

**The ICJ recommends that the African Union acknowledge that COVID-19 vaccines are a “public good”<sup>1</sup> and all States must ensure access to these vaccines in order to realize the human rights of their inhabitants**

The African Charter on Human and People’s Rights, to which most AU Member States are Party, provides that “*every individual shall have the right to enjoy the best attainable state of physical and mental health*” (Art 16(1)). The Charter also places an obligation on the States Parties to take all “*necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick*” (Art 16(2)).<sup>2</sup>

This obligation must be understood consistently with the equivalent Article 12 of the International Covenant on Economic, Cultural and Social Rights (ICESCR), to which most AU Member States are also Party. That provision protects the right to the “*highest attainable standard of physical and mental health*”, and requires States to take all necessary measures to realize this right including to ensure “*the prevention, treatment and control of epidemic, endemic, occupational and other diseases*” (Art 12(1)(c)).<sup>3</sup> Vaccines, for some such diseases including COVID-19, are necessarily an integral part of prevention, treatment and control

Therefore, under these treaties and other internationally binding human rights law, it is clear access to certain vaccines is necessary to fulfill a human right, must not be seen as a privilege. Vaccines are a public good and should be treated as such by States. This understanding was affirmed by the UN Committee on Economic, Social and Cultural Rights (CESCR) in December in a statement on universal and equitable access to vaccines. CESCR stressed that: “*every person has a right to have access to a vaccine for COVID-19 that is safe, effective and based on the application of the best scientific developments*”. It further implored States to “*give maximum priority to the provision of vaccines for COVID-19 to all persons*”.<sup>4</sup>

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<sup>1</sup> R. Cornes and T. Sandler, *The Theory of Externalities, Public Goods and Club Goods* (1986); and Samuelson, ‘Pure Theory of Public Expenditure and Taxation’, in J. Margolis and H. Guitton (eds), *Public Economics* (1969). What do we mean by a global public good? In economic theory, a public good, in contrast to a private good, is one that is non-excludable (no one can be excluded from the good’s consumption) and non-rivalrous (the good’s consumption does not reduce its availability to others). Public Good definition per : For a good to be recognized as a global public good, it must exhibit three properties. The good must be non-rivalrous and its consumption by a person or entity must not reduce the quantity present. The good must also be non-excludable, making it impossible to deter anyone from using it even if they were not involved in the good’s production. A global public good must also be available more-or-less worldwide.

<sup>2</sup> African Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), Article 16, available at: <https://www.achpr.org/legalinstruments/detail?id=49>.

<sup>3</sup> International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, Article 12, available at: <https://www.ohchr.org/documents/professionalinterest/cescr.pdf>.

<sup>4</sup> Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19) E/C.12/2020/2 (15 Dec 2020), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en).

## **States have an obligation to secure International Co-operation to ensure access to vaccines**

Under Article 2 of the ICESCR, States are under an obligation to realize the right to health both individually and “*through international assistance and cooperation, especially economic and technical*”. As is captured by the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, States must “*jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes*”. In the process of collectively ensuring the fulfilment of economic and social rights including the right to health, the Maastricht Principles also clarify that States must individually and collectively “prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups”.<sup>5</sup>

Despite these clear obligations, access to vaccines continues to be dramatically skewed towards countries of the Global North, with Global South nations including the significant majority of African countries, having limited or no access to vaccines. In addition, inequitable access to vaccines within countries of increasing and continuing concern. This situation flies in the face of the international law requirement to secure the right to health for all people in all countries through international co-operation. As the UN Independent Expert on Human Rights and International Solidarity, Obiora C. Okafor, observed in January 2021:<sup>6</sup>

*“this pandemic will not end for anyone, until it ends for everyone. The virus can still travel from the vastly unvaccinated massive population of the Global South to the Global North, including in its increasingly mutating forms...”*

*A globally coordinated vaccine distribution programme is highly preferable to the individualised approaches adopted by all-too-many of the richer states. International vaccine solidarity should be much preferred over international vaccine competition.*

*States, rather than act separately to hoard vaccines, should rededicate themselves to the COVAX programme. While many have commendably contributed large sums of money to COVAX, they undermine its effectiveness, and the overall effort to end the pandemic as rapidly as possible for everyone, when they simultaneously engage in vaccine hoarding.”*

This statement rings true both globally and regionally and should guide African Union responses to vaccine access between Africa and the rest of the world between African States; and within particular African States. The African Union has a key leadership role in directing such cooperation grounded in international human rights law standards including the right to health.

## **Endorsement of the WHO’s COVID-19 Technology Access Pool**

Despite these pressing needs, not all States have operated in a manner which is consistent with these obligations and too many continue to hoard vaccines and oppose measures necessary to ensure equitable vaccine access for all.

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<sup>5</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <http://www.etoconsortium.org/en/library/maastricht-principles/>, Principles 31-2.

