

The COVID-19 Pandemic and International Law

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How does the COVID-19 pandemic affect States' obligations under international law? This is a question of not just academic interest but real importance for people's lives. After all, whether States abide by international law—and whether international law is fit for purpose—is vitally important for everyone from refugees exposed to the virus in unsanitary detention centers to national leaders fighting disinformation campaigns and safeguarding vaccine supply chains. International law has been central to the world's response to the pandemic from the start—even if the participants did not always realize it. International law, after all, required States to take certain actions to detect and prevent the spread of the novel coronavirus. Some governments responded quickly and effectively, significantly reducing the impact on their populations, but many others were far less successful. Many have made matters worse by responding to the virus in ways that exacerbated the toll on the most vulnerable populations, violating their international law obligations in the process. Moreover, some States have used the pandemic as an excuse for delaying elections or for failing to provide adequate access to legal aid and information. This Article examines the many ways in which COVID-19 is straining the rules and norms of international law. It considers the five main bodies of international law implicated by the pandemic: international humanitarian law, international human rights law, immigration and refugee law, international cyber law, and the rules and regulations of the World Health Organization. It outlines the obligations each body of law imposes on States, and how those obligations apply during the current pandemic. It concludes with several proposals for reform to the international legal system so that the world can prepare to more effectively address the next inevitable pandemic.

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Introduction	151
I. International Humanitarian Law	156
A. Conduct of Hostilities	157
1. <i>Principles Governing Conduct of Hostilities in IACs</i> <i>During a Pandemic</i>	158
2. <i>Principles Governing Conduct of Hostilities in NIACs</i> <i>During a Pandemic</i>	160
3. <i>Conduct of Hostilities in the COVID-19 Context</i>	160
B. Humanitarian Access	162
1. <i>Principles Governing Humanitarian Access in IACs in</i> <i>a Pandemic</i>	163
2. <i>Principles Governing Humanitarian Access in NIACs</i> <i>in a Pandemic</i>	164
3. <i>Humanitarian Access in the COVID-19 Context</i>	165
C. Treatment of Detainees	167
1. <i>Principles Governing Detention in IACs</i>	168
2. <i>Principles Governing Detention in NIACs</i>	169
3. <i>Detainee Treatment in the COVID-19 Context</i>	170
II. International Human Rights	171
A. Right to Life	171
1. <i>The Right to Life, as Defined and Protected by</i> <i>International Law</i>	171
2. <i>The Right to Life During a Pandemic</i>	173
3. <i>Application in the Context of COVID-19</i>	174
4. <i>States' Obligations Outside their Territories</i>	175
B. Right to Health	177
1. <i>The Right to Health, as Defined and Protected by</i> <i>International Law</i>	178
2. <i>The Right to Health During a Pandemic</i>	179
3. <i>Application in the Context of COVID-19</i>	181
4. <i>States' Obligations Outside their Territories</i>	183
C. Civil and Political Rights	184
1. <i>Right of Speech and Peaceful Assembly</i>	185
2. <i>Right to Privacy</i>	187
3. <i>Right to Participate in the Electoral Process</i>	188
4. <i>Right to Justice and Fair Trials</i>	189
5. <i>Derogation under the ICCPR</i>	190
III. Immigration and Refugee Law	191
A. Non-Refoulement	191
1. <i>The Principle of Non-Refoulement</i>	192
2. <i>The Principle of Non-Refoulement During</i> <i>a Pandemic</i>	195
3. <i>Application in the Context of COVID-19</i>	198
4. <i>States' Obligations Outside their Territories</i>	199
B. States' Obligations to Refugees, Asylum Seekers, and Other Migrants in Detention	200

1. Health-Focused International Law Obligations to Immigration Detainees	202
2. States' Obligations to Immigration Detainees During a Pandemic	204
3. States' Obligations to Immigration Detainees in the Context of COVID-19	205
IV. Cyber Law: Vaccine Theft and Disinformation	207
A. Law Governing the Use of Force	208
B. The Principle of Non-Intervention	209
C. The (Non-)Rule of Sovereignty	211
V. The WHO's Pandemic Response and the International Health Regulations	214
A. The Role of the WHO and the International Health Regulations	215
B. Potential Breaches of the WHO's Regulations During the COVID-19 Pandemic	217
VI. Preparing for the Next Pandemic	221
A. Create a U.N. Coordinator to Focus on Non-Health Responses to a Pandemic	223
B. Reform Global Health Governance	227
1. Reforming the IHR	229
2. National and Global Disease Surveillance	233
C. Develop Proactive Outcasting Tools	234
1. Confronting the Enforcement Challenge: Harnessing Outcasting Tools for Public Health	235
2. Outcasting Solutions	237
a. Access to Vaccines	237
b. Access to Technical Expertise	240
c. Access to Funding	242
Conclusion	243

Introduction

The COVID-19 pandemic, which first emerged in Wuhan, China, in late 2019,¹ has now led to more than 240 million documented infections worldwide and nearly five million documented deaths.² Unfortunately, it is far from over. Successive, more transmissible variants have emerged, causing new waves of the disease.³ Although a number of effective vaccines have been developed and are being distributed, analysts estimate that it will

1. See Maciej F. Boni et al., *Evolutionary Origins of the SARS-CoV-2 Sarbecovirus Lineage Responsible for the COVID-19 Pandemic*, 5 NATURE MICROBIOLOGY 1408, 1408 (2020).

2. *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> [https://perma.cc/P4QJ-JEFK].

3. *Tracking SARS-CoV-2 variants*, WORLD HEALTH ORGANIZATION, <https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/>.

take until 2023 before they are accessible worldwide.⁴ In the meantime, many more people will die. This tragedy has focused attention on what went wrong: Could the pandemic have been halted in its early stages; what steps could governments have taken to better protect their citizens; and, perhaps most important, how can we prevent something like this from happening again?

There is another question that has received much less attention but is no less important: In their responses to the pandemic, did States abide by or violate their legal obligations to other States and to their own citizens under international law? That question may seem esoteric, of interest only to legal scholars, but, in reality, whether States abide by international law—and whether international law is itself fit for purpose—is vitally important for everyone from refugees exposed to the virus in unsanitary detention centers to national leaders fighting disinformation campaigns and safeguarding vaccine supply chains. International law has been central to the world's response to the pandemic from the start—even if the participants did not always realize it.

International law, after all, required States to take certain actions to detect and prevent the spread of the novel coronavirus. And yet the virus spread rapidly anyway. After emerging in Wuhan, it quickly jumped to other parts of China as the government silenced doctors and whistleblowers who were calling attention to the virus's deadly potential.⁵ Soon after that, the virus went global. Europe's first case of COVID-19 may have come as early as December 2019.⁶ The first cases were detected in the United States in January 2020.⁷ Africa recorded its first case in early February 2020, and a case was confirmed in Latin America some weeks later.⁸

Some governments responded quickly and effectively. The Taiwanese government, for example, closed borders early, increased the domestic pro-

4. Devika Desai, *It Could Be up to Three Years Before a Coronavirus Vaccine Is Accessible, Canadian Scientists Say*, NAT'L POST (Jan. 31, 2020), <https://nationalpost.com/news/it-could-be-up-to-three-years-before-a-coronavirus-vaccine-is-accessible-canadian-scientists-say> [https://perma.cc/P6E4-RJJN].

5. See Tom Grundy, *China May Have Prevented 95% of Virus Cases if It Enacted Measures After Silenced Whistleblower's Warning*, H.K. FREE PRESS (Mar. 14, 2020), <https://hongkongfp.com/2020/03/14/china-may-prevented-95-virus-cases-acted-silenced-whistleblowers-warning> [https://perma.cc/P6E4-RJJN].

6. See *Coronavirus: France's First Known Case 'Was in December'*, BBC NEWS (May 5, 2020), <https://www.bbc.com/news/world-europe-52526554> [https://perma.cc/8P35-LPCV].

7. Michelle A. Jorden et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January-February 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 680, 680 (2020).

8. See *COVID-19 Cases Top 10,000 in Africa*, WORLD HEALTH ORG. REGIONAL OFF. FOR AFR., (Apr. 7, 2020), <https://www.afro.who.int/news/covid-19-cases-top-10-000-africa#:~:text=reaching%20the%20continent%20through%20travellers,countries%20have%20reported%20cases> [https://perma.cc/777C-3W7K]; Elizabeth Gonzalez et al., *The Coronavirus in Latin America*, AM. SOC'Y COUNCIL AM. (Dec. 16, 2020), <https://www.as-coa.org/articles/coronavirus-latin-america> [https://perma.cc/WJ59-7FFE].

duction of masks, and relied on big data tools to track the virus's spread.⁹ South Korea was another early success story.¹⁰ As the *Atlantic* has noted, South Korea based its COVID-19 strategy on fast testing, expansive high-tech tracing, and zero-tolerance isolation.¹¹ And New Zealand responded so successfully that in the summer of 2020, as the pandemic continued to rage elsewhere, it had no active cases and was able to fully reopen its economy.¹²

Many others, however, were far less successful. In the United States, for example, President Donald Trump refused to take the virus seriously in its early months.¹³ As of October, 2021, more than 45 million people in the United States have been infected by the virus, and approximately 740,000 have died,¹⁴ more than in any other country.¹⁵ The United Kingdom's initial lack of urgency in responding to the virus also led to tens of thousands of excess deaths, disproportionate effects on ethnic minorities, and a staggering death rate proportional to population.¹⁶ A fearsome second wave of COVID-19 ravaged India: The official death toll hit a peak of 4,000 a day in mid-May 2021, and experts have suggested that the true death toll far exceeded official statistics.¹⁷ India's "nonexistent public

9. See Jessica Wang, *How Taiwan Largely Escaped the COVID-19 Pandemic*, NEWS.COM.AU (Dec. 30, 2020), <https://www.news.com.au/world/coronavirus/global/how-taiwan-largely-escaped-the-covid19-pandemic/news-story/b2a2fe7545b333b3afb1c1bf5a83a87> [https://perma.cc/P9XX-F237].

10. Derek Thompson, *What's Behind South Korea's COVID-19 Exceptionalism?* ATLANTIC (May 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/whats-south-koreas-secret/611215> [https://perma.cc/66V5-KKD6].

11. *Id.*

12. See Eleanor Ainge Roy, *New Zealand Beat Covid-19 by Trusting Leaders and Following Advice—Study*, GUARDIAN (July 23, 2020), <https://www.theguardian.com/world/2020/jul/24/new-zealand-beat-covid-19-by-trusting-leaders-and-following-advice-study> [https://perma.cc/R8EY-KJMF].

13. See Stephen Collinson, *Trump, Finally, Takes the Coronavirus Emergency Seriously*, CNN (Mar. 19, 2020), <https://edition.cnn.com/2020/03/17/politics/white-house-donald-trump-coronavirus-emergency/index.html> [https://perma.cc/8GB2-4AVZ].

14. See *Coronavirus World Map: Tracking the Global Outbreak*, *supra* note 2.

15. *Number of Novel Coronavirus (COVID-19) Deaths Worldwide as of October 26, 2021, by Country*, STATISTA (Oct. 28, 2021), <https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country> [https://perma.cc/8TUP-JYQF]; *Number of Novel Coronavirus (COVID-19) Cases Worldwide as of October 26, 2021, by Country*, STATISTA (Oct. 28, 2021), <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-cases-worldwide-by-country/> [https://perma.cc/M3G7-2DCK].

16. See Gavin Yamey & Clare Wenham, *The U.S. and U.K. Were the Two Best Prepared Nations to Tackle a Pandemic—What Went Wrong?*, TIME (July 1, 2020), <https://time.com/5861697/us-uk-failed-coronavirus-response> [https://perma.cc/2994-9U4X]; *Coronavirus Tracker: The Latest Figures as Countries Fight Covid-19 Resurgence*, FIN. TIMES (Jan. 12, 2021), <https://www.ft.com/content/a2901ce8-5eb7-4633-b89c-cbdf5b386938> [https://perma.cc/8K3M-NS87]; *Mortality Analyses*, JOHNS HOPKINS U. & MED. CORONAVIRUS RESOURCE CTR. (Jan. 12, 2021), <https://coronavirus.jhu.edu/data/mortality> [https://perma.cc/6ZHA-R24G].

17. See *The Rule of Six: More Evidence Emerges of India's True Death Toll From Covid-19*, ECONOMIST (June 12, 2021), <https://www.economist.com/asia/2021/06/12/more-evidence-emerges-of-indias-true-death-toll-from-covid-19> [https://perma.cc/D2GN-F96V].

healthcare system” and Prime Minister Narendra Modi’s initial refusal to take the second wave seriously attracted criticism, leading one commentator to term the Indian government’s mismanagement a “crime against humanity.”¹⁸ And Brazil, which eased preventive measures too early, also became a global epicenter of the outbreak, with the world’s third worst outbreak after the United States and India.¹⁹

Not only have many States failed to prevent or slow the spread of the virus, but many have also responded to the virus in ways that exacerbated the toll on the most vulnerable populations, violating their international law obligations in the process. Greek officials, for example, made headlines by intercepting and turning back boats filled with asylum seekers before those boats could land on Greek soil, sometimes leaving them to drift after disabling their engines.²⁰ Although the country has employed such practices for several years, experts have suggested that “Greece’s behavior during the pandemic has been far more systematic and coordinated.”²¹ Hong Kong, meanwhile, was celebrated for successfully controlling the spread of the virus.²² But public authorities have also used the virus as justification for repressive restrictions on public demonstrations.²³ Numerous governments have also developed technologies, includ-

18. See Arundhati Roy, *We are Witnessing a Crime Against Humanity: Arundhati Roy on India’s Covid Catastrophe*, THE GUARDIAN (Apr. 28, 2021), <https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe> [<https://perma.cc/B7TC-AN7H>]. See also Lauren Frayer, “This Government has Failed Us”: Anger Rises in India Over PM Modi’s COVID Response, NAT’L PUB. RADIO (May 11, 2021), <https://www.npr.org/2021/05/11/995446333/this-government-has-failed-us-anger-rises-in-india-over-pm-modis-covid-response> [<https://perma.cc/6KKZ-5KM5>]; Shoab Shafi, *How My Uncle Became One of Modi’s Coronavirus Victims*, FOREIGN POL’Y (May 24, 2021), <https://foreignpolicy.com/2021/05/24/india-coronavirus-modi-elections> [<https://perma.cc/5E55-XY98>].

19. See Manuela Andreoni, *Coronavirus in Brazil: What You Need to Know*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/article/brazil-coronavirus-cases.html> [<https://perma.cc/RRV7-9BBN>]; *Coronavirus World Map: Tracking the Global Outbreak*, supra note 2 (showing the United States with 45,710,843 total cases, India with 34,215,653 total cases, and Brazil with 21,766,168 total cases).

20. See Patrick Kingsley & Karam Shoumali, *Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html> [<https://perma.cc/Y3FB-DMGC>].

21. *Id.*; see also Giorgos Christides et al., *EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign*, SPIEGEL INT’L (Oct. 23, 2020), https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7?utm_source=dlvr.it&utm_medium=twitter#ref=rss [<https://perma.cc/WJH4-MRXW>]; Itamar Mann & Niamh Keady-Tabbal, *Torture by Rescue: Asylum Seeker Pushbacks in the Aegean*, JUST SECURITY (Oct. 26, 2020), <https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker-pushbacks-in-the-aegean> [<https://perma.cc/56EF-C74D>].

22. See Zeynep Tufekci, *How Hong Kong Did It*, THE ATLANTIC (May 12, 2020), <https://www.theatlantic.com/technology/archive/2020/05/how-hong-kong-beating-coronavirus/611524> [<https://perma.cc/Q9FG-XFHQ>].

23. See Sue-Lin Wong & Nicolle Liu, *Beijing Clamps Down on Hong Kong Under Cover of Coronavirus*, FIN. TIMES (Apr. 23, 2020), <https://www.ft.com/content/bf08a177-9631-48e5-b542-18bf5b15faf4> [<https://perma.cc/AJN4-QCNC>]; see also Austin Ramzy & Elaine Yu, *Under Cover of Coronavirus, Hong Kong Cracks Down on Protest Movement*,

ing smartphone apps, for contact tracing, but, as one study put it, “there are a number of unresolved questions about the use of smartphone data for health surveillance, including how to protect individual privacy.”²⁴ Other governments have used the pandemic as an excuse for delaying elections or for denying arrested individuals adequate legal representation.²⁵ And while the discovery of an effective vaccine has offered hope that the world is at the beginning of the end of the pandemic, human rights organizations have warned that access to the vaccine may be used by governments and rebel groups to advance their political agendas.²⁶

As a result of these and similar actions, which are in tension with if not outright violations of States’ international legal obligations, the pandemic is taking a toll not only on individual countries but also on the international legal order. In remarks to the United Nations General Assembly in the midst of the pandemic, French President Emmanuel Macron warned that the U.N. “runs the risk of powerlessness” and that “this crisis, undoubtedly more than any other, requires cooperation, requires the invention of new international solutions.”²⁷ U.N. officials soon after called on world leaders and non-state actors to recommit to international law.²⁸ Filippo Grandi, the U.N. High Commissioner for Refugees, warned States not to close “avenues to asylum” or to force “people to return to situations of danger,” arguing that “we all need . . . solidarity and compassion now more than ever before.”²⁹

N.Y. TIMES, (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/world/asia/coronavirus-hong-kong-protests.html> [https://perma.cc/7MCE-MU3R].

24. Shaoxiong Wang et al., *A New System for Surveillance and Digital Contact Tracing for COVID-19: Spatiotemporal Reporting over Network and GPS*, 8 JMIR MHEALTH & UHEALTH (2020).

25. See *Elections Postponed Due to COVID-19 - As of December 15, 2020*, INT’L FOUND. FOR ELECTORAL SYS. (Dec. 15, 2020), https://www.ifes.org/sites/default/files/elections_postponed_due_to_covid-19.pdf [https://perma.cc/PJ5N-6UQC]; *Guidance Note: Ensuring Access to Justice in the Context of COVID-19*, U.N. OFF. ON DRUGS & CRIME 6-9 (2020), https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf [https://perma.cc/JU6Y-N9BK].

26. See Catherin Schaer, *COVID-19 Vaccines as “Biological Warfare in Middle East?”*, DEUTSCHE WELLE (Feb. 5, 2021), <https://www.dw.com/en/covid-vaccines-as-passive-biological-warfare-in-middle-east/a-56471435> [https://perma.cc/GX9W-7E2G]. The International Center For Not-For-Profit Law has tracked a number of challenges to civil freedom posed by States’ responses to the pandemic. See *Coronavirus & Civic Space*, INT’L CENTER FOR NOT-FOR-PROFIT LAW, <https://www.icnl.org/coronavirus-response> (last visited Oct. 13, 2021) [https://perma.cc/FK8V-DR52].

27. See *COVID-19 Pandemic Should Be ‘Shock’ to UN, Revive Multilateral Order, France’s Macron Tells World Leaders*, U.N. NEWS (Sept. 22, 2020), <https://news.un.org/en/story/2020/09/1073172> [https://perma.cc/5DCF-2UXZ].

28. See, e.g., *Human Rights Must Be ‘Front and Centre’ of COVID-19 Response: Secretary General*, U.N. NEWS (Dec. 10, 2020), <https://news.un.org/en/story/2020/12/1079632> [https://perma.cc/3BW7-RNNR]; Press Release, U.N. High Comm’r for Refugees, Statement by Filippo Grandi, U.N. High Commissioner for Refugees, on the COVID-19 Crisis, (Mar. 19, 2020), <https://www.unhcr.org/en-us/news/press/2020/3/5e7395f84/statement-filippo-grandi-un-high-commissioner-refugees-covid-19-crisis.html> [https://perma.cc/US4W-JRAD].

29. Press Release, U.N. High Comm’r for Refugees, *supra* note 28.

This Article examines the many ways in which COVID-19 is straining the rules and norms of international law. It considers five main bodies of international law implicated by the pandemic.³⁰ Part I examines international humanitarian law, the rules that govern conduct of belligerents during armed conflict, examining how those obligations are affected by the emergence of a worldwide pandemic. Part II looks at international human rights law—specifically the right to life, the right to health, and civil and political rights—and how States’ responses to the pandemic have put these rights at risk. Part III looks at the implications for immigration and refugee law, specifically the principle of non-refoulement, which prohibits States from returning asylum-seekers to an unsafe foreign territory, and law that governs the treatment of immigration detainees, who are uniquely vulnerable to the pandemic’s spread. Part IV examines whether international cyber law has been violated by recent efforts to hack into the companies developing and distributing COVID-19 vaccines. Part V looks at the rules and regulations of the World Health Organization (WHO), which is the international organization responsible for detecting and responding to global public health threats, and which has been accused of responding slowly and ineffectively to the COVID-19 pandemic. Finally, Part VI makes several proposals for reform so that the world is better prepared to address the next inevitable pandemic.

I. International Humanitarian Law

As the pandemic began to unfold, António Guterres, the U.N. Secretary General, called for warring actors to respect international humanitarian law and appealed for a global ceasefire.³¹ But belligerents largely ignored these calls.³² As a result, States’ conduct risked violating the international humanitarian law (IHL) rules regulating the conduct of States during armed conflict. This Part examines in particular three separate sets of IHL rules: (1) rules governing the conduct of hostilities, which protect medical personnel, hospitals, civilian objects, and infrastructure against attack; (2) rules governing humanitarian access, which allow humanitarian personnel to seek to treat and prevent the spread of a pandemic in war

30. The COVID-19 pandemic has strained other fields of international law, too. See, e.g., Vincent Power, *COVID-19 and Maritime Law: Lives; Laws; and Lessons*, 26 J. INT’L MAR. L. 1 (2020). Power points out that most maritime nations around the world “individually adopted laws and practices” in response to the pandemic, rather than attempt “comprehensive co-ordination,” *id.* at 1, and calls for an international treaty that would govern “the maritime response to pandemics and epidemics generally.” *Id.* at 2.

31. See Press Release, Secretary-Gen., Secretary-General Reiterates Appeal for Global Ceasefire, Warns ‘Worst Is Yet to Come’ as COVID-19 Threatens Conflict Zones, U.N. Press Release SG/SM/20032 (Apr. 3, 2020), <https://www.un.org/press/en/2020/sgsm20032.doc.htm> [https://perma.cc/QT8J-LK3A].

32. See Richard Gowan, *What’s Happened to the U.N. Secretary-General’s COVID-19 Ceasefire Call?*, INT’L CRISIS GROUP (June 16, 2020), <https://www.crisisgroup.org/global/whats-happened-un-secretary-generals-covid-19-ceasefire-call> [https://perma.cc/EN8V-YFMB].

zones and areas adjacent to them; (3) and rules governing the treatment of wartime detainees, who are particularly vulnerable to the spreading virus.

A. Conduct of Hostilities

Amidst the COVID-19 pandemic, conflict continues to rage in various parts of the world. In some conflicts, warring parties' failure to respect IHL rules on the conduct of hostilities long before the pandemic further exacerbated the acute health crisis.³³ In other conflicts, combatants failed to adapt their behavior to the pandemic, leading to violations of IHL—or even sought to exploit the pandemic to gain a military advantage.³⁴ This includes the violation of rules that protect medical personnel, hospitals, civilian objects, and infrastructure against attack. In Syria, for example, belligerents deliberately or indiscriminately attacked medical personnel and facilities over the course of nearly ten years of conflict, leaving health systems ill-equipped to control the spread of COVID-19.³⁵ Physicians for Human Rights estimates that more than 900 medical professionals were killed from 2011 through March 2021.³⁶ The systematic targeting of health care workers and facilities left the country without sufficient numbers of health care workers, which impeded an adequate response to COVID-19 as infection rates among medical professionals rose and the pandemic spiraled wildly out of control.³⁷

This section first considers the relevant obligations of participants in “international armed conflicts” (IACs), that is, conflicts between nation states. It then turns to the obligations of belligerents in “non-international armed conflicts” (NIACs), which entail protracted armed violence between governmental authorities and organized armed groups or between such groups themselves. Finally, it closes with an assessment of what these obligations mean in the COVID-19 context.

33. See, e.g., Bethan McKernan, *Yemen: In a Country Stalked by Disease, COVID Barely Registers*, *GUARDIAN* (Nov. 27, 2020), <https://www.theguardian.com/global-development/2020/nov/27/yemen-disease-covid-war> [<https://perma.cc/2K4W-NV49>]; Elizabeth Tsurkov & Qussai Jukhadar, *Ravaged by War, Syria's Health Care System is Utterly Unprepared for a Pandemic*, *MIDDLE EAST INST.* (Apr. 23, 2020), <https://www.mei.edu/publications/ravaged-war-syrias-health-care-system-utterly-unprepared-pandemic> [<https://perma.cc/2R87-RLEM>].

34. See, e.g., Cara Anna, Associated Press, *U.N. Fears “Massive” COVID Transmission in Ethiopia’s Tigray*, *GLOBE & MAIL* (Jan. 8, 2021), <https://www.theglobeandmail.com/world/article-un-fears-massive-community-transmission-of-covid-19-in-ethiopia/> [<https://perma.cc/7N2H-Q7EF>]; see also Kate Ng, *Coronavirus: Myanmar ‘Emboldened’ by Pandemic to Commit ‘Crimes Against Humanity,’ Says U.N. Expert*, *INDEPENDENT* (Apr. 30, 2020), <https://www.independent.co.uk/news/world/asia/coronavirus-myanmar-military-war-crimes-united-nations-yanghee-lee-a9492686.html> [<https://perma.cc/9YEH-J2K9>].

35. See *Medical Personnel Are Targeted in Syria*, *PHYSICIANS FOR HUM. RTS.*, <https://phr.org/our-work/resources/medical-personnel-are-targeted-in-syria> [<https://perma.cc/G2FU-2CZ5>].

36. *Id.*

37. See U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, *Briefing to the Security Council on the Implementation of Resolution 2532* (Sept. 9, 2020).

1. Principles Governing Conduct of Hostilities in IACs During a Pandemic

The International Committee of the Red Cross (ICRC), an “impartial humanitarian body,” in the words of the Geneva Conventions,³⁸ with a mandate to act as a substitute protecting power for prisoners of war (that is, captured combatants fighting on behalf of a party to the Conventions),³⁹ contends that, as a matter of customary law, in all conflicts humanitarian relief personnel must be respected and protected.⁴⁰ In addition, objects used for humanitarian relief operations must be respected and protected.⁴¹ These rules have generally been accepted by States as customary law.⁴²

In addition to customary law, international treaty law governs the conduct of hostilities in IACs, regulating targeting and military operations based on principles of distinction, prohibition on indiscriminate attacks, proportionality, and necessary precautions. The governing conventions—specifically the four Geneva Conventions and Additional Protocol I (API)—protect medical personnel, entities, and equipment from direct attack.⁴³

To ensure the care of wounded and sick combatants, the First Geneva Convention (GC I) establishes protections for the belligerent armed forces’

38. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

39. See *Protecting Powers*, INT’L COMM. RED CROSS, <https://casebook.icrc.org/glossary/protecting-powers#:~:text=in%20the%20absence%20of%20an%20agreement%20on%20a,system%20has%20not%20been%20used%20in%20recent%20years> [https://perma.cc/5FL8-TLDZ]; see also *Why Does the ICRC Visit POWs and Interned Civilians?*, INT’L COMM. RED CROSS (Dec. 19, 2003), [https://www.icrc.org/en/doc/resources/documents/faq/5udmxd.htm#:~:text=prisoners%20of%20war%20\(POWs\)%20and%20civilian%20internees%20\(CI\),are%20visits%20to%20prisoners,%20both%20military%20and%20civilian](https://www.icrc.org/en/doc/resources/documents/faq/5udmxd.htm#:~:text=prisoners%20of%20war%20(POWs)%20and%20civilian%20internees%20(CI),are%20visits%20to%20prisoners,%20both%20military%20and%20civilian) [https://perma.cc/AX9V-67Y9].

40. See I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INT’L HUMANITARIAN L. 105–09 (2005); see also 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INT’L HUMANITARIAN L. (2005).

41. I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 109–11.

42. That is not true of all of the rules identified by the ICRC as “customary law.” Some States, including the United States, have questioned whether all the rules identified by the ICRC truly constitute customary international law. See generally Letter from John B. Bellinger III, Legal Adviser, U.S. Department of State & William J. Haynes II, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006) (on file with U.S. Department of State), <https://2001-2009.state.gov/s/l/rls/82630.htm> [https://perma.cc/4RN7-VSR8]. For a discussion of the requirements for a rule to be customary international law, see William S. Dodge, *The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law*, OPINIOJURIS (Mar. 8, 2018), <http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law> [https://perma.cc/3W68-XFJ8].

43. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 38; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

medical personnel and units, as well as hospital zones, medical transport, and the necessary passage to effect such transport.⁴⁴ The Second Geneva Convention (GC II) provides corresponding protections for maritime warfare.⁴⁵ In addition, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) allows parties to a conflict to establish hospital and safety zones, as well as localities and neutralized zones intended to shelter wounded and sick combatants and civilians taking no part in hostilities from the effects of war.⁴⁶ It stipulates, moreover, that civilian medical entities and operations, as well as persons engaged in the operation and administration of such civilian hospitals, shall in no circumstances be the object of attack.⁴⁷

For States that are party to it, AP I also extends protections established in GC I and GC II to civilian medical personnel, equipment, and transport, and explicitly prohibits attacks on such entities.⁴⁸ AP I recognizes additional protections for medical personnel performing their duties. No one can “be punished for carrying out medical activities compatible with medical ethics” regardless of the benefactor, nor can they be compelled to act (or to refrain from acting) in ways contrary to rules of medical ethics, and force cannot be used to threaten personnel to provide medical information of those who have been or are being treated.⁴⁹

AP I, moreover, prohibits parties to IACs from undertaking indiscriminate attacks that, by their nature, can fail to distinguish between military and civilian objects (including medical facilities and personnel).⁵⁰ Belligerents must also assess the proportionality of an attack by weighing the military advantage anticipated against the expected “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof.”⁵¹ Belligerents are required to take precautionary steps to minimize incidental harm to civilians and civilian objects in undertaking attacks,⁵² and they have a duty to protect civilians and civilian objects under their control from the dangers of conflict.⁵³ Many of these obligations, moreover, arguably constitute customary law and therefore might be

44. GC I, *supra* note 43, arts. 19, 23, 24, 35–37.

45. GC II, *supra* note 43, arts. 12–18, 22–32, 34–43.

46. GC IV, *supra* note 43, arts. 14–15.

47. *Id.*, arts. 18, 20, 21.

48. See AP I, *supra* note 43, arts. 8–34, 48, 51, 52, 54. The United States is not a party to Additional Protocol I, but it recognizes some portions of it, including Article 75’s fundamental guarantees of minimum treatment for all persons, as applicable to U.S. conduct. See Press Release, The White House, Office of Press Sec’y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011) (on file with The White House), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> [<https://perma.cc/RD3N-LPS2>]; AP I, *supra* note 43, art. 75.

49. AP I, *supra* note 43, arts. 16(1)–(3).

50. *Id.*, art. 51(4).

51. *Id.*, art. 51(5)(b).

52. *Id.*, art. 57.

53. *Id.*, art. 58. Many of these obligations arguably constitute customary law and therefore might be considered binding on all States, regardless of whether they are party to AP I. See *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, ¶ 527 (Jan. 14,

considered binding on all States, even those that are not party to AP I.⁵⁴

2. Principles Governing Conduct of Hostilities in NIACs During a Pandemic

As in IACs, customary international law rules provide for and protect humanitarian relief personnel and objects in NIACs. In addition, Additional Protocol II to the Geneva Conventions (AP II) establishes obligations for States and non-state armed groups that are party to that Protocol, if the conflict takes place in the territory of a state that is party to the Protocol.⁵⁵ Belligerents covered by AP II cannot punish medical personnel, who are to be “respected and protected.”⁵⁶ Health care workers must not be compelled to undertake tasks contrary to their humanitarian mission or to give priority except on medical grounds.⁵⁷ Generally, they should not be punished for adhering to ethical standards on information-sharing and for maintaining confidentiality.⁵⁸ Additionally, Common Article 3 of the Geneva Conventions—so called because the text of the article is “common” or shared between all four Geneva Conventions—requires parties to NIACs (whether States or non-state armed groups) to humanely treat individuals not taking part in the conflict, including members of armed forces placed “hors de combat” by sickness or other causes.⁵⁹

3. Conduct of Hostilities in the COVID-19 Context

The formal rules and obligations governing the conduct of hostilities do not change in the context of a deadly pandemic, but their practical impact may be altered. In particular, certain actions that might be permissible under normal circumstances may be impermissible during a pandemic.

2000); Jean-François Quéguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 INT'L REV. RED CROSS 793, 796, 812, 819 (2006).

