

**IS THE COVID-19 PANDEMIC A PROFIT MAKING SCHEME:  
A CALL FOR WAIVING INTELLECTUAL PROPERTY RIGHTS IN THE FIGHT AGAINST COVID-19**

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**RECOMMENDED CITATION:** Joseph Byomuhangyi (2021) “Is the Covid-19 Pandemic A Profit Making Scheme: A Call for Waiving Intellectual Property Rights In the Fight against Covid-19” Volume 22 Issue 2, Makerere Law Journal pp 346-367

**IS THE COVID-19 PANDEMIC A PROFIT MAKING SCHEME:  
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AGAINST COVID-19**

Joseph Byomuhangyi\*

**ABSTRACT**

*The World is awash with fear of extinction due to the corona virus. However, where people see death, pharmaceutical companies see an opportunity to make profits through manufacturing vaccines and protecting their intellectual property rights. This paper calls for a critical examination as to whether intellectual property (IP) rights should be waived or maintained in the fight against COVID-19 pandemic. The author is cognizant of the technological advancements that modern countries have had hence giving them the leverage to manufacture most of the vaccines; while struggling third world countries cannot afford to innovate and hence have to purchase the vaccines from the pharmaceutical companies. This paper therefore suggests that, pharmaceutical companies should waive their intellectual property rights insofar as manufacture and distribution of COVID-19 vaccines extends in the fight against COVID-19.*

**1.0 INTRODUCTION**

On 11th March, 2020, the World Health Organization (WHO) declared the Novel Coronavirus (COVID-19) disease outbreak a global pandemic. By March 2021 there were 235 candidate vaccines under development, according to a document released by the WHO.<sup>1</sup> There have been 14 vaccines authorized and in circulation across the World. Of these are two RNA vaccines (Pfizer–BioNTech and Moderna), five conventional inactivated vaccines (BBIBP-CorV, CoronaVac, Covaxin, WIBP-CorV, and CoviVac), five viral vector vaccines (Sputnik Light, Sputnik V, Oxford–AstraZeneca, Convidecia, and Johnson & Johnson), and two protein subunit vaccines (EpiVacCorona and RBD-Dimer).

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<sup>1</sup> WHO at <<https://www.who.int/publications/m/item/draft-landscape-of-covid-19-candidate-vaccines>> [Accessed 13 June 2021]

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Of the 14, six were approved for emergency or full use by at least one WHO-recognized stringent regulatory authority.<sup>2</sup> These six are Oxford–AstraZeneca, Pfizer-BioNTech, Sputnik V, Sinopharm-BBIBP, Moderna, and Johnson & Johnson all of which are used widely.

Considering the threat of legal suits by pharmaceutical companies over Intellectual Property (IP) rights, there is limited legal protection for the innovations of the COVAX facility under GAVI, the Vaccine Alliance which was set up in an ‘unparalleled and ambitious’ attempt to create a global mechanism to supply all vaccines to all countries in the world. Given that the COVAX facility is the sole body that would be able to buy the vaccines from manufacturing companies and distribute them to the whole world, its main goal was to ensure equitable access to COVID-19 vaccines. However, this goal is yet to be realised owing partly to the IP concerns raised by a number of the vaccine manufacturers.

The outbreak of Coronavirus disease 2019 (COVID-19) still ravages even the strongest global health systems. It has shaken not only the health system but also the economies that support it. Globally, as of 16 June 2021, there have been 176,303,596 confirmed cases of COVID-19 and over 3,820,026 deaths.<sup>3</sup> In this line, this paper is aimed to show the legal implications of intellectual property rights and to argue that waiving IP rights for COVID-19 vaccine will improve access to drugs and the right to health during the global pandemic.

