

12^{ème} Commission

Epidemics and International Law

Les épidémies et le droit international

Rapporteur : Shinya Murase

La commission est composée de MM. José E. Alvarez, Antony Terence Anghe, Eyal Benvenisti, Francesco Francioni, Claudio Grossman, Mme Vanda Eva Lamm, MM. Campbell McLachlan, Theodor Meron, Václav Mikulka, Gérard Niyungeko, Fausto Pocar, Antonio Remiro Brotons, Bernardo Sepúlveda-Amor, Dire Tladi, Mme Xue Hanqin.

Table of Contents

Résumé du rapport	41
Introduction	43
I. Background of the Topic	45
1. History of Epidemics and International Law	45
2. Sources of International Law Relating to Epidemics.....	47
(1). International health law	48
(a) The Constitution of WHO	48
(b) The International Health Regulations (IHR 2005).....	48
(2) Human rights law.....	49
(a) The International Covenant on Economic, Social and Cultural Rights (ICESCR).....	49
(b) The International Covenant on Civil and Political Rights (ICCPR)	50
(c) Regional human rights instruments.....	51
(3) International Environmental Law (Multilateral Environmental Agreements (MEAs))	51
(4) Other Relevant Agreements.....	52
(5) Draft Articles, Declarations, Other Instruments and Judicial Decisions.....	52
(a) Articles and Guidelines of the International Law Commission (ILC).....	52
(b) Resolutions of the <i>Institut de Droit international</i> (IDI).....	53
(c) Resolutions of the International Law Association (ILA).....	54
(d) Other Instruments.....	54
(6) International Judicial Decisions	54
II. Goals and the Guiding Principles of the Project	56
III. Scope, Objective and the Use of Terms	61
1. Scope.....	61
2. Objective	63

EPIDEMICS AND INTERNATIONAL LAW

3. Use of terms.....	64
IV. General Principles.....	68
1. Human Rights.....	68
2. The Role of the States	72
3. International Cooperation.....	79
4. Interrelationship among Relevant Rules	82
(1). International Environmental Law	86
(2). International Trade Law	90
(3). International Investment Law	93
(4). International Transport Law	95
(5). International Law of Peace and Security and International Humanitarian Law.....	98
(6). Other Laws	100
V. Risk Reduction and Preparedness	103
1. States' Obligation of Risk Reduction.....	104
2. Preparedness.....	106
VI. Obligations of the Affected States during Epidemics	111
1. Obligation of the Affected States to Ensure Information Disclosure	111
2. Emergency Measures by the Affected States	113
3. Obligation to Seek External Assistance	115
VII. Obligations of Other States during Epidemics	117
1. Preventative Measures.....	117
2. Offer of Assistance.....	119
VIII. Measures in the Post-Epidemic Phase	121
1. Review and Information Sharing	121
2. International Responsibility of States and International Organizations.....	123
3. Dispute Settlement	127
Draft Resolution	135
Projet de résolution	143

Résumé du rapport

Bien que l'Organisation mondiale de la santé (OMS) joue un rôle central dans la lutte contre les épidémies avec son Règlement sanitaire international (RSI-2005), le droit de l'OMS n'est pas un régime scellé ou se suffisant à lui-même. Il s'agit d'un système de droit ouvert, qui a besoin d'être complété par d'autres règles du droit international. L'Institut de Droit international (IDI) serait bien placé pour examiner la question du point de vue du droit international général et élaborer un projet d'articles sur le sujet. Naturellement, il appartient aux États de décider s'il est nécessaire et approprié ou pas de conclure une convention-cadre sur le thème proposé. Néanmoins, il est à espérer que le projet d'articles élaboré par l'IDI revêtira une certaine valeur normative, même s'il ne devient pas une convention contraignante.

Tout d'abord, l'histoire des épidémies et l'évolution du droit international depuis le milieu du XIX^{ème} siècle sont brièvement passées en revue, suivies d'un résumé des sources pertinentes du droit international à cet égard. Malgré l'importance considérable de cette question, le droit international de la santé n'a malheureusement jamais été reconnu comme un domaine classique du droit international. Il est en effet surprenant que, même si les épidémies ont fait beaucoup plus de morts que les guerres mondiales, le droit international n'ait pas joué de rôle majeur, laissant plutôt la responsabilité principalement à l'OMS en tant que question de coopération scientifique et technique.

Le rapport définit premièrement les objectifs du projet sous la forme d'un préambule. La protection des personnes contre les épidémies est proclamée comme « préoccupation commune de l'humanité », l'accent étant mis sur la nécessité d'une solidarité et d'une coopération internationales pour répondre aux menaces d'épidémies. Après avoir clarifié la portée et l'objectif du projet, le rapport donne quelques définitions des termes utilisés dans le projet d'articles, tel que ceux d'« épidémie », d'urgence de santé publique de portée internationale, de « pandémie » et d'« États affectés ».

Ensuite, les « principes généraux » du projet d'articles sont énumérés, y compris les droits humains, le rôle des États, la coopération internationale, ainsi que les interrelations entre les règles pertinentes, y compris notamment, celles relatives au droit international de l'environnement, au droit international du commerce et des investissements, au droit international des transports, au droit

international de la paix et de la sécurité et au droit international humanitaire.

L'examen des obligations des États se divise en trois phases ; *avant*, *durant* et *après* les épidémies. Dans la phase pré-épidémique, la réduction des risques et la préparation sont mises en évidence. L'évaluation de l'impact environnemental lié aux épidémies doit être considérée comme faisant partie des efforts de préparation. La formation d'experts et l'éducation du public sont également extrêmement importantes. Dans ce contexte, une « culture de la prévention épidémique » devrait être promue.

Pendant les épidémies, les obligations des États affectés et celles des autres États sont envisagées séparément. L'obligation la plus importante des États affectés est de garantir une divulgation rapide des informations pertinentes et une transparence totale ainsi qu'un accès complet et sans entrave à ces informations par le public. L'État affecté doit garantir la liberté d'expression et de communication des individus relevant de sa juridiction et celle de la presse doit être protégée en ce qui concerne les informations relatives au déclenchement des épidémies. Les obligations des autres États comprennent l'adoption de mesures préventives d'urgence afin d'éviter une nouvelle transmission de la maladie. Les mesures doivent être prises conformément aux preuves scientifiques et aux règles applicables du droit international, y compris celles relatives aux droits humains, en tenant compte des besoins de tous les groupes vulnérables. En outre, les autres États doivent offrir leur assistance à l'État affecté dans les meilleurs délais.

En ce qui concerne les mesures dans la phase post-épidémique, le rapport souligne que des examens approfondis doivent être menés et partagés par tous les États, les organisations internationales pertinentes et les autres acteurs concernés. Il est rappelé qu'une violation de l'obligation d'un État de prévenir, réduire et contrôler les épidémies en vertu du droit international ainsi que de fournir des informations précoces sur le déclenchement d'épidémies imputable à cet État engage sa responsabilité, et aussi qu'une violation de l'obligation d'une organisation internationale engage également la responsabilité de cette organisation internationale.

En ce qui concerne le règlement des différends [entre États] relatifs aux épidémies, le rapport indique qu'ils seront réglés par des moyens pacifiques, notamment la négociation, l'enquête, la médiation, la conciliation, l'arbitrage et les moyens judiciaires, le recours à des organismes ou accords régionaux, ou tout autre moyen pacifique de leur choix. Étant donné que les différends concernant les épidémies peuvent avoir un caractère hautement factuel et tributaire de la science, le rapport rappelle qu'il convient de prendre dûment en considération le recours à des experts techniques et scientifiques.

Report*

Introduction

1. The background leading to the adoption of the present topic by the *Institut de Droit international* (IDI) was as follows: On 20 March 2020, the Secretary-General of the IDI, Professor Marcelo Kohen, sent its members his letter in which he wrote, *inter alia*: "[Facing the current situation of pandemic,] I invite all our members to reflect on how our Institute can contribute the most efficiently in this regard, including by examining issues that we have not yet addressed or that were addressed in an insufficient manner." On this appeal, the present writer responded on the following day, and suggested that the IDI should take up a topic on "Epidemics and International Law," along with his brief seven-page "concept paper". In view of the importance and urgency of the topic, the Bureau of the IDI moved quickly, and it decided on 27 March 2020 to set up a commission on the topic, the 12th Commission, and appointed the present writer as its Rapporteur. The membership of the 12th Commission was finalized on 12 April 2020.¹ The Rapporteur's First Report on the topic "Epidemics and International Law" was submitted for consideration by the members of the 12th Commission on 20 April, the Second Report on 20 May, and the Third Report on 23 June 2020. The Members of the 12th Commission submitted their comments on these reports, which have been compiled in the documents, Members' Comments on the First, Second and Third Reports respectively together with the Rapporteur's Responses. The Fourth Report, which was sent to the Members in late July 2020, integrated these three Reports into a single text with

* The Rapporteur wishes to express his heartfelt gratitude to Professor Gian Luca Burci of the Graduate Institute of International and Development Studies and also to Dr. Suzanne Zhou, Manager of the McCabe Centre for Law and Cancer, who gave valuable comments on the draft of this Report. Deep appreciation also goes to Dr. Danae Azaria, Associate Professor at the University College of London, and Mr. Andrew Van Duyn, JD candidate of the New York University Law School, for their comments and edits on the earlier draft of this Report. The Rapporteur also wishes to thank Ms. Maoli Zhang, PhD candidate of Peking University Law School, Ms. Xiaolu Fan, Master student of Peking University Law School, Professor Zhiping Chen of Yunnan University Law School, Dr. Masayuki Hiromi, Associate Professor at Kobe City University of Foreign Studies, and Dr. Jo Toriyabe, Associate Professor at Setsunan University Law School, for supplying useful material on the topic. Responsibility for any errors belongs to the Rapporteur.

¹ The members of the 12th Commission are: José Alvarez, Antony Anghie, Eyal Benvenisti, Francesco Francioni, Claudio Grossman, Vanda Lamm, Campbell McLachlan, Theodor Meron, Vaclav Mikulka, Gérard Niyungeko, Fausto Pocar, Antonio Remiro Brotons, Bernardo Sepulveda Amor, Dire Tladi, Hanqin Xue, and Shinya Murase as Rapporteur.

amendments that reflect the Members' comments. The 12th Commission had an online meeting on 20 August 2020, for which the IDI Secretariat subsequently provided detailed summary record. Based on the comments received from Members on the Fourth Report, the Rapporteur revised it and submitted the Fifth Report on 10 November 2020. The present Report is the revised version of the Fifth Report finalized on 10 December 2020, submitted to the IDI on 30 December 2020. Thus, the present Report is the product of collective work of all the Members of the 12th Commission.

2. The IDI's lawmaking efforts may not solve the immediate problems relating to epidemics that humankind is facing at present. However, these efforts will certainly help the international community meet the challenges of *future* epidemics. Therefore, the IDI should still consider the topic with a sense of urgency, since, like in the past, once the epidemic is gone, it may be easily and quickly forgotten. Nonetheless, the Commission must maintain the traditional high standard of the IDI's work in spite of the time pressure. It has been proposed that the topic be considered in August 2021 at the IDI's eightieth session in Beijing by adopting a Resolution and a set of draft articles.² If the plenary meeting considers it necessary and appropriate to continue the topic beyond the eightieth session, the 12th Commission will certainly do so.

3. Humankind has faced the dangers of epidemics since the beginning of time, but we have overcome them with wisdom and courage, as well as huge sacrifice in the interest of future generations. This project thus recognizes the need to prevent and ensure proper control of epidemics in the future, believing that international law can play an important role in this context.

² This sense of urgency may be something similar to the *ethos* of the drafters of the UN Charter. There was a strong feeling among those who gathered at Dumbarton Oaks in 1944 and San Francisco in 1945 that the Charter must be drafted *before* the end of the war, because, once peace was restored, they feared that the momentum might be lost. Professor Louis Sohn (1914-2006), who had contributed to drafting some of the provisions of the Charter, was one of them. Having attended his seminar on the Law of the United Nations at Harvard Law School in the mid-1970s, the Rapporteur was deeply impressed by his pioneering spirit and his sense of responsibility as an international lawyer. Facing the current situation of disastrous epidemic, we must seize on a similar sense of urgency as that was held by the founding fathers of the UN. The topic on epidemics has long been neglected by mainstream international law, despite the fact that the world has seen a number of very serious events of epidemics during which a huge number of people have died. There were voices appealing for the need to take up the topic from the perspective of international law in each time when an epidemic broke out, but they were quickly forgotten once the epidemic receded. It was therefore commendable that the Bureau of the IDI, in a most expeditious manner, established the 12th Commission, designating the topic with high priority.

4. It goes without saying that the World Health Organization (WHO) plays a central role in combatting epidemics. WHO law is quite an autonomous law, but it is not a sealed or self-contained regime. It is an open system of law, which needs to be supplemented by other rules of international law such as human rights law, international environmental law, international trade and investment law, international transport law, international law relating to peace and security, international humanitarian law, and so forth. Therefore, a study of the law of epidemics should avoid a single-issue approach. Rather, it is necessary to look into the gaps in and linkages with other branches of international law. In this sense, the question of interrelationship among relevant rules of international law is extremely important.

I. Background of the Topic

1. History of Epidemics and International Law

5. The history of epidemics can be traced back to the beginning of the written history. The first recorded epidemic was the “Plague of Athens” in 429-426 BC, the death toll of which was estimated at 100,000.³ There have been numerous such instances of epidemics from the first human settlements to the modern day.⁴ In only the past twenty years of this

³ In his *History of the Peloponnesian Wars*, Thucydides describes vividly and in detail the “Plague of Athens”. Thucydides himself contracted the disease, but survived: Θουκυδίδης, *Ἱστορίαι*, B’, 47-54 (Thucydides, *Histories*, Vol. 2, 47-54). Athens had sent troops of 20,000 to fight with Sparta only to be totally defeated. According to Thucydides, the invading Spartan army decided not to enter Athens due to the epidemic going on in the city as Sparta did not know how to protect themselves from the disease. Thus, this first case of the “Thucydides Trap” demonstrated that the epidemics prevailed over military actions.

⁴ The following list includes only those that exceeded 40,000 in the expected death toll (name, place, year, death toll): “Plague of Athens”, Greece, 429-26 BC, 100,000; “Antonine Plague”, Roman Empire, 165-180AD, 5-10 million; “Plague of Justinian”, Europe and Africa, 541-42, 100 million; “Japanese Smallpox”, 735-37, 2 million; “Black Death”, Europe, Asia and North Africa, 1331-53, 50-200 million; “Mexican Smallpox”, 1520, 2-5 million; “Cocoliztli Epidemic”, Mexico, 1545-48, 1576-80, 7-17.5 million; “New England Epidemic”, 1616-20, 3-90% of the population; “Italian Plague”, 1629-31, 280,000; “Great Plague of London”, 1665-66, 100,000; “Plague”, France, 1668, 40,000; “Great Plague of Vienna”, 1679, 76,000; “Great Plague”, Balkans, 1738, 50,000; “Great Plague of Marseille”, France, 1720-22; “Russian Plague”, 1770-72, 50,000; “Persian Plague”, 1772, 2 million; “Caragea’s Plague”, Romania, 1813, 60,000; “First Cholera Epidemic”, Asia and Europe, 1816-26, 100,000; “Second Cholera Epidemic”, Asia, Europe and North America, 1829-51, 100,000; “Third Cholera Epidemic”, Russia, 1852-60, 1 million; “Third Plague Epidemic”, Worldwide, 1855-69, 22 million; “Flu Epidemic”, Worldwide, 1889-90, 1 million; “Sixth Cholera Epidemic”, Europe, Asia and Africa, 1899-1923, 800,000; “Encephalitis Lethargica Epidemic”, Worldwide, 1915-26, 1.5 million; “China Plague”, 1910-11, 1919-21, 100,000; “Spanish Flu”, Worldwide, 1918-20, 50-100 million; “Asian Flu”, Worldwide, 1957-58, 2 million; “Hong Kong Flu”, Worldwide, 1968-69, 500,000. To be noted additionally: “Smallpox”, Worldwide, 1877-1977, 500 million (smallpox was

century, the world has witnessed the outbreaks of SARS (2002-2004), Dengue (2005-2006), Ebola (2007-present), H1N1 Influenza (2009), MERS (2012), Zika (2016) and now COVID-19 (2019-present), just to name a few.

6. International law began to address epidemics in the latter half of the 19th century. The first International Sanitary Conference was held in Paris in 1851 to standardize international quarantine regulations against the spread of cholera, plague and yellow fever.⁵ In total, there were 14 Conferences held between 1851 and 1938. The first International Sanitary Convention was adopted in 1892 and revised in a series of conventions afterwards, the last revision being in 1944. During this time, conventions on specific health issues were also adopted, like the 1934 International Convention for Mutual Protection against Dengue Fever.⁶

7. In 1902, the Pan-American Sanitary Bureau was created. Now known as the Pan-American Health Organization (PAHO), the Bureau was the first international organization specializing in health. This was followed in 1907 by the creation of the first permanent health office, the Office International d'Hygiène Publique (OIHP), which served as a clearinghouse on infectious disease information to ensure State responses were adequately informed.⁷ The Covenant of the League of Nations provided in Article 23(f) that Members “will endeavour to take steps in matters of international concern for the prevention and control of disease.” Thus, during the inter-war period, the Health Organization of the League of Nations (HOLN, 1921-45) played an important role in the field of global health by disseminating information and providing technical assistance, as did the Office International des Epizooties (OIE),

eradicated in 1977); HIV/AIDS”, (1920-) 1981-present, 32 million. See, George Childs Kohn, *Encyclopedia of Plague and Pestilence: From Ancient Times to the Present* (3rd ed, Facts on File Library of World History, 2007); Joseph P. Byrne (ed.), *Encyclopedia of Pestilence, Pandemics, and Plagues*, 2 vols. (Greenwood Press, 2008); Hiroyuki Ishi, *World History of Infectious Diseases*, Kadokawa, 2018 (in Japanese).

⁵ The background was that there was the outbreak of the Second Cholera Epidemic in 1829 in Europe, which prompted the European governments to appoint medical missions to investigate the causes of the disease. The report of the French team in 1834, finding that different countries adopted differing quarantine requirements, advised that an international conference be held to standardize the requirements.

⁶ US Marine Hospital Service, 'International Convention for Mutual Protection Against Dengue Fever' [1935] 50 *Pub Health Repts* 102.

⁷ Alexa M Stern and Howard Markel, 'International Efforts to Control Infectious Diseases, 1851 to the Present' [2004] 292 *J Am Med Ass'n* 1476.

which focuses specifically on animal health but may address aspects of human health as well.⁸

8. The World Health Organization (WHO), established in 1948, succeeded the OIHP and HOLN, combining functions from both organizations, and subsumed the PAHO as one of its six regional offices. The WHO adopted the International Sanitary Regulations in 1951, greatly expanding the reach of the international public health regime from the patchwork of conventions adopted in the first half of the 20th century.⁹ In 1969, WHO modified and adopted the regulations as the International Health Regulations (IHR). The current version of the IHR, adopted in 2005, after a radical revision from the previous approach, is the basic binding instrument to cope with global health issues.

9. As mentioned earlier, while the WHO IHR (2005) is central in global health law relating to epidemics, it must be supplemented by other rules of international law. Thus, it is necessary at the outset to have a general view of the sources of international law relating to epidemics.

2. Sources of International Law Relating to Epidemics

10. There are several sources of international law relevant to epidemics that can be cited. This section only describes those multilateral treaties and non-treaty instruments of primary importance. Other multilateral treaties, bilateral treaties, domestic legislation and domestic court cases will be referenced in specific contexts later in the Report. Principles and rules of customary international law must be ascertained in light of the general practice of States and *opinio juris*. Draft articles and guidelines elaborated by the International Law Commission (ILC) and the resolutions adopted by the *Institut de Droit international* (IDI) may be relevant in identifying customary international law. There is only a limited number of cases of international courts and tribunals that specifically relate to epidemics, although some environmental law cases may be relevant to international law on epidemics. For academic literature, see the link to the bibliography¹⁰:

<https://www.peacepalacelibrary.nl/research-guides/special-topics/health/>

⁸ David P Fidler, 'Public Health and International Law: The Impact of Infectious Diseases on the Formation of International Legal Regimes, 1800-2000' in Andrew T Price-Smith (ed), *Plagues and Politics*, Palgrave Macmillan, 2001, p. 269.

⁹ *Ibid.*

¹⁰ This bibliography was compiled by Eveline N. van Trigt of the Peace Place Library for the Centre for Studies and Research on Epidemics and International Law of the Hague Academy of International Law. The Rapporteur expresses his gratitude to Ms. van Trigt and the Peace Palace Library for the kind permission to share this link for the present Report.

(1) International health law

(a) The Constitution of WHO

11. The WHO Constitution¹¹ proclaims that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.” (Preamble, paragraph 2), and that “[u]nequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger” (Preamble, paragraph 5). Thus, the Constitution provides for the objective of WHO as “the attainment by all peoples of the highest possible level of health” (Article 1). Its functions are listed, among others, as (a) to act as the directing and coordinating authority on international health work, (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments, and (g) to stimulate and advance work to eradicate epidemic, endemic and other diseases (Article 2). There are also provisions relating to the WHO’s legal capacity, privileges and immunities (Articles 66-68) and dispute settlement (Article 75). The WHO has a strong lawmaking power for the States Parties in relation to epidemics: In accordance with Articles 21 and 22 of the Constitution, the World Health Assembly has the authority to adopt regulations that are binding on all States Parties, unless they opt out from those regulations.¹² The regulatory power is limited to five specific topics (which include “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease”), while the general power to adopt conventions in Article 19 of the WHO Constitution can be on any topic.

(b) The International Health Regulations (IHR 2005)

12. The current IHR was adopted in 2005 and entered into force in 2007,¹³ and is binding on 196 States, plus Liechtenstein and the Holy See. The purpose and scope of the IHR are defined as: “...to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to

¹¹ The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, and entered into force on 7 April 1948, 14 UNTS 185.

¹² This is similar to the Convention–Protocol relationship in multilateral environmental agreements (MEAs), in which a Convention provides for general obligations of States and a Protocol is adopted as binding on all the Parties to the Convention unless the States opt out from the Protocol before the prescribed deadline. See S. Murase, “Perspectives from International Economic Law on Transnational Environmental Issues,” *The Hague Academy of International Law, Recueil des cours*, Vol. 253, 1995, pp. 317-318.

¹³ WHO, ‘International Health Regulations’ (23 May 2005) WHA 58.3.

public health risks, and which avoid unnecessary interference with international traffic and trade.” (Article 2). The IHR obliges States to notify WHO within 24 hours of “all events which may constitute a public health emergency of international concern” (Article 6). The WHO can collect information from other sources and the IHR provides for “verification” procedures for the information collected (Article 9). The IHR also provides for recommendations on information sharing, capacity building, isolation and quarantine, travel restrictions, etc. Additionally, States must take health measures “without delay, and applied in a transparent and non-discriminatory manner” (Article 42). States can take additional measures under certain conditions (Article 43). The WHO’s Director General (DG) is given the power to declare “public health emergency of international concern (PHEIC)” (Article 12). The IHR provides for inter-State dispute settlement in the form of arbitration under the Permanent Court of Arbitration (PCA) Optional Rules (Article 56).¹⁴

(2) Human rights law

(a) The International Covenant on Economic, Social and Cultural Rights¹⁵ (ICESCR)

13. Article 2 (1) provides for “progressive realization” of the rights prescribed in the Covenant. Article 2 (2) obliges States to guarantee the enumerated rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The right to health is guaranteed under Article 12, recognizing “the right of everyone to the enjoyment of the highest attainable standard of ... health” (paragraph 1). It includes access to health facilities, goods and services, and “the prevention and treatment and control of epidemic ... diseases” (Article 12 (2) (c)).¹⁶ The Committee on Economic, Social and Cultural Rights (CESCR)’s General Comment 14 on the Rights to the Highest Attainable Standard of Health

¹⁴ Adam Kamradt-Scott, “The International Health Regulations: Strengthening Their Effective Implementation and Utilization”, *International Organizations Law Review*, Vol. 16, 2019, pp. 242-271; Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, Max Planck Institute for Comparative Public Law and International Law, *MPIL Research Paper Series*, No. 2020-07, 26 March 2020, <<https://ssrn.com/abstract=3561650>>

¹⁵ Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

¹⁶ Committee on Economic, Social and Cultural Rights, General Comments No. 14, para. 16. See also, Benjamin Mason Meier and Larissa Mori, “The Highest Attainable Standard: Advancing a Collective Human Right to Public Health” (2005), 37 *Columbia Human Rights Law Review*, 113-115.

(Article 12)¹⁷ is the most important in the interpretation of Article 12. While the Covenant provides for progressive realization and acknowledges resource constraints, General Comment 14 emphasizes that the term “progressive realization” should not be interpreted as depriving States parties’ obligations of all meaningful content. Rather, “progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of Article 12.” (para. 31). General Comment 14 refers to such vulnerable population in need of special protection like women, children, older persons, persons with disabilities and indigenous peoples (paras. 21-27). The States parties’ obligation includes “the implementation or enhancement of immunization programs and other strategies of infectious disease control.” (para. 16). General Comment 14 also recognizes the importance of access to information, bodily autonomy and informed consent, and participation, transparency, and accountability to effective public health responses. The prevention and control of diseases is often also dependent on underlying determinants that may be protected by other rights, such as housing, food, water and sanitation.

(b) The International Covenant on Civil and Political Rights¹⁸
(ICCPR)

14. There are a number of rights under the ICCPR that may be affected by emergency measures. Article 4 (1) provides for a public emergency exception in which a human right can be temporarily suspended or restricted. These derogations should be necessary and proportional to the threat posed, while also avoiding discriminatory measures.¹⁹ No derogation is permitted for certain human rights that need absolute protection, including the “right to life” (ICCPR, Article 4(2)).²⁰ Article 12 (3) provides for the “right to liberty of movement”, which “shall not be subject to any restrictions except those which ... are necessary to protect ... public health, or the rights and freedoms of others ...” (noting that, in addition to liberty of movement, quarantine and isolation may constitute a deprivation of liberty/detention, Article 9 is also relevant). International travel bans must take into account every person’s right to leave any country (Article 12 (2)) and the right to enter their own country (Article

¹⁷ CESCR General Comment No. 14, E/C.12/200/4. <https://www.refworld.org/pdfid/4538838d0.pdf>

¹⁸ Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. As of 1 February 2020, 173 State Parties to ICCPR.

¹⁹ See the Siracusa Principles, promulgated by the Commission on Human Rights (E/CN.4/1985/4), particularly paras. 10 on necessity, and 25 and 26 on public health.

²⁰ Article 4 (2); See also CCPR General Comment 29, Article 4: Derogations during a State of Emergency, adopted on 29 July 2001, paras. 4 and 8.

12 (4)). The freedoms of opinion and expression under ICCPR Article 19 are not explicitly listed as a non-derogable right in the state of emergency, but may still be impossible in a condition of necessity.²¹ The freedom of the press may be included as a corollary of this freedom, with certain inherent limitations. The freedoms of thought, conscience and religion under Article 18 are non-derogable, but the freedom to *manifest* one's religion may be limited for emergency public health reasons under Article 18 (3), such as banning mass gatherings in churches, mosques and temples.

(c) Regional human rights instruments

15. These include: (1) African Charter on Human and Peoples' Rights²² (African Charter); (2) American Declaration of the Rights and Duties of Man²³ (American Declaration); (3) American Convention on Human Rights²⁴ (4) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights²⁵ (Protocol of San Salvador); (5) European Convention of Human Rights,²⁶ European Social Charter (Revised).²⁷ (6) Council of Europe's Convention on Human Rights and Biomedicine (Oviedo Convention), see also a global soft law instrument, the Universal Declaration on Bioethics and Human Rights.²⁸

(3) International Environmental Law (Multilateral Environmental Agreements (MEAs))

16. The present topic on epidemics and international law are closely related to international environmental law, and therefore a number of multilateral environmental agreements (MEAs) will be referenced in this study. They include: (1) Vienna Convention for the Protection of the Ozone Layer (1985),²⁹ (2) Montreal Protocol to the Vienna Convention

²¹ CCPR, General Comment 34: Article 19: Freedoms of opinion and expression, para. 5.

²² Adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58

²³ Adopted by the Ninth International Conference of American States OAS Res XXX in May 1948, entered into force on 2 May 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1, at 17 (1992)

²⁴ Adopted 22 November 1969, entered into force 18 June 1978, 1144 UNTS 123, 9 ILM 673.

²⁵ Entered into force 16 November 1999, OAS Treaty Series No. 69 (1988), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1, at 67 (1992).

²⁶ 4 November 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html>

²⁷ Adopted 3 May 1996, entered into force 1 July 1999) ETS 163.

²⁸ Adopted by the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) on 19 October 2005, UNESCO Publ. No. SHS/EST/BIO/06/1(2005), SHS.2006/WS/14, full text at: <http://unesdoc.unesco.org/images/0014/001461/146180E.pdf>

²⁹ 26 ILM 1529 (1985)

(1987),³⁰ (3) United Nations Framework Convention on Climate Change (1992, UNFCCC),³¹ (4) Kyoto Protocol to the UNFCCC (1997),³² (5) Convention on Biological Diversity (1992, CBD),³³ (5) Cartagena Protocol on Biosafety to the CBD (2000),³⁴ (6) Nagoya-Kuala Lumpur Supplementary Protocol to the Cartagena Protocol,³⁵ (7) Nagoya Protocol on Access and Benefit Sharing (2010),³⁶ (8) United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994),³⁷ (9) Stockholm Convention on Persistent Organic Pollutants (2001, POPs)³⁸ and (10) Minamata Convention on Mercury (2013).³⁹

(4) Other Relevant Agreements

17. In the section on “interrelationship with other relevant rules”, several treaties will be referenced, including those related to international trade law, international transportation law, international labor law, international law of peace and security, international humanitarian law, and others.

