

Avian Influenza and International Law: Obligations upon Affected States

Patti Troutbeck

A dissertation submitted in partial fulfilment of the degree of Bachelor of
Laws (Honours)

University of Otago, Dunedin, New Zealand
October 2006

ACKNOWLEDGEMENTS

Firstly I would like to thank my supervisor, Associate Professor Kevin Dawkins, for his time and advice. I would also like to thank my parents for their never-ending support; and Bobby, for calming me down when things got stressful.

CONTENTS

Introduction	3
Chapter One: Avian Influenza and its Control	5
1. Background Information.....	5
2. Control.....	7
Chapter Two: International Health Regulations	9
1. Introduction.....	9
2. The Revised IHR.....	10
2.1. National Focal Point.....	10
2.2. Surveillance.....	11
2.3. Notification.....	12
2.4. Response.....	13
3. Will they be Effective?.....	13
3.1. Non-Compliance.....	14
3.2. Resources.....	16
3.3. Notification Obligations.....	17
3.4. Enforcement.....	17
Chapter Three: The IHR and State Responsibility	19
1. State Responsibility.....	19
2. Cover-ups by Central Governments.....	20
3. Attribution.....	21
4. Breaches of Surveillance and Response Obligations.....	23
5. Force Majeure: Article 23.....	25
Chapter Four: International Environmental Law and Transborder Harm	27
1. Customary International Law.....	27
2. General Principles of Law.....	33

Chapter Five: International Human Rights Law	37
1. Introduction.....	37
2. The Right to the Highest Attainable Standard of Physical and Mental Health.....	37
3. The Right to Life.....	41
3.1. Is the Right to Life Applicable to the Issue of Infectious Disease?.....	41
3.2. Does the Failure to Provide Vaccines and Appropriate Medical Treatment Violate the Right to Life?.....	46
4. The Right to Liberty of Movement.....	47
5. The Right to Freedom of Assembly.....	49
6. Implementation of the ICCPR.....	49
7. Human Rights and State Responsibility.....	51
Conclusion	55
Bibliography	57

INTRODUCTION

Avian influenza, commonly known as “bird flu,” is an infectious disease of birds caused by certain strains of the influenza virus.¹ Since 2003, the World Health Organization has reported 143 confirmed human cases of death due to the H5N1 strain of avian influenza.² While this number is relatively low when compared to the number of deaths that other diseases cause, there is a fear that the virus will re-assort or mutate into a strain that can be transmitted easily among humans. This could result in an influenza pandemic affecting the human population and causing large-scale casualties.

Infectious disease is not a new issue, pandemics have occurred many times throughout history. For example, in the 14th Century bubonic plague – or “the Black Death” – spread from China to Europe and wiped out roughly a third of Europe’s population in 5 years.³ However, in modern times, the global nature of infectious disease is much more prominent. While disease did spread among countries and even continents hundreds of years ago, the speed and frequency with which it did was nowhere near as extreme as it is today. Huge increases in global traffic and trade mean that urgent public health risks such as infectious disease will often quickly transcend national boundaries. Because of this highly global nature, it is not desirable to leave the handling of the issue of infectious disease solely up to the affected state.

¹ World Health Organization, *Avian Influenza – fact sheet* Jan 2004
www.who.int/csr/don/2004_01_15/en/

² As at 8 September 2006, World Health Organization, Cumulative Number of Confirmed Human Cases of Avian Influenza Reported to WHO

http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_09_08/en/index.html

³ The Black Death – Bubonic Plague, www.themiddleages.net/plague.html

Cover-ups by China during the SARS outbreaks indicate we can not always rely on affected states to deal with infectious diseases in an appropriate manner. International law can be used a mechanism for requiring a certain standard from states in their notification and handling of potentially global disease threats. While the international co-operation necessary to combat Avian Influenza will undoubtedly include obligations on states not affected by the virus, my dissertation is going to focus solely on the obligations incumbent upon States where instances of the virus have been discovered.

Firstly I will be examining the revised International Health Regulations to see if they are likely to provide an adequate international framework for dealing with global disease threats. I will then look at other areas of international law to see if there are existing policies which may be applied to the issue of infectious disease, and in particular, avian influenza. These other areas of law I will be looking at are; Human Rights law, Environmental law, and the law relating to State Responsibility.

CHAPTER ONE: AVIAN INFLUENZA AND ITS CONTROL

1. BACKGROUND INFORMATION

Avian influenza viruses are common among birds. While many wild bird species can carry the viruses without any apparent symptoms or resulting harm, other species, including domestic poultry, will develop disease if they become infected.⁴ In poultry, infection with the viruses causes two main forms of disease distinguishable by their degrees of severity.⁵ One form of the disease usually only causes mild symptoms – such as ruffled feathers and a decrease in egg production – and will often go undetected.⁶ The other form, however, is highly pathogenic, spreads rapidly, and has a mortality rate that can come close to 100% with just 48 hours.⁷

Most avian influenza viruses will only affect birds and do not cross over to other species. However, a small number of the viruses have caused disease in other species, including humans. Of all avian influenza viruses, the H5N1 virus is of greatest concern for human health at present.⁸ This is because it has caused the highest number of severe or fatal human cases, when compared to other avian influenza viruses which have caused infection in humans in the past.⁹ Recently, there has been a worrying number of outbreaks of the H5N1 virus subtype. These outbreaks began

⁴ World Health Organization *Avian Influenza (“bird flu”) – Fact Sheet* February 2006 at www.who.int/mediacentre/factsheets/avian_influenza/en

⁵ CDC *Avian Influenza (Bird Flu) Fact Sheet* June 2006
http://www.cdc.gov/flu/avian/gen_info/pdf/avian_facts.pdf

⁶ CDC *Supra* note 5

⁷ World Health Organization 2006 *Supra* note 4

⁸ *Ibid*

⁹ *Ibid*

in Asia in late-2003,¹⁰ and the H5N1 virus has since spread to Europe and Africa, with cases in birds being reported in over 50 countries.¹¹ As at 27 September 2006, laboratory-confirmed human cases have been reported to WHO by 10 different countries.¹² Although the number of human cases has thus far remained relatively low, this will likely change if the virus mutates or re-assorts into a form than can be easily spread by human-to-human contact. According to the World Health Organization (WHO), the world is now the closest to a pandemic it has been since 1968 – the date of the last influenza pandemic.¹³ The only prerequisite for the beginning of a new pandemic which has not been met is the lack of efficient human-to-human transmission.¹⁴

Avian influenza viruses spread easily among poultry, and can easily be transmitted among farms by the movement of such things as birds, contaminated shoes and clothing, and contaminated vehicles and equipment.¹⁵ The more highly pathogenic viruses can survive in the environment for extended periods of time. For example, samples of faecal matter showed that the H5N1 virus could survive for over a month if the temperature is low.¹⁶

¹⁰ David Fidler *ASIL Insight: The Continuing Global Spread of Avian Influenza A (H5N1) and its Implications for International Law* November 7 2005

¹¹ OIE Update on Avian Influenza in Animals, September 20 2006, www.oie.int/downld/AVIAN%20INFLUENZA/A/AI-asia.htm

¹² WHO Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to Who, September 27 2006 http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_09_27/en/index.html

¹³ World Health Organization *Responding to the Avian Influenza Pandemic Threat: Recommended Strategic Actions* WHO/CDS/CSR/GIP/2005.8 3

¹⁴ *Ibid*

¹⁵ World Health Organization *Supra* note 4

¹⁶ *Ibid*

2. CONTROL

WHO states that the H5N1 virus is already endemic in some parts of Asia, and it is very likely the complete eradication of the virus is not possible due to its presence in wild birds.¹⁷ However, although wild birds are thought to be partly responsible for the spread of the H5N1 virus, the spread of the virus throughout Asia has been primarily caused by the movement of domestic birds.¹⁸ Although it may not be feasible to manage the virus in wild birds, control of the disease in domestic birds is realistic and would have a strong impact on the incidence of human cases.

The ability to control infectious diseases such as the H5N1 virus depends upon a state's capacity to rapidly detect the disease.¹⁹ Efficient surveillance capabilities will allow a country to bring an instance or an outbreak of the virus under control more easily, before it has spread to other areas. This includes the ability to quickly detect cases in migratory wild bird populations as well as in domestic birds and other species. While it is not possible to control the movements of migratory birds, it is possible to predict approximately what these movements will look like,²⁰ by gathering information relating to the habits of migratory bird populations.

In domestic birds, the most important way of controlling the spread of the H5N1 virus (and other highly pathogenic subtypes) is by culling all infected or exposed birds. For example, some experts believe that the rapid culling of Hong Kong's entire poultry

¹⁷ World Health Organization Supra note 13 5

¹⁸ United States Department of the Interior *An Early Detection System for Highly Pathogenic H5N1 Avian Influenza in Wild Migratory Birds: US Interagency Strategic Plan*, March 14 2006, [http://www.doi.gov/issues/birdflu-strategic plan.pdf](http://www.doi.gov/issues/birdflu-strategic%20plan.pdf)

¹⁹ Ibid

²⁰ Ibid

population during an outbreak of human cases in 1997 prevented an influenza pandemic.²¹ Other extremely important control measures include: disposing properly of the infected carcasses; quarantine and disinfection of farms; implementation of strict bio-security measures; and restrictions on the movements of live poultry.²² In addition, as most human cases have occurred in rural areas, it is important to educate farmers and their families as to how to avoid exposure to avian influenza.²³

Nonetheless, there are many factors existing which can make control of avian influenza difficult. Research has shown that domestic ducks can carry the H5N1 virus yet show no symptoms, meaning that large amounts of the pathogen can be excreted by them unbeknown to farmers.²⁴ There are also many difficulties in controlling the virus in poorer rural areas. Owners of flocks may not recognise deaths or illness in birds as caused by avian influenza, or may purposely cover up instances of the virus for fear of inadequate compensation for destroyed birds. There is also an increased risk of human exposure in poorer areas. For example, even if birds are ill or have died, they may be eaten as there is little other food supply. In backyard flocks, as well, birds will often roam freely and mix with wild birds, frequently among the same areas where children play or sleep.²⁵

²¹ World Health Organization Supra note 4

²² Ibid

²³ World Health Organization Supra note 13 5

²⁴ Ibid

²⁵ World Health Organization Supra note 4

CHAPTER TWO: INTERNATIONAL HEALTH REGULATIONS

1. INTRODUCTION

The International Health Regulations (IHR) are the only set of binding international legal rules designed specifically to control the spread of infectious disease.²⁶

Originally beginning life as the International Sanitary Regulations in 1951²⁷, the IHR were adopted under the Constitution of the World Health Organization (WHO).

