

To the Special Procedures Mandate Holders:

The United Nations Special Rapporteur on Physical and Mental Health

The United Nations Special Rapporteur on Extreme Poverty and Human Rights

The United Nations Working Group on Human Rights and Transnational Corporations and Other Business Enterprises

The Working Group on Economic, Social and Cultural Rights at the African Commission on Human and Peoples' Rights

The Special Rapporteur on Economic, Social, Cultural and Environmental Rights at the Inter-American Commission on Human Rights

Re.: Urgent appeal calling on States and business actors to comply with human rights law mandating universal and equitable global access to COVID-19 vaccines

Dear Mandate Holders:

Vaccination is one of the most critical¹—yet unequally distributed²—measures to face and control the novel coronavirus (COVID-19) pandemic. For vaccination to reach its full potential benefit, along

¹ The United Nations Committee on Economic, Social and Cultural Rights (CESCR) said last year, “[a] safe and effective vaccine is expected to reduce the health and life risks posed by the coronavirus disease (COVID-19), while allowing the progressive lifting of some restrictive measures that have been necessary to combat the spread of the virus.” CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, par. 1, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx. As stated by the World Health Organisation (WHO) Director-General, Dr. Tedros Adhanom Ghebreyesus:

[s]afe and effective vaccines have been developed and approved at record speed, giving us a crucial new way, in addition to traditional public health measures, to protect people from the virus. Now we must ensure they're available to everyone, everywhere... Any opportunity to beat this virus should be grabbed with both hands...Flexibilities in trade regulations exist for emergencies, and surely a global pandemic, which has forced many societies to shut down and caused so much harm to business – both large and small – qualifies...While the virus has taken advantage of our interconnectedness, we can also turn the tables by using it to spread life-saving vaccines further and faster than ever before.

Tedros Adhanom Ghebreyesus, WHO, *Waive Covid vaccines patents to put the world on war footing*, 7 March 2021, available at: <https://www.who.int/news-room/commentaries/detail/waive-covid-vaccine-patents-to-put-world-on-war-footing>.

² This has long been recognized. See e.g. *Statement by UN Human Rights Experts: Universal access to vaccines is essential for prevention and containment of COVID-19 around the world*, 9 November 2020 available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E> (“According to Oxfam, in a note of 17 September 2020, ‘51 percent of the doses to be produced based on current capacity have already been reserved for countries with just 13 percent of the global population...’”); WHO, *WHO Director-General's opening remarks at 148th session of the Executive Board*, 18 January 2021, available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board> (“As the first vaccines begin to be deployed, the promise of equitable access is at serious risk. More than 39 million doses of vaccine have now been administered in at least 49 higher-income countries. Just 25 doses have been given in one lowest-income country. Not 25 million; not 25 thousand; just 25. I need to be blunt: the world is on the brink of a catastrophic moral failure – and the price of this failure will be paid with lives and livelihoods in the world's poorest countries”).

with prioritizing populations most at risk, “[e]xperts note that at least 70% of the population needs to have been vaccinated to curtail transmission around the world.”³

Urgent universal and equitable global access to COVID-19 vaccines is a human right and public health imperative requiring States, business actors, and the World Trade Organisation (WTO) to abide by their obligations to, *inter alia*, overcome information monopolies, such as those created by vaccine patents. Patent and technology holders should have participated unreservedly in the World Health Organisation (WHO) COVID-19 Technology Access Pool (C-TAP) since its launch on 29 May 2020, but no businesses have done so, this despite the urging⁴ of impoverished States, the WHO, and members of civil society, and the fact that numerous vaccines development efforts benefited from public money.⁵ Many business actors continue to influence government decision making to protect private interests and limit liability.⁶ With the possible need for regular boosters and the spread of virus variants globally,⁷ fully facing the pandemic and avoiding potentially cyclical concerns over vaccine access requires putting people and human rights over profit.

And where vaccines are available, States must do more to ensure their just distribution.⁸

Continuing on the present course risks prolonging the pandemic, with indefinite, severe, and unjustly distributed threats to millions of people and public healthcare systems and to the rights to life, health, enjoyment of the benefits of scientific progress, substantive equality, and other human rights. In light of the information and legal obligations detailed below, we request that the human rights special procedures mandate holders issue urgent appeals to enable the massive emergency and sustainable scaling up of production and fair distribution necessary to ensure urgent, universal, and equitable global access to COVID-19 vaccines by calling, as a matter of international human rights law, on:

- i. all States to comply with their duties to ensure just access to COVID-19 vaccines within countries and also between them, including via any needed international economic,

³ Inter-American Commission on Human Rights, *LACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine*, 5 February 2021, available at: http://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/027.asp.

⁴ WHO, *Making the Response to COVID-19 a Public Common Good, Solidarity Call to Action*, 1 June 2020, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool/solidarity-call-to-action>.

⁵ Oxfam, *Monopolies causing “artificial rationing” in COVID-19 crisis as 3 biggest global vaccine giants sit on sidelines*, 5 February 2021, available at: <https://www.oxfam.org/en/press-releases/monopolies-causing-artificial-rationing-covid-19-crisis-3-biggest-global-vaccine>.

⁶ Corporate influence on government decision making is a phenomenon that many movements and organizations working on human rights call “corporate capture.” To learn more about corporate capture, please see: ESCR-Net, *Manifestations of Corporate Capture*, available at: https://www.escr-net.org/sites/default/files/manifestation_-_en.pdf.

⁷ Berkeley Lovelace Jr., Pfizer CEO says third Covid vaccine dose likely needed within 12 months, CNBC, 15 April 2021, <https://www.cnbc.com/2021/04/15/pfizer-ceo-says-third-covid-vaccine-dose-likely-needed-within-12-months.html>.

⁸ For an example of delineations of human rights obligations regarding equitable vaccine access within States, see Inter-American Commission on Human Rights, Resolution 01/2021, *COVID-19 vaccines and inter-American human rights obligations*, 6 April 2021, Part C(I-VI), available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-21-en.pdf>.

- scientific and other cooperation, such as the alleviation of debt burdens;
- ii. those States opposing⁹ the proposed¹⁰ Trade-Related Intellectual Property Rights (TRIPS) Agreement waiver for the prevention, containment, or treatment of COVID-19 to: a) reconsider their positions, b) stop blocking the advancement of the proposal, and c) if necessary, enable its submission to a binding vote within the WTO;
 - iii. the relevant business and other private actors¹¹--including the pharmaceutical industry possessing patents, know how, and necessary organic materials for COVID-19 vaccines--to support the TRIPS waiver, to participate unreservedly in the WHO's COVID-19 Technology Access Pool (C-TAP), and to openly share any other inputs required for effective COVID-19 vaccine production and distribution;
 - iv. all States to: a) regulate and hold accountable any private actors responsible for causing or contributing to human rights violations or abuses related to the obstruction of urgent, universal, and equitable vaccine access, and b) participate in the ongoing United Nations (UN) open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises;
 - v. all relevant States and business actors to ensure full transparency in all elements of vaccine development, procurement, provision and debate; and
 - vi. the WTO, to facilitate the expeditious resolution of the COVID-19 TRIPS waiver proposal, including by marshalling it to a binding vote if consensus cannot be reached.

⁹ As of March 22, 2021 these States were **Australia, Brazil, Japan, Norway, Singapore, Switzerland, United Kingdom, United States, El Salvador, and the following European Union (EU) countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.** Médecins sans Frontières (MSF), *No Patents, No Monopolies in a Pandemic*, available at: <https://msfaccess.org/no-patents-no-monopolies-pandemic>.

¹⁰ WTO communication, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, Communication from India and South Africa, 2 October 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

¹¹ WTO communication, *Examples of IP Issues and Barriers in COVID-19 Pandemic, Communication from South Africa, Council on Trade-Related Aspects of Intellectual Property Rights*, 23 November 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W670.pdf&Open=True>; Christopher Garrison, *How the 'Oxford' Covid-19 Vaccine Became the 'AstraZeneca' Covid-19 Vaccine*, *Medicines Law and Policy*, 5 October 2020, available at: <https://medicineslawandpolicy.org/wp-content/uploads/2020/10/How-the-Oxford-Covid-19-Vaccine-became-the-AstraZeneca-Covid-19-Vaccine-Final.pdf>; Jorge L. Contreras, *Deconstructing Moderna's COVID-19 Patent Pledge*, Blog, Bill of Health, Petrie Flom Center, Harvard Law School, 21 October 2020, available at: <https://blog.petrieflom.law.harvard.edu/2020/10/21/moderna-covid19-patent-pledge/>; International Federation of Pharmaceutical Manufacturers and Associations, IFPMA Statement on the "Solidarity Call to Action to realize equitable global access to COVID-19 health technologies through pooling of knowledge, intellectual property and data," 28 May 2020, available at: https://www.ifpma.org/wp-content/uploads/2020/05/IFPMA_Statement_Costa_Rica_Proposal_28May2020.pdf; Michael Safi, *WHO Platform for Pharmaceuticals Unused since Pandemic Began*, 22 January 2021, available at: <https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firms-unused-since-pandemic-began>; Global Health Innovation Center, Duke University, Issue Brief: Deciphering the Manufacturing Landscape for Covid-19 Vaccines, 19 March 2021, available at: <https://launchandscalefaster.org/sites/default/files/documents/Speedometer%20Issue%20Brief-COVID%20Manufacturing%20Landscape%2019%20March%2021.pdf>.

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I. Overview of facts

A. Inequitable access to COVID-19 vaccines within and between countries

1. As late as 5 February 2021, the WHO reported that 130 countries, home to 2.5 billion people, had yet to administer a single COVID-19 vaccine dose.¹² The WHO also announced then that the number of vaccinations had reached a higher number, than the quantity of reported infections.¹³ However, 10 countries accounting for almost 60% of global Gross Domestic Product had at that point received three quarters of the vaccinations manufactured.¹⁴ Executive Director of UNAIDS Winnie Byanyima has warned of, “vaccine apartheid.”¹⁵
2. Inequitable access to COVID-19 vaccines within and between countries is a widespread problem, as illustrated by the examples below.
3. In India and beyond, heightened COVID-19 vaccine prices raise concerns about inequitable access. The Serum Institute of India, an Indian biotechnology and pharmaceuticals company and the world’s largest vaccine manufacturer,¹⁶ is reportedly selling the AstraZeneca vaccine to the Indian government at USD 2.74 per dose but reportedly plans to sell it on the private market at USD 13.68.¹⁷ The European Union (EU) reportedly paid EUR 1.78 for the AstraZeneca vaccine¹⁸ (compare this to the United States (US), quoted at USD 4 per dose).¹⁹ AstraZeneca has been subject to scrutiny about the higher pricing of its vaccine faced unequally by Global South countries, such as India, South Africa, and Uganda.²⁰ There is a concerning lack of transparency around how much countries pay per dose, compounded by the fact that Serum Institute of India is one of the few manufacturers licensed by AstraZeneca,

¹² WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 5 February 2021, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-february-2021>.

¹³ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 5 February 2021, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-february-2021>.

¹⁴ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 5 February 2021, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-february-2021>.

¹⁵ Winnie Byanyima, UNAIDS, *A global vaccine apartheid is unfolding. People's lives must come before profit*, 3 February 2021, available at: https://www.unaids.org/en/20210203_oped_guardian; See also Jackie Dugard, Jeff Handmaker, Bruce Porter, *Mobilising Human Rights to Address Coronavirus Vaccine Apartheid*, *Opinio Juris*, 18 February 2021, available at: <http://opiniojuris.org/2021/02/18/mobilising-human-rights-to-address-coronavirus-vaccine-apartheid/>.

¹⁶ Serum Institute of India, About us, webpage, available at: https://www.seruminstitute.com/about_us.php

¹⁷ Aniruddha Ghosal, *AP Interview: India bars virus vaccine maker from exporting*, Associated Press, 4 January 2021, available at: <https://apnews.com/article/ap-top-news-global-trade-immunizations-india-coronavirus-pandemic-c0c881c0f07166e8fd494e078171a7cc>.

¹⁸ Reuters Staff, *EU paying full price for AstraZeneca vaccine -EU health official*, Reuters, 1 February 2021, available at: <https://www.reuters.com/article/health-coronavirus-vaccine-eu/eu-paying-full-price-for-astrazeneca-vaccine-eu-health-official-idUSL8N2K757M>.

¹⁹ Sisi Cao, *COVID-19 Vaccine Prices Revealed From Pfizer, Moderna, and AstraZeneca*, *Observer*, 23 November 2020, available at: <https://observer.com/2020/11/covid19-vaccine-price-pfizer-moderna-astrazeneca-oxford/>.

²⁰ David Meyer, *AstraZeneca is finding it hard to keep its COVID-19 vaccine promises*, *Fortune*, 25 January 2021, available at: <https://fortune.com/2021/01/25/astrazeneca-covid-vaccines-europe-deliveries-south-africa-price/>.

upon which 92 of the world's poorest countries are reliant via the COVAX facility.²¹ A Belgian politician in December tweeted the EU COVID-19 vaccine price list, information the European Commission later urged was covered by confidentiality clauses.²² The Coalition for Epidemic Preparedness Innovations (CEPI), which helps run the COVID-19 Vaccines Global Access (COVAX) facility has also been criticized over pricing transparency.²³

4. Indonesia, the hardest hit country in Southeast Asia with over 1.5 million confirmed COVID-19 cases and more than 42,000 deaths,²⁴ requires 426 million doses in order to vaccinate the target proportion of its population with about 15 million doses already administered to a population of around 270.6 million.²⁵ However, in late March 2021, it announced that it would need to slow down its vaccine rollout campaign as a result of supply shortages, including the potential delay of 10 million AstraZeneca doses that were expected to be delivered via the COVAX facility in March and April.²⁶ Of further concern is the country's approval in February 2021 of a parallel private sector vaccination programme, which allows businesses to register to buy vaccines for their families and staff.²⁷ While conditions are in place to ensure quality and safety, and avoid undermining supplies of the public programme, "it has also triggered concerns that it could worsen inequity because the authorization does not require participating business entities to cover all their workers. So, a company may include only some categories of employees, leaving uncertainties over temporary or outsourced workers and their families."²⁸ Parallel private sector vaccination programmes have also been approved in India and Malaysia, adding to concerns; as stated by the People's Health Forum in Malaysia, "[i]n a situation of global vaccine shortage as we are facing now, a parallel private sector vaccination rollout is highly inequitable, potentially resulting in those who should be prioritised (the frontliners, elderly, patients with underlying conditions) not getting the vaccines earlier, as those who can afford it will jump the queue in the private sector."²⁹

²¹ Achal Prabhala and Leena Menghaney, *The world's poorest countries are at India's mercy for vaccines. It's unsustainable*, The Guardian, 2 April 2021, available at: <https://www.theguardian.com/commentisfree/2021/apr/02/india-in-charge-of-developing-world-covid-vaccine-supply-unsustainable>; *India delays jab supplies to UN-backed vaccine programme*, Al-Jazeera, 25 March 2021, available at: <https://www.aljazeera.com/news/2021/3/25/indias-biggest-world-vaccine-manufacturer-to-delay-jab-exports>.

²² Sarah Boseley, *Belgian minister tweets EU's Covid vaccine price list to anger of manufacturers*, The Guardian, 18 December 2021, available at: <https://www.theguardian.com/world/2020/dec/18/belgian-minister-accidentally-tweets-eus-covid-vaccine-price-list>.

²³ Ann Danaiya Usher, *CEPI criticised for lack of transparency*, The Lancet, 23 January 2021, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00143-4/fulltext?hss_channel=tw-27013292](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00143-4/fulltext?hss_channel=tw-27013292).

²⁴ WHO, *Indonesia: WHO Coronavirus Disease (COVID-19) Dashboard*, 14 April 2021, available at: <https://covid19.who.int/region/searo/country/id>.

²⁵ Ardila Syakriah, *Indonesia slows down vaccine rollout amid delayed supplies*, The Jakarta Post, 28 March, available at: <https://www.thejakartapost.com/news/2021/03/28/indonesia-slows-down-vaccine-rollout-amid-delayed-supplies.html>.

²⁶ Ardila Syakriah, *Indonesia slows down vaccine rollout amid delayed supplies*, The Jakarta Post, 28 March, available at: <https://www.thejakartapost.com/news/2021/03/28/indonesia-slows-down-vaccine-rollout-amid-delayed-supplies.html>.

²⁷ People's Health Forum, *Letter: NIP should ensure equitable access*, New Straits Times, 21 March 2021, available at: <https://www.nst.com.my/opinion/letters/2021/03/675778/nip-should-ensure-equitable-access>.

²⁸ People's Health Forum, *Letter: NIP should ensure equitable access*, New Straits Times, 21 March 2021, available at: <https://www.nst.com.my/opinion/letters/2021/03/675778/nip-should-ensure-equitable-access>.

²⁹ People's Health Forum, *Letter: NIP should ensure equitable access*, New Straits Times, 21 March 2021, available at:

5. In Kenya, with a population over 50 million, lack of equitable global access to vaccines means the State currently has plans to vaccinate only 15 million by mid 2023.³⁰ Kenya had as of 25 March 2021 received only one million vaccine doses from COVAX.³¹ This supply initiative under COVAX facility has been dogged by vaccine nationalism and hoarding.³² Furthermore, domestically, “Kenya will let private hospitals charge for COVID-19 vaccinations and will not set a price limit on their cost - a measure charities warned would ‘price out the poor’ and create greater inequalities in access.”³³ Although the government has eventually closed the window for private companies to import, distribute, and administer vaccines,³⁴ the roll-out of Kenya’s COVID-19 vaccine programme is marred with confusion and has been hijacked by a politically-connected elite.³⁵ Meanwhile, there is continuing concern that stateless people in Kenya will not have access to COVID-19 vaccines. According to the Kenya Human Rights Commission:

Kenya has an estimated 18500 stateless people, most of whom are members of ethnic minority groups. This category of people is likely to be closed out of vaccination programmes being rolled out in Kenya because they do not have identity documents. For anyone to be vaccinated in Kenya, they are required to show their national identity cards which stateless people do not have. There is need to call upon the government of Kenya to deliberately roll out vaccination programmes for stateless people and to particularly give priority to the elderly and those with underlying health conditions.³⁶

The Ministry of Health in Kenya outlined a clear plan to roll out the vaccine in three phases starting off with health workers, security and immigration officials in the first phase, the elderly, those with underlying health conditions and those considered vulnerable such as those living in informal settlements in the second phase and third phases. In early March 2021, reports highlighted that some politicians in Kenya were trying to grab vaccines meant for

<https://www.nst.com.my/opinion/letters/2021/03/675778/nip-should-ensure-equitable-access>; Ram Anand, *Private hospitals in Malaysia can procure own vaccines*, 30 March 2021, available at:

<https://www.straitstimes.com/asia/se-asia/private-hospitals-in-malaysia-can-procure-own-vaccines>.

³⁰ Nita Balla, “Pricing out the poor”: Fears over COVID-19 vaccine access as Kenya lets in private sector, Reuters, 25 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-kenya-vaccine/pricing-out-the-poor-fears-over-covid-19-vaccine-access-as-kenya-lets-in-private-sector-idUSKBN2BH2Q9>.

³¹ Nita Balla, “Pricing out the poor”: Fears over COVID-19 vaccine access as Kenya lets in private sector, Reuters, 25 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-kenya-vaccine/pricing-out-the-poor-fears-over-covid-19-vaccine-access-as-kenya-lets-in-private-sector-idUSKBN2BH2Q9>.

³² The Conversation, Kenya’s COVID-19 vaccine rollout has got off to a slow start: the gaps, and how to fix them, 9 April 2021, available at: <https://theconversation.com/kenyas-covid-19-vaccine-rollout-has-got-off-to-a-slow-start-the-gaps-and-how-to-fix-them-158477>

³³ Nita Balla, “Pricing out the poor”: Fears over COVID-19 vaccine access as Kenya lets in private sector, Reuters, 25 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-kenya-vaccine/pricing-out-the-poor-fears-over-covid-19-vaccine-access-as-kenya-lets-in-private-sector-idUSKBN2BH2Q9>.

³⁴ Tom Odula, *Kenya stops the private importation of COVID-19 vaccines*, Associated Press, 3 April 2021, available at: <https://apnews.com/article/health-kenya-coronavirus-pandemic-africa-541094c0e7e8412f5c49885908bb2c92>.

³⁵ Patrick Gathara, *What is going on with Kenya’s COVID-19 vaccine drive?*, Al-Jazeera, 2 April 2021, available at: <https://www.aljazeera.com/opinions/2021/4/3/what-is-going-wrong-with-kenyas-covid-19-vaccine-drive>.

³⁶ Kenya Human Rights Commission, E-mail correspondence with ESCR-Net, 17 April 2021.

frontline health workers, with some politicians and religious leaders claiming they were seeking public support for vaccination.³⁷ A similar issue took place in the United States where politicians were getting vaccinated before health workers, though this was part of the US vaccine rollout plan and some claimed it was to, “build public trust.”³⁸

6. In Libya, access to health, including access to vaccines, is especially challenging due to years of insecurity and armed conflict, a severely compromised healthcare system, and a lack of access to electricity, water, and sanitation.³⁹ The country remains entirely dependent on the COVAX facility, which has allocated an initial number of 292,800 doses of AstraZeneca vaccine, although no information is available as to when the first shipment will arrive.⁴⁰ The World Health Organisation also indicated a 22% funding gap in 2020 to support its response to COVID-19 in Libya.⁴¹ This context is compounded by regional inequalities and pre-existing discriminations against ethnic minorities such as the Tebu and Tuareg,⁴² as well as against internally displaced populations, and migrants and refugees, notably those in arbitrary detention facing pervasive abuse. According to the International Organisation for Migration (IOM), 74% of migrants in Libya have limited or no access to health services.⁴³ While they can access the public health system in principle, they often lack the resources or abstain due to their irregular migrancy status. In January, Libyan organisations denounced a denial of Libyan migrants’ right to health, including from the United Nations High Commissioner for Refugees (UNHCR).⁴⁴ Common misperceptions that migrants are vectors of diseases are also widespread.
7. In Mexico, Foreign Minister Marcelo Ebrard denounced unequal access to vaccines on 17 February, saying that the COVAX initiative has been insufficient. He asked that countries with limited resources, which by some estimates will not have access to vaccines until the middle

³⁷ Angela Oketch, *Kenya: Politicians Grab Vaccine Meant for Frontline Medics*, All Africa, 3 March 2021, available at: <https://allafrica.com/stories/202103040085.html>.

³⁸ Fenit Nirappil, Isaac Stanley-Becker, and William Wan, *Politicians get vaccinated early to build public trust, while furious health workers wait*, Washington Post, 23 December 2020, available at: <https://www.washingtonpost.com/health/2020/12/23/covid-vaccine-priority-congress/>.

³⁹ Kate Vigneswaran, *A Radical Shift in Libyan and International Priorities is Necessary to Protect Health and Save Lives in Libya*, 5 May 2020, available at: <http://opiniojuris.org/2020/05/05/a-radical-shift-in-libyan-and-international-priorities-is-necessary-to-protect-health-and-save-lives-in-libya/>.

