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PANDEMICS AND INTERNATIONAL LAW: THE NEED FOR ACTION [CHILE]

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I. INTRODUCTION

Let me start by stating that international law has developed principles, norms, institutions that provide an important basis for addressing pandemics; and stressing important values in the international community, including cooperation among States and the vital role of international organizations—among others. First, I will make some introductory remarks on whether international law has norms, principles, and institutions relevant to the topic of pandemics. Then, I will propose a path forward.

II. GLOBAL INSTRUMENTS AND INTERNATIONAL COOPERATION

The World Health Organization (WHO), or the Pan-American Health Organization (PAHO) in the Western hemisphere, have crucial

* I want to thank Lena Raxter (Special Rapporteur for the conference Pandemics and International Law) for her contributions to the conference as a whole, in terms of organization and preparation, and also for the contribution to my article – as well as the role that she plays in terms of all the participants of the conference.

institutional importance and are a very relevant point of departure to strengthen the need for international cooperation in the area of pandemics. A key in this is the 2005 International Health Regulations (2005 IHR), adopted by the WHO.¹ These regulations were a significant step forward in terms of promoting a global approach to public health emergencies.²

In the context of this conference, some components of these regulations are worth considering. In general, the regulations require that States improve international surveillance, reporting, and response mechanisms for disease outbreaks.³ They expanded the events which must be reported to the WHO: for example, States must report any event that has a serious public health impact, is unusual or unexpected, might be internationally virulent, or is likely to trigger a significant restriction to international travel or trade.⁴ States must appoint a national focal point who reports to regional WHO contacts, and at least one individual must be available at all times.⁵ The WHO may also adopt temporary emergency recommendations for ongoing health risks.⁶ Moreover, a role has been designed and enhanced by the 2005 IHR for the Director General of the WHO, who may obtain advice on temporary recommendations for public health emergencies from an emergency committee.⁷ Additionally, the 2005 IHR adopted some innovated approaches in the realm of international law and the law of international organizations, such as stressing the importance of human rights.⁸ Human rights are essential because there is currently a

1. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (3d ed. 2005) [hereinafter "2005 IHR"].

2. See Anastasia Telesetsky, *International Governance of Global Health Pandemics*, ASIL INSIGHTS (Mar. 23, 2020), <https://www.asil.org/insights/volume/24/issue/3/international-governance-global-health-pandemics>.

3. See 2005 IHR, *supra* note 1, arts. 4–14 (providing the relevant obligations for States).

4. *Id.* at art. 6.

5. *Id.* at art. 4.

6. *Id.* at art. 15.

7. *Id.* at art. 12, ¶ 2.

8. See *id.* at 1, arts. 3, 32 (outlining the innovations of the 2005 IHR, which include the "protection of the human rights of persons and travellers [*sic*]," article 3 additionally provides: "the implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons," and

patchwork of norms, as my colleague Patricia Galvao Teles said, and it is crucial to see that the necessary level of interconnectedness does not ignore the importance of protecting persons, and complying with international obligations concerning human rights – valid even in times of an emergency.

III. INNOVATIONS IN THE INTERNATIONAL SYSTEM

In addition to analyzing all areas of law or regimes that are relevant for the purposes of promoting international cooperation, it is worth wild to look at innovations existing in the constitution of the WHO and the 2005 IHR. For example, the right of initiative of the Director General, and the opt-out provisions that do not require express approval by a State to comply with the decisions of the organization.⁹ If a State does not agree with these decisions, the State must opt out within the time period provided by the 2005 IHR.¹⁰ These innovations, and others that follow, are an important basis for demonstrating how the need for international cooperation is further strengthened. Essential is also the recognition of the importance of civil society organizations. For example, article 43 of the 2005 IHR gives a role to scientific evidence. As we have seen in the current pandemic, the role of scientists has been crucial to provide guidance to the authorities and to keep the public informed.¹¹ This role could be strengthened further, establishing – for example – the importance of scientific organizations cooperating with one another even more. However, scientists have not been the only ones in the realm of civil society that have played a crucial role. The contributions of journalists, and the importance of the freedom of expression and freedom of the press, are also essential. It is, therefore, also relevant in developing further international cooperation, the importance of their role should be explicitly acknowledged. Already, article 3 of the 2005 IHR provides a good basis for this as it specifically states that, when implementing the

requires States to “treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures.”).

