ARTICLE

Global Pandemics and International Law: An Evaluation of State Responsibility and States' Human Rights Obligations arising from COVID-19

Christopher Yaw Nyinevi[*]

Abstract

The outbreak of the COVID-19 pandemic, its damaging impacts and the corresponding measures that states have implemented implicate two important questions: (a) whether or to what extent a state bears responsibility under international law for its complicity in the outbreak of a pandemic; and (b) whether any human rights obligations or liabilities arise for states relative to the measures they enact to combat a pandemic. This paper addresses these two questions. The discussions on international responsibility are situated within the context of the Articles on State Responsibility, the Law of the World Health Organization and other rules of general international law. And drawing from the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights, the second part of the paper focuses on the human rights obligations of states arising from the COVID-19 pandemic.

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I. Introduction

The COVID-19 pandemic has impacted life in a way that most people would have thought unimaginable a few months back. International travel has grounded to a halt, major global sporting and entertainment events have been cancelled or postponed,[1] and most importantly, untold deaths and suffering have become the order of the day in a lot of countries around the world.[2] To contain the pandemic and respond to its socioeconomic impacts, many states have enacted various measures. Emergency laws restricting movement of persons and public gatherings have been imposed, borders have been closed to international travel and immigration, and stiffer regulations on trade in medical supplies and other essential goods have also been enacted by some states.

Pandemics are not new in human history, however.[3] While they tend to be once-in-a-lifetime events, the world has seen several of them. The Plague of Justinian which

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[1] See Justin McCurry and Sean Ingle, 'Tokyo Olympics postponed to 2021 due to coronavirus pandemic' (*The Guardian*, 25 March 2020)< https://www.theguardian.com/sport/2020/mar/24/tokyo-olympics-to-be-postponed-to-2021-due-to-coronavirus-pandemic> accessed 11 September 2020. Tumaini Carayol, 'Wimbledon 2020 cancelled in response to coronavirus pandemic' (*The Guardian*, 2 April 2020) <https://www.theguardian.com/sport/2020/apr/01/wimbledon-2020-cancelled-response-coronavirus-pandemic-tennis> 11 September 2020.

[2] See 'Coronavirus Digest: Global deaths surpass 800 000' (*Deutsche Welle,* 22 August 2020) <https://p.dw.com/p/3hL7m>accessed 11 September 2020.

[3] Currently the term 'pandemic' does not have a technical legal meaning or significance within WHO Regulations or other international legal instrument. Nevertheless, the WHO describes it on its website as 'the worldwide spread of a new disease', a definition that comports with the ordinary meaning of the word. *See* WHO, 'Emergencies preparedness, response' (24 February, 2020) <https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/> accessed 1 November 2020. It is in that ordinary sense that 'pandemic' is used in this paper.

occurred in 6th century (AD) is believed to have killed about 50 million people, probably half of the world's population at the time.[4] There was also the Bubonic Plagues of the 14th century that was likely caused by the same pathogen as the Justinian plague. Popularly known as 'the Black Death', it is estimated to have killed about 200 million people.[5] The 20th century brought with it two major pandemics. The Influenza (commonly known as the 'Spanish Flu') broke out in 1918 and killed about 50 to 100 million people, numbers that outstrip casualties of the First World War which began the same year.[6] The HIV/AIDS pandemic emerged towards the end of the century and still has no vaccine. The UN estimates that as of 2019, approximately 76 million people have been infected with HIV and about 33 million of that number have died of AIDS.[7]

Throughout history, pandemics and other infectious disease outbreaks have had major impacts on various aspects of life, including politics and international relations. For instance, in the aftermath of the Black Death, Italian city states began the practice of issuing health certificates to diplomats and traders who travelled across borders.[8] These health cards have been regarded as the precursor to the modern passport and other government-issued documents for international travel.[9] Worth mentioning is also the International Sanitary Convention (ISC), the antecedent to the current International Health Regulations of the World Health Organisation (WHO) which has become prominent in the discussions on COVID-19. First adopted in 1892 to provide quarantine measures for cholera and later revised to include plague and yellow fever, the ISC was the product of a 'series of Sanitary Conferences beginning in 1851 to forge an international agreement to curb the spread of infectious diseases' from Asia into Europe.[10]

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[4] Bryan Walsh, 'COVID-19: The History of Pandemics' (*BBC*, 26 March 2020) <https://www.bbc.com/future/article/20200325--19-the-history-of-pandemics> accessed 11 September 2020.

[5] Ibid.

[6] Ibid.

[7] UNAIDS, 'Global HIV & AIDS statistics: 2020 fact sheet' <https://www.unaids.org/en/resources/fact-sheet>accessed 11 September 2020.

[8] *See* Sarah Nouwen on 'Episode 2: WHO let the Bats Out?' *EJIL: The Podcast* (European Journal of International Law, 6 May 2020) 00:58.

[9] Ibid

[10] Lawrence Gostin and Rebecca Katz, 'The International Health Regulations: The Governing Framework for International Health Security' (2016) 94(2) The Milibank Quarterly 264, 266.

The COVID-19 pandemic would be no different in shaping international law. Already, China's potential responsibility under international law for the outbreak of the pandemic has provoked keen interest and debate. How that question is resolved will influence reforms or the development of new rules in this area of international law. It may also inform what new powers states may be willing to give the WHO and other international institutions that are concerned with global health. Indeed, some states including Australia have not only demanded an international investigation into the origin and causes of COVID-19, they have also called for the establishment of an international inspection mechanism that can proactively investigate the causes of future pandemics.[11] These may be a few of the many international legal developments that the COVID-19 pandemic will spawn.

This paper has a relatively narrow scope, however. It focuses on the following two questions that the outbreak of the COVID-19 pandemic raise:

(a) Whether a state may be responsible under international law for its complicity in the outbreak of a pandemic such as COVID-19; and
(b) Whether and to what extent a state may incur responsibility for the incidence and impact of a pandemic such as COVID-19 on the lives and health of its population or for the measures it implements to control the spread of the disease.

With COVID-19 as the context, the paper examines the rules of state responsibility, the law of the WHO and other rules of international law to provide some perspectives on the liability that a state may have under international law if its actions or omissions were to cause a pandemic. It then examines through the prism of international human rights law the potential responsibility that individual states may

[11] *See* Lidia Kelly, 'Australia demands coronavirus enquiry, adding to pressure on China' (*Reuters,* 19 April 2020)<https://www.reuters.com/article/us-health-coronavirus-australia/australia-demands-coronavirus-enquiry-adding-to-pressure-on-china-idUSKBN221058> accessed 11 September 2020; Anthony Galloway, 'Australia wants WHO to have same powers of weapons inspectors' (*The Sydney Morning Herald*, 22 April 2020) <https://www.smh.com.au/politics/federal/australia-wants-who-to-have-same-powers-of-weapons-inspectors-20200422-p54m7i.html> accessed 11 September 2020.

incur for the incidence and impact of COVID-19 on the lives and health of their citizens or for the measures they enact to control the spread of the pandemic.

The paper comprises six parts including this introduction as Part I. Following the introduction, Part II provides an overview of the law of state responsibility to provide context for the discussion of the issues identified above. Part III recounts how the events related to the COVID-19 pandemic unfolded in China and led to a public health emergency of international concern. The aim is to provide a factual background for the discussions in Part IV. Using China as the point of reference, Part IV examines the vexed question of international responsibility for the pandemic in light of the law of the WHO and other relevant rules of international law. It also addresses the important issue of the relevant international dispute settlement mechanism and/or legal remedies that may be employed to implement China's responsibility for the pandemic assuming there is a plausible case for responsibility. In Part V, the paper turns to the response of individual states to the pandemic and the potential responsibility that they may incur within the context of international human rights law. The discussions there examine the direct human rights obligations of states towards their citizens that are activated by the pandemic and those human rights norms that states must respect as they enact and implement measures to fight the pandemic. Part VI concludes the paper with suggestions on how states may better utilize international law and the opportunities that international co-operation offers, to prepare themselves for a next possible pandemic.

II. An Overview of the Law of State Responsibility

For purposes of state responsibility, the rules of international law may be broadly classified into two. There are the primary rules that confer rights or impose obligations. These include areas of law such as human rights law, humanitarian law, the rules on the use of force, the law of the sea, the law of diplomatic relations, and the rules of international trade and investment. Then there are the secondary rules. Secondary rules of international law are those rules concerned with the determination of the consequences of a state's failure to fulfil the obligations imposed by the primary rules of international law.[12] In other words, they are the rules

[12] See Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 1016.

by which we determine whether a state has failed to meet its international legal obligations, and if so, what consequences or sanctions should flow from such failure. In international law, a state's liability for failure to observe its obligations is what we call 'responsibility.' It follows that the law of state responsibility belongs in the category of secondary rules of international law.

