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PANDEMICS START AND END IN COMMUNITIES

Why civil society participation in the governance of the Pandemic Accord is critical

1. LESSONS FROM COVID

The evidence is irrefutable. The COVID-19 pandemic hit marginalised communities hardest by far¹.

Many efforts to contain the spread of the virus actually exacerbated existing inequalities. Public health measures such as stay-at-home orders placed some people – for whom ‘home’ was not a place of safety – directly in harm’s way. The abject failure to guarantee timely, equitable and universal access to COVID-19 vaccines and therapeutics for all has ushered in a pandemic recovery that is divisive, vastly unequal and lacking in global solidarity. Despite the rhetoric about COVID-19 being a common threat, the recovery process excludes those who need it the most.

The COVID-19 pandemic has highlighted that as a global community, we need to strengthen systems to prevent, prepare for and respond to public health emergencies. Member States and the World Health Organization (WHO) have agreed that in order to achieve this we must amend the International Health Regulations (IHR) and negotiate a new international legal agreement on pandemics (the ‘pandemic accord’).

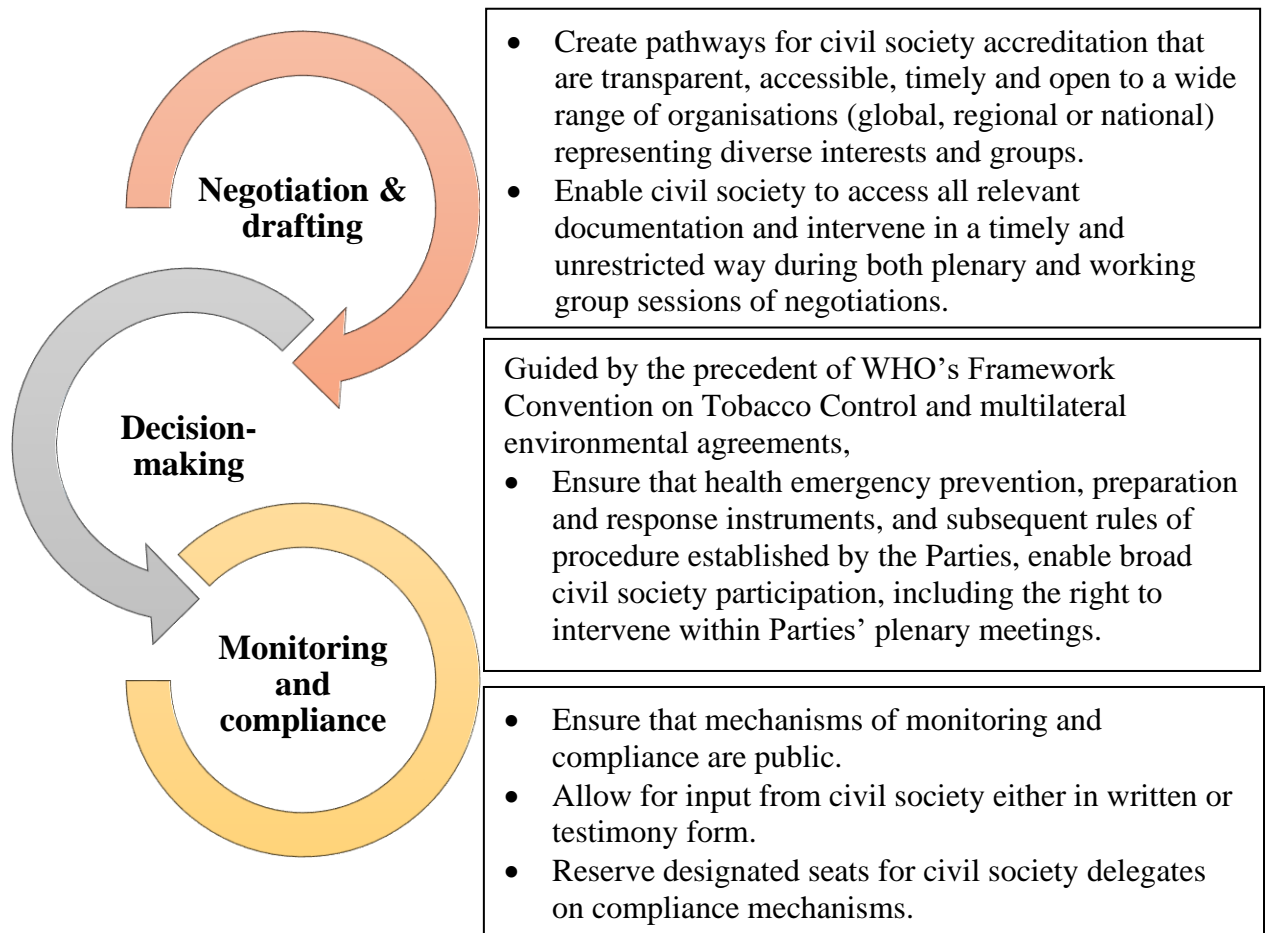
But these reforms of international law are unlikely on their own to build a robust, effective and equitable framework to prevent, prepare for, respond to and recover from global public health emergencies. Rather, the process of amending this framework needs to recognise the reality of people’s lives, especially those who are systematically marginalised. Unless this process is one of co-development, the needs of the most vulnerable people will remain on the fringes of decision-making. However, negotiations about the pandemic accord and the IHR have so far largely unfolded behind closed doors, with civil society organisations often explicitly excluded. It is not a promising start.

