

# The Unvaccinated

## Equality not Charity in Southern Africa

A Briefing Paper, May 2021



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## INTRODUCTION

In January 2021, the African continent recorded a total increase of 40 percent in COVID-19 deaths compared to December 2020,<sup>1</sup> with a fatality rate of 2.5 percent, while the global average was 2.2 percent during that same period.<sup>2</sup> Southern African countries recorded substantially increased COVID-19 cases and deaths after the identification of the more contagious B.1.1.35 variant by South African scientists in October 2020.<sup>3</sup>

While it is evident that the B.1.135 variant led to higher COVID-19 transmission and death rates across the African continent, especially in Southern Africa, lower testing rates and underreporting potentially mask the true severity of the impact of the virus.<sup>4</sup> South Africa, for example, conducted more testing than most other Southern African countries,<sup>5</sup> yet still reached only one-fifth or less of the testing rates recorded in Europe and North America by mid-March 2021.<sup>6</sup> The infection rate in South Africa is therefore widely projected to be much higher than the reported rate with a large number of “excess deaths”,<sup>7</sup> which could mean that COVID-19 has accounted for “almost triple” the reported number of deaths.<sup>8</sup> As underscored by Professor Shabir Madhi, a South African expert in vaccinology, “when it comes to calculating the impact [COVID-19] has had on a health front, this is completely underestimated”.<sup>9</sup> The same is very likely true for the significant majority of Southern African Development Community (SADC) Member States.

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<sup>1</sup> P Mwai, BBC, “Coronavirus: Africa's new variants causing growing concern” (12 February), available at: <https://www.bbc.com/news/world-africa-53181555>.

<sup>2</sup> Reuters, “Africa's COVID-19 case fatality rate surpasses global level” (21 January), available at: Africa's COVID-19 case fatality rate surpasses global level; Our World Data, available at: <https://ourworldindata.org/coronavirus-testing#world-map-total-tests-performed-relative-to-the-size-of-population> (accessed 16 April 2021).

<sup>3</sup> A Le Page, A Conion, South African covid-19 variant (B.1.351), available at: <https://www.newscientist.com/definition/south-african-covid-19-variant/>; A Hanekom, T de Oliveira, South African scientists who discovered new COVID-19 variant share what they know (22 January 2021), available at: <https://theconversation.com/south-african-scientists-who-discovered-new-covid-19-variant-share-what-they-know-153313>. This variant of COVID-19 is often incorrectly referred to in the media as “the South African variant” of COVID-19, simply because it was first identified in South Africa. See: U Nkanjeni, Schooled! Prof Salim Abdool Karim tells the world to stop calling it ‘the SA variant’ of Covid-19 (5 February 2021), available at: <https://www.sowetanlive.co.za/news/south-africa/2021-02-05-watch-schooled-prof-salim-abdool-karim-tells-the-world-to-stop-calling-it-the-sa-variant-of-covid-19/>. While the variant was identified in South Africa, it has not been determined where the variant emerged or what the significance of this might be. Despite its unknown origin and spread, the variant is currently unhelpfully associated with South Africa due to the misnomer.

<sup>4</sup> A Soy, Lack of COVID-19 testing undermines Africa's ‘success’ (27 May 2020), available at: <https://www.bbc.com/news/world-africa-52801190>.

<sup>5</sup> S Madhi Presentation, Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>; Our World Data, Coronavirus (COVID-19) Testing, available at: <https://ourworldindata.org/coronavirus-testing> (accessed 5 May 2021).

<sup>6</sup> Id.

<sup>7</sup> SAMRC, Report on Weekly Deaths in South Africa, available at: <https://www.samrc.ac.za/reports/report-weekly-deaths-south-africa> (accessed 5 May 2021).

<sup>8</sup> Eyewitness News, S.Africa Excess Death Nearly Triple Official Virus Fatalities (March 2021), available at: <https://ewn.co.za/2021/03/04/s-africa-excess-deaths-nearly-triple-official-virus-fatalities>. As highlighted by researcher Debbie Bradshaw during the peak of the COVID-19 crisis in January 2021, “(..) most of the confirmed covid deaths are really only being reported from hospitals, whereas there are many who leave hospitals before death or never make it to the hospitals in the first place,”. The situation in most Southern African countries where testing has been less prevalent and reporting less transparent may well follow similar patterns.

<sup>9</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.

Despite the great harm caused during the second wave of the COVID-19 pandemic, at the time of writing the majority of countries in Southern Africa had barely progressed at all with their COVID-19 vaccine rollout and the World Health Organization (WHO) had sounded the alarm at the lack of supply of vaccines.<sup>10</sup> While all SADC Members, with the exception of Madagascar and Tanzania, have begun vaccination by May 2021, the majority of Member States have fully vaccinated no more than 0.6 percent of their population by the beginning of May 2021.<sup>11</sup>

The reasons for this dire situation, while multifaceted and complex,<sup>12</sup> too often lie in the failure of the authorities of States in the region, singularly or collectively, to do what is necessary within their capacities to meet the gravity of the problem presented by the COVID-19 pandemic.

COVID-19 obviously poses an enormous public health and human rights crisis for all countries of the world, and few responses have been entirely exemplary. To be sure, the slow rate of progress made regarding COVID-19 vaccines in the SADC region is at least partly due to lack of global international cooperation and solidarity, a failure that has carried adverse consequences for much of the Global South. The practices of many high-income countries, sometimes criticized as “vaccine nationalism” and “vaccine hoarding”, has led some States to purchase and reserve large vaccine quantities, sometimes enough to vaccinate their entire population several times over.<sup>13</sup> This, in turn, limits already scarce COVID-19 vaccine supplies for other countries and augmenting a global cycle of inequality in vaccine access.

Lois Chingandus, a Zimbabwean HIV expert and member of the People’s Vaccine Alliance has expressed the fear that “people are going to continue to die of Covid (...) while people in other countries are living a normal life” and “eventually when the privileged decide that it's time to save the poor people, then we will get the vaccine”.<sup>14</sup> These dire circumstances have led Fatima Hassan, South African human rights defender and director of the Health Justice Initiative to observe that “philanthropy [and] benevolence, cannot fund equality” in vaccine access.<sup>15</sup> Indeed, the protection of intellectual property has taken precedence over the

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<sup>10</sup> P Mwai, Covid-19 Africa: What is happening with vaccines? (23 April 2021), available at: <https://www.bbc.com/news/56100076>.

<sup>11</sup> The New York Times, World COVID-19 Vaccine Tacker, New York Times, available at: <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> (accessed 5 May).

<sup>12</sup> Amnesty International, “A Fair Shot” Ensuring Universal Access to COVID-19 Diagnostics, Treatments and Vaccines (2020), available at: <https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF>; The People’s Vaccine (“Pharmaceutical corporations use patents and other intellectual property rights to stop other companies from making the vaccines or medicines they have developed. We are saying that in these unprecedented times, companies should share their knowledge and not enforce intellectual property rights in the interests of public health. But intellectual property is not the only barrier. Vaccines are not as straightforward as many other medicines to copy and many are made of biological material.”) available at: <https://peoplesvaccine.org/faq/> (accessed 5 May 2021); ESCR-NET, Press Statement: “Call for urgent action to secure universal and equitable access to COVID-19 vaccines” (21 April 2021), available at: <https://www.escr-net.org/news/2021/press-release-call-urgent-action-secure-universal-and-equitable-access-covid-19-vaccines>.

<sup>12</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso>.

<sup>13</sup> Amnesty International, “A Fair Shot” Ensuring Universal Access to COVID-19 Diagnostics, Treatments and Vaccines (2020), available at: <https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF>.

<sup>14</sup> S Hegarty, Covid: The countries worried they won't get the vaccine (19 December 2020), available at: <https://www.bbc.com/news/world-55325450>.

<sup>15</sup> F Hassan, available at: <https://twitter.com/HassanF/status/1387851535481200640>.



protection of public health,<sup>16</sup> and, as Hassan has highlighted, States and pharmaceutical companies are “treating intellectual property as sacrosanct rather than human life as sacrosanct”.<sup>17</sup> Without rapid and adequate action to ensure equitable access to COVID-19 vaccines, therefore, she concludes that the world will only witness the “survival of the wealthiest, survival of the richest, and in many cases survival of the whitest”.<sup>18</sup> For the rest of the world, including the vast majority of those living in Southern Africa, they remain the “unvaccinated”: a category of people continuously at risk to COVID-19 transmission, illness and death due in large part to inequitable vaccine access.

None of this dereliction of responsibility by powerful States and global actors can serve to let the authorities of the SADC off the hook when it comes to accountability for continued scarcity of vaccines in Southern Africa. This briefing paper focuses on the domestic and sub-regional specific reasons for the glacial progress in access to COVID-19 vaccines. It measures the performance of SADC Member States and the SADC itself against the international law and standards in respect of COVID-19 vaccine access. The recent dramatic COVID-19 outbreak in India should, as Professor Salim Abdool Karim has highlighted, act as a warning to South Africa and Southern Africa more broadly of the need for increased vaccination efforts and forward planning for future waves of COVID-19 in the wake of emerging COVID-19 variants as observed in India.<sup>19</sup>

At the centre of the human rights analysis in this briefing paper are the obligations of every SADC Member State to realize the rights of all people to health, life and equal benefit from scientific progress, individually or through international cooperation and assistance. Importantly, as the first section of this briefing paper shows, States in the SADC have human rights obligations both to their inhabitants (citizens and non-citizens alike) as well as to those of other States including non-SADC Member States. The briefing paper makes general recommendations to SADC Member States as well as particular recommendations to States including Madagascar, Malawi, Tanzania, South Africa and Zimbabwe in light of this analysis.

Vastly improved coordination and cooperation facilitated, in part, by the SADC is therefore not only politically and morally urgent but required in terms of international human rights law and standards. As the South African Constitutional Court noted in its 2018 judgment in relation to the SADC Tribunal, SADC Member States should relate to each other as “sister countries” with an:

*“...unshakeable purpose of contributing to the realisation of a more just, equal, peaceful, human rights-oriented, truly democratic order and shared*

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<sup>16</sup> OHCHR, 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>.

<sup>17</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.

<sup>18</sup> Id.

<sup>19</sup> R Nkgadima, What’s happening in India should be warning to SA – Prof Abdool Karim (28 April 2021), available at: <https://www.iol.co.za/news/politics/whats-happening-in-india-should-be-warning-to-sa-prof-abdool-karim-2168b2a8-6818-4103-a87e-93742fe4202b>; N Sonjica, SA is likely to experience third wave in winter, says Prof Abdool Karim, (28 April 2021), available at: <https://www.timeslive.co.za/news/south-africa/2021-04-28-sa-is-likely-to-experience-third-wave-in-winter-says-prof-abdool-karim/>.

*prosperity*. This is especially so in a region that has a long and painful history of struggling for the attainment of these good governance, economic development, growth and stability-enhancing goals of universal application.”<sup>20</sup>

The SADC should replace its conspicuous silence on COVID-19 vaccine access with determined, coordinating action towards the “unshakeable purpose” of ensuring equitable vaccine access and the realization of human rights for all people living in Southern Africa.

## **I. INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS**

While the core of international human rights law and standards on the application of the right to the highest attainable standard of physical and mental health, several international authorities have interpreted and applied these to the context of COVID-19 over the past year.

This section summarizes some of these key developments in the articulation of international human rights standards applicable to COVID-19 vaccine access in terms of the rights to health, life and equal benefit from scientific progress. It also briefly summarizes the international standards relating to States’ international assistance and cooperation obligations and corporate responsibilities to respect human rights.

### **A. International Human Rights Law**

#### **1. The Right to Health**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has 171 States Parties.<sup>21</sup> These include all SADC Member States with the exception of Comoros, Botswana and Mozambique are state parties. The ICESCR contains in Article 12<sup>22</sup> the obligation for States to take all necessary measures to ensure the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” and create conditions “which would assure to all medical service and medical attention in the event of sickness”.<sup>23</sup> The primary rights under the ICESCR,

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<sup>20</sup> Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018), available at: <http://www.saflii.org/za/cases/ZACC/2018/51.html>, para. 91.

<sup>21</sup> OHCHR, Status of Ratification, available at: <https://indicators.ohchr.org/> (accessed 5 May 2021).

<sup>22</sup> Article 12 of ICESCR provides:

“1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness”

<sup>23</sup> ICESCR, Article 12; See also: Comoros has signed but not yet ratified this Covenant, available at: <https://indicators.ohchr.org> (accessed 6 May 2021).

including the right to health, form part of the corpus of general international law or customary international law and even those States that are not a party to the ICESCR, have recognized these rights through their assent to numerous UN General Assembly and Human Rights Council Resolutions and the 1993 Vienna Declaration and Programme of Action.<sup>24</sup> In addition, as States Parties to the International Covenant on Civil and Political Rights (ICCPR),<sup>25</sup> SADC Member States have obligations to protect the components of the right to health that form part of the right to life.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has set out the scope of these obligations in terms of the right to health under article 12 in its General Comment 14. There the CESCR affirms that all healthcare goods, facilities and services must be available, accessible, acceptable and of adequate quality.<sup>26</sup> In addition, these goods, facilities and services should be “accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.”<sup>27</sup> The right to health should be accessible without discrimination “even in times of severe resource constraints” such as those brought on by the COVID-19 epidemic.<sup>28</sup>

The right to health is protected under the Convention on the Rights of the Child (CRC), article 24 of which provides that “States Parties shall strive to ensure that no child is deprived of his or her right of access to [...] health care services”, particularly “to facilities for the treatment of illness and rehabilitation of health”. States Parties to the CRC “shall pursue full implementation of this right and, in particular, shall take appropriate measures”, “[t]o combat disease [...], including

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<sup>24</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF.157/23, (12 July 1993), available at: <https://www.refworld.org/docid/3ae6b39ec.html>.

<sup>25</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, (16 December 1966), available at: <https://www.refworld.org/docid/3ae6b3aa0.html>, Art. 6.

<sup>26</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 at: <https://www.refworld.org/docid/4538838d0.html> [accessed 31 March 2021], para 12.

<sup>27</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 International Covenant on Economic, Social and Cultural Rights)* E/C.12/2000/4 (11 August 2000) (“General Comment 14”), para 12(b).

<sup>28</sup> *Id.*, para 18.

within the framework of primary health care, through, inter alia, the application of readily available technology [...].<sup>29</sup> All African States are party to the CRC.<sup>30</sup>

The right to health is also protected under Article 16 of the African Charter on Human and Peoples Rights (ACHPR), which the African Commission on Human and People's Rights has affirmed places an obligation of immediate effect on States to take "measures to prevent, treat and control epidemic and endemic diseases".<sup>31</sup>

The ICESCR obliges States to take all necessary measures to respect, protect, and fulfil (facilitate, provide and promote) this and all other ESCR.<sup>32</sup> The obligations of States in this regard are both "progressive" and "immediate", with immediate obligations including obligations to:

- Take steps towards realizing the right to health in full;
- Avoid any retrogressive steps decreasing existing access to health;
- Ensure that health services, facilities and goods are available to all without discrimination; and
- Ensure immediate access to at very least the "minimum essential level" of health services, facilities and goods.<sup>33</sup> COVID-19 vaccine access constitutes

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<sup>29</sup> UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74, Article 24 provides:

"1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.  
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To diminish infant and child mortality;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries."

<sup>30</sup> See: OHCHR Website, Committee on the Rights of the Child, available at: <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx> (accessed 29 April 2021)

<sup>31</sup> African Charter on Human and Peoples' Rights ("*Banjul Charter*"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 16 provides:

"Every individual shall have the right to enjoy the best attainable state of physical and mental health. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."; African Commission on Human and People's Rights, Principles and Guidelines on the Implementation of Economic, social and cultural rights in the African Charter on Human and People's Rights (2010), available at:

[https://www.achpr.org/public/Document/file/English/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf), para 60-67.  
<sup>32</sup> Id para 33. For more detail on these obligations see: International Commission of Jurists "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" (1 September 2020), available at: <https://www.ici.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>.

<sup>33</sup> African Commission on Human and People's Rights, Principles and Guidelines on the Implementation of Economic, social and cultural rights in the African Charter on Human and People's Rights, available at: [https://www.achpr.org/public/Document/file/English/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf), para 15.

a key part of the minimum essential level of healthcare States are obliged to realize immediately.

The CESCR, in a statement issued at the outset of the COVID-19 pandemic,<sup>34</sup> noted that healthcare systems had been “weakened by decades of underinvestment in public health services” and that healthcare systems around the world were “ill-equipped to respond effectively and expeditiously to the intensity of the current pandemic”.<sup>35</sup> It called on States to undertake the “extraordinary mobilization of resources” and “adopt appropriate regulatory measures to ensure that health-care resources in both the public and the private sectors are mobilized and shared among the whole population to ensure a comprehensive, coordinated health-care response to the crisis”.<sup>36</sup>

The CESCR also indicated that States should “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”. The CESCR has since adopted two additional statements, both of which focus directly on the right to equitable vaccine access in the context of COVID-19.<sup>37</sup>

The CESCR has stressed that guarantees in respect of the right to health require 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.”<sup>38</sup> These are “priority obligations”<sup>39</sup> and require States to all necessary measures to:<sup>40</sup>

- Ensure that vaccines are available, accessible, acceptable and of adequate quality;
- Remove any discrimination which acts as a barrier to vaccine access;
- Prioritize physical accessibility to vaccines, especially for marginalized groups and people living in remote areas;
- Guarantee affordability and economic accessibility of vaccines for all people, including by providing vaccines free of charge, at least for lower-income persons; and
- Guarantee access to relevant health information (including pertaining to vaccines), especially through the dissemination of accurate scientific information on the safety and effectiveness of different vaccines and

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<sup>34</sup> United Nations Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020): <https://undocs.org/E/C.12/2020/1>.