⁴⁰ WHO, *Libya: Health response to COVID-19 in Libya*, update # 25 (Reporting period: 1-31 March 2021), p. 1, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/libya_covid_update_25_final.pdf.

⁴¹ WHO, *Libya: Health response to COVID-19 in Libya*, update # 25 (Reporting period: 1-31 March 2021), p. 6, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/libya_covid_update_25_final.pdf.

⁴² Amnesty International, *Libya: Historic discrimination threatens right to health of minorities in the south amid COVID-19*, 20 April 2020, available at: <https://www.amnesty.org/en/latest/news/2020/04/libya-historic-discrimination-threatens-right-to-health-of-minorities-in-the-south-amid-covid19/>.

⁴³ International Organization of Migration (IOM), *IOM Libya Appeal COVID-19*, April-December 2020, available at: https://crisisresponse.iom.int/sites/default/files/appeal/documents/IOM%20LIBYA_COVID-19%20PREPAREDNESS%20AND%20RESPONSE%20PLAN%20APPEAL_10042020.pdf.

⁴⁴ Cairo Institute for Human Rights Studies, *Libya: The denial of non-Libyan citizens’ right to health must be investigated and remedied*, 2 February 2021, available at: <https://cihrs.org/libya-the-denial-of-non-libyan-citizens-right-to-health-must-be-investigated-and-remedied/?lang=en>.

of 2023 if current trends persist, be prioritized. “Guaranteeing universal access to vaccines is the only way to defeat the pandemic,” he said.⁴⁵

8. In Palestine, COVID-19 continues to spread. As of the end of March 2021, Israel had fully vaccinated over 50%,⁴⁶ including teenagers.⁴⁷ In the occupied Palestinian territory (oPt), the Israeli authorities have provided the vaccine to Israeli settlers residing in illegal settlements across the West Bank, while denying the vaccine to millions of Palestinians in the oPt who remain unprotected and exposed to COVID-19.⁴⁸ The several thousand doses donated to the oPt thus far fall far short of meeting the needs of the 5.1 million Palestinians⁴⁹ living in the oPt, particularly the elderly, vulnerable groups, and healthcare workers.⁵⁰ Israel, as the Occupying Power, has largely excluded Palestinians under its effective control in the oPt⁵¹ from receiving the vaccine, a discriminatory and unlawful policy disregarding its obligations under international human rights and humanitarian law.⁵² Nevertheless, Israel has been celebrated by some for its “impressive” vaccination drive, while its racially and politically motivated discriminatory distribution of the vaccine has been ignored. According to Médecins Sans Frontières (MSF), “you are over 60 times more likely to have a vaccination in Israel than

⁴⁵ Government of Mexico, *In UN Security Council, Mexico denounces unequal access to vaccines*, Press Release 83, 17 February 2021, available at:

<https://www.gob.mx/sre/prensa/in-un-security-council-mexico-denounces-unequal-access-to-vaccines?idiom=en>.

⁴⁶ Johns Hopkins Coronavirus Resource Center (CRC), *Israel - COVID-19 Overview*, available at:

<https://coronavirus.jhu.edu/region/israel>.

⁴⁷ Associated Foreign Press (AFP), *Israel Expands Vaccination to Teens*, France 24, 23 January 2021, available at:

<https://www.france24.com/en/live-news/20210123-israel-expands-vaccination-campaign-to-teens>.

⁴⁸ Oliver Holmes and Hazem Balousha, *Palestinians excluded from Israeli COVID vaccine rollout as jabs go to settlers*, The Guardian, 3 January 2021, available at: <https://www.theguardian.com/world/2021/jan/03/palestinians-excluded-from-israeli-covid-vaccine-rollout-as-jabs-go-to-settlers>.

⁴⁹ State of Palestine, Palestinian Central Bureau of Statistics, *About 13.5 Million Palestinians in the Historical Palestine and Diaspora*, 11 July 2020, available at:

<http://pcbs.gov.ps/site/512/default.aspx?lang=en&ItemID=3774#:~:text=While%20the%20estimated%20population%20of,males%20and%201.01%20thousand%20females.&text=The%20percentage%20of%20individuals%20aged,and%2041%25%20in%20Gaza%20Strip>.

⁵⁰ Matthias Kennes, *In Israel, you're 60 times more likely to have a COVID vaccine than in Palestine*, MSF, 22 February 2021, available at: <https://www.msf.org/stark-inequality-covid-19-vaccination-between-israel-and-palestine>

⁵¹ This excludes Palestinians in occupied East Jerusalem, as well as Palestinians residing in Israel (within the Green Line).

⁵² International humanitarian law requires Israel, the occupying power, to ensure the food and medical supplies of Palestinians to the fullest extent possible (Fourth Geneva Convention, Article 55) and to maintain medical services, public health, and hygiene in the occupied Palestinian territory, with particular reference to the adoption of preventive measures necessary to combat the spread of infectious diseases (Article 56, Fourth Geneva Convention). Israel is bound under international human rights law to uphold the right of Palestinians to the highest attainable standard of physical and mental health, including the underlying determinants of health and well-being, which include the right to adequate food, water and sanitation, housing, and work, and ultimately require the realisation of the right of the Palestinian people to self-determination. See ICESCR Article 1, 12 and CESCR, General Comment 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, par. 4, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjmc0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL>; See also *Joint Statement: 10 Israeli, Palestinian and international health and human rights organizations: Israel must provide necessary vaccines to Palestinian health care systems*, Relief Web, 23 December 2020, available at: <https://reliefweb.int/report/occupied-palestinian-territory/joint-statement-10-israeli-palestinian-and-international>.

in Palestine.”⁵³ The denial of equal access to and discriminatory distribution of COVID-19 vaccines for Palestinians subject to Israel’s colonization, occupation and apartheid is a stark example of structural discrimination and oppression persisting and escalating during a global emergency. Since the beginning of the pandemic, Israel has consistently rejected its obligations under international humanitarian and human rights law, including by failing to protect Palestinian prisoners and detainees in its custody⁵⁴ and Palestinian workers in Israel;⁵⁵ denying Palestinians in the Gaza Strip access to healthcare, and systematically neglecting the healthcare sector in occupied East Jerusalem.⁵⁶ Israel’s deliberate and strategic fragmentation of Palestinians into segregated and separated administrative, political, legal and geographic categories has played into the racist and structurally violent ways through which Israel has restricted access to the vaccine to specific Palestinian groups across the oPt.⁵⁷ In March 2021, Israel announced that it would vaccinate Palestinians who come in contact with Israelis; i.e., Palestinian labourers who work in Israel and Israeli settlements,⁵⁸ about 130,000 Palestinians who are already exploited and underpaid.⁵⁹ At the same time, Israel delayed the delivery of 2,000 vaccines, donated by Russia to the Palestinian Authority in the West Bank,⁶⁰ as some Israeli officials called for the delivery to be conditioned.⁶¹ It should be noted that Gaza, wherein two million Palestinians live, has been under Israeli-imposed closure for nearly 13 years and subject to recurrent Israeli military offensives, resulting in the health system reaching the verge of collapse with severe shortages of medical supplies which pre-date the COVID-

⁵³ Matthias Kennes, *In Israel, you’re 60 times more likely to have a COVID vaccine than in Palestine*, MSF, 22 February 2021, available at: <https://www.msf.org/stark-inequality-covid-19-vaccination-between-israel-and-palestine>.

⁵⁴ Al-Haq, Law in the Service of Man, Al Mezan Centre for Human Rights, Cairo Institute for Human Rights Studies, Palestinian Centre for Human Rights, non-governmental organizations in special consultative status, Joint Written Statement, Human Rights Council Forty-six session 22 February–19 March 2021, available at: https://cihrs.org/wp-content/uploads/2021/03/Israels-Medical-Negligence-Targeting-Palestinian-Prisoners-and-Detainees-During-COVID-19_jf.pdf; Civicus, *Civil Society Calls for Urgent Release of Palestinian Prisoners and Detainees in Israeli Prisons*, 22 April 2020, available at: <https://www.civicus.org/index.php/media-resources/news/4382-on-palestinian-prisoners-day-civil-society-calls-for-urgent-release-of-palestinian-prisoners-and-detainees-in-israeli-prisons>.

⁵⁵ Al-Haq, *Civil Society Groups Send Appeal to UN Special Procedures on the Rights and Dignity of Palestinian Workers in Israel during COVID-19*, 15 April 2020, available at: <https://www.alhaq.org/advocacy/16733.html>.

⁵⁶ Medical Aid for Palestinians (MAP), *Briefing Paper: COVID-19 & the Systemic Neglect of Palestinian in East Jerusalem*, July 2020, available at: <https://www.map.org.uk/campaigns/-3>; Al-Haq, *Racism and Institutionalised Discrimination in the Roll-Out of the COVID-19 Vaccine*, 18 January 2021, available at: <https://www.alhaq.org/advocacy/17767.html>.

⁵⁷ Al-Haq, *Racism and Institutionalised Discrimination in the Roll-Out of the COVID-19 Vaccine*, 18 January 2021, available at: <https://www.alhaq.org/advocacy/17767.html>.

⁵⁸ Rami Ayyub, *Israel Plans COVID Jobs for Palestinian Labourers and Settlement Workers*, 28 February 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-israel-palestinian-idUSKCN2AS0HJ>.

⁵⁹ Juessica Buxbaum, *In-depth : How Israeli industrial zones exploit Palestinian land and labour*, The New Arab, 11 March 2021, available at: <https://english.alaraby.co.uk/english/indepth/2021/3/11/how-israeli-industrial-zones-exploit-palestinian-land-and-labour?fbclid=IwAR1RAailMXvOrEH76a7UtbEWFgFWYcb4Rt4eDRbzJAUFLeZRTCHP4giHUeU>.

⁶⁰ France 24, *Gaza receives first Covid-19 vaccines after Israel delayed shipment*, 17 February 2021, available at: <https://www.france24.com/en/middle-east/20210217-gaza-receives-first-covid-19-vaccines-after-israel-delayed-shipment>; Oliver Holmes & Hazem Balousha, *Israel allows 2,000 Covid vaccine doses into Gaza after hold-up*, The Guardian, 17 February 2021, available at: <https://www.theguardian.com/world/2021/feb/17/israel-allows-1000-covid-vaccines-into-blockaded-gaza-after-hold-up>.

⁶¹ Maureen Clare Murphy, *Israel uses vaccines as bargaining chips*, Electronic Intifada, 16 February 2021, available at: <https://electronicintifada.net/blogs/maureen-clare-murphy/israel-uses-vaccines-bargaining-chips>.

19 pandemic.⁶² While the vaccines have enabled Israel to begin loosening restrictions in February 2021, there has been a sharp increase in the number of COVID-19 cases among Palestinians across the West Bank, and the Palestinian Authority has implemented another lockdown. With thousands of cases recorded on a daily basis, hospitals are functioning at more than 100% capacity.⁶³ As a result, some hospitals in the West Bank and East Jerusalem announced that cancer patients from the Gaza Strip could no longer be admitted.⁶⁴ United Nations (UN) Special Procedures mandate holders have already issued a statement calling on Israel to ensure equal access to COVID-19 vaccines for Palestinians on 14 January 2021; the experts stated that the right to health is a fundamental human right and that “the denial of an equal access to health care, such as on the basis of ethnicity or race, is discriminatory and unlawful.”⁶⁵ Moreover, on 26 March 2021, the Special Committee to Investigate Israeli Practices also urged Israel to fulfill its international legal obligation by facilitating vaccine access in the oPt.⁶⁶

9. In areas across the Middle East and North Africa (MENA), particularly in situations of conflict, challenges in realizing human rights, including the rights to health and life, have been aggravated due to the COVID-19 pandemic and its repercussions. As the world rolls out the vaccine, it has been reported that, “little more than one percent of the population of the entire region,” have received vaccines.⁶⁷ In conflict-affected countries in the MENA region, such challenges have increased and escalated.
10. In January 2021, reports highlighted that South Africa would pay more than double the price that the European Union (EU) paid for the AstraZeneca vaccine and for far fewer doses than it needs.⁶⁸ In South Africa, the first health care worker was vaccinated on 17 February 2021,

⁶² WHO, *WHO Concerned over Increasingly Overwhelmed Health Services in the Gaza Strip*, 17 April 2021, available at: <http://www.emro.who.int/palestine-press-releases/2018/who-concerned-over-increasingly-overwhelmed-health-services-in-the-gaza-strip-april-2018.html>.

⁶³ Zainah El-Haroun, *Palestinian hospitals fill up as Israel loosens COVID-19 restrictions*, Reuters, 9 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-israel-palestinian/palestinian-hospitals-fill-up-as-israel-loosens-covid-19-restrictions-idUSKBN2B128P>.

⁶⁴ Physicians for Human Rights - Israel, Tweet, 11 March 2021, available at: https://twitter.com/PHRIIsrael/status/1369955681428721664?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1369955681428721664%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Felectronicintifada.net%2Fblogs%2Fmaureen-clare-murphy%2Fvaccinating-palestinians-only-when-it-serves-israel (“There is an increase in infections, and a full occupancy in #Palestinian hospitals in the West Bank and Jerusalem. Two hospitals have announced that cancer patients from Gaza cannot be admitted. And yet, Israel is neglecting its responsibilities of supplying #vaccines to the oPt”).

⁶⁵ *Israel/OPT: UN experts call on Israel to ensure equal access to COVID-19 vaccines for Palestinians*, 14 January 2021, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26655&LangID=E>.

⁶⁶ The United Nations Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, *Special Committee to Investigate Israeli Practices Urges Israel to Facilitate COVID-19 Vaccines in oPt*, Press Release, 25 March 2021, available at: <https://www.un.org/unispal/document/special-committee-to-investigate-israeli-practices-urges-israel-to-facilitate-covid-19-vaccines-in-opt-press-release/>.

⁶⁷ Azad Essa, *Covid-19 vaccine: How the poor in the Middle East are being left behind*, Middle East Eye, 10 March 2021, available at: <https://www.middleeasteye.net/news/covid-vaccine-middle-east-apartheid-poor-left-behind>.

⁶⁸ Helen Sullivan, *South Africa paying more than double EU price for Oxford vaccine*, The Guardian, 22 January 2021, available at: <https://www.theguardian.com/world/2021/jan/22/south-africa-paying-more-than-double-eu-price-for-oxford-astrazeneca-vaccine>.

more than two months after the United Kingdom began vaccinating seniors.⁶⁹ There is also remaining uncertainty of exactly how the South African government will ensure non-citizens access vaccinations.⁷⁰

11. The case of Syria exemplifies the additional challenges faced in acquiring and ensuring access to vaccines in situations of conflict without ineffective international oversight. The Syrian government has repeatedly withheld humanitarian aid from its political opponents and civilians, a tactic at risk of being repeated in its distribution of vaccines.⁷¹ Full and equitable access to vaccines is further complicated by the geographic fragmentation of the country. North Syria, which remains divided and controlled by various parties including Turkish occupying forces and various armed non-state actors, still has only one border crossing open in the northwest for the delivery of aid.⁷² The Syrian government began vaccinations in early March 2021 after receiving 5,000 doses from a “friendly country”.⁷³
12. In Uganda, as of January 2021, the State had not yet engaged in meaningful public discussion of the country’s COVID-19 vaccine plans.⁷⁴ Uganda applied to COVAX on 7 December 2020.⁷⁵ According to the Ugandan Initiative for Social and Economic Rights, those in low-income countries should not have to wait for leftovers and even those vaccines that Uganda gets through COVAX will not be enough.⁷⁶ No country will receive enough doses to vaccinate more than 20% of its population under COVAX, as explained by Gavi, a leading partner in the facility.⁷⁷ The Permanent Secretary of the Ministry of Health indicated that from COVAX,

⁶⁹ Fatima Hassan, *Don't Let Drug Companies Create a System of Vaccine Apartheid*, Foreign Policy, 23 February 2021, available at: <https://foreignpolicy.com/2021/02/23/dont-let-drug-companies-create-a-system-of-vaccine-apartheid/>.

⁷⁰ Tshegofatso Mothapo, *South Africa belongs to all who live in it, and so does the right to be vaccinated against Covid-19*, Maverick Citizen, 10 February 2021, available at: <https://www.dailymaverick.co.za/article/2021-02-10-south-africa-belongs-to-all-who-live-in-it-and-so-does-the-right-to-be-vaccinated-against-covid-19/>.

⁷¹ Human Rights Watch, *Syria: Covid-19 Vaccine Access Should Be Expanded*, Fair - Press Release, 2 February 2021, available at: <https://www.hrw.org/news/2021/02/02/syria-covid-19-vaccine-access-should-be-expanded-fair>.

⁷² Human Rights Watch, *Syria: Covid-19 Vaccine Access Should Be Expanded*, Fair - Press Release, 2 February 2021, available at: <https://www.hrw.org/news/2021/02/02/syria-covid-19-vaccine-access-should-be-expanded-fair>.

⁷³ Patrick Kingsley, Ronen Bergman and Andrew E. Kramer, *Israel Secretly Agrees to Fund Vaccines for Syria as Part of Prisoner Swap*, New York Times, 20 February 2021, available at:

<https://www.nytimes.com/2021/02/20/world/middleeast/israel-syria-prisoner-swap-vaccines.html>; Anchal Vohra *Syria launches COVID vaccine drive as Israel questions swirl*, Al-Jazeera, 17 March 2021, available at: <https://www.aljazeera.com/news/2021/3/17/syria-launches-covid-vaccination-drive-amid-economic-challenges>

⁷⁴ Initiative for Social and Economic Rights (ISER), *The COVID-19 Vaccine and Uganda: Twelve Questions to Policy Makers*, January 2021, available at: https://www.iser-uganda.org/images/downloads/The_COVID_19_vaccine_and_Uganda_12_questions_to_policy_makers.pdf.

⁷⁵ Initiative for Social and Economic Rights, *The COVID-19 Vaccine and Uganda: Twelve Questions to Policy Makers*, January 2021, available at: https://www.iser-uganda.org/images/downloads/The_COVID_19_vaccine_and_Uganda_12_questions_to_policy_makers.pdf.

⁷⁶ ISER, *Government COVID-19 Vaccine Strategy Leaves Critical Questions Unanswered*, February 2021, p1, available at: https://www.iser-uganda.org/images/downloads/Government_COVID-19_Vaccine_Strategy_Leaves_Critical_Questions_Unanswered.pdf.

⁷⁷ “Subject to funding availability, funded countries would receive enough doses to vaccinate up to 20 per cent of their population in the longer term.” See: Seth Berkley, *Covax Explained*, Gavi, 3 September 2021, available at: <https://www.gavi.org/vaccineswork/covax-explained>.

Uganda decided to procure 18 million doses.⁷⁸ Since most vaccines require a dual dose, that allocation will only cover 9 million of the population of 46 million, or slightly more than 19%. This is not enough to achieve herd immunity, which requires a significant percentage of the population to be vaccinated. It would be misplaced to rely only on COVAX.⁷⁹ Furthermore, price disparities undermine Uganda's access to vaccines, as with other low income countries. According to a report from the Health Policy Watch, Uganda will be paying USD 7 per dose for its 18 million dose order of the AstraZeneca vaccine – a price that is 20% more than South Africa and roughly triple that being paid by the European Union – sparked anger and outrage around global medicines access advocates – and on social media channels.⁸⁰

13. In the United Kingdom, according to a statistician from the Office of National Statistics in England, “[v]accination rates are markedly lower amongst certain groups, in particular amongst people identifying as Black African and Black Caribbean, those identifying as Muslim, and disabled people.”⁸¹
14. In the United States, the Centers for Disease Control and Prevention highlighted in a report issued on 17 March 2021 that in, “the first 2.5 months of the program, vaccination coverage was lower in high vulnerability counties nationwide, demonstrating that additional efforts are needed to achieve equity in vaccination coverage for those who have been most affected by COVID-19.”⁸²
15. The case of Yemen illustrates the multi-layered challenges confronted in guaranteeing access to vaccines across the divided-geographical areas amid a looming famine, already-existing diseases, and a health system overwhelmed for several years, with less than half of the country's health facilities operating at full capacity, due to the war, economic collapse, deficiency in humanitarian funding, and political divisions of state and non-state actors.⁸³ According to MSF, within the last week of March 2021, Yemen was confronted with a tense influx of critically ill-COVID-19 patients in different parts, while no aspects of COVID-19 response are available.⁸⁴ The war and the lack of medical resources have restricted the reporting and

⁷⁸ ISER, *Government COVID-19 Vaccine Strategy Leaves Critical Questions Unanswered*, February 2021, p1, available at: https://www.iser-uganda.org/images/downloads/Government_Covid-19_Vaccine_Strategy_Leaves_Critical_Questions_Unanswered.pdf.

⁷⁹ ISER, *The COVID-19 Vaccine and Uganda: Twelve Questions to Policy Makers*, January 2021, available at: https://www.iser-uganda.org/images/downloads/The_COVID_19_vaccine_and_Uganda_12_questions_to_policy_makers.pdf.

⁸⁰ Esther Nakkazi, *Uganda Defends Price Paid For AstraZeneca COVID19 Vaccine; New Study Suggests Vaccine Could Cut Transmission By Two-Thirds*, 3 February, 2021, available at: <https://healthpolicy-watch.news/uganda-defends-astrazeneca-price-says-its-not-higher-than-other-countries/>.

⁸¹ *English vaccine take-up lower in minority groups, ONS says*, Reuters, 29 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-britain-vaccines-idUSKBN2BL148>.

⁸² Centers for Disease Control and Prevention, *County-Level COVID-19 Vaccination Coverage and Social Vulnerability — United States*, 14 December 2020– 1 March, 2021, Morbidity and Mortality Weekly Report, 17 March 2021, available at: <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e1.htm?s>.

⁸³ *Yemen gets first COVID-19 vaccines but is "at the back of the queue"*, 31 March 2021, available at: <https://www.reuters.com/article/health-coronavirus-yemen-vaccine-int/yemen-gets-first-covid-19-vaccines-but-is-at-the-back-of-the-queue-idUSKBN2BN1IS>.

⁸⁴ *Yemen gets first COVID-19 vaccines but is "at the back of the queue"*, 31 March 2021, available at: <https://www.reuters.com/article/health-coronavirus-yemen-vaccine-int/yemen-gets-first-covid-19-vaccines-but-is-at-the-back-of-the-queue-idUSKBN2BN1IS>.

testing of COVID-19 in all parts of Yemen. On 31 March 2021, Yemen received 360,000 doses of the AstraZeneca vaccine via the COVAX Facility.⁸⁵ Besides the allotted doses possibly being insufficient in number, other structural challenges concerning the ongoing conflict and the dire humanitarian situation in Yemen pose serious challenges. For example, one of the main challenges is the storage of the vaccine in Yemen, as different areas in the country face regular and complete power cuts. Since August 2010, there has been a major crisis in oil derivatives, which is needed to operate power stations and central refrigerators. Moreover, some of the areas are difficult to access such as Taiz, which is subject to two sieges imposed by two different parties to the conflict.

