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## PANDEMIC NATIONALISM, COVID-19, AND INTERNATIONAL LAW

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### I. INTRODUCTION

In late 2019, a mysterious illness emerged in China.<sup>1</sup> On December 31, 2019, the WHO China country office was informed of pneumonia cases of unknown etiology detected in Wuhan city.<sup>2</sup> As it turns out, the virus probably appeared earlier,<sup>3</sup> and during the months of December and January, Chinese leaders were made aware that a new coronavirus was causing the outbreak and were reluctant to allow the information to become public.<sup>4</sup> Early investigation attributed it to a “novel” coronavirus that had probably spread from bats to other animals and then to humans. Although

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1 See *Timeline of WHO's response to COVID-19*, WORLD HEALTH ORG. (Sept. 9, 2020), <https://www.who.int/news/item/29-06-2020-covid-timeline>.

2 *Novel Coronavirus (2019-nCoV) Situation Report – 1*, WORLD HEALTH ORG., (Jan. 21, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4).

3 Allyn L. Taylor, Roojin Habibi, Gian Luca Burci, Stephanie Dagron, Mark Eccleston-Turner, Lawrence O. Gostin, Benjamin Mason Meier, Alexandra Phelan, Pedro A. Villareal, Alicia Ely Yamin, Danwood Chirwa, Lisa Forman, Gorik Ooms, Sharifah Sekalala, Steven J. Hoffman, *Solidarity in the Wake of COVID-19: Reimagining the International Health Regulations*, 396 LANCET 82 (2020) (citing Chaolin Huang et al., *Clinical features of patients infected with 2019 novel coronavirus in Wuhan, China*, 395 LANCET 497–506 (2020)).

4 Chang-fa Lo, *The Missing Operational Components of the IHR (2005) from the Experience of Handling the Outbreak of COVID-19: Precaution, Independence, Transparency and Universality*, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 16(2020). The first confirmed case of COVID-19 occurred on December 1, 2019. Doctor Li Wenliang in Wuhan, China created a message group to discuss the novel outbreak with his colleague on December 30 but was accused of fear mongering and “subject to a police disciplinary measure.” *Id.*

initial reports suggested that the virus was not transmitted by humans,<sup>5</sup> this was incorrect. The novel coronavirus was wildly contagious and by mid-January, the first case outside China was confirmed.<sup>6</sup>

As of this writing, 107.8 million cases have been reported worldwide resulting in 2.37 million deaths.<sup>7</sup> The United States leads the world in confirmed cases (27,122,583) and deaths (471,635) with India, Brazil, the Russian Federation, and much of Western Europe and the Americas also suffering very high infection rates.<sup>8</sup> China, where the virus originated, has confirmed 101,496 cases, with 4,837 deaths.<sup>9</sup>

The appearance of the virus and the havoc it has wreaked on human health and the global economy have been devastating. Global GDP has dropped more than four percent,<sup>10</sup> and if we graded the international community on its response to the virus, it would receive poor marks. Instead of transparency and cooperation, nationalism, secrecy, and recrimination have characterized the response of many governments to the pandemic, with predictably devastating results.<sup>11</sup> It is now evident that China was not entirely forthcoming with the WHO and the international community at the outset of the outbreak. In addition, the WHO may not have been quick

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5 *Novel Coronavirus – Thailand (ex-China)*, WORLD HEALTH ORG. (Jan. 14, 2020), <https://www.who.int/csr/don/14-january-2020-novel-coronavirus-thailand/en/>. Under the headline of “WHO risk assessment,” the report notes that “[b]ased on the available information there is no clear evidence of human-to-human transmission,” though “[a]dditional investigation is needed.” *Id.*

6 Mark Eccleston-Turner, *COVID-19 Symposium: The Declaration of a Public Health Emergency of International Concern in International Law*, OPINIOJURIS (2020), <https://opiniojuris.org/2020/03/31/covid-19-symposium-the-declaration-of-a-public-health-emergency-of-international-concern-in-international-law/> (noting that, by January 23, only four cases of coronavirus had been reported outside of China and that all four people “appeared to have travel history to the affected region”).

7 *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG. (last visited Feb. 13, 2021) <https://covid19.who.int/>.

8 *Id.*

9 *China, WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG. (last visited Feb. 13, 2021), <https://covid19.who.int/region/wpro/country/cn>

10 *Global Outlook*, GLOB. ECON. PROSPECTS 1, 4 (Jan. 2021) (reporting a 4.3 decline in global GDP).

11 See Lauren Tonti, *The International Health Regulations: The Past and the Present, But What Future*, HARV. INT’L L.J. (2020), <https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/>; Lawrence O. Gostin, Roojin Habibi & Benjamin Mason Meier, *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revising the International Health Regulations to Prepare for Future Threats*, 48 J.L. MED. & ETHICS 376 (2020); see also Barry R. Bloom, Paul E. Farmer & Eric J. Rubin, *WHO’s Next—The United States and the World Health Organization*, 7 NEW ENG. J. MED. 676, 676–77 (2020) (rebuking the threat by the United States to withdraw from the World Health Organization); Pedro Villarreal, *COVID-19 Symposium: “Can They Really Do That?” States’ Obligations Under the International Health Regulations in Light of COVID-19 (Part II)*, OPINIOJURIS (Mar. 31, 2020), <http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-ii/>.

enough to respond to information of the outbreak and declare a public health emergency of international concern (a “PHEIC”) under the International Health Regulations (2005) (IHR),<sup>12</sup> as it stopped short of declaring a PHEIC even after China had effectively quarantined nearly twenty million people across Wuhan and other cities and announced measures to curb the spread of disease nationwide.<sup>13</sup> Moreover, even when the WHO declared a PHEIC on January 30, 2020,<sup>14</sup> the measures recommended were arguably insufficiently robust to contain the spread of the disease.<sup>15</sup>

The combination of Chinese secrecy and possible missteps by the WHO caused the outbreak to spread. When it reached the United States, it encountered a nationalistic government already repudiating international law and international institutions that subsequently politicized the pandemic for political advantage.<sup>16</sup> The U.S. government, like its Chinese counterpart, also kept knowledge of the virus’s potential lethality secret for several weeks, although it had been receiving regular intelligence briefings about the virus starting in early January.<sup>17</sup> The Trump administration declared a public health emergency in the United States on January 31, simultaneously blocking most travel from China. Inexplicably, however, the administration continued to downplay the virus, even after it had taken the lives of more than one hundred thousand individuals in the United States.<sup>18</sup> Some countries were able to successfully contain the virus due to a happy

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12 See, e.g., Ching-Fu Lin, *COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?*, 13 CONTEMP. ASIA ARB. J. 269, 274–76 (2020) (proposing both that China delayed notifying the WHO of the emergence of COVID-19 and that the WHO was too slow to declare a PHEIC in response to COVID-19).

13 Sebastien Ricci & Nina Larson, *Here’s why the WHO hasn’t Declared China’s Coronavirus a Global Health Emergency*, SCI. ALERT (Jan. 24, 2020), <https://www.sciencealert.com/here-s-why-the-who-hasn-t-declared-the-wuhan-virus-as-a-global-health-emergency>.

