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## The role of international law in controlling disease outbreaks

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**Abstract:** Disease outbreaks in the form of epidemics and pandemics are known to destabilise the existing global public health infrastructure and to put nation-states in an alarming set of circumstances, thereby posing quite a few questions before us, including: can there be a solution to such problem in international law? In light of this question, the present essay tries to discern the role of international law in handling disease outbreaks. It wants to know whether there are sufficient international legal safeguards to address disease outbreaks and whether liability can be fastened on nation-states (including their people), international organisations, etc., if they are found to be directly and substantially responsible for such outbreaks. It dissects theoretical frameworks, analyses and interprets the existing literature to conclude that a 'one-size-fits-all' international legal approach is required to control disease outbreaks. It eventually recommends the need to have a Pandemic Convention.

**Keywords:** disease outbreaks; pandemics; international law; global public health; global health laws; Covid-19; Pandemic Convention.

**Reference** to this paper should be made as follows: Banerjee, R. and Kumar, A. (2021) 'The role of international law in controlling disease outbreaks', *Int. J. Public Law and Policy*, Vol. 7, No. 1, pp.74–96.

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## 1 Introduction

Whenever communicable diseases spread<sup>1</sup> across international borders, one of the major challenges that the world community faces is how to control such diseases by applying the relevant norms and by invoking the appropriate systems and processes that guide the international legal and political discourses. In the event of such disease outbreaks and the consequent spread to other countries, the world community becomes increasingly worried and looks towards prompt ways to not only mitigate the complex and challenging public health risks but also minimise the long-lasting socio-economic consequences of such outbreaks. Disease outbreaks in the form of epidemics and pandemics<sup>2</sup> are known to destabilise the existing global public health infrastructure and to put the nation-states in an alarming situation, thereby posing quite a few questions before us, including: can there be a solution to such problem in international law?<sup>3</sup> In light of this question, the present paper aims to discern the role of international law in handling disease outbreaks in the form of epidemics and pandemics. It wants to know whether there are sufficient international legal safeguards to address disease outbreaks and whether liability can be fastened on nation-states (including their people), international organisations, etc., (beings subjects of international law)<sup>4</sup> if they are found to be directly and substantially responsible (as causative agents) for such outbreaks or are found to be not taking sufficient measures (as mitigating agents) to arrest the proliferation of infectious diseases. The paper attempts to throw light on whether the advisory jurisdiction of the International Court of Justice (ICJ) may be invoked to address the issues emanating out of disease outbreaks. To find answers to the question posed above, the paper revisits a few pandemics (that occurred in the past hundred years or so) to underscore not only their discomfiting effects but also the need to regulate them harmoniously in tune with the mandates of international law. The paper also theoretically dichotomises a few international norms (including a few non-binding ones) to understand whether they would in any way address the multifarious issues linked to pandemics, especially that of pandemic preparedness. In a way, it wants to decipher whether in the event of a disease outbreak we have an overarching law or even a policy either with regard to providing substantive normative safeguards at the international level or in respect of fastening liability on errant nations (or their citizens) or international organisations for their wrongful acts or omissions.

For centuries, disease outbreaks in the form of epidemics and pandemics have destabilised nations' public health infrastructure and have forced national governments and international organisations to define new ways and devise new strategies to mitigate the potential hazards and to reverse the long-lasting socio-economic consequences. Many of these communicable diseases that had spread across international borders induced public health emergencies and had led to potential loss of lives and livelihood. Lack of global surveillance especially with regard to reporting of cases complicated the issue further.<sup>5</sup> The misconception of some of the global health leaders that communicable disease outbreaks are a problem of the past<sup>6</sup> coupled with the absence of a robust normative framework at the international level to address issues arising out of such outbreaks have brought untold misery especially to those states that do not have strong public healthcare systems.

One of the earliest attempts to put the subject of disease outbreaks into an international legal framework was through the International Sanitary Conference that took place in Paris in 1851.<sup>7</sup> A series of conferences (approximately thirteen) of a similar nature were held thereafter (the last such conference was held in 1938) to unravel the aetiology of infectious diseases and to understand the roles of various pathogens and rodents in spreading such diseases.<sup>8</sup> The conferences were strong evidence that international legal cooperation was the best possible way to address the trans-border spread of communicable diseases.<sup>9</sup> In fact, these sanitary conferences provided the much-needed impetus to the genesis and development of global health laws<sup>10</sup> and in 1951, the World Health Organization (WHO) adopted International Sanitary Regulations (ISR), arguably the first treaty on global health laws. In 1969, ISR was renamed and replaced by International Health Regulations (IHR), which were subsequently modified in 1973 and in 1981. In 2001, the World Health Assembly tried to attune the provisions of the original IHR draft<sup>11</sup> to the changing healthcare needs of the international community so that member states could identify, verify and respond to a public health emergency of international concern.<sup>12</sup> An intergovernmental working group was created in 2003 by the assembly and a revised IHR was adopted in 2005. It eventually came into force in 2007. The 2007 draft continues to prevail as the maiden law<sup>13</sup> governing disease outbreaks at the international level. In tune with the IHR, the WHO (the primary intergovernmental body on global health) adopted the Pandemic Influenza Preparedness (PIP) Framework in 2011.<sup>14</sup> The PIP augments WHO's efforts in the sharing of influenza viruses and access to vaccines, and in assessing and responding to risks caused because of pandemics. Paragraph 6.1 of the PIP Framework stipulates "WHO will coordinate influenza pandemic preparedness and response in accordance with applicable International Health Regulations (2005) provisions and this framework." Apart from consolidating the existing IHR regime, the framework recommends a novel method of governance through contracts.<sup>15</sup>

In view of the earlier pandemics caused by the SARS, the H1N1 Swine Flu, the Ebola, the Zika, etc., and the present situation created by Covid-19,<sup>16</sup> one thought which has occupied the central focus is that whether there exists a panacea in the discipline of international law to control disease outbreaks. *Prima facie*, the corresponding answer is 'no'. To explain why the answer is in the negative, we must put strong focus on what the expression 'control' connotes (in reference to international law, for this paper). Control supposedly refers to the powers<sup>17</sup> of the nation-states and international organisations (as subjects of international law) to address issues relating to the violation of rights,

enforcement of legal obligations, and settlement of disputes that are directly and substantially related to disease outbreaks in the form of epidemics and pandemics.<sup>18</sup>

A review of the existing authorities that lie at the intersection of global health laws and international law<sup>19</sup> indicates that states and international organisations (in a restricted sense) may enjoy the following powers<sup>20</sup> (in isolation or in combination) in pandemic situations. They may:

- 1 adopt necessary situation-based planning<sup>21</sup> and mitigation strategies after evaluating the disease transmission rate, case fatality rate, basic reproduction rate, etc., and assessing the chances of re-emergence of the infectious disease
- 2 issue necessary orders, directions and advisories during a health emergency situation
- 3 apprise the citizens of the possible ramifications of disease outbreaks and order lock-down and/or curfew, depending on the gravity of the pandemic situation
- 4 monitor and update the growth and emergence of pathogenic microorganisms, including the ones that are presumably fatal
- 5 monitor and update on the availability of vaccination and antibiotics during and after epidemics and pandemics
- 6 develop a disease surveillance procedure<sup>22</sup>
- 7 devise standard operating procedures and rules, including quarantine<sup>23</sup> and sanitisation rules, to tackle the spread of infectious diseases
- 8 formulate norms to engage communities and social groups during disease outbreaks
- 9 devise rules to monitor and control the use and transport of infectious substances
- 10 fasten liability on states (and/or their citizens) and international organisations that are found to be responsible for such outbreaks
- 11 empower courts and tribunals to render effective justice<sup>24</sup>
- 12 pigeonhole the testing standards and their effective implementation
- 13 report on the number of infected cases and fatalities<sup>25</sup>
- 14 pass necessary orders to procure the protective gear and equipment that may be required to arrest the spread of infectious diseases
- 15 devise outbreak control policies and laws that may be effectuated on a real-time basis<sup>26</sup>
- 16 formulate border control strategies by regulating the air traffic network<sup>27</sup>
- 17 chart out an action plan to address the probability of future outbreaks.

