

INTERNATIONAL ORGANISATIONS VERSUS STATE ACTORS IN LAW-MAKING IN THE INTERNATIONAL SYSTEM*

Abstract

Globalisation, trade, poverty, and new challenges such as coronavirus, terrorism, and environmental degradation, among others are increasingly asserting non-state actors such as international organisations in international activities and making them more relevant than ever in contemporary times. These international organisations are contributing to international securities, co-operations, expert opinions, international law-making and solutions to global challenges. Arguably, these contributions are putting them in a competing pedestal with the state. Many states belong to different international organisations and by virtue of such membership, surrender part of their powers to international organisations. Based on the forgoing, this paper questions whether international organisations, through the lens of World Health Organisation (WHO), are taking priority in international affairs and replacing states as primary actors in the international system. This paper argues that despite the prominence of international organisations, states are resisting international organisations and guarding their sovereignty. It is recommended that rather than such competition and conflicts among states and international organisations, more co-operation among states and international organisations are necessary for addressing contemporary challenges.

Keywords: International organisations, international system, States, World Health Organisation, and law-making

1. Introduction

There is no single generally accepted definition of international organisations. An attempt to define international organisation seem to raise more problems.¹ While appreciating the difficulty of a comprehensive accepted definition of international organisation, it has been put forward that international organisations ‘are social constructs, created by people in order, presumably, to help them achieve some purpose, whatever that purpose maybe’.² Whether this definition is seen as narrow or not, it points out the practical nature of international organisations, which is that they are created for a limited or special purpose. A particular organisation does not have the competence to handle the affairs of every international issue. For example, *In the legality of Nuclear Weapon Opinion*³, the International Court of Justice reasoned that the constitution of the WHO did not empower it to deal with issues concerning the legality of weapons system, though, it would empowered to deal with the effects of the use of nuclear weapon on health.⁴ Therefore, this is a limitation as to the role they can play in law-making. In view of this, it can be said that international organisations are created to enhance and regulate the public dimension of the international realm; to be a forum for negotiations among states; to establish norms in the various areas of multilateralism and to extend assistance when possible and necessary such as in the area of security, development and other domains.⁵ Legal questions most times attract ‘yes and no’ responses simultaneously from lawyers.⁶ This is because it has been observed that legal subjects usually do not have clear cut distinctions. They are usually inter-woven. The discussion of this article is not an exception to this view. However, for the purpose of this paper, the position here is, ‘no’, international organisations have not replaced states as primary law makers in the international system. It has been observed that despite states submissions to various international monitoring and control, states still resist international organisations.⁷ Nevertheless, there are some limitations of states’ powers owing to the impact of globalisation and the need for states to cooperate for their respective benefits. Also, the changes and significant roles international organisations play cannot be neglected due to their competence to make or influence laws or create treaties within the scope of their powers, whether express or implied.⁸ The participation of states and international organisations gives credence to the notion that the international system in contemporary times is made up of states and non-state actors. The

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¹J E Alvarez, *International Organisations as Law Makers* (Oxford University Press, 2005).

²Jan Klabbers, *An Introduction to International Institutional Law* (second edn, Cambridge University Press, 2009) 6-7

⁴ Legality of the use by a State of nuclear weapons in armed conflict, advisory opinion, (1996) ICJ Reports 66; Jan Klabbers, Klabbers (n 2).

⁵Jean-Marc Coicaud, Veijo Aulis Heiskanen (eds), *The legitimacy of international organisations*, (United Nations University Press, 2001) 335.

⁶ Michael Byers (ed.) *The Role of Law in International Politics. Essays in International Relations and International Law*, (Oxford University Press, 2001).

⁷ *ibid.*

⁸ Jan Klabbers (n 2).

involvement of these diverse actors seeks collaborative efforts in order to effectively tackle global challenges as they are regarded as subjects of international law. Most often, idea of subjectivity or capacity to participate in international activities brings to perspective the possession of legal personality. There has been a suggestion of three indicators which are:

- (a) whether the subject in question possesses the right to enter into international agreement;
- (b) whether they have the right to send and receive legations; and
- (c) whether they can bring and receive international claims.⁹

According to the preamble of the 1986 Vienna Convention on the law of Treaties, 'international organisations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfilment of their purposes.'¹⁰ Also, according to article 66 of the constitution of the WHO, 'the Organisation shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its functions.'¹¹ To summarise the status of international organisations, the International Court of Justice in the *Reparation for Injuries Opinion*,¹² gave the bold answer that United Nations is a subject of international law, capable of possessing international rights and duties, and has the capacity to maintain its rights and bring international claims. It has to be noted also that the international organisations are separate legal personalities acting on their own behalf and not on behalf of members. There is no presumption of establishment of agency relationship.¹³

In order to explore the theme of this article, the WHO as a case study is x-rayed to inquire whether international organisation are taking the place of states as primary actors in the international system. To do so, this article is classified into six sections. The first is the introductory aspect. The next explores law-making in the international system. Here the ability to engage in law-making as one of the important characteristics of the 'subjects' of international law is examined. The next section questions whether international organisations have the competence to make laws. In this section, the paper demonstrates the capacity of international organisations to engage in law-making and goes further to explore the legal effect of such law-making role. Subsequently, the article delves into the debate of whether these active roles by the international organisations have provided new sources of law to grant them the position of primary law-makers. In conclusion, the paper observes that despite submissions of states to the control of international organisations, states are protective of their positions as major actors in the international system.

