
IMPACT OF COVID-19 ON INTERNATIONAL LEGAL ORDER

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ABSTRACT

The COVID-19 pandemic has compelled the international legal order to re-examine the legal perspective on emergency situations regarding individual national responses towards human rights violations. The long tradition of adjudicating based on interpretation and case law in international law aligns with similar practice towards crisis events like a pandemic. The international community is often quick to respond to crises with immediate findings and solutions, and such instantaneous formulations obstruct constructive engagement for outcome-oriented solutions and condemn the actors and scholars of the international legal order for perpetual review of the issue at hand. The crisis has highlighted the need for accurate information to ensure good governance and the rule of law when implementing unilateral measures. The role of media, accountability, and transparency should be revitalized to combat dire situations through proper acknowledgement of a crisis corresponding to an appropriate response. This article comprehensively devolves the phenomenal role played by the pandemic in spurring research into the irrelevancy of international law. Additionally, it advocates for the international community to go beyond the bounds of human rights and democratic accountability when developing measures reluctant to the last resort doctrine, adhering to a professionally oriented and self-limited approach for responding to similar crisis situations.

1. Introduction

The unpredictable crisis and COVID-19 like pandemics act as external phenomenon concealing the role played by international law and the consequences of their actor's actions. It produces certain risk in the international legal order pushing them to endeavor its space of irrelevancy through researches and thus, constantly encourages for self-development and self-betterment. However, International legal order, in practice, efforts to avoid such risks in the form of 'counterpoint' international law.¹ Various critical activities have been carried out to repoliticize the legal analysis of the pandemic.² Most of such movements focused on the act of china stating that the pandemic would have taken different scenario had the china complied with the different obligations, when the virus was first seen in one of its province, been established in the International Health Regulations (hereafter IHR).³

The adjudication and administration of justice have long been centrally focused on the interpretation, application, elaboration of law and the decisions of earlier cases.⁴ Preponderance of similar practice is seen even in the field of international law, where not only the case laws and judicial decisions but also the specific events called 'crisis' have prominent place.⁵ International communities often provide the immediate findings and instantaneous solutions at the time of crisis and thus such prompt formulations intervenes the constructive engagement for result oriented solutions and condemns the actors and scholars of international legal order for perpetual review of the same issue in hand.⁶ In its professional approach to crises, international law fails to address challenges as essential as the tension between agency and structure, and matters of "state-centrism".⁷ For instance, the fairest analysis of state responsibility in reference to the present act of China as cause of widely spreading global

¹ David Kennedy, *When Renewal Repeats: Thinking against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 338 (1999)

² Francisco-José Quintanaet. al., *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 15 (2020).

³ James Kraska, *China Is Legally Responsible for COVID-19 Damage and Claims Could Be In The Trillions*, WAR ON THE ROCKS (Oct. 18, 2020), at <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>

⁴ ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME*, A GREATER TASK 47, 50 (2015).

⁵ Fleur Johns et. al., *THE FORCE OF INTERNATIONAL LAW* (2011); *See also*, Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 THE MODERN LAW REVIEW 377, 380 (2002).

⁶ Charlesworth, *Supra* note 5, at 384.

⁷ Quintana, *Supra* note 2, at 7.

pandemic miss to analyze the role of non-state actors contributing on its governance underlying the present pandemic.⁸

2. International Legal order

International legal order has been experiencing the unusual extension of discretionary powers and authority of executive and the displacement of human rights at the lowest levels amidst the present COVID-19 pandemic.⁹ Although the international law has offered practical tools as vernacular and mechanisms of human rights and democratic accountability to resist these tendencies, such approaches have been unable to deal with broader structural issues.¹⁰ Arbitrary rulings and strengthening of powers of various authoritarian governments in the name of emergency measures and legislation have resulted in the obstruction of rule of law and civil liberties globally. For illustration, in Hungarian parliament granted Prime Minister Viktor Orbán the power to rule by decree indefinitely, purportedly to fight the virus.¹¹ The continual of such actions of government is likely to overrule the long principles of good governance and supremacy of law established by international legal orders within few months.