<sup>35</sup> Id, para 4.

<sup>36</sup> Id, paras 13 and 25.

<sup>37</sup> CESCR, 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); CESCR, Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property E/C.12/2021/1 (12 March 2021): [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en).

<sup>38</sup> CESCR, 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 2.

<sup>39</sup> Id para 3.

<sup>40</sup> Id para 4.



publicly combat misinformation or pseudoscience-based information concerning vaccines.

The CESCR has also emphasized that prioritization of vaccine access within countries “must be based on medical needs and public health grounds”,<sup>41</sup> meaning that of healthcare workers, older persons, persons with existing health vulnerabilities or persons who otherwise experience marginalization which might result in disproportionate impact from COVID-19 and COVID-19 response measures must be prioritized.<sup>42</sup> Prioritization must also be determined “through a process of adequate public consultation”, be “transparent”, “subject to public scrutiny” and, in the event of dispute, subject to “judicial review to avoid discrimination”.

More generally, States have a duty to develop, publish and implement comprehensive vaccine acquisition, storage and distribution plans.<sup>43</sup> Such plans must be produced in a participatory manner and should be publicized and disseminated widely in line with States’ obligations to ensure the accessibility of health information.<sup>44</sup>

## **2. Right to Equal Benefit of Scientific Progress**

Article 15 (1)(b) of ICESCR protects the right to “enjoy the benefits of scientific progress and its applications”,<sup>45</sup> the scope of which the CESCR has set out in some detail in its General Comment 25.<sup>46</sup> The CESCR has emphasized that a component

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<sup>41</sup> CESCR, 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 5.

<sup>42</sup> International Commission of Jurists “Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses” (1 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>, pp.39.

<sup>43</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 (Art. 2 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, available: <https://www.refworld.org/docid/4538838d0.html>, paras 43(d)(e)(f), 44(b), 54-55.

<sup>44</sup> Id, para 12(b); WHO SAGE Roadmap for Prioritizing uses of COVID-19 Vaccines in the Context of Limited Supply, Version 1.1 (13 November 2020), available at: <https://www.who.int/publications/m/item/who-sage-roadmap-for-prioritizing-uses-of-covid-19-vaccines-in-the-context-of-limited-supply>.

<sup>45</sup> International Covenant on Economic, Social and Cultural Rights (“ICESCR”), 16 December 1966, United Nations, Treaty Series, vol. 993, Article 15 provides:

- “1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”

<sup>46</sup> CESCR General Comment No. 25 (2020) on Science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) (April 2020) E/C.12/GC/25, available at: <https://undocs.org/E/C.12/GC/25>.

of this right is a right to equitable COVID-19 vaccine access, as this is an unquestionable product of recent scientific progress.<sup>47</sup>

Intellectual property rights protection, including in respect of pharmaceutical companies that develop, manufacture and distribute COVID-19 vaccine, necessarily carry particular significance in the context of the accessibility and affordability of those vaccines. This provides “incentives for new research activities and thus plays an important role in contributing to innovation and the development of science”.<sup>48</sup> The CESCR has stressed that the intellectual property regime also may “pose significant obstacles for persons wishing to access the benefits of scientific progress, which may be crucial for the enjoyment of other economic, social and cultural rights, such as the right to health”.<sup>49</sup>

States, therefore, have obligations to take measures to:

- Counter distortions of funding associated with intellectual property;
- Provide adequate financial support for research, through national efforts and/or, through international technical and technological cooperation;
- Ensure that in their national regulations and international agreements on intellectual property, social dimensions of intellectual property are guaranteed; and
- Prevent unreasonably high costs for access to essential medicines which undoubtedly includes COVID-19 vaccines.

In the specific context of vaccines to combat epidemic diseases, the CESCR clarifies that States “should use, when necessary, all the flexibilities of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, such as compulsory licenses, to ensure access to essential medicines, especially for the most disadvantaged groups”,<sup>50</sup> as well as generic medicines to ensure accessibility and affordability.<sup>51</sup>

### **What is the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement?**

The TRIPS Agreement came into effect on 1 January 1995 and “is to date the most comprehensive multilateral agreement on intellectual property”,<sup>52</sup> covering a wide range of IP areas including patents, copyrights and undisclosed information including trade secrets and test data.<sup>53</sup> The Agreement sets out minimum standards

<sup>47</sup> CESCR, 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>48</sup> CESCR General Comment No. 25 (2020) on Science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights) (April 2020) E/C.12/GC/25, available at: <https://undocs.org/E/C.12/GC/25>, para 61.

<sup>49</sup> Id, para 61.

<sup>50</sup> Id, para 69.

<sup>51</sup> Id, para 71.

<sup>52</sup> WHO Website, WTO and the TRIPS Agreement, available at: [https://www.who.int/medicines/areas/policy/wto\\_trips/en/](https://www.who.int/medicines/areas/policy/wto_trips/en/).

<sup>53</sup> WTO Website, Overview: the TRIPS Agreement, available at: [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

of intellectual property protection that must be provided by all WTO Member States, details domestic enforcements procedures for IP rights and subjects any TRIPS related disputes between Members to the WTO dispute settlement procedures.<sup>54</sup> According to the WTO, "TRIPS is expected to have the greatest impact on the pharmaceutical sector and access to medicines".<sup>55</sup>

### 3. The Right to Life

The International Covenant on Civil and Political Rights (ICCPR), under Article 6 of the ICCPR protects every human being's "inherent right to life".<sup>56</sup> The UN Human Rights Committee has affirmed that this includes the obligation to ensure "adequate conditions for protecting the right to life" including "measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health care."<sup>57</sup>

In the direct context of COVID-19, the Human Rights Committee has stressed that States "must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction".<sup>58</sup> This would likely include measures necessary to ensure equitable vaccine access for all people, given the immediate and far-reaching threat to life brought on by COVID-19.<sup>59</sup>

<sup>54</sup> WTO Website, Overview: the TRIPS Agreement, available at:

[https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

<sup>55</sup> WHO Website, WTO and the TRIPS Agreement, available at:

[https://www.who.int/medicines/areas/policy/wto\\_trips/en/](https://www.who.int/medicines/areas/policy/wto_trips/en/).

<sup>56</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999,

Article 6 provides:

- "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

<sup>57</sup> UN Human Rights Committee (HRC), *General Comment no. 36, Article 6 (Right to Life)*, 3 September 2019, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/5e5e75e04.html> [accessed 1 April 2021], para 26.

<sup>58</sup> UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (30 April 2020), available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

<sup>59</sup> On the application of the right to life in the context of COVID-19 in Southern Africa see as examples: Lesotho Medical Association and Another v Minister of Health and Others (CONST. CC NO: 19/2019) [2020] LSHC 14 (24 June 2020) available at: <https://lesotholii.org/ls/judgment/high-court/2020/14>; Farisé, N., "COVID-19 and Africa Symposium: The State's Duty to Provide PPE to Health Workers in Lesotho" (8 December 2020), OpinioJuris, available at:

## **B. International Human Rights Law and Standards: International Cooperation and Assistance**

States have an obligation under the ICESCR to realize the rights to health and equal benefit from scientific progress individually and “through international assistance and cooperation”.<sup>60</sup> States, therefore, have obligations to realize these rights for all people within their jurisdictions, as well as extraterritorial obligations to contribute to the realization of the same rights at a global level. States’ extraterritorial obligations are restated in the Maastricht Principles on Extraterritorial State Obligations in the area of Economic, Social and Cultural Rights (ESCR),<sup>61</sup> which have become a recognized part of CESCR’s jurisprudence.

The African Charter on Human and People’s Rights sets a core objective to “coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation”.<sup>62</sup> The African Commission on Human and People’s Rights has affirmed that the duty of international cooperation applies in the context of the ACHPR<sup>63</sup> and indicated that States must “prioritise allocation” of international assistance towards the realization of ESCR.<sup>64</sup> Moreover, States must ensure that their economic policies facilitate access to and enjoyment of ESCR and that bilateral and multilateral agreements between States, or with international financial institutions are not, “relied on as a justification for a failure to ensure enjoyment of [ESCR]”.<sup>65</sup>

The African Union Constitutive Act sets as an African Union (AU) objective to “work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent”.<sup>66</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>67</sup> The AU General Assembly must do this by determining common policies, and issuing directives on “emergency situations”.<sup>68</sup>

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<https://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-states-response-to-covid-19-in-africa/>;  
The State on application of Kathumba and others v President of Malawi and others (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020), available at:

<https://malawilii.org/mw/judgment/high-court-general-division/2020/29>; Fish Hodgson, T., “COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2)”, (8 December 2020), OpinioJuris, available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2/>.

<sup>60</sup> ICESCR, Article 2(1).

<sup>61</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-PrinciplesENG-booklet.pdf> ; See also: O De Schutter et al “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” Human Rights Quarterly 34 (2012) 1084–1169 available at: <https://www.icj.org/wpcontent/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>.

<sup>62</sup> African Charter, Preamble.

<sup>63</sup> African Commission on Human and People’s Rights, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2010), available at: [https://www.achpr.org/public/Document/file/English/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf).

<sup>64</sup> Id, para 39.

<sup>65</sup> Id, para 40.

<sup>66</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). See also: <https://www.icj.org/wp-content/uploads/2021/02/Africa-ICJ-Vaccine-Access-Submission-2020-ENG.pdf>.

<sup>67</sup> Id, Article 3(h).

<sup>68</sup> Id, Articles 9(1)(a),(g).

As to the SADC, its founding treaty sets combatting deadly communicable diseases, just like COVID-19, as one of its founding objectives.<sup>69</sup> The SADC Health Protocol requires Southern African governments to cooperate in addressing health problems and challenges facing them through “effective regional collaboration and mutual support” in order, in particular, to “coordinate regional efforts on epidemic preparedness, mapping, prevention, control and where possible the eradication of communicable and non-communicable diseases”.<sup>70</sup>

Article 29 of the SADC Health Protocol addressing pharmaceuticals provides that SADC States must “cooperate and assist one another” in the “production, procurement and distribution of affordable essential drugs”.<sup>71</sup> This obligation necessarily applies to the production, production and distribution of affordable COVID-19 vaccines and therapeutics.

### **C. International Human Rights Law and Standards: Business Enterprises and Vaccine Access**

In November 2020, Members of the UN Working Group on Business and Human Rights signed onto a joint statement with various UN Special Procedures, which prominently acknowledges the “social function” of business indicating that “industry and private benefit cannot be prioritized over the rights to life and health of billions with so far reaching consequences”.<sup>72</sup> In so doing, the joint statement emphasizes business enterprises responsibility to respect human rights, including the right to health, in the context of COVID-19 vaccine access.

Under general international human rights law, States have an obligation not only to respect human rights but also to protect persons from the impairment of human rights by others, including business enterprises. The obligation is set out in respect of the right to health and benefit of scientific progress by the CESCR in its General Comment 24<sup>73</sup> and affirmed by the Human Rights Committee in respect of the right to life.<sup>74</sup> The UN Guiding Principles on Business and Human Rights (UNGPs),<sup>75</sup> adopted by the UN Human Rights Council,<sup>76</sup> reinforces this general obligation. Regulatory measures to protect these rights must be implemented domestically,

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<sup>69</sup> Consolidated Treaty of the Southern African Development Community (2015), available at: [https://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf), Article 1(i).

<sup>70</sup> Southern African Development Community, Protocol on Health (18 August 1999), available at: <https://www.ifrc.org/docs/IDRL/Southern%20African%20Development%20Community.pdf>, Article 3.

<sup>71</sup> Id, Article 29(b).

<sup>72</sup> OHCHR, 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>

<sup>73</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24, available at: <https://www.refworld.org/docid/5beaecba4.html>, para III, (B), (2)24.

<sup>74</sup> UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: <https://www.refworld.org/docid/478b26ae2.html>, para. 8.

<sup>75</sup> OHCHR, Guiding Principles on Business and Human Rights (2011), available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf), principles 11-15.

<sup>76</sup> Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (A/HRC/17/31), (21 March 2011), available at: [https://www.ohchr.org/documents/issues/business/a-hrc-17-31\\_aev.pdf](https://www.ohchr.org/documents/issues/business/a-hrc-17-31_aev.pdf).



but also when acting through international organizations such as the World Health Organization (WHO) and the World Trade Organization (WTO).

The UNGPs provide that businesses, including pharmaceutical companies themselves have a responsibility to respect human rights including the right to health.<sup>77</sup> Pharmaceutical companies should, for instance, avoid measures and practices which: exacerbate supply scarcity or delays in access to COVID-19 vaccines; exacerbate lack of affordability of COVID-19 vaccines; omit principles of equity and non-discrimination from their business decisions; and lack transparency or prevent States from providing information about their interactions with companies transparently.<sup>78</sup>

## **II. COMMON CHALLENGES IN EQUITABLE, TIMELY AND ADEQUATE ACCESS TO COVID-19 VACCINES IN SOUTHERN AFRICA**

As vaccines are rolled out globally, many Southern African countries are facing a variety of common challenges that are limiting equitable and timely access to COVID-19 vaccines. This section of the briefing paper highlights some common obstacles reported at different stages of the COVID-19 vaccine procurement and distribution processes in Southern Africa.

### **A. Insufficient Access to COVID-19 Vaccines**

In general, COVID-19 vaccine access in Southern African countries has been minimal and insufficient, as reflected in the table below. The table below shows the very low levels of vaccine allocation and receipt by SADC countries, indicating proportionately paltry rate of people vaccinated across the SADC, with the exceptions of Mauritius and Seychelles. The vast majority of people in the other 14 SADC countries remain unvaccinated.

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<sup>77</sup>OHCHR, Guiding Principles on Business and Human Rights (2011), available at: [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf), Principles 11-15, General Comment 24, available at: <https://www.refworld.org/docid/5beaecba4.html>, para 5.

<sup>78</sup> Universal and Equitable Access to Covid-19 Vaccines, Testing, Treatments: Companies' Human Rights Responsibilities (11 February 2021), available at: <https://www.hrw.org/news/2021/02/11/universal-and-equitable-access-covid-19-vaccines-testing-treatments-companies-human>.

SADC Member States	% of Population Vaccinated <sup>79</sup>	% of Population Fully Vaccinated <sup>80</sup>	COVAX Doses Received <sup>81</sup>		COVAX Doses Allocated Q1-Q2 2021 <sup>82</sup>		% per population <sup>83</sup> (2 dose requirement)
			Brand	Amount	Brand	Amount	
<b>ANGOLA</b>	1.4%	-	AZ/SII	624,000	AZ/SII	2,544,000	0.95%
<b>BOTSWANA</b>	2.0%	-	AZ/SII	24,000	AZ/SKBio	117,600	0.51%
<b>COMOROS</b>	N.A.	N.A.	AZ/SII	12,000	AZ/SII	108,000	0.69%
<b>DEMOCRATIC REPUBLIC OF CONGO</b>	0.3%	-	AZ/SII	1,700,000	AZ/SII	6,948,000	0.95%
<b>ESWATINI</b>	3.0%	-	AZ/SII	12,000	AZ/SII	108,000	0.52%
<b>LESOTHO</b>	0.8%	-	AZ/SII	36,000	AZ/SII	156,000	0.84%
<b>MADAGASCAR</b>	-	-	-	-	-	-	-
<b>MALAWI</b>	1.6%	-	AZ/SII	360,000	AZ/SII	1,476,000	0.94%
<b>MAURITIUS</b>	9.3%	-	N.A.	N.A.	AZ/SKBio	100,800	N.A.
<b>MOZAMBIQUE</b>	0.2%	-	AZ	384,000 <sup>84</sup>	AZ/SII	2,424,000	0.61%
<b>NAMIBIA</b>	0.8%	-	AZ	24,000	AZ/SKBio	127,200	0.47%
<b>SEYCHELLES</b>	69.0%	61.0%	-	-	-	-	-
<b>SOUTH AFRICA</b>	0.5%	0.5%	AZ/SII	117,000	AZ/SII	864,000	0.10%
<b>UNITED REPUBLIC OF TANZANIA</b>	-	-	-	-	-	-	-
<b>ZAMBIA</b>	0.2%	-	AZ/SII	228,000	AZ/SII	1,428,000	0.62%
<b>ZIMBABWE</b>	2.9%	0.6%	N.A.	N.A.	AZ/SII	1,152,000	N.A.