(5) Draft Articles, Declarations, Other Instruments and Judicial Decisions

(a) Articles and Guidelines of the International Law Commission (ILC)

18. Articles and Draft articles⁴⁰ and Guidelines elaborated by the ILC may be relevant to identifying customary international law on epidemics, or may be used for analogous purposes. They include: (1) Articles on the

³⁰ 26 ILM 154 (1987)

³¹ 1771 UNTS 107 (1992)

³² 37 ILM 22 (1998)

³³ 31 ILM 822 (1992)

³⁴ 39 ILM 1027 (2000)

³⁵ International rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, adopted 15 October 2010, entered into force 5 March 2018, Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-V/11, UN Doc No. UNEP/CBD/BS/COP-MOP/5/17, available at <http://www.cbd.int/doc/meetings/bs/mop-05/official/mop-05-17-en.pdf>.

³⁶ <https://www.cbd.int/abs/>

³⁷ 33 ILM 1328 (1994)

³⁸ 40 ILM 532 (2001)

³⁹ C.N. 560. 2014. TREATIES-XXVII.17, adopted 10 October 2013, entered into force 16 August 2017, [2016] 55 ILM 582.

⁴⁰ The draft articles completed on second reading by the ILC that are sent to the Sixth Committee of the General Assembly are called “Articles”, while those that are still on first reading are called “Draft articles”.

Responsibility of States for Internationally Wrongful Acts (ARSIWA),⁴¹ (2) Articles on Responsibility of International Organizations,⁴² (3) Articles on Prevention of Transboundary Harm from Hazardous Activities,⁴³ (4) Articles on Protection of Persons in the Event of Disasters,⁴⁴ and (5) Draft Guidelines on Protection of the Atmosphere.⁴⁵ The document that should also be referenced: (6) Conclusions of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.⁴⁶

(b) Resolutions of the *Institut de Droit international* (IDI)

19. Likewise, some of the resolutions adopted by the IDI are relevant to the work of the present draft articles, including: (1) Transboundary Air Pollution,⁴⁷ (2) Protection of Human Rights and the Principle of Non-Intervention in the Internal Affairs of States,⁴⁸ (3) The Legal Consequences for Member States of the Non-fulfilment by International Organization of Their Obligations toward Third Parties,⁴⁹ (4) Environment,⁵⁰ (5) Responsibility and Liability under International Law for Environmental Damage,⁵¹ (6) Procedures for the Adoption and Implementation of Rules in the Field of Environment,⁵² (7) Humanitarian

⁴¹ *Official Records of the General Assembly, Fifty-third session*, Supplement No. 10, A/56/10, Report of the International Law Commission, Fifty-sixth session, 2001, Chapter IV.

⁴² *Official Records of the General Assembly, Sixty-sixth session*, Supplement No. 10, A/66/10, Report of the International Law Commission, Fifty-sixth session, 2011, Chapter V.

⁴³ *Official Records of the General Assembly, Fifty-sixth session*, Supplement No. 10, A/56/10, Report of the International Law Commission, Fifty-third session, 2001, Chapter V

⁴⁴ *Official Records of the General Assembly, Seventy-first session*, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 12-73.

⁴⁵ *Official Records of the General Assembly, Seventy-third session*, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 151-200.

⁴⁶ *Official Records of the General Assembly, Sixty-first session*, Supplement No. 10, A/61/10, Report of the International Law Commission, Fifty-eighth session, 2006, Chapter XII. Report of the Study Group, A/CN.4/L. 682.

⁴⁷ *IDI Annuaire*, Vol. 62, Part II, Session of Cairo, 1987. (G.E. do Nascimento e Silva as Rapporteur). Article 2: No harm rule; Article 6: State responsibility.

⁴⁸ *IDI Annuaire*, Vol. 64, Part II, Session of Santiago de Compostela, 1989. (Giuseppe Sperduti as Rapporteur).

⁴⁹ *IDI Annuaire*, Vol. 66, Part II, Session of Lisbonne, 1995 (Roselyn Higgins as Rapporteur).

⁵⁰ *IDI Annuaire*, Vol. 68, Part II, Session of Strasbourg, 1997 (L. Ferrari Bravo as Rapporteur).

⁵¹ *IDI Annuaire*, Vol. 68, Part II, Session of Strasbourg, 1997 (F. Orrego Vicuña as Rapporteur).

⁵² *IDI Annuaire*, Vol. 68, Part II, Session of Strasbourg, 1997 (Felipe Paolillo as Rapporteur).

Assistance,⁵³ (8) Obligations and Rights *erga omnes* in International Law,⁵⁴ and (9) Mass Migration.⁵⁵

(c) Resolutions of the International Law Association (ILA)

20. The Committee on Global Health Law of the International Law Association adopted a resolution on Global Health Law on 13 December 2020 at its 79th online Kyoto Conference.⁵⁶

(d) Other Instruments

21. Other non-binding instruments may also be relevant. (1) Declaration of the United Nations Conference on Human Environment (1972 Stockholm Declaration),⁵⁷ (2) Rio Declaration on Environment and Development (1992 Rio Declaration),⁵⁸ (3) Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992 Rio Forestry Principles), (4) Johannesburg Declaration on Sustainable Development (2002),⁵⁹ (5) Sustainable Development Goals (SDGs, 2015),⁶⁰ and (6) Universal Declaration on Bioethics and Human Rights.⁶¹

(6) International Judicial Decisions

22. There are a few judicial decisions by international courts and tribunals which directly refer to epidemics. These include: (1) WTO Dispute Settlement, Appellate Body reports on *Brasil — Measures Affecting Imports of Retreaded Tyres (Brazilian Tires)* (which refers to malaria and other infectious diseases),⁶² and *India — Import Prohibition*

⁵³ IDI *Annuaire*, Vol. 70, Part II, Session of Bruges, 2003 (B. Vukas as Rapporteur).

⁵⁴ IDI *Annuaire*, Vol. 72, Part II, Session of Krakow, 2005. (Giorgio Gaja as Rapporteur), 2005

⁵⁵ IDI *Annuaire*, Vol. 78, 2017, pp. 131-213. (Maurice Kamto as Rapporteur).

⁵⁶ Resolution 2 Kyoto 2020 Global Health Law FINAL.pdf (160KB). See also the Committee's Third Report (The COVID-19 and the Global Health Law): Global Health Law Kyoto 2020 Interim FINAL.docx (155KB)

⁵⁷ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*, A/CONF.48/14/Rev.1; See Louis B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, Vol. 14, 1972, pp. 423f.

⁵⁸ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, Vol.1, *Resolutions Adopted by the Conference*, resolution 1, annex I.

⁵⁹ para. 19

⁶⁰ Goal 3.

⁶¹ Adopted by the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) on 19 October 2005, UNESCO Publ. No. SHS/EST/BIO/06/1(2005), SHS.2006/WS/14, full text at: <http://unesdoc.unesco.org/images/0014/001461/146180E.pdf>

⁶² WTO, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007). See, I. Van Damme. "III. Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, Adopted on 17 December 2007," *International and*

of *Agricultural Products* (which concerns Avian Influenza),⁶³ and (2) the 2010 Cholera outbreak in Haiti for which local residents sued the UN Peacekeeping Operations.⁶⁴ (3) Judgment of the Inter-American Court for Human Rights on *Cuscul Piraval et al v. Guatemala* of 23 August 2018⁶⁵ (which deals with the issue of the HIV/AIDS epidemic). (4) Report of the Inter-American Commission on Human Rights, 12.249, Report No. 29/01, Annual Report 2000, OEA/Ser.L/V/II.111, Doc. 20 Rev. (2001), (dealing with AIDS, access to medicine). (5) European Court of Human Rights, (i) *Kiyutin v. Russia*, 10 March 2011, app. 2700/10 (AIDS); (ii) *Z. v. Finland* (1998) 25 E.H.R.R. 371; (iii) *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, Jul 14 2014, app. 47848/08 (AIDS); (iv) *Paposhvili v. Belgium*, 13 December 2016, app. 41738/10 (tuberculosis). There are however a number of domestic court cases involving epidemics.⁶⁶ Other judicial decisions that could indirectly be useful references to epidemics may be cited in this Report.

Comparative Law Quarterly, Vol. 57, 2008, pp. 710f.; K.R. Gray. “Brazil – Measures Affecting Imports of Retreaded Tyres” (2008) 102:3 *American Journal of International Law*, Vol. 102, No. 3, 2008, pp.610f.; Julia Qin. “WTO Panel decision in *Brazil – Tyres* supports safeguarding environmental values,” *ASIL Insights*, 23:11, 2007, <<https://www.asil.org/insights/volume/11/issue/23/wto-panel-decision-brazil-tyres-supports-safeguarding-environmental>>; Philippe Sands, et al. *Principles of International Environmental Law*, 4th ed, Cambridge University Press, 2018, pp 867-869.

⁶³ WTO, *India – Measures Concerning the Importation of Certain Agricultural Products (Report of the Appellate Body)*, 4 June 2015, WT/DS430/AB/R. The dispute’s focus was on H5N1 Influenza (commonly known as “avian flu”). For a deeper analysis, see Chad Bown and Jennifer Hillman, “Bird Flu, the OIE, and National Regulation: The WTO’s *India – Agricultural Products* Dispute” (2016) 15 *World Trade Review*, 235–57; See also Saggi, Kamal & Mark Wu, “Trade and Agricultural Disease: Import Restrictions in the Wake of the *India–Agricultural Products* Dispute”, *World Trade Review*, Vol. 16, No. 2, 2017, pp. 279–302.

⁶⁴ Melina Garcin, “The Haitian Cholera Victims against the United Nations”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 75, 2015, pp. 671-705. See also footnote 333.

⁶⁵ Series C, No. 395 (Spanish only), but unofficial English translation is available. See also, review of the case: <<https://ijrcenter.org/2018/11/06/inter-american-court-state-inaction-on-hiv-violated-progressive-realization-obligation/>>

⁶⁶ See, UNDP “Judging the Epidemic: A Judicial Handbook on HIV, human rights and law”, 2013, https://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf. (These are primarily domestic court cases but there are also some cases of regional and UN treaty bodies.); UNDP, “Compendium of Judgments: Background Material”, 2013, <https://www.undp.org/content/dam/undp/library/hivaids/English/Compendium%20of%20Judgments%20-%20Background%20Material%20BKK%20Judicial%20Dialogue%20FINA%20%20%20.pdf>. Similarly for TB: International Human Rights Clinic, University of Chicago Law School, “Tuberculosis, Human Rights and Law: A Compendium of Case Law”, 2017, <http://www.stoptb.org/assets/documents/resources/>

II. Goals and the Guiding Principles of the Project

23. Despite the far-reaching importance of the topic, regrettably, international health law has never been recognized as a topic of mainstream international law. It is indeed puzzling that, even though epidemics have claimed many more deaths than world wars, international law has not played a major role, instead leaving the responsibility mostly to WHO as a matter of scientific and technical cooperation.⁶⁷ The IDI would be well-positioned to consider the topic from the perspective of general international law and to elaborate a set of draft articles on the topic. Naturally, it is up to the States to decide whether or not it is necessary and appropriate to conclude a framework convention on the proposed topic. Nonetheless, it is hoped that the set of draft articles elaborated by the IDI will have certain normative value, even if it does not become a binding convention.

24. At the outset of the project, it is also necessary to indicate the guiding principles in formulating draft articles on the topic, which would include the following principles. First, the most important principle is recognizing that epidemics are a global concern. International law has developed the concept of the “common concern of the international community as a whole” or “common concern of humanity”, which has acquired a sound normative meaning, including *inter alia*, that the matter does not belong solely to the domestic jurisdiction of States. The concept of “common concern” has been clearly and fully established through State practice and legal doctrines in the environmental field. The idea can now be extended to the realm of global public health, as the transboundary and global characteristics of the health impacts from communicable diseases are so much similar to environmental damage. The well-known first paragraph of the preamble to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) acknowledges that “change in the Earth’s climate and its adverse effects

publications/acsm/TB%20Human%20Rights%20and%20the%20Law%20Case%20Compendium%20FINAL.pdf The Global Health and Human Rights Database includes about 200 cases on infectious diseases (mostly domestic, but also some regional and international cases): <https://www.globalhealthrights.org/category/health-topics/infectious-diseases/>

⁶⁷ It is sometimes mentioned that at WHO scientific and medical assessments prevail over legal considerations. David P. Fidler, “International Law and Global Public Health”, 48 *The University of Kansas Law Review*, Vol. 48, 1999, pp.1f. Jose E. Alvarez, “The WHO in the Age of the Coronavirus”, *American Journal of International Law*, Vol. 114, Issue 4, October 2020, pp. 578-587, at 585. The report of the ILA Committee on Global Health Law submitted in November 2020 acknowledges the “secondary role” of international law in addressing COVID-19. Global Health Law Kyoto 2020 Interim FINAL.docx (155KB) (para. 3).

are a *common concern of humankind*⁶⁸ (emphasis added), which was reiterated in the preamble of the 2015 Paris Agreement on Climate Change.⁶⁹ Likewise, other conventions use similar languages.⁷⁰ The main benefit of employing “common concern” in prior relevant environmental treaty practice has been to encourage participation, collaboration, and action rather than discord, which is especially important with regard to the current topic.⁷¹ It is however to be deeply concerned that in some key States populism has fatally weakened world’s ability to respond to epidemics by undermining the capacity of the structures and mechanisms of international law to address the issue.⁷²

25. In the context of epidemics, this recognition presupposes the acknowledgement (1) that public health constitutes a “global public good” whose production and protection requires international cooperation and solidarity, and (2) that the very concept of State sovereignty needs to be reconceptualized in “functional” terms, i.e. in function of protecting the general interest of the international community to prevent and reduce

⁶⁸ UNFCCC, Preamble, para.1.

⁶⁹ Paris Agreement, preamble, para. 11.

⁷⁰ 1992 Convention on Biological Diversity (the third preambular paragraph: “common concern of humankind”); 1994 Convention to Combat Desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa (the first preambular paragraph: “center of concerns; second preambular paragraph: “urgent concern of the international community, the fourth preambular paragraph: “problems of global dimension”); 2013 Minamata Convention on Mercury (the first preambular paragraph: mercury as “a chemical of global concern”).

⁷¹ There is broad support for the concept of common concern of humankind in the literature. M. Bowman, “Environmental Protection and the Concept of Common Concern of Humankind,” in M. Fitzmaurice, D. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010), p. 501. Duncan French, “Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?” in M.J. Bowman, P.G.G. Davies and E. J. Goodwin, eds., *Research Handbook on Biodiversity and Law* (Cheltenham: Edward Elgar, 2015, forthcoming), pp. 7-8, 11; Jutta Brunnée, “Common Areas, Common Heritage, and Common Concern,” in Daniel Bodansky, Jutta Brunnée and Helen Hey, eds., *The Oxford Handbook of International Environmental Law*, (Oxford: Oxford University Press, 2007), p. 565; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, (3rd edn., Oxford: Oxford University Press, 2009), pp. 128-130; Dinah Shelton, “Common Concern of Humanity,” *Environmental Policy and Law*, vol. 39 (2), (2009), pp. 83-96; *Ditto*, “Equitable Utilization of the Atmosphere: Rights-based Approach to Climate Change?,” in *Human Rights and Climate Change* (Cambridge: Cambridge University Press) 2010; Stephen Stec, “Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment,” *International Community Law Review*, vol. 12, Issue 3 (2010), pp. 361- 389.

⁷² Campbell McLachlan, “Populism, the Pandemic & Prospects for International Law”, KFG Working Paper Series, No. 45, October 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715745

the spread of epidemics rather than in terms of absolute territorial power. Thus, every State should interpret and apply the IHRs, relevant treaty norms and customary international law in such a way as to protect not only the health and related interests of the people under its jurisdiction, but also the rights and interests of peoples of other States. This is especially important in relation to the possibility of access and equitable sharing of vaccines and other remedies to overcome epidemics.

26. It is also of paramount importance to indicate that the focus of the present project is on the protection of “persons” from epidemics. The primary concern here is to address the essential needs of the persons whose life, health and well-being are affected, or likely to be affected, by epidemics. Based on the situation, one could differentiate three categories of persons, (1) persons living with epidemic diseases (patients), (2) medical professionals (or healthcare workers) and other essential workers, and (3) general population in the country.

27. Second, all States are obliged to protect persons from epidemics, not merely affected States. States must take a variety of measures, whether individually or jointly, in accordance with applicable rules of international law regarding the protection of global public health. These rules are reflected in Article 2 (purpose and scope) of the WHO IHR “... to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks ...”.

28. Third, since epidemics are matters of common concern of humankind, it is necessary for the international community to respond to them on the basis of “international solidarity and cooperation”. This was noted by the UN General Assembly in its resolution of 2 April 2020 titled as “Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19)”.⁷³ The resolution recognized that COVID-19 “requires a global response based on unity, solidarity and renewed multilateral cooperation” (preamble), and called for “intensified international cooperation to contain, mitigate and defeat the pandemic, including by exchanging information, scientific knowledge and best practices and by applying the relevant guidelines recommended by the World Health Organization” (para. 5).⁷⁴ Likewise, the 73rd World Health Assembly adopted a resolution on 19 May 2020 which called for “in the spirit of unity and solidarity, the intensification of cooperation and collaboration at all levels

⁷³ A/RES/74/270, 2 April 2020.

⁷⁴ It may be recalled that the Commission of Human Rights established the mandate of the Independent Expert on ‘Human Rights and International Solidarity’ in 2005. The Human Rights Council in its resolution 35/3 renewed its commitment to the work of the independent expert on ‘Human Rights and International Solidarity’.

in order to contain and control the COVID-19 pandemic and mitigate its impact” (para. 1).⁷⁵ Thus, both the UN General Assembly and World Health Assembly have emphasized the need for international solidarity and cooperation in responding the threats of epidemics, which should also be reflected in the present project.⁷⁶

29. Fourth, if the protection of persons is the main objective of the present project, it follows that “human rights” considerations should be the primary concern. It goes without saying that respect for, protection of, and fulfilment of human rights is the fundamental rule of international law in the context of epidemics. The WHO Constitution provides that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition” (Preamble, paragraph 2). The WHO IHR mandates full respect for “dignity, human rights and fundamental freedoms” (Articles 3 and 32). Obviously, there are certain “limitations” built in the human rights treaties⁷⁷ as well as “derogations” which are permitted in extraordinary situations of epidemics. As discussed earlier, the ICESCR does not explicitly provide for derogation though it may be implicit in some of the enumerated rights. Further, as noted earlier, the ICCPR imposes certain conditions on limitations and derogations.

30. Additionally, States must consider disproportionate impacts on vulnerable populations. In applying and implementing international and national health law, it is necessary to be conscious of the danger to vulnerable or marginalized populations, especially women, children, older persons, refugees and migrants, persons in detention, persons living with co-morbidities, and persons with disabilities, who may need particular protection from exposure to epidemics or from their social consequences. Naturally, “vulnerable population” varies depending on the situations and contexts, and therefore warrant flexible and meaningful interpretation.

31. Fifth, the central role that is played by the World Health Organization (WHO) in this field must be highlighted⁷⁸ along with its

⁷⁵ WHA 73.1 (19 May 2020).

⁷⁶ Matiangi Sirleaf, “Capacity Building, International Cooperation and COVID-19”, *ASIL Insights*, Vol. 24, Issue 17, 9 July 2020, <https://www.asil.org/insights/volume/24/issue/17/capacity-building-international-cooperation-and-covid-19>

⁷⁷ Articles 12, 18, 19, 21 and 22 of the ICCPR.

⁷⁸ See para. 4 above. Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185. Resolution 2 of the Committee on Global Health Law of the International Law Association (ILA) adopted on 13 December 2020 at its 79th online Kyoto Conference appeals the support to WHO. Resolution 2 Kyoto 2020 Global Health Law FINAL.pdf (160KB) para. 2.

International Health Regulations adopted in 2005 (IHR 2005) as the core legal instrument for the prevention of epidemics.

32. Sixth, while the role of WHO is vital as mentioned above, the WHO regime is not self-contained and its development should be considered in tandem with other areas of international law. It is an open system of law which must be supplemented by other rules of international law. Thus, it should be stressed that the present project must place its focus on the “principle of interrelationship” which necessitates interpretation, application and implementation of the relevant rules of international law in a “coherent”, “harmonious”, “systemic” and “mutually supportive” manner.⁷⁹

33. It is proposed that these guiding principles be stated as the Draft Preamble, which reads as follows:

Draft Preamble

The Institute of International Law (*Institut de Droit international*, IDI),

Affirming that protection of persons from epidemics without discrimination of any kind and regardless of the sources and cause of the disease is a common concern of humankind,

Recognizing that States bear the primary obligation in preventing, protecting against, controlling and providing public health responses to the international spread of epidemics,

Emphasizing the need for international solidarity and cooperation in responding to the threats of epidemics,

Recognizing that respect for, and protection of, human rights is fundamental in applying and implementing international and national health law, and that certain vulnerable populations, especially women, children, older persons, refugees, internally displaced persons and migrants, persons in detention, persons living with co-morbidities, and persons with disabilities, may need particular protection from exposure to epidemics,

Recognizing also the vital role of the World Health Organization (WHO) in the protection of human health related to epidemics, especially WHO’s International Health Regulations (IHR) which

⁷⁹ See, Report of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, para. 251). The report appears in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two. See also, S. Murase, Fourth Report on the Protection of the Atmosphere, A/CN.4/705, 2017, paras. 8-92; C. McLachlan, “The principle of systemic integration and article 31 (3) (c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279.

constitute a comprehensive attempt to create a structure that would enable a coordinated and effective response to epidemics,

Considering that international health law must be interpreted, applied and implemented in a coherent manner with other relevant rules of international law,

Proposes the following draft articles on Epidemics and International Law.

III. Scope, Objective and the Use of Terms

1. Scope

34. The present draft articles are concerned with the protection of persons from epidemics to which international law is applicable. National laws and regulations are referenced if relevant to the identification of customary international law, or general principles of law. They may also be recognized as subsidiary means to determine rules of international law (in the sense of Article 38 (1) (d) of the ICJ Statute). This scope article must set the orientation of the present draft articles as being primarily focused on the protection of persons whose life, health and well-being are affected, or likely to be affected, by epidemics. The draft articles will be inspired by the Articles on the Protection of Persons in the Event of Disasters, adopted by the International Law Commission (ILC) in 2016.⁸⁰ The said ILC Articles do not seem to include “epidemics” in the scope of “disasters”,⁸¹ while the IDI Resolution on Humanitarian Assistance of 2003 refers to “epidemics” as part of the “disasters”, providing that “Disaster” means “calamitous events which endanger life, health ... whether of natural origin (such as ... epidemics)”.⁸²

35. The present draft articles concern “epidemics” (Article 2 of the WHO Constitution) as infectious diseases, which is meant to be, more precisely, “communicable diseases”⁸³ as used in the IHR. However, the expression of “communicable diseases” is not a familiar language in ordinary use, and therefore, the term “epidemics” is used for the purpose of the present

⁸⁰ *Official Records of the General Assembly, Seventy-first session*, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 12-73.

⁸¹ The text of Article 3(a) on the use of the term “disaster” or its commentary does not include “epidemics”. The commentary (4) thereto refers to the examples of disasters as “sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as frequent small-scale events (floods or landslides)”. The commentary (7) refers to “non-fatal injuries, disease or other health problems *caused by the disaster*” to be included, which do not seem to address epidemics as such. *Ibid.* p. 23 (emphasis added).

⁸² IDI *Annuaire*, Vol. 70, Part II, Session of Bruges, 2003 (B. Vukas as Rapporteur). Para. 2.

⁸³ WHO Constitution Article 2. It excludes “non-communicable” disease such as cancer or diabetes which are also considered as public health concerns by WHO.

project.

36. The present draft articles will cover, *ratione materiae*, the rights and obligations of States affected, or likely to be affected, by epidemics in respect of persons present in their territory (irrespective of nationality) or in territory under their jurisdiction or control,⁸⁴ and the rights and obligations of third States and intergovernmental organizations and non-governmental organizations and other entities in a position to cooperate, particularly in the provision of relief assistance as well as in the reduction of the risk of epidemics.⁸⁵ The scope *ratione personae* of the draft articles is limited to natural persons affected, or likely to be affected, by epidemics. Also included are the activities of States and international organizations as well as those of non-governmental organizations, civil society and private actors involved in the efforts to control epidemics.

37. The scope *ratione temporis* of the draft articles has three phases: (1) *before* the epidemic, (2) *during* the epidemic and (3) *after* the epidemic. (1) In the pre-epidemic phase, States and international organizations have the obligation to prevent and prepare for the outbreak of epidemics. (2) During the occurrence of epidemics, affected States come under obligations to effectively control and mitigate epidemics and inform other States and international organizations without delay, while those other States (States not yet affected) must take necessary measures to prevent the epidemics from entering their territory/jurisdiction/control and assist the affected States. (3) In the post-epidemic phase, States and international organizations must conduct a thorough review of the causes of the epidemic and the responses to it so that the international community can prepare for future outbreaks. This process is considered together with the issues of international responsibility of States and international organizations as well as dispute settlement.⁸⁶

38. Since epidemics can spread to other countries and worldwide in a very short time, the draft articles are not limited, *ratione loci*, to the affected States or the States likely to be affected but can extend to the international community as a whole. In this sense, the characteristics of epidemics resemble transboundary atmospheric pollution of international significance. Human health should be treated as a single unit, like the

⁸⁴ The term “jurisdiction” normally refers to territorial jurisdiction, while “control” refers to personal jurisdiction such as flag States jurisdiction for vessels and aircrafts. “Control” sometimes means *de facto* control such as the one exercised by a State over its occupied territory.

⁸⁵ When the present draft articles refer to obligations that arise related to Additional Protocols I and II to the Geneva Conventions, the relevant entities are certainly to be covered.

⁸⁶ See paras. 154-173 of the present Report.

atmosphere, which warrants a holistic treatment in international law.⁸⁷ In view of the above, the following Draft Article is proposed:

Draft Article 1: Scope

The present draft articles concern the rules of international law applicable to the protection of persons from epidemics.

2. Objective

39. The objective of the present draft articles is to “promote the progress of international law, a) “by striving to formulate the general principles of the subject ...”, and, b) “by lending its co-operation in any serious endeavour for the gradual and progressive codification of international law” (Article 1, paragraph 2 of the IDI Statute). This is in principle consistent with the phrase “progressive development of international law and its codification” in Article 13, paragraph 1 (a) of the Charter of the United Nations and the Statute of the International Law Commission (ILC), (Article 15).⁸⁸

40. It may be worth noting that Article 2 of the ILC Articles on Protection of Persons in the Event of Disasters includes the expressions of “facilitate adequate and effective responses” and of “essential needs of the persons concerned”.⁸⁹ In the case of epidemics, the word “timely” should be explicitly stated here,⁹⁰ as it is considered that the timeliness of the response is crucial for the protection of affected persons or persons who are likely to be affected. The word “facilitate” may well reflect the sentiment that, although the present draft articles might not by themselves reduce the risk of epidemics or ensure a response and the risk reduction of epidemics, they are intended to facilitate timely, adequate and effective

⁸⁷ See the ILC project on the Protection of the Atmosphere. *Official Records of the General Assembly, Seventy-third session, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 151-200.*

⁸⁸ It was Dr. Liang Yuen-li who was instrumental in drafting the Charter Article 13 (1) at Dumbarton Oaks (1944) and San Francisco (1945) as a member of the Chinese delegation who also served as Secretary of the International Law Commission in 1949-64. See Shinya Murase, “Dr. Liang Yuen-li and His Contribution to International Lawmaking”, *Soochow Law Journal*, 2021, forthcoming. See also, Arnold Pronto, “Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations”, *Florida International University Law Review*, Vol. 13, No. 6, 2019, pp. 1101-1123.

⁸⁹ *Official Records of the General Assembly, Seventy-first session, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, p. 20.* Article 2 reads: “The purpose of the present draft articles is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect of their rights.”

⁹⁰ It may be noted that an element of timeliness was considered “implicit” in the word “effective” in the context of disasters. See commentary (2) to Article 2, *Ibid.*, p. 20.

action. As noted above, the words “persons concerned” may include not only the people who are directly affected by epidemics but also those who are “likely to be affected”. This is due to the fact that epidemics can expand very rapidly. The scope of “likelihood” is to be determined based on a scientific evaluation of the persons’ exposure and vulnerability.⁹¹

41. The draft article seeks to protect the rights of the affected persons as well as the rights of other persons. In referring to the “persons”, one may differentiate between three groups of the population, (1) infected persons (patients), (2) health professionals (healthcare workers) and other essential workers, and (3) the uninfected part of the population. In view of the above, the following Draft Article is proposed:

Draft Article 2: Objective

The objective of the present draft articles is to promote progress of international law through its codification and progressive development for the protection of persons from epidemics, and by so doing, to facilitate timely, adequate and effective response to epidemics, and reduction of the risk of epidemics, so as to meet the essential needs of the persons concerned, with full respect of their human rights established under international law.

3. Use of terms

42. It is necessary at the outset to clarify the meaning of the terms used in the present draft articles, starting with the term “epidemic” as used in the project’s title. The word “epidemic” comes from Greek, with “*epi*” (ἐπί) meaning “upon” or “above,” and “*demos*” (δῆμος) meaning “people”. In common parlance, “epidemic” refers to an infectious disease that is likely to infect a large number of people in one or different countries within a short period of time, in excess of the normal rate for that disease. Epidemiologists use a more technical definition of the term.⁹² The WHO Constitution seeks “to stimulate and advance work to

⁹¹ In the context of Intergovernmental Panel on Climate Change (IPCC), in whose activities the Rapporteur was involved as a lead author, it was the instruction given to the lead authors that the word “likely” was to be used when the probability was somewhere around 66 %. (“very likely” was for 90 %, “more likely than not” was 50 % or more, and “unlikely” 33% or less). These were of course addressed mainly to natural scientists, but social scientists and lawyers involved were also expected to follow this instruction. S. Murase, *Studies of International Law*, Shinzansha, 2012, pp. 45-46 (in Japanese).

