual Report focused on vaccine access, particularly the importance universal and equitable access to the vaccines.⁴² Throughout REDESCA's efforts during the pandemic, it emphasized the need to adopt an indivisible, interdependent and intersectional approach to the global crisis.

III. REDESCA'S INDIVISIBLE, INTERDEPENDENT AND INTERSECTIONAL APPROACH TO THE PANDEMIC

Even prior to the global health crisis, REDESCA has made the right to health a thematic priority due to its importance as a "fundamental and indispensable human right for the exercise of other human rights."⁴³ Moreover, REDESCA recognized that the pandemic was not only severely affecting the right to health, but also other human rights, including the right to life, personal safety, right to work, to social security, education, food, water, housing, and other ESCER.⁴⁴ As such, this crisis demonstrated the indivisibility and intimate relationship between all human rights.

In terms of intersectionality, IACHR and REDESCA have called for States to apply an intersectional approach and take into consideration

[...]the needs and differentiated impact of those measures on the human rights of historically excluded or high-risk groups, such as older people and people of any age who have preexisting medical conditions, persons deprived of liberty, women, indigenous peoples, persons in a state of human mobility, children and adolescents, LGBTI people, people of African descent, persons with disabilities, working people, and people living in poverty and extreme poverty, particularly people working in the informal sector and street people, as well as human rights defenders, social leaders, health professionals, and journalists.⁴⁵

Further, the IACHR and REDESCA have highlighted the impact that the pandemic has had on women's personal and professional development as a result of their historical primary role as caregivers.⁴⁶ It is also important to

⁴⁰ *Res. 1/2020, supra* note 5, at 1.

⁴¹ REDESCA, Fifth Annual Report of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA) (Mar. 30, 2021), ¶1647 (hereinafter "Annual Report of 2021").

⁴² *Id.*

⁴³ Annual Report of 2020, *supra* note 1, at ¶1144.

⁴⁴ *Res. 1/2020, supra* note 5, at 4.

⁴⁵ *Res. 1/2020, supra* note 5, at 6.

⁴⁶ *Res. 1/2020, supra* note 5.

note other considerations that may exacerbate women’s vulnerabilities, such as “economic difficulties, age, status as a migrant or displaced person, disability, incarceration, ethnic or racial origin, sexual orientation, and gender identity and/or expression.”⁴⁷ Accordingly, the IACHR and REDESCA have called member states to adopt an intersectional approach to their COVID-19 response, as well as to “adhere to unconditional observance of inter-American and international standards on human rights, which are universal, interdependent, indivisible and cross-cutting, particularly economic, social, cultural, and environmental rights.”⁴⁸ During the pandemic, REDESCA had the opportunity to reflect and identify the main pandemic challenges that the Americas region faces.

IV. REDESCA’S PANDEMIC CHALLENGES

One of the main challenges in coordinating a pandemic response in the Americas has been addressing the ESCER issues that have long pre-dated the pandemic, including “discrimination, poverty, inequality, structurally weak public health systems, and, in many cases, a lack of political and institutional stability.”⁴⁹ These enduring ESCER-related issues have “hampered the effectiveness of quarantining, social distancing, and other measures taken pursuant to the International Health Regulations (IHR) and the recommendations of the World Health Organization (WHO) and the Pan American Health Organization (PAHO).”⁵⁰

Furthermore, in its Annual Report of 2021, REDESCA identified the three main challenges that the region faces when guaranteeing human rights and ESCER in the context of the pandemic. The first challenge is the emergence of new COVID-19 variants “coupled with the lack of equitable and universal access to vaccines against COVID-19 -in a context of serious challenges for their acquisition by countries with lower incomes, as well as high levels of public skepticism towards the same.”⁵¹ Second, REDESCA noted a setback on several ESCER rights, including right to food, housing, drinking water, social security, work, and education as a result of the pandemic.⁵² REDESCA emphasized the increase of poverty, inequality, and hunger in the region, resulting in a disproportional impact on vulnerable groups.⁵³

Lastly, REDESCA expressed concern about the lack of equitable and universal access to COVID-19 vaccines, stating “the immunization process in the region showed serious disparities, in which, as an example, as of July,

⁴⁷ *Res. 1/2020, supra* note 5 at 14.

⁴⁸ *Res. 1/2020, supra* note 5 at 7.

⁴⁹ *Res. 4/2020, supra* note 18, at 1.

⁵⁰ *Res. 4/2020, supra* note 18.

⁵¹ *Annual Report of 2021, supra* note 27, at ¶1638.

⁵² *Annual Report of 2021, supra* note 27.

⁵³ *Annual Report of 2021, supra* note 27.

while in some North American countries the proportion of the population with a complete vaccination schedule was approximately 49.3%, in Latin America and the Caribbean the rate was 16.8% (with South America with 17.2%, Central America with only 7.4% and the Caribbean with 10%), with some countries in which not even 1% of inoculation had been reached.”⁵⁴

V. CONCLUDING REMARKS

Since 2020, the pandemic was responsible for insurmountable losses as highlighted in this Article. Such tragedies will never be forgotten and the lessons learned from the global crisis must be used to further strengthen the response from the IACHR and REDESCA to future pandemics. The COVID-19 pandemic has shown “the structural weakness of most public health systems,” as well as “exposed social inequalities to the extreme.”⁵⁵ The pandemic has also demonstrated that this crisis is more than a right to health issue, but also a crisis of its basic social determinants which relate to other human rights, including but not limited to it is also a right to food, housing, drinking water, social security, work, and education issues. REDESCA has previously highlighted that “poverty translates into a widespread violation of all human rights, so there is no way to provide an effective guarantee to ESCERs without combating this problem efficiently.”⁵⁶ Similarly, “if universal and equitable access to vaccines is not ensured for all the countries of the region, any effort in this area will be reduced.”⁵⁷ As such, it is paramount to continue to adopt an interdependent, indivisible, and intersectional approach to future global human rights crisis. Furthermore, it is also necessary to address the deeply rooted structural barriers that the Americas region faces and invest in the protection of ESCER to ensure that we are better prepared for future pandemics.