<sup>79</sup> New York Times, Tracking Coronavirus Vaccinations Around the World, available at: <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> (accessed 4 May 2021).

<sup>80</sup> Id.

<sup>81</sup> <https://www.gavi.org/covax-vaccine-roll-out>.

<sup>82</sup> The COVAX Facility: Interim Distribution Forecast (3 February 2021), available at: [https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d\\_5](https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d_5).

<sup>83</sup> See individual population size: <https://data.un.org/default.aspx>.

<sup>84</sup> UNICEF, "The first 384,000 doses of life saving COVAX vaccines arrived in Mozambique today" (8 March 2021), available at: <https://www.unicef.org/mozambique/en/press-releases/first-384000-doses-life-saving-covax-vaccines-arrived-mozambique-today>.

## **B. COVAX Under-Delivering, AZ/SII Vaccine Hesitancy and Lack of Transparency**

### **What is COVAX (COVID-19 Vaccines Global Access)?**

The COVAX Facility is co-led by the Coalition for Epidemic Preparedness Innovations, Gavi, the Vaccine Alliance, and the World Health Organization, and was “created to maximise (...) chances of successfully developing COVID-19 vaccines and manufacture them in the quantities needed (...)”.<sup>85</sup> Through pooled funding, the Facility was able to invest in and gain access to multiple COVID-19 vaccine candidates. COVAX aims to provide 20 percent of participating countries’ populations with vaccine doses, and thereby increase equitable and timely access to vaccines globally.<sup>86</sup>

Participating countries either receive vaccines through “self-financing” mechanisms, if they are upper-income and upper-middle-income economies, or as donations through the Advanced Market Commitment (AMC) plan<sup>87</sup> if they are lower-middle and low-income economies.<sup>88</sup> In total, 92 low- and middle-income economies are eligible for these donations, and COVAX “expects” to provide these economies with approximately 1,7 billion, 26 percent of their populations, vaccine doses in 2021.<sup>89</sup>

Vaccine manufacturing capacity is severely limited across the African continent. Although Africa constitutes some 14 percent of the global population, according to the WHO, it manufactures less than 0.1 percent of all vaccines.<sup>90</sup> This meagre production capacity is limited to “fewer than 10 African manufacturers” in five countries: Egypt, Morocco, Senegal, South Africa and Tunisia.<sup>91</sup> Of these only South Africa is an SADC Member state.

This capacity deficit “severely limits vaccine availability in disease emergency situations as there is no immediate readiness,”<sup>92</sup> according to WHO Africa. African countries are therefore reliant on procuring vaccines from external sources. In the context of COVID-19 vaccine access, this means it could take three years, at best, to vaccinate 60 percent of the African population.<sup>93</sup> Until mid-April 2021 a combination of the WHO-led COVAX Facility, the African Vaccine Acquisition Task

<sup>85</sup> S Berkley CEO of Gavi, the Vaccine Alliance, “COVAX explained” (3 September 2020), available at: <https://www.gavi.org/vaccineswork/covax-explained>.

<sup>86</sup> Gavi Webpage, “COVAX”, available at: <https://www.gavi.org/covax-facility#what>.

<sup>87</sup> Fair allocation mechanism for COVID-19 vaccines through the COVAX Facility (9 September 2021), available at: <https://www.gavi.org/sites/default/files/covid/covax/who-covid19-vaccine-allocation-final-working-version-9sept.pdf>.

<sup>88</sup> Gavi Webpage, “COVAX”, available at: <https://www.gavi.org/covax-facility#what>.

<sup>89</sup> COVAX Global Supply Forecast (7 April 2021), available at: <https://www.gavi.org/sites/default/files/covid/covax/COVAX%20Supply%20Forecast.pdf>.

<sup>90</sup> W Ampofo, Vaccine Manufacturing in Africa Self – Sufficiency a need? or a dream?, Noguchi Memorial Institute for Medical Research, available at: [https://www.who.int/immunization/research/forums\\_and\\_initiatives/1\\_William\\_Ampofo\\_Vaccine\\_Manufacturing\\_Africa.pdf?ua=1](https://www.who.int/immunization/research/forums_and_initiatives/1_William_Ampofo_Vaccine_Manufacturing_Africa.pdf?ua=1).

<sup>91</sup> WHO, What is Africa’s vaccine production capacity? (19 March 2021), available at: <https://www.afro.who.int/news/what-africas-vaccine-production-capacity>.

<sup>92</sup> Id.

<sup>93</sup> R Agyarko “A new era of vaccine sovereignty in Africa beckons” (14 April 2021), available at: <https://mq.co.za/africa/2021-04-14-a-new-era-of-vaccine-sovereignty-in-africa-beckons/>.

Team and bilateral agreements with vaccine manufacturers formed the core prospects for vaccine acquisition in the SADC region as throughout Africa.

However, the African Union and Africa CDC organized an expert conference on the expansion of Africa's vaccine manufacturing capacity on 12-13 April 2021<sup>94</sup> which revealed that the lack of COVID-19 vaccine access has encouraged a critical shift towards local production. The conference marked the launch of Partnerships for African Vaccine Manufacturing,<sup>95</sup> and the publication of memoranda with the Coalition for Epidemic Preparedness Innovations (CEPI) to increase manufacturing capacities, with the aim of building five manufacturing centres in north, south, east, west and central Africa over the next 10-15 years.<sup>96</sup> The Africa CDC also endorsed the "proposed ambition to manufacture 60 percent of Africa's routine immunisation needs on the continent by 2040".<sup>97</sup>

In the meantime, and in the pressing context of the COVID-19 pandemic, the continent remains largely dependent on external providers, including through COVAX donations. However, the COVAX facility itself has not been able to source, allocate and deliver sufficient COVID-19 vaccines. While COVAX ultimately aims to deliver enough vaccines to "funded countries" to cover 20 percent of their populations by the end of 2021, on its own admission there have been significant delays in its processes. As a consequence, access to most African countries is substantially limited in the absence of an ability to procure vaccines bilaterally,<sup>98</sup> which most do not possess due to their lower purchasing powers and resulting inability to compete with wealthier countries in the open market.<sup>99</sup> This is exacerbated by so-called "vaccine nationalism", by which many high-income countries have negotiated bilateral deals with multiple manufacturers well in advance of the production phase, thus limiting the scarce supplies for lower-income countries and increasing the cost of purchasing vaccines.<sup>100</sup>

By the end of the first quarter of 2021, which ended March 2021, none of the SADC Member States had received enough vaccine through COVAX to fully vaccinate even 1 percent of their population.<sup>101</sup>

Despite almost all SADC States' participation in the COVAX initiative, by the beginning of March 2021, only South Africa had received vaccine deliveries, which

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<sup>94</sup> Virtual Conference: Expanding Africa's Vaccine Manufacturing (13 April 2021), available at:

<https://africacdc.org/event/virtual-conference-expanding-africas-vaccine-manufacturing/>.

<sup>95</sup> African Union and Africa CDC launches Partnerships for African Vaccine Manufacturing (PAVM), framework to achieve it and signs 2 MoUs (12-13 April 2021), available at: <https://africacdc.org/wp-content/uploads/2021/04/post-summit-comunique-African-Union-and-Africa-CDC-launches-Partnerships-for-African-Vaccine-Manufacturing.pdf>.

<sup>96</sup> Aljazeera, "African Union seeks to boost vaccine-making with 5 new centres" (14 April 2021), available at: <https://www.aljazeera.com/news/2021/4/14/african-union-wants-five-vaccine-making-centres-on-continent>.

<sup>97</sup> African Union and Africa CDC launches Partnerships for African Vaccine Manufacturing (PAVM), framework to achieve it and signs 2 MoUs (12-13 April 2021), available at: <https://africacdc.org/wp-content/uploads/2021/04/post-summit-comunique-African-Union-and-Africa-CDC-launches-Partnerships-for-African-Vaccine-Manufacturing.pdf>.

<sup>98</sup> The Wall Street Journal, "What Is Covax and How Will It Deliver Covid-19 Vaccines to Poorer Countries?" (2 March 2021), available at: <https://www.wsj.com/articles/covax-covid-19-vaccine-11613577473>

<sup>99</sup> The New York Times, "For COVID-19 Vaccines, some are too rich-and too poor" (28 December 2020), available at: <https://www.nytimes.com/2020/12/28/world/africa/covid-19-vaccines-south-africa.html>.

<sup>100</sup> Amnesty International, A Fair Shot, pp.13

<sup>101</sup> See Table, p.19

is particularly curious as, unlike many other SADC states, South Africa did have the means to enter bilateral arrangements to also procure vaccines outside of COVAX. The situation had improved little by the end of March 2021, by which time COVAX vaccine rollout had only begun in four SADC countries: Angola, Botswana, Eswatini, Malawi,<sup>102</sup> despite the forecast predicting a greater coverage in the first quarter of 2021.<sup>103</sup>

While all eligible SADC Members have now received COVAX supplies,<sup>104</sup> such States have only received a fraction of the doses originally allocated to them for the first two quarters of 2021 by COVAX. As examples, Botswana has received 24 000 doses out of the 100 800 and the Democratic Republic of Congo has received 1.7 million doses out of the 6.95 million allocated to it.

Compounding these challenges, Tanzania and Madagascar did not participate in the COVAX initiative at all at its outset, although both qualified for free vaccine doses from COVAX due to their economic status.<sup>105</sup> It was not until the end of March 2021 that Madagascar indicated any intention to procure COVID-19 vaccines at all and it was only in early April 2021 that Tanzania followed suit.

The question also arises as to *which* COVID-19 vaccines have been made available under COVAX, and their safety and efficacy. The large majority of vaccines allocated to SADC countries in terms of COVAX thus far has been the AstraZeneca (AZ) vaccine.<sup>106</sup> The first concern with AZ emerged after studies began to show that it was less effective against the B.1.135 variant which has spread significantly throughout the SADC region.<sup>107</sup> Thus, despite receiving COVAX vaccines, some SADC States, such as the Democratic Republic of Congo, South Africa<sup>108</sup> and Zimbabwe,<sup>109</sup> have delayed or completely halted roll-outs of the AZ vaccine out of uncertainty or fear of ineffectiveness.<sup>110</sup> South Africa even sold its AZ/SII doses to the African Union in mid-March 2021 after having received the batch of vaccines

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<sup>102</sup> GAVI Website, COVAX Vaccine Roll-Out: Country Updates, <https://www.gavi.org/covax-vaccine-roll-out> (accessed 5 May 2021)

<sup>103</sup> The COVAX Facility: Interim Distribution Forecast (3 February 2021), available at: [https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d\\_5](https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d_5)

<sup>104</sup> GAVI Website, COVAX Vaccine Roll-Out: Country Updates, <https://www.gavi.org/covax-vaccine-roll-out> (accessed 5 May 2021)

<sup>105</sup> See: COVAX Facility Commitment agreements (21 September 2021), available at: [https://www.gavi.org/sites/default/files/covid/pr/COVAX\\_CA\\_COIP\\_List\\_COVAX\\_PR\\_V5.pdf](https://www.gavi.org/sites/default/files/covid/pr/COVAX_CA_COIP_List_COVAX_PR_V5.pdf), p.6

<sup>106</sup> Gavi-COVAX webpage, COVAX Vaccine Roll-out, available at: <https://www.gavi.org/covax-vaccine-roll-out> (accessed 12 April 2021).

<sup>107</sup> Shabhir, M, et. al, Safety and efficacy of the ChAdOx1 nCoV-19 (AZD1222) Covid-19 vaccine against the B.1.351 variant in South Africa (12 February 2021), medRxiv, available at: <https://www.medrxiv.org/content/10.1101/2021.02.10.21251247v1.article-info>.

<sup>108</sup> Reuters, "South Africa sells AstraZeneca COVID-19 vaccines to other African countries" (21 March 2021), available at: <https://www.reuters.com/article/us-health-coronavirus-safrica-vaccine-idUSKBN2BD0K4>; G Kuria, DR Congo to commence delayed AstraZeneca COVID-19 vaccination rollout (14 April 2021), available at: <https://africa.cgtn.com/2021/04/14/dr-congo-to-commence-delayed-astrazeneca-covid-19-vaccination-rollout/>.

<sup>109</sup> P Mwai, Covid-19 Africa: What is happening with vaccines? (23 April 2021), available at: <https://www.bbc.com/news/56100076>.

<sup>110</sup> Reuters, "South Africa sells AstraZeneca COVID-19 vaccines to other African countries" (21 March 2021), available at: <https://www.reuters.com/article/us-health-coronavirus-safrica-vaccine-idUSKBN2BD0K4>; G Kuria, DR Congo to commence delayed AstraZeneca COVID-19 vaccination rollout (14 April 2021), available at: <https://africa.cgtn.com/2021/04/14/dr-congo-to-commence-delayed-astrazeneca-covid-19-vaccination-rollout/>.



through COVAX in January 2021.<sup>111</sup> Additionally, COVAX announced on 25 March that there would be delivery delays of AZ vaccines throughout March and April.<sup>112</sup>

The reason AZ has been widely used across the globe and to supply lower and middle-income countries is most likely due to lower prices compared to other manufacturers<sup>113</sup> and increased manufacturing capacities by partnering with the Serum Institute in India, rendering them the largest initial contributors to COVAX.<sup>114</sup> India, which is itself presently suffering among the direst COVID-19 situations in the world and has been criticized for controlling the shipment of AZ vaccines and determining how much of the vaccine is received by individual countries and COVAX itself.<sup>115</sup>

Further concerns have arisen regarding the lack of transparency in COVAX agreements with pharmaceutical companies, as little or no information is provided about the conditions and pricing negotiated in the contracts with ten vaccine developers, including Moderna, Novovax and AstraZeneca.<sup>116</sup> The contracts negotiated between CEPI, one of the organizations co-leading COVAX, and pharmaceutical companies are not publicized.<sup>117</sup>

### **C. Lack of effective Global and Regional Cooperation**

The SADC region faces the continued risk of increases in COVID-19 transmission with the emergence of more resilient and contagious mutations such as the B.1.135 variant.<sup>118</sup> There is likely also to be higher fatality rates than the global average, with insufficient access to vaccines and health facilities, services and products to effectively fight moderate or severe disease.<sup>119</sup>

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<sup>111</sup> Media Statement, Ministry of Health Republic of South Africa (21 March 2021), available at: <https://pbs.twimg.com/media/ExAtYEgXEAyCgo?format=jpg&name=large>; News24, Why South Africa isn't using the AstraZeneca jabs it bought (29 March 2021), available at: <https://www.news24.com/health24/Medical/Infectious-diseases/Coronavirus/why-south-africa-isnt-using-the-astrazeneca-jabs-it-bought-20210329>; africanews, "Malawi to destroy thousands of expired Covid vaccines – Minister (14 April 2021), available at: <https://www.africanews.com/2021/04/14/malawi-to-destroy-thousands-of-expired-covid-vaccines-minister/>.

<sup>112</sup> WHO Press Release, "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).

<sup>113</sup> Aljazeera, "Oxford–AstraZeneca vaccine: What to know, in less than 500 words" (10 December 2020), available at: <https://www.aljazeera.com/news/2020/12/10/oxford-astrazeneca-vaccine-what-you-should-know-in-500>.

<sup>114</sup> Press Statement, AstraZeneca advances mass global rollout of COVID-19 vaccine through COVAX (2 March 2021), available at: <https://www.astrazeneca.com/media-centre/press-releases/2021/astrazeneca-advances-mass-global-rollout-of-covid-19-vaccine-through-covax.html>.

<sup>115</sup> A Prabhala, L Menghaney, "The world's poorest countries are at India's mercy for vaccines. It's unsustainable" (2 April 2021), *Guardian*, available at: <https://www.theguardian.com/commentisfree/2021/apr/02/india-in-charge-of-developing-world-covid-vaccine-supply-unsustainable>.

<sup>116</sup> A Danaiya Usher, "CEPI criticised for lack of transparency" (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).

<sup>117</sup> Id.

<sup>118</sup> M Shabhir, V Baillie, C Cutland, et. al, "Safety and efficacy of the ChAdOx1 nCoV-19 (AZD1222) Covid-19 vaccine against the B.1.351 variant in South Africa" (12 February 2021), medRxiv, available at: <https://www.medrxiv.org/content/10.1101/2021.02.10.21251247v1.article-info>.

<sup>119</sup> C Keeton, "Africa edging towards third wave as 10 million get Covid-19 vaccine" (2 April 2021), Times Live, available at: <https://www.timeslive.co.za/news/south-africa/2021-04-02-africa-edging-towards-third-wave-as-10-million-get-covid-19-vaccines/>.

