

Privacy International's comments on the Bureau's text of the WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response ("WHO CA+")

June 2023

Introduction

Privacy International (PI) notes the Bureau's text of the WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response ("WHO CA+").¹ PI has sought to closely follow and engage with the discussions leading up to the draft treaty, despite the significant limitations to civil society participation in the process.² In February 2023 we intervened during the briefing organised by the INB bureau and published our comments on the zero draft of the WHO CA+.³

PI reiterates its welcoming of the inclusion of a provision on confidentiality and privacy in Article 29. The inclusion of such provision reflects the importance that data protection and privacy plays in any effective, modern public health policies, including supporting the building of trust which is so fundamental in cooperation among states in this field.

¹ Available at: https://apps.who.int/gb/inb/pdf_files/inb5/A_INB5_6-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 at: <https://privacyinternational.org/advocacy/4838/pis-contribution-first-public-consultation-international-pandemic-treaty>

³ See: PI's comments on the zero draft of the WHO's Pandemic Treaty, 20 February 2023. Available at: <https://privacyinternational.org/advocacy/5035/pis-comments-zero-draft-whos-pandemic-treaty>

However, the Bureau's draft removes some important provisions contained in the zero draft (notably Article 14 on human rights) and fails to require effective regulation of the private-sector entities, including ensuring that safeguards (such as transparency, adequate procurement process, accountability, oversight and redress) are in place to mitigate the risks of human rights harm.

The following sections provide comments on specific provisions of draft Bureau's text of WHO CA+ and build upon observations previously made by PI.⁴

Reintroduce Article on protection of human rights

PI is concerned that the Bureau's draft has omitted the provision on human rights protection contained in Article 14 of the Zero Draft. PI recommends that this provision is reinstated and strengthened.

In particular, PI recommends that the human rights article:

- includes a recognition that human rights continue to apply during states of emergency as codified in the Siracusa Principles, including the principles of legality, necessity and proportionality;⁵
- is worded to reflect existing obligations under international human rights law by replacing "in accordance with their national laws" with "in accordance with international human rights law", given the obligation of all Member States to protect human rights without discrimination;

⁴ See: PI's submission on the conceptual zero draft, 29 November 2022. Available at: <https://privacyinternational.org/advocacy/4990/pis-analysis-conceptual-zero-draft-whos-pandemic-treaty>; and 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>

⁵ 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). Available at: <http://hrlibrary.umn.edu/instate/siracusaprinciples.html>

- spells out the obligations of states to protect against abuses by non-state actors, such as private companies.

Chapter I. Introduction

Article 1, Use of terms

(e) “pandemic-related products” means products that may be needed for pandemic prevention, preparedness, response and/or recovery, and which may include, without limitation, diagnostics, therapeutics, medicines, vaccines, personal protective equipment, syringes and oxygen;

While this definition is open-ended (“may include, without limitation,”) it does not list the use of technologies such as contact tracing, digital covid-19 vaccination status, which governments introduced often relying on untested or poorly tested technologies, including with the aim to track the spread of the virus.⁶ We have observed that the lack of human rights due diligence and effective enforcement of existing human rights obligations and responsibilities of governments and private entities led to short-sighted decision-making with little consideration of what is needed for an effective public health response and limited understanding of the impact on individuals and communities, in particular those in vulnerable positions.⁷ If such products/tools are to be used in the future they should be subject to the obligations and safeguards provided for in this Treaty in particular the Principles provided for in Article 3, Article 29 on Confidentiality and Data Protection, as well as others we are requesting be integrated into the treaty including with regards to regulating the role of the private sector, and the commitment to the protection, promotion and respect of human rights.

⁶ Privacy International, Fighting the Global Covid-19 Power Grab. Available at: <https://privacyinternational.org/campaigns/fighting-global-covid-19-power-grab>; Privacy International, Tracking the Global Response to Covid-19. Available at: <https://privacyinternational.org/examples/tracking-global-response-covid-19>

⁷ Privacy International, Tracking the Global Response to Covid-19: Migration and Covid-19. <https://privacyinternational.org/examples/migration-and-covid-19>

- PI recommends that the list of pandemic-related products provided in Article 1 (e) include reference to other types of products such as contact tracing and digital vaccination status to ensure that if they are to be used they are subject to the safeguards and obligations provided for and requested to be provided for under the Treaty.

