EFFECTIVE PANDEMIC PREPAREDNESS DEMANDS THAT GOVERNMENTS CONFRONT HARD QUESTIONS ABOUT SOVEREIGNTY

By: Martin McKee and Scott L. Greer

Summary: No-one is safe until everyone is safe. But what can be done when a country fails to take measures to control a pandemic virus? It poses a threat to its own people but also to its neighbours and beyond. Countries do pool sovereignty, working through supra-national structures, such as international agencies, or using processes set out in treaties, recognising the mutual benefits of the international rules-based system. Here we review the ways in which governments have, or have not worked together on other issues that pose a threat to global health and discuss the implications for pandemic responses.

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The limits of sovereignty in a pandemic

It is a cliché that microorganisms do not respect national frontiers. Unseen, they hitch lifts on the people, animals, and goods that cross them. Yet when we look at the maps that have been prepared to monitor the spread of the COVID-19 pandemic, those frontiers are often clearly visible. Infection rates can be many times higher on one side than on the other. This seems inexplicable. All governments have access to the knowledge needed to respond to the pandemic, even if they need to monitor it constantly as it accumulates. The difference is what they do with that knowledge.

Had they prepared for the pandemic that so many had predicted? Had they invested in the infrastructure, whether in the form of essential supplies, laboratories, high quality housing, well ventilated schools, or high speed internet that was required to mount an effective response? And above all, were they prepared to work together with other countries in the face of a common threat? The last of these is especially important. We now know that successive waves of infection, driven by new variants of SARS-CoV-2, have spread from certain countries. A country that fails to suppress a virus with pandemic potential is a threat to the entire world.
So the international community has a legitimate interest in the decisions that its political leaders make.

But what does this mean in practice? Countries are sovereign. They make their own laws and create the structures and institutions to implement and uphold them. Indeed, some have elevated the pursuit of sovereignty above almost all other goals regardless of the cost.

In some ways they have already taken the first steps, with a commitment to report on what they are doing to improve health. In 2015, world leaders committed to an ambitious agenda of sustainable development, building on the earlier Millennium Development Goals. In a series of 17 goals, operationalised in 169 targets, they signed up to take actions to achieve a better and more sustainable future for all. One of these goals, Sustainable Development Goal (SDG) 3, focuses explicitly on health, calling on governments to ensure healthy lives and promote well-being for all, at all ages. Many others include targets that will contribute, in different ways, to better health. These include alleviation of poverty and hunger, improvement of education, promotion of gender equality, and action on climate change, all underpinned by peace, justice, and strong institutions.

The SDGs are, however, aspirational. They form a political declaration that imposes no legally binding obligation on governments to make their best efforts to achieve them. There are no sanctions for failing to make progress and, indeed, even if there were, it is not obvious what mechanism might judge them or otherwise hold them to account. The 2030 Agenda, from which they have arisen, speaks of “accountability to our citizens” and of review processes at all levels that will be “open, inclusive, participatory and transparent for all people” as well as being “people centred, gender sensitive, respect human rights and have a particular focus on the poorest, most vulnerable, and those furthest behind”.* The question of how these aspirations can be realised remains unanswered.

Beyond the SDGs, there are many other international agreements in which they have agreed to report progress on measures that have implications for health. Examples include the Paris Agreement on Climate Change, the UN Convention on the Rights of the Child, the Ottawa Treaty banning landmines, the Framework Convention on Tobacco Control, the International Health Regulations, and many others. They differ in the extent to which they include goals and obligations, the number of countries that have signed up to them, mechanisms for monitoring implementation, and the extent to which they can be enforced. Their operation also depends, to varying degrees, on the features of the state that has ratified them. Thus, the extent to which citizens of a country can seek remedies based on treaties will depend, for example, on whether that country has acceded to the Vienna Convention on the Laws of Treaties, and on whether the state adopts a monist approach, whereby international law has direct effect, in some cases, overriding domestic legislation, or a dualist approach, whereby treaties must be translated into domestic legislation. There are also a number of regional structures, such as the European Union, MERCOSUR, ASEAN, the African Union, and others, as well as bodies with historical connections, such as the Commonwealth, some of which have a significant role in health policy. Finally, there are numerous intergovernmental agreements.

Not all threats are treated equally

At the risk of generalisation, these instruments have had greater impact in some areas than others. Those with the strongest systems for enforcement typically focus on security (e.g. the Nuclear Non-Proliferation Treaty and the Chemical Weapons Convention, with their inspectorates) and trade/the economy (the World Trade Organisation, with Disputes Settlement procedures) rather than health per se. For example, international law contains stronger provisions against counterfeit banknotes than counterfeit medicines.† This situation is, however,
changing. Thus, in the pre-2005 International Health Regulations, reporting of outbreaks was the prerogative of the national government. It was difficult for the World Health Organization (WHO) to act in places where that government denied the presence of an outbreak, with several well-known examples of where this happened. The new Regulations enable WHO to draw on other sources of evidence and, where necessary, to challenge governments in denial.

The importance of pooling sovereignty in international health and there are many areas where governments have, to greater or lesser extent, surrendered a degree of sovereignty. In most cases, governments consent to provisions in international agreements. However, where they do not, there is the potential of sanctions. Conventionally, these can be imposed for several purposes:

- those designed to force cooperation with international law, such as the sanctions on Iraq in Resolution 661 after the invasion of Kuwait, an act that violated the sovereignty of Kuwait;
- those designed to contain a threat to peace within a geographical boundary, such as the Iran nuclear proliferation pact;
- those that condemn a specific action or policy of a government, as with those following the Rhodesian Unilateral Declaration of Independence in 1965.

