III. Pandemic Crisis

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Innovations in International Public Governance in Response to the Covid-19 Pandemic

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Abstract: While the Covid-19 pandemic has mainly been a challenge for national governments, administrations and domestic law, international law also has a say in the response. International law has long been set up to deal with pandemics: there is an international organization devoted to human health – the World Health Organization. There is human rights law – the right to the highest attainable standard of human health. And there is a wide-reaching obligation for states to cooperate in pandemic responses. Unfortunately, with the West African Ebola-epidemic starting in 2014, there is even a highly prominent example of those factors coming together. The governance framework has not been tested in a truly world-wide pandemic. The opportunity arose with the Corona pandemic of the 2020s. Nevertheless, the legal framework in the crisis has not been adequately modified in more than three years since the WHO declared Covid-19 a 'public health emergency of international concern.'[1] This article will highlight the opportunities for innovation, as well the responses of individual states and international organizations. It will illustrate which players are involved and their (missed) opportunities to take action. Ultimately, all possible opportunities to improve international health governance have been of no avail.

I. International law framework for pandemic responses before Covid-19

Having spent most of its existence outside the scope of major scholarly debates in international law,[2] the Ebola outbreak of 2014 placed international health law in the limelight. Legal aspects of health were often overlooked or even ignored as they constitute a rather niche field of law.[3] In the case of

1 Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) on 30 January 2020 <www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-%282005%29-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-%282019-ncov%29> accessed 12 March 2024.

2 It is clear that there were international health lawyers before 2014 who were involved in scholarly debates within their scientific community.

3 Benjamin Mason Meier and Larisa M Mori, 'The Highest Attainable Standard: Advancing a Collective Human Right to Public Health' (2005) 37 Columbia Human Rights Law Review 101, 103 ff; Obijiofor Aginam, 'Mission (Im)possible? The WHO as a "Norm Entrepreneur" in Global Health Governance' in Michael Freeman, Sarah

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health emergencies, other factors matter more and are more urgent. There seems to be no need for international law if states are eager to cooperate and stop a disease from spreading any further. Medical, social and other aspects are more pressing. Also, traditional challenges to health usually require continuous and permanent efforts – maternal and childhood health, issues arising from disabilities or HIV/AIDS, as well as poverty, are all long-term-challenges and need to be addressed accordingly.

I.1. The World Health Organization

I.1.1. The WHO as a player in international law

Nevertheless, health concerns have always existed within the international community. Within the framework created after the Second World War, the World Health Organization (WHO) has the objective of attaining for all peoples the highest possible level of health (Article 1 of the Constitution of the WHO).[4]

As an international organization, the WHO enjoys international legal personality, i.e. it bears the rights and obligations of international law and enjoys domestic immunity (Article 66 et seq. of the Constitution of the WHO). As a special organization, according to Article 57 of the UN Charter, the WHO is part of the UN family based in Geneva.

The WHO has three bodies which carry out its tasks (Article 9 of the Constitution of the WHO): The World Health Assembly (WHA) meets annually and sets the main lines of action, monitors the other bodies and appoints their members, manages the finances and reports to the UN; it may also establish institutions and take other appropriate measures to promote the objectives of the WHO (Article 18 of the Constitution of the WHO). Additionally, as will be demonstrated, the WHA has unrivalled powers in the area of treaty law. The second body is the Executive Council, the executive body of the WHA (Article 28(b) of the Constitution of the WHO). In particular, it implements the decisions and guidelines of the WHA, advises the WHA and proposes a general programme of work. The

Hawkes and Belinda Bennett (eds), *Law and Global Health* (Oxford UP 2014) 559. This holds especially true for German scholarship of international law.

4 Cf Pia Acconci, 'The Reaction to the Ebola Epidemic within the United Nations framework: What Next for the World Health Organization?' (2014) 18 Max Planck Yearbook of United Nations Law 405, 406 ff.

