

HUMAN RIGHTS

Incorporating human rights on global health security screening at the airport: an analysis of the International Health Regulations 2005

Dr Ismail Adua Mustapha *

Introduction

Adoption of Human rights as one of the significant innovations and changes affecting public health through international law, has greatly contributed to the growth and development of international human rights to public health. This is evident in the World Health Organization's Constitution (WHO) 1948, where it was enshrined that the attainment of health is one of the highest fundamental human rights.¹ In furtherance of the various human rights laws provisions, the World Health Assembly (WHA),² under the umbrella of the World Health Organization, adopted a new International Health Regulations (IHR) in May 2005, incorporating and adopting the various international human rights provisions.³ This adoption therefore put an end to the various revision exercises on the IHR which commenced in 1995.⁴ The adoption of the IHR 2005 was urgently needed to safeguard the international community against the potential outbreak of influenza, which started rampaging the Asia, and which could eventually become epidemics transmitted by human-to-human,⁵ thereby affecting the global health security.

Consequently, the new IHR widen the scope of the IHR's obligations by incorporating human rights principles. Thus, the new IHR maintain that implementation of its provisions shall be in compliance "with full respect for the dignity, human rights and fundamental freedoms of persons."⁶ Neither the old International Sanitary Regulations 1951 nor the 1969 International Human Rights Regulations directed the Port Authority in civil aviation institution to act in strict compliance with the human rights provisions. However, an improved 2005 Regulations has filled the gap by directing the States parties' Public Health Authorities to implement IHR 2005 medical examination, vaccination or prophylaxis on civil aviation passengers and goods to do so with due regard to human rights to privacy, movement, and freedom from discrimination on one hand, and to be in compliance with the vision and preamble to the World Health Organization's Constitution 1948.

This article will therefore provide the reader with an analysis of IHR 2005 enhanced roles of civil aviation authority in maintaining global health security at airports. It will then examine the twin methods (Traditional and Modern) of conducting global health screening of passengers at the airport. This will be done to give insights to the various screening modes to be adopted under the IHR 2005. The article will finally discuss the issue of health security screening versus adherence to human rights, particularly with respect to right to human dignity, privacy and freedom of persons as provided under the IHR 2005. The importance of this is to discover whether or not the global health security is to support the various rights mentioned under the IHR 2005.

* Department of Business Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria.

¹ See David Fidler, From International Sanitary Convention to Global Health Security: 'The New International Health Regulations' (2005) 4 (2) *Chinese Journal of International Law* 326.

² World Health Assembly is the World Health Organization's highest policy-making organ of WHO with power to review or revise and adopt international health instruments. See David Fidler (n 2) 326.

³ See World Health Assembly Revision of the International Health Regulations, WHA 58.3, 23 May 1995.

⁴ See World Health Assembly Revision of the International Health Regulations, WHA 48.7, 21 May 1995.

⁵ See Angus, N. et al, 'Proposed New International Health Regulations' [2005] *British Medical Journal*, 321.

⁶ World Health Assembly, Revision of the International Health Regulations, WHA58.3, 23 May 2005 (hereinafter IHR 2005), Art. 3 (1).

Enhanced roles of the Civil Aviation Authority in sustaining global health security in the light of IHR 2005

Pursuant to the provisions of the IHR 2005, the Civil Aviation Port Authority (CAPA) of a State Party is burdened with the critical roles to maintain global health security through strict compliance with the provisions of the IHR on prevention and suppression of the spread of infectious diseases, without violating the provisions of human rights to privacy, freedom of movement and discrimination. These roles are discussed hereunder.

Civil Aviation Authority and Global Health Security under the IHR 2005

It is argued that one of the responsibilities of the aviation authority is to maintain safe and secure air through the prevention of terrorism, as well protecting the passenger against infectious diseases. That was why the Convention on International Civil Aviation 1944 (Chicago Convention)⁷ obliges the State party not to use the civil aviation in a manner that will negatively affect world safety and security.⁸ It is not only the use of aircraft as weapons of mass destructions that is contravening the intent and purpose of the 1944 Convention, the ability to use the aircraft as a means of spreading infectious disease(s) can also be regarded as an act of using the aircraft against the intent and purpose of the Chicago Convention 1944 and the IHR 2005 respectively. Against this back drop, the IHR 2005 directives to prevent, suppress, and control the international spread of disease in ways that commensurate with and restricted to public health risks subject to avoiding unnecessary interference with international traffic of passengers and trade must be complied with.⁹ Therefore, the civil aviation authority, must, as a matter of compliance, dutifully perform the following functions under the Regulations:

Protection of goods from any source of infection or contamination

The authority shall properly monitor all goods including baggage, cargo, containers, conveyances, postal parcels and human remains departing or arriving from affected territories to ensuring that they are free from infection or contamination, “including vectors¹⁰ and reservoirs.¹¹” It is submitted that the authority can implement this provision by keeping the goods in a decontaminated or derrat areas otherwise it will be difficult to detect which goods is infectious or contaminated. Fundamental to the implementation of this provision is human factor; the monitor must be a person who has passion for carrying out this responsibility and he must be at all-time be provided with necessary supports so as to serve as motivational apparatus in carrying out his duty. The supports include enabling environment, prompt payment of salaries and allowances; and adequate facilities needed to perform this important duty.

