Introduction

Makane Moïse Mbengue and Jean d'Aspremont

International lawyers have always shown a great confidence in their ability and that of their craft to change and manage the world according to preferences and necessities they define. And they have generally found in the experience of crises a formidable confirmation of their power to intervene and manage the world. It is no surprise that crises have been a convenient narrative for international lawyers to reaffirm their managerial power and that crisis narratives have continuously populated the literature and the case-law for more than a century.

As the world emerges from a very severe pandemic and prepare to a severe climate catastrophe, crises narratives are back in international law circles. Yet, as crisis narratives again dominate the international legal discourse, there is a strong sense that we have been here before and that the current pandemic and upcoming climate catastrophe may be just crises like all those which international lawyers capitalize on to reaffirm their managerial ambitions. Crisis narratives seem to be a very mundane referent of the international legal discourse. At the same time, the pandemic as well as the upcoming environment catastrophe cannot be dismissed as part of a certain ordinariness of the international legal discourse. There seems more to them than just the crisis narratives that the pandemic as well as the upcoming environment catastrophe generate. Such crises seem to seriously bear on the functioning of international law and international legal institutions, the meaning they convey, and the vocabularies around which international law is articulated. International law, the international lawyers and the international legal discipline seem to be simultaneously craving for crises and battered by crises.

It is the purpose of this collection of short essays to reflect on this fundamental ambivalence permeating the way in which international lawyers, international law, and the international legal discipline engage with the recent Covid 19 pandemic and the upcoming climate catastrophe.

This volume includes nineteen short and highly self-reflective essays by a diverse range of junior and leading international lawyers. They offer new and original reflections on international law and its relation to crises. Together these essays provide a unique stocktaking about the role, limits, and potential of international law as well as the worlds that are imagined through international lawyers' vocabularies.

touches on the role of resistance at times of crisis in bringing about change in the international legal order. It concludes with some final reflections.

Drawing on the work of Hillary Charlesworth, Frédéric Mégret's chapter reflects on what it describes as the « crisis mode in international legal scholarship,” a way of doing research that is largely constrained by the exigencies of the moment to which international lawyers must attend urgently. For Frédéric Mégret, COVID provides just such a crisis, one that reveals much about the nature of international legal scholarship. For him, the question in this context is less “what can international law do to alleviate the COVID crisis?” but “what does the COVID crisis say about our modes of knowledge production?”

Makane Moïse Mbengue claims in his chapter that the COVID-19 crisis offers an opportunity to shape new narratives of solidarity. Africa has been at the forefront of such revisited narratives on solidarity. His chapter explores, in particular, the narrative developed by President Macky Sall of Senegal which highlights two facets of crises narratives: narratives *on* the crisis and narratives *of* the crisis. In Makane Mbengue's view, the COVID-19 might serve as a momentum to build a new international order. However, the new international order should not be based on a hegemonic perspective; it must be inclusive and allow to rebuild a new global partnership within the international community that takes into account the needs of both developed and developing nations.

For Jean d'Aspremont, international law lives off crises, lives its crises, and lives in crisis. International law is a discourse for crisis, about crisis, and in crisis. In short, international law is a crisis discourse. In that sense, engaging with international law from the vantage point of crisis hardly adds anything, let alone proves novel. International lawyers are the masters of a discourse that is all about containing, making, and surviving crises in an interventionist, and managerial spirit. Against this backdrop, the very extensive literature that burgeoned following the outbreak of the COVID-19 pandemic is nothing but business as usual for a crisis discourse like international law. And yet, as this paper tries to demonstrate, should international law let the looming climate catastrophe – as well as the calamitous consequences of the measures necessary to avert it entail – be absorbed in its crisis narratives and in what is called here its ‘normally abnormal normality’, international law would be condemned to wordlessness.

Anne Peters begins her chapter by recalling that an infectious disease such as Covid-19 hits with disproportionate negative effects the poorer populations and thus exacerbates the wealth and income gap inside and across states. As previous diseases, she argues, the pandemic is both a driver and an outcome of international relations. Against the background that the foundations of international law have been laid by infecting the “others”, and that notably

zoonoses have stimulated institution-building on the international plane, it is not out of the question that the Covid-19 pandemic will trigger developments in international law. The normative proposal that comes with her chapter is to modify and operationalise the so-far underdeveloped One Health approach, informed by the international constitutional principle of solidarity.

