



## International Law and COVID-19 Pandemic: An Analytical Study

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DOI: <https://doi.org/10.53724/jmsg/v6n1.02>

### Abstract

The world is witnessing COVID-19 pandemic. The current crisis has several repercussions, across the society. There have been strong restrictions imposed by various countries: from general health advisories, to quarantines and isolations, to curbing of trans-border movement of people. In few countries emergency has been declared and the government has assumed exceptional powers. Under such circumstances it is pertinent to look into the issues like obligations, authority and procedures for dealing with such situation under International Law? Have the current governments in all countries complied with it? What role has International Law played through its institutions especially the role of World Health Organization (WHO). WHO has come under severe criticism from various countries for its ineffective and seemingly biased role so far in dealing with the pandemic. It needs to be seen that under International Law what best WHO could have done. The International Health regulations (IMR) is the legal instrument for laying the rules in pandemic. How has the IMR been adopted by various governments, needs to be evaluated. The paper attempts to address these questions and then evaluates it against other regimes under International Law like human rights, peace and security law and law of finance. The paper concludes by answering these queries based on current empirical data and descriptive research analysis.

**Key word:** COVID-19, Quarantines and isolations, International Law, Role of W.H.O., Provisions in Indian Law.

### 1. Introduction

On November 17, 2019, a patient went to a small clinic in Wuhan, China and reported problem in breathing and other symptoms of pneumonia. By December 2019, it was identified as being caused by a new virus which was named SARS-CoV2 or COVID-19 for short. The virus

started spreading throughout the world. Within three months the virus has brought the world to a grinding halt. Since it is spread from human to human connection, is highly contagious, has high mortality rate and has no known vaccine or medicine, the countries opted to stop the intermingling of population. This impacted economic activities which have come to a grinding halt in last three months thus pushing the world into recession. Although number of deaths are still much less than what occurred in 1918-19 during the Spanish Flu<sup>1</sup> but the economic impact is worse than 2008 crisis and some claim it would turn out to be worse than 1929 great depression even.<sup>2</sup>

Since there is no known medicine for the virus the immediate response has been of closing down the markets, putting people into mandatory quarantines, isolation of individuals, travel bans across borders, cordoning off effected areas and in some cases entire cities. Under such circumstances it is pertinent to look into the issues like obligations, authority and procedures for dealing with such situation under International Law? Have the current governments in all countries complied with it? What role has International Law played through its institutions especially the role of World Health Organization (WHO). WHO has come under severe criticism from various countries for its ineffective and seemingly biased role so far in dealing with the pandemic. But whether the International Law has been able to tackle such situations earlier, has it resolved other issues like human rights, law of finances etc., and above all has the legal regime within WHO hampered its effectiveness, all these matters need to be investigated.

The paper is divided into four sections. In the first section the response of WHO under the existing legal regime would be discussed. The second section would deal with response of the UN in similar crisis earlier. The third section would deal with the relevance of other legal regimes and its response like that of human rights. And the last section offers conclusions to these questions based on empirical data and descriptive research analysis.

## **2. International Law and Pandemics**

### **2.1 Role of W.H.O.**

Pandemics are probably the worst global alarms that mankind has faced so far. That's why even way back in 1851, a group of primarily European countries met in Paris, France to first discuss about a common framework for harmonizing response to pandemics. Pandemics caused by Plague and Cholera had devastated continents several times in the history and the most common response was keeping the sailors and travelers in quarantine. The word 'quarantine' comes from word

<sup>1</sup> David Morens, Jeffery Taubenberger, "The Mother of All Pandemics Is 100 Years Old (and Going Strong)!" (2018)

<sup>2</sup> <https://www.weforum.org/agenda/2020/03/a-u-s-recession-probably-depression-only-if-the-virus-is-untamed/>

‘quarantena’ which in Italian means ‘forty days’. This was the period, a ship had to stay isolated at the harbor before passengers and crew could go ashore during the pandemics.<sup>3</sup>

However the response varied from state to state. With the advent of industrial revolution, and increase of trade, the haphazard response started hampering the economic activities. Hence, to streamline the response, in 1851, few countries met in Paris. Their main objective was to remove disparities between the measures adopted by different countries which were in particular disrupting commercial activities. Though the need for a uniform regime was felt by everybody, but the meeting was a failure as the countries refused to give up their police powers to confront outbreaks.<sup>4</sup>

In 1902, the Pan-American Health Organization (PAHO) was created. This was the first international organization which specialized in health issues. Later, in 1907, the Office Internationale d’ Hygiene Publique was established for similar objective. These were precursors to WHO.<sup>5</sup>

