

# The Immunisation against COVID-19 as a Global Public Good

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## Abstract

In 2020, COVID-19 emerged and spread rapidly across the globe. Soon thereafter, the World Health Assembly (WHA) proclaimed the immunisation against COVID-19 a Global Public Good in its Resolution WHA 73.1. What

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the concept of Global Public Good (GPG) entails, both generally, and, in particular with respect to international law, are far from settled. This article aims to further develop an understanding of this concept and to frame its meaning in the context of immunisation against COVID-19. It argues that while the concept originated in economics, it carries normative value and has implications for different areas of international law. The Resolution concretises a duty to cooperate in the context of immunisation. Furthermore, it requires us to think beyond state borders as well as beyond states' responsibilities and market mechanisms. This article will explore the repercussions of the normative concept of Global Public Goods within the framework of human rights law, international security law, international economic law, and intellectual property rights. The reference to the concept of Global Public Goods provides an overarching framework in a matter that concerns the international community. Thus, it requires us to develop and provide for international instruments of concrete collective action.

## Keywords

Global Public Goods – Covid-19 – Human Rights Law – WHO – Global cooperation – Export restrictions – Intellectual property rights

## I. Introduction

Since the COVID-19 pandemic<sup>1</sup> began in early 2020, the virus has spared almost no country, reaching 260 million cases by the end of 2021 and claiming more than 5,2 million lives so far<sup>2</sup>. Some countries have been hit worse than others. But, unlike with other diseases, the global north and south have been affected almost equally. Currently, the entire world urgently needs functioning tools to combat the virus.

Immunisation is the most effective and promising tool against the virus. In fact, not only would global immunisation<sup>3</sup> help individual countries to coun-

<sup>1</sup> A pandemic is defined as 'an epidemic occurring worldwide, or over a very wide area, crossing international boundaries, and usually affecting a large number of people', Miquel Porta (ed.), *A Dictionary of Epidemiology* (5th edn., Oxford: Oxford University Press 2008), 179.

<sup>2</sup> See <[www.worldometers.info](http://www.worldometers.info)> [Information collected on 27.11.21].

<sup>3</sup> Immunisation is understood as 'the process whereby a person is made immune or resistant to an infectious disease, typically by the administration of a vaccine. Vaccines stimulate the body's own immune system to protect the person against subsequent infection or disease'. See <<https://www.who.int>>

teract the virus, it could stop the virus from mutating and might even help to eradicate the disease in the end. The global dimension, especially the fact that the virus spreads from human to human and across borders, thus rendering any national answers less effective, demands unprecedented international governance and cooperation. These features of the COVID-19 pandemic, which make it a *truly international* phenomenon, led the Assembly of the World Health Organization (WHO), in the early phase of the pandemic, to adopt a declaration that uses unique language to describe immunisation against the virus. The Resolution proclaims the

‘role of extensive immunization against COVID-19 as a *global public good* for health in preventing, containing and stopping transmission in order to bring the pandemic to an end’.<sup>4</sup>

In stark contrast to this proclamation stands the *vaccine nationalism*<sup>5</sup> that has manifested itself since the first vaccines were approved or granted authorisation for emergency use in late 2020 and 2021.<sup>6</sup> Individual countries have begun to administer vaccines, and high-income countries have reserved at least 70 % of the doses available in 2021 despite representing only 16 % of the global population.<sup>7</sup> While vaccination campaigns have made considerable progress in some states, other countries have received only negligible amounts of vaccine doses so far. This reflects a considerable discrepancy

<sup>4</sup> WHO, COVID-19 Response, 73rd World Health Assembly (WHA), Resolution WHA 73.1 of 19 May 2020, OP6 [emphasis added].

<sup>5</sup> Speech delivered by UN-Secretary General, 9 December 2020.

<sup>6</sup> Comirnaty (also known as tozinameran or BNT162b2, by Pfizer + BioNTech), mRNA-1273 (or Spikevax, by Moderna + National Institutes of Health), Sputnik V (also known as Gam-Covid-Vac, developed by the Gamaleya Research Institute), Vaxzevria (also known as AZD1222, by AstraZeneca + University of Oxford) and the Covishield (by the Serum Institute of India), Convidecia (also known as Ad5-nCoV, developed by CanSino Biologics + Academy of Military Medical Sciences), Ad26.COV2.S (by Johnson & Johnson + Janssen Pharmaceutica in collaboration with Beth Israel Deaconess Medical Center), the EpiVacCorona (by the Vector Institute), the ZF2001 (by the Anhui Zhifei Longcom and the Institute of Medical Biology at the Chinese Academy of Medical Sciences), the Soberana 2 (or Pasteur in Iran, by Cuba’s Finlay Vaccine Institute), the Abdala (by the Center for Genetic Engineering and Biotechnology of Cuba), the vaccine developed by Medigen, BBIBP-CorV (by Beijing Institute of Biological Products + Sinopharm), CoronaVac (formerly PiCoVacc by Sinovac Biotech), Sinopharm + Wuhan Institute of Biological Products, the Covaxin (also known as BBV152 A, B, C, by Indian Council of Medical Research + National Institute of Virology + Bharat Biotech). Additionally, some of them, such as Comirnaty and mRNA-1273, have been approved by the WHO Emergency Use Listing Procedure (EUL). See <<https://extranet.who.int>> [Information collected on 25 July 2021].

<sup>7</sup> Olivier J. Wouters, Kenneth C. Shadlen, Maximilian Salcher-Konrad, Andrew J. Pollard, Heidi J. Larson and Yot Teerawattananon, ‘Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment’, *The Lancet* 397 (2021), 1023–1034.

between countries, demonstrating that plans for the vaccine's fair distribution have failed.<sup>8</sup>

Against the background of immunisation being proclaimed a Global Public Good,<sup>9</sup> this article will examine the question whether, and if so, which implications should follow from the concept and from its unequivocal reference by the global community in the context of this pandemic. What is a GPG? What is its meaning in this particular instance of the immunisation against COVID-19? What are the implications, especially the legal implications, of this concept, if any? As this concept originates in economics, no clear legal effects have been attributed to it yet. Therefore, this article will analyse and interpret WHA Resolution 73.1 in order to understand the term of the GPG in this particular context of the fight against COVID-19 and with regard to immunisation. We will argue that in this context, proclaiming immunisation a GPG has not merely descriptive but *normative* value. This normative value has implications for other areas of international law, which can be considered consequential to the proclamation of immunisation against COVID-19 as a GPG.

The article has four main parts. The first section highlights some essential developments in global health law and governance that contextualise the current pandemic and WHA Resolution 73.1 (II.). The second section articulates an understanding of the concept of GPG and its particular meaning in the context of immunisation (III.). Against this background, section three will analyse and interpret WHA Resolution 73.1 and its reference to the GPG of immunisation against COVID-19, concluding that it has not merely descriptive but normative value. Section four examines possible implications for different areas of international law that follow from a normative concept of a GPG (IV.). The article ends with concluding remarks (V.).

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<sup>8</sup> 110 candidate vaccines are in clinical development and another 184 candidates are at preclinical stages. See <<https://www.who.int>>. [Information collected on 4 August 2021]. In December 2020, while UN-Secretary General alerted the public to the fact that 'vaccine nationalism' was moving 'at full speed', he reiterated his call for vaccines to be treated as a GPG. See <<https://en.mercopress.com>>. On this topic see also: Anthony D. So and Joshua Woo, 'Reserving Coronavirus Disease 2019 Vaccines for Global Access: Cross Sectional Analysis'. *BMJ* 2020, 371:m4750.

<sup>9</sup> See, e.g. Ministry of Foreign Affairs, Sweden, and Institute of Development Studies (2001) *Financing and Providing Global Public Goods: Expectations and Prospects* (Development Financing) (Stockholm: Nortstedts 2000); Inge Kaul, Isabelle Grunberg and Marc A. Stern, (eds), *Global Public Goods: International Cooperation in the 21st Century* (New York: Oxford University Press 1999); Inge Kaul, Pedro Conceição, Katell Le Goulven and Ronald U. Mendoza, *Providing Global Public Goods: Managing Globalization* (New York: Oxford University Press 2003); and Inge Kaul, *Global Public Goods: A Concept for Framing the Post-2015 Agenda?* DIE Discussion Paper (Bonn: German Development Institute 2013).

## II. COVID-19 and Global Health Law and Governance

The global dimension of COVID-19 is unprecedented, as are the responses to it by the WHO and the United Nations (UN) (1.). However, both the pandemic and the measures to counter it are set against the background of global diseases and of developments within global health law and governance that began prior to the outbreak of COVID-19 and that considerably increased international cooperation, especially with regard to communicable diseases in the last decades (2.).

### 1. The Case of COVID-19

It is a truism that globalisation creates an unprecedented opportunity for spreading communicable diseases that have the potential to become pandemics, thus creating a global risk. Recent cases in point are H5N1 in 1997,<sup>10</sup> SARS in 2003,<sup>11</sup> and H1N1 in 2009<sup>12</sup>. This holds especially true in the case of SARS-COV-2, which we shall refer to, in what follows, as COVID-19.

Due to its rapid spread from human to human and factors that augment its efficiency, COVID-19 is a particularly compelling case.<sup>13</sup> After the outbreak and its acknowledgement in January 2020, the WHO declared COVID-19 a pandemic on March 11. Since then, the WHO has made numerous efforts to tackle the rapid spread of the disease across the globe, introducing instruments for the distribution of vaccines.<sup>14</sup> A vaccine allows the body to defend itself against pathogens by triggering its immune-system response, thus offering protection against the disease.<sup>15</sup> When administered to a high percentage of the population, it lowers the virus' chances to spread within a population: This is called *herd immunity* or *population immunity*.<sup>16</sup>

<sup>10</sup> Influenza A virus subtype H5N1 (A/H5N1).

<sup>11</sup> Severe Acute Respiratory Syndrome (SARS).

<sup>12</sup> Influenza A virus subtype H1N1 (A/H1N1).

<sup>13</sup> See *inter alia* on this subject: Ruiyun Li, Sen Pei, Bin Chen, Yimeng Song, Tao Zhang, Wan Yang and Jeffrey Shaman, 'Substantial Undocumented Infection Facilitates the Rapid Dissemination of Novel Coronavirus (SARS-CoV-2)', *Science* 368 (2020), 489-493.

<sup>14</sup> On 30 January 2020, the WHO Director-General declared the novel coronavirus outbreak a Public Health Emergency of International Concern (PHEIC). On 11 March 2020, WHO declared COVID-19 to be characterised as a pandemic. On 24 April 2020, WHO launched the Access to COVID-19 Tools Accelerator. On 17 July 2020, WHO launched an updated Global Humanitarian Response Plan for COVID-19. On 29 May 2020, the WHO launched the Solidarity Call to Action and the COVID-19 Technology Access Pool.

