

Human Rights Obligations of States to not impede the Proposed COVID-19 TRIPS Waiver

Expert Legal Opinion
November 2021

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Acknowledgments:

This legal opinion was researched and drafted by Sanya Samtani (University of Pretoria) and Timothy Fish Hodgson (ICJ). The executive summary was drafted with the assistance of Jamie Burton QC. Legal and Policy Review was provided by Ian Seiderman.

A range of individuals and organizations contributed significantly to the content and formulation of this opinion, including: Mandivavarira Mudarikwa (Women's Legal Centre); Andrew Higgins (University of Oxford), Franziska Sucker (University of the Witwatersrand), Yuanqiong Hu (SOAS University of London), Markus Kaltenborn (Ruhr-University Bochum), Miguel Ruiz Reixa (Abogado del Programa de Promoción de la no Discriminación Residencial de Inmigrantes), Siva Thambisetty (London School of Economics and Political Science), the People's Vaccine Alliance; the Global Network of Movement Lawyers (of Movement Law lab); the International Network for Economic, Social and Cultural Rights; the South Centre; the European Centre for Constitutional and Human Rights; the Centre for Economic and Social Rights; the International Network of Civil Liberties Organizations; Minority Rights Group International; el Proyecto de derechos Económicos Sociales y Culturales; Dejusticia - Centro de estudios de derecho, justicia y sociedad; Minbyun; Amnesty International; Médecins Sans Frontières; Third World Network; Initiative for Social and Economic Rights. The opinion emerged out of a joint symposium organised by Oxfam GB and the Bonavero Institute of Human Rights at the University of Oxford.

At time of publication on 8 November the jurists listed on the page below have signed on to this expert legal opinion. The opinion remains open for further signature.¹

¹ To sign the opinion please fill in the google form available here in full: <https://docs.google.com/forms/d/e/1FAIpQLSeDj5FZ2e6YrDnKGybTqi1TCrIyAxxoKFn61SgooFk15-hU2A/viewform>. The International Commission of Jurists welcomes sign on by experts on human rights, legal experts, intellectual property experts and other eminent jurists around the world.

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1. This opinion concerns State obligations relating to the full range of diagnostics, medications, vaccines, therapeutics and other relevant health products required for the containment, prevention and mitigation of COVID-19. The opinion recognises that for the pandemic to end, or at least be brought under control, urgent access to vaccines is crucial, even if they are not the only determinant of the rights to health, science, equality and life. Although the opinion focuses on these rights, it recognises the interdependence and indivisibility of all human rights in responding to the global pandemic.
2. This opinion takes as an established fact that a number of COVID-19 vaccines have been produced that are both effective and necessary in preventing COVID-19 transmission, sickness and death and that a growing number of diagnostics, medications, therapeutics and other relevant health products can and do contribute to combatting COVID-19.² It also notes that as of 15 October 2021, high income countries have procured upwards of 7 billion confirmed vaccine doses, while low income countries have only been able to procure approximately 300 million doses.³ Several high-income countries have procured enough doses to vaccinate their populations several hundred times over.⁴
3. The acute inequality in access to COVID-19 vaccines across and within States is thus a continued and major cause for concern.⁵ The World

² For instance at the time of writing, Merck has applied for emergency regulatory approval in the US for its newly developed COVID-19 anti-viral drug. See Reuters News Agency, 'Merck COVID-19 pill sparks calls for access for lower income countries' (17 October 2021) available at: <https://www.reuters.com/business/healthcare-pharmaceuticals/merck-covid-19-pill-sparks-calls-access-lower-income-countries-2021-10-17/>. The concern is that COVID-19 vaccine inequality replicates itself in regard to therapeutics.

³ Upper middle income countries have procured approximately 2 billion doses and middle income countries have also procured approximately 2 billion vaccine doses. See, Tab 2, 'Tracking covid-19 vaccine purchases across the globe', Duke Global Health Innovation Centre available at: <https://launchandscalefaster.org/covid-19/vaccinepurchases>.

⁴ *ibid* at tab 2.2.

⁵ See, UN General Assembly, 'Decrying Covid-19 Vaccine Inequity, Speakers in General Assembly Call for Rich Nations to Share Surplus Doses, Patent Waivers Allowing Production in Low-Income Countries', 76th Session, 10th and 11th Meetings, 23 September 2021, GA/12367, media coverage available at: <https://www.un.org/press/en/2021/ga12367.doc.htm>.

Health Organization (WHO) has repeatedly decried the fact that the African continent accounts for a mere 2% of global vaccinations against COVID-19, despite Africa constituting approximately 17.5% of the world's population.⁶ Only 15 out of 54 African nations had met the WHO's target to vaccinate 10% of each country's population by the end of September 2021.⁷ The UN Secretary General has described this situation as 'a moral indictment of the state of our world' and an 'obscenity'.⁸ This remains pressing where newer, potentially more virulent variants of concern of COVID-19 continue to emerge.