Having summarised the potential powers of states and international organisations vis-à-vis pandemic situations, we must now look into whether such powers are backed by any substantive legal safeguards at the international level to address disease outbreaks. We must also look into what happens if states and/or international organisations while enjoying their powers fail to discharge their obligations, either negligently or recklessly or intentionally. Furthermore, we must reflect on whether those who fail to discharge their obligations or those who commit wrongful acts (while enjoying their powers or not)

may be made answerable and be held civilly or criminally liable under the present international legal regime. To address the aforementioned issues, the present commentary invokes global health laws, the law of state responsibility and international criminal law to understand how and to what extent such international norms have bearing on disease outbreaks. It also looks into the principles of advisory jurisdiction of the ICJ to understand the interplay of the aforementioned laws, especially in light of pandemic preparedness.<sup>28</sup>

## **2 A century-long history of major disease outbreaks**

Before we delve into understanding the role of international law in controlling disease outbreaks, let us read through a few pandemics and epidemics that had killed millions of people across the world. One of the first known and recorded disease outbreaks transcending national boundaries was the Spanish Flu that had killed more than 25 million people.<sup>29</sup> Triggered by the H1N1 influenza virus strain, the flu started sometime in 1918–1919 and occurred in three phases<sup>30</sup> touching almost all continents. The pandemic was so severe that it had forced many of the regional and national governments to close public places such as theatre halls, churches, etc., although no central lockdown took place.<sup>31</sup> Attempts to arrest the spread of the flu virus seemed futile and the strategic quarantine policies did not effectively decelerate the fatality rate.<sup>32</sup> The problems relating to Spanish Flu were further exacerbated by the causes and effects of World War I.<sup>33,34</sup> The large-scale annihilation caused by Spanish Flu was indeed an eye-opener and many nations started adopting effective mechanisms to respond to further epidemics. They started implementing aggressive disease surveillance systems<sup>35</sup> and investing in disease eradication programs (especially after World War II).<sup>36</sup> The approach was somehow successful and for almost a century the world did not witness a severe pandemic such as the Spanish Flu. However, the Asian Flu pandemic of 1957, the Hong Kong Flu Pandemic of 1968, the HIV/AIDS pandemic of 1981 (which continues to be a threat in parts of Africa), the outbreak of SARS in 2003, the H1N1 Swine Flu outbreak in 2009 and the Ebola and Zika virus outbreaks (which are continuing) between 2014 and 2016 posed intermittent threats to our global public healthcare infrastructure. Seemingly, a reflection of the effects caused by the Spanish Flu may be witnessed in the most recent Covid-19 outbreak<sup>37</sup> that has ravaged almost the entire world. The devastating consequences caused by the Spanish Flu and the Covid-19 are interestingly quite similar, despite sweeping advancements in the field of disease prevention and management. As per the latest reports available from John Hopkins University<sup>38</sup> as on date, the Covid-19 infection has affected about 81,680,712 people. Not only that, the disease has seemingly reached almost all parts of the globe requiring states to opt for stringent measures such as lockdown and curfew. The total number of deaths stands at 1,781,798 with almost all countries bearing the brunt of this disease outbreak. National governments are trying their best to control the spread of the virus but are still unable to gain the desired success and the surge in Covid-19 viral infections continues.

### **3 The governing international laws on disease outbreaks**

The role of international law in controlling disease outbreaks is arguably limited since there are hardly any direct laws (barring the IHR, which is dealt with subsequently) governing the subject. One of the probable reasons why an overwhelming international legal framework on disease outbreaks is absent is that for decades following World War II, most of the nation-states, intergovernmental and non-governmental organisations (NGOs) were unwilling to recognise the potential of international law in addressing global public health issues.<sup>39</sup> It was only in the 1990s that the nation-states and such organisations increasingly felt the need to realign their strategies to address global public health concerns. This shift in attitude was mainly because of the changing international order and the public health threats caused in the wake of globalisation.<sup>40</sup> Another possible reason why an overwhelming legal framework on disease outbreaks is absent is that health and hygiene standards differ across jurisdictions and it is hard to find a common thread to bind nations together especially in the perspective of outbreak of communicable diseases. A third reason may be that many states are unwilling to accept global health law not only because it trenches on state sovereignty but also because it lacks sanction.<sup>41,42</sup>

In view of the above argument(s) and the question(s) hypothesised in the introductory part of this paper, let us examine the existing international legal framework and corroborate whether such framework may possibly address issues emanating out of disease outbreaks.

#### *3.1 Global health laws*

Although global health laws are supposedly best-suited to address potential disease outbreaks and to provide answers to ethical issues,<sup>43</sup> it was for years that a well-defined nexus between global health laws and public international law could be created.<sup>44</sup> In fact, the potential of international law to address global public health concerns remained untapped for a long time.<sup>45</sup> Arguably, global health law is still a slowly developing field<sup>46</sup> and there was no overwhelming consensus regarding the effective application of such laws from 1980s till the advent of the 21st century. One possible explanation behind the slow growth of global health laws may be that the subject-matter of such laws is in a state of continuous change not only because of the advancements in medical science and technology but also because of the changing perceptions of the risks posed on public health.<sup>47</sup> Another explanation may be that global health laws are structurally infirm since there exists a marked variance in which nation-states construe, implement and interpret such laws. This explains why such laws do not even attempt to harness (even experimentally) the resources and creativity of potential actors, including non-state actors and NGOs.<sup>48</sup> Eventually, from monitoring to enforcement to compliance they are solely dependent on the WHO whose seeming indifference (despite its 'health-for-all' vision) to adopt a holistic legal approach in the first few decades of its formation makes it clear why a comprehensive disease response mechanism could not be drawn up internationally. In fact, on the contrary, WHO's emphasised strategies<sup>49</sup> relating to disease outbreaks seemed to marginalise the purposive role of international law.<sup>50</sup> Although WHO enjoys sweeping powers in playing a critical role in establishing and promoting global health laws at the municipal, regional and international levels,<sup>51</sup> it was not until the late 1990s that the WHO felt the need to redefine the laws of pandemic preparedness in tune with

the emerging global health norms created as a consequence of the globalisation of public health.<sup>52</sup> While the globalisation of public health forced nations to cooperate on trans-border health issues, it also transformed the role of quite a few nation-states, outstripping the capability of such states to address the issues of disease control.<sup>53</sup> Because of globalisation, issues such as health equity or health justice<sup>54</sup> did not receive sufficient treatment in public international law,<sup>55</sup> a point which may further explain the out-of-proportion rift between global health laws and public international law.

Globalisation, nonetheless, requires that states cooperate between and among themselves and engage in constructive dialogue in advancing the principle of equitable health.<sup>56</sup> In tune with the requirement, the WHO eventually adopted a broad and revised IHR<sup>57</sup> in 2005 thereby creating a modified international health system that not only engaged states through mechanisms such as reporting and compliance but also facilitated the process of addressing public health emergencies of international concern.<sup>58</sup> The revised regulations ushered in a new era of transformational reforms by including the principles of early reporting and non-state reporting (in deviation from WHO's statist approach).<sup>59</sup> The main purpose<sup>60</sup> of the revised IHR is to chart out ways that effectively prevent and control the international spread of infectious diseases and that ensure minimum interference with international traffic and trade.<sup>61</sup> Another purpose of the Regulations is to oversee and control epidemiological information relating to the trans-boundary spread of infectious diseases. The preamble of the revised IHR attests the continuing significance of the WHO's role not only in effectively responding to disease outbreaks but also in facilitating capacity building of member states. Article 2 defines the scope and purpose of the regulations. Article 3 of the IHR spells out the operative principles, which include the protection of all people from the trans-boundary spread of infectious diseases. Article 3 also bestows plenary powers on the nation-states to devise their respective health policies in conjunction with the mandates of the IHR. Article 4 creates an obligation on nation-states to establish or designate a national-level point of contact which shall provide all necessary information (to the WHO contact point) required for the effective implementation of the IHR mandates. States are also obligated to enhance their capacity to successfully conduct disease surveillance<sup>62</sup> and report public health events in accordance with the provisions of the IHR. Vide Articles 6 and 7 of the IHR, a responsibility is bequeathed on the states to notify and inform the WHO of a public health event, usual, unusual or unexpected, which may trigger a public health emergency of international concern. Article 9 of the IHR empowers the WHO to admit 'other reports'<sup>63</sup> that effectuates the analysis of a particular epidemiological situation.<sup>64</sup> Apart from the above, the IHR envisages the formation of an Emergency Committee<sup>65</sup> that can render advice to the WHO Director-General, and can declare a public health emergency of international concern if the committee is satisfied that such a situation has arisen. Apart from its above powers and functions, the committee can make recommendations on increasing surveillance and on the need to avoid unnecessary trade, travel and human rights restrictions.<sup>66</sup>

