

## Policy Paper

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# A Role for International Law in Containing COVID-19: The Right to Health

By Shoji Matsumoto

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From the perspective of international human rights law, the right to health is important with respect to the international COVAX vaccine-supply scheme. Although many States with sufficient resources have prioritized access to future vaccines through bilateral agreements with vaccine manufacturing companies over multilateral cooperation between States, it is almost universally believed that only multilateralism would enable the eventual eradication of COVID-19 from the world.

There are two kinds of legal grounds for the right to health in international law from which legal obligations emanate, even if COVAX itself is not legally binding. One is the framework of international human rights law in general, including the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Another legal ground is the immediate obligations prescribed in the ICESCR.

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## **Policy Center for the New South**

Suncity Complex, Building C, Av. Addolb, Albortokal Street, Hay Riad, Rabat, Morocco.  
Email : [contact@policycenter.ma](mailto:contact@policycenter.ma)  
Phone : +212 5 37 54 04 04 / Fax : +212 5 37 71 31 54  
Website : [www.policycenter.ma](http://www.policycenter.ma)

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First, the right to health in the midst of the COVID-19 pandemic may involve the right to life, which is defined as an absolute human right in the ICCPR. So, COVAX continues to impose obligations on States with sufficient resources, even when such States declare states of emergency.

Second, 'progressive realization' of the right to health under the ICESCR means that States have a specific and continuing obligation to move as expeditiously and effectively as possible towards its full realization, while immediate obligations applicable to States, as opposed to programmatic measures, are: an obligation not to discriminate; an obligation to take steps towards the realization of the right, known as 'progressive realization'; and a presumption that States should not take any retrogressive measures.

As such, the COVAX is legally binding to the extent described above in the framework of international human rights law, even though COVAX itself was originally not binding. Therefore, States with sufficient resources have an obligation to provide COVID-19 vaccines to needy States. And, States with insufficient resources do not have the political option of rejecting the COVAX vaccine offer.

Given the reality that the existing obligations emanating from the right to life are not duly observed, however, a new pandemic treaty shall be discussed for advancing the observance.

## 1. Introduction

In response to the COVID-19 pandemic, 154 world leaders, including Nobel laureates, proclaimed in June 2020 that "*ultimately the only way to definitively eradicate the pandemic is to have a vaccine that can be administered to all people on this planet, urban or rural, men or women, living in rich or poor countries*"<sup>1</sup>. To effectively mitigate the pandemic, international law is expected to play a role, when the COVAX is sadly missed for its alleged lack of legal binding force. According to this criticism, the exercise of rights and the implementation of obligations, as defined in international law, are expected implicitly to contribute to stop the pandemic spreading.

Obligations emanating from the right to health in international law happened to be focused, by virtue of the pandemics. If implementation of the obligations could not in fact eradicate COVID-19, the rights and obligations should be reviewed and amended so COVID-19 can be eradicated<sup>2</sup>.

It has been pointed out that law "*can serve as both an enabler and a barrier to global health, equity, and justice*"<sup>3</sup>. Barriers to equitable access to COVID-19 vaccines are erected by narrow-minded, but widely prevailing, vaccine nationalism<sup>4</sup>. Many 'democratic states'<sup>5</sup> with sufficient resources have preferred to prioritize access to future vaccines through bilateral Advance Purchase Agreements (APA) with pharmaceutical companies<sup>6</sup>, rather than multilateral cooperation between states in

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1. Nathalie Ernoult and Natalie Roberts, "Are COVID-19 Vaccines Really a Common Good for Humanity?", iD4D, 2020, <https://ideas4development.org/en/covid19-vaccines-common-good-humanity/>.

2. Its eradication is expected to serve to mitigate the exacerbated tensions between China and the U.S. Taoufik Marrakchi, "Covid-19: Are We Heading to a War Without Guns?", Policy Center for the New South, Policy Brief, PB 20-66, 2020.

3. Lawrence O. Gostin et al., "The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development", *Lancet*, 2019, p. 1857.

4. Salma Daoudi, "Vaccine Nationalism in the Context of Covid-19: An Obstacle to the Containment of the Pandemic", Policy Center for the New South, Policy Brief, PB 20-71, 2020.

5. It is reported that not only in less-democratic States such as Poland and Hungary, but in the U.S. and the United Kingdom, political and administrative attempts to use COVID-19 to take anti-democratic measures were made. Selam Gebrekidan, "For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power", *New York Times*, 2020.

6. Alexandra L. Phelan, et al., "Legal Agreements: Barriers And Enablers to Global Equitable COVID-19 Vaccine Access", *Lancet*, 2020, p. 801.

conformity with the principle of international cooperation<sup>7</sup>. The APA would be beneficial only to a state's parochial nationalist interest, detrimental to the principle of international solidarity in the sense of complementarity. In fact, African states have faced significant challenges in receiving sufficient doses to vaccinate their own people against COVID-19. It is lamentable that global inequality has never been so marked as seen in relation to COVID-19 vaccination<sup>8</sup>. The World Health Organization reports that "75% of vaccine supplies have been sent to just ten countries. Less than one percent of all doses have gone to countries with low GDPs"<sup>9</sup>. According to Hinh Dinh, furthermore, states are expected to continue to provide social protection in terms of cash transfers for vulnerable populations. In this way, financially-constrained states may be exposed to massive challenges, especially those states at risk of debt distress<sup>10</sup>. As such, APAs may widen gaps in COVID-19 vaccination rates, making it more difficult to eradicate COVID-19.

