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Ensuring Access to Accurate Information and Combatting Misinformation

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ENSURING ACCESS TO ACCURATE INFORMATION AND COMBATTING MISINFORMATION ABOUT PANDEMICS

DIANE ORENTLICHER*

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The devastating toll of COVID-19 makes it easy to grasp the urgent need in *any* pandemic to develop and deploy an effective vaccine. Within a year after the virus emerged in China in December 2020, more than sixty-eight million people reportedly had contracted COVID-19 and more than one and one-half five million had lost their lives to it.¹ By late February 2021, more than 113 million had

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1. See MNT News Team, *COVID-19 Live Updates: Total Number of Cases Passes 67.6 Million*, MEDICAL NEWS TODAY (last visited Dec. 9, 2020), <https://www.medicalnewstoday.com/articles/live-updates-coronavirus-covid-19#1>. Although the title of this report used the figure “67.6 million,” the text stated: “THE

been infected, of whom more than two and one-half million had died.²

Yet even the welcome development of highly effective vaccines in late 2020³ cannot end the COVID-19 (or any other) pandemic unless we surmount myriad challenges to their scaled-up production and equitable distribution.⁴ Indeed, the grossly unequal burden of COVID-19 highlights the crucial importance, and immense challenge, of ensuring the latter.⁵

Also crucial—and the focus of this paper—are challenges relating to public *willingness* to get vaccinated. Here, public opinion surveys

VIRUS HAS RESULTED IN MORE THAN 68.2 MILLION INFECTIONS AND MORE THAN 1.5 MILLION DEATHS.” As has often been noted, reported levels of contraction and death likely underestimate the toll of the coronavirus; *see, e.g.*, Ana Santos Rutschman et al., *Comments on the Preliminary Framework for Equitable Allocation of COVID-19 Vaccine* 1, 1 (Sept. 4, 2020).

2. MNT News Team, *COVID-19 Live Updates: Total Number of Cases Passes 113 Million*, MED. NEWS TODAY (last visited Feb. 26, 2021), <https://www.medicalnewstoday.com/articles/live-updates-coronavirus-covid-19#1>.

3. *See* Yasmeen Abutaleb et al., *How the ‘Deep State’ Scientists Vilified by Trump Helped Him Deliver an Unprecedented Achievement*, WASH. POST (Dec. 14, 2020, 5:40 PM), <https://www.washingtonpost.com/health/2020/12/14/trump-operation-warp-speed-vaccine/>; Erin Garcia de Jesus, *Moderna Says its Covid-19 Vaccine Is Nearly 95 Percent Effective*, SCIENCE NEWS (Nov. 30, 2020, 10:30 AM), <https://www.sciencenews.org/article/moderna-vaccine-covid19-coronavirus-early-results>.

4. *See* Katie Thomas, *The Coronavirus Vaccines Will Probably Work. Making Them Fast Will Be the Hard Part*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/11/17/health/coronavirus-vaccine-operation-warp-speed.html>; Nicole Hassoun, *Buying a Coronavirus Vaccine for Everyone on Earth, Storing and Shipping It, and Giving It Safely Will All Be Hard and Expensive*, THE CONVERSATION (Nov. 10, 2020, 2:20 PM), <https://theconversation.com/buying-a-coronavirus-vaccine-for-everyone-on-earth-storing-and-shipping-it-and-giving-it-safely-will-all-be-hard-and-expensive-149221>; Ruth Maclean, *Facing Roadblocks, Vast Global Vaccination Effort Gets Underway*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/world/africa/covax-vaccine-inequality.html>.

5. *See* Lily Rubin-Miller et al., *COVID-19 Racial Disparities in Testing, Infection, Hospitalization, and Death: Analysis of Epic Patient Data*, KAISER FAM. FOUND. (Sept. 16, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-racial-disparities-testing-infection-hospitalization-death-analysis-epic-patient-data/>; James Kingsland, *Why Are Asian and Black Patients at Greater Risk?*, MED. NEWS TODAY (Feb. 2, 2021), <https://www.medicalnewstoday.com/articles/covid-19-why-are-asian-and-black-patients-at-greater-risk>.

suggest grounds for concern. In the United States, barely over half of respondents in a survey conducted by the non-partisan Pew Research Center in September 2020 said they would definitely or probably get a COVID-19 vaccine if it were available,⁶ down from 72 percent of respondents in a survey four months earlier;⁷ the rest said they definitely or probably would *not* get vaccinated.⁸ In a later Pew survey, the percentage who said they definitely or probably would get a vaccine rose to 60, but a worryingly high percentage said they definitely would *not* get vaccinated.⁹ Beyond U.S.-based views, vaccine hesitancy in general has been “steadily globalizing” and “accelerating.”¹⁰

This trend is worrying, because even highly effective vaccines cannot end a pandemic unless “there are high rates of acceptance and coverage.”¹¹ The risks posed by substantial pockets of vaccine

6. Alec Tyson et al., *U.S. Public Now Divided Over Whether to Get COVID-19 Vaccine*, PEW RSCH. CTR. 1, 4 (Sept. 17, 2020) <https://www.pewresearch.org/science/2020/09/17/u-s-public-now-divided-over-whether-to-get-covid-19-vaccine/>.

7. *Id.*

8. *Id.* See generally Amy A. Malik et al., *Determinants of COVID-19 Vaccine Acceptance in the US*, ECLINICAL MAG. 1, 2, 5 (Aug. 12, 2020), <http://https://www.journals.elsevier.com/eclinicalmedicine>.

