1 Some Reflections on the Scope of the Topic "Epidemics and International Law"

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The 2020 edition of the Centre for Studies and Research took place in unique circumstances. At the time of writing, the Covid-19 pandemic has killed almost 3 million people worldwide, pushed hundreds of millions more into ill health and poverty and placed extraordinary stresses on societies worldwide [1]. Covid-19 has exacerbated long-standing inequalities while creating new ones, as reflected in who becomes ill; who is able to receive treatment, care, diagnostics and vaccinations; who suffers the social and economic consequences of the pandemic; whose rights are interfered with or protected in the response; and whose interests are represented in decision-making.

These developments have renewed attention on the role of international law in protecting and promoting health, and the circumstances required to enjoy good health in practice, as well as the role of international law in addressing the impact of health crises more broadly. There are few areas affected by the pandemic which are not touched by international law, from the need for international cooperation to address diseases that cross borders, to human rights violations arising out of the pandemic, to the economic drivers and impacts of the pandemic, to the interaction between human health and the environment, to the development and distribution of medicines, diagnostics and vaccines. Covid-19 has both challenged – and in many ways been shaped by – the norms and institutions of international law.

It is therefore somewhat obvious why the 2020 session of the Centre for Studies and Research should address the topic of epidemics and international law. But this project is intended to take a broader perspective than the current pandemic. Covid-19 is not the first, nor will it be the last, epidemic with major health, social and economic consequences. Yet despite the death, suffering, and

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1. WHO Coronavirus (Covid-19) Dashboard, https://covid19.who.int/, as at 2 April 2021; Christoph Lakner *et al.*, "Updated estimates of the impact of Covid-19 on global poverty: Looking back at 2020 and the outlook for 2021" (World Bank Blog, 11 January 2021), https://blogs.worldbank.org/opendata/updated-estimates-impact-covid-19-global-poverty-looking-back-2020-and-outlook-2021.

social and economic damage caused by epidemics throughout the centuries, and the importance of international cooperation – and therefore international law – in responding to diseases that cross borders, epidemics (and health more generally) have rarely been the subject of mainstream international legal scholarship. It is necessary to address this neglect in deeper terms than the current pandemic. The scope of this volume therefore examines epidemics and international law more generally, with the aim of generating new thinking in a variety of fields of international law on the topic.

Our decision to take a broader perspective on this subject raises the question of what is included in a project titled as "epidemics and international law". This introductory chapter therefore offers some remarks on the scope of the topic, including how we understand the term "epidemic", the different fields of international law as they relate to epidemics and some reflections on what is covered, and not covered, in this volume.

SECTION 1 **EPIDEMICS, PANDEMICS, PHEICS AND OTHER TERMS**

For simplicity's sake, this session of the Centre for Studies and Research, and this volume that is the outcome, has chosen to define epidemics in terms of epidemic infectious diseases. This focus is intended to narrow the scope of what can be a large and unwieldy topic, while capturing the fact that many of the norms of international law we aimed to examine are principally concerned with the cross-border spread of infectious disease, often in relation to new and re-emerging diseases and circumstances characterised as "health emergencies".

However, the term epidemic has a variety of technical usages in public health, as well as a history of usage under particular treaty regimes, and it exists alongside several cognate terms, including but not limited to terms such as pandemic, public health emergency of international concern, and others. Many of these are not limited to infectious disease, may or may not concern cross-border spread and may capture different kinds of characteristics in terms of the severity of illness, the number of persons affected and the way the disease spreads. At the outset, therefore, it is helpful to lay out some of the context of these terms more broadly.

An epidemic is not the primary concept used to classify infectious health risks in contemporary international health law. The key concept used to describe major cross-border health risks in the current law of the World Health Organization (WHO) is a public health emergency of international concern. Under the WHO's 2005 International Health Regulations (IHRs), the WHO Director-General, on the advice of the Emergency Committee, may declare a public health emergency of international concern (PHEIC), and issue

temporary recommendations in relation to the PHEIC [2]. Article 1 of the IHRs defines a PHEIC as "an extraordinary event which is determined, as provided in these Regulations . . . to constitute a public health risk to other States through the international spread of disease and . . . to potentially require a coordinated international response", with Article 1 also defining an "event" as "a manifestation of disease or an occurrence that creates a potential for disease". An "[e]vent caused by a pathogen with high potential to cause epidemic" is given in Annex 2 of the IHRs as an example of an event which States should notify to the WHO under the IHRs, but the examples are explicitly named as non-binding and indicative, and the trigger for notification is the "event", rather than the potential "epidemic".