Article 21 of the Constitution gives WHO the authority to adopt regulations concerning “sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.” Under Article 22 of the Constitution, these regulations are binding on all WHO Member States except those which notify the Director-General of a rejection or reservations within a certain period of time.

Only three diseases - yellow fever, plague and cholera - are subject to the IHR currently in force. Thus these regulations are of no applicability in relation to Avian Influenza and other modern infectious disease threats, such as the SARS outbreaks and the HIV/AIDS pandemics. In addition, the legal obligations under the current IHR are routinely ignored.²⁸ Such shortcomings have long been realized, and in accordance with a resolution adopted by the World Health Assembly in May 1995,²⁹ a revision process of the IHR was initiated. The result is the revised IHR, which were adopted by the World Health Assembly on 23 May 2005.³⁰ The revised IHR aim to

²⁶ Barbara Von Tigerstrom *The Revised International Health Regulations and Restraint of National Health Measures* 13 *Health Law Journal* 35, 2005 36

²⁷ David Fidler *SARS, Governance and the Globalization of Disease*, New York: 2004 32

²⁸ *Ibid* 35

²⁹ WHA48.7

³⁰ World Health Assembly *Revision of the International Health Regulations* WHA58.3 May 23, 2005

address the ineffectiveness of the current regulations in a number of ways. They greatly expand the currently limited scope of the IHR, they create more onerous obligations upon Member States and they establish new powers for WHO.³¹ In the following paragraphs I will examine the revised IHR and the obligations which they impose upon Member States. I will then consider whether they will be effective in ensuring that these obligations are met.

2. THE REVISED IHR

The purpose of the revised IHR is “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, and which avoid unnecessary interference with international traffic and trade” (Article 2). Thus, while the purpose remains the same as that under the current IHR, the means with which WHO aims to achieve it will change.

2.1 NATIONAL FOCAL POINT

The revised IHR require each Member State to establish a “National IHR Focal Point” which shall be accessible at all times for communications with the “WHO IHR Contact Points” (Article 4.1). The functions of these Focal Points include sending communications to WHO Contact Points and distributing and co-coordinating information to and from relevant sectors of the administration of the Member State (Article 4.2). Under the current IHR there have often been considerable delays in the

³¹David Fidler and Lawrence Gostin *The New International Health Regulations: an Historic Development For International Law and Public Health* 34 *Journal of Law, Medicine and Ethics* 1, Spring 2006, 86

reporting of potential health threats, and the requirement for IHR Focal Points aims to address this.³²

2.2 SURVEILLANCE

Improved surveillance capabilities are central to the new regulations. One of the reasons why Member States often fail in their duty to notify WHO of outbreaks of diseases subject to the current IHR is because the poor surveillance systems of many states means they are often not identified.³³ The new IHR aim to address this issue. Article 5 of the revised IHR requires each State Party to “develop, strengthen and maintain... the capacity to detect, assess, notify and report events in accordance with these regulations.” The minimum requirements are set out in Annex 1. At the local community level State Parties must have the capacities to “detect events involving disease or death above expected levels for the particular time and place” in all areas within their territory, and to report all available essential information³⁴ to the appropriate health personnel.³⁵ At the intermediate public health response levels the minimum level of assessment and notification requires State Parties to have the capacities “to confirm the status of reported events” and to “assess reported events immediately and, if found urgent, to report all essential information to the national level.”³⁶ And at the national level State Parties must have the capacities to “assess all reports of urgent events within 48 hours;” and to immediately notify WHO when this

³² Eric Mack *The World Health Organization's New International Health Regulations: Incursion on State Sovereignty and Ill-Fated Response to Global Health Issues* 7 Chicago Journal of International Law 365, Summer 2006 370

³³ David Fidler *International Law and Infectious Diseases* New York, 1999 65

³⁴ Annex 1A Art 4(b) provides that essential information includes: clinical descriptions, laboratory results, sources and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed

³⁵ Annex 1A Art 4(a)

³⁶ Annex 1A Art 5(a) and (b)

assessment indicates the event may constitute a public health emergency of international concern.³⁷

2.3 NOTIFICATION

Unlike the old IHR, the revised IHR do not limit their scope to address only specifically identified diseases. Rather, a broad approach is adopted, by which countries must notify WHO of “all events which may constitute a public health emergency of international concern” within 24 hours of assessment of the relevant information.³⁸ Annex 2 provides a decision instrument for the assessment and notification of events detected by national surveillance systems. This broad approach is effective as it encompasses the emergence of new diseases which may be unheard of at the time of drafting of the regulations. In addition, Article 7 states 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.” In contrast to the current IHR, the notification requirements under the revised IHR are clearly relevant to human cases of avian influenza. However these notification requirements may be open to abuse by Member States, as discussed below.

³⁷ Annex 1A Art 6(a) and (b)

³⁸ Article 6.1

2.4 RESPONSE

Article 13 requires each State Party to “develop, strengthen and maintain... the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.” The minimum requirements for response capabilities are set out in Annex 1. Many of these requirements will create onerous obligations for Member States. They include, for example, having the capacity to “provide support through specialized staff, laboratory analysis of samples... and logistical assistance,”³⁹ and establishing, operating and maintaining “a national public health emergency response plan, including the creation of multidisciplinary/multisectoral teams to respond to events that may constitute a public health emergency of international concern.”⁴⁰

3. WILL THEY BE EFFECTIVE?

Although the revised IHR will enter into force in May 2007,⁴¹ Member States will not have to fulfil their surveillance and response capability obligations under the revised IHR until May 2012 (Articles 5.1 and 13.1). In addition to this, there is the potential to obtain an extension of two years on the basis of “a justified need”, and in exceptional circumstances, a further two year extension.⁴² This means that for some Member States, the revised IHR will not be fully applicable until May 2016.

Although the IHR only explicitly provide that the surveillance and response obligations will not have to be fulfilled immediately, other obligations will also be

³⁹ Annex 1A Public Health Response (b)

⁴⁰ Annex 1A Public Health Response (g)

⁴¹ Gerald S Schatz *ASIL Insight, International Health Regulations: New Mandate for Scientific Cooperation* 2 August 2005

⁴² Articles 5.2 and 13.2

affected by these provisions. For example, if there is a lack of adequate surveillance, the requirement under Article 6 to provide notification of all events which may constitute a public emergency will be much weaker. In light of the WHO's statement that recently "the world has moved closer to a pandemic than at any time since 1968"⁴³ and their recommendation that countries urgently prepare for a pandemic, it has to be of concern that many of the obligations contained in the IHR will not of much value for a number of years.

3.1 NON-COMPLIANCE

WHO Member States have consistently fallen short in meeting their obligations under the current IHR by failing to report outbreaks of diseases subject to the regulations.⁴⁴

One of the main reasons for non-compliance is the potential for notification of diseases to cause considerable economic losses for tourism and trade.⁴⁵ For example, India lost an estimated \$US1.7 billion in trade due to restraints put in place by other countries after an outbreak of the plague in 1994.⁴⁶ The potential negative economic, social and political consequences that follow outbreaks of infectious disease mean that State Parties have strong incentives to cover up outbreaks to the WHO.⁴⁷

Under the current IHR, WHO can only notify other State Parties of information it has received from a government. Thus, the operability of the current regulations is

⁴³World Health Organization Supra note 13 3

⁴⁴ Fidler, Supra note 27 35

⁴⁵ Delon PJ *The International Health Regulations: A Practical Guide* World Health Organization, 1975, 24

⁴⁶ David Fidler *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law* 81 Minnesota Law Review 771, April 1997 816

⁴⁷ David Bishop *Lessons from Sars: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations* 36 Georgetown Journal of International Law 1173, Summer 2005 1191

wholly dependant upon the affected country making an official notification to WHO.⁴⁸ The WHO has no legal authority to distribute any information it may receive from other sources, no matter how reliable that source may be. In contrast, Article 9 of the new IHR allows WHO to take into account reports from sources other than official notifications or consultations. It is possible that the inclusion of Article 9 will provide more incentive for Member States to comply with their notification obligations, as it will become less likely that their failure to comply will prevent the dissemination of information to other states. Member States may also have learnt a valuable lesson from the SARS outbreaks in China. Although Chinese officials tried to cover up the outbreaks, information still managed to leak out to the international community.⁴⁹ However, one issue which may prevent non-state actors from disseminating information to WHO is the matter of confidentiality, or lack thereof.⁵⁰ Article 9.1 states that WHO will only maintain the confidentiality of the source of non-official information where it is “duly justified.” Just what qualifies as duly justified is not made clear. If governments are trying to cover up outbreaks, then it is likely they will not look favourably on informants. This risk can be seen in the case of Qiao Songju who was one of the first informers of an outbreak of avian influenza in Gaoyou County, China.⁵¹ Two days after Qiao attempted to report a second outbreak he was arrested on suspected fraud charges.⁵² While it is impossible to be certain, many observers believe the timing was not simply coincidental but that Qiao was framed.⁵³

⁴⁸World Health Organization *Global Crises Global Solutions: Managing Public Health Emergencies of International Concern through the Revised International Health Regulations* WHO/CDS/CDR/GAR/2002.4

⁴⁹ Fidler and Gostin *Supra* note 31 89

⁵⁰ *Ibid*

⁵¹ Xiang, Xu *China Plagued by Bird-flu Cover-ups* 8 June 2006
<http://www.atimes.com/atimes/China/HF08Ad01.html>

⁵² *Ibid*

⁵³ *Ibid*

3.2 RESOURCES

Articles 5 and 13 create onerous duties for Member States in relation to surveillance and response capabilities. However, many states do not have the capacity to fulfill these duties as implementation will require considerable financial and human resources. Although Article 5.3 and 13.3 provide that WHO shall assist State Parties in the strengthening and development of surveillance and response capacities, the new IHR contains little information as to how and where WHO plans to obtain the required resources. These duties to provide assistance fail to address WHO's own shortage of funds and personnel.⁵⁴ While Article 44 does state that State Parties shall undertake to collaborate with each other in relation to the mobilization of financial resources to support developing countries, it gives no information as to how this should be done and is likely to do little in raising sufficient funds to help developing countries fully implement the necessary capabilities. So far, most instances of the H5N1 virus have occurred in less developed countries where it is likely that assistance will be necessary in order to meet the new IHR obligations. Thus, although the new IHR do create relevant obligations upon states affected by avian influenza, their effectiveness in controlling the spread of the disease will depend upon whether the necessary funds can be raised. And as David Fidler and Lawrence Gostin point out, "Given the financial demands created by other global health problems... the new IHR's silence on how the economic demands of the core capacity objectives will be met is a serious problem for which the new IHR provide no apparent answers."⁵⁵