Interestingly, even the revised IHR has not been able to create an infallible system to support the cause of pandemic preparedness. Systemic deficiencies such as states' non-compliance in matters pertaining to reporting or pandemic preparedness seem to cripple the IHR regime; debatably, it has been observed that only 30% of the member states appear to meet the IHR's core capacity requirements on pandemic preparedness.<sup>67</sup> Also, the conspicuous lack of an incentive structure within the IHR framework deters the member states from utilising resources to develop core capacities.<sup>68</sup> Furthermore, during

disease outbreaks states are at liberty to not report unusual findings or any findings that may adversely impact their trade, tourism or businesses.<sup>69</sup> Apart from the systemic flaws referred above, the apparent unwillingness of the WHO to forge synergistic partnerships with international bodies such as the Food and Agricultural Organization, International Labour Organization, etc.,<sup>70</sup> and with NGOs such as the Global Health Security Agenda that operate in similar areas (infectious diseases) may also provide an explanation why the IHR regime has failed to live up to its standards.

Although the H1N1 Swine Flu outbreak in 2009, and the Ebola and Zika virus outbreaks between 2014 and 2016 (which are continuing) were addressed by the IHR with some effectiveness (although there is a substantial body of research indicating to the contrary),<sup>71</sup> the present Covid-19 pandemic has exposed the inherent infirmities of the IHR regime. For example, the Ebola pandemic conspicuously pointed out that the gap between IHR's norms and their real-world effect is vast.<sup>72</sup> The force of the so-called operative provisions of the IHR draft, especially those relating to public health response and public health measures, seem to be failing to control the deleterious effects of the pandemics, including Covid-19. While there is hardly any dispute in regard with the WHO performing its task by trying to implement the IHR provisions, in the absence of a therapeutic design<sup>73</sup> and a sturdy outbreak response mechanism, the global administration of pandemics seems to be dwindling.

### 3.2 *The law of state responsibility*

The paper briefly discusses the apparent chances of putting the vector of state responsibility in the current accruing discussion and argues, in light of the elements determining responsibility, viz., attributability and breach of *erga omnes* obligations,<sup>74</sup> whether a state may be held responsible for an internationally wrongful act. The law of state responsibility finds its spirit in the principle of 'attributability',<sup>75</sup> which essentially means that it must be proved beyond any reasonable doubt whatsoever that the wrongful act/omission of a state caused the wrongful event. Which conduct (that may be attributed to a state or its agencies) leads to a breach of what obligation is another question in this ensuing debate. In climate change law, for example, the element of causation has been a matter of long-standing disagreement; in current jurisprudence, states cannot be made responsible for emissions because it becomes a challenging issue to demonstrate the direct causal link between climate-change-related disasters and emissions by a particular state. International action on climate change adaptation and mitigation – consisting mainly of projects with a primal focus on certain environmental issues – contrasts sharply with the restorative obligations of a state responsible for an internationally wrongful act. The objective of mitigating climate change through 'quantified emission limitation and reduction commitments' differs in terminology and substance from the obligation of a state responsible for continuing an internationally wrongful act to 'cease that act'. In that way, an obligation of a state to not emit greenhouse gases because it causes harm in the form of global warming cannot be, under general circumstances, proved under international law. In order to determine the attribution of responsibility in the case of pandemics, i.e., for the massive visible loss of lives and livelihoods across borders – there is a need to understand whether any specific country (or even a group of countries) breached any obligation owed towards the international community, and what kind of obligation it was.

The law of state responsibility defines the conditions under which states may be held liable for breaching *erga omnes* obligations. Obligations *erga omnes* are said to be the broadest, and simultaneously the narrowest principles that could help articulate such a responsibility. They also lay down the consequences for the breach of such obligations and the possible defences that are available to the nation-states to avoid the obligations. In the context of pandemics, especially with reference to the IHR regime, states are obligated to cooperate and report to mitigate any chances of spread of infectious diseases across borders. In fact, the reporting obligation is undoubtedly an *erga omnes* one, the breach of which tantamounts to an internationally wrongful act; for example, if a nation-state suppresses information about an infectious disease that spreads across borders, the nation may be held civilly liable<sup>76</sup> and be asked to make reparations.<sup>77</sup>

Interestingly, the progressive development of such an important law did not translate into codification (in the form of a multilateral treaty or otherwise) despite the notable efforts of the International Law Commission (ILC) to include it (in the statute books) as an international obligation law. Many of the passionate attempts spanning across almost half a century<sup>78</sup> by the ILC to codify the laws governing state responsibility in accordance with Article 13, paragraph (1)(a) of the United Nations Charter, were in vain. The law finally consolidated in 2001 as Draft Articles on Responsibility of States for Internationally Wrongful Acts. The Draft Articles provided the much-desired framework as to how states might be made responsible for breaches of international obligations. Article 1 of the Draft Articles makes states responsible for every internationally wrongful act (which also includes omission). An *ejusdem generis* construction of Article 1 indicates that each single internationally wrongful action constituting a broader action leads to some consequences and is, therefore, sufficient to make a state responsible, provided the two important elements of attributability and breach (discussed above) are made out. The Draft Articles spell out, among other things, the conditions and circumstances under which a conduct may be attributable to a state, the circumstances under which a conduct tantamounts to a breach of an international obligation, the circumstances that may preclude liability of states, the modes of reparation for injuries caused, the consequences arising out of an internationally wrongful act, etc. The articles even allow third-party states (states that have not suffered any direct damage) to bring action against a state for any breach of obligations that involves serious human rights violations.<sup>79</sup> By virtue of Article 48, any third-party state can invoke state responsibility and can ask for cessation and non-repetition, apart from seeking reparations.<sup>80</sup> In fact, this non-privity clause transcends the nearest neighbour principle and plays a quintessential role in including human rights issues (arising out of disease outbreaks) within the broader framework of the law of state responsibility.

Even if the ILC succeeded in codifying the articles on state responsibility, the requirement of attribution and causation, rather than focusing on the duty of a state to cooperate would not resolve the issue of addressing the human costs of the spread of infectious diseases. The lack of a detailed understanding of what state obligations should be will bring the discussion to *erga omnes* and will keep international law restricted to intentional and aggressive breaches rather than insidious ones, such as the ones that are apparent during the current Covid-19 pandemic. The ILC has also adopted draft articles on the prevention of trans-boundary harm from hazardous activities. This brings the analysis to the question of whether the rule relates to the harm caused, or to specific activities which *would cause* harm. The answer entails different consequences particularly in the case of an errant nation's responsibility. If the harm itself from

whatever source or activity is prohibited, then the nature of the activity is irrelevant. If, on the other hand, state responsibility depends on whether a specific activity is allowed or prohibited, then the question of how to deal with activities not prohibited by international law has to be addressed. Accordingly, assuming that the virus came from bats or pangolins, the question that one may pose is: is wildlife trade a hazardous activity under international law? If it is not, then the ILC articles on trans-boundary harm would not apply *prima facie*.

If the no-harm rule is not about whether or not the relevant activity as such is unlawful, but whether or not the home state has done everything in its means to avoid causing trans-boundary harm, then the approach by the ILC seems to be fundamentally misconceived and, to a certain extent, superfluous. What is more, it waters down the no-harm principle, which should be strengthened instead. In the words of Rosalyn Higgins, former President of the ICJ, “if what is required for something to fall within the law of state responsibility is an internationally wrongful act, then what is internationally wrongful is allowing the harm to occur.”<sup>81</sup>

Therefore, the international community must understand the different facets of available principles so that legal processes may be strengthened. This can be done by:

- 1 advancing the no-harm rule by focusing on the harm rather than the activity
- 2 articulating and advancing *erga omnes* obligations to include the no-harm principle.