B. Proposed waiver of certain COVID-19-related intellectual property rights

16. On 2 October 2020, India and South Africa formally proposed a temporary waiver of certain Trade-Related Intellectual Property Rights (TRIPS) Agreement protections, “in relation to prevention, containment or treatment of COVID-19,” *inter alia* “[r]ecognising the need for unimpeded and timely access to affordable medical products including diagnostic kits, vaccines, medicines, personal protective equipment and ventilators for a rapid and effective response to the COVID-19 pandemic.”⁸⁶ The following month, South Africa provided examples of, “[intellectual property] issues and barriers in [the] COVID-19 pandemic.”⁸⁷ Delegations on the TRIPS Council have engaged in numerous discussions in response to the waiver proposal, with predominantly wealthier States from the Global North blocking textual negotiations and advancement of the initiative by repeatedly asking for further information at the World Trade Organisation (WTO), a largely consensus-driven body.⁸⁸
17. Importantly, the TRIPS waiver would not be limited to vaccines, but encompasses all medical products necessary for the prevention, containment, or treatment of COVID-19, such as diagnostic kits, medicines, personal protective equipment, or ventilators. The greater production of these products is curtailed by different rights granted via the TRIPS Agreement in addition to patents, such as the protection of undisclosed information, copyright and industrial design. The scale-up of vaccines and other medical products production to guarantee its universal and equitable access requires a global and comprehensive resolution, and the

⁸⁵ *Yemen gets first COVID-19 vaccines but is "at the back of the queue*, 31 March 2021, available at: <https://www.reuters.com/article/health-coronavirus-yemen-vaccine-int/yemen-gets-first-covid-19-vaccines-but-is-at-the-back-of-the-queue-idUSKBN2BN1IS>.

⁸⁶ WTO communication, *Waiver from certain provisions of the TRIPS agreement for the prevention, containment and treatment of COVID-19*, Communication from India and South Africa, 2 October 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

⁸⁷ WTO communication, *Examples of IP Issues and Barriers in COVID-19 Pandemic*, Communication from South Africa, Council on Trade-Related Aspects of Intellectual Property Rights, World Trade Organization, 23 November 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W670.pdf&Open=True>.

⁸⁸ WTO, *Members discuss TRIPS waiver request, exchange views on IP role amid a pandemic*, 23 February 2021, available at: https://www.wto.org/english/news_e/news21_e/trip_23feb21_e.htm ; and WTO, Zip Folder with waiver related communications, available at: <https://docs.wto.org/dol2fe/Pages/SS/DirectDocsFM.aspx?MeetingId=194325&Language=e>.

proposal for a waiver on certain TRIPS provisions provides a scenario for, “uninterrupted collaboration in development and scale up of production and supply and that collectively addresses the global challenge facing all countries”.⁸⁹

18. As of 22 March, 36 States were in opposition to the waiver proposal.⁹⁰ These States are Australia, Brazil, Japan, Norway, Singapore, Switzerland, United Kingdom, United States, El Salvador, and the following EU countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.⁹¹ Three States remain undecided: Canada, Chile, and Mexico.⁹² By contrast, there are 101 States who have either co-sponsored the WTO proposal for a waiver or expressed support.⁹³
19. Opposition to the WTO waiver comes even though this proposal could be a first step in attempts to scale up production of treatments and vaccinations against COVID-19 and accordingly opening up more opportunities for dissemination to a larger number of the world’s population and at a more reasonable and affordable lower cost. While the vaccine waiver is not expected to immediately and entirely address the inequitable access to vaccines worldwide, it will open doors for manufacturers around the world who may be able to speed up the production of vaccines.
20. According to a report on intellectual property rights by the United Nations Conference on Trade and Development (UNCTAD), “[i]nnovation-based pharmaceutical companies hold large patent portfolios to control production and marketing of their drugs worldwide. [...] While there is some degree of licensing in pharmaceuticals, innovation-based pharmaceutical companies are generally reluctant to lose control over their products, particularly the most profitable ones. In addition, licensing agreements often limit local production to the formulation of medicines while active ingredients are provided by the licensor.”⁹⁴
21. The EU, UK, the US, and other countries in the Global North where pharmaceutical giants are headquartered, have the most direct ability to regulate the rights-impacting conduct of these companies, in compliance with their State duty to protect the right to health and related

⁸⁹ WTO communication, *Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19—Responses to Questions*. Communication from the Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe, 15 January 2021, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W672.pdf&Open=True>.

⁹⁰ The proposal ([IP/C/W/669](https://www.wto.org/english/press/p/20201210_ip_waiver.htm)) was initially submitted by South Africa and India on 2 October. See WTO, *Members to continue discussion on proposal for temporary IP waiver in response to COVID-19*, 10 December 2020, available at: https://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm.

⁹¹ Médecins sans Frontières (MSF), *No Patents, No Monopolies in a Pandemic*, available at: <https://msfaccess.org/no-patents-no-monopolies-pandemic>.

⁹² Médecins sans Frontières (MSF), *No Patents, No Monopolies in a Pandemic*, available at: <https://msfaccess.org/no-patents-no-monopolies-pandemic>.

⁹³ Médecins sans Frontières (MSF), *No Patents, No Monopolies in a Pandemic*, available at: <https://msfaccess.org/no-patents-no-monopolies-pandemic>.

⁹⁴ United Nations Conference on Trade and Development (UNCTAD), *Intellectual Property: How Much Room is Left for Industrial Policy?* Discussion Papers, No. 223, October 2015, available at: https://unctad.org/system/files/official-document/osgdp20155_en.pdf.

human rights.⁹⁵ Nevertheless, the European Commission and member States, for example, recently discussed the possibility of the COVID TRIPS waiver more in terms of public relations than public health, according to documents reported by the Corporate Europe Observatory.⁹⁶

22. Corporate actors, through years of lobbying, contributed to shaping regulatory systems that enabled the effective commodification of the right to health, privatizing medical treatment and prevention into a profitable industry. In Europe, the Corporate Europe Observatory issued a 2019 report on the pharmaceutical industry ties to the European Commission noting that, “[t]hanks to this lobbying arsenal, the industry has succeeded in influencing the review into pharma incentives and rewards (such as intellectual property rules)...”⁹⁷ The industry in the US has also had a historically outsized impact on decisions regarding public health.⁹⁸ US-based Pfizer, for example, spent USD 11 million on federal US government lobbying in 2019 according to reports.⁹⁹ Pfizer was also a leader in lobbying rich governments to advance patent and other intellectual property protections.¹⁰⁰ Further, the pharmaceutical company spearheaded efforts to influence the adoption of intellectual property rights protections at the WTO through the TRIPS Agreement.¹⁰¹ According to a case study by several academics, US companies pushed to strengthen patent protections internationally dating back 1980, when the

⁹⁵ See UN *Guiding Principles on Business and Human Rights*, 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf; See also CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 16-17, available at: https://digitallibrary.un.org/record/1304491/files/E_C12_GC_24-EN.pdf; CESCR, *General Comment 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, par. 4, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjImC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL>.

⁹⁶ Corporate Europe Observatory, *Patently Absurd*, 11 March 2021, available at: <https://corporateeurope.org/en/2021/03/patently-absurd>.

⁹⁷ Corporate Europe Observatory, *High prices, poor access: What is Big Pharma fighting for in Brussels?* 9 May 2019, available at: https://corporateeurope.org/sites/default/files/2019-05/High%20Prices%2C%20Poor%20Access_Full%20report.pdf.

⁹⁸ See Alexander Zaitchik, *How Big Pharma Was Captured by the One Percent*, New Republic, 28 June 2018, available at: <https://newrepublic.com/article/149438/big-pharma-captured-one-percent>.

⁹⁹ Center for Responsive Politics, *Client Profile: Pfizer Inc*, 2019, available at: <https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000000138>.

¹⁰⁰ Mohamad Omar Gad, *Impact of Multinational Enterprises on Multilateral Rule Making: The Pharmaceutical Industry and the TRIPS Uruguay Round Negotiations*, 9 Law & Bus. Rev. Am. 667, 2003, available at: <https://core.ac.uk/download/pdf/147643063.pdf>; Achal Prabhala, Benny Kuruvilla, Burcu Kilic and Dana Brown, *We can't let the WTO get in the way of a 'people's vaccine'*, The Guardian, 15 October 2020, available at: <https://www.theguardian.com/commentisfree/2020/oct/15/peoples-vaccine-coronavirus-covid-wto>; Sarah Lazare, *Pfizer Helped Create the Global Patent Rules. Now it's Using Them to Undercut Access to the Covid Vaccine*, In These Times, 17 December 2021, available at: <https://inthesetimes.com/article/pfizer-covid-vaccine-world-trade-organization-intellectual-property-patent-access-medicines>.

¹⁰¹ Charan Devereaux, Robert Z. Lawrence and Michael D. Watkins, *Case Studies in U.S. Trade Negotiation*, Chapter 3 - Trade-Related Aspects of Intellectual Property Rights, available at: https://www.piie.com/publications/chapters_preview/392/03iie3624.pdf.

Paris Convention was being revised.¹⁰² According to an academic study, Pfizer chairman Edmund Pratt, who served on the President's Advisory Committee on Trade Negotiations during the Carter and Reagan administrations during the 1980s, was “...instrumental in arguing that intellectual property should be included on the Uruguay Round agenda,” that included the General Agreement on Tariffs and Trade talks, the negotiation that led to the establishment of the World Trade Organization in 1995.¹⁰³

23. Though global demand far outstrips current COVID-19 vaccine supply, many business actors remain publicly opposed to the WTO waiver that could open new avenues for manufacturing. The International Federation of Pharmaceutical Manufacturers & Associations (IFPMA), whose members include vaccine manufacturers such as Pfizer, AstraZeneca, Johnson & Johnson, and GlaxoSmithKlein, issued a statement¹⁰⁴ after the TRIPS waiver proposal by India and South Africa, arguing that patents and intellectual property must be protected. More recently, as reported by the Financial Times, “US business groups, including pharma industry lobbyists, are urging the Biden administration to resist pressure from developing nations to suspend intellectual property protections for Covid-19 vaccines.”¹⁰⁵ Several US senators also wrote to President Biden in support of protecting patents in order to guard, “American innovation.”¹⁰⁶ This comes despite life threatening shortfalls in the production and distribution of vaccines worldwide. On the other hand, a report from 21 March 2021 highlighted that House Democrats collected close to a hundred signatures on a letter in March 2021 urging Biden to support the WTO vaccine waiver, with Senators Bernie Sanders (I-Vt.) and Elizabeth Warren (D-Mass.) also weighing in on the need to scale up the production and distribution of vaccines.¹⁰⁷
24. Delays in COVID-19 vaccines production were evident in the example of AstraZeneca, which has faced scrutiny from the EU after it failed to meet its vaccines delivery targets due to what it said were production problems.¹⁰⁸ At the same time, the company has been a proponent of intellectual property rights and patent protection. In May 2020, its chief executive stated, “I think [intellectual property] is a fundamental part of our industry, and if you don’t protect

¹⁰² Charan Devereaux, Robert Z. Lawrence and Michael D. Watkins, *Case Studies in U.S. Trade Negotiation*, Chapter 3 - Trade-Related Aspects of Intellectual Property Rights, p. 47, available at: https://www.piie.com/publications/chapters_preview/392/03iie3624.pdf.

¹⁰³ Charan Devereaux, Robert Z. Lawrence and Michael D. Watkins, *Case Studies in U.S. Trade Negotiation*, Chapter 3 - Trade-Related Aspects of Intellectual Property Rights, p. 49 available at: https://www.piie.com/publications/chapters_preview/392/03iie3624.pdf.

¹⁰⁴ IFPMA, *IFPMA Statement on “Intellectual Property and COVID-19”*, 16 October 2020, available at: <https://www.ifpma.org/resource-centre/ifpma-statement-on-intellectual-property-and-covid-19/>.

¹⁰⁵ Aime Williams, Biden urged to keep patent protections for Covid vaccines, Financial Times, 30 March 29, 2021, available at: <https://www.ft.com/content/9b544e07-d173-4d51-8f4a-0dd970c866e6?list=intlhomepage>.

¹⁰⁶ *Senators to President Biden: Protect American COVID Innovation*, 4 March 2021, available at: <https://www.cotton.senate.gov/news/press-releases/senators-to-president-biden-protect-american-covid-innovation>.

¹⁰⁷ Doug Palmer, *Poor countries are fighting with drug companies over vaccines. Now Biden must pick a side*, 21 March, available at: <https://www.politico.com/news/2021/03/21/coronavirus-vaccine-wto-477272>.

¹⁰⁸ Jillian Deutsch, *Commission’s vaccine contract with AstraZeneca ties EU’s hands on lawsuits*, Politico, 19 February 2021, available at: <https://www.politico.eu/article/coronavirus-vaccine-europe-commission-contract-astrazeneca-ties-hands-lawsuits/>.

[intellectual property], then essentially there is no incentive for anybody to innovate.”¹⁰⁹ According to a report by the Guardian, about one year ago, researchers at Oxford University’s Jenner Institute stated that they intended to allow any manufacturer, anywhere, the rights to their COVID-19 vaccine when it was developed.¹¹⁰ However, later that year, the Bill & Melinda Gates Foundation reportedly encouraged the signing off of exclusive rights to a pharmaceutical company that would manufacture and sell the vaccine, leading to the partnership with AstraZeneca.¹¹¹

25. While wealthier Global North States have argued that the TRIPS Agreement already has flexibilities to address the pandemic,¹¹² the UN Committee on Economic, Social and Cultural Rights (CESCR) has recognized that, “these flexibilities operate ‘case by case’ through decisions taken by specific countries in relation to specific products and with legal requirements that are not appropriate for such an exceptional health crisis as the one created by this pandemic.”¹¹³ As explained by CESCR:¹¹⁴

The insufficient supply of vaccines and its deeply unequal global distribution necessitates urgent additional measures to be taken also in relation to the intellectual property regime. In that context, some States have proposed in the WTO¹¹⁵ a temporary waiver for some of the provisions of the TRIPS agreement for vaccines and treatment for COVID-19, at least while global herd immunity for COVID-19 is achieved and the pandemic is considered under control. This proposal has been supported by a number of independent experts from the Human Rights Council’s special procedures, the expert

¹⁰⁹ Sarah Newey, *WHO patent pool for potential Covid-19 products is ‘nonsense’, pharma leaders claim*, 29 May 2020, available at: <https://www.telegraph.co.uk/global-health/science-and-disease/patent-pool-potential-covid-19-products-nonsense-pharma-leaders/>.

¹¹⁰ Achal Prabhala and Leena Menghaney, *The world’s poorest countries are at India’s mercy for vaccines. It’s unsustainable*, The Guardian, 2 April 2021, available at: <https://www.theguardian.com/commentisfree/2021/apr/02/india-in-charge-of-developing-world-covid-vaccine-supply-unsustainable>

¹¹¹ Christopher Garrison, *How the ‘Oxford’ Covid-19 Vaccine Became the ‘AstraZeneca’ Covid-19 Vaccine*, Medicines Law and Policy, 5 October 2020, p. 7, available at: <https://medicineslawandpolicy.org/wp-content/uploads/2020/10/How-the-Oxford-Covid-19-Vaccine-became-the-AstraZeneca-Covid-19-Vaccine-Final.pdf>.

¹¹² IFPMA, *IFPMA Statement on “Intellectual Property and COVID-19”*, 16 October 2020, available at: <https://www.ifpma.org/resource-centre/ifpma-statement-on-intellectual-property-and-covid-19/>.

¹¹³ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 10, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

¹¹⁴ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 12, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

¹¹⁵ See *South Africa’s Statement at the WTO TRIPS Council*, 30 July 2020, available at: <https://www.keionline.org/33593>.

mechanism on the right to development,¹¹⁶ WHO,¹¹⁷ a growing number of States and an increasing number of scientific and humanitarian organizations.

26. Another way of obtaining rights to produce patented COVID-19 vaccines as prescribed by the WTO is for States to issue compulsory licences for production in-country. In reality, the process of issuing compulsory licensing faces complex, costly, and often inefficient negotiations. They are case-by-case and product-by-product, and they have to be issued by each country – many of which do not have technical and institutional capacity to deal with these processes.¹¹⁸ A compulsory license further applies only to already patented technologies and not those in the pipeline, and they mainly serve to supply domestic markets of countries that already have the capacity to manufacture the patented product.¹¹⁹ The case of compulsory licenses to supply countries without productive capacity is even more complex and costly.¹²⁰ In the face of an immediate global threat, the compulsory license mechanism severely curtails the possibility of technical coordination between companies and countries. Countries co-sponsoring the TRIPS waiver have explained in detail why the compulsory licensing is an unfit mechanism to address a global emergency as the current COVID-19 pandemic.¹²¹
27. Voluntary mechanisms regarding intellectual property have also not been adequate to face the pandemic. A WTO communication from the plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe dated 15 January 2021 states:

[n]ine months into the pandemic voluntary approaches have proven to be insufficient. For instance, despite receiving significant public funding of at least USD 70.5 million, Gilead has signed secretive bilateral licenses for Remdesivir (a therapeutic for COVID-19 treatment) with a few generic companies of its choosing that excludes nearly half of the world's population from its licensed

¹¹⁶ *Statement by UN Human Rights Experts on universal access to vaccines is essential for prevention and containment of COVID-19 around the world*, 9 November 2020, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>; see also *COVID-19: UN experts urge WTO cooperation on vaccines to protect global public health*, 1 March 2021, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26817&LangID=E>.

¹¹⁷ Tedros Adhanom Ghebreyesus, *A 'me first' approach to vaccination won't defeat Covid*, *The Guardian*, 5 March 2021, available at: <https://www.theguardian.com/commentisfree/2021/mar/05/vaccination-covid-vaccines-rich-nations>.

¹¹⁸ WTO communication, *Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19—Responses to Questions*, Communication from the Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe, 15 January 2021, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W672.pdf&Open=True>.

¹¹⁹ WTO communication, *Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19—Responses to Questions*, Communication from the Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe, 15 January 2021, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W672.pdf&Open=True>.

¹²⁰ Henrique Zeferino de Menezes, *The TRIPS waiver proposal: an urgent measure to expand access to the COVID-19 vaccines*, South Centre Research Paper 129, March 2021, available at: <https://www.southcentre.int/wp-content/uploads/2021/03/RP-129.pdf>.

¹²¹ WTO communication, *Response to questions on intellectual property challenges experienced by members in relation to COVID-19 in document IP/C/W/671*. Communication from the Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe, 15 January 2021, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W673.pdf&Open=True>.

territories. Much of Gilead's supply has also been reserved for very rich nations. As a result, to date, most developing countries have barely received any supply of Remdesivir. The prices of Remdesivir are also prohibitively high."¹²²

Gilead claimed lack of supply chain coordination was the barrier to wider availability, not limited licensing.¹²³ In a window onto the pitfalls of limited manufacturing chains, India has recently banned exports of Remdesivir while it deals with a COVID-19 surge.¹²⁴ The United States government spent USD 162 million on Remdesivir development but holds no patents.¹²⁵ In another example, in a WTO communication prepared by South Africa dating back to November 2020, numerous countries--including Albania, Armenia, Australia, Azerbaijan, Belarus, Brazil, Canada, China, Indonesia, Japan, Kazakhstan, Republic of Korea, Kyrgyz Republic, Malaysia, Republic of Moldova, Nigeria, North Macedonia, Russian Federation, Serbia, Singapore, South Africa, Tajikistan, Thailand, Turkey, Turkmenistan, and Vietnam--requested use of AT-527 and similar compounds for RNA virus treatment (other than HCV). Not one country was granted "rights" for use as of the time that communication was made.¹²⁶

28. A recently adopted Resolution of the UN Human Rights Council, led by Ecuador and States of the Non-Aligned Movement that addresses COVID vaccines calls for, "equitable, affordable, timely, and universal access by all countries," reaffirms vaccine access as a protected human right and openly acknowledges, "unequal allocation and distribution among countries."¹²⁷ The resolution urges all States, individually and collectively, to "remove unjustified obstacles restricting exports of COVID-19 vaccines," and to "facilitate the trade, acquisition, access and distribution of COVID-19 vaccines," for all. However, despite the protestations of civil society organizations involved in deliberations about the resolution, the resolution only restates the right for States to utilize TRIPS flexibilities, as opposed to endorsing such measures as a best practice for realizing State human rights obligations. This tepid approach--which follows principles of international trade while, ironically given the

¹²² WTO communication, *Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19--Responses to Questions*, Communication from the Plurinational State of Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, the Bolivarian Republic of Venezuela and Zimbabwe, 15 January 2021, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W672.pdf&Open=True>.

¹²³ Svět Lustig Vijay, *Gilead Says Remdesivir Shortages Due To Supply Chain Issues, Civil Society Argues For Wider Licensing*, Health Policy Watch, 3 September 2020, available at: <https://healthpolicy-watch.news/gilead-says-remdesivir-shortages-due-to-supply-chain-issues-civil-society-argues-for-wider-licensing/>.

¹²⁴ Bibhudatta Pradhan, *Prognosis: India Bans Exports of Covid Drug Remdesivir Amid Virus Surge*, 11 April 2021, available at: <https://www.bloomberg.com/news/articles/2021-04-11/india-bans-exports-of-covid-drug-remdesivir-amid-virus-surge>.

¹²⁵ Christopher Rowland, United States spent \$162 million on remdesivir development but holds no patents, review finds, Washington Post, 1 April 2021, available at: <https://www.washingtonpost.com/business/2021/04/01/covid-drug-remdesivir-gilead/>.

¹²⁶ WTO communication, *Examples of IP Issues and Barriers in COVID-19 Pandemic*, Communication from South Africa, Council on Trade-Related Aspects of Intellectual Property Rights, World Trade Organization, 23 November 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W670.pdf&Open=True>

¹²⁷ UN Human Rights Council, *Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic*, Resolution, 17 March 2021, Preamble, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/066/56/PDF/G2106656.pdf?OpenElement>.

resolution emanates from the Human Rights Council, ignoring human rights standards--is inconsistent with the resolution's otherwise firm grounding of vaccine access in human rights. The resolution also inexplicably fails to address corporate responsibilities, including those of pharmaceutical companies, to respect the right to health in terms of the UN Guiding Principles on Business and Human Rights, and States' corresponding duty to protect the right to health through adopting adequate regulatory measures. These deficiencies are an illustration of a larger problem of States failing to fully and adequately center their human rights obligations with regard to COVID-19 responses worldwide. The subtle but important phrasing of the exercise of TRIPS flexibilities as a "right of States" rather than as one of the optimal ways of fulfilling an obligation, exposes the degree to which attitudes by State policymakers and legal advisors are out of sync with the human rights obligations States willingly assumed by becoming party to treaties like the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

C. Vaccine nationalism and COVAX

29. In addition to State and business opposition to the WTO COVID-19 waiver, vaccine nationalism is another serious factor impacting the inequitable access. On 9 November 2020, independent UN human rights experts decried COVID-19 vaccine hoarding, saying that there is no room for nationalism in the distribution of the vaccine and calling for equitable access for all.¹²⁸ They explained that, "[a] me-first approach might serve short-term political interests, but it is self-defeating and will lead to a protracted recovery, with trade and travel continuing to suffer."¹²⁹ According to a recent estimate, at least 85 poor countries will not have significant access to COVID-19 vaccines before 2023.¹³⁰ As COVID-19 continues to spread globally, there is a dire need for vaccines. In February 2021, only 10 countries accounted for the administration of 75% of vaccinations.¹³¹ While COVAX facility is meant to accelerate access to vaccinations in low- and middle- income countries, the programme alone will not ensure the equitable distribution of COVID-19 vaccines worldwide, and certainly not at the pace required to meet the scale of the challenge posed by the pandemic. Of concern, in a recent statement, the WHO announced delays in their COVAX vaccination programme.¹³²

¹²⁸ *Statement by UN Human Rights Experts on universal access to vaccines is essential for prevention and containment of COVID-19 around the world*, 9 November 2020, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>.

