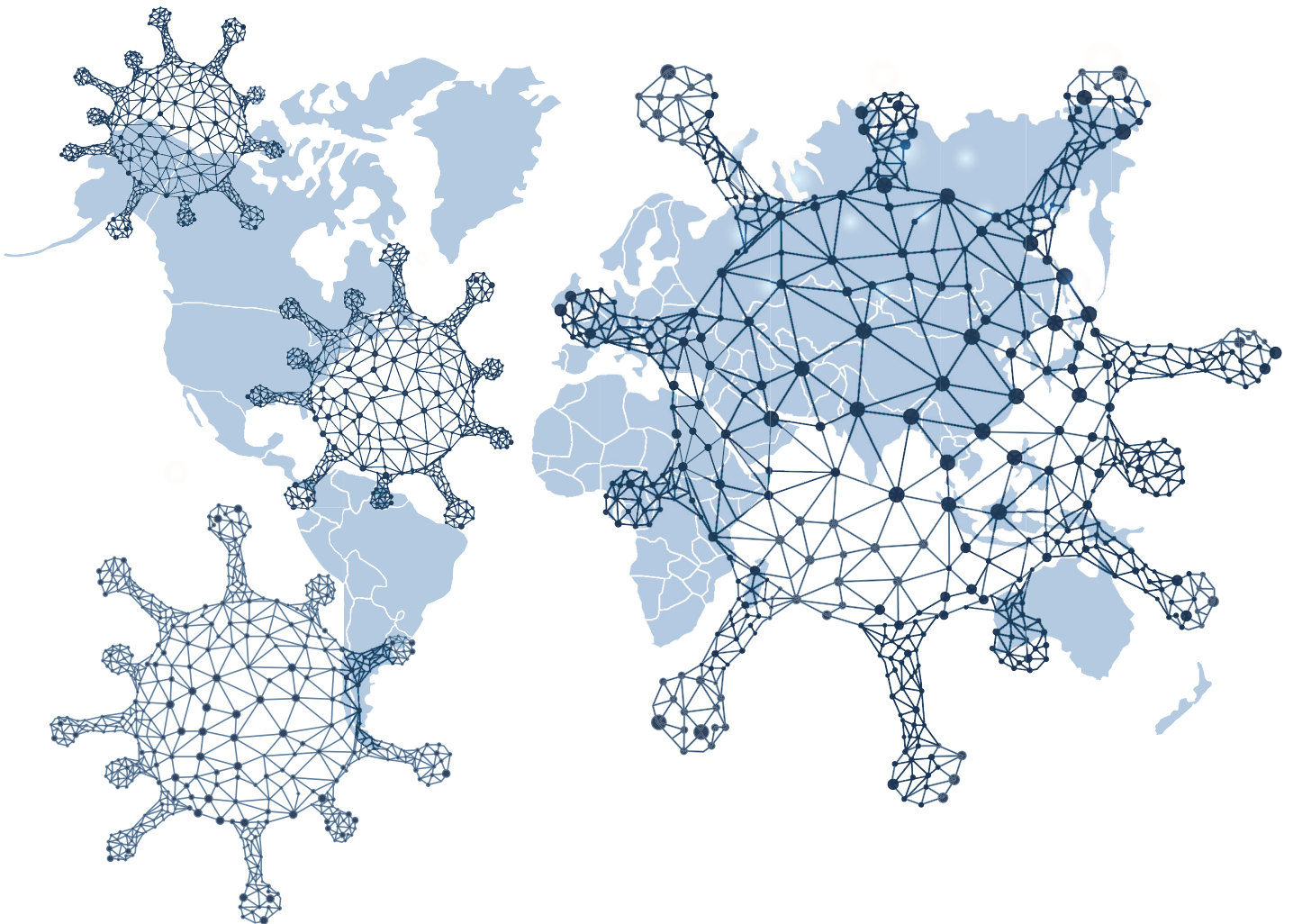




INTERNATIONAL
AND COMPARATIVE
LAW RESEARCH CENTER

COVID-19 AND INTERNATIONAL LAW

OVERVIEW OF PUBLICATIONS, ISSUE 2



Moscow 2020

ABOUT THE INTERNATIONAL AND COMPARATIVE LAW RESEARCH CENTER

The International and Comparative Law Research Center is a non-profit non-governmental organization conducting research on various legal issues that are of importance for the Russian Federation.

The mission of the Center is to enhance the quality of legal regulation by issuing recommendations for improving the Russian legislation.

Through comprehensive practice – oriented research and discussions with involvement of the leading Russian and foreign experts in various disciplines, the Center facilitates a dialogue between State authorities, business, and expert community and implements projects to promote studies in international law.

The Center provides expertise to Russian delegations to international organizations (ISA, UNIDROIT, etc.), takes part in the work of UNCITRAL as an observer.

The Center is also the organizer of the International Law in the XXI Century Award for the best long paper on public international law, holds the Summer School on Public International Law with the participation of the world-renowned experts in international law for citizens of Russia and other CIS countries.

The constantly replenished Library of the Center provides access to classical and modern publications on private and public international law, comparative law in different languages, and access to foreign and Russian electronic legal databases.

The Center is the environment of knowledge, competence, and dialogue in the sphere of law.

14 bldg. 3, Kadashevskaya Naberezhnaya, Moscow
Russia, 119017

+7 495 640-65-65
info@iclrc.ru www.iclrc.ru

DESCRIPTION

This document provides an overview of publications by academics and practitioners, as well as various documents prepared by intergovernmental and non-governmental organizations, on topics related to the spread of COVID-19 and various aspects of international law that were not included in the overview of April 28, 2020,* along with new publications that came out between April 28 and May 28, 2020.

In addition to certain aspects of international law covered in the first overview (responsibility of States, international human rights law, international humanitarian law, international investment law, and the law of the WTO), this overview is supplemented by issues discussed in the framework of international security law, international cooperation, international refugee law, and international criminal law. The classification used to place the issues considered in the overview under one or another “branch” is rather illustrative: it is mostly done so for the reader’s convenience.

This overview is not purported to be complete due to ongoing release of new materials; there are plans to update it as new publications appear. The overview does not constitute an analytical material and is to be used only for informational purposes.

