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Modest International Law: COVID-19, International Legal Responses, and Depoliticization

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Abstract

In this Essay, we analyze two sets of international legal responses to the COVID-19 pandemic: the academic discussion on state responsibility; and the deployment of international law as a tool for resistance. We argue that both approaches made significant contributions but concealed the role of the discipline in the production of the conditions that led to the pandemic and its unequal impact. These interventions reflect a "modest international law"; an understanding of the discipline that hinders change and is ethically weak. We contend that repoliticization can help reclaim international law's ambition and responsibility.

Crises present extraordinary opportunities for change. The COVID-19 pandemic should be no exception: it has disrupted the social and economic life of societies in each corner of the world. As we navigate through the pandemic, it might be too soon to examine with detail the effects that this crisis will have on global life. However, for international lawyers, crises offer an additional opportunity: they constitute a valuable occasion to assess the current state of the discipline. There is, after all, an intimate bond between international law and crises.[1] Many of us point to international incidents as the spark that ignited our interest in the field, and seize real or manufactured crises as opportunities for professional or scholarly involvement. In the middle of a pandemic with devastating worldwide consequences, it seems only reasonable to ask: what *can* international law offer?

In this Essay, we use the COVID-19 pandemic as an opportunity to engage in an exercise of disciplinary self-examination. To that end, we analyze what international law *has*, in fact, offered, by identifying and exploring two sets of responses to the pandemic. First, we address international legal scholars' contribution to the conversations about how to think about this crisis. Second, we discuss the deployment of international law as a practical tool for resisting its consequences. We argue that dominant approaches to both international legal thought and practice have made valuable but dangerously depoliticizing contributions, which portray the pandemic as a largely external phenomenon, concealing the role of international law in the production of the conditions that led to the pandemic and the allocation of the suffering that this crisis has caused. These interventions reflect what we term as "modest international law";

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[1] Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 Mod. L. Rev. 377 (2002).

an understanding and engagement with the discipline that hinders structural change, and excuses international lawyers from taking responsibility for what they produce in the world.

These shortcomings risk pushing international law toward a place of growing irrelevance as a field of research. However, we argue that international law has available inspiration to avoid this in the form of "counterpoint" international law.[2] In stark contrast to dominant approaches, critical approaches to international law, notably including those associated with the Third World Approaches to International Law (TWAIL) movement, have sought to repoliticize the legal analysis of the pandemic. This Essay contends that the field can reclaim its senses of ambition and responsibility by repoliticizing legal thought and practice. This can be achieved by broadening the lens of what constitutes international law's object of study, rethinking the relationship between politics and expertise, and establishing institutions that can channel change.

This Essay has the following structure. Part I critically examines the dominant international legal analyses of the COVID-19 crisis, focusing on analyses of state responsibility. Part II concentrates on the practical responses, evaluating the limits and possibilities of deploying human rights and democratic accountability as tools for resistance in this context. As we analyze both sets of responses, we reflect on the extent to which they represent core disciplinary practices. Part III argues that these practices reveal a tendency of international lawyers to present themselves as modest companions to power, describes the costs of this approach, and identifies possible first steps toward a repoliticization of the discipline across the board, in the hope of encouraging scholars and practitioners to acknowledge the field's responsibilities and reclaim its potential in the task of institutional reconstruction.

I. International Legal Thought in Times of COVID-19

The COVID-19 outbreak prompted international lawyers to focus on a vital issue: state responses and the causes of the pandemic. A dominant approach in mainstream platforms was to address this question within the framework of state responsibility. In particular, the focus was placed on China, on the basis that the outbreak would have taken a different turn had China complied with the obligations of assessment, timely notification, and information-sharing established in the International Health Regulations (IHR).[3] Scholars either assumed

[2] On counterpoint international law, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. Int'l L. & Pol. 335 (2000).

