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### **Introduction**

Pandemics are, by definition, **global as well as national**. The worst off globally are often the most affected. Measures taken in response, even if nationally-focussed, inevitably have implications in other countries. This poses a distinct set of **human rights issues for the UK**, which we set out in the present submission. Our contribution is based on international law binding on the UK with a particular focus on the right to health, rather than more debateable ethical or political claims. We evaluate the UK's performance at global level with reference to these norms.

### **The Right to Health**

In Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) states recognize **'the right of everyone to the highest attainable standard of health'**. The Article lists among the steps to be taken toward realizing that right, 'the treatment and control of epidemic, endemic, and occupational diseases' and 'the creation of conditions which would assure to all medical services and medical attention in the event of sickness'. The right is similarly recognized in Article 24 of the Convention on the Rights of the Child and Article 12 of the Convention for the Elimination of Discrimination Against Women.

**Authoritative guidance** on the right to health was provided by the UN Committee on Economic, Social and Cultural Rights in a General Comment (GC 14). Thus, states are under a threefold obligation to: 1) *respect*, by refraining from action on their own part that infringes upon the right; 2) *protect*, by intervening to prevent third party violations; 3) *fulfil*, by acting positively to ensure that individuals can enjoy an increasing standard of health.

Article 12 ICESCR is an inclusive right, concerned not only with packages of medical care, but also with the **'underlying determinants of health'**, eg. environmental and sanitary factors, funding and provisioning of the health system, and extreme economic inequality. Under Article 2(1) ICESCR states need not realize the right in full immediately, but must take steps now towards achieving it, using the maximum of resources available. But, as GC3 makes clear, it is subject to the 'non-derogable' requirement that all states must ensure a **'minimum core'** provision without delay, including medicines on the WHO's Essential Drugs list.<sup>1</sup>

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<sup>1</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14<sup>th</sup> December 1990, E/1991/23.

## Extraterritorial Human Rights Obligations

The rights under Article 12 are guaranteed to individuals *within* the territory of the state concerned in the first instance. However, the ICESCR is not silent on their international dimensions. It imposes three types of **'extraterritorial' obligation** on states as regards individuals *residing in other states*. In the following we set out these general obligations, applying them to the current pandemic in line with guidance issued by the UN Committee on Economic, Social and Cultural Rights on 17<sup>th</sup> April 2020 ('CESCR Guidance').<sup>2</sup>

### **Obligation 1: Assistance**

Under Article 2(1) states are **entitled to 'international assistance and cooperation**, especially economic and technical' in realizing the right to health. According to the former UN Special Rapporteur on the Right to Health, the extent of the obligation on wealthier nations to assist can be determined with reference to the idea of the minimum core.<sup>3</sup> Certainly, all states are required (and permitted) to deploy their own resources to meet the needs of their own populations. But where **some are incapable of reaching the minimum core**, better situated states are obliged to help them to meet this modest target. This duty of assistance is the extraterritorial form of the requirement on states to *fulfil* the right to health domestically. It lies on particular states even where others, who are similarly capable, fail to help.<sup>4</sup>

The CESCR Guidance states that Covid-19 shows the need for **'ongoing investment in public health and social protection'** and that the 'extraordinary mobilization of resources should be ongoing'.<sup>5</sup> This echoes relevant, binding provisions of the World Health Organization (WHO) International Health Regulations (IHR). These obligate states 'to mobilize financial resources to build, strengthen and maintain **core capacities**' for detecting and responding to infectious disease outbreaks, with particular reference to needs of developing countries, and to provide support to the WHO in case of a Public Health Emergency of International Concern, as has been declared in the case of Covid-19.<sup>6</sup> Article 44.1(b) IHR in particular requires countries to **mobilize financial resources** which could include direct assistance for developing countries.

After an initial delay, the UK committed £200 million through the **Department for International Development** on 12<sup>th</sup> April supporting UN agencies, including the WHO, and selected NGOs.<sup>7</sup> Contributions to humanitarian relief, vaccine development and support for an IMF package to stabilize global south economies brings this total to £744 million.<sup>8</sup> This is welcome progress towards

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<sup>2</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 17<sup>th</sup> April 2020, E/C.12/2020/1.

<sup>3</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Twenty-second session, , Summary Record of the 10th Meeting, 4<sup>th</sup> May 2000, E/C.12/2000/SR.10..