Earlier editions of the IHRs did refer to "epidemics" of the diseases specifically covered by the Regulations (plague, cholera and yellow fever in the 1969 editions, with smallpox, typhus and relapsing fever included in earlier editions). The version immediately prior to the current IHRs, the 1969 International Health Regulations, define an epidemic as "an extension of diseases subject to the Regulations by a multiplication of cases in an area" [3]. Similarly, the 1951 International Sanitary Regulations define epidemic diseases as including plague, cholera, yellow fever, smallpox, typhus and relapsing fever, and an "epidemic" as "an extension or multiplication of a foyer" (a foyer is defined as "the occurrence of one or more secondary cases of an epidemic disease in the neighbourhood of a first case") [4]. Both of these versions of the Regulations define the concept of an epidemic by reference to multiplication or spread, rather than the number of persons affected, reflecting the fact that these treaties often imposed obligations starting from the occurrence of a single case of the relevant diseases. The pre-WHO 1926 International Sanitary Convention also referred to epidemics, generally as a way of delineating the duration of notification obligations [5].

Outside of the IHRs, the WHO Constitution defines the WHO's work as including functions "to stimulate and advance work to eradicate epidemic, endemic and other diseases" [6]. Similarly, Article 12 of the International Covenant on Economic, Social and Cultural Rights outlines the steps that

2. International Health Regulations, concluded 23 May 2005, 2509 UNTS 79 (entered into force 15 June 2007), Articles 12, 15.

3. International Health Regulations, concluded 25 July 1969, 764 UNTS 3 (entered into force 1 January 1971), Article 1.

4. International Sanitary Regulations, concluded 25 May 1951, 175 UNTS 215 (entered into force 1 October 1952), Article 1.

5. See e.g. the International Sanitary Convention 1926, which requires notification only for epidemic forms of typhus and smallpox, and includes ongoing obligations to send communications "so as to keep the Governments informed of the progress of the epidemic": International Sanitary Convention, concluded 21 June 1926 (entered into force 28 March 1928), Article 1 (3), Article 4.

6. WHO Constitution, concluded 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948) Article 2 *(g)*.

States shall take to achieve the full realisation of the right to health include "prevention, treatment and control of epidemic, endemic, occupational and other diseases" [7]. General Comment 14 of the Committee on Economic, Social and Cultural Rights defines this as an obligation to prevent such diseases through programmes of prevention and education, to treat them through the healthcare system and to control them through epidemiological surveillance, the use of relevant technologies and immunisation programmes or other infectious disease control strategies [8]. The WHO Framework Convention on Tobacco Control, so far the only convention adopted under Article 19 of the WHO Constitution, recognises in its preamble "that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response" [9]. However, none of the above instruments define the term epidemic, and those that list epidemics alongside endemic and other diseases have not materially distinguished between the categories of disease in practice.

In the field of public health, an epidemic is often defined as an increase in the number of cases over and above the endemic, or usual, levels of the disease [10]. The term outbreak is used to refer to smaller or more localised epidemics, while the term cluster refers to several related cases of a disease [11]. Depending on the particular context in which it is used, each of these terms can be neutral as to the cause of the disease which is spreading or the total number of cases involved, although in some contexts it can also incorporate those factors too. What these definitions capture is an above-usual number of persons affected by the disease, which may imply its spread, although it is not directly defined by it. The term epidemic is contrasted with endemic diseases, which are consistently present within a community.

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7. International Covenant on Economic, Social, and Cultural Rights, concluded 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 12 *(c)*.

8. Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (11 August 2000), para. 16.

9. WHO Framework Convention on Tobacco Control, concluded 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005), preamble.

10. See Miguel Porta, "Epidemic", in Miguel Porta (ed.), *A Dictionary of Epidemiology*, 6th edition (Oxford University Press, 2016): "The occurrence in a community or region of cases of an illness, specific health-related behavior, or other health-related events clearly in excess of normal expectancy . . .". Compare Centers for Disease Control and Prevention (United States), "Epidemic Disease Occurrence", in *Principles of Epidemiology in Public Health Practice*, 3rd edition (CDC, 2012): "refers to an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area".

11. Centers for Disease Control and Prevention (United States), above footnote 10.

A pandemic, according to its classical epidemiological definition, is "an epidemic occurring over a very wide area, crossing international boundaries and usually affecting a large number of people" [12]. It is also described by the WHO as a "worldwide spread of a new disease" [13].

Legally, the most significant usage of the term pandemic is in relation to pandemic influenza within the practices of the WHO. Within these frameworks, the term pandemic is largely a term of soft law. The 2017 document *Pandemic Influenza Risk Management: A WHO Guide to Inform & Harmonize National & International Pandemic Preparedness and Response*, which outlines the WHO risk assessment process in relation to influenza, includes a formal ability on the part of the Director-General to declare a pandemic of influenza if a new subtype of influenza is found: "During the period of spread of human influenza caused by a new subtype, based on risk assessment and appropriate to the situation, the WHO Director-General may make a declaration of a pandemic" [14]. These risk assessments are intended to inform national, WHO and UN system responses, although they do not specifically give rise to legal obligations except to the extent that they inform other legal instruments (e.g. contractual obligations or domestic legislation) which may use such determinations as triggers. The risk assessment process replaces a previous six-phase system which had formal definitions for each phase of an influenza pandemic based on the extent of spread, which was criticised as confusing by the IHR review committee for the 2009 H1N1 influenza pandemic [15]. The new risk assessment explicitly decouples global risk assessments from national and regional risk assessments and responses, and replaces the formal definitions of each phase with a discretionary ability to declare a pandemic, to address the criticism that the formal definitions did not necessarily correspond to the degree of response required in each individual country [16].