⁵⁴ *Annual Report of 2021*, *supra* note 27 at ¶1641.

⁵⁵ *Annual Report of 2020*, *supra* note 1, at ¶1148.

⁵⁶ *Annual report of 2021*, at ¶1647.

⁵⁷ *Annual report of 2021*, at ¶1648.

MAINSTREAMING “ONE HEALTH” IN THE INTER-AMERICAN HUMAN RIGHT SYSTEM’S PANDEMIC ACTIONS

Christopher Campbell-Durufflé¹

ABSTRACT

The Inter-American Human Rights System only started to actively integrate the health-environment nexus in response to the devastating impacts of the COVID-19 pandemic on human rights. Two broad dimensions of this nexus can be identified. On the one hand, environment degradation increases the risk of future pandemics by increasing the probabilities of animal-human disease transmission. On the other, environmental degradation can also magnify the health impacts of pandemics once these are declared, especially for vulnerable groups and in the context of climate change. In this context, this article argues that the Inter-American System should mainstream the One Health approach in its pandemic prevention, preparedness, and response actions. This approach, recently adopted by the World Health Organization, would allow the different organs of the Inter-American System and its many participants to envision the health of people, animals, and the environment as fully integrated.

In order to provide member states with clear, detailed, and comprehensive guidance, a systematic examination of the legal implications of the One Health approach for the implementation of the Inter-American human rights instruments is urgently needed. This article identifies relevant normative foundations for this task in the Inter-American Court of Human Rights’ interpretation of the rights to a healthy environment, life, and health. It also proposes concrete avenues moving forward. These include a resolution by the Inter-American Commission on Human Rights adopting the One Health approach to pandemic prevention, preparedness, and response; online public consultations and Hearings of a General Nature to gather civil society perspectives; a request that all member states provide information on the domestic measures adopted; and a Thematic Report by the Special

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Rapporteurship on Economic, Social, Cultural and Environmental Rights dedicated to the legal implications of the One Health approach to pandemics.

I. INTRODUCTION

The Inter-American Human Rights System started actively integrating the health-environment nexus in response to the devastating impacts of the COVID-19 pandemic on human rights. In March 2020, the Inter-American Commission on Human Rights' ("IACHR") first efforts were to preserve the rights to life and health in the region, with a particular emphasis on vulnerable groups.² Then, in August 2020, the IACHR Special Rapporteurship on Economic, Social, Cultural and Environmental Rights ("Special Rapporteurship") and the United Nations ("UN") Special Rapporteur on Human Rights and the Environment noted that "it is no coincidence that areas with higher levels of environmental pollution and higher death rates from COVID-19 are the same in which historically discriminated against people live" and warned that "[i]n the Americas, as well as in the rest of the world, human health is inextricably tied to ecosystem health."³ These observations are consonant with the World Health Organization's recent "One Health" approach, which envisions the health of people, animals, and the environment as fully integrated,⁴ but arrive after decades of disease specialists sounding the alarm over human activities that increase the risk of outbreaks that pose major threats to public health.⁵

² See e.g., Press Release, Inter-American Commission on Human Rights, IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic, Press Release No. 060/20 (Mar. 20, 2020); Press Release, Inter-American Commission on Human Rights, The IACHR Urges States to Guarantee the Health and Integrity of Persons Deprived of Liberty and their Families in the Face of the COVID-19 Pandemic, Press Release No. 066/20 (Mar. 31, 2020); Press Release, Inter-American Commission on Human Rights, The IACHR Calls on States to Provide Comprehensive Protection for the Lives of People with Disabilities During the COVID-19 Pandemic, Press Release No. 071/20 (Apr. 8, 2020).

³ Press Release, Inter-American Commission on Human Rights, The Americas: Governments Should Strengthen, Not Weaken, Environmental Protection During COVID-19 Pandemic, Press Release No. 198/20 (Aug. 13, 2020).

⁴ One Health, WORLD HEALTH ORGANIZATION: Newsroom, (Sept. 17, 2021), <https://www.who.int/news-room/questions-and-answers/item/one-health>; see also Benjamin Capps, *One Health Ethics*, 36 *BIOETHICS* 348 (2022).

⁵ See e.g., Joshua Lederberg, *Medical Science, Infectious Disease, and the Unity of Humankind*, 260 *JAMA* 684

(1988), Richard C Russell, *Mosquito-Borne Arboviruses in Australia: The Current Scene and Implications of Climate Change for Human Health*, 28 *INTERNATIONAL JOURNAL FOR PARASITOLOGY* 955 (1998), Hilde Kruse, Anne-Mette Kirkemo & Kjell Handeland, *Wildlife as Source of Zoonotic Infections*, 10 *EMERG INFECT DIS* 2067 (2004), A. Alonso Aguirre & Gary M. Tabor, *Global Factors Driving Emerging Infectious Diseases*, 1149 *ANNALS OF THE NEW YORK ACADEMY OF SCIENCES* 1 (2008), Felicia Keesing et al., *Impacts of Biodiversity on the Emergence and Transmission of Infectious Diseases*, 468 *NATURE* 647 (2010), James N. Mills, Kenneth L. Gage & Ali S. Khan, *Potential Influence of Climate Change on Vector-Borne and Zoonotic Diseases: A Review and Proposed Research Plan*, 118 *ENVIRONMENTAL HEALTH PERSPECTIVES* 1507 (2010), Celia McMichael, *Climate Change-Related Migration and Infectious Disease*, 6 *VIRULENCE* 548 (2015), Sandra Diaz et al., *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services*, INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERV.'S, [IPBES] 1, 22 (2019), [ipbes_global_assessment_report_summary_for_policymakers.pdf](#).