4. This global health crisis has been characterised, by the UN Secretary General, as a 'pandemic of human rights abuses',⁹ both those caused directly by COVID-19 itself and frequently compounded by restrictive measures imposed by States purportedly to combat it. The pandemic has also, according to at least nine UN independent human rights experts (Special Procedures) 'brought to the fore systemic inequalities, aggravated pre-existing institutional weaknesses' with the result that 'socio-economic inequality has deepened even further'.¹⁰ Undoubtedly,

⁶ UN, Only 2% of Covid-19 vaccines have been administered in Africa (14 September 2021) available at: <https://news.un.org/en/story/2021/09/1099872>.

⁷ WHO, Fifteen African countries hit 10% COVID-19 vaccination goal (30 September 2021) available at: <https://www.afro.who.int/news/fifteen-african-countries-hit-10-covid-19-vaccination-goal>.

⁸ UN, Solidarity 'Missing in Action', Secretary-General Tells General Assembly, Decrying 'Malady of Mistrust' while Stressing: 'We Must Get Serious (21 September 2021) available at: <https://www.un.org/press/en/2021/sgsm20918.doc.htm>.

⁹ Antonio Guterres, 'The world faces a pandemic of human rights abuses in the wake of Covid-19', The Guardian (22 February 2021) available at: <https://www.theguardian.com/global-development/2021/feb/22/world-faces-pandemic-human-rights-abuses-covid-19-antonio-guterres>.

¹⁰ Statement by UN Human Rights Experts Universal access to vaccines is essential for prevention and containment of COVID-19 around the world (8 November 2020): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>. Cosigned by Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Olivier De Schutter, Special Rapporteur on extreme poverty and human rights; Anita Ramasastry (Chair), Dante Pesce (Vice-Chair), Surya Deva, Elżbieta Karska, and Githu Muigai, Working Group on the issue of human rights and transnational corporations and other business enterprises; Obiora C. Okafor, Independent Expert on human rights and international solidarity, and Saad Alfarargi, Special Rapporteur on the right to development.

COVID-19 and States' responses to it have exacerbated existing inequalities faced by marginalised and communities and individuals.¹¹

5. At the time of writing, six independent human rights experts, as part of their mandate under the UN Special Procedures, have jointly written 43 letters to G7 States, G20 States, the European Union (EU), the World Trade Organisation (WTO) and pharmaceutical companies calling upon States to discharge their 'collective responsibility to use all available means to facilitate faster access to vaccines, including by introducing a temporary waiver of relevant intellectual property rights under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement), to ensure that protection of patents concerning the vaccines does not become a barrier to the effective enjoyment of the right to health'.¹²
6. This opinion sets out States' human rights obligations in regard to the proposed TRIPS Waiver. It also sets out common States parties obligations under the TRIPS Agreement and the WTO 'covered agreements'. In doing so, it explains that, at the very least, States parties have an obligation to not obstruct TRIPS Waiver negotiations. States parties cannot act in a manner that contravenes or limits the realisation of human rights in their response to the COVID-19 pandemic. Rather, they are bound to act in furtherance of their duty to cooperate towards the full realization of all human rights.

A. Relevant rights under international human rights treaties

7. The International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the most widely ratified treaties in the world, imposes an obligation upon its 171 States parties¹³ to ensure the non-

¹¹ UN 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) available at: <https://undocs.org/E/C.12/2020/1>, para 5.

¹² OHCHR, 'Information Note: Experts send pharma companies, States, EU and WTO letters calling for urgent action on COVID-19 vaccines' available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27670&LangID=E>. The letters were signed by: the Chair of the Working Group on business and human rights, Mr Surya Deva; the Special Rapporteur on the Right to physical and mental health, Ms Tlaleng Mofokeng; the Special Rapporteur on extreme poverty and human rights, Mr Olivier De Schutter; the Special Rapporteur on the right to development, Mr Saad Alfarargi; the Independent Expert on international order, Mr Livingstone Sewanyana; and the Independent Expert on human rights and international solidarity, Mr Obiora C. Okafor.

¹³ The website of the Office of the High Commissioner for Human Rights contains a full list of ratifications and signatories to the international human rights treaties, available at: ohchr.org.

discriminatory realisation of all the economic, social and cultural rights it guarantees.¹⁴ States parties are required take steps to ensure that *all* people have access to diagnostics, medications, vaccines, therapeutics and other relevant health products necessary for the prevention, control and treatment of COVID-19. Article 12(1) guarantees the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (right to health) in the following terms:¹⁵ 'the steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for: [...] (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.'

8. This opinion discusses below how the Article 12(1) obligation indisputably requires States parties to ensure access to a full range of diagnostics, medications, vaccines, therapeutics and other relevant health products required for the containment, prevention and mitigation of COVID-19.