Protection of facilities from sources of infection or contamination

The facilities been used by the passengers at the point of entering a particular State shall be free from any sources of infection or contamination.¹² Maintaining these facilities in a sanitary condition is a key factor to carry out this responsibility. Consequently, the sanitary methods such as de-ratting,¹³

⁷ Chicago Convention on International Civil Aviation 1944 adopted on 7 December 1944 and entered into force on 4 April 1947, ICAO Doc. 7300/9, Ninth Edition, 2006.

⁸ Ibid, Art. 4.

⁹ See International Health Regulations, 2005, Art. 2

¹⁰ “Vector” means an insect or other animal which normally transports an infectious agent that constitutes a public health risk, See IHR 2005, Art. 1

¹¹ “Reservoir” means an animal, plant or substance in which an infectious agent normally lives and whose presence may constitute a public health risk. See IHR 2005, Art. 1. See IHR 2005, Art. 22 (1) (a).

¹² Ibid, Art. 22 (1) (b).

¹³ “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, See IHR 2005, Art. 1

disinfection,¹⁴ disinsection,¹⁵ or decontamination,¹⁶ of all goods are the keys to maintain facilities protection against been infected or contaminated.

Supervisory role and notice of sanitary duty

Sanitary examination or vaccination or inspection of travellers/passengers is one of the fundamental duties of the civil aviation public health authority in controlling the spread of infectious diseases. Therefore, sanitary measures are required for passengers and the goods including human remains at the point of entering or departing which ought to be supervised by the civil aviation authority in-charge.¹⁷ Further to this duty is an advance written notice of sanitary duty, and the method to be adopted in carrying out the conveyance operators' duty.¹⁸

It is submitted that lack of or inadequate supervision will certainly affect the effective measures to control the spread of infectious diseases in international airports. This might, probably contributed to the spread of diseases such as Ebola Virus, COVID-19 among others which has negatively affected the global socioeconomic being of human race across the world. Furthermore, the authority is obliged to supervise the removal and safe disposal of any contaminated goods,¹⁹ or article including foods, human or animal "dejecta", wastewater and other contaminated goods from a conveyance.²⁰ Accordingly, the regulations defines contamination as "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".²¹ The Regulations defines "conveyance" to mean an aircraft, ship, train, road vehicle or other means of transport on an international voyage.²² Therefore, the Civil Aviation Authority is under the regulatory obligation to make sure that its public health officer removes any aircraft that is infected with any of the communicable disease or containing any of the toxic agent or dead body or any contaminated objects that may constitute a global health risk. It is further submitted that the authority has two duties in this respect: removal of any infectious objects or toxic agent among others; and safe disposal of what the authority is removed from the aircraft or goods. They therefore complement each other, as removal without safe disposal will amount to non-implementation of the regulations.

The Authority is further obliged to supervise the ways and manner the Service providers carry out inspection and examination of passengers and their goods including cargo, parcel, aircraft, human remains and all other objects at the point of entry a particular destination.²³ What therefore is the relationship between 'Inspection and examination'? The *Cambridge Dictionary* has interpreted the word "inspection" to mean "the act of looking at something carefully, or an official visit to a building or organization to check that everything is correct and legal"²⁴ the Black's law dictionary defines the term as "the examination or testing food, fluid or other articles made subject by law to such examination,

¹⁴ "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. See IHR 2005, Art. 1

¹⁵ "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, and goods and postal. See IHR 2005, Art. 1 parcels;

¹⁶ "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, which may constitute a public health risk. See IHR 2005, Art. 1

¹⁷ See IHR 2005, Art. 22 (1) (c).

¹⁸ "Conveyance operator" means a natural or legal person in charge of a conveyance or their agent. See IHR 2005, Art. 1. Ibid, Art. 22(1) (d).

¹⁹ "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. See IHR 2005, Art. 1

²⁰ Ibid, Art. 22 (1) (e).

²¹ Ibid, Art. 1

²² Ibid.

²³ Ibid, Art. 22 (1) (g).

²⁴ See *Cambridge Dictionary* <<https://dictionary.cambridge.org>> assessed on 25/10/2022.

to ascertain their fitness for use or commerce”.²⁵ The regulations define the term as “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”²⁶ It is submitted that the terms: “inspection and examination” connote the same meaning, and can be used interchangeably in aviation parlance.

However, a distinguishing factor that differentiates inspection and examination is the word “medical”. Therefore, “medical examinations” 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”²⁷ By this definition, the Regulations has placed a duty on the authority to permit Airport public health officer to physically assessed passengers for the purpose of determining their health status with a view to knowing whether or not they constitute potential health risk to the public. It needs be stated that assessment is not only directed to passengers’ person, the health documents may be screened by way of assessing the required document at the point of entry whenever the need arises.

Provision for contingency arrangement for unexpected public health risk

The authority is under an obligation to have plan and provide contingency arrangement to guide against unexpected public risk.²⁸ Although what amounts to contingency arrangement for the unexpected public health risk is not stated in the Regulations. However, submitted that arrangements such as sanitary measures, means of inspection and medical examination, means of communication and the equipment to be used in conducting and/or inspection of goods and medical examinations of passengers can be regarded as contingency plan. It is submitted that timely control of infectious diseases at the point of entry a State is crucial in the prevention of spread of communicable diseases. This is will be possible where the authority has proper planning including provision for contingency arrangement for expected or unexpected health risk. It is submitted that it was the failure of the Civil Aviation Authority in Nigeria to have a standby plan and contingent arrangement that caused the rapid spread of *ebola* virus and COVID 19 in Nigeria.