In this context, this article argues that the Inter-American System should mainstream the One Health approach in its pandemic prevention, preparedness, and response actions in a way that provides clear, detailed, and comprehensive guidance to member states. Part 2 defines One Health and identifies broad two dimensions of the health-environment nexus. On the one hand, environmental degradation increases the risk of future pandemics by increasing the probabilities of animal-human disease transmission. On the other, environmental degradation can also magnify the impacts of pandemics once these are declared, especially for vulnerable groups and in the context of climate change. Part 3 reviews the Inter-American System’s main activities since 2020 and argues that a systematic examination of the legal implications of this approach from the perspective of the Inter-American human rights instruments is still lacking. Part 4 identifies normative foundations for this urgent task in the Inter-American Court of Human Rights’ approach to the rights to a healthy environment, life, and health. Part 5 concludes by identifying concrete avenues to mainstream the One Health approach within the Inter-American System’s activities and within member states’ domestic legal frameworks.

II. THE HEALTH-ENVIRONMENT NEXUS AND PANDEMIC PREVENTION, PREPAREDNESS, AND RESPONSE

The One Health High-Level Expert Panel was established in 2021 by the Food and Agriculture Organization, the World Organization for Animal Health, the UN Environment Programme, and the World Health Organization (“WHO”).⁶ Building on two decades of scientific literature, the panel defined One Health as “an integrated, unifying approach that aims to sustainably balance and optimize the health of people, animals, and ecosystems.”⁷ This approach was adopted by the Pan American Health Organization in 2021 and was recently included in the Kunming-Montreal Global Biodiversity Framework.⁸ Its broad acceptance should not overshadow ongoing debates, however. While beyond the scope of this article, important critiques include the continued prioritization of human health and failure to acknowledge

⁶ Activities of the One Health High-Level Expert Panel, WORLD ORGANISATION FOR ANIMAL HEALTH: Bulletin (2021), [https://bulletin.woah.org/?official=08-3-09-2022-2_ohhlep#:~:text=The%20One%20Health%20High%2DLevel%20Expert%20Panel%20\(OHHLEP\)%20was,challenges%20raised%20at%20the%20animal%E2%80%93](https://bulletin.woah.org/?official=08-3-09-2022-2_ohhlep#:~:text=The%20One%20Health%20High%2DLevel%20Expert%20Panel%20(OHHLEP)%20was,challenges%20raised%20at%20the%20animal%E2%80%93)

⁷ One Health High-Level Expert Panel (OHHLEP) et al., *One Health: A New Definition for a Sustainable and Healthy Future*, 18 PLOS PATHOGENS 1, 2 (2022); see also Capps, *supra* note 4; Simon Coghlan & Benjamin Coghlan, *One Health, Bioethics, and Nonhuman Ethics*, 18 AM. J. BIOETH. 3 (2018); Jane Johnson & Chris Degeling, *Does One Health Require a Novel Ethical Framework?*, 45 J. MED. ETHICS 239 (2019).

⁸ *One Health: A Comprehensive Approach for Addressing Health Threats at the Human-Animal-Environment Interface*, Pan American Health Organization [PAHO] CD59/9 (Sep. 20-24, 2021), <https://www.paho.org/en/documents/cd599-one-health-comprehensive-approach-addressing-health-threats-human-animal>; CONFERENCE OF THE PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY, *Kunming-Montreal Global Biodiversity Framework*, ¶ 25 U.N. Doc. CBD/COP/15/L.25 (Dec. 18, 2022).

similar integrative approaches within traditional Indigenous knowledge.⁹

At least two dimensions of the health-environment nexus can be identified. First, in the context of pandemic prevention, disease specialists warned us long before 2020 that environmental degradation (including biodiversity loss, habitat fragmentation, and wildlife trade) increase the risk of future outbreaks by facilitating the transmission of pathogens from wild animals to humans (or zoonotic spillover).¹⁰ Alongside the global movement of people and other living organisms, unabated climate change also increases this risk by changing the ranges of both animal species and disease vectors.¹¹ For example, mammal geographical range shifts caused by human activity and climate change generate “hotspots” for spillover risk that can now be pinpointed with increasing precision throughout the Americas.¹² At higher latitudes, sea ice loss in the Arctic heightens the risk of viral transmissions among seals, otters and other mammals between the North Atlantic and the North Pacific Oceans.¹³ Reducing the risks of new zoonotic spillovers like COVID-19, but also Ebola, Zika and so many others, is thus inseparable from promoting global health.

Second, in the context of pandemic preparedness and response, environmental degradation can heighten the vulnerability of equity-seeking groups to a pandemic’s impacts. For example, the International Migration Organization observed that internal migrants that settle in urban and peri-urban areas of Bolivia due to slow onset events such as glacier melt, deforestation, and soil degradation are particularly vulnerable to COVID-19. Reasons identified include “precarious and/or overcrowded living conditions, limited access to basic services, and little or no social protection.”¹⁴ The UN High Commissioner for Refugees observes a similar vulnerability to COVID-19 in the wake of natural disasters such as floods, droughts, and hurricanes, which triggered the displacement of 24.9 million people in 2019 alone.¹⁵ In the Amazon basin, the pandemic exacerbated deforestation, biodiversity loss,

⁹ Vittorio A. Sironi, Silvia Inglese & Andrea Lavazza, *The “One Health” Approach in the Face of Covid-19: How Radical Should it Be?*, 17 PHIL., ETHICS, AND HUMAN. IN MED. 1, 2 (2022); Sean A. Hillier et al., *Examining the Concept of One Health for Indigenous Communities: A Systematic Review*, 12 ONE HEALTH 1, 4 (2021).