*International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. URL: http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf.

TABLE OF CONTENTS

- Introduction 5
- I. State Responsibility 7
- II. International Security Law 9
- III. International Cooperation 10
- IV. International Human Rights Law. 12
- V. International Refugee Law 16
- VI. International Humanitarian Law 17
- VII. International Criminal Law 18
- VIII. International Investment Law 19
- IX. The Law of the WTO 20

INTRODUCTION

1. In the context of **State responsibility**, the possibility of holding China accountable for violations of the provisions of the International Health Regulations of 2005 (hereinafter, “**IHR**”) is continued to be discussed (**paras. 10-11**). To that end, the World Health Organization’s (hereinafter, “**WHO**”) leverage with the Chinese government to obtain detailed information about the origin of the COVID-19 virus is being considered (**para. 13**), and the idea of establishing an international commission of inquiry for COVID-19 is being put forward (**para. 12**). It is noted that the measures taken by States in response to the spread of the virus may soon cause various legal disputes on the basis of the IHR, but a number of shortcomings of the regulation provided will not allow for their effective resolution (**para. 14**). In this regard, it is suggested that an advisory opinion of the International Court of Justice should be requested to clarify the content of States’ obligations under the IHR (**para. 15**).

2. In the light of **international security law**, attention is drawn to cyber attacks against the health systems of a number of States during the pandemic (**para. 16**). The principles and norms of international law that protect the States against such attacks are analyzed (**para. 17**), the adoption of a new norm on responsible behavior of States in cyberspace is proposed (**para. 18**).

3. Issues related to **international cooperation** are considered through the prism of interaction between countries within the framework of the WHO (**paras. 19-20**), the global response to natural disasters based on the provisions of the Articles on the protection of persons in the event of disasters of 2016 (hereinafter, “**Articles on the protection**”) (**para. 21**), as well as through regional organizations and unions (**para. 22**).

4. Publications on **international human rights law** continue to focus on issues related to derogations of States from their human rights obligations (**paras. 23-26**), as well as on restrictions imposed in connection with the pandemic and their impact on the enjoyment of certain human rights: to freedom of movement (**para. 27**); to privacy (**para. 27**); to freedom of speech (**para. 28**); and to social security (**para. 34**). In addition, the challenges faced by the most vulnerable groups within the population during the pandemic are discussed: persons deprived of their liberty (**para. 29**); women (**paras. 30-31**); people with disabilities (**para. 32**); and indigenous peoples (**para. 33**).

5. Within the framework of **international refugee law**, the issue of compliance of restrictive border crossing measures imposed by several countries with the principle of non-refoulement is examined (**paras. 35-36**).

6. In the context of **international humanitarian law**, the issue of engagement with non-state armed groups in order to ensure that they comply with certain obligations in respect of the population living in the territories under their control during the pandemic is raised (**paras. 37-38**).

7. In relation to **international criminal law**, the possibility of qualification of the conduct of the US President as a crime of genocide is analyzed (**paras. 39-40**).

8. In the field of **international investment law**, the impact of the pandemic on the protection of foreign investors (**para. 41**), as well as the possibility of companies to claim compensation for expected future profits due to restrictive measures imposed by countries and damage to their investments are discussed (**para. 42**).

9. In the area of **the law of the World Trade Organisation** (hereinafter, “**WTO**”), discussions are focused on the reasons for countries to impose restrictions on exports during the pandemic (**paras. 43-46**) and the applicability of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures to trade restrictions related to public health (**para. 47**).

I. STATE RESPONSIBILITY

10. As in the publications included in the [overview of April 28, 2020](#),¹ the possibility of bringing China to international legal responsibility in connection with the COVID-19 pandemic is still being discussed². A number of lawsuits against China have already been filed in national courts, in particular, in the courts of some states of the United States (California, Nevada, Pennsylvania, Texas, Florida, Mississippi, and Missouri³).⁴

11. At the same time, it is suggested that neither recourse to international nor national courts will lead to the desired result (compensation for material and/or moral damage), since:

- acceptance of the jurisdiction of an international judicial body depends on China;
- as a sovereign State, China is immune from the jurisdiction of any foreign court.⁵

12. In this regard, as an alternative to judicial proceedings, it is proposed to create an international commission of inquiry for COVID-19 that, in addition to China's behavior, would also consider the actions of other States that failed to prevent the spread of the virus.⁶ It is noted that such a commission could be established by the UN Security Council or the UN General Assembly to combat disinformation and provide a report on the COVID-19 and the crisis caused by it. Such a report could be used for the discussion of structural changes in international relations that the world may need after the pandemic.⁷

¹ International and Comparative Law Research Center. COVID-19 and International Law. Overview of publications. P. 7, paras. 9-11. URL: http://iclr.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-1-ENG.pdf.

² J. deLisle. Pursuing Politics through Legal Means: U.S. Efforts to Hold China Responsible for COVID-19. URL: <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/>. in view of the complaints filed by citizens of the United States and India to the International Criminal Court, the theoretical possibility of bringing the Chinese officials to individual international criminal responsibility is also analysed, see J. Sanyal, S. Bhargava. Taking China to the International Criminal Court – Barking Up the Wrong Tree. URL: <https://silpnujs.wordpress.com/2020/05/19/taking-china-to-the-international-criminal-court-barking-up-the-wrong-tree/?fbclid=IwAR1rD578zeT5hVVvZABBsYHPpExhaRkbPU6jjFZUfOKMLFhe9wPsCTqjSuM>. for the problems that a complaint filed against China to the UN Human Rights Council may face, see V. Bansal. Extra-territorial Human Rights Violations by China: Viability of Seeking Reparations. URL: <https://silpnujs.wordpress.com/2020/05/22/extra-territorial-human-rights-violations-by-china-viability-of-seeking-reparations/>.

³ Б. Тузмухамедов. Международное коронавирусное судяничество. Удастся ли американским штатам засудить Китай. URL: http://www.ng.ru/dipkurer/2020-05-17/10_7862_china.html. It is argued that the lawsuits against the Chinese authorities “contradict the logic, the object, and purpose of the US Foreign Sovereign Immunities Act [on the basis of which the claims for compensation are made] – at least, because the activities of the defendants were not conducted within the territory of the United States and were not directed against them ... Finally, there was no commercial element in such activities in the form of civil relations between the defendants and any individuals in the United States” (translated by the ICLRC).

