

The WHO pandemic treaty proposal: responding to needs or playing COVID geopolitics?

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A catastrophe that should not have happened

The coronavirus disease (COVID-19) crisis has ignited eagerness for new binding instruments in some circles of the global health arena. This is an unexpected development, in many ways: health policy arrangements are mostly grounded on soft norms, and the WHO has adopted binding agreements only twice in its 76 years of history. On several occasions, a clear syndrome of opposition to treaty proposals in past negotiations at the WHO¹ had been manifested by those very influential member states that are now spearheading the idea of a binding treaty for pandemic preparedness and response. The emergency scenario triggered by SARS-CoV-2 has apparently healed the treaty fatigue symptoms - particularly after the labourious negotiations on the Framework Convention on Tobacco Control

(FCTC)² - that several multilateral public health actors had pretexted as the origin of their reluctance to binding norm-setting. The proclaimed intention now is to build a more robust global health architecture that will protect future generations.³ The diagnosis is that there will be other pandemics and major health emergencies in the future, threats for which no single government or multilateral agency can tackle alone.

There is no doubt that COVID-19 and other recent health emergencies (in early August 2021, national authorities confirmed the first ever case of the highly infectious Marburg virus disease in West Africa) have shown that the world is still not effectively able to prepare for, predict, prevent, respond to and recover from a multi-country outbreak or pandemic. The fact is, as the WHO Independent Panel for Pandemic Preparedness and Response has reminded us in its outspoken report on the woeful reality of

COVID-19,⁴ that the pandemic should never have occurred in the first place. Not only did the new coronavirus arrive in a world that had ignored warnings coming from public health officials, infectious disease experts, and the majority of recommendations from previous international commissions and organizations, but the international community had all the technical knowledge and tools to confine the viral evolution and make SARS-CoV-2 a geographically controlled epidemic. It simply did not do it.

The COVID-19 slide from an outbreak into a pandemic, with its attendant social and economic crises, is the consequence of failed government leadership and cooperation at national and international levels. But another part of the story has to do with the difficulties in which countries found themselves as they scrambled to get hold of suddenly needed medical equipment and supplies: masks, diagnostic tests,

1 The rejection of a WHO treaty on needs-driven research and development (R&D) is a contentious case in point: <https://www.twn.my/title2/health.info/2016/hi160601.htm>

2 https://www.who.int/fctc/text_download/en/

3 <https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty>

4 COVID-19: Make it the Last Pandemic, Report of the Independent Panel for Pandemic Preparedness and Response, May 2021, <https://theindependentpanel.org/>

ventilators, personal protective equipment (PPE), and so on. They also needed funds and a sufficient workforce to respond to the exponentially growing COVID-19 caseload. No international system existed that had previously created accessible stockpiles sufficient for the scale of country needs, or that could trigger the flow of resources and intervene to regulate and manage orderly access. “It is clear,” as the Independent Panel reports, “that the combination of poor strategic choices, unwillingness to tackle inequalities and an uncoordinated system created a toxic cocktail which allowed the pandemic to turn into a catastrophic human crisis.”⁵

The question is: Would a new international pandemic treaty be the missing tool required to overcome the identified gaps and legal constraints, and garner stronger political commitment from WHO member states against infectious disease outbreaks?

How did a pandemic treaty proposal become a priority at the WHO?

The pandemic treaty debate originated at the 148th session of the WHO Executive Board in January 2021. The proposal was first announced by the President of the European Council, Charles Michel, at the Paris Peace Forum in November 2020, and then

championed among a handful of reforms floated to the Geneva agency. It received an immediate enthusiastic welcome from the WHO Director-General: in his quest for political cooperation around the pandemic or, quite as likely, in his quest for his prospective re-election in 2022.

By the way: an instrument of international law that provides the WHO with the framework for emergency coordination and countries’ response has already existed for a while. This is the International Health Regulations (IHR)⁶ adopted by the World Health Assembly (WHA) in 1969. In 2005, in the wake of the SARS outbreak (2002-2003), the 58th WHA unanimously agreed on the revision of the IHR with the task to “prevent, protect against, control, and provide a public health response to the international spread of disease...”⁷ Since it entered into force in June 2007, the IHR 2005 has been the core tool to regulate disease outbreaks with an international dimension: “Its obligations and protocols reflect a condensed understanding of best practices developed through many decades

of diplomatic negotiations, expert input, and also on-the-ground operations in health campaigns.”⁸ However, the COVID-19 emergency has disclosed the not-so-hard side of the IHR. The repeated breaches of legal obligations have mirrored a number of problematic features in the existing framework, including the weak system of accountability, the lack of a process for independent verifications and compliance evaluation, along with ambiguities in relation to travel restrictions.

