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## Pandemics and International Law: The Need for Action [Turkey]

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# PANDEMICS AND INTERNATIONAL LAW: THE NEED FOR ACTION [TURKEY]

NİLÜFER ORAL \*

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## I. INTRODUCTION

As someone who has actually survived two major earthquakes, what we are living through now with the pandemic is a level ten earthquake—devastating and upheaving our lives in so many different ways. As my colleague Patricia Galvao Teles noted, this level of pandemic is a collective experience that we have not seen since a century ago with the Spanish Flu. It has demonstrated to us, as happens

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in disasters in general, the structural deficiencies of our current system. My colleagues have outlined some of these deficiencies; I will reiterate some of those noted previously but frame this issue in a format that speaks to whether we need an additional framework to address pandemics.

I will address—and reiterate—much that has already been said today, specifically on whether there is a need for an instrument of a comprehensive nature, such as a treaty, to address the pandemic. I will then follow with a few thoughts on how, if such an instrument is necessary, it can be created.

## II. A WORLD UNPREPARED

For the most part, most countries were unprepared to face the COVID-19 pandemic. However, as noted by my esteemed colleague Prof. NGUYEN, who is from Vietnam, Asia was possibly more prepared for the pandemic due to the prior experience of SARS.<sup>1</sup> Now, some nine to ten months after the beginning of the pandemic, I think we can see the difference. For the most part, western States were not prepared for the COVID-19 pandemic.<sup>2</sup> Most importantly, what we see in particular is the failure in international cooperation.<sup>3</sup> This has been fatal at many levels.

## III. THE FAILURE OF INTERNATIONAL COOPERATION AND COORDINATION

During the pandemic, we saw a complete lack of any mechanism for cooperation. Remarkably, the International Health Regulations (IHR), which govern how States should act during a pandemic or epidemic, is weak on international cooperation.<sup>4</sup> Consequently, what

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

2. See David E. Sanger et al., *Before Virus Outbreak, a Cascade of Warnings Went Unheeded*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/us/politics/trump-coronavirus-outbreak.html>.

3. See Stewart Patrick, *When the System Fails: COVID-19 and the Costs of Global Dysfunction*, FOREIGN AFF. (July/Aug. 2020), <https://www.foreignaffairs.com/articles/world/2020-06-09/when-system-fails>.

4. Jaemin Lee, *IHR 2005 in the Coronavirus Pandemic: A Need for a New*

we have is somewhat of a piecemeal sectoral approach.<sup>5</sup> Just to remind ourselves of what we went through in the early months of the pandemic, examples of this cooperation failure include the over fifty-four countries that applied export bans on medical supplies and medicines back in March 2020.<sup>6</sup> Everyone was clamoring to obtain personal protective equipment, especially masks.<sup>7</sup> Remember the severe mask shortage and resulting mask war? Now we do not have to worry as much about this lack of equipment; however, we should not forget that it happened. Even in the European Union (EU) system, it was remarkable that there was this breakdown despite the EU being one of the strongest systems of international cooperation.<sup>8</sup>

We of course have the General Agreement on Trade and Tariffs (GATT).<sup>9</sup> From a legal perspective, the unilateral measures taken by States during the COVID-19 crisis may actually be justified for health reasons, but that doesn't help us in a pandemic.<sup>10</sup> Justifiable unilateral measures are not a cooperative measures.<sup>11</sup> In terms of international trade, the existing rules certainly did not promote cooperation in situations such as a global pandemic as COVID 19.<sup>12</sup>

Remember the cruise ships and port restrictions? That was another

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*Instrument to Overcome Fragmentation?*, AM. SOC'Y INT'L L. (June 12, 2020), <https://www.asil.org/insights/volume/24/issue/16/ihr-2005-coronavirus-pandemic-need-new-instrument-overcome-fragmentation>.

5. *Id.*

6. *See* EXPORT CONTROLS AND EXPORT BANS OVER THE COURSE OF THE COVID-19 PANDEMIC, FED. GER. INDUS. 1 n.1 (Apr. 29, 2020), [https://www.wto.org/english/tratop\\_e/covid19\\_e/bdi\\_covid19\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf).

7. *Id.*

8. *See* Ben Hall et al., *How coronavirus exposed Europe's weaknesses*, FIN. TIMES (Oct. 20, 2020), <https://www.ft.com/content/efdadd97-ae5-47f1-91defe02c41a470a>.

