

AN ANALYSIS OF THE LAW AND PRACTICE OF THE WORLD HEALTH ORGANIZATION DURING THE 2019 INFLUENZA PANDEMIC

Written by *Honest Thadeus Shio*

2nd Year, LLM Student, St Augustine University of Tanzania, Mwanza, Tanzania

ABSTRACT

This article delves into the 2019 Influenza pandemic named COVID-19 and examines the law and the institution responsible for health matters in the world the World Health Organization. The article argues that the WHO failed to execute a coordinated global response towards COVID-19 due lack of political will from states, elements and claims of bias and the mandate bestowed upon it by the International Health Regulations is toothless that is in-case of breach there is no a sound accountability mechanism. The article lastly recommends the restructuring of the World Health Organization, amendments to the International Health Regulations to give more powers to the WHO and an adoption of a new international convention devoted to dealing with pandemics.

INTRODUCTION

In the late 2019 the world experienced once again in the history of its existence a deadly influenza pandemic. The effect of this influenza pandemic which was named COVID-19 continues to date. The emergence of COVID-19 threw the world into a stand-still. Borders were closed, economies were devastated, imposition of safety measures like lockdowns, and millions of people died. Amid all those effects, the conduct of the global body on health issues the World Health Organization (WHO) is overlooked. The body is responsible in generally ensuring a healthy and safe world as far as diseases are concerned. The WHO found itself in scandals due to the way it carried itself in the early stages of the COVID-19 pandemic. This article aims at examining the influence and the role played by the WHO during COVID-19 by looking at its constitution and important instruments like the International Health Regulations. Lastly this article will suggest better ways of dealing with future pandemics. Such suggestion(s) will arise from gaps identified in the law(s) relevant during COVID-19 and the conduct of the World Health Organization during this pandemic. The suggestion(s) will also take into account the global politics that have been a suspect of having influence in the operations, decisions and policies of the World Health Organization.

THE WORLD HEALTH ORGANIZATION

The World Health Organization (WHO) is one of the 17 United Nations specialized agencies.ⁱ The WHO is a specialized agency on health matters with an objective of attainment by all peoples of the highest possible level of health.ⁱⁱ WHO was founded in 1948 and its headquarters are in Geneva, Switzerland.ⁱⁱⁱ The WHO exists in the spirit of article 57 of the UN Charter.^{iv} The provision allows for the establishment of various specialized agencies to deal with various specific global matters like finance, labour, industrial development, refugees, civil aviation, and tourism among others. The membership to the WHO is open to all states.^v There are more than 190 member states of the WHO.^{vi}

The WHO is established by the WHO Constitution which was adopted in 1946 and came into force in 1948.^{vii} The constitution outlines all essential components and functions of the WHO and it has been amended various times since its adoption. Under its constitution, the WHO has

the following functions which are to act as the directing and co-coordinating authority on international health work, to assist Governments, upon request, in strengthening health services, to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments and to stimulate and advance work to eradicate epidemic, endemic and other diseases among other functions.^{viii} Other functions of the WHO can be found in other documents for example the International Health Regulations.^{ix}

The WHO operates through three organs which are the World Health Assembly, the Executive Board and the Secretariat.^x The World Health Assembly is comprised of delegates from member states to the WHO.^{xi}

The Health Assembly has various functions which include determination of the WHO policies, appointment of the WHO's Director General, supervision of financial policies of the WHO, to instruct the Board and the Director-General to bring to the attention of Members and of international organizations, governmental or non-governmental, any matter with regard to health which the Health Assembly may consider appropriate and to consider recommendations bearing on health made by United Nations organs like the General Assembly and the Security Council and to report to them on the steps taken by the Organization to give effect to such recommendations among other functions.^{xii} So, generally the Health Assembly is the decision making organ of the WHO.^{xiii} On top of those functions the Health Assembly has been vested with powers to adopt conventions or agreements on matters that are within the competence of WHO.^{xiv} Also the Health Assembly can adopt regulations on various matters specified which include sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.^{xv} The Health Assembly decides on matters through annual sessions and special sessions.^{xvi} Annual sessions are regular meetings which take place each year between all members of the WHO and special sessions are those meetings which take place at the request of the Executive Board or majority of the WHO members.^{xvii} Since its establishment the Health assembly has had 75 annual sessions with the last one being held on 22nd to 28th May 2022.^{xviii} Special sessions can be called to discuss an urgent matter which cannot wait for the regular annual session for example where there is a public health emergency etc. So far, there have only been two special sessions in the history of WHO.^{xix} The first special session was held on 9th November 2006 to address the consequence of the death of the then WHO Director General and to fast track the election of the Director General.^{xx} The second

special session was held on 29th November to 1st December 2021 that aimed at discussing development of a pandemic preparedness and response.^{xxi}