54. See generally Kupreškić *et al.*, *supra* note 53 ¶ 527; Quéguiner, *supra* note 53, at 793, 796, 812, 819; I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 55–67. The ICRC's compilation of customary rules draws heavily on AP I as well as the 1899 and 1907 Hague Regulations and 1907 Hague Convention (IX). *Id.* at xxxiv; AP I, *supra* note 43; The Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevens 247; The Hague Convention (IV) with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevens 631; The Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevens 681.

55. Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The United States is also not a party to this Protocol, though the Reagan Administration submitted it to the Senate for approval in 1987 and the Obama administration encouraged the Senate to act on it in 2011 and embraced it as customary law in the process. Press Release, White House, *supra* note 48.

56. AP II, *supra* note 55, art. 9.

57. *Id.*

58. *Id.*, art. 10.

59. GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

Some legal obligations incumbent upon parties to a conflict where there is a risk of COVID-19 are fairly straightforward: parties to conflicts are not to target military personnel who are *hors de combat* because of the virus.⁶⁰ Further, belligerents are not to punish medical personnel disseminating personal protective equipment such as masks, carrying out COVID-19 tests, or administering a vaccine, in accordance with their ethical duties, even if such personnel assist enemy forces or civilians allied with those adversaries.⁶¹

The need for assessing proportionality of attacks and undertaking precautionary measures may also necessitate that parties take into account foreseeable pandemic-related “reverberating effects” of a military operation.⁶² Emanuela-Chiara Gillard cites as an example of reverberating harm an attack that results eventually in a disease outbreak, such as an attack that knocks out an electricity generation and distribution system, which might in turn prevent the operation of water purification systems and lead ultimately to an outbreak of waterborne disease.⁶³ However, as Ellen Nohle and Isabel Robinson explain, “[w]hile there is growing consensus that belligerents in an armed conflict are legally obliged to take into account the reasonably foreseeable reverberating effects of an attack, . . . the precise scope of this obligation remains unclear.”⁶⁴ Further, there is not yet a consensus as to what qualifies as a reverberating effect.⁶⁵

Whatever the precise scope of the obligation to account for reverberating effects, the pandemic is likely to magnify foreseeable effects of hostile activities. Second-order impacts from attacks on civilian objects and infrastructure increase the damage of such attacks and thus alter the required proportionality analysis.⁶⁶ For example, belligerents may have to assess the risk of attacks that might reduce systemic capacity to respond to COVID-19 (or prevent its spread). A party to a conflict may need to weigh, for example, whether an attack could have the incidental harm of destroying stocks of mechanical ventilators that are in short supply. Likewise, the foreseeable consequences of a temporary interruption to civilian water or medical supply lines might be much greater in a pandemic context than in

60. See GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

61. See GC I, *supra* note 43, arts. 19, 23, 24, 35-37; GC II, *supra* note 43, arts. 12-18, 22-32, 34-43; GC IV, *supra* note 43, arts. 18, 20-21; AP I, *supra* note 43, arts. 8-34, 48, 51, 52, 54.

62. See Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment*, CHATHAM HOUSE 18-20 (Dec. 2018), <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf> [https://perma.cc/Q2TM-7KBE].

63. *Id.* at 19.

64. Isabel Robinson & Ellen Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, 98 INT'L REV. RED CROSS 107, 107 (2016).

65. *Id.* at 108-09.

66. *Id.* at 116.

other times, as even temporary lack of access to hygiene or personal protective equipment can significantly affect disease spread.

Additionally, the AP I and AP II obligations to adopt precautionary measures regarding “works and installations containing dangerous forces” might be read to extend special protections to laboratories or medical clinics where biological agents of infectious diseases are kept.⁶⁷ Such locations might be analogized to those facilities for which these articles provide special protection, namely dams, dykes, and nuclear electrical generating stations. In consequence, if belligerents were to target a vaccine development, distribution, or storage site, they would also have to consider the reverberating effects of such an attack. Given the importance of vaccines to the population’s wellbeing, such an attack would likely be considered disproportionate.

In short, belligerents’ conflict-related duties remain relevant—and abiding by these rules has arguably become even more essential—as COVID-19 has reached populations in conflict-ridden areas. Conversely, *violations* of such laws and norms, which are all too common, have also taken on greater consequence as conflict-affected societies seek to protect their already vulnerable populations from the added dangers of the current pandemic.

B. Humanitarian Access

As COVID-19 spreads unchecked in war-torn areas around the world, the international humanitarian law principle of humanitarian access has become more urgent than ever. Local health systems, already overburdened by years of war, are poorly equipped to deal with the new challenges posed by COVID-19. In Yemen, for example, both States and non-state armed groups hindered humanitarian access by the U.N. and aid agencies, even as COVID-19 emerged as a threat.⁶⁸ One report showed that “[e]fforts to prevent the spread of COVID-19 and respond to other urgent health needs in Yemen have been severely hampered by onerous restrictions and obstacles that the Houthi and other authorities have imposed on international aid agencies and humanitarian organizations.”⁶⁹ The UN warned that as a result, “COVID-19 is ‘likely to spread faster, more widely and with deadlier consequences [in Yemen] than almost anywhere else.’”⁷⁰

This Section first outlines the general IHL principle of humanitarian access. Next, it identifies the specific obligations of belligerents in both

67. AP I, *supra* note 43, arts. 56-57; AP II, *supra* note 55, art. 15.

68. *Yemen Southern Provinces Reject Separatists’ Claim to Self-Rule*, ALJAZEERA (Apr. 26, 2020), <https://www.aljazeera.com/news/2020/04/26/yemen-southern-provinces-reject-separatists-claim-to-self-rule> [https://perma.cc/X9TA-2FXW].

69. *Deadly Consequences: Obstruction of Aid in Yemen During COVID-19*, HUM. RTS. WATCH (Sept. 14, 2020), <https://www.hrw.org/report/2020/09/14/deadly-consequences/obstruction-aid-yemen-during-covid-19> [https://perma.cc/XHF2-8WV7].

70. *Yemen Can’t Survive War on Two Fronts, Top U.N. Envoy Tells Security Council, as Coronavirus Outbreak Looms*, U.N. NEWS (Apr. 16, 2020), <https://news.un.org/en/story/2020/04/1061942> [https://perma.cc/4S6W-69U4].

IACs and NIACs. Finally, it assesses the significance of these obligations in the COVID-19 context.

1. *Principles Governing Humanitarian Access in IACs in a Pandemic*

The ICRC maintains that, as a matter of customary law, in all conflicts, parties must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need. That relief must be impartial in character and conducted without any adverse distinction, subject to the parties' right of control.⁷¹ In addition, "[t]he parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions."⁷² Only in cases of "imperative military necessity may their movements be temporarily restricted."⁷³ These rules have generally been accepted by States as customary law.

In addition to customary international law, treaty law also governs IACs during pandemics. The Geneva Conventions and AP I establish the right of the ICRC and other aid organizations to provide humanitarian relief.⁷⁴ Accordingly, while belligerents have the primary obligation to care for the wounded and sick without adverse distinction, if they are unable or unwilling to fulfill their primary responsibility, they may not deny consent to humanitarian agencies that offer assistance.⁷⁵ As the ICRC's 2016 Commentary on GC I puts it: "If the humanitarian needs cannot be met otherwise, the refusal of such an offer would be considered arbitrary, and therefore inconsistent with international law."⁷⁶ In addition, GC IV—which provides protections to all civilian persons during IACs—requires States to "allow the free passage of all consignments of medical and hospital stores" intended for civilians of another High Contracting Party (i.e., States that are party to the Conventions) and "the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers, and maternity cases."⁷⁷

AP I establishes broader obligations for States Parties to that Protocol. It states that "if the civilian population of any territory under the control of a Party to the conflict . . . is not adequately provided with [humanitarian] supplies . . . relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken."⁷⁸ Moreover, the parties to the conflict and each High Contracting Party "shall

71. Int'l Comm. Red Cross [ICRC] Rule 55: Access for Humanitarian Relief to Civilians in Need.

72. Int'l Comm. Red Cross [ICRC] Rule 56: Freedom of Movement of Humanitarian Relief Personnel.

73. *Id.*

74. GC I, *supra* note 43, art. 9; GC II, *supra* note 43, art. 9; GC III, *supra* note 38, art. 9; GC IV, *supra* note 43, art. 10; AP I, *supra* note 43, art. 71.

75. See GC I, *supra* note 43, art. 12; GC II, *supra* note 43, art. 12.

76. *Commentary of 2016: Article 9, INT'L COMM. RED CROSS*, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=3074EE1C685CFDBDC1257F7D00360B7B> [<https://perma.cc/AMN6-PH2A>].

77. GC IV, *supra* note 43, art. 23.

78. AP I, *supra* note 43, art. 70.

allow and facilitate rapid and unimpeded passage” of humanitarian assistance, “even if such assistance is destined for the civilian population of the adverse Party.”⁷⁹ States are not relieved of these obligations during a pandemic. States are, however, entitled to prescribe certain measures to regulate humanitarian activities.⁸⁰

In short, despite the fact that the provision of humanitarian activities is “subject to the consent of the [p]arties to the conflict concerned,” belligerents arguably have little room to deny consent to humanitarian organizations if they cannot or elect not to meet humanitarian needs themselves.⁸¹ The ICRC has also argued that the civilian population has a *right* to receive humanitarian relief essential for its survival,⁸² and legal commentators have noted that a State Party’s willful denial of humanitarian access can in certain contexts amount to a war crime.⁸³ Additionally, States that have occupied the territory of other States have primary responsibility in the occupied territory to provide “supplies essential to the survival of the civilian population.”⁸⁴

2. Principles Governing Humanitarian Access in NIACs in a Pandemic

As in IACs, customary international law rules provide for and protect humanitarian access. In addition, in NIACs, Common Article 3 allows impartial humanitarian bodies to offer their services to the parties to the conflict.⁸⁵ AP II complements this framework, for States that are party to it. AP II Article 18(2) states that

[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential to its survival . . . relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.⁸⁶

AP II speaks only of the consent of the High Contracting Party—that is, the State Party to the conflict.⁸⁷ However, there is disagreement as to whether State Party consent is always required.⁸⁸ If a humanitarian relief convoy is

79. *Id.* art. 70(2).

80. For example, parties to the conflict and each High Contracting Party may articulate “technical arrangements, including search, under which passage is permitted.” *Id.* art. 70(3). During a virulent pandemic, these “technical arrangements” might validly include measures to contain the spread of disease such as temporary quarantine.

81. See GC I, *supra* note 43, art. 9; GC II, *supra* note 43, art. 9; GC III, *supra* note 38, art. 9; GC IV, *supra* note 43, art. 10.

82. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 199.

83. Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime Under International Law*, 835 INT’L REV. RED CROSS 1, 3 (1999).

84. AP I, *supra* note 43, art. 69.

85. GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

86. AP II, *supra* note 55, art. 18(2).

87. *Id.*

88. See Principle 24, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. 16 (Oct. 2016), <https://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf> [https://perma.cc/8TF9-JVYB].

traveling to civilians in an area controlled by a non-State actor group and need not traverse territory under the State Party's control, then does the convoy need State Party consent? The Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict correctly notes that "as a matter of operational practice, the agreement or acquiescence of all [p]arties to an armed conflict to humanitarian relief operations intended for civilians in territory under their effective control or transiting through such territory will be required" for the safe conduct of operations.⁸⁹ Yet it also emphasizes that, as with IACs, "consent to humanitarian relief operations may not be arbitrarily withheld."⁹⁰

3. *Humanitarian Access in the COVID-19 Context*

The principles of humanitarian access in IACs and NIACs apply with particular urgency to conflicts during the COVID-19 pandemic. Assistance by aid organizations is essential in places where armed conflict continues to rage and States are ill-equipped to ensure that civilians and captured enemy fighters have access to COVID-19-responsive medical supplies and treatment.

As noted above, humanitarian personnel must be respected and protected, as must objects for humanitarian relief operations.⁹¹ If those personnel are transporting COVID-19-related equipment, such as face masks or vaccines, warring parties have a similar duty to respect and protect that equipment. In addition, civilians should not be denied access to essential COVID-19 prevention materials. In cases of occupation, occupying powers have a duty to adopt and apply "prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics" such as COVID-19.⁹² Warring parties in an IAC must treat members of the armed forces and other protected persons who have contracted COVID-19 in light of their obligation to care for the sick and wounded.⁹³

International humanitarian law clearly establishes that aid organizations such as the ICRC have the right to offer aid in both IAC and NIAC contexts. In the current crisis, such aid organizations may be better positioned and equipped than parties to the conflict to provide COVID-19-related aid to civilians and prisoners of war.⁹⁴ As noted above, while humanitarian activities are subject to the consent of the parties to the conflict, belligerents arguably have little room to deny consent to provide access to aid organizations if they cannot themselves provide the necessary assistance.⁹⁵ That likely means that aid organizations offering personal

89. *Id.* at 17-18.

90. *Id.* at 21.

91. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 105-11.

92. GC IV, *supra* note 43, art. 56.

93. GC I, *supra* note 43, art. 12.

94. See GC I, *supra* note 43, art. 9; GC II, *supra* note 43, art. 9; GC III, *supra* note 38, art. 9; GC IV, *supra* note 43, art. 10; AP I, *supra* note 43, art. 71.

95. Int'l Comm. Red Cross [ICRC], *IHL Rules on Humanitarian Access and Covid-19* (Apr. 19, 2020), at 2-3, <https://reliefweb.int/report/world/ihl-rules-humanitarian-access-and-covid-19> [<https://perma.cc/UPF9-Y2HC>].

protective equipment (such as masks) and other essential supplies (such as ventilators), medical treatment for COVID-19 patients, and vaccines must be provided access unless the party to the conflict can and does provide for those needs. Warring parties can prescribe technical arrangements for the distribution of COVID-19 supplies and are permitted to supervise the delivery of humanitarian aid.⁹⁶ They cannot, however, discriminate against civilians of a rival party to the conflict.⁹⁷

Warring parties around the world have unfortunately violated the obligation to permit humanitarian access. For example, the Syrian regime's regular targeting of humanitarian relief facilities and vehicles and refusal to grant access and passage to aid workers and aid efforts violate the obligation to protect humanitarian access.⁹⁸ This has undoubtedly exacerbated the spread of COVID-19 in the country and, indeed, the region. The same is true in Yemen, where Houthi authorities reportedly blocked international organizations from distributing vaccines in much of the country.⁹⁹ Elsewhere, however, warring parties have taken steps to respect the principle of humanitarian access. In Afghanistan, for example, Taliban insurgents offered "secure passage to humanitarian organizations and health workers seeking to provide aid" and provided supplies to those living under Taliban control.¹⁰⁰

The ICRC has concluded that "arguments based on the necessity to counter the spread of COVID-19 are not valid grounds under IHL to deny consent to humanitarian activities undertaken by impartial humanitarian organizations."¹⁰¹ While States might, for example, require all incoming aid personnel to be vaccinated or to quarantine for two weeks under the "technical arrangements" provision of AP I, State Parties cannot entirely refuse access to aid organizations.¹⁰²

96. GC IV, *supra* note 43, art. 23.

97. The principle of free passage of consignments of medical and hospital stores "applies to all such consignments, when they are intended for the civilian population of another contracting party, whether that party is an enemy, allied, associated or neutral State." *Commentary of 1958: Article 23*, INT'L COMM. RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=660CC3CB70E98F1AC12563CD0042B693> [<https://perma.cc/KA3G-VWCM>].

98. *Assad Regime, Russia Target Humanitarian Groups, Killing Nearly 1,000 Aid Workers in Syria*, DAILY SABAH (Dec. 25, 2019), <https://www.dailysabah.com/war-on-terror/2019/12/25/assad-regime-russia-target-humanitarian-groups-killing-nearly-1000-aid-workers-in-syria> [<https://perma.cc/T96N-MCS4>].

99. *See Yemen Southern Provinces Reject Separatists' Claim to Self-Rule*, *supra* note 68; *Yemen: Houthis Risk Civilians' Health in Covid-19*, HUM. RTS. WATCH (June 1, 2021), <https://www.hrw.org/news/2021/06/01/yemen-houthis-risk-civilians-health-covid-19> [<https://perma.cc/6WF9-DGDQ>].

100. Ruchi Kumar, *With Taliban Help, Afghanistan Girds for a Virus*, UNDARK (Apr. 2, 2020), <https://undark.org/2020/04/02/afghanistan-covid-19> [<https://perma.cc/GAX2-LHQ9>].

101. ICRC, *IHL Rules on Humanitarian Access and Covid-19*, *supra* note 95, at 1.

102. AP I, *supra* note 43, art. 70(3). The ICRC study suggests that States even have an affirmative obligation to "ensure the freedom of movement" of aid personnel providing COVID-19 prevention and treatment; *see also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 201.

Finally, it is worth underscoring the novel coronavirus' virulence. The pandemic does not observe battle lines and does not distinguish between combatants and civilians. Given the virus's potency, States have a responsibility to deliver or allow aid organizations to deliver protective gear and treatment. Failing to allow humanitarian access necessarily increases the exposure of civilians to a virus that has already taken the lives of too many.

C. Treatment of Detainees

In settings of armed conflict, those subject to wartime detention may face circumstances that leave them vulnerable to COVID-19. These include inadequate medical services, overcrowding, lack of adequate ventilation, and pre-existing health conditions lowering their resistance to the disease. South Sudan, where armed conflict has persisted since 2014, illustrates the challenges: The government's National Security Service (NSS) operates outside of official state structures and has arbitrarily detained alleged political opponents and other civilians in facilities where these individuals have been subject to abuse and substandard conditions.¹⁰³ According to Human Rights Watch, these locations lack adequate medical care and are overcrowded and unsanitary.¹⁰⁴ Government efforts to reduce overcrowding in regular prisons in early 2020 did not include the NSS's detention facilities, putting NSS detainees at even greater risk.¹⁰⁵

Another example can be found closer to home. At the United States' military base at Guantánamo Bay, many of the 40 detainees who remained as the pandemic hit were of advanced age and in poor health, leaving them particularly at risk if they were to contract COVID-19.¹⁰⁶ In early 2020, two U.S. service members serving at the base tested positive for the virus, and observers warned that an outbreak among the detainees could be catastrophic.¹⁰⁷ The pandemic thus put the U.S. at risk of violating its duties

103. See U.N.S.C., Letter dated 28 April 2020 from the Panel of Experts on South Sudan addressed to the President of the Security Council, ¶ 29, U.N. Doc. S/2020/342 (Apr. 28, 2020); see also *Sub-Saharan Africa: Protect Detainees at Risk of COVID-19, Unclog Prisons and Release Prisoners of Conscience*, AMNESTY INT'L (Apr. 20, 2020), <https://www.amnesty.org/en/latest/news/2020/04/subsaharanafrica-protect-detainees-at-risk-of-covid-unclog-prisons-and-release-prisoners> [<https://perma.cc/CD9A-7LNJ>].

104. Nyagoah Tut Pur, *COVID-19 Threatens South Sudan's At-Risk Populations*, HUM. RTS. WATCH (Mar. 24, 2020), <https://www.hrw.org/news/2020/03/24/covid-19-threatens-south-sudans-risk-populations> [<https://perma.cc/6T4U-T5FH>].

105. Diing Magot, *South Sudan Frees Some Prisoners*, VOA NEWS (Apr. 19, 2020), <https://www.voanews.com/covid-19-pandemic/south-sudan-frees-some-prisoners> [<https://perma.cc/D4T2-CK7U>].

106. See Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html> [<https://perma.cc/XB8N-8YP2>]; *Deprivation and Despair: The Crisis of Medical Care at Guantánamo*, CTR. FOR VICTIMS TORTURE 7, (June 26, 2019), <https://phr.org/wp-content/uploads/2019/06/2019-PHR-CVT-Guantanamo.pdf> [<https://perma.cc/LX6G-TTKB>].

107. See Sacha Pfeiffer, *As Pandemic Halts the Military Court at Guantánamo, Critics Call for Its Closure*, WPRL 91.7 FM THE GOLD (May 22, 2020), <https://www.wprl.org/post/pandemic-halts-military-court-guant-namo-critics-call-its-closure> [<https://perma.cc/5WNH-BDZ7>]; Scott Roehm, *Guantánamo's COVID-19 Precautions Must Safe-*

toward the detainees, despite its longstanding position that military detention operations at the base are compliant with IHL.¹⁰⁸ The Department of Defense initially planned to offer vaccinations to the detainees in January 2021, but it suspended that plan, apparently due to political pressure, in a move that arguably violated its legal obligations to the detainees.¹⁰⁹ It was not until April 2021 that the U.S. military finally reported that 32 of the 40 detainees had received at least the first dose of a COVID-19 vaccine.¹¹⁰

This Section examines, first, the obligations of participants in IACs, before turning to those of belligerents in NIACs. The Section closes with an assessment of what these obligations mean in the COVID-19 context.

1. Principles Governing Detention in IACs

The relevant treaty provisions that govern the treatment of detainees in an IAC are mostly contained in GCs III and IV.¹¹¹ Prisoners of war are entitled to both general and specific guarantees of health and hygiene.¹¹² In particular, “the Detaining Power is responsible for the treatment” given to prisoners of war; “[p]risoners of war must at all times be humanely treated,” and they must be afforded “every guarantee of hygiene and healthfulness.”¹¹³ In addition, interned civilians are entitled to “the medical attention required by their state of health.”¹¹⁴

The detaining power also has a duty to implement certain sanitary measures in its POW camps. The detaining power “shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics. Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene.”¹¹⁵ Moreover, “medical inspections of prisoners of war shall be held at least once a month” to “supervise the general state of health, nutri-

guard Detainees’ Rights, JUST SECURITY (Mar. 31, 2020), <https://www.justsecurity.org/69468/guantanamos-covid-19-precautions-must-safeguard-detainees-rights> [<https://perma.cc/VEL7-QYMW>].

108. See Letter from Kevin K. Sullivan, Interim Permanent Representative, United States Permanent Mission to the Organization of American States, to Mr. Paulo Abrão, Executive Secretary, Inter-American Commission on Human Rights 5, Dec. 23, 2016, <https://www.state.gov/wp-content/uploads/2019/05/16.w-Ameziane-Pet%E2%80%99n-No.-12.865-U.S.-Further-Response-of-the-United-States-Dec.-23-2016.pdf> [<https://perma.cc/6CVA-S6YQ>].

109. Ryan Goodman, Oona Hathaway & Steve Vladeck, *Why Guantánamo Detainees Should Have Access to COVID Vaccines Part I: Law of Armed Conflict and Good Policy*, JUST SECURITY (Feb. 1, 2021), <https://www.justsecurity.org/74470/why-guantanamo-detainees-should-have-access-to-covid-vaccines-law-of-armed-conflict-and-good-policy/> [<https://perma.cc/M5Z7-QHQZ>].

110. Ben Fox, *US military: 32 of 40 Guantánamo Prisoners Now Vaccinated*, REUTERS (Apr. 20, 2021), <https://apnews.com/article/politics-cuba-health-united-states-government-and-politics-01faf57e94c71edc0bd242e9a903dd70> [<https://perma.cc/UUH7-KWJ4>].

111. GC III, *supra* note 38; GC IV, *supra* note 43.

112. GC III *supra* note 38, art. 12.

113. *Id.* art. 12-13, 22; see also 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 435-37.

114. GC IV, *supra* note 43, art. 76.

115. GC III, *supra* note 38, art. 29.

tion and cleanliness of prisoners and to detect contagious diseases.”¹¹⁶ The detaining power has a duty to ensure that the camps meet specified minimum standards for the conditions of detention.¹¹⁷

The detaining power must further ensure that the camp has a suitable physical infrastructure to attend to medical emergencies, including disease outbreaks. Every camp “shall have an adequate infirmary where prisoners of war may have the attention they require”¹¹⁸ and “every place of internment shall have an adequate infirmary, under the direction of a qualified doctor” with “isolation wards . . . set aside for cases of contagious or mental diseases.”¹¹⁹ Camp buildings and quarters also must meet certain hygienic standards. The detaining power “is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health.”¹²⁰

2. Principles Governing Detention in NIACs

IHL provides detainees in a NIAC context both general and specific guarantees of hygiene and health. The Geneva Conventions’ Common Article 3 provides a broad and non-derogable guarantee of proper detainee treatment, stating that “[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”¹²¹ It specifies, moreover, that the “wounded and sick shall be collected and cared for.”¹²²

Similarly, AP II articulates a broad guarantee of proper treatment: The wounded “shall be respected and protected,” shall in all circumstances “be treated humanely,” and shall “receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”¹²³ It also contains more specific guarantees of proper detainee treatment: It extends to “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” the same health and hygiene protections afforded to the “local civilian population.”¹²⁴ Detainee treatment is tied to the standard enjoyed by the local civilian population, but that treatment may not fall below the basic, funda-

116. *Id.* art. 31.

117. *See, e.g., id.* art. 25 (quarters); *id.* arts. 26, 27 (food rations, clothing); GC IV, *supra* note 43, arts. 89, 90; *see also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 428-31.

118. GC III, *supra* note 38, art. 30.

119. GC IV, *supra* note 43, art. 91.

120. *Id.* art. 85.

121. GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

122. GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

123. AP II, *supra* note 55, art. 7.

124. *Id.* art. 5(1)(b); *see also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 40, at 428-31, 435-37.

mental guarantees of humane treatment under IHL.¹²⁵ Moreover, the detaining authorities shall, “within the limits of their capabilities,” provide detainees with “the benefit of medical examinations” and ensure that detainee “physical or mental health and integrity shall not be endangered by any unjustified act or omission.”¹²⁶

3. *Detainee Treatment in the COVID-19 Context*

How do these IHL guarantees of proper treatment apply in the context of COVID-19? The specificity of the answer depends significantly on whether the conflict is an IAC or a NIAC, but the broad principles are the same.

The IAC context is tightly regulated: Detainees are to enjoy sanitary procedures and a basic level of goods and infrastructure in the camps. A detaining power must take measures to prevent epidemics.¹²⁷ In the COVID-19 context, this would mean providing personal protective equipment such as face masks and building detention facilities that have enough space for adequate social distancing. Detaining powers are obligated to conduct regular medical inspections of POWs. Civilian internees who manifest symptoms of COVID-19 should be quarantined in an isolation ward and provided with adequate medical treatment; POWs manifesting symptoms should also be quarantined.¹²⁸ Lastly, the ICRC and other aid organizations can offer humanitarian relief; the detaining power is arguably obligated to consent to humanitarian relief if it cannot meet the health needs of detainees on its own.¹²⁹

The NIAC context is less tightly regulated, though detainees are still entitled to “medical examinations,” proper treatment, and to a basic standard of health and hygiene. If detainees are infected with COVID-19, they are entitled to the appropriate medical care to the greatest practicable extent.¹³⁰ If feasible, the detaining party should provide the medical facilities at a detention camp with respirators, oxygen tanks, and other equipment commonly used to deal with COVID-19 cases. The detaining power must also, to the extent practicable, organize medical examinations and ensure the health of detainees. At the very least, detaining powers should ensure that detention facilities are large enough to allow for adequate social distancing and that basic protective equipment, such as masks, is provided. Lastly, detainees in the NIAC context must be afforded the same COVID-19 protections as the local civilian population, including access to vaccination. As in IACs, humanitarian bodies can offer their services to the parties to a NIAC, and the detaining party is arguably obligated to consent to humanitarian relief if it cannot meet the health needs of detainees on its

125. See AP II, *supra* note 55, art. 7.

126. *Id.* arts. 5(2)(d)-(e).

127. GC III, *supra* note 38, art. 29.

128. *Id.* art. 30; GC IV, *supra* note 43, art. 91.

129. See *id.* art. 9.

130. AP II, *supra* note 55, art. 7.

own.¹³¹

II. International Human Rights

International human rights law governs the behavior of States towards individuals both within their territory and, to a lesser extent, abroad. Three bodies of human rights law are particularly relevant during the COVID-19 pandemic: the law governing the right to life, the law governing the right to health, and the law governing civil and political rights. This Part examines whether and under what circumstances the failure by many States to effectively respond to the pandemic might have violated the right to life or right to health of those who, as a result, were infected or killed by the virus. It examines, too, whether States that used the pandemic as a basis for suppressing civil or political rights—for example, suspending elections or prohibiting political protests—violated their human rights obligations in the process.

A. Right to Life

Many States have failed to ensure that all individuals under their jurisdiction can live with security and dignity in the face of COVID-19. States' shortcomings in protecting populations under their care from the threat of COVID-19 may violate a fundamental right in international human rights law: the right to life. This right, included in a number of core human rights treaties, must not be infringed.¹³² This Section first outlines the right to life as it is defined in various human rights conventions. It then considers the scope of State obligations related to the right in the context of the COVID-19 pandemic. In light of claims that countries are culpable for the virus's impact on other States when they have failed to prevent COVID-19's spread beyond their borders, this Section also evaluates the extraterritorial reach of the right to life and its application to the current pandemic.¹³³

1. *The Right to Life, as Defined and Protected by International Law*

The right to life is a fundamental, foundational principle of international human rights law under both customary international law and treaty law.¹³⁴ The non-binding Universal Declaration of Human Rights

131. See GC I, *supra* note 43, art. 3; GC II, *supra* note 43, art. 3; GC III, *supra* note 38, art. 3; GC IV, *supra* note 43, art. 3.

132. U.N. OFF. HIGH COMM'R, THE CORE INTERNATIONAL HUMAN RIGHTS TREATIES, at 4, 60, 122, 224, 277, U.N. Sales No. E.14.XIV.1 (2014), https://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf (documenting the express “right to life” in the “core international human rights treaties”) [<https://perma.cc/6FEQ-MB9M>].

133. David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?* JUST SECURITY (Mar. 27, 2020), <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations> [<https://perma.cc/9B7Q-VJ6J>].

134. Christof Heyns & Thomas Probert, *Securing the Right to Life: A Cornerstone of the Human Rights System*, EUR. J. INT'L L. [EJIL] BLOG: TALK! (May 11, 2016), <https://>

(UDHR) states that “everyone has the right to life, liberty, and security of person.”¹³⁵ The International Covenant on Civil and Political Rights (ICCPR), which has 173 parties, provides that “every human being has the inherent right to life,” which is to be “protected by law,” and that “no one shall be arbitrarily deprived of his life.”¹³⁶ Further, the Convention on the Rights of the Child (CRC), which has 196 parties, states that “States Parties recognize that every child has the inherent right to life.”¹³⁷

Regional human rights treaties also entrench the right to life. The American Convention on Human Rights (ACHR) affirms that “[e]very person has the right to have his life respected.”¹³⁸ The European Convention on Human Rights (ECHR) similarly states that “everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”¹³⁹ The African Charter on Human and Peoples’ Rights states that “human beings are inviolable.”¹⁴⁰ “Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”¹⁴¹

As a non-derogable right in the ICCPR, the right to life cannot be suspended even in a state of emergency.¹⁴² The African Commission on Human and Peoples’ Rights has similarly held the right to life to be non-derogable.¹⁴³ However, the right to life is not an unbounded right, as provisions of human rights conventions provide leeway for authorities to use deadly force in their pursuit of justice or security. Article 2(2) of the ECHR, for example, provides that “[d]eprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary.”¹⁴⁴

www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/ (“The right to life has been described as the ‘supreme’ or ‘foundational’ right.”) [https://perma.cc/22SQ-7UDD].

135. Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Dec. 10, 1948 [hereinafter UDHR].

136. International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

137. Convention on the Rights of the Child art. 6(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

138. Organization of American States, American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

139. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

140. African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

141. *Id.*

142. ICCPR, *supra* note 136, art. 4(2).

143. General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), African Commission on Human and Peoples’ Rights, ¶ 1, Dec. 12, 2015, https://www.achpr.org/public/Document/file/English/general_comment_no_3_english.pdf [https://perma.cc/3MQC-XH95].

144. ECHR, *supra* note 139, art. 2(2); *see also* ICCPR, *supra* note 136, art. 6(2).

2. The Right to Life During a Pandemic

The U.N. Human Rights Committee, the body of independent experts established to monitor implementation of the ICCPR, has stressed that the right to life, as expressed in the ICCPR, should not be “interpreted narrowly;” accordingly, individuals are entitled “to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”¹⁴⁵ Critically, the Committee suggests States Parties “should 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,” conditions that may include “the prevalence of life-threatening diseases.”¹⁴⁶ It also notes that “[t]he duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health.”¹⁴⁷ In *Toussaint v. Canada*, the Committee specifically held that Canada’s exclusion of undocumented immigrants from a federal health care program violated the right to life, among other rights; the Committee found that the duty to respect the right to life “extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.”¹⁴⁸

Parties to adjudication in the European Court of Human Rights (ECtHR) have invoked the right to life across a range of issues, including in the health care context. In *Powell v. United Kingdom*, the ECtHR wrote, “[I]t cannot be excluded that the acts and omissions of . . . [state] authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2.”¹⁴⁹ And, in *Cyprus v. Turkey*, the ECtHR observed that “an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally.”¹⁵⁰ A State authority is obligated, the Court continued, to take “appropriate steps to safeguard the lives of those within its jurisdiction.”¹⁵¹ Further, in *Stoyanovi v. Bulgaria*, the ECtHR broadly interpreted the Convention’s right to life provision as sometimes requiring the authorities to take preventive

145. General Comment No. 36 on ICCPR Article 6: The Right to Life, U.N. Hum. Rts. Comm., ¶ 3 (Sept. 3, 2019), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/36&Lang=EN [<https://perma.cc/X4GY-48Z4>].