Looked from a very objective sense, there is hardly any doubt that in pandemics state responsibility would arise if nation-states pose harm/risk by not implementing proper restrictions or by implementing the restrictions in an improper time or by being negligent in effectively addressing the threats arising out of the pandemics.<sup>82</sup>

Although the law of state responsibility continues to be the maiden law<sup>83</sup> that can supposedly bring errant states to book, the legal consequence for the conduct of a state responsible for any wrongful act is only reparation; such a consequence relegates the law to a strict liability tort in domestic law!<sup>84</sup> Also, the general principles of the draft on state responsibility primarily refer to the responsibility of states and not of international organisations,<sup>85</sup> individuals or non-state actors, who may also be held liable, either individually or jointly, for committing internationally wrongful acts.<sup>86</sup> Furthermore, third-party states can hold a state responsible only in the event of a breach of peremptory norms. The points posited above indicates that the law remains weak and has a barren land for its growth. Whether there is a chance of invoking the law in reference to disease outbreaks is a matter of acrimonious debate.

### 3.3 *International criminal law*

One pertinent point that may not come immediately to our thinking is the relevance, if any, of international criminal law and international criminal justice in reference with pandemics such as Covid-19. Pandemics are seemingly not connected to international criminal law but what if a criminal act or omission is responsible for such pandemics or what if a criminal act or omission consolidates the causes or consequences of the pandemics. Will the notions of individual criminal responsibility<sup>87</sup> and of criminal (mis)conduct become relevant in the particular context? Will international criminal justice play an instrumental role in the prevention of, and response to public health emergencies triggered by such kind of criminal act or omission? Will the victims be

eligible for an effective remedy and will the perpetrators be punished? The only forum that may answer these apparently atypical questions, which intersect between the two laws, viz., international criminal law and global health law, is the International Criminal Court (ICC),<sup>88</sup> which applies the respective crime elements to know whether any of the mandated type(s) of crime(s), viz., genocide,<sup>89</sup> crimes against humanity,<sup>90,91</sup> war crimes<sup>92</sup> and crime of aggression<sup>93</sup> is/are committed. Article 21 of the Rome Statute allows the ICC to even go beyond the treaty wordings circumscribing the four core crimes and embrace a purposive approach while taking into consideration the customary rules<sup>94</sup> and the general criminal law principles followed domestically while interpreting and applying the given norms. Furthermore, Article 15 of the statute (read with Articles 53 and 54) bestows powers on the prosecutor<sup>95</sup> of the ICC to initiate *proprio motu* investigation if he/she thinks there is a reasonable basis for conducting such investigation regarding the alleged crimes.<sup>96</sup> But the reason why such plenary powers of the ICC or of its prosecutor cannot be harnessed to address the issue of disease outbreaks is that they are meant to be invoked only in a conflict-ridden setting<sup>97</sup> and in a situation where *mens rea* could be explicitly made out.<sup>98</sup> While the former contextual requirement of a conflict-ridden setting is almost always absent during disease outbreaks, the latter requirement of *mens rea* (a *sine qua non* for attributing individual criminal responsibility)<sup>99</sup> may be present but may not be proved, thereby restricting the ICC and/or its prosecutor to exercise discretion in an alleged criminal (mis)conduct. Therefore, in a sense, all the four crimes are but discretely related to criminally wrongful acts/omissions relating to disease outbreaks not only because the contextual requirements of the core international crimes are not in conformity with those acts/omissions (strict liability, intentional or non-intentional) purportedly committed as a cause or consequence of disease outbreaks but also because a few of them (such as the crime of genocide) require special/specific intent (sometimes referred to as *dolus specialis* in inquisitorial jurisdictions), indicating *inter alia* the substantive requirement to meet the proof-beyond-reasonable-doubt standard. Also, the structural elements of the international crimes recognised in the ICC statute, perhaps, require an overt act and does not *prime facie* include a criminal omission. Hence, criminal omissions incidental to or consequential upon disease outbreaks may not automatically qualify as crimes contemplated under the statute; for example, if a nation or an international organisation criminally omits to take substantive precautions to restrict the transmission of an infectious disease that causes extensive devastation, the norms of international criminal law may not come into play naturally, irrespective of whether such omission is intentional, negligent or reckless. It is imperative to mention here that in a few countries such as Norway, Denmark, etc., transmission, including aggravated transmission, of infectious diseases constitutes a criminal offence;<sup>100</sup> for example, the Danish criminal law purportedly punishes a person who, in contravention of laid-down norms meant for preventing or combating a contagious disease, creates a danger that such a disease will infect the public.<sup>101</sup> Unfortunately, international criminal law seems oblivious to the issue of criminal transmission either as a cause or consequence of outbreaks of communicable diseases.

Another important issue that is at the juxtaposition of international criminal law and disease outbreaks is that of admissibility. As per Article 17 of the Rome Statute, the ICC will only admit a case where a state is either disinclined or is genuinely incapable of carrying out the criminal prosecution. The determination of such disinclination or incapability is incumbent on the subjective satisfaction of the state, implying further that

the state may cherry-pick cases on its own accord. Also, such an admissibility regime operates only between ICC and states parties and not between ICC and non-state parties or between the non-state and non-state parties or between the states parties and the non-state parties.<sup>102</sup> The dependence on the states largely curtails the power of the ICC, which can only complement and supplement national jurisdictions while prosecuting international crimes.<sup>103</sup> In fact, ICC's unqualified adherence to the principle of complementarity is quite often self-defeating since it is the states' prerogative to implement the principle not only by transposing the mandates of the Rome Statute in their domestic laws and policies but also by effectively investigating and prosecuting the statutory international crimes.<sup>104</sup> Also, such transposition of laws is easier said than done; examples from the African Union (AU) indicate that many of the AU states do not possess the institutional capacity and preparedness to transpose the laws in their respective legislative framework.<sup>105</sup> They also face other challenges such as lack of resources, lack of political will to implement the operative provisions of the Rome Statute, etc.<sup>106</sup> Also, quite a few nation-states have either not incorporated the ICC crimes in their criminal statutes or are not adroit in undertaking the task of doing so.<sup>107</sup> In a nutshell, in the context of disease outbreaks, the complementarity principle strikes at the very root of international criminal justice contemplated under the ICC regime.

Having understood the inherent limitations of the applicability of international criminal norms in disease outbreaks, we may decide to explore the applicability of different modes of responsibility to actors placed in situations of power who deliberately fail to take all necessary steps to contain the propagation of a potentially deadly virus, in full awareness of the consequences. Or we may inquire as to how we may potentially characterise evidence of an intentional failure to provide adequate health information, support, and facilities to a targeted group suffering a life-threatening pandemic. As we learn more about the connections between climate change and health crises such as Covid-19, we may also renew our efforts to support the ongoing initiatives to develop a certain category of international environmental crimes that may lead to pandemics, or, at least, demand that more emphasis is placed on the environmental consequences of existing crimes on pandemic situations. After all, it is not outside the realm of possibilities that the international criminal justice system be asked to hold to account those who use a crisis situation (caused by a pandemic) as a shelter or a tool to commit or perpetuate crimes against humanity or war crimes, amongst the other core crimes. The very idea and the seed of ICC should germinate in curing the very plexus of the global health crisis, which has the potential of affecting millions.<sup>108</sup> While it is not within the scope of this paper to suggest sweeping changes in the crime categories, the authors feel that it is the appropriate time that the ICC transcends the traditional international crime categories and adopts a more nuanced approach that is best-suited to the changing political, legal and socio-economic needs.