2. Law-Making in the International System

The rule of law has been described as essential in the international system.¹⁴ It has been argued that without law, the international society would be faced with chaos and anarchy which states and international organisations like the United Nations Organisations aim to combat.¹⁵ Another role of law-making in the international community is the creation of a multilateral system which promotes international efficiency.¹⁶ This is achieved most times through the creation of expert bodies such as the WHO, World Trade Organisation (WTO) to render expert recommendations, regulations and other services within their competence. International law historically has been centred on state's will, particularly through customary international law which is based on the consent of states for the creation of new rules.¹⁷ Although it has been contended that customary international law is not an exclusive preserve of states,¹⁸ for the purpose of in regards to the capacity of states, there has been some propositions stating that:

- (1) international law as a general system has been accepted by all states and hence is an expression of their will;
- (2) a state may withhold its consent from that system and opt out of it;
- (3) the creation of a new rule or repeal of an old rule of customary law requires the consent of states;
- (4) a state which has not consented to a customary law rule is free at any time to reject its application to that state;

⁹Jan Klabbers, (n 2) 39.

¹⁰ Vienna Conventions on Law of Treaties, 1986.

¹¹ Article 66, constitution of World Health Organisation, 1948.

¹² *Reparation for injuries Suffered in the service of the United Nations*, Advisory Opinion: I.C. J. Reports 1949, p. 174.

¹³D Sarooshi, *International Organisations and their exercise of Sovereign Powers*, (Oxford University Press, 2007).

¹⁴ 'Rule of Law and Human Rights, available at < <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>> accessed 30 November 2021.

¹⁵ Michael Byers (n 5).

¹⁶ *ibid.*

¹⁷ Oscar Schacter, *International Law in Theory and Practice*, (Martinus Nijhoff Publishers, 1991).

¹⁸ Joycelin Chinwe Okubuiro, 'Third World Resistance as Counterhegemonic Phenomenon in Customary International Law' [2020] (9) *Global Journal of Comparative Law* 183.

- (5) any state is free to exercise its sovereign right to reject the application of a customary rule on the ground that it is in accordance with that state's will.¹⁹

Can it be said that these propositions fully illustrate law-making in the international system? The first proposition of state's 'will' has been premised on the acceptance of a system to abide by a legal obligation.²⁰ However, the claim of the proposition is faced with some possible weaknesses in the face of the emergence of international organisations because the will of a state is limited to an extent in international treaties. For example, though states are provided with the opportunity to make reservations under article 41 of the covenant, the provisions tend to weaken the power of states especially on human rights which United Nations seem to protect without space for state abuse.²¹ Secondly, on the proposition of power for a state to opt out still prevails today. International organisations have not taken away that choice for states to opt out of an international treaty. For example, articles 20 and 22 of the constitution of the WHO grant member states opportunities to opt out from the organisation's conventions or agreements. There is no strict regulation or law, compelling states to abide by the laws created by the organisation. This positions the states as chief actors in the international system. Thirdly, customary law is one of the sources of international law.²² Although it has been contended that customary international law is not an exclusive preserve of states,²³ international courts have held customary international law to be based on state practice, generality, *opinio juris* and consistency.²⁴ The number of states to determine state practice has remained controversial.²⁵ Despite the imprecise nature of customary law²⁶, it has remained a primary source of international law that binds states. This is due to its advantage of filling the gap or lacuna in treaties; it is also resorted to in the absence of bilateral investment treaties [BIT] by foreign investors and host states, as well serve as a last resort of international legal protection against unlawful conduct by states.²⁷ International organisations have not provided an alternative definition of custom, but have rather operated some of its norms/laws under the mode of state practice. For example, the protection of human rights by international organisations still bases the definition of customary humanitarian law on state practice.²⁸ This situation suggests that states are still the major actors of customary international law-making. Fourthly, based on voluntarist-consensualist theory, states are not bound by rules which they have not consented to. It is true that presently states have the legal rights to be bound by rules they have consented²⁹ but the United Nations Security Council in performance of its function can create a third party obligation though there are modern oppositions to the creation of third party obligation.³⁰ Fifthly, the proposition that a state is free to exercise its sovereign power to reject the application of customary rule is today limited owing to the impact of globalisation.³¹ Absolute sovereignty is rather seen as a theory not a practical power. States have volunteered part of their powers to international organisations and as such cannot totally reject a rule because it is against its will. Even when states work out of these international organisations, it has been observed that they always come back because of the benefits derived from these organisations.³²

Despite the dominate roles played by states in law-making in the international system, international organisations, to some extent, have made impacts in international law-making process. This shows that states are no longer the only parties to treaties in international law. International organisations have changed the classic mode of law-making which is negotiation and conclusion of treaties by states. The situation sometimes involve convening of ad hoc conferences.³³ Presently, treaties involve more government negotiators and more non- state actors and

¹⁹ Oscar Schachter, (n 16).

²⁰ *ibid.*

²¹ United Nations Rights Committee, General Comment 24 Reservations Covenant or Optional Protocols or declarations under article 41 of the Covenant UN Doc. CCPR/C/21/Rev.1/Add.6.

²² Article 38 (1) (b) of the Charter of the International Court of Justice.

²³ Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) *Virginia Journal Of International Law*, Vol. 48, No. 1, pp. 119-186, Joycelin Chinwe Okubuiro (n 17).

²⁴ *North Sea Continental case*, (1969) ICJ Reports 43.

²⁵ P Malanczuk, *Akehurst's Modern Introduction to International Law* (seventh edn, Routledge, 1997). 42.

²⁶ Michael Byers (n 5).