⁴ S. Prasso. Lawsuits Against China Escalate Covid-19 Blame Game With U.S. URL: <https://www.bloombergquint.com/businessweek/lawsuits-against-china-escalate-covid-19-blame-game-with-u-s>; see also K. Watson. Missouri and Mississippi sue China over coronavirus. URL: <https://www.cbsnews.com/news/missouri-sues-china-over-coronavirus/>.

⁵ H. Zhengxin. COVID-19 lawsuits against China are illegal by international law. URL: <https://www.globaltimes.cn/content/1187897.shtml>; see also G. Shuai. Don't bother suing China for COVID-19 before the ICJ. URL: <https://www.chinadaily.com.cn/a/202004/09/WS5e8ec46aa3105d50a3d15041.html>.

⁶ M.A. Becker. Do We Need an International Commission of Inquiry for COVID-19? Part I. URL: <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-i/>.

⁷ Ibid. See also M.A. Becker. Do We Need an International Commission of Inquiry for COVID-19? Part II. URL: <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-ii/>.

13. Attention is also drawn to the WHO's leverage with the Chinese government to obtain detailed information about the origin of the COVID-19 virus.⁸ In particular, it is stated that Article 9 of the IHR allows the WHO to take into account not only official reports but also "other reports" for the purpose of analyzing the epidemiological situation. Accordingly, the WHO has the right to take into consideration any available information about the virus outbreak in China, compare it with official data, and ask the Chinese authorities for clarification. In addition, it is noted that by using the powers provided for in Article 10 of the IHR (to request a verification of such information from a state party and, if it refuses to cooperate, to share it with other States), the WHO could play a crucial role in the current geopolitical situation since the failure to cooperate would adversely affect China, demonstrating its unreliability regarding factual issues and calling into question the veracity of any statements made by China about the effectiveness of its measures against coronavirus.⁹

14. In general, it is noted that the measures taken in response to the spread of the COVID-19 virus are likely to lead to a significant number of legal disputes, one of the main documents in which will be the IHR.¹⁰ However, the limited scope of legal regulation, the generalized nature of the terminology of this document, as well as the dependence of dispute resolution on the will of specific States demonstrate the ambiguity of the obligations for States and inefficiency of said regulation in managing the consequences of the pandemic.¹¹

15. To clarify the international obligations of States in the face of the spread of the disease, as well as the legal consequences for the WHO and its member States arising from the failure to comply with their respective obligations under international law, the possibility of obtaining an advisory opinion of the International Court of Justice at the request of the UN General Assembly or the WHO is considered.¹²

⁸ A. Bogdandy, P.A. Villarreal. International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-07. P. 8. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650.

⁹ Ibid.

¹⁰ R. Volterra, Á. Nistal, R. Gerhard. COVID-19 and the WHO's International Health Regulations (2005). URL: <https://www.lexology.com/library/detail.aspx?g=c2edb745-5f18-4cc7-8d13-00acf8ebdf10>.

¹¹ Ibid.

¹² S. De Herdt. A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic. URL: <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>.

II. INTERNATIONAL SECURITY LAW

16. Since the outbreak of the COVID-19 virus, a number of countries, including the Czech Republic, France, Spain, Thailand, and the United States, have reported cyberattacks against their health systems. These incidents once again drew attention to the rules of international law protecting the health-care sector against cyberattacks.¹³

17. The following relevant provisions of international law are mentioned. First, a cyber operation, the consequences of which directly lead to the death of patients in a medical facility, falls under the general prohibition of the use of force in international law contained in Article 2(4) of the UN Charter. Second, international law forbids interference by a State in the domestic affairs of other States, including the provision of essential medical services. Third, cyber operations that affect a State's health system could be qualified as violations of that State's sovereignty.¹⁴

18. As a result of those cyberattacks, States Parties of the UN Open-Ended Working Group on developments in the field of information and telecommunications in the context of international security are once again invited to consider a new norm of responsible State behavior in cyberspace proposed by the International Committee of the Red Cross.¹⁵ This rule requires that States do not conduct or knowingly support cyber activity that would harm medical facilities and take measures to protect medical services from harm.¹⁶

¹³ K. Mačák, T. Rodenhäuser, L. Gisel. Cyber-attacks against hospitals and the COVID-19 pandemic: How strong are international law protections? URL: <https://blogs.icrc.org/law-and-policy/2020/04/02/cyber-attacks-hospitals-covid-19/>; see also D. Akande, D. Hollis, H.H. Koh, J. O'Brien. Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector. URL: <https://www.ejiltalk.org/oxford-statement-on-the-international-law-protections-against-cyber-operations-targeting-the-health-care-sector/>.

¹⁴ K. Mačák, T. Rodenhäuser, L. Gisel. Op cit.

¹⁵ Ibid.

¹⁶ See ICRC. Norms for responsible State behavior on cyber operations should build on international law. URL: <https://www.icrc.org/en/document/norms-responsible-state-behavior-cyber-operations-should-build-international-law>.

III. INTERNATIONAL COOPERATION

19. It is suggested that in the fight against the spread of the COVID-19 pandemic, cooperation among States in addressing this global problem should take place within the framework of the WHO,¹⁷ whose effectiveness could be improved by giving it the authority to conduct inspections and analyze State reports in detail.¹⁸ In addition, it is assumed that such inspections could have been carried out within the framework of the Convention on the Prohibition of Bacteriological Weapons of 1972 if the “Protocol on inspections” (Protocol on verification measures), blocked by the United States in 2001, would have been adopted and put into effect on time. In particular, it is noted that the inspections could provide clarification “not only of speculations about the anthropogenic origin of the COVID-19 virus but also other matters related to the virus”.¹⁹

20. The WHO’s key leadership role in tackling the pandemic was highlighted at the 73rd World Health Assembly.²⁰ Furthermore, the resolution adopted during the session, foreshadowing the upcoming debate related to the international intellectual property regime, called on States to consider the eventual COVID-19 vaccine and other medical products as a “global public good” in order to provide access to them for all countries.²¹ As a result of repeated requests to the WHO Director-General to conduct an impartial, independent, and comprehensive assessment of the IHR’s implementation, the resolution proposed the use of two WHO’s internal mechanisms:

- the Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme;²² and
- a Review Committee of the IHR.²³

21. The possibility of a global response to disasters based on the provisions of the Articles on protection adopted by the International Law Commission in 2016 is also being considered.²⁴ It is pointed out that, despite the possible application of the Articles on protection to the COVID-19 outbreak, the provided regulation has a number of disadvantages.²⁵ In particular, the document does not contain obligations to notify the international community of health risks and not to impede

¹⁷ M. Riegner. Global information governance in pandemic times. URL: <https://voelkerrechtsblog.org/global-information-governance-in-pandemic-times/>.