⁵⁴ Fidler and Gostin *Supra* note 31 88

⁵⁵ *Ibid*

3.3 NOTIFICATION OBLIGATIONS

The decision instrument found in Annex 2 of the new IHR consists of a flow diagram and is to be used to determine whether an event may constitute a public health emergency. Many of the questions contained in the diagram however are subjective, and the Government of a Member State may reach a different conclusion than a WHO official in relation to the same event. As discussed earlier, governments often face disincentives – such as the potential for economic losses – in reporting outbreaks of diseases. It is possible that Member States could blame their failure to meet their notification obligations on the fact that on their subjective belief the event did not meet the criteria in the decision instrument. As David Bishop suggests, since countries fail to disclose outbreaks of certain diseases under the current system even when they are expressly required to, it is unlikely that they will be less reluctant in disclosing information under the “new amorphous standard.”⁵⁶

3.4 ENFORCEMENT

The new IHR clearly create obligations upon Member States affected with avian influenza. However, if states fail to live up to these obligations, what measures – if any -can be applied against them? The WHO Constitution does not provide for any sanctions against State Parties which fail to fulfill their obligations under binding regulations enacted under the Constitution.⁵⁷ Furthermore, there is nothing contained in either the old or new IHR which give WHO enforcement capabilities to ensure

⁵⁶Bishop Supra note 47 1196

⁵⁷Fidler Supra note 33 68

compliance with the supposedly binding duties.⁵⁸ This could contribute to a continuing reluctance among Member States to meet their obligations. However, state concerns about sovereignty may mean that if a mandatory enforcement clause had been included many states may reject the new IHR or notify the Director-General of a reservation to that clause. Ultimately, it is extremely difficult to predict whether Member States' compliance will improve under the new IHR.⁵⁹

However, as the new IHR do create legal obligations upon State Parties, a failure to comply with them may mean that other states can use the doctrine of State Responsibility to seek redress for any harm caused. This will be discussed in the following chapter.

⁵⁸ Bishop Supra note 47 1197

⁵⁹ Von Tigerstrom, Supra note 26 75

CHAPTER THREE: THE IHR AND STATE RESPONSIBILITY

1. STATE RESPONSIBILITY

After over four decades of work on the issue of state responsibility, in 2001 the International Law Commission produced the latest Draft Articles on Responsibility of States for Internationally Wrongful Acts, (hereafter the Draft Articles). These were adopted by General Assembly Resolution on 12 December 2001.⁶⁰ Article 1 of the Draft Articles provides that “Every internationally wrongful act of a State entails the international responsibility of that State.” Article 2 goes on to state that an internationally wrongful act occurs when “conduct consisting of an action or omission is attributable to the State under international law; and constitutes a breach of an international obligation of the State.” Once a breach occurs there is a requirement for the state responsible to compensate the injured state for any injurious consequences. As it was said by the Permanent Court of International Justice in the *Chorzow Factory Case*⁶¹, “it is a principle of international law that the breach of an agreement involves an obligation to make reparation in an adequate form.” In other words, if by act or omission a state breaches one of its international obligations then it incurs international responsibility and is liable to other states for any injurious consequences which arise.

It is clear that the revised IHR create international obligations upon states, and in this chapter I will examine whether certain actions by infected countries could result in

⁶⁰UN Doc: A/RES/56/83 cited in Rosalyn Higgins, *Issues of State Responsibility before the International Court of Justice*, in Malgosia Fitzmaurice, Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* Oxford 2004

⁶¹ *Chorzow Factory Case* 1927 PCIJ Ser.A No 9 21

international responsibility. It is immaterial what the origin of the international obligation may be. In the *Rainbow Warrior Arbitration* the Tribunal stated that “...any violation by a state of any obligation, of whatever origin, gives rise to state responsibility...”⁶² Thus it is not contentious that the breaches of the binding obligations set out in the IHR could, in principle at least, give rise to international responsibility if they cause any kind of harm to another state.

2. COVER-UPS BY CENTRAL GOVERNMENTS

For a long time during the SARS epidemic of 2002-2003, the Chinese central authorities attempted to suppress information about the disease, covered-up and denied the severity of outbreaks of the disease, and refused to co-operate with WHO officials in controlling the disease.⁶³ As the current IHR only require notification of three specific diseases, this was not in breach of their obligations. The revised IHR, however, require countries to notify WHO of “all events which may constitute a public health emergency of international concern.” Thus, if any central government were to deal with outbreaks of avian influenza in this same way after the revised IHR enter into force (May 2007), it would clearly be a breach of an international obligation. The delay of entry into force of the surveillance obligations will not prevent states being liable for conscious cover-ups, as these imply an awareness of the situation despite the poor surveillance capabilities.

⁶² Cited in J Scott Davidson *The Rainbow Warrior Arbitration Concerning the Treatment of the French Nationals Mafart and Prieur* 40 *The International and Comparative Law Journal* 446, 1991

⁶³ Joshua Reader *The Case Against China; Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic* 19 *Columbia Journal of Asian Law* 519, 525 2006

3. ATTRIBUTION

It appears that in relation to avian influenza the Chinese central government may be taking a more responsible approach than it did with regards to SARS. However, there have been reports that local officials are defying orders by covering up outbreaks due to economic concerns.⁶⁴ In some places in Asia revenue from poultry and eggs provide almost all the gross domestic product of the area.⁶⁵ As the consequences of an avian influenza outbreak would be disastrous, residents and local officials therefore tend to oppose actions which may expose a possible outbreak. This raises the issue of what constitutes an act of state. If the central government of an infected state is doing all it can to meet its IHR obligations, can it still be held internationally responsible for the acts of lower level officials?

State responsibility can only arise in relation to an act of a state, not in relation to private individuals acting for themselves. For example, a state cannot be held responsible for the consequences of cover-ups of avian influenza outbreaks by farmers. Article 4 of the Draft Articles provides that “the conduct of any State organ shall be considered an act of that State under international law” (Art 4(1)) and that “an organ includes any person or entity which has that status in accordance with the internal law of the State,” (Art 4(2)). At first glance then it would seem that whether any entity is an organ of a state is determined solely by the state’s national law. However, Article 5 qualifies this by providing that the conduct of an entity which is not an organ of the state under Article 4 may nonetheless be considered an act of the state if it is empowered by the law of the state to exercise elements of governmental

⁶⁴ Xu Xiang Supra note 51

⁶⁵ Ibid

authority and is acting in that capacity in the relevant instance. Furthermore, the commentary points out that a state may not avoid responsibility for the conduct of an entity which acts as an organ of the state but is not defined as such under national law.⁶⁶ Therefore, when a state does not classify an entity as an “organ” under its internal law, factual circumstances rather than the absence of such a classification will often be determinative of whether the entity qualifies as an organ of state.⁶⁷ Article 4 provides that the conduct of any state organ shall be considered an act of state “whatever its character as an organ of the central government or of a *territorial unit of the State*.” The Commentary to the Draft Articles makes it even plainer that this would include local government officials by stating that the phrase “territorial unit of the State” makes it clear that this “includes an organ of a territorial governmental entity within the State on the same basis as the central governmental organs of that State.”⁶⁸ This would appear to also include an instance such as that described above when local officials are acting *ultra vires*. Article 7 provides that even if the entity is exceeding its authority or contravening instructions it shall still be considered an act of state. According to the Commentary, the conduct will still be an act of an organ of the state even if the entity has committed clearly unlawful acts under the guise of their official status, and even if “other organs of the State have disowned the conduct in question.”⁶⁹ In conclusion, in a situation such as the one above where local officials directly contravene the orders of the central government, their actions can still be classified as acts of state.

⁶⁶ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* Cambridge 2002 98

⁶⁷ Daniel Bodansky, John R Crook *The ILC's State Responsibility Articles: Introduction and Overview* 96 *American Journal of International Law* 773 2002 783

⁶⁸ James Crawford *Supra* note 66 94

⁶⁹ *Ibid* 107

4. BREACHES OF SURVEILLANCE AND RESPONSE OBLIGATIONS.

Firstly, it should be noted that Article 13 of the Draft Articles provides that an act of a state only constitutes a breach of an international obligation if the state is bound by that obligation at the time the act occurs. As discussed earlier, Member States are not bound to fulfil their surveillance and response capability obligations under the revised IHR until May 2012 (Articles 5.1 and 13.1). In addition, there is the possibility of a further 2 year or 4 year extension, meaning that for some Member States, the revised IHR will not be fully applicable until May 2016. Thus any act inconsistent with the surveillance and response obligations under revised IHR will only constitute a breach of an international obligation after this time. In turn, this affects the applicability of many of the other obligations. For example, the requirement under Article 6 to notify the WHO of all events which may constitute a public health emergency will be much weaker if countries do not have the capacity (required under Article 5) to properly detect and assess events.

Once the IHR have become binding on states, it is likely that it will be much less clear-cut when it comes to determining breaches of the regulations when compared to cases of intentional cover-ups. It is difficult to pinpoint what would constitute fulfilment of the obligations and what would constitute a breach of them. For example, under Article 13 (and with regards to Annex 1) states must have the public health capacities to rapidly determine the control measures required to prevent domestic and international spread of a health threat. It is open to interpretation as to exactly when a state could be said to have met this obligation. Just one of the issues which could be raised includes what sort of time span is indicated by the term

“rapidly”? Some may say hours, some may say days, some even weeks. Another obligation under Article 13 requires states to have the public health capacities to provide support through specialised staff, laboratory analysis of samples and logistical assistance. It gives no indication, however, as to what level of support is required. What if a state has a minimal level of support but which is incapable of having any meaningful affect? As it has technically provided some level of support, is that fulfilment of the obligation? If not, then at what stage is the cut-off point between breach and fulfilment?

Furthermore, in relation to the above capability obligations, where a breach is established it will often be extremely difficult to say whether it was that breach which resulted in the harm to the injured state. Since many things contribute to the spread of avian influenza, in many cases it will be difficult to identify a specific and causally related breach. Additionally, states may be unwilling to invoke a claim of state responsibility in relation to the surveillance and response capabilities, as it may leave them vulnerable to similar claims. If a state is attempting to invoke a claim of international responsibility against another state in relation to the spread of avian influenza, then presumably the injury suffered consists of infection by the disease. In the face of the somewhat ambiguous capability requirements, it is unlikely that states can be 100% confident they will not commit breaches themselves. What remedy they might obtain from the other state could possibly be offset by claims against their own state. In conclusion, it is likely that if state responsibility is to be invoked, it will be in relation to gross breaches of obligations such as cover-ups by central authorities. This is because if infectious disease spreads to another state, such breaches may be more readily identified as connected to injury suffered. Claims of state responsibility for

lesser breaches may leave the claimant state vulnerable to counter-claims. Claims against other states will also undoubtedly harm relations with that state, providing another reason why they will only be invoked in relation to the more repugnant breaches.

