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RECOMMENDATIONS TO STATES AHEAD OF NEGOTIATIONS ON THE CONCEPTUAL ZERO DRAFT OF AN INTERNATIONAL INSTRUMENT ON PANDEMIC PREVENTION, PREPAREDNESS AND RESPONSE

A process to negotiate a new international instrument on pandemic prevention, preparedness and response is underway. The Intergovernmental Negotiating Body [INB] (a body open to all WHO member states), will be meeting in Geneva from 5 to 7 December 2022 to discuss the Conceptual Zero Draft of this proposed instrument. This briefing outlines Amnesty International's human rights concerns regarding pandemic prevention, preparedness and response, based largely on our documentation and campaigning during the Covid-19 pandemic, and makes concrete suggestions for reform of the text of Conceptual Zero Draft.

Recommendations are focussed on addressing marginalization and discrimination; protecting human rights in any public health response; protecting health and other essential workers; highlighting the importance of the determinants of health; and strengthening international assistance and cooperation.

I. ADDRESSING MARGINALIZATION AND DISCRIMINATION

The right to equality and non-discrimination are guaranteed in a range of international instruments. Amnesty International's research and monitoring across several countries showed how 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 was a result of discrimination and neglect preceding and during the pandemic, combined with the fact that states often adopted punitive approaches to enforce measures to protect public health, including by heavily resorting to law enforcement and by criminalizing the non-compliance with lockdown measures. These approaches had a disproportionate impact on marginalized groups, whose needs were not taken into account while designing responses to protect people during the pandemic. Amnesty International documented the experiences of Indigenous persons,[1] transgender people,[2] groups affected by unjust criminalization,[3] and older persons[4] during the Covid-19 pandemic, finding that they faced significant barriers in accessing care and their rights during this time. The experiences Amnesty documented confirm the importance of addressing barriers to care and discrimination in access to health care and other social determinants of health as a priority in non-pandemic times to protect all people during pandemics. The Conceptual Zero Draft reflects the importance of protecting marginalized groups in its text, but it is important these provisions be strengthened in order to ensure that no one is left behind.

Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

[1] Amnesty International, Amazonian Indigenous Peoples and COVID-19: 'We're not still waiting for help as we know it'll never arrive', 9 August 2020, https://www.amnesty.org/en/latest/news/2020/08/pueblos-indigenas-amazonia-covid19/
[2] Amnesty International, Asia and the Pacific: "Pandemic or not, we have the right to live": The urgent need to address structural barriers undermining transgender people's rights across Asia and the Pacific, November 14, 2022, Index Number: ASA 01/6197/2022, https://www.amnesty.org/en/documents/asa01/6197/2022/en/
[3] Amnesty International, "There is no help for our community": The impact of States' Covid-19 responses on groups affected by unjust criminalization, 31 May 2022, Index Number: POL 30/5477/2022, https://www.amnesty.org/en/documents/pol30/5477/2022/en/
[4] See for example Amnesty International, As if Expendable, 4 October 2020, https://www.amnesty.org.uk/care-homes-report

1. In Article 4 (12): Non-discrimination and respect for diversity – All individuals should have fair, equitable and timely access to pandemic response products and health services, without fear of discrimination or distinction based on race, religion, political belief or economic or social condition. **[ADD: or any other prohibited ground. States should recognise and address the impacts and drivers of discrimination, including multiple and intersecting forms of discrimination, while preparing for and responding to pandemics.]**

2. In Article 4 (13). Rights of individuals and groups at higher risk and in vulnerable situations – Nationally determined and prioritized actions, including support, will take into account communities and persons in vulnerable situations, places and ecosystems. Indigenous peoples, refugees, migrants, asylum seekers, and stateless persons, persons in humanitarian settings and fragile contexts, **[ADD: people facing discrimination due to their sexual orientation and gender identity, sex workers, people who use drugs, people living in poverty, people who are homeless, ethnic minorities],** marginalized communities, the elderly, persons with disabilities, persons with health conditions, pregnant women, infants, children and adolescents, for example, are particularly impacted by pandemics, owing to social and economic inequities, as well as legal and regulatory barriers **[ADD: ,including systemic and intersectional discrimination,]** that may prevent them from accessing health services

3. **ADD Article 10(2)(b)(iii)**: Measures to remove all barriers to health care marginalized groups experience, including but not limited to, financial barriers; long distances to health facilities; unjust criminalization and other legal and regulatory provisions that unjustly limit people's access to health care; and a lack of health-related information, including lack of accessible information.

