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JOINT PUBLIC STATEMENT:
THE PANDEMIC TREATY ZERO DRAFT MISSES THE MARK ON HUMAN RIGHTS

Amnesty International, the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Human Rights Watch (HRW), and the International Commission of Jurists (ICJ) express serious concern that human rights are not adequately reflected in the negotiations underway around the Pandemic Treaty and human rights are not adequately protected in the substance of the latest draft of the Pandemic Treaty.

The organizations are calling on the Intergovernmental Negotiating Body (INB) to urgently revisit the process by which the Treaty is being drafted, to ensure effective and meaningful participation by all stakeholders (including by those who face obstacles, especially due to power imbalances), and to revise its provisions to make them fully consistent with States' obligations and companies' responsibilities regarding human rights.

A process to negotiate a new international instrument on pandemic prevention, preparedness and response is underway (the "Pandemic Treaty"). The Intergovernmental Negotiating Body (INB), open to all World Health Organization (WHO) Member States, will be meeting in Geneva from 27 February to 3 March to discuss the Zero Draft of this proposed instrument, which was made public earlier this month.

The Covid-19 pandemic exposed how human rights protections are indispensable for just and effective pandemic prevention, preparedness and response. However, the Zero Draft does not adequately protect human rights in the context of future public health emergencies. An overview of our major concerns around the lack of adequate human rights protections in the Zero Draft is outlined below, including a few selected suggestions on specific text.

1. Participation and accountability

Under international human rights law and standards, the right to health encompasses the effective and meaningful participation of the population in all health-related decision-making at the community, national and international levels,[1] and human rights standards make clear that the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy.[2] The principle of accountability is also crucial for the realization of the right to health,[3] and needs to be embedded in the Zero Draft.

As it currently stands, the Zero Draft provides limited guidance on holding States accountable for their international obligations. Instead, the Governing Body of the accord would only decide on details of the accountability measures once the accord is implemented, which is of concern, given that a robust accountability framework is essential to ensure the success and realization of the Pandemic Treaty.

[1] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, UN Doc. E/C.12/2000/4, para. 11.
[2] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, UN Doc. E/C.12/2000/4, para. 54.
[3] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, UN Doc. E/C.12/2000/4, paras 59-62.

Genuine participation by and consultation with affected groups and civil society organizations should be incorporated in all aspects of pandemic preparedness and response, including the process by which this treaty is being drafted. While the Zero Draft mentions inclusiveness and community engagement in its Guiding Principles, there presently are limited official channels for community or civil society participation at this stage of the instrument's development. Civil society has repeatedly raised concerns that this instrument is being developed without effective and meaningful civil society participation and historically marginalized groups that are likely to be disproportionately affected by its content.[4] It is crucial that this process is urgently reconsidered, and that the process provide transparent and accessible opportunities for all affected stakeholders to contribute to its development, taking into consideration inherent imbalances of power.

2. The Right to Health and social determinants of health

The Covid-19 pandemic underscored the importance of the social determinants of health and the protection of all human rights, especially economic and social rights. People's access to adequate nutrition, housing, and social protection, for example, were key to ensuring their ability and willingness to follow public health guidance. Groups without adequate access to key underlying determinants of health have been marginalized historically and presently; people among these groups were among the worst affected. Furthermore, the Covid-19 pandemic and States' responses to it also underscored the linkages between health and other social sectors: the pandemic profoundly impacted people's livelihoods, often deepening inequalities and raising the incidence of poverty.

While the Zero Draft mentions the underlying determinants of health, it does not provide enough clarity as to the measures that must be taken to effectively protect them in pandemic prevention, preparedness, and response. The elements forming the content of the right to health necessarily include the determinants of health, as repeatedly affirmed by the Committee on Economic, Social and Cultural Rights (CESCR), including in its General Comment 14 on the right to the highest attainable standard of health. In addition, provisions on financing should also cover social systems that guarantee key determinants of health; and provisions on non-discrimination and equality should extend to access to key determinants of health, ranging from social protection to health services. Furthermore, many determinants of health are also internationally protected human rights (including rights to housing, work, social security, food, education, water and sanitation), which should be reflected in the instrument. The instrument's reference to "human rights" should explicitly include certain rights in Article 4(1), and in particular the text should reference the rights to housing, social security and an adequate standard of living. Article 2 should also reference States' human rights obligations while discussing their relationship with international agreements and instruments.