In South Africa for example, a new wave may well result in more infections than the first two waves did.<sup>120</sup> Dr Waasila Jassat, a public health specialist at the National Institute for Communicable Diseases in South Africa, predicts that at the current rate of vaccine rollout “it is unlikely that COVID-19 vaccines will have a substantial indirect effect [on transmission rates] before the fourth quarter of 2021”.<sup>121</sup> At the same time, the majority of high-income countries around the world have attempted to secure and reserve significant quantities of vaccines, which in some cases could theoretically vaccinate their entire population several times over.<sup>122</sup> States engaged in such purchasing strategies are sometimes accused of “vaccine nationalism” and “vaccine hoarding”.<sup>123</sup>

Similar concerns are shared by UN Secretary-General Guterres who, in his statement on the COVID-19 pandemic on 11 March 2021 stated:<sup>124</sup>

“(…) I am deeply concerned that many low-income countries have not yet received a single dose, while wealthier countries are on track to vaccinating their entire population. *We see many examples of vaccine nationalism and vaccine hoarding in wealthier countries* — as well as continued side deals with manufacturers that undermine access for all.”<sup>125</sup>

The ultimate thrust of the “vaccine hoarding” allegation is that States which have generally sufficient resources to protect the right to health of their own populations are doing little to discharge their extraterritorial obligations to people beyond their boundaries. There is indeed some merit to these accusations, although many States in the Global North still lack enough vaccine access for their own populations even if they are far better off than those of the Global South.

Notwithstanding the conduct of the wealthier States, SADC States have their own obligations to ensure not only their own countries’ procurement of COVID-19 vaccines but also to contribute towards procurement in other SADC countries. As has been detailed above, in terms of international human rights law and the SADC Treaty and SADC Health Protocol, SADC States have obligations to coordinate their own planning and measures around vaccine access sub-regionally. Each SADC State is therefore accountable individually to show how its policies and actions regarding COVID-19 vaccines realize – and do not diminish – vaccine access in other SADC Member States.

Despite these obligations, the SADC has failed to provide almost any concrete guidance or coordinating role in regional procurement of COVID-19 vaccines, and Member States’ measures. In September and October 2020, the SADC released its latest COVID-19 Bulletins which included information on COVID-19 vaccine

<sup>120</sup> N Mukwevho, “Third wave of COVID-19 in South Africa to be ‘bigger’ than the first two, expert predicts” (9th April 2021), available at: <https://health-e.org.za/2021/04/09/experts-predict-third-wave-of-covid-19/>.

<sup>121</sup> Id.

<sup>122</sup> The Amnesty International, “A Fair Shot”, pp.13.

<sup>123</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.

<sup>124</sup> United Nations Secretary General, António Guterres, Statement on the COVID-19 Pandemic, One Year On (11 March 2021), available at: <https://www.un.org/sg/en/content/sg/speeches/2021-03-11/statement-covid-19-pandemic-one-year>.

<sup>125</sup> Id.

access. In Bulletin 13, SADC recommended that States “position themselves for the anticipated roll-out of vaccines and also explore partnerships for resourcing their vaccine needs.”<sup>126</sup> They further indicated in Bulletin 13 that they would, provide information and updates of the Global Vaccine Initiative, also referred to as COVAX.<sup>127</sup> In Bulletin 14, the SADC insisted that Members “must utilise the planning tools that have been provided by WHO to project their COVID-19 vaccine needs with a view to future discussions with GAVI on vaccine procurement and delivery”.<sup>128</sup> While acknowledging that the SADC encouraged national readiness for vaccine rollouts, these bulletins were published in September and October 2020 – prior to the availability of COVID-19 vaccines – and the recommendations unsurprisingly do not provide concrete guidance to States on the actual procurement and roll-out strategies.

Since October 2020, the SADC has not published another Bulletin, nor has it made any other clear and decisive statement on COVID-19 vaccines. The SADC’s chair, President Filipe Nyusi of Mozambique has, however, encouraged a regional pooling of resources to facilitate procurement of necessary vaccines and distribution in a statement in January 2021.<sup>129</sup> The SADC has since taken no clear action towards this goal.<sup>130</sup> The impact of the pandemic is felt in the widening inequalities regionally, so that, for example, Seychelles has inoculated 61 percent of its population, while other SADC countries have yet to provide one dose to even one or two percent of their population.<sup>131</sup>

On 15 April 2021, during a virtual joint session of the SADC Parliamentary Forum’s standing committees, participants, including some SADC MPs, members of the Aids and Rights Alliance for Southern Africa and the Southern Africa Program on Access to Medicines and Diagnostics, discussed the employment of TRIPS flexibilities to advance COVID-19 vaccines, medicines and diagnostics.<sup>132</sup>

However, no official guidelines on this topic or the range of other crucial vaccine access related issues discussed in this briefing paper have been published by SADC.<sup>133</sup> Thus to this date, the SADC has failed to take any meaningful steps to effectively accelerate and ensure equitable vaccine access.<sup>134</sup>

Moreover, the SADC has failed to exercise responsibility in countering the regressive and anti-scientific stances taken by the governments of Madagascar

<sup>126</sup> 13<sup>th</sup> Bulletin of the SADC Regional Response to COVID-19 (24 September 2020) available at: [https://www.sadc.int/files/8816/0119/7567/BULLETIN\\_13-SADC\\_Response\\_to\\_COVID19\\_-ENGLISH.pdf](https://www.sadc.int/files/8816/0119/7567/BULLETIN_13-SADC_Response_to_COVID19_-ENGLISH.pdf), p.2.

<sup>127</sup> Id. p.2.

<sup>128</sup> 14<sup>th</sup> Bulletin of the SADC Regional Response to COVID-19 (29 October 2020), available at: [https://www.sadc.int/files/1916/0398/2311/COVID-19\\_14th\\_Report\\_EN\\_mail.pdf](https://www.sadc.int/files/1916/0398/2311/COVID-19_14th_Report_EN_mail.pdf), p. 6.

<sup>129</sup> SADC, Statement by his excellency Filipe Jacinto Nyusi, President of the Republic of Mozambique, SADC Chairperson on COVID-19 Second Wave in the Region (29 January 2021), available at: <https://www.sadc.int/news-events/news/statement-his-excellency-filipe-jacinto-nyusi-president-republic-mozambique-sadc-chairperson-covid-19-second-wave-region/>.

<sup>130</sup> M Machacha, T Hodgson, “SADC’s silence on access to COVID-19 vaccines is too loud” (11 March 2021), available at: <https://mq.co.za/africa/2021-03-11-sadcs-silence-on-access-to-covid-19-vaccines-is-too-loud/>.

<sup>131</sup> New York Times, Tracking Coronavirus Vaccinations Around the World, available at: <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> (accessed 5 May)

<sup>132</sup> Virtual Joint Session of SADC PF Standing Committees and the RWPC 15 April 2021, see full recording at: <https://www.youtube.com/watch?v=vaI9RUACawU>.

<sup>133</sup> SADC Webpage, available at: <https://www.sadc.int/documents-publications/> (accessed 30 April 2021).

<sup>134</sup> M Machacha, T Hodgson, “SADC’s silence on access to COVID-19 vaccines is too loud” (11 March 2021), available at: <https://mq.co.za/africa/2021-03-11-sadcs-silence-on-access-to-covid-19-vaccines-is-too-loud/>.

and Tanzania, who until very recently failed to act on their obligations to ensure COVID-19 vaccine access at all.<sup>135</sup> While this critical stage of the pandemic has presented ample opportunities and the urgent need for regional cooperation and SADC coordination and leadership – its *raison d'être* – the SADC has remained largely and conspicuously silent.<sup>136</sup>

#### **D. TRIPS Agreement Waiver, C-TAP and International Obstacles**

A number of States globally continue to block certain initiatives, such as the proposed TRIPS waiver, which limit means to accelerate large-scale vaccine production and distribution globally.

##### **What is the “TRIPS Waiver”?**

On 2 October 2020, South Africa and India submitted to the WTO a proposal for the temporary Intellectual Property waiver from the TRIPS Agreement in response to COVID-19.<sup>137</sup> Specifically, recommending “a waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19”.<sup>138</sup>

In effect, the proposal aims to ensure that “intellectual property rights such as patents, industrial designs, copyright and protection of undisclosed information do not create barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of medical products essential to combat COVID-19.”<sup>139</sup>

The proposal has yet to garner the sufficient support to bring it into effect and is being actively opposed by predominantly Global North states, though it received a significant boost on 5 May 2021 when the United States announced its support for the waiver.<sup>140</sup>

As members of the African Union, all Member States of the SADC are effectively committed to South Africa and India’s proposal.<sup>141</sup> However, a number of States

<sup>135</sup> Id.

<sup>136</sup> Id.

<sup>137</sup> 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>.

<sup>138</sup> 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>, p 2.

<sup>139</sup> Id. p.1

<sup>140</sup> Office of the United States Representative Press Statement, “Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver” (5 May 2021), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>. Ambassador Katherine Tai, available at: <https://twitter.com/AmbassadorTai/status/1390021205974003720?s=20>.

<sup>141</sup> S Dersso, “The 34th summit of the African Union: COVID-19, New Leadership and Africa’s Arts” (17 February 2021), available at: <https://www.accord.org.za/analysis/the-34th-summit-of-the-african-union-covid-19-new-leadership-and-africas-arts/>; S Dersso, “African Union wants vaccine patent waiver” (10 Feb 2021) available at: <https://mq.co.za/africa/2021-02-10-african-union-wants-vaccine-patent-waiver/>; 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>.

globally continue to block certain initiatives, such as the proposed TRIPS waiver, which limit the means to accelerate large-scale vaccine production and distribution globally.<sup>142</sup> Leading NGOs, including the ICJ Human Rights Watch<sup>143</sup> and Amnesty International,<sup>144</sup> have supported the TRIPS waiver as has the People's Vaccine Alliance.<sup>145</sup>

The CESCR has endorsed this waiver proposal,<sup>146</sup> indicating that it "strongly recommends" that States take measures, including by exercising their voting rights at the WTO, "to support the proposals of this temporary waiver". The CESCR stressed that the waiver "is an essential element" of "complementary strategies" aimed at ensuring universal and equitable access to COVID-19 vaccines. The waiver has also been called for by a number of Special Procedures of the UN Human Rights Council, including, among others, the Special Rapporteur on the right to health,<sup>147</sup> and the Director-General of the WHO, Tedros Adhanom Ghebreyesus.<sup>148</sup> Most recently, the UN Human Rights Council also adopted a consensus resolution, which restates and reaffirms "the right" of States to apply TRIPS flexibilities.<sup>149</sup>

The WHO has developed a COVID-19 Technology Access Pool (C-TAP) established through the "Solidarity Call to Action" to realize equitable global access to COVID-19 health technologies through the pooling of knowledge, intellectual property and data.<sup>150</sup> 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>151</sup>

<sup>142</sup> Human Rights Watch, "Urgently Waive Intellectual Property Rules for Vaccine" (10 December 2021), available at: <https://www.hrw.org/news/2020/12/10/urgently-waive-intellectual-property-rules-vaccine>.

<sup>143</sup> Universal and Equitable Access to Covid-19 Vaccines, Testing, Treatments: Companies' Human Rights Responsibilities (11 February 2021), available at: [https://www.hrw.org/news/2021/02/11/universal-and-equitable-access-covid-19-vaccines-testing-treatments-companies-human#\\_What\\_are\\_the](https://www.hrw.org/news/2021/02/11/universal-and-equitable-access-covid-19-vaccines-testing-treatments-companies-human#_What_are_the); Amnesty International, "A Fair Shot" (2020) available at: <https://www.amnesty.org/download/Documents/POL3034092020ENGLISH.PDF>.

<sup>144</sup> Amnesty International, "A Fair Shot" (2020).

<sup>145</sup> See: Website, The People's Vaccine, available at: <https://peoplesvaccine.org> (accessed 5 May 2021).

<sup>146</sup> CESCR, Statement on universal affordable vaccination for COVID-19, international cooperation and intellectual property E/C.12/2021/1 (12 March 2021): [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en).

<sup>147</sup> OHCHR, 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>; See also Statement by UN Human Rights Experts on 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>.

<sup>148</sup> WHO Director Tedros Adhanom Ghebreyesus, "A 'me first' approach to vaccination won't defeat Covid" (5 March 2021), available at: <https://www.theguardian.com/commentisfree/2021/mar/05/vaccination-covid-vaccines-rich-nations>.

<sup>149</sup> T Hodgson, R De Falco, "Human Rights and Universal Access to COVID-19 Vaccines: Does the Human Rights Council Resolution go far enough?" (23 April 2021), available at:

<http://opiniojuris.org/2021/03/23/human-rights-and-universal-access-to-covid-19-vaccines-does-the-human-rights-council-resolution-go-far-enough/>.

<sup>150</sup> "Making the response to COVID-19 a public common good Solidarity Call to Action" (June 2020), available at: [https://www.who.int/docs/default-source/coronaviruse/solidarity-call-to-action/solidarity-call-to-action-01-june-2020.pdf?sfvrsn=a6c4b03d\\_4](https://www.who.int/docs/default-source/coronaviruse/solidarity-call-to-action/solidarity-call-to-action-01-june-2020.pdf?sfvrsn=a6c4b03d_4).

<sup>151</sup> WHO Webpage, What is C-TAP, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool/what-is-c-tap> (accessed 5 May 2021).



Only 40 of the 200 WHO Member States have so far endorsed C-TAP.<sup>152</sup> The only SADC States to have endorsed are Mozambique, South Africa and Zimbabwe.<sup>153</sup>

### **What is the COVID-19 Technology Access Pool (C-TAP)?**

C-TAP was launched in May 2020 by the WHO and Costa Rican President Carlos Alvarado Quesada alongside the Solidarity Call to Action in response to COVID-19. The initiative aims to accelerate the development of health products and scale-up of manufacturing to fight COVID-19<sup>154</sup> by enabling participants to “voluntarily share COVID-19 health technology-related knowledge, intellectual property and data.”<sup>155</sup> To date, 40 states and 11 inter and non-governmental organizations have endorsed the initiative.<sup>156</sup>

While a number of intergovernmental governmental as well as non-governmental organizations, such as UNAIDS or UNDP, have endorsed C-TAP,<sup>157</sup> the COVAX Facility, which 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 endorsed it. Nor have the organizations co-leading COVAX with the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and Gavi or COVAX’s delivery partner UNICEF.<sup>158</sup>

### **E. Lack of Transparency in Procurement Procedures**

The limited ability of low and middle-income countries to access COVID-19 vaccines and minimal success so far of international initiatives to supply Southern African countries has placed substantial pressure on SADC Member States to explore other procurement options, including bilateral deals as well as international open bidding forums.

However, governments globally are entering into bilateral deals with large pharmaceutical companies to procure COVID-19 vaccines, contract details, including pricing, are typically kept a secret.<sup>159</sup> This has fostered a system

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<sup>152</sup> WHO Webpage, Endorsements of the Solidarity Call to Action, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool/endorsements-of-the-solidarity-call-to-action> (accessed 5 May 2021).

<sup>153</sup> Id.

<sup>154</sup> WHO, “Operationalising the COVID-19 Technology Access Pool (C-TAP)”, 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](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).

<sup>155</sup> WHO Webpage, What is C-TAP, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool/what-is-c-tap> (accessed 2 May 2021).

<sup>156</sup> <https://www.who.int/initiatives/covid-19-technology-access-pool/endorsements-of-the-solidarity-call-to-action> (accessed 2 May 2020).

<sup>157</sup> WHO Webpage, Endorsements of the Solidarity Call to Action, available at: <https://www.who.int/initiatives/covid-19-technology-access-pool/endorsements-of-the-solidarity-call-to-action> (accessed 5 May 2021).

<sup>158</sup> Id.

<sup>159</sup> M Apuzzo, S Gebrekidan, “Governments Sign Secret Vaccine Deals. Here’s What They Hide.” (24 February 2021), available at: <https://www.nytimes.com/2021/01/28/world/europe/vaccine-secret-contracts-prices.htm>;



shrouded in secrecy which enables pharmaceutical companies, in particular, to regulate and vary their prices in negotiations with different countries.<sup>160</sup> Additionally, some of these contracts restrict governments from donating excess doses,<sup>161</sup> meaning that if they have a large surplus of vaccines, they will be unable to administer or donate these supplies. The South African government has defended the signing of non-disclosure agreements with COVID-19 vaccine manufacturers as it is seen as a “standard” worldwide.<sup>162</sup>

While non-disclosure agreements have made it difficult to establish discrepancies in pricing, incidents of apparent price gouging practices have emerged. At the end of January 2021, leaked information suggested that South Africa was offered AstraZeneca doses at two and a half times the price of doses procured by European governments,<sup>163</sup> while Uganda reportedly would have to pay up to three times more than European governments for the same vaccine.<sup>164</sup> Inhabitants of SADC Member States may thus fear their governments are falling prey to price gouging by large pharmaceutical companies.<sup>165</sup>

Other concerns regarding procurement lie with the lack of transparency in open bidding procedures. In March 2021, for example, the Namibian government advertised a tender for any company to submit their bids to “procure, supply and deliver” 1 million COVID-19 vaccines,<sup>166</sup> raising concerns about corruption, inefficiency and lack of transparency in pricing as a result of involving middlemen to procure vaccines rather than the State negotiating and cooperating directly with COVID-19 manufacturers.<sup>167</sup>

## **F. Failure to allow science and public health imperatives drive the COVID-19 Disaster-Management Response**

As governments across the region have sought to address and regulate the impact and remedies of COVID-19, concerns are rising regarding the apparent “politicization” of COVID-19 responses and its detrimental impact on vaccine acquisition and rollout in particular. WHO Director-General Tedros Adhanom Ghebreyesus warned as early as April 2020 about the danger of letting a political

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<sup>14</sup>th Bulletin of the SADC Regional Response to COVID-19 (29 October 2020), available at: [https://www.sadc.int/files/1916/0398/2311/COVID-19\\_14th\\_Report\\_EN\\_mail.pdf](https://www.sadc.int/files/1916/0398/2311/COVID-19_14th_Report_EN_mail.pdf).