However it would be after the second world war that in 1947, WHO was created as a wing of the United Nations. Article 2 of the Constitution of WHO defines its functions as ‘the directing and co-ordinating authority on international health work’. The decision making process to be adopted at WHO is entailed in its Constitution itself. It has sweeping powers and Article 21 and 22 state that WHO can issue regulations which would be binding for all member states even without national ratification procedures. No other organization of the UN has such sweeping powers. The main body of the organization vested with the power to make rules is World Health Assembly which can enact any rule by two thirds majority of states present and voting. But whenever WHO has tried to venture out of technical details into the political or economic arena, it has met with criticism. The sweeping powers WHO enjoys had made it venture into such realms to enforce its policies and this has proved to be a double edged sword. The US complained against WHO for its direct intervention in Palestine<sup>6</sup> and subsequently WHO faced the flak during pharmaceutical industry wars across the globe.<sup>7</sup>

After its inception in 1947, in the first decade WHO gave emphasis to controlling communicable disease in the world. Smallpox eradication program is considered still as its greatest success story so far. With technological development, non-communicable diseases became a matter of greater concern than communicable ones as that had been brought under check. The major problem with non-communicable disease was that there were no magic bullets or vaccines.<sup>8</sup>

<sup>3</sup> <https://en.wikipedia.org/wiki/Quarantine>

<sup>4</sup> Neville M Goodman: International Health Organizations and Their Work, note 5, 36.

<sup>5</sup> David Kennedy: “The Move to Institutions” (1987): 8 Cardozo Law Review, 841-842.

<sup>6</sup> Gene Lyons, David Baldwin: Donald McNemar, “The “Politicization” Issue in the UN Specialized Agencies” (1977).

<sup>7</sup> Fiona Godlee: “WHO in Retreat: Is it Losing its Influence?” (1994), 309 BMJ, 1495.

<sup>8</sup> Mateja Steinbrück-Platise, “The changing structure of global health governance”, in Leonie Vierck, Pedro A. Villarreal and Katarina Weilert

It was in this realm that WHO concentrated on nutrition and tobacco control programs. It was in such fields that WHO got pitched against economic interests of large conglomerates especially the tobacco lobby. In recent times, WHO's response to the COVID-19 crisis was lackadaisical.

Its failures have led to public perception that WHO is an agency which knows everything but does nothing. However this would be discussed in detail in section three.

## 2.2 International Health Regulations

Though WHO has sweeping powers but since its inception the main instruments adopted under Article 21 have been International Health regulations (IHR), International Sanitary Regulations and Nomenclature Regulations.

In 2002 when Severe Acute Respiratory Syndrome (SARS) hit the world, the IHR of 1969 was found inadequate and new negotiation efforts started.<sup>9</sup> The 58th World Health Assembly adopted revised IHR in 2005. The new rules allowed for rules-based disease surveillance and response was designed in a way where country's sovereignty was to be squeezed a bit to achieve shared goals of international community.<sup>10</sup>

The IHR has 66 Articles and is a detailed and encompassing legal document which was expected to tackle a situation like current pandemic. A brief outline of the regulations are enumerated here-in-under.

- (i) Art 1 - lists definitions and outlines the objectives of the IHR
- (ii) Art 2 - defines purpose and scope of the regulations. It states that the purpose of the IHR is...  
'to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade'.
- (iii) Art 4 - mandates member states to designate nodal authority for implementation of the health measures.
- (iv) Art 6 - makes it obligatory for member states to notify within 24 hours of 'all events that might constitute public health emergency of international concern'. If a member state fails to notify WHO about such an event in stipulated time then it becomes a legal issue. This obligation is at the root of current debacle between China and rest of the world in COVID-19 pandemic. China informed WHO only in January 2020 whereas the outbreak started in

<sup>9</sup> David Heymann and Guénél Rodier, "SARS: A global response to an international threat" (2004), X Brown Journal of World Affairs (2004).

<sup>10</sup> Christian Kreuder-Sonnen, Emergency Powers of International Organizations. Between Normalization and Containment (OUP, 2019).

November 2019. Earlier, during 2002-03 SARS outbreak also, China did not promptly notify WHO.<sup>11</sup>

- (v) Art 9 - allows WHO to take into account all sorts of reports, including official and 'other reports', into consideration and take cognizance. Since information over 'social media', comes under other reports, it should have been appropriate for WHO to ask China about the delay in reporting the advent, response and impact of pandemic.
- (vi) Art 10 - allows WHO to ask member state to verify such 'other reports'. Hence if China was not notifying COVID-19 outbreak, WHO should have asked China, suo-moto, for status report on the basis of social media messages.