<sup>6</sup> UN expert says global coordination and more equitable sharing of COVID-19 vaccines key to recovery (22 Jan 2021), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26683&LangID=E>.

For instance, while the WHO itself has nearly 200 Member States, only 40 States have to date committed to and endorsed its COVID-19 Technology Access Pool (C-TAP). C-TAP is aimed at facilitating the transparent sharing of COVID-19 health technology related knowledge, intellectual property and data, to accelerate the development and manufacturing of health products required to fight COVID-19, including vaccines.<sup>7</sup> Though high income countries have commonly failed to endorse C-TAP, so have low and middle-income States in Africa, with the only AU members to have endorsed it being: Egypt; Kenya; Mozambique; South Africa, Tunisia and Zimbabwe.

Indeed it is of serious concern that the COVAX Facility, which ostensibly aims to “accelerate the development and manufacture of COVID-19 vaccines, and to guarantee fair and equitable access for every country in the world”, has not itself endorsed C-TAP and continues to operate in a manner which is not transparent.<sup>8</sup>

### **Endorsement and Implementation of WTO waiver proposal**

Moreover, in addition to the voluntary C-TAP mechanism initiated by the WHO, in October South Africa and India submitted a proposal (IP/C/W/669) to the WTO’s Trade Related Aspects of Intellectual Property Rights (TRIPS) Council on 2 October 2020, proposing a temporary intellectual property rights waiver in relation to prevention, containment or treatment of COVID-19.<sup>9</sup> Advancing arguments for the waiver, which has received widespread support from human rights organizations, public health experts and civil society actors globally, India and South Africa explain that “intellectual property rights hindering or potentially hindering timely provisioning of affordable medical products to the patients” for COVID-19 treatment and prevention. Such intellectual property rights and patent monopolies continue to prevent many States in Africa – and indeed globally – from accessing sufficient quantities to meet global demand at affordable prices. This proposal has since been co-sponsored by Kenya, Eswatini, Mozambique, Pakistan, and Bolivia and endorsed by at least 40 States as well as international organizations such as UNAIDS.

Importantly, South Africa and India’s proposal has also been endorsed in a detailed statement by several Special Procedures who are experts of the UN Human Rights Council<sup>10</sup>, They called on States to “*fully exercise the right to grant compulsory licences pursuant to the TRIPS Agreement and the Doha Declaration on the TRIPS Agreement and Public Health to ensure that patents and*

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<sup>7</sup> Website of the COVID-19 Technology Access Pool, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool> (accessed 27 January 2021).

<sup>8</sup> See generally: Amnesty International “A Fair Shot: Ensuring Universal Access To Covid-19 Diagnostics, Treatments And Vaccines” (Dec 2020), available: <https://www.amnesty.org/en/documents/pol30/3409/2020/en/>; Human Rights Watch “Whoever Finds the Vaccine Must Share It: Strengthening Human Rights and Transparency Around Covid-19 Vaccines” (Oct 2020), available: <https://www.hrw.org/report/2020/10/29/whoever-finds-vaccine-must-share-it/strengthening-human-rights-and-transparency>.

<sup>9</sup> Council for the Trade-Related Aspects of Intellectual Property Rights “Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19, Communication from India and South Africa” IP/C/W/669 (2 Oct 2020), available: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>, p.1-4; WTO, Press Release “Members to continue discussion on proposal for temporary IP waiver in response to COVID-19 (10 December 2020), [https://www.wto.org/english/news\\_e/news20\\_e/trip\\_10dec20\\_e.htm](https://www.wto.org/english/news_e/news20_e/trip_10dec20_e.htm); Amnesty International, “Fair Shot: Ensuring Universal Access To COVID-19 Diagnostics, Treatment and Vaccines”, p 4-5; Human Rights Watch, “Urgently Waive Intellectual Property Rules for Vaccine” (10 December 2020), available: <https://www.hrw.org/news/2020/12/10/urgently-waive-intellectual-property-rules-vaccine>; UNAIDS, Press Statement, UNAIDS supports a temporary WTO waiver from certain obligations of the TRIPS Agreement in relation to the prevention, containment and treatment of COVID-19, available: [https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/october/20201015\\_waiver-obligations-trips-agreement-covid19](https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2020/october/20201015_waiver-obligations-trips-agreement-covid19). MSF Access Campaign, “WTO COVID-19 TRIPS Waiver Proposal: Myths, realities and an opportunity for governments to protect access to medical tools in a pandemic” (3 Dec 2020), available: <https://msfaccess.org/wto-covid-19-trips-waiver-proposal-myths-realities-and-opportunity-governments-protect-access>.

<sup>10</sup> These experts include: Tlaleng Mofokeng (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health); Olivier De Schutter (Special Rapporteur on extreme poverty and human rights); Anita Ramasastry (Chair), Dante Pesce (Vice-Chair), Surya Deva, Elżbieta Karska, and Githu Muigai (Working Group on the issue of human rights and transnational corporations and other business enterprises); Obiora C. Okafor (Independent Expert on human rights and international solidarity); and Saad Alfarag (Special Rapporteur on the right to development).

