Padjadjaran Journal of International Law
ISSN: 2549-2152, EISSN: 2549-1296
Volume 5, Number 1, January 2021

New Normal Aviation Safety: International Regulations on Prevention of COVID-19 Transmission by Mean of International Aviation

Garry Gumelar Pratama*

ABSTRACT

Each party of the Chicago Convention 1944, the treaty governing international aviation, has agreed to take effective measures to prevent the spreading of diseases including the New CoronaVirus 2019 or COVID-19, which ruptures so many aspects of life. In fact, the current situation is not the first encounter of international aviation law with the same problem, combating dangerous and contagious disease pandemic. Before COVID-19, International aviation had to deal with highly contagious diseases such as Avian Influenza and Severe Acute Respiratory Syndrome (SARS). Now, states have learned better to keep in close consultation with the organizations that adopt international regulations relating to sanitary measures applicable to aviation. Due to the great danger to humankind, cutting the spreading of communicable diseases on international flights is not a mere legal obligation but also a moral responsibility to the human race as a whole.

Keywords: Air Law, COVID 19, International Aviation, International Regulations, New Normal

Keamanan Penerbangan Normal Baru: Regulasi Internasional mengenai Pencegahan Penyebaran COVID-19 melalui Penerbangan Internasional

ABSTRAK

Negara pihak dalam Chicago Convention 1944 sebagai salah satu sumber hukum internasional yang mengatur penerbangan internasional telah berkomitmen untuk mencegah penyebaran penyakit melalui penerbangan, termasuk juga penyebaran Novel Coronavirus 2019 atau disingkat COVID-19. Pandemik yang telah meluluhlantakkan berbagai aspek kehidupan tersebut, sebenarnya bukan merupakan situasi pertama yang dihadapi oleh dunia penerbangan internasional, pada khususnya. Sebelum pandemik COVID-19, telah terdapat berbagai macam penyakit yang menyebar, salah satunya melalui penerbangan, termasuk Flu Burung (Avian Influenza) dan Severe Acute Respiratory Syndrome (SARS). Saat ini, dengan demikian, negara telah memiliki pengalaman untuk mengadakan koordinasi dengan lembaga-lembaga internasional terkait tindakan saniter yang dapat diaplikasikan pada perjalanan pesawat.

* Researcher and Secretary at the Indonesian Center for Air and Space Law (ICASL); Member of International Law Association (ILA), Indonesian Branch, Jalan Imam Bonjol No. 21, Bandung, pratama.garry@gmail.com.

Pemutusan penyebaran penyakit menular melalui penerbangan internasional merupakan masalah moral sekaligus masalah hukum.

Kata Kunci: COVID-19, Hukum Udara, Penerbangan Internasional, Regulasi Internasional, Normal Baru

A. INTRODUCTION

Transportation by plane has customarily been utilized not just as the speediest method for international traveling but also as the most luxurious and comfortable means.[1] In other situations, aviation becomes the backbone of humanitarian aids for distressful and catastrophic disasters, events, starvation, and war.[2] However, despite its positive contributions, sadly, flying has likewise been utilized as a weapon of mass destruction, especially with regards to the cataclysmic occasion of 11 September 2001. In the most recent worldwide concern, aviation likely could be an open gate to let COVID-19 invade state after state in the blink of eyes. Be that, in spite of the fact that aviation as the most advanced human mover technology, the actual nature of air transport which requires people in a closed capsulated space where ventilation and air pressure circulated for hours, offers certain dangers to human health and wellbeing.

In the event of 15 March 2004, a situation happened in a flight between Hongkong and Beijing which carried 120 persons onboard, including two pilots and six flight attendant personnel. A senior citizen with a fever symptom was on the three-hour flight. Five days after the flight, he passed away, which upon his death, a doctor diagnosed him with 'atypical pneumonia'. Eight days after the flight, 18 passengers of the same flight became the SARS suspects by WHO's definition.[3] Long before 2004, Chicago Convention 1944 was designed to impose a set obligation to states to make sure that civil aviation can be operative in a safe manner. One of the obligations is the duty of States to take measures to prevent the spread of illness through air transport. The duty for states to stop widespread via aviation falls under Article 14 of Chicago Convention 1944 which was intended to address communicable diseases decades ago, leaves a question whether the norm is still relevant and effective nowadays to face highly contagious virus of COVID-19, where international aviation becomes a very effective catalysator in wide-spreading the virus from one country to another.

The norm expressly regresses essential obligation on states to take measures to forestall airborne disease via international flights. State parties to Chicago Convention 1944 need to enact rules for air carriers to make sure that air transport is still safe for passengers and the human race as a whole. In a modern pandemic, states also liaise with the World Health Organization (WHO) in making and implementing the rules for air

---

1 Dierikx, Marc. *Clipping the Clouds: How Air Travel Changed the World: How Air Travel Changed the World*. London: Praeger, 2008, at viii.

2 Levinson, Jay and Hayim Granot. *Transportation Disaster Response Handbook*. New York: Academic Press, 2002, at 11.

3 Olsen, Sonja J. (*et.al.*). "Transmission of the Severe Acute Respiratory Syndrome on Aircraft". *The New England Journal of Medicine,* vol. 18, 2003 pp. 2416-2422, at 2419.

carriers. Observant of the carriers to the rules is mandatory, otherwise, they need to cope with legal consequences. Due to international flight characteristics, which involves several jurisdictions, at the very basic, airlines will abide by international health regulations and the laws of the state of departure, arrival, or any other states that the aircraft land. The airline also owes its passengers a duty of care to exercise all caution in protecting their health while traveling by air. Airlines vigilantly will observe passenger profiles and conditions which potentially threaten other passenger's health.