The current crisis caused due to Covid-19 may also lead the international legal community (courts, practitioners, academics, and states) to re-visit some of the international criminal law categories and concepts particularly in light of disease outbreaks. For instance, we may decide to make more and better use of the war crimes provision banning intentional attacks on humanitarian personnel (ICC Statute, Article (8)(2)(b)(iii)) – a crime the ICC Office of the Prosecutor confirmed in its 2016 Policy Paper on Case Selection and Prioritization that it would pay particular attention to make sure that its construction captures deliberate attacks on impartial and independent health workers operating in the context of an armed conflict.<sup>109</sup> But then, the requirement

of an armed conflict can no way be fulfilled in a disease outbreak setting. Another crime that may be considered to address an internationally wrongful criminal act of a nation vis-à-vis disease outbreaks is contemplated under Article 7(1)(k) which may punish an accused for inhumane acts committed intentionally as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack thereby causing great suffering, or serious injury to body or to mental or physical health. But one of the fundamental requirements of Article 7 in general is that such acts must be performed in furtherance of a state or organisational policy,<sup>110,111</sup> or by politically organised groups.<sup>112</sup> Also, a crime within the meaning of Article 7(1)(k) requires that states must domestically carry out the task of investigation and prosecution.<sup>113</sup> Furthermore, the complementarity principle renders any action under Article 7(1)(k) difficult. Consequently, both the crimes mandated under Articles (8)(2)(b)(iii) and Article 7(1)(k) require a purposive interpretation by the ICC in light of the complementarity principle before they could be extended to criminal (mis)conduct typical of such disease outbreak settings. Such interpretation by the ICC may hold persuasive value to the extent that the line drawn between interpretation and law-making becomes difficult to differentiate.<sup>114</sup> There is a remote possibility of invoking the crime of genocide in pandemics not only because of the requirement of special intent but also because one has to establish that there is a link (through evidence) between the perpetrator and the causal factor (generally a virus in case of pandemics) and that the virus is spread deliberately with the specific intention to destroy an ethnic, racial, or religious group.<sup>115</sup>

#### **4 The advisory jurisdiction of the ICJ?**

Disease outbreaks such as the Covid-19 continue to shock and de-globalise the international community. There have been recent deliberations about the ICJ's contentious jurisdiction in the context of the Covid-19 pandemic, stressing in this respect the problem of the state's acceptance of jurisdiction and establishing the existence of a dispute. However, while the focus remains on the Court's contentious proceedings, which is primarily guided by the so-called compulsory jurisdiction of the ICJ,<sup>116</sup> the route of advisory jurisdiction has taken an unfortunate backseat. Article 96 of the UN Charter states that, in addition to the UN General Assembly (UNGA) and Security Council, other UN organs and specialised agencies may request advisory opinions on 'legal questions arising within the scope of their activities', if duly authorised by the UNGA. In the case of a request for an advisory opinion by the UNGA, the question should be one arising within its scope of activities.<sup>117</sup> Article 10 of the UN Charter confers upon the UNGA competence to determine whether 'any questions or any matters' fall within the scope of the charter, that is, the question(s)/matter(s) must simply be of international concern.<sup>118</sup> It appears beyond serious doubt that questions relating to pandemics fall within the competence of the UNGA, as confirmed by the UNGA resolutions. Any advisory opinion sought for by the UN or its specialised agencies may be rendered by the World Court, invoking its powers specified under Article 65 of the ICJ Statute. Under Article 65 of the ICJ Statute, the ICJ may render an advisory opinion, the purpose of which is to 'offer legal advice to the organs and institutions requesting the opinion'.<sup>119</sup> Article 65 of the ICJ Statute reads: "the Court may give an advisory opinion on any legal question at the

request of whatever body may be authorized by or in accordance with the charter of the United Nations to make such a request.”<sup>120</sup>

It can be argued here that requesting an advisory opinion from the ICJ would be a desirable route to clarify certain conflicting questions, for instance:

- 1 The international obligations of states in the face of an international spread of disease, and, in particular:
  - when these obligations arise
  - whether the provisions of the IHR are legally binding
  - whether the possible WHO guidance and recommendations fall within the scope of the IHR
  - the extent of national legislative power that may be exercised in pursuance of health policies “in accordance with the Charter of the United Nations and the principles of international law.”<sup>121</sup>
- 2 The legal consequences for both the WHO and its members arising from the failure to perform their respective obligations owed under international law relating to trans-boundary spread of diseases.
- 3 The way in which states should balance their competing international obligations such as international human rights obligations, when confronting an international spread of disease.

It can be said that these kinds of questions do not appear to exclusively fall within the domestic jurisdiction of a state. As they are questions particularly of international law, they fall within the sphere of issues on which the ICJ could exercise its advisory jurisdiction.

Also, member states may themselves seek advisory opinion from the ICJ. The basis for invoking the jurisdiction of the ICJ is Article 75 of the WHO Constitution, which states “any question or dispute concerning the interpretation or application of this constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court unless the parties concerned agree on another mode of settlement.” While member states may seek advisory opinion invoking Article 75 read with Article 22<sup>122</sup> of the WHO Constitution, the WHO may, *suo motu*, seek for an advisory opinion from the ICJ by virtue of Article 76. Furthermore, Article 77 of the Constitution empowers the Director-General of the WHO to appear before the World Court in relation to any proceedings arising out of any request for an advisory opinion.

It is interesting to note and highlight that while advisory opinions are not binding on states, they lay down a path for the subsequent course of action. In the instant matter, it could assist the General Assembly to pass resolutions condemning the passivity of an errant nation in controlling the spread of a pandemic. Secondly, in the landmark advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case*,<sup>123</sup> the ICJ observed that victims can be provided reparations. Drawing the same analogy, an errant nation can be asked by the ICJ to compensate for losses. Thirdly, the advisory opinion does not require the consent of states; this can offer scope for judicial activism and transcend the passivity that is associated with contentious cases. Fourthly, in an advisory opinion, every state is provided with an opportunity to submit relevant evidence and facts. The court gets to decide on the basis of all the available

evidence at its disposal thus ensuring evidentiary propriety.<sup>124</sup> Lastly, it remains to be seen whether the organs of UNGA or WHO would even consider requesting such an opinion by cooperating together. In all likelihood, dispute settlement mechanisms, including diplomatic means,<sup>125</sup> would play a major role in the post-pandemic phase. Alternatively, apart from the ICJ, some other adjudicating bodies such as regional human rights bodies may step in, which can add the much-required fuel to mitigate this crisis centrally by providing a helping hand.

## 5 Conclusions

To summarise, we are yet to get an affirmative answer when we hunt for an overarching law or even a policy either with regard to providing substantive legal safeguards at the international level or in respect of fastening liability on errant nations (or their citizens) or international organisations for their wrongful acts *vis-à-vis* disease outbreaks. As regards global health laws operating at an international plane, as on this date, apart from the IHR there is hardly any comprehensive normative guideline to deal with a sudden disease outbreak that has the potential to destroy the lives and livelihoods of people across the globe. Even within the IHR framework, on pandemic preparedness and response, the feasibility of harmonisation of international laws and policies both within and between nations is rendered ineffective because of a high degree of variance in legal and ethical considerations, in socio-cultural perspectives, and in the perception of health and hygiene standards.<sup>126</sup> The harmonisation becomes even more difficult because of jurisdictional issues.

With regard to bringing nation-states and international organisations to book for their internationally wrongful acts *vis-à-vis* disease outbreaks, neither the law of state responsibility nor international criminal law provides any cogent solution. The main problem with the law of state responsibility is that operation of the law largely depends on the political will of the nation-states; whether a state may be held liable under international law is concomitant of a political decision to be made by the state(s) that suffered the harm.<sup>127</sup> Another issue with the law is that the burden of proof is on the victim(s) to prove that there is a causal link between a state's violation of a legal obligation and the damage that he/she suffered.<sup>128</sup> In regard to international criminal law, it appears that the law is yet not competent to address the multifarious issues, including that of aggravated transmission of diseases across boundaries. The Rome Statute addresses an altogether different genre of internationally wrongful (mis)conduct. Even if we accept for the sake of argument that some of the provisions of the Rome Statute, especially Articles 7(1)(k) and (8)(2)(b)(iii), may be invoked to address the unsettled issues relating to disease outbreaks, both the impugned provisions require purposive interpretation in the hands of the ICC so that criminal acts or omissions of states or individuals leading to disease outbreaks or exacerbating the consequences of such outbreaks are addressed effectively. But by no stretch of imagination can we assume that the ICC would be willing to purposively interpret<sup>129</sup> the above-mentioned provisions to prove that the drafters of the Rome Statute intended to include (in the said provisions) criminal (mis)conduct that is incidental to or consequential upon disease outbreaks.

On the issue of invocation of advisory jurisdiction of the ICJ during disease outbreaks, any of the UN agencies, including the WHO and its member states, are at liberty to seek advice. The UNGA would presumably be contended if any of the

UN agencies seeks advisory opinion from the ICJ. But the ICJ can at the most help in the redefinition of the contours of the laws of state responsibility or global health laws (the only laws that operate, albeit ineffectually, in disease outbreaks). The advisory jurisdiction does not generally allow the ICJ to render guidance on the criminality of states or international organisations. It remains to be seen how the UNGA and/or the specialised agencies of the UN makes use of the advisory jurisdiction route of the ICJ.

