

The Effectiveness of the World Health Organization (WHO) in Overcoming the Covid 19 Pandemic

Hilton Tarnama Putra M¹, Belardo Prasetya Mega Jaya²
hilontarnamapm@untirta.ac.id, belardoprasetya@untirta.ac.id
Faculty of Law Untirta¹, Faculty of Law Untirta²

Info Artikel

Received: 2022-05-11
Revised: 2022-07-03
Accepted: 2022-07-03

Keywords:
WHO; Covid 19;
International Law

Kata kunci:
WHO; Covid 19; Hukum
Internasional

Abstract

The Covid 19 outbreak has caused a lot of casualties. WHO as an international organization whose goal is to achieve health at the highest level has a responsibility to mitigate the spread of the virus and its victims. The authority possessed by WHO based on international law is effective in overcoming the covid 19 pandemic. All of the categorizations to assess the effectiveness of WHO can be fulfilled by WHO while showing that WHO has succeeded in overcoming the Covid 19 pandemic.

Keywords: WHO; Covid 19; International Law

Abstrak

Penyebaran Covid 19 telah menimbulkan korban jiwa sangat banyak. WHO sebagai organisasi internasional yang memiliki tujuan untuk mewujudkan kesehatan pada level tertinggi mempunyai tanggung jawab untuk memitigasi penyebaran virus dan korban. Kewenangan yang dimiliki oleh WHO berdasarkan hukum internasional efektif dalam mengatasi pandemik covid 19. Kategorisasi untuk menilai efektifitas WHO semuanya dapat dipenuhi oleh WHO sekaligus menunjukkan bahwa WHO berhasil dalam mengatasi pandemik Covid 19

Kata Kunci: WHO; Covid 19; Hukum Internasional

I. Introduction

The spread of COVID-19 is still massive in all countries. Even though the World Health Organization (WHO) declared what was happening as a Public Health Emergency of International Concern (PHEIC) on January 30, 2020, it seems that it is still not running effectively.¹ The international community is still struggling to deal with Covid 19. One of the efforts made is to accelerate the manufacture of a Covid-19 vaccine. WHO as an international organization that has the goal of international cooperation in realizing public health bears a heavy burden to make it happen.

To achieve this goal, WHO can use the powers granted to it in the WHO Constitution and International Health Regulations (IHR) of 2005. One of the powers given to WHO is to be able to make international agreements or policies to realize international health.² However, in policies related to the Covid-19 vaccine, WHO issued a policy that the Covid-19 vaccine is a "private item". The result of this decision is that the price of the Covid-19 vaccine will later follow the market mechanism. In accordance with the law of supply and demand, due to high market demand for the Covid-19 vaccine, it can be seen that the price of the Covid-19 vaccine will definitely be expensive, making it difficult to reach for developing countries.³

WHO is also considered "failed" to carry out its mission in realizing public health⁴. One of the evidences submitted is in the handling of cases of HIV/AIDS. As a global pandemic, the handling of HIV/AIDS should be the domain of WHO

¹ <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, accessed on April 20, 2020, at 02.00 WIB.

²Article 21, WHO Constitution

³Weinian Hu, Compulsory Licensing and Access to Future Covid-19 Vaccines, CEPS Research Report, 2020, p.1

⁴David P. Findler, The Future of the World Health Organization: What Role for International Law, Vanderbilt Journal of Transnational Law, Vol.31, No.5, 1998, p. 1126

to realize international cooperation in dealing with these cases. But what happened, the international community even formed a new organization, namely the United Nations AIDS (UNAIDS) in 1994 to overcome the HIV/AIDS pandemic.⁵

The failures and policies taken by WHO during a global pandemic are a phenomenon referred to by international legal experts as the "Frankenstein Dilemma"⁶. On the one hand, international organizations are independent legal subjects, but on the other hand, international organizations are formed as an extension of the interests of member states. In this context, WHO as an international organization that has a separate goal from member countries to realize international health is experiencing difficulties.

In the international legal system, international organizations have a vital role. Since they are considered to have the capacity as subjects of international law, international organizations are one of the actors in international law to create an orderly international community. However, in practice, as an independent entity and separate from the state, international organizations experience obstacles in realizing their goals. WHO as an international organization initiated by countries, it has been given a mandate to address public health issues. Through the instrument of its formation, WHO has the authority to realize the mandate given. However, in the constitution and the 2005 WHO IHR, the role of member states is still seen as dominant in making organizational policies. At this point the "trade off" between the interests of member countries and the interests of WHO as an independent entity looks unbalanced.

⁵Look <https://www.unaids.org/en/whoweare/about>, accessed on 24 November 2020; Armin von Bogdandy, Pedro A. Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of Coronavirus Crisis, MPIL Research Paper No. 2020-07, 2020

⁶Andrew Guzman, International Organizations and the Frankenstein Problem, The European Journal of International Law, Vol. 24 No.4, 2013, p. 1002

In some cases it appears that WHO is powerless against countries. Even though the WHO has a set of powers, the fact is that it is still not running effectively. Therefore, the study of WHO as an international organization becomes very significant to strengthen the international system. This is important because as subjects of international law, international organizations have the capacity to make international law.

Based on the above background, it is interesting to study further the issue of the effectiveness of international organizations, especially WHO in realizing organizational goals.