⁹² The United States Centers for Disease Control (CDC) and the leading epidemiological reference work define the term as “a rate of disease incidence clearly above the normal expectancy for a specified area,” which refers to “the baseline disease incidence in an area among the same population at the same time of year”. U.S. Department of Health and Human Services, Centers for Disease Control, *Principles of Epidemiology in*

eradicate *epidemic*, ... and other disease” as part of the organization’s function (Article 2, emphasis added). It also refers to “infectious disease” and “communicable disease.”⁹³ These include, but are not limited to, small pox, tuberculosis, cholera, plague, pest, yellow fever, polio, HIV/AIDS, Influenza, SARS, MERS, Zika and COVID-19. The term “epidemics” used in the present project reflects what is commonly used in the legal literature relating to infectious disease outbreaks⁹⁴ as described above, rather than the epidemiological definition. The present draft articles concern international aspect of epidemics, and accordingly, the focus will be on those diseases occurring “in different countries”. However, even those epidemics confined locally are not excluded if they have the potential to spread across borders within a short period of time.

43. Within the WHO regime, “public health emergency of international concern” (PHEIC) is the highest legal designation (outside influenza), which is the situation to be declared by the WHO Director General (DG) in accordance with Article 12 of the IHR. The DG may do so when he/she considers that the situation is extremely serious, and poses an extraordinary public health risk to other States through the international spread of the disease or risk of interference in international traffic that cannot be tackled purely at the national level.⁹⁵ Though the declaration does not create any new legal obligations for States as such, it puts pressure on national authorities to take appropriate measures in accordance with WHO Recommendations. The DG declared “PHEIC” in connection with the following events under the IHR 2005: H1N1 Influenza (24 April 2009),⁹⁶ Wild Poliovirus (5 May 2015), West African Ebola

Public Health Practice (3^d ed., 2012), pp. 1-72; ‘Epidemic’, in Miquel Porta (ed), *A Dictionary of Epidemiology* (Oxford University Press, 2008).

⁹³ This differentiates from “non-communicable diseases” such as cancer or diabetes. However, it may be noted that, for example, during the 2011 UN General Assembly negotiations on a political declaration on non-communicable diseases a number of states took the position that NCDs should be considered an epidemic, and they continue to take the position that the term ‘epidemic’ when used in international trade law in relation to compulsory licensing covers both communicable and non-communicable diseases. See, J. Liberman, “Implications of international law for the treatment of cancer: The Single Convention on Narcotic Drugs and the TRIPS Agreement”, *Public Health*, No. 125, 2011, pp. 840-846.

⁹⁴ This is without prejudice to special meanings sometimes accorded to the term “epidemics” in footnote 92 above.

⁹⁵ Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, *Max Planck Institute for Comparative Public Law and International Law*, MPIL Research Paper Series, No. 2020-07, (26 March 2020), pp. 11-16. <<https://ssrn.com/abstract=3561650>>.

⁹⁶ In this first PHEIC declaration, no explanation was given in the WHO public statement on why this event fulfilled the criteria of established in IHR.

outbreak (8 August 2014), Zika outbreak (1 February 2016), Ebola outbreak in the DRC (17 July 2019)⁹⁷ and COVID-19 (30 January 2020).⁹⁸

44. A “pandemic” is an extraordinary form of an epidemic. The difference between a “pandemic” and an “epidemic” is that the former affects a wider geographical area, often worldwide, infects a much larger number of people, causes more deaths, and often creates more severe social disruption and economic loss.⁹⁹ The term pandemic is not a legal term or a formal declaration within the law of WHO except in relation to pandemic influenza, but rather a descriptive term to allow national and international public health agencies to respond to the situation at a higher degree. There is no systematic practice at WHO in the use of the term “pandemic”. Note that there is a 1986 WHA resolution on “tobacco or health” which characterizes “smoking” as a “pandemic”.¹⁰⁰ The classical definition of pandemic has been criticized for not including population immunity, virology or disease severity. By the current definition, pandemics can be said to occur annually given that seasonal epidemics cross international boundaries and affect “a large number of people.”¹⁰¹ The declaration of “pandemic” by the DG in case of Influenza in 2009 was based on the WHO’s Pandemic Influenza Risk Management Guidelines, rather than the IHR’s PHEIC concept.¹⁰² Regarding the COVID-19, on 11 March 2020, the DG made factual statements based on epidemiological considerations, but regrettably, no criteria were clarified or explained why this event could be characterized as a “pandemic”.¹⁰³ It is therefore with some reluctance to include the term “pandemic” in the use of terms of the present draft articles, but the Commission has decided

⁹⁷ World Health Organization, *Statement on the meeting of the International Health Regulations (2005) Emergency Committee for Ebola virus disease in the Democratic Republic of the Congo on 12th April 2019*, available at <https://bit.ly/3bmV9a5>

⁹⁸ World Health Organization, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, available at <https://bit.ly/2WCrm4a>

⁹⁹ Last J. M., ed. *A dictionary of epidemiology*, 4th edition. New York: Oxford University Press; 2001; *Bulletin of the World Health Organization* 2011;89:540-541.

¹⁰⁰ WHA 39.14, “Deeply concerned by the current pandemic of smoking ...” (Preamble, para. 2);

¹⁰¹ See, Heath Kelly, “The classical definition of a pandemic is not elusive”, *Bulletin of the World Health Organization* 2011, available at <https://www.who.int/bulletin/volumes/89/7/11-088815/en/>.

¹⁰² *Pandemic Influenza Risk Management. A WHO Guide to inform & harmonize national & international pandemic preparedness and response* (2017), <<https://bit.ly/3bdu588>>, pp. 25-26.

¹⁰³ WHO Director General’s Opening Remarks at the Media Briefings on 11 March 2020. He failed to give any explanations as to what the criteria were for characterizing the COVID-19 as a “pandemic”. <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>

to do so since the term is now used widely in public statements and literature. It is hoped that WHO will elaborate in the future a precise legal definition of pandemic with necessary criteria for its application.

45. The term “affected States” reflects the basic stance that the present draft articles are primarily addressed to States, anticipating in particular the central role played by the State affected by the epidemic. The governmental functions of the State are the key focus for epidemic response, which is to be exercised within the State’s jurisdiction or control. “Jurisdiction” normally refers to territorial jurisdiction while “control” refers to non-territorial power exercised over ships or aircrafts flying the flag of that State. “Control” sometimes means the *de facto* exercise of the governmental function over another territory in which an epidemic occurs such as occupied territories or military bases of the foreign stationing forces. The terms such as “assisting States”, “other assisting actors”, “relief personnel”, “equipment and goods” are self-explanatory. Pursuant to the above, the following Draft Article is proposed:

Draft Article 3: Use of Terms

- a. “epidemic” means an infectious disease that is likely to spread rapidly to a large number of people in one country or in different countries within a short period of time;
- b. “public health emergency of international concern” means an extraordinary event, posing a risk to human health, the risk of international spread of disease and/or the risk of interference with international traffic;
- c. “pandemic” means an extraordinary form of an epidemic, affecting a wider geographical area, often worldwide, infecting a much larger number of people, causing more deaths, and often creating more severe social disruption and economic loss;
- d. “affected State” means a State under whose jurisdiction or control an epidemic occurs;
- e. “assisting State” means a State providing assistance to an affected State with its consent;
- f. “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;
- g. “relief personnel” means civilian, public and military personnel sent by an assisting State or other assisting actor for the purpose of providing medical and other relief assistance;
- h. “equipment and goods” include medical and other supplies, tools, machines, clothing, bedding, vehicles and tents.

IV. General Principles

1. Human Rights

46. It is necessary at the outset to confirm that respect for human rights is a fundamental rule of international law, even when an epidemic occurs. It must also be ascertained that the rules of international health law and those of international human rights law must be identified, interpreted, applied and implemented in an integrated manner.¹⁰⁴ It is also noted that there must be no further derogations than that already allowed under existing treaties. Thus, the WHO IHR mandates full respect of the “dignity, human rights and fundamental freedoms” (Articles 3 and 32).

47. International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁵ provides certain relevant rights. It does not provide for derogations, though there is a general provision on limitations (Article 4). The right to health is guaranteed under ICESCR Article 12 and includes access to health facilities, goods and services, and “the prevention and treatment and control of epidemic, ...diseases” (Article 12 (2) (c)).¹⁰⁶ This includes “the implementation or enhancement of immunization programs and other strategies of infectious disease control.”¹⁰⁷ The Human Rights Council has further stressed “the responsibility of States to ensure access to all, without discrimination, of medicines, in particular essential medicines[.]”¹⁰⁸ Article 2 (2) obliges States to guarantee the rights “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. It is observed that “other status” may be relevant, for example, to non-discriminate on the basis of age.¹⁰⁹ The

¹⁰⁴ See Resolution 2 of the International Law Association (ILA) Kyoto Conference adopted on 13 December 2020, para. 4. Resolution 2 Kyoto 2020 Global Health Law FINAL.pdf (160KB) Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, *Max Planck Institute for Comparative Public Law and International Law*, MPIL Research Paper Series, No. 2020-07, (26 March 2020), pp. 17-20. <<https://ssrn.com/abstract=3561650>>.

¹⁰⁵ 170 States Parties, as of 1 February 2020.

¹⁰⁶ Committee on Economic, Social and Cultural Rights, General Comments No. 14, para. 16. See also, Benjamin Mason Meier and Larissa Mori, “The Highest Attainable Standard: Advancing a Collective Human Right to Public Health” (2005), 37 *Columbia Human Rights Law Review*, 113-115.

¹⁰⁷ CESCR General Comment No. 14, The Right to the Highest Attainable Standard of Health, para. 16.

¹⁰⁸ Human Rights Council Res. 12/24, Access to Medicine in the Context of the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, para. 2.

¹⁰⁹ Adina Ponta, “Human Rights Law in the Time of the Coronavirus”, ASIL, *Insights*, vol. 24, Issue 5, 20 April 2020, p. 5. <<https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus>>. See, ‘Office of the United Nations High Commissioner on

CESCR's General Comment 14 on the Rights to the Highest Attainable Standard of Health (Article 12)¹¹⁰ emphasizes that the term “progressive realization” used in Article 2 (1) of the ICESCR should be interpreted as meaning that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of Article 12.” (para. 31).

48. Obviously, there are certain “limitations” built in the human rights treaties¹¹¹ as well as “derogations” that are permitted in extraordinary situations of epidemics. Most notably, Article 4 (1) of the International Covenant on Civil and Political Rights (ICCPR)¹¹² provides for a public emergency exception in which a human right can be temporarily suspended or restricted. The derogations are recognized on five conditions, namely, that 1) the State must officially proclaim a state of emergency,¹¹³ and that the measures must be 2) “necessary” and 3) “proportionate”, to be applied 4) in a manner of “non-discrimination”, and also 5) in conformity with other international law obligations of the State (such as those in regional human rights conventions to which the State is a party).¹¹⁴ Principles of necessity, proportionality and non-discrimination must be assessed very carefully in accordance with the circumstance and context of the emergency situation in question. First, the measures taken must satisfy the principle of necessity, meaning that they are required in the circumstances, where there are no alternatives. The measures must be strictly limited in “duration, geographical coverage and material scope”.¹¹⁵ Second, it is also required for the measures to satisfy the principle of proportionality that they are limited to the extent strictly required by the exigencies of the situation. Due to the exceptional

Human Rights, “Unacceptable” – UN Expert Urges Better Protection of Older Persons Facing the Highest Risk of the COVID-19 Pandemic’. 27 March 2020.

¹¹⁰ CESCR General Comment No. 14, E/C.12/200/4. <https://www.refworld.org/pdfid/4538838d0.pdf>

¹¹¹ Articles 12, 18, 19, 21 and 22 of the ICCPR.

¹¹² As of 1 February 2020, 173 State Parties to ICCPR.

¹¹³ A declaration of a national state of emergency must be justified as a governmental response to an extraordinary situation posing a fundamental threat to the State. Adina Ponta, “Human Rights Law in the Time of the Coronavirus”, ASIL, *Insights*, Vol. 24, Issue 5, 20 April 2020, <<https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus>>

¹¹⁴ No derogation is permitted for certain human rights that need absolute protection, including the right to life (ICCPR, Article 4(2)). The State must officially and promptly inform the international community about the measures taken (ICCPR, Article 4 (3)). See also the Siracusa Principles, promulgated by the Commission on Human Rights (E/CN.4/1985/4), particularly paras. 10, 25, and 26.

¹¹⁵ CCPR General Comment 29, Article 4: Derogations during a State of Emergency, adopted on 29 July 2001, para. 4.

character of the emergency measures, protected values (human rights and public safety) must be carefully considered.¹¹⁶ Third, any measures imposed must respect the principle of non-discrimination and must not involve any discrimination “solely on the ground of race, colour, sex, language, religion or social origin”.¹¹⁷ Fourth, it must be noted that: “No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to Article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.”¹¹⁸

49. There are a number of rights under ICCPR that may be affected by emergency measures. Article 12 (3) provides for the “right to liberty of movement”, which “shall not be subject to any restrictions except those which ... are necessary to protect ... public health, or the rights and freedoms of others ...”. The “classic” non-pharmaceutical interventions such as quarantine, isolation, social distancing, travel bans and curfews should be no more restrictive than necessary and should be based in evidence (sometimes isolation of persons with an illness would be more justifiable than curfew of the general population). It should be noted in this context that the needs of some populations must be considered in this context, such as the needs of differently abled persons who may require assistance from care providers and should not be isolated in the context of quarantine, or under any circumstances. The measures may be implemented progressively from “voluntary isolation”, to “quarantine” and eventually “social distancing in parts or the whole of a country” (or *cordons sanitaires*).¹¹⁹ Nonetheless, international travel bans must take into account every person’s right to leave any country (Article 12 (2)) and the right to enter his own country (Article 12 (4)).

50. Freedoms of opinion and expression under ICCPR Article 19 are not listed as non-derogable rights in the state of emergency, but it is generally considered that derogation might not be possible because of the condition

¹¹⁶ *Ibid.*, para. 4.

¹¹⁷ *Ibid.*, para. 8.

¹¹⁸ *Ibid.*, para. 13 (e).

¹¹⁹ Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, *Max Planck Institute for Comparative Public Law and International Law*, MPIL Research Paper Series, No. 2020-07, (26 March 2020), <<https://ssrn.com/abstract=3561650>>. Lawrence Gostin and Benjamin E Berkman, “Pandemic Influenza: Ethics, Law, and the Public’s Health” (2007), 59 *Administrative Law Review*, 171; A Wilder-Smith and David Freedman, “Isolation, quarantine, social distancing and community containment: pivotal role for old-style public health measures in the novel coronavirus (2019-nCoV) outbreak” (2020) 27 *Journal of Travel Medicine*, 2.

of necessity.¹²⁰ Freedom of the press may be included as a corollary of this freedom, with certain inherent limitations. Freedoms of thought, conscience and religion under Article 18 are non-derogable, but the freedom to *manifest* one's religion may be limited for emergency public health reasons under Article 18 (3) by which the bans on mass gatherings in churches, mosques and temples may be imposed as necessary.

51. The legislative and regulatory frameworks that States have implemented to fight against epidemics are being scrutinized from the viewpoint of compatibility with international human rights norms, which must be examined carefully whether the measures taken have been “proportionate” to the evaluated risk, “necessary” and applied in a “non-discriminatory” way, citing “best practices” and “concerns” of those measures.¹²¹

52. It should be noted that the territorial scope of the human rights obligations of States in the context of epidemics has been extended. As stated by the Inter-American Court for Human Rights in the Advisory Opinion requested by the Republic of Colombia (2017): “the States Parties to the American Convention [on Human Rights] should not act in a way that hinders other States Parties from complying with their obligations under this treaty. This is important not only with regard to acts and omissions outside its territory, but also with regard to those acts and omissions within its territory that could have effects on the territory or inhabitants of another State.”¹²² The Committee on Economic, Social and Cultural Rights issued a “Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights” in which it stated that: “State parties have extraterritorial obligations related to global efforts to combat covid-19. In particular, developed States should avoid decisions, such as imposing limits on the export of medical equipment, resulting in obstructing access to vital equipment to the world's poorest victims of the pandemic. “Moreover, State parties shall make sure that unilateral border measures do not hinder the flow of necessary and essential goods, particular staple foods and health equipment... Any restriction based on the goal for securing national supply shall be proportionate and take into consideration the urgent needs of other countries.”¹²³

¹²⁰ CCPR, General Comment 34: Article 19: Freedoms of opinion and expression, para. 5.

¹²¹ Liora Lazarus, et al., “A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions”, Oxford University, BONAVERO REPORT NO. 3/2020, 6 MAY 2020.

¹²² Advisory Opinion OC-23/17 (15 November, 2017), para. 94 (available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf).

¹²³ 24 May 2020, available at: https://brill.com/view/journals/hrlr/9/1/article-p135_135.xml?language=en

53. Based on the above, the following Draft Article is proposed:

Draft Article 4: Human Rights

1. Everyone has the right to the full enjoyment of the highest attainable standard of health. As part of the efforts for the full realization of this right, States shall take steps for the prevention, treatment and control of epidemics.
2. Persons affected by epidemics are entitled to the respect for and protection of their human rights in accordance with international law.
3. States Parties to international human rights treaties should not act in a way that hinders other States Parties from complying with their respective human rights obligations.
4. State measures must be specifically aimed at preventing, reducing and controlling disease, necessary and proportionate to that aim. The measures must be implemented in a manner so as to avoid unjustifiable discrimination.
5. States may not derogate from their human rights obligations in any epidemic beyond that already allowed under existing human rights treaties.

2. The Role of the States

54. As the Preamble (paragraph 2) recognizes, the primary obligation to prevent, and protect against, epidemics rests with the State, which should therefore be placed as one of the most important general principles. While international cooperation among States is extremely important in the present project, the role of the State is the prerequisite of international cooperation, and thus, it is considered that, logically as well as in practical sense, the obligations of States should precede international cooperation. This is in line with some of the ILC products.¹²⁴

55. In the 1949 *Corfu Channel* case, the International Court of Justice referred to “certain general and well-recognized principles,” reaffirming “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹²⁵ The formulation of the

¹²⁴ See Watercourses Convention (Articles 3-7: Obligations of watercourse States; Article 8: General obligation to cooperate); Articles on the Prevention of Transboundary Harm (Article 3: Prevention (by the State of origin); Article 4: Cooperation); Articles on Transboundary Aquifers (Article 3: Sovereignty of aquifer States; Article 7: General obligation to cooperate); Articles on Disasters (5th Preambular paragraph: “Stressing the principle of sovereignty of States and consequently, reaffirming the primary role of the State ...; Article 7: Duty to cooperate). Also, Draft Guidelines on the Protection of the Atmosphere adopted on first reading in 2018, Draft Guideline 3 (Obligation (of States) to Protect the Atmosphere; Draft Guideline 8: International Cooperation.

¹²⁵ *Corfu Channel Case*, Judgment of April 9th, 1949, *ICJ Reports 1949*, p. 22.

latter half of the present draft article on “due diligence” derived from Principle 21 of the Stockholm Declaration, which reflected the holding of the *Trail Smelter* arbitration.¹²⁶ According to Principle 21, States have ... “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.¹²⁷ This principle is further reflected in Principle 2 of the 1992 Rio Declaration. The term “environmental damage” has never been defined in the relevant environmental instruments, but it certainly covers the damage caused by epidemics, as well as possible acceleration of epidemic spread due to environmental degradation.¹²⁸

56. It is the obligation of “all States” to protect persons from epidemics, as it is a common concern of humankind. Thus, this is an obligation *erga omnes* owed to the international community as a whole under general international law, and also an obligation *erga omnes partes* under a multilateral treaty, such as the WHO IHR in the present case. It is recalled that the IDI adopted a resolution on the “Protection of Human Rights and the Principle of Non-Intervention in the Internal Affairs of States” in 1989, in which the obligation of States to protect human rights is *erga omnes*.¹²⁹ The IDI further affirmed the existence of such

¹²⁶ See UNRIIAA, vol. III (Sales No. 1949.V.2), pp. 1905–1982 (Award of 11 March 1941), at p. 1965 *et seq.* in which the tribunal stated, confirming the principle of *sic utere tuo ut alienum non laedas* (“use your own property so as not to injure that of another”): “under the principles of international law ... no State has the right to use its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”

¹²⁷ This principle was affirmed in the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, para. 29: “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” *ICJ Reports 1996*, para. 29.

¹²⁸ See, for example, the 2002 *Johannesburg Declaration on Sustainable Development*, para. 19, which addresses “communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis” as a threat to sustainable development and the UN General Assembly in 2015 that eradication of HIV/AIDS, Tuberculosis, Malaria and Neglected Tropical Diseases (NTDs) is one of the goals to be achieved by the year 2030 as the Sustainable Development Goals (SDGs) of the international community (Goal 3.3). See also the UN Environmental Assembly Resolution 3/4 on Environment and Health, which noted the “likely increased risks of vector-borne diseases due to climate change.”

¹²⁹ Article 1(2): “This obligation [of human rights], as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as

obligations in international law in its Resolution of 2005 on “Obligations *erga omnes* in international law.”¹³⁰

57. The obligations of the State in this context are reflected in Article 2 (purpose and scope) of the WHO IHR “... to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks ...”.¹³¹ More generally, the phrase “prevent, reduce and control”, which draws upon Article 194 of the United Nations Convention on the Law of the Sea and other conventions¹³² as well as the formulations of Draft Guideline 3 of the ILC Draft Guidelines on the Protection of the Atmosphere,¹³³ may cover broader obligations of the State. These environmental treaties and instruments provide useful points

possible the effective protection of human rights throughout the world.” *IDI Annuaire*, Vol. 64, Part II, Session of Santiago de Compostela, 1989.

¹³⁰ The IDI Resolution adopted in 2005 on “Obligations *erga omnes* in international law” (5th commission, Judge Giorgio Gaja as Rapporteur): Article 1 (a) defines an obligation *erga omnes* as follows: “an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action.” Article 1 (b) defines an obligation “*erga omnes partes*” (though the Resolution does not employ this terminology but simply uses the same term “*erga omnes*” for both cases), as follows: “an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.” With regard to the procedural requirements to give effect to these obligations, the Resolution states that there should be “a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed” in order for the latter State to have standing to bring a claim to the International Court of Justice or other international judicial institutions in relation to a dispute concerning compliance with that obligation (Article 3). For a State to participate in the proceedings before the Court or that institution relating to that obligation, “[s]pecific rules should govern this participation” (Article 4), without which no participation is possible. Nonetheless, it is significant that the Institute has clearly confirmed the existence and function of the obligations *erga omnes* in international law as it stands at present. (*Annuaire, IDI*, 2005; See also the Rapporteur’s first Report (2002) in *Annuaire*, vol.71, tome 1, pp. 119-151; second Report (2004), *Ibid.*, pp. 189-212; replies and observations of the Commission, *Ibid.*, pp.153-187.)

¹³¹ WHO, “International Health Regulations” (23 May 2005) WHA 58.3 (IHR) art 2.

¹³² See, *Vienna Convention for the Protection of the Ozone Layer* (Article 2), *United Nations Framework Convention on Climate Change* (Article 3, paragraph 3), *Convention on Biological Diversity* (Article 3), *Convention on the Law of the Non-Navigational Uses of International Watercourses* (Article 21) and *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (Article 4).

¹³³ *Official Records of the General Assembly, Seventy-third session*, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 174-177.

of analogy for the present topic, since there are intrinsic similarities recognized between environmental harm and the spread of epidemics. The simple and clear statement of the 1997 IDI Resolution on “Environment” that “[E]very human being has the right to live in a *healthy environment*” (Article 2, emphasis added) would fully support the linkage between health and environment.¹³⁴

58. The term “prevent” means the outright avoidance of the harm of epidemics.¹³⁵ It expresses the concept and intention to avoid completely the potential adverse impact of epidemics through actions taken in advance. Very often, however, the complete avoidance of harms is not feasible and the task transforms to that of reduction. Partly for this reason, the terms “prevent” and “reduce” are sometimes used interchangeably.¹³⁶ The term “reduce” means the lessening or limiting the effect of epidemics. While the adverse effects of epidemics often cannot be prevented fully, their scale or severity can be substantially lessened by various strategies and actions.¹³⁷ The term “harm” covers both damage and risk. Damage is the type of harm that has already occurred *ex post*, while the term “risk” refers to the harm expected *ex ante* to occur in the future.¹³⁸ It is characteristic of the harm caused by epidemics that the relationship between damage and risk is closely intertwined. Based on epidemiological models, the measure of current damage often bears quite heavily on assessments of future risk.

59. As mentioned above (paragraph 47), the obligation of the State in this context include those contained in ICESCR. The right to health is guaranteed under ICESCR Article 12, recognizing “the right of everyone to the enjoyment of the highest attainable standard of ... health” (paragraph 1). It includes access to health facilities, goods and services, and “the prevention and treatment and control of epidemic ... diseases” (Article 12 (2) (c)).¹³⁹ The CESCR’s General Comment 14 on the Rights to the Highest Attainable

¹³⁴ IDI *Annuaire*, Vol. 68, Part II, Session of Strasbourg, 1997 (L. Ferrari Bravo as Rapporteur).

¹³⁵ Black’s Law Dictionary (11th ed. 2019) defines prevent as “to stop from happening.”

¹³⁶ Black’s Law Dictionary recognizes that prevent may also be defined as “to hinder or impede.”

¹³⁷ See, the Terminology on Disaster Risk Reduction prepared by the United Nations Office for Disaster Risk Reduction in 2009. www.unisdr.org/we/inform/terminology.

¹³⁸ Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, 1991, pp. 365-367; Shinya Murase, “Perspectives from International Economic Law on Transnational Environmental Issues”, *Recueil des cours de l’Académie de Droit international*, Vol. 253, 1995, p. 306.

¹³⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14, para. 16. See also, Benjamin Mason Meier and Larissa Mori, “The Highest Attainable Standard: Advancing a Collective Human Right to Public Health” (2005), 37 *Columbia Human Rights Law Review*, 113-115.

Standard of Health (Article 12)¹⁴⁰ emphasizes that the term “progressive realization” should be interpreted as meaning that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of Article 12.” (para. 31).

60. The judgment of the Inter-American Court for Human Rights on *Cuscul Piraval et al v. Guatemala* of 23 August 2018¹⁴¹ squarely deals with the issue of State’s obligation in regard to the HIV/AIDS epidemic. It would merit a rather detailed description here. This case concerned 49 individuals who were diagnosed with the HIV virus between 1992 and 2003, along with their family members. The victims in this case did not receive any public medical care from the time that they were diagnosed with HIV/AIDS (between the years of 1992 and 2004) until 2006 and 2007, when the State began providing minimal assistance to them. The Court found that many of the victims also faced other conditions related to their socioeconomic status that exacerbated the impact of their medical condition. The Court determined that the State did not comply with its positive duty to guarantee the rights to health, integrity, and life, protected under Articles 26 (progressive development), 5 (right to humane treatment), and 4 (right to life) of the American Convention on Human Rights.¹⁴² It also found that the State violated the right of non-discrimination by failing to guarantee the victims medical care that accounted for their various vulnerabilities, particularly for the specialized medical attention that the two victims who were pregnant needed.¹⁴³ The Court noted that the lack of adequate medical assistance, which had a different type of impact on pregnant women and their unborn children who were at greater risk of vertical transmission of the virus, constituted gender-based discrimination.¹⁴⁴ With regard to the victims’ access to healthcare, the Court determined that prior to 2004, the State failed to provide them with any treatment and that, subsequently, the victims’ access to healthcare, medication, and social services was inconsistent, inadequate, and limited, in violation of their right to health.¹⁴⁵ The Court

¹⁴⁰ CESCR General Comment No. 14, E/C.12/200/4. <https://www.refworld.org/pdfid/4538838d0.pdf>

¹⁴¹ Series C, No. 395 (Spanish only), For the English translation of the judgment, see: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_359_ing.pdf> See also, a review of the case: International Justice Resource Center, “Inter-American Court: State Inaction on HIV Violated Progressive Realization Obligation”, 6 November 2018. <<https://ijrcenter.org/2018/11/06/inter-american-court-state-inaction-on-hiv-violated-progressive-realization-obligation/>>

¹⁴² Judgment, para. 72.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* paras. 119, 126-27.

ordered Guatemala to take a number of actions to provide a remedy to the victims and their relatives, and prevent the repetition of these violations. It directed Guatemala to guarantee free medical treatment, both physical and psychological, to the victims and their relatives; take steps to improve the healthcare benefits of people living with HIV; create a national HIV awareness and sensitization campaign; and provide compensation for material and moral damage to the victims and their relatives, including free education, and coverage of legal fees.¹⁴⁶ It also ordered the State to implement mechanisms to regulate and supervise healthcare services; improve their accessibility, availability, and quality for people living with HIV; guarantee the provision of antiretroviral drugs and other appropriate medication for every person living with HIV, offer HIV tests to the public, and implement a training program for healthcare professionals.

61. The reference to competence of States would provide the background against which the entire set of the present draft articles is to be understood. Power of the State is by no means absolute. It is subject to international law, and it must be exercised “in accordance with international law” and with the Charter of the United Nations. It is important in this context to recall Judge Max Huber’s *dictum* in the *Island of Palmas* case that “[t]erritorial sovereignty ... involves the exclusive right ... This right has as corollary a duty: the obligation to protect within the territory the rights of other States ...”¹⁴⁷ One such obligation is “due diligence” mentioned above (see paragraph 55).

62. Each State has, under international law, the exclusive and comprehensive legislative, administrative and judicial jurisdiction, within its territory. Each State also has control over the ships and aircrafts flying its flag on or over the high seas. It may also exercise *de facto* control in exceptional circumstances such as over an occupied territory. Jurisdiction and control are the components of State sovereignty. Thus, for instance, the State’s emergency legislation concerning epidemics is applied and enforced under its jurisdiction and/or control. As noted in IHR Article 3(4), “States have ... the sovereign right to legislate and to implement legislation in pursuance of their health policies.”

63. The jurisdiction of State can be exercised, in principle, only within its territory (territoriality principle), though extraterritorial application of national law may be permitted in certain circumstances in which there are

¹⁴⁶ *Ibid.* paras. 198-251.