The Executive Board is an organ of the WHO that ensures the implementation of the Health Assembly decisions.^{xxii} It is the executive organ of the Health Assembly.^{xxiii} Other function of this organ include advising the Health Assembly on issues referred to it by the assembly and on matters assigned to the WHO by conventions, agreements and regulations, preparing the agenda of meetings of the Health Assembly, studying all questions within its competence and also to perform any function that will be assigned to it by the Health Assembly.^{xxiv} The Executive Board is comprised of 34 qualified persons in the health field elected by member states.^{xxv} The composition of the board reflects the diversity of the members of WHO. Each region is represented accordingly.^{xxvi} The members of the Executive Board serve for a period of three years upon their election to the board and they can be re-elected.^{xxvii} The WHO constitution requires the Executive Board to meet at least twice a year.^{xxviii} In its operations the board is allowed to adopt its own rules and procedures and it is headed by a chairman who is elected by members of the board.^{xxix}

The Secretariat organ of the WHO is composed of the Director-General and all the administrative and technical staff of the WHO.^{xxx} The Director-General is the head of the secretariat. He is also the chief technician and administrator of the WHO.^{xxxi} He is appointed by the Health Assembly after being nominated by the Executive Board.^{xxxii} As the head of WHO the Director-General has the task of preparing and submitting to the board the financial reports and budget estimated of WHO.^{xxxiii} The secretariat is required to observe impartiality and refrain from taking instructions from any government or authority outside of the WHO.^{xxxiv}

THE 2019 INFLUENZA PANDEMIC

This influenza is a coronavirus disease which is caused by the Severe Acute Respiratory Syndrome-Coronavirus-2 (SARS-CoV-2).^{xxxv} The 2019 Influenza pandemic is commonly referred to as the COVID-19 pandemic. COVID-19 originated in the province of Hubei in Wuhan city in China. The first cases of this influenza were reported in December 2019.^{xxxvi} The World Health Organization first declared COVID-19 a public health emergency of

international concern on 30th January 2020.^{xxxvii} COVID-19 was later declared a pandemic on 11th March 2020 by the Director General of the World Health Organization.^{xxxviii} COVID-19 has proved to be a deadly influenza pandemic to have happened since the 1918 influenza pandemic. As of mid-September 2022 more than 6.5 million people have been reported to have died from COVID-19.^{xxxix}

In curbing the spread of the influenza virus, the WHO issued guidelines and directives which insisted on measures like frequent hand sanitization, wearing of face masks and personal protective equipment and social distancing. States individually imposed various travel restrictions from countries that were reported to be hotbeds of COVID-19. Later nearly all countries closed their borders and imposed lockdowns and curfews as measured to curb the spread of COVID-19.

Multinational pharmaceutical companies undertook to research, develop and produce vaccinations. As of January 2022 there were nine vaccines that were approved by the World Health Organization.^{xl} They include the following vaccines the Oxford/AstraZeneca vaccine,^{xli} the Janssen vaccine,^{xlii} the Moderna COVID-19 vaccine,^{xliii} the Sinopharm COVID-19 vaccine,^{xliv} the Sinovac-CoronaVac vaccine,^{xlv} the Bharat Biotech BBV152 COVAXIN vaccine,^{xlvi} the Covovax vaccine,^{xlvii} the Nuvavoxid vaccine^{xlviii} and the Pfizer BioNTech corminaty vaccine.^{xlix} As of September 2022 a total of 12,589,972,108 vaccine doses have been issued.¹ With the COVID-19 pandemic the issue of vaccine inequality still persists. There are states mostly in Africa that have relied on vaccine donations from the rich countries because they are unable to acquire enough vaccines for their people.^{li} Africa has also lagged behind in the aspect of research, development and production of vaccines and it still relies on continents for such matters. This presents a challenge because usually the African perspective and interests are sidelined or ignored.

The world seems to have slightly moved on from COVID-19 whereby the strict measures imposed to fight it have been lifted and life goes on. There are some few measures that still continue like mandatory COVID-19 testing before travelling to another country also there are countries that have mandatory vaccination policy. African countries seem the most reluctant when it comes to enforcement of anti-covid measures due to forecasted economic impacts like

loss of foreign currency if they close borders and also unemployment and poverty if they enforce lockdowns in their countries.

