

# PANDEMIC LAW-MAKING: A TALE OF TWO PROCESSES

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# CLOSING THE COVID-19 GAP: GOVERNANCE, POWER, RULES, FINANCING

- Need for better governance, WHO and beyond - new bodies (Global Pandemic Board/Council) and system approach
- Questions of power and control, G20/G7 club approach versus WHO/UN – role and leadership of regional organizations
- Financing: search for a new model to fund national capacities and global public goods – use existing institutions or create new fund? New Pandemic Fund
- Equity and solidarity, in particular access to medical countermeasures, technology transfer. Search for sustainable solution
- Balancing of public versus private authority – role of industry and philanthropies
- Human rights – safeguarding dignity and livelihood
- Need for legal rules, channel politics and aim at addressing gaps

# The international health regulations

- WHO's normative authority: conventions, regulations, recommendations.
- Article 21 WHO Constitution: «The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease....”
- Article 22: «Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.”

## IHR (2005) – MAIN FEATURES

- Global instrument: 194 states parties
- Open system based on “disease”, “event”, “public health risk”, “public health emergency of international concern”
- Scope: natural, accidental, intentional events. Security and political implications. Globalization of health risks
- Adaptation to different diseases through cooperative risk assessment
- Managerial instrument and joint framework for action and coordination
- Limited «midstream» scope: preparedness, detection, containment

# States' obligations

- Cooperation, transparency and good faith – assessment and reporting of events.
- Core capacities: health security is implemented inside a country
- Control measures and their limits, including human rights
- Article 43: states retain the final word but subject to disciplines

# Who's functions and powers

- Surveillance, information, alert, joint risk assessment with states
- Use of non-state information and challenge of dependence on states
- Functioning of the emergency mechanism: public health emergency of international concern. Authority of DG, role of emergency committee
- Temporary and standing recommendations: what is their legal force and effect?
- «Grand bargain»: managerial authority versus sovereignty

# INTERACTION WITH OTHER legal regimes SEEKING COHERENCE

- **Trade:** risk assessment and decision-making process – consistency with WTO agreements
- **Human rights:** general principle (article 3) and consistency requirements. Personal scope of application: “travelers” – disconnect with pandemic measures.
- **Safety:** overlaps with 1986 IAEA “Chernobyl” conventions and environmental conventions

# Challenges of the ihr

- 1) Unrealistic binary alert and bias towards new diseases in LMIC (cf. monkeypox and polio)
- 2) core capacities (intrusive, challenging, overambitious?)
- 3) lack of compliance monitoring and accountability mechanisms – soft and voluntary tools
- 4) discretion of states to act without much accountability and unclear limits.
- 5) WHO's deference to states for crucial surveillance and alert functions
- 6) Insufficient incentives and deterrents. No protection for compliance
- 7) IHR unfit to coordinate collective response to long emergency.



# THE “PANDEMIC TREATY”

- EU initiative, role of DG Tedros, “friends of the treaty”
- 1) Why do we need a treaty? What is the politics behind it?
- 2) What about the International Health Regulations (IHR) and other instruments and international regimes like trade and intellectual property, transport, biodiversity, wildlife trade?
- 3) what content?
- Ambivalent reactions and political positions. Launch of WHO process: USA initial hostility, Global South skepticism, EU motives, China defensive. Lack of preliminary discussion and of consensus on purpose, objective and functions.
- Choice of WHO as forum – framing complex issue as human health. What about the UN?

# PANDEMIC INSTRUMENT

- Intergovernmental Negotiating Body (INB): launched by WHA special session in December 2001 – deadline for adoption May 2024
- Is it a treaty? *“draft and negotiate a WHO convention, agreement or other international instrument on pandemic prevention, preparedness and response, with a view to adoption under Article 19, or under other provisions of the WHO Constitution as may be deemed appropriate by the INB”*
- Methods of work: bottom-up process with MS, NSA, expert consultations, regional and public inputs. Working draft July 2022 – conceptual zero draft November 2022 – zero draft February 2023 – “Bureau’s draft” 22 May 2023
- Concern at structure and content of the draft – alternative proposals and uncertainty on basis for negotiations. Textual negotiations have not yet begun
- Is May 2024 realistic? Why the rush?

