States Responsibility vs Domestic Control Measures of the COVID-19 Pandemic: An Analysis of the Current International Health Regulation (IHR) Regime

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ABSTRACT

The Covid-19 pandemic has changed the way we live. Despite its negative effect on people's lives, the world has adopted new strategies to adapt to such unpredictable situations. At the international level, the UN-based organization, the World Health Organization, adopted the International Health Regulation in 2005 (IHR 2005). This regulation stipulates several measures that should be adopted by member states, with regard to the prevention of diseases spreading internationally. However, countries have struggled or failed to contain the virus, so millions of people have been adversely affected by the pandemic. The aims of this are twofold. First, this article analyzes the nature of the IHR 2005, whether or not it creates international obligations to its member states, and thus whether or not it has compliance mechanisms for states which do not comply with it. Second, this article investigates whether non-compliance with the IHR 2005 can be used to invoke state responsibility under the international public law regime. By critically analyzing the available international law and several legal cases relevant to the topic, this article argues that the state responsibility doctrine might be invoked for any member states' non-compliance with their international state obligations, including the failure to adopt appropriate domestic control measures in on time.

Keywords: *states responsibility, domestic control measures, COVID-19 pandemic, IHR.*

1. INTRODUCTION

The end of the pandemic sparked by the novel Corona virus seems unforeseeable soon. The disease, which began at the end of 2019, was considered an outbreak that constitutes a Public Health Emergency of International Concern (PHEIC) on 30 January 2020 [1]. The World Health Organization (WHO) Director-General declared the PHEIC status following the recommendations of its Emergency Committee. PHEIC status is an alarm of an emergency that can be given 'if the situation poses a risk to countries outside where it originated requiring an international response [2]. In some cases, the emergency could have pandemic potential. The term of PHEIC was introduced in 2005 due to the revision process of the WHO regulation on international health emergencies [2]. Since 2005, the WHO has used the term "PHEIC" several times, including in the time of H1N1, Ebola, and Zika virus outbreaks. The softer term is preferred rather than "pandemic" to avoid panic while at the same time encouraging government to act in accordance with the WHO's advice [2].

However, in the case of COVID-19, following the PHEIC declaration, many governments worldwide ignored and did not follow the WHO advice [2]. Later, the WHO categorized the outbreak as a "pandemic" situation on 11 March 2020 [3]. By that time, the disease had spread to several parts of the world, causing adverse impacts on worldwide health, as well as the global economy. Although the term 'pandemic' is not an official term of the International Health Regulation, following the statement, world leaders have started to pay more attention to containing and tackling this world's new threat [2]. The author argues that debating the term between pandemic and PHEIC may not be highly crucial, once a declaration has been made, to act appropriately is the most essential element.

At the time of writing, the harm caused by the virus is still being experienced in most countries. For example, India is suffering from a lack of hospital beds, and a shortage of oxygen supplies as well as medical personnel [4]. The death toll there has reached 159 per one million people [4]. Other countries, such as Brazil [5] and Indonesia [6], are also still experiencing negative effects. Although thevaccination program started in early 2021, infection cases in these countries tend to fluctuate. In some areas, the variation may be caused by the easing or lifting of social restrictions.

The COVID-19 pandemic has exacerbated the socio-economic problems that were previously being experienced by the world population. It has underlined inequalities in many aspects of life, such as health, housing, income, education, employment [7], and many other aspects, including the geopolitics of the world's most powerful states [8]. Governments around the world have tried to cope with the situation, and have raced to develop vaccines to prevent similar pandemics in the future. Despite the pandemic's negative effect on people's lives, the world has adopted new strategies to adapt to such unpredictable situations.

Governments have become the primary parties responsible for adopting measures to prevent, respond to, and cooperate with international communities, to tackle the pandemic [9]. At the international level, several arrangements are setting such obligations. One such arrangement is the International Health Regulation adopted in 2005 (IHR 2005) [10]. This instrument was adopted by a United Nations-based organization, the World Health Organization. This regulation stipulates several measures that should be adopted by member states, with regard to the prevention of diseases spreading internationally. Other international level arrangements setting duties include international human rights law, international disaster law, and international humanitarian law [9]. This article focuses only on the IHR and international human rights law (IHRL).