Together, the EU and WHO managed to mobilize the backing of 25 heads of State of both high- and low-income countries to a global call on 30 March 2021 for the creation of an international pandemic treaty to make the world better prepared to react to future health crises, and strengthen global capacity to predict, prevent and respond to pandemic threats.⁹ The proposal, we are told, aims to ensure serious political commitment; to define clear processes and tasks; to ensure long-term public and private sector support at all levels.¹⁰ Moreover, as we read, the international pandemic treaty

5 The Independent Panel, COVID-19: Make it the Last Pandemic, p. 43.

6 <https://www.who.int/publications/i/item/9789241580410>.

7 WHO, International Health Regulations, 1967, art.2, cited in A. von Bogdandy and P. A. Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, in MPIIL Research Paper Series, No 2020-07, Max Planck Institute for Comparative Public Law and International Law, March 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650

8 Bogdandy and Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis.

9 <https://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture>

10 <https://www.consilium.europa.eu/en/infographics/towards-an-international-treaty-on-pandemics/>

“would make it possible to integrate the One Health approach in the international health architecture, thereby connecting the health of humans, animals and the planet”.¹¹ The focus would be at enhancing the “sharing of information”, the “sharing of pathogens” and the “sharing of technologies”, as highlighted by the WHO Director-General when presenting the call with Charles Michel at the WHO.¹²

The proposal is light on details, but the notion of a new pandemic treaty seemingly seeks to avoid the attitudes of secrecy and health nationalism that have hampered the containment of the SARS-CoV-2 contagion, and it could capture many ideas spelled out in the Independent Panel report. The initiative originated as a European demarche clearly directed at keeping EU geopolitical clout, after the political and financial leadership exercised by France and Germany in building the 2020 coalition of the support to the WHO¹³ against the Trump’s hazardous departure from the organization. The EU is also aggressively fashioning its strategic position in the face of China’s ascending global health hegemony,

not only in Geneva. According to Germany, a pandemic treaty negotiated “under the roof of the WHO” is the preferred approach to strengthening the multilateral health architecture. Global support to the treaty is a far-reaching goal;¹⁴ so far, the fact that China, the USA and Russia have shown no appetite for the treaty proposal is a reality that cannot be ignored.

The pushed-for recommendation for a new pandemic treaty made its way to the 74th WHA in May 2021. The issue triggered great interest during the assembly, were it only for the fact that numerous member states had raised concerns about it in the lead-up to the WHA and during the assembly. They had expressed hesitance on starting discussions about a treaty to avoid future pandemics right in the middle of the COVID-19 crisis.

In the end, the 74th WHA resolved to postpone the potentially polarizing discussion until a special session of the WHA (WHASS) is convened for “considering the benefits of developing a WHO convention, agreement or other international instrument on pandemic preparedness and

response”¹⁶ from 29 November to 1 December 2021. The WHASS will have to establish “an intergovernmental process” to draft and negotiate this instrument, “taking into account the report of the Working Group on Strengthening WHO Preparedness and Response to Health Emergencies.”¹⁷

Some experts and countries view the creation of a pandemic treaty as a means to strengthen the role of the WHO and the implementation of the International Health Regulations. They also interpret the treaty as a strategy to ascribe responsibilities to other stakeholders beyond governments: “the safety of the world’s people cannot rely solely on the goodwill of governments”, said the WHO Director-General, when closing the 74th WHA.¹⁸

The final decision reflects what the USA had advocated for, but rather than sealing the pandemic treaty negotiation roadmap for March 2022, as planned by the EU-WHO treaty paladins, the Biden administration would still set that date for convening a high-level ministerial meeting to exam-

11 Ibid.

12 <https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty>

13 <https://www.france24.com/en/20200625-germany-and-france-shore-up-support-for-who-seek-global-answer-to-covid-19> and also <https://healthpolicy-watch.news/germany-france-push-for-more-power-funding-for-who/>

14 L. Husain and G. Bloom, Understanding China’s growing involvement in global health and managing processes of change, in *Globalization and Health*, 1 May 2020, 16: 39, <https://doi.org/10.1186/s12992-020-00569-0>.