Article 4(1) of the instrument should also include States' human rights obligations in building well-coordinated public healthcare systems to effectively respond to pandemics. This is grounded in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires States to progressively build universal health systems for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases."[5] In this context, the CESCR recently affirmed in a statement on

[4] See, for example: Harm Reduction International, "OHCHR and Civil Society International Participation in the negotiations of the new 'Pandemic Treaty'", March 2022 - Joint Open Letter, available at: hri.global/files/2022/03/09/Letter_to_HC_on_Pandemic_Treaty_FINAL_2.pdf; The 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", April 2022, available at: static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/62557ab11dcdf7231b939fa1/1649769137328/%5B11+April+2022%5D+Final+Draft%2C+Brief+on+Participation.pdf

[5] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR) Article 12 and General Comment 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, see, for example, paras 11, 43 (f) and 54.

the Covid-19 pandemic that States must adopt appropriate regulatory measures to ensure that healthcare resources in 'both the public and the private sectors are mobilized and shared among the whole population to ensure a comprehensive, coordinated healthcare response to the crisis."[6] We thus propose that wording is added to Article 4(2) to the effect that States must progressively build rights-aligned, universal and well-coordinated public healthcare systems that are able to effectively prevent, prepare for and respond to public health emergencies.

3. The Right to Benefit from Scientific Progress and its Application in the context of medical knowledge sharing and technology transfer

While the Zero Draft states that human rights and the right to health in particular guide this document, the draft fails to acknowledge the importance of the right to enjoy the benefits of scientific progress and its applications, established in both Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15 of the ICESCR. Furthermore, it is key to ensure access to medical technologies such as diagnostics, treatments and vaccines which can play a crucial role in addressing pandemics. This right, and States' obligations to guarantee it without discrimination, are further detailed in General Comment 25 on science and economic, social and cultural rights (article 15(1)(b), (2), (3) and (4) of the ICESCR) from the CESCR.[7] Human rights standards clearly establish that scientific progress must be available, accessible, acceptable and of good quality to all individuals and communities. To this end, States must take steps to invest in science[4] and all people should have equal access to the applications of scientific progress without discrimination and these must be affordable.[6] This is particularly relevant for disadvantaged and marginalized groups that may have limited or no access to these tools.[7]

Article 7 of the Zero Draft addresses the importance of knowledge and technology transfer in ensuring fair and timely access to health products, but it fails to establish obligations to discharge these functions in line with international human rights law and standards. Vague language such as "strengthen", "promote", "incentivize", "encourage", "facilitate", or "support" dilute the obligation that States have to ensure that intellectual property rights do not constitute a barrier to the right to health and the right to science, especially during a public health emergency. The preamble also emphasizes States' rights to implement waivers and other limitations of intellectual property rights instead of identifying the instances where they have an obligation to remove barriers of access under international law, construed as a coherent whole.[8]

4. Equality and non-discrimination

The rights to equality, equal protection, and non-discrimination are guaranteed in a range of international instruments, and expressly apply to all State action under the Article 26 of the International Covenant on Civil and Political Rights (ICCPR). The Covid-19 pandemic had a particular and often more severe, impact on specific groups that have been historically and systematically marginalized and face long-standing and intersectional discrimination. Differential impact has resulted from discrimination and neglect preceding and during the pandemic, combined with the often punitive approaches adopted by States to enforce measures purportedly instituted to protect public health, including by resorting heavily to law enforcement and criminalizing non-compliance with lockdown measures. These approaches had a disproportionate impact on

[6] CESCR, "Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social, and Cultural Rights", 17 April 2020, E/C.12/2020/1.
[7] General Comment 25 (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), 30 April 2020, E/C.12/GC/25.
[8] International Commission of Jurists, "Expert Legal Opinion: Human Rights Obligations of States to not impede the Proposed COVID-19 TRIPS Waiver", November 2021, www.icj.org/wp-content/uploads/2021/11/Human-Rights-Obligations-States-Proposed-COVID-19-TRIPS-Waiver.pdf

persons from marginalized groups, whose needs often were not taken into account, or inadequately so, while designing responses to protect people during the pandemic.

