

By a special resolution issued by the World Health Assembly on 31 May 2021, WHO member states decided to “convene a special session ... in November 2021 ... dedicated to considering the benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness”. Ahead of this extraordinary special session, this draft document, prepared by ICJ and GHLC in consultation with an expanding group of experts, researchers and civil society organizations, is intended to begin shaping a position from a human rights perspective on key principles that should guide the drafting of a Pandemic Treaty. It is intended to inform the development of collective human rights advocacy ahead of the special session of the WHA in November 2021.

[WORKING DRAFT] HUMAN RIGHTS PRINCIPLES FOR A PANDEMIC TREATY

These Principles and their accompanying explanations set out the foundations for the elaboration and content of the proposed Pandemic Treaty. They are deliberately framed at a general level and do not amount to an exhaustive, detailed or comprehensive list of what the Pandemic Treaty should include.

The States elaborating the Pandemic Treaty and other participants in the drafting process should engage with the full and growing range of diverse inputs from experts, researchers, civil society and community organizations and any other interested stakeholders during the course of treaty deliberations.

States, private actors, international organizations, civil society organizations and all others are encouraged to advocate for the conformity of the proposed Treaty with these Principles and international human rights law and standards more broadly. Such advocacy provides an opportunity to ensure effective responses to future pandemics in order to preserve the life, health, dignity, human rights and livelihoods of all people around the world.

This is a working draft as of 28 October 2021, which will be updated on an ongoing basis as further consultation with experts, civil society organizations and community organizations take place.

10 Human Rights Principles for a Pandemic Treaty:

Principle 1 (Consultation and Participation): The Pandemic Treaty should be developed through a robust participatory process allowing for the full, equal, meaningful and effective participation of civil society and community organizations on global, regional and domestic levels from the outset of its development. The Pandemic Treaty itself should provide for procedures on decision making and implementation of national and transnational measures for pandemic preparedness and responses that allow for the full, equal, meaningful and effective participation of civil society and community organizations at global and domestic levels at all governance and decision-making platforms.

Principle 2 (Human Rights Protection): The Pandemic Treaty should enhance, complement and must not diminish or impair the effective discharge of existing human rights obligations in international human rights law and standards.

Principle 3 (Health Systems): Guided by a multisectoral One Health approach, the Pandemic Treaty should entrench long-term and transformative investments in public health systems of adequate quality, accessibility, acceptability and availability in all communities, and effectively regulate private and public sector actions that impact on public health in the context of pandemic preparedness and response.

Principle 4 (Diagnostics, Medication, Vaccines and Therapeutics): The Pandemic Treaty should prohibit any State or third party action or omission that serves to prevent or cause undue impediments to equitable access to quality diagnostics, medications, vaccines, therapeutics and other relevant health products and services, and reaffirm the positive obligation of States, individually and collectively, to guarantee equitable access to quality diagnostics, medications, vaccines, therapeutics and other relevant health products and services in the context of pandemics.

Principle 5 (Human Rights-based Responses to Public Health Emergencies): The Pandemic Treaty should restate and reinforce the international law obligation of States to ensure that any restrictive measures adopted with the purported aim of responding to pandemic threats and other public health emergencies comply with their international human rights law obligations and do not continue to be applied after the end of a pandemic. In general, States should not enact or implement criminal or similarly punitive sanctions to enforce pandemic response measures.

Principle 6 (Equality & Non-Discrimination): The Pandemic Treaty should reaffirm the principle of equality before the law, equal protection of the law and the prohibition of discrimination on grounds prohibited by international law in the context of preparation for and response to pandemics. It should affirm States' obligations in the context of pandemics to take proactive measures to realize the human rights of individuals at greater risk of human rights violations, such as those who are already marginalized and/or belong to at-risk groups.

Principle 7 (Accountability and Access to Justice): The Pandemic Treaty should establish dynamic, universal, periodic and independent review procedures and processes to facilitate

accountability of duty-bearers under the treaty. The Pandemic Treaty should recall the international law obligation of States to ensure access to justice and effective remedies for human rights violations and abuses, and require States to provide for such access to justice and effective remedies in a timely manner in the context of their domestic pandemic responses.