Disease outbreaks start and end in communities. The success of the amended IHR and the pandemic accord will depend not only on the text of these instruments themselves but on the capacity of governments to work with their people to implement its obligations, in times of both calm and crisis. The inclusion of civil society perspectives in the drafting, negotiation, implementation, monitoring, and compliance of these instruments is therefore essential. It is the only way to ensure that the content of the instruments is centred on the needs of the poorest and most vulnerable communities and groups. And it is the only way to build trust and mobilise support for the implementation of amended frameworks and treaties.

¹ *The impact of COVID-19 on global health goals*, WHO, 2021 <https://www.who.int/news-room/spotlight/the-impact-of-covid-19-on-global-health-goals>

This policy brief provides WHO and its Member States with a blueprint for engaging civil society (non-governmental organizations (NGOs) and community-led organisations), in negotiating, governing, monitoring and overseeing instruments related to preventing, preparing for and responding to health emergencies.

Figure 1: A roadmap to achieving rights-based participation in international law reforms for preventing, preparing for and responding to health emergencies



2. PARTICIPATION: A LEGAL IMPERATIVE

Engaging communities is critical to making good policy. An absence of social participation can lead to limited detection of needs, biased decisions, dismissed knowledge, excluded groups, and reduced accountability. As set out in the previous section, all this was laid bare by the COVID-19

pandemic, which in turn saw economic and social inequality exacerbated, human rights restricted, and trust in governments eroded.

By contrast, public policy-making that is informed by the rights-based participation of a diverse range of stakeholders is likely to lead to decisions that are more representative of the needs and perspectives of diverse communities. This builds trust and legitimacy in the policy process, with the resulting policies ultimately more likely to be accepted, ratified and effectively enforced. In today's climate of widespread misinformation and confusion about COVID-19, building trust and legitimacy in the reform of prevention, preparation and response (PPR) to international health emergencies is especially important.

What is rights-based participation?

In contrast to pro forma or tokenistic participatory processes, or processes undertaken to create the appearance of legitimacy for predetermined policies, the aim of *rights-based* participation is to be transformative.² It promotes the active, informed and meaningful participation of people in designing, formulating, implementing, following up and evaluating policies that affect them. It is guided by human rights principles, including respect for autonomy, dignity and agency; equality and non-discrimination; transparency and access to information; and accountability.

The lack of civil society participation in the IHR amendment and Pandemic Accord negotiations

Since 2022, a Working Group on Amendments to the IHR (WGIHR) has been mandated to propose a package of amendments for adoption at the 77th World Health Assembly. In tandem, an intergovernmental negotiating body (INB) is steering negotiations towards the adoption of a pandemic accord by convening WHO Member States.

Civil society participation in both processes remains limited. Only non-State actors in official relations with WHO are currently considered for engagement in the WGIHR, with their involvement so far limited to attending some segments of the official meetings held in February and April 2023.

The participation of civil society within the INB until recently has been more open. First, a number of “relevant stakeholders”, nominated by Member States, have been invited to attend official meetings. Second, the WHO Secretariat organized two rounds of public hearings in 2022, which allowed a wide range of actors to share views on the pandemic accord. Finally, the INB Bureau has invited non-State actors to attend informal, intersessional consultations and briefings. However, in both cases, non-State actors and relevant stakeholders are not invited to attend the drafting group sessions and do not receive regular updates on the texts themselves. This lack of transparency and participation contrasts with other treaty-making processes that are detailed in this briefing (see pages xx–xx).