9. CARY FUNK & ALEC TYSON, INTENT TO GET A COVID-19 VACCINE RISES TO 60% AS CONFIDENCE IN RESEARCH AND DEVELOPMENT PROCESS INCREASES, 1, 4 (Pew Research Center, Dec. 3, 2020), <https://www.pewresearch.org/science/2020/12/03/intent-to-get-a-covid-19-vaccine-rises-to-60-as-confidence-in-research-and-development-process-increases/>. The rising percentage of survey participants willing to get vaccinated captured in the later survey was attributed to several factors, including the exceptionally high efficacy of vaccines approved at the end of 2020 and their limited availability. See Jan Hoffman, *Early Vaccine Doubters Now Show a Willingness to Roll Up Their Sleeves*, N.Y. TIMES (Dec. 26, 2020), <https://www.nytimes.com/2020/12/26/health/covid-vaccine-hesitancy.html>.

10. Katherine E. Bliss et al., *The Risks of Misinformation and Vaccine Hesitancy within the Covid-19 Crisis*, CTR. FOR STRATEGIC AND INT’L STUD. 1, 3 (Sept. 4, 2020), <https://www.csis.org/analysis/risks-misinformation-and-vaccine-hesitancy-within-covid-19-crisis>; see also Wojciech Feleszko et al., *Flattening the Curve of COVID-19 Vaccine Rejection—A Global Overview*, 9 VACCINES 1, 1 (2021).

11. Malik et al., *supra* note 8, at 2. Estimates of the percentage of a population that must get vaccinated to reach herd immunity—and thus stop the spread of the coronavirus—vary. At this writing, estimates range from 70 to 90 percent. See Matthew Conlen & Charlie Smart, *When Could the United States Reach Herd*

hesitancy or resistance are by no means speculative; we have seen what happens when growing numbers decline to get vaccinated. In several regions, a steep rise in vaccine hesitancy¹² has led to a resurgence of measles, mumps and other diseases previously eliminated, along with avoidable deaths.¹³ If large numbers of people refuse to take a COVID-19 vaccine, the human toll would be far worse. Yet a study conducted last year found that “the level of unwillingness to vaccinate against COVID-19 is in most countries much *higher* than regular vaccination reluctance.”¹⁴

What, then, accounts for disturbingly high levels of vaccine hesitancy? And how is international law relevant? After briefly addressing the first question, I take up the questions whether international law adequately equips us to address this challenge, and whether a new treaty on pandemics could helpfully strengthen the existing framework for doing so. First, it should be noted that, while this paper focuses on public acceptance of vaccines, much of my analysis is relevant to other measures that are critical to preventing and ending pandemics.

I. INFODEMICS AND PUBLIC HEALTH

A crucial factor behind high levels of vaccine hesitancy is what

Immunity? It's Complicated, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/interactive/2021/02/20/us/us-herd-immunity-covid.html>.

12. There is a spectrum of beliefs among those likely to refuse vaccinations. At one end are individuals ideologically opposed to vaccinations (sometimes called vaccine rejectors); others are resistant to vaccines but open to persuasion; still others have significant concerns about vaccines but similarly can be persuaded. See generally Tara Smith, *Vaccine Rejection and Hesitancy: A Call to Action*, 4 OPEN F. INFECTIOUS DISEASES 1, 4 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5597904/>; Julie Leask et al., *Communicating with Parents about Vaccination: A Framework for Health Professionals*, 12 BMC PEDIATRICS 1, 4 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3480952/>.

13. See Elizabeth Benecke & Sarah Elizabeth DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 GLOB. PEDIATRIC HEALTH 1, 1 (2019).

14. Feleszko et al., *supra* note 10, at 2. To be sure, it is possible that, just as we have recently seen a rise in willingness to get a COVID-19 vaccine in the United States, there may be growing willingness elsewhere to get vaccinated for this coronavirus.

the World Health Organization (WHO) calls “infodemics.”¹⁵ In the WHO’s words, these “can be defined as the rapid spread of information of all kinds, including rumours, gossip and unreliable information.”¹⁶ Early last year, the organization sounded the alarm about a COVID-19 infodemic, noting the rapid and “dangerous” spread of “fake news” about the pandemic.¹⁷ Public health experts have repeatedly warned that misinformation about COVID-19 threatens critical efforts to stem its spread.¹⁸ While the COVID-19 infodemic is by no means the only cause for high levels of vaccine hesitancy,¹⁹ it is one of the most important.²⁰

Not surprisingly, online platforms have accelerated the COVID-19 infodemic.²¹ In a 2020 report, the non-governmental organization

15. WORLD HEALTH ORGANIZATION, *MANAGING EPIDEMICS: KEY FACTS ABOUT MAJOR DEADLY DISEASES*, 26 (2018) [hereinafter *MANAGING EPIDEMICS*].

16. *MANAGING EPIDEMICS*, *supra* note 15, at 26. In light of the potentially grave impact of rapidly-spreading rumours, “infodemiology” is an increasingly critical component of epidemiology. Feleszko et al., *supra* note 10, at 34.

17. See, e.g., World Health Organization, *Remarks of WHO Director-General, Munich Security Conference* (Feb. 15, 2020), <https://www.who.int/director-general/speeches/detail/munich-security-conference>.

18. See, e.g., Sandhya Raman, *Public Health Experts Worry about Spread of COVID-19 Misinformation*, ROLL CALL (March 18, 2020, 5:30 AM), <https://www.rollcall.com/2020/03/18/public-health-experts-worry-about-spread-of-covid-19-misinformation/> (reporting public health experts were concerned “that the spread of COVID-19 could be exacerbated by misinformation”).