<sup>160</sup> 14<sup>th</sup> Bulletin of the SADC Regional Response to COVID-19 (29 October 2020), available at: [https://www.sadc.int/files/1916/0398/2311/COVID-19\\_14th\\_Report\\_EN\\_mail.pdf](https://www.sadc.int/files/1916/0398/2311/COVID-19_14th_Report_EN_mail.pdf).

<sup>161</sup> Id.

<sup>162</sup> S Ndlovu, “Mkhize tells parly why SA signed vaccine non-disclosure agreements” (23 February 2021), available at: <https://citizen.co.za/news/covid-19/2445789/mkhize-tells-parly-why-sa-signed-vaccine-non-disclosure-agreements/>.

<sup>163</sup> Aljazeera, “South Africa to pay 2.5 times more than EU for COVID vaccine” (22 January 2021), available at: <https://www.aljazeera.com/news/2021/1/22/s-africa-to-pay-2-5-times-more-than-eu-for-virus-vaccine>; E 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/>.

<sup>164</sup> Id.

<sup>165</sup> Aljazeera, “South Africa to pay 2.5 times more than EU for COVID vaccine” (22 January 2021), available at: <https://www.aljazeera.com/news/2021/1/22/s-africa-to-pay-2-5-times-more-than-eu-for-virus-vaccine>.

<sup>166</sup> CGTN, “Namibia opens bids for supply of COVID-19 vaccines” (16 March 2021), available at: <https://africa.cgtn.com/2021/03/16/namibia-opens-bids-for-supply-of-covid-19-vaccines/>.

<sup>167</sup> M Amakali, “Painfully slow’ Covax frustrates health ministry” (17 March 2021), available at: <https://neweralive.na/posts/painfully-slow-covax-frustrates-health-ministry>; M Amakali “Cut out the ‘middleman’, govt told ... questions over Covid-19 vaccine tender” (15 March 2021), available at: <https://neweralive.na/posts/cut-out-the-middleman-govt-told>.

agenda guide public health responses and international cooperation, proclaiming: “my short message is, please quarantine politicizing COVID.”<sup>168</sup>

Nonetheless, as the pandemic evolves, it is becoming more apparent in SADC Member States that the COVID-19 crisis has all-too-often led to a system steered by narrow political considerations rather than science. Prominent examples include Tanzania and Madagascar, where COVID-19 denialism prevailed for approximately a year, but also include countries such as Malawi,<sup>169</sup> Zimbabwe<sup>170</sup> or Zambia,<sup>171</sup> where governments have abused COVID-responses to advance their political agendas.

The ability of governments to do so has, in part, been as a result of the governance models often adopted by SADC states in terms of “state of emergency” or “national disaster” provisions are legislation that centralize State power in COVID-19 responses, rather than allocating tasks to specialized, independent health authorities.

South Africa<sup>172</sup> and Botswana,<sup>173</sup> as examples, set up specialized COVID-19 task units under government authority, which are prone to politically steered responses, and in some circumstances result in the side-lining of departments of health and/or public health experts more broadly. In many instances, the power assumed by the national executive has either been of questionable lawfulness and indeed struck down by courts in Namibia,<sup>174</sup> South Africa<sup>175</sup> and Malawi.<sup>176</sup>

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<sup>168</sup> United Nations Press Statement, “No need to politicize COVID-19: UN health agency chief” (8 April 2020), available at: <https://news.un.org/en/story/2020/04/1061392>.

<sup>169</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.

<sup>170</sup> J Moyo, “Africa: COVID-19 targets politicians in droves” (27 January 2021), available at: <https://www.aa.com.tr/en/africa/africa-covid-19-targets-politicians-in-droves/2124194>; T Hodgson, K Farise, J Mavedzenge, “Southern Africa has cracked down on fake news, but may have gone too far” (5 April 2020), available at: <https://mg.co.za/analysis/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/>.

<sup>171</sup> African Journalist, “Press freedom violations throughout Africa linked to Covid-19 coverage” (14 April 2020), available at: <https://www.rfi.fr/en/africa/20200414-press-freedom-violations-throughout-african-continent-linked-to-covid-19-coverage>.

<sup>172</sup> Minister Blade Nzimande on establishment of Coronavirus COVID-19 Departmental Task Teams (26 Mar 2020) available at: [https://www.gov.za/speeches/minister-blade-nzimande-establishment-covid-19-departmental-task-teams-26-mar-2020-0000?qclid=Cj0KCQjw1a6EBhC0ARIsAOiTKrGbQfEVHETHFbHytsPq1Yq6nq0XxCIDMczk9LUTMVfZ3Mu\\_VJaTtQEa\\_AqIIEALw\\_wcB](https://www.gov.za/speeches/minister-blade-nzimande-establishment-covid-19-departmental-task-teams-26-mar-2020-0000?qclid=Cj0KCQjw1a6EBhC0ARIsAOiTKrGbQfEVHETHFbHytsPq1Yq6nq0XxCIDMczk9LUTMVfZ3Mu_VJaTtQEa_AqIIEALw_wcB).

<sup>173</sup> COVID-19: WHO’s Action in Countries, “Botswana” (July 2020), available at: [https://www.who.int/docs/default-source/coronaviruse/country-case-studies/botswana-c19-case-study-20-july.pdf?sfvrsn=7703d71b\\_2&download=true](https://www.who.int/docs/default-source/coronaviruse/country-case-studies/botswana-c19-case-study-20-july.pdf?sfvrsn=7703d71b_2&download=true).

<sup>174</sup> *S v Yusiku* (CR 49/2020) [2020] NAHCMD 295 (17 July 2020), available at: <https://namiblii.org/na/judgment/high-court-main-division/2020/295>; V Mutandwa, “COVID-19 and Africa Symposium: Lockdowns, the Right to Work and the Rule of Law in Namibia” (8 December 2020), available at: <http://opiniojuris.org/2020/12/08/lockdowns-the-right-to-work-and-the-rule-of-law-in-namibia/>.

<sup>175</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020), available at: <http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html>; *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* (22311/2020) [2021] ZAGPPHC 168 (24 March 2021), available at: <http://www.saflii.org/za/cases/ZAGPPHC/2021/168.html>; M Kruger, “The Silence of the Constitutionalists”, (26 March 2021), available at: <https://hsf.org.za/publications/hsf-briefs/the-silence-of-the-constitutionalists>.

<sup>176</sup> *The State on application of Kathumba and others v President of Malawi and others* (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020), available at: <https://malawilii.org/mw/judgment/high-court-general-division/2020/29>; T Hodgson, “COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 1)” (8 December 2021), available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-1/>.

On the level of vaccine acquisition specifically, the Africa Centre for Disease Control has cautioned against “vaccine diplomacy”, by which political relations become the central driving force of negotiations for vaccine acquisition.<sup>177</sup> There are allegations that China and the Russian Federation are using this opportunity to advance their relations and influence in Africa by providing donations or vaccines at lower prices.<sup>178</sup>

While most SADC Member States are claiming to work extensively with independent health experts and base decisions on scientific evidence, the lack of transparency in terms of the reasoning behind government responses creates greater confusion and hesitancy amongst the population. This, along with the centralization of responses and opportunistic reflexes of governments, contributes to COVID-19 response measures not being fully driven by public health and human rights objectives.

### **III. COMMON CHALLENGES IN COVID-19 VACCINE ROLL-OUTS IN SOUTHERN AFRICA**

As COVID-19 vaccine rollouts slowly proceed in some SADC States, the lack of necessary government guidance and transparency in terms of vaccine procurement, allocation and distribution, is evident across the region.

This section of the briefing paper discusses the most prevalent common challenges regarding equitable and timely vaccine distribution experienced in SADC Member states. The information is based, in part, on consultations with local human rights defenders (HRD) and public health officials, who have raised and discussed a number of common challenges.

#### **A. Lack of Information and Transparency in Government Roll-out Plans**

##### **1. Vaccine Rollout Plans**

Across Southern African countries, details of COVID-19 vaccine acquisition rollouts remain scarce, as rollout plans often appear not to exist, or, where they do exist,

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<sup>177</sup> J Bavier, D Lewis, “Africa proves rocky terrain for Russian and Chinese vaccines” (12 March 2021) <https://www.reuters.com/business/healthcare-pharmaceuticals/africa-proves-rocky-terrain-russian-chinese-vaccines-2021-03-12/>; Reuters, “Africa proves rocky terrain for Russian and Chinese vaccines”. (12 March 2021), available at: <https://www.timeslive.co.za/news/africa/2021-03-12-africa-proves-rocky-terrain-for-russian-and-chinese-vaccines/>.

<sup>178</sup> S Tomic, “Covid-19 vaccines and the competition between independent and politicised models of regulation” (11 March 2021), available at: <https://blogs.lse.ac.uk/euoppblog/2021/03/11/covid-19-vaccines-and-the-competition-between-independent-and-politicised-models-of-regulation/>; J Bavier, D Lewis, “Africa proves rocky terrain for Russian and Chinese vaccines” (12 March 2021). <https://www.reuters.com/business/healthcare-pharmaceuticals/africa-proves-rocky-terrain-russian-chinese-vaccines-2021-03-12/>; See also: “The president of South Africa's Medical Research Council, Professor Gray, advised in January 2021 that while current safety concerns would likely not result in Russian or Chinese vaccine roll-outs, the State should not be led by prejudice based on where the vaccines come from”, Cowan, Ke., “Covid-19: Approval of Russian, Chinese vaccines in SA 'unlikely', say top experts” (11 January 2021), news24, available at: <https://www.news24.com/news24/southafrica/investigations/covid-19-approval-of-russian-chinese-vaccines-in-sa-unlikely-say-top-experts-20210111>.

are seldom adequately detailed or publicized. Many countries have begun vaccinating people even prior to the completion and publication of such plans.

Botswana, for example, had not published a comprehensive vaccination plan at the beginning of their vaccination process at the end of March 2021. The government merely indicated their aim to prioritize front line workers and vulnerable individuals, failing to provide concrete details of who precisely this would include or the measures undertaken to ensure non-discriminatory access to COVID-19 vaccines on their territory.<sup>179</sup>

Failure to publish plans has resulted in much public uncertainty. In mid-March 2021 after the country had already received a first batch of vaccines, Botswanan doctors underlined that they were still unsure whether the government would even be providing the vaccines free or whether fees would be charged.<sup>180</sup> Tellingly, in Botswana, even members of the Department of Health were unclear on the existence and status of a vaccine roll-out plan when contacted in mid-April and have since not responded to direct requests for such a plan.<sup>181</sup>

In Namibia, local human rights defenders and public health experts assert that at the time of vaccine arrivals in Namibia the government had not provided any concrete roll-out plans. Similar reports were made by human rights defenders from Angola and the Democratic Republic of Congo.<sup>182</sup>

By contrast, Mozambique<sup>183</sup> and Kenya<sup>184</sup> have published detailed plans and South Africa has provided an extensive amount of information, though it has failed to publish a consolidated, comprehensive plan with timelines.<sup>185</sup>

In Zimbabwe, in the absence of a plan and desperate for further information on the government measures taken to secure the rights to health and life, the NGO ZimRights has initiated litigation seeking to compel the government to publish a comprehensive vaccine roll-out plan.<sup>186</sup> With the ICJ, ZimRights has also submitted a letter of complaint to the African Commission on Human and Peoples' Rights seeking to ensure the publication and public dissemination of a comprehensive vaccine acquisition and roll out plan in Zimbabwe.<sup>187</sup>

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<sup>179</sup> CGTN, Jerry Omondi, "Botswana receives over 33,000 doses of COVID-19 vaccines" (27 March 2021), available at: <https://africa.cgtn.com/2021/03/27/botswana-receives-over-33000-doses-of-covid-19-vaccines/>.

<sup>180</sup> Joint-Symposium on Equitable Vaccine Access in Southern Africa (16 April 2021), available at: <https://youtu.be/tqHP7thFU5Y>.

<sup>181</sup> ICJ correspondence with Botswana Ministry of Health officials, on file with authors.

<sup>182</sup> Joint-Symposium on Equitable Vaccine Access in Southern Africa (16 April 2021), available at: <https://youtu.be/tqHP7thFU5Y>.

<sup>183</sup> On file with International Commission of Jurists.

<sup>184</sup> C Kyobutungi, The ins and outs of Kenya's COVID-19 vaccine rollout plan (3 March 2021), available at: <https://theconversation.com/the-ins-and-outs-of-kenyas-covid-19-vaccine-rollout-plan-156310>; Republic of Kenya National COVID-19 Vaccines Deployment and Vaccination Plan 2021, available at: <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/120939/Kenya-Ministry-of-Health-National-COVID-19.pdf>.

<sup>185</sup> NICD "COVID-19 Vaccine Rollout Strategy FAQ" available at: <https://www.nicd.ac.za/covid-19-vaccine-rollout-strategy-faq/>; South African Government, "COVID-19 Coronavirus vaccine strategy" available at: <https://www.gov.za/covid-19/vaccine/strategy>.

<sup>186</sup> Zimbabwe Lawyers for Human Rights, "High Court Says Zimrights Application to Compel Govt to Provide National Deployment Vaccination Plan Not Urgent" (8 February 2021), available at: <https://www.zlhr.org.zw/?p=2288>.

<sup>187</sup> International Commission of Jurists Press Statement, "The ICJ and ZimRights ask for urgent intervention on access to COVID-19 vaccines from African Commission Mechanism" (19 February 2021), available at:

## 2. Equitable Access to Vaccines: Discrimination against Non-Citizens

The WHO SAGE Values Framework for the allocation and prioritization of COVID-19 vaccination, published in September 2020, underscores the overarching goal that COVID-19 vaccines should be for the benefit of all people globally. However, given the reality of limited supply, the WHO advises the prioritization of vaccine access for those “at risk of experiencing greater burdens from the COVID-19 pandemic”, which include, among others, vulnerable migrants, refugees and asylum seekers in irregular situations.<sup>188</sup> This prioritization, taking into account the vulnerabilities of vulnerable groups, is also necessary to ensure States’ compliance with their immediate obligation to ensure non-discriminatory access to COVID-19 vaccines.<sup>189</sup>

Public health officials have underlined on numerous occasions the importance of vaccinating all parts of the population to ensure effective immunization against the virus. It is both a public health imperative and a requirement of international human rights law that COVID-19 vaccines are provided without any form of discrimination based on citizenship, nationality or documentary status.<sup>190</sup>

In the specific context of vaccine access, the CESCR indicated that “in accordance with the general prohibition of discrimination” vaccine prioritization should be based on medical needs and public health grounds. Priority should be given to “health staff and care workers”; “persons presenting greater risks of developing a serious health condition if infected by SARS-COV2 because of age or preexisting conditions”; and “those most exposed and vulnerable to the virus owing to social determinants of health” including “migrants, refugees [and] displaced persons.”<sup>191</sup>

In March 2021, United Nations experts underlined the higher vulnerability of migrants and refugees to poor health as non-nationals and the resulting urgency

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<https://www.icj.org/the-icj-and-zimrights-ask-for-urgent-intervention-on-access-to-covid-19-vaccines-from-african-commission-mechanism/>. No response has yet been received.

<sup>188</sup> WHO SAGE values framework for the allocation and prioritization of COVID-19 vaccination (14 September 2020), available at: [https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE\\_Framework-Allocation\\_and\\_prioritization-2020.1-eng.pdf?ua=1](https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf?ua=1), pp. 11.

<sup>189</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html>, para 30.; 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 at: <https://www.refworld.org/docid/4538838d0.html>, para 34; International Commission of Jurists “Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses” (1 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>.

<sup>190</sup> Id.

<sup>191</sup> CESCR, 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 5.



of facilitating vaccine access to migrants, regardless of their immigration status.<sup>192</sup> They underscored that access to vaccines should not be limited by measures that implicitly discriminate migrants and refugees by, for example, requiring national identification or documentation to sign up for vaccines or collection of personal data that will be shared with local immigration offices.<sup>193</sup>

Throughout the region there continues to be great uncertainty regarding the vaccination of non-citizens, few countries, having explicitly shared their aim to ensure access to all, such as South Africa.<sup>194</sup> The South African government publicly stated in February 2021 that it aimed to include all people on their territory in the vaccination process. However, an open letter by civil organizations and human rights defenders to the President on 24 February 2021, highlighted the remaining uncertainty and lack of transparency in this process and expressed concern at the government's failure to clarify and demonstrate effective measures to facilitate equal access for all across the country.<sup>195</sup> The letter also underlined that the issue of documentation not only concerns undocumented migrants, but also a large number of undocumented South African nationals.<sup>196</sup>

## **B. Access to Health Information: Vaccine Choice**

The veil of secrecy and lack of transparency seen in rollout plans, strategies and procedures also extends to government acquisitions procedures and choice of vaccines, specifically AZ/SII and more recently Johnson & Johnson.