Despite the above arrangements, countries have struggled or failed to contain the virus, and millions of people have experienced the devastating impacts of the pandemic. Countries like the USA, India, and Brazil have the highest infection cases in the world [11]. This situation can be seen as an indication of the unsuccessful measures adopted by the governments of these countries. Such a lack of success in tackling the pandemic might raise questions relating to state responsibility. Under international law, states can be held responsible if there is a breach of international law that causes harm to other states. Can China's failure to notify the HO in time, causing the disease to spread uncontrollably all over the world, be used to hold China responsible? If the highest death toll in a country is amongst foreign migrant workers, can the country be held responsible for not protecting its population? The use of the law on states responsibility in this situation is still debatable, especially regarding the binding compliance mechanism of the IHR [12], and whether or not there are international wrongful acts that can be attributed to states with regard to the COVID-19 pandemic. [13]

Based on the background mentioned above, the aims of this article are twofold. First, the article analyzes the nature of the IHR 2005, whether or not it creates international obligations to its member states, and thus whether or not it has compliance mechanisms for states which do not comply with it. Second, this article investigates whether non-compliance with the IHR 2005 can be used to invoke state responsibility for internationally wrongful acts under the international public law regime.

As far as the writer is concerned, there is still a scarcity of literature on this topic, particularly articles that attempt to relate non-compliance with IHR with the claim of state responsibility doctrine under international law. Although there were discussions in academic journals and in the news to hold China responsible for its wrongdoing, the debates did not discuss the public international law doctrine and rules. Such claims were merely based on some national laws. This article fills such discrepancies and complements the already available literature (listed in the references) by emphasizing that non-compliance with IHR and the WHO recommendations in a pandemic may constitute a breach of international law which inflicts harm to other states. Thus, such non-compliance may also trigger states' responsibility for internationally wrongful acts.

The rest of this article is divided into three parts. The first part explains the method used in researching and writing the article. The next part contains the results and findings, which consist of two sections: on the legal nature of the IHR 2005 and on how the IHR 2005 relates to the responsibility of a state, if any harm to foreign states is triggered by the state's omission or action. The final part presents the conclusions.

2. RESEARCH METHOD

This article employs a method that has been described as the core of the legal research method [12, 13, 14], namely doctrinal/normative legal research. This method fits the purpose of this article: to explore, analyze, and evaluate the positive law that currently underpins the international health regime (IHR). This normative legal research primarily bases its analysis on legal materials. Thus, this article examines primary and secondary legal materials relevant to IHR and its applicability in the pandemic era as well as doctrine and rules on state responsibility. The primary legal materials include international instruments and case law. The international instruments used in this article are the International Health Regulation 2005, the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, and the Vienna Convention on the Law on Treaties, and the WHO Constitution. Relevant cases that served as primary legal materials are *Chorzów Factory, Rainbow Warrior, Trail Smelter, Alabama, and Nuclear Weapons*. The secondary legal materials consist of relevant documents from the United Nations Bodies, and literature and academic journals relating to the chosen topic.

In order to answer the research questions set out in the introduction, this article combines deductive legal reasoning with the interpretation method. Deductive legal reasoning is beneficial in understanding the complex legal rules applicable to the issue surrounding the nature of IHR and its relation to state responsibility norms. This reasoning process enabled the writer to "reach a logically certain conclusion" [16]. By employing the interpretation method enshrined in the Vienna Convention on the Law of Treaties, the interpretation process assisted the writer in understanding the meaning of the primary legal materials.