That is why application of the United Nations Convention on Contracts for the International Sale of Goods<sup>11</sup> to the EU-AstraZeneca APA is advocated<sup>12</sup>. In this regard, it has been argued that "*multilateral legal agreements could be the path back to global health security and justice by re-establishing norms of international solidarity, committing to global equitable vaccine access initiatives, and laying a foundation for a post-pandemic era built on multilateralism and cooperation*"<sup>13</sup>.

On the other hand, in the midst of the COVID-19 pandemic<sup>14</sup>, it has been mentioned, although incorrectly<sup>15</sup>, that states do not assume international obligations regarding the right to health, in particular an obligation to offer COVID-19 vaccines via COVAX to the states with insufficient resources<sup>16</sup>, and an obligation not to reject COVAX vaccine offers, as illustrated by North Korea's rejection<sup>17</sup>.

7. Eduardo A. Haddad, Karim El Aynaoui, Abdelaziz Ait Ali, Mahmoud Arbouch and Inácio F. Araújo, "The Impact of COVID-19 in Morocco: Macroeconomic, Sectoral and Regional Effects", Research Paper, RP 20-17, Policy Center for the New South, 2020.

8. Atlantic Currents 8th Edition: The Wider Atlantic in a Challenging Recovery, Policy Center for the New South, 2022.

9. Quoted in Stephanie Höppner, "Can COVAX Really Vaccinate the World?", Deutsche Welle, 2021, <https://www.dw.com/en/can-covax-really-vaccinate-the-world/a-57816099>.

10. Hinh T. Dinh, "COVID-19 and the Dilemma of the Developing Countries", Policy Center for the New South, Policy Brief, PB 03/22, 2022. See also Seleman Yusuph Kitege, "Globalization and the COVID-19 Pandemic: How is Africa's Economy Impacted?", Policy Center for the New South, Policy Brief, PB 20-37, 2020.

11. UN Doc A/CONF.97/SR.12, 1980. See also Maureen T. Murphy, "United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law", Fordham International Law Journal, Vol. 12, 1988, pp. 727-750.

12. Ben Gerrit Köhler, "Global Sales Law in a Global Pandemic: The CISG As the Applicable Law to the EU-AstraZeneca Advance Purchase Agreement?", 2021, <https://conflictflaws.net/2021/global-sales-law-in-a-global-pandemic-the-cisg-as-the-applicable-law-to-the-eu-astrazeneca-advance-purchase-agreement/?print=pdf>.

13. Alexandra L. Phelan, et al., "Legal Agreements: Barriers And Enablers to Global Equitable COVID-19 Vaccine Access", Lancet, 2020, pp. 800-802.

14. The COVID-19 pandemic has been politically exploited particularly in Africa, according to Hisham Aidi. Idem., "COVID-19 and Digital Repression in Africa", Policy Brief, PB-34/21, Policy Center for the New South, 2021.

15. What is incorrect in the proposition will be detailed later in this paper.

16. COVID-19 Vaccines Global Access (COVAX) is the vaccines pillar of the Access to COVID-19 Tools Accelerator, which is a global public-private collaboration to accelerate the development, production, and equitable rollout of COVID-19 tests, treatments, and vaccines. COVAX brings together experts from the world to collaborate on the research and development of COVID-19 vaccine candidates and the manufacturing, procurement, and delivery of the approved vaccines. Distribution is based on WHO's Fair Allocation Framework for equitable COVID-19 vaccine access. So far, 190 States are participating in the COVAX Facility. This includes most of the 92 States that are eligible for donor-funded doses through the COVAX Advance Market Commitment (AMC), through which the poorest States can gain access to COVID-19 vaccines. Hannah Kettler, "What Is COVAX?", PATH, 2021, <https://www.path.org/articles/what-covax/>. The COVAX Facility targets self-financing economies, while the AMC was created to promote access to vaccines to lower-income economies. Magali C. Hamer, "COVID-19 Vaccines: Is It Worth Continuing Funding the COVAX Flop?", iD4D, 2021, <https://ideas4development.org/en/covid-vaccine-covax/>.

17. John Power, "North Korea Shuns Outside Help As COVID Catastrophe Looms", Aljazeera, 2022, <https://www.aljazeera.com/economy/2022/5/20/north-korea-shuns-outside-help-as-covid-catastrophe-looms>

In international law, States assume different kinds of obligations at different levels to fully realize the right to health, although it has been argued, as a starting point, that they are positive obligations, different from negative obligations which require states only to refrain from interfering in exercise of the right by individuals. Negative obligations usually emanate from civil and political rights, such as freedom of expression<sup>18</sup>. However, according to the Committee of Economic, Social and Cultural Rights (CESCR), while the adoption of such a rigid classification would be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent, “*there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions*”<sup>19</sup>. In fact, positive obligations have been recognized also as requiring their restraint<sup>20</sup>, and may be violated by an omission.

## 2. Human Rights Framework

COVAX is not isolated from the international legal framework. As provisions in international human rights treaties are not always specified in detail, they are usually interpreted interactively with reference to other treaties. Regarding COVAX, the framework consists of the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and many other international legal instruments related to the right to health. COVAX may be legally binding, if the framework of international human rights is taken into account.

Such an interactive interpretation is not rare in international law, and may be exemplified by the interaction between the Universal Declaration of Human Rights and the ICCPR. As the Universal Declaration was adopted as a UN General Assembly resolution, it was originally not legally binding on the Member States. So, an act in contravention of the Universal Declaration alone does not constitute a breach of international obligations. However, if a broader view is taken, that act may be in breach of the legally binding ICCPR as well. Consequently, an act in contravention of the Universal Declaration is, at the same time, in breach of international obligations under the ICCPR. Therefore, it is not always finally correct to assert that an act in contravention of the Universal Declaration is not internationally wrongful. In a similar way, an act in contravention of COVAX may be simultaneously in breach of international obligations under the ICCPR and the ICESCR. COVAX should be interpreted and applied within that wider framework.