When there is a question whether a state is responsible for a particular action or omission under international law, the rules of state responsibility require that two issues are addressed: First, whether the impugned conduct is attributable to the state; and second, whether the conduct has breached a legal obligation binding on the state.[13] If both questions are answered in the affirmative, then the state is, as a consequence, liable to make reparations in the appropriate form.[14]

Generally, for a conduct (either an act or omission) to be attributable to a state, it must meet the threshold of being an 'act of the state'. This test is satisfied if the conduct was perpetrated by an organ, agency, or other instrumentality of the state regardless of whether it was performing executive, legislative or judicial functions, and whatever its position in the constitutional structure of the state.[15] It is also irrelevant that in the particular instance, the organ, agency or instrumentality of the state acted beyond the scope of its authority or in disregard of instructions ('ultra vires').[16]

The foregoing implies that generally acts or omissions of a private person done in their private capacity are not 'acts of the state' and may therefore not form the basis of the international responsibility of the state. However, there are exceptions. The general 'immunity' of a state from liability for acts of private persons does not apply where it can be shown that the private persons were agents of the state either by way of exercising elements of governmental authority (i.e., public or regulatory

[13] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001', arts 2, 12 and 13 (hereafter 'Articles on State Responsibility').
[14] Ibid, art 31.
[15] Ibid, art 4; See also *The Salvador Commercial Company Case* (1902) RIAA Vol. XV 467.
[16] Articles on State Responsibility (n13), art 7.

functions)[17] or by acting under the directions, instructions or control of the state.[18] The acts of private persons may also be attributable to a state where by its conduct (including public statements by government officials praising or endorsing the acts) the state can be said to have adopted the wrongful acts of the private persons.[19]

Yet another important basis for attributing private conduct to a state is when the state has failed in the exercise of its due diligence obligation regarding the conduct of the private individuals.[20] The due diligence obligation requires the state to utilize all lawful means at its disposal to anticipate and prevent acts of private persons that may breach the state's international obligations. Where the wrongful private acts were probably spontaneous or caught the state unawares, there still exists for the state a continuing due diligence obligation to restore the status quo ante if possible and /or find the perpetrators, prosecute them to the fullest extent of the law and offer assurances of non-repetition to the injured state or other international legal person, as the circumstance may require. Consequently, what is otherwise a private act may be translated into an 'act of the state' for which a respondent state is liable if the state has failed to exercise due diligence to prevent the acts from occurring or to promptly remedy the effects of such acts.

In light of the above, the question whether China is responsible for the outbreak of the COVID-19 pandemic implicates two questions: first, whether the outbreak of the pandemic is attributable to China; and second, whether the outbreak of the pandemic breaches any international obligations binding on China. Similarly, two sub-issues arise concerning the potential responsibility of individual states for the impact of the disease on the lives or health of their citizens and the manner in which such states have managed the COVID-19 crisis. These are whether actions or omissions relating to the pandemic within a particular state are attributable to the state; and whether such actions or omissions breach the state's international human rights obligations. The question of China's responsibility is addressed (in Part IV), followed by the

[17] Ibid, art 5.
[18] Ibid, art 8.
[19] Ibid, art 11; See also *United States Diplomatic and Consular Staff in Tehran (Judgment))* [1980] I.C.J. Reports 3, 35 [74].
[20] See *The Home Missionary Society Claim* (1920) RIAA, Vol. VI 44; *Pulp Mills on the River Uruguay Case* [2010] ICJ Reports 14, para. 197.

responsibility of individual states within human rights law for their management of the pandemic (in Part V).

Before those discussions, the next part (Part III) traces the events related to the outbreak of COVID-19 to provide a factual background for the discussions on China's responsibility.

III. Facts Related to how the COVID-19 Pandemic broke out

The big policy questions for the international community on how the outbreak of COVID-19 could have been differently handled and what rules and mechanisms must be put in place to deal with a future pandemic can be better answered if the facts surrounding the outbreak of COVID-19 are objectively established. Such an exercise is no less important for the discussions in this paper given that for an honest assessment of China's international responsibility (or lack thereof) for the outbreak of COVID-19, one must know the basic facts about how it started and was handled (or mishandled) by China. In light of this, the table below summarizes the chronology of events together with the Chinese government's reactions and interactions with the WHO to map out the outbreak of the COVID-19 pandemic. The objective is to present the facts as are currently known to inform the subsequent discussion on whether it is plausible to attribute the outbreak of the pandemic to China.

Table 1[21]

Timeline of COVID-19 Events and China's Reactions and Interactions with the World Health Organization

1 December 2019	'Lancet', the medical journal, publishes a study stating that signs of what would later be called COVID-19 had been observed in some people in Wuhan, China. Based on this study, it is estimated that the initial transmission of the virus to humans

[21] This summary of the chronology of events related to the outbreak of the COVID-19 pandemic is based on reporting by the BBC. See 'Coronavirus: What did China do about early outbreak?' (*BBC*, 9 June 2020) <https://www.bbc.com/news/world-52573137> accessed 11 September 2020.

	would have occurred sometime in November 2019 given what we now know to be the incubation period of the virus.
27 December 2019	A doctor in a Hubei provincial hospital tells the authorities about his observation of a SARS-like respiratory disease in his patients (which we now know to be COVID-19). At this point, there had been multiple cases.
30 December 2019	The Wuhan Health Commission notifies local hospitals about a 'pneumonia' of an unknown cause and asks them to report any information they had had about suspicious health cases in the previous week. On the same day, a senior doctor at Wuhan Central Hospital, Dr Ai Fen, receives lab results of a patient with suspected coronavirus. He takes a photo of the results and sends it to a colleague doctor leading to a circulation of the information among the medical community in Wuhan. Following this, another doctor, Dr Li Wenliang, messages his doctors' chat group about the outbreak of a coronavirus and advises them to wear protective gear to avoid infection. The Wuhan Public Security Bureau later summons Dr Li on charges of 'making false comments' that were causing social disorder. By this point, reports of a 'mysterious pneumonia' likely caused by a deadly virus had spread on Weibo, China's equivalent of Twitter.
31 December 2019	The Chinese government confirms that it is investigating 27 cases of a viral pneumonia, seven of which are critical and dispatches a team of medical experts to Hubei province. The government alerts the WHO about the situation but states that no human-to-human transmission has been identified.

1 January 2020	Dr Ai Fen indicates that she has been reprimanded by a disciplinary committee of her hospital for 'spreading rumours'. The Wuhan Public Security Bureau arrests and detains eight people for spreading rumours about the virus, although on the same day the provincial authorities in Hubei shut down a seafood market in Wuhan which China says was the source of the outbreak. On its part, the WHO puts itself on an emergency alert and prepares to deal with a potential outbreak.
3 January 2020	Unverified allegations on Chinese social media, many of which were censored by the government, indicate that hospital authorities were threatening and silencing hospital staff for speaking about the virus. Meanwhile, health authorities in Wuhan issue a statement saying that there has been no human-to-human transmission of the virus, although they are investigating the cause of the outbreak.
7 January 2020	China's President Xi discusses the outbreak of the virus in a meeting with the top leadership of the Chinese Communist Party, a development which indicates that the central government had known about the virus for some time.
8 January 2020	Experts from China's National Health Committee say they have identified a new coronavirus as the cause of the epidemic, an indication that the central government had been aware of the outbreak and was studying the situation.
9 January 2020	China publishes the genome of the virus confirming its link to the SARS and MERS viruses.
13 January 2020	The first case of coronavirus outside of China is reported in Thailand. The infected person had travelled from Wuhan, China.

14 January 2020	The WHO tweets China's continued insistence that no human-to-human transmission of the virus has been detected.
15 January 2020	The US reports its first case of COVID-19 as coming from a person who had returned from Wuhan, China.
20 January 2020	China's National Health Commission finally confirms human-to-human transmission of the virus.
23 January 2020	Wuhan and its environs are put under lockdown, but WHO decides not to declare a global health emergency.
23-25 January 2020	China commences construction of two new hospitals to serve as isolation and treatment centres for COVID-19.
24-30 January 2020	China allows the planned celebrations of the Lunar New Year to proceed, an event that involves millions of people travelling to and across China.
28 January 2020	WHO Director General meets with the Chinese President Xi to discuss the outbreak of the virus.
30 January 2020	The WHO declares that COVID-19 is a public health emergency of international concern (PHEIC) following confirmed reports of 82 cases outside China.

With the facts mapped out, it is now apposite to turn to the vexed question of China's potential responsibility for the outbreak of COVID-19 and its devastating impacts around the world.

IV. The Question of China's Responsibility for the Pandemic

A. *Atrribution of the COVID-19 Pandemic to China*

As far as COVID-19 is concerned, there are two main theories about how the virus began to spread to humans in Wuhan, China.[22] One theory is that as a result of negligence or an accident, the virus may have escaped from the Wuhan Institute of Virology, a research lab in Wuhan, where the virus was possibly being studied for scientific or other purposes.[23] The Wuhan Institute of Virology is an agency of the Chinese Academy of Sciences, a national scientific body that is financed and controlled by the Chinese government.[24] The Chinese Academy of Sciences and its affiliates such as the Wuhan Institute of Virology are a core part of China's national development agenda and its policy to become a global economic, technological and political power.[25] This potentially makes the Wuhan Institute a parastatal agency that performs public functions. Accordingly, assuming it were true that the virus escaped from the Institute's lab, attribution to China would be less complicated since, generally, the conduct of a parastatal agency that performs public functions or exercises elements of governmental authority is attributable to the state.[26] However,

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[22] A third theory that has been pushed mainly by the Chinese government is that the virus originated in the United States and was introduced in China through the visit of some U.S. military personnel to Wuhan, China. *See* Steven Lee Myers, 'China Spins Tale that the U.S. Army Started the Coronavirus Epidemic' (*The New York Times*, 13 March 2020)< https://www.nytimes.com/2020/03/13/world/asia/coronavirus-china-conspiracy-theory.html> (accessed 1 November 2020). This theory is however seen as an attempt by China to deflect blame for its handling of the outbreak of the virus. *See* Tanner Brown, 'Inside China's campaign to blame the U.S. for the coronavirus pandemic (*Market Watch*, 15 March 2020) <https://www.marketwatch.com/story/inside-chinas-campaign-to-blame-the-us-for-the-coronavirus-pandemic-2020-03-15> (accessed 1 November 2020).