Reapplication of Health Measures on Arrival of passengers

The IHR 2005 provides that the civil aviation authority is responsible to reapply World Health Organization’s health measures for travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains disembarking from an affected area, if evidences are bound that the measures applied on departure from the affected area were not successful.²⁹ It is submitted that the condition precedent for the implementation of the above provision are: (a) the passengers or goods or human dead body must have departed from an affected area; (b) there must be verifiable indications and/or evidence of unsuccessful application of health measures on departure; and (c) the measure must have been the one prescribed by the World Health Organization.

It is also submitted that the word “may” as adopted in the provision ordinarily connotes “not compulsory.”³⁰ It is however be noted that it is not in all situation that a “not compulsory” obligation meaning is given to it. In fact in some situations, the word “may” has been interpreted to be word of obligation or compulsion to perform an obligation.³¹ Considering the importance of the WHO’s health measures in controlling and preventing the spread of communicable diseases, the principle of reapplication of health measures should be made compulsory, more so where there is evidence of

²⁵ See *Black’s Law Dictionary*, 2nd Edition, INSPECTION: Definition & Legal Meaning <thelawdictionary.org> assessed on 25/10/ 2022.

²⁶ IHR 2005, Art. 1.

²⁷ Ibid.

²⁸ Ibid, Art. 22 (1) (g).

²⁹ Ibid, Art. 22 (2).

³⁰ See *State of Kerala & Ors v Kandath Distilleries* (2013) 6 SCC 573

³¹ See *Ramji Missar v State of Bihar* AR 1963 SC 1088.

unsuccessful application of health measure to passengers; goods including cargo, postal parcel and human remain in departing states.

However, such public health measures should be applied or reapplied so as to avoid injury, 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”.³² In summary, it should be applied in such a way that will not contravene the human rights as enshrined in the human rights laws.

Global health security screening of airline passengers

Pursuant to the International Civil Aviation Organization (ICAO) Health-Related Document to effectively secure global health safety, the public health authority of the affected State in conjunction with the Airport Authority and the WHO should, as a matter of obligation, conduct a national exit screening for any of the passengers without any form of discrimination before boarding the aircraft.³³ The purpose of this guidelines on national exist screening are: (1) to reduce or erase the transport of infectious diseases through the air transport, (2) to ascertain the number of passengers who have been infected before boarding the aircraft and (3) to apply the required treatment to the affected passenger.

Conceivably, the guidelines further encouraged the State concerned to adopt screening methods such as Visual inspection, Questionnaire and temperature measurement by means of temperature measurement devices.³⁴ Visual observation and questionnaire can be described as traditional on one hand, adoption of Bodily Temperature Devices are referred to as Modern methods of global health safety screening. Traditionally, none-medical personnel at the airport may be engaged to carry out visual observation and identification of those passengers who are demonstrating symptom of infectious disease before boarding the aircraft.³⁵ This is tactically referred to as primary health screening. The advantage of this method is that it is free from contravening the fundamental human rights of passengers since no contact is involved. However, it involves the deployment of many none-medical personnel to carry out visual observation. Furthermore, its adoption is for mere suspicion of passengers who might be infected with disease.

In case of the questionnaire, the public health authority subject to the supervision of civil aviation authority shall distribute questionnaires to the passengers before, during or at the point of disembarkation at the point of arrival. The questionnaires are designed in such a way that each passenger is obliged to fill his/her information concerning the status of his/her health status. Such information shall be treated as correct and truth to the best of the informant’s information. Therefore, the purpose of this strategy is (a) to ascertain whether the passenger is from the disease infected area; (b) to know whether a particular passenger has had contact with an infected person, (c) to ask the passenger to report his/her symptom; and (d) to obtain passenger’s contact information at his/her destination.³⁶ The adoption of questionnaire facilitates contact tracing should in case it is discovered that the aircraft is infected with infectious disease. However, the challenges in the adoption of this method are that passengers may give fake information which will make it impossible to trace the suspicious passenger. In addition, illiterate syndrome is another challenge. Some may not be literate in the language of the questionnaire while others may be illiterate. For the administrator, the time to carry out analysis of questionnaire is a serious challenge. Before the analysis could be concluded, all the passengers would have dispersed from the screening area. These pose a serious challenge to the administration of questionnaire as one of the primary screening strategies at the airport.

³² IHR 2005, art. 22 (3).

³³ See ICAO Health-Related Documents: Airport Preparedness, p. 23 <

³⁴ Ibid.

³⁵ See Lukas Gold, Ismaeil Balal, and Okan G, ‘Health Screening Strategies for International air travellers during an epidemic or pandemic’ [2019] 75 *Journal of Transport Management* 27.

³⁶ Gostic Katelyn *et al*, ‘Effectiveness of Traveller Screening for Emerging Pathogens is Shaped by Epidemiology and Natural History of Infection’ (2015) *Elife*, 4 <elifesciences.org> accessed 27/10/22. See also Shu P.Y *et al*, ‘Fever Screening at Airport and Imported Dengue’ (2005) 11(3) *Emerg. Infect. Dis.* 460.

