

## THE PANDEMIC PARADOX IN INTERNATIONAL LAW

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### ABSTRACT

*This Essay examines a series of paradoxes that have rendered the international legal order's mechanisms for collective action powerless precisely when they are needed most to fight COVID-19. The "patriotism paradox" is that disengagement from the international legal order weakens rather than strengthens state sovereignty. The "border paradox" is that securing domestic populations by excluding noncitizens, in the absence of accompanying regulatory mechanisms to secure adherence to internal health measures, accelerates viral spread among citizens. The "equality paradox" is that while pandemics pose an equal threat to all people, their impacts compound existing inequalities.*

### I. INTRODUCTION

The word "pandemic" derives from the Greek *pan* (all) and *demos* (people). A pandemic is thus an epidemic of an infectious agent that has spread across a population, crossing national boundaries and affecting large numbers of people worldwide. Arguably, the most striking feature of the current pandemic is its *global* reach and effects. There is no single territory or human community that is unaffected by or invulnerable to the spread of the COVID-19 respiratory disease. As Paulo Giordano observes, the contagion knows no borders nor discriminates on the basis of nationality, race, ethnicity, religion, or indeed any other ground of distinction. The danger it poses is to human life itself:

And so the epidemic encourages us to think of ourselves as belonging to a collective. It pushes us to behave in a way that is unthinkable under normal circumstances, to recognise that we are inextricably connected to other people, to consider their existence and well-being in our individual choices. In the contagion we rediscover ourselves as part of a single organism. In the contagion we become, again, a community.<sup>1</sup>

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<sup>1</sup> PAULO GIORDANO, *HOW CONTAGION WORKS: SCIENCE, AWARENESS AND COMMUNITY IN TIMES OF GLOBAL CRISES*, at ch. 12 (2020).

This visceral sense of a common humanity faced with a protean global threat arises at a particularly fractious juncture in history: a moment when the modern internationalist vision of multilateral cooperation and global governance is widely understood to be under assault and unravelling. In this Essay, we term this the “pandemic paradox”: the fact that the COVID-19 pandemic has exposed the inherent logic and necessity of an effective international legal order at a moment when ideas of supranational organization and post-national sovereignty are increasingly resisted. Seeking to understand the nature and origins of this paradox is vital to any coherent future of international law.

The causes of the current assault on multilateral cooperation and global governance are complex and multifaceted, but by now the story is broadly familiar.<sup>2</sup> In the wake of decades of both neoconservative foreign policy culminating in the invasion of Iraq in 2003 and neo-liberal economic policy culminating in the global financial crisis of 2008, a populist backlash has emerged that opposes not only global governance conceptions of international law, but key pillars of the UN Charter’s “liberal” regime of sovereign equality and collective security.

These currents can be traced to contradictions internal to the normative structure of international law itself and, in particular, the dramatic shift in understandings of sovereignty under conditions of technological globalization. As Martti Koskeniemi explained, modern international law seeks to cope with what appear to be opposing demands for individual freedom and social order by means of a paradox: “to preserve freedom, order must be created to restrict it.”<sup>3</sup> On the one hand, social order is ultimately legitimate only insofar as it protects individual freedom; but on the other hand, “individual freedom can be preserved only if there is a normatively compelling social order.”<sup>4</sup> This oscillating dialectic of freedom and order creates the distinctive double-bind of modern international law.

The current populist moment opposes such a dialectic vision of international legal order in two ways. In relation to post-1948 conceptions of sovereign equality, an unapologetic political theology of popular sovereignty—under which the will of the people is the *single* legitimate source of normativity—makes any claim of rational legal constraint on national sovereignty inherently problematic. This is a long-standing obstacle to American participation in treaty and multilateral regimes, which has proved possible only where a right of veto or other declaration of normative non-self-execution in U.S. domestic law is accepted by other states. In relation to post-1990 global governance conceptions of international law, a notion of fundamental rights as deriving from or being internal to popular sovereignty is opposed to the idea of universal human rights. This latter phenomenon expanded dramatically in the post-Cold War era, as the rise of the vocabulary of globalization and transnational governance, and the implicit critique of national sovereignty internal to these discourses, has generated great anxiety in national political communities.

