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Must China Pay? How Claims Against China for COVID-19 Reveal Flaws in the International Legal System that Make Accountability Impractical

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**MUST CHINA PAY? HOW CLAIMS
AGAINST CHINA FOR COVID-19 REVEAL
FLAWS IN THE INTERNATIONAL LEGAL
SYSTEM THAT MAKE ACCOUNTABILITY
IMPRACTICAL**

*By Talia Danielle Sturkie**

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I. INTRODUCTION

“China must pay!”¹ The first accusation went out while the nations of the world were still reeling from the coronavirus (COVID-19) pandemic. As economic damage continues to grow, and the death toll continues to mount, many nations find themselves facing unprecedented challenges responding to and recovering from the pandemic. Well before the full extent of the COVID-19 pandemic could be ascertained, voices around the world started assigning China varying levels of political and legal responsibility for the crisis.² These claims varied from wild conspiracy theories about a purposefully released bioweapon to claims of negligence to failures to satisfy international health obligations.³

Some commentators quickly dismissed these claims as political theatre or efforts to shift the blame from the claimants’ own failures.⁴ Other commentators took a serious look at various theories of state liability.⁵ Even if initially politically-motivated, a consensus

¹ Obiageli Ezekwesili, *Opinion: China Must Pay Reparations to Africa for Its Coronavirus Failures*, WASH. POST (Apr. 16, 2020), <https://tinyurl.com/8kya53ar>.

² See, e.g., Francesca Marino, *Why We, Italians, Are Angry with China – and Want War Damages*, THE QUINT (Mar. 27, 2020, 12:40 PM), <https://tinyurl.com/3b5vnray> (expressing disgust with China’s approach to aid in Italy and an asserted strategic approach for China to profit from the pandemic culminating in an assertion that the pandemic is a direct result of “endemic failures of the Beijing regime”).

³ See, e.g., Mark Rubin, *China Must Pay a Historic Price if COVID-19 Lab Leak is Reality*, AM. ENTER. INST. (Aug. 5, 2021), <https://www.aei.org/op-eds/china-must-pay-a-historic-price-if-covid-19-lab-leak-is-reality/>; Robert Skopec, *Coronavirus Is a Biological Warfare Weapon*, HSOA J. OF CLINICAL STUDS. & MED. CASE REPS. (Dec. 31, 2020), <https://www.heraldoopenaccess.us/openaccess/coronavirus-is-a-biological-warfare-weapon>.

⁴ See, e.g., Luke Moffett, *Why Calls for Reparations from China for Coronavirus Are an Unfeasible Distraction*, THE CONVERSATION (Jun. 9, 2020, 8:10 AM), <https://theconversation.com/why-calls-for-reparations-from-china-for-coronavirus-are-an-unfeasible-distraction-139684> (arguing that not only do claims for reparations have no legal basis, but they are actively harmful to the proper resolution of the pandemic).

⁵ See, e.g., Joseph Bosco, *China Must Pay for the Calamity It Has Unleashed on the World*, THE HILL (Apr. 21, 2020, 10:30 AM), <https://tinyurl.com/yjnxakij>

that China must pay something to other nations has only grown.⁶ However, despite a widespread belief in China's liability, the sentiment among many is doubt—doubt that China would ever pay.⁷

While today's international mechanisms are theoretically capable of assessing financial liability between nation-states, practical considerations render them incapable of responding to needs raised by the pandemic. Failure to adequately address the problems raised by the pandemic not only robs the crisis's victims of justice but will likely exacerbate problems if another global crisis were to occur. Without an appropriate international legal approach to assess liability in cases where one nation's failure leads to a global crisis, future failures in responding to existential threats seem inevitable. When the offending nation is a permanent member of the United Nations Security Council, the existing mechanisms face further challenges. Even the mere proposal of investigations into liability may lead to retaliation by the Chinese government.⁸

Using litigation and liability to assign the financial burden caused by the pandemic onto a particular country (or particular countries) is only one approach towards recovery.⁹ A public, formal

(suggesting that China either intentionally released the virus or was “egregiously negligent”); Romel Regalado Bagares, *Breaches and Reparations: China's International Responsibility for the COVID-19 Pandemic*, ABS-CBN NEWS (Mar. 26, 2020, 3:52 AM), <https://news.abs-cbn.com/spotlight/03/26/20/breaches-and-reparations-chinas-international-responsibility-for-the-covid-19-pandemic> (noting China may be liable to pay reparations for its prompt failure to notify the world under the WHO's International Health Regulations).

⁶ See Luke Hawker, ‘Accept Responsibility!’ China MUST Pay Compensation for COVID-19 Economic Crisis – Poll, EXPRESS (Jun. 17, 2020, 7:44 PM), <https://www.express.co.uk/news/uk/1297364/Coronavirus-news-china-compensation-latest-boris-johnson-uk-economy-covid19> (citing a 96% polling from readers that China should pay some form of compensation).

⁷ *Id.*

⁸ See Doug Bandow, *It Would Be Great to “Make China Pay” for COVID-19, But the Price Could Be High*, CATO INST. (May 8, 2020, 11:14 AM), <https://www.cato.org/blog/it-would-be-great-make-china-pay-covid-19-price-could-be-high>.

⁹ E.g., Michael A. Becker, *Do We Need an International Commission of Inquiry for COVID-19? Part I*, EJIL:TALK! (May 18, 2020), <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-i/> (suggesting a

inquiry and assignment of liability is possible, but it is more likely that the states involved will be distributing costs through diplomatic negotiation. Handshake deals and negotiations made behind closed doors have their advantages in terms of speed and versatility. However, a purely diplomatic solution, where money is quietly transferred between parties or debt payments are paused or even forgiven, will be unsatisfying to many aggrieved parties.¹⁰ A diplomatic method also fails to address the need to develop a viable solution for resolving disputes over future crises. Regardless, China's official resistance to even independent investigations into the first weeks of the pandemic provides little hope that it will "accept responsibility with humility," as proponents of reparations demand.¹¹

Although China has admitted no fault, it is already under pressure from loan recipients to allow extensions on loan payments and make contributions to foreign aid that it otherwise may not have made.¹² World Health Organization initiatives such as COVID-19 Vaccines Global Access (COVAX) are a likely recipient of significant amounts of this aid.¹³ China has been extremely active in publicizing

non-binding, international commission of inquiry to determine how to make China pay).

¹⁰ See, e.g., Obiageli Ezekwesili, *Aid Is No Longer Enough: China Must Pay Africa for Pandemic Damages*, THE GLOBE & MAIL (Apr. 17, 2020), <https://www.theglobeandmail.com/opinion/article-aid-is-no-longer-enough-china-must-pay-africa-for-pandemic-damages/> (asserting need for a reparations mechanism due to the damage caused by a lack of transparency in the pandemic response); James Kraska, *China Is Legally Responsible for COVID-19 Damage and Claims Could Be in the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/> (asserting China's financial and legal responsibility and suggesting nations enact countermeasures).

¹¹ Obiageli Ezekwesili, *Yes, I Insist That #ChinaMustPay Africa Damages for COVID-19*, THE AFR. REP. (May 10, 2020, 8:26 AM), <https://www.theafricareport.com/27696/yes-i-insist-that-chinamustpay-africa-damages-for-covid-19/>.

¹² Weizhen Tan, *China Under Pressure to Write Off Loans as Countries Struggle to Repay Debt During Coronavirus Crisis*, CNBC (May 11, 2020, 7:10 AM), <https://www.cnbc.com/2020/05/11/belt-and-road-china-may-have-to-write-off-loans-as-countries-struggle-to-pay.html>.

¹³ See *Donor Profile on China*, GAVI, <https://www.gavi.org/investing-gavi/funding/donor-profiles/china> (last visited Mar. 19, 2023) (citing \$120 million in donations in the 2021-2025 period as of June 30, 2022); see generally COVAX,

its contributions to aid programs and has promised to provide “\$2 billion of international assistance over [the next] two years.”¹⁴ Even though China has not acknowledged any legal liability, the publicity it gives to its contributions may be in part an attempt to diffuse potential liability claims.

Given crises like the COVID-19 pandemic, it is apparent that domestic actions have far-reaching effects on the global community. Effective methods to resolve such controversies will prove increasingly necessary as global crises further threaten mankind. As this comment will explain, the existing mechanisms to address crises are unable to adequately resolve issues of a global scale.

Even if some of the claims against China represent little more than political theatre, they indicate a desire to appeal to a more global sense of accountability.¹⁵ Enforcing any such determination would only be possible with a stronger international judicial organ than the International Court of Justice (ICJ).

Part I of this Comment examines the global health obligations of states under international law and the mechanisms that currently exist to assign state liability. Part II describes potential theories of state liability for COVID-19 and addresses the inherent problems with implementing them. This Comment will further

WHO, <https://www.who.int/initiatives/act-accelerator/covax> (last visited Jan. 4, 2023).

¹⁴ Xi Jinping, *Statement by H.E. Xi Jinping President of the People’s Republic of China at the General Debate of the 75th Session of The United Nations General Assembly*, MINISTRY OF FOREIGN AFFS. OF CHINA (Sept. 9, 2020, 11:04 PM), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zjyh_665391/202009/t20200922_678904.html. This unilateral assertion has not been independently audited since it was made, but China has pledged \$100 million as of the latest COVAX Donors table. *Key Outcomes One World Protected*, GAVI (Apr. 27, 2022), <https://www.gavi.org/sites/default/files/covid/covax/COVAX-AMC-Donors-Table.pdf>.

¹⁵ Compare Moffett, *supra* note 4 (rejecting liability claims as political theater), with Hawker, *supra* note 6 (asserting broad support for Chinese liability among polled English residents), and Michael Waller, *Poll: Almost Two-thirds of Americans Believe China Should Pay Reparations for the Pandemic*, TIPP INSIGHTS (Jul. 13, 2021), <https://tippinsights.com/poll-almost-two-thirds-of-americans-believe-china-should-pay-pandemic-reparations/> (citing a common sentiment among those polled that China should be held accountable).

address how, even if such methods could overcome their intrinsic difficulties, such as jurisdictional and evidentiary burdens, they would prove impossible to implement in the case of COVID-19. Finally, with the legal means available today exhausted, this Comment proposes a series of changes to the international legal system to improve the viability of legal methods to seek justice on the global stage.

