

## INTRODUCTION TO “THE INTERNATIONAL LEGAL ORDER AND THE GLOBAL PANDEMIC”

By Curtis A. Bradley\* and Laurence R. Helfer\*\*

### ABSTRACT

*This introduction provides an overview of thirteen essays selected in response to a worldwide call for papers for an Agora on “The International Legal Order and the Global Pandemic.” The essays in the Agora consider some of the most pressing challenges, as well as potential opportunities, that COVID-19 is creating for the international legal order. The specific topics addressed include the role of international organizations such as the World Health Organization, state responsibility, human rights, financial regulation, and international trade. Contributors were invited to address the theme from a historical, institutional, doctrinal, normative, critical, or geopolitical perspective, or a mix of perspectives.*

As we write this Introduction in early October 2020, the COVID-19 pandemic continues to rage across the world. Millions of people have already been infected with the novel coronavirus and over a million have already died. The virus is easily transmitted, making social distancing, masks, and restrictions on many activities essential to limit its spread. These limitations are affecting almost all aspects of human interaction, including public health, human rights, and the world economy. While research to develop potential vaccines continues, it is unclear whether they will ultimately be successful, and if successful, how quickly they can be made available to the public.

As a global phenomenon, the pandemic intersects in a variety of ways with the international legal order. Coordination among countries is needed in order to limit the spread of infectious diseases, ameliorate their effects, and develop potential treatments. Yet the challenges of coping with the pandemic have caused some countries to become more isolationist as they seek to protect their citizens and economies. Moreover, while international institutions can potentially facilitate interstate cooperation, there have been criticisms of how some of these institutions, especially the World Health Organization (WHO), have responded to the pandemic.

The pandemic also raises difficult issues of state responsibility. The virus originated in China, and questions have been raised about whether the government did enough to contain its spread and whether its actions and statements may have misled other countries and contributed to the crisis. Whether and how to evaluate the Chinese government’s conduct—to learn lessons for the future, if nothing else—is an important and ongoing topic of international concern.

\* Co-Editor-in-Chief; William Van Alstyne Professor, Duke University Law School.

\*\* Co-Editor-in-Chief; Harry R. Chadwick, Sr. Professor, Duke University Law School.

As often occurs in emergencies, human rights are under stress during the COVID-19 pandemic. An unprecedented number of countries have derogated from the International Covenant on Civil and Political Rights and from regional human rights conventions, and a wide range of international monitoring bodies have forcefully reminded states of the obligation to conform virus-control measures to human rights standards. In addition, cross-border travel has been sharply restricted, raising questions about the rights of migrants, asylum seekers, foreign students, and others. As nations seek to limit the spread of the virus, they are also resorting to technologies—such as new forms of tracking and tracing—that raise significant privacy concerns. More generally, the emergency conditions created by the pandemic have provided an excuse for some authoritarian governments to consolidate power and suppress dissent.

In addition to its many devastating effects, the pandemic may have some salutary consequences. Most immediately, air quality in many countries has improved as a result of sharp reductions in the use of fossil fuels. If some of this reduction becomes permanent, it may not only ameliorate pollution but also help to address the looming problem of climate change. This is just one example where the pandemic may create opportunities to rethink previous ways of addressing transborder problems or suggest new modes of intergovernmental cooperation. The pandemic is also highlighting the needs of vulnerable individuals and groups—such as those who are incarcerated or have low-paying service and production jobs that expose them to health risks—in ways that might produce positive change.

It is difficult to predict the longer-term consequences of this crisis, including changes to international laws and institutions. Some changes may be short-lived and others long-lasting. Some trends that were already underway before the onset of the pandemic may be accelerated. But new trends—and perhaps new institutions—are likely to emerge. In the past, global crises and shocks have often contributed to major changes in the international legal order.

Recognizing the many international legal and institutional issues presented by COVID-19, we commissioned an Agora on “The International Legal Order and the Global Pandemic.” To respond quickly to rapidly unfolding events, we issued a worldwide call for papers in April 2020 with a deadline of July 1. We invited contributors to address any aspect of the topic from a historical, institutional, doctrinal, normative, critical, or geopolitical perspective, or a mix of perspectives. In order to allow us to publish a broad array of contributions, we imposed a 5,000 word limit for each essay.

The response to our call was phenomenal, with over 150 papers submitted by scholars and practitioners in forty countries. We selected thirteen essays—a record number for an Agora in the print volume of the *Journal*. In making the selections, we considered the importance of the topic addressed, the overall quality of the analysis, and the extent to which the arguments are likely to have lasting relevance. We also attempted to ensure that the essays reflected a diverse set of contributions, in terms of subject matter, methodology, and the gender, ethnicity, and geographic location of the authors.

