

# COVID-19 and International Law

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# Symposium on COVID-19 and International Law: Introduction

[opiniojuris.org/2020/03/30/symposium-on-covid-19-and-international-law-introduction/](https://opiniojuris.org/2020/03/30/symposium-on-covid-19-and-international-law-introduction/)

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As we write this introduction we are each sitting in different houses, in different countries, on different continents, and in different hemispheres. We could not be much farther apart. And yet our present experience could not be more similar. We are both social distancing at home, we both see desolated streets outside, we are both worried about our friends and families, and we are both trying to make sense of what is happening around us. This is but one illustration of the universal nature of this crisis. It has affected us all. Our situations may be different, but our experience is shared.

Many are now beginning to ascribe meaning to our collective experience. We ask questions and we have ideas. And we do so with imperfect information and much uncertainty. Ambiguity presents both an opportunity and a challenge in moments of crisis. An opportunity because it can prompt action which transcends existing paradoxes, but also a challenge because it can entrench existing biases.

As Daniel Kahneman famously observed in his book *Thinking, Fast and Slow*, we have two principal modes of thinking. In a crisis our survival instinct is to think fast, to simplify, and to jump to conclusions. But in doing so, we risk neglecting how our think-fast world may have lit the match for the COVID-19 disaster and future crises to come – whether through under-regulation of dangerous trade and environmental practices, under-funding of public health institutions, or under-planning for the current pandemic. We have, in fact, had plenty of warning about the potential for a highly infectious viral outbreak. So while it is natural to think fast in survival mode, we also need to think slow, to reflect, and to anticipate.

COVID-19 knows no borders, and neither should our response. Whether these borders are international frontiers, disciplinary boundaries, or industry sectors, it is clear that we need to work together to understand the wide-ranging implications of COVID-19.

In recent days and weeks our international law community has, like many other communities and in its own way, been scrambling to make sense of the situation in which we find ourselves. It has offered understanding, it has revealed hidden realities, it has cautioned about the various risks at stake, and it has begun to speculate about how to remedy the challenges we face. It is indeed encouraging to see a growing number of voices contributing to the debate. We are convinced that pooling intellectual resources, collaboration, and communication are central in navigating crises. Since announcing this symposium on social media, we have tried to collate and share as much of this new thinking as we can.

Through this symposium we aim to facilitate the dissemination of expertise and insights at a critical time. If we have learnt anything in the experience of the last few weeks, it is that failing to appreciate, understand, and act upon information can have devastating consequences.

Each contribution appraises the impact of COVID-19 from different perspectives of international law. With over 30 contributions, some of which feature as part of complementary clusters of analysis around a given topic area, we are delighted that the symposium is as broad as it is deep. Many of the authors in this symposium question whether international law, or its failure, is complicit in the COVID-19 crisis. Others ask how international law can or should respond to the pandemic.

We hope the contributions will help catalyse the conversation beyond the parameters of this symposium. Moreover, we hope that these pieces will form part of a broader constructive response to COVID-19, to alleviate its impact, to prevent similar crises occurring again, and to re-make the international order in a more equitable, more just, and more environmentally-conscious way.

We have been honoured by the response to this symposium. All authors have written their pieces in record time and under invariably challenging circumstances. They have done so because they appreciate the significance of this moment. If the collegiality we

have experienced in assembling this symposium is a reflection of the state of our profession and its desire to offer help when it is needed most, we can be hopeful about its future and the contribution it can make.

Philip Allott once observed: 'In law-making society speaks to its future, intending that, when the time comes, its future will listen to its past'. We now need to imagine our best future, and remember that for our imagination to become reality, we must make it so.

# COVID-19 Symposium: COVID-19 and International Law

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The birth and transmission of the Sars-Cov-2 virus, and the COVID-19 illness it generates, and the response to it – are matters for international law. The full consequences will emerge over time, but certain observations may be proposed. It is plain that the health needs of COVID-19 go beyond the capacities of our hospitals, and of our international legal structures.

What have we learned?

We are interconnected.

We are fragile.

We are ill-informed.

We need government and cannot rely on the market-place.

We adopt international principles – like precaution – then fail to apply them.

We are adaptable.

We cannot act alone.

Whether the world will act together remains unclear. 'The epidemic itself and the resulting economic crisis are global problems', Yuval Noah Harari notes, even as the response confronts us with a binary choice, 'between nationalist isolation and global solidarity'. Harari opts for 'global co-operation'.

It cannot be assumed, however, that the fearful and their governments will embrace that viewpoint. The World Health Organisation has shown leadership ('Test, test, test', the Director-General declared), as the UK ignored his plea and the US eyed deep cuts to the WHO budget.

The timing is hardly propitious, situated as we are at a 'strong man' moment. 'Make America Great Again' (the U.S. and President Trump) and 'Take Back Control' (the U.K. and Brexit) offered an inward turn, an abandonment of the two countries' earlier ideas of a rules-based multilateral legal order premised on global co-operation: see The Atlantic Charter, 1941. The assault on multilateral cooperation was underway before COVID-19 worked its magic.

Nor is it apparent, for proponents of greater co-operation, that existing institutions have been sufficiently prepared for what has befallen, or adequately responsive when it arrived. 'Each to ourselves' has been the initial instinct. European Union members defaulted to unilateral actions, bringing back borders and the measures each deemed necessary. The call for a retreat to a world of greater borders will echo widely. More national self-reliance, it will be said, less movement, more barriers.

The cries will multiply. They must be resisted. They will not prevail, not over the longer term. We are where we are, in an imperfect world, and we are in it together, a common humanity, from Anchorage to Abu Dhabi, from Brixton to Bali, from Cartagena to Canberra. As Paolo Giordano puts it in a sublime and painful essay:

'And so the epidemic encourages us to think of ourselves as belonging to a collective. It pushes us to behave in a way that is unthinkable under normal circumstances, to recognise that we are inextricably connected to other people, to consider their existence and wellbeing in our individual choices. In the contagion we rediscover ourselves as part of a single organism. In the contagion we become, again, a community.' (How Contagion Works, 2020, p. 24)

The contagion knows no borders, even if we seem unable to look beyond our own boundaries to see the havoc that is wrought.

If nothing else, the need to avoid a greater economic dislocation will drown the calls to shelter behind walls that are higher and stronger. Global co-operation in relation to health, technology, trade and investment is inevitable, as are the response measures

that curtail our most basic freedoms, necessary perhaps in the short term, but surely not beyond.

This means more international law, not less. 'International law may well be our only global value system', Aung San Suu Kyi recently told the International Court of Justice. (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Verbatim Record, CR 2019/19, 11 December 2019, p. 19, para. 29). Indeed. But what does that value system allow us to do. What is to be done?

International law tends to be responsive, to war, atrocity or other disasters. We are struck by events, and only then do we act. As international lawyers, when it comes to actions, we tend to follow rather than lead. And we have much to learn about interacting with other disciplines, not least in the world of science.

We lawyers know how to ask questions.

What worked? What didn't? Why not?

What is needed? What is possible?

What tools are available to us? What new tools do we need?

We lawyers are less effective in offering answers.

Let us use this moment wisely. Let us open our legal imaginations. Let us seek to give true meaning to the notion of a community.

# COVID-19 Symposium: Returning “Home”–Nationalist International Law in the Time of the Coronavirus

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One of the most characteristic symptoms of globalization was the fairly significant expatriation of large numbers of nationals for life, work and adventure. This was frequently coupled with a discourse emphasizing the fraying of national identification and the relativity of state affiliation. That discourse was deeply schizophrenic and remains so: it coexisted with the paranoid closure of borders to the ‘unwanted’ migrant, at the cost of untold suffering and inequities. But this contradiction at the heart of globalization was remarkably neglected.

What has been striking about the coronavirus epidemic is the rapidity with which many émigrés, particularly those with the privilege of mobility, have sought refuge in their country of origin. In turn, what has been remarkable in those states is the combination of further closing borders to foreigners whilst going out of their way to repatriate nationals. Many states have launched fairly large-scale repatriation operations, including chartered planes, medical personnel and complex consular assistance. Protection from the virus seems to have been associated with a sort of scramble to “return home” by the hundreds of thousands, even at the cost of accelerating its spread.

To some extent, the closing of borders is a function of a medically determined agenda. But we know better than to think that it was only determined by such an agenda, or rather that this agenda itself is free of its own structuring politics. The decision to prohibit entry to foreigners and, conversely, to deploy resources to bring back nationals at significant costs was one that was over-determined by political and legal considerations far more than it was, strictly speaking, a way of optimally fighting the disease. After all, just as the coronavirus knows of no boundaries, it also knows of no bodily limitations based on nationality: one's nationals might turn out to be just as infected as non-nationals. Rather, the decision to repatriate seems to manifest a sense of residual but enduring obligation to one's nationals above all else, perhaps to even resurrect relatively unfashionable older notions of the sort of special obligations that might attach towards aliens, except from the perspective of the state of nationality.

Several phenomena seem implicated by this move. First, a renewed "romantic" emphasis on nationality. "Nationals" are singled out for the right to return before the gates close. It is of course not as if nationality had previously ceased to have any importance, and it has consistently acted as a crucial vector of privilege for at least some in conditions of globalization. But the focus on nationality has been even more relentless and exclusive, narrowly reshaping the contours of "return mobility," and drawing the line between nationals and the rest. It has recast the state as a somewhat brooding but caring presence, perhaps resurrecting earlier tropes once excavated by Foucault of governing as a "pastoral" mission (including in its sacrificial function of deciding who to "let die"), where the shepherd is seen to rally its "stranded" flock. Return has sometimes been extended to permanent residents or non-national parents of children who are themselves nationals, but not always or automatically, further highlighting the separation of families as an inherent and not merely contingent feature of migration policing.

Second, the moment evidences a complex and often contradictory concern with diasporas. Diasporas are increasingly meaningful actors in international relations and law. They have voiced their expectations in relation to their state of origin in a range of domains, including when it comes to the ability to return and repatriation. States of nationality have been receptive and relatively sympathetic to the plight of their citizens abroad, which they increasingly rely on for remittances or political clout (although those have noticeably dropped in India or Kenya for example). At the same time, diasporas remain doubly vulnerable: to the host state and society which may accuse them of having imported the virus; to the state of origin, which may view their return with suspicion.

States of origin have been caught in this paradox of gratitude and ingratitude to their populations abroad, straining cherished solidarities: whilst Lebanon, Ethiopia and Armenia have already called upon their diasporas to contribute financially to the fight against the coronavirus, Romania has explicitly called, "with deep sadness but also sincerely," for its diaspora not to return, lest it bring infections back with them. What use is a diaspora as a source of remittance, moreover, if it rushes "home"? The diaspora,

furthermore, is a fragile concept: when push comes to shove, it is still only passport holders who have been able to return. For example, India has suspended the “visa free” entry privileges of “overseas Indians” in the wake of the epidemic.

Third, the reaction to the outbreak has foregrounded an almost archaic notion of “protection”. States have acted fast and forcefully to provide a form of shielding that may be illusory but which they felt was needed. That protection has been understood to involve the need for repatriation, the sooner the better, as if borders and territory could provide a certain immunity. It has led to new geographies of movement and quarantine that straddle the domestic and the international. That sort of protection was traditionally understood as being offered at the state’s discretion (and indeed foreign services seem to be mindful of not setting too much of a precedent), but it is increasingly presented as if it were a duty owed to nationals abroad, a new form of extraterritorial public service that may even flow from human rights. That surfeit of protection for the select few, of course, coincides in some countries with a further undermining of protections for foreigners, particularly unlawful immigrants.

What will be the consequences of these evolutions, especially if they become even more entrenched in months to come? Globalization was always a half-truth or a half-lie depending on one’s perspective, a phenomenon as much symbolizing the freedom of movement for some and its impossibility for others. In that respect, COVID-19 may at least make more visible, within globalization’s hinterland (a broad Western-Chinese axis), what had long been obvious to everyone else, namely some of globalization’s inherently abusive and exploitative proclivities. A whole branch of the discourse of globalization devoted to extolling the virtues of a relatively carefree expatriation (for those who could manage to emigrate and immigrate in the first place) has been put in doubt by the increasingly calibrated separations between the previously intimately connected (US-UK, US-Canada, Hong Kong-China, Schengen). In its wake, what we are witnessing is not the return of the border (the border had never left) but perhaps a doubling down on its role as semi-porous membrane designed to both exclude, detain, and privilege.

Indeed, this resurgence could also allow states to double down on their exclusionary practices in the name of defending the nation, as part of a sort of renewed prophylactic Hobbesian pact. The State owes much more of its construction to the fear of infectious diseases from abroad (often associated with migrants) than is commonly acknowledged. States have never been in a better position to exact concessions from a populace, moreover, than when presiding over a panic-inducing emergency. The epidemic, at any rate, is already manifesting new heights of controls on human mobility, spurred by a sort of unholy competition between the relative merits of authoritarian or liberal systems in tackling the epidemic.

In that respect, the sort of ostentatious, even caring concern exhibited for one’s nationals abroad can be usefully contrasted, for example, with many states’ tremendous reluctance to repatriate those of their nationals suspected of having joined DAESH, leaving no doubt that even solicitousness for one’s nationals (let alone the attitude to

non-nationals) remains a highly bifurcated affair. The lines of nationality – or at least the sort of nationality that is deserving of the state going out of its way to provide protection – can sometimes be subtly redrawn to distinguish between nationals, a phenomenon manifest in relation to dual nationals or racialized nationals.

Whither international law in all of this? When it comes to globalization, international law was as much implicated in its unleashing, as it was privy to its inequities. It could yet serve as a vehicle to generalize techniques of tracking and surveillance that have long been developed at borders, in the fight against terrorism, or by various totalizing institutions of the state (most notably, the prison). Human rights are already being touted as a precious bulwark against the worst of abuses and they will undoubtedly have a role to play. But their implication in the proclamation of states of emergency and in technologies of statehood as well as their methodological nationalism make them a precarious guarantee against the processes of exclusion characteristic of the border.

Already the discourse of rights and exceptions, limitations “for reasons of public policy or internal security”, “extremely critical situations”, and proportionality is being deployed with familiar, and possibly lethal, vagueness at a time when the EU’s own commitment to both internal mobility and external asylum was itself, needless to say, in crisis. Human rights’ failure to problematize the inequities of the international system itself – as opposed to some inequities within states – also suggests a risk of remaining at the surface, when the project of globalization is very much what is at stake. Whether human rights can maintain a critical edge in light of the imperative but potentially authoritarian maintaining of (national) life at all costs remains an open question, but the experience of the two decades following 9/11 does not offer much hope.

This should incite us as a profession to turn our minds with urgency to the sort of communal and transnational solidarities that ought to emerge not only to make fighting against the outbreak bearable (including disruptive solidarities such as South-North ones in evidence here or there), but to clarify what we might be fighting for beyond COVID-19. The challenge is to imagine how international law might not drift back to its default position of guaranteeing the status quo, let alone of ratifying further exclusion. It is precisely that effort, however, that is being made difficult by our current fragmented condition, the circular isolation in our homes only replicated by the isolation within our states. It is ironic but timely, then, that solidarity is the theme of this year’s ESIL forum, which was to be held in Sicily (Catania) in a few weeks, and was one of the first events on the international law calendar to be postponed.

# COVID-19 Symposium: The COVID-19 Pandemic and the Limits of International Environmental Law

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What can a global health crisis tell us about international environmental law? To answer this question, this short piece maps the interconnections between the COVID-19 pandemic and international environmental law at three stages of the crisis: its origins, policy responses, and consequences. It argues that the pandemic sheds light on the weaknesses of international environmental law.

## ***1. The disconnect between humans and nature at the origins of the new coronavirus***

The COVID-19 pandemic draws attention to the profound disconnect that exists in modern societies between humans and their environment. As a zoonotic disease, COVID-19 is the latest newcomer in a long list of what Jared Diamond calls the 'deadly gifts from our animal friends' (*Guns, Germs, and Steel: The Fates of Human Societies*, 1997). It has long been clear that human health is inextricably linked with that of animals and the environment, but this phenomenon has been exacerbated by increased rates of

environmental degradation combined with high levels of urbanisation. The COVID-19 pandemic has its origins in the inability of the international community to protect our forests, its wildlife and govern land use, which have led to the disappearance of the traditional buffer zones that used to separate humans from animals and their pathogens (UNEP 2016). Constrained by traditional legal structures, international environmental law has been unable to fully adopt an ecosystemic approach that appreciates the interconnections between the health of our planet, biodiversity, and humans. More specifically, if the hypothesis that the virus originated in a live animal market in Wuhan were confirmed, it would be a painful demonstration of the failure of existing legal regimes to protect the wildlife. The possibility that the pangolin might have been an intermediary host turns the spotlight on the challenges facing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). While the Convention transferred all eight pangolin species to its Appendix I, prohibiting their international commercial trade, in 2016, pangolins remained nevertheless the world's most trafficked mammal (Wildlife Justice Commission).

## ***2. Analysing responses to the pandemic through a climate lens***

Other difficulties faced by international environmental law are highlighted when comparing the responses to the COVID-19 pandemic with those given to the climate crisis. Both global health and climate change are collective action problems, and similarities are plentiful: for instance, both crises rely heavily on scientific knowledge and require individual actions that might not be clearly linked to a collective outcome and can suffer from policy and behavioural lethargy. The warnings of the World Health Organisation about 'alarming levels of inaction' from governments will sound oddly familiar to all those involved in the climate fight. However, the unprecedented measures taken by governments to limit the spread of the disease have been exponentially more drastic than those designed to reduce greenhouse gas emissions.

A few weeks ago, we thought that changing our ways of life drastically to mitigate climate change would be impossible. We were told that economic growth would always be prioritised over environmental protection. We were told that governments did not have the budget to finance the energy transition in our countries and abroad. And yet, the pandemic has suddenly shown that when the threat becomes evident, all this becomes possible at great speed and scale. The lexicon used to describe both problems may have been the same – 'crisis', 'emergency' – but their implications in the climate context have been much more timid. When compared with responses to the pandemic, the inability of the international community to act decisively to solve the climate crisis becomes even more striking.

## ***3. Impacts of the pandemic for environmental protection***

The third and final interconnection between the pandemic and international environmental law is perhaps the most evident one and pertains to the direct consequences of the pandemic for environmental protection. In the short-term, the pandemic appears to be having a positive impact on the environment, with emissions of

air pollutants and greenhouse gases decreasing significantly in areas affected by the virus. As a result, existing environmental obligations might be met more easily, in particular quantitative and qualitative targets that are unlikely to be exceeded as a result of the economic slow-down. At the same time, caution needs to be exercised.

Firstly, the response to the pandemic might nevertheless bring unforeseen environmental impacts, linked for instance to last-minute constructions of hospitals without prior environmental impact assessments; large scale, repeated spraying of disinfectants in cities and towns to eradicate the virus; or temporarily scrapping the plastic bag levy to avoid risking spreading the virus through reusable bags. Additionally, the pandemic could hinder the implementation of environmental treaties: for instance, reporting, financial or capacity-building duties might not be met as a result of shifting priorities.

Secondly, the pandemic is likely to delay global efforts for environmental action, as it is certainly distracting the high level policy attention that was needed in 2020. This year was supposed to be a transformational year for international environmental law. The schedule of intergovernmental meetings was packed, including the climate COP 26 in Glasgow expected to raise climate ambition, the biodiversity COP 15 in Kunming (China) to agree a post-2020 global biodiversity framework, as well as talks to adopt a new treaty on marine biodiversity in areas beyond national jurisdiction. The pandemic has shed significant uncertainties about the holding of these important environmental talks and risks delaying action and losing momentum.

As for the longer-term impacts of the pandemic for environmental protection, they remain to be seen. As prosperity declines, the crisis might drain funding and political will from sustainability traditions (International Energy Agency). Alternatively, the crisis could give us a unique opportunity to completely rethink the existing structures (including legal) that have failed to protect the planet. Two months ago, the changes needed to respond to the environmental crisis were seen to be so drastic that they were considered to be nearly impossible. But the pandemic has un-locked us from path dependent trajectories, giving us the chance to create green jobs, catalyse structural investment, and facilitate behavioural change.

### ***Conclusion and personal reflections***

The COVID-19 pandemic is a striking image of the Anthropocene era: human impacts on Earth have been so profound that they have constituted a new geological epoch. We have destabilised the fragile equilibrium of our planet's ecosystems and are now facing the direct consequences. The pandemic is nevertheless a chance to remedy this and build new foundations.

As I write this post, I am thinking about the future of higher education and how the crisis will impact an already fragile sector, as evidenced by strike action across UK universities just two weeks ago. The chance, however, is that, as we move our teaching and research online, we realise that we can do much more to reduce our emissions. While higher

education has made significant contributions to building and disseminating knowledge on climate change, it has however shied away from rethinking its existing structures and modes of operation. As we explore new tools for doing our work online, we can reimagine higher education and lead the way for climate change action.

# COVID-19 Symposium: “Can They Really Do That?” States’ Obligations Under the International Health Regulations in Light of COVID-19 (Part I)

[opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/](https://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/)

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In what is now an omnipresent claim, the coronavirus (SARS-CoV-2) pandemic currently rages throughout the globe. The epidemiological situation changes on a daily basis, often in dramatic fashion. Such fast-paced dynamism also encompasses the measures adopted by domestic authorities – for which there is a very useful tool here. It is appalling to see how the crisis has already shaken the deepest structures of society. As this symposium shows, the direct relevance of this event in such a highly heterogeneous set of legal fields is a sign of how multilayered the pandemic already is.

Thus, revisiting some basic elements of the specialized international law instrument for pandemic response – i.e. the World Health Organization (WHO)’s International Health Regulations (IHR) – is worthwhile. In these two posts, I address the following questions: What are some of the core obligations under the IHR in light of the coronavirus pandemic? What could happen if the IHR’s norms are breached? And WHO (pun

intended) can follow-up on these breaches of norms? This post certainly does not deal with all of the IHR's obligations. It only touches upon a few issues that can lead to future analyses. In light of the ever-increasing number of online posts on this topic, a warning of inevitable overlap is warranted. Several of the following arguments are already introduced in a paper co-authored with Armin von Bogdandy.

## **The IHR: An Atypical Legal Instrument**

The first peculiar feature of the IHR is its approval procedure. It is not a treaty. Instead, it is a legally binding instrument approved on the basis of Article 21 of the Constitution of the WHO – which, in turn, is a treaty. This provision allows the World Health Assembly, the WHO's highest decision-making body, to issue binding regulations in the field of, *inter alia*, '...procedures designed to prevent the international spread of disease'. In 2005, just two years after the 2002-2003 debacle with Severe Acute Respiratory Syndrome (SARS-CoV-1), the World Health Assembly (composed of representatives from WHO Member States) voted to approve the IHR. Under Article 22 of the Constitution of the WHO, there is no ulterior national ratification procedure. As argued elsewhere, this notable delegation of lawmaking powers by Member States shows a foundational trust in the organization's lawmaking powers.

As pointed out by others, the WHO has not made extensive use of the powers under Articles 21 and 22 of its Constitution. Since 1948, binding regulations have been issued only twice – namely, the IHR and the *Regulations regarding nomenclature with respect to disease and causes of death*. From a normative perspective, some see this as wasting the potential of international law for fostering global health. Others, instead, are more critical in so far as the existing legal regimes have fallen short of their promises. If so, why strain compliance even further? This is a debate far beyond the scope of this post. Suffice it to say, there is increasing recognition that the existing norms do not live up to their purpose and need an overhaul.

## **States' Obligations Under the IHR: "Hard-and-Fast", "Protracted" and "Contingent"**

A broad question related to public international law stands at the center of the ongoing coronavirus crisis: What are states' legal obligations? A seemingly simple question leads to convoluted answers – because: lawyers. At the risk of oversimplification, I will try to divide some of the obligations by using three (*very*) informal terms to distinguish them: 'hard-and-fast', 'protracted' and 'contingent'. A more doctrinally acceptable classification is left for another day.

The IHR contains a series of 'hard-and-fast' obligations, i.e. those whose compliance can be attested in a practically immediate form. The obligation to notify the WHO under Article 6 IHR falls into this category. It is the cornerstone of the global disease surveillance system. It can also be seen, from a normative perspective, as justified. As the 2002-2003 SARS-CoV-1 crisis demonstrated, the consequences of unwariness can be catastrophic for the international community. The Chinese government's delay in reporting the virus to the WHO in 2002 didn't allow other states to prepare themselves.

The reasoning hinges upon technical matters. In very oversimplified epidemiological terms – and risking scorn by medical experts – coronaviruses cause a ‘flu-like illness’, named COVID-19. Its symptoms sometimes resemble those of a seasonal flu. This, in turn, makes it difficult for states’ surveillance systems to initially identify infected persons. They can only do so *once* they know there is a new pathogen circulating. Otherwise, positive cases might be – and actually, were – diagnosed as flu cases or, in more severe instances, as “unexplained pneumonia”. Instead, being alerted to a new pathogen allows authorities to include new pathogens in epidemiological surveillance lists and change diagnosis guidelines. This procedure will be especially necessary in territories’ ‘points of entry’ (see Articles 19-22 IHR). Thus, Article 6 IHR obliges states to notify the WHO within 24 hours after they identify any event that ‘might constitute a public health emergency of international concern’. Mark Eccleston-Turner’s post in this symposium deals with this concept in greater detail.

As I argued previously [here](#), without states’ disease reporting the WHO would be mostly ‘blind’. Domestic authorities are (usually) the best equipped to gather empirical epidemiological data. Still, an international organization capable of processing these reports without a national agenda, or at least not openly, can fulfill an essential technical role in the middle of an emergency. Let us imagine what would happen to global disease surveillance if the system depended on governments sharing their sensitive data directly with each other. If we multiply that times two hundred, the result would be a jigsaw of reports by states. Plus, any geopolitical hostilities could prove fatal for pandemic preparedness. Having a ‘neutral hub’ in the form of the WHO makes sense to avoid this.

‘Hard-and-fast’ obligations are also related to respecting travelers’ rights. Articles 31, 32, 40 and 42 IHR establish a series of limitations on how states can implement health measures in respect of persons entering their territory. Noteworthy is Article 42 IHR, mandating non-discriminatory treatment. The profiling of travelers in light of their personal features – and what this includes can be debated – would violate the IHR’s provisions. Such a violation could, in turn, be immediately ascertainable.

Other obligations of the IHR are ‘protracted’ in comparison. As analyzed [here](#) and [here](#), Articles 5, 6, 13 IHR, with reference to its Annex 2, also contain capacity-building obligations. Certainly, in order for a state to promptly report, it needs a health system capable of doing so in the first place. Through the IHR, states have committed themselves to developing ‘core capacities’ within a certain period of time (five-plus-two-plus-two years, Articles 5, 13 and Annex 1 IHR). But how the minimum threshold for this capacity-building obligation can be measured is not clear-cut. Nor are the consequences for not meeting the initial deadline fully fleshed out. As measured by a so-called [Joint External Evaluation Tool](#), compliance has increased gradually throughout the years. Still, in a world in which there are enormous contrasts between healthcare systems, uniform compliance with these ‘protracted’ obligations is a chimera.

Finally, there are obligations which can be seen as more 'contingent' in nature. They will be highly dependent on the circumstances. Due to the abstract formulation of some of the provisions of the IHR, they require a contextualized application to particular instances. Article 43 IHR, for example, allows states to take health measures additional to those recommended by the WHO, as long as they: 1) notify the WHO; and 2) provide a scientific basis. This can include measures against individuals, or even against states in general e.g. through travel bans. As mentioned above, the obligation to notify is 'hard-and-fast'. Yet once this is effectuated, (non)compliance will depend on what justification states might provide.

The possibility for the WHO – and, in particular instances, its Director-General – to issue recommendations to states under Articles 15, 16 and 18 IHR is where it best exercises its technical authority. Similar to other parts of the IHR, Article 43 allows states to adopt additional health measures contingent on providing a scientific justification. Ignoring this obligation will be contingent on the prevailing circumstances. Indeed, depending on the type of emergency at hand, the best course of action will be different. Whereas one restriction might be recommended in some circumstances, it could be advised against in others. States may, indeed, offer scientific justifications countering the WHO's recommendations. In fact, amidst the ongoing crisis there have been disagreements between public health experts on what the 'best course of action' is. Since this requires complex understandings of medicine and public health, expert input is necessary in order to provide more clarity. The WHO's recommendations can reflect which measures should be taken during a specific crisis. It means, then, that the IHR's general obligations can acquire more specificity. The WHO is in a privileged position to provide more guidance on what type of restrictions might be justified. Whether its assessments always provide full context is a different matter.

That being said, if states deviate from the WHO's advice, are they failing to fulfill their obligations under the IHR? The (controversial) answer in my opinion is: it depends. Article 43 IHR as a whole is not 'hard-and-fast' in the sense that disregarding the WHO's recommendations leads *per se* to a violation. This would require wholly re-framing them, starting with their name. They would no longer be 'non-binding advice' as Article 1 IHR defines them. Certainly, not following the Article 43 IHR steps of notifying-plus-justifying can be seen as a downright violation. For example, although the WHO stated on 30 January 2020 that travel bans (mostly to China) were "not recommended", we nevertheless witness how states apply them increasingly. Is that in itself a breach of the IHR? The discussion is still open.

In the light of this overview of some of the IHR's obligations for states, in the next post I will deal with other issues related to their implementation, namely: what happens if and when states deviate?

# COVID-19 Symposium: “Can They Really Do That?” States’ Obligations Under the International Health Regulations in Light of COVID-19 (Part II)

[opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-ii/](https://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-ii/)

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## ***The WHO's Oversight of the IHR's Obligations – Still No Health Police***

As explained in the [previous post](#), the WHO cannot invoke legal responsibility when states breach the IHR. Reports of non-compliance have been presented at the World Health Assembly – without further action. No explicit mandate is granted by the IHR to the WHO to hold states responsible when the IHR is breached.

An example highlighting this gap is related to the legality of the ever-increasing ‘travel bans’. These would directly fall under the purview of the IHR. When the emergency was first declared, the major concern was how travel bans would isolate China, and mainly Hubei province where the virus first started spreading. Now, the bans go two-ways: persons are prevented both from entering a foreign country, as well as from leaving their own. Are they legally allowed to do so? As argued in my previous post in this symposium in light of Article 43 IHR: it depends.

Disregard for [the WHO's recommendation of 30 January, 2020](#) against travel bans seems to be widespread. The claim, [posited by others](#), that all of these measures are a violation of the IHR certainly needs to be scrutinized further. To begin with, it places a lot

of weight on non-binding recommendations. The implication would be that the WHO, and also its Director-General, would have the power to actually create *motu proprio* new obligations for states through her/his recommendations. This would represent a major delegation of powers.

Furthermore, the blatant lack of enforcement mechanisms for the WHO whenever the IHR are breached was an explicit choice of design. Ultimately, when approving the IHR, Member States did not see the need to turn an international organization into a health police. This means that comparisons with domestic authorities, which do exercise police powers in order to protect public health, are a stretch. Instead, attention should be focused more towards its allocated role as a technical agency.

### **No Individuals Here: "Classic" State-Centered Reparations**

As mentioned previously here, a breach of the IHR would lead to international responsibility for wrongful acts. But, if not the WHO, then who (pun not intended) can invoke this responsibility? It is worth noting that, in terms of subjects of international law, the IHR is basically a state-centered instrument. Article 56 IHR allows states to enter into negotiations or mediation and, if this is unsuccessful, settle their disputes in the Permanent Court of Arbitration. This would allow states to seek redress whenever measures such as, for example, travel bans are taken by other states. Certainly, the act would first need to be attributable to state's agents, so it would hardly be applicable in a setting where private companies adopt it as their own policy.

Since dispute settlement has – so far – never occurred, this is merely a hypothetical scenario. Nevertheless, further exploring the possibility can help understand the underlying rationale of the regime. The usual elements of state responsibility apply, which involve, *inter alia*, demonstrating causation. States could have standing in a judicial forum to file claims against actions or omissions by other states if their interests were damaged in some way. Here, a factual analysis of the effects of travel bans in other states' economies – a concern which is also related to the WHO's reasons for advising against travel restrictions – would be necessary. There is a potential way out of the initial hurdles for standing, though. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') allow for states to invoke responsibility when, even if a particular action or omission did not affect them directly, 'the obligation breached is owed to the international community as a whole' (Article 48(1)(b) ARSIWA). But this requires a much more detailed justification.

The difficulties with causation also apply in the case of 'hard-and-fast' obligations, as classified in the first post. If we focus on Article 6 IHR's obligation to notify, ascertaining a breach should be a relatively straightforward process: Either states report on time (24 hours), or they don't. And if there are detrimental consequences in other states as a result of the delay, then redress could be sought. At this point, lawyering enters the stage: Demonstrating such a breach in a judicial forum also requires evidence. The 24-hour timeframe begins once 'public health information' has been assessed, e.g. once there is laboratory confirmation of the presence of a new virus. Thus, a subjective

element is involved, in so far as it needs to be shown that authorities knew of the existence of an event for which they needed to notify the WHO. But if national authorities were themselves unaware of the presence of a threat, how could they be seen as obliged to notify? And, besides the possibility of whistleblowers stepping up or resorting to alternative, non-state reports (see Article 9 IHR), how can it be proven that national authorities were 'aware' of the presence of a potentially pandemic disease long before it was reported? Would journalistic accounts suffice?

In contrast to states, individuals simply do not have standing *solely* under the IHR. References to the human rights of persons and travelers are made, for example, in Articles 2 and 32 IHR. But the legal instrument does not envisage any recourse for individuals in case of wrongdoing by states. If travelers' rights under the IHR are violated, it is actually up to their home states to bring a claim forward. In the past, and perhaps as a result of cost-benefit analyses, potential disputes between states arising out of treatment of travelers have been settled diplomatically.

