

Privacy International’s comments on the REVISED Draft of the negotiating text of the WHO Pandemic Agreement

March 2024

Introduction

Privacy International (PI) notes the **REVISED Draft of the negotiating text of the WHO Pandemic Agreement** (Revised Draft, dated 13 March 2024).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 Pandemic Agreement.³

In PI’s view the Revised Draft is a significant step back to the already weakened previous draft. Among the many concerns that we highlight in this analysis, we are particularly dismayed by the deletion of a principle on privacy, data protection and confidentiality in Article 3. In all previous drafts, the inclusion of such provision reflected the importance that data protection and privacy plays in any effective, modern public health policies, including supporting the

¹ Text available here: https://apps.who.int/gb/inb/pdf_files/inb9/A_inb9_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 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>

building of trust which is so fundamental in cooperation among states in this field. Failing to keep a specific principle on privacy and data protection in the Revised Draft sends the wrong message to Members States and third parties by implying that the well documented abuses of data exploitation during recent pandemics (including COVID-19) are not an issue worth preventing and addressing in future pandemics.

Further the Revised Draft removes some important provisions contained in the zero draft⁴ (notably Article 14 on human rights) and continues to fail 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 Revised Draft and build upon observations previously made by PI.⁵

Chapter I. Introduction

Article 1. Use of terms

(g) “pandemic-related products” means products that are needed for pandemic prevention, preparedness and response, which may include, without limitation, diagnostics, therapeutics, vaccines and personal protective equipment;

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

⁴ Available at: https://apps.who.int/gb/inb/pdf_files/inb4/A_INB4_3-en.pdf

⁵ 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>

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 including specific provision on privacy, data protection and confidentiality.

- PI recommends that the list of pandemic-related products provided in Article 1 (g) 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.

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

PI regrets that the Revised Text fails to recognise that certain individuals, groups and communities can be disproportionately affected in the context of a pandemic, due to discrimination. For example, there is ample evidence of how migrant and refugee populations⁸

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>

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:

were disproportionately affected by the Covid-19 pandemic, as well as members of the LGBTIQ+ community⁹ in terms of 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*” reflects the text included in the February 2024 refined textual proposals of WHO CA+ to include vulnerability due to discrimination on the basis of race, colour, age, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3. Principles

PI regrets that the Principles listed in Article 3 of the Revised Draft no longer include some very important Principles that were included in previous drafts. There is no justification for failing to include those Principles other than convenience of simplifying the text in order to possibly reach agreement across delegations negotiating the treaty. However, these omissions would significantly undermine the capacity of this treaty to provide states with a framework to prevent and address future Pandemics in effective ways, without resorting to some of the shortcuts which ultimately contributed to some of the inefficiencies and human rights abuses documented in the response to Covid-19 and other recent pandemics.

In particular, we are concerned that:

<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&LangRequest-ed=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-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/>

Human Rights

The current wording of Article 3.1 fails to cover the whole scope of the existing obligation under international human rights law, namely to respect, protect, and fulfill human rights. It also omits previous language to protect non-discrimination and gender equality.

- PI recommends that Article 3.1 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 and includes the principles of non-discrimination and gender equality.¹⁰

PI is also concerned that the current draft omits the provision on human rights protection contained in Article 14 of the Zero Draft (A/INB/4/3, art. 14.) PI recommends that this provision be reinstated and strengthened.

In particular, PI recommends that a stand-alone human rights article be added and:

- include 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;¹¹
- be 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;
- spells out the obligations of states to protect against abuses by non-state actors, such as private companies.

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 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/instreet/siracusaprinciples.html>

Transparency

PI regrets that transparency is only mentioned, without an attempt to define its scope, in Principle 5, together with solidarity and accountability.

The previous draft correctly included reference to international privacy and data protection rules, regulations and laws to clarify the scope of the principle of transparency, in line with the WHO policy on data sharing in the context of public health emergencies which articulates that security and confidentiality remain central pillars of any decision-making even within times of emergency.¹²

- PI recommends that the Principle of Transparency included in the previous text is reinstated, to read: *“The effective prevention of, preparedness for and response to pandemics depends on the transparent, open and timely sharing of, 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 the research and development of pandemic-related products and services, including reports on 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.”*

Privacy, data protection and confidentiality

PI regrets that the Revised Draft omits the principle on Privacy, data protection and confidentiality. This principle was included in previous drafts (or as a stand-alone article) and its omission at this late stage of the negotiations is unwarranted and unjustified.

The adoption and effective application of laws and policies to regulate the processing of personal data is a key piece of the legal framework to protect people and their rights. Over 150 countries around the world have adopted data protection legislation¹³ and data protection

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 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416

principles have been recognised in a range of UN resolutions and reports by UN human rights experts and bodies.¹⁴

A principle on privacy in this treaty would affirm 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.

- PI recommends to reintroduce Privacy, data protection and confidentiality as a separate principle in Article 3, using the formulation included in the previous draft, namely: *“Implementation of this Agreement shall respect the right to privacy, including as such right is established under international law, and shall be consistent with each Party’s national laws and international obligations regarding confidentiality, privacy and data protection, as applicable”*.

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

Article 4. Pandemic prevention and public health surveillance

Echoing our comments elsewhere on the importance of recognising Member States’ existing obligations to promote, respect and protect human rights, and the importance of effectively regulating the use of new technologies in the health sector, including for pandemic prevention, preparedness and response, we would strongly recommend that this Article include under (4) a requirement that implementing the provisions in Article 4 shall be done “in accordance with relevant national law and international human rights law” and that this new sub-provision also make direct reference to the obligations of states to protect against abuses by non-state actors,

¹⁴ For relevant references, see Privacy International, Data Protection Guide, <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, <https://undocs.org/Home/Mobile?FinalSymbol=A%2F77%2F196&Language=E&DeviceType=Desktop&LangRequested=False>

such as private companies.

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

Article 11. 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.

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.¹⁵

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 technologies¹⁶, PI recommends that Article 11(1) includes provisions 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 transfer and use of data and technology;

¹⁵ For some examples, see: <https://privacyinternational.org/examples/tracking-global-response-covid-19>

¹⁶ 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>

- 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;
- Carry out human rights due diligence prior to using and transferring digital technologies in the health sector.

Article 14. Regulatory Systems 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.¹⁷ 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 has long documented the increased reliance on private companies to deliver public health services including in the context of the COVID 19 pandemic.¹⁸ 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

¹⁷ See: Privacy International, Analysing responses to Covid-19. Available at:

<https://privacyinternational.org/learning-resources/analysing-responses-covid-19>

¹⁸ See: Privacy International, Covid-19 response: Corporate Exploitation, 8 April 2020. Available at:

<https://privacyinternational.org/news-analysis/3592/covid-19-response-corporate-exploitation>

telecommunications companies entering into data sharing agreements with public authorities or even third party analytics companies to enable tracking and location mapping.¹⁹

Considering these concerns, PI recommends that Article 14 is significantly strengthened to require that Parties:

- 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.

Chapter III. Institutional and final provisions

Article 26. Relationship with other international agreements and instruments

Privacy International recommends that Article 26 includes the following provision:

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

¹⁹ 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>