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EPIDEMICS AND INTERNATIONAL LAW: THE NEED FOR INTERNATIONAL REGULATION

*Claudio Grossman**

INTRODUCTION

This article presents comments by the author made to open the Miami Law Review conference on Epidemics¹ and International Law.² Its main purpose is to refer to the impact of COVID-19 on different norms and legal regimes, focusing mainly on the 2005 International Health Regulations (IHR), addressing areas of reform as well as the interactions of those norms with international human rights law. This will include the proposals of change for the 2005 IHR, designed to better protect vulnerable peoples in future global health crises. Some of the ideas presented in this contribution are included in a proposal that I have presented with a colleague from Sierra Leone, Professor Charles Jalloh, for consideration by the International Law Commission, on epidemics and international law. Additionally, I was appointed as a member of the Committee on Epidemics and International Law for the Institute of International Law (IDI), whose

* Professor of Law, Dean Emeritus, and R. Geraldson Scholar for International and Humanitarian Law, American University Washington College of Law; Member of the UN International Law Commission; Member of the Institut de Droit International (IDI); former Chair of the Inter-American Commission on Human Rights (IACHR). Professor Grossman would like to thank his Research Assistant, Lena Raxter, for her contributions to this article.

¹ An epidemic is an infectious disease that spreads rapidly to a large number of people in different countries within a short period of time, whereas a pandemic is a non-seasonal epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people. See *Epidemic, Endemic, Pandemic: What are the Differences?*, COLUMBIA PUB. HEALTH (Feb. 19, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/epidemic-endemic-pandemic-what-are-differences>. For the purposes of this paper, the focus will be on epidemics rather than pandemics, due to the topic of the Miami Law Review's conference.

² Some of these ideas were also presented by the author in prior conferences and papers. See Claudio Grossman, *Pandemics and International Law: The Need for International Action*, 24 HUM. RTS. BRIEF 130 (2021); Claudio Grossman, *Pandemics and International Law: The Need for Action [Chile]*, 36 AM. U. INT'L L. REV. 971 (2021).

rapporteur was Shinya Murase. Both his contributions and leadership, as well as the discussion in the committee, are of great influence on this topic. The exchanges in this conference, and to a certain extent captured in this publication, could have an impact in the proposal that is designed to strengthen our response before, during, and after epidemics whose impact on human life cannot be exaggerated.

THE IMPACT AND THE FAILURE TO PREVENT AND ACT COOPERATIVELY

COVID-19 has impacted the world as a whole by thrusting it into a grave crisis,³ resulting in over five million deaths so far,⁴ millions infected,⁵ and the closure of national borders worldwide. The pandemic is inflicting tremendous economic damage and impacting everyone, in particular the most vulnerable. Considering the characteristics and responses to this catastrophic event, we could identify the following issues.

First, COVID-19 touches almost every area of human activity. Consequently, it impacts almost every area of the law: economic law, international trade and investment law, human rights law, humanitarian law, labor law, climate change, global health law, international finance, international environmental law intellectual property,⁶ access to medicine, international sports law,⁷ international maritime and air law,⁸ peace and security, refugee law, and more.

³ *Coronavirus (COVID-19)*, WORLD HEALTH ORG., https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Feb. 1, 2021).

⁴ According to Johns Hopkins University Coronavirus Resource Center, as of Nov. 16, 2021, there have been 5,113,864 deaths from COVID-19. Ctr. for Sys. Sci. and Eng'g, COVID-19 Map, JOHNS HOPKINS UNIV.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> (last visited Nov. 16, 2021).

⁵ According to Johns Hopkins University Coronavirus Resource Center, as of Nov. 16, 2021, there have been 254,289,204 cases of COVID-19.

⁶ For example, intellectual property rights may restrict the distribution of pharmaceutical products, medicine, and vaccines.

⁷ For example, the current COVID-19 crisis has caused multiple large and small sporting events to be cancelled or postponed—including the 2020 Olympic Games.

