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THE INTERNATIONAL RESPONSIBILITY OF THE WORLD HEALTH ORGANIZATION IN CASE OF PANDEMICS AND THE ROLE OF INDIVIDUALS

DIEGO ERNESTO IVÁN SANCHEZ¹

I. INTRODUCTION. II. INTERNATIONAL RESPONSIBILITY IN CASE OF PANDEMICS. III. ROLE OF INDIVIDUALS. IV. CONCLUSIONS.

ABSTRACT: With the incidence of COVID-19 in the organised social life, the work of the World Health Organization was tested on the coordination and prevention before a new and infectious disease. Given that the WHO is empowered with certain competences by its Constitution and the International Health Regulations, it is relevant to discuss whether the conduct of the WHO respected the content of those international obligations in the handling of the pandemic. This paper, hence, examines the conduct of the WHO in the immediate moment before and after the declaration of COVID-19 as a pandemic within the framework of international responsibility. Likewise, given the negative effects towards individuals, this paper identifies and analyses the international procedural venues to implement this international responsibility.

KEYWORDS: Pandemics – COVID-19 – International responsibility – World Health Organization – *Locus standi* – Individuals

LA RESPONSABILIDAD INTERNACIONAL DE LA ORGANIZACIÓN MUNDIAL DE LA SALUD EN CASO DE PANDEMIA Y EL ROL DE LOS INDIVIDUOS

RESUMEN: Con la incidencia del COVID-19 en la vida social organizada, la labor de la Organización Mundial de la Salud fue puesta a prueba respecto de la coordinación y prevención ante una enfermedad nueva e infecciosa. Dado que la Organización está dotada de ciertas competencias en su Tratado Constitutivo y el Reglamento Sanitario Internacional, es relevante discutir si las conductas de la OMS respetaron el contenido de estas obligaciones internacionales en el marco de la respuesta ante una pandemia. Este

¹ Master of Laws (Access to Legal Profession) Candidate, Universitat Pompeu Fabra; and Postgraduate Certificate (PGCert) Candidate in European Union Environmental Law, Universitat de Barcelona.

estudio, por tanto, examina la conducta de la OMS en el momento previo y posterior inmediato a la declaración del COVID-19 como pandemia en el marco de la responsabilidad internacional. También, considerando los perjuicios reputados para individuos, este estudio identifica y analiza las vías procesales internacional para implementar esta responsabilidad internacional.

PALABRAS CLAVE: Pandemia – COVID-19 – Responsabilidad internacional – Organización Mundial de la Salud – *Locus standi* – Individuos.

LA RESPONSABILITÉ INTERNATIONALE DE L'ORGANISATION MONDIALE DE LA SANTÉ EN CAS DE PANDÉMIE ET LE RÔLE DES INDIVIDUS

RÉSUMÉ : Avec l'incidence du COVID-19 sur la vie sociale organisée, le travail de l'Organisation Mondiale de la Santé a été mis à l'épreuve en matière de coordination et de prévention face à une nouvelle maladie infectieuse. Considérant que l'Organisation possède quelques compétences sur son Constitution et le Règlement sanitaire internationale, il est relevant de discuter si les actions de l'OMS ont respecté le contenu de ses obligations internationales dans le marc de réponse d'une pandémie. Cette étude, en conséquence, examine les actions de l'OMS au moment immédiatement antérieur et postérieur à la déclaration du COVID-19 comme une pandémie dans le cadre de la responsabilité internationale. Aussi, considérant les effets négatifs sur les individus, cette étude identifie et analyse les voix procédurales internationales pour implémenter cette responsabilité internationale.

MOTS CLÉS : Pandémie – COVID-19 – Responsabilité internationale – Organisation mondiale de la santé – *Locus standi* - Individus

I. INTRODUCTION

After three years since the detection of the first suspicious case of SARS-CoV-2, the international community recapitulates on the lessons from the pandemic. In that time lapse, the effectiveness of international law, seen through the optics of health law, was tested in its scope and limitations of the powers of the main international organization (IO) responsible for public health, the World Health Organization (WHO). Accordingly, with a considerable number of deceased and detected cases of COVID-19, the plausibleness of international norms on public health are the object of inquiry by the individuals that are the subjects to be protected by this branch of international law.

On that line, the previous remarks bear upon the necessary reflection about the real power entrusted to international organizations (IOs) to assume the competences conferred in their founding treaties, especially when related

to international public health. A discussion that involves both the relevance of the fundamental norm of an IO and of an international instrument, the International Health Regulations (IHR) over which the competences are complemented to face international public health threats.

Bearing in mind the previous paragraphs, this paper discusses: To what extent is it possible for individuals to claim the international responsibility of the WHO for acts or omissions during the handling of the pandemic?

To answer the question, the paper divides into two sections:

The first section analyses the factual circumstances in the WHO decision-making process, jointly with the identification and determination of the international obligations conferred to by international law instruments, all to establish whether the WHO incurred into international responsibility in its handling of the pandemic.

The second section identifies the procedural venues under international law for individuals to, directly or indirectly, invoke the international responsibility of the WHO, considering whether they enjoy *locus standi*, in addition to the requirements to make effective the exercise of actions to set a precedent in the responsibility of the WHO.

II. INTERNATIONAL RESPONSIBILITY IN CASE OF PANDEMICS

1. Introductory Remarks

The present analysis examines the factual and legal circumstances applicable to the WHO, especially given the facts, referred to as *iter pandemicus*, to the extent that they allow to indicate when the pandemic category was reached, is relevant to (i) identify the applicable law within international responsibility, (ii) establish the applicable international obligations, and (iii) determine the internationally wrongful acts or omissions.

2. The *lex specialis* applicable to the WHO

Firstly, it is necessary to satisfy the *lex specialis* requirement under Article 64 of the International Law Commission (ILC) Draft Articles on International Responsibility of International Organizations (DAIRIO).² The question

² ILC: “Responsibility of international organizations: Titles and texts of the draft articles on the responsibility of international organizations adopted by the Drafting Committee on second reading in 2011”, 30 May 2011, (A/CN.4/L.778).

would be whether the IHR or the WHO Constitution are the adequate instruments to, factually and legally, analyse the international responsibility of the WHO. It is noteworthy to underscore that, under international law, the IHR derive its legally binding force from the exercise of a competence attributed to the WHO's World Health Assembly (WHA) under Article 21(a) of its Constitution to regulate threats to public health.

On that line, the IHR is the source of international obligations relevant to the analysis. As a regulatory instrument, derived from a function attributed to the WHO, the obligations contained therein acquire the "international" nature *ex lege vis-à-vis* both the WHO and its Member States.³ As a result, if an international obligation is born out of a regulatory instrument regarding the pandemic, given that it includes the power to designate a public health event of international concern (PHEIC), to the effects of Article 64 DAIRIO, the main international obligation is laid down in the IHR.

3. The Legal Nature of the WHO

Having established the *lex specialis*, the DAIRIO criteria must be met to implement the international responsibility. To start with, the WHO is an IO according to Article 2(a) DAIRIO. Following Article 66 of its Constitution, the WHO, based upon the principle of speciality,⁴ acknowledges that the Organization possesses a distinct legal personality than that of its Members to perform its functions.⁵

Likewise, the distinct legal personality is established under the WHO Constitution. Following Article 69, the WHO is a specialized organ of the United Nations, thereby making applicable Article 3 of the Convention on the Privileges and Immunities of the Specialized Organs that sets forth the legal personality of the Organization.⁶ Hence, because the WHO was created by

³ BURCI, G. & FEINÄUGLE, C., "The ILC's Articles Seen from a WHO Perspective", in Ragazzi, M. (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Netherlands, Martinus Nijhoff Publishers, 2013, pp. 177-88, p. 186.