This paper does not allege to provide the legal solution for waiving intellectual property rights of pharmaceutical companies in the COVID-19 but provides insights into which areas deserve IP rights and which rights may be waived. It is also of concern that waiver of IP rights proposed to WTO may result into

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<sup>2</sup> WHO Status of COVID-19 Vaccines within WHO EUL/PQ evaluation process, May 2021 accessible at [https://extranet.who.int/pqweb/sites/default/files/documents/Status\\_COVID\\_VAX\\_18May2021.pdf](https://extranet.who.int/pqweb/sites/default/files/documents/Status_COVID_VAX_18May2021.pdf) [Accessed 13 June 2021]

<sup>3</sup> WHO Coronavirus (COVID-19) Dashboard at <https://covid19.who.int> [Accessed 17 June 2021]

decline of rule of law and potential substandard vaccines and unfair trade practices.

This paper will undertake this objective by first highlighting the Intellectual Property legal regime on medicines under the TRIPS Agreement and the WIPO guidelines for medicines during the COVID-19 period. Herein the paper will show some cases which have applied IP rights in medicine and illustrate the danger of reinforcing them during the COVID-19 pandemic.

Section 3.0 illustrates the application of Global Health systems response to COVID-19 with an emphasis on the dilemma created by COVAX and hence a need for waiver of the IP rights. Under section 4.0, using the United Nations guiding principles on human rights, the paper seeks a balance of human rights and Intellectual Property rights in the COVID-19 fight. Herein, the paper posits that total waiver of IP rights is not feasible because of the various interest like recouping funds spent in research. However, it posits measures that can be taken such as licensing. The paper concludes by calling for a less stringent IP regime to guarantee a healthier society post COVID-19.

## **2.0 INTELLECTUAL PROPERTY LEGAL FRAMEWORK AND THE RIGHT TO HEALTH**

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names, and images used in commerce.<sup>4</sup> IP is protected in law by, for example, patents, copyright, and trademarks, which enable people to earn recognition or financial benefit from what they invent or create.<sup>5</sup> By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.

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<sup>4</sup> What is Intellectual Property? World Intellectual Property Organisation Dashboard, available at <<https://www.wipo.int/about-ip/en/>> [Accessed 18 June 2021]

<sup>5</sup> *ibid.*

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Under the global trading system, the Agreement on Trade-Related Aspects of Intellectual Property Rights,<sup>6</sup> is a minimum standards agreement, that allows members to provide more extensive protection of intellectual property i.e., patents, copyrights, industrial designs, and trade secrets if they so wish.<sup>7</sup> The TRIPS agreement is an international trade agreement among all 164 members of the World Trade Organisation (WTO).

It is one of three founding and central components of the WTO, along with the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>8</sup> Under this agreement, members are free to determine the appropriate method of implementing the provisions of the Agreement within their legal system and practice.<sup>9</sup> This agreement is the major agreement governing all intellectual property rights concerning the WTO system.

On the other hand, health is a fundamental human right indispensable for the exercise of other human rights.<sup>10</sup> The right to health is perhaps best seen as a Universal right in light of its pronouncement and expression in International Instruments ratified by many states across the Globe. These include the Universal Declaration of Human Rights,<sup>11</sup> International Covenant on Economic, Social, and Cultural Rights and the Convention on the Rights of Persons with Disabilities.

The International Covenant on Economic, Social, and Cultural Rights provides the most comprehensive expression on the right to health in international human rights law. Per Article 12(1) of the Covenant, States parties recognize

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<sup>6</sup> Herein referred to as the TRIPS Agreement

<sup>7</sup> Part I of the TRIPS Agreement

<sup>8</sup> Tom Lee, Christopher Holt; *"Intellectual Property, COVID-19 Vaccines, and the Proposed TRIPS Waiver"* May 10, 2021, available at <https://www.americanactionforum.org/insight/intellectual-property-covid-19-vaccines-and-the-proposed-trips-waiver/> [Accessed 12 June 2021]

<sup>9</sup> *ibid*, Part I, Article 1

<sup>10</sup> CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)

<sup>11</sup> Article 25(1).

“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” States are obliged to take numerous steps to achieve the full realization of this right.

