

Who's to Blame for COVID-19?: Views from the Law of State Responsibility, the International Health Regulations, and International Human Rights Law

Francis Tom Temprosa^{*}

I. INTRODUCTION: LET THE BLAME GAME BEGIN	925
II. TO BLAME IS HUMAN: BLAMING IN THE CONTEXT OF THE PANDEMIC.....	930
A. <i>Horizontal Aspects of Blaming</i>	
B. <i>Vertical Aspects of Blaming</i>	
III. THE RULES OF THE GAME: STATE RESPONSIBILITY, THE INTERNATIONAL HEALTH REGULATIONS, AND INTERNATIONAL HUMAN RIGHTS LAW.....	939
A. <i>The Concept of State Responsibility</i>	

^{*} '17 LL.M., University of Michigan Law School; '10 J.D., *with honors*, Ateneo de Manila University School of Law. The Author was a Clyde Alton DeWitt Fellow, and is currently a Doctor of Juridical Science (S.J.D.) candidate, Michigan Grotius Fellow, at the University of Michigan Law School. He graduated with a Certificate of Merit, awarded by International Court of Justice Judge Bruno Simma, from the University of Michigan Law School during his LL.M. year, and won the Jon Henry Kuoba Prize for Best Paper on International Peace and Security. The Author was appointed as Pacific Fellow of the Carnegie Council for Ethics in International Affairs, in New York, U.S.A. He is currently the Director for Human Rights Education and Promotion of the Commission on Human Rights of the Philippines, and a faculty member of the Ateneo de Manila University School of Law and Ateneo de Naga College of Law, teaching Contemporary Developments in International Law, Human Rights, Legal Profession, and Legal Research and Writing, among others. The Author is also a professorial lecturer at the De La Salle University Tañada-Diokno College of Law and the Far Eastern University Institute of Law. His previous works published in the *Journal* are *The 'Liberalization' of Refugee Naturalization: Some Insights in Republic v. Karbasi on the Gains and Deficits on the Law on Local Integration*, 61 ATENEO L.J. 242 (2016) & *Statelessness in Philippine Law: Expanding Horizons of the International Stateless Person Protection Regime*, 50 ATENEO L.J. 29 (2013). The Author has other publications on human rights and international law.

Cite as 66 ATENEO L.J. 924 (2022).

B. *The International Health Regulations*

C. *International Human Rights Law*

- IV. CONTROVERSIES AROUND THE RULES OF THE GAME: SOME REFLECTIONS..... 964
- A. *Divisions and Dissension with Regard to the Applicability of the Rules*
- B. *Disagreements Around Pro-responsibility and Anti-responsibility Arguments*
- V. CONCLUSION: MOVING FROM BLAME TO ACCOUNTABILITY974

I. INTRODUCTION: LET THE BLAME GAME BEGIN

By the time this Article comes out, the readers would have hoped that the coronavirus disease (COVID-19) pandemic¹ was over.

The controversial issue as to whom fault for COVID-19 can be attributed to has been in the spotlight in recent discussions about the pandemic.² Otherwise stated, for this Article's purposes, *who is to be blamed for the COVID-19 pandemic?* Blame, as used in this Article, means “attributing causality, responsibility, intent, or foresight to someone [or] something for a fault or wrong” in the sense of international law.³ Blame has been an issue in many tragedies — both in real life and even in works of fiction.⁴ When bad things happen, such as when a contagious disease spreads and affects its victims

-
1. Tedros Adhanom Ghebreyesus, World Health Organization Director-General, Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020) (transcript *available at* <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last accessed Jan. 30, 2022) [<https://perma.cc/2L4F-VTUU>]).
 2. See, e.g., Laura Silver, et al., Americans Fault China for Its Role in the Spread of COVID-19 (Pew Research Center Report, July 30, 2020), *available at* <https://www.pewresearch.org/global/2020/07/30/americans-fault-china-for-its-role-in-the-spread-of-covid-19> (last accessed Jan. 30, 2022) [<https://perma.cc/U32F-ESQZ>].
 3. Ayoub Bouguettaya, et al., *Social and Cognitive Psychology Theories in Understanding COVID-19 as the Pandemic of Blame*, 12 FRONTIERS PSYCHOL. 1, 1 (2022).
 4. See Ayoub Bouguettaya & Victoria Team, How the Psychology of Blame Can Explain COVID-19 Responses: New Research, *available at* <https://theconversation.com/how-the-psychology-of-blame-can-explain-covid-19-responses-new-research-175586> (last accessed Jan. 30, 2022) [<https://perma.cc/2SVB-UYXN>]. Bouguettaya & Team posit that blame is considered “a common strategy in life” as it allows people to escape responsibility for mistakes. *Id.*

without much care, an ordinary human reaction would be finding someone else to be blamed.⁵

There are times when there is no mystery at all on who is to blame; there are also other times, such as now, when a tragedy complicates the question of blame.⁶ This is because the issue of blame around the COVID-19 pandemic has a lot of layers and sub-layers which this Article cannot fully capture — it has been the center of conspiracy theories,⁷ bitter exchanges among world leaders and powers,⁸ and countless rants and opinions on social media by those infected or affected by the pandemic, among others.⁹ Who or what caused the virus in the first place? Is it the fault of one State? Was the virus caused by a lab leak that could have been prevented? Or was there some form of negligence in handling or responding to the first episodes, or in the emergence, of the virus so much so now that the world faces a global pandemic? In their response, had States been negligent or somehow at fault in some way or another?

