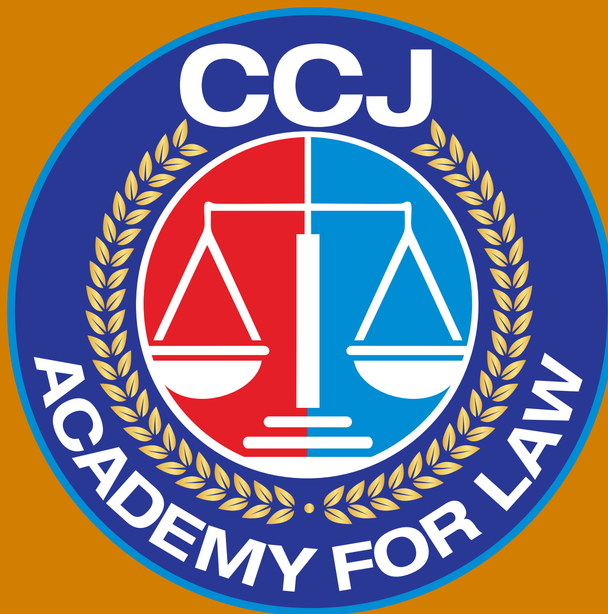
THE CCJ ACADEMY FOR LAW'S BIENNIAL CONFERENCE SERIES™

THE 2020 WEBINAR SERIES FOR THE 6TH BIENNIAL CONFERENCE:

LEGAL DIMENSIONS ARISING FROM THE COVID-19 PANDEMIC



Edited by

Winston Anderson

Judge of the Caribbean Court of Justice
Chairman of the CCJ Academy for Law

Legal Dimensions Arising From The COVID-19 Pandemic

The CCJ Academy for Law's
Biennial Conference Series

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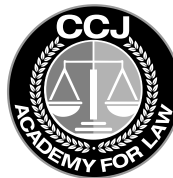

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The CCJ Academy for Law is grateful to the many persons who have made this publication possible. Chief among these are the panellists who participated in our memorable Webinar held on 19 May 2020 and which was dedicated to examining legal aspects arising from the COVID-19 pandemic. The presentations were so rich and diverse that the decision was taken, soon after the event, to collect and publish the various papers. We are thankful that the presenters fully cooperated in reducing their verbal contributions to the written form that now forms the basis of this book.

The Academy also expresses its gratitude to Attorneys-at-Law Abdul RF Mohammed, Renelle D Maharaj and Laurissa R Maharaj, who assisted with producing a summary of the event, and Ms Susan Medina, LL.B, Executive Assistant (Judicial) and Secretary of the CCJ Academy for Law, for her usual tireless efforts.

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Finally, the Academy extends sincere thanks to the producers, Paria Publishing Co Ltd who undertook the task of production, and to Professor Bridget Brereton for her usual excellence in proofreading the manuscript. Any errors that remain are to the account of the Academy.

The Hon Justice Winston Anderson

Judge of the Caribbean Court of Justice
Chairman of the CCJ Academy for Law
November 2020

STATEMENT OF
MS JACQUELINE GRAHAM
CCJ REGISTRAR AND CHIEF MARSHAL

Greetings to everyone from the Caribbean Court of Justice located in Port of Spain, Trinidad and Tobago.

Welcome to the 6th Biennial Conference of the CCJ Academy for Law—the first ever virtual meeting of the Academy being held under the extraordinary circumstances of the COVID-19 pandemic.

The Caribbean Court of Justice was inaugurated on 16 April 2005 and presently has a Bench of seven judges presided over by CCJ President, the Honourable Mr Justice Adrian Saunders. The CCJ has an Original and an Appellate Jurisdiction and is effectively, therefore, two courts in one.

In its Original Jurisdiction, the CCJ is an international court with exclusive jurisdiction to interpret and apply the rules set out in the Revised Treaty of Chaguaramas and to decide disputes arising under it.

In its Appellate Jurisdiction, the CCJ is the final court of appeal for criminal and civil matters for those countries in the Caribbean which have acceded to this jurisdiction: at present, four states access the Court in its Appellate Jurisdiction, Barbados, Belize, Dominica and Guyana.

The Court has two educational arms, the Caribbean Association of Judicial Officers (CAJO) and the CCJ Academy for Law. CAJO, founded in 2009, brings together the region's Heads of Judiciaries, Justices of Appeal, Judges, Masters, Magistrates, Registrars, Tribunal Members, Court Administrators, and other judicial officers.

The CCJ Academy for Law, established in 2010, brings together students, academics and professionals to provide informative and innovative perspectives on the rules and the roles of law, particularly International Law.

I hope you find the topics in this Conference today, discussed under the theme "Legal Dimensions Arising from COVID-19 Pandemic", stimulating and that you will tune in again to other activities of the CCJ hosted by the Academy and CAJO.

STATEMENT OF
THE HON MR JUSTICE WINSTON ANDERSON, JCCJ
CHAIRMAN OF THE CCJ ACADEMY FOR LAW

Good Morning; Good Afternoon; Good Evening; Good Night.

Hello everyone, from wherever in the world you are joining us, for this live event and welcome to the 6th Biennial Conference of the CCJ Academy for Law which, this year, takes the form of three Webinars exploring the legal issues arising from the COVID-19 pandemic.

These legal issues are global, and they are local; they pervade virtually every aspect of the ways in which we live our lives. From the international obligations of the State on whose territory the virus first appeared; to the question of equal access to therapeutics and vaccines by all states of the world; to the impact on civil rights and liberties; to the reassessment of commercial contracts; and to the administration of justice—the issues are as varied as they are significant.

We have assembled an outstanding and varied panel of jurists and public health officials to take us through a discussion of these issues. Appropriately, the presenters are, at this moment, located in several countries around the world: Barbados, Brazil, Guyana, Israel, Jamaica, Singapore, Turkey, United Kingdom, United States, and here in Trinidad.

We can only hope that the technology will, for the next few hours, be COVID-19 compliant and so allow you to hear from the presenters without too much disturbance or interruption.

The CCJ Academy for Law is the educational arm of the Caribbean Court of Justice. The President of the Court, the Hon. Mr Justice Adrian Saunders, is strongly supportive of this initiative. He wishes, as do I, that you find this symposium informative and enjoyable.

Thank you and welcome!

STATEMENT OF
MR ALAN WOOD, Q.C.
CHAIRMAN OF THE GENERAL LEGAL COUNCIL OF JAMAICA

The COVID-19 pandemic has brought about a new reality and it has done so in the blink of an eye. In this reality we have experienced the closing of borders, quarantines, curfews, face masks, social distancing and meetings by ZOOM. This new normal raises questions for our consideration as to the rule of law in a civilised society.

On the level of international law, is there an obligation to provide less developed states with a fair share of resources such as vaccines and other medical supplies that are necessary to combat the pandemic?

As to individual rights, what are the permissible limits to the interference with our civil liberties for our own protection and to protect others?

The pandemic has thrown the world into economic recession—what is the legal effect on commercial obligations, should they be treated as merely suspended or wholly terminated?

As to the administration of justice, the pandemic has disrupted the operation of the courts—what are the adjustments necessary to ensure a resumption while affording a fair hearing in this new normal?

I look forward to the presentations that will address these and other issues and I thank the CCJ Academy for inviting the General Legal Council to partner in hosting this 6th Biennial Conference.

INTRODUCTION

The year 2020 saw the CCJ Academy for Law host its 6th Biennial Conference. Instead of the usual invitation for attendees to participate at a physical venue for the conference, attendees were invited to participate online. This year's conference was intended to consist of three online symposia, the first of which was held on May 19, 2020. The focus of this symposium was on the very issue which led to the hosting of this Conference in a manner that had never before been adopted: the 2019 Novel Coronavirus (COVID-19) pandemic.

The Academy assembled jurists from around the world, leaders in their field, to discuss the unprecedented legal issues arising from the COVID-19 pandemic and, specifically, the issues related to:

i. International Law

ii. Civil Liberties

iii. *Force Majeure* and Commercial Contracts

iv. The Administration of Justice.

Attendees were able to view the panel discussions via video link and to present questions to the panelists and to flesh out further recommendations to mitigate the inevitable adverse effects that this pandemic presents to our global community. The presentations and the discussions which ensued are presented in this publication.

An important objective of the Webinar was to sensitise members of the profession as well as members of the public to legal problems and issues presented by the COVID-19 pandemic. An equally important goal was to galvanise action to explore solutions. The panels discussed possible legal responses to the issues, and these are collected in a series of recommendations at the end of this book.

Chapter 1

INTERNATIONAL LAW AND COVID-19

Many challenges in the arena of public international law have been brought to the forefront as a result of the COVID-19 pandemic. This panel came together to shed light on the following four issues and to make recommendations for the Community as we move forward:

(i) The nature and extent of the duty of a state on whose territory a public health emergency arises to warn other states who may be affected;

(ii) The right of nationals stranded in foreign countries to be accepted into their state of nationality;

(iii) The international human right to health; and

(iv) The international regime for equitable access to therapeutics and vaccines.

The fact that there exists a pandemic in the form of the coronavirus is clear evidence that the legal rules designed to present the spread of contagious diseases worldwide have not been successful. Justice Anderson opened the panel by examining the responsibility of the state on whose territory a virus first appears to ensure the protection of the global community. He noted that there were two historical legal principles that are relevant and can be useful: i. the duty of a state to prevent the escape of pollutants from their territory[1]; and ii. the right to health that is now enshrined in over one hundred and fifteen constitutions, after first being recognised in 1946 in the constitution of the World Health Organisation (WHO).

However, these two legal principles were not sufficient to confront the problems posed by the COVID-19 pandemic. The WHO and the World Health Assembly (WHA) had developed International Health Regulations (IHR) to particularise the responsibility of states to develop competences to recognise the emergence of contagious diseases, to provide urgent warning to the international community through the WHO, and to take other steps to contain and treat with the threat. Justice Anderson highlighted the weaknesses of the regime, particularly as regards enforcement and liability. The judge suggested several alternatives for responding to these deficiencies, including the empowerment of individuals to act in the interest of humanity.

1 Trail Smelter Arbitration (USA v Canada) (1938, 1941)

A widespread response to the COVID-19 pandemic has been the practice of all states globally to impose travel restrictions, which have indirectly affected the right to freedom of movement of an individual as recognised under international law. Dr. Martha explained that there are three dimensions to this right. The first is the right of a citizen to freely move within his country, the second being his right to leave and the third his right to return. The focus of the discussion was on the right to return. This right is spelt out explicitly in multiple sources of international law.[2] Following these provisions, the test of arbitrariness is the guiding principle to determine the circumstances under which a citizen can be deprived of the right to enter his own country. Dr. Martha observed that it appears that a country can deprive its citizen from returning, provided that it is done in a non-arbitrary way; however, the general exceptions of the ICCPR still apply. An exception will only be recognised where: i. there is a public emergency; ii. this public emergency must threaten the life of the nation; iii. it has been officially proclaimed; iv. it was strictly necessary; and v. it is non-discriminatory. This template was developed by the UN Commission on Human Rights under the Siracusa Principles in 1984.[3]

Dr. Martha pointed out two elements within this that are important and relevant to the circumstances surrounding the COVID-19 pandemic. The first is where an exception is invoked, the notion of proportionality must be observed; and the second is where the exception involves public health, the state must take into account the regulations and guidelines of the WHO. He concluded that due to the WHO's statement that the prevention of transmission can be achieved without a travel ban, countries would not be able to justify depriving their citizens of their right to return home.

States and international and regional bodies have been actively responding to the COVID-19 pandemic, including the Pan-American Health Organisation, the Regional Office of the WHO (PAHO). Mrs. Schutt-Aine pointed out the three pillars of PAHO's response: i. Save lives; ii. Protect health care workers; and iii. Slow spread. Underlying these pillars is the importance of keeping up surveillance and testing for the virus. Although there exists a legally binding instrument of international law[4] that provides for the prevention, protection against and control of disease on an international scale, heads of government within CARICOM have expressed their concern over the inequitable access to the medical supplies, such as Personal Protective Equipment (PPE) and test kits, that are necessary to carry out their obligations under this instrument.

In addressing the concern of some states that there might not be equitable access to supplies (and by extension technology) to treat with this pandemic, Dr. Hollingsworth drew attention to the flexibilities provided within the TRIPS Agreement for Member States to develop their domestic patent laws to address public health concerns by the

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2 "No one shall be deprived of the right to enter the territory of the State of which he is a national": Art. 3(2), Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS 9 European Convention on Human Rights (ECHR);"No one shall be arbitrarily deprived of the right to enter his own country": Art. 12(4), International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

3 The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 of 1985: https://undocs.org/pdf?symbol=en/E/CN.4/1985/4

4 The WHO International Health Regulations (2005) (IHR 2005)

issuance of compulsory licences.[5] Compulsory licensing allows an individual, company or government to be able to use or have access to goods or processes that are protected under a patent, without the right to or authorisation of the rights holder. The Doha Declaration[6] sought to clarify the issue that such licences can only be issued to supply the domestic market of the state. It did so by affirming the right of developing countries to grant compulsory licences and the freedom to determine the grounds for such, based on their own unique national circumstances. However, certain conditions apply. All effort must first be made by the state to obtain a voluntary licence from the rights holder. If the licence is issued, it must be non-exclusive and non-assignable. There must then be a judicial or other independent review with regards to the decision that was made. Finally, there must be adequate remuneration to the patent holder and such holder has the right to challenge the decision through the court system. This now paves the way for states to access the technologies, data, medical supplies and other inventions that are imperative for the treatment of COVID-19 cases.

5 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 UNTS 299, Arts. 30 and 31 (TRIPS Agreement)

6 World Trade Organisation, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) (Doha Declaration)

INTERNATIONAL RESPONSIBILITY FOR PUBLIC HEALTH RISKS OF INTERNATIONAL CONCERN

The Hon. Mr Justice Winston Anderson

Professor of Law

Judge of the Caribbean Court of Justice

Chairman of the CCJ Academy for Law

It is not hyperbolic to suggest that the novel coronavirus was a possible extinction level event,[7] or so it seemed to many. It was compared to the vicious Spanish influenza which, a hundred years ago, killed an estimated 50 million people worldwide and left indelible images of morgues overwhelmed with stacked un-embalmed bodies; and of towns and municipalities around the world having to resort to the use of steam shovels for digging mass graves. By contrast, the numbers generated by COVID-19 have, so far, been modest. As at the time of writing, five million persons have been infected, two-and-a-half million have recovered and less than half a million have died.[8]

Nevertheless, the highly contagious nature of the virus; the rapidity of its spread;[9] the draconian 'lockdown' and 'stay at home' measures of governments; and the compulsion to wear facial masks when unavoidably in public, have generated mass mania. When coupled with the apocalyptic imaginings locked in one hundred years of the collective unconscious, but often teased by fictional accounts of a pathogen that wipes out the world's population,[10] the global hysteria over the coronavirus has been perfectly understandable.

The practical yet existential question that remains for consideration is whether the international legal regime that exists is sufficiently robust to ensure the detection and containment of infectious diseases, so that what ought to be a local health emergency does

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7 I am grateful to Mr Samuel Bailey, Judicial Counsel at the Caribbean Court of Justice, for reading an earlier version of this paper and making comments thereon. Broadly speaking an 'extinction-level-event' is one which terminates life (at least human life) on earth.

8 See: https://covid19.who.int/:

9 The first case of the virus was reported at the end of December 2019, and within 3 months, i.e., by the end of April 2020, the virus had spread to 215 countries across the globe.

10 The books and movies produced around the concept of termination of human life by viruses include: The Stand (a Stephen King novel converted into an American horror miniseries); Outbreak (1995); I Am Legend (2007); and Contagion (2011). Day After Tomorrow (2004) details a fictional account of how climate change could be an extinction-level-event.

not become a global extinction level event. The answer is self-evidently in the negative. The evidence is that the world is currently in the throes of the COVID-19 pandemic[11] and a vaccine is not yet available. In the circumstances, it is not unreasonable to examine the applicable legal regime with a view to suggesting some further improvements that might be needed.

Regime prior to 1969

The international regime, prior to 1969, consisted of general principles of International Law drawn largely from the environmental context. In the famous Trail Smelter Arbitration of the 1930s[12], airborne pollutants from Canada caused damage to agricultural crops in the neighbouring United States. The Arbitral Tribunal held that: "… under the principles of international law… no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Incidentally, these principles were also invoked in the Chernobyl disaster (mid-1980s) and were evident in the two global conventions concluded within a month of that incident.[13]

However, that rather basic regime had several gaps as regards the obligations of States in the context of international public health threats to, for example: (i) develop public health competences; (ii) contain public health outbreaks; (iii) warn other states; (iv) restrict international travel; (v) request assistance; (vi) provide assistance; (vii) accept assistance; (viii) provide compensation; and (ix) suitably empower a global institution to act on behalf of the international community.

Current Legal Regime

There are three major legal instruments regarding global health governance applicable to the prevention, containment, and treatment of infectious diseases. These are: (i) The International Health Regulations (IHR) 2005; (ii) The Pandemic Influenza Preparedness Framework; and (iii) The Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing. Of these, the most critical is the IHR 2005 on which most attention in this paper is focussed. The three instruments are all connected directly or indirectly with the WHO about which a word must first be said.

11 A pandemic can be defined as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people." Last JM, editor. A dictionary of epidemiology, 4th edition. New York: Oxford University Press, 2001.

12 *Trail Smelter Arbitration (United States v Canada) Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).*

13 *Convention on Early Notification in case of a Nuclear Accident*; and *Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency*: both concluded in September 1986.

The World Health Organisation

The WHO has the core mandate of acting as the coordinating authority on international health issues and thus helping to give effect to the notion that the right to health is critical to the system of international human rights expressed in the Universal Declaration on Human Rights (UDHR) 1948 and the International Covenant on Economic, Social and Cultural rights ('CESCR) 1966. In the words of the preamble to WHO's Constitution: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition…." WHO has the singularly important responsibility of managing the global regime designed to prevent the international spread of diseases. In accordance with this responsibility, WHO's World Health Assembly has plenary power to adopt regulations which enter into force for all WHO Member States that do not affirmatively opt out of them within a specified time.

The Fourth World Health Assembly adopted the International Sanitary Regulations in 1951. Eighteen years later, the more generic International Health Regulations (IHR or Regulations) 1969 were adopted to deal with 'quarantinable diseases.' These Regulations were overtaken with the adoption of the IHR 2005 by the 58th World Health Assembly on 23 May 2005. IHR 2005 entered into force on 15 June 2007, and at present, are binding on 196 State Parties, including all 194 Members States of the WHO.

IHR 2005 were specifically adopted in consideration of the emergence or re-emergence of international disease threats and other public health risks, exacerbated by the growth in international travel and trade.[14] Significant momentum was generated in 2003, with the emergence of severe acute respiratory syndrome (SARS) the first global public health emergency of the 21st century. The 2005 Regulations were intended to be fully effective in combatting global infectious diseases. Article 2 states the purpose and scope of the Regulations in suitably heroic terms: "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade." Article 3 affirms that implementation of the Regulations shall be with full respect for the dignity and human rights of persons, and shall be guided by the Charter of the United Nations, by the WHO Constitution, and by the goal of their universal application for the protection of all people of the world from the international spread of disease.

14 The Foreword to the IHR 2005 (Third Edition, 2016) states: "The WHO reports that "the Forty-eighth World Health Assembly in 1995 called for a substantial revision of the Regulations adopted in 1969. In resolution WHA48.7, the Health Assembly requested the Director-General to take steps to prepare their revision, urging broad participation and cooperation in the process. After extensive preliminary work on the revision by WHO's Secretariat in close consultation with WHO Member States, international organisations and other relevant partners, and the momentum created by the emergence of severe acute respiratory the Health Assembly established an Intergovernmental Working Group in 2003 open to all Member States to review and recommend a draft revision of the Regulations to the Health Assembly."

Further, the 2005 Regulations established innovative principles and obligations that, at first sight, appear to fill most of the gaps in the pre-1969 regime. Seven such principles or obligations are worth isolating and emphasising because of their obvious relevance to the COVID-19 pandemic.

(i) Public Health Emergency of International Concern

The event which triggers the principles and obligations enshrined in the 2005 Regulations is a "public health emergency of international concern" which is defined[15] to mean "an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response." COVID-19 clearly falls within the meaning of a public health emergency concern in that it posed a public health risk to all states through the international spread of the virus. But by defining the triggering event of a "public health emergency of international concern" in such broad terms, the international regime is not limited to any specific disease or manner of transmission and is clearly adaptable to future events: "it is intended that the Regulations will maintain their relevance and applicability for many years to come even in the face of the continued evolution of diseases and of the factors determining their emergence and transmission."[16]

(ii) State Obligation to Develop Minimum Core Public Health Capacities

All States Parties are required to have or to develop minimum core public health capacities to implement the IHR 2005 effectively. Among these capacities must be the ability "to detect, assess, notify and report events" in accordance with these Regulations. Annex 1 has very detailed rules regarding the required capacities and competencies of States Parties to: conduct surveillance;[17] respond promptly and effectively to public health risks;[18] and regulate points of entry into the country.[19] These requirements are supported by several other provisions relating to the provision of assistance to developing countries.[20]

(iii) Notification of a Public Health Emergency of International Concern

A critical obligation on States Parties is the obligation to notify WHO of events occurring within their territory that may constitute a public health emergency of international concern. That obligation is situated in the context of the obligation to conduct surveillance in the detection of public health risks.[21] Annex 2 contains a detailed algorithm of the

15 Article 1, IHR 2005.

16 Foreword (supra).

17 Article 5, IHR 2005.

18 Article 13, IHR 2005.

19 Articles 19, 20, 21, IHR 2005.

20 Article 44, IHR 2005.

21 Article 5 (1), IHR 2005.

notification obligation. Notification must be within 24 hours of assessment of the event which may constitute a public health emergency of international concern;[22] following the notification the State Party is required to continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it.[23] Article 7 requires a State Party who has evidence of an unexpected or unusual public health event within its territory, "irrespective of origin or source", which may constitute a public health emergency of international concern, to provide WHO with all relevant public health information, in accordance with the notification responsibility.

(iv) WHO Determination of a "Public Health Emergency of International Concern" and issuance of "Temporary Recommendations"

The IHR 2005 contain procedures for the determination by the WHO Director-General of a "public health emergency of international concern" and the issuance of temporary recommendations, after taking account of the views of the Emergency Committee.[24] Article 12 requires that the Director-General determines, based on the information received, particularly from the State Party within whose territory the event is occurring, whether an event constitutes a public health emergency of international concern in accordance. If it is so determined, the Director-General must consult with the State Party in whose territory the event arises[25] and seek the views of the Emergency Committee on appropriate temporary recommendations. These temporary recommendations "may include health measures to be implemented by the State Party experiencing the public health emergency of international concern, or by other States Parties, regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic."[26] The temporary recommendations may be modified or extended, as appropriate, including after it has been determined that a public health emergency of international concern has ended, at which time other temporary recommendations may be issued as necessary for the purpose of preventing or promptly detecting its recurrence.[27]

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22 Article 6 (1), IHR 2005.

23 Article 6 (2), IHR 2005. The information shall include "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".

24 Established under Article 48, IHR 2005.

25 Article 12 (3) provides that "If, following this consultation, the Director-General and the State Party in whose territory the event arises do not come to a consensus within 48 hours on whether the event constitutes a public health emergency of international concern, a determination shall be made in accordance with the procedure set forth in Article 49." Article 12 (4) provides that: "In determining whether an event constitutes a public health emergency of international concern, the Director-General shall consider: (a) information provided by the State Party; (b) the decision instrument contained in Annex 2; (c) the advice of the Emergency Committee; (d) scientific principles as well as the available scientific evidence and other relevant information; and (e) an assessment of the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic."

26 Article 15 (2), IHR 2005.

27 Article 15 (1), IHR 2005.

(v) Protection of Human Rights of Persons and Travellers

It may be recalled that a fundamental principle of the IHR 2005 is that implementation of the regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.[28] This principle is further particularised in Article 32 which requires that in implementing the Regulations, States Parties shall treat travellers with courtesy and respect for their dignity, human rights and fundamental freedoms and minimise any discomfort or distress associated with such measures, including by: "…(b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and (c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes."[29]

(vi) Establishment of National IHR Focal Points and WHO IHR Contact Points

The 2005 Regulations require[30] that each State Party must designate or establish a National IHR Focal Point responsible within its jurisdiction for the implementation of IHR health measures. These Focal Points must be accessible "at all times" for communications with the WHO IHR Contact Point, which is the unit within WHO "which shall be accessible at all times for communications with the National IHR Focal Point." The establishment or designation of these contact points is intended to facilitate urgent communication between the territorial state and the WHO.

(vii) Collaboration and Assistance

States Parties to the IHR 2005 undertake to collaborate with each other, "to the extent possible", in matters of detection, assessment and response relating to public health emergencies; as well as the provision or facilitation of technical cooperation and logistical support; and the mobilisation of financial resources. There is a specific provision for collaboration and assistance in relation to the formulation of proposed laws and other legal and administrative instruments for the implementation of the Regulations. WHO is also required to collaborate in these areas[31] with States Parties, "upon request, [and] to the extent possible."[32] The required collaboration may be implemented through multiple channels, including bilaterally, through regional networks and the WHO regional offices, and through intergovernmental organisations and international bodies.

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28 Article 3, IHR 2005.

29 Ibid.

30 Article 4, IHR 2005.

31 Note, though, the absence of mention, in relation to WHO, of cooperation relating to formulation of laws and other legal and administrative provisions.

32 Article 44 (2), IHR 2005.

The other two global instruments that complete the current international law regime may be usefully mentioned at this juncture. *The Pandemic Influenza Preparedness Framework* (PIP Framework) was developed by Member States and came into effect on 24 May 2011 when it was unanimously adopted by the 64th World Health Assembly. The *PIP Framework* networks Member States, WHO, industry and other stakeholders to implement a global approach to pandemic influenza preparedness and response.

Key objectives are the sharing, through the Global Influenza Surveillance and Response System (GISRS), of influenza viruses that could cause a pandemic, and the provision of access to capacity-development and products such as vaccines. In exchange for receiving GISRS data, manufacturers pay an annual Partnership Contribution (totalling US$28 million) to WHO, and agree, under legally binding contracts, to provide vaccines, antivirals, diagnostic kits or other products to WHO at the time of the next pandemic. In this way, WHO has real-time access to approximately 10% of global vaccine production and is able to send life-saving doses to developing countries which are in need.

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation* (*Nagoya Protocol*) was adopted on 29 October 2010 in Nagoya, Japan, as a protocol to the Convention on Biological Diversity, and entered into force on 12 October 2014. The objective of the *Nagoya Protocol* is to ensure the fair and equitable sharing of benefits arising from utilisation of genetic resources with the Party providing the resources. To ensure this objective, each Party is required to take appropriate legislative, administrative or policy measures, including in relation to the rules regarding prior informed consent, especially of indigenous peoples and those possessed of traditional knowledge. Contracting Parties are required to take measures to monitor the utilisation of genetic resources after they leave a country, and at the various stages in the value-chain: research, development, innovation, and commercialisation. Parties are to encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to enter into legally binding contracts which include specific clauses including those relating to dispute settlement. Parties are required to support model contractual clauses for benefit-sharing arising from the utilisation of traditional knowledge associated with genetic resources.[33]

A study conducted by the WHO Secretariat on the public health implications of the *Nagoya Protocol* [34] found a close relationship between the Protocol and the IHR 2005 as well as the PIP Framework. The key findings of the study were that: (1) the Nagoya Protocol has implications for the public health response to infectious diseases; and (2) these implications include opportunities to advance both public health and principles of fair and equitable sharing of benefits. In the context of influenza, the possibility was highlighted that the *Nagoya Protocol* could help to bolster support for the *PIP Framework*, encourage more participation in the influenza virus-sharing system, and provide an opportunity to consider the equitable sharing of benefits arising from the use of seasonal influenza viruses.

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33 Article 19, Nagoya Protocol.

34 SECRETARIAT, "IMPLEMENTATION OF THE NAGOYA PROTOCOL AND PATHOGEN SHARING: PUBLIC HEALTH IMPLICATIONS" (Advanced copy).

Weaknesses in the Current Legal Regime

The IHR 2005 regime functioned relatively well in the WHO's response to the 2009-H1N1 influenza outbreak. WHO utilised the 2005 Regulations to create an Emergency Committee to advise the WHO Director-General; to declare a public health emergency of international concern; to issue temporary recommendations on increasing surveillance and on the need to avoid unnecessary trade, travel and human rights restrictions.

But even with the relatively successful response to the H1N1, specialists raised concerns over whether the 2005 Regulations were being implemented in the way they were intended. These concerns included the:

> "… narrow interpretations of the WHO Director-General's power to declare a public health emergency of international concern, the lack of coordinated and adequately funded global support for IHR(2005), implementation by developing countries, the relationship between the IHR (2005) and WHO's pandemic influenza alert system and the ability of countries to violate IHR (2005)'s rules on measures affecting trade, travel and human rights with relative impunity."[35]

Now, the prevalence of COVID-19 is eloquent evidence that the current regime did not work to prevent the spread of coronavirus. What went wrong? Was there a failure of administration of the system or were deficiencies more structural? It is suggested that both aspects played a significant role in failing the world and humanity in the present crisis. Fundamentally, however, the coronavirus has revealed deep-seated issues mostly connected with the reliance of the IHR system on the notion of sovereignty of States Parties.

i. Failure to Warn/Provide Timely Information to WHO and Other States

The IHR 2005 are built upon the foundational understanding that the State in whose territory a public health threat first emerges has the obligation to warn and provide timely information to the WHO and, in conjunction with the WHO, take the steps necessary to contain and mitigate the threat. A similar obligation on the territorial state exists to warn other States and to collaborate in confronting the health threat. In the latter regard the obligation goes back to the statement in *Trail Smelter Arbitration*[36] of international responsibility for trans-boundary pollution and its implicit adoption of the two global conventions that followed the Chernobyl disaster.[37]

There are serious allegations that China failed to provide the earliest warning possible of the emergence of the coronavirus, that it failed to contain the virus in its birthplace in Wuhan, and that it misled the international community by under-reporting the virus threat. Critics say that had China not undermined the seriousness of the virus and hidden information about its spread, the virus could have been contained as a local health problem and the pandemic could have been avoided. There is, still, uncertainty of the date on

35 Kumanan Wilson, John S Brownstein and David P Fidler, "Strengthening the International Health Regulations: lessons from the H1N1 Pandemic" (2010) 25 *Health Policy and Planning* 505–509, at 506.

36 Supra.

37 Supra.

which the virus was first discovered in China, and of how the State dealt with the medical and other professionals who sought to alert the world to the potential calamity.

Whatever the truth of these allegations (and China has blamed much of these allegations on attempts by the US to distract from what China alleges to be the US's inefficient handling of the virus), they bring to the fore the fact that the efficacy of the IHR 2005 depends on the adherence by the territorial state to its international obligations. In short, IHR 2005 are largely depended on how territorial sovereignty is exercised.

ii. Late Declaration of Global Public Health Emergency

On 31 January 2020, WHO declared the novel coronavirus a global emergency. The WHO Director-General made clear that the main reason for the declaration was not what was then happening in China but, rather, the concern that the virus could spread to countries with weaker health care systems. Some five weeks later, on 11 March 2020, the Director-General described COVID-19 as a "pandemic" due to the global reach of the disease and the rapid increase in the number of cases.

The declaration of a global public health emergency appeared to have been rather late, considering that the virus emerged, at latest, in December 2019, and that there was official confirmation of the first recorded case outside of China on 13 January 2020.[38] On 22 January 2020, WHO indicated that there was evidence of human-to-human transmission, and an Emergency Committee was convened under IHR 2005. Given the intent of the IHR for rapid communication of global health risks, it is reasonable to question whether the declaration of the public health emergency of international concern could, and should, have been made earlier. Much, of course, depends on the country, on whose territory the virus first appeared, complying with the IHR obligation to notify WHO within 24 hours of all events which may constitute a public health emergency of international concern. Where a country does not do that there are limited alternative avenues available to WHO.

Funding can also be an issue in the functioning of international institutions. WHO, like other UN agencies, is significantly underfunded relative to the resources necessary to carry out its mandate. The funding problem has recently been exacerbated by the decision of the U S to suspend its funding in light of what the US considers to be WHO mismanagement of the coronavirus pandemic.

iii. Failure to Establish and Maintain Core Capacities

There are continuing problems with surveillance and response capacities in many countries, especially developing countries. The absence of real-time, comprehensive clinical surveillance to rapidly identify outbreaks that might occur can lead to loss of life, as was evident in Mexico during the 2009 H1N1 outbreak.[39] Even in the US, there

38 In Thailand. The first case in the United States was dated 21 January 2020, and in Europe 24 January 2020. The first case of COVID-19 in the Caribbean Region was in March 2020.

39 Ibid, at 506.

was, at the height of the pandemic, a serious concern that there was insufficient Personal Protection Equipment (PPE), hospital beds, and ventilators. There are also issues of prioritisation of the medical resources in developing countries, and the concern that deployment of resources to combat infectious diseases, which do not originate in their territory, protect the wealthier nations without any corresponding binding obligations to provide assistance. This at a time when resources for public health emergencies of local concern are scarce and diminishing.[40]

The development of the PIP Framework to confront the global health threat of influenza does provide an avenue for tangible assistance to the developing countries. The Nagoya Protocol also promises access to equitable sharing of benefits derived from genetic resources that are sourced from developing countries. However, there remains that these two avenues[41] neither camouflage the need for significant capital inflows to empower developing States to be better prepared to detect and contain public health threats, nor negate the fact that there are no corresponding binding obligations to provide such assistance.

iv. Failure to Accept Assistance from Other States/WHO

As we have seen, there are obligations on a State to develop certain minimum core medical competences, but there seems not to be any direct obligation on a State to accept assistance offered by either the WHO or other States. In the absence of such obligation, the State decides whether to accept international assistance based on its sovereign policies. There are unconfirmed reports that China refused offers of assistance by the Centres for Disease Control and Prevention (CDC) of the United States.[42]

v. Denial of Entry to Travellers/Residents/Nationals

The IHR 2005 dealt with the matter of international travellers from the perspective of the obligation of the receiving state to treat such persons with respect and consideration and of providing essentials to maintain life. With the global "lockdown" the remarkable development ensued where travellers were denied entry to States, in some cases, even the state of their nationality.

There are important legal questions regarding the legality at customary international law of denying entry to cruise ships and other vessels in distress.[43] The customary right of a ship to seek shelter when in distress probably requires re-examination where the ship poses a potential threat to life to the inhabitants of the territory; although, even then, the principle of proportionality would probably dictate permission to dock and the right to obtain supply without any corresponding right to disembark.

40 Kumanan Wilson, John S Brownstein and David P Fidler, "Strengthening the International Health Regulations: lessons from the H1N1 Pandemic" (2010) 25 *Health Policy and Planning* 505–509, at 507.

41 Discussed earlier.

42 See: China spurned CDC offer to send team to contain coronavirus: US Health Secretary. Coronavirus Pandemic. Published 28 January 2020.

43 Any port in a storm.

Denial of entry to nationals raises much more difficult problems. Article 12(4) of the ICCPR states that, "no one shall be arbitrarily deprived of the right to enter their own country". It is generally accepted that the referent 'own country' means that the right of entry inheres not only in nationals but also "embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien."[44] Residents are therefore also included. Further, this right of return is not subject to the same restrictions as paragraphs 1 and 2 of Article 12 which permit restrictions to protect national security, public order, public health or morals, or the rights and freedoms of others. Reference to arbitrariness is meant to emphasise that even interference permitted by law should be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the circumstances. There are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.[45]

vi. Absence of Coercive Mechanisms

The failure of the IHR 2005 to contain COVID-19 was clearly a failure of States and the WHO to comply with their international obligations. This was possible because there is no coercive mechanism in the Regulations themselves that compel compliance; there are not even mandatory dispute settlement arrangements (such as applicable in WTO or UNCLOS). The vaunted alternative of "naming and shaming" States who default on their responsibility[46] has, obviously, not worked thus far. The old chestnut of 'State Sovereignty' remains the double-edged sword it has always been: it is the necessary building block for the current world order, and will probably only get stronger in the retreat from 'globalism' that is likely to follow the current pandemic; yet it makes difficult the ensuring of State compliance to international regimes meant to benefit, and perhaps save, humanity as a whole.

Possible Ways Forward

Empowerment of global institutions. It is most unlikely that global institutions, such as WHO will be strengthened by investing them with supranational powers. The view has been offered that they have been deliberately constructed as weak institutions to be

44 See: Human Rights Committee's General Comment No. 27. See also statement of IACHR in respect of the deportation of human rights activist Ana Quiros from Nicaragua.

45 Human Rights Committee's General Comment No. 27, para. 21. For a comprehensive discussion of this issue, see, further, the paper presented by Dr Martha to this symposium, *infra*.

46 The World Health Organisation's (WHO) first Director of International Health Regulations (IHR) coordination, Dr Guénaël Rodier, commented on the incentives to comply with the 2005 Regulations, thus: "There are no police or fines here. There are, however, strong incentives for countries to comply. In today's information society, you cannot ignore or hide a problem for very long. You can perhaps ignore or hide an event for a day or two, but after a week it's virtually impossible. WHO and its partners have a powerful system of gathering intelligence that will pick anything up immediately…One of the incentives for countries to report such events is that these will already have been reported via the electronic highway. We will be in a much better position to help if we have been involved early on by the affected country. The fear of being named and shamed by the media and other countries concerned by the situation is in itself an incentive." (On Interview).

subservient to the nation state. The one international body that has significant executive power is the UN Security Council but, as at the time of writing, the Council was unable to pass a Resolution on the coronavirus which would have included a 90-day cease-fire in conflicts around the world due to the outbreak. The Council is gridlocked because of disagreement between permanent Members China and the United States as to whether to include a clause commending the WHO for its handling of the pandemic.[47] The project of empowering global institutions is therefore not promising.

Countermeasures. Countermeasures are an old institution of international law that allow a State to take unilateral measures in response to the breach of its rights by the wrongful act of another State. Some have argued that countermeasures may be taken against China by injured States collectively and/or individually.[48] The menu for such countermeasures is broad, excluding only the use of force. Even if justified, there must be some doubt as to whether the international community would have the appetite to take significant countermeasures against, arguably, the second most powerful nation on earth.

Litigation. There has been significant discussion surrounding holding China liable for alleged breaches of its obligations to properly warn the WHO and the international community of the emergence of the coronavirus and to take effective steps to contain it. In theory, it is possible, at the international level, to bring proceedings against China before the International Court of Justice (ICJ). The well-known problem is that the ICJ does not have inherent compulsory jurisdiction, and the latest research reveals that China is not among the list of countries accepting the Court's jurisdiction as 'Optional clause declarations' under Article 36 (2), that would give the Court jurisdiction based on reciprocity between claimant and defendant States. It is therefore unlikely that the ICJ would have jurisdiction over an action brought against China. An advisory opinion may be possible if, for example, a majority of the membership in the UN General Assembly voted in favour of it but the opinion would not be binding.[49]

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47 See: Betul Yuruk, "WHO clause blocks UN Security Council virus resolution: draft resolution includes 90-day global ceasefire due to coronavirus pandemic." 19.05.2020.

48 See e.g., Dr Kraska, *War on The Rocks*, 23 March 2020. He states: 'The menu for such countermeasures is as limitless as the extent that international law infuses the foreign affairs between China and the world, and such action by injured states may be individual and collective and does not have to be connected explicitly to the kind or type of violations committed by China. Thus, action could include removal of China from leadership positions and memberships, as China now chairs four of 15 organisations of the United Nations system. States could reverse China's entry into the World Trade Organisation, suspend air travel to China for a period of years, broadcast Western media in China, and undermine China's famous internet firewall that keeps the country's information ecosystem sealed off from the rest of the world. Remember that countermeasures permit not only acts that are merely unfriendly, but also licences acts that would normally be a violation of international law. But the limitations still leave considerable room to roam, even if they violate China's sovereignty and internal affairs, including ensuring that Taiwanese media voices and officials are heard through the Chinese internet firewall, broadcasting the ineptness and corruption of the Chinese Communist Party throughout China, and reporting on Chinese coercion against its neighbors in the South China Sea and East China Sea, and ensuring the people of China understand the responsibility of the Chinese Communist Party in unleashing a global contagion.'

49 Articles 65–68, Statute of the ICJ.

Lawsuits have been threatened, and some have actually brought against China in domestic courts. In Texas, a US$20 trillion class action lawsuit has been filed against China, alleging that in creating and releasing the coronavirus China violated "US law, international laws, treaties, and norms."[50] Such claims face a significant obstacle in the form of the US Foreign Sovereign Immunities Act, 1976 (FISA), which limits the possibility of a foreign sovereign nation being sued in a US Court. A similar obstacle exists in India, though an exception exists to the rule of sovereign immunity which permits a foreign state to be sued in an Indian court if the claimant first procures the written consent of the Central Government certified in writing by a Secretary to the Government.[51]

Concerned citizens. The IHR 2005 make interesting provisions for an individual to play a role in alerting the international community to the emergence of a public health emergency of international concern. The 2005 Regulations include the right by WHO to receive non-state surveillance reports and include the inaugural reference to international human rights principles in outbreak response. The growth in the reliance on information communication technology (ICT) and the recognition of the importance of respecting human rights in disease surveillance now fundamentally influence how public health and international organisations gather and act on information on outbreak events. Use of social media, in tandem with recognition of human rights to monitor disease outbreaks, has become as critical as traditional communication from states. Rather than "waiting for states to inform the WHO and other states of outbreaks, individuals may choose to harness the technology to instantly send local media reports of outbreaks all around the world." The encouragement of non-state actors to participate in information sharing, coupled with their adherence to personal responsibility mores (such as social distancing and personal hygiene), may yet become a potent weapon in circumventing difficulties to containing public health emergencies of international concern posed by the sovereignty of states.

50 Another lawsuit has been filed in Florida.

51 Section 86 of the Code of Civil Procedure, 1908.

COVID-19 TRAVEL RESTRICTIONS: QUESTIONS CONCERNING THE RIGHT TO ENTER ONE'S OWN COUNTRY

Dr Rutsel Silvestre J Martha, LLM

LINDEBORG COUNSELLORS AT LAW, UNITED KINGDOM

Introduction

In responding to the COVID-19 pandemic, many States have introduced quarantine measures, entry bans, or other restrictions for individuals who have travelled to the most affected areas. In some cases, States have prohibited all foreign nationals from entering and/or prevented their own nationals from travelling overseas. Samoa and India would appear to have gone the furthest: Samoa denied entry to eight of its nationals who had transited via Singapore[52] and India prohibited the travel of individuals (including Indian nationals) to India from many States.[53] Together with a decreased willingness to travel, the restrictions have had a negative economic and social impact on the travel sector leading to a decrease in flights available to those who are seeking to return to their own country.

The measures adopted by Samoa and India raise two important legal question for Caribbean States. First, does an individual have the right to enter his or her own country? Second, if so, does international law obligate a State to assist the individual in entering when he or she is unable to arrange their own travel?

I will be addressing these questions in my presentation today. I will also say a few brief words on the right of an individual to an effective remedy and the role that the right plays in the context of the foregoing two questions and the COVID-19 pandemic. Before turning to these issues, however, I deem it useful to outline the broader right to freedom of movement.

52 'Eight Samoan Nationals Denied Entry at Faleolo Airport', *Samoa Global News* (10 February 2020), available at: https://samoaglobalnews.com/eight-samoan-nationals-denied-entry-at-faleolo-airport/.

53 'Now, India bans entry of Indians from EU, Turkey and UK', *The Economic Times* (18 March 2020), available at: https://economictimes.indiatimes.com/news/politics-and-nation/government-prohibits-entry-of-passengers-from-eu-turkey-uk-from-march-18/articleshow/74657194.cms.

The Right to Freedom of Movement

The right to freedom of movement is reflected in two global international legal instruments:

- Article 13 of the Universal Declaration of Human Rights (UDHR)[54]; and
- Article 12 of the International Covenant on Civil and Political Rights (ICCPR).[55]

For the Caribbean region, Article VIII of the American Declaration on the Rights and Duties of Man[56] and Article 22 of the American Convention on Human Rights (ACHR)[57] are also of specific relevance. Moreover, Articles 2 to 4 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[58] are pertinent to the French overseas departments in the Caribbean and the islands pertaining to the Kingdom of The Netherlands.

The right to freedom of movement appears in three manifestations in international law. First, it encompasses the right to move freely within a country and to choose one's place of residence. Second, it includes the right to leave any country, including one's own. Third,

54 Art. 13 UDHR: "*Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country".*

55 Art. 12 ICCPR: "*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant. **4. No one shall be arbitrarily deprived of the right to enter his own country"*** (emphasis added).

56 Art. VIII American Declaration: "*Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will*".

57 Art. 22 ACHR: "*1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country freely, including his own. 3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others. 4. The exercise of the rights recognised in paragraph 1 may also be restricted by law in designated zones for reasons of public interest. 5. **No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.** 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law. 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions. 9. The collective expulsion of aliens is prohibited*" (emphasis added).

58 Art 2 of Protocol No. 4 to the ECHR: "*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society*". Art 3 of Protocol No. 4 to the ECHR: "*1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. 2. No one shall be deprived of the right to enter the territory of the state of which he is a national*". Art 4 of Protocol No. 4 to the ECHR: "*Collective expulsion of aliens is prohibited".*

it encompasses the right to enter one's own country. This is coupled with the right to seek and enjoy, in other countries, asylum from persecution.[59]

Today we are only concerned with the third manifestation of the right to freedom of movement, i.e., the right to enter one's own country. Broadly speaking, the right to enter is a norm in international law that guarantees to everyone the right to enter or re-enter voluntarily their own country. This right is inherent in individuals' nationality, citizenship and ancestry.

According to Article 12(4) of the ICCPR, "*[n]o one shall be arbitrarily deprived of the right to enter his own country*". It is plain from this language that the scope of "*his own country*" is broader than the concept of "*country of his nationality*". According to the UN Human Rights Committee's General Comment No. 27, "*it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien*" and includes nationals of a country who have been stripped of their nationality in violation of international law, and other categories of long-term residents, including—but not limited to—stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Thus, if an individual is deprived of his or her nationality in violation of international law, the country of former nationality remains the person's "*own country*" for the purposes of the right to enter one's own country. The Inter-American Commission on Human Rights said as much in the recent case concerning the deportation of the human rights activist, Ana Quirós, from Nicaragua.[60]

Permissibility of Restrictions Preventing the Return of Nationals

The right to liberty of movement within the territory of a State and the right to leave any country, guaranteed in Article 12(1) and (2) of the ICCPR respectively, are subject to restrictions (set out in Article 12(3)): they include restrictions provided by law necessary to protect national security, public order, public health or morals. The right to return under Article 12(4) of the ICCPR is not subject to these restrictions and the rationale behind this may have to do with the special responsibility a State has towards its nationals, who are the primary beneficiaries of the right to return.[61] However, the term "*arbitrarily*" in Article 12(4) of the ICCPR indicates that there may be some exceptions to the right to return. The term implies that a State may interfere with the right to enter one's own country so long as it does not do so in an arbitrary fashion. The UN Human Rights Committee, the authoritative UN body for interpreting the ICCPR, has ruled that:

> "*[i]n no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasise that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives*

59 See Jane McAdam, "An Intellectual History of Freedom of Movement in International Law: the right to leave as personal liberty", 12 *Melbourne Journal of International Law* (2011) 1-30, at 4-5.

