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INTERNATIONAL COMMISSION OF JURISTS’ STATEMENT TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE OPENING OF ITS 69th SESSION

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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International Commission of Jurists’ Statement to the Committee on Economic, Social and Cultural Rights on the Opening of its 69th Session

1. The International Commission of Jurists (ICJ) applauds the concerted efforts of the Committee on Social, Economic and Cultural Rights (CESCR) to provide guidance to States about the fulfillment of their obligations under the ICESCR in responding to the COVID-19 pandemic. Both the CESCR’s statement on COVID-19 and ESCR (April 2020)¹ and its subsequent statement on universal and equitable access to COVID-19 vaccines (Dec 2020)² have fast become rallying points for human rights defenders around the world working to enforce human rights under trying circumstances.

2. In addition, the authoritative interpretations of the Covenant provided by the CESCR’s General Comment on the Right to Health,³ and the timeously published General Comment on Science,⁴ will, if seriously taken on board by States, make invaluable contributions to the realization of Covenant rights even as States struggle to respond to the pandemic.

3. However, despite this Committee’s best efforts, in many countries governments continue to fail to make provision to meet their minimum core obligations under the right to health.

   In light of this, the ICJ calls on the CESCR to make use of the Convention’s State reporting procedure to provide crucial and specific guidance to individual States on how best to ensure compliance with their Covenant obligations related to the right to health in the context of COVID-19.

4. In addition, the ICJ wishes to draw to the Committee’s attention some key concerns, by way of example, focusing on the vital issues of vaccine access and access to justice, and urge the Committee to remind States of their obligations in these areas.

A. STATE OBLIGATIONS TO PROCURE VACCINES

5. Tanzanian President John Magufuli has described vaccines as “dangerous”, and the Health Minister Dorothy Gwajima has confirmed that the “government has no plans to receive the Covid vaccine”. Alongside Tanzania, Burundi, Eritrea and Madagascar have reportedly refused even free access to vaccines through COVAX.⁵

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States Parties should acknowledge explicitly that: access to vaccines is a necessary condition for the enjoyment of the right to health and other Covenant rights, that vaccines are a public good, and everyone’s entitlement. States Parties should comply with their legal obligation under the Covenant to take measures toward securing vaccine access for their populations.

B. STATE OBLIGATIONS TO PRODUCE AND IMPLEMENT COMPREHENSIVE ROLL OUT PLANS

6. All States have an obligation “to take all the measures necessary, to the maximum available resources, to guarantee access to vaccines for COVID-19 to all persons, without discrimination”. Consistent with CESCR’s jurisprudence, this obligation clearly includes a duty to develop, publish and implement comprehensive vaccine acquisition, storage and distribution plans.6

7. In Zimbabwe, however, the human rights organization ZimRights has approached the High Court seeking an order requiring the government to budget for and produce a vaccine roll out plan for the country.7 In South Africa, the Health Justice Initiative has contemplated similar litigation,8 and continues to criticize the adequacy of government plans.9 In many States little or no information is provided to the public about the States’ vaccine procurement and distribution plans.10

States Parties should formulate and publicize comprehensive vaccine procurement and distribution plans consistent with their Covenant obligation to ensure access to health information.11

C. NON-DISCRIMINATORY ACCESS TO VACCINES

8. Without advanced access to States’ vaccine acquisition and roll out plans, individuals and groups seeking to enforce Covenant rights are unable to do so. There is a real risk, for example, that States’ roll out plans will discriminate against disadvantaged and marginalized groups either explicitly or

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7 NewsDay, ZimRights demands COVID-19 vaccine roll-out plan (5 February 2021), available at: https://www.newsdaily.co.zw/2021/02/zimrights-demands-covid-19-vaccine-roll-out-plan/. The matter was struck off the roll for a lack of urgency, a decision which has been appealed by ZimRights. See: https://twitter.com/ZimRightsLIVE/status/1359437954331140966?
in their impact. For example, it was initially reported that in South Africa vaccines would only be made available to South African citizens, and not to “undocumented” foreign nationals. Concern remains that documentary requirements to access vaccines may discourage “undocumented migrants” from seeking vaccination. The authorities’ vaccine distribution strategies in Mexico and Colombia gave rise to similar concerns, although Colombia appears to have reversed its decision.

9. While allowing Palestinian residents of East Jerusalem access to vaccines, Israel continues to deny it to Palestinians living in the Occupied Palestinian Territories, particularly, in the West Bank and Gaza, with the Israeli Health Minister Yuli Edelstein claiming “Palestinians have to take care of their own health”, despite international law obligations to ensure such access in coordination and cooperation with State of Palestine authorities

States Parties should provide disaggregated data on vaccine access for all marginalized and disadvantaged persons in their territory and illustrate compliance with their obligation to ensure equal and non-discriminatory access to vaccines under Article 2 of the Covenant.