II. BACKGROUND: STATES' PUBLIC HEALTH OBLIGATIONS UNDER INTERNATIONAL LAW

A. Customary International Law Obligations

The core obligation one state has to another under customary international law is to respect the sovereignty and territoriality of other states.¹⁶ Respect for sovereignty is crucial to the functioning of the international system and serves as the starting point for recognizing the existence of any other rights and obligations. One of the ways states fulfill this obligation is by prohibiting acts that cause harm in another state's territory. In further support of this obligation are the practices of comity and mutual limits on extraterritorial jurisdiction.¹⁷

There is always the risk of one party failing to meet this obligation. So the nature of respecting sovereignty requires permitting nations to use countermeasures—or otherwise illegal acts—to respond when another state violates international law and faces no consequences from the rest of the international community.¹⁸ However, in an effort to limit the inevitable escalation of conflicts under a system based entirely on countermeasures, states often accept the decisions of dispute-resolution bodies such as the

¹⁶ See, e.g., MICHAEL N. SCHMITT, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 16 (2013) (“Sovereignty implies that a State may control access to its territory and generally enjoys, within the limits set by treaty and customary international law, the exclusive right to exercise jurisdiction and authority on its territory.”).

¹⁷ See generally BARRY E. CARTER ET AL., INTERNATIONAL LAW 570 (7th ed. 2018).

¹⁸ See *id.*

Permanent Court of Arbitration (PCA) or the International Court of Justice (ICJ) as binding.¹⁹

Disputes between states for violations of customary international law are within the jurisdiction of the ICJ, so long as the parties consent to its jurisdiction.²⁰ Yet, without explicit consent for jurisdiction over the instant controversy or a prior declaration of compulsory jurisdiction, nations are unable to bring one another before the ICJ.²¹ Respecting state sovereignty in a mostly positivist international society requires consent jurisdiction.²²

There is no complete or perfect compilation containing all of the existing and everchanging customary international law, but in 2001, the International Law Commission (ILC) created the Draft Articles of Responsibility of States for Internationally Wrongful Acts (RSIWA), containing many basic principles thought to exist in current international law.²³ While these articles have not been formally adopted by the U.N. General Assembly, RSIWA codifies what the ILC considered customary international law existing between nations and sets forth a series of responsibilities they have towards each other.²⁴ In the event a state commits a “wrongful act” against another, RSIWA requires restitution or reparations for the

¹⁹ See generally *Arbitration Rules*, PERMANENT CT. OF ARB. (Dec. 17, 2012), <https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf> (noting in Article 34 that all arbitration awards are final and binding); *How the Court Works*, INT’L CT. J., <https://www.icj-cij.org/en/how-the-court-works> (last visited Jan. 5, 2022) (noting that the International Court of Justice’s judgements are final).

²⁰ See Statute of the International Court of Justice art. 36; *Basis of the Court’s Jurisdiction*, INT’L CT. J., <https://www.icj-cij.org/en/basis-of-jurisdiction> (last visited Jan. 5, 2022).

²¹ See *id.*

²² See CARTER ET AL., *supra* note 17, at 34.

²³ Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/49 (Vol. 1)/Corr. 4 (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [hereinafter RWISA].

²⁴ See generally Arman Sarvarian, *The Ossified Debate on a UN Convention on State Responsibility*, 70 INT’L & COMPAR. L. Q. 769, 769 (2021) (discussing why RSIWA remains in draft form).

harm.²⁵ Wrongful acts include violations of a state's obligations or intrusions against the sovereignty of another nation.²⁶

The standards contained in RSIWA establish a baseline system of accountability between nations for harms made against each other through action or inaction. Although not formally adopted, application of the RSIWA standards has already had a significant impact on international dispute resolution and has been cited in official ICJ opinions as a part of international law.²⁷

A state need not explicitly agree to be bound by customary international law. However, enforcement of its customary obligations can prove difficult without relying on treaties or declarations to create jurisdiction.²⁸

In the event of a breach of the responsibilities between states, the parties are generally encouraged to resolve the dispute using any mutually acceptable peaceful means.²⁹ But if negotiations break down, customary law does not require any particular means or structure to resolve the dispute. Self-help measures such as countermeasures are perfectly acceptable in dealing with violations of international custom.³⁰ These countermeasures must be proportional before they also become breaches of international law, but generally, customary law has little in the way of prescriptive guidance to resolve disputes.

²⁵ RSIWA, *supra* note 23, at arts. 31-39.

²⁶ *See id.*

²⁷ *See* Simon Olleson, *The Impact of the ILC'S Articles on Responsibility for Internationally Wrongful Acts*, BRITISH INST. OF INT'L AND COMPAR. L. 1 (Oct. 10, 2007) https://www.biicl.org/files/3107_impactofthearticlesonstate_responsibility_preliminarydraftfinal.pdf ("the basic principles . . . have been implicitly affirmed by a number of decisions by judicial and arbitral bodies. . ."); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. 43, ¶ 173 (Feb. 26).

²⁸ *See* INT'L CT. J, *supra*, note 20.

²⁹ *See, e.g.*, World Health Organization Constitution art. 75.

³⁰ RSIWA, *supra* note 23, at arts. 49-54.

Customary law is relatively silent with respect to global health initiatives.³¹ There is no long history of state practice involving international health obligations as these obligations are relatively new, arising with the formation of the World Health Organization (WHO).³² It is unclear what, if any, responsibilities one nation owes another regarding international health as a matter of modern, customary international law.

B. Obligations Under the United Nations Charter

While the United Nations Charter does not directly address public health goals, it does require its members to “maintain international peace and security.”³³ The scope and intensity of the COVID-19 pandemic demonstrates that a public health crisis can have far-reaching effects that pose a significant threat to the charter’s ideals.³⁴

A core part of the maintenance of peace and security is embodied in the prohibition against the use of force, which was initially thought to relate solely to limitations on military action but has since been broadened to include modern uses.³⁵ This prohibition against the “threat or use of force” applies not only to belligerent actions but also to some nonmilitary actions based on their effects.³⁶

³¹ See Sienho Yee, *To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic—Lex Specialis or Lex Generalis at Work?*, 19 CHINESE J. INT’L L. 237, 237-238 n.3 (2020) (discussing how the lack of any historic international efforts to assert liability for a public health matter should be interpreted).

³² See *id.*; WORLD HEALTH ORG., BASIC DOCUMENTS 1 n.1 (49th ed. 2020), https://apps.who.int/gb/bd/pdf_files/BD_49th-en.pdf.

³³ U.N. Charter art. 1, ¶ 1.

³⁴ See David Luban, *Responsibility to Humanity and Threats to Peace: An Essay on Sovereignty*, 38 BERKELEY J. INT’L L., 185, 187 (2020).

³⁵ See, e.g., U.N. Charter art. 2, ¶ 4; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 30-50 (Michael Schmitt ed., 2nd ed., 2017); RSIWA, *supra* note 23, at art. 51.

³⁶ See, RSIWA, *supra* note 23, at arts. 16 cmt. 8, 50 cmt. 5 (highlighting that obligations to refrain from use of force apply both to allowing other actors to commit wrongful acts in a state’s territory and to responses made after being the

While there is no comparable direct requirement to protect international health found directly in the United Nations Charter, one of the earliest actions of the United Nations was to form an international health agency.³⁷ This suggests that some level of cooperation surrounding international health was a vital goal to the international community.

One suggested application of the obligation to promote international peace and security is the reconceptualization of sovereignty as a “responsibility to humanity” that states bear.”³⁸ The theory is that rather than considering the interests of solely their own citizens, nations should consider the shared interests of humanity, and as a result, foster greater international cooperation. This theory advocates for a cooperative approach in matters such as a health crisis because competition over resources results in mutually worse outcomes.³⁹ This position is both speculative and controversial.⁴⁰ While a general responsibility to humanity presents novel applications of state sovereignty, it does not necessarily create direct accountability between states, nor is it compatible with traditional notions of sovereignty.⁴¹ Adoption of this type of responsibility would necessitate the creation of some kind of legal mechanism for shared responsibility, although such a mechanism would not necessarily be tied directly to notions of reparations for harmful acts.⁴² However, so long as the traditional notions of sovereignty continue to dominate among the larger world powers, the approach seems unlikely to see substantive action in the international community.

victim of another internationally wrongful act). Further examination of what may be a use of force, however, is outside the scope of this comment.

³⁷ See WORLD HEALTH ORG., *supra* note 32.

³⁸ Luban, *supra* note 34, at 187 (The approach rejects a nationalistic view of sovereignty as both “a dire moral and practical mistake.”).

³⁹ See *id.* at 234 (arguing that competition over resources at the start of the COVID-19 pandemic mirrored that of the “prisoner’s dilemma”).

⁴⁰ See *id.* at 187.

⁴¹ See *id.* at 238.

⁴² See *id.*

C. Obligations as a World Health Organization Member

Member nations of the World Health Organization, such as China and the United States, commit to several goals under the mission of promoting global health.⁴³ The majority of these commitments are both voluntary and binding but lack specificity and accountability.⁴⁴ When the WHO implemented the International Health Regulations (IHRs) in 2005, it specifically created responsibilities among the member states.⁴⁵ These requirements are designed to facilitate the WHO mission of promoting global health and were developed in response to the effects of the first SARS epidemic of the 21st century.⁴⁶ The treaty enacting the IHRs was signed by 196 nations, including all member nations of the WHO. Subject to reservations and understandings, the signing nations agreed to undertake several steps to implement the global health goals of the WHO.⁴⁷

Nations who have signed onto the IHRs are obligated to enact several health protection and reporting measures.⁴⁸ These measures include implementing extensive health surveillance procedures to identify potential “public health risks” and reporting requirements.⁴⁹ Specifically, nations must designate a certain individual or office to be a contact point between the state and the WHO.⁵⁰ This entity is required to report “all events which may constitute a public health emergency of international concern” to the WHO within twenty-four hours of assessing that risk.⁵¹ States have a

⁴³ See generally WORLD HEALTH ORG. CONST.