(f) “persons in vulnerable situations” means individuals, groups, or communities with disproportionate increased risk of infection, severity or disease in the context of a pandemic;

While PI welcomes the recognition that certain individuals and communities can be disproportionately affected in the context of a pandemic, it recommends that this definition recognises non-health related factors and wider human rights considerations which may disproportionately expose certain individuals and communities to harms and threats during pandemic prevention, preparedness and response. Here we are referring to individuals and communities which are already subject to discrimination, unlawful surveillance and exclusion, and who are likely to be subject to heightened harms and risks in the context of a pandemic. There is ample evidence of how migrant and refugee populations⁸ were disproportionately affected by the Covid-19 pandemic, as well as members of the LGBTIQ+ community⁹ in terms of

⁸ See WHO, Promoting the health of refugees and migrants during COVID-19 pandemic. Available at: <https://www.who.int/activities/promoting-the-health-of-refugees-and-migrants-during-covid-19-pandemic>; Privacy International, Tracking the Global Response to Covid-19: Migration and Covid-19. <https://privacyinternational.org/examples/migration-and-covid-19>, and Privacy International, Covid-19 doesn't discriminate based on immigration status - nor should the Home Office, 25 March 2020. Available at: <https://privacyinternational.org/advocacy/3490/covid-19-doesnt-discriminate-based-immigration-status-nor-should-home-office>

⁹ See report to the UN General Assembly of the UN Independent Expert on protection against violence. Available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2F75%2F258&Language=E&DeviceType=Desktop&LangRequested=False>; Statement by human rights experts on the International Day against Homophobia, Transphobia and Biphobia, 17 May 2020. Available at: <https://www.ohchr.org/en/statements/2020/05/covid-19-suffering-and-resilience-lgbt-persons-must-be-visible->

access to healthcare but also limitations on their freedom of movement and ability to sustain their livelihood, amongst other curtailments.

- PI recommends that the definition of “*persons in vulnerable situations*” also include individuals and communities which are disproportionately exposed to harms and threats because of non-health related factors.

Article 3. General principles and approaches

- 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, including the right to the enjoyment of the highest attainable standard of health, and each Party shall protect and promote such rights and freedoms, with due regard to the need for specific measures to ensure non-discrimination, the respect for diversity, the promotion of gender equality and the protection of persons in vulnerable situations.*

Privacy International is concerned that the current wording of Article 3.1 does not reflect the existing obligations of states under international human rights law. Privacy International notes that the provision does not include the fundamental principle of non-discrimination, unlike the zero draft which had a dedicated provision on non-discrimination and respect for diversity. Further, noting that “Right to health” has been removed as a stand-alone principle (it was included in the zero draft of the treaty) and given the prominent role that the right to health ought to play in the context of pandemic prevention, preparedness and response (that is to say the central aim of the WHO CA+), it is important that this provision is further developed to include reference to all component of the right to health.

PI recommends that Article 3.1:

and-inform?LangID=E&NewsID=25884; and World Economic Forum, LGBTIQ people have been hit hard by COVID-19. Here's how we can provide support. Available at: <https://www.weforum.org/agenda/2020/07/covid-19-lgbtqi-our-response/>

- refers to respect, protect and fulfil human rights in its title to adequately cover the range of human rights obligations under applicable international law;
- includes reference to the obligation to respect, protect and fulfil human rights in accordance with the Universal Declaration of Human Rights and the core international human rights instruments;¹⁰
- includes the principle of non-discrimination, 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.
- includes reference to the 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;¹¹

5. Transparency –*The effective prevention of, preparedness for and response to pandemics depends on transparent, open and timely sharing, access to and disclosure of accurate information, data and other relevant elements that may come to light, for risk assessment, prevention and control measures, and development of pandemic-related products and services, including sales revenues, prices, units sold, marketing costs, and subsidies and incentives, consistent with national, regional and international privacy and data protection rules, regulations and laws.*