# AMENDMENTS TO THE IHR

- Amendment process initiated in January 2022 under US leadership – why?
- Health Assembly 75 in May 2022: Adoption of “technical amendment” and launch of “targeted amendment” process, Working Group IHR to negotiate agreed package – deadline May 2024.
- Massive amount of far-reaching amendments proposed by 14 states (100 states represented)
- Main issues: strengthening alert mechanism, equity, cooperation, strengthen WHO’s authority, financing, accountability, governance. Proposed expansion of IHR scope and risk of dilution of original function.

# PARALLEL PROCESSES

- Two complex parallel negotiations (moving targets) seeking synergy and complementarity but with many overlapping bargaining chips. Why? Who gains from it?
- Coordination mechanisms, but what criteria to place issues?
- Current imbalance in negotiating approach: detailed IHR amendments versus general draft instrument without full ownership
- Concern at workload, multiple meetings and resource imbalance – how to level the playing field? Political positions: USA engagement, EU separate approach, groups of “friends” (One Health, equity) and regional groups (Africa). Negotiating tactics: moving fast or slow?

# PROPOSED CONTENT – PANDEMIC TREATY AND IHR

- 1) one health and zoonotic risk
- 2) preparedness, health systems and core capacities, linked with assistance and financing
- 3) transparency, information sharing and alert
- 4) empower WHO, alert and verification. Speed, IT reliance and precautionary approach
- 5) Pathogen, genetic sequences and benefit sharing
- 6) Avoiding disproportionate travel and trade measures. Integrity of supply chains
- 7) Equity: how to implement the principle?
- 8) Accountability, compliance assessment, effective implementation
- 9) Governance and structure, separate or embedded in WHO?
- 10) Financing for national capacities and international action