2. Methods

This research used normative research methods. The main characteristics of normative legal research in conducting legal studies lie in the data source, namely secondary data sources. It consisted of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are various international provisions or regulations, and statutory regulations. Secondary legal materials are literature in the form of books and articles, journals, papers, and related data, while tertiary legal materials are accessing the internet related to research.

After the data has been obtained, then do the analysis. In this study, the method of analyzing data was descriptive qualitative, namely presenting data in the form of a descriptive narrative (explaining/describing) by providing a complete picture.

3. Result and Discussion

3.1. WHO and Global Health Governance

3.1.1. Delegation of Authority at WHO

In international law, the state is the main legal subject. However, in the 19-20 century, international organizations (OIs) emerged as a new phenomenon as

actors in international relations⁷as well as having the capacity as a legal subject in international law⁸. Based on the opinion of experts, the definition of OI referred to here is an institution that has the following characteristics, namely:⁹:

- 1) *establishment by agreement between states;*
- 2) *the existence of at least one organ capable of operating separately from member states; and*
- 3) *operation under international law*

OI is an entity formed by a state through an international agreement. One of the reasons states create OIs is to facilitate state preferences in international relations. In general, there are two points of view in viewing OI. First, see OI as a state vehicle to achieve its goals. This relationship is known as a vertical relationship. Second, see OI as a separate entity from the state. This relationship is commonly referred to as a horizontal relationship¹⁰Based on this horizontal point of view, the legal relationship between the state and the OI is equal, that is, both legal subjects have rights and obligations.

OI as a subject of international law that is separate from its constituent countries has rights and obligations under international law. One of the rights of OI is to establish legal relations with other international legal subjects in the form of international agreements, while OI's obligations are to realize the organizational goals that have been stipulated in the instrument of formation. In order to realize this goal, OI is given the authority to carry out certain legal

⁷Jose E. Alvarez, *International Organization: Then and Now*, American Journal of International Law, Vol. 100:324, 2006, p. 324

⁸See *Case of Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: ICJ Reports 1949, p. 179.

⁹Andrew Guzman, *International Organizations and the Frankenstein Problem*, The European Journal of International Law, Vol. 24 No.4, 2013, p. 1002

¹⁰Kristina Duagirdas, *How and Why International Law Binds International Organization*, Harvard International Law Journal, Vol.57, No.2, 2016, p. 327

actions in this case, namely to make decisions. Theoretically, there are three possible powers of OI to make laws, namely:

- 1) Member countries give OI authority to make certain laws in basic instruments (constituent theory)
- 2) Member states attribution to OI to form laws (attributed doctrine)
- 3) The authority to make OI laws is only for the internal affairs of the organization¹¹

It is customary in the law of international organizations that the authority to establish OI law will be determined in the instrument of formation. If it has been determined in the instrument for forming the delegation, then OI has the legality to make it. In this regard, it is also necessary to look at the distinction between OIs that are supranational and deliberative. OI which is supranational like the European Union, basically member states have surrendered some of their sovereignty to the organization. Therefore, OI has the authority to form laws and bind to member countries. For OI which is deliberative, the situation is different, OI is only a consultative institution. Modern international organizations can be classified as Intergovernmental Organizations (IGO's) and Non-Governmental Organizations (NGO's) to distinguish between international private institutions and single states. In addition to the state system, international organizations can play a number of important roles.¹²

WHO is an international organization founded by representatives of 61 countries in 1946 at an international health conference held in New York, United States. In this activity, the WHO constitution was agreed as the organization's articles of association. Two years later, on April 7, 1948, the WHO constitution

¹¹JE Alvarez, *International organizations as law-makers*, Oxford, OUP, 2006, p. 120-121

¹²A. Le Roy Bennett, *International Organizations Principles and Issues*, Prentice Hall, New Jersey, 1997, p. 1-3.

came into force after 26 member states of the United Nations became parties to the WHO constitution.¹³ However, the idea of establishing WHO actually started in 1945 at the 'UN Conference on International Organizations' through the thought that there was a need for a special international organization that had a mandate to deal with public health issues.¹⁴ However, the attention of the international community regarding public health issues can be traced back to 1851 at the International Sanitary Conference in Paris.¹⁵

WHO has fulfilled the three elements of OI. WHO is formed by countries through international treaty instruments in the form of a constitution; has an organizational structure, namely the world health assembly, the executive board and the secretariat¹⁶, which is contained in the constitution and is subject to international law in carrying out its duties and functions.¹⁷

WHO as an OI formed by the state through an international agreement in the form of a constitution cannot be separated from the interests of the country that formed it. In a vertical relationship, it can be seen that WHO is a country's vehicle to achieve its goals, namely realizing public health. That is, the issue of public health is a problem that crosses national borders and every country has its limitations, it is necessary to have an institution/organization that can realize the goals of the country.¹⁸ This is one way of looking at the relationship between WHO and member countries.

Second, WHO as a separate entity from the state or in an equal position as an independent subject of international law. This relationship is commonly

¹³Article 80, WHO Constitution. See WHO, Basic Documents, 49th Edition, Geneva, 2020.