9. General Agreement on Trade and Tariffs, Oct. 30, 1947, 55 U.N.T.S. 194.

10. *See* Louise Curran et al., *The Trade Policy Response to COVID-19 and its Implications for International Business*, CRITICAL PERSP. ON INT'L BUS. (Jan. 20, 2021), <https://www.emerald.com/insight/content/doi/10.1108/cpoib-05-2020-0041/full/html>.

11. *See* Stewart M. Patrick, *The Multilateral System Still Cannot Get Its Act Together on COVID-19*, COUNCIL ON FOREIGN REL. (Mar. 26, 2020, 8:00 AM), <https://www.cfr.org/blog/multilateral-system-still-cannot-get-its-act-together-covid-19>.

12. *See* Miho Shirotori et al., *Reading regional trade agreements for future crises and pandemics*, UNCTAD (Jan. 21, 2021), <https://unctad.org/fr/node/31909>.

disaster. So many cruise ships were stranded, revealing a major gap in the regulation of ports as to what to do with the cruise ships with infections.<sup>13</sup> The existing rules are really only designed to address maybe only a few people being ill, not hundreds.<sup>14</sup> Consequently, there were no guidelines for how to respond to cruise ships during the COVID-19 pandemic.<sup>15</sup> Additionally, there were no guidelines on how to address crews on ships; in fact, as of September 2020, some ships were still waiting for their crews to leave the ship.<sup>16</sup>

What we saw was a lack of uniformity, or rather a lack of an overarching system of how to cooperate when you have this level of a global disaster.<sup>17</sup> Even though we have the institutions such as the International Maritime Organization and the International Labor Organization for seafarers, there are no set international standards to mitigate the spread of the virus.<sup>18</sup> Each country imposed, and continues to impose, their own restrictions; we don't have a set of common standards.<sup>19</sup> Now we see the development of travel bubbles, vaccination passports—but, again, there is no international uniformity in this practice.<sup>20</sup>

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13. See Xiaofei Liu & Yen-Chiang Chang, *An emergency responding mechanism for cruise epidemic prevention—taking COVID-19 as an example*, 119 MARINE POL'Y 1, 1 (2020).

14. *Id.* at 2.

15. *Id.* at 2–4.

16. Aurora Almendral, *Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>.

17. See General Assembly, *COVID-19 Pandemic Demonstrates Multilateral Cooperation Key to Overcoming Global Challenges, President Stresses as General Assembly Concludes Annual Debate*, U.N. Doc. GA/12273 (Sept. 29, 2020), <https://www.un.org/press/en/2020/ga12273.doc.htm>.

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

19. See Alexa M. Stern & Howard Markel, *International Efforts to Control Infectious Diseases, 1851 to the Present*, 22 J. AM. MED. ASS'N 1474, 1474–79 (2004), <https://pubmed.ncbi.nlm.nih.gov/15383519/> (providing a historical background on public health measures to control disease spread).

20. See Shannon McMahon, *How do Travel bubbles work? 4 questions answered.*, WASH. POST (Nov. 17, 2020), <https://www.washingtonpost.com/travel/2020/11/17/australia-singapore-bubble->

#### IV. VACCINE ACCESS

As a result of the fractured measures taken by States, there is an imbalance and fragmentation that can be quite disruptive economic and politically.<sup>21</sup> Now, of course, the question of the vaccine access needs to be added to the discussion.<sup>22</sup> It is wonderful news that we are looking at definitely two, if not more, vaccines in the very near future.<sup>23</sup> However, who is going to have access to those vaccines? We know already that the developed rich countries have bought up the vaccines.<sup>24</sup> What about the rest of the world? As my colleague Charles Jalloh noted, we have a wonderful resolution for equitable access to medical equipment, but this is only a non-binding resolution.<sup>25</sup> We do not have a system in place.<sup>26</sup> This is quite serious. There is also the COVAX system that if adequately supplied can play an important role in delivering vaccines to the developing countries. We have to be able to tackle this very important issue of how to get equitable access to vaccines within the shortest time possible, especially for the most vulnerable groups.

#### V. THE 2005 INTERNATIONAL HEALTH REGULATIONS

I want to briefly address the 2005 International Health Regulations (IHR).<sup>27</sup> The regulations are a modification of the pre-existing 1969

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covid.

21. See Patrick, *supra* note 11.

22. See Diane Desierto, *Equitable COVID Vaccine Distribution and Access: Enforcing International Legal Obligations under Economic, Social and Cultural Rights and the Right to Development*, EJIL: TALK! (Feb. 2, 2021), <https://www.ejiltalk.org/equitable-covid-vaccine-distribution-and-access-enforcing-international-legal-obligations-under-economic-social-and-cultural-rights-and-the-right-to-development>.

