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The Art of Crisis Management: The Pandemic Agreement – An Opportunity for Health for all

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- **The Pandemic Agreement responds to global coordination deficits during the COVID-19 pandemic. It seeks to improve preparedness for future pandemics by fostering cooperation without jeopardizing national sovereignty. However, national discontent could have a negative impact on the negotiations.**
- **Fears that national sovereignty or the protection of human rights could be undermined by the Pandemic Agreement or the World Health Organization (WHO) are unfounded, as national legislative and decision-making processes will remain decisive.**
- **The stated goal is concluding the negotiations by May 2024, although there are still some points of contention.**
- **The realistic concern is that the WHO will end up lacking sufficient competences and resources and will not provide an effective framework for preventing and responding to future pandemics, rather than becoming a "world health police" with invasive powers of intervention.**
- **The pandemic agreement should be seen as an opportunity to positively transform lessons learned from the COVID-19 pandemic into clear and transparent rules to prevent future pandemics.**

Initial situation – a slide into crisis as an unsatisfactory scenario

The dynamics of the COVID-19 pandemic have confirmed the pandemic cycle from initial panic to subsequent non-compliance: While policy-makers initially had to focus on short-term emergency measures, the openness to comprehensive reforms has declined as the pandemic subsides, especially as new geopolitical challenges shaped the international agenda with Russia's invasion of Ukraine. As the pandemic spread to more and more countries in 2020, it became apparent that both national health systems and international health coordination were largely ill-equipped for such an event. In particular, the unclear criteria for declaring a pandemic, insufficient financial resources for the World Health Organization (WHO), lack of transparency regarding the cause of the outbreak, lack of coordination among member states and lack of solidarity in the distribution of personal protective equipment, medicines and vaccines were criticized. National self-interest and the lack of binding international rules in many areas have taken a heavy toll in the form of human lives.

According to the lessons learned from the crisis, the WHO's existing toolkit and the International Health Regulations (IHR), need a fundamental overhaul. In the event of a new pandemic, the scope of the IHR remains limited. As a result, as early as 2020, a broad coalition of countries spoke out in favor of drafting of a pandemic accord. In the future, it shall not be the financially strongest countries who will be in pole position for the purchase of vaccines and therapeutics. Selfishness shall give way to solidarity. And the sooner the international community can take

countermeasures in the event of disease outbreaks, the sooner they can be contained with existing means. Against this background, a special Intergovernmental Negotiating Body (INB) was established by the WHO General Assembly in December 2021. This body is meant to draw up an international "convention, agreement or other international instrument on pandemic prevention, preparedness and response", or "pandemic agreement" in short.

In both instruments, issues of distributive justice, access and benefit-sharing, capacity building and financing have played important roles. The WHO secretariats of both negotiation processes are therefore working to ensure that both processes are as coherent, complementary, and coordinated as possible. They are expected to conclude as early as the WHO General Assembly in May 2024 - although many points still remain controversial. Additionally, in view of the upcoming elections in the USA, the EU and India, the tendency towards domestic navel-gazing is escalating considerably with each passing month.

Criticism and fears

Critics, especially representatives of non-governmental organizations and groups, but also the scientific community, consider both negotiation processes to be non-transparent, as most of the negotiations are held behind closed doors. This would also give space to those who peddle misinformation about the pandemic agreement out of vested interests. However, claims that a pandemic agreement would waste scarce financial resources and grant the WHO too broad rights that threaten the national sovereignty of its members are false and are refuted below.

Sovereignty and Subsidiarity: Safeguarding National Responsibility

During the debate on a pandemic agreement, concerns were raised about an impermissible restriction on national sovereignty. However, a closer look at the drafts so far shows that this concern is unfounded: the proposals aim at efficient cooperation to tackle global health crises. National legislative processes will continue to be crucial for action on the ground, but resources should be shared to be able to solve crises faster and more effectively together.

If, at the end of the negotiations, there is a treaty text by which the states commit themselves under international law, this would also provide an opportunity for national action in the sense of international coordination and support. No country can be forced to join such a system. However, such accession may be in the common good and in one's own interest. The drafts repeatedly underline the importance of national sovereignty. Countries like China or the USA will not be seduced into anything. Germany is also subject to its own constitutional limits. The implementation of measures shall consider national possibilities and capacities.[1] The pandemic agreement must therefore be implemented in accordance with national sovereignty, supplemented by the assumption of international responsibility.[2]

In principle, WHO decisions do not have direct legally binding effect on its Member States. The WHO is an intergovernmental organization and the decisions of its body, the General Assembly, are primarily recommendations to the member states. The transposition of these recommendations into national law is the responsibility of the individual states.[3] Operationally, the WHO also has limits and will not decide, for example, on the provision of vaccines, diagnostics, and therapeutics in the contracting states even after a pandemic agreement enters into force. There are no automatisms and no right to intervene, and this would apply for a pandemic agreement as well.