5. FORCE MAJEURE: ARTICLE 23

Even if a breach of the surveillance and response obligations is found, the breaching state may be able to invoke a claim of force majeure. Under Article 23 of the Draft Articles, the wrongfulness of an act in breach of a state's international obligations "is precluded if the act is due to force majeure." Force majeure is defined as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation." An irresistible force is defined in the Commentary as unavoidable constraint, and the economic shortcomings of some countries are highly likely to meet the definition. Many states simply do not have the necessary resources available to fulfil the obligations created by the IHR. If the WHO and the international community are unable to allocate poorer nations the necessary funds to develop the required capabilities, it will be materially impossible for them to perform their obligations under the IHR, especially in relation to developing the requisite levels of surveillance and response capabilities. Because the test in relation to the applicability of force majeure is one of material impossibility (Article 23(1)), circumstances which simply make performance more difficult do not qualify.⁷⁰ For many countries, meeting the obligations of the revised IHR are likely to be just that – materially impossible. For

⁷⁰ Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, *International Law Cases and Materials* ed 3 New York 1993 568

example, doctors in Vietnam warn they will find it difficult to cope if avian influenza takes hold in humans as they simply do not have the laboratory facilities for fast and accurate blood testing.⁷¹ If states do not even have the resources for such basic laboratory facilities, they are certainly not going to have the resources to create things such as multidisciplinary teams able to effectively respond to possible public health emergencies on a 24-hour basis as required by the revised IHR (Annex 1).

⁷¹ Jonathan Watts *Vietnam Needs Cash to Stave off Future Outbreaks of Bird Flu* www.thelancet.com
Vol 365 May 21 2005

CHAPTER FOUR: INTERNATIONAL ENVIRONMENTAL LAW

AND TRANSBORDER HARM

1. CUSTOMARY INTERNATIONAL LAW

As discussed above, there must be a wrong that is attributable to a State in order to give rise to state responsibility. Apart from the IHR, infectious disease is not specifically dealt with in other binding areas of international law. Arguably, however, other areas of law not explicitly directed at infectious disease may be applicable to the issue. In this chapter I will consider whether it is possible to extend the principles under international environmental law to infectious disease. Under international law it is often said that states are not allowed to conduct activities within their territories without regard for the rights of other states.⁷² This is often referred to by the maxim *sic utere tuo, ut alienum non laedas* (one should use his own property in such a manner so as not to harm the rights of another,) and can be clearly seen in relation to international environmental law. That states must prevent transboundary environmental harm being caused to other states is one such principle. In relation to such a principle, one could argue that it may extend to preventing transborder harm caused by global public health threats.⁷³ The spread of infectious disease can cause harm to neighbouring countries in the same way that things such as pollution do. That causing one could be an unlawful act at international law and not the other does not really seem consistent. This chapter will examine whether any international legal rule exists preventing the spread of transborder environmental harm, and will then discuss

⁷² Patricia Birnie, Alan Boyle *International Law and the Environment*, New York 1992 89

⁷³ Fidler *Supra* note 27 110

whether this could be extended to include the spread of public health risks such as avian influenza.

Many legal scholars assert that transboundary harm is prohibited at international law. For example, Birnie and Boyle state that “it is beyond serious argument that states are required by international law to take adequate steps to control and regulate sources of serious global environmental pollution or transboundary harm within their territory.”⁷⁴ This principle that a state must protect other states from transborder environmental harm arising out of activities within areas of its jurisdiction is presented as a customary rule, creating binding obligations upon all states regardless of their individual consent. Article 38(1)(b) of the Statute of the International Court of Justice defines international custom as “a general practice accepted as law.” In other words, customary rules result from a combination of state practice (what states do and say) and *opinio juris* (a belief on the part of state actors that their conduct is required or permissible).⁷⁵

The first question is whether there is any customary rule on transborder harm. The *Trail Smelter Arbitration*⁷⁶ involving Canada and the United States is often cited as laying down the basic principle relating to transborder harm.⁷⁷ This arbitration, which is the leading decision on transboundary pollution in international law, has assumed great importance in the development of customary international law in this area.⁷⁸ The case arose because a Canadian smelter plant, owned by a Canadian

⁷⁴Birnie and Boyle *Supra* note 72 89

⁷⁵Byers, Michael *War Law*, Vancouver 2005

⁷⁶*Trail Smelter (U.S. v. Can.)*, 3 UNRIAA 1905, 1938 (1949)

⁷⁷Henkin, Pugh, Schachter and Smit, *Supra* note 70 1382

⁷⁸Thomas W Merrill *Golden Rules for Transboundary Pollution* 46 *Duke Law Journal* March 931 947, 1997

corporation, was emitting sulphur dioxide fumes which were causing damage across the border in the United States.⁷⁹ There were no international decisions which dealt with air pollution, and the Tribunal used earlier United States Supreme Court decisions as authoritative precedents.⁸⁰ The Tribunal concluded that under principles of international law and United States law, “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”⁸¹ The decision of the Arbitral Tribunal has been extensively cited as evidence of the principle that a state is responsible to other states for environmental damage caused by activities within its jurisdiction.⁸²

More recently, in its advisory opinion on the *Legality of Threat or Use of Nuclear Weapons*⁸³ the International Court of Justice (ICJ) stated that “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.” Similarly, a year earlier, Judge Weeramantry stated in the *Nuclear Tests Case (New Zealand v France)*⁸⁴ that it is a “fundamental” and “deeply entrenched” principle of environmental law that “no nation is entitled by its own activities to cause damage to the environment of any other nation.” Such statements indicate a belief within the ICJ

⁷⁹Henkin, Pugh, Schachter and Smit, *Supra* note 70 1381

⁸⁰Merrill *Supra* note 78 949

⁸¹Henkin, Pugh, Schachter and Smit, *Supra* note 70 382

⁸²Edith Brown Weiss *International Environmental Law: Contemporary Issues and the Emergence of a New World Order* 81 *Georgetown Law Journal* 675, 677 1993

⁸³*Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 Para 29

⁸⁴*Nuclear Tests Case (New Zealand v France* 22 September 1995 General List No 97 at 346

that a principle requiring states to prevent transborder harm does exist, and although these statements are not binding, they will be influential for decision-making bodies considering the issue.

That states must desist from causing transboundary harm is also pronounced in a number of international declarations. Principle 21 of the Stockholm Declaration on the Human Environment (1972) and principle 2 of the Rio Declaration on the Environment (1992) both state that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental)⁸⁵ policies, and 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.”

Although the principles set out in so-called soft-law sources such as the above Declarations are non-binding, they indicate agreement among the international community as to the principles expounded. In connection to a number of areas of international law, such sources are still generally observed despite their lack of strict binding authority.⁸⁶ Therefore, despite the fact they are non-binding, can we assume that international declarations and other “soft-law” sources constitute *opinio juris* among states if all states concur and do not dispute the principles expressed? The answer is no. In establishing the existence of *opinio juris* there must be evidence that states view themselves as being bound by the obligation. Viewing a principle as binding is different from agreeing with its correctness. Such declarations as the ones

⁸⁵ Words in brackets included in Principle 2 of the Rio Declaration on the Environment (1992) only

⁸⁶ Paul C Szasz, *International Norm Making*, in Edith Brown Weiss ed *Environmental Change and International law* United Nations University 1992

discussed above are agreements of how the law *should* be; this is to be distinguished from actual belief as to what the law actually *is*.⁸⁷ The reality of state practice in relation to transboundary harm points against the existence of a customary rule and a belief on the part of states that they are bound by such a rule. If an alleged customary rule says one thing but states generally do something else, then one can no longer say that the rule governs their behaviour.⁸⁸ Many scholars point out that transborder environmental pollution is by mean no means an uncommon occurrence. As Oscar Schachter says, “to say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day.”⁸⁹ Transborder pollution by states in fact appears to be the norm rather than the exception. Thus it would appear the case for a customary rule is far from met. Furthermore, as David Fidler points out, the repeated resort to treaty law in dealing with transboundary environmental harm provides further evidence of the weakness of the purported customary rule.⁹⁰

It cannot be denied that transborder pollution is a common occurrence. It is unlikely though that states will bring claims relating to this every-day level of pollution. Even commentators arguing that a customary law does exist tend to assume that the level of harm or damage must reach a certain level of seriousness before it becomes wrongful.⁹¹ Perhaps one way of reconciling the opposing opinions could be to recognise that transborder pollution does occur frequently, but a customary rule exists

⁸⁷ Daniel Bodansky *Customary (and not so Customary) International Environmental Law* 3 Indiana Journal of Global Legal Studies Fall 105, 109 1995

⁸⁸ *Ibid*

⁸⁹ Oscar Schachter *The Emergence of International Environmental Law* 44 Journal of International Affairs 1991 457, 463 1991

⁹⁰ Fidler *Supra* note 27 111

⁹¹ Alan Boyle, *Reparation for Environmental Damage in International Law: Some Preliminary Problems*, in Michael Bowman and Alan Boyle (eds) *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*, New York (2002) 18

prohibiting only the more extreme cases of transborder harm? Whatever the case may be, despite state practice the International Court of Justice has indicated approval of a principle of prevention of transborder environmental harm, and when it comes down to it, it is international decision-making bodies which are going to rule on the matter and not scholars.

Even if we assume that customary principles relating to transboundary harm do exist, they are difficult to extrapolate to infectious disease.⁹² As customary law requires both a belief that a principle is binding and a generally consistent state practice in conformity with the principle, one cannot simply extend one customary rule and apply it to a different area by analogy. To support an application of any customary principle relating to transborder harm to infectious disease control, one must firstly be able to point to a generally consistent state practice in favour of a rule that states are bound to take adequate steps in controlling and regulating public health threats.⁹³ In addition to this, states must also accept, as a matter of legal conviction, that they are required by law to control, regulate and prevent transborder public health threats. This absence of *opinio juris* can be seen to be in relation to China's cover-ups of the SARS outbreaks. Although China's conduct was widely condemned, other states did not go so far as to accuse China of breaching existing international law. Rather, the international community recognised the limitations in the current law, thus accelerating the process to revise the IHR. The spread of infectious disease across boundaries is not at all uncommon in our increasingly globalised world. For example, in 1996 10,000 cases of malaria were imported into Europe from other regions.⁹⁴ The combination of

⁹² Fidler Supra note 27 111

⁹³ Ibid

⁹⁴ World Health Organization Fact Sheet 200 *Global Infectious Disease Surveillance* June 1998
<http://www.who.int/mediacentre/factsheets/fs200/en/index.html>

prevalent transborder spreads of infectious disease and the lack of belief among states that they are legally bound to actively control and prevent this makes it clear there is no existing customary law in relation to the spread of infectious disease. To extend a (possibly existing) customary rule relating to environmental harm to a different issue would seem an unnatural extension.

