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The Proposed Pandemic Agreement: A Pivotal Moment for Global Health Law

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Abstract

This article discusses the prospects and pitfalls of a legally binding pandemic agreement under the auspices of the World Health Organization, currently under negotiation in Geneva. Such an agreement could foster a rules-based pandemic prevention, preparedness and response as a reaction to the failures by states during the COVID-19 pandemic, including a lack of effective coordination for sharing all kinds of data and the global inequity in the distribution of medical goods fueled by vaccine nationalism. Achieving these goals, however, will depend upon a meaningful engagement by delegations negotiating the agreement, a legally sound formulation of its provisions, and overcoming the currently pervasive emergency-bias in this field of global health law. Thus, as advocated by Lawrence Gostin in his seminal treatise on Global Health Law ten years ago, the pandemic agreement could help realize the transformative potential of law for facing one of the greatest health threats to humanity.

Keywords: pandemic agreement; global health law; communicable diseases; World Health Organization

Introduction

One decade ago, Lawrence Gostin posited in *Global Health Law* the transformative potential of international law, both hard and soft, to allow humankind to face the biggest public health threats in a united fashion.[1] These claims are as valid now as they were then. Indeed, the catastrophic dimension of the COVID-19 pandemic, with more than 7 million confirmed deaths and the actual amount likely to be more than twice as high, exposed numerous shortcomings in the international regulation of pandemic prevention, preparedness, and response.[2] Gross inequities in the global distribution of medical countermeasures — including vaccines, diagnostics, and personal protective equipment — led to calls for new legally binding rules that can herald a new era of interstate cooperation under a new "pandemic agreement."

If approved, the pandemic agreement would not stand "in clinical isolation"[3] from existing international law. The International Health Regulations (IHR) of 2005 have been in force since 2007 and are legally binding for 196 States Parties. Their scope was the subject of increased scrutiny and criticism in light of their not being "fit for purpose" in the wake of COVID-19, leading to approval of the IHR amendments in June 2024 and discussed previously in this special issue.[4] Beyond these amendments, the IHR continue to face limitations in the glaring absence of provisions dealing with questions of distributive justice concerning access to emergency- or pandemic-related medical goods.[5] Such gaps were evidenced during COVID-19, as rampant vaccine nationalism[6] led Global North countries to hoard these life-saving products, leaving numerous other countries in the Global South behind.

These gaps in global health law led to heightened calls for a new international law instrument focused on pandemics, which could contribute to foster a closer collaboration between states in future events of a similar nature. This article examines the importance of the pandemic agreement in the continuing advancement of global health law by, first, offering an overview of key open questions in the current state of negotiations in Geneva. Secondly, the article sheds light upon some of the pitfalls facing the agreement, including difficult political circumstances and the prevalence of an emergency logic that risks distorting the prioritization of global health problems. While the pandemic agreement is still under negotiation in Geneva, this agreement, if approved, would represent a new "grand social bargain"[7] through which countries agree on common paths for facing future disease-related threats.

Negotiations on a Pandemic Agreement: Between Ambition and Compromise

At the historic November 2021 special session of the World Health Assembly, World Health Organization (WHO) Member States adopted a decision to formally launch negotiations on a new international convention, agreement or other international instrument on pandemic prevention, preparedness and response.[8] An Intergovernmental Negotiating Body (INB), composed of representatives of WHO Member States, was granted the mandate to

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conduct negotiations. Years of intense debates on issues of both form and substance have followed.[9]

A fundamental question relating to form is the type of instrument to be developed. Article 19 of the Constitution of the WHO enables the World Health Assembly to adopt legally binding conventions or agreements.[10] Alternatively, Member States could decide to develop a non-binding instrument that would be adopted by the World Health Assembly under Article 23 of the WHO Constitution. The latter scenario occurred with the adoption of the non-binding International Code of Marketing of Breast-milk Substitutes in 1981, which was originally intended to be a legally binding instrument but lacked sufficient consensus by WHO Member States.[11] While such a decision to employ Article 23 might disappoint some decrying the limited number of binding instruments in global health law,[12] the potentials of soft law in steering normative expectations should not be underestimated.[13] Such an approach could bring otherwise reluctant Member States on board. A shift in practice by the World Health Assembly toward soft law could also make the most of the reporting obligations of WHO Member States under Article 62 of the Constitution of the WHO, which are applicable to both binding instruments and non-binding recommendations.

As for substance, equity was reportedly a key driver of the negotiations on a possible pandemic agreement. However, during the course of INB negotiations, key disagreements have emerged around how to realize this goal. Delegations from Global South countries, particularly from the Africa Group and Egypt, as well as a broader group of countries called the "Group of Equity," have insisted since the second meeting of the INB that they will not accept any agreement unless there is a credible guarantee of greater equity in future pandemics.[14] Yet the legal means to ensure such equity in fostering robust collaboration towards pandemic prevention, preparedness, and response remains the subject of much controversy. In seeking to develop these legal means to realize equity, the INB in May 2024 highlighted three subjects as being the most difficult to reach consensus: (1) The creation of a Pathogen-Access and Benefit-Sharing (PABS) System; (2) the inclusion of One Health obligations; and (3) overarching questions in making financing available for lower- and middle-income countries in order to meet their obligations.