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Executive Board consists of 34 members, for three-year renewable terms. Finally, the Secretariat is responsible for the administration of the WHO. The Secretariat is currently headed by a Director-General, who took up his post in July 2017. Surprisingly, the Constitution of the WHO does not specify the length of the Director-General's term of office. Rather, the Director-General is appointed on terms specified by the WHA (Article 31 of the Constitution of the WHO), which, in the current case is five years.

In addition to these three main bodies, committees can also be set up if the WHA and the Executive Board consider this desirable (Article 38 of the Constitution of the WHO). The WHO has established regional sub-organizations consisting of a regional office and regional committees. The current regional offices for Africa (based in Brazzaville), Europe (Copenhagen), Southeast Asia (New Delhi), Eastern Mediterranean (Cairo), Western Pacific (Manila) and America (Washington D.C.) are intended to meet the specific needs of their geographic regions (Article 44 of the Constitution of the WHO).

I.1.2. The WHO's powers under international law

International law recognizes the binding legal sources of treaty law, customary law and general principles of international law. However, Article 38(1) of the Statute of the International Court of Justice (ICJ), from which this list is taken, is not exhaustive. Additionally, there is the category of unilateral legal acts by state or by other subject of international law, especially by international organization, namely the so-called secondary law.

Despite its ambitious goals and far-reaching tasks, the WHO lacks tangible legal powers. Nevertheless, the work of the WHO occasionally leads to familiar forms of action under international law.

(a) Internal 'law'

The legally binding decisions of the WHA only affect the organization internally, such as elections to the Director-General or the Executive Council. On the other hand, the WHO performs most of its tasks in a legally non-binding manner. Its constitution stipulates that it issues reports, recommendations and opinions or supports scientific projects. In particular, the WHA may address recommendations to the member states, which can extend to the entire mandate of the WHO (Article 23 of the Constitution

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of the WHO). These are not binding *per se*. Decisions, recommendations and opinions can be described as soft law. This means 'regulations' which cannot be assigned to any source of international law and are non-binding. They are not law in the actual sense of the word. Temporary recommendations which the Director-General can issue in health emergencies also constitute soft law.

(b) Treaty-making powers

In addition to the rather traditional and common possibilities of adopting conventions or agreements (Article 19 of the Constitution of the WHO) and making recommendations (Article 23 of the Constitution of the WHO) there is a unique feature under WHO law: the authority of the WHO to issue legally binding regulations under Article 21 of the Constitution of the WHO.[5] This provision empowers the organization to adopt regulations on aspects specified in its points (a)–(e). The key aspect is the effect: a convention or agreement adopted under Article 21 enters into force for all members after due notice has been given of its adoption (Article 22 of the Constitution of the WHO) – explicit consent is not required. Consequently, the regulations adopted under Article 21 of the Constitution of the WHO are binding on all its member states.[6] The only way for a state to opt out of such a regulation is for it to notify the Director-General of its rejection or its reservations before that regulation becomes binding.

This is the legal basis of the International Health Regulations of 2005, or IHR (2005), which entered into force in 2007.[7] The IHR (2005) were a result of a reform process after the outbreak of the Severe Acute Respiratory Syndrome (SARS) in 2003, which affected more than 8,000 people and killed 774 people in 27 countries.[8] The previous instruments were the IHR

5 Lawrence O Gostin, *Global Health Law* (Harvard UP 2014) 111; Aginam (n 3) 559, 561.
6 Jennifer P Ruger, 'Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 Yale Journal of Law & the Humanities 273, 312.
7 World Health Organization, International Health Regulations, 2005, 2509 UNTS 179, thereinafter IHR (2005).
8 Cf <www.who.int/publications/m/item/summary-of-probable-sars-cases-with-onset-of-illness-from-1-november-2002-to-31-july-2003> accessed 20 March 2024.

