

GIMPA LAW & ETHICS POLICY PAPER

INTERNATIONAL LAW, HUMAN RIGHTS AND DIPLOMACY DURING GLOBAL PANDEMICS: STATE RESPONSIBILITY IN PERSPECTIVE

Executive Summary

On Wednesday 15th July 2020, Mr. Chris Nyinevi a Lecturer at the Faculty of Law of the Kwame Nkrumah University of Science and Technology (KNUST) delivered via Zoom the 11th session of the GIMPA Law and Ethics Web Series on the theme: *International Law, Human Rights and Diplomacy during Global Pandemics: State Responsibility in Perspective*. This session was moderated by Ms. Maame Efua Addadzi-Koom, also a Lecturer at the Faculty of Law, KNUST.

The COVID-19 pandemic has impacted life in a way that most people would have thought unimaginable a few months back. The damaging impact of the pandemic and the corresponding measures that States have enacted implicate two important questions regarding the extent a State bears responsibility under International Law for its complicity in the outbreak of a pandemic; and regarding the extent a State bears responsibility for internationally wrongful acts relative to the measures that it enacts to combat a pandemic such as COVID-19.

By examining the Law of the World Health Organization (WHO), the Law of State Responsibility and other rules of International Law and Human Rights, the liability or otherwise of States under International Law for their actions or omissions relative to a pandemic such as COVID-19 may be ascertained.

The potential liability of China as the origin of the pandemic and of other States in how they respond to a disease pandemic of this nature, may also be ascertained through the lenses of International Human Rights Law, International Trade and Investment Law and other relevant areas of International Law. In sum, although not impossible, it is extremely difficult to hold States liable for an outbreak of a pandemic such as COVID-19, or for failing to enact measures to prevent the spread thereof.



I. Introduction

The WHO's objective is to help all peoples in the world attain the best possible level of health. To this end, Article 2 of its Constitution spells out its responsibilities which include: directing and coordinating international health work and establishing and maintaining effective collaboration with the United Nations, specialized agencies, governmental health administrations and such other organizations. The WHO also assists Governments to strengthen their health services, provides appropriate technical assistance, where necessary, aid, and provides information and counsel in the field of health. Moreover, the organization assists in developing an informed public opinion among all peoples on matters of health, promotes research on health, and establish and revise international nomenclatures of diseases, causes of death and public health practices. To carry out its functions, the WHO Constitution establishes three main organs, namely the World Health Assembly (WHA), the Secretariat of the WHO, and the Executive Board. The World Health Assembly is the Supreme decision-making body. The Executive Board implements the decisions of the Assembly and the Secretariat, presided over by the Director General, oversees the day-to-day functions of the organization. In furtherance of the Constitution

of the WHO, specifically, Article 21, the WHA adopted the International Health Regulations (IHR) which was last revised in 2005 and came into force in 2007. The IHR has therefore become very prominent in discussions regarding State Responsibility towards prevention of pandemics and during this pandemic. In International Law, the liability of a State for international wrongs is regulated by the principles on State Responsibility. Under these rules, a State is responsible for an internationally wrongful act where there is a conduct attributable to the State and when this conduct has breached an obligation of the State. Regarding Attribution, a State cannot be held liable unless it can be shown that the conduct is an act of that State. Thus, the acts of private persons are not attributable to States except where the private individuals acted as agents of the State by way of exercising elements of governmental authority or public or regulatory functions. Moreover, States are only liable based on the law applicable at the time of the conduct. In the case of the COVID-19 pandemic, the rules applicable now are the IHR under the WHO, general principles of International Law and Human Rights treaties. It is only by carefully examining these instruments that we can conclude on issues of State Responsibility.



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II. Assessing State Responsibility in the wake of COVID-19

The alleged responsibility and/or complicity of China and other States for causing and/or contributing to the outbreak and spread of COVID-19 can be assessed by examining the concept of attribution, and whether the actions of some States violate their obligations under International Law and Human Rights:

- Different theories have been put forward regarding the origins of the virus. Evidence available from the WHO however suggests that the virus is zoonotic and that a human acquired it from an animal in a wet market in Wuhan, China. It thus appears that China may have failed in its obligations to report and predict the outbreak of the disease, and subsequently failed to take the necessary steps to contain it. This may be the basis of attribution;
- China and other States' failure in respect of the containment of the pandemic, may constitute a breach of other general principles of International Law prohibiting States from using their territory for activities which could cause injury to the rights of other States. This rule arguably prohibits the unleashing of deadly viruses on the territory of another State;
- The question of extraterritorial application of Human Rights treaties may come to the fore, especially in situations where a State does not properly control its borders, for instance, with a multiplying effect on the the right to health of people in other States;