*other intellectual property rights do not create obstacles to providing for access to vaccines to all – particularly those in vulnerable situations and living in poverty*".<sup>11</sup> The proposal has also been endorsed by the CESCR which has indicated that the proposal must be "*implemented in order to facilitate the prevention, containment and treatment of COVID-19 through the global affordability of vaccines*".<sup>12</sup>

### **Uncertainty regarding Vaccine Roll-Out plans in individual African States**

In many AU Member States confusion and fear abound about whether and when vaccines will be locally accessible, which vaccines will be accessible and to whom such vaccines will be accessible. Globally States have been negotiating privately with vaccine producers and manufacturers, as well as other stakeholders without providing sufficient information to their populations.

The right to health obliges all States to ensure "*information accessibility*" including by providing all persons with the necessary information to make "*informed choices about their health*".<sup>13</sup> According to the CESCR, "*[a]ccurate and accessible information about the pandemic is essential both to reduce the risk of transmission of the virus and to protect the population against dangerous disinformation*".<sup>14</sup> In the specific context of vaccine access the Committee has indicated that States are required to: "*guarantee access to relevant information, especially through the dissemination of accurate scientific information on the safety and effectiveness of different vaccines, and public campaigns protecting people against false, misleading or pseudoscience information concerning vaccines, which is rapidly spreading on the Internet and social media*".<sup>15</sup>

At a minimum, and to begin with, States have an obligation in terms of the right to health to proactively and transparently disclose to the public their efforts to procure vaccines as well as develop, publicize and continuously update comprehensive vaccine rollout plans.

### **Role of the African Union in ensuring equitable vaccine access**

Since the inception of the COVID-19 pandemic, the African Commission on Human and People's Rights has consistently emphasized the need for human rights compliant State responses.<sup>16</sup> In August 2020, the Commission specifically urged the African Union to both "*prioritize identification and support of efforts for the development of vaccines on the African Continent*" and "*develop 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*".

The African Union Constitutive Act of the African Union sets amongst the AU's objectives to "*work with relevant international partners in the eradication of preventable diseases and the promotion*

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<sup>11</sup> Statement by UN Human Rights Experts Universal access to vaccines is essential for prevention and containment of COVID-19 around the world (9 Nov 2020), available:

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

<sup>12</sup> Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19) E/C.12/2020/2 (15 Dec 2020), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en).

<sup>13</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available: <https://www.refworld.org/docid/4538838d0.html>, para 37.

<sup>14</sup> Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights E/C.12/2020/1 (17 April 2020), available: <https://undocs.org/E/C.12/2020/1>, para 18.

<sup>15</sup> Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19) E/C.12/2020/2 (15 Dec 2020), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en), para 4.

<sup>16</sup> For a summary of African Commission interventions see J King, "Building Back Better—Can COVID-19 Renew African States' Commitment to African Charter ESCR Obligations?" (7 Dec 2020), available: <http://opiniojuris.org/2020/12/07/covid-19-and-africa-symposium-building-back-better-can-covid-19-renew-african-states-commitment-to-african-charter-escr-obligations/>.

*of good health on the continent*".<sup>17</sup> It also requires the AU to "*promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments*".<sup>18</sup> The AU General Assembly, which meets at the AU Summit between 3-7 February 2021, must do this by determining common policies, and issuing directives on "*emergency situations*".<sup>19</sup>

### **Recommendations of the International Commission of Jurists**

The AU will be expected by the constituents of its Members to fulfil its proper leadership function in terms its Constitutive Act an ensure the promotion and protection of human rights in Africa. To this end, the ICJ calls upon the AU to adopt resolutions:

1. Calling on all member States to ensure that their COVID-19 responses, including vaccine acquisition and distribution, comply with international human rights law and standards including those particularly relating to the rights to health and to duty ensure this right is realized through international cooperation.
2. Calling on all member States to endorse and fully participate in the WTO's COVID-19 Technology Access Pool.
3. Calling on all member States to openly support the approval and implementation of a waiver of intellectual property rights in terms of the TRIPS agreement in order to ensure equitable and affordable access of COVID-19 vaccines and treatment for all.
4. Calling on all member States to urgently publish public, comprehensive vaccine rollout plans and transparently provide clear and full health-related information to their populations.
5. Calling on all participants in COVAX to endorse and fully participate in the WTO's COVID-19 Technology Access Pool.<sup>20</sup>
6. Calling on the WTO to respond expeditiously and favourably to the proposal communicated by India and South Africa for waiver of IP protection for vaccines.

*Johannesburg, 4 February 2020*

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<sup>17</sup> African Union Constitutive Act, available: [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf), Article 3(n).

<sup>18</sup> Id, Article 3(h).

<sup>19</sup> Id, Articles 9(1)(a),(g).

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