

LEGAL FRAMEWORK OF THE WORLD HEALTH ORGANIZATION ACTIVITIES DURING COVID-19 PANDEMIC

Summary: In the recent months, the international community, as well as the universal health system and society, have been seriously challenged by another new virus. The World Health Organization (WHO) on March 11, 2020, has declared the novel coronavirus (COVID-19) outbreak a global pandemic. This fact determined the research aim in the paper, which refers to better understanding of the rights and obligations of the WHO during the COVID - 19 pandemic. The subject of the research is referring to the consideration of the legal framework of the WHO during pandemics, especially during the current pandemic of the new coronavirus. In order to understand the legal order of the WHO as concisely as possible, an analysis of the status of the WHO within international health law will be performed first. Special attention will be devoted to the analysis of the provisions of the International Health Regulations in order to determine whether the WHO uses all the legal instruments at its disposal in order to prevent the spread of infections caused by the new coronavirus. Within the concluding remarks, the authors will identify both the advantages and disadvantages of the legal order of the WHO and will present recommendations in order to improve the legal framework regarding regulating WHO activities in terms of establishing standards for the global public health protection.

Key words: International health law, WHO, International Health Regulations, COVID-19

Introductory remarks

The globalization process has deep implications on global public health, as well as on establishment and development of basic tenets of the international health law¹. The World Health Organization (WHO) has an extremely important role in the

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¹ Due to the fact that there is no consensus in the doctrine regarding the definition of the content and scope of health law as a separate branch of law, for the purposes of this paper the authors accept the notion of health law as a set of legal norms, as well as other issues that arise directly or indirectly in the process of providing health care. (Bélanger, 2011: 121,122.)

context of establishment of multilateral cooperation to preserve public health in that process. The global public health in the 21st century in the institutional sense relies in great measure on scientific research initiated by the WHO and its normative activity (Rosskam, Kickbusch, 2011: 5). In that sense, there is a justified expectation that precisely WHO will stop the fragmentation of the international health law in the time of global crisis caused by the new virus, as well as to divide the authority among the member countries and undertake rational and efficient coordination of activities to contain the said crisis.

A new virus has seriously challenged the international community as well as universal healthcare system and society over the last several months. The WHO declared the pandemic caused by the new coronavirus (COVID-19) on March 11th, 2020. The said fact determined the research goal of this paper, that relates to forming a clear picture in sense of rights and obligations the WHO has in the COVID-19 pandemic.

The subject of the research is an analysis of the legal framework of the WHO activities, particularly during the current pandemic of the new coronavirus. In order to understand the legal order of the WHO as concisely as possible, an analysis of the status of the WHO within international health law will be performed first. Special attention will be devoted to the analysis of the provisions of the International Health Regulations in order to determine whether the WHO uses all the legal instruments at its disposal in order to prevent the spread of infections caused by the new coronavirus. Within the concluding remarks, the authors will identify both the advantages and disadvantages of the legal order of the WHO and will present recommendations in order to improve the legal framework regarding regulating WHO activities in terms of establishing standards for the global public health protection.

International health law and the WHO

The international health law is characterized by a high degree of fragmentation and decentralization that implies that numerous health organization covers specific aspects of global health (Gostin, 2014: 80). In this way, the possibility of creating contradictory regulations is possible, since different organization in overlapping areas adopt them.² Therefore, it is necessary that the WHO takes over the role of coordinating normative activities of the international health law, but not in the sense of consolidating all the aspects of universal norming of health due to the fact that full centralization in a said sense is not even possible (Trachtman, 2002). Such role of the WHO is based on the fact that it is the largest health organization that has a unique mandate as a specialized agency of the United Nations, confirmed by its Constitution, to promote rational and efficient development of the international health law.

² For example, the establishment of universal standards in the context of making contracts in the field of access to medicines may imply a link between health and trade, meaning the competence of both the WHO and the World Trade Organization.