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12. Porta, above footnote 10, 209. The sixth edition of this work departs from the fifth edition from 2008 in that it does not use the descriptor "worldwide", and adds the clarification that "[o]nly some pandemics cause severe disease in some individuals or at the population level".

13. World Health Organization, "What is a Pandemic?", https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/ (24 February 2010).

14. World Health Organization, *Pandemic Influenza Risk Management: A WHO Guide to Inform & Harmonize National & International Pandemic Preparedness and Response* (May 2017), 14, https://apps.who.int/iris/bitstream/handle/10665/259893/WHO-WHE-IHM-GIP-2017.1-eng.pdf?sequence=1.

15. World Health Organization, *Implementation of the International Health Regulations (2005): Report of the Review Committee on the Functioning of the International Health Regulations (2005) in relation to Pandemic (H1N1) 2009: Report by the Director-General*, A64/10 (5 May 2011), paras. 25, 33, 121, 122 ("H1N1 IHR Review Committee Report").

16. Heath Kelly, "The Classical Definition of a Pandemic is Not Elusive", (2011) 89 *Bulletin of the World Health Organization* 540, https://www.who.int/bulletin/volumes/89/7/11-088815/en/; Peter Doshi, "The Elusive Definition of Pandemic Influenza", (2011) 89 *Bulletin of the World Health Organization* 532, https://www.who.int/bulletin/volumes/89/7/11-086173/en/.

The Pandemic Influenza Preparedness Framework, another soft law instrument relating to influenza, applies to influenza viruses with "human pandemic potential" (as opposed to "seasonal" influenza viruses or other kinds of viruses), and establishes a framework for sharing virus samples and the benefits of the technologies derived from them [17]. It is adopted under the WHO's power to make non-binding recommendations under Article 23 of its Constitution. Under the PIP Framework, an influenza virus with human pandemic potential is defined as a "wild-type influenza virus that has been found to infect humans and that has a haemagglutinin antigen that is distinct from those in seasonal influenza viruses so as to indicate that the virus has potential to be associated with pandemic spread within human populations with reference to the International Health Regulations (2005) for defining characteristics" [18]. The reference to the IHRs links the PIP Framework to those influenza cases which must be notified under Annex 2 and Article 6 of the IHRs, i.e. "human influenza caused by a new subtype" [19]. The PIP Framework is thus a framework that applies from well before a pandemic is actually underway, to viruses which may potentially pose a risk of pandemic spread. Both the PIP Framework and the risk assessment guidance for pandemic influenza sit alongside the IHRs; with the IHRs (based on the concept of a PHEIC) forming the "hard law" component and the pandemic influenza instruments (based on the concept of a pandemic) providing additional soft law and technical guidance.

There are several instances where health issues other than influenza have been described as pandemics by different organs of the WHO and the broader UN system. However, outside of influenza, these do not take place under formal frameworks for such announcements, and there are no formal criteria for when non-influenza pandemics should be "declared". In the World Health Assembly's 1986 decision on Tobacco or Health [20], the WHA notes that it is "[d]eeply concerned by the current pandemic of smoking and other forms of tobacco use" and "[c]alls for a global public health approach and action now to combat the tobacco pandemic" [21]. The United Nations General Assembly's 2001 Declaration of Commitment on HIV/AIDS recognises "that access

17. World Health Organization, "Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits", adopted in World Health Assembly, Resolution 64.5, *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits*, A64/VR/10 (24 May 2011) ("PIP Framework").

18. PIP Framework, paras. 3.1, 4.2.

19. IHRs, Annex 2, "Examples for the Application of the Decision Instrument for the Assessment and Notification of Events That May Constitute A Public Health Emergency of International Concern".

20. World Health Assembly, Resolution 39.14, *Tobacco or Health* (15 May 1986), preamble, para. 2.

21. Elsewhere tobacco is described as an epidemic, for example in the WHO Secretariat's biennial publication of its Report on the Global Tobacco Epidemic, or in the preamble to the WHO Framework Convention on Tobacco Control.

to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and "that the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic" [22]. The best known example, of course, is when the WHO Director-General in March 2020 announced that Covid-19 had become a pandemic [23]. This pronouncement has often been mistaken in public discourse for a legal declaration akin to the PHEIC declaration under the IHRs, although it did not in fact add anything further to States' obligations to address Covid-19 as a PHEIC under the International Health Regulations, nor was it part of a formal procedure within the WHO like the Director-General's statements in relation to pandemic influenza. As a political matter, however, the characterisation of Covid-19 as a pandemic attracted far greater attention than the more legally significant earlier declaration of Covid-19 as a PHEIC, reflecting that, although the terms epidemic and pandemic may have technical meanings, they also have colloquial meanings which connote the gravity of a particular risk. These technical and colloquial meanings are sometimes in tension, with whether there is sufficient worldwide spread to meet the classical definition of a pandemic not necessarily coinciding the degree of alarm needing to be sounded or the measures necessary to prepare for it [24].