From the perspective of international human rights law, what matters most in the context of COVAX is the right to health. There are two kinds of legal grounds for the right to health in international law. One is the framework of international human rights law in general, as described above. Another is the immediate obligations under the ICESCR.

The right to health is widely recognized in the international human rights law, because health is indispensable for the exercise of other human rights<sup>21</sup>. Thus, the Constitution of the World Health Organization proclaims that enjoyment of the highest attainable standard of health is one of the fundamental rights of human beings, without distinction as to race, religion, political belief, economic or social condition<sup>22</sup>. Indeed, a disease may threaten even the right to life. The COVID-19 pandemic has already caused the loss of hundreds of thousands of lives, and disrupted the lives of

18. UN Human Rights Office of the High Commissioner (OHCHR), Statement by Ms. Louise Arbour, High Commissioner for Human Rights to the Third Session of the Open-Ended WG OP ICESCR, Third Session, Salle XVII, Palais des Nations, 2006.

19. CESCR, General Comment No. 9: The Domestic Application of the Covenant, 1998, para. 10.

20. Malcom Langford, “The Justiciability of Social Rights: From Practice to Theory”, in idem. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2009, p. 30.

21. CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para. 1.

22. WHO Constitution, Preamble. *American Journal of Public Health*, Vol. 36, 2005, p. 1315.



billions all around the world<sup>23</sup>, although the actual number of deaths across the world could be two to three times the official number<sup>24</sup>.

The right to life is identified as one of the two absolute human rights, together with the right not to be discriminated against, in Article 4 (2) of the ICCPR. Absolute human rights are non-derogable even in time of emergency<sup>25</sup>. So, the right to health may be non-derogable even in time of emergency—such as the COVID-19 pandemic—if it threatens the right to life. Besides, States are not permitted to restrict absolute human rights, differently from relative human rights which may be restricted by domestic legislation, in application of the ‘clawback clause’ included in many different articles of the ICCPR. The right to health, and therefore the right to obtain the COVID-19 vaccine, can neither be restricted by domestic legislation nor derogated even in time of emergency, and States with insufficient resources, such as North Korea and Eritrea<sup>26</sup>, are not entitled to reject the offer of the COVID-19 vaccine from abroad.

Regarding the application of the right to health between States, the CESCR has issued General Comment No. 14, in which it said that States must respect the enjoyment of the right to health in other States<sup>27</sup>. Moreover, in its General Comment No. 3, the CESCR draws attention to the obligation of all States to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the right. An agreement to recognize the essential role of international cooperation and to comply with the commitment to take joint and separate action to achieve the full realization of the right to health is invoked in the UN Charter<sup>28</sup>, the ICESCR<sup>29</sup>, and the Alma-Ata Declaration<sup>30</sup>.

In particular, the Alma-Ata Declaration proclaims that *“the existing gross inequality in the health status of the people particularly between developed and developing States, as well as within States, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries”*<sup>31</sup>. In the Declaration, it is believed that the promotion and protection of the health of the people is essential to sustained economic and social development and contributes to a better quality of life and world peace<sup>32</sup>. Each State is expected to contribute to such cooperation to the maximum of its capacities<sup>33</sup>. Given the well-known high transmissibility of COVID-19 infections

23. The cumulative total of deaths because of COVID-19 was 6,285,171 as of May 2022. WHO, “WHO Coronavirus (COVID-19) Dashboard”, 2022, <https://covid19.who.int>.

24. Oumayma Bourhriba and Uri Dadush, “Voice, Accountability, and the COVID-19 Death Count”, Policy Center for the New South, Opinion, 2021.

25. Abdessalam Jaldi, “Coronavirus: Does the State of Health Emergency in Morocco Comply with International Human Rights Law?”, Opinion, Policy Center for the New South, 2020.

26. “WP: N. Korea, Eritrea Only 2 Nations That Haven’t Vaccinated People Against COVID-19”, KBS World, 2022, [https://world.kbs.co.kr/service/news\\_view.htm?Seq\\_Code=169211](https://world.kbs.co.kr/service/news_view.htm?Seq_Code=169211).

27. CESCR, General Comment No. 14, supra n. 21, para 38.

28. UN Charter, Art. 56.

29. ICESCHR, Arts. 12, 2.1, 22 and 23.

30. Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, USSR (now Kazakhstan), 6-12 September 1978, [https://disasterlaw.ifrc.org/media/1152?language\\_content\\_entity=en](https://disasterlaw.ifrc.org/media/1152?language_content_entity=en). See also WHO, “WHO called to return to the Declaration of Alma-Ata”, 2022, <https://www.who.int/teams/social-determinants-of-health/declaration-of-alma-ata>. The Alma-Ata Declaration provides compelling guidance on the core obligations, emanating from Article 12 of the ICESCR, for primary healthcare, based on the CESCR’s General Comment (General Comment No. 14, supra note 21), as below: a) Non-discriminatory access to health facilities, goods and services; b) Access to the minimum, nutritionally adequate and safe food; c) Access to basic shelter, housing and sanitation, and safe and potable water; d) Provision of essential drugs (as defined by the WHO); e) Equitable distribution of all health facilities, goods and services; and f) Adoption and implementation of a national public health strategy and plan of action.

31. Ibid., para. II.

32. Ibid., para. 3.

33. CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant); General Comment No. 14, supra note 21.



beyond State borders, the international community is compelled to implement a collective response to contain COVID-19.

Even in times of emergency, States with sufficient resources assume a responsibility to provide the COVID-19 vaccine to States with insufficient resources. This is still more the case when emergency is not declared or withdrawn, because its absence implies that there are no longer difficulties legitimizing derogation from international obligations arising from an absolute human right to life and the right to health.