3. FINDINGS AND DISCUSSION

3.1. The Legal Nature of the IHR 2005

The International Health Regulations (IHR) were first adopted by the Health Assembly in 1969. The 1969 IHR, which were later amended in 1973 and 1981, covered three quarantinable diseases: yellow fever, plague, and cholera, and marked the global eradication of smallpox. Moreover, due to the growth in international travel and trade, and the emergence or re-emergence of international disease threats and other public health risks, in 1995 the Forty-eighth World Health Assembly called for a substantial revision of the 1969 Regulations.

Later in its resolution, WHA48.7, the Health Assembly requested the Director General to take further actions to prepare their revision, urging broad participation and cooperation of all WHO member states in the revision process. For the purpose of revision, the Health Assembly established an Intergovernmental Working Group in 2003, which asked all Member States to review and recommend a draft revision of the Regulations to the Health Assembly. The 2005 IHR was finally adopted by the Fifty-eighth World Health Assembly on 23 May 2005 and entered into force on 15 June 2007.

The aims of the Regulations are stated in Article 2, as "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" [10]. Thus, it can be said that the IHR is the primary international level legislation aiming to manage public health emergencies [12]. The IHR was formulated during an epoch of optimism in global institutional cooperation [12]. This cooperation is expected to be implemented within all the member states of the IHR, in order to control and manage (international) public health.

The adoption of the IHR was based on Articles 20 and 21 of the WHO Constitution. The Constitution was signed on 22 July 1946 and entered into force on 7 April 1948. The Constitution has experienced three re-amendments, which were adopted by the Twenty-sixth, Twenty-ninth, and Fifty-first World Health Assemblies (Resolutions WHA26.37, WHA29.38, WHA39.6, and WHA51.23). The amendments came into force on 3 February 1977, 20 January 1984, 11 July 1994, and 15 September 2005, respectively. Article 21 states that "The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c)…" [17]. The IHR received its legal basis from Articles 21 and 22, as there was growing concern about the spread of diseases, caused by people moving across borders and by massive international trade. In this specific measure, the World Health Assembly used its quasi-legislative powers and created a new procedure for health emergencies [18].

The IHR was adopted unanimously by the World Health Assembly, meaning that the Regulation is legally binding on countries, unless member states propose reservations to certain articles. The states' public health obligations imposed by the IHR include:

a. Establish a National IHR focal point for the implementation of health measures under the IHR (Art. 4);
b. Assess all events within the state's territory and notify the WHO within 24 hours if such assessment constitutes a public health emergency of international concern (Art. 6 para 1);
c. Communicate with the WHO of such occurrences (Art. 6 para 2);
d. Disseminate all pertinent public health information (Art. 9);
e. Develop, strengthen, and maintain the capacity to respond promptly and effectively to public health emergencies of international concern (Art. 13).

Once the WHO has categorized an event as an international concern to public health, follow-up measures should be adopted. This includes a travel ban, which might hinder many aspects of the economy (such as trade and tourism) due to travel limitations. States have to report all measures in containing and tackling the public health emergency.

Although the IHR 2005 does not constitute an international treaty, several experts argue that it does have a binding effect on its state parties [10, 17, 20] This binding effect derives from the authority given by the WHO Constitution to the Health Assembly to adopt regulations (Art. 21), one of which, preventing the international spread of disease. Further, the Constitution stipulates that all regulations adopted by the Health assembly should be entered into force in the member states of the WHO. Based on these two articles, IHR, as one of the regulations adopted by the Health Assembly does have a binding nature to member states.

Moreover, the IHR aims to "prevent, protect against, control and provide a public health response to the international spread of disease"; thus, it protects international public health. Therefore, states "in … implement(ing) international health measures to safeguard their citizens' health, … should be mindful of their international obligations under the IHR, (and) other applicable instruments and customary international law more generally" [18, 19]. Moreover, having been accepted by 196 state parties [23], the IHR is universally accepted and practiced [22] by states under the WHO and UN frameworks. Hence, it can be concluded that the IHR 2005 is a legally binding international instrument which lays out legal obligations for its member states.