PI welcomes that the principle of transparency includes reference to 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

¹⁰ 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>

¹¹ 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

that security and confidentiality remain central pillars of any decision-making even within times of emergency.¹²

6. Accountability – *States are accountable for strengthening and sustaining their health systems' capacities and public health functions to provide adequate health and social measures by adopting and implementing legislative, executive, administrative and other measures for fair, equitable, effective and timely pandemic prevention, preparedness, response and recovery of health systems. States are accountable to provide specific measures to protect persons in vulnerable situations.*

While states have the primary responsibility to ensure the right to health, private actors play a central role in the health sectors and should be held accountable for abuses to peoples' rights.

PI recommends that the principle of accountability:

- includes reference to Member States' obligations to protect against abuses by non-state actors as well as companies' responsibility to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights.¹³

9. Inclusiveness – *The full and active engagement with, and participation of, representatives of communities and relevant stakeholders across all levels, consistent with relevant and applicable international and national guidelines, rules and regulations, including those relating to conflicts of interest, is essential to mobilize social capital, resources, adherence to public health and social measures, and to gain trust in government and partners supporting pandemic prevention, preparedness, response and health systems recovery.*

¹² WHO, Policy statement on data sharing by WHO in the context of public health emergencies, <https://apps.who.int/iris/handle/10665/254440>

¹³ See UN Guiding Principles on Business and Human Rights, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

PI welcomes this principle which recognizes the role that representatives of communities and a variety of stakeholders “across all levels” play in “in pandemic prevention, preparedness and response. PI recommends that this provision recognises specifically the role of civil society organisations. We are concerned that the failure to clearly articulate this will sustain the current situation whereby civil society has not been meaningfully integrated into national and global digital health policy- and decision-making processes. This clarification is essential given the skewed power dynamic that currently exist with representatives of communities and civil society having limited resources and leverage compared to other non-state actors such as industry. In particular, we encourage the recognition of the role that can be played by organisations and groups from disciplines who may not yet be involved in global health and health-related policymaking such as groups working at the intersection of human rights and technology.

Chapter II. The world together equitably: Achieving equity in, for and through pandemic prevention, preparedness, response and recovery of health systems

Article 8. Preparedness monitoring and functional reviews

Option 8.C: Parties propose to establish a universal health and preparedness review mechanism.

8. The Parties agree to establish a universal health and preparedness review mechanism, a regular intergovernmental dialogue among Member States that aims to promote collective global action and accountability for preparedness by bringing them together with stakeholders at the national, regional and global levels to comprehensively review their national health emergency preparedness capacities

We welcome the emphasis placed on sustained and ongoing monitoring and function reviews of policies, practices and mechanism put in place for preparedness.

In particular in relations to the proposed Option 8 (C), PI recommends that the envisaged universal health and preparedness review mechanism considers existing monitoring and

accountability mechanism provided for by human rights treaties, including the recommendations made by human rights monitoring mechanisms at the national, regional and international level.

- PI recommends that existing national and human rights human rights accountability, redress and monitoring mechanisms be utilised as part of monitoring efforts, including by the proposed universal health and preparedness review mechanism.

Article 14. Regulatory strengthening

PI reiterates its belief that the future treaty should seek to regulate the role of digital technologies (and the processing of data related to its use) introduced in the prevention of and responses to pandemics. Time and again our research has shown how the government reliance to technological ‘solutions’ to deal with the COVID-19 pandemic has not been accompanied by adequate regulation and robust human rights impact assessments. And in many instances, we have seen that existing safeguards undermined and not applied with States resorting to arbitrary and excessive exemptions to avoid having to comply with existing laws and regulations.