Principle 8 (Economic, Social and Cultural Rights): The Pandemic Treaty should ensure that measures for pandemic preparedness are undertaken with respect for and contribute to the realization of all human rights, including in particular Economic, Social and Cultural Rights (ESCR), and that responses to pandemics do not result in violations of any human rights, including ESCR.

Principle 9 (Solidarity/International Cooperation): The Pandemic Treaty should incorporate the individual and collective obligation of States to engage in international cooperation and assistance, and establish measurable and objective mechanisms to facilitate the universal, collaborative, coordinated and equitable enjoyment of human rights in pandemic preparedness and response measures, including through global solidarity in global health.

Principle 10 (Information, Technology and Data): The Pandemic Treaty should reaffirm States' obligation to proactively ensure the accessibility of all public health information necessary in pandemic preparedness and responses, including through public dissemination of disaggregated data. The Pandemic Treaty should provide for an obligation for States to put in place adequate and effective human rights safeguards when data and technology are used with the stated aim of responding to or in preparation for pandemics, particularly in the deployment of new technologies and infrastructure, and new sources of data.

Brief Explanation of the 10 Human Rights Principles for a Pandemic Treaty:

Principle 1 (Consultation and Participation): The Pandemic Treaty should be developed through a robust participatory process allowing for the full, equal, meaningful and effective participation of civil society and community organizations on global, regional and domestic levels from the outset of its development. The Pandemic Treaty itself should provide for procedures on decision making and implementation of national and transnational measures for pandemic preparedness and responses that allow for the full, equal, meaningful and effective participation of civil society and community organizations at global and domestic levels at all governance and decision-making platforms.

Extensive consultation and participation of a wide range of stakeholders and experts, including civil society organizations and marginalized groups and individuals, is critical to the development of all international treaties. For consultation and participation to be meaningful and effective drafting processes of the Pandemic Treaty must be transparently communicated from the outset and inputs from all stakeholders, including civil society organizations marginalized groups and individuals, must be actively solicited and properly considered by the drafters of the Pandemic Treaty. On a domestic level, the Pandemic Treaty should reaffirm States' human rights obligation to allow for public participation in decision-making processes which affect their health and public health generally. This is also best practice from a public health perspective. Individuals and groups affected by measures for pandemic preparedness and responses must, to the maximum extent practicable, be involved in making decisions, planning, implementing and evaluating strategies to achieve realization of the right to health, as authoritatively interpreted by UN treaty bodies including the *UN Committee on Economic, Social and Cultural Rights'* General Comment 14 on the right to health and General Comment 22 on the right to sexual and reproductive health. This necessitates, by direct implication, the full and meaningful consultation of all individuals and groups whose rights and interests may be affected by all measures aimed at responding to or preparing for pandemics. Civil society, including human rights defenders and grassroots organizations, have an important role to play in overseeing rights and evidence based of pandemic preparedness and response measures. It is of critical importance that a rights-respecting and otherwise conducive environment for civil society is consistently maintained.

Principle 2 (Human Rights Protection): The Pandemic Treaty should enhance, complement and must not diminish or impair the effective discharge of existing human rights obligations in international human rights law and standards.

The Pandemic Treaty should reaffirm and advance existing human rights protections and should not decrease existing protections in international human rights law and standards. The provisions of a new pandemic treaty should reinforce and/or amplify existing human rights standards and obligations in global health, including those entrenched in the *International Health Regulations*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* and in international law and standards reflected in core human rights treaties. The Pandemic Treaty should also be strongly grounded in international law and standards underscored by UN bodies in their jurisprudence and stemming from, as examples, the *Siracusa Principles on the Limitation and Derogation Provisions the International Covenant on Civil and Political Rights* and

the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*.

Principle 3 (Health Systems): Guided by a multisectoral One Health multi-sectoral approach, the Pandemic Treaty should entrench long-term and transformative investments in public health systems of adequate quality, accessibility, acceptability and availability in all communities, and effectively regulate private and public sector actions that impact on public health in the context of pandemic preparedness and response.

