

An interview with Anne Peters about the challenges and opportunities presented by Covid-19 for international relations and international law

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On Vaccine Nationalism, the ‘Slowbalisation’ and Zoonotic Diseases – Part I

Muratcan Sabuncu: *Professor Peters, thank you for giving me the opportunity to discuss with you the coronavirus pandemic which has become one of the most important challenges that we face. I would like to begin our discussion with the most recent and promising news. A handful of vaccines have now achieved regulatory authorization or approval. Among them, the vaccine developed by Pfizer and Germany’s BioNTech has been found to be 95 per cent effective. Although several world leaders, including UN Secretary-General Antonio Guterres, President Xi Jinping of China, President Emmanuel Macron of France, and President Moon Jae-in of South Korea, speaking at the opening of the 73rd World Health Assembly (WHA) in May, referred to future Covid-19 vaccines as a “global public good”, there is a serious potential of vaccine nationalism. Do you think that a “my country first” approach will prevail, as it was the case with the 2009 pandemic of the influenza A virus H1N1, also known as swine flu, when wealthy countries bought up all the supplies? Do you think that humanity should have a fair and equitable distribution of good and harm? The EU has agreed to buy up to 300 million doses of the vaccine. Moreover, some countries, including the UK and the US, have already started their vaccination programs. Does that indicate the unequal distribution?*

Anne Peters: The WHO Director General has warned against a “vaccine nationalism”. And it currently looks as if a public-private partnership consisting of states, intergovernmental organisations (such as WHO, the World Bank, and the EU), the private sector (notably the firms developing and producing the vaccines), charities (notably the Bill and Melinda Gates Foundation), and NGOs are able to prevent this. The platform to implement sanitary solidarity is Covax. Covax is run under the aegis of GAVI (the “Global Alliance for Vaccines and Immunizations”) which is formally a foundation under Swiss law based in Geneva. Currently, 180 states which represent 90 percent of the world population participate in Covax (including the EU on behalf of its member states and China, but so far not the US and Russia). The participating self-financing states commit themselves to purchase vaccines through the facility which will then be distributed fairly also in low income states. In parallel, high and middle income states have ordered

vaccines for their own populations independently – actually many more doses than those Covax participants have purchased through the facility. The prices have been quite volatile, dictated by the market logics, with the vaccine itself being a scarce good.

In contrast, immunity is a “global public good” at least in the wider sense prevalent in the United Nations and the WHO. With this buzzword, the global institutions signal that immunisation is a task in the global public interest, to which all should contribute in a spirit of solidarity. WHO and others have already suggested various ethical frameworks to secure a fair and equitable allocation of the necessary medical products. In contrast, hard legal rules on the global vaccine distribution are not easy to identify. The international human right to health (Art. 12 ICESCR) offers some guidance, because it imposes moderate extraterritorial obligations on state parties. According to the UN Human Rights Committee’s General Comment No. 14, state parties must respect the enjoyment of the right to health in other countries. This seems to imply that international law prohibits the hoarding of vaccines. It could thus be argued that states may buy only the amount needed to bring the transmission rate (R_t) down to 1 in their country. Moreover, depending on the availability of resources, states must “facilitate access to essential health facilities in other countries, wherever possible, and provide the necessary aid when required”, says the mentioned General Comment. This might mean that rich states are to some extent legally obliged to donate vaccines to poorer states, although precise parameters are lacking. And, of course, moral and political considerations strongly speak in favour of such aid, especially in the current context of emergency.

Another legal obligation is the WTO-based duty not to prohibit firms based in the country to export the vaccine. Art. XI GATT prohibits export restrictions, but Art. XI(2) allows members to prohibit temporarily exports “applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party”. It would seem that the vaccine is “essential” in this sense. During the pandemic, WTO members already invoked this clause to justify the export bans on masks and other medical goods. To conclude, states have a special responsibility towards their own populations, as a corollary to their sovereignty. Democratic states are moreover formally accountable to their citizens. However, all states must also, according to their capacities, work towards a global, fair and equitable distribution. We need to discuss openly what this exactly involves, and which degree of “priority” to the own nation is morally and legally admissible.

MS: *The scientists who developed the Pfizer/BioNTech Covid-19 vaccine are a Turkish-German power couple. Can this potential vaccine, which is an immigration success story, become also a cure for the rising xenophobia?*

AP: I am not sure whether xenophobia is rising. According to Eurobarometer polls, the proportions of Europeans who see immigration as a “problem” is mounting in some states but going down in others. In any case, unfortunately most people do not seem to know who is behind BioNTech. This beautiful, encouraging, and heart-warming “personal” story should be spread much more!