19. Among other determinants, Black Americans have expressed higher levels of vaccine hesitancy than white Americans in significant part because of notorious medical abuses of Black citizens, such as the Tuskegee study in which the U.S. Public Health Service infected 400 Black sharecroppers with syphilis without their knowledge, much less consent, and followed them for 40 years to learn about the disease’s progression. Yet Black Americans as well as other minority communities have been at heightened risk for infection with and death from COVID-19. See Malik et al., *supra* note 8, at 3; Lola Fadulu, *Amid History of Mistreatment, Doctors Struggle to Sell Black Americans on Coronavirus Vaccine*, WASH. POST, Dec. 7, 2020, https://www.washingtonpost.com/local/social-issues/black-vaccine-trust/2020/12/07/9245e82e-34c2-11eb-b59c-adb7153d10c2_story.html. On strategies for overcoming mistrust in minority communities, see Jessica Jaiswal, et al., *Disinformation, Misinformation and Inequality-Driven Mistrust in the Time of COVID-19: Lessons Unlearned from AIDS Denialism*, 24 AIDS & BEHAV. 2776, 2777 (2020).

20. See Samia Tasnim et al., *Impact of Rumors and Misinformation on COVID-19 in Social Media*, 53 J. PREVENTIVE MED. & PUB. HEALTH 171, 171 (2020).

21. See Barrie Sander & Nicholas Tsagourias, *The COVID-19 Infodemic and Online Platforms as Intermediary Fiduciaries Under International Law*, 11 J.

Article 19 succinctly summarized the content and viral spread of social media posts relating to the coronavirus this way:

Among the myths circulating online and elsewhere are claims that using hand dryers, eating garlic and drinking bleach can cure infections, that the origins of the outbreak lie in American or Chinese biological weapons or a sinister plot by the Bill & Melinda Gates Foundation, and that a 1993 episode of *the Simpsons* predicted the coronavirus by name. More mundane falsehoods include exaggerated infection figures and inaccurate descriptions of government policies.²²

Research indicates that “false information about COVID-19 has circulated much more widely than information from authoritative sources such as the WHO and the Centers for Disease Control and Prevention.”²³ Despite efforts by Facebook to limit false information about COVID-19, “anti-vaccine conspiracy-theory accounts” on the social media platform grew by almost 50 percent over the course of 2020.²⁴ During the final weeks of the year, “peddlers of online falsehoods” began “ramping up lies about the Covid-19 vaccines” just as they were first being administered in the United States.²⁵

INT'L HUMANITARIAN LEGAL STUD. 331, 334–35 (2020); RORY SMITH ET AL., UNDER THE SURFACE: COVID-19 VACCINE NARRATIVES, MISINFORMATION AND DATA DEFICITS ON SOCIAL MEDIA 45 (First Draft ed. Nov. 2020).

22. ARTICLE 19, VIRAL LIES: MISINFORMATION AND THE CORONAVIRUS 4 (2020) [hereinafter VIRAL LIES].

23. *Id.*; see also Cat Zakrzewski, *The Technology 202: Facebook Removes Some Pages Appearing to Coordinate to Push Health Misinformation*, WASH. POST (Dec. 9, 2020, 9:36 AM), <https://www.washingtonpost.com/politics/2020/12/09/technology-202-facebook-removes-some-pages-appearing-coordinate-push-health-misinformation/> (reporting that information posted by the Centers for Disease Control and WHO had about one-tenth the engagement on social media as dubious claims relating to COVID-19 posted on Facebook).

24. Elizabeth Dwoskin, *Vaccine Opponents Outline Online Campaigns to Sow Distrust in a Coronavirus Vaccine*, WASH. POST (Dec. 30, 2020, 11:00 AM), <https://www.washingtonpost.com/technology/2020/12/23/anti-vaxx-covid-vaccine/> [hereinafter *Vaccine Opponents*].

25. Davey Alba & Sheera Frenkel, *From Voter Fraud to Vaccine Lies: Misinformation Peddlers Shift Gears*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/12/16/technology/from-voter-fraud-to-vaccine-lies-misinformation-peddlers-shift-gears.html>. As the Center for Countering Digital Hate has documented, anti-vaxx campaigns are not an accidental byproduct of digital technology; they have been mounted in a concerted, highly-sophisticated, and deliberate fashion. See CENTER FOR COUNTERING DIGITAL HATE, THE ANTI-

This poses a significant challenge to public health. Noting the high volume and rapid spread of social media posts that fuel opposition to vaccines, one study found it “only takes 5 to 10 minutes on an anti-vaccine site to increase perceptions of vaccination risks and decrease perceptions of the risks of vaccine omission.”²⁶

Though easily established, beliefs forged by misinformation are notoriously difficult to dislodge. Myriad studies have shown that “people often continue to rely on corrected misinformation”—that is, on misinformation they have *learned* is incorrect—even if they understand, believe, and later remember the correction.”²⁷ Put simply, “[m]isinformation is sticky—even when it seems to have been corrected.”²⁸

More to the present point, beliefs based on misinformation can produce grave harm—and they have. Beyond the impact of misinformation-based vaccine hesitancy on the course of a pandemic,²⁹ more specific harms abound—“in some cases[,] literally life or death.”³⁰ For example, more than 700 Iranians died, according to the WHO, because they acted on a rumor that drinking high-proof alcohol can cure COVID-19.³¹ Viral online conspiracy theories about who is to blame for COVID-19 have also incited violent attacks against individuals and property.³²

VAXX PLAYBOOK 36, 38 (2020), <https://www.counterhate.com/playbook>.