Taken together, these populist claims render the notion of liberal international order implausible. In classical international law, sovereignty is understood in *relational* terms, as the shifting product of the need to reconcile individual (private) free will and interest with the social (public) demands of reason. Similarly, fundamental individual rights have been

<sup>2</sup> See Peter G. Danchin, Jeremy Farrall, Jolyon Ford, Shruti Rana, Imogen Saunders & Daan Verhoeven, *Navigating the Backlash Against Global Law and Institutions*, 38 AUSTRALIAN Y.B. INT’L L. 33, 34–35 (2020).

<sup>3</sup> MARTTI KOSKENIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 71 (2d ed. 2006).

<sup>4</sup> *Id.*

understood in universalistic terms as applying to the *human* as subject, as opposed to the members of any particular political community. As global governance conceptions of international law have taken shape in specialized regimes of trade, human rights, environment, security and migration, and as complex managerial vocabularies have proliferated, political liberal conceptions of national sovereignty and self-determination have gradually become eclipsed by cosmopolitan views of international law. This shift has not been received by populists at the national level, however, as “a pluralistic, cooperative world political system under a new, impartial global *rule of law*, but rather a project of imperial world domination.”<sup>5</sup>

It is critical to keep these intellectual trajectories and contradictions in mind in seeking to understand the valence and contradictions internal to responses to the COVID-19 pandemic. In the discussion that follows, we chart the contours of three key paradoxes exposed by the pandemic in the international legal order.

Part II explores the “patriotism” paradox: in the name of the people, populist governments seek to strengthen their national sovereignty by disengaging from global treaty regimes and international organizations. Yet by doing so, they diminish their very sovereign capacity to project externally and protect internally their most basic national values and interests. This insight was made forty years ago by David Kennedy, who astutely observed that the contradiction between the autonomy and cooperation of states is never in permanent opposition. Instead, “[b]ecause its elements require and deny each other, their opposition can be mediated by internal transformation.”<sup>6</sup> A state may participate in an international organization to realize its national interests through community, but equally may do so as an expression of fear or to attain the goal of protection from other states. Faced with a deadly global pandemic, the populist retreat of states from regimes of sovereign cooperation such as the UN Security Council and similar withdrawal from institutions of global governance such as the World Health Organization (WHO) has left the sovereign capacity and interests of these states greatly diminished.

Part III describes the “border” paradox: the haphazard, uncoordinated, and nationality-driven closure of points of entry and suspension of international travel and trade by states such as the United States at the end of January accentuated rather than stemmed the global spread of COVID-19.<sup>7</sup> Adopting the population-based and managerial rationality that underlies global public health law, WHO experts have long warned against such national measures without ensuring the simultaneous implementation on a global scale of strict protocols of quarantining, testing, and contact tracing.<sup>8</sup> The attempt to protect citizens by shutting borders and excluding non-nationals ignores the propensity of the virus to traverse borders at will, including in the bodies of citizens whose entry is unrestricted and unmonitored. Similarly, trade restrictions risk weakening the capacity of local production to withstand shocks that a functioning global supply system can weather. The border measures intended to protect a population may thus leave it more vulnerable.

<sup>5</sup> Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 *ETH. & INT’L AFF.* 1, 2 (2004).

<sup>6</sup> David Kennedy, *Theses About International Law Discourse*, 23 *GERMAN Y.B. INT’L L.* 353, 363–64 (1980) (quote is on page 362).

<sup>7</sup> Natalia Banulescu-Bogdan, Meghan Benton & Susan Fratzke, *Coronavirus Is Spreading Across Borders, But It Is Not a Migration Problem*, *MIGRATION POL’Y INST.* (Mar. 2020).

<sup>8</sup> WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH AND THE LAW* 260 (2009).

Finally, Part IV discusses the “equality” paradox: while the virus poses an equally lethal threat to all people and societies, its impact is felt unevenly as the capacities and resources to respond to and protect from the virus are not controlled, distributed or received equally among or between states and peoples. As discrimination and injustice proliferate with impunity within national and sub-national communities, the need again for an effective international system of monitoring and protection of universal human rights has never been more evident.

## II. THE GLOBAL LEADERSHIP VACUUM AND THE PATRIOTISM PARADOX

A distinctive feature of the COVID-19 crisis has been the absence of effective global leadership to drive responses to this escalating threat. International organizations, great powers, and their leaders, have distinguished themselves by their incapacity or unwillingness to take the steps necessary to respond effectively and collectively to the pandemic. This vacuum of leadership, already apparent prior to the COVID-19 onset, is both a symptom and product of the patriotism paradox.