¹⁰ *Supra* note 5.

¹¹ Madeleine C. Thomson & Lawrence R. Stanberry, *Climate Change and Vectorborne Diseases*, 387 NEW ENGLAND JOURNAL OF MEDICINE 1969 (2022).

¹² See Colin J. Carlson et al., *Climate Change Increases Cross-Species Viral Transmission Risk*, 607 NATURE 555 (2022).

¹³ Elizabeth VanWormer et al., *Viral Emergence in Marine Mammals in the North Pacific May be Linked to Arctic Sea Ice Reduction*, 9 SCI. REP. 1, 2 (2019).

¹⁴ Ximena Flores-Palacios, *Climate Migration and COVID-19 in Bolivia: The nexus and the way*, IOM BLOG (Jun. 15, 2021), <https://environmentalmigration.iom.int/blogs/climate-migration-and-covid-19-bolivia-nexus-and-way-forward>.

¹⁵ U.N. Human Rights Council, *COVID-19, Displacement and Climate Change Factsheet* (June 2020), <https://www.unhcr.org/protection/environment/5ef1ea167/covid-19-displacement-climate-change.html>; see also Mrinalini Banerjee & S. Shanthakumar, *Analysing the Legal Rights of the Climate Refugees during COVID-19 Pandemic in India: Challenges to International Law*, 9 ASIAN J. LEGAL EDUC. 216 (2022).

and violation of Indigenous peoples’ land rights, which simultaneously undermined their right to health and increased their vulnerability to COVID-19.¹⁶

III. THE INTER-AMERICAN SYSTEM’S COVID-19 ACTIONS

The Organization of American States (“OAS”) General Assembly has referred to the health-environment nexus on multiple occasions.¹⁷ Below are selected examples, although an exhaustive review is beyond the scope of this article. Starting in 2020, General Assembly resolutions recognized “the social, economic, and environmental impacts of the COVID-19 pandemic” and called onto states to address such impacts “while making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, as well as respecting the human rights of individuals in situations of vulnerability.”¹⁸ In 2021, the General Assembly urged its members to take “concrete, integrated, multisectoral and cooperative approaches to equitable and sustainable economic recovery, enhanced environmental protections, and the implementation of universal health care coverage that contributes to human well-being” and to address “structural deficiencies in health systems exposed by the COVID-19 pandemic, tackling health inequities and environmental risk factors”.¹⁹ In 2022, the General Assembly explicitly adopted the One Health approach in the following terms:

To urge member states to adopt the “One Health” approach to create synergies that can address more efficiently and in a coordinated manner the protection of human, animal, environmental health and the protection of ecosystems, with a view to achieving better public health outcomes for the benefit of present and future generations.²⁰

In light of the foregoing, it is surprising that the IACHR did not place greater emphasis on the One Health approach in its own response to the unprecedented threat to human rights created by the pandemic. The following overview reveals an acknowledgment of the health-environment nexus by the Special Rapporteurship, but also how the IACHR has yet to adopt the One Health approach and to systematically examine its legal implications from the

¹⁶ Maria Antonia Tigre, *COVID-19 and Amazonia: Rights-Based Approaches for the Pandemic Response*, 30 REV. OF EUR. COMPAR. & INT’L ENV’T LAW 162, 172 (2021).

¹⁷ See e.g., *infra* notes 18-20.

¹⁸ Org. of American States [OAS], General Assembly Res. 2955 at Preamble, OAS Doc. AG/RES. 2955 (L-O/20) (Oct. 20, 2020); *Id.* at G.A. Res. 2952 at ¶ 1.

¹⁹ Org. of American States [OAS], General Assembly Res. 2967 at ¶ 10, OAS Doc. AG/RES. 2967 (LI-O/21) (Nov. 11, 2021); *Id.* at G.A. Res. 2977 at ¶ 4.

²⁰ Org. of American States [OAS] General Assembly Res. 2993 at ¶ 9, OAS Doc. 2993 (LII-O/22) (Oct. 7, 2022).

perspective of the Inter-American human rights instruments.²¹

To this date, the IACHR has adopted three resolutions focused on the COVID-19 pandemic.²² The first recognizes the differential impact of the pandemic “on particularly vulnerable individuals and groups”, including in the context of “poor access to drinking water and sanitation, food insecurity, environmental pollution and the lack of adequate housing.”²³ The resolution also adopts a broad focus on “the humans right to health and its basic social determinants”, which may be understood as including environmental factors, and uses the expression “economic, social, cultural and environmental rights” throughout.²⁴ The two other resolutions of the IACHR, by contrast, focus on the rights of persons with COVID-19 and on access to vaccines, and do not consider the health-environment nexus.²⁵ Similarly, the IACHR’s Rapid Integrated Response Coordination Unit published three guides since the beginning of the pandemic that focus on specific themes without engaging with environmental issues.²⁶

The Special Rapporteurship directly addressed the relationship between biodiversity loss and zoonotic spillovers in its 2020 annual report:

“although there is a general call to return to a “new normal”, it could have been the same reason that led us to this present. [...] [P]art of the factors that helped the new coronavirus to spread in the way that it did was partly due to [sic] the large rates of loss of bio-diversity that may have been a natural barrier to the virus.”²⁷

In turn, the 2021 annual report explicitly affirmed the One Health approach and repeatedly framed the pandemic and climate change as

²¹ There are no cases of the Inter-American Court of Human Rights that deal with states’ response to the pandemic because of the time necessary for a case to be referred to the Court by the IACHR. Precautionary Measures granted by the IACHR were left beyond the scope of this article due to space constraints.

²² See *infra* notes 23-25.

²³ Inter-American Commission on Human Rights [IACHR] Res. 1/20 at A. (Apr. 10, 2020).