There were two issues which would have been considered by WHO. Firstly, response of undemocratic China has been more effective than democratic US. So asking China about its response might have become a political issue. Secondly, asking China to verify social media reports might have construed that the international body was casting doubt on any success China was claiming about its COVID-19 control. This would impact credibility of China and meant economic loss for the country. WHO had already burnt its fingers during the tobacco wars.

Anyway, the fault in controlling the pandemic from spreading was due to China or WHO or inherent problem in implementing International Law is what this paper attempts to address.

- (vii) Art 18 - provides a list of measures which WHO may recommend to member states. These suggestions vary from least intrusive to most intrusive in nature. These recommendations are like putting infected persons in isolation (least intrusive), complementary screening process at international ports, to even imposing travel ban (most intrusive). During the current pandemic, few countries have adopted the policy of collection of personal data from the mobile phones for tracing contacts of the affected persons, as mandated in general framing of rules of 'contact tracing' of this article.
- (viii) Art 26 - deals with 'public health measures'. These are introduced to limit the restrictive measures imposed by the states to safeguard international travelers against excessive interference in their freedom and also hindrance in trading goods. Art 26 prevents imposition of restrictions on lorries, trains and coaches that has crossed an affected area without embarking, disembarking, loading or discharging.

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<sup>11</sup>Tom Christensen and Martin Painter, "The Politics of SARS – Rational Responses or Ambiguity, Symbols and Chaos?" (2004)

- (ix) Art 31 - allows member states to require ‘medical examination, vaccination or prophylaxis’ as a condition for travelers to be able to enter their territories.
- (x) Art 32 - further clarifies that though restrictions can be imposed as per Art 31 but the conditions imposed should honor ‘dignity, human rights and fundamental freedoms’ of the travelers. There is an existing lacuna in this provision vis a vis human rights laws. Russia had invoked restrictions against Chinese under IHR but China claimed it violated their basic human rights.<sup>12</sup>
- (xi) Art 40 - affirms that a country cannot charge international travelers with the cost of preventive measures that a country has put in place at the point of entry. Hence cost of quarantine or tests at ports has to be borne by the state itself.

Most of these provisions directly impact domestic policy making. It may be noted that IHR are not ‘treaty laws’ but only secondary law of an international organization, in this case WHO. As per International Law, secondary law very rarely enjoys direct effect.<sup>13</sup> Hence in the case of IHR also, domestic laws would supersede.

- (xii) Art 43 - qualifies that a country may invoke ‘additional health measures’ even beyond those suggested by WHO, however that country shall inform WHO about such actions with proper justification for higher degree of restrictiveness.
- (xiii) Art 56 - in the final provisions IHR stipulates possibility of dispute settlement whenever there are disagreements.

Though the IHR have been subjected to criticism over the years, but during current pandemic its apparent ineffectiveness has been highlighted even more. Even then, IHR, at least, enlists a range of ‘best practices’ developed over the years and helps in evaluating effectiveness of response of various states.

### 2.3 Public Health Emergency of International Concern (PHEIC)

In 2003, when SARS epidemic broke out, the then WHO Director General Gro Harlem Brundtland had given instructions to issue travel warnings. SARS was strictly not under the purview of IHR 1969. Hence, the decision of WHO was met with criticism stating that the Director General had acted ultra-vires.<sup>14</sup>

This situation called for convening of World Health Assembly in 2005, which promulgated IHR 2005. This gave powers to WHO Director General to declare a ‘public health emergency of international concern’ (PHEIC). Such a declaration raises an alert towards an “extraordinary event” that, one, cannot

<sup>12</sup>Gabrielle Tétrault-Farber, “China to Russia: End discriminatory coronavirus measures against Chinese”, Reuters (26 February 2020), available at <https://reut.rs/3bu4F6F>

<sup>13</sup>Markus Benzing, “International Organizations or Institutions, Secondary Law” (2007)

<sup>14</sup>Christian Kreuder-Sonnen, Emergency Powers of International Organizations, note 29, 155-156.

be tackled purely at the national level and, two, poses a risk of international spread.<sup>47</sup> In this vein, on 30 January 2020, WHO Director-General Tedros Adhanom Ghebreyesus declared that the ongoing coronavirus crisis is a PHEIC.<sup>15</sup>

This has given an entirely new dimension to the methodology of tackling a pandemic. This power gives a rather ‘unique and extraordinary’ tool in the law of International Organizations. This is unmatched power of WHO and only UNSC has more sweeping impact across the globe. It grants one single official, WHO Director General, the power to issue a formal declaration with global ramifications. Although PHEIC does not create new obligations for member states, but it obligates them to take action in the emerging circumstances that one’s declared. This is a fine example of ‘governance by information’. PHEIC declarations are in true sense an instrument of international public authority.