26. Benecke & DeYoung, *supra* note 13, at 2.

27. Jessica Paynter et al., *Evaluation of a Template for Countering Misinformation—Real-World Autism Treatment Myth Debunking*, PLOS ONE 1, 2 (2019).

28. STEPHAN LEWANDOWSKY ET AL., THE DEBUNKING HANDBOOK 6 (2020).

29. It is worth reiterating that misinformation is not the sole reason some hesitate to get vaccinated. *See supra* note 19.

30. Evelyn Douek, *COVID-19 and Social Media Content Moderation*, LAWFARE (Mar. 25, 2020, 1:10 PM), <https://www.lawfareblog.com/covid-19-and-social-media-content-moderation>.

31. *See* Donald G. McNeil Jr., *Wikipedia and W.H.O. Join to Combat Covid-19 Misinformation*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/10/22/health/wikipedia-who-coronavirus-health.html>.

32. *See* Jon Roozenbeek et al., *Susceptibility to Misinformation about COVID-19 Around the World*, ROYAL SOC’Y OPEN SCI. 9–12 (2020).

II. INTERNATIONAL LAW: A FRAMEWORK FOR COMBATting INFODEMICS

In this setting, a key question is whether international law provides an adequate framework for tackling these challenges and, if not, whether addressing them in a treaty on pandemics could facilitate more effective responses. For reasons elaborated below, I believe existing law provides a solid basis for addressing these and other pandemic-related challenges, though adherence to key principles, as well as effective global cooperation in combating COVID-19, have fallen dangerously short in the past year. Even so, a new treaty or soft-law instrument on pandemics could usefully consolidate disparate areas of law that now comprise a patchwork of relevant principles; clarify core elements of States' existing obligations by codifying key interpretations in black-letter treaty law; and elevate attention to the responsibilities of non-State actors.

A. GUIDANCE IN EXISTING INTERNATIONAL LAW

What, then, are key elements of effective public messaging about pandemics, as well as other measures that can prevent or blunt the impact of infodemics, and how do they align with existing international standards? Four principles provide a useful starting point:

First, governments must undertake affirmative and ongoing measures to ensure the public has timely and accurate information about serious health threats.³³ They need to be proactive in this regard for the obvious reason that such information is essential to public health, and because without it, misinformation is more likely to fill the resulting "data deficits"³⁴ and shape beliefs anathema to health.

As previously noted, it is notoriously difficult to debunk spurious

33. See David Kaye, *Disease Pandemics and the Freedom of Opinion and Expression*, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 44, U.N. Doc. A/HRC/44/49 (Apr. 23, 2020) [hereinafter *Kaye Report*].

34. A "data deficit" arises when the "supply of accurate and reliable information about a given topic" is below "the level of demand for it." SMITH ET AL., *supra* note 21, at 20.

beliefs that were formed on the basis of misinformation. A growing body of research suggests that a more effective strategy than trying to correct mistaken beliefs is to “pre-bunk” anticipated misinformation when doing so is possible.³⁵ Government officials, particularly in the public health sector, and other trusted professionals can do this by warning targeted audiences to expect to see misleading accounts of, say, harms associated with a COVID-19 vaccine; explaining in understandable and fact-based terms why those accounts would be incorrect; and providing accurate and trustworthy information that can inoculate the public against false accounts if and when they encounter them.³⁶

This type of messaging must be ongoing. As we have seen, the medical community’s understanding of COVID-19 and the coronavirus that causes it has evolved continuously, and guidance to the public about necessary public health measures has correspondingly changed over time.

Recent experience has also highlighted the importance of transparency about clinical trials that produce approved vaccines. While effective COVID-19 vaccines could not come soon enough, the very fact that they were developed and approved with record speed has fueled skepticism about their safety. Small wonder, then, that many public health specialists have called for heightened transparency about clinical trial data.³⁷

Several sources of established law support the principle that governments must ensure public access to information about pandemics. To begin, States parties to the International Covenant on Civil and Political Rights (ICCPR) and other human rights treaties must respect and ensure the right to life.³⁸ As the Human Rights

35. LEWANDOWSKY ET AL., *supra* note 28, at 7.

36. My use of the word “inoculate” is not intended as a pun. The technique I have described has become known as “inoculation.” *See id.* at 4, 7-8.

37. *See* Ali Nouri & Beth Simone Noveck, *The FDA Should Condition Any Vaccine Approval on Open Trial Data*, WASH. POST (Dec. 4, 2020, 10:57 AM), <https://www.washingtonpost.com/opinions/2020/12/04/fda-should-condition-any-vaccine-approval-open-trial-data/>.

38. International Covenant on Civil and Political Rights, arts. 2(1), 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2,

Committee, which monitors States parties' compliance with the ICCPR, has stated, the "duty to protect life" in accordance with Article 6 of the Covenant "implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life," including "the prevalence of life threatening diseases."³⁹ In the context of a lethal pandemic, timely dissemination of trustworthy information is not only an "appropriate" but an essential measure to ensure the right to life.

Another provision of the ICCPR bolsters this interpretation. Article 19(2) establishes the right to seek *and receive* information of all kinds:

Everyone shall have the right to freedom of expression; this right shall include *freedom to seek, receive and impart information and ideas of all kinds*, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁴⁰

The Human Rights Committee has interpreted this provision to "embrace[] a right of access to information held by public bodies."⁴¹ And as David Kaye, then-UN Special Rapporteur on Freedom of Expression, observed in a 2020 report on pandemics, the "default position must be that public authorities do not wait for a request for information; they must have an affirmative policy of releasing all relevant information in ways that are understandable to a non-technical public and that advance public health priorities."⁴² As I

Nov. 4, 1940, Eur. T.S. No. 5 [hereinafter ECHR]; Organization of American States, American Convention on Human Rights, art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, 1520 U.N.T.S. 217.

