



Equitable Access to COVID-19 vaccines: Marshalling international law for current and future global public health

As the administration of Covid-19 vaccines has begun to pick-up pace in select parts of the world, there has been a vast disparity in the distribution of these vaccines. As of late March 2021, only 0.1 % of doses administered worldwide had been administered in “low-income” countries, while “high-income” countries (16 per cent of the world’s population) accounted for more than half of the doses administered.¹ Some States such as the United States of America, Canada, Australia, and those in the European Union have procured sufficient vaccine doses to vaccinate their entire populations multiple times over.² By some estimates, at this rate, the bulk of the adult population in advanced economies will have been vaccinated by mid-2022; for middle-income countries, this timeline will stretch to late 2022 or early 2023, and for the poorest countries, mass immunization will not be achieved until 2024, if at all.³ The COVAX Facility, the main vehicle through which multilateral efforts to address this disparity is currently taking place, has many limitations. Most importantly, even if the Facility were to work perfectly as intended, it would still just achieve the vaccination of only 20% of the population of each country, far below the minimum level required to achieve herd immunity.

Given the profound disruption caused globally by COVID-19, it is no exaggeration to say that the disparity in access to COVID-19 vaccines between developed and developing countries strikes at all aspects of human life.

Even where this problem is acknowledged, debates and discourse among governments, international organizations and other stakeholders have largely operated in the realm of moral, public policy and practical considerations. There has been relatively little focus on what rules of international law require, in particular whether they require States to go beyond the practical solutions currently being debated or developed and/or impose certain minimum obligations on developed States in relation to their procurement of vaccine supplies. **Marshalling international law – both pre-existing obligations as well as new norms that may be created by currently ongoing processes – will affect not only the outcome of the current crisis of COVID-19 vaccine distribution, but also shape the outcome of any future crisis where global public health goods are concerned.**

Professor Diane Desierto, Professor of Law and Global Affairs at Notre Dame Law School, member of the UN Working Group on the Right to Development, an expert consultant to the Association of Southeast Asian Nations (ASEAN), and a member of IILA’s Advisory Council, has set out an overview of applicable human rights obligations – found [here](#) - as well as highlighting the other norms of international law potentially applicable in these debates.

IILA – in collaboration with Professor Desierto – proposes to work with small / developing State delegations to develop the strategies and content of their legal arguments for the purposes of advocating for and advancing the reality of greater equitable access to COVID-19 vaccines. This would not replace, but rather complement, any existing and future diplomatic and political advocacy on the issue.

¹ <https://www.euronews.com/2021/03/22/global-covid-vaccine-inequality-becoming-more-grotesque-every-day-who-warns>.

² The Launch and Scale Speedometer, Duke University Global Health Innovation Center (Mar. 1, 2021), <https://launchandscalefaster.org/COVID-19#Timeline%20of%20COVID%20Vaccine%20Procurement%20Deals>. Canada has sufficient vaccines procured to immunize their population five times over.

³ <https://thediplomat.com/2021/01/southeast-asia-covid-19-vaccine-coverage-a-long-way-off-report/>



This short memorandum provides a brief and non-exhaustive overview of potentially relevant issues; the strengths and weaknesses of each argument will have to be fully assessed as part of a holistic advocacy plan, taking into account more structured and tailored engagement with IILA and its partners.

1. Intellectual property rules at the World Trade Organization (WTO)

The joint proposal by South Africa and India for a waiver of certain commitments under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement has been the subject of much legal argumentation between its supporters – nearly 100 countries, including many SDS – and its detractors. Issues have included the applicability of alternative flexibilities under the TRIPS Agreement (such as compulsory licensing under Article 31 and 31bis). While not yet the subject of discussions at TRIPS, the security exceptions under Article 73 of the TRIPS Agreement may also potentially be relevant.

As at the TRIPS Council meeting on 10 and 11 March 2021, the discussion remains live. The next regular TRIPS Council meeting is scheduled for 8-9 June, but members agreed to consider additional meetings in the interim in order to assess potential progress on discussion of the waiver.

2. International economic and social rights

As Professor Desierto's piece points out, a series of international human rights obligations in the field of economic and social rights are relevant to the equity of COVID-19 vaccine distribution. These include the right to the "enjoyment of the highest attainable standard of physical and mental health" and the "enjoy[ment of] the benefits of scientific progress and its applications" (Articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively). The Committee on Economic, Social and Cultural Rights' General Comment No. 25, focused on Article 15, notes that everyone has the right to enjoy "the material results of the applications of scientific research, such as vaccinations...". The baseline obligation in Article 2(1) of the ICESCR - "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means..." (emphasis added.) - applies to both Articles 12 and 15.

Thus, international economic and social rights provide fertile ground for articulating obligations on the part of developed States in relation to their actions that affect the access to COVID-19 vaccines of persons outside their territory, most pertinently in the developing world. These may include (but are not limited to) their actions in relation to entities within their territory, such as major pharmaceutical companies, which affect the global distribution of COVID-19 vaccines.

In articulating these arguments, key legal issues to be assessed include: (i) the scope of the obligations imposed by Articles 12 and 15; (ii) whether the obligations in ICESCR, particularly Articles 12 and 15, apply extraterritorially; and (iii) fora in which States may enforce such obligations against other States.