\* \* \* \*

The Agora opens with two essays focused on the WHO. In *The WHO in the Age of the Coronavirus*, José E. Alvarez observes that, in theory, the WHO’s fundamental principles make it well-suited to address the current pandemic.<sup>1</sup> He notes, however, that the

<sup>1</sup> José E. Alvarez, *The WHO in the Age of the Coronavirus*, 114 AJIL 578 (2020).

organization's actual response to the crisis has not lived up to its potential. Alvarez identifies five reasons for the WHO's failures: an inability to overcome its state-centered roots; overreliance on soft law techniques; inflexible "emergency" declarations; an absence of institutionalized mechanisms for cross-regime collaboration; and the blind spots and pathologies that arise when experts become bureaucrats. As a result of these problems, he explains, the organization has been unwilling to criticize important member states; overly deferential to government reporting; too slow in declaring a public health emergency of international concern; and insufficiently transparent in its decision making and policy advice. Alvarez argues that the WHO could address these problems by embracing its authority to pressure member states to comply with the International Health Regulations; adopting structural reforms that would facilitate collaboration with human rights regimes; giving the organization more independence from states; and expanding its expertise beyond public health, particularly in the legal sphere.

In *The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, Eyal Benvenisti argues that the WHO lacks the necessary authority to adequately fulfill its mission of managing global health.<sup>2</sup> According to Benvenisti, the COVID-19 pandemic has demonstrated that the principal challenge of improving global health is not poor coordination among scientists but a lack of political cooperation. After distinguishing between the coordination and cooperation issues addressed by international organizations, Benvenisti explains that global health presents complex cooperation problems, and he argues that the WHO was never equipped with the monitoring and enforcement authority needed to address those problems. Although he notes that the organization responded swiftly and effectively to the SARS pandemic, he contends that the International Health Regulations, revised after SARS, undermined the WHO's coordination and cooperation functions, leaving it unable to respond effectively to future pandemics. Thus, says Benvenisti, the WHO's failure in responding to the COVID-19 pandemic "lies with the member states who designed it."

In an essay that considers broader systemic failures, *The Pandemic Paradox in International Law*, Peter G. Danchin, Jeremy Farrall, Shruti Rana, and Imogen Saunders identify three paradoxes that contribute to the international legal order's inability to effectively address the pandemic.<sup>3</sup> First, the "patriotism paradox" describes populist leaders who have withdrawn from the international legal order to protect state sovereignty. Such isolation, the authors argue, deprives the inhabitants of these countries of the benefits of a global response, weakening the capacity to externally project and internally protect national values. Second, the "border paradox" explains how closing national boundaries diverts attention from individuals who can freely travel but are just as likely to carry the virus with them. The result, ironically, is compromised security for domestic populations. Finally, the "equality paradox" reveals that, despite the virus being a global threat, persistent inequalities compound its impact on society's most vulnerable and uphold hierarchies antithetical to realizing human rights. Viewing the pandemic through these three lenses, the authors argue, should lead us to

<sup>2</sup> Eyal Benvenisti, *The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 AJIL 588 (2020).

<sup>3</sup> Peter G. Danchin, Jeremy Farrall, Shruti Rana & Imogen Saunders, *The Pandemic Paradox in International Law*, 114 AJIL 598 (2020).

reassess the pervasive tensions between freedom and social order and the increasingly fragile system of international law.

In *Executive Underreach, in Pandemics and Otherwise*, David E. Pozen and Kim Lane Scheppele contrast two opposing responses to the COVID-19 pandemic.<sup>4</sup> When executives overreach, they invoke emergencies to claim exceptional powers to curb individual liberties, marginalize political opponents, and degrade the rule of law. Concerns about such overreach have been leveled at many countries in the wake of the coronavirus. Yet Pozen and Scheppele observe that in other countries, including the United States and Brazil, executives have failed to sufficiently use their authority to address the pandemic. Because so much attention has been focused on the problem of executive overreach, the authors contend, scholars have been ill-prepared to identify and respond to executive underreach. Pozen and Scheppele define executive underreach and identify transnational trends that make it more likely to occur. They also outline the ways in which underreach may undermine constitutional governance and the international legal order, and they suggest ways to remedy the phenomenon.

How foundational legal rules may shift in response to the pandemic is the focus of Martins Paparinskis's essay, *The Once and Future Law of State Responsibility*.<sup>5</sup> Paparinskis considers how COVID-19 may change state responsibility for intentionally wrongful acts. He describes the existing rules of state responsibility, as articulated by the International Law Commission, and argues that the pandemic has the potential to disrupt some of these norms. Paparinskis first considers the possibility of a "communitarian shift" in how state responsibility norms are understood and implemented and then explores whether the gravity of the pandemic is likely to push those norms toward their "bilateral roots" in ways that further the interests of injured states. Whatever the precise evolution of state responsibility, Paparinskis sees the pandemic as presenting "a law-making moment."