¹²⁹ Tedros Adhanom Ghebreyesus, *A 'me first' approach to vaccination won't defeat Covid*, The Guardian, 5 March 2021, available at: <https://www.theguardian.com/commentisfree/2021/mar/05/vaccination-covid-vaccines-rich-nations>.

¹³⁰ *More than 85 poor countries will not have widespread access to coronavirus vaccines before 2023*, The Economist, 27 January 2021, available at: <https://www.eiu.com/n/85-poor-countries-will-not-have-access-to-coronavirus-vaccines/>.

¹³¹ UN, *COVID-19 vaccination 'wildly uneven and unfair': UN Secretary-General*, 17 February 2021, available at: <https://news.un.org/en/story/2021/02/1084962>.

¹³² WHO, *COVAX updates participants on delivery delays for vaccines from Serum Institute of India (SII) and AstraZeneca*, 25 March 2021, available at: [https://www.who.int/news/item/25-03-2021-covax-updates-participants-on-delivery-delays-for-vaccines-from-serum-institute-of-india-\(sii\)-and-astrazeneca](https://www.who.int/news/item/25-03-2021-covax-updates-participants-on-delivery-delays-for-vaccines-from-serum-institute-of-india-(sii)-and-astrazeneca).

30. COVAX, which is the vaccine pillar of the Access to COVID-19 Tools (ACT) Accelerator, is a commitment coordinated by Gavi, the WHO, and CEPI that aims at fair distribution of the vaccine to protect people globally. The COVAX facility, through which self-financing economies and funded economies can participate, enables States to commit money and pool purchasing power to procure allotments from vaccine manufacturers and negotiate their pricing. Within this there is also a separate funding mechanism, the Gavi COVAX Advance Market Commitment (AMC), which supports access to COVID-19 vaccines for 92 lower-middle and low-income economies.
31. However, COVAX operates in a two-tiered system, with self-financing (i.e. wealthier) States “guaranteed sufficient doses to protect a certain proportion of their population, depending upon how much they buy into it,” while funded (i.e. lower-income) States, “[s]ubject to funding availability...will receive enough doses to vaccinate up to 20 per cent of their population in the longer term.”¹³³ COVAX has been so far seriously underfunded, with one of its Council members stating, “the most wealthy countries need to step up and fill that gap.”¹³⁴ The troubles faced by the COVAX initiatives illustrate the pitfalls of relying on notions of voluntary international aid, instead of human rights duties of international cooperation.
32. According to Gavi, one of the co-leads with the World Health Organization (WHO) on the COVAX programme, no country will receive enough doses to vaccinate more than 20% of its population until all countries have been offered doses to vaccinate 20% of their population.¹³⁵ This means that the vaccination of the percentage of individuals required for herd immunity in countries relying on COVAX vaccines could take years. Put in plain words, a healthy young adult in one of the richer countries that disproportionately procured vaccines beyond COVAX is more likely to get the COVID-19 vaccine before even healthcare and other essential workers in one of the lower-income countries. By Gavi’s estimate, COVAX is only likely to support 27% of populations in lower-income States by the end of 2021,¹³⁶ leaving billions at continued risk of contracting COVID-19, falling seriously ill, dying or suffering lasting health harms.
33. African countries are also able to access vaccines through AVATT, the COVID-19 African Vaccine Acquisition Task Team, an initiative by the African Union to secure vaccines for

¹³³ Seth Berkley, *Covax Explained*, Gavi, 3 September 2021, available at: <https://www.gavi.org/vaccineswork/covax-explained>.

¹³⁴ Emma Farge, *U.S. alone won't fill COVAX funding gap, lead official says*, Reuters, 22 January 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-who-covax/u-s-alone-wont-fill-covax-funding-gap-lead-official-says-idUSKBN29R1Q3>; see also, Jenny Lei Ravelo, *Is COVAX part of the problem or the solution?*, Devex, 11 March 2021, available at: <https://www.devex.com/news/is-covax-part-of-the-problem-or-the-solution-99334>; Jenny Lei Ravelo, *With scarce funding for ACT-A, 'everything moves slower': WHO's Bruce Aylward*, Devex, 22 February 2021, <https://www.devex.com/news/with-scarce-funding-for-act-a-everything-moves-slower-who-s-bruce-aylward-99195>.

¹³⁵ Seth Berkley, *Covax Explained*, Gavi, 3 September 2021, available at: <https://www.gavi.org/vaccineswork/covax-explained>, see also: Gavi, *First Round of Allocation: AstraZeneca / Oxford Vaccine (manufactured by AstraZeneca & licensed and manufactured by Serum Institute of India) Feb-May 2021*, available at: <https://www.gavi.org/sites/default/files/covid/covax/COVAX-First-round-allocation-of-AZ-and-SII.pdf>.

¹³⁶ Priya Joi and James Fulker, *COVAX Supply Forecast reveals where and when COVID-19 vaccines will be delivered*, 29 January 2021, available at: <https://www.gavi.org/vaccineswork/covax-supply-forecast-reveals-where-when-covid-19-vaccines-will-be-delivered>; Fatima Hassan, *Don't Let Drug Companies Create a System of Vaccine Apartheid*, Foreign Policy, 23 February 2021, available at: <https://foreignpolicy.com/2021/02/23/dont-let-drug-companies-create-a-system-of-vaccine-apartheid/>.

Africa. As of 3 February 2021, AVATT has secured about a billion doses, of these, 700 million of which are from COVAX, and therefore subject to all of the above concerns about delays.¹³⁷ Of note, AVATT recently secured 300 million Sputnik V doses to its COVID-19 vaccine portfolio, and further signed the purchase of 400 millions COVID-19 vaccine doses in agreement with Johnson & Johnson through the AVATT programme.¹³⁸

34. An analysis published by the Transnational Institute International (TNI) strongly critiqued COVAX and highlighted that at its core, the multistakeholder initiative caters to an economic system that prioritizes profit, and thus certain States with capital, over the public good and the rights to life and health. In his words:

[i]n the context of a structurally weak global health system, it is clear that any global vaccine governance system was going to face a lot of challenges. But it is also clear that multistakeholder governance is not the way to govern vaccine distribution, vaccine production, or the delivery of the vaccine to the arms of people around the globe. Multistakeholderism is premised on marginalizing governments, inserting business interests directly into the global decision-making process, and obfuscating accountability. Over the centuries, the legal concepts of state responsibility, state obligation, and state liability have served to underline, for better or worse, governments' legal decision-making affecting their citizen's health, their over-all care, and the care that needs to be extended to non-citizens. In the corporate world, there are legally explicit standards on responsibilities and liabilities. No such standards of responsibility, obligation or liability exist for participants in multistakeholder bodies. The multiple layers of the four multistakeholder bodies "overseeing" the multistakeholder COVAX program make it truly obscure who even has moral obligations, even when COVAX makes profound life decisions for hundreds of millions.¹³⁹

35. While States have an obligation to ensure that human rights are indeed enjoyed universally and applied consistently and without discriminations domestically and extraterritorially,¹⁴⁰ many are practicing "vaccine nationalism" by making decisions about vaccine procurement for their own populations that have disproportionately negative impacts on the rights of people in other countries. These States have failed morally and legally to ensure the equitable access to COVID-19 vaccines globally.

¹³⁷ Khanyi Mlaba, *Africa Just Secured 1 Billion COVID-19 Vaccine Doses*, Global Citizen, 3 February 2021, available at: <https://www.globalcitizen.org/en/content/how-will-africa-get-more-vaccines-covid-19/>.

¹³⁸ *Africa Signs Historic Agreement with Johnson & Johnson for 400 Million Doses of COVID-19 Vaccines*, Janngo, 30 March 2021, available at: <https://www.janngo.com/africa-signs-historic-agreement-with-johnson-johnson-for-400-million-doses-of-covid-19-vaccines/>; *African Union member states accelerates online pre-orders as AMSP adds 300 million Sputnik V doses to its COVID-19 vaccine portfolio*, Janngo, 19 February 2021, available at: <https://www.janngo.com/african-union-member-states-accelerates-online-pre-orders-as-ampsp-adds-300-million-sputnik-v-doses-to-its-covid-19-vaccine-portfolio/>.

¹³⁹ Harris Gleckman, *COVAX: A global multistakeholder group that poses political and health risks to developing countries and multilateralism*, Transnational Institute, 1 April 2021, available at: <https://longreads.tni.org/covax>.

¹⁴⁰ The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, FIAN International, January 2013, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

36. For example, as of December 2020, Canada had bought more doses per capita than anyone else, enough to vaccinate every single Canadian five times over.¹⁴¹ Despite this, Canada has also requested that it promptly receive its 20% supplies from the COVAX programme, though there are many other countries that would have little access to vaccines.¹⁴²
37. In early 2021, the European Union (EU) attempted to pass legislation that would grant it control over exports of COVID-19 vaccines manufactured in Europe; following outcry by several Western countries that would have been impacted, such as the United Kingdom, the legislation is on pause.¹⁴³
38. Israel has categorically refused to supply the Palestinian population with COVID-19 vaccines under Israeli occupation, even when a surplus of these vaccines is available and despite its legal obligation under the Fourth Geneva Convention to the people under its jurisdiction.¹⁴⁴ Instead, Israel is using the vaccine as a political tool, rewarding States that recognize Jerusalem as Israel's capital, in clear contravention of international law.¹⁴⁵ After receiving criticism, Israel's vaccine program for allies was reportedly suspended.¹⁴⁶ Despite an appeal by Palestinian human rights organization Al-Haq calling out Israeli policies of vaccine systemic discrimination,¹⁴⁷ Pfizer continued to supply Israel with vaccines.¹⁴⁸
39. The United Kingdom (UK) has been at the forefront of Western countries that have purchased the vaccine in abundant quantities to ensure that its nationals get priority in vaccinations at a time when there is a dire need worldwide to immunise populations globally,

¹⁴¹ Gill Prabhjote, *Canada has enough COVID-19 vaccine doses to cover each citizen five times over while the fate of 67 poor countries remains undecided*, Business Insider, 9 December 2020, available at:

<https://www.businessinsider.in/science/health/news/canada-has-enough-covid-19-vaccine-doses-to-cover-each-citizen-five-times-over-while-the-fate-of-67-poor-countries-remains-undecided/articleshow/79645493.cms>.

¹⁴² *Covax: Canada defends taking vaccines from sharing scheme*, BBC News, 4 February 2021, available at:

<https://www.bbc.com/news/world-us-canada-55932997>; Michael Safi and Leyland Cecco, *Canada takes Covid vaccines from Covax program despite side deals*, The Guardian, 3 February 2021, available at: <https://www.theguardian.com/global-development/2021/feb/03/canada-to-receive-significant-haul-of-covid-vaccines>.

¹⁴³ BBC, *Coronavirus: WHO criticises EU over vaccine export controls*, 30 January 2021, available at:

<https://www.bbc.com/news/world-europe-55860540>.

¹⁴⁴ Human Rights Watch, *Israel: Provide Vaccines to Occupied Palestinians*, 17 January 2021, available at:

<https://www.hrw.org/news/2021/01/17/israel-provide-vaccines-occupied-palestinians>; *Palestinian and Israeli human rights organizations has submitted a petition before the Israeli Supreme Court demanding that Israel provide vaccines to the Palestinians in the occupied West Bank and Gaza*, Middle East Monitor, 26 March 2021, available at:

<https://www.middleeastmonitor.com/20210326-israel-supreme-court-petition-calls-for-palestinians-to-get-vaccine/>.

¹⁴⁵ Al-Haq, *Al-Haq Reminds Pfizer of its International Obligations and Calls for Support for Non-Discrimination*, 17 January 2021, available at: <https://www.alhaq.org/advocacy/17777.html>; Fatima Bhutto, *The world's richest countries are hoarding vaccines. This is morally indefensible*, The Guardian, 17 March 2021, available at:

<https://www.theguardian.com/commentisfree/2021/mar/17/rich-countries-hoarding-vaccines-us-eu-africa>.

¹⁴⁶ Raf Sanchez and Paul Goldman, *Israel suspends plan to give Covid vaccines to allies abroad before most Palestinians*, NBC News, 26 February 2021, available at:

<https://www.nbcnews.com/news/world/israel-suspends-plan-give-covid-vaccines-allies-abroad-most-palestinians-n1258933>.

¹⁴⁷ Al-Haq, *Al-Haq Reminds Pfizer of its International Obligations and Calls for Support for Non-Discrimination*, 17 January 2021, available at: <https://www.alhaq.org/advocacy/17777.html>.

¹⁴⁸ *Pfizer CEO to visit Israel in March — report*, The Times of Israel, 21 February 2021, available at:

https://www.timesofisrael.com/liveblog_entry/pfizer-ceo-to-visit-israel-in-march-report/

whatever their nationality.¹⁴⁹ In an article published on 24 March 2021, British Prime Minister Johnson was quoted saying to a meeting of conservative Members of Parliament that, “the reason [the United Kingdom] have the vaccine success is because of capitalism, because of greed, my friends”; a government source said the Prime Minister was referring to the profit motive driving companies to develop new products.¹⁵⁰

40. As of 11 March 2021, the United States of America (US) was sitting on 10 million doses of AstraZeneca vaccines that have not been approved yet for use; these could be exported to countries that need it and could administer it immediately, as the US was in line for millions of other vaccine doses from many different vaccine manufacturers.¹⁵¹ After facing political pressure, the US announced it would donate 4 million doses of the AstraZeneca vaccines to Mexico and Canada.¹⁵² On 2 April, news reports highlighted a statement by Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases and chief medical adviser to the White House, that indicated the US might not even need AstraZeneca.¹⁵³ On 10 March 2021, President Biden instructed his administration to purchase another 100 million vaccines from Johnson and Johnson.¹⁵⁴ Four days prior to this purchase, President Biden said in a speech that The United States will have enough Covid-19 vaccine doses to cover every adult by mid-May 2021 to cover every adult.¹⁵⁵ The announcement by the United States government therefore means that it had bought enough vaccine doses from three major pharmaceuticals, Moderna, Pfizer and Johnson & Johnson, to vaccinate approximately 500 million people, about 60% oversupply for the entire eligible population.¹⁵⁶ The United States is part of “the Quad,” along with Japan, Australia, and India. The Quad is an informal working group collaborating to increase manufacturing capacity. Nevertheless, even as members of the

¹⁴⁹ Ashley Kirk, Finbarr Sheehy and Cath Levett, *Canada and UK among countries with most vaccine doses ordered per person*, The Guardian, 29 January, 2021, available at: <https://www.theguardian.com/world/2021/jan/29/canada-and-uk-among-countries-with-most-vaccine-doses-ordered-per-person>.

¹⁵⁰ Nick Dearden, *Greed is the problem, not the solution, for vaccine woes*, Al-Jazeera, 24 March 2021, available at: <https://www.aljazeera.com/opinions/2021/3/24/the-greed-is-the-problem-not-the-solution-for-vaccine-woes>.

¹⁵¹ Noah Weiland and Rebecca Robbins, *The U.S. Is Sitting on Tens of Millions of Vaccine Doses the World Needs*, New York Times, 11 March 2021, available at: <https://www.nytimes.com/2021/03/11/us/politics/coronavirus-astrazeneca-united-states.html>.

¹⁵² Jeff Mason, *U.S. to share 4 million doses of AstraZeneca COVID-19 vaccine with Mexico, Canada*, Reuters, 28 March 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-usa-mexico-exclusi/exclusive-u-s-plans-to-send-four-million-doses-of-astrazeneca-vaccine-to-mexico-canada-official-idUSKBN2BA22S?il=0>.

¹⁵³ Julie Steenhuisen, *Exclusive: Fauci says U.S. may not need AstraZeneca COVID-19 vaccine*, Reuters, 2 April 2021, available at: <https://www.reuters.com/article/us-health-coronavirus-astrazeneca-exclus/exclusive-fauci-says-u-s-may-not-need-astrazeneca-covid-19-vaccine-idUSKBN2BO6XS>.

¹⁵⁴ Geoff Bennett and Shannon Pettypiece, *Biden announces plan to purchase additional 100 million Johnson and Johnson Covid vaccine doses*, NBC News, 10 March 2021, available at: <https://www.nbcnews.com/politics/white-house/biden-announce-deal-additional-100-million-johnson-johnson-covid-vaccine-n1260408>.

¹⁵⁵ Joe Walsh, *Biden Now Promises Vaccines For Every Adult By Mid-May — Weeks Earlier Than Expected*, Forbes, 6 March 2021, available at: <https://www.forbes.com/sites/joewalsh/2021/03/06/biden-now-promises-vaccines-for-every-adult-by-mid-may---weeks-earlier-than-expected/?sh=6697ccba4e78>.

¹⁵⁶ Jessica Glenza, *'Over-supplied' US faces pressure to send Covid vaccine doses to less wealthy countries*, The Guardian, 13 March 2021, available at: <https://www.theguardian.com/world/2021/mar/13/us-faces-pressure-send-covid-vaccine-doses-less-wealthy-countries-biden>.

Quad, the US is not willing to off-load their stockpiles of vaccines because, “it is part of a plan to be ‘over-prepared and over-supplied.’”¹⁵⁷

D. Financial deficiencies in international cooperation and domestic prioritization for ESCR

41. Alongside addressing and limiting the harmful impact of intellectual property barriers, there is a simultaneous need for additional forms of international cooperation in order to fully resource universal and equitable vaccine access around the world. Direct resource transfers, whether through bilateral or multilateral support, are a key element of this.
42. Although some steps have been taken to marshal resources for global vaccine procurement and distribution, such as, for example, through the development of the COVAX facility, significantly greater transfers will need to take place for vaccinations to take place equitably and in a timely manner on a global scale. Projections indicate that it may potentially take most countries in the Global South until 2024 to fully vaccinate their populations at the current rate.¹⁵⁸ And as already indicated, even COVAX will be severely limited in its near-term ability to provide a sufficient number of vaccines to eligible States.
43. Donor countries should substantially increase the financial support they are providing to COVAX and other international mechanisms that are in keeping with the human rights obligation of international cooperation.
44. However, this manner of support and cooperation alone will be insufficient in generating the fiscal space necessary for most lower and lower-middle income countries to address the human rights consequences of the current crisis. This means not only procuring a sufficient amount of vaccines, but also ensuring that their health systems have the capacity to distribute those vaccines in an equitable manner in accordance with the rights to life, health, benefits of scientific progress, and substantive equality.
45. In its recent statement on vaccine access, CESCR explained:

in order to ensure access to vaccines for COVID-19, States must: [...] secondly, guarantee physical accessibility to vaccines, especially for marginalized groups and people living in remote areas, using both State-run and private channels and through strengthening the capacity of health systems to deliver vaccines; thirdly, guarantee affordability or economic accessibility for all, including by providing vaccines free of charge, at least for lower income persons and the poor [...]

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¹⁵⁷ Jessica Glenza, *'Over-supplied' US faces pressure to send Covid vaccine doses to less wealthy countries*, The Guardian, 13 March 2021, available at: <https://www.theguardian.com/world/2021/mar/13/us-faces-pressure-send-covid-vaccine-doses-less-wealthy-countries-biden>.

¹⁵⁸ *The EIU's latest vaccine rollout forecasts*, The Economist, 5 March 2021, available at: <https://on-site.eiu.com/eiu-latest-vaccine-rollout-forecasts/>.

¹⁵⁹ CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx.

46. Without broader international cooperation measures that allow for the mobilization of adequate financing, many Global South health systems will not be able to ensure that health facilities, goods and services are available, accessible, acceptable and of good quality for all, without discrimination in keeping with the right to health. Such required international cooperation would complement States' obligations to use maximum available resources for the realization of the right to health as a matter of domestic prioritization.

E. The commodification of information and technology

47. In addition to supporting a COVID-19 vaccine patent waiver via the WTO, pharmaceutical companies should participate in open and free sharing of know-how, technology, and material inputs for vaccine production.¹⁶⁰ However, business actors, along with wealthier States, have generally opposed such initiatives, even though many COVID vaccine development efforts benefited from ample public funding.

48. As explained by an article in *The Lancet*:

the production of COVID-19 vaccines is limited by the highly concentrated state of global vaccine manufacturing capacity, and the relationships established between lead developers and contract manufacturers. A successful solution to the production bottleneck would probably require widespread technology transfer to enable the expansion of manufacturing capacity. Currently, few countries have the domestic capacity to rapidly produce COVID-19 vaccines on their own and instead will need companies to actively share knowledge, technology, and data with domestic manufacturers. Some of the lead developers of COVID-19 vaccines have collaboration agreements with manufacturers in middle-income countries—AstraZeneca has such agreements with the Serum Institute of India, Fiocruz in Brazil, mAbxience Buenos Aires in Argentina, and Siam Bioscience in Thailand; Johnson & Johnson has an agreement with Aspen Pharmacare in South Africa; and Novavax with the Serum Institute of India—although the terms of these partnerships, including the extent to which the licensed manufacturers can negotiate their own supply arrangements with countries, are unclear.¹⁶¹

49. The WHO COVID-19 Technology Access Pool (C-TAP) was set up in May 2020 with the intention to “accelerate the scale-up of manufacturing and the removal of barriers to access in order to make products available globally.”¹⁶² Founded on the idea of open information and

¹⁶⁰ United Nations Conference on Trade and Development (UNCTAD), *Intellectual Property: How Much Room is Left for Industrial Policy?* Discussion Papers, No. 223, October 2015, available at: https://unctad.org/system/files/official-document/osgdp20155_en.pdf.

¹⁶¹ Olivier J. Wouters, Kenneth C. Shadlen, Maximilian Salcher-Konrad, Andrew J. Pollard, Heidi J. Larson, Yot Teerawattananon, and Mark Jit, *Challenges in ensuring global access to COVID-19 vaccines: production, affordability, allocation, and deployment*, *The Lancet*, Volume 397, Issue 10278, 1023 – 1034, 13 March 2021, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00306-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00306-8/fulltext).