On the other side, in establishing of said coordination system, we cannot neglect the fact that the WHO has no jurisdiction from the aspect of control and supervision of activities of autonomous international bodies and organizations, which further implies that consistency and compliance between different regimes of international standards can be only partially achieved. One of the ways the WHO can establish the coordination system with rational limitations is by the institutionalization of international legal cooperation priority identification process in the domain of public health, that are mature for legal consideration (Taylor, 2002:978).³ Also, there is a possibility for the WHO to be a platform for codification of all the universal rules that have implications on public health. Said possibility was only used few times in the WHO practice, while the doctrine recognizes its importance chiefly in the aspect of creation of universal standards in domain of health law that relates to containment of infectious diseases (Fidler, 1997:58). Having in mind the jurisdiction problems due to overlapping authorities of global factors of the international health law, previously mentioned coordinative activity of the WHO should be in accordance with the basic tenet of the international law that implies that “one overarching lesson is that the mandate should fit the organization, and vice versa” (Chasek, 2000: 417).

In light of the mentioned, it is clear that the doctrine supports the mandate of the WHO in the context of establishing universal standards of the international health law to prevent appearing, spread and containment of the infectious disease COVID-19 and protection of population from that disease. Scholars generally take stance that the authority and jurisdiction of the WHO shall envelope normative activities in greater measure (Fidler, 1998:1081). Despite the said doctrine, it is necessary to analyze various aspects of legal framework of the WHO activities, so we could confirm the expectations in codification coordination process of rules relevant for the current pandemic of the new coronavirus.

Legal framework of WHO activities

The Constitution of the WHO predicts the possibility to adopt both the international declarative acts and legally binding regulations within the organization. The article 19 of the Constitution states that adoption of conventions and agreements on any topic within the authority of the WHO is a special authority of the World Health Assembly („Службени лист ФНРЈ“ бр.93/47). The said authority of the World Health Assembly shall be looked through the prism of a provision of the Constitution that proclaim the goal of the WHO as achieving the highest possible level of

³ In 2001, the United Nations General Assembly established a Committee to consider proposals for a comprehensive and integrated international convention on the protection and promotion of the rights and dignity of persons with disabilities. Already at the first meeting, the Committee stressed the need to establish a legal forum in order to establish an adequate framework for the realization of the human rights of persons with disabilities. In this regard, the WHO could make a significant contribution primarily through the education of state delegations participating in the negotiations on relevant public health and legal information in the subject area. (Taylor, 2002: 978).

health of all people, as well as the provision which defines health as a state of „complete physical, mental and social well-being, and not only the absence of disease and powerlessness“ („Службени лист ФНРЈ“ бр. 93/47).

The article 21 of the Constitution the possibility of the World Health Assembly to regulate following topics in a legally binding manner: sanitary, quarantine and other measures of prevention of disease spread from one country to another; diseases nomenclature, causes of death and public health practices; diagnostic standards for international use; standards of safety, cleanliness and action of biological, pharmaceutical and similar products in the context of movement within the international trade; advertising and coding of biological, pharmaceutical and similar products in the international trade.⁴ The common denominator of these areas in which the WHO can adopt legally binding universal standards is the universal nature of public health, meaning the impossibility of reducing public health to state borders, as well as the need to harmonize the actions of states in accordance with scientific global health principles. WHO member states were already aware that public health, especially from the aspect of infectious diseases, needs to be viewed from a global perspective. Not only was there a need for international standards in key areas, but the global nature of public health also created the need to apply these standards as much as possible within a coherent international system.

Article 23 of the WHO constitution establishes the authority of the World Health Assembly to adopt recommendations on topics within the WHO authority, along with the obligation of member countries to submit annual reports on measures taken to implement recommendations.