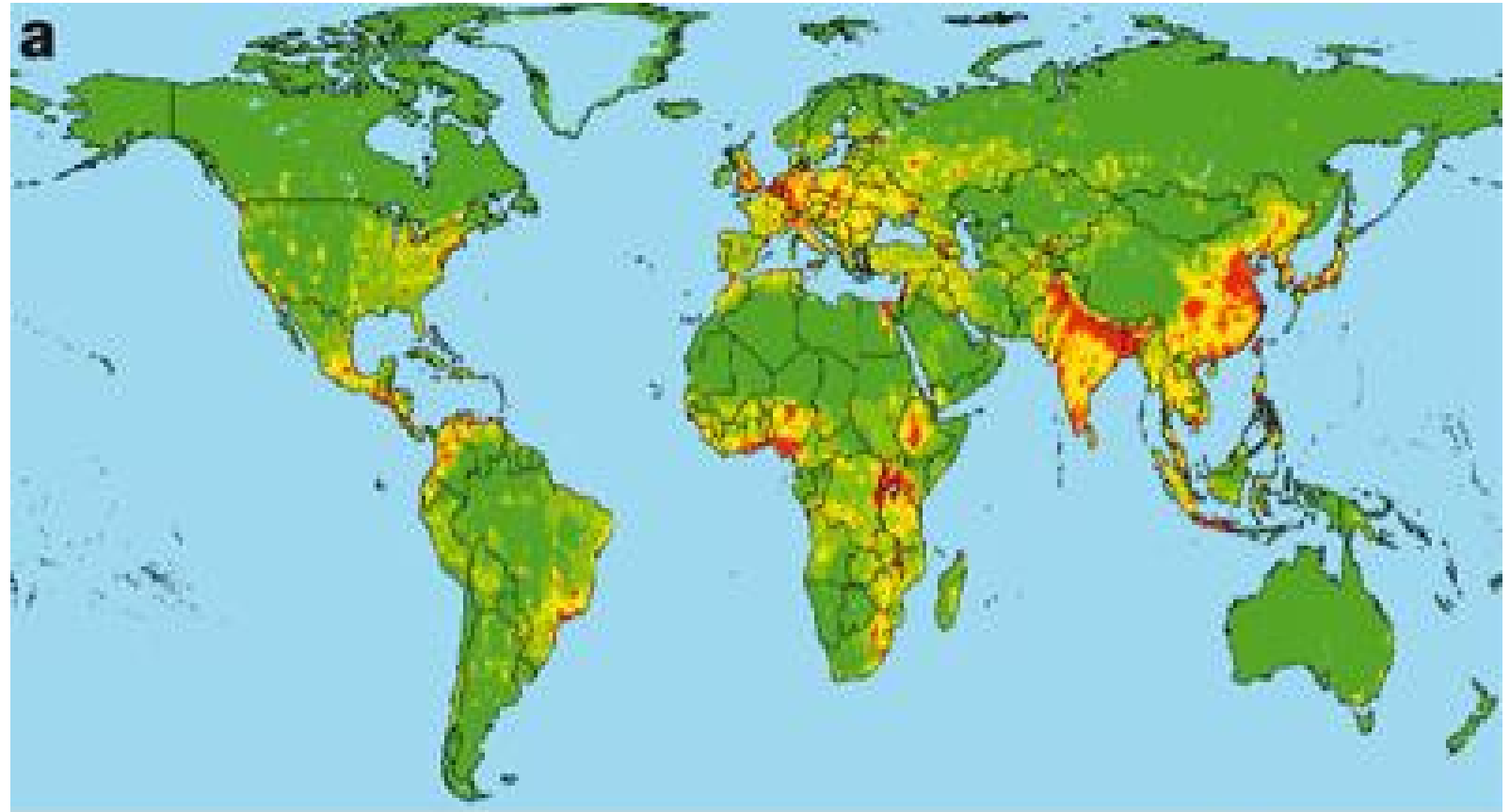
# HOW TO MANAGE COMPLEXITY - EQUITY

- “Equity” as a principle and proxy for political requests
- “Common but differentiated responsibilities”: does it make sense in a pandemic accord?
- Equitable access to medical countermeasures: how to commit the industry?
- Transfer of technology and distribution of manufacturing capacities – role of WHO and industry
- Intellectual property management: what can a WHO treaty do? Relations with WTO/TRIPS
- Financing – can WHO become a financing agency? Who decides on funding? Who contributes? National and international financing.
- Why is pathogen and benefit sharing part of the equity agenda?

# "One Health" What is the problem?

- 60% human infectious diseases have 'zoonotic origins'
  - 75% of *emerging* infectious diseases (EIDs) are zoonotic
- 61% of EIDs are zoonotic
  - 72% of these have *wildlife* source (and % increasing) (Jones)
  - Spillback: zoonotic pathogens spilling back to animals and again to humans (fur minks in Netherlands and Denmark)
  - Wildlife and livestock: intensive farming, species mixing

## Emerging Zoonotic Pathogens from Wildlife



Plus a further 1-2 million pathogens yet to be discovered....

Jones et al *Nature* 2008



# Relevant international legal instruments

<b>Overall goal</b>	Reduce risk of infectious disease (re)emergence and spread in humans and animals			
<b>Context</b>	Environmental governance		Public health governance	
<b>Approach</b>	Deep prevention		Containment	
<b>Stage of intervention</b>	Upstream	Midstream	Downstream	
<b>Focus</b>	Preventing drivers	Preventing events	Detecting, reporting and containing events	
<b>Regulatory target</b>	Drivers of (re)emergence and spread	(Re)emergence (spillover, mutation, outbreak)	Human disease outbreak	Human disease spread
<b>Instruments</b>	International agreements, e.g. on wildlife trade (CITES), climate change (UNFCCC/PA), biological diversity (CBD, Biosafety Protocol), land-use change (CBD, UNCCD), international traffic, population movements, etc	<b>Regulatory 'blind spot'</b>	IHR (2005 or 2024), including self-assessment and Joint External Evaluation (JEE)  PWH, WTO General Exceptions, SPS, FTAs	

Source: G. Le Moli et al, The Deep Prevention of Future Pandemics through a One Health Approach: What role for a Pandemic Instrument? (GHC/C-EERNG, June 2022)

# SOME OPEN QUESTIONS

- Critical moment for global health security: feeling of stalemate and uncertainty. Loss of momentum
- Security versus equity - Different bottom lines for north and south: is a package deal possible?
- How to manage financing
- Functional and political limits of a WHO treaty: how to connect with bigger picture involving other regimes and organizations (FAO, WOA, UNEP), financial institutions, industry
- Why are human rights absent from treaty/IHR? What to do?
- What can the outcome be? Three scenarios.
- What happens in case of failure?