¹⁸ Б. Тузмухамедов. Подтолкнёт ли паника из-за коронавируса глобальное сотрудничество? URL: http://www.ng.ru/dipkurer/2020-04-12/12_7841_collaboration.html.

¹⁹ Ibid. See also A. Telesetsky. International Governance of Global Health Pandemics. URL: <https://www.asil.org/insights/volume/24/issue/3/international-governance-global-health-pandemics>.

²⁰ WHO. Resolution on COVID-19 response. 18 May 2020. URL: https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf; P.A. Villarreal. Pandemic Intrigue in Geneva: COVID-19 and the 73rd World Health Assembly. URL: <https://www.ejiltalk.org/pandemic-intrigue-in-geneva-covid-19-and-the-73rd-world-health-assembly/>.

²¹ WHO. Resolution on COVID-19 response. 18 May 2020. Op cit.; P.A. Villarreal. Pandemic Intrigue in Geneva: COVID-19 and the 73rd World Health Assembly. Op cit.

²² An interim report on the WHO’s response to COVID-19 from January to April 2020 was published by this Committee in April 2020. URL: https://www.who.int/about/who_reform/emergency-capacities/oversight-committee/IOAC-interim-report-on-COVID-19.pdf?ua=1.

²³ P.A. Villarreal. Pandemic Intrigue in Geneva: COVID-19 and the 73rd World Health Assembly. Op cit.

²⁴ In 2016 and 2018, the UN General Assembly took note of the Articles on protection that present an example of the progressive development of international law, and called on the UN member states to express their positions on the possible adoption of a convention based on them. See, e.g., UN GA, A/RES/73/209, Protection of persons in the event of disasters, 20 December 2018. URL: <https://undocs.org/en/A/RES/73/209>.

²⁵ A. Ozturk. Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak. URL: <https://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles>.

ongoing relief efforts (the latter is considered in the context of sanctions that prevent States from responding effectively to the spread of disasters).²⁶ However, it is emphasized that if these shortcomings are addressed, the Articles on protection can become an effective international instrument that ensures the cooperation of States and the proper response to disasters.²⁷

22. The spread of the pandemic has led to attempts to cooperate not only at the universal level²⁸ but also at the level of regional organizations and unions.²⁹ For example, the European Union has introduced the EU Civil Protection Mechanism aimed at assisting countries located both inside and outside the EU in the event of natural or human-made disasters.³⁰

²⁶ Ibid. See also E. Batmanghelidj, A. Kebriaeezadeh. As Coronavirus Spreads, Iranian Doctors Fear the Worst. URL: <https://foreignpolicy.com/2020/03/03/iran-coronavirus-spreads-sanctions-covid19-iranian-doctors-fear-worst/>.

²⁷ A. Ozturk. Op cit.

²⁸ It is believed that in the modern world, States do not consider themselves obligated to cooperate in providing assistance to each other in the event of disasters, as it is proved by information about the UN Security Council's failure to adopt a resolution on COVID-19, States' attempts to monopolise COVID-19 vaccine production, and the ban on the export of protective gears by some countries. See R.M. Fouad. The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity? URL: <https://www.ejiltalk.org/the-legal-duty-to-cooperate-amid-covid-19-a-missed-opportunity/>.

²⁹ See, e.g., R. Arredondo. Mercosur: A New Victim of the Coronavirus? URL: <https://opiniojuris.org/2020/05/02/mercosur-a-new-victim-of-the-coronavirus/>; Asian Development Bank. ADB Approves \$1.5 Billion Financing to Support India's COVID-19 Response. URL: <https://www.adb.org/news/adb-approves-1-5-billion-financing-support-indias-covid-19-response>.

³⁰ For more information about the Mechanism, see the EU Civil Protection Mechanism. URL: https://ec.europa.eu/echo/what/civil-protection/mechanism_en; see also Decision 1313/2013/EU of the European Parliament and of the Council on a Union Civil Protection Mechanism of December 17, 2013. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013D1313-20190321>.

IV. INTERNATIONAL HUMAN RIGHTS LAW

23. As in the publications included in the [overview of 28 April 2020](#),³¹ in the context of human rights, it is noted that the impact of restrictive measures on the enjoyment of individual human rights is one of the main problems of the response to the pandemic.³² The legality and proportionality of such measures at the universal level are primarily determined by the International Covenants on Civil and Political Rights (hereinafter, “**ICCPR**”) and on Social, Economic and Cultural Rights (hereinafter, “**ICESCR**”) of 1966.³³

24. The most common measures taken to combat the COVID-19 pandemic are mandatory self-isolation and quarantine³⁴ which clearly restrict the right to freedom of movement (Article 12 of the ICESCR). It is noted that due to the rapid spread of the virus among the population, States had to resort to the implementation of a mass quarantine at the country level, the legal basis of which was Article 4 of the ICCPR.³⁶ Subject to a number of conditions, this Article provides for a possibility of derogation from certain human rights obligations during a state of emergency.³⁷ As of May 28, 2020, declarations of derogation from the obligations under the ICCPR of the following 7 States remain in force: the Republic of Armenia, the Republic of Chile, the Republic of Colombia, Georgia, the Republic of Guatemala, the Republic of Latvia, and the Republic of San Marino.³⁸

25. A number of countries, such as Italy, Spain, and France, have introduced mass quarantines without official derogation from their obligations under the ICCPR. In this case, it is indicated that States may use legal grounds for imposing restrictions on the right to freedom of movement, such as a natural disaster, a major industrial accident,³⁹ or the need to protect the right to health as set out in Article 12(2)(c) of the ICESCR.⁴⁰ In this regard, it is emphasized that States must find a balance between the right to freedom of movement and the right to assembly, on the one hand, and the right to health, on the other; this balance must be based on scientific evidence, particularly medical and epidemiological studies.⁴¹ If – from a scientific point of view – a restrictive measure

³¹ International and Comparative Law Research Center. P. 11-14, paras. 26-35. Op cit.

