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10 June 2021

The Minister of Health

Per email: georgina.sylvester@health.gov.za minister@health.gov.za

**Chief Executive Officer: Dr Boitumelo Semete-Makokotlela
South African Health Products Regulatory Authority (SAHPRA)**

Per email: Boitumelo.Semete@sahpra.org.za ditshego.molefe@sahpra.org.za

**President Professor Glenda Gray
South African Medical Research Council (SAMRC)**

Per email: glenda.gray@mrc.ac.za

Dear Madams and Sirs,

**The ICJ is concerned about possible unfair and non-transparent
prioritization of individuals to receive Covid-19 vaccinations**

The International Commission of Jurists (ICJ) is a global organization composed of 60 judges and lawyers from all regions of the world working to safeguard the rule of law and the legal protection of human rights. The ICJ's work extends to all human rights, including civil, cultural, economic, political, and social rights. The ICJ has been working to promote equitable vaccine access since the start of the Covid-19 pandemic, as part of its work to protect the rights to health, life, and equal protection of the law. The ICJ is concerned that improper pressure may have been imposed on regulatory or research bodies to vaccinate ineligible people for no rational public health purpose and that clinical trials and national programmes were distorted for sports and political purposes. While we acknowledge and recognise that national and other elite athletes are a source of national pride and Ambassadors for the nation- our concern is motivated by this legitimate public objective taking primacy over human rights concerns.

In its work in respect of Southern Africa the ICJ has observed that as vaccines are rolled out globally, many countries are facing a range of common challenges that include inability or unwillingness to deliver equitable and timely access to COVID-19 vaccines.¹ The ICJ is concerned that the decision, taken on an unknown date, by the SAHPRA and SAMRC and a number of subsequent actions effectively prioritizing elite and other athletes, sport officials from multiple sporting codes, government officials and diplomats, for either Covid-19 vaccine trial or other purposes may constitute inequitable, potentially discriminatory practise. We are concerned that permission has been obtained from SAHPRA to amend the eligibility criteria of the Sisonke vaccine trial as well as to include among others 'elite athletes', enabling them to enjoy special privileged access to some of the remaining clinical trial stock, while others at risk could have been study subjects instead. We are interested to know, other than health care workers and health facility staff, who else received vaccines from Sisonke? No

reasons or public health-based justifications have been made available as to why athletes and other persons working in sport as well government officials and diplomats have been included in the study and national roll out. If they cannot be justified on public health grounds, we are concerned that they may be non-compliant with human rights imperatives, and we question the ethical considerations of the approach.

We have noted the SAMRC media statement, dated 25 May 2021, indicating that it had received urgent approval from SAHPRA to waive eligibility requirements for the study *'to include persons of high priority to the nation, including the Olympic and Para-Olympic Team to be allowed access to the Ad26 SARS-CoV-2 investigational vaccine'*. We have also noted that rugby players from the national team and members of staff and management are also being vaccinatedⁱⁱ as well as national cricket, soccer and local soccer teams, UN staff members and diplomats.ⁱⁱⁱ

In the context of severe shortages of vaccines, and government's own vaccine roll-out plan that was meant to prioritize the most vulnerable, the vaccination of these younger 'elite athletes' and young diplomats who are generally young, fit, healthy and unlikely to have co-morbidities would appear unjustifiable on public health grounds. They are therefore not a priority group, for vaccination purposes, especially where there is vaccine scarcity, inequality, and the promise by government of equity. We acknowledge that the situation may be different in respect of some Paralympic athletes. We understand that there may be other reasons justifying the prioritization of these groups, such as the promotion of sport, but any such objectives cannot supersede the primacy of the protection of life, health and equality and equal protection of the law.

The South African Constitution guarantees the right to have access to health care services as a basic human right.^{iv} We refer in particular to the World Health Organization's guidance which is to prioritize those who are more vulnerable in respect of equitable access and fair allocation of vaccines.^v Worldwide, many States are acting in line with the WHO guidance. Further, South Africa has an international legal obligation to protect the right to health as a State party to the International Covenant on Economic, Social and Cultural Rights. The supervisory body for that treaty, the UN Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that all healthcare goods, facilities, and services must be available, accessible, acceptable and of adequate quality.^{vi} 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."*^{vii} **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 pandemic. The same obligations in terms of the right to health are supported by Section 27 of the South Africa Constitution, Article 16 of the African Charter on Human and People's Rights^{viii} and the SADC Health Protocol.^{ix}

The CESCR has also emphasized that prioritization of vaccine access within countries **"must be based on medical needs and public health grounds"**,^x 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.^{xi} 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".

We underscore that no one is beyond accountability, and this includes the Minister of Health, SAMRC and the SAHPRA. Both transparency and accountability are of greater significance during a pandemic to ensure equitable and non-discriminatory vaccine access. We encourage the Minister of Health, SAHPRA and the SAMRC to act in an accountable and transparent manner to ensure that there are no discriminatory or unfair practises which could act as a barrier to equitable vaccine access.

Considering the above, we request an overview and explanation of the following:

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1. Who exactly has been vaccinated from the various sporting codes, government officials and diplomats outside of SA's programme for vaccination, and what is the basis for the decision to vaccinate these groups? Were journalists also vaccinated?
2. Who approved this approach and what was the basis for the justification for both the Sisonke trial and the national roll out?
3. Which, if any, ethics committee or authority approved these vaccination deviations, as part of the Sisonke trial and when were these approvals granted?
4. Which Ministerial Advisory Committee members/sub-group recommended or sanctioned this approach?

In the interests of transparency and accountability we look forward to your response.

Sincerely,



Kaajal Ramjathan-Keogh

Director of Africa Regional Programme

ⁱ May 2021, Briefing Paper: The Unvaccinated: Equality not Charity in Southern Africa <https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>

ⁱⁱ <https://www.news24.com/sport/rugby/britishandirishlions2021/rassie-erasmus-on-covid-19-vaccinations-for-lions-series-well-try-to-vaccinate-everyone-20210528>

ⁱⁱⁱ <https://www.timeslive.co.za/politics/2021-03-31-sa-diplomats-set-to-be-prioritised-for-single-dose-vaccine-jabs-says-health-adviser/>

^{iv} Section 27 <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>

^v https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf

^{vi} 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

^{vii} 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)

^{viii} Article 16: Right to Health of the African Charter on Human and People's Rights <https://www.achpr.org/legalinstruments/detail?id=49>

^{ix} SADC Health Protocol (1999) <https://www.sadc.int/documents-publications/show/804>

^x 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, para 5.

^{xi} 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/wpcontent/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf>, pp.39.