The increased panic of COVID-19 in general public has been the strongest means for several authoritarian rulers to limit and violate the civil and political rights of their citizens,¹² and in turn provide the same 'new normal' as the background justification to their legal arguments for derogating and suspending from provisions of international human rights.¹³ Lockdowns have hugely affected the right to movement and right to worship; the unprecedented collection and manipulation of health data have endangered the right to privacy; and scrupulous militarization have increased killings and torture.¹⁴ The rhetoric of the “war against the virus” and that “the virus does not discriminate” have obscured the disproportionate impact of the pandemic on marginalized communities.¹⁵ Many countries have started to refrain from the concept of inclusion, particularly ignoring the rights of minorities,¹⁶ and amidst of this critical situation,

⁸Quintana, *Supra* note 2, at 6.

⁹ See Dianne Otto, *Decoding Crisis in International Law: A Queer Feminist Perspective*, IN INTERNATIONAL LAW AND ITS DISCONTENTS: CONFRONTING CRISES 115, 116 (Barbara Stark ed., 2015).

¹⁰ Quintana, *Supra* note 2, at 9.

¹¹ *Id.*

¹² Otto, *Supra* note 9.

¹³ See HUMAN RIGHTS COMMITTEE, STATEMENT ON DEROGATIONS FROM THE COVENANT IN CONNECTION WITH THE COVID-19 PANDEMIC, UN Doc. CCPR/C/128/2 (2020).

¹⁴ Quintana, *Supra* note 2, at 9.

¹⁵ *Id.* at 10.

¹⁶ See Otto, *Supra* note 9, at 117–129.

international law have been consistently offering formal mechanisms for preventing and stopping such backsliding of democracy from the world.¹⁷

3. Global Impact

Various measures for controlling the rage of pandemic have brought a broad spectrum of restrictions: from general alerts to mandatory quarantines and isolations of individuals, to blanket travel bans and cordoning-off of cities and countries; and many governments have declared states of emergency assuming exceptional powers.¹⁸ Among several impact of COVID-19 in international legal order, potentially impairment of international human rights have been the most spreading effect of pandemic in both international and domestic level.. Although Articles 3 and 32 of the IHR duly respects the human rights,¹⁹ it have failed to provide the proper mechanism of upholding them in the time of crisis, and the detail specification on the most endangered right among them. Article 1 of IHR have defined the isolation as social distancing measure for infected person whereas quarantines for persons not diagnosed with infection but suspected to be prone of infection. All of these non-pharmaceutical interventions have been proved effective for controlling the spread of virus to some extent; however the international legal order has been facing it as stringent challenge amounting to restriction of liberty in the form of detention.²⁰

Risk assessment targeted at individual level have been approved, justified and formally recognized by European Court of Human Rights,²¹ but the risk at the community level requires the state to resort to cordons sanitaires - community quarantines- invoking their exceptional powers with legal justification referring to its relevancy t under Article 4(1) of ICCPR. However the restriction of ICCPR rights in such situation are to be justified to United Nations Secretary-General by concerned state in pursuant to Article 4(3) ICCPR, which have been often ignored by most countries in this present situation of COVID-19 creating hurdles for international communities monitoring the implication of international laws. Thus, balancing

¹⁷ Tom Ginsburg, *Democracies and International Law: The Trials of Liberalism*, Address at Lauterpacht Centre For International Law (13 March, 2019), available at <https://www.lcil.cam.ac.uk/lectures-events/hersch-lauterpacht-memoriallectures>.

¹⁸ Armin von Bogdandy, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, 7 MPIL RESEARCH PAPER SERIES 1, 2 (2020).

¹⁹ International Health Regulation, 2005, Art. 3 ¶ 2, 32.

²⁰ Lawrence Gostin et. al., *Pandemic Influenza: Ethics, Law, and the Public's Health*, 59 ADMINISTRATIVE LAW REVIEW 123, 171 (2007); See also, A Wilder-Smith and David Freedman, *Isolation, quarantine, social distancing and community containment: pivotal role for old-style public health measures in the novel coronavirus (2019-nCoV) outbreak*, 27 Journal of Travel Medicine 1, 2 (2020).