2. GENERAL PRINCIPLES OF LAW

Article 38(1)(c) of the Statute of the International Court of Justice recognises “the general principles of law recognised by civilised nations” as one of the three primary sources of international law. They were included so as “to provide a solution in cases where treaties and custom provided no guidance,”⁹⁵ and “are not so much a source of law as a method of using existing sources...extending rules by analogy, and inferring broad principles.”⁹⁶ Is it possible to use existing common law principles relating to nuisance and the rule found in *Rylands v Fletcher*⁹⁷ to cover the prevention of the transborder spread of infectious disease?

In fact, the origins of law on transboundary pollution began with the English common law of nuisance.⁹⁸ In the case of *St Helen's Smelting Co v Topping*,⁹⁹ trees and crops on an estate were being destroyed by fumes from a copper smelter. The House of Lords unanimously upheld the English common law rule that property belonging to

⁹⁵ Peter Malanczuk *Akehurst's Modern Introduction to International Law* 7th ed, New York 1997 48

⁹⁶ *Ibid*

⁹⁷ *Rylands v. Fletcher (1868)*, L.R. 3 H.L. 330; [1861–73] All E.R

⁹⁸ Earl Finbar Murphy, *United-States Canadian Experiences in Combating and Controlling the Airborne Pollutants*, in C Flinterman, B Kwiatkowska, JG Lammers (eds) *Transboundary Air Pollution*, Dordrecht 1986 34

⁹⁹ *St Helen's Smelting Co v Topping* 11 HL Cas. (Clark's) 642 11 ER 1485 (1865) cited in Murphy *Supra* note 98 34

others could not be destroyed by factories even though the property may be located in the same district.¹⁰⁰

The Supreme Court of the United States was the first court to deal with the question of nuisance where the act and consequences occurred in different sovereign (or quasi-sovereign) territories. In the early 1900's it dealt with a number of complaints concerning the spread of pollution from one state territory to another. The first of these was the case of *Missouri v Illinois*¹⁰¹ in which the Court held that the source state would be legally responsible if pollution emanating from its territory was causing a public nuisance in another state's territory.¹⁰² The first decision concerning two international states was the *Trail Smelter Arbitration*, discussed above. Finding no existing international law sources, the Tribunal used United States case law such as *Missouri v Illinois* to infer a general duty on states to protect other states from injurious consequences caused by acts within its jurisdiction.¹⁰³

However, there are a number of difficulties in extending this nuisance-type principle to the issue of infectious disease. Firstly - as with the common law tort of private nuisance - the cases above all deal with interferences with rights over land, where the pollution has caused physical harm to the environment of a neighbouring area. The spread of infectious disease, on the other hand, does not fit as comfortably within the idea of an interference with rights over land. Secondly, in all the above cases there was a concrete and easily identifiable source of harm. With regards to infectious disease, it is not easy to identify the source which is responsible for the harm caused.

¹⁰⁰ Murphy, supra note 98 34

¹⁰¹ *Missouri v Illinois* 200 US 496

¹⁰² Merrill Supra note 78 941

¹⁰³ Alexandre Kiss and Dinah Shelton *International Environmental Law* 2nd ed, New York (2000) 275

Another possible general principle, widely accepted in common law jurisdictions, is the rule in *Rylands v Fletcher*¹⁰⁴ which imposes strict liability for escape of a dangerous thing. Delivering the judgment in the case, Blackburn J stated:

“a person who for his own purposes brings on his land and collects and keeps there something likely to do mischief if it escapes must keep it at his own peril and if he does not he is prima facie answerable for all damage which is the natural consequence of its escape.”

One of the requirements in applying this rule is that there must be a non-natural use of the land.¹⁰⁵ In *Blake v Woolf* “natural” was held to mean customary or usual, it did not matter if the use was artificial or not.¹⁰⁶ Therefore, farming poultry would not meet this test of a “non-natural” use of land. Additionally, even though poultry is “brought onto the land” it is unlikely that one could go so far as to say that avian influenza was also brought onto the land. It is more likely to be found to have occurred naturally and thus fall outside the *Rylands v Fletcher* principle.

What is more, no decision of the ICJ or its predecessor – the Permanent Court of International Justice – has yet been based explicitly upon a rule of law drawn from the “general principles of law recognized by civilized nations.”¹⁰⁷ They tend to be used by parties as a “last resort” or supplementary argument in case the claims based upon customary or treaty law are unsuccessful.¹⁰⁸ This would suggest that one would need

¹⁰⁴ *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; [1861–73] All E.R.

¹⁰⁵ Andrew Grubb (ed) *The Law of Tort* London 2002 979

¹⁰⁶ *Blake v Woolf* [1898] 2 QB 426, cited in Grubb Supra note 104 979

¹⁰⁷ Ariadne K Sacharoff *Multinationals in Host Countries: Can they be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 Brooklyn Journal of International Law 927, 946 1998

¹⁰⁸ *Ibid*

rather convincing evidence if one were to persuade a court that a general principle law exists applicable to an issue not covered by treaty or custom. With regards to the spread of transborder evidence, the evidence is far from compelling.

In conclusion, while general principles of national law are a source of international law, no such general principle can be identified as applicable to the spread of infectious diseases.

CHAPTER FIVE: INTERNATIONAL HUMAN RIGHTS LAW

1. INTRODUCTION

Whereas the previous chapters were concerned with the obligations that a state affected by avian influenza may owe to other states, this chapter deals with the obligations that are owed by a state to individuals within its jurisdiction. The law of human rights has emerged relatively recently when compared with a number of other areas of law. Because of this, the scope of a number of rights is still somewhat vague,¹⁰⁹ and their application to certain issues is untested and thus uncertain. In this chapter I will examine a number of human rights which may be applicable in relation to the issue of avian influenza. Firstly, I will look at the right to health and discuss its relevance to the issue at hand, its implementation, and any issues which may affect the practical realities of its effective application. I will then look at a number of rights contained in the ICCPR, discussing each right separately before looking at issues concerning the implementation of those rights. Finally, I will discuss whether the doctrine of state responsibility can play a role in the implementation of human rights.

2. THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH

The preamble to the constitution of the WHO states that the enjoyment of the highest attainable standard of health is a fundamental human right.

¹⁰⁹ Richard B Bilder, An Overview of International Human Rights Law, in Hurst Hannum (ed) *Guide to International Human Rights Practice* 4th ed, New York 2004 6

This right is included in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides as follows:

- “1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
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:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

The actual substantive scope of this right, however, has been the subject of much debate. The obligations created are qualified by Article 2(1) of the Covenant which states that a state party is to take steps “...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means...” In other words, the obligations on state parties are subject to the availability of resources and only have to be realised by steps over time.¹¹⁰ It is left up to the state party to decide what steps it must take in the realisation of the right, and no timeframe is given for realisation. This flexibility and discretion means that it is difficult to judge what amounts to a breach of the provisions, thus making the rights difficult to monitor and enforce in international law.¹¹¹ Many of the states which have ratified the ICESCR fail to take the obligations

¹¹⁰Henry Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals* 2nd ed, Oxford, 2000 274

¹¹¹Mary Ann Torres *Public Health and International Law: The Human Right to Health, National Courts and Access to HIV/AIDS treatment: A Case Study From Venezuela* 3 Chicago Journal of International Law 105, 107 2002

seriously, not even attempting to comply with the standards in a deliberate and thought-out manner.¹¹² For example, under Article 12(2)(a) state parties are to take steps to reduce child mortality. Yet in spite of this seven states have experienced *increases* in child mortality rates in the last fifty years,¹¹³ with four of these countries having ratified the ICESCR.¹¹⁴ It is difficult to assess whether this lack of progress on the issue is due to lack of resources, or whether the supposedly binding provision has simply been ignored.

Regional human rights instruments often contain similar qualifications with respect to economic, social and cultural rights. For example, the Additional Protocol to the American Convention on Human Rights in the area of Social, Cultural and Economic Rights provides that parties to the protocol undertake to adopt the necessary measures “to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislation, the full observance of the rights recognized in this Protocol,” (Article 1).

The only supervisory mechanism provided for in the ICESCR is the state parties reporting procedure.¹¹⁵ Under article 16 state parties are required to submit reports to

¹¹² Audrey R Chapman, A “Violations” Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights” in Robert McCorquodale *Human Rights* Dartmouth Publishing Co, Aldershot, England 2003

¹¹³ World Health Organization *Drop in World Child Mortality Reaches Target, New Study Shows but Many Countries Lagging* Press Release WHO/67 12 October 2000. These countries include; Botswana, Democratic People’s Republic of Korea, Namibia, Niger, Papua New Guinea, Zambia and Zimbabwe

¹¹⁴ As at 9 June 2004, signatories include Namibia, Niger, Zambia and Zimbabwe Office of the United Nations High Commissioner for Human Rights *Status of Ratifications of the Principal Human Rights Treaties* <http://www.unhchr.ch/pdf/report.pdf>

¹¹⁵ Kitty Arambulo *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?* 2 University of California Davis Journal of International Law and Policy 111, 1996

the Secretary-General of the United Nations (who in turn transmits copies to the Economic and Social Council (ECOSOC)) on the measures they have adopted and the progress made in achieving the observance of the recognised rights. Naturally however, as these reports are compiled by state parties, they are unlikely to report their failures to meet the performance requirements.¹¹⁶ The poor reporting by governments, in combination with scarce resources, means the functioning of the ICESCR supervising body (the Committee on Economic, Social and Cultural Rights or CESCR) is severely hindered,¹¹⁷ and there is little meaningful implementation of the rights. The ICESCR lacks the additional implementation measures found in the ICCPR thus making it weaker in that respect.¹¹⁸ Article 1 of the First Optional Protocol to the ICCPR gives individuals of state parties to the Protocol the right to make complaints to the Human Rights Committee. There is no equivalent provision for individual complaints to be made to any body under the ICESCR. In addition, there is no equivalent provision to Article 41 of the ICCPR which provides that state parties to the covenant may declare their recognition of the competence of the Human Rights Committee to receive communications concerning fulfilment of its obligations from other state parties.