Even an emergency is declared, any State is obliged to refrain from imposing embargoes or similar measures restricting supplies to another State with adequate medicines and medical equipment. Thus, even in the Ukraine crisis<sup>34</sup>, restrictions on such goods should never be used as an instrument of political and economic pressure<sup>35</sup>. In this regard, in 1997, the CESCR recalled its position on the relationship between sanctions and respect for economic, social, and cultural rights, in its General Comment No. 8. It emphasized that *“the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes”*<sup>36</sup>.

### 3. Immediate Obligations

Every human being is entitled to the enjoyment of *“the highest attainable standard of health conducive to living a life in dignity”* under Article 12 of the ICESCR<sup>37</sup>. The right to health includes entitlements to the right to a system of health protection providing equality of opportunity so that everyone can enjoy the highest attainable level of health, the right to prevention, treatment and control of diseases, and access to essential medicines<sup>38</sup>. The problem here is the meaning of the phrase *“to take steps”* to achieve the full realization of the rights progressively, prescribed in Article 2 of the ICESCR.

According to the CESCR, the means which should be used for implementing the obligation ‘to take steps’ are all appropriate means, including in particular the adoption of legislative measures<sup>39</sup>. In addition to legislative measures, judicial, administrative, financial, educational, and social measures can be considered appropriate<sup>40</sup>. Other provisions in the ICESCR<sup>41</sup> are also capable of

34. The Ukrainian government Ended Most COVID-19-Related Restrictions in June, 2021. Human Rights Watch, “Ukraine: Events in 2021”, 2022, <https://www.hrw.org/world-report/2022/country-chapters/ukraine>.

35. If the Security Council decided to impose economic sanctions including the COVID-19-related offer, the decision may pose a problem on their compatibility with obligations to comply with the right to health, in conformity with Article 103 of the UN Charter.

36. CESCR, General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights, 1997, para. 4. In the case of the Ukraine Crisis, the sanctions against Russia have not been decided in the Security Council, and the UN Member States’ obligations shall prevail, in the event of a conflict between the obligations under the UN Charter and their obligations under any other international agreement. UN Charter, Art. 103.

37. The right to health is recognized as an international human right not only in the ICESCR, but also in other human rights agreements, particularly in Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, in Articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women and in Article 24 of the Convention on the Rights of the Child. Several regional human rights instruments also recognize the right to health, such as Article 11 of the European Social Charter as revised, Article 16 of the African Charter on Human and Peoples’ Rights and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. WHO, International Health Regulations, Third Edition, UN, 2005, p. 52. See also CESCR, General Comment No. 14, supra note 21, para. 2.

38. OHCHR and WHO, The Right to Health, Fact Sheet No. 31, p. 3.

39. ICESCR, Art., 2 (1). See also CESCR, General Comment No. 14, supra note 21, para. 3.

40. *Ibid.*, para. 7.

41. ICESCR., Arts. 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4), and 15 (3).

immediate application in domestic judicial and other organs<sup>42</sup>. Moreover, those State parties that are also parties to the ICCPR already have an obligation<sup>43</sup> to ensure that any person whose rights or freedoms are violated shall have an effective remedy<sup>44</sup>.

Yi Zhang conceived that the right to health is “a rather well-defined norm” under international human rights law. However, the effective and full implementation of the right is yet to be done at domestic level<sup>45</sup>, because the ‘appropriate’ domestic means ‘to take steps’ for realizing the right are not yet distinctly indicated.

Regarding ‘appropriateness’, the CESCR makes an account that the States’ reports, under Article 16 of the ICESCR, should indicate the basis on which the measures taken are considered to be the most ‘appropriate’ under the circumstances. However, this account does not provide clues to help States understand ‘appropriateness’. Then, the CESCR adds, “the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make”<sup>46</sup>. The problem regarding ‘appropriateness’ is not who is entitled to interpret it, but its meaning, which is essential for proper implementation of the obligations within a State. What are the obligations arising from the right to health?

According to the Office of the UN High Commissioner for Human Rights (UNCHR) and the WHO, the right to health leads to three immediate obligations. The first is an obligation to respect. It is a negative obligation not to discriminate. The second is an obligation to protect, which is a positive obligation to take steps towards realization of the right, known as ‘progressive realization’. The third is a negative obligation not to take any retrogressive measures<sup>47</sup>. These immediate obligations require States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health. The first and second immediate obligations are especially relevant to COVAX.

Concerning the first immediate obligation not to discriminate, States with sufficient resources may be denounced as in breach of the obligation, in relation to COVID-19 vaccine allocation, regardless of whether discrimination was actually intended or not<sup>48</sup>. It is reported that in the U.S. that as of May 27, 2020, “the overall death rate from COVID-19 is 2.4 times greater for African Americans than it

42. Any suggestion that the provisions indicated are inherently non-self-executing in the domestic judicial court would seem to be difficult to sustain. CESCR, General Comment No. 3, supra note 33, para. 5. Although a right of access to medicines is not explicitly mentioned in human rights treaties, Jennifer A. Stellin wrote that the access right is deduced from the right to health. She continued, “accessibility of medicines is argued to include affordability of medicines”. In poorer States, high medicine prices deter patients from obtaining medicines. Then, she points out that medicine prices are partly ascribed to “the 20-year monopoly enjoyed by pharmaceutical corporations patenting new medicines”. This link between the patent protection and patients’ access to such medicines has been debated, in particular after the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) as Annex 1C to the Marrakesh Agreement establishing the World Trade Organization (WTO, “Agreement on Trade-Related Aspects of Intellectual Property Rights (unamended)”, 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm)). The TRIPS Agreement provides for minimum standards of intellectual property rights, including patents. Jennifer A. Stellin, “Does One Size Fit All?: Patents, the Right to Health and Access to Medicines”, *Netherlands International Law Review*, Vol. 62, 2015, pp. 445–473.