³² For the impact of the measures taken to combat the pandemic on democracy, see T.G. Daly. Democracy and the Global Emergency – Shared Experiences, Starkly Uneven Impacts. URL: <https://verfassungsblog.de/democracy-and-the-global-emergency-shared-experiences-starkly-uneven-impacts/>.

³³ For human rights obligations in a pandemic situation, COVID-19 see A. Donald, P. Leach. Human Rights – The Essential Frame of Reference in the Global Response to COVID-19. URL: <https://verfassungsblog.de/human-rights-the-essential-frame-of-reference-in-the-global-response-to-covid-19/>; see also N. Mavronicola. Positive Obligations in Crisis. URL: <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/>.

³⁴ For the emergence of cyber-civil rights due to the introduction of isolation measures, see D. Citron, M.A. Franks. Cyber Civil Rights in the Time of COVID-19. URL: <https://blog.harvardlawreview.org/cyber-civil-rights-in-the-time-of-covid-19/>.

³⁵ A. Ponta. Human Rights Law in the Time of the Coronavirus. URL: <https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus>; for the impact of isolation on human liberty, see M. Cahill. Lockdown v. Liberty: Do we still believe in freedom? URL: <https://verfassungsblog.de/lockdown-v-liberty/>.

³⁶ A. Bogdandy, P.A. Villarreal. P. 19. Op cit.

³⁷ A. Ponta. Op cit.; see also N. Salem. Proportionality of State Emergency Health Measures amid COVID-19. URL: <http://opiniojuris.org/2020/05/13/proportionality-of-state-emergency-health-measures-amid-covid-19/>.

³⁸ URL: <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=en>. For derogations from obligations under the ICCPR, the European Convention on Human Rights, and the American Convention on Human Rights, see. N. Coghlan. Dissecting Covid-19 Derogations. URL: <https://verfassungsblog.de/dissecting-covid-19-derogations/>.

³⁹ A. Bogdandy, P.A. Villarreal. P. 19. Op cit.; see A. Spadaro. Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law? URL: <https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/>.

⁴⁰ A. Bogdandy, P.A. Villarreal. P. 20. Op cit.

⁴¹ Ibid; see also M.M. Antoniazzi. How to Protect Human Rights in Times of Corona? Lessons from the Inter-American Human Rights System. URL: <https://www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/>.

is considered effective and necessary to achieve the main goal of preventing the spread of the disease, then it is *prima facie* (“at first face”) justified.⁴²

26. A similar position is expressed with regard to the European Convention on Human Rights.⁴³ It is noted that later, when the European Court of Human Rights is called upon to scrutinize the response of States to the spread of the COVID-19 and its impact on human rights, it will have to give national authorities “room for maneuver”, recognizing their margin of appreciation to determine their priorities and develop strategies to combat coronavirus.⁴⁴ This will limit judicial control in determining the proportionality of measures and assessing the legality of the goals pursued by such measures, but not their suitability and necessity.⁴⁵

27. The development of contact tracing apps by States⁴⁶ in the fight against the spread of the COVID-19 has attracted a number of critical comments.⁴⁷ It is noted that such apps are designed for the constant surveillance of a person and thus have a direct impact on the exercise of the right to freedom of movement and the right to privacy.⁴⁸ For example, when people disclose personal location data and other identifiable information that is stored centrally, it is likely that private companies or law enforcement agencies could have access to it now or in the future.⁴⁹ Although each of those rights can be derogated from under international law, it is suggested that by using such apps, States are required to demonstrate that it is impossible to achieve the goal of preventing the spread of COVID-19 by “less restrictive means”, including non-technological ones.⁵⁰ In addition, States must be able to justify whether the involvement of state agencies, other than those dealing with public health, and private companies is necessary and proportionate.⁵¹

28. The restrictive measures imposed by States have also affected the right to freedom of speech. It is noted that censorship, lack of transparency in the provision and exchange of information during the COVID-19 pandemic, threats and punishments of journalists and other informants, such as medical workers,⁵² demonstrate the illegality, unreasonableness, and disproportionality of such restrictions that violate people’s right to freedom of speech.⁵³

⁴² A. Bogdandy, P.A. Villarreal. P. 20. Op cit.

⁴³ As of 28 May 2020, the list of countries that have derogated from their obligations under the European Convention on Human Rights includes: the Republic of Albania, the Republic of Armenia, Georgia, the Republic of Latvia, Romania, the Republic of San Marino, the Republic of Serbia. URL: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO.

⁴⁴ V.P. Tzevelekos. Herd Immunity and Lockdown: The Legitimacy of National Policies Against the Pandemic and Judicial Self-Restraint by the ECtHR. URL: <https://strasbourgoobservers.com/2020/05/11/herd-immunity-and-lockdown-the-legitimacy-of-national-policies-against-the-pandemic-and-judicial-self-restraint-by-the-ecthr/>.

⁴⁵ Ibid.

⁴⁶ For example, the next apps have already been developed: TraceTogether in Singapore, DP-3T in Switzerland, Smittestopp in Norway, Aaroya Setu in India, NHS in the UK. See also eHealth Network, Mobile applications to support contact tracing in the EU’s fight against COVID-19. Common EU Toolbox for Member States. 15 April 2020. URL: https://ec.europa.eu/health/sites/health/files/ehealth/docs/covid-19_apps_en.pdf.

⁴⁷ See e.g., B. Staehelin, C. Aptel. COVID-19 and contact tracing: a call for digital diligence. URL: <https://blogs.icrc.org/law-and-policy/2020/05/13/covid-19-contact-tracing-digital-diligence/>; Y.No. Harari. Yuval Noah Harari: The world after coronavirus. URL: <https://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75>.