Here, still two caveats can be put forward: the IHR can, in theory, be invoked by individuals in either (regional) human rights or domestic courts whenever they believe a breach has affected them. In the case of regional human rights courts, they could somehow make a cross-reference to the IHR's obligations. And, depending on the legal system at hand, invoking the IHR at the domestic level is possible, though not taken for granted. Given how this encroaches upon the thematic contents of other posts in this symposium, I do not expand upon this possibility for the time being.

### ***Deploying Legal Analysis in an Age of Pandemics***

The analysis herein has probably not been a heartening one for international lawyers. After all, one of the purposes of having rules-based pandemic preparedness and response is to provide more certainty to norms' addressees, both those who are obliged and those who are entitled to rights. Instead, so many caveats have been elaborated throughout these two posts, they would seem to lead to an increase in uncertainty. Conversely, I believe there is much value in trying to accurately depict the existing legal regime of pandemic response – including, of course, its existing pitfalls. Precisely due to law's goal of providing certainty and stabilizing normative expectations, taking the many hidden corners into account is a must. Convolved and cryptic as this exercise may be, it is our best chance at making the argument for a rules-based system. Because, in the middle of the unfolding COVID-19 drama, it is only natural to wonder where exactly legal norms are when you most need them.

# COVID-19 Symposium: The Declaration of a Public Health Emergency of International Concern in International Law

[opiniojuris.org/2020/03/31/covid-19-symposium-the-declaration-of-a-public-health-emergency-of-international-concern-in-international-law/](https://www.opiniojuris.org/2020/03/31/covid-19-symposium-the-declaration-of-a-public-health-emergency-of-international-concern-in-international-law/)

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## Introduction

On 30 January 2020, the World Health Organization (WHO) Director-General Tedros Ghebreyesus declared COVID-19 a Public Health Emergency of International Concern (PHEIC). The declaration of a PHEIC serves as a clarion call to the international community to provide political, financial, and technical support to a public health emergency. A PHEIC declaration also empowers the Director-General to make Temporary Recommendations that, although non-binding, seek to provide public health guidance and counteract unnecessary restrictions on international trade and travel. While the Recommendations may carry normative weight, during past PHEIC declarations States have not complied with these recommendations.

This post outlines the status of the PHEIC in international law and analyses the manner in which the criteria to declare a PHEIC were interpreted and applied in respect of COVID-19. It raises concerns that the WHO and its agents failed to properly interpret and

apply the system of legal rules member states created to make such a declaration through the International Health Regulations (IHR).

## **Public Health Emergency of International Concern**

The IHR is the treaty governing global health security. Adopted by the World Health Assembly (WHA) under Articles 21 and 22 of the Constitution of the WHO, it is legally binding on 196 States Parties. The IHR aim to 'prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade'. Article 12 of the IHR sets out that the Director-General shall determine whether an event 'constitutes a public health emergency of international concern in accordance with the criteria and the procedure set out in these Regulations'. In order to do so, the Director-General shall consider:

(a) information provided by the State Party; (b) the decision instrument contained in Annex 2; (c) the advice of the Emergency Committee; (d) scientific principles as well as the available scientific evidence and other relevant information; and (e) an assessment of the risk to human health, of the risk of international spread of disease and of the risk of interference with international traffic.

In addition to the role of the Director-General, the IHR Emergency Committee (EC) is central to the PHEIC process – it is convened by the Director-General in order to advise if the conditions for a PHEIC have been met, and what Recommendations to make to Member States in response to the event. Article 48(1)(a) of the IHR states that the EC 'shall provide its views on ... (a) whether an event constitutes a public health emergency of international concern'. There is no scope within Article 48 for the EC to take into consideration anything other than the legal criteria for a PHEIC.

## **First meeting of the EC**

The EC first considered if the coronavirus outbreak met the criteria to be declared a PHEIC on 22 January 2020. The EC were unable to reach a conclusion at that stage – even holding a vote, which resulted in a tie, the first time this is known to have occurred (the EC process has been criticised for lacking transparency). The DG instructed them to meet the following day to continue their deliberations.

## **Second meeting of the EC**

The second meeting of the EC occurred on 23 January. At that time, the advice was that the event did not constitute a PHEIC, but the EC members agreed on the urgency of the situation and suggested that the EC should be reconvened in a matter of days to examine the situation further. The conclusion appears to be predicated on the lack of necessary data and the (then) scale of global impact. At that time there were only four cases outside of mainland China, and all four appeared to have travel history to the affected region. There were again divergent opinions within the EC itself, with several members consider[ing] that it is still too early to declare a PHEIC, given its restrictive and

binary nature [of the PHEIC declaration].

Division within the EC appears to have centred on the meaning of 'international spread', within Article 1 of the IHR. In the event that all known cases outside of China were of individuals who were infected in China, but then travelled internationally, an argument could be made that this does not constitute international spread. However, this is at odds with the text of IHR, and the manner in which the criteria have previously been interpreted. A PHEIC is, by its very definition, international: it is an 'extraordinary event which is determined to constitute a public health risk to other States through the *international* spread of disease and to potentially require a coordinated *international* response'. However, that does not mean a disease must have crossed international frontiers, or have local spread in a country beyond that which it originated in; it must merely have the potential for, or there must be a risk of, cross-border transmission. Although most outbreaks that have been declared as PHEICs had already crossed national borders and had human-to-human spread within a new country, not all have. The 2014 PHEIC declaration for the resurgence of wild Polio occurred without cross-border transmission; it was the risk of international spread which was the determining factor.

The EC further justified their recommendation on the basis that 'now is not the time' to declare a PHEIC. This is quite bizarre. The EC did not expressly state that the criteria to declare were not met at this stage, merely that now is not the time to make such a declaration. By a plain reading of the treaty, the criteria did appear to be met, and the wording of the EC – with its emphasis on timing – appears to suggest that they took into consideration factors beyond the criteria for a PHEIC outlined in Article 1 – what in administrative law would be deemed 'irrelevant considerations'.

### **Third meeting of the EC**

On 30 January 2020, the WHO declared the outbreak of COVID-19 a PHEIC. On the date of the declaration, there were 7,818 cases of COVID-19 confirmed globally, affecting 19 countries in five WHO regions at that time. The DG stated that the declaration was made in light of how COVID-19 would impact developing countries, not that the events within China were a PHEIC. However, this was eight days after the first meeting of the EC, when the criteria to declare were met. The reasons for the delay are not clear, though this does raise interesting questions regarding the law of responsibility and international organization duties, and calls into question the very utility of the PHEIC process as a function of international law.

### **Conclusion**

This short comment has outlined the purpose, powers and processes associated with the declaration of a PHEIC under the IHR. In doing so it has highlighted the disconnect between the PHEIC in international law, and how the criteria to declare were interpreted by the EC in respect of COVID-19. In short, it appears that the EC and the DG (in following their advice) failed to properly adhere to the IHR by taking into consideration other

factors beyond the treaty and not making a declaration when the criteria were met. The implications of this should not be underestimated; it is not the case that law must be adhered to properly because it is the law, but because a failure to follow the law has wider implications for the normative authority of the IHR, and the WHO.

# COVID-19 Symposium: COVID-19 and the Human Right to Water and Sanitation

[opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-human-right-to-water-and-sanitation/](https://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-human-right-to-water-and-sanitation/)

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Information and advice on COVID-19 has been changing at an alarming rate, but one message has remained consistent for weeks: wash your hands. The World Health Organization (WHO) has stated that ‘frequent and proper hand hygiene is one of the most important measures that can be used to prevent infection with the COVID-19 virus’. States and international bodies have tried to keep the messaging on this point extremely clear and concise, producing illustrated guides and even songs to get the message across.

But as the number of infections in Africa and Asia grows, the messaging on handwashing becomes more complex. There is nothing simple about washing your hands when you have extremely limited access to clean water. In 2019, the WHO reported that 785 million people lack even a basic drinking-water service. Globally, at least 2 billion people use a drinking water source contaminated with faeces. Three billion peoples have no access to hand-washing facilities at home. A particularly terrifying statistic is that over 20% of health care facilities in least developed countries have no water service, no sanitation service and no waste management service. In these circumstances, requiring even medical professionals to wash their hands with the frequency needed becomes challenging. A lack of access to water and sanitation is not only a problem for least

developed countries. In Europe over 16 million people still lack access to basic drinking-water and more than 31 million people are in need of basic sanitation. In addition, access to water and sanitation remains an enormous problem in prisons and in refugee camps around the world.

While limited access to clean water is a life-threatening problem for millions of people on a day to day basis, in the midst of the global COVID-19 pandemic, many may find themselves stuck in a vicious cycle. People with limited access to water and safe sanitation services are at a much higher risk of COVID-19 infection. Infection leads to limited mobility as people become sick or are forced into quarantine, risking greater limitations on their access to water.

This pandemic has highlighted what we have long known – realizing the human right to water and sanitation is critical to preventing the contraction and spread of life-threatening disease. However, realizing this right for all is a task beset with problems, made worse by a lack of global acceptance of the right, climate change, and poverty. Here I look at the status of the right in international law and the importance but complexity of realizing the right in a time of COVID-19 and climate change in an unequal, interconnected world.

### **The status of the right to water and sanitation in international law**

The status and nature of the right to water and sanitation in international law is unclear and contested. The right was not included in the 1948 Universal Declaration of Human Rights, nor did it appear in either of the 1966 Covenants. From the 1970s onwards, however, states increasingly recognized the importance of access to water and reference to it began to appear in conventions on the rights of women and children.

Recognition of non-binding rights to water and sanitation in international law happened only relatively recently. In 2010, the UN General Assembly recognized the human right to safe drinking water, while the right to sanitation was recognized as a distinct right by the General Assembly in 2015. The right to water and sanitation are also recognised in the 6<sup>th</sup> Sustainable Development Goal (2015) which calls on states to ensure the 'availability and sustainable management of water and sanitation for all' by 2030.

The OHCHR has, since 2002, argued that rights to water and sanitation are implied by Articles 11 and 12 of the Covenant on Economic, Social and Cultural Rights. Article 11 guarantees the right 'to an adequate standard of living ... including adequate food, clothing and housing, and to the continuous improvement of living conditions'. Article 12 provides for the right to the highest attainable standard of health.

Connecting the right to water to Articles 11 and 12 highlights the fact that a right to water is a right to access an adequate quantity and quality of water for a wide range of purposes. Ensuring the right to water requires states to take decisions about allocating an often-limited resource among a vast array of consumers, including agriculture, industry, and the energy sector. Furthermore, the right to water is a right to *access* water

which demands sometimes major investments in infrastructure, transportation and water treatment plants. This complexity and expense might explain why currently only 26 states have recognized the right in their constitutions.

### **The right to water and climate change in a time of COVID-19**

Several commentators have linked COVID-19 to unsustainable environmental practices. The Chinese government has claimed that COVID-19 originated in a meat market in Wuhan, but experts have suggested that human encroachment into and destruction of forests and other natural habitats has pushed us into closer contact with animals, who are themselves pushed into closer confines, increasing the likelihood of inter-species transmission of diseases.

It has also been noted that the drivers of a global pandemic like COVID-19 are the same drivers of climate change – rampant destruction of biodiversity, dense, energy-intensive urban centers, rapid growth in international airline travel and transportation. Both COVID-19 and climate change are a product of our globalised, industry-heavy and unequal world.

Some have pointed to a positive connection between COVID-19 and climate change, seeing the slowing down of economies, the limiting of international travel and the closing of factories as an opportunity to transform some of our unsustainable and GHG-emissions intensive economic practices. However, the connection between climate change and global pandemics is much darker when viewed from an access to water perspective.

Climate change is recognized as a major obstacle to the realization of the right to water. It already affects the accessibility of water and sanitation due to an increase in floods, droughts, rising sea levels and changes in temperature extremes. Even areas that are currently water rich will likely face water shortages in the future. The UK's National Audit Office, for example, recently predicted that parts of England will run out of water in the next twenty years due to increased droughts as a result of climate change.

An important question is what impact this pandemic will have on the development of the international law on climate change. Many see the adoption of the Paris Agreement in 2016 as a significant step forward, creating both binding and voluntary measures aimed at limiting the global temperature increase to 1.5 degrees Celsius. However, much work is still needed in the development of standards and rules under the Paris Agreement. The COVID-19 crisis, as well as post-crisis efforts to rebuild economies and the US's withdrawal from the Paris Agreements this year, may mean many states are distracted or discouraged and this may hamper compliance and the further development of global climate law.

### **The right to water and poverty in a time of COVID-19**

Recent research has demonstrated how various measures related to the regulation of water have resulted in discriminatory water allocation practices that hamper the

realisation of rights to water for the poor and marginalized. Privatisation of water resources and distribution has raised costs and reduced access for indigenous and traditional communities and for those living in poverty.

COVID-19 has highlighted the connection between accessing water and exposure to illness for people living in conditions of poverty. In South Africa, for example, people living in informal settlements often share a small number of water taps and toilets with hundreds of others. Collecting water and using toilets means standing for hours, often in crowded conditions. Not only is social distancing impossible in these circumstances, but few are able to collect enough water for cooking, washing clothing, and regular hand washing. Since water collection is often the task of women, women are particularly vulnerable to infection.

Climate change exacerbates existing inequalities in water access. While water scarcity will affect a growing number of people all over the world, it will have a disproportionately negative effect on the poor. Scarce water resources will result in increased costs associated with accessing water, making water more expensive for those with access to piped water but also reducing existing water sources, meaning those who travel to collect water will have to travel further, increasing tensions over water resources.

In the current COVID-19 crisis, those travelling to collect water may find themselves in conflict with police and other authorities enforcing state lockdown measures. Some states have adopted criminal provisions and fines to enforce their lockdowns, and this, combined with the public fear of contracting the virus, may mean people increasingly resort to using contaminated water sources or open defecation.

### **Taking action now**

Overcoming these barriers with the urgency that COVID-19 demands is no simple task. What is clear, however, is that realizing the right to water and sanitation needs to be a key component of states' COVID-19 response plans. International agencies have made a number of important recommendations, including that states stop all water service cut-offs for reasons of non-payment and provide water free of cost for the duration of the crisis. Another crucial measure will be the creation of additional water and sanitation facilities, not only in informal settlements but also in high density areas such as markets and public transport hubs.

From the perspective of international law, hopefully this crisis will mean greater recognition of the right to water and sanitation by states. In our interconnected world, the right to water is not only a sovereign matter, but an international concern. Only Stern has argued that '[i]n the absence of vaccines and treatment, ... this crisis will only be as *over*, as it is in its worst-hit places. Where pockets of outbreak remain, no one will be safe'. The realisation of the right to water in one country is critical to the realisation of the rights to life and health of all people all over the world.

# COVID-19 Symposium: COVID-19 and the Foundations of International Law

[opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law/](https://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law/)

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'Is COVID-19 also disrupting the foundations of international law?' The cliché on the topic safely out of the way in the first sentence, let me say that I will not add to discussion of how international law shapes possible responses in technical and institutional terms, nor will I say anything about the politics and science involved, due to justified modesty about my contribution on the latter points. Instead, I propose to reflect on the effect of COVID-19 and reactions thereto ('COVID-19' in the rest of the piece) on the foundational elements of international law: the generalist vocabulary on sources, responsibility, and actors.

## **Starting Point: Foundations are Forever**

One should not easily assume that COVID-19 calls for re-examination of the foundations of international law. Pandemics, to use the technical term in a lightly anachronist manner, have always been part of the social and legal fabric of the international legal order (with OED tracing its etymology to the late 17<sup>th</sup> century). Plagues were certainly a relatable metaphor and also a normal subject of incidental regulation in the foundational texts: the great 14<sup>th</sup> century writer on reprisals, Giovanni de Legnano, may have himself been a victim; Grotius is full of references to plague via classical quotes; and Vattel nods to plague as a small-print qualification of the right of passage. The broader point is that the foundational elements of the international legal order are remarkably stable, capable of accommodating fundamental shifts in politics and institutions. A flick through the sections on actors, sources, and responsibility in the standard 20<sup>th</sup> century blackletter

text shows how the short century, while changing everything else from empires to jazz, did very little to foundations between 1905 and 1992. In short, foundational layers of the international legal order do not slice away easily.

## COVID-19 and Sources

The law of treaties, reflected to a significant extent in the Vienna Convention on the Law of Treaties (VCLT), and rules on custom, elaborated by the International Law Commission (ILC) in the 2018 Conclusions on Identification of Customary International Law (2018 ILC Conclusions) (strongly supported by States (p.3) and taken note of by the General Assembly ([4])), do not generally distinguish between application to different specialist fields or situations of emergency. It is hard to see how these rules could be affected in a significant manner by COVID-19. In particular, the combination of international law's general disdain for dogmatic attitude to questions of form with modern technologies should take care of almost all practical challenges arising out of quarantines and lockdowns. But COVID-19 may put pressure on certain principles that get less traction in less exceptional times, which I will discuss in turn regarding custom and treaties.

Two challenges seem to me likely regarding custom: concerted inaction and concerted action. First, how to capture the juridical effects on the content of rules of a widespread change of States' position on what counts as lawful, that may not be immediately articulated in practice and *opinio juris*? The brunt of analysis will, in the first instance, be borne by the principle on failure to act as evidence of *opinio juris*, expressed in Conclusion 10(3) of the 2018 ILC Conclusions, and in particular the question of whether 'the circumstances called for some reaction'. Secondly, would States be precluded from generating instant custom if political consensus exists? The 2018 ILC Conclusions are sceptical (Conclusion 8 Commentary 9, Conclusion 12 Commentary 4). But it may be that the better position, suggested over the years by some of the great minds associated with University College London (e.g. Chapter V of Maurice Mendelson's 1996 *Hague Recueil*), permits a narrowly tailored endorsement of instant custom, and COVID-19 is that extraordinary instance of a shared and immediate challenge for the entire international community – the 'aliens' attack' hypothetical – which fits the tailoring.

Two issues seem to me likely regarding treaties. As a general matter, principles of interpretation are perfectly capable of addressing disputes about emergencies, as demonstrated by recent decisions in the fields of trade and investment law. A shift in appreciation by States regarding the appropriate boundaries of lawful conduct against COVID-19 could also be articulated in terms of subsequent agreement and practice (see VCLT Article 31(3)(a), (b), ILC). Of course, inconsistencies may give rise to their own controversies but that is not unusual; a recent award of the Iran-United States Claims Tribunal with 8 separate opinions is one, if extreme, example. A more serious but again familiar challenge is the willingness of international tribunals to give full effect to such inter-State efforts; some mechanisms, particularly when open to non-State actors, may, in the view of some, approach this task without excessive enthusiasm ([53]-[58]). The second point can be put more briskly: COVID-19 may finally be the plausible case for

invoking fundamental change of circumstances as a ground for terminating or withdrawing from a treaty (VCLT Article 62), discussed with such merriment as impossibly strict just a year ago.

## **COVID-19 and Responsibility**

State responsibility deals with secondary rules, without attempting to define the content of primary rules. The treatment of COVID-19 will therefore vary rule by primary rule: different rules require different conduct (and some will be entirely unaffected), some (vaguer) rules may accommodate exceptional circumstances in the process of application, while others will be drafted to take them into account by restrictions or derogations. But two issues seem relevant more generally: first, circumstances precluding wrongfulness; and secondly, rules addressing multiplicity of actors and conduct leading to responsibility.

Paddeu and Jephcott are persuasive in arguing that circumstances precluding wrongfulness are, in their traditional reading, too narrow to apply here (even if I would put less emphasis on Argentinean arbitrations, which are almost entirely worthless as authorities for this topic due to the peculiar way they were argued and decided). But a more interesting question is whether, once the law-making dust has settled, Chapter IV of Part One of the 2001 ILC Articles on responsibility of States for internationally wrongful acts (2001 ILC Articles) will still be good law. If States do invoke these circumstances, that is not at all certain: e.g. the rule on necessity, reflected in Article 25 (or at least more reflected there than anywhere else, [319]), could be plausibly perceived as too restrictive and reshaped around the gravity of peril axis, the 'only available means' relaxed to 'reasonable means', and the qualification of contribution relaxed if not dropped altogether (making Allot ultimately right). And, more generally, if COVID-19-related State practice leads to a perceptibly different result from the elegant formulae of the 2001 ILC Articles, States can always decide to move forward with the long-dormant plans in the Sixth Committee.

The more immediate challenge is capturing in legal terms the complicated factual situation, with many plausible but contested claims about different instances of conduct by different States, international organizations, and non-State actors breaching different primary rules, sometimes on their own and sometimes due to combined effect. Principles of shared responsibility may well eventually provide the broader conceptual prism. But under current law, the weight of the argument will be carried by principles tucked away in the less flashier corners of Part Two of the 2001 ILC Articles, not claiming the pedigree of generally mispronounced Polish place names from yesteryear. Recall that blackletter law does not call for reparation of any and all consequences flowing from the wrongful act (Article 31 Commentary 9); it is only damage for injury *caused* by the wrongful act (Commentary 10) in breach of the *particular* primary rule that has to be repaired. Principles of mitigation (Commentary 11) and contribution (Article 39) (as well as a question-mark about concurrence (Article 31 Commentary 12)), plus the open-ended rules on plurality of injury and responsibility (Article 46, 7) will further calibrate the

content and form of reparation. Less the grandest principles, then, more the boring small print of evidence, injury, causation, and damage ([232]) – and, again, much relevant practice likely directed at these often underexplored rules in the nearest future.

### **Coda: Actors**

Everyone is a Westphalian in a pandemic. A (primarily) inter-State legal order, focused on a solution to a universal and immediate challenge that depends on the choices and technical capacities of individual States, could well consider tinkering with the status or full rights of participants deemed insufficiently competent by the key actors of the relevant community. The history of international law provides many examples, and in recent practice consent has operated as a proxy for such anxieties, for e.g. self-defence (Principles 11-3), humanitarian assistance (Article 13(2)), and treaty-making ([172]), some instances more persuasive and desirable than others. The gravity of the challenge may well bring to the mind of some (States) the concept of the irresponsible sovereign, whose consent to generally desirable conduct, if not given even after a friendly nudge, may be presumed or dispensed with. Classic Great Powers and outlaw States, one would think — but unlikely to play out in the usual manner in the legal and institutional process. The Venn diagram of States most capable of bending the legal order due to their privileges in institutional, economic, military terms, and States (perceived to be) engaged in conduct most threatening to the international community, is, for once, approaching a circle. Sovereign equality will not vanish away, for the Snark *is* a Boojum, you see.

# COVID-19 Symposium: Article 2 ECHR's Positive Obligations–How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?

[opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/](https://opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/)

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In the shock and fear of the COVID-19 pandemic, colleagues have begun to reflect on international human rights law's continued importance: with analyses of due diligence, the right to life and right to health; derogations under the European Convention of Human Rights (ECHR) (also see page 2 here); and a proposal that human dignity inform current policy and future legislation. The British Medical Association, the Royal College of Nursing, and the editor of The Lancet have called on the UK government urgently to ensure the supply of sufficient personal protective equipment (PPE) to health care personnel working with COVID-19 patients, amid reports that the PPE available falls short of World Health Organization (WHO) standards. In the same week, the UK's National Institute for Health and Care Excellence (NICE) has produced a hurried guideline on patients' eligibility for critical care in the context of scarce resources, which has led to concern among lawyers working with people with disabilities. In both these contexts, international human rights law seems absent from policy and practice, despite continuing to bind states in their response to COVID-19.

This post analyses the case law of the European Court of Human Rights (ECtHR) on states' positive operational obligations to protect life under Article 2 of the ECHR, and offers concrete arguments for the protection of health care personnel and vulnerable patients through this human rights lens.

## **Non-Derogable Obligations to Protect the Right to Life**

Article 2 is one of the ECHR's most fundamental Articles. In peacetime, it is non-derogable, meaning that no 'public emergency threatening the life of the nation' can permit the suspension of Article 2 obligations. Article 2(1) requires that 'Everyone's right to life shall be protected by law...' and that states must refrain from the unlawful deprivation of life within their jurisdiction (the negative obligation). The ECtHR has held that Article 2 also requires states to safeguard the lives of those within its jurisdiction (*LCB v United Kingdom*, para 38). This entails positive obligations, which have subsequently been extended to obligations to prevent and obligations to investigate unlawful deprivation of life under Article 2.

The case of *Osman v United Kingdom* first set out the positive obligation 'in certain well-defined circumstances... to take preventive operational measures to protect an individual whose life is at risk...' (para 115). This case (and the early development of the principle) was confined to threats to an individual's life by the criminal acts of a private individual. *Osman* held that for three reasons (policing challenges, the unpredictability of human conduct, and operational choices between priorities and resources) positive obligations must not be interpreted to impose an 'impossible or disproportionate burden' on the national authorities (para 116). This phrasing does not offer expansive excuses to states which invoke resource constraints (see below). There was no violation on the facts of *Osman* because the positive operational obligation is triggered only when the authorities know or should have known of the threat to an individual's life, and this was not established.

The ECtHR has expanded the range of factual circumstances in which Article 2's positive operational obligations apply: to the need for planning to protect life in counter-terrorism operations (*McCann v UK*), for steps to prevent the recurrence of natural disasters (*Budayeva v Russia*), and the provision of emergency response following an accident (*Furdik v Slovakia*, cited in *Lopes de Sousa Fernandes*). In *Oneryildiz v Turkey*, the Grand Chamber ruled that positive obligations apply in the context of 'any activity, whether public or not, in which the right to life may be at stake' (para 71). In that case, 39 people had died following a landslide from a waste collection site where there had been a methane explosion. The Grand Chamber found that the state had not prevented the unlawful construction of the dwellings which were destroyed by the landslide, and that it had disregarded expert advice, allowing the site to operate in breach of health and safety legislation. *Osman's* actual or constructive knowledge requirement was easily reached, and its caveats on scarce resources did not prevent the Grand Chamber from finding a violation.

Subsequently, in *Stoyanovi v Bulgaria*, the ECtHR set a framework for Article 2's positive obligations: first to establish a framework of laws and procedures to protect life, and second to take preventive operational measures. The latter duties only applied to soldiers experiencing "'dangerous" situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made or natural hazards'.

### **Do Article 2's Positive Obligations Apply in the COVID-19 Pandemic?**

Emphatically, yes. As Article 2 is non-derogable (except for deaths resulting from lawful acts of war), ECHR states parties cannot suspend the negative or positive obligations which arise under Article 2 during the current emergency. Even though the pandemic is a 'natural hazard', states have been on notice since January 2020 of the emergence of the novel coronavirus, so they knew or should have known that it could constitute a threat to life in their own jurisdictions. That actual or constructive knowledge threshold for the positive operational obligations is easily passed. ECHR states parties facing COVID-19 have an obligation to establish a framework of laws and procedures to protect life (in the UK context, the Coronavirus Act 2020 and the regulations passed under the Health Protection (Coronavirus Restrictions) Regulations 2020 partially fulfil this); and to take preventive operational measures. I argue that preventive operational measures apply in *at least* the two specific situations below.

### **How Might Article 2's Positive Obligations Protect Health Care Personnel?**

The ECtHR case law on health care focuses on medical negligence rather than pandemic disease. *Lopes de Sousa Fernandes v Portugal* establishes that in the vast majority of negligence cases, the state has only the obligation to establish a regulatory framework for professional standards. However, in two sets of 'very exceptional circumstances', the state has positive operational duties to protect life. These are a) where life is 'knowingly put in danger by denial of access to life-saving treatment', and b) where a 'systematic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about this risk and failed to undertake the necessary measures to prevent that risk materializing...' (para 192). States will have a broad margin of appreciation (see para 175) on 'scarce resources' and 'difficult choices'.

Ostensibly, there is nothing here to protect health care personnel whose PPE is insufficient to confer protection from coronavirus infection: the exceptions in *Lopes de Sousa Fernandes* imply a decision to deprive individuals of 'access to life-saving treatment', rather than PPE. Yet this is where *Stoyanovi* remains relevant. The risks of coronavirus infection, serious illness and possible death are not those which doctors, nurses, paramedics and others will face in the course of their normal duties. They are instead "'dangerous" situations of specific threat to life... [from a] natural hazard'. Further, the flexibility and expansiveness of the ECtHR case law might extend to a 'systematic or structural dysfunction' in the provision of life-saving PPE, to draw on *Lopes de Sousa Fernandes*'s second exception.

In UK domestic law, the cases of Long and Smith (on the systemic failure to provide soldiers with iridium phones, and the failure to provide sufficient protection against improvised explosive devices) are relevant by analogy and also engage Article 2's positive obligations.

There may be practical limitations with the global supply chain, hinting that full provision may be 'impossible', but this does not preclude the positive operational obligation, including to plan for pandemic response. Reports indicate a failure appropriately to stockpile protective eyewear as early as 2017, when the cost of storage was deemed disproportionate to the risk of pandemic influenza. Resource constraints and the current emergency do not give states *carte blanche* to disregard their preventive operational obligations under Article 2 ECHR. Once the actual or constructive knowledge threshold is passed, the positive obligation is triggered; subject to any evidence adduced on 'impossible or disproportionate burden' and a margin of appreciation on how states choose to allocate resources in the implementation of the positive obligation (see Brincat v Malta on 'choice of means').

### **How Might Article 2 Positive Obligations Protect Vulnerable Patients?**

Amid concerns that the exponential growth in infection rates will quickly overwhelm the health service, the NICE rapid guideline adapts a 'frailty' scale usually used for patients with dementia to assess whether patients might be eligible for critical care. The scale is not to be used 'in younger people, people with stable long-term disabilities (for example, cerebral palsy), learning disabilities or autism', who should receive an 'individualised assessment'. '[C]omorbidities and underlying health conditions' should be considered 'in all cases' (p.6). 'Human rights' are absent from the guideline, although there is a responsibility to 'have due regard to the need to eliminate unlawful discrimination...' (p.2).

While individual clinical decisions at the end of life are regulated only by *Lopes de Sousa Fernandes's* positive framework obligation, there is no suggestion in Article 2 jurisprudence that the positive operational obligations to protect life can be *prospectively* disapplied as a matter of national guidance for patients with 'frailty', 'comorbidity and underlying health conditions'. This guideline risks violations of Article 2 ECHR in individual cases, possibly read alongside Article 14 (non-discrimination in the enjoyment of ECHR rights).

Where such guidance appears in an under-funded health service which faces COVID-19, the second exception in *Lopes de Sousa Fernandes* becomes relevant: that of a 'systematic or structural dysfunction in hospital services' which might result in patients 'being deprived of access to life-saving emergency treatment'. Previously, in Asiye Genç v Turkey, the ECtHR had found a violation of Article 2 where a newborn baby was denied admission to a neonatal intensive care unit. There were insufficient incubators, and the state 'had not taken sufficient care to ensure the smooth organisation and correct functioning of the public hospital service'. This situation was 'not linked solely to an unforeseeable shortage of places arising from the rapid arrival of patients'. The

judgment has chilling relevance to COVID-19, and underlines Article 2's continued importance in the current emergency. It suggests that the ECtHR would be rigorous in its assessment of states' past and present compliance with Article 2, and that deference to the current emergency might be limited. COVID-19 does not permit states to disregard positive operational obligations to protect life under Article 2. Human rights law continues to be relevant to states' responses to this pandemic. Specifically, the UK has positive operational obligations to take steps to protect life, which will be adjudicated subject to the margin of appreciation. These obligations apply to much-needed PPE for health care personnel, and to individuals with underlying health conditions who might otherwise be denied life-saving treatment.

# COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 1)

[opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/](https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-1/)

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In evaluating the existing or potential human rights consequences of the varied State responses to the COVID-19 pandemic, a great deal of attention has been focused on the question of limitations or emergency-based derogations to human rights protections based on public health grounds. Such analyses may grapple with the legitimacy of these grounds, as well as questions as to their necessity and proportionality. It will generally be recognized that protecting public health is not only a legitimate, but a supremely important objective.

What has sometimes been neglected, however, including by legislators and policy makers, is that protecting the *right* to health is in itself also a hard legal obligation of States. Merely protecting public health in a general sense is not enough. Rather, what is required is protecting *the right to health* – and all that a rights-based response entails, including, notably, equal protection for all persons without discrimination.

In that connection, assessing whether State responses to COVID-19 are human rights compliant also involves an assessment as to whether they respect, protect and fulfill the right to health, not to mention the right to life. Although an issue not treated in this post, we would note that the tensions between measures to address this public health emergency and human rights, observed by commentators in this symposium and elsewhere, may also potentially give rise to conflict between different rights.

In Part 1 of this post we address the general obligation of States to protect the right to health in the context of COVID-19. We then turn to that obligation as it relates to the private health sector and private health actors' responsibilities to respect the right to health.

In Part 2 we will discuss the obligation of States to use the maximum of their available resources to combat COVID-19 and realize the right to health. We also consider the permissibility of limitations and derogations of State obligations in this connection.

### **The right to health under international law**

The 'right to health' is shorthand for the right to the 'highest attainable standard of physical and mental health' in international human rights law. It is a right of everyone, irrespective of citizenship or immigration status and wherever they may reside to healthcare systems, facilities, goods and services that are available, accessible, acceptable and of sufficient quality.

From the outset it should be noted, then, that States are generally obliged to grant any person who requires such access to COVID-19 prevention, screening and treatment measures. This means that 'triage' type scenarios in Italian hospitals, in which doctors are forced to choose who to admit and who to treat, represents a *prima facie* breach of these obligations, notwithstanding that there may well be valid defences that would excuse such breaches.