### **2.1 Patents and Global Health Rights**

Patents seek to incentivize innovation to benefit society; but this comes with consequences such as exorbitant costs and monopoly of knowledge.<sup>12</sup> Therefore, the assignment of intellectual property rights to a vaccine delays ramping up its production and may make the vaccine unaffordable for low and middle-income countries.<sup>13</sup> This, therefore, calls for the review of the protection offered under intellectual property. If patents instead of global health rights are put at the forefront, states could be defeated in their move to realize the right because with exorbitant prices, not every country can acquire the vaccines.

Key to the TRIPS agreement concerning the intellectual property for essential medicines is the Doha Declaration. This Declaration was birthed from several talks initiated by developing countries in 2001, following their concerns that the developed countries were rooting for a narrow interpretation of the TRIPS Agreement to their benefit.<sup>14</sup> This Declaration is desirable in looking out for the benefits of less developed countries in this COVID-19 fight because it is a reflection of their concerns in dealing with intellectual property rights internationally.<sup>15</sup>

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<sup>12</sup> Abbe Brown et al, Intellectual property rights, the Public interest and COVID 19 Available at <<https://www.abdn.ac.uk/law/blog/intellectual-property-rights-the-public-interest-and-covid19/>>[Accessed 11 June 2021]

<sup>13</sup> Arnab Acharya, Opinion: The debate around intellectual property rights and the COVID-19 vaccine. Available at <<https://www.devex.com/news/opinion-the-debate-around-intellectual-property-rights-and-the-covid-19-vaccine-97609>> [Accessed 12 June 2021].

<sup>14</sup> M.D Nair, TRIPS, and Public Health: The Doha Declaration, Journal of Intellectual Property Rights, Vol 7, pp 241-244 Available at <<http://nopr.niscair.res.in/bitstream/123456789/4918/1/JIPR%207%283%29%2024-1-244.pdf>> [Accessed 11 June 2021].

<sup>15</sup> *ibid.*

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The Doha declaration is a WTO statement that clarifies the scope of the TRIPS agreement. Relevant to this discussion is paragraph 4,<sup>16</sup> to 6,<sup>17</sup> of the agreement which embodies the fact that TRIPS can and should be interpreted in light of the goal of "promoting access to medicines for all." In this regard, the Declaration reaffirms the right of WTO members to use, to the full, the provisions of the agreement which provide for flexibility for this purpose. The provisions in paragraphs 4 to 6 are an open invitation for governments to issue compulsory licenses on patents for medicines and take such steps as necessary to protect public health.

Due to the blank cheque provided in paragraphs, 4 to 6, India and South Africa submitted a proposal signed by over 100 developing countries that would waive four specific protections of COVID-19 vaccines and related medical products and services, that is; Copyrights, Patents, Trademarks, and Undisclosed information procedures. The first three protections allow companies to prevent foreign companies from copying their products. They require the original company to disclose information about the product. Foreign companies are free to study the disclosed information of the patent but cannot copy it unless given a licensing agreement from the original company. Companies can also choose not to get patents for their products and instead keep their information secret.

While TRIPS has been waived previously, if approved, this would be the broadest waiver since the agreement's enactment in 1995. Fortunately, various

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<sup>16</sup> Paragraph 4 of the Declaration states that "The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."

<sup>17</sup> Paragraph 6 of the Declaration states that "We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002."

countries including the US,<sup>18</sup> as a member of the WTO rallied behind the notion of waiving patents of Covid-19 vaccines for poorer countries, a cause that has received support from other key international Organisation leaders such as the Head of the World Health Organisation and several third world countries. Waiver of these patent rights is important for purposes of achieving global health, for no one is safe until everyone is safe.