² Report of the special rapporteur on extreme poverty and human rights, 11 March 2013, A/HRC/23/36

The legal obligation of WHO and the whole UN system to act inclusively

The WHO has long considered social participation to be crucial for health equity. Social participation in decision-making is also a core value and a key element in the realisation of a democratic and equitable international order. It is a legal imperative set out in the United Nations (UN) Charter, the Universal Declaration of Human Rights and many other multilateral treaties, at both international and regional levels. The Sustainable Development Goals call on States to ensure responsive, inclusive and participatory decision-making at all levels. Fundamentally, participation is integral to the perceived legitimacy of the UN itself in the future, with UN Secretary-General António Guterres calling the UN to rally behind a “renewed social contract” anchored in human rights.³

From an institutional perspective, the UN Economic and Social Council is mandated to consult with nongovernmental organizations on matters within its competence. And the WHO Constitution sets the framework of engagement with other organisations, including “non-governmental international organizations” and “national organizations, governmental or non-governmental”. These imperatives have since been affirmed in dozens of resolutions, declarations and other soft law instruments issued under WHO. In the Declaration of Astana (2018), States committed to involving:

...more stakeholders in the achievement of Health for All, leaving no one behind, while addressing and managing conflicts of interest, promoting transparency and implementing participatory governance.

Article 71, WHO Constitution

The Organization may, on matters within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organizations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental.

These pathways for civil society participation are made more challenging by the WHO’s *Framework of Engagement with Non-State Actors* (FENSA). Adopted by the World Health Assembly in 2016, FENSA outlines the overarching principles through which WHO collaborates with non-State actors. By largely combining civil society organisations with a diverse range of actors such as business associations, private sector entities, academic institutions and philanthropic entities, FENSA often overlooks the unique differences between these actors and the positive dynamics of engaging with civil society organisations and communities.

FENSA has also been criticised for its inadequate safeguards against conflicts of interest. It strives to manage and identify institutional conflicts of interest and other risks of engagement, calling only for “particular caution” when engaging with private sector entities whose activities negatively affect health, and banning entirely engagement with tobacco and arms industries. Drawing WHO’s past experience in negotiating the Framework Convention on Tobacco Control,

³ *Our Common Agenda: Report of the Secretary-General*, UN, 2021, https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf

and the strong stance taken during those negotiations to ward off the influence of commercial interests, WHO and its Member States should exercise caution when granting the private sector the same rights and recognition accorded to civil society.

3. PARTICIPATION IN PRACTICE: EXAMPLES FROM ACROSS THE UN

Participatory processes in multilateral negotiations are only the beginning. National governments and the WHO should examine and act on opportunities for broadening civil society participation in:

- 1 the drafting and negotiations of health emergency PPR reforms
- 2 any treaty decision-making bodies that are enshrined in the eventual PPR legal instruments
- 3 the monitoring and oversight of compliance with eventual PPR instruments.

This section draws on examples of civil society participation across these three dimensions in WHO treaties, and in human rights and environmental treaties.

Civil society participation in treaty negotiations

In general, human rights treaties are negotiated by open-ended Working Groups established by the Human Rights Council, which are automatically open to all NGOs accredited by ECOSOC. NGOs are active participants in treaty drafting, invited to the ad hoc drafting committee and invited to express their positions through written and oral interventions.

One of the most inclusive examples of civil society participation is the drafting of the **2006 Convention on the Rights of Persons with Disabilities**, which civil society, including organisations of people with disabilities, was actively engaged in. Indeed, more than 400 such groups were granted equal speaking and voting rights to government representatives on the Ad hoc committee that drafted the Convention. They also had the right to attend committee meetings, make written and oral presentations, and receive copies of official documents. The UN General Assembly passed two significant resolutions to establish separate accreditation processes to enable disability rights organisations without prior ECOSOC accreditation to participate effectively. Additionally, a Trust Fund was established to provide targeted support for participation from the Global South.

Another example is the **2016 Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean** (Escazú Agreement), which aims to “guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters.”

The negotiations of this agreement illustrate some of the creative ways that participation can be realised in international law reform. In developing the Escazú Agreement, negotiations were broadly open to the “interested public”, and individuals could make statements to the sessions. All sessions were public by default unless States decided to hold them in private – in which case

they were required to provide reasons for the request. Moreover, two public representatives were elected and designated to maintain continuous dialogue with the public.

Civil society embedded in treaty decision-making bodies

A ‘framework approach’ to treaty-making, as currently considered for the pandemic accord, is common in international environmental law. Within this regime, standard language appears across treaties, enabling broad civil society participation in the Conference of the Parties.