D. STATES PARTIES OBLIGATIONS TO REALIZE THE RIGHT TO HEALTH “INDIVIDUALLY AND THROUGH INTERNATIONAL ASSISTANCE AND CO-OPERATION”

10. Under Article 2 of ICESCR, as detailed in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, States must “elaborate, interpret and apply their obligations” to ensure equal and non-discriminatory access to vaccines. This requires States to provide data on vaccine distribution strategies to avoid discriminatory access. For example, the Yanhui Deng’s research highlights the importance of ensuring equitable access to vaccines, particularly for marginalized and disadvantaged populations. Furthermore, states are required to ensure that their actions are consistent with international law, including human rights treaties.

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apply” all “relevant international agreements and standards in a manner consistent with their human rights obligations” and “take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially”.

11. Many States, however, by their actions or omissions, continue to impede global access to vaccines. Far too few States have supported global collaborations essential to ensuring equitable vaccine access, such as the WHO’s COVID-19 Technology Access Pool (C-TAP), and South Africa and India’s waiver proposal (IP/C/W/669) to the WTO’s Trade Related Aspects of Intellectual Property Rights (TRIPS) Council.

12. Only 40 of the WHO’s nearly 200 Member States have endorsed C-TAP, which is aimed at facilitating the transparent sharing of COVID-19 health technology related knowledge, intellectual property and data, including vaccines.

13. Similarly, despite CESCR’s endorsement and support from a range of UN Special Procedures, many States – particularly those in the Global North – continue to actively oppose the proposal for the WTO to waive the “implementation, application and enforcement” of TRIPS provisions for the purposes of COVID-19 “prevention, containment or treatment”.

14. The consequence is a continuing divide in vaccine access between Global North and Global South countries, with low-income countries barely having begun the process of vaccination, and many having no access to vaccines at all. Some States have already vaccinated significant proportions of their populations and have more than enough vaccines to do so several times over. At the same time, South Africa, for example, has been widely reported to have had to pay more than double the amount paid by many European countries for Oxford-AstraZeneca vaccine.

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24 Human Rights Watch, “Not helping low-income countries get the vaccine could come back to haunt” (3 February 2021), available at: https://www.hrw.org/news/2021/02/03/not-helping-low-income-countries-get-vaccine-could-come-back-haunt-us-0.
15. In addition, on receipt of such vaccines, it became evident that the vaccines provided expired much sooner than anticipated. This is of broader concern on the continent, as 90 million doses of the Oxford-AstraZeneca vaccine are due to be delivered to African countries, with WHO Africa Director Dr Matshidiso Moeti indicating “we cannot afford to waste even a single dose of these vaccines”.  

**States Parties should explain how they have complied with international co-operation obligations with respect to equitable access to vaccines for all people in all countries. States should illustrate the adequacy of measures taken to ensure that companies do not prevent vaccine access or significantly obstruct affordable access to vaccines for all.**

**E. ACCESS TO EFFECTIVE REMEDIES, INCLUDING JUDICIAL REMEDIES**

16. In some countries, the continued access has proven invaluable in the fulfilment of Covenant rights in the context of COVID-19. In **Nepal**, **Lesotho**, **Zimbabwe** and **India**, for example, courts have handed down decisions relating to access to PPE for healthcare workers.

17. In **Nepal**, in particular, the Supreme Court has made orders in relation to: management of quarantine facilities; the operation of private health facilities; the rights of detained persons; and the provision of COVID-19 related health services free of charge.

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28 COVAX expects to start sending millions of COVID-19 vaccines to Africa in February (4 February 2021), available at: [https://www.afro.who.int/news/covax](https://www.afro.who.int/news/covax)

29 Dr Matshidiso Moeti (@MoetiTshidi) (“Africa has watched other regions start #COVID19 vaccination campaigns from the side-lines for too long. This planned roll-out is a critical first step to ensuring the continent gets equitable access to vaccines. We know no one will be safe until everyone is safe”). (Twitter Post), available at: [https://twitter.com/MoetiTshidi/status/1357390202684211203?s=20](https://twitter.com/MoetiTshidi/status/1357390202684211203)


18. Challenges to the legality of “lockdown” regulations have been adjudicated in several countries, including, New Zealand, Malawi, Kosovo, South Africa, Namibia, Colombia, Australia and Canada.

19. Despite this, many States have taken measures with the stated intent to respond to the COVID-19 pandemic that have severely curtailed access to justice. The role of the judiciary in ensuring access to effective remedies for human rights violations, including ICESCR violations, is “even more important in times of emergency”. CESC’s jurisprudence on the right to health, specifically, has affirmed as much.

States Parties should provide information about the functioning of judicial and non-judicial mechanisms and how effective compliance with judicial and administrative decisions related to ICESCR rights is ensured. Court proceedings online, and where necessary to secure meaningful access to justice, in person, must continue.

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47 Id.
F. RELEVANT ICJ RESOURCES ON COVID-19


“The ICJ recommends that the African Union acknowledge that COVID-19 vaccines are a “public good” and all States must ensure access to these vaccines in order to realize the human rights of their inhabitants”: https://www.icj.org/wp-content/uploads/2021/02/Africa-ICJ-Vaccine-Access-Submission-2020-ENG.pdf