The Pandemic Treaty should reaffirm States' obligation to ensure that their health systems are at all times of adequate quality, accessibility, acceptability and availability as detailed by the *UN Committee on Economic, Social and Cultural Rights in its General Comment 14 on the right to health*. In line with the *Declaration of Alma-Ata* and other international law and standards such health systems should at all times maintain public health capacities to prevent, detect, control and respond effectively to the onset and continuation of pandemics and other public health emergencies, as well as prioritize the improvement of the social, economic and environmental conditions in which people live. These objectives require adequate resourcing of and public investment in public health systems, as well as appropriate and effective regulation of private actors in the health sector. The Pandemic Treaty should confirm that States' entire health systems should be prepared for and to participate fully in efforts to prevent, detect, control and respond to public health emergencies, applying a One Health approach that recognizes the complexities of the human, animal and environmental interface in mitigating intersecting public health threats. At a minimum all private actors involved in pandemic response measures should comply with applicable domestic laws as well as their responsibility to respect all human rights as set out in the *UN Guiding Principles on Business and Human Rights* and by the *UN Committee on Economic, Social and Cultural Rights in its General Comment 24 on business and human rights*.

Principle 4 (Diagnostics, Medication, Vaccines and Therapeutics): The Pandemic Treaty should prohibit any State or third party action or omission that serves to prevent or cause undue impediments to equitable access to quality diagnostics, medications, vaccines, therapeutics and other relevant health products and services, and reaffirm the positive obligation of States, individually and collectively, to guarantee equitable access to quality diagnostics, medications, vaccines, therapeutics and other relevant health products and services in the context of pandemics.

The Pandemic Treaty should reaffirm States' positive obligation, in accordance with the right to health, as detailed by the *UN Committee on Economic, Social and Cultural Rights in its General Comment 14 on the right to health*, to ensure that access to all necessary diagnostics, medication, vaccines therapeutics and other health products and services necessary to prevent and treat epidemic diseases are available on scale, accessible to all, affordable for everyone, acceptable, available and of adequate quality in accordance with best available scientific evidence. The Pandemic Treaty should emphasize that these obligations are heightened when an emerging public health threat appears and include, amongst other things, the provision of diagnostic testing, vaccinations, personal protective equipment, medication and treatment. States should be required to eliminate all domestic, regional and international trade barriers to access diagnostics, medications, vaccines,

therapeutics and other health products necessary to prevent, diagnose, control and treat pandemic diseases. In particular, the Pandemic Treaty should emphasize that States are required to waive all intellectual property rights pertaining to essential diagnostics, medications, vaccines, therapeutics and other relevant health products and services necessary to respond to pandemics at the latest immediately upon the declaration of a public health emergency of international concern by the WHO. At a minimum all private actors involved in any processes relating to the development, production and distribution of diagnostics, medications, vaccines, therapeutics and other relevant health products and services must comply with applicable domestic laws as well as their responsibility to respect all human rights as set out in the *UN Guiding Principles on Business and Human Rights* and by the *UN Committee on Economic, Social and Cultural Rights* in its General Comment 24 on business and human Rights.

Principle 5 (Human Rights-based Responses to Public Health Emergencies): The Pandemic Treaty should restate and reinforce the international law obligation of States to ensure that any restrictive measures adopted with the purported aim of responding to pandemic threats and other public health emergencies comply with their international human rights law obligations and do not continue to be applied after the end of a pandemic. In general, States should not enact or implement criminal or similarly punitive sanctions to enforce pandemic response measures.