WHO as a mandated international organization under The United Nations, is preoccupied with the main objective to work for the highest possible health level of all people in the world. Thus, WHO has to ensure and coordinate effectual combating disease of COVID-19. History shows that measures recommended by WHO including 'Quarantine' stipulated in the WHO International Health Regulations (IHR) in 1951 helps to prevent international widespread diseases.[4] The IHR is an instrument for implementing the mandate of WHO. In the situation of international travel, WHO must do so with minimal inconvenience for passengers which compels cooperation with the International Civil Aviation Organization (ICAO), states, and airlines. The stakeholders must be aware of the nature of a virus. New Diseases emerge due to its constant evolution ability, so it will continue to threaten the health of people.

New diseases spread in different behaviors and can resurface after a lapse of time from the point it disappears. Until a vaccine for new viruses insight, means obliged under international obligation can help to slow down the pace or even localize its contamination. However, in this condition, timely notification is the key to enable the international system to prevent the wider spread of the disease. People Republic of China (PRC) belated notification of the outbreak of COVID-19 as a highly communicable disease to WHO, particularly contributes to unprevented spread to other states. There is no monitoring body in the WHO, so WHO relies on the political willingness of PRC to make a notification. Comparing to earlier pandemics, 2020's situation was far worse, influenza pandemic that afflicted the globe in 1919-1920, killing 20 million worldwide amid its low morbidity rate of 1%, to the point of forecasting a global pandemic, or with SARS treat which infected severely people in large countries such as China, Hong Kong, and Singapore. COVID-19 cases are nearly unstoppable not only in those countries but also in the European States, the United States of America, and the majority of states in this world. Forcing the countries to impose the most stringent measures to prevent inbound of people to their territory.

The spread of COVID-19 is worse than Severe Acute Respiratory Syndrome (SARS) or Avian Flu virus. The former two showed an alarmingly high morbidity rate, as the SARS had infected nearly 6% of people in the world during its height.[5] Although COVID-19 spreads faster and relatively hard

[4] Article 1 of Constitution of the World Health Organization 1946.

[5] Abeyratne, Ruwantissa. *Convention on International Civil Aviation: A Commentary*. New York/Dordrecht/London: Springer, 2013, at 214.

to detect, since the carriers sometimes show no symptoms, it is still noteworthy from the legal point of view to see how states behave to implement international law regarding Aviation during the last outbreak of the previous diseases.

B. LESSON LEARNED FROM SEVERE ACUTE RESPIRATORY SYNDROME (SARS), AVIAN FLU AND EBOLA VIRUS DISEASE (EVD)

Both SARS and COVID-19 pose an in-flight situation and it is important to understand the serious risk of both viruses. The nature of the diseases and the way it spreads must be fully comprehended in order to take effective measures in aviation. SARS initiates with a fever greater than 38.0^0 C,[6] yet, COVID-19 does not always start in the same way. In many cases, infected people can still carry the virus with only mild symptoms or no symptoms. Both viruses can cause other symptoms which may include headache, an overall feeling of discomfort, body aches, respiratory symptoms, and dry cough.[7] SARS and COVID-19 transmit from person to person,[8] so direct contact with infectious objects that are contaminated with droplets followed by touching face, will cause infection. SARS and COVID also transmit when the carrier coughs or sneezes, sending high-speed droplets shot to other people or surfaces nearby. It is also possible that SARS and COVID 19 transmit airborne. Thus, the aircraft cabin environment was designed to prevent the spread of the virus by installing a High-Efficiency Particulate Air (HEPA) filter. When airborne diseases, such as SARS and COVID 19, are impacted in an airplane cabin, the transmission may occur on an airplane when infected people fly in their symptomatic phase of infection. So, the ventilation system has a critical part in this respect and consequently becomes central to an air carrier's measures to prevent transmission. Early jet planes until the last decade used 100 % fresh air circulated in the cabin. Yet, in the 90s, paradoxically with more advanced technology, ventilation systems in aircraft have constructed a way to recycle stale air, therefore increasing the chances of survival of bacteria and virus in the airplane cabin. Such a practice was unavoidable, due to fuel conservation advantage, however, a cautious airline would take additional measures, for example, change of air filters periodically.[9]

At the international level, states have an obligation to give notification promptly to WHO of any kind of outbreak of communicable disease in their territory. The rationale behind this obligation is to ensure other states and WHO to be able to prevent the transboundary spread of the disease. However, factually proven that there have been some cases where WHO did not get reports from states while mainstream media flowed the society with contrary information. States guided by IHR should hand-in-hand together counter the threat of disease in order to protect people's livelihoods. IHR as the international instrument requires the parties of WHO to assess public health events in their territory using an instrument

---

6 Centers for Disease Control and Prevention (CDC). "Fact Sheet: Basic Information about SARS". 2004, pp. 1-3, at. 1, https://www.cdc.gov/sars/about/fs-SARS.pdf. Accessed on 19th of November 2020.

7 *Ibid.*

8 World Health Organization. "SARS (Severe Acute Respiratory Syndrome)", https://www.who.int/ith/diseases/sars/en/. Accessed on 14th of September 2020.