We welcome the provisions in the Zero Draft that reflect the importance of protecting marginalized groups. However, it is important for these provisions to be strengthened to ensure that no one is left behind. Definitions of "persons in vulnerable situations" and "individuals and groups at higher risk" should include people facing discrimination due to their sexual orientation and gender identity or expression, sex workers, people who use drugs, people living in poverty, and people who are homeless, as well as people who are discriminated against on any other prohibited ground. The Zero Draft should explicitly acknowledge the need to address multiple and intersecting forms of discrimination, and the obligation to put in place positive measures to ensure these groups can fully access their rights.

Similarly, while we acknowledge the important emphasis placed on equity throughout the Zero Draft, we emphasize that this framing should be based on the principle of substantive equality, which entails the need for special measures to proactively ensure the protection of the rights of marginalized and disadvantaged persons and groups during pandemic prevention, preparation and response.

5. Human Rights in public health responses

During pandemics, States often put in place measures to protect public health that risk limiting or restricting human rights, such as restrictions on freedom of movement and freedom of assembly protected under the ICCPR, including quarantines, travel bans, prohibitions of large meetings, and 'lockdowns'. Under international human rights law, such restrictions must be provided by law, which must be formulated with sufficient precision to enable an individual to regulate their conduct accordingly. They must be imposed only for such legitimate purposes such as protecting the rights of others, public health, public order or national security. Any restrictive measure must also be demonstrably necessary to such purposes and proportionate, that is the least restrictive measure to achieve the specified purpose. Any restriction must comply with the principle of equality and non-discrimination. In time of an officially proclaimed state of emergency threatening the life of the nation, any derogation must be exceptional and temporary, limited to what is strictly required by the exigencies of the emergency situation. States must also ensure that derogations are not imposed on rights that cannot be derogated from even in the exceptional and temporary circumstances of a state of emergency.[9]

Principle 18 and Article 14 of the Zero Draft seek to address this, but do so in an incomplete manner. While Article 14 includes the incorporation of non-discriminatory measures to protect human rights, this provision is limited to "national laws". Article 14 also fails to comprehensively address the limits put by international human rights law with regards to the scope of potential limitations imposed during a state of emergency. It is therefore essential that international human rights standards be incorporated into non-discriminatory measures to ensure States' compliance with international obligations, which are binding. The Zero Draft also should explicitly incorporate the necessary safeguards required under international human rights law when declaring a state of emergency, including to limit the restrictions to the extent strictly required by the exigencies of the situation relating to the duration, geographical coverage and material scope.

All relevant safeguards under international law must be adhered to when declaring a state of emergency, including the need to issue an official proclamation and its international notification with full information about the measures taken and a clear explanation of the reasons; that it must be temporary and subject to

[9] UN Human Rights Committee (HRC), CCPR General Comment 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: refworld.org/docid/453883fd1f.html.

periodic and genuine review before any extension; and to narrow down any derogations of human rights to those for which this is actually allowed under international law and strictly necessary in the situation. The Zero Draft should also clarify that any measures to protect public health in the context of pandemics must comply with the principles of necessity, proportionality and legality, and be designed and implemented in a non-discriminatory manner. States must enable and support people to adhere to public health measures and accompany any such measures with safeguards to mitigate any disproportionate effects that they may have on persons from marginalized groups. Any such measure must be based on the best available evidence and aimed to fulfil the right to the highest attainable standard of health. The coercive enforcement of measures to protect public health, including through the use of criminal law, should be considered only as a last resort.

6. International assistance and cooperation

States have an obligation to work together to respond to a pandemic, as reflected in the UN Charter and the ICESCR, to realize human rights through international cooperation. In the context of Covid-19, the CESCR has underscored that States must combat pandemics in a manner consistent with human rights, which includes meeting their extraterritorial obligations to support other States to fulfil their duties.[8] In the words of the CESCR, "mechanisms to facilitate national and international cooperation and solidarity, and substantial investments in the institutions and programmes necessary for the realization of economic, social and cultural rights, will ensure that the world is better prepared for future pandemics and disasters."[9]

While this obligation applies generally, the Zero Draft should include a specific acknowledgement that States must cooperate globally to ensure that safe and effective health products are developed in a timely manner, manufactured in sufficient quantities at affordable prices, and distributed fairly across and within countries to achieve broad, non-discriminatory coverage around the globe. For instance, while Article 9 makes it "compulsory" for manufacturers that receive public funding to disclose prices and contractual terms for pandemic-related products, this provision is subject to "the extent of the public funding received." Furthermore, the same Article only goes as far as "encouraging" manufacturers to disclose prices when they receive "other funds". These provisions limit accountability and transparency of pharmaceutical manufacturers, thereby impeding international assistance.