⁴ *Jurisdiction of the European Commission of the Danube*, Series B, N.º 14, Advisory opinion, PCIJ 1927, p. 64.

⁵ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory opinion: ICJ Reports 1980, para. 37.

⁶ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory opinion: ICJ Reports 1996, para. 26.

its Constitution and possesses a distinct legal personality, it is possible for the Organization to incur into international responsibility.

4. Does the WHO possess an international obligation related to pandemics?

The existence of international obligations vis-à-vis the WHO derived from the IHR will be further discussed. Having established the *lex specialis* relies on the IHR, the relevant provisions of the instrument in which an obligation transpires to the WHO to adopt or not a conduct will be indicated. According to Article 12 IHR, there is a direct obligation to act on whether to designate an event, in this case a pandemic, as a public health emergency of international concern (PHEIC), including the subsequent obligation to observe the proceeding set forth in that provision that remits to Article 49 IHR, and the formulation of temporary recommendations.⁷

Additionally, that provision contains a positive duty or obligation that falls into the Director-General of the WHO (DG) that acts as the main civil servant and representative according to Article 32 of its Constitution. Following the International Court of Justice (ICJ), the conduct of the main civil servant or secretary of an IO may derive in the Organization's international responsibility for damages resulting from the IO's action or omission.⁸ Nonetheless, the substantive content of Article 12 IHR is linked to the obligation provided for States Parties to the IHR, following Articles 6(1) and 7 IHR on the duty to notify the event likely to produce or not the designation as a PHEIC in which the DG is bound to.⁹

A. The Substantive Content of the Obligations of the WHO concerning Pandemics

Although, as a safeguard, the IHR establishes that the information of

⁷ BURCI, G. & FEINÄUGLE, C., "The ILC's Articles...", *cit.*, p. 187; FIDLER, D., "From International Sanitary Conventions to Global Health Security: The New International Health Regulations", *Chinese Journal of International Law*, vol. 4, No. 2, 2005, pp. 325-92, p. 377. See also GOSTIN, L., DEBARTOLO, M. & FRIEDMAN, E., "The International Health Regulations 10 years on: the governing framework for global health security", *Lancet*, vol. 386, 2015, 2222-2226, p. 2222.

⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory opinion: ICJ Reports 1999, para. 66

⁹ GOSTIN, L. & KATZ, R., "The International Health Regulations: The Governing Framework for Global Health Security", *The Milbank Quarterly*, vol. 94, No. 2, 2016, pp. 264-313, pp. 269-270.

an event may be received from sources other than States,¹⁰ in this case, the standard set forth by the ICJ regarding the irrelevance of the irregularities in the discharge of functions by the internal organs of the IO in question for it to incur into international responsibility would not apply.¹¹ As such, the standard would only apply if the information of the event transmitted by the State or other source to the corresponding IHR authorities, according to Article 4 IHR, was not received by the DG with the due urgency derived from the proceedings.

Without entering the analysis of the potential international responsibility the State Party may incur into for not notifying the event in the time limit provided, the IHR impose to the WHO a duty of surveillance and supervision, established in Articles 5(4), 9 and 10 IHR. That duty, bearing in mind it sets forth the WHO can recollect information from non-state sources, would not accept an inaction towards the potential event in which the affected State Party did not notify previously.¹² To support that contention, Article 12(1) IHR, according to Article 31 of the Vienna Convention on Law of Treaties (Vienna Convention)¹³ and paragraph (3) of the same provision, demonstrates that “information provided by States Parties” is understood in the meaning that it does not impede the DG to designate an event as a PHEIC albeit the health authorities of the affected State Party consider it does not constitute a PHEIC.

The basis to ascertain the existence of an international obligation requires a specific duty born out to the WHO. The latter can be found in the provisions cited *supra* given that an important reform of the IHR consisted of reducing

¹⁰ BURCI, G. & QUIRIN, J., “Implementation of the International Health Regulations (2005): Recent Developments at the World Health Organization”, *ASIL Insights*, vol. 22, issue 13, 2018.

¹¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory opinion: ICJ Reports 1962, p. 21.

¹² FIDLER, D., “From International Sanitary Conventions...”, *cit.*, p. 376; FIDLER, D. & GOSTIN, L., “The New International Health Regulations: An Historic Development for International Law and Public Health”, *The Journal of Law, Medicine & Ethics*, vol. 34, No. 1, 2006, pp. 85-94, pp. 88, 90. See also GOSTIN, L., HABIBI, R. & MASON, B., “Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats”, *The Journal of Law, Medicine & Ethics*, vol. 48, issue 2, 2020, 376-381, p. 377.

¹³ Vienna Convention on Law of the Treaties, signed on 23 May 1969 (entry into force 27 January 1980), UNTS 1155, p. 331.

the dependence of the IO on the test of opportunity of the State Party.¹⁴ Consequently, the interpretation of Article 12 IHR excludes the compliance or not by the State Party of the duty to notify given the existence of other mechanisms, under which a duty falls into the WHO, whereby the IO is not impeded to discharge its functions.

The previous solution may be controversial, albeit not less reasonable given that the DAIRIO does not provide any circumstance precluding wrongfulness in which this situation can be applied to, especially when another obligation is applicable. In that sense, the international obligation of Article 12 IHR is autonomous, applying the principle of integration¹⁵ regarding the duty of each State Party, therefore, the paper can proceed to the factual and legal analysis of the conduct of the IO.

B. Relationship Between the Obligations related to Pandemics and Human Rights

Corresponds in this section to assess the obligation applicable to the WHO, in accordance with the IHR, to act observing the norms of International Human Rights Law (IHRL). Under Article 3 IHR, the international obligation of the WHO applicable in case of pandemics must be read together with the obligation that its decisions must observe IHRL,¹⁶ affecting the material limit of the temporary recommendations and the implications to the proceedings to designate a PHEIC.

In relation to the last applicable international obligation, to what extent the obligation of Article 3 IHR acts as a corollary in the conduct of the WHO and its legal nature?

According to the natural and ordinary meaning of the provision, when the IHR applies or the pandemic is designated as a PHEIC, the principles applicable to the “implementation of the Regulation” are bestowed upon an

¹⁴ BURCI, G. & FEINÄUGLE, C., “The ILC’s Articles...”, *cit.*, pp. 186-187; FIDLER, D., “From International Sanitary Conventions...”, *cit.*, pp. 376-378; GOSTIN, L., “Global Health Security After Ebola: Four Global Commissions”, *The Milbank Quarterly*, vol. 94, No. 1, 2016, pp. 34-38, pp. 35-36. See also ANDRUS, J., AGUILERA, X., OLIVIA, O., ALDIGHIERI, S., “Global health security and the International Health Regulations”, *BMC Public Health*, vol. 10, Supplement 1, 2010, 1-4, p. 2.

¹⁵ *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory opinion: ICJ Reports 1950, p. 8.

¹⁶ ZIDAR, A., “WHO International Health Regulations and human rights: from allusions to inclusions”, *The International Journal of Human Rights*, vol. 19, issue 4, 2015, pp. 505-526, p. 507.

imperative character given the use of the words “shall be” in the three first paragraphs. It is noteworthy to point out the two main considerations that derive from the imperative character: any conduct of the WHO supported in the IHR must (1) observe “dignity, human rights and fundamental freedoms”, and (2) take into account “the Charter of the United Nations and the WHO Constitution” and the “goal of its universal application for the protection of all people from the world from the international spread of disease”.