The Pandemic Treaty should reaffirm that States should, by all appropriate legal and other measures, ensure that there are clear domestic legal provisions enacted by the Legislature, after full public participation and consultation, which govern how regulatory responses in the context of public health emergencies will occur. Whether these legal provisions are framed as “states of emergency”, “states of disaster”, or fall under the purview of public health legislation, all measures restricting rights in response to a public health emergency must be in pursuit of a legitimate aim, necessary, proportionate, evidence-based, time-bound and subject to democratic controls of the legislature and judicial review, consistently with the *Siracusa Principles on the Limitation and Derogation Provisions the International Covenant on Civil and Political Rights*. States of emergency which derogate from or suspend rights should minimally impair those rights and be used only as a matter of last resort, in compliance with the procedural requirements of domestic and international law. Such measures should also only be used when it can be shown that enacted measures are limited in temporal and geographic scope, and that alternative regulatory regimes that are less restrictive will not suffice in all the relevant circumstances. The Pandemic Treaty should clarify that States are required to explicitly refer to international human rights standards, including the principles of necessity and proportionality, in providing full and transparent justification for any derogations as well as all specific measures pursuant to such derogations, consistently with *UN Human Rights Committee’s General Comment 29 on Derogations during a State of Emergency*. The Pandemic Treaty should assert that States should in general not enact or implement criminal sanctions to enforce pandemic and public health emergency response measures unless less restrictive alternative measures are not available or have been clearly illustrated to be ineffective. Where criminal sanctions are enacted and implemented they must be as limited as possible, narrowly tailored, precisely defined and in compliance with international human rights and standards.

Principle 6 (Equality & Non-Discrimination): The Pandemic Treaty should reaffirm the principle of equality before the law, equal protection of the law and the prohibition of discrimination on grounds prohibited by international law in the context of preparation for and response to pandemics. It should affirm the State obligation in the context of pandemics to take proactive measures to realize the human rights of individuals at greater risk of human rights violations, such as those who are already marginalized and/or belong to at-risk groups.

The Pandemic Treaty should reaffirm that States are required to ensure that pandemic preparedness and response measures are not discriminatory in form or effect. The Pandemic Treaty should acknowledge States' immediate obligations to guard against and respond to discrimination against the full range of marginalized groups recognized in international human rights law and standards, including persons vulnerable to multiple and intersecting forms of discrimination. In particular, it is critical that States take all necessary measures to prohibit and prevent any discrimination whatsoever on the basis of health-status, perceived health status or the proximity to pandemic diseases of, for instance, healthcare workers, essential workers, educators and caregivers who are often predominantly women. The Pandemic Treaty should recognize that States' obligations to take proactive measures to ensure the substantive equality of persons from marginalized groups is heightened during and in preparation for pandemics and health emergencies and States must show how they have proactively taken measures to respect, protect and fulfil the human rights of marginalized groups from the outset of pandemic responses. The Pandemic Treaty should recognize that in preparation of pandemics and public health emergencies states should remove criminal provisions with a discriminatory impact on marginalized groups including, as examples, LGBTQI+ persons, sex workers, persons with HIV and homeless persons. The Pandemic Treaty should define an open, non-exhaustive list of marginalized groups in line with and building upon the prohibited grounds of discrimination recognized by international human rights law and standards.

Principle 7 (Accountability and Access to Justice): The Pandemic Treaty should establish dynamic, universal, periodic and independent review procedures and processes to facilitate accountability of duty-bearers under the treaty. The Pandemic Treaty should recall the international law obligation of States to ensure access to justice and effective remedies for human rights violations and abuses, and require States to provide for such access to justice and effective remedies in a timely manner in the context of their domestic pandemic responses.

Embracing a rights-based approach to accountability founded on monitoring, review, action and remedies, the Pandemic Treaty should establish international review procedures, processes and mechanisms to facilitate accountability of duty-bearers under the treaty and ensure compliance with the right to an effective remedy as detailed in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation* on an international level. In particular, in line with the recommendations of the *Independent Panel on Pandemic Preparedness and Response*, the Pandemic Treaty should establish a dynamic, universal, periodic review procedure, process and mechanism to facilitate accountability of duty bearers under the Pandemic Treaty. Review by this newly established independent mechanism should be carried out regularly, transparently and with opportunities for

participation by all stakeholders including civil society, and the mechanism should be mandated to make recommendations to duty bearers under the Pandemic Treaty. The Pandemic Treaty should empower and mandate coordination and complementarity between the newly created mechanism and international human rights review procedures and treaty bodies, including the sharing of information, and the mechanism should be mandated to review performance both under the Pandemic Treaty and in terms of existing international human rights law and standards. The Pandemic Treaty should reiterate that States are required to make provision for and ensure that at all times all people have access to platforms, institutions, processes and mechanisms for the protection of their right to access to an effective remedy. This is essential in ensuring accountability to the violation or abuse of human rights in the context of a pandemic. In particular, States should make contingency plans ahead of time to ensure that those alleging human rights violations or abuses in the context of measures taken to respond to and prepare for public health emergencies have access to courts, administrative bodies and other avenues at which they can vindicate their rights. The Pandemic Treaty should confirm the particular importance of ensuring the continued operation of court systems during pandemics and public health emergencies. It should also highlight the importance of the provision of easy access to legal information and legal services, whether through legal aid or otherwise, that are affordable and of sufficient quality and range to allow for challenges to measures which restrict or limit their rights.