[3] International Health Regulations, May 23, 2005, 2509 UNTS 79; James Kraska, *China Is Legally Responsible for COVID-19 Damage and Claims Could Be in the Trillions*, War On The Rocks (Mar. 23, 2020), *at* https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions; Peter Tzeng, *Taking China to the International Court of Justice Over COVID-19*, EJIL:*Talk!* (Apr. 2, 2020), *at* https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19; Henning Lahmann, *Does China Really Owe the World Trillions of Dollars?*, Lawfare (May 7, 2020), *at* https://www.lawfareblog.com/does-china-really-owe-us-trillions-dollars-reparations-covid-19-light-bosnian-genocide-judgment; Valerio Mazzuoli, *State Responsibility and COVID-19: Bringing China to the International Court of Justice?*, Int'l L. Blog (May 15, 2020), *at* https://internationallaw.blog/2020/05/15/state-responsibility-and-covid-19-bringing-china-to-the-international-court-of-justice. *See also* Natalie Klein, *Can China Be Sued for COVID-19?*, East Asia F. (May 18, 2020), *at* https://www.eastasiaforum.org/2020/05/18/can-china-be-sued-for-covid-19; Johanna Aleria Lorenzo, *To Sue or Not to Sue*, Völkerrechtsblog (June 4, 2020), *at* https://voelkerrechtsblog.org/to-sue-or-not-to-sue; Meagan Wong, *The Law of State Responsibility and the COVID-19 Pandemic*, *in* COVID-19, Law and Human Rights: Essex Dialogues (2020); *WHO Let the Bats Out?*, EJIL:*The Podcast!* (May 5, 2020), *available at* https://player.captivate.fm/episode/a125dc3e-6fe0-4f9c-9a2b-a890a5bd7679.

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China's failure to comply with these obligations, or—after pointing to reports stating that China covered up the disease—recognized that the matter came down to proof, a task complicated by the lack of credibility and cooperation of the Chinese authorities.[4] The discussion also extended to the potential fora to hold China accountable, best exemplified by the arduous quest to find a jurisdictional basis to sue China before the International Court of Justice (ICJ).[5] Other discussions focused on the rules of international law governing the situation,[6] analyzing whether states can rely on the defenses in the law of state responsibility should they fail to comply with international law obligations,[7] and the procedural requirements for derogations to international human rights treaties.[8]

Responses of this kind fit within a broader disciplinary pattern. For decades, legal thought has concentrated on the interpretation, application, and elaboration of the law in the professional—typically, adjudicative—context.[9] The centrality in legal theory of the question of how should judges decide cases illustrates the preponderance of this approach, which, particularly in the common law tradition, is reinforced by the importance that the study of cases is assigned in legal education.[10] In international law, the tendency to offer practical solutions is linked not only to the dominant status of cases and judicial decisions,[11] but also to its organization around specific "events,"[12] often labelled as crises.[13] Faced with these crises, international legal scholars position themselves in the role of advisors, and offer practical assessments and suggestions to legal practitioners who will ultimately judge their usefulness.[14] At worst, this could be seen as an innocuous activity, but, as illustrated by the discussions on the COVID-19 pandemic, it presents significant analytical and ethical costs.

For a start, the prompt formulation of practical solutions hinders constructive engagement with past scholarship, condemning international legal scholars to rediscover the same issues perpetually.[15] The reactions to the state responsibility analyses illustrate this point. Several scholars eventually countered that those claiming that China was internationally responsible were overlooking important aspects of the Articles on Responsibility of States for

[4] *See*, *e.g.*, Tzeng, *supra* note 3; Gian Luca Burci in EJIL:*The Podcast!*, *supra* note 3.

[5] *See*, *e.g.*, Tzeng, *supra* note 3; Hans Huremagić & Fritz Kainz, *COVID-19, China and International Aviation Law: A Ticket to The Hague?*, EJIL:*Talk!* (July 13, 2020), at https://www.ejiltalk.org/covid-19-china-and-international-aviation-law-a-ticket-to-the-hague.

[6] *See*, *e.g.*, Antonio Coco & Talita de Souza Dias, *Prevent, Respond, Cooperate: States' Due Diligence Duties Vis-à-vis the COVID-19 Pandemic*, 1 J. Int'l Humanitarian Legal Stud. 1 (2020).

[7] *See*, *e.g.*, Federica Paddeu & Freya Jephcott, *COVID-19 and Defences in the Law of State Responsibility: Part 1*, EJIL:*Talk!* (Mar. 17, 2020), *at* https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i.

[8] *See*, *e.g.*, Stevie Martin, *A Domestic Court's Attempt to Derogate from the ECHR on Behalf of the United Kingdom: The Implications of COVID-19 on Judicial Decision-Making in the United Kingdom*, EJIL:*Talk!* (Apr. 9,2020), *at* https://www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom.

[9] Roberto Mangabeira Unger, The Critical Legal Studies Movement: Another Time, a Greater Task 47 (2015).