146. *Id.* ¶ 26.

147. *Id.* ¶ 25.

148. U.N. Hum. Rts. Comm., Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2348/2014, U.N. Doc. CCPR/C/123/DR/2348/2014 (Aug. 7, 2018), https://www.escr-net.org/sites/default/files/caselaw/toussaint_judgment.pdf [<https://perma.cc/XWN7-TQ83>].

149. *Powell v. United Kingdom*, App. No. 45305/99, Eur. Ct. H.R. (2000), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-5215%22%5D%7D> [<https://perma.cc/E95K-XSME>].

150. *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. 219 (2001), <http://hudoc.echr.coe.int/eng?i=001-59454> [<https://perma.cc/3TFY-K4EZ>].

151. *Id.*

operational measures; the Court suggested that such measures are necessary in “dangerous situations of specific threat to life which arise exceptionally from risks posed by . . . man-made or natural hazards.”¹⁵²

3. *Application in the Context of COVID-19*

States have at least minimal obligations to protect the lives of their inhabitants through taking steps to address clear health threats to the population, such as the deadly COVID-19 virus. For instance, as noted above, the U.N. Human Rights Committee states that the right to life obligates ICCPR States Parties to “address . . . life-threatening diseases.”¹⁵³ Further, as Alessandra Spadaro points out, the Committee articulates a “due diligence obligation” for States to “undertake reasonable positive measures . . . in response to reasonably foreseeable threats to life originating from private persons and entities.”¹⁵⁴ While this due diligence obligation is presented in the context of physical threats by armed groups or criminals, Spadaro suggests the duty could also entail “protecting individuals from threats to life posed by others carrying an infectious and deadly disease, such as COVID-19.”¹⁵⁵ These readings of the ICCPR’s right to life provision square neatly with other authoritative bodies’ interpretation of the right to life as it appears in other instruments. For instance, as Elizabeth Stubbins Bates has explained, the ECtHR’s *Stoyanovi* decision and other opinions of that court suggest that States Parties to the ECtHR may have a positive duty to plan for pandemic response so that lives can be saved once public health emergencies arise.¹⁵⁶

The failure of a State to take at least minimal steps to protect its population from the spread of COVID-19 arguably violates the right to life of those who become infected and die. The precise scope of this positive obligation is not clear, but it likely does not mean that States are required to establish lockdown measures or mandatory masking policies. On the other hand, it likely *does* mean that States at least have a duty to not knowingly contribute to the spread of the virus. For instance, States should ensure first responders and health care workers have access to necessary personal protective equipment (especially masks) to protect themselves and those they serve. Moreover, the right to life might be violated by denying access to health care essential to treating those at risk of losing their lives to the pandemic. The right to life does not guarantee universal access to

152. *Stoyanovi v. Bulgaria*, App. No. 42980/04, Eur. Ct. H.R. 61 (2011), <http://hudoc.echr.coe.int/eng?i=001-101678> [<https://perma.cc/E6ZW-55H5>].

153. General Comment No. 36, *supra* note 145, ¶ 3.

154. Alessandra Spadaro, *COVID-19: Testing the Limits of Human Rights*, EUR. J. RISK REG. 1-9 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7211800/#fn7> [<https://perma.cc/2LZ2-QSRE>].

155. *Id.*

156. Elizabeth Stubbins Bates, *COVID-19 Symposium: Article 2 ECHR’s Positive Obligations—How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?* OPINIO JURIS (Apr. 1, 2020), <https://opinio-juris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/> [<https://perma.cc/THM3-MH69>].

health care, of course. But the ICCPR arguably does require States to provide a minimal access to health care in order to fulfill the right to life.¹⁵⁷

There is also clarity on some minimum State obligations: U.N. human rights experts have specified that any lifesaving COVID-19 interventions must not discriminate among social groups.¹⁵⁸ For instance, access to the vaccine must be provided without invidious discrimination. States also have a heightened responsibility to protect the right to life of those they detain. As noted above, the Human Rights Committee has concluded that the duty to protect the life of detained individuals includes providing necessary medical care and monitoring of their health.¹⁵⁹ In the United States, for example, incarcerated people have been infected by COVID-19 at rates five times that of the general population, and the death rate of those incarcerated is higher than the national death rate.¹⁶⁰ Given this greater level of vulnerability of incarcerated populations, and the difficulty they have protecting themselves from infection (they obviously cannot self-quarantine), States have heightened obligations to protect them. This means that incarcerated or detained persons should be provided essential protective equipment (masks) and that social distancing and other measures should be instituted to limit the spread of the virus. Those who are infected should be quarantined away from the rest of the population of those detained and should be provided adequate medical care. The detained should not be denied access to the vaccine, and there may be an obligation to at least ensure access equivalent to that available to the general population. As noted in Part III, these obligations extend, as well, to detention facilities for immigrants.

4. *States' Obligations Outside their Territories*

There have been accusations that some governments' inadequate responses to COVID-19 have allowed the virus to spread transnationally and harm populations abroad.¹⁶¹ It is therefore worth considering whether States' right to life obligations apply outside their own borders—that is, extraterritorially.

157. General Comment No. 36, *supra* note 145.

158. Press Release, Office of the U.N. High Commissioner for Human Rights, No Exceptions with COVID-19: "Everyone Has the Right to Life-Saving Interventions" - U.N. Experts say (Mar. 26, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=&fbclid=IWAR1vFZDTrmlWSQXRq5BMJF3144OrKv9HRQevSO_SH1mqOEJXcXDM4KqUHM4 [<https://perma.cc/DH26-S3HQ>].

159. General Comment No. 36, *supra* note 145, ¶ 25.

160. *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://ej.org/news/covid-19s-impact-on-people-in-prison/> [<https://perma.cc/MT9F-QQL9>].

161. See, e.g., Psmhe Wadud, *Is China Responsible for Health Crises Beyond its Borders?* OPINIOJURIS (July 5, 2020), <http://opiniojuris.org/2020/07/05/is-china-responsible-for-health-crisis-beyond-its-borders/> [<https://perma.cc/4DKF-YKW8>]; Nader Ibrahim, Owen Pinnell & Manisha Ganguly, *Coronavirus by Air: The Spread of Covid-19 in the Middle East*, BBC NEWS (May 5, 2020), <https://www.bbc.com/news/av/world-middle-east-52537663> [<https://perma.cc/E7LY-VFF5>].

There is significant disagreement over the scope of extraterritorial obligations under the primary treaty that establishes the right to life—the ICCPR. Article 2(1) requires a State Party to respect the rights of individuals “within its territory and subject to its jurisdiction.”¹⁶² Some States, including the United States, have taken the view that the ICCPR does not apply extraterritorially.¹⁶³ The Human Rights Committee, however, has concluded that the obligations under the treaty extend to “those within the power or effective control of the forces of the State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.”¹⁶⁴ The Committee has also specified that States have an obligation to “ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory . . . are consistent with” ICCPR Article 6.¹⁶⁵

The ICJ recognized in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* that State obligations under a number of human rights conventions—including the ICCPR, CRC, and Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)—apply “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”¹⁶⁶ Regional courts and conventions take varying approaches to the question of extraterritoriality. The ECtHR clarified in *Al-Skeini v. United Kingdom* that the ECHR obliges States Parties exercising “effective control” in foreign territory to secure the rights and freedoms identified in the Convention for individuals subject to that control.¹⁶⁷ In *Coard et al. v. United States*, the Inter-American Commission on Human Rights similarly recognized that “jurisdiction” may “refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one State, but subject to the control of another State.”¹⁶⁸ Meanwhile, the African

162. ICCPR, *supra* note 136, Art. 2(1).

163. See Kevin Jon Heller, *Does the ICCPR Apply Extraterritorially?* OPINIOJURIS, (July 18, 2006), <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/> [<https://perma.cc/59GR-R4L6>].

164. General Comment No. 31 on the ICCPR, U.N. Hum. Rts. Comm., ¶ 10 (Mar. 29, 2004), docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPFRiCAqhKb7yhsjYoiCFMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEjw%2FGeZRASjdFuuJQRnbjEaUhby31WiQP12mLFDe6ZSwMMvmQGVHA%3D%3D [<https://perma.cc/XGZZ-L94P>].

165. General Comment No. 36, *supra* note 145, ¶ 22.

166. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶ 111 (July 9), <https://www.un.org/unispal/document/auto-insert-178825/> [hereinafter *Israeli Wall Advisory Opinion*] [<https://perma.cc/MW9V-B3DY>].

167. See *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/fre?i=001-105606> [<https://perma.cc/GRN4-8BCY>]; ECHR, *supra* note 139, Art. 1.

168. *Coard et al. v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶ 37 (1999), <http://www.cidh.oas.org/annualrep/99eng/Merits/United-States10.951.htm> [<https://perma.cc/S8HE-NE9A>].

Charter on Human and People's Rights does not have a provision explicitly tying duties to State jurisdiction,¹⁶⁹ which some scholars have pointed out suggests that the Charter's duties may apply extraterritorially.¹⁷⁰

As a result of the limited extraterritorial effect of human rights obligations described above, States have a limited duty to protect the lives of foreign nationals abroad from the COVID-19 threat and to refrain from "acts and omissions" that leave other populations susceptible to the virus. A State Party to the ICCPR exerting effective control of or asserting authority over foreign territory or persons would, under most readings of the ICCPR, be expected to ensure that State policies do not knowingly contribute to "unnatural or premature" deaths during a pandemic. Thus, administering powers of non-self-governing territories, such as the Falkland Islands, American Samoa, and French Polynesia, would likely be obliged to protect the right to life of individuals in those territories by containing the spread of COVID-19 and providing minimum adequate care to infected individuals.¹⁷¹ The same is likely true of the U.S. military base and detention center located at Guantánamo Bay, Cuba.¹⁷²

B. Right to Health

Nearly all States have found it difficult to protect their populations from COVID-19 and prevent its transmission within and beyond their borders. Some States, however, have displayed particularly abysmal responses, leading to widespread infection and deaths. In Brazil, for example, President Jair Bolsonaro's deliberate efforts to publicly deny the magnitude of the COVID-19 threat to the domestic population undermined public understanding of the disease's severity.¹⁷³ That denialism contributed to a population-adjusted COVID-19 mortality rate that is one of the highest in the world.¹⁷⁴ According to one estimate, more than 400,000 additional

169. African Charter, *supra* note 140.

170. See, e.g., Werner Scholtz, *Human Rights and the Environment in the African Union Context*, RSCH. HANDBOOK ON HUM. RTS. & ENV'T, 401-420 (2015), https://ideas.repec.org/h/elg/eechap/15280_19.html [<https://perma.cc/N3UM-4JX2>].

171. See *Non-Self-Governing Territories*, U.N. DEP'T POL. & PEACEBUILDING AFF., <https://www.un.org/dppa/decolonization/en/nsgt> [<https://perma.cc/3WSU-RR4D>].

172. The U.N. Human Rights Commission determined the United States' ICCPR duties (including protection of the right to life) extend to Guantánamo, a position the U.S. continues to reject. See Rep. of the Special Procedure of the Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006), <https://digitallibrary.un.org/record/570963?ln=EN> [<https://perma.cc/LLN6-RML5>]. The U.S. has agreed, however, that the Convention Against Torture extends to its base on Guantánamo; see also Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014), <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> [<https://perma.cc/4F3P-FTS5>].

173. Amy Roeder, *Lack of Federal Leadership Hinders Brazil's COVID-19 Response*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH (June 25, 2020), <https://www.hsph.harvard.edu/news/features/brazil-covid-marcia-castro/> [<https://perma.cc/T5LD-7RWG>].

174. *Mortality Analyses*, JOHNS HOPKINS UNIVER. & MEDICINE: CORONAVIRUS RES. CTR. (Jan. 15, 2021), <https://coronavirus.jhu.edu/data/mortality> [<https://perma.cc/EJP2-GA49>].

Brazilians died as a result of the disastrous response.¹⁷⁵ The Indian government's response, too, has been so terrible that Arundhati Roy has called it a "crime against humanity."¹⁷⁶ This Section examines whether such policy failures might implicate States' obligations to protect the international right to health. It first summarizes how human rights conventions define the right to health. It then considers States' obligations to protect this right in the context of the ongoing pandemic. It also considers whether and how this right extends extraterritorially.

1. *The Right to Health, as Defined and Protected by International Law*

Numerous international declarations and conventions articulate a human right to health. The non-binding UDHR specifies that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."¹⁷⁷ The right to health is most thoroughly conceptualized in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which has 171 parties. It stipulates that States Parties "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"¹⁷⁸ and shall take the steps necessary to progressively "achieve the full realization of this right."¹⁷⁹ The WHO Constitution, to which more than 190 States are party, declares that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."¹⁸⁰

A number of other treaties also provide protections for health to ensure health care interventions are inclusive, equitable, and non-discriminatory. The CRC and the Convention on the Rights of Persons with Disabilities (CRPD) provide respectively that children and people with disabilities should enjoy the "highest attainable standard of health" without discrimination.¹⁸¹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) specifies States Parties are to take "appropriate measures to eliminate discrimination against women in the field of health care in order to ensure . . . access to health care ser-

175. Vanessa Barbara, *We Knew Bolsonaro Was Guilty*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/28/opinion/bolsonaro-brazil-report.html> [<https://perma.cc/3VQ5-D6TE>].

176. See Roy, *supra* note 18. It likely does not, in fact, meet the legal standard for a "crime against humanity."

177. UDHR, *supra* note 135, art. 25.

178. International Covenant on Economic, Social, and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 171 [hereinafter ICESCR].

179. ICESCR, United Nations Treaty Collection (Jan. 15, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en [<https://perma.cc/A285-MMZ6>].

180. Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185.

181. See CRC, *supra* note 137, art. 24(1); see also Convention on the Rights of Persons with Disabilities art. 25, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

vices.”¹⁸² Further, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) creates a duty on States Parties to ensure equality in the enjoyment of “the right to public health, medical care, social security and social services.”¹⁸³

Regional human rights conventions also inform the conception of the right to health and its scope in international law. The American Declaration of the Rights and Duties of Man notes in Article XI that “every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.”¹⁸⁴ Additionally, the African Charter on Human and Peoples’ Rights stipulates in Article 16 that “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health.”¹⁸⁵ While the ECHR does not explicitly articulate a right to health, it has served as the basis for health-related claims before the ECtHR.¹⁸⁶ ECtHR case law has generally established that agents of contracting States must “refrain from acts or omissions of a life-threatening nature, or which place the health of individuals at grave risk,” and “refrain from treatment which damages a person’s physical health.”¹⁸⁷

2. *The Right to Health During a Pandemic*

The ICESCR requires States Parties to take steps necessary for “the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases.” The Committee on Economic, Social and Cultural Rights’ has clarified that the right to treatment entails “the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards.”¹⁸⁸ While the obligation to prevent, treat, and control epidemics is not among the obligations the General Comment identifies as “core” and non-derogable, the Committee has said it is of “comparable priority.”¹⁸⁹ States that have signed but not yet ratified the ICESCR (the United States, Cuba, Palau, and the Comoros) must not take actions contrary to the

182. Convention on the Elimination of All Forms of Discrimination Against Women art. 12, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

183. International Convention on the Elimination of Racial Discrimination art. 5(e), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

184. American Declaration of the Rights and Duties of Man art. XI, O.A.S. Doc. OEA/ser.L./V./I.4 (1948).

185. African Charter, *supra* note 140, art. 16.

186. TAMARA K. HARVEY & JEAN V. McHALE, EUROPEAN UNION HEALTH LAW: THEMES AND IMPLICATIONS 160 (Cambridge Univ. Press 2015), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8BEEDFFF1797476E48F9324E9D4FC5F7/9780511862410c7_p156-183_CBO.pdf/rights_health_rights_as_human_rights.pdf [<https://perma.cc/DVV9-YBCR>].

187. See *Thematic Report: Health-Related Issues in the Case-Law of the European Court of Human Rights* 5, EUR. CT. H.R. (2015), https://www.echr.coe.int/Documents/Research_report_health.pdf [<https://perma.cc/L6AR-8W4P>].

188. See General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), CESCR, ¶ 16 (Aug. 11, 2000), <https://www.refworld.org/pdfid/4538838d0.pdf> [<https://perma.cc/8PBF-DUZG>].

189. See *id.* at ¶ 44.

“object and purpose” of the treaty.¹⁹⁰ More broadly, the Committee also advanced four fundamental elements of the right to health: *availability* of health care facilities, goods and services in sufficient quantity; *accessibility*, in terms of non-discrimination, physical access, affordability, and access to information; *acceptability*, such that health care is ethical and culturally respectful; and the provision of health care of appropriate *quality*.¹⁹¹ These elements remain pertinent in all contexts of health provision, including pandemic response.

Regional human rights bodies have affirmed that corresponding conventions establish positive obligations related to the right to health that apply during a pandemic.¹⁹² For instance, the ECtHR held in *Asiye Genc v. Turkey* that Turkey had not taken “sufficient care” to ensure its health system functioned appropriately.¹⁹³ The Inter-American Court of Human Rights (IACtHR) also found in *Poblete Vilches and Others v. Chile* that the right to health is a right found within the economic, social, cultural, and environmental rights guaranteed by Article 26 of the American Convention on Human Rights,¹⁹⁴ and it faulted the Chilean government for inadequate health care in its public hospitals that resulted in a tragic death.¹⁹⁵

In addition to the positive obligation under the ICESCR, “there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible” and States Parties should refrain from “interfering directly or indirectly with the enjoyment of the right to health.”¹⁹⁶ International courts have referred to this negative duty of

190. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf [<https://perma.cc/BE7U-JFVY>].

191. General Comment No. 14, *supra* note 188, at ¶ 12.

192. See Haniya Hasan, *Is an Ineffective State Response to COVID-19 a Violation of Human Rights?* OPINIOJURIS (June 16, 2020), <http://opiniojuris.org/2020/06/16/is-an-ineffective-state-response-to-covid-19-a-violation-of-human-rights/> [<https://perma.cc/6FKW-4BQ5>]; see also Sascha Dov Bachmann & Joachim Sanden, *COVID-19 And The Duty of A State to Protect the Public’s Health and Security During A Pandemic - A European Convention on Human Rights Perspective*, *INDONESIAN J. INT’L. COMPAR. L.* 7(3), 407-30, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3688784 [<https://perma.cc/UL74-P7KL>].

193. *Asiye Genc v. Turkey*, Eur. Ct. H.R. 80 (2015). Some argue that despite the absence of an explicit right to health in the ECHR, prior Court judgments can be read to impose a positive duty of health protection based on the right to liberty and security. See Bachmann & Sanden, *COVID-19 And the Duty of a State to Protect the Public’s Health and Security During A Pandemic*, *INDONESIAN J. INT’L. COMPAR. L.* 7(3), 407-30.

194. See *Poblete Vilches and Others v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349, ¶ 100-17 (Mar. 8, 2018); see also ACHR, *supra* note 138, art. 26.

195. See *Inter-American Court Finds Right to Health Violation in the Context of Emergency Medical Services*, ESCR-NET, <https://www.escr-net.org/caselaw/2019/poblete-vilches-and-others-v-chile> [<https://perma.cc/E68T-GACM>]; General Comment No. 14, *supra* note 188, ¶ 12. The Inter-American Commission on Human Rights has also granted precautionary measures related to health and medical care in response to individual petitions; see also Luis Rolando Cuscul Pivaral et al. (Persons Living with HIV/AIDS), Case No. 12.484, Inter-Am. Comm’n H.R., Report No. 2/16, OEA/Ser.L/V/II.157, doc. 6 (2016).

196. General Comment No. 14, *supra* note 188, ¶¶ 32-33.

States to not infringe on the ability to access health care. The ICJ determined in the *Israeli Wall* advisory opinion that Israel's erection of a separation barrier between the West Bank and Israel restricts access to health services, and thus violates the ICESCR's right to health.¹⁹⁷ Some regional bodies' jurisprudence also underscores States' duties to refrain from negatively interfering with their citizens' health, as those obligations are formulated in corresponding regional human rights conventions. In *Social & Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, for example, the African Commission on Human and Peoples' Rights addressed the legal ramifications of environmental degradation stemming from the Nigerian government's involvement in oil production.¹⁹⁸ The Commission found that the government violated the African Charter's right to health by failing to take appropriate precautions and share information on health risks with the public.¹⁹⁹ In doing so, it emphasized that States Parties are "obliged to desist from directly threatening the health and environment of their citizens" in addition to taking affirmative measures to protect public health.²⁰⁰

3. *Application in the Context of COVID-19*

States Parties to the ICESCR have obligations to affirmatively protect the right to health of their populations during the COVID-19 pandemic. In an April 2020 statement, the ESCR Committee reiterated its guidance that States Parties establish urgent medical care systems in pandemics. The Committee called on States Parties to "make all efforts to mobilize the necessary resources to combat COVID-19 in the most equitable manner."²⁰¹ In so doing, it outlined several recommendations for States Parties in addressing the current pandemic. It suggested, for example, that States mobilize health care resources and ensure "a comprehensive, coordinated health-care response to the crisis."²⁰² It encouraged particular attention to marginalized and vulnerable groups, who are likely to suffer disproportionate negative effects of the pandemic. It further stated that workers should be protected from risks of contagion at work, measures should be adopted to address profiteering, and accessible information about the pandemic should be disseminated. These various steps to address COVID-19 would broadly embody the four elements of the right to health the Committee (and regional courts such as the IACtHR) had previously advanced.

197. *Israeli Wall Advisory Opinion*, *supra* note 166, at ¶ 134.

198. See *Social & Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, No. 155/96, Decision, African Commission on Human and Peoples' Rights (Oct. 17, 2001), https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf [hereinafter *SERAC and CESR v. Nigeria*] [<https://perma.cc/NGR7-R9QS>].

199. *Id.* ¶ 64.

200. *Id.* ¶ 52.

201. See *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights*, CESCR ¶ 14 (Apr. 11, 2020), <http://unsr.vtaulicorpuz.org/?p=2808> [<https://perma.cc/LQE2-6FFB>].

202. *Id.* ¶ 13.

At a minimum, States have negative obligations under the ICESCR to not jeopardize people's health during COVID-19 by diverting essential funds or medical supplies (including vaccines) toward illegitimate purposes. Further, providing or knowingly assisting in the distribution of faulty medical supplies or unsafe vaccines would likely violate the right to health; such actions would be similar to those the Nigerian government undertook that, according to the African Commission on Human and Peoples' Rights, directly threatened citizens' health.²⁰³ The right to health may also prohibit State actions during the pandemic that have a more indirect impact on individuals' health. For example, States should not disseminate misinformation about the virus that facilitates COVID-19's spread and endangers public health. While the extent of ICESCR signatory States' duties not to defeat the object and purpose of the treaty is less clear, it is reasonable to infer that governments of such States should at a minimum not undermine or counteract efforts to prevent, treat, or control COVID-19. Furthermore, States Parties to more specialized international human rights conventions, such as the CRC, CEDAW, CERD, and CRPD, also have obligations to ensure that health care responses to the virus are broad-based and do not deny treatment to certain ethnic or racial groups or on the basis of sex or disability, for instance. As the Office of the High Commissioner for Human Rights has clarified, "treatment [for COVID-19] should be available to everyone without discrimination, including the most vulnerable or marginalized."²⁰⁴

Governments may also have obligations to work toward an adequate COVID-19 response arising out of regional human rights treaty obligations. Regional bodies have sought to clarify State duties in light of COVID-19. As the pandemic emerged, the Inter-American Commission on Human Rights stated that the right to health requires States Parties to the American Convention to "provide timely, appropriate health care and treatment" during the current pandemic.²⁰⁵ In issuing this clarification, it extended the logic of the IACtHR's *Poblete Vilches* decision, in which the Court faulted a State for not providing health services in accordance with the right to health elements of availability, accessibility, acceptability and quality.

203. See *SERAC and CESR v. Nigeria*, *supra* note 198.

204. *COVID-19 Guidance*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx> (last visited Jan. 30, 2021) [<https://perma.cc/Z9LM-GZN6>]. See International Commission of Jurists, *Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses* (Sept. 2020), <https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf> [<https://perma.cc/99RG-BB4P>].

205. Press Release, Inter-American Commission on Human Rights, IACHR and OSRESCER Urge States to Guarantee Comprehensive Protection for Human Rights and Public Health during the COVID-19 Pandemic (Mar. 20, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/060.asp [<https://perma.cc/H48W-UFMJ>].

4. States' Obligations Outside their Territories

The scope of the extraterritorial reach of the right to health is highly contested, and there is little relevant case law that offers clarity. The ICESCR generally requires that States Parties “take steps individually and through international assistance and co-operation . . . with a view to achieving progressively the full realization” of the rights the Covenant identifies.²⁰⁶ As Todd Howland notes, “the ‘jurisdiction’ limitation that exists in the European Convention, the ICCPR and the American Convention on Human Rights is conspicuously absent in the International Covenant on Economic, Social and Cultural Rights.”²⁰⁷ Scholars have argued that the lack of a clear restriction of jurisdiction in the ICESCR suggests it was intended to have extraterritorial scope.²⁰⁸ Regarding extraterritorial duties in the context of a pandemic, the ESCR Committee has found collective *responsibility* for the control of transmissible diseases, implying wide extraterritorial application of the right: “[G]iven that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem.”²⁰⁹ Though it is not clear the ESCR Committee intended to establish a formal transboundary obligation on States Parties to assist other States in responding to pandemics, this statement underscored the value of such cooperation.²¹⁰

A group of international experts articulated a set of narrower, *negative* extraterritorial obligations related to economic, social, and cultural rights (including the right to health) in the non-binding 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.²¹¹ According to these principles, which draw on existing international law, all States have an obligation to respect such rights “of persons within their territories and extraterritorially”; to “refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories”; and to “refrain from any conduct which impairs the ability of another State . . . to comply with that state’s . . . obligations as regards economic, social and

206. See ICESCR, *supra* note 178, art. 2(1).

207. Todd Howland, *The Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights*, 35 DENVER J. INT'L. L. & POL'Y 389, 405 (2007), <https://digitalcommons.du.edu/djilp/vol35/iss3/4/> [<https://perma.cc/DQE6-HT45>].

208. See Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, in 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 359, 362 (A. von Bogdandy & R. Wolfrum eds., 2007), https://www.mpil.de/files/pdf1/mpunyb_14_coomans_11.pdf [<https://perma.cc/EW4P-ZC7S>].

209. General Comment No. 14, *supra* note 188, ¶ 40.

210. See Fons Coomans, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11 HUM. RTS. L. REV. 1-35, <https://www.corteidh.or.cr/tablas/r26506.pdf> [<https://perma.cc/GHW3-SU8B>].

211. ETO CONSORTIUM, *MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (2011), <https://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/> [<https://perma.cc/37DR-KU5B>].

cultural rights.²¹² Applying these principles to the COVID-19 pandemic, States Parties likely have a duty to work cooperatively with other nations to contain the COVID-19 threat.

In the April 2020 communication referenced above, moreover, the ESCR Committee outlined a number of obligations that States Parties to the ICESCR have in combatting COVID-19 not only within their own territory but extraterritorially as well. These include avoiding the obstruction of access to essential equipment, ensuring free flow of necessary goods, and alleviating financial burdens on developing countries.²¹³ States Parties to the ICESCR likely also have obligations to avoid impinging upon foreign populations' right to health. Consequently, States Parties are likely obligated to take reasonable steps to prevent infectious diseases from spreading beyond the State's territory, to not disseminate pernicious misinformation about the virus that can mislead and endanger foreign populations, and to refrain from deliberately weakening other governments' capacity to provide essential care to their populations, including through economic sanctions.

C. Civil and Political Rights

In response to COVID-19, many States have curtailed civil and political rights, including by limiting public gatherings, constraining freedom of movement, and requiring the disclosure of private medical information and location histories and close contacts. Though many of the constraints and disclosure requirements States have put in place are necessary to combat the pandemic, some governments have exploited the crisis to begin or continue assaults on civil and political rights.²¹⁴ This Section identifies some of the specific civil and political rights protected by the ICCPR that are under assault as governments respond to COVID-19. It focuses on four general categories: (1) restrictions on speech and assembly; (2) intrusions on privacy; (3) modifications to or delays in electoral processes; and (4) denials of justice and fair trial. While not exhaustive, these areas represent the most prevalent transgressions that are collectively producing a civil and political rights crisis amid a public health crisis.

Although this Section focuses on the ICCPR, other treaties also protect civil and political rights. While not legally binding, the UDHR broadly outlines fundamental civil and political rights.²¹⁵ The CERD and CEDAW both prohibit discrimination with respect to a number of rights, including those related to judicial processes and political participation.²¹⁶ And an array of regional treaties also provide significant protections for civil and

212. See *id.* ¶ 19–21.

213. See *Statement on the Coronavirus Disease (COVID-19)*, *supra* note 201.

214. See Fionnuala Ní Aoláin, Kate Brannen & Ryan Goodman, *Assessing Emergency Powers During #COVID-19*, JUST SECURITY (Apr. 22, 2020), <https://www.justsecurity.org/69806/assessing-emergency-powers-during-covid-19/> [<https://perma.cc/S5PF-GWPZ>]; *People Power Under Attack 2020*, CIVICUS MONITOR, <https://findings2020.monitor.civicus.org/index.html> [<https://perma.cc/4LT5-PG2W>].

215. UDHR, *supra* note 135.

216. See CERD, *supra* note 183; see also CEDAW, *supra* note 182.

political rights.²¹⁷ This Section, therefore, is meant as merely a starting point in assessing the ways in which civil and political rights are affected by the pandemic.

1. *Right of Speech and Peaceful Assembly*

ICCPR Article 21 requires that the “right of peaceful assembly” be recognized and allows restrictions on the exercise of this right only to the extent they are necessary “in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”²¹⁸ As the Human Rights Committee has indicated, States Parties are not to derogate from this provision to restrict peaceful assembly “if they can attain their objectives by imposing restrictions in terms of Article 21.”²¹⁹ Further, there must be a fair means for legally contesting official decisions to limit assembly.²²⁰ Separately, ICCPR Article 19 enshrines the rights to hold opinions without interference and to freedom of expression, though restrictions can be imposed for the protection of public health, among other aims.²²¹ The Human Rights Committee has made clear that individuals should be permitted to express and receive opinions regarding, among other subjects, political discourse and commentary on public affairs.²²²

Despite these clear stipulations, governments of States Parties have taken advantage of the need to prevent the spread of COVID-19 to also constrict political activity that poses a threat to the status quo. In Hong Kong (where the ICCPR applies), for instance, authorities denied demonstrators permission to organize a pro-democracy march on the grounds that such protests could further spread COVID-19.²²³ Protest leaders alleged that these were false pretenses, pointing out the city’s decision to open a local theme park.²²⁴ The official claim that restrictions were needed to protect public health created new barriers to demonstrations

217. See, e.g., ACHR, *supra* note 138, arts. 3-16; African Charter, *supra* note 140, arts. 2-13; ECHR, *supra* note 139, arts. 1-14.

218. See ICCPR, *supra* note 136, art. 21.

219. General Comment No. 37 on the Right of Peaceful Assembly (Article 21), U.N. Hum. Rts. Comm., ¶ 96 (Sept. 17, 2020), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f37&Lang=EN [<https://perma.cc/XLU4-MXCM>].

220. *Id.* ¶ 72.

221. ICCPR, *supra* note 136, art. 19.

222. General Comment No. 34 – Article 19: Freedoms of Opinion and Expression, U.N. Hum. Rts. Comm., ¶ 11 (Sept. 12, 2011), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=EN [<https://perma.cc/AW4Q-BRM8>].

223. See ICCPR, U.N. TREATY COLLECTION (Jan. 16, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_En&mtdsg_no=IV-4&src=IND [<https://perma.cc/7PUE-7YWZ>]; Chris Buckley, *What China’s New Security Law Means for Hong Kong*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/28/world/asia/china-hong-kong-national-security-law.html> [<https://perma.cc/2H94-QJU5>].