43. ICCPR, Articles 2 (1) and (3), 3 and 26.

44. ICESCR, Art. 2 (3) (a).

45. Yi Zhang, “The Right to Health Care As a Human Right”, in *idem.*, *Advancing the Right to Health Care in China: Towards Accountability*, Intersentia, 2018, pp. 21-74.

46. CESCR, General Comment No. 14, supra note 21, para. 4.

47. UNCHR and WHO, supra note 38, p. 5.

48. In Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin, which has the purpose or ‘effect’ of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms. Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women also includes the term ‘effect’, in addition to ‘purpose’. See Committee of Civil and Political Rights, General Comment No. 18: Non-Discrimination, 1989; and Committee of Elimination of Racial Discrimination, General Recommendation No. 14: Definition of Discrimination (Art. 1, Par. 1), 1993.

is for white people"<sup>49</sup>. The rate may be far greater, if the European population is compared with the population on the African Continent.

The second immediate obligation specifically addresses COVAX. In Article 2 (1) of the ICESCR, each State undertakes 'to take steps' towards the realization of the right to health<sup>50</sup>. According to the CESCR, while the full realization of the rights enshrined in the ICESCR may be achieved progressively, steps towards that goal should be deliberate, concrete, and targeted as clearly as possible towards meeting the obligations under the ICESCR<sup>51</sup>. Examples of violations of the three immediate obligations will be given later.

When the obligation to protect is fully applied to the relations between States, each State has an obligation to take steps towards the realization of the right in other States. As such, under COVAX, States with sufficient resources are obliged to offer the COVID-19 vaccine to States with insufficient resources. The population of a State with insufficient resources is protected in terms of the right to health by that State imposing the corresponding obligations on the State. Among the obligations is an obligation to respond to the COVAX vaccine offer from abroad.

Thus, North Korea's rejection of the COVAX vaccine offer may be criticized as violating its population's right to health<sup>52</sup>. Also, the head of the African Centers for Disease Control reported that Eritrea has not yet started vaccinating its population against COVID-19<sup>53</sup>. According to the WHO, in Eritrea, from January to May 2022, there were 9,756 confirmed cases of COVID-19, with 103 deaths<sup>54</sup>. Such failure would constitute a breach of an immediate obligation to take steps to achieve the full realization of the population's right to health<sup>55</sup>, and would breach the population's absolute human right to life, according to circumstances.

Actually, even when a State is confronted with difficult financial situation, the State is not exempted from the immediate obligation to take steps to realize the right to health. While the availability of resources is taken into account in a State with insufficient resources, the UNCHR and WHO emphasize that no State can justify a failure to respect its obligations because of a lack of resources. Then, it is reiterated, "*States must guarantee the right to health to the maximum of their available resources, even if these are tight*"<sup>56</sup>.

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49. Clarence Gravlee, "Racism, Not Genetics, Explains Why Black Americans Are Dying of COVID-19", *Voices*, Scientific American, 2020, <https://blogs.scientificamerican.com/voices/racism-not-genetics-explains-why-black-americans-are-dying-of-covid-19/>.

50. Matthew C.R. Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Review*, Vol. 40, 1993, pp. 367-404.

51. In the CESCR's General Comment, the full meaning of the phrase "to take steps" can be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). CESCR, General Comment No. 3, supra note 33, para. 2.

52. "North Korea Rejects Offer of Nearly 3 Million Sinovac COVID-19 Shots", *Reuter*, 2021, <https://www.reuters.com/world/asia-pacific/north-korea-turns-down-sinovac-covid-19-vaccine-doses-wsj-2021-09-01/>.

53. "Eritrea Has Not Started Vaccinating against COVID, Says Africa CDC", *Reuter*, 2021, <https://www.reuters.com/business/healthcare-pharmaceuticals/eritrea-has-not-started-vaccinating-against-covid-says-africa-cdc-2021-12-09/>.

54. WHO, "Eritrea Situation", 2022, <https://covid19.who.int/region/afro/country/er>.

55. ICESCR, Art. 12 (2).

56. UNCHR and WHO, supra note 38, p.5.

For the adjudication of individual and group complaints to the ICESCR against State parties, a UN Commission on Human Rights working group<sup>57</sup> was convened in 2004<sup>58</sup> to debate the feasibility of elaborating an Optional Protocol to the ICESCR<sup>59</sup> that would provide for the adjudication of individual and group complaints against the State parties under the ICESCR<sup>60</sup>. Now, a new international pandemic treaty is discussed, as will be described briefly at the end of this paper.

However, the implementation within a State of an individual's right to the COVID-19 vaccine presupposes that the State has sufficient vaccines. In order to prevent the violation of the individual's right to vaccines within a State with insufficient resources, States with sufficient resources are expected to take steps, individually and through international assistance and co-operation, such as through COVAX.

## 4. Violation of Obligations

In determining violation of immediate obligations arising from the right to health, first of all, it is necessary to distinguish the inability of a State from unwillingness to comply with its obligations, in order to fully realize the highest attainable standard of health under Article 12 of the ICESCR, and an obligation to take the necessary steps to the maximum of its available resources under its Article 2.

A State unwilling to use the maximum of its available resources for the realization of the right is in breach of the obligations. On the other hand, if resource constraints make it impossible for a State to comply fully with the obligations, that State has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal to implement the obligations, or that no resources are available despite its efforts to obtain them.