Principle 8 (Economic, Social and Cultural Rights): The Pandemic Treaty should ensure that measures for pandemic preparedness are undertaken with respect for and contribute to the realization of all human rights, including in particular Economic, Social and Cultural Rights (ESCR), and that responses to pandemics do not result in violations of any human rights, including ESCR.

The Pandemic Treaty should reaffirm that States are required to make provision for and ensure that any and all restrictive legal regulations enacted in order to respond to pandemics and health emergencies do not have a disproportionate impact the full range of human rights, including economic, social and cultural rights (ESCR) recognized under international law in terms of, amongst others, the *International Covenant on Economic, Social and Cultural Rights*. Such rights include the rights to education, health, housing, work, social security, water, sanitation, food and more generally include a right to an adequate standard of living and to the continuous improvement of living conditions. Pandemic response measures taken by States should not amount to retrogressive measures reducing access to ESCR and should not interfere with the implementation of States' progressive and immediate obligations to fully realize ESCR. Public health responses to pandemics may involve lockdowns, business closures, and quarantines that cut people off from their families, communities, livelihoods, and social services that are protected by a range of ESCR. The Pandemic Treaty should stress that when implementing these and similar measures, States should act swiftly and adopt measures to ensure the full protection of ESCR, including the overall right to an adequate standard of living. Measures implemented in this regard should meet the legal obligations of States in terms of ESCR and should be proportionate to the possible negative impacts of a pandemic and measures taken by State to respond to a pandemic on ESCR. The Pandemic Treaty should confirm that when measures such as lockdowns, business

closures, and quarantines are implemented States should expeditiously mobilize and deploy the maximum of resources available to find short, medium and long-term solutions which avoiding the undue continuation or repetition these and similar measures which may impede the realization of range of human rights including ESCR. The Pandemic Treaty should, in particular, ensure the realization of the rights to social security and work for all including health workers, essential workers, sex workers and informal workers. It should also reaffirm the need for protections of human rights defenders including whistleblower protections, and the rights to collective action and bargaining through trade unions and other worker's organizations.

Principle 9 (Solidarity/International Cooperation): The Pandemic Treaty should incorporate the individual and collective obligation of States to engage in international cooperation and assistance, and establish measurable and objective mechanisms to facilitate the universal, collaborative, coordinated and equitable enjoyment of human rights in pandemic preparedness and response measures, including through global solidarity in global health.

The Pandemic Treaty should reaffirm States' obligations to take all necessary measures to seek and provide international assistance and cooperation and ensure global solidarity in response to health emergencies and pandemics, while refraining from any actions that thwart such solidarity. Proactive collaboration and coordination to prepare for and respond to pandemics and health emergencies is necessary across a full range of multinational institutions (including the World Health Organization, the World Trade Organization, UN Human Rights Council, UN Security Council and the UN General Assembly) and relevant international fora (such as the G7 and G20) and is already required by international human rights law treaties, the International Health Regulations and the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. The Pandemic Treaty should acknowledge that such collaboration requires a commitment to equitable responses to pandemics and health emergencies, domestically, regionally and internationally. Aligning international assistance obligations under global health law and human rights law, States should be obliged by the Pandemic Treaty, in all their interactions with other States, to explain how their conduct aligns with their human rights obligations - not only to their own inhabitants but to inhabitants of other States. Any measures that favor a State's own inhabitants, posing a disproportionate impact on equitable access to healthcare services, diagnostics, medicines, vaccines and therapeutics in particular, should be fully and transparently justified by States with reference to international human rights law obligations. Institutional mechanisms set up by the Pandemic Treaty should collaborate with existing WHO institutions and UN human rights treaty bodies to ensure a coordinated, harmonized approach to global health law and international human rights law.