¹⁴Gian Luca Burci and Andrew Cassels, "Health" in Jacob Katz Cogan et.al, The Oxford Handbook of International Organization, Oxford University Press, UK, 2016, p.452

¹⁵Ibid., David P. Findler, The Future of the World Health Organization: What Role for International Law, Vanderbilt Journal of Transnational Law, Vol.31, No.5, 1998, p. 1083

¹⁶Article 9 of the WHO Constitution

¹⁷Article 21 of the WHO Constitution

¹⁸David P. Findler, Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health, Discussion Paper, WHO, Geneva, 2002, p. 7

referred to as a horizontal relationship.¹⁹Based on this perspective, the legal relationship between the state and OI is equal, that is, both legal subjects have separate rights and obligations. Theoretically, it seems that WHO can act independently without any intervention or regardless of the interests of member countries.

WHO's relationship with member countries can be seen from the delegation of authority delegated to WHO by member countries in the constitution. Delegation to WHO can be analyzed based on three aspects, namely; legislative authority, decision-making authority and adjudication authority²⁰

The legislative authority is that OI is given the authority to change the law. The meaning of changing this law here is to form and or change laws that can bind all members without the consent of member countries.²¹Within the WHO there are three legal forms regulated in the WHO constitution, namely conventions and conventions.²², regulations²³, and recommendations (recommendations)²⁴given to the World Health Assembly (WHA) as one of the structures in WHO. However, if you look further, you can see how these actions are still limited by state sovereignty.

Articles 19-20 of the WHO Constitution stipulates the authority of WHA to adopt international agreements related to issues that are within WHO's competence. However, normatively Article 19 provides a limitation, namely the condition for approval of 2/3 of the votes of member countries so that WHA can adopt an international treaty as an independent legal subject.

¹⁹Kristina Duagirdas, How and Why International Law Binds International Organization, Harvard International Law Journal, Vol.57, No.2, 2016, p. 327

²⁰Andrew T. Guzman and Jennifer Landslide, The Myth of International Delegation, California Law Review, Vol.96, 2008, p. 1697

²¹Ibid., p.1703

²²Articles 19-20 of the WHO Constitution

²³Articles 21-22 of the WHO Constitution

²⁴Article 23 of the WHO Constitution

“The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes”

Article 21 of the WHO Constitution is more interesting. The WHA is authorized to adopt regulations to regulate the prevention of the international spread of the virus. In this article, there are no restrictions. However, in Article 22, the condition is then given that WHO regulations will automatically bind member countries if they do not declare refusal or make reservations. This norm explicitly shows that the legislative delegation regarding the making of regulations by WHO still requires state approval conditions.

Slightly different in the norm between Articles 19-20 and Article 22. If you refer to Articles 19-20, it can be seen that the position of the state is very dominant. Because, without the approval of the majority of member countries, WHO cannot adopt the convention. However, in Article 22 the setting is different. The powers of member states are seen to be minimal. Regulations can be made by WHO without the approval of member countries, but in terms of entry into force it requires the approval of member countries. This difference occurs because in adopting international conventions, the subjects involved also consist of third parties so that they have impacts or rights and obligations from and against third parties. It is therefore understandable that WHO member states are slightly more dominant in determining whether WHO can adopt international agreements or not.

For regulatory norms, because it is only an internal WHO affair and does not involve third parties, the intervention of member countries does not appear dominant. However, when the rights and obligations in the regulation want to be attached to member countries, there is still a need for approval. In the context

of the 2005 International Health Regulation (IHR), one of the regulations successfully established by WHO, member countries are given 18 months, since the Director General of WHO approved the IHR, to declare refusal or make a reservation.²⁵

Recommendations in WHO are regulated in Article 23 WHO. This norm is non-binding as a guide for member countries in realizing maximum health standards. This recommendation model does not require conditions for validity from member countries, so it is considered one of the instruments that has been successfully carried out by WHO.²⁶

Decision-making authority is the power given by member countries to OI to make decisions. In a study conducted by Guzman and Landslide²⁷, a perfect example of this delegation is the authority of the UN Security Council (UNSC). UN member states give authority to the UN Security Council to make decisions that are binding on all member states in resolving issues that disrupt world security and peace without having the approval of UN member states.

This delegation of authority at WHO can be referred to based on the first delegation of authority, namely legislative authority. Based on the WHO constitution, it can be seen that the authority of WHO in making decisions regarding the adoption of international agreements and making regulations still requires the approval of member countries. This proves that the decision-making authority at WHO is not fully delegated by member countries to WHO.

The power of adjudication is the authority given by member countries to organizations to be able to resolve disputes that arise. Provisions for dispute resolution in the WHO Constitution are regulated in Articles 75-77. The first route that can be taken if there is a dispute regarding the interpretation and

²⁵Article 59, IHR 2005

²⁶Gian Luca Burci and Andrew Cassels, *op.cit.*, p.452

²⁷Andrew T. Guzman and Jennifer Landslide, *op.cit.*, p. 1708

implementation of the constitution will be resolved through negotiations between the parties. If this step fails, the WHA can refer to the ICJ in accordance with the ICJ statutes²⁸. This provision can be seen that member countries do not give adjudication authority to WHO to resolve disputes. The authority to settle disputes remains with member states as holders of sovereignty. WHA referrals to ICJ are also limited, that is, they must follow the provisions in ICJ.