14 See Ayelet Berman, *The World Health Organization and COVID-19: How Much Legal Authority Does the WHO Really Have to Manage the Pandemic?*, CTR. FOR INT’L L. (2020), <https://cil.nus.edu.sg/the-world-health-organization-and-covid-19-how-much-legal-authority-does-the-who-really-have-to-manage-the-pandemic-by-dr-ayelet-berman/>.

15 See generally Lo, *supra* note 4 (criticizing the response from China and the WHO). *But cf.* Berman, *supra* note 14 (arguing that the WHO’s authority to mandate greater cooperation from China was limited).

16 See Jonathon Rothwell & Christos Madrikis, *Politics is wrecking America’s pandemic response*, BROOKINGS INST. (Sept. 17, 2020), <https://www.brookings.edu/blog/up-front/2020/09/17/politics-is-wrecking-americas-pandemic-response/> (correlating attitudes to the pandemic with political party affiliation and demonstrating that partisanship, not science, is driving public pandemic response).

17 Shane Harris, Greg Miller, Josh Dawsey & Ellen Nakashima, *U.S. intelligence reports from January and February warned about a likely pandemic*, WASH. POST (Mar. 20, 2020, 7:10 PM), [https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597\\_story.html](https://www.washingtonpost.com/national-security/us-intelligence-reports-from-january-and-february-warned-about-a-likely-pandemic/2020/03/20/299d8cda-6ad5-11ea-b5f1-a5a804158597_story.html).

18 Tara Subramaniam & Christopher Hickey, *Timeline: Charting Trump’s public comments on COVID-19 versus what he told Woodward in private*, CNN (Sept. 16, 2020), <https://www.cnn.com/interactive/2020/09/politics/coronavirus-trump-woodward-timeline/>.

coincidence of effective leadership, science-based public policy, adequate resources, and even fortunate geography – New Zealand and Singapore serving as prime examples.<sup>19</sup> Overall, however, a toxic brew of secrecy, timidity, and nationalism allowed the virus to multiply to the despair of scientists, doctors, and other actors seeking to contain it and enhance global cooperation to combat its devastating effects.

In August 2020, as Director of the Harris Institute at Washington University School of Law, I launched a project to examine the global governance issues surrounding the pandemic. Although the IHR 2005 and the declaration of a PHEIC were important improvements in the global architecture developed to provide a “global surveillance tool for cross border transmission of diseases,”<sup>20</sup> they have proven insufficient in the case of COVID-19 to effectively counter the spread of the disease. The project brought together scholars from Washington University School of Law, the National University of Singapore, Florida State University College of Law, the University of Melbourne Law School, and the Max Planck Institute for Comparative Public Law and International Law, as well as a team of medical experts from the Washington University School of Medicine. Meetings were held over Zoom in late summer and fall 2020, and drafts were exchanged later in the year. Participants also had the opportunity to refer to the work of the International Law Association’s Global Health Committee which has been very active regarding the current pandemic,<sup>21</sup> as well as to the ongoing work of the Independent Panel for Pandemic Preparedness and Response for the WHO Executive Board (the “Independent Panel”).<sup>22</sup> The goal was to use the experience with COVID-

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19 Jinshan Hong, Rachel Chang & Kevin Varley, *The Covid Resilience Ranking*, BLOOMBERG NEWS (Nov. 24, 2020), <https://www.bloomberg.com/graphics/covid-resilience-ranking/>. Singapore also performed admirably well. See Ayelet Berman & Fong Han Tan, *When Crisis Meetings Preparation and Discipline: Singapore’s Successful Response to COVID-19*, *infra*.

20 World Health Org., 2005 International Health Regulations (3d ed. 2016), <https://www.who.int/publications/i/item/9789241580496> [hereinafter IHR].

21 *Statement of the Global Health Law Committee of the International Law Association regarding the COVID-19 pandemic*, INT’L L. ASS’N (Apr. 5, 2020), <https://frederickabbott.com/sites/default/files/Statement%20of%20the%20ILA%20Global%20Health%20Law%20Committee%20regarding%20COVID-19%20-%205%20April%202020%20r3.pdf>.

22 In July 2020, WHO Director-General Tedros Adhanom Ghebreyesus announced the establishment of an “Independent Panel for Pandemic Preparedness and Response,” to evaluate the world’s response to the COVID-19 pandemic. *Independent Evaluation of Global COVID-19 Response Announced*, WORLD HEALTH ORG. (July 9, 2020), <https://www.who.int/news/item/09-07-2020-independent-evaluation-of-global-covid-19-response-announced>. The Independent Panel issued a first report on November 5, 2020 and a second, relatively brief, progress report in January 2021. INDEP. PANEL FOR PANDEMIC PREPAREDNESS & RESPONSE, SECOND REPORT ON PROGRESS (Jan. 2021), [https://theindependentpanel.org/wp-content/uploads/2021/01/Independent-Panel\\_Second-Report-on-](https://theindependentpanel.org/wp-content/uploads/2021/01/Independent-Panel_Second-Report-on-)

19 to examine the effectiveness of the IHR and the WHO, propose possible reforms, and suggest additional ways to enhance global cooperation in the face of the COVID-19 pandemic as well as future global health emergencies.

Each scholar in the project has contributed a short essay addressing various elements of the problem or has served as part of the collective to frame the problems addressed by the various essays. In this essay I briefly discuss three issues: (1) how nationalism in international affairs makes cooperation difficult, focusing particularly on the example of the U.S. and Chinese responses to the coronavirus crisis,<sup>23</sup> (2) ways that legal and practice reforms might strengthen and fortify the current architecture of the WHO so as to respond more quickly and effectively to contain global health emergencies;<sup>24</sup> and (3) how existing provisions of the WHO Constitution and the IHR 2005 can be enforced considering principles of State responsibility for internationally wrongful acts and the dispute resolution clauses in these instruments, in particular Article 75 of the WHO Constitution and Article 56 of the IHR 2005. This section will not address, except tangentially, the potential responsibility of international organizations like the WHO, issues surrounding the possible liability of governments to their own people because of missteps allegedly taken,<sup>25</sup> nor possible claims of human rights abuses violating other international treaty and customary international law norms.<sup>26</sup> While important, these issues were not within the framing of this particular project.

I hope that this essay and this Symposium will inform the global conversation taking place on these issues, as well as the WHO reform

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Progress\_Final-15-Jan-2021.pdf [hereinafter SECOND REPORT]. The Panel is scheduled to release a further report in May 2021 at the 74th World Health Assembly. *Id.*

23 The United States and China make for particularly interesting case studies. Both countries' nationalistic interests (arguably) impaired compliance with the IHR and cooperation with other nations. Because of the important standing of both nations, their behavior had outsized consequences for the rest of the world. However, future case studies on other jurisdictions, such as Brazil, Russia, or the United Kingdom, could be similarly illustrative.

