The Law of the WHO, COVID-19 and the Multilateral World Order

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A new virus, SARS-CoV-2, emerged in the Chinese city of Wuhan at the end of 2019. Infected persons developed an atypical form of pneumonia, later known as COVID-19. The pathogen created a pandemic, with fatalities throughout the world, and also led to the adoption of restrictive measures which were, until recently, unthinkable, as well as fostering new political conflicts. Even the path of the multilateral order in its current form is at stake. For a take on these issues under international law, the legal regime of the World Health Organization (WHO) and its response to the pandemic provides an insightful access.

The WHO has given substance to the current multilateral order since 1948 and, after the fall of the Berlin Wall, even became a beacon of hope for global governance that truly caters for humans. Its powers are more extensive than that of most other global organizations. It certainly cannot impose lockdowns, nor distribute hospital beds globally, or even prescribe medical treatments to individual patients. However, it can enact binding regulations by a majority of vote of its World Health Assembly, which is the main decision-making body composed of representatives from its Member States. In 2005, under American leadership, the Assembly approved the International Health Regulations (IHR), which sets a detailed guidance for international cooperation in the event of epidemics and pandemics. It constitutes, as one can see in the current pandemic, an indispensable component of any global response to public health emergencies. Moreover, the WHO has decided to label the current crisis as a pandemic. This way, it provides a cognitive framing for the governments of its 194 Member States, thereby helping their handling of the crisis. The WHO has also published key recommendations on how to deal with the crisis, and its silence on certain issues is also of great legal importance.

Of particular relevance for the WHO's embedding in the current world order of liberal multilateralism is the relationship of its rules and recommendations with regards to human rights, particularly those of the International Covenant on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), respectively. The most critical issues are currently measures imposing mandatory social distancing. As in previous emergencies the WHO has recommended the immediate isolation of infected persons, and quarantine of those who were in contact with them. However, the organization has not issued a recommendation to impose mass quarantines or even *lockdowns,* although this specific tool is included in the list of possible measures under Article 18 IHR. This approach displays a sensitivity towards human rights, and is more fleshed out in the WHO's current interim guidance on the matter.

Mandatory isolations and quarantines do severely restrict multiple liberties. Given this severity, for such measures to be compatible under human rights, a general risk to society from the pathogen is not sufficient. Rather, the general requirement is that the affected person presents an individualized risk. Nevertheless, in the current pandemic, several countries have imposed so-called "lockdowns" which come without such individual assessments. Some fear this may be a sign of a more general trend towards a more illiberal world order. At the same time, there is no question that human rights obligations to protect human lives require implementing effective measures for this purpose. One of these human rights is the right to health, as enshrined in Article 12.2(c) of the ICESCR.

Accordingly, domestic public authorities must make highly sensitive decisions. Recommendations from the WHO may be of importance for their human rights compatibility, as shown in Article 26 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ("Siracusa Principles"). Against this background, it is extremely relevant for the further development of a liberal world order that the WHO does not openly position itself in this matter. While it praised the governments of China and Italy for their lockdowns, so far it has only recommended, as a matter of general guidance, individualized measures and has stated that the most severe restrictions should be squared to the specific contexts, including the distinct legal frameworks. Therefore, the WHO does not claim to settle the politically, and also constitutionally, very sensitive question of lockdowns. That seems wise: the multilateralism of the current world order does not advocate global institutions' takeover of the central functions of states. The proper function of global institutions is a cooperative complementarity in light of common challenges and goals.

The President of the United States puts exactly this role of the WHO into question. He has argued that the organization is responsible for the extent of the pandemic, has hindered the adoption of effective measures and became an instrument of Chinese policy. Thus, he wants to heavily weaken the WHO´s role by withdrawing crucial financial support.

It is indeed still unclear whether in December 2019 the Chinese government fulfilled its obligation under Article 6 of the IHR, which mandates to notify the WHO within 24 hours of „all events which may constitute a public health emergency of international concern within its territory". There are substantiated reports of delays in the process of information-sharing at the beginning of the SARS-CoV-2 pandemic. It also seems possible that the WHO did not forcefully insist on the required clarifications by China. However, it is hardly plausible that this has been the only factor leading to "so much death" in the United States, as its President claims. President Trump has yet to produce any evidence of a causal link and, given the U.S. government´s inexplicable delay in adopting measures against the pandemic, which only came about in March, this line of attack holds little water.