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.¹⁴

Further, PI has long documented the increased reliance on private companies to deliver public health services including in the context of the COVID 19 pandemic.¹⁵ Examples included companies’ involvement in developing contact tracing apps, without necessarily considering

¹⁴ For some examples, see: <https://privacyinternational.org/examples/tracking-global-response-covid-19>

¹⁵ See Privacy International, Covid-19 response: Corporate Exploitation, 8 April 2020. Available at: <https://privacyinternational.org/news-analysis/3592/covid-19-response-corporate-exploitation>

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 sharing agreements with public authorities or even third party analytics companies to enable tracking and location mapping.¹⁶

Considering these concerns, and the recommendation of the UN High Commissioner for Human Rights for “human rights should be at the heart of tech governance”, and the need to mitigate the harmful use of technologies¹⁷, PI recommends that Article 14 requires 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,
- ensure that these legal frameworks apply during states of emergency, and that any exceptions be clearly defined and prescribed by law, respect fundamental rights and freedoms, are necessary and proportionate, and are only applicable, where failure to do so prejudice the legitimate aim pursued ;
- adopt a rights-based approach to the use of digital technologies in the health sector which focuses on ensuring equity in access to care, and carry out human rights impact assessments prior to the introduction of technologies in the health systems;
- undertake regular audits and evaluations of the use of technologies in the health sector to assess and reflect on the impact it has on patients, in particular those from already marginalised communities, and make these audits public;
- ensure that the participation of private-sector entities in the efforts to prevent and address future pandemics 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.

¹⁶ 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>

¹⁷ UN High Commissioner for Human Rights, Human rights should be at the heart of tech governance, 1 September 2022. Available at: <https://www.ohchr.org/en/stories/2022/09/human-rights-should-be-heart-tech-governance>

Article 19. Financing

We have observed that funders have been funding and supporting a variety of digital programmes around the world in the health sector (and associated sectors including social protection), but few have integrated a robust due diligence approach towards ensuring that human rights are integrated within the decision-making processes including first whether to fund certain digital health programmes, and if there is a legitimate reason to ensure its design and implementation is guided by a clear articulation of the risks and the impact.

- 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.

Chapter III. Institutional arrangements and final provisions

Article 27. Relationship with other international agreements and instruments

Privacy International recommends that Article 27 includes the following provision:

- The provisions of the WHO CA+ shall be interpreted so as not to undermine the obligations of States under United Nations international human rights treaties.

Article 29. Confidentiality and data protection

Any exchange of data or information by the Parties pursuant to the WHO CA+ shall respect the right to privacy, including as such right is established under international law, and shall be consistent with each Party's national law and international obligations regarding confidentiality, privacy and data protection, as applicable.

PI strongly welcomes this provision which reflects the importance that data protection and privacy play in any effective, modern public health policies, including supporting the building of trust which is so fundamental in cooperation among states in this field.

The adoption and effective application of laws and regulations to regulate the processing of personal data is a key piece of the protection framework to protect people and their rights as it relates to the use of new technologies.¹⁸

Over 150 countries around the world have adopted data protection legislation¹⁹ and data protection principles have been recognised in a range of UN resolutions and reports by UN human rights experts and bodies.²⁰ It is important that the WHO CA+ recognises these developments and provide clear guidance on states.

- Privacy International recommends that the provision currently under Article 29 be moved higher up in the structure of the treaty to ensure to convey its importance and serves to remind States of their legal obligations in relations to the processing of personal data, and their protection of human rights, including the right to privacy.

¹⁸ See: UN Doc. HRI/GEN/1/Rev.9, General Comment No. 16: Article 17, para 10; UN Doc. A/HRC/17/27

¹⁹ See: Banisar, David, National Comprehensive Data Protection/Privacy Laws and Bills 2023, 28 January 2023. Available at: <https://ssrn.com/abstract=1951416> or <http://dx.doi.org/10.2139/ssrn.1951416>

²⁰ For relevant references, see Privacy International, Data Protection Guide (2019). Available at: <https://privacyinternational.org/data-protection-guide>. See also report of the UN Special Rapporteur on the right to privacy, UN Doc. A/77/196, 20 July 2022. Available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2F77%2F196&Language=E&DeviceType=Desktop&LangRequested=False>