MS: *Even before the promising results of the future Covid-19 vaccine, in the face of global shortages, many countries hoarded supplies of respirators, surgical mask, and gloves for their own hospital workers' use and imposed, in the first 4 months of the pandemic, export controls on local supplies of personal protective equipment, ventilators, or medicines. Has Covid-19 created the potential to encourage countries to become self-sustaining? Can this lead, in the long run, to deglobalisation, diminishing interdependence and integration between countries?*

AP: The Covid pandemic is a quintessential globalisation problem. The speed and spread of the contagion were due to the mobility of persons. The dependence of societies on global value chains makes them more vulnerable: The lock-downs in the North dampened consumption and led to cancellations of sales orders which harmed the workers in the cheap production states. Concomitantly, the northern states were suddenly cut off from their supplies with whose production had been outsourced. Naturally, this sudden shock led leaders to reconsider national autarky. In addition, the reflexes of hoarding, closing borders, and the export bans on the medical products built on prior nationalist trends. The populist “my country first” attitudes had ironically been fuelled by the globalisation-induced anxiety of the ordinary labourers in the rich states who in fact suffered or gained little in the global competition but rather faced stagnation of income and job insecurity due to the outsourcing of production.

However, the initial closure moves have been revised and have been replaced by more sophisticated entry/exit schemes with quarantine obligations. Also, we see many examples of inter-state cooperation ranging from donations of equipment to treating patients from other countries in intensive care units. States seek to enhance their international reputation and gain influence by advising and assisting others. This shows how important good standing in the international community is for states. Although the hyperglobalisation of the 1990s and early millennium might have meanwhile been replaced by a “slowbalisation” (as the Economist called it), it is very unlikely that globalisation will be reversed. Consumers have become accustomed to cheap goods from all over the world, investors will not easily pull out their investments from abroad, and the pictures of the lifestyle in rich parts of the world will continue to attract migrants. And importantly, more than e.g. the abstract threat of climate change, the pandemic forces us to recognise that all humanity sits in “one boat”, suffers one fate, and can only go it together.

MS: *The European Union has been always seen as one of the most important economic and political integration projects with all the symbols showing its evolution into a federalist direction, including the EU flag, anthem and European single currency. Barriers to the movement of people have appeared even within the EU and lack of solidarity between member states facing the pandemic have been criticised by many. Does it show the fragility of the Union?*

AP: The somewhat erratic closures of national borders inside the EU during the first wave were a strong negative signal. However, the symbolic value of open borders could not and should not override the practical necessity. The stand-still of populations (“herds”) is a key principle of epidemic management. The reduction of mobility and the closing off of

smaller groups is not intrinsically connected with nationalism. In fact, many sub-national entities, regions, communities, cities, are pursuing the same geographic containment strategy. At the same time, the travel bans bring back to mind the practical (both economic and personal) utility of pan-European mobility which had been taken for granted and had become too self-evident. A re-appreciation of this mobility more might lead to a renewed prestige of the EU. Also, the pandemic has motivated leaders in the European Council to adopt a historic 'Next Generation EU' recovery instrument' which allows the EU to borrow €750 billion for financing non-repayable support and loans for the EU member states. This might be a key step towards a fiscal Union.

MS: *Domestic authorities have adopted measures including a broad spectrum of restrictions, from quarantines and isolation of individuals, to travel bans and lock-downs. We have been observing declaration of state of emergency after terror attacks and national disasters. Are we assisting to the birth of a “sanitary state of emergency”? Has the state of emergency, which by definition is temporary, the potential to become permanent? Are we capable of balancing sanitary measures with the standards of Rechtsstaat and human rights obligations?*

AP: Especially in the first wave of the pandemic, many states resorted to emergency-type measures available under their domestic law which usually involves an empowerment of the executive branch to regulate through orders and decrees, as opposed to waiting for the parliaments to pass ordinary statutes. Many states have moreover officially declared a public emergency under the relevant international and regional human rights treaties which then allows them to derogate in a summarial fashion from many human rights such as freedom of assembly or family life.

The quick declarations of public emergencies carry the danger that states merely pay lip service to the rule of law, as an empty ritual, and then do what they want without having to explain and justify their measures. However, legally speaking, even the human rights treaty-based public emergency is no law-free zone but policed by the international human rights monitoring bodies. These have pointed out that the declaration of such a public emergency but must satisfy material and formal requirements, and must notably be temporary. Other states remained in the normal mode and curtailed human rights on a case-by-case basis. For example, travel restrictions are a legitimate and lawful restriction of the right to free movement when they serve the legitimate aim of protecting public health, and are necessary and proportionate to that aim, that is when they strike a fair balance between the public interest and the exercise of the fundamental right. In the end, the law as such cannot prevent that states or any other authority violates also these rules. The best laws need to be applied by human beings, and there is never a full guarantee that these humans will not simply break or discard the laws.