15 <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty/>.

16 WHA decision on convening a special session of the World Health Assembly to consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response: [https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74\(16\)-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74(16)-en.pdf).

17 https://apps.who.int/gb/ebwha/pdf_files/EB148/B148_18-en.pdf

18 <https://www.who.int/director-general/speeches/detail/director-general-closing-remarks-at-the-world-health-assembly---31-may-2021>

ine and consider the pathway of an international instrument or treaty,¹⁹ outside of the WHO. Differences of opinion remain on whether the route for the new binding instrument ought to be devised within the context of the UN General Assembly in New York or as an agreement negotiated in Geneva. It is a fact, however, that the WHO Independent Panel for Pandemic Preparedness and Response, the G20 Global Health Summit, the 74th World Health Assembly and the G7 in Cornwall have all endorsed the idea of an international negotiation on this treaty, now.

Key questions that need to be answered

As the debate about the pandemic treaty unfolds, a few key questions have to be answered. For example: are we sure it is a good idea to kickstart global negotiations on a new treaty in this conjuncture of multilateral stress, and deepened decline of international cooperation? What is the core justification for another treaty to move forward, while we remain in this emergency, with many countries overwhelmed and Ministries of Health stretched to their limits? Why this rushed process? Some experts simply do not find the idea so alluring. Others have started to interpret

it as a major distraction from the current challenges.²⁰ The world is not short of treaties and binding frameworks, they say, the international community has enough mechanisms through which to act, if it wanted to.²¹ What is the benefit of yet another instrument? The global health community rather needs to focus on reforming the tools that exist already, like the IHR, so that they serve their purpose better. Concerns also arise over WHO's ability to tackle critical areas such as finance, trade, supplies, law enforcement, and the broader economic and social disruptions that are usually caused by a pandemic.

Whatever the route of the pandemic treaty, it will not be possible for negotiators to sideline how deeply unjust the international order is, and to avoid positioning themselves vis-a-vis this conjuncture. The process set in place so far is such that the striking lack of public consul-

tations makes everyone a mere spectator. In 2020, the international community decided - with the Access to COVID-19 Tools (ACT) Accelerator - to entrust the organizational setup and the operational management of the first viral pandemic in human history to public and private partnerships. In 2021, the pandemic treaty idea may purportedly use the joint effort by the WHO and these multi-stakeholder alliances - the launching pad for the new global governance of the pandemic - to overrun power asymmetries and define the eve of a new normative era: one in which "everybody should be in from the very beginning".²² Not merely a recontextualization of multilateralism, but the setting of novel criteria for shaping international law through the inclusion and involvement of corporate actors' vested interests, in their metamorphic disguise. The COVAX Facility may indeed be the model that the few promoters have in mind for their pandemic treaty. If that were the case, we can be sure of one thing: we shall have future nastier pandemics and, once again, we shall not get it right.

19 E.R. Fletcher, *Exclusive – United States Holds Back on Bold Move Toward Pandemic Treaty*, Health Policy Watch, 21 May 2021, <https://healthpolicy-watch.news/exclusive-us-still-holding-back-on-bold-move-toward-pandemic-treaty/>

20 N. Ramakrishnan, K.M. Gopakumar, S. Shashikant, *WHO: Should Members Pursue a Pandemic Treaty, In the Midst of a Global Pandemic?*, TWN Info Services on Health Issues, 12 May 2021, Third World Network, <https://www.twn.my/title2/health.info/2021/hi210507.htm>; N. Ramakrishnan and K.M. Gopakumar: *Proposal for a WHO treaty on pandemics raises concerns*, Third World Network Report, 14 July 2021, <https://www.twn.my/title2/health.info/2021/hi210702.htm>

21 Vijay S.L., *Global Health Is In Disarray: But Is A Pandemic Treaty A Way Out?*, Health Policy Watch, 23th April 2021, <https://healthpolicy-watch.news/global-health-is-in-disarray-but-is-a-pandemic-treaty-the-way-out/>.

22 Pereira Da Silva Gama C.F., "Broken Threads: Reshaping Multilateralism with COVID-19 Under Way", *op. cit.* p. 5.