<sup>15</sup> See <<https://www.who.int>>.

<sup>16</sup> See on herd immunity, <<https://www.who.int>>.

In addition to WHA Resolution 73.1 – which will be analysed in further detail shortly – the WHO has implemented several instruments: It launched the Access to COVID-19 Tools (ACT) Accelerator, a global collaboration to ‘accelerate the development, production and equitable access to new COVID-19 diagnostics, therapeutics and vaccines’, as a commitment to the ‘shared aim of equitable global access to innovative tools for COVID-19 for all’.<sup>17</sup> COVID-19 Vaccines Global Access (COVAX),<sup>18</sup> which constitutes the vaccines pillar of the ACT, could play a key role in ensuring fair and equitable access to COVID-19 vaccines while supporting their development and manufacture. By doing so, COVAX acts as a vehicle to finance COVID-19 vaccines for low and low-middle income countries through the support of the international community, aiming for a target of two billion doses by the end of 2021.<sup>19</sup> Therefore, COVAX has had two main functions from its inception: to act as an incentive for research and development of COVID-19 vaccines and to invest in vaccine manufacturing, allowing vaccines to be distributed rapidly once they are approved, so they can be deployed in low- and middle-income countries participating in the COVAX Facility.<sup>20</sup> This has provided an opportunity to increase countries’ participation, regardless of states’ ability to develop or pay for vaccines.

From the very beginning, COVID-19 has been treated as a global challenge, and a global instrument has been put in place to ensure fair and equitable access to medicines and vaccines once developed.

## 2. Developments in Global Health Law

Long before the COVID-19 pandemic broke out, it has been acknowledged that health-related matters have a global dimension. Moreover, the WHO is not the only international forum that has engaged with and addressed questions related to the spread of communicable diseases. In effect,

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<sup>17</sup> See <<https://www.who.int>>

<sup>18</sup> COVAX is co-led by the Global Alliance for Vaccines and Immunization (GAVI), the Coalition for Epidemic Preparedness Innovations, the WHO, and other partners.

<sup>19</sup> By the end of 2020, COVAX has made several agreements to access nearly 2 billion doses of vaccine candidates that have already passed regulatory approval and/or WHO prequalification. These doses will be offered to all participating countries in the COVAX facility, in proportion to their population, and prioritising health care workers and vulnerable groups. See: WHO, ‘COVAX Announces Additional Deals to Access Promising COVID-19 Vaccine Candidates; Plans Global Rollout Starting Q1 2021’, (Geneva 2020).

<sup>20</sup> By 3 August 2021, COVAX has distributed 177 millions of COVID-19 vaccines to 138 participants. See <<https://www.gavi.org>>.

some hold that ‘preventing the international spread of disease [...] is a global, collective enterprise from which all countries benefit’.<sup>21</sup>

A strong example of successful cooperation is the smallpox vaccine. Introduced by Edward Jenner in 1796, this was the first successful vaccine to be developed and made eradication of the disease feasible.<sup>22</sup> Later, in 1959, the WHA issued a resolution<sup>23</sup> emphasising the urgency of eradicating smallpox worldwide. Thus, the smallpox vaccination strategy consisted of massive vaccination campaigns to achieve 80 % vaccine coverage in each country. Subsequently, the identification of cases was followed by vaccination using the *ring methodology* in order to isolate the outbreak from the rest of the population. Referring to smallpox, Barrett acknowledged that it ‘could only be eradicated globally if the disease were eliminated in every country [...]’. Cooperation by every country was needed to achieve eradication, but the achievement in turn benefited every country.’<sup>24</sup>

International fora and approaches relating to global health law increasingly reflect this insight about the fight against communicable diseases. In 2015, the United Nations General Assembly (UNGA) issued Resolution 70/1, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, approving the 2030 Agenda and the Sustainable Development Goals (SDGs). The SDGs, together with their 169 targets, are considered integrated and indivisible. Consequently, they are implemented by adopting an interdisciplinary and multilevel approach in order to ‘leave no one behind’. To this end, SDG 3, and more precisely target 3.8, proclaims the objective to

[a]chieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and *vaccines for all*,<sup>25</sup> respectively.

This new framework explicitly ‘calls for a shift from individual disease control strategies [...] to a more coherent and global public health approach that also reflects the key feature of the SDGs that development sectors are integrated and indivisible’.<sup>26</sup> This shift is essential in order to meet the

<sup>21</sup> Richard G. A. Feachem and Carol A. Medlin ‘Global Public Goods: Health Is Wealth’, *Nature* 417 (2002), 695.

<sup>22</sup> The WHO declared smallpox eradicated in 1980. See <<https://www.who.int>>. On the topic, see, e.g. Frank Fenner ‘Global Eradication of Smallpox’, *Reviews of Infectious Diseases* 4 (1982), 916–930.

<sup>23</sup> Regional Committee for the Western Pacific, 010. Smallpox Eradication (Resolution), (Manila: WHO Regional Office for the Western Pacific 1959).

<sup>24</sup> Scott Barrett, ‘The Smallpox Eradication Game’, *Public Choice* 130 (2007), 179–207 (180).

<sup>25</sup> Emphasis added.

<sup>26</sup> Mario C. Raviglione and Dermot Maher, ‘Ending Infectious Diseases in the Era of the Sustainable Development Goals’, *Porto Biomed J.* 2 (2017), 140–142 (142).

ambitious targets set for 2030.<sup>27</sup> It aligns with four main functions associated with a global health system, namely: managing cross-border health effects, mobilising global solidarity for disadvantaged populations, supervising the system's overall functioning, and, lastly, ensuring the adequate provision of GPGs.<sup>28</sup> Moreover, the Addis Ababa Action Agenda stressed that the 'global partnership should reflect the fact that the post-2015 development agenda, including the sustainable development goals, is global in nature and universally applicable to all countries'.<sup>29</sup>

One of the most significant shifts in global health policy over the last decade is linked to the concern of overcoming the globally inequitable access to drugs, diagnostics, vaccines, and other health technologies. This was originally motivated by the worldwide claim regarding antiretroviral drugs to treat HIV/AIDS. As a result, a new health governance system appeared: Whereas essential medicines were long understood as private goods or, at best, as national public goods, today, they are increasingly considered GPGs to which the entire population should have access.<sup>30</sup> An important implication of this global approach is the distribution and delivery of so-called 'essential medicines'.<sup>31</sup>

While this selection of examples and approaches is relatively limited, it nevertheless indicates a broader trend, namely the demand for a coordinated multilateral approach. Such an approach is intended to accompany the challenge of addressing complex global problems that require significant international cooperation, in particular in the case of the global health agenda and highly communicable diseases. The One Health paradigm is increasingly gaining momentum.<sup>32</sup>

<sup>27</sup> Raviglione and Maher (n. 26) and Kaul (n. 9).

<sup>28</sup> Julio Frenk and Suerie Moon, 'Governance Challenges in Global Health', *The New England Journal of Medicine* 368 (2013), 936-942.

<sup>29</sup> Third International Conference on Financing for Development, A/CONF.227/L. 1, 'Outcome document of the Third International Conference on Financing for Development: Addis Ababa Action Agenda', 15 July 2015, para. 10.

<sup>30</sup> See Suerie Moon, 'Medicines as Global Public Goods: The Governance of Technological Innovation in the New Era of Global Health', *Global Health Governance* 2 (2009), 1-23 (2).

<sup>31</sup> According to the WHO, '[e]ssential medicines are those that satisfy the priority health care needs of the population'. By prioritising medicines, the WHO's Essential Medicines List provides a guide for including medicines in national lists <<https://list.essentialmeds.org>>. Nevertheless, there have been debates about whether the right to health includes access to essential medicines. On this matter, see, e.g. Gunila Backman, Paul Hunt, Rajat Khosla, Camila Jaramillo-Strouss et al., 'Health Systems and the Right to Health: An Assessment of 194 Countries', *The Lancet* 372 (2008), 2047-2085; Paul Hunt and Rajat Khosla, 'The Human Right to Medicines', *SUR International Journal on Human Rights* 5 (2008), 99-115.

<sup>32</sup> Anne Peters, 'COVID-19 as a Catalyst for the (Re-)Constitutionalisation of International Law: One Health – One Welfare', *MPIL Research Paper Series* 44 (2020), 5 et seqq.



### III. The Immunisation against COVID-19 as a Global Public Good

While the developments in global health law and governance form the background for WHA Resolution 73.1, it is the first time that immunisation against a particular disease has been proclaimed a GPG. The concept of the GPG is founded in economics and associated with particular characteristics (1.). In the following sections, it will be argued that its incorporation into WHA Resolution 73.1, in accordance with obligations related to the GPG of immunisation, gives the concept a normative value beyond the mere descriptive elements of non-rivalry and non-excludability (2.).

#### 1. What is a Global Public Good: The Elements of Non-Rivalry and Non-Excludability

The most common description of a GPG refers to its central economic properties, namely non-rivalry and non-excludability.<sup>33</sup> The characteristic of a public good being non-excludable means that once it is established, no one can be prevented from enjoying the benefits of the GPG, even if that individual or entity neither contributed to the provision of that good nor paid for it.<sup>34</sup> Additionally, the non-rivalry characteristic means that one individual or entity cannot consume the good to such an extent that it prevents others from consuming it simultaneously. As a result, consumption does not diminish a GPG's availability.<sup>35</sup> Therefore, public goods can be contrasted with private goods, which are excludable and rival. While a private good can be owned and others can be excluded from using it, the public good cannot be owned, and its use cannot be excluded.<sup>36</sup> Moreover, public goods

<sup>33</sup> See Paul A. Samuelson, 'The Pure Theory of Public Expenditure', *The Review of Economics and Statistics* 36 (1954), 387-389. Non-rivalry and non-excludability have been understood in reference to the physical dimension or physical characteristics of the GPG. Sandler has expressed this as follows, 'The prefix of public refers to the publicness properties of nonrivalry and nonexcludability and not to its form of provision'. See Todd Sandler, *Global Collective Action* (Cambridge: Cambridge University Press 2004), 49.

<sup>34</sup> See William D. Nordhaus, 'Paul Samuelson and Global Public Goods: A Commemorative Essay for Paul Samuelson' in: Michael Szenberg, Lall Ramrattan and Aron A. Gottesman (eds), *Samuelsonian Economics and the Twenty-First Century* (New York: Oxford University Press 2006) and Mancur Olson, 'Logic of Collective Action: Public Goods and the Theory of Groups', *Harvard Economic Studies* 124 (Boston: Harvard University Press 1965).