60 "IACHR condemns the arbitrary expulsion of human rights defender in Nicaragua", *Press Release* (28 November 2018), available at: https://www.oas.org/en/iachr/media_centre/PReleases/2018/255.asp.

61 See Kathleen Lawland, "The Right to Return of Palestinians in International Law", 8 *International Journal of Refugee Law* (1996) 532-568, at 547.

of the Covenant and should be, in any event, reasonable in the particular circumstances. ***The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable****. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country*".[62]

The only way in which States could derogate from their responsibilities under Article 12(4) would be during the extreme circumstances described in Article 4(1) of ICCPR: "*[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed*". Even in these situations, however, Article 4(1) prescribes that States may only take measures "*to the extent strictly required by the exigencies of the situation*" and they must ensure their measures are "*not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin*".

According to the Siracusa Principles,[63] endorsed by the (former) UN Human Rights Commission, a threat to the life of the nation is one that (a) affects the whole of the population and either the whole or part of the territory of the State and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the ICCPR.[64] Remarkably, the Siracusa Principles do not mention public health as a ground that would justify a derogation (in contrast to paragraphs 25 and 26 of the Siracusa Principles which recognise that public health may be invoked as a ground for limiting certain rights), but there can be little doubt that a public health emergency is capable of threatening the life of a nation.

If we assume that a public health emergency is capable of threatening the life of a nation (which must be correct), States may only take measures "*to the extent strictly required by the exigencies of the situation*". In General Comment No. 29, the UN Human Rights Committee stated that "*the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers*".[65]

Turning to the COVID-19 pandemic, after some EU Member States announced the complete closure of their borders to foreign nationals,[66] the European Commission President Ursula von der Leyen said that "*[c]ertain controls may be justified, but general*

62 UN Human Rights Committee, "CCPR General Comment No. 27: Article 12 (Freedom of Movement)", UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) para. 21 (emphasis added).

63 UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights", UN Doc E/CN.4/1985/4 (28 September 1984) (Siracusa Principles).

64 Siracusa Principles, para. 39.

65 UN Human Rights Committee, "CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency", UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para. 4.

66 "Coronavirus: Some Of These 24 European Countries Have Closed Their Borders To Tourists", *Forbes* (14 March 2020), available at: https://www.forbes.com/sites/tamarathiessen/2020/03/14/coronavirus-europe-closes-borders-tourists/#5614c3712765.

travel bans are not seen as being the most effective by the World Health Organisation".[67] A few days later, the EU closed its external borders to all but non-essential travel.[68]

However, a study in *Science* found that travel restrictions have only modest effects, delaying the initial spread of COVID-19, unless combined with infection prevention and control measures to reduce considerably transmissibility.[69] Separately, researchers have concluded that "*travel restrictions are most useful in the early and late phase of an epidemic*" and "*restrictions of travel from Wuhan unfortunately came too late*".[70] As a matter of fact, the prolonged closure of borders is inconsistent with the advice of the World Health Organisation (WHO). On 30 January 2020, when declaring the COVID-19 pandemic a public health emergency of international concern, the WHO Director-General said that "*[t]here is no reason for measures that unnecessarily interfere with international travel and trade*".[71] On 29 February 2020, the WHO was more explicit:

> "*[i]n general, evidence shows that restricting the movement of people and goods during public health emergencies is ineffective in most situations and may divert resources from other interventions. Furthermore, restrictions may interrupt needed aid and technical support, may disrupt businesses, and may have negative social and economic effects on the affected countries. However, in certain circumstances, measures that restrict the movement of people may prove temporarily useful, such as in settings with few international connections and limited response capacities. Travel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves. Travel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact*".[72]

In the context of Articles 4(1) and 12(4) of the ICCPR, the foregoing suggests that measures affecting the right of individuals to enter their own country are highly questionable. The position of the WHO, and the availability of less far-reaching measures (such as screening on entry, monitoring after arrival for 14 days and, if necessary, isolating and quarantining) to address the transmission of COVID-19, militate against any

67 "Denmark, Poland and Czechs seal borders over coronavirus", *Financial Times* (13 March 2020), available at: https://www.ft.com/content/4e89ec5c-6565-11ea-b3f3-fe4680ea68b5.

68 "Video conference of the members of the European Council" (17 March 2020), available at: https://www.consilium.europa.eu/en/meetings/european-council/2020/03/17/.

69 Matteo Chinazzi *et al.*, "The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak', 368 *Science* (24 April 2020) 395-400.

70 "COVID-19: Study shows that travel restrictions are most useful in the early and late phase of an epidemic", University of Oxford (25 March 2020).

71 "WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)", World Health Organisation (30 January 2020), available at: https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov).

72 "Updated WHO recommendations for international traffic in relation to COVID-19 outbreak", World Health Organisation (29 February 2020), available at: https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak.

conclusion that a State can invoke the containment of the spread of COVID-19 within its border as a justification for impeding the entry of individuals into their own country.

An Obligation to Assist?

Having established that it is unlikely that the COVID-19 pandemic allows for any interference with the right of an individual to enter his or her own country, it is logical to consider whether international law obligates a State to assist individuals in entering their own country when they are unable to arrange their own travel. This question raises the concept of consular protection. Consular protection refers to assistance provided by a State to its nationals who are living or travelling abroad and are in need of assistance, such as in cases of arrest or detention, a serious accident, serious illness or death, natural disaster or political unrest, or a loss of passport or other travel documents.[73] It is probably correct to say that no rule of international law requires States to assist their nationals (or any other individuals) in entering their own country. At the same time, there is authority which could be said to suggest that a State violates international law if it acts in an arbitrary manner.[74] According to the International Court of Justice, arbitrariness is "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[75] Thus, it may be possible to argue that a State must not act in an arbitrary manner in deciding not to provide consular protection.

In this context, regard should be had to a recent decision of the Higher Administrative Court of Berlin-Brandenburg.[76] While the decision was not based on international law, but rather on German law, the reasoning of the Higher Administrative Court could perhaps be employed by an individual who seeks to argue that a State acted in an arbitrary manner in deciding not to provide consular protection in the form of repatriation.

The facts of the case are as follows. In 2014, a mother and father travelled to Syria to the territory held by the Islamic State (ISIS) together with their two children. A third child was born there. All five have German citizenship. On 21 January 2019, the family turned itself in to American-Kurdish forces. The mother and her children were brought to a guarded part of the Al-Hol camp, where persons without Syrian or Iraqi citizenship who were deemed to be ISIS supporters or members were held. The father was imprisoned by the Kurdish militia and, throughout the court proceedings in Germany, his place of

73 Nina Græger and Wrenn Yennie Lindgren, "The Duty of Care for Citizens Abroad: Security and Responsibility in the In Amenas and Fukushima Crises", 13 *The Hague Journal of Diplomacy* (2018) 188-210.

74 "*Un État viole, par conséquent, le droit des gens s'il porte arbitrairement atteinte aux droit acquis des étrangers, ... Tout ce que le droit international prescrit à cet égard, c'est que l'État ne doit pas violer arbitrairement les droits prives des étrangers, fût-ce même par un acte du législateur*" (Alfred Verdross, "Les règles internationales concernant le traitement des étrangers", 37 *Recueil des Cours, Académie de Droit International* (1931-III) 323-412, at 358-59). While Verdross was concerned with the protection of foreigners against arbitrariness, there is no reason in principle why his view could not be extended to the relationship between the State and its nationals. See also *Asylum (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266, 284: "*[a]n exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law*".

75 *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para. 128.

76 Case No. OVG 10 S 43.19, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), available at: https://perma.cc/XYY5-6RTL.

detention was unknown. On 24 May 2019, the mother and her children applied to the Administrative Court in Berlin to obligate the German Government to grant them consular protection in the form of issuing travel documents and repatriation. The German Government made arrangements to repatriate the three children but refused to repatriate the mother. As a reason for the refusal, the German Government stated that there were safety and domestic and foreign policy concerns.

The Administrative Court in Berlin ruled in favour of the applicants. The German Government appealed the judgment to the Higher Administrative Court. The Higher Administrative Court upheld the judgment of the lower court. It held that the situation in the Al-Hol camp constituted a danger to the life and limb of the children, and, as a consequence, the German Government had no discretion with respect to its obligation to provide consular protection. As the children were not permitted to travel alone, the German Government was obligated to repatriate them together with their mother.[77]

With respect to the mother's circumstances, the Higher Administrative Court made three important findings. First, it found that the mother was a German citizen and the German Government did not submit sufficient evidence to substantiate its position that she constituted a concrete danger to public safety (which would have relieved the German Government of its obligation to repatriate).[78] Second, it found that domestic and foreign policy concerns could not serve as a reason not to repatriate the mother together with her children.[79] Third, it found that the repatriation of the mother was not impossible, notwithstanding that the German Government had no diplomatic or consular representation in Syria. The Higher Administrative Court noted that the German Government had made arrangements with non-governmental organisations to transfer the children to a transit country with German representation and to send them to Germany from the transit country, thereby evidencing that it was possible to repatriate people to Germany.[80]

As noted above, the decision of the Higher Administrative Court was not based on international law, but an individual who seeks to argue in the context of the COVID-19 pandemic that a State acted in an arbitrary manner in deciding not to provide consular protection in the form of repatriation may wish to draw on two stands of the Court's reasoning. First, the burden rests on the authorities to prove that, if repatriated, the individual concerned would pose a danger to the State. Second, if it is theoretically possible to repatriate an individual, the authorities had better have good reasons for not doing so.

77 Case No. OVG 10 S 43.19, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), available at: https://perma.cc/XYY5-6RTL, paras. 22-23. The Higher Administrative Court set out two reasons why the children could not travel without their mother in paragraphs 25-32.

78 Case No. OVG 10 S 43.19, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), available at: https://perma.cc/XYY5-6RTL, paras. 33-41.

79 Case No. OVG 10 S 43.19, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), available at: https://perma.cc/XYY5-6RTL, paras. 42-46.

80 Case No. OVG 10 S 43.19, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00 (6 November 2019), available at: https://perma.cc/XYY5-6RTL, paras. 47-49.

Finally, it bears mentioning that the Emergency Committee convened under the International Health Regulations is of the view that repatriation is important in the context of the COVID-19 pandemic: notwithstanding that we are in the midst of a public health emergency of international concern, the Emergency Committee advised the WHO on 1 May 2020 that it should *"[c]ontinue working with countries and partners to enable essential travel needed for … repatriation"*.[81] Indeed, many governments have arranged special flights to repatriate their nationals. For instance, as at 2 May 2020, Pakistan had reportedly repatriated 15,000 nationals from 38 countries.[82]

Effectiveness of Remedies

The case in Germany illustrates that the availability of an effective remedy to enforce the right to enter one's own country is critical for any meaningful reliance on that right. The right to an effective remedy is a fundamental right, has long been considered integral to the concept of justice[83] and is reflected in numerous international instruments, such as the UDHR,[84] the ICCPR,[85] the ACHR,[86] the ECHR[87] and the EU Charter of Fundamental Rights.[88] As Kuijer notes, "*[t]he primary aim of [Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights] is to increase judicial protection offered to individuals who wish to complain about an alleged violation of their human rights. In that sense, the right to an effective remedy is an essential pre-condition for an effective human rights policy*".[89]

81 "Statement on the third meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19)", World Health Organisation (1 May 2020), available at: https://www.who.int/news-room/detail/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19).

82 "Pakistan to bring back over 100,000 stranded citizens", *Anadolu Agency* (2 May 2020), available at:https://www.aa.com.tr/en/asia-pacific/pakistan-to-bring-back-over-100-000-stranded-citizens/1826742.

83 Dinah Shelton, *Remedies in International Human Rights Law*, 3rd edition (OUP, 2015) 17 (explaining that most legal systems today recognise the significance of ensuring the "*right of access to independent bodies that can afford a fair hearing to claimants who assert an arguable claim that their rights have been infringed*").

84 Art. 8 UDHR: "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*".

85 Art. 2(3) ICCPR: "*Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted*".

86 Art. 25(1) ACHR: "*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties*".

87 Art. 13 ECHR: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

88 Art. 47 EU Charter of Fundamental Rights: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*".

89 Martin Kuijer, "Effective remedies as a fundamental right", Seminar on human rights and access to justice in the

Conclusions and Recommendations

Based on the foregoing, I am of the view that Article 12(4) of the ICCPR (and, potentially, regional human rights treaties) could be used to challenge a decision barring an individual from entering his or her own country and that, whether or not a State seeks to derogate (pursuant to Article 4(1) of the ICCPR) from its obligation under Article 12(4) of the ICCPR, the individual's challenge ought to be successful. A State should not be able to rely successfully on public health grounds when it has more proportionate tools at its disposal for addressing the transmission of COVID-19. While it cannot be said that there is a rule of international law which requires States to assist their nationals in entering their own country, States should refrain from acting in an arbitrary manner in deciding not to provide such assistance. Although the right to an effective remedy is contained in the relevant international instruments, it is perhaps the area where those who are being impeded from entering their own country face the most challenges. Going to court takes time and requires the necessary resources and, in practice, those seeking to enter their country often have little time and limited resources. Therefore, in my view, States and individuals would be better served by proper guidance from international and regional bodies. States should be made aware of their international obligations. In particular, they must understand that they are required to act in a proportionate manner and, as the WHO suggests, mitigate the risk of transmission of COVID-19 by individuals returning to their own countries using the least intrusive measures available.

EU (28-29 April 2014, Barcelona Escuela Judicial Española & European Judicial Training Network), available at: http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Outline_Lecture_Effective_Remedies_KUIJER_Martin.pdf.

THE HEALTH SITUATION AND RESPONSE TO COVID-19: THE PAN-AMERICAN HEALTH ORGANISATION/ WORLD HEALTH ORGANISATION

Jessie Schutt-Aine
Subregional Programme Coordinator
Office of Subregional Programme Coordination—Caribbean
PAHO/WHO

Introduction

On 31 December 2019, the World Health Organisation (WHO) China Country Office was informed of cases of pneumonia of an unknown etiology detected in Wuhan City, Hubei Province, China. From 31 December 2019 through 3 January 2020, a total of 44 case-patients with pneumonia were reported to WHO by the national authorities in China. The causal agent was not identified. By January 7 2020, a new type of coronavirus was isolated, having been associated with a seafood market in Wuhan City. Following the exponential growth in cases and deaths, on 30 January 2020, the Director-General of WHO, based on the recommendation of the Emergency Committee, declared the COVID-19 outbreak a public health emergency of international concern (PHEIC) under the International Health Regulations (IHR 2005). On 11 February, WHO named the disease COVID-19, short for "coronavirus disease 2019". Only a month later, on 11 March 2020, WHO characterised COVID-19 as a pandemic, due to the speed and scale of transmission.[90]

Situation Analysis of COVID-19 in the Americas and the English-Speaking Caribbean

The first confirmed case in the Americas was reported on 20 January 2020 in the United States, while the first case in Latin America was confirmed in Brazil on 26 February 2020. Shortly after, on 10 March 2020, COVID-19 reached the English-speaking Caribbean on the island of Jamaica. Since then, it has rapidly spread to all 54 countries and territories of the region and the Americas have become the epicentre of the pandemic with a total of

90 World Health Organisation. COVID-19 webpage. Available from: https://www.who.int/health-topics/coronavirus#tab=tab_1

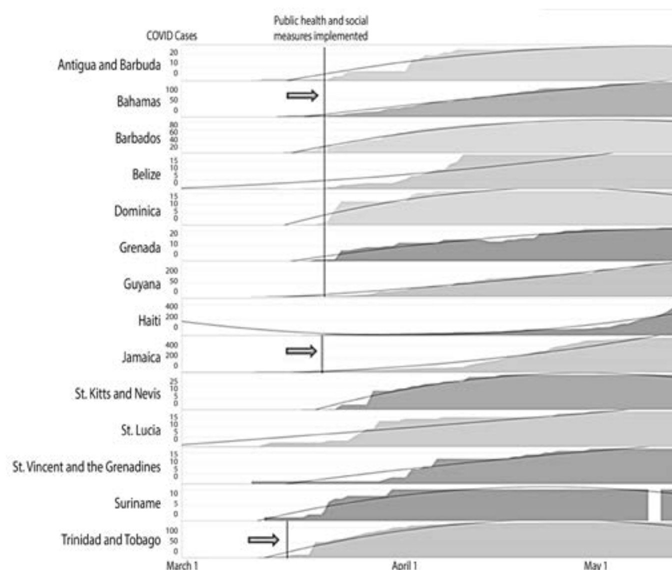
2,949,455 cases in and 165,311 deaths as of June 2, 2020. The United States of America accounts for 61% of all cases and 64% of all deaths in the region.[91]

Table 1: Total Cases of COVID-19 as of 2 June 2020

	Cases		Deaths	
	Total	**Percentage**	**Total**	**Percentage**
Globally	6,287,771	100%	379,941	100%
Africa	111,486	2%	2,789	1%
Americas	**2,949,455**	**47%**	**165,311**	**44%**
Eastern Mediterranean	552,497	9%	13,181	3%
Europe	2,191,614	35%	183,313	48%
South-Est Asia	296,620	5%	8,277	2%
Western Pacific	185,358	3%	7,057	2%
Source: WHO. COVID-19 Situation Report 135.				

In the CARICOM Member States and Associated Member countries, there were 3,797 reported cumulative cases, 111 deaths and 985 recovered, as of 2 June 2020. The Table below depicts the outbreak and growth curve for 14 CARICOM Member States (as of June 1, 2020). These figures are based on the daily count of cases as reported by the National International Health Regulations (IHR) focal points. The Table indicates how the outbreak is progressing in each country and suggests that most countries, with a few exceptions, are starting to "bend the curve" and contain the epidemic. The vertical black line notes the date when public health and social measures started to be implemented. It is still early days and countries need to exercise caution and monitor new cases and deaths as the trend can quickly reverse.

Table 2: Outbreak and Growth Curve for 14 CARICOM Member States



91 Pan American Health Organisation. COVID-19 webpage. Available from: https://ais.paho.org/phip/viz/COVID-19EpiDashboard.asp

Despite the fact that the subregion apparently is managing to bend the curve, and that people of all ages can be infected by the new coronavirus, the information that we have so far is that the risk of becoming severely ill with the virus increases when a person is 60 years or more and/or has pre-existing non-communicable diseases (NCDs) such as diabetes, hypertension, and cancer.[92] This is of particular concern in the Caribbean countries where 10% of the population is over 60 years of age[93], and NCDs are already responsible for 76.8%[94] of all deaths.[95]

Another group that should be mentioned, because it is more exposed to COVID-19, comprises the healthcare workers (HCW). Though the situation varies significantly among countries, it is important to highlight that some of the Caribbean countries are among those in the Americas with the highest percentage of HCWs with COVID-19. Moreover, frontline HCWs and first responders have been exposed to unprecedented stress during this pandemic, being faced with extreme workloads, difficult decisions, witnessing deaths of patients, and stigma. Ensuring the mental health of HCWs is a critical factor in sustaining COVID-19 preparedness, response and recovery, and providing them with access to sources of psychosocial support must be of equal priority with ensuring their physical safety.[96]

Indeed, the mental health and wellbeing of whole societies are also being severely impacted by this pandemic. Although the COVID-19 crisis is, in the first instance, a physical health crisis, psychological distress in populations is widespread due to the immediate health impacts of the virus, the consequences of physical distancing, fear of infection, dying and losing loved ones, and the loss of income and livelihoods. Moreover, specific populations groups are showing high degrees of COVID-19-related psychological distress. In every community, there are numerous older adults and people with pre-existing health conditions who are terrified and lonely. Emotional difficulties among children and adolescents are exacerbated by family stress and social isolation, with some facing increased abuse, disrupted education, and uncertainty about their futures, occurring at critical points in their emotional development. Women are bearing a large brunt of the stress in the home as well as disproportionate impacts more generally.

92 World Health Organisation. Information note COVID-19 and NCDs. Available from: https://www.paho.org/en/ncds-and-covid-19

93 Pan American Health Organisation. Core Indicators 2019- Health Trends in the Americas. Available from: https://iris.paho.org/bitstream/handle/10665.2/51542/9789275121290_eng.pdf?sequence=6&isAllowed=y.

94 Pan American Health Organisation. Noncommunicable Diseases in the Region of the Americas. Facts and Figures. Available from: https://iris.paho.org/bitstream/handle/10665.2/51483/PAHONMH19016_eng.pdf?sequence=6&is Allowed=y.

95 Pan American Health Organisation. Noncommunicable Diseases in the Region of the Americas. Facts and Figures. Available from: https://iris.paho.org/bitstream/handle/10665.2/51483/PAHONMH19016_eng.pdf?sequence=6&isAllowed=y.

96 Inter-Agency Standing Committee. Interim Briefing Note Addressing Mental Health and Psychosocial Aspects of COVID-19 Outbreak. Available from: https://interagencystandingcommittee.org/iasc-reference-group-mental-health-and-psychosocial-support-emergency-settings/interim-briefing.

Additionally, stress, the disruption of social and protective networks, and decreased access to services all can exacerbate the risk of violence.[97, 98]

Finally, it is important to highlight that COVID-19 has put a significant amount of pressure on health systems worldwide, Caribbean countries being no exception. Health systems are not only facing an increased demand for care of people with COVID-19 but are also experiencing disruptions of care for all conditions. When health systems are overwhelmed and people fail to access needed care, this can increase both direct mortality from the outbreak and indirect mortality from preventable and treatable conditions. The ability to maintain the delivery of essential health services, and the population´s trust in the capacity of the healthy system to safely meet essential needs and to control infection risk in health facilities, is therefore critical.[99]

Pan American Health Organisation (PAHO)/WHO's Response to COVID-19

PAHO/WHO's Mandate:

With almost 118 years of existence, the Pan American Health Organisation (PAHO) is the oldest multilateral health agency in the world. PAHO was founded by ten American countries in December 1902 as the International Sanitary Bureau in response to the yellow fever epidemic in Brazil, Paraguay, Uruguay and Argentina, which spread to the United States of America, partially as a result of the rapidly expanding maritime transport resulting from international trade.[100]

Today PAHO has 52 member countries and territories and it functions as the specialised health agency of the Inter-American System and, at the same time, it serves since 1949 as WHO's Regional Offices for the Americas under the United Nations system. According to its constitution, PAHO's fundamental purpose is "promote and coordinate efforts of the countries of the Western Hemisphere to combat disease, lengthen life, and promote the physical and mental health of the people".[101]

WHO was founded after World War II, in April 1948, as a specialised agency within the terms of Article 57 of the Charter of the United Nations. According to its Constitution, WHO's objective is the attainment by all peoples of the "highest possible level of health" and for that end, a set of functions is defined.[102]

97 https://www.un.org/sites/un2.un.org/files/un_policy_brief-covid_and_mental_health_final.pdf

98 https://www.paho.org/en/documents/covid-19-and-violence-against-women.

99 World Health Organisation. Maintaining essential health services: operational guidance for the COVID-19 context. Available from: https://www.who.int/publications-detail/10665-332240.

100 Pan American Health Organisation Pan American Sanitary Code: Toward a Hemispheric Health Policy. Washington, D.C.: PAHO 1999. https://iris.paho.org/bitstream/handle/10665.2/5668/Pan%20American%20sanitary%20code-1999.pdf?sequence=1&isAllowed=y

101 Constitution of the Pan American Health Organisation. Available from: https://iris.paho.org/bitstream/handle/10665.2/45985/OD_308_ch4.pdf?sequence=1&isAllowed=y.

102 Constitution of the World Health Organisation.

International Health Regulations as an Instrument of Public Health International Law

The International Health Regulations (IHR) are an instrument of international law that is legally-binding on 196 countries, including the 194 Member States of the WHO. The purpose of the IHR is to prevent, protect against, control, and provide a public health response to the international spread of disease in ways that restrict public health risks and avoid unnecessary interference with international trade and traffic.[103]

The IHR were first adopted by the Fourth World Health Assembly (WHA)[104] in 1951 and they initially covered six "quarantinable diseases" to reduce and prevent the spread of epidemics. Since then, the IHR have been revised four times. The 2005 edition[105] of the IHR was revised in close consultation with WHO Member States, international organisations, and other relevant partners, after the emergence of severe acute respiratory syndrome (the first global health emergency in the 21st century). The IHR (2005) were adopted by the 58th WHA[106] on 23 May 2005 and entered into force on 15 June 2007. The IHR (2005) contain a range of innovations, including:

a. A scope not limited to any specific disease or manner of transmission, but covering "illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans".
b. State Party obligations to develop certain minimum core public health capacities.
c. Obligations on States Parties to notify WHO of events that may constitute a public health emergency of international concern according to defined criteria.
d. Provisions authorising WHO to take into consideration unofficial reports of public health events and to obtain verification from States Parties concerning such events.
e. Procedures for the determination by the Director-General of a "public health emergency of international concern" and issuance of corresponding temporary recommendations, after considering the views of an Emergency Committee.
f. Protection of the human rights of persons and travellers.
g. Establishment of National IHR Focal Points and WHO IHR Contact Points for urgent communications between States Parties and WHO.

103 The International Health Regulations (2005). 3rd ed. World Health Organisation2016 https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=3AA472BBBF41ACDA6BAA730B291D5736?sequence=1

104 Fourth World Health Assembly. Geneva, 7 to 25 May 1951. Resolutions and Decisions. Available from: https://apps.who.int/iris/bitstream/handle/10665/85614/Official_record35_eng.pdf;sequence=1.

105 International Health Regulations (2005). Third Edition. Available from: https://www.who.int/ihr/publications/9789241580496/en/.

106 Fifty-Eight World Health Assembly. GENEVA, 16-25 MAY 2005. Resolutions and Decisions. Available from: https://apps.who.int/gb/ebwha/pdf_files/WHA58-REC1/english/A58_2005_REC1-en.pdf

By not limiting the application of the IHR (2005) to specific diseases, the IHR are intended to maintain their relevance and applicability. They also include specific measures at ports, airports, and ground crossings to limit the spread of health risks to neighbouring countries, and to prevent unwarranted travel and trade restrictions so that traffic and trade disruption is kept to a minimum.

Article 3 affirms that implementation of the Regulations shall be with full respect for the dignity and human rights of persons, and shall be guided by the Charter of the United Nations, by the WHO Constitution, and by the goal of their universal application for the protection of all people of the world from the international spread of disease.

Furthermore, human rights require that countries should demonstrate that any such restrictive measures are necessary to curb the spread of infectious diseases to ultimately promote the health, rights and freedoms of individuals. In addition, oversight and accountability mechanisms should be in place to allow individuals who are impacted to challenge the appropriateness of those restrictions. If the original rationale for imposing a restriction no longer applies, the restriction should be lifted without delay. Not conforming to these safeguards not only runs the risk of a range of human rights violations of the most vulnerable but will also ultimately undermine the larger public health objectives.

Through IHR, countries have agreed to build their capacities to detect, assess and report public health events. WHO plays the coordinating role in IHR and, together with its partners, helps countries to build capacities.

Declaration of COVID-19 as a Public Health Emergency of International Concern

According to Article 12 of the IHR, when the Director-General of WHO (DG) considers that a public health emergency of international concern (PHEIC) is occurring, he/she can, in agreement with the State Party in whose territory the event arises, seek the views of an Emergency Committee in accordance with the procedures established in Article 48 of the IHR. Following these regulations, on 20 January 2020, the DG convened a 15-member Emergency Committee on what at the time was referred as the novel (2019-nCoV).

The Committee met twice, on January 22 and January 30, when there were 83 cases in 18 countries and there had been no deaths outside China.[107] The Emergency Committee advised the DG that the COVID-19 epidemic met the conditions of a PHEIC. The declaration on COVID-19 represents the sixth time WHO has declared a PHEIC since the IHR came into force in 2005.[108] Countries were reminded that they are legally required to share information with WHO under the IHR. The Committee did not recommend any travel or trade restrictions based on the available information; however, countries were to inform WHO about travel measures taken, as required by the IHR.

107 Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), 30 January 2020, Geneva, Switzerland https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)

108 2009 H1N1 (or swine flu) pandemic, the 2014 polio declaration, the 2014 outbreak of Ebola in Western Africa, the 2015–16 Zika virus epidemic, the ongoing 2018–20 Kivu Ebola epidemic, and the COVID-19 pandemic.

As stipulated in the IHR, a third meeting of the Emergency Committee, which now comprises 18 members,[109] took place three months after its last session, on 30 April 2020. In this meeting the Committee unanimously agreed that the outbreak still constituted a PHEIC and offered advice to the DG. In response, the DG accepted the advice of the Committee, declared that the outbreak of COVID-19 continued to constitute a PHEIC and issued a set of temporary recommendations under the IHR for States Parties.[110]

PAHO/WHO Response

In WHO, declaring a public health emergency of international concern is the highest level of alert and triggers an operational response throughout WHO. Three days after the PHEIC was declared, WHO published its Strategic Response and Preparedness Plan[111] outlining three response strategies:

a. Rapidly establishing international coordination and operational support.

b. Scaling up country readiness and response operations.

c. Accelerating priority research and innovation.

On April 11 WHO's strategy was updated to provide guidance for countries with a whole of government and whole of society approach in preparing for a phased transition from widespread transmission to a steady state of low-level or no transmission.[112]

For its part, PAHO activated regional and country incident management system teams to provide direct emergency response to Ministries of Health and other national authorities for surveillance, laboratory capacity, support health care services, infection prevention control, clinical management and risk communication, all aligning with priority lines of action. The Organisation also developed, published, and disseminated evidence-based technical documents to help guide Member States' strategies and policies to manage this pandemic in their territories.[113, 114]

In the Caribbean, PAHO has delivered technical cooperation to all fifteen CARICOM Member States and its five Associate Members, with persistent support despite grounded commercial flights and limited availability of supplies and equipment in the global marketplace. PAHO's response has followed the nine pillars of WHO's Operational

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109 List of members and advisers to International Health Regulations (IHR) 3rd Emergency Committee for COVID-19—Teleconference session. https://www.who.int/ihr/procedures/novel-coronavirus-2019/ec-30042020-members/en/

110 Statement on the third meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19), 1 May 2020, Geneva, Switzerland https://www.who.int/news-room/detail/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)

111 World Health Organisation. 2019 Novel Coronavirus (2019-nCoV). Strategic Preparedness and Response Plan. Available from: https://www.who.int/publications-detail/strategic-preparedness-and-response-plan-for-the-new-coronavirus

112 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/strategies-and-plans

113 https://www.paho.org/en/technical-documents-coronavirus-disease-covid-19

114 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance

Planning Guidelines to support country preparedness and response.[115] Some examples of the work PAHO has done in the subregion are outlined in Table 3.

Table 3: PAHO's Response in the Caribbean Subregion

Pillar		
1	**Country-level coordination planning, and monitoring**	• Promote multi-partner coordination to respond to the pandemic by working in coordination with Ministries of health, subregional stakeholders (such as CDEMA, CARPHA, University of the West Indies and the Regional Security System), and other UN agencies. • PAHO's technical officers are embedded within many of the subregion's national emergency operations centres, sharing guidance and experience. • Provide technical cooperation to develop and adapt national response plans, and share tools for conducting assessments of health facilities, health system readiness, and needs estimates.
2	**Risk communication and community engagement**	• Provide training to communications officers in Ministries of Health. • Risk communication materials adapted to the Caribbean context and translated into Haitian Creole and Dutch, and disseminated, in collaboration with in-country partners. • PAHO in collaboration with various partners, has organised a series of webinars keeping the Caribbean Community informed, to provide updates on new scientific evidence and respond to issues of relevance in the response to COVID-19.
3	**Surveillance, rapid response teams, and case investigation**	• Monitor the spread of COVID-19, using surveillance guidelines and WHO reporting systems. • PAHO experts are working with national authorities to provide models for how the disease might spread over time. This has been instrumental in helping estimate essential hospital and laboratory supplies, healthcare worker needs, and intensive care units' (ICU) beds. • Provided countries with training in "Go.Data", a contact tracking tool for outbreaks, and seven countries have since adopted it.
4	**Points of entry**	• PAHO worked with national authorities to assess the evolving situation and consider non-pharmaceutical measures in response to the pandemic. • Provided training to personnel stationed at points of entry to monitor for potential incoming cases and has shared technical recommendations to guide those considering adjusting measures.

115 https://www.who.int/publications-detail/draft-operational-planning-guidance-for-un-country-teams

Pillar		
5	**National laboratories**	• Sent 225,000 tests using molecular detection to Caribbean countries and territories and the Caribbean Public Health Agency (CARPHA). • The Organisation continues to work with suppliers around the globe to source critical laboratory supplies and equipment, including reagents, swabs, and other equipment. • Provide national laboratories with the technical know-how to test for the virus and facilitates linkages with CARPHA so countries without in-country capacity to have their samples tested.
6	**Infection prevention and control**	• Delivered personal protection equipment to CARICOM's Member States. As of May 1, 2020, this includes over 502,000 gloves, 11,000 N95 masks, 70,000 gowns, and 10,000 goggles. Additional supplies were sent across the region with the collaboration of the Regional Security Services. • Provided virtual and in-person training on the proper use of PPE, disinfection health establishments, dead body management, and other recommendations to ensure the safety of persons in long-term facilities, including nursing homes, schools, prisons, among others. • Technical missions and virtual capacity-building provided to CARICOM with guidance and recommendations for protecting HCW and their most vulnerable populations.
7	**Case management**	• Delivered virtual trainings on evidence-based recommendations for the management of COVID-19 patients, including severe cases, as well as procedures for triage. • Provide evidence-based recommendations on emergency, compassionate, and experimental therapies, based on rapid reviews on emerging clinical evidence. • Guidance has been shared on managing Emergency Medical Teams (EMTs) and establishing alternative medical sites.
8	**Operational support and logistics**	• In collaboration with UNDP, UNICEF, UNOPS, and other partners, PAHO is procuring other essential medical supplies and equipment. • 10 expert missions conducted between February and March, that enabled countries to receive early, critical technical cooperation in laboratory testing, surveillance, and health system readiness
9	**Maintaining essential health services and systems**	• PAHO is assessing the impact that interrupted supply chains, redirected health resources, a strained health force, and more occupied ICU beds will have on health services. These ongoing analyses serve as the basis for recommendations and guidance for CARICOM countries and territories to ensure continuity in health services.

Source: PAHO operational situation reports.

CARICOM Regional Response

CARICOM has been active in the response to COVID-19, having convened three Special Emergency Meetings of the Conference of Heads of Government of the Caribbean Community and three Emergency Meetings of CARICOM's Council for Human and Social Development-Health. CARICOM has promoted a collective approach to addressing COVID-19 with agreement on the following:

a. *Engaging with International Financial Institutions in accessing assistance to meet the financial challenges arising from the pandemic.* Most Caribbean countries are classified by international financing institutions as middle- and high-income countries. This puts Small Island Developing States (SIDS) at a disadvantage in accessing development funds because their challenges and vulnerabilities (for example to climate related disasters) are not appropriately reflected by the criterion of GDP per capita.

b. *A Common Public Health Policy* that contains parameters for easing restrictions in Member States so as to allow re-opening, which considers adjusting public health and social measures and re-opening airports and intra-regional travel and hotels that Member States would adhere to at the same time when such a decision is taken.

c. *A Common procurement protocol.* Given the global market failure in accessing requisite medical supplies and diagnostics for lab testing, CARICOM leaders recognised the need to pool their efforts at procurement of medical devices and supplies in the context of COVID-19 in order to more easily gain access to supplies and achieve economies of scale. Heads agreed to a system using the existing structures of PAHO and the Organisation of Eastern Caribbean States (OECS) Pharmaceutical Procurement Services (PPS). In the case of PAHO, it will procure eleven prioritised items for treating COVID-19 (such as personal protective equipment, ventilators, and diagnostic kits). The main procurement mechanism that PAHO is making available to countries to obtain access to COVID-19 related supplies is the Strategic Fund, which is a technical cooperation mechanism for pooled procurement, and the Reimbursable Procurement Mechanism.

Prospects and Considerations

The COVID-19 pandemic is eliciting a response to three emergencies at the same time: health, social and economic. This triple-fold emergency has given way to a debate about choosing between opening the economy and saving lives. Small Island Developing States in the Caribbean are caught in an aggravated version of this dilemma, due to their dependence on tourism and high vulnerability to economic shock. As long as there is no approved vaccine or medical treatment, countries will have the difficult task of striking a fine balance between keeping people safe while also protecting the livelihoods of families and communities. The only way that this will be achieved is if everyone, everywhere can access the much-needed health technologies for the detection, prevention, and treatment of COVID-19.

Given past experiences with other pandemics, we know that when the tools are finally available, they are not equally available to all societies and to every person. Therefore PAHO/WHO is working on several initiatives to accelerate research and guarantee access to these technologies. Examples of this are: a) the Solidarity Clinical Trials aimed at facilitating the rapid comparison of unproven treatments; b) the COVID-19 Tools Accelerator (ACT) that looks to accelerate the development, production and distribution of vaccines and therapeutics; c) the COVID-19 Technology Access Pool, or C-TAP, aimed at compiling pledges of commitment made under the Solidarity Call to Action to voluntarily share COVID-19 health technology related knowledge, intellectual property and data.

The COVID-19 outbreak has made it more visible that the possibility of enjoying "the highest attainable standard of health" is not the same for everyone. This unprecedented pandemic is exposing long-standing societal gaps and casting a light on the inequalities in our society and their impact in health outcomes. There is preliminary evidence of higher rates of COVID-19 infection and mortality among already marginalised and vulnerable groups such as ethnic and racial minorities, migrants, and refugees, among others.[116,117,118,119] The reasons behind these observed inequities include the lack of timely access to quality health services, underfunded health systems, as well as social and environmental determinants of health (such as living in close quarters, or in densely populated cities where poor or vulnerable groups lack the means to stay at home and protect themselves).

Without any question, the most important priority of the global community is to stop the COVID-19 pandemic. As PAHO's Director, Dr Carissa Etienne, recently stated, "the situation we face is dire, but not hopeless—as long as our approach to defeating the virus is based on solidarity. We must work together, share resources, and apply the proven strategies that we have learned along the way."[120] This situation has made all of us remember that health is our most important asset and that we will learn from this experience to be better prepared for the next public health emergency. Governments and policymakers must not forget that stronger and more resilient societies evolve when they keep their people safe, when they guarantee access to health, and when they reduce inequities.

116 https://covid19-evidence.paho.org/handle/20.500.12663/1654

117 https://covid19-evidence.paho.org/handle/20.500.12663/1543

118 https://covid19-evidence.paho.org/handle/20.500.12663/1337

119 https://covid19-evidence.paho.org/handle/20.500.12663/1547

120 https://www.paho.org/en/documents/weekly-press-briefing-covid-19-directors-opening-remarks-june-2-2020

GLOBAL ACCESS TO MEDICINES IN THE AGE OF COVID-19: LOOKING THROUGH THE LENS OF INTELLECTUAL PROPERTY

Dr. Wendy Hollingsworth

CHIEF EXECUTIVE OFFICER & CONSULTANT

POLICY NETWORKS INTERNATIONAL, BARBADOS

Dr. Erica Smith

CHIEF EXECUTIVE OFFICER, COPYRIGHT SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS INC.

The current global pandemic has once again drawn attention to the issue of access to medicines, affordable healthcare and the international legal and regulatory framework to allow countries to ensure their citizens have access to what they consider to be essential medical care. In the past, access to medicines was an issue addressed in international trade forums by developing and least developed countries, who have led the charge to effect changes in international trade agreements such as the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to ensure equitable access to healthcare globally. Today, however, many high-income countries are also joining this global fight to ensure the rights of their people to affordable healthcare. Recent experiences with the global COVID-19 pandemic, where within a six-month period there have been approximately five million confirmed cases and 500,000 recorded deaths as at the date of writing, have sparked a global race to both develop effective medicines and vaccines as well as the legal and regulatory means of equitable access to these therapeutics by all states of the world.

This paper addresses these issues within the context of intellectual property law and the individual's right to health and explores how intellectual property rights, specifically patents, affect access to medicines and other medical technologies.

Intellectual property rights (IPRs) references a type of assets resulting from the creativity of the human intellect and is a legal term referring collectively to the rights granted under Industrial Property (e.g. patents, trademarks, industrial designs, geographical indications, trade secrets, integrated circuits, new plant varieties) and Copyright and Related Rights (literary and artistic works). Intellectual property rights can also provide for protection

against unfair competition. These rights confer on rights holders, exclusive rights, as prescribed in national law, to control the commercial exploitation of the invention or creation for a fixed duration.

Intellectual property rights and the laws that govern them are generally accepted as being critical to the control of technological standards, access to essential medicines, treatments and medical literature, as well as providing incentives for the development of new pharmaceuticals and healthcare products. It is this balance between access and profit which international intellectual property (IP) laws seek to achieve, and which national IP-related law and healthcare policies should address. In the context of public health, the most relevant form of IPRs are patents, which are used by pharmaceutical and other healthcare companies to protect their innovations and secure their success by the exercise of their exclusive monopoly in the marketplace. A patent is granted for technical inventions and confers a legal monopoly to the inventor in exchange for full disclosure of how the invention works. In this way, the rights holder can gain commercially while others can examine and improve on the invention, although unable to benefit commercially during the life of the patent without the rights holder's authorisation. This aspect of the patent system allows for mankind to benefit through the sharing of knowledge and continuing technical advancement.

The international legal framework for assuring universal access to medicines is grounded on the premise that health is a fundamental human right. Therefore, when examining the international legal framework for both IP protection and access to appropriate healthcare, it is essential to do so from the assumption that access to essential medicines constitutes a core human rights obligation of states. These human rights provisions in national law and policy provide a basis for consideration of the nexus between public health and the rights of IP rights holders. Indeed, the right to health is a central element of the international human rights system and is integral to the Universal Declaration on Human Rights, adopted in 1948, and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[121] The preamble to the World Health Organisation's (WHO) Constitution[122] stresses that international cooperation is critical to the promotion of health: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition…." It also emphasises that access goes beyond access to medicines but should also encompass "… medical, psychological and related knowledge…" and that "Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures".

The April 2002 United Nations Human Rights Council (HRC) established the Special Rapporteur on the right to health where member states were called upon to promote access to medicines for all, including through the full use of the provisions in trade agreements such as the TRIPS Agreement and the flexibilities it provides. Further, the United Nations

121 P. Krattiger, Anatole F., Zafar Mirza, Antony Taubman, and Jayashree Watal. *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade. Geneva: World Trade Organisation, 2013.*

122 World Health Organisation. Constitution. Forty-fifth edition, Supplement, October 2006. https://www.who.int/about/who-we-are/constitution Accessed 14/05/2020

General Assembly adopted the Sustainable Development Goals (SDGs) Agenda, post the 2015 Millennium Development Goals (MDGs), titled "Transforming our world: the 2030 Agenda for Sustainable Development" which has as part of its vision, "A world with equitable and universal access to quality education at all levels, to health care and social protection, where physical, mental and social well-being are assured".[123]

From a CARICOM perspective, in the Revised Treaty of Chaguaramas[124] establishing the Caribbean Community, including the CARICOM Single Market and Economy (CSME), Article 17 establishes the Council for Human and Social Development (COHSOD). Section 2(a) of Article 17 makes provision, from a regional perspective, to "promote the improvement of health, including the development and organisation of efficient and affordable health services in the Community". The promotion of access to medicine is also preserved in the most significant trade agreement CARIFORUM[125] Member States have entered into in recent times, where under the CARIFORUM-EU Economic Partnership Agreement (EPA) it is explicitly provided in Article 139 (2), "*The Parties also agree that an adequate and effective enforcement of intellectual property rights should take account of the development needs of the CARIFORUM States, provide a balance of rights and obligations between right holders and users and allow the EC Party and the Signatory CARIFORUM States to protect public health and nutrition. Nothing in this Agreement shall be construed as to impair the capacity of the Parties and the Signatory CARIFORUM States to promote access to medicines*".

The International Legal Framework

This section further elaborates on the flexibilities within the international IP system, specifically the WTO-TRIPS Agreement, which address public health and access to medicines and medical therapeutics. The IP system operates by providing exclusive rights to rights owners to prevent third parties from commercially gaining from the use of their protected IPRs, while allowing them to control the authorisation of how their protected proprietary IP assets can be used by others. International IP law provides the context and general principles for national IP systems which seek to achieve a balance between IP rights holders and the national interest in ensuring the good health of citizens.

123 "United Nations Sustainable Development—17 Goals to Transform Our World." United Nations. United Nations. Accessed May 27, 2020. https://www.un.org/sustainabledevelopment/. The Sustainable Development Goals are a call for action by all countries—poor, rich and middle-income—to promote prosperity while protecting the planet. They recognise that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection.

124 A revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (CSME). The Heads of Government of the Caribbean Community signed a Revised Treaty of Chaguaramas on 5 July 2001 at their Twenty-Second Meeting of the Conference in Nassau, The Bahamas. This established the Caribbean Community including the CARICOM Single Market and Economy (CSME).

125 CARIFORUM is a sub-grouping within the Organisation of African, Caribbean and Pacific States comprising CARICOM Members in addition to the Dominican Republic.

The multilateral legal IP framework which addresses these issues is enshrined in the legal system of the TRIPS Agreement[126], which incorporates provisions of the Paris Convention for the Protection of Industrial Property[127], and various treaties administered by the World Intellectual Property Organisation (WIPO).[128] The TRIPS Agreement is the first multilateral treaty to concisely articulate patentability criteria and scope. WTO members were afforded varied options to implement their TRIPS obligations based on different considerations such as the country's stage of development and specific national interests such as public health.

Article 27 of the TRIPS Agreement provides that patent protection must be "available for any inventions, whether products or processes, in all fields of technology," while Article 28[129] addresses the rights conferred to the rights owner in respect of the use, sale, importation or other distribution of goods, pursuant to the provisions of Article 6. Having established the TRIPS Agreement as the primary international legal instrument providing WTO members with guidance to protect patents, inclusive of pharmaceutical patents, it is important to understand the flexibilities it allows for member states to adopt national policies and implement the legislative framework to allow for access to essential medicines and medical technologies for their nationals. Both the Paris Convention (Articles 5 and 5ter)[130] and Articles 30 and 31 of the TRIPS Agreement provide for limitations to the rights of patent owners. These limitations can be used in certain circumstances by countries to provide a national framework to meet their national public health obligations. These include:

> *Regulatory review ("Bolar") exception* also known as a research exemption. This exception is of importance to generic drug producers as it allows them to produce batches of a generic version of a patented pharmaceutical product during the process of developing and submitting testing data to obtain marketing authorisation without such acts being considered an infringement. This exception can potentially allow for generic drugs to be placed on the market faster.