224. Richard Pyne, *Police Refuse Permission for July 1 March*, RTHK NEWS (June 27, 2020), <https://news.rthk.hk/rthk/en/component/k2/1534408-20200627.htm> [<https://perma.cc/N5JV-9XGJ>].

against China's National Security Law and the Hong Kong government's acquiescence thereto.

Governments have also imposed disproportionate restrictions on journalists reporting on the virus under the guise of limiting misinformation. In Sri Lanka, the government made public criticism of or disagreements with official policy an offense meriting arrest and took into custody at least a handful of individuals who allegedly posted false or misleading information about the pandemic or the government's response to it.²²⁵ In India, journalists critical of the government's public health response were arrested and charged with a variety of offenses.²²⁶ The government must "tackle the spread of pessimism, negativity and rumour," Prime Minister Modi told a group of top editors in July 2020.²²⁷ In total, as of October 2021, fifty-eight States have issued measures that affect expression and 153 have issued measures that affect assembly.²²⁸

Governments must judiciously balance efforts to contain COVID-19 with safeguarding liberties to speak and assemble and must not use the pandemic as a pretext for suppressing political opposition. As the Human Rights Committee reaffirmed, governments seeking to protect public health can restrict the rights to expression and peaceful assembly to protect individuals from COVID-19.²²⁹ However, these restrictions must be necessary for that purpose and must be in conformity with the law. As the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted, criminal penalization of disinformation related to the pandemic may be disproportionate and unlawful, and can be counterproductive in any regard.²³⁰ The Human Rights Committee also underscores that "freedom of expression . . . and a civic space where a public debate can be held" are not only inherently critical rights to be protected as States respond to COVID-19, but are also instrumentally important for ensuring States Parties are adhering to their other human rights

225. *Freedom of Expression during COVID-19*, LIBR. CONG. (Dec. 30, 2020), <https://www.loc.gov/law/help/covid-19-freedom-of-expression/srilanka.php?loclr=bloglaw> [<https://perma.cc/N9V4-8LVG>].

226. Danish Raza, *India Arrests Dozens of Journalists in Clampdown on Critics of Covid-19 Response*, GUARDIAN (July 31, 2020), <https://www.theguardian.com/global-development/2020/jul/31/india-arrests-50-journalists-in-clampdown-on-critics-of-covid-19-response> [<https://perma.cc/39KE-XCHY>].

227. *Id.*

228. *COVID-19 Civic Freedom Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/covid19tracker/> [<https://perma.cc/4S9K-Z9WP>].

229. *Compilation of Statements by Human Rights Treaty Bodies in the Context of COVID-19*, U.N. HUM. RTS. OFF. HIGH COMM'R (Sept. 2020), https://www.ohchr.org/Documents/HRBodies/TB/COVID19/External_TB_statements_COVID19.pdf [<https://perma.cc/75KS-B3FH>].

230. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Disease Pandemics and the Freedom of Opinion and Expression*, ¶ 42, U.N. Doc. A/HRC/44/49 (Apr. 23, 2020), https://www.ohchr.org/Documents/Issues/Opinion/A_HRC_44_49_AdvanceEditedVersion.docx [<https://perma.cc/L8F6-Z9E6>].

obligations.²³¹ Governments seeking to balance competing interests in protecting public health and civic space might look toward the ICCPR-compliant approach of Latvia, whose government formally derogated from Article 21 in prohibiting all public gatherings in March 2020, published a month-long extension of its derogation, and subsequently withdrew its derogation and eased restrictions in May 2020.²³²

2. Right to Privacy

ICCPR Article 17 prohibits States Parties from arbitrarily or unlawfully interfering with a person's "privacy, family, home or correspondence" and establishes a right to protection of the law against such interference.²³³ The Human Rights Committee has also clarified that "'arbitrary interference' can also extend to interference provided for under the law," and calls for technically lawful interference to comport with the aims of the Covenant.²³⁴ In this comment, the Committee recommends regulation of the collection and storage of individuals' personal information (whether done by government authorities or private entities) and calls on States to ensure such data is not used for purposes contrary to the Covenant.²³⁵

As of October 2021, sixty-one States have issued measures in response to the pandemic that affect privacy.²³⁶ Some governments' contact tracing, symptom tracking, and quarantine enforcement programs may not fully comport with the letter or spirit of Article 17 or the corresponding comment. For example, the government of Bahrain established an app-based system that facilitates real-time collection of information on users' locations, which can be easily linked back to individuals. Quarantined individuals must use the app and wear a Bluetooth-enabled bracelet that collects location and diagnostic data and can face legal penalties for not complying. Amnesty International notes such a program is "unlikely to be [a] necessary and proportionate" response to COVID-19.²³⁷ In light of substantial political repression in Bahrain, there is a risk that such tools may be used to further limit free expression and participation in public life,

231. U.N. Hum. Rts. Comm., *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, ¶ 2(f), U.N. Doc. CCPR/C/128/2 (Apr. 30, 2020), <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf> [<https://perma.cc/92U8-YLHD>].

232. *Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic*, PEACEFUL ASSEMBLY WORLDWIDE (Sept. 17, 2020), [https://www.rightofassembly.info/assets/downloads/Derogations_by_States_Parties_from_the_right_to_assembly_on_the_Basis_of_the_COVID_19_Pandemic_\(as_of_17_September_2020\).pdf](https://www.rightofassembly.info/assets/downloads/Derogations_by_States_Parties_from_the_right_to_assembly_on_the_Basis_of_the_COVID_19_Pandemic_(as_of_17_September_2020).pdf) [<https://perma.cc/4C7J-MDCG>].

233. ICCPR, *supra* note 136, art. 17.

234. General Comment No. 16: Article 17 (The Right to Privacy), U.N. Hum. Rts. Comm., ¶ 4 (Apr. 8, 1988), <https://www.refworld.org/docid/453883f922.html> [<https://perma.cc/4LF9-WVB8>].

235. *Id.* ¶ 10.

236. *COVID-19 Civic Freedom Tracker*, *supra* note 228.

237. *Bahrain, Kuwait, and Norway Contact Tracing Apps Among Most Dangerous for Privacy*, AMNESTY INT'L (June 16, 2020), <https://www.amnesty.org/en/latest/news/2020/06/bahrain-kuwait-norway-contact-tracing-apps-danger-for-privacy/> [<https://perma.cc/5QV4-GDY5>].

contrary to the intent of the ICCPR.²³⁸

While States are justified in collecting data to stop the spread of the virus, they need to be attentive to privacy concerns. The WHO's International Health Regulations (IHR) offer guidance on State regulations in response to a public health emergency. They establish stipulations on the collection and use of personal data, noting that it should be processed both "anonymously" and "fairly and lawfully" and that it should not be "kept longer than necessary."²³⁹ As 194 States are member States of the WHO, the IHR should also inform governments' approach to contact tracing and similar pandemic-related information gathering.

3. Right to Participate in the Electoral Process

ICCPR Article 25 specifies "every citizen shall have the right and opportunity . . . to take part in the conduct of public affairs" and "to vote and to be elected at genuine periodic elections."²⁴⁰ Regardless, States Parties have had to balance this obligation with efforts to prevent COVID-19's spread, raising concerns that modification, postponing, or suspension of elections are undertaken for opportunist reasons. In Bolivia, unelected interim President Jeanine Áñez and the country's Supreme Electoral Tribunal justified postponing presidential elections, first in May 2020 and once again in September 2020, based on the COVID-19 health emergency.²⁴¹ Prior to the eventual election, which was successfully held in October 2020, the delays exacerbated political tensions arising from Áñez's controversial assumption of the presidency in November 2019.²⁴² Further, even as they encouraged other States to refrain from delaying electoral processes, some Western governments, such as New Zealand's, also opted to delay elections as a means of preventing the pandemic's spread.²⁴³

238. *Freedom in the World 2020: Bahrain*, FREEDOM HOUSE, <https://freedomhouse.org/country/bahrain/freedom-world/2020> [<https://perma.cc/T2YS-EFDS>].

239. INTERNATIONAL HEALTH REGULATIONS (2005): SECOND ED., WORLD HEALTH ORG., https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1 [<https://perma.cc/4FK3-EBDL>].

240. ICCPR, *supra* note 136, art. 25.

241. Ryan Dube, *Bolivia's Interim Leader Exits Election Race to Prevent Morales Party Victory*, WALL ST. J. (Sept. 18, 2020), <https://www.wsj.com/articles/bolivias-interim-leader-exits-election-race-to-prevent-morales-party-victory-11600441630> [<https://perma.cc/PNL9-YQZ4>].

242. See, e.g., Julie Turkewitz, *From Bolivia, Lessons for a Successful Election*, N.Y. TIMES, (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/world/americas/Bolivia-election-explainer-lessons.html> [<https://perma.cc/BQF2-JS8S>]; see also *Healing the Pandemic of Impunity: 20 Human Rights Recommendations for Candidates in the 2020 Presidential Elections in Bolivia*, AMNESTY INT'L (Aug. 2020), <https://www.amnesty.org/download/Documents/AMR1828712020ENGLISH.PDF> [<https://perma.cc/D74P-BZGZ>].

243. See Emanuel Stoakes, *New Zealand Leader Jacinda Ardern Delays Election due to Coronavirus Outbreak*, WASH. POST (Aug. 16, 2020), https://www.washingtonpost.com/world/asia_pacific/new-zealand-coronavirus-election-jacinda-ardern/2020/08/16/2366c508-e02c-11ea-82d8-5e55d47e90ca_story.html [<https://perma.cc/E6TQ-UDKR>]; Fan Anqi, *New Zealand Shows 'Double Standards' to Delay Election but Criticizes Hong Kong*, GLOB. TIMES (Aug. 17, 2020), <https://www.globaltimes.cn/content/1198007.shtml> [<https://perma.cc/LF3V-2WJ3>].

Governments preparing for and conducting elections have to balance public health and electoral rights. States Parties to the ICCPR do have some flexibility, as the Covenant permits derogation of Article 25 provided certain conditions are met.²⁴⁴ In some cases, modifications to electoral processes (including delays) may be necessary not only to prevent COVID-19's transmission, but to ensure the public feels safe voting. Some governments have successfully balanced public health concerns with the need to proceed with elections and ensure their integrity. For instance, ahead of and during its National Assembly elections in April 2020, South Korea adopted measures to ensure both safety and broad participation. It put in place measures to prevent transmission (including disinfecting polling places and disseminating a voter code of conduct regarding hygiene and quarantine practices), while also making arrangements to allow quarantined individuals to vote and observers to remotely watch vote tallying.²⁴⁵ Similarly, in recognition of the risks of in-person gatherings, state governments across the United States passed and implemented laws allowing residents to vote early or use mail-in and absentee ballots during the 2020 election cycle.²⁴⁶ These modifications offered the public protection from COVID-19 and are believed to have contributed to record levels of voter turnout.²⁴⁷

4. *Right to Justice and Fair Trials*

ICCPR Article 9 protects individuals from being “subjected to arbitrary arrest or detention” and prohibits deprivations of liberty “except on such grounds and in accordance with such procedures as are established by law.”²⁴⁸ Importantly, Article 9(3) notes that “anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release,” and Article 9(4) explicitly provides detainees with the opportunity to bring proceedings before a court that can order release if detention is unlawful.²⁴⁹ These obligations, while intrinsically critical, also help ensure a State Party's compliance with Article 2(3), which provides for effective remedies to those whose rights or freedoms (including civil and political rights) have been violated by persons acting in an official

244. ICCPR, *supra* note 136, art. 4.

245. *Featured Elections Held and Mitigating Measures Taken during COVID-19*, INT'L FOUND. FOR ELECTORAL SYS. (Oct. 28, 2020), https://www.ifes.org/sites/default/files/elections_held_and_mitigating_measures_taken_during_covid-19.pdf [<https://perma.cc/MCP8-49LU>].

246. Katie LaRoque, *Time to Make Sure Voting Remains Easy Again in 2022*, THE FULCRUM (Jan. 26, 2021), <https://thefulcrum.us/voting/voting-reform> [<https://perma.cc/DS8B-7QFR>].

247. *See id.* (“Nearly 160 million people voted, more than in any other election in the past 120 years, and a staggering 101 million of those ballots were cast early or absentee”); *Election Policy Briefing: By-Mail Voting Survives 2020*, OSET INSTITUTE (Dec. 31, 2020), https://trustthevote.org/wp-content/uploads/2020/12/31Dec20_VoteByMail-2020AndBeyond.pdf (“The expansion of by-mail voting in this election was clearly a contributing factor to record-breaking participation.”) [<https://perma.cc/2ZUW-DUZR>].

248. ICCPR, *supra* note 136, art. 9.

249. *Id.*

capacity.²⁵⁰

Some governments have used the pandemic as an excuse to arbitrarily arrest and detain opponents or for curtailing their access to justice. In India, for example, demonstrators and activists protesting the government of Prime Minister Modi and its Hindu nationalist policies were arbitrarily arrested, and Human Rights Watch reports that subsequent to arrest, detainees had limited access to legal counsel and lawyers have found it difficult to view court records.²⁵¹ Long-lasting court closures have also impeded bail filings, contributing to activists' continued detention.²⁵² Further, authorities have sometimes been able to keep individuals in custody after they have been granted bail by filing additional charges against activists, potentially prolonging their exposure to the virus in prisons.²⁵³

UN agencies recommend that as governments impose safety measures on courts that may delay legal processes, they prioritize critical legal cases that implicate non-derogable rights (in addition to considering arrangements for remote proceedings, where possible).²⁵⁴ As an example, the Spanish government's "state of alarm" initiated in March 2020 embodied this concept: As the organization Fair Trials highlights, Spanish measures to adjourn judicial proceedings did not apply to "habeas corpus proceedings, duty courts, proceedings in which the suspect is arrested or currently in pretrial detention, protection orders, and urgent matters related to inmates and violence against women or minors."²⁵⁵

5. Derogation under the ICCPR

As noted, some States have opted to formally derogate from particular ICCPR obligations in response to COVID-19.²⁵⁶ ICCPR Article 4 sets out requirements for States Parties to the Covenant seeking to derogate from their obligations "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."²⁵⁷ These States may only undertake such measures "to the extent strictly required

250. ICCPR, *supra* note 136, art. 2.

251. *India: End Violence in Prosecuting Delhi Violence*, HUM. RTS. WATCH (June 15, 2020), <https://www.hrw.org/news/2020/06/15/india-end-bias-prosecuting-delhi-violence> [https://perma.cc/82ZF-7XTQ].

252. Sameer Yasir & Kai Schultz, *India Rounds Up Critics Under Shadow of the Virus, Activists Say*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/world/asia/india-activists-arrests-riots-coronavirus.html?referringSource=ArticleShare&mc_cid=ffcb9e81ea&mc_eid=53f475e67b [https://perma.cc/MTH9-2B4V].

253. HUM. RTS. WATCH, *supra* note 251.

254. *Guidance Note: Ensuring Access to Justice in the Context of COVID-19*, U.N. OFF. ON DRUGS AND CRIME 14 (May 2020), <https://www.un.org/ruleoflaw/wp-content/uploads/2020/06/Ensuring-Access-to-Justice-in-the-Context-of-COVID-19.pdf> [https://perma.cc/KT3Y-DL9F].

255. Jaime Campaner, *Commentary: The Impact of Spain's COVID-19 Measures on the Criminal Justice System*, FAIR TRIALS (Mar. 30, 2020), <https://www.fairtrials.org/news/commentary-impact-spain%E2%80%99s-covid-19-measures-criminal-justice-system> [https://perma.cc/BZ7R-MZM8].

256. PEACEFUL ASSEMBLY WORLDWIDE, *supra* note 232.

257. ICCPR, *supra* note 136, art. 4.

by the exigencies of the situation.”²⁵⁸ The measures must not be inconsistent with other international law obligations or be applied in a discriminatory manner, and any derogations must be temporary. In cases of derogation, the State Party “shall immediately inform the other States Parties . . . through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated” and why it has elected to do so.²⁵⁹ Importantly, Article 4(2) prohibits derogation from ICCPR provisions that, among others, enshrine the right to life; prohibit torture and cruel, inhuman or degrading treatment or punishment; prohibit slavery; provide the right to recognition as a person before the law; and protect freedom of thought, conscience, and religion.²⁶⁰ The Human Rights Committee has further clarified that derogations from Covenant provisions during public emergency must be of “an exceptional and temporary nature.”²⁶¹

Despite these duties, most States Parties that have declared states of emergency in response to COVID-19 have failed to notify the Human Rights Committee of their derogations from ICCPR provisions: The Centre for Civil and Political Rights documents that, as of October 2021, just twenty-four States that had declared states of emergency had notified the United Nations of this development, while more than forty-eight had yet to do so.²⁶² This is to say nothing of States that may have derogated from fundamental obligations without officially initiating states of emergency.

III. Immigration and Refugee Law

The threat posed by COVID-19 has been used by governments around the world to roll back key protections guaranteed under immigration and refugee law. This Part examines whether States’ efforts to restrict immigration during the pandemic ran afoul of their obligations not to return asylum seekers to an unsafe foreign territory, known as “non-refoulement.” It examines, as well, under what conditions States may violate their legal obligations to immigration detainees by failing to adequately protect them from the virus.

A. Non-Refoulement

One of the pillars of international refugee law is the principle of non-refoulement, which prohibits any State conduct “leading to the ‘return in any manner whatsoever’ to an unsafe foreign territory, including rejection

258. *Id.*

259. *Id.*

260. *Id.*

261. General Comment No. 29: States of Emergency (Article 4), U.N. Hum. Rts. Comm., ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), <https://digital.library.un.org/record/451555?ln=EN> [<https://perma.cc/C7M9-V35J>].

262. *States of Emergencies in Response to the COVID-19 Pandemic*, CTR. FOR CIV. & POL. RTS. (Oct. 29, 2021), <https://datastudio.google.com/reporting/1sHT8quopdfavCvSDk7t-zvqKIS0Ljiu0/page/dHMKB> [<https://perma.cc/KZX7-HFL5>].

at the frontier or non-admission to the territory.”²⁶³ During the pandemic, governments have violated the principle of non-refoulement by closing their borders entirely and halting asylum-processing. The UN High Commissioner for Refugees (UNHCR) estimated in April 2020 that “167 countries have . . . fully or partially closed their borders to contain the spread of the virus” and that 57 of those countries made “no exception for people seeking asylum.”²⁶⁴ In the United States, for example, the Centers for Disease Control and Prevention (CDC) issued an order in March 2020 that effectively suspended asylum processing for persons traveling from Canada or Mexico.²⁶⁵ Experts noted that the policy was overbroad and disputed whether there was a credible rationale for categorically barring all asylum seekers, especially since the policy was initiated over the objections of public health authorities.²⁶⁶

While governments can take certain protective measures in response to COVID-19, potentially including restrictions on movement, they are not entitled under international law to completely prevent the entry of asylum-seekers—that is, those who are seeking international protection but whose claim has not yet been decided. (Not every asylum-seeker will be recognized as a refugee, but every refugee is initially an asylum-seeker.) This Section first summarizes how human rights conventions and relevant case law conceptualize the principle of non-refoulement, and then reflects on States’ obligations under this principle in the context of the ongoing pandemic. Further, given that some governments have turned back migrants on the high seas or on foreign territory, this Section also considers the extent to which the principle of non-refoulement applies extraterritorially.

1. *The Principle of Non-Refoulement*

The principle of non-refoulement establishes that those who seek asylum may not be returned to a country in which there are reasonable

263. *Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response*, U.N. HIGH COMM’R FOR REFUGEES [UNHCR] (Mar. 16, 2020), <https://www.refworld.org/docid/5e7132834.html> [<https://perma.cc/H2VG-YT24>].

264. Press Release, UNHCR, *Beware Long-term Damage to Human Rights and Refugee Rights from the Coronavirus Pandemic*: UNHCR (Apr. 22, 2020), <https://www.unhcr.org/en-us/news/press/2020/4/5ea035ba4/beware-long-term-damage-human-rights-refugee-rights-coronavirus-pandemic.html> [<https://perma.cc/U8X9-RG6F>].

265. *Order under Sections 362 & 365 of the Public Health Service Act (42 U.S.C. §§ 265, 268): Amendment and Extension of Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, CTR. FOR DISEASE CONTROL & PREVENTION [CDC], https://www.cdc.gov/quarantine/pdf/CDC-265-Order-Renewal_5-19-20-p.pdf [<https://perma.cc/ZC3R-DQQ9>].

266. See, e.g., Joanna Naples-Mitchell, *There is No Public Health Rationale for a Categorical Ban on Asylum Seekers*, JUST SECURITY (Apr. 17, 2020), <https://www.justsecurity.org/69747/there-is-no-public-health-rationale-for-a-categorical-ban-on-asylum-seekers/> [<https://perma.cc/22WR-AM3R>]; see also Jason Dearen & Garance Burke, *Pence Ordered Borders Closed after CDC Experts Refused*, ASSOCIATED PRESS (Oct. 3, 2020), <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae> [<https://perma.cc/6S27-688Z>].

grounds to believe they will be subjected to persecution. The principle is grounded in the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol.²⁶⁷ The Protocol extends the Convention's protections to all refugees irrespective of the location or date of their displacement, and importantly, requires its 146 States Parties to abide by the Convention regardless of whether they are separately party to it.²⁶⁸ The principle of non-refoulement is also regarded by UNHCR to be a norm of customary international law.²⁶⁹

The 1951 Refugee Convention defines the prohibition on refoulement in Article 33(1), which states that no "Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group, or political opinion."²⁷⁰ Article 33(2) articulates an exception: The

benefit of the present provision may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.²⁷¹

Reliance on this exception requires an "*individualized* showing . . . [and] cannot be applied on a blanket basis to everyone seeking asylum regardless of whether they actually pose a threat."²⁷²

Other international human rights treaties reinforce the principle of non-refoulement in cases where the person returned may face torture or inhuman and degrading treatment. For example, the CAT states that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."²⁷³ The Human Rights Committee has also interpreted the ICCPR to encompass the principle of non-refoulement.

267. 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention]; see also 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, <https://www.unhcr.org/3b66c2aa10> [hereinafter 1967 Protocol] [<https://perma.cc/U4K8-WXQC>].

268. 1967 Protocol ¶ 1-3, Jan. 31, 1967, 606 U.N.T.S. 267, <https://www.unhcr.org/3b66c2aa10> [<https://perma.cc/S8AD-58G3>].

269. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007), <https://www.refworld.org/docid/45f17a1a4.html> [<https://perma.cc/87RL-SZC4>].

270. 1951 Refugee Convention, *supra* note 267, art. 33.

271. *Id.*

272. Oona Hathaway, *The Trump Administration's Indefensible Legal Defense of the Asylum Ban: Taking a Wrecking Ball to International Law*, JUST SECURITY (May 15, 2020), <https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/> [<https://perma.cc/YZ3L-3QKG>].

273. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> [hereinafter Convention Against Torture] [<https://perma.cc/UT47-ALWT>].

ment.²⁷⁴ The ICCPR affirms that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁷⁵ As one legal commentator points out, the “prohibition on *refoulement* is inferred as a component of the absolute prohibition of torture as well as inhuman and degrading treatment.”²⁷⁶

Regional human rights treaties have similarly affirmed and in some cases expanded the prohibition on *refoulement*. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) obliges States to “[r]espect and ensure the right to seek safety in another part of the State and to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.”²⁷⁷ Such language goes beyond that articulated in the ICCPR and CAT and might apply to the COVID-19 context: Under the Kampala Convention, a refugee arguably cannot be returned to a country that has failed to control COVID-19, as return to such a country would place the refugee’s life and health at risk. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa also employs expansive language, stating that “[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”²⁷⁸ Despite the broad language contained in both the Kampala and OAU Unity Conventions, Rodolfo Marques has noted that neither the African Court on Human and Peoples’ Rights nor the African Commission on Human and Peoples’ Rights has “had the opportunity to determine the dimension of [non-*refoulement*] within their jurisdiction.”²⁷⁹

The American context features similar obligations. The ACHR affirms that a foreign national cannot “be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”²⁸⁰ The

274. General Comment No. 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Hum. Rts. Comm., ¶ 9 (Mar. 10, 1992), <https://www.refworld.org/docid/453883fb0.html> [<https://perma.cc/9DSD-55NT>].

275. ICCPR, *supra* note 136, art. 7.

276. Rodolfo Marques, *Non-Refoulement Under the Inter-American Human Rights System*, SPECIAL EDITION REFUGEE L. INITIATIVE WORKING PAPER NO. 20 (Mar. 6, 2017), <http://dx.doi.org/10.2139/ssrn.2992709> [<https://perma.cc/SA2W-KS9K>].

277. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ¶ 2(e) (Oct. 23, 2009), <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> [hereinafter *Kampala Convention*] [<https://perma.cc/D2EF-4UQX>].

278. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa art. II (Sept. 10, 1969), <https://www.unhcr.org/en-us/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html> [<https://perma.cc/R7KB-3BQN>].

279. Marques, *supra* note 276.

280. ACHR, *supra* note 138, art. 22.

ECHR does not contain an explicit non-refoulement clause, but the ECtHR has effectively read non-refoulement into the Convention's prohibition on "torture and inhuman or degrading treatment or punishment."²⁸¹ That right, however, is limited to cases where the person expelled faces a reasonable fear that they will be subjected to torture or inhuman or degrading treatment or punishment upon return.

2. The Principle of Non-Refoulement During a Pandemic

Does a public health emergency grant a government the right to derogate from the principle of non-refoulement? Article 33(2) of the Refugee Convention provides that a refugee cannot claim the benefits of the Convention if "there are reasonable grounds for regarding [him or her] as a danger to the security of the country in which he [or she] is." This may at first glance seem to grant a government-wide discretion.²⁸²

Yet official legal interpretations have cabined a government's right to turn away asylum seekers. Notably, in its *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, UNHCR stated that the application of Article 33(2) requires an "individualized determination by the country in which the refugee is [located] that he or she comes within one of the two categories provided for" under the Article.²⁸³ Moreover, UNHCR noted that Article 33(2) does not "affect the host State's non-refoulement obligations under international human rights law, which permit no exceptions."²⁸⁴ In other words, a host State must make an individualized determination under Article 33(2) that a refugee poses a danger to the security of the country. If the host State finds the refugee in question poses a danger, then the host State is entitled to refuse admission to that refugee, so long as the State does not violate the non-refoulement obligations contained in other human rights conventions to which it is party.

More broadly, no country can cite a pandemic as an excuse for turning away migrants en masse at the border without assessing asylum claims. Androula Pavli and Helena Maltezou note that while countries can introduce screening protocols at the border, the "results of screening must never be used as a reason or justification for deporting a refugee or a migrant [including an asylum-seeker whose refugee status has yet to be determined] from a country."²⁸⁵ Indeed, as various international law experts have noted, States have an affirmative obligation under international law to provide medical care to asylum seekers.²⁸⁶

281. Marques, *supra* note 276.

282. 1951 Refugee Convention, *supra* note 267, art. 33.

283. UNHCR, *supra* note 269, ¶ 10.

284. *Id.* at ¶ 11.

285. Androula Pavli & Helena Maltezou, *Health Problems of Newly Arrived Migrants and Refugees in Europe*, 24 J. TRAVEL MEDICINE 4 (2017), <https://doi.org/10.1093/jtm/tax016> [<https://perma.cc/37PN-6NER>].

286. See, e.g., *Human Rights Dimensions of COVID-19 Response*, HUM. RTS. WATCH (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> [<https://perma.cc/XX3R-7TAM>]; N.Y. UNIV. CTR. INT'L COOPERATION,

Even if a person does pose a threat (that is, has a serious communicable disease), the principle of non-refoulement under the CAT and ICCPR is non-derogable for States Parties to those conventions (including the United States). The Committee Against Torture—the body that monitors implementation of CAT—affirmed that the principle of non-refoulement is, like the prohibition on torture itself, non-derogable.²⁸⁷ Similarly, the U.N. Human Rights Committee—charged with the implementation of the ICCPR—noted that “States [P]arties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.”²⁸⁸ A person therefore cannot be returned to a State where there are “substantial grounds for believing that” they would be in danger of being subjected to torture (in the case of the CAT).²⁸⁹ The ICCPR has been interpreted to contain a similar prohibition: According to the UNHCR Advisory Opinion on the non-refoulement principle’s extraterritorial application, a person also may not be returned “where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Article 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the [ICCPR].”²⁹⁰

In the past, various governments have refused to admit migrants who carried communicable diseases. The United States, for example, provides for exclusion of persons who have a communicable disease of public health significance, but only after individualized medical examination and an opportunity to appeal.²⁹¹ (It was only in 2010 that the United States removed HIV from the list of diseases that could exclude aliens from entry—but even when that ban was in effect, it required an individual determination.²⁹²) It is important to emphasize, however, that this is *not* a basis for denying asylum or for overcoming non-refoulement protections—either under U.S. or international law.

Regional human rights courts have also addressed the principle of non-refoulement. In *Tineo Family v. Bolivia*, the IACtHR articulated procedural safeguards that States Parties to the ACHR must meet before they can

PRINCIPLES OF PROTECTION FOR MIGRANTS, REFUGEES, AND DISPLACED PEOPLE DURING COVID-19 (June 26, 2020), <https://cic.nyu.edu/publications/principles-protection-migrants-refugees-and-displaced-people-during-covid-19> [<https://perma.cc/X8AP-CQ56>].

287. General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, Committee against Torture, ¶ 8-9 (Feb. 9, 2018), <https://www.refworld.org/docid/5a903dc84.html> [<https://perma.cc/X6KC-8NUG>].

288. U.N. Hum. Rts. Comm., *supra* note 274, ¶ 9.

289. Convention Against Torture, *supra* note 273, art. 3.

290. UNHCR, *supra* note 269, ¶ 19.

291. *Immigrant and Refugee Health: Laws and Regulations*, CDC (Jan. 26, 2016), <https://www.cdc.gov/immigrantrefugeehealth/laws-regulations.html> [<https://perma.cc/C2TE-QC3P>].

292. *Immigrant and Refugee Health: Final Rule Removing HIV Infection from U.S. Immigration Screening*, CDC (Nov. 30, 2011), <https://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule-technical-qa.html> [<https://perma.cc/HL99-LQCE>].

expel or deport an asylum seeker.²⁹³ The State must allow an asylum seeker an “adequate and individualized” analysis of their application, must assesses that individual’s “personal circumstances,” and, in the case of an unfavorable decision, must have the right to “review before the competent authority.”²⁹⁴ Such safeguards represent a procedural minimum; States that are party to the ACHR are clearly obligated to adhere to them even during a pandemic. The following year, the court held in *Rights and Guarantees of Children in the Context of Migration* that States Parties cannot return

or expel a person—asylum seeker or refugee—to a State where her or his life or liberty may be threatened as a result of persecution . . . or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.²⁹⁵

The “other circumstances” provision is broad in scope and theoretically could prevent a State from turning asylum seekers back to countries that have failed to control a pandemic. An expert roundtable convened by UNHCR cautioned, however, that the “other circumstances” provision is the “least applied by state practice and hence there seems to be the least common understanding regarding its interpretation.”²⁹⁶

The ECtHR has found that the principle of non-refoulement applies in situations where a person faces a reasonable fear of being subjected to torture. In *Chahal v. United Kingdom*, the Court prohibited Mr. Chahal’s expulsion to India, holding that ECHR Article 3, which prohibits torture and “inhuman or degrading treatment or punishment,” implies a prohibition on non-refoulement when individuals face a reasonable fear of being subjected to torture upon return.²⁹⁷ Such a prohibition is non-derogable and would bind State action even during a pandemic.²⁹⁸ The ECtHR has also suggested that States’ ability to return asylum seekers to substandard conditions—potentially including conditions of uncontrolled pandemic—is limited by the ECHR. In the recent *Case of M.S.S. v. Belgium and Greece*, an

293. Pacheco Tineo Family v. Bolivia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, (Nov. 25, 2013), https://www.corteidh.or.cr/docs/casos/articulos/seriec_272_ing.pdf [<https://perma.cc/QZ6Y-94KJ>].

294. *Id.* ¶ 132, 153.

295. *Rights and Guarantees of Children in the Context of Migration and/or Need of International Protection*, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 212 (Aug. 19, 2014), https://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf [<https://perma.cc/243K-GWQ4>].

296. Summary Conclusions on the Interpretation of the Extended Refugee Definition in the 1984 Cartagena Declaration ¶ 27, UNHCR (Oct. 15-16, 2013), <https://www.unhcr.org/protection/expert/53bd4d0c9/summary-conclusions-interpretation-extended-refugee-definition-1984-cartagena.html> [<https://perma.cc/26LL-5HAV>].