¹⁴⁷ *Island of Palmas* case (Netherlands/USA), 4 April 1928, RIAA, vol. II, p. 839.

legitimate legal grounds to justify it.¹⁴⁸ In some instances, however, it can cause political tension and legal uncertainty, as the principles of jurisdiction under international law may not adequately resolve competing claims. Several cases are found in which extraterritorial application of national environmental or health law has been at issue relating to the protection of the environment.¹⁴⁹ A State occasionally resorts to extraterritorial application of its national law when it considers that the relevant treaty is not sufficiently effective to deal with the stated objective.¹⁵⁰ It may be noted that the issue was already before the WTO Dispute Settlement in the case *India – Measures Concerning the Importation of Certain Agricultural Products*. In this case, the United States complained the prohibitions imposed by India on the importation of various agricultural products from the United States, while India argued that its measures were justified purportedly because of concerns related to Avian Influenza. India’s measures at issue were taken in accordance with, *inter alia*, the Indian Livestock Importation Act, 1898 (9 of 1898) (“Livestock Act”).¹⁵¹ Although the Panel and the Appellate Body did not uphold India’s contention, it appears likely that instances

¹⁴⁸ There are four principles by which extraterritorial jurisdiction can be asserted: the objective territoriality principle, the passive personality principle, the protective principle and the universality principle. The judgment of the Permanent Court of International Justice in the *S.S. “Lotus”* case is seen in part as a precedent confirming the objective territoriality principle (*P.C.I.J., Series A, No. 10, 1927, p. 19*), which is also most pertinent in the context of anti-trust law. See Shinya Murase, “Unilateral measures and the concept of opposability in international law”, in *Thesaurus Acroasium*, Kalliopi Koufa, ed. (Athens, Sakkoulas, 1999), pp. 397–454, reproduced in Murase, *International Law: An Integrative Perspective on Transboundary Issues*, Sophia University Press, 2011, pp. 247–248.

¹⁴⁹ See the cases of extraterritorial application of national environmental law: GATT *Tuna-Dolphin*, and WTO *Shrimp-Turtle* cases (both were the cases of extraterritorial application of the US Marine Mammal Protection Act) and WTO *Hormone Beef* case (concerned with the extraterritorial application of the EC Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action), WTO *Gasoline* (concerned with the extraterritorial application of the US Clean Air Act) case, the ECJ *Air Transport Association* case (concerned with the extraterritorial application of the EC Directive on Emission Trading Scheme). See, Fifth Report on the Protection of the Atmosphere, A/CN.4/711, 2018, paras. 19-31. See also Murase, *International Law: An Integrative Perspective on Transboundary Issues*, Sophia University Press, 2011, pp. 53–73.

¹⁵⁰ For example, the 2003 *Agreement on Transboundary Haze Pollution of the Association of Southeast Asian Nations* (ASEAN), notwithstanding its significant achievement of establishing a collaborative scheme, lacked adequate regulatory provisions to prevent haze pollution in the region. In 2014, Singapore enacted the *Transboundary Haze Pollution Act*, which can be applied extraterritorially in order to cope with the haze coming from Indonesia’s forest burning practice. See, S. Murase, Fifth Report on the Protection of the Atmosphere, A/CN.4/711, 2018, paras. 22-30.

¹⁵¹ WT/DS420/R, Add.1 (14 October 2014); WT/DS420/AB/R (4 June 2015).

concerning national laws on epidemics that are applied extraterritorially will be witnessed more in the future.¹⁵² It may be noted that there is already State practice regarding the extraterritorial application of national health law through Overseas Screening and through a bilateral agreement to that effect.¹⁵³

64. On the basis of these considerations, the following Draft Article is proposed:

Draft Article 5: The Role of the States

All States have the obligation to prevent, reduce and control the harm of epidemics and to exercise due diligence in taking appropriate legislative, administrative, judicial and other measures in accordance with applicable rules of international law. The competence of the affected States and of other States in dealing with epidemics must be respected in accordance with international law.

3. International Cooperation

65. Solidarity among nations is the foundation in coping with the situation of epidemics, and thus, international cooperation is at the core of the whole set of the present draft articles.¹⁵⁴ The concept of international cooperation has undergone a significant change in international law,¹⁵⁵

¹⁵² Ibid. For instance, State A may feel that the sanitary standard of State B is not as high as that of State A, leading to the application of its sanitary law to the production activities of State B and rejecting the imports of State B's products into State A. For PPM (processes and production methods) regulations and their extraterritorial application, see S. Murase, *International Law: An Integrative Perspective on Transboundary Issues*, Sophia University Press, 2011, pp. 42-58

¹⁵³ See Y. Liu, et al., "Overseas Screening for Tuberculosis in U.S.-Bound Immigrants and Refugees", *New England Journal of Medicine*, Vol. 360, No. 23, 2009, p. 2400; S. H. Waterman, et al., "A New Paradigm for Quarantine and Public Health Activities at Land Borders: Opportunities and Challenges", *Public Health Reports*, Vol. 124, No. 2, 2009, pp. 203-211. Mika Okochi, "Place of Quarantine as Matters of International Concern or Domestic Jurisdiction", in Junichi Eto, ed., *Aspects of International Law Studies: Achievements and Prospects* (Festschrift for S. Murase), Shinzansha, 2015, pp. 245-269 (in Japanese).

¹⁵⁴ David P Fidler. *International Law and Public Health: Materials on and Analysis of Global Health Jurisprudence* (Ardsley, New York: Transnational Pub Inc, 2000), p.17. Jeremy R Youde. *Global Health Governance in International Society* (Oxford University Press, 2018), p.75; Lawrence O Gostin. *Global Health Law* (Cambridge, Massachusetts: Harvard University Press, 2014), p. 197; D.P. Fidler, "Developments Involving SARS, International Law and Infectious Disease Control at the Fifty-Sixth Meeting of the World Health Assembly" (2003) 7 *American Society of International Law Insights*, available at <<http://www.asil.org/insigh108.cfm>>

¹⁵⁵ See also, J. Delbrück, "The international obligation to cooperate — an empty shell or a hard law principle of international law? — a critical look at a much debated paradigm of modern international law", H.P. Hestermeyer et al., eds., *Coexistence, Cooperation and Solidarity* (Liber Amicorum Rüdiger Wolfrum), vol. 1, Leiden, Martinus Nijhoff, 2012, pp. 3–16.

and today it is to a large extent built on the notion of common interests of the international community as a whole.¹⁵⁶ It is now part of customary international law. To cooperate for preventing, reducing and controlling epidemics is certainly a common objective of humankind.

66. In concrete terms, such cooperation is with other States and with the World Health Organization (WHO) in particular. States are also under the obligation to cooperate with the United Nations, with other competent international organizations, including the relevant regional organizations such as the Pan-American Health Organization (PAHO), with the components of the Red Cross and Red Crescent Movement, and with other assisting actors. It may be wise to insert the words “as appropriate” which would denote a certain flexibility for States in carrying out the obligation to cooperate depending on the nature and subject matter required for cooperation. The forms in which such cooperation occurs may also vary depending on the situation and allows for the exercise of a certain margin of appreciation of States. It may be at the bilateral, regional or multilateral levels.¹⁵⁷ States may also individually take appropriate action. Article 7 of the ILC’s Articles on the Protection of Persons in the Event of Disasters (2016)¹⁵⁸ and Draft Guideline 8 of the ILC’s Guidelines on the Protection of the Atmosphere (first reading completed in 2018) may provide some references.¹⁵⁹ This is in line with the provisions of some of the multilateral environment agreements.¹⁶⁰ It

¹⁵⁶ B. Simma, “From bilateralism to community interests in international law”, The Hague Academy of International Law, *Recueil des cours*, 1994-VI, Vol. 250, pp. 217–384.

¹⁵⁷ For example, the European Union has developed a “joint risk assessment and management system for communicable disease control.” For greater detail on the EU’s governance model and its implications for “intra-organizational” consultation, see G.L. Burci & S. Negri, “Governing the Global Fight Against Pandemics: The WHO, the International Health Regulations, and the Fragmentation of International Law” (forthcoming 2021) 53 *N.Y.U. Journal of International Law & Politics*, at 16.

¹⁵⁸ *Official Records of the General Assembly, Seventy-first session*, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 12-73.

¹⁵⁹ *Official Records of the General Assembly, Seventy-third session*, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 151-200.

¹⁶⁰ For example, the *Vienna Convention for the Protection of the Ozone Layer* provides, in its preamble, that international cooperation and action should be “based on relevant scientific and technical considerations”, and in article 4, paragraph (1), on cooperation in the legal, scientific and technical fields, there is provision that: “The Parties shall facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information relevant to this Convention as further elaborated in annex II. Such information shall be supplied to bodies agreed upon by the Parties”. Another example is Article 4, paragraph 1, of the *United Nations Framework Convention on Climate Change*, regarding commitments, which provides that: “All Parties ... shall (e) Cooperate in preparing for adaptation to the impacts of climate change; ... (g) Promote and cooperate in scientific, technological, technical, socio-

may also be appropriate to stress, in particular, the importance of cooperation in enhancing scientific knowledge relating to the causes and impacts of epidemics and also to highlight information sharing, monitoring, and assessment of, and responses to, epidemics.¹⁶¹

67. Cooperation could take a variety of forms in all three temporal phases of epidemics, *i.e.*, before, during and after, epidemics. Article 44 of the International Health Regulations (IHR) provides for various modes of collaboration among States and between WHO and States Parties.¹⁶² The IHR also covers a wide range of cooperative mechanisms to combat epidemics including: surveillance (Article 5), notification (Article 6), information-sharing during unexpected or unusual public health events (Article 7), public health response (Article 13), and cooperation with intergovernmental organizations and international bodies (Article 14).¹⁶³ These will be considered in detail in Parts Three, Four and Five of the present draft articles. Thus, cooperation by States must be established closely with the relevant international organizations, including, but not limited to, the World Trade Organization (WTO), the International Civil

economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies; (h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies; (i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations”.

¹⁶¹ Mاتيائي Sирleaf, “Capacity Building, International Cooperation and COVID-19”, *ASIL Insights*, Vol. 24, Issue 17, 9 July 2020,

<https://www.asil.org/insights/volume/24/issue/17/capacity-building-international-cooperation-and-covid-19>. It may be noted, however, that the WHO has not been equipped with the necessary authority to adequately fulfil its mission. Eyal Benvenisti, “The WHO – Destined to Fail?: Political Cooperation and the COVID-19 Pandemic”, *American Journal of International Law*, Vol. 114, Issue 4, October 2020, pp. 588-607.

¹⁶² The IHR Article 44 refers in paragraph 1 to collaboration among States Parties in: (a) the detection and assessment of, and response to, events, (b) the provision or facilitation of technical cooperation and logistical support, (c) the mobilization of financial resources to facilitate implementation, and (d) the formulation of proposed laws and other legal and administrative provisions. Its paragraph 2 provides for collaboration by WHO with States Parties in: (a) the evaluation and assessment of their public health capacities, (b) the provision or facilitation of technical cooperation and logistical support, and (c) the mobilization of financial resources to support developing countries in building, strengthening and maintaining the capacities.

¹⁶³ It should be noted that the WHO’s responses to COVID-19 have revealed the weakness of this organization. Jose E. Alvarez, “The WHO in the Age of the Coronavirus”, *American Journal of International Law*, Vol. 114, Issue 4, October 2020, pp. 578-587.

Aviation Organization (ICAO), International Maritime Organization (IMO), and the treaty bodies of multilateral environmental agreements.

68. In addition to cooperation between States and international organizations, there is also a need for cooperation between international organizations themselves. This “intra-organizational” cooperative governance model “already exists in other fields of multilateral cooperation, such as nuclear safety, humanitarian assistance, and the environment. These regimes are comparable to that of health security, where surveillance, early detection, and response to collective threats are key to protect common values and global public goods.”¹⁶⁴ The UNAIDS approach also provides a cogent example in the field of public health. There, ECOSOC established a standing coordination mechanism among participating organizations, including non-state groups.¹⁶⁵ The WHO has already implemented various cooperation with other international organizations, though some are relatively informal cooperative mechanisms compared to the examples cited above.¹⁶⁶

69. Pursuant to the above, the following Draft Article is proposed:

Draft Article 6: International Cooperation

1. In light of their mutual solidarity and their common and shared responsibilities under international law, States shall cooperate for this purpose with other States, as well as within the framework of the United Nations and the World Health Organization (WHO).
2. The duty to cooperate also applies with and between other relevant international organizations and bodies, including regional organizations, whose specific competence is engaged.
3. The duty to cooperate includes, *inter alia*, further strengthening and enhancing scientific knowledge relating to the causes and impacts of epidemics by sharing information, assessment and responses, and sharing the burdens and benefits of the cooperation efforts, taking into account their geographical situation, capacities and resources and, in particular, the need of developing countries.

4. Interrelationship among Relevant Rules

70. Central in this Report is the question of “interrelationship” among relevant rules of international law. International law related to epidemics may fairly be considered an autonomous regime centered around the law

¹⁶⁴ Burci & Negri, *supra* note 157, at 17. Examples include the International Atomic Energy Agency, the Inter-Agency Standing Committee, and UN environmental initiatives like UN-Oceans and UN-Energy.

¹⁶⁵ *Ibid.* at 17–18.

¹⁶⁶ *Ibid.* at 11.

of WHO, particularly the International Health Regulations (IHR 2005), but is in no way a “sealed” or self-contained regime. It exists and functions in relation to other fields of international law. That is why the IHR Article 57 (Relationship with other international Agreements), paragraph 1, provides: “States Parties recognize that the IHR and other relevant international agreements should be interpreted so as to be compatible”. It may be recalled that the WTO Appellate Body stated in the 1996 *Gasoline* case that “the General Agreement is not to be read in clinical isolation from public international law.”¹⁶⁷ Likewise, WHO law cannot stand by itself in *clinical* isolation from public international law. This is exactly the reason why the IDI, composed of members devoted to general international law, can contribute to placing international public health law within the framework of general international law. Thus, the IHR needs to be supplemented by other rules of international law. Indeed, the core strength of international law on epidemics as a legal system lies in such interrelationship that ensures coherence among the rules of international law.

71. The present draft articles should reflect the fact that epidemics touch every facet of human life. In the past few decades, commentators have begun to recognize that epidemics will concern many specialized regimes of international law.¹⁶⁸ A determination of which rules of international law are implicated in any given situation is necessarily fact-dependent, and these commentaries do not purport to give an exhaustive analysis of every possible interaction. It would be necessary first to provide an overview of the main rules of various specialized regimes which are most likely to be implicated when a State or international organization responds to an epidemic.

¹⁶⁷ WTO, Appellate Body report. *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17; See Shinya Murase, “Unilateral Measures and WTO Dispute Settlement”, in S. C. Tay & D.C. Esty, eds., *Asian Dragons and Green Trade, Environment, Economics and International Law*, Singapore: Times Academic Press, 1996, pp. 137-144.

¹⁶⁸ See, for example, David P Fidler, “International Law and Global Public Health” (1999) 48 *University of Kansas Law Review* 1, 27–394 which provides an early overview of the right to health’s interaction with international trade law, international humanitarian law, arms control law, international human rights law, international labor law, and international environmental law. A recent update, Armin von Bogdandy & Pedro A Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis,” MPIL Research Paper Series, No. 2020-07, (26 March 2020), <<https://ssrn.com/abstract=3561650>>, 16–24, focuses on human rights, international trade law, the UN Security Council’s powers, and the law of development finance, while noting the list is non-exhaustive.

72. In addressing the question of the interrelationship of legal norms, the work of the “Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”¹⁶⁹ should also be noted. Any overlap or conflict arising from several conventions that may be applicable to the same subject-matter may require coordination in the relevant context. In general, it is appropriate to follow the above conclusions from the Study Group on the *relationships of interpretation* (mutually supplementary) and the *relationships of conflict* (one prevailing over the other), as well as the *principle of harmonization* (for a single set of obligations to the extent possible), though admittedly this process presents some difficulties.¹⁷⁰ It would be useful to clarify the various techniques in international law for addressing tensions between legal rules and principles, whether they relate to a matter of interpretation or a matter of conflict.¹⁷¹

73. When the rules of international law are formulated, interpreted and applied, and implemented in a complementary manner, the possibilities for avoiding or resolving conflicts between them will increase with a view to achieving multiple benefits and sustainable development.¹⁷² Hence, in order to protect effectively public health from epidemics, it is crucial that consideration of the relevant rules of international law be undertaken in a mutually supportive manner, which can turn potential conflict in coordinating treaty provisions to coherence for the protection of public health. The principle of “presumption of conformity” is also stressed in this context.

¹⁶⁹ Adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, para. 251). The report appears in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.

¹⁷⁰ See *Ibid.*, pp. 177-178; See also, S. Murase, ILC Fourth Report on the Protection of the Atmosphere, A/CN.4/705, 2017, paras. 8-92; C. McLachlan, “The principle of systemic integration and article 31 (3) (c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279.

¹⁷¹ *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, para. 251. See conclusion (2) on “relationships of interpretation” and “relationships of conflict”. See, for the analytical study, “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1).

¹⁷² See, ILC Draft Guidelines on the Protection of the Atmosphere, Guideline 9 on Interrelationship among relevant rules, *Official Records of the General Assembly, Seventy-third session*, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 151-200; See also, ILC Resolution on the Legal Principles Relating to Climate Change, Washington DC 2014 (Res.2/2014), Draft Article 10 on Inter-relationship.

74. The above analysis may be highlighted within the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969,¹⁷³ including Articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law. Article 31, paragraph 3 (c), is intended to guarantee a “systemic interpretation”, requiring “any relevant rules of international law applicable in the relations between the parties” to be taken into account.¹⁷⁴ In other words, Article 31, paragraph 3 (c), of the 1969 Vienna Convention emphasizes both the “unity of international law” and “the sense in which rules should not be considered in isolation of general international law”.¹⁷⁵ Article 30 of the 1969 Vienna Convention provides rules to resolve a conflict, if the above principle of systemic integration does not work effectively in a given circumstance. Article 30 provides for conflict rules of *lex specialis* (para. 2), of *lex posterior* (para. 3) and of *pacta tertiis* (para. 4).¹⁷⁶ Paragraph 1 addresses three kinds of legal processes, namely the identification of the relevant rules, their interpretation and their application. The phrase “and with a view to avoiding conflicts” at the end of the sentence signals that “avoiding conflicts” is among one of the principal purposes of the paragraph.

75. In considering interrelationship, particular attention should be given first to human rights law, which was already referred to in Draft Article 4 above, and is not repeated here. It may be recalled, from the viewpoint of interrelationship, that many of the human rights norms overlap with those of public health law, leading to synergies between the two, whereas some other human rights norms may come in conflict with the latter, requiring adequate coordination. It must be stressed once again that coordination between these bodies of law cannot come at the cost of derogations to human rights obligations beyond those permitted by international law. Thus, apart from human rights law, the relevant laws to be highlighted in this section will be: (1) international environmental law, (2) international trade law, (3) international investment law, (4) international transport law, (5) law on security and armed conflict, as described in detail in this section.

¹⁷³ United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

¹⁷⁴ See, e.g., WTO, Appellate Body report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 158. See also *Al-Adsani v. the United Kingdom*, Application No. 35763/97, ECHR 2001-XI, para. 55.

¹⁷⁵ C. McLachlan, “The principle of systemic integration and article 31 (3) (c) of the Vienna Convention”, *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279; O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1 (Oxford University Press, 2011), pp. 828–829.

¹⁷⁶ *Ibid.*, pp. 791–798.

76. It would also be necessary to refer to situations in which States wish to develop new rules. It is thus important to signal a general desire to encourage States, when engaged in negotiations involving the creation of new rules, to take into account the systemic relationships that exist between rules of international law relating to health and rules in other legal fields.

(1) International Environmental Law

77. Public health has an intrinsic link with the environment. The direct and indirect river and maritime pollution, climate change, depletion of the ozone layer, deforestation, desertification and biodiversity loss have been cited by scientists as possible causes of epidemics. The WHO's strategy on health, environment and climate change notes that at least 13 million deaths each year (a quarter of all deaths and disease burden) are due to known avoidable environmental risks.¹⁷⁷ The UN Environmental Assembly of the UNEP recognized in its resolution 3/4 of 6 December 2017 on "Environment and Health" "the substantial risk posed by climate change to health" (para. 18) and the "the likely increased risks of vector-borne diseases due to climate change" (para. 19). The same resolution recognized that "biodiversity loss is a health risk multiplier" (para. 23) and that "human, animal, plant and ecosystem health are interdependent, and emphasizes in that regard the value of the "One Health" approach, an integrated approach that fosters cooperation between environmental conservation and the human health, animal health and plant health sectors" (para. 24).¹⁷⁸ Thus, the improvement of the quality of the environment leads to the increased protection of human health. It is for this reason that multilateral environmental instruments refer to the "human environment"¹⁷⁹ rather than "natural environment", or the environment itself. While protecting human health is not the only objective of international environmental law, it ranks as one of the most important goals of this body of international law. Thus, international health law needs to be integrated with international environmental law in

¹⁷⁷ https://apps.who.int/gb/ebwha/pdf_files/WHA72/A72_15-en.pdf?ua=1

¹⁷⁸ UNEP/EA.3/Res.4 (30 January 2018). https://wedocs.unep.org/bitstream/handle/20.500.11822/30795/UNEA3_4EN.pdf?sequence=1&isAllowed=y

¹⁷⁹ Thus, the most important instrument adopted at the beginning of international environmental law was the 1972 Stockholm Declaration of *Human Environment*. See also the IDI Resolution of 1997 on "Environment", Article 2 of which provides that: "[E]very human being has the right to live in a *healthy environment*" (emphasis added). https://www.idi-iil.org/app/uploads/2017/06/1997_str_02_en.pdf

a systemic and harmonious manner in the identification, interpretation, application and implementation of the relevant norms.¹⁸⁰

78. The obligation of “due diligence” is one of the core principles of international environmental law¹⁸¹ and of international law in general.¹⁸² This principle is also the basic principle of international law regarding response to epidemics. It should be noted that in the field of epidemics, the due diligence obligation is not limited to the subjective capability of each State and of its discretion, but it is “objectified” by the reference to objective standards of conduct as laid down in the WHO IHR, human rights treaties, and under customary international law. Closely related to the “due diligence” obligation is the precautionary principle.¹⁸³ An early elucidation from the UN’s 1982 World Charter for Nature is instructive. Article 11(b) provides that “[a]ctivities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed[.]” As noted in paragraph 1, the environment is understood to comprise human health, and thus States should consider it when applying the precautionary principle. This may interact with the obligation under general principles of international law to perform an environmental impact assessment in situations of transboundary environmental harm if such harm would detrimentally affect human health in other States.¹⁸⁴

79. Degrading situations of biodiversity are closely related to the spread of epidemics, and thus public health law should be integrated with biodiversity law. This paragraph focuses on the spread of communicable diseases which can be attributed to biodiversity. As the Director-General of WHO has noted, “biodiversity can sometimes be a source of pathogens and, when unsustainably managed, can exacerbate negative health

¹⁸⁰ David P. Fidler, “International Law and Global Public Health”, 48 *The University of Kansas Law Review* (1999), pp. 38-39; See also, Alan Boyle, “Relationship between International Environmental Law and Other Branches of International Law,” D. Bodansky, et al., eds., *The Oxford Handbook of International Environmental Law*, (Oxford University Press, 2007), pp. 125-146.

¹⁸¹ The *Trail Smelter* arbitral award, 1941, United Nations, *Report of International Arbitral Awards*, Vol. III, p. 1907f, p. 1965.

¹⁸² *Corfu Channel Case*, Judgment of 9 April 1949, *ICJ Reports 1949*, p. 22.

¹⁸³ Meinhard Schröder, “Precautionary Approach/Principle” in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2014).

¹⁸⁴ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] *ICJ Reports 2010*, p. 78, para. 193 (“[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”)

outcomes. Thus the interactions between people and biodiversity can strongly influence population health, livelihoods, and the sustainability of public health interventions.”¹⁸⁵ The Conference of Parties to the Convention on Biological Diversity (CBD) has echoed this sentiment, encouraging States to research the “relationships between biodiversity, ecosystem degradation and infectious disease emergence”.¹⁸⁶ The CBD Conference of Parties further urged States to “consider health-biodiversity linkages in environmental impact assessments, risk assessments and strategic environmental assessments”.¹⁸⁷ Biodiversity law is also relevant to the governance of treatments, vaccines, and diagnostics to address epidemics, for example, through its relevance to the sharing of genetic materials from pathogens.¹⁸⁸

80. The Cartagena Protocol on Biosafety to the CBD has aims to protect biodiversity from the impact of living modified organisms “taking also into account risks to human health.”¹⁸⁹ Commentators have noted that “widespread agreement that protection against indirect effects on human health i.e. resulting from effects on biological diversity, is part of the objective of the Protocol.”¹⁹⁰ The Nagoya-Kuala Lumpur Supplementary Protocol to the Cartagena Protocol, which establishes guidelines on domestic law approaches to liability and redress, requires consideration of an “adverse effect” to include damage to human health.¹⁹¹ There is an emerging recognition that intentional and unintentional inference with

¹⁸⁵ WHO (Report of the Director-General) “Health, Environment and Climate Change: Human Health and Biodiversity” (29 March 2018) A71/11 para 4. See generally Cristina Romanelli and others, *Connecting Global Priorities: Biodiversity and Human Health* (WHO & CBD 2015).

¹⁸⁶ CBD Conference of Parties, 'Biodiversity and Human Health' (14 December 2016) UN Doc CBD/COP/DEC/XIII/6 para 6(a). See also annex, 'Information on Health-Biodiversity Linkages,' para (e) of which recommends promoting "an integrated... approach to the management of ecosystems, associated human settlements and livestock, minimizing unnecessary disturbance to natural systems and so avoid or mitigate the potential emergence of new pathogens[.]"

¹⁸⁷ CBD COP XII/6 (n 65) para 4(d).

¹⁸⁸ See, for example, the preamble to the Nagoya Protocol, which notes the "importance of ensuring access to human pathogens for public health preparedness and response purposes[.]" Sam F Halabi and Rebecca Katz, *Viral Sovereignty and Technology Transfer: The Changing Global System for Sharing Pathogens for Public Health Research* (Cambridge University Press, 2020), <https://www.cambridge.org/core/books/viral-sovereignty-and-technology->

¹⁸⁹ Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208, Article 1.

¹⁹⁰ Ruth Mackenzie and others, *An Explanatory Guide to the Cartagena Protocol on Biosafety* (IUCN 2003) para 170.

¹⁹¹ Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (adopted 15 October 2010, entered into force 5 March 2018) UN Doc CBD/BS/COP-MOP/5/17 art 2(3)(d).

biodiversity can negatively impact human health through the spread of communicable disease, and that such interference may be restricted through international law.

81. Scientific studies reveal that the human–animal contact in some regions can contribute to epidemics, though this is not related to biodiversity *per se* but zoonotic diseases (zoonosis, transfer from animals to humans). The UNEP 2016 Report points out that “some emerging diseases have enormous impacts. Human immune deficiency virus (HIV and AIDS), highly pathogenic avian influenza (bird flu), bovine spongiform encephalopathy (mad cow disease), and Ebola are well-known examples of particularly harmful emerging zoonoses. Outbreaks of epidemic zoonoses typically occur intermittently. Epidemic zoonoses are often triggered by events such as climate changes, flooding and other climate events, and famines”. The International Union for the Conservation of Nature (IUCN) World Congress adopted a resolution in November 2004, noting that “recent outbreaks of zoonotic diseases ... such as SARS, Ebola, West Nile Virus and Avian Influenza, pose a serious threats to human and animal health...” and that “the health threat posed by the movement of millions of live animals and animal parts through markets annually within the global wildlife trade has not yet been recognized, and that efforts to regulate this trade fall far short of the imperative for action”.¹⁹² States are trying to restrict such habits through strict enforcement measures, but the efforts have not always been successful.¹⁹³ In this context, it should be stressed that States should

¹⁹² IUCN World Congress, November 2004, RES 3.011 Addressing the linkages between conservation, human and animal health, and security.

http://www2.ecolex.org/server2neu.php/libcat/docs/LI/WCC_2004_RES_11_EN.pdf See also UNEP Frontiers 2016 Report: Emerging Issues of Environmental Concern, “Zoonoses: Blurred Lines of Emergent Disease and Ecosystem Health”, pp. 18-31.

https://environmentlive.unep.org/media/docs/assessments/UNEP_Frontiers_2016_report_emerging_issues_of_environmental_concern.pdf

¹⁹³ See, Peng Yong, “Study on the Enforcement and Justice of Wildlife Crimes: From the Perspective of 1041 Judgments in 2019”, *Beijing DHH Law Firm Research Paper*, 20 April 2020; Cao Yin, “Wildlife Protection Law to be Strengthened to Safeguard Health”, *China Daily* (11 February 2020), <<https://www.chinadaily.com.cn/a/202002/11/WS5e420ff8a310128217276977.html>>. See also, Jiwen Chang, “China’s Legal Response to Trafficking in Wild Animals: The Relationship between International Treaties and Chinese Law”, Chapter 7, pp. 71-80, in Anne Peters, ed., *Studies in Global Animal Law*, Max Planck Institute, 2020. China has imposed a fast-track and complete ban on the consumption of terrestrial wildlife on 24th February in 2020 as a response to the COVID-19. It was introduced in a format of a ‘decision’ by the Standing Committee of the National People’s Congress. This ban applies to the consumption of terrestrial wildlife, whether artificially bred or wild-sourced: a scope broader than the pre-existing laws that only cover rare or endangered species under specific state protection. This decision is thought to have significant influence on the implementation and revision of the current

cooperate with the World Organisation for Animal Health (OIE).¹⁹⁴ Climate change also has a number of impacts on epidemics, including by increasing the spread of food-borne, water-borne, and zoonotic diseases.¹⁹⁵ The preamble to the Paris Agreement recognizes that parties should, when taking action to address climate change, respect, promote and consider their respective obligations on ... the right to health.

(2) International Trade Law

82. International trade law may regulate, for example, restrictions on the export of medical goods or intellectual property in medicines. Depending on the circumstances, State action could run afoul of the general principles described in the General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS), as well as specific sectoral agreements such as the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).¹⁹⁶ These rules of international trade law must be interpreted and applied in a mutually supportive manner with the rules of international public health law,¹⁹⁷ as the WTO Appellate Body has long held that the WTO law does not exist “in clinical isolation” from public international law¹⁹⁸ and that “relevant customary rules of interpretation of public international law” can be considered in the interpretation of WTO law.¹⁹⁹

Wildlife Protection Law in China, as well as new Chinese Biosafety Law that is being drafting at the time of this writing.

