

Civil Society Alliance for Human Rights in the Pandemic Treaty¹

Human Rights Concerns in Zero Draft of the WHO CA+

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In strengthening human rights law and standards in the development of the World Health Organization (WHO) convention, agreement or other international instrument on pandemic preparedness and response (CA+ or Pandemic Treaty), the Civil Society Alliance for Human Rights in the Pandemic Treaty (CSA) commends the efforts of the drafters in integrating human rights considerations at various points in the Zero Draft of the WHO CA+. However, we recognize that there are several additional opportunities for refinement of the CA+ from a human rights perspective. Such refinements and improvements, we argue, are necessary to further mainstream human rights throughout the Pandemic Treaty, whether by explicitly using language derived from international human rights law or by implicitly reflecting human rights norms and principles.

The [Zero Draft](#) of the Pandemic Treaty, to be revised by the Intergovernmental Negotiating Body (INB) of WHO Member States, provides a crucial opportunity to advance human rights in global health governance, responding

to human rights challenges in the COVID-19 response and establishing human rights obligations to meet future pandemic threats. This CSA analysis builds upon the existing text of the Zero Draft, and seeks to identify and analyze key priority revisions that will be necessary to strengthen human rights through INB negotiations. In developing this Draft, we draw substantially on previous CSA submissions to WHO Member States, including *10 Principles on Human Rights Principles for the Pandemic Treaty*² and *Why States Must Ensure Full, Meaningful and Effective Civil Society Participation in developing a Pandemic Treaty*³.

The succeeding pages highlight key human rights-related revisions to strengthen the Pandemic Treaty to further (1) the right to health, (2) international cooperation and solidarity, (3) the rights-based approach to health, (4) underlying determinants of health, and (5) limitations of human rights in public health responses. We hope this CSA analysis will provide a common basis for civil society advocacy and Member State negotiations.

¹ The CSA is an informal, open group of organizations and individual experts working to mainstream human rights considerations in the negotiations of the "Pandemic Treaty" and related processes in the field of governing health emergency and pandemic prevention, preparedness and response. Find more information [here](#) or [here](#). This analysis was drafted with the contribution of Kuyum Ahmed, Sara Leila Margaret Davis, Judith Bueno De Mesquita, Alessandro Figueroa, Giada Girelli, Roojin Habibi, Timothy Fish Hodgson, Seyed-Moeen Hosseinalipour, Safura Abdool Karim, Ashley Lim, Benjamin Mason Meier, Alessia Nicastro, and Adam Strobecko.

² Civil Society Alliance for Human Rights in the Pandemic Treaty, *10 Principles on Human Rights Principles for the Pandemic Treaty* (11 April 2022), available: <https://www.icj.org/wp-content/uploads/2022/04/11-April-2022-Human-Rights-Principles-for-a-Pandemic-Treaty-.pdf>

³ Civil Society Alliance for Human Rights in the Pandemic Treaty *Why States Must Ensure Full, Meaningful and Effective Civil Society Participation in developing a Pandemic Treaty* (11 April 2022), available: <https://icj2.wpenginepowered.com/wp-content/uploads/2022/04/11-April-2022-Final-Draft-Brief-on-Participation-1.pdf>.

HUMAN RIGHTS CONCERNS

The right to health in the Zero Draft draws primarily from the definition in the WHO Constitution, rather than the more recent International Covenant on Economic, Social and Cultural Rights (ICESCR), which codified “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. This right is also protected in various other international instruments widely acceded to by the vast majority of WHO Member States, including the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Civil and Political Rights.

According to the UN Committee on Economic, Social and Cultural Rights in General Comment 14 (2000), the ICESCR definition “provides the most comprehensive article on the right to health in international human rights law”, extending beyond the right to health care and encompassing underlying determinants of health, such as “food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment”.