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126 "WTO: Intellectual Property (TRIPS)—Gateway." WTO. Accessed June 5, 2020. https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

127 The Paris Convention, adopted in 1883, applies to industrial property, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. This international agreement was the first major step taken to help creators ensure that their intellectual works were protected in other countries. As the predecessor to the TRIPS Agreement, it nevertheless did not make provision for minimum standards for IP protection among signatories, neither did it have a dispute settlement system as provided under the WTP-TRIPS legal system. https://www.wipo.int/treaties/en/ip/paris/

128 https://www.wipo.int/portal/en/index.html

129 TRIPS Article 281. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

130 Paris Convention for the Protection of Industrial Property. https://wipolex.wipo.int/en/treaties/textdetails/12633

> *Compulsory licensing and government use*—National patent laws can allow for the authorisation of the grant of compulsory licences, under certain conditions, to third parties for their own use, or for use by or on behalf of governments, without the authorisation of the rights holder. The compulsory licence provision has been the one most used by developing and least developed countries to provide a national system for access to affordable medicines. Compulsory licensing, and Government Use Compulsory licensing, enables a government, or the court, to grant a licence to a company, government agency or other party for the right to exploit a patent without the rights holder's consent. A compulsory licence must be granted by a competent national authority to a designated person/manufacturer with provision being made to compensate the rights holder through payment of remuneration.

The TRIPs Agreement leaves it up to Members to determine the grounds for the grant of a compulsory licence, however, Article 31 provides the principles to be applied when considering the grant of such a licence which include:[131]

a. that the determination is made on a case-by-case basis;
b. the requirement that a licence be voluntarily requested before being granted on compulsory terms;
c. the use is non-exclusive and non-assignable;
d. the obligation that the compulsory licence must be used predominantly for the supply of the domestic market;[132]
e. provision for judicial and other independent review of decisions made in respect of the compulsory licence; and
f. adequate remuneration to the patent holder.

The TRIPS Agreement further provides that at the national level a compulsory licence may be issued on the following grounds: (i) refusal to deal, for example, when the patent holder refuses to grant a voluntary licence which was requested on reasonable commercial terms; (ii) national emergency situations such as when urgent public health situations exist as a result of a natural catastrophe, war or epidemics; (iii) anticompetitive practices, for example, to correct excessive prices and other abusive trade practices; (iv) governmental use such as to provide healthcare to the poor; (v) lack or insufficiency of working of an invention needed for healthcare or nutrition; and (vi) public interest which can be broadly defined to cover other situations where the public interest is involved.[133]

131 Agreement on Trade-Related Aspects Of Intellectual Property Rights. Annex 1C. Part II—Standards concerning the availability, scope and use of Intellectual Property Rights. WTO. https://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm

132 This provision predates the amendment to the TRIPS Agreement which took effect on 23 January 2017.

133 Integrating Public Health Concerns into Patent Legislation in Developing Countries was first published in October 2000 by the South Centre, Chemin du Champ d'Anier 17, 1211 Geneva 19, Switzerland.

Gaps in the International Legal Framework

Although the TRIPs Agreement articulates the types of provisions and conditions under which WTO Member States can implement legislation to allow for flexibilities, there was much debate among developing and developed countries as to implementation. The Doha Declaration on the TRIPS Agreement and Public Health[134] was made to offer clarification by confirming that the existence of patent rights does not prohibit countries from enacting public health measures. Moreover, while the TRIPS Agreement provides for flexibilities, the Doha Declaration reinforces the right of WTO Members to use the provisions in the TRIPS Agreement, which provide flexibility for Member States to address their national public health priorities. To some extent the Doha Declaration focuses on specific operational choices for Member States in developing policy and the legal framework to support their domestic healthcare system. In terms of clarity the Doha Declaration[135] affirms that Member States have the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted; it identifies public health crises, including epidemics, as grounds for countries to initiate the process of compulsory licensing; and provides that countries are free to implement their own national systems for exhaustion of rights[136] (national, regional, international) in accordance with trade rules against discrimination based on nationality.

Further, the Paragraph 6 System of the Doha Declaration addresses the limited interpretation of Article 31(f) of the TRIPS Agreement which provided that products made under compulsory licensing must be "predominantly for the supply of the domestic market" by providing that Member States with insufficient, or no manufacturing capacity, can avail themselves of their compulsory licensing regime. It also makes clear that Member States within regional systems can "harness economies of scale for the purposes of enhancing purchasing power, for and facilitating the local production of pharmaceutical

134 Doha Declaration on the TRIPS agreement and public health. Adopted on 14 November 2001. DOHA WTO MINISTERIAL 2001: TRIPS WT/MIN(01)/DEC/2. 20 November 2001. https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm The Doha Ministerial Declaration adopted on November 14, 2001 provided the mandate for the negotiations on numerous trade-related topics and sought to address several implementation problems faced by WTO members and to find appropriate solutions to them. Trade-related aspects of intellectual property rights was among the topics adopted to be included in the WTO work programme to address the challenges facing the multilateral trading system. Specifically related to public health, the WTO work programme stressed "… the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration." The Doha Declaration on TRIPS and Public Health was adopted during these Ministerial meetings and has formed the basis for further negotiations among WTO Member States. Further progress was made with the adoption of the Paragraph 6 System into the TRIPS Agreement.

135 Ibid Paragraph 5

136 The principle of the exhaustion of rights as it relates to patents provides that when a product which is protected by a patent is put on the market by the holder of the patent or with the consent of the right holder, then the further sale of that product in that market would not require any authorisation of the patent holder as the exclusive right to sell that product is considered to have exhausted. The application of the principle varies by country or region, for example, in the United States there is international exhaustion which means, that if the product is placed on the market anywhere in the world by the right holder or with his consent, then the exclusive right to sell the product is exhausted. In Europe there is regional exhaustion for products placed in the European Economic Area and in some countries, exhaustion may be limited to the territory, national exhaustion.

products…"[137] The General Council of the WTO adopted the Decision on Implementation of Paragraph 6 of the Doha Declaration on 30 August 2003 which provided a waiver of the export restriction for compulsory licences. Thereafter on 23 January 2017, the Protocol amending the TRIPS Agreement, which allowed for the provisions of Paragraph 6 to be formerly integrated into the TRIPS Agreement, took effect. This amendment replaced the General Council Decision of 30 August 2003[138] (waiver to TRIPS Article 31(f)) for Members who have accepted the amendment. The most current development to this integration of Paragraph 6 has been the WTO General Council's December 10, 2019 Decision to extend the period for the acceptance by Member States of the protocol to amend the TRIPS Agreement.[139]

Accessing Essential Medicines: How Countries are Making it Work

The adoption of the Paragraph 6 System into the TRIPS Amendment was a major achievement for developing and least developed countries. On examining its impact, however, it can be argued that the adoption of Paragraph 6, as it stands in the amendment, creates procedural burdens on countries seeking to operationalise the system. From the perspective of the importing country, while the lack of manufacturing capacity may be easy to prove, procedures in terms of notification and acquiring the services of a manufacturer and supplier could result in delayed access to critical medicines and other essential technologies during a public health emergency such as the COVID-19 pandemic. Likewise, the exporting country will need to negotiate a voluntary licence with several patent holders, and undertake further R&D to obtain test data; and the quantities requested by the importing country(ies) may not be incentive enough to undertake the manufacturing process.[140]

Most cases of countries using TRIPS flexibilities have been in relation to HIV/AIDS and access to antiretroviral treatments. Countries in Africa, for example, have included provisions in national IP laws to allow for national exhaustion. Ghana, Kenya, Mauritius, Namibia, South Africa and Zimbabwe have incorporated provisions in their patent laws

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137 Protocol to amend the TRIPS Agreement. WTO Decision of 6 December 2005. https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm 3. With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products: where a developing or least developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up of countries presently on the United Nations list of least developed countries, the obligation of that Member under Article 31(f) shall not apply to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent rights in question.

138 Decision removes final patent obstacle to cheap drug imports. WTO News: 2003 Press Releases Press/350/Rev.1 30 August 2003. https://www.wto.org/english/news_e/pres03_e/pr350_e.htm

139 Amendment of the Trips Agreement—Seventh Extension of the Period for the Acceptance by Members of the Protocol Amending the Trips Agreement. Adopted by the General Council on 10 December 2019. WT/L/1081. 11 December 2019.

140 Carlos M. Correa. 2019. *Will the Amendment to the TRIPS Agreement Enhance Access to Medicines? Policy Brief No. 57. January 2019. The South Centre.*

allowing parallel imports from anywhere in the world. While the group of 16 countries forming the African Intellectual Property Organisation (OAPI) has taken advantage of a regional exhaustion regime[141], South Africa has been successful in using its competition law to ensure access to antiretroviral drugs where both the government and the pharmaceutical companies involved were able to negotiate an acceptable pricing regime, thus pre-empting competition law proceedings. In July 2007 Rwanda became the first country to successfully use the WTO 30 August 2003 decision to import a generic fixed-dose combination of required antiretroviral drugs from a Canadian generic manufacturing company. East, South and South-East Asian countries with compulsory licensing provisions in their Patent laws have also made use of compulsory licensing mechanisms.

In the Caribbean, the Organisation of Eastern Caribbean States (OECS) Pharmaceutical Procurement Service (PPS) established in 1986 is an official institution of the OECS which is responsible for the procurement, on behalf of Member States, of medicines and healthcare equipment. Its success has been based on the ability to achieve lower prices as well as providing training, capacity building and the sharing of knowledge. It is, however, important to also take note of some of the challenges that have been encountered. These include accessing foreign exchange for payments, late payments, cancellation of orders and managing order sizes.

While the bulk of cases making use of TRIPS flexibilities built into national law have been for access to HIV/AIDS-related medical treatments, these flexibilities have also been used to secure access to other essential medicines. Thailand, for example, has used government use compulsory licences for a range of pharmaceutical products to treat various medical conditions including heart disease and cancer. Canada has legislation which allows it to export pharmaceutical products under compulsory licences as provided for under the amendment to the TRIPS Agreement. India has protected its generic drug manufacturing industry by ensuring that while their Patent Act complies with the TRIPS Agreement, patentability criteria in the Act support continued development of the industry.

With the WHO declaring COVID-19 a global pandemic, countries have been reviewing the provisions of their legislation for options to facilitate access to treatments and medicines. These include the possibility of withholding injunctive relief for the unlicenced manufacture of patented medicines and compulsory licensing. The speed of the action taken reflects the fear that some countries have about ensuring access to treatments or vaccines once developed. Major concerns expressed by some countries include:

1. Production capacity and the ability to keep up with global demand,
2. Pricing which at present is unknown, and
3. Export restrictions where countries seek to secure supplies for their citizens.

As evidence of the reality of these fears, "investment bankers have signalled to investors and manufacturers that they should seek to seize the opportunity to raise drug prices."[142]

141 *Doha+10 Trips Flexibilities And Access To Antiretroviral Therapy: Lessons From The Past, Opportunities For The Future. UNAIDS Technical Brief 2011.*

142 Fang, Lee. "Banks Pressure Health Care Firms to Raise Prices on Critical Drugs, Medical Supplies for Coronavirus." *The Intercept*, March 19, 2020. https://theintercept.com/2020/03/19/coronavirus-vaccine-medical-supplies-price-gouging/.

While the actions taken by some countries have varied, the common factor is the use of provisions already existing within national law. Canada, for example, has issued Bill C-13, an Act respecting certain measures in response to COVID-19 which in Part 12 seeks to amend the Patent Act to, among other things, "provide that the Commissioner must, on the application of the Minister of Health, authorise the Government of Canada and any person specified in the application to make, construct, use and sell a patented invention to the extent necessary to respond to a public health emergency that is a matter of national concern".[143] Chile has issued a "Resolution for the Granting of Non-Voluntary Licences referred to in Article 51º Nº 2 the Industrial Property Law Nº 19.030 to Facilitate Access and Availability of Medicines and Technologies for the Prevention, Treatment and Cure of Coronavirus COVID-19".[144] Similarly, Ecuador has issued a "Resolution to require the National Government to establish compulsory licences and other measures to guarantee free and affordable access to pharmaceutical products and medical technologies in the Declaration of Sanitary Emergency due to the Coronavirus pandemic (COVID-19) and other variations, as well as biosafety protocols and instruments for health personnel, postgraduates and students of the Public Health System"[145]

Pharmaceutical companies have long argued that the compulsory licensing mechanism provided in the TRIPS Agreement, and which has been implemented in the patent laws of several countries, is a disincentive for their continued investment in R&D to develop new improved medicines and therapeutic technologies for existing and emerging diseases. Post the Doha Declaration and the adoption of the amendment to the TRIPS Agreement, however, some pharmaceutical companies have implemented corporate social responsibility business models to circumvent these provisions, by increasingly using licence agreements to allow manufacturers and distribute generic versions of their products, within a defined geographical scope and mostly in relation to HIV/AIDS treatments. By negotiating directly with manufacturers these companies have been able to exercise control in their contractual agreements over quantities manufactured, distribution, and price.

Despite their concerns over the impact of the use compulsory licensing regimes on their overall profitability, the response by some pharmaceutical companies to the COVID-19 pandemic has been positive. According to the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA), in response to the pandemic, its members have donated US$700 million in cash and $40 million in non-monetary donations; they have been sharing real-time clinical data and speeding up research and development and clinical trials among other actions.[146]

143 BILL C-13. An Act respecting certain measures in response to COVID-19. As Passed By The House Of Commons March 24, 2020. www.ourcommons.ca

144 Knowledge Economy International. https://www.keionline.org/chilean-covid-resolution

145 Knowledge Economy International. https://www.keionline.org/ecuador-CL-coronavirus-resolution

146 "COVID-19: The Biopharmaceutical Industry Is Leading the Way in Developing Vaccines, Treatments & Diagnostics." IFPMA. Accessed May 28, 2020. https://www.ifpma.org/covid19/.

Forward Actions

The amendment to the TRIPS Agreement clarifies the flexibilities contained therein and the rights of member states. It is imperative, however, that countries ensure that these provisions are reflected in domestic law to guarantee that medicines and other medical therapeutics are available at affordable prices. Sadly, despite some successes in countries using TRIPS flexibilities to access essential medicines for use nationally, this is not a widespread occurrence. To remedy this situation countries must therefore:

1. Ensure their TRIPS-related legislation, especially patent law, is not only TRIPS compliant but also incorporates the required provisions to allow the freedom to use the flexibilities and exemptions.
2. Make full use of regional mechanisms to take advantage of economies of scale as provided in the Paragraph 6 System and adopt best practices from the OECS procurement mechanism regional model.
3. Enter into negotiations with pharmaceutical companies for access at an early stage.
4. Operationalise the Caribbean Pharmaceutical Policy[147] especially in relation to legislation and institutional framework as well as the regional centralised generic medicines registry process.
5. As a matter of urgency, model varying scenarios in relation to access to medicines for treating COVID-19 and prepare implementable regional responses for such access.[148]
6. Consideration must be given to access within a wide context including appropriate national policy, regulations, and efficient procurement and other supply chain and distribution mechanisms.

147 Pan American Health Organisation. Caribbean Community. Caribbean Pharmaceutical Policy. Washington, DC: PAHO, 2013.

148 Beyond the OECS PPP, there is regional cooperation in public health with the Caribbean Public Health Agency (CARPHA) which was established in 2011 by CARICOM Member States. It is responsible for the collective response to the regional health system approach and assisting the Caribbean Community in their response to public health emergencies. This joint approach recognises the limited financial and technical resources of the region including the ability to recognise and diagnose animal and zoonotic infectious diseases which makes a region dependent on tourism particularly vulnerable. Additionally, there is the Caribbean Cooperation in Health (CCH) for which the secretariat comprises CARPHA, the Pan-American Health Organisation (PAHO) and CARICOM. The CCH is a system which allows CARICOM Member States to cooperate in priority health areas and to develop technical capacity.

COVID-19 AND THE GLOBAL LEGAL ORDER

Professor Simon Chesterman

DEAN, FACULTY OF LAW, NATIONAL UNIVERSITY OF SINGAPORE

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When the world restarts and the masks are put away, will the global legal order look the same? Should it?

A crisis is a terrible time to make predictions about the future. But it's a great time to rethink dubious assumptions of the past, and address tensions revealed in the present.

Just within my own field of international law, COVID-19 has encouraged all three. Pundits predict the death of globalisation—or its rebirth. Others assert that they always knew the global public health infrastructure was fundamentally flawed, or that it was the one thing saving us from apocalypse. And, of course, there are those eagerly seeking someone, somewhere, against whom they might bring a lawsuit.

So it might be helpful to sort some of the wheat from the chaff and map out what we know, what we don't know, and where we might go from here.

1. What we know

One reason for the uncertainty of the current moment is that it's revealing two contradictory things about the global order at the same time.

The first is that we are all connected. Our shared biology, the vectors along which the virus travels, the measures by which we try to slow that movement or ameliorate its effects—these are broadly the same around the world.

Science is converging on best practices and scientists are cooperating on a scale never seen before. The wider public speak knowingly about "flattening the curve" and driving down the coronavirus's R_0, which measures transmissibility.

People who had never heard of the World Health Organisation (WHO) can now pronounce the name of its Director-General. A decades-long campaign against the handshake is finally gaining traction.

Emptied cities, masked individuals, Zoom conversations—that's now our common experience.

To an extent unprecedented in human history, we are one world, having one conversation, about one goal.

But the second thing that has been revealed is that, when push comes to shove, it's every country for itself.

Borders are closed, global supply chains thrown into disarray. Entire industries that depend on the movement of people—airlines, tourism—have collapsed. There is dangerous talk of hoarding medical supplies, or taking them from other countries.

We circle wagons at home, of course, where we do our part by staying put. When nation states practise social distancing, however, the results are pernicious: the idea of an international community is replaced by an "us" and a "them". Nationalism and nativism, already used to stoke political fires, escalate to unapologetic racism and xenophobia.

2. What we don't know

Whether unity or division will win out is one of the many things we do not know. More pressing is how long the current crisis will last, and who might lead subsequent efforts to reconstruct the bridges of global order—or burn them.

As we have seen, control of local transmissions can be undermined by imported ones. Unless there is coordination in global responses, governments will face a choice between re-joining the international community and keeping out the disease.

Unfortunately, global leadership is in short supply and in public institutions is at an historic low.

In the past, the United States might have taken centre stage. Its President seems to want only to be the centre of attention. US credibility has been eroded over the past three years; now it is probably beyond saving.

China had been on a trajectory to match or replace the United States in some areas. Early missteps and habitual concealment of mistakes have left its own trustworthiness in tatters.

International organisations, most prominently the WHO, have come to serve as convenient whipping boys for their weakness. What many do not understand is that they are weak by design: it's in their nature that they cannot push states too hard or defend themselves robustly against political attacks.[149]

As for the rest of the United Nations, the Security Council—the only global governance institution with actual teeth—has been largely silent. A month of negotiation produced a draft resolution[150] weakly urging "enhanced coordination" and a temporary ceasefire in conflict zones. The General Assembly managed to pass a resolution calling for timely access

149 The WHO is, in fact, unusual for being one of the only international organisations that actually requires any relevant experience for its Director-General, who must have a strong background in public health. Dr Tedros Adhanom Ghebreyesus is the first non-physician to hold the role, but he has degrees in immunology and community health, and served as Ethiopia's Minister for Health for seven years. (The other is Interpol, whose head is expected to have experience in police matters.)
Criticism of the WHO is fair game, but the inside story of its early attempts to manage the pandemic show it navigating a path between frenemy superpowers and the egos of their leaders, without the ability to demand information or enforce compliance.

150 Drafted 22 April 2020. It is possible that this could go up for a vote before the end of April.

to a non-existent vaccine—though only because the most powerful member apparently forgot to block it.

The problem facing these institutions of global order is not structural. It's not even a lack of resources. It's a deficit of trust.

That points to another pair of contradictions.

Last week, a global survey done for the 75th anniversary of the UN showed overwhelming support for international cooperation to solve global challenges.

Yet poll after poll also shows that huge swathes of the population do not trust public institutions (or the media, he writes in the Straits Times).

How might that trust be earned? Unfortunately, reasoning is not very effective. Research in cognitive science established that only recently, but advertisers and politicians always knew that emotions and fear work better.

One would like to think, for example, that people stopped shaking hands, practised social distancing, and are now staying home because they believe the science. Yet it's also due to fear of the virus, fear of penalties, and fear of being publicly shamed.

Brexit—remember when that was front page news?—is testament to the powers of populist persuasion in reshaping the institutions of global order. Whether the current moment will see a comparable or greater reordering is another thing we don't know.

Where we might go from here

So a crisis is a terrible time to predict the future.

But, at the level of the global legal order, it's also the only time we can bring about serious change. The League of Nations would not have been created without the First World War; the United Nations was a by-product of the Second.

It's unlikely that COVID-19 will lead to a new World Health Council with powers to address pandemics, comparable to the Security Council's powers to address war.

Instead of traditional structures, or formal groupings like the G7 and the G20, leadership and inspiration have come from countries like South Korea, Taiwan, and—until recently, at least—Singapore. As the Lowy Institute's Michael Fullilove observed, the future might see more such "coalitions of the competent".

This touches on one of the few positive aspects of the crisis: within the space of only a couple of months, a majority of people on the planet changed their behaviour based on the recommendations of scientists. Fear and coercion played a role, yet the fact that change is possible might offer some hope for our ability to deal with other global challenges, notably climate change.

Other aspects will not be so positive.

Global inequality will worsen. For all the concerns about ICU beds in places hit hard by COVID19, there are countries like Somalia without a single ventilator. As economies around the world crater, development and humanitarian assistance are among the first things to be cut.

The surveillance state will expand. Taiwan is a success story because it established the gold standard in tracking its population through their phones. Even in Europe, the debate is shifting from safeguarding privacy to ensuring that such methods are effective.

Whenever security battles liberty, security usually wins. That's true of the past two decades fighting terrorism; it may be a feature of the next two decades fighting pandemics.[151]

Though perhaps the most likely scenario is that when things go back to normal, they will… go back to normal. For a year or two, maybe three, we will be on a heightened state of alert. Travellers will be screened, governments will create early warning systems, the WHO will get more funding and be held to a higher standard.

And then we will relax, stockpiled supplies will expire, and budgets will shift towards the latest crisis du jour. Handshakes, despite the WHO's best efforts, will return—at least until the next pandemic.

Never Waste a Good Crisis

It's often said—wrongly—that the Chinese word for "crisis" (, w ij) is composed of two characters, one meaning danger and the other opportunity. After John F. Kennedy invoked this in a campaign speech, it became a cliché of motivational speakers. Though the first character does mean danger, the second is more properly understood as referring to a crucial moment or an incipient point.

No one should be treating COVID-19 as an opportunity. As we look ahead to a future beyond it, however, there is no doubt that this is a crucial moment.

So by all means speculate on what the future holds—make bets on it, if that's your thing. Just don't put too much stake in confident predictions during a crisis. And if you do bet, maybe don't shake hands on it.

151 On 23 April 2020, the UN issued a report stressing the need to respect human rights when responding to COVID-19.

Chapter 2

CIVIL LIBERTIES AND COVID-19

The insidious nature of COVID-19 has challenged governments around the world to adopt measures designed to prevent, contain and control the spread of the virus. These measures have impacted human rights and civil liberties enshrined in constitutions around the world. The panel sought to explore the following issues:

(i) The balance between treatment of COVID-19 and the need to protect Civil Liberties against excessive government intervention. Two legal issues stemming from this are: i. whether the measures taken were reasonable and proportionate to the threat posed (principle of proportionality); and ii. whether the suspension orders or restrictive measures were legal (principle of legality).

(ii) How has COVID-19 exposed deep structural inequities that exist in the Caribbean in terms of access to rights and liberties, including economic and social rights such as the right to education and the right to health? This issue revolves around the norm of equality.

Principles of Proportionality and Legality

Currently, legal discussions surrounding the COVID-19 pandemic have focused on the legal base, from a perspective of the Principle of Proportionality and the Principle of Legality, of the measures taken by various governments around the world. Those governments have adopted measures designed to contain and to prevent the spread of the infection. In the Caribbean, the measures are varied; some have been under statutory provisions like Quarantine Acts and Public Health Acts; in some countries declarations of emergency have been made under constitutional provisions. The measures which have been taken have involved invasions of the right to freedom of movement, the right to freedom of a person, the right to freedom of association, as well as social rights. The question that therefore arises is whether the measures undertaken are reasonable and proportionate to the dangers which are faced?

The question of the proportionality is a matter in which the courts in different countries, such as South Africa and United States of America, have examined. The courts have analysed the question of the reasonableness of the restrictions and to a certain extent, most courts allow a margin of appreciation to the administration, though it was seen that in the United States of America, closure provisions have been struck down at least in one

state. Dr. Barnett emphasised that the reasonableness of the responses must be considered and the governments have a responsibility to constantly monitor the extent to which the severe restrictions are maintained.

In Europe, the governments have mostly curtailed civil liberties and massively reduced the freedom of movement for disease prevention and control, through implementing extraordinary measures such as lockdowns, travel restrictions, curfews and extensive cellphone surveillance. There are concerns that these types of unprecedented restrictions may not be proportionate and may also lead to the further expansion of state power, particularly the Executive power.

An interesting approach to this issue surrounding proportionality was highlighted by Professor Amnon Lehavi through his focus on the exceptional situation in Israel involving the State of Emergency. He showed the role that proportionality played in the lawmaking and measures taken by the Knesset (Parliament) in Israel. It is the norm for Israel to be in a constantly renewing State of Emergency due to national security. This has major implications with respect to lawmaking, the use of executive power and the role of judicial oversight. However, this unprecedented dimension has altered it to a civilian State of Emergency. The Knesset is authorised by law to proclaim a State of Emergency in Israel which allows it to promulgate emergency regulations, basically through an overnight decision which can supersede regular legislation.

One approved emergency regulation that appeared to be extremely controversial dealt with the employment of digital monitoring tools. The Israeli Security Agency (ISA) had been authorised to gather technological data, mostly through tracking cellphones to assist the Ministry of Health in conducting an epidemiological investigation. Following a petition to the Supreme Court, arguing that such an extensive use of location tracking violated the basic law of human dignity and liberty, the Court ruled that if the state wished to continue pursuing such measures, it had to do so through primary legislation not through emergency regulations. The government wanted to move ahead with enacting a law on the matter, however this was abandoned after a hearing in the Knesset revealed that only three violators have been tracked so far and this was disproportionate to the injury to the right to privacy.

Another example of the courts measuring the question of proportionality arose when the Israeli government made socially and politically sensitive decisions to declare cities and neighbourhoods, where Orthodox Jews lived, as red zones and imposed stricter curfews on them. They petitioned the Supreme Court arguing that such curfews were disproportionate and were at the same time stigmatising them. The Court held that the measures taken were justified and necessary and did not result in unwarranted discrimination against this social group.

With respect to the legality of the suspension or restriction measures, there are two patterns that can be identified. The first pattern is the declaration of a State of Emergency as highlighted above with the example of Israel; and the second pattern is the use of existing but relatively new legislation as seen in Germany, the adoption of new emergency legislation in Norway and Hungary, the use of executive decrees observed in Italy, and the use of old pandemic legislation with the extensive use of soft executive measures observed

in Turkey. The Principle of Legality was not raised generally but briefly mentioned in legal debates as most governments would have followed at least one of the two identified patterns.

Equality

Within this discussion of COVID-19, the most important norm is equality. Though most Caribbean Governments have not embraced inequality in its fullest sense in their jurisprudence, they have hardly ever gone above formal equality, which is mentioned in all their constitutions, particularly highlighted in Trinidad and Tobago's constitution. There is a need to examine structural patterns of inequality in the legal systems. If this is done, we cannot escape a conversation about economic, social and cultural rights and how they intertwine.

Professor Rose-Marie Antoine notes that to foster development, there must be equal access to education and healthcare. This cannot be attained unless the discussion of poverty is brought to the fore. Poverty and marginalisation are sidelined in the Caribbean region, certainly ostracised from a legal point of view. Many Trinbagonians did not believe poverty exists in their country, but the impoverished state of many citizens was highlighted when the society saw long lines of people waiting to collect hampers from an NGO called Living Waters.

Education in Trinidad and Tobago is proclaimed to be "free" as there is a right to education. The state provides education within its developmental objectives; however, as Professor Antoine opines, the core principles of equality must exist within the education system. There is a lot of disparity and inequality regarding how we treat schools based on location. Schools in poor rural areas are not well resourced and this was certainly put on display when COVID-19 struck. The lens of inequality really pierced through the system when those students who did not have the internet or laptops could not be educated in the same way as better-off kids.

In terms of health, Trinidad and Tobago did not have to confront very abusive patterns of poverty or ethnicity as seen in the US or in the UK. The reason has less to do with what was done, but because there was no exponential spread, and because of the health system inherited from England. Citizens did not have to rely on private health care insurance, but it does not mean that inequality did not still exist in the public health system.

In Turkey, the religious conservatives and the nationalists passed a new law, due to COVID-19, for the release of approximately 90,000 prison inmates convicted of severe crimes, and this, Professor Oder contends, has led to a huge discussion on the principle of equality and the principle of fairness. Certainly, inequality is seen in the prisons. Professor Antoine portrayed an example where she asked attendees to imagine if they were in remand for a ganja spliff and were to catch the virus in prison and die. This would not simply be a violation of their right to health but there would be more profound issues such as their right to life being implicated. There is a greater burden on the state to ensure equal access to health care and civil liberties.

THE COVID-19 PANDEMIC AND HUMAN RIGHTS

Dr The Hon Lloyd G. Barnett OJ

Attorney-at-Law

Former Chairman, Independent Jamaica Council for Human Rights

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By the beginning of March 2020 it had become obvious that the coronavirus disease was highly infectious and a great threat to public health. It was known to be transmissible from person to person and soon nearly 200 countries and millions of persons had become infected. It was clearly a great threat to the human rights to life and good health. The World Health Organisation declared the outbreak to be a public health emergency of international concern. The virus was an obvious threat to the Commonwealth Caribbean, the member countries of which have tourism as a major component of their economy and accordingly receive millions of visitors from all parts of the world. As could be readily expected, by early March cases of infection began to appear in the region. Governments' responses included:

(1) the closing of borders, severely limiting entry to and exit from the jurisdictions;

(2) stay-at-home orders for protracted periods;

(3) closure of educational institutions indefinitely;

(4) closure of churches, clubs, bars, shops and other business;

(5) imposition of curfews;

(6) restriction on size of gatherings;

(7) compulsory wearing of masks;

(8) physical or social distancing;

(9) confinement in designated places or areas; and

(10) isolation or placing in quarantine.

These restrictions and impositions abridged or infringed constitutionally protected fundamental rights to freedom of the person, freedom of movement, freedom of association, freedom of religion and privacy. They also abridged socio-economic rights recognised in international human rights jurisprudence, such as the right to education, the right to earn a livelihood and the right to recreation.

These have resulted in loss of income, interruption of career paths, psychological pressures, domestic violence and child abuse.

In general, the peoples of the Commonwealth Caribbean have accepted the justifiability for most of these restrictions. Complaints have usually been confined to the manner of their administration, their inflexibility, and the details of their contents. However, it is in periods of such emergencies, while we are focussed on the necessity to meet the dangers of pandemics, natural disasters, terrorism and other serious threats to our lives and well-being, that we should be careful that we do not surrender our right to due process and concede wide powers to the authorities without any obligation for oversight and accountability.

There are usually provisions in Caribbean Constitutions for periods of emergency to be established and such extraordinary powers exercised and restrictions placed on the enjoyment of fundamental human rights. The essentials of these constitutional provisions are that the emergency periods can only be extended beyond an established limited period by means of the approval of the representative legislature. This requirement for parliamentary oversight is a protection against the abuse of powers under the guise of meeting national dangers. Courts in other countries have struck down or restricted emergency measures where they have been imposed without resort to a system of parliamentary oversight. The practice in the Commonwealth Caribbean has not been consistent. For instance, in Antigua and Barbuda and Barbados, there have been declarations of states of emergency, whereas in Jamaica and Trinidad and Tobago, only ordinary statutory provisions have been invoked. There have been judicial decisions in other jurisdictions which have indicated that far-reaching measures cannot be constitutionally justified where there is no provision for parliamentary oversight. It is in the interest of democracy and constitutional propriety that governments should adopt and employ the most appropriate constitutional methodologies and that the judiciary and legal profession should remain alert in safeguarding our constitutional norms.

CIVIL LIBERTIES IN THE AGE OF COVID-19: THE CASE OF ISRAEL

Professor Amnon Lehavi
Atara Kaufman Professor of Real Estate
Academic Director, Gazit-Globe Real Estate Institute
Harry Radzyner Law School

This entry briefly introduces the situation in Israel in 2020 concerning the balance between the goal of fighting the coronavirus and the need to protect civil liberties against excessive government intervention. While many of the legal issues that concern the Israeli legal system are familiar in other countries, Israel also has its own set of peculiarities. It is this "Israeli exceptionalism" that I would like to focus on in this entry.

Here is the general point that I would like to make at the outset. Israel is a country that is very much used to being in a state of emergency. In fact, from a legal perspective, Israel is in a constantly renewing state of emergency ever since its establishment in 1948—and this has always had major implications for law-making, the use of executive power, and the role of judicial oversight. In a way, dealing with emergency situations, and with their legal implications, is very much part of the DNA of the Israeli system of government.

But the actual type of emergency that Israel is used to is very different in nature from the one the country is currently facing. Israel's constantly renewing state of emergency has to do with national security—although obviously, along its history, the country has seen times of full-scale wars or other high-intensity armed conflicts, alongside more quiet times.

In contrast, what Israeli society is currently facing is a very different type of emergency or crisis. This is a civilian crisis, one of unprecedented dimensions, including in its implications for the Israeli economy. In its 72 years of independence, Israel has been lucky enough not to experience a major natural disaster, such as an earthquake, hurricane, or major plague. It has never had a purely civilian state of emergency.

This crisis is not only exceptional in its essence, but also in its scope. Shopping malls, restaurants, and cafés remain open even during times of war. Many of these places have been closed down for over two months, and other venues and businesses remained closed down even beyond that well into the second half of 2020.

So, in essence, Israel is facing a truly exceptional state of emergency in 2020, without an appropriate legal infrastructure to handle it coming into this crisis, and, accordingly, issues of public health, economics, and national defence are constantly conflated, with

the country's 'DNA' of national-defence emergency constantly showing up, maybe out of context, maybe out of place, but still showing up. And this has some really interesting legal implications.

So what is unique about lawmaking and the use of executive power in Israel in the face of the coronavirus? As mentioned at the outset, since its establishment in 1948, back then in the midst of the War of Independence, the Israeli parliament—the Knesset—is authorised by law to proclaim a state of emergency in Israel for a period of a year, with this seemingly provisional declaration being renewed since then every year.[152]

When a state of emergency exists, the Israeli government is entitled to promulgate "emergency regulations"—basically through an overnight decision. These emergency regulations can supersede regular legislation and stay in force for a period of up to three months, unless such measures are either abolished by a majority of Knesset members or enacted as law.[153]

Since 1992, when the Basic Law: Human Dignity and Liberty—a partial bill of rights with constitutional status—was enacted, such emergency regulations can also deny or restrict rights under this Basic Law, provided that "the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required,"[154] with the Supreme Court having the final say on whether these criteria of "proportionality" have been met.

The Israeli government approved dozens of emergency regulations in 2020 in the context of the coronavirus, with probably the most controversial ones dealing with the employment of digital monitoring tools, which are used for counterterrorism purposes in "regular" times of emergency.

Under one set of emergency regulations, the Israeli Security Agency (the ISA) has been authorised to gather "technological data," mostly through tracking cellphones, in order to assist the Ministry of Health in conducting epidemiological investigations to identify the location data and movement routes of coronavirus carriers in the 14 days preceding their diagnosis as carriers, along with the identity of individuals who came into close contact with them.[155]

The term "technological data" is defined vaguely, and may include in principle any sort of metadata that can be technologically gathered by tracking the cellphones, namely anything that is not the content of phone calls or text messages.[156] This capability of tracking is obviously very concerning in terms of the right to privacy.

Following a petition to the Supreme Court, arguing that such an expansive use of location tracking violates the Basic Law: Human Dignity and Liberty, the Court has ruled that if the state wishes to continue pursuing such measures over the next few months,

152 Basic Law: The Government (2001), Article 38.

153 Ibid., Article 39.

154 Basic Law: Human Dignity and Liberty (1992), Article 8.

155 Emergency Regulations (Authorisation of the Israeli Security Agency to Aid in the National Effort to Contain the Spreading of the New Coronavirus) (March 17, 2020).

156 Ibid., Article 2.

it has to do so through primary legislation in the Knesset, and can no longer rely on emergency regulations.[157]

Yet another set of emergency regulations, which expired on April 22, 2020, granted the Israeli police the authority to gather location data of individuals required to be in home-quarantine—such as those returning from abroad for a period of 14 days—to make sure that they do not violate the home-quarantine.[158] Following an interim order by the Court in the face of another petition, the government wanted to move ahead with enacting a law in the matter, but it abandoned the idea after a hearing in the Knesset Foreign Affairs and Defence Committee revealed that the measure is ineffective—only three violators have been tracked by using this technology—and disproportionate to the injury to the right to privacy.[159]

This shows that emergency measures that are used in "regular" emergencies for purposes of national defence are exposed to more legal scrutiny and public transparency when employed for civilian purposes; when the enemy is a virus, and not the persons being tracked.

And here is another aspect of Israeli exceptionalism. The rate of contagion across Israel is very heterogeneous. Generally speaking, the highest rate of contagion is among ultra-Orthodox Jews. Because the ultra-Orthodox Jews live in their own communities—they live mostly in separate cities or in separate neighbourhoods to preserve their distinct way of life, often cut off out of choice from mainstream media and the internet—this has had both health and legal impacts.

Consequently, the fact that these cities and neighbourhoods are "hot spots" for the coronavirus required the Israeli government to make the socially and politically sensitive decision to declare these cities and neighbourhoods as "red zones" and to impose stricter limits and curfews on them.[160]

This turn of events exposed yet another open nerve in the already heterogeneous and too often divisive Israeli society, with residents of these cities unsuccessfully petitioning the Supreme Court, arguing that such curfews are disproportionate and at the same time are stigmatising them. The Court held that the measures taken were justified and necessary, and did not result in unwarranted discrimination against this social group.[161]

This is yet another aspect in which the coronavirus poses unprecedented challenges for Israel and its legal infrastructure. In a way, Israel looks forward to return to its good old "normal" state of emergency. But if the coronavirus is here to stay, it will also have long-term legal impacts.

157 HCJ 2019/20 Adv. Shachar Ben Meir v. Prime Minister (decided April 26, 2020).

158 Emergency Regulations (Location Data) (March 16, 2020, expired on April 22, 2020).

159 Jonathan Lis, *Israel Suspends Police Phone-tracking for Coronavirus Quarantine*, HAARETZ, April 23, 2020.

160 Allison Kaplan Sommer, *Explained: Shutdown, Curfew in Israel's Toughest Coronavirus Restrictions to Date*, HAARETZ, April 7, 2020.

161 HCJ 2435/20 Yedidia Lewenthal, Adv. v. Prime Minister Benjamin Netanyahu (decided April 7, 2020).

COVID-19 AND DEMOCRATIC DECLINE: EUROPE AND TURKEY

Professor Bertil Emrah Oder

Dekan / Dean

UNESCO Chairholder on Gender Equality
and Sustainable Development

Koç Üniversitesi Hukuk Fakültesi/Koc University Law School

Introduction

The legal and political debate as to the preventive measures regarding COVID-19 pandemic seems to have complemented the scholarly debate as to the future of constitutional democracies and democratic breakdown from a perspective of civil liberties, socio-economic rights and democratic oversight. In general, the corona crisis has become a stress test for democracy and created a phenomenon of pandemic backsliding as to the quality of constitutional democracies, so that the consensus principle is challenged because of the augmentation of executive power and unchecked measures in emergency regimes. Additionally, parliamentary oversight and the vigilance of civic society have been limited or ineffective on the ground of measures necessitating social distancing. In general, the democratic and responsible leadership that has taken the scientific evidence of medical experts seriously and adopted transparent road maps has played a significant role. The heads of local governments have emerged as reliable leaders of crisis management in countries where the central authority was lacking the capacity of developing an efficient strategy or underestimated the pandemic. As expected, the entrenched autocracies have adopted strict and draconian policies of crisis management to control the pandemic. The unconsolidated autocracies have reacted with sweeping measures threatening the rule of law, so that the pandemic has created an opportunity to consolidate the executive power and abusive practices. The pandemic measures have led to a debate as to whether the unconsolidated autocracies will consolidate due to the corona crisis and the democratic breakdown will accelerate. The Council of Europe as an organisation to promote the rule of law and human rights, and its member countries that include the old European democracies (Germany, France), fragile democracies or new autocracies (Hungary, Poland, Turkey), are placed at the centre of this debate. In the following observations, I will touch upon some of the above-mentioned issues of democratic decline in Europe and Turkey amid the COVID-19 pandemic.

Implementation Frameworks of COVID-19 Measures: Emergency and Non-Emergency Regimes

As to the legal base of the restriction or suspension measures in the Council of Europe countries, we can identify different patterns. These can be categorised as follows:

(1) The declaration of a state of emergency (France, Hungary, Estonia).[162]

(2) The use of a state of alarm as a form of emergency management (Spain).[163]

(3) The adoption of temporary emergency legislation that gives the executive the power to sidestep existing laws (Norway).[164]

(4) The use of executive decrees instead of following other options (Italy).[165]

(5) The use of existing statutory legislation ("Infection Protection Act") by making revisions that give the executive extraordinary powers in case of an epidemic situation of national significance (Germany).[166]

(6) The use of old pandemic or ordinary legislation (such as "Law on the Protection of Public Health" or "Law on the Administration of Provinces") as the legal ground with the extensive use of soft executive measures (Turkey).[167]

Civil Liberties and Social Rights Under Threat

In Europe, as in other parts of the world, all governments have mostly curtailed civil liberties and massively reduced freedom of movement for disease prevention and control. Notwithstanding their legal base, the extraordinary measures of the lockdowns, travel restrictions or extensive cell phone surveillance, that have not been witnessed in ordinary times, seem the most discussed topics in the consolidated democracies of Europe. There are concerns that these types of unprecedented restrictions may lead to further expansion of state power. Here, the scholarly question that deserves a comparative research is whether the COVID-19 measures have created a sort of convergence between consolidated

162 Tom Ginsburg and Mila Versteeg, "State of Emergencies: Part I", *Harvard Law Review* Blog, https://blog.harvardlawreview.org/states-of-emergencies-part-i/ (30 May 2020)

163 José Marcos, "Spanish PM considering lifting state of alarm in some regions before others", *El Pais*, 24 May 2020, at https://english.elpais.com/politics/2020-05-24/spanish-pm-considering-lifting-state-of-alarm-in-some-regions-before-in-others.html

164 "Norway to rush through emergency coronavirus law", *The Local*, 18 March 2020, at https://www.thelocal.no/20200318/norway-to-rush-through-emergency-coronavirus-law

165 For a critical analysis of the Italian COVID-19 decree laws that defer to the decrees of the President of Council of Ministers see Arianna Vedaschi, "Italy and COVID-19: A Call for Italian Emergency Constitution?", 12 May 2020, at https://www.justsecurity.org/70081/italy-and-covid-19-a-call-for-an-italian-emergency-constitution/

166 Constanze Stelzenmüller and Sam Denney, "COVID-19 Is a Severe Test for Germany's Postwar Constitution", 16 April 2020, at https://www.lawfareblog.com/covid-19-severe-test-germanys-postwar-constitution; for critical analysis of German approach on the basis that the state of emergency has been provided by the statutory legislation see Klaus Ferdinand Gaerditz and Florian Meinel, "Unbegrenzte Ermaechtigung?", *Frankfurter Allgemeine Zeitung*, 26 March 2020, at https://www.faz.net/aktuell/politik/neues-infektionsschutzgesetz-unbegrenzte-ermaechtigung-16696509/66118921-16697707.html

167 E.g. Sibel Kurtoglu, "Turkey introduces strict new measures to fight COVID-19", Anadolu Agency, 3 April 2020, at https://www.aa.com.tr/en/health/turkey-introduces-strict-new-measures-to-fight-covid-19/1791662

constitutional democracies and unconsolidated autocracies as regards to the measures and their effects.

It is worth mentioning that the Council of Europe has sent 47 Member States a "toolkit" that checks the limits on the scope and duration of the emergency measures as well as derogations.[168] The toolkit prioritises freedom of expression, privacy and data protection, protection of vulnerable groups from discrimination and the right to education, and the protection of victims of crime by a specific emphasis on the victims of the gender-based violence.

As to the positive duties of the state for protection of the right to health, the European Committee of Social Rights has issued a statement of interpretation regarding social rights exigencies and the significance of the European Social Charter by underlining "the right to health and safety at work or the rights of children and older persons".[169] The Committee has recalled "the need for adequate public health provision and resourcing, including for research, vaccine development and prevention".