The interview was conducted for the Turkish Newspaper T24 and will be jointly published by Verfassungsblog and T24.

The second part of the interview can be found [here](#).

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On Vaccine Nationalism, the ‘Slowbalisation’ and Zoonotic Diseases – Part II

MS: *Some countries have done better than others in dealing with the crisis so far. What do you think the reasons could be to tackle the crisis better? Is it a matter of regime type? Is populism a challenge for an effective response to the pandemic?*

AP: The pandemic provides a real-life experiment of state performance, and research comparing the different types of governance is already under way. It is too early to give a definite answer whether and which regime types are doing the better job. Authoritarian states such as China were able to react more quickly and drastically. On the other hand, autocrats failed because they cannot simply manipulate and control the facts. Examples are Russia and Iran. In contrast, in states that act transparently, which facilitate discussion, critique, which allow for challenges in court, and which listen to scientists, people tend to be more reasonable, trust in recommendations and laws, and comply voluntarily. However, both the overall societal culture and the prior experience with an infectious disease might count most. Asian states, both democratic and undemocratic ones, have been doing a good job first of all because they have learnt from SARS, and maybe also because people are more community-oriented and more ready to “sacrifice” by adapting their life-style than in the stereotypical Western states (as epitomised by the US). In the end, health infrastructure and professional and logistical competence, together with voluntary individual compliance, seem to be the crucial success factors – and these are not directly but probably indirectly connected to regime type.

MS: *Can countries be held responsible for their ineffective response to the pandemic: missing, delayed or not fully reliable information related to it? Your answer could help to understand the controversy between the US and China, Donald Trump having accused the Chinese government of a cover-up in the initial stages of the pandemic.*

AP: Under the World Health Regulations of 2005, China was obliged to notify events within its territory which may constitute a “public health emergency of international concern” (PHEIC) within 24 hours to the WHO. The state’s assessment of the facts must be based on a WHO assessment and decision-making tool. The same international legal obligations are incumbent on all 194 WHO members states (basically all states of the

world). The exact timeline of events is still under investigation. The WHO states that its Country Office in the People's Republic of China picked up a media statement by the Wuhan Municipal Health Commission from the latter's website on 31st December 2019. China officially notified the WHO on 3d January 2020 on the cluster of cases of 'viral pneumonia of unknown cause' identified in Wuhan.

Another question is whether quicker information would have changed the spread of the disease, because many other actors, including the WHO itself, might have contributed to this spread by delayed and too weak responses. However, such considerations would not alleviate the international responsibility of a state for late or missing notification, because the obligations to notify are result-independent. They are detached from possible material outcomes, because causality would be – as we see in the case of the pandemic – too difficult or impossible to establish. A state cannot exonerate itself by arguing that even with the utmost diligence it could not have prevented the evil. It is exactly the point of such procedural obligations to foster a culture of transparency which is generally helpful for mitigating health risks.

The WHO General Assembly launched an investigation in May 2020 to examine the reproaches of insufficient information and reactions (of all states, not only China). The "Independent Panel for Pandemic Preparedness and Response" has been mandated to determine the accurate chronology of events and activities in relation to the COVID-19 pandemic, including the specific responses by national governments. The Panel will present its findings to the WHO in May 2021.

MS: *The World Health Organization is the directing and coordinating authority on international health work. How do you consider its performance during the pandemic? Has it been acting as a leader or a low-profile organisation in the current crisis? US president-elect Joe Biden says he will rejoin the WHO on his first day of presidency. Has the re-accession the potential to influence the performance and effectiveness of WHO?*

AP: The WHO has a strong pedigree. Once people began to travel systematically, the transboundary spread of diseases became a structural issue that demanded international cooperation. It is therefore no surprise that a very early proto-international or hybrid organisation was the Health Council of Constantinople, founded by the Sultan in 1838. The WHO, established in 1946, has no power to impose lock-downs or any other measure, and it is no world health police. The Health Regulations of 2005 were adopted in reaction to the SARS crisis of 2003, and they are binding law. However, they only foresee that *states* must develop response capacities (emergency preparedness), inform the WHO, and collaborate. In addition, the Regulations empower the WHO Director General to issue temporary recommendations, for example on border closures. The powers (and the budget) given to the WHO are fairly meek, and this was on insistence of the member states themselves who wished to retain their "sanitary sovereignty". The WHO cannot be better than the member states which kept the organisation's profile low and which have frequently not followed the WHO recommendations.