[23] See Ben Feuerherd, 'Everything we know about the Wuhan lab that may have unleashed the coronavirus' (*New York Post*, 16 April 2020) <https://nypost.com/2020/04/16/all-we-know-about-wuhan-lab-that-may-have-unleashed-COVID-19/> accessed 11 September 2020.

[24] Qinquan Zhang, 'The Chinese Academy of Sciences Responds: We are with the Government and with the People' (*Nature*, 22 October 2019) <https://www.nature.com/articles/d41586-019-03205-z>accessed 11 September 2020.

[25] Ibid. ('CAS is not run independently of government, as you imply. The establishment and development of CAS have been entirely based on the wisdom and support of the central government. The role of the academy in leading China's research has always been recognized by China's leadership, which has respected science and technology from the start — for its own sake as well as for developing a sustainable economy').

[26] Articles on State Responsibility (n 13) art 5.

there is no concrete evidence that the virus escaped from that lab. The WHO has discounted that possibility.[27]

That leaves us with the other theory, which is that the virus escaped from a natural source (possibly an animal host) and got transmitted to a person or persons who then spread it. This second theory has been confirmed by the WHO which says that 'all available evidence' suggest that COVID-19 has a 'zoonotic source.'[28] But without more, this second theory of how the virus initially transmitted to humans is insufficient to attribute the outbreak of the pandemic to China. It only goes as far as to show that the initial transmission of the virus to humans may have been caused by the actions or omission of some private persons. But since the conduct of a private person acting in their private capacity is not attributable to a state, to establish attribution, it must be shown that China's conduct either before or after the initial transmission did not satisfy its due diligence obligation to anticipate, detect and prevent or contain the outbreak. This is why the calls for investigations by countries such as Australia becomes very important. Without an independent international investigation into the origin of the virus, it would be difficult to conclusively establish whether China foresaw the outbreak and therefore ought to have acted more diligently to contain it.

Nevertheless, the currently available facts would seem to lean towards attributing the outbreak of the pandemic to China. It is probable that the virus may have first transmitted to humans by natural causes through the acts or omissions of some private individuals probably in the Wuhan market as China claims. However, China's apparent failure to anticipate and prevent the initial transmission or to act swiftly to contain the virus or to warn the international community through the WHO as soon as it became aware of the initial transmission presents a reasonable case for attribution. From the chronology of events, it is plausible that Chinese government

[27] WHO, 'Coronavirus Disease 2019 (COVID-19) Situation Report—94', (23 April 2020) <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-COVID-19.pdf> accessed 11 September 2020.; *See also* David Nikel, 'Controversial Coronavirus Lab Origin Claims Dismissed by Experts' (*Forbes*, 6 June 2020) <https://www.forbes.com/sites/davidnikel/2020/06/07/controversial-coronavirus-lab-origin-claims-dismissed-by-experts/?sh=64bca7dc68f6> accessed 1 November 2020.

[28] WHO COVID-19 Situation Report (n 27).

authorities, at the very least the provincial government in Hubei, knew about the outbreak of the virus and its potential to escalate to an epidemic or pandemic by 27 December 2017 at the latest.

Indeed, the WHO has stated that investigations conducted by the Chinese government itself confirm that by early December 2019, there were people with symptoms of the virus in Wuhan.[29] The investigation revealed that while some of the earliest cases had links to the Wuhan food market, others did not.[30] Yet instead of taking swift action to investigate and contain the virus, it appears that the authorities rather sought to intimidate and silence health officials who were raising alarms about the virus.[31] Also significant is China's insistence until 20 January 2020 that there was no human-to-human transmission of the virus.[32] That repeated communication to the WHO had the potential of making individuals and governments less cautious, as it gave the impression that the disease was not contagious.

Also, critically significant is the fact that by 23 January 2020, the Chinese government had put Wuhan, the epicenter of the virus, under lockdown and begun constructing two new hospitals to serve as isolation and treatment centers.[33] The two actions give an indication of the government's knowledge of the scale of the outbreak. Yet, while taking these precautions, China sought to give the impression that the situation was not that serious by allowing the Chinese New Year celebrations, an event that involves millions of people travelling to and across China, to proceed. Finally, although China locked down Wuhan on 23 January 2020 and banned domestic and international flights out of Wuhan, its failure to immediately ban outbound international flights from other Chinese cities may have exported the virus abroad given that before 23 January, many Wuhan residents potentially carrying the virus had left the city for other parts of China.[34]

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[29] Ibid.
[30] Ibid.
[31] See Timeline of Events (Table 1) above.
[32] Ibid.
[33] Ibid.
[34] See Sandip Sen, 'How China locked down internally for COVID-19, but pushed foreign travel' (*The Economic Times*, 30 April 2020)<

Together, all these actions, omissions and/or insufficiency of official response can be attributed to China's government at the local, provincial and national levels. Thus, in assessing whether the outbreak of the pandemic is attributable to China, one would have to look objectively at all these actions of the Chinese government to determine whether or not it acted with due diligence as a reasonable and well-administered government faced with similar circumstances would have acted to prevent the spread of the virus from its territory to other states.[35]

B. *The Outbreak of COVID-19 as a Breach of China's International Legal Obligations*

1. *China's Obligations under the Law of the WHO*

The WHO was established in 1948 as a specialized agency of the United Nations. Its mandate and governance structure are spelt out in a treaty known as the Constitution of the World Health Organization, 1946 ('the WHO Constitution')[36] to which China has been a party since 26 July 1946.[37] The WHO's objective is to help all peoples to attain the highest possible level of health.[38] To achieve that objective, the functions of the WHO as spelt out in Article 2 of the WHO Constitution include:

(i) To act as a directing and coordinating authority on international health work;

https://economictimes.indiatimes.com/blogs/Whathappensif/how-china-locked-down-internally-for-COVID-19-but-pushed-foreign-travel/> accessed 11 September 2020.

[35] In *Asian Agricultural Products Ltd v Sri Lanka* (ICSID Case No. ARB/87/3), the Tribunal held that the standard of due diligence required of host state to prevent damage to the property of an investor was 'nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstance'. [para 77]. While the context in which the Tribunal applied the test is different (i.e., duty of a host state to prevent damage to an investor's property), the principle underlying it remains the same and true for other contexts such a state's duty to prevent a deadly virus originating within its territory from spreading to other states.

[36] *Constitution of the World Health Organisation*, 14 UNTS 185 (adopted by the World Health Conference in July 1946 in New York and entered into force on 7 April 1948) ('WHO Constitutiton').

[37] *See* United Nations, *Treaty Series* (vol 14) 185. <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IX/IX-1.en.pdf> accessed 1 November 2020.

[38] WHO Constitution, art 1.

(ii) To assist governments that request its help to streghten their health systems;
(iii) To provide technical assistance and aid to governments including during periods of emergencies;
(iv) To establish systems that work in advance to eradicate epidemic, endemic and other diseases;
(v) To promote research in the field of health;
(vi) To provide information, counsel and assistance in the field of health; and
(vii) To establish and revise as necessary international nomenclatures of diseases, causes of death and of health practices.

To perform these functions, the WHO Constitution establishes three organs and assigns them with different duties. These organs are the World Health Assembly, the Executive Board and the Secretariat of the WHO.[39] The World Health Assembly is the supreme decision-making body of the Organization. It adopts the policies and regulations of the WHO as well as treaties in the field of health that may then be ratified by its members.[40] The Assembly also constitutes the Executive Board whose work it reviews and supervises.[41] Among others, the Executive Board implements decisions of the Assembly, reports to the Assembly on its work and prepares the agenda for the meetings of the Assembly.[42] The Secretariat which comprises the technical and administrative staff performs the administrative functions of the Organization.[43] The Secretariat is headed by the Director General who functions as the chief executive of the WHO.[44]

Under Article 21 of the WHO Constitution, the World Health Assembly has the power to make regulations concerning matters including: (a) 'sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease'; (b) 'nomenclatures with respect to diseases, causes of death and public health practices'; and (c) 'standards with respect to diagnostic procedures for

[39] Ibid, art 9.
[40] Ibid, arts 19-22.
[41] Ibid, arts 19 and 24.
[42] Ibid, art 28.
[43] Ibid, arts 30 and 31.
[44] Ibid.

international use'. A regulation adopted by the World Health Assembly comes into force for each member after due notice of its adoption has been given unless a member affirmatively opts out or makes a reservation.[45] In exercising this power, the World Health Assembly has adopted a number of regulations including the International Health Regulations ('IHR') whose provisions are relevant for our discussions on COVID-19. The IHR was first adopted in 1969 and last revised in 2005.[46]

Article 2 of the IHR 2005 provides that '[t]he purpose and scope of [the IHR] are 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.' Thus, unlike previous versions that operated on a disease-specific model, the IHR 2005 adopts 'an all-hazards strategy, covering health threats irrespective of their origin or source.'[47]

However, given its character as a platform of action for cooperation in matters of global health rather than as a monitoring or inspection agency, the WHO primarily relies on national health authorities to furnish it with the data that it requires for its technical, advisory and coordinating roles.[48] Based on the information received about events occurring in a particular country, the Director General does verifications and assessments to determine whether there is a risk of a *public health*

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[45] Ibid, art 22.

[46] The International Health Regulations is a *sui generis* instrument that creates obligations for WHO members under the WHO Constitution. Some international lawyers are reluctant to call it a treaty because it is not adopted or brought into force in accordance with the formalities for making treaties in the Vienna Convention on the Law of Treaties 1969. See *generally* 'Episode 2: WHO let the Bats Out?' *EJIL: The Podcast* (European Journal of International Law, 6 May 2020).

