



TWN Info Service on Health Issues (May21/07)

12 May 2021

Third World Network

WHO: Should Members Pursue a Pandemic Treaty, In the Midst of a Global Pandemic?

New Delhi/Kochi/London, 12 May (Nithin Ramakrishnan, K M Gopakumar and Sangeeta Shashikant) – A draft decision on the negotiation modalities of a pandemic treaty for consideration of the 74th World Health Assembly has been circulated to WHO Members at a time when most governments are struggling to contain the COVID-19 pandemic as they desperately grapple with repeated lock-downs, overwhelmed hospitals, and shortages of essentials such as oxygen, vaccines, medicines and diagnostics.

The 74th WHA is to take place from 24 May to 1st June virtually in light of the COVID-19 pandemic.

The draft decision was introduced by Chile, the European Union, Tunisia and Indonesia on behalf of the Group of Friends of the Treaty (Albania, Chile, Costa Rica, Croatia, Fiji, France, Germany, Greece, Indonesia, Italy, Kenya, Republic of Korea, The Netherlands, Norway, Portugal, Romania, Rwanda, Senegal, Serbia, South Africa, Spain, Thailand, Trinidad and Tobago, Tunisia, Ukraine, the United Kingdom).

Invoking Rules 41 and 86 of the WHA Rules of Procedure, the draft seeks to establish an intergovernmental meeting (IGM) to prepare and negotiate a WHO framework convention on pandemic preparedness and response to be adopted under Article 19 of the WHO Constitution.

The proposed meetings of the IGM may be held either in person, virtually or in hybrid format with the first meeting to be convened as early as in June 2021.

The draft decision text anticipates that the proposed text of the WHO framework convention will be completed and ready for adoption by the first quarter of 2022.

This week beginning 10 May, nine hours of informal consultations (3 hours each on 10 May, 12 May and 14 May) have been scheduled for discussion on the proposed draft decision text on the pandemic treaty.

Discussion on the draft decision will surely add further pressure on developing country delegates that are already struggling with extremely long days of continuous informal consultations on the numerous agenda items for the forthcoming WHA.

The idea of a pandemic treaty was first mooted in January 2021 by the European Union Council President Charles Michel. Thereafter it has been endorsed by Dr. Tedros Adhanom Ghebreyesus, the WHO Director-General. And together, the EU and WHO have managed to mobilise the backing of 25 WHO member states.

The overall stated aim of the treaty is for the world to be “better prepared to prevent pandemic threats and respond to them rapidly and effectively when they occur”. However, it is light on

details, with serious concerns emerging as to its need, purpose and timing, especially since it is about dealing with future pandemics.

Pandemic treaty, rushed and a distraction from current challenges?

Some WHO members have privately expressed frustration with the haste to begin and complete negotiations even as members are grappling with the consequences of COVID-19. As new waves of COVID-19 hit countries, the raging battle to bring it under control continues globally. As at 9 May 2021, there have been about 157 million confirmed cases of COVID-19, including 3 million deaths, reported to WHO.

Issues around inequitable access to treatment, diagnostics and vaccines have yet to be resolved with mechanisms such as the Access to COVID-19 Tools Accelerator (ACT-A) and COVAX failing to deliver on their promises of equitable access. High income countries representing 16% of the world population proclaim international solidarity, while capturing most of the therapeutic and vaccine supply. They prefer to stress on “donations” of excess supply, rather than take any concrete measures to counter the monopolies of the pharmaceutical industry and the deliberate scarcity of supply created by the industry.

On 7 March, Dr. Tedros said “We need to be on a war footing”. On that note, we are indeed in the middle of a war, and so should we not focus on the current war, rather than prepare to avert future wars?

A list of frequently asked questions (FAQ) prepared by the Group of Friends of the Treaty argue that “the world cannot afford to wait until the COVID-19 pandemic is over to start planning for better pandemic preparedness and response and implementing the lessons learnt from this crisis” adding that “key to the success of this endeavour will be a collective approach that puts aside ‘business-as-usual’”.