As outlined above, States, including SADC Member states, are obliged to not only ensure access to COVID-19 vaccines but safe and effective vaccines of adequate quality. In terms of public health imperatives, this lack of information and transparency provides greater opportunities for false information and myths about vaccines and COVID-19 to spread, thereby increasing the risk of vaccine hesitancy. Such hesitancy or scepticism risks further prolonging time-sensitive, nationwide immunization. It also breaches the State's obligation to provide accessible health information to all in terms of the right to health.<sup>197</sup>

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<sup>192</sup> The Office of the High Commissioner for Human Rights; The UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW); Special Rapporteur on the human rights of migrants; Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants; The Ambassador and Special Representative of the Secretary General on Migration and Refugees of the Council of Europe; and the Rapporteur on the Rights of Migrants of the Inter-American Commission on Human Rights.

<sup>193</sup> United Nations High Commissioner of Human Rights, Press Statement "Migrants: Guidance on equitable access to COVID-19 vaccine" (8 March 2021), available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26860&LangID=E>.

<sup>194</sup> T Hodgson, M Machacha, "SADC's silence on access to Covid-19 vaccines is too loud" (11 March 2021), available at: <https://mg.co.za/africa/2021-03-11-sadcs-silence-on-access-to-covid-19-vaccines-is-too-loud/>; "CoRMSA's Position on Covid-19 Vaccine Rollout Process" available at: <https://www.cormsa.org.za/cormsas-position-on-covid-19-vaccine-rollout-process/>.

<sup>195</sup> People's Coalition, "Open Letter to the President" Covid-19 vaccine for undocumented people (24 February 2021), available at: <https://www.news24.com/news24/opinions/letters/open-letter-to-the-president-covid-19-vaccine-for-undocumented-people-20210224>; T Mothapo, "South Africa belongs to all who live in it, and so does the right to be vaccinated against Covid-19" (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/>.

<sup>196</sup> Id.

<sup>197</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 (Art. 2 of the International Covenant on Economic, Social and Cultural Rights)), 11 August 2000, E/C.12/2000/4, available: <https://www.refworld.org/docid/4538838d0.html>, paras 11, 12(b), 23, 36-37, 43(d).



Beginning of February 2021, the South African government announced that it would halt Astrazeneca vaccine rollouts after a study showed that it was less effective against the B.1.1.35 variant, which had already spread considerably across Southern Africa.<sup>198</sup> While some Southern African countries, such as eSwatini and the Democratic Republic of Congo,<sup>199</sup> followed suit, others have moved ahead, often without any explanation to the public of their decision to maintain the AZ vaccine.

Greater vaccine hesitancy emerged across the region when some European countries subsequently suspended the use of AZ/SII following fears that they could engender a risk of blood clotting.<sup>200</sup> Though some cases of unusual and severe blood clotting have may be correlated with vaccination “a causal relationship between the vaccine and the occurrence of blood clots with low platelets is considered plausible but is not confirmed”,<sup>201</sup>

While the debate and research of the risk of blood clotting due to the AZ/SII vaccine is ongoing, the relatively limited effectiveness of the AZ vaccine to fully protect against the B.1.1.35 variant has been widely confirmed, including by the WHO.<sup>202</sup> However, as the vaccine protects against severe disease, and with that hospitalization or death the WHO continues to encourage its use.<sup>203</sup> A contributing factor to the continued roll-out of AZ/SII in Southern African countries may be the greater availability, due to lower prices, lower storage temperatures, which facilitate distribution in sub-tropical regions,<sup>204</sup> and large-scale cooperation with COVAX. COVAX provides free AZ/SII donations to low and middle-income countries<sup>205</sup> and thus, in some cases, constitutes the only current access to any COVID-19 vaccines.

This uncertainty and insufficient information surrounding vaccine choices, effectiveness, specifically against the B.1.1.35 variant, and potential side-effects, provides greater opportunity for vaccine hesitancy. Even some countries well-

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<sup>198</sup> B Muller, R Robbins, L Chutel, “AstraZeneca’s Vaccine Does Not Work Well Against Virus Variant in South Africa” (7 February 2021), available at: <https://www.nytimes.com/2021/02/07/world/africa/covid-vaccine-astrazeneca-south-africa.html>.

<sup>199</sup> CNN, “eSwatini will not use AstraZeneca vaccine after S.Africa trial data” (10 February 2021), available at: <https://edition.cnn.com/2021/02/10/africa/eswatini-astrazeneca-vaccine-intl/index.html>; P Daniel “African countries temporarily suspend AstraZeneca vaccine” (17 March 2021), available at: <https://www.dw.com/en/african-countries-temporarily-suspend-astrazeneca-vaccine/a-56904649>.

<sup>200</sup> Moorlah, P, “Le judiciaire réticent vis-à-vis du vaccin” (17 March 2021), available at: <https://www.lexpress.mu/article/390428/judiciaire-reticent-vis-vis-vaccin>.

<sup>201</sup> Press Statement, “COVID-19 subcommittee of the WHO Global Advisory Committee on Vaccine Safety on AstraZeneca COVID-19 vaccine” (7 April 2021), available at:

<sup>202</sup> Press Statement, “Interim statement of the COVID-19 subcommittee of the WHO Global Advisory Committee on Vaccine Safety on AstraZeneca COVID-19 vaccine” (7 April 2021), available at: <https://www.who.int/news/item/07-04-2021-interim-statement-of-the-covid-19-subcommittee-of-the-who-global-advisory-committee-on-vaccine-safety>.

<sup>203</sup> Id.

<sup>204</sup> Aljazeera, “Oxford–AstraZeneca vaccine: What to know, in less than 500 words” (10 December 2020), available at: <https://www.aljazeera.com/news/2020/12/10/oxford-astrazeneca-vaccine-what-you-should-know-in-500>.

<sup>205</sup> The COVAX Facility: Interim Distribution Forecast (3 February 2021), available at: [https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d\\_5](https://www.who.int/docs/default-source/coronaviruse/act-accelerator/covax/covax-interim-distribution-forecast.pdf?sfvrsn=7889475d_5).

advanced in their inoculation process have been experiencing a growing reluctance across the population towards the AZ vaccine.<sup>206</sup>

For example, in Mauritius, members of the judiciary collectively refused the AZ/SII vaccine, as a result of several European countries having suspended the vaccine due to potential health risks, including blood clotting.<sup>207</sup> The phenomenon of vaccine hesitancy and lack of information provided by the government is not unique to AZ/SII vaccines. The Seychelles, which has the highest inoculation rate globally,<sup>208</sup> is also experiencing an unexpected low turnout to the second dose, with only 39 percent of vaccinated individuals returning. The government suspects that severe side-effects of the Sinopharm vaccine and low awareness of the necessity of a second dose, are major causes of this hesitancy.<sup>209</sup> Similar concerns relating to the Sinopharm vaccine have been prevalent in Zimbabwe even among health workers.<sup>210</sup>

Recently, the South African government controversially temporarily suspended circulation of the Johnson and Johnson vaccine,<sup>211</sup> on the justification that because it had been reported that eight out of six million people who had accessed the vaccine in the USA developed blood clots.<sup>212</sup> This decision has been criticized by some experts, with one expressing the view that “every day we don’t vaccinate healthcare workers we are killing two or three of them” by leaving them at risk of COVID-19.<sup>213</sup> The suspension has led to concerns of similar reluctance developing in relation to this vaccine both in South Africa itself and Southern Africa more broadly. Following the suspension and a recommendation from the South African Health Products Regulatory Authority (SAHPRA), South Africa has since resumed vaccination with the Johnson and Johnson vaccine.<sup>214</sup>

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<sup>206</sup> T Salaün, “‘I don’t want that’ - France struggles to pitch AstraZeneca vaccine” (19 April 2021), available at: <https://www.reuters.com/world/europe/i-dont-want-that-france-struggles-pitch-astrazeneca-vaccine-2021-04-19/>; Reuters, “Italians Seen Increasingly Reluctant to Accept AstraZeneca Shots” (14 April 2021), available at: <https://www.usnews.com/news/world/articles/2021-04-14/italians-seen-increasingly-reluctant-to-accept-astrazeneca-shots>; Dettmer J, “Trust in AstraZeneca Vaccine Fading, Adding to Shortages” (13 April 2021), available at: <https://www.voanews.com/covid-19-pandemic/trust-astrazeneca-vaccine-fading-adding-shortages>

<sup>207</sup> P Moorlah, “Le judiciaire réticent vis-à-vis du vaccin” (17 March 2021), available at: <https://www.lexpress.mu/article/390428/judiciaire-reticent-vis-vis-vaccin>; Jeewa T, “Is the Mauritian COVID-19 vaccine rollout based on a human rights approach?” (22 April 2021), available at: <https://opiniojuris.org/2021/04/22/is-the-mauritian-covid-19-vaccine-rollout-based-on-a-human-rights-approach/>

<sup>208</sup> The New York Times, World COVID-19 Vaccine Tacker, New York Times, available at: <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html> (accessed 5 May).

<sup>209</sup> Ministry of Health, “Turnout for second dose of Sinopharm vaccines lower than expected”, available at: <http://www.health.gov.sc/index.php/2021/02/08/turnout-for-second-dose-of-sinopharm-vaccines-lower-than-expected/>.

<sup>210</sup> The World, “In Zimbabwe, vaccine hesitancy among front-line workers stalls rollout” (31 March 2021), available at: <https://www.pri.org/stories/2021-03-31/zimbabwe-vaccine-hesitancy-among-front-line-workers-stalls-rollout>; Reuters, “Zimbabwe president gets COVID-19 dose, urges citizens not to hesitate” (24 March 2021), available at: <https://www.reuters.com/article/health-coronavirus-zimbabwe-vaccine-idUSL8N2LM5M6>.

<sup>211</sup> Aljazeera, “South Africa suspends Johnson & Johnson vaccine rollout” (13 April 2021), available at: <https://www.aljazeera.com/news/2021/4/13/us-recommends-pause-for-jj-vaccine-over-clot-reports>.

<sup>212</sup> M Feuer, The Johnson and Johnson vaccine pause and the challenge of risk assessment (April 28, 2021), available at: <https://www.brookings.edu/blog/fixgov/2021/04/28/the-johnson-and-johnson-vaccine-pause-and-the-challenge-of-risk-assessment/>.

<sup>213</sup> M Heywood, “Scientists criticise decision to suspend J&J vaccine in SA as ‘irresponsible and unethical’ (16 April 2021) available at: <https://www.dailymaverick.co.za/article/2021-04-16-scientists-criticise-decision-to-suspend-jj-vaccine-in-sa-as-irresponsible-and-unethical/>.

<sup>214</sup> Aljazeera, “COVID: South Africa to resume vaccine rollout with J&J jab” (26 April 2021), available at: <https://www.aljazeera.com/news/2021/4/26/south-africa-to-resume-vaccine-rollout-with-johnson-johnson-jab>.

### **C. Exclusion of civil society in designs of rollout plans and monitoring**

Governments in the SADC have typically failed to provide for meaningful and adequate participation by human rights defenders and civil society organizations (CSOs) in their plans and responses to the COVID epidemic.<sup>215</sup> Involving concerned stakeholders in the design of vaccine rollouts ensures that a variety of perspectives, experiences and challenges faced in the process are considered and is necessary as a matter of good public health policy and under international human rights law and standards.<sup>216</sup> It is particularly important that at-risk populations and marginalized individuals and groups are capable of fully participating throughout the vaccine acquisition and rollout processes.<sup>217</sup>

Additionally, close cooperation with CSO's, civic and community groups and religious leaders, can facilitate information distribution widely, including among more marginalized groups and reduce vaccine hesitancy or the spreading of myths. Moreover, including local civil society to monitor the roll-out process of COVID-19 vaccines helps to ensure government actions, in fact, align with official plans and statements.

The situation in Lesotho provides an example of the importance of such monitoring of the vaccine rollout. There, the government kick-started their vaccination process beginning in March after receiving 36 000 AZ/SII COVAX vaccines. The government pledged that the first batch would cover "all 35 000 health care workers",<sup>218</sup> failing to highlight that this would only include the first of two doses necessary for the fullest immunization. No official dates have been published regarding the delivery of the second batch of COVAX vaccines, despite the medical prescription that the second dose should be administered no more than three or four weeks after the first.<sup>219</sup>

The scarcity of doses and the government's pledge to prioritize frontline workers in the first stage of the roll-out did not prevent more than a dozen politicians and the royal family in the country from being among the first to receive vaccines.<sup>220</sup> Providing heads of States with some of the first COVID-19 vaccines has become a

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<sup>215</sup> M Heywood, "Civil Society Watch: Vaccine activism takes off under broad new alliance" (15 January 2021), available at: <https://www.dailymaverick.co.za/article/2021-01-15-civil-society-watch-vaccine-activism-takes-off-under-broad-new-alliance/>.

<sup>216</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 (Art. 2 of the International Covenant on Economic, Social and Cultural Rights)), 11 August 2000, E/C.12/2000/4, available: <https://www.refworld.org/docid/4538838d0.html>, paras 36, 49, 52 54.

<sup>217</sup> Amnesty International, "A Fair Shot" (2020).

<sup>218</sup> Press Statement, "PM Receives First Batch of COVID-19 Vaccine" (4 March 2021), available at: <https://www.gov.ls/pm-receives-first-batch-of-covid-19-vaccine/>.

<sup>219</sup> Center for Disease Control and Prevention, COVID-19 Vaccines that Require 2 Shots (27 April 2021), available at: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/second-shot.html>. For the moderna vaccine, the second dose should be administered no more than three weeks after the first, while for Pfizer the second dose should be administered no more than four weeks after the first.

<sup>220</sup> Lesotho Times, "Mass Covid-19 vaccination programme begins" (18 March 2021), available at: <https://lestimes.com/mass-covid-19-vaccination-programme-begins/>.

common practice across the globe,<sup>221</sup> in part to reduce vaccine hesitancy and lead by example.<sup>222</sup> However this justification, in the context of severe vaccine scarcity has its limitations were extended to cover a wide number of political leaders and public figures, at the expense of scientifically-based, human rights compliant prioritization consistent with the WHO's recommendations.

As is detailed below, quite apart from allowing for civil society participation in planning for vaccine distribution and prioritization, the authorities of Tanzania and Madagascar have taken severe and illegitimate criminal action against civil society simply for exercising their rights to freedom of expression. The prevalence of overly broad "fake news" regulations in the SADC, including in Zimbabwe, South Africa and Eswatini, may have a similarly chilling effect on civil society participation in vaccine rollout planning and monitoring.<sup>223</sup>

#### **IV. SPECIFIC CONCERNS IN INDIVIDUAL SADC COUNTRIES**

This briefing paper has focused on issues common to the SADC region. Described below are specific acute problems in several SADC Member States. Some also are emblematic of a pattern that could extend to other Member States. These examples have been selected based on interactions with HRDs and public health experts in the engagements with them facilitated by the ICJ, Oxfam and AI.

##### **A. Tanzania: COVID-19 Denial**

Early on in the pandemic, the Tanzanian government denied the very existence of COVID-19 on their territory, then encouraging prayer and crediting divine powers with eliminating the virus.<sup>224</sup> The government has not published any official COVID-19 data since May 2020 to support their claims of the absence of COVID-19.<sup>225</sup>

According to the WHO, the last data available was published at the beginning of May 2020 which recorded a total of 509 confirmed COVID-19 cases and 21 deaths.<sup>226</sup> Throughout the month of April 2020, cases had been steadily rising and reached the highest rate of confirmed cases and deaths in the last week of the month, shortly before the country stopped publishing data.<sup>227</sup>

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<sup>221</sup> O Okunnu, "Coronavirus update: African leaders collect vaccine live on TV, as countries begin roll out" (1 March 2021), available at: <https://www.bbc.com/pidgin/tori-56236357>.

<sup>222</sup> R Hart, "Here Are All The World Leaders Who Say They'll Get Vaccinated For Covid-19 Publicly To Boost Confidence" (9 December 2021), available at: <https://www.forbes.com/sites/roberthart/2020/12/09/here-are-all-the-world-leaders-who-say-theyll-get-vaccinated-for-covid-19-publicly-to-boost-confidence/?sh=3b6c60ca7cf8>.

<sup>223</sup> T Hodgson, K Farise, J Mavedzenge, "Southern Africa has cracked down on fake news, but may have gone too far" (5 April 2020), available at: <https://mq.co.za/analysis/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/>.

<sup>224</sup> BBC, "Coronavirus: John Magufuli declares Tanzania free of Covid-19" (8 June 2020), available at: <https://www.bbc.com/news/world-africa-52966016>.

<sup>225</sup> WHO Website COVID-19 Global Data, available at: <https://covid19.who.int/region/afro/country/tz> (accessed 29 March 2021).

<sup>226</sup> Id.

