

Comment

The Coronavirus Challenges the International Order*

The far-reaching effects of the coronavirus crisis are not limited to the domestic legal order, but had significant repercussions for international relations and international law. The comment will discuss six key issues that show how well-meant efforts to combat the pandemic have negatively affected the functioning of the international legal order.

I. The Decline of International Organizations: The Failure of the WHO and the UN Security Council

International cooperation met with resistance in all fields even before the pandemic started. This did not favor a coordinated response to the disease, although Covid-19, which ignores borders and sovereignty, called for international management, primarily by the World Health Organization (WHO).

The WHO is vested with the power to take action in the field of global health. It can collect and disseminate information on diseases and make recommendations. In special fields – among them those concerning sanitary and quarantine requirements and other procedures designed to prevent the international spread of diseases – it may even adopt general regulations binding upon all members.¹ The International Health Regulations (IHR) of 1969, amended in 2005, address, for instance, the response to pandemics.² Art. 6 para. 2 IHR provides for the obligation of States to notify the WHO of any situation that may constitute a public health emergency of interna-

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¹ Art. 21 lit. a IHR 2005, however, States may opt out ; s. *A. von Bogdandy*,/*P. A. Villarreal*, International Law on Pandemic Response: A First Stock-Taking in Light of the Coronavirus Crisis, MPIL Research Paper Series, No. 2020/07, a follow-up to *A. von Bogdandy*/*P. Villarreal*, Critical Features of International Authority in Pandemic Response, MPIL Research Paper Series, No. 2020/18.

² <<https://www.who.int>>.

tional concern, and Art. 12 IHR for the power of the Organization to determine the existence of such a situation. According to Art. 9 IHR, the WHO may also collect information from private organizations. The WHO may qualify a disease as a public health emergency of international concern – a declaration that as such does not entail any legal consequences – and it may advise how to respond to a given pandemic, for example by introducing travel bans, quarantines, or sanitary measures. When pandemics actually occur, the general binding acts issued by the WHO authorize this organization only to give non-binding recommendations.³ The WHO may assist when it is asked to do so, and it may criticize States that try to conceal a pandemic, but it must not interfere in the sovereignty of Member States. This shows the ambivalence of States regarding the transfer of powers to international organizations. The Member States, anxiously defending their sovereignty, always denied the WHO more competencies; for example, the WHO cannot send commissions to the Member States without prior notification.

The amendments of the IHR of 2005 may be interpreted at least in part as a rejection of any attempt by the WHO to get involved in the States' internal affairs.⁴ Moreover, the Member States refused to increase funding, thereby allowing the *Bill and Melinda Gates* Foundation to become one of the biggest contributors to the WHO, second only to the United States (US).⁵ The WHO's activities and responses to previous pandemics did not always meet with sympathy in the international community. The WHO's management of the fight against the swine flu or against Ebola, for instance, was harshly criticized.⁶

Due to structural shortcomings and the States' distrust, the WHO faced serious difficulties when confronted with the coronavirus. China informed the organization of the existence of a new disease on 31.12.2019. The WHO only sounded the alarm on 30.1.2020, when it declared the Covid-19 a public health emergency of international concern. Its most spectacular step was to proclaim the disease a pandemic on 11.3.2020. This move was intended to send shockwaves to the still-negligent States, but it did not change the legal situation. The WHO started to fund research for a vaccine and instructed the Member States how to react to the pandemic. However, it never assumed the role of the main coordinator in this crisis.

³ S. Arts. 15-18 of the IHR 2005.

⁴ A. Kamradt-Scott, WHO's to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa, *Third World Quarterly* 37 (2016), 401, 403, 409.

⁵ <<https://www.weforum.org>>.

⁶ A. Kamradt-Scott (note 4), 401.