The coronavirus had — and still has — many untoward consequences to every person, especially to the disadvantaged, marginalized, and vulnerable.¹⁰ Many people died or have been sick from the virus.¹¹ The public health

5. ADRIAN POOLE, TRAGEDY: A VERY SHORT INTRODUCTION 44 (2005).

6. *Id.* at 45.

7. Victoria Knight & Julie Appleby, How COVID Death Counts Become the Stuff of Conspiracy Theories, *available at* <https://khn.org/news/how-covid-death-counts-become-the-stuff-of-conspiracy-theories> (last accessed Jan. 30, 2022) [<https://perma.cc/2NZK-FKS4>].

8. International Crisis Group, COVID-19 and Conflict: Seven Trends to Watch (Crisis Group Special Briefing N°4, Mar. 24, 2020), at 11, *available at* <https://icg-prod.s3.amazonaws.com/Boo4-covid-19-seven-trends.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/DK9A-UDNR>].

9. Gerrit De Vynck, et al., *Coronavirus Misinformation Is Spreading All Over Social Media*, BLOOMBERG, Jan. 29, 2020, *available at* <https://www.bloomberg.com/news/articles/2020-01-29/coronavirus-misinformation-is-incubating-all-over-social-media> (last accessed Jan. 30, 2022) [<https://perma.cc/U6EM-XZ29>].

10. See Neeta Kantamneni, *The Impact of COVID-19 Pandemic on Marginalized Populations in the United States: A Research Agenda*, 119 J. VOCATIONAL BEHAV. 1, 2 (2020).

11. Harapan Harapan, et al., *Coronavirus Disease 2019 (COVID-19): A Literature Review*, 13 J. INFECTION & PUB. HEALTH 667, 671 (2020) (citing Elisabeth Mahase, Coronavirus: COVID-19 Has Killed More People than SARS and MERS Combined, Despite Lower Case Fatality Rate, *available at*

system, food supply, and livelihood were also put to risk in ways never seen before.¹² According to 2020 estimates, tens of millions of people could have fallen into extreme poverty because of the pandemic.¹³ In that year alone, the number of people who were undernourished, which was estimated to be around 690 million, could increase by 132 million at the end of the year.¹⁴ Millions of businesses were in danger and nearly half of the world's 3.3 billion workers faced unemployment at one point.¹⁵ Workers in the informal economy were also particularly vulnerable.¹⁶ During lockdowns, many people were unable to feed their families — and for most, no income meant no food, or food that was less nutritious.¹⁷

Yet scholars and pundits are divided on the blame game, and as this Article demonstrates, a rift also exists as to the applicable rules under international law regarding blaming in the context of the pandemic — it is just as convoluted.

On the one hand, there are arguments that the blame game should end and that States should instead cooperate to defeat the virus and build the framework in order to better address future pandemics.¹⁸ They further argue that the blame game strips governments of credibility; a sort of scapegoat mentality that never eludes one trapped in a crisis.¹⁹ People just want someone

<https://www.bmj.com/content/368/bmj.m641.longm641> (last accessed Jan. 30, 2022) [<https://perma.cc/K7K3-DC67>].

12. Joint Statement *by* International Labour Organization (ILO), Food and Agriculture Organization of the United Nations (FAO), International Fund for Agricultural Development (IFAD), & World Health Organization (WHO), *Impact of COVID-19 on People's Livelihoods, Their Health and Our Food Systems* (Oct. 13, 2020) (available at <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people%27s-livelihoods-their-health-and-our-food-systems> (last accessed Jan. 30, 2022) [<https://perma.cc/7JUC-GRZN>]).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Jamie P. Horsley, Let's End the COVID-19 Blame Game: Reconsidering China's Role in the Pandemic, available at <https://www.brookings.edu/blog/order-from-chaos/2020/08/19/lets-end-the-covid-19-blame-game-reconsidering-chinas-role-in-the-pandemic> (last accessed Jan. 30, 2022) [<https://perma.cc/9VM5-ZU64>].

19. Robert Hoffmann, et al., Playing the COVID-19 Blame Game May Feel Good, but It Could Come at a Cost — The Government's Credibility, available at

to blame. According to a proponent of this view, “the blame game has been and remains a serious distraction from the essential and difficult work needed to control this terrible disease.”²⁰ One should stop being “beastly to others” as “[w]e are all riding out the same storm.”²¹ In the context of the COVID-19 outbreak, it has already begun to harm modern society and medical practice.²² Proponents of this view thus also assert that evidence from previous and current pandemics suggests that seeking blame has an impact on international relations as it promotes the unjustified devaluation of health professionals, which thereby leads to an increase in racism and discrimination.²³ Other arguments are equally being put forward.

On the other hand, scholarship now abounds with claims that international law offers a way to hold States — or probably one State — responsible for the pandemic.²⁴ Similarly, it also puts into picture the possibility of pursuing avenues for accountability.²⁵ Scholars of this view relate the pandemic to the “doctrine of state responsibility,” which is argued as a basis to hold States responsible for violations of international law.²⁶ They posit that the doctrine should be applied to the current COVID-19 situation, or at

<https://theconversation.com/playing-the-covid-19-blame-game-may-feel-good-but-it-could-come-at-a-cost-the-governments-credibility-144120> (last accessed Jan. 30, 2022) [<https://perma.cc/SE9G-9B47>].