<sup>227</sup> Id.

The government has continuously rejected widely endorsed COVID-19 practices, such as lockdowns and social distancing. Instead, it has encouraged the population to pray<sup>228</sup> against the disease and use natural remedies and herbal steams, which have not been scientifically substantiated.<sup>229</sup>

Furthermore, Tanzania opposed procurement of remediating vaccines which led them to not participate in the COVAX initiative and thereby refuse access to even freely provided COVID-19 vaccines.<sup>230</sup> The late President<sup>231</sup> stated, for example, at the end of January 2021 that:

"You should stand firm. Vaccinations are dangerous. If the White man was able to come up with vaccinations, he should have found a vaccination for AIDS by now; he would have found a vaccination [for] tuberculosis by now; he would have found a vaccination for malaria by now; he would have found a vaccination for cancer by now".<sup>232</sup>

Ignoring the calls of experts, including the WHO Regional Director for Africa and WHO the Director-General, to implement adequate public health measures, start a vaccination campaign and share health data, the situation has, to date, remained largely unchanged.<sup>233</sup> The new president Samia Suluhu Hassan – who was part of Magufuli's own denialist administration – announced on 6 April 2021 that she would form a COVID-19 task force to research COVID-19 and advise the government on the effectiveness of remedies used globally.<sup>234</sup> On 4 May 2021 her administration imposed stricter travel restrictions on individuals entering the country, purportedly to prevent the spreading of new COVID-19 variants in the country.<sup>235</sup> While acknowledging the risk of COVID-19 is a welcome if long overdue development, Tanzania's slow progress continues to pose a great public health threat as new variants have been reported in individuals returning from Tanzania.<sup>236</sup> This threat is exasperated by the current government's failure to

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<sup>228</sup> The Wall Street Journal, "Tanzania Shunned Lockdowns. Now It's Rejecting Covid-19 Vaccines" (3 February 2021), available at: <https://www.wsj.com/articles/tanzania-shunned-lockdowns-now-its-rejecting-covid-19-vaccines-11612364606>.

<sup>229</sup> BBC, "Coronavirus in Tanzania: The country that's rejecting the vaccine" (6 February 2021), available at: <https://www.bbc.com/news/world-africa-55900680>.

<sup>230</sup> BBC, "John Magufuli: Tanzania's president dies aged 61 after Covid rumours" (18 March), available at: <https://www.bbc.com/news/world-africa-56437852>.

<sup>231</sup> Allegation suggest that President John Magufuli's death in March 2021, was as a result of COVID-19. See: BBC, "John Magufuli: Tanzania's president dies aged 61 after Covid rumours" (18 March), available at: <https://www.bbc.com/news/world-africa-56437852>.

<sup>232</sup> M Makoni, "Tanzania refuses COVID-19 vaccines" (13 February 2021), available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00362-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00362-7/fulltext).

<sup>233</sup> CNN, "Following controversial remarks by Tanzania's president, WHO urges country to stick to science in fight against Covid-19" (3 February 2021), available at: <https://edition.cnn.com/2021/02/03/africa/following-controversial-remarks-by-tanzanias-president-who-urges-country-to-stick-to-science-in-fight-against-covid-19/index.html>.

<sup>234</sup> T Oliveira, S Lutucuta, J Nkengasong, et al., "A novel variant of interest of SARS-CoV-2 with multiple spike mutations detected through travel surveillance in Africa" (4 April 2021), *medRxiv*, available at: <https://www.medrxiv.org/content/10.1101/2021.03.30.21254323v1>, pp.2.

<sup>235</sup> Ministry of Health, Republic of Tanzania, Tweet: Travel Advisory No 7, available at: [https://twitter.com/wizara\\_afyatz/status/1389792527482503168?s=20](https://twitter.com/wizara_afyatz/status/1389792527482503168?s=20); Business Insider SA, "UPDATE | Tanzania backtracks on SA restrictions – limits quarantine to India" (5 May 2021), available at: <https://www.businessinsider.co.za/tanzania-famous-for-relaxed-covid-rules-now-wants-south-africans-in-2-week-quarantine-2021-5>.

<sup>236</sup> T Oliveira, S Lutucuta, J Nkengasong, et al., "A novel variant of interest of SARS-CoV-2 with multiple spike mutations detected through travel surveillance in Africa" (4 April 2021), *medRxiv*, available at: <https://www.medrxiv.org/content/10.1101/2021.03.30.21254323v1>, pp.2.



provide concrete proposals regarding the acquisitions of vaccines.<sup>237</sup> Thus, while the government's moves are a step forward from the dangerous denialism maintained by the previous administrations, the beneficial results of the President's announcement and potential scientific committee have yet to be seen.

Importantly, repression of dissent by HRDs has continued to be prevalent in Tanzania in the context of COVID-19.<sup>238</sup> For instance, media outlets and journalists were fined and ordered to apologize for publicizing material critical of the government's handling of COVID-19 and generally reporting on COVID-19.<sup>239</sup> Such measures and the broader repression of HRD dissent negatively violates their rights to freedom of expression and reduces the possibility of effective COVID-19 responses and vaccine acquisition and distribution planning.<sup>240</sup>

## **B. Madagascar: Right to Health and Access to Justice**

Madagascar only announced its decision to join the COVAX initiative on 1 April 2021, after first announcing at the end of March 2021, well into their second wave, the government's intention to provide COVID-19 vaccines.<sup>241</sup>

Prior to this change, of course, the population had been left in the dark with no information regarding access to COVID-19 vaccines, and no explanation by the Government of its decision not to procure or distribute COVID-19 vaccines. Virologist Jean-Michel Heraud had underscored, that "it remains a mystery as to why the government refuses to act".<sup>242</sup> Until mid-March 2021, President Rajoelina and his government had advised, despite the lack of scientific evidence, the use of the herbal "Covid-Organics" drink as an effective cure against COVID-19.<sup>243</sup> The lack of transparent and reliable health data prevents the assessment of the gravity of the pandemic in the country. However, during the symposium on equitable vaccine access in Southern Africa, participants suggested that the second wave was more severe and thus may have forced the government to acknowledge the need for a vaccine.<sup>244</sup>

Although the Government has now agreed to procure vaccines, the detrimental health and human rights impact of their denialism cannot be easily dismissed.

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<sup>237</sup> Aljazeera, "Tanzania's new president says it's 'not proper' to ignore COVID" (6 April 2021), available at: <https://www.aljazeera.com/news/2021/4/6/tanzanias-new-president-says-not-proper-to-ignore-covid>.

<sup>238</sup> Amnesty International Submission for the UN Universal Periodic Review, "Tanzania: A Chance to Prioritise Human Rights (November 2020), available at: <https://www.justice.gov/eoir/page/file/1380036/download>.

<sup>239</sup> Amnesty International, "Tanzania: Authorities must end crackdown on journalists reporting on" COVID-19, (21 April 2020), available at: <https://www.amnesty.org/en/latest/news/2020/04/tanzania-authorities-must-end-crackdown-on-journalists-reporting-on-covid19/>.

<sup>240</sup> International Commission of Jurists "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" (1 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>, pp. 104.

<sup>241</sup> Africanews, "Madagascar joins the COVID-19 vaccine COVAX programme" (1 April 2021), available at: <https://www.africanews.com/2021/04/01/madagascar-joins-the-covid-19-vaccine-covax-programme/>.

<sup>242</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.

<sup>243</sup> T, Leger, "Danger and despair in Madagascar: President Rajoelina opts for 'miracle cure' over Covid-19 vaccine" (22 March 2021), available at: <https://www.dailymaverick.co.za/article/2021-03-22-danger-and-despair-in-madagascar-president-rajoelina-opts-for-miracle-cure-over-covid-19-vaccine/>.

<sup>244</sup> Joint Symposium on Equitable COVID-19 Vaccine Access in Southern Africa (16 April 2021), available at: <https://fb.watch/4V4RKO-yso/>.



Throughout the pandemic, government authorities have targeted individuals who publicly opposed government views and actions against COVID-19. Individuals, specifically public health experts, doctors and journalists, who dared to share their opposing opinions were quickly met by drastic government actions forcing them into silence.<sup>245</sup> Arphine Heliosa, for example, was kept in pre-trial detention after having been accused of spreading “fake news” and incitement of hatred after criticizing government measures against COVID-19.<sup>246</sup> Other health experts and journalists voicing similar concerns, also faced arrests or were forced to endure national investigations.<sup>247</sup>

### C. Malawi: Extreme Poverty and Public Health Measures

On 3 February Medecins Sans Frontieres (MSF) called on the international community to rapidly ensure access to COVID-19 vaccines in Africa, specifically Eswatini, Malawi and Mozambique, as the more infectious 1.135 variant was leading to “exponentially higher” rates in the second wave.<sup>248</sup> In Malawi, MSF emphasized that the numbers of COVID-19 infections were “doubling every four to five days” and that the main hospital treating COVID-19 patients was nearing its full capacity.<sup>249</sup>

At the beginning of March 2021, the country was among the first to receive COVAX deliveries, acquiring a donation of 360,000 AZ/SII doses of the 1,260,000 allocated to it by the end of the first half of 2021 to vaccinate 20 percent of its population.<sup>250</sup> This left almost three quarters of the allocated quantities to still be delivered within a mere three months, which seems unlikely after COVAX announced AZ/SII delivery delays at the end of March 2021.<sup>251</sup> While the deliveries and start of the rollout mark a crucial step, the doses received do not allow for the inoculation of even one percent of the population.<sup>252</sup> The World Bank has predicted that vaccination would not “reach a significant portion of the population until at least mid-2022.”<sup>253</sup>

<sup>245</sup> T Leger, “Danger and despair in Madagascar: President Rajoelina opts for ‘miracle cure’ over Covid-19 vaccine” (22 March 2021), available at: <https://www.dailymaverick.co.za/article/2021-03-22-danger-and-despair-in-madagascar-president-rajoelina-opts-for-miracle-cure-over-covid-19-vaccine/>.

<sup>246</sup> Amnesty International, “Madagascar: Journalist Held in Pre-Trial Detention as Authorities use COVID-19 Context to Intimidate Journalists”, (9 April 2020), available at: <https://www.amnesty.org/en/documents/AFR35/2117/2020/en/>.

<sup>247</sup> T Leger, “Danger and despair in Madagascar: President Rajoelina opts for ‘miracle cure’ over Covid-19 vaccine” (22 March 2021), available at: <https://www.dailymaverick.co.za/article/2021-03-22-danger-and-despair-in-madagascar-president-rajoelina-opts-for-miracle-cure-over-covid-19-vaccine/>.

<sup>248</sup> MSF Press Statement: “Ravaged by new strain, southern Africa must get COVID-19 vaccines” (3 February 2021), available at: <https://www.msf.org/msf-urges-immediate-delivery-covid-19-vaccines-southern-africa#:~:text=OPERATIONS-,SHARE,-In>.

<sup>249</sup> MSF Press Statement: “Ravaged by new strain, southern Africa must get COVID-19 vaccines” (3 February 2021), available at: <https://www.msf.org/msf-urges-immediate-delivery-covid-19-vaccines-southern-africa#:~:text=OPERATIONS-,SHARE,-In>.

<sup>250</sup> COVAX vaccine roll-out Malawi, available at: <https://www.gavi.org/covax-vaccine-roll-out/malawi>.

<sup>251</sup> WHO Press Statement, “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).

<sup>252</sup> See Table, p. 19.

<sup>253</sup> The World Bank, The World Bank In Malawi, available at: <https://www.worldbank.org/en/country/malawi/overview>.

Despite the supply scarcity the government announced in April 2021, that it would have to destroy thousands of expired COVID-19 AZ vaccine doses after the country had been unable to administer 16 400 of 102 000 doses received from the African Union three weeks before their expiration date.<sup>254</sup> The sluggish inoculation process and resulting waste of vaccine doses was reportedly caused at least in part by vaccine hesitancy.<sup>255</sup> However, evidence also suggests that slow advancements are also in significant part due to a general lack of country readiness and public health infrastructure.<sup>256</sup>

The situation in Malawi is a striking example of a public health crisis that has been exacerbated by high national poverty rates of more than 50 percent of the population, and limited resources available to a low-income economy.<sup>257</sup> Moreover, providing an example of the complex challenges other low-income countries in the SADC region may have faced throughout the pandemic due to their economic status.

This creates circumstances conducive to greater transmission and higher death rates, including overcrowded households, limited access to clean water or health services and products.<sup>258</sup> Some 88 percent of the national labor force is employed in the informal sectors, which are dramatically impacted by health precautions, such as lockdowns.<sup>259</sup> Overall, this shaping of the economic system makes Malawi less likely to be conducive to the implementation of necessary public health measures, increasing the difficulty of rapidly curbing the impact of the pandemic through strict government regulations.

Indeed, the difficulties in implementing measures that are effective in stemming transmission are so severe that in 2020 the High Court of Malawi<sup>260</sup> struck down legal measures aimed at implementing lockdowns, finding that they presented a “real threat to [the] life and livelihoods” of a significant proportion of people in Malawi.<sup>261</sup>

Given the relative absence, limited effectiveness and health and life-threatening effects of lockdowns in the Malawian context, access to COVID-19 vaccines becomes even more pressing.<sup>262</sup>

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<sup>254</sup> News24, “Malawi to destroy 16 000 expired Covid-19 vaccines”, (14 April 2021), available at: <https://www.news24.com/news24/africa/news/malawi-to-destroy-16-000-expired-covid-19-vaccines-20210414>.

<sup>255</sup> Id.

<sup>256</sup> CGTN, “Malawi to destroy 16,000 expired COVID vaccines” (14 April 2021), available at: <https://africa.cgtn.com/2021/04/14/malawi-to-destroy-16000-expired-covid-vaccines/>.

<sup>257</sup> Id.

<sup>258</sup> B Choon-Looi, C Brasher et al. “The COVID-19 Pandemic: Effects on Low- and Middle-Income Countries.” *Anesthesia and analgesia* vol. 131,1 (2020): 86-92, available at: <https://pubmed.ncbi.nlm.nih.gov/32243287/>.

<sup>259</sup> United Nations, ILO Report “Assessment of the Impact of COVID-19 on Employment in Malawi” (June 2020), available at: <https://malawi.un.org/sites/default/files/2020-09/Assessment%20of%20the%20Impact%20of%20Covid-19%20on%20the%20Labour%20Market%20in%20Malawi%20ECAM%20Final%20Report.pdf>.

<sup>260</sup> The State on application of Kathumba and others v President of Malawi and others (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020), available at: <https://malawilii.org/mw/judgment/high-court-general-division/2020/29>.

<sup>261</sup> Id; T Hodgson COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2) (8 December 2020), available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2/>.

<sup>262</sup> Unlike most other countries lockdown in Malawi was first implemented after these court challenges in January 2021, and has since been extended. See: L Masina, “Malawi Announces New Lockdown Measures as COVID Cases Surge” (18 January 2021), available at: <https://www.voanews.com/covid-19-pandemic/malawi->

## D. South Africa: Separate Private and Public Health regimes

South Africa is one of the most unequal countries in the world. In its concluding observations to South Africa in 2018, the CESCR identified the “large disparities between the public and private healthcare systems”, recommending that South Africa address this to ensure the realization of the right to equitable access to healthcare services, goods and facilities for all people.<sup>263</sup>

Recognizing this, and in line with WHO guidance, South Africa has adopted a “one nation, one plan” strategy to ensure public access to COVID-19 vaccines, to replace the existing two parallel systems – one private and one public – for vaccine acquisition and rollout.<sup>264</sup>

Challenging this, and effectively representing the interest of a predominately white minority in South Africa who form a substantial part of those accessing healthcare through the private sector, the trade union Solidarity<sup>265</sup> and NGO AfriForum launched legal action against the government, challenging their alleged “monopoly” to procure COVID-19 vaccine supplies.<sup>266</sup> This litigation effectively sought to allow for privatized procurement and allocation of COVID-19 vaccines through private sector acquisition outside of the government’s national procurement strategy. If successful, this litigation clearly risked the emergence of what some have described as “vaccine apartheid” and “vaccine elitism”,<sup>267</sup> as socio-economic status restricts abilities to access private health services, including vaccines.

The case was withdrawn following criticism from and being opposed by human rights defenders, public health experts, and the government itself. The Health Justice Initiative (HJI) in particular highlighted the State’s constitutional requirements and international human rights obligations to ensure equitable access to health and the public health interests in equitably allocating vaccines, in line with WHO prioritizations schemes, to ensure effective and rapid

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[announces-new-lockdown-measures-covid-cases-surge](#); AFP, “Malawi imposes first lockdown measures as virus flares” (18 January 2021), available at: <https://www.msn.com/en-us/news/world/malawi-imposes-first-lockdown-measures-as-virus-flares/ar-BB1cQXrF>; J Tengaenga, S Tengaenga Duley, C J. Tengaenga, “Zimitsani Moto: Understanding the Malawi COVID-19 Response Laws” (2021) 10, 20. <https://doi.org/10.3390/laws10020020>.

<sup>263</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of South Africa, E/C.12/ZAF/CO/1, (29 November 2018), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=e](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=e).