297. See *Chahal v. United Kingdom*, Eur. Ct. H.R. 107, App. No. 22414/93 (1996), <http://hudoc.echr.coe.int/rus?i=001-58004> [<https://perma.cc/JTR3-SF3J>]; ECHR, *supra* note 139, art 3.

298. Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT’L J. REFUGEE L. 1 (2003), <https://pdfs.semanticscholar.org/9591/6de69ab1891f895e2154d4573b9ecf4a3cc7.pdf> [<https://perma.cc/YJ8X-ELLF>].

asylum seeker originally from Afghanistan challenged Belgium's decision to return him to Greece, where he first arrived in the EU. The Court held that Belgium had violated the Convention by returning the applicant to Greece, because "by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article."²⁹⁹ Because it is non-derogable, the "non-refoulement" prohibition applies regardless of the pandemic; moreover, "degrading detention and living conditions" may include conditions in countries where a pandemic is uncontrolled.

3. Application in the Context of COVID-19

COVID-19 does not grant States an excuse to derogate from their non-refoulement obligations. In June 2020, international human rights experts laid out 14 Principles of Protection for Migrants, Refugees and Other Displaced Persons, in response to the spread of COVID-19.³⁰⁰ These principles, while not binding in and of themselves, are derived from "international treaties and . . . customary international law."³⁰¹ Principle 6 cautions that "a State's pursuit of legitimate health goals must respect the fundamental principle of non-refoulement, including non-return to a real risk of persecution, arbitrary deprivation of life, torture, or other cruel, inhuman, or degrading treatment."³⁰²

As noted above, the 1951 Refugee Convention's non-refoulement obligation does allow an exception for a case where a refugee poses a threat to the host country, but that exception requires an *individualized* determination.³⁰³ Addressing legal considerations during COVID-19, UNHCR noted that States are "entitled to take measures to ascertain and manage risks to public health" and can implement disease screening protocols as well as impose quarantines in response to COVID-19.³⁰⁴ Thus, States can take measures to ensure that asylum seekers do not spread COVID-19 to the local host State population. This might include testing and perhaps quarantining for up to two weeks where there is reason to believe that an unvaccinated asylum seeker has been exposed to COVID-19. But they may not return refugees en masse or deny them entry based on generalized concerns about COVID-19.

299. *M.S.S. v. Belgium and Greece*, Eur. Ct. H.R., App. No. 30696/09 (2011), <http://hudoc.echr.coe.int/fre?i=001-103050> [<https://perma.cc/VKY4-8AP4>].

300. T. Alexander Aleinikoff et al., *Principles of Protection for Migrants, Refugees, and Displaced People During COVID-19* (June 26, 2020), <https://cic.nyu.edu/publications/principles-protection-migrants-refugees-and-displaced-people-during-covid-19> [<https://perma.cc/5ZET-P3XS>].

301. *Id.*

302. *Id.*

303. UNHCR, *supra* note 269, ¶ 10.

304. UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response* (Mar.16, 2020), <https://data2.unhcr.org/en/documents/details/75349> [<https://perma.cc/DC7Y-MSR7>].

4. *States' Obligations Outside their Territories*

UNHCR has held that the principle of non-refoulement applies whenever a State exercises effective authority over an asylum seeker. UNHCR has stated that States are “bound . . . not to return any person over whom they exercise jurisdiction to a risk of irreparable harm.”³⁰⁵ The “decisive criterion,” UNHCR continued, “is not whether that person is on the State’s national territory, or within a territory which is de jure under the sovereign control of the State, but rather whether or not he or she is subject to that State’s effective authority and control.”³⁰⁶ A State can exercise such effective authority and control in a wide variety of contexts, including “at the frontier, on the high seas or on the territory of another State.”³⁰⁷

In addition, because the principle of non-refoulement is affirmed in other human rights instruments, including the CAT and the ICCPR, the extraterritorial application of those treaties might similarly constrain a State’s ability to return or expel an asylum seeker.³⁰⁸ For example, the Human Rights Committee, in interpreting legal obligations imposed by the ICCPR, has affirmed that States are required to “respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³⁰⁹ Such a prohibition applies, according to the Human Rights Committee, wherever the State in question exercises effective control—contexts like a State-run refugee camp, occupied territory, or State-flagged ships and aircraft. (It is important to point out, however, that not all States, among them the United States, accept this interpretation of the ICCPR.)³¹⁰

Just as the COVID-19 pandemic does not release States from their non-refoulement obligations for those who have reached the border, it also does not release them from their non-refoulement obligations for those who have not yet reached the border. In particular, the “effective authority and control” standard that UNHCR has articulated may constrain State action in a variety of contexts. For example, Greek officials have made headlines by intercepting and turning back boats filled with asylum-seekers before

305. UNHCR, *supra* note 269, ¶ 35.

306. *Id.*

307. *Id.* ¶ 24.

308. The IACtHR has also been applied extraterritorially. See *Coard et al v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, ¶ 37 (1999), <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm> [<https://perma.cc/LR4T-HDNM>].

309. CCPR, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10 (Mar. 29, 2004), <https://www.refworld.org/docid/478b26ae2.html> [<https://perma.cc/XCY5-62BM>].

310. The United States has accepted that the CAT—and thus its non-refoulement obligation—applies to its base at Guantánamo Bay and to U.S.-registered ships and aircraft regardless of where they are located. Press Release, White House, Statement by NSC Spokesperson Bernadette Meehan on the U.S. Presentation to the Committee Against Torture (Nov. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a> [<https://perma.cc/JM8E-9NQR>].

those boats could land on Greek soil.³¹¹ Greek efforts to divert boats full of asylum seekers away from Greek territory arguably violate the principle of non-refoulement. When Greek officials intercept and interact with the migrant boats, they are arguably exercising “effective authority and control,” even if those boats have not yet reached Greek waters. The European jurisprudence on the ECHR’s extraterritorial application may also bind Greek action. The European Commission held in *Cyprus v. Turkey* that “high contracting parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.”³¹² Finally, States may be bound by the extraterritorial application of other human rights instruments to which they are a party. If aliens face the prospect of torture or inhuman or degrading treatment, these non-derogable human rights obligations may impose constraints on their return. COVID-19 does not erase these protections.

B. States’ Obligations to Refugees, Asylum Seekers, and Other Migrants in Detention

For refugees, asylum seekers, and other migrants seeking protection in foreign countries and awaiting regularization of their legal status under the care or custody of national governments, COVID-19 compounds a litany of already-daunting vulnerabilities. Migrants arriving at foreign territory in large-scale influxes and residing in camps or settlements often face conditions that can elevate the risk of infectious transmission. Resources for sanitation, including clean water, soap, and personal protective equipment are sometimes in short supply or not available at all. Limited space and overcrowding may make social distancing infeasible. The disease’s lethality may also be heightened in these environments if medical services are unavailable, inadequate or if residents suffer from other chronic ailments that leave them more susceptible to COVID-19.

These challenges are particularly salient in Greece, for instance, where government authorities have quarantined camps where asylum seekers and migrants are living in substandard conditions after camp residents were found to have contracted COVID-19.³¹³ The dire conditions in these sites pre-date the outbreak of pandemic: Before a fire destroyed the Moria camp in September 2020, for example, the site housed at least 8,000 asylum seek-

311. Patrick Kingsley & Kara Shoumali, *Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html> [https://perma.cc/BH4C-WNKE].

312. *Cyprus v. Turkey*, Decision of the Commission as to the Admissibility of Applications Nos. 6780/74 & 6950/75, 2 Eur. H.R. Rep. 117, appx. I at 20 (July 10, 1976) (Eur. Comm’n on H.R.), <http://hudoc.echr.coe.int/web/services/content/pdf/001-142541?TID=thkbhnilzk> [https://perma.cc/AUA3-F3H5].

313. *First Coronavirus Death in Greek Migrant Camp*, INFO MIGRANTS, Sept. 28, 2020, <https://www.infomigrants.net/en/post/27584/first-coronavirus-death-in-greek-migrant-camp> [https://perma.cc/XVD6-CHZZ].

ers in a space originally intended to shelter only 3,000 people.³¹⁴ Aid organizations seeking to assist residents of camps across the island of Lesbos contend that the Greek government is using the virus as a pretext for detaining migrants while failing to adequately provide for their health in detention.³¹⁵ The Asylum Information Database managed by the European Council on Refugees and Exiles concluded in June 2021 that “the detention conditions for third-country nationals, including asylum seekers, do not meet the basic standards in Greece.”³¹⁶

Greece is far from alone in failing to protect refugees and migrants from COVID-19. The United States has subjected asylum seekers (and foreign nationals more broadly) held in detention centers to deplorable conditions.³¹⁷ The American Civil Liberties Union has alleged in multiple lawsuits that Immigration and Customs Enforcement (ICE) willfully transferred people between facilities knowing that they were positive for COVID-19, increasing the risk of exposure among detainees.³¹⁸ There are reports of inadequate medical monitoring, delayed action in providing medical attention when needed, overcrowding, and inadequate sanitation in these facilities, all of which have contributed to a heightened risk of COVID-19 contraction and transmission.³¹⁹ As of March 2021, there were more than 10,400 cases of COVID-19 across 124 ICE facilities.³²⁰

This Section focuses on how COVID-19 affects States’ obligations toward asylum seekers, refugees, and other migrants under their care in large-scale camps or in custody in smaller facilities, domestically or at points of entry. It first summarizes States’ health-related obligations as they pertain to migrants in State-operated or State-authorized facilities,

314. *Moria Migrants: Fire Destroys Greek Camp Leaving 13,000 Without Shelter*, BBC NEWS, Sept. 9, 2020, <https://www.bbc.co.uk/news/world-europe-54082201> [<https://perma.cc/293Y-HB4L>]; see also *Moria Refugee Camp under Quarantine After Coronavirus Case*, AL JAZEERA (Sept. 2, 2020), <https://www.aljazeera.com/news/2020/9/2/moria-refugee-camp-under-quarantine-after-coronavirus-case> [<https://perma.cc/U3U5-TSV3>].

315. Nektaria Stamouli, *Migration Crisis Upends Greece’s Coronavirus Strategy*, POLITICO (Sept. 29, 2020), <https://www.politico.eu/article/migration-crisis-upends-greeces-coronavirus-strategy-migrants-camps/> [<https://perma.cc/U8PU-V5J7>].

316. See *Country Report: Conditions in Detention Facilities: Greece*, ASYLUM INFO. INST., EUR. COUNCIL ON REFUGEES & EXILES <https://asylumineurope.org/reports/country/greece/detention-asylum-seekers/detention-conditions/conditions-detention-facilities/> [<https://perma.cc/XV9G-9ZJA>].

317. See, e.g., *I Had COVID-19 in ICE Detention. This Is What It Was Like*, FLORENCE IMMIGRANT & REFUGEE RTS PROJECT (Oct. 6, 2020), <https://firrp.org/i-had-covid-19-in-ice-detention-this-is-what-it-was-like/> [<https://perma.cc/FFX9-LFPY>].

318. See Isaac Chotiner, *The Troubling State of Medical Care in ICE Detention*, NEW YORKER (Sept. 25, 2020), <https://www.newyorker.com/news/q-and-a/the-troubling-state-of-medical-care-in-ice-detention> [<https://perma.cc/7KYY-X5E5>].

319. See John J. Openshaw & Mark A. Travassos, *COVID-19 Outbreaks in US Immigrant Detention Centers: The Urgent Need to Adopt CDC Guidelines for Prevention and Evaluation*, CLINICAL INFECTIOUS DISEASES (forthcoming 2021), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa692/5849328> [<https://perma.cc/9NRU-JC66>].

320. *Conditions in Immigration Detention: Quarterly Analysis & Update*, FREEDOM FOR IMMIGRANTS (Mar. 26, 2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/605e0faad231f61abb610ad7/1616777130314/March+Conditions+Report+_FINAL.pdf [<https://perma.cc/5J5Q-ME6C>].

including camps, detention facilities, or reception centers at points of entry. It then turns to States' obligations to immigration detainees during a pandemic. Finally, it considers States' obligations to immigration detainees in the particular context of COVID-19 and suggests steps States might take to fulfill these obligations.

1. Health-Focused International Law Obligations to Immigration Detainees

Governments have a range of international law duties pertaining to their treatment of refugees, asylum seekers, and other immigrants under their care or custody, whether domestically or at points of entry. As noted above, these obligations are clearly established in the 1951 Refugee Convention and its 1967 Protocol, the core sources of international refugee law.³²¹ Further, principles of international human rights law enshrined in human rights treaties including the ICCPR, the ICESCR, and the CAT also identify State obligations relevant to State-run or State-authorized facilities for States that are party to those treaties. Many obligations established by these treaties also reflect customary international law binding on all States, though we do not explore that in depth here. Regional human rights treaties and refugee-specific regional instruments (including the Organization of African Unity 1969 Convention and the 1984 Cartagena Declaration) also establish obligations.³²²

The 1951 Refugee Convention specifies core obligations of States Parties to refugees and asylum seekers in the custody or care of governments, regardless of their status or length of stay in the country (including respecting freedom of religious practice and ensuring access to courts and legal assistance, for example).³²³ In addition, the various human rights treaties identified above require States Parties to ensure certain minimum conditions of confinement and treatment for those held in State-administered facilities or State-authorized camps and settlements. The right to health, as protected in international human rights law and as explained in Part II, is particularly relevant. ICESCR Article 12 requires States Parties to "recognize the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health."³²⁴ Thus, the Convention's duty to prevent, treat, and control epidemics would also extend to migrants. As the ESCR Committee has explained, States Parties are required to "*respect* the right to health" by "refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."³²⁵

321. See 1951 Refugee Convention, *supra* note 267; 1967 Protocol, *supra* note 268.

322. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45; Colloquium on the international Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees (Nov. 22, 1984), http://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf [<https://perma.cc/6PHV-XGR3>].

323. See 1951 Refugee Convention, *supra* note 267.

324. ICESCR, *supra* note 178, art. 12(1) (emphasis added).

325. General Comment No. 14, *supra* note 188, ¶ 34 (emphasis added).

States Parties to the ICESCR have core obligations to all individuals under the effective control of the State, regardless of their legal status. As the Committee underscores, “all people under the jurisdiction of the State should enjoy Covenant rights,” including “asylum seekers and refugees, as well as other migrants, even when their situation in the country concerned is irregular.”³²⁶ States are expected to take steps to ensure “[t]he prevention, treatment and control of epidemic . . . and other diseases” and to secure access to “medical service and medical attention in the event of sickness.”³²⁷ In consequence, if public authorities are unable to provide adequate medical services or supplies to immigrants in State custody or in authorized camps and settlements, they arguably must at least permit independent organizations who can provide such services to do so. These duties as applied to points of entry and reception centers are not solely rooted in obligations toward those individuals in State-operated or -authorized facilities. They are also related to the obligations of States Parties to the WHO Constitution to, as the IHR requires, “ensure . . . that facilities used by travelers at points of entry are maintained in a sanitary condition and are kept free of sources of infection or contamination.”³²⁸

Additionally, the Human Rights Committee has specified that States Parties to the ICCPR are obligated to “take special measures of protection towards persons in situation of vulnerability,” a category that includes “displaced persons, asylum seekers, refugees, and stateless persons.”³²⁹ Of note, “a heightened duty to protect the right to life also applies to individuals quartered in liberty-restricting State-run facilities, such as . . . refugee camps and camps for internally displaced persons.”³³⁰ The State’s obligation to protect the right to life not only extends to facilities and camps within the State’s territory, but also extends to points of entry, international zones, or foreign territory where the State has detained asylum seekers or migrants. As the Human Rights Committee puts it, “States [P]arties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.”³³¹

Regional human rights instruments and bodies echo these obligations. In particular, the ECtHR has decided cases related to the health of detainees on numerous occasions. In *Yoh-Ekale Mwanje v. Belgium*, the Court determined Belgium had violated a Cameroonian national’s right against inhuman and degrading treatment by detaining her in a closed transit center without providing adequate or timely medical care appropriate for her status as an HIV-positive woman.³³² By failing to act with due diligence in protecting the woman’s health while she awaited deportation in

326. CESCR, *Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights*, (Mar. 13, 2017), <https://www.refworld.org/docid/5bbe0bc04.html> [<https://perma.cc/CS3J-KLHN>].

327. ICESCR, *supra* note 178, art. 12.

328. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 22.

329. General Comment No. 36, *supra* note 145, ¶ 23.

330. *Id.* ¶ 25.

331. *Id.* ¶ 63.

332. *Yoh-Ekale Mwanje v. Belgium*, App. No. 10486/10, 56 Eur. H.R. Rep. 35 (2011).

State custody, Belgian authorities subjected her to unnecessary suffering. In *Ghavitadze v. Georgia* and related cases, the ECtHR found Georgian authorities had subjected a prisoner suffering from hepatitis C and tuberculosis (both contracted in prison) to inhuman and degrading treatment by failing to provide him adequate or effective medical services.³³³ Though the case concerned detainees serving penal sentences rather than migrants detained temporarily, the principles the ECtHR conveyed in its ruling demonstrate the Court's concern with conditions in State-operated detention facilities. The IACtHR has also called on States to protect the health of migrants. In a 2014 Advisory Opinion focused on treatment of children, the Court determined States "must guarantee" medical care while children are in State custody awaiting refugee status determination, including specialized care services tailored to each child's specific needs.³³⁴

2. States' Obligations to Immigration Detainees During a Pandemic

Governments' health-related obligations to migrants under their care or within their custody continue during public health emergencies such as pandemics. In fact, States must carefully weigh the risk of infectious disease contraction or transmission within their facilities when deciding whether to detain or confine a migrant in the first instance. States' abilities to restrict movement of migrants (whether in camps, detention facilities, or ports of entry) are not absolute. The 1951 Refugee Convention prohibits States Parties from imposing restrictions on the movements of refugees and asylum seekers "other than those which are necessary," and only permits such restrictions while the confined individual's status in the country is being regularized (or until they obtain admission in another country).³³⁵ This obligation applies even if the State views the refugees or asylum seekers as unlawfully present in the State's territory. While States may initially confine refugees and asylum seekers for a set period in order to undertake health checks "as a preventative measure in the event of specific communicable diseases or epidemics," refugees and asylum seekers who ultimately apply for protection are entitled to freedom of movement within the foreign State's territory.³³⁶

A State that has detained migrants or confined them to a camp is restricted in its ability to assess the medical status of detained individuals. The WHO's IHR specify that when there is evidence of a public health risk, States Parties to the WHO Constitution may undertake, on a case-by-case basis, "the least intrusive and invasive medical examination that would

333. Execution of the Judgments of the European Court of Human Rights in Five Cases Against Georgia, Resolution CM 209 (2014), [https://hudoc.echr.coe.int/fre#{"itemid":\["001-148546"\]}](https://hudoc.echr.coe.int/fre#{) [<https://perma.cc/AV9T-SU68>].

334. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R., ¶ 182 (Aug. 19, 2014).

335. 1951 Refugee Convention, *supra* note 267, art. 31(2).

336. *A Guide to International Refugee Protection and Building State Asylum Systems*, UNHCR (2017), <https://www.unhcr.org/3d4aba564.pdf> [<https://perma.cc/LDK3-MZLP>].

achieve the public health objective of preventing the international spread of disease.”³³⁷ Authorities must acquire travelers’ express informed consent (or the consent of their parents or guardians) before subjecting individuals to medical examinations, which must be administered in accordance with established safety guidelines to minimize risk of disease transmission.³³⁸ States Parties isolating or quarantining travelers (including refugees and asylum seekers) must arrange for adequate food and water, appropriate accommodation and clothing, medical treatment, and means of communication in a comprehensible language; moreover, such quarantine or isolation measures must be limited in time.³³⁹

3. *States’ Obligations to Immigration Detainees in the Context of COVID-19*

States that detain those seeking to enter their territory have a responsibility to prevent, treat, and control the COVID-19 pandemic within and between their detention facilities to the extent possible. This obligation entails working to ensure the availability of health care services, medical and hygiene supplies (including masks), and adequate sanitation and ventilation in such sites to prevent virus transmission. Medical services and supplies necessary to treat those individuals who have contracted the virus in these facilities and camps are also critical. These duties are among those that hundreds of international experts on refugee and migrant protection have endorsed.³⁴⁰

Human rights bodies have expressly affirmed these obligations. UNHCR has compiled an extensive “toolkit” that outlines a number of treaty obligations that States Parties to various human rights obligations have toward detainees during the COVID-19 pandemic.³⁴¹ And in May 2020, the IACtHR issued a resolution in the case of *Vélez Loor v. Panamá* requiring the Panamanian government to take appropriate measures to protect the rights to health, personal integrity, and life of transiting migrants detained at migration reception stations.³⁴² Warning of the potential for a COVID-19 outbreak within the facilities, the Court specifically noted the government’s duties, among others, to conduct health checks for all individuals entering the facilities; adopt appropriate quarantine policies when necessary; provide migrants with free and non-discriminatory access to health care services that have the same standard of care as those available

337. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 23(2).

338. *Id.* art. 23(3)-(4).

339. *Id.* art. 32.

340. See, e.g., *14 Principles of Protection for Migrants and Displaced People During Covid-19*, REFUGEES INT’L, Apr. 29, 2020, <https://www.refugeesinternational.org/reports/2020/4/29/14-principles-of-protection-for-migrants-and-displaced-people-during-covid-19> (collecting signatures) [<https://perma.cc/8T3N-V6YU>].

341. *Internal HRTB toolkit of treaty law perspectives and jurisprudence in the context of COVID-19*, UNHCR, HUM. RTS. TREATIES BRANCH (May 2020), https://www.ohchr.org/Documents/HRBodies/TB/COVID19/HRTB_toolkit_COVID_19.docx [<https://perma.cc/8BM5-XKSE>].

342. *Vélez Loor v. Panamá*, Inter-Am. Ct. H.R. (May 26, 2020), https://www.corteidh.or.cr/docs/medidas/velez_se_01.pdf [<https://perma.cc/DD8R-7YCY>].

in the community; ensure ventilation, cleanliness, disinfection, and waste collection; provide free masks, gloves, and other supplies; and promote personal hygiene to prevent disease transmission.

Beyond providing adequate and accessible medical services and supplies, governments should consider means of reducing overcrowding and limiting transfers of detainees that might increase the risk of transmission of COVID-19 within the detainee population. State authorities might allow individuals in their custody or under their care to transition to reside in host communities where they might socially distance more effectively, within the bounds of official processes for determining status. Some States have taken this approach. The Norwegian government has released some migrants from detention in light of the pandemic on a case-by-case basis, allowing selected individuals to seek accommodation with their contacts in the country so long as they regularly report to public authorities.³⁴³ Courts in Portugal, France, Japan, Indonesia, and elsewhere have occasionally ordered the release of immigrants in response to COVID-19.³⁴⁴ Portugal has gone further than other countries, offering temporary legal status to migrants and asylum seekers to encourage them to report and seek treatment for suspected COVID-19 cases.³⁴⁵ The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment underscores this recommendation in advising States Parties to the Optional Protocol to the CAT to “review the use of immigration detention centres and closed refugee camps with a view to reducing their populations to the lowest possible level.”³⁴⁶ UNHCR, together with the International Organization for Migration, the WHO, and the Office of the High Commissioner for Human Rights, urged in March 2020 that migrants held in overcrowded and unsanitary conditions “be released without delay” in light of “the lethal consequences a COVID-19 outbreak would have.”³⁴⁷ Most States, however, have been reluctant to respond to these calls to release detained migrants, likely fearing that, once released, the

343. See COVID-19 Global Immigration Detention Platform, Global Detention Project, <https://www.globaldetentionproject.org/covid-19-immigration-detention-platform#Norway> (collecting national immigration policy responses to COVID-19) [<https://perma.cc/6HNJ-W6HJ>].

344. Karina Piser, *The End of Immigration Detention Doesn't Mean the End of Fortress Europe*, FOREIGN POL'Y (July 31, 2020), <https://foreignpolicy.com/2020/07/31/coronavirus-asylum-end-immigration-detention-spain-france-end-of-fortress-europe/> [<https://perma.cc/CWL3-5RU4>].

345. Chantal de Silva, *Portugal's COVID-19 Strategy to Treat Immigrants Like Citizens is Working*, NEWSWEEK (June 18, 2020), <https://www.newsweek.com/portugal-protecting-public-health-amid-coronavirus-pandemic-means-protecting-migrant-health-too-1506817> [<https://perma.cc/7VGY-DUA5>].

346. *Advice of the Subcommittee to States Parties and National Preventive Mechanisms Relating to the Coronavirus Disease (COVID-19) pandemic*, Apr. 7, 2020, <https://ombuds.am/images/files/b5b343501230feb3415bebe1d67fe6db.pdf> [<https://perma.cc/CB5H-ZWUQ>].

347. Joint statement by UNHCR, IOM, OHCHR and WHO, *The Rights and Health of Refugees, Migrants and Stateless Must be Protected in COVID-19 Response* (Mar. 31, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25762&LangID=EN> [<https://perma.cc/86RL-Q9FC>].

migrants may not return. That reluctance may have had deadly consequences.³⁴⁸

In short, COVID-19 represents a distinct and substantial challenge for States that detain refugees, asylum seekers, and other immigrants. These States have significant international law obligations to protect the especially vulnerable populations under their care in immigration facilities, detention centers, and refugee camps. Meeting these obligations is not only required by international law, but it is also essential to stemming the pandemic.

IV. Cyber Law: Vaccine Theft and Disinformation

In late 2020, cybersecurity researchers reported a suspected state-sponsored attempt to gain access to the accounts of executives and officials at companies and international organizations managing the logistics of COVID-19 vaccine distribution.³⁴⁹ According to IBM, the hackers were apparently seeking information about how the vaccines, some of which have to be kept at extremely low temperatures, will be stored and moved. The motive—whether to simply steal technology or to interfere with the distribution of the vaccine—was unclear.

This is just one in a slew of cyber incidents related to COVID-19, which has proved to be a boon for hackers. Professional life rapidly went digital during the pandemic, making it more vulnerable to cyber criminals. INTERPOL has reported an “alarming” rise in cyber incidents after the pandemic started.³⁵⁰ Much of the crime wave has come from individuals and gangs looking to turn a quick profit, but States have gotten in on the act, too. British, U.S., and Canadian intelligence agencies accused Russia of attempting to steal research from universities and companies working to create a vaccine for COVID-19.³⁵¹ China apparently attempted to steal vaccine data from the University of North Carolina and other cutting edge research labs.³⁵² Iran tried to break into the personal email accounts of staff at the WHO early in the pandemic.³⁵³ “Nearly all of the United

348. Dan Glaun, *How ICE Data Undercounts COVID-19 Victims*, PBS (Aug. 11, 2020), <https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/> [https://perma.cc/V5CW-PVVY].

349. David E. Sanger & Sharon LaFraniere, *Cyberattacks Discovered on Vaccine Distribution Operations*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/us/politics/vaccine-cyberattacks.html> [https://perma.cc/23J3-MD39].

350. INTERPOL Report Shows Alarming Rate of Cyberattacks During COVID-19, INTERPOL (Aug. 4, 2020), <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-shows-alarming-rate-of-cyberattacks-during-COVID-19> [https://perma.cc/U8MN-H2KR].

351. National Cyber Security Centre, Advisory: APT29 Targets COVID-19 Vaccine Development (July 16, 2020), <https://www.ncsc.gov.uk/files/Advisory-APT29-targets-COVID-19-vaccine-development-V1-1.pdf> [https://perma.cc/MUV4-MMUW].

352. Julian E. Barnes & Michael Venutolo-Mantovani, *Race for Coronavirus Vaccine Pits Spy Against Spy*, N.Y. TIMES (Sept. 5, 2020), <https://www.nytimes.com/2020/09/05/us/politics/coronavirus-vaccine-espionage.html> [https://perma.cc/Q5UA-F9P7].

353. Joseph Menn et al., *Exclusive: Hackers Linked to Iran Target WHO Staff Emails During Coronavirus - Sources*, REUTERS (Apr. 2, 2020), <https://www.reuters.com/article/>

States' adversaries," according to the *New York Times*, have attempted to pilfer cutting-edge research.³⁵⁴

Data theft is not the only COVID-19-related cyber risk. Russian trolls have for years promoted anti-vaccine content online. Kremlin-linked groups have peddled conspiracy theories about COVID-19, including the idea that it is a U.S.-made biological weapon and half-satirical claims that the Oxford-AstraZeneca vaccine turns patients into monkeys because it is based on a deactivated chimpanzee virus.³⁵⁵ To protect the health of their own citizens and the integrity of international scientific collaboration, States need to respond to State and non-State efforts to spread disinformation.

This Part considers what role international law might play in regulating these cyber incidents. It examines the law governing use of force, the principle of non-intervention, and the proposed "rule" of sovereignty. It finds that international law, at least as currently constituted, does not apply to the known incidents thus far (though if state actors were to interfere with vaccine distribution, that could change). No international legal rule clearly prohibits vaccine espionage or misinformation campaigns. The gaps in the law pose a problem for any response to COVID-19 cyber incidents, but they could also provide States with an opportunity—and an incentive—to clarify the rules that govern cyberspace.³⁵⁶

A. Law Governing the Use of Force

One of the bedrock rules of international law is the prohibition on the use of force, contained in Article 2(4) of the U.N. Charter. Although States have had trouble defining exactly when a cyber operation would constitute a use of force, they have mostly agreed that cyber operations could, in principle, violate the prohibition.³⁵⁷ The bar is high, however.

As one of us put it in a 2012 article: "[T]he best test of when a cyber-attack is properly considered cyber-warfare is whether the attack results in physical destruction—sometimes called a 'kinetic effect'—comparable to a

us-health-coronavirus-cyber-iran-exclusi/exclusive-hackers-linked-to-iran-target-who-staff-emails-during-coronavirus-sources-idUSKBN21K1RC [https://perma.cc/W4NX-328U].

354. Barnes and Venutolo-Mantovani, *supra* note 352.

355. See Eric Tucker, *US Officials: Russia Behind Spread of Virus Disinformation*, ASSOCIATED PRESS (July 28, 2020), <https://apnews.com/article/ap-top-news-health-moscow-ap-fact-check-elections-3acb089e6a333e051dbc4a465cb68ee1> <https://perma.cc/HS2L-2XJ8>; see also Manveen Rana & Sean O'Neill, *Russians Spread Fake News Over Oxford Coronavirus Vaccine*, TIMES (Oct. 16, 2020), <https://www.thetimes.co.uk/article/russians-spread-fake-news-over-oxford-coronavirus-vaccine-2nzpk8vrq> [https://perma.cc/9G9Y-7QTX].

356. See Gary Corn, *Coronavirus Disinformation and the Need for States to Shore Up International Law*, LAWFARE (Apr. 2, 2020), <https://www.lawfareblog.com/coronavirus-disinformation-and-need-states-shore-international-law> (arguing that COVID-19 may encourage States to draw clearer lines around unacceptable interference) [https://perma.cc/W7XX-2MKR].

357. See Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 421-59 (2011) (noting that States have struggled to fit cyberattacks into the U.N. Charter framework).

conventional attack.”³⁵⁸ That same year, the U.S. State Department put forward a similar view, concluding that a cyber operation would qualify as a use of force if it caused “direct physical injury and property damage” of the kind produced by traditional weapons.³⁵⁹

No COVID-19 vaccine hacking or disinformation campaign has met that standard, and it is hard to see how efforts to steal data or spread false information could. It is possible that a cyber operation that destroyed stocks of an approved vaccine, or prevented a country from distributing it, could have a sufficiently close causal link to resulting deaths that it would resemble a traditional attack violating the prohibition on the use of force. But anything short of that is unlikely to meet the legal threshold. Even if a hacking effort significantly delayed the production of a vaccine, rather than merely copying researchers’ data, the link between the operation and subsequent deaths from the lengthened pandemic would probably be too attenuated for the hack to constitute a use of force under current interpretations of international law.

Setting aside the use of force, commentators have made two main arguments for why vaccine hacking and disinformation might break international law. First, they argue that such operations could breach the principle of non-intervention. Second, such attacks might violate a putative rule of State sovereignty. We consider each possibility in turn.

B. The Principle of Non-Intervention

The principle of non-intervention bars a State from coercing another State into acting against its will in an area within its inherent sovereign functions. The definitions of both “coerce” and “sovereign functions” have proven tricky to pin down.³⁶⁰ Coercion requires more than a mere attempt to influence State policy,³⁶¹ such as through diplomacy or propaganda, but exactly how much more has been a point of contention. As for the definition of sovereign functions, the ICJ has concluded that an unlawful intervention must bear “on matters in which each State is permitted . . . to decide freely,” such as “the choice of a political, economic, social and cultural system.”³⁶² That definition suggests that the principle protects a broad swathe of government policy. As the legal scholars Marko Milanovic and Michael Schmitt have argued, a government’s response to a pandemic

358. Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817, 841 (2012).