20. Horsley, *supra* note 18.

21. Bret Stephens, *Let's End the COVID Blame Games*, N.Y. TIMES, Nov. 30, 2021, available at <https://www.nytimes.com/2021/11/30/opinion/coronavirus-polarization.html> (last accessed Jan. 30, 2022) [<https://perma.cc/BS22-YZME>].

22. Bouguettaya, et al., *supra* note 3, at 1-2.

23. *Id.*

24. See, e.g., Emily Berman, *The Roles of the State and Federal Governments in a Pandemic*, 11 J. NAT'L SEC. L. & POL'Y 61, 62 (2020). This article puts forward the argument that “[a]s a public health matter, the primary responsibility for pandemic response lies with the [S]tate[s].” *Id.*

25. See, e.g., Lara Khoury, et al., *Governments' Accountability for Canada's Pandemic Response*, J. PUB. HEALTH POL'Y 1, 4 (2022). Accountability mechanisms are through appeals to judicial intervention including that within tort law, criminal law, and constitutional law. *Id.*

26. See Ipshita Chaturvedi, *China's State Responsibility for the Global Spread of COVID-19: An International Law Perspective* (ORF Issue Brief No. 373, June 2020), at 2, available at https://www.orfonline.org/wp-content/uploads/2020/06/ORF_Issue-Brief_373-China-State-Responsibility.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/7M7K-4JXF>].

least to dimensions of it, because it is a matter relating to accountability and the rule of law.²⁷ States failing to take the necessary precautions to prevent the virus from spreading should be held to account.²⁸ For this purpose, scholars have examined the possible and real issues along with the arguments for and against the responsibility of China amid the COVID-19 crisis. On a softer tone, some simply regard the crisis as a vital chance for engagement and evaluation of how the law works and how successful it is.²⁹

Beyond the blame and not-to-blame divide, this Article contributes to the debate by arguing that while the international community grapples with who is to blame for the COVID-19 pandemic and frequently resorts to the doctrine of state responsibility with reference to the International Health Regulations (IHR)³⁰ and International Human Rights Law (IHRL),³¹ the situation exposes the seeming inadequacies of international law's frameworks in terms of dealing with the questions of responsibility around a pandemic. The normative frameworks appear to be contentious in definitively answering questions of responsibility in a mutually satisfying, legitimate, and effective manner. There is likewise a dissension, to begin with, if such rules of international law are even applicable and could be successfully used to mount accountability in the face of a highly unusual — and some say unpredictable or fortuitous — event in human history.³² Disagreements abound around pro-responsibility and anti-responsibility arguments.

27. See Channa Weiss, *Determining Coronavirus Liability Under the Rule of Law: Should China Be Held Liable for the COVID-19 Pandemic Under International or State Law?*, UNT DALLAS L. REV. ON THE CUSP 1, 14 (2020).

28. Maysa S. Bydoon & Omar F. Alotain, *State Responsibility and COVID 19*, 10 J. ARTS & HUMAN. 62, 65 (2021).

29. Lisa Rodgers, *Reimagining State Responsibility for Workers Following COVID-19: A Vulnerability Approach*, 21 INT'L J. DISCRIMINATION & L. 191, 191 (2021).

30. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2d ed. 2005) [hereinafter INTERNATIONAL HEALTH REGULATIONS].

31. PHAP, International Human Rights Law (IHRL), available at https://phap.org/PHAP/Sector_Monitoring/Themes/Law_and_protection/IHRL/PHAP/Themes/IHRL.aspx (last accessed Jan. 30, 2022) [<https://perma.cc/YKM7-5AU7>].

32. Hina Alam, *COVID-19 Mutations Make Pandemic Trajectory Unpredictable, Experts Say*, THE CANADIAN PRESS, Dec. 9, 2021, available at <https://globalnews.ca/news/8436438/covid-19-mutations-pandemic-trajectory-unpredictable> (last accessed Jan. 30, 2022) [<https://perma.cc/DG5M-C2Z9>].

This Article first canvasses, albeit in a general and cursory manner, the recent efforts to blame a State or States for the pandemic. Thereafter, it looks into the rules of state responsibility from the point of view of blame, interposing the same with perhaps the most applicable primary rules of international law that scholars refer to in the blame game: the IHR and IHRL. The Article then presents some observations, which expose the dissensions and disagreements and shows the readers how the normative frameworks appear to be contentious in definitively answering questions of responsibility in a mutually satisfying, legitimate, and effective manner. Ultimately, it is concluded that international law could and should be developed to better respond to future pandemics, as well as to promote accountability and the rule of law.

II. TO BLAME IS HUMAN: BLAMING IN THE CONTEXT OF THE PANDEMIC

“To blame is human.”³³ Blaming has moral, cognitive, and social dimensions.³⁴ It is hardwired into people’s nature as human beings — more so when faced by a crisis. Even science states that the current pandemic “might be [altering] human behavior ... contributing to mood disorders, such as mania[.]”³⁵ Nevertheless, more than the basal desire or need to blame, answering difficult questions of responsibilities for the pandemic is significant and not only theoretical nor academic. Pursuing this does not merely satiate the human desire to blame things and events that cannot be understood.