This argument is disingenuous. How can we learn from lessons of the current crisis when international agencies and the international community have so far failed on global solidarity and equitable access, and instead persisted with “business as usual” approaches.

In fact, the disparity in access between the high income countries and the rest of the world is staggering. In October 2020, UNCTAD found that each resident of high-income countries has benefited, on average, from an additional US\$10 per month of imports of COVID-19 related products. This number is much lower for middle income countries- at about US\$1, and lower still for low income countries – a mere US\$0.10”.

On vaccines, Bloomberg reports that “Countries and regions with the highest incomes are getting vaccinated about 25 times faster than those with the lowest.” and that at the current pace “it would take years to achieve a significant level of global immunity”. The inequity in diagnostic testing is equally huge, with the least developed countries accounting for a mere 1.1% of globally reported tests.

“It is baffling that WHO Members are being rushed to negotiate a pandemic treaty to address future pandemics, when WHO Members should be focused on addressing the vast disparity in access and massive health and socio-economic impact of the COVID-19 pandemic”, said a Geneva-based diplomat who asked not to be quoted, adding that “given that many countries are overwhelmed and Ministries of Health stretched to its limits, how can they be expected to meaningfully participate in the negotiation”.

Another diplomat pointed to the inexplicable short time frame set out for the completion of the WHO framework convention on pandemic preparedness and response, questioning whether

WHO members should begin negotiations when meetings will mostly be held virtually, and even the need to rush into negotiations, given that the focus is future pandemics.

An expert in WHO negotiations argued that the pandemic treaty initiated by the EU is merely a distraction from the real problems of the current pandemic, and the need to take concrete action to address its challenges and the failure of the international community, in particular that of the EU in making good on its promises of international solidarity and equitable access.

The draft decision also bypasses a deliberative examination of the recommendations of the three review committees commissioned by the 73rd WHA Resolution 73.1, for improving the functioning of WHO and International Health Regulations (IHR) 2005.

The three reviews are by the IHR Review Committee (IRC), the Independent Oversight and Advisory Committee (IOAC) for the WHO Health Emergencies Programme, and an Independent Panel for Pandemic Preparedness and Response (IPPPR). These were initiated to examine the “(i) the effectiveness of the mechanisms at WHO’s disposal; (ii) the functioning of the International Health Regulations (2005) and the status of implementation of the relevant recommendations of previous IHR Review Committees; (iii) WHO’s contribution to United Nations-wide efforts; and (iv) the actions of WHO and their timelines pertaining to the COVID-19 pandemic”.

Reports from the IRC and IOAC have been available in the public domain since 5 May 2021 while the release of the IPPPR report is imminent. It seems that the suggestion to formulate a new treaty, announced by the EU, has considerably influenced the review committees’ findings and recommendations. Therefore, it is important to have a thorough discussion on the recommendations of the review committees among WHO members before embarking on the journey of a new treaty.

Interestingly, an EU-sponsored resolution on WHO’s Emergency Preparedness that currently under negotiation has the following operational paragraph: “*DECIDES to establish a Member States Working Group open to all WHO Member States on Strengthening WHO preparedness and response to health emergencies*”.

It would be logical for such a working group to discuss and examine the recommendations of the various review reports and then to decide on the future course of action. The draft decision circulated by the Group of Friends of the Treaty unfortunately pre-empts this possibility.

Lack of clarity on the purpose and content of the proposed treaty

It is common sense, before starting any treaty-making process, to first explore *whether a treaty is the appropriate instrument to satisfactorily regulate the issue at hand*. With regard to a pandemic or a public health emergency of international concern (PHEIC), there is no lack of legal mandate for WHO to act.

Article 2(g) of the WHO Constitution provides for measures “to stimulate and advance work to eradicate epidemic, endemic and other disease”. In doing so, WHO has already adopted IHR 2005, a specific set of regulations under Article 21 of the WHO Constitution, to prevent the international spread of disease.

[Article 21 of the WHO Constitution provides the powers to WHA to adopt regulations to deal with issues like a pandemic, which are applicable to all member states who have not explicitly opted out.]