The adoption of visual look and infrared thermometer, no doubt cannot give desired results in combating the spread of infectious disease. The need to deploy technological health screening devices known as Body Temperature Measurement Devices is inevitable. The device is more advanced and is deployable to screen passengers before boarding the aircraft. The device is of three types: Non-contact Infrared Thermometer, Non-contact Infrared Thermometer Camera, and Ear Infrared Thermometer.

Non-contact Infrared Thermometer (NCIT) is a temperature measuring device to screen and ascertain the temperature of passengers before boarding the aircraft. Practically, it is held by a screening officer who is expected to give distance between 1.2 and 6 inches (3-15cm) from the passenger's forehead.³⁷ The accuracy of its ability to detect fever is between 80%-99%, its error therefore, could be ± 1.0 degree Celsius. However, the device is known for its ability to adapt to different weather, therefore it does not need frequent calibration. This makes it to be less expensive and easy to maintain.³⁸ On the other hand, Non-Contact Infrared Thermometer Camera (NCITC) otherwise known as Thermal Imaging Camera or Thermographic Camera is used to ascertain the temperature of passengers as they pass through the field of view. Its effectiveness and efficiency in determining the accuracy of temperature of passengers depend on how effectively used with the Thermometer.³⁹ Fundamental advantage of NCITC is its higher screening capacity than NCIT. However, unlike NCIT, it does need constant calibration to meet the weather condition otherwise it will lose its efficiency and efficacy. Also, it is not easy to maintain as an instrument of screening at the airport because of its high cost of maintenance.⁴⁰ The Ear Infrared Thermometer, a contact temperature screening device to ascertain and confirm the temperature of a passenger. It is usually adopted as a supplementary to other temperature screening devices because of its accuracy.⁴¹

It is submitted that all these devices constitute means of conducting primary screening of passengers' temperature at the airport. They do not ascertain the nature of infectious disease affecting the suspected passenger(s). It can be safely concluded that they can only be used as suspicion devices. Therefore, what then required to ascertain the real health status of the passengers especially when temperatures rose beyond the normal measurement? It is argued that the secondary method of screening passenger should be deployed. It is an outright medical examination of those who have been suspected to have contacted the infectious disease having undergone the processes of primary screening. The necessity to conduct secondary screening is not farfetched from the fact that primary screening devices cannot ascertain the nature of infectious disease contacted by a particular passenger. While the adoption of medical examination as a secondary measure is pointing to the accuracy of the nature of infectious disease. Its time consuming and delay of passengers constitute source of worry to aviation stakeholders.⁴² Fundamentally, the aim and objective of the secondary screening through medical examination is to ascertain the nature of sickness with a view to prevent its spread to the international community or within the community of nations.

It needs be noted that whichever method is adopted, the provisions of fundamental human rights must be strictly adhered to. The ICAO Health-Related Document and the IHR 2005 obliged member States to consider the instrumentality of human rights provisions whenever the devices on the suppression and prevention of spread of diseases are been deployed. The ICAO Health Related Document provides that 'States are obliged to respect a traveller's fundamental human rights...'⁴³ This provision did place a blanket obligation on the State party concerned. Because, the nature of human rights the airport public health screener is to respect are not specifically mentioned. However, the gap was filled by giving

³⁷ Fluke, *Fluke Corp.; Everest, WA: 2017. Infrared Thermometers*. < <http://en-us.fluke.com/products/thermometers/fluke-62-max-plus-thermometer.html> > accessed 27/10/22.

³⁸ See CDC (Center for Disease Control) Non-contact temperature measurement devices: consideration for use in port of entry screening activities. 2014 < <https://wwwnc.cdc.gov/travel/files/ebola-non-contact-temperature-measurement-guidance.pdf> > accessed 27/10/22.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Cho Kyung *et al*, 'Fever Screening and detection of Fabrice arrivals at an international airport in Korea: association among self-reported fever, infrared thermal camera scanning, and tympanic temperature' (2014) *Epidemiology, Health* 36.

⁴³ ICAO Health Related Document, Note 1, 22-23.

directive to implement health related screening subject to the provisions of the IHR 2005.⁴⁴ Consequently, the IHR 2005 provides that ‘the implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.’⁴⁵ These rights are now analysed.

Global health security screening and the IHR 2005 fundamental human rights provisions

Human rights provisions enshrined in the IHR 2005 supports the notion that the port health security screening at the airport shall conduct health-related screening with due regards for fundamental right to freedom of movement, freedom from inhuman treatment, freedom from discrimination and delay, and right to confidentiality of data information. Filder opined that “the human rights obligations in the new IHR mean that the objective of minimum interference with international traffic includes protecting not only trade flows, but also human rights.”⁴⁶ Therefore, the importance of human rights to the public health screening of passengers at the airport is acknowledged in the IHR 2005.