However, there are certain conditions which the WHO Director General has to (or is expected to) keep in mind before issuing a PHEIC. These conditions are mentioned in Art 1 of IHR and states that the event poses a public health risk to other states through the international spread of disease. It may be noted that PHEIC can take place even if the disease is spread in one country but there is a fair risk that it might spread globally. In this sense there is always a degree of uncertainty and it is unto the discretion and competence of the team of WHO Director General to take a call in this matter.

The chronological sequence of unfolding COVID-19 till it was declared a pandemic can be summarized thus<sup>16</sup> –

- November 17, 2019 - first case of unique pneumonia reported in a 56 year old man working in the wet market in Wuhan which deals wild animal trade.
- December 31, 2019 - WHO receives report from China that a cluster of cases of pneumonia have been reported in Wuhan, Hubei Province. A novel coronavirus was eventually identified.
- January 01, 2020 - WHO sets up the IMST (Incident Management Support Team) putting the organization on an emergency footing.
- January 04, 2020 - WHO reported on social media that there was a cluster of pneumonia cases in Wuhan. It added that there were no deaths however.
- January 05, 2020 - WHO published first ‘Disease Outbreak News’. It only contained risk assessment and advice as given by China to WHO.
- January 10, 2020 - WHO issued comprehensive technical guidance online with advice to all countries on how to detect, test and manage potential cases.
- January 12, 2020 - China publicly shared the genetic sequence of COVID-19.
- January 13, 2020 - first recorded case of COVID-19 outside China in Thailand.

<sup>15</sup>[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))

<sup>16</sup> <https://www.who.int/news-room/detail/08-04-2020-who-timeline---covid-19>

- January 14, 2020 - WHO mentioned possibility of human to human transmission of the disease.
- January 20, 2020 - WHO experts conducted a brief field visit to Wuhan.
- January 22, 2020 - WHO confirms that there was evidence of human to human transmission in Wuhan but more investigation was needed to understand the full extent of transmission.
- January 23, 2020 - The WHO Director General convened an Emergency Committee under IHR 2005 to assess whether the outbreak constituted a PHEIC. But the meeting was inconclusive.
- January 28, 2020 - A senior WHO delegation led by the Director General travelled to China to further study the virus. Still DG could not assess the impact of the virus correctly.
- January 30, 2020 - EC was reconvened and it was decided that the situation demanded PHEIC.
- February 3, 2020 - WHO issues Strategic Preparedness and Response Plan.
- February 11, 2020 - WHO convened a Research and Innovation Forum on COVID-19, The forum was attended by more than 400 experts and funders from around the world.
- February 16-24, 2020 - The WHO-China Joint mission, which included experts from Canada, Germany, Japan, Nigeria, Republic of Korea, Russia, Singapore and the US (CDC, NIH) spent time in Beijing and also travelled to Wuhan and two other cities.
- March 11, 2020 - WHO declares the outbreak as PANDEMIC.

It took China 45 days at least to report the event despite being mandatory for a member state to declare such an event within 24 hours. But surprisingly, it took WHO 71 days to assess and declare the situation as Pandemic. By then the disease had travelled far and wide.

A major feature of the current crisis is ‘governance by information’. The declaration of pandemic calls for convening of Emergency Committee by WHO Director General. The members of the committee are chosen by a roster and mandatorily includes members from affected country. Though International Law gives stress to the process more than the outcome, but strangely enough the meeting of Emergency Committee is held in camera and even the minutes of the meeting are not published. WHO Director General is not obligated to accept the report of the EC also. The IHR 2005 primarily works in a ‘black box’ fashion. The discussions on EC held on Jan 23, 2020 reflect that there were divergent views even amongst the experts and that WHO Director General chose not to call the outbreak as an epidemic.<sup>17</sup> Had it been done, the global impact is expected to have been much milder. But it is widely believed that the declaration would have negatively impacted the prospects of China and effected it economically.

<sup>17</sup>[https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))



Earlier also, WHO has acted in a partisan way. In one statement (April 12, 2019), the Emergency Committee declared that the Ebola outbreak in the Democratic Republic of the Congo had a “very high risk of regional spread”, but it also stated that declaring a PHEIC had “no added benefit“. This reflects that the body has been taking decisions keeping political and economic considerations in mind as well. This has hampered the results which implementation of International Law is expected to bring.

The power of WHO Director General to issue PHEIC have been termed by some as ‘emergency powers’. But it may be noted that even without terming a situation as PHEIC, WHO has issued recommendations in cases earlier which have been accepted by member states. And 6 times WHO has declared PHEIC since IHR 2005. During such times the global response has been unanimous and strong.