Several essays in the Agora focus on international trade and the global economy. In *The Perils of Pandemic Exceptionalism*, Julian Arato, Kathleen Claussen, and J. Benton Heath examine the structural implications of defenses to trade and investment obligations premised on exceptions.<sup>6</sup> The authors argue that the pandemic reveals the weakness of such "exceptionalism," and the need for a new paradigm of justification in international economic law. State invocations of exceptions to justify COVID-19 response measures, the authors contend, pose two related risks: they reinforce the perception that competition-distorting policies are per se illegal unless they meet the strictures of such exceptions; and they expand the reach of trade and investment adjudicators into other areas of international and domestic law. The essay explores structural changes that could help manage future crises by recalibrating the relationship between economic liberalization and other values. These changes include focusing on identifying space for flexibility within primary trade and investment rules; reducing the outsized reliance on dispute settlement; and rethinking the commerce-first structure of international economic law by giving equal weight to values such as health and environmental protection.

<sup>4</sup> David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AJIL 608 (2020).

<sup>5</sup> Martins Paparinskis, *The Once and Future Law of State Responsibility*, 114 AJIL 618 (2020).

<sup>6</sup> Julian Arato, Kathleen Claussen & J. Benton Heath, *The Perils of Pandemic Exceptionalism*, 114 AJIL 627 (2020).

In *Trade Law and Supply Chain Regulation in a Post-COVID World*, Timothy Meyer considers the difficulties of securing domestic supply chains for medical equipment during the COVID-19 crisis as way to understand how WTO rules affect the security of supply chains in general.<sup>7</sup> Meyer argues that modern free trade agreements have not resulted in the diversification of supply chains, but instead made them more vulnerable because of a lack of control over where products are manufactured. This is due in part, he explains, to the agreements' weak requirements concerning rules of origin. Meyer also analyzes why states can only regulate supply chains during pandemics and cannot act more systemically prior to a crisis. These rules place WTO members in a dilemma—they must either wait for a crisis before addressing supply chain risks, or flout WTO rules in order to preemptively protect the supply chains. He suggests that free trade agreements should be reformed to have stronger rules of origin and to provide policy space for members to manage critical supply chain risks.

In *Short Supply Conditions and the Law of International Trade: Economic Lessons from the Pandemic*, Alan O. Sykes explains how governments have used export restrictions to address shortages of critical public health equipment, even though such measures are economically counterproductive and undercut global efficiency.<sup>8</sup> He explores why trade law facilitates, rather than precludes, governments' use of these "short supply" restrictions, noting that trade agreements authorize these restrictions in certain exceptions to treaty commitments, such as when necessary to protect public health. Despite being economically counterproductive, these provisions, he argues, promote the long-term stability of trade agreements by giving national governments an "escape clause" when domestic political pressure might otherwise lead to longer lasting violations or abandonment of treaty obligations.

In *A Global Leviathan Emerges: The Federal Reserve, COVID-19, and International Law*, Daniel D. Bradlow and Stephen Kim Park consider the role of the U.S. Federal Reserve system in shaping global financial reactions to the pandemic.<sup>9</sup> The authors argue that the Fed functions as a de facto global actor whose emergency monetary measures affect the welfare of millions of people across the planet. Yet the Fed is also insulated from political pressure and accountability and lacks clear guidelines in international law. Bradlow and Park explore the extent to which the international legal obligations of the United States apply to the Fed. While domestic institutions normally derive their rights and obligations from their home states and lack distinct international legal status, that approach, the authors contend, does not take sufficient account of the Fed's unique role in global governance. To find some limiting principles and guidance for Fed actions, the authors suggest applying principles of global administrative law or international public law, or treating the Fed like a transnational corporation.

Two Agora essays focus on the pandemic's impact on human rights. In "*Lest We Should Sleep*": *COVID-19 and Human Rights*, Karima Bennoune argues that both the pandemic and government responses to it have threatened nearly all internationally recognized human rights and aggravated longstanding flaws in the international system for protecting those rights.<sup>10</sup>

<sup>7</sup> Timothy Meyer, *Trade Law and Supply Chain Regulation in a Post-COVID World*, 114 AJIL 637 (2020).

<sup>8</sup> Alan O. Sykes, *Short Supply Conditions and the Law of International Trade: Economic Lessons from the Pandemic*, 114 AJIL 647 (2020).