<sup>264</sup> Z Dangor, F Sucker, “South Africa has the legal tools to challenge the vaccine nationalism of rich countries” (25 January 2021), available: <https://www.dailymaverick.co.za/article/2021-01-25-south-africa-has-the-legal-tools-to-challenge-the-vaccine-nationalism-of-rich-countries/>.

<sup>265</sup> See: Solidariteit Solidarity Webpage, available at: <https://solidariteit.co.za/en/who-are-we/>; Solidarity is a trade union which fights for the rights of minorities “specifically for those excluded from government’s affirmative action programs”. Per section 1 of the Employment Equity Act No 55 of 1998, designated groups which fall under the State’s affirmative action programs are black people, women and people with disabilities; Republic of South Africa, Government Gazette (19 October 1998), available at: [https://www.gov.za/sites/default/files/gcis\\_document/201409/a55-980.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a55-980.pdf).

<sup>266</sup> Businesstech, “Court challenge aims to stop ‘nationalisation’ of Covid-19 vaccines in South Africa” (8 January 2021), available at: <https://businesstech.co.za/news/trending/459724/court-challenge-aims-to-stop-nationalisation-of-covid-19-vaccines-in-south-africa/>.

<sup>267</sup> Health Justice Initiative, “Health Justice Initiative (HJI) Statement on Afriforum and Solidarity withdrawing their vaccine procurement and allocation case against Minister of Health & 16 Others (HJI amicus curiae)” (2 March 2021), available at: <https://healthjusticeinitiative.org.za/2021/03/29/afriforum-solidarity-case-amicus/>.

immunization.<sup>268</sup> Evidence submitted on behalf of the HJI in its court papers included affidavits provided by public health experts and the UN Special Rapporteur on the Right to Health, who raised concerns regarding the discriminatory consequences of enabling privatization health, specifically COVID-19 vaccines.

This reversal notwithstanding, the generally bifurcated nature of South Africa's public and private health systems<sup>269</sup> engenders fear that the poor – and especially rural – inhabitants of South Africa will not receive equal access to vaccines. They are likely to be more easily accessible to those seeking them through the private sector and in urban areas.<sup>270</sup> Indeed, even those lucky enough to be able to afford access to private healthcare services have sometimes been burdened by excessive costs for medical bills resulting from COVID-19 related complications.<sup>271</sup>

## **E. Zimbabwe: Access to Health Information and Courts**

Throughout the pandemic, the Zimbabwe government has been providing typically incoherent information regarding the health situation in the country, and limited access to vaccine procurement strategies. As cases were increasing dramatically in February 2021, government officials shared different, even conflicting, information about the COVID-19 situation. While the Information Ministry Permanent Secretary underscored that the health services were overwhelmed, the Vice-President ensured people that there were sufficient health services and hospital beds for COVID-19 patients.

This general absence of information on COVID-19 overall resulted in the filing of urgent litigation in the High Court of Zimbabwe by the Media Institute for Southern Africa,<sup>272</sup> by which a court order was issued requiring the government to provide a wide range of information on COVID-19 the public.<sup>273</sup>

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<sup>268</sup> Id.

<sup>269</sup> Health Market Inquiry, "Executive Summary" (September 2019), available at:

<http://www.compcom.co.za/wp-content/uploads/2020/01/Executive-summary-Presentation-of-the-final-findings-and-recommendations-report.pdf>.

<sup>270</sup> The New York Times, "For COVID-19 Vaccines, some are too rich-and too poor" (28 December 2020), available at: <https://www.nytimes.com/2020/12/28/world/africa/covid-19-vaccines-south-africa.html>; The Financial Times "South African rollout lays bare vaccine struggle in developing world" available at:

<https://www.ft.com/content/3bec85ee-e849-4b97-b2bb-4ca790546a0d>; L Mehlwana, "Eastern Cape: Questions over vaccine readiness in rural areas" (10 February 2021) available at:

<https://www.spotlightnsp.co.za/2021/02/10/eastern-cape-questions-over-vaccine-readiness-in-rural-areas/>; C Gillili "Why the Eastern Cape might take longer to roll out vaccinations" (1 February 2021), available at: <https://mg.co.za/coronavirus-essentials/2021-02-01-why-the-eastern-cape-might-take-longer-to-roll-out-vaccinations/>.

<sup>271</sup> J Malala, "The tragedy of Dr Sindi van Zyl" (15 April 2021), available at:

[https://www.businesslive.co.za/fm/opinion/food-for-thought/2021-04-15-justice-malala-the-tragedy-of-dr-sindi-van-zyl/?utm\\_term=Autofeed&utm\\_medium=Social&utm\\_source=Facebook&fbclid=IwAR0n8fktOpQnu7T3PHC6M\\_c70qpFOSKgoSARNHdfkdfkODS4eqQBIX2734c#Echobox=1618460788](https://www.businesslive.co.za/fm/opinion/food-for-thought/2021-04-15-justice-malala-the-tragedy-of-dr-sindi-van-zyl/?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook&fbclid=IwAR0n8fktOpQnu7T3PHC6M_c70qpFOSKgoSARNHdfkdfkODS4eqQBIX2734c#Echobox=1618460788).

<sup>272</sup> Misa Zimbabwe, "Urgent application for comprehensive information on COVID-19 filed" (18 January 2021), available at: <https://zimbabwe.misa.org/2021/01/18/urgent-application-for-comprehensive-information-on-covid-19-filed/>.

<sup>273</sup> Misa Zimbabwe, "Judge orders government to disseminate comprehensive information on COVID-19" (1 February 2021) available at: <https://zimbabwe.misa.org/2021/02/01/judge-orders-government-to-disseminate-comprehensive-information-on-covid-19/>; Misa Zimbabwe, "High Court orders information access on COVID-19" (24 April 2020) available at: <https://zimbabwe.misa.org/2020/04/24/high-court-orders-information-access-on-covid-19/>.

Meanwhile, independent requests for health equipment and services on social media suggested a more concerning situation than that painted by the government.<sup>274</sup> This lack of adequate, coherent and accessible health information extends to testing data, the impact of new mutations and vaccine procurement and strategy plans.<sup>275</sup> As vaccine donations arrived in the country in February 2021, no transparent distributions strategies had been published. A veil of secrecy remains around procurement proceedings and strategies.<sup>276</sup>

Moreover, the efforts of local civil society organizations have been drastically limited due to a practice directive allowing courts to only deal with urgent matters as a result of the COVID-19 related restrictions.<sup>277</sup> ZimRights filed a case, on urgent basis, with the Zimbabwe High Court on 3 February 2021, in light of the government's failure to uphold the right to health and life. Five days later, the court dismissed the case on the grounds that it lacked urgency and could thus be addressed through normal procedures to be discussed by the court at a later time.<sup>278</sup> The decision has since been appealed and ZimRights still awaits the decision of the Supreme Court of Zimbabwe. The ICJ has since requested that the African Commission on Human and People's Rights intervene in the matter.<sup>279</sup>

## **V. RECOMMENDATIONS**

The responses of SADC Member States have fallen short of the critical steps necessary to address a global health pandemic that has claimed more than three million lives globally – more than 63 000 lives in the SADC region alone – and impaired the health and well-being of countless others. Specifically, SADC Member States have failed, in varying degrees, to meet their international legal obligations to ensure equitable access to vaccines for their populations and to otherwise guarantee and ensure the rights to health, life and equal benefit from scientific progress.

To advance equitable and timely access to COVID-19 vaccines across Southern Africa in compliance with international human rights obligations, the ICJ makes the following recommendations:

### ***Regional Cooperation***

- Individual SADC Member States should engage in regional cooperation and, where necessary, seek and provide regional and international assistance, in

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<sup>274</sup> Misa Zimbabwe, "Why govt was sued over access to Covid-19 information" (16 February 2021) available at: <https://zimbabwe.misa.org/2021/02/16/why-govt-was-sued-over-access-to-covid-19-information/>

<sup>275</sup> Misa Zimbabwe, "Urgent application for comprehensive information on COVID-19 filed" (18 January 2021), available at: <https://zimbabwe.misa.org/2021/01/18/urgent-application-for-comprehensive-information-on-covid-19-filed/>.

<sup>276</sup> International Commission of Jurists, ZimRights: Appeal for urgent intervention for the protection of the rights to health and life in Zimbabwe: COVID-19 vaccination procurement and distribution plan (17 February 2021), available at: <https://www.icj.org/wp-content/uploads/2021/02/ZimRights-ICJ-Letter-to-ACHPR-1.pdf>.

<sup>277</sup> See: Practice Direction 2 of 2021, "Operational Directions on Hearing Urgent Chamber and Bail Applications during Level IV COVID-19 Lockdown Period" available at: <http://www.jsc.org.zw/jscbackend/upload/Publications/PRACTICEDIRECTION2OF2021.pdf>.

<sup>278</sup> High Court of Zimbabwe, Case Number HC 83/2021.

<sup>279</sup> International Commission of Jurists Press Statement, "The ICJ and ZimRights ask for urgent intervention on access to COVID-19 vaccines from African Commission Mechanism" (19 February), available at: <https://www.icj.org/the-icj-and-zimrights-ask-for-urgent-intervention-on-access-to-covid-19-vaccines-from-african-commission-mechanism/>.

order to ensure equitable access to COVID-19 vaccines and related health information for all, across all SADC countries.

- The SADC Secretariat should urgently and actively facilitate and advance sub-regional COVID-19 vaccine procurement and distribution between the Member States.
- The SADC Secretariat should provide clear guidance to the Member States on their human rights obligations pertaining to vaccine access. The SADC should take effective action to address the failure of Member States to act according to their obligations under international law, including under regional agreements.
- Immediate and concrete steps should be taken to restore the jurisdiction of the SADC Tribunal to hear individual complaints and recommit to its rebuilding, staffing and funding it to ensure its operational viability in providing for access to effective human rights remedies.
- The SADC should engage in visible advocacy measures in support of the WTO TRIPS waiver proposal to which, as members of the African Union, all SADC Member States are already committed.
- All SADC should encourage all Member States, as a matter of priority, to develop, publish and publicize national vaccine acquisition and rollout plans and procurement strategies, detailing concrete measures to ensure non-discriminatory access to vaccines to all people.

### ***Equitable Access to COVID-19 vaccines and health information***

- State authorities should act to maximize equitable and timely access to COVID-19 vaccines. These actions should be carried out on a non-discriminatory basis, with particular care taken that no distinction is made on the grounds of citizenship, nationality, statelessness or documentation status.
- State authorities should address the COVID-19 challenges through international cooperation and assistance, which entails specifically engaging in coordination and cooperation measures bilaterally and multilaterally with SADC, the Africa Centre for Disease Control and Prevention (Africa CDC), the AU, the WHO, the WTO, the UN Human Rights Council. Priority should be given to facilitating equitable arrangements for vaccine production and procurement processes.
- States should take all effective measures to ramp up regional and sub-regional vaccine production and manufacturing capacities, including by acting to remove legal and practical obstacles to such production.

### ***Transparency in vaccine procurement, allocation and distribution***

- State authorities should develop, publish and widely disseminate in accessible formats comprehensive health information, which should be



updated regularly. This information should include: COVID-19 infection rates; mortality rates; vaccination rates; scientific health data and recommendations; vaccine procurement and allocation plans; and vaccine choices and risks and benefits, if any, associated with such vaccines. This applies to all vaccines but is particularly pressing in regard to the AstraZeneca, Sinopharm, Russian Sputnik V and Johnson and Johnson vaccines at present.

- Where governments enter into non-disclosure agreements with pharmaceutical companies, they should ensure that the information that is protected from disclosure is consistent with the right to accessible health information by not including vital COVID-19 related information, that the public ought to have access to, under such agreements.
- State authorities should, individually and in cooperation with other States, take regulatory and other measures to ensure that pharmaceutical companies that produce COVID-19 vaccines and related businesses conform their practices with their human rights responsibilities. This includes a requirement of undertaking human rights impact assessments and exercising due diligence to ensure similar compliance in all aspects of vaccine procurement and allocation plans.
- States should take the steps necessary to immediately endorse and participate in the WHO's C-TAP initiative.
- COVAX, and States participating in COVAX, should provide full and publicly accessible information on bilateral deals with pharmaceutical companies, and up to date information on vaccine allocation processes.

### ***Tanzania***

In order to ensure compliance with its human rights obligations, the Tanzanian authorities should take effective measures including:

- Publicly affirming the efficacy of COVID-19 vaccines and the need to procure vaccines for national immunization and promoting the vaccines to the general public. In order to repair the consequences of misinformation caused by the government in 2020 and early 2021, adopt promotional campaigns aimed at providing accurate and scientific information on COVID-19 and COVID-19 vaccines.
- Urgently reallocating and realigning existing budget priorities within the country to ensure adequate resources available to begin purchasing vaccines.
- Urgently taking all steps necessary to join the COVAX Initiative and engage with the African Vaccine Acquisition Task Team to ensure that it benefits from any freely or affordably available COVID-19 vaccine allocations in the future.
- Urgently requesting other States, multilateral institutions and private donors to donate or fund the procurement of COVID-19 vaccines as a matter of priority.

- Publicizing and collecting information on COVID-19 transmission rates and deaths in the country and expanding COVID-19 testing facilities.
- Publishing comprehensive and widely accessible vaccine acquisition roll-out strategies and plans, detailing concrete measures to ensure non-discriminatory access to vaccines to all people in Tanzania.
- Respecting and protecting the rights to freedom of expression, association and access to justice of human rights defenders, journalists and media outlets, including by:
  - Taking steps to ensure that all those who have been sanctioned for commenting critically on the government's COVID-19 response measures have any pending charges dropped; and
  - Immediately releasing human rights defenders, journalists and members of the public convicted or detained for commenting critically on the government's COVID-19 response.

### ***Madagascar***

In order to ensure compliance with its human rights obligations, the Madagascar authorities should take effective measures including:

- Publicly affirming the efficacy of COVID-19 vaccines and the need to procure vaccines for national immunization. In order to repair the consequences of misinformation provided by the government in 2020 and early 2021, adopting promotional campaigns aimed at providing accurate and scientific information on COVID-19 and COVID-19 vaccines.
- Urgently taking all steps necessary to join the COVAX Initiative and engage with the African Vaccine Acquisition Task Team to ensure that it benefits from any freely or affordably available COVID-19 vaccine allocations in the future.
- Urgently requesting other States, multilateral institutions and private donors to donate or fund the procurement of COVID-19 vaccines as a matter of priority.
- Publicizing and collecting information on COVID-19 transmission rates, reflecting scientifically proven COVID-19 rates in the country.
- Publishing comprehensive and widely accessible vaccine acquisition roll-out strategies and plans, detailing concrete measures to ensure non-discriminatory access to vaccines to all people in Madagascar.
- Respecting and protecting the rights to freedom of expression, association and access to justice of human rights defenders, journalists and media outlets including by:
  - Taking steps to ensure that all those who have been sanctioned for commenting critically on the government's COVID-19 response measures have any pending charges dropped; and
  - Immediately releasing human rights defenders, journalists and members of the public convicted or detained for commenting critically on the government's COVID-19 response.

## ***Malawi***

In order to ensure compliance with its human rights obligations, the Malawian authorities should take effective measures including:

- Acting to ensure accelerated access to and distribution of all COVID-19 vaccines received to avoid vaccine expiration.
- Publicly affirming the efficacy of COVID-19 vaccines and the need to procure vaccines for national immunization.
- Adopting promotional campaigns aimed at providing accurate and scientific information on COVID-19 and COVID-19 vaccines.
- Ensuring that lockdowns and other restrictive measures implemented to stem the transmission of COVID-19 comply with international human rights law and standards, including the rights to health and life.
- Publishing comprehensive and widely accessible vaccine acquisition roll-out strategies and plans, detailing concrete measures to ensure non-discriminatory access to vaccines to all people in Malawi.

## ***South Africa***

In order to ensure compliance with its human rights obligations the South African authorities should take effective necessary measures including:

- Ensuring non-discriminatory equitable access to healthcare services, goods and facilities, including COVID-19 vaccines, for all including in particular non-citizens, people living in rural areas and those accessing health care services through the public health sector.
- Taking effective measures to maintain a nationwide, government regulated, controlled and driven public COVID-19 vaccine allocation and distribution in alignment with domestic and international law.
- Publishing comprehensive and widely accessible vaccine acquisition roll-out strategies and plans, detailing concrete measures to ensure non-discriminatory access to vaccines to all people in South Africa.

## ***Zimbabwe***

In order to ensure compliance with its human rights obligations, the Zimbabwean authorities should take effective measures including:

- Publishing comprehensive and widely accessible vaccine acquisition roll-out strategies and plans, detailing concrete measures to ensure non-discriminatory access to vaccines to all people.
- Publicizing and collecting information on COVID-19 transmission rates and deaths in the country and expanding COVID-19 testing facilities.
- Ensuring access to courts is sufficiently maintained during emergency or disaster situations brought on by the COVID-19 pandemic in order to provide for access to justice for alleged human rights violations, including alleged violations of the rights to health and life.

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