²¹ *Id.*

between the rights of liberty, free movement and assembly, on one hand, and the right to health, on the other hand, is most difficult.²²

4. Role of International Instruments and Communities

The applicable legal regime under GATT/WTO rules for health-related trade restrictions is the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).²³ This international law have opened up the ground for implying trade constraint ranging from tariffs to full import bans,²⁴ concerning the global health during the rage of pandemic.²⁵ The relationship between pandemic regulation and international trade law is also relevant when it comes to intellectual property.²⁶ The vaccine which will be introduced to usage in the near days will be protected under the patent right- in pursuant to Agreement on Trade-Related Aspects of Intellectual Property-²⁷ which will create subsequent monopoly of patent holder in the global market violating the international competition laws. Consequently, the others will be required to receive the authorization form exclusive manufacturing right holder- patent holder- for producing the vaccine through replication. Although the Doha Declaration grants the manufacturing licenses to producers other than patent-holders without their authorization,²⁸ this right is still challenging for developing countries with lack of technology and resources required for manufacture of vaccine because the practice have suggested that most of the international laws are formulated with concern on and consensus of developed countries. Thus, in the midst of a pandemic event, the matter of guaranteeing access to medicines,²⁹ and making rightful balance between public health goals and intellectual property rights will be a critical one.³⁰

The trepidation of bioterrorism compelled the international community to recognize the subject of security in matter of international health.³¹ Introducing the security dimensions to fight against pandemics have brought the authority of UN Security Council towards the mandates of

²² Armin von Bogdandy, *Supra* note 18, at 20.

²³ Armin von Bogdandy, *Supra* note 18, at 21.

²⁴ Sanitary and Phytosanitary *Measures Agreement*, Art. 2 (1995).

²⁵ Gostin et. al., *Supra* note 20, at 297-298.

²⁶ Armin von Bogdandy, *Supra* note 18, at 21.

²⁷ Marrakesh Accord establishing the WTO, Annex 3.

²⁸ Doha Declaration ¶ 5(b), 5(c) (2002).

²⁹ Armin von Bogdandy, *Supra* note 18, at 22.

³⁰ HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES, 208 (2007).

³¹ Alexander Kelle, *Securitization of International Public Health: Implications for Global Health Governance and the Biological Weapons Convention Regime*, 13 GLOBAL GOVERNANCE 217, 225-228 (2007).

WHO widening its own resources and actors.³² However, it have been introducing the danger of security over the global health concerns, especially during pandemic, by providing top priorities and privileges to developed countries.³³ In addition to this, the security dimension by the UN Security Council is not provided for every outbreaks of pandemic,³⁴ and thus the requirement for a public health emergency to qualify as a serious threat to international peace and security have been an unbounded topic,³⁵ forcing the public health to be dependent upon the context and political will of Security Council members and³⁶ more specifically the developed countries exercising the veto powers.

Crises present extraordinary opportunities for change by providing valuable occasion to actors of international legal order to assess the present state of discipline and thrive for more relevancy.³⁷ There is an intimate bond between international law and crises.³⁸ The present COVID-19 pandemic have presented some possible opportunities to international laws to amplify the reach and depth of human rights, particularly for marginalized groups in society.³⁹ More specifically concerning the rights of rights of prisoners, the pandemic have opened up the doors for soft legal instruments and regional court to protect the incarcerated through epistemic reframing in terms of science, consequentialist emphasis on public welfare, and a normative focus on positive duties.⁴⁰ Thus, pandemic is more likely to bring certain reforms in prisoners' rights by prioritizing the reality marginalized groups and by translating those realities into such situations which can generate comprehension and compassion.⁴¹

The coronavirus crisis have shown that the world is so fragile and non-resilient, but also the world is full of hidden potentials and undiscovered opportunities.⁴² Hidden opportunities, once

³² ADAM KAMRADT-SCOTT, MANAGING GLOBAL HEALTH SECURITY. THE WORLD HEALTH ORGANIZATION AND DISEASE OUTBREAK CONTROL, 165 (2015).

³³ JIYONG JIN ET. AL., INFECTIOUS DISEASES AND SECURITIZATION: WHO'S DILEMMA, 9 BIOSECURITY AND BIOTERRORISM, 184 (2011).