¹⁶² WHO, *COVID-19 Technology Access Pool - Commitments to share knowledge, intellectual property and data*, available at:

technology sharing to face the pandemic, the initiative was initially proposed by Costa Rica and eventually supported by 40 countries. However, C-TAP has not found effective support among rich States and business actors. As of 22 January 2021, not one company had joined the voluntary initiative.¹⁶³ Reports highlight that even COVAX partners such as Gavi have not engaged in the C-TAP initiative.¹⁶⁴ When the WHO Director first announced his support for an open COVID technology sharing tool on 6 April 2020,¹⁶⁵ the following day US President Donald Trump announced a review of government WHO funding with the aim of potentially freezing it.¹⁶⁶ And when C-TAP was officially launched by the WHO on 29 May 2020,¹⁶⁷ the same day President Trump announced the US's withdrawal from the global health body.¹⁶⁸

50. Several pharmaceutical companies have reportedly instead backed an access/sharing pool called the COVID-19 ACT-Accelerator, which is also supported by the WHO and partially funded by the Bill & Melinda Gates Foundation.¹⁶⁹ The year-old initiative focuses on public-private partnerships and commits to preserving intellectual property rights.¹⁷⁰ In February 2021, the Chief Executive Officer (CEO) of the Bill & Melinda Gates Foundation commented that, “[s]ome have proposed broadly eliminating drug companies’ intellectual property (IP) protections for COVID-19 vaccines as a way to increase vaccine supply and reduce prices. I think this approach misses the mark. At our foundation, we believe that IP fundamentally underpins innovation, including the work that has helped create vaccines so quickly.”¹⁷¹ According to the WHO, as of 18 April 2021, only 793,484,083 COVID-19 vaccine doses have

<https://www.who.int/initiatives/covid-19-technology-access-pool#:~:text=Since%20May%202020%2C%20the%20WHO,property%20and%20data%20necessary%20for.>

¹⁶³ Michael Safi, *WHO platform for pharmaceutical firms unused since pandemic began*, The Guardian, 22 January 2021, available at: <https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firms-unused-since-pandemic-began>.

¹⁶⁴ Priti Patnaik, *Constraints facing the COVID-19 Technology Access Pool (C-TAP)*, Newsletter Edition #32 [The Friday Deep Dives], Geneva Health Files, 19 February 2021, available at: <https://genevahealthfiles.substack.com/p/constraints-facing-the-covid-19-technology>.

¹⁶⁵ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 6 April 2020, available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---6-april-2020>.

¹⁶⁶ US White House, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, 7 April 2020, available at: <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-april-7-2020/>.

¹⁶⁷ WHO, *International community rallies to support open research and science to fight COVID-19*, 29 May 2020, available at: <https://www.who.int/news/item/29-05-2020-international-community-rallies-to-support-open-research-and-science-to-fight-covid-19>; and, WHO, *Operationalising the COVID-19 Technology Access Pool (C-TAP): A Concept Paper*, available at: https://cdn.who.int/media/docs/default-source/essential-medicines/intellectual-property/who-covid-19-tech-access-tool-c-tap.pdf?sfvrsn=1695cf9_36&download=true.

¹⁶⁸ US White House, *Remarks by President Trump on Actions Against China*, 30 May 2020, available at: <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-actions-china/>.

¹⁶⁹ WHO, *What is the ACT-Accelerator?*, available at: <https://www.who.int/initiatives/act-accelerator/about>.

¹⁷⁰ Alexander Zaitchik, *How Bill Gates Impeded Global Access to Covid Vaccines*, New Republic, 12 April 2021, available at: <https://newrepublic.com/article/162000/bill-gates-impeded-global-access-covid-vaccines>.

¹⁷¹ Mark Suzman, *Why we focus on vaccine equity*, Bill & Melinda Gates Foundation, 26 February 2021, available at: <https://www.gatesfoundation.org/ideas/articles/coronavirus-vaccine-equitable-access>.

been administered.¹⁷² At the same time, there have also been several delays in the ongoing process of COVID-19 vaccines production.¹⁷³ One of the goals of the initiative has also been to provide, “discounted vaccines to the ‘priority fifth’ of low-income populations.” This clearly has fallen short, noting that in Bangladesh, Uganda, and South Africa, for instance, some vaccines were being sold at higher prices.¹⁷⁴

51. The WHO is also advocating bilateral technology transfers, so that companies that own vaccine patents can license them to another company. According to Tedros Adhanom, the Director-General of the WHO, “a good example of this approach is AstraZeneca, which has transferred the technology for its vaccine to SKBio in the Republic of Korea and the Serum Institute of India, which is producing AstraZeneca vaccines for COVAX.”¹⁷⁵ At the same time, he cited lack of transparency as a main disadvantage of this approach.
52. Coordinated technology transfer is a third option, whereby universities and manufacturers would license their vaccines to other companies through a global mechanism coordinated by the WHO. This would also facilitate the training of staff at the receiving companies, and coordinate investments in infrastructure. The WHO Director-General said the organisation had in fact used this approach during the H5N1 avian influenza pandemic in the mid-2000s.¹⁷⁶
53. There is little indication of the pharmaceutical industry’s support for widespread open and free technology transfers. Both the Pfizer/BioNTech and Moderna vaccines, the most effective vaccines against the COVID-19 virus yet, require technology that is currently controlled by those companies.¹⁷⁷ In a recent call with investors, the Pfizer Chief Financial Officer lauded the, “significant opportunity,” awaiting the company when the pandemic was declared over, and they could return to regular market pricing without worrying about optics given the “goodwill” created over the past months.¹⁷⁸ AstraZeneca, for its part, promised not

¹⁷² WHO, *WHO Coronavirus (COVID-19) Dashboard*, Global Overview, 19 April 2021, available at: <https://covid19.who.int/>

¹⁷³ See for example, WHO, *COVAX updates participants on delivery delays for vaccines from Serum Institute of India (SII) and AstraZeneca*, 25 March 2021, available at: [https://www.who.int/news/item/25-03-2021-covax-updates-participants-on-delivery-delays-for-vaccines-from-serum-institute-of-india-\(sii\)-and-astrazeneca](https://www.who.int/news/item/25-03-2021-covax-updates-participants-on-delivery-delays-for-vaccines-from-serum-institute-of-india-(sii)-and-astrazeneca), and *India delays jab supplies to UN-backed vaccine programme*, Al-Jazeera, 25 March 2021, available at: <https://www.aljazeera.com/news/2021/3/25/indias-biggest-world-vaccine-manufacturer-to-delay-jab-exports>, and By Christopher Rowland, *Johnson & Johnson suffers another setback as FDA tells Md. vaccine maker to suspend production*, the Washington Post, 19 April 2021, available at: <https://www.washingtonpost.com/business/2021/04/19/johnson-johnson-covid-vaccine-emergent/>

¹⁷⁴ Carmen Paun and Ashleigh Furlong, *Poorer countries hit with higher price tag for Oxford/ AstraZeneca vaccine*, Politico, 22 February 2021, available at: <https://www.politico.eu/article/astrazeneca-vaccine-cost-higher-in-poorer-countries-coronavirus/>.

¹⁷⁵ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 5 March 2021, available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-5-march-2021>.

¹⁷⁶ WHO, *WHO calls for urgent action to ramp up production of COVID-19 vaccines for all*, 5 March 2021, available at: <https://news.un.org/en/story/2021/03/1086512>.

¹⁷⁷ *Secret ingredients behind the breakthrough Covid vaccines*, Financial Times, 19 November 2020, available at: <https://www.ft.com/content/b5d03854-39bb-48cd-9a01-5fb2a0dfbba8>.

¹⁷⁸ Lee Fang, *Drugmakers promise investors they'll soon hike COVID-19 vaccine prices*, The Intercept, 18 March 2021, available at: <https://theintercept.com/2021/03/18/covid-vaccine-price-pfizer-moderna/>; *Interview with Pfizer Inc.*, The Hill, 16 March 2021, available at: https://www.youtube.com/watch?v=Kdlhwq74L_YQ&t=29s.

to profit during the pandemic but reserved the right to declare when the pandemic is over for pricing purposes.¹⁷⁹ As of 23 February 2021, Moderna was one of the few companies with approved vaccines not to commit to supplying COVID-19 vaccines to the COVAX facility,¹⁸⁰ even though CEPI, a foundation involved in the COVAX initiative, invested about USD 1 million in Moderna's coronavirus vaccine.¹⁸¹ Moderna also received nearly one billion dollars from BARDA (Biomedical Advanced Research and Development Authority, part of the US Government's Department of Health and Human Services).¹⁸² More than a year later, Moderna has sold most of the early vaccine doses it has produced to wealthier countries, while impoverished countries remain on the margins.¹⁸³

54. Though much COVID-19 vaccine development was supported by public funding, corporate actors opposing the TRIPS waiver and necessary open and free technology transfers seek to influence healthcare policy making while banking billions in revenue. In an Oxfam press release, Lois Chingandu, Director of Frontline AIDS, commented that: “[o]ver \$100 billion of taxpayers’ money has funded these vaccines, while the companies behind the three successful vaccine candidates are set to make over \$30 billion in revenue this year alone.”¹⁸⁴ For instance, BioNTech, which partnered with Pfizer on a vaccine, received \$445 million from the German government to support COVID vaccine development.¹⁸⁵ However, many deals to develop COVID-19 vaccinations have been largely kept secret, with some not revealing, for instance, how much public money was spent to develop the vaccine.¹⁸⁶
55. The immense public money that went to COVID vaccine development reinforces the call for these vaccines to be people's vaccines, public goods that should be enjoyed by all freely and fairly--this call has been strongly advocated for by The People's Vaccine Alliance, which is a

¹⁷⁹ Jordan Williams, *AstraZeneca's no-profit pledge for vaccine has expiration date: report*, The Hill, 8 October 2020, available at: <https://thehill.com/policy/healthcare/520202-astrazenecas-no-profit-pledge-for-vaccine-has-expiration-date-report>.

¹⁸⁰ Emily Rauhala, *Moderna agreed to 'equitable access' for its coronavirus vaccine, but most of its doses are going to wealthy countries*, The Washington Post, 13 February 2021, available at: https://www.washingtonpost.com/world/coronavirus-vaccine-access-poor-countries-moderna/2021/02/12/0586e532-6712-11eb-bf81-c618c88ed605_story.html.

¹⁸¹ Moderna, *Moderna Announces Funding Award from CEPI to Accelerate Development of Messenger RNA (mRNA) Vaccine Against Novel Coronavirus*, 23 January 2021, available at: <https://investors.modernatx.com/news-releases/news-release-details/moderna-announces-funding-award-cepi-accelerate-development>.

¹⁸² *Moderna gets further \$472 million U.S. award for coronavirus vaccine development*, Reuters, 26 July 2020, available at: <https://www.reuters.com/article/us-health-coronavirus-moderna-funding/moderna-gets-further-472-million-u-s-award-for-coronavirus-vaccine-development-idUSKCN24R0IN>.

¹⁸³ Emily Rauhala, *Moderna agreed to 'equitable access' for its coronavirus vaccine, but most of its doses are going to wealthy countries*, The Washington Post, 13 February 2021, available at: https://www.washingtonpost.com/world/coronavirus-vaccine-access-poor-countries-moderna/2021/02/12/0586e532-6712-11eb-bf81-c618c88ed605_story.html.

¹⁸⁴ Oxfam, *Monopolies causing "artificial rationing" in COVID-19 crisis as 3 biggest global vaccine giants sit on sidelines*, 5 February 2021, available at: <https://www.oxfam.org/en/press-releases/monopolies-causing-artificial-rationing-covid-19-crisis-3-biggest-global-vaccine>.

¹⁸⁵ Riley Griffin, and Drew Armstrong, *Pfizer Vaccine's Funding Came from Berlin, Not Washington*, Bloomberg, 9 November 2020, <https://www.bloomberg.com/news/articles/2020-11-09/pfizer-vaccine-s-funding-came-from-berlin-not-washington>.

¹⁸⁶ MSF, *Coronavirus COVID-19 pandemic: Governments must demand pharma make all COVID-19 vaccine deals public*, 11 November 2020, available at: <https://www.msf.org/governments-must-demand-all-coronavirus-covid-19-vaccine-deals-are-made-public>

coalition of organisations and activists united under a common aim of campaigning for a “people’s vaccine” for COVID-19.¹⁸⁷ All technology, equipment, production inputs, know-how, scientific knowledge and data related to the prevention and treatment of COVID-19 should be shared openly and freely, particularly as the world is navigating a global health emergency. This is both an immediate and long term imperative. Already, emerging virus variants may raise the possibility of the need for further vaccinations in the future.¹⁸⁸

F. Legacies of colonialism and neoliberal imperialism exacerbating lack of equitable vaccine access

56. The past 40 years of neoliberal reform of the economic system driven by the Bretton Woods Institutions was built on long histories of colonialism and imperialism, involving massive dispossession, exploitation of land and natural resources, violence, slavery and underdevelopment. Unequal wealth is not primarily the result of thrift or ingenuity but has foremost been gained via various forms of theft maintained via violence. Amid successful liberation struggles, many countries and communities were then subject to “development aggression”¹⁸⁹ or the imposition of unbridled neoliberal capitalism – often with associated US-backed coups and debt-imposed International Monetary Fund (IMF) structural adjustment, working in concert with the WTO, World Bank and other finance and corporate actors. Privatization and deregulation have been imposed on countries by the IMF over the past 40 years, gutting public health care systems or never allowing them to develop, undermining *inter alia* import substitution, food sovereignty and the maintenance of small-scale diversified farming, while intellectual property has been protected. The current conditions of vaccine systemic discrimination are a long-building product of colonization and imperialism.
57. Systemic discrimination as a result of colonialism and imperialism can be found throughout history. In 2008, the World Health Organisation’s Commission on Social Determinants of Health noted that:

[s]ocial justice is a matter of life and death. It affects the way people live, their consequent chance of illness, and their risk of premature death. We watch in wonder as life expectancy and good health continue to increase in parts of the world and in alarm as they fail to improve in others. A girl born today can expect to live for more than 80 years if she is born in some countries – but less than 45 years if she is born in others. Within countries there are dramatic

¹⁸⁷ *The People’s Vaccine*, available at: <https://peoplesvaccine.org/>; see also Amnesty International, *The campaign for “A Fair Shot”, COVID-19: Pharmaceutical companies and rich states put lives at risk as vaccine inequality soars*, Amnesty International, 11 March 2021, available at: <https://www.amnesty.org/en/latest/news/2021/03/covid-19-pharmaceutical-companies-and-rich-states-put-lives-at-risk-as-vaccine-inequality-soars/>.

¹⁸⁸ Helen Clark and Winnie Byanyima, *The world needs a ‘people’s vaccine’ for coronavirus, not a big-pharma monopoly*, The Guardian, 23 July 2020, available at: <https://www.theguardian.com/commentisfree/2020/jul/23/world-needs-coronavirus-vaccine-big-pharma-monopoly-astrazeneca-patent-pandemic>.

¹⁸⁹ Asia Indigenous Peoples Pact, *Development Aggression as Economic Growth: A Report by the Asia Indigenous Peoples Pact*, 24 February 2012, available at: <https://aippnet.org/development-aggression-as-economic-growth-a-report-by-the-asia-indigenous-peoples-pact/>.

differences in health that are closely linked with degrees of social disadvantage. Differences of this magnitude, within and between countries, simply should never happen.¹⁹⁰

58. Statistics show that so-called disadvantaged and marginalised individuals and communities are the majority of the global population. Despite being the majority of the global population, this “marginalized majority” is strategically divided and disempowered by deep-seated racial, ethnic and financial inequities that fuel structural determinants of health.¹⁹¹ Globally, “histories of slavery, redlining, environmental racism and the predatory nature of capitalism underpin the design of global and public health systems, resulting in structural, racial and ethnic inequities.”¹⁹²
59. The continued division, devaluing and disempowering of this marginalised majority has been at the centre of the COVID-19 vaccines. As COVID-19 was spreading, two French doctors discussed testing the efficacy of the tuberculosis vaccine against the virus in Africa.¹⁹³ This invokes:
- imperialist and colonialist ideologies that “some lives were more valuable than others.” How, in March 2020 when this statement was made, could anyone practising global health deem it appropriate to use Black and Brown communities as “guinea pigs” to promote the health of white, colonialist counterparts? The answer lies in the persistence of racist patterns that have yet to be fully dismantled.¹⁹⁴
60. Historically, because of this context of the marginalised majority, the experience of difference has vastly determined who is able to access lifesaving medicine and when they are able to access such medicine. For some diseases, particularly in the developing world, medicines do not even exist.¹⁹⁵ According to an academic analysis, “[w]ith the emergence of a free market-based world order, profit prospects rather than global health needs guide the direction of new drug development. The adverse public health consequences of this evolution for the tropical

¹⁹⁰ WHO, *Closing the gap in a generation: health equity through action on the social determinants of health - Final report of the commission on social determinants of health*, 2008, available at: <https://www.who.int/publications/i/item/WHO-IER-CSDH-08.1>.

¹⁹¹ Ali Murad Büyüm, Cordelia Kenney, Andrea Koris, Laura Mkumba, and Yadurshini Raveendran, *Decolonising global health: if not now, when?* BMJ Global Health 2020;5:e003394. doi:10.1136/bmjgh-2020-003394, available at: <https://gh.bmj.com/content/bmjgh/5/8/e003394.full.pdf>.

¹⁹² Ali Murad Büyüm, Cordelia Kenney, Andrea Koris, Laura Mkumba, and Yadurshini Raveendran, *Decolonising global health: if not now, when?* BMJ Global Health 2020;5:e003394. doi:10.1136/bmjgh-2020-003394, available at: <https://gh.bmj.com/content/bmjgh/5/8/e003394.full.pdf>.

¹⁹³ *Coronavirus: France racism row over doctors' Africa testing comments*, BBC News, 3 April 2020, available at: <https://www.bbc.com/news/world-europe-52151722>

¹⁹⁴ Ali Murad Büyüm, Cordelia Kenney, Andrea Koris, Laura Mkumba, and Yadurshini Raveendran, *Decolonising global health: if not now, when?* BMJ Global Health 2020;5:e003394. doi:10.1136/bmjgh-2020-003394, available at: <https://gh.bmj.com/content/bmjgh/5/8/e003394.full.pdf>.

¹⁹⁵ Patrice Trouiller, Els Torreele, Piero Olliaro, Nick White, Susan Foster, Dyann Wirth, and Bernard Pécoul, *Drugs for neglected diseases: a failure of the market and a public health failure?*, Tropical Medicine and International Health, 13 January 2002, available at: <https://onlinelibrary.wiley.com/doi/full/10.1046/j.1365-3156.2001.00803.x>.

world have been grave.”¹⁹⁶ The trend has been that when a new disease emerges and causes a pandemic, life-saving medicines and/or vaccines are developed and rich countries have immediate and exclusive access. The world’s poorest countries only have access to medicines and/or vaccines long after they are delivered to richer countries - and when delivered they are often more expensive and difficult to access. A new study by Gavi, the Vaccine Alliance, demonstrates that countries with historical traumas from the colonial era may also be associated with less trust in modern medicine and lower vaccination rates today.¹⁹⁷ This is an issue that States and experts must bear in mind when studying strategies for the distribution of vaccines in a way that addresses people’s history, as well as their cultural and social backgrounds. For many, vaccines through COVAX and other initiatives are viewed as excess or “leftover” vaccines, thus diminishing trust in the vaccine process.¹⁹⁸

61. The availability, accessibility, and affordability of the various COVID-19 vaccines is following the same old patterns, affirming that the findings of the WHO Commission in 2008 remain true 2021. Wealthier and higher-income countries have abundant access while the poorest countries have not been able to access nor afford the COVID-19 vaccines. The world saw a similar scenario¹⁹⁹ unfold in the long fought battle against the HIV/AIDS pandemic and the monopoly over antivirals to treat this illness.²⁰⁰
62. Since vaccines were developed, the ability to have the resources and access to COVID-19 vaccines has never been in doubt for some countries. In an economic system where healthcare is treated as a commodity as opposed to a right, those hoarding capital would have been at ease knowing they could afford to buy vaccines. This knowledge has given their populations the ability to live in the hope. The COVID-19 vaccine enabled the individuals in wealthier and higher-income countries to breathe a sigh of relief, that the pandemic may soon be a thing of the past. For those in impoverished and lower-income countries, the COVID-19 vaccines are simply another reminder of the stark difference of experiences in healthcare across the globe, a painful reminder of inequality. There is no luxury of relief or hope when it comes to the COVID-19 vaccines for people in some countries. This directly impacts on mental health, generating anxiety, stress and depression.
63. The hoarding of COVID-19 vaccines in wealthier and higher-income countries makes it clear that the ground-breaking ability to develop and implement COVID-19 vaccines very expeditiously has as yet predominantly served the interests of powerful and profitable

¹⁹⁶ Patrice Trouiller, Els Torreele, Piero Olliaro, Nick White, Susan Foster, Dyann Wirth, and Bernard Pécoul, *Drugs for neglected diseases: a failure of the market and a public health failure?*, *Tropical Medicine and International Health*, 13 January 2002, available at: <https://onlinelibrary.wiley.com/doi/full/10.1046/j.1365-3156.2001.00803.x>.

¹⁹⁷ Maya Prabhu, *Is the colonial era still impacting people’s health today?*, Gavi, 16 February 2021, available at: <https://www.gavi.org/vaccineswork/colonial-era-still-impacting-peoples-health-today>.

¹⁹⁸ Oxfam, *Oxfam reaction to the announcement that the G7 will send surplus vaccines to developing countries*, 19 February 2021, available at: <https://www.oxfam.org/en/press-releases/oxfam-reaction-announcement-g7-will-send-surplus-vaccines-developing-countries>.

¹⁹⁹ Anna B. Emilio, *Tripping over Trips and the Global HIV/AIDS Epidemic: Legislation and Political Decisions in Brazil and the United States*, 28 *J. Contemp. Health L. & Pol’y* 57, 2012, available at: <https://scholarship.law.edu/jchlp/vol28/iss1/5>.

²⁰⁰ WHO, *WHO Director-General’s opening remarks at 148th session of the Executive Board*, 18 January 2021 available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-148th-session-of-the-executive-board>.

pharmaceutical corporations and higher-income households in society. This over-supply and prioritisation of vaccines to rich and high-income countries has been described as a, “pernicious form of vaccine apartheid.”²⁰¹ This systemic discrimination is characterized by prioritizing access for some countries and for some people, largely based on wealth and geography, and, in turn, resulting in a mostly self-created global supply crisis. As a result, the project of global population immunity is now at risk.

G. Intersectional gender discrimination in access to COVID-19 vaccines and disproportionate impact on women in their diversity

64. The systematic lack of access to COVID-19 vaccines illuminates what has already been recognized in many contexts, namely that the impoverished, marginalised and disadvantaged individuals and communities experience intersectional discrimination. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) recognizes intersectionality in General Recommendation No. 28 on the core obligations of the Convention as “a basic concept for understanding the scope of the general obligations of States parties,” and that:

discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.²⁰²

65. As detailed in General Recommendation No. 35:

[t]he Committee’s jurisprudence highlights that these [factors inextricably linked to discrimination against women] may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, trafficking of women, armed conflict, seeking asylum, being a refugee, internal displacement, statelessness, migration, heading households, widowhood, living with HIV/AIDS, deprivation of liberty, being in prostitution, geographical

²⁰¹ Fatima Hassan, *Don’t Let Drug Companies Create a System of Vaccine Apartheid*, Foreign Policy, 23 February 2021, available at <https://foreignpolicy.com/2021/02/23/dont-let-drug-companies-create-a-system-of-vaccine-apartheid/>.