9. The International Covenant on Civil and Political Rights (ICCPR), which has 173 States Parties, protects the right of 'every human being ... to life' under article 6.¹⁶ According to the UN Human Rights Committee, the ICCPR's supervisory organ, this right necessarily includes the provision by States of '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, electricity and sanitation'.¹⁷ Further, the ICCPR guarantees that all persons are 'equal before the law' and are 'entitled without any discrimination to the equal protection of the law'.¹⁸

¹⁴ ICESCR, art 2(2).

¹⁵ ICESCR art 12. The right to health is also protected under the Convention on the Elimination of All Forms of Discrimination against Women (art 12), the Convention on the Rights of Persons with Disabilities (art 25) and the Convention on the Rights of the Child (art 24). These conventions are important in recognising the differentiated obligations incumbent upon States parties' to fulfil the right to health of the particular marginalised groups protected by the above treaties during the pandemic.

¹⁶ ICCPR art 6.

¹⁷ UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life) (3 September 2019) CCPR/C/GC/3 [26].

¹⁸ ICCPR, arts 26 and 2(2).

10. Therefore, the provision of healthcare services in the face of a pandemic that threatens life and health engages particularly the obligations of any State who is party to the ICESCR and/or ICCPR. This position has been confirmed by the UN Human Rights Committee.¹⁹

11. Measures to prevent, treat and control epidemic diseases typically include the provision of various diagnostics, medications, vaccines, therapeutics and other relevant health products. The provision of these health services is often the product of scientific progress, and therefore the elimination of inequality in access to the benefits of scientific progress is inextricably linked to the elimination of inequality in access to health services. The development of diagnostics, medications, vaccines, therapeutics and other relevant health products has occurred at record speed in the context of the COVID-19 pandemic. Such development necessarily engages both the right to health and the right of everyone to science guaranteed by art 15(1)(b) of the ICESCR.²⁰

12. Art 15 of the ICESCR (right to science), reads as follows:

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.

¹⁹ UN HRC, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, CCPR/C/128/2 (24 April 2020). See also, for State obligations in respect of the rights of particular marginalised groups impacted by the pandemic, Convention on the Elimination of All Forms of Discrimination against Women (art 12), the Convention on the Rights of Persons with Disabilities (art 10, 25) and the Convention on the Rights of the Child (art 6, 24)

²⁰ ICESCR, art 15(1)(b).

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.'

13. The UN Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that States parties must act on the 'best available scientific evidence to protect public health' and that 'no one should be left behind'.²¹ This requires States to 'counteract multiple, intersecting forms of inequality',²² including by 'adopt[ing] the measures necessary to eliminate conditions and combat attitudes that perpetuate inequality and discrimination' in access to the benefits of scientific progress.²³

14. In respect of the relationship between intellectual property and the right to science, the CESCR has explained that 'ultimately, intellectual property is a social product and has a social function and consequently, States parties have a duty to prevent unreasonably high costs for access to essential medicines [...] from undermining the rights of large segments of the population to health'.²⁴

15. Moreover, both the ICCPR and ICESCR require States to perform their treaty obligations without discrimination on the following grounds: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²⁵ By interpreting 'other status', international human rights jurisprudence has held that other

²¹ CESCR, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/1 (6 April 2020).

²² *ibid* [24].

²³ 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, E/C.12/GC/25 (30 April 2020) [25]. See also [70].

²⁴ *ibid* [62]; CESCR, General Comment 17 The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17 (12 January 2006) [35].

²⁵ ICESCR, art 2.

specific prohibited discrimination grounds can be clearly identified, including: sexual orientation or gender identity; age; gender; citizenship; nationality or migration status; health status; disability and socio-economic status.²⁶ CESCR has also noted that 'widespread stigmatization of persons on the basis of their health status' exists and amounts to prohibited discrimination.²⁷

16. States are required to refrain from prohibited discrimination of any kind and also take positive steps to ensure substantive equality for marginalised groups of persons.²⁸ This requires States to take steps to prohibit discrimination 'at the intersection of two prohibited grounds of discrimination' or on 'multiple' concurrent grounds.²⁹

17. In this context, the rights to life, health, equality and science are directly engaged from the outset of the development, production, acquisition and distribution of COVID-19 diagnostics, medications, vaccines, therapeutics and other relevant health products. In relation to the development of COVID-19 vaccines, in particular, enormous State funding support was provided to pharmaceutical companies to supplement their own research and development drives, which built on a large existing body of research available prior to the pandemic.³⁰

18. The capacity to produce, purchase or otherwise procure vaccines, diagnostics, medications, therapeutics and other relevant health products in respect of COVID-19 varies drastically between countries. As this opinion goes on to discuss below, universal equitable access to these healthcare technologies, therefore, requires significant

²⁶ 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. [27]-[35]. See also, General Comment 14 [18]-[19].

²⁷ *ibid* [33].

²⁸ *ibid*.

²⁹ *ibid* [17], [27].

³⁰ Statement by UN Human Rights Experts, Universal access to vaccines is essential for prevention and containment of COVID-19 around the world (8 November 2020) available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E>: 'public funding has greatly contributed to the development of vaccines, directly and indirectly, as well as to researching and developing various products'.

international cooperation, including within multinational entities, such as the WHO³¹ and the WTO.

