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Call for Contributions ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic

**Submission to United Nations Office of the High Commissioner for Human Rights
3 October 2022**

Background

At the beginning of the COVID-19 pandemic, some high-income countries (HICs) enacted laws and undertook other measures that resulted in restricted access to COVID-19 vaccines and related commodities in low-income countries (LICs). It was reported, for example, that the United Kingdom enacted laws to prevent the exportation of essential medicines, the European Union curbed exports of hospital supplies, and the USA restricted PPE [personal protective equipment] exports.¹ Some HICs entered into advance purchase agreements with COVID-19 vaccine manufacturers to secure doses well beyond their population needs (hoarding).² It was also reported that LICs later received shipments of nearly-expired COVID-19 vaccines, which then proved impossible to administer before they expired.³

At its 49th session, the United Nations (UN) Human Rights Council adopted resolution 49/25 on ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic. This submission is in response to the call for contributions from the UN Office of the High Commissioner for Human Rights dated 16 August 2022. The focus of this submission is on the legal obligations of international assistance and cooperation to ensure universal access to COVID-19 vaccines.⁴

Obligations of international assistance and cooperation

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Art 12(2)(c)). The ICESCR provides that a State Party is legally bound to ‘...take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum

¹ Sharifah Sekalala et al, ‘[Health and human rights are inextricably linked in the COVID-19 response](#)’ (2020) 5 *BMJ Global Health* accessed 20 February 2022. 4; Katrina Pehudoff and Jennifer Sellin, ‘Innovation and Access to Medicines under International law’, in Brigit Toebes et al, ‘Global Health Law Disrupted: Covid-19 and the Climate Crisis, (2020) *KNVIR* 31-85, 52.

² Armin von Bogdandy, Pedro A. Villarreal, ‘The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative’ *ZaoRV* 81 (2021) 89-116, 96; Katrina Pehudoff and Jennifer Sellin, ‘Innovation and Access to Medicines under International law’, in Brigit Toebes et al, ‘Global Health Law Disrupted: Covid-19 and the Climate Crisis, (2020) *KNVIR* 31-85, 52

³ Beauty Dhlamini, [Vaccine Apartheid includes Dumping Expiring Vaccines in Africa](#) accessed 3 January 2022. See also Ellen ‘t Hoen, [The Pandemic Treaty and Intellectual Property Sharing: Making Vaccine Knowledge a Public Good](#) (15 October 2021) accessed 25 December 2021.

⁴ The interpretation of international law herein is grounded, inter alia, in the Vienna Convention on the Law of Treaties (Art.31) and the Statute of the International Court of Justice (Art.38(1)) and includes the views of ‘highly qualified publicists’ (ICJ Statute Art 38(1)(d)).

of its available resources...’ (art. 2.1) to realize the rights in the Covenant. The right to health is also affirmed in the Preamble of the WHO Constitution.

States’ obligations under the right to health have mostly been interpreted as primarily owed to their own populations. More recently, commentators have suggested that ICESCR Article 2(1) also establishes ‘health-related extraterritorial obligations (ETOs) that exist alongside (and separate to) a state’s domestic human rights obligations.’⁵ Obligations of international assistance and cooperation (IAC) are also found in other international legal instruments including the UN Charter (Arts. 55 and 56), the Universal Declaration of Human Rights (Art. 22), and the International Health Regulations (Art. 44). An examination of the ICESCR *travaux préparatoires* reveals that states recognised when the ICESCR was drafted that LICs would require international assistance for the realisation of the rights under the Covenant.⁶

Challenges in ensuring universal access to COVID-19 vaccines result in part from the failure of high-income countries (HICs) to accept and act on their IAC obligations in international law. Instead of affirming the legal character of these obligations, WHO has framed HIC (in)action as a ‘moral failure.’⁷

Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Right (CESCR) provides authoritative interpretations of the ICESCR. The CESCR has stressed the obligation of LICs to seek assistance in implementing economic, social and cultural rights when required.⁸ The CESCR has also provided guidance on IAC obligations on the realisation of the right to health in other countries. These obligations include preventing third parties from violating the right in other countries; facilitating access to essential health facilities, goods and services in other countries, depending on the availability of resources; and providing the necessary aid when required.⁹ The CESCR has also clarified that States should not take