Thus, the duty that rests upon the WHO according to Article 3 IHR possesses a two-fold content: (1) any action taken based on Article 12 IHR must observe IHRL, and (2) any action adopted under Article 12 IHR must meet the goals of the IHR and principles set forth in other international instruments.

C. Is there an *ius cogens* obligation applicable to the conduct of the WHO related to the handling of the Pandemics?

When referring to the WHO Constitution in Article 3 IHR, the goal of the WHO is established as to reach the “universal application for the protection of all people from the world from the international spread of disease” (Article 1 WHO Constitution). From there, if the IHR are adopted as a binding regulation by the WHA, Article 3 IHR, the corollary of the international obligations of the WHO, cannot be understood without observing how the effects relate to the right to health.¹⁷ Therefore, it must be determined whether the main obligation resting upon the WHO in the moment of acting under Article 12 IHR reaches the category of an *erga omnes* norm or forms part of the nucleus of *ius cogens* norms.

The main aim is to establish whether Article 26 DAIRIO, that excludes any circumstances precluding wrongfulness when a duty arises from an *ius cogens* norm, concurs in this case. Following the principle of analogy, the ILC understands, referring to the Articles of Responsibility of States for Internationally Wrongful Acts, that the *ius cogens* norms possess a very limited material scope of application (prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right of self-

¹⁷ TOEBES, B., FORMAN, L. & BARTOLINI, G., “Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?”, *Health and human rights*, vol. 22, No. 2, 2020, pp. 99-111, p. 106.

determination).¹⁸ Nonetheless, when interpreting international jurisprudence at the light of the circumstances in which the WHO Constitution was adopted, including the IHR, and the teleological content of both international instruments under Article 31 of the Vienna Convention, it would not be reasonable to follow the perspective adopted in the Commentaries to understand the provision as a *numerus clausus*.

In the line of Article 53 of the Vienna Convention, the ICJ jurisprudence is relevant to extract the necessary requirements to determine whether the reference to IHRL reaches the *ius cogens* character. In this part, the doctrine understands that the interpretation of conventional and consuetudinary norms of general international law has been restrictive, and contradictory to a certain extent over the force of *ius cogens* norms, including its comparison with *erga omnes* norms.¹⁹ For this reason, it is imperative, to the effect of establishing whether Article 3 IHR falls into the category of *ius cogens*, to analyse the substantive content of the provision.

Following the international jurisprudence, to consider the duty arising from Article 3 IHR as an *ius cogens* norm would require to satisfy the following conditions: (1) originates from an obligation of a subject of international law vis-à-vis the international community as a whole,²⁰ (2) refers to norms and principles related to basic rights of the person,²¹ (3) is contained in a norm with a “purely humanitarian and civilizing purpose”,²² (4) creates obligations different from other provisions,²³ (5) derives from a generalized practice and *opinio iuris* or is contained in universal or quasi-universals international

¹⁸ ILC: “Responsibility of international organizations...”, *cit.*, para. 2, p. 75.

¹⁹ CONTRERAS-GARDUNO, D. & ALVAREZ-RIO, I., “A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens”, in Haeck, Y., Mcgonigle, B., Burbano-Herrera, C. & Contreras-Garduno, D. (Eds.), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak*, Belgium, Intersentia, 2013, pp. 113-31, p. 119.

²⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory opinion: ICJ Reports 1951, p. 23.

²¹ *Barcelona Traction, Light and Power Company, Limited*, Judgement: ICJ Reports 1970, paras. 33-34.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement: ICJ Reports 2007, paras. 161-162.

²³ *Ibidem*.

instruments.²⁴

Having read the doctrinal and jurisprudential interpretation, it would be established whether Article 3 IHR possesses the legal nature of an *ius cogens* norm.

Regarding element (1), when the WHO is conferred the duty to act as the authority on international public health, that obligation included the duty to fulfil the objective under Article 1 of the WHO Constitution to materialise the right to attain the highest standard of health as possible.²⁵

Referring to element (2), it is plausible to infer the teleological link between the purpose of the IHR and the right to health, including other IHRL norms. The IHR intends to prevent the international spread of disease, a substantive element that conforms the right to guarantee the access to health within the International Covenant of Social, Economic and Cultural Rights,²⁶ thus, unfolding the connection between the purpose of the IHR, the observance of which was entrusted to the WHO, and the substantive content of the right to health.²⁷ In other words, the measures under Article 12 IHR and other duties resting upon the WHO must attain the respect to the realisation of the substantive content of the right of health and the other rights that conform the corpus of IHRL.

Regarding element (3), the purpose is observed in the high consensus during the adoption of the WHO Constitution, including the lack of opposition to the final wording of Article 1 and the inclusion in the preamble of guaranteeing the right to health.²⁸ Given that the right intends to be universal, especially with its connection to the purpose of the IHR to prevent the international

²⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement: ICJ Reports 2012, para. 99.

²⁵ BROBERG, M., “A Critical Appraisal of the World Health Organization’s International Health Regulations (2005) in Times of Pandemic: It Is Time for Revision”, *European Journal of Risk Regulation*, vol. 11, issue 2, 2020, pp. 202-209, pp. 203-204.

²⁶ International Covenant on Economic, Social, and Cultural Rights, signed on 16 December 1966 (entry into force 3 January 1976), UNTS 993, p. 3.

²⁷ TOBIN, J., “Still getting to know you: global health law and the right to health”, in Burci, G. & Toebes, B. (Eds.), *Research Handbook on Global Health Law*, United Kingdom, Elgar Publishing Ltd, 2018, pp. 56-81, pp. 64,65,71.

²⁸ TOBIN, J., *The Right to Health in International Law*, United Kingdom, Oxford University Press, 2012, pp. 27-29.

spread of a disease, there is no particular but a universal interest of the State Parties as they accepted to confer that mission to the WHO to safeguard the standards pertaining to the substantive content of the right to health.

Referring to element (4), Article 3 IHR imposes a different obligation than Article 12 IHR to the extent that it does not contain a duty to designate, if the criteria is met, an event as a PHEIC, but an autonomous duty to act according to the substantive limits of human rights, including the right to health, the main objective of the WHO, that is directly affected by the pandemic.

Moving to element (5), the duty of Article 3 IHR refers to principles and norms contained in international treaties of human rights that are universally accepted, without saying that all UN Member States have at least ratified one treaty that recognises the right to health, and that more than 130 guarantee this right in their constitutional framework.²⁹

Bearing in mind the previous paragraphs, the duty of Article 3 IHR vis-à-vis the WHO in case of pandemics is of *ius cogens* nature, hence, its compliance is enforceable without the possibility to claim any circumstance precluding wrongfulness of international responsibility.

5. The *iter pandemicus* regarding the conduct of the WHO

The following paragraphs evaluate the *iter pandemicus* on the facts from which a conduct or various conducts attributable to the WHO regarding the pandemics can unfold. This factual assessment comprises the facts from the first detection of COVID-19 cases until its declaration as a pandemic by the WHO. In the following section, the *iter pandemicus* will be used to identify the conducts attributable to the WHO and assess whether an obligation was observed.