These examples illustrate how the international community is willing to act, but primarily where there is a threat to security in military terms. Thus, the case for concerted action in the face of nuclear proliferation is easy to make (leaving aside the many anomalies including the rights of the original nuclear states). The same arguments apply, although arguably even more so, to the Biological Weapons Convention. However, in a post-pandemic world, there is at least an argument that there should be some mechanism for collective action in the situation where a government pursues policies that encourage the spread of a pandemic disease, placing not just residents of that country but also its neighbours at risk. A further, arguably more controversial, question is whether the international community should act in situations where a government adopts policies that pose a grave risk to its own population. Here too, there are analogous arguments. The Genocide Convention includes a Responsibility to Protect (although one consequence is that the international community has striven hard to avoid ever labelling an atrocity as genocide, instead favouring euphemisms such as “ethnic cleansing”). Although not enshrined in instruments of international law, some might point to the doctrine of international community, which was used to justify interventions in settings such as Sierra Leone, and in later, in Iraq.

The reality of a divided Europe

As with all debates in the WHO European Region, identification of common solutions is complicated by the differences between member states in the European Union/ European Economic Area (including the accession countries) and those that are not. Obviously, those in the former group have already accepted the importance of pooling sovereignty in many ways and the opportunities for joint or coordinated action are substantial, even if in practice, they are not always realised. The remaining countries in the Region do not have the same opportunities available to them.

The contested roles of international organisations

Making the case for international organisations always involves confronting the problem that they frequently have poor reputations, with critics accusing them of everything from excessive politicisation to hidden agendas to low-grade corruption. Part of the problem, which must be squarely confronted, is that some of the key functions of international organisations are not ones that are good for morale or effectiveness. Notably, they are arenas for diplomatic activity of all sorts. One result is that staffing them is difficult, since some member states are at times more interested in promoting their citizens into key positions than in filling jobs effectively. They are also, and this is very important, easy to blame for policy failures. Blaming the WHO for inadequate or late pandemic response, for example, is an obvious and easy strategy for all sorts of actors. Absorbing blame is a key function of international organisations, whether or not they match the blame with the autonomy and power to make blameworthy decisions. In many cases, the reason the UN is involved in intractable conflict is precisely because the problem is intractable. The implication is that designing any new international organisation, or trying to reform an existing one, involves a full appreciation of the less palatable functions these organisations serve. In particular, decisions about their roles and functions should be taken with full understanding that one role is to be blamed for member state mistakes, and decisions about their organisation and staffing should reflect a realistic understanding of what staff and member states are actually trying to do when they create and fill jobs.

Where next?

So, what needs to happen now? We clearly need far better, internationally comparable health data if we are to have early warning of health threats. This is not just a technical issue, although agreeing definitions, standards, and interoperability of systems will be complicated enough. It will also require substantial donor assistance, financial and technical, to put systems in place, while navigating concerns about issues such as privacy and cybercrime.

But information is not enough. There is a growing consensus that we need a new pandemic treaty. The members of the International Panel on Pandemic Preparedness and Response are only the latest to conclude that the International
Health Regulations, most recently revised in 2005, are inadequate.\textsuperscript{8} But this will require an acceptance that a strengthened WHO, as the custodian of such a treaty, must have the power to ensure accurate reporting, transparent risk assessment, and measures to fix any weaknesses that are revealed, just as has happened in the global financial system, making it able to respond to threats arising from the pandemic. A new treaty must not become merely a substitute for actual commitment to the level of transparency and realism that we need.

This will raise important questions about the sovereignty that many countries guard jealously, especially when it comes to human health. We can see in successive European Union treaties how member states have been willing to cede much greater powers to the European institutions in areas such as animal health and the environment.

As we have seen repeatedly, legal compliance with the International Health Regulation has, it seems, often outpaced state capacity or the incentives of politicians to comply. Is there a case for a mechanism to take concerted international action where a government is failing to take effective measures to control the spread of infectious disease beyond its borders? Does the international community have a responsibility or duty to protect those living within the borders of a country that is failing to protect its population? The “Responsibility to Protect” doctrine has been abused by governments that use its language to justify actions taken for other reasons, but some would argue that if the international community has a right, or even duty to intervene to prevent crimes against humanity the same principle, even if not involving force, could apply to prevent pandemics when other measures fail.

Many critics tax international organisations, laws, and regimes with hypocrisy, pointing out selective application of any and all international norms. But it is worth remembering that the norm of state sovereignty itself has always been breached as much as any other.\textsuperscript{9} Countries truly adhere to a doctrine of non-interference with the same lack of regard for consistency as they adhere to other doctrines; creditor states, for example, rarely interpret respect for others’ sovereignty as including respect for their debtors’ autonomy. This pattern has held as long as there has been anything resembling international debt, and has shaped the behaviour of creditor state governments regardless of their politics or espoused ideals.\textsuperscript{8} In short, respect for sovereignty is just as often breached as respect for any other norm. If governments are willing to concede their sovereignty to protect against other threats, we need to ask them why they are unwilling to do so in health.

References
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