Global public health screening at the airport and right to human dignity

The term “dignity” has no precise meaning or definition as neither the IHR 2005 nor any of the International or national human rights laws is helpful in giving a precise or specific meaning or definition. This has created serious *lacuna* in determining the scope and limitation of the term in the field of international human rights law. Thus, different meaning has been ascribed to the term, depending on those who invoked it.⁴⁷ This is evident in the statement of Conor that the term ‘dignity’ as used by the States is creating confusion on the ground of its adoption base on different philosophical and cultural thinking of the respective State. He goes on to state that:

A person’s inherent dignity demands the protection of human right on the basis of equal treatment and respect and while the unjustified deprivation of human right may constitute an attack on human dignity, it can never be deemed to derive a person of his or her inherent dignity.⁴⁸

Accordingly, Conor is trying to justify the notion that ‘Human right is the foundation for dignity but not dignity as foundation for human rights’⁴⁹. That was why he further stated that “cruel, inhuman or degrading treatment is one of the most widely recognized ways of infringing on person’s human dignity”⁵⁰ It is submitted that Conor has failed to give a specific meaning of ‘human dignity’ rather he merely stated the foundational basis and the scope of the term. A further argument on the nature of ‘dignity’ as opposed to human right has also been canvassed by Feldman to the effect that:

The notion that dignity on itself be a fundamental right is superficially appealing but ultimately unconvincing. We are conceived and born, and most of us live and die, in circumstances of significant indignity. It seems...that human dignity is a desirable state, an aspiration, which some people manage to achieve some of the time, rather than a right. Nevertheless, human rights when adequately protected, can improve chances of realizing the aspiration’⁵¹

Shultziner’s comment on the nature and scope of human dignity is not different from the earlier writers. He states ‘that...human dignity is regarded as a supreme value that not only stands separated from

⁴⁴ See ICAO Health Related Document, Annex 9: Facilitation, paragraph 8.12, 6.

⁴⁵ See IHR 2005, Art. 3 (1).

⁴⁶ David Fidler, ‘From International Sanitary Conventions to Global Health Security: The New International Regulations [2005] 4(2) *Chinese Journal of International Law*, 367.

⁴⁷ See Doron Shultziner, ‘Human Dignity-Functions and Meanings’ (2003) 3 (3) *Global Jurist Topics* 1; Henk Botha, ‘Human Dignity in Comparative Perspective’ (2009) 2 *Stell LR* 171-172; Conor O’Mahony, ‘There is no such thing as a right to dignity, I. (2012) 10 (2) *CON* 554-557.

⁴⁸ Conor O’Mahony (n 50) 563.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 569.

⁵¹ David Feldman, ‘Human Dignity as a Legal Value: Part 1’ (1999) *Public Law* 682; Conor O’Mahony (n 50) 561.

human rights but also supersedes them. Human rights derived from human dignity while the latter encompasses the essential characteristics of human beings⁵² It is submitted that the nature of dignity is, however, not so clear, as it can be regarded as a tool for strict application of human right to global health security screening of passengers at the airport. Therefore, public health screeners at the airport are under international and national human rights laws obligation to apply equality and respect in the screening of passengers at the airport. This will serve as a foundational basis to the protection of passengers' fundamental human rights.

Global public health screening at the airport and fundamental human right to privacy

Despite the fact that there is no consensus definition of 'right to privacy', yet the IHR 2005 provides for health security screening at the airport with due respect for human right to privacy.⁵³ Although the importance of right to privacy is as old as the history of human existence.⁵⁴ However, the difficulty in comprehending the term makes difficult in defining what it is.⁵⁵ This led to the elusive characteristics in defining the right to privacy⁵⁶ as different scholars looked at it from different background and cultural usages. For example, some scholars looked at it from moral, sociological, religious and cultural perspectives. However, these perspectives are outside the scope of this paper. A 19th century scholar, Warren and Brandeis define it as a 'right to be let alone'⁵⁷ It has also been defined as:

Our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thought feelings, secrets and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose.⁵⁸

Westin defines it as:

The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.⁵⁹

While Warren and Brandeis define the term 'right to privacy in the context of what is obtainable in common law jurisdiction, with the mind set of civil suits against gossip-mongers in the 19th century, Westin conceptualized it in term of individual approach to right to privacy. On the other hand, Westin extended it meaning to include societal right to secrete of information. It can be safely concluded that the concept of right to privacy is "elusive and ill defined".⁶⁰ Meriam Webster dictionary defines it as 'right of person to be free from intrusion into or publicity concerning matter of a personal nature'.⁶¹

The concept of right to privacy has been provided in the IHR 2005. The Regulations provides:

⁵² See Doron Shultziner, 'Human Dignity-Functions and Meanings' (2003) 3 (3) *Global Jurist Topic* 1; Botha H., 'Human Dignity in Comparative Perspective' (2009) 2 *Stell LR* 171-172. See also Paolo Carozza, 'Subsidiarity as a structure principle of international human rights law' (2003) *AJIL* 46; Lorraine Wereinb, 'Human Dignity as Rights Protecting Principle' (2004) 17 *National Journal of Constitutional Law (NJCL)* 132.

⁵³ IHR 2005, Art. 3 (1).

⁵⁴ Patricia Newell, 'Perspective on privacy' (1995) 15 (2) *Journal of Environmental Psychology*, 95; Alibeigi A, et al, 'Right to privacy, a complicated concept to review' (2019) *Library Philosophy and Practice (e-journal)*.