³⁴ J Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARVARD INTERNATIONAL LAW JOURNAL 1, 147 (2015).

³⁵ ILJA PAVONE, "EBOLA AND SECURITIZATION OF HEALTH: UN SECURITY COUNCIL RESOLUTION 2177/2014 AND ITS LIMITS", THE GOVERNANCE OF DISEASE OUTBREAKS, NOTE 128, 308311.

³⁶ Armin von Bogdandy, *Supra* note 18, at 23

³⁷ Quintana, *Supra* note 2, at 1.

³⁸ Charlesworth, *Supra* note 5, at 377–392.

³⁹ Curtis A. Bradley et. al., *Introduction to "The International Legal Order and the Global Pandemic*, 5 (Oct. 18, 2020), available at <https://ssrn.com/abstract=3669853> or <http://dx.doi.org/10.2139/ssrn.3669853>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Mohamed Buheji, *Foresight of Coronavirus (COVID-19) Opportunities for a Better World*, 10 AMERICAN JOURNAL OF ECONOMICS 97, 100 (2020).

discovered, can help close the ‘competitiveness gap’ and ensure better international and regional sustainable growth.⁴³The current global pandemic has created an opportunity for rethinking disarmament and international approaches to warfare.⁴⁴ The pandemic have also started to showcase the possibilities of international war operating through invisible enemy i.e., virus, which have in relation ignited the role of international communities like UN to work in cooperation for promoting the international peace and security. There are clear challenges in implementing measures aimed at tackling the virus in societies affected by an armed conflict.⁴⁵ ‘The fury of the virus illustrates the folly of war’, Guterres proclaimed, referring to the virus as the common enemy of mankind.⁴⁶

The possibility of reconsidering the architecture of global policy making have been introduced by the novel virus. The UN Security Council – the executive body of the UN historically tasked with taking collective action to address threats to humanity as a whole – is widely perceived to be flawed in its structure and composition as it reflects the distribution of power following the Second World War.⁴⁷ Although most of the international communities working for the protection and promotion of international legal orders were established with main aim of deterrence at initials, the outbreak of ongoing pandemic have proved them that the nature-led destructions disregards the disparity among any countries in terms of development or the size. It's constantly appealing the international legal order and its actors to refer to cooperation and defer the inequality and deterrence. It's forcing the international communities to restructure its working modality and principles in reality and at the same time, making them realize the fact that every country in the world, not only the most powerful countries exercising the superior authorities, must have their say in the management or control of COVID-19 like global pandemic/crisis. The current global pandemic is duly advocating the ineffectiveness of UN Security Council and pleading it to adopt quick and effective modality of global crisis management and response.

5. Conclusion

As states have been implementing unilateral measures to combat the virus, there has been a

⁴³ *Id.*

⁴⁴ Marina Aksenova, *COVID-19 Symposium: Quantum Leaps of International Law*, OPINIO JURIS, 3 (2020)

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

clear threat of misinformation spreading through the media.⁴⁸ International communities are likely to play a key role in facilitating a roll-back of national emergency response actions in the future by trampling on individual freedoms.⁴⁹ Thus, the present pandemic have developed the possibility of reconstructing the transparency and accuracy of information as the most effective tool for ensuring the good governance and rule of law whole over the world.

The global pandemic, Covid-19, has put the international legal order and related international communities into the limelight. International law helps to determine what counts as a crisis and as an appropriate response, and contributes to producing the unequal conditions that make a virus more lethal in certain places.⁵⁰ Although the international law is not the prime component to fight against the virus, their role have been proven uncertain and the most significant at the present time of crisis. Though the novel virus have introduced several challenges in front of international laws and related institutions, it have in parallel created widening opportunities to them for reviewing their structure and thrive for betterment. Creating the better opportunities to international community, the present pandemic is appealing for introducing new resistance mechanisms simply beyond the human rights and democratic accountability. The pandemic has exposed the professionally-oriented and self-limited approach to crises of international legal thought, and the “last resort” character of international law as a tool for resisting crises.⁵¹

⁴⁸ Aksenova , *Supra* note 44, at, 4.

⁴⁹ *Id.*

⁵⁰ Quintana, *Supra* note 2, at 13.

⁵¹ *Id.*