²⁴ *Id.* at C.4; *Id.* at A.

²⁵ See Inter-American Commission on Human Rights [IACHR] Res. 4/20, (Jul. 27, 2020); see Inter-American Commission on Human Rights [IACHR] Res. 1/21, (Apr. 6, 2021).

²⁶ Rapid Integrated Response Coordination Unit, *What are the Standards for Ensuring Respect for the Grieving, Funeral Rites, and Memorials of Those Who Died During The COVID-19 Pandemic?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PRACTICAL GUIDE TO COVID-19 (2020), https://www.oas.org/es/cidh/sacroi_covid19/documentos/GuiaPractica01_Duelo_En.pdf; Rapid Integrated Response Coordination Unit, *How to Ensure Access to the Right to Education for Children and Adolescents During the COVID-19 Pandemic?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PRACTICAL GUIDE TO COVID-19 (2020), https://www.oas.org/es/cidh/sacroi_covid19/documentos/GuiaPractica02_Educacion_En.pdf; Rapid Integrated Response Coordination Unit, *How to Promote Universal Internet Access During the COVID-19 Pandemic?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PRACTICAL GUIDE TO COVID-19 (2021), http://www.oas.org/es/cidh/sacroi_covid19/documentos/03_guias_practicas_internet_ing.pdf.

²⁷ Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the IACHR, Fourth Annual Report, *Human and Planetary Health Face an Unprecedented Crisis* (Mar. 30, 2021) OAS/SER.L/V/II ¶ 1217.

inseparable challenges.²⁸ For example: “all aspects of the pandemic and climate change have a direct impact on the guarantee of all human rights from their indivisibility, interdependence and intersectionality. Therefore, all public policy measures taken by States to address both issues must be holistic and with a human rights approach.”²⁹

IV. MAINSTREAMING “ONE HEALTH” WITHIN THE INTER-AMERICAN SYSTEM

The foregoing reveals a considerable opportunity to mainstream the One Health approach within the Inter-American System’s pandemic prevention, preparedness, and response actions. Indeed, in responding to the OAS General Assembly’s appeals, the IACHR has not yet fully articulated 1) states’ obligations with respect to human, animal, environmental risk factors directly relevant to preventing future pandemic outbreaks, 2) states’ obligations with respect to upholding human rights during pandemics, with a particular focus on individuals and communities that are particularly vulnerable, and 3) a framework to uphold the interests of future generations when adopting such an integrated, unifying, and differentiated approach to implementing the Inter-American human rights instruments.

From the outset, three promising normative groundings for this considerable task can be identified in the Inter-American Court of Human Rights’ (“Court”) approach to the rights to a healthy environment, life, and health. A first relevant anchor to mainstream the One Health approach is the Court’s ample definition of the right to a healthy environment under the American Convention of Human Rights (“American Convention”).³⁰ In its 2017 Advisory Opinion, the Court mirrored the One Health’s balanced perspective by outlining a right that “protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.”³¹ Moreover, the Court indicated that the rights to health and to the environment are “especially linked”, with a suitable environment being a condition for the “full enjoyment” of the right to health.³² The Court also emphasized States’ due diligence obligation to prevent environmental harm and to cooperate in situations of transboundary risk. The due diligence lens appears useful to envision current efforts to halt biodiversity loss and climate change not only as ways of preventing adverse health impacts on vulnerable populations, but

²⁸ Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the IACHR, Fifth Annual Report, *The Imperative of Putting the Economy at the Service of People and Nature in the Most Unequal Region of the Planet* (May 26, 2022) OEA/SER. L/V/II ¶ 1640.

²⁹ *Id.*, at ¶ 1692.

³⁰ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

³¹ Inter-American Court of Human Rights [IACrHR], *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 62 (Nov. 15, 2017).

³² *Id.* at ¶ 64.

also of preventing future pandemics.³³

A second anchor is the Court's unique approach to the right to a decent existence under Article 4 of the American Convention. A line of cases started in 1999 interpreted the right to life as encompassing more than the right to be alive, but also basic living conditions including access to food and water.³⁴ The Court has analyzed cases with both environmental and health dimensions from this perspective (sometimes also translated as "dignified life"), suggesting its relevance as an integrative and unifying legal doctrine.³⁵ As noted by Professor Emeritus Jo Pasqualucci, this approach "has made an inroad in merging civil and political rights with economic, social, and cultural rights and has reinforced the position that a human being needs a broad spectrum of rights to live a quality existence".³⁶

A third anchor is the right to health itself, protected by Article 26 of the American Convention regarding the progressive development of economic, social, and cultural rights. In the landmark ruling of *Poblete Vilches et al. v. Chile*, the Court confirmed the justiciability of Article 26 and noted that "in emergency situations, this right requires the States to ensure adequate regulation of the health care services, providing the necessary services based on the elements of availability, accessibility, quality and acceptability, in equal conditions and without discrimination, but also ensuring positive measures for groups in a situation of vulnerability."³⁷ This case did not address whether preventing serious environmental degradation falls within such positive measures, but the ongoing case of La Oroya Community, recently referred to the Court by the IACHR, could very well provide such an opportunity in a non-emergency context. Indeed, at issue is whether the state took adequate measures to address the health risks posed by a metallurgical complex on local communities, including considering the social determinants of health and taking differentiated measures to protect children's health.³⁸

³³ *Id.* at ¶ 123–25; see also Christopher Campbell-Durufié & Sumudu Anopama Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 CLIMATE LAW 321 (2018).

³⁴ "Street Children" (Villagran-Morales et al.) v. Guatemala, Merits, Inter-Am. Ct. H.R. (ser. C) No. 63 ¶ 144 (Nov. 19, 1999).

³⁵ *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 160-178 (Jun. 17, 2005); *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 150-155 (Mar. 29, 2006); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 194-217 (Aug. 24, 2010); Advisory Opinion OC-23/17, *supra* note 31 at ¶ 114.