24 David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079 (1998).

25 See generally *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>.

26 See, e.g., Oona Hathaway, Mark Stevens & Preston Lim, *COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement*, JUST SECURITY (Nov. 30, 2020), <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>.

process that was sparked by criticisms of the organization regarding its response to COVID-19.<sup>27</sup>

## II. THE PROBLEM OF PANDEMIC NATIONALISM:

Addressing a global pandemic is difficult even if one assumes States are inherently inclined to cooperate and coordinate their responses, consistent with international law and scientific considerations informing public health responses. If States are unwilling to cooperate or coordinate, however, it becomes unlikely the pandemic will be contained quickly or that therapeutics and vaccines will be distributed equitably and effectively. The COVID-19 pandemic presents a “weakest-link public goods” kind of game in which the outcome for all will be determined by the weakest member of the group. As a recent paper notes, the optimal solution to the problem of infection and viral spread requires “all citizens to choose actions that go well beyond their pure self-interest (i.e., to cooperate) and many choose voluntarily to engage in such behavior. However, the free riding (i.e., defection) of some may have devastating effects for the community,” by frustrating efforts to contain the virus.<sup>28</sup> The architecture of the WHO and the IHR 2005 is built upon the premise that States, like citizens within States, will cooperate in the case of a public health emergency. If one country refuses to cooperate and take appropriate precautions to control outbreaks, it becomes difficult to contain the spread of disease.<sup>29</sup>

Under its Constitution, the WHO, representing its 194 Member States, acts as “the directing and co-ordinating authority on international health work.”<sup>30</sup> During a global health crisis, the organization monitors and supplies information on the disease and its spread, helps countries to prepare their health systems to identify, track, prevent, and treat the disease, and plays a key role in the search for a treatment or vaccine. It works in collaboration with its Member States, and has little autonomous authority of its own, relying upon national governments for funding, access, and implementation. The IHR 2005 require States to cooperate with the WHO and with each other by tracking health events on their territories, notifying the WHO if they reach a certain threshold of seriousness (based upon the

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<sup>27</sup> See *supra* note 21.

<sup>28</sup> Patrick Mellacher, *Cooperation in the Age of COVID-19: Evidence from Public Goods Games*, ARXIV.ORG (Nov. 18, 2020), <https://arxiv.org/ftp/arxiv/papers/2011/2011.09189.pdf>.

<sup>29</sup> Alejandro Capparos & Michael Finus, *The Corona-Pandemic: A Game-Theoretic Perspective on Regional and Global Governance*, 76 ENV'T & RES. ECON. 913 (2020).

<sup>30</sup> Constitution of the World Health Organization art. 2(a), July 22, 1946, 4 Bevans 119, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

risk of international spread, rather than on actual severity of the illness caused),<sup>31</sup> providing detailed information to each other and to the WHO, and implementing a range of responses, including achieving a core set of public health capacities.

If one takes as an example the U.S. and Chinese responses to the pandemic, not only did both countries arguably fail to comply with the IHR 2005 by concealing information on the virus's morbidity,<sup>32</sup> but the war of words and mutual recrimination that ensued created a very difficult geopolitical environment for the WHO. Beginning in April 2020, President Trump threatened to halt WHO funding, and on May 29, 2020, made good on his threat, announcing that the United States would halt its funding of the WHO and withdraw from the organization.<sup>33</sup> President Trump accused the WHO of protecting China and argued the organization had not taken the reforms necessary to effectively combat the pandemic.<sup>34</sup> Yet at the time the President did this, the United States was bound by the WHO Constitution and U.S. law to maintain funding during the one year denunciation period and to continue to fulfill its treaty obligations. The formal notification to the Secretary-General from the United States took place on July 6, 2020.<sup>35</sup> As explained below, repudiating the treaty and immediately cutting off funding was inconsistent with U.S. obligations under international and U.S. law.<sup>36</sup>

During his May 29 press conference, President Trump blamed the Chinese government for the spread of the "Wuhan virus," using racially charged language, and claimed that the WHO was pressured by China to "mislead the world" about it.<sup>37</sup> The United States also imposed unilateral

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31 IHR, *supra* note 20, art. 6.

32 Raymond Zhong, Paul Mozur, Jeff Kao & Aaron Krolik, *No 'Negative' News: How China Censored the Coronavirus*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/19/technology/china-coronavirus-censorship.html>.

33 *Coronavirus: Trump terminates U.S. relationship with WHO*, BBC NEWS (May 30, 2020), <https://www.bbc.com/news/world-us-canada-52857413/>.

34 See Harold Hongju Koh & Lawrence O. Gostin, *How to Keep the United States in the WHO*, FOREIGN AFFS. (2020), <https://www.foreignaffairs.com/articles/world/2020-06-05/how-keep-united-states-who>; Erica Werner, *Congressional Democrats allege Trump's move to defund World Health Organization is illegal*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/us-policy/2020/04/15/trump-who-democrats/>.

35 Press Release, Stéphane Dujarric (Spokesman for the Secretary-General), Note to Correspondents in answer to questions regarding the World Health Organization, U.N. Press Release (July 7, 2020), <https://www.un.org/sg/en/content/sg/note-correspondents/2020-07-07/note-correspondents-answer-questions-regarding-the-world-health-organization>.

36 Koh & Gostin, *supra* note 34.

37 *Coronavirus: Trump terminates U.S. relationship with WHO*, *supra* note 33; see also Letter from The White House, to Dr. Tedros Adhanom Ghebreyesus, Director-General of the World Health Org. (May 18, 2020), [https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf?fbclid=IwAR37I6eg33gvIDfse0-iLERvoNLTGVpLNdt3luK\\_AEsSOMiFNZCJLxJkuds](https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf?fbclid=IwAR37I6eg33gvIDfse0-iLERvoNLTGVpLNdt3luK_AEsSOMiFNZCJLxJkuds).

trade and travel bans and restrictions on China, and later ended several cultural exchange programs with China.<sup>38</sup> China, in turn, accused the Trump administration of incompetence and misleading the world, itself veering into nationalistic and anti-American rhetoric.<sup>39</sup> The fraught relations between the two States have been unhelpful in containing the spread of the virus, but it is the U.S. response – and death toll – that has been particularly shocking. In spite of serious human rights concerns regarding many of its restrictive policies,<sup>40</sup> China has been relatively successful in containing the virus and has continued to cooperate more or less effectively with the global community.<sup>41</sup> China also announced its participation in the COVAX facility, a joint project of the World Health Organization, the European Commission, and France, to ensure equitable access to COVID-19 diagnostics, treatments, and vaccines,<sup>42</sup> a growing problem given the excessive share of early vaccine distribution claimed by wealthy nations.<sup>43</sup> Nationalist responses have also emerged in other countries such as Brazil, which recently ranked 46th in the world in its response to the virus.<sup>44</sup>

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38 See, e.g., *US ends 5 cultural programs with China in further escalation*, AP NEWS (Dec. 5, 2020), <https://apnews.com/article/donald-trump-beijing-china-united-states-mike-pompeo-e25097dd1879243a71268479d54f4be6>; Paul Mozur & Raymond Zhong, *U.S. Tightens Visa Rules for Chinese Communist Party Members*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/world/asia/us-visa-china-communist-party.html>.

39 Chris Buckley, *China's Combative Nationalists See a World Turning Their Way*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/world/asia/china-nationalists-covid.html>.

40 See Armin von Bogdandy & Pedro Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis* (Max Planck Inst. for Compar. Pub. L. & Int'l L. (MPIL), Research Paper No. 2020-07, 2020), <https://ssrn.com/abstract=3561650>.

