The COVID-19 Pandemic Crisis and International Law

A Constitutional Moment, A Tipping Point or More of the Same?

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I used to think of history as a sort of long scroll with thick black lines ruled across it at intervals. Each of these lines marked the end of what was called a ‘period’, and you were given to understand that what came afterwards was completely different from what had gone before ... And though, of course, those black lines across the page of history are an illusion, there are times when the transition is quite rapid ...¹

1 Introduction

Bruce Ackerman's famous ‘constitutional moments’ theory² posits that moments of crisis can facilitate significant changes in constitutional law and practice. Arguably such exceptional moments are impregnated with a sense of moral urgency, a feeling of grandeur and uncertainty about the long-term political fallout (a relative ‘veil of ignorance’), that can facilitate constitutional reform. When applied to the history of international law, Ackerman's theory can perhaps link major historical events, such as the 30 Year Wars, the end of the Napoleonic Wars, the two World Wars, the end of the Cold War and 9/11, to major structural changes or power shifts (or ‘epochs’)³ in international law. Alongside the narrative of abrupt change, one often finds in the literature on the history of international law a progressive narrative of incremental change brought about by gradual external developments in technology, economics,

1 George Orwell, ‘The Rediscovery of Europe’ *The Listener* (London, 19 March 1942).

2 Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) 22.

3 See generally Wilhelm Grewe, *The Epochs of International Law* (De Gruyter 2000).

social consciousness, politics etc., which are matched by organic growth of legal norms and institutions, reacting to and reflecting these changes.⁴ The emergence of international organizations in the 19th century, the resurgence of human rights law in the 1970s and the expansion of international investment law in the late 20th, early 21st centuries may exemplify instances of such incremental change.⁵

Significantly, these two narratives of historical development of international law are not mutually exclusive. First, certain developments can be understood as clean breaks from the past, whereas others are the product of a long-term process. Second, identifying historical trajectories depends on the focal length of the historical lenses used: what is viewed as a major shift in direction at the time in which events take place, might be regarded decades or centuries later as a minor course correction, a short period of instability, or a mere point on a pattern showing the overall trajectory. And third, the two narratives may merge to generate processes of change, accelerating in particular moments in time due to 'tipping points' generated by certain dramatic events.⁶ Indeed, it would appear that certain important developments in international law can be described as part of long-running trends punctured by sudden fluctuations correlating to dramatic events. For example, the evolution of norms of international humanitarian law, governing non-international armed conflicts, can be narrated as stemming from a gradual process of restraining violence in and around the battlefield that started picking up momentum in the mid-19th century, with certain regulatory peaks occurring after and in connection with major international crises such as World War Two, Vietnam and the Global War on Terror (e.g., Common article 3 in 1949, the 1977 Additional Protocols, and the development of laws governing transnational or asymmetric armed conflicts in the 2000s).

4 See e.g., Ignacio de la Rasilla, 'The Turn to the History of International Adjudication' in Ignacio de la Rasilla and Jorge Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (CUP 2019) 32, 45; Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) *EJIL* 369, 377. See also generally Thomas Skouteris, 'The Idea of Progress' in Anne Orford, Florian Hoffmann, and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 939.

5 See generally J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy, Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 553–561.

6 See eg, Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *Int'l Org* 887, 901.

2 The COVID-19 Pandemic as the Harbinger of a Constitutional Moment

The question before us is whether COVID-19 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 invites an assessment of whether a structural change in international law can be anticipated in the near future, and whether the current crisis might facilitate such a change or accelerate existing trends going in this or the other direction. 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.

One possible vision of a percolating crisis that might lead to a new epoch in international law is found in the writing of my Hebrew University colleague, the historian Yuval Noah Harari. Among the major challenges confronting humanity in the 21st century, which he has identified, are nuclear war, ecological collapse, and technological disruption (e.g., dangerous applications of AI and biotechnology).⁷ What's common to these challenges is their potential for catastrophic consequences, and the need for close global cooperation in order to effectively address them. In addition, they all fit into a Frankensteinian crisis narrative: Scientific, technological, and economic progress getting out of control and creating a threat to the survival of human civilization (at least in its current form). Noah Harari advocates in response to the looming threats a change of paradigm of international relations, a new epoch perhaps, which is based not only on tight global cooperation,⁸ but also on giving a prominent role for scientific knowledge in policy debates.⁹ Arguably, such a new international relations paradigm would also require a corresponding new international law paradigm.