[10] Roberto Mangabeira Unger, What Should Legal Analysis Become? 106–08 (1996).

[11] Fuad Zarbiyev, *On Judge-Centeredness of the International Legal Self* (manuscript on file with authors).

[12] *See* Events: The Force of International Law (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., 2011).

[13] Charlesworth, *supra* note 1.

[14] Kennedy, *supra* note 2, at 397–401. These practices are characteristic of "traditional approaches" to international law. *See* Andrea Bianchi, International Law Theories 21–43 (2016).

[15] Charlesworth, *supra* note 1, at 384.

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Internationally Wrongful Acts. Notably, they pointed to problems of causation, the question of the mitigation of damage, the contribution or possible concurrent responsibility of other states, and the evidentiary difficulties of proving a breach of the IHR.[16] These problems, combined with the legal and political obstacles of finding a forum for adjudication, reveal that certain proposed solutions ultimately lacked practical application. More troublingly perhaps are the ways in which the initial interventions restricted the scope of the field's agenda. Thus, in a second wave of proposals, scholars suggested the establishment of a commission of inquiry or the request of an advisory opinion of the ICJ.[17] Although valuable and more feasible, these remained on the level of ad hoc responses concerned mainly with assessing responses and identifying transgressed norms, even while suggesting other potential lines of inquiry.

Even the soundest analysis of state responsibility will, by itself, provide an inaccurate picture of the subjects involved in the complex scheme of governance underlying a global pandemic. In the 1980s, Philip Allott warned that the law of state responsibility consolidates the idea that wrongdoing results from the behavior of abstract entities and not morally responsible human beings.[18] This concern was overturned with the reemergence of international criminal law, which has, in turn, long been subjected to the critique of the individualization of guilt. In its professional approach to crises, international law fails to address challenges as essential as the tension between agency and structure, and matters of "state-centrism." The foregrounding of the lens of state responsibility, for example, fails to account for the role that nonstate actors, including international financial institutions, vulture funds, pharmaceutical companies, and other multinational corporations play in causing and distributing suffering.

Most significantly, the professionally oriented approach to legal thought shifts the focus of legal thinkers away from the task of informing the conversation about institutional futures, which though possibly less immediate, is surely more important.[19] Reducing the causes of the COVID-19 pandemic to a failure to notify and share information or a lack of compliance with due diligence obligations disregards that the devastation of the environment and ecosystems facilitates the emergence of viruses. Similarly, death and economic losses are not simply inevitable consequences of the virus. Frail health systems are a result of decades of defunding and policies of austerity—policies often ordered by international organizations. This acknowledgement is a precondition for a revision of the structures of the global political economy, which are expressed in law. The containment of the virus was, in fact, difficult to attain from the outset, against the background of an "international economic life" organized around

[16] Martins Paparinskis, *COVID-19 and the Foundations of International Law*, OPINIO JURIS (Mar. 31, 2020), *at* https://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law; David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SECURITY (Mar. 27, 2020), *at* https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations.

[17] Michael A. Becker, *Do We Need an International Commission of Inquiry for COVID-19? Part I*, EJIL:*TALK!* (May 18, 2020), *at* https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-i; Sandrine De Herdt, *A Reference to the ICJ for an Advisory Opinion Over COVID-19 Pandemic*, EJIL:*TALK!* (May 20, 2020), *at* https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic.

[18] Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L. L.J. 1, 13–14 (1988).

[19] UNGER, *supra* note 10, at 129–30.

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open markets, freedom of navigation, migrant workers, and global value chains.[20] Several governments avoided or delayed adopting large scale public health and social measures to prevent economic downturns, while some companies chose to remain open to avoid massive losses and losing their place in the global supply chains.[21] The difficulties to reduce the spread of the virus were exacerbated by an international legal order defined by atomistic conceptions of sovereignty and nonintervention, which leave little space for solidaristic arrangements.[22] The depoliticizing dynamics of formalistic legal analysis sidelined these discussions.

The lack of breadth and depth in legal thought carries over to an ethical cost. The centrality of the interpretation of the law with a view to its application in the professional context turns a blind eye on the violence that results from the current allocation of power and resources through law. Paradoxically, by identifying the set of applicable rules or arguing that a state has breached an obligation, international legal scholars experience a sense of relevance and a clear conscience associated with contributing to the global rule of law.

