

## International Law and Covid-19 Jurisprudence

*Upendra Baxi*

The deadly Covid-19 virus has now enveloped the globe and generated new forms of governmentality and bio-legitimation practises in its wake. But only new forms of human compassion and solidarity can help us overcome this lethal and formidably grim challenge. Even amidst the disease and death caused by the pandemic, theoretical discourse rages: on the one hand, our focus rests on the intensification of state of exception in combatting Covid-19. On the other, we explore the projection of the crisis as an opportunity for building a new future for global politics, one that is marked by empathy, fraternity, justice, and rights as fidelity to establish novel forms of sources of self in society.

Here, we engage only one facet of the new developments: How can international law discourse be read as we step into the future? Respect for norms and standards of international law is among the paramount constitutional duties of the Indian State under Article 51 of the Constitution, regardless of the quibbles of whether the language only refers to treaty-obligations or also to customary international law. It is an egregious error to think that international norms, standards, and doctrines are irrelevant to making policy and law regarding disasters or pandemics.

A threshold distinction of the United Nations, as a site of normative discursivity and of exercising global power politics, is sadly manifest even during this ever-accelerating pandemic. President Donald Trump's insistence on calling Covid-19 the 'Chinese virus' renders it extremely unlikely that the pandemic will be discussed during China's current monthly presidency of the Council. And the threat of veto, both by China and Russia, will always loom large whenever the matter is raised for discussion.

But the UN also illustrates systems of norm enunciation. Responsible for the progressive codification of law (along with the International Law Commission, ILC), the UN system has developed a web of lawmaking and framework treaties as well as provided auspices for systems of 'soft' law that may eventually become binding. Some robust norms, standards, and doctrines have emerged. For example, the peremptory *jus cogens* – a few fundamental, overriding principles of international law, such as crimes against humanity, genocide, and human trafficking – apply to all states. And Article 53 of the Vienna Convention on the Law of Treaties goes so far as to declare that a “treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. And even when ingredients of genocide remain difficult to prove, the International Court of Justice has held, for example in 2007, that states

have a duty to prevent and punish acts and omissions that eventually furnish elements for committing the crime of genocide.

There also exists an *erga omnes* rule prescribing specifically determined obligations that states owe to the international community as a whole. This was enunciated by the World Court in 1970 when it enumerated four ‘situations’ of obligations: the outlawing of acts of aggression, the outlawing of genocide, protection from slavery, and protection from racial discrimination. A great significance of this judicial dictum is that it imposes obligations which transcend consensual relations among states.

Justice Prasana Varale (of the Aurangabad Bench of the Bombay High Court) suggested on April 8, 2020, that the administration can create several centres across districts to avoid large gatherings, thereby recognizing the need of vegetables, medicines, and other essential goods as well as the emphasized role of the fundamental duties of all Indian citizens under Article 51-A of the Constitution. He admirably stated that “while it expects effective measures from the state government for migrants and health workers”, the Covid-19 pandemic requires citizens, who are “always protective about their fundamental rights” to “remind themselves and discharge the fundamental duties”. In doing so, he invoked Article 51-A of the Indian Constitution, which calls on all citizens to “promote harmony and the spirit of common brotherhood amongst all the people of India” and transcend “religious, linguistic and regional to renounce practices derogatory to the dignity of women”.

In this context, we should also remember the American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, the inaugural international human rights instrument that preceded the Universal Declaration of Human Rights (UDHR) by less than a year. And on December 9, 1998, the eve of the 70<sup>th</sup> anniversary of the UDHR, the UN General Assembly adopted a resolution declaring the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. It asserts in Article 18, Section 1 that: “Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible”. And Article 18, Section 3 states that: “Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.”

It is eminently arguable to maintain that this Declaration has become an aspect of customary international law binding on all states – and further that it remains particularly relevant to the global Covid-19 situation, which unites the state and civil society actors to care for the concrete suffering of others. In this connection, the “morality of aspiration” (to recall the phrase of lamented Professor Lon Fuller) is crucial because, as Professor John Finnis reminds us, “universalist and agent-neutral” duties make moral sense even if these “moral duties regarding people’s well-being are not impartial, and if they are agent-relative”.

In addition, there are three other sets of international law obligations. These are primarily derived from the no-harm principles crystallized in the ILC 2001 Draft Articles on the Prevention of Transboundary Harm (DAPTH) and the 2015 Paris Framework Agreement on Climate Change. DAPTH has carefully developed norms of due diligence, stressing entirely that these may be adapted to contextual exigencies. But due diligence obligations may not be gainsaid altogether when the environmental invasions have a transboundary impact. Each state is obliged to observe these standards in the fight against Covid-19 as a matter of international law.

The second set of obligations relate to other core human rights measures: no law or policy to combat epidemics or pandemics can go against the rights of migrant workers, internally displaced peoples, refugees, and asylum seekers. In combating Covid-19, respect is owed to the inherent dignity of individuals, the rights of equal health for all, and the duties of non-discrimination. And the norms of human dignity further reinforce the accountability and transparency of the state and other social actors. Panicky and sadist policing endeavours to maintain lockdown regimes and shoot at sight orders in collective migrant labour exodus situations – and militaristic responses to food riots instantly de-justify public health lockouts and curfews.

The third set of obligations arise out of international humanitarian law. The Biological and Toxin Weapons Convention (BTWC) must be mentioned in this context. Without joining any conspiracy or racist theory about the origins of Covid-19, the Foreign Minister of India rightly affirmed the BTWC obligations on March 26, 2020, the 40<sup>th</sup> anniversary of that Convention. Surely, this first global and non-discriminatory disarmament convention is worthy of applause because it outlawed a range of weapons of mass destruction. India rightly again called for a “high priority” to enable “full and effective implementation by all states parties”.

Moreover, multinational and domestic corporations are also liable before an increasing number of domestic courts. In an illustration of this, the Canadian Supreme Court ruled on February 28, 2020, in *Nevsun Resources Ltd. v Araya et al.*, 2020 SCC 5, that customary international law can give rise to a direct claim in Canada if obligations of avoiding and eliminating forced labour, slavery, cruel, inhumane and degrading treatment, and crimes against humanity are violated.

The metaphor of ‘war’ is often invoked in a determined fight against Covid-19; even when there are some pacific conscientious objections to the starting point, this has to be based on a full-throated repudiation of an ancient Latin maxim *Inter arma enim silent lēgēs* (popularly rendered as “In times of war, the law falls silent.”) Combating this fierce and fearsome pandemic calls for a re-dedication to existing international law obligations and frameworks, not in their violation or denial.

What illustrious thinkers of the pre-Covid-19 era, such as Sir Wilfred Jenks, called the “common law of Mankind”, and what Professor John Rawls later christened the “Law of Peoples”, is a code of summoning and sustainability nested obligations for all states and peoples that must now be fully upheld. Put differently, the innate morality of post-Westphalian

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international law provides the necessary conditions of the “cultural validity” (as Professor Werner Gephart develops this notion) governing anti-Covid-19 platforms of action.

*Professor em. Upendra Baxi is one of the most renowned contemporary Indian legal scholars. His academic career led him to the universities of Delhi, Durham (Duke University), Sydney, Surat, New York, Toronto, and Warwick. He was Fellow at the Käte Hamburger Center for Advanced Study in the Humanities “Law as Culture” from April to November 2011 and from July to December 2012.*