41 After initially refusing to allow WHO investigators to enter the country, China permitted a team of fourteen scientists to visit “laboratories, disease-control centers and live-animal markets” in Wuhan. Javier C. Hernandez, *China Scores a Public Relations Win After W.H.O. Mission to Wuhan*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/09/world/asia/wuhan-china-who-covid.html>. But see Javier C. Hernandez & James Gorman, *On W.H.O. Trip, China Refused to Hand Over Important Data*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/world/asia/china-world-health-organization-coronavirus.html>.

42 Seth Berkley, *COVAX explained*, GAVI (Sept. 3, 2020), <https://www.gavi.org/vaccineswork/covax-explained>.

43 Anthony D. So & Joshua Woo, *Reserving Coronavirus Disease 2019 Vaccines for Global Access: Cross Sectional Analysis*, BMJ 371 (2020), <https://www.bmj.com/content/371/bmj.m4750> (finding that wealthy nations have purchased more vaccines than they need); c.f. Robin Cohen, *COVID Vaccines: Rich Countries Have Bought More than They Needed – Here's How They Could Be Redistributed*, CONVERSATION (Feb. 9, 2021), <https://theconversation.com/covid-vaccines-rich-countries-have-bought-more-than-they-need-heres-how-they-could-be-redistributed-153732>.

44 Hong et al., *supra* note 19. The Bloomberg resilience ratings offer only a rough proxy for responsiveness to the pandemic, and of course, change over time. Although Brazil now ranks higher than only seven other listed countries, it ranked significantly higher in earlier iterations the list and appeared to be outperforming countries without a strong nationalist element, such as Italy, Belgium, and Portugal. Brazil continues to rank better than Mexico and Argentina, whose responses have arguably demonstrated fewer nationalist tendencies.



The election of Joe Biden as the 46th President of the United States abruptly halted the Trump administration's problematic response to the pandemic and presented an opportunity to ameliorate what had become an increasingly toxic geopolitical environment, reset relations, and pivot on the global response to COVID-19. President Biden is well-known for his multilateralist instincts. He has kept his promise to "immediately restore our relationship with the WHO, which – while not perfect – is essential to coordinating a global response during a pandemic."<sup>45</sup> He has also pledged to restore public health initiatives that facilitate U.S. cooperation on global health issues, including the White House National Security Council Directorate for Global Health Security and Biodefense and the Agency for International Development's PREDICT program.<sup>46</sup> So perhaps the worst of the nationalist surge with respect to the coronavirus crisis is over in the United States but other world leaders, especially those following Trump's lead, continue to present challenges to effective global governance.<sup>47</sup>

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45 *Joe and Kamala's Plan to Beat COVID-19*, BIDEN HARRIS, <https://joebiden.com/covid19/> (last visited Dec. 15, 2020); Letter from Joe Biden, President U.S., to António Guterres, United Nations Secretary-General (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/letter-his-excellency-antonio-guterres/>.

46 National Security Memorandum on United States Global Leadership to Strengthen the International COVID-19 Response and to Advance Global Health Security and Biological Preparedness, WHITE HOUSE (Jan. 21, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/21/national-security-directive-united-states-global-leadership-to-strengthen-the-international-covid-19-response-and-to-advance-global-health-security-and-biological-preparedness/>. JOSEPH R. BIDEN, JR., NATIONAL STRATEGY FOR THE COVID-19 RESPONSE AND PANDEMIC PREPAREDNESS (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

47 Frida Ghiti, *Opinion: Which world leader has the worst pandemic record? The competition is fierce.*, WASH. POST (Mar. 30, 2021), <https://www.washingtonpost.com/opinions/2021/03/30/which-world-leader-has-worst-pandemic-record-competition-is-fierce/>. See also Genaro Lozano, *Vaccine Diplomacy: A New Cold War*, AMS. Q. (Feb. 11, 2021), <https://americasquarterly.org/article/vaccine-diplomacy-a-new-cold-war/>; Amanda McGowan, *China's 'Vaccine Diplomacy' Fills Void in Developing World Left by US 'Vaccine Nationalism'*, WORLD (Jan. 12, 2021), <https://www.pri.org/stories/2021-01-12/china-s-vaccine-diplomacy-fills-void-developing-world-left-us-vaccine-nationalism>.

### III. SOME PRELIMINARY THOUGHTS ABOUT REFORM

Because other excellent essays to this project address various elements of reform, this section will be brief. There have been many calls for WHO reform during the current pandemic, and indeed, throughout the years.<sup>48</sup> These can be divided into roughly two broad categories: *legal reforms* of the IHR 2005 and the WHO Constitution, and *practice reforms* that promote good governance and best practices.

In terms of *legal reforms*, most of the focus is on the IHR 2005, which define a PHEIC as “an extraordinary event which is determined . . . to constitute a public health risk to other States through the international spread of disease and . . . to potentially require a coordinated international response.”<sup>49</sup> The WHO Director-General and an Emergency Committee are responsible for declaring a PHEIC, which allow them to issue “non-binding but practically & politically significant measures that can address travel, trade, quarantine, screening, treatment” as well as determine best practices.<sup>50</sup> Six PHEICs were declared between 2009 and 2020, each accompanied by Temporary Recommendations. Two pandemics – H1N1 and COVID-19 – were declared over the same period. As Pedro Villareal addresses in his contribution to this Symposium, there is “no mathematical formula, no algorithm” for a pandemic declaration,<sup>51</sup> nor does this declaration trigger new funding, protocols, or regulations.<sup>52</sup>

Some useful reform proposals have focused upon *reinterpreting* existing provisions of the IHR to promote more effective pandemic control. These

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48 See, e.g., David Bishop, *Lessons from SARS: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations*, 36 GEO. J. INT’L L. 1173 (2005); Lawrence O. Gostin & Ana Ayala, *Global Health Security in an Era of Explosive Pandemic Potential*, 9 J. NAT’L SEC. L. & POL’Y 53 (2018); Tine Hanrieder & Adam Kamradt-Scott, *Same, Same But Different: Reforming the World Health Organization in an Age of Public Scrutiny and Global Complexity*, 11 GLOB. HEALTH GOV. 4 (2017); Mark Eccleston-Turner & Scarlett McArdle, *Accountability, International Law, and the World Health Organization: A Need for Reform?*, 11 GLOB. HEALTH GOVERNANCE 27 (2017).

49 IHR, *supra* note 20, art. 1.

50 World Health Organization (@WHO), TWITTER (January 30, 2020, 2:01 PM), <https://twitter.com/who/status/1222973217435987970?lang=en>.

51 As explained by Michael Ryan, WHO director for health emergencies. See William Wan, *WHO declares a pandemic of coronavirus disease covid-19*, WASH. POST (Mar. 11, 2020), <https://www.washingtonpost.com/health/2020/03/11/who-declares-pandemic-coronavirus-disease-covid-19/>.