Criticism Against Soft Policies

Amid the concerns as to the expansion of state power by hard measures threatening civil liberties, the governments that have applied the flexible measures have also been criticised. The Swedish case that has predominantly followed a soft approach to the lock- downs has raised questions due to a sharp rise in the infection curve, the growing number of cases in the nursing homes for the older population, and the higher death rate compared to neighbouring Nordic countries of Norway, Denmark, and Finland.[170] While Denmark, Norway and Finland have imposed strict isolations, lockdowns, and restrictions, Sweden has applied a policy of civic responsibility and voluntary social distancing that lets shopping centres, restaurants and schools for children under 16 open. Although the Swedish approach has been explained by the low population density in the country, the high rate of single person households (over 50%) and a "slow immunity" strategy, the Swedish economy seems not to be exempted from an economic shrinkage caused by the pandemic, with a significant rise in its unemployment rate.[171]

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168 "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states", Council of Europe, 7 April 2020, Information Documents SG/Inf(2020)11, at https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

169 "European Committee of Social Rights statement on the right to protection of health in times of pandemic crisis", 22 April 2020, at https://www.coe.int/en/web/european-social-charter/-/european-committee-of-social-rights-statement-on-the-right-to-protection-of-health-in-times-of-pandemic-crisis

170 "Sweden prepares for possible tighter coronavirus measures as deaths rise", *The Guardian*, 5 April 2020, at https://www.theguardian.com/world/2020/apr/05/sweden-prepares-to-tighten-coronavirus-measures-as-death-toll-climbs; Natalie Huet, "Coronavirus: Swedes not welcome as neighbors open their borders", *Euronews*, 15 June 2020, at https://www.euronews.com/2020/06/15/coronavirus-swedes-not-welcome-as-neighbours-open-their-borders

171 "Critics question Swedish approach as coronavirus death toll reaches 1,000", *The Guardian*, 15 April 2020, at https://www.theguardian.com/world/2020/apr/15/sweden-coronavirus-death-toll-reaches-1000

Parliamentary Oversight and the Scientific Committees

The incapacity, inefficiency or improper functioning of legislatures has brought up new issues of "democratic deficit" as a COVID-19 implication that results in a deficit of parliamentary oversight. The virtual parliamentary votes, remote voting, and the debate on a reduced-size parliament in times of crisis, have been either applied or discussed in Germany, Spain, several states in the US, the UK and the European Parliament.[172] The fragile democracies or new generation autocracies have adopted either the abusive practices that make the democratic institutions dysfunctional by creating unlimited executive powers, such as Hungary's authorisation law for Prime Minister Orban, or excessive measures that have nothing to do with COVID-19 prevention, such as Turkey's legislative debate on a change of the electoral system in favor of the ruling party and its allies.[173]

Another significant and common feature of the COVID-19 challenge is the involvement of authoritative and scientific voices in the formation of policies in almost all jurisdictions, with the establishment of ad hoc scientific committees, task forces or boards of advisors. They have played a spotlight role in the decision-making and the public debate. Opinion polls demonstrate that their public confidence has been higher than the politicians they advise since they become the trusted figures of around 70 per cent in some of the countries (Sweden, Belgium, and the US).[174] However, there is valid concern and ongoing discussions as to the lack of transparency regarding the role of such expert committees or boards in the decision-making process and democratic consensus building. For instance, the reports of Britain's Scientific Advisory Group for Emergencies (SAGE) and the identity of its members were criticised for not being transparent, but The Netherlands' Outbreak Management Team has worked in an open manner in terms of the identity of its members.[175] The minutes of the SAGE have been published recently after the criticism as to the lack of information how the scientific advice has been formulated.[176]

172 "Coronavirus: MPs allowed to vote remotely for first time", BBC, 6 May 2020, at https://www.bbc.com/news/uk-politics-52556777; "Coronavirus: A stress test for democracy", DW, 8 April 2020, at https://www.dw.com/en/coronavirus-a-stress-test-for-democracy/a-53064455; Natasha Lomas, "EU parliament moves to email voting during COVID-19 pandemic", 23 March 2020, at https://techcrunch.com/2020/03/23/eu-parliament-moves-to-email-voting-during-covid-19/; Jen Kirby, "How to run the world remotely", 8 May 2020, at https://www.vox.com/2020/5/8/21244105/coronavirus-remote-voting-zoom-parliament-congress; Daniel Kraemer, "Coronavirus: How feasible is a virtual Parliament?", 2 April 2020, BBC, at https://www.bbc.com/news/uk-politics-52128502

173 See also Selam Gebrekidan, "For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power", *New York Times*, 30 March 2020, at https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html; "Gov't plans to discuss changes in electoral law with parties, says minister", 15 June 2020, *Hurriyet Daily News*, at https://www.hurriyetdailynews.com/govt-plans-to-discuss-changes-in-electoral-law-with-parties-says-minister-155672

174 Sam van der Staak, "Democracy experts should seek a central role in shaping the post-coronavirus order", *IDEA*, 18 May 2020, at https://www.idea.int/news-media/news/democracy-experts-should-seek-central-role-shaping-post-coronavirus-order

175 Ian Sample, Case for transparency over Sage has never been clear, *The Guardian*, 24 April 2020, at https://www.theguardian.com/society/2020/apr/24/case-for-transparency-over-sage-has-never-been-clearer; see also supra.

176 "Government publishes the SAGE minutes", 29 May 2020, at https://www.gov.uk/government/news/government-publishes-sage-minutes

The Dutch case has been also an example for the political interaction of expert committees that submit and defend their reports to the government, while Germany's Academy of Sciences Leopoldina has advised only the chancellor and the government.[177]

Economic Relief Packages

The COVID-19 economic relief or stimulus packages are another common feature of all jurisdictions.[178] Nonetheless, their use by populist leaders or autocrats for clientelist purposes or rent seeking investments may deepen the democratic breakdown and inequalities. The pressure of the industry and business sector on governments is also very high and the limited unemployment funds represent a new challenge. Besides the country-specific measures and action plans that endorse the regulatory state in general, the European Union has recently announced a roadmap for recovery that puts emphasis both on the rule of law and on the economic aspects of the COVID-19 crisis. The EU has adopted a Recovery Fund and a Multiannual Financial Framework for full functioning of the Single Market and investments.[179]

Turkey's Response to the COVID-19: Hard Measures Without an Emergency Regime

Compared to the countries in the Balkans and Mediterranean region, Turkey has faced the pandemic of COVID-19 relatively late. Therefore, the public authorities had time to follow the developments particularly in Italy and Spain. This has enabled not only the government, but also the metropolitan municipalities involved in crisis management to shape their responses, prepare their action plans, and enhance their administrative capacity as well as their resources for health related materials. At present, the mayors of metropolitan municipalities that represent the highest population of Turkey, such as Istanbul, Izmir and Ankara, are politicians of the main opposition party. They still stand out with their strategic and planned approach, considering the vulnerable groups that need special treatment in a successful manner. However, they are obliged to conduct their operations under disputable governmental inferences such as the blockage of their accounts as to the coronavirus donations.[180] Interestingly, in the recent polls, there is a remarkable increase in public confidence in the Mayors of Istanbul and Ankara, as the

177 "Coronavirus: What is the Academy of Sciences Leopoldina that advises the German government?", DW, 13 April 2020, at https://www.dw.com/en/coronavirus-what-is-the-academy-of-sciences-leopoldina-that-advises-the-german-government/a-53115524

178 Policy responses to COVID-19, International Monetary Fund, at https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19;

179 COM(2020) 456; see also The EU budget powering the recovery plan for Europe, COM(2020) 442 final, 27 May 2020, https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/1_en_act_part1_v9.pdf

180 "Interior Ministry Blocks Coronavirus Donations to stanbul, Ankara Municipalities", *Bianet*, 1 April 2020, at http://bianet.org/english/diger/222283-interior-ministry-blocks-coronavirus-donations-to-istanbul-ankara-municipalities; "AKP members trim Istanbul Municipality's resources despite coronavirus pandemic", *Duvar English*, 12 May 2020, at https://www.duvarenglish.com/politics/2020/05/12/akp-members-cut-down-istanbul-municipalitys-resources-despite-coronavirus-pandemic/

rising political stars of local democracy, as progressive actors in Turkey's democratic life and the leading figures of main opposition party.[181]

In general, the government's responses to COVID-19 have similarities to the responses of other governments from a substantive perspective. Nonetheless, the striking feature of Turkey's strategy is crisis management without any declaration of a state of emergency. Although a "dangerous contagious disease" is pre-defined as an explicit legal ground of emergency in the Constitution of Turkey, the government has not favoured the application of an emergency regime. The majority of the restrictive or suspension measures have been adopted by referring to the ordinary statutory legislation, but in a gradual manner and under the guidance of an *ad hoc* "scientific council" established by the Ministry of Health for the COVID-19 crisis. Announcing measures according to the curve of infected people and prone zones, the government has predominantly referred to the Law on the Protection of Public Health. This law provides a structured approach as to the prevention and control of contagious diseases. However, it is a very old statutory ground that dates to the years of early republican modernisation, namely the 1930s. Furthermore, the relevant restrictive or suspension measures were not explicitly predefined in this old legislation, but in the Law on Emergency Regime. Since the suspension of constitutional rights is not deemed as restrictions, but as excessive forms of interventions that shall not be imposed under non-emergency regimes, their implementation has created a legal debate over unconstitutionality. Additionally, the fact that public health is not prescribed as a ground for restriction of freedom of movement in the Constitution has been a major concern as to the constitutionality of curfews and travel bans from a perspective of legitimate aim.

The Minister of Health has played a significant role in Turkey as to crisis management and has become the public face of the government as to the daily announcements. Although the Minister of Health has represented a high profile as a medical expert and has gained the confidence of public opinion as well as the main opposition party with his open, evidence based, informative and regular communication, the COVID-19 measures are mostly taken by the Ministry of Interior. These have provided a flexible framework to adjust the changes, but they are soft, fragile and unforeseeable since the statutory legislation is either too general and abstract, or gives the authority only to the Ministry of Health, particularly as to the quarantine measures, but not to the Ministry of Interior. Interestingly, no presidential decrees are issued as a response, only selective presidential circulars or presidential decisions. In other words, the minimalist use of direct presidential power has been preferred. Considering the remarkable democratic decline in Turkey with the adoption of the presidential system in 2017 and the augmented executive power, this is another striking feature of crisis management. A presidential decision has been promulgated that imposes free test kits, free medication and free treatment of all patients regardless of their social security status in all public and private hospitals. This has been provided as an imperative of the social state principle as one of the irrevocable principles

181 "Murat Yetkin: MetroPoll Ara tırması'nda Erdo an ve Kılıçdaro lu'na hem iyi hem kötü haberler var," T24, 20 April 2020, at https://t24.com.tr/haber/murat-yetkin-metro-poll-arastirmasi-nda-erdogan-ve-kilicdaroglu-na-hem-iyi-hem-kotu-haberler-var,873782

of the Turkish Constitution. It seems that the presidential power has been used selectively and by soft measures to raise the popular support for the government.

Leaving aside the plenary session that the Minister of Health has participated in, the parliament's oversight and performance as regards the crisis management has been rather weak in Turkey. The parliamentary majority that is composed of the ruling party representatives (AK Party, religiously conservatives) and the nationalists (MHP and BBP) has passed a new law that releases around 90,000 prison inmates, some convicted of severe crimes, due to the infection risk of COVID-19. Since this new law does not extend to the journalists, Kurdish politicians and the cases defined by the ECtHR as human rights defenders, such an immediate and discriminatory release has been criticised by human rights organisations and opposition parties.[182] The relevant law has been brought before the Constitutional Court recently.

Conclusion

From a socio-political and socio-legal perspective, the COVID-19 pandemic has a deconstructive effect on the relationship between governmental authorities and citizens, and on the institutions, particularly parliaments in all constitutional jurisdictions. It is unclear if this deconstruction may lead to a constructive approach based on rationalities of global public health, democratic consensus and constitutionalism. The economic crisis in the aftermath of the pandemic may determine the scope and varieties of the deconstructive and constructive effects, as well as the trends of democratic breakdown or democratic revival. Up to now, the legal discussions have focussed on the legal base of COVID-19 measures from a perspective of the principle of legality and the proportionality of the measures concerned. Since some of the countries have started to apply or announce their exit strategies (such as Austria, Denmark, Germany, Turkey), it will be necessary to examine them for testing the resilience of constitutional democracies against the crisis. The exit strategies may also reveal the endurance capacity of constitutional institutions, to what extent there are transgressions, or whether the democratic equilibrium can be restored, if it is distorted.

182 "COVID-19: Monitors urge Turkish authorities to ensure any prisoner release is non-discriminatory", Council of Europe, Parliamentary Assembly, 3 April 2020, at http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7840&lang=2; "Turkey: Prison release law leaves innocent and vulnerable prisoners at risk of COVID-19", Amnesty International, 13 April 2020, at https://www.amnesty.org/en/latest/news/2020/04/prison-release-law-leaves-prisoners-at-risk-of-covid/

CIVIL LIBERTIES IN THE TIME OF COVID-19: FOCUS ON ECONOMIC AND SOCIAL RIGHTS

Professor Rose-Marie Belle Antoine

DPhil (Oxon); LLM (Cambridge); LLB (UWI)

Professor of Labour Law & Offshore Financial Law

Dean, Faculty of Law, University of the West Indies

I have chosen to focus on economic and social rights and liberties, but there is no doubt that civil and political rights and liberties in general are part of the wider landscape of the COVID-19 induced threats to our conceptions of democracy and justice which are slowly being illuminated.

I make a distinction between civil liberties and human rights. The latter is informed by the Constitution, but the concept of civil liberties has a broader reach and encompasses ordinary laws that proclaim rights and liberties, such as our Equal Opportunities Acts in the region and similar legislation elsewhere; and even liberties identified in our common law. Today, the notions of 'morality,' or reason, or fairness in the law are conveniently, more often than not, expressed in terms of fundamental human rights, or civil liberties, not all of which may be articulated into written law.

In the brief eight minutes allotted to me I will focus on three main themes—

(i) How COVID-19 has exposed bare the deep structural inequities that exist in the Commonwealth Caribbean in terms of access to rights and liberties, especially, but not limited to, economic and social rights—such as the right to education, the right to health etc.;

(ii) The imperative of the human rights/ civil liberties framework to adequately address these structural inequities, as opposed to focussing merely on overt forms of discrimination; and

(iii) The extent to which COVID-19 has rendered our labour rights framework vulnerable, some would say meaningless. This therefore considers issues of *Force Majeure* etc. which are considered further in the latter part of this Symposium. However, such issues raise deeper concerns than simply a legalistic approach and are related to the rights issues in this current conversation.

Framework of Economic, Social and Economic Rights—Justiciability

In my understanding of civil liberties and rights, I accept upfront the legitimacy and justiciability of economic, social and cultural rights. Further, I embrace the indivisibility of rights which sees civil and economic rights and economic, social and cultural rights as not only inextricably linked, but indispensable to each other. For example, when we consider the question of the death penalty and the right to life, can we ignore core questions of deep inequities in our society that demonstrate a clear pattern of who is on death row? Typically, it is the poor and marginalised, in our society which is stratified along race lines (the little black boy syndrome[183]).

Few countries in the region, Belize, Guyana and Grenada being exceptions, have specifically highlighted economic, social and cultural rights in their Constitutions, but this does not mean that these rights are absent from our foundational instruments. They can exist as extensions of civil and political rights, a jurisprudential development originating in the Indian Courts,[184] which furthers our understanding of the substantive rule of law, or stand-alone rights deeply embedded in our Constitutions, which give our laws life and meaning.

I suggest too that there is an inherent obligation to prescribe both economic, social and civil and political rights within the concept of due process. Equality norms are particularly relevant in this regard. Courts have been able to identify unwritten concepts such as due process and the separation of powers in our Constitutions and economic, social and cultural rights can be similarly located.

Equality as a Ground Norm or Overarching Principle

There must be equality in the law and access to rights for the law to have legitimacy. I view this as a core element of the rule of law. I also see this well-known, but sometimes nebulous concept of the rule of law as firmly centred in development, such that policy-makers and by extension, judges, cannot be divorced from the larger economic and social issues of development, when making decisions.

The concepts of equality before the law and protection of the law have been interpreted expansively by liberal courts, such as those in Canada, courts that have often influenced our own significantly. Yet, our judges have not yet embraced equality in its fullest sense, to go beyond formal equality, although it is conceded that our Constitutions do have the capacity to be more expansively interpreted. For example, in Trinidad and Tobago, it is accepted that the relevant sections of the Constitution, sections 4(b) and 4(d), are of general application and are not limited to the stated discrimination grounds of race, origin and the like.[185]

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183 Immortalised in a popular calypso from Trinidad and Tobago, referring to structural patterns of poverty and anti-social behaviour identified in Afro-descendant males in the country.

184 See Antoine, R-M. B.' Economic, Social and Cultural Rights in a Working Environment' [1997] 7 (2) *Carib. LR* 534, for a discussion of this jurisprudential development.

185 *Webster and Ors v AG of Trinidad and Tobago,* [2015] UKPC 10, p. 5.

Notably, to achieve full understandings of equality, be it gender equality, race equality, equality in terms of persons with disabilities and the like, it is necessary for structural patterns to be examined. Treating those who are not identical in like ways only perpetuates and deepens inequality.[186] In pandemics and natural disasters, this suggests that we need also to look below the surface to identify the disproportionate impacts that evidently exist. This elasticity of the concept is also applicable to economic, social and cultural rights.

In today's context, we cannot escape a conversation about economic, social and cultural rights and how these must intersect with civil and political rights. This and other doctrinal positions and principles that give meaning to the concept of equality must inform the law in our jurisprudence. It is not enough to apply rules mechanically, without responding to the real situations apparent in people's lives. The socio-economic context that informs the boundaries of legal disputes is real and must be addressed. Similarly, interrogating the issue of access to equal rights, and the restrictions that inhibit such access, must be part of the discussion.

Poverty and Structural Inequities in Economic and Social Rights

The thrust toward a genuine embrace of equality and civil liberties includes troubling questions such as the impact of poverty and corruption, themselves shaped by the failure of the rule of law and which, in turn, restrict development. Business imperatives must also be concerned about rights, an issue now emerging at the international level. Goldston tells us that the absence of the rule of law has been telling, accounting for "disproportionately high percentages of the developing world's poor, uneducated . . . In advanced economies too, those portions of the population denied access to justice suffer from higher levels of discrimination in education and other public services."[187] Indeed, particular indicators for the rule of law within the context of development, seen as measurable targets, have been identified in the sustainable development goals. These may be used to facilitate progress toward other goals with respect to education, health care, or poverty reduction. They all emphasise equal access.[188]

The COVID-19 pandemic has accentuated and highlighted these equality deficits in the region. Although these structural inequities exist most obviously within a subtext of poverty and marginalisation, poverty is often invisibilised, or even denied in our region, particularly under the illusion of free education and opportunities for all—the ladder out of poverty. During the COVID-19 pandemic, for example, pictures of extremely long lines of persons lining up outside a Catholic NGO in Trinidad, Living Waters, to receive a basic food hamper, prompted not empathy but denial. The relevant Minister declared

186 ". . . it is clear and unquestionable that a law may be discriminatory even if it is not directly or expressly so. That is, a law may be discriminatory by reason of its adverse effects. . .", *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc and others v Attorney General of Trinidad and Tobago* (2009) (*Trinity Cross Case),* 76 WIR 378 at p. 434.

187 James Goldston, 'Why Development Needs the Rule of Law", *Open Society Foundation*, April 4, 2013.

188 Such as whether legal frameworks are in place to resolve disputes over access to education or medicine; and whether provisions guaranteeing access to health care or schooling are enforced equally without discrimination. Ibid, p. 2.

that these were Venezuelan migrants and not Trinidad nationals, despite clear evidence to the contrary.

Right to Education during COVID-19

Caribbean jurisdictions typically proclaim rights and entitlements to education as part of their developmental objectives. This is important and necessary, but often not sufficient. In considering rights to education, core principles of equality before the law would need to be included, but often, are not emphasised or even acknowledged. Before COVID-19, problematic issues of inequality in access to education existed, but these too were invisibilised.

Schools are unevenly resourced, so that rural communities and urban low income areas (ghettos) are continually underserved. We have become desensitised to this issue, seeing so often groups of mothers and crying children on television complaining of it.[189] If these rural and low income areas house children mainly of particular ethnic groups, then we should also appreciate that it also invokes considerations of indirect discrimination on grounds of race.

During the COVID-19 pandemic, if we are to meaningfully engage the Rule of Law context, we need to confront our education system, viewing it through the lens of inequality during this crisis. Our education systems continue to exist against a privileged backdrop. Rich children and rich schools continue to be advantaged, with better chances to benefit from that system because they start off with greater resources, at home and at school. The pattern of students and their parents from poorer geographical areas clamouring for their school buildings to be repaired etc. resulted in losses of school time with the expected results on outcomes. Now, during COVID-19, this has been substituted by the phenomenon of students in these same areas being forced to operate within a new online learning environment without laptops, or access to the Internet. The problem of unequal access is even more starkly revealed.

Yet, it is questionable whether policy-makers have genuinely internalised the now so blatantly obvious inequities. Have we really cast an enlightened eye on this issue? Has the world really changed, as we are told? Is this a kinder, gentler CARICOM? I ask this because just last week we were told that CAPE, CSEC will go ahead in July, apparently without deep thought about the thousands of disadvantaged children who had no laptop, no instruction and no help at home to meet the challenge.

These are not only moralistic questions of fairness. They have legal dimensions. Our task is to translate these gaps in our uneven societies into a rights lexicon. My road map involves a full embrace of the grounding principle of equality, seeing it as a public good in and of itself. From that route, we can access other more tangible rights, such as equal education, equal access to health, to work etc.

189 Rose-Marie Belle Antoine, 'Rights to Education, Health and Work Squandered', Trinidad Express, Nov 28, 2016, http://www.trinidadexpress.com/20161128/editorial/rights-to-education-health-and-work-squandered-healthand-work squandered.

I believe that they are also legitimate legal issues. When we deconstruct what civil liberties/ human rights mean, I contend that there must be a golden unifying thread of equality. In my understanding of the civil liberties that are secured to us, we can indeed challenge this unequal access to public goods and the unequal access to economic rights through the courts. This is a justiciable avenue in the protection of civil liberties and rights.

As a society, we have been afraid to confront these subtexts of gender, race, class and the like, to discern how they impact on our understanding of equality and inform our bread and butter issues (economic, social and cultural rights). The Equal Opportunity Act 2001 of Trinidad and Tobago hints at the need to challenge such myopia when it includes "geographical origin" in its definition of "status", in identifying the grounds of discrimination. However, this has gone unnoticed in the litigation reaching the adjudicative mechanisms of the Act, the Equal Opportunities Commission and the Equal Opportunities Tribunal.[190]

Feminists have exposed these structural inequality issues, but often, they have not reached our courts. Structural discrimination does not depend on intention to discriminate, but looks at the impact of superficially neutral paradigms. If development is lopsided, or inherently unequal, then it offends the core principle of equal rights and liberties. While we have acclaimed the general principle of equality before the law, we have not gone far enough in evaluating and discerning the true meaning and depth of such concepts, handicapped by a myopic vision of direct, intentional discrimination, a relic of the *Smith v LJ Williams* case,[191] which, while now overruled by *Central Broadcasting Services Ltd v Attorney General,*[192] remains embedded in our psyche.

However, the COVID-19 pandemic forced us to stare these structural paradigms of inequality 'straight in the face', confronting them squarely.

Right to Health During COVID-19

Thankfully, the Caribbean has not had to confront abusive patterns of poverty/ ethnicity in the COVID-19 epidemic as has occurred in the US and the UK. However, I suggest that the reason for this is not because there are no clear parallels of inequity with those countries. Indeed, here, as in the US and the UK, it is the lower income classes that operate essential services, use public transport etc., and therefore are more at risk to COVID-19. Given the links between poverty and race, there are therefore race variables in the COVID-19 context also. Thankfully, the Caribbean region was spared the exponential spread of COVID-19 and so the onslaught on our public health systems, with the predictable disproportionate impacts on the poor, did not materialise. If it had,

190 S. 3 "status", in relation to a person, means (a) the sex; (b) the race; (c) the ethnicity; (d) the origin, including geographical origin;

191 (1982) 32 WIR 395. In this case, mala fides or malice was put forward as a pre-requisite for discrimination.

192 Civil Appeal No 16 of 2004.

we would have seen the same patterns of inequality prevail—as we saw, for example in the HIV pandemic, where clear patterns of poverty have been identified.[193]

We have inherited a fairly equitable public health model from the UK, which has been useful to democratise the public health objectives. Regional governments took charge of the pandemic and we were not left to the vagaries and injustices of a private health insurance system which would have required nationals to pay for healthcare. Had this not been the case, the issues of inequality in access to economic, social and cultural rights, specifically health, would have been magnified.

The issue of the inconsistencies in the provision of and access to the right to health is, however, vividly illustrated in the management of the prison populations during the pandemic. Prisoners complained that no adequate health and safety protocols were put in place and that the inadequate facilities, including the lack of running water and soap, further compromised their health. Even a law suit was initiated in this regard. Initially too, there were prison riots due to the fear of contracting the virus.[194]

The issue is particularly significant when one considers prisoners on remand. The region has typically very high numbers of persons on remand for lengthy periods awaiting trial. If, for example, a person is on remand for possession of a small amount of cannabis and that person falls ill with the virus in prison and dies—would this simply be a violation of the right to health—or would more profound issues such as the right to life be implicated? There is a greater burden on the state in such contexts to ensure equal and adequate access to healthcare and other civil liberties and rights.

States of Emergency during the COVID-19 Pandemic

During the pandemic, states in the region opted for States of Emergency, or draconian powers under traditional Public Health Acts, as mechanisms to contain the virus. In these contexts, the potential for abuse, impacting civil liberties, is evident. Moreover, that potential for abuse is uneven. This is particularly in view of quite draconian powers already existing, like those under the Strategic Services Agency Act (SSA), where the right to privacy was initially denied by the state, and more recently, anti-gang legislation.

I contend that in times of emergency there must be even greater safeguards against the abuse of the most vulnerable—the poor and disenfranchised—ensuring consistent and fair application of legal restrictions and avoiding actions which appear directly, or indirectly, to disproportionately impact certain vulnerable groups. For example, during the COVID-19 lockdown, children, including young children, from the ghetto were reprimanded for breaking the rules and bathing in the river. They were confronted by the police armed with machine guns and made to comply. In contrast, a few days earlier, a well-known retailer broke the lockdown rules and was merely lightly reprimanded by the police and asked not to repeat the offence.

193 See Antoine, R-M. B. *Speech on the Occasion of the Launching of the OAS HIV Quilt during the World Health Conference*, OAS, Washington, August, 2012.

194 https://trinidadexpress.com/newsextra/prisoners-attempt-breakout-during-covid-19-riot/article_45beeb2c-688f-11ea-ad97-23afb13212b1.html

Labour Law Rights

The issue of civil liberties, in particular, economic, social and cultural rights, includes labour law rights and in particular, the right to work. It is recognised that employment / labour rights are part of our democratic governance. While this is the subject of another session in this Symposium, it is mentioned here for completeness.

There are deep concerns about the balance that is to be struck in a financially challenged, pressured labour environment as a result of the pandemic. This is particularly significant in legal constructs which have typically not been seen as favouring labour equilibrium. The right to work is not translated literally but rather to mean protection from termination of employment and job security. This is severely compromised in the current pandemic. For example, who should foot the bill when workers are not able to report to work? All of the carefully constructed protections—dismissal law protections, duty of the employer to provide work—to pay etc. have had to be made subservient to the pandemic and labour law is as yet unclear as to the appropriate legal rules that apply. This can only be formulated appropriately within a rights framework. Existing labour law constructs, which are built on preservation of property and capital, are not fit for purpose in pandemics and disasters, which must focus on protecting the vulnerable, so as to promote civil liberties and equality.

We are entering into a new paradigm. This pandemic experience, as well as our recent experiences as a disaster prone region, tells us that we need to re-engineer our legal policy frameworks to accommodate and ameliorate inequitable impacts of such labour vulnerable situations. More sustainable solutions, including legal solutions, must appreciate these inequities. For example, instead of the ad hoc 'bail-outs' we see now, some kind of unemployment insurance and long-term social security measures, which are capable of offsetting disasters, as part of the labour law framework, are more feasible. This is even more warranted given that such 'bail outs' tend not to focus on the most vulnerable in the labour context. For example, the informal sector, which accounts for a large component of the poorest, was left out of these forms of state assistance. Similarly, some lower-income workers were left defenceless on their own to go through the processes for grants, when they required cooperation from employers. In some instances, government grants were aimed at entrepreneurs and not at vulnerable workers.

Addressing structural weaknesses in such ways will better protect the vulnerable and promote civil liberties during COVID-19 and other disasters.

Chapter 3

COVID-19
AND COMMERCIAL CONTRACTS

The pervasive social and commercial restrictions implemented by many governments in response to COVID-19 have been detrimental to the economic community. Commercial entities have been left directionless in navigating the economic consequences of COVID-19 restrictions, in particular the pandemic's impact on commercial agreements. This panel sought to discuss the following:

(i) What are the legal rights of the parties to a commercial contract?

(ii) Can a contractual party either enforce or avoid the terms and obligations agreed upon?

(iii) How does a party enforce or avoid these obligations?

(iv) Is the enforcement or avoidance of obligations the best solution where industries are in state of economic sensitivity?

(v) How is fairness to be achieved?

The panel discussed the role of the Courts in finding a solution to contractual disputes. The Courts could be engaged to interpret the terms of a commercial contract and thereby declare the obligations of the contracting parties. Key to their discussion were the doctrines of *Force Majeure* (an Act of God) and *Frustration* as methods of avoiding contractual obligations.

Force Majeure:

The Common Law system does not recognise *Force Majeure* as a term of practice or principle of law. Therefore, only where parties expressly include a *Force Majeure* clause within their contracts, can they seek to rely on this option. Even then, it will depend on the wording of the clause to define their effect. The panel agreed *Force Majeure* clauses tend to be interpreted narrowly by the Courts. This is likely due to the Courts' presumption that parties should be held to the terms and obligations of their contract.

The panel advocated the principles that have guided the Courts' narrow interpretation of *Force Majeure* clauses. Generally, to gain the effect of such a clause, a party must show there is a physical or legal impossibility of performance. The Courts are unlikely to permit the avoidance of a party's obligations where the prevailing circumstances only make the contract dramatically more onerous to perform or commercially unreasonable. This, however, is reliant on whether the parties provided for the specific event within their contract's *Force Majeure* clause at all. With the COVID-19 pandemic emerging as unexpectedly as it did, the assumption was made that few commercial contracts, that is, those containing *Force Majeure* clauses, would have contemplated the proliferation of a global health crisis.

Ms. Osbourne's contribution was invaluable in providing a case study of a Court intimately acquainted in interpreting and applying the doctrine of *Force Majeure*, the Court of Arbitration for Sport (CAS). CAS is a quasi-judicial arbiter used to settle commercial disputes and disciplinary matters surrounding sport. Ms. Osborne indicated that the issue of *Force Majeure* in commercial contracts is well established in CAS's jurisprudence, known as *Lex Sportiva*. In *POAK FC v. UEFA*[195], CAS very succinctly captured its attitude towards the issue:

"Force Majeure indeed implies an objective, rather than a personal impediment beyond the control of the obliged party, that is unforeseeable , that cannot be resisted and that renders the performance of the obligations impossible, in addition the conditions for the occurrence of Force Majeure are to be narrowly interpreted since Force Majeure introduces an exception to the binding force of an obligation." [196]

Ultimately the panel shared in their criticism of *Force Majeure's* ability to provide an adequate remedy to parties seeking to avoid their contractual obligations. Simply put, in the absence of a *Force Majeure* clause, parties cannot rely on the principle. Even where such a clause exists, the language used must have specifically contemplated an event sufficiently similar to the COVID-19 pandemic for reliance on same to be enforced by the Courts.

Frustration:

Like *Force Majeure*, frustration is a narrow concept. The frustration doctrine can be used to set aside commercial contracts where an unforeseen event renders a contract impossible to perform or changes the obligation of a party to one completely different than envisioned.[197] This is, however, predicated on said event not being the fault or default of either party to the contract. It was, however, mentioned by Mr. Hylton that where the purpose of a contract becomes illegal, which is of particular relevance in light of sweeping public health regulations applied by most countries, the contract will become frustrated.

195 CAS2006/A/1110.

196 *Ibid* page 7, para 7.

197 Paal Wilson and Co v Partenreederei Hannah Blumenthal (The Hannah Blumenthal) 1 All ER 34, [1983]

Focussed on primarily by Mr. Harrison in the context of employment contracts, he recognised that although COVID-19 is an outside event which could not have been foreseen, this alone may not be definitive in establishing the frustration of an employment contract.

Mr. Harrison proceeded to suggest guidelines for finding whether an employment contract may be deemed frustrated in a COVID-19 world. Parties need to show that the impossibility of performance of the contract was as a direct result of COVID-19. However, if a business could implement changes to its functions to accommodate its employee, such as 'work from home' measures, this may mitigate against frustration of the employment contract. If COVID-19 restrictions merely result in the contract's performance being more onerous, difficult, or expensive then frustration is not established.

The employer must also guard against self-induced frustration. There is no frustration where merely waiting for a reasonable period would create a solution. Or, where an employer frustrates the contract in adherence to a governmental recommendation not legally imposed, this may be deemed a voluntary act by the employer, rebutting frustration. Finally, one needs to explore the employment contract to find whether its express provisions cover the present pandemic. The existence of a *Force Majeure* clause wide enough to cover the pandemic would limit the Court's willingness to apply the frustration doctrine.

With these sweeping limitations to the application of the frustration doctrine, a similar conclusion was drawn, that it did not present a reliable solution to the contractual disputes of parties.

ASPECTS OF THE *FORCE MAJEURE* CLAUSES IN COMMERCIAL CONTRACTS

Michael Hylton, QC

Partner, Hylton Powell

Commercial contracts often contain *Force Majeure* clauses, which seek to relieve parties of their obligations under the contract in the event certain things happen. The outbreak of the coronavirus and the restrictions various governments have placed on commercial activities have forced parties to consider the effect of those clauses.

Approximately a century ago there were several court cases that came to be known as the coronation cases, because they resulted from the cancellation of a coronation due to the King's illness. A decade ago, the crisis in world financial markets resulted in a number of similar cases.

In the coming months and years there is likely to be another round of litigation—the "coronavirus cases" perhaps. There are really two separate issues, *Force Majeure* clauses and frustration, and I will start with the former.

The following is a non-exhaustive list of matters to consider when a contracting party seeks to rely on a *Force Majeure* clause:

1. English law does not recognise the term *Force Majeure*. It is not a term of art, so its meaning will depend on the actual language used in the clause. The party who wants to rely on the clause will have to prove that it covers the present situation.
2. The range of wording of such clauses is very wide.
3. To some extent, the courts treat *Force Majeure* clauses the way they treat limitation of liability clauses: they do not like them. The courts start from the premise that people should be held to their contracts.
4. While general "sweeper" words will often be given their wider and natural meaning and will not usually be limited to the preceding categories of events[198], in some cases the court will read them restrictively. In one of the many cases coming out of the 2008 financial crisis [Tandrin[199]] a *Force Majeure* clause covered:

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198 Chandris v Isbrandtsen-Moller Co Inc [1951] 1 KB 240

199 Tandrin Aviation Holdings [2010] EWHC 40

Acts of God or the public enemy; war, insurrection or riots; fires; governmental actions; strikes or labor disputes; inability to obtain aircraft materials, accessories, equipment or parts from vendors; or any other cause beyond the Seller's reasonable control.

The Purchaser claimed that the "unforeseeable and cataclysmic downward spiral of the world's financial markets" in 2008 had triggered the clause. The court held that "any other cause beyond Seller's reasonable control" must be read in the context of the clause and nothing in the specific examples had even a remote connection with the economic downturn so that was not covered by the clause.

5. Another point made in that case and many others is that English law will not allow one party to rely on a *Force Majeure* clause to escape obligations where events only make a contract "dramatically more expensive" or more onerous to perform, unless the parties have expressly provided for such relief in their contract.
6. "Prevention" means "physical or legal prevention" and not merely economic unprofitability.[200] "Hinder" or "delay" are less restrictive.
7. In some cases, the courts have held that a purchaser's principal obligations (payment and accepting delivery) were far less likely to be affected by *Force Majeure* events.

   For example, if a hotel has to be closed because of the effect of the pandemic, the hotel may still be bound by its contracts to purchase goods and services for guests. The closure of the hotel does not prevent the operators from complying with its obligations.

   (I will comment on frustration in a moment).
8. Where the impact results from following government advice, rather than complying with mandatory requirements the parties may not be able to rely on the clause.
9. The relevant event must be the sole cause of the inability to perform. In some cases there may be multiple causes, only one or some of which is covered by the clause. In those cases the clause cannot be invoked.
10. Finally, where there is no express *Force Majeure* clause, it is unlikely one can be implied, since the existence of the doctrine of frustration makes it difficult to argue that the implication of such a clause is necessary.

200 Tennants (Lancashire) Ltd v G S Wilson & Co Ltd [1917] AC 495

Frustration

11. Frustration is a narrow concept. A contract will be viewed as frustrated if an event occurs which makes it "physically or commercially impossible" to perform the contract, or changes the obligation to one that is "radically different" from that undertaken upon entry into the contract, such that it would be "unjust" to hold the parties "to the literal sense" of the obligation.

12. The presence of an applicable *Force Majeure* clause reduces the scope for the frustration doctrine to operate. Where the parties have made express provision for an event that occurs, the contract is not frustrated. The broader the clause, the narrower the scope for the law of frustration.

13. In addition, even if the parties have not expressly provided for an event, they may still have foreseen it. This will usually, though not always, prevent reliance on frustration.

14. However, it is useful to point out that if a contract is frustrated by a supervening illegality it may not matter that the *Force Majeure* clause expressly provides for the event. In other words, if the main purpose of the contract subsequently becomes illegal, it will be frustrated regardless of what a *Force Majeure* clause may say.

15. This may be the case, for example, where an order made under Jamaica's Disaster (Risk Management) Act prohibits a particular activity, or prohibits it being carried out in the way or at the time the contract envisages, the contract will probably be automatically terminated. This would apply to many entertainment and social events, for example.

16. Illegality which may be only temporary can frustrate a contract where the interruption is of such a nature as to radically alter the contract.

FRUSTRATION OF EMPLOYMENT CONTRACTS

Samuel Harrison

PARTNER, MAIR AND COMPANY

ATTORNEYS-AT-LAW, NOTARIES PUBLIC, PATENT AND TRADEMARK AGENTS

Introduction

We may first consider: what frustrates an employment contract? Next, what is the effect of frustration upon the employment contract? Finally, how are employees protected from the causes and effects of frustration of an employment contract?

Deciding whether an employment contract has been frustrated

For all contracts, the *Hannah Blumenthal* shipping case[201] is a leading precedent which decided that "*there are two essential factors which must be present in order to frustrate a contract. The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract.*" (Lord Brandon of Oakbrook).

The pandemic is an outside event and it was not foreseen by the public. Neither is it the fault of employers or employees. That may be necessary, but it is not sufficient. And so, here are at least some guidelines which can help us decide whether an employment contract has been frustrated.

Firstly, it must be *impossible to perform* the contract *and* this must be *directly caused* by the pandemic and the resultant public health regulations. If some other fact interrupts the effect of the pandemic as the cause of non-performance, then the contract has not been frustrated. So if an employee can work at home and use the internet and a computer to get work done, the effect of the pandemic is mostly interrupted and the contract of employment has not been frustrated. This will be true for most service professionals, managers and administrative workers.

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201 Paal Wilson and Co. v. Partenreederei Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 AC 854, [1983] 1 All ER 34, H.L

Secondly, *examine the contractual employment terms* to see if there are provisions governing frustration. Some employment contracts, especially for senior management, may have express provisions governing frustration. These provisions must be interpreted in the context of the work to be done. The question to ask in each case is whether the provisions can conclusively and practically guide the employer and employee.

Thirdly, just because a contract becomes *more onerous or difficult or even expensive to perform does not mean that it has been frustrated*. Thus, in one notable shipping case[202], despite the blockage of the Suez Canal in 1956 due to war, it was held that alternative transport of the cargo around the Cape of Good Hope was not a fundamental alteration of the seller's contractual obligations and thus the contract was not frustrated. So if an employer can instead provide his receptionists, customer service representatives and cashiers with face shields and masks, as well as transparent barriers, then their employment contracts may not have been frustrated. The issue is whether the employer has exercised due care and skill in providing his employees with a safe system of work.[203] To implement this, expert advice on occupational safety and health should be relied upon so as to comply with statutory or other standards.

Fourthly, the inability to perform the contract *must not be self-induced*. So if a supermarket cashier becomes ill due to a failure by the employer to provide the above necessary safety equipment, her employer cannot claim that her employment contract has been frustrated by the pandemic.

Fifthly, there may be *no frustration where waiting will resolve the problem.*[204] An employee's illness may be lengthy or it may clear up. The question then would be what a reasonable period of time is, having regard to the regulatory requirements and information provided by the authorities. In some employment contracts, however, you cannot wait.[205] (See NUGFW v. Deep South Engineering, below).

Effect of Frustration

Frustration must be understood carefully by employers and employees because of its effect on the employment relationship. The effect of frustration is that the employment contract is brought to an end. It is not a void contract. It existed. Rather, it is terminated for future performance. The losses lie where the contract has fallen. This may cause hardship if work has been done on a task basis by an employee but has not been paid for, or, alternatively, the employee has been paid but the task has not yet been completed.

Unlike Jamaica, Trinidad and Tobago does not have the equivalent of the English "Law Reform (Frustrated Contracts) Act 1943", where adjustments by way of payment of wages would be made up to the date of the frustrating event. The consequences could potentially be harsher in Trinidad and Tobago with the same factual circumstances.

202 Tsakiroglou v. Noblee and Thorl GmbH [1961] 2 All ER 179, H.L.

203 Davie v. New Merton Board Mills [1959]1 All ER 346

204 Pioneer Shipping v. BTP Tioxide, The Nema [1981] 2 All ER 1030 at 1047

205 See NUGFW v. Deep South Engineering, below.

The Protection of Employees

In both Jamaica and Trinidad and Tobago, employment legislation requires due process before any dismissal, whether due to frustration or otherwise.

In Trinidad and Tobago, the Industrial Relations Act, cap. 88:01, permits the Industrial Court to determine whether the dismissal of a "*worker*" (who, generally speaking, is an employee without policy-making powers) was "*harsh and oppressive or not in accordance with the principles of good industrial relations practice*". Abrupt dismissals without consultation or non-compliance with procedures laid down by a collective agreement during the pandemic would likely be so adjudged.

In Jamaica, in *Carib Star v. Tracey* IDT 9/2012 (decided 30 October 2012), a security guard at the Port had his ID badge revoked by the Port and so could not access his employer's offices. The employer alleged frustration but this claim was denied due to the employer's failure to permit the employee to state his case or have a representative. The dismissal was held to be "*unjustifiable*" within the meaning of section 12 (5) (c) of Jamaica's Labour Relations and Industrial Disputes Act.

An employer alleging that an employment contract has been frustrated faces other challenges.

An employer's failure to establish both impossibility for the work to be done and direct causation due to the pandemic could lead to a claim that the layoffs are really a dubious device to rid the workplace of surplus labour without implementing a corresponding responsibility to pay severance benefits.

Generally, the Courts take note of the uncertainty surrounding frustration and its consequential chaos and suffering. As a consequence, they are likely to review the evidence comprehensively to be convinced that it has to be declared. An example is the Industrial Court of Trinidad and Tobago's decision in *OWTU v. Nestlé Caribbean*, TD 57 of 2002 (decided 22 March 2007) where the Court held that an injured fork-lift truck driver was entitled to retirement benefits under the collective agreement, rather than declare his employment contract frustrated due to his eye injury.

Contrast the Nestlé case with *National Union of Government and Federated Workers v. Deep South Engineering* TD 170 of 2004 (decided 8 November 2007), where the contract of employment as a safety and health officer was a short term one but essential to the workplace. Absence due to illness for two and a half months therefore frustrated the employment contract.

In all cases, a detailed grasp of the relevant evidence underlying each dispute is the best guide to understanding the parties' rights and obligations.

FORCE MAJEURE AND COMMERCIAL CONTRACTS IN SPORT

Sandra Osborne, SCM, QC

Chair, International Tennis Federation Ethics Commission
President, Barbados Olympic Association Inc

Introduction

There is a wide range of commercial contacts in Sport which may potentially be affected by the novel coronavirus COVID-19. These include contracts relating to host cities, host venues, media rights, sponsorship, marketing, merchandising, endorsements, player/athlete employment, player transfers, agents and coaching, as well as contracts occasioned by the considerable downstream activity generated by sporting events, such as accommodation, transportation, event management, catering and security.

COVID-19 has caused widespread cancellations and postponements of sporting events which will have a knock-on effect well into 2023. The postponement of Tokyo 2020 to 2021 has already resulted in other major event organisers having to move their events from 2021 into 2022 to avoid clashing with the Olympics. This, in turn, has caused dates in 2022 long secured (in some cases seven years in advance) to have to be renegotiated to dates that make sense for all the major stakeholders.

The virus is wreaking havoc on athletes' ability to train and stay fit to ensure their rankings are not adversely affected when competition resumes. Competitions that were aborted midstream have the challenge of determining a definitive result. Players and clubs are unable to fulfill their obligations under their contracts.

The financial challenges are significant. Insurance and other risk mitigation strategies may not completely cover losses or the deferment of revenue. Cancellations and postponements will have a significant impact on the financial condition of event organisers which often earn a substantial portion of their revenue in a year from a single annual event. When competitions do resume, the new norm may involve hosting sporting events in empty stadia until a vaccine is available. The lack of gate receipts for the more popular events and the impact of a broadcast without the excitement of the crowd may be some of the features of the new norm.

Within this maelstrom, however, there are signs of solidarity in attempts to renegotiate, but inevitably negotiations will get difficult, given what is at stake.

The Court of Arbitration for Sport

The commercial impact of cancellations, delays and postponements globally will no doubt generate, or has already generated, litigation before the Court of Arbitration for Sport (CAS), and the very relevant question for Sports Lawyers is whether COVID-19 is a "*Force Majeure* event" relieving parties from their obligations to perform their contracts.

The system of law governing the practice of Sport has developed into a body of law largely shaped by the CAS[206], the seat of which is in Lausanne, Switzerland. CAS is the internationally recognised body for the resolution of commercial disputes and disciplinary matters in Sport. Indeed, the body of case law which CAS has developed forms the core of what is known as *Lex Sportiva*.

CAS is a final court, except for a limited right of appeal to the Swiss Federal Tribunal on matters such as lack of jurisdiction, violation of elementary procedural rules (e.g. violation of the right to a fair hearing) or incompatibility with public policy. Its jurisdiction is derived from agreement—the statues of most sporting bodies will contain an arbitration clause referring disputes to CAS. Its procedure is governed by the Code of Sports-related Arbitration and there are various divisions. In its ordinary jurisdiction, the applicable law is the law the parties have agreed to (or, failing such agreement, Swiss law), while in its appellate jurisdiction, the applicable law is the law governing the relationship between the parties or the law of the country in which the body is domiciled.

The CAS Jurisprudence on *Force Majeure*

This paper seeks to examine how the CAS jurisprudence is likely to influence the Court's view of COVID-19 as a *Force Majeure* event.

Force Majeure in English law is an expression used to describe a contractual term by which a party to a contract is excused from performance, or is entitled to claim an extension of time for performance, on the occurrence of a specified event beyond the party's control. *Force Majeure* is not a term of art in English law and to rely on it, the event which constitutes a *Force Majeure* must generally be specified in the contract, such as war, natural disaster, epidemic. The term is also a well-known doctrine in many civil law jurisdictions and when successfully invoked, will relieve contracting parties from performance. The doctrine is similarly well-established in CAS jurisprudence with clearly developed principles as to what constitutes *Force Majeure*.

One of the leading decisions is a UEFA case decided in 2006, *PAOK FC v. Union des Associations Européennes de Football (UEFA).*[207] The Appellant was a Greek football club which had applied for a licence to participate in UEFA club tournaments in a particular season. The club was eventually granted a licence after the UEFA entry deadline, and UEFA refused to accept the club on the basis that at the deadline the club did not have a valid licence. In the appeal to CAS to set aside the UEFA decision, the club invoked the

206 *See https://www.tas-cas.org/en/index.html.*

207 *CAS 2006/A/1110, https://www.tas-cas.org/en/jurisprudence/archive.html.*

Force Majeure principle, arguing that the delay in the issuance of the licence was due to *Force Majeure*. At paragraph 17, page 7, the Court provided a seminal statement:

> *"Force Majeure, indeed, implies an objective, rather than a personal, impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible (see CAS 2002/A/388, published in Digest of CAS Awards III 2001-2003, pp 516 ff). In addition, the conditions for the occurrence of Force Majeure are to be narrowly interpreted since Force Majeure introduces an exception to the binding force of an obligation."*

The Court found the situation could not be described as a case of *Force Majeure* as the critical elements of the principles had not been satisfied.