Furthermore, many States failed to follow all of the organization's recommendations.⁷ For example, the WHO did not consider it helpful to recommend a ban on international travel and a closure of the borders – especially since doing so would complicate the transport of manpower and equipment during the crisis.⁸ It held that the damage caused by travel bans would outweigh the advantages. This reflects the warning of the United Nations (UN) Security Council resolution 2177(2014), which called upon the African States to lift travel bans during the Ebola crisis. The majority of States, among them the EU and its Member States, blocked the entry of persons from other countries. Many States restricted mildly or curtailed sharply the freedom of movement within their borders. Thus, the old strategy of fighting pandemics by isolating the population found resonance at a moment of crisis and anxiety.

During the crisis, the WHO could not avoid being dragged into the geopolitical competition between the United States and China. Some suspected the WHO of defending China in its fight against the coronavirus. Critics claimed that in praising China's measures, the WHO overlooked the huge curtailment of individual freedoms and failed to condemn the country's lack of due reporting.⁹ In the end, the United States, Japan and Australia maintained that the WHO had completely mismanaged the crisis. The United States ultimately suspended the payment of its contributions, while private persons and the other Member States promised additional funding to compensate for this loss.¹⁰ It is not without irony that China and Russia, usually not very supportive of strong international organizations, have now rallied behind the WHO.¹¹ It was evident that President *Trump* was looking for a scapegoat to blame for the disastrous situation in the United States, thus distracting from his own failure to address the pandemic. But apart from abusing the crisis for an upcoming electoral campaign, there are good reasons to be unhappy with the performance of the WHO.

At no point did the WHO take the lead in the fight against the pandemic. This is not its own fault but was due, above all, to the aforementioned structural deficiencies and the perennial lack of sufficient resources. The WHO's

⁷ This had a precedent during the Ebola crisis in 2014, when many countries failed to institute travel bans as suggested by the WHO, *A. Kamradt-Scott* (note 4), 401, 411; *A. von Bogdandy, P. A. Villarreal*, *Critical Features ...* (note 1), 28.

⁸ See updated WHO Recommendations for International Traffic in Relation to Covid 19 Outbreak of 29 February 2020, <<https://www.who.int>>.

⁹ There was a certain inconsistency in the WHO's rejection of travel bans and the appraisal of China's restrictive policy.

¹⁰ <<https://www.bbc.com>>.

¹¹ <<http://www.rfi.fr>>.

budget amounts to \$ 4,4 billion,¹² a sum that covers all of the organization's activities and not only the fight against the coronavirus, whereas States invest trillions of dollars only in the fight against the disease, including economic compensations.¹³ Even the European Union (EU) can collect more funds than the WHO for the research on a new vaccine.¹⁴ Therefore it seems unfair that the Member States that divest the WHO of power and funding blame it for a lack of efficiency.

The structural weakness of the WHO is not debunked by the fact that on 18.5.2020, the World Health Assembly, the main organ of the WHO, adopted by consensus a resolution expressing a coordinated response and implicit critique to the WHO. The most remarkable part concerns an

“impartial, independent and comprehensive evaluation, including using existing mechanisms, as appropriate, to review experience gained and lessons learned from the WHO-coordinated international health response to COVID-19”.

This formulation accommodates US demands. On the other hand, the resolution does not provide for an investigation within the Member States, which would have made it unacceptable for China. Therefore, the resolution conveys the conflict between two of the most important member States without settling it. The United States did not vote against the resolution but issued a statement in which it criticized some parts of it, especially those which limit intellectual property rights during the public health emergency.¹⁵ On 29.5.2020 the US President announced that the United States will cut ties with the WHO. International cooperation supported by an international organization failed at a moment when it was most crucial.

There is an attempt to get the UN Security Council involved, as in the Ebola crisis.¹⁶ The argument supporting this involvement holds that the most important international organ cannot keep silent while the world struggles with the greatest challenge since the Second World War. France and Tunisia presented a draft resolution that called for a global cease-fire and for the coordination of all capacities in the fight against the pandemic.¹⁷ However, the draft resolution has not been adopted to date. The stumbling block was the mention of the WHO's role in the fight against the coronavirus. The United States categorically rejected this version of the draft, since

¹² <<https://www.who.int>>.