39. Human Rights Committee, General Comment No. 36, ¶ 26, UN Doc. CCPR/C/GC/36 (2018).

40. ICCPR, *supra* note 38, art. 19(2) (emphasis added). Similarly, the European Convention on Human Rights guarantees the right of freedom of expression, and states that this includes freedom "to receive and impart information." ECHR, *supra* note 38, art. 10(1).

41. Human Rights Committee, General Comment No. 34, ¶ 18, UN Doc. CCPR/C/GC/34 (2011).

42. *Kaye Report*, *supra* note 33, ¶ 18; *see also COVID-19: Governments Must Promote and Protect Access to and Free Flow of Information During Pandemic—International Experts*, U.N. OFF. HIGH COMM'R (Mar. 19, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729>

elaborate below, moreover, in the context of pandemics, proactive messaging of science-based information links up with States parties' obligations under another widely-ratified treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴³

While the approach suggested above emphasizes the affirmative obligation of governments to provide the most accurate available information concerning pandemics to the public, the 2005 International Health Regulations (IHR) adopted by the World Health Assembly, which are binding on WHO Members that do not opt out of them, require certain forms of information-sharing between the WHO and States parties. For example, the IHR require States parties to disclose and share with the WHO information about "all events which may constitute a public health emergency of international concern within its territory . . . as well as any health measure implemented in response to those events,"⁴⁴ regardless of the origin of the threat.⁴⁵ Conversely, the WHO is required to share with States parties information it has received about potential health emergencies in their territories.⁴⁶ Setting aside important questions about the extent to which both China and the WHO discharged their obligations when the coronavirus emerged,⁴⁷ these regulations focus on information-sharing among the WHO and States without clarifying States' obligations to keep the *public* informed about a pandemic.⁴⁸ For this reason, too, language clarifying States' information-sharing duties in a pandemic is an obvious candidate for inclusion in a new treaty on pandemics.

&LangID=E [hereinafter *Free Flow of Information During Pandemic*].

43. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966; 993 U.N.T.S. 3 [hereafter ICESCR].

44. World Health Organization [WHO] *International Health Regulations*, art. 6(1) (3rd ed. 2005) <https://www.who.int/publications/i/item/9789241580496>.

45. *Id.* art. 7.

46. *See id.* art. 9(1); *see also id.* arts. 10(4), 11 (addressing WHO's provision of information to States parties other than the State in whose territory an event has occurred that might present a public health emergency of international concern).

47. *See* COUNCIL ON FOREIGN RELATIONS, IMPROVING PANDEMIC PREPAREDNESS: LESSONS FROM COVID-19, Independent Task Force Rep. No. 78, i, 34–37 (2020); Kathy Gilsinan, *How China Deceived the WHO*, ATLANTIC (Apr. 12, 2020), <https://www.theatlantic.com/politics/archive/2020/04/world-health-organization-blame-pandemic-coronavirus/609820/>.

48. *See Kaye Report*, *supra* note 33, ¶ 9.

Second, government officials must not (knowingly or recklessly) generate or spread false information about pandemics.⁴⁹ Although implicit in the first principle, this point bears special emphasis in light of highly problematic statements by some government officials about the pandemic,⁵⁰ and the disproportionate influence they can have in accelerating the spread of misinformation. While focusing on a different subject—campaign-related disinformation in the United States—an academic study published in October 2020 is illuminating: Based on a study of tens of thousands of tweets and Facebook posts that spread disinformation about election fraud, Harvard University’s Berkman Klein Center for Internet and Society found that then-President Donald Trump was the primary source of falsehoods that went viral on social and other media.⁵¹

The principle that government officials must not generate or spread false information about pandemics, like the first principle noted above, comports with established international legal obligations. Article 12 of the ICESCR recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”⁵² and requires States parties to take steps necessary for the “prevention, treatment and control of epidemic . . . diseases.”⁵³ As disease-control experts have repeatedly noted, effective communication to the public about such diseases is an

49. Human rights experts with freedom-of-expression mandates from four international and regional organizations made a similar point about disinformation generally, before the advent of COVID-19. See OSCE ET AL., JOINT DECLARATION ON FREEDOM OF EXPRESSION AND “FAKE NEWS”, DISINFORMATION AND PROPAGANDA (2017) (“State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda)”).

50. See *Kaye Report*, *supra* note 33, ¶ 45; see also Elizabeth Dwoskin, *A Quarter of Trump’s 6,081 Facebook Posts Last Year Featured Misinformation or Extreme Rhetoric*, WASH. POST (Feb. 18, 2021, 3:15 PM), <https://www.washingtonpost.com/technology/2021/02/18/trump-facebook-misinformation/> [hereinafter *Misinformation or Extreme Rhetoric*].

51. Yochai Benkler et al., *Mail-In Voter Fraud: Anatomy of a Disinformation Campaign* 4–6, 9 (Berkman Cent. Res. Pub., Working Paper No. 2020-6, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703701. See generally *Misinformation or Extreme Rhetoric*, *supra* note 50.