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(1969) adopted in 1969.[9] After two modifications in 1973[10] and 1981,[11] the scope of the IHR (1969) was limited to cholera, yellow fever and the plague. Before that, the WHO adopted the International Sanitary Regulations in 1951.[12] The current version is not limited to specific diseases.

It is important to note that this is not a unilateral act performed by the WHO. Rather, it is a special treaty conclusion procedure. In principle, contracts only become binding if states ratify them according to the traditional regulations of the Vienna Convention on the Law of Treaties or common law. This always requires action to be taken. In this case, this principle is reversed and states are bound without their active involvement. Action is exceptionally only required to prevent an act from being legal binding. However, this is not an exception to the consensus requirement of international law. This is because, upon acceding to the WHO Constitution, states are aware that the WHA has such authority. Joining the WHO – i.e. the state's consensus – includes a future commitment to future contracts. It is therefore a matter of prior consent or consent to be bound in the future.

This treaty-making model is unique to the WHO. It is a valuable example of a law-making instrument. Furthermore, it is not just a new mechanism, but a way of letting experts make their recommendations, letting them draft new laws which make sense from the point of view of the experts and of enacting those laws. The binding regulations under Article 21 of the Constitution of the WHO provide an automatism for the adoption of new rules which makes it more difficult to not become bound than to be bound. An opt-out-mechanism could provide useful in certain situations. On the other hand, it is the experts in many fields who are involved in such a scenario. More specifically, in the context of the WHO, those experts are physicians or healthcare professionals. They are not lawyers. That could prove challenging when drafting rules and binding provisions. The legal expertise is missing and may be the reason why this unique mechanism has never been adopted in other regimes of international law.

9 International Health Regulations, 1969, 764 UNTS 3, thereinafter IHR (1969).
10 World Health Organization, Health Assembly Res WHA26.55, 23.5.1973.
11 World Health Organization, Health Assembly Doc WHA34/1981/REC/I. p 10 (resolution WHA34.13); cf World Health Organization, Official Records, no 217, 1974, 21, 71, 81.
12 International Sanitary Regulations, 1951, 175 UNTS 215, thereinafter ISR (1951).

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(c) Temporary recommendations

The Director-General of the WHO has the power to issue temporary recommendations in 'Public Health Emergencies of International Concern', as defined in Article 1 IHR (2005). These recommendations are non-binding in nature (Article 1 IHR [2005]).[13] As a preparatory measure for further health crises, it may be useful to give the IHR (2005) and temporary recommendations more strength.[14] This could be achieved by either creating explicit legal effect or by re-interpreting the law.[15]

I.2. UN-Security Council's practice

The UN Security Council is a powerful player in international law which requires no introduction. When there is a threat to peace, a breach of peace or an act of aggression, the Security Council may conclude that this is the case and adopt resolutions under Articles 41 and 42 of the UN Charter. It must be reiterated that the Security Council is free to draw such conclusions. There is no second-guessing the Council. Once adopted, resolutions under chapter VII are binding.

In reality, 'a threat to the peace is whatever the Security Council says is a threat to the peace.'[16] This also holds true for health concerns, as the past has shown. In the early 2000s the Council prudently hinted that HIV/AIDS 'may pose a risk to stability and security',[17] although it did not dare to make that recommendation in the decades that followed this suggestion.[18]

13 For a discussion see Robert Frau, 'Combining the WHO's International Health Regulations (2005) with the UN Security Council's Powers: Does it make sense for Health Governance?' in Leonie Vierck, Pedro A Villarreal and A Katarina Weilert (eds), *The Governance of Disease Outbreaks* (Nomos 2017) 327, 331.

14 Pedro Villarreal, 'Reforms of the World Health Organization in light of the Ebola crisis in West Africa: More delegation, more teeth?' (*Völkerrechtsblog*, 26 August 2015) <https://voelkerrechtsblog.org/reforms-of-the-world-health-organization-in-light-of-the-ebola-crisis-in-west-africa-more-delegation-more-teeth/> accessed 12 March 2024.