THE GLOBAL LAW RELEVANT TO COVID-19

The applicable, accepted and suitable law is the International Health Regulations (IHR). The WHO and states (194 states are members of the Health Assembly of the WHO) are the key stakeholders of the regulations. The World Health Organization is designated as the custodian of the IHR. This is because the primary implementation of the IHR rests on the WHO for example the key decisions regarding public health emergencies of international concern like influenza pandemics.

The International Health Regulations (IHR) was adopted with an intention of becoming the global binding document on public health matters. The IHR were adopted in 2005 on the background of SARS an influenza pandemic caused by SARS-corona virus that was first discovered in February 2003.^{liii} The pandemic threatened the conduct of international trade and travel which led to global economic problems. The states saw it wise to have an agreement on how to best deal with health situations that can have an impact internationally.

International Health Regulations aim at preventing, protecting against, controlling and providing a public health response to the international spread of disease in ways that are proportionate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.^{liiii} The IHR has an inclination of human rights whereby its implementation is based on full respect of human dignity and fundamental freedom of persons.^{liv} Furthermore, IHR implementation is guided by the United Nations Charter and the Constitution of the World Health Organization (WHO).^{lv} The IHR require states to have and develop ability to detect, assess, report, and respond to public health events. These requirements fulfill one of the core principles of IHR which is ensuring their universal application for the protection of all people of the world from the international spread of disease.^{lvi}

The IHR upholds the principle of sovereignty of states as far as matters of health are concerned. States are allowed to legislate on health matters in their territories as long as they uphold the

spirit of the IHR.^{lvii} With such recognition of sovereignty each state is still required to establish or designate a national IHR focal point that will be responsible for the implementation of all measures under the auspices of the IHR.^{lviii} These national IHR focal points have to always be accessible to WHO and on top overseeing the general implementation of the IHR they are also tasked with ensuring close communication to the WHO regarding Articles 6 to 12 of the IHR.^{lix} These articles generally deal with provision of information to WHO on public health especially those which are public health emergency of international concern.^{lx} The states through their national focal IHR point are tasked with duties of notification, information sharing during unexpected or unusual public health events and consultation among other tasks. All these tasks are mostly in relation to emergence of a new situation as far as public health is concerned and such a situation can cause international concern. It was through this processes that the WHO was notified on 31st December 2019 of the presence of several instances of pneumonia whose origin was unknown in Wuhan, China.^{lxi}

The national IHR focal points therefore play a very important role in upholding the spirit of IHR. These focal points are left solely under the authority of a particular state. If a state acts in bad faith then the global community will really suffer. Also detection and surveillance capabilities of a state can undermine the effectiveness of a national IHR focal point in realizing a new situation as far as public health is concerned. For example third world countries have no up to date detection, intelligence and surveillance technologies possessed by developed nations as far as health issues are concerned.

In determining whether a situation is a public health emergency of international concern, after receiving information and conduct of other processes like consultations the Director-General of WHO is tasked with assessing the information received and communicate such assessment to the state party concerned and if they agree that it is a situation of international concern then an Emergency committee established under IHR will be convened.^{lxii} In assessing such situations the Director-General has to consider factors like the information provided by the state party where the events are occurring and also the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic among other factors.^{lxiii}

The Emergency committee is established under Article 48 of IHR. It is mainly tasked with providing views on whether a situation is a public health emergency of international concern, termination of public health emergency of international concern and on temporary recommendations.^{lxiv} The working of the Emergency Committee and how they arrive at decisions are provided for under Article 49 of IHR. Upon the completion of their task the Director-General makes consideration and goes on announcing to state parties about the status of the events occurring in a particular state that is whether or not it is a public health emergency of international concern. COVID-19 was declared a public health emergency of international concern on 30th January 2020 after the Emergency Committee gave their views that it met criteria for such situation.^{lxv}

Since its adoption in 2005 the IHR has withstood various tests successfully until in 2019 when COVID-19 influenza pandemic arose.