⁴⁴ See *id.* at art. 2.

⁴⁵ WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS (2005) 1 (3rd ed., 2005), <https://apps.who.int/iris/handle/10665/246107> (English version) [hereinafter IHR].

⁴⁶ *Id.* at 3.

⁴⁷ See, e.g., *id.* at art. 5 (requiring nations to conduct programs to monitor the spread of contagious disease within their borders).

⁴⁸ *Id.* at art. 6 (requiring nations to report possible pandemics within 24 hours of domestic determination of a possible public health emergency).

⁴⁹ See *id.* at arts. 5-14.

⁵⁰ *Id.* at art. 4.

⁵¹ *Id.* at art. 6.

further obligation to actively share information with the WHO during the course of any extraordinary public health emergency.⁵²

Once the director-general—in conjunction with the Emergency Committee—has made the determination that an event is a “public health emergency of international concern,” each state must also provide information about the emergency on an ongoing basis for the duration of the crisis.⁵³ While states are neither required to strictly follow WHO recommendations nor required to allow WHO personnel unrestricted access to information and resources, Article 13 of the IHR provides that states who are parties to the organization should provide support to WHO response operations.⁵⁴ Both the WHO Constitution and the IHR are silent on what level of cooperation is required in post hoc WHO investigations of public health emergencies.

The IHR contains provisions on dispute resolution, but does not contain any enforcement mechanism if a state fails to meet its obligations.⁵⁵ If state parties are unable to reach a negotiated agreement in a dispute related to the terms of the IHR they may submit the dispute to the director-general for resolution.⁵⁶ The IHR is silent as to what would occur if parties fail to agree on a dispute resolution system, or the dispute is still unresolved after reaching the director-general. There is neither a default nor a compulsory dispute resolution method laid out within the IHR. Article 75 of the WHO Constitution, however, refers disputes regarding the interpretation of the Constitution to the World Health Assembly, and then to the ICJ.⁵⁷

The World Health Assembly is the WHO’s general body composed of representatives of all member nations.⁵⁸ The Health Assembly is tasked with resolving disputes regarding health issues

⁵² *Id.* at art. 7.

⁵³ *Id.* at art. 9.

⁵⁴ IHR, *supra* note 45, at art 13.

⁵⁵ *See id.* at art 56.

⁵⁶ *Id.*

⁵⁷ WORLD HEALTH ORG. CONST. art. 75.

⁵⁸ *Id.* at art. 9.

between its members.⁵⁹ It is unclear, however, whether Article 75 would permit a dispute about regulations formed pursuant to the Constitution (such as the IHR) to also fall within the treaty jurisdiction of the ICJ. Even though parties are obligated to pursue good faith efforts to resolve their disputes, without agreement between parties there is potentially no assigned forum for a dispute between nations regarding application or enforcement of the IHR.⁶⁰ States may always opt into using the Permanent Court of Arbitration or some other body to help them reach a resolution but are not obligated to submit a dispute before any particular body.⁶¹ The WHO itself also lacks any inherent enforcement power for decisions, save for the ability to suspend the voting rights of a member state that fails to meet its financial obligations.⁶²

Disputes between the WHO and a member state regarding the IHR are referred to the Health Assembly.⁶³ Should the parties fail to reach an agreement, the Health Assembly can refer the controversy to a body like the PCA or the ICJ. Interestingly, despite several global health incidents since the IHR's implementation, a nation has never been formally accused of violating its obligations under the regulations.

III. ANALYSIS: SEEKING ACCOUNTABILITY FOR COVID-19 USING CURRENT INTERNATIONAL LEGAL MECHANISMS

The extent of the COVID-19 pandemic is unprecedented, not just in terms of lives lost but in the scale of the global response. Even before costly efforts like travel restrictions and lockdowns were fully implemented to mitigate the spread of COVID-19, questions abounded over who should pay for the costs. Lockdowns, travel bans, and countless other orders have had an incalculable cost on the world's economies.

⁵⁹ *Id.* at art. 75.

⁶⁰ IHR, *supra* note 45, at art. 56.

⁶¹ *Id.*

⁶² *See* WORLD HEALTH ORG. CONST. art. 7.

⁶³ *Id.*

There is some evidence to suggest that China bears some level of responsibility for the pandemic and its aftermath.⁶⁴ It is more a question of scale and whether that responsibility is sufficient to create liability. A theory of liability for failure to meet IHR obligations is plausible but faces numerous practical difficulties.

Even assuming COVID-19 was caused by entirely natural zoonotic transmission, despite some theories indicating otherwise, there are significant identifiable failures in the Chinese response to the growing pandemic that give rise to questions concerning financial or moral responsibility.⁶⁵ There have been many proposed solutions to the question of resolving China's potential liability.⁶⁶ However, even if investigations could prove China's actions were in violation of international law, it would be another matter entirely to establish liability.⁶⁷ To quantify how much China's actions or inactions affected the end result would be extremely difficult to determine accurately, which would leave any potential award of damages vulnerable to claims of arbitrariness.

⁶⁴ A reluctance to share accurate and official information, conflicting statements regarding human-to-human transmission, bureaucratic delays in acting, and a public downplaying of the threat are all potential sources of responsibility. See, e.g., Associated Press, *China Didn't Warn Public of Likely Pandemic for 6 Key Days*, APNEWS (Apr. 15, 2020), <https://tinyurl.com/4tmnt9rs> (describing several failures of administrative action); James Kraska, *China Is Legally Responsible for COVID-19 Damage and Claims Could Be in the Trillions*, WAR ON ROCKS (Mar. 23, 2020), <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/> (listing additional actions that potentially create liability).

⁶⁵ See Julian E. Barnes, *Intelligence Review Yields No Firm Conclusion on Origins of Coronavirus*, N.Y. TIMES, <https://www.nytimes.com/2021/08/27/us/politics/covid-origin-lab-leak.html>; *COVID-19: Make It the Last Pandemic*, INDEP. PANEL FOR PANDEMIC PREPAREDNESS AND RESPONSE, 21-26 https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf.

⁶⁶ See, e.g., Becker, *supra* note 9; Sandrine De Herdt, *A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic*, EJIL:TALK! (May 20, 2020), <https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/>.

⁶⁷ While it may seem like a contradiction to both be in violation of law and not liable, The ICJ has previously drawn a similar conclusion. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro)*, 2007 I.C.J. 43, ¶ 209 (Feb. 26).

Assuming such legal hurdles are possible to overcome, the present international legal system would likely prove unable to enforce any judgment against China due to precedent. China has previously had no qualms ignoring adverse international legal determinations that implicate its national interests and has a reputation of not complying with the enforcement of foreign arbitration awards.⁶⁸ Should the matter reach the ICJ, China may simply respond as it has in the past. Moreover, precedent for a powerful nation ignoring the ICJ exists, such as when the United States refused either to participate in the proceedings or submit to the judgment in *Nicaragua v. United States*.⁶⁹ Such examples severely limit the moral authority of the United States to call for responsibility from China for any violations it may have committed regarding its response to COVID-19. While the United Nations Security Council may act to enforce a judgment of the ICJ, China's presence as a permanent member of the Security Council can opt to block a resolution, which would make such an action effectively impossible.

Unilateral self-help options are likewise invariable for most states due to China's position as one of the largest economies in the world and its willingness to respond to threats against its trade dominance with overwhelming action.⁷⁰ These factors combine to

⁶⁸ See Robert D. Williams, *Tribunal Issues Landmark Ruling in South China Sea Arbitration*, LAWFARE (July 12, 2016, 11:28 AM), <https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration> ("China's position all along with respect to these proceedings can be summed up as 'no acceptance, no participation, no recognition, and no implementation.'"); see also Roger Alford et al., *Perceptions and Reality: The Enforcement of Foreign Arbitral Awards in China*, 33 UCLA PAC. BASIN L. J. 1, 5-8 (2016) (discussing previous studies' conclusions that enforcement of arbitral awards in China is difficult due to local protectionism with as low as a 52% enforcement rate for foreign arbitral awards in the late 1990s, but asserting that more recent empirical analysis between 2002 and 2006 shows a 93% rate of enforcement for awards after review by the Supreme People's Court.)

⁶⁹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, ¶¶ 44, 78 (Nov 26) (Nicaragua brought suit before the ICJ alleging United States was involved with military forces in and around Nicaragua. The U.S. protested the ICJ's finding of jurisdiction and refused to participate further in the proceedings.)

⁷⁰ See Stephen Dziedzic, *Australia Started a Fight with China Over an Investigation Into COVID-19 — Did It Go Too Hard?*, ABC NEWS (May 20, 2020, 7:14

make obtaining financial accountability from China extraordinarily difficult, if not impossible, to obtain.

Acknowledging those difficulties, many of the proposed solutions to the political tensions surrounding liability claims for the COVID-19 pandemic explicitly avoid questions of blame and accountability.⁷¹ Although more feasible under current international law mechanisms, such solutions fail to meet equitable needs of justice to those nations harmed by the pandemic. Moreover, they fail to prepare the international system to adapt and provide for meeting the needs that arise in the face of the next global crisis. The following sections detail support and flaws of the proposed and possible approaches to the question of liability in the wake of the COVID-19 pandemic.

A. Action Within the World Health Organization

The most obvious place to begin an accountability analysis for state action tied to global health issues is the World Health Organization. The WHO is also likely the first place any dispute will be heard if there is a chance it will reach the ICJ.⁷² China is unlikely to agree to ICJ jurisdiction in any controversy involving COVID-19, but it is already subject to that jurisdiction for any dispute directly related to the WHO Constitution.⁷³ As a result, a nation that would like to bring a controversy regarding China's response to COVID-19 before the ICJ would likely have to pursue action within the WHO first in order to take advantage of the attached jurisdiction.⁷⁴

Regardless of whether the dispute is intended to proceed further, the WHO will almost certainly serve as the first public forum for dispute resolution in a potential controversy related to the

AM), <https://www.abc.net.au/news/2020-05-20/wha-passes-coronavirus-investigation-australia-what-cost/12265896>.