States, individually and collectively, are the primary duty bearers tasked with making this right real, and ensuring doctors are not placed in such invidious positions. The obligation of States to respect, protect and fulfill the right to health, under classic economic, social and cultural rights doctrine, requires both the actual direct provision of enough fully equipped and staffed health facilities and the goods and services necessary in the specific context of COVID-19. Public healthcare facilities that are inadequate to provide screening, testing and treatment will not comply with these obligations. The overcrowded public health facilities we are witnessing in South Africa, to take one example of many from around the world, increase the chances of transmission of COVID-19. These conditions will almost certainly result in violations of the right to health.

Many States have been rightly criticized for the insufficient seriousness with which they have responded to the COVID-19 pandemic. In the United States, the lackadaisical approach of the Governor of Florida to the closing of beaches is a case in point, as is the continuous downplaying of the seriousness of the pandemic by US President Donald

Trump, including recent suggestions that he would soon prematurely act to ease restrictions and controls. Where necessary, proportionate and based on evidence, and undertaken consistently with international human rights law, the expeditious (and pre-emptive) implementation of a variety of public health measures including quarantines, lockdowns and travel bans may well be permissible and indeed required in order to effectively discharge the obligation to protect the right to health. As will be touched upon in part 2 and will be explored by other colleagues in this symposium, such measures themselves will have to be designed and implemented in a human rights compliant manner.

## **Private health sector**

There are also obligations that fall under the State's duty to protect human rights, affirmed in general terms in the UN Guiding Principles on Business and Human Rights, to ensure that private entities, including healthcare providers, insurance schemes and pharmaceutical companies do not harm the health and wellbeing of individuals. This is particularly crucial because in many public health systems it will actually be the private healthcare sector that is charged with the direct responsibility for fulfilling the right to health. Private health providers may serve a small proportion of a country's population, yet they will typically control a disproportionate amount of resources – including hospital beds and respiratory equipment – that may be needed in the screening and treatment of COVID-19.

The approach required to effectively ensure the protection of the right to health will vary from jurisdiction to jurisdiction. In Spain, for instance, the government has 'nationalized' private hospitals to increase treatment capacity, which may better allow it to fulfill its obligations. In the United Kingdom, agreements between the government and private hospitals provide for these hospitals to be contracted to work 'at cost' and without profit to bolster the State's capacity to combat COVID-19.

Failures to take adequate steps to enlist the support of private health providers is, however, not the only pressing health rights concern. States have also taken measures to prevent profiteering from COVID-19 by those operating in the private health sector. In Bangladesh, for example, the government has prevented private laboratories from conducting COVID-19 tests for fear that it would be unable to assure quality control of such testing. Based on the historical experience of HIV and other epidemics, there is also reason to be wary of profiteering by pharmaceutical companies if and when a vaccine emerges. In anticipation of the potential for such abuses in South Africa, for example, the government there has enacted regulations to empower it to 'set maximum prices on private medical services relating to the testing, prevention and treatment of the COVID-19 and associated diseases'. Indeed, private healthcare companies themselves have, at least, under the UN Guiding Principles, a direct responsibility to respect the right to health. Such responsibilities rise to the level of legal human rights duties in some domestic jurisdictions, as the UN Committee on Economic, Social and Cultural Rights has acknowledged. At the most essential level this means adhering to standards while

delivering affordable and accessible health-related goods and services on a non-discriminatory basis. It might also, in accordance with heightened 'social expectations' arising in the crisis situation of the pandemic, compel more proactive measures to assist in the fulfillment of the rights. This could mean such measures as converting production priorities and eliminating or adopting lower profit margins for certain goods and services. This responsibility of businesses to 'respect' the right to health could of course be converted into a domestic legal requirement pursuant to the State's obligations to protect.

# COVID-19 Symposium: COVID-19 Responses and State Obligations Concerning the Right to Health (Part 2)

[opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/](https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-responses-and-state-obligations-concerning-the-right-to-health-part-2/)

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The first part of this post looked at the general obligations of the right to health in the context of the COVID-19 crisis, including in relation to the private sector. We now turn to the question of the obligation of States to harness the maximum of its resources and to ensure the discharge of core obligations.

In short, in the context of COVID-19, States have obligations to *reprioritize and focus existing resources*, whether financial, human, technological or natural. They must also act to *expand existing resources*, whether through support from other States or private sources, to ensure the realization of the right to health.

## **Maximum use of resources**

Whatever the strategic approach taken by a particular State, there is a clear obligation to take proactive measures to ensure that private health sectors do not set back COVID-19 responses. The potential for such retrogression is already being realized in India, where private hospitals have turned away patients in dire need of COVID-19 related treatment and care.

There is a misconceived but frequently expressed view that obligations concerning the right to health are somehow 'soft' obligations, since the effective enjoyment of the right

will depend on a State's capacities and resources. As noted below, this may be the case at the margins of the highest standard of rights protections, but there remain at all times for all States core obligations related to basic health delivery needed in a pandemic like COVID-19.

The general existing standard, expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), is that States must realize the right to health not only within *existing resources* but 'to the maximum of its available resources'. In this regard, a State is duty bound to: 1) use all resources it has at its disposal effectively; and 2) enlarge its pool of resources through the support of international co-operation (of other States) and assistance, as well as the 'private' contributions of companies, groups and individuals.

Importantly, 'resources' in this context are not limited to financial resources. They may include natural resources, human resources (such as medical professionals, community health care workers and volunteers), technological resources (such as the Internet and equipment for screening and testing), and informational resources (including information about COVID-19 and its spread).

There are several upshots of this expanded understanding of 'resources' in this context.

First, under Article 2(1) ICESCR, States have obligations to realize these rights not only individually, but also through international cooperation and assistance, including economic and technical means. The obligation of international cooperation has been developed in the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) and other sources, such as the Maastricht Principles on Extraterritorial State Obligations in area of ESCR. This obligation means that States should coordinate with each other in the allocations of responsibility to address COVID-19, as well as acting in concert through international agencies, such as the World Health Organization. In addition, certain States, typically developing States with fewer available resources, should seek international assistance to ensure the effectiveness of their COVID-19 responses when, despite their best efforts, these States are unable to discharge this obligation on their own.

Second, States may be effectively required to act by seeking out donations from private sources and administering donations directly towards the realization of the right to health. The 'solidarity fund' set up in South Africa by the government is an example of such an attempt.

Third, since such resources include existing health care professionals and health care facilities, States may effectively be required to take measures to ensure that private and public resources combine towards the most effective possible response to COVID-19.

Fourth, States must take measures to protect health care workers, as far as possible, from exposure to and infection with COVID-19. Healthcare workers are an essential part of States' 'available resources' to combat COVID-19. Doctors should not, as reportedly

happened in Egypt, be ‘tricked’ into working in quarantine facilities. Nor should doctors be forced to work without necessary resources such as masks, as reported in Thailand.

Finally, States are required to ensure that all necessary information is made publicly available and accessible to its entire population. For this, public television and radio broadcasts, as well as major grassroots awareness campaigns about COVID-19 and the right to health are necessary in each and every State.

### **Limitations and core obligations**

Much has been said since the outbreak of COVID-19 about the permissible ‘limitation’ or ‘derogability’ of human rights under international human rights law, particularly in the face of declarations of national disasters and national emergencies in countries around the world. For instance, States are permitted, subject to conditions such as necessity and proportionality, to restrict freedom of movement under Article 12 of the International Covenant on Civil and Political Rights (ICCPR) on public health grounds. States may of course also adopt measures derogating from certain rights, to the extent necessary to meet a threat to the life of a nation pursuant to a declared public emergency, including public health emergencies. Human rights organizations such as Amnesty International and Human Rights Watch have rightly drawn States’ attention to the Siracusa Principles, which may be taken as an authoritative interpretation of the permissible scope of limitations and derogations. These Principles affirm that such limitations of rights as a result of ‘public emergency’ must be strictly necessary, proportionate, carried out in accordance with law and scientific evidence, of limited duration, and subject to review.

Importantly in the context of the right to health, the Siracusa Principles indicate that any such restrictions in the name of a ‘public health’ emergency must be ‘specifically aimed at preventing disease or injury or providing care for the sick and injured’. Given the human rights obligations pertaining to the right to health outlined above, it is reasonable to insist that the ‘public health’ objectives that emergency measures and restrictions are undertaken to cure must be specifically aimed at realizing the right to health.

Moreover, the kinds of limitations and emergency derogation clauses applicable to some rights under the ICCPR and regional human rights treaties do not apply to economic, social and cultural rights. ‘Minimum core obligations’, in ESCR doctrine, are decidedly not subject to limitation or restrictions, and are subject to immediate, not progressive realization. Such obligations include, for example: accessibility of health facilities, goods and services for everyone; accessibility of minimum essential food that is nutritionally adequate and safe; accessibility of shelter, housing and sanitation, and an adequate supply of safe and potable water. They also include the equitable distribution of ‘*all* health facilities, goods and services’ whether public or private.

In addition to these core obligations, the CESCR has affirmed that a number of other obligations relevant to COVID-19 are of ‘comparable priority’, so these also should not be subject to emergency-based limitations. These include the provision of ‘immunization

against the major infectious diseases occurring in the community' and 'measures to prevent, treat and control epidemic and endemic diseases'. States declaring 'notified' or 'national' disasters, as in India or South Africa, or states of emergency, as in Colombia or Italy, must take care to ensure that these core obligations are fully discharged in the context of pandemics such as COVID-19.

The COVID-19 pandemic clearly constitutes a global public health crisis that is unprecedented during at least the past century. As with upheavals relating to world war and global security, this pandemic carries enormous rule of law and human rights consequences. As States formulate their responses to the COVID-19 pandemic, they must keep at the forefront the core purpose of protecting public health and realizing the right of everyone to the highest attainable standard of health.

# COVID-19 Symposium: COVID-19, Cyber Surveillance Normalisation and Human Rights Law

[opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-cyber-surveillance-normalisation-and-human-rights-law/](https://opiniojuris.org/2020/04/01/covid-19-symposium-covid-19-cyber-surveillance-normalisation-and-human-rights-law/)

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Ushering in a world of social distancing and self-isolation, the global spread of COVID-19 has intensified societal reliance on the Internet, whether for keeping in touch with family and friends, enabling work and education to be conducted remotely from home, or simply searching for and sharing information in an effort to keep track and make sense of the crisis.

At the same time, the pandemic has also amplified a number of well-established controversies associated with the online environment, including state suppression of online information, Internet shutdowns, the dissemination of disinformation and misinformation across online platforms, the digital divide between those with a reliable

Internet connection and those who lack meaningful access or any access at all, massive data collection for undefined purposes, as well as government-sponsored and criminal cyber exploitation and cyber attack operations.

Pervading many of these controversies are ongoing concerns about the dominance of private technology companies within the cyber domain and the nature and opacity of their partnerships with governments. In this climate, commentators have rightly asked whether COVID-19 represents less a rupture than an acceleration of existing societal trends and, relatedly, what kind of world we will inhabit once the crisis subsides.

Crisis management sometimes requires the adoption of exceptional measures that result in limitations to fundamental human rights. However, history proves that measures adopted in emergency situations – such as terrorist attacks and financial meltdowns – are typically fast-tracked by governments without parliamentary scrutiny and frequently outlast the emergencies they were designed to address.

In this post, we focus on one set of practices in particular – cyber surveillance – and critically reflect on human rights law as a framework and a terrain of contestation for shaping the future of surveillance practices both during and in the aftermath of the COVID-19 crisis.

### ***Cyber Surveillance Normalisation and COVID-19***

As governments around the world grapple with containing the spread of COVID-19, many are using emergency powers to restrict people's freedom of movement and significantly curtail their economic, social, and cultural activity. While the precise package of emergency measures tends to vary, governments are increasingly turning to a range of new cyber surveillance tools that rely on personal location data and the extensive use of Big Data analytics to identify patterns in people's movements, disseminate health alerts to specific locations, and inform public health decision-making.

In China, for example, a new system called Health Code is currently being rolled out across the country. The system leverages vast quantities of mobile data and geo-location points collected by Chinese technology companies to map outbreak hotspots and then assigns users one of three colour codes – green, yellow, or red – based on their travel history, time spent in infection hotspots, and exposure to potential virus carriers. Significantly, the app not only indicates the health status of users and determines whether or not they can move around freely, but also, reports the *New York Times*, 'appears to share information with the police, setting a template for new forms of automated social control that could persist long after the epidemic subsides'.

In South Korea, health authorities and district offices have been sending 'safety guidance texts' to the public detailing the movements of people recently diagnosed with the virus. While the texts do not specify the names of patients, they do include personal information such as gender and age, together with location data that has sometimes enabled embarrassing details concerning their private and family lives to come to light.

For example, one of the alerts indicated that a man had contracted the virus during a sexual harassment class, while others have negatively impacted the businesses of shops and restaurants that infected people had visited prior to confirmation of their diagnosis.

At a time of heightened public concern and anxiety about COVID-19, location surveillance techniques are fast becoming the norm. For example, it has been reported that approximately a dozen countries are testing a new product developed by NSO Group, which analyses huge volumes of data to track people's movements and identify with whom they have interacted. Yuval Harari has even suggested that the COVID-19 crisis could mark a dramatic transition from "over the skin" to "under the skin" biometric surveillance, with governments using the prospect of future pandemics as an excuse to monitor the temperature of a person's fingers and the blood-pressure under their skin.

While it is vital that governments adopt public health measures to address the threat posed by COVID-19, the considerable risks associated with these cyber surveillance tools must be carefully evaluated. For instance, by mirroring the biases of their human designers and the datasets on which they rely, location surveillance systems risk falsely targeting vulnerable and marginalised groups in society. Furthermore, the fact that some vulnerable and marginalised groups, such as the elderly and slum-dwellers, may not own or use smartphones could lead to biased, unreliable and, ultimately, useless results.

The use of technological solutions, in this case, also risks further exacerbating digital divides, excluding the unconnected on the one hand, from receiving essential information about COVID-19 and, on the other, from being properly considered in pandemic monitoring. The prospect of being subject to location surveillance might also deter certain groups from seeking healthcare, whether to avoid embarrassing revelations or through fears of deportation. Moreover, whenever personal data is collected on a large-scale by governments, the risk inevitably arises that such data could be misused by government employees, stolen by criminals or foreign governments, or co-opted for other purposes.

As a mechanism for containing the spread of COVID-19, human rights groups such as the Electronic Frontier Foundation and Privacy International have also questioned the effectiveness of location surveillance systems, observing that there is limited evidence to suggest that movement or location data have proven useful in tackling and predicting the spread of previous diseases such as Ebola and Middle East Respiratory Syndrome (MERS). Susan Landau has also cautioned that where the efficacy of such systems is found wanting – for example, where there are significant numbers of false positives (people mistakenly identified as exposed to the virus) and false negatives (people exposed to virus who are erroneously not identified) – the spread of the virus could be exacerbated by consequent failures to give people reliable information and a breakdown in people's trust in the government.

Given these concerns, it is not beyond the bounds of possibility that governments may be using the COVID-19 crisis as a pretext to expand and normalise their surveillance powers. Once government surveillance systems have been established, history suggests

that they are seldom relinquished. Surveillance normalisation may result from bureaucratic inertia or mission creep, but it is not unreasonable to suspect that the exploitation of emergency circumstances to enact measures that would otherwise be unthinkable amounts to an explicit choice on the part of many governments. After all, surveillance represents a seemingly 'easier' policy lever in contrast to establishing a robust healthcare system that is adequately equipped to protect the public in the longer term.

### ***Human Rights Law as a Framework***

If, as some have suggested, the COVID-19 crisis is likely to serve as a 'never again' moment that will define policymaking for years to come, the precise direction that policymaking will take nonetheless remains an open question. Faced with the prospect of new highly intrusive cyber surveillance tools becoming normalised across the world, scholars and civil society groups are increasingly turning to the vocabulary of human rights law as a form of resistance.

Human rights law offers an important framework to guard against the normalisation of intrusive cyber surveillance programmes both during and in the aftermath of the COVID-19 crisis. The value of human rights law resides in the way it frames the regulatory conversation, encompassing a series of criteria and standards that governments must satisfy. For example, governments may not interfere with the right to privacy unless they can demonstrate that the interference is provided by law, undertaken in pursuance of a legitimate aim (for example, the protection of public health), and necessary and proportionate to the achievement of that aim.

Applying this framework requires governments to establish a publicly accessible and sufficiently precise legal basis for the measures in question, as well as to demonstrate an evidential basis for the connection between the surveillance measures and the legitimate aim, why alternative less intrusive measures are inadequate, and the safeguards that have been put in place to ensure the measures are not overbroad (for example, by identifying the extent to which the measures are narrowly tailored to achieve their protective function, limited in duration, and subject to appropriate oversight).

Exceptionally, more stringent limitations on rights may take place through derogations (see, for example, Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights). While some rights are non-derogable, states may derogate from the rights to privacy and freedom of expression in times of public emergency which threaten the life of the nation. However, derogations are only permissible to the extent that the measures in question are strictly required by the exigencies of the situation, not inconsistent with other obligations under international law, and do not involve discrimination.

These safeguards aim to ensure that all measures – be they based on policy, technology or a blend of both – adopted to mitigate pandemics through surveillance remain consistent with internationally binding human rights laws and standards as well as with

national constitutions guaranteeing protection for fundamental rights such as privacy and freedom of expression.

### ***Human Rights Law as a Field of Contestation***

At the same time, it is important not to lose sight of the fact that human rights law – like all law – is not simply a governing framework but also a field of contestation. As Balakrishnan Rajagopal has observed, human rights is ‘a language... of hegemony and counter-hegemony, and we need to recognize the multiple uses to which it is put and the fact that it is a terrain of contestation... for multiple deployments of power and resistance’. In other words, while human rights law offers an important vocabulary for resisting intrusive surveillance practices, it can also serve as a language of legitimization of State power.

The legitimization function of human rights law is visible in the recent surveillance caselaw of the European Court of Human Rights (ECtHR). For example, in *Big Brother Watch and Others v. the UK* (a case currently under consideration by the Grand Chamber of the ECtHR), the Chamber concluded that ‘the decision to operate a bulk interception regime in order to identify hitherto unknown threats to national security is one which continues to fall within States’ margin of appreciation’, adding that such regimes constitute ‘a valuable means to achieve the legitimate aims pursued, particularly given the current threat level from both global terrorism and serious crime’. While certain aspects of the UK’s bulk interception regime were found to be incompatible with the right to privacy and right to freedom of expression under the European Convention of Human Rights, in this passage the Court upheld and legitimated the practice of bulk interception as compatible with the Convention in principle. of bulk interception as compatible with the Convention in principle.

Surfacing the dual character of human rights law as both a vocabulary of resistance to and legitimization of State power is important for two reasons. First, as Paul O’Connell has explained, the dual character of human rights law reveals ‘the centrality of social struggle in shaping the concrete meaning of rights in specific contexts’ and highlights how ‘rights are not imbued with some essential, transcontextual essence; instead they are defined and re-defined in the very struggles over their meaning’.

And second, as past decades of human rights doctrine have tellingly revealed, one must not underestimate the potential for human rights law to endorse and legitimate regressive State practices. Such potential underlines the importance of complementing struggles in the field of human rights law with other emancipatory efforts – whether in the legal field or beyond.

As the struggle to resist the normalisation of intrusive cyber surveillance tools deployed by governments to address the COVID-19 crisis commences, an awareness of both the potential and limits of human rights law as an emancipatory vocabulary is likely to prove increasingly important in the months and years ahead.

# COVID-19 Symposium: The Impact of Coronavirus (COVID-19) on Prisoners

[opiniojuris.org/2020/04/01/covid-19-symposium-the-impact-of-coronavirus-covid-19-on-prisoners/](https://opiniojuris.org/2020/04/01/covid-19-symposium-the-impact-of-coronavirus-covid-19-on-prisoners/)

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As a general concept, it is an established principle of international human rights law that in addition to the negative obligation *not* to commit acts in breach of rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the overriding principle in Article 1 extends a positive obligation on States to protect individuals and *secure* rights under their jurisdiction. Thus, an act not directly imputable to the State *may* generate the responsibility of the State, not because of the act in and of itself, but due to the lack of due diligence to prevent or remedy the act. A failure by the State or its public authorities, such as the law enforcement and its penal institutions, to exercise due diligence may give rise to State responsibility even if the act in question is committed by non-state actors, but also where an individual is placed in an environment where their physical and mental well-being is foreseeably at risk.

Human rights standards expressly require States to regulate the conduct of state and non-state actors and contain explicit obligations for States to take effective measures to prevent violations of human rights. It is submitted in this regard that 'due diligence' requires States to take *reasonable* or *serious* steps to prevent or respond to a violation that is foreseeable and preventable. It is an established principle of international human

rights law that where persons are detained in an environment or under conditions that gives rise to a *prima facie* breach, the national authorities may be held accountable. Further, where necessary medical care is withheld, whether intentionally or through a failure in the state apparatus, it may constitute inhuman or degrading treatment or punishment and, in exception circumstances, it may reach the threshold of torture.

In considering an allegation of whether a person detained is at risk of treatment that approaches a breach of Articles 2 and 3 of the Convention, the test in applying a State's positive obligation to take preventative operational measures to protect an individual whose life is at risk due to conditions of detention, is one of 'real risk'.

It is recognized that in such cases the positive obligation extends to taking preventive measures to protect the physical integrity of those subject to detention (see *Pantea v. Romania* [2005] 40 E.H.R.R. 459). The European Court has qualified such an approach by confirming that the exercise of the positive obligation to ensure protection of such fundamental rights 'should be interpreted in such a way as not to impose on the authorities an intolerable or excessive burden'.

COVID-19 has been declared a global pandemic and, as it is spreading, identified vulnerabilities such as the situation of persons deprived of their liberty in prisons, administrative detention centres, immigration detention centres and drug rehabilitation centres, require a specific focus.

From the outset, it is inevitable that the impact of the COVID-19 pandemic will place prisoners globally at greater risk. Persons deprived of their liberty face higher vulnerabilities as the spread of the virus can expand rapidly due to the usually high concentration of persons deprived of their liberty in confined spaces and restricted access to hygiene and healthcare in some contexts. In particular, this will be the case in prisons and detention centres that do not have appropriate medical facilities.

In Egypt, for example, with the spread of the COVID-19, the total lack of healthcare provision, along with severe overcrowding and lack of sanitation, the continued imprisonment of political dissidents amounts to torture as a matter of international law, and it would constitute an extrajudicial killing by the State where there is the inevitable loss of life.

Recently, a letter was smuggled out of a Cairo prison detailing the most appalling prison conditions, where detainees are subjected to conditions that can only be described as in breach of fundamental rights such as access to daylight, proper sanitation, family or legal visits, food or necessary medical care. Earlier this month, detainees started to display symptoms consistent with COVID-19: coughing, high temperature, cold, and pneumonia. Panic and anxiety broke out in prisons where health deteriorates rapidly, and no medical care is provided. Detainees appealed for the help of the prison administration and officials; however, these appeals were met with a deliberate and sickening disregard, and prison officials failed to act. None of those detainees displaying symptoms have been admitted to hospital nor have they been seen by a doctor. There is a state of fear and

terror amongst prison officers, and medical staff have refused to enter the prison block. Against this culture of deliberate disregard for the safety and well-being of detainees, it is only to be expected that there will be a significant loss of life if the authorities fail to take urgent action. This is in an environment where UN experts have already deplored the existing conditions prior to the outbreak of COVID-19.

There is further a real risk that repressive states could use the COVID-19 pandemic as a way of further eroding the fundamental rights of prisoners. It has been reported that Iran, Bahrain and Jordan have released detainees to prevent a humanitarian crisis, yet States such as India, Bangladesh and Egypt have resolutely refused to take any action. It must therefore fall on the international community to intervene in circumstances where there are tens of thousands of detainees, many of those being political prisoners, held in conditions where UN human rights experts have already stated that there is credible evidence to suggest that gross human rights violations may be a reality. These experts have stated that many of Egypt's thousands of detainees 'may be at risk of death' and have thus urged the authorities to 'reverse what appears to be deeply entrenched practices' on people's right to a life free of torture, ill-treatment, and the right to due process and medical attention. As the UN experts have confirmed, these violations place detainees at risk of death or 'irreparable damage to their health'. As such, the experts have already called for an effective and impartial investigation into those prisoners who died in custody since 2012 – years prior to the emergence of COVID-19.

We must remind all States that there is an obligation to *respect*, and refrain from breaching, any and all rights secured by international human rights law (negative obligation) and to *ensure* their protection to all individuals within their territory (positive obligation). Accordingly, a State may be held responsible for committing breaches of human rights and for failing to prevent others from taking any action that violates human rights or fundamental freedoms, such as arbitrary arrest and arbitrary or incommunicado detention; acts of torture or inhuman or degrading treatment; and extra-judicial execution by agents of the State; including police, military, intelligence operatives or other public officials. We reiterate that it is an established principle of international law, that the withholding of necessary medical care amounts to torture for which the authorities will be held responsible.

Of course, the COVID-19 pandemic may warrant the widespread release of prisoners. However, if this were to be implemented, it would be essential to first establish the criteria for such release. In the United Kingdom, the High Court recently rejected calls to free hundreds of immigration detainees who, lawyers and human rights activists say, are at risk from COVID-19 while behind bars. The legal action asked for the release of hundreds of detainees who are particularly vulnerable to serious illness or death if they contract the virus because of health conditions, and also for the release of those from 50 countries to which the Home Office is currently unable to remove people because of the pandemic. The two judges came down strongly on the side of the Home Office and highlighted the range of measures already being implemented by the Home Secretary, Priti Patel. These included the release of more than 300 detainees last week, ongoing

assessments of the vulnerability of individual detainees to the virus and a range of 'sensible' and 'practical' steps the Home Office is taking to make detention centres safer, such as single occupancy rooms and the provision of face masks for detainees who wish to wear them.

There of course must be a counter-balancing act when considering the steps that can be taken that are necessary to ensure that the interests of justice are met, whilst ensuring that prisoners are not exposed to risks that put their lives in danger. The steps taken must be proportionate and must be necessary. States are obliged to protect the safety and well-being of prisoners within their jurisdiction and control (as set out in the UN Standard Minimum Rules for the Treatment of Prisoners). At present, there is a heightened risk within (and outside of) prisons, but States need to recognise the risk and respond accordingly. Positive steps should be taken to assess the adequacy of prison conditions in light of the COVID-19 situation, and these assessments should be carried out by state authorities as a matter of urgency. Where necessary, reasonable and proportionate steps must be taken for any persons at risk, for example isolation or, in exceptional circumstances, transfer to another facility. Any such steps being contemplated should be measured against the nature and gravity of the crimes for which the individual in question has been convicted and any blanket position for the mass release of prisoners may be considered wholly disproportionate and unjust. No State acting reasonably would simply release *en masse* individuals convicted of such serious, violent and/or grave crimes without considering the associated risks. As such, measures need to be considered that take into account the safety and well-being of the general public and at the same time the fundamental right of a prisoner not to be detained in an environment that constitutes inhuman or degrading treatment or punishment, or even torture.

On 25 March 2020, the UN High Commissioner, Michelle Bachelet, noting the risk to detainees, called on governments to take urgent action to protect the health and safety of all persons in detention and other closed facilities.

On 27 March 2020, the Inter-Agency Standing Committee (IASC) issued interim guidance, developed by the Office of the High Commissioner for Human Rights and the World Health Organization, on COVID-19 with a focus on persons deprived of their liberty. It is clear that there is a need for such measures to be imposed on prisons the world over, to ensure that the safety and well-being of prisoners globally is protected during the COVID-19 pandemic.

There is increasing concern that conflict zones, such as Syria and Yemen, that have been devastated by conflict with growing numbers of casualties due to the rising humanitarian disaster, present a particular risk to the spread of the COVID-19 virus. In Syria, where there is credible evidence to demonstrate that Syrian and Russian forces have targeted hospitals and *ad hoc* medical facilities, the risk of large numbers of infected persons receiving no treatment is clear, particularly where there are tens of thousands in detention facilities. Yemen has been forced to contend with a devastating attack by the

military might of Saudi Arabia and the United Arab Emirates, and has been ravaged by disease and starvation. An outbreak of COVID-19 would devastate an already fragile state. Bangladesh – a state in which the real number of infected persons is being suppressed by an autocratic regime – is host to more than a million refugees, many of whom are held in makeshift camps in Cox's Bazaar, an area which is a tinderbox of human suffering.

The UN has warned that States should take measures that are strictly necessary in response to COVID-19 and should not use the pandemic to suppress human rights and fundamental freedoms. This is a careful balancing act in which there are no easy solutions. This is also something that is likely to be with us for some time and it will define our notion of security, sovereignty and fundamental rights. To paraphrase and apply to the present crisis the words of Lord Hoffman on the draconian measures adopted to target terrorism in the wake of 9/11, the real threat to the life of the nation comes not from the COVID-19 pandemic, but from disproportionate measures taken to suppress human rights and fundamental freedoms.

# COVID-19 Symposium: A Time to Kill 'Business as Usual'—Centring Human Rights in a Frustrated Economy (Part 1)

[opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/](https://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centering-human-rights-in-a-frustrated-economy-part-1/)

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COVID-19 has upended modern capitalist life. States have instituted a variety of measures that have curbed business activity in an effort to limit the pandemic's spread. Swedish industrialist Jacob Wallenberg has argued for returning to the *status quo* quickly. Explicitly, the presidents of the United States and Brazil, the Prime Minister of Sweden, and seemingly the Prime Minister of the United Kingdom are rushing to promote 'business as usual' as quickly as possible. But now is not the time for that; instead, we should reflect on the lessons of COVID-19. One of those lessons is that 'business as usual' is not only broken but poses a fundamental threat to public health and wellbeing. In this post, I consider how dominant approaches to business activities impact on our preparedness to fight pandemics, shifting the burden of pandemics onto society's most vulnerable. In Part 2, I examine how existing expectations in the field of 'business and human rights,' alongside other structural reforms to international law, can offer a different path forward.

## The Culpability of 'Business as Usual'

The current business model is based on 'shareholder primacy,' the notion that a business's primary purpose, legally and socially, is to financially benefit its shareholders. While some states have begun to introduce requirements that businesses exercise due care for their human rights impacts, or consider the interest of company employees, partners, suppliers, communities, and the environment, enforcement of these measures remains limited. Many business schools continue to teach their students that their

decisions should always be aimed at maximizing the company's value for shareholders, both by profiting enough to provide lucrative dividends and by increasing the value of the shares themselves.

There have been numerous relevant and necessary critiques of the 'shareholder primacy rule,' and its dominant implementation. Yet, even where states reject the shareholder primacy rule on a domestic scale, market forces generally encourage business leaders to follow the same trends and decisions when competing globally. As a result, while there are exceptions to any generalized discussion of business impacts on human rights, the exceptions are not the rule specifically because of global economic forces, including the focus on shareholder value maximization.

The shareholder primacy rule is at the heart of two significant COVID-19 developments. First, corporations have, almost *en masse*, used cash reserves to engage in stock buybacks, which are a quick and easy way to increase the value of shares; the fewer shares available for public trading, the more those shares are worth even if the profit margin of the company remains unchanged. Since many Chief Executive Officers and other top managers receive significantly more compensation via stocks and stock options than their base salary, the buybacks provided these managers a personal financial benefit while depriving companies of the cushion necessary to survive a significant economic downturn.

The general danger of the shift to buybacks was articulated in the Harvard Business Review in January, before the threat of COVID-19 was widely understood. In light of the current pandemic, many companies who engaged in significant buybacks are now often seeking bailouts from their governments, asking taxpayers to provide monetary support, which, through steadied and increased stock prices that comprise a significant part of their compensation, will directly benefit the managers whose poor decisions deprived the company of the financial reserves necessary to weather this downturn in the first place. In the meantime, many of those companies are laying off staff, threatening to lay off staff, or reducing the hours of their most vulnerable employees (those that are at-will or on casual/zero-hour contracts). Of course, those taxes are generally paid for by the salaries of the threatened employees, creating a vicious cycle that places the financial burden on employees, who make on average 1/287 of their CEO. These business practices are harming the rights of employees to work and to adequate compensation, and as a consequence their rights to housing, food, water, (often) health, and a myriad of other fundamental economic and social rights.

Second, the shareholder primacy rule has fostered a business culture that seeks to limit costs in any way possible. This has led businesses to attack unions, fight increased minimum wages and expanded sick pay, and seek and develop complex supply chains that minimize the company's direct costs by outsourcing labour to areas with lower minimum wages. NGOs, scholars, and the media have long documented the negative

human rights impacts that result from such choices. These business practices also play a role in the growing global economic inequality that allows the world's 2,153 billionaires to hold more wealth than the combined wealth of 4.6 billion people.

Economic inequality is proving to be an impediment to the fight against COVID-19 in the (for lack of a better term) so-called 'Global North.' Low-wage employees are often going to work even when they have legitimate fears of coronavirus, either because they are not guaranteed paid sick leave or because the lost wages, even with government assistance, is financially devastating. Where they serve in crucial roles—care homes, grocery stores, and food or parcel delivery—low-wage workers are likely to interact with dozens of other people. Lack of universal health care in the US worsens this reality. Discrimination, both economically and in the provision of healthcare, means that the burden falls disproportionately on persons with disabilities, women, migrants, and persons in ethnic or racial minority groups. By embracing an economic system built on shareholder primacy (coupled with a general culture that disregards the skills and significance of low-wage workers), businesses place at risk the fundamental rights of low-wage workers to housing, healthcare, and food. Low-wage employees are therefore bearing the burden of the virus and the responsibility to stop its spread to one another and to clients. Corporate legal codes facilitate this burden-shifting.