Violations of the immediate obligations to respect, to protect and to not adopt retrogressive measures may occur within a State. For the adjudication of individual and group complaints against a State party to the ICESCR, a working group of the UN Commission on Human Rights was convened in 2004<sup>61</sup> to debate the feasibility of elaborating an Optional Protocol to the ICESCR<sup>62</sup> that would provide for the adjudication of individual and group complaints against the State parties under the ICESCR<sup>63</sup>. Now, a new pandemic treaty is being prepared, as will be described briefly at the end of this paper.

According to the CESCR, among examples of violations of the first immediate obligation to respect the right to health are: denial of access to health facilities, goods and services to particular individuals or groups as a result of discrimination; deliberate withholding or misrepresentation of

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57. This subsidiary body of the UN Economic and Social Council was replaced by the Human Rights Council in 2006. UN Doc A/RES/60/251, 2006.

58. UN, Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the ICESCR on its First Session, UN Doc E/CN.4/2004/44, 2004. See also Martin Scheinin, "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties", *Human Rights Law Review*, Vol. 6, 2006, pp. 131–142.

59. Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?", *American Journal of International Law*, Vol. 98, 2004, p. 462.

60. *Ibid.*

61. ECSC, Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the ICESCR on its First Session, UN Doc E/CN.4/2004/44, 2004. See also Martin Scheinin, "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties", *Human Rights Law Review*, Vol. 6, 2006, pp. 131–142.

62. Dennis and Stewart, *loc. cit.*, supra note 59, p. 462.

63. ECSC, supra note 61.

information vital to health protection or treatment; suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and failure of a State to take into account its international obligations relating to the right to health<sup>64</sup>.

Violations of the second immediate obligation to protect may well follow from a State's failure to take all necessary measures to safeguard persons from infringements of the right to health by third parties. Naturally, this category includes omissions, such as the failure to regulate the activities of individuals, groups or corporations to prevent them from violating the right to health of others, and the failure to discourage the continued observance of harmful traditional medical or cultural practices<sup>65</sup>. Through the failure of States to take all necessary steps to ensure the realization of the right to health, violations of the obligation to protect would occur. In the CESCR's view, examples include the failure to adopt or implement a national health policy; insufficient expenditure or misallocation of public resources; and the failure to monitor the realization of the right to health at national level<sup>66</sup>.

Third, the adoption of any retrogressive measures incompatible with the third immediate obligation would also constitute a violation. The violation includes the repeal or suspension of legislation necessary for the realization of the right to health, or the adoption of legislation or policies that are incompatible with preexisting national or international obligations emanating from that right.

In addition, in the framework of international human rights, violation of the right to health may simultaneously constitute a breach of the absolute human right to life under the ICCPR, as referred to above.

When a State with insufficient resources actually fails to fully realize the right to health in its own territory, other States with sufficient resources may be held as being involved in the failure through omissions, if those States with sufficient resources did not provide COVID-19 vaccines.

In this respect, the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides for aid and assistance as follows: "*A State which aids or assists another State in the commission of an internationally wrongful act by the latter is responsible for doing so ..., [i]f that State does so with knowledge of the circumstances of the internationally wrongful act*"<sup>67</sup>. The failure of a State with sufficient resources to offer the vaccine to another State with insufficient resources may be possibly considered as aiding or assisting the State with insufficient resources in the commission of an internationally wrongful act<sup>68</sup>.

In that failure, the 'aiding or assisting' consists of omission. Regarding an internationally wrongful act which consists of an omission, the Draft Articles on State Responsibility rule that there is an internationally wrongful act of a State when conduct consists of an action or omission<sup>69</sup>. The UN International Law Commission (ILC) observes that wrongful acts by omission are not uncommon, stating that cases "*in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in*

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64. CESCR, General Comment No. 3, *supra* note 33, para. 50.

65. *Ibid.*, para. 51.

66. *Ibid.*, para. 52.

67. UN International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001, Art. 16. Hereinafter, the Draft Articles will be cited as 'Draft Articles on State Responsibility'.

68. Georg Nolte and Helmut P. Aust, "Equivocal Helpers – Complicit States, Mixed Messages and International Law", *International and Comparative Law Quarterly*, Vol. 58, 2009, pp. 1-30.

69. Draft Articles on State Responsibility, Art. 2.

*principle exists between the two*<sup>70</sup>.

Thus, in the Diplomatic and Consular Staff Case, the International Court of Justice (ICJ) concluded that Iran's responsibility was entailed by the omission of its authorities which "*failed to take appropriate steps*", in circumstances in which such steps were evidently called for<sup>71</sup>. That reasoning may be applied to the COVID-19 vaccine. If a State with sufficient resources fails to take appropriate steps to prevent an internationally wrongful act by another State with insufficient resources, because of insufficient vaccination, the omission of the former State would constitute of its own wrongful act. In addition, the former State's wrongful act consisting of omission is normally carried out "*with knowledge of the circumstances of the internationally wrongful act*" within a State with insufficient resources.

## 5. In Lieu of Conclusion: Towards a New Pandemic Treaty

An act committed or omitted by a State in contravention of the originally non-binding COVAX may constitute a breach of immediate obligations emanating from the right to health. Based on the responsibility for aid or assistance by omission under the Draft Articles on State Responsibility, States with sufficient resources are obliged to provide the COVID-19 vaccine to States with insufficient resources. Thus, the Alma-Ata Declaration urges States and international organizations to support national and international commitments to primary healthcare and to channel increased technical and financial support to States with insufficient resources<sup>72</sup>.

The CESCR emphasizes that in accordance with Articles 55 and 56 of the UN Charter and the ICESCR, international cooperation to achieve the full realization of the right to health is a legally binding obligation of all States. It is particularly incumbent on those States that are in a position to assist other States. In this regard, the CESCR cautions that in the absence of an active program of international assistance and cooperation on the part of States with sufficient sources, "*the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many States*"<sup>73</sup>.