9 Abeyratne, Ruwantissa, *Supra Note* 5, at 215.

provided under Annex 2 of IHR. In the assessment, states have to decide whether a public health event has to be notified to WHO or not. Annex 2 provides a set of criteria in deciding that. States have to give notification to WHO after the assessment of 24 hours.[10] Article 6 of IHR says that every State Party shall, by means of the National IHR Focal Point and in 24 hours of the public health information evaluation, report the WHO of any occurrence that may create a Public Health Emergency of International Concern (PHEIC) within its jurisdiction. States are also obliged to report what kind of health measures are taken in response to such an event. [11]

Aside from the above-explained state's obligation under the IHR, the instrument in fact, merely applies to a few diseases. From the Variola virus suppression, which caused in the late the 70s, the IHR has been applied to Cholera, Plague, and Yellow Fever Disease,[12] the IHR does not apply to newly emerged communicable diseases including SARS. So, under the IHR, WHO member states do not have an international legal duty to report SARS cases to WHO or to refrain from such trade and transport restriction steps aimed at preventing the spread of SARS. Consequently, the only international instrument produced by WHO on infectious diseases was unrelated to SARS.[13]

The prevention of communicable disease via air transportation also related to human rights law, since the measurement of preventing worse public health condition is to limit several internationally protected human rights, such as freedom of movement in closing national border for foreign travelers and imposing mandatory quarantine in order to keep the number of infected people to a minimum. This is also interrelated to right to health fulfillment. Human Rights context makes obligation for establishing timely notification to WHO of threatening public health even stronger legal obligation as well as moral obligation. During the SARS crisis, the varying usage of quarantine in various cities shows different measures used by states in balancing between individual human rights fulfillment and public health protection. Racialized history of quarantines undisputedly pose danger to the fulfillment of individual rights.[14]

The WHO released a policy statement in 1975 subsuming its ideology on health and human rights, specifying that: the person is obligated to alert the health authority anytime he or she suffers from a communicable disease or has been subjected to infection, and must be tested, administered, supervised, isolated or hospitalized. Those situations impose mandatory hospitalization or isolation which represents a constraint to the freedom of movement and the right to liberty. It is necessary to define the word 'health' in context. While the WHO Constitution describes the state of health as an aim of reaching the highest possible level of health, the state of health is characterized as a state of full physical,

---

10 WHO Guidance for the Use of Annex 2 of the International Health Regulations 2005, at 6.

11 Article 6 of International Health Regulations 2005.

12 Article 1 of International Health Regulations 2005.

13 Fidlerh, David P. "SARS and International Law", *American Society of International Law,* vol. 8, no. 7, 2003.https://www.asil.org/insights/volume/8/issue/7/sars-and-international-law. Accessed on 15th of September 2020.

14 Jacobs, Lesley A. "Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto". *Law & Society Review,* vol. 41, no. 3, September 2007, pp. 511-552, at 513.

mental and social well-being and not only the absence of sickness. This is a difficult act to pursue from an aeronautical viewpoint as air carrier's duty in a commercial flight applies only to the degree of the obligation to avoid injury or death, and not to the physical or mental health of the passengers.

Despite Air Carriers' obligation for passenger health, WHO and ICAO put more priority on passenger health. After the WHO reported 229 SARS-related deaths and 3,947 alleged SARS cases in more than 20 countries during the period from 1 November 2002 to 22 April 2003,[15] it demanded that flying is banned for passengers with SARS symptoms or those who may have been exposed to the virus. Canada announced a health emergency and Taiwan warned against travel to China In 2003 while The United States has urged its residents to avoid non-essential travel to affected areas. Airlines Industries took a 'direct hit' to their business as the SARS problem was recurrent and negatively impacted traffic statistics. According to The International Air Transport Association (IATA), as a non-governmental entity with air carriers as its members, the impact of SARS on the air travel industry was that the virus posed the largest danger to airlines economically as passengers were banned for travel or reluctant to travel.[16] *Ergo,* the airlines whether like or not now have to guarantee that people can safely travel by air, by abiding with regulations adopted by relevant organizations, including ICAO guidance and recommendation. ICAO, on 2 May 2003 released guidance to:[17]

1. Apply medical screening at the check-in gate prior to aircraft boarding.
2. Give a comprehensive information leaflet on SARS for passengers.
3. Implement passengers screening who come directly from or from the disease impacted areas.
4. Recommend pilots to give radio communication ahead If everyone on board has SARS symptoms.
5. Train the crew to deal with in-flight alleged SARS-patients.
6. Disinfect the plane after a suspected SARS patient has been traveling in.

IATA also joined the ICAO SARS suppression measure by establishing SARS Operation Center in Singapore. The function of the center is to help coordinate the South East Asian region in limiting the spread of SARS. The goal of IATA was to help develop reliable and successful screening systems as the product of the government's integrated public health policy and the operational expertise of airports and airlines. IATA also worked with WHO in the SARS outbreak situation. In April 2003, IATA and WHO met in Bangkok to organize and optimize efforts to curb the risk of diseases impacting air travel, where IATA described the disease as a global epidemic that required a global response with concerted support from governments.[18] This indicated that it was important to avoid implementing reactionary and wasteful countermeasures individually.

Five years later after SARS, the H5N1 avian flu widespread emerged in 2008. The WHO identified the outbreak of the avian

[15] World Health Organization. "Cumulative Number of Reported Probable Cases of Severe Acute Respiratory Syndrome (SARS)". https://www.who.int/csr/sars/country/2003_04_22/en/. Accessed on 14th of September 2020.

[16] Abeyratne, Ruwantissa, *Supra Note* 5*,* at 219.

[17] ICAO Issues Guidelines Regarding SARS, PIO 07/03, Montreal, 02 May 2003.

[18] IATA. "Airlines Refine Battle Plans to Fight SARS More Government Action Needed", 2003. https://www.iata.org/en/pressroom/pr/2003-04-24-02/. Accessed on 14th of September 2020.

flu virus as being in phase 3, [19] which is not in the pandemic phase. Avian influenza is caused by the avian influenza A virus found in domestic and wild avian and mammalian species. Later on, this virus can also infect humans.[20] H5N1 infection is uncommon in human cases and typically happens when the virus is prevalent in poultry, where humans are exposed to sick animals or to polluted conditions.[21] Human infections are mainly acquired by close contact with infected animals or polluted habitats.[22]

Several steps have been taken by the Asian states where the virus has broken out, looking at individual countries where they deem health risks to be high and putting a ban on the transport of live birds. No travel advisories were released by the WHO to urge the public not to travel to affected areas. Unfortunately, the general population was in a state of paranoia, leading air travel sales to plunge worldwide. In poultry species, the pervasive persistence of H5N1 raises two threats to humans: the first is when the virus transfers from poultry to humans; and the second is when the virus changes into a strain that travels from person to person. Air transport is most affected by the second form of risk, as such a move would not only initiate a global pandemic but would also make air transport a gateway between nations for cross-border global disease transmission.