⁵⁵ See Nick Taylor, 'State Surveillance and the Right to Privacy' (2022) 1 (1) *Surveillance and Society* 67; Samuel Warren and Louis Brandeis 'The Right to Privacy' in Schoeman, Ferdinand David, (ed.), *Philosophical Dimensions of Privacy: An Anthology*. (Cambridge, Massachusetts: Cambridge University Press, 1984) 75-103.; Jamal Green, 'The So called Right to Privacy' (2010) 715 *U.C Davis L. Rev* 720; Oliver Diggelmann and Marie Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Right Law Review* 442, 458.

⁵⁶ See Richard Posner 'The Right of privacy' (1978) 12 (3) *Georgia Law Review* 393.

⁵⁷ See Samuel Warren and Louis Brandeis, 'The Right to privacy' (1890) IV (5) *Harvard Law Review* 194.

⁵⁸ See Yael Onn, et al., 'Privacy in the Digital Environment' (2005) *Haifa Center of Law & Technology* 1.

⁵⁹ Alan Westin, 'Privacy and Freedom', 5th edn. New York, U.S.A., Atheneum 1968.

⁶⁰ See Jamal Greene (n 57).

⁶¹ See Right to privacy, Merriam-Webster.com Legal Dictionary, Merriam-Webster < <http://www.merriam-webster.com/legal/right%20of%20privacy>. > accessed 18/11/2022.

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:

(iii) a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective.⁶²

As earlier stated, public health security screening at the airport can be carried out by means of traditional or modern devices, the application of which is subject to fundamental human right to privacy as provided by the IHR 2005 and other international and national human rights laws. Therefore, the unambiguous provision of the regulations to the effect that a non-invasive medical examination which is least intrusive to detect the nature of infection and the status of passenger involved would be a balance in achieving the public health objective. An invasive, according to the IHR 2005 has been interpreted to mean ‘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’.⁶³ The acts of non-invasive have been listed to include ‘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’⁶⁴ Consequently, any method or act adopted to examine a passenger aside those listed under the Regulation could be regarded as an invasive method or act, and therefore interfere with the fundamental human right to privacy of the passenger.

No doubt of the State party’s obligation to maintain least intrusive medical examination is a way to strictly adhere to human right to privacy. Yet, the term “intrusive” has been interpreted to mean ‘possibly provoking discomfort through close or intimate contact or questioning’⁶⁵. A medical examination has been defined by the Regulations to mean ‘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 risk⁶⁶ to others, and may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case’⁶⁷

It is submitted therefore that a provoked discomfort could be sourced while conducting a preliminary assessment of a passenger, or health document to determine his health status and risk to the public, or by physical examination through: (1) close or intimate contact; or (2) questioning of a passenger by the airport medical personnel or an authorized health worker or any person under the supervision under the authority of Port health authority at the airport. Accordingly, going by the Regulations, an intrusive and invasive conduct of civil aviation public health screening would, certainly contravene the fundamental human right to privacy of passenger. Furthermore, while it is mandatory that a suspect passenger whose health constitutes potential health risk to other will have to undergo a medical assessment to determine his real health status, yet this is however subject to an express informed consent of such a passenger otherwise it will amount to a denial of right to privacy. The regulations provide:

No medical examination, vaccination, prophylaxis or health measure under these Regulations shall be carried out on travellers without their prior express informed consent

⁶² IHR 2005, Art. 23 (1) (a) (iii).

⁶³ Ibid, Art. 1.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Public health risk has been interpreted under the Regulations 2005 to mean 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. See IHR 2005, Art. 1.

⁶⁷ Ibid.

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.⁶⁸

Thus, where such passenger is an adult, the consent so required must be obtained from him otherwise it will amount to a flagrant disrespect for such a passenger's fundamental human right to privacy. Likewise, an informed consent of a minor must be obtained through his parent or guardian. It is submitted that the simple reason for a minor's consent to be obtained from his parent is that a minor lacks contractual capacity to enter into a contract of carriage by air. Therefore, parent or guardian shall be liable for any misdeed of the minor. However, an exception to the application of the doctrine of informed consent is where there is an evidence of imminent public risk.⁶⁹ The nature of evidence required and its weight are not stated in the Regulations. However, a documentary or oral evidence of imminent risk to the public at large would suffice. For example, it was evident that COVID-19 posed a serious health risk to the public at large. Its fast spreading through international and local airlines was an evidence and confirmation that the disease constitutes imminent danger to the public. In this circumstance, an informed consent of a passenger (minor or adult) is not required before the authorized personnel could conduct a medical examination. Fidler observed as follows:

The revised Regulation's provisions on compulsory measures raise, however, two concerns from a human rights perspective. First, the new IHR only require States Parties to apply the least intrusive and invasive measure in connection with medical examinations but not to vaccination, prophylaxis, isolation or quarantine.⁷⁰ Secondly, the revised Regulations do not contain requirements that States Parties accord those subject to compulsory measures due process protections, such as the right to challenge such measures in court.⁷¹

Another privacy issue that is protected under the IHR 2005 is Right to privacy of personal data information. The regulations defines personal data as 'any information relating to an identified or identifiable natural person'⁷². Accordingly, a data that is not known to an identifiable natural person needs not be recognized as a personal data or worthy of being protected under the Regulations. The Regulations failed to mention what determines or means of identifying a natural person. However, recourse is made to The European Union (EU) Data Protection Directive where it defines Personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"⁷³. Consequently, a natural person can be identified in person or through physical, physiological, mental, economic, cultural, or his social stability as the case may be.