³⁶ Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT'L & COMP. L. REV. 1, 31 (2008).

³⁷ *Poblete Chiles et al v. Chile*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 349, ¶ 174 (Mar. 8, 2018).

³⁸ Inter-American Commission on Human Rights [IACHR], Informe No. 330/20, Caso 12.718, Informe de Fondo Comunidad de la Oroya Perú [Merits Report No. 330/20, Case 12.718, La Oroya Community, Peru] ¶ 145 (Nov. 19, 2020) (Spanish).

V. CONCLUSION

This article has identified a considerable opportunity for the Inter-American System to mainstream the One Health approach in its pandemic prevention, preparedness, and response actions. Tragically, environmental degradation and unabated climate change continue to increase the risk of future pandemics and to place equity-seeking groups more at risk of human rights violations in the context of pandemics.³⁹ Beyond sporadic references to the environment, the social determinants of health, and One Health, a comprehensive legal analysis by the IACHR of the health-environment nexus in the context of pandemic prevention, preparedness, and response by is urgently needed. In the Americas only, the COVID-19 pandemic has taken nearly three million lives.⁴⁰ Such a comprehensive analysis would not only provide guidance for the resolution of cases brought before the IACHR and the Court, but also assist states throughout the region in proactively updating their laws and policies. It could also make an important contribution to the current negotiation of a new WHO “Pandemic Treaty,” and later to its implementation, from the distinct perspective of the Inter-American human rights instruments.⁴¹

Obviously, resource limitations faced by member states and by the Inter-American System itself may pose certain obstacles to the mainstreaming called for in this article.⁴² Bearing in mind such constraints, but also the magnitude of the threat to human rights at stake, the following avenues could be explored with cost efficiency in mind: 1) a resolution by the IACHR adopting the One Health approach to pandemic prevention, preparedness, and response; 2) online public consultations and Hearings of a General Nature by the IACHR to gather civil society perspectives on this topic; 3) a request by the IACHR to all member states to provide information on the domestic measures adopted regarding this topic, under Article 41(d) of the American Convention; 4) On-Site Observations of the health-environment nexus in the pandemic context by a Special Commission of the IACHR, with the consent of the concerned state(s); 5) a Thematic Report by the IACHR’s Special Rapporteurship on Economic, Social, Cultural and Environmental Rights dedicated to the One Health approach to pandemic prevention, preparedness, and response; 6) the publication of Practical Guides and other tools by the IACHR’s Rapid Integrated Response Coordination Unit to share best practices regarding this topic; and 7) dedicating a recurring section of the

³⁹ Sadie J. Ryan et al., *Warming Temperatures Could Expose More than 1.3 Billion New People to Zika Virus Risk by 2050*, 27 GLOBAL CHANGE BIOLOGY 84 (2021).

⁴⁰ *Cumulative Confirmed COVID-19 Deaths by World Region*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/cumulative-covid-deaths-region> (last visited Jan. 25, 2023).

⁴¹ World Health Organization [WHO], World Health Assembly Second Special Session, Agenda Item 2, WHO Doc. SSA2(5) (Dec. 1, 2021).

⁴² See Press Release, Inter-American Commission on Human Rights, Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff, Press Release No. 069/16 (May 23, 2016).

IACHR's Annual Report to the General Assembly of the Organization of American States entirely to the One Health approach.⁴³

This article mainly focused on the IACHR because of its human rights promotion mandate under the American Convention. Yet the Inter-American System offers many other avenues. For example, the IACHR could enhance its collaboration with bodies of the Pan American Health Organization, the Pan American Sanitary Conference, and the Permanent Council of the Organization of American States. Further down the road, a state could also ask the Court to render an Advisory Opinion on states' human rights obligations regarding pandemic prevention, preparedness, and response in light of the One Health approach, under Article 64 of the American Convention. For decades, many human rights practitioners considered adopting an integrated approach to human, animal, and ecosystem health as secondary to the laudable fight against impunity for grave human rights violations. The COVID-19 pandemic having demonstrated the urgency of simultaneously mainstreaming the health-environment nexus in order to fulfill human rights, all actors involved in the Inter-American System must act accordingly.

⁴³ Rules of Procedure of the Inter-American Commission on Human Rights, Inter-American Commission on Human Rights [IACHR], LIV.53, I.V.58, I.VI.66 (Aug. 1, 2013).

INTELLECTUAL PROPERTY, ACCESS TO MEDICINES AND REGIONALISM

*Olasupo Owoeye**

I. INTRODUCTION

Despite the global gains in the management and treatment of HIV/AIDS, tuberculosis, and malaria, these diseases remain on the list of the ten top causes of death in low-income countries.¹ Access to medicines continues to be one of the measures necessary to stall the spread of communicable diseases particularly in low-income countries.² Access to medicines is generally recognised as an essential component of the right to health.³ Since the entry into force of the Agreement Establishing the World Trade Organization (“WTO”) in 1995 with its suite of agreements including the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”), there have been many discussions on the implications of the intellectual property protection for public health. This paper discusses the flexibilities available under the TRIPS Agreement for facilitating access to medicines and the extent to which regional collaboration and human rights may enhance the use of those flexibilities.

II. THE TRIPS FLEXIBILITIES AND ACCESS TO MEDICINES

Following the entry into force of the TRIPS Agreement, the pharmaceutical industry launched a worldwide campaign to ensure developing countries across the globe redesigned their intellectual property (“IP”) laws to bring them in line with standards under the TRIPS Agreement.⁴ There was a legal action against the South African government by the Pharmaceutical Manufacturers Association to compel the South African government to adopt stronger IP standards as required by the TRIPS Agreement.⁵ The action by the Pharmaceutical Manufacturers Association

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¹ *World Health Statistics 2022: Monitoring health for the SDGs*, WORLD HEALTH ORGANIZATION [WHO] 23 (2022).