<sup>35</sup> Ravi Kanbur, Todd Sandler and Kevin Morrison, *The Future of Development Assistance* (Washington: Overseas Development Council 1999), 55.

<sup>36</sup> Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy', *EJIL* 23 (2012), 651-668.

can be subdivided into two groups: *pure public goods*, meaning those that are both non-excludable and non-rival, and *impure public goods*, meaning those that possess only one of these attributes.<sup>37</sup>

In addition to these characteristics, the main element of a GPG is its global dimension.<sup>38</sup> The GPG thus inherently defers the good from the national to the international level. As Kaul, Grunberg, and Stern define them, GPGs are those goods ‘whose benefits extend to all countries, people and generations’.<sup>39</sup> The list of such global goods ranges from natural phenomena, such as moonlight, to environmental sustainability, peace and security, multilateral trade, and the control or eradication of communicable diseases,<sup>40</sup> to the respect for human rights.<sup>41</sup>

## 2. Immunisation against COVID-19 as a GPG

Two questions arise in this context: first, how to determine which goods are private and which are public, and second, what consequences this distinction entails. According to Andersen and Lindsnaes,<sup>42</sup> we cannot simply know which goods can be defined as public and which are defined as private. They argue that the distinction is difficult because goods are socially constructed by peoples and governments through political action, laws and regulations, and other actions, both collective and private.<sup>43</sup> Therefore, determining what constitutes a GPG is a deliberate choice. Whereas some of a GPG’s feature may relate to characteristics that do or do not exist – such as non-exclud-

<sup>37</sup> Kanbur, Sandler and Morrison (n. 35), 56.

<sup>38</sup> ‘Public goods can be considered global when they cover a rather large group of countries and when it is difficult or impossible to identify a geographically restricted community of beneficiaries’. Daniele Archibugi and Andrea Filippetti, ‘Knowledge as Global Public Good’ in: Daniele Archibugi and Andrea Filippetti (eds), *The Handbook of Global Science, Technology and Innovation* (Oxford: Wiley 2015).

<sup>39</sup> Inge Kaul, Isabelle Grundberg and Marc A. Stern (n. 9) as referred in Inge Kaul and Ronald U. Mendoza, ‘Advancing the Concept of Global Public Goods’, in: Kaul, Conceição, Le Goulven and Mendoza (n. 9), 78-111 (95).

<sup>40</sup> Edith Brown Weiss, ‘Establishing Norms in a Kaleidoscopic World General Course on Public International Law (Volume 396)’, in: *Collected Courses of the Hague Academy of International Law* (Leiden: Brill/Nijhoff 2019), 37-415 (112).

<sup>41</sup> Kaul and Mendoza (n. 39), 98. See also Oliver Morrissey, Dirk W. te Velde and Adrian Hewitt, ‘Defining International Public Goods: Conceptual Issues’ in: Marco Ferroni and Ashoka Mody (eds), *International Public Goods: Incentives, Measurement and Financing* (The Hague: Kluwer, 2002), 31-46.

<sup>42</sup> See Erik Andersen and Birgit Lindsnaes, *Towards New Global Strategies: Public Goods and Human Rights* (Leiden: Brill/Nijhoff 2007), 33.

<sup>43</sup> See Feachem and Medlin (n. 21).

ability and non-rivalry in the famous lighthouse example<sup>44</sup> – with regard to other goods, the determination whether they are public or private may mean that these characteristics are assigned to the good under consideration, so that, for instance, transport can be either a private or a public good.

The determination of a GPG may thus entail descriptive as well as normative elements, depending on the GPG in question and the consequences attributed to the decision. In this section, we argue that WHA Resolution 73.1 supports assigning the GPG of immunisation against COVID-19 a normative value, since it ought to be achieved by the global community.

### a) Beyond a Mere Descriptive Value of the GPG of Immunisation

The wording of WHA Resolution 73.1 recognises extensive immunisation against COVID-19 as the GPG. Extensive immunisation in order to reach *herd immunity* shares the characteristics of a *pure* GPG: It is non-rival because, once such immunisation is achieved, everyone benefits from the protection and eventual eradication of the disease. It is also non-excludable, as everyone around the world will enjoy the benefits of defeating the disease, and no one can be excluded from this accomplishment.

If the consideration were to stop here, the proclamation would have merely descriptive value. It would be much like stating that the world is round and not flat or that the earth moves around the sun. In fact, a statement that entailed no consequences whatsoever for the states and their behaviour with regard to providing the GPG would have limited value. Such a mere descriptive statement would be uncommon in the operative part of a Resolution, since this part, in contrast to the preambular paragraphs, usually contains state obligations.<sup>45</sup>

In turn, this raises the question not of what *does* but of what *should* follow from proclaiming immunisation a GPG. Or, to put it differently, what normative value should be attributed to the proclamation in WHA Resolution 73.1? If we broaden our view and see the GPG as those efforts that aim to prevent, contain, and stop the transmission of COVID-19 by ensuring worldwide immunisation in order to bring the pandemic to an end, the implications are entirely different from the first alternative. In that case, the proclamation has normative and not merely descriptive value.

<sup>44</sup> See, among others Bodansky (n. 36), 656; David Long and Frances R. Woolley, 'Global Public Goods: Critique of a UN Discourse', *Global Governance* 15 (2009), 107-122 (108); Feachem and Medlin (n. 21), 695 and Kaul, Grunberg and Stern (n. 9), 308-325.

<sup>45</sup> The proclamation of the GPG of immunisation is contained in OP6; see section *infra* 2. b).

Can such a normative value be inferred from the Resolution? It is necessary to interpret the proclamation in the Resolution in order to give it meaning. The interpretative methods for documents other than treaties are not as firmly established as the interpretation according to the Vienna Convention on the Law of Treaties (VCLT),<sup>46</sup> Articles 31 and 32. However, when interpreting a Security Council Resolution, the International Court of Justice (ICJ) confirmed that the interpretative canon is relevant also with regard to documents *other* than international treaties. The Court proclaimed that

‘the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect [...] having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution [...]’.<sup>47</sup>

In a similar fashion, interpretation of a WHA Resolution might examine the text’s wording, context, drafting history, object, and purpose as well as other circumstances relevant in determining its legal value. In the following section, the interpretation of WHA Resolution 73.1 according to the canon of interpretative methods will help to answer the question of whether states intended to make a merely descriptive statement or whether, instead, they aimed to attribute normative value to the proclamation.

## b) Interpretation of WHA Resolution 73.1

The Resolution was passed by the WHA, expressing the ‘will of member states, representing the highest level of commitment’<sup>48</sup> in accordance with Article 23 of the WHO Constitution. It should be stressed once more that it

<sup>46</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331.

<sup>47</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSC Res 276 of 30 January 1970, Advisory Opinion, ICJ Reports 1971, 53; on the interpretation of UNSC Resolutions, see also Michael Wood, ‘The Interpretation of Security Council Resolutions’ in: Jochen A. Frowein and Rüdiger Wolfrum (eds), *Max Planck UNYB* vol. 2 (The Hague: Kluwer Law International 1998), 73-95, and Michael Wood ‘The Interpretation of Security Council Resolutions, Revisited’, *Max Planck UNYB* online 20 (2017), 1-35.

<sup>48</sup> Lawrence O. Gostin, Devi Sridhar and Daniel Hougendobler, ‘The Normative Authority of the World Health Organization’, *Public Health* 129 (2015), 854-863 (855). Additionally, on the mechanisms used by the WHO that could be categorised as recommendations, see Alison Lakin, ‘The Legal Powers of the World Health Organization’, *Medical Law International* 3 (1997), 23-49 (33).

is not the Resolution's preambular paragraphs but its operative part that acknowledges the GPG of immunisation.<sup>49</sup> In general, it is the operative paragraphs that contain those aspects that go beyond the general object and purpose and that usually pertain to the particular and specific objectives a Resolution seeks to achieve.<sup>50</sup>

The wording of WHA Resolution 73.1 unequivocally refers to the immunisation against COVID-19 as a GPG. While paragraph 6 merely uses the opening term 'recognizes', which would indicate a declaratory meaning, a systematic interpretation reveals the states' commitment to actually achieving the GPG of immunisation. There is an inherent link to paragraph 4, in which the Resolution

'CALLS FOR the universal, timely and *equitable access to*, and *fair distribution of*, all quality, safe, efficacious and affordable essential health technologies and products, including their components and precursors, that are required in the response to the COVID-19 pandemic as a global priority'.<sup>51</sup>

Usually, resolutions employ the term 'call upon' to describe binding state obligations.<sup>52</sup> Here, it relates to the distribution of products and components required to vanquish the pandemic, including vaccines, which constitute the main tool for achieving immunisation.

Furthermore, paragraph 5 addresses the needs of low- and middle-income countries by 'reiterat[ing] the importance of urgently meeting the needs of low- and middle-income countries in order to fill the gaps in efforts to overcome the pandemic, through timely and adequate development and humanitarian assistance'. Then, in paragraph 7, the resolution 'calls on Member States [...] (11) [...] to share knowledge, lessons learned, experiences, best practices, data, materials, and commodities needed in the response, with WHO and other countries'.

Paragraph 6, which is central, provides for the broader framework and the goal of achieving immunisation as a GPG. Thus, it does not simply acknowledge immunisation as a GPG but connects the previous paragraphs by stating

<sup>49</sup> In full, it reads, '6. RECOGNIZES the role of extensive immunization against COVID-19 as a global public good for health in preventing, containing and stopping transmission in order to bring the pandemic to an end, once safe, quality, efficacious, effective, accessible and affordable vaccines are available'.

<sup>50</sup> See more generally on obligations to consider resolutions and recommendations ICJ, *Whaling in the Antarctic* (Australia and New Zealand (intervening) v. Japan), judgement of 31 March 2014, ICJ Reports 2014, para. 83.

<sup>51</sup> WHA (n. 4), OP4 [emphasis added].

<sup>52</sup> Wood (n. 47), SC Resolutions Revisited, 17-18; Dominik Steiger, 'Nicht-staatliche Gewaltakteure im Fokus des Sicherheitsrats', in: Heike Krieger and Dieter Weingärtner (eds), *Streitkräfte und nicht-staatliche Akteure* (Baden-Baden: Nomos 2013), 55-82 (71).

that the role of the immunisation as a GPG for health is ‘in preventing, containing and stopping transmission in order to bring the pandemic to an end, once safe, quality, efficacious, effective, accessible and affordable vaccines are available’. The Resolution establishes that immunisation – and, explicitly, vaccination – is needed to achieve the ultimate objective of ending the pandemic.