¹³ For comparison: The WHO calculated a malaria control program for Africa between 2006 and 2015 at \$ 2 bn per year, <<https://www.who.int>>.

¹⁴ <<https://www.dw.com>>.

¹⁵ <<https://geneva.usmission.gov>>.

¹⁶ See UNSC Resolution 2177 of 2014.

¹⁷ <<https://www.france24.com>>.

it regards this international organization – allegedly colluding with China – as one of the main culprits in the spread of the disease. The United States also insisted on a clause requiring transparency and accountability with regard to the pandemic. The controversies between certain permanent members prevailed over efforts to defend the WHO's role and reputation. The UN Security Council stood in its own way, offering further proof of its inability to give any guidance in such a situation. Currently, negotiations are underway to draft a resolution that does not mention the WHO, thus satisfying the US preferences, but it is still unclear whether China would accept such a text, which would entail the People's Republic yielding and suffering a diplomatic defeat. Against this backdrop, the very issue at stake, i.e., the fight against the pandemic, only comes second.

II. De-Globalization and the Revival of the Nation-State

In the last decades, globalization was considered to be the irreversible *telos* of history. Borders became more and more permeable, international trade was thriving, and rules were increasingly introduced on the international plane. Although one could notice a backlash before the coronavirus spread, the disease accelerated the undoing of the international structures at breathtaking speed. External borders were closed,¹⁸ and almost all States introduced restrictions or prohibitions to arrivals and departures formally or in practice. Even within the EU, the freedom of movement was suspended, and the free movement of goods was restricted.¹⁹

The principle of solidarity suffered a heavy blow, as some States temporarily forbade the export of goods needed to fight the virus.²⁰ Masks ordered in Asia were allegedly hijacked²¹ and it is currently unclear whether those States that funded research leading to a vaccine or a medicine will be favored in the supply of the drug.²² Some States prioritized their people's

¹⁸ <<https://www.nytimes.com>>.

¹⁹ W. Devroe/N. Colpaert, Corona and EU Economic Law: Free Movement of Goods, <<https://coreblog.lexxion.eu>>.

²⁰ In Germany, an instruction prohibiting the export of masks, gloves, and protective suits was issued by the Federal Ministry of Economy, Bundesanzeiger, Allgemeiner Teil of 4.3.2020, B1; it was abolished when the Implementing Regulation 2020/402 of the European Union of 14.3.2020 was enacted, which required an authorization to export specific protective equipment to third countries.

²¹ <<https://www.theguardian.com>>; the US government later denied this.

²² <<https://www.statnews.com>>.

well-being over the interests of the international community as a whole, as Neo-Darwinism seemed to become fashionable again.

The pandemic is perceived as a danger coming “from the outside”, even if it is present everywhere. The quarantine of migrants is just one expression of this state-of-mind: if the risk is global, salvation will be local. Thus, the nation-state has been enjoying a certain revival. The State proved to be the collective actor who, in public perception, best combined expertise, power, provision of public services and seemingly inexhaustible financial funds. This image paid off, as people’s trust in the State returned. As we saw above, international organizations lack the clout to enforce the policy they consider to be the best. States can impose binding rules and have the power to enforce them. Besides, international organizations address the problems according to their objectives, as set up in the founding documents. It means that they focus exclusively on topics within the realm of their competencies, which makes it more difficult to weigh in other issues at stake. States, which have full competencies in all matters ranging from health and education to economy and public finances as well as the power and obligation to rule the society with all its complexities, appeared to be better placed to strike a balance between all affected interests. National governments are closer to the people and know their needs better than technocratic international organizations, which have greater difficulties communicating their message.