The Zero Draft should frame actions around international assistance and cooperation in the language of obligations, which is not always the case. For example, Article 11(2) only "encourages" States to support others, instead of reflecting their human rights obligation to provide financial and technical support to uphold the right to health, especially in the face of the international spread of disease. This may include the sharing of research, knowledge, medical equipment and supplies, as well as coordinated action to reduce the negative economic and social impacts of the crisis and promote economic recovery endeavours by all States.[10] Similarly, Article 19(1)(d) should ensure that any recommended or required percentage of GDP for international assistance and cooperation recognizes that States with access to more resources (for example, health products) should provide more assistance where possible.

7. Health and essential workers

Health and other essential workers across the world faced enormous challenges in doing their jobs during the Covid-19 pandemic, and governments failed to protect them in many ways. Health and other essential workers were highly exposed to the virus, and experienced high rates of illness and death as a result, with certain groups being disproportionately affected. They were often not able to access adequate protective equipment. Many experienced challenges around remuneration and compensation, high workloads and associated anxiety and stress. In several countries, instead of being supported, health and essential workers

faced reprisals from the state and from their employers for speaking out about their working conditions or for criticizing the authorities' response to the pandemic. Health and essential workers were also subjected to social stigma and acts of violence from members of society because of the jobs they performed. While many of these concerns have been thrown into sharp focus in the context of the pandemic, they often reflect long-standing structural issues that have affected health and social systems for years.[10]

We welcome the Zero Draft's provisions on protecting health workers. Article 12 of the Zero Draft should also reference international protections for workers contained in human rights law and in the conventions and recommendations of the International Labour Organization. It should include protections from violence and stigma while doing their jobs and retaliation for raising concerns or exposing wrongdoing; and these protections should also be guaranteed for other essential workers engaged in pandemic prevention, preparedness, and response.

8. Private actors in healthcare and the right to health

CESCR warned that "decades of underinvestment in public health services and other social programmes" resulted in these programmes being "ill equipped to respond effectively and expeditiously to the intensity of the current pandemic."[11] It also recommended that States "adopt appropriate regulatory measures to ensure that health-care resources in both the public and the private sectors are mobilized and shared among the whole population to ensure a comprehensive, coordinated health-care response to the crisis."

The Zero Draft should include a human rights framework on strictly monitoring and regulating private actors in healthcare, as well as preventing any harmful impact of private actors' involvement in healthcare on States' capacity to effectively respond to pandemics.[12] This requires States take measures to protect the right to health when a third party is involved; ensure that any private involvement in healthcare does not undermine the accessibility, availability, acceptability and quality of healthcare; assess privatization plans and ensure that they do not interfere with the fulfilment of the right to health at the maximum of their available resources; ensure that healthcare privatization does not reduce the level of the enjoyment of the right previously granted; strictly regulate and monitor private healthcare actors.[13] In particular, when private actors provide services in areas where the public sector has been strong, they should be "subject to strict regulations that impose on them so-called 'public services obligations': (…) private healthcare providers should be prohibited from denying access to affordable and adequate services, treatments or information."[13]

We therefore propose that, in Article 4 - Guiding Principles and Rights, wording is included on States' obligations to strictly monitor and regulate private actors in healthcare, such as: "States are obliged to strictly monitor and regulate private actors when they are involved in financing and delivery of healthcare, ensuring that all their operations contribute to the full realization of the right to health. States also bear an obligation to conduct ex-ante and post-facto human rights impact assessments to ensure that participation of private actors in healthcare does not impinge on the right to health and does not diminish the level of the right previously enjoyed."

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[10] Amnesty International, "COVID-19: Health worker death toll rises to at least 17000 as organizations call for rapid vaccine rollout", 5 March 2021, amnesty.org/en/latest/press-release/2021/03/covid19-health-worker-death-toll-rises-to-at-least-17000-as-organizations-call-for-rapid-vaccine-rollout/

[11] CESCR "Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social, and Cultural Rights", 17 April 2020, E/C.12/2020/1.

[12] GI-ESCR, "Compendium on United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare", June 2021.

[13] CESCR, General Comment 24: State obligations under the ICESCR in the context of business activities, 10 August 2017, E/C.12/GC/24.