This finding is further supported by the WHA Resolution’s drafting history. The Resolution is based on a draft proposal submitted by 65 states,<sup>53</sup> i. e. the African Group and its Member States, as well as the European Union (EU) and its Member States. The latter elaborated the Zero Draft. The EU’s draft text already referred to both components,

‘[...] [r]ecognising the need to achieve equitable access and availability of appropriate quality protective and other equipment, medical devices, medicines, vaccines and other health technologies related to COVID-19 [...]’<sup>54</sup>

as well as

‘[...] immunization against COVID-19 as a global public good for health and the crucial role of quality, safe, and efficacious vaccines therein’.<sup>55</sup>

Thus, the allusion to immunisation against COVID-19 has been an integral part of the *COVID-19 Response* vision from the very beginning.

During the negotiation process, there has, in fact, been a clear welcome by the international community to considering the concept of the GPG in relation to immunisation against COVID-19 and the role that a potential vaccine could play in achieving it. The group of states that prepared the initial draft made statements that shed light on the meaning, basis, and scope of the term GPG, linking it to the immunisation against COVID-19 and to the development and distribution of a potential vaccine.<sup>56</sup> Those states empha-

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<sup>53</sup> Albania, Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bhutan, Bolivia (Plurinational State of), Brazil, Canada, Chile, China, Colombia, Cook Islands, Costa Rica, Djibouti, Dominican Republic, Ecuador, El Salvador, Fiji, Georgia, Guatemala, Guyana, Honduras, Iceland, India, Indonesia, Iraq, Jamaica, Japan, Jordan, Kiribati, Maldives, Marshall Islands, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Morocco, Nauru, Nepal, New Zealand, North Macedonia, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, San Marino, Saudi Arabia, Serbia, Singapore, Sri Lanka, Thailand, the African Group and its Member States, the European Union and its Member States, Tonga, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Uruguay.

<sup>54</sup> EU proposal for a CONSOLIDATED zero draft on a WHA 73: ‘Covid-19 Response’, PP16.

<sup>55</sup> EU proposal for a CONSOLIDATED zero draft (n. 54), OP2.

<sup>56</sup> In particular, from Austria, Finland, Germany, Slovakia, and Sweden. See <<https://apps.who.int>>.

sised ‘global solidarity’,<sup>57</sup> ‘equitable and timely access’,<sup>58</sup> and the need to ensure ‘that no one is left behind’.<sup>59</sup> In addition, other states<sup>60</sup> that were not part of the sponsoring group similarly referred to the GPG and how it relates to immunisation against COVID-19 as well as to the development and distribution of a potential vaccine.<sup>61</sup>

After two long days of virtual negotiations and statements under agenda item 3, Resolution WHA 73.1 was adopted without objections. In terms of the steps taken, it is noteworthy that states even opted for the stronger language of ‘calling on’ the WHO Member States to undertake the necessary steps as described in OP4.

Indeed, various states subsequently issued statements concerning immunisation and the vaccine which further support the argument that the Resolution’s object and purpose are to strive towards actually achieving the GPG.<sup>62</sup>

In conclusion, WHA Resolution 73.1 does not merely describe immunisation as a GPG but assigns immunisation the role of a GPG that the international community must achieve by undertaking concrete steps. Thus, the Resolution also expresses a commitment among the WHO Member States to provide the GPG in question.

### c) Assigning Immunisation the Role of a GPG

What are the possible implications of assigning immunisation the role of a GPG? The elements of ‘global’, ‘public’, and ‘good’ each require determination in the case of immunisation.

First, declaring immunisation not only a public good but a *global* public good expressly acknowledges that all states are in this pandemic together. Thus, the question of immunisation is elevated from the national sphere to the global level. It is not each state’s individual struggle but a

<sup>57</sup> On behalf of the Nordic and Baltic countries, Estonia stated that ‘We call on global solidarity and a global agreement among all actors to secure equitable and fair distribution, once they become available’. See <<https://apps.who.int>>.

<sup>58</sup> Sweden stated, ‘Sweden strongly supports the COVID-19 resolution, which aims to ensure equitable and timely access to quality, safe and affordable vaccine’. See <<https://apps.who.int>>.

<sup>59</sup> Poland stated, ‘We must make sure that both the drug and the vaccine will be equally accessible and affordable so that no one is left behind’. See <<https://apps.who.int>>.

<sup>60</sup> In particular, from Argentina, Kenya, and Timor Leste.

<sup>61</sup> Kenya has expressed that it ‘therefore joins calls for concerted efforts aimed at ensuring universal, timely and equitable access to COVID-19 tools, as global public goods for health’. See <<https://apps.who.int>>.

<sup>62</sup> See the G20 Leader’s Declaration subscribed in the framework of the G20 Riyadh Summit of 21-22 November 2020, para. 3.



global challenge that requires global answers. As with other global challenges and concerns,<sup>63</sup> this particular dimension has been assigned to COVID-19 by declaring it a pandemic and the fight and immunisation against it a GPG.

Second, we must consider the concept of public in contrast to that of private. Privately owned goods are those that we can own, from which we can derive profit, and which are sold and bought on the market according to market forces of supply and demand.<sup>64</sup> Public goods, on the other hand, are intended to be removed, at least partially, from these market forces.<sup>65</sup> Since the free market serves as an imperfect framework, tending to either undersupply or overcharge, public goods are usually administered by the public hand in order to benefit the people.<sup>66</sup> These public goods are supplied despite demand shortages and on an affordable basis, taking into consideration their inherent value and essential function. Following the characteristics of non-rivalry and non-excludability, public goods are often affected by unfavourable market incentives that can lead to under-provision or overpricing of the good in question.<sup>67</sup> Pursuant to the definition, both effects result from their benefits, namely that they generally cannot be made excludable and that their consumption typically cannot – and should not – be made exclusive. This again leads to two of the challenges and effects of

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<sup>63</sup> On the common concern and heritage of mankind, see Frank Biermann, “Common Concern of Humankind”: The Emergence of a New Concept of International Environmental Law’, AVR 34 (1996), 426-481 and Rüdiger Wolfrum, ‘The Principle of the Common Heritage of Mankind’, HJIL 43 (1983), 312-337.

<sup>64</sup> Private Good has been defined as ‘a product or service produced by a privately owned, profit-seeking business, and purchased to increase the utility, or satisfaction, of the buyer. The term private good refers to both goods and services, and most of the goods and services produced and consumed in a market economy are private goods. Prices of private goods, such as hamburgers, automobiles, and haircuts, are determined to some degree by market forces of supply and demand. Private goods are both excludable and rivalrous. Excludability means that producers can prevent people from consuming the good or service, with excludability most often based on the consumer’s ability and willingness to pay. Rivalrous means that one person’s consumption of a good or service prevents another from consuming it.’ Rebecca Summary, ‘Private Good’ in: Robert W. Kolb (ed.), *Encyclopedia of Business Ethics and Society* (2nd edn, Thousand Oaks, California: SAGE Publications 2018), 2747-2748.

<sup>65</sup> ‘The notion of public goods encompasses a range of goods that markets fail to allocate efficiently because they are nonrivalrous and nonexcludable in use.’ Karthik Srinivasan, ‘Public Goods’ in: Mark Bevir (ed.), *Encyclopedia of Governance* (1st edn, Thousand Oaks, California: SAGE Publications 2007), 766.

<sup>66</sup> Jonathan Anomaly, ‘Public Goods and Government Action’, *Politics, Philosophy and Economics* 14 (2015), 109-128.

<sup>67</sup> On under-provision see Inge Kaul, ‘Global Public Goods: Explaining Their Underprovision’, JIEL 15 (2012), 729-750. On overpricing, see generally Charlotte Hess and Elinor Ostrom (eds) *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge, Massachusetts; London, England: The MIT Press 2007).



GPGs: externalities and free riding. Externalities relate to ‘unintended effects of private actions on the availability of public goods’,<sup>68</sup> while free riding entails a lack of incentives to finance and therefore provide the GPG.<sup>69</sup> The public nature of the goods attenuates these effects in order to provide them in the first place. For these reasons, the public good should not be exposed to ordinary market transaction mechanisms. Instead, the public should provide the public good, which may then realise the characteristics of non-rivalry and non-excludability.

The good, finally, is the most confusing term, since a public good or a GPG, such as immunisation in the case at hand, is neither material nor tangible. Instead, especially in the case of global immunisation, the good is a goal that requires certain other goods, so-called *intermediate goods*,<sup>70</sup> in order to achieve it. In the case at hand, what is required, first and foremost, is an efficient vaccine. The vaccine again consists of two relevant parts: the knowledge<sup>71</sup> of its formula and production process and the raw materials of which it consists. Assembled and produced in the right way, the vaccine is a tangible good that is tradeable on the market. Hence, intermediate goods are goods that may partake in the effect of a GPG with regard to market forces, e.g. allowing measures relating to property rights in order to achieve the public good or setting maximum prices if the GPG is provided by a private person.<sup>72</sup>

## IV. The Implications of GPGs for the International Legal Order

While theoretical frameworks already allowed for the proclamation of a GPG, it is the first time that the community of states has actually proclaimed a GPG. What role should international law play in achieving the GPG of immunisation if the GPG is perceived as a normative con-

<sup>68</sup> Agnar Sandmo. ‘Global Public Economics: Public Goods And Externalities’, *Économie Publique/Public Economics* 18-19 (2007), 3-21 (6).

<sup>69</sup> The free-riding effect is associated with the characteristics of non-excludability and non-rivalry. See David Hume, *A Treatise of Human Nature* (Overland Park, Kansas: Neeland Media LLC 2019).

<sup>70</sup> Kaul (n. 67). Also, Ferroni argues that Regional Public Goods can be seen as final and intermediate public goods. See Marco Ferroni, ‘Regional Public Goods in Official Development Assistance’ in: Ferroni and Mody (n. 41), 157-186.

<sup>71</sup> Ministry of Foreign Affairs, Sweden & Institute of Development Studies (n. 9), 96.

<sup>72</sup> See Andrew Hill, Junzheng Wang, Jacob Levi, Katie Heath and Joseph Fortunak, ‘Minimum Costs to Manufacture New Treatments for COVID-19’, *Journal of Virus Eradication* 6 (2020), 61-69.

cept?<sup>73</sup> In fact, it has already been observed that ‘since global public goods cannot be adequately provided by the market, we need international institutions and international law to provide them’.<sup>74</sup> Even more to the point is the suggestion that ‘international law [...] is required to produce global public goods’.<sup>75</sup>

In the following section, we will argue that references to the concept of the GPG should have implications for strengthening legal approaches through international law. The proclamation of the GPG concretises abstract obligations to cooperate (1.), extends obligations beyond the states’ own borders (2.) and provides the basis for implications relating to trade in goods and relevant markets (3.).

