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Patrícia Galvão Teles

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INTERNATIONAL LEGAL, POLICY AND INSTITUTIONAL ISSUES RAISED BY THE COVID-19 PANDEMIC [PORTUGAL]

PATRÍCIA GALVÃO TELES*

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When thinking about the title of our discussion today, “Pandemics and International Law: the Need for International Action”, I thought I would focus my remarks on the key international legal policy and institutional issues raised by the COVID-19 pandemic.

I. INTRODUCTION

Three basic sets of questions arise when we attempt to look back to what is now almost one year of probably the greatest pandemic in human history, and also when we look to the future to see what can be improved to fight epidemics and pandemics of this scale and nature. The first set of questions, for us as lawyers, are the legal issues that we are dealing with in regards to the existing legal framework, and how it is interpreted and applied in the event of a pandemic. The second set of questions are policy issues. Discussing the policy issues, for international lawyers, means also discussing the policy issues that are of both a legal and institutional nature. The big question is the

* Member of the United Nations International Law Commission. Associate Professor at the Autonomous University of Lisbon and Adjunct Senior Researcher at the Centre for International Law of the National University of Singapore.

sufficiency of the legal framework that we have today, which we are currently using to combat the COVID-19 pandemic. The third set of questions are institutional. It is important to not only identify the tools within the current framework for combatting pandemics, but also identify the most appropriate and adequate responses in regards to economic and social measures. We must determine whether we do have the adequate legal framework and the adequate institutional framework, or whether those frameworks need to be improved.

II. BACKGROUND

Before I highlight in more detail what I believe are the main institutional legal and policy questions raised by epidemics or pandemics, let me make a few more general remarks. Epidemics and pandemics are not a new phenomenon. What is new, and needs to be highlighted, is the scale of the current pandemic, and how it affected so intensely all regions of the world—which are certainly much more interconnected today than when we had the last major global pandemic 100 years ago with the so-called “Spanish flu.”¹ In particular, it affected regions of the world—certainly Europe, where I come from—that had so far not been affected by the most recent epidemics such as SARS, MERS, Ebola, and Zika.² Clearly Europe was not prepared.³ Even in the European Union, where there is sophisticated regional integration, the health response has been far from uniform and efficient.⁴

1. Matthew Boyce and Rebecca Katz, *The 1918 Influenza Pandemic and COVID-19*, PBS (Mar. 18, 2020), <https://www.pbs.org/wgbh/americanexperience/features/1918-influenza-pandemic-and-covid-19>.

2. See *Major Epidemics of the Modern Age*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/timeline/major-epidemics-modern-era> (last visited Mar. 2, 2021) (providing a history of public health crises from 1899 to 2021).

3. See Hans Henri P. Kluge, *Statement – Catastrophic impact of COVID-19 on cancer care*, WHO (Feb. 4, 2021), <https://www.euro.who.int/en/media-centre/sections/statements/2021/statement-catastrophic-impact-of-covid-19-on-cancer-care> (noting that an obvious impact of COVID-19 has been the negative effect on European economies; however, it has also affected more unexpected aspects of Europe such as noncommunicable disease care).

4. Cf. David M. Herszenhorn & Sarah Wheaton, *How Europe failed the coronavirus test*, POLITICO (Apr. 7, 2020 8:45 PM), <https://www.politico.eu/article/coronavirus-europe-failed-the-test>.

Already in 2004, the “Report of the High-Level Panel on Threats, Challenges and Change,” convened by the then Secretary-General of the United Nations, Kofi Annan, identified—alongside conflict, terrorism, nuclear proliferation, climate change, among others—pandemics and infectious diseases as one of the most pressing threats to the international community.⁵ The report branded these threats as “threats without borders,” with the potential to affect the whole globe.⁶ It seems increasingly clear that these global problems can only be tackled with global approaches. The example of the worldwide dissemination of the new coronavirus—and the impacts at all level of the COVID-19 pandemic on health, economy, human rights, international transport, trade, tourism, etc.—raises the question whether a better equipped legal system of global governance and greater international cooperation and solidarity between states would not have led to better results and less dramatic impact when a second, or even third, wave is already spreading around the global.⁷

III. LEGAL ISSUES

Pandemics raise a broad number of legal issues in almost all areas of international law—not just concerning the application of the 2005 International Health Regulations, which are the core legal instrument in this matter. Let me highlight just a few of these issues in a very brief and incomplete manner. Such issues include: the role of State sovereignty and the power to impose entry and exit requirements and travel restrictions, including air travel and shipping;⁸ issues arising from information disclosure, early warning systems, and reporting requirements regarding diseases; and the content and nature of the

5. U.N. General Assembly, *Report of the High-Level Panel on Threats, Challenges and Change*, at 3–4, 73, U.N. Doc. A/59/565 (Dec. 2, 2004).

