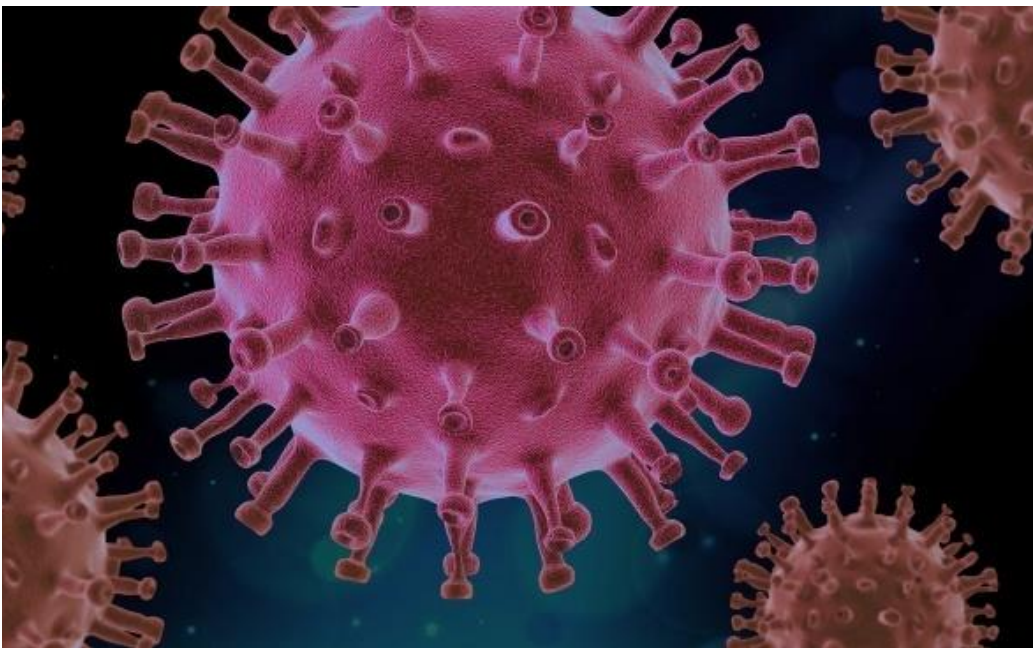




British Institute of  
International and  
Comparative Law

# COVID-19 and International Law: What went wrong and what can we learn from it? Philippe Sands in conversation with Gian Luca Burci





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Comparative Law**

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# Summary

The British Institute of International and Comparative Law (BIICL) held a live [webinar: 'COVID-19 and International Law: What went wrong and what can we learn from it?'](#) on 16 April 2020. The webinar featured a conversation between the award-winning author and international lawyer [Philippe Sands QC](#), and the international health law expert and WHO former legal counsel [Gian Luca Burci](#) to explore what may have gone wrong, the lessons to be learned, and future institutional and legal changes needed. The event was convened by [Constantinos Yiallourides](#), Arthur Watts Research Fellow on the Law of the Sea, BIICL and [Kristin Hausler](#), Dorset Senior Research Fellow and Director of the Centre for International Law, BIICL. Dr Yiallourides acted as moderator of the live-stream. This post-event report provides a summary of the discussion and synthesises some of the main conclusions. It is divided into two parts according to the format of the event: the first part summarises the exchanges between Professor Sands and Professor Burci and the second includes the relevant questions that were submitted by the audience and addressed by the two speakers during the event. BIICL wishes to thank Professor Sands and Professor Burci, and, indeed, all those attending the event for their support.

# Philippe Sands in conversation with Gian Luca Burci

- 1) The discussion started with a brief overview of the [International Health Regulations \(IHR\)](#), the legal instrument that regulates the way states prepare for and respond to health emergencies, how the IHR operate, or how should they have operated in the circumstances the world found itself in at the end of 2019. Burci explained that the IHR of 2005 is the latest version of a long history of international cooperation in the field of global health, particularly concerning the prevention and control of epidemics. The [World Health Organization \(WHO\)](#) itself adopted the IHR in 1951 and were subsequently revised several times. According to Burci:

*The current version [of the IHR] is very contemporary and quite revolutionary... It does not apply to an exhaustive list of diseases. It covers any event that can spread disease internationally, it can be a nuclear accident, it can even be an act of bioterrorism. The IHR are based on a few principles: a) joint approach to surveillance, to detect quickly if something is happening; b) To have a system of alert, to alert the world that a certain stage of risk has been reached, and c) to guide a coordinated response by delegating to WHO the authority to give recommendations on what states should do to prevent, contain and control the event.*

- 2) In response to a question by Sands, Burci went on to explain that Article 6 of the IHR enshrines a legal obligation incumbent upon parties to notify WHO 'as soon as they become aware of a number of events.'<sup>1</sup> Specifically, states are legally obliged to notify WHO when they detect a health event that meets certain characteristics: unusual, particularly lethal, next to an international border. If these and other characteristics are met, they must notify WHO without delay and then continue to cooperate while providing data and information on what they are doing and what their findings are. Burci suggested that there is enough evidence to suggest that local authorities in Wuhan knew, or should have known the rising risks, earlier than 31st December 2019 - when they first notified WHO about the outbreak of the novel coronavirus.
- 3) Sands asked if there is any mechanism available which allows WHO, if it suspects something is happening, even, before a notification has taken place, to intervene. Burci answered in the affirmative pointing to the possibility under IHR to use non-state sources such as internet-based sources, newspapers, anything that may provide hints of a health

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<sup>1</sup> Article 6 of IHR provides:

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.
2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.

event (Article 9, IHR).<sup>2</sup> WHO must ask the state in question to verify and report back (Article 10, IHR).<sup>3</sup> That is an obligation under the IHR. If for any reason, the state in question does not comply, WHO can put its information on the web to make it public, even against the will of the state concerned. 'That is a fairly powerful function', according to Burci. Yet, probably because of the level of internet control in China, this did not work. When the notification for a health event is received, it triggers a dynamic process: on the one hand, between WHO and the state that notifies to try to find more about the characteristics of the event, and, on the other hand, between WHO and other states. WHO kept publicising notices reflecting the knowledge WHO had at that particular time. Perhaps the most controversial aspect is at what exact point WHO knew, or should have known, that there was human to human transmission and, hence, whether this virus was getting out of control.

- 4) On a relevant question posed by Sands, specifically as to whether the test of human to human transmission constitutes a 'catalyst for further actions to be taken', Burci responded that 'it depends on the context' and that whilst 'no one size fits all, indicators of a respiratory disease, like a coronavirus, would certainly be a test' because is airborne and spreads very easily. In Burci's view, based on the chronology of events, WHO acted 'fairly quickly and quite diligently on the basis of the information it had at the time'. He added that this is not a WHO problem, is a problem of design of the IHR: the formal health alert under the IHR is known as [Public Health Emergency of International Concern \(PHEIC\)](#). That implies that the event is already 'sufficiently acute and probably already spreading internationally'. But until that point (i.e. until it is declared as a PHEIC), it may be too late. In Burci's view:

*Even though WHO made a number of alerts and analyses, if the IHR were more context-sensitive (if they had, for example, a step of intermediate alerts) probably a more formal alert could have been given earlier and with more chances of success than when the disease was already spreading outside China.*

- 5) Sands then read Article 12(2) of the IHR:

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<sup>2</sup> Article 9 of IHR provides:

*1. WHO may take into account reports from sources other than notifications or consultations and shall assess these reports according to established epidemiological principles and then communicate information on the event to the State Party in whose territory the event is allegedly occurring. Before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10. To this end, WHO shall make the information received available to the States Parties and only where it is duly justified may WHO maintain the confidentiality of the source. This information will be used in accordance with the procedure set forth in Article 11.*

<sup>3</sup> Article 10 of IHR provides:

*1. WHO shall request, in accordance with Article 9, verification from a State Party of reports from sources other than notifications or consultations of events which may constitute a public health emergency of international concern allegedly occurring in the State's territory. In such cases, WHO shall inform the State Party concerned regarding the reports it is seeking to verify. 2. Pursuant to the foregoing paragraph and to Article 9, each State Party, when requested by WHO, shall verify and provide: (a) within 24 hours, an initial reply to, or acknowledgement of, the request from WHO; (b) within 24 hours, available public health information on the status of events referred to in WHO's request; and (c) information to WHO in the context of an assessment under Article 6, including relevant information as described in that Article.*