In the 21st century where new technologies have been deployed to collect, use, and disseminate personal health information of passengers into databases by the Civil Aviation Public Authority. The way and manner to protect information so collected constitutes a source of concerned to human rights activities. This is due to the fact that the rate at which people share another persons' information through social networking sites is alarming. Furthermore, abuses of personal data information regarding passengers' health status during health security screening, including misuse of information for unlawful purposes, identity theft, eavesdropping and skimming are sources of worried in the field of personal data protection syndrome.

⁶⁸ Ibid, art. 23 (4).

⁶⁹ Ibid, art. 32 (2). See David Fidler, 'From International Sanitary Convention to Global Health Sanitary: The New International Health Regulations' (2005) 4 (2) *Chinese Journal of International Law*, 367.

⁷⁰ Ibid, Arts 23.2 and 31.2.

⁷¹ See David Fidler, (n 71) 367.

⁷² Ibid, Art. 1

⁷³ See Directive 95/46/EC, sec. 2[a]; See also Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, June 20, 2007, at <http://www.gov.gg/ccm/cms-service/download/asset/?asset.id=12058063>. Accessed 11 November 2022.

Interestingly, the IHR 2005 did offer data protection in term of collection, storage and usage.⁷⁴ The protection is similar to the principles of Fair Information Practices which has long been applied since 1960s.⁷⁵ Practically speaking, the United States,⁷⁶ Georgia,⁷⁷ Thailand,⁷⁸ and Nigeria⁷⁹ have adopted the principles with a view to protect personal data information so collected.

Global public health screening at the airport and Right to freedoms of persons

The phrase “fundamental freedoms of persons” as used in the Regulations is not defined. It is suggested herein that it could mean two of the freedoms envisaged in the Regulations: Right to freedom of movement and Right to freedom from discrimination. Even though right to freedom of movement is not directly mentioned in the Regulations. However, what appears to mean right to freedom of movement is rooted in article 2 of the Regulations when the purposes of the Regulations are stated to be among others to protect, prevent, control the international spread of disease in ways that would “avoid unnecessary interference with international traffic and trade”.

Consequently, flight restrictions and/or ban from operating international routes on ground of public health issue(s) amount to movement restriction, therefore contravening the right to freedom of movement, thus a flagrant disobedience to art. 2 of the Regulations. For example, while in early February 2020, about 59 airlines companies had suspended or restricted flight operation en route china; and some other countries, United Kingdom, Australia, Russia and Italy placed travel restrictions on some other countries.⁸⁰ In another development, UK imposed travel restrictions on Nigeria on the ground that 21 detected cases of Omicron variant of Covid-19 in England were traceable to travellers from Nigeria. Consequently, Nigeria reacted by placing a reciprocal ban on travellers from UK, Saudi Arabia, Canada and Brazil over Covid-19 variant.⁸¹

It is submitted that the negative implications of flight and/or travel restrictions on global civil aviation business are :(1) it contravenes right to freedom of movement as envisaged under the IHR 2005 and various international human rights laws; (2) it distorts world economic order, thus causes economic instability; (3) it encourages discrimination among the nations. For example, the Nigeria Aviation Minister has described the travel restrictions/ban placed on Nigeria travellers by the UAE aviation authority as “discriminatory profiling of Nigerian.”⁸²

⁷⁴ See IHR Art. 45 (1) and (2).

⁷⁵ OECD (Organisation for Economic Cooperation and Development). 1980. “OECD Guidelines on the Protection of Privacy and Trans border Flows of Personal Data.” Paris, France. http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html; U.S. Department of Health, Education, and Welfare. 1973. “Records, Computers and the Rights of Citizens: Report of the Secretary’s Advisory Committee on Automated Personal Data Systems July, 1973.” Washington, DC. [http://aspe.hhs.gov/DATACNCL/1973privacy/tocpreface members.htm](http://aspe.hhs.gov/DATACNCL/1973privacy/tocpreface%20members.htm); CSA (Canadian Standards Association International). 1996. “Model Code for the Protection of Personal Information.” Toronto, Ontario. For an extensive discussion on the principle of fair information practice, see David Amir Banisar, ‘The Right to Information Privacy and Privacy: Balancing Rights and Managing Conflicts’ (the international bank reconstruction and development/the world bank 1818 h street NW, Washington DC, 2011) 1-8

⁷⁶ See the Privacy Act of 1974, 5 USC 552(a). There is also a patchwork of sectoral legislation applying to health, financial, and credit records; some telecommunications records; educational records; and other areas at both the national and state levels. For a comprehensive overview, see Solove and Schwartz (2008).

⁷⁷ General Administrative Code, sec. 27.

⁷⁸ Official Information Act, B.E. 2540 (1997).

⁷⁹ See National Health Act, 2014, Vol. 101 No. 145, sections 26, 27, 28 and 29.

⁸⁰ See Matteo Chinazz *et al.*, ‘The effect of travel restrictions on the spread of the 2019 novel corona virus (COVID-19) outbreak’ (2020) *Science* 395.