Whereas the TRIPS agreement covered the manufacturing gap by acceptance of licensing, there is more to be done in order to address the various challenges that still belittle the fight of the third world countries.<sup>19</sup> These range from the capacity to manufacture to distribution challenges. Advocates of strict IP protection assert that suspending patents will not increase the number of vaccines available. It will only prevent the development of new innovative and life-saving drugs and leave us less prepared for future pandemics.<sup>20</sup> However, this paper does not call for an endless waiver of the IP rights. It advocates for the waiver of the IP rights insofar as the manufacture as well as distribution of the COVID-19 vaccines and any available treatments is concerned, because this is a global pandemic. IP rights should not impede our struggle against the pandemic, but unite the world for greater protection.

## **2.2 Intellectual property rights in respect of essential medicines**

On April 22, 2020, the European Committee of Social Rights, the body responsible for overseeing the implementation of the European Social Charter,

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<sup>18</sup> Andrea Shalal et al U.S reserves stance backs giving poorer countries access to COVID vaccine patents. Available at <<https://www.reuters.com/business/healthcare-pharmaceuticals/biden-says-plans-back-wto-waiver-vaccines-2021-05-05/>> [Accessed 11.06.2021].

<sup>19</sup> Abbe ibid (n10).

<sup>20</sup> Sally pipes; Intellectual Property Rights Are Key To Fighting Covid-19 And Protecting Public Health Available at <<https://www.forbes.com/sites/sallypipes/2021/03/05/intellectual-property-rights-are-key-to-fighting-covid-19-and-protecting-public-health/?sh=3ced4ab9400d>>[Accessed 11.06.2021].



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issued its Statement of Interpretation on the Right to Protection of Health in Times of a Pandemic.<sup>21</sup> This statement emphasized the interrelation of the right to health with other human rights such as: the right to social and medical assistance; the right to housing; the right to freedom from poverty and social exclusion; and the right to safe and healthy working conditions.

The Committee pointed towards a "collective responsibility" of the international community concerning outbreaks of infectious diseases.<sup>22</sup> In this regard, the Committee clarified that international cooperation means sharing medical equipment and best practices to combat the virus, sharing knowledge for the development of a vaccine, and engaging in joint action to minimize the economic and social impacts of the public health crisis.

Public health as discussed above is a matter of concern that has led to conflicts with pharmaceutical companies, for instance in the use of generic versions of patented antiretroviral drugs in countries hard hit by AIDS, such as South Africa.<sup>23</sup> The South African case,<sup>24</sup> exposed the inequities of pharmaceutical patents with respect to access to medicines in developing countries thus stimulating significant amendments to TRIPS.<sup>25</sup> The WTO eventually agreed that a waiver should be granted to the government to override IP in public health emergencies to produce generic drugs.<sup>26</sup>

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<sup>21</sup> European Committee of Social Rights, Statement of Interpretation on the Right to Protection of Health in Times of Pandemic (2020).

<sup>22</sup> Committee on Economic Social and Cultural Rights (2000, note 7); Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, UN Doc. E/C12/2020/1 (2020).

<sup>23</sup> Maria Christina Rosas, COVID-19, and intellectual property rights: What to do? Available at <<https://riograndeguardian.com/rosas-covid-19-and-intellectual-property-rights-what-to-do/>> [Accessed 10 June 2021].

<sup>24</sup> Patent barriers to medicine access in South Africa: A case for patent law reform. Available at <<https://www.fixthepatentlaws.org/wp-content/uploads/2016/09/MSF-FTPL-report-FINAL-VERSION.pdf>> [Accessed 11 June 2021].

<sup>25</sup> Abbe *ibid*(n30).

<sup>26</sup> Intellectual property and COVID 19. Available at <<https://www.kaieteurnewsonline.com/2021/05/06/intellectual-property-rights-and-covid-19/>>[Accessed 10 June 2021].

Therefore, the TRIPS should be interpreted in a manner supportive of WTO members' rights to protect public health and, in particular, to promote access to medicines for all,<sup>27</sup> as elaborated in the Doha declaration.

Paragraph 4 of the Doha Declaration reflects that obligations under the TRIPS Agreement should be interpreted consistently with the protection of public health. In line with that, states must prevent unreasonably high costs for access to essential medicines and vaccines. To this end, the need to preserve global health amidst this COVID-19 pandemic should be the driving factor in all states' endeavours to develop the vaccine and as such, the profit concept harboured by some states and companies should be limited, if not eliminated.