A. The events of 2019

On November 30th, samples of a patient with an unknown-origin pneumonia were collected and the presence of a beta coronavirus like SARS was detected.³⁰ However, a day after, the IHR Point of Contact for the WHO

²⁹ GOSTIN, L., *Global Health Law*. United States of America, Harvard University Press, 2014, pp. 243-244, 263.

³⁰ “Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)”, *World Health Organization*, 16-24 February 2020. Available at: <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last accessed: 02 March 2022), p. 4.

Regional Office in the Western Pacific was notified of viral pneumonia cases in the city of Wuhan, People's Republic of China (PRC).³¹

B. The events of January 2020

On January 1st, the WHO sent a request of information to the RPC about the pneumonia cases in Wuhan and activated its Support Team for Incident Management.³² The following day, the WHO offered technical assistance to the PRC's National Health Commission and transmitted information to allies in public health.³³

On January 3rd, the WHO received the PRC's reply about the pneumonia cases in Wuhan.³⁴ A day after, the WHO informed via Twitter about pneumonia cases without any reported death and the ongoing investigation on the causes.³⁵ On the 5th, the WHO started sharing information about the unknown-origin pneumonia through the IHR Events Information System, accessible to all State Parties, including recommendations on public health measures.³⁶ Three days later, the PRC health authorities concluded the pneumonia cases were caused by a new coronavirus and the WHO published guidelines for States.³⁷ On the 10th, the WHO gathered several working groups investigating the new coronavirus, including calls with the main health authorities in the PRC to share information and by the 10th it receives the genetic sequences of the new virus.³⁸

On the 13th, Thailand's Ministry of Health confirmed the first COVID-19 case outside of the PRC and the WHO published the protocol for real-time detection of the presence of the virus.³⁹ Next day, the WHO announced the limited human-to-human transmission of the new virus and shared via Twitter

³¹ "Timeline: WHO's COVID-19 response", *World Health Organization*. Available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-7> (last accessed 06 June 2022).

³² *Ibidem*

³³ *Ibidem*

³⁴ *Ibidem*

³⁵ "Timeline: WHO's...", *cit.*

³⁶ *Ibidem*

³⁷ *Ibidem*

³⁸ "Report of the WHO-China Joint Mission...", *cit.*, p. 4.

³⁹ *Ibidem*

that the PRC health authorities reported no evidence of that transmission.⁴⁰ The WHO, on the 15th, receives the confirmation of the second COVID-19 case outside of the PRC, in Japan, by a traveller from Wuhan.⁴¹ By the 21st, a WHO Mission deployed in Wuhan found evidence of the human-to-human transmission of the new virus.⁴² On the following day, the first COVID-19 case was reported in the United States.⁴³

On January 22nd and 23rd, the WHO received confirmation of COVID-19 cases in two WHO regions: the Americas (in the United States) and the Pacific (the PRC, Japan, Thailand); the DG summoned the Emergency Committee (EC), which decided not to recommend the designation of COVID-19 as a PHEIC,⁴⁴ and the DG accepted.⁴⁵ On the 24th, the first COVID-19 case was reported in France with passengers that had travelled to Wuhan.⁴⁶ By the 27th, the WHO published a new travel advice recommending the adoption of epidemiological surveillance in the entry and exit of territories with COVID-19 confirmed cases.⁴⁷

On January 28th, the DG agreed upon a visit to the PRC to deploy a new International Mission to continue investigating the origin of COVID-19.⁴⁸ A day after, the DG reconvened the EC after the report of a COVID-19 case in the United Arab Emirates, the fourth WHO region with COVID-19 detected

⁴⁰ *Ibidem*

⁴¹ *Ibidem*

⁴² “Report of the WHO-China Joint Mission...”, *cit.*, p. 8.

⁴³ “Timeline: WHO’s...”, *cit.*

⁴⁴ “Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)”, *World Health Organization*. Available at: [https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (last accessed 06 June 2022).

⁴⁵ “Timeline: WHO’s...”, *cit.*

⁴⁶ *Ibidem*

⁴⁷ “WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020”, *World Health Organization*. Available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last accessed 20 March 2022).

⁴⁸ “Timeline: WHO’s...”, *cit.*

cases.⁴⁹ On January 30th, the EC recommended the designation of COVID-19 as a PHEIC, which the DG accepted.⁵⁰ At that moment, globally there were 78 811 confirmed cases with 17 deaths outside the PRC and 2 445 in the PRC.⁵¹ Likewise, temporary recommendations issued did not include the restriction of international traffic of passengers and trade but to facilitate the sharing of information and acceleration of vaccine development.⁵²

C. The events of February-March 2020

Having been declared as a PHEIC, the DG recommended on February 4th to the UN to activate its crisis management policy where it collaborates actively with other IOs.⁵³ On the 16th, the WHO International Mission deployed in Wuhan starts its work in the PRC.⁵⁴ Nonetheless, on the 25th the first COVID-19 case was confirmed in the Africa region, specifically in Algeria.⁵⁵ Three days after, the WHO published the report of the first Investigation Mission⁵⁶ that confirmed COVID-19 was highly infectious, can spread rapidly and must be considered capable of causing an enormous sanitary, economic, and social impact.⁵⁷

Considering that information, on March 7th more than 100 000 confirmed COVID-19 cases were reported globally.⁵⁸ Four days after, the DG declared

⁴⁹ *Ibidem*

⁵⁰ *Ibidem*

⁵¹ “WHO Director-General’s opening remarks at the mission briefing on COVID-19”, *World Health Organization*. Available at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19> (last accessed 06 June 2022).

⁵² *Ibidem*

⁵³ “Coronavirus disease 2019 (COVID-19). Situation Report – 23”, *World Health Organization*. Available at: [https://apps.who.int/iris/bitstream/handle/10665/330992/nCoVsitrep12Feb2020-eng.pdf?sequence=1&isAllowed=yhttps://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://apps.who.int/iris/bitstream/handle/10665/330992/nCoVsitrep12Feb2020-eng.pdf?sequence=1&isAllowed=yhttps://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) (last accessed 06 June 2022).

⁵⁴ “Timeline: WHO’s...”, *cit.*

⁵⁵ *Ibidem*

⁵⁶ *Ibidem*

⁵⁷ “Report of the WHO-China Joint Mission...”, *cit.*, p. 18.

⁵⁸ “Timeline: WHO’s...”, *cit.*

COVID-19 as a pandemic⁵⁹ when more than 118 319 cases and 4 292 deaths were reported in all WHO regions.⁶⁰ The same day, the WHO, jointly with the International Civil Aviation Organization (ICAO), recommended the adoption of IHR health measures for the international traffic of passengers.⁶¹

6. Implementation of the International Responsibility of the WHO

Fourthly, the existence of an internationally wrongful act is analysed within a conduct likely to be attributed to the WHO. To do that, it is important to question whether the WHO violated its international obligations conferred by the IHR or the WHO Constitution regarding the *iter pandemicus*. In that sense, it is noteworthy to bear in mind the set of events between the first knowledge of the WHO about COVID-19, the date in which COVID-19 was refused to be designated as a PHEIC, the date in which it was designated as a PHEIC, and the moment in which the DG declared COVID-19 as a pandemic.

To that end, the available information used by the WHO, through the DG, to decide, following the recommendation of the Emergency Committee on January 23rd, 2020, not to designate COVID-19 as a PHEIC will be assessed.

