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IBA Covid-19 Legal Policy Task Force

Executive Recommendations





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Executive Recommendations

With over five million dead, socio-economic devastation and dangerous variants wreaking havoc, Covid-19 is the most pernicious global catastrophe since the Second World War. Pandemics must be taken for what they are: border-defying existential global threats of the highest order. As such, they can only be prevented and contained by a globally coordinated and collaborative effort.

The pandemic has implicated numerous key legal regimes. While some legal frameworks are largely effective, others have proven inadequate. The International Bar Association (IBA) has formed the IBA Covid-19 Legal Policy Task Force (the 'Task Force') to review the pandemic's impact on salient legal areas; examine what worked and what did not work; and, above all, proffer constructive recommendations for reforming existing – or promulgating new – laws to help the global community effectively manage current pandemics and avert future ones. Notably, while our work has significant implications for public policy and international relations, this is not about politics. We are solely focused on urgent legal policy necessary to enhance global coordination and transparency and optimise pandemic management.

The Task Force has also cogitated the need, advisability and feasibility of a global pandemic treaty. The Task Force strongly recommends dedicating the necessary efforts to overcome the enormous challenges in order to reach a comprehensive, omnibus treaty. In the meantime, however, improvements to existing international regimes and reaching limited multilateral accords in specific areas are more realistic goals.

These recommendations come as a natural complement to existing IBA Covid-19 work. Such work began as soon as the World Health Organization (WHO) declared the pandemic. Work areas were coordinated by the Legal Practice Division; those related to the legal profession were performed by the Section of Public and Professional Interest; and areas specifically addressing human rights erosion during the pandemic came under the direction of the IBA Human Rights Institute.

Finally, the Task Force is aware that its recommendations are focused on the developed world for countries possessing sophisticated legal frameworks and institutions. The recommendations may not entirely fit developing countries. The Task Force will, therefore, assess the possibility of completing the current work with a second phase that will complete the recommendations based upon the views of legal practitioners from developing countries.

The Task Force urges the recommendations below be pursued with all deliberate speed to equip the global community with more potent legal tools to combat pandemics.

I. Healthcare and life sciences

- Simplify long and complex approval processes for therapeutics, diagnostics, tests, treatments and vaccines, while ensuring expedited emergency regulatory clearance and oversight, including reciprocal international recognition of approvals.
- The trend is accelerating towards mandating vaccinations as a condition to participate in public life, on-site employment and travel. Individuals with countervailing health issues should be protected, but will have to accept substantial restrictions or forms of quarantine as an alternative.
- Incentivise and legally authorise the national and, ultimately, international use of interoperable digital health, telemedicine and electronic clinical files for pandemic tests and vaccines.
- Foster the reuse of de-identified health personal data and artificial intelligence (AI) for research and innovation. Make available de-identified data for strategic health planning.
- Ensure that public health legislation equips all levels of government with a toolbox and criteria to avert medical supply and capacity shortages.
- Create a legal and regulatory framework for international and national executive actions during pandemics that provides a clear and harmonised international approach for the distribution of medical supplies, support for innovation, expedited regulatory approval, vaccine injury compensation, and liability limitations due to adverse events caused by therapeutics and vaccines.

II. Communication

- Relax individual consent requirements to allow for the implementation of contact tracing and instruments.
- Store contact-tracing data with an independent authority solely accessible by national healthcare authorities for pandemic purposes to limit unlawful use and dissemination of data.

III. Intellectual property (IP)

- Make medical treatments globally accessible to overcome pandemics and prioritise life and health.
- The pandemic has confirmed that IP-protected innovation remains the solution for pandemics. The technologies underlying vaccines and therapeutics are

driven by the patent system. The patent system has worked well in the prompt reaction and response to offer various vaccines and with promising new products to avert and cure the illness on the horizon.

- Compulsory licences of patents should be thoughtfully reviewed and applied in pandemics, allowing the global community access to vaccines and other medical products. Compulsory licences codified in international treaties, such as the Paris Convention and the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPS), are tools sanctioned by many national laws and international treaties reflecting similar themes, but many are vague and prove to be ineffective. The requirements for compulsory licences should be globally clarified and harmonised. Drawing upon TRIPS and national laws, they should be granted for: (1) pandemics and national health emergencies; (2) to relieve supply shortages or price gouging; and (3) to provide patent holders with fair and reasonable royalties or other remuneration. Compulsory licences should be actively considered based on the criteria applicable to each patent and the circumstances in each country.
- The scarcity of goods and services has proven to be a significant obstacle to spreading vaccines globally. International principles should contemplate measures to facilitate access to inputs through a system that fosters a balance between stakeholders, innovators and governments.

IV. Employment and industrial relations

- Establish international principles for mandatory testing and vaccinations, provided that vaccines have been made globally available.
- Define the legal status for the international remote worker and adopt global minimum social security safeguards.

V. International commerce and distribution

- The general principle of good faith must be applied to resolve pandemic-related disputes. Consistent with good faith obligations, parties should be required to enter into contract renegotiations to mitigate adverse pandemic consequences.
- Force majeure clauses and procedures expressly addressing Covid-19 should be adopted for specific trade sectors.
- Trade associations should provide advice to regional, national and local governments as ad hoc mediation and advisory services for their industry to manage pandemic fallout and draft commodity-specific clauses allocating risks, costs and liabilities arising from business interruptions in their sector.