The current blame game has both horizontal and vertical dimensions: State-to-State and individual-to-State blaming. The *first* one concerns actions taken to hold one State or States accountable for the pandemic or some aspect of it that had been brought by another State or a collective of States.³⁶ The

33. Richard J. Holden, *People or Systems? To Blame Is Human. The Fix Is to Engineer.*, 54 PROF. SAF. 34, 40 (2009).

34. Bertram F. Malle, et al., *Moral, Cognitive, and Social: The Nature of Blame*, in SOCIAL THINKING AND INTERPERSONAL BEHAVIOR 313 (Joseph P. Forgas, et al. eds., 2013).

35. Benjamin M. Seitz, et al., *The Pandemic Exposes Human Nature: 10 Evolutionary Insights*, 117 PNAS 27767, 27768 (2020).

36. See, e.g., Yashwant Raj, *US, China Trade Blame at UNSC’s First COVID-19 Meet*, HINDUSTAN TIMES, Apr. 11, 2020, available at <https://www.hindustantimes.com/world-news/us-china-trade-blame-at-uns-c-s-first-covid-19-meet/story-msuDWe6FHZildlheUjlfj.html> (last accessed Jan. 30, 2022) [<https://perma.cc/MU7W-W8WZ>].

second is about an individual putting the blame on a State or a collective of States.³⁷

A. Horizontal Aspects of Blaming

States have suffered and continue to suffer because of the onslaught and continuing wrath of the pandemic. COVID-19 is “much more than a health crisis.”³⁸ It is a “human, economic[,] and social crisis ... attacking societies at their core.”³⁹

To illustrate, the restrictions put in place to slow the spread of the virus and to relieve pressure on already overburdened and fragile health systems have had a huge impact on the economic growth of States.⁴⁰ For years to come, debt service to official bilateral creditors will be a significant burden.⁴¹ Remittance flows had declined.⁴² In different States, companies — particularly micro, small, and medium enterprises (MSMEs) in developing countries — were under severe hardships, with more than half of them either in arrears or on the verge of becoming so.⁴³ The pandemic has likewise pushed States to incur high costs of health care.⁴⁴ Brookings reported that the pandemic had a major influence on global gross domestic product growth.⁴⁵ In fact, the COVID-19 global recession is the worst since World War II, and the shock is

37. See, e.g., Weiss, *supra* note 27, at 12.

38. United Nations Department of Economic and Social Affairs, Everyone Included: Social Impact of COVID-19, available at <https://www.un.org/development/desa/dspd/everyone-included-covid-19.html> (last accessed Jan. 30, 2022) [<https://perma.cc/F2JK-C4E4>].

39. *Id.*

40. Yunfeng Shang, et al., *Effects of Pandemic Outbreak on Economies: Evidence from Business History Context*, 9 FRONTIERS IN PUB. HEALTH. 1, 2 (2021).

41. Paul Blake & Divyanshi Wadhwa, 2020 Year in Review: The Impact of COVID-19 in 12 Charts, available at <https://blogs.worldbank.org/voices/2020-year-review-impact-covid-19-12-charts> (last accessed Jan. 30, 2022) [<https://perma.cc/NA2A-LNAU>].

42. *Id.*

43. *Id.*

44. *Id.*

45. Eduardo Levy Yeyati & Federico Filippini, Social and Economic Impact of COVID-19 (Brookings Global Working Paper #158, June 2021), at 1-2, available at <https://www.brookings.edu/wp-content/uploads/2021/06/Social-and-economic-impact-COVID.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/JF4W-RUPH>].

likely to have a long-term effect.⁴⁶ The pandemic prompted a health and monetary reaction that was unparalleled in terms of speed and magnitude.⁴⁷ The upshot of all these reveals the real impacts of the pandemic on States, which has set back decades of progress made in tackling world challenges, such as global poverty.⁴⁸

Between and among States, the debate — at least as to who was at fault for mishandling aspects of the initial outbreak of the virus or for mismanagement and failure to take the response to the pandemic seriously — has already reached the United Nations Security Council (UNSC).⁴⁹ At the Council, Estonia had once proposed to discuss the issue.⁵⁰ Although it did not explicitly mention China, Estonia called for cooperation among Member States for transparent information.⁵¹ China, being the President of the UNSC at that time, rejected Estonia's proposal to hold a meeting on it.⁵² China argued that there was no consensus within the Council to convene the meeting.⁵³ Its allies — Russia and South Africa — voted against the discussion.⁵⁴

State relations have been also affected. In a diplomatic row, United States (U.S.) President Joseph R. Biden, Jr., had announced that shortly after taking

46. *Id.* at 1.

47. *Id.* at 2-3.

48. Wellcome, *From Equality to Global Poverty: the COVID-19 Effects on Societies and Economies*, available at <https://wellcome.org/news/equality-global-poverty-how-covid-19-affecting-societies-and-economies> (last accessed Jan. 30, 2022) [<https://perma.cc/RVL3-523D>].

49. Raj, *supra* note 36.

50. Sven Jürgenson, Permanent Representative of Estonia to the United Nations, *Speech at the UN Security Council VTC Meeting on COVID-19* (Apr. 16, 2020) (transcript available at <https://un.mfa.ee/national-statement-at-un-security-council-on-yemen> (last accessed Jan. 30, 2022) [<https://perma.cc/8SVY-M99R>]).