Overall, it should be noted that fears of a restriction on national sovereignty are not confirmed in the current negotiation documents. The pandemic agreement is not intended to provide for the circumvention of national competences or the creation of a supranational body that intervenes directly in national affairs. Such a request would also have no prospect of international consensus, which is needed for an agreement supported by all states. On the contrary, the pandemic agreement strives for

[1] See e.g. Art. 3, No. 5 and Art. 19 of the "WHO Intergovernmental Negotiating Body. Proposal for negotiating text of the WHO Pandemic Agreement"; for better readability, the word pandemic agreement is used in the following.

[2] It remains to be seen whether exclusions from validity of states will be invoked for this purpose. The current version of the pandemic agreement no longer provides for the possibility of exceptions.

[3] In Germany, for example, the International Health Regulations (IHR) have been regulated in a separate law and in the Act on the Implementation of the International Health Regulations (2005).

effective global cooperation without jeopardizing the core principles of national sovereignty. It presupposes free decision-making by each country for the final document to be effective.

Democratic processes and adherence to a rules-based approach, even in times of pandemic

Since decisions in the bodies of the WHO are based on democratic principles, scientifically underpinned, and steered by none other than the member states, the fear of the omnipotence of the WHO is also unfounded.[4] However, its member states have a responsibility to participate in the opinion-forming debates and to raise their voices in order to actively shape the direction and results of the organization. The WHO General Assembly is decisive for the strategic orientation. The WHO operates within a cooperative framework. Although the implementation of the annually agreed work program still has to be carried out mainly through voluntary contributions from member states or third parties, there are plans to rely more on fixed contributions in the regular budget in the future in order to ensure long-term and independent financing security.[5] The member states therefore agree on the working program, which gives rise to the right to joint financing with equal consideration of different projects. The decision is exclusively in the hands of the member states.[6]

The idea of the WHO as an opaque, autocratic organization is therefore inaccurate. Even if only a minority of its members are democracies in the sense of a free democratic basic order according to the European understanding, the WHO itself is a platform for democratic decision-making among its 194 member states, whose common goal is to protect global health.

Since its inception, the WHO has established itself as a linchpin in global health policy, with great political and financial support, especially from Germany. A central aspect of its approach is the promotion of increased cooperation with other organizations and their representatives. This collaborative approach is not only a response to the complexity of modern health problems, but also a practical expression of the WHO's core structural principles, which are also reflected in the pandemic agreement.[7] Compatibility and coherence are at the heart of this, playing in all meetings dealing with the pandemic agreement.[8] Such principles apply not only to the instruments within the WHO, but also to the activities of the other actors in multilateralism. However, it will be important for the pandemic agreement[9] For example, member states are currently negotiating how to use clear and reliable criteria to identify a potential global pandemic in good time, so that appropriate measures can be taken at a stage in which further spread can be slowed down as effectively as possible. On this basis, the official "declaration of a pandemic emergency" would be a response to the criticisms made during the initial phase of the COVID-19 pandemic. Such a definition ultimately means greater transparency and legal certainty. The WHO should not and cannot act either by surprise or on its own, but according to calculable criteria and thus in the interest of all.

Money and *Governance*: Between National Resources and Global Responsibility

The discussion about the forthcoming pandemic agreement raises questions about the resulting financial obligations of the member states. There is no question that these are serious commitments that no one will want to make without

[4] The WHO's working program is defined by its assembly of all member states, the World Health Assembly, and the Executive Council (Council) (Articles 9 and 10 of the WHO Constitution). According to the Rules of Procedure of the World Health Assembly, each country has one vote (cf. Rule 69).

[5] At the 75th WHA Assembly in May 2022, it was decided under Decision 75(8) to gradually increase the fixed contributions to 50% by – ideally – 2029, and by 2031 at the latest.

[6] Of course, within the commonly agreed working program, certain projects that have received earmarked grants can be implemented more quickly than those for which funds have yet to be raised. The General Assembly of the WHO "supervises the financial policy of the Organization" (Art. 18f, 55 and 56 of the WHO Constitution).