¹⁹⁴ For instance, in the WTO case *India – Measures Concerning the Importation of Certain Agricultural Products*, the Panel consulted with the OIE on the interpretation of the OIE Terrestrial Code in respect to India's domestic measures prohibiting importation of certain agricultural products for fear of Avian Influenza (paragraph 169 *infra*).

¹⁹⁵ WHA A/72/15 “Health, Environment and Climate Change”, 18 April 2019, https://apps.who.int/gb/ebwha/pdf_files/WHA72/A72_15-en.pdf?ua=1

¹⁹⁶ For a general overview of the interactions between public health and trade law, see *WTO Agreements & Public Health* (n 14). See also WHO Executive Board, “International Trade and Health: Report by the Secretariat” (28 April 2005) EB 116/4 para 4.

¹⁹⁷ The principle of “mutual supportiveness” has been the part of the WTO GATT jurisprudence in its case law. Shinya Murase, Fourth Report on the Protection of the Atmosphere, A/CN.4/705, 2017, pp. 5-16; See also, Shinya Murase, ‘Perspectives from International Economic Law on Transnational Environmental Issues’ The Hague Academy of International Law, *Recueil des cours*, Vol. 253, 1995, pp. 283f.

¹⁹⁸ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17;

¹⁹⁹ Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, 4 June 2015, para. 5.89.

83. The GATT and GATS both enshrine a general principle of non-discrimination, from which derogation is allowed in limited circumstances.²⁰⁰ Applicable in this context are Articles XX and XIV respectively, which allow measures “necessary to protect human, animal or plant life or health[.]”²⁰¹ The World Health Assembly has sought to “ensure that the interests of trade and health are appropriately balanced and coordinated,”²⁰² a sentiment echoed in the Doha Declaration made by WTO ministers, which stated the TRIPS Agreement “can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.”²⁰³ It should be noted that articles 7 and 8 of TRIPS, titled ‘Objectives’ and ‘Principles’ recognizes that intellectual property should be protected and enforced in a manner conducive to social and economic welfare, and that members may adopt measures necessary to protect public health and nutrition provided they are consistent with other provisions of TRIPS. The Doha Declaration recognizes these two articles as particularly relevant to determining the object and purpose of the TRIPS Agreement, a position that also finds support in a recent decision of the WTO Appellate Body.²⁰⁴

84. As regards intellectual property, WTO members followed the Doha Declaration with an amendment to the TRIPS Agreement, taking effect January 2017, which added an article 31 *bis* clarifying when a State may impose compulsory licenses on pharmaceutical products. Article 31 and 31 *bis* of the Agreement must be read in conjunction with its Annex and Appendix. Article 31 provides that a State may “allow for other use of the subject matter of a patent without the authorization of the right holder” if the use is “predominately for the supply of the domestic market” of that State, among other requirements.²⁰⁵ This presented a problem for

²⁰⁰ For the general framework of non-discrimination, see *General Agreement on Tariffs and Trade* (adopted 30 October 1947, entered into force 1 January 1948, herein after “GATT”) art I and *General Agreement on Trade in Services* (adopted 15 April 1994, entered into force 1 January 1995, herein after “GATS”) Article II.

²⁰¹ GATT Article XX; GATS Article XIV.

²⁰² World Health Assembly, “International Trade and Health” (27 May 2006) WHA 59.26.

²⁰³ WTO, “Declaration on the TRIPS Agreement and Public Health” (14 November 2001) para 4.

²⁰⁴ Australia – Tobacco Plain Packaging, Appellate Body Report, WT/DS435/AB/R, WT/DS441/AB/R (9 June 2020) at 6. 657-6. 658

²⁰⁵ Under art 31, States may generally compulsorily license medicines for use within their territory, that the Doha Declaration confirms that they may choose the grounds on which they do so, and that in situations of national emergency (which the Doha Declaration defines as including epidemics) the normal procedural requirement they have to follow of consultation with patent holders is waived.

developing nations without pharmaceutical manufacturing capabilities. Article 31 *bis* allows the application of Article 31 by exporting States. It provides that “Article 31(f) shall not apply with respect to the grant by [a State] of a compulsory license to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s).” Eligible importing members are defined in the Annex as a least-developed country with “insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question.”²⁰⁶ The granting of compulsory licenses must be performed in a manner consistent with the obligations of those agreements.

85. Two WTO Dispute Settlement cases which concern epidemics should be noted: one is the *Brazilian Tyre* case and the other the *Indian Agricultural Products* case. In the case of *Brasil—Measures Affecting Imports of Retreaded Tyres*, the European Communities complained about Brazil’s restriction of importation of retarded tyres. The Appellate Body upheld the Panel’s finding that the import ban can be considered “necessary” within the meaning of Article XX(b) and is thus provisionally justified under that provision but cannot be justified under the chapeau of Article XX. The Appellate Body²⁰⁷ makes references to some infectious diseases: “At the end of their useful life, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health. Specific risks to human life and health include: (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; ...” (para. 119).²⁰⁸ The other case, *India—Measures Concerning the*

²⁰⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights* (adopted 15 April 1994, entered into force 1 January 1995) art 31 *bis*. See also Suerie Moon & Thirukumaran Balasubramaniam, “The World Trade Organization: Carving out the Right to Health to Promote Access to Medicines and Tobacco Control in the Trade Arena” in Benjamin M Meier & Lawrence O Gostin (eds), *Human Rights in Global Health* (Oxford University Press, 2018) 379–86, and Holger P. Hestermeyer, “Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines,” 11 *ASIL Insights* 28 (2007).

²⁰⁷ *Brasil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (7 June 2007); WT/DS332/AB/R (3 December 2007). See, I. Van Damme. “III. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Adopted on 17 December 2007,” *International and Comparative Law Quarterly*, Vol. 57, 2008, pp. 710f.; K.R. Gray. “*Brazil – Measures Affecting Imports of Retreaded Tyres*” (2008) 102:3 *American Journal of International Law*, Vol. 102, No. 3, 2008, pp.610f.; Julia Qin. “WTO Panel decision in *Brazil - Tyres* supports safeguarding environmental values,” *ASIL Insights*, 23:11, 2007, <<https://www.asil.org/insights/volume/11/issue/23/wto-panel-decision-brazil-tyres-supports-safeguarding-environmental>>; Philippe Sands, et al. *Principles of International Environmental Law*, 4th ed, Cambridge University Press, 2018, pp 867-869.

²⁰⁸ The report also stated as follows: “In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of

Importation of Certain Agricultural Products, concerns India's import prohibition affecting certain agricultural products from countries reporting Notifiable Avian Influenza (NAI) to the World Organisation for Animal Health (OIE). This import prohibition is maintained through India's Avian Influenza (AI) measures, based on its domestic law, *inter alia*, the Livestock Importation Act. The United States complained that the prohibitions imposed by India purportedly because of concerns related to Avian Influenza were not based on the relevant international standard (the OIE Terrestrial Code) or on a scientific risk assessment.²⁰⁹

86. Due to a concern among GATT parties with measures imposed by some States within this exception, the SPS Agreement limited their application by requiring them to be based on "available scientific evidence."²¹⁰ Subsequent disputes brought before the WTO have clarified this requirement, most notably in the *Hormones* Appellate Body report²¹¹ and the *Radionuclides* Appellate Body report.²¹²

(3) International Investment Law

87. Many substantive guarantees of the international investment regime, as expressed in bilateral investment treaties and the investment chapters of free trade agreements, are likely to be triggered by a State's epidemic response, including, *inter alia*, national treatment, most-favored-nation, fair and equitable treatment, full protection and security, non-discrimination, and protection against expropriation.²¹³

waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree" (para. 179).

²⁰⁹ *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, 4 June 2015, para. 5.82.

²¹⁰ *Agreement on the Application of Sanitary and Phytosanitary Measures* (adopted 15 April 1994, entered into force 1 January 1995) art 5(2). See also David P Fidler, "Public Health and International Law: The Impact of Infectious Diseases on the Formation of International Legal Regimes, 1800-2000" in Andrew T Price-Smith (ed), *Plagues and Politics* (Palgrave Macmillan 2001) 271–274.

²¹¹ WTO, *European Communities: Measures Concerning Meat and Meat Products (Hormones)—Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R 46–48, 72–85.

²¹² WTO, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides*, Report of the Appellate Body (11 April 2019) WT/DS495/AB/R.

²¹³ For a general overview of the protections provided by international investment law, see Christoph Schreuer, "Investments, International Protection" in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013).

88. One of the earliest cases on the matter is *Bischoff*, decided by German–Venezuelan Claims Commission.²¹⁴ Though concerned with the protection of aliens and applying “absolute equity” rather than any clear rules of international law, the rulings of the Venezuelan Claims Commissions have continued vitality for international investment law.²¹⁵ In the context of the wrongful seizure of a carriage by police responding to the 1898 Venezuelan smallpox epidemic, the Commission stated that “during an epidemic of infectious disease there can be no liability for the reasonable exercise of police power, even though a mistake is made.”²¹⁶

89. The current position developed by investor-State tribunals since *Bischoff* is summarized in the 2016 *Philip Morris* award, which affirmed the existence of a “police powers doctrine” in customary international law as it relates to expropriation and public health.²¹⁷ The trend among such tribunals, including *Methanex*²¹⁸ and *Chemtura*,²¹⁹ has been to examine whether an expropriation occurred depending “on the nature and purpose of the State’s action.”²²⁰ The *Philip Morris* tribunal found the customary international law formulation to be reflected by the 2004 and 2012 US Model BIT: “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”²²¹

90. It remains to be clarified by investment tribunals how the “police powers doctrine” or the “general principles for the exercise of public power”²²² in the context of public health may apply to the other substantive guarantees described above, as the caselaw currently focuses on expropriation, though there are also some cases on fair and equitable

²¹⁴ *Bischoff Case (Germany/Venezuela)* (1903) 10 RIAA, Vol. X, 420–Π21.

²¹⁵ Heather Bray, “Venezuelan Claims Commissions” in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2018).

²¹⁶ *Bischoff* (n 51) 420.

²¹⁷ *Philip Morris Brands SARL v Oriental Republic of Uruguay* (2016) (Award) ICSID Case No ARB/10/7 paras 290–91.

²¹⁸ *Methanex Corp v United States of America* (2005) (Final Award on Jurisdiction and Merits) UNCITRAL part IV chap D para 7.

²¹⁹ *Chemtura Corp v Government of Canada* (2010) (Award) UNCITRAL para 266.

²²⁰ *Philip Morris*, para. 295.

²²¹ *Ibid* paras. 300–01.

²²² Benedict Kingsbury & Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law,” in Albert Jan Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series*, Vol. 14; See also, Yuka Fukunaga, “Margin of Appreciation as an Indicator of Judicial Deference: Is It Applicable to Investment Arbitration?”, *Journal of International Dispute Settlement*, Vol. 10, 2019, pp. 69-87.

treatment.²²³ Some guidance may be found in cases related to environmental regulations, which implicate other doctrines of international investment law.²²⁴

(4) International Transport Law

91. The obligation of all States to prevent, reduce and control epidemics is reflected in several international instruments on maritime and civil aviation law, as well as the IHR as it relates to these regimes. IHR Article 20 requires States to develop certain health-related “core capacities” at designated air and water ports within the timeframe indicated by Article 19.²²⁵ Under Article 14 of the Convention on International Civil Aviation (Chicago Convention), States agree “to take effective measures to prevent the spread” of communicable diseases through air travel.²²⁶ Annex 9, Standard 8.16 of the Convention requires all States to “establish a national aviation plan in preparation for an outbreak of a communicable disease posing a public health risk or public health emergency of international concern.”²²⁷ The International Convention for the Control and Management of Ships’ Ballast Water and Sediments, which regulates the emptying of ballast waters by vessels partially to prevent the spread of pathogens harmful to human health, obliges States to “develop national policies, strategies or programmes.”²²⁸ States must also ensure ports have “adequate facilities” to comply with the Convention.²²⁹

92. Article 28 of the IHR provides that “a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry,” but the same Article also provides: “However, if the point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it ...” The State has an obligation to notify such measures to WHO and to justify them with available scientific evidence (Article 48, paragraph 3). The WHO may ask the State Party concerned to reconsider the imposition of such measures (Article

²²³ Campbell McLachlan, Matthew Weiniger & Laurence Shore, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford UP, 2017), [7.153]–[7.173] (fair and equitable treatment).

²²⁴ For an overview, see Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Taylor & Francis 2012) 127–159.

²²⁵ IHR Articles 19–20, which outlines these “core capacities” with more detail in Annex I.

²²⁶ Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 102 (Chicago Convention) Article 14.

²²⁷ *Ibid*, annex 9, standard 8.16.

²²⁸ *International Convention for the Control and Management of Ships’ Ballast Water and Sediments* (adopted 13 February 2004, entered into force 8 September 2017) art 4(2) (herein after Ballast Water Convention).

²²⁹ *Ibid*, Article 5(1).

48, paragraph 4). In entering the ports, vessels must also be accorded *free pratique*.²³⁰ Public health measures may not be applied to vessels simply passing through their jurisdiction except in narrow circumstances.²³¹ Public health restrictions of the State must be applied in a non-discriminatory fashion.²³²

93. It would be necessary to indicate the possible measures to be taken, proceeding generally from least to most invasive measures, similar to Article 18 of the IHR, which describes a wider array of measures. In accord with Article 43 of the IHR, States may apply additional health measures beyond those explicitly required. It is also implicit in IHR Articles 23 and 31, which authorizes the medical examination of travelers, and Article 34, which provides for the “inspection and isolation of containers.” It is generally understood that not every air or water port within a State will have the required public health capabilities within the scope of Article 20 and Annex 1 of the IHR.²³³ It is recognized that inspection may be necessary before allowing a vessel to unload. This is authorized by UNCLOS Article 21 and IHR Article 27.²³⁴ After such an inspection, or other evidence of a public health risk, certain measures may be taken by the State such as mandating decontamination of vessels before unloading crew, passengers or cargo and quarantining affected vessels. IHR Article 27 provides that competent authorities “disinfect, decontaminate, disinsect or derat” the vessel, and may isolate the vessel

²³⁰ A certificate from the port-health-authorities that the ship is without infectious disease or plague on board and therefore permitted to enter port and to allow people to board and disembark.

²³¹ The general obligation is reflected in the *United Nations Convention on the Law of the Sea* (herein after UNCLOS) but differs according to whether the ship is in a coastal State’s territorial waters, defined in article 3, or the State’s exclusive economic zone (EEZ), defined in Article 57. In territorial waters, coastal States must accord vessels innocent passage according to Article 17, subject to actions meant to prevent the “infringement of ... sanitary laws and regulations” as stated in Article 21. In the EEZ, the freedom of navigation is presumed (Articles 58 & 87) and coastal States may not apply health measures, which are absent from matters over which they have jurisdiction according to article 56. The IHR clarifies that coastal States must allow vessels showing signs of contamination, or originating from an affected area as defined by WHO in annex 5, to dock as a means to take on fuel, water, food and supplies (Articles 25 & 27) when passing through the coastal State’s territorial waters, though those vessels may be subject to public health restrictions.

²³² UNCLOS Article 227; IHR Article 32; *Ballast Water Convention* 3(3); “by virtue of the prevailing global economic order, all States have a right to free general and maritime economic access and non-discrimination”: *M/V ‘Saiga’* (No. 2) ITLOS (Sep. Op. Laing), para 56.

²³³ Article 28 further permits the competent authorities to order the vessel to “the nearest suitable point of entry available to it”.

²³⁴ Article 9 of the *Ballast Water Convention* also allows inspections “for the purpose of determining whether the ship is in compliance with this Convention.”

to prevent the spread of disease. Ballast Water Convention Article 9 and 10 allow States, after sampling a vessel's ballast water, to prohibit it from discharging such water until the "threat is removed" or detain the vessel.

94. It must also be noted that UNCLOS Article 94 provides: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." This duty is only absolute on the high seas; as noted above, and in UNCLOS Article 19(g), coastal States may apply national sanitary measures in territorial waters. Given IHR Article 43, these may be different from those of the flag State or may be harmonized by an international treaty. One such treaty is the Ballast Water Convention, which provides in Article 4 that "[e]ach Party shall require that ships to which this Convention applies and which are entitled to fly its flag or operating under its authority comply with the requirements set forth in this Convention".

95. Another is the Maritime Labour Convention, which states in Article V(2) that "[e]ach Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention" including health regulations. IHR Annex 5, paragraph 3 provides that "States Parties should accept disinsecting, deratting and other control measures for conveyances applied by other States if methods and materials advised by the Organization have been applied." With regard to air travel, States must comply with the Standards and Recommended Practices outlined in Chicago Convention Annex 9, which cover the IHR and outbreaks of communicable disease. Considering all of the applicable international rules, the difference between coastal and flag State health regulations may be minimal, but more guidance is needed to manage obligations between the two. One such example is the questions posed by cruise ships, many of which are still left in the grey areas of law.²³⁵

²³⁵ For instance, the flag State of the cruise ship the *Diamond Princess* was the United Kingdom, and its owner was a United States corporation. When the ship was on the high seas, a coronavirus patient was found in the ship in February 2020, and after it anchored at Yokohama, Japan, it was not clear to what extent the Japanese government could exercise its jurisdiction over the treatment of the passengers while the captain of the ship was still directly in charge of the maintenance of the order in the ship. Some experts admitted that this was one of the gaps in the existing maritime law regime. It is reported that, as of 2 May 2020, over 40 cruise ships all over the world have had confirmed positive cases of coronavirus. See also, Donald Rothwell, "International Law and Cruise Ships: Sailing into Stormy Waters", ANU College of Law, *COVID-19 and International Law*, 28 April 2020. <<https://law.anu.edu.au/research/essay/covid-19-and-international-law/international-law-and-cruise-ships-sailing-stormy-waters>>; Natalie

96. Issues regarding the position of the vessel itself and that of its passengers and crew should be, in principle, separated. The rights of these persons should be fully respected in accordance with the obligations of the affected States, including the treatment and safe repatriation of seafarers.²³⁶

(5) International Law of Peace and Security and International Humanitarian Law

97. International law on public health has been relevant to international law of peace and security. The Security Council adopted resolutions 1308 (2000)²³⁷ and 1983 (2011)²³⁸ on HIV/AIDS. The UN Security Council also adopted resolutions on Ebola virus, comprising 2177 (2014) addressing Western Africa²³⁹ and 2439 (2018) in the Democratic Republic of the Congo (DRC).²⁴⁰ The resolutions all referred to “the Council’s primary responsibility for the maintenance of the international peace and security” under the Charter. However, the Security Council, as a political organ of the UN, has not demonstrated consistency in addressing epidemics of international concern that had the impacts similar to HIV/AIDS and Ebola. The incidents of SARS, MERS, the H1N1 Influenza and Zika have not received the same attention by the Security Council.²⁴¹ Regarding the on-going threat of COVID-19 in

Klein, “International Law Perspectives on Cruise Ships and COVID-19”, *Journal of International Humanitarian Legal Studies*, 2020, pp. 1-13.

²³⁶ International Maritime Organization, ‘Joint Statement IMO-ICAO-ILO on designation of seafarers, marine personnel, fishing vessel personnel, offshore energy sector personnel, aviation personnel, air cargo supply chain personnel and service provider personnel at airports and ports as key workers, and on facilitation of crew changes in ports and airports in the context of the COVID-19 pandemic’ (Circular letter No 4204/ Add. 18 (26 May 2020)).

²³⁷ UN Security Council, *Security Council resolution 1308 (2000) [on the responsibility of the Security Council in the maintenance of international peace and security: HIV/AIDS and international peacekeeping operations]*, 17 July 2000, S/RES/1308 (2000),

available at: <https://www.refworld.org/docid/3b00efd10.html> [accessed 5 May 2020]

²³⁸ UN Security Council, *Security Council resolution 1983 (2011) [on impacts of HIV/AIDS epidemic in conflict and post-conflict situations]*, 7 June 2011, S/RES/1983(2011), available at: <https://www.refworld.org/docid/4e0c355d2.html> [accessed 5 May 2020]

²³⁹ UN Security Council, *Security Council resolution 2177 (2014) [on the outbreak of the Ebola virus in, and its impact on, West Africa]*, 18 September 2014, S/RES/2177 (2014), available at: <https://www.refworld.org/docid/546f0c644.html> [accessed 5 May 2020]

²⁴⁰ UN Security Council, *Security Council resolution 2439 (2018) [on Ebola in the DRC]*, 30 October 2018, S/RES/2439 (2018), available at: [https://undocs.org/S/RES/2439\(2018\)](https://undocs.org/S/RES/2439(2018))

²⁴¹ J. Benton Heath, “Global Emergency Power in the Age of Ebola”, *57 Harvard International Law Journal*, (2015), pp. 1- 47; Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, *Max Planck Institute for Comparative Public Law and*

Sudan, it was five months after its outbreak when it was referred to by the Security Council.²⁴² The Security Council finally, on 1 July 2020, referred to the potential impact of COVID-19 to “conflict-affected countries”, demanding a cessation of hostilities in all situations, and also recalling “the need for unity and solidarity with all those affected”.²⁴³ The linkage between international public health law and the international law on peace and security needs to be further explored.

98. International humanitarian law contains rules to protect the health of sick, shipwrecked, prisoners of war, civilians and medical personnel in armed conflicts.²⁴⁴ Article 12 of the 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field provides: “Members of the armed forces and other persons ... who are wounded or sick ... shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created”.²⁴⁵ Article 24 of the same Convention I stipulates: “Medical personnel exclusively engaged ... in the prevention of disease ... should be respected and protected in all circumstances”. Article 29 of the 1949 Geneva Convention III relative to the Treatment of Prisoners of War provides: “The Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps, and to prevent epidemics”. Furthermore, Article 56 of the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War provides: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining ... the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.” Article 91 of the same Convention IV provides, with regard to civilian

International Law, MPIL Research Paper Series, No. 2020-07, (26 March 2020), pp. 22-23. <<https://ssrn.com/abstract=3561650>>.

²⁴² S/RES/2524, 3 June 2020 and S/RES/2525, 3 June 2020, on Sudan. S/RES/2525 states as follows: “*Recognizing* the impact of the COVID-19 on the United Nations Hybrid Operation in Darfur (UNAMID)’s drawdown (Preamble, paragraph 5), ... *Determining* the situation in Darfur constitute a threat to international peace and security (Preamble, paragraph 8), ... Request UNAMID to provide support ... to Sudan in its efforts to contain the spread of COVID-19”, Acting under Chapter VII of the United Nations Charter.”.

²⁴³ SRES/2352 (1 July 2020).

²⁴⁴ Obviously, “occupation” and “prisoners of war” are applicable only in international armed conflicts.

²⁴⁵ A similar provision is Article 12 of the 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

internees, that “ ... [I]solation wards shall be set aside for cases of contagious or mental diseases”. Common Article 3 to the Geneva Conventions provides for the minimum application of humane treatment in situations of non-international armed conflict.²⁴⁶ The 1977 Protocols Additional to the Geneva Conventions provide for detailed obligations of the Parties for the protection of the victims of international conflicts (Protocol I) and non-international conflicts (Protocol II).²⁴⁷

99. Security Council Resolution 2439 (2018), determining that the situation constituted “a threat to international peace and security”, called for “immediate cessation of hostilities by all armed groups” in the Democratic Republic of Congo (DRC) (paragraph 4), condemned “all attacks by armed groups, including those posing serious security risks for responders and jeopardizing the response to the Ebola outbreak” (paragraph 5), and demanded that: “all parties to the armed conflict fully respect international law, including, as applicable, ... international humanitarian law, including their obligations under the Geneva Conventions of 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977 and 2005”. Security Council Resolution 2532 (1 July 2020) called for a general and immediate cessation of hostilities in all situations due to COVID-19 (unlike the above resolution on Ebola, this resolution does not refer to “a threat to international peace and security”).

100. International public health law has some relevance to the arms control dimension, particularly in the context of the Biological Weapons Convention.²⁴⁸

(6) Other Laws

101. After having referred in the previous draft articles to the major fields of international law that are most closely related to public health law, it may be necessary to attempt to cover other rules of international law. It would require that these laws also be identified, interpreted, applied and implemented in harmonious and systemic manner.

²⁴⁶ See, David A. Elder, “The Historical Background of common Article 3 of the Geneva Conventions of 1949,” *Case Western Reserve Journal of International Law*, Vol. 11, Issue 1, 1979, pp. 37-69.

²⁴⁷ See, Robert Kolb & Richard Hyde. *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008), pp 262-266; Claude Pilloud, et al, eds. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) pp 861-890

²⁴⁸ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972, 1015 U.N.T.S. 163. See David D. Fidler, “International Law and Global Public Health”, 48 *The University of Kansas Law Review* (1999), pp. 33-35.

102. International law relating to immigration is relevant to the extent it is concerned with the movement of persons, in particular, restrictions of entry into and exit from a country due to the spread of epidemics which adversely affects the rights of migrants, refugees, and other displaced persons.²⁴⁹ For a refugee or an asylum seeker, the principle of *non-refoulement* (Article 33, paragraph 1 of the 1951 Refugee Convention) must be respected, which is an absolute and non-derogable rule under the UN Convention on the Prohibition of Torture (Article 3). On a practical point, the concern should be addressed that *refoulement* itself may contribute to the international spread of a disease.²⁵⁰ It should also be noted that the prohibition of “collective expulsion” could be relevant in this type of situation.²⁵¹ If a movement takes the form of a “mass migration”, it may pose a more serious problem in the case of an epidemic.²⁵²

103. Large scale epidemics often disrupt economic activities forcing many businesses and industries to closure and suspension, and into financial difficulties. The World Bank group created in 2017 the Pandemic Emergency Financing Facility (PEF),²⁵³ aimed at enhancing the immediate availability of financial support during the outbreak of epidemics, mainly addressing the low-income countries.²⁵⁴ It is reported however that the Facility has not proven to be successful due to its

²⁴⁹ Institut d'Études Européennes de l'Université Libre de Bruxelles, “Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons”, 30 April 2020. <<https://www.iee-ulb.eu/en/blog/news/human-mobility-and-human-rights-in-the-covid-19-pandemic/>>

²⁵⁰ Kate Ogg, “COVID-19 Travel Restrictions: A Violation of Non-Refoulement Obligations?”, ANU College of Law, *COVID-19 and International Law*, 24 April 2020. <<https://law.anu.edu.au/research/essay/covid-19-and-international-law/covid-19-travel-restrictions-violation-non-refoulement-obligations>>

²⁵¹ See, Articles on Expulsion of Aliens, Article 9 (Prohibition of Collective Expulsion), *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10, Report of the International Law Commission, Sixty-sixth session, 2014*, pp. 21-59.

²⁵² See, Maurice Kamto, Rapporteur of the 16th commission, “Migrations de Masse”, *IDI Annuaire*, Vol. 77-1, 2016, pp. 115-258; Final Resolution, *IDI Annuaire*, Vol. 78, 2017, pp. 131-213.

²⁵³ See, World Bank Steering Body, “Pandemic Emergency Financing Facility Framework” (27 June 2017) <<http://pubdocs.worldbank.org/en/670191509025137260/PEF-Framework.pdf>>.

²⁵⁴ World Bank, *Pandemic Emergency Financing Facility, Operational Brief*, 2019. <http://pubdocs.worldbank.org/en/478271550071105640/PEF-Operational-Brief-Feb-2019.pdf> It is reported that the World Bank has recently decided to cancel plans for another round of pandemic bonds. <https://www.ft.com/content/949adc20-5303-494b-9cf1-4eb4c8b6aa6b>

limited fund raised, limited list of diseases to be applied and others.²⁵⁵

104. With regard to international labor law, it may be noted that the ILO has established international rules governing occupational health and safety. The ILO's Forced Labour Convention of 1930 noted in Article 2(2) that the term "forced or compulsory labor" did not include "any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as ... violent epidemic or epizootic diseases... and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population." Such a policy has been superseded by multiple universal and regional human rights treaties that have been adopted in the post-war world. The ILO Convention Concerning Occupational Safety and Health and the Working Environment provides, in Article 4, paragraph 1, that "[e]ach Member shall ... formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment." This Convention specifically refers to the workers handling "biological substances" (Article 5(a)), "biological agents in respect of the risk to the health of workers" (Article 11(f)) and "biological agents or products" (Article 12(b)).²⁵⁶ The exploitation of child labor is another issue of particular concern in international labor law, which threatens the health of vulnerable children.²⁵⁷

105. No draft article is proposed on the relationship with "other laws", but it is emphasized that the rules of international law relating to public health shall be identified, interpreted, applied and implemented in harmony with other relevant rules of international law, including but not limited to, international immigration law, the law of the international financial system, and international labor law.

106. Thus, based on the above, the following Draft Article is proposed:

Draft Article 7: Interrelationship among Relevant Rules

1. The rules of international law relating to epidemics and other relevant rules of international law should, to the extent possible, be

²⁵⁵ Amin von Bogdandy and Pedro A. Villarreal, "International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis", *Max Planck Institute for Comparative Public Law and International Law*, MPIL Research Paper Series, No. 2020-07, (26 March 2020), pp. 24-25.
<<https://ssrn.com/abstract=3561650>>.

²⁵⁶ ILO Convention Concerning Occupational Safety and Health and the Working Environment, 1981, No. 155; See also *Charter of Fundamental Rights of the European Union*, art 35 on Fair and Just Working Conditions. David P. Fidler, "International Law and Global Public Health", 48 *The University of Kansas Law Review* (1999), pp. 37-38.

²⁵⁷ *Charter of Fundamental Rights of the European Union*, Article 32 on Prohibition of Child Labor and Protection of Young People at Work.

identified, interpreted, applied and implemented as coherent obligations, in line with the principles of harmonization and systemic integration, in order to avoid conflicts between obligations, as well as the due diligence obligation and the need for international solidarity and cooperation in responding to the threats of epidemics. “Other relevant rules” include *inter alia* those related to international environmental law, international trade and investment law, international transport law, international law on peace and security and international humanitarian law.

2. States should, when developing new rules of international law relating to the protection of persons and communities from epidemics seek to avoid conflicts with other relevant rules of international law.

107. In order to address some of the concerns raised by the Members of the 12th Commission on the relation between the above General Principles and the IHR, the following saving clause has been added.