Each of the terms epidemic, pandemic or PHEIC can describe non-infectious risks as well as infectious ones. The 2005 IHRs specifically take an "all-hazards" approach to disease surveillance, reporting and the application of quarantine and sanitary measures, allowing a PHEIC to be declared in a wide variety of situations, and defining "disease" as "an illness or medical condition, *irrespective of origin or source*, that presents or could present significant harm to humans" (emphasis added) [25]. Outside of the IHRs, some of the few instances where the term pandemic is used by the WHA, or where the term epidemic is included in an international treaty, relate to tobacco, a health risk spread by commercial rather than microbial activity.

However, certain States have sometimes been reluctant to describe non-infectious risks as epidemics or pandemics, even though there is no conceptual reason not to do so. In the negotiations on the UN General Assembly's 2011 Political Declaration on Non-communicable Diseases, for example, a

22. United Nations General Assembly, Resolution S-26/2, *Declaration of Commitment on HIV/AIDS*, A/RES/S-26/2, paras. 15, 16.

23. World Health Organization, "WHO Director-General's Opening Remarks at the Media Briefing on COVID-19", Statement, 11 March 2020.

24. See e.g. the discussion of the definition of an influenza pandemic in Kelly and Doshi (above footnote 16) and H1N1 IHR Review Committee Report (above footnote 15).

25. IHRs, Article 1.

contentious point of negotiation was whether or not the tremendous burden of non-communicable diseases (such as heart disease, diabetes, cancer, chronic lung diseases and mental health conditions, which cause approximately three-quarters of global premature deaths) should be described as an "epidemic" [26]. After significant debate, the Political Declaration eventually described NCDs, somewhat awkwardly, as a "challenge of epidemic proportions" [27].

The heated debate in the General Assembly reflected that the characterisation of a disease as an epidemic may have consequences in other areas. In the case of NCDs, these related to international intellectual property law as contained in the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), where the term epidemic also has legal significance thanks to the operation of the Doha Declaration on the TRIPS Agreement and Public Health [28]. The TRIPS Agreement provides for the compulsory licensing of patented inventions under Article 31, which means that a patent holder can be required to license their invention to others in certain situations, for example to allow for the scale-up of production of medicines. Compulsory licences must only be issued in accordance with certain conditions, including a requirement for the proposed user to first make efforts to obtain authorisation from the rights holder on reasonable commercial terms and conditions for a reasonable period of time. In situations of national emergency or other circumstances of extreme urgency, this procedural requirement to attempt to obtain authorisation can be waived [29]. The Doha Declaration, a WTO Ministerial Council decision adopted by consensus in response to the concerns about the impact of intellectual property on access to medicines, interprets the TRIPS Agreement in relation to public health. It notes with concern "the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics", then "reaffirm[s] the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for these purposes" [30]. Those flexibilities include "the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted", as well as "the right to

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26. See Jonathan Liberman, "Implications of International Law for the Treatment of Cancer: The Single Convention on Narcotic Drugs and the TRIPS Agreement' (2011) 125 *Public Health* 840, 843-844.

27. *Ibid.*; see also United Nations General Assembly, Resolution 66/2, *Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases*, A/RES/66/2 (19 September 2011), paras. 13-14.

28. Fourth WTO Ministerial Conference, *Doha Declaration on TRIPS and Public Health*, WT/MIN(01)/DEC/2 (14 November 2001) ("Doha Declaration").

29. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C – Agreement on Trade-Related Aspects of Intellectual Property Rights, concluded 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995), Article 31 *(b)*.

30. Doha Declaration, paras. 1, 4.

determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency" [31]. The detailed negotiations over the "challenge of epidemic proportions" wording reflected an understanding by the States involved that declaring NCDs to be an epidemic might have implications for compulsory licensing under TRIPS [32].

Whether a disease is epidemic or not does not technically affect whether or not the health technologies to address it can be compulsorily licensed, as compulsory licensing is not limited to national emergencies, a national emergency is not limited to health issues and national emergencies in relation to public health include not only epidemics but "public health crises" as well [33]. It is also clear that States are free to decide that NCDs are indeed an "other epidemic", given the epidemiological definition of the concept and each country's right in the Doha Declaration to interpret the scope of the national emergency provisions of Article 31. However, many developing countries have long faced significant pressure from wealthier countries to limit the use of compulsory licensing, and thus specifically naming NCDs as an epidemic rather than reading them into the Doha Declaration *esjudem generis* would have provided additional political certainty in relation to invoking these flexibilities for NCDs [34]. The debates in the UN General Assembly also need to be seen in the context of attempts by certain States to attempt to limit flexibilities for public health measures to HIV/AIDS, tuberculosis, malaria and "other epidemics" in negotiations both within the WTO and in the context of new trade agreements [35], and so the contestation reflects a two-level negotiating strategy – on the one level to reject such limiting language in trade negotiations, while on the other ensuring that the term epidemics as negotiated in global health fora encompasses health conditions that present the majority of the disease burden in most countries.