Would the crisis surrounding the COVID-19 pandemic facilitate such a paradigm shift? Unlike the Frankensteinian threats identified by Noah Harari, COVID is not, as far as we know, a man-made catastrophe. Rather, it is more akin to a biblical plague (and more recent episodes of contagious diseases, such as the Black Plague, the Spanish Flu and SARS). Furthermore, its introduction was not significantly impacted by a race among nations to obtain superior economic, technological, or scientific capacity; in the same vein, suppression of

7 Yuval Noah Harari, *21 Lessons for the 21st Century* (Spiegel & Grau, Jonathan Cape 2018) 125.

8 *ibid* 116.

9 Noah Harari (n 7) 251.

the pandemic will not necessarily impact the international balance of power or the global spread of wealth. Compared to the efforts required to generate global cooperation with respect to matters such as the proliferation of nuclear weapons, climate change, or misuse of digital technology, it may prove politically easier to introduce reforms aimed at dealing collectively with a crisis like COVID that – (1) potentially affects the population of all States; and (2) does not require certain States to surrender a scientific or technological advantage that they have obtained over the years, or to internalize a significant share of the costs of the technological solution.

At the same time, the COVID-19 crisis dictates a dynamic and logic of isolation: quarantine for those who have tested positive, blockade over the geographical areas in the country where infection rates are particularly high and a travel ban isolating the country from travellers from other countries. From that point of view, the response to the pandemic has been, by and large, the opposite of a joint globalized effort; rather, it has featured the reemergence of strong national regulators, reintroduced border controls, mobilization of national resources to address the crisis, an international race for ventilators and vaccines etc. The perceived impotency of global and regional regulating bodies, such as the WHO, UN Security Council and the EU, in responding to the crisis, further underscores the vital importance of the State as a first and principal responder to serious crises of an overwhelming nature. (Note that unlike historical episodes in earlier centuries where pandemics were viewed as natural disasters and the response largely exceeded human capacity, in the 21st century, States are expected to find scientific, technological, and regulatory solutions to such public health problems). If the perception among the general public is that globalization is a pre-existing condition that promoted the spread of the virus and proved to be a very small part of the solution to the crisis, then it is very doubtful whether COVID-19 in and of itself is likely to mark a constitutional moment or a tipping point facilitating a shift to a more globalized world.

3 International Law and Reliance on Scientific Knowledge

The COVID-19 crisis may however have a significant impact on development of international law, through operating in more subtle ways than merely demonstrating the importance of international cooperation. This requires probably some zooming out from the current state of affairs and a return to a previous major paradigm shift – following the end of the Cold War. The new international legal order heralded at that point in time, featured the main aspects

recommended by Noah Harari for the 21st century – a rise in global cooperation in fields such as international trade and international peace and security, including the development of a common response to global challenges in fields such as the regulation of Chemical Weapons and Climate Change, and increased reliance on scientific knowledge to address such issues. The prominent role of technical experts in these regimes has been, in fact, a source of criticism directed at the democratic deficits of the new modalities of international governance developed in the 1990s, at both the regional and global level.¹⁰

It far exceeds the scope of this short note to seriously grapple with the reasons underlying the gradual erosion of the international norms and structures created in the 1990s. Clearly, there are geopolitical reasons, such as the reemergence of China, and relative decline of the US and the EU that can explain some of the trends (at least from a Westernized perspective).¹¹ There are also reasons related to the growing focus of domestic politics in several key countries on the negative implications of globalization for broad constituencies (e.g. immigration, shifts in production, increased regulation and cross-border terrorism), resulting in the rise in the political fortunes of extremist and/or anti-globalization movements.¹² It has also been observed that the passage of years has also rendered the deep causes for the post-World War Two shift from nationalism to international cooperation – armed conflicts, governmental oppression and economic recession – a distant memory for new generations of voters.¹³

10 See e.g., Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 72–79; Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 Colum L Rev 628, 646. Similar criticism had been directed at earlier attempts to introduce "rule by experts". See Madeleine Herren, 'International Organizations, 1865–1945' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 91, 95.