## 1. Global Cooperation

The duty to cooperate is not duly established in international law as such but relates to particular circumstances and situations.<sup>76</sup> The importance of cooperation is included in the UN Charter as one of the objectives of the UN under Articles 1 (3), 2 (5)<sup>77</sup> and Chapter IX. It was developed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter.<sup>78</sup> Simma has rightly pointed out that this reflects ‘the maturing of international

<sup>73</sup> Generally, on implications of the pandemic for international law, see Armin von Bogdandy and Pedro A. Villarreal, ‘International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis’, MPIL Research Paper Series 07 (2020), 16 et seqq.; further aspects are also discussed by Anne Peters, ‘Die Pandemie und das Völkerrecht’, MPIL Research Paper Series 03 (2021), 13 et seqq.

<sup>74</sup> Bodansky (n. 36), 652.

<sup>75</sup> Gregory Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, EJIL 23 (2012), 669–693 (670–671).

<sup>76</sup> See Rüdiger Wolfrum, ‘Cooperation, International Law of’, in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2010).

<sup>77</sup> Charter of the United Nations (UN Charter), Article 1 (3): ‘[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ and Article 2 (5): ‘All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action’.

<sup>78</sup> UNGA Res 26/25 (XXV) of 24 October 1970, Item 85, 121: ‘(d) the duty of States to co-operate with one another in accordance with the Charter [...] in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences’.

law into a much more socially conscious legal order, [...] a rising awareness of the common interests of the international community [...].<sup>79</sup> The ICJ confirmed this as well in its Advisory Opinion of 1951, in which it stressed that '[t]he very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization'.<sup>80</sup> On this note, Amerasinghe mentions that '[...] this obligation to co-operate applies not only in fields covered by Chapter IX of the Charter where the duty is express but, as an incident of membership, applies to all recommendations aimed at fulfilling the objectives and purposes of the UN or any organization, for that matter'.<sup>81</sup>

The principle of cooperation has been regarded as a general principle of international law and of international environmental law in particular.<sup>82</sup> Accordingly, this principle has undergone a remarkable development, especially in relation to the global commons and common concern.<sup>83</sup> The most important insight that follows from these concepts is the understanding that matters of global concern cannot be dealt with by one state alone and that self-centred handling might have detrimental effects. Indeed, the notion of the common concern of humankind recognises the international community's legitimate interest in dealing with certain issues which, by their nature, affect it as a whole.<sup>84</sup>

<sup>79</sup> Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217 (234); Elif Askin, 'Extraterritorial Human Rights Obligations of States in the Event of Disease Outbreaks' (2017) in: Leonie Vierck, Pedro A. Villarreal and A. Katarina Weilert (eds) *The Governance of Disease Outbreaks – International Health Law: Lessons from the Ebola Crisis and Beyond*, (Baden-Baden: Nomos 2017), 175-212.

<sup>80</sup> Interpretation of the Agreement of 25 March 1951 between the WTO and Egypt, Advisory Opinion, ICJ Reports 1980, 93.

<sup>81</sup> Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press 2005), 179.

<sup>82</sup> Sandrine Maljean-Dubois and Carina Costa de Oliveira, 'The Contribution that the Concept of Global Public Goods Can Make to the Conservation of Marine Resources' in: Ed Couzens, Alexander Paterson, Sophie Riley and Yanti Fristikawati (eds), *Protecting Forest and Marine Biodiversity: The Role of Law* (Cheltenham: Edward Elgar Publishing 2017), 290-314.

<sup>83</sup> See Thomas Cottier 'The Emerging Principle of Common Concern: A Brief Outline' in: Ernst-Ulrich Petersmann (ed.), *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, EUI Working Paper EUI RSCAS 23 (2012), 185-194; Global Governance Programme-18, European, Transnational and Global Governance and Garrett Hardin, 'The Tragedy of the Commons', Science 162 (1968), 1243-1248.

<sup>84</sup> See, *inter alia*, Dinah Shelton, 'Common Concern of Humanity', Environmental Policy and Law 39 (2009), 83-86. and Jutta Brunnée, 'International Environmental Law: Rising to the Challenge of Common Concern?' Proceedings of the ASIL Annual Meeting 100 (2006), 307-310.

As a consequence of the emerging recognition of the GPG in environmental matters, it has been acknowledged that the environment must be protected by means other than individual states' activities.<sup>85</sup> Therefore, a cooperative approach has been adopted from the beginning, which is reflected now in the corpus of most multilateral environmental agreements<sup>86</sup> as well as in state practice, particularly in relation to hazardous activities and transboundary harm.<sup>87</sup> In effect, the development of international law over the past decades has been defined by the shift from a law of coexistence, which defined interstate relations and rules of abstention, to a law of positive cooperation.<sup>88</sup>

The same holds true for provisioning a GPG, especially when the general duty to cooperate concretises in a particular GPG that the global community is aiming to achieve. Thus, there are compelling reasons to cooperate on the supply of GPGs, as they offer potential benefits worldwide, and many of these goods can be less costly and more efficiently produced than if done by individual states or regions but for the benefit of all.<sup>89</sup> Therefore, the GPG depends on effective cooperation in producing and managing the good. The new global challenges in the Anthropocene – or, following Brown Weiss, 'the new kaleidoscopic world'<sup>90</sup> – such as the control of communicable diseases, require collective action to ensure that GPGs are provided. Cooperation among states appears crucial in order to 'achieve ends that their individual efforts could not attain'.<sup>91</sup>

The COVID-19 pandemic demands a global response from the international community as a whole, given the understanding that the fight against

<sup>85</sup> Tseming Yang and Robert V. Percival, 'The Emergence of Global Environmental Law', *Ecology Law Quarterly* 36 (2009), 615-664 (626); see also ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), order, Provisional Measures of 13 July 2006, ICJ Reports 2006, 113.

<sup>86</sup> See, *inter alia*, the United Nations Convention to Combat Desertification, para. 17 and Article 12; the UN Forest Principles (Principle 10) and Agenda 21 (Chapter 2, Section I).

<sup>87</sup> The Stockholm Principles already stated under Principle 24 that cooperation is essential to 'control, prevent, reduce and eliminate adverse environmental effects'. Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc A/CONF.48/14.

<sup>88</sup> Wolfgang Friedmann, *The Changing Structure of International Law*. (New York: Columbia University Press 1964), 60 et seq. and 152 et seq.

<sup>89</sup> Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (Oxford: Oxford University Press 2007) and Suerie Moon, John Arne Røttingen, Julio Frenk, 'Global Public Goods for Health: Weaknesses and Opportunities in the Global Health System', *Health Econ Policy Law* 12 (2017), 195-205.

<sup>90</sup> Edith Brown Weiss, 'International Law in a Kaleidoscopic World', *Asian Journal International Law* 1 (2011), 21-32. See also Edith Brown Weiss, 'The Kaleidoscopic World Confronts a Pandemic' in: Makane Moïse Mbengue and Jean D'Aspremont (eds), *Crisis Narratives in International Law* (Leiden: Brill/Nijhoff 2021), 146-158.

<sup>91</sup> Brown Weiss (n. 40), 123.

the pandemic is best achieved collectively rather than individually. As such, a global health response is needed. In line with the developments in global health governance, the UNGA, in its Resolution 74/270 (2020), also called for global solidarity to fight COVID-19<sup>92</sup> by reaffirming ‘its commitment to international cooperation and multilateralism and its strong support for the central role of the United Nations system in the global response to the coronavirus disease 2019 (COVID-19) pandemic’. This call was followed by several other Resolutions on the same matter.<sup>93</sup>

## 2. Global Responsibilities: Human Right to Health and Threats to Security

In addition to calling on states to cooperate, the concept of the GPG requires thinking beyond states’ borders in regard to states’ responsibilities for ensuring human rights and security. Thus, for the GPG of immunisation, the human right to health extends states’ obligations. The same holds true for security due to the close relationship between the spread of communicable diseases, the threat to peace and security, and immunisation as a vehicle for its resolution.

### a) Human Right to Health

The nexus with human rights is, perhaps, the most evident, as both GPGs and human rights have implications at the global level. Article 25.1 of the Universal Declaration of Human Rights (UDHR) states that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’.<sup>94</sup> Furthermore, several international instruments<sup>95</sup>

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<sup>92</sup> UN Doc A/RES/74/270.

<sup>93</sup> UN Doc A/RES/74/274; UN Doc A/RES/74/306; UN Doc A/RES/74/307; UN Doc A/RES/75/4; UN Doc A/RES/75/156 and UN Doc A/RES/75/157.

<sup>94</sup> Universal Declaration of Human Rights, UNGA Res 217 A (III) of 10 December 1948, Art. 25 (1).

<sup>95</sup> Subsequent instruments addressed the right to health, namely, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5 (e) (iv); the 1979 Convention on the Elimination of All Forms of Discrimination against Women, Arts. 11 (1) (f), 12 and 14 (2) (b); the 1989 Convention on the Rights of the Child, Art. 24; the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Arts. 28, 43 (e) and 45 (c); the 2006 Convention on the Rights of Persons with Disabilities, Art. 25. In addition, the WHO Constitution (n. 96) envisages: ‘[...] the highest attainable standard of health is one of the fundamental rights of every human being’.

explicitly recognise the right to health.<sup>96</sup> Following Article 12<sup>97</sup> of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>98</sup> concerning epidemics, State Parties explicitly obligated themselves to undertake the steps ‘necessary for [...] (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases [...]’. Likewise, the Alma-Ata declaration remarked that health ‘is a fundamental human right and that the attainment of the highest possible level of health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector’.<sup>99</sup> General Comment 14 of the Committee on Economic, Social and Cultural Rights (CESCR) used a more robust formulation, declaring that ‘states parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health’.<sup>100</sup>

Following the theory of human rights law, human rights are universal, equal, and inalienable.<sup>101</sup> While human rights conventions entail a system of rights for individuals, they also entail a legal obligation for states to respect, protect, and fulfil those human rights.<sup>102</sup> The human right to health triggers states’ legal obligation to ensure access to health care of appropriate quality as well as to provide the means for achieving an adequate standard of living, in accordance with article 25 of the UDHR.

Following Kaul et al., the benefits of GPGs extend this jurisdiction beyond national borders.<sup>103</sup> In this regard, the GPG and human rights are mutually supportive concepts. The synergy between the two concepts can contribute to a common goal: the right to a standard of living adequate for health and

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<sup>96</sup> Constitution of the World Health Organization, 22 July 1946, para. 1; WHO has defined health as a: ‘state of complete, physical, mental and social well-being and not merely the absence of disease or infirmity’.