In the year 2000, 13 million people worldwide died from infectious diseases.¹¹⁹

Although obviously a state is unable to protect its citizens against all forms of disease¹²⁰, it must be noted that one of the main factors contributing to this number

¹¹⁶ Nihal Jayawickrama *The Judicial Application of Human Rights: National, Regional and International Jurisprudence* Cambridge 2002 131

¹¹⁷ Arambulo *Supra* note 115 111

¹¹⁸ Steiner and Alston *Supra* note 110 275

¹¹⁹ International Federation of Red Cross and Red Crescent Societies *Diseases are Turning into Silent Disasters Warns Red Cross/Red Crescent Disaster Report* 28 June 2000
<http://www.ifrc.org/docs/news/pr00/1700.asp>

¹²⁰ As noted in General Comment 14 (E/C.12/2000/4) genetic factors and adoption of unhealthy or risky lifestyles play an important role.

was said to be due to governments abandoning their preventative health care responsibilities.¹²¹ In light of this, WHO's classification of the enjoyment of the highest attainable standard of health as a fundamental human right seems naïve. In reality the so-called "right" is of little consequence to many. There is no reason to believe that this will be any different in relation to human cases of avian influenza. The right to health may at first sight appear an appropriate medium in relation to the issues raised by infectious disease. However, the ambiguity created by Article 2 of the ICESCR (and similar provisions in a number of regional instruments,) the questionable scope of the substantive right, and the lack of effective implementation measures mean that, as it currently stands in international law, it is unlikely that states will be held liable for failures to meet their obligations.

3. THE RIGHT TO LIFE

Article 6 of the ICCPR guarantees the right to life. Paragraph 1 states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

This right been called "the supreme right" by the Human Rights Committee¹²², and it is one from which no derogation is allowed under Article 4.

3.1 IS THE RIGHT TO LIFE APPLICABLE TO THE ISSUE OF INFECTIOUS DISEASE?

¹²¹ International Federation of Red Cross and Red Crescent Societies Supra note 119

¹²² Report of the Human Rights Committee UN Doc A/37/40 (1982) annex v para 1

The scope of the right to life is subject to disagreement. Is extending the right to life to cover taking steps to prevent death from infectious disease an inappropriate enlargement of the intended meaning of the right? Some commentators would undoubtedly say it is. In the past some have gone so far as to limit the right to life as merely “the right to protection against arbitrary killing.”¹²³ This extremely narrow interpretation no longer appears to be prevalent, however. The main reason for this is likely to be the 1982 General Comment of the Human Rights Committee which proclaimed that the right to life is not to be interpreted narrowly.¹²⁴ It is not to be understood as a negative right¹²⁵ directed solely at prohibiting certain action on the part of the state, but rather it requires positive measures be taken in order to ensure recognition of the right. In this respect, the Committee has stated that it “would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.” However, the question remains as to how far these positive obligations would extend in relation to preventing or controlling outbreaks of avian influenza. The reference to the word “desirable” in the statement by the Committee would suggest there is no actual immediate legal obligation on the part of the state to take *all possible measures* to increase life expectancy.

In his commentary on the ICCPR, Nowak states that very narrow interpretations of Art 6 are due to “improper merging of the second and third sentences” of the first paragraph. This is supported by the fact that in the drafting Article 6(1) the second

¹²³ Yoram Dinstein, The Right to Life, Physical Integrity and Liberty, in Louis Henkin (ed) *The International Bill of Rights: The International Covenant on Civil and Political Rights* New York 1981, 115

¹²⁴ General comment 6/16 of 27 July 1982

¹²⁵ Manfred Nowak *United Nations Covenant on Civil and Political Rights Commentary* Strasbourg, Arlington 1993 106

and third sentences were in fact adopted at different times, suggesting they were never intended to be read together as a whole. Reading the article in such a way, there is no reason why the right to life - which is to be “protected by law” - should be limited to arbitrary killings.

Furthermore, in a number of cases the Human Rights Committee has approved a wide interpretation of Article 6(1) that goes far beyond “protection against arbitrary killing.” For example, the case of *EHP v Canada*¹²⁶ involved a Canadian citizen claiming a threat to the right to life caused by a temporary disposal site for radioactive waste. While the Committee observed that the communication raised serious issues with regard to the obligation of States parties to protect human life under Art 6(1) it was, however, declared inadmissible because the applicant had failed to exhaust domestic remedies.

Two further cases have involved the deaths of detainees caused by disease. In *Lantsova v The Russian Federation*¹²⁷ the Committee found a violation of Article 6(1) in relation to a detainee in a Russian detention centre who died of acute pneumonia leading to cardiac insufficiency. Although there was no suggestion of actual “killing” in the communication, the failure to provide medical care was enough to constitute a violation of the right to life. The second case of *Carlos Cabal and Marco Pasini Bertran v Australia*¹²⁸ involved a decision on admissibility of a claim brought by two Mexican citizens being detained in Australia. The Committee considered that while a failure to separate detainees with communicable diseases from other detainees could

¹²⁶*EHP v Canada* Communication no.67/1980

¹²⁷*Lantsova v The Russian Federation* Communication No.763/1997

¹²⁸*Carlos Cabal and Marco Pasini Bertran v Australia* Communication 1020/2001

raise issues under article 6(1), the authors of the communication had failed to substantiate their claim.

The Committee has also dealt with the positive obligations of the right to life in a number of concluding observations made regarding reports submitted by state parties. For example, it has expressed concern that in Canada “homelessness has led to serious problems and even to death,” recommending that Canada take positive measures as required by Article 6 to address the issue.¹²⁹ These are only recommendations though, and it is far from clear that Canada would actually be found to have breached their obligations on the matter if a claim was brought against them.

The European Court of Human Rights (ECHR) has also seemed to accept a wide interpretation of the Right. *In LCB v UK*¹³⁰ the Court recognised for the first time that Article 2(1) of the European Convention on Human Rights is not limited to intentional and unlawful killing on the part of the state, but also directs states to take steps to safeguard the lives of those within their jurisdiction.¹³¹ The application involved a claim that the applicant had suffered leukaemia caused by her father’s exposure to harmful levels of radiation during the United Kingdom’s nuclear tests on Christmas Island. The Court considered whether the authorities had done all that one could expect of them in minimising harm to the applicant’s health after the testing and found the evidence inconclusive. Although the applicant was unable to prove causation, the case provides an important statement of principle in relation to the positive obligations encompassed within the right to life.

¹²⁹ Canada 1999 UN doc. CCPR/C/79/add 105 cited in Sarah Joseph, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2nd ed New York (2004) 186

¹³⁰ *LCB v UK* Application 37900/97

¹³¹ Claire Ovey and Robin White *European Convention on Human Rights* 3rd ed, New York 51

Article 2(1), dealing with the right to life in the ECHR states:

“Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The use of the word “intentionally” in relation to deprivation of life in the second sentence would seem to be stronger and more indicative of a narrow interpretation than the use of the word “arbitrarily” used in Article 6(1) of the ICCPR. The ECHR, however, still appeared to accept that a wide interpretation of the right to life was appropriate. The explanation may be that the two sentences were to be interpreted individually, rather than in combination, in much the same way as article 6(1) of the ICCPR has been understood.

It would appear clear that the right to life does create an obligation on state parties to take positive measures to prevent loss of life, though the issue remains as to how far we can extend these positive obligations. As stated earlier, the emergence of international human rights law is quite recent and many areas are yet to evolve. The obligation to take positive measures to prevent loss of life is one area in which there remains a wide scope for innovation.¹³² However it is unlikely it will extend so far as to obligate state parties to do all that is in their power to prevent the spread of infectious disease.¹³³ Although the cases discussed above do indicate states must take positive steps to prevent loss of life, certain facts make them distinguishable from other situations which may require positive measures to protect life. In *EHP v*

¹³² Ovey and White Supra note 131 254

¹³³ I do not discuss what would happen if states simply ignore outbreaks of cases of avian influenza in humans and take no steps to control the disease, as the likelihood of a state doing this is virtually nil.

Canada and *LCB v UK*, the case concerned hazardous material introduced by the state. If the state has introduced something which is likely to cause a risk to life then it is reasonable that the state takes all positive measures to reduce the risk. If, for example, a state imported samples of the H5N1 virus into its territory for research purposes then failed to take proper measures to make sure it did not escape into the public, then that would be a much more analogous situation. Extending the right to life to require all possible control measures be taken to control avian influenza introduced by infected birds, on the other hand, would open the floodgates much too far as to what else could count as a violation of the right to life.

3.2 DOES THE FAILURE TO PROVIDE VACCINES AND APPROPRIATE MEDICAL TREATMENT VIOLATE THE RIGHT TO LIFE?

A lack of resources means that many countries affected with avian influenza may not have the necessary resources to provide vaccination and treatment to all those infected with the virus if large-scale outbreaks of human cases occur. In such a situation, it is extremely unlikely that a state could be held liable for violations of the right to life. Millions of people die worldwide each year from preventable diseases, and it is not suggested that a state which simply could not afford to prevent these diseases should be held liable for a failure to do so. Although this would be more pronounced in relation to developing nations, even developed states have to make choices as to how to allocate limited medical resources. This can be seen in New Zealand in the case of *Shortland v Northland Health Ltd (No 2)*¹³⁴ where the applicant challenged a decision

¹³⁴*Shortland v Northland Health Ltd (No 2)* HC Whangarei, 1997 M75/97

by health authorities to have his renal dialysis discontinued. Affidavits were presented stating that if the individual was not given dialysis he would die within a short time, while if he was given dialysis his life would be preserved. Demand for renal dialysis outstripped the available medical resources and there was a need to provide a basis for fair allocation of the resources. The judgment quotes Professor PDG Skegg's view that in many circumstances, limited medical resources will result in health professionals having a lawful excuse for not providing life-prolonging treatment.¹³⁵ The judgment also refers to the case of *Re J (a Minor)* where it is noted that it is "a sad fact of life" that health authorities do not have sufficient medical resources to treat all patients in the way they would like to treat them.¹³⁶

4. THE RIGHT TO LIBERTY OF MOVEMENT

The right to liberty of movement is included in Article 12 of the ICCPR. If the avian influenza virus mutates or re-assorts into a strain that may be easily transmitted from human to human, methods for preventing the spread of this strain could result in interferences with the right to liberty of movement. Preventing the spread of avian influenza between humans may create a need for the use of quarantine and isolation methods, which would obviously restrict the right to liberty of movement of persons affected. Nonetheless, under paragraph 3, the obligations on state parties created under this article may be subject to restrictions, prescribed by law, which are "necessary to protect national security, public order, public health or morals or the rights and freedoms of others..." Self-evidently, the quarantine or isolation of

¹³⁵ PDG Skegg *Omissions to Provide Life Prolonging Treatment* 8 Otago Law Review 205 1994

¹³⁶ *Re J (a Minor)* [1992] 3 WLR 507, 517

infected persons may indeed be necessary to protect public health, or the rights of others (including the right to health).