⁷¹ See, e.g., Michael A. Becker, *Do We Need an International Commission of Inquiry for COVID-19? Part II*, EJIL:TALK! (May 18, 2020), <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-ii/>.

⁷² See WORLD HEALTH ORG. CONST. arts. 21, 75; IHR, *supra* note 45, at art. 56.

⁷³ See WORLD HEALTH ORG. CONST. art. 75.

⁷⁴ See *id.*

COVID-19 pandemic; however, the WHO is unlikely to be able to completely resolve questions of liability. The WHO is already actively investigating the causes of the COVID-19 pandemic through its existing mechanisms but is facing obstacles in obtaining cooperation from China.⁷⁵ Especially while questions about culpability and liability remain, it seems unlikely that China will willingly allow a transparent, independent investigation into the precise details surrounding the start of the pandemic.⁷⁶ Even without the concern of financial liability, national pride may prove as serious an obstacle in determining everything that went wrong in China.⁷⁷

The WHO investigation is focused on obtaining evidence on the biological and scientific origins of the virus, not on the effectiveness of China's response to the virus.⁷⁸ Despite this, it is likely that information related to potential failures of the monitoring and reporting duties under the IHR could be revealed during the course of any independent examination of the pandemic's origins—a risk that China seems unwilling to take.⁷⁹ Concerns that WHO action could create or reveal potential liability are not entirely new and have stymied responses to global health crises before.⁸⁰ Fears related to liability for vaccines promulgated by the WHO have prompted the creation of an international compensation program for adverse effects linked to COVID-19 vaccinations.⁸¹ There has been no similar

⁷⁵ See The Associated Press, *China Has Rejected A WHO Plan for Further Investigation into the Origins of COVID-19*, NPR.ORG (July 22, 2021, 9:44 AM), <https://www.npr.org/sections/coronavirus-live-updates/2021/07/22/1019244601/china-who-coronavirus-lab-leak-theory>.

⁷⁶ See *id.*

⁷⁷ See Leslie Fong, *Why China Won't be Paying the West Coronavirus Reparations Any Time Soon*, S. CHINA MORNING POST (May 15, 2020, 5:00 AM), <https://tinyurl.com/bde4kv76>.

⁷⁸ WHO Calls for Further Studies, Data on Origin of SARS-CoV-2 Virus, Reiterates That All Hypotheses Remain Open, WORLD HEALTH ORG. (March 30, 2021), <https://tinyurl.com/mr3jkybf>.

⁷⁹ The Associated Press, *supra* note 75.

⁸⁰ See Francesco Guarascio, *Lack of Clarity on Liability Could Cause Delay with WHO Coronavirus Vaccine Drive*, INS. J. (Oct. 16, 2020), <https://www.insurancejournal.com/news/international/2020/10/16/586726.htm>.

⁸¹ See *No-fault Compensation Programme for COVID-19 Vaccines Is a World First*, WORLD HEALTH ORG. (Feb. 22, 2021), <https://www.who.int/news/item/22-02-2021-no-fault-compensation-programme-for-covid-19-vaccines-is-a-world-first>.

action regarding liability for a failure to implement recommended health measures in the international community. This failure is unsurprising, as the functions of the WHO are all preventative rather than aimed at providing restitution for past events.⁸²

Were the WHO to take the novel step of seeking restitution for failures to comply with its regulations, it would threaten the foundational goals of the organization. On inception, the WHO viewed its mission as one of coordination rather than one of enforcing cooperation between nations.⁸³ The mission of improving international health is incompatible with the inherently political demands of any investigation into liability, there is an argument that it would be “immoral” to politicize it.⁸⁴

All these aspects make it unlikely that any action within the WHO would lead directly to liability for China. But this does not mean that the WHO must remain solely focused on preparing for future pandemics and ignore the legal ramifications raised by China’s alleged failures to respond to the outbreak of COVID-19.

Under Article 76 of the WHO Constitution, the WHO could solicit an advisory opinion from the ICJ as to any potential liability for a public health risk of international concern.⁸⁵ Such an opinion could clarify the responsibilities of states to comply with the IHR and to cooperate in investigations into the origins of the pandemic. This advisory opinion could potentially avoid any further questions of seeking liability under international law, which China would undoubtedly welcome. But most valuably, it could help establish a definitive narrative of the events surrounding the pandemic without assigning legal blame.⁸⁶ This could clarify what occurred and frame it

⁸² See U.N. CONST., art. 2.

⁸³ See Eyal Benvenisti, *The WHO-Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 AM. J. INT’L. L. 588, 590 (2020).

⁸⁴ Xinxiang Shi & Xiaouu Zheng, *The Obligations of China and the Role of International Law in the Context of the Coronavirus Pandemic*, 14 J. E. Asian Int’l. L. 101, 112 (2021).

⁸⁵ WORLD HEALTH ORG. CONST. art. 76.

⁸⁶ See Sandrine De Herdt, *supra* note 66.

within the context of existing international law, reducing tensions between nations demanding restorative justice and China.⁸⁷

While seeking an ICJ opinion could be a precursor to more specific litigation into China's alleged violations of IHR, such an action is more likely to raise the issue of impracticability in determining the financial liability of China's alleged shortcomings in addressing the COVID-19 outbreak. An advisory opinion could describe the scope of evidentiary burdens necessary to determine liability without necessarily exonerating or assigning blame to any one nation. Allowing an advisory opinion on liability for violations of IHR is still a risk to China, albeit a smaller one than permitting the ICJ to obtain consent jurisdiction over the controversy as a whole.⁸⁸ Even if such an opinion fails to fully resolve the question of liability and leaves open the possibility of a later suit by other nations against China, it could clearly separate any such controversy from the WHO, allowing it to focus once more on apolitical matters.

However, an opinion like this is may also potentially prove valuable to those nations interested in seeking restitution from China even if that opinion forecloses the possibility of a future case before the ICJ on liability for the pandemic.⁸⁹ Because a future case would not be limited to parties involved in the controversy, more nations may use the opportunity to assess their ability to recover without incurring the political cost of engaging in their own independent investigation.⁹⁰ States may also use such a case as an opportunity to evaluate their chance of success at bringing their own claims.⁹¹ Finally, an advisory opinion supporting some kind of liability would not have to fully resolve difficult questions quantifying liability, allowing those questions to be resolved on an individual basis.⁹²

The WHO, through action in the Health Assembly, could explain whether any obligation exists under international law to

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

prevent the spread of a disease to other nations.⁹³ Seeking an advisory opinion could also clarify whether IHR violations can be brought before the ICJ through treaty jurisdiction under the WHO Constitution, or whether IHR-related disputes are sufficiently connected to the WHO Constitution.⁹⁴

Unlike an opinion on a singular controversy, an advisory opinion would not be binding on any parties and would only carry the moral authority of the ICJ.⁹⁵ This would be like asking the Supreme Court's opinion on a legal question without it being tied to a particular case or controversy—something that U.S. courts do not permit. Even so, the opinion would form the definitive statement on the international legal question of liability for violations of the IHR. Additionally, an opinion that settles the question of the responsibility of states in preventing or mitigating the costs of future pandemics could be useful in the WHO's own process of revising the IHR or formulating a new treaty on global health.

Another advantage of seeking an advisory opinion is that this avoids the extensive investigatory process required to form a judgment based on the specific facts of the COVID-19 pandemic. It would not require nearly the same level of cooperation from Chinese authorities to reach a conclusion. This would make the process far less complicated in the face of potential political resistance.

The WHO began to consider a more comprehensive convention on pandemic preparedness in a special session of the Health Assembly and continues to evaluate its procedures.⁹⁶ The Health Assembly established an intergovernmental negotiating body

⁹³ *See id.*

⁹⁴ *See* WORLD HEALTH ORG. CONST. art. 75; 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>.

⁹⁵ *Advisory Jurisdiction*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/advisory-jurisdiction> (last visited Feb. 9, 2022).

⁹⁶ *Special Session of World Health Assembly 29 November 2021 - 1 December 2021*, WORLD HEALTH ORG., <https://www.who.int/news-room/events/detail/2021/11/29/default-calendar/second-special-session-of-the-world-health-assembly> (last visited Feb. 9, 2022).

that began meeting in 2022 but will not submit an outcome until the 2024 Health Assembly meeting.⁹⁷ A new convention could contain provisions related to liability or enforcement of obligations for future pandemics but is unlikely to offer much in the way of guidance for resolving the questions posed by the current crisis.

None of this fully resolves the issues the WHO faces in the wake of this latest global health crisis.⁹⁸ The difficulty in securing cooperation from authorities is not solely related to questions of liability but may also be tied to fear of international embarrassment, similar to the shame China felt in the wake of the 2002 SARS outbreak.⁹⁹ China is not the only nation unlikely to appreciate independent WHO investigations into the effectiveness of a state's response to a pandemic.¹⁰⁰ The risk that the global response to future global health emergencies will be hampered by national interests remains.¹⁰¹

After the Swine Flu and Ebola outbreaks, further IHR revisions or the creation of an alternative document were not "deemed necessary"; however, such measures are almost certainly needed after COVID-19.¹⁰² Whether or not changes are made to the WHO, the controversy of creating international liability based on the organization's regulations threaten the existence of the entire organization.¹⁰³ Significant disruptions to the operations of the WHO

⁹⁷ *World Health Assembly Agrees to Launch Process to Develop Historic Global Accord on Pandemic Prevention, Preparedness and Response*, WORLD HEALTH ORG., <https://tinyurl.com/mr3j8t7z> (last visited Feb. 9, 2022).

⁹⁸ See Benvenisti, *supra* note 83, at 597.

⁹⁹ See *id.* at 594.

¹⁰⁰ See, e.g., Matt Apuzzo et al., *Trump Gave W.H.O. a List of Demands. Hours Later, He Walked Away*, N.Y. TIMES (Nov. 27, 2020), <https://www.nytimes.com/2020/11/27/world/europe/trump-who-tedros-china-virus.html> (explaining that many nations, the United States included, may find themselves exposed to domestic liability for internal failures related to the pandemic response as the result of a comprehensive international investigation).