- Commercial parties should adjust their practices, use technology to prevent disruption and fairly allocate legal risks caused by unforeseen pandemic consequences to protect the global flow of good and services.

VI. Technology

- Pandemic containment is impeded by the individual and informed data disclosure consent requirement, but excessive loosening of protections may lead to privacy and data abuse. Data anonymisation and minimising use of personally identifiable data are, therefore, key.
- Stronger international principles are needed to protect cybersecurity, the digital space, digital privacy and storage of sensitive information.
- Students and children need stronger international legal protection in the digital space.
- Data aggregators must be regulated to prevent downstream data harms. Data aggregator regulations should enforce transparency about data sources and provide individuals the right to correct, delete and access data collected about them, and the right to opt out entirely from having their data included in data sets used and sold by data aggregators.
- Governments must commit to post-pandemic systemic de-structuring of surveillance and data collection infrastructure.

VII. Immigration and nationality

- Any derogation from the principle of free movement of people enshrined in regional and multilateral treaties, international human rights and refugee law through the use of border closures, travel bans and travel restrictions should only occur in health emergencies if it is: (1) proportionate; (2) evidence-based; and (3) clearly outweighs social and economic damage. Regional trade and economic/political bodies such as the European Union, North American Free Trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN), African Union, Mercosur, Caribbean Community (CARICOM) and Gulf Cooperation Council (GCC) should play a greater role in planning for future pandemics.
- The WHO should play a leading role in reviewing the use and misuse of travel bans and provide clear guidance on suitable and proportionate measures.
- The shutdown of global visa application infrastructure can be avoided if countries commit resources to improve their visa processes. Best practices from countries using digital technology to allow visa processing should be shared and replicated. States should look at alternatives to 'bricks

and mortar' application centres, and facilitate online filing and biometric submission of documents.

- States should secure application channels for refugees to apply for asylum and adopt clear contingency plans for essential services for migrants, including immigration courts.
- States should legally ensure equal access to testing, pandemic prevention and vaccination services for all migrants, displaced persons and refugees, *regardless* of immigration status.

VIII. Antitrust

- Both preventive (mergers) and repressive (investigations) enforcement should be flexible when companies are struggling to survive pandemics; authorities must interpret accordingly anti-competitive conduct in the context of a pandemic.
- Bureaucracy should be relaxed, while the necessity of certain formalities should be considered in the context of a pandemic. The current use of technology should be continued.

IX. Anti-corruption

- The ways in which corruption and fraud undermined efforts to address the pandemic underscore the importance of implementing and enforcing broad, globally coordinated anti-corruption detection and enforcement efforts, both for governments and the private sector, especially with respect to essential procurement and compliance.

X. Treaties

- More than 20 heads of government and international agencies have called for an international pandemic treaty, recognising that there will be other pandemics and major health emergencies requiring a united and coordinated global front for effective pandemic responses which draw upon the WHO constitution and that of other organisations. An international pandemic treaty would address the approval, production, supply and access to medical equipment, vaccines, medicines and diagnostics, and cooperation on research and technology. The treaty would also take multi-sectoral actions, such as the regulation of the production and supply chain, and measures to limit social and economic disruption caused by pandemics to transport, international trade, employment and social protection. However, a treaty would require ratification by most countries to be impactful. This would be difficult to achieve and entail a substantial period of time for negotiation and ratification.

Moreover, if a treaty is to be administered by the WHO, nations must willingly cede substantial powers to the WHO. Thus, while the need for an international pandemic treaty is acute, the actual conclusion of an omnibus global treaty is unlikely. Fortunately, such a treaty is not necessarily required for a robust unified approach to pandemic responses, as evidenced by the international response to the 2008 global financial crisis.

- We strongly recommend pursuing the conclusion of such a treaty, even in the longer term, and dedicating significant resources and efforts to this purpose. In the meantime, a practical and speedy approach is to improve existing regimes and conclude multilateral agreements in areas where global consensus is more likely to be achieved quickly, such as the:
 - harmonisation of laws regulating therapeutics to enable fast-track approval and international recognition of national approvals and registrations;
 - faster scientific reporting of pandemic outbreaks without political interference, enabling the proper investigation of pandemic causes and enactment of laws averting their recurrence (eg, international regulation of known causes, such as bat-to-human contact and international regulation for handling of biohazardous material);
 - creating a new global system of research cooperation, including information sharing and de-identified data for health services, product innovation and health service planning;
 - harmonisation of border controls, travel, airport entries, customs, import–export rules and transportation, including the establishment of an international protocol for advance communication of border closures and vaccination status electronically linked to passports;
 - agreement on the details of key pandemic spread management issues, including travel restrictions, alongside general rules and conditions for introducing lockdowns;
 - establishment of a pandemic authority in each country (acting on scientific evidence), regulating the communication between countries, strengthening knowledge transfer free from political interference, and reviewing the role of the WHO;
 - dealing with infection across borders, including on cruise ships and stranded vessels; and
 - harmonisation of social security regulations applied to international remote workers.
- For IP matters, TRIPS and the Paris Convention should be amended to provide for:

- the implementation of compulsory licences, in compliance with clearly defined and uniform international standards;
- secure patent protection and innovation investment;
- online IP filing and proceedings across all jurisdictions; and
- promotion of collaboration between governments and stakeholders for the transfer of pandemic-related technology.

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