The recent rise of populism and authoritarianism, especially within major Western democracies, has eroded the traditional leadership in multilateral forums of key states such as the United States and the United Kingdom. In order to appeal and respond to domestic political forces, leaders in these states have channeled patriotic sentiment to scapegoat the international institutions that have hitherto been so useful to their foreign policy agenda. A classic example was President Trump’s 2019 statement to the General Assembly:

The future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbors, and honor the differences that make each country special and unique.<sup>9</sup>

In the pursuit of an idealized populist notion of sovereignty as patriotism, the United States has withdrawn from the UN Human Rights Council and the Paris Agreement on Climate Change, and paralyzed the World Trade Organization’s Dispute Settlement Body. The United Kingdom, for its part, has withdrawn from the European Union. Ironically, the disengagement from the international legal order by these powers has become more pronounced at the very moment when a swift collective global response is required to halt the spread of COVID-19.

The response of the Security Council to the pandemic is a case study in how not to exercise collective leadership in the face of a grave global threat. On April 9, 2020, UN Secretary-General António Guterres warned the Council that the COVID-19 pandemic was the world’s “gravest test” since the UN was founded.<sup>10</sup> He further characterized the pandemic as “a significant threat to the maintenance of international peace and security.”<sup>11</sup> As the body with primary responsibility for maintaining international peace and security, the Council might

<sup>9</sup> President Trump, Remarks to the 74th Session of the UN General Assembly, Sept. 24, 2019, at <https://www.whitehouse.gov/briefings-statements>.

<sup>10</sup> UN Secretary-General, Comments to the Security Council at its teleconference on the new agenda item Impact of the COVID-19 Pandemic, Apr. 9, 2020, at <https://www.un.org/sg/en/content/sg/speeches/2020-04-09/remarks-security-council-covid-19-pandemic>.

<sup>11</sup> *Id.*

have been expected to lead global efforts to address the COVID-19 pandemic.<sup>12</sup> Moreover, its location in the New York epicenter of COVID-19 in April and May meant that it could be under no illusions concerning the gravity of the COVID-19 threat. Yet its response to that threat was meek.

While the director-general of the WHO declared “a public health emergency of international concern over the global outbreak of novel coronavirus” on January 30,<sup>13</sup> it took almost two months for the Council to provide the first formal indication that it was paying attention to COVID-19. On March 24, COVID-19 forced the Council to halt in-person meetings, moving to teleconferences.<sup>14</sup> Yet it was not until April 9 that the Council finally met to discuss the “Impact of the COVID-19 Pandemic.”<sup>15</sup> Even then, the Council could not agree on a meaningful response to COVID-19. It did not act on the proposal by some members to endorse the secretary-general’s plea for a global ceasefire during the pandemic.<sup>16</sup> Ultimately, the best it could do was to express support for the secretary-general’s efforts concerning “the potential impact of COVID-19 pandemic to conflict-affected countries” and to recall “the need for unity and solidarity with all those affected.”<sup>17</sup>

The Security Council’s inability to respond assertively to the COVID-19 threat represents a clear failure of collective global leadership. It reminds us yet again that the Council cannot act effectively when a permanent member perceives a clash between proposed collective action and its own national interest. The threat or use of the veto power create a perennial pragmatic constraint on the principled aspirations of Council decision making.<sup>18</sup> While industrious nonpermanent Council members have sometimes exercised influence over the content and contours of some Council decisions,<sup>19</sup> if any permanent member harbors misgivings about prospective action, then efforts to act through the Council are destined to fail.

In relation to the COVID-19 crisis, negotiations toward a Council response unraveled due to squabbling between China and the United States on how to characterize the name of, and early responses to, the virus.<sup>20</sup> The escalating differences between these permanent members, which the Chinese foreign minister has described as a potential “new Cold War,” suggest the

<sup>12</sup> UN Charter, Art. 24.

<sup>13</sup> Director-General of the World Health Organization, Declaration at the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding Novel Coronavirus, Jan. 30, 2020, at [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-(2019-ncov)).