The terms epidemic, pandemic and public health emergency of international concern also overlap with various other concepts which can be used to describe urgent or large-scale health risks. The most prominent example is that of the UN Security Council, which has previously declared the 2014-

31. Doha Declaration, paras. 5 *(b)*, 5 *(c)*.
32. Liberman, above footnote 26, 844.
33. See Kevin Outterson, "Disease-Based Limitations on Compulsory Licences under Article 31 and 31 bis", in Carlos Correa (ed.), *Research Handbook on Intellectual Property Protection under WTO Rules: Intellectual Property in the WTO*, Vol. 1 (Edward Elgar Publishing, 2010), 460.
34. *Ibid*. Also Liberman, above footnote 26, 843-844.
35. See Outterson, above footnote 33, for discussion of the WTO context; for discussion of new trade agreements, see e.g. Andrew Mitchell, Tania Voon and Devon Whittle, "Public Health and the Trans-Pacific Partnership Agreement", (2015) 5 *Asian Journal of International Law* 279.

2015 Ebola epidemic in West Africa as a threat to international peace and security, a declaration which was used to draw political attention and resources to that epidemic, and which is discussed in this volume in the chapters by Aline Almeida Coutinho Souza (Chap. 24) and Craig Gaver (Chap. 25) [36]. Similarly, an epidemic may constitute a state of emergency as understood in the derogation clauses of human rights instruments, discussed by Remzije Istrefi (Chap. 16), and it may also sometimes overlap with the concept of a disaster, as discussed by Ling Chen (Chap. 12).

Finally, several other "-demic" words have been coined to describe particular types of epidemics, such as "twindemic" (two epidemics or pandemics) [37] or "infodemic" (an epidemic of misinformation) [38]. One in particular is worth noting for a research project which aims to situate epidemics in their broader context – the concept of a syndemic, a portmanteau of "synergistic" and "epidemic", which describes several interacting epidemics which reinforce each other in ways that make them more challenging to address than if they had occurred individually [39]. It has been suggested, for example, that Covid-19 is a syndemic, combining both NCDs and economic and social inequality [40].

SECTION 2 **EPIDEMICS AND THE SCOPE OF THIS VOLUME**

Why use the term epidemic in this study, given this context? After all, since March 2020 many academic studies in international law have been framed around the concept of a pandemic [41], understandably so given the extraordinary nature of the Covid-19 pandemic and the desire to situate it in the context of similar events. There are proposals for a new field of "international pandemic law" [42], courses on pandemic law [43] and proposals for

36. United Nations Security Council, Resolution 2177 (2014), S/RES/2177 (2014) (18 September 2014).

37. See e.g. Jan Hoffman, "Fearing a 'Twindemic', Health Experts Push Urgently for Flu Shots", *New York Times*, 16 August 2020.

38. See e.g. World Health Organization *et al.*, "Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation: Joint Statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC", Statement, 23 September 2020, https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation.

39. Merill Singer *et al.*, "Syndemics and the Biosocial Conception of Health", (2017) 389 (10072) *Lancet* 941.

40. Richard Horton, "Offline: COVID-19 is Not a Pandemic", (2020) 396 (10255) *Lancet* 874.

41. See AJIL Agora, "The International Legal Order and the Global Pandemic", (2020) 114 *American Journal of International Law* 1.

42. See e.g. Steve Charnovitz, "The Field of International Pandemic Law", *International Economic Law and Policy Blog* (10 May 2020), https://ielp.worldtradelaw.net/2020/05/the-field-of-international-pandemic-law.html.

43. See e.g. Melbourne Law School, "Pandemic Law and Practice", in *University of Melbourne Handbook* (2020), https://handbook.unimelb.edu.au/2020/subjects/laws90199.

a new "pandemic treaty" [44]. It would be understandable to frame this session of the Centre for Studies and Research in terms of pandemics.

But in many ways, examining the relevant aspects of international law in terms of pandemics is too restrictive. In many of the relevant legal regimes, a pandemic is not distinguished from an epidemic that affects a smaller group of States, a region or even a single state in terms of applicable legal obligations or powers. Similarly, the term does not make for clear distinctions between relevant case studies – it covers Covid-19, pandemic influenza and HIV/AIDS, but it does not include equally relevant examples of infectious disease epidemics such as SARS, MERS and Ebola, nor necessarily the original notifiable diseases under the IHRs' precursors (plague, for example, is now thankfully rarely pandemic). Given there are many reasons to examine the legal aspects of epidemics that may not be considered pandemics, we have chosen to frame this study in terms of epidemics rather than pandemics [45].