An analysis of listed articles of the WHO constitution mainly articles 19 and 21, unequivocally shows the belief of its founders of the agency that the creation of the international health law will be an important segment of its work, which in the late 1940s, when the Constitution was being adopted, represented a significant move for the international community. Walter Sharp, in an article published in 1947 stated that he sees the future of the WHO as a permanent international forum and supervisory mechanism which will gradually create rules of the international health law and control their implementation (Sharp, 1947: 524). The foundation of the WHO during the beginning of the most revolutionary period in the history of international law, with guaranteed legislative authority, was a precedent that created great expectations from the international community. From the current perspective, it seems that the WHO did not meet the initial ambitious expectations.

The problem with the novel virus occurred when it was clear that the WHO does not have not only the best or the final solution, but no solution whatsoever, and therefore it did not justify its existence and its primary function (Bjelajac, Filipović, 2020a: 389). To prove the mentioned claims, the analysis of legal instruments adopted within the WHO based on previously analyzed articles of the Constitution will be the next topic of consideration in this paper.

⁴ These regulations adopted by the WHO are binding on each member state. The exception relates to the possibility for a Member State to enter a reservation on the application of certain rules within the prescribed period.

Legal instruments of the WHO

As stated previously, the Constitution of the WHO, in a normative sense, predicts the authority of the World Health Assembly to adopt three types of regulations: conventions (Art. 19), bylaws (Art. 21), and recommendations (Art. 23). Since 1948 the potential for international legislative activity created by the Constitution of the WHO remained mostly unused.

Only the Framework Convention on Tobacco Control was adopted so far based on Article 19 of the WHO Constitution, adopted in 2003 and put into effect two years later. The signees of the Convention adopted the Protocol to Eliminate Illicit Trade in Tobacco Products in 2012. Based on Article 21 of the Constitution, the WHO adopted the Nomenclature Regulations in 1967 and International Health Regulations in 1969, revised in 2005, while based on Article 23, the WHO adopted numerous recommendations, including the International Code of Marketing of Breast-milk Substitutes in 1981 and Global Code of Practice on the International Recruitment of Health Personnel in 2010.

With this in mind, we can conclude that the WHO very rarely used its normative authority in the sense of adopting legally binding regulations. Scholars recognize the fact that the WHO activity from its foundation to the present day is largely influenced by medical experts, who do not recognize the importance of adopting universal international health law norms in the form of conventions (Aginam, 2014: 562).

Within the modest corps of regulations adopted by the WHO, the International Health Regulations have the greatest importance in the context of determining the legal regime of the activities of the WHO during the COVID-19 pandemic, so the due attention will be given to detailed analysis of provisions of this act.

The International Health Regulations

The International Health Regulations (IHR) is an international legal instrument that binds all WHO member countries.⁵ The goal of the regulations is manifested in a tendency of the international community to act preemptively, and to answer acute public health risks that have the potential to cross borders and become a danger to the people around the world.⁶ The scope of the IHR has expanded significantly since the 2005 amendments. The previous version covered only three infectious diseases (yellow fever, plague and cholera), while the scope of the revised version is not limited to a specific disease or mode of transmission and covers each disease or health condition, regardless of origin or source, which poses a risk of causing significant harm to the population.

⁵ IHR currently binds 196 countries from around the world.

⁶ Article 2 of the International Health Regulations: „The purpose and scope of these Regulations are 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.” (International health regulations, 2005).

The IHR provides that each signatory state is required to notify the WHO of all events within its territorial jurisdiction that may pose a risk to public health of international importance, as well as of all health measures taken in response to such events within 24 hours of the assessment of public health information. Upon notification, the state is obliged to provide additional information on the public health event, which should, *inter alia*, relate to the definition of the case, the conditions conducive to the spread of the disease, the parameters of laboratory analyzes, health measures taken and possible support in response to potential risk to public health of international importance. Signatory states are also required to inform the WHO of events detected outside their territory that pose a risk in the context of public health and international spread. The deadline for notifying the WHO in this regard is 24 hours from the reception of evidence of a public health event. The WHO further has an obligation to verify the submitted allegations and inform the state on whose territory the public health event took place. After being informed of an event that may pose a risk to public health of international importance, the WHO offers the signatory state cooperation in assessing the possible global spread of the disease, the potential impact on international traffic, and the adequacy of control measures.