¹⁰¹ See Benvenisti, *supra* note 83, at 597.

¹⁰² See *id.* at 596-97; Report of the Review Committee on the Role of the International Health Regulations (2005) in the Ebola Outbreak and Response, WHO Doc. A69/21 (May 13, 2016).

¹⁰³ See Benvenisti, *supra* note 83, at 597.

could also potentially derail any ongoing dispute resolution process in the Health Assembly.¹⁰⁴ Changes such as attempting to grant the WHO more power to compel cooperation among states may be necessary for the WHO to become more effective at meeting the organization's goals, but changes could also cause the organization's demise.¹⁰⁵

A major flaw in any process of reforming the WHO or adapting the IHR to deal with future controversies more effectively is that such processes lack direct applicability to the current controversy. While reformation may help reduce the risk of future pandemics or similar questions of liability surrounding them, such processes do little to meet restorative goals of justice. Although not expressly prohibited in international law to make such changes *ex post facto*, such a departure from legal norms would be extreme, and would be inconsistent with the United States Constitution.¹⁰⁶

The WHO is designed to be an apolitical institution.¹⁰⁷ As a result, the WHO is inherently unsuited to pursue matters of financial accountability between member states.¹⁰⁸ Regardless of the disputes' grounding in legal or ethical considerations, such disputes are inevitably political in nature. Vesting the WHO with authority to enforce cooperation with disease response efforts and investigations into the origins of diseases may be reasonable and in keeping with the organization's purposes.¹⁰⁹ Any attempt to empower the organization with punitive authority or to weaponize potential future changes to

¹⁰⁴ See WORLD HEALTH ORG. CONST. art. 75.

¹⁰⁵ See *id.*

¹⁰⁶ See U.S. CONST. art. I § 9. The Nuremberg tribunals remain one of the only instances where the principle against *ex post facto* application of law was arguably circumvented. The exceptional circumstances of the Holocaust prompted the tribunals to reject claims from defendants that application of freshly developed crimes against humanity would be unjust. See Norman JW Goda, *Crimes Against Humanity and the Development of International Law*, NAT'L WWII MUSEUM (Sept. 15, 2021), <https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>.

¹⁰⁷ See WORLD HEALTH ORG. CONST. art. 2.

¹⁰⁸ See Benvenisti, *supra* note 83, at 597.

¹⁰⁹ *Id.*

the IHR would not.¹¹⁰ Thus, unless the WHO requested and received an advisory opinion from the ICJ that foreclosed any possibility of state liability for COVID-19, action within the WHO alone will be insufficient to extinguish the problem posed by requests for Chinese liability for the pandemic.

B. Action Undertaken by the United Nations

The United Nations is also capable of acting directly to resolve questions about China's potential liability for COVID-19. One possible action the United Nations could take is to establish of a commission of inquiry into the causes of the COVID-19 pandemic.¹¹¹ The United Nations Security Council is arguably the most authoritative source to mandate such a commission.¹¹² The Security Council has the power to establish a commission of inquiry into the causes of COVID-19, which allows the establishment of a dependable timeline of events, resolution of unanswered questions surrounding liability, suggestions of best practices for future pandemic management, or even recommendations as to potential efforts of reparations.¹¹³

On its face, such a commission seems unlikely to come out of the current Security Council as it requires unanimous support from the permanent member states, including China.¹¹⁴ While obtaining that support would be difficult, a commission of inquiry could be more palatable than other potential investigations, especially if the commission formed under a mandate "akin to an investigation into the acute and structural causes of an airplane disaster—without a focus on liability. . . ."¹¹⁵ Such a commission would also have to organize a global assessment of the efficacy of pandemic response measures across all nations rather than solely on China's response.¹¹⁶ Most importantly, if a commission were mandated by the unanimous

¹¹⁰ *See id.*

¹¹¹ Becker, *supra* note 9.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See id.*

support of the permanent members of the Security Council, the commission could be assured of more complete support and cooperation of the nations in which the commission has to operate.¹¹⁷

Even without the support of the full Security Council, the United Nations General Assembly also has the power to mandate such a commission.¹¹⁸ Without the support of China, however, it could be difficult for any such commission to gather adequate information to establish definitive recommendations.¹¹⁹ In order to gain the support of China, any such commission would likely have to avoid any question of finding China liable, leaving the commission ineffective at resolving restorative justice goals. Even with such a promise, China seems unlikely to support any kind of international investigation at present.¹²⁰ A Chinese ambassador has already denounced suggestions by Australia that a commission be formed by threatening a public boycott as a potential response.¹²¹

Significant multilateral pressure or negotiation may be able to overcome such objections and obtain cooperation, if not support, for a commission.¹²² Action conducted through the United Nations also has the advantage of requiring general support from the entire international community.¹²³ An independent international investigation would necessitate that the distribution of any potential reparations be done in a more equitable manner than could be accomplished by either a series of unilateral negotiations or a litigation-based approach.¹²⁴ A commission with broad powers to

¹¹⁷ *Id.*

¹¹⁸ See U.N. Charter arts. 13, 14.

¹¹⁹ See Becker, *supra* note 9.

¹²⁰ See, e.g., Nick Wiggins & Sasha Fegan, *Chinese Ambassador's Coronavirus Inquiry Warning Was "Reckless, Undiplomatic", Alexander Downer Says*, ABC RADIO NAT'L (Apr. 30, 2020, 5:52 PM), <https://tinyurl.com/2s3bpsm3>; The Associated Press, *supra* note 75.

¹²¹ Wiggins & Fegan, *supra* note 120.

¹²² See Becker, *supra* note 71.

¹²³ See Becker, *supra* note 9.

¹²⁴ Cf. LORI FISLER DAMROSCH, MULTILATERAL DISPUTES, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 376-400 (Lori Fisler Damrosch ed., 1987) (explaining a weakness of the ICJ is its difficulty in handling

investigate COVID-19 would still face the inevitable difficulties of distributing any award equitably but would not be restricted by the procedural difficulties a multilateral dispute in the ICJ might encounter.¹²⁵

A commission could also prove more effective than an investigation focused on liability in advancing global health goals by helping determine pandemic causes and potential reforms to global preparedness.¹²⁶ Additionally, a commission could bolster the effectiveness of other investigatory efforts, such as those being conducted by the WHO.¹²⁷ This would provide the WHO broader support and authority without as much risk of disrupting the WHO's apolitical purposes.¹²⁸ Perhaps just as importantly, an independent commission could also assess the performance of the WHO as an organization and its own potential failures.¹²⁹ A commission organized as a result of compromise would likely fail to adequately address restitution interests, but could still provide valuable service by sorting through information and establishing an authoritative timeline of events.¹³⁰

Balancing the practical needs of obtaining local cooperation between states with ensuring equitable distribution of the costs of the pandemic would be difficult, but not impossible. One potential approach that balances these goals would be a “roundtable approach” where countries distribute the costs of the pandemic according to certain factors, including responsibility.¹³¹ Such an approach would require contributions, not just from China, but from other wealthy

complex multilateral disputes, especially where questions of mixed jurisdiction apply).

¹²⁵ *See id.*

¹²⁶ *See* Becker, *supra* note 71.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ Sebastian Guidi & Nahuel Maisley, *Who Should Pay for COVID-19? The Inescapable Normativity of International Law*, 96 N.Y.U. L. REV. 375, 390-91 (2021).

states of the world to account for the economic losses caused by the pandemic.¹³²

Many of the wealthiest states would likely balk at the thought of “paying” for other states’ potential mishandling of the crisis in their own borders. However, the outcome of such a process would not be dissimilar to contributing to organizational efforts such as COVAX or other forms of direct foreign aid. Seeking justice for the harms caused by China’s failures in containing COVID-19 invites a broader application of the distributive justice principles China relies on.¹³³

Other calls for reparations, such as those raised at the COP26 in Glasgow, indicate this approach could potentially find significant support among developing nations.¹³⁴ States such as China would be far more likely to accept such a scheme, despite significant payments based on some measure of responsibility, if such nations could be assured that other nations also pay an equitable portion. But often the wealthiest states, such as the United States, stymie discussions on the topic of reparations.¹³⁵ The difficulty in getting the wealthy states of the world to support a plan to broadly redistribute the costs of the global pandemic makes this a poor solution in practice even if it may be among the most equitable in theory.

Aside from directly addressing cost distribution efforts or determinations of liability, the United Nations can still play a significant role in addressing the problems that the pandemic has brought to light.¹³⁶ The General Assembly should create a new Global Health Threats Council to coordinate state and international

¹³² *See id.*

¹³³ *See id.* at 429.

¹³⁴ *See* Somini Sengupta, *Calls for Climate Reparations Reach Boiling Point in Glasgow Talks*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/climate/climate-glasgow-cop26-loss-damage.html?smid=url-share>.

¹³⁵ *See* Rishika Pardikar, *The U.S. Is Blocking Climate Reparations*, DAILY POSTER (Nov. 17, 2021), <https://www.dailyposter.com/the-u-s-is-blocking-climate-reparations/>.

¹³⁶ *See* INDEP. PANEL FOR PANDEMIC PREPAREDNESS AND RESPONSE, *supra* note 65, at 64.

organization action during global health emergencies.¹³⁷ Ensuring future bodies can hold members accountable should be a primary concern.¹³⁸

While a new organization or a new treaty will not fix the damage caused by the current pandemic, it is vital to ensure accountability issues are handled sufficiently before we face the next international health crisis. The efficacy of assessing liability and fault will inevitably arise again, but with a clearer framework of each nation's responsibilities we will not have to relitigate the basic principles.