52 Previously, the WHO utilized a six-stage classification for declaring a disease a pandemic, with a disease being classified as a pandemic when stage six was reached. This process was abandoned following H1N1. See Stephanie Debehay, *WHO says it no longer uses ‘pandemic’ category, but virus still emergency*, REUTERS (Feb. 24, 2020), <https://www.reuters.com/article/uk-china-health-who-idUKKCN20I0PD>.

include proposals to include a “precautionary principle” in the interpretation of IHR Article 12 on the determination of a PHEIC, to err essentially on the side of caution when doing the risk assessment mandated by Article 12(4)(e).<sup>53</sup> Drawing this principle from customary international law, particularly international environmental law, H el ene De Pooter has argued that this customary international law norm should infuse the interpretation of Article 12.<sup>54</sup>

Others have suggested that the WHO’s reluctance to impose travel and trade restrictions that could prevent the spread of diseases such as COVID-19 is linked to a misunderstanding of Article 2 of the IHR 2005 which defines as the purpose and scope of the IHR:

[T]o prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international trade and traffic.<sup>55</sup>

*Reinterpretation* of the IHR 2005 is easier, of course, than amendment of the IHR or the WHO Constitution. The IHR can be amended according to the procedure set forth in Article 55, based upon a proposal by a Member State or the Director-General, then submitted to the Health Assembly. Amendments can also be rejected by States or made the subject of Reservations under Articles 59–64.<sup>56</sup> For this reason, amendments must be carefully chosen and receive substantial political and expert support.

Yet some reform proposals undoubtedly require amending the IHR, including those contained in this Symposium. These include suggestions that address problems with the binary “on/off” nature of the PHEIC/non-PHEIC designation,<sup>57</sup> as opposed to a graduated alert system which has been

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53 Global Health Law Panel, International Law Association Biennial, Dec. 10, 2020 (author’s notes).

54 *Id.*

55 World Health Org., 2005 International Health Regulations art. 2 (2d ed. 2008); see David P. Fidler, *To Declare Or Not to Declare: The Controversy over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo*, 14 ASIAN J. WTO & INT’L HEALTH L & POL’Y 287 (2019).

56 WHO Constitution, *supra* note 30, arts. 59–64.

57 Washington University School of Law, *White Paper - Global Governance: The World Health Organization (WHO) and the Need for Post-COVID-19 Reform, Addressing Challenges to Public Health and Society Through Global Collaboration* (submitted to the World Health Organization’s Independent Panel for Pandemic Preparedness and Response for consideration), April 2021; *Implementation of the International Health Regulations (2005)*, Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response, Report by the Director-

suggested by the Emergency Committees that addressed the COVID-19 pandemic and the current Ebola crisis. Others have proposed making the designation itself more scientific, including amending Annex 2 of the IHR and improving the algorithm that might lead to a designation of a PHEIC or some intermediate level of public health concern.<sup>58</sup> These are the subject of other essays and are under consideration by the Independent Panel launched by Director-General Tedros Adhanom Ghebreyesus in May 2020.<sup>59</sup>

Finally, some have suggested that the IHR should be amended to allow the organization to impose sanctions on its members for noncompliance.<sup>60</sup> Indeed, although the IHR are legally binding, States often treat even mandatory WHO measures as recommendations, creating the problem of “defection” highlighted above.

In terms of *practice reforms*, close observers of the organization and its work generally agree that more transparent and open governance are important to avoid capture of the organization by States and to promote more inclusion of civil society and private philanthropy. Others have argued that better funding and oversight are needed or have advocated for cooperation with other entities such as the IMF.<sup>61</sup> As Armin von Bogdandy and Pedro Villarreal have noted, increasing the transparency and inclusiveness of pandemic decision-making will also require further diversifying participation in the IHR roster of experts, which could increase trust in the WHO on the part of States.<sup>62</sup>

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General, U.N. Doc. A69/21, at 43 (May 13, 2016) (“The need for an intermediate level of alert”); Gian Luca Burci, *The Outbreak of COVID-19 Coronavirus: are the International Health Regulations fit for purpose?*, EJIL:TALK! (Apr. 21, 2020), <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>.

58 David N. Durrheim, Laurence O. Gostin & Keymanthri Moodley, *When does a major outbreak become a Public Health Emergency of International Concern?*, LANCET (May 19, 2020) [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30401-1/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30401-1/fulltext).

59 *COVID-19 response*, Seventy-Third World Health Assembly, WHA73.1 at 7 (May 19, 2020). The Second Report on Progress, *supra* note 22, observes that the COVID-19 pandemic “must be a catalyst for fundamental and systemic change.” *Id.* at 8.

60 Claire Chaumont, *Opinion: 5 Ways to reform the World Health Organization* (Aug. 5, 2020), <https://www.devex.com/news/opinion-5-ways-to-reform-the-world-health-organization-97843>.

61 Alison Agnew, *A Combative Disease: The Ebola Epidemic in International Law*, 39 B.C. INT’L & COMPAR. L. REV. 97, 114 (2016); Gostin & Ayala, *supra* note 48 at 67.

62 Bogdandy & Villarreal, *supra* note 40, at 14.

#### IV. ENFORCING COMPLIANCE USING PRINCIPLES OF STATE RESPONSIBILITY

As explained above, the IHR 2005 are legally binding, and Members of the WHO have entered into formal treaty commitments to adhere to the WHO Constitution and the IHR 2005, even if in practice they sometimes disregard these commitments. Some reform proposals therefore focus on amendments that would involve the imposition of sanctions upon Members who do not comply. This could be a positive development. Yet, as David Fidler observed in an early article on global health law, and the WHO's former legal counsel Gian Luca Burci observed more recently, the WHO, unlike other international organizations, has not turned to international law and international legal authority in the same way that other international organization have done so,<sup>63</sup> preferring “voluntary and technical approaches.”<sup>64</sup> This may stem from the background and training of the Organization's personnel, who are generally specialists in public health and medicine rather than law.<sup>65</sup> Although enhancing the binding nature of WHO rules began to shift with the adoption of the IHR 2005, experts seem divided between those advocating for increasing legalization of the IHR<sup>66</sup> and those doubting the effectiveness of increased legal precision.<sup>67</sup>

Article 75 of the WHO Constitution permits (and arguably mandates) recourse to the International Court of Justice for “[a]ny question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly,” unless the parties agree on another mode of settlement.<sup>68</sup> The IHR 2005 also have a dispute settlement clause, but it is not mandatory. Article 56 of the IHR 2005 permits Members to enter into negotiation and mediation concerning disagreements, and if they are unable to resolve their dispute, provides that they may ask the Director-General to do so, or submit the matter to the

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<sup>63</sup> Fidler, *supra* note 24, at 1096.

<sup>64</sup> Burci, *The Outbreak of COVID-19*, *supra* note 57.

<sup>65</sup> Fidler, *supra* note 22, at 1099.

<sup>66</sup> See Rebecca Katz, *Pandemic policy can learn from arms control*, NATURE (Nov. 19, 2019), <https://www.nature.com/articles/d41586-019-03452-0>; Alison Duxbury, *The World Health Organization as Pandemic Police?*, PURSUIT (2020), <https://pursuit.unimelb.edu.au/articles/the-world-health-organization-as-pandemic-police>.

<sup>67</sup> *C.f.* Duxbury, *supra* note 66 (highlighting the logistic improbability of creating enforcement mechanisms); Svēt Lustig Vijay, *WHO's Legal Mandate Is Weak in Responding to COVID-19 Emergency: But Changes Are Up to Member States*, HEALTH POL'Y WATCH (Apr. 23, 2020), <https://healthpolicy-watch.news/whos-legal-mandate-is-weak-in-responding-to-covid-19-emergency-but-changes-are-up-to-member-states/>.