As observed in the *iter pandemicus*, at that moment, the new coronavirus discovered in Wuhan was responsible for causing a severe acute respiratory infection, including pneumonia, that was confirmed in at least two WHO regions (Americas and Asia-Pacific) with evidence of human-to-human virus transmission. By the time the EC was convened, the number of patients infected with the new coronavirus was 78 811 and 17 deaths in 29 countries were reported, in which the confirmed cases were people who have travelled to or were present in Wuhan.⁶²

On the light of the available information, COVID-19 must have been declared as a PHEIC on January 23rd?

A pandemic is the moment or phase in which an infectious disease has

⁵⁹ *Ibidem*

⁶⁰ “Coronavirus disease 2019 (COVID-19). Situation Report – 51”, *World Health Organization*. Available at: https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10 (last accessed 06 June 2022).

⁶¹ “Joint ICAO-WHO Statement on COVID-19”, *International Civil Aviation Organization*. Available at: <https://www.icao.int/Security/COVID-19/PublishingImages/Pages/Statements/Joint%20ICAO-WHO%20Statement%20on%20COVID-19.pdf> (last accessed 06 June 2022).

⁶² “Timeline: WHO’s...”, *cit.*

spread in at least three countries in two WHO regions.⁶³ Nevertheless, the WHO did not consider COVID-19 as a pandemic until approximately one month after, even though the new coronavirus was already present in two WHO regions. Likewise, when there is transmission of the virus between travellers, and there is evidence of potential cases of asymptomatic patients, with the available reports by the WHO when the EC was convened by the first time, it is relevant to discuss whether the decision not to designate was compatible with the duty conferred in the IHR.⁶⁴

As an initial premise, the DG could have had separated from the recommendation of the EC. To the extent that the decision made by the EC was not binding upon the DG, but was a prerequisite before a decision is adopted, at the time the decision was made there was no *ex lege* impediment that made impossible for the DG to set aside from the recommendation.

In what concerns to the definition of PHEIC in the IHR (Article 1, para. 18), COVID-19 had the entity to spread internationally due to the number of imported cases by travellers from Wuhan and the local transmission of the virus in the PRC. The latter includes, likewise, the available evidence proving the new virus caused a severe acute respiratory infection and its presence in at least two WHO regions. Consequently, it was reasonable to believe COVID-19 would demand a coordinated international response. In that line, based on the objective evidence available, COVID-19 could have been designated as a PHEIC on January 23rd.⁶⁵

Therefore, as COVID-19 complied with the requirements set forth in the PHEIC definition under Article 1, was aligned with the conditions laid down in Article 12 IHR, the duty to designate arose seeking to fulfil the purpose of the IHR and that the decision is not left solely on the DG's subjective

⁶³ "Pandemic Influenza Preparedness and Response. A WHO Guidance Document", *World Health Organization*. Available at: <https://www.who.int/publications/i/item/9789241547680> (last accessed 06 June 2022).

⁶⁴ WHO: "International Health Regulations (2005) Third edition", 2016. Available at: <https://www.who.int/es/publications/i/item/9789241580496> (last accessed 06 June 2022).

⁶⁵ TONTI, L., "The International Health Regulations: The Past and the Present, But What Future?", *Harvard International Law Journal*, 2020. Available at: <https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/> (last accessed 06 June 2022).

perception.⁶⁶

On the same line, the WHO had already received, at that moment, by the PRC authorities the genetic sequences of the new coronavirus and had been established the pneumonia cases were caused by this new virus.

Bearing in mind the previous objective elements were met in the *iter pandemicus*, there were reasonable grounds for the DG, based on the available information at the time of events, to not follow the EC recommendation and to designate COVID-19 as a PHEIC given the imminence and urgency based on the potential threat to the right to health, as required under Articles 3 and 12 IHR.

In the light of the factual elements, a new premise accompanies the initial one that reads the available evidence to the WHO on January 23rd met the criteria set forth in Article 12(4) IHR. However, given that the *verbatim* record of the EC meetings and deliberations is closed, the scope of the present assessment is limited to the extent that no full transparency has been yet achieved within the Organization.⁶⁷

Notwithstanding the previous paragraph, the logical conclusion, on the factual grounds indicated, is that sufficient reasonable elements existed for the DG to not follow the EC recommendation on January 23rd.

Given that the DG of the WHO is the main official of the WHO, hence, meets the condition of agent as its actions are on behalf of and representing the Organization, its conduct can be, thus, attributed to the Organization.⁶⁸ For that reason, the conduct of not designating COVID-19 as a PHEIC by following the objective criteria provided under Article 12 IHR is attributable to the WHO.

Accordingly, the decision of the DG not to designate COVID-19 as a PHEIC when reasonable grounds existed with the available information on January 23rd results in the attribution of this omission to the WHO within the

⁶⁶ *Whaling in the Antarctica (Australia v. Japan: New Zealand intervening)*, Judgement: ICJ Reports 2014, para. 61.

⁶⁷ MULLEN, L., POTTER, C., GOSTIN, L., CICERO, A. & NUZZO, J., “An analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations”, *BMJ Global Health*, 2020, pp. 1-10, p. 8; GOSTIN, L., “Global Health Security...”, *cit.*, p. 35; GOSTIN, L. & KATZ, R., “The International Health Regulations...”, *cit.*, pp. 267, 274.

⁶⁸ See *Difference Relating to Immunity...*, *cit.*, para. 60; Article 6 DAIRIO.

framework of international responsibility.

III. ROLE OF THE INDIVIDUALS

1. Legal-procedural considerations of the international responsibility of the WHO

The following part identifies and analyses the plausibility and viability for individuals to file claims or exercise judicial actions invoking the international responsibility of the WHO. In this case, the lack of recognition by Article 34 of the Statute of the ICJ to the ability of any other subject but States to be a party to any contentious proceedings albeit the evolution of international subjectivity,⁶⁹ may result in potential issues for individuals to submit or file any claim.

Therefore, in the following case, the invocation of diplomatic protection or protection *in stricto sensu* would not be applicable.

In the first case, it would not be possible for a State to exercise diplomatic protection for alleged international wrongful acts suffered by its nationals⁷⁰ caused or derived from the conduct of the WHO due to the lack of *locus standi* of IOs before the ICJ under Article 34 of its Statute.⁷¹

In the second case, neither will the protection *in stricto sensu* would be applicable. Whereas the *praxis* of the ICJ has never required nationality to issue provisional measures when *erga omnes* obligations are at stake,⁷² that is not the case when they are brought against an IO. Although a State may exercise an action on behalf of individuals not nationals of their State when an attack or violation against values that concern the international community, the lack of passive *locus standi* of the WHO would impede the effectiveness of this contentious procedure for one or several States to invoke this type of

⁶⁹ DUPUY, P.-M., “Chapter II. Competence of the Court”, in ZIMMERMANN, A., TOMUSCHAT, C., OELLERS-FRAHM, K. & TAMS, C. (Eds.), *The Statute of the International Court of Justice. A Commentary. 2nd edition*, United Kingdom, Oxford University Press, 2012, pp. 584-604, p. 585.

⁷⁰ *Mavrommatis Palestine Concessions*, Series A N.º 2, Judgement, PCIJ 1924, p. 12; *LaGrand (Germany v. United States of America)*, Judgement: ICJ Reports 2001, para. 42.

⁷¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary objections, Judgement: ICJ Reports 2007, paras. 94-96.