⁸¹ See Oluchi Okorafor, ‘Covid-19 Ban now, Nigeria Places Travel Ban on UK, Canada, Saudi Arabia’ (2021) *Science*, 13 <sciencenigeria.com> accessed 19/12/2022; Bunmi Adeloju, ‘FG to restrict airlines from UK, Saudi Arabia in response to Omicron travel ban’, *The Cable*, 12 Dec., 2021 <the.cable.ng> accessed 19/12/ 2022; see also Jesupemi ‘Are, Covid: UK bans foreign travellers from Nigeria over Omicron concerns’ *The Cable*, 4/12/2022 <thecable.ng> accessed 19/12/2022.

⁸² See Eze Chinadu and Sumaina Kasim, ‘Emirate to resume Nigerian Routes as FG lifts Ban: UAE drops Rapid Antigen Test requirement’ *This Day*, www.thisdaylive.com accessed 19/12/ 2022.

Another part of “fundamental freedoms of persons” is Right to freedom from discrimination. The purposive approach of the Regulations is to protect the international community against the spread of diseases by applying all the public health security measures in a non-discriminatory manner.⁸³ Neither what amounts to non-discriminatory or discriminatory manner nor their meaning was provided in the Regulations. However, article 3 (2) of the Regulations makes the application of its provisions subject to the Charter of the United Nations and the Constitution of the World Health Organization. Therefore, what amount to discriminatory or non-discriminatory of airlines passengers is subject to non-discriminatory provision under the United Nations Charter. Under the Charter, States are encouraged and enjoined to apply laws with due “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;”⁸⁴

It is therefore submitted that what amounts to discrimination is where global aviation health screening is carried out with due regard to race, sex, language or religion. Thus, a non-discriminatory application of the Regulations is where the provisions of the Regulations are administered without considering race, sex, language or religion. The equal treatment of airline passengers on global health security screening without any distinction woman being can think of is referred to a non-discriminatory health security screening at the airport.

Conclusion

The WHO and ICAO had a symbiotic effort on the prevention and protection of international community against the spread of deadly diseases through a theoretical approach by adopting IHR 2005 and the ICAO Guidelines on the application of IHR 2005. While the WHO made general theoretical efforts toward maintaining international health peace by way of adoption of IHR 2005 to eradicate, prevent and suppress the spread of infectious disease, the ICAO singlehandedly made case for civil aviation on how, whom and when the IHR 2005 is to be applied through guidelines in preventing and suppressing the infectious diseases through air transport. This article has clearly analysed the statutory roles of civil aviation authority as directed by the IHR Regulations 2005 in order to sustain sound health of passengers worldwide. The article argues that the directions are the pre-screening roles which must be strictly complied with if the spread of disease is to be curtailed and sound world health is to be maintained. Therefore, strict adherence to pre-screening roles are one of the keys to achieving the aim and objectives of the Regulations 2005.

It is also argued that pre-screening roles of civil aviation authority is not a full proof in preventing and suppressing the spread of disease, further screening of passengers and goods must be conducted through traditional and modern methods. The essence is to ascertain the health status of passengers as well as that of goods, and to know whether or not they constitute public health risk of international concern. It is therefore submitted that the screening roles compliment pre-screening duties because they are two sides of the same coin that are made inseparable to eradicate the spread of infectious disease. However, the methods so adopted must be subject to fundamental human rights under the Regulations 2005.

While it is interesting to state that WHO’s proposals for incorporating human rights in IHR 2005 was traceable to the January 2004 IHR Draft wherein stricter obligations is placed on States Parties regarding protection of rights of identified or identifiable persons than the existing international human rights laws. Very apt in the IHR 2005 as applicable to global security health screening of passengers’ is the doctrine of non-invasive medical examination, vaccination or prophylaxis on travellers without the traveller’s prior informed consent.⁸⁵ The provision was incorporated to protect the fundamental human right to privacy which includes data protection privacy. However, the public health officer at the airport may conduct any invasive screening of passengers’ but subject to compliance with certain laid down

⁸³ IHR 2005, Art. 42.

⁸⁴ United Nations Charter <https://www.un.org/en/about-us/un-charter/full-text> assessed 20/12/2022; Art. 1 (3).

⁸⁵ See World Health Organization, International Health Regulations: Working Paper for Regional Consultations, IGWG/IHR/Working paper/12.2003, 12 January 2004 (hereinafter January 2004 IHR Draft), art. 36 (2).

procedures and protections under the IHR 2005.⁸⁶ Therefore, informed consent of passengers need not be undertaken while examining, vaccinating among other protection devices in order to protect the sanctity of public health.⁸⁷

Furthermore, the concepts of freedom of equality and freedom from discrimination; and freedom of movement had had considerable effects on the passengers. The passengers were not treated equally when it comes to matter of testing or medical examination thereby contravening the doctrine of equality as envisaged in international human rights laws. The way and manner some passengers were being profiled with a view to discriminate was not in tandem with the spirit of IHR 2005. Travel restriction and /or ban placed on some countries clearly inhibits freedom of movement the implication of which the civil aviation business has been distorted.

⁸⁶ See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1985) (hereinafter the Siracusa Principles).

⁸⁷ IHR Conflicts Analysis, 67–8 (“International law allows states to require medical examination, vaccination, or other prophylaxis as a condition of admission for travellers as long as there is compliance with international human rights law. . . . International human rights law recognizes the legitimacy of requiring compulsory medical examination, vaccination, or other prophylaxis in exceptional circumstances”).