51. *Id.*

52. Shishir Gupta, *UNSC Won't Discuss COVID-19; China Blocks It with Help from Russia, South Africa*, HINDUSTAN TIMES, Mar. 27, 2020, available at <https://www.hindustantimes.com/world-news/unsc-won-t-discuss-covid-19-china-blocks-it-with-help-from-russia-south-africa/story-qLYgAv6DMtfzPxBaIO2kiO.html> (last accessed Jan. 30, 2022) [<https://perma.cc/CFD7-2QET>].

53. *Id.*

54. *Id.*

office, he directed the intelligence community to generate a report on the most recent examination of COVID-19's origins.⁵⁵ Biden said that the U.S. intelligence community has “coalesced around two likely scenarios,” but no definite determination has yet been reached as of this writing.⁵⁶ More recently, Biden revealed that China has important information concerning the pandemic's beginnings but Chinese government authorities have worked to keep international investigators and members of the global public health community from seeing the same.⁵⁷ The U.S. President also claimed that China continues to ignore pleas for transparency and to conceal information even as the pandemic's death toll rises.⁵⁸

The Chinese government has expressed its strong opposition to this report by the U.S. intelligence community on the origins of COVID-19.⁵⁹ It claimed

55. Statement by Joseph R. Biden, President, United States of America, *Statement by President Joe Biden on the Investigation into the Origins of COVID-19* (May 26, 2021) (available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/26/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid-19> (last accessed Jan. 30, 2022) [<https://perma.cc/7TXX-424S>]).

56. *Id.*

57. Statement by Joseph R. Biden, President, United States of America, *Statement by President Joe Biden on the Investigation into the Origins of COVID-19* (Aug. 27, 2021) (available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/27/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid-%E2%81%A019> (last accessed Jan. 30, 2022) [<https://perma.cc/6EZB-8EJD>]).

58. *Id.* Similarly, WHO Chief Tedros Adhanom Ghebreyesus, as well as the new President of the UNSC, through Estonian Ambassador Katrin Kivi, have likewise called for more transparency and information on COVID crisis, among others. Max Colchester, *WHO Chief Urges China to Cooperate with Probe into COVID-19 Origins*, WALL ST. J., June 12, 2021, available at <https://www.wsj.com/articles/who-chief-urges-china-to-cooperate-with-probe-into-covid-19-origins-11623532001> (last accessed Jan. 30, 2022) [<https://perma.cc/9H6C-BBAW>] & Sidhant Sibal, *New UNSC President Estonia Calls for Transparency on COVID-19 Crisis*, WION, Apr. 30, 2020, available at <https://www.wionews.com/india-news/new-unsc-president-estonia-calls-for-transparency-on-covid-19-crisis-295946> (last accessed Jan. 30, 2022) [<https://perma.cc/83KJ-PSSR>].

59. Statement by Chinese Embassy in the United States, *Statement by the Chinese Embassy in the United States on the “COVID-19 Origin-Tracing” Report of the U.S. Side* (Aug. 27, 2021) (available at <http://us.china->

that China was upfront and cooperative in its origin-tracing efforts; and instead blamed the U.S. for not being honest, accountable, and cooperative.⁶⁰ China contended that the U.S. has been refusing to react to the international community's reasonable reservations about the Fort Detrick biological laboratory (biolab) and the over 200 overseas locations for biological research to conceal the truth and avoid accountability.⁶¹ In August 2021, Ambassador Chen Xiaodong addressed the statement of Biden, claiming that the U.S. spared no effort to hype up the so-called Wuhan lab leak, as well as the slander that China withholds information, refuses to cooperate, and obstructs international investigation.⁶²

B. Vertical Aspects of Blaming

To be sure, States are not the only ones affected by the pandemic as individuals have either been infected, or at the very least, affected by COVID-19.⁶³ The human costs are real, and are arguably the most significant, with the deaths and illnesses as some of the concrete examples of its human effect.⁶⁴ A 2020 World Bank Report on the impact of COVID-19 has also revealed that the pandemic has disproportionately affected the poor and vulnerable, and that

embassy.gov.cn/eng/sgxw/202108/t20210828_9015583.htm (last accessed Jan. 30, 2022) [https://perma.cc/9MHG-GFQC].

60. *Id.*

61. Statement by Ma Zhaoxu, Vice Foreign Minister, People's Republic of China, *Statement by Vice Foreign Minister Ma Zhaoxu on Release of US Intelligence Report on COVID-19 Origins* (Aug. 28, 2021) (available at https://www.mfa.gov.cn/ce/ceau/eng/sghdxwfb_1/t1902811.htm (last accessed Jan. 30, 2022) [https://perma.cc/2FUS-55SL]).