In order for all signatory states to be able to respond in a timely manner to public health risks, the WHO shall provide them with information on the public health event in question as soon as possible. The WHO does not make this information available to signatory states until some of the conditions set out in Article 11 of the IHR have been met, among others, that it is an event which, in addition to the requirements of Article 12 of the IHR, poses a risk to public health of international importance. (International health regulations, 2005).⁷ After the signatory states receive information at their disposal, the WHO can inform the public thereof.

Further action based on the information obtained involves deciding by the WHO Director-General whether the event in question poses a risk to public health of international importance in accordance with the criteria set out in the provisions of the IHR.⁸ If the Director-General deems it poses a threat to public health, the Direc-

⁷ Said conditions based on Article 11 of the IHR imply that:

- the event is determined to constitute a public health emergency of international concern in accordance with Article 12; or
- information evidencing the international spread of the infection or contamination has been confirmed by WHO in accordance with established epidemiological principles; or
- there is evidence that control measures against the international spread are unlikely to succeed because of the nature of the contamination, disease agent, vector or reservoir; or the State Party lacks sufficient operational capacity to carry out necessary measures to prevent further spread of disease; or
- the nature and scope of the international movement of travellers, baggage, cargo, containers, conveyances, goods or postal parcels that may be affected by the infection or contamination requires the immediate application of international control measures (International health regulations, 2005).

⁸ Article 1 of the IHR defines “public health emergency of international concern” as an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response (International health regulations, 2005).

tor-General seeks the opinion of the Emergency Committee on adequate recommendations.⁹

Once a risk to public health of international importance has been identified, the Director-General shall issue temporary or permanent recommendations which may relate to “persons, baggage, cargo, containers, conveyances, goods and/or postal parcels for specific, ongoing public health risks in order to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic.” (Articles 15 and 16 of the IHR). Temporary recommendations may include health measures taken both by the State Party in whose territory the event was registered and by other States Parties and shall expire within three months of their issuance, with the possibility of extension for an additional period of three months. Ongoing recommendations regarding adequate health measures can be amended or discontinued by the WHO as needed.

The IHR includes public health measures that a state can take to prevent the spread of a disease. In that sense, the IHR contains mandatory limitations of health measures the State Parties can take. Limitations are established to ensure adequate health protection with respect to basic human rights and a minimal hindrance to international traffic. Generally, the State Parties cannot request invasive health checks, vaccination or other prophylaxis as a condition of admitting travelers to their territory, nor a State Party can request any health documents, other than those provided for under these Regulations or in recommendations issued by WHO (Article 35 of the IHR). The IHR also prescribes the measures the State Parties can apply on ships, aircraft, goods, and containers.

The analysis of the provisions of the IHR shows that the WHO is placed in a central position of control and supervision over the health situation within each member state, which allows it to qualify a particular public health event, as well as to determine appropriate measures in the context of combating it. The amendments to the IHR in 2005 expanded the mandate and scope of the WHO in terms of international epidemic risk assessment while affirming the agency as a monitoring mechanism for disease information from around the world. This is a significant transformation in relation to the previous tradition of giving priority to control and management in the context of individual diseases that are evident to pose a threat to global public health. In this way, the WHO has the authority to consider any potential international threat and assess the possible declaration of a public health emergency at the international level. It is evident that the revised IHR has established a global shift in the way the world faces the threats of epidemics (Fidler, Gostin, 2006: 93).

