Geneva, Switzerland

PROPOSED DRAFT
Statement of Dispute by the Republic of Estonia
on the responsibility of the World Health Organization to respect the rule of law
pursuant to Article 56 of the International Health Regulations (2005)

Dear Dr. Tedros Adhanom Ghebreyesus:

The Republic of Estonia affirms the important role of the WHO and advancing global public health. With these responsibilities, we note that members of the WHO are expected to uphold universal values and respect human rights and fundamental freedoms.

Unfortunately, we have grave concerns that the WHO, at the moment, does not appear to share these values. The Republic of Estonia requests that this statement be included in the report of the official record of the plenary meeting.

During the Fifth meeting of the Working Group on Amendments to the International Health Regulations (WGIHR) Russian Federation suggested to violate the mandate of IHR (2005) Article 55(2) on the ground, as Russian Federation claimed, the rule presented a "*bureaucratic obstacle*" which, as claimed by Russian Federation, purportedly hinders accomplishing the task which was given to the WGIHR[1].

Sadly, the Secretariat of the WHO sided with the suggestion of the Russian Federation to proceed with the gross violation of the IHR and, moreover, made this route of violation to represent the official policy of the WHO, even though none of the other States supported the suggestion of Russian Federation to violate the rule. Because of said Secretariat position on the matter, the dispute between Republic of Estonia and Russian Federation regarding the interpretation and application of the provision of IHR (2005) Article 55(2) is raised to the dispute between Republic of Estonia and the rest of the Members of the WHO.

The Republic of Estonia appeals to your responsibility to resolve this dispute on the principle of respect of the rule of law.

Pursuant to Article 56(1) of the IHR (2005) (hereafter, "IHR"), *in the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it.* Pursuant to 56(2) IHR, in the event that the dispute is not settled by the means described under Paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it.

In response to these global appeals, in an online Q&A section[2] on the IHR amendment process, you publicly present a statement claiming that WHO has complied with IHR Article 55(2) (2005): *'In fulfilling the Article 55(2) requirement, the WHO Secretariat circulated all*

1 See *https://www.who.int/news-room/events/detail/2023/10/02/default-calendar/fifth-meeting-of-the-working-group-on-amendments-to-the-international-health-regulations-(2005)* , time mark 45:25 – 47:47.

2 *https://www.who.int/news-room/questions-and-answers/item/international-health-regulations-amendments*

proposals for amendments to the IHR on 16 November 2022, some 17 months before the Seventy-seventh World Health Assembly, which begins on 27 May 2024, when they are proposed for consideration.'

In addition, the argument is presented that the Secretariat even exceeded the technical requirements under IHR Article 55(2) by communicating *'all proposed changes to these [308] amendments developed by the WGIHR [Working Group on the Amendments of the International Health Regulations] drafting group, to all 196 States Parties, after each WGIHR meeting.'*

These claims must be rejected. The requirement of Article 55(2) that *the Director-General shall communicate the final text of any proposed amendment to the State Parties at least four months before the World Health Assembly (WHA) at which it is proposed for consideration* has a clear purpose: to afford the State Parties sufficient time to consider and thoughtfully decide on their position in the vote on such an amendment. Any other interpretation goes against the object and purpose of IHR Article 55(2), as well as the WHO-Secretariat's own established interpretation of Article 55(2) that it adhered to until the publication of the Q&A.

In addition, the Rules of Procedure of the WHA have been disregarded in the current process. As a result, the State Parties are still uncertain about what precisely they are expected to be voting on the 77th WHA. We respectfully submit that the principles of democratic process and international law, and common sense, require that the procedure for adopting documents of great importance should not constitute what essentially is, according to the procedure you advocate for this matter, a "blind vote..

Object and purpose (both the letter and the spirit) of Article 55(2) are being disregarded

As any multilateral treaty, the IHR must be interpreted and applied in line with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT). This requires interpretation in light of the object and purpose ('the spirit') of the provision. The object and purpose of IHR Article 55(2) is to give all State Parties an ample opportunity to thoroughly assess the domestic legal, institutional, political and financial implications of any proposed amendments as well as their compatibility with States' other obligations under international law, including international and regional human rights law. This includes an open political debate and assessment as to whether the respective state is willing to transfer further competences in the area of public health law and policy to the WHO, and in particular to the WHO Secretary-General and the Emergency Committees he can set up under the IHR. Many of the currently discussed amendments to the IHR foresee such transfer. Executive authorities may wish to consult with their legislatures and other authoritiesIn some states, the domestic constitutional order prescribes a mandatory parliamentary approval process.