<sup>68</sup> WHO Constitution, *supra* note 30, art. 75.

Permanent Court of Arbitration.<sup>69</sup> In the current pandemic, both the United States and China, as well as other States, may have been in noncompliance with the IHR and possibly the WHO Constitution. Yet the dispute settlement clauses remain unused. The final section of this essay briefly explores whether mandatory dispute settlement is possible, what principles might govern it, and whether legal action would be useful in the current crisis and set a positive precedent for future cases. It does not examine arbitration before the PCA, but only the possibility of action at the International Court of Justice.

U.S. politicians have argued that China's initial secrecy and withholding of information in the early stages of the outbreak may have violated Articles 6 and 7 of the IHR 2005,<sup>70</sup> which require reporting an event that "may" constitute a PHEIC within 24 hours of assessment.<sup>71</sup> The Second Report of the WHO's Independent Panel is less categorical, but does find that "public health measures could have been applied more forcefully by local and national health authorities in China in January."<sup>72</sup> An initial challenge for any litigant would be to tie any such breach to a violation of the WHO Constitution, as the dispute settlement provision in Article 75 relates to that treaty. It is possible to argue that Articles 21 and 22 of the WHO Constitution, which give the Health Assembly the authority to adopt the IHR and provides for their effectiveness, are in play if States breach the IHR. Under this theory, a breach of a mandatory provision of the IHR is assumed to be tantamount to a breach of Article 22 and, therefore, justiciable under Article 75. It is also possible to make an argument that other provisions of the WHO Constitution, such as Article 37 (Members undertake not to influence the WHO Director-General and staff), Article 63 (requiring prompt communication), or Article 64 (imposing reporting requirements) are directly implicated or could shore up arguments premised upon the IHR.

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69 IHR, *supra* note 20, art 56.

70 STEPHAN P. MULLIGAN, CONG. RSCH. SERV., LSB10525, CAN THE UNITED STATES SUE CHINA OVER COVID-19 IN AN INTERNATIONAL COURT? (2020). This argument has also surfaced in neoconservative writings in Canada and the United Kingdom and seemed to be implicit in a Statement by Australia's Prime Minister who suggested there should be an independent investigation into the origins of the pandemic & the WHO's response and seemed to suggest that China acted wrongly. Paul Karp & Helen Davidson, *China bristles at Australia's call for investigation into coronavirus origin*, GUARDIAN (Apr. 29, 2020), <https://www.theguardian.com/world/2020/apr/29/australia-defends-plan-to-investigate-china-over-covid-19-outbreak-as-row-deepens>.

71 IHR, *supra* note 20, art. 6(1).

72 SECOND REPORT, *supra* note 22, at 17.

Yet even if the compromissory clause of Article 75 could be successfully invoked on this basis, questions remain about standing, remedies, and effectiveness. For the United States to pursue a claim against China for example, it would have to show that China committed an internationally wrongful act.<sup>73</sup> A breach of a treaty is an internationally wrongful act,<sup>74</sup> but typically a State has the capacity to bring an action only if it can show that it was directly injured by the act complained of.<sup>75</sup> Although the United States has argued that Chinese secrecy and failure to report promptly prejudiced its ability to combat the pandemic, the actions of the Trump administration in downplaying the virus caused much greater harm than China's initial silence. Moreover, the WHO declined to declare the virus to be a PHEIC on January 23, and waited until January 30, 2020, to do so, after the Director-General met with President Xi to discuss the outbreak.<sup>76</sup> The Chinese government has also retorted that it released the genetic data on the new coronavirus (although it only did so after researchers independently posted it online on January 10, 2020),<sup>77</sup> and that its initial hesitancy was fully justified, although experts have disputed that claim.<sup>78</sup>

For this and other reasons, although there might be very good reasons to go forward in the International Court of Justice with the claim that a Member's refusal to promptly alert the WHO and other authorities (such as China in the current case) violated Article 6 of the IHR 2005 and parallel

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73 Int'l L. Comm'n, Draft articles on Responsibility of States for Internationally Wrongful Acts art. 2, U.N. Doc. A/56/10, in 2001 Y.B. Int'l L. Comm'n, vol. II, pt. 2 (hereinafter ILC Draft on Resp. of States for Int. Wrongful Acts); Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, ¶¶ 18–23 (Apr. 9); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 379 (Feb. 26); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, ¶ 31 (Feb. 3) [hereinafter Armed Activities].

74 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 73, art. 12; Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 7 ¶ 78 (Sept. 25); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

75 ILC Draft on Resp. of States for Int. Wrongful Acts, *supra* note 73, art. 42.

76 *Coronavirus: What did China do about early outbreak?*, BBC NEWS (June 9, 2020), <https://www.bbc.com/news/world-52573137>.

77 Edward C. Holmes, *Novel 2019 coronavirus genome*, VIROLOGICAL.ORG (Jan. 10, 2020), <https://virological.org/t/novel-2019-coronavirus-genome/319>; *China delayed releasing coronavirus info, frustrating WHO*, AP NEWS (June 1, 2020), <https://apnews.com/article/3c061794970661042b18d5aeaed9fae>; Lisa Schnirring, *China releases genetic data on new coronavirus, now deadly*, UNIV. MINN. CTR. FOR INFECTIOUS DISEASE RES. & POL'Y (Jan. 11, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/01/china-releases-genetic-data-new-coronavirus-now-deadly>.

78 *Compare Lo*, *supra* note 4 at 21, with Kate Mayberry, Umut Uras & Usaid Siddiqui, *WHO praises China for 'openness' on coronavirus: Live updates*, AL JAZEERA (May 25, 2020), <https://www.aljazeera.com/news/2020/5/25/who-praises-china-for-openness-on-coronavirus-live-updates>.

provisions of the WHO Constitution, the United States would not be particularly well-placed to bring such a claim, although some members of Congress have suggested this course of action.<sup>79</sup> As Judge Hudson wrote in his individual opinion for the Permanent Court of International Justice in the *Meuse Case*, a State cannot complain about another State's actions if they have essentially done the same thing. As he put it, relying upon the common law maxim that *he who seeks equity must do equity*,<sup>80</sup>

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.<sup>81</sup>

Other States, however, that have handled the pandemic consistently with their obligations under the WHO Constitution and the IHR 2005 might present a more sympathetic Applicant. Although they may not be able to claim *direct* injury in the same way that a country where the virus is rampant can, they may nonetheless have been required to take extraordinary measures to address an emergency that might have been more quickly contained had notification taken place immediately. New Zealand comes to mind.<sup>82</sup> The Italian experience perhaps lies somewhere in between: Italy was hit hard and early by the virus and was swiftly overwhelmed; Italy, too, might wish that notification had been prompt and action had been immediate.<sup>83</sup> Yet States often have little incentive to complain (formally) about other States' IHR notification failures, given that they might subsequently find themselves similarly situated.<sup>84</sup>

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<sup>79</sup> Mulligan, *supra* note 70.

<sup>80</sup> *Diversion of Water from the Meuse (Neth. v. Belg.)*, Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 76–78, ¶ 323 (June 28).