As is already the case in multilateral environmental agreements, the involvement of national and local civil society organisations and networks in such decision-making bodies is best practice and should be explicitly permitted within PPR instruments. In their 2018 *Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs*, the UN High Commissioner for Human Rights urged States to strengthen the capacity of rights holders, especially grassroots and local civil society organisations working with individuals or groups that are marginalised or discriminated against, “to participate meaningfully in international forums” (para. 109).

Two examples of standard treaty language on civil society participation

The 1985 *Vienna Convention for the Protection of the Ozone Layer* recognises that

“[a]ny body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer” may be represented at a meeting of the Conference of Parties (COP) if it so informs the secretariat of its wish and unless one-third of the Parties object to its representation.

The *Framework Convention on Climate Change* (FCCC) similarly foresees the participation of

“[a]ny body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties.”

The 1993 Convention on Biological Diversity contains near-identical language as well.

In all of these instances, the precise criteria determining admissibility of an entity as an observer must be established by the Rules of Procedure adopted by the COP.

Compliance mechanisms that include communities

Another good practice of inclusivity within environmental agreements is the participation of civil society in compliance committees, which are often established by the Conference of Parties.

For example, Parties to the ***2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*** (Nagoya Protocol) established the Compliance Committee to the Nagoya

Protocol in 2014. The Committee is composed of 15 members nominated by the Parties on an equitable geographic representation basis. In addition, two representatives of indigenous and local communities, at least one from a developing country, are nominated by indigenous and local communities to participate in the deliberations of the Committee as observers. Committee Members are elected by the Conference of Parties (COP). Meetings of the Committee are, by default, public unless the Committee decides otherwise. The Committee may consider information submitted to it by “relevant sources”, including affected Indigenous and local communities, and it may seek advice from “independent experts.”

Indeed, compliance committees should conduct their work in an open manner and reports of deliberations should be publicly accessible. They should have designated seats for civil society observers and any interested civil society entity should have the right to make submissions to a compliance committee or other accountability mechanisms.

Exemplary civil society engagement within the Framework Convention on Tobacco Control

The Framework Convention on Tobacco Control (FCTC), the only international treaty adopted under the WHO Constitution, provides interesting insights on how to engage civil society in global health governance. In the late 1990s, the WHO, then under the leadership of Director-General Dr Gro Harlem Brundtland, emphasised the importance of partnering with NGOs to prioritise health issues in policy-making and resource allocation. On the civil society side, an umbrella organisation was formed, the Framework Convention Alliance (FCA), to disseminate information related to the negotiations and influence governments’ positions. Thanks to this simultaneous engagement, the FCTC has been a hallmark of inclusivity, both in its development and implementation. The treaty is governed by 181 Parties, and the FCA, now officially the Global Alliance for Tobacco Control, is still in action to make sure that provisions and related protocols are implemented year after year.

The FCTC's inclusive approach to engagement with civil society has helped to create a strong and vibrant global tobacco control movement, which has been crucial in driving progress towards a tobacco-free world. The treaty's governance processes provide opportunities for civil society to participate in decision-making and to hold governments accountable for their commitments under the treaty, as described below.

Article 4.7 of the FCTC

Under its Guiding Principles, the FCTC recognizes that “the participation of civil society is essential to the achievement of the objectives of the Convention and its protocols”.

WHO’s FCTC explicitly allows for engagement between NGOs and the COP, which is the decision-making body of the Convention, noting under Article 23 that the COP shall:

request, where appropriate, the services and cooperation of, and information provided by...nongovernmental organizations and bodies as a means of strengthening the implementation of the Convention.

The rules of procedure adopted under the FCTC elaborate on the procedures for NGOs to obtain observer status, with criteria that are less onerous than obtaining official relations with the WHO.

Gaining observer status under the 2018 FCTC COP Rules of Procedure

The considerations for observer status to the FCTC COP are that:

- 1 the NGO must work either internationally or regionally
- 2 admission of the NGO does not contravene the 17th and 18th preambular paragraphs of the FCTC, as well as Article 5.3 (relating to relations between Parties and the tobacco industry).
- 3 the NGO's aims and activities must be in conformity with the spirit, purpose and principles of the Convention.

Observers to the COP may observe open or public meetings of the COP and may speak after Member State and intergovernmental bodies. According to one civil society representative to the FCTC, "FCTC observer status means front seat into live negotiations" – a privilege that is not as common within the framework of the World Health Assembly, where very little speaking time is afforded to civil society.

4. A CHANCE TO GET IT RIGHT

The participation of civil society in negotiating, drafting, deciding, and monitoring health emergency PPR instruments is a legal, civic and public health imperative. As presented in the previous section, there are good examples of such engagement in some WHO processes and across the UN system.