Overall, the main argument that resonates through the entire paper is that there are limited international legal safeguards to effectively address pandemics and to help reverse their adverse effects. The extent of devastation that these pandemics had caused earlier or are seemed to have been causing now is unimaginable. A clear attestation of such devastation is explained by the worldwide sufferings caused due to Covid-19, forcing us to think whether IHR norms are operationally (in)effective and whether new norms need to be created to control disease outbreaks. The paper suggests that it is ripe time to adopt a 'one-size-fits-all' approach that would eventually help in drawing up a comprehensive international convention,<sup>130</sup> a Pandemic Convention, governing disease outbreaks. The Pandemic Convention may incorporate provisions determining the potential liability of member states for their wrongful acts or omissions.<sup>131</sup> The proposed convention may spell out among other things how epidemiological information will be interchanged among and between nations, how trade and commerce will be carried out during disease outbreaks, how nation-states will help each other in preventing the spread of infectious diseases, how the benefits of advancement in medical science and technology will be unequivocally shared among and between nations, etc. Finally, it may help re-establish the missing link between the WHO and the member states and will bridge the divide between public international law and global health laws. An agreement (in the form of the projected convention) entered into by all international stakeholders *inter se* will assist not only in creating a normative framework guiding the rights and obligations arising out of pandemics but also in revamping the global administration of pandemics in light of the changing global public health norms. The convention will on the one hand guarantee that the human right to a standard of living which is adequate for the health and well-being of a person<sup>132</sup> is protected and on the other hand ensure that substantive rule of law<sup>133</sup> prevails.

## Notes

- 1 The scale and prevalence of the spread of communicable diseases has increased overtime and there is evidence that pandemics may become more frequent if proper mitigation measures are not adopted. For details see Zlojutro, A. et al. (2019) 'A decision-support framework to optimize border control for global outbreak mitigation', *Scientific Reports*, Vol. 9, No. 1, p.1.
- 2 Any epidemic (a disease, generally an infectious one, which affects a large number of people) that has spread over an enormous area spanning across territories, nations and continents is termed as a pandemic. In a sense, all epidemics are not pandemics, while all pandemics are epidemics. For further details see *Intermountain Healthcare* [online] <https://intermountainhealthcare.org/blogs/topics/live-well/2020/04/whats-the-difference-between-a-pandemic-an-epidemic-endemic-and-an-outbreak/> (accessed 18 September 2020).
- 3 For the purposes of this paper, the expression international law refers to public international law. Therefore, both the expressions have been used interchangeably.
- 4 Other subjects of international law include, non-state actors, trans-national corporations, etc. However, the scope of this paper is restricted to states (including their citizens) and international organisations as subjects of international law.

- 5 Cash, A.R. and Narasimhan, V. (2000) 'Impediments to global surveillance of infectious diseases: consequences of open reporting in a global economy', *Bulletin of the World Health Organization*, Vol. 78, No. 11, p.1359.
- 6 *Ibid*, p.1358.
- 7 Aginam, O. (2002) 'International law and communicable diseases', *Bulletin of the World Health Organization*, Vol. 80, No. 12, p.948.
- 8 Howard-Jones, N. (1975) *The Scientific Background of the International Sanitary Conferences 1851–1938*, p.100, WHO, Paris.
- 9 Fidler, D.P. (1999) 'International law and global public health', *University of Kansas Law Review*, Vol. 48, No. 1, p.16.
- 10 Although global health law and international health law are debatably synonymous, a broader interpretation of the expression 'global health law' indicates that it incorporates all legal regimes that have bearing on public health. Global health law strives to create a more inclusive and nuanced structure that is attuned to the needs of the global community regarding the administration of global health justice. See Ruger, J.P. (2008) 'Normative foundations of global health law', *Georgetown Law Journal*, Vol. 96, No. 2, p.423. Global health law is defined as "... a field that encompasses the legal norms, processes, and institutions needed to create the conditions for people throughout the world to attain the highest possible level of physical and mental health..." See Gostin, L.O. and Taylor, A.L. (2008) 'Global health law: a definition and grand challenges', *Public Health Ethics*, Vol. 1 No. 1, p.55.
- 11 The IHR, 1969 (as amended) was mandated to monitor and control six communicable diseases, viz., yellow fever, cholera, smallpox, plague, typhus and relapsing fever.
- 12 Aginam, *supra* note 7, p.947. As per art. 1 of IHR, 2005 the expression 'public health emergency of international concern' refers to an extraordinary circumstance that poses public health risk to nation-states (because of the likelihood of spread of an infectious disease across borders) and that requires an organised international response.
- 13 Apart from the IHR, the Framework Convention on Tobacco Control, 2003, debatably the first WHO treaty that was adopted by the World Health Assembly pursuant to art. 19 of the WHO constitution, strives to promote international health cooperation and reasserts the right to the highest standards of health. However, since the Framework Convention has hardly any legal or intellectual bearing on disease outbreaks, it has been excluded from the scope of this paper. For more details on the Framework Convention see WHO (2003) *WHO Framework Convention on Tobacco Control* [online] [https://www.who.int/fctc/text\\_download/en/](https://www.who.int/fctc/text_download/en/) (accessed 18 September 2020).
- 14 The framework was adopted by the World Health Assembly in its 64th session, pursuant to art. 23 of the WHO constitution.
- 15 Gostin, L.O. et al. (2017) 'The global health law trilogy: towards a safer, healthier, and fairer world', *LANCET*, Vol. 390, No. 10105, p.1918.
- 16 The outbreak of the Covid-19 pandemic has posed unprecedented challenges for a wide range of workplaces, institutions and businesses. It has severely impacted personal and professional lives. For details see Barnes, M. and Sax, P.E. (2020) 'Challenges of 'return to work' in an ongoing pandemic', *The New England Journal of Medicine*, Vol. 383, No. 8, p.785. Supposedly, the outbreak of the virus is bringing changes in the crime ecosystems; experts anticipate a steep increase in certain types of crimes (such as domestic violence, commercial burglary, etc.) and a reduction in certain others (such as domestic burglary, etc.). For details see Miller, J.M. and Blumstein, A. (2020) 'Crime, justice & the COVID-19 pandemic: toward a national research agenda', *American Journal of Criminal Justice*, Vol. 45, No. 4, p.516.
- 17 Here the reference to the powers of the subjects of international law is with disease outbreaks. The list of powers referred herein is not exhaustive, it is tentative and is subject to further academic scrutiny.

- 18 The present paper only considers the powers of the states and international organisations (and not other subjects of international law) in addressing violations of rights, in enforcing obligations and in settling disputes.
- 19 International law serves as a major source of global health law, which is based on the moral foundations of justice. Global health governance strategies that strive to uphold health-producing behaviour are deeply entrenched in the principles of international law. For details see Gostin and Taylor, *supra* note 10, p.56.
- 20 Not all international organisations enjoy legal personality; hence, such organisations may not be bestowed with the aforementioned powers. For further details see Klabbers, J. (2015) *An Introduction to International Organizations Law*, 3rd ed., p.46, Cambridge University Press, Cambridge. Also see Amerasinghe, F.C. (2005) *Principles of the Institutional Law of International Organizations*, 2nd ed., p.66, Cambridge University Press, Cambridge.
- 21 Shearer, F.M. et al. (2020) 'Infectious disease pandemic planning and response: incorporating decision analysis', *PLOS Medicine*, Vol. 17, No. 1, p.7.
- 22 Cash and Narasimhan, *supra* note 5, p.1358.
- 23 Arguably, with the reemergence of the epidemic of Black Death in parts of Mediterranean Europe in around 1,374, the first city to opt for quarantine rules was Rugasa (Now Dubrovnik in Southern Croatia), where every plague suspect was sequestered and isolated for a period of 30 days (which eventually became 40 days) so that the spread of the plague could be prevented. Since then, the rules started consolidating and by the early 16th century most countries in Europe adopted some form of quarantine rules. For further details see Frith, J. (2012) 'The history of plague – part 1. The three great pandemics', *History*, Vol. 20, No. 2, p.14. Also see Carmichael, A.G. (2006) 'Infectious disease and human agency: an historical overview', in Pontifical Academy of Sciences (Ed.): *Interactions between Global Change and Human Health*, pp.3–46, The Pontifical Academy of Sciences, Vatican City.
- 24 Municipal courts need to adopt an activist approach in this regard. They may do so by prioritising cases or by suspending non-urgent cases or by changing the modalities of hearings. For details see International Commission of Jurists (2020) *The Courts and Covid-19*, November [online] <https://www.icj.org/wp-content/uploads/2020/05/Universal-ICJ-courts-covid-Advocacy-Analysis-brief-2020-ENG.pdf> (accessed 18 September 2020).
- 25 A few of the developing countries, because of the fear of being sidelined by the world community, often provide erroneous disease surveillance reports. See Cash and Narasimhan, *supra* note 5, p.1359.
- 26 Zlojutro et al., *supra* note 1, p.2.
- 27 *Ibid*, p.1. The border control strategy mentioned in the work was passenger screening at airport entry points upon passengers' arrival so that high-risk persons might be detected and provided the necessary support. Also see Merrill, R.D. et al. (2017) 'Responding to communicable diseases in internationally mobile populations at points of entry and along Porous Borders, Nigeria, Benin, and Togo', *Emerging Infectious Diseases*, Vol. 23, No. 12, p.S114.
- 28 Bennett, B. and Carney, T. (2010) 'Law, ethics and pandemic preparedness: the importance of cross-jurisdictional and cross-cultural perspectives', *Australian and New Zealand Journal of Public Health*, Vol. 34, No. 2, p.107.
- 29 Carmichael, *supra* note 23, p.31.
- 30 *Ibid*.
- 31 BBC News (2020) *Coronavirus: how they Tried to Curb Spanish Flu Pandemic in 1918*, May, [online] <https://www.bbc.com/news/in-pictures-52564371> (accessed 19 September 2020).
- 32 Carmichael, *supra* note 23, p.32.
- 33 *Ibid*, p.33.