<sup>81</sup> *Id.*

<sup>82</sup> Alexis Robert, *Lessons from New Zealand's COVID-19 outbreak response*, 5 LANCET (Oct. 13, 2020).

<sup>83</sup> Gary P. Pisano, Raffaella Sadun, & Michele Zanini, *Lessons from Italy's Response to Coronavirus*, HARV. BUS. REV. (Mar. 27, 2020), <https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus>.

<sup>84</sup> 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/>. Other commentators have argued that the ICJ might require *both* negotiation and World Health Assembly Settlement before accepting jurisdiction over the case, which could make it quite difficult to use Article 75 to obtain jurisdiction. Mike Videler, *ICJ Jurisdiction over Obligations to Share Information with the WHO*, EJIL:TALK! (Jan. 21, 2021), <https://www.ejiltalk.org/icj-jurisdiction-over-obligations-to-share-information-with-who/>.



One might also contemplate the possibility of standing on the part of all Members of the WHO *erga omnes* given the object and purposes of the WHO Constitution and the critical importance of promoting swift and collective action on behalf of the global community in the face of new diseases.<sup>85</sup> This was essentially the basis for standing in *The Gambia v. Myanmar*, in which the International Court of Justice issued a provisional order agreeing that even though The Gambia was not directly affected by the alleged genocide of the Rohingya people in Myanmar, it had the capacity to assert rights under the Genocide Convention because that treaty imposed obligations *erga omnes partes*.<sup>86</sup> The Court relied upon earlier jurisprudence in *Belgium v. Senegal* which had interpreted obligations under the Torture Convention similarly.<sup>87</sup> In other cases, such as its recent advisory opinion in the *Chagos Archipelago*, the Court has pointed to the right of self-determination as *erga omnes*,<sup>88</sup> and the International Law Commission has suggested that some obligations concerning the global commons have an *erga omnes* character, because they concern the entire international community, meaning that they are opposable to all States.<sup>89</sup>

One can therefore plausibly suggest that the Court might entertain an action by one Member against another under the WHO Constitution on an *erga omnes* basis, regardless of direct injury or special interest in the case. Analogizing from *The Gambia v. Myanmar*, all States have a common interest in preventing the spread of infectious disease, an interest exemplified by their participation in the WHO and agreement to the IHR 2005. The 24-hour notification requirement of IHR Article 6(1) is a critical and clear component of the IHR, and notification is a core element of the WHO Constitution. Since defection in the case of a global problem that is like a “weakest-link public goods” game imposes intolerable risks on the

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85 Rüdiger Wolfrum, *Identifying Community Interests in International Law: Whose Interests Are They and How Should We Identify Them*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Eyal Benvenisti, Georg Nolte & Karen Yalin-Mor eds., Oxford University Press 2018).

86 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Order, 2020 I.C.J. 178, ¶ 41 (Jan. 23).

87 Questions Concerning the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J. 422, ¶ 68 (July 20).

88 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 180 (Feb. 25).

89 Int'l L. Comm'n, Report of its 58th Session, Chapter XII, Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, conclusion 39 (2006) (Marti Koskenniemi, Special Rapporteur) (referring to the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, and article 136 of the United Nations Convention on the Law of the Sea).

entire community, as is the case with certain international environmental norms,<sup>90</sup> standing on an *erga omnes* basis might be appropriate.

Finally, although many commentators have understandably focused upon Chinese responsibility for the uncontained spread of the virus due to lack of prompt and effective notification,<sup>91</sup> the United States bears its own responsibility for the imperfect global response and tragic outcomes in its own country. In addition to increased spread because of U.S. noncompliance with public health guidelines and the IHR, President Trump's decision to denounce the treaty and withhold funds violated U.S. obligations under the WHO Constitution.

The WHO Constitution contains no provision for denunciation. Under Article 56 of the Vienna Convention on the Law of Treaties,<sup>92</sup> assuming that the treaty permits the “possibility of denunciation or withdrawal,”<sup>93</sup> the denunciation could be effective *at the earliest* on July 6, 2021, as twelve months' notice of withdrawal is required.<sup>94</sup> This rule was codified in an arrangement made in 1948 that conditioned U.S. participation in the WHO on the right of the United States to withdraw upon giving one year's notice and fully meeting the payment of assessed financial obligations during that year.<sup>95</sup> This rule was embodied in a Joint Resolution adopted by Congress in 1948,<sup>96</sup> and the U.S. accession to the WHO Constitution was conditioned thereon and agreed to in a Resolution of the WHO Assembly on July 2, 1948.<sup>97</sup> The July 6, 2020, withdrawal note from Washington gave an

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90 Nicholas A. Robinson, *Environmental Law: Is an Obligation Erga Omnes Emerging?*, Panel Discussion at the United Nations (June 4, 2018), [https://www.iucn.org/sites/dev/files/content/documents/2018/environmental\\_law\\_is\\_an\\_obligation\\_erga\\_omnes\\_emerging\\_interamcthradvisoryopinionjune2018.pdf](https://www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018.pdf); The Environment and Human Rights, Advisory Opinion OC-23/17 of Nov. 15, 2017, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶¶ 62–63.

91 See, e.g., Peter Tzeng, *Taking China to the International Court of Justice over COVID-19*, EJIL:TALK! (Apr. 2, 2020), <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>; Valerio Mazzuoli, *State Responsibility and COVID-19: Bringing China to the International Court of Justice?*, INT'L L. BLOG (May 15, 2020), <https://internationallaw.blog/2020/05/15/state-responsibility-and-covid-19-bringing-china-to-the-international-court-of-justice/>.

92 Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLOT].

93 *Id.* art. 56(1)(a).

94 *Id.* art. 56(2).

95 Joint Resolution Providing for Membership and Participation by the United States in the World Health Organization and Authorizing an Appropriation Therefor, H.R.J. Res. 469, 80th Cong. (1949).

96 S.J.Res. 98, 80th Cong., Pub. L. No. 80-643, 62 Stat. 441 (1948); see also Harold Hongju Koh, *Trump's Empty "Withdrawal" from the World Health Organization*, JUST SECURITY (May 30, 2020), <https://www.justsecurity.org/70493/trumps-empty-withdrawal-from-the-world-health-organization/>.