52. ICESCR, *supra* note 43, art. 12(1).

53. *Id.*, art. 12(2)(c).

indispensable element of prevention and control.⁵⁴

Not surprisingly, then, the UN Committee on Economic, Social and Cultural Rights, which monitors States parties' compliance with the ICESCR, has found that the "deliberate withholding or misrepresentation of information vital to health protection or treatment" violates Article 12.⁵⁵ More affirmatively, the Committee has observed that States parties' obligations arising from Article 12 include providing "education and access to information concerning the main health problems in the community, including methods of preventing and controlling them."⁵⁶

While human rights treaty bodies have often focused on the obligations of States parties as abstract entities, violations by government *officials* are, under the law of State responsibility, attributable to the State.⁵⁷ An explicit reference in a treaty on pandemics to the information-sharing obligations of public officials (along with government agencies) could elevate attention to the critical role they play, and indeed must play, in shaping beliefs about public health measures.

Language in a treaty on pandemics recognizing the obligation of States parties, including government officials, to refrain from

54. See, e.g., MANAGING EPIDEMICS, *supra* note 15, at 26, 34; Malik et al., *supra* note 8, at 1. To be effective, communications strategies must differentiate among distinct communities. For example, efforts to overcome vaccine hesitancy among Black citizens deriving from past medical abuses of Black communities should "include trusted voices in Black communities, including church leaders." Michele L. Norris, *Black People Are Justifiably Wary of a Vaccine. Their Trust Must Be Earned*, WASH. POST (Dec. 9, 2020, 2:02 PM), https://www.washingtonpost.com/opinions/black-people-are-justifiably-wary-of-a-vaccine-their-trust-must-be-earned/2020/12/09/4cf5f18c-3a36-11eb-9276-ae0ca72729be_story.html. More generally, "overcoming fears [about COVID-19 vaccines] depend[s] on understanding . . . intimate neighborhood networks." Frances Stead Sellers, *Now That There's a Coronavirus Vaccine, How Do You Persuade People to Take It?*, WASH. POST (Dec. 11, 2020, 9:49 PM), https://www.washingtonpost.com/health/covid-vaccine-communication-campaign/2020/12/10/c825ad18-34e9-11eb-a997-1f4c53d2a747_story.html.

55. Committee on Economic, Social and Cultural Rights, General Comment No. 14, U.N. Doc. E/C.12/2000/4, ¶ 50 (2000). See also *id.*, ¶ 34.

56. *Id.* ¶ 44(d).

57. See International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, art. 4, II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 31, 40 (2001).

disseminating false information should explicitly state that this duty applies “regardless of frontiers” or language to this effect, unless the treaty is drafted to apply extraterritorially in general. While I have focused on dangerous misinformation directed by government officials toward their own State’s citizens, the COVID-19 pandemic has also, according to U.S. intelligence officials, seen the spread of disinformation about the virus by foreign governments.⁵⁸ According to the *New York Times*, “Russian intelligence services in particular are laying the groundwork for a more aggressive effort to escalate the anti-vaccine movement in the West and could use the allegations of spying to give its narrative greater traction.”⁵⁹

Third, any government measures taken to *restrict* misinformation about pandemics must meet the stringent criteria enunciated by human rights treaty bodies. Treaty provisions assuring freedom of expression, such as Article 19 of the ICCPR, recognize that some restrictions are permissible if they meet several tests. First, the restrictions must be necessary for a limited number of legitimate purposes. Since these purposes include “protection of . . . public health,”⁶⁰ restrictions aimed at ending a pandemic’s spread are not *per se* violations of the right to freedom of expression. For reasons already developed, restricting *deliberate* efforts to disseminate false information about pandemics—that is, efforts to spread *disinformation*—might meet the test of legitimate purpose.

But it is not enough for a government to *claim* it may restrict communications to end a pandemic. Any such restrictions must also be provided by law and *necessary* to achieve a legitimate end.⁶¹ With

58. See *China Pushing for Coronavirus Disinformation, U.S. Intelligence Officials Say*, NBC NEWS (Apr. 17, 2020), <https://www.nbcnews.com/nightly-news/video/china-pushing-coronavirus-disinformation-u-s-intelligence-officials-say-82231877846>.

59. Julian E. Barnes & Michael Venutolo-Mantovani, *Race for Coronavirus Vaccine Pits Spy against Spy*, N.Y. TIMES (Sept. 5, 2020), <https://www.nytimes.com/2020/09/05/us/politics/coronavirus-vaccine-espionage.html>.

60. ICCPR, *supra* note 38, art. 19(3); see also ECHR, *supra* note 38, art 10(2) (stating that one of the permissible aims for restricting expression when other conditions are satisfied is that the restrictions are “necessary in a democratic society . . . for the protection of health”).

61. See ICCPR, *supra* note 38, art. 19(3); see also ECHR, *supra* note 38, art.

respect to the latter, even a restriction provided by law to advance a legitimate aim “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁶² Implicit in the necessity requirement is that any restriction on expression must be proportionate to its legitimate aim. More particularly, in the words of the Human Rights Committee, the restriction must “be the least intrusive instrument amongst those which might achieve their protective function.”⁶³

Strict adherence to these requirements in a pandemic is important for many reasons, not least of which is that independent media play a key role in ensuring access to accurate and essential information about pandemics,⁶⁴ and governments have been all too ready to use serious threats—including the COVID-19 pandemic—as a pretext for clamping down on independent speech.⁶⁵ For this reason, freedom-of-expression mandate holders appointed by four international and regional organizations included the following in their joint call for heightened protection of expressive rights in the context of the COVID-19 pandemic:

[T]he right of access to information means that governments must be making exceptional efforts to protect the work of journalists. Journalism serves a crucial function at a moment of public health emergency, particularly when it aims to inform the public of critical information and monitors government actions. We urge all governments to robustly implement their freedom of information laws to ensure that all

10(2).