Overall, the quest for prompt and practical legal responses to the crisis ends up limiting the discussion. These analyses neglect structural determinants of economic relations, environmental degradation, and development policies, among other processes expressed in international law, and thus preclude imagining alternative institutional futures. Facing a crisis of a rare magnitude that could enable change, international legal thought misses the opportunity to rethink the constitutive role of law in the global political economy. The study of structures is deferred to adjacent disciplines—and "counterpoint" international law. More troublingly, for a discipline that is continually jumping from crisis to crisis, this becomes the norm and not the exception.[23]

II. Crises and the Limits of International Legal Resistance

The COVID-19 pandemic, as most crises, has favored the extension of executive authority and the displacement of human rights at the domestic level.[24] In comparison with the abstract scholarly focus on state responsibility, international law has offered practical tools to resist these tendencies, in the form of the vernacular and mechanisms of human rights and democratic accountability. While effective, these practical approaches are also unable to deal with broader structural issues.

Three trends illustrate the threats that international law seems to hold promise to counter. First, several authoritarian governments have strengthened their power through emergency measures and legislation. Notably, in Hungary, Parliament granted Prime Minister Viktor Orbán the power to rule by decree indefinitely, purportedly to fight the virus. Across the Atlantic, Bolivia had been plunged into crisis since 2019, when President Evo Morales was ousted in a coup following irregularities in the elections and replaced by Senator Jeanine Áñez,

[20] Anne Orford, *Theorizing Free Trade*, *in* The Oxford Handbook of the Theory of International Law 702 (Anne Orford & Florian Hoffmann eds., 1st ed. 2016).

[21] Tomaso Ferrando, *Law and Global Value Chains at the Time of COVID-19: A Systemic Approach Beyond Contracts and Tort*, Eur. Ass'n Private Int'l L. (March 20, 2020), *at* https://eapil.org/2020/03/20/law-and-global-value-chains-at-the-time-of-covid-19-a-systemic-approach-beyond-contracts-and-tort.

[22] We thank Nico Krisch for pressing us on this point.

[23] Charlesworth, *supra* note 1, at 391.

[24] *See* Dianne Otto, *Decoding Crisis in International Law: A Queer Feminist Perspective*, *in* International Law and Its Discontents: Confronting Crises 115, 116 (Barbara Stark ed., 2015).

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who promised to call for elections as soon as possible. After the outbreak, Áñez initially postponed them indefinitely and adopted a decree providing penalties up to ten years of imprisonment for those who "misinform" on the pandemic.[25]

Second, panic has favored the limitation and violation of civil and political rights.[26] Several states have violated the right to freedom of expression, while lockdowns have affected rights worldwide, including the rights to movement and religious worship. The unprecedented collection and manipulation of health data have endangered the right to privacy, and the militarization of the public space led to killings and torture. Panic has contributed to portray these developments as necessary—or even as part of the "new normal." In fact, governments have, more and less persuasively, offered legal justifications for the impact of their policies on human rights, and even formally derogated and suspended from international human rights law provisions.[27]

Finally, and somewhat more insidiously, the crisis and its responses have contributed to legitimize violations of economic and social rights. The rhetoric of the "war against the virus" and that "the virus does not discriminate" have obscured the disproportionate impact of the pandemic on marginalized communities. In the United States, the rate of black fatalities from COVID-19 has been tentatively estimated to be over twice that of white ones. Panic further deflects attention from the fact that most states had already failed to respect the rights of these minorities before the pandemic.[28]

International law can help resist some of these threats. To the extent that crises are conceived as more the product of nature than the product of structures, or as more contingent than necessary, international law will appear very helpful, in at least two different ways. However, when one adjusts the lens, this promise dissipates, and international law becomes more problematic. The pandemic serves as an important case study.

First, as argued by Tom Ginsburg, international law offers mechanisms that pause democratic backsliding.[29] Regional organizations, Ginsburg emphasizes, have greater incentives and capacity to make a difference. As an example, he mentions the case brought by the European Commission against Poland before the European Court of Justice concerning the lowering of the retirement age of judges.[30] In compliance with the court's decision, Poland reinstated the judges, which temporarily halted the deterioration of the institutional order. If we understand crises as external and primarily contingent phenomena, these mechanisms become extremely valuable: they can reduce the window of opportunity that panic presents to consolidate authoritarian power and practices. In the context of COVID-19,

[25] *See* Laurence Blair & Cindy Jiménez Bercerra, *Is Bolivia's "Interim" President Using the Pandemic to Outstay Her Welcome?*, GUARDIAN (June 1, 2020), *at* https://www.theguardian.com/global-development/2020/jun/01/bolivia-president-jeanine-anez-coronavirus-elections.