PROPOSED REVISIONS**Article 4. Guiding principles and rights**

To achieve the objective of the WHO CA+ and to implement its provisions, the Parties will be guided, inter alia, by the principles and rights set out below:

*1. Respect, **protect, and fulfill human rights** – The implementation of the WHO CA+ shall **include the obligation to respect, protect and fulfill human rights and fundamental freedoms in accordance with international human rights law.***

*2. The right to health – The enjoyment of the highest attainable standard of **physical and mental health**, defined as **a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.** ~~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.~~*

HUMAN RIGHTS CONCERNS**Global Solidarity**

International human rights law obligates states to take steps, through individual and collective action, towards the full realization of human rights, including the right to health. The obligation to cooperate in solidarity with other states is commonly referred to as an obligation of “international assistance and cooperation” in various international instruments, including the International Covenant on Economic, Social and Cultural Right. The CA+ presents an opportunity to advance the obligations of international assistance and cooperation, including so-called “extraterritorial obligations” under the right to health, as an international legal basis for global solidarity.

PROPOSED REVISIONS**Preamble**

Add a paragraph to the Preamble (between items 5 and 6) noting that:

Recognizing that states are, in meeting legal standards relating to international cooperation and assistance, obligated to take all necessary steps, individually and collectively, to ensure the full realization of all human rights, including the right to health.

Article 4. Guiding principles and rights

5. Solidarity – The effective prevention of, preparedness for and response to pandemics requires national, international, multilateral, bilateral and multisectoral collaboration, coordination and cooperation, through global unity, to promote realization of the right to health, prevent third parties from undermining the right to health in other countries, and achieve the common interest of a fairer, more equitable and better prepared world.

International Obligations

HUMAN RIGHTS CONCERNS

Intellectual Property

The current language of the Zero Draft emphasizes the Doha declaration and the TRIPS agreement as the exclusive basis for delineating the extent to which IP rights may be limited during pandemics. It does so to the exclusion of other international sources that are legally binding on the vast majority of WHO Member States – international human rights treaties. Where international legal sources must be interpreted together, as far as possible, as a single coherent system, WTO treaties (such as TRIPS), WHO treaties (such as the CA+), and international human rights treaties must be read together.

The experience of the TRIPS Waiver sought during the COVID-19 pandemic demonstrates the insufficiency of the Doha Declaration and the unwillingness of the WTO to limit IP rights, even in public health emergencies. The language of the preamble of the Zero Draft places the Pandemic Treaty as secondary, subordinate and supplementary to the existing regime of the WTO, implying that this treaty will not disturb the existing WTO regimes, which have proven to hinder access to novel vaccines.

PROPOSED REVISIONS

Paragraphs 37-44 of the preamble can be replaced with the two streamlined paragraphs:

“Recognizing that the Doha Declaration, interpreted in the context of international legal obligations to ensure access to medicines, diagnostics, treatments and technologies, recognises the need to limit intellectual property rights in public health emergencies”

and

“Recognizing that there is a need to reform international trade arrangements to correct and prevent the gross inequities in accessing health technologies critical to preventing and controlling pandemics”

HUMAN RIGHTS CONCERNS**Access to Technology**

The Zero Draft refers to transfers of technology as a matter of strengthening and developing innovative multilateral mechanisms that promote and incentivize transfer of technology and know-how for production of pandemic-related products, on mutually agreed terms, to capable manufacturers in low-income countries; however, this language is based on a one-directional notion of the technology transfer, without addressing the inequities which underlie the existing models of knowledge production and access to technology that are necessary to ensure the protection of the right to life and attainment of the right to the highest attainable standard of health. The Pandemic Treaty text would thus benefit from including concrete commitments with regard to technology co-development and mutual capacity building.