As a specialized organ of the United Nations, WHO has jurisdiction to seek legal opinion from the ICJ regarding WHO competencies²⁹. This authority is also limited by the provisions of Article 96 paragraph (2) of the United Nations Charter. In the case of *Legality of the Use by State of Nuclear Weapons in Armed Conflict* in 1993, WHO once asked the ICJ's opinion. However, the results were rejected because they were considered outside the competence of WHO. The norm in this article also shows that WHO still refers to the ICJ in deciding a legal question.

The provisions in the WHO Constitution prove that the delegation given by member states to WHO is a myth³⁰. Delegation presupposes that member states surrender some of their sovereignty to international organizations as separate entities or subjects of international law to make laws, make decisions and resolve disputes. The WHO constitution can be seen that member states do not want to completely surrender their sovereignty.

This is indicated that within the legislative authority and making decisions, it still requires the approval of member states. Although in the authority to make regulations, WHO is given the authority, but to be able to bind member countries, they are still given the option of rejecting or making reservations for these regulations. Regarding the adjudication authority, WHO

²⁸Article 75 of the WHO Constitution

²⁹Article 76 of the WHO Constitution

³⁰Andrew T. Guzman and Jennifer Landslide, *op.cit.*, p. 1724

member countries are more focused on submitting or completing it through the ICJ. This proves that WHO does not give the authority to resolve disputes.

3.1.2. Global Health Governance Coping With Pandemic

Public health began to receive important attention and recognition in the international community in the late 19th century. Initially, health issues were considered as a domestic problem of a country but had an international dimension. This international aspect was initially related to state cooperation in limiting the spread of the virus across countries.³¹

Efforts to monitor and reduce the spread of the virus across countries are apparently not enough if only done by the state. Then other actors emerged, one of which was international organizations in order to create what is called global health governance (GHG). The main idea of GHG is that the assets the world has for improving public health could actually be more effectively and equitably deployed. To realize good global health governance, the role of OI needs to be supported by law.³²

The role of law to realize GHG is very important. However, it should be remembered that to achieve global health it is not enough to rely solely on international law. Cooperation between national law and international law regarding public health is the key in realizing GHG.³³Based on this idea, it can be seen that to realize global health there are at least three important elements that need to be considered, namely OI, international law and national law.

WHO as an OI whose goal is to achieve the highest level of health for all is currently the main actor in realizing GHG. Of course, in carrying out this role,

³¹Gian Luca Burci and Andrew Cassels, op.cit. 447

³²David P. Findler, *Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health*, op.cit., p.6

³³David P. Findler, *The Future of the World Health Organization: What Role for International Law*, op.cit., p. 1116

WHO needs to strengthen the role of international law and the national legal capacity of member countries in tackling public health issues. In the history of the WHO, between 1948 and 1998, WHO has never used the authority to make laws contained in the WHO constitution. Only two regulations have been successfully adopted by WHO. First, by utilizing Article 19 of the WHO Constitution, WHA gave instructions to the Director General of WHO to establish an 'international framework convention for tobacco control' in 1996. Second, WHO succeeded in adopting the Nomenclature Regulations,³⁴

The general criticism of the WHO's failure to use the authority to establish international law to realize GHGs is due to limited human resources. The workforce at WHO is dominated by public health and medical experts who have a work ethic that health issues are medical-technical problems that can only be solved through treatment. In terms of treatment, they prioritize volunteerism from the state over legal obligations, so the role of law is considered to have less direct influence.³⁵

Through the GHG approach, it can be seen that public health is not enough just to be approached from a technical-medical perspective. Globalization makes health problems also related to other aspects, such as human rights issues, international trade law,³⁶ environmental law and others. The WHO's history of not paying attention to other aspects, besides technical-medical, has proven to be inaccurate.³⁷

The future of WHO in realizing GHG will be related to the use of international law in achieving public health goals. The emergence of communicable diseases requires the readiness of WHO in tackling these types of

³⁴Ibid., p. 1089-1090

³⁵Ibid., p. 1110-1111

³⁶Armin von Bogdandy, Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of Coronavirus Crisis*, MPIL Research Paper No. 2020-07, 2020, p. 16-21;

³⁷David P Findler, *ibid.*

diseases. Determination of the status of infectious disease transmission in WHO can be determined in two events. First, through the declaration of a Public Health Emergency of International Concern (PHEIC) regulated in the IHR³⁸. Second through the Pandemic Declaration³⁹. The two instruments have different binding power. PHEIC is legally binding, while the Pandemic Declaration is only a guide for WHO member countries.

Determination of the status of the spread of infectious diseases as PHEIC in the IHR is a delegation given Articles 21 and 22 of the WHO Constitution. Article 2 of the IHR states that the purpose of establishing the IHR is to overcome the spread of infectious diseases by avoiding disruption to international traffic and trade

“The purpose and scope of these Regulations are to prevent, protect against, control and provide 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.”