Conversely, the choice to limit the scope of this study to infectious diseases, and to epidemics of infectious diseases rather than infectious disease control generally, is based on the need to narrow the topic for practical reasons. Although epidemics can be non-infectious, infectious disease epidemics raise particular legal issues distinct from NCD epidemics, including in relation to human rights and measures to limit or trace movements to prevent the spread of an infection, and measures taken in relation to cross-border travel and trade. Similarly, while an endemic infectious disease may be no less urgent or serious than an epidemic of a novel virus, and be governed by many of the same legal instruments, the need to address a fast-spreading epidemic raises some distinct legal issues – including more acute questions about the use of emergency powers, cross-border movement limitations and coordination among international organisations. Given the potentially wide scope of the topic, we felt that focusing on epidemics of infectious diseases would be a workable scope for the purposes of this project.

SECTION 3 **WHAT FIELDS OF INTERNATIONAL LAW DOES THIS VOLUME COVER?**

If the term "epidemics" is a new one to international lawyers, one hopes that the term "international law" is more familiar. In the first instance, this includes what is variously described as international

44. World Health Organization, "Global Leaders Unite in Urgent Call for International Pandemic Treaty", (News release, 30 March 2021), https://www.who.int/news/item/30-03-2021-global-leaders-unite-in-urgent-call-for-international-pandemic-treaty.

45. Similarly, framing a project such as this in terms of PHEICs would also have been restrictive, given the intention to examine not only the IHRs but other areas of international law as well.

health law or global health law[46] – that is, a subfield of international law centred on the legal norms developed under the auspices of the WHO, the "directing and co-ordinating authority on international health work" and the United Nations specialised agency for health[47]. Indeed, this volume contains several chapters that examine in detail different aspects of WHO law, including the historical development of the IHRs (as discussed by Maria Adele Carrai in Chapter 3), the legal status of the IHRs (Ana Cristina Gallego Hernández in Chapter 8), the role of scientific evidence in the WHO's decision-making (Margherita Mellilo in Chapter 9), reporting and information sharing (Olha Bozhenko in Chapter 10) and the WHO's powers relating to public health surveillance (René Fabrizio Figueredo Corrales in Chapter 11).

However, as is widely acknowledged by most lawyers who practise it, examining only the rules of international law that specifically relate to health provides an incomplete picture of the place of health in international law. As defined by Brigit Toebes, global health law is not simply norms created by the WHO but also includes the many other areas of international law that impact on health[48]. Similarly, Lawrence Gostin and Allyn Taylor define global health law as encompassing all legal norms and processes that impact on the ability of all human beings to achieve the highest attainable standard of health[49]. From an international relations perspective, Ilona Kickbusch and Martina Szabo describe three "governance spaces for health" in global health: governance for global health (dealing with national/regional level developments that relate to global health), global health governance (dealing with international organisations dedicated to global health) and global governance for health (dealing with international organisations in areas outside health, due to the impact that such organisations have on the political, social and economic determinants of health)[50] – each of which relates to different areas of law as well. The question of "non-health" areas of international law and their relationship with health is fundamental to the practice of contemporary global health law.

These trends in global health law generally are also apparent when we examine epidemics specifically. The chapters in this book demonstrate the diversity of the areas of international law that relate to epidemics, including

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46. Brigit Toebes, "Global Health Law: Defining the Field", in Gian Luca Burci and Brigit Toebes (eds.), *Research Handbook on Global Health Law* (Edward Elgar Publishing, 2018), 2, 5-6.

47. WHO Constitution, Article 2 *(a)*.

48. Toebes, above footnote 46, 5-6.

49. Lawrence O. Gostin and Allyn L. Taylor, "Global Health Law: A Definition and Grand Challenges", (2008) 1 *Public Health Ethics* 53.

50. Ilona Kickbusch and Martina M. C. Szabo, "A Ne Governance Space for Health", (2014) 7 *Global Health Action* 23507, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3925805/.

human rights law (discussed by Fernando Arlettaz (Chap. 15), Shaimaa Abdelkarim (Chap. 6), Remzije Istrefi (Chap. 16), Cecilia I. Silberberg (Chap. 17) and Luciano Bottini Filho (Chap. 18)), peace and security (Aline Almeida Coutinho Souza (Chap. 24), Craig D. Gaver (Chap. 25) and Mulry Mondélice (Chap. 26)), international environmental law (Iraida Angelina Giménez (Chap. 19), Xiaoou Zheng (Chap. 20) and Andrew Van Duyn (Chap. 21), the law of maritime transport (Maria Emilynda Jeddahlyn Pia V. Benosa (Chap. 23)), investment law (Sophie Davin (Chap. 22)), liability (Siamak Karimi (Chap. 27)), responsibility (Alex Silva Oliveira (Chap. 28) and Yu-Hsiang Huang (Chap. 29)), state immunity (Anna Facchinetti (Chap. 31)), the concept of borders (Raphael Oidtmann (Chap. 4)), international cooperation (Otto Spijkers (Chap. 5) and Ling Chen (Chap. 12)) and international dispute settlement (Zhang Maoli (Chap. 30)). Each of these chapters shows the intersection between health and these areas of law, and in many cases, they also show how the prevention and control of epidemics challenges many of the concepts and assumptions of each field.