⁴⁸ For the indiscriminate nature of mobile phone location tracking and the possibility of States to derogate from Article 8 of the European Convention on Human Rights, see I. Siatitsa, I. Kouvakas. Indiscriminate Covid-19 location tracking (Part I): Necessary in a democratic society? URL: <https://strasbourgoobservers.com/2020/05/04/indiscriminate-covid-19-location-tracking-part-i-necessary-in-a-democratic-society/>; I. Siatitsa, I. Kouvakas. Indiscriminate Covid-19 location tracking (Part II): Can pandemic-related derogations be an opportunity to circumvent Strasbourg’s scrutiny? URL: <https://strasbourgoobservers.com/2020/05/05/indiscriminate-covid-19-location-tracking-part-ii-can-pandemic-related-derogations-be-an-opportunity-to-circumvent-strasbourgs-scrutiny/>.

⁴⁹ L. McGregor. Contact-tracing Apps and Human Rights. URL: <https://www.ejiltalk.org/contact-tracing-apps-and-human-rights/>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² The reason for such persecutions is the disclosure of information related to the spread of the virus and the lack of medical equipment that, on the one hand, is of public interest, and, on the other hand, negatively affects the reputation of the authorities of many States.

⁵³ H. Taylor. Freedom of Expression and Information in the Coronavirus Era. URL: <https://ohrh.law.ox.ac.uk/freedom-of-expression-and-information-in-the-coronavirus-era/>; V. Abazi. Truth Distancing? Whistleblowing as Remedy to Censorship during COVID-19. European Journal of Risk Regulation. Vol. 0:0. P. 7. URL: <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/truth-distancing-whistleblowing-as-remedy-to-censorship-during-covid19/65BBF491CF53D1C6130D65CBC941CDCB>.

29. In the context of the spread of the COVID-19, special attention is paid to ensuring the rights to life and health of persons deprived of their liberty and held in confined and unsanitary conditions in close proximity to each other.⁵⁴ Some international and non-governmental human rights organizations have issued guidelines for dealing with the pandemic in places of detention and called for action. Many countries around the world are already taking steps to reduce the risk of outbreaks by commuting jail terms or temporarily releasing prisoners.⁵⁶

30. Measures to prevent the spread of COVID-19, such as isolation and quarantine, have left many girls and women at home alone with their partners, spouses, and family members, which has resulted in a surge in gender-based violence (domestic violence, in particular)⁵⁷. It is noted that women face great difficulties in isolation:

- seeking to avoid domestic violence, they may find themselves in a situation when they have no place to go;
- contacting law enforcement agencies, they may face an additional risk of being accused of violating self-isolation or quarantine;
- the limited functionality of courts inhibits women's access to protection orders to guard themselves against further abuse.⁵⁸

31. In this regard, States are called upon to take urgent measures to combat domestic violence in the context of the implementation of restrictive measures related to COVID-19.⁵⁹

32. Attention is also drawn to the fact that in the current situation the rights and needs of such a vulnerable group of people as persons with disabilities are ignored.⁶⁰ It is indicated that they have encountered a large number of problems:

- self-isolation measures are not feasible in permanent care facilities as residents are often accommodated in large groups and depend on the assistance by medical staff;
- many of them are cut off from their family and social environment as most of the institutions are subject to restrictions on attendance;

⁵⁴ E. Turkut, A. Yildiz. Before it Spreads "Like Wildfire": Prisoners' Rights in the Time of COVID-19. URL: <https://verfassungsblog.de/before-it-spreads-like-wildfire-prisoners-rights-in-the-time-of-covid-19/>; see also T. Cadman. COVID-19 Symposium: The Impact of Coronavirus (COVID-19) on Prisoners. URL: <http://opiniojuris.org/2020/04/01/covid-19-symposium-the-impact-of-coronavirus-covid-19-on-prisoners/>.

⁵⁵ See also WHO. Prevention and control of COVID-19 in prisons and other places of detention. URL: <http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>; UN. COVID-19: UN teams step up efforts to protect rights in prisons, as revolts intensify worldwide. URL: <https://news.un.org/en/story/2020/05/1063292>; ICRC. COVID-19: Protecting prison populations from infectious coronavirus disease. URL: <https://www.icrc.org/en/document/protecting-prison-populations-infectious-disease>.

⁵⁶ See also, J. Hincks. The Coronavirus Is Prompting Middle East Regimes to Release Prisoners. But Journalists and Activists Remain Behind Bars. URL: <https://time.com/5811237/coronavirus-middle-east-prisoners-released/>; A.T. Kuru. Turkey releasing murderers – but not political opponents – from prison amid coronavirus pandemic. URL: <https://theconversation.com/turkey-releasing-murderers-but-not-political-opponents-from-prison-amid-coronavirus-pandemic-136466>; E. Turkut, A. Yildiz. Op cit.

⁵⁷ B. Jang, K. Farise. Gender Based Violence during the COVID-19 Pandemic and economic, social and cultural rights. URL: <https://opiniojuris.org/2020/04/23/gender-based-violence-during-the-covid-19-pandemic-and-economic-social-and-cultural-rights/>.

⁵⁸ Ibid. See also UN. Policy Brief: The Impact of COVID-19 on Women. URL: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406>.

⁵⁹ The UN Secretary-General. UN chief calls for domestic violence 'ceasefire' amid 'horrifying global surge'. URL: <https://news.un.org/en/story/2020/04/1061052>; see also The UN Special Rapporteur on violence against women. States must combat domestic violence in the context of COVID-19 lockdowns. URL: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25749&LangID=E>.

⁶⁰ UN. COVID-19 Outbreak and Persons with Disabilities. URL: <https://www.un.org/development/desa/disabilities/covid-19.html>; Council of Europe, Commissioner for Human Rights. Persons with disabilities must not be left behind in the response to the COVID-19 pandemic. URL: <https://www.coe.int/en/web/commissioner/-/persons-with-disabilities-must-not-be-left-behind-in-the-response-to-the-covid-19-pandemic>.

