Going Beyond the Rhetoric: Taking Human Rights Seriously in the Post-COVID-19 New Paradigm

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The health crisis caused by SARS-CoV-2 has renewed and reinvigorated the international community's calls for the overhaul of all actors on the basis of human rights. Around the world, this unprecedented crisis is being accompanied by broad discussions on both the protection of health and the protection of human rights which invariably end in the same way: with calls to take human rights seriously. In April 2020, UN Secretary General (UNSG) António Guterres, summarized the situation clearly:

> "the COVID-19 pandemic is a public health emergency—but it is far more. It is an economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis". The consequence of this diagnosis? That a human rights-based approach (HRBA), a central UN strategy for achieving development outcomes for over a decade, "can and must guide the COVID-19 response and recovery".

This approach, relying on the principle of human dignity, strengthens the focus on marginalized and vulnerable groups as well as the capacities of rights holders to make their claims; it also requires governments to meet their obligations by embedding fundamental principles of participation, equality, non-discrimination, transparency and accountability into their practices. For the UNSG, this approach brings two advantages: it offers a response to the immediate crisis through emergency measures that are legal, proportionate, necessary and non-discriminatory; and it orientates the preparation of our societies for future (health) crises, the strengthening of economic and social rights, bolstering "resilience for the long haul".

This article first analyses the various dimensions of the public health and human rights crisis, in order to identify, secondly, the breadth of the efforts that need to be made for a short- and long-term human rights-based response to COVID-19.

1. COVID-19: a public health and human rights crisis

The UNSG's description of the COVID-19 crisis as a human rights crisis needs to be deciphered in order to expose the extent of the links between public health – defined as "what we, as a society, do collectively, to assure the conditions for people to be healthy" – and human rights. His characterisation refers to the dual relationship between the two: that while public health measures can have a negative impact on human rights, human rights violations can also negatively impact public health.

First, public health measures affect, and in some cases can violate, human rights. This is illustrated by the violations perpetuated all over the world by governments adopting disproportionate and discriminatory surveillance and control measures ostensibly to protect populations and limit the virus' spread. For instance, the rights of journalists or human rights defenders – as was the case in China or Turkey according to Amnesty International – or those of members of the LGBTQ+ community as well as of other minorities, such as members of the Roma community (in relation to access to health and sanitation facilities or drinking water), migrants and asylum seekers (ill-treatment, stigmatization and discrimination, denial of access to the asylum procedure), or prisoners, have been clearly violated by governments using the pandemic to solidify their power and install discriminatory policies. Such measures have been condemned by the United Nations High Commissioner for Human Rights, who reminded states in October 2020 that the pandemic was not an excuse for committing human rights violations.

Second, human rights violations can impact negatively on public health. The 2020 health crisis highlighted the pre-existing deep and long-term socio-economic inequalities between countries and between individuals within countries. These disparities can be violations of human rights in and of themselves, but they have also led to the increased vulnerability to SARS-CoV-2 of certain already vulnerable populations. As such, their existence undermines global efforts to control the propagation of the virus and to protect the whole community. Several analyses by the media have shown the link between poverty and vulnerability to SARS-CoV-2. For instance, in the USA, where black American populations are bearing a disproportionate COVID-19 burden, analyses quickly established and documented a connection with the historic economic and social inequalities, discrimination and racism suffered by those populations and which has hampered the realization of their human rights to education, to decent accommodation, access to health care, access to a social protection system, decent working conditions, etc. The link between COVID-19 and economic and social rights violations has also been expressed by UN human rights experts such as Philip Alston, the UN's Special Rapporteur on Extreme Poverty until 2020, who summed up the situation as follows: "This is a crisis that disproportionately affects poor people, who are more likely to have health complications, live in crowded housing, lack the resources to stay at home for long periods, and work low-paid jobs that force them to choose between risking their health or losing their income." The strong link established between poverty, the violation of socio and economic rights and negative health outcomes in the case of the COVID-19 is extremely worrying. Recent figures concerning the increase in extreme poverty in the world caused by the pandemic indeed raise fears for the protection of the health of these vulnerable populations as well as for the protection of the whole community, but also for states' capacities to effectively fight the pandemic while dealing with the rise in poverty.

From the understanding that the public health and human rights crises are intimately intertwined, follows a consequence, already developed in theory by the literature on health and human rights and now asserted by the UNGS: that the promotion and protection of human rights benefits the promotion and protection of public health, and vice versa. As such, the response to the COVID-19 crisis should be based on

an HRBA to health, respectful of human rights generally, and of the right to health more specifically. This conclusion has also been framed as essential by WHO's Director General, Dr Tedros Adhanom Ghebreyesus, who contributed largely to the adoption of a resolution to this effect at the World Health Assembly in May 2020. The COVID-19 pandemic offers a unique opportunity to make the concrete links between health and human rights clear once and for all, and to develop guidance for states on how to take practical steps to protect human rights in the context of this health crisis and to better prepare for future public health crises. The success of the implementation of an HRBA is however, largely conditioned by the realisation of a number of efforts, yet to be described.