A recent incident may serve as an example: Many observers have harshly criticised the WHO for the suppression of a report on Italy's First Response to Covid-19 of 13 May 2020. This WHO report had mentioned Italy's failure to update its pandemic preparedness plan. It was removed from the organisation's website after a few days. This removal can be traced back to the WHO Assistant Director Dr. Ranieri Guerra. He is an Italian national and was responsible for pandemic preparation in Italy from 2014 to 2017. Although he is professionally obliged to loyalty only to the WHO he is serving now, his past role in the Italian civil service gave rise to a conflict of interest for him which then probably motivated a move which might appear as self-censorship of the WHO. This self-censorship is especially problematic against the background that Italy had donated 10 million US dollar to WHO shortly before the publication of the report. The episode illustrates all structural handicaps of international organisations: They are dependent on their member states with regard to their legal powers, their staff, and their budget. The public underfunding then leads to a dependency on private funding which risks creating additional problems such as lacking accountability and conflict of interest. On top of it, the member states use the WHO as a scapegoat – which is patently unfair given the weak autonomy it enjoys. I also find the warnings against rising Chinese influence in the organisation partly hypocritical, because European States and the US have long secured themselves a disproportionate influence on other international organisations, starting with the UN Security Council over the World Bank and the International Monetary Fund, to name only a few.

A return of the US to the WHO is an important step, not the least because it pays 24 % of the ordinary membership fees. Moreover, all states must consider increasing the organisation's funding and revising the International Health Regulations in the direction of stricter and binding obligations, beyond the procedural ones. Importantly, they should establish a robust mechanism for monitoring member state compliance, with real sanctions for noncompliance. Such reforms will be acceptable only if they are accompanied by a democratisation and politicisation of the WHO which would involve more transparency, participation, and recall mechanisms in its own workings.

MS: *Covid-19 is a zoonosis, an infectious disease that has jumped from a non-human animal to humans. It is however not the first zoonosis in human history, as other recent diseases such as HIV and SARS have jumped from a non-human animal to humans. Do you think that Homo sapiens should reconsider its relation with other animals? Do you think that the Anthropocene epoch, characterised by Homo sapiens becoming the single most important agent of change in the global ecology, can evolve by embracing biodiversity with more humility? Can international law mechanisms help with that?*

AP: I think that Homo sapiens urgently needs to reconsider its relations with other animals and nature more generally. The Intergovernmental Platform on Biodiversity and Ecosystem Services recently recalled that around 1.7 million currently undiscovered viruses are thought to exist, of which 540 000 to 850 000 could have the ability to infect humans. The next zoonosis is therefore only a matter of time. Ruthless intrusion into the wilderness, for example the clearing of tropical forests (e.g. for livestock pasture), brings

humans in contact with the pathogens. A maybe even more urgent problem is antimicrobial resistance which is chiefly owed to the overuse of antibiotics in factory farming.

We therefore need to pursue a “One Health” approach which acknowledges that the health of human and non-human animals is interdependent and therefore can only be secured together, not in isolation. For example, during the Covid Pandemic, not only have bats originally infected Chinese clients of the wildlife market, but also minks in Dutch and Danish fur factory farms contaminated human workers. In consequence, besides the millions of humans who suffered and died, 21 million minks were killed and trashed within a few weeks in the spring. Although “One Health” is not yet an established legal principle, it has become a policy guideline for international organisations. WHO, the Food and Agriculture Organisation (FAO), the World Trade Organisation (WTO), and the World Organisation for Animal Health (OIE) have begun to collaborate along this line. Necessary measures include the radical reduction of stocking densities in farms, the roll-out of “artificial” meat created from stem cells (as recently brought on the market in Singapore), the substitution of animal materials such as leather and fur by synthetic fibres, and a prohibition of “bush meat.” The four mentioned international organisations could form the institutional hub for international standard-setting in this direction.

MS: *The pandemic has reminded that viruses do not “respect borders” that only exist in humans’ imagination and are thus fictive. To conclude the discussion, I would like to ask your thoughts on the multilateralism in addressing global crises which are not limited to the current Covid-19 pandemic. Do you think global problems need global solutions?*

AP: Roughly speaking, yes. Global problems need global solutions. Think of the planetary warming, mass migration, and terrorism, to name just a few problems of global proportions. However, we also need to act locally in order to address the “globalised” problems at the roots. The legal principle which accommodates this strategy is subsidiarity. This principle demands that the smaller units (for example states, or even regions or cities) which are closer to the ground, know the facts better, and can react more swiftly, should be competent in the first place. Only if the smaller political unit cannot tackle the problem effectively, the higher unit must step in.

It is also necessary to allow for a regulatory competition in order to try out and find good legal approaches. If one state, for example, closes schools, and the other state prescribes masks, we can compare the results and see which approach works better. However, the regulatory competition must not be unbridled but may only take place inside the four corners of meta-rules which regulate this competition, too. For example, the universal principle of human dignity would seem to prohibit a legislative approach which just lets the elderly die in order to keep the economy running. And finally, the pandemic is a “weakest link-game”: One failing country will endanger the health security of all humans. And therefore, in the end, we need a global approach.

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