Draft Article 8: Saving Clauses

1. The general principles stated above do not undermine additional, more specific obligations of prevention, disclosure and compliance that commit States to cooperate with other states and with international organizations that States have undertaken in relation to epidemics pursuant to international convention whether under the International Health Regulations 2005 or otherwise.
2. These general principles are without prejudice to the State’s human rights and humanitarian law obligations, including the prohibition to go beyond the limitations or derogations authorized by these bodies of law.

V. Risk Reduction and Preparedness

108. The present work is concerned with the protection of persons from epidemics. The temporal scope of the draft articles has three phases: *before* the epidemic, *during* the epidemic and *after* the epidemic.²⁵⁸ The temporal phases would address legal measures taken to protect persons before, during and after an epidemic. Such an approach would allow us to

²⁵⁸ This temporal demarcation was adopted in the ILC topic on the “Protection of Persons in the Event of Disasters” (before, during and after disasters), *Official Records of the General Assembly, Seventy-first session, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, Chapter IV, pp. 12-73*. The same approach has been taken for the topic “Protection of the Environment in relation to Armed Conflicts” (before during and after armed conflicts), *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10, Report of the International Law Commission, Seventy-first session, 2019, Chapter VI, pp. 209-296*.

identify concrete legal issues relating to the topic that arise at the different stages of an epidemic, which would facilitate the development of the draft articles. Nonetheless, the temporal distinction should not be taken too rigidly, since some of the obligations and recommendations addressed in one of the phases may, at least in part, overlap with those in other phases.

109. In the pre-epidemic phase, States and international organizations, as well as all the people at large, have the duty to prevent and prepare for the risk of outbreak and spread of epidemics. In this phase, States' obligation of risk reduction should first be highlighted.

1. States' Obligation of Risk Reduction

110. This section addresses the obligation of States to reduce the risk of epidemic outbreaks at all times, including in particular in the pre-epidemic phase, that is, before the occurrence of epidemic events. While areas of high population density or frequent human–animal interaction may be more likely to be the source of an epidemic, an epidemic can occur at any time in any place. Therefore, all States are under the obligation to implement measures reducing the risk of an outbreak. This obligation is the concrete manifestation of Draft Article 4 which provided for the obligation of States as a general principle.²⁵⁹ WHO IHR Article 5 provides for the obligation of each State party to “develop, strengthen and maintain ... the capacity to detect, assess, and notify and report events ...” Further, IHR Article 43 applies a risk analysis framework to the imposition of additional health measures by member States. Paragraph 2 states that members “shall base their determinations upon: scientific principles... and available scientific evidence of a risk to human health[.]”

111. It will be recalled that there is an obligation under the right to health in Article 12 (2)(c) of the ICESCR²⁶⁰ to prevent and control epidemic diseases. The ICESCR practice would encompass preventive health policies, adequate health goods/facilities/services, as well as health-promotion measures (e.g. addressing inequality and underlying social determinants). Thus, the epidemic risk reduction should also be

²⁵⁹ Draft Article 5 reads: “All States have the obligation to prevent, reduce and control the harm of epidemics and to exercise due diligence in taking appropriate measures in accordance with applicable rules of international law”. See also Article 12(2)(c) of the ICESCR – there is an obligation to prevent, treat and control diseases under the right to health (incl. epidemic but also endemic, occupational, and other diseases). ohchr.org/en/professionalinterest/pages/cescr.aspx

²⁶⁰ ICESCR Article 12(2). “The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases”.

undertaken in the context of broader international law obligations to protect and promote the right to health, including the obligation to prevent, treat and control epidemic, endemic, occupational, and other diseases in the ICESCR Article 12(2)(c), as well as the risks to health recognized in international environmental law and other relevant areas of international law.

112. Article 16 of the Cartagena Protocol to the Convention on Biological Diversity states that “[m]easures based on risk assessment shall be imposed to the extent necessary to prevent adverse effects of the living modified organism on the conservation and sustainable use of biological diversity, taking also into account risks to human health, within the territory of the Party of import.” While only applying to the transboundary movement of living modified organisms, the Protocol’s Article 3(h) clarifies that this definition includes virus samples.²⁶¹

113. It has been stressed that, in view of the evidence of increased likelihood of new pathogens emerging from the effects of human ecological disruption causing new zoonoses, it is necessary to devise new methods of international cooperation to address the root environmental and zoonotic causes of epidemics.²⁶²

114. Article 3 of the ILC’s Articles on the Prevention of Transboundary Harm states that “[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof[,]” with “harm” defined as “harm caused to persons, property or the environment” in Article 2(b). Given this broad definition, the spread of an outbreak to another State can be considered “harm”; whether it is “significant,” as required, is a fact-dependent determination. More broadly, Article 9 of the ILC’s Articles on Protection of Persons in the Event of Disasters underscores that “[e]ach State shall reduce the risk of disasters by taking appropriate measures ... to prevent, mitigate, and prepare for disasters.” While epidemics are not specifically mentioned in Article 3 on use of terms, defining “disaster” as “a calamitous event or series of events resulting in widespread loss of life [or] great human suffering and distress ... thereby seriously disrupting the functioning of society” would seem to cover at least some epidemics. The IDI

²⁶¹ Article 3 (h) of the Cartagena Protocol provides: “Living organism” means any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids”.

²⁶² Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) Expert Panel on 'Biodiversity and Pandemics,' (November 2020), p. 8. <http://doi.org/10.5281/zenodo.4147318>

Resolution on Humanitarian Assistance defines disaster as including epidemics.²⁶³

115. Evidently, States must undertake to reduce the risk of the spread of epidemics through appropriate and effective legislative, administrative, judicial and other measures. The words “appropriate and effective” are to emphasize that it is not just any general measures that are being referred to, but rather specific and concrete measures aimed at prevention, reduction and control of epidemic risk. What might be “appropriate” and “effective” in a particular case is to be understood in terms of the stated goal of the measures to be taken, namely “to prevent, reduce and control the risk of epidemics”. This is to be evaluated within the broader context of the existing capacity and availability of resources of the State in question as well as available scientific evidence. The fundamental requirement of due diligence is inherent in the concept of “appropriate and effective”. It is envisaged that, for those States that do not already have such a legislative framework in place, the general obligation to reduce the risk of epidemics would also include an obligation to put such a legal framework into place so as to allow for the taking of the “appropriate and effective” measures, as it is generally recognized that such law-based measures are the most common and effective way to facilitate the taking of epidemic risk reduction measures at the domestic level.²⁶⁴

116. It goes without saying that not only the legislative branch of government but also the relevant administrative, judicial and other State organs must be involved for effective implementation of laws and regulations in preparing for the outbreak of epidemics. In taking appropriate and effective measures, it is indispensable to seek cooperation with other States and the relevant international organizations, in particular with WHO.²⁶⁵

117. No draft article is proposed for this section, as its content is already covered by Article 5 on the role of the State above, which is part of the General Principles.

2. Preparedness

118. “Preparedness” in the context of the present draft articles is the notion referring to the knowledge and capacities to be developed by governments, scientists, scientific community, professional organizations,

²⁶³ *IDI Annuaire*, Vol. 70, Part II, Session of Bruges, 2003 (B. Vukas as Rapporteur), para.2.

²⁶⁴ “Protection of Persons in the Event of Disasters”, *Official Records of the General Assembly, Seventy-first session*, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, Article 9, Commentaries (12) and (13), p. 48.

²⁶⁵ See WHO IHR Article 13.

communities and individuals to effectively anticipate and respond to the impacts of likely future occurrence of epidemics. Preparedness action is carried out within the context of risk management and aims to build the capacities needed to efficiently manage all types of emergencies and achieve orderly transitions from response through to sustained recovery. Preparedness is based on a sound analysis of the harm of epidemics and good linkages with early warning systems. However, a lack of scientific certainty should not hinder measures intended to increase a State's preparedness. This "precautionary approach" was well-summarized in the Rio Declaration, which stated in paragraph 15 that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". This is in contrast with the preventative principle described above, which requires evidence of "significant harm".²⁶⁶ The precautionary approach is not limited to environmental law, and is also applied to "threats to public health due to new diseases and techniques".²⁶⁷ The measures to be taken must be supported by formal institutional, legal and budgetary capacities.²⁶⁸ There may be certain overlaps between Draft Articles 15 and 16, because preparedness also refers to risk reduction of the spread of epidemics, but it should not cause any confusion, as there are also some overlapping provisions in the IHR.

119. It should be noted that the IHR Article 13 provides that: "Each State Party shall *develop, strengthen and maintain ... the capacity* to respond promptly and effectively to public health risks and public health emergencies of international concern ..." (emphasis added), which addresses the core concept of preparedness. More concretely, the obligations of States for preparedness include, *inter alia*, the following: obligations related to the creation and design of specific protocols guiding any limitation of rights, the regulations concerning the state of emergency, and suspension of rights in the relevant situations; the adoption of preventive measures which could facilitate speedy isolation or, in the worst scenario, effective and sustained quarantines, and the necessary budget reserves allocated for this purpose; and the establishment of permanent advisory bodies that allow people to

²⁶⁶ Meinhard Schröder, 'Precautionary Approach/Principle' in *Max Planck Encyclopedia of Public International Law* in Rudiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (OUP 2014) para 4.

²⁶⁷ *Ibid.* para 8.

²⁶⁸ See "Terminology on Disaster Risk Reduction prepared by the United Nations Office for Disaster Risk Reduction" in 2009, www.unisdr.org/we/inform/terminology.

participate in the design of health strategies and give legitimacy and general acceptableness to the measures.

120. The following is a non-exhaustive list of other measures for achieving preparedness. The first is that States must promote and develop effective research and monitoring capabilities, which is the basic infrastructure for coping with future outbreaks of epidemics, taking into account their respective circumstances and capabilities and seeking cooperation with other States and the competent international organizations, particularly WHO. Second, it is necessary for States, by promoting the role of scientific organizations, to facilitate the routine exchange of scientific, technical and legal information concerning epidemics and their health and societal impacts associated with possible exposure to such epidemics. Third, States are required to cooperate to provide, within their respective capabilities, appropriate capacity building and technical assistance to other States in need of such assistance. States within their capabilities should promote and facilitate, supported by private sector and other stakeholders as appropriate, development, transfer, access to medical and other knowledge and technologies to effectively implement the present draft articles. It should be noted in this connection that Article 2 of the ICESCR acknowledges that the economic and social rights obligations are to be implemented “individually and through international assistance and cooperation”, and that CESCR General Comment 14 discusses the scope of obligations of assistance for the right to health.²⁶⁹ Fourth, States should promote and facilitate provisions to the public of available information on the health effects of epidemics and the methods for prevention and of education, training and public awareness on the protection of human health from epidemics in collaboration with competent international intergovernmental and non-governmental organizations, as appropriate.

121. Establishment of an adequate health system is indispensable which should be supported by the infrastructure of scientific institutions, laboratories and hospitals. In the context of preparedness, there is a clear analogy to the environmental impact assessment (EIA) requirement found in general international law.²⁷⁰ States constructing hospitals, laboratories,

²⁶⁹ On the linkages between the IHR core capacity and the minimum core obligations under the ICESCR, see Brigit Toebes, “States’ Resilience to Future Health Emergencies: Connecting the Dots between Core Obligations and Core Capacities”, *ESIL Reflection*, Vol. 9, Issue 2, 2020. <https://esil-sedi.eu/esil-reflection-states-resilience-to-future-health-emergencies-connecting-the-dots-between-core-obligations-and-core-capacities/>

²⁷⁰ In the context of epidemics, an EIA may more properly be called an “*epidemic* impact assessment” rather than an “environmental impact assessment”. This naming is by Mr. Andrew Van Duyn.

and medical production factories must consider how those installations will effectively prevent and contain epidemic outbreaks.²⁷¹ This obligation applies to any facility that may increase the likelihood of transboundary epidemics, such as food processing factories dealing with wild animal meat, big food markets and even the related transportation facilities. The ICJ held in the *Pulp Mills* case that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”²⁷² In the *Border Area and Construction of a Road* joined cases, the ICJ clarified the *Pulp Mills* holding, noting that “the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.”²⁷³ Article 7 of the ILC Articles on Prevention of Transboundary Harms requires that “[a]ny decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.” Article 9(b) of the ILC Articles on Protection of Persons in the Event of Disasters also notes that “disaster risk reduction measures include the conduct of risk assessments”.²⁷⁴

²⁷¹ For instance, a medical photographer was killed by exposure to smallpox at the University of Birmingham Medical School even after that disease was eliminated, as samples had been kept for study. Pallen, Mark (2018). *The Last Days of Smallpox: Tragedy in Birmingham*. UK: Amazon. ISBN 9781980455226; Shooter, R. A. (July 1980). Report of the investigation into the cause of the 1978 Birmingham smallpox occurrence (PDF) (Report). London: H. M. Stationery Office. in 1979 an anthrax epidemic in Sverdlovsk (now Ekaterinburg), Russia has been attributed to an accident at a nearby Soviet military microbiology facility. Stefan Riedel, *Biological warfare and bioterrorism: a historical review*, 17 *BUMC Proceedings* 400, 404 (2004). See also, Cassandra Willyard, *Biosafety bungle leads to bird flu contamination*, 15 *Nature Medicine* 349 (2009), doi:10.1038/nm0409-349a (reporting a biosafety accident in the Czech Republic which involved ferrets being accidentally infected with avian influenza); Russian Scientist Russian Scientist Dies after Ebola Lab Accident, 304 *Science* 1225 (2004), <https://science.sciencemag.org/content/304/5675/1225.2> (reporting the death of a Russian scientist after being accidentally exposed to Ebola); Center for Disease Control (CDC), *CDC Lab Incident: Anthrax* (July 19, 2014) <https://www.cdc.gov/anthrax/news-multimedia/lab-incident/index.html> (reporting a lab accident with Anthrax that resulted in a moratorium on the transfer of any infectious agents – active or inactive – from any biosafety level 3 or 4 laboratories).

²⁷² *ICJ Reports 2010*, p. 78, para. 193.

²⁷³ *ICJ Reports, 2015*, p. 665, para. 153.

²⁷⁴ Note that, in public health, there is a practice of ‘health impact assessments’ (HIAs). These are typically about non-health policies (e.g. urban design, new construction) and the impact they have on health (e.g. before building a road, an HIA would require looking at the exposure of the nearby population to air and noise pollution, possible urban heat island

122. In order to achieve the objective of protecting persons from the danger of epidemics, it is imperative to cultivate, through education and training, certain personal behavior, including maintaining appropriate sanitation and physical distancing. These behaviors should be encouraged and supplemented by governmental strategies and policies necessary for preparedness and prevention in all States. This would certainly lead to recognition of the duty to reduce proactively health risks. It may be noted that the 2019 UN General Assembly resolution on universal health coverage,²⁷⁵ includes commitment to build such a culture: “Prioritize ... *disease prevention*, ... enabling people, through their life course ... to improve *health-seeking behaviour*” (emphasis added). In the nuclear field, the 1994 Convention on Nuclear Safety provides for a number of measures to ensure the safety of nuclear activities. The Convention’s Preamble states: “*Desiring* to promote nuclear safety culture”, and this notion of “nuclear safety culture” has been developed by the International Atomic Energy Agency (IAEA).²⁷⁶ Similar vigilance should be considered indispensable for States, organizations and people at large in relation to the prevention of epidemics and the protection of health more generally.²⁷⁷ The idea of an “epidemic prevention culture” would certainly promote greater implementation of, and effective compliance with, the legal obligations elucidated by the present draft articles.

123. In view of the above, the following Draft Article is proposed:

Draft Article 9: Preparedness

1. States shall develop, strengthen and maintain the capacity to respond promptly and effectively to the risk of the spread of epidemics, including overall strategies, policies, and institutional structures, in particular, monitoring and early warning systems, coordination mechanisms among government ministries and guidelines on

effects from the asphalt, as well as the impact it would have on physical activity as compared to other forms of transport). https://www.who.int/topics/health_impact_assessment/en/

²⁷⁵ A/RES/74/2 (18 October 2019). “27. Prioritize health promotion and disease prevention, through public health policies, good governance of health system, education, health communication and health literacy, as well as safe, healthy and resilient cities, enabling people, through their life course, including among others, adolescents, to have increased knowledge to take informed health decisions and improve health-seeking behavior.”

²⁷⁶ See the Report of the International Nuclear Safety Advisory Group (1991), INSAG Series 4, which describes the concept of “nuclear safety culture” in connection with nuclear plant safety in relation to both organizations and individuals engaged in nuclear power activities. <<https://www.iaea.org/publications/3753/safety-culture>>

²⁷⁷ If one sees a fire, even a small fire, one would, even without knowing the cause of, or responsible party for, the fire, immediately report it to the authorities. It is believed that this is the sort of the attitude required for epidemics not only among the professionals but also the public at large.

containment and control measures. For preparedness, consideration should be given by States, while fully respecting human rights of persons affected, to the creation and design of specific protocols concerning the state of emergency in relevant situations, the adoption of preventive measures which could facilitate speedy isolation or, in the worst scenario, effective and sustained quarantines, along with the necessary budget reserves allocated for this purpose.

2. States shall establish, within their capacity, scientific institutions, laboratories and hospitals to prepare for possible outbreaks of epidemics. In so doing, States have the obligation to conduct an environment impact assessment (EIA) on these and other relevant facilities in an open, transparent manner.
3. States shall provide adequate health education and training of the population for the prevention of epidemics with a view to promoting the epidemic prevention culture.

VI. Obligations of the Affected States during Epidemics

1. Obligation of the Affected States to Ensure Information Disclosure

124. Initial actions by the affected State are crucial in preventing, reducing and controlling the risk of epidemics, and for this purpose, it is of paramount importance for the State to notify to WHO immediately about the occurrence of an epidemic. The IHR Article 6 requires the State to “assess events occurring within its territory” and to “notify WHO ... within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern”. Even if the State is not fully certain about the emergence of an epidemic, the State is required to inform WHO if it faces an “unexpected or unusual” public health phenomenon. Thus, the IHR Article 7 provides that: “If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information.” It should also be stressed that the States should communicate clear and reliable data to the public and the international community in accordance with the IHR 2005 – especially with regard to its Annex 2.

125. The WHO collects all necessary information from all available sources (IHR Article 9), and requests the affected State to verify it (Article 10). The State Party is required to reply to the request by WHO within 24 hours, and supply the relevant public health information within 24 hours. This verification would certainly give significant pressure on

the affected State that may be reluctant for some reason to acknowledge the occurrence of a public health emergency.

126. The initial information normally comes from the medical profession, which, however sporadic and seemingly premature it may be, must be treated with due respect. The State and local authorities must not impede the free flow of information on the possible occurrence of an epidemic event, regarding which the freedom of expression and communication and the freedom of the press must be guaranteed.²⁷⁸ In this context, it must be stressed that the role of national and international medical associations, practitioners and scientists, are essential to information sharing and to meet the full scope of States' obligations. It must also be taken into account to protect the privacy of the affected persons.²⁷⁹ Equally essential is the role of the press. It goes without saying that, not only in the affected States but also in all other States the freedom of the press must be guaranteed in accordance with international law.

127. Thus, the following Draft Article is proposed:

Draft Article 10: Obligation of the Affected States to Ensure Information Disclosure

1. If a State has *prima facie* evidence of an unexpected or unusual public health event within its territory or areas under its jurisdiction or control, the State must notify, in accordance with applicable international regulations, WHO, other States and relevant international organizations by the most rapid means of communications available, as well as any public health measure implemented in response to those.
2. The affected State must guarantee prompt disclosure of relevant information and complete transparency as well as full and unimpeded access to the information by the public. For this purpose, the affected State must guarantee the freedom of expression and communication of individuals within its jurisdiction and that of the press must be protected in relation to information regarding the outbreak of the epidemics.
3. States must guarantee the privacy of affected persons in accordance

²⁷⁸ These are the freedoms guaranteed under the ICCPR, which must also be respected, in connection with epidemics, by the non-signatory States.

²⁷⁹ See "The Right to Privacy in the digital age", Human Rights Council resolution 34/7, April 2018.

<https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/INCLO.pdf>; ILA Committee on Global Health Law, Interim Report for Kyoto Conference, 2020, (on the use of AI technology), paras. 10-49, Global Health Law Kyoto 2020 Interim FINAL.docx (155KB)

with international law.

2. Emergency Measures by the Affected States

128. The affected State must implement without delay necessary measures to avoid the spread of an epidemic in accordance with the advice of the competent experts. These measures may include screening measures, testing and contact tracing, vaccination or treatment where available, entry restriction into its territory, exit restriction from its territory, isolation, quarantine or social distancing in parts or whole of its territory. These are not limited to border measures; they may also include testing, tracing, and quarantine/isolation/treatment of suspected individual cases and ensuring effective follow-up of those cases, whether within a State's territory or in cooperation with other countries in cases where there may have been cross-border movement.²⁸⁰ The measures must be taken in accordance with scientific evidence, the laws and regulations of the State, and also the relevant rules of international law, particularly the rules on human rights protection provided in the relevant human rights treaties and the IHR. The duty to comply with the prohibition of collective expulsion and the prohibition of refoulement should be recalled here.²⁸¹ It may be noted that, under the IHR, these measures are to be no more restrictive of travel and trade than needed, though the assessment is not always easy in concrete cases.²⁸²

129. The WHO IHR Articles 15-39 provide a wide range of measures to be considered by the affected State. Article 18, paragraph 1, for instance, provides for a number of measures that could be taken by the affected States, including such measures to require medical examination, place suspect persons under public health observation, implement quarantine, implement isolation, refuse entry of suspect and affected persons and implement exit screening and/or restrictions on persons from affected areas, etc. Additional health measures under Article 43 must be based on scientific evidence and WHO recommendations. It is not possible to

²⁸⁰ Diseases like yellow fever or measles where there is a vaccine, as well as novel diseases – e.g. in the case of polio, there is probably no need for border restrictions by affected States but there might be a duty to vaccinate (and/or negotiate with armed groups for a ceasefire to vaccinate, given the typical fact scenario of polio outbreaks).

²⁸¹ See para. 102 above. In this regard, it must be stressed that States have the obligation to institute a refugee status determination process, in accordance with international law.

²⁸² In previous outbreaks, such as Ebola or HIV/AIDS, many restrictions were not scientifically justified with the consequences of interrupting transport links required for humanitarian aid or stigmatizing people with the disease. See *Statement on the meeting of the International Health Regulations (2005) Emergency Committee for Ebola virus disease in the Democratic Republic of the Congo on 17 July 2019*, available at <https://bit.ly/33OsVOg>; Bradley Condon and Tapen Sinha, *Global Lessons from the AIDS Pandemic. Economic, Financial, Legal and Political Implications* (Springer, 2008).

enumerate the specific measures that the affected State may take, as they may be different depending on concrete cases and situations. For example, if a foreign ship arrives at its port with passengers and crew members who may be suspected to have been infected by an epidemic, the port State has the right and duty to take the measures that it considers necessary upon the persons (passengers and crew members), while fully protecting human rights of these persons. They should be guaranteed to receive adequate medical care and safe repatriation. The joint statement of IMO-ICAO-ILO expressly designates “seafarers, marine personnel, fishing vessel personnel, offshore energy sector personnel, aviation personnel, air cargo supply chain personnel and service provider personnel at airports and ports as key workers, and on facilitation of crew changes in ports and airports” for proper treatment and safe repatriation.²⁸³

130. The measures taken by the State must immediately be shared with WHO, other States likely to be affected by the measures, and other relevant international organizations.²⁸⁴ States bear the obligation to publicly declare an emergency *if* the conditions for such declaration are present—namely imminent or real threat to the life of a nation—as well as the need to comply with the required notifications to the international community. Even without an emergency, a State can restrict the exercise of rights; however, this can happen only to the extent that it is strictly required by the exigencies of the situation and fully respecting the principle of non-discrimination. Article 16 of the ILC Articles on Transboundary Harms underscores that States of origin “shall develop contingency plans for responding to emergencies, in cooperation, where appropriate,” with likely affected States and competent international organizations. Consultations between the States and other States must be conducted, if necessary. Other States must not take these measures as “unfriendly acts” of that State.

131. On the basis of the foregoing, the following Draft Article is proposed:

Draft Article 11: Emergency Measures by the Affected States

1. The affected State must take, in accordance with its laws and regulations, emergency measures such as entry and exit restrictions, testing/screening and contact tracing programmes,

²⁸³ IMO, Circular letter No 4204/ Add. 18 (26 May 2020)

²⁸⁴ It should be recalled that State parties to the ICCPR must, in accordance with article 4(3), immediately notify “the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.”

treatment or vaccination programmes where available, isolation, quarantine or social distancing in parts or whole of its territory in order to avoid the spread of the epidemic, which must be taken in conformity with scientific evidence and applicable rules of international law, including human rights law, taking into consideration the needs of all the vulnerable groups. The measures must fully comply with the requirements of necessity, proportionality, and non-discrimination, as well as their timely implementation.

2. Information on measures taken by the State must be immediately transmitted to WHO, to other States likely to be affected by the measures and to other international organizations.

3. Obligation to Seek External Assistance

132. Paragraph 1 is modelled after Article 11 of the ILC Articles on the Protection of Persons in the Event of Disasters,²⁸⁵ which provides: “To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance...” In case of a disaster, it is easier to foresee whether the State can deal with the situation by itself or it exceeds national response capacity because the scale of the harm is visible and largely calculable, but in the case of epidemics, it is often not so “manifestly” evident whether the harm exceeds national capacity or not due to its invisibility and uncertainty. Thus, paragraph 1 provides “if the harm of the epidemic *appears likely* to be exceeding national response capacity”. The point is that the State must not wait until it is totally overwhelmed by the epidemic before requesting external assistance. Thus, the obligation of the affected State to seek external assistance is significantly stronger in epidemics than in disaster situations, requiring more proactive and flexible actions. The role of the precautionary approach is again emphasized in this context.

133. It is necessary to initiate negotiations/consultations to seek external assistance without any hesitation. It should never be considered disgraceful for the nation to seek assistance in the case of epidemics. The imperative is to avoid collapse of medical services in the affected State caused by an overwhelming number of patients visiting hospitals within a short period of time. The term “seek” is found in the Resolution of the IDI on Humanitarian Assistance (Article III, paragraph 3),²⁸⁶ which is considered more appropriate than the term “request”. External assistance to be sought may include receiving medical personnel, medicine, medical

²⁸⁵ *Official Records of the General Assembly, Seventy-first session, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, p. 53.*

²⁸⁶ *IDI Annuaire, Vol. 70, Part II, Session of Bruges, 2003, p. 263.*

equipment and other supplies, tools, machines, clothing, bedding, vehicles and tents.

134. The WHO IHR Article 10, paragraph 3, provides that WHO shall offer to collaborate with the States affected by an event constituting a public health emergency of international concern is occurring. If the State Party does not accept the offer of collaboration, there is not much that WHO can do. However, IHR Article 10, paragraph 4, provides that WHO may, when justified by the magnitude of the public health risk, share the information with other States Parties.

135. It should be proper to oblige the affected State to take the necessary measures to “facilitate” the prompt and effective provision of external assistance. This is taken from Article 15 of the ILC Articles on the Protection of Persons in the Event of Disasters.²⁸⁷ In order to receive external assistance, it goes without saying that the affected State needs to make the necessary legislative and administrative arrangements to facilitate the external assistance “within its national law”. Measures may also include actions taken under emergency legislation, as well as permissible temporary adjustment or waiver of the applicability of particular national legislation or regulation, where appropriate. It can also extend to practical measures designed to facilitate external assistance, provided that they are not prohibited by national law. For instance, if a group of medical doctors is invited to assist, the affected State must arrange their visa and entry procedures (privileges and immunities in some cases) and its national law relating to the license for medical practice and work permits may need to be amended or suspended for facilitating recognition of foreign credentials. The affected State must thus consider allowing for temporary non-applicability of national law that might otherwise unnecessarily hamper assistance in the critical period of an epidemic. Certain facilitation measures may also remain necessary even after the need for assistance has passed, in order to guarantee an efficient and appropriate withdrawal of the relief personnel.²⁸⁸

136. It should be appropriate to establish the obligation of the affected States to ensure protection of relief personnel, and equipment and goods for the purpose of external assistance. Article 16 of the ILC Articles on the Protection of Persons in the Event of Disasters²⁸⁹ is a good model to follow. Since the relief personnel, equipment and goods are present in the

²⁸⁷ *Official Records of the General Assembly, Seventy-first session, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 65-67.*

²⁸⁸ See Commentary (2) to Article 15 of the ILC Articles on the Protection of Persons in the Event of Disasters, *Ibid.*, p. 66.

²⁸⁹ *Ibid.*, p. 67-70.

affected States at its request for assistance, they must be accorded with full protection. This obligation must be known to all the relevant organs of the State, and they must refrain from exercising any harmful conduct. The affected State must also ensure protection from any adverse conduct by its citizens and non-State actors and groups. The medical doctors and workers engaged in epidemics may sometimes be target of unwarranted criticisms and harassing attacks in these tense situations, which should be avoided by all means.

137. In view of the above, the following Draft Article is proposed:

Draft Article 12: Obligation to Seek External Assistance

1. The affected State must seek external assistance from other States and relevant international organizations, particularly WHO, as well as other potential assisting actors, without delay, if the harm of the epidemic appears likely to exceed national response capacity.
2. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance.
3. The affected State shall take appropriate measures to ensure protection of relief personnel, and equipment and goods present in the territory or areas under its jurisdiction or control, for the purpose of providing external assistance.

VII. Obligations of Other States during Epidemics

1. Preventative Measures

138. Upon receiving information on the outbreak of an epidemic, other States shall undertake preventative measures so that the epidemic will not be transferred to its own State. The WHO Director-General's temporary and standing recommendations (IHR Articles 15 and 16), are intended to serve a coordinating purpose in such situations. The recommendations are not binding²⁹⁰ but do have implications for obligations under article 43 of the IHRs, discussed below. Note also the IHR Article 43 requires consideration of scientific evidence and WHO guidance. It does not require WHO recommendations to be followed, but procedurally the State must consider the factors listed. While today vaccine is available for some diseases such as measles, polio and Ebola, if there is no vaccine or directly effective medicine available, the classic "non-pharmaceutical"

²⁹⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4911720/>

methods,²⁹¹ such as border closure, quarantine and social distancing, that have been employed since the ancient times, may be the only available means of protection from a new epidemic. Other States must take all necessary emergency measures to ensure safety of its population. Deployment of vaccines, diagnostics and medical responses must be vigorously pursued by States. It must be stressed that, under human rights law, States have a duty of prevention towards individuals. This is the case, for example, of article 1(1) of the American Convention on Human Rights that creates an obligation for States to “guarantee” the enjoyment of certain rights.