- the lack of digital alternatives for work and schooling creates serious obstacles to the enjoyment of the rights to education and work.⁶¹

33. The concern is also expressed about the indigenous peoples' rights to life, to health, and to receive information about the COVID-19 and preventive measures in their native language.⁶² It is emphasized that they have historically had limited access to health care, face certain obstacles to the practice of traditional medicine, many of them suffer from chronic diseases and are at high risk of contracting diseases from contact with people outside their communities.⁶³ It is noted that the lack of access to food, medical services (along with the lack of immunological defenses against relatively common diseases), water, and hygiene items poses a serious threat to the survival not only of some individuals but also entire groups of indigenous peoples.⁶⁴

34. In the context of COVID-19, attention is also drawn to the need to respect the right to social security, including social insurance, provided for in Article 9 of the ICCPR. It is noted that States are obliged to take all necessary measures to facilitate individuals' enjoyment of the right to social security, including by the provision of direct assistance in the form of grants and transfers, and to promote social protection measures for all persons.⁶⁵ However, it is indicated that at present "most States are doing all too little to protect those most vulnerable to this pandemic", focusing instead on protecting the economic interests of the richest groups in society.⁶⁶

⁶¹ V. Blicke. Leaving no one behind? URL: <https://voelkerrechtsblog.org/leaving-no-one-behind/>.

⁶² UN. COVID-19 and Indigenous peoples. URL: <https://www.un.org/development/desa/indigenouspeoples/covid-19.html>; UN. Coronavirus impact on world's indigenous, goes well beyond health threat. URL: <https://news.un.org/en/story/2020/05/1064322>.

⁶³ Center for Justice and International Law. COVID 19: The survival of indigenous peoples is at risk. URL: <https://www.cejil.org/en/covid-19-survival-indigenous-peoples-risk>.

⁶⁴ Ibid.

⁶⁵ D. Kurolova, D. Sivaprakasam. The Right to Social Security: Navigating the Narrow Passage Between Virus Suppression and Economy Resuscitation. URL: <https://opiniojuris.org/2020/05/12/the-right-to-social-security-navigating-the-narrow-passage-between-virus-suppression-and-economy-resuscitation/>.

⁶⁶ Ibid.

V. INTERNATIONAL REFUGEE LAW

35. Due to the spread of the COVID-19, States have restricted border crossings. Many countries (for example, the United States, as well as some EU member States) have begun to use this situation as an excuse to curb migration flows, limiting the right to seek asylum.⁶⁷

36. It is noted that the principle of non-refoulement, which is the basis of international refugee law, does not allow for any derogations, even during a state of emergency. Consequently, States are obliged to grant refugees at least temporary admission to their territories. It is highlighted that States choose to justify the impossibility of admission to the territory by not fulfilling the requirements for being considered places of safety for asylum seekers in order to avoid the positive obligations arising from the principle of non-refoulement, namely a duty to provide access to a fair and efficient asylum procedure. Recognizing that a health emergency may endanger the lives of migrants, it is emphasized that it is most important to take measures to protect their basic rights, including the right to health care.⁶⁸

⁶⁷ S. Nicolosi. Non-refoulement During a Health Emergency. URL: <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/>.

⁶⁸ Ibid. For information on the impact of the pandemic on refugees and temporarily displaced persons, see UNHCR. Coronavirus outbreak. URL: <https://www.unhcr.org/uk/coronavirus-covid-19.html>.

VI. INTERNATIONAL HUMANITARIAN LAW

37. The COVID-19 pandemic is a major challenge for all countries, even those with strong health systems. However, its impact is the greatest in places where armed conflicts have been weakening the health system for many years. As a result, conflict-affected health systems have a limited capacity to detect, manage, and follow-up cases which increases the risk of transmission. Moreover, it is noted that the activities of armed non-state actors create additional complexity during a pandemic.⁶⁹

38. It is emphasized that under international humanitarian law both States and armed non-state groups are required to ensure access to medical facilities, goods, and services for those in need without discrimination.⁷⁰ However, the lack of monitoring and enforcement mechanisms for ensuring compliance with such obligations by armed groups with respect to the population living in the territories under their control necessitates the use of a special approach. In this regard, the non-profit organization “Geneva Call” has been taking measures aimed at engaging with such groups and strengthening the protection of civilians in conflict-affected areas during the COVID-19 pandemic.⁷¹ To date, there have been several examples of armed groups which have declared unilateral ceasefires, suspended businesses, increased health checks, imposed travel controls and other restrictions on freedom of movement, or publicly requested support from governments and international aid agencies to help combat the current crisis.⁷²

⁶⁹ A. Délétroz. Supporting COVID-19 response through the engagement of armed non-State actors. URL: <https://www.genevacall.org/supporting-covid-19-response-by-the-engagement-of-armed-non-state-actors/>.

⁷⁰ K. Vigneswaran. A Radical Shift in Libyan and International Priorities is Necessary to Protect Health and Save Lives in Libya. URL: <https://opiniojuris.org/2020/05/05/a-radical-shift-in-libyan-and-international-priorities-is-necessary-to-protect-health-and-save-lives-in-libya/>.

⁷¹ Geneva Call. Bringing Within Reach: The importance of engaging armed non-State actors to tackle the COVID-19 pandemic. URL: <https://www.genevacall.org/bringing-within-reach-the-importance-of-engaging-armed-non-state-actors-to-tackle-the-covid-19-pandemic/>.

⁷² Geneva Call. COVID-19 Armed Non-State Actors' Response Monitor. URL: <https://www.genevacall.org/news-covid-19-armed-non-state-actors-response-monitor/>.

VII. INTERNATIONAL CRIMINAL LAW

39. On May 5, 2020, the President of the United States announced the dissolution of the White House coronavirus task force, which caused a suggestion to qualify his actions as a crime of genocide in view of the death of thousands of people because of negligence and inaction.⁷³

40. It is noted that it is not legally appropriate to apply the term “genocide” to pandemics unless there is evidence that the virus was created by humans and was deliberately spread with the specific intent to destroy a national, ethnic, racial, or religious group.⁷⁴ The failure of the US President to mobilize all the resources of the federal government to assist the states in the fight against the pandemic is analyzed through the prism of such an element of the crime of genocide as *dolus specialis* (special intent). It is indicated that there is currently no evidence that the US President specifically intended to destroy, in whole or in part, any racial or ethnic groups by not supporting or blocking the efforts of particular states in their fight against the COVID-19 virus.⁷⁵

⁷³ L. Moran. Epidemiologist Slams U.S. Coronavirus Response: ‘Close to Genocide by Default’. URL: https://www.huffpost.com/entry/epidemiologist-coronavirus-genocide-by-default_n_5eb2a5ebc5b63e6bd96f5d81.