As devastating as this is in the 'Global North', the coronavirus will likely prove worse in many developing and emerging economies, even if the virus itself remains relatively contained. When businesses take action that reduces employment down their supply chain, the businesses take no responsibility for those cuts. They do not report them as job losses or layoffs. As a result, businesses tend to feel no obligation to factor their suppliers' employees into their decision-making process. (Notably, at least one UK University appears to have adopted the same approach for fixed-term and casual employees.)

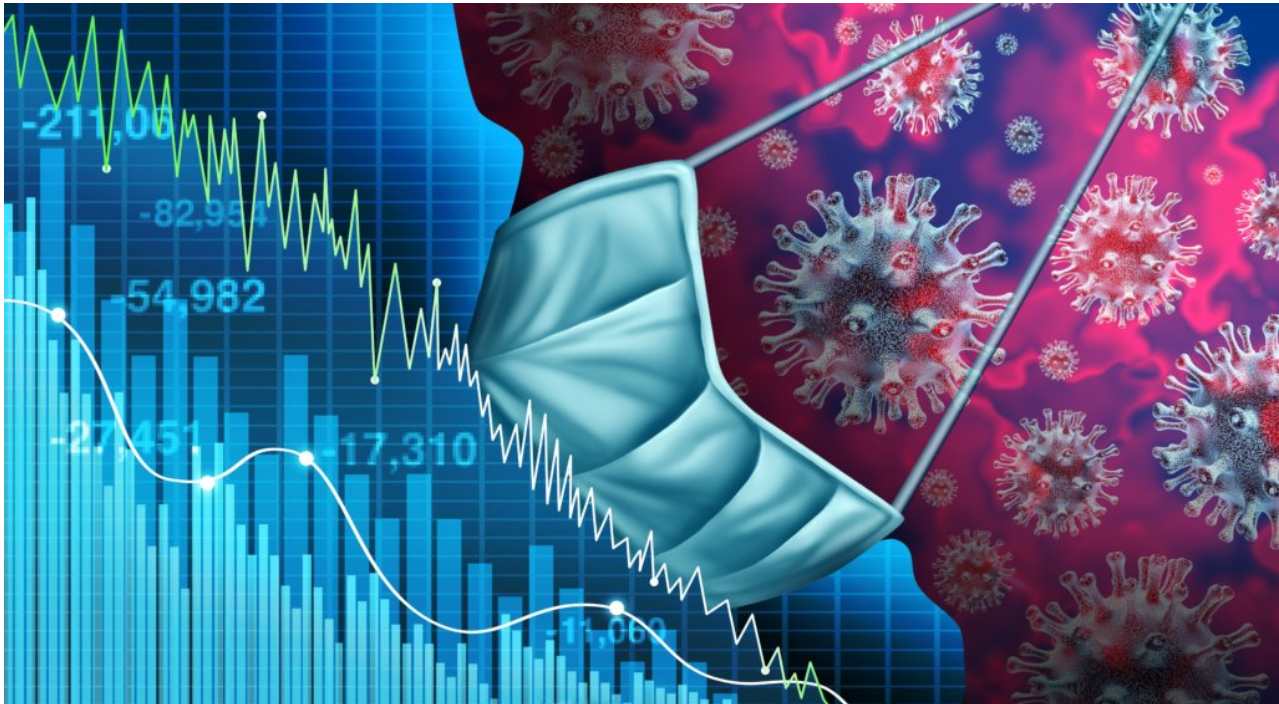
Companies like Primark, whose 'fast fashion' raises significant concerns about sustainability and ethics, are disavowing their contractual obligations to the garment manufacturers at the bottom of their supply chain. European companies have cut \$1.5 billion USD in orders from 1,089 garment factories in Bangladesh alone. The 1.2 million workers impacted are some of the most precariously employed in the world. While Bangladesh' public health infrastructure does not yet report significant viral infections, the combination of 'business as usual' and COVID-19 means that the choices of European businesses will significantly undermine the human rights of these workers. This is even before we factor in the likelihood of a widespread outbreak within these states, which will exacerbate all of these concerns.

As further discussed in part 2 of this blog post, it's time for a new approach.

# COVID-19 Symposium: A Time to Kill 'Business as Usual'—Centring Human Rights in a Frustrated Economy (Part 2)

[opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centring-human-rights-in-a-frustrated-economy-part-2/](https://opiniojuris.org/2020/04/02/covid-19-symposium-a-time-to-kill-business-as-usual-centring-human-rights-in-a-frustrated-economy-part-2/)

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In the first part, I set out how 'business as usual' with regard to shareholder primacy has exacerbated human rights concerns associated with COVID-19. In this post, I want to set out a path forward for a more sustainable and appropriate approach. Before I do, I want to briefly address the title of these posts.

Over 21,000 people have died from the COVID-19. Talking about killing anything or anyone during this time should be undertaken with seriousness; it must not be a throw-away joke but a serious call to arms for the benefit of humanity. But 'kill' is also the correct term here. Corporate cultures are living organisms that influence and change those who work for them, often much more than most individuals themselves (including corporate leaders) will change the culture. What we have now is not individual organizational cultures that are broken but an entire system that is. The global business culture creates priorities and influences decision-making. 'Infrastructures of knowledge' (Celine Tan min 41:30) have largely replicated orthodox approaches to shareholder primacy that are dangerous for human rights and that have proven destructive during the COVID-19 crisis. 'Business as usual' is therefore an organism that threatens us, individually and communally. The title of these posts are not a joke; they are a plea to recognize 'business as usual' as parasitic and dangerous to our health, individually and communally, and to work to protect ourselves from reproducing this crisis in the future

Some will inevitably argue that I am being unfair to business leaders and shareholders. Traditional orthodoxy tells us that shareholders are 'risk takers' who help foster economic growth (p 201), which is why they should be rewarded with hefty benefits. If this were actually true, then we would not be looking at our second major global corporate bailout in twelve years. States insulate risk for businesses, and it is time that states insulate us from toxic business approaches. Additionally, my critique is not aimed at individual business leaders; I am targeting structures of beliefs, and the institutional inheritance of those beliefs, not the individuals who believe in them or even those that benefit from them.

But if I am sincere that we need to replace our current approach to corporate purpose, the next question is obviously: what should we replace it with? Where should we be going from here? Business and human rights provides us with some answers, but it also requires us to address other systems within international law.

### **What 'Business and Human Rights' Offers**

The UN Guiding Principles on Business and Human Rights (UNGPs) remind states that they have a primary obligation to regulate businesses to ensure their operations, practices, policies, and products do not negatively 'impact' on human rights. David Birchall rightfully argues that the notion of an 'impact' used by the UNGPs is broader than that of a 'violation.' The legal approach to 'violations' suggests action + direct causation = violation, but by focusing on 'negative impacts' the UNGPs embrace a wider range of harms. Both the OHCHR and Birchall use an example of a business '[t]argeting high-sugar foods and drinks at children, with an impact on childhood obesity'. The impact is neither direct nor immediate, but it does negatively affect the right to health of children in the short, medium and long term. States are to use due diligence to identify the risks posed by business activities so as to guard the human rights of their populations. Extrapolating to COVID-19 and the impact of the shareholder primacy rule, the rule has shown itself to pose significant short- and long-term threats to human rights. While the impact will not always be direct, it is still there and needs to be addressed through regulation that requires managers and directors to evidence a more holistic approach to corporate purpose. Progressive reforms that would tax shareholders at greater rates could help ensure that individuals have access to the realisation of all their human rights.

According to the UNGPs, businesses also need to assess the risks they pose and work to mitigate or remediate any harms. This responsibility exists independently of any state's ability or willingness to hold the business accountable. Independent business assessment, for instance, proved important during the period in which the UK government promoted an ill-conceived and ill-fated 'herd immunity' approach to combatting COVID-19. While the state was promoting a 'business as usual' mentality, responsible employers moved to a work-from-home approach, and in doing so did a better job of protecting vulnerable employees and the public at large than the state was doing. Their motives likely varied, and some may not have understood or considered the

human rights implications of their decision, but to those businesses who made this decision: thank you. And congratulations – you just successfully performed human rights due diligence!

Now, expand that out to other rights and other situations. It is easy to identify risks posed by particular events or activities. It is often harder to take a step back and assess how underlying cultures, policies, and inherited orthodoxies threaten human rights. But this is the work that is needed; businesses need to move away from a narrow understanding of corporate purpose. We have seen some progress on this issue. Last summer, Business Roundtable released a statement on revising the corporate purpose to recognize the need for businesses to serve all stakeholders. The next day, the Council of Institutional Investors objected to this new corporate purpose, calling for businesses to ‘sustain a focus on long-term shareholder value’. Institutional investors have their own human rights responsibilities, and should be partnering with businesses to provide a sustained change in our corporate culture. Businesses on their own need to adopt policies and practices and mainstream those throughout their operations; they also need to provide a means by which they can solicit genuine feedback from employees on how the corporate culture is harming them. They need to consider not merely violations, but the wide range of ways in which they negatively impact human rights through policies and practices and respond to those with sustained change.

Finally, the UNGPs also have a ‘third pillar’: businesses and states need to ensure victims have access to effective remedies. We need effective mechanisms by which corporate decisions harmful to individuals and communities can be challenged.

### **What Else Do We Need?**

Merely implementing the UNGPs domestically or in individual corporations is not enough, however. We also need structural reform in other areas of international economic law. If international investment law continues to provide a shield to bad corporate activity while providing those same actors with a sword that can defeat progressive legislation aimed at protecting human rights, then changed corporate culture will simply continue to reward bad actors with greater profits and protect them from greater accountability. COVID-19 offers an opportunity, and perhaps the impetus, for the international community to push forward on these reforms. In light of new pressures related to COVID-19, the European Commission has recognised the need for states to have greater policy space when regulating foreign direct investment to protect national interests. In doing so, they are challenging rules and expectations that have long been used to abuse developing and emerging economies. The EC is right to ensure control over its public policy space, but it also needs to lead by example, rather than hypocrisy, and ensure developing and emerging economies are given that same control. We need new international developments—including but not limited to a treaty on business and human rights—that foster long-term and sustainable change in our understanding of corporate purpose, and that provide effective protection for human rights.

Returning to 'business as usual' after this COVID-19 pandemic will simply mask the threats that the current system poses to individuals and communities. We deserve better, and we have an obligation to recognize this crisis as the warning it is and undertake the widespread reforms we need to protect ourselves and our communities in the future – properly equipped for the crises to come.

# COVID-19 Symposium: The Combined and Uneven Geography of COVID-19, or on Law, Capitalism and Disease

[opiniojuris.org/2020/04/02/covid-19-symposium-the-combined-and-uneven-geography-of-covid-19-or-on-law-capitalism-and-disease/](https://opiniojuris.org/2020/04/02/covid-19-symposium-the-combined-and-uneven-geography-of-covid-19-or-on-law-capitalism-and-disease/)

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Francisco de Vitoria was obsessed with food. I do not refer here to his private habits, but rather to the importance he assigned to the consumption of raw food and cannibalism (real or imagined) as markers of savagery. Indeed, imaginaries of cannibalism were central to the imperialist imaginary, including that of international lawyers, and were often mobilised to signify racial difference and justify the domination over and exploitation of non-European peoples.

In this respect, there is something familiar about the current obsession and moral panic about Chinese dietary habits and their links to the COVID-19 outbreak. However, there is a crucial difference between present and past obsessions with food in international law and politics, with the former operating as a form of displacement. Let me explain: focusing on Chinese wet markets and eating habits comes with an implicit or explicit attribution of the outbreak to Asian backwardness, primitiveness and (economic, cultural, moral) under-development. However, it is not Chinese backwardness or

underdevelopment that render this (and previous) coronavirus so dangerous, but quite the opposite: the country's rapid capitalist development and increased incorporation into the global circuits of capital.

Both in China and elsewhere, the last few decades have witnessed an unprecedented expansion of commercial farming and other forms of commercial exploitation of land to the detriment of, amongst other things, wild forests. This trend pushes everyone, including wild animal growers, deeper into previously uninhabited lands increasing the risks of contact with unknown viruses. Secondly, the rise of Chinese capitalism has resulted in the increased domestic mobility of millions of workers, who labour and live under unsafe conditions, while maintaining 'traditional' lifestyles, including eating habits. Furthermore, the centrality of Chinese capitalism within global value chains means that Chinese nationals, capital and goods have become fundamentally integrated in the global economy and therefore, dreams of local containment (partly encapsulated in the early closing of borders and the imagining of this as a uniquely 'Chinese' virus) are always destined to fail. Far from being the outcome of backwardness, the frequency and fatality of viruses such as COVID-19 are unique products of globalised neoliberal capitalism.

It would be a unique form of lawyerly narcissism to say that international law is to blame for these developments, which are the unique outcome of formal, informal, legal, a-legal and illegal processes and implicate a multitude of legal systems interacting in ways that often diverge from their formal relations. However, the entanglement of (international) law with processes such as 'land-grabbing' and the construction of global value chains is impossible to miss.

For example, many international legal fields, including the workings of international financial institutions and international investment law, have played a central role in the conceptualisation of the world within which we live as either the object of property and investment or as 'vacant' and 'under-utilised' and, therefore, the ideal object of commodification with few, if any, negative consequences. In this context, scientific knowledge is essential to justify restrictions to market activity, but the expansion of such markets has come to be considered the default rule and most self-justified. This move both ignores other, non-expert forms of knowledge, but also subsumes science to the discipline of competitive markets and capitalist accumulation. In a context where the expansion of commercial activity and the production of commodities becomes the (international legal) rule, while everything else – including public health – needs to be conceptualised as a narrowly-tailored exception, our well-documented lack of full understanding of the inter-connectedness and fragility of all living things cannot operate as a moral or political barrier to economic expansionism. So far, climate change has certainly been the most prominent unintended consequence of the encounter between capitalist accumulation, its legal infrastructure and the living world, but the current crisis indicates that potential catastrophes do not stop there.

This is not a romantic critique of international law as a 'corrupt' product of rationalist modernity, nor a call to return to a 'simpler', supposedly unmediated relationship between human societies and nature. Rather, I am suggesting the radical and definite undoing of the Hayekian formula about the relationship between knowledge, markets and regulation.

Hayek, one of the most sophisticated neoliberal intellectuals, argued that in the light of humanity's overwhelming lack of understanding of the function of the 'economy', conscious regulation of market activity was virtually impossible and it would inevitably trigger unintended consequences which would, in turn, lead to never-ending governmental interventionism and, eventually, totalitarianism. This formula, which surrenders to uncertainty only to turn this surrender into a pro-market default rule, has been a prominent way of governing human life during the last few decades and has exerted crucial influence on international economic law, which tends to only allow for anti-competitive regulation in the light of overwhelming scientific evidence.

The undoing (and reversal) of this formula is, in my mind, long overdue in the light of the ongoing events. Crucially, there is no necessary link between such a reversal and anti-scientific alarmism. In fact, a second de-linking is necessary here in order to re-orient our relationship with the complex inter-relation of beings that surrounds us. Severing (or, at the very least, disrupting) the links between scientific research and profit-making would enable the re-orientation of much scientific work into questions essential for our collective survival (and thriving) and away from short-term financial incentives. To a significant extent, this re-orientation would require the sovereign decision of nation-states to invest in their domestic research capacities. However, international law has a significant role to play here insofar as it has tended to incorporate extensive protections of intellectual property and only to allow for limited deviations, even in the light of public-health disasters, such as the HIV-AIDS pandemic, or periodic Ebola outbreaks.

There is little doubt that the international legal and political order will emerge fundamentally altered at the end of this disaster. The challenge that lies ahead of us is to shape these changes and make sure that we emerge on the other side equipped with tools and ideas that will enable us not only to push against state authoritarianism, anti-Chinese hysteria and the most reactionary forms of Malthusianism, but also to remake our legal orders in ways that will make life possible.

# COVID-19 Symposium: Thinking Creatively and Learning from COVID-19– How the WTO can Maintain Open Trade on Critical Supplies

[opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/](https://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/)

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Over a matter of days, governments became reflexively nationalist in responding to COVID-19. Several emergency powers and orders were ignited. Global Trade Alert [found](#) that, as of 21 March 2020, 54 governments had introduced export restrictions on medical supplies. Chad Bown *et al* of the Peterson Institute for International Economics reported [here](#), [here](#), and [here](#) on the ‘self-defeating’ export restrictions by the European Union and richer countries, including the dire impact upon poorer countries and risks for unleashing a downward spiral of beggar-thy-neighbour policies. On 26 March 2020, The Economist [reported](#) on the coming ‘brutal’ shock to global trade: aside from the rise in trade barriers, factories around the world are struggling with uncertain supplies and sick workers, not to mention regional and national ‘shelter-in-place’ orders.

These developments present a fresh threat to the world trading system. Was any of this legal?

The World Trade Organization (WTO) trade rules contain exceptions, whereby members may cite health or national security concerns to justify WTO-illegal measures. Article XX of the General Agreement on Tariffs and Trade (GATT) provides for exceptions for measures 'necessary to protect human animal or plant life or health'. Further, GATT Article XXI(b)(iii) confirms the GATT shall not 'be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests [...] taken in time of war or other emergency in international relations'. As a result, there is at least an argument that such measures are justified.

But perhaps that was the wrong question to be asking. It may be legal, but that doesn't make it the right response. In a pandemic, maybe the rules should push in the opposite direction. What if instead of an exception that permits discrete trade barriers, there was a universal exception to the negotiated balance that allows WTO Members to engage in protection? What if there was a provision that *required* all Members to make trade *completely open* to address the pandemic?

Maintaining open trade is crucial to ensuring necessary supplies can go where needed. Returning to Chad Bown's work, the EU's export restrictions threaten to cut off many countries from vital medical supplies when they need it the most. Moreover, in a report entitled Tackling COVID-19 Together, Simon Evenett at Global Trade Alert cautioned against 'fear-driven' and 'counterproductive' export limits. For example, while the aim of export restrictions is to increase supply to local hospitals and doctors, they can also create *higher* costs for the implementing country, as 'the loss of future export sales will discourage local firms from ramping up production and investing in new capacity' (Evenett at 6). Further, trade restrictions can jeopardize international cooperation, which is why WTO Director-General Roberto Azevêdo welcomed a pledge by the Group of 20 major economies to work together to 'ensure the flow of vital medical supplies, critical agricultural products, and other goods and services across borders'.

The idea of an inverse of the GATT exceptions ('Inverse-Exceptions') acknowledges the global nature of COVID-19. There are not multiple crises occurring right now. There is one. To avoid international trade slowing to a standstill due to a rapid rise in trade barriers, invocation of Inverse-Exceptions would still come from a single WTO Member. However, it would require all Members to acknowledge that there is a need for immediate trade liberalization due to an overwhelming global concern. That is, it is not just a national security or health concern: it is a concern of humanity.

How would such a provision work? The WTO is an intergovernmental organization where each Member retains the right to pursue its domestic agenda while committing to international cooperation through its dispute settlement, monitoring, and transparency mechanisms. There are no WTO police to enforce its rules. In this sense, invoking a global exception such as the one proposed seems improbable.

Inverse-Exceptions could look like Article XXI of the GATT, with pre-defined criteria as to what actions fall under its umbrella. Such circumstances could, for example, include language related to a pandemic. Once a pandemic is declared, an institutional body

would immediately be convened to evaluate invocation of Inverse-Exceptions and, subsequently, to effect coordination with all Members to remove trade barriers on certain designated products in a targeted, temporary, and transparent manner. Here I have in mind medical equipment and supplies. As Deputy Director-General Alan Wolff recently observed, 'Nothing in the WTO rules prevents a roll-back of export restrictions'.

In designing Inverse-Exceptions, Members must determine what sort of body works best in these circumstances, e.g. an *ad hoc* committee or emergency ministerial. Working in coordination with relevant international organizations and UN bodies, this new WTO body would maintain the procedural norm of multilateralism, acknowledging Members' cultural and economic differences (the dynamics of how this could work are well theorized by Mary Footer, here at §§3.3, 3.4). Possible precedents may be found in the 'Heads of Delegations' of the GATT Contracting Parties that 'sometimes meet in private, constituting a special high level body whose actions are then ratified by the CONTRACTING PARTIES' (Jackson at 158). Another possible frame of reference is Jutta Brunnée's elaboration of the 'continuous interactional processes' of the Conference of the Parties, or COPs, common in multilateral environmental agreements.

Thinking about Inverse-Exceptions complements recent scholarship seeking to consider deliberative mechanisms for security policies, such as Simon Lester and Inu Manak's recently proposed WTO Committee on National Security (*forthcoming* Duke Journal of Comparative and International Law), or Ben Heath's normative consideration of fora for 'institutionalized shadow politics'. Other recent work by Manak demonstrates that WTO committees are valuable for many strategic and political reasons beyond the goal of dispute avoidance. I do not envision Inverse-Exceptions as a forum for disputes, but have in mind a specialized body to map out cooperation and oversee transparent procedures for liberalization of certain goods and services following invocation of the Inverse-Exceptions. Prior to COVID-19 we may not have had a counter-factual, but recent events demonstrate what happens without *ex ante* guidance.

Inverse-Exceptions is not meant to sustain the global economy, nor would it ward off financial crises. Invocation could only occur for urgent global concerns. It accepts that in an increasingly interconnected world, there are some challenges that require global action, even if on a select and temporary basis.

*The author wishes to thank Simon Lester, Harlan Cohen, and Inu Manak for thoughtful edits.*

# COVID-19 Symposium: Teaching Public International Law in the Time of Coronavirus–Migrating Online

[opiniojuris.org/2020/04/02/covid-19-symposium-teaching-public-international-law-in-the-time-of-coronavirus-migrating-online/](https://opiniojuris.org/2020/04/02/covid-19-symposium-teaching-public-international-law-in-the-time-of-coronavirus-migrating-online/)

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I have been asked to write on taking teaching online during the coronavirus pandemic. Others are much better qualified to speak on the topic (see some great resources [here](#) from Joe McIntyre and [here](#) from Kate Galloway), but I do have the possible advantage of having taught only in face-to-face formats until last year when I joined an institution that does most of its Masters teaching online and had to learn quickly before the current

pandemic. That said, I've also had an interest in creating online resources for students for some time and have made YouTube capsule courses for international criminal law and law of the sea in the past.

In any event, what I offer you is a mixture of my own experience and the best advice I've come across so far. It may or may not work for your circumstances.

And that is the first thing to stress: any advice you receive from any source on online teaching is going to need to be sensitive to context. Most of my online teaching is to career professionals used to working from home and squeezing study in around other commitments, in a wealthy country in which concern about coronavirus has only just begun to result in school and campus closures (despite toilet paper shortages). Undergraduates sent home from university accommodation may be in a different position to my mature students and may well have lost their jobs as well. Students suddenly locked down in a family home may also go from having sole access to their computers to needing to share them with others or, indeed, having no internet enabled device other than their phone. Students, in every sense, will likely have much more limited bandwidth for their studies. We as teachers of international law are also generally adjusting to radically changed working conditions.

So, the first and most important piece of advice I've seen so far is: keep it simple and straightforward. Responsible employers are not expecting teaching staff to move courses online mid-semester as if they are the Open University and had several years of planning and a dedicated team behind them to bring about an excellent online experience. What we can responsibly aim for is a "minimum viable" teaching and learning experience online for what had first been designed as a face-to-face course.

The lightest footprint for teaching online I can recommend involves the following considerations: reading, listening/watching, and reflecting. How will we help students with each of these forms of learning? After that, we need to think about assessment.

**Reading.** Weekly or class-by-class reading lists need to be accessible, concise and scalable. First, assume access to physical libraries is out. Therefore, you cannot put anything on the reading list which is not open access; readily available through your libraries' own online system; or contained in a physical textbook that students will *already* have purchased.

Second, I have long advocated that course reading lists are best divided into the following headings: *required* (what I expect you to have read as a complete minimum to participate in class); *highly recommended* (what in an ideal world you would be reading each week); and *further reading* (starting points for a research essay or developing a specialisation for an exam). I aim to have no more than 30 to 35 pages under each of the first two headings, and no more than 12 to 15 items on the total list. (Being human and enthusiastic about my subject, sometimes I exceed this).

The point of such triage is to make it clear to students through the structure of your reading list: (a) that you understand that there will be days or weeks when they simply can't get through everything; and (b) what the most important thing to focus on is in order to pass/comprehend the course at a basic level.

**Listening and watching.** As many have pointed out, this is not the time to attempt to become a polished on-screen presenter if you have not done it before. Some, with experience in the right resources, are already doing it brilliantly (make it to the end of the clip). Others will feel more like poor Robert Kelly on the BBC. The point is, find something that works for you.

I'm fond of Audacity for audio only recording: it looks more complicated than it is and there are plenty of tutorials on YouTube about using it effectively. Essentially, record yourself speaking and turn it into an MP3 and upload it to your course website. If you can work out how, make sure that the file is downloadable. A good microphone or headset will really help recording quality if you have access to one. A few simple tips and tricks can also make the sound quality a lot better (I'm a fan of using the "noise reduction" effect to minimise background noise). But remember, if you're going for this "podcast" style approach, MP3s take up a lot of bandwidth and space – so consider breaking your lecture up into smaller chunks and recording them separately. I find it helpful to try and think of these recordings as a fireside chat and imagine that I'm speaking to just one person. I don't try for comedy or high-end entertainment, I just try to remember someone might be experiencing this through earbuds so declaiming as if lecturing from a podium will sound a bit odd.

Also, consider *how much* you need to do. At my best I try to keep my fireside chat recordings to a short introduction to the readings and other material for the week. I attempt to do this in one or two clips of no more than 20-25 minutes each. Shorter is even better. (OK, yes, I sometimes fail and with complex material provide two 50 minute standard lectures).

Also remember that there is no need to reinvent the wheel. If you can find YouTube clips, podcasts or the like, which cover the material you want to, refer students to them. Other than making a small handful of my own YouTube playlists in the past, I have also used podcasts quite liberally as supplementary listening. Among many which might be very helpful for either international law or international relations students, one could look at the Lauterpacht Centre's international law lunchtime lecture series at Cambridge, the Asymmetrical Haircuts podcast on international criminal law, and the podcasts or recorded public events of think tanks such as the Lowy Institute in Australia, which has had excellent podcasts on topics such as the treaty on the prohibition of nuclear weapons.

**Reflecting.** This brings us to the tricky bit. How will we help students reflect on material and consolidate their learning? Face-to-face seminars, discussion groups, or tutorials are plainly out. Realistically, the best and lightest footprint alternatives I have found so far are essentially twofold. One is the good old-fashioned online discussion board: have

students post a reaction to a discussion-starting question or just thoughts and comments about one of the readings. Ask other students to comment on an existing thread that has already begun or to start their own. With a large enough class this can work surprisingly well. Don't feel obliged to weigh in on every single comment – I often comment on a few opening posts and then stand back for a few days before making a general comment covering a number of themes across various threads and posts. It is (in my view) important to be present in the conversations both early (so that everyone feels that they are being listened to by the teacher) and late (to try and round off the conversation and give it some unity).

Virtual meetings online via Zoom or Blackboard Collaborate or other forums may work. My institution uses Blackboard Collaborate and with a little training it works fine as a virtual classroom where one can moderate discussion. Again, keep it simple. I tend to share a slide with a few discussion prompts and then ask students to “raise their hand” and call on people to make contributions. Breaking students into smaller online groups for discussion is also relatively easy.

If you are going to break a class into smaller discussion sections, it is probably useful to keep group membership consistent if possible. These times – and online teaching – can be a bit isolating so to the extent that group identities can build up, it's all to the good.

It's useful, however, to emphasise the obvious difference between *synchronous* and *asynchronous* teaching. Asynchronous teaching, such as asking students to contribute to discussion boards – which they can do at any time on their own time – is going to meet the needs of more students. Synchronous teaching, requiring people to log-on at a particular time to join a real-time discussion may not always be possible or desirable. A compromise might be to have both – and suggest that the online real-time discussions will go ahead for those students who are able to attend but with no expectation that “attendance” is compulsory. Everyone is going to have unusual stresses and demands on their time. On the other hand, those in lockdown or self-isolation may greatly appreciate the ability to interact with classmates in a synchronous online tutorial.

I am sure there are other more exciting things that can be done, particularly those who want to, say, make YouTube clips of themselves discussing the material, or reacting to it in other ways. This is fine, but remember the “keep it simple and straightforward” principle. Get this right this semester, and you will be able to refine it next semester – when there is a significant chance we will all still be teaching online.

**Assessment.** Assessment requirements will obviously vary by institution, but everyone is going to have to adapt. Physical, invigilated exams are clearly out. Research essays requiring library access will be difficult – but as more and more resources are online and open access some students this may be less of a concern than once it was. Your institution may insist that you continue to mark and grade as normal; or may declare this semester to be pass/fail or satisfactory/unsatisfactory completion. You may or may not

be allowed to vary forms of assessment. Experiences will vary, so share them with friends and share them online so we have an idea of what best practice looks like as it emerges.

My thoughts here are necessarily tentative. One element of online assessment I have found works well has been a reflective learning journal. That is, if you require students to interact on the discussion boards, then have them parcel up four or five of their best contributions to those discussions in a narrative or journal format where they reflect how their own thinking about the subject matter has evolved over the course. At their best, I find these journals really eye-opening and inspiring when students can clearly articulate how much their own thinking has changed between the beginning and end of the semester.

What should replace final exams and whether we should make adjustments to research essay expectations remains, I think, a work in progress for all of us and will depend very much on institutional arrangements and expectations.

# COVID-19 Symposium: The Courts and Coronavirus (Part I)

[opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-i/](https://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-i/)

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Other colleagues are setting out the general framework for derogations under the International Covenant on Civil and Political Rights (ICCPR) during a public health emergency such as the COVID-19 pandemic. States have obligations to take effective protection measures arising from the right to life and right to health; at the same time, as in any other emergency, the State's other human rights and rule of law obligations remain applicable. Whether based on the ordinary scope for limitations of rights, or on derogations, protection measures must satisfy requirements of legality, non-discrimination, necessity, and proportionality (and time-limitedness for derogations). The criterion of proportionality may be particularly difficult to apply, at least in the short-

term, to the COVID-19 crisis given the various uncertainties on transmission, degree of spread, and effectiveness of measures, and what is already known about the potential severity of its consequences.

Our contribution (in two parts) will consider the specific context of restrictions on access to or operation of courts. Around the world, in response to COVID-19, courts are adopting different modalities for the hearing of matters and limiting the range of matters than can be brought before them to only the most “urgent”, while postponing all others.

This first post will set out the most relevant provisions on the role of courts in international human rights law, including in situations of emergency. A subsequent post will look at various aspects in more detail.

Judicial institutions primarily feature in international human rights law in three roles: the right to fair trial by an independent and impartial court (e.g. article 14 ICCPR); the right to judicial control of deprivation of liberty (e.g. article 9(3) and (4)); and the right to an effective remedy (e.g. article 2(3)). These three roles are reflected also in regional and subject-matter specific human rights treaties.

The judiciary also plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law. Indeed, this role becomes even more important in times of emergency or other crisis, and yet it is precisely in those situations that it is most often limited or threatened. Whenever the executive claims extraordinary powers there is a risk of deliberate abuse for improper motives; limiting the ability of courts to review and respond to executive action greatly increases this risk. Detecting and addressing such abuses should be a priority for human rights and rule of law mechanisms. Our analysis here, however, focuses on key human rights and rule of law considerations that should inform the adoption and application of good faith efforts.

Independence of the judiciary is essential for both human rights and the rule of law. Restrictions adopted by or at the request of the judiciary are generally more compatible with judicial independence than measures imposed on the judiciary by another branch of government.

It is not only the parties to a case and other affected individuals whose human rights must be considered in the context of the COVID-19 pandemic: individual actors within the court system are also rights-holders, and the right to life and right to health of individual judges, lawyers, prosecutors and court staff, for instance, must also be respected, protected and fulfilled. The fact COVID-19 mortality appears to increase with age may be a particular consideration if the judiciary in a country has a higher proportion of older persons than for other professions.

Some human rights treaty provisions expressly permit restrictions to the exercise of a right, even without a derogation, on grounds relevant for the current Coronavirus pandemic (see e.g. allowance for ‘public health’ restrictions in ICCPR articles 12 (freedom of movement), 18 (freedom to manifest one’s religion or beliefs), 19 (freedom of

expression), 21 (right of peaceful assembly), 22 (freedom of association), or concepts such as 'arbitrary' in for instance article 9(1) (prohibition of arbitrary arrest or detention) and 17(1) (right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence)). Other rights can be limited only in situations of emergency that 'threaten the life of the nation' (for instance under article 4 ICCPR).

Articles 2, 9(3) and (4), and 14 ICCPR do not explicitly allow for 'public health' restrictions, but this does not necessarily mean there is no flexibility in their application. As regards article 14, the Human Rights Committee has explained that '[a]ll trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly' and courts must 'provide for adequate facilities for the attendance of interested members of the public, within reasonable limits'. However, '[t]he requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities' (HRC GC 32, para 28). Furthermore:

Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons... (HRC GC32, para 29).

Elsewhere in the ICCPR, 'public order' and 'public health' are listed as distinct grounds; it appears then that generally limiting public access to court proceedings on health grounds may require a derogation in relation to publicity of hearings under article 14(1), at least in the absence of a substitute such as video broadcasting of proceedings.

Similarly, article 14 does not explicitly contemplate a denial or significant postponement of the general access of civil litigants, criminal accused, or their lawyers, to apply to or appear before the court and receive timely hearings, on any ground; so such a general denial or postponement may again require a derogation. The same may apply to the access of those claiming to be victims of human rights violations to any judicial remedies under article 2, and the access of persons deprived of liberty under articles 9(3) and 9(4). Furthermore, article 9(3) includes the right 'to trial within a reasonable time or to release' for persons deprived of liberty; raising the question whether anticipated delays caused by general and extended COVID-19 suspensions extend the period for 'trial within a reasonable time', or (at least absent derogation) would require the release of large numbers of persons from pre-trial detention (which may in any event be needed as a public health measure).