⁸ For example, one of the cruise ships with a high number of COVID-19 cases—the Diamond Princess—was a flag ship of the United Kingdom, but the owner was a United States Corporation. Off the coast of Japan, a passenger became sick with COVID-19; however, as a result of gaps in the existing maritime law regime, the

Second, we do not have a single body of law regarding international cooperation that could adequately address all the issues implicated by epidemics. In that vein, and in order to avoid the fragmentation of international law, it is also important to harmonize international obligations, bearing in mind the ultimate goal of the protection of persons. Because of that goal, harmonization should not be a pretext to diminish the existing obligations in international law and international human rights law – most notably the protection of persons during emergencies.⁹

Third, the reaction to COVID-19 by the international community has been absolutely insufficient to cope with this scourge. This is not a matter for the past; we know that with increasing globalization and interdependence, this type of devastating event is possible again in the future.

Fourth, countries by themselves cannot properly prevent and response to epidemics. It is difficult to make a more compelling case for the need of a multilateral approach than the case of epidemics. Accordingly, it is imperative for the international community to learn from the current epidemics and adopt measures designed to develop effective preventative systems and appropriate response mechanisms when epidemics occur in the future.

Fifth, epidemics affect everyone, but they have a greater effect on less developed countries – and within each country, on the most vulnerable groups. In fact, epidemics have shown the need for the development of health infrastructure and methodologies to detect public health emergencies, as well as to ensure a certain level of access to health facilities, treatments, and health literacy. The access to health is not only an issue for developing countries as vulnerable groups also exist in developed countries and require attention and action.¹⁰

Japanese government was uncertain regarding whether it could exercise jurisdiction over the treatment of the passenger.

⁹ See *Secretary-General Highlights COVID-19 as Pretext for Violations, in Message for Opening of Human Right's Council's Forty-Sixth Session*, U.N. Doc. SG/SM/20589 (Feb. 22, 2021).

¹⁰ For example, the right to health is addressed in General Comment 14 of the International Covenant on Economic, Social and Cultural Rights (PIDESC), 993 UNTS 3 (adopted 16 Dec. 1966, entered into force on 3 Jan. 1976), which applies equally to developing and developed States Parties.

Sixth, coordinating effective action by the international community as a whole is not only a question of values. International law has long recognized values that were established in the Universal Declaration on Human Rights and further developed these values through numerous treaties. Every article in those treaties provides for rights for all humans, without discrimination. However, the basis for proper action concerning epidemics is not only a question of values but also a question of *access*. If we fail to create a legal order where everyone would have access to health preventative measures, treatments and health literacy—irrespective of economic status or nationality—no one will be protected in the end.

Seventh, the current inadequate response to epidemics has shown the need to strengthen certain regulations, including the establishment of obligations that would result in responsibilities for those who violate the international legal framework. This framework should include prevention mechanisms, cooperation regimes, and measures for response before, during, and after a public health emergency.

THE NEED TO BE EFFECTIVE AND STRENGTHEN THE CURRENT NORMATIVE FRAMEWORK

The existing legal framework for health matters

The first topic of essential relevance in addressing the issue of epidemics is the existing legal regime governing state responses in health matters, governed by the WHO and the 2005 International Health Regulations. Building upon the International Sanitary Regulations, the WHO created the International Health Regulations (IHR) in 1969.¹¹ Notably, the 1969 IHR provide a specific list of disease outbreaks which trigger a duty to notify the WHO. Specifically, States were required to notify the WHO whenever an outbreak of cholera, plague, yellow fever, smallpox, relapsing fever, or typhus occurred within the State's territory.¹² However, the SARS epidemic of 2003

¹¹ *Frequently Asked Questions of the International Health Regulations (2005)*, WHO, <https://www.who.int/ihr/about/FAQ2009.pdf>.