There are many cases which deal with failure to meet financial obligations. One such case was *Real Betis Balompié SAD v. PSV Eindhoven*[208] which dealt with the failure to obtain a bank guarantee. The Appellant was a Spanish professional football club which failed to obtain a bank guarantee to secure the exercise of an option under a loan agreement to buy a player outright from the Respondent, a Dutch professional football club. The Appellant claimed that the failure to get the bank guarantee was a *Force Majeure* event making it impossible to fulfil its contractual obligations. The Court found that the failure to get the guarantee was not due to unforeseen events beyond the party's control, but to its delicate financial situation.

Similarly, a block on the credit of a football club due to claims by the Brazilian Treasury Department because of old tax debts resulting in the failure of a club to complete instalment payments due for a player transfer was held not to be caused by *Force Majeure* but by the club's conduct: *Club Atlético Mineiro v. FC Dynamo Kyiv.*[209]

In the case of *Panthrakikos FC v. Fédération Internationale de Football Association (FIFA)*[210] it was held that the Appellant could not invoke, as a situation of *Force Majeure*, strict regulatory restrictions placed on the national banking sector in Greece. Such restrictions required specific authorisation and approval for the transfer of capital, but did not result in an outright ban on all international transfers and did not entail an undue burden ultimately making it impossible or extremely difficult to make payments abroad, especially if these restrictions were enacted after the Appellant had defaulted on its financial obligations.

The same strict and narrow interpretation is to be found in other financial cases[211] and in non-financial cases as well: The case of *FC Dnipro v. Football Federation of Ukraine (FFU)*[212], involved a Ukrainian football club and its national football federation. The club failed to arrive by plane at the match venue due to persistent bad weather. It was held

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208 *CAS 2010/A/2144, https://www.tas-cas.org/en/jurisprudence/archive.html.*

209 *CAS 2015/A/3909, https://www.tas-cas.org/en/jurisprudence/archive.html.*

210 *CAS 2016/A/4402, https://www.tas-cas.org/en/jurisprudence/archive.html.*

211 *See also CAS/2008/A/1621, Iraqi Football Association v. Fédération Internationale de Football Association (FIFA) & Qatar Football Association, https://www.tas-cas.org/en/jurisprudence/archive.html; CAS 2014/A/3533, Football Club Metallurg v. Union des Associations Européennes de Football (UEFA), https://www.tas-cas.org/en/jurisprudence/archive.html; and CAS 2015/A/4144, Newell's Old Boys v. Al Ain FC, https://www.tas-cas.org/en/jurisprudence/archive.html*

212 *CAS 2013/A/3471, https://www.tas-cas.org/en/jurisprudence/archive.html.*

that there was no *Force Majeure* if other means of transport—bus or train—were available but the club chose to fly at a time when the risk of adverse meteorological conditions was known. The Panel held that there was no objective and unforeseeable impediment that rendered travel to the match venue impossible.

The case of *Al Masry SC v. Egyptian Football Association (EFA)*[213] concerned an Egyptian football club and the national football federation. This case arose against a backdrop of a FIFA strict liability rule imposed on home national associations and clubs for improper conduct among spectators. Following a period of suspension of football activity because of social and political unrest in Egypt, it was decided to resume football in Port Said despite the club's expressed concern about its inability to control spectators. During the match, fans invaded the field on more than one occasion and at the end of the match a melee ensued during which 74 people were killed. It was clear that the security had failed hopelessly. Disciplinary action was ordered against the club.

In its appeal to CAS, the club argued that the circumstances which existed at the time of the incidents made it impossible for it to maintain security and that its obligation to maintain security was extinguished due to *Force Majeure*. Noting that *Force Majeure* was concerned with impossibility of performance and noting the strict liability for crowd control, the Court found that it was impossible for the club's supporters to behave properly during and after the match given the circumstances surrounding the match and failures in the organisation of the game could not be an argument for *Force Majeure*.

The appeal of *Royal Moroccan Football Federation (FRMF) c. Confédération Africaine de Football (CAF)*[214] is most on all fours with COVID-19. The Moroccan Federation appealed against a CAF ruling and challenged a finding that it was in breach of its contract to host the 2015 Orange African Cup of Nations. A year before the event, there was the Ebola outbreak in West Africa. WHO described the virus as an "epidemic", "an extraordinary event", and "a public health emergency of international concern constituting a risk to public health for the international community". The Moroccan Ministry of Health requested all public authorities to postpone sporting events such as the African Cup. The Morocco Federation requested a postponement of the competition for one year, but CAF did not accede to the request. The Moroccan Federation did not host the competition and CAF interpreted this action as a withdrawal under the Rules and imposed heavy sanctions and penalties. The right to host the event was then given to Equatorial Guinea and the competition was played.

In the appeal to CAS, the Federation argued that the request to postpone the event was due to *Force Majeure* because of the significant worsening of the Ebola epidemic and it was following WHO and Ministry of Health recommendations. CAF argued that the request to postpone the event for one year under considerably different modalities than those which were agreed to amounted to another competition and hence constituted a refusal or withdrawal under the Rules. CAS found that the Federation had not proven a case of *Force Majeure.* The Court's observation at paragraph 4, page 79 of the judgment, which was delivered in French and is unofficially and freely translated here, is very instructive:

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213 *CAS 2012/A/2802, https://www.tas-cas.org/en/jurisprudence/archive.html.*

214 *TAS 2015/A/3920, CAS Bulletin 2016/1, p.76.*

> *"There is no legal definition of Force Majeure in Swiss law. Swiss jurisprudence retains Force Majeure in a very restrictive manner. This presupposes the impossibility of executing. Difficulties are not enough. Thus, the condition that the service—here the organisation of a competition—could absolutely not be provided by the obligor due to a health risk, is not met when another federation has been able to organise the said competition on the agreed dates by taking the appropriate health measures, which shows that a solution was possible."*

Force Majeure was, however, successfully argued in a case where the Egyptian civil war put an end to the football season. It was held that the event was beyond the parties' control; that it could not have been reasonably provided for before entering into the contract; it could not reasonably have been avoided or overcome; and was not attributable to any of them. The parties could not perform all or part of their contractual obligations and were released from further performance. *Alexandria Union Club v. Juan José Sánchez Maqueda & Antonio Cazorla Reche.*[215]

- The law on *Force Majeure* therefore appears to be well settled in CAS jurisprudence and may be summarised as follows:
- *Force Majeure* must render impossible the performance of an obligation.
- It is an event which leads to non-performance.
- It is due to causes which are beyond the control of the "obliged party".
- "*Force Majeure*" implies an objective (rather than a personal) impediment.
- The event must be unforeseen and must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it.
- It is not intended to excuse any possible negligence or lack of diligence from a party.
- It is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference.
- The conditions for the occurrence of *Force Majeure* are to be narrowly and strictly interpreted since *Force Majeure* introduces an exception to the binding force of an obligation.

Conclusion

The cases seem to suggest that parties seeking to rely on *Force Majeure* before CAS will have to prove that the event on which they are relying comes within the narrow confines of all the elements of the established principles. A few observations are relevant in the context of COVID-19.

Even if a viral epidemic was foreseeable given the recent epidemics in the world—SARS, H1N1, Ebola)—there is, nevertheless, much merit in the submission that COVID-19 was not only beyond the control of parties and was an objective impediment, but that the extent of the impact of the pandemic, resulting in a virtual shutdown across the world—

215 *CAS 2014/A/3463 & 3464, https://www.tas-cas.org/en/jurisprudence/archive.html.*

complete lockdowns, curfews, and cessation of economic activity, except for essential services—was unforeseeable, unavoidable, and made performance impossible.

The test as to whether a party has taken reasonable steps or specific precautions to prevent or limit the effects of the external interference will be based on the nature of governmental intervention in each case. These interventions have taken the form of restrictions on movement evidenced by the closing of borders, quarantines, curfews, social distancing, and stay at home orders, some imposed by law, and therefore mandatory, and some implemented as public health recommendations. If only recommendations, mitigation may arise as an issue. It will be left to be seen whether measures like social distancing, wearing of masks and hand sanitising are effective precautions (except for the vulnerable) and therefore, once implemented, constitute reasonable steps to prevent or limit the effects of COVID-19. The activation of business continuity plans as a key mitigation strategy may become a relevant consideration.

Inevitably, the strength of any case before CAS will lie in the argument that it is COVID-19's far-reaching and unpredictable impact, rather than the pandemic itself, that amounts to *Force Majeure.*

The Sports community awaits with great interest the outcome of the certain wave of litigation before CAS on COVID-19.

Chapter 4

COVID-19 AND THE ADMINISTRATION OF JUSTICE

With the unprecedented pandemic overwhelming every facet of our world, the Courts, being committed to the continued administration of justice, had to strike a balance between justice and the health and safety of all court users and staff. National 'States of Emergency', lockdowns, and other restrictive measures have impacted the core functions of the Courts. Regional judiciaries were forced to take measures to deal with the current crisis. According to The Hon. Mme. Yonette Cummings-Edwards, COVID-19 came like an urgent application, without notice, and sought to injunct the very core functions of the Courts. The panelists selected for this discussion explored the following issues:

(i) How has COVID-19 affected the Courts' operations?;

(ii) What measures can be implemented to resume the Courts' functions?;

(iii) What challenges can the Judiciary expect in implementing these measures?

Measures for Resumption of Court Functions

In response to COVID-19, many judiciaries implemented practice directions aimed at the protection of judicial officers of the Courts, court staff, litigants and members of the public. The goal was to ensure the maintenance of access to justice and keeping the judicial system functioning.

One particular measure taken by several jurisdictions was the suspension of in-person hearings. This required e-filing and virtual hearings. In order to facilitate this, critical investments were required in the form of human resources, technology and otherwise. This shift presented a steep learning curve for all judicial contributors, including Judges and judicial officers, who had to get acquainted with the technology required to conduct virtual court hearings.

With regards to the use of technology, The Hon. Mr Justice C Dennis Morrison OJ noted that a key realisation from these new measures was the accommodation of the civil procedure rules in always having provisions to facilitate alternative or remote forms of hearings.

One challenge to the suspension of the in-person hearings has been its impact on self-represented litigants. How do they enjoy access to justice? There is a need for them to have some means of reaching the courts and being heard. Governments and judiciaries must consider the 'Digital Divide'. Many issues arise for persons with disabilities, such as the hearing impaired, those with language barriers and economically challenged persons. Access to technology such as internet connections and computers presents an issue, not to mention ensuring that contributors possess the required computer literacy to operate this technology. Their ability to participate in the proceedings should have been a significant consideration in the exercise of setting out measures.

Criminal Trials

On the issue of resuming criminal trials, while preserving and protecting public health, three measures under active consideration were mentioned. The first of these is the resumption of regular trials, with safe distancing. Highlighted was the resumption of jury trials in the United Kingdom where measures were implemented to have jurors and counsel observe social distancing. Media personnel could also observe remotely via video link. To implement similar measures in the CARICOM region, several factors must be assessed. These include assessing the size of our usual courtrooms and whether alternative larger rooms can be found. Accommodations for other stakeholders such as witnesses, the media and members of public must also be identified.

The second measure considered is conducting virtual hearings. While this may be convenient for appeal hearings, logistically one can anticipate issues where many contributors are required. We must also be cognisant of the 'Digital Divide' that may affect jurors. Further, there appears to be no way to remotely control jurors and ensure that they are paying attention and not being influenced. The nuances of body language observed in a courtroom setting would be lost via this method. It is also difficult to determine whether witnesses are being assisted by anyone off-screen. So even if the technology can be made available to all necessary participants, there will be serious questions as to whether the trial held is a fair one.

If neither of these options can be made to work consistently with principles of fundamental justice and at the same time securing the public health, then the third option would be to introduce judge only trials, with the consent of the defence, as is available in Trinidad and Tobago and Belize. Where the previous two measures are not feasible, it may be necessary to make this method compulsory, albeit temporary, during this pandemic period.

The Challenges Faced

The panel agreed that it is wholly unacceptable to not resume civil and criminal trials while waiting for a change in the circumstances to occur before action is taken. States need to be creative and bold in adopting a combination of methods after careful consideration of all the issues. The stark truth is that the judiciary's response over the preceding three months in providing access to justice is unsustainable in the long term. Matters other than those defined as urgent cannot continue to be postponed indefinitely. The bail of accused

persons cannot also continue to be extended indefinitely. In short order, as the danger associated with COVID-19 subsides, the constitutional imperative of fair hearings within a reasonable time will begin to assert itself.

While moving towards a greater emphasis on virtual hearings and trials, one nuanced challenge is the exhaustion associated with virtual existence. The panel cited research which shows the psychological impact on persons in lockdown and using virtual resources. 'Face to face' interaction is no longer the norm, the forced change in our environment, with no intervening silences and no transition periods, are all impacting on the psychological health of us all. Those responsible for implementing virtual Courts have to ensure logistic management of their time and their users, independent of Judges. Court hearings should be scheduled with sensitivity to the impediments and pressures on users of the Courts who may not be able to communicate their difficulties when a matter is scheduled.

The real challenge may be for judicial stakeholders to accept, in a collaborative manner, that responsibility falls on the lawyers and the Courts to ensure all the options and possible solutions are properly thought out and discussed through meaningful engagement with bar associations.

COVID-19 AND THE JUDICIARY: THE GUYANA EXPERIENCE

The Hon Mme Yonette Cummings-Edwards OR, CCH

Chancellor of Judiciary of Guyana (Actg)

I. How Has the COVID-19 Pandemic Affected the Courts?

Judicial notice can be taken of the pandemic and the damage it has caused on all spheres of life. The courts have not been spared.

The pandemic came like an urgent application without notice and sought to injunct the very core functions of the courts. It filed a large body of supporting evidence. It succeeded initially.

Severe restrictions on the core functions of the courts occurred as a result of the pandemic. National States of Emergencies, disasters and curfews were imposed. National lockdowns were imposed in some territories to restrict movement of persons and stop community spread of the coronavirus. What should the judiciary do in these circumstances?

The judiciary is an important arm of the state. Should it stop operations and allow anarchy to rule in the face of the pandemic? At the courts, court users gather daily—members of the public, attorneys-at-law, court staff are present and interacting in pursuit of justice. This interaction was the very essence of community spread. This is what the public health authorities wanted to guard against. Steps, therefore, had to be taken to keep the doors of the courts open or at least allow court users access to the services of the courts. This was necessary as the courts are considered an essential service.

The court administration being committed to the critical role it plays in the administration of justice tried to strike a delicate balance. As a result, the Practice Directions sprung up like mushrooms overnight to militate against the pandemic striking at the very existence of courts and to protect all court users and staff. The Practice Directions for the various jurisdictions were crafted with the twin principles of:

1) promoting the health and safety of employees, court users, and
2) maintaining access to justice.

The common thread was carrying out the core functions of the courts.

II. What Are the Core Functions of the Courts?

In *Watson v. Fernandez*,[216] Justice De La Bastide gave some useful guidance on this subject. He posited that:

> "Courts exist to do justice between the litigants, through balancing the interest of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency".

The National Association for Court Management USA[217] also proffered some assistance:

> "Courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain rule of law, to provide for equal protection, and to ensure due process of law".

From these declarative statements one can readily appreciate the core functions of the courts. If the courts did not carry out their functions, we would have witnessed the following:

- The Rule of Law would have been under threat.
- Society, especially the vulnerable members, seeking the help of the courts would be left helpless, hapless even, left without any remedy to their legal problems.
- Members of the public may have been tempted to take justice in their own hands.

All courts in the Caribbean were cognisant of their duties and thankfully, kept their services available to its citizens.

III. Measures Taken to Overcome the Pandemic

In Guyana, the Practice Direction published in the *Official Gazette* of 23 March 2020 recites:

"In response to the COVID-19 Pandemic, these Practice Directions are intended to:

(a) Protect the health, safety and well-being of judges, magistrates, judicial officers, staff, attorneys-at-law, and court users by maintaining social distancing, and

(b) Maintain the core functions of the court as far as possible and ensure access to justice."

How did we honour our commitment? We did so by implementing a raft of measures, chief among which were suspension of in-person hearings and prioritising the cases that could be heard.

These measures are reviewed constantly as we aim to carry out the courts' core functions and in keeping with the overriding objective[218] of the courts to deal with cases justly. Justly means ways which are proportionate to the importance of the case, ensuring that the case is dealt with expeditiously, allotting to the case an appropriate share of the courts' resources

216 [2007] CCJ 1 (AJ)

217 https://nacmcore.org/competency/purposes-and-responsibilities/

218 Civil Procedure Rules 2016

while taking into account the need to allot resources to other cases. The application of the overriding objective took on new dimensions as cases had to be prioritised and only urgent cases could be filed and heard.

Variously and throughout the Caribbean, urgent matters included matters relating to children, domestic violence applications, maintenance applications, habeas corpus applications, matters for which persons were in custody, especially those where bail could not be granted, stays of execution, injunctive relief and curfew related charges.

The suspension of in person hearings required e-filing of cases and applications and virtual hearings. To do this one needed critical resources. Resources were needed to purchase equipment for virtual court hearings, resources were needed to adapt or retool what was already in existence. Retooling is not simply a term of art. It entailed altering or changing the formation or way hearings were conducted. We had to operate differently. All of this had to be done in the context of speed and efficiency and in consideration of the fact that there was a finite supply of resources.

What were these resources?

- Human Resources had to be retooled in some instances.
- Physical Resources had to be reconfigured, retrofitted.
- Financial Resources had to be acquired.

IV. Challenges That Were Encountered in Retooling and Changing the Format of Court Operations to Achieve its Core Functions

Human Resources

While some regional judiciaries were already on the technological highway prior to COVID-19 and were getting their work done, some were slowly behind. Guyana prided itself on in-person hearings, having a few cases using Skype every now and then. We were back in time; hence the need to retool.

Judges and judicial officers had to be made aware of the technology for court hearings and become acquainted with it. They had to familiarise themselves with the use of technology and not just using it, but doing so effectively. This posed a steep learning curve for some of us. Some had the technical advantage, as they were technologically savvy, others not so much. Training of judicial officers and staff had to be factored in to this matrix.

Self-represented or pro-se litigants who were being affected by the suspension of the in- person hearings would have faced challenges too. How do they enjoy access to justice? They needed to have some means of reaching the courts and being heard. We have to consider the digital divide, the economically challenged litigant who did not own a computer or smart phone or those whose smart phones were smarter than the user. Their ability to participate in the proceedings must be part of the considerations in the retooling exercise. Many problems would arise for persons with disabilities, persons who are hearing impaired or have language barriers. Interpreters providing services for persons with language barriers had to be accommodated. Due process for everyone is critical.

Physical Resources

The question may be asked how Guyana supplies 50 Magistrates' Courts, three High Courts, four Land Courts and one Court of Appeal with necessary equipment for remote hearing. We are still working on it!

Equipment such as computers, headphones, laptops, tablets, cameras, speakers had to be provided for judicial officers. Existing courtrooms had to be outfitted with TV monitors, computers, public address systems and increased bandwidth had to be acquired.

Due to limited competing resources, judicial officers had to decide which matters were deemed fit for hearing, bearing in mind only urgent matters were being done.

Challenges had been posed to the hearing of civil and criminal trials in the High Court. Apart from outfitting courtrooms with the necessary equipment, the physical structure itself posed challenges. Our lovely wooden buildings and the Victorian architecture which adorns some of our buildings do not lend to easy adaptation or physical changes.

Some courts fall under the National Trust and so we had to tread carefully as we made changes, without interfering with the style and ambience.

In spite of the limited resources, work had to be done as cases were filed, challenging the constitutionality of some of the national responses to the pandemic. There were challenges to the limitation of individual rights and freedom in respect to isolation and quarantine. Some questioned the power of the State to impose national quarantine.[219]

Art. 148-of Guyana's Constitution provides for the protection of freedom of movement in the following terms:

> (1)"No person shall be deprived of his or her freedom of movement…." (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision-…(a)for the imposition of restrictions of movement or residence…that are reasonably required in the interests of … public safety…or public health…"

The High Court ruled that rights are not absolute and can be circumscribed by the State's responsibility to take measures that are reasonably justifiable for dealing with the pandemic.

We had challenges to the electoral process, too. This emphasises the point that the courts had to keep going, even working remotely during a pandemic.

In relation to criminal trials, in the Magistrates' Courts, remote hearings did not pose much challenge and hearings continued without interruption. However, for the High Court it was a different matter. Our court rooms are not built for us to practice effective social distancing with today's guidelines of six feet apart or more from each other. Suspension of in-person hearings during the pandemic translated to no jury trials. Therefore High Court criminal trials that require a jury did not go on, as physically, they were not conducive to the existing structure. We do not have courtrooms that are large enough to accommodate

219 Khalid Gobin v Attorney General 2020 HC-DEM-CIV-FCA-27

the required social distancing. Having jurors assemble for empanelment, and even having twelve members sit closely in a jury box for the trial of a case, can spell community spread.

There is no legislative provision for judge alone trials in Guyana unlike some jurisdictions in the region, e.g., Belize, Trinidad and Tobago and the Turks and Caicos Islands. How then do we achieve hearings with juries? The answer seemed to be acquisition of the necessary platforms to accommodate trials and changing the physical space, to utilise about four courtrooms for a trial.

At present, we have a jury trial that has been suspended since the onset of the pandemic as our courtrooms could not physically accommodate the necessary public health guidance for the safety of jurors, judicial officers and staff. Consideration is being given to the rental of a large theatre, gymnasium or school auditorium with the necessary space for social distancing and circulation of air to complete the case. Many of those places, however, are in lockdown mode.

In the meantime we have to bear in mind the constitutional provisions of fair trial within reasonable time. Article 144 of our Constitution provides that if a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. In that regard, delay raises its ugly head.

Notwithstanding the fact and circumstances of the pandemic and the challenges posed, a defendant may still complain of unjustifiable delay in bringing his case to trial. He can argue that he would suffer serious prejudice to the extent that no fair trial could be held. These are considerations which a court must bear in mind along with the trial process and powers of the judge. These considerations are not new and case law has provided useful guidance.[220]

Remote participation of defendants in prison was also a factor in the equation. Prisoners had a right to be present for the hearings or at least have access to technology to participate in their case. The Constitution affords them protection of the law. Article 144(9) stipulates:

> "Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other tribunal, including the announcement of the decision of the court or other tribunal, shall be held in public.
>
> (10) Nothing in the preceding paragraph shall prevent the court or other tribunal from excluding from the proceedings persons other than parties thereto and their legal representatives to such extent as the court or other tribunal-
>
> (a) ….
>
> (b) may by law be empowered or required to do so in the interests of defence, public safety or public order."

220 Attorney General 's Reference (No. 1 of 1990) (1992) 2 WLR 9; R.v. S (SP)[[2006] 2 Cr App R. 23

Article 144(10) provides:

> "Nothing in the preceding paragraph shall prevent the court or other tribunal from excluding from the proceedings persons other than parties thereto and their legal representatives to such extent as the court or other tribunal -(a) may by law be empowered so to do and may consider necessary or expedient in the circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or
>
> (b) may by law be empowered or required so to do in the interests of defence, public safety or public order."

In *Lucas and another v. Chief Education Officer and ors,*[221] Saunders J reminded us that:

> "The right to the protection of the law is broad and pervasive. The right is anchored in and complements the State's commitment to the rule of law. The rule of law demands that the citizenry be provided access to appropriate avenues to prosecute, and effective remedies to vindicate any interference with their rights."

With the retooling and retrofitting, the principle of public hearings or open justice must not be sacrificed at the altar of expediency during the pandemic. Open justice requires court proceedings to be accessible to the public and the media. As Lord Atkin in *Andre Paul Terrence Ambard v. Attorney General of Trinidad and Tobago*[222] observed, "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful, even though outspoken, comments of ordinary men...."

Jeremy Bentham in his theory of the law asserted that:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. "

Similar sentiments were echoed in the Canadian case of *R. v. C.B.C.*[223]

In this regard having court rooms with a gallery for the public and media must be taken on board along with live streaming, recordings or having transcripts available to the media.

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221 [2015] 86 WIR 100 at 140

222 [1936] AC 322

223 *2013 ONCJ 164 (CanLII)"*

Financial Resources

Money has always been known to be in short supply. This has been a perennial headache for court administrators. In the Book of Ecclesiastics 10:19, it is stated that: "Money answereth all things." Another translation says "money gives everything." In my view, the response to the challenges of having the courts opened during the pandemic lies with money and equipment. They answereth all matters now. A sufficient supply of funding will help to alleviate the challenges faced at present.

In sum, finding solutions to these challenges require that the following be done:

- Review and evaluate existing measures and equipment;
- Provide access to the necessary equipment and licence to conduct remote hearings;
- Reconfigure and even retrofit existing court rooms; in so doing make accommodations for pro-se litigants and the media and the public;
- Train judicial officers, staff and attorneys;
- Ensure reliability of equipment, capability of platform and expanded bandwidth for better connectivity.

Conclusion

The lesson learnt is that we must plan for the future. No one saw the pandemic coming. We know from science and the public health specialists that it will most likely be around for the next two years. Some experts even predict a second wave and third wave. Therefore, for the courts to continue functioning beyond the pandemic, we need to plan ahead. Emergency planning and preparedness in the judicial branch must receive sufficient funding and urgent attention.

The Caribbean region has experienced natural disasters. However, the disaster preparedness here is not like preparing for an earthquake or a flood. It involves acquisition of critical resources and retooling and reshaping existing ones.

It was not raining when Noah built the ark but after the great flood life continued because of the species he took on board the ark. It is testament to planning and acquisition of the necessary resources.

We must realise that this is not a sprint, it's a marathon and we are all in it together.

We expect that there will be a surge in new cases for hearing post COVID-19. We are better prepared to deal with the spike of cases with the necessary resources being made available.

Stay safe, stay healthy and stay sane.

COVID-19 EMERGENCY PRACTICE DIRECTIONS IN THE CARIBBEAN

The Hon. Mr Justice C. Dennis Morrison, OJ CD QC
President of the Court of Appeal of Jamaica

Our region has been fairly prolific in the production of Practice Directions alerting practitioners and others to the conduct of judicial business during the COVID-19 emergency. The following is an indication, not necessarily exhaustive, of the Practice Directions that have been issued:

1. **Barbados**: Initial Protocol issued 22 March 2020
2. **Jamaica**: *Amended Third COVID-19 Emergency Directions*—effective 11 May 2020 to 29 May 2020 (Supreme Court)

   Practice Direction No 2/2020 (supplementing No 1/2020), issued May 11 2020
3. **Guyana**: Further Updated *COVID-19 Emergency Measures*—effective 23 April 2020 for a month
4. **Belize**: *COVID-19 Directions (May 2020)*—effective 1 May 2020
5. **Trinidad and Tobago**: *COVID-19 Emergency Directions*—effective 16 March 2020 to 18 May 2020
6. **Eastern Caribbean Supreme Court**: *COVID-19 Emergency Measures*—effective 30 March 2020
7. **Caribbean Court of Justice**: *COVID-19 Emergency Directions*—effective 6 April 2020
8. **Cayman**: *COVID-19: Guidance for the Family Division*, *Practice Direction Modifying Standard Remote Hearing Practice During Coronavirus Pandemic and Until Further Notice*
9. **The Bahamas**—latest version effective 14 May 2020
10. **Aruba, Curacao, St Maarten, Bonaire, Suriname**

The scope of the Practice Directions

1. Generally speaking, the measures set out in these Practice Directions are aimed at:

   a) The protection of the safety and health of judicial officers, officers of the courts, court and office staff, support staff including security personnel, court users, and members of the public.

   b) Ensuring the maintenance of access to justice.

   c) Keeping the judicial system functioning.

2. The language of the Cayman Islands guidance for conduct of business in the Family Division, albeit specifically geared to the needs of the division, captures the competing interests perfectly:

   "The aim of the Guidance is to 'Keep Business Going Safely'. There is a strong public interest in the Family Justice System continuing to function as normally as possible despite the present pandemic. At the same time, in accordance with government guidance, there is a need for all reasonable and sensible precautions to be taken to prevent infection and, in particular, to avoid non-essential personal contact."

3. The overarching strategies employed to date seek to:

   a) Minimise the need for attendance at court houses and court offices by court users and members of the public.

   b) Maximise safety precautions by enhanced cleaning strategies for frequently used physical structures, installing hand sanitiser dispensers in areas frequented by staff and public, institution of temperature checks, insisting on social distancing within court buildings, wearing of face masks or appropriate face covering, installation of proper signage emphasising the risks and the need for care—all generally in line with Government strategies and known World Health Organisation guidelines.

   c) Resort as far as possible to the use of technology to minimise in-person contact. This includes e-filing of court documents, the conduct of hearings as far as possible by telephone, Skype, Microsoft Teams, Zoom, and the like, and the disposition of applications by written submissions instead of in-person hearings.

   d) Generally, in some cases after consultations with the parties, ensure that only matters that are urgent or otherwise fit for adjudication are heard during this period of emergency.

4. As regards the use of technology, one important feature of the new strategies has been the realisation that existing rules of civil procedure throughout the region (the 'new rules' as the elders still call them, despite the fact that they are now close to 20 years old in most places!) have always had provisions that facilitate some form of telephonic and other remote hearings. So, for some, it has been a voyage of rediscovery. For others (like the Cayman Islands), it has been a case of extending existing practices into new situations.

5. Special measures will inevitably lead to special problems. So, for instance, the CCJ in its guidance felt it necessary to articulate a specific protocol for virtual hearings, reminding attorneys to dress appropriately and seek as far as possible to eliminate background noises and switch off cell phones, etc, during hearings.

   (And this applies equally to judges working from home—avoid becoming the elephant in the Zoom, so to speak!)

Looking Ahead

6. Despite the fact that, in a very short time, all of this already seems entrenched as our new normal, we are still to a significant extent in uncharted territory, having to make up new rules as the needs arise. So, the wearing of masks, which up to six weeks ago was regarded in some very high circles internationally as a non-essential eccentricity, is now de rigeur. Already most of the PDs in the region have been amended at least once and in some cases three times—see, for instance, Guyana, Trinidad and Tobago, Jamaica, the Eastern Caribbean Supreme Court and The Bahamas.
7. And now, with the incidence of new virus infections throughout the region appearing to stabilise (the much hoped for 'flattening of the curve'), the new challenge—the same as the national challenge—will be how best to normalise court operations without increasing the risks. For the stark truth is that much of what we have been able to achieve over the last two or three months has been at a cost which is unsustainable in the medium to long term. To take but one example, we cannot keep postponing all but urgent cases and extending the bail of accused persons indefinitely. In short order, as the danger subsides, the constitutional imperative of fair hearings within a reasonable time, which can never be regarded as being in abeyance, will begin to reassert itself. Already, as you will no doubt hear during the course of this very discussion, issues such as the availability of jury trials in criminal cases are coming to the fore.
8. But, however all of this turns out, it is clear that some things will never be the same again. I doubt very much, for instance, that the current attractiveness of e-filing and telephone and video-conference hearings (to both judges and counsel) is likely to subside. In many respects, that is where the technology was driving us anyway, so all that has happened now has only accelerated the process.
9. Nevertheless, spare a thought in all of this for how starkly it has exposed the digital divide, the phenomenon that still sees close to 40% of persons in our region falling below the line, so to speak. In the area of education, for instance, many complaints have been made about the exclusion or marginalisation of students who have no or only limited access to devices. So too with many unrepresented litigants, still a part of the reality of our justice system. Even in these times of extraordinary pressure on our already fragile economies, this is a matter that Governments will need to address as a matter of urgency if we are to credibly sell technology as the answer to all our current problems.

THE IMPACT OF COVID-19 ON AMERICAN COURTS: THE OHIO PERSPECTIVE

Chief Justice Maureen O'Connor
Supreme Court of Ohio, United States of America

The issues and problems are not unique to any country—all are plagued by same challenges. Consider the case of Ohio—the seventh largest state—11 million population. At the onset of the pandemic, the state agencies and the Governor came together very quickly and were able to work together to create legislation, executive orders, and orders from the Director of Health who has state-wide authority, and judicial order via the Supreme Court. The legislation tolled the statute of limitations as of March 9 until July 30. If it needs to be rescinded earlier then they have the flexibility of doing that.

The Governor rapidly created advisory groups to focus on various parts of the pandemic challenges. He ordered cancellation of public events and issued stay-at-home orders and closed the schools in Ohio. The students returned to classes online after a few weeks. This placed a burden on teachers and parents.

There was not widespread acceptance of these measures. Some called them 'draconian measures', whether they were necessary or not. Even today with the number of deaths, hospitalisations and numbers of people who have been stricken by COVID-19, there are still people in denial, calling it a political ruse and are not taking it seriously. They are defiant of all the directives.

The Supreme Court issued an order tolling time deadlines related to case filings and to document filings. It also issued guidelines to all courts regarding their responsibility to cease in-person hearings except for the essential, immediate matters such as domestic violence or crimes of violence. These were able to take place but only under certain conditions.

The courts were advised to review the dockets of those defendants in mobile jails who were awaiting the disposition of their case and to modify bail to allow for their release.

The concentration of COVID-19 in jails and prisons—the responsible response was to remove persons from that environment safely and place them into the community.

Summons were being issued to appear at a date to be determined for non-violent matters.

All government workers were asked to telework. Only essential workers were to report to work. My building has 266 people. On any given day, only 40-50 people will enter the building. They rest of the staff is teleworking.

All protective measures are to be employed by the courts to comply with health and safety orders and that is the directive to private employers as well.

The courts were never closed. They always maintained that they were open. However, access was limited to persons having business at the courts and even then only under certain circumstances.

This is an ongoing evolution. We will not know the full extent of the changes until we get accurate and full testing for the virus. I do not envision that will be anytime soon, so there are certain presumptions that the courts must continue to operate under.

We emphasise coordination with colleagues both inside and outside of the judicial system.

The judges conference with one another, be it the Supreme Court in the Ohio Judicial Conference to discuss best practices and what is necessary and what is recommended. The Supreme Court quickly engaged judges to ramp up their knowledge and become trainers and educators for judges and magistrates to share best practices. We held webinars weekly or twice a week for judges to access so as to be informed, trained and embrace the information that they were receiving. Our bar associations (state, local and national) supported education and training and communication for their bar members.

What has not happened is jury trials in Ohio. The danger is too great. The effort to secure citizens' attendance became problematic and the staff's safety was also a concern. Now the focus is on how we can slowly return to jury trials. One project that occurred organically has been the state-wide effort to include the criminal and civil bar and to engage representatives from all entities that played a role in the trial in the courtroom, so as to agree on what is essential to have in place before a jury trial and what is merely recommended for a jury trial to take place. This info was shared across the state with all members of the judiciary (all 721 judges). The engagement between those entities and the judges is imperative as they move forward.

The National Centre for State Court engaged the Chief Judges of all 50 states and territories to develop best practices, to share success and to receive training on what works and what remains a challenge. This was no easy task because the states' judicial systems and resources may vary greatly from one state to another just as they vary greatly from one court to another inside the states.

There has been great cooperation throughout, not just the NCSC but amongst states, organisations and the judges.

There are some 386 local courts. We have budgeted to have technology ramped up in local courts. I have used some of my budget to give money to local courts. Current needs are Zoom licences, laptops, cameras, capacity to create virtual courtrooms for hearings—$6 million.

Grants to 277 courts and 87 out of 88 counties received grants.

Finally, I should note that restrictions are being loosened for bars, entertainment—people go there voluntarily. However, courts are different. People come to court because they have to; they have no choice. It is therefore the courts' moral duty/obligation to keep all persons coming in safe. The public's trust and confidence demand that they do so.

TRIALS IN THE COVID-19 ERA

Douglas Mendes SC
President, Law Association of Trinidad and Tobago

Measures Which Are Under Consideration for the Resumption of Jury Trials

The major assumption is that no one is willing to countenance the total suspension of jury trials during the COVID-19 period: this period could be 18 months, two years or longer. A related assumption is that we are all committed to the resumption of criminal trials as soon as possible. The challenge, then, is to devise means by which this can be done and at the same time preserve and protect the health of the public, ensure that trial fairness is guaranteed and that all fundamental principles of justice are adhered to.

Larger Rooms for Social Distancing?

The first possibility is to resume trials in the usual way but observe safe distancing protocols. The normal jury consists of twelve persons. Alternates must be selected and be present. Many other essential persons required to be in the same room where other persons would have sat in the same space for a previous trial. Further there are various witnesses who must appear to give viva voce evidence. How can all of this be done safely?

Jury trials resumed in the UK this week and they have implemented measures to have the jury sit two meters apart at the well of the court, accommodate the counsels where the jury usually sit and facilitate media personnel in another room and watch via video. The emphasis has been on using larger courtrooms or other buildings not in use which are large enough to ensure safety.

Time will tell the success of this measure but to replicate that in this region we must take into account the space available at our usual courtrooms, whether alternative larger rooms are available and can be repurposed, whether additional rooms can be found where the public and media can view proceedings, whether the rooms in which witnesses usually wait in to appear in the witness box are large enough to comply with safe procedures. And the rooms where jury deliberate must be large enough to ensure that safe distancing guidelines are maintained.

Reduce the Number of Jurors?

One measure that might make normal jury trials easier to accommodate is legislatively to reduce the number of jurors required per trial. There is no magic in the number twelve

or ten as the case may be. Research suggests that the greater the number of persons who deliberate, the greater the likelihood that a correct decision will be arrived at. The more minds that are brought to bear on the subject, the greater the chance that prejudices might be neutralised, the greater that relevant evidence might be considered and that all arguments will be traversed.

However, by way of identifying an optimum number of jurors, it is worth noting that the US Supreme Court has determined that the right to the trial by jury (which is enshrined in the US Constitution) would not be guaranteed by a jury consisting of less than six persons but only in circumstances where the verdict must be unanimous.

Reducing the number of jurors and concomitantly, the number of jurors and alternates required to be present at the trial, could make it easier to comply with safe distancing requirements and at the same time would not affect any fundamental principle of justice even where there is a constitutional right to a jury trial.

Even with reduced juries, however, the additional complication is that a jury member might contract the virus during a trial which will inevitably lead to a consideration to abort or postpone the trial until at least other jury members are tested.

Additional concern is the intangible one that it is unfair to force members of the public to be in close contact with each other for possibly extended periods of time, including the period of deliberations which will likely occur in closed quarters thereby increasing their exposure to infection. The anxiety and anger with the situation may prejudice the defence or the prosecution more than will otherwise take place.

Virtual Hearings?

Virtual hearings might be easy for appeals which involve only legal arguments, but must be a logistical nightmare where it is necessary for a large number of people to tune in. Simple hearings with judge and counsel on opposing sides have been plagued with inadequate bandwidth, insecure connections and faulty equipment.

There is no guarantee and every reason to doubt that every juror will have necessary internet connection. There is no way to control the jury and ensure that they are paying attention and not being influenced by someone else that may be present, or intimidated and manipulated.

Nuances of body language observed in a courtroom setting could be lost via this method. There is no way to determine that the juror would accurately determine the credibility of a witness. Indeed, some commentators have suggested that framing, lighting, camera angles and location might make jurors question the credibility or create bias. It is also difficult to determine whether witnesses are being assisted by anyone off-screen.

Even if the technology can be made available to all necessary participants, there will be serious questions as to whether the trial held is a fair one. Research in the US has indicated that defendants fare more poorly in remote proceedings. A 2010 study suggested that judges set bail higher for defendants using closed circuit television than those who appeared in person.

If neither of these options considered above can be made to work consistent with principles of fundamental justice and at the same time securing the public health, then the third option would be tried.

Judge Alone Trials?

It may be worth considering the introduction of judge alone trials with the consent of the defence. Or trial by a panel of judges or a judge and laypersons where this option does not already exist.

In Trinidad and Tobago and in Belize, a defendant can select a judge alone trial. Cases have resulted in both guilty and not-guilty verdicts. This will not eliminate the need to accommodate jury trials by the other measures already discussed.

If any of the other territories are unable to implement the other measures, it may be necessary to make this method the compulsory one during the COVID-19 period as a temporary measure. We should all see our way to reluctant acceptance but only if other measures are unsuitable. As a temporary measure, principles of fundamental justice will not be unduly sacrificed.

What is unacceptable, and cannot be countenanced, is simply to not resume criminal trials with juries at all. We need to be creative and experiment by either adopting one or more the methods where they can be shown to work or by some combination of these measures.

COVID-19 AND THE ADMINISTRATION OF JUSTICE: PERSPECTIVES OF A PRACTITIONER

Reginald TA Armour SC

Caribbean Law Practitioner

Chairman of the Council of Legal Education[224]

The Starting Point

Access to justice is the issue to which this pandemic has awakened us. COVID-19 has ushered in a new environment with challenges, limitations and opportunities, bringing with it an almost wholesale reorganisation of our court modules. Greater emphasis is on online court trials/hearings in a system which itself must produce a calm and controlled environment, where all parties have assurances that justice is not compromised. All parties include judges, court staff, lawyers, accused, claimants, jurors, witnesses, and the public, including media.

The natural conservatism of lawyers and judges might have suggested that the legal profession and the judiciary might have been resistant to change, and innovative change at that, in the modalities by which we practice our profession as advocates and advisers of our clients and participate in ensuring that access to justice is not compromised, so as to ensure fair trials and the protection of the law.

It would not appear that either the judges or the lawyers have permitted that inherent conservatism to be the reflex. All have risen to the occasion, even whilst challenges exist.

We have had the benefit of decisions of courts across the Commonwealth and beyond (Africa, Australia, Bosnia, the Caribbean, including Guyana, Israel and the UK, to name a few). It is clear that they all have risen to the challenge.

The Public Health and Disaster Regulations have introduced mandatory terms of our 'new normal', constraining us to operate on a rostered basis with reduced staff and in some cases, as practitioners, operating with significantly reduced income streams, from which we physically deliver value to our clients and the administration of justice in order to appear on the technological platforms in use, be they Zoom, Blue Jeans, Micro Soft Teams or howsoever.

224 The Council of Legal Education oversees the administration and policy framework of the three Caribbean Law Schools in The Bahamas, Jamaica and Trinidad and Tobago.

Intensity/Exhaustion/Research

Thought and care must be accorded to the psychological impact of the new normal; the drain on individual energy must not be underestimated: face to face; forced change of environment with no intervening silences, little or no spaces between friends, family and work; allowing for little or no transition periods.

Equality

Thought and care must be accorded to the technological limitations and/or challenges obtaining in our countries with reference to internet consistency and band width. This is of significance in general application but for us in the Caribbean will assume particular significance in those jurisdictions with far-flung outlying land mass areas (of which Guyana would be an example) or far-flung outlying islands (of which The Bahamas or the Turks and Caicos Islands would be examples), from which witnesses and clients will be required to communicate remotely, and some of whom may not even have a computer or do not adequately know how to use a computer.

What are the legal limitations and implications for the course of a trial being held virtually, ensuring secure remote platforms from which we can be assured that witnesses giving evidence in chief or who are being cross examined are not receiving coaching from someone in an adjacent room or having answers suggested to them out of earshot? Whether a judge may remain in one sovereign island jurisdiction and preside remotely over a trial physically located across the Caribbean Sea in another sovereign island jurisdiction, and in the absence of treaty and constitutionally enabling legislation?

Undoubtedly questions loom large but equally the strength of the common law and the resolve of our judges, lawyers and court administrators are all throwing up answers as we evolve through our new normal.

Perhaps the real challenge is for us all to accept in a collaborative manner that the responsibility is ours to ensure that the proper administrative and logistic considerations are thought out, tested and discussed including, I would expect, through active input from and consultation with Bar Associations.

A practical consideration (amongst several others), was very usefully addressed in *CAPIC v Ford Motor Company of Australia [2020] FCA 486*: That of practitioners who have children being under particular strain if trying to conduct a trial whilst supervising children. This consideration becomes that more acute as an overbearing impediment in a scenario which I have witnessed: A court hearing is scheduled virtually for a fixed time and all counsel are located remotely to commence at that time; the judges (unknown to counsel) are engaged virtually in other matters in the queue so that the actual matter is not called until some six hours later. In the meantime, there is no capability to allow communication between counsel and the court either to ascertain the status of the matter and/or accordingly, to make arrangements for children who are to be attended to in a lockdown environment with limitations of movement and support homecare staff. This calls for online administration and logistical management of court Time and court users, *independent of the judges themselves* who are engaged in court and often not cognisant of these challenges.

These challenges must be addressed equally on a case by case basis, with acute logistical online management. It will be the challenge of both the judge and counsel to ensure that the systems in our new normal are not abused. We can address all of the challenges of the future if we acknowledge with some humility that we are ALL on a steep learning curve, with little or no room for impatience or arrogance.

It would be remiss of me if I ended without acknowledging with appreciation the innovative efforts of Chief Justice Ivor Archie of Trinidad and Tobago (an engineer before he read law) and the continuing dynamic roll-out of new platforms of online Justice, many of which were in the pipeline *before the advent of COVID-19*, such as online child care and maintenance payments. It would be remiss of me also not to acknowledge the students of the Council of Legal Education who have made the time to “tune in” to this learning experience. Thank you also to our Moderator, Mr. Wesley Gibbings, and to the CCJ Academy of Law.

BEYOND COVID-19
EVOLVING THE JUSTICE SECTOR TO THE NEW NORMAL

Bevil Wooding

Executive Director

APEX – The Caribbean Agency for Justice Solutions [225]

Navigating the New Normal

The COVID-19 pandemic has changed the context of life and courts fundamentally and irreversibly. With in-person court operations suspended or severely constrained, the pandemic is forcing justice systems across the Caribbean, and globally, to rapidly transition to technology-enabled solutions.

In the process, it is spotlighting areas and issues critical to the modernisation of courts and to the fair, transparent, accessible and equitable delivery of justice in the region. Our technology infrastructure is limited, staff competencies need to be upgraded, policies and practices for conducting business are not optimised for the new normal.

It is already clear that the transition will have a lasting impact on how justice services are accessed, delivered and administered throughout the Caribbean. We are being forced to fast-tracking changes many in the sector have championed for years.

The Now Demand

The requirement to ensure uninterrupted access to court services has created an urgent need to strengthen public confidence, upgrade court infrastructure, ensure the safety of court personnel and the public, and the continuity of critical court services. With many jurisdictions in the Caribbean already burdened by staggering case-backlogs, many cannot risk the further expansion of backlogged cases. But without deliberate, strategic action, this will be an inevitable outcome.

The challenge at hand, then, is to enable business continuity in a traditionally paper-based, manual-operation dependent court system. The solution requires that funding and leadership action be invested in migration from paper-based systems to electronic systems; in procurement and deployment of information and communications

225 APEX is a non-profit agency established by the Caribbean Court of Justice (CCJ) in 2017 to provide technology-enabled solutions and training to improve the region's justice delivery sector.

technology infrastructure and services; in development of new protocols for safety, access and administration; in evolution of practice directions and legislation to fit the times; in training of staff, clients and stakeholders; and in sourcing adequate levels of funding to implement, in record time, while still navigating an uncertain future.