Action undertaken within the United Nations has the capacity to address many of the needs raised by the COVID-19 pandemic. However, achieving actionable results through United Nations action alone is unlikely. While many nations may speak of seeking equitable solutions, far fewer are willing to take the lead in implementing such initiatives.¹³⁹

One of the most compelling reasons for conducting this process through the United Nations is that even if nations compromise on liability, the forum at least gives all member nations the opportunity to negotiate an equitable result on fair terms while still being shielded by the multilateral action of the body as a whole. This would help mitigate the risks of China implementing targeted reprisals against vocal proponents of a repayment scheme.¹⁴⁰ Likewise, there is a lower risk of China refusing to participate in any discussion for fear that it risks a result like when the Soviet Union

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See, e.g., Xavier Vives, *COP26 "Cheap Talk" Is a Weak but Necessary First Step on Climate Change*, S. CHINA MORNING POST (Nov. 19, 2021, 1:30 AM), <https://www.scmp.com/comment/opinion/article/3156472/cop26-cheap-talk-weak-necessary-first-step-climate-change>.

¹⁴⁰ Cf. Dziedzic, *supra* note 70 (showing a Chinese ambassador's threat in response to Australian support for an investigation).

boycotted the meetings of the Security Council and lost the opportunity to vote against the Korean War.¹⁴¹

C. Suit Through the International Court of Justice

While suits within the ICJ traditionally have only a few parties, the global scope of damage related to the pandemic makes it unlikely that a single case could fully resolve questions of liability for COVID-19. Nevertheless, the ICJ is a tempting venue to address the issue of reparations because the ICJ would likely prove the most authoritative statement in legitimately establishing liability before the international community.

The first challenge in bringing a case before the ICJ is establishing the court's jurisdiction.¹⁴² China is not among those states who have agreed to compulsory jurisdiction of the ICJ.¹⁴³ Nor is it likely that China would agree to subject itself to the jurisdiction by special agreement. Jurisdiction would likely need to rely on a pre-existing treaty. Individual states may be able to rely on any number of bilateral treaties with China that grant the ICJ jurisdiction—much as Iran was able to establish ICJ jurisdiction in some disputes with the United States based on the 1955 Treaty of Amity.¹⁴⁴ This method will only prove viable if states can point to specific actions that violate their existing bilateral treaties. However, since the most likely theory of liability relies on China's failure to fulfill its duties under the IHR, the closest treaty would be the WHO Constitution.¹⁴⁵

As mentioned above, it is far from settled that the IHR is sufficiently linked to the WHO Constitution to establish ICJ

¹⁴¹ See S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

¹⁴² See INT'L CT. JUST., *supra* note 20.

¹⁴³ See Declarations recognizing the jurisdiction of the Court as compulsory, INT'L CT. JUST., <https://www.icj-cij.org/en/declarations> (last visited Jan. 08, 2023).

¹⁴⁴ Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., art. XXI, Aug. 15, 1955, 284 U.N.T.S. 284 (entered into force June 16, 1957).

¹⁴⁵ See IHR, *supra* note 45, arts. 5-14; WORLD HEALTH ORG. CONST. art. 75.

jurisdiction.¹⁴⁶ The IHR contains dispute resolution provisions that neither mention the ICJ nor refer parties to the WHO Constitution.¹⁴⁷ Without some prior determination by the WHO or the Health Assembly that the IHR is a part of the organization's Constitution for the purposes of dispute resolution, it could prove difficult to establish ICJ jurisdiction for a pandemic-related dispute at all.¹⁴⁸

Even assuming that jurisdiction can be established, any case would still face significant difficulties in establishing liability for a wrongful act. The IHR contains no punitive provisions, and it is unclear what, if any, penalty the WHO could enforce for failing to meet the IHR's commitments. Likewise, it is unclear to what extent any of China's failures could be considered a direct cause of the harms suffered by other nations.

Once jurisdiction is established, the ICJ may examine both treaty terms and customary international law. In the case of COVID-19, customary responsibilities outlined in RSIWA likely cannot stand on their own.¹⁴⁹ There is no historic precedent for nations to enforce a specific state responsibility to protect others from global health threats.¹⁵⁰ The lack of any consistent history of state practice supporting such liability effectively ends any attempt to apply RSIWA to a state's health policy action.

Even a knowing failure to prevent the spread of a disease that causes harm to other nations—as alleged by some lab-leak theorists—may not be considered a wrongful act under customary international law because there is no established history of states imposing lasting financial consequences for health crises.¹⁵¹ Instead, some accusations characterize the intentional spread of disease as

¹⁴⁶ See *supra* notes 13-14 and accompanying text.

¹⁴⁷ IHR, *supra* note 45, art. 56.

¹⁴⁸ See WORLD HEALTH ORG. CONST. art. 75; IHR, *supra* note 45, art. 56; see also Sandrine De Herdt, *supra* note 66 (explaining how the Health Assembly could seek an advisory opinion from the ICJ on the matter of whether IHR violations can be resolved under the World Health Org.'s Constitution).

¹⁴⁹ See Yee, *supra* note 31, at 237.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* at 239.

akin to unleashing a biological weapon.¹⁵² Additionally, the evidentiary burden for any such claim “involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”¹⁵³ This would likely be impossible without an incontrovertible “smoking gun.”¹⁵⁴ Moreover, it seems unlikely any state would officially commit to such a claim without such evidence due to the inevitable political retaliation for such defamatory assertions.

There is still hope for an application of RSIWA to matters involving public health, but only insofar as a state has a duty to meet the obligations the state creates for itself through treaties and agreements.¹⁵⁵ This simplifies the inquiry into China’s actions to whether its activity violated an obligation it has imposed on itself. Such an inquiry requires an examination of a state’s obligations regarding public health and pandemic response under other international agreements.

An examination of previous ICJ cases reveals some of the difficulties in using the ICJ in a case where evidence is unclear or difficult to obtain.¹⁵⁶ The case of applying the convention against genocide in *Bosnia and Herzegovina v. Serbia and Montenegro* is notable for several reasons and is relevant to an analysis of COVID-19 liability.¹⁵⁷

First, the Court describes the high evidentiary burden that cases of “exceptional gravity” require.¹⁵⁸ While the majority of alleged

¹⁵² Compare Skopec, *supra* note 3 with Complaint, Missouri v. China, Case No. 1:20-cv-00099 (E.D. MI., Apr. 21, 2020), ¶¶ 71-76 [hereinafter Missouri Complaint] (alleging that China was aware of the global health risks and still both held large public gatherings and allowed significant international travel).

¹⁵³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. and Herz. v. Serb. and Montenegro*), 2007 I.C.J. 43, ¶ 209 (Feb. 26).

¹⁵⁴ *Smoking Gun*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/smoking%20gun> (last viewed Jan. 12, 2022).

¹⁵⁵ RSIWA, *supra* note 23, art. 2.

¹⁵⁶ See *Bosn. and Herz. v. Serb. and Montenegro* at ¶ 1.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* at ¶ 209.

claims against China are more akin to negligence actions than intentional crimes, the extensive potential liability and the sheer scale of the loss of life involved would likely qualify the case as one of exceptional gravity.¹⁵⁹ This burden applies not only to establish that China's actions violated international law but also that the violations were the cause of the harm.

In its decision in *Application of the Genocide Convention*, the Court found sufficient evidence that the genocide took place, and even that Serbia and Montenegro violated their obligations under the convention against genocide by failing to prevent it.¹⁶⁰ Despite this, the Court ordered no restitution or financial compensation.¹⁶¹ This was due in large part to the difference between failing to prevent the genocide and being complicit in it.¹⁶² It was sufficient to establish that Serbia and Montenegro had the means to prevent the genocide and manifestly refrained from doing so.¹⁶³ The violation still occurred even though it was not “proven that the State concerned definitely had the power to prevent the genocide.”¹⁶⁴ The Court's inability to determine with sufficient certainty that the genocide could have been averted even if Serbia and Montenegro had acted likely influenced the decision regarding appropriate satisfaction.¹⁶⁵ Specifically, the Court required “a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered” for reparations to be appropriate.¹⁶⁶ Without definitive proof of such causation, financial compensation was deemed inappropriate.¹⁶⁷

A similar parallel can be drawn with China's actions regarding the pandemic. China's response was far from perfect, and it may establish clear violations of the obligations under the IHR. Establishing China's conduct as a violation of its obligation alone is

¹⁵⁹ See, e.g., Missouri Complaint, *supra* note 152.

¹⁶⁰ *Id.* at ¶ 438.

¹⁶¹ *Id.* at ¶ 471.

¹⁶² *Id.* at ¶ 432.

¹⁶³ *Id.* at ¶ 438.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at ¶ 462.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

likely insufficient to create financial liability for the COVID-19 pandemic. Proving that the pandemic could have been averted had China fulfilled its obligations under the IHR perfectly would be necessary, but evidence of that assertion seems unlikely to be “fully conclusive.”¹⁶⁸

Even if the perfect application of the IHR provisions could have prevented much of the pandemic, questions remain about the rest of the causal nexus between China’s failures and the international harms suffered. Intervening actions of other individuals and governments interrupt the chain of events between the costs of the pandemic and China’s internal actions. Barring a “smoking gun” that shows a purposeful spread of the disease, it is highly unlikely that a case could establish sufficient connections to make the ICJ deem financial compensation appropriate.

In conclusion, analysis of the potential litigation through the ICJ demonstrates that such a path is highly unlikely to result in a determination of liability. If the United States were to bring the case before the ICJ and somehow overcome the jurisdictional and evidentiary obstacles, there would remain the challenge of enforcing a judgment.

Similarly, even if a judgment were rendered against China, it remains questionable whether there would be any way to enforce it. While the problem of enforcement in Nicaragua was rendered moot by Nicaragua voluntarily ending the case, the risk to the stability of the ICJ and the United Nations Security Council still exists and would be raised again in a case of similar scale between China and the United States.¹⁶⁹ Much like how the United States declined to participate in the ICJ proceedings in *Nicaragua v. United States*, China could simply refuse to participate in any proceedings involving COVID-19, making the gathering of evidence effectively

¹⁶⁸ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. and Herz. v. Serb. and Montenegro*), 2007 I.C.J. 43, ¶ 209 (Feb. 26).