But it is for the first time that the member states have casted aspersions on the intentions of the WHO Director General. There is a major lacuna in the International Law in this regard. It is not specified what consequences would follow if a Review Committee were to find evidence of malfeasance or wrongdoing by WHO officials. Additionally, general public international law is of little help: the draft articles on the responsibility of international organizations provide little direction for an answer.<sup>18</sup>

### **3.Epidemics in the past and its handling by WHO**

COVID-19 is not the first pandemic the world is facing. It is a fact that managing pandemics has been a difficult task always. How and why the COVID-19 was declared a ‘pandemic’ needs better introspection into the history of the humankind’s fighting with such diseases. When on March 11, 2020, WHO declared COVID-19 as a pandemic, it was a result of decades of wisdom and experience. It calls for chronologically understanding the response of humankind to such outbreaks.

One of the most common outbreaks has been that of Cholera. Seven cholera pandemics have occurred in the past 200 years, with the first pandemic originating in India in 1817 and the last one in 2016-20 in Yemen.

By late 18th century and early 19th century all European countries were in a race to colonize third world. With much riches from these plunder came diseases as well. It was in 1834 that a French health administrator called for a meeting for the first time to create a harmonized standard. The agenda of the meeting was to discuss ‘disastrous hindrances to international commerce’ from these contagious disease outbreaks.

In 1851, France convened a series of International Sanitary Conferences to standardize quarantine regulations to prevent importation of cholera, plague and yellow fever.

At that time the medical science was not as advanced as today and in general the experts across the world differed on the diagnosis and prognosis of the diseases. It took 41 years of a series of such conferences that the states finally agreed in 1892 to a narrow treaty agreeing to maritime quarantine

<sup>18</sup> 82 International Law Commission’s Draft Articles on the Responsibility of International Organizations.

regulations for communicable diseases like cholera on westbound shipping routes from India and other colonies.<sup>19</sup>

In 1909, the European countries signed an agreement and opened an Office International d'Hygiene Publique in Paris.

The world was hit by deadly Spanish Flu in 1918 in which nearly 5 Million people lost their life. This called for an immediate updated International Sanitary Convention to provide notification to every government in the world. This was the inception of governance by information principle. Later the methodology was replicated for small pox, polio, yellow fever and malaria too. But the word 'epidemic' was never defined. What would be the implications of calling an outbreak an 'epidemic' was a matter of discussion only. At that time despite the fatal effects of Spanish Flu, the countries refused to call it an epidemic arguing that it was not practical to quarantine for such a commonly occurring disease.<sup>20</sup>

This is quite in contrast to the current situation of COVID-19, wherein despite much better medical facilities, the situation has been declared 'pandemic'.

During World War II, in 1943, the United Nations Relief and Rehabilitation Administration focused on providing aid and relief to people, especially the displaced people.

It was after the World War II was over that the constitution of WHO was adopted and in 1947 the body was formally established. WHO started introducing better practices in international co-ordination around pandemics.

In 1952, the WHO created the Global Influenza Surveillance and Response System (GISRS) to monitor the evolution of influenza viruses. It was hoped that countries would try to identify in a timely fashion, strains of influenza which might otherwise turn into pandemics, and make efforts to prepare vaccines for the same.

In 1969, member countries adopted the IHR. (Details already mentioned in section 1 above). The IHR was also criticized because it did not address the events of mass misery created by disease like flu.

In 1999, for the first time, the WHO published an influenza pandemic planning framework. This stressed upon the need to enhance influenza surveillance, speed vaccine production and antiviral drugs, and improve influenza research and emergency preparedness.<sup>21</sup>

In 2002, SARS was reported in Guangdong, China. The WHO had an opportunity for the first time to check effectiveness of its Global Outbreak Alert and Response Network which it had established in 2000.

<sup>19</sup> Handa, Sanjeev (February 16, 2016) "Cholera: Background"

<sup>20</sup> McNeil J. Something New Under The Sun: An Environmental History of the Twentieth Century World.

<sup>21</sup> Pike J (2007-10-23). "Cholera- Biological Weapons". Weapons of Mass Destruction (WMD).

The outbreak highlighted various lacunae in the framework of WHO and so in 2005 the World Health Assembly formulated IHR, which gave sweeping powers to WHO Director General. Details of developments hereinafter are mentioned in above sections already.