Some rights or aspects of rights can never be limited in any circumstances, whether by explicit provision in the treaty or by inference, including several with particular relevance for the courts:

- While 'adjustments to the practical functioning of its procedures governing judicial or other remedies' for rights violations under article 2(3) may be permitted by derogation, 'a remedy that is effective' must always be available. (HRC GC 29, para 14 and see Inter-American Court of Human Rights).
- 'It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2', such as the prohibition of torture and right to life, 'that they must be secured by procedural guarantees, including, often, judicial guarantees'. (HRC GC 29, para 15).
- 'Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. [...] [T]he principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency' (HRC GC 29, para 16). '[...]States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. [...] Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times' (HRC GC 32, para 6).
- 'In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant' (HRC GC 29, para 16; GC 35 paras 64-67, and see Inter-American Court of Human Rights).

Having set out this framework, in our next post, we will analyse specific kinds of measures taken to restrict access to or operations of courts in the context of the COVID-19 pandemic.

# COVID-19 Symposium: The Courts and Coronavirus (Part II)

[opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-ii/](https://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-ii/)

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In our [first post](#), we highlighted key provisions of international human rights law relevant to restrictions on access to or operation of courts in response to emergencies such as the COVID-19 pandemic. In this post we look in more detail at a number of more specific issues including:

- Suspension of 'non-urgent' cases
- Changes in the modality of hearings
- Dealing with the consequences of postponement of cases
- Risk-tolerance and the fundamental role of judges

Our analysis is informed by trends reflected in the measures adopted in a range of countries. In addition to a useful global survey published by the International Association of Judges, and ongoing reporting by Fair Trials, we have also looked at measures in Australia, Belgium, Canada, China, Colombia, France, Guatemala, Honduras, India, Ireland, Italy, Mexico, New Zealand, Norway, the Russian Federation, Singapore, South Africa, South Korea, Spain, Sri Lanka, Switzerland, the United Kingdom, the United States of America, and Zimbabwe, among others. However, we have not for this article specifically analysed whether the particular measures in any of these countries do or do not meet the applicable criteria.

In many cases, judiciaries are generally suspending all matters except those deemed 'urgent'. The actual distinction between 'urgent' and 'non-urgent' measures varies between jurisdictions, but generally appears to be based on inferences about the categories of cases in which delay is most likely to cause irreparable harm.

As a general matter, it is worth also recalling in this connection the potential for interim injunctions or other forms of immediate relief, based on relatively brief and summary procedures, to preserve the situation and particularly to prevent irreparable harm, until a complex matter can be given a full hearing.

The following are especially worth considering in determining which matters should qualify as 'urgent':

Retaining scope for judicial review by independent courts is essential to upholding human rights and the rule of law during states of emergency (see the International Commission of Jurists' (ICJ) 2011 Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principles 1 and 4 and pp. 1-15, 57-75 of the Commentary). In a 2008 report, the UN Special Rapporteur on the Independence of Judges and Lawyers similarly emphasised that national courts must remain competent and capable to evaluate and if necessary nullify any unlawful imposition or unjustified extension of emergency measures (see report paras 16-19, 66). While in performing such a role, the courts may accord a certain degree of deference or margin of appreciation on questions of a scientific or political matter, no emergency measure should be beyond some degree of judicial review.

A discussion paper published by the World Health Organization in 2008 on pandemic influenza planning, for instance, concluded that 'countries should have procedural mechanisms for groups to challenge the unjustified use of the quarantine or isolation power', in order to comply fully with the Siracusa Principles and the ICCPR. (In so far as particular quarantine or isolation orders may not merely constitute restrictions on freedom of movement under art 12 ICCPR, but actually constitute deprivation of liberty under art 9 ICCPR, as noted in our previous post and below the Human Rights Committee has specifically indicated that the right to challenge the deprivation of liberty before a court cannot be restricted by derogation).

As was noted in our previous post, the right to an effective remedy is also treated by the Human Rights Committee as non-derogable, and where a judicial order would be necessary for the remedy to be effective, this implies courts must always be available for such cases (see also ICJ Geneva Declaration principle 11 and Commentary pp. 181-196).

Judiciaries should give particular consideration to the situation of women and children, older persons, persons with disabilities, and others, recognising the urgency of applications to the court for protective measures for persons from such groups who do or may face increased risks of violence, abuse or neglect, relative to others, whether as a result of general confinement measures, or who would otherwise be at greater risk if access to other protective orders were suspended or limited.

Judicial guarantees have been particularly recognised (para 13) as necessary to protect non-derogable rights for persons deprived of their liberty, whether in police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes or in compulsory quarantine for reasons of public health protection. Procedural guarantees such as the right to have access to a court to challenge any deprivation of liberty and the right of persons deprived of liberty on criminal law grounds to be promptly brought before a judge, may consequently be seen as non-derogable (para 67), and given the particular vulnerability of persons deprived of liberty, must be seen as urgent. Primarily to prevent the spread of COVID-19 in closed institutions, some States are releasing persons from pre-trial detention or prison to house arrest or other forms of monitoring or control, and/or ceasing to arrest or detain people for minor offences. Such measures can also reduce the burden on the judiciary to conduct judicial supervision of deprivations of liberty.

In many proceedings, particularly at first instance, the litigants (or the prosecutors and accused), as well as their lawyers, and persons arrested or detained on criminal grounds, normally appear in person before the Court. Often documents must be filed in person at a court registry. In response to the COVID-19 outbreak, many judiciaries are increasing reliance instead on alternatives such as telephone- and video-conferencing, and electronic filing.

If they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the present outbreak, and do not for instance prevent confidential communication of a person with their lawyer, in principle such adaptations of modalities can be a proportionate response, at least in civil matters and criminal appeals (see e.g. Vladimir Vasilyev v Russia, para 84; Marcello Viola v Italy, paras 63-77; Golubev v Russia; Gankin v Russia). The limitations of such technologies, which are not always self-evident, must be taken into account and the suitability of a matter for such modalities may need to be determined on a case-by-case basis. There will be some matters in which face-to-face in-person hearings will be indispensable (see e.g. as regards criminal matters, ICCPR article 14(3)(d) right 'to be tried in his presence', and

article 9(3) right to 'be brought promptly before a judge' – although some States had already started to whittle away at these even before the current crisis). Reserve capacity for such hearings must be maintained if they are not capable of being postponed.

## **1. Dealing with the consequences of postponement**

In the immediate term, States and judiciaries should be considering the impact of limitation periods and filing deadlines in the postponement of civil and criminal proceedings and, where the current circumstances would not already automatically extend such periods, consider amending the relevant laws or enacting an exception (see e.g. measures announced by the European Court of Human Rights and Inter-American Court of Human Rights).

Furthermore, particularly if postponements become very prolonged, judges will need to consider the implications for the right to trial 'without undue delay' (ICCPR 14(3)(c)) and the right of pre-trial detainees to release if not tried 'within a reasonable time' (ICCPR 9(3)).

Once the current crisis subsides sufficiently for the justice system to resume its activities at an increased or full capacity, the courts will face a considerable, possibly overwhelming, backlog of postponed proceedings, hearings and trials, as well as possibly greater-than-normal numbers of bankruptcy, insurance, labour law, and other such matters. It may not be possible for judiciaries to secure the resources to scale up capacity beyond pre-crisis levels, and so States may need to consider decriminalisation or amnesty for certain offences, presumably focussing on minor non-violent matters, increased use of mandatory ADR for a larger portion of civil litigation, and perhaps more fundamental reforms to areas of substantive law. Indeed, decriminalisation of some offences may simultaneously advance human rights: see for example the 2017 Principles on the Decriminalisation of Petty Offences in Africa and the ICJ's ongoing decriminalization project.

## **2. Risk-tolerance and the fundamental role of judges**

There is no doubt that individual judges are entitled to measures to protect their right to life and right to health, and indeed the ability of the judiciary to continue to function depends on their well-being. At the same time, the question arises in the present circumstances whether judges might justifiably be asked to accept a higher degree of risk than that expected of other individuals that do not hold judicial office, given the essential role of the judiciary in securing human rights protection and the rule of law.

Courts have themselves taken into account the risks inherent in certain public functions when assessing the adequacy of protective measures for, for instance, members of the armed forces, while nevertheless being ready to find States responsible for rights violations in appropriate circumstances. An acceptance of heightened risk may also follow from public service as a firefighter, police officer, medical practitioner, and so on.

In practice, most judiciaries and States do seem to recognise the special role and

potentially increased risk-tolerance of judges, by ensuring for the moment access for urgent matters even while much of the rest of the population may be at home, and individual judges continue to demonstrate courage in this regard. But as the pandemic spreads and deepens, the question of how much risk judges must assume by nature of their office, may become more consequential in assessing the necessity and proportionality of further restrictions on access to and operation of the courts.

# COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Exposure and Transmission, Part I

[opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/](https://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-exposure-and-transmission-part-i/)

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***This piece is split into two parts – the first focuses on criminalization of COVID-19 exposure and transmission, and the second on criminal sanctions for the enforcement of public health measures.***

On 11 March, the World Health Organization (WHO) officially recognized COVID-19 as a pandemic. COVID-19 is a serious, highly contagious respiratory illness, with symptoms that range in severity. Most people will have mild symptoms, and some, none at all, while others may experience severe respiratory distress, which can result in death.

COVID-19 is an unprecedented public health emergency – both in the rapid spread of the disease and because of the sweeping nature of some the measures States have taken in their responses to it. In the urgency of responding to this crisis, however, governments must not forget their human rights obligations. The Siracusa Principles – which reflect obligations codified in numerous international human rights instruments and customary

international law – acknowledge that certain human rights may be restricted in a public health emergency. Under international law, however, limits on human rights may only be justified when they fulfill specific criteria: they must be prescribed by law; pursue a legitimate aim; be strictly necessary; proportionate; be rationally connected to the pursued aim, including by being based on scientifically sound evidence; be of limited duration; and subject to review.

In light of those criteria, this post focuses on States' use of criminal law in their responses to COVID-19. While it is important that States recognize that the new coronavirus is a serious public health emergency, COVID-19-related criminalization is an alarming trend. We question, in particular, the advisability and effectiveness of current criminal law responses in terms of public health, based on past experience, and seriously doubt their consistency with human rights law and standards. Though States may be using criminal law with the broad aim of reducing transmission of COVID-19, for present purposes, we analyze two distinct ways in which States are resorting to these measures: criminalization of COVID-19 exposure and transmission (part 1), and enforcement of public health measures through criminal sanctions (part 2).

### ***Overview of COVID-19-related Criminalization for Exposure and Transmission***

Since the emergence of the new coronavirus, some States have resorted to criminal law with the stated aim of sanctioning COVID-19 exposure and transmission. They have done so in at least two ways: through COVID-19 specific offences and general criminal provisions.

#### *COVID-19 Specific Provisions*

Some States have enacted specific offences for COVID-19 exposure and transmission. In January, after the outbreak of COVID-19 in China's Hubei province, authorities announced that people with confirmed COVID-19 infections could face criminal proceedings if they spat in public, thereby 'intentionally spreading' the virus. People who are suspected of having COVID-19 or people who have tested positive for COVID-19 but refuse to be quarantined might also face criminal sanctions. In March, as part of South Africa's response to COVID-19, the country enacted regulations under the Disaster Management Act to explicitly criminalize COVID-19 exposure. The Regulations proclaim that 'any person who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted murder or murder'. Pursuant to those regulations, a man was reportedly arrested for 'attempted murder' when he went to work, despite testing positive for COVID-19.

#### *Applicable General Criminal Provisions*

States are also applying other criminal provisions to COVID-19 exposure and transmission. In France, there have been reports of individuals who had repeatedly violated quarantine rules being charged with 'endangering the lives of others'. This offence is punishable by a fine of 15,000 Euros or up to a year's imprisonment. In the US,

the Department of Justice announced that ‘purposeful exposure and infection’ with COVID-19 or threats of such actions could be charged under federal terrorism laws. In pursuit of this approach in the state of New Jersey, the state’s attorney general charged a man with making a ‘terroristic threat’ by allegedly coughing at a woman and telling her that he had COVID-19. If convicted, the man faces three to five years’ imprisonment and a fine of US \$ 15,000.

## ***Analysis***

Criminalization of exposure and transmission of infectious diseases raises concern under criminal and human rights law. It is generally neither effective nor necessary to advance public health goals. When considering such criminalization in the context of COVID-19, States should learn lessons from another epidemic: HIV and AIDS. Since the beginning of the HIV epidemic, States have enacted laws that criminalize HIV non-disclosure, exposure and transmission. Over the years, however, these laws have been found to violate human rights and public health standards and may be inconsistent with principles of substantive criminal law. Rather than being based on scientific and medical evidence, criminalization of HIV non-disclosure, exposure and transmission was driven by fears and prejudices about the disease. Such criminalization increases HIV-related stigma and is not informed by the latest scientific and medical evidence and undermines public health outcomes. For instance, research shows that criminal sanctions, and attendant HIV-related stigma and discrimination, disincentivize HIV testing.

The current resort to criminal laws, purportedly to sanction COVID-19 exposure and transmission, eerily echoes back to those concerns. The use of criminal law is likely to contribute to fear of COVID-19, increasing stigma for people with COVID-19 or those who may have symptoms associated with the illness. Upon conviction, the potential penalties associated with those offences also appear to be disproportionately harsh in light of the WHO’s advice that the vast majority of people (over 80%) will recover without any treatment. There are also concerns about the discriminatory application of COVID-19 exposure and transmission offences. For instance, COVID-19-related discrimination has already occurred, as seen through the rise in coronavirus-related attacks against Asians. Like HIV-related criminalization, it is also foreseeable that these offences may be disproportionately enforced against marginalized individuals, such as people who live in informal settlements or those who are affected by homelessness.

Current gaps in knowledge and science about COVID-19 mean that prosecuting people for COVID-19 exposure and transmission would be fraught with difficulties. First, proving ‘culpability’ would appear to be extremely hard. Moreover, the criminalized ‘act’ for COVID-19 exposure or transmission may be too vague and overbroad to comply with foundational principles of criminal law. Questions abound around COVID-19 transmission, including the possibility and rate of asymptomatic transmission (i.e., transmission of the virus by people who have the illness, but no symptoms). Even with

more data becoming available, given that the new coronavirus is highly contagious, and that there is community spread in many places, it will be difficult, if not impossible, to prove that one person definitively acquired the virus from another identified individual.

Critically, criminalization of COVID-19 exposure and transmission undermines public health outcomes. Criminal sanctions for people with COVID-19, as well as increased stigma as a result of criminalization, may deter people from seeking testing and other health services. COVID-19-related criminalization also greatly increases the harm to individuals via detention and/or incarceration. Individuals in closed settings are at higher-risk of acquiring COVID-19 because of the inability to practise social distancing measures and limited access to medical goods and services. In fact, some States have released people in closed settings, including prisoners. Others have delayed criminal and other trials, recognizing that courts, like other public spaces, may contribute to COVID-19 transmissions. Criminalization of exposure and transmission thus weakens public health responses to COVID-19.

In conclusion, given considerations around human rights, substantive criminal law and public health, countries should refrain from criminalizing COVID-19 exposure and transmission.

# COVID-19 Symposium: The Use of Criminal Sanctions in COVID-19 Responses – Enforcement of Public Health Measures, Part II

[opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/](https://opiniojuris.org/2020/04/03/covid-19-symposium-the-use-of-criminal-sanctions-in-covid-19-responses-enforcement-of-public-health-measures-part-ii/)

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## ***Overview of Criminalization related to Violations of Public Health Measures***

Responses to the new coronavirus have escalated at a rapid rate, with States using a variety of public health interventions, including policy and legal tools, with the stated aim of trying to control COVID-19. We have all become accustomed to hearing terms such as ‘quarantine’, ‘lockdown’, ‘isolation’ and ‘social distancing’ – at times, seemingly interchangeably – to refer to some of the steps taken. While sharing the same goal – to slow disease transmission – these are distinct, albeit interrelated, measures:

- **Isolation** – separation of sick individuals, with the aim of preventing or limiting onward transmission.
- **Quarantine** – restriction of movement of healthy people who may have been exposed to the virus, usually for the incubation period prior to symptoms or a positive test for the illness (at which point they would be put in isolation).

- **Social Distancing** – a range of activities, from community-based to individual behaviour, to reduce contact among people – this includes actions such as closing schools, prohibiting large gatherings and encouraging people to increase physical distance between each other.
- **Lockdown** – colloquial term with no specific public health definition, which has been used to refer to some or all of the preceding terms, but is generally understood as severely restricting movement.

Since China imposed its quarantine of Hubei province in January 2020, many other States have followed suit, enacting some type of quarantine and/or social distancing measures. These actions range from issuing guidelines advising people to limit social interaction to strict, mandatory orders for home confinement. Measures have been enacted in both large geographic areas (e.g., China's mass quarantine of 57 million people in Hubei province) and smaller ones (e.g., the 'containment zone' in New Rochelle, NY, in the US). In the US, as of March 26, at least 200 million people in 21 states, 47 counties and 14 cities were being urged to stay at home.

Some States have turned to the criminal law to enforce some of these public health measures in their COVID-19 responses. Notably, Italy – currently under a national quarantine – has reportedly charged more than 40,000 individuals for violating its quarantine rules. Norway, which announced partial quarantine measures for the country on 12 March, confirmed that fines or jail time would apply for individuals who violate quarantine or isolation rules. Similarly, Argentina announced that any person who does not follow mandatory isolation or quarantine rules could face imprisonment from six months to two years. Bulgaria's district Prosecutor's Offices are taking forward at least seven cases of individuals accused of violating quarantine rules – if convicted, they may be forced to pay a fine ranging from 10,000 to 50,000 leva (approximately US\$ 5500 to US\$ 27,600), or face up to five years' imprisonment. In the United Arab Emirates, which has imposed a 14-day quarantine for any person entering into the country, the attorney general noted that individuals who violate the quarantine requirement commit a 'punishable crime'. In Israel, police have opened 86 criminal investigations into quarantine violations. Canada's Minister of Health recently announced that the country would use all of its powers under its Federal Quarantine Act to control COVID-19, including criminal penalties. Since the enhanced community quarantine in the Philippines was announced in mid-March, police have arrested hundreds of people on various charges, including violations of quarantine and social distancing measures.

## ***Analysis***

The role of criminal law in enforcing public health measures must be limited, based on scientific evidence and comply with human rights. An analogous area from which to draw 'lessons learned' when assessing the appropriateness of using the criminal law to enforce public health measures in the COVID-19 response is tuberculosis (TB).

Although TB is a contagious disease, it is curable with detection and proper treatment. Nevertheless, there may be a need to isolate a person with active TB to prevent further transmission. Effective responses to TB, like other contagious diseases, rely on voluntary, autonomous and informed decision-making for prevention, treatment and care. In most cases, people with active TB voluntarily adhere to the prescribed treatment. Even for people who may be initially reluctant to agree to isolation, patient engagement, counseling and social support will generally resolve the situation.

Global health and international human rights norms caution that, in most circumstances, involuntary isolation 'infringes an individual's rights to liberty of movement, freedom of association, and to be free from arbitrary detention'. However, public health and human rights standards cater for the rare instances necessitating involuntary isolation and treatment of people with TB. As the WHO has stated, in cases where people with TB do not adhere to treatment, 'or are unwilling or unable to comply with infection control measures ... the interests of other members of the community may justify efforts to isolate the patient involuntarily'.

But, under international human rights law and standards, as reflected in the Siracusa Principles, resort to deprivation of liberty must be provided for and carried out in accordance with the law; directed toward a legitimate objective (with due regard to the WHO guidance when public health is the legitimate aim being pursued); strictly necessary in a democratic society; the least intrusive and restrictive means available; neither arbitrary nor discriminatory in application; of limited duration; and subject to review, including before a judicial or quasi-judicial body. These same standards should be applied to the use of criminal law to enforce COVID-19-related public health measures.

The WHO, as well as other key public health experts and actors, have highlighted the importance of voluntary, non-coercive measures in addressing infectious diseases.

Community-level activities – such as appropriate, rights-aligned quarantine and social distancing measures – can be more effective for compliance with public health interventions in the COVID-19 response than the threat of criminal sanctions. Clear, transparent and consistent public health communications can help persuade people to comply with public health measures. Provision of support services, fulfillment of basic needs (e.g., food, water), as well as financial, social and psychosocial support, can also strengthen compliance. Moreover, should sanctions to address the consequences of non-compliance be needed, States may impose administrative or civil fines, provided that they are implemented in a manner that is consistent with human rights.

### *Red Flags for Future Use of Criminal Law in the Context of Public Health*

When countries use criminal law, as they are doing now in their COVID-19 responses, they are using the most coercive tool at their disposal. History shows that when extraordinary powers are introduced in connection with situations qualified as 'emergencies threatening the life of the nation' (whether in good or bad faith) they have an uncanny way of seeping into the ordinary legislative and policy framework. For

example, in 2015, France introduced extraordinary measures in response to the terrorist attacks in Paris – these measures have now found their way into *le droit commun*, ordinary legislation. Extraordinary powers, therefore, are normalized. In the criminal justice and public health contexts, the misuse and overly broad use of criminal law in public health emergencies set a concerning precedent for how the penal law may be used after the crisis subsides.

### *Creating an Enabling Environment for COVID-19 Responses*

Instead of focusing on criminal measures, countries should concentrate their efforts on enacting effective, evidence- and rights-based interventions in their COVID-19 responses. This includes transparent and clear public health messaging; widespread, accessible testing; provision of support services, especially for vulnerable or marginalized populations; and, as a last resort, involuntary isolation and quarantine measures, coupled with due process safeguards to ensure compliance with international law. It is key to remember that there is no pandemic exemption to respecting, protecting and fulfilling human rights.

# COVID-19 Symposium: US Border Closure Breaches International Refugee Law

[opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/](https://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/)

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As nearly half the world goes under lockdown to contain the spread of COVID-19, migrants have been especially helpless in the face of governmental measures restricting the movement of persons. Recent reports have documented the plight of seasonal workers stranded in India, as well as the precariousness of migrant camps in Greece, Italy and Bangladesh. The border between Mexico and the United States constitutes another flashpoint where conditions are rapidly deteriorating. On March 20<sup>th</sup>, the Mexican and American governments partially closed their land boundary, barring all non-essential travel until April 20<sup>th</sup>. The challenges of implementing these tightened controls to protect public health are staggering: documented crossings amount to over 990 million annually, making this the busiest international boundary worldwide.

However, the pandemic is also being invoked by the Trump administration to roll out unprecedented measures aimed at deporting migrants and asylum seekers. These new provisions place migrants at severe risk of kidnapping, torture, rape, and, ultimately, death. Their adoption and ongoing implementation therefore bring the United States in breach of international refugee law, particularly as regards the obligation of non-

refoulement. To be clear, the US government is duty-bound to avoid further contagion through immigration and other controls, but procedures must be applied in a proportionate and non-discriminatory manner. Absent any proof that migrants constitute an important source of contagion, these new restrictions can hardly pass muster as being proportionate, legitimate or necessary, given that they seem disconnected from immediate public health concerns. Instead, the new rules aggressively target migrants and their application represents a credible threat to the personal integrity of refugees and asylum seekers.

### **The Unprecedented Measures Breach Non-Refoulement Obligations**

The far-reaching authorization issued by the US Department of Homeland Security requires officials to immediately remove undocumented migrants regardless of their provenance and, most problematically, to return all asylum seekers without distinction to their country of origin or point of entry without being processed. According to *The Washington Post*, the US government is now expelling all border-crossers to Mexico in 96 minutes on average. This contravenes the non-refoulement obligations contained in Article 33 of the Refugee Convention of 1951 that bind the United States through its accession to the 1967 Protocol and customary international law. Pursuant to the guarantee of non-refoulement, individuals cannot be returned to their country of nationality if they have a well-founded fear that their life, bodily integrity or fundamental rights would be threatened there.

The border's closure further breaches US obligations relating to the determination of refugee status in accordance with Article 9 of the Refugee Convention, which are outlined in a dedicated Handbook issued by the United Nations High Commissioner for Refugees. According to that document, authorities must have a clearly established procedure for examining and processing refugee applicants, who must be allowed to remain in the country while their refugee status is being determined. The right to remain must also be guaranteed when an appeal to said determination is pending. Moreover, refugees may not be penalized by unlawful arrival, as recognized in Article 31 of the Convention.

President Trump's new restrictions have also diverted the public's attention from other, more drastic, rules adopted by his administration against migrants and refugees beyond the border area. On the day of the partial closure, the US Centers for Disease Control and Prevention suspended the introduction of persons from designated countries, including Mexico, in the interest of public health for one year with the possibility of indefinite extension. This comes on the heels of the cancellation of all deportation hearings in US immigration courts from March 18<sup>th</sup> for health and safety reasons.

Taken together, these measures could effectively bring the entire US asylum system to a grinding halt, thus placing migrants and refugees at severe risk. Their lack of any sunset provisions also brings the US in breach of the aforementioned obligations contained in the Refugee Convention. The immediate return policy is also disproportionate to the objective sought, considering that the US government has failed to demonstrate that

migrants constitute a focal point of contagion as outlined below. Therefore, the obligation to avoid the credible threat to loss of life that expelled refugees and asylum seekers are subject to greatly outweighs the application of these new measures.

### **The Emergency Response Cloaks Discriminatory Action against Migrants**

The stated aim of this unparalleled operation is to contain the coronavirus pandemic, but the methods used hardly withstand scrutiny when measured against the ostensible health risk posed by migrants. For one, the US government has not provided conclusive evidence that migrants have been significantly exposed to the virus. Indeed, on the day in which the closure came into effect, the World Health Organization (WHO) reported 164 confirmed cases of contagion in Mexico, whereas the US had 15,219 infected patients. Furthermore, Honduras, Guatemala and Belize, which are countries from where many migrants originate, had 36 cases in total. Although the lack of testing capabilities in Latin America might skew these statistics, travelers may not be turned away on this ground alone and their fundamental rights should be respected, according to the WHO's International Health Regulations. It would seem, then, that discriminatory action against migrants is being cloaked as a public health emergency response.

Quite tellingly, in his address of March 20<sup>th</sup> announcing the border's partial closure, President Trump cited the need to 'reduce the incentive for a mass global migration', and gestured in no ambiguous terms to the stringent immigration policies that have been a hallmark of his presidency. Surely, viral containment must be ensured across complex borders that are also economically vital. But this does not justify the systematic forced return of thousands of migrants and asylum seekers, especially when their exposure to the virus has not been conclusively established. Moreover, the procedures largely disregard the health and safety of migrant populations and, if anything, have worsened their conditions.

To justify the severity of these restrictions, Trump also invoked the National Emergency Proclamation that he issued on March 13<sup>th</sup>. However, such emergency declarations are subject to 'strict scrutiny' review by the US judiciary when they involve restrictions to fundamental rights. According to one expert, this review requires that the measures adopted be narrowly tailored to achieve the compelling interest sought. Crucially, the action taken should be the least restrictive means available to achieve the public health goal and must be evidence-based. In contrast, Trump's clampdown-like policies are disproportionate and fail to demonstrate compelling interest, notably because of the lack of conclusive proof that migrants represent such an imminent public health risk that would justify their automatic expulsion. It is therefore highly doubtful that the US administration's border restrictions meet the requirements of strict scrutiny review.

Further indication that the specific restrictions for migrants are unconnected to public health can be found in the so-called Migration Protection Protocols, also known as the 'Remain in Mexico' policy, which the recent measures further strengthen. Pursuant to this program, the US has already been outsourcing the custody of migrants to Mexico since January 2019. The practice is highly controversial, given the credible threat posed by

drug cartels and other criminal organizations at the border. Even then, the 60,000 aliens currently subject to these proceedings have access to free counsel and are able to enter the US to attend their immigration court hearings. The new policies would render this system all but inoperative, thus depriving claimants from the opportunity to present their case before competent immigration judges. Needless to say, Mexico's aid or assistance to the US in executing these restrictive procedures could also give rise to its responsibility for breaches of international standards of refugee protection.

### **Concluding Remarks**

The efforts to contain COVID-19 are placing a formidable strain on solidarity mechanisms established by international law, and risk placing vulnerable groups in evermore precarious situations. As borders continue to harden, governments should bear in mind that restrictions to freedom of movement and liberty will only be justified if they are proportionate, time-bound, strictly necessary and applied in a non-discriminatory manner. In particular, they should not unduly affect human rights or the right to seek asylum.

# COVID-19 Symposium: COVID-19 and Migrants–Gaps in the International Legal Architecture?

[opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture/](https://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture/)

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The past few weeks have seen the COVID-19 virus spread across the globe like wildfire. While for many, normal life has been disrupted, the virus has not slowed down the pace of events for those caught up in conflict or forced to flee their homes for reasons such as climate change or lack of opportunities. The COVID-19 pandemic is set to make the already dire circumstances for many migrants all the more challenging.

On 31 March, the World Health Organization (WHO), the Office of the High Commissioner for Human Rights (OHCHR), International Organization for Migration (IOM) and the office of the UN High Commissioner for Refugees (UNHCR), issued a joint statement expressing concern and urging greater protection for the rights and health of migrants, refugees and stateless persons.

This post raises a few basic questions concerning the legal protection of migrants during a pandemic, for further analysis. What is the impact of this global pandemic on legal obligations of states, and how does this relate specifically to migrants? There are multiple overlapping legal regimes, including international human rights law, refugee law, and international health law. It is hoped that these legal regimes will be able to reinforce rights of the most vulnerable, but are there gaps in protection?

(For clarity, the term ‘migrants’ is to be construed broadly in this post, without reference to legal status, and includes refugees within its ambit. The post does not cover migrants within their own countries who have also been affected by the ‘lockdown’ of cities, such

as in India. This needs to be the subject of another post altogether).

### **Seeking Refuge: Access to Protection and Living Conditions**

A particularly troubling hallmark of the response to this pandemic is that it has been posited as the protection of the right to life and health of individuals *within* the state – an obligation of the state to those of its own – which is used to minimize and disregard the rights of migrants, inherent in human rights treaties as well as the refugee law protection regime.

Specifically, two important issues relating to the movement of individuals at times such as these are, firstly, their ability to access protection (including via asylum); and secondly, living conditions in the custody of the receiving state or in transit, such as detention centres or camps such as Moria, and Cox's Bazaar. Compounding this is a lack of access to information – many camps have little to no access to the Internet, such as in Cox's Bazaar.

On access to protection, the first hurdle is of course the closure of borders. The WHO indicated that this was up to individual states and their circumstances, and thereafter virtually every state put some form of closure in place (e.g. Europe, Americas). In addition, reports indicate plans to place more armed guards at some borders, and greater 'push back' of those seeking refuge. There are also alarming reports of conditions of detention and in refugee camps – which at the best of times are dire and are now set to become worse. A case of COVID-19 infection was recently reported in a detention centre in the United States. Refugee camps are unprepared for such an eventuality and it is now only a matter of time before many of these facilities are ravaged by the disease, given constraints regarding sanitation, supplies and the impossibility of social distancing.

While space constraints preclude detailing all aspects of applicable international law, a few are highlighted. Due diligence obligations of states are a good starting point (for a comprehensive overview, see here). Some of the obvious rights to assess include the right to life (Article 6, International Covenant on Civil and Political Rights (ICCPR) and General Comment No. 36) and the right to health (Article 12(1), International Covenant on Economic, Social and Cultural Rights (ICESCR) and General Comment No. 14), which provide the legal basis for an effective response to pandemics and the realization of the 'highest attainable standard of health'.

In terms of protection under the refugee law regime, specifically with respect to those fleeing persecution, states must abide by the principle of non-refoulement, which mandates that no one is returned to situations of peril – a right defined in customary international law as well as treaty law. The 'push backs' are an attempt to side-step any form of legal responsibility and evade these binding obligations.

The obligations of states towards those in its care continues regardless of status. Individuals seeking refuge are entitled to humane conditions, and states need to comply with their international legal obligations. These emanate not just from the foundational human rights treaties such as the ICCPR, the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and others, but also the Refugee Convention.

In the case of a pandemic, the applicable nascent international law treaty – the International Health Regulations (IHR) of 2005 – entered into force in 2007 and has never been tested in a global pandemic. The obligation owed to populations within states needs to be calibrated in conjunction with and not against those seeking refuge. How do the aforementioned rights as applicable to migrants balance against the IHR?

On the links between these areas, the Office of the UN High Commissioner for Human Rights' (OHCHR) Recommended Principles and Guidelines on Human Rights at International Borders, presented to the General Assembly in 2014, Guideline 6 (on 'Screening and Interviewing') states:

'Ensuring that public health is only invoked as a ground to limit rights of entry where there are serious threats to the health of the population or to individuals, due regard being paid to the International Health Regulations of the World Health Organization.'

The IHR references treatment of 'travellers' and it is assumed that the definition would include all categories, regardless of legal status and purpose of travel. ('Traveller' is defined in the IHR as 'a natural person undertaking an international voyage'. In the entire text of the IHR, there is but one reference to 'refugee' in Annex 1-B). Articles 31 and 32 of the IHR stipulate that travellers who are entering for temporary or permanent resident status need to permit procedures such as medical examinations, and administering prophylaxis, without which they may be barred. However, this seems to indicate that they still need to be permitted entry and cannot be shut out entirely. Overall, there are two references to 'human rights', in Article 3 ('Principles') and Article 32 ('Treatment of travellers').