III. Imitation without Coordination

Although there was very limited international coordination via international organizations, the States addressed the challenge with functionally equivalent policies.²³ Almost all States drew on medical expertise when deciding on the answers to the problems. This helped to create a common conceptual world in the response to the problems because, notwithstanding the modalities of the disputes, the vast majority of scientists agreed that the coronavirus constitutes a high risk to human life. Moreover, and regardless of their ideological orientation and the form of the regime, States as different as the US and China considered it their primary concern to save human lives, thereby subordinating other values such as economic freedom, the

²³ There have been a few countries whose governments openly denied the existence of the pandemic within their borders or played down its impact, such as Belarus, Turkmenistan, Tajikistan, North Korea, Tanzania or the Federal Government of Brazil.

freedom of religion or the right to life.²⁴ Even liberal democracies were willing to pay high costs in the fight against the coronavirus and decided to curtail fundamental rights. Having no previous experience with a disease of that kind, States observed each other to find the best response to the problem. Thus the States hit first by Covid-19 set the standards, especially when they succeeded – at least according to official records – in stopping the pandemic.

At the beginning of the outbreak, Western policy-makers harshly criticized the measures adopted by the Chinese government. But once the coronavirus arrived at their territories, many of them imposed restrictions on their citizens and their economies that were functionally equivalent, albeit milder, than those of the Chinese approach. In the end, China's conduct established a path-dependency that steered also the response of States such as Italy, Spain or France. What in China's case was initially considered as the product of an authoritarian regime, became, under Western rule, a response without alternative, dictated by the imperatives of science. States that initially tried to play down the pandemic – United States, United Kingdom (UK), Russia – were compelled, by their experts' warnings and the rising death toll, to fall in line with the measures taken by the majority of the other States.

As a matter of fact, there are "variations of a theme": Sweden relied on citizens' self-restriction, Italy, Spain and France introduced strict restrictions of movement, Germany navigated a middle ground by imposing social distancing and closing schools, universities, and shops while trying to keep the economy working, and South Korea and Taiwan succeeded in tracking and isolating persons infected with the coronavirus. But no government could afford to openly declare that it did not care much about human lives because of economic considerations. Not international bodies, but mutual observation, comparison of, and competition between systems led to functionally equivalent approaches in the response to the pandemic.

²⁴ Even Saudi-Arabia suspended the Hajj this year, <<https://www.arabnews.com>>, and the mullahs in Iran forbade the Friday prayer, <<https://globalnews.ca>>, and the Pope celebrated Easter without pilgrims.

IV. A Universal Answer to Different Social and Economic Environments

However, pursuing uniform objectives – especially by harsh means – is an approach that holds serious risks. The blind imitation of the course of action taken by the countries of the North may have appalling consequences in developing or least developed countries. The different economic situations must be taken into consideration as well as the different risks the countries face.

Rich countries with a sufficient infrastructure may weather the storm of the pandemic by a so-called “lockdown”. It is highly doubtful whether poor countries can follow this approach successfully. It may entail collateral damages – including the loss of life – which in the end will eclipse the rescued lives. It is hard to imagine how 1.3 billion people – as in India²⁵ – can be restricted in their homes, although neither State nor society will be able to guarantee even their basic needs. In some States in Africa and Latin America, the police enforces strict regulations to stay at home, without taking into account whether people can survive under the imposed conditions. Starvation may be a more immediate risk in these countries than the coronavirus; the World Food Program predicts that the number of persons suffering from hunger will double to 265 million by the end of the year.²⁶

Deploying all available resources in the fight against the pandemic generates opportunity costs and lack of means for the pursuance of other – and perhaps more urgent – goals. For example, in Africa, the financial and medical means invested in the fight against the coronavirus pandemic are diverted from combating measles, polio, tuberculosis, malaria and other diseases, which have a higher death rate on this continent than the coronavirus (approximately 400.000 persons die from malaria every year in Africa). Models show that this could lead to 700.000 persons dying of malaria this year.²⁷

As a consequence, the WHO issued a warning not to divert all means from other programs to the fight against coronavirus.²⁸

The rift between the rich and the poor countries is also visible from another perspective. Rich countries, where the research for a vaccine and medicine against the coronavirus is conducted, require proper protection of in-

²⁵ S. India Situation Report No. 9 of 28.3.2020 by the WHO, <<https://www.who.int>>.