**Since IHR 2005, six PHEICs have been declared so far. Their date of declaration and status are thus -**

EVENT	Date of PHEIC declaration	STATUS
H1N1 Influenza Pandemic	24.04.2009	Ended - 10.07.2010
Wild Poliovirus	05.05.2014	Active
West African Ebola Outbreak	08.08.2014	Ended - 29.03.2016
Zika Outbreak	01.02.2016	Ended - 23.11.2016
DR Congo Ebola Outbreak	17.07.2019	Active
COVID-19 Pandemic	30.01.2020	Active

Thus we see that declaring a pandemic is an exercise which has inputs of experience and wisdom of decades and centuries. The delay in declaring current crisis as a pandemic is still being debated as being intentional or impotence of International Law despite sweeping powers to WHO.

The paper attempts to look into the impact of Pandemics and International Law beyond the WHO. This in turns affects the decision making of a pandemic as the announcement has a rippling effect across various governments and legal regimes.

#### **4. Pandemics - Its effects on other International Law regimes**

In the realm of International Law, the regulations laid by International Law on Pandemics crosses current with primarily five other regimes of International Law, namely -

- Human Rights
- International Trade Law
- United Nations' Security Council proceedings
- World Bank's Law of Development Finance, and
- Convention on International Civil Aviation.

Since after the Ebola crisis in 2014, it has become an established norm now, that in the case of an overlap of legal regimes, the IHR assumes the seat of the 'principal driver' of responses. Other laws get squeezed into smaller spaces as IHR takes the prominence to mitigate crisis.<sup>22</sup>

We shall see the impact of IHR vis a vis the above mentioned International Laws case wise.

<sup>22</sup> Gearóid Ó Cuinn and Stephanie Switzer, "Ebola and the airplane: securing mobility through regime interactions and legal adaptation" (2019).

#### 4.1 Human Rights

Art 3 and Art 32 of the IHR mandates upon WHO and member countries to respect human rights of all. But the regulations are silent without any further specifications if HR are on stake and how to uphold them. Art 32 of IHR asks member countries to maintain ‘dignity, human rights and fundamental freedoms’ of travelers but it is a very open ended provision.

There are two covenants which are directly relevant to a pandemic situation -

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

In the case of ICCPR following two issues of IHR come in direct conflict with one’s HR -

- (i) Mandatory isolation - for persons with confirmed infection.
- (ii) Quarantine - for person who do not have a diagnosis of infection but are suspected to be infected.

because they have been either in contact with an infected person or were present at a high transmission zone

These two are deployed when there are no pharmaceutical remedy available for the disease. These have been construed as an infringement of liberty due to conditions amounting to detention. Countries can even promulgate law compelling people to stay at home under the threat of heavy penalty or even imprisonment. Cuba placed HIV patients in mandatory isolation during 1986-89.<sup>23</sup>

The decision to introduce isolation and/or quarantine as a means for achieving social-distancing is primarily with WHO and the principle to be adopted in such cases has not been categorically mentioned anywhere. This has led to debate on the issues like whether the solution to COVID-19 is much painful than the disease itself or not.

In a non-emergency case HR calls for a specific risk assessment for every person while deciding which regulations to be put in place. HR Courts in European countries have though upheld enforcing isolation and quarantine but only under very narrow circumstances.

When the transmission crosses human to human stage to community transmission then it is difficult for the state to decide each case individually. Under such circumstances, authorities have been empowered to introduce wide ranging restrictions on movement. This is called community quarantine or cordon sanitaries. These had been rarely resorted to till Ebola outbreak of 2014 and have become a very common instance, worldwide during the current crisis. This is being done by countries on their own and WHO has not issued any direction for mandatory community quarantine, so far.

This calls for reconciling a unique situation wherein personal liberty of a person is curtailed whereas the person may claim that there is no concrete danger or risk to him or her. It may be noted, that

<sup>23</sup> Tim Anderson, “HIV/AIDS in Cuba: A Rights-Based Analysis” (2009), 11 Health and Human Rights, 95-96.

the current community quarantines are not based on sound legal foundations and may be challenged in court of law on the grounds of violation of one's human rights. Under international human rights law, such declaration of community quarantine is relevant under Article 4(1) ICCPR. However, in order to justify the restriction of ICCPR's rights, Article 4(3) ICCPR requires state parties to notify the United Nations Secretary-General. This has probably not been done by most countries who have enforced such laws.

It has been debated that the human rights entail right to health to each individual and so such restrictions are justified under the Art 12.2 of ICCPR which states that to maintain public health during epidemics state can impose such restrictions, including quarantines, isolations and even cordon sanitizes when lesser restrictive means have failed to control the epidemic.

Of course, achieving a balance between the rights of liberty, free movement and assembly, on one hand, and the right to health, on the other hand, is very difficult. It is now well accepted in contemporary human rights law that civil, political, social, economic, and cultural rights are equal. The duties to safeguard liberties and to protect against pandemic events, are both two sides of the coin of human rights.

