

Privacy International's comments on the conceptual zero draft of the WHO's Pandemic prevention, preparedness and response accord

November 2022

Introduction

Privacy International (PI) notes the conceptual zero draft of the WHO's Pandemic prevention, preparedness, and response accord ("WHO CAII").¹ PI has sought to closely follow and engage with the discussions leading up to the draft CAII, despite the significant limitations to civil society participation in the process.² In September 2022 we submitted our observations to the working draft of the WHO CAII.³ This analysis builds upon those observations.

Broadly, PI welcomes the content of the conceptual zero draft. We believe this draft offers a good basis for negotiation. However, there are significant gaps which need to be addressed to ensure the treaty puts the respect and protection of human rights at the centre of the prevention and response to future pandemics.

Below we outline a number of our observations and recommendations on the conceptual zero draft.

¹ Available here: https://apps.who.int/gb/inb/pdf_files/inb3/A_INB3_3-en.pdf

² In November 2021, PI was a signatory to the open letter calling on the World Health Assembly to put human rights at the forefront of the pandemic treaty. In April 2022, PI made a written submission, and delivered an oral statement, to the WHO Intergovernmental Negotiating Body public hearing. Our contributions are available here: <https://privacyinternational.org/advocacy/4838/pis-contribution-first-public-consultation-international-pandemic-treaty>

³ See: PI's submission on the working draft of the WHO's Pandemic prevention, preparedness and response accord, 21 September 2022. Available at: <https://privacyinternational.org/advocacy/4957/pis-submission-working-draft-whos-pandemic-prevention-preparedness-and-response>

Preamble

PI welcomes the reference to human rights in **PP2** and to the right to health in **PP4**.

We recommend that:

- **PP2** also reaffirms the responsibility of companies to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights;⁴
- **PP4** makes the list of prohibited discriminatory grounds an open list by including 'other status', in line with the wording of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights and Article 2 of the Universal Declaration on Human Rights.

PI also welcomes the reaffirmation in **PP14** of the "importance of diverse, gender-balanced and equitable representation and expertise" in pandemic prevention, preparedness and response.

We recommend that:

- **PP14** includes an acknowledgment of the role of civil society organisations in pandemic prevention, preparedness and response.

We support the reference to good governance in **PP19** and the call for strengthening "resilient health systems to advance universal health coverage" in **PP26**. However, we believe that the preamble should reflect on the role of technologies in achieving these goals. In this regard, we echo the recommendation made by the UN High Commissioner for Human Rights that "human rights should be at the heart of tech governance", and on the need to mitigate the harmful use of technologies.⁵ We further encourage the WHO to uphold its commitment to ensuring the appropriate use of digital technologies for health and reaffirm existing obligations to protect people and their rights within the framework established by international treaties binding the Member States.⁶

⁴ See UN Guiding Principles on Business and Human Rights, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁵ UN High Commissioner for Human Rights, Human rights should be at the heart of tech governance, 1 September 2022, <https://www.ohchr.org/en/stories/2022/09/human-rights-should-be-heart-tech-governance>

⁶ See WHO Global Strategy on Digital Health 2020-2025, <https://www.who.int/docs/default-source/documents/gsdhdaa2a9f352b0445bafbc79ca799dce4d.pdf>

Chapter I. Introduction

Article 1. Definitions and the use of terms

The conceptual zero draft does not contain definitions. In particular there is no definition of "pandemic response products". If these intend to include technological products such as those used to monitor individuals' behaviours or their movements, e.g. to track the spread of future pandemics; or other technologies result in surveillance of individuals, we recommend that specific privacy and data protection safeguards are included in the treaty to address the risks posed by these technologies.

Chapter II. Objective(s), principles and scope

Article 4. Principles

Article 4.1. "Respect for human rights – The implementation of the WHO CA+ shall be with full respect for the dignity, human rights and fundamental freedoms of persons, and each Party shall protect and promote such freedoms."

PI recommend that **Article 4(1)**:

- refers to respect, protect and fulfil human rights in its title;
- includes reference to the Universal Declaration of Human Rights and the core international human rights instruments;⁷
- includes reference to government obligations to protect against abuses by non-state actors as well as companies responsibility to respect human rights;
- includes specific reference to the human rights provisions applicable during states of emergency as codified in the Siracusa Principles, including the principles of legality, necessity and proportionality.⁸

⁷ See The Core International Human Rights Instruments and their monitoring bodies, <https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>

⁸ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), <http://hrlibrary.umn.edu/instree/siracusaprinciples.html>

Article 4.2. "The right to health – The enjoyment of the highest attainable standard of health, defined as a state of complete physical, mental and social well-being, is one of the fundamental rights of every human being without distinction of age, race, religion, political belief, economic or social condition."

PI recommend that **Article 4(2)**:

- includes reference to all components of the right to health, notably availability, accessibility, acceptability and quality in line with, inter alia, General Comment 14 of the Committee on Economic, Social and Cultural Rights;⁹
- makes the list of prohibited discriminatory grounds an open list by including 'other status', in line with the wording of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights and Article 2 of the Universal Declaration on Human Rights.

Article 4. 6. "Transparency – The effective prevention of, preparedness for, and response to, pandemics depends on transparent and timely sharing of information, data and other elements at all levels, notably through a whole-of-government and whole-of-society approach, based on, and guided by, the best-available scientific evidence, consistent with national, regional and international privacy and data protection rules, regulations and laws."