⁵ Bogdandy and Villarreal, 110. See also Martin Buijsen, ‘The Meaning of “Justice” and “Solidarity” in Health Care’ in: Andre den Exter (ed.), *International Health Law. Solidarity and Justice in Health Care* (Apeldoorn: Maklu, 2008), 55; Alicia Ely Yamin, ‘Our Place in the World: Conceptualising Obligations Beyond Borders in Human Rights-Based Approaches to Health’, 12(1) *Health and Human Rights Journal* (2010) pp. 3-14; Judith Bueno de Mesquita, Paul Hunt and Rajat Khosla, ‘The Human Rights Responsibility of International Assistance and Cooperation in Health’, in Mark Gibney and Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press 2010, pp.104-129

⁶ See generally Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987 Hum Rts Q) 156. See also Ben Saul, ‘The International Covenant on Economic, Social and Cultural Rights, *Travaux Préparatoires* 1948-1966, (Vol 1, OUP 2016).

⁷ David Patterson, “[‘On the brink of a catastrophic moral failure’ – not the time to abandon international law](#)” Human Rights Here (15 April 2021) accessed 27 September, 2022. See also United Nations, [Shared responsibility, global solidarity: responding to the socio-economic impacts of COVID-19](#), 2020, accessed 9 December 2021.

⁸ CESCR, General Comment No. 3. ‘The Nature of States Parties Obligations’, (1990) UN Doc. E/1991/23, para. 13-14; General Comment No. 17. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (2006) UN Doc. E/C.12/GC/17, para. 36; CESCR, The right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 22’ (May 2016) UN Doc. E/C.12/GC/22, para. 50; CESCR, General Comment No. 25. Science and Economic, Social and Cultural Rights (2020) UN Doc. E/C.12/GC/25, para. 77.

⁹ CESCR, ‘UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health, UN Doc E/C/12/2000/4 (11 August 2000) [hereinafter CESCR General Comment No. 14]. para. 38.

action which impedes the enjoyment of the right to health in other countries (e.g., through embargoes restricting the supply of another state with medicines).¹⁰

The CESCR has reiterated these obligations in statements in the context of universal access to COVID-19 vaccines.¹¹ The CESCR has also noted that states have the duty to ensure universal and equitable access to COVID-19 vaccines, including by using their voting rights to support the work of the international institutions and organisations to which they belong and refraining 'from taking measures that obstruct this goal.'¹² Decrying 'vaccine nationalism' and 'the unhealth race among States for COVID-19 vaccines', the CESCR has noted that,

Vaccine nationalism infringes extraterritorial obligations of States to avoid taking decisions that limit the opportunity of other States to make vaccines available and thus to implement their human rights obligations related to the right to health, as it results in the shortage of vaccines for those who are most in need in the least developed countries.¹³

The IAC obligation is also based on states' obligations under the right to enjoy the benefits of scientific progress and its applications (right to benefit from scientific progress) contained in ICESCR Art. 15(1)(b). The CESCR has also noted that access to COVID-19 vaccines is an essential component of the right to benefit from scientific progress.¹⁴

Maastricht Principles on Extraterritorial Obligations of States in the Area of ESC Rights

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights¹⁵ identify the following obligations:

1. 'Obligations of a global character [...] to take action, separately, and jointly through international cooperation, to realise human rights universally.' (Principle 8(b)). States that can do so must provide international assistance to LICs in the fulfilment of their ESCRs. (Principle 33) This assistance, which is not limited to economic and technical assistance,¹⁶ would include facilitating access to vaccines by sharing technology and expertise.
2. 'Obligations relating to the acts and omissions of a state [...] that have effects on the enjoyment of human rights outside that state's territory.' (Principle 8(a)) Thus, states should not hinder the exercise of the right to health in other territories.¹⁷

¹⁰ CESCR General Comment No. 14, para. 41.