[7] The pandemic agreement stipulates that where activities affect the areas of competence of other organizations or treaty bodies, appropriate steps shall be taken to promote synergies, compatibility and coherence (Article 25)

[8] Health Policy Watch quotes the co-chair of the Working Group on Amending the International Health Regulations (WGIHR), New Zealander Dr Ashley Bloomfield, as saying that "complementarity, coherence and continuity" were the main themes of a joint meeting with the INB.

[9] In its report on the response to the Covid-19 pandemic, the Independent Panel on Pandemic Preparedness and Response (IPPPR) recommended strengthening risk communication, especially in pandemics, in order to ensure up-to-dateness of information, transparency and accountability (see p. 59).

a convincing concept and structure. However, a closer look at this question shows that the fears need to be placed in a broader context.

The pandemic agreement emphasizes the need to create appropriate governance structures and strategies based on international guidelines. This focus aims to provide a framework for effective prevention, preparedness, and response to future health crises. However, the pandemic agreement does not provide for a specific percentage of financial allocation of national health budgets.

In any case, the pandemic agreement will not contain any agreements that serve to finance WHO structures beyond the administration of the treaty. Rather, it is about encouraging and supporting member states to prioritize national resources for health according to their capacities and needs.[10]

Once the negotiations have concluded, it remains to be seen whether sufficient financial resources will actually be channeled into pandemic preparedness, prevention and response in accordance with the individual situations of the member states. Past experience with the implementation of the International Health Regulations (IHR) suggests that a pandemic agreement should require a stronger financial commitment in order to be effectively implemented.[11] So far, at least, the pandemic agreement underscores the need for national governments to provide financial resources for pandemic prevention and response. The flexibility of the agreement makes it possible to consider the individual context and requirements of each country, while ensuring that an adequate response to future health crises is ensured.

Protection of individual rights and freedoms

In the midst of the ongoing debate about the future organization of the global pandemic response, concerns are being raised about the concrete possible restriction of individual rights and freedoms. Some of the accusations go so far as to claim that a pandemic agreement ultimately curtails human rights, introduces compulsory vaccination, or uses digital vaccination passports for mass surveillance.

However, a closer look at the fundamental principles and goals of the current draft of the pandemic agreement shows that they are primarily intended to effectively contain potential pandemics and thus protect the lives of individuals, reduce the burden of disease on the general public and preserve essential livelihoods.[12] Any agreement must respect the fundamental principles of international law. There is neither the intention nor the mandate to minimize personal freedoms – the opposite is the case.

Effective and focused pandemic control: Core contents of a pandemic agreement

The negotiation of the pandemic agreement raises important questions concerning the balance between pandemic prevention and preparedness, as well as the fair distribution of resources. Compared to the first zero draft, which showed a strong focus on preparing for a pandemic outbreak or responding to a pandemic with neglect of preventive approaches, the current draft increasingly includes statements on prevention. The German and European representatives continue to push for a balanced approach that emphasizes both preparation and prevention.[13] While the potential availability of vaccines and therapeutics is important to respond to unexpected health crises, extensive prevention efforts must not be neglected. The WHO has promoted prevention measures in the past and will continue to stress the need for early detection and containment of outbreaks, as this would make epidemic-related measures with restrictions on social life unnecessary.

Regarding pandemic preparedness, important lessons can be learned from the approaches taken during the COVID-19 pandemic, specifically from the distribution of vaccines (COVAX).[14]

[10] Each party should therefore establish, implement, and adequately fund an effective national coordinating cross-sectoral mechanism, in line with its national capacities. (cf. Art. 17 of the Pandemic Agreement)

[11] In its first report in September 2020, the IPPPR found that the majority of the recommendations from the IHR had not been implemented, as they were considered non-binding (p. 15f.).

[12] Article 2 clearly defines these primary objectives. The criticism is even refuted by the clear focus on the protection of human rights and national sovereignty in Article 3.

[13] See, for example, the text proposals of the European Union of 28.02.2023, which proposed to insert a new Chapter II entitled "Prevention, detection and reporting of pandemics".

[14] COVAX should deliver COVID-19 vaccines for all based on solidarity and equity. Some obstacles that

Transparency, civil society involvement and the avoidance of conflicts of interest are recognized by the WHO as key to improving effectiveness. These experiences will serve as a basis for improved cooperation and coordination to ensure that future actions adequately address the concerns of different stakeholders.