139. The WHO IHR Articles 15-39 provide in detail for a wide range of preventative measures that States must consider.²⁹² Some States impose these measures as mandatory with penalties for non-complying persons, while other States “request” (albeit most strongly) these measures for voluntary compliance, depending on their constitutional and legal requirements as well as their cultural differences. There is no “one size fits for all” type of application of these measures. Each State must consider the best mix of the measures fit for its people. It should be noted that procedural/proportionality requirements apply under the IHR Articles 42 and 43: While it is permissible to exceed the WHO temporary recommendations and there is policy space for States to consider non-recommended measures, they must act in a non-discriminatory and transparent way, must not interfere with traffic and trade more than necessary, and must notify WHO (and other States) with the rationale and basis for decision-making under Article 43.

²⁹¹ See Neil Ferguson, et al (Imperial College COVID-19 Response Team), “Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand”, 16 March 2020, pp. 14-15.
<https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>.

²⁹² IHR Article 15: Temporary recommendations; Article 16: Standing recommendations; Article 18: Recommendations with respect to persons, cargo, containers, conveyances, goods and postal services; Article 20: Airports and ports; Article 21: Ground crossings; Article 23: Health measures on arrival and departure; Article 24: Conveyance operators; Article 25: Ships and aircraft in transit; Article 26: Civilian lorries, trains and coaches in transit; Article 27: Affected public health observation; Article 31: Health conveyances; Article 28: Ships and aircraft at points of entry; Article 29: Civilian lorries, trains and coaches at points of entry; Article 30: Travelers under public health observation; Article 31: Health measures relating to entry of travelers; Article 32: Treatment of travelers; Article 33: Goods in transit; Article 34: Container and container loading areas; Article 35: General rule (on health documents); Article 36: Certificates of vaccination or other prophylaxis; Article 37: Maritime Declaration of Health; Article 38: Health Part of the Aircraft General Declaration; Article 39: Ship sanitation certificates.

140. The State whose nationals are affected by the emergency measures taken by another State should not take the measures as “unfriendly acts”. The relevant States should engage in negotiations and consultations in order to solve their differences, if any. Sometimes, differences may occur as to the assessment of risk of a given event, which must be made on scientific evidence. However, an evaluation of scientific evidence can itself be controversial in some cases.²⁹³

141. The States taking such emergency measures must inform without delay (that is, within the timeframe specified in the relevant instruments²⁹⁴) other States, WHO and other relevant international organizations. The States must conduct good faith negotiations and consultations with them concerning necessary response coordination, as appropriate.

142. Pursuant to the forgoing, the following Draft Article is proposed:

Draft Article 13: Preventative Measures

1. States other than the affected States shall undertake preventative emergency measures in order to avoid further transmission of the disease. The measures may include closure of the border, travel restrictions and quarantine which must be taken in conformity with scientific evidence and applicable rules of international law, including human rights law, taking into consideration the need of all the vulnerable groups. The measures must fully comply with the requirements of necessity, proportionality, and non-discrimination.
2. The State must inform other States, WHO and other relevant international organizations on the measures taken immediately, and conduct good faith negotiations and consultations with them concerning necessary response coordination.

2. Offer of Assistance

143. Offer of assistance is an expression of the solidarity and cooperation highlighted in the preamble,²⁹⁵ which underlie the whole set of draft articles on the topic. This provision can follow, at least in part, Article 12 of the ILC Articles on the Protection of Persons in the Event of

²⁹³ For example, in the WTO case on *India – Agricultural Products*, the relationship between the risk assessment and scientific evidence requirements was one of the crucial issues in its Appellate Body decision. See, Saggi, Kamal & Mark Wu, “Trade and Agricultural Disease: Import Restrictions in the Wake of the *India – Agricultural Products* Dispute”, *World Trade Review*, Vol. 16, No. 2, 2017, pp. 298-299.

²⁹⁴ See IHR Articles 6 (1), 9 (2) and 10 (2).

²⁹⁵ Preamble, paragraph 2.

Disasters.²⁹⁶ The IHR Article 44 provides for assistance and collaboration between States (paragraph 1) and from WHO (paragraph 2). While WHO must offer assistance to the affected State Party as part of its duty under the IHR and its emergency assistance functions, other States need not offer assistance as a matter of a legal duty.²⁹⁷ As the CESCR General Comment 14 holds: “States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing ... humanitarian assistance in times of emergency... Each State should contribute to this task to the maximum of its capacities.”²⁹⁸ States may do so unilaterally or by request. Offer of assistance is an act which is based firmly on the duty of solidarity. Unlike natural disasters (as typically considered), however, the offer to help contain an epidemic to the affected State is not merely out of solidarity. It is for the State’s own benefit. If the epidemic is controlled and suppressed within the affected State, other States can avoid the spread of the disease to their territories, which will be a tremendous global benefit. It should also be emphasized that the offer must be made “expeditiously”, namely, timeliness, which is essential in coping with epidemics.

144. An “offer” of assistance is not the same as actual “provision” thereof. Such an offer is made essentially voluntarily, and it should not be regarded as interference in the affected State’s internal affairs. This aligns with the 1989 IDI Resolution on the Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States, which proclaimed: “An offer by a State, a group of States, an international organization or an impartial body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened, cannot be considered as an unlawful intervention in the internal affairs of the State.”²⁹⁹

145. It should be recalled that General Comment 14 affirms that “States parties which are members of international financial institutions, notably

²⁹⁶ *Official Records of the General Assembly, Seventy-first session, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 56-59.*

²⁹⁷ There is some recognition of duties to assist in the realization of the right to health under the General Comment 14 of ICESCR, though the extent to which there are extraterritorial obligations to assist in the realization of economic and social rights under the ICESCR is a topic of debate (see e.g. 2012 “Maastricht Principles”: <http://www.lse.ac.uk/humanRights/documents/2012/HRQMaastricht.pdf>)

²⁹⁸ General Comment 14, Paras. 38-41.

²⁹⁹ IDI *Annuaire*, Vol. 63, Part II, Session of Santiago de Compostela, 1989, p. 345, Article 5.

the International Monetary Fund, the World Bank, and regional development banks should take account of public health needs in influencing the lending policies, credit agreements and international measures of these institutions.”³⁰⁰

146. It would be necessary to address the requirement of consent by the affected State to the provision of external assistance in line with Article 13 of the ILC Articles on the Protection of Persons in the Event of Disasters.³⁰¹ Consent to external assistance must not be withheld arbitrarily.³⁰²

147. In view of the above, the following Draft Article is proposed:

Draft Article 14: Offer of Assistance

When external assistance is sought by affected States, other States, along with WHO, the United Nations, and other potential assisting actors, must offer assistance to the affected State in an expeditious manner. The modalities of the provision of external assistance shall be agreed expeditiously between the States concerned.

VIII. Measures in the Post-Epidemic Phase

1. Review and Information Sharing

148. A review conducted in the post-epidemic phase is of paramount importance for preventing similar events in the future. With regard to the performance of WHO and key States, it is the established practice that a Review Committee conducts an inquiry and review of the recommendations made by WHO in accordance with IHR Articles 50 to 53. A Review Committee is composed of individual members who are selected by the WHO Director General. There have been two reports by such Review Committees so far.³⁰³

149. The Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme (IOAC) is also the pertinent organ for

³⁰⁰ Paragraph 39.

³⁰¹ *Official Records of the General Assembly, Seventy-first session*, Supplement No. 10, Report of the International Law Commission, Sixty-eighth session, 2016, pp. 59-63.

³⁰² *Ibid.*

³⁰³ See, *Implementation of the International Health Regulations: Report of the Review Committee on the Functioning of the International Health Regulations (2005) in Relation to Pandemic (H1N1) 2009*, WHA, Doc. A64/10. 2011; *Implementation of the International Health Regulations: Report of the Review Committee on the Role of the International Health Regulations (2005) in Ebola Outbreak and Response*, WHA, Doc. A69/21. 2016. The latter Review Committee Report for the Ebola response pointed to “delays in notification” by national authorities (namely, from Guinea) as one factor for the initial unchecked spread of the virus. The report also underscored WHO’s own delay in raising the alarm.

the work. The Committee consists of seven members drawn from national governments, NGOs and the UN system, each with extensive experience in a broad range of disciplines. Members serve in their personal capacity and will exercise their responsibilities independently of allegiance to a particular State. The main functions of IOAC are as follows: assess the performance of the Organization's emergency work in preparedness, prevention, detection and response; assess the performance of the WHO Health Emergencies Programme (the WHE Programme) key functions in all emergencies, including graded emergencies and infectious disease risks; review the adequacy of the WHE Programme's financing and resourcing; provide advice to the Director-General; and prepare a report on its activities, containing the Committee's conclusions and recommendations, for submission by the Chair of the Committee to the World Health Assembly.³⁰⁴ The IOAC already issued an interim report on COVID-19, with the final results being expected to be issued after the pandemic's peak has receded.³⁰⁵

150. The United Nations may establish a high-level panel to review the performance of WHO and other relevant international organizations, as appropriate. There may be other external reviews to be conducted, as appropriate.

151. With regard to the performance of each key State most seriously affected by the epidemic, the State must, by establishing an independent panel of experts, conduct a thorough review to assess the propriety of its own actions and omissions.

152. While WHO already has a mechanism of monitoring compliance with IHR,³⁰⁶ setting up a mechanism for assessing compliance or non-compliance with international public health law by States after the "facilitative" model in some multilateral environmental agreements (MEAs) may be useful.³⁰⁷ Facilitative procedures may include providing "assistance" to States, since many States may be willing to comply but are unable to do so for lack of capacity. Thus, facilitative measures

³⁰⁴ https://www.who.int/about/who_reform/emergency-capacities/oversight-committee/en/
See also, World health Assembly resolution WHA 73.1, para. 9(10) on independent evaluation.

³⁰⁵ Michael A Becker, "Do We Need an International Commission of Inquiry for COVID-19?", Part I and Part II, EJIL:Talk! (18 May 2020) <<https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-i/>> <<https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-ii/>>

³⁰⁶ <https://www.who.int/gho/ihr/en/>

³⁰⁷ The WHO Framework Convention on Tobacco Control has adopted such a mechanism as well, and is currently a voluntary pilot with a decision on whether or not to adopt a full mechanism scheduled for the Conference of the Parties in 2021.

should be adopted in a transparent, non-adversarial and non-punitive manner to ensure to comply with their obligations so that the States concerned can receive assistance for compliance with their obligations under international law. For applying these measures, the capabilities and special conditions of the States must be taken into account by recognizing the specific challenges that some of the developing countries are facing.³⁰⁸

153. Based on the above, the following Draft Article is proposed:

Draft Article 15: Review and Information Sharing

1. Given that a review conducted in the post-epidemic phase is of paramount importance for preventing similar events in the future, WHO shall conduct a thorough review of its performance in accordance with its Constitution and other applicable procedures. An independent panel of experts may also convene to review the performance of each key State. External reviews may be conducted, as appropriate. All applicable information shall be shared by all States, the relevant international organizations and other relevant stakeholders.
2. Each State that was most seriously affected by the epidemic shall, by establishing an independent panel of experts, conduct a thorough post-epidemic review to assess the propriety of its own actions and omissions.
3. The States shall share all applicable information among themselves and with the relevant organizations and other relevant stakeholders as well as their own populations.

2. International Responsibility of States and International Organizations

154. It is considered necessary for the present Report to touch on the issue of the obligations of States under the primary rules of international law. Issues of State responsibility belong to the secondary rules of international law, namely, that a breach of such obligations by a State entails the responsibility of that State under international law.³⁰⁹

³⁰⁸ See, “Protection of the Atmosphere”, *Official Records of the General Assembly, Seventy-third session*, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, Draft Article 11, pp. 196-198. Shinya Murase, Fifth Report on the Protection of the Atmosphere, A/CN.4/711, paras. 32-43. Pedro A. Villarreal, “Pandemic Intrigue in Geneva: COVID-19 and the 73rd World Health Assembly”, *EJIL: Talk!*, 22 May 2020, <https://www.ejiltalk.org/pandemic-intrigue-in-geneva-covid-19-and-the-73rd-world-health-assembly/>.

³⁰⁹ “Articles on Responsibility of States for Internationally Wrongful Acts”, *Official Records of the General Assembly, Fifty-sixth session*, Supplement No. 10, A/56/10, Report of the International Law Commission, Fifty-third session, 2001, Chapter IV (hereafter ARSIWA).

Prerequisites for seeking responsibility of a State are: (a) the existence of a legal obligation in the existing treaties or customary international law, (b) the attribution of the act to the State.³¹⁰ Additionally, the State invoking responsibility must normally prove, at least for the purpose of establishing standing and claiming reparation/compensation, the establishment of the causal link between the cause and result of the damage, and, that the State has suffered from the damage of the epidemic. In the context of the law relating to epidemics, however, it may be considered that seeking State responsibility for wrongful acts of a State under the current international law might face some difficulties.³¹¹

155. First, international law is concerned only with human activities and is not concerned with natural phenomena such as bacteria and viruses themselves.³¹² It is therefore necessary to prove that certain anthropogenic activities have been the causes of the outbreak and spread of epidemics. Second, international law is not yet well-developed in terms of State's obligations within the WHO law³¹³ as well as outside.³¹⁴

³¹⁰ *Ibid.*, See also, James Crawford, et al., eds., *The Law of International Responsibility*, Oxford University Press, 2010..

³¹¹ Sienho Yee, "To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic—*Lex Specialis* or *Lex Generalis* at Work?", *Chinese Journal of International Law*, Vol. 19 (2020), No. 2, pp. 237–252.

³¹² Oscar Schachter, *International Law in Theory and Practice*, Nijhoff, 1991, pp. 365-368. For instance, international law does not regulate the damage caused by falling meteorites because they are natural phenomena. If, by contrast, a man-made satellite falls, it is covered by a treaty (1972 Convention on International Liability for Damage Caused by Space Objects) or by customary international law (eg. 1978 Kosmos 954 satellite that crashed in Canada). Human mismanagement or failure to contain viruses in laboratories can be, and have already been, the source of epidemics. See footnote 271 above.

³¹³ The substantive obligations relating to epidemics are contained in the WHO's IHR Articles 5 to 14, requiring States to prepare for public health emergencies and coordinate when they occur, which includes the obligations to assess events, inform WHO, verify information from other sources. These obligations are provided, however, in such a way to allow significant discretion for States. They are often obligatory in form but recommendatory in substance. For example, Article 6 provides for reporting obligation within 24 hours but it is only after the State's "assessment" of the event. Article 10 (2) on verification within 24 hours is also ambiguous as it provides only for the reporting on the "status of the event". Non-compliance of these obligations are subject primarily to internal remedies.

³¹⁴ There are not many substantive international law rules relating specifically to epidemics defined in other treaties nor in customary international law, apart from the general obligation of "due diligence" to prevent transboundary harm. See "Articles on Prevention of Transboundary Harm from Hazardous Activities", *Official Records of the General Assembly, Fifty-sixth session*, Supplement No. 10, A/56/10, Report of the International Law Commission, Fifty-third session, 2001, Chapter V, article 3 ("The

Third, even assuming that there were substantive rules in international law applicable to epidemics, the breach of which might entail State responsibility, there would be a problem of causality, namely, identifying the cause of the epidemic and responsible State organs or individuals. There has been no precedent of States invoking the responsibility of other States for the damage caused by epidemics, despite the fact that the world has experienced a number of serious events for centuries. This may be because any State could be an epidemic's "country of origin" of an epidemic, and therefore finds itself under the microscope one day.³¹⁵ Fourth, determining whether the circumstances preclude wrongfulness, such as with *force majeure*, necessity and distress, may be fact-dependent inquiries in the context of epidemics.³¹⁶ Fifth, even if the responsibility is established, a State may have little control over cessation and non-repetition, while reparation/compensation may also be difficult to assess.

156. Despite these difficulties in invoking State responsibility, it should nonetheless be noted that, if the IDI did not touch on this issue at all, it would be a significant omission, which may be considered unjustified. While a few members of the Commission expressed certain hesitation (but not necessarily an opposition) in referring to State responsibility in the present draft articles, some other members stressed the importance of identifying the relevant norms of international law relating to the issue. It was also proposed that a "without prejudice" clause might be desirable, stating: "The provisions of present articles shall not prejudge any question that may arise from international responsibility of a State or of an international organization". However, this may be regarded as a rather evasive approach. It appears proper, therefore, to refer to the issue of State responsibility in a general manner. In any event, it is necessary to avoid, by all means, immediate political controversies in the work of the present topic, and accordingly, caution and prudence are required in referring to the issue of responsibility.

157. That said, the State concerned is required to carefully study the anthropogenic causes of an outbreak, which would be relevant for the purposes of attribution and causation. At a minimum, due diligence

State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof.").

³¹⁵ David Fidler, "COVID-19 and International Law: Must China Compensate Countries for the Damage?", *Just Security* (27 March 2020), <<https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/>>

³¹⁶ See generally, ARSIWA, Article 23, paragraphs 2–3 of the commentaries, which describe the conditions necessary to invoke *force majeure*, and Article 25, paragraphs 15–20 of the commentaries, which describe the conditions necessary to invoke state of necessity. Article 24 on distress may also be relevant.

requires identification of the zoonotic, natural, or human origin of a disease to the extent possible. Furthermore, management of viruses in laboratories is clearly within the scope of the IHR, and mismanagement or failure to contain biohazards and viruses being studied can, and may, be the source of infection.³¹⁷ It is also necessary for the State to examine whether the required information disclosure was appropriately done vis-à-vis WHO, other States concerned and its own population at the time of outbreak of the epidemic.

158. As mentioned in the preamble, it is the “common concern of humankind” to prevent, reduce and control the harm of epidemics, which is also the obligation of all States being characterized as the obligation *erga omnes*, the responsibility of States for the breach of such an obligation may entail, under the future communitarian international law, not only that of a single State in the traditional bilateral relationship but rather that of plural States in the form of joint or shared responsibility.³¹⁸

159. Apart from the “responsibility” of States for internationally wrongful acts, the issue of “liability” of State for “acts not prohibited by international law” (namely, lawful acts) may be relevant to epidemics. Although the ILC attempted to codify the rules on the subject since the late 1970s, it did not succeed in the topic, because it was not possible to find the relevant rules in customary international law, even if the regime of strict liability could be found in some specific treaty provisions. Thus, the ILC decided to elaborate rules on “prevention” rather than “liability”.³¹⁹ Nonetheless, epidemics can occur from activities not prohibited by international law, and the issue need to be studied further.

160. Additionally, a question of the responsibility of an international organization may be raised, if a wrongful act is deemed attributable to WHO as an organization or to the Director General, to other officials or bodies as organs of the organization, as well as the issue of potential joint responsibility of States members and the international organization.³²⁰

³¹⁷ Recall the smallpox incident at the Birmingham laboratory, and other incidents, see footnote 271 above.

³¹⁸ Martins Paparinskis, “The Once and Future Law of State Responsibility”, *American Journal of International Law*, Vol. 114, Issue 4, October 2020, pp. 618-626.

³¹⁹ See, “Articles on Prevention of Transboundary Harm from Hazardous Activities”, *Official Records of the General Assembly, Fifty-sixth session*, Supplement No. 10, A/56/10, Report of the International Law Commission, Fifty-third session, 2001, Chapter V.

³²⁰ “Articles on the Responsibility of International Organizations”, *Official Records of the General Assembly, Sixty-third session*, Supplement No. 10, A/66/10, Report of the International Law Commission, Fifty-sixth session, 2001, Chapter V. It may be recalled that, in the event of cholera outbreak in Haiti in October 2010 which resulted in the deaths of some 10,000 people, the claims commission established under the status of forces agreement rejected the claims made by the victims. The claims filed in the US

Bearing in mind that the Director General's acts (declarations and statements) are based on the discussion and advice of the WHO's Emergency Committee and that he/she is given broad discretion, it may be difficult to attribute his/her acts to wrongfulness and responsibility in light of the existing WHO law. It seems unlikely that such an issue can be raised successfully in the context of WHO IHR or under applicable international law.

161. It may be useful to have a paragraph linking the obligations of States and international organizations with international responsibility in the Draft Article. This is a compromise provision which largely states the obvious, but in the absence of the relevant State practice, it seems difficult to go any further. In view of the above, the following Draft Article is proposed:

Draft Article 16: International Responsibility of States and International Organizations

1. States and international organizations shall ensure that all measures to prevent, reduce and control epidemics are not to be in contravention of international law.
2. A breach of the obligation of a State to prevent, reduce and control of epidemics under international law or to provide early information of the outbreak of epidemics that are attributable to that State entails the responsibility of that State.
3. A breach of the obligation of an international organization to prevent, reduce and control epidemics under international law or to provide early information of the outbreak of epidemics that are attributable to that international organization entails the responsibility of that international organization.

3. Dispute Settlement

162. With regard to international dispute settlement relating to epidemics, it may be appropriate for the present draft articles to first make a general declaration of the States' obligation to settle their disputes by peaceful means in line with the ILC Draft Guideline 12 on the Protection of the Atmosphere.³²¹ It would be necessary to use the

domestic courts were also rejected on account of the immunity of the UN (UN Charter, Article 105; Convention on the Privileges and Immunities of the UN, Article 2 (2)). See, Melina Garcin, "The Haitian Cholera Victims against the United Nations", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 75, 2015, pp. 671-705; See also footnote 333 *infra*.

³²¹ See the ILC project on the Protection of the Atmosphere. *Official Records of the General Assembly, Seventy-third session, Supplement No. 10, Report of the International Law Commission, Seventieth session, 2018, Chapter VI, pp. 198-200.*

expression “between States” in order to clarify that the disputes being referred to here are inter-State in nature and also to highlight various pacific means of settlement such as negotiation, inquiry, mediation, conciliation, arbitration and judicial means, resort to regional agencies or arrangements, or any other peaceful means of their own choice, that may be preferred by the States to settle disputes relating to epidemics. The paragraph is not intended to interfere with or displace existing dispute settlement provisions in treaty regimes, most notably the IHR provisions, which will continue to operate in their own terms.

163. The IHR Article 56 provides for settlement of disputes: “In the event of a dispute between two or more States Parties concerning the interpretation or applications of these Regulations”, the Parties shall seek to resolve the dispute “through negotiation or any other means of their own choice, including good offices, mediation or conciliation” (paragraph 1). If the disputes are not settled by these means, Parties concerned “may agree to refer the disputes to Director-General” (paragraph 2). Paragraph 5 provides that a dispute between WHO and one or more State Parties must be submitted to the Health Assembly. Paragraph 3 provides for inter-State dispute settlement in the form of arbitration under the Permanent Court of Arbitration (PCA) Optional Rules, but this has never been used by States in the history of IHR.³²² There is thus no accumulated case law. The dispute system adopted by the IHR is predominantly non-judicial type of procedures that are short of demonstrating clear limits to lawful State conducts. The IHR Article 56, paragraph 4, allows States Parties to resort to dispute settlement mechanisms of other international organizations or of any international agreements, which means that the IHR is an open system. As there are no other international dispute settlement mechanisms within WHO dealing with public health³²³ applicable to epidemics, the openness of the IHR system may hopefully lead to wider use of other fora for dispute settlement.

³²² Adam Kamradt-Scott, “The International Health Regulations: Strengthening Their Effective Implementation and Utilization”, *International Organizations Law Review*, Vol. 16, 2019, pp. 242-271; Amin von Bogdandy and Pedro A. Villarreal, “International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis”, Max Planck Institute for Comparative Public Law and International Law, *MPIL Research Paper Series*, No. 2020-07, 26 March 2020, <<https://ssrn.com/abstract=3561650>>

³²³ Though unrelated to epidemics, the 2003 WHO Framework Convention on Tobacco Control provides for dispute settlement mechanism for solving disputes between the parties (Article 27, paragraph 2, on “ad hoc arbitration” as compulsory) but the Parties, but no procedures have not yet been voted in favor.

164. Article 75 of the WHO Constitution provides that “[a]ny 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 ...”. It may however be difficult, if not impossible, to claim that a dispute arising under the IHR could be construed as a question of interpretation or application of the WHO Constitution. Nonetheless, as a general matter, it would be desirable for States to consider referring their legal disputes relating to IHR to the International Court of Justice under their mutual consent.

165. Article 76 of the WHO Constitution provides that “... the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization”, for which the UN General Assembly has authorized WHO under the Agreement between the UN and WHO of 1948, Article X, paragraph 2. The WHO requested advisory opinions of the Court in two occasions, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980), and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. In the latter case, the Court declined to entertain the request because the question asked by WHO did not arise within the scope of activities of WHO itself.³²⁴

166. As discussed in previous sections, international dispute settlement on epidemics can take place in connection with international trade (WTO dispute settlement), investment (ICSID and others), law of the sea (ITLOS) and human rights (human rights committees and courts). The ICAO dispute settlement may also be employed. Dispute settlement on epidemics can also take place in regional organizations and arrangements.³²⁵

³²⁴ Sandrine de Herdt, ‘A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic’ EJIL:Talk! (20 May 2020) <<https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>>

³²⁵ So far, there have been very few cases reported that are related to epidemics. The WTO Appellate Body report on *Brasil—Measures Affecting Imports of Retreaded Tyres* DS332, 3 December 2007, makes references to some infectious diseases: Para. 119. “At the end of their useful life, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health. Specific risks to human life and health include: (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; ...”. Para. 179 also stated: “In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases “is both vital and important in the highest degree”. See, I. Van Damme. “III. Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Adopted on 17

167. It has proved that the experiences of the Law of the Sea Convention have been useful in the settlement of disputes. Article 283 of the Convention provides that when a dispute arises between States, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. It also provides in Article 284 that a State which is a party to a dispute may invite the other party or parties to a mutually agreed conciliation procedure. Further, the Convention's Annex VIII Special Arbitration, Article 1 (Institution of Proceedings) provides for a special arbitral procedure under the auspices of the Permanent Court of Arbitration and in accordance with the agreement reached by the party or parties involved in the controversy.³²⁶ These provisions should be considered appropriate for the present Draft Article.

168. Draft Article 5 above provides for the obligation of "all States" to prevent, reduce and control the harm of epidemics." This is an obligation *erga omnes* owed to the international community as a whole under general international law, and also an obligation *erga omnes partes* under a multilateral treaty, such as the WHO IHR in the present case.³²⁷ There is however a disconnect between the substantive and procedural law in contemporary international law. There is generally no procedural system which enables a (non-injured) third State to claim its standing before international courts or tribunals on the basis of obligations *erga omnes*, while, in the case of *erga omnes partes*, the standing may be admitted, depending on the treaty provision in question, if the "common interests" are based on *erga omnes partes*.³²⁸

December 2007," *International and Comparative Law Quarterly*, Vol. 57, 2008, pp. 710f.; K.R. Gray. "Brazil – Measures Affecting Imports of Retreaded Tyres" (2008) 102:3 *American Journal of International Law*, Vol. 102, No. 3, 2008, pp.610f.; Julia Qin. "WTO Panel decision in Brazil - Tyres supports safeguarding environmental values," *ASIL Insights*, 23:11, 2007,

<<https://www.asil.org/insights/volume/11/issue/23/wto-panel-decision-brazil-tyres-supports-safeguarding-environmental>>; Philippe Sands, et al. *Principles of International Environmental Law*, 4th ed, Cambridge University Press, 2018, pp 867-869.

³²⁶ See, Myron H Nordquist, Rosenne Shabtai & Louis B Sohn, eds. *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (Martinus Nijhoff, 1989), pp 28-31, pp 32-34, pp 440-452.

³²⁷ See the Resolution adopted by the IDI in 2005 on "Obligations *erga omnes* in international law" (5th commission, Judge Giorgio Gaja as Rapporteur, *Annuaire, IDI*, 2005.

³²⁸ In contrast to the 1966 *South West Africa* judgment which denied the claimants' standing under the League of Nations Mandate (*South West Africa (Ethiopia v. South Africa)*, Second Phase, Judgment of 18 July 1966, *I.C.J. Reports 1966*, para. 33), the 2012 *Obligation to Prosecute or Extradite* judgment admitted Belgium's standing by stating that "[a]ll the States parties 'have a legal interest' in compliance with them in any given case since it is an 'obligations *erga omnes partes*' under the Torture Convention (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v.*

169. It is important to recognize that disputes relating to epidemics would be highly “fact-intensive and science-dependent”, and therefore that presenting reliable scientific evidence is the key to successful resolution of the disputes. This is true not only in arbitration and judicial settlement but also in non-judicial methods such as negotiation and conciliation. Complicated scientific and technical issues have been raised in disputes relating to international environmental law, and this will also be true in epidemics-related disputes, which typically requires specialized expertise to contextualize or fully grasp the issues in dispute. In the WTO dispute settlement on *India – Measures Concerning the Importation of Certain Agricultural Products*, the Panel decided to seek advice on certain aspects of the dispute from experts and international organizations as with the majority of SPS cases. The Panel consulted with the OIE on the interpretation of the OIE Terrestrial Code and with three individual experts on AI surveillance regimes with particular respect to India's domestic measures and its disease situation. The Panel found that India was inconsistent with SPS requirements, which was upheld by the Appellate Body.³²⁹

170. If a dispute on an epidemic goes to an arbitration or judicial settlement with the consent of the parties, the proper use of scientific experts is crucially important.³³⁰ It may be desirable to employ scientists not as counsels but as experts appointed by the parties (party-appointed experts). Ideally, the courts and tribunals may be encouraged to appoint them as their own experts (court-appointed experts) to solve disputes on epidemics.³³¹

Senegal) Judgment of 20 July 2012, I.C.J. Reports 2012, para 68). This was echoed by the 2020 provisional measures order in the recent *Genocide Convention* case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 23 January 2020, paras 39–42). See, Hugh Thirlway, *The Sources of International Law*, Oxford University Press, 2013, pp. 143-153.