In order to ensure that member states implement the Regulations, the IHR stipulates reporting mechanisms for states adopting measures, with regard to their response to public health emergencies of international concern, including domestic control measures. The WHO then assesses the measures taken by a specific state. However, this assessment has an inherent weakness: the WHO does not criticize the reports, even in the case of non-compliance [22]. As with many other international instruments, the IHR does not contain punishments or penalties for non-compliance. One reason for non-compliance is (for example) that a lack of resources has hindered low-income countries in implementing the obligation. Usually, to follow up states' reports, the WHO recommends several measures for adoption by the states in question. However, states often deviate from such recommendations, particularly when the suggested measures would be likely to affect their economy [12]. In the event of a global threat to public health, the WHO will mostly recommend travel bans across states' borders to prevent the spread of disease. Travel bans would automatically limit trading and human movement. States which depend on their tourism industry will likely suffer most from such restrictions. Hesitance has also occurred when implementing the obligation to report on the existence of a threat to public health. In past epidemics, the WHO imposed trade and travel restrictions on countries which reported such events, further hindering the economy of the reporting states [12].

In the event of pandemics, states also have to adopt specific measures in order to control, contain, and tackle them. These measures aim to reduce the spread, which could further harm people and the environment, including livestock. Experts are debating as to whether China's late informing of the WHO, and its insufficient domestic measures to contain the virus, would make it responsible for the harms it caused to the world. Although a few countries have succeeded in tackling the pandemic, many states are still taking insufficient domestic measures to control the virus in their territories, which causes further increases in infection rates. If such a high infection rate causes harm to other countries - for example, if a country adopts a vaccination program too late and causes immigrants to suffer, or a country discriminates against non-citizens, can such non-compliance be used to hold a state accountable for such harm?

The following section will discuss and investigate the law on state responsibility under public international law, and analyze whether non-compliance with the IHR would be sufficient to hold a state accountable.

3.2. Non-compliance with the IHR 2005 and State Responsibility

Under international public law, a breach of international obligations by states can trigger international responsibility. Article 2 of the 2001 ILC Articles of States Responsibility for Internationally Wrongful Acts (ILC Articles) stipulates two requirements for international wrongful acts, conducted either by action or omission. These requirements are: (a) the conduct is attributable to the state under international law, and (b) the conduct constitutes a breach of an international obligation of the state [24]. In order to be attributable to a state, an action should be conducted by the state's organs or agents. This requirement has already been recognized under international customary law [13], which was supported by state practices as well as by case law - for example, the *Chorzów Factory* case [25], and the *Rainbow Warrior* case [26]. A breach of international law should be based on the fact that there should be an existing international norm guiding states' international obligations. Moreover, the existence of a breach depends on international law, irrespective of any provisions in the national law [24], [27]. Thus, even if national law considers that an act is not a breach if international law says so, the act will be considered a breach of international law.

To be able to invoke this doctrine, damages caused by one state should be experienced by another state. This doctrine is only applicable between states, not between individuals and their states. Therefore, to invoke the doctrine, there should be a breach of international obligation conducted by a state that causes harms to another state. States' domestic control measures concerning a pandemic will most likely not cause damage or harm to another state, except if the measures involve the exclusion of certain groups, such as foreign citizens or other foreign elements under international law.

In the case of COVID-19, the failure of domestic measures, in terms of informing the WHO and containing the virus, would amount to a breach of international obligations stated in the IHR 2005 and the WHO Constitution. Such obligations are stated in Articles 5 to 10 related to member states' obligations to notify WHO. Another obligation is "… to respond promptly and effectively to public health risks and public health emergencies of international concern …" The detailed responses to public health emergencies are stipulated in Annex 1 of the IHR [12]. In addition, the failure of domestic measures could also be against Article 22 of the WHO Constitution. Several experts have discussed the possibility of holding China accountable for its breach of the notification obligation, which ultimately harmed many other countries. However, in witnessing the development of COVID-19, apparently, it is not only China that might be violating its obligation, but also some other countries which may have contributed to the possible failure to contain the virus. The latter is proven by the spread of the new variants of the COVID-19 virus, despite the restrictive travel policies adopted by countries around the world following the pandemic situation announced by the WHO. Can this "failure" amount to a breach of international obligation?