While the IHR enables greater cooperation between states in the case of health risks and pandemics and are seen by some as undermining sovereignty (due to reporting requirements etc.), they do, however, cater to a more 'statist' approach. This may be at odds with protection requirements under international human rights and refugee law, to the detriment of migrants.

### **Global Pandemics and Borders: Uncharted Legal Territory**

There seem to be gaps in the international legal architecture – comprising the IHR, refugee protection obligations, and human rights obligations – in the event of a global pandemic such as this, and a need for greater cohesion between these legal regimes.

The tension between a state-centric approach and sovereignty on the one hand, and that of protection of all vulnerable populations on the other, has never been greater in light of COVID-19.

At this time, when sovereignty and a narrower construction of public health obligations is being used by states to shut out the most vulnerable, it is time to re-emphasize the fundamentals of humanity and the inter-connectedness of us all. The inter-relationship between global health emergencies, refugee protection, and human rights obligations must be addressed in more detail, to ensure the 'humanization of international law', with a greater focus on individuals rather than states as the main actors.

We are only as strong as the most vulnerable among us, and more so in the case of a disease such as this, which knows no boundaries.

# COVID-19 Symposium: COVID-19 in Conflict-Affected Areas–Armed Groups as Part of a Global Solution

[opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-in-conflict-affected-areas-armed-groups-as-part-of-a-global-solution/](https://www.opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-in-conflict-affected-areas-armed-groups-as-part-of-a-global-solution/)

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Conflict-affected areas are particularly vulnerable to the spread of COVID-19. Several countries where armed conflicts are taking place have already reported cases – more will surely surface in the days to come, while others will remain concealed due to the lack of appropriate facilities and testing kits. The imperative need to address this scenario became evident on 23rd March, when the UN Secretary-General called for a global ceasefire.

Understandably, scholarly discussions – including most contributions to this symposium – are focusing on State responses ([here](#), [here](#) and [here](#)) and the role of international organizations ([here](#)). Around the world, however, non-State armed groups (NSAGs) – especially those that exert control over a certain territory – are also facing the unexpected challenges posed by COVID-19, which may affect their ranks and the individuals under their control. While some NSAGs have not been responsive to the UN Secretary-General's appeal (e.g. [here](#) and [here](#)), others have shown their willingness to

address this exceptional situation ([here](#) and [here](#)). From Syria to the Philippines, and from Afghanistan to Gaza, NSAGs have issued instructions to their troops, adopted and implemented exceptional measures in the territories they control, and begun to engage with other actors on this issue.

This post reflects on some of the difficulties this scenario presents. In particular, it examines the exercise of regulatory authority by NSAGs, and it considers the need for further interaction between these groups and other concerned actors, namely humanitarian organizations and the World Health Organization (WHO). As the international community is dealing with a new global challenge, non-State armed groups need to be a part of the solution.

### **Acts of governance: How armed groups tackle COVID-19**

As recently [highlighted](#) by the International Committee of the Red Cross (ICRC), many NSAGs exercise control over territory and persons living therein (p. 52). Sometimes they allow State organs to continue operating, other times they replace them, including in the provision of services for the population. Different degrees of control can entail acts of ‘governance’ – this notion, applied to NSAGs, has been [defined](#) as ‘the manner in which an insurgent group regulates life within a defined territory and provides public services’ (p. 40).

Individuals living in conflict-affected areas, including those controlled by NSAGs, are especially vulnerable to the consequences of humanitarian crises, such as the spread of COVID-19. It is unsurprising that several groups rapidly adopted measures (acts of governance) to contain the virus. In the Philippines, the Chair of the Moro National Liberation Front (MNLF) [asked](#) its fighters and villagers ‘to stay home and refrain from going’ to a specific city ‘to avoid acquiring the virus from other people’. In Gaza, [reports](#) indicate that Hamas has placed into quarantine almost 1,300 people returning from abroad, also closing schools, street markets, and wedding halls. In Syria, hours after the government confirmed the first case of COVID-19, the Kurdish-led autonomous administration [announced](#) a lockdown in the broad swathes of territory under its control. Ethnic groups in Myanmar have [imposed](#) travel restrictions, increased health checks, and established fines in some areas. The Donetsk People’s Republic (DPR) [decided](#) to close certain checkpoints and to ban the movement of people and transport. Even the Islamic State group (ISg) issued [guidelines](#) to contain the spread of the virus, a measure that has been [reported](#) as a decision ‘to follow the example of governments worldwide’. While some of these measures indeed resemble those adopted by States, they are conditioned by the specific nature, objectives, and capacities of each NSAG (e.g. business lockdowns would hardly be accompanied by economic mitigation measures). None of these acts of governance, however, are adopted in a legal void – they should be examined through the lens of the international rules that NSAGs are bound by.

International humanitarian law (IHL), designed to apply in the exceptional situation of armed conflict, is generally not concerned with everyday issues related to the provision of public order, and is often silent on the protection of numerous rights. Some IHL rules,

however, may be relevant with respect to measures adopted by NSAGs. For instance, both under Common Article 3 to the 1949 Geneva Conventions and customary IHL, the sick need to be collected and cared for. Parties to an armed conflict must ensure that the sick receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition, without any distinction other than those founded on medical grounds. These rules may call for the adoption of certain measures, such as increased health checks and quarantines, inasmuch as they are adopted to identify, collect, and care for the sick.

Other measures, such as closing businesses, establishing lockdowns, or other restrictions to freedom of movement, are more difficult to address from an IHL perspective. Under IHL rules applicable to occupation, some measures could be justified by Article 56 of the 1949 Geneva Convention IV, which establishes the Occupying Power's duty to ensure and maintain public health and hygiene in occupied territory, in particular 'prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics'. Yet there is no parallel IHL rule applicable in NIACs, and therefore to most NSAGs. And even if some measures could constitute a form of deprivation of liberty, they would fall beyond the scope of IHL, since they were not adopted for reasons related to the armed conflict. Certainly, IHL does not prevent NSAGs from adopting these regulations, but neither does it provide a legal basis for them, nor does it establish limits to the regulatory authority of NSAGs in this realm.

Inasmuch as IHL is ill-suited to address these complexities, international human rights law (IHRL) is better prepared to address other exceptional situations, such as pandemics. Moreover, IHRL is the legal framework that should be considered to govern the regulatory authority of NSAGs in this scenario, where the relationship between "authorities" and "citizens" takes center stage. It is precisely when NSAGs exercise stable control over territory and are able to act like a State authority, that the practical need to apply IHRL should be recognized (p. 54).

### **Humanitarian actors and armed groups: Interactions to address the COVID-19 crisis**

Other elements highlighted by recent statements are NSAGs' lack of means and knowledge to appropriately address the COVID-19 crisis, and their need for assistance from other actors. In Syria, it has been reported that medical facilities in the area under Kurdish control are very limited, and do not include operational testing facilities. In Myanmar, ethnic armed groups declared that they could only afford to provide health education, but had no funds for masks or sanitizer, calling on aid agencies and the government to help them. The Islamic Emirate of Afghanistan issued a statement demanding that humanitarian and relief organizations 'execute their obligation' of sending aid, also promising safe passage for humanitarian workers to assist with COVID-19.

But there is no obligation of humanitarian organizations to send aid, as the duty-bearers are actually States and NSAGs. Common Article 3 establishes that humanitarian organizations may offer their services to the parties to conflict – throughout this crisis,

for example, the ICRC and Geneva Call have continued performing their tasks with the goal of ensuring that individuals have access to healthcare. In this regard, States and NSAGs are bound to allow and facilitate the passage of humanitarian relief for civilians in need, subject to their right of control, as long as it is impartial and conducted without distinction – that is, humanitarian relief must not be refused on arbitrary grounds. But perhaps the most important aspect of this issue is that humanitarian organizations regularly face serious difficulties to perform their functions. On the one hand, many NSAGs fail to abide by IHL rules on the respect and protection owed to medical and humanitarian personnel and objects (including some NSAGs that are now requesting assistance, but have even been identified for attacking hospitals in a recent report of the UN Secretary-General, in particular at 39-41). On the other hand, States also impose significant obstacles, such as restrictions emerging from the establishment of economic sanctions and regulations that criminalize the activities of humanitarian workers. Thus, to be able to provide assistance, humanitarian organizations will often need to rebuild trust with NSAGs and States – their chances of success might depend on the possibility of coordinating actions with both of them.

Another aspect of the COVID-19 crisis that will require further coordination with (and between) NSAGs and States, is ensuring that the WHO – the most important authority on international health work – can effectively perform its crucial role. Interactions between NSAGs and WHO officials or personnel have previously taken place in conflict settings, e.g. in Afghanistan (where the WHO has had regular contact with the Taliban) and in Ukraine (where the WHO works in territories controlled by various parties). In the current scenario, it has already been reported that the Kurdish administration in Syria contacted the WHO and is awaiting the delivery of testing kits. Moreover, after a recent visit to Gaza, the head of the WHO office for the occupied Palestinian territories identified the need to strengthen the capacities of the health system in order to address its shortages.

In Syria, in Gaza, and beyond, multi-party coordination will be essential to produce reliable information and to adopt timely measures that can help to slow down the spread of COVID-19. For States involved in armed conflict against NSAGs, adopting ceasefires and engaging in cooperative dialogue with these actors may simply be the only way to fulfill their due diligence obligations.

### **Concluding ideas: The importance of involving armed groups in a global solution**

It is uncertain whether the COVID-19 crisis will slow conflicts or intensify them. Yet it is certain that populations living under NSAGs' control are extremely vulnerable to the potential consequences of the crisis. In this sense, involving NSAGs in the implementation of a global solution is a matter of common sense – if those populations are not protected, it increases risks even outside of those specific geographical areas. But involving NSAGs requires certain efforts. First and foremost, a 'diplomatic effort' of States to engage with NSAGs, and to allow and encourage their interaction with humanitarian organizations and the WHO – traditional legitimacy concerns need to be

left aside if the global pandemic is to be defeated. Second, an 'intellectual effort' to progressively enlarge the legal framework applicable to NSAGs, in particular, to consider their regulatory activities under IHRL. Third, a 'humanitarian effort' from all of us: not to forget, ignore, or neglect the everyday life of individuals in territories controlled by NSAGs, and to demand that the international community meets the challenge of simultaneously addressing concomitant phenomena of the greatest complexity. If these efforts are successful, perhaps new avenues for engagement will remain open, and the overall impact of the COVID-19 crisis on conflict-settings will ultimately be a positive one.

\*This post was finalized on 26 March 2020 and does not include developments after that date.

# COVID-19 Symposium: Israel and its International Law

## COVID-19 Obligations Towards Gaza

[opiniojuris.org/2020/04/04/covid-19-symposium-israel-and-its-international-law-covid-19-obligations-towards-gaza/](https://opiniojuris.org/2020/04/04/covid-19-symposium-israel-and-its-international-law-covid-19-obligations-towards-gaza/)

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There is no question that Israel has an obligation to alleviate the health crisis that COVID-19 may trigger in the Gaza Strip. After all, according to the jurisprudential line taken by the Israeli Supreme Court, the State cannot allow the emergence of a humanitarian crisis in post-disengagement Gaza. The current post would like to examine how these international law obligations are translated when it comes to the need to avert any COVID-19 expansion in Gaza. Emphasis in this post will be placed on Gaza, but it goes without saying that the Israeli obligations extend also to the West Bank and East Jerusalem.

The case of Gaza though is more acute. Whereas Israel has annexed and exercises control over East Jerusalem and cooperates with the Palestinian Authority in the West Bank, Gaza is ruled by Hamas which has been declared by Israel an enemy entity. Moreover, the extent of the Israeli obligations towards Gaza becomes more complicated given the debate over whether the Strip is still occupied by Israel following the Israeli

withdrawal of its army and settlements in 2005. Proponents of the stance that Israel is still occupying Gaza point to the fact that Israel is controlling Gaza's air and sea space as well as its crossings (see [here](#), page 38, n.101), whereas those that hold that it is not occupied, underline the lack of boots on the ground and Israel's stated unwillingness to permanently reconquer the area (see [here](#), page 37, n.97).

For those holding that Gaza is still occupied, things are clear when it comes to COVID-19. The right to health is a socio-economic right and, as the International Court of Justice held back in 2004, prior to the Israeli disengagement, the International Covenant on Economic, Social and Cultural Rights (ICESCR) should be seen as applying also to Gaza and the West Bank (see [here](#), para.112). Yet, the position that Israel must provide for the socio-economic rights of the Palestinian residents in Gaza, even after the Israeli disengagement, raises a number of hurdles.

The first hurdle is doctrinal. According to the ICESCR, States are meant to provide for socio-economic rights according to their available resources. As noted by Lubell (see [here](#), page 330), there is a need for a 'contextual approach' when we come to discuss the level of obligations and the precise duties of the occupying power. As Lubell notes, there are doubts whether an occupying power can carry out the 'fulfill' aspects of socio-economic rights. In Gaza all the more so, given that it is Hamas and not Israel that runs the local hospitals.

The second hurdle is teleological; if after the disengagement Israel is to be considered an occupying power in the Gaza Strip on the same terms as before the country withdrew its army and settlers, then given the number of rocket attacks that have been recorded coming from the Strip in the last few years, no country facing a similar situation and holding boots on the ground in order to stabilize a volatile security situation, would have the impetus to terminate the state of military occupation. Examples could include the U.S. presence in Afghanistan and Iraq. Yet, in international law, military occupation is meant to be temporary. States should be given incentives to terminate it, not prolong it.

The contention, therefore, that Israel is still occupying Gaza and, when it comes to COVID-19, must provide to Gaza residents the same level of satisfaction to the right to health that it provides for its own citizens, is quite comfortable to make from a legal point of view, since it leads to clear ramifications, but at the same time problematic, to the extent that it raises the aforementioned hurdles. This maximalist approach which in essence equates Israeli citizens and Gaza residents and calls on Israel to treat the two groups the same, allocating for example the same number of medical supplies, runs the danger of being disregarded by the State altogether.

On this account, scholars, like Shannon Maree Torrens, who have underlined the stance that Israel must step in to avert any COVID-19 crisis in Gaza due to it being the occupying power there, have equally noted that even if the question of whether Israel is still occupying Gaza is answered differently, Israel would be under a moral obligation to avert a spread of the virus in the Strip. Yet, whereas obligations based on morality are always welcome, someone must not forget that States are not benevolent institutions. The

question is thus if international law can propose a binding scheme, beyond the realms of morality, that could be cited as a ground for any Israeli obligations towards Gaza in the current COVID-19 crisis.

In a 2011 article I held that Gaza cannot be deemed to be occupied by Israel after the Israeli disengagement. I reiterate this stance. At the same time, as I wrote back in 2011, post-disengagement Gaza has a *sui generis* status, with Israel still having certain obligations towards the Strip. In the current post, I would like to pose some ideas on where such obligations can be grounded when it comes to the handling of the COVID-19 pandemic.

To the extent that the post-disengagement Gaza case is unique, precedents from other cases where a State has withdrawn from the territory it occupied, yet the de-occupation process has not fully culminated, cannot be cited. Of greater relevance, however, is the way States have treated the outbreak of COVID-19 in dependent territories. By 'dependent', I mean factually and not only legally dependent territories. These territories can be separate States which nevertheless depend on other States in certain neuralgic fields such as those of defence and foreign relations (the case of New Zealand and the Cook Islands) or territories which formally belong to a State, yet their geographical position or their political history renders them also a separate unit from the parent State on which they depend for the providing of essential services.

The examples of Greenland with Denmark and of Easter Island with Chile, fall in this latter category. In both instances, when the first COVID-19 cases erupted in these territories, the main governments in Denmark and Chile did everything on a preventive basis to contain the further spread of the virus. Measures taken included sending laboratory tests for the tracing of the virus from Greenland and Easter Island to mainland Denmark and Chile respectively. The Cook Islands have not so far reported a COVID-19 case, but test samples are also being sent to New Zealand.

The examples of New Zealand, Denmark and Chile involve countries with high health standards, extending their aid to populations where such standards cannot be enjoyed. It could be argued that the same degree of due care should be applied regarding Israel's obligations towards Gaza. Indeed, so far, Israel has acted likewise, permitting the sending to the Strip of supplies like swabs to collect samples, resources required for laboratory testing and equipment to protect the Gazan health workers. Israeli labs could similarly become more actively engaged in the examination of any samples taken from the Gaza population.

Moreover, it is important to note that Israeli actions should also be extended once COVID-19 cases are detected among Gaza's population. Given Israel's prior objections to the hospitalization of Gazan patients in East Jerusalem hospitals-a case that needed to be resolved by the country's Supreme Court-no obstacles should be put to the hospitalization of Gazan patients in the West Bank, in other countries abroad or even in Israel itself if the country's health system has the relevant capacity.

This brings me to the concept of solidarity. Ultimately, the case of Gaza can be a prototype for a wider discussion on the obligations of the developed world towards countries and populations which do not have the means to even attempt to combat COVID-19, let alone efficiently confront it. Certain African States, Syria or Afghanistan or even indigenous isolated tribes in the Amazon, constitute such examples.

For many years, solidarity has been viewed as largely a moral philosophical notion embedded in the writings of scholars like Sangiovanni. Yet, recent international developments, such as the large influx of Syrian refugees in the European Union (EU), have resulted in the European Commission trying to persuade Member States that solidarity should be a legal precept obliging all Member States to equally accept responsibilities stemming from refugee flows. The current crisis brings the question of solidarity and international cooperation once again to the forefront. This is extremely important in an era where States have showed a tendency to self-isolate and return to a more inward-looking national agenda.

The view that Israel must satisfy the health needs of Gaza's residents because it is the occupying power, leads to a situation where Israel is left alone to tackle the needs of the Palestinian population. Yet, if there is one thing that the current crisis has taught us, is that it cannot be addressed by any single State acting alone. Cooperation is paramount. Along these lines, a Chinese businessman donated millions of medical equipment items to African countries in order for the latter to battle COVID-19, while in Europe, the European Parliament urged the EU institutions to relocate the refugees from the Greek camps to other more affluent parts of Europe. It is this principle of solidarity which should govern any Israeli aid towards Gaza, not only from a moral but also from a legal point of view. At the same time, solidarity as a legal precept also calls for the Palestinians in Gaza to internationalize any COVID-19 crisis and ask for help from any country or private entity that is ready to assist. Our times are not times of exclusion or collision.

# COVID-19 Symposium: Will the UN Security Council Act on COVID-19?

[opiniojuris.org/2020/04/04/covid-19-symposium-will-the-un-security-council-act-on-covid-19/](https://opiniojuris.org/2020/04/04/covid-19-symposium-will-the-un-security-council-act-on-covid-19/)

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Since the novel coronavirus first appeared in December 2019, the virus and ensuing illness, known as COVID-19, has commanded the world's attention. For the international legal community, much of the attention has been devoted to the World Health Organization (WHO)—and rightly so. The WHO holds the central and historic responsibility for the global regime that responds to the international spread of disease. All eyes were upon the WHO as it pulled the trigger on 30 January 2020, declaring the virus a 'public health emergency of international concern' (PHEIC). That decision, fraught with legal significance, was followed by the declaration of 'pandemic' on 11 March 2020. Although the latter declaration holds less legal significance, it resonated more strongly with the general public.

The WHO drew its authority from the International Health Regulations (IHR 2005), which, in the words of former WHO Legal Counsel Gian Luca Burci, was a 'radical change from previous versions' of the IHR, moving from a passive approach relying on a list of

diseases and strict national measures to a fluid, more interconnected approach. Under the IHR 2005, the 'WHO plays a central role in surveillance, risk assessment and response and aims at ensuring an effective but proportional public health response to avoid unnecessary interference with traffic and trade'. WHO Member States are obligated to cooperate in good faith with each other and the WHO in detection, notification, and taking measures in response to certain health events.

But another actor has been missing so far from the response: the UN Security Council. The Security Council is tasked with primary responsibility for the maintenance of international peace and security, generally characterized as armed conflict, and has a broad array of tools at its disposal in pursuit of that mandate.

Despite that general characterization, the Security Council creatively expanded that mandate in September 2014 in the wake of the Ebola crisis in West Africa. UNSC Resolution 2177, for the first time, characterized a public health issue—more specifically, a communicable disease—as a threat to international peace and security.

The Resolution's Preamble went to great lengths to explain why this was so:

- the Ebola outbreak spanned national borders;
- it threatened to undermine 'the stability of the most affected countries' and could have led to 'civil unrest, social tensions and a deterioration of the political and security climate';
- it had a 'particular impact' on women;
- 'the outbreak may [have] exceed[ed] the capacity of the governments concerned to respond'; and
- there was concern about 'the impact, including on food security, of general travel and trade restrictions'.

Accordingly, the Security Council underscored the need for enhanced and coordinated regional and international responses due to the unique nature of the threat.

The operative parts of Resolution 2177 undertook the following acts, among others:

- encouraged the governments of the affected States to accelerate national mechanisms for diagnosing, isolating, and treating patients, as well as protect health workers and first responders and promote public health education;
- encouraged the governments of the affected States to 'mitigate the wider political, security, socioeconomic, and humanitarian dimensions of the Ebola outbreak';
- called upon all UN Member States 'to lift border restrictions, imposed as a result of the Ebola outbreak... and airlines and shipping companies to maintain trade and transport links with the affected and the wider region';
- called upon Member States, acting individually and in multilateral organizations, to provide personnel, technical expertise, and supplies to fight the outbreak; and

- urged Member States to ‘implement relevant Temporary Recommendations issued under the International Health Regulations (2005) regarding the 2014 Ebola Outbreak in West Africa’.

The Resolution also indirectly led to the creation of the United Nations Mission for Ebola Emergency Response (UNMEER).

Perhaps the most telling word used in the entire Resolution appeared in the Preamble: ‘unprecedented’. This description was true not only of the extent of the Ebola outbreak, but of the Resolution itself.

The novelty and importance of Resolution 2177 do not eclipse the challenges that Security Council action on public health might pose. For instance, while disease outbreaks can threaten international peace and security, it is far more difficult to mandate or proscribe actions by actors than in the case of armed conflict. One shortcoming of this ‘securitization of health’ is that the Security Council can invoke its Chapter VII authority to order States in conflict to stand down; it cannot instruct the same to a virus.

From a public health standpoint, the 2014 Ebola outbreak and the COVID-19 outbreak differ in important ways. Ebola has a higher mortality rate; COVID-19 is much less lethal and indeed often asymptomatic. The 2014 Ebola outbreak affected an especially vulnerable part of the world, but containment efforts were ultimately successful; yet COVID-19 is a true pandemic and is still racing its way around the world, affecting different States and societies differently.

By other measures, COVID-19 is objectively worse. Despite a lower mortality rate, the virus has killed more people in a few short weeks than all Ebola outbreaks ever have. The insidious danger of the disease is that it can overwhelm national health care infrastructure, forcing health care practitioners to make the most difficult decisions as to how to allocate scarce resources. To slow the speed of transmission by ‘flattening the curve’, and thus trying to ease the burden on health care facilities, States have taken significant measures to curtail travel and public interaction. This, in turn, has caused large parts of the global economy to grind to a halt while citizens in many countries engage in quarantine, voluntary or otherwise.

Given the global threat to international peace and security posed by COVID-19, especially in light of the Ebola precedent, there is an arguable case for the Security Council to act. The wisdom in such action lies in asking, what can the Security Council do? The Security Council’s greatest skill in the coordination of global health effort is its ability to create binding obligations upon UN Member States and thereby corral recalcitrant Member States. The WHO has already seized the moment, yet Member States are often acting unilaterally in response to the individual circumstances in their domestic jurisdictions. To the extent that individual Member States do not cooperate in the sharing of scientific information or medical and humanitarian aid in the WHO context, the Security Council could play a valuable role in giving the WHO efforts greater heft. As a general matter, the

Security Council could emphasize 'the role of all relevant United Nations System entities' in support of the WHO's mission during the Ebola outbreak. More specifically, it could convert WHO recommendations to Member States into prescripts of a binding Resolution.

To the extent that Member States are loathe to act in concert, the Security Council could instruct their cooperation as envisioned by Article 48 of the Charter. To the extent that their actions risk violating or failing to honor other international legal obligations or norms, such as health, trade, or aviation regulations or treaty regimes, the Security Council can invoke the supremacy of the Charter as embodied in Article 103 and the obligation to follow the Security Council's decisions per Article 25.

Unlike the Ebola case, it is unlikely that Member States would, or indeed should, unwind the travel restrictions or border closures that have been imposed. As time goes on, however, different States will recover at different rates, perhaps while others are still in the throes of the virus. As such, calling on Member States to unwind such measures at that time to prevent isolation may be necessary to prevent an inequitable distribution of recovery. In that vein, the Security Council could move proactively to ameliorate the worst effects of COVID-19 on the global financial system through targeted aid or coordinating with the major international financial institutions. In a more creative turn, the Security Council could 'pierce the State veil' to call on private multinational manufacturing industries to provide and distribute necessary medical supplies, namely personal protective equipment, or eventual vaccines to other States where they are needed most. A number of multinational corporations have already announced that they are willing to do so. This would blunt the temptation by States with strong manufacturing capabilities to act solely in their self-interest at the expense of less developed States.

The more creative the solution, the more political capital is needed to act. Any Security Council action, of course, requires the cooperation of the Permanent Members (P5). China held the rotating Security Council presidency during the month of March 2020. Certain Chinese officials have accused the US Army of creating and disseminating the virus (to the contrary, international medical officials are confident in how the virus first appeared in Wuhan), while US President Trump, in turn, has taken to calling the virus and disease the 'Chinese virus'. Any Resolution text would therefore have to be sufficiently anodyne so as to not risk a veto from any of the P5. Although the Dominican Republic assumed the rotating presidency during the month of April, this concern remains.

Will the Security Council act? The answer is not clear at present. Many high-ranking diplomats have fled New York. (In fairness, these authors have too). Yet, Article 28 of the Charter requires the Security Council to 'be so organized as to be able to function continuously' and empowers it to meet at places other than the Headquarters. Following negotiations in late March, the Security Council agreed to new internal procedures, including a twenty-four hour voting period. More contentious was the issue of meeting

by video teleconference (VTC). While the Security Council agreed to meet through open and closed VTCs, voting will follow the written process agreed at the written voting procedure agreed in late March. These procedural changes, though minute in comparison to a substantive resolution, might prove to be significant to the Security Council's overall working methods in the long run. Nevertheless, reconvening under the specter of COVID-19 does not guarantee that the Security Council will *address* COVID-19. The Security Council has an unfortunate but unique opportunity to build upon a novel legal foundation and demonstrate the functional value of an oft-criticized institution. Whether it will decide to act, and in what form that response will take, remains to be seen.

# COVID-19 Symposium: COVID-19 and International Criminal Law

[opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-international-criminal-law/](https://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-international-criminal-law/)

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As we move further into the uncertain, our offices turned virtual, our children at home, our social habits transformed, our concerns for ourselves and others guiding our daily routines, questions as to the shape of the post-COVID-19 world flood the internet. Alongside them are questions, such as the one at the heart of Opinio Juris' very pertinent symposium about the role of international law in responding to the crisis. One sub-question that may not come immediately to our minds is the relevance, if any, of international criminal law (ICL) and international criminal justice vis-à-vis pandemics like the COVID-19 one. Are notions of individual accountability and of criminal conduct relevant in this particular context? Is there a role for international criminal justice in the prevention of, and response to public health emergencies of this kind?

Many will advance a negative answer to these questions, some because of the lack of a clear and direct connection between international crimes and epidemics; others, because they will fail to see how the prosecution of international crimes may help

prevent or solve a crisis of this nature. There is some truth in this, and criminal law is not – and should not situate itself – in the first line of defence in this context. And yet, as I hope to suggest, it has a role to play, if viewed through the correct lens. But before discussing this further, one important point of clarification: my analysis is confined to the relevance of international criminal law and international criminal justice in the current context; it does not touch on the distinct issue of resort to domestic criminal law by States in their responses to COVID-19, a matter that has been critically discussed by Nina Sun and Livio Zilli in this Symposium (see [here](#) and [here](#)).

A necessary basis for assessing the potential relevance of ICL entails accepting some basic truths underlying the COVID-19 crisis, which have been already noted by many: we are, regardless of whether we like it or not, a deeply interconnected world, and our security relies as much in global responses as in local ones. We have seen the evidence of this for years, but perhaps without grasping the extent of it. We have witnessed repeatedly how a humanitarian crisis created by atrocities in one part of the world could lead to a migrant crisis elsewhere, frequently accompanied by a surge in transnational organized crime feeding from both.

Still, the interplay between international criminal law and public health is less obvious. Do war crimes and impunity, for instance, contribute to a pandemic, or, conversely, can the prevention of such crimes contribute to a healthier world? How does global lawlessness impede the ability to respond to save lives and protect rights? There are no quick answers to these questions, but they deserve careful reflection as we move from immediate responses to the longer-term vision of our world. We can start configuring the answer to this question by examining some real-life scenarios where the conduct of actors involved in international crimes also seriously disrupts the ability to contain public health crises:

- In 2017, Médecins Sans Frontières (MSF) expressed concern about the safety and well-being of humanitarian organizations in the field, who were being targeted by armed groups terrorizing the Sahel region, including the groups at the heart of the crimes prosecuted by the International Criminal Court (ICC) in the *Al Mahdi* and *Al Hassan* cases. The targeted organizations included those trying to contain an Ebola outbreak and prevent a spread of the virus to neighbouring countries (see, *inter alia*, [here](#))
- In 2018, Human Rights Watch (HRW) requested the ICC to prosecute the perpetrators of a number of killings in the Kivu region of the Democratic Republic of the Congo, noting that ‘the attacks complicate efforts to stem an Ebola virus outbreak that has left at least 70 people dead since August. The risks of the outbreak worsening are heightened, with health workers unable to access some areas due to the insecurity and neighboring Uganda facing an “imminent” threat, according to the World Health Organization’ (see [here](#)).

- In 2009, then-President of Sudan, Omar al-Bashir responded to the warrant of arrest issued against him by the ICC by expelling from the country 13 humanitarian organizations, including Oxfam, International Rescue Committee and Save the Children, working in war-torn Darfur. The World Health Organization (WHO) warned at the time that 'the decision could lead to the increase of mortality and morbidity due to the interruption of health services, the decline of immunization coverage and the lack of therapeutic feeding and nutrition services for children' (see [here](#)). In sharp contrast, with al-Bashir in custody and awaiting justice, be it national or international, for the crimes for which he was indicted by the ICC, the same Save the Children announced a few days ago that a fleet of its vehicles equipped with loudspeakers and signboards had moved through North Darfur and Kordofan in Sudan this week, sharing messages about handwashing, social distancing and other ways to prevent the spread of [COVID-19](#). Save the Children also said that it was 'working closely with the Sudanese Ministry of Health to distribute facemasks and hand sanitizers to all health facilities in the region, with 1200 masks distributed and 1200 litres of sanitizer procured to date. The agency is also working with the Ministry of Health to establish isolation centres to ensure people who test positive to the virus can recover at a safe distance from the rest of the community' (see [here](#)).

These are only illustrations. There are more scenarios where humanitarian assistance (local, international, state and non-state actors) and the provision of basic health care and support, that we see as crucial across the globe today, has been impeded by those who enjoy impunity for war crimes and crimes against humanity.

None of this should come as a surprise. Epidemics and international crimes, more often than not, feed from the same toxic elements: systemic poverty, lack of education, of basic services, of state protection, of respect for individual rights, including the most basic socio-economic human rights. The groups and communities that are particularly vulnerable vis-à-vis epidemics tend to be those at the heart of the victimization in war crimes or crimes against humanity scenarios. And as real life examples show, the actors behind those crimes are rarely sensitive to public health considerations: armed groups who extensively victimize civilians for military, political and/or financial gain are prone to forcibly remove anything or anyone that they perceive to be a potential threat to their criminal plans, be it a priest, a children's rights NGO or a group of health workers, regardless of the consequences; genocidaires, almost by definition, do not care about the health and well-being of their own civilian population, even if they have the responsibility, and the power, to protect it, like al-Bashir did. Meanwhile, as we are starting to see as the impact of COVID-19 goes global, systemic crimes strip communities and states of the resources and resilience needed to effectively react.

Admittedly, none of this is really new. But what the COVID-19 crisis is showing us, is that the consequences of epidemics spiralling out of control, even if long known to specialists, can go beyond anything we could have imagined from the comfort of our offices, our classrooms, or our homes. An armed group systematically preventing the containment

of a deadly virus in a place that may seem remote to us can lead to a health crisis reaching our doorsteps, thousands of kilometres away (for encouraging contrary examples, see [here](#)). The interconnectedness of the world, our mutual dependence – considerations actually lying at the heart of the very notions of crimes against humanity, war crimes and genocide – have become inescapable realities.

International criminal justice (understood as the aggregate of national jurisdictions applying international criminal law and international and/or internationalized criminal courts and tribunals) undoubtedly offers only a limited response, and its effects can often only be seen after a prolonged period of time. But it can help isolate the actors behind the crimes, generate awareness of their actions and their potential consequences, and galvanize efforts to counter them. It can expose environments of dangerous misinformation (that we see today) and stubbornly remind the world that when we protect those who have brutally victimized their population and rendered it vulnerable, we do so at our peril; it can also lead to moments of potentially rich expressive value, such as Al Mahdi's plea at the ICC, repudiating the violence of the armed groups he was part of in Timbuktu and asking others not to become involved in the types of acts in which he became involved 'because they are not going to lead to any good for humanity'. Finally, it can send the message that in extreme situations, increasing the vulnerability of your population may bring accountability, no matter how much time has passed, as cases such as *Habré* reveal. In short, international justice can and should be one piece of a much more comprehensive response, one that tackles the actions of war criminals and their damaging consequences, as well as the chronic underlying factors that have contributed to a world much less secure, in many different ways, than we may have thought. Maybe in the post-COVID-19 world we will pay more attention to a comprehensive approach to security and to its protection.