¹² *International Health Regulations (1969)*, WHO, <https://apps.who.int/iris/bitstream/handle/10665/96616/9241580070.pdf?sequence=1>.

called into question the effectiveness of the WHO and the IHR.¹³ Additionally, the Chernobyl disaster showed that non-listed events, like a nuclear catastrophe, could have severe health implications, and accordingly it was necessary to not limit the reasons why international health cooperation would be required. As a result, the WHO updated the IHR in 2005.¹⁴

The 2005 IHR require that States improve international surveillance, reporting, and response mechanisms for disease outbreaks. Further, the 2005 IHR expanded the events which must be reported to the WHO. Specifically, States must report any event that: (1) has a serious public health impact; (2) is unusual or unexpected; (3) might be internationally virulent; and (4) is likely to trigger a significant right of international travel or trade restrictions.¹⁵ States must appoint a National IHR Focal Point who reports to regional WHO Contact points, and at least one individual must be available at all times. The WHO may make temporary, emergency recommendations for ongoing health risks.¹⁶ Moreover, the revisions create a method through which the Director-General of the WHO may obtain advice on temporary recommendations for public health emergencies from an Emergency Committee.¹⁷

The 2005 IHR adopted some innovative approaches in the realm of international law and the law of international organizations, such as: stressing the importance of human rights, creating an opt-out regime for compliance, and including the right of initiative of the Director-General. Article 3 of the 2005 IHR explicitly states that States must respect human dignity, human rights, and fundamental freedoms of persons when implemented measures to respond to global health crises.¹⁸ Article 32 builds upon this, requiring States to "treat travelers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with

¹³ SARS was not included in the list of diseases which triggered a State duty to notify the WHO. Consequently, the 1969 IHR was criticized for limiting the duty to notify to a such a limited set of diseases.

¹⁴ *International Health Regulations (2005)*, WHO, U.N. Doc. WHO/CDS/EPR/IHR/2007.1 (June 2007).

¹⁵ *Id.* at annex 2.

¹⁶ *Id.* at art. 15–16.

¹⁷ *Id.* at art. 48–49.

¹⁸ *Id.* at art. 3.

such measures.”¹⁹ Articles 21 and 22 create an opt-out regime for compliance, wherein all Member States of the WHO are immediately bound to the regulations unless they explicitly opt out of the 2005 IHR within the time period required.²⁰ Further, Article 12 gives the Director-General of the WHO the unilateral power to declare a “public health emergency of international concern.”²¹ Because of the need for cooperation and the global nature of epidemics, any effort aimed at prevention and proper response during epidemics—and the need also to react after an epidemic has occurred—requires focusing on WHO and the 2005 IHR.

While the current legal framework is important and provides a base for further expansion of international cooperation, the experience of COVID-19 demonstrates it is insufficient, to say the least, as it does not properly require States to take every action possible to prevent global health crises or react effectively when they occur.²² As the law currently exists, there are few state obligations,²³ fewer enforcement mechanisms for ensuring compliance with these obligations, and no liability for the violation. Consequently, international law must clarify the questions of international responsibility and indicate what acts or omissions should be considered internationally wrongful acts. Additionally, the role of civil society that has proven so effective—association of scientists, journalists, non-governmental organizations—is not sufficiently protected. Further, due to the globalized nature of our current world, access to vaccines, medicines, and treatments worldwide are necessary to ensure global health, as well as the special protection required for vulnerable groups. 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

¹⁹ *Id.* at art. 32.

²⁰ *Id.* at art. 21–22.

²¹ *Id.* at art. 12.

²² 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>.

²³ Under the current system, affected States must implement necessary measures, and seek necessary external assistance, to prevent the spread of disease.

“shortcoming” in the international legal framework, and at the same time prepare us for future catastrophic events of this type.