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, 23 April 2021, E/C.12/2021/1 [hereinafter CESCR Statement on COVID-19, international cooperation and intellectual property] para 2; CESCR Statement of 6 April 2020 on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights (E/C.12/2020/1); CESCR Statement of 27 November 2020 on universal and equitable access to vaccines for the coronavirus disease (COVID-19) (E/C.12/2020/2).

¹² CESCR Statement on COVID-19, international cooperation and intellectual property, para 3.

¹³ CESCR Statement on COVID-19, international cooperation and intellectual property, para 4.

¹⁴ CESCR Statement on COVID-19, international cooperation and intellectual property. See also CESCR, General Comment No. 25. Science and Economic, Social and Cultural Rights (2020) UN Doc. E/C.12/GC/25, para. 7; International Commission of Jurists (ICJ), '[Human Rights Obligations of States to not impede the Proposed COVID-19 TRIPS Waiver - Expert Legal Opinion](#)' (2021), 5 accessed 1 March 2022.

¹⁵ [The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights](#), Maastricht University and the International Commission of Jurists (28 September 2011) accessed 21 February 2022.

¹⁶ Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', *Human Rights Quarterly* (2012) 51.

¹⁷ Bogdandy and Villarreal, 99.

Extent of extraterritorial obligations

It has been argued that ‘the human rights responsibility of international assistance and cooperation is a legally binding obligation on states parties to the ICESCR, as well as other relevant human rights treaties’,¹⁸ and further that the ‘duty of assistance is the extraterritorial form of the requirement on states to *fulfil* the right to health domestically. It lies on states even where others, who are similarly capable, fail to help.’¹⁹ However, the exact extent of these obligations remains unsettled. At a minimum, it has been proposed that, ‘(t)he international obligation also demands that states must actively consider measures by which they can individually and collectively assist other states *fulfil* the right to health... states may enjoy significant discretion with respect to the measures they adopt to satisfy their international obligation to secure the right to health but they are still required to justify whatever measures they adopt as being reasonable in the circumstances.’²⁰

The No Harm Principle

States have the general obligation under international law not to engage in activities that could cause harm in another territory.²¹ It has been suggested that this principle not only creates a negative obligation, but also creates a positive obligation on states to take actual steps to prevent causing harm to another state.²² The UN Special Rapporteur on the right to health has affirmed this duty, and added that it extends to preventing private actors under their jurisdiction from doing so.²³ Commentators have also suggested that this duty is ‘the extraterritorial form of the requirement on states to *respect* and *protect* the right to health.’²⁴

Conclusion

Immunization is currently the best COVID-19 prevention tool available and an important component of efforts to assure the right to the highest attainable standard of health for all. States have extraterritorial obligations to assist other states to respect, protect and fulfil the right to health of their populations, including in the context of access to COVID-19 vaccines. Vaccine hoarding and the other actions of HICs identified above breach this obligation. Yet, the virus will continue to mutate and spread until it is controlled in every country. No country and no one in any country should be left behind. No one is safe until everyone is safe.

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This submission is based on research undertaken at the University of Groningen by Suliyat Olapade, LL.M. Information: d.w.patterson@rug.nl

¹⁸ Judith Bueno de Mesquita, Paul Hunt and Rajat Khosla, ‘The Human Rights Responsibility of International Assistance and Cooperation in Health’, in Mark Gibney and Sigrun Skogly (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press 2010, pp.104-129, 128.

¹⁹ See M E Salomon ‘Is there a Legal Duty to Address World Poverty’ (2012 European University Institute, Robert Schumann Centre for Advanced Studies) 3.

²⁰ Tobin, 369-370.

²¹ Bogdandy and Villarreal, 111. CESCR General Comment No. 14, para. 39.

²² Jutta Brunnee, ‘Procedure and Substance in International Environmental Law?’ (2020 RdC), 87, 158.

²³ UN General Assembly, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretary-General, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 13th August 2012, A/67/302.

²⁴ John Harrington and Sharifah Sekalala, ‘[COV0102 - The Government’s response to Covid-19: human rights implication](#)’ (Written evidence in UK Parliament Human Rights (Joint Committee), 11 May 2020) accessed 10 March 2022.