[47] Lawrence Gostin et al, 'The International Health Regulations 10 Years On: The Governing Framework for Global Health Security' (2015) 386 Lancet 2222; See also Gian Luca Burci, 'The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?' (*EJIL:Talk!* 27 February 2020) <https://www.ejiltalk.org/the-outbreak-of-COVID-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/> accessed 11 September 2020.

[48] The WHO may receive informal reports from non-governmental sources and monitor media reports etc to assess whether an event that may lead to a PHEIC is occurring a a country. But in each of such cases, it still has to confirm the informtion from the government of the member state. See Gostin and Katz (n 10) 273.

emergency of international concern ('PHEIC'). A PHEIC is defined in the IHR as an extraordinary event determined by the Director General (i) 'to constitute a public health risk to other States through the international spread of disease; and (ii) to potentially require a coordinated international response.'[49] The Director General makes a determination of PHEIC in consultation with the state in whose territory the events are occurring and on the advice of the Emergency Committee.[50] A declaration of a PHEIC puts all states on notice to be alert and to take actions recommended by the WHO and/or their competent national health authorities to address the public health risk that has been declared.

To this end, Article 6(1) of the IHR requires that each member of the WHO 'shall assess events occurring within its territory' and 'shall notify [the] WHO, by the most efficient means of communication available…and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory'. After such an initial notification, the Member concerned 'shall continue to communicate to [the] WHO timely, accurate and sufficiently detailed public health information available to it on the notified event.'[51] This 'continued notification' obligation under Article 6(2) of the IHR requires the state to report, where possible, 'case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.' Additionally, under Article 7, a member that 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' must provide the WHO with every relevant public health information on it. The 'continued notifications' obligation under Article 6(2) of the IHR apply after the initial reporting of the unexpected or unusual public health event.

[49] International Health Regulations 2005, art 1 (hereafter 'IHR').
[50] Ibid, arts 12, 48 and 49.
[51] Ibid, art 6(2).

Some international law experts hold the view that China may have acted in violation of the foregoing obligations based on its handling of the COVID-19 outbreak. They argue that China's initial notification to the WHO about the virus was late, and therefore in breach of Article 6(1) of the IHR.[52] That assuming, *arguendo*, that China's initial notification to the WHO was timely, it nevertheless failed consistently thereafter to provide detailed reporting to the WHO on the situation as required by Article 6(2).[53] The failure to provide such detailed reporting including its insistence that there was no human-to-human transmission, which turned out to be wrong, led to a late declaration of PHEIC by the WHO. An earlier declaration of a PHEIC would have put all states on sufficient notice to take the necessary precautions to prevent the spread of the virus into their territories. That for those reasons, China ought to be internationally responsible for the outbreak of the pandemic.

2. *China's Potential Breach of the Obligation to Prevent Transboundary Harm*

It has alternatively been argued that China's complicity in the outbreak of the COVID-19 pandemic may be considered a breach of the obligation to prevent transboundary harm ('the principle of prevention').[54] The principle which is of customary origin finds expression in a number of arbitral and judicial decisions.[55] Thus, the International Court of Justice has, for instance, explained that 'the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory'.[56] At its core, the principle requires a state to anticipate, prevent and/or redress any significant transboundary harm to other states or their population arising from activities on its territory or areas under its

[52] See Peter Tzeng, 'Taking China to the International Court of Justice over COVID-19' (*EJIL: Talk!,* 2 April 2020)<https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-COVID-19/> accessed 11 September 2020. *See also* Katja Creutz, 'China's Responsibility for the COVID-19 Pandemic: An International Law Perspective' (FIIA Working Paper 115, Finish Institute of International Affairs, June 2020) 7-9.

[53] See Tzeng (n 52); *See also* Creutz (n 52) 7-9.

[54] See Viti Bansal, 'Can China be held Liable for the COVID-19 Global Pandemic?' (*Cambridge International Law Journal,* 30 August 2020) <http://cilj.co.uk/2020/08/30/can-china-be-held-liable-for-the-COVID-19-global-pandemic/> accessed 11 September 2020.

[55] See *Trail Smelter Case (United States v Canada)* (Award of 16 April 1938 and 11 March 1941) RIAA (Vol II) 1905; *The Corfu Channel Case (Judgment)* (1949) I.C.J Reports 4 ; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) I.C.J Reports 226; *Pulp Mills Case* (n 20).

[56] *Pulp Mills Case* (n 20) [para. 101].

jurisdiction or control.[57] To date, the principle's application has been confined generally to the context of international environmental disputes.[58] Thus, for instance, in the *Pulp Mills case*, the Court held that a state has an obligation to use all means it its disposal to prevent activities on its territory or any place under its jurisdiction that may cause significant environmental damage in another state.[59]

In the light of its environmental law slant, it is difficult to determine whether and to what extent the principle of prevention may apply in other areas of international law such as global public health. Yet, some have argued that there is no reason why the principle should not apply with equal force to a situation where a state does not use the means at its disposal to prevent activities that may unleash a deadly virus into the territories of other states.[60] That is probably correct if we consider the environment as being broader than just the physical space in which we live. Indeed, in the *Nuclear Weapons Advisory Opinion,* the Court defined 'environment' broadly to include not just our physical living space as humans, but also 'the quality of life and the very health of human beings, including generations unborn.'[61] If such an expanded view of the environment is accepted, then a pandemic or other infectious disease outbreak is a threat to the environment and is properly within the scope of the principle of prevention. It would follow from this premise, that by failing to take sufficient measures to contain the virus within its borders, China may have breached the customary law principle of prevention and is therefore responsible for the COVID-19 pandemic along with its health and economic losses in other states.

C. *Invoking China's Responsibility for COVID-19: Forums and Procedures for Claims*

[57] See *generally* ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001' UN Doc A/56/10. *See also* Antonio Coco and Talita de Souza Dias, 'Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak' (Part I) (*EJIL: Talk!*, 24 March 2020)<https://www.ejiltalk.org/part-i-due-diligence-and-COVID-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/> accessed 11 September 2020.
[58] See *Trail Smelter Case* (n 55); *Pulp Mills Case* (n 20); *Gabcikovo Nagymaros Project (Hungary/Slovakia) (Judgment)* (1997) I.C.J Reports 7.
[59] See *Pulp Mills Case* (n 20) [para. 101].
[60] See Vanshaj Jain, 'Can China be brought before an international court over COVID pandemic? Yes' (*The Print,* 9 April 2020) <https://theprint.in/opinion/can-china-be-brought-before-an-international-court-over-COVID-pandemic-yes/398218/> accessed 11 September 2020.
[61] *Nuclear Weapons Advisory Opinion* (n 55) [para 29].

Assuming, *arguendo*, that a plausible case has been made for China's responsibility for the pandemic, we must now consider the procedural or dispute settlement mechanisms by which that responsibility may be invoked and implemented. Article 56 of the International Health Regulations provides various dispute settlement processes such as negotiation, mediation, conciliation; and ultimately arbitration for the settlement of any disputes concerning the application or interpretation of the IHR. Any of the dispute settlement methods is contingent upon the prior consent of the parties to submit a dispute to that process. Given what we know about China's attitude to international dispute settlement such as its refusal to participate in *The South China Sea Arbitration*,[62] it is highly unlikely that China would consent to any of the dispute settlement options in Article 56 of the IHR. In the circumstance, the only viable option left may be the option of a claim against China in the International Court of Justice.[63] Article 75 of the WHO Constitution provides that '[a]ny question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.' Tzeng argues that there is a plausible path to the ICJ for a case against China on the basis of this provision.[64] He

[62] *The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* PCA 2013-19 (*Date of Final Award*: 12 July 2016).

[63] The Statute of the International Court of Justice is annexed to the Charter of the United Nations 1945 and forms an integral part of it. All members of the UN including China are, therefore, *ipso facto*, parties to the Statute and may be subject to the jurisdiction of the Court in an appropriate case. The Court's jurisdiction extends to contentious cases in which two or more states with adverse claims over a subject matter present their dispute to the Court for determination. The Court's jurisdiction in contentious cases may be invoked (i) on the basis of reciprocal declarations made in advance to accept the court's jurisdiction as compulsory in specified cases (ICJ Statute, art 36); (ii) by special agreement or *compromis* to submit a case to the Court (ICJ Statute, art 40); (iii) by application to the Court on the basis of a compromissory clause in a treaty (ICJ Statute, art 40); or (iv) on the basis of the *forum prorogatum* rule whereby a state which does not recognize the jurisdiction of the Court in a matter, but against whom an application is filed, may subsequently accept the Court's jurisdiction to entertain the case. In a COVID-19 claim against China before the ICJ, the most viable route of jurisdiction will be on the basis of the compromissory clause in the WHO Constitution.

[64] *See* Tzeng (n 52). Tzeng makes good point especially since China has not made any reservation to the WHO Constitution or the IHR that may preclude the application of the compromissory clause of the WHO Constitution to a dispute between China and another WHO member. Nor has China made any reservation or declaration in respect of the ICJ Statute that may have a similar effect.

says that if Article 75 is understood in line with the ICJ's interpretation of Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD) in *Ukraine v Russia, Preliminary Objections*, then a WHO member bringing a claim against China before the ICJ needs only show that the parties have not been able to settle their differences by negotiation.[65]

Concerning the substance of the claims that may be brought against China, Tzeng suggests among others, that a claim could be founded on Article 64 of the WHO Constitution. That Article provides: 'Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.' In his view, this provision of the WHO Constitution could be read to incorporate Articles 6 and 7 of the IHR relating to members' obligation to provide detailed and timely reports to the WHO on events within their jurisdiction that have the potential to create an international health emergency. The argument will then be that China's failure to provide detailed and timely reporting on the virus to the WHO (which borders on a coverup) violates its obligations under Article 64 of the WHO Constitution. While Tzeng's approach is plausible, the question is whether it is a practicable and prudent course to take.[66] Which country would risk a major diplomatic spat with China to file such a claim? Also considering that we do not yet know the full extent of how the virus originated in China, there may be evidential difficulties in proving the culpability of China.