⁷⁴ J. Heieck. Trump’s Coronavirus Response: Genocide by Default? URL: <http://opiniojuris.org/2020/05/15/trumps-coronavirus-response-genocide-by-default/>.

⁷⁵ *Ibid.*

VIII. INTERNATIONAL INVESTMENT LAW

41. Due to the fact that the COVID-19 pandemic has already decimated economies of many countries around the world, it is assumed that implementation of protectionist policies can be expected when the current situation is brought back into line.⁷⁶ States may come under enormous pressure from domestic industries with requests to support their businesses that could trigger the adoption of strict regulatory measures.⁷⁷ This, in turn, may lead to unwillingness/inability of States to provide even minimal protection for foreign investors and use the arbitration procedure to resolve disputes with them.⁷⁸

42. In the fight against the spread of the COVID-19 virus, States have taken a number of measures, including restrictions on travel, limitations on business operations and tax benefits, which have negatively affected the profits of large enterprises around the world and led to discussions about the possibility of filing complaints about compensation for expected future profits.⁷⁹ It is noted that such demands from companies have arisen from the actions of State authorities that have damaged their investments directly, through expropriation, or indirectly, through measures taken by governments to combat the pandemic.⁸⁰

⁷⁶ S. Dutta. Will 'Investor-State Arbitration' Survive the COVID-19 Crisis? URL: <https://opiniojuris.org/2020/05/07/will-investor-state-arbitration-survive-the-covid-19-crisis/>.

⁷⁷ Ibid. See also R. Arredondo. Mercosur: A New Victim of the Coronavirus? URL: <https://opiniojuris.org/2020/05/02/mercosur-a-new-victim-of-the-coronavirus/>.

⁷⁸ S. Dutta. Op cit.

⁷⁹ J. Johnson. 'Ticking Time Bomb': Corporate Lawyers Openly Discussing Suing Nations Over Profits Lost to Covid-19 Measures. URL: <https://www.commondreams.org/news/2020/05/20/ticking-time-bomb-corporate-lawyers-openly-discussing-suing-nations-over-profits>.

⁸⁰ Ibid.

IX. THE LAW OF THE WTO

43. Due to the spread of the COVID-19 virus worldwide, more than 75 countries in need (real or perceived) for certain products, ranging from protective masks and gloves to ventilators, medicines, and even food or agricultural products, have restricted their exports.⁸¹ In this regard, attention is drawn to the positive and negative sides of such restrictions,⁸² as well as to the reasons for their imposition and the limits set in international agreements.⁸³

44. In addition to the reasons highlighted in the overview of April 28, 2020,⁸⁴ it is noted that under Article XX(j) of the General Agreement on Tariffs and Trade (hereinafter, “**GATT**”), a shortage of a product on the local or international market may be one of the reasons for imposing export restrictions.⁸⁵ However, such restrictions must be consistent with the principle that all WTO members are entitled to “an equitable share of the international supply” which may imply the right of WTO members to have access to a certain share of the world’s production of personal protective equipment or an eventual COVID-19 vaccine.⁸⁶

45. It is also indicated that in cases where countries are concerned about shortages or high prices of raw materials (for example, ingredients for the production of medicines or vaccines), Article XX(i) of the GATT can be used to justify restrictions on the export of such materials.⁸⁷

46. Although Article XI of the GATT generally prohibits quantitative restrictions on exports of goods, it also provides for a number of carve-outs that explicitly allow countries to restrict exports, particularly during a pandemic.⁸⁸ However, it is emphasized that in the midst of a crisis, the requirements for imposing such restrictions may be ignored, and therefore transparency, notifications, and consultations on the potential imposition of restrictions may be the best options to maintain trade and collectively resolve the crisis.⁸⁹

47. It is pointed out that, in addition to the GATT provisions, the Agreement on the Application of Sanitary and Phytosanitary Measures of the WTO is the applicable legal regime for trade restrictions related to public health. It provides for the possibility of introducing measures with varying degrees of restriction, ranging from tariffs to a complete ban on imports.⁹⁰ It is suggested that States negatively affected by such public health measures during the COVID-19 pandemic

⁸¹ J. Pauwelyn. Export Restrictions in Times of Pandemic: Options and Limits under International Trade Agreements. P. 2. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579965.

⁸² R. Baldwin, S. Evenett, COVID-19 and Trade Policy: Why Turning Inward Won’t Work, CEPR Press, April 2020. URL: <https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work>; see also C.P. Bown. EU limits on medical gear exports put poor countries and Europeans at risk. URL: <https://www.piie.com/blogs/trade-and-investment-policy-watch/eu-limits-medical-gear-exports-put-poor-countries-and>; C.P. Bown. COVID-19: Trump’s curbs on exports of medical gear put Americans and others at risk. URL: <https://www.piie.com/blogs/trade-and-investment-policy-watch/covid-19-trumps-curbs-exports-medical-gear-put-americans-and>.

⁸³ J. Pauwelyn. P. 3, 6. Op cit.; see also S.S. Aatreya. Are COVID-19 Related Trade Restrictions WTO-Consistent? URL: <https://www.ejiltalk.org/are-covid-19-related-trade-restrictions-wto-consistent/>.

⁸⁴ International and Comparative Law Research Center. P. 19, para. 44. Op cit.

⁸⁵ J. Pauwelyn. P. 10-12. Op cit.

⁸⁶ Ibid. P. 12.

⁸⁷ Ibid.

⁸⁸ Ibid. P. 15.

⁸⁹ Ibid. P. 16.

⁹⁰ A. Bogdandy, P.A. Villarreal. P. 21. Op cit.

may file complaints with the WTO Dispute Settlement Body in the same way as, for example, a complaint brought against India because of the measures imposed by it in times of the spread of the H5N1 virus in 2012.⁹¹

⁹¹ Ibid. See the dispute *India-Measures Concerning the Importation of Certain Agricultural Products* (DS430). URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm.