359. Harold H. Koh, Legal Advisor U.S. Department of State, Speech at the USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012), <https://2009-2017.state.gov/s/l/releases/remarks/197924.htm> [<https://perma.cc/C8R6-NNVV>].

360. See Harriet Moynihan, *The Application of International Law to State Cyberattacks* 26, CHATHAM HOUSE (2019), <https://www.chathamhouse.org/sites/default/files/publications/research/2019-11-29-Intl-Law-Cyberattacks.pdf> (quoting scholars describing the prohibition as “vague” and “elusive”) [<https://perma.cc/EYK8-Q8XF>].

361. See Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L L. 345, 348 (2009).

362. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgement, 1986 I.C.J. 14 (June 27, 1986).

likely qualifies, since protecting public health is widely regarded as a core function of the State.³⁶³

State practice backs up these definitions. States have accused the perpetrators of cyber incidents of violating international law, in the words of a recent Chatham House report by Harriet Moynihan, only when the attack has “practical effects” on a State’s ability to exercise its “inherently sovereign powers,” and not when the attack targets individuals and private companies without a broader effect on State policy.³⁶⁴ Thus in 2018, the United Kingdom accused Russia of a “flagrant violation” of international law for allegedly carrying out a campaign of cyberattacks that disrupted transportation systems in Ukraine.³⁶⁵ Likewise, in 2020, the United Kingdom accused Russia of violating international law in a 2019 cyberattack on Georgia, which knocked out the national TV station and numerous government websites.³⁶⁶

In contrast, countries have responded in other ways—notably without alleging violations of State sovereignty—to cyber incidents that do not impinge on core State functions. After the 2014 North Korean hack of Sony, U.S. President Barack Obama characterized the incident not as an act of war but as “an act of cyber vandalism.”³⁶⁷ In 2018, the United States and the United Kingdom declined to accuse Iran of breaking international law by conducting a spear-phishing campaign against private universities and companies, instead treating the incursion as a violation of domestic law.³⁶⁸ The same reticence showed up after the 2017 WannaCry ransomware operation, despite the potentially dangerous effects of the incident. The malware hit the British National Health Service particularly hard, locking patient records and making thousands of medical devices temporarily unusable, leading to the cancellation of doctor’s appointments and surgical procedures. Yet its main aim appeared to be financial gain, not changes to State policy, and the United Kingdom characterized it as “a

363. Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations during a Pandemic*, 11 J. NAT. SECURITY L. & P’CY 247, 257 (2020).

364. Moynihan, *supra* note 360, at 34–35.

365. Press Release, National Cyber Security Centre, Reckless Campaign of Cyber Attacks by Russian Military Intelligence Service Exposed (Oct. 18, 2018), <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed> [<https://perma.cc/R4X5-J4BV>].

366. Press Release, Foreign & Commonwealth Office, UK Condemns Russia’s GRU over Georgia Cyber-Attacks (Feb. 20, 2020), <https://www.gov.uk/government/news/uk-condemns-russias-gru-over-georgia-cyber-attacks>.

367. Steve Holland & Doina Chiacu, *Obama Says Sony Hack Not an Act of War*, REUTERS (Dec. 22, 2014), <https://www.reuters.com/article/us-sony-cybersecurity-usa/obama-says-sony-hack-not-an-act-of-war-idUSKBN0JX1MH20141222> [<https://perma.cc/8H5N-X8J8>].

368. Foreign & Commonwealth Office, Foreign Office Minister Condemns Criminal Actors Based in Iran for Cyber-Attacks Against UK Universities (Mar. 18, 2018), <https://www.gov.uk/government/news/foreign-office-minister-condemns-criminal-actors-based-in-iran-for-cyber-attacks-against-uk-universities>.

criminal use of cyber space” rather than a violation of international law.³⁶⁹

Thus, attempts to merely steal vaccine research likely do not violate the international law rule against intervention, as simply copying research does not involve coercing the target State or affecting core State policy. It is instead an act of cyber espionage, which is generally not directly regulated by international law (though it is prohibited almost everywhere by domestic law). However, destroying data, disabling vaccine research or production, or disrupting distribution could curtail States’ capacity to respond to the pandemic. Such actions arguably would constitute a prohibited coercive intervention.

As for disinformation, Milanovic and Schmitt persuasively argue that merely seeking to influence the population, even in harmful ways, is not sufficiently coercive to constitute an intervention.³⁷⁰ Yet some acts of misinformation could qualify as prohibited intervention if sufficiently coercive as to remove or significantly limit the State’s capacity to effectively respond to the pandemic. As of this writing, it does not appear that the current vaccine-related operations have crossed, or even come close to, that line.

C. The (Non-)Rule of Sovereignty

Underlying international law is the principle of State sovereignty. Some legal scholars, including Schmitt, the editor of the *Tallinn Manual 2.0*, have argued that the sovereignty principle creates a stand-alone rule of international law that applies to cyberspace.³⁷¹ This rule would sweep in many intrusions that fall below the non-intervention threshold. A State violates another State’s sovereignty, the *Manual* holds, when it exercises State power within the target State’s territory without its consent. Violations can be executed remotely.

A few States, including Finland, France, and the Netherlands, as well as members of the Shanghai Cooperation Organization, have endorsed this view.³⁷² Milanovic and Schmitt, who endorse the principle, argue that

369. Foreign & Commonwealth Office, Foreign Office Minister Condemns North Korean Actor for WannaCry Attacks (Dec. 19, 2017), <https://www.gov.uk/government/news/foreign-office-minister-condemns-north-korean-actor-for-wannacry-attacks>.

370. Milanovic & Schmitt, *supra* note 363, at 269.

371. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS r. 4 (Michael M. Schmitt & Liis Vihul eds., 2017).

372. See Ministry for Foreign Affairs of Finland, *Finland Published its Positions on Public International Law in Cyberspace* (Oct. 15, 2020), https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/suomi-julkisti-n-c3-a4kemyksens-c3-a4-kan-sainv-c3-a4lisest-c3-a4-oikeudesta-kyberymp-c3-a4rist-c3-b6ss-c3-a4 [<https://perma.cc/N5CH-SX3U>]; Ministère des Aermés, *Droit International Appliqué aux Opérations dans le Cyberspace (International Law Applicable to Operations in Cyberspace)* (Sept. 2019), <https://www.justsecurity.org/wp-content/uploads/2019/09/droit-internat-applique-aux-opérations-cyberspace-france.pdf> [<https://perma.cc/S9VS-XST9>]; Netherlands Ministry of Foreign Affairs, *Letter to the Parliament on the International Legal Order in Cyberspace* (July 5, 2019), <https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> [<https://perma.cc/94WA-QYUC>]; see also Sarah McKune & Shazeda Ahmed, *The Contestation and Shaping of Cyber Norms Through China’s Internet Sovereignty Agenda*, 12 INT’L J. COMMC’N 3835, 3835 (2018).

misinformation campaigns can violate the rule “by causing effects on the territory of” another State “or by interfering with its inherently governmental functions even in the absence of territorial effects.”³⁷³ In their view “any negative health outcome would qualify as an ‘effect’” and therefore any cyber-operation that has a negative health outcome violates the sovereignty rule.³⁷⁴ For example, a denial of service attack against a website providing information on virus testing or a ransomware attack that impedes dissemination of information about the pandemic would qualify as a violation as long as there is “some concrete harm.”³⁷⁵

The stand-alone sovereignty argument is not widely accepted, however. The United Kingdom has rejected it outright. In 2018, British Attorney General Jeremy Wright set out his government’s position: “[T]here is no such rule as a matter of current international law.”³⁷⁶ In this view, operations that fall short of the non-intervention rule may be unwelcome—and, depending on the specific facts, illegal under domestic law—but they are not barred by international law.

The U.S. government has expressed sympathy for the British view. In May 2020, Department of Defense General Counsel Paul Ney argued that there was not sufficiently “widespread and consistent State practice . . . to conclude that customary international law generally prohibits such non-consensual cyber operations in another State’s territory,” a position he characterized as sharing “similarities” with the British view.³⁷⁷

Those who reject a rule of cyber sovereignty as an independent rule have, we think, the better of the argument. For one thing, the principle of sovereignty is precisely what underlies the principle of non-intervention. Going beyond non-intervention to bar all cyber operations that infringe on “sovereignty” broadly defined would almost certainly sweep in too much activity. Traditional espionage operations, for example, are not directly regulated by international law.³⁷⁸ The proposed stand-alone rule of sovereignty would risk making most electronic snooping illegal; according to the Chatham House report, “a [S]tate simply sitting on another [S]tate’s server” could violate the victim [S]tate’s sovereignty.³⁷⁹ That would upend intelligence work and would, in any case, be rejected out of hand by the world’s practitioners of cyber espionage (or at least those who are mindful of their international law obligations).

373. Milanovic & Schmitt, *supra* note 363, at 253.

374. *Id.* at 254–55.

375. *Id.*

376. Jeremy Wright, Attorney General of the UK, Cyber and International Law in the 21st Century, Address at Chatham House Research Event (May 23, 2018), <https://www.chathamhouse.org/event/cyber-and-international-law-21st-century> [<https://perma.cc/K96W-Q65F>].

377. Paul C. Ney, Jr., U.S. Defense Dep’t Gen. Counsel, Remarks at U.S. Cyber Command Legal Conference (Mar. 2, 2020), <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/> [<https://perma.cc/T4QV-LT3N>].

378. See generally, Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT’L L. 291, 291–368 (2015).

379. Moynihan, *supra* note 360, at 19.

It is not just States that would find their activities curtailed by a free-standing sovereignty rule prohibiting cross-border cyber operations. Human rights organizations, for example, often seek to influence the politics and law of the countries within which they operate, and these influence campaigns sometimes involve cross-border operations that are resisted by the sovereign State in which they take place. Russia, for instance, has banned foreign non-governmental organizations.³⁸⁰ A broad rule of sovereignty might help legitimate Russia's actions by substantiating its claim that these organizations and their sponsors are violating Russia's "sovereignty." Or consider Voice of America, which aims to provide television and radio programming to populations whose governments do not always welcome it. Does Voice of America's projection of electronic signals into these countries violate their "sovereignty"?

Some commentators have attempted to save the idea of sovereignty-as-rule by exempting *de minimis* territorial intrusions,³⁸¹ but no one seems to agree where to draw the line, and State practice thus far provides no guidance. In the end, as Ney pointed out, the very fact of wide disagreement among States about a potential rule of cyber sovereignty itself forecloses the existence of such a norm—at least at present.

* * *

Without a violable rule of sovereignty, efforts to steal vaccine research likely do not break international law—as long as they do not impede that research. Espionage appears to fall within the zone of intelligence activity.³⁸² Data theft alone does not appear to violate the non-intervention principle, as there is nothing inherently governmental about protecting commercial or scientific information and such theft has not apparently significantly impeded efforts to respond to the virus. (That said, the actions are far from legal: They almost certainly violate U.S. domestic law, including the Economic Espionage Act and the Cyber Fraud and Abuse Act.)

It is no surprise, then, that the United States has largely avoided referring to international law when condemning cyber espionage, instead treating it as a violation of domestic law or aspirational codes of State behavior. In 2015, when China and the United States agreed that neither country would support intellectual property cybertheft—an agreement that proved short-lived—the deal made no mention of international law.³⁸³ And in July

380. *Russia's Putin Signs Law Against 'Undesirable' NGOs*, BBC NEWS (May 24, 2015), <https://www.bbc.co.uk/news/world-europe-32860526> [<https://perma.cc/3R3E-GKY3>].

381. See, e.g., Moynihan, *supra* note 360, at 23 (describing a *de minimis* threshold as "attractive from a practical and pragmatic point of view").

382. See Edwin Djabatey, *U.S. Offensive Cyber Operations Against Economic Cyber Intrusions: An International Law Analysis - Part I*, JUST SECURITY (July 11, 2019), <https://www.justsecurity.org/64875/u-s-offensive-cyber-operations-against-economic-cyber-intrusions-an-international-law-analysis-part-i/> [<https://perma.cc/M45J-JFMP>].

383. See White House, Press Release, FACT SHEET: President Xi Jinping's State Visit to the United States (Sept. 25, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states> <https://perma.cc/3M34-6A97>; see also *U.S. Accuses China of Violating Bilateral Anti-Hacking*

2020, when the Department of Justice indicted two Chinese government hackers for attempting to steal vaccine research, it did not accuse China of violating international law, instead simply denouncing it for working to steal the “hard-earned intellectual property” of American companies.³⁸⁴

Even before COVID-19, the international community struggled to define rules of the road for cyberspace and to deter unwelcome State cyber operations. Indicting foreign State hackers can shame wrongdoers and impose unwelcome travel restrictions, but perpetrators of State-backed cyber incidents are unlikely to face criminal prosecution. Diplomatic measures are also frequently insufficient. In July 2020, according to the *New York Times*, the Trump administration shuttered the Chinese consulate in Houston in part because China was using it for medical research espionage, but it is unclear what effect the move had.³⁸⁵ Bilateral agreements, such as the 2015 U.S.-Chinese deal, can help, but only temporarily. The digital world remains something of a Wild West.³⁸⁶

Perhaps the greatest impact of the cyber incidents during the COVID-19 pandemic has been to reveal how few rules there really are. There have been two UN-sponsored efforts aimed at providing greater clarity about the rules for “responsible behavior in cyberspace.”³⁸⁷ One concluded in March 2021 with little new substantive progress.³⁸⁸ Perhaps the inability of international law to regulate hacking incidents during the pandemic will encourage the international community to begin to take more serious steps to agree on the international rules that govern cyber activities.

V. The WHO’s Pandemic Response and the International Health Regulations

International law has long regulated the management of global public health threats. Ever since 1851, when the first International Sanitary Conference attempted to harmonize quarantine procedures among European States, countries have repeatedly united around the need to prevent the

Deal, REUTERS (Nov. 9, 2018), <https://www.reuters.com/article/us-usa-china-cyber/u-s-accuses-china-of-violating-bilateral-anti-hacking-deal-idUSKCN1NE02E> [https://perma.cc/9AT8-RHJ4].

384. Press Release, U.S. Dep’t of Just., Two Chinese Hackers Working with the Ministry of State Security Charged with Global Computer Intrusion Campaign Targeting Intellectual Property and Confidential Business Information, Including COVID-19 Research (July 21, 2020), <https://www.justice.gov/opa/pr/two-chinese-hackers-working-ministry-state-security-charged-global-computer-intrusion> [https://perma.cc/2J89-9H2E].

385. Barnes and Venutolo-Mantovani, *supra* note 352.

386. See Marietje Schaake, *The Lawless Realm: Countering the Real Cyberthreat*, FOREIGN AFF., (November/December 2020), <https://www.foreignaffairs.com/articles/world/2020-10-13/lawless-realm> [https://perma.cc/AKK2-KMP5].

387. See U.N. GGE and OEWG, GENEVA INTERNET PLATFORM, DIGWATCH, <https://dig.watch/processes/un-gge> [https://perma.cc/37SQ-ADJP].

388. U.N. Gen. Assembly, Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security: Final Substantive Report, U.N. Doc. A/AC.290/2021/CRP.2 (Mar. 10, 2021), <https://front.un-arm.org/wp-content/uploads/2021/03/Final-report-AAC.290-2021-CRP.2.pdf> [https://perma.cc/PS86-65JA].

spread of disease. The latest iteration of the global rules on pandemics, the 2005 International Health Regulations (IHR), set requirements for how States should report outbreaks, manage diseases within their borders, and cooperate to prevent their spread.

The regulations, the first version of which was adopted by the WHO in 1969, are binding on all 194 WHO members.³⁸⁹ They aim to “prevent, protect against, control, and provide a public health response to the international spread of disease” while minimizing interference with “international traffic and trade” and respecting “the dignity, human rights and fundamental freedoms” of all people.³⁹⁰ The regulations allow the WHO to coordinate a global disease surveillance network made up of monitoring systems with each state in order to catch outbreaks that risk turning into international health emergencies and report them to the WHO.

Yet during the COVID-19 pandemic, the regulations have too often proven ineffective in shaping the response of States, and even the WHO itself, to the pandemic. Chinese officials reportedly attempted to cover up the initial spread of the disease.³⁹¹ The WHO took a full month to declare a public health emergency after learning about the outbreak, leading many to argue it should have moved more quickly.³⁹² Many States broke with the WHO’s recommendations by imposing strict travel bans, stay-at-home orders, and other repressive measures;³⁹³ although, in retrospect, these moves were likely justified. And, especially early on in the pandemic, competition rather than cooperation ruled the day.

The IHR are binding on WHO members, but they contain no enforcement mechanism. As a result, the WHO has been unable to hold States to their obligations—or discipline those that have failed to meet them. As the disease surges once again in Europe and the United States, it is time for governments to find ways to strengthen the world’s health regulations and return to the principle of cooperation that undergirds them.

A. The Role of the WHO and the International Health Regulations

Although COVID-19 is hardly the first global pandemic, it may be the first to take place despite an international agreement specifically designed to stop it. In 2005, in the wake of China’s failure to report the 2002 SARS outbreak to the WHO for more than two months, the World Health Assem-

389. See *International Health Regulations*, WORLD HEALTH ORG. [WHO], <https://www.who.int/health-topics/international-health-regulations> [https://perma.cc/NCJ7-SCHX].

390. See INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, arts. 2, 3.

391. James Kynge, Sun Yu, & Tom Hancock, *Coronavirus: The Cost of China’s Public Health Cover-Up*, FIN. TIMES (Feb. 6, 2020), <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441> [https://perma.cc/5J8E-ASZK].

392. Betsy McKay and Drew Hinshaw, *How Coronavirus Overpowered the World Health Organization*, WALL ST. J. (Aug. 28, 2020), <https://www.wsj.com/articles/the-who-was-built-to-guard-global-health-it-was-too-weak-for-coronavirus-11598625537> [https://perma.cc/6GQF-JH6M].

393. See Selam Gebrekidan, *The World Has a Plan to Fight Coronavirus. Most Countries Are Not Using It*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/world/coronavirus-world-health-organization.html> [https://perma.cc/8WZY-NP2A].

bly, made up of the WHO's members, revamped the IHR to try to address weaknesses in pandemic prevention, detection, and response.³⁹⁴

Before 2005, the regulations had covered just three diseases: cholera, plague, and yellow fever.³⁹⁵ The new regulations covered all potential public health hazards and contained stricter requirements on States to alert the WHO to outbreaks.³⁹⁶ They also gave the Director General of the WHO, acting on the advice of an emergency committee of experts, the power to declare a Public Health Emergency of International Concern (PHEIC), the official international alert. The regulations define such an emergency as an event that “constitute[s] a public health risk to other States through the international spread of disease” and “potentially require[s] a coordinated international response.”³⁹⁷ The WHO has declared six public health emergencies since 2005, most recently on January 30, 2020, in response to the COVID-19 outbreak.³⁹⁸

Apart from giving the WHO the ability to declare an emergency, the revised regulations impose four main requirements on WHO members. First, they must notify the WHO within 24 hours of all public health events inside their territory that might constitute an international public health emergency.³⁹⁹ After States send a notification to the WHO, they must keep the WHO up to date with “timely, accurate and sufficiently detailed” information about the health event.⁴⁰⁰ Second, States must improve their domestic capacities to prevent, detect, and respond to the spread of diseases that threaten the international community.⁴⁰¹ States get to decide how they will fulfill this obligation, but they must “uphold the purpose” of the regulations through their domestic efforts.⁴⁰² Third, States are limited in how they can respond to disease outbreaks once they occur. The regulations instruct countries to impose only those measures that are supported by scientific evidence, appropriate to the risks involved, and maintain respect for human rights.⁴⁰³ In general, health measures must follow WHO recommendations, although States are allowed to impose additional measures under some circumstances.⁴⁰⁴ Finally, governments must report to the WHO any public health measures they take that constitute a “significant interference” with international traffic—meaning delaying the entry or departure of travelers or goods for more than 24 hours—along with the rationale for the action and the evidence behind it.⁴⁰⁵

394. Lawrence O. Gostin & Rebecca Katz, *The International Health Regulations: The Governing Framework for Global Health Security*, 94 *MILBANK Q.* 264, 267 (2016).

395. *Id.* at 266.

396. *Id.* at 267-68.

397. See INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 1.

398. Lawrence O. Gostin, Roojin Habibi, & Benjamin Mason Meier, *Has Global Health Law Risen to Meet the COVID-19 Challenge?*, 48 *J.L. MED. ETHICS* 376, 377 (2020).

399. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 6(1).

400. *Id.* art. 6(2).

401. *Id.* art. 5.

402. *Id.* art. 3.

403. *Id.* arts. 42, 43.

404. *Id.* art. 43.

405. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 43(3).

B. Potential Breaches of the WHO's Regulations During the COVID-19 Pandemic

States, and the WHO itself, may have breached the IHR in several ways during the current crisis. First off, China may have violated the requirement to report disease outbreaks to the WHO at the start of the pandemic—although the fault may have been more with local officials in Wuhan than the central government in Beijing.

China first notified the WHO of a cluster of novel coronavirus-like infections on December 31, 2019, but the disease had been circulating in Wuhan for several weeks before that.⁴⁰⁶ Throughout December, the Wuhan authorities had insisted that the situation was under control.⁴⁰⁷ Local police had accused several people who posted on social media about the outbreak of spreading “rumors,” and the city’s medical authorities had barred a doctor from speaking publicly about patients suffering from a SARS-like disease.⁴⁰⁸ Subsequent assessments by the U.S. intelligence community have reportedly concluded that Wuhan authorities played the decisive role in covering up the initial spread of the virus, keeping central party officials in the dark.⁴⁰⁹

Beijing may have been unaware of the outbreak at the start, but its later delays in releasing information may nevertheless have violated its obligations under the IHR. In January, after reporting the situation in Wuhan to the WHO, Beijing continued to downplay its severity, claiming, for example, that the virus was not spreading from human to human for days after Chinese officials reportedly knew that it was.⁴¹⁰ China reportedly sat on other information, too, including the genome of the virus and data from patients.⁴¹¹ By slow walking crucial information, China may

406. See Press Release, World Health Org. [WHO], Novel Coronavirus – China (Jan. 12, 2020), <https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/> [<https://perma.cc/NK55-QPMX>]; see also Julia Belluz, *China Hid the Severity of its Coronavirus Outbreak and Muzzled Whistleblowers – Because it Can*, VOX, Feb. 10, 2020, <https://www.vox.com/2020/2/10/21124881/coronavirus-outbreak-china-li-wenliang-world-health-organization> [<https://perma.cc/257S-AHCJ>].

407. Li Yuan, *China Silences Critics Over Deadly Virus Outbreak*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/health/virus-corona.html> [<https://perma.cc/3XQM-VVCE>].

408. See *id.*; see also Kynge et al., *supra* note 391.

409. Edward Wong, Julian E. Barnes & Zolan Kanno-Youngs, *Local Officials in China Hid Coronavirus Dangers From Beijing, U.S. Agencies Find*, N.Y. TIMES, (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/world/asia/china-coronavirus-beijing-trump.html> [<https://perma.cc/7DEW-78UG>].

410. *China Didn't Warn Public of Likely Pandemic for 6 Key Days*, ASSOCIATED PRESS (Apr. 15, 2020), <https://apnews.com/article/virus-outbreak-health-ap-top-news-international-news-china-clamps-down-68a9e1b91de4ffc166acd6012d82c2f9> [<https://perma.cc/TBF9-RVRU>].

411. See Bill Bostock, *China Knew the Coronavirus Could Become a Pandemic in Mid-January but for 6 Days Claimed Publicly That There was no Evidence it could Spread Among Humans*, BUSINESS INSIDER (Apr. 15, 2020), <https://www.businessinsider.com/coronavirus-china-hid-pandemic-news-six-days-2020-4?r=US&IR=T> [<https://perma.cc/6QUA-QLHW>]; see also *China Delayed Releasing Coronavirus Info, Frustrating WHO*, ASSOCIATED PRESS (June 2, 2020), <https://apnews.com/article/3c061794970661042b18d5aeaaed9fae> [<https://perma.cc/TBF9-RVRU>].

have run afoul of the IHR's requirement that States keep the WHO abreast of "timely" and "accurate" public health information about the outbreak.

Even after China reported the cluster of cases on December 31, the WHO took a full month to declare a PHEIC. That delay reflected, in part, China's decision to prevent health care workers, scientists, and reporters from speaking publicly about an outbreak of SARS-like illnesses in December and, even after acknowledging the cluster of infections on December 31, to decline for weeks offers from the WHO and the U.S. Centers for Disease Control to send teams of experts to Wuhan.⁴¹²

In the intervening weeks, more than 8,000 people contracted the disease, 170 of them died, and more than 35 million people in Hubei were placed under lockdown and cut off from the rest of China.⁴¹³ Dr. Tedros Adhanom Ghebreyesus, the WHO Director General, convened multiple emergency committee meetings in late January to consider whether a declaration of a PHEIC was warranted. On January 23, the day the Chinese government locked down Wuhan, a meeting of the WHO's emergency committee did not recommend declaring an emergency.⁴¹⁴ Several members concluded that it was "too early," since there was only "a limited number of cases abroad."⁴¹⁵

The decision not to announce an emergency may have run counter to the IHR. Lawrence Gostin, Roojin Habibi, and Benjamin Mason Meier have argued that the emergency committee members "misapplied" the definition of a health emergency given in the WHO's own regulations, which requires only the "potential" for international spread and says nothing about the timing of a declaration.⁴¹⁶ The rules, however, give the Director General the power to "make the final determination" over declaring a public health emergency.⁴¹⁷ That discretion may mean that the ultimate decision not to make the declaration did not violate the regulations, even if the emergency committee got the definition of an emergency wrong.

412. Donald G. McNeil Jr. & Zolan Kanno-Youngs, *C.D.C. and W.H.O. Offers to Help China Have Been Ignored for Weeks*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/health/cdc-coronavirus-china.html> [<https://perma.cc/E5XE-39DD>].

413. See *Coronavirus (COVID-19) Cases: China*, OUR WORLD IN DATA, <https://ourworldindata.org/covid-cases?country=-CHN;%20https://ourworldindata.org/covid-deaths?country=-CHN> (last visited Oct. 14, 2021) [<https://perma.cc/XUG4-GY5M>]; Chris Buckley & Javier C. Hernández, *China Expands Virus Lockdown, Encircling 35 Million*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/world/asia/china-coronavirus-outbreak.html> [<https://perma.cc/Q6FS-UXBL>].

414. World Health Org. [WHO], *Statement on the First Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)* (Jan. 23, 2020), [https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [<https://perma.cc/NZ6H-L7RJ>].

415. Maria Cheng, U.N. Agency: China Virus 'Too Early' for Emergency Declaration, ASSOCIATED PRESS (Jan. 23, 2020), <https://apnews.com/article/0f266d872a7571bfa8807d2fa3daff9f> [<https://perma.cc/8KC4-WKML>].

416. Gostin et al., *supra* note 398, at 378.

417. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 49(5).

After the WHO finally declared an emergency, many States' responses arguably bent the rules, as well. The WHO's regulations require States to generally follow WHO recommendations in responding to disease outbreaks. When States take health measures that go beyond what the WHO recommends, those measures must be as effective as the WHO's recommendations (or more effective), follow scientific principles and evidence, not intrude more on international travel or be "more invasive or intrusive to persons" than "reasonably available alternatives," and be implemented with "full respect" for people's "dignity, human rights and fundamental freedom."⁴¹⁸

When the WHO declared a health emergency on January 30, it recommended against "any travel or trade restriction."⁴¹⁹ While the IHR were designed to prevent border closures that could discourage States from reporting outbreaks, States nonetheless ignored the WHO's recommendation: The very next day, the U.S. government banned entry for non-citizen travelers who had been in China in the past 14 days.⁴²⁰ Over subsequent months, governments across the world responded to the pandemic with sweeping international travel bans, flight restrictions, visa cancellations, and quarantine requirements.

Early in the pandemic, some scholars argued that these travel restrictions violated the WHO's rules. Public health researchers, they noted, had found little evidence that travel restrictions worked in the face of pandemic viruses similar to SARS-CoV-2, and the WHO had advised that such restrictions did more harm than good. The authors of one article in the *Lancet* argued that, since the WHO had provided alternatives, including "risk communication, surveillance, patient management, and screening at ports of entry and exit," travel bans violated the regulations' instruction that health measures do not restrict international traffic more than "reasonably available alternatives."⁴²¹

In retrospect, although flight restrictions and border closures did not work everywhere, according to one study they did play an important role in slowing international transmission.⁴²² And in countries able to seal them-

418. *Id.* art. 43.

419. World Health Org. [WHO], *Statement on the Second meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, (Jan. 30, 2020), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [https://perma.cc/J8XQ-RUUF].

420. White House, No. 9984, 85 Fed. Reg. 24 (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/> [https://perma.cc/6X78-YPJ4].

421. Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 *LANCET* 664 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30373-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30373-1/fulltext) [https://perma.cc/25EK-BDSB].

422. See Tamás Krisztin, Philipp Piribauer, & Michael Wögerer, *The Spatial Econometrics of the Coronavirus Pandemic*, 13 *LETTERS & SPATIAL RES. SCI.* 209, 209 (2020).

selves off entirely or nearly entirely, travel restrictions may have helped significantly. A study of Australia early on in the pandemic concluded that the country's imposition of a travel ban on February 1 reduced cases by over 80 percent.⁴²³ Those conclusions suggest that at least some governments may have been justified in imposing restrictions despite the WHO's recommendations to the contrary, as the "reasonably available" alternatives wouldn't have been as effective.

The WHO also did not advise governments to impose lockdowns early on in the pandemic. Despite an initial burst of enthusiasm for China's strict approach—"perhaps the most ambitious, agile and aggressive disease containment effort in history," according to the WHO—the organization recommended only that countries plan to take measures such as suspending large-scale gatherings and closing schools and workplaces, not mass stay-at-home orders and internal travel restrictions.⁴²⁴

Once again, countries paid little attention to this recommendation. Many governments imposed tight limits on their citizens' movements, ordering people to stay at home except in a few enumerated circumstances.⁴²⁵ Some used emergency authorities as an excuse to undermine democracy and violate human rights.⁴²⁶

To be clear, while the WHO did not recommend lockdowns, it never explicitly opposed them either, and once countries started imposing them, it characterized them more as a last-resort option than as a violation of the rules. In April, the WHO appeared to accept lockdowns as legitimate when it laid out factors for governments to consider before lifting disease control orders.⁴²⁷ The WHO wanted "as much as anyone" to see restrictions relaxed, Dr. Ghebreyesus said, but easing "too quickly" could lead to a resurgence of the virus.⁴²⁸ In July 2020, the WHO urged countries to find other ways to manage the virus, saying that lockdowns were not "a long-

423. Valentina Costantino, David J. Heslop & C. Raina MacIntyre, *The Effectiveness of Full and Partial Travel Bans Against COVID-19 Spread in Australia for Travelers from China During and After the Epidemic Peak in China*, 27 J. TRAVEL MEDICINE 1, 2 (2020).

424. See WORLD HEALTH ORG. [WHO], REPORT OF THE WHO-CHINA JOINT MISSION ON CORONAVIRUS DISEASE 2019 (COVID-19) 16 (Feb. 28, 2020), [https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications/i/item/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)) [<https://perma.cc/G8ZS-GXWG>].

425. See *Lockdowns Compared: Tracking Governments' Coronavirus Responses*, FIN. TIMES (updated Nov. 5, 2021), <https://ig.ft.com/coronavirus-lockdowns/>.

426. See Fionnuala Ní Aoláin, Kate Brannen & Ryan Goodman, *Assessing Emergency Powers During #COVID-19*, JUST SECURITY (Apr. 22, 2020), <https://www.justsecurity.org/69806/assessing-emergency-powers-during-covid-19/> (collecting discussions of emergency overreach) [<https://perma.cc/CGB6-M7PD>]; see also Alexis Thirty, *Will COVID-19 Create a Human Rights Crisis in the Middle East and North Africa?*, JUST SECURITY (Oct. 1, 2020), <https://www.justsecurity.org/72643/will-covid-19-create-a-human-rights-crisis-in-the-middle-east-and-north-africa/> [<https://perma.cc/7REC-TXCB>].

427. U.N. Health Agency Working on Strategies to Gradually Lift COVID-19 Restrictions, U.N. NEWS (Apr. 10, 2020), <https://news.un.org/en/story/2020/04/1061532> [<https://perma.cc/GBX8-TA2F>].

428. *Id.*

term solution.”⁴²⁹ And in October, Dr. David Nabarro, one of the WHO’s special envoys on COVID-19, said that the WHO did not support lockdowns as “the primary means” of controlling the virus; they could be justified under some circumstances, he said, “but by and large, we’d rather not do it.”⁴³⁰ The widespread use of lockdowns to control the virus is thus likely not a violation of the IHR.