The international community needs to further explore and adopt measures regarding what can happen before, during, and after an epidemic. The strengthening of relevant international organizations’ ability to operate in a multilateral framework is essential so that they could be more effective in accomplishing their tasks.²⁴ It is imperative to also strengthen capacity building, so that all States can adopt measures designed prepare them for global health crises.²⁵ Moreover, the international community needs to explore further the role of friendly settlement of disputes, in case of the alleged breach of international obligations to face epidemics, and should seek 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.²⁶

Lastly, the IHR focuses, as a fundamental basis, on the need to avoid the spread of diseases. While this continues to be valid, it seems that in light of the current experience concerning epidemics, a change in approach is required, namely the global prevention of diseases. We need a concept based not only on reaction against a disease that started and could reach our shores but on positive, preventative measures such as exchange of information, health literacy, and access to and distribution of vaccines. It is not just about preventing the spread of the diseases; it is also about the prevention of the disease in the first place. This requires comprehensive, holistic action with the idea of permanent care. This change of approach would also include the need to strengthen constant supervision. For example, the supervision of labs, as exemplified by the Nagoya protocol. We need to expand the idea of supervision of labs, even before the idea of disease explodes.

²⁴ 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 epidemics and pandemics, to mention a few relevant topics that are already known by the international community.

²⁵ 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>.

²⁶ 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>.

The current epidemic has revealed dramatically the importance of comprehensive actions designed to share information about pathogens.

Strengthening human rights during Epidemics

The second topic of essential relevance in dealing with epidemics is human rights. Sometimes these matters are restricted to abstract technical terms—for example, health literacy and access to technology. These are certainly important topics, but it is also imperative to understand that addressing the issue of epidemics requires a more fully person-centered approach. The ultimate purpose of the legal regime concerning epidemics is the protection of human beings and the society at large, and this should be explicitly stated. Based on the impact of epidemics and pandemics, it is not enough to solely address the role of states as institutions that, from the point of view of human rights, should abstain from specific actions—e.g., torture, killing, interference with freedom of religion, interference with freedom of speech, and so on. Certainly, these are important rights, but it is essential to guarantee the exercise of these rights as well as the ability of individuals to have access to health education, vaccines, and healthcare. This requires action by states and the international community as a whole that is not dominated by the word “don’t” but the word “do.” For example, it is not enough to say: “Don’t discriminate against women.” Rather, during an epidemic such as this, States must be told: “*Do* protect women from domestic violence.”

Already in international law and human rights law we see important developments that are relevant for epidemics. For example, these regulations include strict compliance with the legal criteria to declare an emergency situation; recognition that some rights are absolute and cannot be derogated, even in an emergency situation; and the suspension of other human rights require compliance with the principles of proportionality, necessity, and *the principle of non-discrimination*. Non-discrimination requires affirmative and positive action in order to be realized. The regulations on emergencies are included in both regional and universal treaties, such as article 4 of the International Covenant on Civil and Political Rights (ICCPR), article 27 of the American Convention, article 12 of the African Charter of

Human and People's Rights, and article 15 of the European Convention.

Moreover, the UN Covenant of Economic, Social and Cultural Rights (CESCR) establishes additional norms that apply in cases of emergencies, including epidemics. General Comment No. 14²⁷ of the CESCR elaborates on specific obligations which, at a minimum, offer persuasive legal arguments on the scope of State's obligations. Paragraphs 34,²⁸ 35,²⁹ 36,³⁰ and 37³¹ are of great relevance to global health emergencies as they set the specific legal obligations of States concerning the right to health, reflecting treaty and customary international law obligations.

The important paragraphs of General Comment No. 14 are currently in the process of further development by judicial adjudication. In that respect, the case of *Cuscul Piraveal et al v. Guatemala*³² addresses the right to health in the HIV/AIDS epidemic. In that case, forty-nine individuals—fifteen of which died while the

²⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (the right to health is addressed in General Comment 14).

²⁸ *Id.* at ¶ 34 (sets the obligation of States to respect the right to health and provides situations in which this obligation would arise. For example, States must “refrain [] from denying or limiting equal access for all persons . . . to preventive, curative and palliative health services; [and] abstain [] from enforcing discriminatory practices as a State policy”).