LIMITATIONS ON RESTRICTIONS

Such restrictions to the right must be both prescribed by law and necessary to achieve one of the aims listed.

The meaning of “prescribed by law” and “necessary” is expanded upon in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights.¹³⁷ “Prescribed by law” encompasses the requirement that the limitations shall not be arbitrary or unreasonable. “Necessary” means the restriction must be based on one of the grounds recognised in the relevant article; respond to a pressing public or social need; pursue a legitimate aim; and be proportionate to that aim. The Siracusa Principles also provide that in applying a limitation, the means used must be no more restrictive than is required to achieve the purpose sought by the restriction; and the restriction must not be discriminatory contrary to Article 2(1). In summary, all limitations on the right to liberty of movement must:

1. Be provided for by law;
2. Be non-arbitrary;
3. Respond to a pressing public or social need based on a recognised ground;

¹³⁷ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985)

4. Pursue a legitimate aim;
5. Be proportionate to that aim; and
6. Be non-discriminatory.

If quarantine and isolation methods used for preventing the spread of avian influenza are imposed in a way consistent with the above limitations, then no breach of the right to freedom of movement has occurred.

5. THE RIGHT TO FREEDOM OF ASSEMBLY

The right to freedom of assembly is guaranteed by Article 21 of the ICCPR. As with the right to liberty of movement, an outbreak of an avian influenza strain contagious among humans may result in restrictions to people's freedom of assembly. Situations in which many people are gathered together would create a higher risk of the virus being passed on to high numbers of people. Again, this right may be subject to the certain restrictions, including restrictions in connection with the protection of public health and the protection of the rights of others. The same limitations on restrictions apply as in relation to Article 12, and as long as the restrictions meet these limitations they do not constitute a breach of a human rights obligation.

6. IMPLEMENTATION OF THE ICCPR

The ICCPR is somewhat stronger than the ICESCR with respect to implementation mechanisms. In addition to an equivalent state party reporting requirement, the ICCPR provides for the possibility of inter-state complaints to the Human Rights

Committee, while the First Optional Protocol allows individuals to make complaints. However, because both these mechanisms are optional, only those states which have consented to them will be bound. Moreover, implementation with respect to the rights contained is still weak.

Firstly, the state party reporting mechanism faces the same shortcomings as it does in relation to the ICESCR. The reports are compiled by states and it is extremely unlikely they are going to include instances of all their human rights violations.

Under Article 41 of the ICCPR, state parties may declare that they recognise the competence of the Human Rights Committee to receive complaints in relation to failures to fulfil their obligations from other state parties. However, even though almost 50 states have made declarations recognising the Human Rights Committee competence under Article 41,¹³⁸ this inter-state complaints procedure has never once been used.¹³⁹ This is likely to be due to both the fact that the internal treatment of one state's citizens does not usually affect the interests of another state, and the fact that states will often be reluctant to upset relations with other states by criticising their behaviour.¹⁴⁰ Although in the context of avian influenza the interests of other states are more prone to being affected, it is still unlikely that Article 41 will be used.

Firstly, it is improbable that the right could be extended to include taking all possible measures to control the spread of disease (as discussed above). Secondly, none of the

¹³⁸ As at 19 September 2006, Office of the United Nations High Commissioner for Human Rights *Declarations Recognising the Competence of the Human Rights Committee Under Article 41* http://www.ohchr.org/english/countries/ratification/4_2.htm

¹³⁹ Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights* in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* Hart Publishing, Oregon (2004) 164

¹⁴⁰ Bilder *Supra* note 109 12

states which have reported human cases so far have made declarations recognising the inter-state complaint procedure.

Under the First Optional Protocol to the ICCPR, the Human Rights Committee is only able to consider alleged violations by a state party which has also become a party to the Protocol. Most states where avian influenza is currently an issue are not parties to the Protocol so that even if their actions could amount to a breach of the right to life (or any other rights), individuals affected by this are not able to bring complaints to the Human Rights Committee. Even in the future, if human cases of avian influenza start to occur in other states, it is more likely that those states which have not ratified the Protocol are going to be the states which fail to put proper measures in place for the control of the disease. As J Shand Watson points out, the governments which are more likely to engage in deviant behaviour are the least likely to consent to being bound by human rights norms.¹⁴¹ This is also relevant to Article 41, discussed above.

7. HUMAN RIGHTS AND STATE RESPONSIBILITY

As discussed above, the doctrine of State Responsibility provides that “every internationally wrongful act of a State entails the international responsibility of that State.”¹⁴² Violations of binding human rights instruments constitute breaches of international obligations by states, indicating that states should be held internationally responsible for these violations. Despite the fact that some states have not made declarations accepting the inter-state complaint mechanism under Article 41 of the

¹⁴¹ J Shand Watson *Theory and Reality in the International Protection of Human Rights* New York (1999) 49

¹⁴² Article 1 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001

ICCPR, can other states get round this by invoking the doctrine of state responsibility? This section will argue that the principles of state responsibility as described in the Draft Articles could in theory be relevant to breaches of human rights at a regional level, but are of little use in relation to addressing breaches of human rights at a global level.¹⁴³ This is due to the fact that international human rights law is characterized as owing duties to individuals, while it is only states which may invoke claims of state responsibility for breaches of international obligations.

The invocation of the international responsibility of a state is outlined in chapter one of part three of the Draft Articles. Article 42 deals with the invocation of responsibility by an injured state, and is clearly not relevant in cases where states violate the human rights of those within its jurisdiction. Article 48, on the other hand, deals with invocation of responsibility by a state which has not been injured. It allows a state other than an injured state to invoke responsibility in two instances. Firstly, “if the obligation breached is owed to a group of states including that State, and is established for the protection of a collective interest of the group,” and secondly, “if the obligation breached is owed to the international community as a whole.”

In its discussion of the first instance, the Commentary specifically states that it could apply to a regional system for the protection of human rights.¹⁴⁴ This suggests the obligations under regional human rights instruments are not only owed to individuals, but also to a group of states, and are established for the protection of the collective interest of that group. This seems to be the case at least in relation to the European

¹⁴³ Malcolm Evans *State Responsibility and the European Convention on Human Rights: Role and Realm* in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* Hart Publishing, Oregon (2004) 147

¹⁴⁴ Crawford *Supra* note 66 277

Convention of Human Rights (ECHR). The preamble to the ECHR states as one of its considerations that “the aim of the Council of Europe is the *achievement of greater unity between its Members* and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms.” (emphasis added). This suggests that the ECHR was not only created out of concern for the individual, but also out of the collective interests of the region’s states. Nonetheless, it is extremely unlikely that a state party would resort to using the doctrine of state responsibility as a mechanism for enforcing human rights under the ECHR. There is really no requirement of the states party to the ECHR to use such a mechanism, as under the European Convention a state is already able to bring claims against another state for breaches of human rights. The European Convention system is a much more appropriate forum for such issues, and as Malcolm Evans states, what is happening within that system “is much more significant than the incremental development of the scope of Convention obligations premised upon the (mis)use of the language of State responsibility.”¹⁴⁵ The same can be said in connection with the inter-American system of human rights. More than 20 states have accepted the optional jurisdiction of the inter-American Court of Human Rights¹⁴⁶, and this provides a much more appropriate forum to address regional human rights concerns.

In connection with the second instance, where “the obligation breached is owed to the international community as a whole”, it is unlikely that this would apply to international human rights. The Commentary states that the provision intends to give

¹⁴⁵Evans Supra note 143 147

¹⁴⁶Bilder, Supra note 109 11

effect to statements of the International Court in the *Barcelona Traction case*,¹⁴⁷ in which the concept of obligations erga omnes was established. The examples of obligations erga omnes listed in the *Barcelona Traction Case* include: the outlawing of acts of aggression; the outlawing of genocide; the protection from slavery; and the protection from racial discrimination.¹⁴⁸ In the *East Timor Case*¹⁴⁹ the Court added the right of self-determination of people to the list.¹⁵⁰ This list is small, and although it may be non-exhaustive, the narrowly defined examples given suggest that not all human rights are obligations owed to the international community as a whole. For example, the Court in the *Barcelona Traction Case* could have stated that protection from all forms of discrimination was an obligation erga omnes, but instead chose to limit it to protection from racial discrimination.¹⁵¹ Furthermore, the Human Rights Committee has suggested that human rights are not obligations owing to the international community, stating that human rights treaties, and in particular the ICCPR, “are not a web of inter-State exchanges of mutual obligations,” rather, “they concern the endowment of individuals with rights.”¹⁵²

What's more, the fact that not one state has used Article 41 of the ICCPR to bring an inter-state claim of human rights abuses indicates that even if it were theoretically possible for states to invoke state responsibility in relation to human rights there is little possibility of it actually happening.

¹⁴⁷ *Barcelona Traction, Light and Power Company, Limited, Second Phase* ICJ Reports 1970

¹⁴⁸ Maurizio Ragazzi *The Concept of International Obligations Erga Omnes* Oxford (1997) 17

¹⁴⁹ *East Timor Case* 1928 PCIJ Series A, No1 30

¹⁵⁰ Crawford Supra note 66 278

¹⁵¹ Ragazzi Supra note 149 132

¹⁵² General Comment 24, para 17 CCPR/C/21/Rev.1/Add.6 1994

CONCLUSION

Despite some of the shortcomings inherent in the revised IHR, it appears that they will play the most important role in creating legally binding obligations upon states affected by avian influenza. Attempts to extend existing general principles or environmental law principles are not fruitful. Human rights law does seem to provide useful guidelines in relation to restrictions on the freedom of movement and the freedom of assembly, but in relation to the right to health and the right to life there are problems relating either to enforceability or applicability.