Secondly, it is quite unfair that all the leading vaccine developers have benefited from billions of dollars in public subsidies, yet pharmaceutical corporations have been handed the monopoly rights to produce and profit from them.<sup>28</sup> This highlights the selfishness of the companies in developed countries that seek to put profits over human life.

Thirdly, a reservation on Intellectual Property Rights to Covid-19 vaccines is a hindrance to the realization of the role of the World Health Organisation. WHO is an organization that is a primary player in the health of the global population. During the prevalence of the pandemic, it has taken centre stage in taking measures and enacting policies to manage the pandemic as well as steps to have it completely controlled.

Having all countries access formulas for making vaccines is one such big stride to realizing its goals. This is because the percentage of the countries manufacturing vaccines and able to purchase vaccines adequate for their citizenry are but a small portion of the entire world's population.<sup>29</sup> In any case,

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<sup>27</sup> Abbe *ibid*(n10).

<sup>28</sup> Rich nations vaccinating one person every second while the majority of the poorest nations are yet to give a single dose Available at [https://www.unaids.org/en/resources/presscentre/featurestories/2021/march/20210310\\_covid19-vaccines](https://www.unaids.org/en/resources/presscentre/featurestories/2021/march/20210310_covid19-vaccines) > [accessed 10 June 2021]

<sup>29</sup> Less than 2% of the world's COVID-19 vaccines are administered in Africa. Available at <https://www.afro.who.int/news/less-2-worlds-covid-19-vaccines-administered-africa>>

a pandemic is not a competition between companies, but a race between humanity and a virus. Instead of competing, countries and companies need to do all they can to cooperate and end the pandemic.

Drawing back to the South African Case scenario, COVID-19 is already a public health emergency and the vaccine is therefore an essential 'medicine,' access to which should not be denied or impeded. Therefore, the world can once more come together again and save humanity, having surrendered the need to accumulate profits.

### **3.0 COVID-19 AND HEALTH SYSTEMS: THE INTERNATIONAL RESPONSES TO COVID-19**

There is no record currently indicating that there was any country prepared for COVID-19. Its spread brought the world to a halt, despite the current targeted return to normalcy, the effects and indicators of unpreparedness are still vivid. Fortunately, researchers all across the globe started working to find possible treatments for the 'new disease'. Drugs like Oseltamivir, Lopinavir chloroquine, and hydroxychloroquine as well as other anti-influenza treatments have been used, but with varying degrees of success.<sup>30</sup> However, most of the initiatives taken were based on various hypotheses, and to date, no successful treatments have been achieved.

However, the spread of COVID-19 could not be left unchecked. The international community, guided by the WHO, was able to adapt to certain practices that were meant to limit the spread.<sup>31</sup> These included recommendations such as firstly, washing hands frequently with water and soap or using hand-sanitizing gel. Secondly, maintaining social distancing that is keeping a distance of 1 meter (3 feet) between yourself and anyone who is

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<sup>30</sup> Ankit Awasthi, et al "Outbreak of the novel coronavirus disease (COVID-19): Antecedence and aftermath" European Journal of Pharmacology, Volume 884, 5 October 2020. Available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7381902/>> [Accessed 13 June 2021].

<sup>31</sup> WHO Coronavirus Outbreak *ibid*(n1).

coughing or sneezing. Thirdly, avoiding touching eyes, nose, and mouth and wearing a mask as needed.

Furthermore, following respiratory hygiene such as covering your mouth and nose with your folded elbow or tissue when you cough or sneeze and, disposing of the used tissue immediately. Lastly, seeking medical care early if one had a fever, cough, and difficulty breathing; as well as staying informed and following advice given by the health care provider, national and local public health authority, or employer on how to protect oneself and others from COVID-19.