It bears noting that the Committee on Economic, Social and Cultural Rights has released a series of statements on the application of the ICESCR to access to COVID-19 vaccines.⁴ In particular, the Committee has expressly declared that:⁵

- “Access to a vaccine for COVID-19 that is safe, effective and based on the best scientific developments is an essential component” of the rights under Articles 12 and 15 of ICESCR;
- States Parties therefore have a priority obligation to take all the necessary measures to guarantee access to available vaccines for COVID-19 to “all persons, without any discrimination” (emphasis added);
- This obligation needs to be implemented nationally and at the same time has also an international dimension. States have therefore a duty of international cooperation and assistance to ensure access to vaccines for COVID-19 wherever needed, including by using their voting rights as members of different international institutions or organizations. States must strengthen their international cooperation to guarantee, as soon as possible, affordable vaccines for COVID-19 globally, including for developing and least developed countries.

Several UN human rights experts and Special Rapporteurs have also released statements specifically articulating the applicability of various human rights obligations to the distribution of COVID-19 vaccines.⁶

Economic and social rights as articulated under regional human rights systems are also relevant. For example, the African Charter on Human and People’s Rights provides that “every individual shall have the right to enjoy the best attainable state of physical and mental health” (Article 16(1)) and placing an obligation on the States Parties to take all “necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick” (Article 16(2)). The ASEAN Intergovernmental Commission on Human Rights (AICHR) has articulated the case for equitable vaccine distribution on the basis of Article 29 of the ASEAN Human Rights Declaration (AHRD), which states that “every person has the right to the highest attainable standard of health, basic and affordable health services, as well as access to medical facilities.” Article 35 of the ASEAN Human Rights Declaration also sets out a right to development as an “inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in,

⁴ See CESCR Statement adopted on 17 April 2020 on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights; CESCR Statement adopted on 27 November 2020 on universal and equitable access to vaccines for the coronavirus disease (COVID-19); CESCR Statement adopted on 12 March 2021 on universal affordable vaccination for COVID-19, international cooperation and intellectual property.

⁵ CESCR Statement adopted on 12 March 2021 on universal affordable vaccination for COVID-19, international cooperation and intellectual property

⁶ Statement by UN Human Rights Experts Universal Access to Vaccines is Essential for Prevention and Containment of COVID-19 Around the World, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS (Nov. 9, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E> [hereinafter Special Rapporteurs and Experts Statement]. The statement was signed 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; and COVID-19: Equitable Vaccine Access for All, Including Migrants, is Crucial, Say UN Special Rapporteurs, United Nations Office of the High Commissioner on Human Rights (Jan. 22, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26684&LangID=E>.



contribute to, enjoy, and benefit equitable and sustainably from economic, social, cultural, and political development”.

3. The right to development

As Professor Desierto has argued, Article 1(1) of the 1986 Declaration on the Right to Development requires ^[OBJ] States to take into consideration their respective duties to respect, protect, and fulfill the right to development, which includes not taking measures or actions that impede or prevent individuals and peoples from contributing, enjoying, and participating in their “economic, social, cultural, or political development, in which all human rights and fundamental freedoms can be fully realized”. These obligations would arise even more strongly under Article 4 of the pending Draft Convention on the Right to Development, which provides for the rights of individuals and peoples to “participate in, contribute to and enjoy economic, social, cultural, civil and political development that is consistent with and based on all other human rights and fundamental freedoms.”

4. Links to other ongoing international law processes

Legal advocacy in relation to the equitable distribution of vaccines cannot be seen in isolation. It is closely connected with other current processes for the interpretation, development and articulation of international law rules, most pertinently:

- i) The draft treaty on Business and Human Rights – a key obstacle to the applicability of the above human rights rules to COVID-19 vaccines is that they do not apply to private entities. One of the foundational issues being debated at the UN Working Group on a draft treaty on business and human rights is the scope of the treaty’s application to private companies. Insofar as the distribution of COVID-19 vaccines is an important issue for SDS, SDS should engage in the UN Working Group process as part of their wider strategy. To this end, please see Annex 2 on how IILA can support SDS on engagement in this treaty process.
- ii) The draft treaty on the Right to Development – as outlined above, the right to development is an important potential argument for the equitable distribution of COVID-19 vaccines. The right to development is currently being developed by a UN Working Group on the Right to Development. The next session of the Working Group is scheduled for 17 to 21 May 2021, having been postponed from 4 to 8 May 2020 due to COVID-19. The Working Group is expected to discuss the right to development specifically in connection to COVID vaccine distribution, in dialogue with State representatives. Again, it is important for SDS to engage in this process. IILA can support SDS in preparing for this meeting as well as longer-term engagement with the negotiation of the draft treaty on the right to development.

Should you require any further details or wish to discuss how IILA can help your government to engage with these important issues and for a going forward, please do not hesitate to write to us at info@independentILA.org.



Annexes

- [Annex 1:](#) D Desierto, “Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social, and Cultural Rights and the Right to Development” (2 February 2021) EJIL Talk!
- [Annex 2:](#) Independent International Legal Advocates, “State comments due at the end of February 2021 on a draft treaty on Business and Human Rights (BHR Treaty)”