

Open Letter calling for rule of law, equity and an appropriate review process in development of the WHO proposals to address pandemics.

March 2024. Silvia Behrendt, Amrei Muller, Thi Thuy Van Dinh, David Bell

In late May of this year, it is planned for 194 Member States of the World Health Organization (WHO) to vote on acceptance of two documents that, taken together, are intended to transform international public health and the way States interact when the Director General of WHO declares an emergency. These drafts, a [Pandemic Agreement](#) and [amendments](#) to the International Health Regulations (IHR), are intended to be legally binding and govern the relationship between States and WHO.

Although they contain significant health, economic and human rights implications, they are still being negotiated by various committees less than two months prior to the intended vote. They have been developed with unusual haste, on the premise that there is a rapidly increasing urgency to mitigate pandemic risk.

While this urgency has now been shown to be [contradicted](#) by the data and citations on which WHO and other agencies have relied, the urgency persists. As a result, norms requiring specific review times have been put aside, inevitably undermining equity within the agreements by preventing States with less resources from having time to fully assess the implications for their own populations prior to voting.

This is an extremely poor and dangerous way to develop a legally binding international agreement or treaty. Now is the time to decelerate for the purpose of designing a coherent legal pandemic package instead of rapidly institutionalizing a confusing set of different legal regimes, overriding authorities and proliferation of competing global actors, as ill-advised in a recent [public letter](#).

The Open Letter below calls upon WHO and Member States to extend the deadline for the adoption of the amendments to the International Health Regulations and a new Pandemic Agreement at the 77th WHA to safeguard the rule of law and equity.

27th March 2024

Dear Dr. Tedros, Director-General of the World Health Organization
Dear Co-Chairs Dr. Asiri and Dr. Bloomfield of the WGIHR,
Dear Co-Chairs Dr. Matsoso and Mr. Driecce of the INB,
Dear national delegates of the respective working groups,

Both the Working Group on Amendments to the International Health Regulations (2005) (WGIHR) and the International Negotiating Body (INB) negotiating the Pandemic Agreement were mandated to deliver the definite legal wording of the targeted amendments of the International Health Regulations (IHR) as well as of the Pandemic Agreement to the 77th World Health Assembly (WHA), taking place at the end of May 2024. These processes have been ushered through in haste to “capture a post-COVID-19 moment”, despite evidence that there is limited risk of another pandemic occurring in the short-to-medium term. In other words, there is time to get these measures right.

Yet, due to the speed in which these processes have occurred both negotiation processes are threatening to deliver illegitimate policies by violating the very objectives and principles of equity and deliberation which are proclaimed to be safeguarded through the pandemic law-making process under the auspices of WHO. Consequently, the politically set deadline for adoption at the 77th WHA must be lifted and extended to safeguard the lawfulness and transparency of the processes, clarifying the relationship between the amended IHR and the new Pandemic Agreement, and ensuring an equitable and democratic outcome.

The WGIHR's non-compliance with the IHR excludes a lawful adoption at the 77th WHA

The adoption of any amendments of the IHR at the 77th WHA can no longer be achieved in a lawful manner. Currently, the WGIHR keeps negotiating the draft amendments, with the aim to finalise the package of proposed amendments during its 8th meeting scheduled for the 22nd – 26th April that is then to be presented to the 77th WHA. This *modus operandi* is unlawful. It violates Article 55(2) IHR which sets out the procedure to be followed for amending the IHR:

‘The text of any proposed amendment shall be communicated to all States Parties by the Director-General at least four months before the Health Assembly at which it is proposed for consideration.’

The deadline for the Director-General to circulate the package of proposed amendments to the IHR to States Parties lawfully in advance of the 77th WHA has passed on the 27th January 2024. As of yet, the Director-General has not communicated any amendments to the States.

The IHR is a multilateral treaty¹ binding both States that ratified the IHR and the WHO, including subdivisions² of the WHA like the WGIHR. They must abide by the binding procedural rules of Article 55(2) IHR and cannot suspend these rules arbitrarily.

During the public webcast of 2nd October 2023,³ the issue was referred to WHO’s Principal Legal Officer, Dr Steven Solomon, who explained that since the draft amendments come from a subdivision of the WHA, the 4-month requirement of Article 55(2) did not apply. However, his opinion disregards the fact that Article 55(2) does not make any distinction as to which State, group of States or specific part of the WHA propose the amendments. Moreover, in the Terms of Reference of the IHR Review Committee (2022)⁴ the timeline of the WGIHR’s work was set at ‘January 2024: WGIHR submits their final package of proposed amendments to the Director-General who will communicate them to all States Parties in accordance with Article 55(2) for the consideration of the Seventy-seventh World Health Assembly.’ If the WGIHR and WHO purposefully violate the IHR, the rule of law is indeed undermined, potentially entailing international responsibility for the organisation and/or individuals in charge.