²⁷ Patrick Dumberry 'The Last Citadel! Can a State Claim the status of Persistent Objector to prevent the Application of Customary International Law in Investor-State Arbitration?' [2010] (23) (2) *Leiden Journal of International Law* 379.

²⁸ Birgit Schleutter, 'Constitutionalisation at its best or worst? Lessons from the development of customary humanitarian law' available at < <https://esil-sedi.eu/wp-content/uploads/2018/04/Schleutter.pdf> > accessed 30 November 2021.

²⁹ Oscar Schachter, (n 16).

³⁰ Alan Boyle and Christine Chinkin, *The Making of International Law; Foundations of Public International Law* (Oxford University Press, 2007).

³¹ Guiguo Wang, 'The Impact of Globalisation on State Sovereignty' [2004] (3) (2) *Chinese Journal of International Law*, 473.

³² Jan Klabbers, (n 2).

³³ J Alvarez, (1).

experts and such situation has multiplied options for treaty initiators.³⁴ Consequently, international organisations have greatly increased the amount of information useful to treaty initiators. For example, it has been argued that negotiations that led to the 1987 Montreal Protocol would have been impossible if not for the scientific data concerning ozone depletion generated by several entities established by the Vienna Convention for the Protection of the Ozone Layer.³⁵ Also, the Health expertise of WHO has contributed to international health decisions as discussed later in this article. The next section explores the law-making capacity of international organisations.

3. Do International Organisations have the Competence to Make Laws?

International organisations have been viewed to contribute to law-making through certain techniques.³⁶ Firstly, international organisations participate in the elaboration or amendment of conventions that require ratification or other forms of acceptance by each prospective state party.³⁷ Consent governs this treat-making process. This is done through adoption and ratification, acceptance or approval laid down in the Vienna Convention on the Law of Treaties. Each convention binds only states that have expressly accepted the rules.³⁸ Legislation by international organisations is a second category.³⁹ The enactments of rules by international organisations do not require the approval by each member state to become bound. It is a unilateral act. According to some constitutional instruments, amendments of their constitutions come into force through adoption by a two-third majority vote and accepted by two-third of the members in respect of constitutional procedures.⁴⁰ For instance, article 73 of the constitution of WHO states that ‘Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes’.⁴¹ The third category of law-making lies in between legislation and treaty-making. This procedure can be described as quasi-legislation. Here, there is no need for individual ratification, acceptance or approval by the states bound after the adoption of a regulation by a competent organ of the international organisation. However, there is a possibility to opt-out of the international regulation by notification to the international organisations within a certain time limit of non-acceptance of the regulation.⁴² For instance, article 22 of the constitution of WHO require that each member notify the Director-General of rejection or reservations within the period stated in the notice. Having identified the techniques employed by international organisation in law-making, their power to make laws could be express or implied as granted by its charter. An international organisation generally derives the power to assist in multilateral treaty negotiations when it is not inconsistent with its charter and the proposed subject lies within the organisations mandate. In this regard, international organisation probably becomes a party, an initiator or convenor, usually as a result of implied power.⁴³ According to article 19 of the constitution of the WHO, ‘The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organisation. A two-third vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes’. Article 21 of the constitution of the WHO goes further to grant the Health Assembly the power to adopt regulations concerning sanitary and quarantine requirements and procedures; nomenclatures with respect to diseases, standards of diagnostic procedures, standards with respect to safety, purity, pharmaceutical and similar products; advertising and labelling in international commerce. Article 21 creates an innovative international legal process (regulations) binding on its members.⁴⁴ A member state can only be exempted from the obligation under article 21, if such a member notifies the Direct-General of rejection or reservations within the period stated in the notice as provided by article 22.⁴⁵ This suggests that there is a limited time frame for states to take action on whether to be bound by the conventions or not.

Based on the above provisions of the constitution of the WHO, it would be argued that this international organisation has basically made regulations affecting the international health system in terms of standards, requirements and procedures affecting sanitation, quarantine, public health, advertising of biological, and

³⁴ *ibid*

³⁵ *ibid*.

³⁶ Julia Sommer, ‘Environmental law-making by International Organisation’, available at <https://www.zaoerv.de/56_1996/56_1996_3_a_628_667.pdf> accessed on 30 November 2021.

³⁷ *ibid*.

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ Julia Sommer, (n 35).

⁴¹ Constitution of the World Health Organisation, 1948, art 73

⁴² Julia Sommer, (n 35).

⁴³ J Alvarez (n 1) 276.

⁴⁴ David P Fidler, ‘The future of the WHO: What Role for International law?’ [1998] (32) *Vand JTL* 1079.

⁴⁵ *ibid*.

pharmaceutical products in international commerce. It is the universal forum for health treaties; however, its regulations are subjected to states acceptance to make an impact. There is no enforcement power granted to the organisation by its constitution. The constitution of the WHO states in article 1 that the objective of the organisation ‘...shall be the attainment by all peoples of the highest possible level of health,’ has been argued to be almost a limitless power.⁴⁶ However, the over-stretching of this power led to the Nuclear Weapons Opinion in which the ICJ categorically made it clear that in as much as the health effect of the use of nuclear weapon will fall within the competence of WHO, the legality of the use of nuclear weapon does not fall within its power.⁴⁷ The extent of the competence of law-making by the WHO is restricted to its functions as the constitution provided. It is important to note that in carrying out these functions, article 17 of its constitution states that ‘The Health Assembly shall adopt its own rules of procedures’.⁴⁸ This is an independent power conferred on the organisation by its constitution.