<sup>14</sup> UN Security Council, VTCs of the Security Council Members and Outcomes During the COVID-19 Pandemic, at <https://www.un.org/securitycouncil/content/meetings-2020-rtc>.

<sup>15</sup> Security Council President, Press Elements from VTC on the Impact of COVID-19, Apr. 9, 2020, at <http://webtv.un.org/media/media-stakeouts/watch/jose-singer-security-council-president-dominican-republic-on-the-20impact-of-covid-19-on-the-issues-that-fall-under-the-security-council%E2%80%99s-mandate-security-council-virtual-media-stakeout-9-april-2020/6148490173001>.

<sup>16</sup> UN Secretary-General, Appeal for Global Ceasefire, Mar. 23, 2020, at <https://www.un.org/sg/en/content/sg/speeches>.

<sup>17</sup> Security Council President, *supra* note 15. Three months later the Council finally adopted a resolution demanding a cessation of hostilities in all situations on its agenda: SC Res. 2352 (July 1, 2020).

<sup>18</sup> UN Charter, Arts. 23, 27.

<sup>19</sup> See Jeremy Farrall, Marie-Eve Loiselle, Christopher Michaelsen, Jochen Prantl & Jeni Whalan, *Elected Member Influence in the UN Security Council*, 33 LEIDEN J. INT’L L. 101 (2020).

<sup>20</sup> Security Council Report, International Peace and Security, and Pandemics: Security Council Precedents and Options (Apr. 5, 2020), available at <https://www.whatsinblue.org/2020/04/international-peace-and-security-and-the-covid-19-pandemic-security-council-precedents-and-options.php>.

Council will struggle to develop an effective strategy to address COVID-19.<sup>21</sup> This dismissal of the international interest as antagonistic to the national interest is shortsighted and self-defeating when faced with a pandemic. It is particularly ironic that permanent members have prevented the Council from taking action on COVID-19, given the damage the pandemic has wrought not just on the Council's New York home, but also on the domestic populations of all permanent members. For most of May and June 2020, the only permanent member who sat outside the COVID-19 top ten infectious countries was China, where the virus originated.<sup>22</sup>

The effects of this failure of cooperative multilateralism have been exacerbated by political attacks on, and the withdrawal of funding from, the WHO in the midst of the COVID-19 crisis. For years, the trend in international law of treaty regime fragmentation, legal deformalization, and norm conflict has led to increasing skepticism among states of claims to expert knowledge and global governance. Yet the paradox again is that pandemics cannot be contained or mitigated by individual states, no matter how powerful, whether acting alone or in concert.<sup>23</sup> Effective protection of national populations can be achieved only through a truly global response that prioritizes transparency, burden sharing, and public health resource distribution in conjunction with legally binding international health regulations.

### III. INVISIBLE ALIENS AND THE BORDER PARADOX

These contradictions in the autonomy-community dialectic are equally apparent within states. Much of international law is concerned with territory and boundaries: records of borders date to ancient times,<sup>24</sup> and border disputes feature prominently in the jurisprudence of the World Courts.<sup>25</sup> The entire Westphalian system is predicated on sovereign states, and a defined territory is one of the accepted criteria for statehood.<sup>26</sup> It is little wonder then that as the COVID-19 pandemic challenges international law, foundational issues of borders, exclusion, and territory are equally implicated. Themes that have been dominant in national and international populist rhetoric have played out through this process.

This is particularly clear in the case of border control. Populist leaders have long used borders as a vote winning tactic. Exemplified by chants of "Build the Wall" at Trump rallies, this strategy also underpinned Britain's self-exclusion through Brexit and continues to inform Australia's offshore detention of refugees. Territory and protection of territory here is not (just) "a tangible, fixed object, but equally . . . a symbolic (identity) and flexible construct

<sup>21</sup> Anna Fifield, *Chinese Foreign Minister Warns U.S. Against Taking the Countries "to the Brink of a New Cold War,"* WASH. POST (May 24, 2020), at [https://www.washingtonpost.com/world/asia\\_pacific/china-tells-us-to-stop-taking-them-to-the-brink-of-a-new-cold-war/2020/05/24/4eda6ffc-9da9-11ea-9d96-c3f7c755fd6e\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-tells-us-to-stop-taking-them-to-the-brink-of-a-new-cold-war/2020/05/24/4eda6ffc-9da9-11ea-9d96-c3f7c755fd6e_story.html).