[65] Article 22 of CERD provides that disputes between the parties concerning the interpretation or application of the Convention 'which is not settled by negotiation or by the procedures expressly provided for' in the Convention may be submitted to the International Court of Justice by either of the disputing parties. In *Georgia v Russia*, the question was whether the preconditions to the invocation of the ICJ's jurisdiction must be satisfied cumulatively or in the alternative. The Court took the view that negotiations and other procedures expressly provided for in the CERD are 'two means to achieve the same objective, namely, to settle a dispute by agreement.' Therefore, the preconditions should be read disjunctively, rather than cumulatively. The Court thought that it would make little sense to require disputing parties who have failed to resolve a dispute by negotiations go through another procedure under the Convention also aimed at an amicable settlement of the dispute. For those reasons, the Court held that it was sufficient for a party to invoke the Court's jurisdiction if either of the two preconditions has been satisfied. See *Ukraine v Russian Federation (Preliminary Objections*) (International Court of Justice, 8 November 2019) [paras 110-113].

[66] *See* Creutz (n 52) at 10-11, where she also doubts the prudence of such a step.

As an alternative to international dispute settlement procedures including a claim in the ICJ, some have considered the option of suits against China in national courts. Already, a number of class action suits have been filed in U.S. federal courts against China over the pandemic.[67] A similar suit has been filed by a group of Nigerians in the Federal High Court of Nigeria.[68] Cases filed against China in national courts face the herculean jurisdictional hurdle of the sovereign immunity defence. While there is the doctrine of restrictive immunity that allows cases to be brought against states or foreign governments in national courts for commercial transactions or acts done in the capacity of a private person (*acta jure gestionis*)[69], the management of public health in general including by adopting relevant laws and policies, and liaising with the WHO are governmental acts (*acta jure imperii*).[70] In respect of such governmental acts, the rule that a sovereign may not sit in judgment of another sovereign still applies— *par in parem, non habet imperium*.[71] Consequently, suits in national courts that seek to hold China, its government or the Chinese Communist Party liable for the COVID-19 pandemic are likely to be dismissed on jurisdictional grounds.[72]

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[67] See Sheridan Prasso, 'Lawsuits against China Escalate COVID-19 Blame Game with U.S.' (*Bloomberg* News, 6 May 2020) <https://www.bloomberg.com/news/articles/2020-05-06/lawsuits-against-china-escalate-COVID-19-blame-game-with-u-s> accessed 11 September 2020.

[68] See Alex Enumah, 'Nigerians Drag China to Court, Seek U.S.$200 Billion Compensation Over COVID-19 Pandemic' (*All Africa*, 7 July 2020) <https://allafrica.com/stories/202007070641.html> accessed 11 September 2020.

[69] See *United Nations Convention on Jurisdictional Immunities of States and their Property*, 2 December 2004 (UN Doc A/59/508) art 10; *I Congresso del Partido* [1983] 1 A.C. 244 [UKHL]; and *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529 [CA].

[70] *See* Part V(A) below for detailed explanation of why public health management is a governmental act.

[71] See *The Schooner Exchange v McFaddon* 7 Cranch 116 (1812); See also *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (2012) I.C. J. Reports 99 [para 39] where the Court concluded that, under the present state of international law, even if a state is accused of serious violations of international law such as human rights or the law of armed conflict, those violations will not operate to remove the jurisdictional immunity that the state enjoy before national courts of other states.

[72] *Britannica* describes the CCP as 'a monolithic, monopolistic party that dominates the political life of China. It is the major policy-making body in China, and it sees that the central, provincial, and local organs of government carry out those policies.' See 'Chinese Communist Party' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/Chinese-Communist-Party> accessed 11 September 2020. In other words, the policy of the CPP is the policy of the Chinese government just as the party's top leadership automatically consitutes the government of China.

In any event, holding China responsible for the pandemic does not end with making a plausible claim for responsibility and finding a forum (whether international or national) that can determine it. There are additional questions about causation and the nature of reparations that would be appropriate for the kind of damage caused by the pandemic. For instance, even if we assume for purposes of argument that the outbreak of the pandemic is attributable to China and that it breaches China's obligations, we must still account for whether China's conduct alone caused the losses that each state has suffered because of the pandemic. China's conduct may have set the pandemic in motion, but the manner in which each state responded or handled the situation in their country would have contributed to the losses the state suffered. China cannot be held responsible for each state's contribution to their own injury. In fact, under international law, 'an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided'.[73]

The task of measuring China's contribution to each state's losses alone will be a near impossible task. Besides, given the sheer scale of the human, economic and other losses that the pandemic has caused, it does not seem that any form of reparation would be sufficient to totally wipe out its effects. Nor would it be conscionable or conceivable to hold China liable to the world at large and order it to restore the *status quo ante* in each state devastated by COVID-19 or provide monetary compensation. A court cannot decree the impossible. Therefore, in the final analysis, even if it were possible to hold China responsible for the pandemic, the most realistic reparation that China may be ordered to make is satisfaction. This would usually be an acknowledgment of the wrong, an apology and assurances of non-repetition.[74] If all that can be gained in the end is an apology and assurances of non-repetition, the question is whether it would be a worthwhile cause to press a claim against China that would strain relations in other areas of international life.

The CCP could thus be regarded as governmental entity that should be entiteld to the defense of sovereign immunity in a national court. Therefore, a strategy to sue the CCP instead of China or its government, is likely to encounter the same jurisdictional hurdle they seek to avoid by adopting that strategy.

[73] *Gabcikovo Nagymaros Case* (n 58) [para 80].

[74] *See* Creutz (n 52) 9-10.

V. COVID-19 and Individual States' Responsibility in the Context of International Human Rights Law

The responsibility of a state whose actions or omission causes a pandemic has been amply discussed in Part IV using China and its role in the outbreak of the COVID-19 as the case study. But independent of the potential responsibility of a state for its complicity in the outbreak of a pandemic, the manner in which other states individually manage the pandemic and its socioeconomic effects may equally incur responsibility under international law. To this end, this Part examines the responsibility that individual states may incur, within human rights law, for the health impact of COVID-19 on their populations and also for the measures they implement to control the spread of the pandemic. Regarding the human rights obligations of states that may be the basis of responsibility in this context, the discussions are limited mainly to the International Covenant on Civil and Political Rights, 1966 ('ICCPR') and the African Charter on Human and Peoples' Rights, 1981('the African Charter'). The choice of the ICCPR and African Charter is influenced by two considerations: the need to have a global and regional balance to the human rights norms discussed in this part of the paper; and the author's desire to bring to the discussion perspectives from the African human rights system.

This part now examines the two questions relevant to a state's responsibility, within human rights law, for how it manages the COVID-19 pandemic in its jurisdiction. They are, whether the actions or omissions relating to the management of the pandemic within a particular state are attributable to the state; and whether such actions or omissions breach the state's international human rights obligations. Afterwards, the concluding sections of this part address two things: (i) the legal effect of characterizing COVID-19 human rights restrictions as 'derogations' or 'limitations'; and (ii) the means by which victims of COVID-19 related human rights violations may obtain redress.

A. *Attributing COVID-19 Related Actions or Inaction to States*

It should be noted from the outset that the management of public health emergencies such as an infectious disease is necessarily a governmental function. It implicates many facets of the regulatory power of the state including enactment of regulations or policies on public health; granting licenses or permits for the development and trial of vaccines or therapeutics; approving the production or trade in personal

protective equipment and other medical supplies; enforcing public health regulations and policies (including but not limited to quarantines) to safeguard the public against infection; and liaising with other states or international organizations such as the WHO to manage the public health crisis.

As far as the particular case of COVID-19 is concerned, the responsibility of individual states in the field of human rights may be incurred in light of two categories of human rights obligations. These are the positive human rights obligations that the pandemic has activated for states to fulfil regarding the lives and health of their populations; and those human rights norms that states must be mindful of or refrain from violating as they implement measures to combat the pandemic and its effects. It follows, that conduct that may be attributed to individual states for purposes of responsibility would equally come in two broad categories: (i) the failure or omission of a state to take necessary measures to protect the lives and health of their populations from COVID-19[75] and (ii) measures that states may impose or implement to contain the spread of the COVID-19 pandemic or manage its effects. Concerning the latter, the following appear to be most common COVID-19 measures impacting human rights that states have implemented:

i) Quarantines, isolations or detentions and their enforcement with public or private security services. Closely related are the conditions of the places of quarantine or isolation and the treatment meted out to persons during quarantine or isolation;[76]
ii) Restrictions on religious gatherings or services;
iii) Prohibition or restriction of public gatherings, processions and protests;

[75] What constitutes measures necessary to protect the lives and health of citizens and residents of a state against COVID-19 would be defined by the content and scope of the underlying human rights obligations that incidence of the pandemic creates for the state. See below Part V(B)(1) for detailed discussions on that point.