- COVID-19 has triggered positive obligations that States must fulfil in order to effectively respond. However, States also have negative obligations to refrain from infringing on certain fundamental rights, while imposing the necessary measures. The rights affected include: the right to life, which imposes negative obligations on the State to prevent arbitrary deprivation of rights, but requires States to protect life, including by taking measures to mitigate threats such as the prevalence of life-threatening diseases;
- There is also the right to health, which requires States to adopt measures to prevent epidemics or pandemics. This is a socio-economic right and is therefore generally subject to progressive realization. However, there are minimum core obligations regarding socio-economic rights which are not subject to progressive realization. This includes immunizations to control diseases and epidemics etc.; and
- The right to bodily integrity, a concomitant of the right to dignity, which protects people from becoming mandatory subjects of clinical trials may be at risk of violation, theoretically speaking. Also, where vaccines are developed, there is a question of whether States can compel their citizens to be vaccinated or whether people travelling to other countries should be required to subject themselves to mandatory vaccinations.

III. Challenges

- **Dispute settlement under International Law and the International Health Regulations (IHR):** Even if it is determined that certain States have breached International Law, in terms of their obligations thereof, responsibility must be invoked under Article 56 of the IHR. Dispute settlement under this rule is by negotiation, good offices, mediation or conciliation and arbitration. It is doubtful that States in breach will willingly submit to such means of settlement of disputes, especially in the current international political climate;
- **Assembling the rules under which States may be culpable could be another hurdle:** The WHO Constitution merely sets out the structure and objectives of the organization. It does not set substantive obligations specifically regarding pandemics. There are also arguments that the IHR is not a treaty, properly so called, and that it would take a lot of extrapolation to attribute wrongful actions under those rules to "infringing" States;
- **WHO guidelines are mere guidelines and States are free to vary the recommendations to suit their circumstances:** For instance, a State is not obliged to consider other countries when amassing medical supplies because States first have obligations to their own citizens to protect their health. The guidelines are thus more of moral obligations; and
- **Derogation and Limitation Clauses:** States can rely on inherent limitations or claw back clauses in International Human Rights treaties and could use these to abuse the rights of citizens during the subsistence of the pandemic.



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IV. Policy Recommendations

The following recommendations are aimed at making the WHO more effective and to help States manage the responsibilities they have under various laws applicable to them:

- An inspection panel for the WHO has already been proposed to help improve its monitoring system. This will ensure that effective monitoring, including early warning mechanisms and protocols, which will enable prompt reactions to potential epidemics or pandemics are put in place and fit for purpose;
- The WHO must outline graduated levels of global public health risks and emergencies of international concern; and
- The WHO must clarify the obligation of States relative to the outbreak of pandemics and clarify the liabilities to be incurred. In this regard, the International Law Commission should consider the International Health Rules in terms of transforming it into hard law.

To help States manage their responsibilities under International Law, the following should be considered:

- Limitations imposed by States must be reasonable, narrowly tailored or restrictively applied and justifiable

in a Democratic society. States must bear this in mind in order not to open themselves up to suits regarding Human Rights violations, as these may lead to upheavals which would render all efforts to control the virus nugatory;

- Legal action for States who breach WHO rules could be based on Article 75 of the WHO Constitution which provides that disputes regarding interpretation and application of the Constitution could be referred to the International Court of Justice. Thus, the refusal of States to use other peaceful means of settling such disputes, should they arise, could be a basis to trigger Article 75 to pursue the matter before the ICJ;
- States must cooperate to ensure that when a vaccine or drug is eventually developed to treat COVID-19, a compulsory access license under the TRIPS agreement of the WTO is provided, so the products are not restricted by Intellectual Property rules. This would ensure that vaccines or drugs are mass produced so that every State can have access to them for the benefit of their people; and
- In limiting certain fundamental rights of its people, States should use

the processes outlined for derogations in times of public emergencies, outlined in many Human Rights instruments, rather than inherent limitation clauses. This is because, such derogations are only in relation to certain fundamental rights only during periods of emergency. Due to the procedural requirements i.e. the Declaration of a state of emergency, notifying other parties and terminating the derogations when they are no longer necessary, States are more accountable regarding protection of Human Rights. This is because the derogating State must justify why they are derogating from their obligations and demonstrate that the extent of restrictions imposed are proportional and for a fixed period.

V. Conclusion

COVID-19 has exposed weaknesses in the WHO system and highlighted hurdles regarding state responsibility when pandemics occur. Even though it is our hope that there will be no pandemics in the future, this is highly unlikely. Bearing this in mind, we need to make the necessary changes to our International Health System so as to ensure global surveillance of diseases, while ensuring that States comply with their obligations to their citizens and to one another.

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