4. In Article 18(2)(a): Strengthen and prioritize domestic financing for pandemic prevention, preparedness, response and health systems recovery, including through greater collaboration between the health, finance and private sectors, in support of primary health care and universal health coverage, **[ADD: keeping in mind the needs of marginalized groups and the distribution of health care resources]**

5. In Article 15(2)(a) Engage with communities, civil society, academia and non-State actors, including the private sector, as part of a whole-of-society approach to pandemic prevention, preparedness, response and recovery of health systems, **[ADD: and ensure that marginalized and underserved groups are reached in these efforts]**

II. HUMAN RIGHTS IN PUBLIC HEALTH RESPONSE

During pandemics, states often put in place measures to protect public health, that risk limiting or restricting human rights, such as restrictions on movement and assembly including quarantines, travel bans, prohibitions of large meetings, and 'lockdowns'. While States can legitimately impose restrictions on some human rights such as the rights to freedom of movement, expression, peaceful assembly and association to protect public health, any restriction must meet all elements of a stringent three-part test. It must be provided by law, which must be formulated with sufficient precision to enable an individual to regulate their conduct accordingly. It must be imposed only for the purpose of protecting specified public interests, in this case public health. And finally, it must be demonstrably necessary 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.

Amnesty International's research during the pandemic illustrated that public health measures of this nature were often imposed in a manner inconsistent with human rights standards. They risked being discriminatory,[5] or were imposed in a manner which resulted in marginalized groups bearing disproportionate impact.[6] Some governments used the pandemic as a pretext to muzzle critical voices: in the name of protecting public health or curbing the spread of "fake news" and to "prevent panic", they restricted human rights beyond what is permitted under international law.[7]

[5] See for example, Amnesty International, Stigmatizing Quarantines of Roma Settlements in Slovakia and Bulgaria, April 17, 2020Index Number: EUR 01/2156/2020, https://www.amnesty.org/en/documents/eur01/2156/2020/en/

[6] See for example, Amnesty International, India's most vulnerable bare the brunt of Covid-19, 31 March 2020, https://www.amnesty.org.uk/indias-most-vulnerable-bare-brunt-covid-19

[7] Amnesty International, Silenced and misinformed: Freedom of expression in danger during Covid-19, October 19, 2021Index Number: POL 30/4751/2021, https://www.amnesty.org/en/documents/pol30/4751/2021/en/

The Conceptual Zero Draft only mentions possible restrictions to human rights in the name of public health in Article 4 (18) on Proportionality. Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

6. In Article 4 (18), Proportionality – Due consideration should be given, including through continuous policy evaluation, to ensuring that the impacts of measures aimed at preventing, preparing for and responding to pandemics are proportionate to their intended objectives. **[ADD: Any measures to protect public health in the context of pandemics must be necessary and proportionate, 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 marginalized groups. Any such measure must be based on the best available evidence and aimed to fulfill the right to the highest attainable standard of health. The coercive enforcement of measures to protect public health should be considered only as last resort.**

III. PROTECTING HEALTH AND OTHER 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.[8] 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.[9] 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.

The emphasis on strengthening and sustaining a skilled and competent health workforce in the Conceptual Zero Draft is welcome. Furthermore, Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

7. Article 11 (1). The Parties [shall]/[should] strengthen and sustain an adequate, skilled, trained, competent and committed health workforce, with due protection of their employment, civil and human rights **[ADD: including protections from violence and stigma while doing their jobs and retaliation for raising concerns]** and well-being, consistent with relevant codes of practice, including at the frontline of pandemic prevention, preparedness, response and recovery of the health system. **[ADD: These protections should also be guaranteed for other essential workers, engaged in pandemic prevention, preparedness, and response].**

IV. DETERMINANTS OF HEALTH

The Covid-19 pandemic underscored the importance of the social determinants of health and the protection of all economic and social rights. People's access to nutrition, housing, and social protection, for example, were key to ensuring people's ability and willingness to follow public health guidance. Groups without adequate access to key underlying determinants of health, are often historically marginalized; these people 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

[8] There is no global or uniformly agreed definition for who constitutes an essential worker. For the purposes of Amnesty International's work during the Covid-19 pandemic, "essential worker" refers to anyone who has been working and providing essential public services during the pandemic, including people working in public services (such as emergency response, public transport workers, refuse collectors) as well those working in businesses allowed to remain open during the pandemic (such as grocery stores and people providing delivery services). Amnesty International, *Exposed, silenced, attacked: failures to protect health and essential workers during the COVID-19 pandemic*, 13 July 2020, Index Number: POL 40/2572/2020, https://www.amnesty.org/en/documents/pol40/2572/2020/en/

[9] Amnesty International, *Exposed, silenced, attacked: failures to protect health and essential workers during the COVID-19 pandemic*, 13 July 2020, Index Number: POL 40/2572/2020, https://www.amnesty.org/en/documents/pol40/2572/2020/en/

pandemic profoundly impacted people's livelihoods, often deepening inequalities[10] and raising the incidence of poverty;[11] it impacted children's access to education; and disrupted food systems.[12] Ensuring that all social sectors, including health, are strengthened in non-pandemic times, and that states' pandemic responses reflect the importance of cross-sectoral collaboration is crucial. This includes ensuring people have access to housing, to adequate water and sanitation, and to social protection during pandemics. Intersectoral collaboration and the provision of key public goods are integral to the right to health, which is an "inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health".[13]

Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

8. In Article 14 (2)(b): Tackle the social, environmental and economic determinants of health that contribute to the emergence and spread of pandemics, and prevent or mitigate the socioeconomic impacts of pandemics, including but not limited to, those affecting economic growth, the environment, employment, trade, transport, gender equality, education, social assistance, housing, food insecurity, nutrition and culture, and especially for persons in vulnerable situations. **[ADD: Measures should be free from discrimination, and remove all barriers to their access, including barriers created by legal regulations, such as the criminalization of identities, choices and status]**

9. In Article 14 (2) (d): Strengthen national public health and social policies to facilitate a rapid, resilient response, especially for persons in vulnerable situations. **[ADD: Enhance financial and technical support, assistance and cooperation among Member States to ensure social systems, such as housing and social protection, are adequately funded and that governments are able to guarantee human rights].**

V. STRENGTHENING INTERNATIONAL ASSISTANCE AND COOPERATION

States have an obligation to work together to respond to a pandemic. In the context of Covid-19, the Committee on Economic, Social and Cultural Rights has established that states must combat pandemics in a manner consistent with human rights, which includes meeting their extraterritorial obligations to support other states fulfil their duties.[14] Human rights bodies have elaborated on what the content of this assistance and cooperation could be in the context of the Covid-19 pandemic, including: "coordinated action to reduce the economic and social impacts of the crisis";[15] "joint endeavours by all States to ensure an effective, equitable economic recovery",[16] and "A more comprehensive debt standstill should be put in place for all countries with a high debt burden that have been hit hard by the pandemic and have requested debt relief".[17] In the words of the Committee on Economic, Social and Cultural rights, "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".[18]

[10] See for example, N Yonzan et al, *Is COVID-19 increasing global inequality?*, World Bank Blogs, 7 October 2021, https://blogs.worldbank.org/opendata/covid-19-increasing-global-inequality
[11] See for example: UNICEF, COVID-19 impacts on child poverty, https://www.unicef.org/social-policy/child-poverty/covid-19-socioeconomic-impacts; World Relief, Pandemic and Poverty: COVID-19 Impact on the World's Poor, 15 March 2022, https://worldrelief.org/pr-sobering-new-report-reveals-covid-19s-devastating-impact-on-the-worlds-poor/
[12] OECD Policy Responses to Coronavirus (COVID-19), COVID-19 and global food systems, 2 June 2020, https://www.oecd.org/coronavirus/policy-responses/covid-19-and-global-food-systems-aeb1434b/
[13] 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
[14] CESCR, Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights, E/C.12/2020/1, 17 April 2020, para. 20, https://www.amnesty.org/en/documents/ior30/5645/2022/en/
[15] Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 17 April 2020, UN Doc. E/C.12/2020/1, para 19
[16] Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 17 April 2020, UN Doc. E/C.12/2020/1, para 19
[17] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Yuefen Li, Addressing, from a human rights perspective, the debt-related problems of developing countries caused by the coronavirus disease (COVID-19) pandemic, 31 July 2020, UN Doc. A/75/164, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/185/60/PDF/N2018560.pdf?OpenElement
[18] Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, 17 April 2020, UN Doc. E/C.12/2020/1, para 19

This is particularly true in the context of vaccine inequality and the barriers created by global intellectual property rules. The WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement sets out minimum standards for many forms of intellectual property (IP), such as copyrights, trademarks, patents, undisclosed information (including trade secrets and test data) and anti-competitive practices. As IP rights can create barriers to timely access to lifesaving health products, the TRIPS Agreement includes safeguards known as "flexibilities" so states can amend their laws and take certain measures to address public health emergencies, such as issuing compulsory licenses that would allow a company to produce a lifesaving drug without following IP rules.

The Covid-19 pandemic has raised questions about whether the "flexibilities" are effective to address the world's urgent needs, given that they usually apply on a country-by-country, case-by-case, and drug-by-drug basis and have onerous reporting requirements. In October 2020, India and South Africa requested a temporary waiver (IP/C/W/669) to intellectual property protections that would allow countries to produce versions of Covid-19 products more easily. Despite receiving support from more than 100 countries, this draft stalled due to opposition from a small number of wealthy states.