Trump's second allegation relates to the WHO´s recommendation to restrain from adopting travel restrictions in the current crisis. Apart from the fact that this recommendation has hardly been followed, it is legally unsound to argue that this non-binding recommendation could have caused harm. Article 43 of the IHR clarifies that "additional health measures" of states remain permissible. The only obligation is to inform the WHO about their adoption, as well as to justify the more far-reaching restrictions with a scientific basis.

President Trump's anger can be better understood against a background of a geopolitical competition with China, in which the United States is not boding well at the moment. The most recent Chinese propaganda shows how its authorities aim at demonstrating their political model's superiority over the West, and especially over the United States, through a better management of the pandemic. The Chinese government now presents itself as a model that should be followed across the globe. Accordingly, one can assume that it expects to inform the global standards of good governance which multilateral organizations should advocate to other states in the world.

It is therefore noteworthy that the officials of the WHO, including its Director-General, have praised the Chinese government's decisions as well as their officials' work. However, they have done the same with the Italian government and even the U.S. President himself. Such praise needs to be seen in light of the fact that the WHO as an international organization does not enjoy the powers of a world government, but remains highly dependent on the good will of Member States. What is truly important in this context is that the WHO has not recommended on all states to go "the Chinese way" regarding the massive restrictions on liberties.

Overall, most of the academic specialists and commentators of global health give generally positive testimony on the WHO's response to the pandemic under Director-General Ghebreyesus so far. Of course,

there are issues to be clarified, for instance, the reasons why the Director-General did not declare a public health emergency of international concern already on 23 January, 2020, but only on 30 January. Deference to China may certainly be one explaining factor. Also a lack of clarity in the WHO's use of the term "pandemic" (as seen here and here) led to confusion amongst Member States on COVID-19's nature. For these and other reasons, after the pandemic subsides, an independent Review Committee (based on Article 50 of the IHR) should scrutinize the measures adopted by the WHO, as was already done after the H1N1 pandemic of 2009-2010 and the West African Ebola crisis of 2014-2016.

The WHO should moreover play a clarifying technical role in the competition between political regimes with the aim to advance the global discourse on how to better protect against pandemics in the future. For this goal, it should, among other things, provide reliable figures on how many people have succumbed to the disease in different countries. As always, the WHO depends for that on reports by national authorities, and governments are likely to be tempted to embellish these figures. But Article 9 IHR enables the WHO to take into account not only official reports, but also "other reports" related to the on-the-ground situation in a country. Since, even in China, social media reports on deaths can help to identify inconsistencies in official numbers, the WHO can and should look into "other reports", request clarification from state authorities and, if necessary, publicize non-cooperation (Article 10 IHR). Such transparency and visualization of "blind spots" serve the interests of global health.

This would entail a welcome development in the WHO's approach towards its Member States. In the past, it has mostly relied on reports by national authorities, leading to dire consequences. For example, during the initial stages of the West African Ebola crisis in April 2014, the WHO limited its assessment to the Guinean government's inaccurate accounts and refused to consider reports by NGOs, namely *Médécins sans Frontières*, on the severity of the outbreak. The resulting delay in declaring a public health emergency of international concern did not help its credibility.

Lastly, both Germany and Europe should not remain passive during this global regime competition and rather contribute in shaping the future path of the WHO. Indeed, pursuing a multilateral world order based on the respect of human dignity of every person is at the core of German *raison d'état* as well as a core constitutional principle of the European Union according to Article 21, paragraph 1 TEU. The WHO, as shown clearly by the ongoing pandemic, is an essential part of this multilateral world order. This entails, among other things, encouraging the organization to fully live up to its role for the multilateral world order, as well as supporting the organization in its current financial predicament, caused by the irresponsible withdrawal of the US funding.

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