The FAQ accompanying the draft decision text justifies the framework convention on the basis

that it “would promote political commitment at the highest level” and “could establish principles, priorities and targets for pandemic preparedness and response through a legally-binding international instrument” in particular to:

- Build national, regional and global preparedness and resilience to pandemics and other global health emergencies;
- Mobilize collective international efforts necessary to prevent, rapidly detect and effectively respond to events, including outbreaks of disease, with pandemic potential;
- Ensure universal, proportionate and equitable access to countermeasures for pandemic preparedness and response; and
- Support global coordination for pandemic preparedness and response through a stronger global health architecture, in which WHO plays a central role.

The FAQ further states “with respect to the IHR, it is important to note that the treaty would not replace the IHR – on the contrary, the IHR would be a cornerstone of the treaty. The treaty would recognize the central role played by the IHR as the only international legal framework for preparedness and response to the international spread of disease at a technical level, and measures to further strengthen the IHR could be included in the treaty, without having to re-open the IHR themselves”.

Thus the proposed treaty aims to incorporate the IHR.

The specific objective and elements that will be in the proposed treaty are far from clear. Importantly WHO member states have yet to have any serious discussion on the contents or whether the “treaty” approach is even the best way forward to address the challenges of a global pandemic.

Furthermore, adoption of a framework convention under Article 19 of the Constitution and various other sub-treaty instruments such as protocols and guidelines, is likely to lead to fragmentation of the legal regime established through the IHR. In order to strengthen global coordination and preparedness under the IHR, what is actually needed are legal instruments in the nature of rules, clarifications, general commentaries of interpretation and more prescriptive implementation guidelines.

Article 57 of IHR 2005 actually presents WHO and its member states with a *lex specialis* (a law governing a specific subject matter) to be invoked during the period of sustained PHEIC. It requires all other instruments and treaties to be interpreted consistently with IHR 2005. A framework convention, when it garnishes a higher political visibility, as mentioned in the FAQ, will diminish the focus on the IHR.

It must be noted that already there is a significant gap in the implementation of the IHR and the achievement of the core-capacities targeted in those regulations. When the WHO member states perform better in detecting the outbreak of a health emergency event, they perform much less when it comes to responding to the event. Funds and technical assistance that have supported developing countries so far have only been helpful in building detection capacities. This situation must be reverted and member states must develop preparedness as well as response capabilities.

Therefore, what is required are supplementary instruments giving clarity to the interpretation of the IHR and its application, providing for better achievement of core-capacities in the member states. It requires additional commitments from developed countries to ensure proper finance,

knowledge and technology transfer from developed to developing countries. The framework convention hardly provides anything in this direction.

There is so far no promising proposal or plan about any sort of pragmatic or innovative legal solution ensuring equitable access, shared responsibility, and capacity building in the proposals or policy statements about the new pandemic treaty.

Therefore, it is quite apparent that the content of this proposed new treaty is going to create further legal complexities as to the implementation of the IHR as well as further entrench the existing asymmetric relationship between developed and the developing countries.

Most importantly, the draft decision under informal discussion is not likely to mobilise the global community by coming out in the most struggling periods of human history and that too without addressing any of the real concerns of the developing part of the world and its people. It is not even considerate about the ability of struggling governments to engage effectively in the discussion about the proposed treaty provisions. The basic principles of international law making such as free consent and good faith risk being disregarded by not considering the effective participation of the member states having vital interests in the subject matter, i.e. developing and least developed states.

Even the 2021 report of the IRC has postponed the comprehensive assessment of progress on implementing previous review committees' recommendations citing that states, governments and WHO are too stretched out these days and have no sufficient resources to participate in such a process.

Micheal Wood, a Member of the International Law Commission, opines that before starting any treaty-making process, one should always ask two basic questions: *(1) Is a treaty really necessary to regulate the issue at hand, and (2) if so, what is the proper time to start negotiations?*

On both counts, the proposal for the new pandemic treaty and the draft decision to start negotiations fall short. The draft decision fails to provide a satisfactory reason why a treaty is necessary to better handle PHEIC. It has been proposed at a wrong time devoid of any "fairness and equity" considerations.

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