Another case is West Africa's 2014-16 Ebola outbreak which was also considered one of the most serious transmissions of the diseases on record. The WHO has identified the virus as one of the United Nations (UN) agency's most daunting public health challenges ever encountered, with 28,646 people diagnosed and 11,323 dead at the end of the epidemic on 29 March 2016. On 8 August 2014, WHO Director-General Margaret Chan eventually declared the Ebola epidemic a PHEIC under IHR following intense criticism from civil society over its delays. The WHO Director-General then issued temporary guidelines for a globally organized solution to deter and mitigate the spread of the disease. These temporary guidelines, as described in the IHR, seek to deter and monitor the international spread of the disease while preventing disruption with international traffic and trade.[23] Canada, for instance, as one of the relatively few high-income countries to introduce stringent travel policies, stood out during the 2014-16 Ebola outbreak by terminating and halted the processing of visa applications by foreign nationals who were in Ebola-affected states. Canada also banned their nationals planning to go to Ebola-affected areas. This stringent measure has been criticized due to Canada's cancellation and restriction of Ebola-affected states' traveler visa applications specifically violated the IHR and hampered global health efforts. In fact, Canada's response went against the consensus opinions of public health experts, the latest scientific data available on disease

---

19 World Health Organization. "Current WHO phase of pandemic alert (avian influenza H5N1)". https://www.who.int/influenza/human_animal_interface/h5n1phase/en/. Accessed on 15th of September 2020.

20 Martins, Nelson Rodrigo da Silva. "An Overview on Avian Influenza". *Brazilian Journal of Poultry Scienc*e, vol. 14, no. 2, 2012, pp. 71-87, at 71.

21 *Ibid*. p. 74.

22 World Health Organization. "Influenza (Avian and other zoonotic)". https://www.who.int/news-room/fact-sheets/detail/influenza-(avian-and-other-zoonotic). Accessed on 15th of September 2020.

23 Tejpar, A. L. I. and S. J. Hoffman. "Canada's violation of international law during the 2014–16 Ebola Outbreak". *Canadian Yearbook of International Law/Annuaire canadien de droit international*, vol. 54, 2017, pp. 366-383, at 367-368.

transmission, and the WHO's recommendations.[24]

C. INTERNATIONAL REGULATION ON PREVENTION OF SPREAD OF COVID 19 UNDER ICAO AND WHO

Following the advice of the Emergency Committee convened under the International Health Regulations (2005), the Director-General of the World Health Organization on 30 January 2020 declared the latest outbreak of COVID-19 a global health emergency of international significance and released Interim Recommendations.[25] WHO Interim Guidance on "Operational considerations for managing COVID-19 cases or outbreak in aviation" 18 March 2020 recommends four measures: awareness of aviation personnel; management of a suspected case; identification and management of contact; and cleaning and disinfection.[26] The guidance is based on the existing facts available, where the transmission of coronavirus disease, primarily through respiratory, human-to-human transmission droplets from an infected person, or direct communication. The guidelines accompany the Handbook of WHO for the Management of Public Health Events in Air Transport.[27]

With the adoption by the World Health Assembly of the International Health Regulations (IHR) in May 2005, the States Parties agreed to create, improve and sustain core public health prevention, monitoring, control, and response capacities at specified points of entry (PoE) as set out in IHR Annex 1.[28] This entails the development and management at PoE of public health disaster response measures to deter the transmission of disease globally. The IHR assigns the WHO to publish guidance on development in collaboration with the States Parties' capacities for public health monitoring. In 2011, the development of the guideline was done based on WHO's Scientific Advisory Principles for Case Management of Influenza A (H1N1) in Air Travel as the result of WHO, ICAO, and IATA's joint efforts. In response to requests from States Parties and the aviation industry, the guideline was developed for general guidance on public health incidents that may occur during air travel, particularly at airports.[29]

Under the UN framework, WHO is the leading and organizing authority for international health. It is responsible for delivering public health leadership, setting the agenda for public health, developing norms and standards, articulating scientific health policy, providing countries with technical assistance, and tracking and evaluating trends of health. Using the IHR, WHO is to establish a regulatory basis for the avoidance, monitoring, and containment, before diseases expand across borders making worse public threats. In 2005, the IHR was adopted and entered into force in 2007 and State Parties are legally obliged to apply it accordingly. IHR itself is not an international agreement or a

---

24 *Ibid.*

25 World Health Organization. "Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak". https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak. Accessed on 15th of September 2020.

26 WHO Interim Guidance on Operational Considerations for Managing COVID-19 Cases or Outbreak in Aviation, 18 March 2020.

27 International Health Regulations, Handbook for the Management of Public Health Events in Air Transport 2015, updated with information on Ebola virus disease and Middle East respiratory syndrome coronavirus.

28 *Ibid.,* at 5.

29 *Ibid.*

treaty, however, it derives its binding power from an international treaty, the WHO Constitution. Article 22 of the WHO Constitution gives power to the World Health Assembly, consisting of state party representatives, to adopt IHR.[30]

The IHR contains human rights protection. Article 3 of the IHR provides that the operation of the IHR is carried out in absolute respect of the dignity, civil rights, and basic freedoms of individuals. This is an acknowledgment that public health policies that place restrictions on movement or require other activities level can often be justified for the public benefit. Human rights protection is also implied in the IHR as it specifies limitations of implementing health measures for people entering national territory.[31] The ground principle for the implementation of the measure is 'non-discriminatory treatment'.[32] However, even if the IHR undisputedly derived a legally binding power, in the previous outbreaks of Avian Flu, SARS, and EVD, countries involved in acts that may have breached the IHR without experiencing significant repercussions. One of the legal barriers is that the IHR does not include a compulsory dispute resolution process or implementation procedure.[33] To this, it is inevitable to look at other instruments to strengthen the IHR observant.

