

AN INTERNATIONAL LAW PERSPECTIVE ON THE COVID-19 PANDEMIC

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The World Health Organization (WHO) has been leading the charge against COVID-19, the novel strain of coronavirus spreading across the globe. The WHO is a specialized agency of the United Nations that is focused on promoting good health and directing coordination and collaboration on international health work.¹ However, the WHO has no enforcement authority. It is intended to help countries keep their citizens safe and to help handle global health threats, but there is no ‘WHO police force.’² Therefore, countries must voluntarily make the effort to work together to prevent the spread of disease outbreaks.

This is not the first pandemic with which humanity has dealt, and it will not be the last. But our experiences with HIV/AIDS, H1N1 Swine Flu, and Spanish Flu have led to significant developments in healthcare and international cooperation in hopes of stymying such pandemics. Social distancing and international response protocols have been outlined before, but as new diseases pop up and the world becomes increasingly interconnected, new procedures may become necessary.³

China has been accused of downplaying the severity of COVID-19 when it first emerged in Wuhan province.⁴ This is likely not the first case of China attempting to hide a serious outbreak; China was accused of similar actions during the 2003 SARS pandemic.⁵

Overlooking, for a moment, how these actions are irresponsible and may be catastrophic on a global scale, there are ramifications for disclosing outbreaks. In a mere two-month period, an outbreak of plague cost India \$1.3 billion as a result of other countries’ knee-jerk reactions as they cut off trade.⁶ This can make countries hesitant to disclose such outbreaks.⁷ There are no legal ramifications to withholding such information. The WHO has no sanction authority and international law is not positioned to hold countries accountable for hiding outbreaks.⁸

In an unusual incident, in 2005 Indonesia refused to share samples of the H5N1 virus (colloquially known as the “bird flu”) with the WHO.⁹ Indonesia hoped to profit off of the outbreak and sought to retain the intellectual property rights to any vaccine that may be developed for the bird flu.¹⁰ Indonesia was hit hard by the bird flu, but was concerned over the fact that “[d]eveloping countries provide[] information and virus samples to the WHO-operated system” for free and then the pharmaceutical companies in developed countries develop a vaccine which they profit from but which developing countries cannot afford.¹¹ To avoid this problem, Indonesia partnered with a US company to develop a bird flu vaccine and chose not to provide the WHO with virus samples.¹² Once again, there were no legal instruments available to the international community to force Indonesia to work with the WHO or to sanction Indonesia’s failure to do so.¹³

To help combat the uncooperative and duplicitous attitude some States have toward outbreaks, several solutions have been explored. The WHO adopted a resolution in 2007 that attempted to address both Indonesia’s

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¹ See Constitution of the World Health Organization, (Apr. 7, 1948), https://www.who.int/governance/eb/who_constitution_en.pdf.

² See *Health Security*, WHO, https://www.who.int/health-topics/health-security/#tab=tab_1 (last visited Sept. 30, 2021).

³ See WHO Interim Protocol: Rapid Operations to Contain the Initial Emergence of Pandemic Influenza (Oct. 2007), <https://www.who.int/influenza/resources/documents/RapidContProtOct15.pdf>.

⁴ See James Griffiths, *Did Xi Jinping Know About the Coronavirus Outbreak Earlier Than First Suggested?*, CNN (Feb. 17, 2020), <https://www.cnn.com/2020/02/17/asia/china-coronavirus-xi-jinping-intl-hnk/index.html>.

⁵ See Justin Kamen, *Prosecuting the Pandemic: Strengthening International Public Health Law*, 5 EYES ON THE ICC 159, 164 (2008).

⁶ See *id.* at 163; see also A. Louis Evans, *Confronting Global Pandemics: Responding to a State’s Refusal of International Assistance in a Pandemic*, 34 CONN. J. INT’L L. 1, 6-9 (2018).

⁷ *Id.* at 163.

⁸ See *id.* at 167.

⁹ *Id.* at 171.

¹⁰ See *id.*

¹¹ See *id.*

¹² See Nicholas Zamiska, *Indonesia Refuses to Share Bird-Flu Virus for Research*, WSJ (Feb. 7, 2007), <https://www.wsj.com/articles/SB117078425088499758>.

¹³ See Kamen, *supra* note 5, at 163.

concerns over an affordable vaccine with the global need for free disease sample sharing.¹⁴ However, this resolution is nonbinding and did not create a firm, legal structure within which future disputes could be handled.¹⁵

Many scholars propose that harsh legal ramifications are necessary. One proposal suggests that “withholding accurate and timely information on dangerous, infectious diseases...should be constituted as a crime against humanity in the jurisdiction of the International Criminal Court under Article 5 of the Rome Statute.”¹⁶ Kamen proposes that there is an international “right to health” derived from the Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.¹⁷ Kamen suggests that infringing upon this “right to health” constitutes a violation of crimes against humanity as outlined in the Rome Statute.¹⁸ As such, Kamen suggests using the Rome Statute to prosecute, in the ICC, States that hide the seriousness of outbreaks or fail to cooperate with the WHO.¹⁹

Another proposal suggests using Chapter VII of the UN Charter to “force international assistance on a country in a pandemic.”²⁰ Chapter VII gives the UN Security Council the power to “determine the existence to any threat to the peace.”²¹ Evans explores both prior uses of Chapter VII’s binding authority to deal with humanitarian crises and past uses of Chapter VI’s nonbinding authority to deal with pandemics.²² Evans suggests that pandemics are a threat to international peace and security and the Security Council could use its Chapter VII authority to, essentially, force aid onto an unwilling country in hopes of preventing the outbreak from spreading further.²³ This proposed solution seems to be more proactive in dealing with ongoing pandemics, instead of hoping to censure uncooperative States after the fact through the ICC.

Scholars Brahmhatt and Jonas explored the positive steps the international community has taken in the past to combat outbreaks, such as the creation of the WHO, the strengthening of the WHO’s International Health Regulations (IHR) in 2005 after the SARS outbreak, and the creation of the Global Program for Avian Influenza Control and Human Pandemic Preparedness and Control.²⁴ However, Brahmhatt and Jonas note that many national action plans to deal with outbreaks are not fully funded and implemented.²⁵ Once the impending threat has been dealt with, governments and politicians tend to focus on more concrete, visible threats and lose sight of the serious, lurking danger that outbreaks pose.²⁶ Brahmhatt and Jonas propose that, in order to mitigate the impact of outbreaks and avoid a global pandemic, the international community should focus on preventative measures and invest significant financial resources into the underfunded WHO.²⁷

While no amount of funding and preparedness will be able to prevent every outbreak from occurring, international cooperation can help reduce the human and economic toll of outbreaks. If States continue to hide the severity of outbreaks within their own borders, the international community may need to adopt a concrete framework, such as those explored briefly above, to hold those States accountable.

¹⁴ See *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, WHO (May 23, 2007), <https://apps.who.int/iris/handle/10665/22607>.

¹⁵ See *id.*

¹⁶ Kamen, *supra* note 5, at 160.

¹⁷ See *id.* at 162-63.

¹⁸ See *id.* at 179-81.

¹⁹ See *id.*

²⁰ Evans, *supra* note 6, at 14.

²¹ U.N. Charter art. 39.

²² See *id.* at 17-26.

²³ See *id.* at 27.

²⁴ See Milan Brahmhatt & Olga Jonas, *International Cooperative Responses to Pandemic Threats: A Critical Analysis*, 21 BROWN J. WORLD AFF. 163, 173 (2015).

²⁵ See *id.* at 174.

²⁶ See *id.* at 170-71.

²⁷ See *id.* at 175-76.