<sup>22</sup> See Johns Hopkins University Coronavirus Resource Center, *COVID-19 Dashboard*, at <https://coronavirus.jhu.edu/map.html>.

<sup>23</sup> Michael Kirby, *Multilateralism, Pushback and Adjustment: From the UN Charter to COVID-19*, 35 MD. J. INT'L L. 101 (forthcoming 2020).

<sup>24</sup> Daniel-Erasmus Khan, *Territory and Boundaries*, in OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 225, 229 (Bardo Fassbender & Anne Peters eds., 2012).

<sup>25</sup> Hugh Thirlway, *Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice*, 31 LEIDEN J. INT'L L. 117, 117 (2018).

<sup>26</sup> Montevideo Convention, Art. 1, 165 LNTS 19.

of social and political power.”<sup>27</sup> Through the “othering” of non-nationals, governments gain popular support for policies that exclude them, which are perceived as strengthening national borders and defending sovereignty.

Responses to COVID-19 have followed this path. But the irony is that in the context of a pandemic, such purported defense of sovereignty ultimately risks undermining it. This is evident in the tension between external border controls and internal protection measures. The opposing pulls of individual freedom and social order come to a head in the duality best described as “the right to protect, the freedom to infect”: whereby a state is buoyed by popular support for its exclusion of others but confronted by a populace unwilling to obey internal social distancing, lockdown, or mask-wearing requirements. Exclusion of others fits neatly into previous populist behavior, enjoying the same domestic support as populist border controls did pre-pandemic. The visible alien has become invisible: a disease rather than a person, but still couched in terms of the other. In contrast, internal measures are seen as a constraint on freedom, an unacceptable imposition on the lives of the everyday citizen.

The same rejection of scientific evidence that has challenged international consensus on climate change is present here. Without acceptance of scientific evidence by leaders, there is little domestic appetite to weather restrictions on liberty. This in turn challenges the international law goals of collective protection and realization of human rights for all. The protection of individual freedom is illusory as community transmission of COVID-19 flourishes without strong adherence to internal public health restrictions.<sup>28</sup> This leads to crisis *within* closed borders: the very people meant to be protected by a nationalistic assertion of sovereignty are instead the ones most exposed to danger.<sup>29</sup>

This border control dynamic is also apparent in the context of trade. When states faced shortfalls in personal protective equipment (PPE) and other medical supplies, many were quick to blame a lack of domestic manufacturing and reliance on international supply chains.<sup>30</sup> States enacted export bans to keep scarce supplies onshore.<sup>31</sup> State rhetoric has indicated a desire not just to control exports for now, but to shift manufacturing back onshore permanently. The links to pre-pandemic populism are clear, from Trump’s rejection of the North American Free Trade Agreement (NAFTA), citing jobs lost to Mexico,<sup>32</sup> to the “taking back control” rhetoric of Brexit.<sup>33</sup> As with border controls on the movement of people, attempts to bolster national supplies by dismantling international trade expose domestic populations to shocks from within.

<sup>27</sup> David Newman, *Territory, Compartments and Borders: Avoiding the Trap of the Territorial Trap*, 15 *GEOPOLITICS* 773, 773 (2010).

<sup>28</sup> And as set out in Part III, this is facilitated by domestic leaders unwilling to take action to enforce such measures.

<sup>29</sup> This also impacts on the effectiveness of border measures internationally. See Matteo Chinazzi, Jessica T. Davis, Marco Ajelli, Corrado Gioannini, Maria Litvinova & Stefano Merler, *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, 368 (6489) *SCIENCE* 395 (2020).

<sup>30</sup> See Jane Feinmann, *PPE: What Now for the Global Supply Chain?*, *BMJ*, 369:m1910 (2020).

<sup>31</sup> *Id.*

<sup>32</sup> Although the impact of NAFTA is much more complicated. See Jonas Gamso & Robert Grosse, *NAFTA 2.0: What Should Be Next?*, 40 *HARV. INT’L REV.* 30 (2019).

<sup>33</sup> Gianfranco Baldini, Edoardo Bressanelli & Stella Gianfreda, *Taking Back Control? Brexit, Sovereignism and Populism in Westminster (2015–17)*, 21 *EUR. POL. & SOC’Y* 219, 220 (2019).