²⁶ <<https://insight.wfp.org>>.

²⁷ <<http://whotogo-whoafroccmaster.newsweaver.com>>.

²⁸ The Secretary General of the WHO declared: “Countries must strike a balance between measures that address the mortality caused by COVID-19, and by other diseases due to overwhelmed health systems.” <<https://apps.who.int>>.

tellectual property, whereas poor countries demand access to affordable drugs. The recent World Health Assembly resolution of 18.5.2020 refers to the Doha Declaration of 2001, which reduces the protection of intellectual property in case of a public health emergency.²⁹ As mentioned above, the US criticized this reference.

There are good reasons why all countries should be interested in effectively combating the pandemic everywhere. But the richer countries can focus exclusively on fighting the coronavirus, while the poorer countries have to struggle with other life-threatening problems at the same time. By enforcing a coronavirus-centered policy, the poorer States will suffer greater damages.

V. Competition Between Systems

The faster a State is able to effectively combat the coronavirus and return to normality, the fewer lives are lost, the lesser is the economic damage, and the higher is its reputation in the international system. It is a truism that material strength always proves to be an advantage when it comes to competition. What might be even more important is that this success also pays in the currency of reputation. All States are watching the current fight against the virus closely, and the politico-economic system with the best result will thus increase its soft power. A system's legitimacy derives from values such as democracy, the rule of law, and the protection of fundamental rights, but it is likewise rooted in how effectively a State fulfills its responsibility to protect its citizens' lives and provides assistance to other States. When a political system fails to guarantee the freedom from fear and the freedom from want, it will be poor solace if it demonstrates that it successfully protects the freedom of speech. The Chinese leaders illustrated this finding very skillfully. China – and even Russia – started to send humanitarian equipment to countries ravaged by the pandemic, among them European countries like Italy or Hungary, thereby trying to emphasize the contrast with Western countries criticized of lack of solidarity.³⁰ If one looks to some countries in Africa or even to India, it seems that these countries followed China's example rather than the initial response of the US and the

²⁹ Doha Declaration of the World Trade Organization, Ministerial Conference of 14.11.2001, WT7Min (01)/Dec/W/2; para. 4 reads: "We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health." The Declaration includes the right of each Member State to grant compulsory licenses.

³⁰ <<https://www.atlanticcouncil.org>>.

UK to the crisis. When the US suspended its contributions to the WHO, China also stepped in and promised further funding to compensate for the loss caused by the US refusal to pay.³¹ At the moment, it is not yet foreseeable if we are witnessing a historical tide of change, motivating at least some States to depart from the Western model and turn toward the Chinese way of governance.

The States feel that there is more at stake than healing from a disease. A major crisis – especially of the dimensions of this pandemic – is always a risk to the established order and an opportunity to change the rules of the game. Therefore, the United States and China in particular adapted their forms of communication to the new situation. Competition between the systems resulted in reciprocal blaming for the respective responses to the pandemic. The United States spoke out against China for its belated information on the disease, and the US President is even considering claiming compensation from China.³² Moreover, rumors have been circulating that the viral infection did not originate in a market in Wuhan but in a Chinese laboratory. The attempt to adopt a common resolution of the Group of Seven on the coronavirus crisis was aborted because the United States was obsessed with the desire to label the disease as “the Wuhan virus”, which did not meet the consent of the other members, who preferred cooperation instead of confrontation with China.³³ The Chinese accuse the Americans of slander, harshly criticizing the United States’ slow and inadequate reaction to the pandemic. Such competition based on distrust presents an obstacle to a common response to the crisis. The exchange of information is limited, and China bluntly rejects any international investigation on its territory.³⁴ Honest cooperation as established in the fight against the Severe Acute Respiratory Syndrome (SARS) seems out of reach. The common interest retreats behind the fight for national supremacy.

VI. The Suffering of the Rule of Law and Human Rights

The States’ strict measures have profoundly affected human rights. Freedom of assembly, religious freedom, freedom of movement, and the freedom to conduct business and to exercise a profession – to name just a few examples – have been either restricted or temporarily suspended. The fear of

³¹ <<https://www.washingtonpost.com>>.