This balance is expected to be achieved based on sound scientific evidence. The adoption of such restrictive measures should be grounded in science, particularly medical-epidemiological research.<sup>24</sup>

The basic criteria to be adopted in this case is that the restrictive measure should be able to stem the spread of the disease. The technical advice of the WHO thus helps in identifying the measures which may be acceptable.

Under present crisis, the response of WHO to mass isolation has been quite ambivalent. On one hand it has praised China for effectively locking down whole cities and on the other hand its standard recommendations for COVID-19 response include only individual quarantine and isolation.<sup>25</sup>

It can also be contested that since WHO is not an expert organization on HR, it does not comment on necessity of violation of same and that is how it balances between the two issues.

#### **4.2 International Trade Law**

Under Art 18(2) of IHR, WHO can call for restrictive trade measures. This would be however in direct conflict with the law of World Trade Organization (WTO). The applicable legal framework within WTO for health related trade restrictions is called Agreement on Sanitary and Phytosanitary Measures. It allows for imposition of varying degrees of constraint from tariffs to import bans, to contain pandemic.

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<sup>24</sup> Article 43(b) of IHR 2005.

<sup>25</sup> World Health Organization, Considerations for quarantine of individuals in the context of containment for coronavirus disease (COVID-19), note 91.

WTO allows member states negatively impacted by such public health measures taken during pandemics to approach WTO for settlement of disputes. However, whenever such an issue has come up, WTO has shown polite submission and respect towards other organizations when addressing scientific evidence. Since WHO has so far, never recommended any trade restrictions for controlling an outbreak, a conflict between WTO and WHO has never occurred.

The relationship between the two regimes becomes relevant when it comes to Intellectual Property as well. WHO promotes individuals and countries to do research for finding a vaccine. Such parties apply for patent protection of such vaccines. However, such protection creates a monopoly in which patent holder gets exclusive rights for manufacturing the vaccine. Now, it is obvious that the vaccine would be in huge demand. WTO law can turn such protection into a multi-lateral issue in accordance with the Agreement on Trade Related Aspects of Intellectual Property. As per this all users either need to take authorization from patent holder for mass producing such vaccine or fall under one of the stated exception in the Agreement. This conflict between public health goals and IPR needs to be resolved at the time of such pandemics.

To reconcile this position the Declaration on the TRIPS Agreement and Public Health was adopted in 2001. This is famously known as ‘Doha Declaration’. This expands on contents of Art. 30 and 31 of TRIPS Agreement and provides for certain exceptions where patent rights would be superseded for general public health. The Doha Declaration foresees the possibility for states to issue compulsory licensing in circumstances of “national emergency or other circumstances of extreme urgency”. This allows for the granting of manufacturing licenses to producers other than the patent-holders without the latter’s authorization.<sup>26</sup>

### 4.3 UN Security Council

The outbreak has a major security aspect in the form of ‘bio-terrorism’. This aspect has introduced the matter of security into the field of international health. After the SARS breakout in 2002-03 this aspect has been constantly debated.

In fact, during the current crisis there has been a demand that due to mis-handling of the crisis by WHO, the UNSC should take up the issue in its hands and be the nodal agency for drafting and implementing a response to the outbreak. Such a move shall empower UNSC which can in turn then appeal to a wide range of actors and rope in resources which can be streamlined towards the WHO and fulfill its mandate. However, this would also mean that security concerns would take an upper hand which might hamper research for a new vaccine or a more comprehensive and scientific planning of the response.

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<sup>26</sup> Doha Declaration, paragraphs 5(b) and 5(c).

The UNSC deals with international security issues in accordance with Article 24 of the UN Charter. UNSC can frame issues which pose a threat to international security. It has so far taken an unprincipled approach towards health issues. Whereas, it considered 2014-16 Ebola outbreak and HIV/AIDS crisis in Africa as a threat to international security, UNSC chose to address 2018-19 Ebola outbreak only tangentially in its resolution. Other PHEIC such as H1N1 pandemic or Zika outbreak was not even considered by UNSC even though the health impact was similar.

Hence, which outbreak would be considered a threat to International Security continues to be an open matter.<sup>27</sup>

#### **4.4 World Bank's Law of Development Finance:**

Fighting pandemics is a costly affair. Normally pandemics originate and/or devastates developing countries and they need international support to fight the miserable situation. Resources for pandemic response are pooled only after the crises is fully blown. To address this problem, in 2017 a Steering Body within the World Bank, comprised of the International Bank for Reconstruction and Development and the International Development Association, devised the Pandemic Emergency Financing Facility. The main objective of the facility is to enhance availability of financial support to effected countries during the disease outbreak and prevent the outbreak from becoming pandemic.<sup>28</sup>

The World Bank (WB) sells 'pandemic bonds' in financial markets to collect money to be given to low-income countries. Investors are offered bonds on premium and asked to wait either until, one, they reach their dates of maturity and cash them out or, two, certain conditions of return, so-called "activation criteria", have been met. The activation criteria is based upon the specific epidemiological, geographical and severity features. The funds thus collected are made available to the states to ramp up its response to the outbreak. The Wb also encourages member states and philanthropic agencies to donate funds to the Facility.