Making the Transition…Rapidly…But Wisely

The public and attorneys want to interact with the courts as they do with other businesses in the modern era—online and anytime. There is also urgent need for integrated justice solutions and judicial support systems. Thankfully, there already exist tools and emerging best practices to guide the process: essential software and hardware tools from the technological infrastructure layer. This includes electronic-filing platform; electronic-case management system; online court calendars; access devices such as computers, tablets and smart phones; and video conferencing facilities.

Given the critical nature of the role of technology across the court ecosystem, an indigenous ecosystem of technical expertise is needed to support the design, deployment, administration and maintenance of Caribbean justice sector technology solutions. For the region, this ecosystem should be tailored and prioritised specifically to the needs of Caribbean courts and court stakeholders. After all, technology should be locally relevant, secure and sustainable.

The sharing of ideas, experiences and expertise can be a powerful catalyst to the scaling of local or national solutions for regional benefit. A coordinated approach to collaboration and the development of regionally accessible human capacity can be the enabler for implementing and supporting technology solutions; deploying related capacity building programmes; and facilitating research and publication of best practices in service innovation and administration.

The Technology Imperative

It is already clear that the technological solutions being deployed now can play a significant role in tackling the massive backlog of cases the region's already overburdened courts will face when current restrictions are lifted. It is also clear that we have hit an inflection point past which we can no longer treat the technology-enabled modernisation of our court systems as anything but the most urgent priority facing our sector.

Technology is proving its value in ensuring the continuity of operations now. However, it has an even more crucial role as we move into an uncertain future. Technology solutions must be considered holistically and coupled with adequate training of persons and deliberate attention to issues of equitable access. The extent to which *due diligence* is applied in defining solutions today will determine the sector's capacity and readiness to deliver quality service and respond to inevitable future disruptions.

With New Solutions Come New Challenges

Few will contest that the paper-based processes that were previously normal were very inefficient and costly. Moving to automated, electronic systems have the immediate benefits of lower costs, greater efficiency and better scalability. However, with new solutions come new challenges for courts. These challenges can include access to funding and expertise and cultural opposition to change.

Deploying and maintaining technology infrastructure is also non-trivial. And while technology-enabled solutions can significantly reduce certain operational costs, they can also create new recurring expenses, such as internet connectivity, access devices, infrastructure upgrade, online-hosting and equipment maintenance.

Digitising services or moving services online can also expose wider societal challenges of access and digital literacy; increase the risk of information compromise via cyber attacks or hacking; and present challenges in adapting workflows and re-training staff once competent in administrating paper-based for digital systems. New digital skills may even result in workforce redundancies.

Shifts in the dynamics of court proceedings, especially brought on by the use of video conferencing technology, can also potentially disadvantage litigants. Furthermore, the conduct of e-trials, jury selection processes, jury deliberations, evidence management, transcripts generation and cashless payments can also be affected in ways require constant evaluation of options and approaches.

Opportunities in the Crisis

Still, the prospects and benefits inherent in transitioning to digital courts make the effort worthwhile. We have an extraordinary opportunity to innovate, create precedents, define new traditions and fast-track changes that were overdue and that are necessary for strengthening the sector and improving the delivery of justice throughout the Caribbean. We have to seize the moment.

Technology is undoubtedly essential to ensuring the continuity of operations now and into the future. However, it is not sufficient to address the complex mix of factors necessary to sustain safe, equitable and efficient access to justice. The current crisis is a powerful catalyst for leaders across the sector to embrace the new, technology-enabled normal, and to enact a radical, overdue departure from outdated, inefficient and costly paper-based systems. There is a leadership responsibility to now define more efficient, responsive, service-oriented, equitable and accessible models for delivering justice.

Transformation is a Marathon, not a Sprint

Sustaining the transformation gains and momentum will require hitherto unprecedented levels of cooperation, coordination and commitment across many stakeholder groups. Personnel well-being; human resource capacity; trial modalities; national infrastructure; safety and security; stakeholder needs; economic realities; political priorities will all be involved.

To best pace ourselves we can focus on removing inefficiencies and eliminating unnecessary or wasteful processes. This will involve identifying specific potential areas for productivity improvements, cost savings and revenue generation. Priorities and investments should be based on formal surveying of stakeholder needs and requirements. Promotion of mediation and ADR options will also be key. Finally, we must sustain and, where possible, extend multi-stakeholder consultations and collaboration.

RECOMMENDATIONS

The COVID-19 pandemic has left no geographical region, industry or area of law unturned. The adverse effects of this virus are global and inevitable but mitigation is possible. In hosting this Webinar, the CCJ Academy for Law sought not only to spark interest in these concerns within the region but also to ignite a trail of research, discussions and collaboration between legal academia worldwide.

The panelists sought to bring to the forefront the challenges faced with measures implemented by governments and the harsh realities of our affected society. Unique views and perspectives were given using examples of different jurisdictions. These perspectives can be used as learning blocks from which governments can pull the successful measures to deal with this unprecedented pandemic.

We have to plan for the future. We are still in unchartered territory with the demand to construct new legal framework as the needs arise. The common factor of the recommended actions put forth by all panelists is that they must all be pursued with a degree of urgency. This is a call to action that would only be successful with collaborative effort.

Recommendation s from the International Law Panel

An international treaty, convention, and/or regulation should be adopted to address issues arising out of a pandemic. These instruments should address the current gaps in international law and ensure that territorial states:

(i) develop the public health competencies that are necessary to detect this kind of virus;

(ii) put rules in place to contain the public health outbreak;

(iii) warn other states—not just neighbouring states—and the global community at large of any viral outbreak within their territory;

(iv) are conferred the ability to restrict international travel;

(v) are given the right to request assistance from states with the ability to offer it;

(vi) are obligated to provide assistance;

(vii) are required to make provision to provide compensation—e.g. the forgiving of loans from the territorial state.

The negotiation of these instruments must be guided by international legal principles and adopt a human rights-based approach to health. Provision should also be made for the establishment of a binding judicial tribunal to determine liabilities with the instruments.

1. All states must try to empower an appropriate global agency to ensure that those in breach will be held accountable.
2. Institutions like CARICOM should disseminate knowledge and assist developing countries to defend themselves in the event that they are a party to a dispute.

3. Consolidated purchasing should be pursued for medical supply needs which are common across all CARICOM states. Procurement strategies proposed are:
   (i) procurement through PAHO/WHO; and
   (ii) procurement led by the OECS Commission through the Multi-Sectoral Response Coordination Mechanism coordinated by the Caribbean Disaster Emergency Management Agency (CDEMA).
4. All states attempting to loosen their restrictive measures should assess risk using the criteria set out by PAHO.[226]
5. Amendments to the relevant Intellectual Property laws within the states should be made to allow for compulsory licensing (i.e. to ensure that domestic law is TRIPS compliant). Examples of legislation that would assist include that from Canada,[227] Chile, Ecuador, Germany, Israel and the US.
6. All states should enter into good faith negotiations with pharmaceutical companies for access to the necessary supplies.
7. A Caribbean Pharmaceutical Policy and a regional centralised generic medicines registry process should be developed.
8. Even where all legal frameworks have been enacted on an international and national level, the region must then ensure that our distribution channels and supply chains are effective enough to ensure that once we have access on an external level, internally, individuals can have access to those medicines.

Recommendations from the Civil Liberties Panel

1. Governments should monitor the extent to which the severe restrictions are maintained and determine from their monitoring whether a restriction is proportionate or not.
2. In times of emergencies there must be even greater safeguards against abuse of the most vulnerable, poor and disenfranchised. The governments must ensure that there is equal access to the country's resources.
3. Governments should re-engineer their legal policy framework to offset disasters and to avoid ad hoc bailouts.

226 Criteria set out in publications found at: https://www.who.int/publications-detail/public-health-criteria-to-adjust-public-health-and-social-measures-in-the-context-of-covid-19 and https://www.paho.org/en/documents/considerations-adjustments-social-distancing-and-travel-related-measures

227 Bill C-13, Part 12

Recommendations from the *Force Majeure* and Commercial Contracts Panel

The panel was ultimately critical of the Courts' ability to provide a just and fair conclusion to any contractual dispute arising out the COVID-19 pandemic. They acknowledged that no commercial contract is the same. Professor de Araujo noted that every commercial contract and by necessary implication, every contractual dispute, requires a specific understanding of the unique conditions forming the contractual relationship for the fairest conclusion.

With domestic courts not typically possessing the intimate knowledge of and consistency in application of the principles guiding *Force Majeure* and the doctrine of frustration, widely varied and potentially unjust resolutions would occur. Similarly, Mr. Hylton concluded that litigation as a solution to contractual disputes arising out of COVID-19 was not favourable, however, it may be the only option in some cases.

For these reasons, the panel advocated for *negotiation* to be the first option utilised by parties. With parties best suited to understand their needs, this may provide the most just resolution to their contractual disputes. Parties should also make use of *mediation* where necessary and other forms of *Alternative Dispute Resolution* (ADR) resources. These options lean towards the maintenance of the commercial relationship while parties work together in mitigating their losses. It was noted, however, that the options of negotiation, mediation and ADR may be idealistic. Where parties observe an avenue through litigation to avoid or greatly minimise their loss emanating from the COVID-19 fallout, by nature, they may pursue that option.

The panel emphasised the need for solidarity amongst economic entities, as Ms. Osbourne has witnessed amongst the sporting community in response to COVID-19.

Recommendations from the Administration of Justice Panel

1. Encourage the use of technology to minimise in-person contact (e-filing, court hearings via telephone calls, Microsoft Team, Zoom etc.) and to enable disposition of applications by written submissions instead of in-person appearances. Court staff should be trained to adapt to the use of new technology.
2. States should budget to fulfill the courts' needs for Zoom licences, laptops, cameras, and the capacity to create virtual courtrooms for hearings.
3. Maximise safety precautions by means of enhanced cleaning strategies (sanitiser dispensers, temperature checks and social distancing, wearing of masks, proper signage etc.)
4. Considerations and special provisions should be made for persons with disabilities, language barriers and economically challenged persons.
5. There should be consistent reviews and evaluations of all measures to ensure all key issues are being addressed and measures are being adapted to meet the changing needs of court participants.

6. For in-person urgent hearings, there should be reconfiguration and retrofitting as far as possible for the courtrooms.
7. Resume jury trials via one or more of the following methods, while ensuring fundamental rights are preserved:
   (i) Resumption of trials in the usual way but observing safe distancing protocols; legislatively reducing the number of jurors per trial would assist;
   (ii) Commencement of virtual hearings: putting protocols in place to eliminate technological problems, influencing of jurors behind the camera etc. must be done for this method to be successful; and
   (iii) Introduction of judge-only trials or trial by a panel of judges or a judge and laypersons, where this option does not already exist, with the consent of the defence: this method does not eliminate the need to accommodate jury trials by way of the other two methods.

ANNEX I:
INTERNATIONAL HEALTH REGULATIONS (2005)
THIRD EDITION

INTERNATIONAL HEALTH REGULATIONS (2005)

PART I – DEFINITIONS, PURPOSE AND SCOPE, PRINCIPLES AND RESPONSIBLE AUTHORITIES

Article 1 Definitions

1. For the purposes of the International Health Regulations (hereinafter "the IHR" or "Regulations"):

   "affected" means persons, baggage, cargo, containers, conveyances, goods, postal parcels or human remains that are infected or contaminated, or carry sources of infection or contamination, so as to constitute a public health risk;

   "affected area" means a geographical location specifically for which health measures have been recommended by WHO under these Regulations;

   "aircraft" means an aircraft making an international voyage;

   "airport" means any airport where international flights arrive or depart;

   "arrival" of a conveyance means:

   (a) in the case of a seagoing vessel, arrival or anchoring in the defined area of a port;

   (b) in the case of an aircraft, arrival at an airport;

   (c) in the case of an inland navigation vessel on an international voyage, arrival at a point of entry;

   (d) in the case of a train or road vehicle, arrival at a point of entry;

   "baggage" means the personal effects of a traveller;

   "cargo" means goods carried on a conveyance or in a container;

   "competent authority" means an authority responsible for the implementation and application of health measures under these Regulations;

   "container" means an article of transport equipment:

   (a) of a permanent character and accordingly strong enough to be suitable for repeated use;

   (b) specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;

   (c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; and

(d) specially designed as to be easy to fill and empty;

"container loading area" means a place or facility set aside for containers used in international traffic;

"contamination" means the presence of an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, that may constitute a public health risk;

"conveyance" means an aircraft, ship, train, road vehicle or other means of transport on an international voyage;

"conveyance operator" means a natural or legal person in charge of a conveyance or their agent;

"crew" means persons on board a conveyance who are not passengers;

"decontamination" means a procedure whereby health measures are taken to eliminate an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, that may constitute a public health risk;

"departure" means, for persons, baggage, cargo, conveyances or goods, the act of leaving a territory;

"deratting" means the procedure whereby health measures are taken to control or kill rodent vectors of human disease present in baggage, cargo, containers, conveyances, facilities, goods and postal parcels at the point of entry;

"Director-General" means the Director-General of the World Health Organization;

"disease" means an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans;

"disinfection" means the procedure whereby health measures are taken to control or kill infectious agents on a human or animal body surface or in or on baggage, cargo, containers, conveyances, goods and postal parcels by direct exposure to chemical or physical agents;

"disinsection" means the procedure whereby health measures are taken to control or kill the insect vectors of human diseases present in baggage, cargo, containers, conveyances, goods and postal parcels;

"event" means a manifestation of disease or an occurrence that creates a potential for disease;

"*free pratique*" means permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores; permission for an aircraft, after landing, to embark or disembark, discharge or load cargo or stores; and permission for a ground transport vehicle, upon arrival, to embark or disembark, discharge or load cargo or stores;

"goods" mean tangible products, including animals and plants, transported on an international voyage, including for utilization on board a conveyance;

"ground crossing" means a point of land entry in a State Party, including one utilized by road vehicles and trains;

"ground transport vehicle" means a motorized conveyance for overland transport on an international voyage, including trains, coaches, lorries and automobiles;

"health measure" means procedures applied to prevent the spread of disease or contamination; a health measure does not include law enforcement or security measures;

"ill person" means an individual suffering from or affected with a physical ailment that may pose a public health risk;

"infection" means the entry and development or multiplication of an infectious agent in the body of humans and animals that may constitute a public health risk;

"inspection" means the examination, by the competent authority or under its supervision, of areas, baggage, containers, conveyances, facilities, goods or postal parcels, including relevant data and documentation, to determine if a public health risk exists;

"international traffic" means the movement of persons, baggage, cargo, containers, conveyances, goods or postal parcels across an international border, including international trade;

"international voyage" means:

(a) in the case of a conveyance, a voyage between points of entry in the territories of more than one State, or a voyage between points of entry in the territory or territories of the same State if the conveyance has contacts with the territory of any other State on its voyage but only as regards those contacts;

(b) in the case of a traveller, a voyage involving entry into the territory of a State other than the territory of the State in which that traveller commences the voyage;

"intrusive" means possibly provoking discomfort through close or intimate contact or questioning;

"invasive" means the puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity. For the purposes of these Regulations, medical examination of the ear, nose and mouth, temperature assessment using an ear, oral or cutaneous thermometer, or thermal imaging; medical inspection; auscultation; external palpation; retinoscopy; external collection of urine, faeces or saliva samples; external measurement of blood pressure; and electrocardiography shall be considered to be non-invasive;

"isolation" means separation of ill or contaminated persons or affected baggage, containers, conveyances, goods or postal parcels from others in such a manner as to prevent the spread of infection or contamination;

"medical examination" means the preliminary assessment of a person by an authorized health worker or by a person under the direct supervision of the competent authority, to determine the person's health status and potential public health risk to others, and

may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case;

"National IHR Focal Point" means the national centre, designated by each State Party, which shall be accessible at all times for communications with WHO IHR Contact Points under these Regulations;

"Organization" or "WHO" means the World Health Organization;

"permanent residence" has the meaning as determined in the national law of the State Party concerned;

"personal data" means any information relating to an identified or identifiable natural person; "point of entry" means a passage for international entry or exit of travellers, baggage, cargo, containers, conveyances, goods and postal parcels as well as agencies and areas providing services to them on entry or exit;

"port" means a seaport or a port on an inland body of water where ships on an international voyage arrive or depart;

"postal parcel" means an addressed article or package carried internationally by postal or courier services;

"public health emergency of international concern" means an extraordinary event which is determined, as provided in these Regulations:

(i) to constitute a public health risk to other States through the international spread of disease and

(ii) to potentially require a coordinated international response;

"public health observation" means the monitoring of the health status of a traveller over time for the purpose of determining the risk of disease transmission;

"public health risk" means a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger;

"quarantine" means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination;

"recommendation" and "recommended" refer to temporary or standing recommendations issued under these Regulations;

"reservoir" means an animal, plant or substance in which an infectious agent normally lives and whose presence may constitute a public health risk;

"road vehicle" means a ground transport vehicle other than a train;

"scientific evidence" means information furnishing a level of proof based on the established and accepted methods of science;

"scientific principles" means the accepted fundamental laws and facts of nature known through the methods of science;

"ship" means a seagoing or inland navigation vessel on an international voyage;

"standing recommendation" means 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;

"surveillance" means the systematic ongoing collection, collation and analysis of data for public health purposes and the timely dissemination of public health information for assessment and public health response as necessary;

"suspect" means those persons, baggage, cargo, containers, conveyances, goods or postal parcels considered by a State Party as having been exposed, or possibly exposed, to a public health risk and that could be a possible source of spread of disease;

"temporary recommendation" means non-binding advice issued by WHO pursuant to Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, so as to prevent or reduce the international spread of disease and minimize interference with international traffic;

"temporary residence" has the meaning as determined in the national law of the State Party concerned;

"traveller" means a natural person undertaking an international voyage;

"vector" means an insect or other animal which normally transports an infectious agent that constitutes a public health risk;

"verification" means the provision of information by a State Party to WHO confirming the status of an event within the territory or territories of that State Party;

"WHO IHR Contact Point" means the unit within WHO which shall be accessible at all times for communications with the National IHR Focal Point.

2. Unless otherwise specified or determined by the context, reference to these Regulations includes the annexes thereto.

Article 2 Purpose and scope

The purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

Article 3 Principles

1. The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.
2. The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization.
3. The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.
4. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in

pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.

Article 4 Responsible authorities

1. Each State Party shall designate or establish a National IHR Focal Point and the authorities responsible within its respective jurisdiction for the implementation of health measures under these Regulations.
2. National IHR Focal Points shall be accessible at all times for communications with the WHO IHR Contact Points provided for in paragraph 3 of this Article. The functions of National IHR Focal Points shall include:
   (a) sending to WHO IHR Contact Points, on behalf of the State Party concerned, urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12; and
   (b) disseminating information to, and consolidating input from, relevant sectors of the administration of the State Party concerned, including those responsible for surveillance and reporting, points of entry, public health services, clinics and hospitals and other government departments.
3. WHO shall designate IHR Contact Points, which shall be accessible at all times for communications with National IHR Focal Points. WHO IHR Contact Points shall send urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12, to the National IHR Focal Point of the States Parties concerned. WHO IHR Contact Points may be designated by WHO at the headquarters or at the regional level of the Organization.
4. States Parties shall provide WHO with contact details of their National IHR Focal Point and WHO shall provide States Parties with contact details of WHO IHR Contact Points. These contact details shall be continuously updated and annually confirmed. WHO shall make available to all States Parties the contact details of National IHR Focal Points it receives pursuant to this Article.

PART II – INFORMATION AND PUBLIC HEALTH RESPONSE

Article 5 Surveillance

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to detect, assess, notify and report events in accordance with these Regulations, as specified in Annex 1.
2. Following the assessment referred to in paragraph 2, Part A of Annex 1, a State Party may report to WHO on the basis of a justified need and an implementation plan and, in so doing, obtain an extension of two years in which to fulfil the obligation in paragraph 1 of this Article. In exceptional circumstances, and supported by a new implementation plan, the State Party may request a further extension not exceeding two years from the Director-General, who shall make the decision, taking into account the technical advice of the Committee established under Article 50 (hereinafter the "Review Committee"). After the period mentioned in paragraph 1 of this Article, the

State Party that has obtained an extension shall report annually to WHO on progress made towards the full implementation.

3. WHO shall assist States Parties, upon request, to develop, strengthen and maintain the capacities referred to in paragraph 1 of this Article.

4 .WHO shall collect information regarding events through its surveillance activities and assess their potential to cause international disease spread and possible interference with international traffic. Information received by WHO under this paragraph shall be handled in accordance with Articles 11 and 45 where appropriate.

Article 6 Notification

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.

Article 7 Information-sharing during unexpected or unusual public health events

If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.

Article 8 Consultation

In the case of events occurring within its territory not requiring notification as provided in Article 6, in particular those events for which there is insufficient information available to complete the decision instrument, a State Party may nevertheless keep WHO advised thereof through the National IHR Focal Point and consult with WHO on appropriate health measures. Such communications shall be treated in accordance with paragraphs 2 to 4 of Article 11. The State Party in whose territory the event has occurred may request WHO assistance to assess any epidemiological evidence obtained by that State Party.

Article 9 Other reports

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.

2. States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk identified outside their territory that may cause international disease spread, as manifested by exported or imported:
   (a) human cases;
   (b) vectors which carry infection or contamination; or
   (c) goods that are contaminated.

Article 10 Verification

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.
3. When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.
4. If the State Party does not accept the offer of collaboration, WHO may, when justified by the magnitude of the public health risk, share with other States Parties the information available to it, whilst encouraging the State Party to accept the offer of collaboration by WHO, taking into account the views of the State Party concerned.

Article 11 Provision of information by WHO

1. Subject to paragraph 2 of this Article, WHO shall send to all States Parties and, as appropriate, to relevant intergovernmental organizations, as soon as possible and by the most efficient means available, in confidence, such public health information which it has received under Articles 5 to 10 inclusive and which is necessary to enable States Parties to respond to a public health risk. WHO should communicate information to other States Parties that might help them in preventing the occurrence of similar incidents.
2. WHO shall use information received under Articles 6 and 8 and paragraph 2 of Article 9 for verification, assessment and assistance purposes under these Regulations and, unless otherwise agreed with the States Parties referred to in those provisions, shall not make this information generally available to other States Parties, until such time as:
   (a) the event is determined to constitute a public health emergency of international concern in accordance with Article 12; or
   (b) information evidencing the international spread of the infection or contamination has been confirmed by WHO in accordance with established epidemiological principles; or
   (c) there is evidence that:
      (i) control measures against the international spread are unlikely to succeed because of the nature of the contamination, disease agent, vector or reservoir; or
      (ii) the State Party lacks sufficient operational capacity to carry out necessary measures to prevent further spread of disease; or
   (d) the nature and scope of the international movement of travellers, baggage, cargo, containers, conveyances, goods or postal parcels that may be affected by the infection or contamination requires the immediate application of international control measures.
3. WHO shall consult with the State Party in whose territory the event is occurring as to its intent to make information available under this Article.
4. When information received by WHO under paragraph 2 of this Article is made available to States Parties in accordance with these Regulations, WHO may also make it available to the public if other information about the same event has already become publicly available and there is a need for the dissemination of authoritative and independent information.

Article 12 Determination of a public health emergency of international concern

1. The Director-General shall determine, on the basis of the information received, in particular from the State Party within whose territory an event is occurring, whether an event constitutes a public health emergency of international concern in accordance with the criteria and the procedure set out in these Regulations.

2. 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.
3. If, following the consultation in paragraph 2 above, the Director-General and the State Party in whose territory the event arises do not come to a consensus within 48 hours on whether the event constitutes a public health emergency of international concern, a determination shall be made in accordance with the procedure set forth in Article 49.
4. In determining whether an event constitutes a public health emergency of international concern, the Director-General shall consider:
   (a) information provided by the State Party;
   (b) the decision instrument contained in Annex 2;
   (c) the advice of the Emergency Committee;
   (d) scientific principles as well as the available scientific evidence and other relevant information; and
   (e) an assessment of the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic.
5. If the Director-General, following consultations with the State Party within whose territory the public health emergency of international concern has occurred, considers that a public health emergency of international concern has ended, the Director-General shall take a decision in accordance with the procedure set out in Article 49.

Article 13 Public health response

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern as set out in Annex 1. WHO shall publish, in consultation with Member States, guidelines to support States Parties in the development of public health response capacities.
2. Following the assessment referred to in paragraph 2, Part A of Annex 1, a State Party may report to WHO on the basis of a justified need and an implementation plan and, in so doing, obtain an extension of two years in which to fulfil the obligation in paragraph 1 of this Article. In exceptional circumstances and supported by a new implementation plan, the State Party may request a further extension not exceeding two years from the Director-General, who shall make the decision, taking into account the technical advice of the Review Committee. After the period mentioned in paragraph 1 of this Article, the State Party that has obtained an extension shall report annually to WHO on progress made towards the full implementation.

3. At the request of a State Party, WHO shall collaborate in the response to public health risks and other events by providing technical guidance and assistance and by assessing the effectiveness of the control measures in place, including the mobilization of international teams of experts for on-site assistance, when necessary.
4. If WHO, in consultation with the States Parties concerned as provided in Article 12, determines that a public health emergency of international concern is occurring, it may offer, in addition to the support indicated in paragraph 3 of this Article, further assistance to the State Party, including an assessment of the severity of the international risk and the adequacy of control measures. Such collaboration may include the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.
5. When requested by WHO, States Parties should provide, to the extent possible, support to WHO-coordinated response activities.
6. When requested, WHO shall provide appropriate guidance and assistance to other States Parties affected or threatened by the public health emergency of international concern.

Article 14 Cooperation of WHO with intergovernmental organizations and international bodies

1. WHO shall cooperate and coordinate its activities, as appropriate, with other competent intergovernmental organizations or international bodies in the implementation of these Regulations, including through the conclusion of agreements and other similar arrangements.
2. In cases in which notification or verification of, or response to, an event is primarily within the competence of other intergovernmental organizations or international bodies, WHO shall coordinate its activities with such organizations or bodies in order to ensure the application of adequate measures for the protection of public health.
3. Notwithstanding the foregoing, nothing in these Regulations shall preclude or limit the provision by WHO of advice, support, or technical or other assistance for public health purposes.

PART III – RECOMMENDATIONS

Article 15 Temporary recommendations

1. If it has been determined in accordance with Article 12 that a public health emergency of international concern is occurring, the Director-General shall issue temporary recommendations in accordance with the procedure set out in Article 49. Such temporary recommendations may be modified or extended as appropriate, including after it has been determined that a public health emergency of international concern has ended, at which time other temporary recommendations may be issued as necessary for the purpose of preventing or promptly detecting its recurrence.
2. Temporary recommendations may include health measures to be implemented by the State Party experiencing the public health emergency of international concern, or

by other States Parties, regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic.

3. Temporary recommendations may be terminated in accordance with the procedure set out in Article 49 at any time and shall automatically expire three months after their issuance. They may be modified or extended for additional periods of up to three months. Temporary recommendations may not continue beyond the second World Health Assembly after the determination of the public health emergency of international concern to which they relate.

Article 16 Standing recommendations

WHO may make standing recommendations of appropriate health measures in accordance with Article 53 for routine or periodic application. Such measures may be applied by States Parties regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels for specific, ongoing public health risks in order to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic. WHO may, in accordance with Article 53, modify or terminate such recommendations, as appropriate.

Article 17 Criteria for recommendations

When issuing, modifying or terminating temporary or standing recommendations, the Director-General shall consider:

(a) the views of the States Parties directly concerned;

(b) the advice of the Emergency Committee or the Review Committee, as the case may be;

(c) scientific principles as well as available scientific evidence and information;

(d) health measures that, on the basis of a risk assessment appropriate to the circumstances, are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection;

(e) relevant international standards and instruments;

(f) activities undertaken by other relevant intergovernmental organizations and international bodies; and

(g) other appropriate and specific information relevant to the event.

With respect to temporary recommendations, the consideration by the Director-General of subparagraphs (e) and (f) of this Article may be subject to limitations imposed by urgent circumstances.

Article 18 Recommendations with respect to persons, baggage, cargo, containers, conveyances, goods and postal parcels

1. Recommendations issued by WHO to States Parties with respect to persons may include the following advice:

   - no specific health measures are advised;

- review travel history in affected areas;
- review proof of medical examination and any laboratory analysis;
- require medical examinations;
- review proof of vaccination or other prophylaxis;
- require vaccination or other prophylaxis;
- place suspect persons under public health observation;
- implement quarantine or other health measures for suspect persons;
- implement isolation and treatment where necessary of affected persons;
- implement tracing of contacts of suspect or affected persons;
- refuse entry of suspect and affected persons;
- refuse entry of unaffected persons to affected areas; and
- implement exit screening and/or restrictions on persons from affected areas.

2. Recommendations issued by WHO to States Parties with respect to baggage, cargo, containers, conveyances, goods and postal parcels may include the following advice:
   - no specific health measures are advised;
   - review manifest and routing;
   - implement inspections;
   - review proof of measures taken on departure or in transit to eliminate infection or contamination;
   - implement treatment of the baggage, cargo, containers, conveyances, goods, postal parcels or human remains to remove infection or contamination, including vectors and reservoirs;
   - the use of specific health measures to ensure the safe handling and transport of human remains;
   - implement isolation or quarantine;
   - seizure and destruction of infected or contaminated or suspect baggage, cargo, containers, conveyances, goods or postal parcels under controlled conditions if no available treatment or process will otherwise be successful; and – refuse departure or entry.

PART IV – POINTS OF ENTRY

Article 19 General obligations

Each State Party shall, in addition to the other obligations provided for under these Regulations:

(a) ensure that the capacities set forth in Annex 1 for designated points of entry are developed within the timeframe provided in paragraph 1 of Article 5 and paragraph 1 of Article 13;

(b) identify the competent authorities at each designated point of entry in its territory; and

(c) furnish to WHO, as far as practicable, when requested in response to a specific potential public health risk, relevant data concerning sources of infection or contamination, including vectors and reservoirs, at its points of entry, which could result in international disease spread.

Article 20 Airports and ports

1. States Parties shall designate the airports and ports that shall develop the capacities provided in Annex 1.

2. States Parties shall ensure that Ship Sanitation Control Exemption Certificates and Ship Sanitation Control Certificates are issued in accordance with the requirements in Article 39 and the model provided in Annex 3.

3. Each State Party shall send to WHO a list of ports authorized to offer:

   (a) the issuance of Ship Sanitation Control Certificates and the provision of the services referred to in Annexes 1 and 3; or

   (b) the issuance of Ship Sanitation Control Exemption Certificates only; and

   (c) extension of the Ship Sanitation Control Exemption Certificate for a period of one month until the arrival of the ship in the port at which the Certificate may be received.

   Each State Party shall inform WHO of any changes which may occur to the status of the listed ports. WHO shall publish the information received under this paragraph.

4. WHO may, at the request of the State Party concerned, arrange to certify, after an appropriate investigation, that an airport or port in its territory meets the requirements referred to in paragraphs 1 and 3 of this Article. These certifications may be subject to periodic review by WHO, in consultation with the State Party.

5. WHO, in collaboration with competent intergovernmental organizations and international bodies, shall develop and publish the certification guidelines for airports and ports under this Article. WHO shall also publish a list of certified airports and ports.

A*rticle 21 Ground crossings*

1. Where justified for public health reasons, a State Party may designate ground crossings that shall develop the capacities provided in Annex 1, taking into consideration:

   (a) the volume and frequency of the various types of international traffic, as compared to other points of entry, at a State Party's ground crossings which might be designated; and

   (b) the public health risks existing in areas in which the international traffic originates, or through which it passes, prior to arrival at a particular ground crossing.

2. States Parties sharing common borders should consider:
   (a) entering into bilateral or multilateral agreements or arrangements concerning prevention or control of international transmission of disease at ground crossings in accordance with Article 57; and
   (b) joint designation of adjacent ground crossings for the capacities in Annex 1 in accordance with paragraph 1 of this Article.

Article 22 Role of competent authorities

1. The competent authorities shall:
   (a) be responsible for monitoring baggage, cargo, containers, conveyances, goods, postal parcels and human remains departing and arriving from affected areas, so that they are maintained in such a condition that they are free of sources of infection or contamination, including vectors and reservoirs;
   (b) ensure, as far as practicable, that facilities used by travellers at points of entry are maintained in a sanitary condition and are kept free of sources of infection or contamination, including vectors and reservoirs;
   (c) be responsible for the supervision of any deratting, disinfection, disinsection or decontamination of baggage, cargo, containers, conveyances, goods, postal parcels and human remains or sanitary measures for persons, as appropriate under these Regulations;
   (d) advise conveyance operators, as far in advance as possible, of their intent to apply control measures to a conveyance, and shall provide, where available, written information concerning the methods to be employed;
   (e) be responsible for the supervision of the removal and safe disposal of any contaminated water or food, human or animal dejecta, wastewater and any other contaminated matter from a conveyance;
   (f) take all practicable measures consistent with these Regulations to monitor and control the discharge by ships of sewage, refuse, ballast water and other potentially disease-causing matter which might contaminate the waters of a port, river, canal, strait, lake or other international waterway;
   (g) be responsible for supervision of service providers for services concerning travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains at points of entry, including the conduct of inspections and medical examinations as necessary;
   (h) have effective contingency arrangements to deal with an unexpected public health event; and
   (i) communicate with the National IHR Focal Point on the relevant public health measures taken pursuant to these Regulations.
2. Health measures recommended by WHO for travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains arriving from an affected area may be reapplied on arrival, if there are verifiable indications and/or evidence that the measures applied on departure from the affected area were unsuccessful.

3. Disinsection, deratting, disinfection, decontamination and other sanitary procedures shall be carried out so as to avoid injury and as far as possible discomfort to persons, or damage to the environment in a way which impacts on public health, or damage to baggage, cargo, containers, conveyances, goods and postal parcels.

PART V – PUBLIC HEALTH MEASURES

Chapter I – General provisions

Article 23 Health measures on arrival and departure

1. Subject to applicable international agreements and relevant articles of these Regulations, a State Party may require for public health purposes, on arrival or departure:
   - (a) with regard to travellers:
     - (i) information concerning the traveller's destination so that the traveller may be contacted;
     - (ii) information concerning the traveller's itinerary to ascertain if there was any travel in or near an affected area or other possible contacts with infection or contamination prior to arrival, as well as review of the traveller's health documents if they are required under these Regulations; and/or
     - (iii) a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective;
   - (b) inspection of baggage, cargo, containers, conveyances, goods, postal parcels and human remains.
2. On the basis of evidence of a public health risk obtained through the measures provided in paragraph 1 of this Article, or through other means, States Parties may apply additional health measures, in accordance with these Regulations, in particular, with regard to a suspect or affected traveller, on a case-by-case basis, the least intrusive and invasive medical examination that would achieve the public health objective of preventing the international spread of disease.
3. No medical examination, vaccination, prophylaxis or health measure under these Regulations shall be carried out on travellers without their prior express informed consent or that of their parents or guardians, except as provided in paragraph 2 of Article 31, and in accordance with the law and international obligations of the State Party.
4. Travellers to be vaccinated or offered prophylaxis pursuant to these Regulations, or their parents or guardians, shall be informed of any risk associated with vaccination or with non-vaccination and with the use or non-use of prophylaxis in accordance with the law and international obligations of the State Party. States Parties shall inform medical practitioners of these requirements in accordance with the law of the State Party.

5. Any medical examination, medical procedure, vaccination or other prophylaxis which involves a risk of disease transmission shall only be performed on, or administered to, a traveller in accordance with established national or international safety guidelines and standards so as to minimize such a risk.

Chapter II – Special provisions for conveyances and conveyance operators

Article 24 Conveyance operators

1. States Parties shall take all practicable measures consistent with these Regulations to ensure that conveyance operators:
   - (a) comply with the health measures recommended by WHO and adopted by the State Party;
   - (b) inform travellers of the health measures recommended by WHO and adopted by the State Party for application on board; and
   - (c) permanently keep conveyances for which they are responsible free of sources of infection or contamination, including vectors and reservoirs. The application of measures to control sources of infection or contamination may be required if evidence is found.
2. Specific provisions pertaining to conveyances and conveyance operators under this Article are provided in Annex 4. Specific measures applicable to conveyances and conveyance operators with regard to vector-borne diseases are provided in Annex 5.

Article 25 Ships and aircraft in transit

Subject to Articles 27 and 43 or unless authorized by applicable international agreements, no health measure shall be applied by a State Party to:

- (a) a ship not coming from an affected area which passes through a maritime canal or waterway in the territory of that State Party on its way to a port in the territory of another State. Any such ship shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies;
- (b) a ship which passes through waters within its jurisdiction without calling at a port or on the coast; and
- (c) an aircraft in transit at an airport within its jurisdiction, except that the aircraft may be restricted to a particular area of the airport with no embarking and disembarking or loading and discharging. However, any such aircraft shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies.

Article 26 Civilian lorries, trains and coaches in transit

Subject to Articles 27 and 43 or unless authorized by applicable international agreements, no health measure shall be applied to a civilian lorry, train or coach not coming from an affected area which passes through a territory without embarking, disembarking, loading or discharging.

Article 27 Affected conveyances

1. If clinical signs or symptoms and information based on fact or evidence of a public health risk, including sources of infection and contamination, are found on board a conveyance, the competent authority shall consider the conveyance as affected and may:

   (a) disinfect, decontaminate, disinfect or derat the conveyance, as appropriate, or cause these measures to be carried out under its supervision; and

   (b) decide in each case the technique employed to secure an adequate level of control of the public health risk as provided in these Regulations. Where there are methods or materials advised by WHO for these procedures, these should be employed, unless the competent authority determines that other methods are as safe and reliable.

   The competent authority may implement additional health measures, including isolation of the conveyances, as necessary, to prevent the spread of disease. Such additional measures should be reported to the National IHR Focal Point.

2. If the competent authority for the point of entry is not able to carry out the control measures required under this Article, the affected conveyance may nevertheless be allowed to depart, subject to the following conditions:

   (a) the competent authority shall, at the time of departure, inform the competent authority for the next known point of entry of the type of information referred to under subparagraph (b); and

   (b) in the case of a ship, the evidence found and the control measures required shall be noted in the Ship Sanitation Control Certificate.

   Any such conveyance shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies.

3. A conveyance that has been considered as affected shall cease to be regarded as such when the competent authority is satisfied that:

   (a) the measures provided in paragraph 1 of this Article have been effectively carried out; and

   (b) there are no conditions on board that could constitute a public health risk.

Article 28 Ships and aircraft at points of entry

1. Subject to Article 43 or as provided in applicable international agreements, a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry. However, if the point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it, unless the ship or aircraft has an operational problem which would make this diversion unsafe.

2. Subject to Article 43 or as provided in applicable international agreements, ships or aircraft shall not be refused *free pratique* by States Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging

or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties may subject the granting of *free pratique* to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, disinfection or deratting, or other measures necessary to prevent the spread of the infection or contamination.

3. Whenever practicable and subject to the previous paragraph, a State Party shall authorize the granting of *free pratique* by radio or other communication means to a ship or an aircraft when, on the basis of information received from it prior to its arrival, the State Party is of the opinion that the arrival of the ship or aircraft will not result in the introduction or spread of disease.

4. Officers in command of ships or pilots in command of aircraft, or their agents, shall make known to the port or airport control as early as possible before arrival at the port or airport of destination any cases of illness indicative of a disease of an infectious nature or evidence of a public health risk on board as soon as such illnesses or public health risks are made known to the officer or pilot. This information must be immediately relayed to the competent authority for the port or airport. In urgent circumstances, such information should be communicated directly by the officers or pilots to the relevant port or airport authority.

5. The following shall apply if a suspect or affected aircraft or ship, for reasons beyond the control of the pilot in command of the aircraft or the officer in command of the ship, lands elsewhere than at the airport at which the aircraft was due to land or berths elsewhere than at the port at which the ship was due to berth:

   (a) the pilot in command of the aircraft or the officer in command of the ship or other person in charge shall make every effort to communicate without delay with the nearest competent authority;

   (b) as soon as the competent authority has been informed of the landing it may apply health measures recommended by WHO or other health measures provided in these Regulations;

   (c) unless required for emergency purposes or for communication with the competent authority, no traveller on board the aircraft or ship shall leave its vicinity and no cargo shall be removed from that vicinity, unless authorized by the competent authority; and

   (d) when all health measures required by the competent authority have been completed, the aircraft or ship may, so far as such health measures are concerned, proceed either to the airport or port at which it was due to land or berth, or, if for technical reasons it cannot do so, to a conveniently situated airport or port.

6. Notwithstanding the provisions contained in this Article, the officer in command of a ship or pilot in command of an aircraft may take such emergency measures as may be necessary for the health and safety of travellers on board. He or she shall inform the competent authority as early as possible concerning any measures taken pursuant to this paragraph.

Article 29 Civilian lorries, trains and coaches at points of entry

WHO, in consultation with States Parties, shall develop guiding principles for applying health measures to civilian lorries, trains and coaches at points of entry and passing through ground crossings.

Chapter III – Special provisions for travellers

Article 30 Travellers under public health observation

Subject to Article 43 or as authorized in applicable international agreements, a suspect traveller who on arrival is placed under public health observation may continue an international voyage, if the traveller does not pose an imminent public health risk and the State Party informs the competent authority of the point of entry at destination, if known, of the traveller's expected arrival. On arrival, the traveller shall report to that authority.

Article 31 Health measures relating to entry of travellers

1. Invasive medical examination, vaccination or other prophylaxis shall not be required as a condition of entry of any traveller to the territory of a State Party, except that, subject to Articles 32, 42 and 45, these Regulations do not preclude States Parties from requiring medical examination, vaccination or other prophylaxis or proof of vaccination or other prophylaxis:
   (a) when necessary to determine whether a public health risk exists;
   (b) as a condition of entry for any travellers seeking temporary or permanent residence;
   (c) as a condition of entry for any travellers pursuant to Article 43 or Annexes 6 and 7; or
   (d) which may be carried out pursuant to Article 23.
2. If a traveller for whom a State Party may require a medical examination, vaccination or other prophylaxis under paragraph 1 of this Article fails to consent to any such measure, or refuses to provide the information or the documents referred to in paragraph 1(a) of Article 23, the State Party concerned may, subject to Articles 32, 42 and 45, deny entry to that traveller. If there is evidence of an imminent public health risk, the State Party may, in accordance with its national law and to the extent necessary to control such a risk, compel the traveller to undergo or advise the traveller, pursuant to paragraph 3 of Article 23, to undergo:
   (a) the least invasive and intrusive medical examination that would achieve the public health objective;
   (b) vaccination or other prophylaxis; or
   (c) additional established health measures that prevent or control the spread of disease, including isolation, quarantine or placing the traveller under public health observation.

Article 32 Treatment of travellers

In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:

(a) treating all travellers with courtesy and respect;

(b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and

(c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.

Chapter IV – Special provisions for goods, containers and container loading areas

Article 33 Goods in transit

Subject to Article 43 or unless authorized by applicable international agreements, goods, other than live animals, in transit without transhipment shall not be subject to health measures under these Regulations or detained for public health purposes.

Article 34 Container and container loading areas

1. States Parties shall ensure, as far as practicable, that container shippers use international traffic containers that are kept free from sources of infection or contamination, including vectors and reservoirs, particularly during the course of packing.
2. States Parties shall ensure, as far as practicable, that container loading areas are kept free from sources of infection or contamination, including vectors and reservoirs.
3. Whenever, in the opinion of a State Party, the volume of international container traffic is sufficiently large, the competent authorities shall take all practicable measures consistent with these Regulations, including carrying out inspections, to assess the sanitary condition of container loading areas and containers in order to ensure that the obligations contained in these Regulations are implemented.
4. Facilities for the inspection and isolation of containers shall, as far as practicable, be available at container loading areas.
5. Container consignees and consignors shall make every effort to avoid cross-contamination when multiple-use loading of containers is employed.

PART VI – HEALTH DOCUMENTS

Article 35 General rule

No health documents, other than those provided for under these Regulations or in recommendations issued by WHO, shall be required in international traffic, provided

however that this Article shall not apply to travellers seeking temporary or permanent residence, nor shall it apply to document requirements concerning the public health status of goods or cargo in international trade pursuant to applicable international agreements. The competent authority may request travellers to complete contact information forms and questionnaires on the health of travellers, provided that they meet the requirements set out in Article 23.

Article 36 Certificates of vaccination or other prophylaxis

1. Vaccines and prophylaxis for travellers administered pursuant to these Regulations, or to recommendations and certificates relating thereto, shall conform to the provisions of Annex 6 and, when applicable, Annex 7 with regard to specific diseases.
2. A traveller in possession of a certificate of vaccination or other prophylaxis issued in conformity with Annex 6 and, when applicable, Annex 7, shall not be denied entry as a consequence of the disease to which the certificate refers, even if coming from an affected area, unless the competent authority has verifiable indications and/or evidence that the vaccination or other prophylaxis was not effective.

Article 37 Maritime Declaration of Health

1. The master of a ship, before arrival at its first port of call in the territory of a State Party, shall ascertain the state of health on board, and, except when that State Party does not require it, the master shall, on arrival, or in advance of the vessel's arrival if the vessel is so equipped and the State Party requires such advance delivery, complete and deliver to the competent authority for that port a Maritime Declaration of Health which shall be countersigned by the ship's surgeon, if one is carried.
2. The master of a ship, or the ship's surgeon if one is carried, shall supply any information required by the competent authority as to health conditions on board during an international voyage.
3. A Maritime Declaration of Health shall conform to the model provided in Annex 8.
4. A State Party may decide:
   (a) to dispense with the submission of the Maritime Declaration of Health by all arriving ships; or
   (b) to require the submission of the Maritime Declaration of Health under a recommendation concerning ships arriving from affected areas or to require it from ships which might otherwise carry infection or contamination.

   The State Party shall inform shipping operators or their agents of these requirements.

Article 38 Health Part of the Aircraft General Declaration

1. The pilot in command of an aircraft or the pilot's agent, in flight or upon landing at the first airport in the territory of a State Party, shall, to the best of his or her ability, except when that State Party does not require it, complete and deliver to the competent authority for that airport the Health Part of the Aircraft General Declaration which shall conform to the model specified in Annex 9.

2. The pilot in command of an aircraft or the pilot's agent shall supply any information required by the State Party as to health conditions on board during an international voyage and any health measure applied to the aircraft.
3. A State Party may decide:
   (a) to dispense with the submission of the Health Part of the Aircraft General Declaration by all arriving aircraft; or
   (b) to require the submission of the Health Part of the Aircraft General Declaration under a recommendation concerning aircraft arriving from affected areas or to require it from aircraft which might otherwise carry infection or contamination.

   The State Party shall inform aircraft operators or their agents of these requirements.