[76] For instance, there were claims that the government of the State of Victoria (in Australia) supplied expired food items to public housing residents in Flemington and North Melbourne during a period quarantine in July 2020. *See* Lucy Mae Beers, 'Victoria coronavirus public housing lockdown causes food delivery anger' (*7News*, 6 July 2020)< https://7news.com.au/lifestyle/health-wellbeing/victoria-coronavirus-public-housing-lockdown-causes-food-delivery-anger-c-1146592> accessed 11 September 2020.

iv) Closure of borders and suspension of immigration (eg., India and Samoa restricted entry for persons including their nationals abroad.[77]);
v) Compulsory testing for coronavirus (eg., China's compulsory, selective testing of Africans for coronavirus in Guanzhou Province);[78]
vi) Requirement for individuals to install contact tracing apps on their phones or tablets and governnment collection of data from telecom operators for contact tracing; and
vii) Development and human trials of vacines or pharmaceutical drugs.

The performance of any one or more these public functions may involve direct exercise of power by the government of a state whether legislatively, administratively or judicially. Alternatively, such functions may be delegated to agents or parastatal agencies of the state empowered to exercise elements of governmental authority. In either case, the management of the COVID-19 pandemic would be attributable to individual states for purposes of responsibility under international law.[79]

B. *COVID-19 Related Breaches of Human Rights by States*

This Part discusses the human rights obligations that states have potentially breached or may breach within the context of managing the COVID-19 pandemic. First, we look at the positive human rights obligations that the pandemic has activated for states to fulfil, the breach of which may incur responsibility. Secondly, we examine those human rights norms that states must be mindful of or refrain from violating as they enact or implement measures to combat the pandemic.

1. *Positive Human Rights Obligations Activated by the COVID-19 Pandemic: The Rights to Life and Health*

[77] Rutsel Martha and Stephen Bailey, 'The Right to enter his or her own country' (*EJIL: Talk!*, 23 June 2020) <https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/ >accessed 11 September 2020.

[78] Hsiao-Hung Pai, 'The coronavirus crisis has exposed China's long history of racism' (*The Guardian*, 25 April 2020) <https://www.theguardian.com/commentisfree/2020/apr/25/coronavirus-exposed-china-history-racism-africans-guangzhou> accessed 11 September 2020.

[79] *See* Articles on State Responsibility (n 13), arts. 4 and 5.

Both the ICCPR and the African Charter guarantee the right to life.[80] Without prejudice to the idea of indivisibility of human rights, the right to life is arguably the most important. The African Commission on Human and Peoples' Rights has described it as 'the fulcrum of all other rights' and 'the fountain through which other rights flow'.[81] The right to life, generally, imposes a negative obligation that prohibits arbitrary deprivation of life; however, it also has a positive component. That component requires states to use all means at their disposal to protect and preserve life. Accordingly, in its General Comment 36, the Human Rights Committee explains that the right to life under the ICCPR implies a positive duty for state parties to take 'appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[82] According to the Committee, the threats to life that states are required to prevent include 'the prevalence of life-threatening diseases', environmental degradation and hunger.[83] To this end, the COVID-19 pandemic activates for individual states, the positive component of the right to life requiring them to take all necessary measures to protect the lives of their populations against death from the pandemic.

A related right whose enjoyment is complementary to the right to life is the right to health.[84] It is guaranteed in the International Covenant on Economic, Social and Cultural Rights, 1966 ('ICESCR').[85] Under the ICESCR, state parties have the duty to take all necessary steps to secure the realization of the right to health including 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases.'[86] Like other socioeconomic rights, the right to health is subject to the doctrine of progressive realization based on available resources. However, when it comes to public health emergencies, the state has a minimum core obligation to 'provide immunization against the major infectious diseases occurring in the

[80] ICCPR, art 6 and African Charter, art 4.
[81] *Forum of Conscience v Sierra Leone* (2000) AHRLR 293, 295 (ACHPR 2000)
[82] Human Rights Committee, 'General Comment No. 36 on Article 6, The Right to Life' [para 26].
[83] Ibid [para 26].
[84] See ICESCR, art 12 and African Charter, art 16.
[85] See ICESCR, art 12 and African Charter, art 16.
[86] ICESCR, art 12(2)(c).

community' and to 'take measures to prevent, treat and control epidemic and endemic diseases.'[87] These minimum core obligations require immediate realization.

Within the context of the COVID-19 pandemic, the combined effect of the right to life and the right to health would seem to require individual states to protect the health of their populations and ultimately, their rights to life. Based on the circumstances of each state, this may translate into (i) ensuring that personal protective equipment such as masks are available for frontline health workers and members of the public who would need them; (ii) providing medical equipment, facilities or infrastructure needed to isolate and treat infected persons; (iii) supporting the development of vaccines or cures for the disease or making arrangement to procure a vaccine or cure when one is developed; and (iv) providing the public with relevant information that they require to protect themselves from the disease. The failure of a state to meet these obligations potentially breaches the rights to life and health and exposes it to responsibility under international law.

2. *Human Rights Obligations Implicated by COVID-19 Measures*.

As previously stated, the second category of human rights norms that are implicated by the pandemic are those rights that states may have violated or would potentially violate through the COVID-19 measures they are implementing to contain the spread of the pandemic. The ensuing paragraphs discuss some of those specific human rights norms.

(a) The Right to Personal Liberty and the Freedom of Movement

The right to personal liberty and the freedom of movement are among the human rights norms that have been most impacted and potentially breached by COVID-19 measures such as quarantines, lockdowns, travel bans and closure of borders and restrictions on immigration. The right to liberty and security of the person is guaranteed under both the ICCPR and the African Charter.[88] It guarantees the freedom of action of the individual and prohibits unlawful or arbitrary arrest, restriction or detention. The right may only be subject to reasonable restrictions

[87] CESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' [para 44].
[88] See art 21 and art 11 respectively of the ICCPR and the African Charter.

previously laid down in law and which are necessary in a democratic society for the maintenance of public order, national security, public safety and health, and morals or freedoms of others. Equally guaranteed is the related right of freedom of movement, including the right to leave and return to one's country which is guaranteed under the common Article 12 of the ICCPR and the African Charter. On the right to leave and return to one's country in particular, the ICCPR and the African Charter have a very similar phraseology. Article 12(4) of the ICCPR provides that 'No one shall be arbitrarily deprived of the right to enter *his own country*.' Similarly, Article 12(2) of the African Charter states: 'Every individual shall have the right to leave any country including his own, and to return to *his country*. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.'

The use of the expression 'his country' in both instruments instead of 'country of his nationality' is significant. The Human Rights Committee has explained in General Comment No. 27 that [t]he scopes of 'his own country' is broader than the concept 'country of his nationality'.[89] That 'it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.'[90] In the Committee's view, this would cover long term residents, persons whose nationality has been transferred to another entity or arbitrarily stripped of them, stateless persons, and other persons who have substantial connections to the country. In *Warsame v Canada* (HRC, Comm No. 1959/2010), the petitioner, a man of Somalian descent born in Saudi Arabia had been brought to Canada when he was four years old. He had schooled in Canada and had lived all the rest of his life there. The question was whether he was entitled to consider Canada as 'his own country' and therefore could not be deported from, or arbitrarily deprived entry into, Canada. The Committee held that '[t]he words 'his own country' invite consideration of such matters as long-standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.'[91] It concluded that given the substantial ties the petitioner had in Canada coupled with the fact that he had never lived in his native Somalia and

[89]Human Rights Committee, 'General Comment 27: Article 12 (Freedom of Movement)', UN Doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999) [para 20].
[90] Ibid [para 20].
[91] *Warsame v Canada* (HRC, Comm No. 1959/2010) [para 8.4].

therefore did not have any family ties there, Canada must be regarded as the petitioner's 'own country' within the meaning of Article 12 of the ICCPR.

Neither the African Commission nor the African Court has had opportunity to interpret or apply the equivalent provision in the African Charter, particularly the expression 'his country'. However, given the close similarity between the text in the African Charter and that of the ICCPR, there is strong reason to believe that the provision in the African Charter would not be interpreted differently.

Be that as it may, both the African Charter and the ICCPR accommodate the possibility that a person may be denied entry into his own country under certain circumstances. But like all other limitations, such a measure must be reasonable, narrowly tailored, previously laid down in law and applied without discrimination or arbitrariness. Accordingly, it would be inconsistent with both the ICCPR and the African Charter for a state to deny entry of a person into his own country where there are 'less draconian alternatives.'[92] This implies that for purposes of containing the spread of COVID-19, the better approach would be for a state to allow persons who are entitled to return to the country to do so and be quarantined upon arrival to protect the public health. The total denial of entry of a person into his own country where the alternative of quarantine upon arrival exists would be arbitrary.

(b) The Right to Dignity and Freedom from Degrading Treatment

A person who is restricted or detained must be treated with dignity and must not be subject to any conditions or treatments that are degrading or likely to detract from their dignity and worth as a human being. This means that while persons are in quarantine in the custody of the state, the state must ensure that they are not subject to violence, brutality or any form of abuse including sexual abuse or harassment. The conditions of the place where they are quarantined must also meet minimum standards of decency. At a minimum, it must have a decent toilet facility, clean beddings in a well ventilated and hygienic space; and some heating if it is winter in the place of quarantine. Access to food, clean water and other basic necessities must also be assured to the person quarantined or detained. A state's failure to meet these basic standards may amount a violation of the right to dignity and protection against

[92] Martha and Bailey (n 77).

degrading treatment guaranteed under Article 7 of the ICCPR and Article 5 of the African Charter.

(c) The Freedoms of Assembly and Religion

The right to peacefully assemble with others, which includes the right to peaceful protest, procession or assembly for political activities is respectively guaranteed under Article 21 of the ICCPR and Article 11 of the African Charter. Under both instruments, the right is subject to reasonable and narrowly tailored limitations necessary in a democratic society for the public order or safety, public health and public morals. Lockdowns and quarantine measures imposed by states to contain COVID-19 implicate this right. States are, no doubt, within their right to limit public gatherings to contain the spread of the virus. However, to be reasonable and least restrictive to the enjoyment of the freedom to assemble, restrictions on public gatherings must be periodically reviewed (and if possible eased) based on the rate of infection, the advice of health experts and the need to strike a fair balance between public health and individual freedoms.