³²⁹ WT/DS430/R and Add.1 (14 October 2014); WT/DS430/AB/R (4 June 2015). See, Chad Bown and Jennifer Hillman, “Bird Flu, the OIE, and National Regulation: The WTO’s *India-Agricultural Products* Dispute”, *World Trade Review*, Vol. 15, 2016, pp. 235–57; See also Saggi, Kamal & Mark Wu, “Trade and Agricultural Disease: Import Restrictions in the Wake of the *India– Agricultural Products* Dispute”, *World Trade Review*, Vol. 16, No. 2, 2017, pp. 279–302.

³³⁰ Shinya Murase, ILC, Fifth Report on the Protection of the Atmosphere, A/CN.4/711, 2018, paras. 47-104.

³³¹ See the trend on the use of scientific experts at ICJ (Ibid., paras. at WTO Dispute Settlement (para. 103, and at ITLOS (para. 102). Regarding the practice of the Permanent Court of Arbitration (PCA), see the statement of the representative of PCA, A/C.6/73/SR.24, para. 73; Shinya Murase, ILC, Sixth Report, A/C.4/736, 2020, para. 96. See, Chester Brown. *A Common Law of International Adjudication*, (International Courts and Tribunals Series) (Oxford University Press, 2007). pp. 111-117.

171. Disputes may arise between a State and an international organization, if the latter breaches its international obligations (as discussed in Draft Article 23, paragraph 2), in which case, the present draft article may be applicable *mutatis mutandis*.

172. While the present project is primarily concerned with inter-State dispute settlement, the litigations on epidemics may be carried out in domestic courts, which cannot be totally outside the scope of the present topic, as it may have some relevance to international law, most notably, the issue of the sovereign immunities of States.³³²

173. Pursuant to the above observation, the following Draft Article is proposed:

Draft Article 17: Dispute Settlement

1. Disputes between States relating to epidemics shall be settled by

It may be pointed out in this connection that “the appropriate role of such evidence must reflect the special needs and specific circumstances of developing States, particularly their lack of capacity to provide technical and scientific experts. Opening the door to *amici* and expert witnesses should ensure the equality of States before the law. Developed States should not be able to overwhelm the proceeding with experts and supportive *amici* not available to developing States due to resource constraints. Affirmative measures should be considered to establish equality, like a trust fund for developing States to call expert witnesses.” Comments by Antigua and Barbuda on the Protection of the Atmosphere, (<https://undocs.org/en/A/CN.4/735>, 2020, p. 39).

³³² See the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 (not yet in force). Hazel Fox & Philippa Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), p. 13. Already, some U.S. states have attempted to sue China in American federal court, despite the Foreign Sovereign Immunities Act generally precluding such suits. The state of Missouri sued the Chinese Communist Party rather than the Chinese State in attempt to avoid immunity claims, though this will likely fail. See *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865–9 (2008). The complaint may be accessed at:

http://ago.mo.gov/docs/default-source/press-releases/2019/prc-complaint.pdf?sfvrsn=86ae7ab_2.

Another example may be the litigation brought by Haitian civil society seeking to invoke the responsibility of the UN for the 2010 cholera epidemic. See United Nations, Off. Doc *New approach to cholera in Haiti. Report of the Secretary-General (A/71/895)* 3 May 2017; BODE, T.G., «Cholera in Haiti: United Nations Immunity and Accountability», 47 *Georgia Journal of International Law* (2016), pp. 759 (2015-2016); DaugirdaS, K. and Mortenson J. D., “*Contemporary Practice of the United States Relating to International Law: International Organizations: United States Defends United Nations’ Immunity in Haitian Cholera Case*”, *American Journal of International Law*, Vol. 108, (2014), No. 4, pp.783-842; R. Friedmann & N. Lemay-Hebert, “Towards an alternative interpretation of UN immunity: A human rights-based approach to the Haiti Cholera Case”, *Question of International Law Journal*, Vol. 2 (2015), p. 336, <http://www.qil-qdi.org>; R. Pavoni, «Choleric notes on the Haiti Cholera Case, Questions of International Law», *Question of International Law Journal*, Vol. 2 (2015),p. 350, <http://www.qil-qdi.org/author/riccardo-pavoni/>

peaceful means, including negotiation, inquiry, mediation, conciliation, arbitration and judicial means, resort to regional agencies or arrangements, or any other peaceful means of their own choice.

2. Without prejudice to other obligations which may be applicable to the dispute between States concerning epidemics:
 - (a) the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
 - (b) a party to the dispute may invite the other party or parties to a mutually agreed conciliation procedure.
 - (c) a party to a dispute concerning epidemics may invite the other party or parties to submit the dispute, by mutual agreement, to an arbitral procedure.
 - (d) The parties should also consider referring their legal disputes relating to epidemics to the International Court of Justice.
 - (e) Given that disputes concerning epidemics may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

DRAFT RESOLUTION
Epidemics and International Law

Preamble

The *Institute of International Law* (Institut de Droit international, IDI),

Affirming that protection of persons from epidemics without discrimination of any kind and regardless of the sources and cause of the disease is a common concern of humankind,

Recognizing that States bear the primary obligation in preventing, protecting against, controlling and providing public health responses to the international spread of epidemics,

Emphasizing the need for international solidarity and cooperation in responding to the threats of epidemics,

Recognizing that respect for, and protection of, human rights is fundamental in applying and implementing international and national health law, and that certain vulnerable populations, especially women, children, older persons, refugees, internally displaced persons and migrants, persons in detention, persons living with co-morbidities, and persons with disabilities, may need particular protection from exposure to epidemics,

Recognizing also the vital role of the World Health Organization (WHO) in the protection of human health related to epidemics, especially WHO's International Health Regulations (IHR) which constitute a comprehensive attempt to create a structure that would enable a coordinated and effective response to epidemics,

Considering that international health law must be interpreted, applied and implemented in a coherent manner with other relevant rules of international law,

Proposes the following draft articles on Epidemics and International Law.

Scope, Objective and the Use of Terms

Article 1: Scope

The present draft articles concern the rules of international law applicable to the protection of persons from epidemics.

Article 2: Objective

The objective of the present draft articles is to promote progress of international law through its codification and progressive development for the protection of persons from epidemics, and by so doing, to facilitate timely, adequate and effective response to epidemics, and reduction of the risk of epidemics, so as to meet the essential needs of the persons concerned, with full respect of their human rights established under international law.

Article 3: Use of Terms

- a. “epidemic” means an infectious disease that is likely to spread rapidly to a large number of people in one country or in different countries within a short period of time;
- b. “public health emergency of international concern” means an extraordinary event, posing a risk to human health, the risk of international spread of disease and/or the risk of interference with international traffic;
- c. “pandemic” means an extraordinary form of an epidemic, affecting a wider geographical area, often worldwide, infecting a much larger number of people, causing more deaths, and often creating more severe social disruption and economic loss.
- d. “affected State” means a State under whose jurisdiction or control an epidemic occurs;
- e. “assisting State” means a State providing assistance to an affected State with its consent;
- f. “other assisting actor” means a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent;
- g. “relief personnel” means civilian, public and military personnel sent by an assisting State or other assisting actor for the purpose of providing medical and other relief assistance.
- h. “equipment and goods” include medical and other supplies, tools, machines, clothing, bedding, vehicles and tents.

General Principles

Article 4: Human Rights

1. Everyone has the right to the full enjoyment of the highest attainable standard of health. As part of the efforts for the full realization of this right, States shall take steps for the prevention, treatment and control of epidemics.

2. Persons affected by epidemics are entitled to respect for and protection of their human rights in accordance with international law.
3. States Parties to international human rights treaties should not act in a way that hinders other States Parties from complying with their respective human rights obligations.
4. State measures must be specifically aimed at preventing, reducing and controlling disease, necessary and proportionate to that aim. The measures must be implemented in a manner so as to avoid unjustifiable discrimination.
5. States may not derogate from their human rights obligations in any epidemic beyond those derogations already allowed under existing human rights treaties.

Article 5: The Role of the States

All States have the obligation to prevent, reduce and control the harm of epidemics and to exercise due diligence in taking appropriate legislative, administrative, judicial and other measures in accordance with applicable rules of international law. The competence of the affected States and of other States in dealing with epidemics must be respected in accordance with international law.

Article 6: International Cooperation

1. In light of their mutual solidarity and their common and shared responsibilities under international law, States shall cooperate for this purpose with other States, as well as within the framework of the United Nations and the World Health Organization (WHO).
2. The duty to cooperate also applies with and between other relevant international organizations and bodies, including regional organizations, whose specific competence is engaged.
3. The duty to cooperate includes, *inter alia*, further strengthening and enhancing scientific knowledge relating to the causes and impacts of epidemics by sharing information, assessment and responses, and sharing the burdens and benefits of the cooperation efforts, taking into account their geographical situation, capacities and resources and, in particular, the need of developing countries.

Article 7: Interrelationship among Relevant Rules

1. The rules of international law relating to epidemics and other relevant rules of international law should, to the extent possible, be identified, interpreted, applied and implemented as coherent obligations, in line with the principles of harmonization and systemic integration, in order to avoid conflicts between obligations, as well as the due diligence

obligation and the need for international solidarity and cooperation in responding the threats of epidemics. “Other relevant rules” include *inter alia* those related to international environmental law, international trade and investment law, international transport law, international law on peace and security and international humanitarian law.

2. States should, when developing new rules of international law relating to the protection of persons and communities from epidemics, seek to avoid conflicts with other relevant rules of international law.

Article 8: Saving Clauses

1. The general principles stated above do not undermine additional, more specific obligations of prevention, disclosure and compliance that commit States to cooperate with other states and with international organizations that States have undertaken in relation to epidemics pursuant to international convention whether under the International Health Regulations 2005 or otherwise.

2. These general principles are without prejudice to the State’s human rights and humanitarian law obligations, including the prohibition to go beyond the limitations or derogations authorized by these bodies of law.

Risk Reduction and Preparedness

Article 9: Preparedness

1. States shall develop, strengthen and maintain the capacity to respond promptly and effectively to the risk of the spread of epidemics, including overall strategies, policies, and institutional structures, in particular, monitoring and early warning systems, coordination mechanisms among government ministries and guidelines on containment and control measures. For preparedness, consideration should be given by States, while fully respecting human rights of persons affected, to the creation and design of specific protocols concerning the state of emergency in relevant situations, the adoption of preventive measures which could facilitate speedy isolation or, in the worst scenario, effective and sustained quarantines, along with the necessary budget reserves allocated for this purpose.

2. States shall establish, within their capacity, scientific institutions, laboratories and hospitals to prepare for possible outbreaks of epidemics. In so doing, States have the obligation to conduct an environment impact assessment (EIA) on these and other relevant facilities in an open, transparent manner.

3. States shall provide adequate health education of the population for the prevention of epidemics with a view to promoting the epidemic prevention culture.

Obligations of the Affected States during Epidemics

Article 10: Obligation of the Affected States to Ensure Information Disclosure

1. If a State has *prima facie* evidence of an unexpected or unusual public health event within its territory or areas under its jurisdiction or control, the State must notify, in accordance with applicable international regulations, WHO, other States and relevant international organizations by the most rapid means of communications available, as well as any public health measure implemented in response to those.
2. The affected State must guarantee prompt disclosure of relevant information and complete transparency as well as full and unimpeded access to the information by the public. For this purpose, the affected State must guarantee the freedom of expression and communication of individuals within its jurisdiction and that of the press must be protected in relation to information regarding the outbreak of the epidemics.
3. States must guarantee the privacy of affected persons in accordance with international law.

Article 11: Emergency Measures by the Affected States

1. The affected State must take, in accordance with its laws and regulations, emergency measures such as entry and exit restrictions, testing/screening and contact tracing programmes, treatment or vaccination programmes where available, isolation, quarantine or social distancing in parts or whole of its territory in order to avoid the spread of the epidemic, which must be taken in conformity with scientific evidence and applicable rules of international law, including human rights law, taking into consideration the need of all the vulnerable groups. The measures must fully comply with the requirements of necessity, proportionality, and non-discrimination, as well as their timely implementation.
2. Information on measures taken by the State must be immediately transmitted to WHO, to other States likely to be affected by the measures and to other international organizations.

Article 12: Obligation to Seek External Assistance

1. The affected State must seek external assistance from other States and relevant international organizations, particularly WHO, as well as other potential assisting actors, without delay, if the harm of the epidemic appears likely to exceed national response capacity.
2. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance.

3. The affected State shall take appropriate measures to ensure protection of relief personnel, and equipment and goods present in the territory or areas under its jurisdiction or control, for the purpose of providing external assistance.

Obligations of Other States during Epidemics

Article 13: Preventative Measures

1. States other than the affected States shall undertake preventative emergency measures in order to avoid further transmission of the disease. The measures may include closure of the border, travel restrictions and quarantine which must be taken in conformity with scientific evidence and applicable rules of international law, including human rights law, taking into consideration the need of all the vulnerable groups. The measures must fully comply with the requirements of necessity, proportionality, and non-discrimination.
2. The State must inform other States, WHO and other relevant international organizations on the measures taken immediately, and conduct good faith negotiations and consultations with them concerning necessary response coordination.

Article 14: Offer of Assistance

When external assistance is sought by affected States, other States, along with WHO, the United Nations, and other potential assisting actors, must offer assistance to the affected State in an expeditious manner. The modalities of the provision of external assistance shall be agreed expeditiously between the States concerned.

Measures in the Post-Epidemic Phase

Article 15: Review and Information Sharing

1. Given that a review conducted in the post-epidemic phase is of paramount importance for preventing similar events in the future, WHO shall conduct a thorough review of its performance in accordance with its Constitution and other applicable procedures. An independent panel of experts may also convene to review the performance of each key State. External reviews may be conducted, as appropriate. All applicable information shall be shared by all States, the relevant international organizations and other relevant stakeholders.
2. Each State that was most seriously affected by the epidemic shall, by establishing an independent panel of experts, conduct a thorough post-epidemic review to assess the propriety of its own actions and omissions.
3. The States shall share all applicable information among themselves

and with the relevant organizations and other relevant stakeholders as well as their own populations.

Article 16: International Responsibility of States and International Organizations

1. States and international organizations shall ensure that all measures to prevent, reduce and control epidemics are not to be in contravention of international law.
2. A breach of the obligation of a State to prevent, reduce and control epidemics under international law or to provide early information of the outbreak of epidemics that are attributable to that State entails the responsibility of that State.
3. A breach of the obligation of an international organization to prevent, reduce and control epidemics under international law or to provide early information of the outbreak of epidemics that are attributable to that international organization entails the responsibility of that international organization.

Article 17: Dispute Settlement

1. Disputes between States relating to epidemics shall be settled by peaceful means, including negotiation, inquiry, mediation, conciliation, arbitration and judicial means, resort to regional agencies or arrangements, or any other peaceful means of their own choice.
2. Without prejudice to other obligations which may be applicable to the dispute between States concerning epidemics:
 - (a) the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
 - (b) a party to the dispute may invite the other party or parties to a mutually agreed conciliation procedure.
 - (c) a party to a dispute concerning epidemics may invite the other party or parties to submit the dispute, by mutual agreement, to an arbitral procedure.
 - (d) The parties should also consider referring their legal disputes relating to epidemics to the International Court of Justice.
 - (e) Given that disputes concerning epidemics may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

PROJET DE RÉSOLUTION
Les épidémies et le droit international

Préambule

L'Institut de Droit international (IDI),

Affirmant que la protection des personnes contre les épidémies sans discrimination d'aucune sorte et quelles que soient les sources et la cause de la maladie est une préoccupation commune de l'humanité,

Reconnaissant que les États ont l'obligation primaire de prévenir, protéger contre, contrôler et apporter des réponses de santé publique à la propagation internationale des épidémies,

Soulignant la nécessité d'une solidarité et d'une coopération internationales pour faire face aux menaces d'épidémies,

Reconnaissant que le respect et la protection des droits de l'homme sont fondamentaux dans l'application et la mise en œuvre du droit international et national de la santé, et que certaines populations vulnérables, en particulier les femmes, les enfants, les personnes âgées, les réfugiés, les personnes déplacées internes et les migrants, les personnes en détention, les personnes vivant avec des comorbidités et les personnes handicapées, peuvent avoir besoin d'une protection particulière contre l'exposition aux épidémies,

Reconnaissant également le rôle vital de l'Organisation mondiale de la santé (OMS) dans la protection de la santé humaine liée aux épidémies, en particulier le Règlement sanitaire international (RSI) de l'OMS, qui constitue une tentative globale de création d'une structure permettant une réponse coordonnée et efficace aux épidémies,

Considérant que le droit international de la santé doit être interprété, appliqué et mis en œuvre de manière cohérente avec les autres règles pertinentes du droit international,

Propose le projet d'articles suivant sur les épidémies et le droit international.

Portée, objectif et expressions employées

Article 1 : Portée

Le présent projet d'articles concerne les règles du droit international applicables à la protection des personnes contre les épidémies.

Article 2 : Objectif

L'objectif du présent projet d'articles est de promouvoir le progrès du droit international par sa codification et son développement progressif pour la protection des personnes contre les épidémies, et ce faisant, de faciliter une réponse rapide, adéquate et efficace aux épidémies et de réduire le risque d'épidémies, afin de répondre aux besoins essentiels des personnes concernées, dans le plein respect de leurs droits humains établis par le droit international.

Article 3 : Expressions employées

- a. « Épidémie », s'entend d'une maladie infectieuse susceptible de s'étendre rapidement à un grand nombre de personnes dans un pays ou dans différents pays en une courte période de temps ;
- b. « Urgence de santé publique de portée internationale », s'entend d'un événement extraordinaire, présentant un risque pour la santé humaine, un risque de propagation internationale de maladies et/ou un risque d'interférence avec le trafic international ;
- c. « Pandémie » s'entend d'une forme extraordinaire d'épidémie, affectant une zone géographique plus large, souvent le monde entier, infectant un bien plus grand nombre de personnes, causant plus de décès et créant souvent de plus graves perturbations sociales et pertes économiques ;
- d. « État affecté » s'entend d'un État sous la juridiction ou le contrôle duquel une épidémie survient ;
- e. « État prêtant assistance » s'entend d'un État qui fournit une assistance à un État affecté avec son consentement ;
- f. « Autre acteur prêtant assistance » s'entend d'une organisation intergouvernementale compétente, ou d'une organisation ou entité non gouvernementale pertinente, fournissant une assistance à un État affecté avec son consentement ;
- g. « Personnel de secours » s'entend du personnel civil, public et militaire envoyé par un État prêtant assistance ou un autre acteur prêtant assistance aux fins de fournir une assistance médicale ou toute autre assistance de secours ;
- h. Les « équipements et biens » comprennent les fournitures médicales et autres, les outils, les machines, les vêtements, la literie, les véhicules et les tentes.

Principes généraux

Article 4 : Droits humains

1. Chacun a le droit de jouir pleinement du meilleur état de santé qu'il soit possible d'atteindre. Dans le cadre des efforts pour la pleine

réalisation de ce droit, les États doivent prendre des mesures pour la prévention, le traitement et le contrôle des épidémies.

2. Les personnes affectées par des épidémies ont droit au respect et à la protection de leurs droits humains conformément au droit international.

3. Les États parties aux traités internationaux relatifs aux droits humains ne devraient pas agir d'une manière qui empêcherait les autres États parties de respecter leurs obligations respectives en matière de droits humains.

4. Les mesures étatiques doivent spécifiquement viser la prévention, la réduction et le contrôle des maladies, et être nécessaires et proportionnées à cette fin. Ces mesures doivent être mises en œuvre de manière à éviter toute discrimination injustifiable.

5. Les États ne peuvent pas déroger à leurs obligations en matière de droits humains en cas d'épidémie, au-delà de ce qui est déjà autorisé par les traités relatifs aux droits humains existants.

Article 5 : Rôle des États

Tous les États ont l'obligation de prévenir, réduire et contrôler le préjudice engendré par les épidémies et de faire preuve de diligence requise en prenant les mesures législatives, administratives, judiciaires et autres appropriées, conformément aux règles applicables du droit international. La compétence des États affectés et des autres États dans la gestion des épidémies doit être respectée conformément au droit international.

Article 6 : Coopération internationale

1. Compte tenu de leur solidarité mutuelle et de leurs responsabilités communes et partagées en vertu du droit international, les États doivent coopérer à cette fin avec les autres États, ainsi que dans le cadre des Nations Unies et de l'Organisation mondiale de la santé (OMS).

2. Le devoir de coopérer s'applique également avec et entre les autres organisations et organes internationaux pertinents, y compris les organisations régionales, dont la compétence est spécifiquement engagée.

3. Le devoir de coopérer comprend, entre autres, davantage de renforcement et d'amélioration des connaissances scientifiques relatives aux causes et aux effets des épidémies par le partage de l'information, des évaluations et des réponses, et par le partage du fardeau et des bénéfices des efforts de coopération, en tenant compte de la situation géographique, des capacités et des ressources et, en particulier, des besoins des pays en voie de développement.

Article 7 : Interrelation entre les règles pertinentes

1. Les règles de droit international relatives aux épidémies et les autres règles pertinentes du droit international devraient, dans la mesure du possible, être identifiées, interprétées, appliquées et mises en œuvre en tant qu'obligations cohérentes, conformément aux principes d'harmonisation et d'intégration systémique, afin d'éviter les conflits entre obligations, ainsi qu'à l'obligation de diligence requise et à la nécessité de solidarité et de coopération internationales pour répondre aux menaces d'épidémies. Les « autres règles pertinentes » comprennent notamment celles liées au droit international de l'environnement, au droit international du commerce et de l'investissement, au droit international des transports, au droit international de la paix et de la sécurité et au droit international humanitaire.
2. Les États devraient, lorsqu'ils développent de nouvelles règles de droit international relatives à la protection des personnes et des communautés contre les épidémies, s'efforcer d'éviter les conflits avec d'autres règles pertinentes du droit international.

Article 8 : Clauses de sauvegarde

1. Les principes généraux énoncés ci-dessus ne portent pas atteinte aux obligations supplémentaires, plus spécifiques, de prévention, d'information et de respect qui engagent les États à coopérer avec les autres États et les organisations internationales et que les États ont contractées en matière d'épidémies conformément à une convention internationale que ce soit dans le cadre du Règlement sanitaire international de 2005 ou autre.
2. Ces principes généraux sont sans préjudice des obligations de l'État en matière de droits humains et de droit humanitaire, y compris l'interdiction d'aller au-delà des limitations ou dérogations autorisées par ces corps de droit.

Réduction des risques et état de préparation

Article 9 : État de préparation

1. Les États doivent développer, renforcer et maintenir une capacité à réagir rapidement et efficacement au risque de propagation des épidémies, et notamment des stratégies générales, des politiques et des structures institutionnelles, en particulier des systèmes de surveillance et d'alerte précoce, des mécanismes de coordination entre les ministères et des directives sur les mesures de confinement et de contrôle. Pour être prêts, les États devraient envisager, tout en respectant pleinement les droits de l'homme des personnes affectées, la création et la conception de protocoles spécifiques concernant l'état d'urgence dans les situations

pertinentes, l'adoption de mesures préventives qui pourraient faciliter l'isolement rapide ou, dans le pire scénario, des quarantaines efficaces et durables, ainsi que les réserves budgétaires nécessaires allouées à cette fin.

2. Les États doivent établir, dans la limite de leurs capacités, des institutions scientifiques, des laboratoires et des hôpitaux pour se préparer à d'éventuelles épidémies. Ce faisant, les États ont l'obligation de mener une étude d'impact environnemental (EIE) sur ces installations et les autres installations pertinentes, de manière ouverte et transparente.

3. Les États doivent dispenser une éducation sanitaire adéquate à la population pour la prévention des épidémies en vue de promouvoir une culture de prévention des épidémies.

Obligations des États affectés lors d'épidémies

Article 10 : Obligation des États affectés d'assurer la divulgation d'informations

1. Si un État a la preuve *prima facie* d'un événement de santé publique inattendu ou inhabituel sur son territoire ou dans des zones sous sa juridiction ou contrôle, l'État doit en notifier, conformément à la réglementation internationale applicable, l'OMS, les autres États et les organisations internationales pertinentes par les moyens de communication les plus rapides à sa disposition, ainsi que toute mesure de santé publique mise en œuvre pour y répondre.

2. L'État affecté doit garantir une divulgation rapide des informations pertinentes et une transparence totale ainsi qu'un accès complet et sans entrave à l'information par le public. À cet effet, l'État affecté doit garantir la liberté d'expression et de communication des individus relevant de sa juridiction et celle de la presse doit être protégée en ce qui concerne les informations relatives au déclenchement des épidémies.

3. Les États doivent garantir la vie privée des personnes affectées conformément au droit international.

Article 11 : Mesures d'urgence par les États affectés

1. L'État affecté doit prendre, conformément à ses lois et règlements, des mesures d'urgence telles que les restrictions d'entrée et de sortie, les programmes de test/dépistage et de traçage des contacts, les programmes de traitement ou de vaccination lorsque ceux-ci sont disponibles, l'isolement, la quarantaine ou la distanciation sociale dans une partie ou sur la totalité de son territoire afin d'éviter la propagation de l'épidémie, celles-ci devant être prises en conformité avec les preuves scientifiques et les règles applicables du droit international, y compris le droit des droits humains, en tenant compte des besoins de tous les groupes vulnérables.

Ces mesures doivent être pleinement conformes aux exigences de nécessité, de proportionnalité et de non-discrimination, ainsi que de rapidité dans leur mise en œuvre.

2. Les informations sur les mesures prises par l'État doivent être immédiatement transmises à l'OMS, aux autres États susceptibles d'être affectés par ces mesures et aux autres organisations internationales.

Article 12 : Obligation de rechercher une assistance extérieure

1. L'État affecté doit rechercher sans délai une assistance extérieure auprès d'autres États et d'organisations internationales pertinentes, en particulier l'OMS, ainsi que d'autres potentiels acteurs prêtant assistance, si le préjudice causé par l'épidémie semble susceptible de dépasser la capacité nationale de réponse.

2. L'État affecté doit prendre les mesures nécessaires, dans le cadre de son droit national, pour faciliter la fourniture rapide et efficace d'une assistance extérieure.

3. Les États affectés doivent prendre des mesures appropriées pour assurer la protection du personnel de secours, et des équipements et biens présents sur le territoire ou dans les espaces relevant de sa juridiction ou contrôle, aux fins de fournir une assistance extérieure.

Obligations des autres États durant l'épidémie

Article 13 : Mesures préventives

1. Les États, autre que les États affectés, doivent prendre des mesures préventives d'urgence afin d'éviter une nouvelle transmission de la maladie. Ces mesures peuvent comprendre la fermeture de la frontière, des restrictions de voyage et la mise en quarantaine qui doivent être prises conformément aux preuves scientifiques et aux règles applicables du droit international, y compris le droit des droits humains, en tenant compte des besoins de tous les groupes vulnérables. Les mesures doivent être pleinement conformes aux exigences de nécessité, de proportionnalité et de non-discrimination.

2. L'État doit immédiatement informer les autres États, l'OMS et les autres organisations internationales pertinentes des mesures prises, et mener avec eux des négociations et des consultations de bonne foi au sujet de la coordination nécessaire à la riposte.

Article 14 : Offre d'assistance

Lorsqu'une assistance extérieure est recherchée par les États affectés, les autres États, ainsi que l'OMS, les Nations Unies et les autres potentiels acteurs prêtant assistance, doivent offrir leur assistance à l'État affecté de

manière rapide. Les modalités de fourniture de l'assistance extérieure sont convenues dans les meilleurs délais entre les États concernés.

Mesures dans la phase post-épidémique

Article 15 : Examen et partage d'informations

1. Étant donné qu'un examen effectué dans la phase post-épidémique est d'une importance primordiale pour prévenir des événements similaires à l'avenir, l'OMS doit procéder à un examen approfondi de sa performance conformément à sa Constitution et aux autres procédures applicables. Un groupe d'experts indépendant peut également se réunir pour examiner la performance de chaque État clé. Des examens externes peuvent, le cas échéant, être effectués. Toutes les informations applicables doivent être partagées par tous les États, les organisations internationales pertinentes et les autres acteurs pertinents.
2. Chaque État ayant été très gravement affecté par l'épidémie doit, en créant un groupe d'experts indépendant, procéder à un examen post-épidémique approfondi pour évaluer le bien-fondé de ses propres actions et omissions.
3. Les États doivent partager toutes les informations applicables entre eux et avec les organisations pertinentes et autres acteurs pertinents ainsi qu'avec leurs propres populations.

Article 16 : Responsabilité internationale des États et des organisations internationales

1. Les États et organisations internationales doivent veiller à ce que toutes les mesures visant à prévenir, réduire et contrôler les épidémies ne soient pas contraires au droit international.
2. La violation de l'obligation d'un État de prévenir, réduire et contrôler les épidémies en vertu du droit international ou de fournir des informations précoces sur le déclenchement d'épidémies qui est imputable à cet État engage la responsabilité de cet État.
3. La violation de l'obligation d'une organisation internationale de prévenir, réduire et contrôler les épidémies en vertu du droit international ou de fournir des informations précoces sur le déclenchement d'épidémies qui est imputable à cette organisation internationale engage la responsabilité de cette organisation internationale.

Article 17 : Règlement des différends

1. Les différends entre États relatifs aux épidémies sont réglés par des moyens pacifiques, notamment la négociation, l'enquête, la médiation, la conciliation, l'arbitrage et les moyens judiciaires, le recours à des

organismes ou accords régionaux ou tout autre moyen pacifique de leur choix.

2. Sans préjudice des autres obligations susceptibles d'être applicables au différend entre États concernant les épidémies:

- a) les parties au différend doivent procéder rapidement à un échange de vues sur son règlement par voie de négociation ou par d'autres moyens pacifiques.
- b) une partie au différend peut inviter l'autre ou les autres parties à une procédure de conciliation convenue d'un commun accord.
- c) une partie à un différend concernant des épidémies peut inviter l'autre ou les autres parties à soumettre le différend, d'un commun accord, à une procédure arbitrale.
- d) Les parties devraient également envisager de soumettre leurs différends juridiques relatifs aux épidémies à la Cour internationale de Justice.
- e) Étant donné que les différends concernant les épidémies peuvent avoir un caractère hautement factuel et tributaire de la science, il convient de dûment envisager le recours à des experts techniques et scientifiques.