PROPOSED REVISIONS

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

*1. The Parties recognize that inequitable access to pandemic-related products (including but not limited to vaccines, therapeutics and diagnostics) should be addressed, **among other means**, by increased manufacturing capacity that is more equitably, geographically and strategically distributed.*

*2. The Parties, working through the Governing Body for the WHO CA+, shall strengthen existing and develop innovative multilateral mechanisms that promote and incentivize relevant transfer of technology and know-how for production of pandemic-related products, on mutually agreed terms, to capable manufacturers, particularly in developing countries. **The Parties shall take full account of the specific needs and special situation of the least developed countries in their actions with regard to the establishment and funding of the new innovative multilateral mechanisms.***

HUMAN RIGHTS CONCERNS**Access and Benefit Sharing**

It remains unclear whether *Pathogen Access and Benefit-Sharing System (PABS)* is to be established as part of CA+ or separately under the WHO Constitution, and it remains unclear how such a system would operate in practice, how it would relate to other international obligations in this area, and how it would be financed.

PROPOSED REVISIONS

Article 10. WHO Pathogen Access and Benefit-Sharing System (PABS)

Add a new paragraph under the section of Art. 10(3) to ensure fair and equitable benefit-sharing:

The Parties agree to establish the PABS Benefits Committee. The Benefits Committee would ensure representation of different categories of stakeholders in the PABS system: researchers, database managers and private innovators, particularly from developing countries. The Benefits Committee would produce bi-annual reports concerning the needs of different stakeholders and deliver policy-relevant and actionable conclusions regarding the role of PABS System in addressing these needs.

Rights-Based Approach to Health

HUMAN RIGHTS CONCERNS

Non-Discrimination and Equality

Non-discrimination provisions in the Zero Draft are narrow, and less encompassing than the protected grounds recognized under human rights law (e.g., gender equality language does not recognize transgender and non-binary people) and while the Zero Draft acknowledges different vulnerable groups, it does not mention the synergistic effect of intersectionality (as intersectionality is never mentioned).

PROPOSED REVISIONS

Preamble

*3. Recognizing that all lives have equal value, and that therefore equity should be a principle, an indicator and an outcome of pandemic prevention, preparedness and response, **with particular reference to access to pandemic products (drugs, vaccines, and diagnostics) in accordance with the right to health.***

Article 4. Guiding principles and rights

*4. Equity... Effective pandemic prevention, preparedness, response and recovery cannot be achieved without political will and commitments in addressing the structural challenges **in access to fair, equitable, and timely pandemic-related products and services, primary healthcare and other essential health related services...***

*11. Gender equality – Pandemic prevention, preparedness, response and recovery of health systems will be guided by and benefit from the principle of gender equality and the goal of equal participation and leadership of men and women in decision-making with a particular focus on gender equality, taking into account the specific needs of ~~all women and girls~~ **all persons, regardless of their gender identity and orientation**, using a country-driven, gender responsive/transformative, **intersectional**, participatory and fully transparent approach.*

*12. Non-discrimination and respect for diversity – All individuals should have fair, equitable and timely access to pandemic-related products, health services and support, without fear of discrimination or distinction or **persecution** based on ~~race, religion, political belief, economic or social condition~~ **race, colour, gender, sex, language, religion, political or other opinion, national or social origin, property, birth and other status.***

HUMAN RIGHTS CONCERNS**Participation**

Participation is essential for the realization of all human rights, as well as a democratic society and the rule of law. For vulnerable groups, such as indigenous people, to end marginalization and discrimination, it is crucial that everyone has the right to participate in political and public life, which generally leads to institutional representation. The latter is fundamental to inform laws and measures that respect and fulfill the needs of all persons, without discrimination.

Ultimately, participation ensures recognition in the public space. The right to participate in society enables people to carry out their social obligations and publicly express their opinions to mobilize, thereby influencing the political processes.