B. Right to COVID-19 healthcare technologies and corresponding obligations

19. In September 2020, the WHO asserted that 'COVID-19 vaccines must be a global public good', meaning that they 'should be available universally because of [their] critical importance to health'.³² The CESCR³³ and at least nine UN independent human rights experts (Special Procedures), in a joint statement,³⁴ have taken the same position. This recognition is premised on the human rights set out above and translates directly into a range of State obligations 'in relation to universal access and affordability of vaccines against COVID-19'.³⁵

20. States are required to take measures to respect, protect and fulfil the right to health, by 'provid[ing] immunisation' against 'major infectious diseases', such as COVID-19.³⁶ This obligation is a minimum core

³¹ The mandate for cooperation in the context of global public health emergencies is set by the International Health Regulations (2005) available at: <https://www.who.int/publications-detail-redirect/9789241580410>. In February 2020, the WHO declared that the outbreak constitutes a Public Health Emergency of International Concern in terms of these regulations. See: [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum).

³² WHO, '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?sequence=1&isAllowed=y.

³³ CESCR, Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19), E/C.12/2020/2, 15 December 2020: 'States parties consequently have a duty to prevent intellectual property and patent legal regimes from undermining the enjoyment of economic, social and cultural rights by, for example, making critical public goods, such as vaccines or medicines, inaccessible to developing countries or impoverished communities because of unreasonable cost structures'.

³⁴ 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> 'International cooperation and assistance between developed and developing countries are crucial in ensuring that all relevant health technologies, intellectual property data and know-how on COVID-19 vaccines and treatment are widely shared as a global public good.'

³⁵ *ibid* [2].

³⁶ See CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (E/C.12/2000/4), 11 August 2000 [44(b)].

obligation of 'immediate effect'.³⁷ The CESCR has reiterated, in the context of the COVID-19 pandemic, that States parties must prioritise the fulfilment of minimum core obligations for marginalised communities and individuals.³⁸ The adoption of any 'retrogressive measures incompatible with the core obligations under the right to health',³⁹ including the obligation to provide immunisation and protection against COVID-19 in the form of diagnostics, medications, vaccines, therapeutics and other relevant health products, amounts to a clear violation of the right to health.

21. Therefore, State are obliged to undertake 'extraordinary mobilisation of resources to address the COVID-19 pandemic'.⁴⁰ The reference to resources is to a wide range of resources, whether human, natural financial, technological or scientific resources.

22. States are afforded a degree of leeway in adopting appropriate measures to respect, protect and fulfil the right to health. These measures, however, must include 'appropriate legislative, administrative, budgetary, judicial and other measures'.⁴¹ Violations of States' obligations to respect, protect and fulfil the right to health can occur through acts of commission or 'through the omission or failure of States to take necessary measures arising from legal obligations'.⁴²

23. Further, States are obliged to ensure that effective regulatory measures are put in place to ensure that private actors, such as pharmaceutical

³⁷ The only justification available to States for not fulfilling their minimum core obligations is to demonstrate that 'every effort has been made to use all resources that are at its disposition, in an effort to satisfy, as a matter of priority, those minimum obligations' according to General Comment 3, (E/1991/23), 1990 [10].

³⁸ CESCR, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/1 [12], [14].

³⁹ General Comment 14, [48].

⁴⁰ *ibid.*

⁴¹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 6.

⁴² CESCR, General Comment 14 [38]-[39].

companies, do not impede access to healthcare⁴³ and comply with their own responsibilities to respect human rights, including the right to health.⁴⁴ The CESCR is clear that a State's failure to effectively regulate private actors, including 'manufacturers of medicine' so as to 'prevent them from violating the right to health' amounts to a violation of the duty to protect.⁴⁵

24. In the context of COVID-19, CESCR has stressed that private actors, including pharmaceutical companies 'have the obligation, at a minimum, to respect Covenant rights [...] including in relation to access to medicines and vaccines', and that this extends to 'medicines, comprising active pharmaceutical ingredients, diagnostic tools, vaccines, biopharmaceuticals and other related health-care technologies', and should, therefore, 'refrain from invoking intellectual property rights in a manner that is inconsistent with the right of every person to access a safe and effective vaccine against COVID-19 or the right of States to exercise the flexibilities of the TRIPS Agreement'.⁴⁶

C. International Cooperation as a Legal Obligation

25. Art 2(1) of the ICESCR provides that States must not only realise Covenant rights within their territorial jurisdiction, but also 'through international assistance and co-operation, especially economic and technical'. CESCR has recognised that 'combating pandemics effectively requires stronger commitments from States to international cooperation as national solutions are insufficient', on the basis that 'virus and other pathogens do not respect borders'.⁴⁷ States obligations under the ICESCR, including the obligation to mobilise resources in the

⁴³ See 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.