Cooperation and coordination of ICAO and WHO is one of the Aeropolitical issues in the world after COVID-19.[34] In 1944, ICAO was formed to promote secure and orderly progress in the field of international civil aviation. It sets the required standards and regulations for aviation security and safety. With 191 parties to the Chicago Convention on International Civil Aviation 1944, which is a legally binding international instrument. Article 14 of the Convention titled "Prevention of Spread of Disease" encourages contracting States to take effective measures to prevent the spread of communicable diseases and to collaborate with other relevant agencies to this end. Article 14 stipulates that:

> *"Each contracting State agrees to take effective spread of disease measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties."*

ICAO constantly state's conformity with the SARPs, governed in 19 annexes. Relevant annexes of Chicago Convention 1944 for preventing the spread of communicable diseases are Annex 6 Operations; Annex 9 Facilitation; Annex 11 Air Traffic Services; Annex 14 Aerodromes,

---

30 Article 22 of the Constitution of the World Health Organization 1946.

31 Article 31, 32, and 40 of the International Health Regulation.

32 Article 42 of the International Health Regulation.

33 Wilson, Kumanan (*et.al.)*. "Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic", *Health Policy and Planning*, vol. 25, no. 6, 2010, pp. 505-509, at 507.

34 Macilree, John and David Timothy Duval. "Aeropolitics in a Post-COVID-19 World". *Journal of Air Transport Management*, vol. 88, 2020, pp. 1-4, at 3.

Procedures for Air Navigation Services – Air Traffic Management; and Annex 18 - Technical Instructions for the Safe Transport of Dangerous Goods by Air.

The IHR is 'endorsed' under Annex 9 Chicago Convention 1944, adding its binding force on the context of international aviation. According to Paragraph 8.12 of Annex 9, states are also obliged to adhere to WHO's health provisions. Paragraph 2.4 of Annex 9 Contracting States shall not make a measure that may interfere air services, for public health purposes at any international airport unless such measure is taken in compliance with the World Health Organization's International Health Regulations 2005,[35] Annex 9 Paragraph 2.4 recommends that:

> *"In accordance with the International Health Regulations of the World Health Organization, Contracting States should not interrupt air transport services for health reasons. In cases where, in exceptional circumstances, such service suspension are under consideration, Contracting States should first consult with the World Health Organization and the health authorities of the State of occurrence of disease before taking any decision as to the suspension of air transport services."*

To this, paragraph 8.17 and 8.19 of Annex 9 says that States are expected to develop a national facilitation program and corresponding oversight committee with regard to communicable diseases.

Annex 9 is based on 10 articles in the Chicago Convention authorizing the civil aviation entities to comply with regulations regulating the inspection of aircraft, freight, and passengers by customs, immigration, agricultural, and public health authorities.[36] The Facilitation SARPS rooted from norms of landing at customs airport;[37] entry and clearance regulations;[38] prevention of spread of diseases[39]; facilitation of formalities;[40] customs and immigration procedures;[41] customs duty[42]; documents carried in aircraft;[43] cargo restrictions[44]; adoption of international standards and procedures;[45] and departures from international standards and procedures.[46]

The SARPS has its legally binding nature from Article 37 of the Chicago Convention 1944 which gives an obligation to each state party to collaborate in securing the highest practical degree of uniformity in standards, regulations, procedures, and organizations in relation to airways and auxiliary services. ICAO's SARPs, which mostly deal with safety and security issues, is the instrument to achieve such uniformity. States obliged to follow SARPs, even an exit clause exit under article 38 Chicago Convention 1944 which mentions that should state find it difficult to comply with SARPS, the state has to give notification of such fact to the ICAO Council, no later than sixty days. State must explain any differences and any changes between the national laws and activities and the SARPs in the notification for ICAO.

---

35 Annex 9 to Chicago Convention 1944 – Facilitation.

36 ICAO. "Security and Facilitation". https://www.icao.int/Security/FAL/ANNEX9/Pages/default.aspx. Accessed on 15th of September 2020.

37 Article 10 of Chicago Convention 1944.

38 Article 13 of Chicago Convention 1944.

39 Article 14 of Chicago Convention 1944.

40 Article 22 of Chicago Convention 1944.

41 Article 23 of Chicago Convention 1944.

42 Article 24 of Chicago Convention 1944.

43 Article 29 of Chicago Convention 1944.

44 Article 35 of Chicago Convention 1944.

45 Article 37 of Chicago Convention 1944

46 Article 38 of Chicago Convention 1944

ICAO Council Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken;[47] Under the Chicago Convention 1944, there are several norms by which State Parties of the Convention are placed under an obligation to conform with the international requirements adopted by ICAO in the form of SARPs. In certain cases, decisions from the ICAO Council may be the resort if there is a dispute regarding the norms interpretation of the Chicago Convention 1944.

The following articles are contained in Chapter VIII)of the Convention and may be reviewed in this context, with each applicable to the circumstances or conditions of non-conformity of state to SARPs: Articles 54 (j), 54 (k), Article 84, Article 86 and Article 88 of the Chicago Convention 1944. Under Article 54 (j) of the Chicago Convention 1944, The ICAO Council adopted an accountability and disclosure protocol for the Convention with regard to serious enforcement violations with respect to safety requirements and recommended procedures under SARPs. This prescribes that the inability of a State to comply with the relevant ICAO Council determinations or guidelines must be made publicly available. Article 54 (k)of the Chicago Convention 1944 further specifies that breaches of the Convention by a Member State shall be submitted to the Triennial Assembly of the ICAO by the Council if no effective action is taken by the State within a suitable period of time following the notification of a violation.