The state of health in a country is categorized as PHEIC if it is considered an extraordinary event that can pose a health risk to other countries through the spread of disease and to the possibility of this risk requiring an international response.⁴⁰This definition has a message to the international community that the spread of disease in one country can spread to the territory of other countries. So PHEIC status can be given to the condition of the spread of disease in a country even though it has not been proven that the disease has spread to other countries.⁴¹

³⁸Article 12 IHR 2005

³⁹World Health Organization, Pandemic Influenza Risk Management, WHO, Geneva, 2017

⁴⁰Article 1 IHR 2005

⁴¹Pedro A. Viilareal, Pandemic Declaration of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies, Goettingen Journal of International Law, Vol.7, No.1, 2016, p.615

Regarding this situation, Article 12 of the IHR grants the Director General of WHO the authority to declare that a situation can fall into the PHEIC category. In making this decision, the Director General of WHO needs to take into account information from States parties, advice from the Emergency Committee, scientific facts, and assessments of risks to human health, spread of disease and risks of international traffic. Before the Director General of WHO determines the status of PHEIC, he is obliged to summon an Emergency Committee consisting of experts regarding the current situation. Committee members are selected by the Director General of WHO from a list of names held by WHO after consultation with member countries. This committee must be able to represent the existing geographic area including representatives from the country of impact.⁴²When a PHEIC is declared, the Director General of WHO will usually provide recommendations to member countries regarding diseases and actions that need to be taken during an emergency.⁴³

There are two types of recommendations in the IHR, namely temporary and standing recommendations. Interim recommendations mean non-binding advice issued by WHO regarding the timing of implementation, the risk base in dealing with PHEIC, as measures to prevent the spread of widespread disease and reduce the impact on international traffic. While Standing recommendation relates to advice within a certain period.

*non-binding advice issued by WHO for specific ongoing public health risks pursuant to Article 16 regarding appropriate health measures for routine or periodic application needed to prevent or reduce the international spread of disease and minimize interference with international traffic.*⁴⁴

⁴²Armin von Bogdandy, Pedro A. Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of Coronavirus Crisis, op.cit. pp.10-12

⁴³Article 15 IHR 2005

⁴⁴Article 1 IHR 2005

Based on the definition of the recommendation above, it can be seen that the legal position of the recommendation is non-binding. This is problematic because Article 15 paragraph (2) of the IHR states that "Temporary recommendations may include health measures to be implemented by the state..." The provisions of this article provide an obligation that member countries are obliged to implement recommendations issued by WHO. However, if this article is interpreted as an obligation, it will be contrary to Article 1 of the IHR. Apart from Article 15 paragraph (2) there is no information that can prove that if the state party ignores the recommendation then the action is contrary to the law.⁴⁵

However, this does not mean that the status of a recommendation does not have legal consequences. Article 43 of the IHR regulates the obligation of member countries to comply or explain to WHO recommendations. Participating countries may adopt policies that are "contrary" to WHO recommendations but must be carried out with higher standards set by WHO⁴⁶. This proves that member countries still need to meet WHO recommendations to achieve global health. Emphasis on the principle of good faith for member countries to follow WHO recommendations is very important in the context of GHG.⁴⁷

Institutionally, it can be seen that the determination of a situation that can be categorized as a PHEIC is quite complicated, both politically and legally. From a political perspective, the authority of the Director General of WHO in determining status is considered to provide incentives that can be abused. This suspicion arose in the case of H1N1 Influenza in 2009-2010, although in the end

⁴⁵Armin von Bogdandy, Pedro A. Villarreal, Critical Features of International Authority in Pandemic Response, MPIL Research Paper Series, No.2020-18, 2020, p.15

⁴⁶Ibid.

⁴⁷Pedro A. Villarreal, The (not-so) Hard Side of the IHR: Breaks of Legal Obligations, Global Health Law Groningen, Blog, 2020. Accessed via website <https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/the-not-so-hard-side-of-the-ihr-breaches-of-legal-obligations-26-02-2020?lang=en> 22/04/2022 at 11.30 WIB.

it was not proven. When viewed from the legal side, complex authority⁴⁸ as explained above, how the stages of the WHO Director General can issue a PHEIC, then there are several legal obstacles that must be addressed by WHO to realize good health governance.

The use of PHEIC for emergency health situations is indeed an official institutional term based on the IHR, but the public more often uses the term Pandemic to describe the above. This is also regulated in the Pandemic Influenza Risk Management Guidance (PIRMG), 2017. Because it is in the form of a guideline, it does not have a legal binding force as PHEIC is regulated in the IHR.

Definition of Pandemic and PHEIC have different meanings. A situation is considered to have become a pandemic if it is a virus that spreads from person to person and has the potential to spread globally. When the elements are met, the Director General of WHO will announce a Pandemic Declaration (DP).⁴⁹ Meanwhile, according to PHEIC, it is like giving a reminder to the world that there will be an emergency health situation even though the spread of the virus has not crossed national borders. Thus it is very clear that the approach in PHEIC uses prevention while in PIRMG it is based on real situations.⁵⁰

When the WHO Director General declared the Pandemic Declaration, it was based on the phase of flu spread caused by the virus subtype and based on risk and observation of the situation. Thus, the basis for the Director General of WHO to be able to issue a DP is not as complicated as PHEIC. However, setting a down payment on the situation of the spread of disease can provide incentives, namely reviving dormant contracts with pharmaceutical companies. In the 2009 H1N1 crisis, WHO was accused of having a conflict of interest because by stating the situation at that time with the DP, it gave big profits to pharmaceutical

⁴⁸Armin von Bogdandy, Pedro A. Villarreal, *Critical Features...*, op.cit., p.10

⁴⁹World Health Organization, *Pandemic Influenza Risk Management*, WHO, Geneva, 2017, p.26