The danger is that popular—and populist—border restrictions in response to COVID-19 will continue long after the crisis has abated. Breaches of international law that may be excused in the context of crisis could continue, as domestic politicians grab opportunities to advance their own agendas by targeting groups perceived as undesirable in a discriminatory manner. In Italy, for instance, far-right politicians used the pandemic to expand restrictions on immigration from Africa when Africa's COVID-19 infection rates were magnitudes lower than those of Europe.<sup>34</sup> Ongoing trade barriers are also short-sighted: long-term global supply of PPE equipment is best guaranteed by international cooperation to secure supply chains, alongside regulation, to prevent predatory stockpiling, rather than by export/import restrictions.<sup>35</sup>

#### IV. UNEQUAL BURDENS AND THE EQUALITY PARADOX

As it emerged, the COVID-19 pandemic was viewed as an equalizing, if terrifying force, steamrolling across territorial borders and state-level protective efforts. However, in its impact on international law, the pandemic has not been the great unifying force that some predicted and the term pandemic implies.<sup>36</sup> Instead, the COVID-19 pandemic has exposed and deepened the fault lines of global inequality, spreading suffering unevenly and disproportionately through already marginalized groups as it unravels safety nets and public trust. Ultimately, its most immediate and perhaps most lasting legal impact may be the ways that it has laid bare and further entrenched the hierarchies embedded in the international legal order that directly impede equality and the realization of human rights.

Two themes have emerged around the unequal burdens forming in the wake of the pandemic's first wave. The first is that the pandemic has sharpened rather than elided distinctions between haves and have-nots within nations and on the global stage. This has reinvigorated traditional hierarchies of race, gender, class, and citizenship, abruptly reversing recent gains and eroding legal advances in international human rights protections. The clock is being turned rapidly backward on the human rights gains, norms, and values that proliferated in the 1970s and after the Cold War, which sought to expand the scope of international human rights norms, institutions, and treaties to cover issues such as racial and gender discrimination.<sup>37</sup> These trends are accelerating the impact of the current backlash against multilateral institutions and the discourses and mechanisms of globalization.

For example, the recognition of gender-based violence as a human rights violation deserving of state and legal protection is a recent and fragile development in international law, with some of the most significant advances dating only to the mid-1990s.<sup>38</sup> The COVID-19 pandemic quickly undermined the vital legal and social mechanisms established to prevent and

<sup>34</sup> Lorenzo Tondo, *Salvini Attacks Italy PM Over Coronavirus and Links to Rescue Ship*, GUARDIAN (Feb. 24, 2020), at <https://www.theguardian.com/world/2020/feb/24/salvini-attacks-italy-pm-over-coronavirus-and-links-to-rescue-ship>.

<sup>35</sup> See Asian Development Bank, *Global Shortage of Personal Protective Equipment amid COVID-19: Supply Chains, Bottlenecks, and Policy Implications*, 130 ADB BRIEFS (2020).

<sup>36</sup> Anthea Roberts & Nicolas Lamp, *Is the Virus Killing Globalization? There's No One Answer*, BARRON'S (Mar. 15, 2020), at <https://www.barrons.com/articles/is-the-virus-killing-globalization-theres-no-one-answer-51584209741>.

<sup>37</sup> Danchin, et al., *supra* note 2, 39–40.

<sup>38</sup> See CEDAW General Recommendation No. 19: Violence Against Women (1992).



address gender-based violence, as shutdowns of government and civil society institutions cut women off from legal aid, social services, and other protective measures. The resulting spike in domestic violence, with cases reportedly rising by at least 30 percent worldwide, has been described as a “double pandemic” following the COVID-19 health crisis.<sup>39</sup>

Similarly, recent economic and social gains of workers, particularly those already marginalized in markets by gender, race, class, or legal status, were swiftly wiped out as legal protections and support systems fell by the wayside. Around the world, workers suddenly deemed “essential” were revealed to also be the most “disposable” as the gendered and raced devaluation of care and service work simultaneously rendered these workers most subject to exploitation and among the least able to access protective equipment or legal protection.<sup>40</sup>

The impact of cumulative, systemic discrimination was sharply exposed as, around the world, both the virus and its economic and social consequences have hit hardest on most severely marginalized racial, ethnic, and socioeconomic groups.<sup>41</sup> The compounding effects of stripping away social and legal protections for the very people who need them most, just when they need them most, therefore threatens to strengthen and further entrench the traditional hierarchies viewed as antithetical to the project of modern human rights. The pandemic may thus effectively complete the goals of the backlash against the international legal order by nullifying many of the recent human rights gains and the work of the multilateral institutions to support and expand the recognition of human rights to marginalized groups.