15 See infra III.4. The Way forward for the IHR [2005]?

16 Lawrence O Gostin and Eric A Friedman, 'Ebola: a crisis in global health leadership' (2014) 384 Comment 1323.

17 UN Security Council, Res 1308 (2000).

18 UN Security Council, Res 1983 (2011), which repeats the phrasing of Res 1308 (2000).

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In an astonishing move, the Security Council addressed the Ebola outbreak in 2014 in a resolution under chapter VII. In Res. 2177 (2014), the Security Council highlighted the severity of the Ebola outbreak. The Council audaciously stated 'that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security', thereby opening its powers under chapter VII. This is an innovative approach. Similarly, there is a major discussion about the scope of the notion 'threat to international peace and security' under Article 39 of the UN Charter. Scholars are divided on the interpretation of 'peace' in Article 39 of the UN Charter. Some argue in support of a broad understanding of 'peace', which includes aspects of positive peace, e.g. including 'broader conditions of social development'.[19] Others take a more cautious approach, understanding the term to only apply to negative peace, or in other words the absence of armed conflict between states.[20]

Taking note of the different players, i.e. the countries affected, neighbouring states, UN bodies and organizations, NGOs, as well as first-line responders, the Security Council called upon them to collectively address the threat posed by the epidemic. In the operative part of its resolution, the Council commended the entities for their contributions but also 'encouraged', 'called on' and 'urged' them to do even more. Of importance is not the fact that the Council was dissatisfied with the efforts to date, but rather that the Council did not 'decide' on a common strategy, nor did it 'demand' specific measures or 'request' concrete actions. It could have done so with regard to travel and trade restrictions, border management or access of healthcare workers to affected countries or regions – matters that are addressed by the WHO, as well as the Council, but purely as recommendations.[21] Also, the WHO recommendations were not transformed into legally binding obligations by Security Council actions under chapter VII of the UN Charter. The Council could have easily demanded that member states keep their borders open to affected countries, cooperate with them on border management (namely through exit and entry screenings) or address

19 Cf Michael Akehurst, *A modern introduction to international law* (6th edn, George Allen & Unwin 1987) 219.

20 Cf only Christian Tomuschat, *Obligations arising for States without or against their will* (1993) 241 Recueil des Cours de l'Academie de droit international de la Haye 195, 334 ff.

21 Cf UN Security Council, Res 2177 (2014), recitals 9, 17.

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domestic players to continue travel and transport to and from West Africa.[22] Essentially, the Council refrained from addressing the epidemic by legal means and merely issued recommendations.

II. Practice of the WHO and the Security Council during the Covid-19 crisis

The WHO's response to the Ebola outbreak has been criticized widely. However, there was neither the time nor the willingness to substantially modify the existing governance. States simply had other priorities. When the Covid-19 crisis hit, it transpired that no lessons had been learned from the Ebola outbreak.

II.1. The WHO

There is no question that the WHO acted to the limits of its capacities during the Corona pandemic. This article cannot even list the measures and meetings held by the WHO in general and its Emergency Committee on the Covid-19 pandemic in particular. This committee advised the Director-General up until May 2023, when it recommended that the acute crisis had ended.[23]

However, some things need to be emphasized. The ample powers of the WHO to introduce draft treaties into international debate under Article 19 of the Constitution of the WHO or to make recommendations under Article 23 of the Constitution of the WHO were not utilized. This may be understandable, given the lesser significance of the new law in an ongoing health crisis. Again, states and governments had more pressing things to do than negotiate over new international treaties modifying the existing law. The virus would not have been impressed by a new treaty.

22 Similarly Lawrence O Gostin and Eric A Friedman, 'A Retrospective and Prospective Analysis of the West African Ebola Virus Disease Epidemic: Robust National Health Systems at the Foundation and an Empowered WHO at the Apex' (2015) 385 Public Policy 1902, 1906.