²⁰² CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, par. 18, 16 December 2010, available at: <https://www.icj.org/wp-content/uploads/2013/05/General-Recommendation-CEDAW-28-core-obligations-Article-2-2010-eng.pdf>.

remoteness and stigmatisation of women fighting for their rights, including human rights defenders.²⁰³

66. Analysis of discrimination and exclusion within an intersectional lens enables a nuanced, purposive, and socio-contextual consideration and understanding of the realities. As the Constitutional Court of South Africa further explained, “[o]ne consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.”²⁰⁴
67. Differentiation in accessing COVID-19 vaccines has systematically followed the typical patterns of exclusion based on poverty and economic status, race, gender, social origin, nationality, less/no political power and geographical location.²⁰⁵
68. Gender remains a key determinant of health in all countries around the world.²⁰⁶ Discrimination based on gender and/or gender identity experienced by women, including transpersons, is complex and diverse.²⁰⁷ As explained the CEDAW Committee, discrimination against women is inextricably linked to other identities and contexts that women navigate which affect their lives which include their diverse sexual orientation, gender identity and expression and sex characteristics [SOGIESC], HIV/AIDS status, race, class, refugee status, religion among others.²⁰⁸ Reference to women must therefore ensure that certain stigmas and prejudices of womanhood are dismantled and responded to. To this end, reference to women in this appeal includes women in all their diversity.
69. Due to the patriarchal structures rooted systematically in our societal structure, healthcare workers are disproportionately women.²⁰⁹ Additionally, women continue to be primarily

²⁰³ CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, par. 12, 26 July 2017, available at: <https://www.ici.org/wp-content/uploads/2013/05/General-Recommendation-CEDAW-28-core-obligations-Article-2-2010-eng.pdf>.

²⁰⁴ Constitutional Court of South Africa, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC), 9 October 1998, par. 113, available at: <http://www.saflii.org/za/cases/ZACC/1998/15.pdf>.

²⁰⁵ CESCR, *General Comment 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2009, available at: <https://www.refworld.org/docid/4a60961f2.html>.

²⁰⁶ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, pg.1041, available at: <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

²⁰⁷ Sophie Harman, Asha Herten-Crabb, Rosemary Morgan, Julia Smith, Clare Wenham, *COVID-19 vaccines and women's security*, *The Lancet*, Volume 397, Issue 10272, p357-358, 30 January 2021, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32727-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32727-6/fulltext).

²⁰⁸ CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, par. 12, 26 July 2017, available at: <https://www.ici.org/wp-content/uploads/2013/05/General-Recommendation-CEDAW-28-core-obligations-Article-2-2010-eng.pdf>.

²⁰⁹ OECD Health Statistics, *Women make up most of the health sector workers but they are under-represented in high-skilled jobs*, 2000, available at: <https://www.oecd.org/gender/data/women-make-up-most-of-the-health-sector-workers-but-they-are-under-represented-in-high-skilled-jobs.htm>.

considered as only meant to be caregivers or mothers within the context of healthcare access.²¹⁰

70. Because intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms of discrimination, vulnerability, and subordination, it is important to understand that certain classes of persons would be more vulnerable within a given population. As was explained by Crenshaw, who coined the application of intersectionality in the context of discrimination, a black woman for example, may experience compounded forms of discrimination compared to Black men or White women.²¹¹ Similarly, transgender women may experience compounded forms of discrimination compared to cisgender women. Within the context of access to healthcare and vaccines, women in poor and low-income countries experience even more compounded discrimination when seeking to access COVID-19 and other global health resources in order to improve their health outcomes.
71. In December 2020, the National Women’s Law Center in the US argued that all of the jobs lost in the US that month were women’s jobs.²¹² According to the analysis, the social, economic and long-term health consequences are disproportionately impacting women and girls, “in ways that could continue to exacerbate divides and inequalities within societies and impact the most marginalised, including migrant, disabled, HIV, and lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) communities.”²¹³
72. The disproportionate negative impacts on women also run through the issue of care work. Before the COVID-19 pandemic, International Labour Organisation (ILO) statistics indicated that women performed three-quarters of all unpaid care work, or 76.2% of the total of hours provided.²¹⁴ The ILO explained that there is no country where men and women provide an equal share of unpaid care work.²¹⁵ The burden of care work also follows this pattern of vulnerability and marginalisation. The ILO has explained that:

[d]isparities in the gendered division of unpaid care work and paid work are the result of household composition and deeply-rooted inequalities based on sex, income, age, education and residence. Women and girls living in low-

²¹⁰ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, p. 1042, available at <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

²¹¹ Kimberle Crenshaw, *Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies*, *University of Chicago Legal Forum* 139, 1989, available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf>.

²¹² Claire Ewing-Nelson, *All of the Jobs Lost in December Were Women’s Jobs*, National Women’s Law Center, January 2021, available at: <https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf>.

²¹³ Megan Holloway, *Why a gender lens is needed for the COVID-19 response*, 2020, available at: <https://www.gavi.org/vaccineswork/why-gender-lens-needed-covid19-response>.

²¹⁴ International Labour Organization (ILO), *Care work and care jobs for the future of decent work*, pg 37, 2018, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf.

²¹⁵ International Labour Organization (ILO), *Care work and care jobs for the future of decent work*, pg 37, 2018, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf.

income countries, in rural areas, with a low income and education provide a disproportionate share of unpaid care work.²¹⁶

73. As apparent in many countries, COVID-19 has compounded women's care burden, violence against women, barriers to sustained healthcare and gender-based discrimination among other issues. First, the WHO reports that more than 70% of all the global health and social workforce are women.²¹⁷ Women are therefore on the frontline of the COVID-19 response. Second, within the health workforce, women earn on average 28% less than men, are less likely than men to be in full-time employment, are underrepresented in senior positions, and have significantly fewer opportunities for career advancement within the workforce.²¹⁸ An approach to addressing the COVID-19 must therefore place women in all their diversity at the centre and take an intersectional approach to try and undo the historical and present gendered discrimination and marginalisation of women within the health workforce. Third, the transmission rate of COVID-19 is high. There is serious misinformation about the virus, and many communities and individuals live in perpetual fear of the virus. This reality, combined with the pre-existing gender inequalities, makes women in all their diversity working on the frontline of the COVID-19 pandemic vulnerable to being shunned within their households and communities.²¹⁹ Fourth, school closures and household isolation in all countries moved the work of caring for children from the paid economy of schools, day-care centers and babysitters to the unpaid economy of the household, disproportionately increasing the burden on women. The United Nations Educational, Scientific and Cultural Organization (UNESCO) reported that 1.37 billion students (72.4%) across 177 countries have been affected by school closures.²²⁰ Fifth, with social protections overburdened and collapsing because of the economic downfall caused by COVID-19 women have filled the gaps in social protection systems, as they have always done.²²¹ This is because when social security services are not able to feed all children, women are predominantly taking steps to feed them. When hospitals are unable to provide continued care to COVID-positive patients or when families are not able

²¹⁶ International Labour Organization (ILO), *Care work and care jobs for the future of decent work*, pg 37, 2018, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf.

²¹⁷ WHO, Mathieu Boniol, Michelle McIsaac, Lihui Xu, Tana Wuliji, Khassoum Diallo, Jim Campbell, *Gender equity in the health workforce: analysis of 104 countries*, Working Paper 1, March 2019, p. 5, available at <https://apps.who.int/iris/bitstream/handle/10665/311314/WHO-HIS-HWF-Gender-WP1-2019.1-eng.pdf?ua=1>.

²¹⁸ WHO, Mathieu Boniol, Michelle McIsaac, Lihui Xu, Tana Wuliji, Khassoum Diallo, Jim Campbell, *Gender equity in the health workforce: analysis of 104 countries*, Working Paper 1, March 2019, p. 5, available at <https://apps.who.int/iris/bitstream/handle/10665/311314/WHO-HIS-HWF-Gender-WP1-2019.1-eng.pdf?ua=1>.

²¹⁹ International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses*, International Commission of Jurists, p. 58, September 2020, available at: <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

²²⁰ UNESCO, *1.37 billion students now home as COVID-19 school closures expand, ministers scale up multimedia approaches to ensure learning continuity*, 24 March 2020, available at: <https://en.unesco.org/news/137-billion-students-now-home-covid-19-school-closures-expand-ministers-scale-multimedia>.

²²¹ International Women's Rights Action Watch - Asia Pacific and Center for Economic and Social Rights, *Governments' Obligation to Ensure Substantive Gender Equality, COVID-19 Recovering Rights*, August 2020, available at: https://www.cesr.org/sites/default/files/Brief%20%20Gender%20Equality_0.pdf.

to afford hospital services, women step in and provide the healthcare needed. This has translated into additional care burdens, intensifying the already unfair social distribution of unpaid care work, fortifying patriarchal norms, and increasing the risk of illness as a result of caring for infected relatives. Sixth, the ILO (2020) has also highlighted the risk of increased domestic violence during the crisis, particularly because of confinement measures, and more barriers in the access to justice when reporting domestic violence. According to UN Women, only “155 countries have passed laws on domestic violence, and 140 have laws on sexual harassment in the workplace. However, even when laws exist, this does not mean they are always compliant with international standards and recommendations, or that the laws are implemented and enforced” with a significant number of countries having no laws on domestic violence²²² -- this leaves many women in very precarious and dangerous domestic situations. Further, because the social, psychological, emotional and economic responses needed for domestic violence survivors required financial commitments, these are rarely available in poor and low-income countries, particularly relative to rich and high-income countries. Seventh, one of the responses to COVID-19 is to divert sexual and reproductive health services to deal with the outbreak. This has catastrophic consequences for women and girls as it places them at risk of ‘increased maternal and newborn mortality, increased unmet need for contraception, and increased number of unsafe abortions and sexually transmitted infections. In addition, supply chain strains due to the pandemic can affect services and commodities for menstrual health and other aspects of sexual and reproductive health.’²²³

74. Of note, these gendered patterns during health pandemics are not unique to the COVID-19 outbreaks. Within the context of the Ebola virus:

[e]xisting gendered roles of women and girls in west Africa posed Ebola-specific risks related to the disease itself and broader gender-related risks arising from the social upheaval caused by Ebola. In terms of Ebola-specific risks, women’s traditional roles as carers (both within the family and as health-care workers), and as the people who traditionally prepare bodies for burial, placed them at particular risk of exposure to Ebola.²²⁴

The gendered consequences also impacted on the education of girls when schools were closed and forced girls to stay home which was also linked to the increased number of adolescent girls’ pregnancies.²²⁵ Responses to the Ebola viruses also included diversion of funds from

²²² UN Women, *Facts and figures: Ending violence against women*, available at:

<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes>.

²²³ UN Population Fund, *COVID-19: A Gender Lens: Protecting sexual and reproductive health and rights, and promoting gender equality*, p. 4, March 2020, available at: <https://www.unfpa.org/resources/covid-19-gender-lens>.

²²⁴ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, p. 1047, available at: <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

²²⁵ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, p. 1048, available at: <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

sexual and reproductive health²²⁶ and restrictions on movement, which seriously impacted the ability of women to access pre and post-natal care.²²⁷ This forced many women to give birth unassisted and without health support or services meaning that pregnant women faced the dual risk of the Ebola virus and maternal motility.²²⁸ Like the context of COVID-19, women and girls experienced disproportionate risk of contracting the Ebola virus and they were critical to the success of the responses to counter the virus. Similar experiences were recorded during the Zika virus outbreak. In the case of the COVID-19 pandemic, school closures are also contributing to increases in child marriage/increased risk of child marriage, as are the economic fallout, death of parents, pregnancy, and isolation.²²⁹

75. CEDAW Committee's COVID-19 Guidance Note, released in June 2020, calls on states inter alia to “address women’s increased health risk through preventive measures and by ensuring access to early detection and treatment of COVID-19. States parties should also protect women health workers and other frontline workers from contagion through measures such as the dissemination of necessary precautionary information and adequate provision of personal protective equipment as well as psychosocial support.”²³⁰ Protecting women worldwide from contagion would require unimpeded access to vaccinations.
76. The intersectional impact of discrimination is also experienced by other groups who are marginalised and vulnerable as a result of their diverse sexual orientations, gender, their gender identities and expressions and sex characteristics (SOGIESC), their age (children and older adults), refugee status, immigration status, people living with HIV, persons with disabilities, people with albinism, and so on.
77. COVID-19 pandemic has had devastating and disproportionate consequences on persons with diverse SOGIESC.²³¹ These classes of persons remain criminalised in many countries and have faced, “increasing level of hostility, scapegoating, hate crimes, as well as greater barriers in their access to healthcare, goods and services. Prejudice, stigma, discrimination, criminalization and violence have enhanced the risk that LGBT persons would experience

²²⁶ UN Population Fund, *COVID-19: A Gender Lens: Protecting sexual and reproductive health and rights, and promoting gender equality*, p. 4, March 2020, available at: <https://www.unfpa.org/resources/covid-19-gender-lens>.

²²⁷ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, p. 1048, available at: <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

²²⁸ Sara Davies and Belinda Bennett, *A gendered human rights analysis of Ebola and Zika: locating gender in global health emergencies*, *International Affairs* 92: 5 (2016) 1041–1060, p. 1048, available at: <https://www.chathamhouse.org/sites/default/files/publications/ia/inta92-5-01-daviesbennett.pdf>.

²²⁹ United Nations Children’s Fund, *10 million additional girls at risk of child marriage due to COVID-19*, 7 March 2021, available at: <https://www.unicef.org/press-releases/10-million-additional-girls-risk-child-marriage-due-covid-19>; Sophie Cousins, *2.5 million more child marriages due to COVID-19 pandemic*, *The Lancet*, 10 October 2020, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32112-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32112-7/fulltext).

²³⁰ CEDAW Committee, *Guidance Note on CEDAW and COVID-19*, 16 December 2010, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9156&Lang=en.

²³¹ International Commission of Jurists, *Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia*, March 2021, p. 3, available at: <https://www.ici.org/wp-content/uploads/2021/03/Colombia-SouthAfrica-Malaysia-SOGIE-Publications-Reports-Thematic-reports-2021-ENG.pdf>.

violations and abuses of their human rights during the COVID-19 pandemic.”²³² Even in contexts where there is no criminalisation, discrimination is rife and equally hinders access to healthcare.

78. Without international and inclusive interventions that are aimed at addressing the intersectional discrimination experienced, barriers to health care will persist and lead to poor health outcomes for vulnerable and marginalised populations which will significantly increase their risk of contracting the COVID-19 virus without any hope of accessing the vaccine.
79. As has already been explained above, the patterns of group disadvantage and discrimination along intersectional lines in accessing global health follow the patterns created by slavery, racism, sexism, gender inequality and class stratification.
80. COVID-19 has also clearly highlighted that the cumulative effect of intersectional discrimination exacerbates the already compromised position of domestic workers in society and marginalises them further.

²³² International Commission of Jurists, *Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia*, March 2021, p. 21, available at: <https://www.icj.org/wp-content/uploads/2021/03/Colombia-SouthAfrica-Malaysia-SOGIE-Publications-Reports-Thematic-reports-2021-ENG.pdf>.

II. Human rights obligations of States, business and other private actors and the World Trade Organisation to ensure urgent, universal and equitable global access to COVID vaccines

A. Rights to life, health, enjoyment of the benefits of scientific progress and substantive equality

81. The promotion and defense of public health, and the range of human rights undergirding it, are obligations, reinforced by global political commitments. With the Declaration of Alma-Ata of 1978, States agreed to work together to ensure that the entire planet has access to primary health care, noting that the health of one people benefits all by the year 2000. A strong group of human rights organizations formed The People’s Charter for Health in the year 2000 critiquing the Alma-Ata process and highlighting that in its progress, “the health status of Third World populations has not improved. In many cases it has deteriorated further.”²³³ The commitment to ensuring the entire planet has access to primary health care was reaffirmed by States in the recent Astana Declaration of 2018, in which States highlighted their duty to achieve effective cooperation to prevent, detect and respond to epidemics based on respect for human rights in the development and exchange of knowledge and good practices.

82. States have multiple sources of international human rights obligations to guarantee urgent universal and equitable global access to vaccines against COVID-19. UN human rights experts have issued 144 statements on human rights obligations and COVID-19.²³⁴ Regarding vaccines specifically, different mandate holders have recalled human rights obligations in urging equitable vaccine access, including via measures such as the waiving of TRIPS Agreement provisions,²³⁵ greater international cooperation,²³⁶ and equal access for Palestinians²³⁷ and migrants.²³⁸ The UN Special Rapporteur in the field of cultural rights, whose mandate includes

²³³ People’s Health Movement, The People’s Charter for Health, December 2000, p. 1, available at: <https://phmovement.org/wp-content/uploads/2020/06/phm-pch-english.pdf>.

²³⁴ Office of the High Commissioner for Human Rights, COVID-19 and Special Procedures, available at: <https://www.ohchr.org/EN/HRBodies/SP/Pages/COVID-19-and-Special-Procedures.aspx>

²³⁵ *Statement by UN Human Rights Experts: Universal access to vaccines is essential for prevention and containment of COVID-19 around the world*, 9 November 2020 available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>; *COVID-19: UN experts urge WTO cooperation on vaccines to protect global public health*, 1 March 2021, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26817&LangID=E>.

²³⁶ *UN expert says global coordination and more equitable sharing of COVID-19 vaccines key to recovery*, 22 January 2021, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26683&LangID=E>

²³⁷ *Israel/OPT: UN experts call on Israel to ensure equal access to COVID-19 vaccines for Palestinians*, 14 January 2021, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26655&LangID=E>.

²³⁸ *COVID-19: Equitable vaccine access for all, including migrants, is crucial, say UN Special Rapporteurs*, 22 January 2021, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26684&LangID=E>; *see also* UN Committee on Migrant Workers, African Commission on Human and Peoples’ Rights, Council of Europe, Inter-American Commission on Human Rights, *Joint Guidance Note on Equitable Access to COVID-19 Vaccines for All Migrants*, available at: <https://www.ohchr.org/Documents/Issues/Migration/JointGuidanceNoteCOVID-19-Vaccines-for-Migrants.pdf>.

the right to enjoy the benefits of scientific progress, affirmed in a report that, “[a]ctions such as the hoarding of vaccines by some wealthy nations are entirely unacceptable.”²³⁹ The UN Independent Expert on human rights and international solidarity, called for States to support the COVID-19 TRIPS waiver.²⁴⁰ And as stated in the UN Special Rapporteur on Health’s report on human rights and pandemic:

In response to COVID-19 specifically, States that can assist should: share research, medical equipment, supplies and best practices; coordinate to reduce the economic and social impacts of the pandemic; limit economic sanctions, debt obligations and intellectual property regimes that impede access to needed resources; and, in all this, focus on groups in vulnerable and disadvantaged situations, fragile countries and conflict and post-conflict situations.

...

In the COVID-19 context, an emphasis on biomedical interventions focuses on the development of vaccines and medical treatments. However, without broader public health and human rights inputs, these developments will fail to reach everyone, and groups in more vulnerable, remote, disadvantaged or discriminated situations will be less likely to receive them. Viral infections do not have a perfect technical fix: immunity is not guaranteed for everyone, it can be short-lived, or not found at all, as for example with HIV and herpes simplex, or new strains of the virus may keep emerging.

...

However, the Special Rapporteur understands that controlling the spread of COVID-19 will require a vaccine as part of a larger containment campaign, and he is supportive of research for, and the equitable distribution of, an affordable “people’s vaccine,” without diverting funding from responses needed to protect persons in vulnerable situations. Nonetheless, he agrees with “the most consequential fact about infectious illness: the wealthy protect themselves; the suffering is done by the poor.”²⁴¹

83. Article 3 of the Universal Declaration of Human Rights (UDHR) guarantees the right to life, and Article 25 details the right of everyone to enjoy an adequate standard of living that ensures health and well-being, which includes healthcare. Access to medicines and vaccines, as well as any other health technology that contributes to a better standard of living, are part of these universal rights. UDHR provisions have been interpreted in numerous instances to be binding on all States as a matter of customary international law.²⁴²

²³⁹ UN Special Rapporteur in the field of cultural rights, *COVID-19, culture and cultural rights*, 17 February 2021, par. 45, available at: <https://undocs.org/en/A/HRC/46/34>.

²⁴⁰ Obiora Chinedu Okafor, *COVID-19 vaccines should be shared much more equitably, in solidarity, around the world*, Toronto Star, 12 January 2021, available at: <https://www.thestar.com/opinion/contributors/2021/01/12/covid-19-vaccines-should-be-shared-much-more-equitably-in-solidarity-around-the-world.html>.

²⁴¹ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Final Report*, 16 July 2020, par. 11, 43-44, available at: <https://undocs.org/A/75/163>.

²⁴² See, e.g. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, GA. J. INT’L & COMP. L. Vol 25: 289, available at:

84. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which enjoys near universal ratification, further provides for the right to health under Article 12, including “medical service and medical attention” (12(2)(c)). Article 2 of the ICESCR requires States to use maximum available resources, as well as international assistance and cooperation, to achieve the progressive realization of the rights protected by the Covenant, including the right to health, and Article 12(2)(c) mandates States to take steps to ensure the “prevention, treatment and control of epidemic...diseases.” Article 15 of the Covenant, for its part, establishes the right of everyone to enjoy the benefits of scientific progress and its applications and States’ duty to adopt the necessary measures for the conservation, development and dissemination of science. Article 2 also mandates that Covenant rights be guaranteed “without discrimination of any kind” according to a range of fundamental characteristics.
85. General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) complements the interpretation of State human rights obligations in response to a pandemic. For CESCR, when Article 12 of the Covenant refers to the duty of States to fight epidemic diseases, it is understood that States have a commitment to provide, among other things, the relevant technologies for the implementation or expansion of vaccination programs.²⁴³ In turn, General Comment 25, CESCR detailed that among the benefits of scientific progress is access to material results of the applications of scientific research, like vaccines. According to CESCR, “ultimately, intellectual property is a social product and has a social function and consequently, States parties have a duty to prevent unreasonably high costs for access to essential medicines,” thus, “States parties should use, when necessary, all the flexibilities of the [Trade Related Intellectual Property Rights (TRIPS)] Agreement, such as compulsory licences, to ensure access to essential medicines, especially for the most disadvantaged groups.”²⁴⁴
86. On COVID-19 vaccines specifically, CESCR has recently determined that:
- [a]ccess to a vaccine for COVID-19 that is safe, effective and based on the best scientific developments is an essential component of the right to the enjoyment of the highest attainable standard of physical and mental health and the right to enjoy the benefits of scientific progress....States parties have a duty to prevent intellectual property and patent legal regimes from undermining the enjoyment of economic, social and cultural rights ... All mechanisms, including voluntary licensing, technology pools, use of TRIPS flexibilities and waivers of

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl> (“Many of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all states. This development has been confirmed by states in intergovernmental and diplomatic settings, in arguments submitted to judicial tribunals, by the actions of intergovernmental organizations, and in the writings of legal scholars.”)

²⁴³ CESCR, General Comment 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, par. 16, available at:

[http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzD\]mC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhqY65auTFbQRPWNDxL](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzD]mC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhqY65auTFbQRPWNDxL).