62. General Comment No. 34, *supra* note 41, ¶ 33.

63. *Id.* ¶ 34.

64. *See id.* ¶ 23; VIRAL LIES, *supra* note 22, at 12–13.

65. *See* Mu Sochua, *Coronavirus ‘Fake News’ Arrests Are Quieting Critics*, FOREIGN POL’Y (May 22, 2020, 9:28 AM), <https://foreignpolicy.com/2020/05/22/coronavirus-fake-news-arrests-quiet-critics-southeast-asia/>; Lindsey Kennedy & Nathan Paul Southern, *Hun Sen’s Coronavirus Crackdown*, FOREIGN POL’Y (Apr. 23, 2020, 6:52 PM), <https://foreignpolicy.com/2020/04/23/hun-sen-coronavirus-pandemic-crackdown-cambodia-authoritarianism/>; Todd Prince, *Russian Activist Says She’s Hit by First Investigation under ‘Fake’ Coronavirus News Law*, RADIO FREE EUROPE, RADIO LIBERTY (Apr. 5, 2020, 7:12 AM), <https://www.rferl.org/a/russian-activist-says-she-s-hit-by-first-investigation-under-fake-coronavirus-news-law/30532116.html>; Karima Bennouna, “*Lest We Should Sleep*”: COVID-19 and Human Rights, 114 AM. J. INT’L L. 666, 670 (2020).

individuals, especially journalists, have access to information.⁶⁶

Finally, companies in the information, communications and technology (ICT) sector must exercise due diligence to ensure they do not become vectors for the spread of false information that imperils the right to health and other rights. As already noted and in the words of then UN Special Rapporteur on Freedom of Expression David Kaye, the COVID-19 pandemic has highlighted the “enormous impact” of social media and search engine companies “on the rights of individuals on and off their platforms.”⁶⁷ Recognizing their central role in the spread of misinformation, several communications platforms took unusually strong measures to counter misinformation about COVID-19 early in the pandemic.⁶⁸ But these proved clearly inadequate,⁶⁹ as Facebook acknowledged in December 2020, when it announced it would take more robust steps to remove posts containing misinformation about COVID-19 vaccines.⁷⁰

What, then, does international law have to say about the responsibilities of ICT platforms like Facebook? The most helpful framework for addressing this subject is in a non-binding yet authoritative instrument, the UN Guiding Principles on Business and Human Rights (UNGPs),⁷¹ which were adopted by the UN Human Rights Council in 2011.⁷² While affirming the legally-binding

66. U.N. Office of the High Commissioner for Human Rights, *Free Flow of Information During Pandemic*, *supra* note 42.

67. *Kaye Report*, *supra* note 42, ¶ 51.

68. *See* Douek, *supra* note 30.

69. *See* Tasnim et al., *supra* note 20, at 172; *Vaccine Opponents*, *supra* note 24.

70. *See* Elizabeth Dwoskin, *Facebook Steps Up Campaign to Ban False Information about Coronavirus Vaccines*, WASH. POST (Dec. 3, 2020, 3:35 PM), <https://www.washingtonpost.com/technology/2020/12/03/facebook-covid-vaccine/>; Mike Isaac, *Facebook Says it Will Remove Coronavirus Vaccine Misinformation*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/03/technology/facebook-coronavirus-vaccine-misinformation.html>.

71. John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, Annex (Mar. 21, 2011) [hereinafter *UNGPs*].

72. Human Rights Council, *Human Rights and Transnational Corporations*

obligations of States under international law, the UNGPs also recognize that business enterprises have a responsibility to respect internationally-recognized human rights. This means they “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁷³

Ensuring that business enterprises do not cause or contribute to adverse human rights impacts requires that they put in place a “human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights” as well as processes to “enable the remediation of any adverse human rights impacts they cause or to which they contribute.”⁷⁴ It follows, and the UNGPs state explicitly, that human rights due diligence processes must be ongoing,⁷⁵ as human rights risks are dynamic: new risks may emerge and previously small risks may become substantially more serious in an ever-changing environment. Thus, for example, if an ICT business enterprise finds, through ongoing tracking, that a previously-effective mechanism for blocking misinformation about a pandemic is no longer effective, it should assess the flaws in its procedures with a view to adopting more effective filters—and follow through expeditiously.

There is, unfortunately, ample evidence that social media platforms have *not* performed adequate due diligence, even when they have pledged to ensure they do not amplify pandemic-related misinformation. For example, only after a non-partisan think tank found at least twelve Facebook pages “with massive followings” disseminating false claims about COVID-19 and other health-related issues did Facebook take corrective action.⁷⁶ Relevant websites reportedly had been “pushing misinformation for almost two years before Facebook took action against pages linking to them.”⁷⁷

The natural question is whether a treaty on pandemics can and should reinforce the responsibilities now set forth in a soft-law

and Other Business Enterprises, ¶ 1, UN Doc. A/HRC/RES/17/4 (2011).

73. *UNGPs*, *supra* note 71, Principle 11.

74. *Id.*, Principle 15(b)-(c).

75. *Id.*, Principle 17(c); *see also id.*, Principle 20.