23 Statement on the fifteenth meeting of the IHR (2005) Emergency Committee on the Covid-19 pandemic on 5 May 2023 <www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(covid-19)-pandemic> accessed 12 March 2024.

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The same holds true for the powers under Article 21 of the Constitution of the WHO. The WHO itself needed to allocate its resources efficiently to combat the actual virus. A new treaty entering into force under Article 21 of the Constitution of the WHO was not developed. Again, this also holds true for the IHR. This treaty defines the powers of the Emergency Committee. Given that the committees only advise the Director-General, there is no need to give them more power in a legal sense. After all, the WHO's legal framework did not evolve during the Covid-19-pandemic.

II.2. The Security Council

The Security Council felt the impact of the pandemic as we all did. It switched to videoconferencing for a longer period.[24] However, its practice is more interesting from a legal vantage point than that of the WHO.

II.2.1. Res. 2532 (2020)

The Council adopted Res. 2532 (2020) in July 2020, in which it emphasized the 'devastating impact (…) across the world, especially in countries ravaged by armed conflict or in post-conflict situations, or affected by humanitarian crises'. It considered that 'the unprecedented extent of the Covid-19 pandemic is likely to endanger the maintenance of international peace and security'. It continued to call for cease fires in ongoing conflicts and requested that the UN, especially the Secretary General, accelerate their responses to the health crisis. The Council itself, however, did not adopt any meaningful measures.

II.2.2. Res. 2565 (2021)

In February 2021, after a little more than a year from the declaration of public health emergency of international concern by the WHO,[25] the Council adopted Res. 2565 (2021). Here, the Council recalled the efforts made in the previous twelve months by several players, most importantly the WHO. The Security Council referred in the recitals to the IHR (2005)

24 Working methods of the Security Council during the presidency of the Dominican Republic, April 2020, S/2020/273 of 6 April 2020.

25 Cf IHR (2005) Emergency Committee (n 1).

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and recalled the obligations therein. It still maintained that the 'Covid-19 pandemic is likely to endanger the maintenance of international peace and security' – almost a year after the world locked down for the first time.

As a measure, the Council called for increased national and international efforts to combat the virus, in particular vaccination efforts. It also called for unhindered passage of health professionals. Apart from these suggestions, no other binding measures were adopted.

II.2.3. Statement by the President of the Security Council

The Council's president made a statement shortly afterwards.[26] Such statements are even rarer than Security Council resolutions. After deliberating with the other member states, the president highlighted vaccination efforts and the unequal availability of vaccines throughout the world. They lamented the undersupply to Africa, connected health concerns with post-conflict societies and called for increased international support. Again, no binding measures were suggested.

II.3. International Response during Covid-19 and the Innovations introduced

In brief, no legal innovations were introduced during the Covid-19 crisis. The WHO remained in line with the established framework, while the Security Council was more than reluctant to declare the Covid-19 pandemic a threat to international peace and security.

As for the Security Council, surprisingly, in 2014, the Council declared the regionally limited Ebola outbreak to be a threat. Of course, this was due to the post-conflict societies that were hit hardest.[27] It was the 'unprecedented extent' of the outbreak that constituted the threat and not the mere existence of an epidemic. However, with Corona, even more dangerous conflicts were affected and situations posed challenges with the outbreak of the Corona virus. Still, the Council did not conclude that the Corona virus was a threat.

26 UN Doc S/PRST/2021/10 of 19 May 2021.
27 For details Frau (n 13) 327, 341.

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II.4. Aftermath

It is important to mention that the WHO is currently assessing its response. There was little time during the pandemic, whereas now there is more.