²⁴⁴ CESCR, *General Comment 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4), par. 62, 69 of the International Covenant on Economic, Social and Cultural Rights)*, 30 April 2020, par. 62, 69, available at: <https://undocs.org/E/C.12/GC/25>.

certain intellectual property provisions or market exclusivities should be explored carefully and utilized...the waiver of certain provisions of the TRIPS Agreement is an essential element of these complementary strategies....[T]he Committee strongly recommends States to support the proposals of this temporary waiver, including by using their voting rights within WTO.²⁴⁵

Earlier, as vaccines were first emerging, CESCR had already established that, States, “should...adopt transparent and participatory mechanisms that ensure that prioritization in the global distribution of vaccines is based – as should be the case also at the national level – on medical needs and public health considerations.”²⁴⁶ These two statements, in turn, were more targeted follow up to a statement CESCR issued early in the pandemic, in which it stated, “States parties should also promote flexibilities or other adjustments in applicable intellectual property regimes to allow universal access to the benefits of scientific advances relating to COVID-19 such as diagnostics, medicines and vaccines.”²⁴⁷

87. The International Covenant on Civil and Political Rights (ICCPR), also nearly universally ratified, guarantees the right to life in its Article 6, which entails, among others, State duties regarding healthcare provision. As the UN Human Rights Committee has clarified in General Comment 36, “[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity,” such as, “the prevalence of life threatening diseases”; according to the Committee, “[t]he measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as...health-care...and other measures designed to promote and facilitate adequate general conditions such as the bolstering of effective emergency health services...”²⁴⁸ Article 26 of the ICCPR also provides for the equal protection of the law and prohibition on discrimination. As with the ICESCR, all the rights guaranteed by the ICCPR must be realized by States without discrimination.
88. Massive unjust inequalities within and between States regarding access to COVID vaccines also highlight the importance of States’ human rights duties to realize substantive intersectional equality. Beyond non-discrimination guarantees within broader instruments like the two Covenants, these duties to realize substantive intersectional equality are further clarified via

²⁴⁵ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 3, 7, 13, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C_12_2021_1_9318_E.docx.

²⁴⁶ CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, par. 11, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx.

²⁴⁷ CESCR, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, 6 April 2020, par. 21, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/STM_COVID19.docx.

²⁴⁸ UN Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, par. 26, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (citing Communication No. 2348/2014, *Toussaint v. Canada*, Views, 24 July 2018, par. 11.3; see also UN Human Rights Committee, *Concluding Observations on the fourth periodic report of Israel*, 21 November 2014, par. 12, available at: https://digitallibrary.un.org/record/786571/files/CCPR_C_ISR_CO_4-EN.pdf).

specific instruments, such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW Committee has explained that:

[i]ntersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in Article 2 of that treaty. Discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.²⁴⁹

89. As the South African Constitutional Court has explained regarding substantive equality:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.²⁵⁰

90. Cognizant of these human rights obligations, UN Secretary General Antonio Guterres early in the pandemic called on eventual COVID-19 vaccines to be treated as a, “global public good,”²⁵¹ a position on which he has remained vocal.²⁵² Similarly, the UN High Commission for Human Rights, Michelle Bachelet, delivered a report to the 46th Session of the Human Rights Council in 2021 urging States to, “[p]rovide COVID-19 vaccines free of charge when

²⁴⁹ CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, par. 18, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

²⁵⁰ Constitutional Court of South Africa, *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC), 29 July 2004, par. 27, available at: <http://www.saflii.org/za/cases/ZACC/2004/3.pdf>.

²⁵¹ UN, *Quick, Equal, Affordable Access to COVID-19 Vaccine Must Be Considered Global Public Good, Secretary-General Says in Remarks to Africa Dialogue Series*, 20 May 2020, available at: <https://www.un.org/press/en/2020/sgsm20089.doc.htm>.

²⁵² See, e.g. UN, *COVID-19 Vaccines Must Be Global Public Good, Secretary-General Says, Announcing ‘Only Together’ Campaign to Encourage Sharing of Technology, Doses*, 11 March 2021, available at: <https://www.un.org/press/en/2021/sgsm20620.doc.htm>.

needed, to cover everyone without discrimination, and ensure full accessibility to all,” and, “[t]reat COVID-19 vaccines as a global public good, put in place a well coordinated global approach to the development and distribution of vaccines, and ensure access for all people on a non-discriminatory basis.”²⁵³ The Office of the High Commissioner for Human Rights (OHCHR), along with the WHO and UNESCO, also launched the Joint Appeal for Open Science in 2020.²⁵⁴ OHCHR has produced detailed human rights guidance on access to COVID-19 vaccines, calling on them to be treated as global public goods, joining the Solidarity Call to Action launched by Costa Rica and the WHO that led to C-TAP, and stating that, “[i]ntellectual property rights should not be applied in a manner which undermines the rights to health, food, science and other human rights.”²⁵⁵

91. The international law framework is further detailed by numerous analogue and complementary obligations on States arising in, and articulated by, regional systems of human rights protection, with, *inter alia*: a) the African Commission on Human and Peoples’ Rights’ (ACHPR) Working Group on Economic, Social, and Cultural Rights urging the African Union (AU) to, “[d]evelop a strategy for ensuring that when a COVID-19 vaccine is found, arrangements are made for the production and distribution of the vaccine on the continent,” a call then taken up by the full African Commission;²⁵⁶ b) the European Committee of Social Rights (ECSR) detailing that, “States Parties [to the European Social Charter] must operate widely accessible immunisation programmes”;²⁵⁷ c) the Inter-American Commission on Human Rights (IACHR), in partnership with the inter-American Special Rapporteur on Economic, Social, Cultural, and Environmental Rights, calling, “on American States to make public health and human rights the focus of all their decisions and policies concerning the COVID-19 vaccine”;²⁵⁸ and d) the Inter-American Court of Human Rights (IACtHR) recalling that, “the right to health must be guaranteed respecting human dignity and fundamental bioethical principles, as well as in accordance with InterAmerican standards concerning its availability, accessibility, acceptability and quality, as appropriate for the circumstances

²⁵³ UN High Commissioner for Human Rights, *Impact of the coronavirus disease (COVID-19) pandemic on the enjoyment of human rights around the world, including good practices and areas of concern*, 18 January 2021, par. 85(e), 88(d), available at: <https://undocs.org/A/HRC/46/19>.

²⁵⁴ OHCHR, WHO, UNESCO, *Joint Appeal for Open Science*, 2020, available at: https://www.ohchr.org/Documents/Press/WebStories/JointAppeal_OpenSciences_EN.pdf

²⁵⁵ OHCHR, *Human Rights and Access to COVID-19 Vaccines*, 17 December 2020, p. 1-2, 4. https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf

²⁵⁶ See, e.g. ACHPR Working Group on ESCR, *Press release on the impact of the COVID-19 pandemic on economic, social and cultural rights in Africa*, 4 June 2020, available at: <https://www.achpr.org/pressrelease/detail?id=510>; ACHPR, *Resolution on Human and Peoples’ Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts*, ACHPR/Res. 449 (LXVI), 7 August 2020, par. 16(d), available at: <https://www.achpr.org/sessions/resolutions?id=480>.

²⁵⁷ See ECSR, *Statement of interpretation on the right to protection of health in times of pandemic*, 21 April 2020, p. 5, available at: <https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>.

²⁵⁸ See e.g., IACHR, *IACHR statement on pandemic and creation of SACROI*, 20 March 2020, available at: http://www.oas.org/en/iachr/media_center/PReleases/2020/060.asp; IACHR, *IACHR and its SRESCER Call on American States to Make Public Health and Human Rights the Focus of All their Decisions and Policies Concerning the COVID-19 Vaccine*, 5 February 2021, available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/027.asp.

resulting from this pandemic”.²⁵⁹ The Inter-American Commission also issued a several resolutions on human rights in the context of the pandemic, calling on States in the first weeks of the pandemic to:

[e]nsure access to medication and health technologies needed to address the pandemic situation, giving particular attention to the use of strategies such as the use of flexibility clauses or exceptions in intellectual property regimes to prevent restrictions on generic drugs, and prevent price gouging of medication and vaccines, abuse of the use of patents or exclusive protection of test results.²⁶⁰

In July 2020, the Inter-American Commission stated that, “[t]he right to benefit from scientific progress and its applications with regard to health requires that States adopt measures, in a participatory and transparent manner, to ensure access to any essential medicines, vaccines, and medical equipment and technology that are developed thanks to science and practice in this context to prevent and treat infection from the SARS-COV-2 virus.”²⁶¹ More recently, the Inter-American Commission issued Resolution 1/2021 on COVID-19 Vaccines and Inter-American Human Rights Obligations, stating, *inter alia*, that:

[I]ntellectual property is a social product, and therefore has a social function, for which reason the recognition of intellectual property, patents, and trade secrets cannot constitute an impediment to human rights, particularly the right to health in the context of a pandemic.

...

States must facilitate and strengthen implementation of COVAX, C-TAP, and other mechanisms developed globally and regionally to promote equitable access to vaccines and ensure the exchange of information and technologies.²⁶²

Also early in the pandemic, the Chairperson of the African Commission on Human Rights Solomon Dersso and the UN High Commissioner on Human Rights Michelle Bachelet called on 20 May 2020, for equitable access to COVID-19 diagnostics, therapeutics, and vaccines.²⁶³

92. International calls for greater, more equitable COVID-19 vaccine access have been growing in intergovernmental spaces. In the 46th session of the UN Human Rights Council, one resolution adopted unanimously specifically addressed COVID vaccines access. The more specific resolution entitled, “Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic,” recognized that, “...immunization against COVID-19 is a global public good,” it called for

²⁵⁹ IACtHR, *Statement of The Inter-American Court of Human Rights 1/20*, 9 April 2020, p. 2, available at: https://www.corteidh.or.cr/tablas/alerta/comunicado/Statement_1_20_ENG.pdf.

²⁶⁰ IACHR, *Pandemic and Human Rights in the Americas*, Resolution 1/2020, 10 April 2020, par. 9, <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

²⁶¹ IACHR, *Human Rights of Persons with COVID-19*, 27 July 2020, Resolution 4/2020, par. 11, <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-20-en.pdf>.

²⁶² See IACHR, *COVID-19 vaccines and inter-American human rights obligations*, Resolution 1/2021, 6 April 2021, Preamble, par. 27-29, available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-21-en.pdf>.

²⁶³ ACHPR, *Africa: We must act now to avoid a catastrophe, say rights chiefs*, 20 May 2020, available at: <https://www.achpr.org/pressrelease/detailPid=505>.

strengthened international cooperation that takes *inter alia* people centered approach focused on, “people in vulnerable situations.”²⁶⁴ The resolution further calls on States to remove unjustified obstacles restricting the export of COVID-19 vaccines – and to facilitate trade and administration of vaccines for all to enjoy highest attainable health. The resolution also called for enhanced “...access to science, innovation, technologies, technical assistance and knowledge-sharing.”²⁶⁵ Significantly, the resolution called on all States, international organizations and relevant stakeholders to “commit to transparency in all matters related to the production, distribution and fair pricing of vaccines, and urges States to immediately take steps to prevent, within their respective legal frameworks, speculation and undue export controls and stockpiling that may hinder affordable, timely, equitable and universal access for all countries to COVID-19 vaccines;”²⁶⁶ The resolution also strongly urged, “all States to refrain from taking any economic, financial or trade measures that may adversely affect equitable, affordable, fair, timely and universal access to COVID-19 vaccines, in particular in developing countries.”²⁶⁷

93. Furthermore, in a broader resolution on economic, social and cultural rights, the Council unanimously, “[u]rge[d] all States to prioritize measures to guarantee economic, social and cultural rights for all individuals, in particular for those disproportionately affected by the pandemic, and to ensure timely, fair and equitable universal access to quality, safe, affordable and effective vaccines, therapeutics and diagnostics; .”²⁶⁸
94. The African Union in February 2021 decided to support the TRIPS waiver as proposed by South Africa and India, observing, “exceptional circumstances exist justifying a waiver from the obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) specifically for the prevention, containment and treatment of COVID-19.”²⁶⁹ At the Organisation of American States, a resolution on “equitable distribution of covid vaccines” was adopted by the Permanent Council expressing, “grave concern regarding

²⁶⁴ UN Human Rights Council, *Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic*, Resolution, 17 March 2021, Preamble, par. 1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/066/56/PDF/G2106656.pdf?OpenElement>.

²⁶⁵ UN Human Rights Council, *Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic*, Resolution, 17 March 2021, par. 9, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/066/56/PDF/G2106656.pdf?OpenElement>.

²⁶⁶ UN Human Rights Council, *Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic*, Resolution, 17 March 2021, par. 14, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/066/56/PDF/G2106656.pdf?OpenElement>.

²⁶⁷ UN Human Rights Council, *Ensuring equitable, affordable, timely and universal access for all countries to vaccines in response to the coronavirus disease (COVID-19) pandemic*, Resolution, 17 March 2021, par. 16, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/066/56/PDF/G2106656.pdf?OpenElement>.

²⁶⁸ UN Human Rights Council, *Question of the realization in all countries of economic, social and cultural rights*, Resolution, 16 March 2021, par. 9, available at: <https://undocs.org/A/HRC/46/L.13>.

²⁶⁹ AU Executive Council, *Decision on the Report on the African Union Response on Covid-19 Pandemic in Africa*, Doc. Ex.Cl/1256(Xxxviii), February 2021, par. 15, available at: https://au.int/sites/default/files/decisions/40025-ex_cl_dec_1107_-_1125_xxxviii_e.pdf.

all measures with the purpose or result being inequality and discrimination in access to vaccines and in their distribution between developed and developing states...”²⁷⁰

95. It important to recall that States should also use this moment as an opportunity to dramatically increase health spending, particularly for the most marginalized communities, in an effort to rebuild health systems weakened by decades of austerity. Many States face real fiscal constraints, a situation worsened by the economic toll of the pandemic. Most States, however, have some room to prioritize the right to health, and doing so is a matter of political choice. Even outside of the impacts of the pandemic, most countries have consistently under-resourced their health systems over the past decades, leaving them vulnerable not only to the pandemic itself, but also unequipped to deal with large scale, national efforts such as vaccination campaigns.
96. As part of the obligation of maximum available resources, all States must ensure that they take all steps necessary to mobilize sufficient resources to ensure that their domestic health systems are prepared for and can most equitably distribute vaccinations. This includes allocating resources to procure sufficient amounts of vaccines, increasing investments in health care workers and personnel, ensuring capable cold storage chains are in place, particular for the most marginalized communities, and all other aspects of the health system in an equitable and non-discriminatory manner. While intellectual property barriers present a significant obstacle to affordable global vaccine supply, this should not be used as a pretext to sanction inadequately funded and underprepared health systems domestically.
97. Steps that States should take in this respect include putting in place more progressive tax systems to more equitably generate greater revenue, ensuring that resources are allocated in as equitably and non-discriminatory manner as possible, cracking down on procurement or other kinds of corruption which siphon away resources from the health sector, and others.²⁷¹ There have already been numerous reported instances of corrupt practices siphoning resources from public coffers into private hands.

B. Extraterritorial obligations

98. All States must abide by their respective extraterritorial human rights obligations to ensure urgent, universal, and equitable global COVID vaccine access. These obligations emanate from the human rights guarantees discussed above, most notably--though not exclusively--from the ICESCR.
99. As explained by CESCR in General Comment 24, States have extraterritorial obligations to respect, protect and fulfill Covenant rights in relation to activities of businesses “domiciled in

²⁷⁰ OAS Permanent Council, *La distribución equitativa de vacunas contra la COVID-19*, Resolution 1165 (2312/2021), 17 February 2021, available at: https://twitter.com/oea_oficial/status/1362116172871835648.

²⁷¹ IACHR, *COVID-19 vaccines and inter-American human rights obligations*, Resolution 1/2021, 6 April 2021, Preamble, Part C(V), available at: <https://www.oas.org/en/iachr/decisions/pdf/Resolucion-1-21-en.pdf>.

their territory and/or under its jurisdiction” that impact those outside of its territory.²⁷² The Committee detailed the textual basis for extraterritorial obligations and the consonance of its views with those expressed in relevant pronouncements by the International Court of Justice and the UN Human Rights Council.²⁷³

100. According to the Committee, States’ extraterritorial obligations to respect ICESCR rights:

requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements.²⁷⁴

101. States’ extraterritorial obligations to protect under the ICESCR:

requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.

This obligation extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law.²⁷⁵

102. Furthermore, as to States’ extraterritorial obligations to fulfill:

Article 2 (1) of the Covenant sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.

Consistent with article 28 of the Universal Declaration of Human Rights, this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and

²⁷² CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 26, 28, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

²⁷³ CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 27, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

²⁷⁴ CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 29, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

²⁷⁵ CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 30-31, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

policies, including diplomatic and foreign relations measures, to promote and help create such an environment. States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights.²⁷⁶

103. These articulations of States' extraterritorial obligations are in line with the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.²⁷⁷ Of particular note, apart from detailing States' extraterritorial obligations to respect, protect and fulfill ESCR, the Principles also provide, *inter alia*, that:

As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extra-territorially. A State that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.

...

States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.²⁷⁸

104. In April 2020, CESCR stated, "States parties have extraterritorial obligations related to global efforts to combat COVID-19."²⁷⁹ More recently, regarding vaccines, CESCR determined that:

[g]iven the global nature of the pandemic, States have also the obligation to support, to the maximum of their available resources, efforts for making vaccines available globally. 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 right to health, as it results in shortage of vaccines for those who are most in need in the least developed countries...In addition, States parties have an extraterritorial obligation to take the necessary measures

²⁷⁶ CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 36-37, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

²⁷⁷ The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, FIAN International, January 2013, par. 8-9, 13-35, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

²⁷⁸ The ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, FIAN International, January 2013, par. 15, 17, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

²⁷⁹ CESCR, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, 6 April 2020, par. 20, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/STM_COVID19.docx.

to ensure that business entities domiciled in their territory and/or under its jurisdiction do not violate economic, social and cultural rights abroad.²⁸⁰

105. Thus, CESCR has further clarified that, “States should therefore take all measures necessary to ensure that such business entities do not invoke intellectual property law, either in their own territory or abroad, in a manner that is inconsistent with the right of every person to have access to a safe and effective vaccine for COVID-19.”²⁸¹ Already foreseeing the ills of vaccine nationalism, CESCR warned in late 2020 that, “competition among States may lead to an increase in the price of vaccines and might even create a temporary monopoly of access to the first vaccines produced for some developed States, undermining, at least temporarily, the possibility of other countries, especially developing States, to ensure access to vaccine for their population.”²⁸² It further cautioned that “such competition for a vaccine runs counter to the extraterritorial obligations of States to avoid taking decisions that limit the opportunity of other States to realize their right to health.”²⁸³

106. As part of their extraterritorial human rights obligations, therefore, when a government has decisive influence on people’s rights overseas such as through membership in international organizations, such as the IMF or WTO, that can effectively force governments to adopt budget, debt or trade policies that harm human rights, they must take positions that push the organization to act consistently with their human rights obligations. In the case of vaccine and health system funding, this may involve further steps, such as providing debt relief, preventing the hemorrhaging of resources, and enabling access to additional unconditioned forms of financial support.²⁸⁴

C. Duty of international cooperation

107. As provided, *inter alia*, in the ICESCR and ICCPR, each State, within its possibilities, must carry out economic, technical and scientific cooperation to support other members of the international community to deal in the best way with the main infectious diseases and to prevent, treat and control epidemic and endemic diseases, such as the COVID-19 pandemic. CESCR has noted that, “[p]andemics are a crucial example of the need for scientific international cooperation to face transnational threats,” stating further that, “[t]he COVID-19

²⁸⁰ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 4, 9, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

²⁸¹ CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, par. 8, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx.

²⁸² CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, par. 10, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx.

²⁸³ CESCR, *Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19)*, 27 November 2020, par. 10, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/E_C_12_2020_2_AUV.docx.

²⁸⁴ See Center for Economic and Social Rights, *Governments’ Obligation to Cooperate Internationally to Realize Human Rights*, June 2020, available at: <https://www.cesr.org/sites/default/files/Issue%20Brief%202020.pdf>.

pandemic is a global crisis, which highlights the crucial importance of international assistance and cooperation, a core principle enshrined in the Covenant.”²⁸⁵

108. According to CESCR:

Such international assistance and cooperation include the sharing of research, medical equipment and supplies, and best practices in combating the virus; coordinated action to reduce the economic and social impacts of the crisis; and joint endeavours by all States to ensure an effective, equitable economic recovery. The needs of vulnerable and disadvantaged groups and fragile countries, including least developed countries, countries in conflict and post-conflict situations, should be at the centre of such international endeavours.²⁸⁶

109. CESCR more recently “remind[ed] States of their obligations under the Covenant in relation to universal access and affordability of vaccines for COVID-19, in particular in relation to international cooperation and intellectual property,”²⁸⁷ stating:

States have therefore a duty of international cooperation and assistance to ensure access to vaccines for COVID-19 wherever needed, including by using their voting rights as members of different international institutions or organizations, including regional integration organizations such as the European Union. All those international organizations should also contribute to the achievement of universal and equitable access for vaccines and refrain from taking measures that obstruct this goal. Thus, States must strengthen their international cooperation to guarantee, as soon as possible, affordable vaccines for COVID-19 globally including for developing and least developed countries.²⁸⁸

110. The Committee also explained that, “[p]roduction and distribution of vaccines must be organized and supported by international cooperation and assistance, which includes the sharing of benefits of scientific progress and its applications.”²⁸⁹

111. Furthermore, the International Health Regulations (2005), which are binding on all member states of the World Health Organization, explicitly state that international cooperation is necessary to provide an effective public health response to the international spread of infectious diseases and with pandemic potential. On several occasions, the Director-

²⁸⁵ CESCR, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, 6 April 2020, par. 19, 23, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/STM_COVID19.docx.

²⁸⁶ CESCR, *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights*, 6 April 2020, par. 19, available at: https://www.ohchr.org/Documents/HRBodies/CESCR/STM_COVID19.docx.

²⁸⁷ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 2, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

²⁸⁸ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 3, 4, 9, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

²⁸⁹ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 5, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

General of the World Health Organization has warned that effective access to vaccination against COVID-19 requires that all countries act for the benefit of the global community over and above individual interests.