A ministerial decision spearheaded by the WTO Director General (WT/MIN(22)/W/15) was discussed and eventually adopted at the WTO's 12th Ministerial Conference (MC12) held from 12 to 17 June 2022. Rather than waive intellectual property protections, it provides some clarifications to current "flexibilities" and a narrow exception to an export restriction on Covid-19 vaccines for the duration of five years. While not a comprehensive waiver that many states and civil society organizations had advocated for, its extension, if unchanged, to cover therapeutics and diagnostic tests could significantly help improve global surveillance efforts and prevent needless disease progression and death from Covid-19, by enabling countries to source additional supplies of such essential medical tools from generic manufacturers.

Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

10. Preamble: [Proposal: 38. Recognizing that protection of intellectual property rights is important for the development of new medical products, but also recognizing concerns about its effects on **[ADD: access to supply and]** prices, as well as noting discussions/deliberations in relevant international organizations on, for instance, innovative options to enhance the global effort towards the production of, timely and equitable access to, and distribution of health technologies and know-how, by means that include local production;]

11. Preamble: 41. Recognizing that publicly funded research and development plays an important role in the development of pandemic response products, and, as such, requires conditionalities **[ADD: in line with human rights principles and standards]**;

12. Article 4, Principles: [ADD: The right to enjoy the benefits of scientific progress and its applications: Scientific progress must be available, accessible, acceptable and of good quality to all individuals and communities. As states must take steps to invest in science, all people should have equitable and affordable access to the applications of scientific progress, without discrimination. Additionally, good quality scientific creation and its applications should rely on the most advanced, up-to-date, accepted and verifiable science available at the time.]

13. Article 6 (2) (a) (ii) measures to promote and encourage transparency in cost and pricing of pandemic response products, including **[ADD: research]** development, production and distribution costs

14. Article 4(8): Common but differentiated responsibilities and capabilities in pandemic prevention, preparedness, response and recovery of health systems – Full consideration and prioritization are required of the specific needs and special circumstances of developing country Parties, especially those that (i) are particularly vulnerable to adverse effects of pandemics; (ii) do not have adequate capacities to respond to pandemics; and (iii) would have to bear a disproportionate or abnormal burden. **[ADD: Assistance and financing should be cognizant of countries' needs for assistance for multiple, overlapping threats, such as economic crises and climate change, and focused on building overall resilience].**

15. Article 7 (1) The Parties [shall]/[should] develop multilateral mechanisms, particularly during inter-pandemic times, that promote and provide relevant **[ADD: and timely]** transfer of technology and know-how, in a manner

consistent with international legal frameworks **[ADD: and human rights principles]**, to potential manufacturers in developing countries/all regions to increase and strengthen regional and global manufacturing capacity.

16. Article 8 (2) (A) (iii) measures to encourage, incentivize, and facilitate participation of private-sector entities in voluntary transfer of technology and know-how through collaborative initiatives and multilateral mechanisms, **[ADD: as well as open non-exclusive licenses in the interest of ensuring timely access to health products for all]**

17. Article 8 (2) (a) (iii) (a) measures to support the collective development and use of principles and norms and sets of practices that ensure that public financing of research and development for pandemic response products results in more **[delete 'more' and add 'global']** equitable access and affordability, including through conditions on distributed manufacturing, licensing, technology transfer and pricing policies

18. Article 8 (2) (d) (ii) recommendations **[replace 'recommendations' with 'measures']** to make it compulsory for companies that produce pandemic response products to disclose prices and contractual terms for public procurement in times of pandemics.

19. Article 18 (2) (d): **[ADD: In line with obligations to provide international assistance and cooperation],** Facilitate rapid and effective mobilization of adequate financial resources, including from international financing facilities, to affected countries, based on public health need, to maintain and restore routine public health functions during and in the aftermath of a pandemic response, **[ADD: and to ensure affected countries are able to guarantee people's rights and access to the determinants of health, such as housing and social security at this time].**

VI. PARTICIPATION AND ACCOUNTABILITY

The right to health includes the participation of the population in all health-related decision-making at the community, national and international levels,[19] 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.[20] Genuine participation and consultation with affected groups and civil society organizations should be reflected in all aspects of pandemic preparedness and response, including the process by which this current instrument is being drafted. For example, there is no official channel for civil society participation at this stage of the instrument's development. The principle of accountability is also crucial,[21] and must be embedded in the infrastructure of the Conceptual Zero Draft.

Amnesty International urges all members of the INB to consider the following changes to the Conceptual Zero Draft:

20. Art 13 (2)(C)(ii) (a): measures to gather and analyse data, including data disaggregated by gender **[ADD: and other prohibited grounds of discrimination]**, on the impact of policies on different groups

21. ADD: Article 15(2)(f): Establish processes to ensure meaningful oversight and participation of civil society and ensure that affected groups and communities, particularly marginalized groups, are genuinely consulted and participate in decisions and policies around pandemic preparedness, response and recovery in health and other social sectors.

[19] 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
[20] 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
[21] 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 59-62