11 See generally, for example, Joseph HH Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] (Dec) Sing JLS 248; Robert Art, 'The United States and the Rise of China: Implications for the Long Haul' (2010) 125(3) Political Science Quarterly 359; Geir Lundestad, *The Rise and Decline of the American "Empire": Power and its Limits in Comparative Perspective* (OUP 2012).

12 See eg, Manuela Caiani, Donatella de la Porta and Claudius Wagemann, *Mobilizing on the Extreme Right: Germany, Italy and the United States* (OUP 2012) 168 *et seq.*

13 See eg, Ian Traynor, 'Peace in Europe may too often be taken for granted' *The Guardian* (London, 12 October 2012), <<https://www.theguardian.com/world/2012/oct/12/peace-europe-taken-granted>> accessed 19 March 2021.

Still, one possible reason for the increased disenchantment with international expert-based governance in the 21st century could be the rejection of science as a principal driver of policy, in national and international arenas. Again, the roots of this anti-science turn are deep and widespread. Another Hebrew University colleague of mine, the late Yaron Ezrahi, has linked this change to a fundamental epistemic shift in the political imagination of large population groups, moving from a dualistic cosmology, separating scientific facts and subjective beliefs (an epistemic stage he associates with the enlightenment movement),¹⁴ to a new secular monistic cosmology representing a merger of science and culture.

The changing role of science in political life also relates to important political, sociological, and technological developments, which include the rise of identity politics, the broad acceptance of critical theory and increased access to information. Identity politics push politics away from being a competition of ideas about how to solve societal problems and develop new policies, to a form of expression of belonging. Scientific approaches to problem-solving and policy design have little currency in such a political environment. Critical theory approaches to knowledge as a form of power and to mainstream science as a form of power monopoly have generated scepticism towards scientific expertise and increased the association of knowledge-based policy proposals with political liberalism and elitism. And while new information technology has democratized access to knowledge in the technical sense, it has done so without addressing the challenges of scientific literacy that enables making informed choices between competing scientific claims and methods. The result of all of these developments has not only been the adoption of populist agendas and policies that are not evidence-based at the domestic level in several countries, but also their extrapolation to the international level.

Such a linkage is clear in some cases: climate change denial seems to underlie the withdrawal of the US from the Paris Agreement and misinformation and disinformation about international migration trends and the alleged violent propensities of migrants is likely to have led to the failure of the global pact on migration. In other cases, the paths connecting anti-science with anti-globalization are more obscure. Arguably, the move away from evidence-based evaluation of international governance projects – including, their effectiveness, efficiency, cost-effectiveness, impartiality and procedural propriety – to a sentiment-based evaluation renders such global projects that are almost inevitably distant, foreign and not embedded in any specific local culture and

14 Yaron Ezrahi, *Imagined Democracies: Necessary Political Fictions* (CUP 2012) 303.

tradition, more vulnerable to criticism and a sense of alienation. In the same vein, rather than comparing on a systematic basis competing alternatives – i.e. the pros and cons of international versus national governance, as would be required in a political environment relying on knowledge-based analysis – those who wish to retain power at the national level are often successful in manipulating the discussion by focusing only on one subset of the matrix: The disadvantages of international governance projects, ranging from the mythological Polish plumbers in the UK to the economic collapse of West Virginia coal country.

Can the COVID-19 crisis alter or exacerbate this dynamic? It has already been widely commented that one of the significant changes brought about by the pandemic has been a renewed interest in science as source of information, not only informing, but actually shaping the public debate, and providing real solutions (a panacea-like vaccine or treatment drugs).¹⁵ Furthermore, there appears to be some degree of correlation between the anti-science stance of prominent politicians, the manner in which their countries handled the crisis and their political standing. At the time of writing, the 2020 US elections have not yet taken place, although it is notable that anti-science positions, which were expressed in a strong manner by the Trump Administration, have been toned down by the Trump campaign. In any event, regardless of the actual outcome of the US election, it is more than plausible than not that governments operating under the shadow of the COVID-19 crisis would find it more difficult than before to reject scientific knowledge and evidence-based policy (still, the risk of political appropriation of science remains).