*If the Director-General considers, based on an assessment under these Regulations, that a public health emergency of international concern is occurring, the Director-General shall consult with the State Party in whose territory the event arises regarding this preliminary determination. If the Director-General and the State Party are in agreement regarding this determination, the Director-General shall, in accordance with the procedure set forth in Article 49, seek the views of the Committee established under Article 48 (hereinafter the "Emergency Committee") on appropriate temporary recommendations.*

'So, there is', Sands added, 'an 'Emergency Committee which advises the Director-General'. The immediate question that follows concerns the chronology of events in the case of coronavirus. 'What exactly happened and when?' Burci explained that Article 12 of the IHR should be read together with the definition of a PHEIC.<sup>4</sup> There are three key criteria embedded in this definition: first, the 'extraordinary nature' of the event; second, a 'public health risk to other states', and third, one that requires a 'coordinated international response'. Burci further noted that the definition of a PHEIC is deliberately vague: it is meant to apply and adapt to a wide range of potential Earth-wide public health events, from a spread of a virus to a chemical spill in an international river that causes harm across several riparian states. To that end, there is an Emergency Committee, comprised of international experts, selected by the WHO Director-General, which provides WHO with technical advice on PHEICs. In the case of coronavirus, the committee met twice: the first time on the 22nd of January 2020 but could not reach consensus as to whether the event constituted a PHEIC. It was not until the Committee met for a second time, on 30 January 2020, that they decided that COVID-19 did constitute a PHEIC.

- 6) At this point, Sands posed a further question: 'China's notification took place on the 31st of December 2019. Yet, three weeks had passed until the committee met for the first time on the 22nd of January 2020. Why so, and did the committee get it right in not reaching a consensus at that time?' Burci responded that these are difficult questions but the narrative is that, based on China's reports, it was not clear at that time (at least not during January) that there was a sustained human-to-human transmission. For example, 'if the transmission was only limited to people that had gone into the famous 'Wet Market' in Wuhan, then it was a quite different kind of event. If it had become clearer that this 'sustained transmission was spreading like a wildfire through the community as it was, that was a different event'. In any case, even if the emergency committee could not reach a consensus on the 22nd of January, that would not prevent the Director-General to make a decision. The committee is purely advisory and the Director-General is not bound by its advice. So theoretically, the Director-General could also decide based on what he heard. But until now, and this is the sixth emergency under WHO, the Director-General has always accepted the advice from the Emergency Committee.
- 7) As to whether things could have been done differently, Burci posited that if China had notified WHO on the basis of whatever knowledge it had earlier than the 31st of December, 'that would have given quite an advance notice to the rest of the world'.

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<sup>4</sup> The term 'Public Health Emergency of International Concern' is defined in the IHR (2005) as 'an extraordinary event which is determined, as provided in the Regulations:

- i. to constitute a public health risk to other States through the international spread of disease
- ii. , and to potentially require a coordinated international response". This definition implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State's national border and may require immediate international action.

Moreover, an emergency should have been declared earlier in China. But the main thing that should have happened is other countries start preparing more quickly and early. 'That did not happen', Burci added. Many countries thought that the problem would be confined to China. But they could, and should have known (based on earlier experience, e.g. SARS) that a virus of that kind and nature, can spread internationally. Responsibility, thus, lies with the countries concerned.

- 8) Sands considered the broader interconnections between health law and other international laws and institutions. In Sands' view:

*International institutional structures and legal rules are not seamless. It's like a series of small islands. If you can go into other areas, one of the consequences immediately that one thinks of with a virus like this, is international transport and international trade in goods and movements of goods.*

There's the need to enhance the seamlessness of the relationship between the WHO on health policies, the International Civil Aviation Organization (ICAO) on international transport, and the WTO on trade in goods. Burci pointed out that the IHR were revised with these potential overlaps in mind and the need to consistent with other bodies of international law. To that end, the IHR are rooted in 'risk assessment' and 'proportional, necessary measures' to control the spread of a disease, in line with human rights and trade law principles. However, when things go so wrong, there is an immediate reaction by states to close the door to neighbours, restrict exports of protective equipment or changing tariffs resulting in supply disruptions and retaliation by other countries, under a state of panic and beyond the spirit and objective of IHR. The [Peterson Institute for International Economics](#)<sup>5</sup> pointed the irrationality of those unilateral, unregulated, uncoordinated set of restrictions. In Burci's view:

*One of the lessons of this crisis would be that in planning for the next pandemic, we need to have at least a consultative mechanism whereby states sit together and compare risk assessment, whether it is coordinated by WHO or by somebody else. But the irrationality of what is going now is so evident. I hope that wiser minds will prevail in the future.*

- 9) Next, Sands raised the issue of human rights in relation to access to vaccines, surveillance, the use of mobile apps to follow and trace people to ensure that they self-isolate or if they came in contact with certain people. What are the human rights responsibilities of organisations, such as WHO, concerning health-related issues, and who sets the rules at that level? Are the rules set by each country, or are there any global arrangements in place? Burci suggested that there may be a normative gap in this area. Human rights organisations should be given a more active role in these processes. Right after 9/11, we have witnessed a considerable erosion of human rights and liberties to a point which is now irreversible.
- 10) Sands queried whether a possible international inquiry into the COVID-19 outbreak would be required, who would be in the best place to carry out that inquiry, and what would be the principal questions that inquiry should be addressing? Burci suggested that WHO could appoint an interdependent expert committee to critically review the chronology

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<sup>5</sup> Peterson Institute for International Economics, 'How the G20 Can Hasten Recovery from COVID-19' (PIIE BR 20-1, APRIL 2020) at p.33: 'Export restrictions are classic beggar-thy-neighbor policies that throw costs of adjustment back onto international markets and exacerbate the very dynamics they were intended to prevent. Hoarding—at the individual and country levels—is rational if one expects the other to do so.'



of events and identify possible faults in the process, as WHO has done, quite successfully, in the past. Public health should continue to be the driver to achieve change. Moreover, Burci envisaged a role for the UN Secretary-General. He added, however, that:

*The most important thing is to plan for the next pandemic because the number of diseases spreading internationally are accelerating...This is our future and we may not have too long a peacetime to prepare. The hard question is what is politically realistic and effective. Strengthening the IHR, strengthening WHO but fixing some of the big [normative] gaps that go beyond that institution... Coordination on trade and travel and a political agreement on what will happen when we have a vaccine. Who will get it, at what price, who will control what is seen as a public good. How to share pathogens - because we need the virus to prepare the vaccine.*

- 11) Both Sands and Burci agreed that the spread of coronavirus is not merely a global health crisis but it has far-reaching international financial, economic, political, social and human rights consequences. A global coordinated interphase is required to address them all effectively.

# Q&A with the audience

**1) Do you think that there is likely to be a future revision of the international health regulations in light of what happened? And if so, what are the key reforms needed? Should we be incorporating sanctions into that treaty?**

Burci expressed the hope that countries will show the required political will to revise the IHR at least partly. In Burci's view, it is unrealistic to go back to the drawing board but is necessary to address certain 'design weaknesses' and fill the implementation gaps within the IHR. A required reform, for example, is to revise the current mechanism for PHEIC alerts: 'you cannot wait for an emergency'. A system of 'compliance, assessment and monitoring' should also be incorporated as part of the IHR. However, Burci did not envision the possibility of WHO becoming a sanctioning body as 'this is not part of its mission'. A 'name and shame' practice for countries that do not expose themselves to WHO's scrutiny may be equally effective in that regard, Burci added.

**2) What role does the UN Security Council have, and what role should it have, concerning the COVID-19 pandemic and future pandemics? This, especially in light of the US decision to freeze funding to WHO.**

Sands quoted the writer Harari Yuval<sup>6</sup> in saying that there are two potential routes here: the 'nationalist route' where 'we close the borders, we build walls and every country is in it for itself' or 'the internationalist route', where we have greater international cooperation and greater coordination because 'we are all in this together'. As to the role of the UN Security Council specifically, Sands said, 'there is going to have to be an enquiry'. Sands considered that the enquiry should be conducted by an 'independent group of individuals who are of impeccable independence and integrity'. International experts should provide a complete exposition, first of all, of what happened. 'Once we know what the exact facts are, we can then draw up the legal consequences' Sands added.