This situation is different to the first time the virus struck China, and the world is still questioning what is happening. The obligation, based on the IHR, is to notify the WHO and further collaborate with it to identify and investigate events. Later, if events are considered to denote a pandemic, states have either to mitigate or to stop the pandemic and prevent it from happening again in the future.

The mitigation process is crucial at the domestic level. If a virus is proven to be highly contagious, and it could lead to death beyond a state's borders, states under the international customary law should conduct or adopt measures as best as they can, to prevent and redress a range of internal or transboundary harms, or any possible risks therefrom [28]. This preventive and redress measure is known as the 'no harm principle', which is also recognized in case law - for example, in *the Trail Smelter* [29], *Alabama* [30], *and Nuclear Weapons* [31] cases. The International Law Commission drafted the 2001 Draft Articles on the Prevention of Transboundary Harm, which also contain the principle. This principle is generally applicable to inter-state relations, or specifically to fields such as the environment, human rights, international humanitarian law, and cyberspace, as well as global public health [28]. The latter is the field we are facing in the current situation: a pandemic which concerns and affects global health.

In order to determine the applicability of the state responsibility doctrine, we must analyze three

elements with regard to non-compliance: the existence of a breach of international obligations, harm and damage suffered by other states, and the attribution of the non-compliance to states.

As discussed previously, several states did not succeed in mitigating the pandemic, creating a considerably high risk of people suffering from the virus. If we take a look at the obligation of due diligence based on the IHR, as discussed before, states do not always follow WHO recommendations strictly - for example, by not fully closing their borders, because such closure might have other serious impacts, for example on their economy. However, opening and loosening the restriction will also cause their citizens, and possibly other states' populations, to suffer. States have therefore to adopt necessary measures which might sometimes not comply with the WHO's recommendations. Can this also amount to a breach?

Article 43 of the IHR allows its member states to adopt diversion on measures recommended by the WHO or other measures consistent with the IHR provisions. Nevertheless, some requirements need to be fulfilled before deciding on such diversions. The diversions should be "a direct response to a PHEIC or a public health risk, [are] based on the available science and a risk assessment, [are] proportional to the risk and [are] reported to WHO…" [19]. Furthermore, Article 43 para 3 requires that diversion measures should "… achieve the same or greater level of health protection than WHO recommendations." These two requirements are quite broad and are challenging for states to provide the evidence in advance.

In the absence of such requirements, diversion measures might be considered a breach or non-compliance with the IHR. However, the Article does specify whether states parties may violate the IHR when implementing additional measures [19]. Furthermore, it does not provide concrete guidance for choosing measures beyond the WHO's recommendations or categorizing which actions breach certain IHR obligations [19]. The unclear provision might cause difficulty in deciding the existence of a breach in the case of divergence. It is understandable that the IHR also respects any national laws applicable for public health in its member states (article 43). This position respects states' sovereignty under international law. However, international law, *i.e.* IHR, requires compliance between measures adopted based on national and international law. In other words, actions taken under national law should not be contradictory to international law.

Hence, IHR does allow divergence measures other than those suggested by the WHO that are subjected to a few requirements discussed above. However, if states completely ignore and do not consider WHO recommendations, it can be said that such states do not comply with the IHR. Indeed, recommendations of any kind do not constitute a legally binding power. Nevertheless, states have agreed to establish WHO as the sole international body authorized to decide and adopt regulations, policies as well as measures relevant to international health. These assigned competencies aim to achieve "the attainment by all peoples of the highest possible level of health" as stated in Article 1 of the WHO Constitution. The WHO's recommendations based on IHR in PHEIC or pandemic situations are crucial and should be followed in order to tackle emergencies situation. As member states have agreed to implement and enforce IHR in their territories, such enforcement can be extended to all obligations contained in IHR, including to implementing the recommendations in the event of health emergencies, to achieve the highest attainable health of all people worldwide.