Given that the IHR amendments are scheduled to be adopted together with the new Pandemic agreement (Treaty) at the 77th WHA, an extra layer of complexity is added: State Parties must thoroughly evaluate how proposed IHR amendments will interact with the Treaty provisions to avoid overlapping and conflicting commitments under the respective international instruments, and to assess the potentially far-reaching legal, institutional and financial consequences at the domestic and international level.

To make such assessments, State Parties must be provided with the final actual text of the proposed amendments at least four months in advance of the respective WHA. Review of, debates and consultations on, anything other than the final actual text of the proposed

amendment which will be submitted for adoption on the 77th WHA has no meaningful purpose. Submitting a text that is not final through domestic processes is a waste of time and resources, undermining the object and purpose of IHR Article 55(2) and thus is absurd. This is the case in particular when such non-final text is comprised of 308 incoherent and contradictory proposals, the purpose of which was to launch a 15-month negotiation process of the IHR amendments within the WGIHR. Similarly, such a process would be absurd when this text is subject to constant change due to on-going negotiations within the WGIHR,. This was the case with all proposed amendments developed by the WGIHR drafting groups, which were allegedly circulated to all States Parties after each WGIHR meeting. Similarly, suggesting that the 308 originally proposed amendments or proposed amendments discussed by the WGIHR at various stages are the final text that should be voted on at the 77th WHA leads to absurd results. Shall there, for example, be a vote on each of the 308 randomly proposed amendments to the IHR at the 77th WHA, even though they did not make it into the final text? It is highly unlikely that this will result in a fruitful outcome, compatible with the rule of law.

Moreover, it has to be recalled that many State Parties are represented in the negotiations of the WGIHR by regional integration organizations, such as the EU Commission, due to their membership in these organizations. Other State Parties have to participate through other regional groupings or diplomatic group representations due to the significant resource constraints that delegations of many low- and middle-income countries are under. These features of the process make it all the more necessary that all States are given at least four months' time to evaluate the final text of the proposed amendments. Against this background, the Secretariat's statement that '*[t]he spirit of the provision, which is to ensure that all States Parties have adequate time to consider and coordinate domestically and internationally on the proposed amendments in the run up to the Assembly, has been met*', can only be seen as an encroachment on States' sovereign rights, and equally, on the democratic participation rights of the people these States represent.

There is conclusive evidence that, until recently, it has been the Secretariat's own interpretation of IHR Article 55(2) that it is the final text of the proposed amendments to the IHR that must be circulated to all State Parties to the IHR four months before the respective WHA. The evidence also shows that back in October 2022, the Secretariat clearly intended to apply this interpretation to the 15-month amendment process of the IHR to be negotiated within the WGIHR and to its outcome.

First, this is clear from the WGIHR's Terms of Reference of 23rd of October 2022. They mandate the WGIHR in paragraph 6 to, by January 2024,

> *'submit[…] their final package of proposed amendments to the DG who will communicate them to all States Parties in accordance with Article 55.2, for the consideration of the Seventy-seventh World Health Assembly.'*

The Terms of Reference thus undoubtedly refer to the final package of the proposed amendments, that is, the proposed amendments to the IHR in their final wording in which they should be considered by the WHA.

Second, there is evidence that the WHO-Secretariat had no legal intention in November 2022 to circulate the 308 amendments proposed by State Parties under the remit of IHR Article 55(2), presumably because it recognized that these proposed amendments were meant as a starting point for the WGIHR's negotiations and indeed did not constitute the final text of the proposed amendments. In its address to the State Parties accompanying the publication of the 308 proposed amendments, the WHO-Secretariat did not follow its established administrative practice, indicating to State Parties that the circulation constituted a formal communication under

IHR Article 55(2). Rather, it noted that the amendments were published following a decision that the WGIHR had taken at its first meeting. However, explicitly notifying State Parties that amendments proposed by a specific State and circulated by the Secretariat constitute *'a formal communication of the text of the amendments' 'in accordance with paragraph 2 of Article 55 of the IHR (2005)'* has indeed been established administrative practice of the Secretariat. This can be seen from the Secretariat's last formal communication under IHR Article 55(2) of 20th of January 2022 (Ref.: C.L.2.2022).