⁵⁰Pedro A. Villarreal, *Pandemic: Building A Legal Concept For the Future*, Washington University Global Studies Law Review, Vol. 20, 2020, p. 622-625

companies. Although in the end it was not proven that the determination of conditions through the DP was considered less transparent, thus raising suspicion.⁵¹

When the situation is determined as a pandemic, related to risk management, participating countries carry out virus sharing and benefit-sharing. Virus sharing is carried out by participating countries to carry out monitoring and risk assessment. The long term is the development of human resistance and the manufacture of vaccines. Benefit sharing means that between participating countries and WHO guarantees the benefits derived from sharing biological material data (viruses) can be accessed by countries based on public health risks and needs. WHO benefits are obtained from pharmaceutical companies when they use data on biological materials (viruses) provided by member countries to WHO to diagnose and manufacture vaccines.⁵²

To be able to see the use of PHEIC and DP in practice, it is useful to review the history of handling health emergency cases by WHO. In 2009 "Swine Influenza" appeared in Mexico and the United States. On April 25, 2009, the Director General of WHO declared the situation to be in the PHEIC category because based on the data obtained, the distribution was still in the regional category. However, on June 11, the status changed to a pandemic due to the risk of spreading to become multi-regional. Regarding the policies taken by WHO, 142 WHO member countries have adopted policies to overcome the pandemic situation.⁵³

The response of member countries to the status of PHEIC and DP looks different. Reports from WHO show that member states are more responsive to the DP than the PHEIC declaration, even though the DP is not legally binding

⁵¹Ibid., 623.

⁵²World Health Organization, Pandemic Influenza Risk Management, WHO..., op.cit., hlm.15

⁵³Pedro A. Villarreal, Pandemic Declaration of the World Health, op.cit. p.622

compared to the PHEIC.⁵⁴The reason is that DP creates economic incentives for WHO, namely reviving "dormant contracts" with pharmaceutical companies that can provide benefits to WHO as happened in the H1N1 case in 2009. Even though in the end it was not proven that there was a conflict of interest by WHO when issuing the DP status.⁵⁵

Incentives that appear to WHO at the time of issuing a DP can also be reviewed through a comparison of how the two methods are made. As previously explained, the PHEIC policy-making process according to IHR is more complicated because it involves several actors such as member states, emergency committees and scientific reports so that the WHO Director General is more careful. While determining the status of DP, the Director General of WHO only needs to look at the status of the phase of the spread of the virus. If the results of the report have met that phase, he can announce the status of the DP to the public.

3.2. WHO's Effectiveness in Overcoming the Covid-19 Pandemic

In December 2019, a new type of corona virus that attacks organs Human respiration was identified in Wuhan, China. The World Health Organization (WHO) later called it Corona Virus Disease 19 (COVID-19). The new type of virus then spread throughout the world.⁵⁶On January 30, 2020, WHO Director General Tedros Adhanom Ghebreyesus responded to the situation by issuing a PHEIC status and providing several recommendations to reduce the impact of Covid 19.

Reports from several countries, that the rate of spread and death of Covid 19 rose significantly so that WHO needed to announce that the status of this virus had met the criteria for a pandemic. However, on February 26, 2020, the Director

⁵⁴Ibid.

⁵⁵Ibid.

⁵⁶Armin von Bogdandy, Pedro A. Villarreal, International Law on Pandemic Response: A First Stocktaking in Light of Coronavirus Crisis, MPIL Research Paper No. 2020-07, 2020, p.1

General of WHO made a statement that the cases in Covid 19 had not yet entered the pandemic stage. The reason is that it will produce fear throughout the world. As the spread and death toll continued to increase, on March 11 the WHO Director General of WHO announced that the health emergency had met the criteria for a pandemic.⁵⁷

If Seen chronologically the statements made by the Director General of WHO regarding the status of the spread of Covid 19, there is a two-month gap between the PHEIC declaration and the DP. This proves WHO's caution in issuing DP status, given the suspicion of a conflict of interest that occurred during the H1N1 crisis in 2009-2010. Looking at the policies that have been issued by WHO, it is interesting to see their effectiveness in tackling Covid 19.

The study of the effectiveness of an OI is a concept to see how an organization's policies are to achieve their goals in the context of resolving conflicts or current situations.⁵⁸ Thus, looking at the effectiveness of WHO here, namely assessing WHO policies in resolving the current situation, namely Covid 19.

The basis of the assessment used to assess the effectiveness of WHO is through an output or outcome approach. There are several reasons why this approach is used. First, the results approach looks at the actions or policies taken by the organization rather than the impact on policies. Second, this type of approach is less complicated than the outcome and impact approach. Third, it can be used as a comparison. The point is to see how OI's policies make decisions in certain situations. Fourth, through the output approach, it can be used for advanced studies. The results approach in looking at the effectiveness of WHO in overcoming the Covid 19 pandemic can be seen through 5 instruments,

⁵⁷Pedro A. Villarreal, *Pandemic Declaration of the World Health Organization*, op.cit. p.611

⁵⁸Jonas Tallberg, et.al., *The Performance of International Organizations: An Output-Based Approach*, General Conference of the ECPR, 2015, p. 5.

namely; policy volume, policy orientation, policy type, policy instrument and policy target.⁵⁹