⁹ According to Article 48 of the IHR, The Director-General shall establish an Emergency Committee that at the request of the Director-General shall provide its views on:

- whether an event constitutes a public health emergency of international concern;
- the termination of a public health emergency of international concern; and the proposed issuance, modification, extension or termination of temporary recommendations (International health regulations, 2005).

The dilemma remains whether recommendations, as legally non-binding acts, are an adequate response tool in situations when the world faces diseases that pose a global threat to human life and health and whether prescribing restrictions on health measures is an appropriate normative response of the WHO in this regard. It is evident that this is the maximum that the international community at a given moment could achieve in the field of the international health law.

However, while everything is on the level of informative recommendations, the world will not have a singular response, nor will it be capable to combat an increasing number of public health challenges brought by the modern society (Bjelajac, Filipović 2020b: 620). The reasons for such activity should be sought primarily in the context of international relations and the political influence of individual member states. On the other hand, the question arises as to whether and to what extent the WHO uses prescribed mechanisms of action in situations that pose a risk to global public health. This dilemma is currently the subject of numerous academic and professional discussions due to the declared pandemic of the new coronavirus.

WHO vs. COVID-19

The analysis of the provisions of the IHR indicated the obligation of the states to react immediately to the declaration of a situation that represents a risk to public health. Therefore, from the aspect of IHR, it is not the moment of declaring a pandemic that is relevant, but the declaration of an international emergency situation that poses or may pose a risk to public health.

In December 2019, China reported cases of pneumonia of unknown cause to the WHO, after which it was determined that these were infections caused by the new corona virus. Based on the said report, on January 30, 2020, the WHO declared an international state of emergency that poses a risk to public health in accordance with the provisions of the IHR. Also, the WHO, complementary to the requirements of the IHR, has established a series of temporary measures in order to spread the new corona virus. Three months after China reported events that could pose a risk to public health of international importance, more than 500,000 confirmed cases of the new corona virus and 33,106 deaths have been registered worldwide (WHO, Novel coronavirus (2019-nCoV) situation report, 2020: 70). In response to this new public health situation, the WHO convened the Global Forum for Research and Innovation on the new coronavirus in February 2020, attended by more than 300 experts from 48 countries, to assess the current level of knowledge of the virus, identify the shortcomings and work together to accelerate and fund priority research. After this event, the WHO organized more than 60 webinars on the current pandemic, with 13,500 participants from more than 120 countries, including representatives of 460 organizations. (Timeline of WHO's response to COVID-19, 2020.). Under the auspices of the WHO, research relevant to the discovery of a vaccine for COVID-19 is being conducted, while the agency itself is actively working on expanding access to potential vaccines and helping increase production capacity.

Stated facts confirm the thesis that the WHO acted entirely in accordance with the framework that regulates the work of this agency, mainly in accordance with the rules prescribed by the Constitution and IHR. Criticism of the WHO generally comes from politicians, while the theorists generally took position that the WHO absolutely uses its authority per the normative framework (Gostin, Wetter 2020). However, we cannot dismiss the fact that the WHO would be far more ready to tackle the newly emerged situation if it had previously used its legislative potential and adopted relevant international contracts and adequate supervisory mechanism.

On the other hand, it seems that certain structural problems within the agency itself, as well as its position in relation to the member states, largely determine the way the WHO reacts to the current pandemic. The operation of the WHO mainly relies on reports of the Member States in the context of basic data on the epidemiological situation within their territorial jurisdiction. Examining the credibility of the data itself and removing the dilemma of whether they are under the influence of the efforts of states to protect their economy is not within the competence of the WHO.

Also, it should be borne in mind that the WHO is financed primarily through donations from member states, which puts it in an extremely difficult position when it comes to criticizing the actions of individual countries and ultimately poses a threat to the survival of the agency, and consequently to global health. Thus, the international community must establish a way of financing the WHO to an extent commensurate with its global mandate, enabling the WHO to set binding standards in international health law with an appropriate control mechanism that would imply absolute autonomy of this agency. In this sense, one of the models could imply that most of the funding is based on mandatory contributions from states, rather than voluntary contributions.¹⁰ This way of financing would undoubtedly provide more objective and transparent action of the WHO from the aspect of the position of the most important universal actor in the preservation of public health.