⁴⁴ *ibid* [5] read with UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Principle 3. In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights' available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁴⁵ CESCR General Comment 14 [51].

⁴⁶ UN CESCR Committee, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property (21 April 2021) E/C.12/2021/1 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2021/1&Lang=en, [8]-[9].

⁴⁷ *ibid* [23].

extraordinary context of the pandemic, thus extend beyond their own borders.

26. The duty of international assistance and co-operation requires States to 'facilitate access to essential health facilities, goods and services in other countries wherever possible and provide the necessary aid when required'.⁴⁸ It also requires States to 'influence [...] third parties by way of legal or political means' to ensure the full realisation of the right to health across the world.⁴⁹ The duty also requires States to ensure the right to health 'is given due attention in international agreements' including through 'the development of further legal instruments'.⁵⁰ Moreover, the CESCR explicitly affirms that, 'given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address [such diseases]'.⁵¹

27. There is a 'special responsibility'⁵² on high-income States to secure international cooperation by working with low and middle-income States to achieve the prevention, control and treatment of epidemic diseases such as COVID-19. In addition, *all* States must cooperate on a full range of international platforms and within multinational State entities and agencies in order to ensure the full realisation of the right to health. This falls within States' obligations to 'create an international enabling environment' through interactions in their 'foreign relations, including actions within international organisations'.⁵³

28. The CESCR has therefore indicated that the obligation of international cooperation requires States to take action 'including by using their voting rights as members of different international institutions and organisations' to ensure access to COVID-19 health technologies, services and products for all people.⁵⁴ This includes States' multilateral

⁴⁸ See CESCR General Comment 14 [39].

⁴⁹ *ibid*

⁵⁰ *ibid.*

⁵¹ *ibid* [40].

⁵² *ibid.*

⁵³ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013, Principle 29(b).

⁵⁴ CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, E/C.12/2021/1, 23 April 2021 [3].

activities at the WHO and the WTO.⁵⁵ The UN Independent Expert on human rights and international solidarity has emphasised that States' existing obligations of international cooperation towards the realisation of human rights 'have taken on a particular and renewed importance and urgency'⁵⁶ in light of COVID-19.

29. Finally, the duty of international cooperation requires all States to 'refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories', directly or indirectly, including by refraining from conduct that 'impairs the ability of another State or international organisation to comply with that State's or that international organisation's obligations.'⁵⁷

D. International Cooperation at the World Trade Organization

30. The Marrakesh Agreement Establishing the WTO (WTO Agreement) states that the WTO forms a 'common institutional framework' for the purpose of 'conduct[ing] trade relations among its members,' through 'reciprocal and mutually advantageous arrangements'.⁵⁸ In order for a State (or supranational entity, like the European Union) to become a member of the WTO, the State is required to accede to a number of treaties ('covered agreements') as part of the WTO's 'single undertaking'.⁵⁹ The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) is one such treaty.⁶⁰

31. The WTO Agreement establishes a General Council, which (apart from the Ministerial Conferences that take place every two years) is the organization's highest decision-making body, consisting of

⁵⁵ CESCR, General Comment 17 [56].

⁵⁶ HRC, International solidarity in aid of the realization of human rights during and after the coronavirus disease (COVID-19) pandemic: Report of the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, A/HRC/47/31, 13 April 2021 [7].

⁵⁷ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013, Principles 20-21.

⁵⁸ WTO Agreement preamble, art II.

⁵⁹ See WTO, 'Principles and practices', available at: https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm.

⁶⁰ WTO Agreement, Annex 1C.

representatives of all members.⁶¹ The WTO Agreement also establishes the TRIPS Council, open to representatives of all members of the WTO,⁶² for the purpose of overseeing the implementation of the TRIPS Agreement.⁶³ The TRIPS Council is explicitly empowered to review the TRIPS Agreement in light of 'any relevant new developments which might warrant modification or amendment'.⁶⁴ The COVID-19 pandemic is clearly 'a relevant new development'. On this basis, and setting out evidence of intellectual property acting as a barrier to containing, mitigating and ending the pandemic, in October 2020 (later amended in May 2021), India and South Africa proposed a waiver of sections 1, 4, 5 and 7 of Parts II and III of the TRIPS Agreement at the TRIPS Council.⁶⁵

32. A time-limited waiver of certain parts of the TRIPS Agreement is hardly novel. In fact, the WTO Agreement explicitly contemplates this possibility.⁶⁶ Moreover, there is precedent for a waiver in response to the widespread and uncontrolled outbreak of a disease, in the form of the WTO General Council's decision to implement paragraph 6 of the Doha Declaration. The Doha Declaration in respect of public health was adopted by the Ministerial Conference, as a result of the HIV/AIDS epidemic in Southern Africa in 2001.⁶⁷ There are in fact many precedents for WTO waivers including in the area of intellectual property.⁶⁸ The WTO Analytical Index sets out the scope and manner in which the Dispute

⁶¹ WTO Agreement art IV.2.