In dealing with the Covid 19 pandemic, WHO has at least issued many policies. Starting from statements, conferences, initiative formation to guidelines. From December 31, 2019 to January 2021, there were at least 134 public statements (media briefings) including statements issued by the WHO Director General to the establishment of the Strategic and Technical Advisory Group on Infectious Diseases (STAG-HI). On January 10-12, 2020, WHO issued a package of guidelines for countries in dealing with a pandemic. The policy package consists of:⁶⁰

- 1) *Infection prevention and control*
- 2) *Laboratory testing*
- 3) *National capacities review tool*
- 4) *Risk communication and community engagement*
- 5) *Disease Commodity Package (v1)*
- 6) *Disease Commodity Package (v2)*
- 7) *Travel advice*
- 8) *clinical management*
- 9) *Surveillance case definitions*

When viewed from the category of the number of policies taken by WHO related to handling the Covid 19 pandemic, the efforts that have been made by WHO have been good. This is because the WHO effectiveness assessment in this category is quantitative in nature, namely the number of policies that have been taken. WHO can issue a significant number of policies, which is understandable because WHO is the OI that is the main reference in the health sector. Not only seen from the OI side endorsed by the international community through the

⁵⁹Ibid., pp. 6-10.

⁶⁰Accessed from <https://www.who.int/news/item/29-06-2020-covid-timeline> on 22/04/2022

United Nations⁶¹but also related to aspects of strength in the technical-medical field.

OnIn terms of policy orientation, WHO's effectiveness in tackling the COVID-19 pandemic can be seen from the side of responsibility for overcoming social problems. If you look at the WHO timeline, it can be seen that WHO policies are very responsive to deal with Covid 19. Although at the beginning of the incident WHO was a little slow, for example in determining the status of a pandemic, this is understandable because of the precautionary element to avoid allegations of conflicts of interest such as in previous H1N1 treatment. However, the WHO's overall response, particularly regarding recommendations and guidance in terms of handling Covid 19, is very good and has a focused orientation on mitigating the spread and victims of Covid 19.

Based on the Constitution, WHO has three types of policies that can be issued, namely adopting agreements, making regulations and issuing recommendations. Based on the type of policy (policy type) owned by WHO, the most recommendations were issued by WHO during the handling of the Covid 19 pandemic.⁶². This is because historically and philosophically, WHO was formed to help achieve an equitable level of public health. It should be remembered that WHO is not a regulatory body so that institutionally it does not have the experience to utilize international law in realizing GHG.

This is a fact that in the early period of WHO's existence, WHO was more involved in the technical-medical field than strengthening the obligations of member states through law. This has become the target of criticism to WHO and proposes that in the future WHO can make more use of the authority that has

⁶¹Gian Luca Burci and Andrew Cassels, "Health" in Jacob Katz Cogan et.al, The Oxford Handbook of International Organization, Oxford University Press, UK, 2016, p.452

⁶²Look <https://www.who.int/news/item/29-06-2020-covidtimeline>

been granted by the constitution and strengthen the legal binding of its policies towards member countries.⁶³

Although based on the WHO's constitution, recommendations do not have legal binding force, they still demand that member countries follow WHO policies or set higher standards than WHO. In handling the COVID-19 pandemic, for example, WHO issued recommendations related to isolation and quarantine at the community level to prevent the spread of the virus. This WHO recommendation was then responded by member countries to impose a lockdown or shutdown at the country level by banning flights both from within and outside a country.⁶⁴The policies taken by the country turned out to be in excess of the standards set by WHO. Thus, the recommendations issued by WHO are effectively followed by member countries.

The category of instruments in seeing the effectiveness of OI is through what kind of instrument the OI policy is taken, legal provisions binding (hard law) or non-binding (soft law).⁶⁵If you look at the definition of this category, it has been answered by looking at the policy type category. In dealing with the Covid 19 pandemic, WHO uses more soft law instruments, namely recommendations. There are two reasons that can be put forward. First, legally the position of recommendations in the WHO Constitution and the IHR is indeed positioned as non-legally binding. This is understandable due to the effectiveness of tackling the situation. If you have to form laws or adopt regulations that are structurally more difficult and longer, it will be very slow to respond to

⁶³David P. Findler, *Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health*, Discussion Paper, WHO, Geneva, 2002; David P. Findler, *The Future of the World Health Organization: What Role for International Law*, *Vanderbilt Journal of Transnational Law*, Vol.31, No.5, 1998.

⁶⁴Armin von Bogdandy, Pedro A. Villarreal, *Critical Features of International Authority in Pandemic Response*, *MPIL Research Paper Series*, No.2020-18, 2020, pp.16-21

⁶⁵Jonas Tallberg, et.all., *The Performance of International Organizations: An Output-Based Approach...*, op.cit., p.15

emergency situations. Second, the recommendation will provide policy space for member countries in making arrangements at the domestic level.

Thus, the choice of soft law instruments does not automatically mean that OI policies will become ineffective. In the case of WHO tackling Pandemic 19, it can be seen that the soft law instrument model provides more flexibility for member countries to adopt internal policies and is more responsive in mitigating the spread of the virus and victims.