D. Corporate accountability and State obligations to regulate business

112. As noted above, CESCR recently affirmed:

States parties [to the Convention] have the international obligation to respect the right to health in other countries, and to prevent third parties, including business entities, from violating the right to health in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. [...] In addition, States parties have an extraterritorial obligation to take the necessary measures to ensure that business entities domiciled in their territory and/or under its jurisdiction do not violate economic, social and cultural rights abroad. Therefore, States should take all necessary measures to ensure that such business entities do not invoke intellectual property law, either in their own territory or abroad, in a manner inconsistent with the right of every person to access a safe and effective vaccine for COVID-19.²⁹⁰

113. Pharmaceutical companies not only have a responsibility to people's human rights regarding the safety and efficacy of their vaccines; they are also called upon to carry out assessments of impacts on human rights of other policies related to access to vaccines, such as their prices or the distribution of their products. If said evaluation results in a possible negative impact on human rights, these companies must take all necessary actions to prevent or mitigate damage to the affected populations,²⁹¹ especially if there are potential adverse impacts on the rights to life and health. In the midst of a global health emergency, it is clear that companies must not hinder the protection of human rights by invoking their intellectual property rights and prioritizing economic gain over the general interest. Accordingly, CESCR has determined that:

pharmaceutical companies, have the obligation, as a minimum, to respect Covenant rights; they have specific responsibilities to enable the realization of the right to health, including in relation to access to medicines and vaccines. In particular, pharmaceutical companies, including innovator, generic and biotechnology companies, have human rights responsibilities in relation to

²⁹⁰ CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 9, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

²⁹¹ See CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 16-17, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf; UN *Guiding Principles on Business and Human Rights*, Principle 15, 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

access to medicines, comprising active pharmaceutical ingredients, diagnostic tools, vaccines, biopharmaceuticals and other related health-care technologies. Thus, business entities should also refrain from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine for COVID-19 or to the right of States to exercise TRIPS flexibilities.²⁹²

114. The Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines, presented to the United Nations General Assembly in 2008 by the Special Rapporteur on the right to the highest possible level of health state that pharmaceutical companies have human rights responsibilities, along with member States, to promote access to medicines; these guidelines reaffirm the commitment that pharmaceutical companies have to do what is in their power to make essential medicines, and in this case vaccines against COVID-19, available to all.²⁹³ Guideline 5, for example, states that pharmaceutical companies must pay special attention to the needs of disadvantaged individuals, communities and populations, such as children, the elderly and those living in poverty in their strategies, policies, programs, projects and activities.²⁹⁴ The guidelines also call for pharmaceutical companies to respect the right of States to use the flexibilities established in the TRIPS Agreement, which includes respecting and not interfering with the rights of States to protect public health and increase access to medicines in accordance with the WHO Doha Declaration on the TRIPS Agreement and Public Health.²⁹⁵

115. Under pillar I of the UN Guiding Principles on Business and Human Rights (UNGPs), international human rights law is clear that States have an obligation, as emphasized by CESCR, to protect human rights in both normal times and at times of crisis; the duty to protect under principle 3 of the UNGPs includes an obligation on States to:

- a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

²⁹² CESCR, *Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property*, 12 March 2021, par. 8, available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_2021_1_9318_E.docx.

²⁹³ See UN Special Rapporteur on the enjoyment of the highest attainable standard of physical and mental health, *Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines*, Report, Annex, Preamble (h), 11 August 2008, available at: https://www.who.int/medicines/areas/human_rights/A63_263.pdf.

²⁹⁴ See UN Special Rapporteur on the enjoyment of the highest attainable standard of physical and mental health, *Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines*, Report, Annex, Guideline 5, 11 August 2008, available at: https://www.who.int/medicines/areas/human_rights/A63_263.pdf.

²⁹⁵ See UN Special Rapporteur on the enjoyment of the highest attainable standard of physical and mental health, *Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines*, Report, Annex, Guideline 22, 28, August 2008, available at: https://www.who.int/medicines/areas/human_rights/A63_263.pdf.

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.²⁹⁶

116. As explained by the UN Working Group on Business and Human Rights, under pillar II of the UNGPs:

all companies have a baseline responsibility to prevent and address adverse impacts with which they may be involved, and to treat people with dignity. Human rights due diligence is key to ensuring that any risks to people are identified and mitigated. [...] The Guiding Principles also clarify that the responsibility of businesses extends beyond the business' own activities, either when contributing to adverse impacts caused by others, or when directly linked to their operations, products or services through adverse impacts caused by business relationships.²⁹⁷

With the right to life and the right to health particularly impacted by the unfair distribution of COVID-19 vaccines on a global scale, any acts by States or businesses to obstruct access to vaccines or to facilitate vaccine nationalism is acting in contradiction to obligations and responsibility to respect international human rights law and the UN Charter.

117. Of note, several States, social movements, and civil society organizations, have been calling for a stronger international legally binding instrument to ensure that standardized laws exist worldwide to hold accountable corporate and economic entities – particularly multinational corporations – and prevent them from causing harm in their business activity. To this effect, States and civil society have engaged over the last few years in the UN intergovernmental working group process to establish a treaty to regulate, in international human rights law, the activities of transnational corporations and other business enterprises – pursuant to UN Human Rights Council resolution 26/9. Unsurprisingly, many of the States who have blocked the proposal of India and South Africa for a TRIPS waiver considering COVID-19 are the same States who have long delayed and/or obstructed progress on the international instrument to regulate business activities.

118. The ICESCR and General Comment No. 14 of the CESCR establish the obligations of States party to prevent third parties, including companies, from interfering in the application of the guarantees provided for in Article 12, which establishes the right fundamental of health and with this, the duty of cooperation to face a pandemic.²⁹⁸ Pharmaceutical companies not

²⁹⁶ UN *Guiding Principles on Business and Human Rights*, Principle 3, 2011, available at:

https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

²⁹⁷ UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights*, 28 April 2020, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E>.

²⁹⁸ CESCR, General Comment 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, par. 35, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDjmc0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL>; See also CESCR, *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, par. 14-16, available at: https://digitallibrary.un.org/record/1304491/files/E_C-12_GC_24-EN.pdf.

only have a legal responsibility towards the protection of human rights, specifically to life and health, but also a moral obligation, both towards the States with which they negotiate and towards the citizens of the world who require access to vaccines to have the same opportunities to have a healthy life. After all, the health of human beings is also a necessary condition for a prosperous economy that facilitates industrial development. In addition, in many vaccine research and development projects, public resources have been used, which should also imply a reciprocal duty of pharmaceutical companies to assume their responsibility towards guaranteeing the right to health of all citizens of the world.²⁹⁹

119. Another aspect of huge concern is the lack of transparency in both the general dealings of intergovernmental bodies such as the World Trade Organization,³⁰⁰ as well as in contracts between pharmaceutical companies and States purchasing vaccines at a fast pace.³⁰¹ Such contracts should be public knowledge available for all to monitor – communities need information as a preventative measure and for purposes of monitoring and enforcing compliance of companies and business activities with international law. The public funding that contributed to various vaccine development efforts further underscores the rationale for transparency and accessibility. Pascal Canfin, Chair of the European Parliament’s Health Committee, recently echoed these concerns over accountability stating: “We have very little information on the content of the contracts that have been signed by the European Commission and some laboratories.” In September 2020, the EU seemingly gave AstraZeneca partial immunity in a low-cost vaccine deal.³⁰² According to some patient-focused organizations, “it is of immense concern that amidst the rush to develop a vaccine, pharmaceutical companies have successfully lobbied to effectively be waived of the responsibilities usually expected of them if anything goes wrong.”³⁰³ In December 2020, the Serum Institute in India also requested immunity in case the vaccines they are manufacturing have any serious adverse effects.³⁰⁴ According to news reporting from January 2021, this

²⁹⁹ See Report of the United Nations Secretary-General’s High Level Panel on Access to Medicines, 2016, p.26-27, available at:

<https://static1.squarespace.com/static/562094dee4b0d00c1a3ef761/t/57d9c6ebf5e231b2f02cd3d4/1473890031320/UNSG+HLP+Report+FINAL+12+Sept+2016.pdf>.

³⁰⁰ Steve Charnovitz, *Transparency and Policy and Participation in the World Trade Organization Organization*, 56 Rutgers L. Rev. 927, 2004, available at:

https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1432&context=faculty_publications.

³⁰¹ Matt Apuzzo and Selam Gebrekidan, *Governments Sign Secret Vaccine Deals. Here’s What They Hide*. New York Times, 28 January 2021, available at: <https://www.nytimes.com/2021/01/28/world/europe/vaccine-secret-contracts-prices.html>.

³⁰² Francesco Guarascio, *Exclusive: AstraZeneca gets partial immunity in low-cost EU vaccine deal*, Reuters, 25 September 2020, available at: <https://www.reuters.com/article/uk-health-coronavirus-eu-astrazeneca-exc/exclusive-astrazeneca-gets-partial-immunity-in-low-cost-eu-vaccine-deal-idUKKCN26G0NE?edition-redirect=uk>.

³⁰³ Transparency International, *Transparency & Accountability Is Crucial If a Vaccine Is to Overcome Covid-19*, available at: <https://www.transparency.org.uk/coronavirus-covid-19-vaccine-transparency-accountability-clinical-trials>.

³⁰⁴ Lerory Leo, *Covid vaccine makers must be shielded from lawsuits: SII chief*, Mint, 18 December 2020, available at: <https://www.livemint.com/science/health/serum-ceo-wants-covid-19-vaccine-makers-to-be-indemnified-from-legal-liability-11608306871907.html>.

request was not accepted.³⁰⁵ Giving complete immunity for big pharmaceuticals in vaccine production and distribution can jeopardize the effective global prevention of COVID-19 and it sets a very dangerous precedent. Without transparency, it is much harder to ensure corporate and State accountability for obstructing access to COVID-19 vaccinations. It is also much harder to address the phenomenon of corporate capture of government decision making both at the domestic and multinational level – whether through the manifestation of revolving doors, where employees move from the corporate sector to public regulators and other agencies and vice versa to influence government decision-making, or through policy and legislative interference, economic diplomacy, shaping of narratives, or capture of academic institutions.³⁰⁶ Both the UNGPs³⁰⁷ and the Organization for Economic Co-operation and Development (OECD)³⁰⁸ highlight the added value of transparency laws in protecting human rights and attempts to implement soft laws – particularly when there are barely any coercive laws in existence that could hold companies or States accountable in their responses to the COVID-19 pandemic.³⁰⁹

120. Corporations are using the COVID-19 crisis to push through measures to create precedents for impunity that could have an impact on our health.³¹⁰ Industry pursuit of liability waivers -- especially when they feel mounting pressure -- is not new at all. At the same time that many civil society organizations are engaged in trying to drive forward accountability, through initiatives like Make Big Polluters Pay³¹¹ or the Binding UN Treaty to regulate transnational corporations and other business enterprises,³¹² industry actors are likewise engaged in their own offensive, to exempt themselves from liability. The tobacco industry tried to push through a liability waiver in the US Congress back when they were facing legal investigations in the US for the impact of smoking on health.³¹³ There was also a US-backed push for a liability waiver at the last climate talks (COP 25) which was narrowly defeated by

³⁰⁵ Teena Thacker, *Covid vaccine makers to be liable for adverse effects of jabs*, The Economic Times, 14 January 2021, available at: <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/vax-cos-to-be-liable-for-adverse-effects-of-jabs/articleshow/80260148.cms?from=mdr>.

³⁰⁶ See ESCR-Net, *Manifestations of Corporate Capture*, available at: https://www.escr-net.org/sites/default/files/manifestation_en.pdf.

³⁰⁷ See UN *Guiding Principles on Business and Human Rights*, Principles 3d, 21, 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

³⁰⁸ OECD, *OECD Guidelines for Multinational Enterprises*, 2011, par. III.33, IV.45, available at: www.oecd.org/corporate/mne/48004323.pdf.

³⁰⁹ Radu Mares, *Corporate transparency laws: A hollow victory?* Netherlands Quarterly of Human Rights, July 2018, available at: https://www.researchgate.net/publication/326130140_Corporate_transparency_laws_A_hollow_victory#pf18.

³¹⁰ Francesco Guarascio, *Exclusive: AstraZeneca gets partial immunity in low-cost EU vaccine deal*, Reuters, 25 September 2020, available at: <https://www.reuters.com/article/uk-health-coronavirus-eu-astrazeneca-exc/exclusive-astrazeneca-gets-partial-immunity-in-low-cost-eu-vaccine-deal-idUKKCN26G0NE?edition-redirect=uk>, and Lerory Leo, *Covid vaccine makers must be shielded from lawsuits: SII chief*, Mint, 18 December 2020, available at: <https://www.livemint.com/science/health/serum-ceo-wants-covid-19-vaccine-makers-to-be-indemnified-from-legal-liability-11608306871907.html>.

³¹¹ *Make Big Polluters Pay*, Campaign Page, available at: <https://makebigpolluterspay.org/act>.

³¹² See ESCR-Net, *Human Rights and Business Treaty*, available at: <https://www.escr-net.org/corporateaccountability/hrbusiness treaty>.

³¹³ Yussuf Saloojee and Elif Dagli, *Tobacco industry tactics for resisting public policy on health*, Bulletin of the World Health Organization, 2000, available at: [https://www.who.int/bulletin/archives/78\(7\)902.pdf](https://www.who.int/bulletin/archives/78(7)902.pdf).

civil society.³¹⁴ The meat industry also tried to insulate themselves from accountability for the lives lost in meat packing facilities where people were not given adequate protective gear. Now we are seeing a similar tactic from the pharmaceutical industry.³¹⁵

121. States may also utilize the power to issue compulsory licenses of patents critical to the development and production of vaccines, as per the 2001 Doha Declaration, which restates and reinforces the availability under the TRIPS Agreement of flexibilities with respect to intellectual property rights; these could allow non-patent-holders to produce a patented product or make use of a patent-protected process without the consent of the patent holder but still requiring their engagement.³¹⁶ It is one of the flexibilities included in the WTO TRIPS Agreement.³¹⁷ However, as explained above, this is an unfit, slow and cumbersome mechanism to address a global emergency posed by COVID-19. Allowing for the use of compulsory licenses alone is not sufficient to address massive inequalities in COVID-19 vaccine distribution. The situation requires a swift and clear waiver on TRIPS provisions relating to the prevention, containment or treatment of COVID-19 and the facilitation of the transfer of proprietary technology, know-how and materials to manufacture vaccines locally in low- and middle-income countries.³¹⁸
122. Voluntary notions of corporate social responsibility not only fall short of the requirements of international human rights law; they have failed to ensure that pharmaceutical companies are fully sharing patents, scientific knowledge, technology, and data to enable the mass production of life-saving COVID-19 vaccines. As mentioned in the overview of facts above, not one company has joined the WHO-backed COVID-19 Technology Access Pool (C-TAP) as of 22 January 2021 for the purpose of sharing information openly and freely.³¹⁹

E. Obligations of the World Trade Organisation

123. Intellectual property rights cannot become a barrier to the effective enjoyment of the fundamental right to health. According to the WHO Doha Declaration, States must be allowed to interpret intellectual property rules in a way that supports public health both in access to existing medicines and in creating of new technologies. This means that States must, on the one hand, prevent access to essential medicines and vaccines from being limited by

³¹⁴ Corporate Europe Observatory, *Corporate COP25: the biggest failure so far?* 19 December 2019, available at: <https://corporateeurope.org/en/2019/12/corporate-cop25-biggest-failure-so-farr>.

³¹⁵ See: Harris Gleckman, *COVAX: A global multistakeholder group that poses political and health risks to developing countries and multilateralism*, Transnational Institute, 1 April 2021, available at: <https://longreads.tni.org/covax>.

³¹⁶ WHO, Declaration on the Trips Agreement and Public Health (Doha Declaration), 14 November 2001, par. 5(B), available at: <https://www.who.int/medicines/areas/policy/tripshealth.pdf?ua=1>.

³¹⁷ WTO, *Compulsory licensing of pharmaceuticals and TRIPS*, available at: https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm.

³¹⁸ Aruna Kashyap and Margaret Wurth, Human Rights Watch, *Waiving Intellectual Property Rules Key to Beating Covid-19*, 16 November 2020, available at: <https://www.hrw.org/news/2020/11/16/waiving-intellectual-property-rules-key-beating-covid-19>.

³¹⁹ Michael Safi, *WHO platform for pharmaceutical firms unused since pandemic began*, The Guardian, 22 January 2021, available at: <https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firms-unused-since-pandemic-began>

intellectual property rights, and on the other hand, they must help countries develop medicines and vaccines quickly to meet the demand.

124. Under Principle 10 of the UNGPs, States acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.³²⁰

Many countries that support the UNGPs have been opposing a request made by India and South Africa to waive certain provisions of the TRIPS Agreement that may be contrary to the prevention, containment and treatment of COVID-19. This means they are failing to uphold commitments under the UNGPs.

125. WTO members must ensure that public health prevails over commercial interests, as well as support research and development of vaccines and drugs wherever they are needed. International cooperation to ensure the realization of human rights is required by international law, as specified above.

126. The request made by India and South Africa to waive provisions of the TRIPS agreement that may hinder the all out effort needed to prevent, contain, and treat COVID-19 worldwide should be accepted by all members of the organisation. It is necessary to ensure that all technologies that can contribute to reducing the risk of mortality, disease or infection are widely accessible and affordable. All member countries are called to support the initiative, even if they do not have the capacity to produce drugs or vaccines, since the elimination of production barriers benefits all countries if the production capacity of these technologies increases.

127. The WTO has an obligation to facilitate the effective consideration and adoption of the TRIPS waiver, including, if necessary, through a binding vote, as provided for in its governing rules, if consensus cannot be reached.³²¹ As explained by the WTO:

³²⁰ UN *Guiding Principles on Business and Human Rights*, Principle 10, 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

³²¹ See Thanh Nguyen, Quynh Nguyen, and Phong Pham, *Decision-Making by Consensus in the WTO*, 3 August 2012, p. 7-8, available at:

https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2125583_code1849786.pdf?abstractid=2122948&mirid=1
 (“Decisions to waive an obligation imposed on a Member are provided in Article IX:3 WTO Agreement, which provides: In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.”)

Where consensus is not possible, the WTO agreement allows for voting — a vote being won with a majority of the votes cast and on the basis of “one country, one vote.”

The WTO Agreement envisages ... specific situations involving voting:

- An interpretation of any of the multilateral trade agreements can be adopted by a majority of three quarters of WTO members.
- The Ministerial Conference can waive an obligation imposed on a particular member by a multilateral agreement, also through a three-quarters majority...³²²

³²² WTO, Whose WTO is it anyway?, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

III. Urgent appeal

128. In light of the information and legal obligations detailed below, we request that the human rights special procedures mandate holders issue urgent appeals to enable the massive emergency and sustainable scaling up of production and fair distribution necessary to ensure urgent, universal, and equitable global access to COVID-19 vaccines by calling, as a matter of international human rights law, on:
- i. all States to comply with their duties to ensure just access to COVID-19 vaccines within countries and also between them, including via any needed international economic, scientific and other cooperation, such as the alleviation of debt burdens;
 - ii. those States opposing³²³ the proposed³²⁴ Trade-Related Intellectual Property Rights (TRIPS) Agreement waiver for the prevention, containment, or treatment of COVID-19 to: a) reconsider their positions, b) stop blocking the advancement of the proposal, and c) if necessary, enable its submission to a binding vote within the WTO;
 - iii. the relevant business and other private actors³²⁵--including the pharmaceutical industry possessing patents, know how, and necessary organic materials for COVID-19 vaccines--to support the TRIPS waiver, to participate unreservedly in the WHO's COVID-19 Technology Access Pool (C-TAP), and to openly share any other inputs required for effective COVID-19 vaccine production and distribution;

³²³ As of March 22, 2021 these States were **Australia, Brazil, Japan, Norway, Singapore, Switzerland, United Kingdom, United States, El Salvador, and the following European Union (EU) countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden.** MSF, *No Patents, No Monopolies in a Pandemic*, available at: <https://msfaccess.org/no-patents-no-monopolies-pandemic>.

³²⁴ WTO communication, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication from India and South Africa, 2 October 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>.

³²⁵ WTO communication, Examples of IP Issues and Barriers in COVID-19 Pandemic, Communication from South Africa, Council on Trade-Related Aspects of Intellectual Property Rights, 23 November 2020, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W670.pdf&Open=True>; Christopher Garrison, How the 'Oxford' Covid-19 Vaccine Became the 'AstraZeneca' Covid-19 Vaccine, *Medicines Law and Policy*, 5 October 2020, available at: <https://medicineslawandpolicy.org/wp-content/uploads/2020/10/How-the-Oxford-Covid-19-Vaccine-became-the-AstraZeneca-Covid-19-Vaccine-Final.pdf>; Jorge L. Contreras, Deconstructing Moderna's COVID-19 Patent Pledge, *Blog, Bill of Health, Petrie Flom Center, Harvard Law School*, 21 October 2020, available at: <https://blog.petrieflom.law.harvard.edu/2020/10/21/moderna-covid19-patent-pledge/>; International Federation of Pharmaceutical Manufacturers and Associations, IFPMA Statement on the "Solidarity Call to Action to realize equitable global access to COVID-19 health technologies through pooling of knowledge, intellectual property and data," 28 May 2020, available at: https://www.ifpma.org/wp-content/uploads/2020/05/IFPMA_Statement_Costa_Rica_Proposal_28May2020.pdf; Michael Safi, WHO Platform for Pharmaceuticals Unused since Pandemic Began, 22 January 2021, available at: <https://www.theguardian.com/world/2021/jan/22/who-platform-for-pharmaceutical-firms-unused-since-pandemic-began>; Global Health Innovation Center, Duke University, Issue Brief: Deciphering the Manufacturing Landscape for Covid-19 Vaccines, 19 March 2021, available at: <https://launchandscalefaster.org/sites/default/files/documents/Speedometer%20Issue%20Brief-COVID%20Manufacturing%20Landscape%2019%20March%2021.pdf>.

- iv. all States to: a) regulate and hold accountable any private actors responsible for causing or contributing to human rights violations or abuses related to the obstruction of urgent, universal, and equitable vaccine access, and b) participate in the ongoing United Nations (UN) open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises;
- v. all relevant States and business actors to ensure full transparency in all elements of vaccine development, procurement, provision and debate; and
- vi. the WTO, to facilitate the expeditious resolution of the COVID-19 TRIPS waiver proposal, including by marshalling it to a binding vote if consensus cannot be reached.

Sincerely,



Chris Grove

Executive Director

ESCR-Net - International Network for Economic, Social, and Cultural Rights³²⁶

³²⁶ ESCR-Net - International Network for Economic, Social and Cultural Rights connects over 280 nongovernmental organizations, social movements and advocates across more than 75 countries to build a global movement to make human rights and social justice a reality for all. Numerous network members contributed to the strategy, research, drafting, and/or reviewing of this urgent appeal, foremost via the Corporate Accountability Working Group and the Strategic Litigation Working Group, with special thanks to: Al-Haq (Palestine), Amnesty International (AI, United Kingdom), Cairo Institute for Human Rights Studies (CIHRS, MENA), Center for Economic and Social Rights (CESR, United States), Centro de Estudios Legales y Sociales (CELS, Argentina), Dejusticia - Centro de Estudios de Derecho, Justicia y Sociedad (Colombia), Initiative for Social and Economic Rights (ISER, Uganda), International Commission of Jurists (ICJ, Switzerland), International Women's Rights Action Watch - Asia Pacific (IWRAW-AP, Malaysia), Jackie Dugard (South Africa), Kenya Human Rights Commission (KHRC, Kenya), Project on Organization, Development, Education and Research (PODER, Mexico), Social Rights Advocacy Centre (SRAC, Canada), Women's Legal Centre (WLC, South Africa).