Concluding remarks

The current pandemic caused by the new coronavirus has pointed out to all countries of the world the necessity of observing the protection of public health through the prism of international law. There is an urgent social need to balance the interests imposed by international trade on the one hand and to preserve human health on the other. This balance can be achieved only through the formation of standards of the international health law. Since this is a branch of law characterized by a high degree of fragmentation, it is necessary to emphasize that the mandate in the context of establishing universal rules for the protection of global public health should belong exclusively to the WHO.

An analysis of the provisions of the WHO Constitution established that the WHO has the authority to adopt legally binding rules and thus standardize numerous

¹⁰ It is estimated that the mandatory contribution of the member states makes up only a quarter of the WHO's budget (Gostin, Wetter 2020).

segments of universal protection of human health. On the other hand, based on the review of WHO practice, the conclusion is that this is an underutilized legislative potential and that the normative activities of the WHO are mostly neglected. The consequences of this situation came to the fore at a time when the whole world is facing a new virus and when it is evident that the legal instruments adopted under the auspices of the WHO are not an adequate response. The WHO has responded to the challenges posed by the new coronavirus to humanity in full accordance with current regulations, meaning the provisions of the IHR. Nevertheless, it seems that the previously adopted international agreement in the subject area under the auspices of the WHO would still be a more relevant answer from the aspect of the rules of international law. We should not ignore the structural problems of the WHO, which the authors pointed out, primarily in terms of financing the agency, and thus its more objective action.

In light of the above, the expectations of the international community for the WHO to respond more comprehensively to the new coronavirus pandemic are not based on the current legal instruments available to the WHO. Namely, the WHO acts absolutely complementary to the requirements of the IHR, as a relevant act at this time. The problem is the fact that under its legal framework, the World Health Organization has not fully used its legislative powers, and in this sense, it is not able to more adequately approach the global public health situation. Adoption of universal standards of treatment in the field of infectious diseases under the auspices of the WHO in the form of an international agreement with a clear mechanism for monitoring the implementation of these rules, as well as restructuring the funding system, are basic lessons that the international community should learn from the current pandemic. International health law should strive to preserve global public health.

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ПРАВНИ ОКВИР ДЕЛОВАЊА СВЕТСКЕ ЗДРАВСТВЕНЕ ОРГАНИЗАЦИЈЕ У ВРЕМЕ ПАНДЕМИЈЕ COVID-19

Сажетак: Последњих месеци међународну заједницу, као и универзални здравствени систем и друштво, озбиљно је изазвао још један нови вирус. СЗО је 11. марта 2020. године прогласила пандемију изазвану новим корона вирусом (COVID-19). Наведена чињеница определила је циљ истраживања у раду који се односи на формирање јасне представе у погледу права и обавеза које има СЗО у време пандемије COVID-19. Предмет истраживања рада представља разматрање правног оквира деловања СЗО у време пандемија, нарочито у време актуелне пандемије новог корона вируса. Како би се што концизније сагледао правни поредак СЗО, најпре ће бити извршена анализа положаја СЗО у међународном здравственом праву. Посебна пажња биће посвећена анализи одредаба Међународног здравственог правилника како би се установило да ли СЗО користи све правне инструменте које има на располагању у циљу сузбијања ширења инфекција изазваних новим корона вирусом. У оквиру закључних разматрања, аутори ће идентификовати како предности, тако и недостатке правног поретка деловања СЗО и изложиће препоруке у циљу унапређења правног оквира уређења њених активности са аспекта установљавања стандарда очувања глобалног јавног здравља.

Кључне речи: међународно здравствено право, СЗО, Међународни здравствени правилник, COVID-19