[26] On the role of panic in "crisis governance," see Otto, *supra* note 24.

[27] *See* HCR, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, UN Doc. CCPR/C/128/2 (Apr. 30, 2020).

[28] *See* Otto, *supra* note 24, at 117–29.

[29] Tom Ginsburg, *Democracies and International Law: The Trials of Liberalism (Part 2)*, *available at* https://www.lcil.cam.ac.uk/lectures-events/hersch-lauterpacht-memorial-lectures.

[30] European Commission v. Republic of Poland, C-619/18, ECLI:EU:C:2019:531, Judgment of 24 June 2019.

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regional action is available. In the case of Hungary, experts have suggested suspending its voting rights on EU matters and withholding financial payments.[31]

Second, international human rights law and institutions have historically been effective in documenting and denouncing abuses.[32] It is not surprising that a crisis of the magnitude of the COVID-19 pandemic has prompted a wealth of human rights activity, putting pressure on governments and providing tools for domestic activists. International and regional human rights bodies promptly began offering thematic guidance and establishing monitoring mechanisms.[33] The Inter-American Commission on Human Rights, for example, launched a Rapid and Integrated Response Coordination Unit and raised concern about human rights violations in several countries, including Bolivia.[34]

However, international law cannot simply be seen as a tool to address external crises. This is evident even in the case of the COVID-19 pandemic, which lawyers might be tempted to label as an "act of God" considering it involves a zoonotic disease. Still, as science and technology studies scholar Bruno Latour explains, the virus is only one of the links in a chain that determines the virulence of the disease, together with elements including the distribution of medical supplies and the regulation of property rights.[35] This network, permeated by international law, explains why the virus acts differently in different places—and why the pandemic "is no more a 'natural' phenomenon than the famines of the past or the current climate crisis."[36] From the perspective that not even the COVID-19 pandemic is an entirely natural or contingent crisis, one can identify limits and, crucially, complicities of international law in the reproduction of injustice in and through crises.

First, it must be reemphasized that the processes that determine what counts as a crisis and how to respond to it are influenced by a Western-dominated struggle among experts, including international lawyers, and significantly organized in law.[37] Most plainly, through resolutions, reports, and budgetary decisions, international and regional organizations and their subsidiary organs direct attention and resources to specific causes. These processes have produced outcomes that are hard to justify, such as prioritizing the "fight against terrorism" over food and debt crises. Thus, international lawyers cannot exaggerate the posture of deploying the certainties of law against the vagaries of politics. Instead, as we argue below, the distinctively legal knowledge about the details of structural arrangements could be very useful in a more transparent conversation about political and economic futures.

[31] *What Should the EU Do About Hungary?*, POLITICO (Apr. 14, 2020), *at* https://www.politico.eu/article/what-should-the-eu-do-about-hungary-coronavirus-viktor-orban.

[32] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).

[33] *See* International Justice Resource Center, *COVID-19 Guidance from Supranational Human Rights Bodies*, *at* https://ijrcenter.org/covid-19-guidance-from-supranational-human-rights-bodies.

[34] Organization of American States, SACROI COVID-19, *at* http://www.oas.org/en/iachr/SACROI_COVID19.

[35] Bruno Latour, *La crise sanitaire incite à se préparer à la mutation climatique*, LE MONDE (Mar. 25, 2020), *at* https://www.lemonde.fr/idees/article/2020/03/25/la-crise-sanitaire-incite-a-se-preparer-a-la-mutation-climatique_6034312_3232.html.

[36] *Id.*

[37] *See* Charlesworth, *supra* note 1; Otto, *supra* note 24; DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

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Second, the pandemic illustrates the conceptual limits of international law's quintessential vernacular for resistance: human rights. The effectivity of human rights to denounce abuses makes them an essential tool to tackle those contingently and temporarily produced by crises. However, once a pandemic is exposed as an at least partially socially and economically grounded crisis, human rights appear less useful. They offer a significantly limited framework to understand the conditions in which these problems arise.[38]