The recommended prevention measures were designed based on overcoming the mode of transmission, for instance frequent hand washing, maintaining physical distance, quarantine, covering the mouth and nose during coughs, and avoiding contamination of the face with unwashed hands were introduced to curb the spread after one has touched contaminated surfaces. In addition, the use of a mask is recommended particularly for suspected individuals and their caregivers,<sup>32</sup> however, after several studies, it was recommended that all persons should always put on masks while in public space.

### **3.1 Research, development and distribution of Vaccines**

The preventive measures as discussed above were just a means to slow down the virus. As of May 2021; the World Health Organization Director while commenting on the 772,000 new cases reported on average each day globally, and nearly half in India, where a virus variant, B.1.617, had been spreading said that, “Globally, we are still in a perilous situation.”<sup>33</sup> This means that actually, there is a need for a better solution, which as of now, researchers opine that has to be a vaccine; because COVID-19 can only be limited but not defeated by staying at home.

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<sup>32</sup> Girum, T., Lentiro, K., Geremew, M. *et al.* “Global strategies and effectiveness for COVID 19 prevention through contact tracing, screening, quarantine, and isolation: a systematic review.” *Trop Med Health* 48, 91 (2020).

Retrievable at <https://doi.org/10.1186/s41182-020-00285-w> [Accessed 17 June 2021]

<sup>33</sup> See The New York Times, “Covid-19: Global Cases Fall but the Virus Is Surging in Countries That Lack Vaccines” May 26, 2021 Publication at <https://www.nytimes.com/live/2021/05/10/world/covid-19-coronavirus> [Accessed 17 June 2021]

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Vaccines are biological preparations that confer immunity against specific diseases, typically by provoking a response from the body's immune system.<sup>34</sup> Each year, vaccination prevents some 2.5 million deaths.<sup>35</sup> Indeed, there has been an enormous effort to develop an effective and safe vaccine to control the rapid spread of the COVID-19. Multilateral institutions funded by multiple governments, pharmaceutical companies, and philanthropists poured hundreds of millions into the vaccine development effort, which has helped hasten discovery.

The COVAX facility under Gavi, the Vaccine Alliance was set up as an 'unparalleled and ambitious' attempt to create a global mechanism to supply all vaccines to all countries in the world.<sup>36</sup> It is the sole body that would be able to buy the vaccines from manufacturing companies and distribute it to the whole world. Its main goal is to ensure equitable access to COVID-19 vaccines.<sup>37</sup> This goal has been far from achieved as discussed in the next section.

### **3.2 The Dilemma**

The world needs around 11 billion doses of coronavirus vaccine to immunize at least 70% of the world's population.<sup>38</sup> As of March 2021, there was a confirmed order for 8.6 billion doses, a remarkable achievement. However, some 6 billion of these will go to high and upper-middle-income countries leaving less than one-third of the available vaccines at the disposal low-income countries that happen to account for about 80% of the world's population.<sup>39</sup> There are still

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<sup>34</sup> Hilde Stevens, Koenraad Debackere, Michel Goldman, Richard T. Mahoney, Philip Stevens, Isabelle Huys; Vaccines: Accelerating Innovation and Access; A WIPO Global Challenges Report page 3

<sup>35</sup> *ibid.*

<sup>36</sup> Ann Danaiya Usher, 'A Beautiful Hoax: how COVAX has fallen short.' Available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01367-72/fulltext#.YMzbELhx2IU.twitter](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01367-72/fulltext#.YMzbELhx2IU.twitter) [Accessed 19 June 2021]

<sup>37</sup> *ibid.*

<sup>38</sup> "It's time to consider a patent reprieve for COVID vaccines" The International Journal of Science Vol 592 of April 1, 2021, 7.

<sup>39</sup> *ibid* (n35)

major bottlenecks to the manufacturing and access of the COVID-19 vaccine. These include Vaccine-greedy rich countries that totally disregarded the COVAX facility vaccine equal distribution obligations and Intellectual property rights. This paper emphasizes the latter.