The current crisis may also lead the international law community (courts, practitioners, academics, and states) to re-think some of our international criminal law categories and concepts. For instance, we may decide to make more and better use of the war crimes provision banning intentional attacks on humanitarian personnel (ICC Statute, Article (8) (2) (b) (iii)) – a crime the ICC Office of the Prosecutor (OTP) confirmed in its 2016 Policy Paper on Case Selection and Prioritisation that it would pay 'particular attention to' (see [here](#)), making sure that its construction captures deliberate attacks on impartial and independent health workers operating in the context of an armed conflict (for an interpretation of this provision see [Abu Garda Confirmation Decision](#), paras. 68-74). We may decide to explore the applicability of different modes of responsibility to actors placed in situations of power who deliberately fail to take all necessary steps to contain the propagation of a potentially deadly virus, in full awareness of the consequences. Or we may inquire as to how we might potentially characterize evidence of an intentional failure to provide adequate health information, support, and facilities to a targeted group suffering a life-threatening epidemic. As we learn more about the connections between climate change and health crises such as COVID-19, we may also renew efforts to support ongoing initiatives to develop the category of international environmental crimes, or, at least, demand that more emphasis be placed on the environmental

consequences of existing crimes (see the declaration of intent in this regard at para. 41 of the 2016 OTP Policy Paper on Case Selection and Prioritisation, referred to above). Finally, it is not outside the realm of possibilities that the international criminal justice system be asked to hold to account those who use the COVID-19 crisis as an excuse to commit or perpetuate crimes against humanity or war crimes.

One thing is clear: as Philippe Sands stresses in his contribution to this symposium, relying also on a thought-provoking article by Yuval Harari, we need a global response. And global responses imply the international rule of law, global governance and accountability dimensions. The response should put the responsibility to protect human beings at its centre, supported by, among others, multilateralism and effective international institutions. Most of all, we need to return to the values and principles that led States back in 1998 to write inspiring, almost poetic words in the Preamble of the Rome Statute – words that today resonate with particular force – when they reminded us ‘that all peoples are united by common bonds, their cultures pieced together in a shared heritage’ and expressed concern ‘that this delicate mosaic may be shattered at any time’.

We believed in these words then. It is imperative that we believe in them now.

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# COVID-19 Symposium: To Derogate or Not to Derogate?

[opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/](https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/)

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Earlier contributors have highlighted that in addition to permissible *restrictions* (or *limitations*) upon human rights, applicable in perfectly normal situations, some human rights treaties also allow for the more far-reaching option of a State to *derogate* from some of its obligations during a situation of grave crisis. This applies to the subset of other than so-called non-derogable rights under the UN-level International Covenant on Civil and Political Rights (ICCPR, see article 4) and two of the regional human rights treaties, the American Convention on Human Rights (ACHR, see article 27) and the European Convention on Human Rights (ECHR, see article 15).

Almost twenty States parties to the three treaties mentioned have resorted to derogation during the current COVID-19 epidemic, officially declaring it as a state of emergency threatening the life of the nation and, as a consequence, notifying the United Nations, Organization of American States or Council of Europe about unilaterally derogating from some of their treaty obligations under the three treaties. As of 2 April 2020, they included eight countries derogating from the ECHR (Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia and Romania), three of them notably EU Member States, as well as no less than ten Latin American countries (Argentina, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Panama, Peru) derogating from the ACHR. A subset of six of these States have also notified the UN about derogating

from the ICCPR (Armenia, Ecuador, Estonia, Guatemala, Latvia and Romania). The mere number of derogations because of COVID-19 – almost one out of every ten countries in the world – is unprecedented.

Many more States have resorted to domestic emergency powers, either nationally or on a regional or local basis. Such powers typically entail rule by decree, i.e., the executive assuming law-making powers that normally belong to the elected Parliament. In addition to such a power shift, in most cases they also allow deviation from constitutionally protected fundamental rights or some of them.

Emergency powers carry a grave risk of being abused, often for political purposes such as curtailing dissent, dissolving Parliament, postponing elections or cementing the powers of a would-be dictator. What is happening right now in Hungary demonstrates how this risk also applies during the public health emergency of the COVID-19 pandemic.

In light of the risk of abuse, it appears as the safe course of action to insist on the *principle of normalcy*, i.e. to handle the crisis through normally applicable powers and procedures and insist on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights on the basis of a pressing social need created by the pandemic. This would be the approach of resisting panic, a *Leitmotiv* during my six-year work as UN Special Rapporteur on human rights and counter-terrorism. As 9/11 of 2001 or the phenomenon of global terrorism did not create a permanent threat to all nations in the world, States should resist declaring a state of emergency for the purpose of combatting terrorism and, instead, rely on, review and improve their counter-terrorism laws, including by securing full respect for human rights when so doing. In my dealings with governments, I found myself not only recommending not to resort to emergency powers but also not to stretch, breach or abuse their normal laws through treating terrorism as a *de facto* emergency and the assumed terrorist as an enemy of humankind who belongs to a legal black hole.

During COVID-19, however, there is a powerful counter-argument. It was eloquently captured by Alan Greene in a recent blog post: Officially declaring a State of emergency and notifying international institutions about measures that derogate from some of their human rights treaty obligations, may have the positive effect of *taming emergency powers* by constraining the State to articulate their emergency measures under the terms of necessity, proportionality, exigency in the situation, temporality and a commitment to human rights as a framework for legitimate emergency measures.

The current pandemic has triggered many philosophers, political theorists or legal scholars to remind us about Carl Schmitt as the theorist who claimed that a state of emergency is the moment that shows who in a State actually is the sovereign. Legislators and laws, even the Constitution, may be set aside when the true sovereign, typically a President or Prime Minister, declares a state of emergency. As Alan Greene explains, Carl Schmitt is *passé* and his relevance grossly overrated. After World War Two and the adoption of human rights treaties, we have in principle fixed the problem. The possibility of officially derogating from some but not all provisions in some but not all human rights

treaties, coupled with the requirement of international notification, results, as Greene writes, in 'the closest we shall get to an "ideal state of emergency"'. For Greene, it would be the *failure to use* the derogation option that today 'risks normalising exceptional powers and permanently recalibrating human rights protections downwards'. If the exigencies of the COVID-19 pandemic require exceptional measures and deviation from some dimensions of the full enjoyment of all human rights, then it is best to introduce those measures through a framework that entails a commitment to legality and to the full restoration of normalcy as soon as possible.

Before serving as UN Special Rapporteur (2005-2011), I sat for eight years (1997-2004) on the UN Human Rights Committee, the treaty body under the ICCPR. During that time, in 2001, we adopted the Committee's General Comment No. 29 on states of emergency. After 9/11, this document proved extremely useful in efforts to keep a check on human-rights-intrusive counter-terrorism measures. Even if the document does not mention pandemics as a category of situations that may threaten the life of a nation, I do insist that it forms an extremely valuable source in efforts to prevent the abuse of power or, more broadly, in securing that any measures in the fight against the pandemic that have a negative impact upon human rights, will not constitute human rights violations but either permissible restrictions or necessary and proportionate derogations.

Hence, my answer to Alan Greene is: we can both have our cake and eat it. One can insist on the principle of normalcy and on full respect for human rights. What can be done under the framework of permissible restrictions, should be preferred. If those available options prove insufficient during COVID-19, then it is better to derogate than not to derogate. General Comment No. 29 will then show that the scope of legitimate additional human-rights-intrusive measures is quite limited. As a consequence, what we will see *after* declaring a state of emergency is that the principle of normalcy is still there, or, in other words, much of the cake of human rights remains untouched. It is worth underlining that Hungary has *not* derogated from the ECHR or the ICCPR, suggesting that those who abuse emergency powers for a power grab do not accept to be tamed by the framework of official derogation. So, Alan Greene is right in that international notification of an emergency may reflect a country's commitment to legality and normalcy. As doing so will demonstrate that human rights are not suspended and emergency powers will be tamed, a government may as well decide to maintain the usual form of normalcy, i.e. fight the pandemic within the framework of permissible limitations that are proven necessary and proportionate in pursuit of a legitimate aim. It is useful to note that hardest-hit countries, such as Italy or Spain, have *not* notified about any derogations. This puts into question whether a state of emergency needs to be elevated to the status of the 'new normal' through formal notification and derogation, rather than seeking to preserve normalcy, i.e. the 'old normal' at least for purposes of international law.

A quick inventory of the ICCPR notifications so far made suggests that the derogation clauses do work in taming emergency powers. The new derogations usually relate to the freedoms of movement, assembly and association (articles 12, 21 and 22), where the effect of the derogation may be quite harmless, in light of the fact that even in normal

times these rights are subject to a proportionality test. Paradoxically, this would nevertheless suggest that it was not necessary to derogate at all. In two cases derogations also relate to liberty and fair trial (articles 9 and 14, Estonia and Latvia) and in two cases to privacy (article 17, Estonia and Romania). Derogations from liberty and fair trial will require close scrutiny. Although privacy in principle is subject to a proportionality test also in normal times, it is in my view different from the first set of rights just mentioned because of the risk of letting loose Orwellian surveillance in respect of highly sensitive personal health data. The risk of breaching the essential core of privacy rights is real.

The pattern of derogations under the ECHR is similar. The ACHR pattern is less obvious due to the persistent tendency in Latin America to use the notion of 'suspension' of rights as the framework for derogations.

Finally, many human rights are not subject to derogation during a state of emergency. During the COVID-19 pandemic, it is worth remembering that the right to life and the prohibition against any inhuman or degrading treatment belong to this category. One dimension of General Comment No. 29 makes the case that many human rights that do allow for derogations may include non-derogable dimensions. Further, derogation is generally not available under treaties on economic, social and cultural rights, with the European Social Charter an exception to this rule. And some human rights treaties, such as the Convention on the Rights of Persons with Disabilities (article 11), call for *heightened* protection in situations of crisis.

# COVID-19 Symposium: Human Rights in the Time of COVID-19–Front and Centre

[opiniojuris.org/2020/04/06/covid-19-human-rights-in-the-time-of-covid-19-front-and-centre/](https://opiniojuris.org/2020/04/06/covid-19-human-rights-in-the-time-of-covid-19-front-and-centre/)

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As of 8:00 am CET this morning, the [Coronavirus COVID-19 Global Cases tracker](#) by the Center for Systems Science and Engineering at Johns Hopkins University in the US recorded 1,275,542 confirmed cases of individuals who had contracted the COVID-19 disease in 183 countries, and 69,498 people who had succumbed to the virus. Against this background, the aim of this blog is to highlight the necessity of ensuring the consistency of public health policies taken as part of the global responses to the COVID-19 pandemic with human rights law and standards.

As outlined in a prescient 2019 Lancet Commission report – *[The legal determinants of health: harnessing the power of law for global health and sustainable development](#)* – the law, and a firm commitment to the rule of law, play a critical role in the pursuit of global health with justice. Ultimately, scientifically sound, evidence-based, human rights compliant, transparent and accountable public health policies and practices will also be more effective, as they will, in turn, elicit greater public support, including by prompting greater adherence to public health policy directives imposing restrictive measures on human rights. As Michelle Bachelet, the UN High Commissioner for Human Rights

recently affirmed, 'COVID-19 is a test for our societies, and we are all learning and adapting as we respond to the virus. Human dignity and rights need to be front and centre in that effort, not an afterthought'.

China, where cases of COVID-19 were first documented, has been questioned from inside and outside for its response to the crisis, at first attempting to shut down information about the virus, leading to arrests and detentions. Outside China, while some COVID-19 health policies have been evidence-based, such as scaled-up, accurate testing for suspected cases, others are ineffective and overly broad, increasing stigmatization and misinformation. Around the world, people of Asian descent have been subjected to xenophobia, stigmatization and racist attacks. Moreover, many States have now imposed extensive travel restrictions or even blanket travel bans; some have gone as far as using the COVID-19 pandemic as a pretext to promote their xenophobic and anti-asylum agenda and have now shut down their borders to refugee claimants, thereby flouting the right of anyone to seek asylum from persecution in other countries. In a frontal attack against women's human rights, in Texas and Ohio, the authorities have moved to ban healthcare providers from performing abortions in most circumstances – purporting to do so to respond to the global COVID-19 crisis. There is also a world of false information on COVID-19. For instance, Indonesia's health minister suggested that Islamic prayers shielded people from the virus.

To foster scientifically accurate, human rights compliant global health responses – including to events such as the COVID-19 pandemic – it is crucial to enhance dialogue between the public health and human rights sectors. A good place to start framing a productive exchange in this respect is to take a close and simultaneous look at the International Health Regulations (IHR (2005)) – an agreement among 196 WHO Member States to work together for global health security – and to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (the Siracusa Principles), setting out criteria to determine the lawfulness of measures restricting or otherwise limiting human rights taken by States to respond to – among other things – public health emergencies.

### *International Health Regulations & Travel Restrictions*

Article 3(1) of the IHR (2005), setting out the principles informing the regulations, recalls that, '[t]he implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons'. And, perhaps tellingly, in Article 32, concerning the treatment of travellers, the IHR proclaim, among other things, that, '[i]n implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms'.

Notwithstanding the express human rights obligations enshrined in the IHR, current public policy responses to the ongoing crisis – and even public discourses around those responses – make very few, if any, direct references to human rights and, in fact, seem to be oblivious to the impact that measures taken and/or considered in the response to COVID-19 have on human rights.

But the IHR, as noted in a recent piece by Roojin Habibi *et al*, restrict ‘the measures countries can implement when addressing public health risks to those measures that are supported by science, commensurate with the risks involved, and anchored in human rights. The intention of the IHR is that countries should not take needless measures that harm people or that disincentivise countries from reporting new risks to international public health authorities’.

### *Siracusa Principles*

The 1985 Siracusa Principles provide a good basis to flesh out what a human rights compliant public health response to the COVID-19 pandemic must entail. They detail criteria – by now firmly enshrined in international human rights law and standards – to determine the lawfulness of State measures restrictive of human rights.

According to the Siracusa Principles, for instance, when a State invokes public health as a ground for limiting certain rights, its actions ‘must be specifically aimed at preventing disease or injury or providing care for the sick or injured’. Even in circumstances when it is undeniable that a public health emergency may threaten the life of a nation, the Siracusa Principles reaffirm the obligation of States to ensure that any public health response to such an emergency be rooted in and compatible with human rights law and standards. Importantly, the Principles provide further interpretive guidance to States, proclaiming that restrictions on human rights may be justifiable only when they are:

- provided for and carried out in accordance with the law;
- based on scientific evidence;
- directed toward a legitimate objective;
- strictly necessary in a democratic society;
- the least intrusive and restrictive means available;
- neither arbitrary nor discriminatory in application;
- of limited duration; and
- subject to review.

The final condition – that State action be subject to review – is critical. Analogous requirements can be seen in other areas of international law. In the asylum and refugee context, for example, detention guidelines promulgated by the United Nations High Commissioner for Refugees emphasize that confinement on health grounds beyond an initial medical check must be subject to judicial oversight. Similarly, the Human Rights Committee’s General Comment no. 35 makes clear that the International Covenant on Civil and Political Rights ‘entitles anyone who is deprived of liberty by arrest or detention’ to take their case before a court to decide on ‘the lawfulness of detention’, enshrining the principle of *habeas corpus*. The General Comment adds that this right also applies to house arrest, as a form of deprivation of liberty. Of course, whether involuntary home confinement constitutes deprivation of liberty – entitling those subjected to such a measure to challenge the lawfulness of their detention before a court – is a question of

fact, depending, in turn, on the degree of the physical confinement imposed. Voluntarily choosing to stay at home in response to State authorities' exhortation to do so, on the other hand, does not constitute deprivation of liberty.

Furthermore, any State action must comply with the rule of law and should respect the separation of powers. Neither the executive nor public health authorities should be immune from having their actions legitimately scrutinized by other branches of the State, namely, the legislature and the judiciary. Checks and balances are necessary to ensure respect for human rights and for democratic legitimacy.

In conclusion, both the IHR (2005) and the Siracusa Principles remind us of the fact that State responses to global public health emergencies cannot be unfettered, and must comply with States' human rights obligations. Public responses to health emergencies and human rights need not be in conflict – indeed, grounding States' public health measures in the human rights framework provides the most effective way to advance global health with justice.

The Lancet Commission report suggests one way to further identify human rights and rule of law compliant measures in the current and future global public health policy response. The report calls for a partnership between 'legal and health experts to create an independent standing commission on global health and the law' that would propose 'evidence-based legal interventions for addressing major global health challenges, reforms of the global health architecture and international law, and strategies to build and strengthen global and national health law capacities'.

We should heed that call.

# COVID-19 Symposium: Don't Let Religious Freedom Become a Casualty of Coronavirus

[opiniojuris.org/2020/04/06/covid-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus/](https://opiniojuris.org/2020/04/06/covid-19-symposium-dont-let-religious-freedom-become-a-casualty-of-coronavirus/)

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How far can a government limit religious freedom in the name of fighting the coronavirus (COVID-19) under international law? As the global pandemic continues, many national and local governments are grappling with this question. Religious gatherings are important opportunities for people to practice and share their beliefs, but they are also sites for transmission of COVID-19, endangering not only participants in these gatherings but everyone with whom they interact. Crises require decisive government action, but governments often use times of crisis to encroach on individual freedoms or target minority groups long after the crisis has passed.

As commissioners on the United States Commission on International Religious Freedom (USCIRF), we have also had to figure out how to advance our mission to monitor and promote freedom of religion and belief around the world while recognizing the pressing

public health needs. Fortunately, as we document in a new [factsheet](#), international human rights law offers some guidance.

Article 18 of the International Covenant on Civil and Political Rights ([ICCPR](#)) guarantees freedom of religion, but also allows governments to narrowly restrict religious freedom by law when necessary to protect a legitimate state interest, including public health. The [Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR](#) explains that public health measures that limit rights must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

Given the fundamental nature of [freedom of religion or belief](#), it is subject to fewer restrictions than other rights. Only manifestations of this freedom can be limited, but never holding beliefs itself. Unlike other rights, religious freedom [cannot](#) be derogated in times of public emergency, which means that governments must continue to balance this fundamental right even in efforts to combat the impact of the virus. While freedom of religion is not absolute, it also cannot be limited disproportionately, or in a way that discriminates against believers and non-believers or a certain religion or belief. Public health emergencies should also not be used to target or stigmatize certain religious groups.

As [stressed](#) by UN High Commissioner for Human Rights Michelle Bachelet, ‘human dignity and rights need to be front and [center]’ in the effort to contain and combat the spread of COVID-19. UN experts have also [emphasized](#) that restrictions must be based on public health concerns and not used ‘simply to quash dissent’ or target particular groups, minorities, or individuals. The World Health Organization (WHO) has [noted](#) that in the response to this pandemic, ‘[a]ll countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights’. To this aim, the WHO has provided [guidelines](#) and [planning recommendations for mass gatherings](#) to aid authorities in mitigating the public health risks of large events, including religious services. These tools urge public health authorities to conduct a detailed risk assessment to determine whether a mass gathering should be cancelled to mitigate the spread of COVID-19.

Compliance with international law not only protects human rights, but also should ultimately create more effective implementation of public health measures to slow COVID-19. Many governments have asked religious groups to voluntarily take measures that limit the spread of COVID-19, including cancelling services, disinfecting houses of worship, and limiting the length of prayer times. These requests utilize a cooperative approach in which governments treat religious groups as partners rather than potential threats. As such, we expect wider implementation and stronger individual adherence to these public health measures.

Across the globe, religious authorities are limiting gatherings in response to COVID-19. On March 5, Saudi Arabia [closed](#) the Grand Mosque in Mecca for disinfecting, and reopened it nine days later with restrictions. The Vatican [suspended](#) public masses on March 8 and has begun livestreaming the Pope’s general audience. The United Arab

Emirates has prohibited children from attending church activities and limited Friday prayer times in mosques to 15 minutes. Tajikistan's semi-official Council of Ulema issued a fatwa calling on clergy to close mosques and cancelled public celebrations of the Nowruz holiday.

In other countries, existing limitations on freedom of religion might be exacerbated during the response to COVID-19. The Iranian government has released 85,000 prisoners on furlough to prevent the spread of COVID-19, but has reportedly placed prisoners who are part of the Sufi religious minority in wards that are overcrowded, increasing their risk. And, although the South Korean government's response has generally drawn praise for balancing rights and public health, there are worrying signs that some local authorities are scapegoating a small religious sect known as the Shincheonji church because some of its members were infected.

Religious freedom must be balanced with public health concerns, even as the COVID-19 pandemic continues. We cannot allow fear to override human rights principles, including the unique protections afforded to the freedom of religion or belief. Instead, we must be vigilant that governments carefully balance this right and enact neutral responses that do not unduly target religious communities. We at USCIRF will continue to monitor government responses to ensure compliance with international human rights standards and use our voice to sound the alarm when public health is used as a mask for persecuting religious communities. We urge others to be vigilant in ensuring that our most sacred right is not forsaken, even in this time of crisis.

*A version of this article was published in the Arkansas Democrat-Gazette.*

# COVID-19 Symposium: The Right to Enjoy the Benefits of Scientific Progress at the Time of the COVID-19 Pandemic

[opiniojuris.org/2020/04/06/covid-19-symposium-the-right-to-enjoy-the-benefits-of-scientific-progress-at-the-time-of-the-covid-19-pandemic/](https://opiniojuris.org/2020/04/06/covid-19-symposium-the-right-to-enjoy-the-benefits-of-scientific-progress-at-the-time-of-the-covid-19-pandemic/)

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## Introduction

With the return to our normal lives depending on the development of an effective treatment and/or a vaccine for COVID-19, science has never seemed so important. The paradox has been brilliantly encapsulated by an unnamed Spanish researcher that became immediately widely popular on social media. Feeling pressured to give an answer about a possible timeline for a vaccine for COVID-19, she reportedly affirmed: 'you have given millions of euros to football players, and only 1300 euros a month to biologists; now go to Ronaldo to find a cure for Corona'.

In international law, much of the discussion on science usually revolves around the role of scientific expertise in law-making and adjudication. Significantly, human rights have been relatively absent in discourses on science. Yet, the human rights repertoire encompasses the right to 'enjoy the benefits of scientific progress and its applications' (Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights, ICESCR). This right has enjoyed only limited attention (with the most important exception being, at least from my own personal perspective, Thérèse Murphy, who looks at it from a health and human rights perspective; but also Audrey Chapman, Olivier de Schutter,

and the 2012 report of Farida Shaheed, Special Rapporteur in the field of cultural rights).

Perhaps in an effort to draw attention to the human rights dimension of science, on 2 January 2020 the Committee on Economic, Social, and Cultural Rights published the Draft General Comment on Science (the Draft), with a focus on Article 15(1)(b). While we wait for the final text, this is a good time to take a first look at the Draft. Accordingly, this post first reviews some of its main features, before turning to examine whether the Draft can provide any guidance on how to tackle any of the issues that are emerging in the COVID-19 pandemic.

Before proceeding, it is important to clarify that this blogpost does not endeavour to provide answers to all the human rights questions that may, and will, arise in this context. Several competing human rights are, in fact, at stake in the COVID-19 pandemic – many of which have already been discussed in this Symposium.

### **Draft General Comment on Science**

Given the constraints of space, this Section only sketches out answers to two questions.

#### *1. What constitutes science and scientific applications?*

Lawyers love definitions, and hence it seems appropriate to start with this question. The Draft begins by defining these terms too. It does so by endorsing UNESCO's definition of science, updated in a recommendation of 2017, where 'sciences' are defined as 'a complex of knowledge, fact and hypothesis, in which the theoretical element is capable of being validated in the short or long term, and to that extent includes the sciences concerned with social facts and phenomena' (para 6).

This is a traditional, method-based definition of science, broadened to include (some) social sciences. However, this definition does not correspond to the modern understanding of science as a social phenomenon, where scientific consensus (along with its best personification: peer review) is seen as a central element. Most importantly, it does not offer any elements in distinguishing between good and junk science, even though this has arguably become one of the most pressing challenges of our times.

*What does the right to enjoy the benefits of scientific progress and its applications entail?*

In addition to laying down the general elements of Article 15(1)(b), the Draft clarifies that the obligations are of 'progressive realization'. Nonetheless, it also demands that 'legislative and budgetary measures' be adopted 'immediately or within a reasonably short period of time' (para 31). Even more poignantly, the Draft provides a list of 'core obligations' of 'immediate realization' (para 54). The list is drawn from human rights texts, case-law and practice, among which the 'recommendations adopted by UNESCO play a very important role' (para 55).

The COVID-19 pandemic has brought into sharp focus the importance of research, and there are encouraging signs that it is going to be well-funded and prioritised. This observation could lead us, *prima facie*, to say that States are fulfilling their obligations under Article 15(1)(b). But is this enough to ensure the right of everyone to enjoy the benefits of this research? As you can guess, the short answer is no.

### **The right to enjoy the benefits of scientific progress and the COVID-19 pandemic**

Scientific laboratories are now working frantically to develop a vaccine. As The Atlantic reports, this effort is proving challenging because we have never developed vaccines for any previous coronavirus. But let's forget about these problems, and fast-forward to the moment when we will have a vaccine that is safe, approved, and reproduced on a large scale. Even at that moment, we will probably not be able to make vaccines for the almost 8 billion people on Earth. The global vaccine production capacity is simply not sufficient to vaccinate everyone in the event of a pandemic, as Laurence Gostin has remarked (p. 370).

At the time of writing, the situation of low- and middle-income countries in the face of the COVID-19 pandemic is garnering only limited attention. However, the number of confirmed cases is growing in all regions of the world. Low- and middle-income countries have on average a younger population which could be spared from the worst consequences of COVID-19. However, the prevalence of HIV/AIDS and other diseases, combined with a structural weakness of the health systems, can make the same young populations no less vulnerable. Reports of what has happened in Ecuador in the last few days are not encouraging. At some point, it is possible that low- and middle-income countries will need the vaccine against COVID-19 as much as high-income countries.

The material limits of global vaccine production will likely require us to make a choice as to who gets the vaccine first. Put in these terms, the choice seems ethically challenging. But the answer will most likely be technical: those who patent the vaccine(s) or, alternatively, those who have financed the development of the patented vaccine, will choose who will get it first. In all likelihood, the vaccine(s) will be produced by a laboratory in an advanced economy, such as the US, Israel, Germany, or China. The situation is similar for the existing drugs that can be used to treat COVID-19. There are material limits to the global production of drugs, and, moreover, these drugs have patent protection.

The challenges that intellectual property rights pose to the accessibility of drugs and vaccines in low- and middle-income countries are well-known problems (for a recent contribution, see Sharifah Sekalala). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) provides some 'flexibilities', but they are hardly enough to solve this much deeper and complex problem. The experience with the 2009 H1N1 influenza pandemic demonstrates that intellectual property rights can pose the same problems in the event of a pandemic. In that case (which, it is worth recalling, concerned a much less pathogenic disease), high-income countries rushed to conclude advance purchase agreements for all the available vaccines, and international solidarity

seemed particularly scarce (see [Fidler](#) for a fuller account). After that event, and extended negotiations, the WHO agreed on a [Pandemic Influenza Preparedness Framework](#) (WHO PIP), which, in principle, provides that States should contribute to a 'benefit-sharing system' that includes drugs and vaccines. This framework, however, has some clear limitations (see [Gostin](#), p. 373-377). First, it only outlines some principles, and it is far from constituting a clear and fair distribution plan for drugs and vaccines among countries. Second, it is not directly applicable to COVID-19 (which is not an influenza virus).

The Draft acknowledges the challenges that intellectual property rights pose to the enjoyment of Article 15(1)(b), analysing it as a 'special topic of broad application' (Section V(C)). Unfortunately, however, the Draft falls short of fully analysing the topic, and of referring to the pandemic scenario. Instead, the Draft limits itself to a generic reaffirmation of the ICESCR Committee's view that States should seek a balance between intellectual property rights and sharing of scientific knowledge (para 66). Worryingly, the Draft does not even acknowledge that there is an important North/South dimension to this issue. This amounts to an unfortunate lack of guidance at a time when it is most needed.

In fairness, the Draft's disregard of the WHO PIP is mirrored by the [WHO PIP's disregard](#) of the human rights dimensions of international cooperation in the event of a pandemic. For those familiar with the WHO, this is hardly surprising. Traditionally, the WHO has been populated by a '[transnational Hippocratic society](#)' that sees its role in purely medical-technical terms. Whilst there has been an effort to reinforce synergies with human rights (see for example the [Global Action Plan on Non-Communicable Diseases](#), but also [the International Health Regulations of 2005](#)), it seems that the WHO's work on pandemic preparedness remains mostly detached from these developments.

Thus far, the WHO's work on the COVID-19 pandemic has confirmed this approach. The WHO sees its role as that of a 'scientist-in-chief', [coordinating international research efforts](#), and even launching an [international clinical trial](#) across several countries. On 23 March [Costa Rica wrote to the Director-General](#), to ask him to take efforts to 'develop an initial concise memorandum of understanding on the intent to share rights in technologies funded by the public sector and other relevant actors'. The Director-General has [welcomed](#) this proposal, but so far [no steps have yet been taken](#). Despite the calls for solidarity made [in many of the Director-General's speeches](#), the WHO has not (at least to my knowledge) made any proposals on how to concretely address the problem of the distribution of existing drugs or of future vaccines.

## Conclusions

The Draft addresses a highly complex and controversial topic. In this regard, it seems clear that it cannot go into depth on all relevant aspects. It is, however, also clear that, at least at this stage, the Draft does not bring particular clarity on much-needed topics. One example is the method-based definition of what constitutes science, which fails to address the very relevant topic of what constitutes junk science. The other example,

illustrated by the case of the COVID-19 pandemic, is the problem of accessibility to drugs and vaccines, not only during ordinary times, but also in the event of a pandemic (which, we have all learnt by now, was not so remote).

In this regard, a reference to the 'benefit-sharing system' outlined in the WHO PIP could have perhaps provided some guidance on the major challenge of the distribution of COVID-19 drugs and vaccines that we are probably going to face. The fact that the Draft does not offer any solutions to these issues suggests that there are structural obstacles to the enjoyment of the right to benefit from scientific progress that it cannot, or does not try to, address. At the same time, the WHO's persistence on adopting a purely technical-medical approach to the problem of distribution of drugs and vaccines is certainly not helping to affirm the right enshrined in Article 15(1)(b) of the ICESCR.

As it is in the nature of a blogpost on moving targets (in this case, both the Draft and the COVID-19 pandemic), these comments are only preliminary and provisional. We shall have to wait for the publication of the final draft of the General Comment on Science to draw more definitive and in-depth conclusions. And, naturally, only the evolution of the COVID-19 pandemic will be able to tell us whether, and to what extent, States will be willing to share the benefits of scientific progress going forward.

# COVID-19 Symposium: COVID-19 and the ‘Western Gaze’



07.04.20 | [0 Comments](#)

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The COVID-19 pandemic can be understood through various different [frameworks](#). It can be a vindication of anti-neoliberalism, a resurgence of [nationalism](#), or even an opportunity to criticize or praise [democracy and autocracy](#). The issue of [framing](#) is an increasingly important, if underestimated, meta-discussion in this crisis.

One of the dominant ways the COVID-19 pandemic has been framed is as the first truly ‘global’ crisis of the ‘globalized’ world. But what does this mean? Who defines what ‘global’ means and the way we understand it? After all, ‘global’ framing is usually produced in English, by Western outlets, based in the Global North. Globalization, truth be told, is a privilege, not an equal experience. This is why, when seen from Southern eyes, ‘global’ is usually perceived as a synonym for ‘Western’.

It is not surprising, therefore, that our (at least nominally) ‘global’ world is consumed, experienced and framed through a ‘Western gaze’ that commonly denies any agency to the non-Western communities that inhabit it. When local Latin American news goes ‘global’, for example, it changes frames. Brazil’s President is no longer the product of a particularly Brazilian process. ‘Globally’, he is presented as the “[Trump of the Tropics](#)”. Likewise, environmental conservation discussions are reframed as *casus belli*: “[who will invade Brazil](#)

[to save the Amazon?](#)” Even counter-hegemonic left-leaning views tend to get caught up in this trend, particularly regarding Venezuela, where the situation is almost cartoonishly simplified as a “[US-backed coup](#)” and not a complex regional crisis, involving sometimes conflicting diplomatic efforts by at least fifteen other Latin American and Caribbean states. It is really unsurprising, therefore, that the ‘pandemic-as-global-crisis’ framing of COVID-19 has also occurred through a ‘Western gaze’, with analysis of the crisis following Western attitudes rather than human problems.

At the start of the pandemic, ‘global’ attitudes painted it through the prism of Western geopolitics. China’s coronavirus plight, as the main rival to Western dominance, was framed in the language of civil and political rights; as an ideological battle between ‘Western democracy’ and ‘Chinese dictatorship’. In late January and early February, reports of China’s [censorship](#) and human rights violations in the course of its [lockdown](#) dominated the discussion. For [The Atlantic](#), for instance, the Wuhan lockdown was a ‘radical experiment in authoritarian medicine’, claiming similar measures would be unconstitutional in the US. For [The Guardian](#), the Chinese quarantine was ‘terrifying’; the product of a country where ‘people cannot remove their leaders from power’. Even the American Civil Liberties Union (ACLU) [stated](#) – in late January – that ‘travel bans and quarantines are not the solution’ for the COVID-19 pandemic. China’s social and economic obligations to its quarantined population were a secondary concern at best.