Second, the responses to COVID-19 have highlighted a key feature of the relationship between inequality and state power. That is, perhaps implicitly accepting the view that the protection of rights, especially for the most marginalized, requires positive state action, populist and authoritarian-leaning states have simply failed to act in the face of the pandemic, deliberately forfeiting their protective role and powers.

New fault lines have developed between authoritarian-leaning and more democratic nations, as these political divisions have created a wide gulf between states with the capacity and will to utilize government power to protect their people and those that cannot or refuse to do so. The authoritarian-leaning leaders of the United States, United Kingdom, Brazil, and India, for example, spent the pre-pandemic period undercutting and weakening their countries’ healthcare systems, while fanning the flames of social division and political polarization, perhaps critically wounding public trust and power. Each has refused to mobilize state power to fight the pandemic, while simultaneously deriding and flouting available, community-oriented protective measures such as masks and social distancing as symbols of “weakness.” Instead, they have chosen to focus on the rhetoric of autonomy and self-reliance, while employing state power to crack down on dissent and obscure facts and science.

These failures by leaders to protect their own populations have led to skyrocketing infection rates, which in turn compound the social, racial, and economic divides described above, widening the gulf separating them from the states that moved decisively, forcefully, and at

<sup>39</sup> Shruti Rana, *COVID-19’s Gendered Fault Lines and Their Implications for International Law*, ANU COLLEGE L. (June 24, 2020), at <https://law.anu.edu.au/research/essay/covid-19-and-international-law/covid-19%E2%80%99s-gendered-fault-lines-and-their-implications>.

<sup>40</sup> *Id.*

<sup>41</sup> *What’s Really Behind the Gender Gap in COVID-19 Deaths? When in Doubt, Look to Social Factors First, Not Biology*, N.Y. TIMES (June 24, 2020), at <https://www.nytimes.com/2020/06/24/opinion/sex-differences-covid.html>.

least initially, successfully, to contain the virus. Ironically, the populists who rose to power claiming to channel the will of the people have been exposed as the least able to marshal or retain the cooperation of their own populations.

## V. CONCLUSION

We began with Giordano's observation that COVID-19 has forced us to acknowledge our common humanity. The logical response to the pandemic threat, then, is to work collectively to protect and support each other and to eradicate the threat. Yet, as we have traced in this Essay, a series of paradoxes have pitted states against one another and undermined the mechanisms for collaborative action precisely when they are most needed. These developments have rendered the international legal order powerless in the face of the most serious global threat in a generation.

First, the patriotism paradox, premised on the populist claim that national power would be strengthened by prioritizing domestic grievances over global needs, has gutted national defenses and sovereign power both within states and within the international community of states. Second, the border paradox reveals that the quest to fortify borders, while allowing inequality and impunity to flourish within those borders, has undermined the security of domestic populations. It has simultaneously accelerated viral spread among those now locked within national borders, while reducing the ability to seek help from outside those borders, leaving states vulnerable to a virus which responds to science, not passports. Third, the equality paradox has exposed how a global threat to all people does not impact all people in the same way, but rather compounds its impacts at the intersections of social fault lines. Inequality has been exacerbated within and between national borders, entrenching hierarchies that block the realization of human rights.

These developments upend the initial narrative of the COVID-19 virus as a faceless equalizing force that would infect rich and poor alike without regard to nationality, politics, or economics. The paradoxes we identify raise fundamental questions about the future of global governance. The populist backlash against the international legal order and the accompanying populist reflex to disengage from global norms and institutions represent a fundamental obstacle to the collective action required to manage grave global threats. The rapid spread of the COVID-19 pandemic has acted as the accelerating agent placing nations worldwide into a crucible between these perhaps irreconcilable demands. As the pandemic rages on, it turns up the heat on all the elements already simmering in the gaps between these paradoxes, threatening to overturn the oscillating dialectic of freedom and order that underpins our increasingly fragile system of modern international law. Our future demands a response on all these fronts.