However, as Mareike Haase observed, in reality, a State with sufficient resources continues to pursue its own strategic interests and donates vaccines directly to its allies. In face of this reality, she reminds us, "*it is COVAX that has to be in charge of distribution if it is to be equitable*", although in fact the supplies are just "*a drop in ocean*"<sup>74</sup>. Besides, it is true that immediate obligations emanating from the right to health are not duly implemented, as eloquently demonstrated by lower COVID-19 vaccination rates in States with insufficient resources<sup>75</sup>.

70. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 82.

71. Diplomatic and Consular Staff, paras. 63, 67.

72. Alma-Ata Declaration, para. X.

73. CESCR General Comment No. 2: International Technical Assistance Measures (Art. 22 of the Covenant), 1990, para. 3.

74. Moreover, Haase calls for patent protection to be waived for the duration of the pandemic, although EU countries are against the waiver, quoted in Stephanie Höppner, "Can COVAX Really Vaccinate the World?", Deutsche Welle, 2021, <https://www.dw.com/en/can-covax-really-vaccinate-the-world/a-57816099>.

75. Chloe Taylor, "These Countries Have the Lowest Covid Vaccination Rates in the World", CNBC, 2022, <https://www.cnbc.com/2022/02/02/these-countries-have-the-lowest-covid-vaccination-rates-in-the-world.html>.



On the other hand, in support of the non-binding COVAX<sup>76</sup>, it is argued, “*compared to treaties, such instruments promise greater flexibility*”<sup>77</sup>. Such an agreement does not need parliamentary approval. So, it may bypass vaccine nationalism, differently from a treaty<sup>78</sup>. As a result, it will come into effect quickly.

However, actually facing the harsh reality of the continuing COVID-19 pandemic worldwide, speed seems no more imperative for struggles against the longstanding pandemic. Moreover, Salma Daoudi is of the opinion that the long-standing COVID-19 pandemic has served to increase appreciation of “*the importance of the health of populations for sustaining the political, economic, and social health of the nation-state*”<sup>79</sup>. In this way, the non-binding COVAX is no longer preferable even to nationalism, in the face of the tremendous death toll. In addition, the less strict observance of obligations emanating from the right to life seems to justify the opening of negotiations on more effectively ensuring the full realization of the right to health in the form of a legally-binding new pandemic treaty. In practice, recently, proposals on negotiating a new pandemic treaty have been made, particularly in the WHO and the Council of the European Union<sup>80</sup>.

At the World Health Assembly<sup>81</sup>, a process towards a pandemic treaty has been discussed<sup>82</sup>. In the WHO Working Group, a new WHO convention, agreement or other international instrument has been discussed<sup>83</sup>. In December 2021, the World Health Assembly adopted a decision<sup>84</sup>. It established an intergovernmental negotiating body to draft and negotiate the contents of the new pandemic treaty, with a view to covering aspects including data sharing and genome sequencing of emerging viruses, equitable distribution of vaccines and drugs, and related research all over the world<sup>85</sup>. In February 2022, the first meeting of the Intergovernmental Negotiating Body was held<sup>86</sup>.

76. Timothy Meyer, “Alternatives to Treaty-Making – Informal Agreements”, in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties*, 2nd ed., Oxford University Press, 2020, p. 67-73. In 1959, the ILC considered whether or not non-binding instruments should be included in the definition of treaty, when considering the Vienna Treaty Convention. It decided not to include such instruments in its definition. ILC, Report of the ILC to the General Assembly, Yearbook of the ILC 1959, Vol. 2, 1959, pp. 96-97.

77. Ian Brownlie, *Principles of Public International Law*, 9th ed., Oxford University Press, 2019, p. 400.

78. Anne Peters, “The Global Compact for Migration: to Sign or not to Sign?”, *EJIL:Talk!*, 2018, [ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/](http://ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/).

79. Salma Daoudi, “The War on Covid-19: the 9/11 of Health Security?”, Policy Center for the New South, Policy Paper, PB 20-06, 2020.

80. WHO, “World Health Assembly Agrees to Launch Process to Develop Historic Global Accord on Pandemic Prevention, Preparedness and Response”, 2021, <https://www.who.int/news/item/01-12-2021-world-health-assembly-agrees-to-launch-process-to-develop-historic-global-accord-on-pandemic-prevention-preparedness-and-response>.

81. The World Health Assembly is WHO’s decision-making body, held annually, attended by delegations from all WHO Member States. Special sessions are very rarely held. The Assembly focuses on a specific health agenda prepared by the Executive Board. One of its main functions is to determine the WHO’s policies. Idem., “World Health Assembly”, 2022, <https://www.who.int/about/governance/world-health-assembly>.

82. Idem., “Special Session of World Health Assembly 29 November 2021 - 1 December 2021”, 2021. Idem., “Special Session of the World Health Assembly to Consider Developing a WHO Convention, Agreement or Other International Instrument on Pandemic Preparedness and Response”, World Health Assembly Decision, WHA74(16), 2021.

83. Idem., Draft Report of the Member States Working Group on Strengthening WHO Preparedness and Response to Health Emergencies to the Special Session of the World Health Assembly, UN Doc A/WGPR/5/2, 2021.

84. Idem., loc. cit., supra note 80.

85. “WHO’s Pandemic Treaty”, Insights, 2022, <https://www.nightsonindia.com/2022/03/03/whos-pandemic-treaty/>.