9. 2005 IHR, *supra* note 1, at 1.

10. *Id.*

11. *See id.* at art. 43.

measures proscribed by the 2005 IHR, States must respect the dignity of human rights and fundamental freedoms of persons.¹² Freedom of expression is an essential component of that dignity.

While the current legal framework is important and provides a base for further expansion of international cooperation, the experience of COVID-19 demonstrates they are insufficient, to say the least, as they do not properly require States to take every action possible to prevent global health crises or react effectively when they occur.¹³ We need to further explore and adopt measures regarding what can happen before, during, and after an epidemic. The strengthening of the relevant international organization's ability to operate in a multilateral framework is essential, so that they could be more effective in accomplishing their tasks.¹⁴ It is imperative to also strengthen capacity building, so that all States can adopt measures designed prepare them for global health crises.¹⁵ We need to explore further the role of friendly settlement of disputes, in case of the alleged breach of international obligations to face pandemics and have more clarity about obligations of the States and international organizations—including special measures to ensure non-discrimination, the protection of vulnerable groups, and so forth.¹⁶

12. *Id.* at art. 3.

13. For example, at this moment, access to vaccines is not guaranteed. Needless to say, establishing international solidarity in this matter will not be easy, but certainly the current experience requires further international cooperation to deal with such a “shortcoming” in the international legal framework, and at the same time prepare us for future cartographic events of this type. See Benjamin Mueller & Matina Stevis-Gridneff, *E.U. and U.K. Fighting Over Scarce Vaccines*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/2021/01/27/world/europe/eu-uk-covid-vaccine.html>.

14. For example, it is essential to strengthen the obligations to define and report health crises early on – i.e., early warning systems. Equally, there are serious issues of protecting supply chains during pandemics, to mention a few relevant topics that are already known by the international community.

15. See Matiangai Sirleaf, *Capacity-Building, International Cooperation, and COVID-19*, ASIL (July 9, 2020), <https://www.asil.org/insights/volume/24/issue/17/capacity-building-international-cooperation-and-covid-19>.

16. See Peter Tzeng, *Taking China to the International Court of Justice over COVID-19*, EJIL: TALK! (Apr. 2, 2020), <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19>.

IV. AREAS OF INTERNATIONAL LAW AFFECTED BY PANDEMICS

In addition to the WHO, practically all areas of the law are impacted by global health crises, and have created norms and, in some cases, institutions that are relevant to deal with global health emergencies. However, as mentioned before, these norms address emergencies in a very scattered and uncoordinated manner. Areas relevant include international peace and security; economic law; international trade and investment; labor law; global health law; international financing law; maritime law; intellectual property law;¹⁷ international sports law;¹⁸ international humanitarian law¹⁹ and human rights law.

Human rights law establishes the conditions required for States to declare an emergency, including the rights that cannot be derogated, the test for the suspension of rights, the prohibition of discrimination, and the obligation to adopt positive measures to protect vulnerable groups.²⁰ Substantive obligations also are laid down in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), as well as in its General Comment No. 14—which further elaborates on specific obligations that, at a minimum, offers persuasive legal arguments on the content of the obligations of that covenant.²¹

17. For example, e.g., access to medicine.

18. For example, e.g., we have seen that the current COVID-19 crisis has caused multiple large and small sporting events to be canceled or postponed, including the 2020 Olympic Games.

19. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art.3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (common article 3 of the Geneva Convention and the Additional Protocols 1 and 2 establish obligations whose value cannot be excluded even in the case of a pandemic).

20. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), art. 4, Dec. 16, 1966, S. Treaty Doc. 95–20, 999 U.N.T.S. 171; American Convention on Human Rights, art. 27, Nov. 22, 1969, S. Treaty Doc. No. 95–21, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 12, June 27, 1981, 1520 U.N.T.S. 217; European Convention on Human Rights, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221. The current pandemic has impacted everyone, but more so for vulnerable populations including women, children, minorities, indigenous peoples, the elderly, and LGBTQ+ communities. Effective realization of the prohibition of discrimination requires then special positive action by States to ensure compliance with such prohibition.

21. ESCOR, *General Comment No. 14: The Right to the Highest Attainable*

In the realm of jurisprudence, there have been major developments. A decision worth mentioning in this respect is the judgement of the Interamerican Court of Human Rights in the case of *Cuscul Piraval et al v. Guatemala*,²² which details the components of the right to health and links it with civil and political rights as it is part of the right to physical integrity and the right to life.²³

The developments existing in different areas of the law reflect a very important principle—our common humanity and our common responsibility, which are expressed in the concept of the obligation *erga omnes*.²⁴ The need of concerted international action in addressing global health crises is not only a matter of values, as the current pandemic has shown, it is also a matter of valuables, because it is our common interest to coordinate action to protect humankind: as Patrícia Galvao Teles said, there are other pandemics that will afflict humankind and failure to act together in this context could have existential consequences.²⁵

V. THE INTERNATIONAL LAW COMMISSION (ILC)

Achieving an effective legal regime designed to prevent and react effectively against global health crises is a complex matter considering the issues at stake, including the vast array of areas of the law that are impacted by global health crises, and the variety of legal regimes and institutions existing. Such an undertaking requires thorough study, cooperation, and the adoption of consensual proposals that could lead to their acceptance by the international community as a whole.²⁶ From this perspective, one important possibility is to resort to the ILC, whose point of departure is international law and its need for

Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4, ¶ 2 (Aug. 11, 2000).

22. Preliminary objections, merits, reparations and costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 359, (Aug. 23, 2018).

23. *Id.* at 53–57.

24. See Jochen A. Frowein, *Obligations Erga Omnes*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Dec. 2008) (explain the concept of obligation *erga omnes*).

25. *Pandemics and International Law*, YOUTUBE (Nov. 18, 2020), <https://youtu.be/t-wcYGfv3-w> [hereinafter “Pandemics Conference”].

26. See Sean D. Murphy, *Concluding Remarks by Sean D. Murphy*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 277–83 (2021).

development.²⁷ The ILC's composition (e.g., different legal cultural and equitable geographic distribution), its ability to interact with States, and its flexibility to coordinate with States in terms of its final product, have been tested.²⁸ The ILC has proven its ability to contribute to the development of the building blocks of international law, even in times where the international community faced significant obstacles for cooperation, such as during the cold war.²⁹

VI. CONCLUSION

In conclusion, as we analyze the experience brought about by COVID-19, it is important to bear in mind the value of the law and the processes for its codification and development, and the understanding that the ultimate goal in this process is the protection of persons. Traditionally, it seems that the international community has been more disposed to act meaningfully when reacting to catastrophes than to adopting measures to prevent them. It seems inevitable that, in the future, humankind could suffer again from a catastrophic event. I express my hope that we will not need to wait for future pandemics to prompt us to meaningfully act.

27. See Yifeng Chen, *Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 233–64 (2021).

28. See Claudio Grossman Guiloff, *Concluding Remarks by Claudio Grossman Guiloff*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 333–45 (2021).

29. Very important examples are the Vienna Convention on the Law of Treaties; the Vienna Convention on Consular Relations; and the Vienna Convention on Diplomatic Relations. See Kuen-Gwan Lee, *Recalibrating the Conception of Codification in the Changing Landscape of International Law*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 300–32 (2021).

* * *