At the same time, the countries of the Global South tend to advocate for more distributive justice. However, there is still no common vision of the WHO and its members on how distributive justice can actually be improved in a concrete and sustainable way.[15] Ensuring equitable distribution of products such as vaccines, tests and therapeutics remains a complex undertaking. Member states are working to develop mechanisms to ensure that all countries have fair access. The pandemic agreement provides a platform to strengthen such efforts and ensure that resources are distributed equitably, but also improve overall future measures in terms of effectiveness and fairness. WHO takes the challenges and concerns seriously and is continuously working to create a framework that addresses the concerns of all stakeholders. Their democratic principles and commitment to promoting global health are at the heart of this effort to build a better future for all. Even if the outcome of the debate is still open, helping each other does not diminsh national identity or sovereignty, but rather strengthens it. In the event of a pandemic, if countries or entire regions of the world cannot sufficiently ensure containment and prevent its spread, there is an increased risk that new variants of a disease will develop in these countries and regions that prove resistant to previous measures. The WHO can play a valuable coordinating role in this regard.

Conclusion: Don't let internationally meaningful efforts fail because of national resentment

Every negotiation process for international conventions is accompanied by criticism. It is legitimate to critically question the processes and content. It is helpful to be aware of the different interests and interest groups that must be reconciled in such a negotiation. Fears that national competences and responsibilities would be curtailed to its detriment do not stand up to a reality check. For example, overly blunt criticism that the pandemic agreement would be negotiated largely behind closed doors ignores the nature of negotiation processes and the need for confidential consultations. No one will publicly advocate a compromise that has not been staked out beforehand. In other words, ever-changing negotiating positions cannot be conveyed in front of cameras and live on the Internet. Transparency means sensible intermediate steps, disclosure of interests, sharing of negotiation statuses and essential documents. However, the negotiating parties – the WHO member states – sometimes have very different views on individual points of the agreement, and not every negotiation step towards a compromise can be carried out in public.

On closer inspection of the draft text and the reality of international law, other criticisms also have no reliable basis. In this way, the WHO will not become a supranational institution in the future that has direct access rights to national implementation processes – as the European Union has in part in the fields of competence assigned to it by the Treaties of Maastricht and later Lisbon. Civil liberties in future pandemic situations must be realized based on national legislation and not on the instructions of the WHO.

A pandemic agreement does not give the WHO a wealth of power to which the member states would have to submit. Beyond all constitutional boundaries, this power would not be a practical or sensible , because only the states themselves can establish effective health protection on the ground. It is more likely that the justified concern that in the end the pandemic agreement will only find a common denominator that is too small and that the problems of prevention or distribution of goods and information will not be sufficiently solved in the event of a pandemic. A toothless agreement, conspicuous by weak and

only became visible during implementation are now to be circumvented in future initiatives to make access to medical countermeasures more successful and sustainable. Supply shortages are seen as the main obstacle to global vaccination. COVAX' also includes a universal compensation scheme that had made it easier for manufacturers to provide vaccines to low-income countries.

[15] Health Policy Watch concludes that while there is agreement that distributive justice must be at the heart of future pandemic response, there is significant disagreement on how to achieve this. And the co-chair of the INB is also quoted as expressing disappointment that member states are emphasizing distributive justice as a cornerstone of the pandemic agreement, "without saying how it will be implemented."

incomplete regulations, is far more likely to be a conceivable scenario than for the WHO to become an all-powerful world health police. It is much more realistic that after the end of the negotiations, the WHO still has too few competences and resources to be able to act effectively in a future pandemic.

The pandemic agreement should therefore be seen as an opportunity to ensure that much of the international cooperation that has not been regulated or insufficiently regulated in the past three years can now be regulated between WHO member states – especially everything that is not covered by the current International Health Regulations (IHR). However, no one should allow themselves to be seduced into turning their discontent with national or regional measures, which may or may not be justified in individual cases, into a blanket rejection of strengthening international responsibility. Perhaps this is the core of a wave of criticism that has reached the negotiations. In addition to a high level of approval for many political decisions, there was also disappointment and outright rejection of national decision-makers. However, restoring the necessary social peace here requires a different level of debate on the global health architecture. The struggle for the right measures, which also have a freedom-restricting character, was, is and remains a genuinely national challenge that a democratic state will have to face whenever circumstances require it.

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