**3) Which is the geographical scope of application of the IHR? Are they linked to state territory or state jurisdiction?**

Burci said that the IHR is a 'genuinely global instrument'. The assumption is that the IHR are based on the exercise of jurisdiction. So, countries such as France and the UK are responsible for their overseas territories. Same for events taking place on military ships (e.g. on the [US aircraft carrier](#)). Even then, the flag state has a clear responsibility to apply the IHR. However, the exclusion of certain territories, such as Taiwan, from WHO membership, is certainly something that needs to be addressed.

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<sup>6</sup> Yuval Noah Harari, 'The World After Coronavirus' (*Financial Times*, 20 March 2020):

'In this time of crisis, we face two particularly important choices. The first is between totalitarian surveillance and citizen empowerment. The second is between nationalist isolation and global solidarity.'

**4) What are the international responsibilities of private companies in this area? WHO is already closely linked to private companies in some areas and there were criticisms of private companies rushing for Ebola medicines without full evidence of applying research protocols. How can - and should - WHO and international institutions regulate these activities.**

Burci noted that in combating a global pandemic sometimes there may be a need to develop responses in a much more compressed period. However, he was against the view that WHO is complicit with pharmaceutical companies in 'cutting corners' and adopting 'unethical approaches' and other countermeasures. Bioethical principles remain applicable in all critical trials and protocols.

**5) Can we also consider the lessons learnt from COVID-19 for other emergencies, i.e. environmental or climate change emergency?**

'This is a wakeup call', Sands responded. He added: 'If this is what happens with a single virus, the lethality of which is terrible but limited to the 1% of people who get it, what on earth are we going to do when it comes to the consequences of climate change?'. In Sands' view, 'if we are unable to get our act together as a global community on this, what prospect for something like climate change?' On a brighter note, Sands expressed the hope that the current lockdown 'will concentrate minds away from the kind of knee jerk response from President Trump into a more reflective response: What are the lessons to be learned for what comes next? 'This certainly calls for greater international cooperation and coordination'. Burci agreed and added that 'early action and preparedness' is what the world needs at the moment, and one such form of preparedness involves investing in the public health service. 'Not just profit logic, but meaningful preparation because the next event, sooner or later, will come'. That applies to diseases as much for climate change or other potential natural disasters.

**6) Is there a legal basis for the US to halt WHO funding and what are the legal consequences of President Trump's decision? As for dispute settlement: Article 56 of the IHR provides for disputes between States to be resolved by arbitration and other routes. Do you see a role for Art 56 dispute settlement to play in this case?**

Both Sands and Burci agreed that there is no legal basis for the unilateral decision by the US to stop funding WHO and that the US is responsible for its financial contributions as a matter of international law. As for dispute settlement, Burci noted that Article 56 of the IHR is quite generic and has never been applied.<sup>7</sup> It covers a typical peaceful means of settlement, optional arbitration. And no country has so far opted for arbitration under the IHR. Nevertheless, Article 56 of the IHR gives authority to the Director-General of WHO to offer its good offices to resolve

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<sup>7</sup> Article 56, IHR provides:

1. In the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it.

2. In the event that the dispute is not settled by the means described under paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it.

disputes arising between parties to IHR. But this has never been used either. As for the lessons learned, Burci suggested that health-related issues are time-sensitive and do not lend themselves to disputes that can be resolved in five- or six-years' time.

## Conclusory Remarks

Concluding, Sands noted that the story of coronavirus' spread raises important questions of criminality and state responsibility but now is not the moment to be pointing the finger of blame at individual governments or individual politicians: 'We have to get ourselves out of this difficulty as people are dying...At some point, there will be a reckoning. But now we need solidarity'. Sands referred to the [Henry Jackson Society Report](#) which calls for legal proceedings against China, but he suggested that it may be too early, at this point, to be engaging in that sort of conversation. At some point, issues of state responsibility will find their way into legal discussions. But at present, Sands added: 'there is a need to step back and ask ourselves the question as part of the international law community: What is the most socially useful thing we can do to stop this from happening again? That seems to be the central question.'

***Please note that this report has not been reviewed by Professor Sands and Professor Burci***