The areas of weakness of the IHR do not indicate a lack of foresight on the part of those who drafted them. Rather, they are limitations which are likely to have been unavoidable. The inclusion of a provision that certain obligations will not have to be fulfilled for a number of years, and the exclusion of a mandatory enforcement clause, are necessary concessions to allay state sovereignty concerns. In addition, the fact that there is a need for resources which at present are not available is not something that could easily be dealt with within the scope of the regulations. The inclusion of a provision which comprehensively sets out a method by which state parties are required to allocate resources is again likely to provoke state sovereignty concerns. In order to be effective the IHR needs to apply to a majority of states. In drafting the IHR it was necessary to avoid the possibility of numerous rejections or reservations to the regulations, thus creating constraints upon the drafters with regards to what could be included.

There are a number of issues concerning what would actually constitute a breach of the regulations. Nonetheless, behaviour such as that of China during the SARS epidemic would clearly be a breach of the notification obligations, and it is likely that the doctrine of state responsibility could be invoked by a state injured as a result of such a breach. The IHR will be most successful in dealing with such overt breaches.

BIBLIOGRAPHY

BOOKS

Patricia Birnie and Alan Boyle *International Law and the Environment* Oxford University Press Inc, New York, 1992

Michael Bowman and Alan Boyle (eds) *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* Oxford University Press Inc, New York, 2002

Edith Brown Weiss (ed) *Environmental Change and International law: New Challenges and Dimensions* United Nations University Press, Tokyo, 1992

Michael Byers *War Law*, Douglas and McIntyre Ltd, Vancouver, 2005

James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* Cambridge University Press, Cambridge 2002

PJ Delon *The International Health Regulations: A Practical Guide* World Health Organization, Geneva, 1975

David Fidler *International Law and Infectious Diseases* Oxford University Press Inc, New York, 1999

David Fidler *SARS, Governance and the Globalization of Disease* Palgrave Macmillan, New York, 2004

Andrew Grubb (ed) *The Law of Tort* Reed Elsevier, London 2002 979

Malgosia Fitzmaurice, Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* Hart Publishing, Oxford, 2004

C Flinterman, B Kwiatkowska, JG Lammers (eds) *Transboundary Air Pollution* Martinus Nijhoff Publishers, Dordrecht, 1986

Hurst Hannum (ed) *Guide to International Human Rights Practice* 4th ed Transnational Publishers Inc, New York, 2004

Louis Henkin (ed) *The International Bill of Rights: The International Covenant on Civil and Political Rights* Columbia University Press, New York 1981

Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit *International Law Cases and Materials* ed 3 West Publishing Co, Minnesota, 1993

Nihal Jayawickrama *The Judicial Application of Human Rights: National, Regional and International Jurisprudence* Cambridge University Press, Cambridge 2002

Sarah Joseph, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2nd ed Oxford University Press Inc, New York (2004)

Alexandre Kiss and Dinah Shelton *International Environmental Law* 2nd ed, Transnational Publishers Inc, New York, 2000

Peter Malanczuk *Akehurst's Modern Introduction to International Law* 7th ed, Routledge, New York, 1997

*Robert McCorquodale *Human Rights* Dartmouth Publishing Co, Aldershot, England 2003

Manfred Nowak *United Nations Covenant on Civil and Political Rights Commentary* NPEngel, Kehl, Strasbourg, Arlington, 1993

Claire Ovey and Robin White *European Convention on Human Rights* 3rd ed, Oxford University Press Inc, New York, 2002

Maurizio Ragazzi *The Concept of International Obligations Erga Omnes* Clarendon Press, Oxford, 1997

Henry Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals* Clarendon Press, Oxford, 1996

Henry Steiner and Philip Alston *International Human Rights in Context: Law, Politics, Morals* 2nd ed, Oxford University Press Inc, Oxford, 2000

J Shand Watson *Theory and Reality in the International Protection of Human Rights* Transnational Publishers Inc, New York, 1999

JOURNAL ARTICLES

Kitty Arambulo *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?* 2 University of California Davis Journal of International Law and Policy 111, Winter 1996

David Bishop *Lessons from Sars: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations* 36 Georgetown Journal of International Law 1173, Summer 2005

Daniel Bodansky *Customary (and not so Customary) International Environmental Law* 3 Indiana Journal of Global Legal Studies 105, Fall 1995

Daniel Bodansky, John R Crook *The ILC's State Responsibility Articles: Introduction and Overview* 96 American Journal of International Law 773, October 2002

Edith Brown Weiss *International Environmental Law: Contemporary Issues and the Emergence of a New World Order* 81 *Georgetown Law Journal* 675, March 1993

James Crawford, Jacqueline Peel and Simon Olleson *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading* 12 *European Journal of International Law* 963, December 2001

David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 *Minnesota Law Review* 771, April 1997

David Fidler and Lawrence Gostin *The New International Health Regulations: an Historic Development For International Law and Public* 34 *Journal of Law, Medicine and Ethics* 1, Spring 2006

Eric Mack *The World Health Organization's New International Health Regulations: Incursion on State Sovereignty and Ill-Fated Response to Global Health Issues* 7 *Chicago Journal of International Law* 365, Summer 2006

Thomas W Merrill *Golden Rules for Transboundary Pollution* 46 *Duke Law Journal* 931, March 1997

Joshua Reader *The Case Against China; Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic* 19 *Columbia Journal of Asian Law* 519, Spring 2006

Oscar Schachter *The Emergence of International Environmental Law* 44 *Journal of International Affairs* 457, Winter 1991

J Scott Davidson *The Rainbow Warrior Arbitration Concerning the Treatment of the French Nationals Mafart and Prieur* 40 *The International and Comparative Law Journal* 446, 1991

PDG Skegg *Omissions to Provide Life Prolonging Treatment* 8 *Otago Law Review* 205 1994

Barbara Von Tigerstrom *The Revised International Health Regulations and Restraint of National Health Measures* 13 *Health Law Journal* 35, 2005

Mary Ann Torres *Public Health and International Law: The Human Right to Health, National Courts and Access to HIV/AIDS treatment: A Case Study From Venezuela* 3 *Chicago Journal of International Law* 105, Spring 2002

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNAL

Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons (1996) ICJ Reports 226

Barcelona Traction, Light and Power Company, Limited, Second Phase ICJ Reports 1970

East Timor Case 1928 PCIJ Series A, No1 30

Nuclear Tests Case (New Zealand v France 22 September 1995 General List No 97

The Rainbow Warrior (New Zealand and Greenpeace vs. France, Case no. 6, arbitration proceedings, 1986-1990)

Trail Smelter (U.S. v. Can.), 3 UNRIAA 1905, 1938 (1949)

DECISIONS BY HUMAN RIGHTS COURTS/COMMITTEES

EHP v Canada Communication no.67/1980

Lantsova v The Russian Federation Communication No.763/1997

Carlos Cabal and Marco Pasini Bertran v Australia Communication 1020/2001

LCB v UK Application 37900/97

ENGLISH CASE LAW

Blake v Woolf [1898] 2 QB 426

Re J (a Minor) [1992] 3 WLR 507

Rylands v. Fletcher (1868), L.R. 3 H.L. 330; [1861–73] All E.R

St Helen's Smelting Co v Topping 11 HL Cas. (Clark's) 642 11 ER 1485 (1865)

NEW ZEALAND CASE LAW

Shortland v Northland Health Ltd (No 2) HC Whangarei, 1997 M75/97

US CASE LAW

Missouri v Illinois 200 US 496

INTERNATIONAL INSTRUMENTS

International Covenant on Economic, Social and Cultural Rights (1966)

International Covenant on Civil and Political Rights (1966)

International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Rio Declaration on the Environment (1992)

Statute of the International Court of Justice (1945)

Stockholm Declaration on the Human Environment (1972)

WORLD HEALTH ORGANIZATION DOCUMENTS

World Health Organization *Avian Influenza – fact sheet* Jan 2004 at www.who.int/csr/don/2004_01_15/en/

World Health Organization *Avian Influenza (“bird flu”) – Fact Sheet* February 2006 at www.who.int/mediacentre/factsheets/avian_influenza/en

World Health Organization *Drop in World Child Mortality Reaches Target, New Study Shows but Many Countries Lagging* Press Release WHO/67 12 October 2000

World Health Organization Fact Sheet 200 *Global Infectious Disease Surveillance* June 1998 <http://www.who.int/mediacentre/factsheets/fs200/en/index.html>

World Health Organization *Responding to the Avian Influenza Pandemic Threat: Recommended Strategic Actions* WHO/CDS/CSR/GIP/2005.8

World Health Assembly *Revision of the International Health Regulations* WHA58.3 May 23, 2005

UNITED NATIONS

Economic and Social Council General Comment 14 (E/C.12/2000/4)

Office of the United Nations High Commissioner for Human Rights, General comment 6/16 of 27 July 1982

Office of the United Nations High Commissioner for Human Rights *Status of Ratifications of the Principal Human Rights Treaties* 9 June 2004 <http://www.unhchr.ch/pdf/report.pdf>

Office of the United Nations High Commissioner for Human Rights *Declarations Recognising the Competence of the Human Rights Committee Under Article 41*
http://www.ohchr.org/english/countries/ratification/4_2.htm

United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex*, UN Doc E/CN.4/1985/4 (1985)
Canada 1999 UN doc. CCPR/C/79/add

ONLINE ARTICLES

David Fidler *ASIL Insight: The Continuing Global Spread of Avian Influenza A (H5N1) and its Implications for International Law* November 7 2005 at
<http://www.asil.org/insights.htm>

Gerald Schatz *ASIL Insight, International Health Regulations: New Mandate for Scientific Cooperation* 2 August 2005 at <http://www.asil.org/insights.htm>

Jonathan Watts *Vietnam Needs Cash to Stave off Future Outbreaks of Bird Flu*
www.thelancet.com Vol 365 May 21 2005

Xu Xiang *China Plagued by Bird-flu Cover-ups* 8 June 2006
<http://www.atimes.com/atimes/China/HF08Ad01.html>

INTERNET RESOURCES

CDC *Avian Influenza (Bird Flu) Fact Sheet* June 2006
http://www.cdc.gov/flu/avian/gen_info/pdf/avian_facts.pdf

International Federation of Red Cross and Red Crescent Societies *Diseases are Turning into Silent Disasters Warns Red Cross/Red Crescent Disaster Report* 28 June 2000 at <http://www.ifrc.org/docs/news/pr00/1700.asp>

OIE Update on Avian Influenza in Animals, September 20 2006,
www.oie.int/download/AVIAN%20INFLUENZA/A/AI-asia.htm

United States Department of the Interior *An Early Detection System for Highly Pathogenic H5N1 Avian Influenza in Wild Migratory Birds: US Interagency Strategic Plan* March 14 2006 at http://www.doi.gov/issues/birdflu-strategic_plan.pdf