Article 39 Ship sanitation certificates

1. Ship Sanitation Control Exemption Certificates and Ship Sanitation Control Certificates shall be valid for a maximum period of six months. This period may be extended by one month if the inspection or control measures required cannot be accomplished at the port.
2. If a valid Ship Sanitation Control Exemption Certificate or Ship Sanitation Control Certificate is not produced or evidence of a public health risk is found on board a ship, the State Party may proceed as provided in paragraph 1 of Article 27.
3. The certificates referred to in this Article shall conform to the model in Annex 3.
4. Whenever possible, control measures shall be carried out when the ship and holds are empty. In the case of a ship in ballast, they shall be carried out before loading.
5. When control measures are required and have been satisfactorily completed, the competent authority shall issue a Ship Sanitation Control Certificate, noting the evidence found and the control measures taken.
6. The competent authority may issue a Ship Sanitation Control Exemption Certificate at any port specified under Article 20 if it is satisfied that the ship is free of infection and contamination, including vectors and reservoirs. Such a certificate shall normally be issued only if the inspection of the ship has been carried out when the ship and holds are empty or when they contain only ballast or other material, of such a nature or so disposed as to make a thorough inspection of the holds possible.
7. If the conditions under which control measures are carried out are such that, in the opinion of the competent authority for the port where the operation was performed, a satisfactory result cannot be obtained, the competent authority shall make a note to that effect on the Ship Sanitation Control Certificate.

PART VII – CHARGES

Article 40 Charges for health measures regarding travellers

1. Except for travellers seeking temporary or permanent residence, and subject to paragraph 2 of this Article, no charge shall be made by a State Party pursuant to these Regulations for the following measures for the protection of public health:

(a) any medical examination provided for in these Regulations, or any supplementary examination which may be required by that State Party to ascertain the health status of the traveller examined;

(b) any vaccination or other prophylaxis provided to a traveller on arrival that is not a published requirement or is a requirement published less than 10 days prior to provision of the vaccination or other prophylaxis;

(c) appropriate isolation or quarantine requirements of travellers;

(d0 any certificate issued to the traveller specifying the measures applied and the date of application; or

(e) any health measures applied to baggage accompanying the traveller.

2. States Parties may charge for health measures other than those referred to in paragraph 1 of this Article, including those primarily for the benefit of the traveller.

3. Where charges are made for applying such health measures to travellers under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:

(a) conform to this tariff;

(b) not exceed the actual cost of the service rendered; and

(c) be levied without distinction as to the nationality, domicile or residence of the traveller concerned.

4. The tariff, and any amendment thereto, shall be published at least 10 days in advance of any levy thereunder.

5. Nothing in these Regulations shall preclude States Parties from seeking reimbursement for expenses incurred in providing the health measures in paragraph 1 of this Article: (a) from conveyance operators or owners with regard to their employees; or (b) from applicable insurance sources.

6. Under no circumstances shall travellers or conveyance operators be denied the ability to depart from the territory of a State Party pending payment of the charges referred to in paragraphs 1 or 2 of this Article.

Article 41 Charges for baggage, cargo, containers, conveyances, goods or postal parcels

1. Where charges are made for applying health measures to baggage, cargo, containers, conveyances, goods or postal parcels under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:

(a) conform to this tariff;

(b) not exceed the actual cost of the service rendered; and

(c) be levied without distinction as to the nationality, flag, registry or ownership of the baggage, cargo, containers, conveyances, goods or postal parcels concerned. In particular, there shall be no distinction made between national and foreign baggage, cargo, containers, conveyances, goods or postal parcels.

2. The tariff, and any amendment thereto, shall be published at least 10 days in advance of any levy thereunder.

PART VIII – GENERAL PROVISIONS

Article 42 Implementation of health measures

Health measures taken pursuant to these Regulations shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.

Article 43 Additional health measures

1. These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:
   (a) achieve the same or greater level of health protection than WHO recommendations; or
   (b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

   provided such measures are otherwise consistent with these Regulations.

   Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.
2. In determining whether to implement the health measures referred to in paragraph 1 of this Article or additional health measures under paragraph 2 of Article 23, paragraph 1 of Article 27, paragraph 2 of Article 28 and paragraph 2(c) of Article 31, States Parties shall base their determinations upon:
   (a) scientific principles;
   (b) available scientific evidence of a risk to human health, or where such evidence is insufficient, the available information including from WHO and other relevant intergovernmental organizations and international bodies; and
   (c) any available specific guidance or advice from WHO.
3. A State Party implementing additional health measures referred to in paragraph 1 of this Article which significantly interfere with international traffic shall provide to WHO the public health rationale and relevant scientific information for it. WHO shall share this information with other States Parties and shall share information regarding the health measures implemented. For the purpose of this Article, significant interference generally means refusal of entry or departure of international travellers, baggage, cargo, containers, conveyances, goods, and the like, or their delay, for more than 24 hours.
4. After assessing information provided pursuant to paragraph 3 and 5 of this Article and other relevant information, WHO may request that the State Party concerned reconsider the application of the measures.
5. A State Party implementing additional health measures referred to in paragraphs 1 and 2 of this Article that significantly interfere with international traffic shall inform WHO, within 48 hours of implementation, of such measures and their health rationale unless these are covered by a temporary or standing recommendation.

6. A State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article shall within three months review such a measure taking into account the advice of WHO and the criteria in paragraph 2 of this Article**.**
7. Without prejudice to its rights under Article 56, any State Party impacted by a measure taken pursuant to paragraph 1 or 2 of this Article may request the State Party implementing such a measure to consult with it. The purpose of such consultations is to clarify the scientific information and public health rationale underlying the measure and to find a mutually acceptable solution.
8. The provisions of this Article may apply to implementation of measures concerning travellers taking part in mass congregations.

Article 44 Collaboration and assistance

1. States Parties shall undertake to collaborate with each other, to the extent possible, in:
   (a) the detection and assessment of, and response to, events as provided under these Regulations;
   (b) the provision or facilitation of technical cooperation and logistical support, particularly in the development, strengthening and maintenance of the public health capacities required under these Regulations;
   (c) the mobilization of financial resources to facilitate implementation of their obligations under these Regulations; and
   (d) the formulation of proposed laws and other legal and administrative provisions for the implementation of these Regulations.
2. WHO shall collaborate with States Parties, upon request, to the extent possible, in:
   (a) the evaluation and assessment of their public health capacities in order to facilitate the effective implementation of these Regulations;
   (b) the provision or facilitation of technical cooperation and logistical support to States Parties; and
   (c) the mobilization of financial resources to support developing countries in building, strengthening and maintaining the capacities provided for in Annex 1.
3. Collaboration under this Article may be implemented through multiple channels, including bilaterally, through regional networks and the WHO regional offices, and through intergovernmental organizations and international bodies.

Article 45 Treatment of personal data

1. Health information collected or received by a State Party pursuant to these Regulations from another State Party or from WHO which refers to an identified or identifiable person shall be kept confidential and processed anonymously as required by national law.
2. Notwithstanding paragraph 1, States Parties may disclose and process personal data where essential for the purposes of assessing and managing a public health risk, but State Parties, in accordance with national law, and WHO must ensure that the personal data are:

(a) processed fairly and lawfully, and not further processed in a way incompatible with that purpose;

(b) adequate, relevant and not excessive in relation to that purpose;

(c) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified; and

(d) not kept longer than necessary.

3. Upon request, WHO shall as far as practicable provide an individual with his or her personal data referred to in this Article in an intelligible form, without undue delay or expense and, when necessary, allow for correction.

Article 46 Transport and handling of biological substances, reagents and materials for diagnostic purposes

States Parties shall, subject to national law and taking into account relevant international guidelines, facilitate the transport, entry, exit, processing and disposal of biological substances and diagnostic specimens, reagents and other diagnostic materials for verification and public health response purposes under these Regulations.

PART IX – THE IHR ROSTER OF EXPERTS, THE EMERGENCY COMMITTEE AND THE REVIEW COMMITTEE

Chapter I – The IHR Roster of Experts

Article 47 Composition

The Director-General shall establish a roster composed of experts in all relevant fields of expertise (hereinafter the "IHR Expert Roster"). The Director-General shall appoint the members of the IHR Expert Roster in accordance with the WHO Regulations for Expert Advisory Panels and Committees (hereinafter the "WHO Advisory Panel Regulations"), unless otherwise provided in these Regulations. In addition, the Director-General shall appoint one member at the request of each State Party and, where appropriate, experts proposed by relevant intergovernmental and regional economic integration organizations. Interested States Parties shall notify the Director-General of the qualifications and fields of expertise of each of the experts they propose for membership. The Director-General shall periodically inform the States Parties, and relevant intergovernmental and regional economic integration organizations, of the composition of the IHR Expert Roster.

Chapter II – The Emergency Committee

Article 48 Terms of reference and composition

1. The Director-General shall establish an Emergency Committee that at the request of the Director-General shall provide its views on:

(a) whether an event constitutes a public health emergency of international concern;

(b) the termination of a public health emergency of international concern; and

(c) the proposed issuance, modification, extension or termination of temporary recommendations.

2. The Emergency Committee shall be composed of experts selected by the Director-General from the IHR Expert Roster and, when appropriate, other expert advisory panels of the Organization. The Director-General shall determine the duration of membership with a view to ensuring its continuity in the consideration of a specific event and its consequences. The Director-General shall select the members of the Emergency Committee on the basis of the expertise and experience required for any particular session and with due regard to the principles of equitable geographical representation. At least one member of the Emergency Committee should be an expert nominated by a State Party within whose territory the event arises.
3. The Director-General may, on his or her own initiative or at the request of the Emergency Committee, appoint one or more technical experts to advise the Committee.

Article 49 Procedure

1. The Director-General shall convene meetings of the Emergency Committee by selecting a number of experts from among those referred to in paragraph 2 of Article 48, according to the fields of expertise and experience most relevant to the specific event that is occurring. For the purpose of this Article, "meetings" of the Emergency Committee may include teleconferences, videoconferences or electronic communications.
2. The Director-General shall provide the Emergency Committee with the agenda and any relevant information concerning the event, including information provided by the States Parties, as well as any temporary recommendation that the Director-General proposes for issuance.
3. The Emergency Committee shall elect its Chairperson and prepare following each meeting a brief summary report of its proceedings and deliberations, including any advice on recommendations.
4. The Director-General shall invite the State Party in whose territory the event arises to present its views to the Emergency Committee. To that effect, the Director-General shall notify to it the dates and the agenda of the meeting of the Emergency Committee with as much advance notice as necessary. The State Party concerned, however, may not seek a postponement of the meeting of the Emergency Committee for the purpose of presenting its views thereto.
5. The views of the Emergency Committee shall be forwarded to the Director-General for consideration. The Director-General shall make the final determination on these matters.
6. The Director-General shall communicate to States Parties the determination and the termination of a public health emergency of international concern, any health measure taken by the State Party concerned, any temporary recommendation, and the modification, extension and termination of such recommendations, together with the views of the Emergency Committee. The Director-General shall inform conveyance operators through States Parties and the relevant international agencies of such temporary recommendations, including their modification, extension or

termination. The Director-General shall subsequently make such information and recommendations available to the general public.

7. States Parties in whose territories the event has occurred may propose to the Director-General the termination of a public health emergency of international concern and/or the temporary recommendations, and may make a presentation to that effect to the Emergency Committee.

Chapter III – The Review Committee

Article 50 Terms of reference and composition

1. The Director-General shall establish a Review Committee, which shall carry out the following functions:
   (a) make technical recommendations to the Director-General regarding amendments to these Regulations;
   (b) provide technical advice to the Director-General with respect to standing recommendations, and any modifications or termination thereof;
   (c) provide technical advice to the Director-General on any matter referred to it by the Director-General regarding the functioning of these Regulations.
2. The Review Committee shall be considered an expert committee and shall be subject to the WHO Advisory Panel Regulations, unless otherwise provided in this Article.
3. The Members of the Review Committee shall be selected and appointed by the Director-General from among the persons serving on the IHR Expert Roster and, when appropriate, other expert advisory panels of the Organization.
4. The Director-General shall establish the number of members to be invited to a meeting of the Review Committee, determine its date and duration, and convene the Committee.
5. The Director-General shall appoint members to the Review Committee for the duration of the work of a session only.
6. The Director-General shall select the members of the Review Committee on the basis of the principles of equitable geographical representation, gender balance, a balance of experts from developed and developing countries, representation of a diversity of scientific opinion, approaches and practical experience in various parts of the world, and an appropriate interdisciplinary balance.

Article 51 Conduct of business

1. Decisions of the Review Committee shall be taken by a majority of the members present and voting.
2. The Director-General shall invite Member States, the United Nations and its specialized agencies and other relevant intergovernmental organizations or nongovernmental organizations in official relations with WHO to designate representatives to attend the Committee sessions. Such representatives may submit memoranda and, with the

consent of the Chairperson, make statements on the subjects under discussion. They shall not have the right to vote.

Article 52 Reports

1. For each session, the Review Committee shall draw up a report setting forth the Committee's views and advice. This report shall be approved by the Review Committee before the end of the session. Its views and advice shall not commit the Organization and shall be formulated as advice to the Director-General. The text of the report may not be modified without the Committee's consent.
2. If the Review Committee is not unanimous in its findings, any member shall be entitled to express his or her dissenting professional views in an individual or group report, which shall state the reasons why a divergent opinion is held and shall form part of the Committee's report.
3. The Review Committee's report shall be submitted to the Director-General, who shall communicate its views and advice to the Health Assembly or the Executive Board for their consideration and action.

Article 53 Procedures for standing recommendations

When the Director-General considers that a standing recommendation is necessary and appropriate for a specific public health risk, the Director-General shall seek the views of the Review Committee. In addition to the relevant paragraphs of Articles 50 to 52, the following provisions shall apply:

(a) proposals for standing recommendations, their modification or termination may be submitted to the Review Committee by the Director-General or by States Parties through the Director-General;

(b) any State Party may submit relevant information for consideration by the Review Committee;

(c) the Director-General may request any State Party, intergovernmental organization or nongovernmental organization in official relations with WHO to place at the disposal of the Review Committee information in its possession concerning the subject of the proposed standing recommendation as specified by the Review Committee;

(d) the Director-General may, at the request of the Review Committee or on the Director-General's own initiative, appoint one or more technical experts to advise the Review Committee. They shall not have the right to vote;

(e) any report containing the views and advice of the Review Committee regarding standing recommendations shall be forwarded to the Director-General for consideration and decision. The Director-General shall communicate the Review Committee's views and advice to the Health Assembly;

(f) the Director-General shall communicate to States Parties any standing recommendation, as well as the modifications or termination of such recommendations, together with the views of the Review Committee;

(g) standing recommendations shall be submitted by the Director-General to the subsequent Health Assembly for its consideration.

PART X – FINAL PROVISIONS

Article 54 Reporting and review

1. States Parties and the Director-General shall report to the Health Assembly on the implementation of these Regulations as decided by the Health Assembly.
2. The Health Assembly shall periodically review the functioning of these Regulations. To that end it may request the advice of the Review Committee**,** through the Director-General. The first such review shall take place no later than five years after the entry into force of these Regulations.
3. WHO shall periodically conduct studies to review and evaluate the functioning of Annex 2. The first such review shall commence no later than one year after the entry into force of these Regulations. The results of such reviews shall be submitted to the Health Assembly for its consideration, as appropriate.

Article 55 Amendments

1. Amendments to these Regulations may be proposed by any State Party or by the Director-General. Such proposals for amendments shall be submitted to the Health Assembly for its consideration.
2. The text of any proposed amendment shall be communicated to all States Parties by the Director-General at least four months before the Health Assembly at which it is proposed for consideration.
3. Amendments to these Regulations adopted by the Health Assembly pursuant to this Article shall come into force for all States Parties on the same terms, and subject to the same rights and obligations, as provided for in Article 22 of the Constitution of WHO and Articles 59 to 64 of these Regulations.

Article 56 Settlement of disputes

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.
3. A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the Permanent Court of Arbitration Optional

Rules for Arbitrating Disputes between Two States applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.

4. Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.

5. In the event of a dispute between WHO and one or more States Parties concerning the interpretation or application of these Regulations, the matter shall be submitted to the Health Assembly.

Article 57 Relationship with other international agreements

1. States Parties recognize that the IHR and other relevant international agreements should be interpreted so as to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.

2. Subject to paragraph 1 of this Article, nothing in these Regulations shall prevent States Parties having certain interests in common owing to their health, geographical, social or economic conditions, from concluding special treaties or arrangements in order to facilitate the application of these Regulations, and in particular with regard to:

   (a) the direct and rapid exchange of public health information between neighbouring territories of different States;

   (b) the health measures to be applied to international coastal traffic and to international traffic in waters within their jurisdiction;

   (c) the health measures to be applied in contiguous territories of different States at their common frontier;

   (d) arrangements for carrying affected persons or affected human remains by means of transport specially adapted for the purpose; and

   (e) deratting, disinsection, disinfection, decontamination or other treatment designed to render goods free of disease-causing agents.

3. Without prejudice to their obligations under these Regulations, States Parties that are members of a regional economic integration organization shall apply in their mutual relations the common rules in force in that regional economic integration organization.

Article 58 International sanitary agreements and regulations

1. These Regulations, subject to the provisions of Article 62 and the exceptions hereinafter provided, shall replace as between the States bound by these Regulations and as between these States and WHO, the provisions of the following international sanitary agreements and regulations:

(a) International Sanitary Convention, signed in Paris, 21 June 1926;

(b) International Sanitary Convention for Aerial Navigation, signed at The Hague, 12 April 1933;

(c) International Agreement for dispensing with Bills of Health, signed in Paris, 22 December 1934;

(d) International Agreement for dispensing with Consular Visas on Bills of Health, signed in Paris, 22 December 1934;

(e) Convention modifying the International Sanitary Convention of 21 June 1926, signed in Paris, 31 October 1938;

(f) International Sanitary Convention, 1944, modifying the International Sanitary Convention of 21 June 1926, opened for signature in Washington, 15 December 1944;

(g) International Sanitary Convention for Aerial Navigation, 1944, modifying the International Sanitary Convention of 12 April 1933, opened for signature in Washington, 15 December 1944;

(h) Protocol of 23 April 1946 to prolong the International Sanitary Convention, 1944, signed in Washington;

(i) Protocol of 23 April 1946 to prolong the International Sanitary Convention for Aerial Navigation, 1944, signed in Washington;

(j) International Sanitary Regulations, 1951, and the Additional Regulations of 1955, 1956, 1960, 1963 and 1965; and

(k) the International Health Regulations of 1969 and the amendments of 1973 and 1981.

2. The Pan American Sanitary Code, signed at Havana, 14 November 1924, shall remain in force with the exception of Articles 2, 9, 10, 11, 16 to 53 inclusive, 61 and 62, to which the relevant part of paragraph 1 of this Article shall apply.

Article 59 Entry into force; period for rejection or reservations

1. The period provided in execution of Article 22 of the Constitution of WHO for rejection of, or reservation to, these Regulations or an amendment thereto, shall be 18 months from the date of the notification by the Director-General of the adoption of these Regulations or of an amendment to these Regulations by the Health Assembly. Any rejection or reservation received by the Director-General after the expiry of that period shall have no effect.

2. These Regulations shall enter into force 24 months after the date of notification referred to in paragraph 1 of this Article, except for:

   (a) State that has rejected these Regulations or an amendment thereto in accordance with Article 61;

   (b) State that has made a reservation, for which these Regulations shall enter into force as provided in Article 62;

(c) State that becomes a Member of WHO after the date of the notification by the Director-General referred to in paragraph 1 of this Article, and which is not already a party to these Regulations, for which these Regulations shall enter into force as provided in Article 60; and

(d) State not a Member of WHO that accepts these Regulations, for which they shall enter into force in accordance with paragraph 1 of Article 64.

3. If a State is not able to adjust its domestic legislative and administrative arrangements fully with these Regulations within the period set out in paragraph 2 of this Article, that State shall submit within the period specified in paragraph 1 of this Article a declaration to the Director-General regarding the outstanding adjustments and achieve them no later than 12 months after the entry into force of these Regulations for that State Party.

Article 60 New Member States of WHO

Any State which becomes a Member of WHO after the date of the notification by the Director-General referred to in paragraph 1 of Article 59, and which is not already a party to these Regulations, may communicate its rejection of, or any reservation to, these Regulations within a period of twelve months from the date of the notification to it by the Director-General after becoming a Member of WHO. Unless rejected, these Regulations shall enter into force with respect to that State, subject to the provisions of Articles 62 and 63, upon expiry of that period. In no case shall these Regulations enter into force in respect to that State earlier than 24 months after the date of notification referred to in paragraph 1 of Article 59.

Article 61 Rejection

If a State notifies the Director-General of its rejection of these Regulations or of an amendment thereto within the period provided in paragraph 1 of Article 59, these Regulations or the amendment concerned shall not enter into force with respect to that State. Any international sanitary agreement or regulations listed in Article 58 to which such State is already a party shall remain in force as far as such State is concerned.

Article 62 Reservations

1. States may make reservations to these Regulations in accordance with this Article. Such reservations shall not be incompatible with the object and purpose of these Regulations.

2. Reservations to these Regulations shall be notified to the Director-General in accordance with paragraph 1 of Article 59 and Article 60, paragraph 1 of Article 63 or paragraph 1 of Article 64, as the case may be. A State not a Member of WHO shall notify the Director-General of any reservation with its notification of acceptance of these Regulations. States formulating reservations should provide the Director-General with reasons for the reservations.

3. A rejection in part of these Regulations shall be considered as a reservation.

4. The Director-General shall, in accordance with paragraph 2 of Article 65, issue notification of each reservation received pursuant to paragraph 2 of this Article. The Director-General shall:

(a) if the reservation was made before the entry into force of these Regulations, request those Member States that have not rejected these Regulations to notify him or her within six months of any objection to the reservation, or

(b) if the reservation was made after the entry into force of these Regulations, request States Parties to notify him or her within six months of any objection to the reservation.

States objecting to a reservation should provide the Director-General with reasons for the objection.

5. After this period, the Director-General shall notify all States Parties of the objections he or she has received with regard to reservations. Unless by the end of six months from the date of the notification referred to in paragraph 4 of this Article a reservation has been objected to by one-third of the States referred to in paragraph 4 of this Article, it shall be deemed to be accepted and these Regulations shall enter into force for the reserving State, subject to the reservation.

6. If at least one-third of the States referred to in paragraph 4 of this Article object to the reservation by the end of six months from the date of the notification referred to in paragraph 4 of this Article, the Director-General shall notify the reserving State with a view to its considering withdrawing the reservation within three months from the date of the notification by the Director-General.

7. The reserving State shall continue to fulfil any obligations corresponding to the subject matter of the reservation, which the State has accepted under any of the international sanitary agreements or regulations listed in Article 58.

8. If the reserving State does not withdraw the reservation within three months from the date of the notification by the Director-General referred to in paragraph 6 of this Article, the Director-General shall seek the view of the Review Committee if the reserving State so requests. The Review Committee shall advise the Director-General as soon as possible and in accordance with Article 50 on the practical impact of the reservation on the operation of these Regulations.

9. The Director-General shall submit the reservation, and the views of the Review Committee if applicable, to the Health Assembly for its consideration. If the Health Assembly, by a majority vote, objects to the reservation on the ground that it is incompatible with the object and purpose of these Regulations, the reservation shall not be accepted and these Regulations shall enter into force for the reserving State only after it withdraws its reservation pursuant to Article 63. If the Health Assembly accepts the reservation, these Regulations shall enter into force for the reserving State, subject to its reservation.

Article 63 Withdrawal of rejection and reservation

1. A rejection made under Article 61 may at any time be withdrawn by a State by notifying the Director-General. In such cases, these Regulations shall enter into force with regard to that State upon receipt by the Director-General of the notification, except where the State makes a reservation when withdrawing its rejection, in which case these Regulations shall enter into force as provided in Article 62. In no case shall these Regulations enter into force in respect to that State earlier than 24 months after

the date of notification referred to in paragraph 1 of Article 59.

2. The whole or part of any reservation may at any time be withdrawn by the State Party concerned by notifying the Director-General. In such cases, the withdrawal will be effective from the date of receipt by the Director-General of the notification.

Article 64 States not Members of WHO

1. Any State not a Member of WHO, which is a party to any international sanitary agreement or regulations listed in Article 58 or to which the Director-General has notified the adoption of these Regulations by the World Health Assembly, may become a party hereto by notifying its acceptance to the Director-General and, subject to the provisions of Article 62, such acceptance shall become effective upon the date of entry into force of these Regulations, or, if such acceptance is notified after that date, three months after the date of receipt by the Director-General of the notification of acceptance.

2. Any State not a Member of WHO which has become a party to these Regulations may at any time withdraw from participation in these Regulations, by means of a notification addressed to the Director-General which shall take effect six months after the Director-General has received it. The State which has withdrawn shall, as from that date, resume application of the provisions of any international sanitary agreement or regulations listed in Article 58 to which it was previously a party.

Article 65 Notifications by the Director-General

1. The Director-General shall notify all States Members and Associate Members of WHO, and also other parties to any international sanitary agreement or regulations listed in Article 58, of the adoption by the Health Assembly of these Regulations.

2. The Director-General shall also notify these States, as well as any other State which has become a party to these Regulations or to any amendment to these Regulations, of any notification received by WHO under Articles 60 to 64 respectively, as well as of any decision taken by the Health Assembly under Article 62.

Article 66 Authentic texts

1. The Arabic, Chinese, English, French, Russian and Spanish texts of these Regulations shall be equally authentic. The original texts of these Regulations shall be deposited with WHO.

2. The Director-General shall send, with the notification provided in paragraph 1 of Article 59, certified copies of these Regulations to all Members and Associate Members, and also to other parties to any of the international sanitary agreements or regulations listed in Article 58.

3. Upon the entry into force of these Regulations, the Director-General shall deliver certified copies thereof to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations.

ANNEX II:
Practice Direction 1 of 2020

PRACTICE DIRECTION
COVID-19 Emergency Directions

1.0 AUTHORITY

This Practice Direction is issued by the President pursuant to Part 17.1(1) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2019, as amended ("Appellate Jurisdiction Rules") and Part 6.1(1) of the Caribbean Court of Justice (Original Jurisdiction) Rules 2019, as amended ("Original Jurisdiction Rules").

2.0 COMMENCEMENT

This Practice Direction shall come into force, on the 6th day of April, 2020.

3.0 INTRODUCTION

In response to the novel coronavirus (COVID-19) pandemic and the emergency situation in the Republic of Trinidad and Tobago, the Seat of the Court, and in the other jurisdictions of CARICOM, this Practice Direction is issued to protect the health and safety of court staff and the public.

4.0 DIRECTIONS

WHEREAS Part 6 of the Appellate Jurisdiction Rules and Part 9 of the Original Jurisdiction Rules provide for the filing and service of documents and Part 6.1 of the Appellate Jurisdiction Rules and Part 9.2 of the Original Jurisdiction Rules, provide for the submission of documents for filing;

AND WHEREAS the Caribbean Court of Justice (Court) is committed to doing everything necessary to ensure continued access to justice and functioning of the Court while protecting court staff and users;

AND WHEREAS the Court is committed to –

a. Facilitating access to justice;

b. Reducing the number of persons attending physically at the Court; and

c. Contributing to the health and safety of staff members of courts in the jurisdictions of the Caribbean that provide support to the CCJ's operations for the hearing of matters.

The following measures shall operate until further notice -

a. HEARINGS OF APPEALS AND ORIGINAL JURISDICTION CASES

The Court shall, after consultations with the parties, hear only matters that are urgent or otherwise fit for adjudication.

b. TIME AND FORM

All directions previously given or applied or provided for by the Rules for the filing of submissions or other documents may be varied by the Court on application made by letter or other form of written communication to the Court and copied to the other parties. The Court may grant or refuse such application by letter or other form of written communication.

5.0 PROTOCOL FOR VIRTUAL HEARINGS

Attorneys are expected to dress as they would for Chamber Court in their respective home state or at a Case Management Conference.

Every effort must be made to eliminate background noises. Cell phones and/or smart phones, ipods or MP3 players must be switched off during hearings.

In all other respects, the Court's Protocols for virtual hearings shall be observed.

6.0 RESERVED JUDGMENTS

The Court shall deliver its reserved judgments as and when the same are ready for delivery. Parties and their Counsel shall be advised in the usual way of the date and time of delivery.

Dated this 6th day of April, 2020

/s/ Adrian Saunders

President, Caribbean Court of Justice

ANNEX III:
EASTERN CARIBBEAN SUPREME COURT
PRACTICE DIRECTION
No. 5 of 2020

COVID-19 EMERGENCY MEASURES
(3rd RE-ISSUE)

This Practice Direction is made pursuant to Rule 4.2(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000,[1] and is applicable to all the Member States and Territories in the jurisdiction of the Eastern Caribbean Supreme Court.

Practice Direction No. 3 of 2020 is revoked and substituted by this Practice Direction.

1. Introduction

1.1 This Practice Direction supplements the Rules in that it regulates the practice and procedure of the Court which has been affected by the situation created with the impact of the COVID-19 (Coronavirus) on all of the Member States and Territories of the Court.

1.2 This Practice Direction –

(a) is intended to facilitate the continuation of court proceedings in the Member States and Territories through the filing, service and disposition, of matters which are not presently available on the E-Litigation Portal of the Court; and

(b) applies to all Civil (including Commercial), Criminal[2], and

Family proceedings before the Supreme Court in the Member States and Territories.

1.3 This Practice Direction will remain in force until the Chief Justice so directs.

1.4 Insofar as the Civil Procedure Rules and any other Rules of Court are inconsistent with this Practice Direction, they are modified by it.

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1 In Saint Lucia this Practice Direction is also made pursuant to Rule 2.1 (2) of the Criminal Procedure Rules in Saint Lucia.

2 This Practice Direction is applicable to Criminal proceedings in Saint Lucia. Criminal proceedings in all other Member States and Territories to which this Practice Direction applies will be guided by the emergency measures protocols put in place in each Member State and Territory for dealing with criminal matters during the emergency period.

2. Context

In this Practice Direction:

i. ECSC means Eastern Caribbean Supreme Court; ii. ELP means the ECSC E-Litigation Portal; iii. Judicial officer means a judge, master or registrar of the court; iii Member States mean Antigua and Barbuda, Dominica, Grenada, St. Kitts & Nevis, Saint Lucia and St Vincent & the Grenadines; iv Territories mean Anguilla, Montserrat and the Virgin Islands

3. Filing in all Matters not yet Available on the E-Litigation Portal

3.1 Prescribed fees that are due on a document filed by e-mail shall be paid at the time and in the manner specified by this Practice Direction.

3.2 It is the responsibility of every Legal Practitioner (or their firm) to provide an undertaking, as set out in Form 1, to pay all filing fees which are due as a result of the documents which are filed in accordance with this Practice Direction as soon as practicable after the filing has been submitted.

3.3 Only filings in respect of which law firms have provided this undertaking under this Practice Direction shall be accepted and deemed to be filed for processing and determination by the Court.

3.4 Where the Registrar determines that it has become practicable for a legal practitioner or law firm to pay the filing fees pursuant to the undertaking and issues a request for payment, then unless payment is made within 72 hours of the request, the undertaking shall be deemed to have been breached and no subsequent documents shall be accepted for filing from that legal practitioner or law firm. Further a Judge or Master may take the failure to make payment into account as a factor when making any costs order in respect of any application or hearing.

3.5 Every document which the Rules or the Commercial Court Practice Directions permit or require to be filed in the Registry of the High Court in the Territory of the Virgin Islands shall be filed only electronically:

(a) by sending that document in PDF format to the appropriate email address for the applicable Registry of the Supreme Court as listed in Schedule 1; and

(b) by filing a completed E-Filing Application Header form.

(c) Prior to any hearing, draft orders required to accompany all applications shall be filed electronically in Word format for the use of the Court.

3.6 Where a document is filed by e-mail, the party who has filed the document must also subsequently deposit one (1) hard copy of the document at the High Court Registry in their respective Member State or Territory, within seven (7) calendar days, or where the last calendar day falls on a Saturday, Sunday, public holiday or a day on which the Court Office is closed for business, the next business day , when the Court Office is open for Business.

3.7 When a document is filed, the subject line of the e-mail must contain the following information –

(a) the title of the case;

(b) the case number (if available) using a four-digit file number after the year e.g. DOMHCV2017/0123;

(c) the date and time of any hearing to which the e-mail relates; and

(d) the type of matter/application being filed.

3.8 The e-mail message must contain the sender's–

(a) identity;

(b) telephone number; and

(c) e-mail address, and should be in plain text or rich text format rather than HTML.

3.9 Correspondence and documents to be filed must not be sent as text in the body of the e-mail, but rather as attachments to the e-mail in the format stipulated by the Court.

3.10 No single document filed under this paragraph should exceed 5 MB.

Every such document should comply with the Rules and Practice Directions and must:

(a) contain a header with the title of the court:

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

[Country]

(b) contain the full title of the proceedings;

(c) contain a header with the title of the document;

(d) reflect the name, business address, e-mail address, reference (if any), telephone number and fax number (if any) of the filer;

(e) be dated;

(f) be signed by the person filing it (if not an affidavit) and should not be in the name of the firm;

(g) be signed by the person who deposes (if an affidavit);

(h) state the name of the party on whose behalf it is filed;

(i) state the full name of the signatory legibly below the signature;

(j) state the address of the court; and

(k) be properly indexed and paginated (if it is a record or bundle of documents being filed).

4. Service of Documents

4.1 Notwithstanding the provisions of CPR 3.11(1), every document which is required by CPR 5.6 to be served upon a Legal Practitioner may be served upon that Legal Practitioner by e-mail.

4.2 A party who serves a document by e-mail shall copy the court on the email effecting service, using the appropriate e-mail address for the court office as specified in Schedule 1.

4.3 The E-mail address at which service may be effected under paragraph

4.1 is the e-mail address:

(a) notified in writing by that Legal Practitioner for this purpose; or

(b) if an e-mail address has not been notified in writing by that Legal Practitioner, service may be validly effected upon that Legal Practitioner by sending that document to:

(i) the e-mail address used on the letterhead of that Legal Practitioner or previously used by that Legal Practitioner;

(ii) the e-mail address given on the website of that Legal Practitioner; or

(iii) the e-mail address of the general mailbox of the firm to which that Legal Practitioner belongs.

4.4 Notwithstanding the provisions of CPR 5.7 and CPR 6.2, a claim form or other document may be served on a limited company by sending it by email to the registered office or Registered Agent of that limited company.

4.5 The e-mail address under paragraph 4.4 at which service may be effected is the e-mail address:

(a) notified in writing by that limited company or its Registered Agent for the purposes of paragraph 4.4; or

(b) if an e-mail address has not been notified in writing by that limited company or its Registered Agent, service may be validly effected upon that limited company by sending the claim form or other document to:

(i) the e-mail address used on the letterhead of that limited company or its Registered Agent or previously used by that limited company or its Registered Agent;

(ii) the e-mail address given on the website of that limited company or its Registered Agent; or

(iii) the e-mail address of the general mailbox of that limited company or its Registered Agent.

4.6 Proof of service of a filed document shall be by way of an affidavit of service, which shall exhibit the following:

(a) copy of the e-mail under cover of which the document in question was served; and

(b) a copy of any message tracking, relay or delivery confirmation, including the address to which the e-mail was sent, the date and time the email was sent, and if applicable, a copy of any reply or bounce-back notice of non-delivery or delivery failure.

5. Remote Hearings

5.1 The objective is to undertake as many hearings as possible remotely so as to minimise the risk of transmission of Covid-19. This section provides basic guidance as to the conduct of remote hearings.

5.2 The Chief Justice through a published Notice has directed that the location from which a Judge, Master, or Registrar conducts a remote hearing pursuant to this Practice Direction shall be declared a Court for the purpose of the conduct of Court proceedings.

5.3 A hearing conducted in accordance with this Practice Direction must be treated as a hearing in accordance with the Rules of Court. Nothing in this Practice Direction derogates from the judicial officer's duty to determine all issues that arise in the case judicially and in accordance with normal principles.

5.4 All in-person appearances are discouraged. Hearings will be conducted on the date and in the manner specified by the judicial officer and will utilize digital technology including audio, web, video or teleconference where the judicial officer deems it appropriate.

5.5 The method by which all hearings, including remote hearings, are conducted is always a matter for the judicial officer(s), operating in accordance with applicable law, Rules and Practice Directions. In determining the method by which a hearing or trial should be conducted, a judicial officer must:

(a) have regard to the interest of public health and the ability to maintain appropriate physical distancing while in attendance in courtrooms; and

(b) give directions as to the venue from which a litigant or witness is to be present.

5.6 Where a judicial officer deems it fit for a hearing to be conducted in person, attendance should be limited to attorneys, parties, and necessary witnesses only.

5.7 It is good practice for the judicial officer and court office staff to consider as far ahead as possible how future hearings should best be undertaken.

5.8 Where a hearing proceeds remotely:

(a) the court may, if deemed necessary, fix a remote case management conference in advance of the fixed hearing date to allow for directions to be made in relation to the conduct of the hearing, the technology to be used, and/or any other relevant matters;

(b) Legal practitioners shall inform the Court of the location from which they intend to attend a hearing prior to the commencement of the hearing;

(c) the court, and the parties, will be required to log in or call in to the dedicated facility in good time for the stated start time of the remote hearing. Parties are to ensure that they are online in time for the prompt commencement of the hearing. If the parties are having any connectivity or other difficulties this should be promptly communicated to the court office;

(d) it is the responsibility of a Legal Practitioner who is not physically present in the Member State or Territory at the time of the hearing to identify an appropriate video conferencing facility which they will utilize and to connect to the facility of the Court;

(e) at the commencement of that hearing, a Legal Practitioner representing each party shall identify every person present with him or her;

(f) no party or his/ her Legal Practitioner is entitled to be physically present before the Court unless the Court gives permission;

(g) the hearing will be recorded by the court office in accordance with the measures put in place for the recording of court matters;

(h) the parties and their legal representatives are not permitted to record the hearing; and

(i) requests for copies of the audio recordings are to be done in accordance with this Practice Direction.

5.9 The first hearing of a Fixed Date Claim Form shall not be treated as a hearing at which the evidence of any witness is to be given, unless the Court has given a direction to that effect.

5.10 Where a hearing is conducted remotely, details of the manner in which the public shall have access to the live stream/ of the hearing will be published on the court's website.

6. Bundles for Hearings

6.1 The parties must prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing. Each electronic bundle should be indexed and paginated in accordance with the guidelines in Schedule 2 of this Practice Direction and should be provided to the court office and to all other parties via email or via the Electronic Litigation Portal should the matter be available there. The electronic bundles must be available well in advance of the hearing.

6.2 Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Single large electronic files should be avoided as these can be slow to transmit and unwieldy to use.

6.3 Electronic bundles can be prepared in .pdf and must be filed in accordance with the measure put in place for filing by the court office.

6.4 Legal practitioners must ensure that the documents which form part of an electronic bundle are scanned in a quality which makes the contents clearly

visible and legible. Legal Practitioners must also ensure that scanned documents are presented in the electronic bundle in an upward manner, whether in portrait or landscape orientation, so that the document can be easily read. The court should not have to rotate any page in a document in order to read it.

6.5 The party responsible for preparing the bundles for any hearing under the Rules shall, within the periods prescribed:

(a) deliver one (1) hard copy of the bundle to the Registrar of the High Court within seven days or as soon as the Court Office is open to receive documents whichever occurs later; and

(b) deliver a bookmarked electronic copy of that bundle by e-mail to every other party.

6.6 The Court reserves the right to request additional hard copies of any bundles from the party who has filed by e-mail.

6.7 The bundle should be clearly labelled as a hearing bundle and must bear the date of the hearing.

6.8 Bundles provided in hard copy must be a replica of the electronically filed bundles paginated in similar form accompanied by an Index cover describing the documents contained in the bundle and referencing the page number within the bundle of the document.

7. Applications for admission as a Legal Practitioner (For Member States without the ELP)

7.1 An application for admission as a Legal Practitioner in a matter shall be filed by e-mail in accordance with this Practice Direction.

7.2 The hearing of an application for the admission as a Legal Practitioner shall be by personal appearance using video conference facilities, except where the Court otherwise directs.

7.3 Where the Court is satisfied that it is appropriate to admit such a person as a Legal Practitioner:

(a) the Registrar shall enter the name of that person onto the Court Roll;

(b) the Court may accept such undertakings as appears to it appropriate:

(i) as to the production of the originals, or certified copies of the originals of the documents produced at that hearing;

(ii) as to the signing of the Roll (or a facsimile of it); and

(iii) as to the receipt of payments;

(c) payment of any fees prescribed shall be paid at the relevant High Court Registry, at least 2 clear days prior to the application for admission once the Court Office is open to receive such payments.

8. STATUS HEARING UPDATE FORMS – HIGH COURT

8.1 For matters in the High Court, all parties are to complete the status hearing update form (FORM 2) attached to this Practice Direction.

8.2 The status hearing update form must be returned to the Registrar via email to the address specified in Schedule 1 no less than 7 days prior to the date of hearing.

8.3 Parties are asked to submit joint or agreed forms as much as possible.

8.4 Where there is no agreement, parties are asked to submit separate forms and state that there is no agreement.

9. CASE MANAGEMENT CONFERENCE REMOTE HEARING FORMS- COURT OF APPEAL

9.1 In the case of appeals, all parties will be required to complete the case management conference remote hearing form (FORM 3) attached to this practice direction.

9.2 The case management form must be completed in full, including and in particular the section designated for the listing of all the documents which have been filed in the matter.

9.3 The Legal Practitioner must return the completed form to the Chief Registrar or Deputy Chief Registrar, and copied to the Court of Appeal Registry at the email address specified in Schedule 1, no less than 3 days before the case management conference.

9.4 As much as possible, parties in any given matter are encourageed to return a jointly completed form to the Court.

9.5 Where there is no agreement, parties may submit separate forms, indicate that there is disagreement and note the areas of disagreement.

10. COURT FEES

10.1 The Eastern Caribbean Supreme Court (Court Proceedings Fees) Rules and the Commercial Claims Fees Order 2011 shall continue to apply.

10.2 An administrative fee may be applied for the following services in accordance with any such Notice published by the Registrar:

- (a) e-filing
- (b) printing and copies
- (c) transcripts/audio file retrieval
- (d) video-link
- (e) teleconference

10.3 The administrative fee in paragraph 9.2 shall be due to be paid by the party filing or requesting as part of the undertaking provided in Section 3.2.

11. Recording of Court Proceedings

11.1 At any hearing of the Court, the proceedings will be recorded by the court by such recording equipment as approved by the Chief Justice.

11.2 No party or member of the public may use unofficial recording equipment at any hearing or in any court or judge's chambers without the prior authorization of the presiding judge.

11.3 The court recording, whether in written, audio or other digital form, shall be the official transcript of the proceedings.

12. Preparation of Transcripts

12.1 A party may request from the Registrar by using Form 4 provided in this Practice Direction, a transcript or transcripts of the recording of any hearing in which they are involved.

12.2 Further to a party's request, a transcript will be provided upon payment of the charges authorized by any scheme in force in any Member State or Territory for the making of the recording or the transcript.

12.3 If a person who is not a party to the proceedings requires a transcript, or if the hearing or any part of it was held in private under CPR rule 2.7, a transcript may only be provided if the Court so orders.

13. Provision of Transcripts

13.1 A party or a person approved under paragraph 12.3 may request a copy of the transcript of proceedings to be provided either by electronic means or hard copy.

13.2 The fee payable will be in accordance with the scheme in force as aforesaid for the making of transcripts and will be based on the type of transcript requested.

13.3 Where a transcript is requested in the form of an audio file where this is available, the fee payable shall be $100.00 per day or part thereof of the recorded proceedings.

14. Special Directions

14.1 In the event that the court office in any particular Member State or Territory gives Notice of closure of the Court Office or where the Government of any particular Member State or Territory issues a Notice of Closure or lock down of all services within the Member State or Territory:

(a) time under the provisions of the Civil Procedure Rules 2000 and the Criminal Procedure Rules (where applicable) for the filing of any documents shall cease to run for the period stipulated in such Notice;

(b) time for compliance with any Rule, Practice Direction or procedural court order shall cease to run. This would include the time for service of filed documents for matters where service other than by electronic means is required or available;

PROVIDED THAT where the Registrar or Chief Registrar in respect of appeals gives Notice that the period of suspension of time hereunder has ended, time shall begin or continue to run as from the effective date of the termination of the suspension as contained in the Notice.

14.2 Where, in support of any application under these Rules it is not practicable to produce sworn evidence on affidavit, then the application may be supported by evidence given by witness statement and, as soon as practicable thereafter to produce the evidence by affidavit.

14.3 The Registrar may, on the direction of the Chief Justice, give special instructions by way of Notices, for the filing of documents by electronic means to meet the requirements of particular cases or by way of experiment.

14.4 Section 14.3 would include any instructions which are given by the Registrar, on the direction of the Chief Justice, for the transfer of matters from the manual filing environment to the Electronic Litigation Portal, where the system is available.

15. Effective Date

This Practice Direction shall come into effect in a Member State or Territory on the 15th day of June, 2020

Dated the 8th day of June, 2020

Dame Janice M. Pereira, DBE
Chief Justice

ANNEX IV:
COURT OF APPEAL
TURKS AND CAICOS ISLANDS
CIVIL

CL-AP 6/20

BETWEEN:
ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

APPELLANT

AND
MICHAEL EUGENE MISICK, FLOYD BASIL HALL, MCALLISTER EUGENE HANCHELL, LILLIAN BOYCE, JEFFREY CHRISTOVAL HALL, CLAYTON STANFIELD GREENE, THOMAS CHALMERS MISICK, LISA MICHELLE HALL AND MELBOURNE ARTHUR WILSON

RESPONDENTS

****

CL-AP 7/20

BETWEEN:
MICHAEL EUGENE MISICK, FLOYD BASIL HALL, MCALLISTER EUGENE HANCHELL, LILLIAN BOYCE, JEFFREY CHRISTOVAL HALL, CLAYTON STANFIELD GREENE, THOMAS CHALMERS MISICK, LISA MICHELLE HALL AND MELBOURNE ARTHUR WILSON

APPELLANTS

AND
ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENT

BEFORE:	**Sir Elliott Mottley**	**President**
	The Hon. Mr. Justice Stollmeyer	**Justice of Appeal**
	The Hon. Mr. Justice Adderley	**Justice of Appeal**

APPEARANCES:

CL-AP 6/20

Andrew Mitchell, Q.C; Quinn Hawkins; Kate Duncan; Latisha Williams for the Appellants Ariel Missick, Q.C; Selvyn Hawkins for the Respondents

CL-AP 7/20

Ariel Missick, Q.C; Selvyn Hawkins for the Appellants
Andrew Mitchell, Q.C; Quinn Hawkins; Kate Duncan; Latisha Williams for the Respondents

HEARD: 21, 22, 23, 24 and 27 July, 2020
DELIVERED ON: 31 August, 2020

JUDGMENT

Mottley P *(with whom Stollmeyer and Adderley JJA agreed):*

1. In these appeals the appellant in Civil Appeal 6/20 and the respondent in Civil Appeal 7/20 is referred to as "Attorney General". The respondents in Civil Appeal 6/20 and the appellants in Civil Appeal 7/20 are referred to as "Misick et al". In so doing, I mean no disrespect either to Mr. Michael Misick or any of the other respondents/ appellants but do so for the sake of convenience in referring to the respondents/ appellants in these appeals.

