Pandemics without Borders?

Reconsidering Territoriality in Pandemic Preparedness and Response Instruments

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The COVID-19 pandemic has (yet again) disclosed that, in contemporary international law, the notion of borders resembles a distinct emanation of legal fiction, i.e. 'something assumed in law to be fact irrespective of the truth or accuracy of that assumption'. This characterization of international borders holds particularly true with a view towards managing, containing, and countering the spread of highly contagious pathogens: especially in the context of responding to the global COVID-19 pandemic, it has hence become apparent that the traditional conception of borders as physical frontiers has been rendered somewhat moot. On the contrary, the pandemic experience has proven that a more flexible, fluid, and functional understanding of (international) borders might be warranted, also with a view towards (re-)conceptualizing international health law.

The insinuated conceptual realignment of borders in international (health) law hence requires scholars and practitioners to relinquish the hitherto applied focus on territoriality. The classical reading has thus perceived borders primarily in physical terms, i.e. construed as rather static lines of division between delimitable entities with defined points of entry, such as harbours or airports, where selected border measures might be implemented. This reductionist sympathy of borders as stable physical frontiers, however, neglects their multi-dimensional and complex character, various instances in which borders have proven rather porous and fragile, as well as the multiple ways in which borders 'are not necessarily where they are meant to be according to the conventional inside/outside model' (Vaughan-Williams 2008: 63). While we ought to take note of certain *sui generis* cases in which geographically determined borders are (still) synonymous with contemporarily applicable borders (such as, *inter alia*, in the case of Australia), it is thus about time to thoroughly re-examine and, contingently, re-conceptualize the notion of international borders for the purposes of pandemic preparedness and response.

When the Special Session of the World Health Assembly will gather in November 2021 to 'consider developing a WHO convention, agreement or other international instrument on pandemic preparedness and response', it therefore might wish to re-examine the manifold effects that have been caused by the imposition of border measures, also during the COVID-19 pandemic, and to ponder contingent avenues to improve the international community's responsiveness towards future pandemic outbreaks. In deliberating a future international treaty or other instrument, this contribution posits, the World Health Assembly should thus refrain from further designating border action as 'additional health measures' in the meaning of Article 43(1) of the 2005 International Health Regulations, thereby opening a contingent strategic space, which might be unilaterally embellished by single States. Rather, it is suggested here that any future international treaty or instrument should re-emphasise a return to the original 2005 IHR framework's overall alignment, which put particular emphasis on international cooperation in fighting globally spreading diseases, including by engaging (and complying) with the quasi-compulsory reporting mechanism under Article 6 2005 IHR. Rather than allowing for States to impose unilateral measures, including such unfolding their effects immediately at the border. While it is hence acknowledged that single States that have imposed different kinds of border measures, it remains unclear whether and to what extent positive developments, e.g. a decrease of infec-

tions or mortality rates, might be directly attributable to the imposition of border measures. Beyond that, this insinuated re-orientation would constitute an important step towards mitigating one of the most far-reaching conceptual flaws inherent in the 2005 IHR, namely that – despite the WHO's overall preference for enhanced multilateralism – it maintained a discreet, yet formative 'Westphalian' (Fidler 2003: 485) element, allowing States to impose unilateral border measures, including border closures, under the heading of Article 43 2005 IHR in conjunction with Article 3(4) 2005 IHR, the latter highlighting States' 'sovereign right[s] to legislate and to implement legislation in pursuance of their health policies'.

Why is that necessary, one could ask? Well, if COVID-19 has taught us one thing, it is that pathogens do not heed to human-imposed borders, neither domestically nor internationally. This fact protrudes even more in an ever more globalized world with inter-continental flights, open-border regional economic areas, and overall increased human mobility and interaction. Notwithstanding that selected sanitary measures implemented at defined points of entry – for example, compulsory testing regimes at airports or imposed quarantine measures – have crystallized as useful early-warning instruments aiding in managing disease outbreaks, our previous (legal) understanding of international borders has proven to be rather obstructive: the observed renaissance of States imposing unilateral border measures as a means to counter the spread of COVID-19, including the closure of borders, has caused wide-spread and detrimental ramifications, *inter alia* for international trade and commerce, for the maintenance of international supply chains, as well as for human mobility (including medical professionals) – not to mention profound human rights-related challenges, including with a view to refugees being denied entry at the border. While acknowledging certain isolated successes in limiting the spread of *inter alia* COVID-19, any future international treaty or instrument on pandemic preparedness and response should thus refrain from further perpetuating an understanding of international borders that is primarily based on considerations of territoriality – rather, it should ensure that borders are no longer a constitutive element determining the international community's effort of fighting the spread of dangerous diseases.

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