It is fundamental that any sharing of information and data is done responsibly to avoid risks of abuses and harm to individuals and communities. The WHO policy on data sharing in the context of public health emergencies has articulated that security and confidentiality remain central pillars of any decision-making even within times of emergency.¹⁰

PI recommend that **Article 4(6)**

- clarifies that sharing of information and data needs to comply with the right to privacy and the standards of the protection of personal data.

⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en

¹⁰ WHO, Policy statement on data sharing by WHO in the context of public health emergencies, <https://apps.who.int/iris/handle/10665/254440>

Chapter III. Achieving equity in, for and through pandemic prevention, preparedness, response and recovery of health systems

Article 7. Access to technology: promoting sustainable and equitably distributed production and transfer of technology and know-how

This provision is central to the future treaty, given how important role technology (and the processing of data related to its use) plays and is likely to play in the prevention and response of pandemics. There are immense lessons to be learned from recent prior pandemics around the use of data and technology and in particular the impact they have on people and their rights.

Article 7(1) The Parties [shall]/[should] develop multilateral mechanisms, particularly during inter-pandemic times, that promote and provide relevant transfer of technology and know-how, in a manner consistent with international legal frameworks, to potential manufacturers in developing countries/all regions to increase and strengthen regional and global manufacturing capacity.

For this provision to address what learned from these lessons, we recommend that:

reference to "international legal frameworks" is further developed to require that Parties have publicly accessible, clear, precise, comprehensive and non- discriminatory legal frameworks to protect, promote and respect human rights and to regulate the use of data and technology.

Article 7 (2) Towards this end, each Party [shall]/[should]: (a) Strengthen local capacity, particularly in developing countries and regional groups, to manufacture pandemic response products through transfer of technology and know-how in order to ensure rapid and equitable access to adequate global supplies that meet surge demand, including by encouraging innovative options, by means that include: (iii) measures to encourage, incentivize, and facilitate participation of private-sector entities in voluntary transfer of technology and know-how through collaborative initiatives and multilateral mechanisms

PI has long documented the increased reliance on private companies to deliver public health services including in the context of the COVID 19 pandemic.¹¹ Examples included companies' involvement in developing contact tracing apps, without necessarily considering their impact on privacy/data protection, digital identity companies providing vaccination status identification tools, data analytics companies offering health data management solutions to countries across the globe, without any transparency regarding what those entailed and telecommunications companies entering into data

¹¹ See Privacy International, Covid-19 response: Corporate Exploitation, 8 April 2020. Available at: <https://privacyinternational.org/news-analysis/3592/covid-19-response-corporate-exploitation>

sharing agreements with public authorities or even third party analytics companies to enable tracking and location mapping.¹²

In light of these concerns, PI recommends that **Article 7(2)(a)(iii)**:

- clarifies that participation of private-sector entities are effectively regulated and that safeguards (such as transparency, adequate procurement process, accountability, oversight and redress) are in place to mitigate the risks of human rights harm.

Chapter IV. Strengthening and sustaining capacities for pandemic prevention, preparedness, response and recovery of health systems

Article 10. Strengthening and sustaining preparedness and health systems' resilience

Given the central role data and technology played in the response to the recent pandemics, it seems unavoidable that the treaty should consider and address the benefits and harms that such technologies entail.

In particular, PI noted how governments' responses to the COVID-19 pandemic have often been predicated on the introduction of new or poorly tested technologies and the exploitation of personal data, without human rights due diligence and effective enforcement of human rights obligations and with little consideration of how these technologies contributed (or not) to the resilience of the health system and its capacity to deliver health services to individuals and communities, in particular those in vulnerable positions.

PI recommends that **Article 10** includes provisions requiring states parties to:

- adopt a rights-based approach to the use and adoption of digital technologies in health which focuses on ensuring equity in access to care;
- carry out human rights impact assessments prior to the introduction of technologies in the health systems;
- adopt and assess their publicly accessible, clear, precise, comprehensive and non-discriminatory legal frameworks to protect, promote and respect human rights and to regulate the use of data and technology;

¹² See: PI's submission on the working draft of the WHO's Pandemic prevention, preparedness and response accord, 21 September 2022. Available at: <https://privacyinternational.org/advocacy/4957/pis-submission-working-draft-whos-pandemic-prevention-preparedness-and-response>

- undertake regular audits and evaluations of the use of technologies in the health system to assess and reflect on the impact it has on patients, in particular those from already marginalised communities, and make these audits public;
- ensure the respect and protection of the personal data processed by the health system, including by companies;

Chapter V. Pandemic prevention, preparedness, response and health system recovery coordination, collaboration, and cooperation

Article 16. Strengthening pandemic and public health literacy

PI shares the view that pandemic and health literacy is central to support efforts to prevent and respond to future pandemics. PI believes that efforts to address misinformation and disinformation (Article 16(2)(e)) should consider the ways in which information is distributed in social media platforms and via other digital means. In particular, profiling of individuals, including by exploiting personal data, has been linked to the spreading of misinformation and disinformation online.¹³

PI recommends that **Article 16**:

- requires states parties to adopt comprehensive data protection legislation and establish independent data protection authorities in order to contribute to addressing the spreading of pandemic and health disinformation.

Chapter VI. Financing

Article 18. Sustainable and predictable financing

Article 18 (2)(b) "Finance, through new or established international mechanisms, regional and global capacity-building for pandemic prevention, preparedness, response and recovery of health systems".

- PI recommends that financing mechanisms adopt rights-based decision-making processes and include requirements to undertake comprehensive Human Rights Due Diligence (HRDD). Building on observed shortcoming of existing financing mechanisms, we also recommend that these mechanisms integrate strong transparency and accountability mechanisms.

¹³ For some examples, see: <https://privacyinternational.org/examples/tracking-global-response-covid-19>