⁷² GAJA, G., “The Position of Individuals in International Law: An ILC Perspective”, *The European Journal of International Law*, vol. 21, issue 1, 2010, pp. 11-14, pp. 12-13.

protection.⁷³

Having discarded the contentious proceedings due to Article 34 of the Statute of the ICJ, the next section discusses, on one hand, the advisory proceedings, and on the other, the internal proceedings within the WHO.

2. The Advisory Proceedings before the ICJ

Whereas Article 34 of the Statute of the ICJ does not acknowledge the active legitimacy of individuals to bring cases before the Court, doctrine discusses the possibility of an advisory opinion to acquire binding force. In that point, the ICJ ruled that its advisory opinions lacked any binding force.⁷⁴ However, jurist Roberto Ago understands that, following the *praxis* of the ICJ, it is possible to attribute an *inter partes* binding force outside of the scope of the Statute to these opinions if it is so provided in an international treaty or instrument.⁷⁵

Although it sounds paradoxical, the two views do not mutually oppose. Given that the binding force of the content of the opinion between the parties originate from an international treaty, and not from the Statute, it does not alter the legal nature of this instrument, especially if that would not affect the Court's examination of the case.⁷⁶

In this case, the invocation of international responsibility of the WHO by individuals should then observe the advisory proceedings. To that end, the WHO Constitution⁷⁷ provides two scenarios in which it will be discussed

⁷³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional measures, Order of 15 October, ICJ Reports 2008, paras. 142-145; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional measures, Order of 23 January, ICJ Reports 2020, paras. 39-42.

⁷⁴ *Interpretation of Peace Treaties*, Advisory opinion: ICJ Reports 1950, p. 71.

⁷⁵ AGO, R., “‘Binding’ Advisory Opinions of the International Court of Justice”, *The American Journal of International Law*, vol. 85, No. 3, 1991, pp. 439-451, p. 448. See also VARGIU, P., “From Advisory Opinions to Binding Decisions: The New Appeal Mechanism of the UN System of Administration of Justice”, *International Organization Law Review*, vol. 7, issue 2, 2010, 261-275, p. 274.

⁷⁶ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory opinion: ICJ Reports 1956, p. 84.

⁷⁷ WHO: “Constitution of the World Health Organization”. Available at: <https://apps.who.int/gb/bd/PDF/bd48/basic-documents-48th-edition-sp.pdf?ua=1#page=7> (last accessed 06 June 2022).

whether an individual may exercise either or both.

A. Article 75 of the WHO Constitution

Whereas Article 75 of the WHO Constitution refers to “any divergence or dispute regarding the interpretation or application of this Constitution”, the application of this provision requires the previous verification of the existence of a divergence or dispute, in addition to the concurrence of two alternative elements: whether to submit it to negotiation or to the WHA before the case is brought to the ICJ to issue an advisory opinion.⁷⁸

To determine the existence of a dispute or divergence between the parties, the criteria must be objective and reflect there are two parties with opposing views on the question of implementing certain conventional obligations⁷⁹, a question that might consist of a disagreement on a point of law or of fact, a conflict of legal views or of interests between two subjects⁸⁰.

In that sense, Article 75 offers a complex venue to individuals if considered that, first, a dispute must exist between the WHO and one or several States Parties -and not individuals- over the WHO functions and obligations related to a pandemic contained in the Constitution. To that end, it would be sufficient to factually verify there are opposing views regarding the content of the WHO functions, being necessary then that one or several States Parties dispute the WHO’s understanding of its functions under the Constitution⁸¹. Secondly, the WHO and the States Parties in question must either enter into negotiations -where it is sufficient to establish there is a deadlock or the other party is unwilling or refuses to continue-⁸² or submit the dispute to the WHA, the deliberative organ with representation of all States Parties to the Constitution.

On the other hand, in case it is so decided to submit the question to the WHA would require convening an extraordinary session according to Article 13 of the WHO Constitution. According to the same provision, either a decision of the Council or the majority of Members of the Assembly is required to

⁷⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment: ICJ Reports 2006, paras. 99-100.

⁷⁹ *Interpretation of Peace Treaties...*, *cit.*, p. 74.

⁸⁰ *Mavrommatis Palestine Concessions...*, *cit.*, p. 11.

⁸¹ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory opinion: ICJ Reports 1988, paras. 45-50.

⁸² *Mavrommatis Palestine Concessions...*, *cit.*, p. 13.

convene the WHA, in a date that must be consulted beforehand with the Secretary-General of the United Nations as set forth in Article 15 of the Constitution. Once convened, the adoption of a decision requires the majority of the Members present in the Assembly given that this matter does not meet the “important” category according to Article 60(b) of the Constitution. Thirdly, in case the dispute is not solved, it would then be possible to submit the dispute for consideration of the ICJ.

In any case, by its ordinary meaning and purpose, an international obligation derives from Article 75 of the WHO Constitution as it imposes a duty to the parties to a dispute to submit it to the ICJ if the two previous alternative steps fail.⁸³ The previous legal consideration results from the binding character of the treaty that contains it whose binding nature is not challenged by international jurisprudence.⁸⁴

Although an obligation to the State Parties originates from the Constitution, including to the WHO itself, when having recourse to the advisory proceedings after exhausting the previous elements, the binding force of the content of the opinion is subject to discussion. Article 75 unfolds the clear end of solving the dispute by mutual agreement, as observed in the ratification of the Constitution, and the *ex lege* obligation laid down in the IO, a point from which there is no room for any alternative not contemplated therein.⁸⁵ Nonetheless, the content of Article 75 does not include an explicit reference that attributes the binding force to the advisory opinion to be obtained from the ICJ.⁸⁶

On that light, it would be discussed whether an express attribution is a condition *sine qua non* to derive a legally binding character, especially if considered it would allow the WHO to obtain *locus standi* in the proceedings,⁸⁷ situation excluded under Article 34 of the Statute. In the light of these considerations, according to Article 31 of the Vienna Convention, Article 75 of the Constitution includes a peaceful settlement of disputes clause that evokes a good faith obligation to implement the agreement that solves

⁸³ *The Greco-Bulgarian “Communities”*, Series B N.º 17, Advisory opinion, PCIJ 1930, p. 32; *Applicability of the Obligation to Arbitrate...*, *cit.*, para. 57.

⁸⁴ *Legality of the Use by a State of Nuclear Weapons...*, *cit.*, para. 19.

⁸⁵ *Applicability of the Obligation to Arbitrate...*, *cit.*, para. 56.

⁸⁶ *Judgments of the Administrative Tribunal of the ILO...*, *cit.*, pp. 84-85

⁸⁷ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory opinion: ICJ Reports 1989, paras. 33-34.

the initial dispute.⁸⁸ The latter is complemented when considering that, in advisory proceedings, the lack of consent does not exclude the concurrence of jurisdiction to entertain the dispute or question.⁸⁹

To conclude with, express attribution is not a *conditio sine qua non* to predicate certain binding force of the advisory opinion, especially if it was requested to bring a solution to the dispute or divergence, albeit the force to oblige would only be sufficient if it is predicated within the framework of peaceful settlement of disputes and good faith.⁹⁰

B. Article 76 of the WHO Constitution

On the other hand, the proceedings under Article 76 require the concurrence of an objective element that consists only of the authorization of the UN General Assembly or of the one provided in any agreement between the WHO and the UN. To that end, following the Agreement of 10 of July of 1948 between the UN and the WHO, the WHO is legitimised to bring a request for an advisory opinion, thus satisfying the criteria under the provision.⁹¹

As such, the WHO would need to follow certain requirements when requesting an advisory opinion in the matter. Firstly, the question to be submitted must be of legal nature, evoking *prima facie* issues of international law.⁹² To further develop this point, the ICJ has clarified that the political nature of the question does not deprive the request from its legal nature nor excludes the Court's jurisdiction to address the question.⁹³ Additionally, the request shall clarify or indicate the applicable legal principles to interpret the WHO Constitution.⁹⁴ Moreover, the request for an advisory opinion to be issued by the WHO would have to demonstrate the question submitted -in the case of the content of the WHO obligations related to a pandemic- fall

⁸⁸ *Applicability of the Obligation to Arbitrate...*, *cit.*, para. 41.