There is currently an imbalance in access to the vaccine, caused largely by rich countries placing substantial advance orders with the relatively small group of vaccine manufacturers.<sup>40</sup> This is more prevalent in the COVAX facility mechanism that has fallen short of its intended purpose. Antonio Guterres, the UN General Secretary states that ‘COVAX has delivered over 72 million doses to 125 countries which is far less than the 172 million it should have delivered by now.’<sup>41</sup>

This means that of the 2.1 billion COVID-19 vaccine doses administered worldwide so far, COVAX has been responsible for less than 4%.<sup>42</sup> The vaccine coalition under COVAX has been brought to its knees by the rich countries that entered bilateral deals with vaccine manufacturers. By August 2020, the USA had entered into seven bilateral deals with six companies for more than 800 million doses enough to vaccinate 140% of its population; the UK had bought into five bilateral deals giving it access to 270 million doses, equivalent to 225% of its population.<sup>43</sup>

While the rich countries are getting more than enough for their population, low and middle-income countries have nothing. Ironically, these countries are the greatest funders of the donor-based vaccines mechanism under the COVAX for low and middle-income countries.<sup>44</sup>

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<sup>40</sup> Ann, *ibid* (n36).

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid*.

<sup>44</sup> Team Europe led by Germany and USA has provided 5 billion dollars, Japan 1 Billion dollars and the UK 735 million dollars to purchase vaccines for low and middle-income countries.

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That notwithstanding, according to some scholars, IP rights, in particular, patents are the primary cause,<sup>45</sup> of the dilemma. Patents confer on their owner the right, for a limited time defined under law, to prevent others from using, making, selling, offering for sale, or importing the invention without his or her authorization. This contributes to an environment that is supportive of a patentee's endeavour to earn profits. Certain authors argue that IP rights allow inventors to set high prices against which the public sector has no recourse.<sup>46</sup>

It is argued, therefore, that IP is the main challenge insofar as the manufacture, as well as distribution of the vaccines, is concerned. One way of elevating the supply curve is by eliminating the barrier to increasing supply through technology sharing and hence increasing the manufacturers of the vaccines. This mechanism is in line with the available human rights regime as discussed above and under the guiding principles on business and human rights.

#### **4.0 UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS.**

The United Nations Guiding Principles on Business and Human Rights (UNGPs) is an instrument consisting of 31 principles implementing the United Nations' (UN) "Protect, Respect and Remedy" framework on the issue of human rights and transnational corporations and other business enterprises.<sup>47</sup> These enjoin business enterprises to have regard to human rights while conducting their business transactions as well as operations.

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<sup>45</sup> T'Hoën E (2009) *The Global Politics of Pharmaceutical Monopoly Power: Drug Patents, Access, Innovation and the Application of the WTO Doha Declaration on TRIPS and Public Health*. AMB Publishers, Diemen.

<sup>46</sup> Hilde ibid n32).

<sup>47</sup> See, Guiding Principles on Business and Human Rights; at <[https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf)> [Accessed 23 June 2021]

In light of all the above, it is crucial to take into consideration the UN Covid-19 Access to Vaccines Guidance,<sup>48</sup> which is also alive to the human rights concerns presented in the Guidelines. The Guidance on access to vaccines also lays down very important human rights considerations to be taken into account in the access to vaccines in the wake of the Covid-19 pandemic. Placing the Guidelines on business and human rights side by side with the guidance on access to vaccines is necessary because it presents concerns that countries developing, selling, and distributing vaccines should heed to in upholding the right to health as a human right.

Firstly, the Guidance on vaccines states that "health is a right and COVID-19 vaccines should be treated as global public goods, rather than as marketplace commodities available only to those countries and people who can afford to pay the asking price."<sup>49</sup> Secondly, the Guidance on vaccines also puts forward the fact that the "Unfair distribution of vaccines across countries, or hoarding of vaccines, disregards international legal norms and undermines the achievement of the Sustainable Development Goals."