<sup>9</sup> Daniel D. Bradlow & Stephen Kim Park, *A Global Leviathan Emerges: The Federal Reserve, COVID-19, and International Law*, 114 AJIL 657 (2020).

<sup>10</sup> Karima Bennoune, "*Lest We Should Sleep*": *COVID-19 and Human Rights*, 114 AJIL 666 (2020).

Human rights thought leaders, many from Western countries, have long focused on negative liberties to the exclusion of positive obligations; on civil and political rights to the exclusion of economic, social, and cultural rights; and on national governments to the exclusion of non-state actors. The pandemic, Bennoune contends, reveals the inadequacy of that approach, highlighting the need for governments to ensure rights, and the connections between all categories of rights as well as between individual and collective rights. After surveying the responses of various international organizations and human rights bodies, and countering attempts “to hijack . . . rights to oppose legitimate pandemic measures,” the essay concludes by advocating for a more holistic approach to rights discourse.

In *Pandemics as Rights-Generators*, Neha Jain argues that COVID-19 presents an opportunity to amplify the reach and depth of human rights, particularly for marginalized groups in society.<sup>11</sup> Focusing in depth on the rights of prisoners, Jain reviews a spate of soft law instruments and regional court efforts to protect the incarcerated. She concludes that such efforts suffer from “ad-hocism” and are prone to reversal, leaving the landscape “bleak and in need of an overhaul.” Jain envisions the pandemic as an opportunity for prisoners’ rights reform, and she describes three ways that rights discourse can be reframed to achieve meaningful change—epistemic reframing through science, consequentialist emphasis on public welfare, and a normative focus on positive duties. These reframing strategies, she contends, can help to address two kinds of bias that hold back human rights development: “The first is ignorance or denial of the lived reality of a marginalized group that is seen as the ‘other,’ and the second is the failure to translate that reality in terms that generate comprehension as well as compassion.”

In *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, Francisco-José Quintana and Justina Uriburu offer a conceptual critique of what they see as the international legal order’s inadequate ambition.<sup>12</sup> The authors challenge the restrained response to the pandemic by many international legal scholars and practitioners, in particular concerning the law of state responsibility. The focus of these actors on providing prompt and practical guidance, Quintana and Uriburu argue, has obscured how international law and institutions facilitated the underlying conditions that led to the pandemic and exacerbated its unequal impact. In addition, the authors note that while international law offers practical tools to resist threats to civil and political rights from authoritarian responses to the pandemic, these tools are less effective in protecting economic and social rights. These tools thus do little to address the unequal conditions that make the virus more lethal in some places and among some communities. Quintana and Uriburu advocate a turn away from modesty in favor of repoliticizing international law “as a terrain for struggle over alternatives and rival forms of governance and authorities.”

The final essay in the *Agora*, by Federica Paddeu and Michael Waibel, is appropriately titled *The Final Act: Exploring the End of Pandemics*.<sup>13</sup> The authors note that, while scholars have examined the point at which a pandemic begins, the end point remains unclear and underexplored. Beyond the difficulty of classifying a crisis with conditions that vary worldwide, a temporal discrepancy exists between when a pandemic ends as a biological

<sup>11</sup> Neha Jain, *Pandemics as Rights-Generators*, 114 AJIL 677 (2020).

<sup>12</sup> Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AJIL 687 (2020).

<sup>13</sup> Federica Paddeu & Michael Waibel, *The Final Act: Exploring the End of Pandemics*, 114 AJIL 698 (2020).

phenomenon and when governments and private actors cease their responses to it. These challenges, the authors explain, complicate the work of adjudicators who must decide when national governments are no longer justified in exercising the extraordinary powers during pandemics and other emergencies. Paddeu and Waibel survey several international bodies—the WHO, the European Court of Human Rights, the UN Human Rights Committee, and investment tribunals—and reveal divergence in their approaches to determining when emergencies end. Given these variations, the authors argue, adjudicators are ill-equipped to determine the end of the COVID-19 pandemic and, thus, to impose consistent limits on the emergency powers used to combat it.

\* \* \* \*

The essays in this Agora survey some of the many challenges, as well as potential opportunities, that COVID-19 is creating for the international legal order. Writing about these issues in the midst of the pandemic has both advantages and disadvantages. An advantage is that we know first-hand how this moment feels and how it compares with the state of the world prior to the pandemic. A disadvantage is that we lack the broader perspective that can come with hindsight, and our assessments are inevitably affected by the immediacy of the particular events we are experiencing. We nevertheless hope that the diverse arguments and insights offered in these essays will be useful both for understanding this fraught moment in time and in generating ideas for the future.