- 34 Huremović, D. (2019) 'Brief history of pandemics (pandemics throughout history)', in Huremović, D. (Ed.): *Psychiatry of Pandemics: a Mental Health Response to Infection*, pp.7–35, Springer International Publishing, Cham.
- 35 For example, the global surveillance of influenza started somewhere around 1948 which eventually led to the streamlining of influenza vaccination. For further details, refer Cash and Narasimhan, *supra* note 5, p.1358.
- 36 Carmichael, *supra* note 23, p.33.
- 37 Arguably, Covid-19 viral infection started sometime in November/December, 2019 and had been spreading at an alarming rate since then. For more details, refer Sahin, A.R. et al. (2020) '2019 novel coronavirus (COVID-19) outbreak: a review of the current literature', *Eurasian Journal of Medicine and Oncology*, Vol. 4, No. 1, p.2.
- 38 Worldometers (2020) *Covid-19 Coronavirus Pandemic* [online] <https://www.worldometers.info/coronavirus/> (accessed 29 December 2020).
- 39 Fidler, *supra* note 9, p.2. Supposedly, the WHO was also reluctant to apply the international norms in addressing global public health issues.
- 40 *Ibid*, p.2.
- 41 *Ibid*, p.6.
- 42 Also, from the point of view of enforcement of global health laws, the role of intergovernmental organisations and of national governments has been supposedly restricted. It is needless to add here that enforcement of laws during disease outbreaks plays a critical role in balancing the required resources and responding to emergency situations. For details see Richards, E.P. et al. (2006) *The Role of Law Enforcement in Public Health Emergencies*, p.2, US Department of Justice, Washington, DC.
- 43 Belanger, M. (1989) 'The future of international health legislation', *International Digest of Health Legislation*, Vol. 40, No. 1, p.3.
- 44 The situation was not so in the late 19th century and in the pre-WHO world order (the early 20th century) when international law was expressly utilised to address international public health concerns. For details see Fidler, *supra* note 9, p.2.
- In the early 20th century, for example, international agreements (in the form of treaties and conventions) that focused on controlling the illegal trading of narcotic drugs and opium were reached at. For details see Ruger, *supra* 10, p.424.
- 45 Fidler, *supra* note 9, p.1.
- 46 *Ibid*, p.2. The cause may be attributed to the sluggish approach of the international scientific community to appreciate the merits of the existing normative regime governing global health laws.
- 47 *Ibid*, p.4.
- 48 Gostin and Taylor, *supra* note 10, p.61.
- 49 Arguably, such strategies are firmly rooted in the Westphalian sovereign-state approach to infectious diseases. The sovereign-state approach restricted the issue of outbreak and control of infectious diseases to nations and derided any form of global cooperation on the issue. See Ruger, *supra* note 10, p.428.
- 50 Fidler, *supra* note 9, p.13.
- 51 *Ibid*, p.22.
- 52 *Ibid*, p.14.
- 53 *Ibid*, p.50.
- 54 Global health equity and global health justice play an instrumental role in reducing inequalities in health capabilities and may be attained by ensuring proper redistribution of resources, by embracing proper legislation and/or policy, etc. See Ruger, *supra* note 10, p.427.
- 55 Toebes, B. (2015) 'International health law: an emerging field of public international law', *Indian Journal of International Law*, Vol. 55, No. 3, p.300.

- 56 Gostin and Taylor, *supra* note 10, p.53.
- 57 The revised IHR, 2005 was drafted pursuant to arts. 21(a) and 22 of the Constitution of WHO. Art. 21(a) of the WHO Constitution empowers the World Health Assembly to draw up regulations to prevent the trans-national spread of communicable diseases. *Vide* art. 21(b), the WHO may also create binding laws governing nomenclatures with regard to diseases, causes of death and other public health practices.
- 58 Wilson, K. et al. (2010) 'Strengthening the International Health Regulations: lessons from the H1N1 pandemic', *Health Policy and Planning*, Vol. 25, No. 6, p.505.
- 59 Gostin et al., *supra* note 15, p.1920.
- 60 IHR, art. 2 (2005).
- 61 Aginam, *supra* note 7, p.947.
- 62 IHR, art. 5 (2005).
- 63 These reports are exclusive of those regular reports that may be drawn up *vide* art. 6(2) of the IHR.
- 64 International and Comparative Law Research Centre (2020) *Covid-19 and International Law* [online] [http://iclr.c.ru/files/pages/research/papers/ICLRC\\_COVID-19-and-International-Law-Issue-2-ENG.pdf](http://iclr.c.ru/files/pages/research/papers/ICLRC_COVID-19-and-International-Law-Issue-2-ENG.pdf) (accessed 19 September 2020).
- 65 IHR, art. 48 (2005).
- 66 Wilson, *supra* note 58, p.505.
- 67 Gostin et al., *supra* note 15, p.1921.
- 68 *Ibid.*
- 69 *Ibid.*
- 70 Art. 14 of the IHR read with the preamble (recital 4) requires the WHO to coordinate its activities with international bodies and intergovernmental organisations for the purposes of protecting global public health.
- 71 Wilson, *supra* note 58, p.507. For further details see Toebes, *supra* note 55, p.300. Also see Quammen, D. (2014) *Tracking a Serial Killer: could Ebola Mutate to become More Deadly?* [online] <https://www.nationalgeographic.com/news/2014/10/141015-ebola-virus-outbreak-pandemic-zoonotic-contagion/> (accessed 18 September 2020).
- 72 Gostin et al., *supra* note 15, p.1921.
- 73 Guillermo, F.C.G. (2020) 'A perspective about coronavirus disease 2019 (COVID-19)', *INSPIPILIP*, Vol. 4, No. 2, p.18.
- 74 UNGA Resolution 56/83, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 2 (2001).
- 75 In contemporary international law, the primary norms of state responsibility define what types of internationally wrongful acts may be attributable to a state. For details see Sucharitkul, S. (1996) 'State responsibility and international liability under international law', *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 18, No. 4, p.828.
- 76 Even if there is a breach (by a state) of *erga omnes* obligations arising out of *jus cogens* norms, it is only treated as a serious civil breach and not a criminal one. This further implies that all forms of internationally wrongful acts or omissions in respect of the law of state responsibility are civil in nature and that victims will only be entitled to civil remedies such as restitution, compensation, satisfaction, etc.
- 77 Bergkamp, L. (2020) 'State liability for failure to control the COVID-19 epidemic: international and Dutch law', *European Journal of Risk Regulation*, Vol. 11, No. 2, pp.343.
- 78 Although the law of state responsibility did feature as one of the 14 topics in ILC's first session in 1949, it did not receive the desired treatment. In 1963, a sub-committee was appointed under the leadership of Robert Ago to look into those obligations that created responsibility on the part of the respective states. Robert Ago was also entrusted with the responsibility to define the rules of state responsibility, focusing on the subjective and

objective conditions that constituted internationally wrongful acts. Between 1968 and 1969, the commission tried to revisit the law by discussing whether international responsibility of states should be extended to international organisations. See Rosenne, S. (1970) 'The role of the International Law Commission', *American Journal of International Law*, Vol. 64, No. 4, p.32.