Since WHO was formed, the goals and targets to be achieved are high levels of health at the individual level. Although the ultimate goal is individual, the policy targets issued by WHO are at the country level. This is based on the fact that the fulfillment of health is a state obligation. Thus, the state must be given instructions on how from a technical-medical and regulatory perspective to create healthy citizens. In addition, in the GHG concept, WHO cannot realize global health governance independently. There needs to be cooperation with countries and other actors, individuals and multinational companies, to achieve public health.

In handling the Covid 19 pandemic, WHO has given instructions to countries to take actions in handling Covid 19. WHO's policy targets for countries are because WHO membership consists of countries. However, not only countries, WHO also issues guidance to companies⁶⁶and individual. From a policy target perspective, WHO prioritizes its policy recommendations to countries. Because indeed the dominant actor in realizing GHG is the state, so the state needs to be encouraged to strengthen its capacity and regulations in improving domestic health. WHO also engages individuals and MNCs to strengthen good global health governance.

⁶⁶Armin von Bogdandy, Pedro A. Villarreal, *The Role of International Law in Vaccinating Against Covid-19: Appraising the Covax Initiative*, ZaoRV, Vol.81, 2021

4. CONCLUSION

Based on the discussion above, it can be concluded that the authority given to WHO through the constitution has proven to be effective in dealing with the COVID-19 pandemic. The three typologies of policies owned by WHO provide the flexibility to make policies that are appropriate to the situation at hand. In dealing with Covid 19, WHO is more dominant in issuing policy recommendations. Although not legally binding, this type of policy actually gives member countries the option to adapt their internal policies to WHO recommendations. In addition, the selection of recommendation policies is appropriate because it can be done quickly to respond to the Covid 19 pandemic.

The effectiveness of WHO in dealing with the Covid 19 pandemic is also good. This conclusion was drawn after analyzing WHO's performance based on 5 categories of evaluating the effectiveness of an OI, namely policy volume, policy orientation, policy type, policy instrument and policy target. The results of a review of WHO's performance during the Covid 19 pandemic based on these five categories show that the policies taken by WHO are very effective in tackling the Covid 19 pandemic. WHO policies are very large in number, have a clear orientation, namely tackling the covid 19 pandemic, the types and policy instruments chosen are also is appropriate because it provides elasticity to member countries without reducing the effects. The policy target chosen by WHO is the country is also good because to realize global health governance.

Acknowledgments

Thank for all parties who have helped in the completion of this article.

Bibliography

- A. Le Roy Bennett, *International Organizations Principles and Issues*, Prentice Hall, New Jersey, 1997
- Andrew T. Guzman, *International Organizations and the Frankenstein Problem*, *The European Journal of International Law*, Vol. 24 No.4, 2013
- Andrew T. Guzman and Jennifer Landslide, *The Myth of International Delegation*, *California Law Review*, Vol.96, 2008
- Armin von Bogdandy, Pedro A. Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of Coronavirus Crisis*, MPIL Research Paper No. 2020-07, 2020
- Armin von Bogdandy, Pedro A. Villarreal, *Critical Features of International Authority in Pandemic Response*, MPIL Research Paper Series, No.2020-18, 2020.
- David P. Findler, *The Future of the World Health Organization: What Role for International Law*, *Vanderbilt Journal of Transnational Law*, Vol.31, No.5, 1998
- David P. Findler, *Global Health Governance: Overview of the Role of International Law in Protecting and Promoting Global Public Health*, Discussion Paper, WHO, Geneva, 2002.
- Jacob Katz Cogan et.all, *The Oxford Handbook of International Organization*, Oxford University Press, UK, 2016

- Jonas Tallberg, et.all., *The Performance of International Organizations: An Output-Based Approach*, General Conference of the ECPR, 2015
- Jose E. Alvarez, *International Organization: Then and Now*, *American Journal of International Law*, Vol. 100:324, 2006.
-, *International organizations as law-makers*, Oxford, OUP, 2006
- Kristina Duagirdas, *How and Why International Law Binds International Organization*, *Harvard International Law Journal*, Vol.57, No.2, 2016
- Pedro A. Viilareal, *Pandemic Declaration of the World Health Organization as an Exercise of International Public Authority: The Possible Legal Answers to Frictions Between Legitimacies*, *Goetingen Journal of International Law*, Vol.7, No.1, 2016, p.615
- Pedro A. Villarreal, *Pendemic: Building A Legal Concept For the Future*, *Washington University Global Studies Law Review*, Vol. 20, 2020.
- Weinian Hu, *Compulsory Licensing and Access to Future Covid-19 Vaccines*, CEPS Research Report, 2020

Legal Instruments

WHO Constitution

International Health Regulations, 2005

World Health Organization, *Pandemic Influenza Risk Management*, WHO, Geneva, 2017

Other Sources

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, accessed on April 20, 2020, at 02.00 wib

Pedro A. Villarreal, *The (not-so) Hard Side of the IHR: Breaks of Legal Obligations*, *Global Health Law Groningen*, Blog, 2020. Accessed via website

<https://www.rug.nl/rechten/onderzoek/expertisecentra/ghlg/blog/the-not-so-hard-side-of-the-ihl-breaches-of-legal-obligations-26-02-2020?lang=en> on 22/04/2022 at 11.30 WIB.

WHO Time Line, Accessed via <https://www.who.int/news/item/29-06-2020-covidtimeline> on 22/04/2022 at 11.30 WIB