PROPOSED REVISIONS**Article 15. Global coordination, collaboration and cooperation**

*(c) develop, as necessary, and implement global policies, **with direct participation of affected persons and community-led organizations**, that recognize the specific needs, and ensure the protection of, persons in vulnerable situations, indigenous peoples, and those living in fragile environments or areas, such as Small Island Developing States, who face multiple threats simultaneously, by gathering and analysing data, including data disaggregated by gender, to show the impact of policies on different groups;*

Rights-Based Approach to Health

HUMAN RIGHTS CONCERNS

Accountability

Accountability is a key principle of the rights-based approach to health because it recognizes states and other actors as duty-bearers, and allows victims of human rights violations to bring a claim for redress. States may be held accountable for their failure to fulfill legal - not just moral - obligations.

In order to advance human rights, public institutions must contribute, on both the national and international level, to hold states and other actors accountable. Since the right to health is a right of progressive realization, accountability mechanisms are particularly relevant, as they enable an assessment of realization over time.

PROPOSED REVISIONS

Article 13. Preparedness monitoring, simulation exercises and universal peer review

1. Each Party shall undertake regular and systematic capacity assessments in order to identify capacity gaps and develop and implement comprehensive, inclusive, multisectoral national plans and strategies for pandemic prevention, preparedness and response, based on relevant tools developed by WHO and considering recommendations, provided by human rights monitoring mechanisms, especially in relation to the right to health.

Article 14. Human Rights

(b) ~~shall endeavor to~~ develop an independent and inclusive advisory committee to advise the government on the national implementation of the present instrument, with particular attention to human rights protections during public health emergencies, including on the development and implementation of its legal and policy framework, and any other measures that may be needed to protect human rights.

Underlying Determinants of Health

HUMAN RIGHTS CONCERNS

The Zero Draft recognizes underlying determinants of health, in both the preamble and article 14; however, there remains a need to link these underlying determinants to human rights imperatives.

Many underlying determinants of health are linked to distinct human rights that impose independent legal duties on states. By recognizing these human rights links, the Pandemic Treaty can leverage these pre-existing human rights obligations to create obligations on states to progressively realize the right to health as well as human rights to underlying determinants of health.

PROPOSED REVISIONS

Preamble

*10. Recognizing that the threat of pandemics is a reality and that pandemics have catastrophic health, social, economic, ~~and~~ political **and human rights** consequences, especially for persons in vulnerable situations, pandemic prevention, preparedness, response and recovery of health systems must be systemically integrated into whole-of-government and whole-of-society approaches, to ensure adequate political commitment, resourcing and attention across sectors **and to the progressive realization of human rights obligations under the right to health and human rights to underlying determinants of health,** and thereby break the cycle of “panic and neglect”,*

Article 14. Human Rights

(ii) all protections of rights, including but not limited to, provision of health services ~~and as well as the human rights obligations underpinning and underlying determinants of health such as the rights to social security, work protection—programmes, water, sanitation, shelter, and food, and education are non-discriminatory~~ and take into account the needs of people at high risk and persons in vulnerable situations

Article 16. Whole-of-government and whole-of-society approaches at the national level

Article 16 puts forth the provision that there should be a whole-of-government and whole-of-society approach at the national level. It cites the importance that pandemic prevention, preparedness, and resource prioritizes the environmental, social, and economic determinants of health, **and the States’ duties to ensure the progressive realization of human rights obligations in this regard.** The provision calls for members to “mitigate the socioeconomic impacts of pandemics...”

Limitations of Human Rights

HUMAN RIGHTS CONCERNS

There are clear standards that have been developed under human rights law for permissible limitations of or derogations from human rights, which include that such limitations or derogations must be:

1. Provided for and carried out in accordance with the law;
2. Based on scientific evidence;
3. Directed toward a legitimate objective;
4. Strictly necessary in a democratic society;
5. The least intrusive and restrictive means available;
6. Neither arbitrary nor discriminatory in application;
7. Of limited duration; and
8. Subject to review.

Beyond this recognition of human rights derogation standards, it is necessary to clarify the specific application of human rights to ensure consistency with international law. To this effect, it is necessary to delineate human rights into various sub-articles, including:

14(1): slightly altered from the original and indicating the requirement for compliance with international law rather than measures consistent with existing domestic law (which in the COVID-19 pandemic were often inadequate).