¹⁶⁹ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Discontinuance, 1991 I.C.J. 47 (Sep. 26).

impossible.¹⁷⁰ Having done the same in the past, the United States would lack the moral high ground to object to such a response.¹⁷¹

Overall, a case before the ICJ would fail to adequately address the majority of concerns of nations seeking restorative justice for China's alleged failures in containing COVID-19. Despite being the premier body representing international law, the ICJ is poorly equipped to handle many novel legal issues. Consent jurisdiction is fundamental to obtaining cooperation with its verdicts, but many of the world's most significant controversies continue to fall outside that narrow jurisdiction. Fears of being brought into court for dubious unilateral actions caused the United States to withdraw its own declaration of compulsory jurisdiction. Perhaps it is necessary for the United State to re-evaluate its position if nations wish to be able to appeal to broad equitable legal principles in future global concerns such as pandemics or the climate crisis.

D. Domestic Legal Efforts

The position that domestic jurisdiction can extend to actions which have “a substantial effect” within the territory of another state is highly controversial among the international community.¹⁷² While there is some support for a reasonable extension of jurisdiction, U.S. courts operate with a strong “presumption against extraterritoriality.”¹⁷³ Many other nations which do not permit this sort of extended jurisdiction would find a domestic legal solution impossible. There are many reasons states do not permit their courts to have reach over international affairs, but chief among them is the principle of international comity. Any state which exercises this type of jurisdiction may expect reciprocation from others, which could lead to chaos if left unchecked. This has not stopped at least two U.S.

¹⁷⁰ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 14 ¶¶ 44, 78 (Nov. 26).

¹⁷¹ *Id.*

¹⁷² CARTER ET AL., *supra* note 17, at 570.

¹⁷³ *Id.* at 571.

states, Missouri and Mississippi, from attempting to sue China for its part in the COVID-19 pandemic in U.S. courts.¹⁷⁴

The two complaints are nearly identical as to their description of China's alleged actions.¹⁷⁵ Both complaints allege China's "malfeasance and deception" directly caused the COVID-19 pandemic and claim that Chinese hoarding of medical supplies has directly harmed the lives of their constituents.¹⁷⁶ In *Mississippi v. People's Republic of China*, the complaint focuses on the economic and commercial activity related to personal protective equipment (PPE) as grounds for suit, relying on Mississippi state law.¹⁷⁷ The case relies on interpreting the actions of China as commercial activity under the Foreign Sovereign Immunities Act (FSIA).¹⁷⁸

The FSIA abrogates the immunity granted to foreign states where the activity is in connection with commercial activity—even when that activity takes place outside the United States—and the activity causes a direct effect in the United States.¹⁷⁹ The claim faces many potential legal hurdles that are beyond the scope of this article. As of this writing, the case has yet to complete service of process.¹⁸⁰

Similarly, in *Missouri v. People's Republic of China*, Missouri alleges similar activity directly causing the global pandemic, but instead focuses its legal claim on common law doctrines of nuisance, strict liability for harms caused by the "abnormally dangerous activity" of viral research at the Wuhan labs, and negligence for

¹⁷⁴ Kathryn Watson, *Missouri and Mississippi Sue China Over Coronavirus*, CBS NEWS (April 22, 2020, 5:11 PM), <https://www.cbsnews.com/news/missouri-sues-china-over-coronavirus/>.

¹⁷⁵ Complaint, *Mississippi v. People's Republic of China*, Case No. 1:20-cv-00168-LG-RHW (S.D. Miss., May 12, 2020) [hereinafter *Mississippi Complaint*]; *Missouri Complaint*, *supra* note 152.

¹⁷⁶ *Mississippi Complaint*, *supra* note 175.

¹⁷⁷ *Id.* at ¶¶ 128-39.

¹⁷⁸ *Id.* at ¶ 36.

¹⁷⁹ Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1976).

¹⁸⁰ See *State of Mississippi v. People's Republic of China*, COURTLISTENER, <https://www.courtlistener.com/docket/17160343/state-of-mississippi-v-peoples-republic-of-china/> (last visited Mar. 19, 2022).

allowing the transmission of COVID-19 generally.¹⁸¹ In Missouri, the court permitted service of process via email to the public addresses of the defendant agencies, but the Chinese have not responded, nor does it seem likely that they will offer any official response to the filings at all.¹⁸² As a result, the clerk has entered a default judgment against China.¹⁸³ Despite this, it is unclear what, if any, action Missouri may take in order to enforce the judgment and obtain an actual remedy. The trial judge has since dismissed the case with prejudice for lack of subject matter jurisdiction, but the case has been appealed.¹⁸⁴

If the cases proceed further on their legal theories, each is likely to face difficulty in clearly establishing jurisdiction under the FSIA, which provides only limited exceptions to immunity:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁸⁵

The direct effects theory is tenuous because of the existence of numerous potential intervening causes and events between China's alleged actions and the harms suffered by individuals in other

¹⁸¹ Missouri Complaint, *supra* note 152, at ¶ 149.

¹⁸² See *State of Missouri v. People's Republic of China*, COURTLISTENER, <https://www.courtlistener.com/docket/17085710/state-of-missouri-v-peoples-republic-of-china/> (last visited Mar. 19, 2023).

¹⁸³ *Id.*

¹⁸⁴ *Id.*; Memorandum and Order at 2, *Missouri v. People's Republic of China*, No. 1:20-cv-00099 (E.D. Mo. July 8, 2022).

¹⁸⁵ 28 U.S.C. § 1605(a)(2) (1976).

states.¹⁸⁶ Moreover, it may be a stretch to consider many of the offending actions as “commercial” rather than executive actions. Much of the problematic activity alleged to have occurred in China is administrative in nature, regarding national health policy and foreign relations, rather than clearly commercial in nature.¹⁸⁷

There is potentially a greater chance for the commercial activities alleged in the Mississippi complaint to withstand this challenge insofar as it is more clearly related to commerce.¹⁸⁸ Even these actions are likely to be considered regulatory in nature and outside of the “commercial activity” exception to the FSIA.¹⁸⁹

One potential way around this problem of immunity would be to amend the FSIA to permit lawsuits against China for activities related to COVID-19.¹⁹⁰ The FSIA has been amended before to accommodate significant litigation with the Justice Against Sponsors of Terrorism Act (JASTA).¹⁹¹ Congress can amend the statute again to permit claims for a government’s pandemic-related decision. With any such action, however, comes a significant risk that China, or any other nation sued under such expanded liability, would retaliate in kind.¹⁹² Because of the difficulty in attempting to seize foreign assets this would put considerable strain on international relations for a limited benefit.¹⁹³

¹⁸⁶ See Amicus Curiae Brief, *Missouri v. China*, Case No. 1:20-cv-00099 (E.D. MI., Apr. 21, 2020).

¹⁸⁷ Cf. Mississippi Complaint, *supra* note 175; Missouri Complaint, *supra* note 152.

¹⁸⁸ See Mississippi Complaint, *supra* note 175.

¹⁸⁹ 28 U.S.C. § 1605(a)(2) (1976).

¹⁹⁰ See CONG. RSCH. SERV., LSB10467, *Foreign Sovereign Immunity and COVID-19 Lawsuits Against China* 3-4 (May 15, 2020), <https://sgp.fas.org/crs/row/LSB10467.pdf>.

¹⁹¹ Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 18 U.S.C. § 2333 (2018)); 28 U.S.C. § 1605B (2018).

¹⁹² See CONG. RSCH. SERV., *supra* note 190.

¹⁹³ *Id.*

IV. MODIFYING THE INTERNATIONAL LEGAL SYSTEM TO PROVIDE ACCOUNTABILITY

The most glaring flaw with any legal regime tasked to find an equitable remedy for those nations harmed by China's alleged action or inaction at the beginning of the pandemic is the problem of enforcement. China has demonstrated its willingness to flout adverse rulings from international arbitral bodies before, and it is not the only nation that has done so.¹⁹⁴ Many international agreements do not even include a clause on enforcement but leave such questions to the parties involved in the agreement to sort out as they see fit should issues arise later.¹⁹⁵ Enforcement of an agreement's terms is often left to states to use self-help methods and diplomatic pressure rather than resolution through legal institutions.¹⁹⁶

An added difficulty in the interpretation of treaties is the language barrier. Slight differences in translation could lead to terms that can be interpreted in entirely different ways. While it is useful to set one source as authoritative in the event of disputes between differing version of the treaty terms, even with an authoritative version, interpretation can prove incredibly difficult. To further complicate matters, customary international law allows states to adjust the express terms of an agreement through conduct and changes in customary law, effectively changing the treaty terms

¹⁹⁴ Compare Williams, *supra* note 68, with *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 14 ¶¶ 44, 78 (Nov. 26) (both China and the U.S. have openly rejected international legal decisions and have faced no direct penalties for doing so).

¹⁹⁵ See, e.g., IHR, *supra* note 45, at art. 56 (dispute resolution provisions are common, but there is rarely anything explicitly referencing the enforcement of terms in an agreement).

¹⁹⁶ A relatively small number of cases are put before the major international dispute-resolution bodies compared to the number of disputes that arise. The ICJ has offered fewer than 200 opinions since its creation. *List of All Cases*, INT'L CT. J., <https://www.icj-cij.org/list-of-all-cases> (last visited Mar. 19, 2023). By contrast, the International Chamber of Commerce reported 20% of its 869 new arbitration cases registered in 2019 involved a state or state entity. *ICC Dispute Resolution 2019 Statistics*, INT'L CHAMBER COM. 10 (2020), https://library.iccwbo.org/content/dr/pdfs/2019%20Statistics_ICC_Dispute%20Resolution_901.pdf.

despite no change to the written agreement.¹⁹⁷ In a dispute arising out of a treaty that has been modified by subsequent state action this can become particularly challenging.¹⁹⁸ These factors combined can leave the requirements of international law unclear at best, and entirely unenforceable at worst.