62. Chen Xiaodong, Ambassador, Ministry of Foreign Affairs of the People's Republic of China, Remarks at the Press Briefing on COVID-19 Origins from Chinese Embassy in South Africa (Aug. 30, 2021) (transcript available at https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202108/t20210830_9169878.html (last accessed Jan. 30, 2022) [https://perma.cc/G4N8-BVB2]). The Ambassador put forth three main arguments in opposing and condemning the U.S. report, namely: (1) the so-called Wuhan lab leak theory is replete of loopholes and is a complete fabrication; (2) China has nothing to hide and it has been open and transparent on origin-tracing cooperation; and (3) "the timeline of China's COVID-19 response proves that [it] has no reservations about sharing information with the world." *Id.*

63. See United Nations Department of Economic and Social Affairs, *supra* note 38.

64. Harapan, et al., *supra* note 11, at 671.

millions more were at risk of falling into poverty as a result.⁶⁵ Moreover, there are effects on the education of children and the youth, internet inequalities, gender inequality, and on many other collective areas of life.⁶⁶

The world as it is now is different from what it was before the pandemic, with considerable impact on the income of households.⁶⁷ This phenomenon presented itself in all regions of the world. One study by the Asian Development Bank revealed that in Asia, for example, the COVID-19 pandemic had “a severe impact on Asian economies and hence on Asian households.”⁶⁸ About 73% of the households in the said study witnessed a decrease in earnings.⁶⁹ Most households with dropping income (33%) also reported a decrease of 26% to 50%.⁷⁰ Indonesia and the Philippines had the highest percentages of people reporting income declines at 81% and 84%, respectively.⁷¹

In terms of the vertical aspects of blaming, individuals have sought legal remedies through their domestic courts. This occurrence is most pronounced in the U.S. where, as of June 2020, at least 20 civil lawsuits had been filed — 18 by private litigants, and two by state attorneys-general.⁷² The lawsuits had

65. Blake & Wadhwa, *supra* note 41 (citing Christoph Lakner, et al., How Much Does Reducing Inequality Matter for Global Poverty? (Global Poverty Monitoring Technical Note No. 13, June 2020), at 16-17, *available at* <https://documents1.worldbank.org/curated/en/765601591733806023/pdf/How-Much-Does-Reducing-Inequality-Matter-for-Global-Poverty.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/SY8K-NQAX>]).

66. *See generally* Blake & Wadhwa, *supra* note 41.

67. *Id.*

68. Peter J. Morgan & Long Q. Trinh, Impacts of COVID-19 on Households in ASEAN Countries and Their Implications for Human Capital Development (ADB Working Paper Series No. 1226, March 2021), at 2, *available at* <https://www.adb.org/publications/impacts-covid-19-households-asean-countries> (last accessed Jan. 30, 2022) [<https://perma.cc/EA2A-SA3F>].

69. *Id.* at 6.

70. *Id.*

71. *Id.*

72. Chimène I. Keitner, *To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities*, 19 CHINESE J. INT'L L. 229, 229 (2020).

been launched against China,⁷³ where the novel coronavirus was first reported.⁷⁴

For example, a class action was filed by individuals and business owners in the U.S. and the State of Florida for compensatory and other damages suffered as a result of the pandemic, against China and its various government entities overseeing the said pandemic.⁷⁵ Another case was filed before a district court in Texas for “damages and equitable relief arising out of the [alleged] creation and release, accidental or otherwise, of a variation of the coronavirus known as COVID-19 by [China] and its agencies and officials as a biological weapon in violation of China’s agreements under international treaties.”⁷⁶ In Nevada, another complaint was filed by “small businesses” as defined in the U.S. Small Business Administration,⁷⁷ for monetary and related damages sustained as a result of the coronavirus pandemic, also against China and its various

73. *Id.* at 230.

74. Hengbo Zhu, et al., *The Novel Coronavirus Outbreak in Wuhan, China*, 5 GLOBAL HEALTH RESEARCH & POL’Y 1, 1 (2020).

75. Complaint, Mar. 13, 2020, ¶ 1 (on file with Southern District of Florida), *in* Alters v. People’s Republic of China, Case No. 1:20-cv-21108-UU (S.D. Fla. 2020). The main thrust of the plaintiffs’ arguments is that the conduct of China, along with its various government entities, in slowly acting against COVID-19 and in covering up the virus for their own economic self-interest, has caused the plaintiffs’ injury and incalculable harm. The plaintiff has five causes of action, denominated as “counts,” namely: (1) negligence; (2) negligent infliction of emotional distress; (3) intentional infliction of emotional distress; (4) strict liability for conducting ultrahazardous activity; and (5) public nuisance. *Id.* ¶ 3 & at 13-19.

76. Complaint, Mar. 17, 2020, ¶ 1 (on file with Northern District of Texas), *in* Buzz Photo, et al. v. People’s Republic of China, et al., Case No. 3:20-cv-00656-K-BN (N.D. Tex. 2020). There are six causes of action in this case, viz.: (1) aiding and abetting the risk of death or serious bodily injuries to U.S. citizens and members of the class and subclasses in violation of 18 U.S.C. § 2332 (a), (b), & (c), and 18 U.S.C. § 2333; (2) provision of material support to terrorists in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2333; (3) conspiracy to cause injury and even death of U.S. citizens and members of the class and subclasses in violation of 18 U.S.C. § 2332 (b) and 18 U.S.C. § 2333; (4) negligence; (5) wrongful death; and (6) assault and battery. *Id.* at 16-24.