⁶² WTO Agreement art IV.5.

⁶³ TRIPS Agreement art 24.2.

⁶⁴ TRIPS Agreement art 71.1.

⁶⁵ Communication by India and South Africa, 'Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of Covid-19', World Trade Organisation, IP/C/W/669 (2 October 2020) ; Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of covid-19 - Joint statement of co-sponsors, (18 May 2021) WTO, IP/C/W/677 .

⁶⁶ WTO Agreement art IX:3(b).

⁶⁷ Doha Declaration on the TRIPS Agreement and Public Health, adopted at WTO Ministerial Conference 2001, WTO WT/MIN(01)/DEC/2 (20 November 2001).

⁶⁸ Waiver of Article 70.9 (WT/L/478), Waiver of Articles 31(f) and (h) TRIPS (WT/L/540); Waiver of Articles 70.8 and 70.9 (WT/L/971).

Settlement System has interpreted waivers of State obligations under the 'covered agreements'.⁶⁹

33. The proposed TRIPS waiver should be understood, in light of the above, as an effort by the States proposing and supporting the waiver to comply with their human rights obligations to guarantee the rights to health, equality, science and life by initiating necessary cooperation in line with their obligations relating to international assistance and cooperation. As CESCR has noted 'the current restrictions imposed by the intellectual property rules in the TRIPS Agreement make it very difficult to achieve the international cooperation needed for the massive scale up'⁷⁰ required to ensure universal access to diagnostics, medications, vaccines, therapeutics and other relevant health products to prevent, treat and control COVID-19.⁷¹

34. The following process must be completed for the proposed waiver to be adopted. As a general practice, decision-making at the TRIPS Council, and indeed the General Council, takes place through consensus.⁷² Where consensus is not achieved in the TRIPS Council, the particular issue is referred to the General Council for a decision.⁷³ If consensus is not reached in the General Council, the WTO Agreement provides that 'where a decision cannot be arrived at by consensus, the matter at issue

⁶⁹ Citing WTO, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* WT/DS27/AB/RW/USA ; WT/DS27/AB/RW2/ECU (26 November 2008) [381]-[382]. See also for previous jurisprudence on the interpretation of waivers cited in *EC-Bananas III, Panel Report on US – Sugar Waiver* [5.9] and *Waiver Granted in Connection with the European Coal and Steel Community*, Decision of 10 November 1952, BISD 1S/17 [3].

⁷⁰ CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, E/C.12/2021/1, 23 April 2021 [11].

⁷¹ Id [13] reads: "All mechanisms, including voluntary licensing, technology pools, use of TRIPS flexibilities and waivers of certain intellectual property provisions or market exclusivities should be explored carefully and utilized" and "thus, the waiver of certain provisions of the TRIPS Agreement is an essential element of these complementary strategies. Besides, failing to approve the temporary waiver of TRIPS Agreement provisions for equitable and affordable access to medical technologies, including COVID-19 vaccines, will also stand in the way of global economic recovery, which is necessary in order to overcome the negative impact of the pandemic on the enjoyment of all economic, social and cultural rights. In that context, the Committee strongly recommends that States support the proposals of this temporary waiver, including by using their voting rights within WTO."

⁷² WTO Agreement art IX.

⁷³ Rules of procedure for meetings of the Council for TRIPS (28 September 1995) (IP/C/1), Rule 33.

shall be decided by voting'.⁷⁴ This indicates a mandatory turn to voting once consensus-building has failed. In respect of the proposed waiver, in the absence of consensus, this would require a three-fourths majority vote in favour at the Ministerial Conference.⁷⁵ It must be noted that at the time of writing 64 member States of the WTO co-sponsor the proposed waiver, which has garnered the support of reportedly approximately 100 members.

35. The members of the WTO (and parties to the TRIPS Agreement) overlap significantly with States parties to the ICESCR and ICCPR. This means that these very same States parties cannot ignore their human rights obligations in their activities at the WTO.⁷⁶ In this respect, some 87% of WTO member States bear concurrent treaty obligations under the ICESCR,⁷⁷ and 88% of WTO member States bear concurrent treaty obligations under the ICCPR.⁷⁸

36. In public international law, there is a strong presumption against conflicting obligations.⁷⁹ This is the corollary of the principle of *pacta sunt servanda*, meaning that States must perform their treaty obligations in good faith.⁸⁰ In other words, States are presumed to have entered into treaty obligations that are compatible with one another, so that States can perform concurrent obligations effectively.⁸¹ The Vienna Convention on the Law of Treaties (VCLT) enshrines this principle in its rules of interpretation of treaties – in particular, its art 31 provides that

⁷⁴ WTO Agreement art IX:1.

⁷⁵ WTO Agreement art IX:3.

⁷⁶ The WTO has 164 members and 24 observers. See WTO Members and Observers, available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁷⁷ There are 142 common States parties to the ICESCR and the TRIPS Agreement, with 19 out of 24 observer States to the WTO also having ratified the ICESCR. Two states, the USA and Cuba are members of the WTO and signatories to the ICESCR.