Principle 10 (Information, Technology and Data): The Pandemic Treaty should reaffirm States' obligation to proactively ensure the accessibility of all public health information necessary in pandemic preparedness and responses, including through public dissemination of disaggregated data. The Pandemic Treaty should provide for an obligation for States to put in place adequate and effective human rights safeguards when data and

technology are used with the stated aim of responding to or in preparation for pandemics, particularly in the deployment of new technologies and infrastructure, and new sources of data.

The Pandemic Treaty should reaffirm States' obligation to proactively ensure the accessibility of all public health information necessary in pandemic preparedness and responses, including through public dissemination of any relevant, disaggregated public health data necessary for the realization of the right to health, as detailed in *UN Committee on Economic, Social and Cultural Rights'* General Comment 14 on the right to health. The Pandemic Treaty should also consolidate States obligation to ensure that human rights safeguards are put in place, implemented and monitored where technologies and data are used in response to a pandemic. This is particularly crucial when technologies are used to:

- collect, process and share personal data, such as health data and data on health outcomes;
- in enforcing emergency and security restrictions, by surveilling and tracking impacted populations and human rights defenders;
- set requirements for access essential services such as healthcare services and social security benefits.

The deployment of technologies, particularly when they are newly created, adopted or rushed into implementation during health emergencies, may also cause or exacerbate discrimination and exclusion of marginalized groups and individuals. The Pandemic Treaty should require States to build human rights into the design, development and deployment of technological approaches to the pandemic, by including privacy concerns as a pillar of national strategies for pandemic preparedness and response, and by carrying out, in consultation with all relevant stakeholders including affected marginalized groups and individuals, human rights impact assessments prior to the design and deployment of new technologies intended to be used in preparation for and in response to pandemics. This should include an assessment of their impact on the enabling environment for civil society. Given the role that data plays in international responses to pandemics, the Pandemic Treaty should require international organisations, including WHO and WHO-related agencies, to develop and apply policies to ensure their own compliance with human rights safeguards in the processing of data, and to provide advice and technical assistance to States on the same.

Annex to Principle 6 (Equality & Non-Discrimination)

Principle 6 (Equality & Non-Discrimination): The Pandemic Treaty should reaffirm the prohibition of all discrimination in preparation for and response to pandemics, and stress a heightened duty to take proactive measures to realize the rights of marginalized individuals and groups in the context of pandemics.

Individuals and groups may be marginalised or vulnerable on the basis of structural vulnerability or clinical vulnerability; marginalised individuals and groups include but are not limited to:

- Non-citizens including asylum seekers, refugees, immigrants, migrants and people without legal residence status or documentation reflecting legal residence status, migrant workers and stateless persons.
- Indigenous groups
- Racialized communities and people identifying as racial or ethnic minorities
- Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Asexual persons
- People who use drugs
- Sex workers
- People who are homeless or precariously housed
- People detained or incarcerated
- People in voluntary or closed healthcare and social care facilities, including aged care facilities
- People living with HIV or AIDS, tuberculosis, hepatitis and COVID-19.
- Persons with disabilities, including but not limited to physical, sensory, psychosocial, intellectual, and sensory disabilities as well as people with mental health conditions
- People with chronic health conditions
- People in need of palliative care
- People who have experienced, experience or survived domestic violence, including women and girls, with particular consideration for intimate partner violence issues and barriers to accessing sexual and reproductive health care during pandemics
- Children, especially in child-headed households, foster care, orphanages and those reliant on schools for nutrition
- Older persons
- Isolated rural populations or people who may not have access, or adequate access, to the internet
- People working in congested and high-risk environments including mines and factories
- People working in or around situations of heightened COVID-19 transmission such as health workers and support staff in health facilities.
- Informal workers, including informal waste reclaimers and informal traders

Other: any group that is considered vulnerable based on the nature of the pandemic and the impact of the pandemic, or pandemic preparedness and responses measures, on their livelihood and wellbeing.