4. Legal Effects of the Policies/Treaty-Making of International Organisations

The provisions and constitutive elements of a treaty establishing an international institution is a fundamental determinant of its functions and powers. It has been posited that,

The effect of acts of an international organisation depends upon the constitutive treaty of that organisation. This is because an organisation cannot award greater competence to an organ or a subsidiary organ than itself possesses, the powers of such entities also depend on the constitution of the organisation.⁴⁹

The Constitution of WHO was adopted by the International Health Conference held in New York from 19 June to 22 July 1946. It entered into force on 7 April 1948. It establishes WHO as a specialised agency under Article 57 of the United Nations Charter.⁵⁰ WHO’s objective is the attainment by all peoples of the highest possible level of health and in order to achieve this, she shall serve as the coordinating authority on international health work.⁵¹ This means that WHO is the international hub that supervises every health-related matter. It does this by setting out guidelines, policies, reports for all countries to follow. Other functions include; assist government to strengthen their health system, stimulate and advance work to eradicate epidemic, endemic and other diseases, promote in cooperation with other specialised agencies the prevention of accidental injuries, improvement of nutrition, housing, sanitation and other environmental hygiene, promote improved standard of teaching and training of health personnel, among others.⁵² The work of WHO shall be carried out by the World Health Assembly, Executive Board and Secretariat.⁵³ While carrying out the responsibility of controlling and managing global health and spread of diseases, Article 21 of the constitution of the WHO provides that the health assembly shall adopt regulations concerning sanitary and quarantine requirements, nomenclatures with respect to diseases, causes of death and public health practices, standards of diagnostic procedures, standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products and advertising and labelling of biological, pharmaceutical and similar products. Article 22 provides that Regulations adopted pursuant to Article 21 shall come into force for all members after due notice has been given of their adoption by the Health Assembly except for such members as may notify the Director-General of rejection/reservation within the period of notice. The implication here is that for member states, regulations are directly applicable to them by virtue of their membership. One of such regulations of importance is the International Health Regulations (The Regulations).⁵⁴ The purpose of the Regulations is to prevent, protect against, control and provide a public health response to the international spread of diseases, commensurate to public health risks and avoid unnecessary interference with international traffic and trade. Provisions of the Regulations include: unlimited scope to all diseases, obligation of state parties to develop minimum public health capacities and notify WHO of events that may constitute a public health emergency of international concern, procedure for determining a public health emergency of

⁴⁶ *ibid.*

⁴⁷ *Legality of the Use by a State of nuclear weapons in armed conflict, Advisory Opinion, (n 3).*

⁴⁸ Article 17 of the constitution of WHO.

⁴⁹ Julia Sommer, (n 35).

⁵⁰ Paragraph 2 of the Preamble to the Constitution of the World Health Organisation

⁵¹ Constitution of the World Health Organisation constitution.

⁵² WHO Constitution, art 2

⁵³ WHO Constitution, art 9

⁵⁴ *The International Health Regulations (2005), 3rd Edition.* The Regulation was adopted in 1969 and covered quarantinable diseases. It was amended in 1973 and 1981 to reduce the number of covered diseases from six to three and to mark the eradication of small pox. After the emergence of severe acute respiratory syndrome, the Health Assembly called for a revision of the Regulation by the Health Assembly. The Regulations was adopted by the 58th World Health Assembly on 23 May 2005 and entered into force on 15 June 2007. See *The Regulations*, 1

international concern, establishment of National International Health Regulations Focal Points⁵⁵ and WHO International Health Regulations Contact Points⁵⁶ for urgent communication between WHO and state parties, among others.

WHO encourages state parties to develop International Health Regulations (IHR) capacities. These capacities are important because they prevent and contain outbreaks in a particular state from spreading.⁵⁷ In doing these, WHO published the IHR Core Capacity Monitoring Framework in accordance with Article 5 and 13 of the Regulations. Article 5 mandates state parties to develop, strengthen and maintain the capacity to detect, assess, notify and report events in accordance with the Regulations. IHR Core Capacity Monitoring Framework (IHRCCMF) is a framework for state parties to monitor development of their core capacities at the national, intermediate and community/primary response levels.⁵⁸ The framework is not legally binding but represents a consensus of technical expert views from state parties, partners, institutions and WHO. In all these, WHO appears to have a strong framework for coordinating disease outbreaks globally. However, response to global emergencies differs from one state party to another and the ability of such states to build strong health systems.⁵⁹ This means that although state parties are signatories, compliance is within the discretion of states and WHO cannot compel these states to comply with their Regulations. It is this reason that global responses to disease outbreaks have been flawed in the past.⁶⁰ During the pandemic, it was noted that WHO learned of the outbreak in Wuhan on 31 December 2019. However, it waited for a whole month before it declared it a public emergency of international concern. This singular act accounted for states' laxity in taking prompt measures to curb the spread of the virus.⁶¹ In all these, WHO struggled with compliance of 194 states to follow its guidance with a statement from the Director-General, noting the 'alarming levels of inaction in states.'⁶² One reason for this is that despite the Regulations and frameworks in place, WHO has no power to enforce compliance due to a number of reasons. First, the WHO Constitution fails to provide the organisation a right to sanction erring member states. These states are free to choose whether to comply with the WHO's directives or not without any repercussions and this affects the promotion of global health. The second reason lies in the funding capacity of the organisation. In the performance of its functions, WHO must ensure that they do not receive instructions from any government or external authority.⁶³ This provision appears to portray WHO as an independent organisation; however, as will be examined below, the organisation may not be as independent as it should be. According to WHO, it is only able to protect global health from member states', private sector, academic institutions, civil society and other partners' donations.⁶⁴ It gets its funding from two main sources: member states assessed contributions and voluntary contributions.⁶⁵ It also set aside a contingency emergency funding, with Germany as the greatest contributors in 2021.⁶⁶ With its major funding source from member states, it will be difficult to sanction these states for non-compliance with their Regulations. This is because sanctioning a donor state may amount to withdrawal of its

⁵⁵ National (IHR) Focal Point is the national centre designated by each state party accessible at all times for communication with WHO IHR Contact Points. See Article 1 of the WHO Regulations.