² *Id.* at 24.

³ Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Rep. of Human Rights Council, on Its Eleventh Session, U.N. Doc. A/HRC/11/12, at 6–7 (2009).

⁴ Erika George, *The Human Right to Health and HIV/AIDS: South Africa and South-South Cooperation to Reframe Global Intellectual Property Principles and Promote Access to Essential Medicine*, 18 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 167, 169–170 (2011).

⁵ See generally *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (S. Afr.).

; Rachel Roumet, *Access to Patented Anti-HIV/AIDS Medicine: The South African Experience*, 32 EUR. INTELL. PROP. REV. 137 (2010).

was to challenge the measures taken by the South African government to confront the HIV pandemic ravaging the country at the time. The pharmaceutical industry action was met with fierce resistance by the South African government and the civil society.⁶ The outrage they generated was one of the developments that drew the attention of the world to the implications of the TRIPS Agreement for public health.⁷ The global interest on the extent to which patents could hinder access to medicines propelled the WTO Ministers to adopt the Declaration on the TRIPS Agreement and public health on 14 November 2001. Of particular significance is paragraph four of the Doha Declaration which provides thus:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.⁸

Two of the major flexibilities enshrined in the TRIPS Agreement are the provisions on exhaustion of intellectual property rights and compulsory patent licensing. A compulsory licence allows a licensee to make use of a patented article without the consent of the patent holder. Under Article 31(f) of the TRIPS Agreement, a WTO Member approving the grant of a compulsory licence is required to limit the operation of the licence "predominantly for the supply of the domestic market of the Member authorizing such use".⁹ The fact that the original provision of Article 31 requires compulsory licence to be predominantly for the supply of domestic market means a "non-predominant" part may still be exported under the tenor of that provision.¹⁰ Nonetheless, Article 31(f) was to all intents and purposes a real impediment to the ability of countries with little or no significant pharmaceutical manufacturing capacity to use the system.¹¹ This impediment was recognised by the WTO Ministers in the Doha Declaration,

⁶ Nabila Ansari, *International Patent Rights in a Post-Doha World*, 11 CURRENTS: INT'L TRADE L.J. 57, 60 (2002).

⁷ *Id.*

⁸ World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2 (2001) [hereinafter *Doha Declaration*].

⁹ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter *TRIPS*].

¹⁰ *Id.*

¹¹ OLASUPO OWOEYE, INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN AFRICA: A REGIONAL FRAMEWORK FOR ACCESS 23 (2019).

and they gave a mandate to the Council for TRIPS to find a permanent solution to the problem in the following terms:

We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.¹²

The solution came in the form of the Doha Implementation Decision which was later incorporated into the TRIPS Agreement in the form of the Protocol Amending the TRIPS Agreement. Under the Doha Paragraph six system, countries with no manufacturing capacity in the pharmaceutical sector may use the system.¹³

It is pertinent to add that least developed countries (“LDCs”) enjoy certain implementation waivers under the TRIPS Agreement. Pursuant to Article 66.1 of the TRIPS Agreement, LDCs were initially allowed an eleven-year transition period to implement obligations under the TRIPS Agreement.¹⁴ The initial waiver was to expire in 2006.¹⁵ This was first extended 1 July 2013 and then later to 1 July 2021.¹⁶ The transition period for LDCs to comply with the provisions of the TRIPS Agreement was more recently extended to 1 July 2034 by the Council for TRIPS on 29 June 2021.¹⁷

Apart from the general waiver for LDCs in relation to the implementation of the TRIPS Agreement under Article 66.1, the WTO Ministers in paragraph seven of the Doha Declaration also made a further exception for least developed countries in relation to pharmaceuticals by providing that LDCs “will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016.”¹⁸ The WTO Minister thus gave a directive to the Council for TRIPS to take the necessary measures to give effect to the waiver. This was

¹² *Doha Declaration*, *supra* note 8.

¹³ World Trade Organization, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WTO Doc. WT/L/641 (2005).

¹⁴ *TRIPS*, *supra* note 9.

¹⁵ *Responding to least developed countries’ special needs in intellectual property*, World Trade Organization: Intellectual Property: Least Developed Countries (Oct. 16, 2013), https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm [hereinafter *Responding*].

¹⁶ *Id.*

¹⁷ Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period Under Article 66.1 for Least Developed Country Members*, WTO Doc. IP/C/88 (June 29, 2021).

¹⁸ *Responding*, *supra* note 15.

done through a decision of the Council for TRIPS dated 27 June 2002.¹⁹ On 6 November 2015, the Council for TRIPS further extended the waiver in respect of obligations relating to pharmaceutical products under the TRIPS Agreement to 1st January 2033.²⁰ The Decision provides that LDCs “will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2033, or until such a date on which they cease to be a least developed country Member, whichever date is earlier.”²¹

On 17 June 2022, the WTO Ministerial Conference adopted the Ministerial Decision on The Trips Agreement that creates an additional waiver for COVID-19 vaccines.²² The Decision allows the compulsory licensing of patented COVID-19 vaccines, and it provides for a less rigorous process than what is required under Doha-paragraph six system. The WTO Decision on IP and COVID vaccines also goes beyond the Article 31bis flexibility by providing that data exclusivity restrictions shall not be an impediment to the use of the waiver.²³ All developing countries are eligible to use the COVID-19 vaccine’s waiver under the WTO Ministerial Decision on the TRIPS Agreement. The COVID-19 waiver may be used by an eligible country till June 2027.²⁴

Under Article 6 of the TRIPS Agreement, it is provided that subject to the non-discrimination national treatment and most favoured nation principles, nothing in the TRIPS Agreement is to “be used to address the issue of the exhaustion of intellectual property rights.”²⁵ Exhaustion of intellectual property rights doctrine is to the effect that intellectual property rights in an item are exhausted for marketing purposes once the item embodying the IP has been sold by the IP owner or with their consent.²⁶ Exhaustion of rights may be national, regional, or international.²⁷ The exhaustion regime adopted by any country is determined by national law. Exhaustion is national when the rights are only exhausted within the national territory of the country of sale.²⁸ It is regional when the rights are exhausted within the region of sale

¹⁹ Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period Under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, WTO Doc. IP/C/25 (July 1, 2002).