Inseparable processes of IHR and new Pandemic Treaty

The available drafts of the WGIHR and INB imply that the two processes of the WGIHR and INB cannot stand independently but are inseparable from each other. Particularly, the new draft Pandemic Agreement cannot be adopted prior to revising the IHR because

¹ UNTS Vol 2509, p.79, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801d31cc&clang=en>

² In accordance with Rule 41 of the Rules of Procedure of the Health Assembly.

³ <https://www.youtube.com/watch?v=1XvavE-p6VA>

⁴ https://cdn.who.int/media/docs/default-source/international-health-regulations/terms-of-reference_ihr-amendments-rc_for-web_rev-221024.pdf, para.6

it needs to build upon the revised structure, material scope and institutions of the IHR (especially given wording of IHR core capacities currently in the March 7th, 2024 negotiating text of the Pandemic Agreement). Disrupting challenges like the significant overlap *ratione materiae*, the competences and relationships between the newly established treaty bodies, and vs Member States, as well as the long-term financial implications for the health budget, etc. – require detailed clarification prior to adoption.

Equity and democratic legitimacy

Disregarding procedural obligations under the IHR and leaving the relationship between the amended IHR and new Pandemic Agreement nebulous not only undermines the international rule of law, it also undercuts the spirit of Article 55(2) of the IHR (2005), which guarantees Member States four months lead-time to review IHR amendments to promote democratic legitimacy, procedural justice, and to better ensure equitable outcomes.

States need at least four months to thoroughly reflect on the implications of proposed amendments for their domestic constitutional legal orders and their financial capacities. They must seek political and/or parliamentary approval prior to the adoption of the respective resolutions at the WHA. This is especially germane given the unique legal status of adopted IHR amendments that will enter into force automatically unless a State Party actively opts out within a very short timeframe of 10 months.⁵

Equity is stated by WHO to be at the heart of the pandemic preparedness and response agenda. Many low- and middle-income countries do not have representatives and experts present in Geneva during the entire parallel negotiation processes, have their representatives' discussing matters in less familiar languages, and/or must rely on diplomatic group/regional representations. This introduces inequity to the ability to fully participate in the negotiation process within the WGIHR and the INB developing the Pandemic Agreement. Richer countries have more ability to input into drafts and greater resources to review their implications. These manifestly unfair negotiation processes are contrary to the spirit and stated intent of the entire process. Ensuring equity, transparency and fairness requires an adequate time to discuss and consider what are intended to be legally-binding agreements.

Markedly exaggerated urgency claim

Whilst some have argued that urgency in developing new pandemic management instruments is justified by a rising risk and burden of such infectious disease outbreaks, this has recently been demonstrated to be a markedly exaggerated claim.⁶ The evidence bases on which the WHO have relied, and partner agencies including the World Bank and G20, demonstrate that the risk of naturally-derived outbreaks is not currently increasing, and overall burden is probably declining. This suggests that current mechanisms are indeed working relatively effectively, and changes must be viewed carefully, without undue urgency, in the light of the heterogeneity of threat and competing public health priorities across WHO Member States.

Appeal not to adopt the IHR amendments or Pandemic Agreement at the 77th WHA

The two working groups are requested to follow the UN Principles and guidelines for international negotiations, UN A/RES/53/101,⁷ and to conduct negotiations in a spirit of

⁵ In accordance with Arts. 59, 61 and 62 IHR as well as Art. 22 of the WHO's Constitution.

⁶ <https://essl.leeds.ac.uk/downloads/download/228/rational-policy-over-panic>

⁷ https://digitallibrary.un.org/nanna/record/265687/files/A_RES_53_101-EN.pdf?withWatermark=0&withMetadata=0&version=1®isterDownload=1

good faith and 'endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress.' A rational timeline without political pressure for results will safeguard the current law-making process from collapsing and prevent potential political abandonment, as experienced in case of the WHO Research and Development (R&D) Treaty.

One of the original reasons to initiate the amendment process of the IHR (2005) was the WHO's express concern that States did not comply with their obligations under the IHR during the Covid-19 Public Health Emergency of International Concern. With their failure to keep to the 4-months review period, the WHO and the WGIHR themselves show their open disregard for their legally binding duties under the IHR. A resolution with proposed amendments to the IHR for adoption at the 77th WHA can no longer be presented lawfully. Consequently, the Pandemic Agreement also needs to be delayed, as both processes are interdependent.

This is an urgent appeal to the WHO and its Member States to safeguard the rule of law and procedural and outcome equity by allowing fair input and deliberation. To do so, it will require lifting and extending the deadline, thus rendering the possibility for a more future-proof legal architecture for pandemic prevention, preparedness and response in-line with international law and its normative commitments.

Respectfully yours.