⁵⁶ WHO IHR Contact Point is the unit within WHO which shall be accessible at all times for communications with the National Focal Point. See Article 1 of the WHO Regulations.

⁵⁷ World Health Organization, IHR Core Capacity Monitoring Framework: Checklist and Indicators for Monitoring Progress in the Development of IHR Core Capacities in States Parties (2013).

⁵⁸ Core capacities are used for detecting and responding to the specified human health hazards at the point of entry. They include National Legislation, Policy and Financing, Coordination and National Focal Point Communications, Surveillance, Response, Preparedness, Risk Communication, Human Resources and Laboratory. See IHRCCMF, p. 15-17.

⁵⁹ LO Gostin and Rebecca Katz, 'The International Health Regulations: The Governing Framework for Global Health Security,' *The Milbank Quarterly*, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4911720>> accessed 3 October 2021.

⁶⁰ A good example is the Ebola epidemic where the Director-General, even after it spread across countries, waited five months before declaring it a public health emergency. In the same vein, the WHO regional office in Africa stalled deployment of international aid. Gostin and Katz (n 58).

⁶¹ WHO was also alleged to have given contrary guidelines on how best to control the virus. It initially claimed that the use of facemasks was not necessary unless physical distancing was possible and subsequently, WHO recommended wearing facemasks. See AFP, 'WHO's Pandemic Response: From Criticism to Nobel?' (11 March 2021)

https://www.google.com/amp/s/m.economicstimes.com/news/whos-pandemic-response-from-criticism-to-nobel/amp_articles/81443977.cms accessed 3 October 2021.

⁶² *ibid*

⁶³ WHO Constitution, art 37

⁶⁴ World Health Organization, Our Contributors, <https://www.who.int/about/funding/contributors> accessed 3 October 2021.

⁶⁵ Assessed contributions are a percentage of a country's gross domestic product (GDP) approved by member states every two years. Voluntary contributions are from member states and other United Nations organizations, intergovernmental organizations, private sector and other sources. See World Health Organization, 'How WHO is Funded,' <https://www.who.int/about/funding> accessed 3 October 2021.

⁶⁶ Germany's contribution in 2021 was \$16,998,828. The Contingency Fund for Emergencies (CFE) provides resources to respond to disease outbreaks and health emergencies promptly. See World Health Organization, Contingency Fund for Emergencies, <<https://www.who.int/emergencies/fund-for-emergencies>> accessed 3 October 2021.

funds. In effect, the powers of the organisation has been whittled down so much that Richard Horton noted that WHO has been ‘drained of power and resources making its coordinating authority and capacity weak.’⁶⁷

From the foregoing, it is evident that the powers of states have not been whittled down by WHO to a great extent. Rather, what we have is the member states of the organisation setting the pace, especially with the huge funding they bring to the table. This reinforces the power of state actors over non-state actors. This brings to mind that the founders of WHO intended that the creation of this international organisation would play a central role in international health activities. Therefore, it became worrisome when WHO tried to go beyond its constitutional power to inquire about the legality of the Use of Nuclear weapon.⁶⁸ Article 19 gives an express power to the Organisation stating that the Health Assembly by two-third votes of the Health Assembly shall adopt conventions or agreements within its competence. This definitely becomes binding on its members. However, the Members reserve the right of non-acceptance.⁶⁹ Also article 21 has the same binding effect and the article allows the members to reject or make reservations. It is to be noted that through article 28, the Executive Board gives effect to the decisions and policies of the Health Assembly.⁷⁰ In practice, the WHO has been criticised that what it does is mere recommendations without any legal binding effect. However, these so-called recommendations have binding effect only on those who do not object to them. Even those who did not object to these recommendations cannot prove absolute compliance.⁷¹ However, international organisations have some avenues of enforcement which include requirements of national reporting whereby failure to make these required reports constitute improper behaviour.⁷² This could lead to the issuance of the Organisation itself.⁷³ Article 61-65 of the constitution of WHO imposes an obligation on its members to report annual acts to improve the health of their, report steps taken in implementation of recommendations of WHO, to communicate important laws, regulations and other statistics in the state concerned, and so on. In principle, verification of information is a cardinal principle of approach of the WHO to global surveillance regardless of the source of the information⁷⁴. The WHO has been criticised to have failed in enforcing these obligations and such failure has been attributed to the lack of enforcement power by its constitution.⁷⁵

However, international organisations are said to make a direct enforcement by withholding its benefit. For instance, International Atomic Energy Agency suspended technical assistance after Israel bombed an Iraq nuclear reactor.⁷⁶ In the issue of withholding benefits as an enforcement mechanism, article 7 of the constitution of WHO grants the Health Assembly the enforcement power to suspend the voting privileges and services to which a member is entitled to, where the Member fails to meet up its financial obligations or in other exceptional matters. It further went ahead to state that ‘the Health Assembly shall have the authority to restore such voting privileges and services.’⁷⁷ There are times international organisations suspend or terminate membership of members.⁷⁸ This suspension has been argued not to be in favour of the international organisations.⁷⁹ That it is better to keep the violating state and look for other measures to keep them in check. The argument is that it is only a member state that can be checked. If the violating state is outside the organisation, it may constitute security risk to the international community, therefore other means of punishment should be employed to check an offending state.⁸⁰

⁶⁷ Richard Horton is an editor of the Lancet. See Stephen Buranyi, ‘The WHO v Coronavirus: Why it can’t handle the Pandemic,’ (10 April 2020) <<https://www.theguardian.com/news/2020/apr/10/world-health-organization-who-v-coronavirus-why-it-cant-handle-pandemic>> accessed 3 October 2021.