⁸⁹ *Interpretation of Peace Treaties...*, *cit.*, p. 71.

⁹⁰ *Interpretation of the Agreement of 25 March 1951...*, *cit.*, paras. 46-47; *Difference Relating to Immunity...*, *cit.*, paras. 24-25.

⁹¹ *Legality of the Use by a State of Nuclear Weapons...*, *cit.*, paras. 11-12.

⁹² *Western Sahara*, Advisory opinion: ICJ Reports 1975, para. 15.

⁹³ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory opinion: ICJ Reports 1973, para. 14.

⁹⁴ *Interpretation of the Agreement of 25 March 1951...*, *cit.*, para. 33.

into the competences of the WHO.⁹⁵ In that regard, under Article 2 of the WHO Constitution, the question must necessarily show a connection to the functions of this IO for the ICJ to find it has jurisdiction.⁹⁶

Consequently, the question to be submitted must request the clarification of the international obligations that arise to the WHO related to the handling of the pandemic, a fact with international nature *per se* that falls into paragraphs (a), (b), (f), (k) and (v) of Article 2. Thanks to the generic nature of the question, and the consideration that it may enlighten future generations when pandemic arises, the connection is much simpler to establish.⁹⁷

Notwithstanding the previous paragraph, the WHO could request, as a second question, the Court to examine the application of international responsibility,⁹⁸ without affecting the Court's ability to do so *ex officio* after identifying and establishing the existence of such obligations.⁹⁹

As a result, after establishing as binding the recourse to the ICJ to clarify a legal question, the procedural option of Article 76 appears to be an effective tool to delimitate clearly the substantive content and scope of the WHO obligations and set a precedent about the mechanisms to implement them.

C. Analysis of the Appropriate Procedural Venue

After analysing Articles 75 and 76 of the WHO Constitution, the discussion focuses on the analysis of whether individuals can benefit from them either directly or indirectly.

According to Article 50 DAIRIO, individuals may have *locus standi* to invoke the international responsibility of IOs,¹⁰⁰ albeit lacks express reference to the mechanisms to exercise it. Although individuals lack *locus standi* to request an advisory opinion from the ICJ, they do have the ability to influence in the decision-making of the WHO and its States Parties -those of their

⁹⁵ *Legality of the Use by a State of Nuclear Weapons...*, *cit.*, paras. 18-19.

⁹⁶ *Ibidem*, para. 22.

⁹⁷ DE HERDT, S., "A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic", *EJIL:Talk!*, 20 May 2020. Available at: <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/> (last accessed 06 June 2022).

⁹⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: ICJ Reports 1949, p. 7.

⁹⁹ *Difference Relating to Immunity...*, *cit.*, para. 66.

¹⁰⁰ ILC: "Responsibility of international organizations...", *cit.*, para. 2, p. 91.

nationality- to request the opinion. To that end, individuals could only satisfy their interests of invoking the international responsibility, even indirectly, through the mechanism under Article 76 of the WHO Constitution.

The aforesaid mechanism is understood to be the most appropriate -from the point of view of an individual- given the recognition of non-governmental organizations (NGOs) to partake in the WHA discussions, the organ responsible for deciding on the matter, on behalf of the WHO, to the ICJ.¹⁰¹

For the recognition to operate, the NGOs wishing to participate in the discussions pertaining to the possibility to request an advisory opinion to the ICJ, the NGO must demonstrate its responsibilities are related to the WHO and participate in the conditions set forth by the Assembly which, in any case, would be without vote according to Article 18(h) of the Constitution.

The previous situation regulates the indirect participation of individuals, through NGOs created to promote international public health and/or provide support to communities affected by the handling of the pandemic, both aspects connected to Article 2 of the WHO Constitution, to submit their case before the Assembly in a manner consistent to obtain the Members support, by simple majority, to accept the submission of the request of an advisory opinion to the ICJ. Whereas under Article 75 of the Constitution the WHA might be convened to decide on the dispute, as it is left to the WHO and States to decide either that venue or to enter into negotiations, the likeliness is lesser when compared to the option under Article 76.

Hence, indirectly, under Article 76 of the WHO Constitution, individuals may invoke the international responsibility of the WHO.

3. The internal proceedings of the IHR

According to Article 65(5) IHR, there exists a special and exclusive mechanism to solve the dispute that arises between the WHO and a State Party to the Regulations. An alternative that derives from the interpretation, following Article 31 of the Vienna Convention of the previous paragraphs within that provision of the IHR in which the only reference is made to States Parties and in any case to the WHO. Thus, if the WHO is only mentioned in that specific paragraph, the only duty or obligation that rests upon the WHO and over the States Parties with which the dispute arises, would be to submit

¹⁰¹ *Legality of the Use by a State of Nuclear Weapons...*, *cit.*, para. 11

the dispute to the WHA.¹⁰²

Consequently, if no solution is achieved with respect to the dispute at hand on the obligations and effects attributable to the conduct of the WHO regarding Article 12 IHR, the Assembly would be obliged to issue a decision. To that end, the NGOs mentioned *supra* may be able to express and/or indicate the interests of the allegedly affected individuals by the handling of the pandemic while the Assembly decides on how to provide a solution. However, the internal proceedings could only be effective if the adequate means to exercise any action to claim reparations for internationally wrongful acts of the WHO are likewise clarified in the decision.

The previous paragraph is explained if considered that, under Articles 21(a) and 22 related to Articles 2(a), (k) and 1 of the WHO Constitution, before the binding nature of the IHR, the Assembly shall discuss the scope of the obligations of the WHO and the DG with respect to Article 12 IHR. Once established the substantive content of the aforesaid obligations, the Assembly would be able to clarify, as a second point to the dispute, the available means under the WHO to repair the damages, if any, produced by the decision not to act in conformity with the obligations derived from the IHR.

To conclude, the internal proceedings of the IHR are analogous, to a certain extent, to that of Article 76 of the WHO Constitution regarding the indirect representation of individuals through NGOs before the WHA to influence the interpretation of the scope of the obligations arising with the pandemic, and the international responsibility of the WHO in a pandemic.

IV. CONCLUSIONS

The handling of the COVID-19 pandemic constitutes a legally relevant event, especially if considered the trust deposited in the multilateral organs to prevent and fight against threats to public health. In that sense, the present paper has demonstrated, under the specific circumstances in which the COVID-19 affected the life of the international society, that existed certain events that unfold the attribution of international responsibility to the WHO.

The aforesaid attribution implies the need to reflect on the scope and real effectiveness of the obligations conferred to IOs in pandemic situations. Having witnessed the aggressive and fast evolution of the disease produced by

¹⁰² *Applicability of the Obligation to Arbitrate...*, *cit.*, para. 56.

SARS-CoV-2 around the globe, the objective conditions were met to designate the event as a PHEIC. Nonetheless, the decision not to act accordingly to that duty or obligation, in the light of the factual and legal circumstances, constitutes an omission attributable to the WHO.