Where, through negotiation, any dispute between two or more Contracting States relating to the interpretation or implementation of the Chicago Convention 1944 and its Annexes cannot be resolved, the ICAO Council shall rule on the application of the disagreement of any State concerned. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the International Court of Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.[48] On consideration by the Council, any state involved in the case is banned to use its voting rights to decide. So far, since ICAO was established in 1944, there have been five disputes that have been settled under Articles 84 and 85 of the Chicago Convention1944.

If the Statute of the International Court of Justice has not been adopted by any Contracting State Party to a dispute in which the decision of the Council is appealed and the Contracting States Parties to the dispute are unable to agree on the appointment of an arbitral tribunal, each of the Contracting States Parties to the dispute shall nominate a single arbitrator to appoint an umpire. Any arbitral tribunal established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural

[47] Article 54 (l) of Chicago Convention 1944.

[48] Article 84 of Chicago Convention 1944.

questions in the event of any delay which in the opinion of the Council is excessive.

If one of the parties to the dispute fails to appoint an arbitrator within a period of three months from the date of the appeal, the President of the Council shall appoint the arbitrator on behalf of that State from the list of competent and available persons maintained by the Council. If the arbitrators are unable to agree on an umpire within thirty days, the President of the Council shall appoint an umpire from the list previously referred to. An arbitral tribunal is then collectively appointed by the arbitrators and the umpire. Any arbitral tribunal created shall resolve its own procedure and give its decisions by a majority vote, provided that, in the event of any delay which is unreasonable in the opinion of the Council, the Council may determine procedural issues.

Unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

The Chicago Convention 1944 gives the ICAO Assembly power, in Article 88, to impose a penalty for non-compliance by a member state. The ICAO Assembly will suspend the voting power in the ICAO Assembly and in the ICAO Council of any of its members. The Assembly itself contained entirely the ICAO Member States who assembles a minimum of once every three years then is arranged by the ICAO Council at an appropriate period and place. Upon the call of the ICAO Council or at the demand of a minimum of 1/5 of the whole number of ICAO members, an 'extraordinary' meeting of the ICAO Assembly can be held at any time.

D. COLLABORATIVE ARRANGEMENT FOR COMBATING COVID-19 AND AIRLINES LIABILITY

Collaborative Arrangement for the Prevention and Management of Public Health Events in Civil Aviation (CAPSCA) exists to deter and control the transmission of communicable diseases that cause a public health pandemic. As a multi-sector initiative, CAPSCA promotes coordination and cooperation between all stakeholders, including the public health and aviation sectors. CAPSCA supports States to adopt and meet with WHO, IHR 2005, the applicable ICAO requirements and recommended practices. CAPSCA is based on the need to resolve the threats and risks associated with infectious diseases impacting aviation, work is also important for the control of other aviation-relevant public health emergencies.

Both governments and international organizations can play a major role in combating COVID-19 and its new virus variants by preventing and minimizing the spread of COVID-19 via air transport. Cooperation and teamwork would necessarily entail such an endeavor. Funding, particularly for developing countries and the procurement of essential goods for them, will be a key area of support. Air transport would be playing a key role in this endeavor in this crisis.

The case with COVID-19 was distinct from previous outbreaks of the pandemic of SARS and avian flu. The world was not warned of the epidemic in advance and the

alert gave us little chance to plan and localize the virus. The COVID-19 situation was different from earlier outbreaks of SARS and the Avian Flu pandemic. The world had not been warned in advance about the outbreak and the warning gave us no opportunity to prepare and localize the virus. The WHO had leaned on the influenza epidemic of the 20th century, as in 2003 WHO proposed that the world should take advantage of the incremental mechanism of adaptive mutation of the virus in response to a pandemic threat and introduce early action with antiviral medicines, accompanied by other public health initiatives. But, in fact, states have evidently struggled to take advantage of this with the COVID-19 pandemic.

Governments, carriers, and airport operators were unaware of the early circumstances of COVID-19, allowing the virus to spread exponentially. In this current scenario, with the new COVID-19 version cases in the United Kingdom and Germany, luckily airlines have been more trained and have already taken the requisite steps to avoid the worst situations in the world. The commitment of complete disclosure amongst countries and organizations engaged in reacting to the possibility of COVID-19 virus mutation helps more stringent measures to be implemented by the aviation industry. Technology is possible for tackling an epidemic around the world from an air transport perspective, as States will find it increasingly easier to enforce steps after they have been used during the SARS crisis, particularly when both ICAO and IATA have adopted an exhaustive program of action since the SARS crisis exploded. As the SARS crisis has demonstrated, both organizations are now coordinating closely with the WHO through this crisis.

In the last SARS outbreak, The Medical Advisory Group of IATA has partnered with the WHO to create recommendations for check-in officers, cabin crew, cleaning and maintenance workers. A systematic solution to a future epidemic of communicable disease has also been put into motion by ICAO. at the 35th Session of the ICAO Assembly, in 2004, adopted Resolution A 35–12 for the protection of the health of passengers and crews and prevention of the transmission of communicable disease by international travel. It notes that the safety of the health of passengers and crews on international flights is an important part of safe air travel and that conditions should be in place to ensure that passengers and crews are protected in a timely and cost-effective manner.[49]

The Council was asked by this Resolution to review the current Standard and Recommended Practices (SARPs) of the related Annexes to the Chicago Convention and, where appropriate, to implement new SARPs, while recalling institutional arrangements to coordinate the activities of the Contracting States and other members of the international civil aviation community.[50]

From the airlines side, international law governs liability of air carriers mainly under two big treaty systems. The Warsaw

[49] Art. 1 A35-12: Protection of the health of passengers and crews and prevention of the spread of communicable disease through international travel, Resolutions Adopted at the 35th Session of the Assembly October 2004.