97 Status of the WHO Constitution, UNITED NATIONS [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=IX-1&chapter=9&lang=en#11](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en#11) (Feb. 16, 2021).

effective withdrawal date of July 6, 2021, thereby meeting the first condition. However, it did not specify that the United States would continue to pay its assessed contributions,<sup>98</sup> violating the second. Defunding the WHO during a global pandemic was a reckless act that endangered the ability of the organization to address the growing spread of the disease<sup>99</sup> and a possible material breach of terms upon which the United States acceded to the WHO Constitution.<sup>100</sup> Had President Biden not reversed the Trump administration's decision, it might be argued that the United States could be brought before the International Court of Justice as Respondent in a case brought either by a Member State alleging direct injury, or perhaps, once again, by a Member State on the basis of obligations *erga omnes partes*.<sup>101</sup>

Using the International Court of Justice to enforce State compliance with the WHO Constitution and the IHR 2005 has obvious drawbacks. The judicial process is slow, and the outcome is uncertain. In an area of the law in which speed is paramount this is less than ideal. Article 75 has never been relied upon by the International Court of Justice in a decision, although in *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court acknowledged, in dicta, that if the dispute in the case had arisen under the WHO Constitution, Article 75 would presumably have conferred jurisdiction on the Court, assuming that the DRC had first attempted to resolve it through negotiation or by appeal to the World Health Assembly.<sup>102</sup> The WHO has endeavored to use the advisory jurisdiction of the Court twice, in the *Nuclear Weapons Advisory Opinion* where its application was rejected,<sup>103</sup> and in a case involving the possible transfer of one of its regional offices.<sup>104</sup>

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98 See TIAJI SALAAM-BLYTHER, LUISA BLANCHFIELD, MATTHEW C. WEED & CORY R. GILL, CONG. RSCH. SERV., R46575, U.S. WITHDRAWAL FROM THE WORLD HEALTH ORGANIZATION: PROCESS AND IMPLICATIONS (Oct. 21, 2020).

99 See Frederick Abbott, *Confronting COVID-19 in a World without WHO—Seriously?*, HEALTH POL'Y WATCH (Apr. 14, 2020), <https://healthpolicy-watch.news/confronting-covid-19-in-a-world-without-who-seriously/>.

100 VCLOT, *supra* note 92, art. 60.

101 Under the WHO Constitution, countries not fulfilling their obligations may lose their voting rights in the organization. WHO Constitution, *supra* note 30, art. 7. In my example, the U.S. is arguably violating a separate agreement with the organization which results in *both* a material breach of the WHO Constitution and the U.S. agreement with the organization.

102 *Armed Activities*, *supra* note 73, ¶¶ 96, 99.

103 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 226 (July 8).

104 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73, 74 (Dec. 20).

Yet, as others have noted,<sup>105</sup> governments must understand that they have *legal* obligations under the WHO Constitution and the IHR and that their policy choices are constrained by these legal commitments. Although an argument can be made that it would be counterproductive to bring an action against either the United States or China because of their tendency to resist judicial action,<sup>106</sup> they are also States that benefit greatly from international trade and travel and have much to gain from effective pandemic control. Framing a critique in legal as opposed to policy terms may also help shift interstate dialogue away from excessively nationalist language by requiring it to be articulated in legal terms.

A claim that a State has violated its international legal obligations may be defended on the basis that its conduct was excused or justified. A State might assert that its actions were predicated on advice of the WHO, and that the WHO itself should bear international responsibility for the spread of the pandemic. The responsibility of international organizations for their own missteps is a complex area beyond the scope of this short essay. It seems unlikely that in the case of COVID-19, however, one could successfully establish that the WHO failed to follow its mandate. As Eyal Benvenisti has noted, the governance model of the WHO was arguably designed to fail in the face of State intransigence.<sup>107</sup> Persuasive arguments can and have been made that the IHR 2005 are insufficiently precise and need reform, or at least reinterpretation, in order to make WHO actions more effective and clearer. Yet, given the problematic behavior exhibited by States during the current pandemic, enhancing the effectiveness of the WHO would require the addition of “tools to overcome . . . complex cooperation problems among mutually distrustful sovereigns,” including being able to regulate and distribute global health goods directly, as opposed to working through its Member States.<sup>108</sup> Finally, as this and other essays in this Symposium have noted, to be effective, the WHO must be able to monitor and enforce

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105 Pedro Villarreal, *COVID-19 Symposium: “Can They Really Do That?” States’ Obligations Under the International Health Regulations in Light of COVID-19 (Part I)*, OPINIOJURIS (Mar. 31, 2020), <http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/>; Villarreal, *States’ Obligations Under the International Health Regulations in Light of COVID-19 (Part II)*, *supra* note 11.

106 See Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, in *THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* (Cesare Romano ed., 2008) (noting that “the United States has never been willing to submit itself to the plenary authority of the Court, and has typically reacted negatively to decisions by the Court that are adverse to U.S. interests.”); Julian G. Ku, *China and the Future of International Adjudication*, 27 MD. J. INT’L L. 154 (2012).

107 Eyal Benvenisti, *The WHO-Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 AM. J. INT’L L. 588 (2020).

108 *Id.* at 592.

compliance.<sup>109</sup> This, as well as the defector problem highlighted earlier, suggests that to become truly effective in the face of future pandemics, the WHO will need much more power than it currently has, and probably more authority than powerful States will be willing to accord it.

## V. CONCLUSION

The WHO is currently reviewing its performance in light of the COVID-19 pandemic and the toll it has taken in lives lost and economic costs. Yet review and reform by the organization has been undertaken twelve different times since 2011,<sup>110</sup> with undetermined effectiveness. Reform has also been the word of the day for many other international institutions including the World Trade Organization, the International Criminal Court, and the Human Rights Council.<sup>111</sup> Although the architecture of existing global institutions, including the WHO, may be wanting, as they lack sufficient funding, monitoring, and enforcement measures, they are not likely to be granted either more money or increased authority by States any time soon.

Indeed, meaningful structural reform will be impossible without amelioration of the geopolitical environment. Until that reality changes, States will need to use existing legal frameworks creatively, including reinterpreting existing provisions of the IHR 2005 and the WHO Constitution. They may usefully consider using both formal dispute settlement provisions and informal pathways to invigorate treaty provisions and hold each other to their international commitments. We have seen creative “workarounds” in other areas of international law: in the creation of the International, Impartial and Independent Mechanism by the General Assembly to combat Russian and Chinese vetoes of Security Council Resolutions attempting to refer the situation in Syria to the International Criminal Court, for example,<sup>112</sup> and even in the creation of the Sanctions Committee by the Security Council in response to terrorist activity. Civil

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<sup>109</sup> See *infra* Ayelet Berman, *Closing the Compliance Gap: From Soft to Hard Monitoring Mechanisms under the International Health Regulations*.

<sup>110</sup> SECOND REPORT, *supra* note 22, at 13.

<sup>111</sup> See, e.g., Chen Fengying & Sun Lipeng, *The United States' Role in WTO Reform*, 76 CHINA INT'L STUD. 81 (2019); Joanne Pedone & Andrew R. Kloster, *New Proposals for Human Rights Treaty Body Reform*, 22 J. TRANSNAT'L L. & POL'Y 29 (2013); Stef Block, *The International Criminal Court Must Do Better. Reforms are Urgently Needed.*, WASH. POST (Dec. 2, 2019), <https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/>.

<sup>112</sup> Homepage for the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes in Syrian Arab Republic under International Law, UNITED NATIONS, <https://iiim.un.org/> (last visited Feb. 15, 2021).

society organizations, including networks of scientists and public health officials, will also need to press international organizations and national systems to adhere to global public norms and best practices. Although the WHO is at the center of the global health system, no one organization can handle all the various tasks that must be undertaken to combat the world's increasingly frequent public health emergencies. That responsibility requires all stakeholders – individuals, States, and subnational government entities – to cooperate. As vaccine distribution ramps up and multilateralism returns to the fore as a result of leadership changes in the United States, it may be possible to step back from the precipice of pandemic nationalism towards a more cooperative and effective system of global health preparedness, with increased receptivity to the ideas incorporated in this Symposium.