⁶⁸ Legality of the Use by a State of nuclear weapons in armed conflict, Advisory Opinion, (n 3).

⁶⁹ Constitution of the WHO, art 20

⁷⁰ Constitution of the WHO, art 28

⁷¹ David P Fidler, (n 43).

⁷² *ibid.*

⁷³ K W Abbott and D Snidal, ‘Why States act through formal International Organisations’, in Brian Frederking and Paul F Diehl (eds) *The Politics of Global Governance; International Organisations in an Independent World*, (Lynne Rienner, 2015).

⁷⁴ David P Fidler, Developments involving SARS, International Law and Infectious Disease Control at the fifty-sixth meeting of the World Health Assembly in the American Society of International Law, ASIL Insights, available <<https://www.asil.org/insights/volume/8/issue/14/developments-involving-sars-international-law-and-infectious-disease>> accessed 30 November 2021.

⁷⁵ Lawrence Gostin, Devi Sridhar and Daniel Hosgendobler, ‘The Normative Authority of the World Health Organisation’ accessed <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2510&context=facpub>> accessed 30 November 2021.

⁷⁶ K W Abbott and D Snidal, (n 72).

⁷⁷ Constitution of the WHO, 7

⁷⁸ Jan Klabbers, (n 2).

⁷⁹ *ibid.*

⁸⁰ *ibid.*

5. Have The International Organisations Provided New Sources of Law to Grant Them the Position of Primary Law-Makers?

On 30 January 2020, Coronavirus Disease (COVID-19) was declared a public health emergency of international concern (PHEIC).⁸¹ Subsequently, it was declared a pandemic on 11 March 2020 where the Director-General, directed that all countries must adopt a ‘whole-of-government, whole-of-society approach to combat the virus.’⁸² COVID-19 is an infectious disease caused by SARS-CoV-2 virus and transmitted from an infected mouth from liquid particles when a person coughs, sneezes, speaks or breathes.⁸³ The outbreak began in Wuhan, China. Symptoms include fever, cough, sore throat, headache, muscle pain, loss of taste, and are likely to occur within 14 days after exposure to the virus.⁸⁴ With the outbreak of the virus, there was a shutdown globally of all sectors because of the fast-spreading virus in the world. This pandemic was unprecedented and it was up to World Health Organization (WHO) to set up guidelines for countries to follow. This further exposes the power of non-state actors globally. It shows that non-state actors have gained prominence and dictate the steps to follow in issues like this. During health emergencies, WHO, as a global health body, is vested with the role to set up guidelines to tackle such emergencies on a global step. One of its roles is to conduct research from data gathered globally, evaluate same and advise counties on the best strategies to follow to combat such emergencies.⁸⁵ After the research is conducted, the result is published, mostly as technical guidelines. The COVID-19 pandemic was no exception as detailed guidelines were published on how to carry out tests for suspected cases, provide suitable care for patients, contact tracing and quarantine, steps to prevent person-to-person infection. In doing all these, there are designated platforms through which information is transmitted globally through virtual press conferences, social media platforms.⁸⁶ Documents have also been published on this and they include the following:

- a) Critical preparedness, readiness and response actions for COVID-19⁸⁷. This guideline’s aim was to suppress transmission, prevent illnesses and death, all resulting from COVID-19. Its objectives include suppression of transmission of the virus,⁸⁸ reducing exposure of citizens to infected persons as well as to the virus,⁸⁹ empower communities,⁹⁰ counter misinformation and disinformation,⁹¹ protect vulnerable persons through vaccination,⁹² reduce mortality and morbidity,⁹³ acceleration of access to COVID-19 tools.⁹⁴ It categorizes levels of transmission and prescribes the response actions for each level.⁹⁵
- b) Country –level coordination, planning and monitoring;
- c) Guidance for schools, workplaces and institutions;
- d) Health workers.⁹⁶

⁸¹ Public health emergency of international concern is an extraordinary event which is determined by the Regulations. See Article 1 of the International Health Regulations 2005

⁸²World Health Organization, Strategic Response to COVID-19 in the WHO African Region, <https://www.afro.who.int/publications/strategic-response-covid-19-who-african-region> accessed 26 September 2021.

⁸³World Health Organization, Coronavirus Disease (COVID-19), <https://www.who.int/health-topics/coronavirus#tab=tab_1> accessed 26 September 2021

⁸⁴Aaron Kandola, ‘Coronavirus Cause: Origin and How it Spreads’ (June 2020) <https://www.medicalnewstoday.com/articles/coronavirus-causes>

⁸⁵ World Health Organization, ‘A Guide to WHO’s Guidance on COVID-19 (July 2020) <<https://www.who.int/news-room/feature-stories/detail/a-guide-to-who-s-guidance> > accessed 26 September 2021.