In addition, not all human rights are equally protected. Civil and political rights are more easily protected by human rights' repertoire of tools—from naming and shaming to treaty bodies' decisions—than economic and social rights. The latter, including the never more prominent right to health, are much more dependent on the material resources of states, which international human rights law largely neglects.[39] Furthermore, while distributive inequality has strongly conditioned the effects of the COVID-19 pandemic,[40] social and economic rights reflect a concern for sufficiency rather than equality.[41]

International law helps to determine what counts as a crisis and as an appropriate response, and contributes to producing the unequal conditions that make a virus more lethal in certain places. While international law can also be employed as a tool for resistance, its potential is limited. The COVID-19 pandemic demonstrates the need for new vernaculars of resistance beyond human rights and democratic accountability. Since global political activities take place against the background of institutional arrangements expressed in law—from the organization of property or trade to human rights and the environment—, invoking international law to face the threats of crises is necessary, but no more than an act of self-defense. Its promise to resist crises should not, as it exists today, be celebrated as emancipatory, much less as the best we can hope for.

III. Beyond Modesty: Repoliticizing International Law

The pandemic has exposed the professionally oriented and self-limited approach to crises of international legal thought, and the "last resort" character of international law as a tool for resisting crises. On the whole, international law emerges as understating its own role in global governance. We term this prevalent understanding of the discipline as "modest international law."

In this context, modesty is no virtue.[42] On the one hand, it excuses international lawyers from taking responsibility for what they produce in the world.[43] More significantly, a modest international law deters change, by concealing the fact that law, in the words of Roberto Unger, "deals with the details of social life; it defines, in fine texture, the institutional form of the life of a people."[44] International law is not just a humble check for abuses in the hands

[38] Susan Marks, *Human Rights and Root Causes*, 74 Mod. L. Rev. 57 (2011).

[39] A prominent exception is GA Res. 41/128 (Dec. 4, 1986).

[40] FAO, *Addressing Inequality in Times of COVID-19* (June 18, 2020), *at* http://www.fao.org/3/ca8843en/CA8843EN.pdf.

[41] Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018).

[42] However, a forceful critical argument has been made in favor of an "ethos of modesty" in international law. *See* Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212 (2016).

[43] Kennedy, *supra* note 37, at 256–76.

[44] Roberto Mangabeira Unger, *The Universal History of Legal Thought* 20, *available at* http://www.robertounger.com/en/wp-content/uploads/2017/01/the-universal-history-of-legal-thought.pdf.

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of professionals and professionally oriented scholars. International legal thought has a privileged access to the structure of global governance, which could prove essential to rethink global institutional arrangements.

Against this background, a number of questions arise: how can scholars retrieve a disciplinary sense of responsibility? How can we reclaim the relevance of international law in the public debate? How can international law help those seeking to seize the crisis to construct more egalitarian futures? While quests for disciplinary renewal have been characterized by a call for interdisciplinarity, a simpler improvement in intradisciplinary engagement remains full of promise.[45] This is demonstrated by the interventions by several critical scholars—many of them associated with the TWAIL network—who, in parallel to mainstream analyses, have repoliticized the international legal analysis of the pandemic.[46]

By repoliticization, we refer to recognizing, analyzing, and promoting international law as a terrain for struggle over alternatives, and rival forms of governance and authorities. In contrast, modest international law presents itself as a given institutional order with no intrinsic content. International law, in this view, is a means to direct our conduct toward relatively uncontroversial goals, such as the peaceful settlement of disputes or the prevention of human rights violations. As warned by Unger, this kind of approach denies the place of law as a space for contestation and the reimagination of the economic, political, and social orders.[47]

The contrast between mainstream and counterpoint international legal analyses of the crisis shows what certain forms of repoliticization might look like. Critical scholars have emphasized the structural aspects of international law that contributed to the pandemic and the uneven distribution of its effects, and called for institutional reforms. Thus, where modest legal thought has focused on discrete questions of state responsibility, critical scholars have argued for a new framework of responsibility for epidemics, to recognize situations of need, assign greater responsibility to those who have contributed more, and, significantly, to those who have more resources or capacity to respond.[48] Where modest legal resistance has called for debt relief or the suspension of investor-state dispute settlement (ISDS) for COVID-19 related measures, critical scholars have emphasized the short-termism of such measures and called for the reform of ISDS and the establishment of a sovereign debt restructuring mechanism to prevent the cuts in public spending that left developing countries extremely vulnerable to this pandemic in the first place.[49] Finally, against staunch defenses of multilateralism, critical scholars have stressed the flaws of the financial packages that international institutions offer to developing countries, and proposed replacing discretionary aid contributions with mandatory pooling of funds, designing accountability schemes for financiers, and destining

[45] Bianchi, *supra* note 14, at 1–20.