14(2)(a): the original list of (i)-(iii) has been adapted and replaced with the generally recognized set of non-exhaustive factors for valid and lawful limitation/derogation from rights.

14(2)(b): A reworking of existing text in the list provided in the Draft in 14(2)(a)(i)-(iii) to highlight that international law requires non-discrimination in light of substantive equality, which requires taking into account and preventing discrimination as well as prioritizing - or taking special measures - to alleviate/prevent such discrimination.

14(2)(c): a minor revision of existing sub-provision in the list of 14(2)(c)(i)-(iii), which speaks directly to some of the major concerns individuals will face in future pandemics (including "lockdowns" to acknowledge the legal and colloquial language used in many countries, which "quarantines" does not cover).

Article 14(2)(d) is a necessary inclusion to deal with a critical issue - access to justice and effective remedies for alleged violations perpetrated during periods of rights limitation/derogation. This is an accepted standard in international law and necessary in emergency contexts in which judicial remedies are not available.

Article 14(2)(e) is a minor revision of an existing sub-provision in the list of 14(2)(c)(i)-(iii) to ensure consistency with international requirements on participation.

Limitations of Human Rights

PROPOSED REVISIONS

Preamble

8. Recalling the International Health Regulations of the World Health Organization and the role of States Parties and other stakeholders in preventing, protecting against, controlling and providing a public health response to the international spread of disease in ways that are **compliant with the principles of necessity, proportionality and legality**, commensurate with, and restricted to, public health risks, and which avoid unnecessary interference with international traffic, trade, **and human rights**,

Article 4. Guiding principles and rights

18. Proportionality – Due consideration should be given, including through regular monitoring and policy evaluation, to ensuring that the impacts of measures aimed at preventing, preparing for and responding to pandemics are proportionate to their intended objectives and that the benefits arising therefrom outweigh costs.

Article 14. Protection of human rights

1. The Parties shall **take legislative and other measures to**, ~~in accordance with their national laws, incorporate prevent discrimination and protect equality non-discriminatory measures to protect human rights as part of their pandemic prevention, preparedness, response and recovery, with a particular emphasis on the rights of persons in vulnerable situations.~~

2. Towards this end, each Party shall:

(a) incorporate into its laws and policies human rights protections during **which should apply to situations in which states take action to prevent, prepare for or respond to public health emergencies, including by ensuring that limitations or derogations of human rights during public health emergencies must be:**

- (i) **provided for and carried out in accordance with the law;**
- (ii) **based on scientific evidence;**
- (iii) **directed toward the legitimate objective of protecting public health;**
- (iv) **strictly necessary in a democratic society;**
- (v) **the least intrusive and restrictive means available to protect public health;**
- (vi) **neither arbitrary nor discriminatory in application;**
- (vii) **of limited duration; and**
- (viii) **subject to review.**

(b) **ensure that all measures taken that limit or derogate human rights in the context of a public health emergency, including but not limited to, provision of health services and social protection programmes, are non-discriminatory and take into account and prioritize the needs of people at high risk and persons in vulnerable situations;**

(c) **ensure that** people living under any restrictions on the freedom of movement, such as quarantines, lockdowns and isolations:

- (i) have sufficient access to **all necessary medication, health services, products, and technologies;**
- (ii) **have sufficient access to all and other necessities essential to maintain and protect their lives and livelihoods, in compliance with the right to an adequate standard of living. and rights.**

(d) **Ensure that people retain, at all times, meaningful access to justice and effective remedies, including for alleged violations of rights perpetrated in the context of public health emergencies. Such remedies must include judicial remedies.**

(e) ~~endeavour to~~ **shall** develop an independent and inclusive advisory committee, **with participation from non-state representatives including community-led organizations**, to advise the government on human rights protections during public health emergencies, including on the development and implementation of its legal and policy framework, and any other measures that may be needed **or taken to protect human rights in the context of public health emergencies.**