In his chapter, Yuval Shani wonders whether the COVID-19 crisis has the potential for generating a “constitutional moment” or a “tipping point” for the development of international law separating between epochs or significantly accelerating already-occurring trends. Discounting serendipitous changes in the course of history (the ‘unknown unknowns’ of historical change), such a question, according to the author of that chapter, invites an assessment of whether a structural change in international law can be envisioned or required in the near future, or whether the current crisis might facilitate such a change or accelerate existing trends going in this or the other direction. For Yuval Shani, if the answers to these questions are in the negative, then the reaction to the COVID crisis is likely to showcase ‘more of the same’ for international law. Building on works by Yuval Noah Harari and Yaron Ezrahi, this chapter suggests that the pandemic and the response to it may help to renew and reorient efforts to base the national and international policies aimed to tackle the major challenges confronting the world in the 21st century on science.

In her chapter, Eliana Cusato considers some implications of the narrative framing the COVID-19 pandemic as an international peace and security issue, which can be seen as the epitome of crisis narratives. If ‘war talk’, as other crisis discourses, allows for a simplified normative agenda, she wonders, what gets elided in such accounts of the pandemic? What does this exclusion tell us about international law and lawyers? Using the concept of structural violence, her chapter sheds light on the socio-economic-ecologic violence that pre-exist and persist beyond the COVID-19 ‘crisis’ and that the vocabulary of war/insecurity conceals. The chapter also argues that the narrative framing the virus as the ‘enemy’, obscures the complex interconnection between humanity, economy, and ecology. In reproducing this separation, international law, she seeks to demonstrate, shows a myopic attitude to the root causes of the pandemic, which are the same of the ecological breakdown: exploitation of fellow humans and nature.

Christian Tams’ chapter formulates two wishes for the international legal debate post-Covid. The first wish is for an expanded canon of international law in which basic aspects of global health law form part of the standard curriculum. The second is that international lawyers be able to resist the temptation of reducing the international law of 2020–21 to questions of Covid: there is so much more that has been done with, and to, international law. Both wishes

are purposefully understated in an attempt to avoid the all-too-predictable attempts to present Covid as a dramatic turning point in international legal discourse.

In her chapter, Catherine Kessedjian makes the point that there is no before or after, but that we have to learn to live with viruses. In her view, surveillance of the population may not be organised to the detriment of civil liberties and strict proportionality should be observed. Mobility, globalisation and governance must be reformed.

For Laurence Boisson de Chazournes, the response to Covid-19 has highlighted weaknesses in the rules, principles and institutions of the international legal order. In the wake of this realisation, international lawyers are rightly turning their attention to reform of the International Health Regulations. But, in her view, questions should also be asked about the broader governance context in which these regulations operate. She argues that, in order to avoid the failings that Covid-19 has exposed from happening again in the future, a legal approach that prevents fragmentation trends, allows for a comprehensive rule of law response to such issues and places human dignity and fundamental rights at the forefront is needed. Her chapter aims to begin a conversation about reform of international law and organizations viewed through this lens. For her, international law needs to rise to this challenge and make solidarity a key concept.

Edith Brown Weiss makes the point that the COVID-19 crisis illustrates the workings of a kaleidoscopic world, in which patterns rapidly change, many actors beyond States are critical, flexible instruments are imperative, and scientific knowledge is evolving. In her view, the kaleidoscopic world sharply contrasts with the traditional view of an international system dominated by States in a rather static order in which States negotiate and implement binding agreements. She goes on to argue that controlling the virus is a public goods problem that shows the need for rapid and flexible responses by governments and others and collective actions at the local, regional, and global levels. At the same time, she claims, it is a private goods problem, as in development of a vaccine by private companies, which calls for public-private collaboration. According to her argument, the COVID-19 crisis reveals the need to reconceptualize public international law to broaden its scope, to include relevant actors beyond States, to encompass many kinds of legal instruments, and to recognize the imperative need for shared norms.