[50] *Ibid.,* Art. 2.

Convention 1929[51] and its amendments called 'Warsaw System' consists of the unification of rules applicable to the international carriage. Another system is the 'Montreal' system under the newer and simplified system under Montreal Convention 1999.[52] The two instruments mainly focus on liability of airlines conducting international flights for damage suffered in the event of a passenger's death or bodily injury. There is a potential relation between the COVID-19 transmission cases and the existence of an air carrier's liability for the safety of its passengers. The 'accident' definition according to the Conventions in governing the liability of the airline has a special and distinct significance referring to the liabilities of some types of airlines. The word 'accident' leaving the door was not specified by the Conventions making it open for interpretation by the court. According to a case between Air France v. Saks,[53] 'accident' terminology in the Warsaw Convention 1929 has several criteria: the event must be 'unexpected' or 'unusual' and happening that is external to the passenger'. In interpreting the term 'accident', It is not enough that the claimant gets injured because of his internal reaction to the usual, normal, and expected aircraft operation.[54] Saks is the leading case which was subsequently followed by many courts outside the United States of America. Those courts applied Saks's requirements to determine whether an event can be regarded as an 'accident' under the Warsaw System.[55]

Air passengers are placed with many other passengers in a closed space where the concept of social distance can be hard to be implemented effectively and considering the fact that COVID-19 is easily transmittable. The question arising here is whether to apply the requirements to the event where passengers get infected by COVID-19 infection post-flight. Whether the event that caused disease transition can be regarded as an 'accident' because satisfying the Sacks criteria: external, unexpected, or unusual.

The liability of airlines then relies on court interpretation. However, it is important to note that even though COVID-19 infection is a bodily injury for passengers, the very fact that a passenger is contaminated with COVID-19 during a flight does not actually mean that an 'accident' happens. As the vaccine is found, and the fact that WHO declared COVID-19 as PHEIC, getting infected while using air transport should be expected. With WHO, ICAO, and IATA, flying with COVID-19 threat can also eliminate the element of 'unexpected' and 'external' to a passenger. Study shows that, even after imposing the strictest measures, risk of COVID-19 spread can still exist at airports.[56] So, the risk and awareness of the COVID-19 threat are now a 'New Normal'.

---

51 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929.

52 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention 1999.

53 Air France v. Saks, the United States Supreme Court 1985

54 Abeyratne, Ruwantissa. *Aviation, and International Cooperation: Human and Public Policy Issues*. New York/Dordrecht/ London: Springer, 2015, at. 233.

55 Naboush, Eman and Raed Alnimer. "Air Carrier's Liability for the Safety of Passengers during COVID-19 Pandemic". *Journal of Air Transport Management*, Vol. 89, 2020, pp. 1-9, at 2.

56 Nakamura, Hiroki and Shunsuke Managi. "Airport Risk of Importation and Exportation of the COVID-19 Pandemic". *Transport Policy*, vol. 96, 2020, pp. 40-47, at 47.

E. CONCLUSION

The ongoing global health crisis of COVID-19 forced the aviation industry to adjust quickly to provide the safest air service for its passengers.[57] The disruptions caused by the COVID-19 pandemic could have a much longer impact on the aviation sector than the duration of the pandemic itself. Risk aversion and self-imposed social distancing can alter current trends and the user way of traveling by air.[58] Air transport is a significant facilitator in COVID-19 events, while domestic COVID-19 distribution contributes to other modes of transport, including trains and buses.[59]

The global business situation of aviation suffers serious results on the travel banning, causing negative economic growth. When air travel saw a drastic decline in demand, there was a major loss of revenue. The closing of several industries, reducing potential expenditure and wages, will be a direct corollary of this pattern. COVID-19 caused a serious problem in international aviation. Instigated by travel restrictions, airlines suffered revenue plummet forcing them to liquefy their assets, even going bankrupt.[60]

ICAO state parties, WHO and IATA, now show coordinated effort on ensuring the health of passengers and crew on the grounds that it is important to prevent the transmission of COVID-19 as a communicable disease within the aircraft. However, unlike the SARS and Avian Flu Pandemic, aviation community unpreparedness persisted in the early stage of pandemic, caused by the belated report of the COVID-19 outbreak. As the situation is deteriorating, Airlines take the wave of hits, due to its nature as the speediest means of transportation. To that, several International Regulations on Prevention of Covid-19 Transmission by Mean of International Aviation established by WHO, ICAO as well as Regulation under Warsaw 1929 System and Montreal 1999 are New Normal Aviation Safety are mutually strengthening each other position as a legally binding instrument. Even if, IHR undisputedly derived a legally binding power, countries involved in acts that may have breached the IHR without experiencing significant consequences. One of the legal barriers is that the IHR does not include a compulsory dispute resolution process or implementation procedure. However, IHR is strengthened by Annex 9 as SARPs for member states of ICAO. Under Annex 9 Contracting States shall not implement health measures upon aircraft entry, for public health purposes at any international airport unless such measure is taken in compliance with the World Health Organization's International Health Regulations 2005. Annex 9 is based on 10 articles of the Chicago Convention 1944 authorizing the civil member state to comply with regulations regulating the inspection of aircraft, freight, and passengers by customs, immigration,

---

57 Serrano, Francisco and Anton Kazda. "*The Future of Airports Post COVID-19". Journal of Air Transport Management,* vol. 89, 2020, pp. 1-10, at 2.

58 Abate, Megersa (*et.al.)*. "Government Support to Airlines in the Aftermath of the COVID-19 Pandemic". *Journal of Air Transport Management,* vol. 89, 2020, pp. 1-15, at 12.