77. A “small business” is defined by the Office of Advocacy as an independent business having fewer than 500 employees. U.S. Small Business Administration Office of Advocacy, Frequently Asked Questions About Small Business, at 1, available at https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/K4HY-77NZ>].

government entities which handled and managed the response to the discovery of the coronavirus, as well as the latter's alleged cover-up of the pandemic, thereby causing and/or contributing to the subsequent spread of the coronavirus all over the world.⁷⁸ Finally, individuals, owners, or business shareholders in Pennsylvania also filed a case against China based on the latter's alleged "negligence and reckless indifference to the rights of the [p]laintiffs and all others similarly situated."⁷⁹ The plaintiffs were seeking "on behalf of themselves and all others similarly situated, compensatory damages, punitive damages, costs[,] and attorney's fees."⁸⁰

States within Federal States have also launched cases before courts. Missouri and Mississippi, for instance, filed cases against China to recover for the enormous loss of life, human suffering, and economic turmoil.⁸¹ Both

78. Complaint, Mar. 23, 2020, ¶ 1 (on file with District Court of Nevada), *in* *Bella Vista LLC, et al. v. People's Republic of China, et al.*, Case No. 2:20-cv-00574-JCM-NJK (D. Nev. 2020). The plaintiffs hinge their complaint on three main causes of action similar with the previous cases cited: (1) negligence; (2) strict liability for conducting ultrahazardous activity; and (3) public nuisance. *Id.* at 17-22. Related to *Bella Vista* is the case of *Cardiff Prestige Property, Inc., et al. v. People's Republic of China, et al.* where the claims are identical. The latter case of *Cardiff* is also a class action complaint by "small businesses," which was filed in California. See Complaint, Apr. 8, 2020, ¶ 1 (on file with Central District of California), *in* *Cardiff Prestige Property, Inc., et al. v. People's Republic of China, et al.*, Case No. 8:20-cv-00683 (C.D. Cal. 2020).

79. Complaint, Apr. 20, 2020, ¶ 1 (on file with Eastern District of Pennsylvania), *in* *Francis Smith, et al. v. People's Republic of China*, Case No. 2:20-cv-01958-AB (E.D. Pa. 2020).

80. *Id.* ¶ 2.

81. Complaint, Apr. 21, 2020, ¶ 1 (on file with Eastern District of Missouri Southeastern Division), *in* *State of Missouri v. People's Republic of China, et al.*, Case No. 1:20-cv-00099 (E.D. Mo. 2020) [hereinafter *Complaint-Missouri*] & Complaint, May 12, 2020, (on file with Southern District of Mississippi Southern Division), *in* *State of Mississippi v. People's Republic of China, et al.*, Case No. 1:20-cv-168-LG-RHW (S.D. Miss. 2020) [hereinafter *Complaint-Mississippi*]. The State of Missouri, as represented by Attorney Eric Schmitt, imputes liability on the basis of four causes of action: (1) public nuisance; (2) abnormally dangerous activities; (3) breach of duty in allowing the transmission of COVID-19; and (4) hoarding of personal protective equipment, while the State of Mississippi only alleges two causes of action which are the violation of the following laws: (1) Mississippi Consumer Protection Act; and (2) Violations of Mississippi Antitrust Law. *Complaint-Missouri*, *supra* note 81, at 34-46 & *Complaint-Mississippi*, *supra* note 81, at 27-29.

alleged that the Chinese authorities “deceived the public, suppressed crucial information, arrested whistleblowers, denied the existence of human-to-human transmission” despite evidence to the contrary, and “destroyed critical medical research[.]”⁸²

There had been novel moves by individuals as well to hold certain States responsible before the international tribunals. Some have pushed the Prosecutor of the International Criminal Court to open an inquiry under Article 15 of the Rome Statute⁸³ to “investigate the urgent and important question of the likely creation and release, accidental or otherwise,” of COVID-19.⁸⁴ The “requests” pertain to opening investigations into the Wuhan Institute of Virology, as well as China’s alleged willful interference, with attempts to fight the spread of the disease and to develop treatments, tests, and a vaccine.⁸⁵ Accusing China of flouting the IHR and the Rome Statute, a Mumbai-based lawyer sought compensation on behalf of the Government of India from China on account of a recent outbreak of COVID-19.⁸⁶

People are likewise not oblivious to the internal state dynamics of the blame game — citizens claiming the mishandling of the pandemic by governments and States pointing fingers at citizens for breaching otherwise

82. Complaint–Mississippi, *supra* note 81, ¶ 1.

83. Rome Statute of the International Criminal Court art. 15, *signed* July 17, 1998, 2187 U.N.T.S. 3.

84. Complaint, Apr. 4, 2020, ¶ 1 (on file with International Criminal Court), *in* In the Matter of: Crimes Against Humanity and Genocide by Development of Outlawed Biological Warfare Weapons by the People’s Republic of China (2020).

85. *Id.* ¶¶ 1 & 66.