While the ICJ can serve as a final arbiter in controversies, it can only do so when it has consent jurisdiction.¹⁹⁹ As of now, only seventy-three states have agreed to accept the compulsory jurisdiction of the ICJ for cases and controversies involving their nation.²⁰⁰ Even the question of jurisdiction can prove controversial, such as the case of *Nicaragua v. United States*, where the United States objected to the ICJ's finding of jurisdiction to the point where it boycotted the actual proceedings.²⁰¹ In *Nicaragua*, the ICJ held that the United States had a duty to cease violating international law by breaching its obligations under a treaty and to pay reparations for all injuries caused to Nicaragua.²⁰² Yet the ruling itself did little to change the behavior of the United States, and the case was eventually withdrawn by Nicaragua before any restitution was ordered.²⁰³ Anger over the Court's decisions in the matter eventually resulted in the United States completely withdrawing its acceptance of compulsory jurisdiction in 1985.²⁰⁴ The United States has followed this pattern

¹⁹⁷ See Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 238-40 (2016).

¹⁹⁸ See *id.* at 260.

¹⁹⁹ See *Basis of the Court's Jurisdiction*, INT'L CT. JUST., <https://www.icj-cij.org/en/basis-of-jurisdiction> (last visited Jan. 12, 2023).

²⁰⁰ *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <https://www.icj-cij.org/en/declarations> (last visited Jan. 12, 2023).

²⁰¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 14 ¶¶ 44, 78 (Nov. 26) (responding to the United States rejection of a finding of jurisdiction based on the treaty of friendship between the two nations).

²⁰² *Id.*

²⁰³ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Discontinuance, 1991 I.C.J. 47 (Sep. 26) (a full analysis of the factors at play involving the military conflict between Nicaragua and its neighbors and the decision to withdraw the controversy is outside the scope of this comment).

²⁰⁴ *Termination of Declaration Recognizing as Compulsory the Jurisdiction of the Court*, Oct. 7, 1985, 1408 U.N.T.S. 270.

multiple times, further weakening the institutions when they reach results contrary to United States interests.²⁰⁵

When the Court's authority to even hear a case continues to be disputed, it is unsurprising that its decisions on the merits will also be rejected. Rejecting the determinations of the Court poses the risk of delegitimizing it as an organ of the United Nations. If the ICJ's decisions in significant controversies can be ignored without consequence, then there is little value in maintaining it at all.

Even when the ICJ acknowledges jurisdiction, receiving a remedy is far from assured. If a party in a dispute before the Court fails to perform its obligations under a judgment, the other party may turn to the Security Council.²⁰⁶ The Security Council may decide to pass a resolution or take measures to enforce the judgment against an uncooperative state.²⁰⁷ But in the event that the uncooperative state is also a permanent member of the Security Council, such a resolution seems impossible to pass.

As it currently stands, it seems unlikely that the International Court or the United Nations could survive a truly uncooperative permanent member of the Security Council unscathed. Such a test could potentially arise from any number of future crises, and its potential is especially relevant in any consideration of liability for COVID-19.

The smallest possible change would involve limitations to the permanent member power to object to a resolution. Even if such a restriction were only applied when the member state is also a party to the dispute in question, it would significantly increase the ability for the ICJ and the international community to hold permanent member states accountable under international law. Reform to the structure of the Security Council is crucial if the Council's legitimacy is to

²⁰⁵ See Scott R. Anderson, *Walking Away from the World Court*, LAWFARE (Oct. 5, 2018, 4:24 PM), <https://www.lawfareblog.com/walking-away-world-court>.

²⁰⁶ U.N. Charter art. 94.

²⁰⁷ *Id.*

continue.²⁰⁸ This need not be a complete removal of permanent member authority but creating some procedure to overcome the “veto power” is essential to any viable efforts.²⁰⁹

Regarding the issues raised by COVID-19, no single approach to resolving the issue of state liability can both compensate parties harmed by the pandemic and help prepare the world to face the next crisis. The potential avenues for seeking accountability or restitution for the pandemic described above are not all mutually exclusive remedies. A hybrid approach is required, balancing the needs of the present with the goals of the future. Failing to account for present needs for justice robs the process of protecting future generations of legitimacy and casts doubt on the seriousness of the desire for real accountability. Setting a precedent for completely absolving a nation of liability when it fails to meet its commitments is a poor foundation for establishing a system of future accountability.

At the same time, addressing present needs does not have to create the kind of crushing liability the most vocal opponents of China demand.²¹⁰ Seeking to punish China at the expense of international cooperation could prove as damaging as the pandemic itself. Most likely China refuses, threatening the collapse of the interdependent global economy. But even if China accepted responsibility, attempting to make it pay for the entire world with crushing liability could lead to the same type of internal conditions Germany faced after World War I.²¹¹ Reproducing conditions that

²⁰⁸ See *Security Council Reforms Must Reflect 21st Century Realities, Says UN Assembly President*, U.N. (Jan. 26, 2021), <https://news.un.org/en/story/2021/01/1082962>.

²⁰⁹ See *id.*

²¹⁰ *Contra* Hank Campbell, *An Argument to Force China to Pay Coronavirus Reparations*, SCIENCE2.0 (May 7, 2020, 1:05 PM), https://www.science20.com/hank_campbell/an_argument_to_force_china_to_pay_coronavirus_reparations-247785; Michael Rubin, *China Must Pay a Historic Price if COVID-19 Lab Leak Is Reality*, AM. ENTER. INST. (Aug. 5, 2021), <https://www.aei.org/op-eds/china-must-pay-a-historic-price-if-covid-19-lab-leak-is-reality/>.

²¹¹ While historians still debate the full impact of the reparations ordered under the Treaty of Versailles on the German economy, contemporaneous scholars credited them as a major factor that led to the end of the Weimar Republic, whether economically, or due to the social impact on the people of Germany. See

created a nation willing to start another World War only a generation later would be foolish. But acknowledgement for the failures that led to the start of the pandemic is vital.

Some sort of investigation into the causes of COVID-19 is inevitable, and such an investigation is not possible without cooperation. Because China seems unwilling to take the first step in cooperating with broad investigations into the origins of the pandemic, other nations must take the lead. One step the United States could take to encourage cooperation would be to invite criticism and feedback on its own response to the pandemic, admitting some failures. Another would be to soundly reject the domestic legal efforts underway to make China pay.²¹² The cases are unlikely to provide any significant relief to victims of the pandemic, but the step of dismissing those cases and rejecting politically driven claims could reduce diplomatic tension and make cooperation more possible.

China is far from the only party with some responsibility for the cost of the pandemic. The WHO's own timeline demonstrates significant room for improvement and doesn't fully align with the procedures outlined in the IHR.²¹³ Both internal and independent investigations into what aspects of the WHO response failed have already begun to make recommendations for change within the organization.²¹⁴ Mechanisms to create accountability for failures

generally, Niall Ferguson, *The Balance of Payments Question: Versailles and After*, in *THE TREATY OF VERSAILLES: A REASSESSMENT AFTER 75 YEARS* 401, 401-40 (Gerald Feldman, Elisabeth Glaser, Manfred F. Boemeke eds., 1998) (describing the attitudes of contemporary figures that the reparations were crushing and the modern opinion that the economic impact of reparations was far more limited); see also *Treaty of Peace between the Allied and Associated Powers and Germany* art. 231, June 28, 1919, 2 *Bevans* 43, 1919 U.S.T. Lexis 7 (stating that Germany "accepts the responsibility" for all the loss and damage from the war).

²¹² See *Mississippi Complaint*, *supra* note 175; *Missouri Complaint*, *supra* note 152.

²¹³ *Compare Timeline: WHO's COVID-19 Response*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-2> (last visited Jan. 12, 2023), with IHR, *supra* note 45, arts. 12, 42-49.

²¹⁴ See INDEP. PANEL FOR PANDEMIC PREPAREDNESS AND RESPONSE, *supra* note 65; WORLD HEALTH ORG., *supra* note 96.

among all international actors are necessary but remain relatively undeveloped.²¹⁵

How the international community will handle questions of developing and enforcing equitable principles in the wake of global crises such as the COVID-19 pandemic and climate change remains to be seen. A path forward that embraces these principles will only be possible if the world starts applying them in situations like the one at present.

V. CONCLUSION

While initial claims that China should be held liable for the COVID-19 pandemic may have been politically motivated, there are legal justifications for them. Although investigations into the precise facts surrounding the start of the pandemic have yet to establish a definitive chain of events, China's defensiveness and lack of transparency have given the world pause. Unfortunately, the looming issue of threatened liability of a nearly immeasurable scope does little to incentivize cooperation from China in further investigations.

But even if further investigation absolves China of financial liability for the pandemic, demands for a more robust system of holding nations accountable are only likely to grow. These demands, and the world's response to the pandemic have highlighted significant flaws in the current international justice system. These flaws make the present system ill-suited to fulfill the needs of an international community that embraces more equitable principles. The practical political and procedural issues are further exacerbated when the offending party is a permanent member of the United Nations Security Council.

²¹⁵ See Alnoor Ebrahim, *Accountability in Practice: Mechanisms for NGOs*, 31 WORLD DEV. 813, 813-29 (2003) (explaining that accountability within NGOs has generally been focused on accountability to donors, and not to goals of lasting social or political change); STIAN ØBY JOHANSEN, THE HUMAN RIGHTS ACCOUNTABILITY MECHANISMS OF INTERNATIONAL ORGANIZATIONS 1-26 (2020) (focusing on the human rights obligations of IOs).

This can result in an aggrieved party that is unable to negotiate a mutually-agreeable solution with little means of responding other than countermeasures—which may prove more costly to implement and maintain than the initial harm. Countermeasures can also often lead to further escalations of a dispute. This problem is further worsened in disputes between nations with significant power imbalances, none starker than the difference between those nations which are permanent members of the United Nations Security Council and those which are not.

Calls from states for China to be held accountable for its part in failing to prevent the pandemic are not the first to highlight these problems, nor will they be the last. Contributions to initiatives like COVAX and foreign aid alone are not enough without enforceable commitments to do better. They may even be seen as hollow gestures without admissions of past failures. If the international community desires the ability to offer substantive responses to these claims or others like them in the future, then it must make changes to the organs of international justice. These changes must strike a balance between providing a remedy for the problems of today and preparing the world to face the problems of tomorrow.