It states that the prioritization of vaccine delivery should be done through transparent protocols and procedures that respect human rights. In these procedures, it is expedient to look at the group given priority in the receipt of vaccines.<sup>50</sup> The UN Guidelines on Business and Human Rights recognize the need for policy coherence at the international level. This is relevant for multilateral business transactions in upholding international human rights obligations in these transactions.

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<sup>48</sup> UN Covid-19 Access to Vaccines Guidance, 17th December 2020  
<[https://www.ohchr.org/Documents/Events/COVID19\\_AccessVaccines\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID19_AccessVaccines_Guidance.pdf)>  
[Accessed 9 June 2021]

<sup>49</sup> *ibid*, 1.

<sup>50</sup> WHO SAGE Values Framework for the Allocation and Prioritization of the Covid-19 Vaccination.  
<[https://www.ohchr.org/WHO-2019-nCoV-SAGE\\_Framework-Allocation\\_and\\_prioritization-2020.1-eng.pdf](https://www.ohchr.org/WHO-2019-nCoV-SAGE_Framework-Allocation_and_prioritization-2020.1-eng.pdf)> [Accessed 9 June 2021].



The reflections discussed above present an avenue of upholding human rights over legalistic regimes that are more egocentric than communal, more so in the fight against COVID-19.

## 5.0 CONCLUSION AND RECOMMENDATIONS

Various measures are pertinent in ensuring that global health is guaranteed. Firstly, this paper calls for waiver of the intellectual property rights to guarantee a healthy global population, the countries should retain their united front under the COVAX facility for a global action against the virus. The same should be pointed towards companies that have refused to share their IP,<sup>51</sup> and hence look at protection of their patents in light of the looming deaths in case of a delay in vaccination.

Alternatively, there is need for companies to increase the licensing of their product designs in exchange for reduced payment. A compulsory license is an authorization granted by a state authority that allows the person who receives it to use the invention without the agreement of the patent holder.<sup>52</sup>

The grounds for the grant of this license include the following: (a) market demand not sufficiently satisfied, (b) exploitation of patent rights violates competition law (e.g. excessive prices), (c) patentees abuse their exclusive rights; (d) public interest (e.g. health, environment, economic development, national security); (e) dependent patents (e.g. technical improvement).<sup>53</sup> This would make possible the manufacture of the vaccine by a multitude of companies.

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<sup>51</sup> Mancini DP and Peel M. Poorer countries join WHO call for virus patents to be shared. *The Financial Times*, 29 May 2020. Also, see Lovett S. Coronavirus: drug giant AstraZeneca urged to make vaccine patent-free. *The Independent*, 2 June 2020.

<sup>52</sup> European Patent Academy. Compulsory licensing in Europe: a country-by-country overview, [www.epo.org/learning/materials/compulsory-licensing-in-europe.html](http://www.epo.org/learning/materials/compulsory-licensing-in-europe.html)

<sup>53</sup> Biadgleng et al. TRIPS post-grant flexibilities: compulsory licenses & government use. UNCTAD. In: Workshop on flexibilities in international intellectual property rules and local production of pharmaceuticals for the Southern, Central, and West African Region, Cape Town, 7–9 December 2009.

There is also need to share information amongst key stakeholders that will provide equitable access to life-saving technologies around the world. This includes relevant knowledge, IP, and data to enable worldwide production, distribution, and use of technologies as well as necessary raw materials.<sup>54</sup> This is in light of the desired view that the most pragmatic way to combat the pandemic is through collaboration and data sharing.<sup>55</sup>

Whereas waiver of the patents only covers the manufacturing deficits, this paper equally calls for a vaccine on debt or subsidized price of the vaccines for the third world countries so that they can protect the health of their citizens at a greatly reduced cost. Through the adoption of these measures, global health will be guaranteed.

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<sup>54</sup> Olga Gurgula et al, COVID-19, IP and access: Will the current system of medical innovation and access to medicines meet global expectations? *Journal of Generic Medicines* 2021, Vol. 17(2),65.

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