[46] On TWAIL and political engagement, see Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 Trade, L. & Dev. 103 (2011).

[47] Unger, *supra* note 9, at 47–49.

[48] Matiangai Sirleaf, *Africa, COVID-19 and Responsibility*, Afronomics L. (May 12, 2020), at https://www.afronomicslaw.org/2020/05/12/africa-covid-19-and-responsibility.

[49] Margot E. Salomon, *Reconstituting the Unequal Global System After Pandemic – A Cautionary Tale of International Law*, LSE COVID-19 Blog (June 11, 2020), *at* https://blogs.lse.ac.uk/covid19/2020/06/11/long-read-the-pandemic-is-an-opportunity-to-reconstitute-the-unequal-global-system; The IEL Collective, *International Economic Law & COVID-19*, Critical Legal Thinking (Mar. 27, 2020), *at* https://criticallegalthinking.com/2020/03/27/international-economic-law-covid-19.

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funds toward reforming the structural conditions of the global economy that contributed to the pandemic.[50] These are merely examples of a vast range of interventions.[51]

Despite the heterogeneous character of counterpoint approaches to the pandemic, some exhibit common characteristics that enhance their analytical purchase and potential for political engagement, and constitute important first steps to repoliticize international law. First, they embrace a broad understanding of what international law is. In this view, the field's object of study goes far beyond the rules and institutions that govern interstate relations. This understanding allows us to capture international law's power more accurately, foregrounding its impact on the everyday.[52] Second, they acknowledge law's tensions and contradictions. Thus, when scrutinizing or enacting legal expertise, choices—for example, the interpretation of the non-precluded measures of bilateral investment treaties—are not disguised as simply technical matters.[53] Finally, critical interventions, aided by historiography, do not understand current institutions—whether the intellectual property regime or the World Health Organization—as the best outcome of an evolving historical process, but often subvert them through contingency, thus unravelling creative thinking about alternative institutions.[54] From this perspective, legal knowledge about different ways of organizing property could be employed to transform and relativize the international protection of intellectual property rights, including in relation to drugs and vaccines. Similarly, acknowledging the false necessity of an understanding of international organizations as primarily created and controlled by member states can give way to imagining more effective organizational forms.

Importantly, repoliticizing international legal thought could not only facilitate change, but, in this context, also serve the interests of those seeking to prevent certain forms of change. For the supporters of the liberal approach to international law, depoliticizing modesty has been an ally: projecting an idealized vision of the law has helped to block change. However, international law could be moving toward a more authoritarian form as authoritarian regimes increasingly engage with international law.[55] To counter this threat, scholars supportive of the international legal liberal project have reasons to defend it over alternative approaches on political, economic, and social grounds. This might provide an occasion for more substantive engagement with dissident views.

In the context of crisis, repoliticization seems possible enough. Crises are often moments of reconstruction, in which legal thought has played a prominent role. In view of the depoliticized disciplinary response to the pandemic, recalling the importance of conceiving law as a terrain for political struggle for the improvement of global arrangements is therefore not

[50] Celine Tan, *International Public Finance and COVID-19: A New Architecture Is Urgently Needed*, IEL COLLECTIVE (Apr. 17, 2020), *at* https://medium.com/iel-collective/international-public-finance-and-covid-19-a-new-architecture-is-urgently-needed-6a364c43141e.

[51] *See, e.g.*, TWAILR:EXTRA, TWAIL-Related Commentary on the Coronavirus Pandemic (May 13, 2020), *at* https://twailr.com/twail-related-commentary-on-the-coronavirus-pandemic; *Afronomics Symposia on COVID-19*, AFRONOMICS L., *at* https://www.afronomicslaw.org/symposia.

[52] *See* LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT (2015).

[53] *See* B. S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 12 (2d ed. 2017).

[54] When seen through the lens of necessity, in turn, current arrangements are not celebrated, but subject to structural critique.

[55] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

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without significance. Prospectively, efforts should be placed in establishing institutions and fostering scholarly practices that facilitate the understanding and discussion of our interests and ideals, thus reducing the dependence of change on crisis.[56] In other words, we should leave modesty aside.

[56] UNGER, *supra* note 9, at 53–67.

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