Countries may have breached the IHR, however, by failing to work together to combat COVID-19. The regulations require States to “collaborate . . . to the extent possible” by coordinating medical, logistical, financial, and legal responses to public health emergencies. The regulations do not define what this collaboration means in practice, but many States arguably violated it in the early months of the pandemic when governments slammed borders shut, hoarded scarce medical supplies and personal protective equipment, and blamed one another for the spread of the disease.⁴³¹ Even within the European Union, countries ignored rules guaranteeing freedom of movement to impose unilateral border closures.⁴³² Yet here, as in other areas, the WHO discovered that in the midst of a crisis, it had little power to convince States to follow the IHR’s provisions.

* * *

The inability to enforce its regulations unfortunately fits into a larger pattern for the WHO. The organization serves an invaluable role as a center of scientific expertise and a champion for global health. Yet it is too often powerless. It is asked to do too much with too little authority or capacity. Those problems, and potential reforms to address them, are addressed in the next Part.

VI. Preparing for the Next Pandemic

COVID-19 has strained the rules and norms of international law, revealing weaknesses in global institutions. If States are to foster a recom-

429. Director General, World Health Org. [WHO], WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 (Aug. 21 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--21-august-2020> [https://perma.cc/JY7A-L37C].

430. Michael Doyle, *WHO Doctor Says Lockdowns Should Not be Main Coronavirus Defence*, ABC (Oct. 12, 2020), <https://www.abc.net.au/news/2020-10-12/world-health-organization-coronavirus-lockdown-advice/12753688> [https://perma.cc/V2FL-8F82].

431. See Stewart Patrick, *When the System Fails*, FOREIGN AFFAIRS (July/August 2020), <https://www.foreignaffairs.com/articles/world/2020-06-09/when-system-fails> (surveying the lack of international cooperation in the early stages of COVID-19) [https://perma.cc/JG33-A575]; see also Press Release, Security Council, Secretary-General Highlights ‘Essential’ Failure of International Cooperation, in Address to Security Council Meeting on Post-Coronavirus Global Governance, U.N. Press Release SC/14312 (Sept. 24, 2020), <https://www.un.org/press/en/2020/sc14312.doc.htm> [https://perma.cc/HNY6-NPLW].

432. See, e.g., *Coronavirus: Germany Latest Country to Close Borders*, BBC NEWS (Mar. 16, 2020), <https://www.bbc.co.uk/news/world-europe-51905129> [https://perma.cc/N28Q-SK67].

mitment to international law that endures beyond the current crisis, they will need to adopt reforms that improve international institutional coordination, streamline communication, shift national governments' policy incentives, and restore confidence in the international system. A reformed global health infrastructure will help States respond effectively to future global health crises while complying with international law.

Leaders of States, global institutions, and non-governmental organizations should consider three solutions to improve the architecture of the global public health emergency response. First, the U.N. should create a Coordinator strictly responsible for encouraging legal non-health responses to future pandemics in order to complement the work of the WHO and other health-focused institutions. During COVID-19, States have struggled to respond swiftly and effectively to the health crisis while complying with critical humanitarian law, human rights protections, and refugee law principles and norms. A UN Coordinator would ensure that in the future, international law does not get lost in responding to public health crises. Second, structural changes to the WHO's International Health Regulations and improvements to disease monitoring systems can make future pandemics both less likely and less deadly when they do occur. Third, and perhaps most important, we recommend creating stronger incentives in the form of more funding and privileged access to public health expertise and medical assistance prior to and during disease outbreaks for governments that comply with IHR pandemic preparedness and response standards. This technique would take advantage of innovative "outcasting" techniques for international law enforcement and could help overcome longstanding obstacles to effective reform.⁴³³

The COVID-19 pandemic made all too clear the need to strengthen future responses to health emergencies. Momentum for discussions of a new international treaty on pandemics is quickly growing.⁴³⁴ Earlier this year, 194 countries passed a World Health Assembly resolution to host a special session starting on November 29, 2021, in which the Assembly would consider the benefits of an international agreement on pandemic preparedness and response.⁴³⁵ Public health experts have advocated for a potential treaty to feature powerful enforcement mechanisms.⁴³⁶ The steps

433. Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011).

434. WHO Director-General Ghebreyesus and nearly a dozen global leaders have publicly called for an international treaty, while the European Council has adopted a decision to support negotiations for an international treaty. WHO member States will consider a new international treaty on pandemics during the forthcoming November 2021 special session of the World Health Assembly. See *An International Treaty on Pandemic Prevention and Preparedness*, EUROPEAN COUNCIL (June 15, 2021), <https://www.consilium.europa.eu/en/policies/coronavirus/pandemic-treaty> [<https://perma.cc/5LGC-CKL9>].

435. Lawrence O. Gostin, Sam F. Halabi, Kevin A. Klock, *An International Agreement on Pandemic Prevention and Preparedness*, JAMA NETWORK, <https://jamanetwork.com/journals/jama/fullarticle/2784418> [<https://perma.cc/RQW4-G65F>].

436. See, e.g., Lawrence O. Gostin, Eric A. Friedman, & Lauren Deck, *The World Needs a Post-Pandemic Healthy Treaty with Teeth*, FOREIGN POL'Y, <https://>

advocated here could be pursued as stand-alone reforms or included within a future treaty regime.

A. Create a U.N. Coordinator to Focus on Non-Health Responses to a Pandemic

The global response to COVID-19 has required action from a range of governmental, inter-governmental, and non-governmental organizations. This has created a coordination challenge unparalleled in modern memory. It has not gone well. In September 2020, for example, U.N. Secretary General Guterres cast the pandemic as a “clear test of international cooperation—a test we have essentially failed.”⁴³⁷

At the United Nations itself, coordination has proven poor—not just in matters necessary to address the global health threat but in encouraging U.N. bodies to consider the implications of the pandemic for their core areas of responsibility. Many of the problems described in Parts I through III might have been alleviated had there been an earlier response from the U.N. bodies responsible for monitoring compliance with the different areas of law—anticipating, for example, the humanitarian and human rights implications of the pandemic and getting ahead of the problem by issuing specific guidance to States as soon as the scale of the pandemic was clear. Instead, U.N. bodies have played catch-up, their advice often arriving only after problems have become widespread. U.N. advice has thus been difficult, if not impossible, to implement effectively.⁴³⁸

Given the communication and coordination issues that have bedeviled the international community’s response to COVID-19, future reforms should focus on streamlining and centralizing the global pandemic response. Although there is understandable skepticism about the capacity of the U.N. to serve this role, it is the most universal global organization. With representatives from 197 States, it is the only standing body capable of serving this communication and coordination function. Moreover, its multi-jurisdictional scope—covering a wide range of legal and policy mat-

foreignpolicy.com/2021/04/05/who-un-pandemic-treaty-health-regulations/ [https://perma.cc/F7Z4-KSPE].

437. U.N. Press Release SC/14312, *supra* note 431. Our discussion in this Section benefitted greatly from an interview with Ambassador John E. Lange. Telephone Interview with Ambassador John E. Lange, Senior Fellow, Global Health Diplomacy, United Nations Foundation (November 19, 2020). He has also written thoughtfully on the topic. See, e.g., Amb. John Lange, *Pandemic Preparedness and Response Under a Different President*, THE HILL (Aug. 10, 2020), <https://thehill.com/opinion/white-house/511320-pandemic-preparedness-and-response-under-a-different-president> [https://perma.cc/2QDE-VGHF]; see also Ambassador John Lange, *Despite Coronavirus Alarm Bells, Global Health Security Remains Underfunded*, UNITED NATIONS FOUNDATION (Feb. 13, 2020), <https://unfoundation.org/blog/post/despite-coronavirus-alarm-bells-global-health-security-remains-underfunded/> [https://perma.cc/BGA9-2G8A].

438. The U.N. Secretary General did launch the U.N. Comprehensive Response to COVID-19. It was primarily focused, however, on describing the health response. See UNITED NATIONS SUSTAINABLE DEVELOPMENT GROUP, UNITED NATIONS COMPREHENSIVE RESPONSE TO COVID-19 (Sept. 2020), <https://www.un.org/sites/un2.un.org/files/un-comprehensive-response-to-covid-19.pdf> [https://perma.cc/N7MU-C2C4].

ters—means it is the only organization capable of addressing the range of problems that emerge with a global pandemic.

To allow the UN to effectively play a global coordinating role in the future, the Secretariat should establish a U.N. Coordinator to manage non-health responses to a pandemic. The role of the U.N. Coordinator would be similar to that of Special Envoys appointed by the WHO to coordinate health responses to COVID-19, but the focus would instead be on non-health responses. In February 2020—that is, fairly early on in the pandemic—WHO Director-General Ghebreyesus appointed six Special Envoys on COVID-19, who were meant to collaborate with the “WHO’s Regional Directors and country offices to coordinate the global response to COVID-19.”⁴³⁹ Among other functions, the Special Envoys were to “engage with regional bodies and national governments,” report to the Director-General on regional and national responses to COVID-19, and engage in “high-level advocacy and political engagement.”⁴⁴⁰ Dr. Ghebreyesus appointed a seventh Special Envoy, responsible for coordination in South East Asia, in January 2021.⁴⁴¹

Each of the Special Envoys has taken an active role by highlighting COVID-19 issues specific to various regions and advocating for heightened global cooperation. Dr. John Nkengasong, for example, one of the Special Envoys and the director of the Africa Centres for Disease Control and Prevention, has called on Canada, the U.S. and European countries to “distribute their excess vaccines equitably to the countries that need it most.”⁴⁴² Dr. Nkengasong has specifically called on the Canadian government to make arrangements for vaccine access with the African vaccine acquisition task force.⁴⁴³ Dr. David Nabarro, another Special Envoy, has proven similarly active in communicating with state governments.⁴⁴⁴ In September 2020, Dr. Nabarro spoke with the British Parliament’s Foreign Affairs Committee and specifically called on Britain’s Foreign, Commonwealth, and Development Office to help low-income countries deal with the

439. WHO Director-General’s Special Envoys on COVID-19 Preparedness and Response, WORLD HEALTH ORG. [WHO], <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/who-director-general-s-special-envoys-on-covid-19-preparedness-and-response> [https://perma.cc/JQY5-QXCN].

440. *Id.*

441. Dr. Palitha Abeykoon Appointed WHO Special Envoy, COLOMBO GAZETTE (Jan. 8, 2021), [https://colombogazette.com/2021/01/08/dr-palitha-abeykoon-appointed-who-special-envoy/#:~:text=DR.%20Palitha%20Abeykoon%20appointed%20WHO%20special%20envoy%208,World%20Health%20Organization%E2%80%99s%20\(WHO\)%20special%20envoy%20on%20COVID-19](https://colombogazette.com/2021/01/08/dr-palitha-abeykoon-appointed-who-special-envoy/#:~:text=DR.%20Palitha%20Abeykoon%20appointed%20WHO%20special%20envoy%208,World%20Health%20Organization%E2%80%99s%20(WHO)%20special%20envoy%20on%20COVID-19) [https://perma.cc/NKC7-RTBM].

442. *History Will Judge Us If We Vaccinate Rich Countries While Poor Ones Suffer: African CDC Head*, CBC RADIO (Jan. 1, 2021), <https://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.5859339/history-will-judge-us-if-we-vaccinate-rich-countries-while-poor-ones-suffer-african-cdc-head-1.5859340> [https://perma.cc/VR4R-TSR5].

443. *See id.*

444. William Worley, *World Still ‘At the Beginning of Pandemic,’ Says WHO Special Envoy on COVID-19*, DEVEX (Sept. 15, 2020), <https://www.devex.com/news/world-still-at-the-beginning-of-pandemic-says-who-special-envoy-on-covid-19-98099> [https://perma.cc/PDC3-5YJ9].

fallout of the pandemic.⁴⁴⁵

At the very least, these Special Envoys have managed to communicate the WHO's priorities to state governments, reminding both government officials and the general public of the need for global coordination. Although neither the United Nations nor other organizations has yet conducted a detailed assessment of the Special Envoys' performance, it is clear that the Special Envoys have served as an important source and conduit of information and attempted to shape a more global response out of national governments' COVID-19 efforts. In the case of future pandemics, the WHO would do well to resume its practice of appointing Special Envoys to deal with regional pandemic responses.

Despite the good work of the WHO's Special Envoys, however, the UN's global response to the pandemic was lacking in several key respects. For one thing, no one was formally tasked with coordinating non-health responses to the pandemic. As COVID-19 has made clear, countries cannot merely rely on public health measures or protocols to deal with long-lasting pandemics. Measures such as quarantine, travel restrictions, and lockdown have imposed sharp consequences on the global economy.⁴⁴⁶ There is thus a need for a coordinator or envoy to cooperate closely with institutions such as the World Bank, the International Monetary Fund, and the U.N. Development Program and ensure a well-oiled financial response to future pandemics. This coordinator would work not just with international organizations, but also with national finance ministries and aid organizations well as with regional bodies such as the Asian Development Bank and the Inter-American Development Bank. The benefits of a well-coordinated global financial policy to a pandemic would include increased macroeconomic stability, decreased damage to global GDP, and more efficient provision of aid to less-developed countries. Last, the U.N. coordinator could also work with U.N. bodies to encourage them to anticipate non-health legal and policy challenges the pandemic might pose for their areas of expertise and to develop quick proactive advice for countries.

A U.N. Coordinator tasked with this portfolio would be able to synthesize the guidance that a number of U.N. institutions and organs provide to States, maximizing the impact of all-too-often disparate lines of effort. Such a Coordinator would amplify and promote the advocacy of, for instance, the Office of the High Commissioner for Human Rights, UNHCR, human rights treaty bodies, and Economic and Social Council programs, funds, commissions, and agencies. In this respect, the U.N. Coordinator would not only augment those institutions' messaging but could also provide clear guidance on how the various recommendations can practically

445. *See id.*

446. *See* Press Release, World Bank, COVID-19 to Add as Many as 150 Million Extreme Poor by 2021 (Oct. 7, 2020), <https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021> [<https://perma.cc/DQ87-4K42>]. The press release points out that the pandemic pushed "an additional 88 million to 115 million people into extreme poverty" in 2020 and that the total could rise to "as many as 150 million by 2021."

inform government policy outside of the health sector when States are grappling with the effects of health crises.

The U.N. Coordinator would also backstop high-level advocacy by the U.N. Secretary-General by addressing the many non-health issues the pandemic implicates. For instance, U.N. Secretary-General Guterres fiercely advocated for a global ceasefire in response to COVID-19's spread in mid-2020 but was ultimately unsuccessful. While the Security Council's paralysis was a major reason for this shortcoming, the International Crisis Group notes that a lack of "ceasefire architecture" in various contexts of conflict inhibited agreements; to address this particular gap, the U.N. Coordinator could advocate for policies reflecting IHL principles across conflict zones and promulgate guidance to effect such policies.⁴⁴⁷ The Coordinator would have broad pandemic-focused credibility and expertise equivalent to that of the WHO Director-General.

In structuring such an Office, the U.N. would do well to feature the proposed Coordinator as a key member of the U.N. Secretariat rather than as a Special Envoy within an organization such as the WHO. Given the sheer complexity of coordinating the global non-health responses to a pandemic, the Coordinator would benefit from the legitimacy afforded by membership of the U.N. Secretariat and from the consequent ability to act as, in effect, a "coordinator of coordinators." The U.N. Secretariat, as one of the U.N.'s key organs, is itself composed of various offices and departments. The U.N. has a variety of ways to institutionalize the proposed Coordinator. One option would be to appoint a special advisor, representative, or envoy, similar to the Office of the Special Advisor on Africa or the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict—both offices contained within the U.N. Secretariat.⁴⁴⁸ The U.N. General Assembly might request the Secretary General to create the "Office of the Special Representative of the Secretary General on Comprehensive Responses to Public Health Crises." Led by a single Coordinator, the Office of the Special Representative would in turn organize itself into divisions that would each focus on particular priorities, including coordinating with U.N. institutions, coordinating with non-U.N. international institutions, and coordinating regional responses. The Special Representative would coordinate and lead the work of these divisions, convening conferences of experts to assist in the development of a legal and political framework to guide future responses to pandemics, and establishing lines of communication to allow rapid coordination in the event of a crisis.

447. Richard Gowan, *What Happened to the U.N. Secretary-General's COVID-19 Ceasefire Call?*, INT'L CRISIS GRP. (June 16, 2020), <https://www.crisisgroup.org/global/whats-happened-un-secretary-generals-covid-19-ceasefire-call> [https://perma.cc/E7GW-XSW5].

448. See *About Us, Mandate*, U.N. OFF. SPECIAL ADVISOR ON AFRICA, <https://www.un.org/osaa/content/about-osaa> (last visited Oct. 14, 2021) [https://perma.cc/8BQ4-ZWHD]; *About Us, About the Office*, U.N. OFF. SPECIAL REPRESENTATIVE SECRETARY-GEN. ON SEXUAL VIOLENCE IN CONFLICT, <https://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> (last visited Oct. 14, 2021) [https://perma.cc/W2CA-X4KV].

The U.N. Coordinator role must be a standing position—not merely appointed when a particular pandemic emerges. Regular global health threats are a fact of modern transnational life. In the last decade-and-a-half, there have been three: the current COVID-19 pandemic, the 2014–16 Ebola outbreak, and the 2009–2010 H1N1 flu. Not long before that there was a SARS outbreak in 2002–2004 that was, luckily, contained but could have been much worse. Though none was as deadly as the current pandemic, each of these crises posed serious challenges to the global community. Establishing the U.N. Coordinator as a standing office that develops plans and protocols for significant disease outbreaks and that stands ready to help coordinate non-health responses to health crises would put the international community in a position to respond quickly and proactively when the next crisis inevitably emerges.

B. Reform Global Health Governance

The U.N. is not the only global institution to have fallen short during the pandemic. The WHO has been battered by criticism from national leaders and public health experts for its initially halting and imperfect response.⁴⁴⁹ Defenders of the WHO point out that, while it may have been slow to declare COVID-19 an international public health emergency in January, it responded rapidly in other ways, sending a team to Wuhan earlier that month to assess the situation and urging countries to prepare for the likelihood that the disease would spread beyond China.⁴⁵⁰ The WHO has had other successes, too. It has worked with social media companies to combat the spread of misinformation about the virus.⁴⁵¹ It has organized large international trials of potential treatments and is playing a major role in COVAX, an initiative to distribute billions of doses of COVID-19 vac-

449. See, e.g., Andrew Joseph and Helen Branswell, *Trump: U.S. Will Terminate Relationship with the World Health Organization in Wake of Covid-19 Pandemic*, STAT NEWS (May 29, 2020), <https://www.statnews.com/2020/05/29/trump-us-terminate-who-relationship/> [<https://perma.cc/G6YD-Q3RJ>]; Marisa Fernandez, *Cuomo: WHO was “Too Little, Too Late” on Coronavirus*, AXIOS (Apr. 24, 2020), <https://www.axios.com/cuomo-world-health-organization-coronavirus-346afe6b-50c9-4b11-9154-9431611505c1.html> [<https://perma.cc/P9ZU-YZHS>]; Brahma Chellaney, *The Chinese Health Organization?*, JAPAN TIMES (Apr. 29, 2020), <https://www.japantimes.co.jp/opinion/2020/04/29/commentary/world-commentary/chinese-health-organization/> (quoting Japanese Deputy Prime Minister Taro Aso describing the WHO as looking more like the “CHO”—the Chinese Health Organization) [<https://perma.cc/Q98Y-BJEL>].

450. See *Mission Summary: WHO Field Visit to Wuhan, China 20-21 January 2020*, WORLD HEALTH ORG. [WHO] (Jan. 22, 2020), <https://www.who.int/china/news/detail/22-01-2020-field-visit-wuhan-china-jan-2020> [<https://perma.cc/YM8X-P6RA>]; see also *WHO Director-General’s Statement on the Advice of the IHR Emergency Committee on Novel Coronavirus*, WORLD HEALTH ORG. [WHO] (Jan. 23, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-the-advice-of-the-ihremergency-committee-on-novel-coronavirus> (describing the risk as “very high” in China and “high” in the rest of the world) [<https://perma.cc/MHK7-3FSU>].

451. See *Immunizing the Public Against Misinformation*, WORLD HEALTH ORG. [WHO] (Aug. 25, 2020), <https://www.who.int/news-room/feature-stories/detail/immunizing-the-public-against-misinformation> [<https://perma.cc/M9PU-PFJL>].

cines.⁴⁵² Criticism of the WHO, moreover, is often a convenient way for governments to distract from their own failures.

Yet the WHO's shortcomings have been real. The WHO was slow to declare COVID-19 an international emergency and its International Health Regulations were ignored by many States. The organization also found itself unable to coordinate national responses early on in the pandemic, appearing reluctant to criticize its largest members for their inadequate management of the virus. Even before COVID-19, a majority of countries had failed to meet the WHO's pandemic preparedness standards.

The initial WHO-led investigation into the origins of COVID-19 illustrates some of the organization's flaws, in particular its reliance on the goodwill of its largest members. While the investigators, who reported their findings in February 2021, provided useful new information about the early spread of the disease in Wuhan, they lacked independent access to crucial data and physical sites and failed to identify exactly how the virus first reached human hosts, whether directly from an infected animal, through an intermediate animal host, or from an accidental laboratory leak.⁴⁵³ Despite the lack of definitive evidence, the investigators declared that natural transmission from animals was the most likely explanation and a leak from a laboratory was "extremely unlikely."⁴⁵⁴ That conclusion lined up with the Chinese government's stance, as Beijing has consistently rejected the idea that a lab leak could be responsible.⁴⁵⁵ In the aftermath of the investigation, several leading microbiologists and epidemiologists criticized the probe for reaching strong conclusions without clear evidence, and the U.S. government expressed similar reservations.⁴⁵⁶ WHO officials acknowledged to the *Wall Street Journal* that the mission was mandated to "design and recommend scientific studies, not to do an investigation, let

452. See "Solidarity" Clinical Trial for COVID-19 Treatments, WORLD HEALTH ORG. [WHO], <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/solidarity-clinical-trial-for-covid-19-treatments> (last visited Oct 14, 2021) [<https://perma.cc/TNQ5-7WNC>]; COVAX: Working for Global Equitable Access to COVID-19 Vaccines, WORLD HEALTH ORG. [WHO], <https://www.who.int/initiatives/act-accelerator/covax> (last visited Oct. 14, 2021) [<https://perma.cc/XDB5-TV3>].

453. See Yanzhong Huang, *What the WHO Investigation Reveals About the Origins of COVID-19*, FOREIGN AFF. (Mar. 31, 2021), <https://www.foreignaffairs.com/articles/china/2021-03-31/what-who-investigation-reveals-about-origins-covid-19> [<https://perma.cc/LX92-LVN4>].

454. *Id.*

455. Vincent Ni, *China rejects Biden's call to examine Covid origin theories*, GUARDIAN (May 27, 2021), <https://www.theguardian.com/world/2021/may/27/china-rejects-bidens-call-to-examine-covid-origin-theories> [<https://perma.cc/GVV4-AYRM>].

456. Jesse D. Bloom et al., *Investigate the origins of COVID-19*, 372 SCIENCE 694 (2021); Statement by National Security Advisor Jake Sullivan, The White House, (Feb. 13, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/13/statement-by-national-security-advisor-jake-sullivan/> (noting "deep concerns" about the findings and "questions" about the process behind them), [<https://perma.cc/6J5G-NU8H>].

alone a forensic audit of laboratories.”⁴⁵⁷

The WHO is not blind to its problems. In July 2020, it announced an independent review of its response to the pandemic (as well as the responses of individual States).⁴⁵⁸ And in October 2021, it unveiled a new permanent advisory body, the Scientific Advisory Group for the Origins of Novel Pathogens, which will continue to investigate the origins of SARS-CoV-2.⁴⁵⁹ Change is overdue.

1. *Reforming the IHR*

The WHO’s inability to enforce compliance with the IHR predates the current pandemic. In 2005, the regulations were reformed in response to the 2002–2004 SARS epidemic. The reforms required all States to develop and maintain a set of minimum capabilities to detect and respond to potential international public health emergencies.⁴⁶⁰ States were originally required to comply by 2012, with less developed countries receiving assistance from the WHO to boost their public health capacities. Yet just 22 percent of WHO members met the deadline, and the WHO has repeatedly granted extensions.⁴⁶¹ In early 2020, 15 years after the regulations were adopted, fewer than half of countries were in compliance.⁴⁶² What’s more, although the standards are set by the WHO, governments monitor and report their own progress, and the WHO has no enforcement mechanism for those that fall short.

Flaws in the IHR may also have played a role in the WHO’s delay in declaring a PHEIC at the start of the COVID-19 pandemic. One of the major changes in 2005 was to give the WHO the ability to use non-governmental sources of information to monitor outbreaks.⁴⁶³ That was supposed to address state reluctance to report disease clusters for fear that their neighbors would cut off travel and trade in response.

457. Jeremy Page et al., *How the WHO’s Hunt for Covid’s Origins Stumbled in China*, WALL STREET J. (Mar. 17, 2021), <https://www.wsj.com/articles/who-china-hunt-covid-origins-11616004512> [https://perma.cc/6ENX-23WY].

458. See *Independent Evaluation of Global COVID-19 Response Announced*, WORLD HEALTH ORG. [WHO] (July 9, 2020), <https://www.who.int/news/item/09-07-2020-independent-evaluation-of-global-covid-19-response-announced>, [https://perma.cc/M75G-MVRN]. Others have also proposed reforms to the IHR. See, e.g., Benjamin Mason Meier, et al., *The World Health Organization in Global Health Law*, 48 J. L. MED. & ETHICS 796 (2021).

459. Anne Gulland et al., *WHO reveals new Covid origins team as China analyses blood banks*, TELEGRAPH (Oct. 13, 2021), <https://www.telegraph.co.uk/global-health/science-and-disease/reveals-new-covid-origins-team-china-analyses-blood-banks/> [https://perma.cc/96CE-HJ2A].

460. See Gostin & Katz, *supra* note 394, at 269.

461. See Amitabh B Suthar et al., *Lessons Learnt From Implementation of the International Health Regulations: A Systematic Review*, 96 BULL. WORLD HEALTH ORG. 110, 110 (2017).

462. See Nirmal Kandel et al., *Health Security Capacities in the Context of COVID-19 Outbreak: An Analysis of International Health Regulations Annual Report Data from 182 Countries*, 395 LANCET 1047, 1047 (2020).

463. Gostin et al., *supra* note 398, at 378.

Yet COVID-19 revealed that the rules still did not work as intended. The WHO still cannot send experts to investigate reports of novel diseases unless the government in question invites them. It took until February 2020, for example, for the WHO's team to gain access to Wuhan.⁴⁶⁴ If the WHO receives information about outbreaks from a non-state source, the regulations require it to verify the reports with the relevant government.⁴⁶⁵ Thus even though Taiwan, which is excluded from WHO membership, claims that it warned the organization in late December 2020 that a new virus was circulating and appeared to be transmissible from human to human, the WHO could not act until China confirmed the reports three weeks later.⁴⁶⁶ In principle, if a country refuses to work with the WHO in response to a third-party report of an outbreak in its territory, the WHO can make the information public anyway, but the IHR does not specify how much cooperation is necessary, and, in any case, the WHO did not avail itself of this option when it came to COVID-19.⁴⁶⁷

The design of the WHO's alert system may also have increased the delay in declaring a public health emergency. The regulations create only one level of alert, the PHEIC. Without a more fine-grained series of warnings, the WHO may have wanted to avoid pulling its only fire alarm prematurely.

Observers have suggested several reforms to the IHR in response to the pandemic. The WHO itself has suggested changing its alert system. In the January 23, 2020 statement in which it said that it was too early to declare a public health emergency, the organization suggested that the rules be altered to allow "a more nuanced system" with an "intermediate" alert level.⁴⁶⁸ A series of stepped alert levels is a good idea. Such a system would prevent a repeat of the situation in early 2020, when governments may have interpreted the WHO's decision not to declare an emergency as an indicator that all was well. Stepped alerts would focus attention on the rising danger, not on whether the highest level has been reached. Under a related reform, proposed by former WHO Legal Counsel Gian Luca Burci, the WHO would maintain a database of national responses to public health incidents and ask governments to notify the WHO of any

464. See McNeil & Kanno-Youngs, *supra* note 412; see also Javier C. Hernandez, *Two Members of W.H.O. Team on Trail of Virus are Denied Entry to China*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/world/asia/china-who-wuhan-covid.html> [<https://perma.cc/US67-KRLH>].

465. INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 10.

466. See *Taiwan Says WHO Failed to Act on Coronavirus Transmission Warning*, FIN. TIMES (Mar. 20, 2020), <https://www.ft.com/content/2a70a02a-644a-11ea-a6cd-df28cc3c6a68>, [<https://perma.cc/XP8N-7BZG>]; see also Lily Kuo, *China Confirms Human-to-Human Transmission of Coronavirus*, GUARDIAN (Jan. 21, 2020), <https://www.theguardian.com/world/2020/jan/20/coronavirus-spreads-to-beijing-as-china-confirms-new-cases> [<https://perma.cc/HK6K-3BHS>].

467. See INTERNATIONAL HEALTH REGULATIONS, *supra* note 239, art. 10(4).

468. WHO, *supra* note 414.

changes.⁴⁶⁹ Such a system would enable the WHO and outside observers to better track global compliance with international law and respond early to any concerning trends.

The emergency WHO committee that declares international public health emergencies should also be given greater political independence. It is possible that the WHO was reluctant to declare COVID an emergency because of the risk of backlash from China. But this is not the first time the WHO has been slow to respond. During the 2014 Ebola outbreak, the WHO was even slower to act. The Director-General did not convene the emergency committee until five months after Guinea and Liberia had notified the WHO of a potential public health emergency.⁴⁷⁰ A reformed IHR should create a standing emergency committee that meets regularly—without needing authorization from the Director-General, who may be subject to particular political pressure as the most visible WHO official—to review emerging disease threats. The committee should have the authority to declare health emergencies on its own initiative. And the appointments process should be structured so as to insulate the committee from pressure from major WHO members.

The WHO, moreover, needs more regular mandatory funding so that it is not dependent on voluntary contributions, which currently makes it difficult for the organization to act quickly and autonomously. The underfunding of the WHO is a long-recognized problem.⁴⁷¹ According to the WHO Constitution, the organization should be primarily financed through regularly assessed contributions on member States in proportion to their wealth and population. These contributions are known as “regular budget funds” (RBFs). Yet RBFs do not come anywhere close to covering the WHO’s operating budget, especially during a pandemic, leaving it dependent on voluntary contributions to make up the shortfall. This may have compromised the WHO’s independence. In the early days of the pandemic, the WHO praised China’s response while concealing concessions it had made to the country, likely for fear of alienating Beijing.⁴⁷² Although China is not currently a major source of WHO funds, it is a major diplomatic power, and the WHO may well hope that making nice with China will encourage the country to dramatically increase its voluntary contribu-

469. *International Law Behind the Headlines: Coronavirus and the International Law of Epidemics*, AM. SOC. INT’L L. (Feb. 21, 2020), <https://www.asil.org/resources/podcast/ep19> [https://perma.cc/WC85-JWNU].

470. *Key Events in the WHO Response to the Ebola Outbreak*, WORLD HEALTH ORG. [WHO] (Jan. 2015), <https://www.who.int/csr/disease/ebola/one-year-report/who-response/en/> [https://perma.cc/3S3P-9XUQ].

471. See Srinath K. Reddy, Sumaira Mazhar & Raphael Lencucha, *The Financial Sustainability of the World Health Organization and the Political Economy of Global Health Governance: A Review of Funding Proposals*, 14:119 *GLOBALIZATION AND HEALTH* 1, 2 (2018).

472. See Selam Gebrekidan, Matt Apuzzo, Amy Qin & Javier C. Hernández, *In Hunt for Virus Source, W.H.O. Let China Take Charge*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/2020/11/02/world/who-china-coronavirus.html> [https://perma.cc/R6KT-8TSH].

tions in the future.⁴⁷³ President Donald Trump blamed China for the pandemic and the WHO for what he suggested was its lackluster response—citing the relationship between the two as one reason for pulling the United States out of the organization (a decision President Joe Biden has since reversed).⁴⁷⁴ Greater regular mandatory funding would help eliminate both the perception and reality of any such clientelism.