⁸⁶ *ibid*

⁸⁷WHO Team, Critical preparedness, readiness and response actions for COVID-19 (CPRRA Document), WHO/2019-nCov/Community_Actions/2021.1, < <https://www.who.int/publication/i/item/critical/preparedness-readiness-and-response-actions-for-covid-19>

⁸⁸ This was to be done through equitability in the distribution of COVID-19 vaccines and vaccinations, infection prevention and control measures, contact tracing and quarantine of persons who came into contact with infected persons, and isolating confirmed cases of persons infected and taking strict measures to protect persons at high risk of getting the virus (persons with underlying sickness, old persons, among others). WHO (n 60).

⁸⁹ This is through proposing practices to communities that reduces the risk of person-to-person infection such as maintaining physical distancing, proper hand hygiene, use of face masks and indoor ventilation. *Ibid*

⁹⁰ This is by empowering communities to enforce risk communication and source for local solutions. WHO (n 60).

⁹¹ This is by managing the information system, online and offline, communicating different risks of COVID-19 to specific groups of population, among others. *ibid*

⁹² This is by ensuring that vaccines get to all countries and populations, building vaccine acceptance for all groups of persons.

⁹³ This is by ensuring that infected patients are diagnosed early, in order to prevent the possible infection of others, accessibility to oxygen of patients with severe COVID conditions, that all priority groups are vaccinated, among others.

⁹⁴ These tools include vaccines, therapeutic support, rational allocation of vaccine and support to all countries on an equitable basis.

⁹⁵ The categories include no active cases, imported cases, clusters of cases, community transmission (levels 1-4).

⁹⁶ Others include, Humanitarian Operation, Camps and other Fragile Settings, Maintaining Essential Health Services and Systems, Essential Resource Planning, National Laboratories, Surveillance, Rapid Response Teams and Case Investigations, Infection Prevention and Control.

Technical guidance on COVID-19 was also prepared and they include clinical care, essential health services, essential resource planning, infection prevention and control, laboratory and diagnosis, mass gatherings, schools, businesses and institutions, vaccines, vulnerable populations and fragile settings, among others. In carrying out its activities, WHO has a guiding document that contains how the organisation is run. Despite the above powers of WHO, there is the understanding that the WHO makes recommendations and policies that are expected to be binding on members who have accepted them.⁹⁷ Such position arguably weakens the WHO as member states have the power to determine what recommendations to accept and what not to accept. This tends to make the states neglect the organisation to the extent of leaving although states do come back as evidenced in case of the exit of the Soviet Union from WHO in the 1950s and its return.⁹⁸ Although states sometimes neglect the recommendations of the WHO, they later adhere to such owing to the health expertise of the organisation, which is beneficial to the international community.⁹⁹ However, where there are severe medical threats which require mandatory powers, only the United Nations Security Council (UNSC) (the executive organ of the United Nations) has such competence. Though, in resolution 1308(2000), the United Nations Security Council (UNSC) recognised that HIV/AIDS may have the potential to cause risk to international stability and security but there is no legislative action under chapter vii of the United Nations charter to that effect in response of global health.¹⁰⁰

To further determine who the primary law-maker is in the international system, it is necessary to examine UNSC. The UNSC is held to have valid and binding decisions that do not only affect Member States, but that the jurisprudence suggests that there is also an over-riding power if inconsistent with international law. For instance, in the Lockerbie case, the International Court of Justice (ICJ) refused Libya's application 'for provisional measures on the ground that prima facie, resolution 748 requiring Libya to surrender terrorists' suspects for trial was binding and thus prevailed over the inconsistent provisions of the 1972 Montreal Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation. The court left the matter open for reconsideration on the merits only in respect of the question whether Resolutions 748 was binding. Moreover, reviewing UNSC Resolutions which expressly or by implication assert priority over other treaties... that binding UNSC decisions taken under chapter vii suspended other treaty commitments seems to be generally recognized...'¹⁰¹ However, it has been argued that veto power possessed by the permanent members weakens the effect of the decisions of the UNSC¹⁰²

In terms of international security, there is a great temptation to suggest that International Organisations through the UNSC has replaced States in the international system. Though chapter vii of the United Nations charter limits the power of the UNSC to the maintenance of international peace and security, the UNSC has given this provision a wide interpretation by laying down rules and principles of general application, binding on all States and taking precedence over other legal rights and obligations. According to article 51 Of the United Nations charter, States have 'inherent right of individual or collective self-defence if an armed attack occurs, but only until the UNSC has taken the measures necessary to maintain international peace and security'. This article goes a long way to give power of international security decisions to UNSC above States. Even article 39 goes further to state that 'the Security Council shall determine the existence of any threat to peace, breach of peace or act of aggression and shall make recommendation, or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security'¹⁰³. However, states employ customary international law of self-defence over that of the UNSC provision to protect themselves from armed attack, thereby making the states the primary law maker in the situation of armed attack. The authority of the UNSC in the maintenance of peace goes beyond mere theoretical binding on just Members, but goes further to create a third-party obligation. According to article 2, paragraph 6: 'the Organisation shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security'.¹⁰⁴ This suggests global obligation¹⁰⁵. In legal consequences for states for the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion (21/06/1971), the International Court of Justice, stressed the binding determination made by a competent organ of the United Nations to the effect that a situation that is illegal cannot remain without

⁹⁷ Article 20 of the constitution of the WHO.

⁹⁸ Jan Klabbers, (n 2) 36.

⁹⁹ Alan Boyle and Christine Chinkin, *The Making of International Law: Foundations of Public International Law* (Oxford University Press, 2007) 129.

¹⁰⁰ *ibid* at 129.