²⁹ *Id.* at ¶ 35 (sets the obligation of States to protect, which include the adoption of legislation, or other such measures, which would ensure equal access to health care and health-related services – including creating regulation for the health sector to ensure it is equally accessible to all).

³⁰ *Id.* at ¶ 36 (sets the obligation of States to fulfil, which means States parties must “give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health”).

³¹ *Id.* at ¶ 37 (sets the obligation of States to fulfil (facilitate) by taking “positive measures that enable and assist individuals and communities to enjoy the right to health.” Further, States are required to fulfil (provide) “a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.” Lastly, States are required to fulfil (promote) the right to health by “undertak[ing] actions that create, maintain and restore the health of the population”).

³² *Cuscul Piraveal et al v. Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 359 (Aug. 23, 2018).

case was being examined – brought the case to the Court alleging that Guatemala violated their right to health by providing inadequate access to healthcare for HIV/AIDS.³³ The Inter-American Court agreed, and ruled that, because of the inadequate treatment available for HIV/AIDS victims, the Guatemalan government violated the victims' rights to health, personal integrity, life, and judicial protection as persons living with HIV/AIDS. Further, the Court affirmed that Article 26 of the American Convention creates the right to health as an autonomous right which requires a State to provide permanent, quality treatment.³⁴

Other important human rights norms at stake are the role of scientists and the free press during COVID. The IHR mentions these two groups, but the language needs to be strengthened. 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.³⁵ This role could be strengthened further by 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 and 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 measures proscribed by the 2005 IHR, States must respect the dignity of human rights and fundamental freedoms of persons.³⁶ Freedom of expression is an essential component of that dignity.

An essential component of the protection of human rights has been the right of individuals themselves to take action at the international level to protect their rights when the internal mechanisms are not accessible or irrelevant. Accordingly, any effective system to confront epidemics would develop mechanisms for individuals to present complaints if, in their opinion, their rights have been violated. Currently, this is possible only on the basis of human rights commissions and courts; however, it is important to also

³³ *Id.* at ¶ 1.

³⁴ *Id.* at ¶ 107.

³⁵ *International Health Regulations (2005)*, *supra* note 15, at art. 43.

³⁶ *Id.* at art. 3.

consider further strengthening the role of individuals in the mechanism and procedures established by the WHO.

Finally, there is a need for effective mechanisms to ensure compliance with health obligations—including liability for violations of these obligations—and procedures for the settlement of disputes. As it is obviously the case in every field of law, the possibility for disputes concerning the scope and applicability of obligations is always present. Accordingly, in the absence of an effective solution for the settlement of disputes, disputes will linger that affect compliance with international law.

FUTURE ACTION OF THE INTERNATIONAL LAW COMMISSION

International law is not only about good intentions. Without proper leadership, whose absence we have witnessed throughout the pandemic, we will fail to see the common interest that all States and the international community have in the prevention of epidemics, and we will be only waiting for the next common disaster to occur.

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.³⁷ The IDI has done a superb job in addressing this subject, conducting a thorough study in a short time. It is a valuable contribution that can influence current attempts to create a legal framework to deal with the subject. If those attempts do not have a result, a possibility to consider is resorting to the International Law Commission (ILC).

The ILC's composition—i.e., its 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,

³⁷ See Sean D. Murphy, *Concluding Remarks by Sean D. Murphy*, in SEVENTY YEARS OF THE INT'L LAW COMM'N 277–83 (2021).

have been tested by the pandemic.³⁸ 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.³⁹ Further, its institutional position and legitimacy could greatly benefit progressing this topic further, and therefore should be taken into account. The consequences of inaction are disastrous. Additionally, it will question the relevance of international law when addressing the existential issues affecting humankind.

³⁸ See Claudio Grossman Guilloff, *Concluding Remarks by Claudio Grossman Guilloff*, in SEVENTY YEARS OF THE INT'L LAW COMM'N 333–45 (2021).

³⁹ 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 Int'l Law*, in SEVENTY YEARS OF THE INT'L LAW COMM'N 300–32 (2021).