<sup>97</sup> Art.12 reads: ‘[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.

<sup>98</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, vol. 993, 3.

<sup>99</sup> Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, former USSR of 6-12 September 1978.

<sup>100</sup> General Comment No. 14: The Right to the Highest Attainable Standard of Health. (Document E/C.12/2000/4) [emphasis added].

<sup>101</sup> See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca; London: Cornell University Press 2013), 10.

<sup>102</sup> See Donnelly (n. 101), 93-95. On this topic see also: Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’, HRLR 5 (2005), 81-103, and David Jason Karp, ‘What Is the Responsibility to Respect Human Rights? Reconsidering the ‘Respect, Protect, and Fulfill’ Framework’, *International Theory* 12 (2020), 83-108.

<sup>103</sup> Kaul, Conceição, Le Goulven and Mendoza (n. 9).

well-being and the eradication of a particular communicable disease on the global level by means of immunisation.

Yet, given this characteristic of global concern and global response, it follows that ensuring the health of one country requires guaranteeing the health of others.<sup>104</sup> In effect, the successful provision of GPGs depends on successful international cooperation. The International Health Regulations adopted in 2005 highlight that the need for international cooperation is at the core of the concept of PHEIC.<sup>105</sup>

Consequently, providing the GPG that aims to achieve the milestone of immunisation against COVID-19 will ulteriorly assure the implementation of a fundamental human right, the right to health. Therefore, the GPG approach requires the promotion and protection of human rights of all individuals on the global level in a cooperative fashion.

As mentioned above, in today's globalised world, states increasingly act and cause effects beyond their borders. This requires a broader interpretation of concepts traditionally linked to territory, such as jurisdiction and national sovereignty of human rights.<sup>106</sup> According to such a broader interpretation, one state's actions and omissions, in going beyond national borders, have an effect on the human rights of individuals in another state. The basis for these extraterritorial obligations is founded on the fact that 'it is a matter of taking responsibility for one's own actions or omissions'.<sup>107</sup>

Along these lines, Article 29 of the VCLT provides that a treaty binds each of the parties in respect of its entire territory unless 'a different intention appears from the treaty or is otherwise established'. While most human rights treaties include the so-called *jurisdiction clause*,<sup>108</sup> the ICESCR does not

<sup>104</sup> See, *inter alia*, Richard Smith, David Woodward, Arnab Acharya, Robert Beaglehole and Nick Drager 'Communicable Disease Control: A "Global Public Good" Perspective', *Health Policy and Planning* 19 (2004), 271-278.

<sup>105</sup> See Li, Pei, Chen, Song, Zhang, Yang and Shaman (n. 13).

<sup>106</sup> Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', *HRLR* 11 (2011), 1-35 and Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Cambridge: Intersentia 2006). On the recognition of an extraterritorial jurisdictional link in the context of Human Rights, see IACtHR, *The Environment and Human Rights*, Advisory Opinion of 15 November 2017, OC-23/17, Series A, No. 23.

<sup>107</sup> Sigrun Skogly and Mark Gibney, 'Economic Rights and Extraterritorial Obligations', in: Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press 2007), 267-283 (268).

<sup>108</sup> This is a key clause in civil and political rights treaties, such as the European Convention on Human Rights (ECHR), Art. 1; the 1966 International Covenant on Civil and Political Rights, Art. 2(1) and the American Convention on Human Rights, Art. 1.



assign the jurisdiction to the territory of the state party nor to the territories or persons over which the state party has jurisdiction.<sup>109</sup>

This extraterritorial approach helps states to increasingly cooperate in realising social, economic, and cultural rights around the world. Indeed, Article 2 (1) of the ICESCR refers to the fact that the realisation of economic, social, and cultural rights has a transnational dimension,<sup>110</sup> which denotes the obligation of every State Party 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[...]’.<sup>111</sup> In the context of the COVID-19 pandemic, this would mean that states have an obligation to realise the rights protected under the ICESCR not only on an individual scale but also through international assistance and cooperation, providing the necessary means ‘[t]o the maximum of its available resources’.<sup>112</sup>

Using the same line of reasoning, some authors have identified the above-mentioned Article 2 (1) of the ICESCR as a source of states’ obligation to cooperate in providing disaster relief.<sup>113</sup> Furthermore, following the General Comment 3 from the CESCR, the above-mentioned article imposes a general obligation on all State Parties to cooperate in realising the human rights detailed therein. It states that ‘[...] in accordance with Articles 55 and 56 of the Charter of the United Nations, [...] international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States’.<sup>114</sup>

In this consideration, and while the CESCR’s interpretation is non-legally binding, it is nevertheless noteworthy as an authoritative interpretation of the ICESCR, one that proclaims that international cooperation for development

<sup>109</sup> However, it should be noted that the ICESCR mentions jurisdiction under Article 14 for a certain right.

<sup>110</sup> Coomans (n. 106).

<sup>111</sup> ICESCR, Article 2 (1).

<sup>112</sup> Furthermore, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights recognise that, international law, particularly in the area of economic, social and cultural rights, requires states to act for the realisation of these rights extraterritorially, through ‘international assistance and cooperation’ (para. 7 and Principle 19 ‘General Obligation’ of Title III ‘Obligations to Respect’). See also Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, HRQ 34 (2012), 1084-1169.

<sup>113</sup> See Rana M. Essawy, ‘The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?’ EJIL: Talk! (2020).

<sup>114</sup> General Comment No 3: The nature of States parties’ obligations (Art. 2, para. 1 of the ICESCR), 14 December 1990, E/1991/23; 1(1) IHRR 6 (1999), para. 14.



is a state obligation in the context of human rights under the umbrella of the ICESCR. In this regard, the Alma-Ata Declaration proclaims the existing inequality in the health status of the people unacceptable and, therefore, ‘of common concern to all countries’.<sup>115</sup>

## b) Security

Communicable diseases and COVID-19 have also made evident that international emergencies such as pandemics and epidemics can become a threat to international peace and security. Immunisation and the fight against the virus are intrinsically linked to questions of peace and security.

Already in 2003, the UN High-Level Panel on Threats, Challenges and Change was established to analyse factors relating to international peace and security and to recommend measures based on that analysis, providing a new framework for the work and action of the UN in the area of security. In its 2004 Report,<sup>116</sup> the Panel argued for a new security consensus to tackle six clusters of interconnected security threats of global concern in the upcoming decades: inter-state conflicts; internal conflict; terrorism; organised crime; nuclear, radiological, chemical, and biological weapons; and poverty, *infectious disease*, and environmental degradation.<sup>117</sup>

The Report identifies the above-mentioned elements as ‘threats without boundaries’.<sup>118</sup> It bases this ascription on the understanding that threats are so interrelated nowadays that a threat to one is a threat to all and that ‘every threat to international security today enlarges the risk of other threats’.<sup>119</sup> The Report defines a threat to security as ‘any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system [...]’.<sup>120</sup> Moreover, the UN-Secretary General 2005 Report ‘In Larger Freedom: towards development, security and human rights for all’<sup>121</sup> includes deadly infectious diseases among the threats to peace and security in the twenty-first century. This reinforces the concept of collective security, which requires broader international cooperation among states and is particularly important in the case of infectious diseases.

<sup>115</sup> Declaration of Alma-Ata (n. 99), para. II.

<sup>116</sup> UN Doc A/59/565.

<sup>117</sup> UN Doc (n. 116).

<sup>118</sup> UN Doc (n. 116), section II. A.

<sup>119</sup> UN Doc (n. 116), section II. A., para. 20.

<sup>120</sup> UN Doc (n. 116), para. 9 of the Synopsis.

<sup>121</sup> UN Doc A/59/2005, para. 78.

The term collective security refers to ‘a system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace’.<sup>122</sup> In line with the considerations presented above, collective security aims to ensure security in a way that benefits the world’s population as a whole. Therefore, a GPG approach can offer security an opportunity for collective action, particularly where pandemics are concerned.

Indeed, in the past, the Security Council (SC) has emphasised the intimate relationship between security and health issues and characterised the outbreak of certain diseases as a threat to peace and security. In its former SC Resolution 1308 (2000) on HIV/AIDS and International Peace-keeping Operations, the SC recognised that the HIV/AIDS pandemic may pose a risk to stability and security. Afterwards, the SC delivered Resolution 1983 (2011) on the HIV/AIDS epidemic, which underlined that ‘urgent and coordinated international action continues to be required to curb the impact of the HIV epidemic in conflict and post-conflict situations’.<sup>123</sup>

Some years later, it unanimously issued SC Resolution 2177 (2014), which characterised the Ebola epidemic as a threat to international peace and security, in accordance with Article 39 of the UN Charter. In its operative paragraphs, the Resolution called on all Member States to provide international assistance and cooperation. By this time, the Ebola outbreak had undoubtedly become a matter of international concern, as Guinea, the epicentre of the Ebola crisis, called for international support.<sup>124</sup> Subsequently, SC Resolution 2439 (2018), with a focus on the Democratic Republic of Congo (DRC), was issued. The SC’s ‘humanitarian response’ – also supported by the WHO, which declared the outbreak a PHEIC – envisaged the importance of collective efforts in order to develop a global response to global issues, in particular for those demanding urgent action to halt the cross-border spread of the disease. In addition, it also highlighted the link between health and international security, making epidemics and pandemics a security issue and thus requiring the SC’s intervention.

In relation to COVID-19, on 23 March 2020, the UN Secretary-General, António Guterres, called for a global ceasefire, demanding that the international community focus global efforts on fighting the pandemic and put ‘armed conflict on lockdown’.<sup>125</sup> This was followed by the UNGA Resolu-

<sup>122</sup> Vaughan Lowe (ed.), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*. (Oxford: Oxford University Press 2008), 13.

<sup>123</sup> UNSC Res 1308 of 17 July 2000, S/RES/1308 and UNSC Res 1983 of 7 June 2011, S/RES/1983, para. 1.

<sup>124</sup> See <<https://ebolaresponse.un.org>>.