The PABS System is based on two interconnected prongs. First, provisions would strive to ensure that samples and sequences of "pathogens with pandemic potential" will be made readily available by all States Parties to the WHO laboratory network and sequence databases. To date, there is no such express pathogen access obligation under international law.[15] Second, the benefits from the use of pathogen samples and sequences — such as diagnostics, treatments, and vaccines — would be equitably shared, based on public health risk and need. The details of how this would be realized are still hotly contested, and may involve the use of legally binding contracts with entities accessing pathogen samples or sequences, including terms of use for acceptable databases. These arrangements are proposed to commit manufacturers of countermeasures to provide an as-yet undetermined percentage of real-time production of pandemic-related products that are developed through the use of pathogen samples and sequences. Some scholars have criticized the feasibility of such a system,[16] while others advocate it as one element in a portfolio of methods for ensuring equity under a legally binding mechanism.[17]

One Health is a concept that aims to integrate human, animal, and environmental health to protect against new and re-emerging diseases.[18] Implementation of a One Health approach aims to overcome a silo-based model of prevention, preparedness, and response that ignores the interdependence of these three dimensions.[19] This approach is further validated by estimates that more than 70% of emerging or newly emerging disease outbreaks have been due to a zoonotic event. Elsewhere, the One Health theory of change[20] has identified dozens of risk factors in each of the three pillars of human, animal, and environmental health. A holistic One Health perspective could thus help bring the three pillars together, offering a policy model that others have labelled a "deep prevention."[21] Nevertheless, some delegations in the INB — including Brazil — were wary of framing One Health in the proposed pandemic agreement. A fear is that higher-income economies, like those of the European Union, could invoke One Health to resort to protectionist measures, imposing additional costs on agricultural exports from low- and middle-income countries, as well as insufficient financing obligations to assist implementation of a One Health approach.

The latter point is part of a broader concern about the financing of future legal obligations on pandemic prevention, preparedness, and response. This has not been a feature unique to the pandemic agreement. In the recently adopted amendments to the IHR (2005),[22] new financing obligations on States Parties to collaborate with and assist other Parties in strengthening minimum core capacities of disease surveillance, detection, and reporting reflect a reluctance by multiple States Parties to devote additional resources to support other States.[23] This reflects a global trend in which financial resources devoted to global health security continue to fall short of the required longer-term structural investments.[24] To worsen things, a looming global sovereign debt crisis threatens longer-term budgetary planning, as multiple States from the Global South face harsh difficulties in paying interest rates, which at times exceed the amounts devoted to national healthcare systems.[25] A pandemic agreement that does not adequately address financing needs will fail to protect the international community.

Scoping the Pitfalls of a Future New Pandemic Agreement

With delegates in the INB failing to reach consensus by the initial deadline of May 2024 to put forward a draft pandemic agreement for approval at the World Health Assembly, the negotiation process was extended until May 2025.[26] A new agreement could expand the legal toolkit available to States, paving the way for a rules-based pandemic prevention, preparedness, and response that eschews at least some of the gross inequities witnessed during the COVID-19 era. The adoption of amendments to the IHR (2005) could provide delegations with a renewed impetus to reach consensus on the pandemic agreement.[27]

But the negotiations on a new pandemic agreement face both internal and external obstacles. Internally, the delegations in Geneva have struggled in achieving consensus even after the initial deadline of May 2024. Key discussions remain unresolved on whether to tackle all of the contentious issues in the main text of the pandemic agreement or to draft separate protocols or other legal instruments in the future that can go into more depth. One possibility is to adopt a framework convention, similar to the Framework Convention on Tobacco Control, which would set

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the general foundations in an initial agreement and allow for future commitments to be agreed upon by a Conference of the Parties.[28] Nevertheless, such an approach risks failing to deliver promises in the future, as political support for addressing pandemic threats among countries may wane over time. However, regular meetings of the Conference of Parties, including negotiations for future instruments, are one way to break the cyclical neglect of prevention and preparedness in inter-pandemic periods.

Externally, negotiations have been, and will inevitably be, informed by national and regional elections across multiple countries in 2024 and 2025, encompassing at least 50% of the global population,[29] including snap elections in France and the United Kingdom, and the recent elections in the United States and Germany.[30] Pervasive military conflicts in Ukraine and Gaza have deeply polarized the international community. The proliferation of isolationist governments, compounded by global financial challenges around the world, could have a direct impact on the prospects of a pandemic agreement being negotiated, adopted, or ratified.

Beyond the fate of the pandemic agreement, the pitfalls of its emergency logic should be avoided.[31] Time and time again, the best strategies for preventing, preparing against, and responding to pandemics has been to develop sustainable plans of strengthening health systems in inter-pandemic times.[32] Additionally, an emergency logic may reinforce the current governance system — such as the IHR — which excludes diseases that do not cause new pandemics, yet remain endemic to the Global South. Such diseases take the lives of hundreds of thousands annually, and must not only attract concern when they pose a pandemic threat to the Global North. Such exclusion also may reinforce the existing prioritization given in global health law to diseases thought of as "emergencies" at the expense of not only such endemic diseases, but also of the need to address non-communicable diseases and the social determinants of health.

Conclusion

The future of global health law on pandemic prevention, preparedness, and response stands at a crossroads. A legally binding pandemic agreement would be an opportunity to ensure that the international community of states learns from, and acts upon the haunting memories of the COVID-19 pandemic. Failure by governmental delegations in Geneva to reach consensus on these new rules could result in legally non-binding norms, which would require further political strategies to ensure relevant stakeholders uphold their commitments. In both scenarios, the theoretical analysis, systematization efforts and normative considerations in Lawrence Gostin's work on the transformative potential of law will remain as timely as ever.

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