⁷⁸ There are 145 common States parties to the ICCPR and the TRIPS Agreement, with 21 out of 24 observer States to the WTO also having ratified the ICCPR. Three states, Cuba, China and St Lucia are members of the WTO and signatories to the ICCPR.

⁷⁹ ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group', 13 April 2006, A/CN.4/L.682 [37] ('Fragmentation Report Analysis').

⁸⁰ VCLT art 26.

⁸¹ Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) ICJ Reports 1957 p. 142.

'[t]here shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties'.⁸² Along with the rest of art 31, this provision forms a part of customary international law and is universally applicable to all States.⁸³

37. Art 31 of the VCLT requires all treaties to be interpreted in good faith by determining the ordinary meaning of the text in its surrounding context (as well as elements to be taken into account along with the context), and in light of the object and purpose of the treaty. The object and purpose of the TRIPS Agreement provide that under the Agreement the 'protection and enforcement of intellectual property rights' should take place 'in a manner conducive to social and economic welfare'.⁸⁴ Importantly, the TRIPS Agreement recognises that, in fulfilling their obligations, members 'may adopt measures necessary to protect public health and nutrition' that are consistent with the TRIPS Agreement.⁸⁵

38. In addition to the TRIPS Agreement's object and purpose, other provisions in the TRIPS Agreement,⁸⁶ and other WTO 'covered agreements',⁸⁷ also recognise 'public health' as a legitimate objective. The recent *Plain Packaging* decision of the WTO Appellate Body affirms this position by holding that encumbrances on the use of trademarks may be imposed in pursuit of public health objectives despite restricting trade.⁸⁸ The Appellate Body emphasised that measures seeking to protect public health encompass a range of measures, including through exceptions to exclusive patent rights (art 30), compulsory licences (art 31), and the disclosure to the public of test data (art 39.3).

39. The Appellate Body also affirmed that it was appropriate for the Panel to take into account the WHO Framework Convention on Tobacco

⁸² VCLT art 31(3)(c).

⁸³ Fragmentation Report Analysis [168].

⁸⁴ TRIPS Agreement art 7.

⁸⁵ TRIPS Agreement art 8.1.

⁸⁶ TRIPS Agreement art 27.2.

⁸⁷ Eg., GATT, art XX(b).

⁸⁸ WTO, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Appellate Body Report (29 June 2020) WT/DS435/AB/R. [6.706]-[6.707].

Control as a relevant rule of international law, to confirm the importance of a Member's (in this case Australia) 'public health' objective, as additional factual evidence that the member was not acting inconsistently with its TRIPS obligations.⁸⁹

40. Further, the Panel report in *Plain Packaging* affirmed the importance of interpreting the Doha Declaration as a subsequent agreement under art 31(3)(a) of the VCLT, given that it was adopted by consensus by all member States during a Ministerial Conference.⁹⁰ In the context of COVID-19, as discussed above, the Doha Declaration is most analogous, given that it responded to a public health crisis in a manner that led to a waiver of particular provisions of the TRIPS Agreement.⁹¹

41. All of the above provisions, decisions and declarations provide guidance in interpreting the scope of 'public health' under the TRIPS Agreement. In taking measures under the TRIPS Agreement, States parties cannot ignore their obligations to realise the rights to health, life, equality and science. The CESCR has recognised that 'intellectual property regimes primarily protect business and corporate interests and investments' and that 'legal entities are included among the holders of intellectual property rights [...] their entitlements, because of their different nature, are not protected at the level of human rights'.⁹²

42. In the context of the proposed TRIPS waiver, steps that can be taken by States parties include participating and negotiating at the TRIPS Council, General Council and Ministerial Conference as discussed above. Failing to implement legitimate and legal, public health safeguards, as provided in the TRIPS Agreement, including by creating obstacles to the TRIPS waiver negotiations, constitutes a failure on the part of States parties to fulfil their human rights obligations under the rights to health, equality, science and life.

⁸⁹ *ibid.*

⁹⁰ WTO, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, (28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R [7.2409].

⁹¹ WTO General Council, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August 2003, WT/L/540 and Corr.1.

⁹² CESCR, General Comment 17 [2], [7].

43. In order to fulfil their obligation to cooperate under international human rights law, States must ensure the realisation of the rights to health, equality, science and life, including the immediate obligation to ensure universal and equitable access to COVID-19 diagnostics, medications, vaccines, therapeutics and other relevant health products to prevent, treat and control COVID-19 transmission.