THE WHO, IHR AND COVID-19

Pandemics are usually declared by the World Health Organization after a verification process that goes through various phases as explained in the preceding section. However, the role of WHO in such situations has been debatable. WHO is accused of being slow to act and biased in the process of determining the existence of the COVID-19 pandemic. It took WHO more than two months to declare COVID-19 a pandemic.^{lxvi} Because of such situation some states notably the United States of America usually work alone in matters of COVID-19 citing the incompetence of the WHO. In 2020 the USA renounced her membership to the WHO citing that the WHO was not independent of Chinese influence.^{lxvii} Such renouncement was because of USA's allegations that because of the financial aid it receives from China, the WHO failed to act timely since the report of the first cases of the pandemic in Wuhan, China for it was biased.^{lxviii}

IHR as the global instrument that aim at preventing the spread of diseases internationally has displayed weaknesses both institutionally and legally. Institutionally, the WHO (the designated executor of IHR) has failed to ensure a coordinated preparedness and response framework to pandemics most notably the COVID-19. Legally, the IHR has failed to ensure accountability

to states that deviate from a global response framework designated by the WHO. Under the current IHR framework such deviation is accommodated. With such accommodation, there is risk of rapid spread of diseases something that is contrary to the spirit of IHR. Another concern on IHR is there is no an exact procedure on how are the pandemics end. This has prompted individual states into unilaterally declaring that the pandemics are over in their territories. This undermines the spirit of IHR. On 14th September 2022 the WHO declared that the end of the 2019 pandemic is in near.^{lxi} On 19th September 2022, the President of the United States of America declared the pandemic to be over in his country even though there has been rise of influenza pandemic related deaths in the USA.^{lxx} This situation is detrimental to the outbreaks that are of international concern because states individually decide what to do and therefore lack of international coordination can severely impact protection of civilians in all types of situations including armed conflicts. Since it was the WHO that declared the start of the pandemic then it is prudent that only the WHO to be the body that declares its ending.

The world lacked a unified and coherent way of dealing with COVID-19. This failure is attributable to WHO's weakness under its constitution and IHR. States individually or collectively as regional blocs adopted their own ways of dealing with COVID-19. For example there are states that imposed mandatory wearing of face masks, testing, lockdowns and vaccinations. Other States chose not to enforce at all the measures that are deemed to be important in fighting influenza pandemics and releasing COVID-19 related data.^{lxxi} Some countries went as far as denying existence of such pandemics and they have more than three neighbours.^{lxxii} Such geographical position implies danger to that bloc and if it happens that other neighbours adopt the same decision then millions of people could be in danger. Under IHR such decisions are not in violation of any law but they are seen as just exercising their sovereignty. Such decisions by individual states can be detrimental to other states especially those neighbouring states and the international community in general.

CONCLUSION

The WHO has not been able to execute a coordinated effort in fighting COVID-19 due to various factors most of them being political factors. States have not displayed political will in adhering to directives and practices advanced by WHO a fact that puts more people in danger.

The political factors are highly caused by avenues found under IHR most of them being ones that allow sovereignty of individual states in various matter. Could there be a transparent checking and verifying system and also an accountability mechanism under IHR for non-compliance then there could be no problems as we witnessed during COVID-19.

RECOMMENDATIONS

The WHO has to undergo an institutional change that will guarantee and prevent suspicions of biasness and financial independence so as to enable it to achieve its expected goals. The current setting where few states offer lots of donations to WHO and thus allegedly exerting influence will become more detrimental in the future especially where an influenza pandemic like COVID-19 occurs.

International Health Regulations should be amended to render them powerful in situations of influenza pandemics. They should prevent deviation from agreed global standards on dealing with future influenza pandemics and promote values like transparency, accountability, detection and prevention of pandemics.

There should be an international convention that is solely devoted to dealing with pandemics. The convention should address pandemic preparedness and response. To curb with derogation, such a convention should attain an international customary law status (*jus cogens*) breach of which triggers state responsibility clauses on a breaching state. This will help in ensuring certainty and uniformity in dealing with future pandemics unlike what we saw during the COVID-19 influenza pandemic.

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ENDNOTES

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^{iv} Adopted in 1945

^v Article 3 of the WHO Constitution

^{vi} Annex 1 of the WHO Basic Documents Forty-Ninth Edition 2020

^{vii} <https://www.who.int/about/governance/constitution> accessed on 7 November 2022

^{viii} Article 2 of the WHO Constitution

^{ix} Adopted in 2005

^x Article 9 of the WHO Constitution

^{xi} Article 10

^{xii} Article 18

^{xiii} <https://www.who.int/about/governance/world-health-assembly> accessed on 7 November 2022

^{xiv} Article 19

^{xv} Article 21

^{xvi} Article 13

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- ^{xli} Approved on 16th February 2021.
- ^{xlii} Approved on 12th March 2021.
- ^{xliii} Approved 30th April 2021.
- ^{xliv} Approved 7th May 2021.
- ^{xlv} Approved on 1st June 2022.
- ^{xlvi} Approved on 3rd November 2022.
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