Even if we look specifically at institutions and lawmaking specifically relating to health, we see a remarkable diversity of instruments and institutions. Scholars of international relations and health have long noted that there are now many organisations other than WHO working in global health, from public-private partnerships such as the Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria, to private philanthropies such as the Bill and Melinda Gates Foundation, to regional health organisations, to other international organisations whose mandate is not health but which arguably have almost as much ability to shape health outcomes as the WHO itself[51]. Further, as noted by scholars such as Sharifah Sekalala[52] and Suerie Moon[53], global health is an area characterised by the extensive use of soft law and informal cooperation. The papers by Jose Yepez (Chap. 13), Bethlehem Arega Asmamaw (Chap. 14) and Gail C. Lythgoe (Chap. 7) make important contributions to legal scholarship on global health governance beyond the framework of the WHO treaties, through their discussion on the role of regional organisations and frameworks in Latin America and Africa, and in relation to hybrid and informal forms of governance respectively.

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51. See Kickbusch and Szabo, above footnote 50; see also Chelsea Clinton and Devi Sridhar, *Governing Global Health: Who Runs the World and Why?* (Oxford University Press, 2017).

52. Sharifah Sekalala, *Soft Law and Global Health Problems* (Cambridge University Press, 2017).

53. Suerie Moon, "Global Health Law and Governance: Concepts, Tools, Actors, and Power", in Gian Luca Burci and Brigit Toebes, *Research Handbook on Global Health Law* (Edward Elgar Publishing, 2018), 24.

SECTION 4 ADDITIONAL AREAS OF INTERNATIONAL LAW RELATING TO EPIDEMICS

The topics in this book represent a selection of the topics studied during the Centre, and thus are not a complete collection of the subtopics studied during the session. Even allowing for this, no one course on a topic as wide-ranging as this one can cover all aspects of the examined issue, and the finite number of researchers whom we could supervise during this session means that there remain many important topics which we were not able to cover during the Centre.

One of the most significant omissions is that of gender – particularly given that this volume was written and edited during the Covid-19 pandemic. A pandemic where women have borne a disproportionate share of employment losses [54], taken on a disproportionate share of additional caregiving responsibilities [55], formed the majority of frontline health workers [56] and faced increasing rates of domestic and occupational violence, all while being underrepresented in global health leadership and often not well served by gender-blind health and social support policies [57], starkly demonstrates the importance of a gender-responsive approach to global health. Further, Covid-19 is hardly the only epidemic where it is necessary to examine gender – scholars such as Clare Wenham [58], Sara Davies and Belinda Bennett [59] have documented the gendered effects of the Zika virus and Ebola epidemics, while gender and sexuality have long been central to the response to HIV/AIDS and have been a key part of the development of norms of human rights in relation to that pandemic [60]. On a more conceptual level, feminist legal theory provides useful insights into the way we frame problems and solutions in public health, such as the pitfalls

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54. International Labour Organization, "ILO Monitor: COVID-19 and the World of Work. Seventh Edition: Updated Estimates and Analysis", 25 January 2021, 9, https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/briefingnote/wcms_767028.pdf.

55. See e.g. Kate Power, "The COVID-19 Pandemic Has Increased the Care Burden of Women and Families", (2020) 16 *Sustainability: Science, Practice and Policy* 67.

56. See e.g. Global Health 50/50, *Gender Equality: Flying Blind in a Time of Crisis* (Global Health 50/50 Report, 2021), https://globalhealth5050.org/2021-report/; World Health Organization, Global Health Workforce Network and Women in Global Health, "Delivered by Women, Led by Men: A Gender and Equity Analysis of the Global Health and Social Workforce", Human Resources for Health Observer Series No. 24, March 2019, https://www.who.int/hrh/resources/health-observer24/en/.

57. Global Health 50/50 Report, above footnote 56.

58. See e.g. Clare Wenham, *Feminist Global Health Security* (Cambridge University Press, 2021).

59. See Belinda Bennett and Sara Davies, "Looking to the Future: Gender, Health and International Law", in Susan Harris Rimmer and Kate Ogg, *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing, 2019), 323.

60. See e.g. Global Commission on HIV and the Law, *HIV and the Law: Risk, Rights & Health* (Final Report, 2012); Alan Greig *et al.*, "Gender and AIDS: Time to Act", (2008) 22 (Suppl. 2) *AIDS* S35.

of framing epidemic response in terms of a "war" on disease, rather than in terms that acknowledge that epidemic response is fundamentally a question of cooperation [61]. To draw again on the concept of a syndemic, many epidemics are syndemic with gender inequalities, and collaborations between the field of feminist approaches to global health and feminist approaches to international law should be seen as a critical part of responding to this pandemic and preparing for future ones.