44. By failing to take all measures required to ensure international cooperation towards the provision of COVID-19 vaccines, by omission, a State may fail to fulfil the right to health.⁹³ By failing to take measures that effectively regulate private actors in health operating on a multinational level where their operations compromise access to COVID-19 vaccines and other essential health technologies, such as pharmaceutical companies, by omission, a State may fail to *protect* the right to health.⁹⁴ By actively opposing proposed measures to give effect to the immediate obligation to provide immunisation against COVID-19 using COVID-19 vaccines, by commission, a State may fail to *respect* the right to health.⁹⁵

E. States parties' international obligations to *not* obstruct the COVID-19 TRIPS waiver proposal

45. International human rights obligations continue to bind member States when they act in international organisations such as the WTO. Most member States opposing the waiver, including as examples the UK, Norway, Switzerland and Germany, are all party to the ICESCR and ICCPR

⁹³ CESCR, General Comment 24 [37]: 'Consistent with article 28 of the Universal Declaration of Human Rights, this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment'.

⁹⁴ CESCR General Comment 14 [50] reads: 'Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties'. Given the nature of multinational corporations their effective regulation requires collective state action in terms of the duty of international cooperation.

⁹⁵ *ibid* [5] indicates that violations of the obligation to respect the right to health include: 'failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organisations and other entities, such as multinational corporations'. See also, General Comment 24 [29]: 'The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories [...] This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties.' The same logically applies to the execution of such agreements and the determinations of waivers of specific provisions of such agreements.

and bear the above concurrent obligations under these treaties. By continuing to obstruct negotiations on the waiver, these States are failing to discharge their treaty obligations, under the rights to health, equality, life and science of people within their territories and internationally. By doing so they also frustrate and prevent States seeking to comply with their obligations by proposing and supporting the waiver from cooperating towards the realisation of these same rights.

46. Furthermore, the UN Charter commits member States of the UN to 'pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of [...] higher standards of living, full employment, and conditions of economic and social progress and development [...] solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁹⁶

47. Moreover, States opposing the TRIPS waiver also fall foul of their customary international law duty to cooperate. The ILC has recognised that 'the principle of cooperation between States is essential in designing and implementing effective policies to prevent or minimize the risk of causing significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and implementation.'⁹⁷

48. The principle of cooperation between States arises as a duty to ensure that a State's activities on its own territory do not cause significant transboundary harm, and has been developed in the context of international environment and water law.⁹⁸ It is equally applicable to pandemics as '[v]irus and other pathogens do not respect borders'.⁹⁹ The International Court of Justice has held that it is 'every State's obligation not to allow knowingly its territory to be used for acts contrary

⁹⁶ UN Charter art 55.

⁹⁷ Report of the ILC on the work of its 53rd session, *Official Records of the General Assembly*, 56th session, A/56/10 chapter V.E.2.

⁹⁸ Eg., *Trail Smelter Arbitration (United States v. Canada) (1938 and 1941)* 3 RIAA 1905; *Lac Lanoux Arbitration (France v. Spain) (1957)* 12 RIAA 28; *Gabčíkovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, [1997] ICJ Rep 7.*

⁹⁹ CESCR Statement on the Pandemic (2020) [23].

to the rights of other States'.¹⁰⁰ This has been affirmed in the context of economic, social and cultural rights by the Maastricht Principles.¹⁰¹

49. In the context of COVID-19, this extends to the exclusivity exercised over the know-how to produce diagnostics, medications, vaccines, therapeutics and other relevant health products by companies within territories of the above States parties, causing significant loss of life. This is directly detrimental to non-discriminatory access to the rights to health, life, equality and science in other common States parties, and in particular, in those States proposing and supporting the waiver.

F. Conclusion: States should not impede the TRIPS Waiver proposal

50. This opinion has set out States' obligations to guarantee the human rights to health, life, equality and science. These obligations include minimum core obligations of immediate effect that States parties to international Covenants are bound to prioritise, in particular, in respect of marginalised communities and individuals. Furthermore, States are bound to refrain from obstructing the realisation of these rights; to regulate private actors, including businesses, in order to prevent interference with these rights; and, finally, to take proactive steps to realise these rights in full without discrimination of any kind.

51. State obligations in this regard also include extra territorial obligations – in particular the obligation to cooperate internationally to realise these rights. At the same time, a large majority of States parties to the ICESCR and ICCPR are member States of the WTO. These same States bear obligations to act in a manner that realises their human rights obligations. This extends to their activities at the WTO. The WTO 'covered agreements' contemplate this through the 'public health' objective in the TRIPS Agreements.

52. This opinion also explains that waivers of trade and intellectual property obligations are exceptional, but not unprecedented, and discusses the

¹⁰⁰ Corfu Channel (United Kingdom v. Albania), [1949] ICJ Rep p. 22 as cited in Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Judgment, [2010] ICJ Rep, p. 14

¹⁰¹ Maastricht Principles, Principle 8(b).

waiver that followed the Doha Declaration as analogous to the proposed TRIPS Waiver in responding to a public health crisis.

53. Finally, this opinion explains that in concrete terms, under international human rights law, States have, at the very least, a duty not to obstruct TRIPS waiver negotiations. By opposing the negotiations, as many continue to do, these States fail to perform their treaty obligations under international human rights law in violation of the rights to health, life, equality and science.

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