The COVID-19 crisis also demonstrates that the IHR prohibition on excess travel restrictions may be untenable and even counterproductive. During the COVID-19 crisis, early travel restrictions likely helped reduce the spread of the virus. Indeed, “by the time WHO acknowledged, in late February [2020], that restrictions on travel might have some limited value, the window of opportunity to prevent a pandemic had long been closed.”⁴⁷⁵ This experience has fed growing skepticism of the recommendation against travel restrictions: One of the preliminary findings of the “Review Committee on the Functioning of the IHR During the COVID-19 Response,” reported in November 2020, was that “[t]he role of WHO in relation to travel recommendations as well as incentives for States Parties to comply with their obligations related to travel measures need to be further examined.”⁴⁷⁶

Changing the IHR will be difficult. Any changes will require approval from the World Health Assembly, followed by a period during which any member State can opt out of the rules. Although some reforms, such as a more fine-grained alert system, may be largely uncontroversial, opening up the text would kick off a likely years-long negotiating process. Further, once the rules were up for debate, States might take the reforms in unexpected directions. The last time the WHO renegotiated the IHR, after the 2002 SARS outbreak, the process took two years.⁴⁷⁷ It took five years for WHO members to finalize the 2011 Pandemic Influenza Preparedness (PIP) Framework.⁴⁷⁸ Some proposed reforms, such as giving the WHO greater powers to investigate outbreaks, declare emergencies in the absence of a notification from a member state, and require greater mandatory contributions may be non-starters. Many States are reluctant to agree to hand over such powers to an international body. The next Section offers an idea for helping to overcome this predictable opposition. Even in the absence of

473. See Srinivas Mazumdaru, *What Influence Does China Have Over the WHO?*, DW (Apr. 17, 2020), <https://www.dw.com/en/what-influence-does-china-have-over-the-who/a-53161220> [<https://perma.cc/N599-G3B8>].

474. Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal from W.H.O.*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html> [<https://perma.cc/JYP8-7MWM>].

475. Barbara von Tigerstrom & Kumanan Wilson, *COVID-19 Travel Restrictions and the International Health Regulations (2005)*, BMJ GLOB. HEALTH 1, 2 (2020).

476. *Third Meeting of the Review Committee on the Functioning of the International Health Regulations (2005) During the COVID-19 Response*, WORLD HEALTH ORG. [WHO] (Nov. 3, 2020), [https://www.who.int/publications/m/item/third-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-\(2005\)-during-the-covid-19-response](https://www.who.int/publications/m/item/third-meeting-of-the-review-committee-on-the-functioning-of-the-international-health-regulations-(2005)-during-the-covid-19-response) [<https://perma.cc/K3NH-3J TZ>].

477. Gostin & Katz, *supra* note 394, at 267.

478. *Id.* at 289.

fundamental reform to the IHR, however, States and the WHO can improve pandemic detection and preparedness within the current system.

2. *National and Global Disease Surveillance*

As COVID-19 has shown, speed is paramount in responding to a disease outbreak—and to responding to new variants of an existing pathogen. Rapid responses require accurate real-time information. To that end, one of the WHO's most important jobs is coordinating disease surveillance systems around the world. The IHR require countries to create and maintain public health monitoring systems that can detect outbreaks quickly. The WHO helps coordinate those efforts and lends technical assistance to countries attempting to build up their monitoring capacities, but there is more that it could do to ensure that the world catches outbreaks early. It should regularly update its interpretations of the IHR requirements to track improving public health standards and continue its work to integrate national systems into a global surveillance network. These steps would allow better global disease monitoring without requiring changes to the IHR.

One potential reform is to create a body to regularly review the implementation and interpretation of the IHR, a step proposed by the Council on Foreign Relations' 2020 pandemic preparedness task force.⁴⁷⁹ A group of public health experts would provide the WHO and member States with interpretive guidance on the IHR, allowing the implementation of the IHR's provisions to track technological progress and current state-of-the-art public health knowledge. Guidance could cover such topics as the latest technical standards for emerging pathogen monitoring systems and what kinds of data—perhaps including genome sequences, pathogen samples, and anonymized patient-level information—States should provide the WHO alongside notifications of emerging outbreaks and new variants.⁴⁸⁰

States also need new incentives and assistance to comply with the existing IHR requirements for disease surveillance. After the West African Ebola outbreak that began in 2013, experts called for greater efforts to ensure that States complied with the IHR's requirements for state capacity to detect and respond to disease outbreaks.⁴⁸¹ But little was done, and by 2018 still fewer than half of countries were in compliance.⁴⁸² COVID-19 is an even bigger wakeup call. The delay in reporting the initial outbreak was partly the result of political failures within China, but stronger disease monitoring systems might have made it far more difficult for officials in Wuhan to slow-walk the release of information. A renewed focus by the

479. Sylvia Matthews Burwell et al., *Improving Pandemic Preparedness: Lessons From COVID-19*, COUNCIL ON FOREIGN REL. 1, 9 (2020), https://www.cfr.org/report/pandemic-preparedness-lessons-COVID-19/pdf/TFR_Pandemic_Preparedness.pdf [<https://perma.cc/U32B-9CT5>].

480. *See id.* at 91.

481. Suerie Moon et al., *Will Ebola Change the Game? Ten Essential Reforms Before the Next Pandemic. The Report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola*, 386 LANCET 2204, 2205 (2015).

482. Kandel et al., *supra* note 462, at 1047.

WHO and member States on boosting national surveillance systems would not require renegotiating the IHR and could be led by a group of the body's major funders, including the United States.

A further necessary step will be to integrate national surveillance systems into a global disease monitoring network. The WHO already operates the Global Influenza Surveillance and Response System, which uses national influenza centers to monitor trends in influenza around the world.⁴⁸³ Replicating that system for emerging pathogens would allow the WHO to respond to potential health crises much as it currently does to yearly flu outbreaks. Some initiatives for global emerging pathogen monitoring are already underway. This past summer, a consortium of academic research centers and public health agencies launched Sentinel, a new viral surveillance system based on novel diagnostic tools that can detect hundreds of known and emerging viruses.⁴⁸⁴ The system is being deployed in West and Central Africa, but its backers, including the African Center of Excellence for Genomics of Infectious Diseases and Harvard and MIT's Broad Institute, plan to expand it to other regions. In October, the Africa Centres for Disease Control and Prevention, with funding from the Gates Foundation and the U.S. CDC, among others, launched a program to use cutting-edge genomic sequencing tools to track emerging diseases across the continent.⁴⁸⁵ The WHO should build on these efforts, and member States should fund the development and deployment of such systems while providing the WHO with the resources to monitor and maintain them. These steps, like heightened national surveillance efforts, can take place within the existing IHR framework.

C. Develop Proactive Outcasting Tools

The recommendations for reforms to the IHR and national and global disease surveillance are all important steps. But many of these reforms are not new proposals. Some of the most obvious reforms—such as permitting more robust surveillance procedures—have been on the table for decades but resisted by States wary of setting off alarm bells only to find their goods and people barred from entering foreign countries. At the same time, the COVID-19 crisis has reminded us of a longstanding reality: National governments require a broad range of materials and capacity to respond to public health emergencies. Here, we propose creating a treaty

483. See *Global Influenza Surveillance and Response System (GISRS)*, WORLD HEALTH ORG. [WHO], <https://www.who.int/initiatives/global-influenza-surveillance-and-response-system> (last visited Oct. 14, 2021) [<https://perma.cc/P86J-JK52>].

484. See David Cameron, *Scientific Coalition Developing Surveillance System for Detecting Emerging Pandemics in Real-Time*, BROAD INST. (May 11, 2020), <https://www.broadinstitute.org/news/scientific-coalition-developing-surveillance-system-detecting-emerging-pandemics-real-time> [<https://perma.cc/QT7B-6VL3>].

485. See Press Release, Africa CDC, US\$100 million Africa Pathogen Genomics Initiative to Boost Disease Surveillance and Emergency Response Capacity in Africa (Oct. 12, 2020), <https://africacdc.org/news-item/us100-million-africa-pathogen-genomics-initiative-to-boost-disease-surveillance-and-emergency-response-capacity-in-africa/>, [<https://perma.cc/AHG4-F2Z9>].

regime that harnesses these twin realities to encourage States to participate in more effective, and more onerous, regulatory systems in exchange for privileged access to global assistance both prior to and during public health emergencies.⁴⁸⁶ This subsection explains the theory behind this approach and then explores possible structural reforms that could create incentives that would more effectively ensure States and global institutions are capable of preventing, containing, and responding to public health emergencies.

1. *Confronting the Enforcement Challenge: Harnessing Outcasting Tools for Public Health*

International law mechanisms like the WHO's International Health Regulations face a variety of challenges to effective enforcement. International treaty law is entirely voluntary—no State, for example, is required to be a party to the WHO and its regulations. Therefore, when designing international legal institutions and rules, it is essential to design rules that States are willing to accept. But that creates a significant puzzle: How is it possible to design rules that are effective at changing state behavior (and thus costly to States) that significant numbers of States are willing to accept? This is the fundamental challenge that faces not just international health law but international law as a whole.⁴⁸⁷

There are a number of answers that international law has provided to this question. One too-common answer is to design weak rules and institutions that can gain broad-based support but require little real action from States. As a result, they can be largely ineffective, though they might form the foundation for more stringent and effective measures in the future or offer an organizing tool for domestic reform efforts.⁴⁸⁸ International legal institutions are more effective, however, if they utilize a technique one of us has called “outcasting.”⁴⁸⁹ Outcasting involves denying the disobedient the benefits of social cooperation and membership. Put simply, the international legal institution creates some benefit to which States want access. That benefit is worth enough to them that they are willing to bear the attendant costs of membership.

A classic example is the World Trade Organization (WTO). Despite

486. To be clear, global institutions must still help countries not in compliance with the IHR grapple with disease outbreaks when they arise. However, facilitating and accelerating access for critical resources to those countries that are compliant and whose policies help prevent disease emergence and spread in the first instance may be a powerful tool for incentivizing national-level buy-in for critical policies.

487. See, e.g., Oona A. Hathaway, *The Cost of Commitment*, 55 *STAN. L. REV.* 1821, 1856 (2003); see also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469, 535 (2005).

488. This can be said, for example, of some human rights treaties. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2020 (2002).

489. See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 302 (2011).

recent challenges,⁴⁹⁰ the WTO is regarded as one of the most effective international legal institutions in the modern era. It requires States to do something costly: admit goods of all other members into the country under mandatory “most favored nation” rules, which provide for lower negotiated tariffs and other trade barriers. Their willingness to do so is monitored, moreover, by a mandatory dispute settlement system with the power to impose penalties. Why are States willing to do this? Because they get the same access to every other member state, enforced by the same dispute settlement process. The system is enforced, moreover, by “outcasting penalties”—in short, States that are found to have broken the rules and refuse to change their behavior to comply are subject to “countermeasures” from the harmed States. Countermeasures are effectively measures that deny wrongdoers the full benefits to which they would usually be entitled as members—state parties that are found to have been harmed by the rule violations of a member will be authorized to break the rules in return, say by raising tariffs on goods coming from the wrongdoing state.

Not every area of international law, however, is as naturally amenable to outcasting tools as trade. Human rights law, environmental law, and international health law face a shared challenge: These are areas where costs of compliance can be high and the benefits of a successful system are, generally speaking, widely distributed. This incentivizes free riding and makes States reluctant to join treaties that impose significant costs. It also makes it extremely difficult to design effective enforcement structures. If the price of membership is too high, no State will participate. The response has often been to design modest rules that States are willing to accept but that are often ineffective at achieving their expressed aims.

There have been creative efforts to find ways around this problem. One example can be found in the Montreal Protocol on Substances That Deplete the Ozone Layer.⁴⁹¹ The designers of the Protocol faced the same problem many environmental treaties face: Solving the problem requires States to take costly steps (eliminate the use of widespread chemicals that deplete the ozone layer within their territory) and produces only dispersed benefits (reducing the thinning of the ozone layer of Earth’s atmosphere). The solution the designers of the Protocol hit on was to create a club good. Parties to the Protocol were required to ban trade in certain designated substances with nonparty States. This created a tangible benefit to membership: access to the trading system. That benefit grew as more States joined the club. The Protocol thus also generated a tool for disciplining States that broke the rules: Their trading rights could be suspended until

490. These include both political attacks and failure to appoint members to the Appellate Body. See Aditya Rathore & Ashutosh Bajpai, *The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead?*, JURIST (Apr. 14, 2020), <https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/> [<https://perma.cc/C5XB-7RMN>].

491. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol]. The Montreal Protocol is a protocol to the Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 324.

they came back into compliance.⁴⁹²

The WHO's IHR have been hobbled by similar challenges. The benefits of pandemic surveillance are spread globally. But the costs are localized. For example, States that are identified as potential sources of an outbreak may be closed off from international trade and travel as a result. This helps explain why the IHR have been less stringent than might be optimal for pandemic response. It also helps explain the otherwise puzzling regulation that prohibits States from putting in place more stringent travel restrictions than recommended by the WHO. That was an effort to reduce the fear that participation in the surveillance regime could lead to costly travel restrictions. It also helps explain why the WHO's independent surveillance and investigation powers are limited and regular budget funds inadequate.

More effective institutional design could deploy outcasting tools to enable more effective international health regulations that enjoy better compliance. The next subsection explores three proposals for doing just this.

2. *Outcasting Solutions*

There are several ways in which the outcasting technique could be used to encourage states to contribute to global collaboration to anticipate, prepare for, and respond to emerging pandemics. The essential insight here is similar to the insight that informed the response to the thinning ozone layer: To overcome States' reluctance to contribute to solving a collective action problem, create club goods and then condition access to those goods on compliance with the rules of the system. The goal is not to take away from States anything they already have; it is to better align their altruistic impulses and private incentives. States contribute to solving the shared problem of pandemics and, in return, they receive direct access to the benefits they have helped create. There are at least three areas in which this technique could be used: access to vaccines, access to technical expertise, and access to funding for pandemic preparedness.

a. *Access to Vaccines*

Although companies and governments have already developed a diverse array of COVID-19 vaccines, the international community still has a long way to go in ensuring equitable access. The WHO has set an ambitious target of vaccinating 70% of the global population by the end of 2022.⁴⁹³ Mechanisms providing significant benefits to States combatting COVID-19 are already in place. The Access to COVID-19 Tools (ACT) Accelerator was established in April 2020 specifically to promote the devel-

492. See Hathaway & Shapiro, *supra* note 433, at 321-22; see also OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 321-22, 371-95 (2017).

493. Press Release, World Health Org. [WHO], WHO, U.N. Set Out Steps to Meet World COVID Vaccination Targets (Oct. 7, 2021), <https://www.who.int/news/item/07-10-2021-who-un-set-out-steps-to-meet-world-covid-vaccination-targets> [https://perma.cc/LLG9-5T5M].

opment and equitable distribution of tests, treatments, and vaccines for the current emergency.⁴⁹⁴ ACT has an impressive track record: It has procured more than 32 million PCR (polymerase chain reaction) tests and 32 million rapid antigen tests for low- and middle-income countries (LMICs), the creation of a stockpile of dexamethasone for emergency use in severe cases of COVID-19, the procurement of \$500 million worth of PPE for LMICs, and the development of 120 million rapid response tests for LMICs.⁴⁹⁵ One pillar of the ACT Accelerator, COVAX, focuses exclusively on the development and fair global distribution of COVID-19 vaccines. States participating in COVAX have access to a diverse selection of COVID-19 vaccines regardless of the States' wealth or ability to make bilateral deals with vaccine manufacturers. Self-financing participating States are guaranteed doses proportionate to their level of contribution, while funded States will ultimately receive doses sufficient for vaccinating up to 20 percent of their populations.⁴⁹⁶ Other global health funding mechanisms go beyond COVID-19. The private Coalition for Epidemic Preparedness Innovations (CEPI), for example, is a standing organization funding research into vaccines for emerging diseases (and is also currently supporting the ACT Accelerator framework and COVAX).⁴⁹⁷

To encourage compliance with the IHR, these kinds of mechanisms and certain benefits they offer could be made into long term club goods, available to States contingent on their adherence to the IHR. To foster continued compliance even after the COVID-19 crisis dissipates, the existing institutions of the ACT Accelerator (including COVAX) and CEPI should be expanded in scope and duration. Specifically, compliant countries could have access to a standing multilateral mechanism that facilitates production and distribution of vaccines, diagnostics, and therapeutics for emerging and yet-to-emerge infectious diseases. Although CEPI operates on a permanent basis, it is only focused on vaccine production and does not address distribution logistics for future vaccines or the development and manufacturing of components of diagnostics and therapeutics for emerging diseases. As WHO Health Emergencies Programme Executive Director Dr. Michael Ryan has noted, breakdowns in the supply chain and logistics systems for critical products plagued the COVID-19 response, and a comprehensive solution addressing manufacturing, raw materials, distribution, and competition between States is needed to prepare for future global health emergencies.⁴⁹⁸

494. ACTACCELERATOR, WORLD HEALTH ORG. [WHO], URGENT PRIORITIES & FINANCING REQUIREMENTS 7 (Nov. 10 2020), <https://www.who.int/docs/default-source/coronaviruse/act-accelerator/act-a-urgent-priorities-financing-requirements-final-single-11nov20.pdf>, [<https://perma.cc/6URB-DJ3V>].

495. ACTACCELERATOR, WORLD HEALTH ORG. [WHO], ACT NOW, ACT TOGETHER 2020-2021 IMPACT REPORT 9 (Apr. 2021), <https://www.who.int/publications/m/item/act-now-act-together-2020-2021-impact-report> [<https://perma.cc/XJ9V-5LRC>].

496. COVAX, *supra* note 452.

497. See generally *New Vaccines for a Safer World*, CEPI, <https://cepi.net/> (last visited Oct. 14, 2021, 3:22 PM), [<https://perma.cc/AG63-3UBU>].

498. Nurith Aizenman, 'Everything Broke': *Global Health Leaders on What Went Wrong in the Pandemic*, NAT'L PUB. RADIO (Jan. 25, 2021), <https://www.npr.org/sections/goat>

A standing institution focused on all these aspects of pandemic preparation can both ensure resources are broadly available when they are needed *and* help induce States' compliance with the IHR—and reforms to it. For years, experts have put forward proposals for research programs to develop drugs, vaccines, and manufacturing processes in advance of the next pandemic.⁴⁹⁹ Some of this work was ongoing before COVID-19 hit, but there is a lot more the world could have done to prepare, such as developing broad-spectrum antivirals, universal diagnostics, and a universal flu vaccine.⁵⁰⁰ This mechanism could formally incorporate the existing institutional efforts to prepare for future disease outbreaks. It would also be able to establish permanent partnerships with vaccine manufacturers, building on relationships COVAX has developed with private producers in the current crisis.⁵⁰¹

In consolidating preparation and production, a permanent multilateral mechanism could also be empowered, during public health crises, to offer privileged access to eventual vaccines to those national governments that have been compliant with all, or the most important, aspects of the IHR. Allocation of the vaccines the mechanism helps develop might be one point of leverage. While it would be inappropriate and self-defeating for non-compliant States to be denied allocations of vaccines altogether, there might be a two-tiered allocation regime. As an example, if such an arrangement were currently in place through COVAX's provision of vaccines to participating States, the timetable for distribution to States might be adjusted depending on the States' compliance. Thus, States receiving funds for vaccine purchases that are IHR-compliant would receive initial

sandsoda/2021/01/25/959692787/everything-broke-global-health-leaders-on-what-went-wrong-in-the-pandemic [https://perma.cc/P6ZK-USPB].

499. See Arnold S. Monto, *Vaccines and Antiviral Drugs in Pandemic Preparedness*, 12 *EMERGING INFECTIOUS DISEASE* 1, 59 (Jan. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291404/> [https://perma.cc/TE2S-6HPS]; Nina Gobat et al., *Preparedness for Clinical Research during Pandemics: A Perspective from the Platform for European Preparedness Against (Re-)emerging Epidemics (PREPARE)*, 392 *LANCET* S38 (Nov. 2018), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)32099-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)32099-3/fulltext) [https://perma.cc/U2PX-FEXQ]; Kate Bingham, *Plan Now to Speed Vaccine Supply for Future Pandemics*, *NATURE* (Oct. 6, 2020), <https://www.nature.com/articles/d41586-020-02798-0> [https://perma.cc/Q9QZ-BGKS].

500. See Vipul C. Chitalia & Ali H. Munawar, *A Painful Lesson from the COVID-19 Pandemic: The Need for Broad-spectrum, Host-directed Antivirals*, 18 *J TRANSLATIONAL MEDICINE* 390 (2020), <https://translational-medicine.biomedcentral.com/articles/10.1186/s12967-020-02476-9> [https://perma.cc/J9A7-U49Y]; Heather Youngs & Chris Somerville, *Explaining Our Bet on Sherlock Biosciences' Innovations in Viral Diagnostics*, *OPEN PHILANTHROPY* (June 19, 2019), <https://www.openphilanthropy.org/blog/explaining-our-bet-sherlock-biosciences-innovations-viral-diagnostics> [https://perma.cc/M6ER-QTDA]; *Universal Influenza Vaccine Research*, *NAT'L INST. OF ALLERGY AND INFECTIOUS DISEASE* (Sept. 5, 2019), <https://www.niaid.nih.gov/diseases-conditions/universal-influenza-vaccine-research> [https://perma.cc/AC4Z-LV69].

501. Kate Kelland & Ludwig Burger, *Exclusive: Pfizer-BioNTech Agree to Supply WHO Co-led COVID-19 Vaccine Scheme - Sources*, *REUTERS* (Jan. 21, 2021), <https://www.reuters.com/article/us-health-coronavirus-covax-pfizer-exclu/exclusive-pfizer-biontech-agree-to-supply-who-co-led-covid-19-vaccine-scheme-sources-idINKBN29Q2R9> [https://perma.cc/B3BD-NMV2].

deliveries of vaccines earlier than other States. Similarly, States that are self-financing their production but are participating in the permanent mechanism would also operate within a two-tiered system for vaccine allocation. The tiers could be adjusted to ensure self-financing States still have incentives to participate in the permanent mechanism and that humanitarian concerns do not impede rapid delivery of some portion of total allocations to countries regardless of their compliance with the IHR, when necessary. Alternatively, the WHO and other global institutions could aim to induce private manufacturers of future vaccines to offer doses at slightly reduced prices to those countries that are deemed to be IHR compliant.

Such a standing organization could also be a strong and consistent advocate for the lifting of trade and intellectual property barriers that impede the dissemination of essential health resources. Export controls on medicines and supplies, as well as inflexible protection of intellectual property rights, can inhibit global health cooperation.⁵⁰² This has been the case during the current crisis: Once COVID-19 began to spread in China, for instance, the “government not only restricted its PPE exports, it also purchased a substantial portion of the global supply,” disrupting the global supply chain.⁵⁰³ India similarly paused exports of nationally produced vaccines as infections surged over the course of 2021.⁵⁰⁴ National governments’ restrictions on the export of items necessary for preventing or responding to health emergencies can raise costs and limit availability. This danger has become more acute as wealthy nations administer booster doses that divert supplies while priority groups in other countries have yet to access a primary vaccination series.⁵⁰⁵ While advocates for vaccine equity have condemned such restrictions and diversions, steady pressure by an organization specifically dedicated to producing and distributing crisis-responsive materials could more effectively diminish barriers.⁵⁰⁶

b. Access to Technical Expertise

To respond to public health emergencies, national governments require both a robust frontline healthcare workforce (including doctors, nurses, public health specialists, and epidemiologists) and qualified ministerial coordinators who can direct dissemination of resources, issue public guidance, and ensure coordination between subnational and nongovern-

502. See Burwell et al., *supra* note 479.

503. Jennifer Cohen & Yana van der Meulen Rodgers, *Contributing Factors to Personal Protective Equipment Shortages During the COVID-19 Pandemic*, 141 PREVENTATIVE MEDICINE (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7531934/> [<https://perma.cc/7SDH-RH47>].

504. Neha Arora & Krishna N. Das, *India to Restart COVID Vaccine Exports to COVAX, Neighbours*, REUTERS (Sept. 20, 2021), <https://www.reuters.com/world/india/india-resume-covid-vaccine-exports-next-quarter-2021-09-20/> [<https://perma.cc/26GJ-VM5L>].

505. *Interim Statement on Booster Shots for COVID-19 Vaccination*, WORLD HEALTH ORG. [WHO] (Oct. 4, 2021), <https://www.who.int/news/item/04-10-2021-interim-statement-on-booster-doses-for-covid-19-vaccination> [<https://perma.cc/VL74-GV2E>].

506. See *WTO Report Finds Growing Number of Export Restrictions in Response to COVID-19 Crisis*, WORLD TRADE ORG. (Apr. 23, 2020), https://www.wto.org/english/news_e/news20_e/rese_23apr20_e.htm [<https://perma.cc/P4RX-USJ4>].

mental actors. The WHO should work to ensure all nations, especially developing countries, have the human capital necessary to respond to health emergencies. There is growing recognition of this need: Looking back on the COVID-19 response, the WHO's Michael Ryan has advocated for a larger health emergency workforce that can be swiftly deployed to countries hit by public health emergencies.⁵⁰⁷

Eligibility for benefits supporting healthcare and epidemiology personnel in individual countries might be conditioned on their governments' compliance with the IHR in order to further incentivize the coordination and transparency necessary to prevent public health crises. In short, States that agree to abide by IHR rules (and any reforms to them), gain access to global healthcare expertise organized through the WHO, which will be funded through mandatory contributions of member States.

Decentralized efforts to train frontline healthcare workforces in poorer nations are already ongoing in a decentralized fashion, separate from a strategic global effort. For example, field epidemiology training programs are organized through global networks, the largest of which is TEPHINET (reaching more than 100 countries and comprising 75 of these training programs).⁵⁰⁸ While the WHO does have some influence in these networks, it has little authority over these independent initiatives. There may be value in centralizing the deployment of such staff under the auspices of a formal, unified global health reserve workforce, overseen by the WHO. The establishment of such a roster was a clear recommendation of the 2011 IHR Review Committee.⁵⁰⁹ Alternatively, the WHO's added value may instead lie in facilitating the sharing of expertise among national governments. The WHO might, for example, arrange for high-ranking public officials from governments with a track record of success in public health responses to be temporarily seconded to governments lacking such expertise, both prior to and during public health emergencies.

Similarly, the WHO might push for amendments to the 2010 Global Code of Practice on the International Recruitment of Health Personnel to reinforce the retention of health personnel in low-capacity countries.⁵¹⁰ There is evidence that the recruitment of healthcare workers from low- and middle-income countries by the developed world is one factor—along with governance gaps, poor educational systems, and inadequate resources—that can hamper nations' development of strong health care systems.⁵¹¹ In

507. Aizenman, *supra* note 498.

508. TEPHINET: About, TRAINING PROGRAMS IN EPIDEMIOLOGY & PUBLIC HEALTH INTERVENTIONS NETWORK [TEPHINET], <https://www.tephinnet.org/about> (last visited Oct. 14, 2021) [<https://perma.cc/TF28-D4VT>].

509. *Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on Pandemic Influenza A (H1N1)* (2009), WORLD HEALTH ORG. [WHO] 119-20, (2011).

510. WHO *Global Code of Practice on the International Recruitment of Health Personnel*, WORLD HEALTH ORG. [WHO] (May 21, 2020), <https://www.who.int/hrh/migration/code/practice/en/> [<https://perma.cc/R6EY-SJR9>].

511. See Sam F. Halabi, *The Origins and Future of Global Health Law: Regulation, Security, and Pluralism*, 108 GEO. L. J. 1607, 1641 (2020).

parallel with strengthening codified guardrails against detrimental medical staff migration, the WHO might partner with the World Bank to establish a grant program enabling national governments of low-capacity States to provide financial incentives for health personnel to remain in their home countries.

c. Access to Funding

The ability of individual States to access certain funding mechanisms for public health emergency responses could also be conditioned on IHR compliance. One of the perennial problems faced by the WHO has been inadequate guaranteed funding. States that agree to increase their mandatory contribution levels and comply with enhanced IHR obligations should be granted greater access to funds that can assist them in preparing for, detecting, and responding to a pandemic. Conditioning funding does not require reducing access to existing funding. The system can be structured to limit access to *enhanced* funding by those that refuse to accept *enhanced* obligations. Private actors, moreover, could strengthen the incentives by contributing funds as well.

Limiting or delaying noncompliant States' access to specific facilities may be appropriately conducive to motivating their compliance with the IHR. One such facility for which gate-keeping may be appropriate is the World Bank's Pandemic Emergency Financing Facility, which supplements financing for low-income countries' responses to significant cross-border disease outbreaks, in some cases by providing funding directly to governments.⁵¹² While it is important to not punish low-income countries by limiting the application of financial incentives to governments with the most minimal capacity, making it clear prior to public health emergencies that eligible States may be denied or delayed funds from this and other facilities could be a powerful means of promoting compliance with the IHR. A politically feasible approach might be to condition funding for noncompliant States on either demonstrated progress—rather than full compliance—or measurable assurances that they will adhere to the IHR going forward. Agreeing to collaborate with the WHO to conduct a Joint External Evaluation could be one form of assurance.⁵¹³ Finally, and regardless of whether these conditions on assistance are in place, funds should be made available to those States that report disease outbreaks early and subsequently suffer economic harm from other States' travel and trade restrictions. To the extent possible, States should be given incentives to take steps that help protect the entire global community.

Such an incentive structure would have to be carefully crafted. Funds from some mechanisms must remain available to all States, regardless of their internal policy decisions, based on human rights principles. For

512. *Pandemic Emergency Financing Facility*, WORLD BANK, <https://www.worldbank.org/en/topic/pandemics/brief/pandemic-emergency-financing-facility> (last visited Oct. 14, 2021) [<https://perma.cc/9URJ-RPVV>].

513. *Joint External Evaluation Tool*, WORLD HEALTH ORG. [WHO], <https://www.who.int/publications/i/item/9789241550222> [<https://perma.cc/VG7W-RLA4>].

example, in the current context, it would be inappropriate to foreclose States from humanitarian assistance funded through the U.N. Global Humanitarian Response Plan for COVID-19.⁵¹⁴ Further, blocking access to some funding facilities could undermine urgent action that can help prevent an infectious disease outbreak from spreading transnationally. One example is the WHO's Contingency Fund for Emergencies, which "provides funding during the critical gap between the moment the need for an emergency response is identified and the point at which funds from other mechanisms can be released."⁵¹⁵

In order to ensure that funds are available for distribution in the first instance, rather than relying on annual contributions to respond to crises, the WHO should establish a permanent emergency fund rather than rely on annual contributions to respond to crises, so that it does not have to fundraise in the middle of future public health emergencies. Further, as the Council on Foreign Relations' COVID-19 Task Force has suggested, international institutions might look toward nontraditional sources of financing for pandemic response, such as user fees on international economic activity like international travel or financial transactions, to fill funding gaps and create a larger emergency fund that could be distributed to States that participate in effective pandemic preparedness and response.⁵¹⁶

Conclusion

COVID-19 has exposed longstanding weaknesses in global health institutions. Despite decades of warnings, governments of all levels of capacity have struggled to contain the virus. Millions of people have died and millions more have been infected. While there have been hopeful developments at the global level, such as the establishment of COVAX, the global community has not done enough to effectively respond to the crisis. Moreover, COVID-19 has exacerbated skepticism toward, and neglect of, fundamental principles of international law. States have disregarded or rejected their duties across a number of bodies of law in responding to the pandemic. Balancing commitments to international law against public health is difficult in normal times; during a devastating pandemic, it is even more daunting, when principles such as the right to health may be in tension with other legal obligations, such as protections for refugees or for civil and political rights.

There is an urgent need for creative thinking to encourage and enforce compliance with international law and global health regulations not only

514. See generally, U.N. OFF. COORDINATION HUMANITARIAN AFF., GLOBAL HUMANITARIAN RESPONSE PLAN: COVID-19 (Mar. 28, 2020), <https://www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf> [<https://perma.cc/95AW-VXCA>].

515. *Contingency Fund for Emergencies (CFE)*, WORLD HEALTH ORG. [WHO], <https://www.who.int/emergencies/funding/contingency-fund-for-emergencies> (last visited Oct. 14, 2021) [<https://perma.cc/3CK3-GTAD>].

516. Burwell et al., *supra* note 479, at 81.

during but also ahead of public health emergencies. When the COVID-19 pandemic passes, the impulse may be to move on and put the terrible events behind us. But that would be a mistake. This pandemic has demonstrated that waiting until a crisis hits is a recipe for disaster. Pandemics are a predictable fact of modern life. Though the current crisis is the most severe in a century, it is the third deadly pandemic in a decade-and-a-half. The global community cannot afford to simply wait for the next pandemic to hit but must plan now for the reality that it will come—though we don't know when. By taking proactive steps to address both health and non-health challenges that have emerged in the current crisis, the global community can reduce the chance that the next pandemic will be as devastating.