In her chapter, Mónica Pinto points to some of the features of States' reactions to the crisis. For her, neither the level of development nor the democratic traditions of States have made a great difference to the almost generalized authoritarian approaches to the crisis. In some scenarios the pandemic and

the confinement diverged in their goals. Science driven decisions did not necessarily meet human rights criteria. The confinement highlighted discrimination, violence and, once again, the role of women as unpaid care workers. Structural inequality, underdevelopment, poverty aggravated the vulnerability of the situation of many groups. Mónica Pinto claims that the global nature of the pandemic requires effective and sustainable policy responses, involving public and private sectors as main actors of a prevention which includes universal access to vaccines and medical treatment but also to tap water and sewerage. She argues that, as lessons learned from the ongoing crisis, both the rule of law and human rights should lead to the wisest decisions.

The chapter by Benedict Kingsbury starts with a reference to the frontispiece to Hobbes' *Leviathan* (1651) which features two specially-garbed plague doctors standing together within the walls of the almost empty city. Benedict Kingsbury argues that, in conventional terms, they might symbolize one of the sovereign's greatest duties, or they may remain outside the body politic because they are hired-in only during the emergency. Benedict Kingsbury's chapter however reflects from a different thought, that the itinerant plague doctors might be emblematic of transnational knowledge circulation, and located in the complex history of science-experts (and medical experts) in relation to formalized ruling power. It builds from Thucydides, Hobbes and Foucault to argue that the courage and special status of front-line health professionals, fearless also in speaking out against political pressures, might desirably be instantiated in bodies such as the World Health Organization, and can also be an inspiration for lawyers in troubling times.

Malgosia Fitzmaurice starts her chapter by claiming that one of the most disadvantage groups in relation to pandemic crisis are indigenous peoples. The latter's vulnerabilities are placing them in a particularly sensitive as exposure to the disease appears to be situating them at risk of increased mortality, as well as more severe symptoms. Indeed, in her view, indigenous groups appear to specially vulnerable, and scholars have raised the alarm over the need to take special mitigating measures with regard to the impact of the pandemic on specific communities. Diverse but often compounding factors appear to be relevant in driving this undesirable outcome for many communities. Biological characteristics appear to play a part, although they are not always the key factor, with socio-economic causes also driving this trend. Elevated rates of transmission are also due to conditions of poverty in which many of these communities are forced to live. Poor housing quality and sanitation, crowding, weaker infrastructures, and other effects of reduced economic security result in a diminished capacity for adaptability when confronted with the social and economic restrictions typically imposed as part of official responses to

coronavirus. Malgosia Fitzmaurice claims that there is evidence that Covid-19 has had a particularly negative impact in regions predominantly inhabited by indigenous populations, where health systems were fragile and may have collapsed, leaving vulnerable populations in unprecedented state of exposure and risk.

In his chapter, Fuad Zarbiyev makes the claim that international legal scholarship dedicated to COVID-19 has been largely limited to descriptions of relevant legal instruments and possible remedies offered by the latter. A characteristic common to most contributions has been the remarkable lack of anything that could be described as 'intellectual' if one means by 'intellectual' the quality of a work that furthers one's understanding beyond what should be obvious to any decently trained international legal professional capable of competently reading and interpreting legal materials. The chapter of Fuad Zarbiyev reflects on some conditions that make this reality possible or even unavoidable and conclude with a proposition.

In what constitutes the last chapter of the volume, Iga Joanna Józefiak argues that crises are inherent part of our present world, and it is even expected that in the next decades, the Earth will be increasingly subject to a variety of disasters. Her chapter looks at the recent coronavirus pandemic, analyzing the constraints of the international law. By evaluating real-life examples, it identifies the main weaknesses of crises management, such as the poor relationship between international law and science, clear primacy of politics and economics over scientific research, and failure in educating an aware and responsible society. Pandemic, as well as climate change or terrorism, she argues, is a global problem against which it is impossible to win alone. Particularly the young generation with its all determination should constitute a source of inspiration in joining international efforts. Paraphrasing Thomas Reid, she claims that the international system is only as strong as its weakest link, hence the necessity of appropriate cooperation between states, transfer of knowledge, and mutual support.

Paris and Geneva

2 July 2021