<sup>125</sup> See: <<https://www.un.org>>.

tion 74/270, which called for an ‘intensified international cooperation to contain, mitigate and defeat the pandemic’.<sup>126</sup> Subsequently, for the first time in its history, the SC, exercising its responsibilities under Chapters 5 and 7 of the UN Charter and, in particular, Articles 24<sup>127</sup> and 39,<sup>128</sup> called for a global ceasefire and a humanitarian pause in armed conflicts. It did so by adopting Resolution 2532 (2020),<sup>129</sup> which declares that the ‘unprecedented extent of the COVID-19 pandemic is likely to endanger the maintenance of international peace and security’.<sup>130</sup> Moreover, it

[d]emands a general and immediate cessation of hostilities in all situations on its agenda and supports the efforts undertaken by the Secretary-General and his Special Representatives and Special Envoys in that respect’.<sup>131</sup>

The commitment expressed in the United Nations Security Council (UNSC) Resolution 2532 (2020) was ratified and reinforced by the unanimously adopted UNSC Resolution 2565 (2021), which draws attention to the impact of armed conflicts during the COVID-19 pandemic. Furthermore, like Resolution WHA 73.1, it recognises ‘the role of extensive immunisation against COVID-19 as a global public good for health in preventing, containing, and stopping transmission, of COVID-19 and its variant strains, in order to bring the pandemic to an end’.<sup>132</sup> While reiterating its demand for a general and immediate cessation of hostilities, this Resolution requires all parties to armed conflicts to ‘facilitate, inter alia, the equitable, safe and unhindered delivery and distribution of COVID-19 vaccinations in areas of armed conflict’.<sup>133</sup> Indeed, the UNSC Resolution 2565 (2021) stresses the need for solidarity, equity, and efficacy and for fair access to and equitable allocation of COVID-19 products.

In this sense, the SC has placed particular emphasis on the intersection between armed conflict and its impact on the spread of infectious diseases, such as COVID-19. It has underscored that armed conflict has an especially

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<sup>126</sup> UNGA Res 74 of 12 August 2020, A/RES/74/270, para. 5.

<sup>127</sup> Art. 24 reads: ‘1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf [...]’.

<sup>128</sup> Art. 39 reads: ‘[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.

<sup>129</sup> UNSC Res 2532 of 1 July 2020, S/RES/2532 (2020).

<sup>130</sup> UNSC Res 2532 (n. 129), para. 11.

<sup>131</sup> UNSC Res 2532 (n. 129), para. 1.

<sup>132</sup> UNSC Res 2565 of 26 February 2021, S/RES/2565 (2021), para. 11.

<sup>133</sup> UNSC Res 2565 (n. 132), para. 3.

detrimental effect on the roll-out of the vaccines, leading to disparities in their distribution. What is more, this could jeopardise immunisation against COVID-19. International security is thus closely related to the provision of the GPG of immunisation.<sup>134</sup> In fact, the above-mentioned SC Resolutions reveal the intimate relationship between the pandemic and immunisation as the GPG on the one hand and international peace and security on the other hand. This becomes even more evident when juxtaposing the GPG of immunisation with that of the GPG of international peace and security, revealing its global benefit, especially in the case of pandemics.<sup>135</sup>

### 3. Market Implications and International Economic Law

GPGs are even more closely linked to International Economic Law. While there are a range of possible implications, two aspects will be focused on here: first, export restrictions relating to the vaccines and their components and second, the regime relating to Intellectual Property Rights (IPR) that concern the knowledge and patents relevant for the vaccine.

#### a) 'Vaccine Nationalism' Manifested in Prior Purchase Agreements and Export Restrictions of Vaccines and Components

Since the beginning of the pandemic, states have entered into prior purchase agreements. By doing so, wealthy states have ensured that their populations receive preferential access to vaccines.<sup>136</sup> Moreover, since December 2020, the US has imposed export restrictions on key raw materials for COVID-19 vaccines, ensuring that Americans have priority access to any vaccine produced in the US or acquired by the United States (US) Government.<sup>137</sup> The EU has also instituted a mechanism to monitor exports with the

<sup>134</sup> 'In some sense, therefore, security is defined and valorized by the threats which challenge it.' Richard Ullman, 'Redefining Security', *International Security* 8 (1983), 129-153 (133).

<sup>135</sup> On this topic, see *inter alia* Johan Galtung, 'Twenty-Five Years of Peace Research: Ten Challenges and Some Responses', *Journal of Peace Research* 22 (1985), 141-158.

<sup>136</sup> This has allowed *inter alia* the commencement of the vaccination campaign by Israel as early as December 2020 as a result of a deal with Pfizer-BioNTech in exchange for sharing data from the national vaccination campaign. See the Agreement: <<https://govextra.gov.il>>.

<sup>137</sup> By US Executive Order 13962 of 8 December 2020, the US guaranteed priority access to COVID-19 vaccines to the US population before providing access to other countries. See <<https://www.federalregister.gov>>.

possibility of limiting the export of vaccines outside the Union.<sup>138</sup> To date, an EU Member State has activated this mechanism once.<sup>139</sup>

If one of the main aspects of a GPG is its removal from the market forces of supply and demand, prior purchase agreements that follow the usual logic of supply for the best offer stand in tension with reaching the goal of immunisation equally. As a result, the vaccine is distributed unequally, to the detriment of poorer countries, which, in many cases, have little possibility to access the vaccine before the year 2023 in sufficient amounts. What is more, as some studies have already warned, disparities in the vaccine distribution system between and within countries could delay global herd immunity.<sup>140</sup> The GPG of immunisation, according to studies of immunisation effects, would be much more efficient if it followed a common strategy to acquire and distribute the vaccine on a global level.<sup>141</sup>

A somewhat different logic applies to export restrictions. While they interfere with usual market forces, those measures similarly undermine fair global distribution. Especially when a vaccine first becomes available, there is not a sufficient amount of it to achieve global immunisation at once. Henceforth, restrictions in one state necessarily lead to fewer vaccines being distributed elsewhere. Under World Trade Organization (WTO) and especially the General Agreement on Tariffs and Trade (GATT), export restrictions are generally prohibited and only exceptionally allowed under certain conditions, namely Article XI:2,<sup>142</sup> which is considered a carve-out, and

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<sup>138</sup> The EU has issued the Commission Implementing Regulation (Regulation 2021/111/EU), which establishes that the export of COVID-19 vaccines as well as ‘active substances including master and working cell banks used for the manufacture of such vaccines’ is subject to the production of an ‘export authorization’. The Commission Implementing Regulation (Regulation 2021/442/EU) has extended this restriction until 30 June 2021. Moreover, the Commission adopted the Implementing Regulation (EU) 2021/521, which added another factor to the export authorization. The measures introduced by that Regulation were further extended by Commission Implementing Regulation (EU) 2021/734 until 30 June 2021. Later, on 29 June 2021, the European Commission issued the Implementing Regulation (EU) 2021/1071, which amended the Implementing Regulation (EU) 2021/442 and the (EU) 2021/521, prolonging the Regulations until 30 September 2021. See: <<http://data.europa.eu>>.

<sup>139</sup> Italy has blocked the export of 250,700 doses of the AstraZeneca vaccine to Australia. See <<https://www.esteri.it>>.

<sup>140</sup> See Chistie Aschwanden, ‘Five Reasons why COVID Herd Immunity is Probably Impossible’, *Nature*, 591 (2021), 520–522.

<sup>141</sup> Arnaud Fontanet and Somin Cauchemez analyse the concept and formula of herd immunity and apply it to calculate the level of herd immunity needed to offer widespread protection for COVID-19. See: Arnaud Fontanet and Simon Cauchemez, ‘COVID-19 Herd Immunity: Where Are We?’, *Nature Reviews Immunology* 20 (2020), 583–584.

<sup>142</sup> This allows members to ‘export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party’.

XIII<sup>143</sup> GATT.<sup>144</sup> Both provisions are intended to prevent critical shortages of *essential* products in any WTO Member.

With regard to COVID-19, essential products could include both final products (e.g. masks or ventilators as well as a vaccine) and inputs (e.g. for vaccine manufacture). Any export restriction measures need to be temporary, targeted, and transparent. Moreover, those measures generally need to adhere to the principle of non-discrimination (Art. XIII:1 GATT),<sup>145</sup> which prohibits imposing export restrictions on like products destined to some members while allowing export to others.

The above-mentioned conditions need to be interpreted in light of the GPG of immunisation. During a pandemic, it is essential to be able to ensure the effective distribution of vaccines globally, despite the concentration of vaccine supply and manufacturing capacities in different regions.<sup>146</sup> While in exceptional circumstances, such as the situation in India in May 2021, in which it might be possible to restrict certain essential goods that relate to the COVID-19 crisis, in the general pandemic situation, the adoption of measures should be aligned with the objective of delivering immunisation on a global scale. Hence, export restrictions should only be imposed under extreme circumstances in order to uphold global value chains and the possibility of fair distribution.

In this respect, a dispute based on a direct GATT violation might prove difficult. A possible remedy could be a reference to a non-violation complaint (Art. XXIII:1(b) GATT),<sup>147</sup> given that the WTO and GATT were founded on the understanding that countries may protect their own interests. However, in a situation of a common threat, the spirit of the preamble, which provides for the optimal use of the world's resources, the goal of sustainable development, and the particular consideration of developing countries' interests must be taken into account. While not directly conflicting with GATT obligation, a WTO Member's course of action during the pandemic might

<sup>143</sup> Related to non-discriminatory administration of quantitative restrictions.

<sup>144</sup> Arts. XX and XXI GATT could further justify export restrictions.

<sup>145</sup> The WTO's Appellate Body elaborated on this in *EC – Bananas III*: 'The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin [...]'. WTO Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of 25 September 1997, WT/DS27/AB/R, DSR 1997: II, 591, para. 190.

<sup>146</sup> See OECD, 'Using trade to fight COVID-19: Manufacturing and distributing vaccines', OECD Policy Responses to Coronavirus (COVID-19) (2021).

<sup>147</sup> Art. XXIII:1(b) reads, '1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of [...] (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement.'

have nullified or impaired benefits under the covered agreements, also in light of the common goal of immunisation.<sup>148</sup>

## b) Intellectual Property Rights

The vaccine and, more particularly, the knowledge it embodies as well as the production process for its global distribution are central to achieving the GPG of immunisation. The first vaccines are, or will most probably be, protected by different national patents, and their production will likely be limited to a certain number of sites.<sup>149</sup> There are constant calls demanding that the knowledge and technology for the vaccine be shared and IPR be suspended.<sup>150</sup>

The role of knowledge and its relationship to questions of public health is heavily disputed and unresolved. In fact, knowledge can be excludable when it is either simply not shared or when it is protected by IPR. While the Paris Convention for the Protection of Industrial Property<sup>151</sup> generally establishes the regime for intellectual property protection in patents,<sup>152</sup> it is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>153</sup> of the World Trade Organization that plays the central role in the trade in patent-protected goods.<sup>154</sup>

<sup>148</sup> On non-violations complaints, see Christophe Larouer, 'WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System', NILR 53 (2006), 97-126.