23. See *Covid-19 Latest Updates*, N.Y. TIMES, <https://www.nytimes.com/live/2021/02/28/world/covid-19-coronavirus#jj-vaccine-pfizer-moderna-differences> (last visited Mar. 7, 2021) (providing up-to-date reporting on COVID-19, and both the available vaccines and those under development).

24. *Rich countries hoarding Covid vaccines, says People's Vaccine Alliance*, BBC (Dec. 9, 2020), <https://www.bbc.com/news/health-55229894>.

25. Pandemics Conference, *supra* note 1.

26. *Id.*

27. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS

International Health Regulations, adopted in response to the gaps in the existing international system that were discovered after the 2002 SARS breakout.<sup>28</sup> However, even the 2005 IHR has issues; below is only a short overview of some of the major gaps and structural deficiencies that were exemplified by the COVID-19 pandemic.<sup>29</sup> The 2005 IHR were primarily designed to fill these gaps; however, if you look closely at the regulations, the emphasis on cooperation is weak.<sup>30</sup> Further, while there are references to human rights, the regulations as a whole appear to be protective of trade and do not necessarily address the situation we currently face.<sup>31</sup>

## VI. AN INTERNATIONAL CONVENTION

Each sectoral area—shipping, trade, aviation, and so on—need to address the existing gaps, as identified in our lived experience. However, that is not enough. I think we really need to have an instrument that will address at a global and regional levels cooperation, coordination and solidarity, to ensure that we have the mechanisms in place when there is—and there will be—another epidemic or pandemic.

## VII. THE INTERNATIONAL LAW COMMISSION

The International Law Commission (ILC) already has adopted draft articles on the protection of persons in the event of disasters.<sup>32</sup> This topic is currently being discussed by the Sixth Committee and it could

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(3d ed. 2005) [hereinafter “2005 IHR”].

28. International Health Regulations art. 1, July 25, 1969, 1286 U.N.T.S. 390; see Telesetsky, *supra* note 18.

29. Lee, *supra* note 4.

30. *Id.*

31. See *International Health Regulations*, *supra* note 28, art. 3 (“The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.”); *id.*, art. 32 (requiring States to “treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures . . .”). See also Lee, *supra* note 4, at 1 (outlining the innovations of the 2005 IHR, which include the “protection of the human rights of persons and travellers . . .”).

32. Int’l Law Comm’n, Draft articles on the protection of persons in the event of disasters, U.N. Doc. A/71/10, ¶ 48 (2016), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/6\\_3\\_2016.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/6_3_2016.pdf).

be adopted as a binding instrument upon States.<sup>33</sup> This is very good work.<sup>34</sup> While the draft articles may provide a basis for a global response to pandemics, I think that there is still a need to develop something more. The ILC is well situated to look into this; in fact, our dear colleagues here, Professor Grossman and Professor Jalloh, have already taken the lead in looking at this.<sup>35</sup> It is quite possible that, under the statute for the ILC, the U.N. General Assembly—or any organ of the U.N., including the World Health Organization—could make a request to the ILC for it begin a study on pandemics, and look into creating an overarching instrument of cooperation and solidarity that would address the many problems that have emerged during this pandemic.

## VIII. CONCLUSION

I will just end here and thank the organizers again for the invitation to speak at this timely event. I think this will be an ongoing discussion. Pandemics and international law is such a critical issue; as COVID-19 has demonstrated. Our lives have been completely changed and altered by the occurrence of a global health crisis. This is certainly not the first pandemic in world history and will not be the last. We must be prepared for the next pandemic, whenever it occurs.

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33. ANALYTICAL GUIDE TO THE WORK OF THE INTERNATIONAL LAW COMMISSION: PROTECTION OF PERSONS IN THE EVENT OF DISASTERS, [https://legal.un.org/ilc/guide/6\\_3.shtml](https://legal.un.org/ilc/guide/6_3.shtml) (last visited Feb. 28, 2021).

34. See Giulio Bartolini, *The Draft Articles on “The Protection of Persons in the Event of Disasters”: Towards a Flagship Treaty?*, EJIL: TALK! (Dec. 2, 2016), <https://www.ejiltalk.org/the-draft-articles-on-the-protection-of-persons-in-the-event-of-disasters-towards-a-flagship-treaty>.

35. Claudio Grossman & Charles Jalloh, *Protection of Persons from Epidemics in International Law, proposal Draft for the long-term programme of work of the ILC*, U.N. Doc. ILC(LXXII)/WG/LT/INFORMAL/2 (Sept. 18, 2020).



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