The next element to be investigated is the damages or harm experienced by other states. Although some states, like the USA, Germany, and Australia, have claimed that they have experienced devastating economic damages caused by China, for not taking early precautionary measures and for "violating" its international obligation under the IHR, such damages are not yet proven to have been caused by China's actions. International case law shows that states are obliged to make full reparation for wrongful acts [32]. Furthermore, there should be a causal link between actions and damages. This direct link is mentioned in the ILC Articles 31. The ILC commentary to this article states that "the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act" [24].

The case of damage caused by a pandemic is challenging to measure, especially under the current situation; still being in the emergency phase, and still finding it difficult to predict when the pandemic will end. Therefore, any calculation made by states is still preliminary. By the time the pandemic ends, calculating the damages and pointing fingers at certain states who triggered the damages might be even blurrier. The overlapping measures between states, and the movement of people between countries, will complicate decisions about which countries are not complying with the IHR. Needless

to say, a positive law requires a direct causal link between action and damages, and as long as states can prove their claim, compensation and reparation might be awarded. However, in the absence of any causal link, international settlement dispute mechanisms can provide a way out to settle such a complex situation. States have the freedom to choose any of the available mechanisms. The IHR refers explicitly to the Permanent Court of Arbitration to settle disputes that arise between member states concerning the interpretation or application of the IHR (Art 56 para 3). However, IHR still allows parties to choose which international mechanisms to which they wish to participate in. Another mechanism that can be employed is the International Court of Justice (ICJ). The ICJ might declare that a particular act is a breach of international law, yet no compensation will be awarded as the damages might not have been caused by the breach. [13].

The third element of the state responsibility doctrine is that a wrongful act can be attributed to a state. The ILC articles stipulate that attribution to states can only materialize if an act is conducted by states' agents, or by persons who are authorized to perform states' affairs.
In a time of public health emergency, states under the IHR have a primary responsibility to adopt some obligations. States may distribute power to private actors, but these actors' actions can still be attributed to states if an authorization clearly defines the actors' rights and duties. As the main actors in handling the pandemic, it is most likely that states' non-compliance, leading to breaches and damages to other states, can be challenged and attributed to states' conduct.

The three requirements mentioned above are cumulative, meaning that all three should exist in a legal claim based on States' Responsibility for Wrongful Acts. However, it is still questionable whether the damage caused by COVID-19 can be compensated and repaired. The international community has witnessed irreversible damages caused by the virus. It is really challenging to point a finger at certain states as the culprits, as many states might have lacked a (good) response to the pandemic - for example, lack of testing, poor distribution of vaccines, and less strict travel bans, a combination of which have led to worsening of the outbreak. As the pandemic has now become a global problem, all states are responsible. The pandemic can only be mitigated and tackled by international cooperation.

4. CONCLUSION

Based on the discussion in the preceding sections, it can be concluded that the IHR does set international obligations for its member states. As all members have agreed to conclude the regulations, based on the WHO statute and international law, the IHR is categorized as a treaty concluded under the WHO; thus, it is legally binding on all members. Consequently, non-compliance with the IHR may result in a breach of international law.

In this regard, the state responsibility doctrine can be invoked if: (a) there is a breach of existing international law; (b) damages are directly caused by the breach; (c) the breach can be attributed to a state. Non-compliance with the IHR may be used to hold states responsible for their wrongful acts. However, the IHR contains unclear provisions regarding the extent of deviations from the WHO recommendations which would constitute a breach of the IHR, or which do not constitute a breach at all. The momentum of the COVID-19 pandemic might be useful (in a positive sense) for re-thinking and clarifying the limitations to breaches of the IHR.

In this era of global public health emergencies, all member states have joint responsibilities and should make sure that their measures comply with international norms. Most importantly, the international community should advance and promote international cooperation and assistance in tackling the pandemic, rather than blaming the international public health emergency system itself.

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