²⁰ Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period Under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, WTO Doc. IP/C/73 (Nov. 6, 2015).

²¹ *Id.*

²² World Trade Organization, Ministerial Declaration on the TRIPS Agreement of 27 June 2022, WTO Doc. WT/MIN(22)/30 WT/L/1141 (2022).

²³ *Id.* at 4.

²⁴ *Id.* at 6.

²⁵ *TRIPS*, *supra* note 9.

²⁶ Darren E. Donnelly, *Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine*, 13 SANTA CLARA HIGH TECH. L.J. 445, 447 (1997).

²⁷ *Owoeye supra*, note 11, at 110.

²⁸ *Id.*

and exhaustion is considered international when the rights are exhausted internationally once the goods are released into the market anywhere in the world.²⁹ International exhaustion is the most liberal exhaustion regime and one that allows for lawful importation from any country of the world that offers the most competitive pricing.³⁰

III. REGIONALISM, ACCESS TO MEDICINES AND HUMAN RIGHTS

Regionalism has been defined “as the process of building economic interdependence characterized by trade liberalization policies at the regional level and geared towards enhancing the economic competitiveness of contracting parties with view to building blocs for an open and transparent global economy.”³¹ Regional trade blocs play important roles in globalisation and trade liberalisation.³² Regional trade blocs allow for the integration of trade policies at regional levels, and this can ultimately facilitate the actualisation of a fully integrated global economy.

Regional trade organisations may also use the regional trade framework to promote the use of the TRIPS flexibilities within their region. Article 31 of the TRIPS Agreement does allow for compulsory licensing of patents to meet the needs of countries with a regional trade area. The relevant provision provides thus:

With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products: where a developing or least developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up of countries presently on the United Nations list of least developed countries, the obligation of that Member under Article 31(f) shall not apply to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. It

²⁹ *Id.*

³⁰ See NIGERIAN INTELLECTUAL PROPERTY LAW: REFORM AND DEVELOPMENT 11–25 (Ayoyemi Lawal-Arowolo, et al. eds., 2022).

³¹ Olasupo Owoeye, *Regionalism and WTO Multilateralism: The Case for an African Continental Free Trade Area*, 50 JOURNAL OF WORLD TRADE 1085, 1090 (2016).

³² *Id.* at 1092–93.

is understood that this will not prejudice the territorial nature of the patent rights in question.³³

While this flexibility presently applies under the TRIPS Agreement, it remains a grossly under-utilised option. It is pertinent to add that the requirement that a regional trade agreement (“RTA”) that may qualify for a regional compulsory licence under the TRIPS Agreement must have at least 50% of the RTA members ranked as least developed countries by the United Nations. Most RTAs in Africa will satisfy this requirement as more than 50% of African countries are still ranked as least developed by the United Nations.³⁴ Regional bodies that do not meet the requirement of the Doha paragraph six system may nonetheless still rely on Article 31(f) of the TRIPS Agreement to export a non-predominant part of medicines made under a compulsory licence for exportation within the region.

It is noteworthy that access to medicines is recognised as an integral part of the right to health in international law and the human rights rhetoric may be relied upon to support a liberal interpretation of the flexibilities available under the TRIPS Agreement.³⁵ This view finds support in Article 7 of the TRIPS Agreement which provides that the protection and enforcement of intellectual property should be “in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”³⁶ In a similar vein, Article 8 of the TRIPS Agreement recognises the need to safeguard health and development rights in the protection of intellectual property by providing that WTO Members may adopt “measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”³⁷ The WTO Dispute Settlement Body Panel has held that the Preamble to the TRIPS Agreement as well as Articles 7 and 8 of the TRIPS Agreement embody underlying principles and objectives that should be taken into consideration when interpreting the TRIPS Agreement.³⁸ Health and development rights considerations may therefore be considered in the implementation of intellectual property rights.

³³ *TRIPS*, *supra* note 9.

³⁴ *UN list of least developed countries*, U.N. Conference on Trade and Development, <https://unctad.org/topic/least-developed-countries/list> (last visited Feb. 1, 2023).

³⁵ *See generally* Owoeye *supra*, note 11.

³⁶ *TRIPS*, *supra* note 9.

³⁷ *Id.*

³⁸ WTO Panel Report, *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging - Panel report - Action by the Dispute Settlement Body*, 725 WTO Doc. WT/DS435/R (June 28, 2018); Owasupo Owoeye, Oladapo Fabusuyi, & Mathews Nkhoma, *The Australian Tobacco Plain Packaging Legislation: A Case Study on Intellectual Property Enforcement and Policy Intervention to Promote Public Health*, 16 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 162, 172 (2021).

IV. CONCLUSION

The debates on patents and access to medicines continue to be of significant international interest. The COVID-19 pandemic has given rise to a renewed interest in the need to design measures for ensuring patents do not unduly hinder public health goals especially in developing countries. Regional collaboration remains an under explored strategy for dealing with the challenge even though it offers great prospects for promoting public health objective in least developed and developing countries. Human rights considerations will also continue to play an important role in the enforcement and protection of intellectual property rights with public health implications. Developing countries can thus rely on the existing flexibilities to design intellectual property frameworks that align with the national goals and public health objectives.