<sup>4</sup> See M E Salomon 'Is there a Legal Duty to Address World Poverty' (2012) European University Institute, Robert Schumann Centre for Advanced Studies, ,Florence, Italy, RSCAS PP 2012/03.

<sup>5</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 17<sup>th</sup> April 2020, E/C.12/2020/1, paragraphs 24-25.

<sup>6</sup> Articles 44, 5.3, 6.7, 13.4 International Health Regulations (2005) respectively.

<sup>7</sup> UK Government, 'UK leads global fight to prevent second wave of coronavirus' (2020). Available at: <https://www.gov.uk/government/news/uk-leads-global-fight-to-prevent-second-wave-of-coronavirus> (accessed 13/05/20).

<sup>8</sup> UK Government, 'UK leads global fight to prevent second wave of coronavirus'(2020). Available at: <https://www.gov.uk/government/news/uk-leads-global-fight-to-prevent-second-wave-of-coronavirus>

meeting the UK's **obligation of assistance**, but given that the total aid budget is in excess of £14 billion there is further scope for allocation of support for those countries and regions most likely to suffer the effects of global limits on trade and credit in response to the pandemic.

## Obligation 2: Cooperation

The obligation of 'cooperation' in Article 2(1) ICESCR<sup>9</sup> requires states to work to ensure that the international legal, economic and political order supports the realization of the right to health. According to GC14, states should act so as to ensure that the right is **not limited by international agreements** to which they are parties, or by the **work of multilateral bodies** in which they participate (eg. UN Security Council, WHO, World Trade Organization (WTO), World Bank, or International Monetary Fund (IMF)). This duty is underpinned by Articles 55 and 56 of the UN Charter.<sup>10</sup> It is the extraterritorial form of the requirement on states to *respect* the right to health.

The CESCR Guidance affirms that states should use their voting powers in international financial institutions to **alleviate the financial burden of developing countries** in combatting the Covid-19 pandemic.<sup>11</sup> The IHR also place an obligation on States to collaborate with each other in order to respond to global epidemics<sup>12</sup> and recognises that some countries will need to provide **technical cooperation** in order to enable developing countries to build their core capacities in order to fight epidemics.<sup>13</sup>

Consistent with the WTO's 2001 Doha Declaration on HIV/AIDS, states should also collaborate to exploit **flexibilities in international intellectual property** treaties which would allow universal **access** to essential diagnostics, as well as medicines and vaccines currently in development.<sup>14</sup> Initiatives to extend compulsory licensing of patented products and the creation of patent pools to free up the information necessary for product development should also be supported by the UK through the WTO and in future post-Brexit bilateral trade deals.<sup>15</sup>

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(accessed 13/05/20).

<sup>9</sup> See also Article 24 of the Convention on the Rights of the Child on the right to health of the child, which requires account to be taken of 'the needs of developing countries' in international cooperation.

<sup>10</sup> Article 55 of the UN Charter requires the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all" and Article 56 requires "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

<sup>11</sup> World Trade Organization, Declaration on the TRIPS Agreement and Public Health, 20<sup>th</sup> November 2001, WT/MIN(01)/DEC/2, paragraph 21. See also Article 44 (3) of the International Health Regulations which requires countries to collaborate through multiple channels including bilaterally, through regional networks and the WHO regional offices and, through intergovernmental organizations and international bodies.

<sup>12</sup> Article 44.1a International Health Regulations (2005).

<sup>13</sup> Article 6.6. International Health Regulations (2005).

<sup>14</sup> World Trade Organization, Declaration on the TRIPS agreement and public health, 20<sup>th</sup> November 2001, WT/MIN(01)/DEC/2, paragraph 21. See also, Open letter asking 37 WTO Members to declare themselves eligible to import medicines manufactured under compulsory license in another country, under 31bis of TRIPS, published by Agreement, Knowledge Ecology International on 7<sup>th</sup> April 2020. Available at: <https://www.keionline.org/32707> (accessed 13/05/20); G Yamey et al, 'Ensuring Global Access to COVID-19 Vaccines' (2020) 395 *The Lancet* 1405. Available at: [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(20\)30763-7.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(20)30763-7.pdf) (accessed 13/05/20).

<sup>15</sup> E t'Hoen, 'Covid-19 Intellectual Property Pool Gaining Support' (2020) *Medicines, Law and Policy* Available at: <https://medicineslawandpolicy.org/2020/04/covid-19-intellectual-property-pool-gaining-support/> (accessed 13/05/20).