<sup>149</sup> Aisling McMahon, 'Global Equitable Access to Vaccines, Medicines and Diagnostics for COVID-19: The Role of Patents as Private Governance', Journal of Medical Ethics 47 (2021), 142-148.

<sup>150</sup> See, *inter alia*, the Statement made by the UN Secretary-General, Munich Security Conference 2021, Segment on 'Priorities for Global Action', 19 February 2021, and the Remarks made by the Secretary of Foreign Affairs of Mexico to the UN Security Council, UN Security Council high-level open debate on 'Challenges to Ensuring Equitable Access to COVID-19 Vaccines', 17 February 2021.

<sup>151</sup> Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference of 20 March 1883, 21 UST 1583; 828 UNTS 305.

<sup>152</sup> The Paris Convention refers to patents as an object of the protection of industrial property (Article 1.2 of the Paris Convention)

<sup>153</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, 33 I.L.M. 1197. The TRIPS Preamble in its paragraph eight, calls for a mutually supportive relationship between the WTO and the World Intellectual Property Organization (WIPO) as well as other relevant international organizations.

<sup>154</sup> TRIPS, Article 33 establishes that: '[t]he term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.'



The WHA Resolution 73.1 already stressed the important relationship between the immunisation against COVID-19 and the IPR system by calling for

‘the urgent removal of unjustified obstacles [to essential health technologies and products], consistent with the provisions of relevant international treaties, including the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the flexibilities within the Doha Declaration on the TRIPS Agreement and Public Health’.<sup>155</sup>

How could the GPG of immunisation impact the IPR framework? While the TRIPS Agreement stems from a different regime than the WHA – and direct implications may not be explicitly drawn from the WHA Resolution – it may well be argued that the proclamation of the GPG of global immunisation should steer states’ behaviour within the leeway granted by the regime in question, i.e. the WTO and TRIPS agreement in line with Article 31 paragraph 3 c VCLT.<sup>156</sup>

While recognising the special link between intellectual property and trade, TRIPS holds that

‘[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.<sup>157</sup>

Most important in this respect are the flexibilities provided by the Agreement establishing the WTO<sup>158</sup> and TRIPS itself. Article 31 of the latter Agreement provides for compulsory licences. Compulsory licences allow administrative or judicial authorities to grant licences without the express consent of the patent owner,<sup>159</sup> e.g. for pharmaceutical prod-

<sup>155</sup> WHA (n. 4), para. 4.

<sup>156</sup> Article 31 paragraph 3 (c) VCLT requires to take into consideration any relevant rules of international law applicable in the relations between the parties. On this topic, see the work of Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention’, ICLQ 54 (2005), 279-320.

<sup>157</sup> TRIPS, Article 7.

<sup>158</sup> So called Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, 1867 UNTS 154, 33 I.L.M. 1144.

<sup>159</sup> Art. 30 and 31 TRIPS read ‘[m]embers may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties’. (Article 30) respectively ‘[w]here the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected [...]’ (Article 31).



ucts,<sup>160</sup> under certain conditions.<sup>161</sup> Nevertheless, as the Doha Declaration on the TRIPS Agreement and Public Health (DD) clarifies and elaborates,<sup>162</sup> these circumstances should not be considered in a restrictive fashion.<sup>163</sup> In fact, with regard to public health, WTO members explicitly recognise the need for a balanced approach in the DD by stressing that TRIPS ‘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’. Under the amended Article 31*bis* TRIPS,<sup>164</sup> special compulsory licences can be granted to generic suppliers in order to manufacture medicines exclusively for export to countries in need.<sup>165</sup> Consequently, and beyond the WHO declaring COVID-19 a PHEIC and then a pandemic, recognising immunisation as a good that is both global and public means that the mechanism of compulsory licences can be authorised in order to produce pharmaceutical products.

As compulsory licences require that ‘[t]he right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization’,<sup>166</sup> it has been indicated that in the case of pharmaceutical patents, ‘the basic principle of access to medicines for all should be upheld, and the balance between compensating patent holders and ensuring access to life-saving medicines must be appropriately weighted’.<sup>167</sup>

The proposal for a general waiver, according to Article IX:3 Marrakesh Agreement, goes a step further and circumvents the requirement of compen-

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<sup>160</sup> According to Article 1 of the Annex to the Trips Agreement a ‘pharmaceutical product’ is ‘[a]ny patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2). It is understood that active ingredients necessary for its manufacture and diagnostic kits needed for its use would be included.’ Therefore, this would also include vaccines.

<sup>161</sup> Yet, TRIPS, Art. 31 (b) provides that for ‘national emergency or other circumstances of extreme urgency’ and other particular cases, it is not required to obtain a voluntary license.

<sup>162</sup> Doha Declaration on the TRIPS Agreement and Public Health (DD) of 20 November 2001, WT/MIN(01)/DEC/W/2.

<sup>163</sup> See in particular DD, Articles 5 (b) and (c).

<sup>164</sup> Protocol amending the Agreement on Trade-Related Aspects of Intellectual Property Rights of 6 December 2005. The Protocol entered into force on 23 January 2017.

<sup>165</sup> DD, para. 4; TRIPS, Art. 31*bis*.

<sup>166</sup> TRIPS, Art. 31 (h).

<sup>167</sup> Xiuqin Lin, ‘Prior Negotiation and Remuneration for Patent Compulsory Licensing: Practice, Problem, and Proposal’, in: Reto M. Hilty and Kung-Chung Liu (eds) *Compulsory Licensing* (Berlin; Heidelberg: Springer 2015), 165–190 (189).

sation.<sup>168</sup> India and South Africa have proposed to generally suspend certain TRIPS obligations during the pandemic.<sup>169</sup> In fact, the US-backed statement<sup>170</sup> during the WTO General Council meeting in favour of a temporary waiver of intellectual property protection for vaccines against COVID-19, was an important sign. The statement, which has been described by the WHO Director-General as a ‘monumental moment’ in the fight against the pandemic, has also been backed by France, whose President referred to making ‘this vaccine a global public good’.<sup>171</sup> The waiver of IPR on the COVID-19 patents would likely make it possible to boost the production, distribution, and subsequent roll-out of vaccines, especially in developing countries.<sup>172</sup> Thus, granting a TRIPS waiver in the COVID-19 pandemic could make an important tool available in particular situations.<sup>173</sup> Yet, up to date, the waiver has not been granted as especially Germany has upheld its resistance against it.

Hence, the WTO agreements grant WTO Members flexibility by means of a TRIPS-waiver or by compulsory licences under TRIPS. These instruments should be utilised during the pandemic to achieve the GPG of immunisation.

<sup>168</sup> This provision reads, ‘In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph’.

<sup>169</sup> Waiver from certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 to the WTO-Council for Trade-Related Aspects of Intellectual Property Rights on 2 October 2020; WT/IP/C/W/669, relating to Sections 1, 4, 5, 7 and Part II of TRIPS. Furthermore, the waiver proposal has been co-sponsored by Kenya, Eswatini, Mozambique, Pakistan, Bolivia, Venezuela, Mongolia, Zimbabwe, Egypt, the African Group, the Least Developed Countries (LDC) Group, and, most recently, Maldives, Fiji, and Namibia, reaching a total of 60 WTO members [Information collected on 06 May 2021]. According to the WTO Glossary, a ‘waiver’ is a Permission granted by WTO members allowing a WTO member not to comply with normal commitments. Waivers have time limits, and extensions have to be justified. This exceptional nature of waiver decisions was stressed by a panel established under the GATT 1947 and by the Appellate Body in the following proceedings: WTO, Appellate Body, *United States – Sugar Waiver*, panel report of 7 November 1990, para. 5.9; WTO Appellate Body, *EC – Bananas III* (n. 145), paras 185 and 382.

<sup>170</sup> See the Statement from Ambassador Katherine Tai from the US on the Covid-19 Trips Waiver: <<https://ustr.gov>>.

<sup>171</sup> See <<https://www.reuters.com>>.

<sup>172</sup> Furthermore, this is an opportune momentum, following the outbreak in India, which by 6 May 2021 accounted for 46 % of the new COVID-19 cases recorded worldwide. See <<https://www.reuters.com>>.

<sup>173</sup> Other important examples are the so-called Kimberley waiver adopted by the General Council in 2003, relating to conflict diamonds (Decision of 15 May 2003, WT/L/518) and its extension by Decision of 15 December 2006, WT/L/676), and the Decision, also adopted by the General Council in 2003, on the implementation of Paragraph 6 of the DD – the TRIPS Waiver (Decision of 30 August 2003, WT/L/540(2 Sept. 2003)).

## V. Conclusion

The global spread of COVID-19 and its consequences underline the need for international cooperation and joint coordination. The WHA Resolution reflects this spirit: a consensus among the community of states to attribute the characteristics of a GPG to the immunisation against COVID-19, accompanied by specific demands on how to meet this common goal.

Why is the world failing in the fight against COVID? Because of its unwillingness to take its own proclamations serious. By declaring immunisation a GPG, the community of states made a normative statement with implications for the legal order. The process of achieving a GPG may face different challenges regarding its intermediate goods, as it evolves from innovation and development to financing and compliance in order to ensure its realisation. Over the course of the COVID-19 pandemic, states have confirmed the objective of treating vaccination against the disease as a GPG. Therefore, the COVID-19 vaccine should be included in this consideration, and equitable and global access to it should be ensured. As we move forward in the decade of action to deliver the SDGs by 2030, collective action and cooperation are essential so as to deliver globally tailored solutions for *all people*.<sup>174</sup>

As the fight against COVID-19 continues, a certain threat has reappeared that states will act individually and, in fact, against the spirit of achieving the GPG of immunisation on a fair and equitable basis. At the same time, there is the ulterior hope that the experience of achieving immunisation against COVID-19 would bring the international community together to fight for a common concern and against a global challenge. As Kaul et al. put it, ‘At the end of the day, common concerns bind all people. Everyone wants to participate in a fair, stable global market economy. Everyone seeks an end to diseases such as HIV/AIDS and tuberculosis. Everyone hopes to benefit from nature. And everyone desires peace. Such issues also bind nations’.<sup>175</sup> Today, everyone hopes that the COVID-19 nightmare will end soon. Tomorrow, the world will hope for other GPGs to be achieved. It is time to give meaning to the concept of the GPG, not only on an abstract but also on a concrete legal level.

<sup>174</sup> After all, ‘pandemic’ comes from Greek πᾶν, pan, ‘all’ and δῆμος, demos, ‘people’.

<sup>175</sup> Kaul, Conceição, Le Goulven and Mendoza (n. 9), 53.