Another topic which was underrepresented during the Centre is international trade law. Epidemics and the response to epidemics are fundamentally shaped by economic globalisation, and indeed, many definitions of global/ international health law explicitly describe the aims of this area of law in terms of a counterweight to the health impacts of international economic law [62]. The linkage between trade and epidemics is specifically acknowledged in the IHRs, which aim to limit disruptions to international traffic and trade during a PHEIC. Beyond the IHRs, international trade law has many intersections with public health, which have long been a significant area of study in international law. Trade law affects the flow of health goods and services – as well as goods and services giving rise to health risks – across borders during an epidemic, while certain health measures taken to address epidemics (such as quarantine requirements) can affect cross-border trade as well [63]. International trade law significantly shapes the ability of States to take certain measures in the name of public health, with WTO disputes about public health measures having led to major debates on the regulatory autonomy of States to take public health measures [64]. Agreements relating to intellectual property, which are now significantly integrated into trade agreements such as the TRIPS Agreement and the intellectual property chapters of bilateral and regional free trade agreements, also have significant implications for access to treatments, vaccines and diagnostics, and on health and medical research [65], as do related

61. See e.g. Christine Schwobel-Patel, "We Don't Need a 'War' Against Coronavirus: We Need Solidarity", *Al Jazeera*, 6 April 2020, https://www.aljazeera.com/opinions/2020/4/6/we-dont-need-a-war-against-coronavirus-we-need-solidarity.

62. See Brigit Toebes, "International Health Law: An Emerging Field of Public International Law", (2015) 55 *Indian Journal of International Law* 299.

63. See e.g. World Trade Organization, "Trade Topics: COVID-19 and World Trade", https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm, as at 3 April 2021; Mona Pinchis-Paulsen, "COVID-19 Symposium: Thinking Creatively and Learning from COVID-19 – How the WTO can Maintain Open Trade on Critical Supplies", *Opinio Juris* blog, 2 April 2020, http://opiniojuris.org/2020/04/02/covid-19-symposium-thinking-creatively-and-learning-from-covid-19-how-the-wto-can-maintain-open-trade-on-critical-supplies/.

64. See e.g. Benn McGrady, "Health and International Trade Law", in Gian Luca Burci and Brigit Toebes, *Research Handbook on Global Health Law* (Edward Elgar Publishing, 2018), 104.

65. Frederick M Abbott, "Health and Intellectual Property Rights", in Gian Luca Burci and Brigit Toebes, *Research Handbook on Global Health Law* (Edward Elgar Publishing, 2018), 135. See e.g. the current proposal for a Covid-19 related waiver of

rules such as those on standards relating to pharmaceutical products [66]. This volume examines these issues through the lens of international investment law, commercial shipping and scientific evidence, but it does not examine international trade law itself. Other areas we might have examined, and which may form the basis of future publications, include the rights of Indigenous peoples in relation to epidemics [67]; aviation law and infectious disease control [68]; the ongoing legacy of colonialism in global health, including global health law [69]; and the development of additional treaties in relation to epidemics to supplement the IHRs [70].

SECTION 5 **CONCLUSION**

The twenty-nine contributions (Chaps. 3 to 31) to this book provide a wide array of perspectives from brilliant emerging scholars from different areas of expertise and professional backgrounds. We hope their work during this session of the Centre provides valuable food for thought on the topic of epidemics and international law, and that it will start many productive and important conversations on the role of international law in preventing, controlling and mitigating the consequences of epidemics.

TRIPS obligations – World Trade Organization Council for Trade-Related Aspects of Intellectual Property Rights, "Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa", WTO Doc. IP/C/W/669, 2 October 2020.

66. See e.g. Xavier Seuba, "International Harmonization of Pharmaceutical Standards: Trade, Ethics and Power", in Gian Luca Burci and Brigit Toebes, *Research Handbook of Global Health Law* (Edward Elgar Publishing, 2018), 460.

67. See e.g. the case study of Indigenous self-determination in the context of the Australian Covid-19 response, where despite significant health disparities in relation to other conditions, not a single Covid-19 death was recorded among Aboriginal and Torres Strait Islanders in 2020 due to the rapid and effective response of Aboriginal Community Controlled Health Organizations: "'We Have Not Lost One Elder': NACCHO CEO Pat Turner Reflects on Aboriginal Community Successes in COVID-19", *Croakey*, 9 December 2020, https://www.croakey.org/we-have-lost-not-one-elder-naccho-ceo-pat-turner-reflects-on-aboriginal-community-successes-in-covid-19/.

68. See e.g. Gearóid Ó Cuinn and Stephanie Switzer, "Ebola and the Airplane: Securing Mobility Through Regime Interactions and Legal Adaptation", (2019) 32 *Leiden Journal of International Law* 71.

69. See e.g. Seye Abimbola and Madhukar Pai, "Will Global Health Survive Its Decolonisation?", (2020) 396 (10263) *Lancet* 1627. As with feminist approaches, one can imagine fruitful collaboration between international legal scholars working on Third World Approaches to International Law, and their global health counterparts, such as the Decolonising Global Health movement.

70. Such as the current proposal for an "international pandemic treaty": World Health Organization, "Global Leaders Unite in Urgent Call for International Pandemic Treaty", above footnote 44.