59 Lau, Hien (*et al.)*. "The association between International and Domestic Air Traffic and The Coronavirus (COVID-19) Outbreak". *Journal of Microbiology, Immunology, and Infection,* vol. 53, no. 3, 2020, pp. 467-472, at 468.

60 Dube, Kaitano (*et.al.)*. "COVID-19 Pandemic and Prospects for Recovery of The Global Aviation Industry". *Journal of Air Transport Management,* vol. 92, 2021, at 1-2.

agricultural, and public health authorities. Under the Chicago Convention 1944, there are several norms by which State Parties of the Convention are placed under an obligation to conform with the international requirements adopted by ICAO in the form of SARPs. In certain cases, decisions from the ICAO Council may be the recourse if there is a dispute regarding the norm's interpretation of the Chicago Convention 1944.

REFERENCES

Books

Abeyratne, Ruwantissa. *Aviation, and International Cooperation: Human and Public Policy Issues*. New York, Dordrecht, London: Springer, 2015.

_____. *Convention on International Civil Aviation: A Commentary.* New York, Dordrect, London: Springer, 2013.

Dierikx, Marc. *Clipping the Clouds: How Air Travel Changed the World: How Air Travel Changed the World*. London: Praeger, 2008.

Levinson, Jay and Granot, Hayim. *Transportation Disaster Response Handbook*. New York: Academic Press, 2002.

Journals

Abate, Megersa (*et.al.)*. "Government Support to Airlines in the Aftermath of the COVID-19 Pandemic". *Journal of Air Transport Management,* vol. 89, 2020, pp. 1-15.

Dube, Kaitano (*et.al.)*. "COVID-19 Pandemic and Prospects for Recovery of The Global Aviation Industry". *Journal of Air Transport Management,* vol. 92, 2021.

Jacobs, Lesley A. "Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto". *Law & Society Review,* vol. 41, no. 3, September 2007, pp. 511-552.

Lau, Hien (*et al.)*. "The association between International and Domestic Air Traffic and The Coronavirus (COVID-19) Outbreak". *Journal of Microbiology, Immunology, and Infection,* vol. 53, no. 3, 2020, pp. 467-472.

Macilree, John and David Timothy Duval. "Aeropolitics in a Post-COVID-19 World". *Journal of Air Transport Management*, vol. 88, 2020, pp. 1-4.

Martins, Nelson Rodrigo da Silva. "An Overview on Avian Influenza". *Brazilian Journal of Poultry Scienc*e, vol. 14, no. 2, 2012, pp. 71-87.

Naboush, Eman and Raed Alnimer. "Air Carrier's Liability for the Safety of Passengers during COVID-19 Pandemic". *Journal of Air Transport Management*, Vol. 89, 2020, pp. 1-9.

Nakamura, Hiroki and Shunsuke Managi. "Airport Risk of Importation and Exportation of the COVID-19 Pandemic". *Transport Policy*, vol. 96, 2020, pp. 40-47.

Olsen, Sonja J. (*et.al*.). "Transmission of the Severe Acute Respiratory Syndrome on Aircraft". *The New England Journal of Medicine,* vol. 18, 2003 pp. 2416-2422.

Serrano, Francisco and Anton Kazda. "*The Future of Airports Post COVID-19". Journal of Air Transport Management,* vol. 89, 2020, pp. 1-10.

Tejpar, A. L. I. and S. J. Hoffman. "Canada's violation of international law during the 2014–16 Ebola

Outbreak". *Canadian Yearbook of International Law/Annuaire canadien de droit international*, vol. 54, 2017, pp. 366-383.

Wilson, Kumanan (*et.al.)*. "Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic", *Health Policy and Planning*, vol. 25, no. 6, 2010, pp. 505-509.

Other Documents:

Centers for Disease Control and Prevention (CDC), 2004, "Fact Sheet: Basic Information about SARS", https://www.cdc.gov/sars/about/fs-SARS.pdf.

David P. Fidlerh, "SARS and International Law", https://www.asil.org/insights/volume/8/issue/7/sars-and-international-law.

IATA, 2003, "Airlines Refine Battle Plans to Fight SARS More Government Action Needed", https://www.iata.org/en/pressroom/pr/2003-04-24-02/.

ICAO. "Security and Facilitation", https://www.icao.int/Security/FAL/ANNEX9/Pages/default.aspx.

WHO Guidance for the Use of Annex 2 of the International Health Regulations 2005.

WHO, "Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak" https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak.

World Health Organization, "Cumulative Number of Reported Probable Cases of Severe Acute Respiratory Syndrome (SARS)", https://www.who.int/csr/sars/country/2003_04_22/en/.

World Health Organization, "Current WHO phase of pandemic alert (avian influenza H5N1)", https://www.who.int/influenza/human_animal_interface/h5n1phase/en/.

World Health Organization, "Influenza (Avian and other zoonotic)", https://www.who.int/news-room/fact-sheets/detail/influenza-(avian-and-other-zoonotic).

World Health Organization, "SARS (Severe Acute Respiratory Syndrome)", https://www.who.int/ith/diseases/sars/en/.

Legal Documents:

Air France v. Saks, the United States Supreme Court 1985.

Annex 9 to Chicago Convention 1944 – Facilitation.

Chicago Convention 1944.

Constitution of the World Health Organization, 1946.

Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention 1999.

Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929.

Document A35-12: Protection of the health of passengers and crews and prevention of the spread of communicable disease through international travel, Resolutions Adopted at the 35th Session of the Assembly October 2004.

ICAO Issues Guidelines Regarding SARS, PIO 07/03, Montreal, 02 May 2003.

International Health Regulations, Handbook for the Management of Public Health Events in Air Transport 2015, updated with information on Ebola virus disease and Middle East respiratory syndrome coronavirus.

WHO Interim Guidance on "Operational considerations for managing COVID-19 cases or outbreak in aviation" 18 March 2020.