By late February, the pandemic reached Europe. Italy placed Lombardy in lockdown on February 22<sup>nd</sup>, and the whole country on March 9<sup>th</sup>. Spain followed suit on March 14<sup>th</sup>. At this point, the discussion [shifted](#). Blank correlations of quarantine and dictatorship stopped. Italy, after all, ‘unlike China’ – said [The New York Times](#) – ‘is a democracy’. The ‘global’ question now became: what does a liberal, Western, democratic, and human-rights-compliant lockdown look like? Rather than a sign of Asian authoritarianism, lockdowns became a ‘[test](#)’ for Western democracy. ‘[W]e have always recognized’ – said the [ACLU](#) – ‘that, during a disease outbreak, individual rights must sometimes give way to the greater good’.

And then, in mid-March, the virus hit the United States. On March 14<sup>th</sup>, Donald Trump [banned](#) air travel from Europe. Two days later, he [banned](#) gatherings of over 10 people. On March 20<sup>th</sup>, [California](#) declared a lockdown. New York [followed suit](#) on March 22<sup>nd</sup>. At that stage, Trump said he expected to lift restrictions within three weeks, hoping to see ‘[packed churches](#)’ at Easter. US news filled with pundits terrifyingly suggesting [older people would rather die than kill the economy](#). Since then, predictably, the discussion has [tended](#) towards state [obligations to mitigate and prevent](#) pandemics.

This change of narrative and focus, from China to Europe to the United States, and from civil rights violations, to civil rights limitations to social rights obligations is a phenomenon worth noting and mapping. Given the fast-changing nature of the COVID-19 crisis, the Western gaze with which ‘global’ attitudes are formed is a lot more visible than usual, which allows us to notice just how much it has conditioned our understanding – even legal and academic – of the pandemic.

Of course, the issues discussed are important. It is not my purpose here to delegitimize human rights violations in China or the inadequacy of the US’ response, but rather to ask why these topics and framings were highlighted and make us aware of their impact in our scholarly output.

Contrast, for example, the Western ‘global’ story of COVID-19 with Latin America’s ‘regional’ one. As early as January, the Spanish-speaking discussion focused on [readiness](#). The [precarious and underfunded](#) state of public healthcare systems prompted the immediate question: ‘[are we ready?](#)’. After all, Brazil, with nearly half the population of all the European Union combined, spends half of what France spends on healthcare.

In a region much more used to states of emergency, and frequently sidelined from great power politics, discussions on the rise of China and mobility limitations were much less of a focus than healthcare and economic inequality. Unlike their European counterparts, Latin states like [Paraguay](#) and [Peru](#) did not hesitate to set up lockdowns before even a single death was recorded, with 95% of Peruvians [supporting](#) it. For [comparison](#), Italy’s lockdown was imposed after 800 deaths and Spain’s after 200. As soon as the virus arrived, news coming out of Latin America focused on the question of how [middle income economies](#) would deal with a pandemic. In Bolivia, a patient was [denied entry](#) to four hospitals by doctors because they claimed they lacked protective equipment. In Peru, the nurses’ union [threatened](#) to go on strike over poor working conditions.

In fact, the most critical human rights issues were not related to abuse during lockdowns (even if, of course, [problems](#) do exist), but rather the states who were refusing to instate them. Mexico’s President, the leftist Andres Manuel Lopez Obrador, consistently encouraged people to [go out](#) normally, [hugging and kissing](#) supporters, and claiming the best ‘[détente](#)’ against coronavirus were prayer and religious amulets. In Brazil, President Jair Bolsonaro, who really can only be fairly described as a right-wing fascist, called the virus a media-induced ‘[fantasy](#)’ and attended [mass pro-government demonstrations](#) in the country’s capital despite being himself under self-isolation for risk of infection. At one point Bolsonaro called state governors trying to impose local lockdowns ‘[lunatics](#)’ actively downplaying the severity of the situation. Recently, he [called on](#) Brazilians to ‘go back to normality’, referring to the virus as a ‘little cold’. The situation is so dire that citizens in both countries took to the courts to try to force their government to take meaningful action (see [here](#) and [here](#)).

It is perhaps because of an awareness of these issues that, on March 6<sup>th</sup>, while ‘global’ public opinion was still slowly waking up to the possibility of a national lockdown in Western Europe, the UN High Commissioner for Human Rights, Michelle Bachelet – herself Latin American – was already [placing](#) the right to health and economic support to citizens front and centre: ‘our efforts to combat this virus won’t work unless we approach it holistically, which means taking great care to protect the most vulnerable and neglected people in society, both medically and economically’, she said, with little ‘global’ repercussion. Similarly, the Inter-American Human Rights Commission’s first Coronavirus-related [statement](#), focused mostly on mitigation of hardship, not restrictions of mobility. It said: ‘states must urgently assess effective responses for mitigating the impacts of the pandemic on human rights ... by adopting an appropriate combination of regulatory frameworks and short- and medium-term public policies such as credit relief programs and the rescheduling and flexibilization of repayment schemes for debts and other financial obligations that may impose financial or tax burdens that jeopardize human rights’.

Had the ‘global’ discussion truly adopted a ‘global’ approach to the pandemic, COVID-19’s story would likely have looked a lot different, focusing more evenly on the problems and concerns of not just average Westerners preoccupied with the rise of China, the strangeness of a European lockdown or the baffling negligence of Donald Trump (all worthy topics of discussion, of course) but, also, on the problems of a [migrant worker](#) in India making 3

dollars a day or a Brazilian [street vendor](#) that simply can't socially isolate without support from their government. What does mitigation and economic support look like in nations with limited resources and underfunded health services? What is the 'minimum core' of the [right to health](#) in these circumstances? What does progressive realization look like? These questions have been sidelined because the crisis has not yet been framed through Southern eyes.

# COVID-19 Symposium: Quantum Leaps of International Law

[opiniojuris.org/2020/04/07/covid-19-symposium-quantum-leaps-of-international-law/](https://opiniojuris.org/2020/04/07/covid-19-symposium-quantum-leaps-of-international-law/)

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Legal studies condition lawyers to think about international law as progressing in a linear fashion with the gradual evolution of its various institutions in parallel with the development of the body of applicable law – treaties, custom and the general principles of law. At the same time, if one looks at the historical development of the discipline in recent times, it becomes clear that international law develops in quantum leaps rather than in a gradual linear way. These developmental shifts occur in response to crises perceived as being of concern to humanity as a whole. This post argues that the current global health crisis is a unique opportunity to ‘recondition’ the system to better reflect the increased global interconnectedness of people, organisations and states across the world. This momentum should not be lost.

## **Moment of consensus**

Arguably, the entire architecture of the international global order is premised on consensus formed as a response to crises perceived as a threat to humanity as a whole. The entire structure of the United Nations (UN) as a global institution was conceived immediately in the aftermath of the Second World War with the principal aim of preventing aggressive war. The drafting of the UN Charter began on 25 April 1945 in San Francisco. The document was adopted two months later and came into effect on 24 October 1945, a mere six months after work had started. With the memory of mass atrocities still fresh in the psyche of policy makers, the necessary momentum and motivation emerged for taking decisive and much needed action. The process started in the 1940s gave rise to the UN human rights system, international criminal law, and the global economic order (the World Bank, International Monetary Fund, General Agreement on Tariffs and Trade).

The second point of consensus initiating another wave of international institutions and instruments can be traced back to late 1980s and early 1990s when Francis Fukuyama famously announced 'the end of history' – a time when the destructive ideologies of fascism and communism appeared to have been defeated. The creation of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda through unanimous resolutions of the UN Security Council was one manifestation of this surge in internationalism. That said, one may object that their establishment was rather a sign of the inability of the global actors to prevent mass atrocities from unfolding. Yet, the mere fact that enough support was garnered for the creation of these institutions – an outcome that appeared far from certain to some circles at the time – was a sign that the international community agreed on at least some measure of collective response, however imperfect. The UN Security Council failed to exhibit similar solidarity in the 2000s with respect to the situations in Syria and North Korea.

Are we living through a third wave of consensus building in our present moment? On 11 March, the Director General of the World Health Organization declared a global pandemic – a move acknowledging the truly universal significance of the threat posed by COVID-19. Can the threat of the virus galvanize enough support to trigger decisive action on behalf of the international community as a whole?

### **Nature of the threat**

There are important differences between the threats tackled by international community in the 1940s and the present moment that have implications for potential consensus building. First, policymakers in the 1940s were responding to the devastation of the Second World War, largely to harm that had occurred in the past. The current crisis response is more oriented towards the future, with the focus of policymakers on putting mechanisms in place in order to mitigate the effects of the pandemic prospectively. The number of reported cases globally is disheartening, yet restrictive measures introduced by various governments are more in line with the precautionary principle and the desire to mitigate the effects of the virus in the future.

Secondly, war is a human-led activity and is therefore based on distinctions set out by people. The response of the 1940s was thus tailored to tackling abuses of power by individual civilian and military leaders, as well as eliminating harmful ideologies resulting in discrimination. In contrast, the current pandemic is driven by the laws of nature (even if caused in part or entirely by human colonization of the planet) and is consequently following its own inherent logic. Containment of such a threat is less of an issue of the passing of abstract laws and regulations to which people or states (may) respond, but more a question for scientists and data crunchers. It is impossible to institute a tribunal to prosecute COVID-19 for crimes against humanity as the agent is missing in this case. That being said, international (criminal) law is not to be fully dismissed as irrelevant in tackling the current crisis. As Fabricio Guariglia argues, epidemics and international crimes often stem from the same roots, such as systemic poverty, lack of access to education and basic human rights, including socio-economic rights. The instrument of international criminal justice can therefore potentially be useful in assigning individual responsibility for failing to address these core conditions leading both to offending and the spread of the virus.

Thirdly, the current crisis is unfolding in an incomparably more interconnected world. It reveals that the borders of a nation state serve as weak protection against the disruption of global supply chains and the spread of the virus.

### **Cooperation vs. deterrence: a new paradigm?**

The peculiarities of the current crisis call for a number of potential adjustments to the global governance order. In this post, I only focus on three possibilities.

First, there is an opportunity for rethinking disarmament and international approaches to warfare. A global war on the virus, which is an 'invisible enemy', highlights the role of the UN and other international institutions in promoting peace. There are clear challenges in implementing measures aimed at tackling the virus in societies affected by an armed conflict. Can the virus bring us one step closer to peace? On 23 March, the UN Secretary General advanced in this direction by calling for an immediate global ceasefire. 'The fury of the virus illustrates the folly of war', Guterres proclaimed, referring to the virus as the common enemy of mankind.

Secondly, there is a possibility to reconsider the architecture of global policy making. 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. Its key task, at the time of conception, was ensuring deterrence. The pandemic is demonstrating that nature-led disasters have no regard for the disparity in equality among states regardless of their size and historical role. It is then only logical that each and every state needs to have an equal say in the global management of this situation. It is telling that no specific action has been taken by the UN Security Council yet to respond to the pandemic. If the virus is merely a 'test run' for other (and perhaps even more devastating) nature-driven disasters that may ensue as a result of the extensive

damage done to the planet, then we need to have a quick and effective global response mechanism. Cooperation, and not deterrence, should be the guiding principle of its operation. The UN Charter provides a legal basis for building on this principle in Articles 1(3), 55(b) and 56.

Finally, transparency may rise to the forefront of discussions at the international level. As states implement unilateral measures to combat the virus, there is a clear threat of misinformation spreading through the media. International institutions may play a key role in the future by facilitating a roll-back of national emergency response actions trampling on individual freedoms. Transparency and accuracy of information may become an increasingly important tool to address constituencies below the level of the state. Such clear communication may then have capacity to put pressure on governments to ease restrictive measures once the emergency has passed.

# COVID-19 Symposium: Law in the Time of Corona (or: Dear Dr...)

[opiniojuris.org/2020/04/07/covid-19-symposium-law-in-the-time-of-corona-or-dear-dr/](https://opiniojuris.org/2020/04/07/covid-19-symposium-law-in-the-time-of-corona-or-dear-dr/)

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Dear Dr. Heathcote,

I write this letter to you as the Co-Founder of ATLAS, a network of women international lawyers who now find we are operating under the conditions of the global pandemic COVID-19, popularly referred to as the coronavirus. (The irony of this pandemic being given a name which can be attributed to 'the crown' is not lost on me. As one anonymous 'friend from India' suggested in the press, why not call it communovirus, as they have done there? This might at least focus attention on its capacity to create community, to enable people to stand together, rather than maintaining ongoing anxieties regarding its capacity to colonize and exacerbate further global inequalities).

In recent weeks, I have watched as this newfound hyper-object (as Oliver Hailes put it) has begun to capture both the public imagination and the public international legal imaginary. My co-founder and friend, Sareta Ashraph, has drawn my attention to the efforts being made to calibrate responses to COVID-19 to address the risks of gender-based violence by the Inter-Agency Standing Committee of Humanitarian Assistance for the United Nations. Additionally, Marissa Conway at the Center for Feminist Foreign Policy has created a resource of feminist publications on the pandemic, highlighting the need to consider the increased threat of intimate partner violence; the gendered division of labour/burden of care; threats to sexual and reproductive health; and the institutionalized inequality prevalent in the response, primarily being formulated by teams of men, to the coronavirus.

As I read through the policy briefings generated, I note that there is an ongoing prevalence of co-opting sex and gender into existing vectors of power within international legal institutions and processes, further entrenching existing gender binaries. For example, amongst international institutions in the Asia-Pacific, calls are being made for global responses to the virus to disaggregate the data related to outbreaks based on sex, age and disability in order to understand the 'gendered differences in exposure and treatment and to design differential preventive measures'. In keeping with the Inter-Agency Standing Committee's (IASC) tool, this would seem to re-inscribe existing gendered norms onto any approach to the pandemic and may entrench gendered stereotypes in our response. While there is undoubtedly some merit in collating this data, it falls short of considering the different types of harm women and men of different ethnicities and class experience, different access different women and men have to preventive measures and follow-up care, and the different costs both women and men face in the community when responding to the coronavirus. Meanwhile, several international law blogs tend towards dividing along traditional gender lines (whether consciously or not), with the European Journal of International Law's blog EJIL:Talk! publishing pieces such as those focused on how coronavirus relates to international peace and security and international investment law, while feminist blog IntLawGrrls published a piece on the demands of home-schooling one's children whilst being an international law academic.

All this has led me to question what the role of women (including female-identifying) international lawyers should be at this time. Might there, as yet, be room for us to reflect on our collective response to COVID-19 by resisting the twin poles of envisaging international law as a language of crisis or international law as reiterating business as usual, particularly in the way international institutions function? Could we not begin to craft a response to the coronavirus that might enable us to envisage multiple feminisms, drawing from a plurality of subjectivities, being considered simultaneously, re-casting the problem as one that is inherent in international law's response to it, rather than as one 'out there' that needs fixing? In this respect, I drew some inspiration from the way in which health scientist Julia Smith was asking as many questions as they were suggesting answers. I wondered if you had any questions (or indeed, answers) you thought we should propose at this stage?

Yours sincerely,

Michelle Staggs Kelsall.

Dear Dr. Staggs Kelsall,

Many thanks for your letter, your questions. It arrived while I was cleaning the bathroom, perhaps an unremarkable moment to record in a symposium on international law but I will elaborate why my COVID / covert cleaning matters in global politics, to international law, to this global pandemic.

I have been thinking about the politics of crisis, the continued framing of this as THE crisis in a manner that pigeon-holes the COVID-19 pandemic into a known set of ways to respond, masculinized, securitized, focused on state actions (Italy did this, Japan did that) and ignoring the politics of everyday. Yes, I have been re-reading Charlesworth while I have been getting on with the business of cleaning. At the same time, I note that British media report what they have labelled the first quarantine 'murders' which appear to in fact be straight out, run of the mill, domestic violence killings. Then again, perhaps COVID-19 made them do it and it was just the isolation that provoked the violent acts. The strangeness of a moment where everything is seemingly being re-imagined and re-packaged through the lens of COVID-19, international lawyers are writing about the ethics of care and promoting a political / legal model premised on community, all the while feeding into the crisis mode that actively forgets both the role the last ten years of austerity politics plays in the magnitude of harm and risk and the histories of feminist and queer utopias, futures and alternatives that offer blueprints that might be returned to, appraised and implemented going forward.

In Rosaura Sánchez and Beatrice Pita's novella Lunar Braceros 2125-2148 (2009), feminist and queer organizing that recognizes labour undertaken by the world's poorest, literally cleaning the world's shit, and the labour of revolution provides a fantastic insight into the limits of our imagination or, rather, the Hollywood loop of what is imagined as after the crisis / zombie uprising / global pandemic / end of the world as we know it. I mention the Sánchez and Pita novella here, also the topic of Ulibarri's account in Feminist Review 116, as it is a reminder that someone has to clean the mess, already, now and their labour is overlooked, not clapped for in doorways or re-posted on social media. I was reminded of this when my own cleaner was unable to come this week and I had to clean the bathroom. I was reminded of this as I listened to my teenager complain about how disgusting it was to clean the sink. I was reminded of this as I mused on the choice to go to work, to pay someone to do the chores I am less inclined to do, as a function of capital's need for unseen workers to take a tiny percentage of our income. Have there been sufficient questions about who is cleaning the hospital? Have there been sufficient inquiries into who is cleaning the White House and the Kremlin? Has anyone asked who is cleaning the World Health Organization? How does international law understand the cleaners of the world? It does not. Yet the world still needs those that clean the bathrooms of the powerful. Who is caring for the army of cleaners, globally, now and before coronavirus-19?

During the Ebola outbreak in West Africa the gendered labor of tending to the deceased was misunderstood by the international NGOs sent into assist. The gendered meanings and performance of care were more important than a foreign decree about how to avoid infection. How does gender inflect what is happening now, globally? I suspect you need to ask the individuals who are doing the cleaning and the caring to find out. I don't for a moment think that it is uniform within our various communities, temporally or geographically, I feel confident it is as varied as gender is diversely lived, globally and locally.

Our approach to international law might also interrogate, learn and become familiar with queer accounts of kinship. International lawyers might ask about queer futurity, feminist utopias and the long history of the intertwined public and private politics that are gendered, that shape who has access to what and when. These are re-imaginings of sovereignty, of nation, of subjectivity that already exist. It saddens me to think that there is a dialogue centred on seizing the moment to re-think the political which does not notice the long histories of the transnational, of the queer and caring, of feminist blueprints that can be mobilized. Institutions that have continually re-packaged gender law reform into legitimations of business as usual might, right now, ask if there was already an alternative starting point, framing of the political, and the personal.

I have always admired the alternative public space that ATLAS Women has created – over 7000 international lawyers connected through a private social network. Hierarchies are relatively absent as professor, graduate student, and senior practitioner develop dialogues, connect friends and build different kinds of networks than the ones we more often find in the everyday networks of international law. I always wondered if ATLAS Women's success was partly the weird contradiction of the creation of a womyn-only space leaving gender absent. This, it seems, is a radical act of care, a transnational network that learns from itself and is ever expanding like a fractal and not unlike the COVID-19 tentacles of care that have spread across our local neighbourhoods, in a global fashion, these past few weeks, months.

At the same time, I worry about this new COVID-19 public space also in the virtual environment, how and when does gender reinforce and when is gender disrupted in the clamour to access Microsoft Teams, Google Hangouts, Zoom, Jitsi and the rest during the pandemic. Is it just me that finds these disembodied spaces, talking heads a weird parody of what business as usual looks like? The public is very much in the private and my private space must be rendered neutral lest my co-workers learn too much about me when we ought to be discussing alternative assessments at the university. The students have access to the cat's shenanigans and the sound of my partner making coffee. Benign maybe, but there may be other things noticed in the edges of the screen.

I should think our dialogue needs to commence with an excavation of the feminist utopias, feminist alternatives already offered, fully downloadable during the crisis moment, and offering blueprints for doing the public and private, the cleaning, the everyday, politics and gender differently. International law is no exception.

Yours sincerely,

Gina Heathcote.

# COVID-19 Symposium: COVID-19 and the Racialization of Diseases (Part I)

[opiniojuris.org/2020/04/07/covid-19-symposium-covid-19-and-the-racialization-of-diseases-part-i/](https://opiniojuris.org/2020/04/07/covid-19-symposium-covid-19-and-the-racialization-of-diseases-part-i/)

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The President of the United States has problematically utilized geographic references for the coronavirus disease (COVID-19) to play on anxieties of the racialized other, the foreigner and their diseases. Prior to the pandemic, he reportedly complained that Haitians 'all have AIDS' when discussing extending temporary protections for Haitian, El Salvadoran, Liberian and other immigrants. This echoes the historical pathologizing of Black, Indigenous and other people of color as disease-ridden and unsanitary. For example, when the smallpox epidemic hit San Francisco in 1876, officials referred to the city's Chinatown as a 'laboratory of infection'. The Chinese Exclusion Act, an immigration law passed in 1882, prevented Chinese laborers from immigrating to the United States in part based on biases and stereotypes that they were more likely to carry cholera and smallpox. A century later, the U.S. government ran an HIV camp in Guantanamo Bay, Cuba from 1991 and 1993, which detained 310 Haitians with HIV/AIDS without regard to their refugee and asylum rights or their credible claims of political persecution. This post connects the racialization of COVID-19 to the historical narratives and interventions premised on the suspicion of diseased and uncontrolled racialized bodies coming to infect those in the West. I explore the significance of this legacy for global health in more detail in Part II of this post and in a forthcoming article in the *UCLA Law Review*.

The COVID-19 pandemic has surfaced what was always latently there, the racialization of diseases. For example, a 1915 article in the Southern Medical Journal states that Black people were 'a hive of dangerous germs, perhaps the greatest disease-spreader among the other subspecies of *Homo sapiens*.' Racial hierarchies based in part on the racialization of diseases were replicated globally through slavery, colonialism and imperialism. In the United States, Black people were considered a 'notoriously syphilis-soaked race' while White people purportedly suffered from polio because of their 'complex and delicate bodies,' which made them more susceptible. Scientific racism legitimated explicit and implicit pseudo-scientific distinctions that dehumanize, devalue and denigrate the worth of Black, Indigenous and other people of color. For example, in South Africa, because leprosy was perceived to be a 'Black disease,' harsh measures were enacted that allowed for compulsory segregation of all lepers due to fears that the disease was spreading and affecting Whites, while many Black lepers were detained on Robben Island; White lepers were allowed to remain quarantined at home.

Despite significant efforts towards the de-legitimation of scientific racism, the racialization of diseases continues to percolate through processes of socialization that have persisted, morphed and diffused these norms globally. Thus, when H1N1, a novel influenza virus emerged in 2009 in the United States, some were quick to try to identify a 'foreign source.' A few commentators blamed Mexican immigrants and 'illegals' for bringing the virus across the border. Notably, when mad cow disease spread from the United Kingdom, it did not generate a similar racist or ethnic backlash. The above examples indicate a long history of othering people of color as disease-ridden by nature even though disease carrying microorganisms do not differentiate amongst their victims based on race, nationality, ethnicity or other categories. While microorganisms do not discriminate, institutions, laws, policies, individuals and other actors do. There are countless studies that demonstrate significant racial disparities in healthcare, which illustrate how racial inequality functions as social determinant of health.

This post illuminates how racialized fears of contagion contributed to the development of the global public health regime. The emergence of this regime was in many ways coterminous with European imperial expansion. Colonial powers increased international cooperation with other imperial powers for the containment of diseases to perfect the expansion of empires and to secure trade routes. For example, between 1851 and 1873, European powers negotiated three different international treaties relating to disease prevention and control, although none were enacted. Colonial powers eventually concluded treaties aimed at determining how restrictive quarantine regulations needed to be to continue the expansion of imperial trade without exposing their populations on the mainland to health risks from colonial territories. Remarkably, during the first half of the twentieth century there were no less than thirteen international treaties relating to cooperation on health control measures. This history is striking given that in 1793, British colonials gave Lenape emissaries items from a smallpox infirmary to intentionally spread diseases to nearby Indigenous peoples. The incongruity of the settler colonial project spreading diseases that decimated Native and Indigenous populations while European colonial powers formulated treaties aimed at protecting their metropolises is telling.

Understood against this background, European imperial powers' early efforts at global health cooperation were inherently racialized. The first International Sanitary Conferences were convened to address the danger that cholera, yellow fever and the plague posed to Europe. Of these diseases, cholera sparked significant panic having reached Russia from India. Adrien Proust, a member of the French delegation and one of the leading participants in the International Sanitary Conferences, authored several monographs relating to 'the defense of Europe' against 'Asiatic cholera'. The 1892 Convention thus *only* addresses cholera and the sanitary control of westbound shipping to European countries based on fears that the Suez Canal might be a conduit for the importation of cholera from India to Europe.

Additionally, in the 1893 Convention, states agreed to notify one another urgently of any outbreaks of cholera within their territories. In 1893, a cholera epidemic in Mecca claimed the lives of 30,336 people. As a result, some Europeans feared that Muslim pilgrims returning to Europe posed a serious threat. Accordingly, the Sanitary Convention of 1894 *exclusively* focuses on the pilgrimage to Mecca and the precautions to be taken at ports of departure, the sanitary surveillance of pilgrims traversing the Red Sea, and the sanitary regulation of shipping in the Persian Gulf.

The prioritization of diseases of importance to Western interests was critical to the emergence of the global health regime. For instance, Austria-Hungary proposed the conference that led to the adoption of the 1897 Convention following a serious epidemic of the plague in India. Some Europeans feared that Muslim subjects in colonial territories might become infected by Indian pilgrims and bring the plague back with them. Consequently, the International Sanitary Convention of 1897 added the plague as a disease warranting international attention. The Euro-centric focus of the early treaties is also manifested in the 1903 Convention, which consolidated the earlier four conventions. Of its 184 articles, only one relates to yellow fever, which Europeans regarded as a minor concern limited to the Americas.

The calculus changed by the 1926 Sanitary Convention, which modified the 1912 Convention and required international notification for the first confirmed cases of cholera, plague, yellow fever, as well as small pox and typhus. Following WWI, millions of cases of typhus in Poland and the Soviet Union occurred, which increased this disease's importance on the global health agenda. In 1932, the eastward spread of yellow fever from endemic locations in Latin America and West Africa to other African colonial territories and from there to vital South Asian colonial territories spurred a meeting to discuss greater protection against epidemic diseases. A map showing European airlines routes traveling across the African continent featured prominently at the meeting with representatives from several African colonial territories and British India. European countries subsequently adopted a treaty focused on sanitary and quarantine requirements for aerial navigation. Moreover, during the 1930s, when the *Aedes aegypti* mosquito was endemic in parts of southern Europe resulting in several outbreaks of dengue, thirteen European countries agreed to prioritize the prevention of the spread of dengue under the International Convention for Mutual Protection Against Dengue.

The inclusion on the list of diseases that deserved international recognition and regulation coincided with the importance of these diseases in Western capitals. It was not as if diseases prioritized by the early global health treaties were the only diseases afflicting populations globally. These treaties did not take place in a vacuum as Western countries formulated the nascent global health regime to perfect the colonial project. This brief synopsis of the history of global health law is crucial for understanding current global health practices.

# COVID-19 Symposium: COVID-19 and the Racialization of Diseases (Part II)

[opiniojuris.org/2020/04/07/covid-19-symposium-covid-19-and-the-racialization-of-diseases-part-ii/](https://opiniojuris.org/2020/04/07/covid-19-symposium-covid-19-and-the-racialization-of-diseases-part-ii/)

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Part I of this post details how European powers enacted treaties that prioritized diseases considered most relevant to protecting Western colonial interests. It helps to elucidate how the racialization of diseases and their valuation informed the emergence of the global health regime and highlights how the development of this regime often depended on the coercive power of the colonial administrative state to implement public health measures. This post analyzes how the racialization of diseases is accomplished more subtly and indirectly under the current global health architecture.

It was not until the 1944 modification of the International Sanitary Convention that the global health regime began requiring state parties to generally send epidemiological information for *any* communicable diseases, irrespective of whether they had been preordained by Western powers as significant. The creation of the World Health Organization (WHO) reflects a broad vision for societal change that is manifest in the founding documents of other post-WWII international institutions. The WHO's constitution recognizes the right to health and notes that its enjoyment 'is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.' The WHO is also premised on the right of equality

as well as the principle that the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and states.

The International Health Regulations of 2005, broadens the system of state surveillance and notification for infectious diseases. Significantly, member states gave the WHO the power to define a Public Health Emergency of International Concern (PHEIC), 'an extraordinary event, which is determined... (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.' Yet, the determination of when a given disease constitutes an international emergency is a decision informed either explicitly or implicitly by a determination of the worth, utility and importance of the populations impacted and their proximity to Western interests.

The 2014-2015 Ebola epidemic, which went from an unfortunate situation in a 'backward' region to a significant public health emergency of international concern strikingly illustrates this. In March of 2014, the humanitarian organization Doctors Without Borders began sounding the alarm that the scale of the Ebola outbreak in West Africa was 'unprecedented.' Yet, it was not until August of 2014 that the WHO declared Ebola a PHEIC and it was only at this point that it unveiled a framework for attempting to contain the epidemic. The WHO initially determined that from a numbers perspective, the Ebola outbreak did not rise to the level of an international emergency. Yet, this approach failed to take account of the unique characteristics of the outbreak in the sub-region. Under pressure, the WHO seized on the fact that —someone from Liberia who was infected with Ebola traveled to Nigeria—as an opportunity to revise its initial flat-footed stance toward the disease. The 2014 Ebola epidemic was evidently 'international' as it had traveled across several borders in the West African sub-region to upend things. Thus, the possibility of the disease spreading was already present. Yet, the comparatively trivial number of cases that occurred in Europe and the United States turned Ebola into a crisis calling for international action.

The Ebola epidemic of 2014 resuscitated historical images of Black African bodies as uncontrollable and disease-ridden and sparked racialized fears. The death of Thomas Eric Duncan who was the first Ebola case in the United States is illuminating. Two healthcare workers in Dallas, Texas contracted Ebola while providing him care shortly after his arrival from Liberia. Although they recovered, racialized fears of contagion in the United States were almost instantaneous with children of African immigrants in Dallas taunted as 'Ebola kids' and two students from Rwanda (2,600 miles from West Africa) sent home from a New Jersey elementary school for 21 days. Additionally, a Texas college sent out letters to prospective students from Nigeria informing them that they were no longer accepting applications from countries with 'confirmed Ebola cases,' despite the WHO declaring Nigeria 'Ebola-free.' A middle school even placed a principal on paid administrative leave for a week for attending a funeral in Zambia (2,770 miles from West

Africa) despite it also having no cases of Ebola. Ebola transformed from a 'local' disease in 'Africa,' to a significant international one that might touch and concern Western interests.

Yesterday it was Ebola, today these racialized fears of contagion are manifesting with the COVID-19 pandemic. The pandemic has reinvigorated the 19th century strain of thought that maintains that all things Asian are a threat to the Western world with a newspaper in France recently carrying the headline 'Yellow Alert.' People have physically attacked students of Asian descent in cities like London and in San Fernando. Moreover, individuals that present as Asian are being racially profiled, kids have tried to 'test' other kids for coronavirus, and some institutions have tried to normalize xenophobia and racism as understandable reactions to COVID-19. The racialization and mapping of the disease onto certain countries and their progeny, but not others is also playing out at the global level.

We have seen some states completely elide the global health regime with entirely uncoordinated country-specific measures. Some of these responses are premised on defensive measures against contagion from racialized others. The United States is a paradigmatic example. It initially attempted to travel ban its way out of the spread of a novel virus, by banning foreign nationals who had traveled to China in the last 14 days from reentering. This runs counter to WHO's usual guidance, which discourages travel and trade bans, as they can make it harder to help nations respond to outbreaks. Moreover, while travel bans in limited circumstances may prove helpful at the very early stages of an outbreak as a means to buy time and shore up the health system's ability to respond to a potential external shock, when used alone they do not serve as an effective prophylactic measure. Further, the United States did not use COVID-19 diagnostic tests produced by the WHO in favor of generating its own. Yet, delays in developing a reliable test, plus a limited and faulty domestic supply, as well as restrictions on testing based on travel history, meant that the virus was likely spreading locally undetected for a while.

The racial and imperial logics influencing some of the United States' decision-making was apparent in myriad ways. The President's incessant characterization and understanding of the disease as 'foreign' initially limited the space for consideration of community transmission. Additionally, colonial logics was manifested in the decision to protect certain metropolises with the initial exclusion of the United Kingdom from the expanded travel ban that the United States imposed on a number of European countries. Further, the lax screening measures and crush at airports from those Americans hastily returning from the recently banned countries belie a genuine policy aimed at mitigating risks of transmitting COVID-19. The racializing of diseases underlying some of the U.S. administration's policies is also evident in the fallacy of thinking that the disease is somehow engaged in border control efforts and checking passports, nationalities and ethnicities to figure out who to infect next. This practice harkens back to 1900 when San Francisco battled the plague and White people were allowed to leave the impacted areas, but Chinese and Japanese Americans needed to show a health certificate before they were allowed to leave.

The response from global actors to the COVID-19 pandemic reminds us quite powerfully how the history of diseases and responses to diseases is linked to colonial and ongoing politics of racial exclusion. The material effects of the racialization of diseases exacerbates racial subordination and violates the fundamental human rights of historically subordinated groups. Some states have looked to return 'back to the future' of the early global health regime and have prioritized *ad hoc* and piecemeal responses. Yet, deepening globalization and the mobility of people makes it nearly impossible to fight pandemic diseases in this racialized and counterproductive manner. The COVID-19 pandemic is a wake-up call from inside all our houses to strengthen health systems globally as well as the global health architecture to better respond to existing and emerging diseases. It is also a timely reminder of the shared obligations of actors to ensure greater protection from highly infectious diseases and of the need for effective global action and solidarity.