### Obligation 3: Avoiding Harm

States are also subject to a duty to avoid **causing harm directly to citizens** of other states or **allowing private actors** under their jurisdiction to do so.<sup>16</sup> The first case would cover the disproportionate use of coercive disease control measures which damages the health of citizens in another country, for example. The second requires states to ensure that companies registered or domiciled in their territory refrain from harming individuals elsewhere. Taken together these are an extraterritorial form of the requirement on states to *respect* and *protect* the right to health.

The CESCR Guidance gives further examples from the present context, including **pre-emptive buying** of medical equipment, or the **enforcement of export controls** on local manufactures and essential food stuffs, where this would deny access to the poorest and most vulnerable communities in the world. It would also include **clinical trials of vaccines and treatments** for Covid-19 in global south countries, such as Kenya. Safeguarding the rights of trial participants to be free from coercion, and to benefit in the fruits of such trials, as well as the employment rights of local collaborators, are all essential.

### Limitations and Strengths

We must be clear: the extraterritorial human rights regime outlined here has a number of **limitations**. There is no strong enforcement mechanism for any of the obligations in the ICESCR or the IHR. The extent of the duty to assist has not yet been fully defined and there is, as yet, no single international system to operationalize it. In the world of ‘microbial realpolitik’ the national economic and security concerns will continue to be of great significance.<sup>17</sup>

There are also **positive opportunities**, however, in framing the UK’s global role during the pandemic in human rights terms, and in enabling parliamentarians and citizens to evaluate it in these terms.<sup>18</sup> As we pointed out, all of the above are **binding obligations**, not mere aspirations. Adhering to them strengthens the culture of the rule of law around the world. In ethical terms they offer a pragmatic **middle-way** between narrow ‘statism’ and unlimited ‘cosmopolitanism’, allowing states to act responsibly at global level to protect the most vulnerable, without wholly surrendering the priority accorded to the interests of their own citizens.<sup>19</sup>

Piecemeal systems for operationalizing these duties do already exist. The UK’s own commitment to spend **0.7% of GDP on development aid**, entrenched in domestic statute law, is one example;<sup>20</sup> the

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<sup>16</sup> UN General Assembly, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretary-General, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 13<sup>th</sup> August 2012, A/67/302.

<sup>17</sup> See the report of the Commons Select Committee on Foreign Affairs, The FCO’s role in building a coalition against COVID-19, 6<sup>th</sup> April 2020. Available at: <https://publications.parliament.uk/pa/cm5801/cmselect/cmcaff/239/23902.htm> (accessed 13/05/20).

<sup>18</sup> See further S Sekalala and J Harrington, ‘Communicable Diseases, Health Security, and Human Rights’ in L Gostin and B Mason Meier (eds) *Foundations of Global Health and Human Rights* (Oxford University Press 2020) 221.

<sup>19</sup> G Ooms and R Hammonds ‘Taking up Daniels’ Challenge: the Case for Global Health Justice’ (2010) 12: 1 *Health and Human Rights: An International Journal*. Available at <https://www.hhrjournal.org/2013/08/taking-up-daniels-challenge-the-case-for-global-health-justice/> (accessed 13/05/20).

<sup>20</sup> International Development (Official Development Assistance Target) Act 2015, Chapter 12, Section 1.

WHO's Covid-19 Response Fund, to which the UK has contributed over US \$100 million, is another.<sup>21</sup> Moreover, the duty of cooperation entails a duty to construct and support institutions needed to realize the right to health as well as providing technical assistance. In any case, as the terrible course of Covid-19 has shown, acting globally in ways consistent with international human rights law, is often the most effective means of securing the national interest of any single state.<sup>22</sup>

11/05/2020

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Available at: [http://www.legislation.gov.uk/ukpga/2015/12/pdfs/ukpga\\_20150012\\_en.pdf](http://www.legislation.gov.uk/ukpga/2015/12/pdfs/ukpga_20150012_en.pdf) (accessed 13/05/2020).

<sup>21</sup> World Health Organization, 'Coronavirus disease (COVID-19) donors & partners: WHO says thank you!' (2020). Available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/donors-and-partners> (accessed 13/05/2020).

<sup>22</sup> LO Gostin and R Archer, 'The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law' (2008) 7 *Journal of Law, Medicine & Ethics* 526.