A Review Committee on the Functioning of the IHR (2005) during the Covid-19 response was published as early as in May 2021.[28] The experts analysed past outbreaks of various viruses and identified shortcomings of the existing framework. It made nine recommendations in three areas. First, with regard to 'Compliance and empowerment', the failure of states to comply with certain obligations under the IHR, especially on preparedness was identified as having contributed to the Covid-19 pandemic, becoming a protracted global health emergency. Consequently, the responsibility for implementing the IHR should to be elevated to the highest level of government in each respective state, including a 'robust accountability mechanism for evaluating and improving compliance with IHR obligations.' The second group of recommendations stated that early alerts, notifications and response procedures should be improved. The Committee reiterated the need for international cooperation and fast notifications. Lastly, with regard to financing and political commitment, monetary resources are needed to foster preparedness.

Today, the task of following-up and updating the IHR (2005) is bestowed on a Review Committee with regard to amendments to the IHR (2005). The Review Committee started its work in October 2022. It has met three times as of the time of writing (June 2023). It has already produced a number of proposals, which can be seen on the WHO's website. However, as they are currently under deliberation, it is too early to engage in an abstract discussion about the proposals. For the purposes of this article, suffice is to say that the WHO is assessing its framework rather comprehensively. It is taking a look at the applicable law. This is not just words, it is also action. There are concrete proposals and not just statements of intent. In this sense, the Corona pandemic has led to a reform within the WHO, the success of which needs to be seen in the future. Many issues have been identified as major obstacles in the past work of the WHO. Most importantly, most of the contributions to the WHO are made voluntarily and do not offer a robust or reliable financial framework. Additionally, funds are mostly allocated to specific tasks within the WHO, giving the funders a say, but

28 <www.who.int/publications/m/item/a74-9-who-s-work-in-health-emergencies> accessed 12 March 2024.

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leaving less room for the experts to manoeuvre within the organization. Additionally, what has so far not been a major focus in international health law is the interplay between human rights and the response to the pandemic. Essentially, the human right to the highest attainable standard of health under Article 12 ICESCR has not been used for moving any discussion forward. It is regrettable that no major player, be it the WHO or the UN, has focussed on the human rights dimension to advance the reform process.

III. The Human Rights Dimension

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees a human right to the 'enjoyment of the highest attainable standard of physical and mental health' (Article 12(1) ICESCR). Article 12(2) ICESCR suggests several steps which state parties will take to achieve the full realization of the right enshrined in Article 12(1). These steps include the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases' and the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness.' However, under Article 2(1) ICESCR, account must be taken of a state being required to take steps to 'progressively [achieve] the full realization of the rights recognized' by the ICESCR. Therefore, Article 12(2) ICESCR complements[29] the individual human right to health with the obligations of the state parties.[30] In this sense, Article 2(1) ICESCR 'limits' the human right to health to a relatively weak and abstract obligation of progressive realization.[31] States can therefore differ in their approach to the full realization as a result of specific domestic factors.[32] Some specific areas of concern have been identified in the General Comment shaping the substantive obligations. However, these do not include substantive obligations regarding emergency situations. This has not been changed since the Ebola outbreak in 2014, even though the shortcomings were visible.

Furthermore, the human rights dimension was not once addressed by the Security Council. Given that the Council is usually quick to remind states of their human rights obligations – it even did so in Res. 2565 (2021)

29 Meier and Mori (n 3) 101, 113.
30 Cf John Tobin, *The Right to Health in International Law* (Oxford UP 2012) 75, 225 ff.
31 Critical Meier and Mori (n 3) 101, 115.
32 ibid.

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– it is worth mentioning that the right to the highest attainable standard of health was not even mentioned during the three years of the worldwide pandemic. On the side-line, this holds true for the case law of the German Federal Constitutional Court, which has not mentioned the international dimension of human rights in its judgments, although 'the German people (…) acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world' (Article 1(2) of the German Basic Law).

IV. Result

International law did not progress during the Corona pandemic. The WHO shifted its resources differently and the Security Council was not even ready to determine that the outbreak constituted a threat to international peace. The progressive realization of human rights law has not been advanced. Overall, the major health crisis opened numerous opportunities for developing international law and introducing innovations. Nevertheless, states and the major players, the WHO and the UN Security Council, failed to do so.

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