76. Zakrzewski, *supra* note 23.

77. *Id.*

instrument, the UNGPs, in the specific context of pandemics. For reasons elaborated below, I believe such a treaty could helpfully elevate attention to companies' responsibilities by referencing the UNGPs in preambular language. Less clear is whether it would be helpful to include a provision *requiring* States parties to ensure that non-State actors, including ICT companies, do not disseminate misinformation harmful to health and life.⁷⁸

To the latter point, three considerations counsel caution. First, intense focus on the role of tech platforms in disseminating misinformation about COVID-19 heightens but does not resolve a robust debate, well underway for some years, about the most appropriate way to ensure ICT companies moderate harmful content.⁷⁹ While we have seen greater consensus about the need to stem the spread of misinformation relating to the pandemic than other categories of harmful expression,⁸⁰ the type of global consensus necessary to support relevant legal obligations may be elusive.⁸¹

Second, current efforts to establish binding obligations for corporations through a treaty on business and human rights have surfaced a raft of challenging issues.⁸² Whatever the outcome of this effort, controversies surrounding successive drafts suggest we should

78. To be sure, it follows from my previous analysis that, under existing treaties, when truly necessary to protect life and health States may take proportionate measures to limit dissemination of misinformation about life-threatening pandemics. But for reasons elaborated in the text, I do not believe it wise to include in a new treaty a provision that elevates this appropriately limited *possibility* to a black-letter treaty obligation.

79. See Sander & Tsagourias, *supra* note 21, at 2 n.2; Douek, *supra* note 30.

80. See Douek, *supra* note 30.

81. While hardly the only divide, recent years have seen stark differences between the European Union, which has often favored regulating tech companies' approach to extremist speech, and the United States, where there is a "heavy presumption against speech restrictions." Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1038 (2018).

82. In 2014, the U.N. Human Rights Council established an open-ended intergovernmental working group to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. Doc. A/HRC Res. 26/9, ¶ 1 (2014).

be cautious about prospects for including in a treaty on pandemics language that imposes a binding obligation relating to content moderation, one of the more complex dimensions of business enterprises' human rights responsibilities.⁸³ To be sure, it may be tempting to use a pandemics treaty as a vehicle for *beginning* to harden the soft-law principles set forth in the UNGPs by including a provision on this subject. Yet, for reasons noted above, standards concerning dissemination of harmful content by platforms is hardly the proverbial low-hanging fruit when it comes to codifying the human rights responsibilities of business enterprises.

Finally, and more substantively, treaty language mandating governments to regulate the flow of misinformation could heighten the risk—one that has already materialized during the COVID-19 pandemic—of States adopting overly broad legislation and/or abusing their discretion through enforcement that targets legitimate forms of expression.⁸⁴ (Thus, as I have suggested, a treaty provision reaffirming *restraints* on States' use of speech restrictions would serve a useful purpose.) The wiser path may therefore be to double down on efforts to foster more effective content moderation in accordance with international human rights principles, developed and implemented with the robust engagement of key stakeholders, and with long-overdue processes of “industry-wide oversight and accountability.”⁸⁵

83. See David P. Fidler, *UN Treaty Talks and Human Rights Accountability for Corporate Digital Activities*, COUNCIL ON FOREIGN RELATIONS (Oct. 23, 2018, 10:00 AM), <https://www.cfr.org/blog/un-treaty-talks-and-human-rights-accountability-corporate-digital-activities>.

84. On the risks of government-mandated restrictions, see *Kaye Report*, *supra* note 42, ¶¶ 13, 17. In the United States, constitutional constraints make “regulatory approaches” to harmful speech on tech platforms—or at least most categories of such speech—“largely unavailable.” Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, B.U.L. REV. 1435, 1441 (2011).

85. David Kaye, *A New Constitution for Content Moderation*, ONE ZERO (June 25, 2019), <https://onezero.medium.com/a-new-constitution-for-content-moderation-6249af611bdf>. If a treaty on pandemics were to include binding obligations addressing the harmful spread of misinformation, a prime candidate for inclusion would be a provision obligating States parties to require companies to conduct due diligence with a view to ensuring they do not facilitate the spread of misinformation about pandemics that threatens public health. “Mandatory due diligence” in relation to human rights and the environment is increasingly

A treaty on pandemics could advance these efforts by including *in preambular text* references to the responsibilities of business enterprises as delineated in UNGPs. Such language should also explicitly call upon communications platforms to be transparent about measures they have taken and are considering to ensure access to trustworthy, science-based information about pandemics and to curb the dissemination of misinformation, as well as the effects of the measures already implemented.

For as experts on social media have emphasized, it is simply impossible for platforms to perform “content moderation at scale . . . perfectly”; mistakes are inevitable.⁸⁶ Enabling key stakeholders—including public health and freedom of expression experts—to assess the efficacy of measures adopted by ICT companies to prevent infodemics would not be a panacea. But it would help ensure that the extraordinary power of tech platforms is exercised in accordance with international standards, and that the ICT sector is accountable in a sphere where the stakes are very high indeed.

III. CONCLUSION

Effective, science-based messaging has always played a key role in managing public health crises. Yet it has never been more challenging to ensure that a diverse and far-flung public *believes* information on which society must act if we are to end—or at least effectively manage—global threats to health. Addressing this challenge in a treaty on pandemics along the lines suggested in this paper could provide much-needed support to the ongoing efforts of public health professionals.

addressed in national laws and proposed legislation, and has also been the focus of European Union regulatory attention. *See generally* Almut Schilling-Vacaflor & Andrea Lenschow, *Hardening Foreign Corporate Accountability through Mandatory Due Diligence in the European Union? New Trends and Persisting Challenges, Regulation and Governance* (May 2021); SHIFT Project, *Accountability as Part of Mandatory Due Diligence* (Fall 2020), https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf;

86. Douek, *supra* note 30.