A right that is closely related to, and somewhat overlaps with, the freedom of assembly is the right of people to congregate or assemble for communal worship. Guaranteed in the ICCPR[93] and also the African Charter,[94] the freedom of religion has two components: the freedom to hold religious beliefs; and the right to manifest or practice one's religious beliefs.[95] The former cannot be restricted, but the latter is always subject to reasonable and proportionate limitations imposed for reasons of public order and safety, the rights of others or public health.[96] Nevertheless, the state must ensure that any restrictions on religious activities are reasonable, narrowly tailored or least restrictive and non-discriminatory. Accordingly, if given the rate of infection and scientific evidence, it is possible for religious services to safely take place subject to protocols such as physical distancing, wearing of masks and maximum occupancy limits, then it would be an unreasonable impairment of the right if the state were to prohibit religious meetings.

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[93] *See* ICCPR, art 18.
[94] African Charter, art 8.
[95] *See* Human Rights Committee, 'General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)' UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993.
[96] Ibid [paras 7 and 8]; See also *Prince v South Africa* (2004) AHLR 105 (ACHPR 2004).

(d) The Right to Privacy

The ICCPR guarantees the right to privacy of correspondence and prohibits unlawful or arbitrary interferences with it.[97] The right implies a duty for the state to guarantee, *de jure* and *de facto*, the 'integrity and confidentiality' of all correspondence including electronic communication.[98] To this end, the Human Rights Committee has noted that 'surveillance, whether electronic or otherwise, interception of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited'.[99] In other words, '[c]orrespondence should be delivered to the addressee without interception and without being opened or otherwise read.'[100] Curiously, the right to privacy does not feature in the African Charter. However, based on Articles 60 and 61 of the Charter, it should be possible for the African Commission (and now the African Court) to imply the right to privacy in an appropriate case by drawing inspiration from other human rights instruments and their jurisprudence.

COVID-19 has brought privacy, particularly privacy of electronic communication, into focus. Some states are deploying contact tracing apps to gather metadata that can reveal the places a person has visited and the people they have interacted with for purposes of identifying persons who may have contracted the virus. For the same purposes, other states are ordering telecom operators to turn over communications data to relevant government agencies. The use of contact tracing apps or requests for telecom operators to turn over communications data, especially if they are mandatory, implicate the right to privacy in a significant way. Undoubtedly, the right to privacy is not absolute and, therefore, governments should be able to employ some of these measures if they are necessary in the context of the pandemic to protect public health.

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[97] ICCPR, art 17.

[98] *See* Human Rights Committee, 'General Comment No. 16: Article 17 (Right to Privacy)', 8 April 1988 [para 8] and *The Right to Privacy in the Digital Age, Report of the United Nations Office of the High Commissioner for Human Rights* UN Doc. A/HRC/27/37 (30 June 2014) [para. 17]. See also *Copland v The United Kingdom* (No. 62617/00, ECHR 2007-I).

[99] General Comment No. 16 (n 98) [para 8].

[100] Ibid.

Nevertheless, to fall within the narrow exceptions of the right to privacy, the requirement for individuals to install and use these apps or requests for telecom operators to supply communications data to government must be prescribed by a law which itself is compliant with human rights values.[101] Secondly, to satisfy the requirement of not being arbitrary interference, the measure employed must be reasonably justified by the particular circumstances. The Human Rights Committee has interpreted reasonableness in the context of such surveillance programs to mean that the collection of the data, the means used as well as the storage and use of the data must be 'proportional to the end sought and be necessary in the circumstances of any given case'.[102] Therefore collecting more information than is necessary for tracing potential carriers of the virus, even if authorised by law, may be unreasonable and arbitrary and, therefore, unjustifiable under the ICCPR.

(e) The Right to Bodily Integrity

The right to bodily integrity is essential to the dignity of the human person and may be implied from the combined effect of the right to dignity and protection against torture or degrading treatment[103] as well as the right to health.[104] It protects against compulsory medical procedures without a person's consent and the subjection of a person to medical or scientific experimentation without their consent. Under the ICCPR, the protection against forced medical or scientific experimentation is non-derogable.[105] What is not clear is whether a person may be compelled to undergo other medical procedures such as vaccination against a disease that is a public health emergency. This issue will become important when a vaccine or some pharmaceutical cure is developed for COVID-19. The question will be whether a person can be compelled to undergo testing for COVID-19 and/or to vaccinate against it in order to contain the pandemic and protect the right of other persons to health. In the case of *Jacobson v Massachusetts*, the United States Supreme Court

[101] *See* Ibid [para 10]; *The Right to Privacy in the Digital Age* (n 98) [para 21].
[102] See General Comment No. 16 (n 98) [para 10].
[103] ICCPR, 7 and African Charter, Arts 4 and 5.
[104] In CESCR General Comment No. 14 (n 87), the Comitttee explains that '[t]he right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, *and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation*'—[para 8].
[105] See Articles 4 and 7 of the ICCPR.

upheld a Massachusetts criminal statute that required individuals to vaccinate against smallpox on the pain of fines. The Court reasoned that the state's interest in protecting public health should trump the individual's right to refuse the vaccine since 'a community has the right to protect itself against an epidemic which threatens the safety of its members'.[106] It remains to be seen whether a national or international court faced with a similar question in the future over a mandatory COVID-19 vaccination program would follow the reasoning in *Jacobson*.

C. *The Question of Inherent Limitations of Rights and Derogations*

The enactment by states of measures to limit certain human rights to contain the spread of COVID-19 has engendered a debate on the difference between inherent limitations of human rights and derogations from rights as well as the circumstances under which either may be applied. This sub-part weighs in on that debate.

All rights, except those that are absolutely non-derogable, have inherent (or in-built limitations) that permit the state to enact or apply reasonable and narrowly tailored measures to further legitimate public interests such as public order or safety, public health, public morals and the rights of other persons. So, for instance, the right to life is protected against arbitrary deprivation. This means that in some circumstances, the life of a person may be deprived so long as such deprivation is not arbitrary. Non-arbitrary deprivation may include deprivation of life that take place in self-defence or in the course of legitimate law enforcement activities to protect the lives of others. Freedom of speech also has an inherent limitation designed to protect the reputations of others. This is why the tort of defamation is a justifiable limitation on free speech.

However, apart from such inherent or inbuilt limitations of human rights, some human rights treaties also have 'derogation clauses.'[107] Derogations are heightened or exceptional limitations that may be imposed on rights during periods of emergency. In effect, a derogation clause allows a state to impose broad or sweeping limitations amounting to a temporary suspension of a particular right. While inherent

[106] 197 US 11, 27 (1905).

[107] See eg., ICCPR, art 4; European Convention on Human Rights 1950, art 15 and American Convention on Human Rights, art 27.

limitations and derogations may serve the same ends and therefore virtually have the same practical effects, there are some normative or conceptual differences between the two. First, unlike inherent limitations that are inbuilt into the right and effective *ab initio* and indefinitely, derogation clauses limit the circumstances in which derogations may be imposed to periods of emergency only. Secondly, derogation clauses specify those rights from which no derogations are permitted, and which must therefore be respected and fulfilled at all times.[108] A third factor that makes derogations normatively or conceptually different from limitations is the procedural steps a state must follow to impose them.[109]

Under Article 4 of the ICCPR, a derogation may be made subject to (a) an official declaration of a state of public emergency that threatens the life of the nation; (b) a notification to the state parties through the intermediary of the UN Secretary General informing them about the rights from which derogations are being made and the reasons necessitating the derogation; and (c) a second notification to the parties through the same intermediary informing them about the termination of the derogations upon the expiration of the emergency or the derogation's sunset clause. These procedural requirements subject derogations to some external or peer oversight. The African Charter is unique for not having a derogations clause.[110] However, it has inherent limitations and 'claw-back' clauses[111] that subject enjoyment of most of its guaranteed rights to requirements such as public order or security, public health, public morality or the condition that the individual exercising the right must abide with the law.[112]

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[108] Under Article 4 of the ICCPR, no derogations may be made to (i) the right to life; (ii) the right to dignity and freedom from torture, degrading treatment or scientific experiments; (iii) freedom from slavery and servitude; (iv) freedom from imprisonment for debt or contractual obligation; (v) right against retroactive criminalisation and punishment; (vi) right to personhood or recognition before the law; and (vii) freedom of thought, conscience and religion.

[109] See ICCPR, art 4; European Convention on Human Rights 1950, art 15 and American Convention on Human Rights, art 27.

[110] See *Commission nationale de droits de l'homme et des libertés v. Chad* (2000) AHRLR 66 (ACHPR 1995) [para 21].

[111] Unlike derogations that only permit well defined, specfic and temporary or time-bound suspension of guaranteed rights, clawback clauses restrict the rights ab initio and make their enjoyment subject to vague and discretionary standards of domestic law. See Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22(4) Virginia Journal of International Law 667, 691-692.

[112] See Ibid, 691-692.