Has the Secretariat now moved away from this interpretation of IHR Article 55(2) that is in line with the provision's object and purpose, requiring circulation of the final text of any amendments of the IHR four months in advance of the WHA? If so, why? And how is this compatible with the WHO's commitment to uphold the international rule of law? (Or did the Secretariat fail to comply with its own established administrative procedures when communicating the 308 amendments in November 2022?)

Final text has not been communicated to State Parties at least four months before the start of the 77th WHA in violation of Article 55(2) of IHR

The final text of the proposed IHR amendments is not available to this day – three (3) weeks before the start of the 77th WHA – and has therefore not been circulated to all State Parties to the IHR by the Secretariat. This grossly violates the 4-months-period requirement under IHR Article 55(2).

Neither the 308 amendments originally circulated in November 2022, nor the circulation of all proposed changes developed by the WGIHR drafting groups after each WGIHR meeting, nor the draft amendments to the IHR (A/WGIHR/8) made available on 17th of April 2024 constitute the final text of the amendments. Rather, these documents form part of an on-going negotiation process within the WGIHR and are therefore subject to constant change. As set out in the above-mentioned Terms of Reference of the WGIHR, this process should have delivered the final text of the proposed amendments in January 2024 for circulation to all State Parties in advance of the 77th WHA. The WGIHR failed to do so.

IHR Article 55(2) is clear in its wording on the four-month advance notice requirement. According to the express intent of the drafters of IHR Article 55(2), this provision is a *lex specialis* provision in relation to the general rule of Article 40(2) of the Vienna Convention on the Law of Treaties (1969) on the amendment of multilateral treaties.

Violations of the WHA Rules of Procedure

Neither the WGIHR nor the Intergovernmental Negotiation Body (INB) have finished the negotiations of their respective instruments, and final versions of neither the proposed amendments to the IHR nor the new pandemic agreement are available to State Parties of the WHO. Thereby, the WHO-Secretariat, the INB and the WGIHR also act in violation of the WHA Rules of Procedure.

As a general rule, all documents relating to the provisional agenda shall be made available online no less than 6 weeks before the commencement of a regular session of the WHA (Rule 14). Whilst some exceptions are permitted under Rules 13 and 15 upon agreement by the WHA or a decision to suspend these rules made by the President of the WHA with the consent of the General Committee, such flexibility does not apply to international Conventions or Agreements or international Regulations that are proposed for adoption by the WHA. Rule 10 requires that the *'Director-General shall consult the United Nations and the specialized agencies, as well as*

Member States on [these …] conventions or agreements or […] regulations […] in respect of any provision thereof which affects the[ir] activities'. The Director-General shall also bring the comments of the UN, its specialized agencies and governments that result from such consultations to the attention of the WHA.

Complying with this Rule first requires giving opportunities to the UN, its specialized agencies and governments to consult on the definite text of both the new pandemic treaty and the proposed amendments to the IHR; and second, to provide a reasonable time period for such effective international consultations and submission of comments in advance of the WHA. Less than three weeks before the start of the 77th WHA, and given the absence of the final text of the pandemic treaty and the final wording of the proposed IHR amendments, there is no longer reasonable time to carry out such consultations as required under the WHA Rules of Procedure.

Moreover, practical problems arise concerning the timely translation of these documents into the official languages of the WHO, which is a necessary requirement to ensure equal participation in the deliberations at the WHA by all delegations.

Appeal not to adopt the IHR amendments and the pandemic treaty at the 77th WHA

In light of the above, we call on the WHO-Secretariat to stop its non-compliance with IHR Article 55(2) and the Rules of Procedures of the WHA. There is no longer a lawful way to adopt any proposed amendments to the IHR at the 77th WHA, nor can the new pandemic treaty with a scope *ratione materiae* and an institutional framework significantly overlapping with that of the (amended) IHR be adopted. The adoption of both instruments must be postponed safeguarding the international rule of law and procedural and outcome equity by allowing fair input and deliberation.

Regarding the time constraints, we anticipate your kind resolution of the above-stated dispute within 3 business days upon receipt of this Statement of Dispute.

Thank you for your consideration.

[To be signed by the Prime Minister, or by the head of the delegation to the WHO]