If indeed science is going to re-emerge as a more prominent method and source for policy-making in the post-COVID-19 era, it would likely have significant implications on the level of international cooperation. This is because the logic of the scientific method of accumulating, processing, and disseminating knowledge is global in nature, regardless of whether the policy problem is itself local or not. The response to COVID-19 illustrates the point: Whereas the regulatory responses to the pandemic were mostly national (and local), the scientific efforts to find effective ways to prevent and treat the disease and to develop a vaccine, were very much global in scope and nature. Furthermore, even with regard to the domestic regulations adopted, a strong public expectation that they be evidence-based has emerged, and the experience of other countries has been often discussed in domestic decision-making processes.

15 See e.g. Mandë Holford and Ruth Morgan, '4 ways science should transform after COVID-19' (*World Economic Forum*, 17 June 2020) <<https://www.weforum.org/agenda/2020/06/4-ways-science-needs-to-change-after-covid-19-coronavirus/>> accessed 19 March 2021.

If, indeed, such a decision-making mode will become more prominent, the relevance of knowledge-based international mechanisms of cooperation, which collect, process, and share expertise is also likely to increase, inviting perhaps a return to the trajectory of the 1990s. The discourse about the need to reform the WHO and provide it with more legal powers and material capabilities is one immediate illustration of this new propensity. But, a shift to a knowledge-based decision-making is likely to strengthen other international mechanisms dealing with policy problems which have a strong scientific and planning dimension, such as the environment, economic development, and immigration.

4 Concluding Remarks

Two key questions raised by my two University colleagues remain however unanswered. First, would a renewed push towards evidence-based decision-making be sufficiently significant in order to overcome sharply divergent national interests that hinder close global cooperation? That is, would States agree to subject themselves to global regulatory power on rational evidence-based grounds, even if this would imply loss of relative powers vis-à-vis their political adversaries or competitors? We have seen that the evolution of international norms and institutions post-WW2 and post-Cold War was significant, but ultimately deferential to State sovereignty and relative power considerations. The retention of veto power by the P-5, the refusal of nuclear powers to disarm themselves and the preservation of WTO exceptions on subsidies illustrate such side-constraints. Still, the Frankensteinian mega-challenges identified by Noah Harari require taking global cooperation to another level of intensity. The inconsistent, at best, and hostile at worst attitude of the two last US administrations towards international frameworks such as the Paris Agreement, the WTO dispute settlement machinery and the ICC, shows that considerable obstacles would still have to be cleared in order to significantly advance international governance, even when the stakes are very high.

Second, it is doubtful whether the 'epistemic genie' – i.e. the critical attitude towards science as informed by cultural (or political) biases – can be fully returned to the bottle. In this respect, once the forbidden fruit – the fruit of knowledge about knowledge – has been tasted there might be no turning back. Furthermore, it is unlikely that the prominent role of science in democratic decision-making can be fully re-established, without dealing with problems of scientific literacy and elitism that have led to its marginalisation in recent years, and to reduced confidence in delegating power to scientists on

a long-term basis. This is not impossible, but it would require a considerable effort at the national level that is likely to face considerable resistance from powerful ideological groups that are anti-science and anti-globalization. In a world where alternative facts and alternative science are culturally acceptable and represent a sound political investment, the prospects of a smooth slide to a new stage of knowledge-based international law appear slim.

The upshot of these speculations is that while the world needs a constitutional moment, current political obstacles suggest that the COVID-19 crisis has more potential to serve as a tipping point pushing international relations back towards a previous, more cooperative, stance. Still, even this is far from certain, and cultural and political forces may yet lead the post-COVID-19 world to conduct itself more or less the same way as the pre-COVID-19 world.