As far as COVID-19 measures are concerned, it does not seem to make much of a difference whether states are applying inherent limitations or invoking derogations. If the state is proceeding under an inherent limitation, it must show that the measure being applied is necessary to achieve the public interests being pursued. Equally, the state invoking a derogation must show that the measures being applied are necessary in light of the exigencies of the emergency that has been declared. The slight advantage that a derogation would have over an inherent limitation during this COVID-19 period is the domestic political pressure that a derogation may engender. The state will have to justify, in advance, the appropriateness of declaring a state of emergency and the necessity of the measures to be imposed. This is because, in addition to the procedural requirement under the ICCPR, most states have constitutional rules that subject derogations to parliamentary oversight. Also, because derogations must be imposed for specified periods of time and terminate thereafter, they have an inbuilt sunset clause. Inherent limitations do not have these safeguards. Therefore, there is the risk that governments may impose or apply them well beyond the circumstances necessitating their application. Such conduct normalizes limitations and surreptitiously erode human rights.

D. *Redressing COVID-19 Related Human Rights Violations*

The ICCPR and the African Charter's human rights systems provide individual complaint procedures that a person who has suffered a COVID-19 related human rights violation can take advantage of. Under the First Optional Protocol to the ICCPR, the Human Rights Committee has the jurisdiction to receive and address individuals' complaints of human rights violations.[113] Similarly, a person who suffered a human rights violation within an African State that is a party to the African Charter may submit a complaint to the African Commission[114] or to the African Court if the state against whom the complaint is made has ratified the African Court Protocol and made the optional declaration permitting individuals and NGOs to directly seize the Court.[115] Be that as it may, international and regional human rights

[113] *Optional Protocol to the International Covenant on Civil and Political Rights* 999 UNTS 171 (entered into force 23 March 1976) art 1. ('Optional Protocol to the ICCPR').
[114] African Charter, Article 55.
[115] *Protocol to the African Charter on the Establishmen of an an African Court on Human and Peoples' Rights 1998*, arts 4, 5 and 34(6).

bodies generally operate on the principles of subsidiarity and complementarity.[116] That is, their jurisdiction is designed to complement national jurisdictions in the enforcement of human rights rather than to replace them. Therefore, a state against whom a complaint of human rights violation is made must be given the opportunity to redress it, before it may be hauled before an international or regional human rights body if local remedies are non-existent, insufficient or ineffective or unduly prolonged. In the circumstances, the first port of call for an individual who complains of a COVID-19 related human rights violation must be the domestic courts or other adjudicative forum of the respondent state.[117] It is only after local remedies have been exhausted or at least unsuccessfully attempted that the individual may proceed to an external forum such as the Human Rights Committee, the African Commission or the African Court.

VI. Conclusion and Recommendations

As was noted from the outset of this paper, global pandemics have profound implications and tend to shape global politics and international law. The paper has addressed state responsibility and human rights, two of the many areas of international law that are already implicated by the pandemic and will be shaped by it going forward. The discussions in the paper bring to the fore various important issues; some that are specific to the present crisis and others that are more general and forward looking. They include:

i) the need for an international investigation into the COVID-19 pandemic to establish the full facts about how it originated in China and spread to the rest of the world;
ii) the need for a more effective IHR that empowers the WHO to detect warning signs of infectious diseases so the world can prevent or contain future pandemics;
iii) the need to clarify the rules of international law on the obligations or liability of states concerning the outbreak of infectious diseases and pathogens;

[116] *See generally* Samantha Besson, 'Subsidiarity in Internationa Human Rights Law—What is Subsidiary about Human Rights?' (2016) 61(1) *American Journal of Jurisprudence* 69.
[117] *See* Optional Protocol to the ICCPR (n 113), art 5; African Charter, art 56 and *Jawara v The Gambia* (2000) AHLR 107 (ACHPR 2000).

iv) the need for cooperation and investment in global public health research particularly research into infectious diseases or their pathogens and the development of vaccines and cures; and
v) the need for states to recognize pandemics as threats to human security and human rights and therefore be pandemic-prepared by developing human rights-centered protocols for containing or managing future pandemics.

The need for an investigation into COVID-19 is self-evident. Without understanding the origin of this pandemic, how it was handled by China in the early stages and what the rest of the world could have done differently to contain it, it will be difficult to know what reforms will be needed to strengthen the current legal regime for managing global public health. The call by Australia for an investigation should therefore be supported by all states including China. This will ensure that there is a multilateral approach to resolving the questions surrounding the pandemic, and thereby close the door to unilateral actions that will not serve the interest of the whole of the international community.

Concerning the IHR 2005, it is important to note that it is a marked improvement on the previous Regulations. Yet, even before this COVID-19 pandemic, it had become evident that more reforms would be needed to make it a stronger legal regime for fighting international public health threats. The IHR operates a member-centered global health security architecture. The WHO primarily depends on national health authorities for information about threats to global public health. To this end, the capacities of WHO members to detect threats to global health, promptly report to the WHO and be prepared to implement recommendations of the WHO constitute the bedrock of global health security.[118] Yet, many WHO members have not developed the national core capacities that would enable them to meet these obligations.[119] There have been several instances such as the Ebola epidemic in West Africa and the MERS outbreak in Saudi Arabia where countries defaulted on their prompt notification obligations.[120] The situation is exacerbated by a self-evaluation system built into the IHR to measure members' implementation of their obligations.

[118] Gostin and Katz (n 10) 276.
[119] Ibid.
[120] See Ibid, 279.

Many states do not collect sufficient data that will enable them produce accurate and reliable assessments. But more importantly, the self-assessment model is flawed as it is 'inherently self-interested and unreliable, absent rigorous independent validation.'[121] There must, therefore, be some mechanism under the IHR to enable the WHO to conduct independent assessment of members' implementation of their obligations under the IHR. Also, a process that allows the WHO to obtain and use shadow reports from non-government sources in its PHEIC assessments will go a long way to ensure there are no government cover-ups that may threaten international public health.

Another defect of the current IHR is that it does not make room for the Director General to declare a PHEIC in a graduated format. Whether the infectious disease outbreak potentially affects only ten countries or a hundred, the Director General is only empowered to declare a one-size-fit-all PHEIC. In the past, some states have overlooked PHEIC declarations and their accompanying recommendations because they did not think that the public health threats were sufficiently grave to be a PHEIC.[122] This conflation of all degrees of public health emergencies is problematic for at least two reasons. First, there is the risk that if a particular PHEIC turns out to be less serious than anticipated, states would have already implemented measures (probably out of panic) to shut down their economies and unduly restrict human rights. Then there is also the risk that some states may (by their own unilateral assessment) miscalculate the seriousness of a PHEIC to their own detriment and that of other states. To avoid these risks, a tiered process for declaring a PHEIC must be introduced. It will enable states to mobilize resources and respond appropriately to international health threats based on their graduated levels of seriousness.

The above issues with the IHR and others make reforms necessary. Fortunately, the COVID-19 pandemic, while tragic, has created a momentum for self-reflection within the WHO. It must be harnessed to implement the much-needed reforms to the IHR to ensure that the world is better prepared to deal with international public health threats of the future.

[121] Ibid, 278.
[122] Ibid, 273-274.

Besides the weaknesses in the *lex specialis* of the WHO, the COVID-19 pandemic has also exposed the inadequacy of general international law as far as obligations or liability of states for the spread of infectious diseases is concerned. While the IHR creates a duty to report to the WHO events that may cause an international public health emergency, neither the WHO Constitution nor the IHR imposes a substantive obligation on states to prevent activities within their jurisdiction or control that may cause the outbreak of a pandemic. Nor is there such an obligation in customary law that is clear or settled. Given the incalculable damage that COVID-19 has caused around the world and the lack of a clear answer to the question whether China could be held liable for it, it is pertinent to have clear international rules on this going forward. If for nothing at all, such rules on the liability of states for their complicity in the outbreak of pandemics may have a deterrent effect. It will, therefore, be prudent for the International Law Commission to put this topic on its agenda for study and possibly develop draft Articles that may be the basis of a treaty.

Finally, regarding the issues of investing in infectious disease research and developing human rights-centered frameworks to be in readiness for a future pandemic, these could not be more urgent for developing countries such as those in Africa. African countries are generally reporting lower death rates for COVID-19.[123] This has been attributed, in part, to the continent's young population which means that a lot of infected persons are recovering because of stronger immune systems.[124] The continent might not be so lucky with another pandemic. It, therefore, behoves countries in the region to be prepared. If the COVID-19 pandemic has taught us anything, it is the fact that in times like this, every country's priority is their own people. Given the many infectious diseases that are endemic to Africa and threats of disease from other parts of the world due to globalization, it seems prescient and commendable that the African Union established the Africa Centre for Disease Control and Prevention in 2016.[125]

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[123] See Andrew Harding, 'Coronavirus in South Africa: Scientists explore surprise theory for low death rate' (*BBC*, 2 September 2020) <https://www.bbc.com/news/world-africa-53998374>accessed 11 September 2020.

[124] Ibid.

[125] The legal basis for the Centre is found in the *Constitutive Act of the African Union 2000* which provides in Article 3 that the objectives of the African Union include working 'with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.'

The Centre has great potential to become a platform for African scientists and public health experts to conduct collaborative research into infectious diseases that threaten the continent, so that finally Africans can develop their own scientific and medical solutions to public health emergencies. But none of this can happen without prioritizing public health and adequately resourcing and staffing the Centre. Therefore, just as the African Union and individual African countries have security strategies in place to deal with conflicts and other threats to peace and security, they must now recognize the equal, if not greater, danger that a pandemic can pose to human security, human rights, and economic development. The gains that the continent expects to make from the Continental Free Trade Area and the African Union's Agenda 2063 may be derailed if individual states and the continental organization are ill-prepared for a future pandemic in the mould of COVID-19.[126] The time to act therefore is now.

[126] John Nkengasong, Building a new public health order for Africa – and a new approach to financing it, https://www.brookings.edu/essay/support-for-public-health-preparing-for-the-next-pandemic/ (accessed 1 February 2021).