Drawing on the analysis presented in this paper, we call on the WHO and Member States negotiating the amendments to the International Health Regulations and the Pandemic Accord to involve civil society in three critical stages of the process for developing health emergency PPR instruments:

- negotiating and drafting
- treaty decision-making bodies
- monitoring and compliance

Our recommendations to improve inclusivity at each of these stages of the international law reform process are in line with UN standards and WHO precedent. By ensuring civil society voices and perspectives are heard, it becomes possible to develop health emergency PPR instruments that are effective, equitable and grounded in human rights principles.

Recommendations

We call on the WHO and Member States negotiating the amendments to the International Health Regulations and the Pandemic Accord to:

1: Include civil society in negotiating and drafting of health emergency PPR instruments

Up to now, opportunities for civil society participation in negotiations to amend the IHR or develop a pandemic accord have been strictly limited to plenary meetings of the WHO and its Member States. Civil society participation within the live negotiations and drafting in these processes remains non-existent despite repeated calls from civil society organizations engaged in these two processes.

As presented above, not all UN institutions act so exclusively around the negotiating table. Experiences of treaty drafting from human rights and environmental international law, and guidance provided by the Office of the High Commissioner for Human Rights⁴, show how this can – and must – be done differently and more effectively in global health. Rights-based participation in treaty-making means engaging people in decisions that ultimately affect their lives. The building blocks to ensuring rights-based participation in treaty-making include:

- transparent and straightforward access and accreditation processes for civil society
- rights for civil society to access all relevant documentation, intervene and be considered during deliberations – in an unrestricted and timely way
- public livecasting of plenary and working group sessions of the deliberations to the extent possible, and where this is not possible, some form of civil society participation (eg, as observers)
- funding for stakeholder participation while avoiding conflicts of interest.

2: Include civil society in treaty decision-making bodies of health emergency PPR instruments

Over the past few years, multilateral treaties have become widespread in various areas of global concern including human rights, trade, the environment, and health. With this expansion of treaty-making, more attention has been placed on how to implement these treaties effectively, given how critical this is to their success or failure. The process of adopting a treaty and having it ratified by States is just the beginning. Equally important is the interpretation and action taken by the treaty parties, both in terms of implementing it domestically and working together internationally, as well as effectively addressing any issues that may arise during implementation.

⁴ *Hearing Civil Society Voices in Treaty Making*, UNHCR, 2023, <https://www.ohchr.org/en/documents/tools-and-resources/hearing-civil-society-voices-treaty-making>

Both the draft pandemic accord and certain proposed amendments to the IHR have advanced the idea of a governing or plenary body that may resemble a conference or meeting of the Parties where decisions concerning the implementation of the treaty or regulations are made. Civil society participation within these decision-making bodies is crucial.

Such participation is especially important within the context of treaties that adopt a Framework Convention/Protocol approach, as the final, agreed upon text of a Framework Convention is likely to be aspirational and high-level in nature, containing few if any specific obligations. Subsequent plenary meetings of the Parties are essential to further legislative development under a Framework Convention/Protocol approach to treaty design.

3: Include civil society in the monitoring and compliance of health emergency PPR instruments

It is crucial that any accountability mechanisms within the pandemic accord or an amended IHR (whether independent expert advisors elected on an equitable basis to a committee by Member States, a peer review mechanism between Member States representatives themselves, or some combination or both) create opportunities for civil society feedback and dialogue.

The UN human rights system provides a strong precedent for why and how this may be done. In fact, in their 2021 report, the IHR Review Committee on the COVID-19 response recommended exploring a mechanism similar to the Human Rights Council's Universal Periodic Review (UPR) for monitoring compliance with the IHR (2005).

Recommendations from the Review Committee on the functioning of the IHR during COVID-19 Response

“The UPR in the human rights arena has been shown to foster intersectoral coordination, whole-of-government approaches and civil society engagement, to encourage participation and good practices, and to link implementation of its recommendations with the Sustainable Development Goals and other government agendas. These outcomes are highly relevant to the need to raise awareness of and foster intersectoral cooperation for IHR implementation at the country level.” – IHR Review Committee, para. 123.

Some amendments proposed to the IHR have advanced the idea of a Compliance Committee that is empowered, *inter alia*, to “seek the services of experts and advisors, including representatives of NGOs or members of the public, as appropriate.” The Committee may also ask the Director-General to invite representatives of NGOs in official relations to attend sessions of the Committee “to address a specific issue under consideration.” As presented above, such Committees have long-standing precedence in the multilateral environmental regime and are more inclusive of civil society participation. The current proposals for the IHR should consider expanding access to civil society beyond those in official relations, possibly through an accreditation process.

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