2. Civil Appeal 7/20 was heard at the conclusion of Civil Appeal 6/20. These appeals arose out of the judgment of Madam Justice Lobban-Jackson given on 18 June 2020, following a trial which lasted 9 days. The judge declared and ordered as follows:

   1. *That Regulation 4(6) of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020 is ultra vires the Governor's powers under the Constitution of the Turks and Caicos Islands, the Emergency Powers Ordinance and the Emergency Powers 2017 Order, to the extent that it purports to confer power on a judge of the Supreme Court to conduct proceedings while sitting outside of its territorial boundaries.*

   2. *That the said Regulation 4(6) is of no legal effect.*

The judge declined to make any of the other declarations sought by the applicants.

3. In the Amended Originating Summons re-dated 15 May 2020, Misick et al sought the following relief:

   1. *A declaration that Regulation 4(6) of the Regulations constitutes an unlawful infringement by the Governor with the Plaintiffs' right to protection of the law, including their right to a fair hearing in the Proceedings and the right against irrational, unreasonable and arbitrary exercise by the Governor of his powers under the Constitution, the Ordinance, and the Order.*

   2. *A declaration that Regulation 4(6) contravenes the principle of separation of powers as it is specifically directed at the Proceedings and made for the purpose of directing and/or enabling, permitting, soliciting, and encouraging the judge in the Proceedings to conduct the proceedings from Jamaica during the period that the Regulations are in force.*

   3. *A declaration that Regulation 4(6) is ultra vires the Governor's powers under the Constitution, the Ordinance and the Order in that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries.*

   4. *A declaration that Regulation 4(6) violates international law and the territorial jurisdiction of Jamaica, a sovereign State, by purporting without the consent of the Parliament of Jamaica to establish a court/courtroom of the Supreme Court of the Turks and Caicos Islands ("TCI") in Jamaica.*

   5. *A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to revisit his decision to adjourn the trial to 22nd June 2020 or by further order of the judge himself, it violates the Plaintiffs' rights to due process and/or their legitimate expectation that the Proceedings would not be resumed save*

by orders competently made by the Judge seised of the conduct of the Proceedings and sitting in the TCI.

6. *A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to resume sitting in the Proceedings outside of the territorial boundaries of the TCI it violates the Plaintiffs' rights to due process and equality of treatment, and/or their legitimate expectation that they would be able to present their evidence and case in the same way as the prosecution and its witnesses.*
7. *Such Orders and Directions as the Court may think appropriate in this particular case.*
8. *That the costs of and incidental to this application be paid by the Defendant.*

4. Subsequent to the making of the Declarations set out in paragraph 2 above, the Attorney General on 20 June 2020, filed a Notice and Grounds of Appeal (Civil Appeal 6/20). The Grounds of Appeal are set out below:

   1. *The judge failed to consider or explain, having been invited to do so, why the principles set out in the persuasive (but not binding) decision of the Court of Appeal of British Colombia in the case of Endean v Attorney General did not apply in the Turks and Caicos Islands, indeed the judge erred in not referring to the relevant parts of the decision in her judgment at all;*
   2. *The judge failed to consider and apply the purposive principle of statutory interpretation to the said Regulations, having been invited to do so, consistent with the state of public emergency and the clear intentions as expressed by the Chief Justice in her note to the Honourable Attorney General when expressing the need for regulatory assistance to enable the courts to operate;*
   3. *The judge failed to consider and apply the mischief rule, when considering the application of Regulation 4(6) having been invited to do so;*
   4. *The judge held, contrary to the clear intention of regulation 4(6) read as a whole, that the intention of the regulation was to create a court outside the Turks & Caicos Islands, yet when read as a whole the purpose and intent of the regulation is to enable a judicial officer to "sit" only when linked to the recording system in the court in the Turks & Caicos Islands and therefore only when so linked to have the authority of the Court in the Turks and Caicos Islands.*

5. The Notice and Grounds of Appeal filed on behalf of Misick et al (Civil Appeal No. 7/20) contained the following Grounds of Appeal:

   (a) A declaration that Regulation 4(6) of the Emergency Powers (COVID-

   19) (Court Proceedings) Regulations 2020 ("the Regulations") constitutes an unlawful infringement by the Governor with the Plaintiffs' right to protection of the law, including their right to a fair hearing in the Proceedings and the right against irrational, unreasonable and arbitrary exercise by the Governor of his powers under the Constitution, the Ordinance, and the Order.

   (b) A declaration that Regulation 4(6) contravenes the principle of separation of powers as it is specifically directed at the Proceedings and made for the purpose of directing

and/or enabling, permitting, soliciting, and encouraging the judge in the Proceedings to conduct the proceedings from Jamaica during the period that the Regulations are in force.

(c) A declaration that Regulation 4(6) violates international law and the territorial jurisdiction of Jamaica, a sovereign State, by purporting without the consent of the Parliament of Jamaica to establish a court/courtroom of the Supreme Court of the Turks and Caicos Islands ("TCI") in Jamaica. (d) A declaration that to the extent that Regulation 4(6) seeks to direct and/or enable the judge in the Proceedings to resume sitting in the Proceedings outside of the territorial boundaries of the TCI it violates the Plaintiffs' right to due process and equality of treatment, and/or their legitimate expectation that they would be able to present their evidence and case in the same way as the prosecution and its witnesses.

Para C was abandoned.

6. The Governor of the Turks and Caicos Islands on 20 March 2020, on the advice of the Cabinet exercised the powers conferred on him by section 3(1) the Emergency Powers Ordinance ("EPO"). Section 3(1) of the EPO provides as follows:

Proclamation of Emergency

3. (1) If the Governor is satisfied that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other calamity whether similar to the foregoing or not, or that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial part of the community of supplies or services essential to life, the Governor may by proclamation (hereinafter called a Proclamation of Emergency) declare that a state of emergency exists.

The Governor made the declaration for the purpose of preventing, controlling or containing the spread of COVID-19 in the Turks & Caicos Islands.

7. The Proclamation of Emergency, which was made on 20 March 2020, was to take effect on 24 March 2020, at midnight. The Proclamation stated:

"PROCLAMATION OF EMERGENCY

(Proclamation 1 of 2020)

(Legal Notice 16 of 2020)

WHEREAS section 3(1) of the Emergency Powers Ordinance provides that if the Governor is satisfied that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease, or other calamity whether similar to the foregoing or not, or that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial part of the community of supplies or services essential to life, the Governor may by proclamation (hereinafter called a Proclamation of Emergency) declare that a state of emergency exists;"

8. Although a number of Regulations were issued, this appeal deals with the Emergency Powers (COVID-19) Court Proceedings Regulations 2020. This was contained in Legal Notice 32 of 2020 and was made by the Governor on 17 April 2020, having consulted the Cabinet under section 4(1) of the Emergency Powers Ordinance and article 6(1) of the Emergency Powers (Overseas Territories) Order 2017 (S.I. 2017 No/ 181).

9. Regulations 1, 2, 3 and 4 which deal with Citation, Commencement and Expiry, Interpretation, Purposes of Regulation, Remote Sitting respectively are set out in detail below:

TURKS AND CAICOS ISLANDS EMERGENCY POWERS (COVID-19) (COURT PROCEEDINGS) REGULATIONS 2020

(Legal Notice 32 of 2020)

***MADE** by the Governor under section 4(1) of the Emergency Powers Ordinance and article 6(1) of the Emergency Powers (Overseas Territories) Order 2017 (S.I. 2017 No. 181), having consulted the Cabinet.*

Citation, commencement and expiry

1. *(1) These Regulations may be cited as the Emergency Powers (COVID19) (Court Proceedings) Regulations 2020 and shall come into operation on 20th April 2020.*

(2) These Regulations shall expire on 31st December 2020 or on such date as the Governor appoints by Notice published in the Gazette, whichever is sooner.

Interpretation

2. *In these Regulations—*

"court" means the Magistrate's Court, the Supreme Court or the Court of Appeal;

"Covid-19 means the novel Coronavirus (2019-n CoV);

"video and audio link" means facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court.

Purposes of Regulations

3. *These Regulations put measures in place during the Covid-19 pandemic to ensure that the administration of justice, including enforcement of orders, and access to justice is carried out so as not to endanger public health.*

Remote sitting

4. *(1) During the period in which these Regulations are in force, the Chief Justice may make Rules and issue such order or direction as deemed necessary notwithstanding anything contained in section 16 of the Supreme*

Court Ordinance to ensure—

(a) full criminal trials are conducted by video and audio link;

(b) the adjournment of all trials;

(c) all civil trials are conducted by video and audio link;

(d) all pre-trial procedures such as sufficiency hearings and plea and direction and readiness hearings are conducted remotely;

(e) accused persons as well as persons ordered to be produced in habeas corpus proceedings appear remotely by video and audio link;

(f) all witnesses including expert witnesses testify/give evidence remotely in the remote manner set up by the court;

(g) all processes, including proposed exhibits are scanned by parties/counsel and filed along with pleadings by email.

(2) A Judge's duty to observe audi alteram partem rule of natural justice is not to be compromised because of the remote sittings.

(3) A Judge's duty to determine matters in a judicial manner in accordance with settled principles of adjudication and in accordance with the Rules of Court and all pertinent Practice Directions is continued.

(4) Rules of evidence shall be adhered to, except where by the agreement of the court, counsel/parties, these will be impracticable, the Judge or Magistrate will then have recourse to judicial discretion in how to proceed.

(5) Court sittings shall be done remotely in the manner provided by Rules or Orders from the Chief Justice.

(6) The courtroom shall include any place, whether in or outside of the Islands, the Judge or Magistrate elects to sit to conduct the business of the court:

Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties, counsel and witnesses.

10. On 23 April 2020, Madam Justice Agyemang, Chief Justice, issued Practice Direction No 3 of 2020 in respect of "COVID 19 TEMPORARY PROTOCOL FOR AUDIO-VISUAL COURT HEARING AND RELATED MATTERS". The Practice Direction No. 3 provided *inter alia*, as follows:

    PRACTICE DIRECTION NO 3 OF 2020

    COVID 19 TEMPORARY PROTOCOLS FOR AUDIO-VISUAL COURT HEARINGS AND RELATED MATTERS

    AUTHORITY: This Practice Direction is issued by the Chief Justice acting in conjunction with the Chief Magistrate pursuant to regulations 4 and 9 of the Emergency Powers (COVID-19) (Court Proceedings) Regulations 2020, Legal Notice 32 of 2020, Section 17 of the Supreme Court Ordinance, and section 150 of the Magistrate's Court Ordinance.

    INTRODUCTION: This Practice Direction is issued in response to the COVID-19 pandemic, and is aimed at protecting the health and safety of court personnel and court users.

The protocols herein contained establish guidelines and security measures for the conduct of court business electronically, and enable sittings of court remotely.

DURATION: This Practice Direction will be in force from 4th May 2020 until 31st of December 2020, unless sooner varied, revoked or replaced by the Chief Justice.

1. GENERAL MATTERS

1. *These directions are not meant to do away entirely with in-person hearings.*
2. *It is within the sole discretion of the Judge, Magistrate or Registrar having regard to the COVID 19 pandemic and the physical distancing protocols in the Emergency Powers (Covid-19)(No. 3) Regulations 2020 as well as the health and safety of him or herself, court staff and court users, to require an in-person hearing.*
3. *A person summoned to appear before the court shall unless otherwise directed by the court, appear by video and audio link as defined by regulation 2 of the Emergency Powers (COVID-19)(Court Proceedings Regulations 2020. Provided that the video and audio link platform must be a place where documents may be uploaded (such as FILES in Microsoft Teams).*
4. *It is recommended that hearings be held remotely using the Microsoft Teams platform. The choice of platform, including Zoom or Skype Business, is however within the discretion of the Judge, Magistrate or Registrar.*
5. *The Registrar or the Clerk at the Magistrate's Court (as the case maybe) shall communicate the date and time scheduled for the hearing to all parties/counsel three clear days before the scheduled date unless the time is extended or abridged by the Judge or Magistrate.*
6. *The Registrar/Court Clerk/Clerk of Court at the Magistrate's Court (as the case may be) shall set up the hearing, allow access into the hearing, end the hearing, and produce a record of the hearing.*
7. *Parties, counsel, witnesses and any necessary person to the hearing, including an officer from the Department of Social Development, shall be granted access to the hearing.*
8. *Except where the proceedings are held in camera, the hearing may be accessible to the media and to members of the public upon their application to the Registrar or Clerk of Court (as the case may be).*
    i. *The Registrar/Court Clerk/Clerk of Court at the Magistrate's Court may grant access to members of the media and the public upon their request in writing submitted not less than twenty-four hours before the hearing.*

….

4. CRIMINAL CASES

1. *All jury trials already commenced are hereby adjourned sine die, until otherwise directed.*
2. *No new jury trials shall take place within the period of this Practice Direction.*

3. *New criminal trials may be heard by Judge alone where determined appropriate, in accordance with section 58 of the Criminal Procedure Ordinance, provided that a defendant may opt for a jury trial at a later date of no more than six months.*
4. *Every defendant whether or not in custody, and whether or not represented, shall appear for every pre-trial proceeding as well as the conduct of his or her trial by video link.*
    i. *For the avoidance of doubt, a trial includes a sentencing procedure by video link.*
5. *It is the responsibility of counsel to ensure such appearance by a represented person by video link at trial.*
6. *Every defendant in Police custody shall appear before the court remotely from the Police Station in the presence of not less than two (2) Police Officers.*
7. *Every defendant in Her Majesty's Prison shall appear before the court remotely from the correctional facility.*
8. *The Superintendent of Prisons shall ensure that counsel shall, if such request is made, have access to the place the defendant testifies from.*

11. Under the caption CIVIL CASES in the Practice Directions, it is provided that:

    3. CIVIL CASES

    1. *The Registrar shall list the cases for hearing and serve the parties and counsel by electronic means: email.*
    2. *Any party objecting to having his or her matter heard remotely may bring an application three clear days before the return date, to oppose the hearing.*
    3. *If the other side opposes the application, the judge will hear arguments on the date scheduled for hearing, and give his or her ruling on the application.*
    4. *If the opposing side also opposes hearing, the Registrar may be notified to adjourn the case to a date no later than sixty days.*
    5. *After the sixty days, it will be in the discretion of the Judge or Magistrate whether or not to conduct the hearing remotely.*

12. In para 6 of her judgment, Madam Justice Lobban-Jackson in setting out the factual background listed the history of events leading to the constitutional challenge by Misick et al. Inasmuch as no issue was taken by either side with this statement, I adopt what is contained in that paragraph and see no need to set this out again in detail.

Civil Appeal 6/20

13. In Civil Appeal 6/20, the issue is whether the declaration of the judge that

    Regulation 4(6) is *ultra vires* the Governor's powers under the Constitution, the Emergency Powers Ordinance and the Order in that it purports to confer powers on the Supreme Court to conduct proceedings outside of its territorial boundaries, is correct.

14. In her judgment, the judge stated the following:

    "[38] It is against the legislative framework set out above that the court must consider the constitutional validity of Regulation 4(6). Under s.21(1) of the Constitution, if a person alleges that any of his fundamental right has, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

    In the circumstances the Plaintiff's challenge is not premature.

    [39] The legislative scheme that applies to the Supreme Court is not the same as that of the Court of Appeal, the clear words of s.80(2) of the Constitution state that the Court of Appeal may sit either in the Islands or in such places outside the Islands as the President may from time to time direct. No similar provisions exist in the Constitution in relation to the Supreme Court. The parameters of the court's jurisdiction are then set out in s.3 of the Supreme Court Ordinance. The wording of this section must be given its plain and ordinary meaning when it says that in addition to any jurisdiction previously, by it or conferred upon it by this Ordinance or any other law the court, shall have "within the Islands" the jurisdiction vested in the High Court of Justice in England. When one looks at s 71(1) of the Senior Court Act of 1981, it says that the sittings of the High Court may be held at any place in England and Wales…"

15. The judge later returned to the question of the constitutional validity of Regulation 4(6) and stated:

    "[35] Returning to the question of the constitutional validity of Regulation 4(6) which states that the courtroom, shall include any place, whether in or outside the Islands, the Judge or Magistrate elects to sit; the argument presented by the Defendant that the Judge sitting outside the jurisdiction would be "beamed into" the courtroom set up in the Turks and Caicos Islands via electronic means, would not suit the wording of the Regulation.

    The courtroom is wherever the Judge or Magistrate elects to sit.

    [36] Given the legislative frame work previously outlined, Regulation 4(6) ought not to attempt to alter the existing law, where there is no evidence to suggest that it was necessary, proportionate to the threat of the pandemic or urgent to do so, as required by Article 7 of the 2017 Order or indeed reasonably justifiable as required s. 20 of the Constitution.

[37] The Regulation makes no mention of any particular territory, and is worded in such a way as to be of general application both in the Supreme Court and the Magistrate's Court. To say that it was targeted solely at the proceedings and Learned Judge in Jamaica, would be to agree with the submission of Queen's Counsel for the Plaintiff's that the legislation was ad hominem, which I do not. The Learned Judge in the proceedings remains at liberty to conduct the trial in a manner he deems fit.

[It is to be observed that these paras 35, 36 and 37 appear to be numbered out of sequence.]

16. Having referred to what was said by Goepel J in the Court of Appeal in British Columbia in the case of Endean v. British Columbia, 2014 BCCA 61 that "the English common law did not allow English Judges to sit outside their territorial boundaries", the judge concluded that "Because of the legislative scheme outlined above… the Turks and Caicos Islands are wedded to the restrictions".

17. On the question of the constitutional validity of Regulation 4(6), the judge declared that:

    [39] For the reasons given in the forgoing discussion, I declare that

    Regulation 4(6) is ultra vires the Governor's powers under the Constitution, the Emergency Powers Ordinance and the 2017 Order, only to the extent that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries.

18. In arriving at that conclusion, it would appear that the judge accepted that Regulation 4(6) purported to confer power on the Supreme Court to conduct proceedings outside of the territorial boundaries of the Turks and Caicos Islands.

19. In placing that construction on Regulation 4(6), it does not appear that the judge considered placing a purposive construction on Regulation 4(6). Nor did she consider applying the mischief rule to the construction of Regulation 4(6).

20. In my view, the judge ought to have approached the construction of Regulation 4(6) by placing the plain meaning rule. If this construction did not provide an adequate or proper meaning, she was required to adopt a purposive construction.

21. It is stated in the most recent edition of Bennion on Statutory Interpretation (7th Ed.), section 22.1 that:

    "(1) The starting point in statutory interpretation is to consider the ordinary meaning of a word or phrase, that is its proper and most known signification."

However, it is stated that the context may require an alternative meaning to be adopted. In **R (The Good Law Project) v Electoral Commission** [2017] EWHC 2414 at [33], Leggatt LJ said:

> *"The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation."*

22. The rule relating to the purposive construction is set out in Bennion on Statutory Interpretation at section 11.1 where it is stated:

    "Presumption that enactment to be given a purposive construction

    (1) In construing an enactment the court should aim to give effect to the legislative purpose.

    (2) A purposive construction of an enactment is a construction that interprets the enactment's language, so far as possible, in a way which best gives effect to the enactment's purpose.

    (3) A purposive construction may accord with a grammatical construction, or may require a strained construction."

23. In **DPP v Schildkamp** [1969] 3 All ER 1640, [1971] AC 1, Lord Upjohn observed that:

    "The task of the court is to ascertain the intention of Parliament; one cannot look at a section, still less a subsection, in isolation, to ascertain that intention; one must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by Viscount

    Simonds in A-G v H R H Prince Ernest Augustus of Hanover ([1957] 1 All ER 49 at p 53; [1957] AC 436 at p 461):

    "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

24. Lord Nicholls stated in **R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd** [2001] 1 All ER 195: *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention*

which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in BlackClawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810 at 814, [1975] AC 591 at 613: 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.'

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute."

25. Further, Lord Nicholls stated:

    "…the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission (with or without a draft Bill attached), and a statute's legislative antecedents.

    Use of non-statutory materials as an aid to interpretation is not a new development. As long ago as 1584 the Barons of the Exchequer enunciated the so-called mischief rule. In interpreting statutes courts should take into account, among other matters, 'the mischief and defect for which the common law did not provide' (see Heydon's Case (1584) 3 Co Rep 7a at 7b, 76 ER 637 at 638).

    Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure.

    In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.

    This is subject to an important caveat. External aids differ significantly from internal aids. Unlike internal aids, external aids are not found within the statute in which Parliament has expressed its intention in the words in question."

26. Lord Nicholls made it clear that the judge was required to identify the meaning of the words contained in Regulation 4(6) in the context of the Emergency Order. In order to do this, it was necessary to look at the intention of Parliament (in this case the Governor). His Lordship pointed out, this meant "the intention which the court

reasonably imputes to Parliament" (the Governor) in respect to the words contained in Regulation 4(6).

27. In constructing Regulation 4(6) the judge was required to examine all the provisions of the Emergency Regulations which would also shed light on what was the intention of the Governor at the time he made the Regulation. Lord Nicholls also indicated that a judge should look at aids external to Regulation 4(6)

    "such as its background setting and its legislative history".

28. In **Regina (Quintavalle) v Secretary of State for Health** [2003] 2 AC 687, Lord Bingham at para 8 stated:

    [8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

29. Lord Bingham went on to point out that the dissenting opinion of Lord Wilberforce in the **Royal College of Nursing of the United Kingdom v Department of Health and Social Security** [1981] AC 800 may now be treated as authoritative. Lord Wilberforce stated at p. 822:

    In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing

to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question "What would Parliament have done in this current case - not being one in contemplation - if the facts had been before it?" attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

30. Lord Bingham later stated:

    "On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markham (1945) 148 F 2d 737, 739 Learned Hand J explained the merits of purposive interpretation:

    "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

    The pendulum has swung towards purposive methods of construction."

31. From this guidance, it is my opinion that in seeking to construe Regulation 4(6), the judge was required to consider that at the time there was a pandemic and the effects of that pandemic on the socio-economic conditions in the Turks and Caicos Islands.

32. Based on this observation, the judge in my view, was required to examine the reason why the Emergency Order and in particular Regulation 4(6) were necessary. What was the purpose of publishing the Emergency Order.

33. Civil Appeal 6/20 relates to the declaration made by the judge "that Regulation 4(6) of the Emergency Powers (COVID-19) Court Proceedings was ultra vires the Governor's power under the Constitution, the Emergency Power Ordinance and the 2017 Order, only to the extent that it purports to confer power on the Supreme Court to conduct proceedings outside of its territorial boundaries".

34. The sole issue on Civil Appeal 6/20 is the construction of Regulation 4(6). Was the judge correct in the way she construed Regulation 4(6)? The judge placed an interpretation that, insofar as the Regulation purports to confer power on the Supreme Court to sit outside of the territorial boundaries of the Turks and Caicos Islands it was ultra vires to the power of the Governor under the Constitution, the Emergency

Power Ordinance and the Order. The issue therefore, is whether the judge was correct in placing this construction on Regulation 4(6).

35. It is worth, at this stage, repeating Regulation 4(6) which provides:

4(6) The courtroom shall include any place whether in or outside of the Islands the Judge or Magistrate elects to sit to conduct the business of the court.

Provided always that the video and audio link…. Must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties counsel and witnesses.

36. In construing Regulation 4(6) it is therefore necessary, in my view, to give it a purposive construction. I begin this exercise by looking at what was the intent in issuing the Regulations. In so doing, I must look at the contents of the Emergency Powers (COVID-19) (Court Proceeding) Regulations 2020. I commence by looking at the Explanatory Note to the Regulation. It is stated that "This Note is not part of the Regulations".

EXPLANATORY NOTE

(This Note is not part of the Regulations)

These Regulations provide measures to enable remote court trials and for ancillary matters to expand availability of video and audio link in court proceedings.

Counsel, parties and all persons accessing court services should bear with the court as they navigate technological challenges which will no doubt improve with time.

The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants.

37. In section 24.14 in Bennion on Statutory Interpretation under the rubric Explanatory Notes etc. it is stated *inter alia*:

"(1) Explanatory Notes to an Act may be used to understand the background to and context of the Act and the mischief at which it was aimed."

In **Flora v Wakom (Heathrow) Ltd** [2006] EWCA civ 1103, Lord Justice Brooke, Vice President stated:

[15] The use that courts may make of Explanatory Notes as an aid to construction was explained by Lord Steyn in R (Westminster City Council) v NASS [2002] UKHL 38 at [2]-[6], [2002] All ER 654, [2002] 1 WLR 2956, see also R (S) v Chief Constable of South Yorkshire Police [2004] UKHL 39 at [4], [2004] 4 All ER 193, [2004] 1 WLR 2196. As Lord Steyn says in the NASS case, Explanatory Notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the

parliamentary process. They are prepared by the Government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and cannot be amended by Parliament. They are intended to be neutral in political tone: they aim to explain the 4 effect of the text and not to justify it.

[16] The text of an Act does not have to be ambiguous before a court may be permitted to take into account an Explanatory Note in order to understand the contextual scene in which the act is set (NASS, para 5). In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of Explanatory Notes as an aid to construction by saying (at para 6):

> *"What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."*

38. As stated earlier, the Explanatory Note may be used to understand the background to and context of the Regulations and the mischief at which they are aimed. The Regulations are intended to provide measures to enable remote court trials. In addition, the Regulations were intended to expand the use of technology by making use of video and audio links. The Regulations were intended to enable a **wider** range of proceedings to be conducted by video and audio link. It was intended that the courts would continue to remain open to the public, but function without the need for participants to attend in person.

39. Regulation 3 which has a subheading "**Purposes of Regulations**" provides as follows:

    "3. These Regulations put measures in place during COVID-19 pandemic to ensure that the administration of justice including enforcement of orders, and access to justice is carried out not to endanger public health."

    The intention is to ensure that during the COVID-19 pandemic, the administration of justice, including trial, continues in a manner that would not endanger public health.

40. By Regulation 4(1), the Chief Justice is empowered to make Rules and issue such orders or directions to ensure that "full criminal trials are conducted by video and audio link." Video and audio link is defined as meaning "facilities (including closed circuit television) having recording capability that enables audio and visual communication between persons at different places. This is a recognition that trial may proceed by video and audio links even though all persons are not physically in the same place. Traditionally, all persons who are involved in criminal trials were all physically present in the court – courtroom. As technology developed and means of communications

(both audio and visual) improved, changes were made to the procedure in criminal trial. Witnesses were permitted to give evidence via video link. (See the provisions of the Audio Visual Link Ordinance Cap 2.08).

41. Regulation 5, for the first time, provided for court sitting to be done remotely in the manner provided by the Rules and Orders made by the Chief Justice. On 23 April 2020, the Chief issued the Practice Direction No. 3 of 2020. In the Preamble it is stated, inter alia, that *"it has become necessary to limit, reduce or remove human to human contact in accordance with the physical distancing protocols now in place and the Emergency Powers (COVID-19) (No, 3) Regulation 2020"*. Again, it may be inferred that the Regulations are intended to reduce or remove the need for persons to physically attend the court-courtroom.

42. Under the caption "GENERAL MATTERS Rule 4" it is recommended that hearings be held remotely. This recommendation suggests that, while in person physical hearings may still take place in a courtroom, it was the recommendation of the Chief Justice that the hearing take place remotely.

43. The Practice Direction is recommending that the hearing be conducted remotely rather than parties and counsel being present in the same courtroom. The object is to prevent the spread of COVID-19 by having people physically present in the courtroom.

44. The overriding intent of the Regulations is to ensure that during the period as specified in Regulation 1, the administration of justice should continue with the changes set out in the Regulations. One reason for these changes is not to endanger public health in the Turks and Caicos Islands. The directions issued by the Chief Justice state that the directions are not meant to do away entirely with in-person hearing. The need for the physical courtroom still remains. A judge has a discretion to require an in-person hearing but in so doing, he is required to have regard to the COVID-19 pandemic and the physical distancing protocols.

45. The recommendation was that hearings be held remotely using the Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court. The video and audio link provides for audio and visual communication between persons at different locations. It is however clear from the Regulations that the need for the physical courtroom remains.

46. Regulation 4(5) provides that "*Court sitting shall be done remotely*." In addition, the Chief Justice has recommended that hearings be held remotely. The question arises, 'remotely from where'? The physical courtroom? The definition as set out in paragraph 2 of the regulations is stated that: "*Video and audio link*" *means facilities*

(including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams, Zoom, Skype or other such media with recording capability approved by the court." The proviso to regulation 4(6) states: "*Provided always that the video and audio link facility at the said location must be accessible remotely to the court recorder, interpreter in the appropriate cases, parties, counsel and witnesses.*" In my view, these provisions demonstrate that the physical courtroom is the place from which the court will be connected remotely for the hearing.

47. An accused person who is in custody may appear remotely. What is the position of an accused who is unrepresented by counsel and who does not have access to the facilities for video and audio link? Would such a person be required to attend the physical courtroom or would his trial be adjourned because he does not have the necessary technology to appear remotely?

48. The physical courtroom, in my view, will still have to be used albeit with limited access by the parties, witnesses and the public generally. I therefore approach the construction of the words "*the courtroom shall include*" with what I have stated above.

49. The proviso to Regulation 4(6) requires that, in order for the place where the judge is sitting to be considered part of the courtroom, certain conditions must be fulfilled. The video and audio link facility which the judge is using must be accessible remotely to the court recorder, parties, counsel and witnesses. In my view, the link must be to the courtroom in order that the place where the judge is sitting be part of the courtroom.

50. It follows from what I have stated that I do not consider that Regulation 4(6) created any court to sit outside the Turks and Caicos Islands. The Regulation 4(6) in my view permits a judge while outside the territorial limits of the Turks and Caicos Islands to sit and preside over a trial, which is taking place in a courtroom within the territorial boundaries of the Turks and Caicos Islands. In so doing, the judge in my view, is doing nothing more than making use of modern technology. The coercive powers of the judge may at all times be enforced within the courtroom. Further, there is but one courtroom and the judge who sits outside the territorial boundary of the Turks and Caicos Islands is conducting one trial which is taking place within the territorial boundaries of the Turks and Caicos Islands.

51. The question that arises in these circumstances is whether a judge who sits outside the territorial limits of the Turks and Caicos Islands, but presides over a trial which is taking place in a courtroom within the Turks and Caicos Islands, offends the English Common Law rule which prevents judges from sitting outside of their territorial boundaries.

52. For the reasons set out below, I am of the view that a judge sitting in the circumstances set out above would not offend the common law rule.

53. Regulation 4(6) declares that wherever the judge sits outside of the territorial limits is part of the 'courtroom' where the trial is being conducted. The proviso to Regulation 4(6) is clearly designed to ensure that at all times, there is a video and audio link between where the judge is sitting and the recorder, parties, counsel and witnesses. Put another way, there must always be a video and audio link between where the judge is sitting (part of the Courtroom) and the recorder, parties, counsel and witnesses (the physical courtroom) in Turks and Caicos Islands.

54. The effect of Regulation 4(6) is that, while the court may be physically split, for all intents and purposes, it is a single courtroom within the territorial boundaries of the Turks and Caicos Islands. In my view, Regulation 4(6) is intended to make clear that there is in fact **one courtroom**. The judge's ability to make coercive orders is in no way compromised because the judge is sitting remotely. The judge's power to punish for contempt in the face of the court is not in my view affected. Even though the judge sits remotely, he is required to observe all the rules of natural justice and to comply at all times with the requirement of the Constitution of Turks and Caicos Islands.

55. Section 6(9) of the Constitution of the Turks and Caicos Islands provides as follows:

    "All proceedings instituted in a court for the determination of the existence or extent of any civil right or obligation or to try any criminal charge including the announcement of the decision of the court; shall be held in public."

56. In my view, the proviso to Regulation 4(6) ensures that at all times there is connection with the physical courtroom within the territorial boundaries of the Turks and Caicos Islands where the parties etc. would appear. Practice Direction No. 3 of 2020 provides for the maintenance of a Record of Proceedings. The Registrar of the Supreme Court or court clerk is charged with the recording of the proceedings. The recording if not done by the Registrar, shall be turned over to the Registrar at the end of the day's proceeding.

57. The Practice Direction expressly states that except where proceedings are held in camera, the hearing may be accessible to the media and to members of the public upon their application to the Registrar.

58. The provisions which are made by Regulation 4(6) and the Practice Direction ensure that if a judge is presiding outside the territorial boundaries of Turks and Caicos Islands the provision of section 6(9) of the Constitution is not in any way offended.

59. Changes have been made to the common law by the enactment of the Audio Visual Link Ordinance. This Ordinance permits a witness to give evidence by audio and visual links from a remote point in both criminal and non-criminal matters. This is mentioned to show that changes are being made to criminal trials. These changes are taking place having regard to the rapid development of technology such as Microsoft Teams, Zoom, Skype, Webex etc. A developing law must have regard to, and keep pace with the technological developments. I am not suggesting or recommending a change to the long existing common rule relating to sitting of the court outside the territorial boundaries without the intervention of the legislature. It is the realization of the technological development and the need to make use of such development while at the same time adhering to the common law rule. In Regulation 2, Audio Visual Link is defined as meaning

    "facilities (including closed circuit television), having recording capability, that enable audio and visual communication between persons at different places and includes video media such as Microsoft Teams Zoom, Skype or other such media with recording capability approved by the court."

60. In coming to my conclusion, I find solace in the observations of Goepel J in Endean v. British Columbia, 2014 BCCA 61, where he stated:

    [79]As noted, the province has no objection to a judge who is outside the province conducting a hearing by video conference or other communication medium as long as the hearing itself takes place in a British Columbia courtroom. If for reasons of convenience or otherwise, a judge determines that a matter is to be heard by telephone, video conference or other communication medium, there is I suggest no reason why the judge, counsel or witnesses necessarily need to be physically present in the province as long as the hearing itself takes place in a courtroom in British Columbia. Witnesses and counsel, of course, will have the right to be present in the courtroom and cannot be compelled to attend to a location other than a courtroom in British Columbia.

    [80]Such a hearing in my view would not offend the common law rule that prohibits judges from conducting hearings outside of British Columbia; although the judge may be located elsewhere, he or she would be exercising his or her jurisdiction and authority in a hearing taking place in British Columbia. The hearing would respect the open court principle as interested members of the public and media would be able to observe the proceedings in a British Columbia courtroom.

    [81]It will be up to the individual judge to determine when it is appropriate to conduct a hearing while outside the province. Such hearings I expect would be rare and only arise in exceptional circumstances.

61. For the reasons set out above, I am the of the view that the appeal should be allowed. Consequently, I order that the declaration made by the judge should be set aside.

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62. In their first ground of appeal, the appellants, Misick et al, raised the issue of the '*right to protection of law*'. They alleged that the protection meant that they were entitled as of right to be protected against irrational, unreasonable and arbitrary exercise by the Governor of his power.

63. In her judgment, Madam Justice Lobban-Jackson stated at paragraph 32:

    "Whereas, the plaintiff alleges that their right to protection of law under section 6 of the Constitution is likely to be infringed by the Regulation 4(6) on one view, it provides an avenue to secure another right under same section; that of a fair hearing within a reasonable time by an independent and impartial court established by law. But this does not dilute the requirement by s.20 of the Constitution that the Regulation passed during periods of public emergency be justifiable in the circumstances."

64. Counsel for Misick et al contended that Regulation 4(6) contravenes their constitutional right to be tried by a judge sitting in the Turks and Caicos Islands as per the supreme law of the land. It was submitted that the protection of the Law including due process requires the judge to sit only in the Turks and Caicos Islands.

65. In response, counsel for the Attorney-General submitted that the protection of section 6 continues to apply to Misick et al for periods of public emergency (See section 20). Further, counsel said that nothing contained in the Regulations, or the Practice Directions undermined the rights set out in section 6 of the Constitution. Counsel argued that there is nothing unreasonable or unjustified in a judge, in the exercise of his discretion, deciding to utilize the available technology to manage the trial process and continue a trial especially when he takes public health issues into consideration.

66. For my part, I accept and agree with the submission of counsel for the Attorney General that the Regulations are not irrational, unreasonable or fundamentally unfair and do not offend against the general proposition of the protection of law. The Regulations and the Practice Direction No. 3 of 2020 are to be viewed in the light of the worldwide pandemic and the requirements of public health-social distancing, the wearing of masks in public and the washing of hands.

67. As regards to Ground 2 of Civil Appeal 7/20, counsel for Misick et al submitted that the judge ought to have analysed the circumstances surrounding the promulgation of Regulation 4(6). Had the judge done so, she would have found that the only proceedings to which Regulation 4(6) could have applied was the criminal case involving Misick et al. Further, that Mr. Justice Harrison was the only judge who could invoke the provisions of Regulation 4(6). Counsel further submitted that Regulation 4(6) was not necessary to achieve the legislative object set out in the Regulations. Counsel contended that Regulation 4(6) would have no national purpose if not directed at the

appellants and further that Regulation 4(6) was retrospective in relation to Misick et al.

68. Counsel for the Attorney General stated that Misick et al are entitled to protection from legislation that is personalized, targeted and designed to direct a court to exercise judicial authority or apply a "new" law in a particular way.

69. The question to be asked is how does the court ascertain a more specific purpose of the Regulations. Applying an objective test- what is the effect of the Regulation 4(6)? Counsel for the Attorney General submitted that no new law was passed redefining the criminal conduct, the admissibility of evidence or the nature of sentences to be passed in the event of conviction.

70. The issue of ad hominem was dealt with by the Judicial Committee of the Privy Council in **R v Liyanage** [1967] 1 AC 259. In delivering the opinion of the Board, Lord Pearce observed:

"That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state.

But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal."

71. His Lordship went on to observe:

"In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted.

These alterations constituted a grave and deliberate incursion into the judicial sphere.

Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial."

72. The issue of ad hominem legislation again engaged the attention of the Judicial Committee in **Ferguson v The Attorney General of Trinidad et al** [2016] UKPC2.

73. In giving the judgment of the Board, Lord Sumption pointed out that:

    "[23]...Direct interference with judicial proceedings is usually inherently contrary to the separation of powers and the rule of law. It is also a denial of due process."

74. His Lordship continued at para 25 of the judgment:

    "[25] Legislation which alters the law applicable in current legal proceedings is capable of violating the principle of the separation of powers and the rule of law by interfering with the administration of justice, but something more is required before it can be said to do so. The "something more" is that the legislation should not simply affect the resolution of current litigation but should be ad hominem, ie targeted at identifiable persons or cases.

75. Lord Sumption observed:

    "[26] Legislation may be framed in general terms as an alteration of the law and yet be targeted in this way. The legislation considered in Liyanage was framed in general terms. It would have been valid if its operation had been wholly prospective. What made it invalid was the combination of three factors: (i) it influenced or determined how inherently judicial functions would be exercised, notably in the matter of the admission of evidence and the minimum sentence; (ii) it was retrospective in the sense that it applied to current judicial proceedings; and (iii) the sunset clause and the fact that the legislation dealt with specific issues in the criminal proceedings against the plotters of the coup. The critical factor was the third, without which the first two might have been unobjectionable. This was because it showed that the statute was directed at identifiable people or groups of people. The Board considers that targeting of that kind is the least that must be shown if it is contended that a statute which merely alters the law violates the principle of the separation of powers or the rule of law by impinging on the judicial function."

76. In setting out the test to be applied to ascertain whether the legislation is ad hominem, Lord Sumption stated:

    "27. How is the court to ascertain a more specific purpose behind an Act of Parliament than its general terms would suggest? Although this question commonly arises in politically

controversial cases, in the Board's opinion the answer does not depend on an analysis of its political motivation. The test is objective. It depends on the effect of the statute as a matter of construction, and on an examination of the categories of case to which, viewed at the time it was passed, it could be expected to apply. Liyanage itself is the classic illustration. The Board's conclusion in that case was that the legislation applied to a category of persons and cases which was so limited as to show that the real object was to ensure the conviction and long detention of those currently accused of plotting the coup. The reason why in such circumstances as these the statute will be unconstitutional is that the Constitution, like most fundamental law, is concerned with the substance and not (or not only) with the form. There is no principled distinction between an enactment which nominatively designates the particular persons or cases affected, and one which defines the category of persons or cases affected in terms which are unlikely to apply to anyone else. In both cases, it may be said, as Lord Pearce said in Liyanage (p 290) that "the legislation affects by way of direction or restriction the discretion or judgment of the judiciary in specific proceedings".

77. In deciding whether the Regulation 4(6) is ad hominem, it is necessary to examine the circumstances which led to the Regulation being made, the purpose of the Regulation and whether and to what extent the Regulation affected any discretion or judgement of the judge in the criminal case involving Misick et al. Misick et al were the defendants in criminal proceedings which commenced on 7 December 2015. Mr. Justice Harrison, sitting without a jury, is presiding over the trial. Mr. Justice Harrison is ordinarily resident in Jamaica and travels to the Turks and Caicos Islands to preside over the trial.

78. On 11 March 2020, the World Health Organization declared that a global pandemic COVID-19 existed. On 12 March 2020, the proceedings in the criminal trial were adjourned until 20 April 2020. On 25 March 2020, the Premier of the Turks and Caicos Islands outlined the Emergency Powers (COVID-19) Regulations under which the Islands would be governed including a period of lockdown.

79. The Governor issued the Emergency Powers (COVID-19) Court Proceedings Regulations 2020, which came into force on 20 April 2020 and is scheduled to expire on 20 December 2020. Regulation 3 stated that the Regulations were putting measures in place during COVID-19 to ensure that the administration of justice, including enforcement of orders and access to justice were carried out in a manner not to endanger public health.

80. In my opinion, the purpose of the Regulations was to ensure that during the COVID-19 emergency Supreme Court, Magistrate Court and Court of Appeal would continue to operate and to do so in a manner which gave maximum protection to those involved in the administration of justice and indeed to the public generally.

81. Regulation 4(1)(a) provided for criminal trials to be conducted by video and audio link. Regulation 4(1)(c) makes similar provisions for proceedings in civil trials. Regulation 4(5) stipulates that the court sitting shall be done remotely in the manner provided for by Rules and Orders from the Chief Justice. The Chief Justice issued Practice Directions No. 3 of 2020 on the 23 April 2020. These Practice Directions related to both civil and criminal trials in addition to other administrative matters.

82. In my opinion, the Regulations including Regulation 4(6) were made to ensure that the administration of justice would continue during the period of emergency and that those involved would have the maximum protection from COVID-19. Regulation 4(6) enables judges to decide whether to continue a trial remotely (civil or criminal) from wherever the judge is, whether in the Turks and Caicos Islands or outside and to do so by video link to the Supreme Court (as set out above) within the Island.

83. Regulation 4(6) is entirely prospective in the sense that it relates to the future conduct of all trials.

84. Even if it may be said that Regulation 4(6) applies to the criminal trial of Misick et al, it does not interfere with the exercise of any discretion which the judge has or will have in the future.

85. It follows from what I have said, this ground of appeal is rejected.

86. The final ground of appeal in Civil Appeal 7/20 deals with the issue of 'equal treatment of the law'. Reference is made to section 7(1) of the Constitution which provides:

    "7(1) Everyone is equal before the law and has the right to equal protection of the law."

87. Counsel for Misick et al contended whether the Regulation 4(6) was directed to the appellants or not, Regulation 4(6) would apply to them in a way that it could not and would not apply to any other criminal defendants. Counsel suggested that this is so even if Regulation 4(6) were held not to be unconstitutional. He submitted that his clients' rights to equality are being infringed.

88. Counsel argued that there was no evidence at trial to show that there was another criminal trial, that was part heard at the time of the making of the Regulation, in which the judge presiding over the trial was abroad and in which the prosecution had concluded its case before the judge sitting in the same location as the defendants and counsel. Counsel contended that no other defendant in a criminal case would be faced with the situation in which the appellants find themselves in the criminal case.

89. For the Attorney General, counsel submitted that the question of inequality is to be judged objectively by a standard of reasonable justification. Counsel suggested that the question which is required to be answered is whether it is reasonably justified for an enabling provision to permit a judge to decide whether or not he might hear evidence whilst linked to the court from another place.

90. In **DeFreitas v P.S. Ministry of Agriculture** [1999] AC 69, the Privy Council stated that in determining whether legislation which would otherwise contravene fundamental rights of an individual is reasonably justifiable, the questions which are to be asked are:

    "Whether; (i) the legislation objective is sufficiently important to justify limiting a fundament right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".

91. In answering these questions, the Court has to determine whether a fair balance was struck between objectives of the legislation and the general interest of the public and the protection of the fundamental right of the individual. See **Sporong v Sweden** [1982] ECHR 5.

92. Counsel for the Attorney General submitted that the issue of whether the criminal trial may properly proceed is a matter for the trial judge. Counsel contended that a Regulation which enables a court to decide whether to do something or not, cannot violate upon the mental rights unless that right is to have a judge sit within the territorial boundaries of the Turks and Caicos Islands. He submitted further that it is unclear where such a constitutional right is enshrined in the Constitution. In my view, if such a right exists, it ought to fall within the Constitutional provision which deals with the protection of law which includes due process. See **Nevillle v Lewis** [2001] 2AC 15.

93. In answering the question posed in **DeFreitas**, the starting point is the declaration by the World Health Organization on 11 March 2020, that COVID-19 was a global pandemic. On 12 March 2020, Justice Harrison adjourned the proceedings in the criminal case involving Misick et al until the 20 April 2020. On 20 March 2020, the Governor, acting on the advice of the Cabinet, declared a State of Emergency existed in the Turks and Caicos Islands. The Proclamation of the State of Emergency took effect on 24 March 2020 at midnight. The purpose of the declaration of the State of Emergency was to prevent, control and/or contain the spread of COVID-19. On the 25 March 2020, the Premier of the Turks and Caicos Islands outlined the contents of the Turks and Caicos Islands Emergency Powers (COVID-19) Regulations which included an imposition of a period of lockdown.

On 17 April 2020, the Governor made the Emergency Powers (COVID-19) (Court Proceedings) Regulations, which included Regulation 4(6).

94. On 23 April 2020, Counsel who represented the Crown in the criminal proceedings, submitted to the Registrar proposals for the resumption of the criminal trials of Misick et al prior to the 22 June 2020.

95. Regulation 4, in addition to permitting the judge to sit remotely, expressly stated that a judge is required to observe the '*audi alteram partem*' rule of natural justice.

96. The use of technology by the judge who is presiding over the trial is in my view necessary to assist in the administration of justice and to ensure that any outstanding trials are not delayed unreasonably. Having stated that, it must be remembered that in Civil Appeal 6/20, I held that Regulation 4(6) is not unconstitutional.

97. For the reasons set out above, Civil Appeal 7/20 is dismissed.

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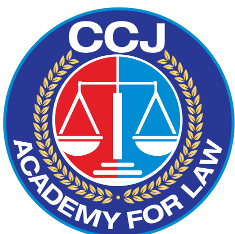
Chairman of the General Legal Council of Jamaica



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