So far, the WB has not been able to raise sufficient funds for meeting any pandemic by floating bonds. The complex 'activation criteria' has undermined the practical effectiveness of this instrument.<sup>29</sup>

So far, this instrument has helped investors more by creating more assets for the investors than to beneficiary countries.

#### **4.5 Convention on International Civil Aviation:**

As per Article 14, Convention on International Civil Aviation (Chicago Convention – 1944)..

'Each contracting State agrees to take effective measures to prevent the spread by means of air spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and

<sup>27</sup> Ilja Pavone, "Ebola and Securitization of Health: UN Security Council Resolution 2177/2014 and Its Limits"

<sup>28</sup> World Bank, Pandemic Emergency Financing Facility Operations Manual, para. 7.

<sup>29</sup> Pandemic Emergency Financing Facility Operations Manual, approved by the Steering Body on 15 October, 2018

such other communicable diseases as the contracting States shall from time to time decide to designate....’

This provision was rarely enforced till the SARS 2003 crisis. At that time it was found the regulations were insufficient to tackle a crisis. In IHR 2005, changes were brought about in the response. Subsequently, International Civil Aviation Organization (ICAO) provisions were also altered.<sup>30</sup>

**In 2007 following provisions were added -**

1. States were asked to have a pandemic preparedness plan for aviation and get it integrated into national plan.
2. Cabin crew were to be advised to identify suspected case and prevent them from boarding. Aircraft general declarations were altered accordingly.
3. In collaboration with International Airport Transport Association (IATA), passenger locator card were agreed upon by WHO for contact tracing

**In 2009 following provisions were further included -**

1. All flights were mandated to carry ‘universal precaution kit’ for managing onboard communicable disease.
2. If there was a suspected case onboard, Pilots in command were to notify air traffic control of the same before landing.
3. Public health emergencies were included in air traffic and aerodrome contingency plans.

It is for the first time that international travel has been stopped by nations for controlling the pandemic. The effects of the response adopted in the COVID-19 pandemic is yet to be assessed.

**5. Summary**

The current COVID-19 pandemic is an unprecedented test of the effectiveness of International Law Organizations. Indeed, so far the role of any and every agency seems uncertain. Though the countries have adopted the approach ‘my country first’, there has been overwhelming evidence to show that all stakeholders have echoed ‘we are in this together’. Rarely has an issue been so ever global as COVID-19 pandemic.

We are now in a position to answer the questions that the paper had at the outset mentioned.

- 5.1. What are the obligations, authority and procedures for dealing with such situation under International Law?

This article has shown that international law, and in particular the law of the WHO, set out a number of relevant rules steeped in expertise. They are usually precise and allow the evaluation of a good number of critical issues. Also, the concrete WHO input into the coronavirus pandemic has significant legal ramifications.

<sup>30</sup> [https://www.icao.int/Meetings/AMC/MA/CAPSCA\\_SCM1/CAPSCASCM01\\_Day01\\_04\\_ICAO\\_Evans.pdf](https://www.icao.int/Meetings/AMC/MA/CAPSCA_SCM1/CAPSCASCM01_Day01_04_ICAO_Evans.pdf)



## 5.2. Have the current governments in all countries complied with it?

Of course, not. The decisions of WHO have been colored with each case and depends largely on political and economic might the effected country. However, there is no evidence that the WHO regime is defunct.

## 5.3. What role has International Law played through its institutions especially the role of World Health Organization (WHO).

The pandemic rages on. Had WHO assessed the situation quickly and not gone into the issue of sending teams thrice to China for assessing the crisis again and again, the pandemic could have been nipped in the bud. It is a matter of investigation to look into the 'mens rea' of the WHO officials. However, after March 11, when WHO declared crisis as a Pandemic, it seems safe to assume that, without the framework subsequently provided by the WHO, the various responses by the many countries under high pressure would be even more diverse and the degree of uncertainty would be even higher. After the declaration of the pandemic WHO's role has been a balanced one and it has remained a relevant technical actor for fighting the pandemic. But a more aggressive, transparent and decisive WHO would have prevented the outbreak from becoming a fully blown pandemic. To that extent at least the WHO has failed the spirit of the International Law.

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