¹⁰¹ *ibid* at 232.

¹⁰² Michael Byers (n 5).

¹⁰³ Article 39, United Nations Charter.

¹⁰⁴ United Nations Charter, art 2

¹⁰⁵ J Mrazek, 'Prohibition of the Use and Threat of Force: self-defence and self-help in International law' [1989] (27) *Canadian Year Book of International law* 81.

consequences. The court maintained that South Africa had the obligation to put to an end and withdraw its administration and also to put to an end all acts establishing its presence in Namibia because it violated international obligation. The court maintained further that Member States are under the obligation to abstain from any form of relation with South Africa. Also, called non-member States to follow suit in abstaining because under Resolution 276(1970), they were under an obligation to give assistance which has been taken by the United Nations with regards to Namibia, even if, they were not bound by article articles 24 and 25.¹⁰⁶

In the area of human rights and international humanitarian law, international organisations have made a huge mark in international law-making. In the popular *Tadic's case*,¹⁰⁷ the competence of the UNSC to establish the International Criminal Tribunal formal Yugoslavia (ICTY) was challenged but the Appeals Chamber held in the favour of UNSC.¹⁰⁸ Article 41 of United Nations charter was held to have a wide discretionary power to take whatever measures it wants to accomplish the maintenance or restoration of international peace and security¹⁰⁹. In the pursuit of international humanitarian law (especially on war crimes), other the United Nations have established other judicial bodies such as International Criminal Court (ICC), and International Criminal Tribunal for Rwanda (ICTR). The European Union also established European Court of Human Rights. These international courts have created judgements that made some alterations in the international legal system. For instance, the European Convention on human rights have granted an individual the capacity of been a subject in international law. Again, as stated earlier, the veto power held by the permanent members sometimes limit the authority.

It has been noted that article 38 of International Court of Justice is usually the starting point on the discussion of the sources of international law and states are regarded here as the primary law-makers. Though the treaties created by international organisations can be argued to be sources of international law that bind states. However, states have to ratify them first to give them binding effects. In view of this, international organisations mainly provide soft laws. This is through the recommendations that have no binding effect. For instance, it has been posited that the SAR Resolution of WHO does not create a new source of international law that binds the WHO member states. It only provides a good example of soft law in international relations and encourages international cooperation.¹¹⁰ However, soft laws have been said to possibly culminate into hard laws over time.¹¹¹ For example, where the soft law of SARS and IHR Resolutions become state practice and perhaps crystallise into customary law on infectious disease prevention and control. It can be said that soft law has progressed into hard law. Also the persuasive power of the international organisations for states to ratify treaties gradually may provide a source of law for states. This proves that states most times have the authoritative power to accept or refuse soft laws. Although international organisations have provided room for judicial resolution of disputes through negotiations, mediations and litigations through its judicial bodies, States would first submit their wills before such a judicial body will bind them.¹¹² For example, the International Court of Justice is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

- by entering into a special agreement to submit the dispute to the Court;
- by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
- through the reciprocal effect of declarations made by them under the Statute, whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.¹¹³

Therefore, the international organisations will be said to encourage judicial resolutions, not replacing states. International organisations and their specialised agencies are open to advisory opinions.¹¹⁴ The limitations faced by the international organisations as contained in the charters establishing them¹¹⁵ gives the states edge over the

¹⁰⁶ Legal Consequences for States for the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21/06/1971).

¹⁰⁷ *Prosecutor v. Dusko Tadic* reproduced in 35 ILM (1996)32.

¹⁰⁸ V P Tzevelekos, 'In Search of Alternative Solutions: Can the State of Origin be held Internationally Responsible for Investors' Human Rights Abuses which are not Attributable to it?' [2010] (35) *Brooklyn JILaw* 155; Alvarez, (n 1).

¹⁰⁹ Alvarez, (n 1).

¹¹⁰ Lawrence Gostin, Devi Sridhar and Daniel Hosgendobler, (n 74).

¹¹¹ Alvarez (n 1).

¹¹² For example, see the Charter of the International Court of Justice.

¹¹³ 'The International Court of Justice: How the Court Works' available at <https://www.icj-cij.org/en/how-the-court-works> [accessed 27 November 2021].

¹¹⁴ *Ibid.*

¹¹⁵ *Nuclear weapons case.*

international organisations as primary law makers in the international system. The states are not limited in the treaties they make or enter. They can enter or create any type of treaty and it is binding.

6. Conclusion

Whether international organisations have replaced states or not as primary law-makers may remain an issue of debate because, though states remain the major subject of the international system, the impact of the international organisations on globalisation cannot be neglected. Also, states are no longer the exclusive participant of international legal process.¹¹⁶ States though have surrendered part of their sovereignty to international organisations, thereby limiting their traditional absolute sovereign power. States have not surrendered totally; international organisations need more of the cooperation of the states to function effectively. For instance, the recommendations of the WHO solicit the cooperation of member states and the member states need the expertise of the WHO. Also, the World Trade Organisation may have made tremendous impact in the international system, it still needs the cooperation of some countries like the United States for effect functioning. Finally, the international organisations cannot boldly be said to have replaced states as primary law makers. They appear to have symbiotic relationships with member states. They certainly depend on the cooperation of one another. States and international organisations require solidarity to effectively tackle global challenges.

¹¹⁶Chinmi B. S. International Institutions Today: An Imperial Global State in the Making (2004) 15 *European Journal of International Law*, 1, 1-37, available at <http://www.ejil.org/pdfs/15/1/334.pdf> [Accessed on December 23, 2011]