³² <<https://www.washingtonpost.com>>.

³³ <<https://www.businessinsider.com>>.

³⁴ <<https://www.bbc.com>>.

the consequences of disobedience – i.e., the risk of infection with the disease – makes people respect the restrictions of their freedoms. Fear does not create an ideal climate for human rights and democracy. Even rule of law-States with entrenched democratic structures and culture adopt measures that hardly live up to constitutional requirements. The executive has vastly expanded its powers and occasionally sidelined the parliament, whose role of supervising the government has been weakened during the surge of the pandemic.

Some countries declared a state of emergency, strongly restricting human rights, and a number of States notified the respective international organizations of derogation from obligations under international human rights instruments,³⁵ shielding themselves, to a certain extent, from judicial scrutiny. Practice shows that human rights courts are reluctant to review States' declaration of a state of emergency³⁶ and allow countries some leeway in assessing whether a situation justifies a state of emergency.

If States do not declare a derogation from the human rights instruments while harshly restricting the rights guaranteed by these conventions, the restriction clauses which may be applied only within the limits established by the principle of proportionality could be overstretched. States have to strike a balance between the fundamental rights and the common interest.³⁷ The balancing of the conflicting interests is subject to judicial review. As it is the States' general practice – i.e., not only the practice of one State – to harshly restrict the rights international courts may eventually refrain from declaring the restriction of human rights to be incompatible with the respective international convention; it will be hard for an international court to take the responsibility for ruling against a State if the lives of tens of

³⁵ More than ten member States notified the Secretary General of the Council of Europe of the derogation, five of them also notified the UN Secretary General with regard to the International Covenant on Civil and Political Rights, more than ten member States of the American Convention of Human Rights informed the Secretary General about the derogation from the obligations, see *S. Molloy*, Covid-19 and Derogations Before the European Court of Human Rights, <<https://verfassungsblog.de>>; *K. Istefi/I. Humburg*, To Notify or Not to Notify: Derogations from Human Rights Treaties, <<http://opiniojuris.org>>; *M. Morales Antoniazzi/S. Steininger*, How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System, EJIL:Talk!, <<https://www.ejiltalk.org>>.

³⁶ The European Court of Human Rights always showed self-restraint in checking the exercise of “It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency [...] In this matter Article 15 § 1 [...] leaves those authorities a wide margin of appreciation.” (*Ireland v. the United Kingdom*, § 207); see *S. Molloy* (note 35).

³⁷ In this sense *A. Greene*, States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic, <<https://strasbourgothers.com>>.

thousands of people, if not more, are at stake.³⁸ But if the restriction clauses would cover these radical curtailments of human rights, these clauses would lose any inherent self-limitation. Since the coronavirus may continue to threaten lives for some time, some States might be tempted to prolong these restrictions for quite a while – perhaps until an effective vaccine is found. But this may take time. If the circumstances command limiting human rights for an extended period, the exception could turn into rule. If this disease infects the human rights systems, the consequences might last longer than the coronavirus pandemic itself.

Conclusions

A crisis often illuminates weaknesses and deficits in an established system. It is not necessarily the challenge as such but the response to it that reveals the actors' potential, as well as the limits or even lack of this potential. The crisis does not produce changes, but it may facilitate and accelerate processes that started before and without it. Such is the case with the coronavirus pandemic. It catalyzes developments already underway in international relations and international law. Whatever the outcome will be, nobody will call this pandemic a gentle civilizer.

Matthias Hartwig

³⁸ The Inter-American Court of Human Rights issued a statement on 14.4.2020, in which it recalled that restrictions must be “temporarily limited, legal, adjusted to well-defined aims based on scientific criteria, reasonable, absolutely necessary and proportionate and in accordance with other requirements developed in Inter-American human rights law.”, <<http://www.corteidh.or.cr>>; this monition waits for its reality test in a case before the Court.