2. From affirmation to implementation: the human rights-based approach in public health in the post-COVID-19 paradigm

Two knowledge gaps exist that must be filled before a HRBA can be fully implemented in public health. First, the impacts of both the violations or the promotion of human rights on physical and mental health are under-researched, under-documented and under-analysed. There is thus little understanding of the principles that must be applied to limit human rights during global public health emergencies. Second, the lack of human rights-based guidance concerning states' longer term preparations for future public health emergencies must also be addressed.

Firstly, efforts must be made to compensate for the lack of knowledge on health of the violation of, or indeed of the protection of, any human rights, as well as the principles to be applied to limit human rights during global public health emergencies. This research is essential to translate human rights into national practical measures. The knowledge gap is in part due to the fact that the links between health and human rights were neither expressly nor strongly affirmed until the end of the 20th century. Despite the right to health's acknowledgment in WHO's Constitution, it was only following the HIV/AIDS pandemic and the coalescence of an effective and global pro-human rights civil society movement that a HRBA to health began to emerge. As such, since 1996, in the field of HIV/AIDS, guidelines, comments, codes of practice and declarations have been adopted by UN institutions in charge respectively of the protection and promotion of human rights, social justice, public health or peace and security. However, and despite some early efforts to address women's specific health issues for instance, the HRBA to health only begun to be recognized and admitted as necessary in more recent global health strategies, and in UNGA resolutions adopted since 2018, such as on the fight against tuberculosis, the prevention and control of non-contagious diseases, and the fulfilment of universal health coverage for all. Efforts by the same UN institutions must be made to combine all information on human rights protection and promotion relating to global health issues in order to fully explore the links between human rights and health and their potential impact on public health strategies.

A comparable situation can be found relating to the knowledge on permissible limitations on human rights during public health crises and, in fact, many difficulties are connected with the inadequacy of the existing rules during public health crises. The immediate response to the COVID-19 crisis has been characterized by an apparent reinforcement of social protection, a central economic and social human right, with the expansion of economic assistance and social security programs around the world, combined with, on the contrary, multiple limitations and derogations of civil and political rights. Under the International Covenant on Civil and Political Rights, states are authorized to impose limitations on most rights and liberties in public emergencies. The Syracusa principles specify the conditions for these limitations: they must be motivated by a legitimate aim, provided for by law, proportionate and evidence-based, of limited duration and subject to review against abusive applications. Moreover, limitations must respect the principles of equality and non-discrimination and therefore particular attention must be attributed to the protection of vulnerable groups. These principles however, designed to be applicable in each and all situations of national public emergency and to achieve "an effective implementation of the rule of law," have revealed themselves extremely difficult to operationalize in the case of the COVID-19 crisis. While identifying violations may be straightforward in some cases – such as the measures mentioned above relating for example to the imprisonment of journalists –

determining whether particular health measures adopted by governments were proportionate and well designed to attain the objective pursued is far more challenging. These difficulties are not surprising, scientific uncertainties concerning a new virus, its transmission, the measures to be adopted or the duration of the crisis, being inherent to the situation. A consequence of this confusion is that the protection of human rights, like freedom of movement, the right to privacy or freedom of religion, has been invoked or instrumentalized to delegitimise and brand as illegal certain public health measures such as the obligation to wear a mask. These difficulties must be rapidly addressed.

Secondly, efforts must be made to compensate for the lack of human rights-based guidance for states to prepare for a future public health emergency. The International Health Regulations (IHR), adopted in 2005 and which establish a legal framework to manage the collective defences in order to detect disease events and to respond to public health risks and emergencies, do not impose on states precise obligations relating to the protection of human rights. Under the IHR, states must develop certain core capacities of surveillance and response throughout their territories and specific capacities at certain points of entry into their territory. But none of these capacities is directly designed to ensure, for instance, non-discriminatory access to healthcare services or goods to vulnerable populations, or to authorize the participation to the development of public health measures to categories of the population more particularly concerned by these measures. Moreover, emphasis has been put on the technical preparation of states for future outbreaks and not on the human rights protection and socio-economic resilience of societies. The Global health security agenda (GHSA) launched by 30 states and international organizations as a reaction to the 2014 West African Ebola crisis and intended to guide the international effort on infection and prevention control, encourages countries to develop technical

capacities in particular. WHO's tool for monitoring and evaluating states' IHR core capacities was developed in collaboration with the GHSA, further emphasizing the importance of technical capacities for preparedness.

Proposals have already been formulated in the doctrine in favour of interpreting the IHR's core capacity obligations with regard to the human right to health. Such proposals should be applauded and implemented as they offer concrete guidance to states. But they also need to be developed and elaborated further to address not only issues of healthcare systems strengthening or access to health services and medicinal products, but also the restructuring of our societies in preparation of future crisis of the breadth and intensity of COVID-19. The realization of the right to health strongly depends on the realization of other economic, social and cultural rights – such as the right to social protection or the right to enjoy the benefits of scientific progress. Combining attention for the protection and promotion of all these rights will undoubtedly facilitate a more rapid and sustainable recovery.

Conclusion

The COVID-19 pandemic should mark the beginning of a new era where a HRBA is neither recommended nor hoped for, but is an obligation when developing immediate and long-term responses to public health crises. Where human rights were previously simply mentioned and tolerated (alongside Sustainable Development Goals for instance), they should now form the basis for the construction of resilient societies in the post-COVID-19 area.