6. *Id.*

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

8. C.f. Barbara von Tigerstrom & Kumanan Wilson, *COVID-19 travel restrictions and the International Health Regulations (2005)*, 5 BMJ GLOBAL HEALTH 1, 1 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7237384/pdf/bmjgh-2020-002629.pdf>.

duty of international cooperation and solidarity, including with regard to equitable access to protective and medical equipment, treatments, and – the question of the moment – vaccines.⁹ Other issues implicated by pandemics are issues of prevention, due diligence, responsibility and liability of States, and international organizations and their consequences;¹⁰ mechanisms for settlement of disputes, inquiries, and enforcement measures; and the impact of pandemics on human rights in general.¹¹ This last point is particularly relevant for the right to health, the right to life, and the question of the impact of human rights caused by emergency measures and other consequences of the fight against the pandemics. Questions related to international trade and foreign investment are also implicated in pandemic response. One could go on with a longer list.

IV. LEGAL POLICY ISSUES

We can find answers to many of the above-mentioned questions in existing international legal instruments, with their principles and norms, but they appear now mostly in a fragmented or patchwork manner as part of many different legal regimes.¹² Consequently, a legal policy question is whether there are discrepancies and normative gaps in this fragmented legal regime, and whether it would be better to have a more holistic approach in a dedicated legal instrument. Alternatively, perhaps an instrument of soft law could be created as a

9. See *Universal and Equitable Access to Covid-19 Vaccines, Testing, Treatments: Companies' Human Rights Responsibilities: Questions and Answers*, HUM. RTS. WATCH (Feb. 11, 2021, 3:00 AM), <https://www.hrw.org/news/2021/02/11/universal-and-equitable-access-covid-19-vaccines-testing-treatments-companies-human#>.

10. Cf. Antonio Coco & Talita de Souza Dias, *Part I: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak*, EJIL: TALK! (Mar. 24, 2020), <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak>.

11. *Human rights must be 'front and centre' of COVID-19 response: Secretary-General*, U.N. NEWS (Dec. 10, 2020), <https://news.un.org/en/story/2020/12/1079632>.

12. See Jaemin Lee, *IHR 2005 in the Coronavirus Pandemics: A Need for a New Instrument to Overcome Fragmentation?*, ASIL INSIGHTS (June 12, 2020), <https://www.asil.org/insights/volume/24/issue/16/ihr-2005-coronavirus-pandemic-need-new-instrument-overcome-fragmentation>.

first step.¹³ The current COVID-19 pandemic has illustrated how useful it would have been to have a clear, robust, and harmonized legal framework for before, during and after the pandemic.

V. INSTITUTIONAL POLICY ISSUES

From a more institutional policy point of view, especially considering that the COVID-19 pandemic seems to be more the beginning of a “new normal” than the end of a chapter, it is also pertinent to ask whether a more reinforced global multilateral system based on the action of the various United Nations bodies would produce better results to fight future pandemics.¹⁴ Of course, such a system would have the WHO at the center, as the key institutional organization; however, it could also incorporate other U.N. family organizations and regional organizations in an organized fashion.

VI. CONCLUSION

Let me end with two concluding remarks. First, the evolution of global governance and international law has been essentially reactive and can be accelerated by crisis as history itself shows—including through the creation of the U.N. after the end of WWII precisely seventy-five years ago, and a new post-Westphalian international legal order. Second, it might be that international law is “one pandemic late,” but it would be desirable—in my view, as a legal and additional policy matter—to discuss further how to strengthen the foundations of international cooperation and solidarity, as well as a more comprehensive legal approach to the legal issues raised by pandemics—in close coordination with regional and domestic approaches so that the international community is not, once again, caught by surprise by an upcoming pandemic.

13. See American University Washington College of Law, *Pandemics and International Law*, YOUTUBE (Nov. 18, 2020), <https://youtu.be/t-wcYGfv3-w>.

14. See Press Release, Security Council, Amid COVID-19, Strong Multilateral System Key to Delivering for World’s Most Vulnerable, European Union Foreign Policy Chief Tells Security Council, U.N. Press Release SC/14197 (May 28, 2020), <https://www.un.org/press/en/2020/sc14197.doc.htm>.

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