86. WHO, “WHO Director-General’s Opening Remarks at First Meeting of the Intergovernmental Negotiating Body to Draft and Negotiate a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response – 24 February 2022”, 2022, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-first-meeting-of-the-intergovernmental-negotiating-body-to-draft-and-negotiate-a-who-convention-agreement-or-other-international-instrument-on-pandemic-prevention-preparedness-and-response-24-february-2022>. The intergovernmental Negotiating Body will deliver a progress report, which will be prepared by August 2022, to the World Health Assembly in 2023, and the proposed instrument will be presented for adoption in the Assembly in May 2024. Council of the EU, “Towards an International Treaty on Pandemics”, 2022, <https://www.consilium.europa.eu/en/infographics/towards-an-international-treaty-on-pandemics/>.



In 2022, the Council of the EU adopted a decision authorizing the launching of negotiations on a convention, agreement, or other international instrument, which is legally binding<sup>87</sup>, on pandemic prevention, preparedness, and response<sup>88</sup>. Charles Michel, President of the European Council, has advocated the call for a new pandemic treaty to prepare the world better to respond to pandemics and health crises<sup>89</sup>.

In the wake of more than 6.2 million deaths from COVID-19 in two years, it is reported that the new pandemic treaty will be backed by the U.S. effort to build a global pandemic-prevention fund sponsored by the World Bank. The suggested proposals for a new pandemic treaty involve “the sharing of data and genome sequences of emerging viruses and rules on equitable vaccine distribution”<sup>90</sup>.

On the other hand, Andres Constantin noted that as States are entitled to exercise their sovereignty to refuse aid or assistance from abroad, any discussion around the adoption of a new Pandemic Treaty must consider “the intrinsic vulnerabilities of the international legal system”<sup>91</sup>. However, on the basis of a review of North Korea’s incomprehensible refusal of the COVID-19 vaccine offer from abroad<sup>92</sup>, the conversion of the right to receive the vaccine into an obligation not to refuse it in the new pandemic treaty may help overcome the vulnerabilities. Generally speaking, the implementation of obligation would neither leave political options nor damage the image of the decision-maker.

At the same time, it is critically noted that commercial interests have discouraged publicly-funded vaccines from reaching the population in need, and have exploited the COVID-19 pandemic for privatizing healthcare<sup>93</sup>. While that may be true, States with sufficient resources would never be thereby exempted from the obligations under international human rights law and Article 12 of the ICESCR, as reiterated in this paper. As Constantin reminds us, “change is possible”<sup>94</sup>.

Finally, from the above, five modest proposals for the new pandemic treaty can be made:

1. Existing immediate obligations emanating from the right to health should be reconfirmed in the treaty.
2. Reference to the framework of international human rights, including the ICCPR and the ICESCR, should be involved in the new treaty.

87. Council of the EU, “An International Treaty on Pandemic Prevention and Preparedness”, 2022, <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/>.

88. Idem., “Council Gives Green Light to Start Negotiations on International Pandemic Treaty”, 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/03/03/council-gives-green-light-to-start-negotiations-on-international-pandemic-treaty/>. See also idem., “Towards an International Treaty on Pandemics”, 2022, <https://www.consilium.europa.eu/en/infographics/towards-an-international-treaty-on-pandemics/>.

89. WHO, “WHO Director-General’s Remarks at the Press Conference with President of the European Council to Discuss the Proposal for an International Pandemic Treaty”, 2021, <https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-press-conference-with-president-of-the-european-council-to-discuss-the-proposal-for-an-international-pandemic-treaty>.

90. Katija Hamilton, “WHO Pandemic Treaty: The Makings of a New World Order?”, Biz Community, 2022, <https://www.bizcommunity.com/Article/196/148/225648.html#>.

91. Andres Constantin, “Opinion: Is a WHO Pandemic treaty set to fail?”, Thomson Reuters Foundation News, 2021, <https://news.trust.org/item/20211203162418-huar8>.

92. It is considered that the reason for the rejection was that public acceptance of the vaccine from abroad would be a big blow to Kim Jong-un’s carefully managed image. Pratik Jakhar, “North Korea’s Curious COVID-19 Strategy”, Foreign Policy, 2021, <https://foreignpolicy.com/2021/08/09/north-korea-covid-pandemic-vaccine-strategy-pyongyang/>.

93. Geneva Global Health Hub, “Immunizing WHO Pandemic Treaty Negotiations Against Pandemic Profiteers”, Pandemic Treaty Press Release, 2022, <https://g2h2.org/wp-content/uploads/2022/04/Pandemic-Treaty-Press-Release.pdf>.

94. Constantin, loc. cit., supra note 91.

3. Domestic and international mechanisms to ensure the implementation of immediate obligations emanating from the right to health, regarding a pandemic, should be established.
4. An independent committee in charge of monitoring and reporting violations of the right to health should be established.
5. An obligation of States to accept offers of vaccines should be stipulated.





## About the Author, Shoji Matsumoto

Professor Shoji Matsumoto Senior Fellow at Policy Center for the New South. He is currently working in NGOs, namely as the President of Sapporo Institute for International Solidarity (Sapporo, Japan); Japan Center for Moroccan Studies (Sapporo, Japan); and the International Center on Separatism (Tokyo, Japan). He was previously professor of international law at Sapporo Gakuin University, and has recently retired. Dr. Shoji continues to teach international law and other related subjects at the university as a lecturer. Dr. Shoji was additionally a visiting fellow at the SOAS, University of London and also visiting professor at Mohamed V University.

## Policy Center for the New South

Suncity Complex, Building C, Al Bortokal Street, Hay Riad, Rabat - Morocco  
Email : [contact@policycenter.ma](mailto:contact@policycenter.ma)  
Phone : +212 (0) 537 54 04 04 / Fax : +212 (0) 537 71 31 54  
Website : [www.policycenter.ma](http://www.policycenter.ma)