For that reason, and in reply to the question submitted at the first part of this paper, the exercise by individuals of actions aimed at implementing the international responsibility of the WHO is possible only indirectly.

Given that individuals lack *locus standi* before the ICJ, the available proceedings, albeit not closely related to their reach, are the ones under Articles 76 of the WHO Constitution and 65(5) IHR. In both scenarios, the *locus standi* of individuals is that of indirect representation through NGOs with aims and functions connected to the purpose of the WHO. Through this representation, the individuals might see their interests satisfied through the influence that could be exercised by NGOs during the deliberations and discussions in the World Health Assembly either in the form of a request of an advisory opinion to the ICJ or of a decision on the scope and content of the obligations of the WHO with respect to a pandemic.

Whereas the present paper intends to contribute to the discussion on the implementation of international responsibility of the WHO, the discussion does not preclude the further assessment on the international responsibility of certain WHO Member States. In that light, bearing in mind the *iter pandemicus* laid down *supra*, the present paper acknowledges the impact of the ongoing efforts to further investigate the origins of COVID-19 in relation to the PRC, especially given the impact in the future review of Member States' compliance with the duty to notify. Thus, having examined the duties in the IHR, should the findings indicate a non-compliance, the international responsibility may be invoked in contentious proceedings under the ICJ Statute.

BIBLIOGRAPHY

AGO, R., ““Binding” Advisory Opinions of the International Court of Justice”, *The American Journal of International Law*, vol. 85, No. 3, 1991, pp. 439-451.

ANDRUS, J., AGUILERA, X., OLIVIA, O., ALDIGHERI, S., “Global health security and the International Health Regulations”, *BMC Public Health*, vol. 10, Supplement 1, 2010, 1-4, p. 2.

BROBERG, M., “A Critical Appraisal of the World Health Organization's

- International Health Regulations (2005) in Times of Pandemic: It Is Time for Revision”, *European Journal of Risk Regulation*, vol. 11, issue 2, 2020, pp. 202-209.
- BURCI, G. & FEINÄUGLE, C., “The ILC’s Articles Seen from a WHO Perspective”, in RAGAZZI, M. (Ed.), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Netherlands, Martinus Nijhoff Publishers, 2013, pp. 177-88.
- BURCI, G. & QUIRIN, J., “Implementation of the International Health Regulations (2005): Recent Developments at the World Health Organization”, *ASIL Insights*, vol. 22, issue 13, 2018.
- CONTRERAS-GARDUNO, D. & ALVAREZ-RIO, I., “A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens”, in Haeck, Y., Mcgonigle, B., Burbano-Herrera, C. & Contreras-Garduno, D. (Eds.), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak*, Belgium, Intersentia, 2013, pp. 113-31.
- DE HERDT, S., “A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic”, *EJIL:Talk!*, 20 May 2020.
- DUPUY, P.-M., “Chapter II. Competence of the Court”, in Zimmermann, A., Tomuschat, C., Oellers-Frahm, K. & Tams, C. (Eds.), *The Statute Of The International Court Of Justice. A Commentary. 2nd Edition*, United Kingdom, Oxford University Press, 2012, pp. 584-604.
- FIDLER, D., “From International Sanitary Conventions to Global Health Security: The New International Health Regulations”, *Chinese Journal of International Law*, vol. 4, No. 2, 2005, pp. 325-92.
- FIDLER, D. & GOSTIN, L., “The New International Health Regulations: An Historic Development for International Law and Public Health”, *The Journal of Law, Medicine & Ethics*, vol. 34, No. 1, 2006, pp. 85-94
- GAJA, G., “The Position of Individuals in International Law: An ILC Perspective”, *The European Journal of International Law*, vol. 21, issue 1, 2010, pp. 11-14.
- GOSTIN, L., *Global Health Law*. United States of America, Harvard University Press, 2014.
- GOSTIN, L., “Global Health Security After Ebola: Four Global Commissions”, *The Milbank Quarterly*, vol. 94, No. 1, 2016, pp. 34-38.
- GOSTIN, L., DEBARTOLO, M. & FRIEDMAN, E., “The International Health Regulations 10 years on: the governing framework for global health security”, *Lancet*, vol. 386, 2015, pp. 2222-2226.
- GOSTIN, L., HABIBI, R. & MASON, B., “Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to

- Prepare for Future Threats”, *The Journal of Law, Medicine & Ethics*, vol. 48, issue 2, 2020, pp. 376-381.
- GOSTIN, L. & KATZ, R., “The International Health Regulations: The Governing Framework for Global Health Security”, *The Milbank Quarterly*, vol. 94, No. 2, 2016, pp. 264-313.
- MULLEN, L., POTTER, C., GOSTIN, L., CICERO, A. & NUZZO, J., “An analysis of International Health Regulations Emergency Committees and Public Health Emergency of International Concern Designations”, *BMJ Global Health*, 2020, pp. 1-10.
- TOBIN, J., *The Right to Health in International Law*, United Kingdom, Oxford University Press, 2012.
- TOBIN, J., “Still getting to know you: global health law and the right to health”, in BURCI, G. & TOEBES, B. (Eds.), *Research Handbook on Global Health Law*, United Kingdom, Elgar Publishing Ltd, 2018, pp. 56-81.
- TOEBES, B., FORMAN, L. & BARTOLINI, G., “Toward Human Rights-Consistent Responses to Health Emergencies: What Is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?”, *Health and human rights*, vol. 22, No. 2, 2020, pp. 99-111.
- TONTI, L., “The International Health Regulations: The Past and the Present, But What Future?”, *Harvard International Law Journal*, 2020.
- VARGIU, P., “From Advisory Opinions to Binding Decisions: The New Appeal Mechanism of the UN System of Administration of Justice”, *International Organization Law Review*, vol. 7, issue 2, 2010, pp. 261-275.
- ZIDAR, A., “WHO International Health Regulations and human rights: from allusions to inclusions”, *The International Journal of Human Rights*, vol. 19, issue 4, 2015, pp. 505-526.



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Documentación III. Breach Of the UN Convention on the Rights of the Child and the Use of Minors by the Moroccan Authorities in the Migratory Crisis in Ceuta, European Parliament Resolution of 10 June 2021 - Resolución del Parlamento Europeo sobre la violación de la Convención de las Naciones Unidas sobre los derechos del niño y el uso de menores por las autoridades marroquíes en la crisis migratoria de Ceuta (versiones en inglés y español)

ANNOTATED BIBLIOGRAPHY

DEL VALLE GÁLVEZ, A. (Dir.) - CALVO MARISCAL, L. y EL HOUDAÏGUI, R. (Coords.), Inmigración y Derechos Humanos en las Fronteras Exteriores del Sur de Europa, Madrid, Dykinson, 2021, 319 pp. Por Cristina CASTILLA CID

CALAMIA, A., GESTRI, M., DI FILIPPO, M., MARINAI, S., CASOLARI, F., Lineamenti di diritto internazionale ed europeo delle migrazioni, Ed. Wolters Kluwer, Milano, 2021, 425 pp. Por Miguel A. ACOSTA SÁNCHEZ

FAJARDO DEL CASTILLO, T., La Diplomacia del Clima de la Unión Europea. La Acción Exterior sobre Cambio Climático y el Pacto Verde Mundial, Ed. Reus, Madrid, 2021, 188 pp. Por Enrique DEL ÁLAMO MARCHENA