In the meantime, the observations of Robert Ago were reflected in various ILC's reports that were tabled before the General Assembly. Of special mention was the 22nd Session Report that was submitted in 1970. In the subsequent report submitted in 1971, Robert Ago identified internationally wrongful acts of the states as the source of international responsibility. The 1971 report also tried to deal with the types of wrongful acts that could be attributed to the states. Unfortunately, his suggestions and observations (through various session reports) never transpired into reality. Between 1975 and 1977, the commission's role was largely restricted to streamlining the conceptual framework governing state responsibility; for example, it wanted to see whether state responsibility could be dissociated from international liability for consequences that arose out of acts (including omissions) that were otherwise not prohibited under international law. In 1980, draft articles on state responsibility and related questions were put up before the General Assembly by the commission through its 32nd Session Report. The articles never saw the light of the day. Yet another unsuccessful attempt was made by the ILC in 1996 to codify the law.

- 79 Bird, A. (2010) 'Third state responsibility for human rights violations', *European Journal of International Law*, Vol. 21, No. 4, p.884.
- 80 *Ibid*, p.900.
- 81 Higgins, R. (1994) *Problems and Process: International Law and how we Use it*, 2nd ed., p.165, Clarendon Press, Gloucestershire.
- 82 Bergkamp, *supra* note 77.
- 83 The law continues to be rooted in state practice and in the general principles of law recognised by civilised nations.
- 84 Dupuy, P-M. (1989) 'The international law of state responsibility: revolution or evolution?', *Michigan Journal of International Law*, Vol. 11, No. 1, p.106.
- 85 The ILC adopted 'draft articles on the responsibility of international organisations' in 2011 to bestow obligations on international organisations for their internationally wrongful acts.
- 86 Dimitrovska, M. (2015) 'The concept of international responsibility of state in the international public law system', *Journal of Liberty and International Affairs*, Vol. 1, No. 2, p.6.
- 87 One of the requirements of the principle of individual criminal responsibility is that only natural persons may be held criminally responsible. Disease outbreaks may not always be caused by or through natural persons. Debatably, quite a few of the outbreaks of infectious diseases had been caused by animals!
- 88 The ICC was constituted vide the provisions of the Rome Statute, 1998.
- 89 Rome Statute, art. 6 (1998).
- 90 Rome Statute, art. 7 (1998).
- 91 It includes crimes committed both during war and peace, crimes committed both by civilians and soldiers, and crimes committed by government(s) against its own people and against people from other countries. For details see Luban, D. (2004) 'A theory of crimes against humanity', *Yale Journal of International Law*, Vol. 29, No. 1, p.93.
- 92 Rome Statute, art. 8 (1998).
- 93 Rome Statute, art. 8 *bis* (1998).
- 94 There is an existing debate as to what extent the Rome Statute of the ICC redefines customary international criminal law rules (crystallised rules applicable to all states) or creates new rules (progressive development) which essentially bind only signatories to it.

- 95 While employing such powers, one of the foremost requirements is that the prosecutor must objectively assess the gravity of the allegedly crimes committed in a given situation considering factors such as nature and manner of the commission, impact of such commission, etc. For details see Einarsen, T. (2012) *The Concept of Universal Crimes in International Law*, p.74, Torkel Opsahl Academic EPublisher, Oslo.
- 96 In conducting such investigation, the prosecutor must respect the principle of complementarity which entails that only when the municipal criminal law fails to bring the offender to book, the ICC may exercise jurisdiction. The spirit of the complementarity rule runs across the length and breadth of the Rome Statute and finds mention in its preamble (paragraph 10) and in art. 1. For further details see Ventura, M. (2020) *Proprio Motu Investigation by the ICC Prosecutor* [online] <https://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor/> (accessed 18 September 2020).
- 97 Such situations may be triggered by an armed conflict and/or a systematic and widespread attack against the civilians. Also, there has to be proven nexus between the situations and the alleged criminal misconduct.
- 98 Any absence or defect in the *mens rea* standard precludes individual criminal responsibility. For details see Marchuk, I. (2014) *The Fundamental Concept of Crime in International Criminal Law*, p.70, p.113, Springer-Verlag, Heidelberg.
- 99 *Id* at 70.
- 100 Turanjanin, V. and Radulović, D. (2020) ‘Coronavirus (COVID-19) and possibilities for criminal law reaction in Europe: a review’, *Iran Journal of Public Health*, Vol. 49, Suppl. 1, p.5.
- 101 *Ibid*, p.6.
- 102 Bassiouni, M.C. (2010) ‘Crimes against humanity: the case for a specialised convention’, *Washington University Global Studies Law Review*, Vol. 9, No. 4, p.588.
- 103 Bachmann, S.D.D. and Nwibo, E.L. (2018) ‘“Pull and push’ – implementing the complementarity principle of the Rome Statute of the ICC within the AU: opportunities and challenges’, *Brooklyn Journal of International Law*, Vol. 43, No. 2, p.463.
- 104 *Ibid*, p.541.
- 105 *Ibid*, p.542.
- 106 *Ibid*.
- 107 Bassiouni, *supra* note 102, p.587.
- 108 *Ibid*.
- 109 Guariglia, F. (2020) *Symposium on Covid-19 and International Law*, *European Journal of International Law* [online] <http://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-international-criminal-law/> (accessed 19 September 2020).
- 110 Jalloh, C.C. (2013) ‘What makes a crime against humanity a crime against humanity’, *American University International Law Review*, Vol. 28, No. 2, p.384.
- 111 As per art. 7(2)(a) of the Rome Statute, attack refers to a conduct (involving multiple acts) against any civilian population, in pursuance of a state or organisational policy to commit such attack.
- 112 Luban, *supra* note 91, p.95.
- 113 Bassiouni *supra* 102, p.588.
- 114 Einarsen, *supra* note 95, p.219.
- 115 *Supra* note 64.
- 116 This consent-based jurisdiction restricts the ICJ to take *suo motu* cognisance of any contentious matter. Also, it is optional for the contending states (they cannot be compelled, in view of their sovereign nature) to accept the jurisdiction of the World Court for the settlement of disputes. For further details see Alexandrov, S.A. (2006) ‘The compulsory

- jurisdiction of the International Court of Justice: how compulsory is it?', *Chinese Journal of International Law*, Vol. 5, No. 1, p.31.
- 117 Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. Rep. 325 (July 20).
- 118 UN Charter, art. 11 (1945).
- 119 Legality of the threat or use of nuclear weapons, advisory opinion, 1996 I.C.J. Rep. 226 (July 8).
- 120 Rules of court, arts. 102–109 (1978).
- 121 IHR, art. 3(4) (2005).
- 122 Article 22 of the constitution envisages that any regulation made in pursuance of Article 21 shall be applicable to the member states unless any of the members expressly reject or reserve such regulation.
- 123 Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion, 2004 I.C.J. Rep. 136 (July 9).
- 124 *Ibid*, p.153.
- 125 IHR, art. 56 (2005).
- 126 Bennett and Carney, *supra* note 28, p.112.
- 127 Bergkamp, *supra* note 77.
- 128 *Ibid*, p.4.
- 129 The ICC may not apply special rules of interpretation since the clear wording of art. 22(2) of the Rome Statute, viz., “the definition of a crime shall be strictly construed and shall not be extended by analogy...” proves beyond any reasonable doubt that the drafters of the statute wanted a strict construction of its provisions unless there are express ambiguities in the provisions. For details see Einarsen *supra* note 95, p.102.
- 130 Speakman, E.M. et al. (2017) ‘Pandemic legislation in the European Union: fit for purpose? The need for a systematic comparison of national laws’, *Health Policy*, Vol. 121, No. 10, p.1021.
- 131 Bergkamp, *supra* note 77.
- 132 UDHR, art. 25 (1948).
- 133 In the perspective of international law, substantive rule of law refers to an all-encompassing concept that is to an extent inherent in contemporary international law and that embodies the principles of fairness in all respects. Brownlie categorises five elements of substantive rule of law. For details see Einarsen, *supra* note 95, p.31.