86. William Julie & Sophie Menegon, COVID-19: Potential Legal Actions Against China, *available at* <https://www.ibanet.org/article/D1B023C0-4033-4197-B68D-C11301478271> (last accessed Jan. 30, 2022) [<https://perma.cc/CFP5-L54R>] (citing Zee Media Bureau, *Mumbai Man Moves International Criminal Court Against China over Coronavirus COVID-19 Pandemic*, ZEENEWS, Apr. 19, 2020, *available at* <https://zeenews.india.com/india/mumbai-man-moves-international-criminal-court-against-china-over-coronavirus-covid-19-pandemic-2277464.html> (last accessed Jan. 30, 2022) [<https://perma.cc/2TK8-NNG3>]). Unfortunately, a copy of the complaint entitled *Ashish Sohani v. People’s Republic of China* is not yet available online.

reasonable and proper health regulations. However, both exacerbate the health crisis.⁸⁷

III. THE RULES OF THE GAME: STATE RESPONSIBILITY, THE INTERNATIONAL HEALTH REGULATIONS, AND INTERNATIONAL HUMAN RIGHTS LAW

If the question of responsibility for COVID-19 were a game, or a rules-based question, then scholars primarily point to the doctrine of state responsibility⁸⁸ along with the primary rules of the IHR, and not unanimously, to IHRL, as the rules which govern the blame game. Primary rules refer to the substantive obligations of States.⁸⁹ In this case, scholars frequently look to the IHR and IHRL.⁹⁰ China, for example, has certain obligations under the IHR with regard to the origins of COVID-19 and the initial management of and response to the pandemic, among others.⁹¹ Other States, as applicable, also bear obligations under it.

Meanwhile, the right to health under IHRL is an obligation of many States.⁹² Such right is expounded by IHRL in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹³ and in other normative

87. See Matthew Flinders, *Gotcha! Coronavirus, Crises and the Politics of Blame Games*, POL. INSIGHT, June 2020, at 23-24, available at <https://journals.sagepub.com/doi/pdf/10.1177/2041905820933371> (last accessed Jan. 30, 2022) [<https://perma.cc/772U-LMWW>].

88. See Chaturvedi, *supra* note 26.

89. International Law Commission, *Report on the Work of Its Fifty-Third Session (Supplement No. 10)*, at 31, U.N. Doc. A/56/10 (2001).

90. See generally INTERNATIONAL HEALTH REGULATIONS, *supra* note 30. IHRL, on the other hand, “lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect[,] and to fulfil human rights.” Office of the United Nations High Commissioner for Human Rights, *International Human Rights Law*, available at <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (last accessed Jan. 30, 2022) [<https://perma.cc/4UPM-CWB6>].

91. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, arts. 6 & 7.

92. See Office of the United Nations High Commissioner for Human Rights, *The Right to Health (Fact Sheet No. 31)*, at 9, available at <https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet31.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/P2KB-PSYN>].

93. International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3.

instruments.⁹⁴ Depending on a particular situation, other rules may be engaged.

Rules are secondary when intended to determine the legal ramifications of failing to follow the obligations imposed by the “main” rules (primary).⁹⁵ Only these “secondary” norms fall under the true sphere of international wrongful actions liability — although some authors criticize the technical and artificial nature of the distinction.⁹⁶ Nevertheless, for the purposes of this Article, the distinction will be recognized.

A. The Concept of State Responsibility

The Articles on the Responsibility of States for Internationally Wrongful Acts⁹⁷ (ARSIWA) of the International Law Commission (ILC) represents the current framework on state responsibility, which is a combination of the codification and progressive development of international law.⁹⁸ Article 1 of the ARSIWA states that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁹⁹ The fundamental principle of state responsibility is mirrored in the concept of justice, that States are obligated to follow through on the commitments that they have made and to do so in good faith and without causing harm to others.¹⁰⁰

Article 2 of the ARSIWA canonically adds that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:

94. See, e.g., Convention on the Rights of the Child art. 24, signed Nov. 20, 1989, 1577 U.N.T.S. 3.

95. International Law Commission, *supra* note 89, at 31, ¶ 1.

96. Gilbert Guillaume, *Overview of Part One of the Articles on State Responsibility*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 187 (James Crawford, et al. eds., 2010).

97. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 1, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ARSIWA].

98. *Id.* at 24, ¶ 66.

99. *Id.* art. 1.

100. Valerio de Oliveira Mazzuoli, *International Responsibility of States for Transnational Epidemics and Pandemics: The Case of COVID-19 from the People’s Republic of China*, 23 *REVISTA DE DIREITO CIVIL CONTEMPORÂNEO* 1, 7 (2020).

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.”¹⁰¹

An internationally wrongful act therefore has two constitutive elements: (1) attribution to a state and (2) breach of an international obligation.¹⁰²

At the heart of state responsibility is the general principle in international law that a breach of an international obligation entails responsibility.¹⁰³ This law on state responsibility is concerned with the occurrence and repercussions of unlawful acts, as well as the types of reparation available for losses incurred.¹⁰⁴ It may also provide compensation for the effects of legitimate or “excusable” activities; hence, it is important to analyze issues in the context of state responsibility in general, where applicable.¹⁰⁵ Finally, this responsibility refers to both treaty and non-treaty violations of obligation.¹⁰⁶

I. Attributability

While the principle is relatively easy to grasp despite its sense of moral loftiness, the application of the doctrine of state responsibility is often controversial. There has to be a conduct — an act or omission — that is attributable to the State *in the first place*.¹⁰⁷ The State is viewed as a single entity, encompassing the various legal persons, ministries, and other legal entities that make up its structure and act on its behalf.¹⁰⁸ Article 4 of the ARSIWA clearly states this.¹⁰⁹

However, it is not that simple as a State acts ordinarily through real human beings. It may be an issue if a State is “acting” or the individual, groups of people, or organizations are “acting” in another capacity — and not “acting” for or on behalf of the State. The mix of possibilities can be complex, and a

101. ARSIWA, *supra* note 97, art. 2.

102. International Law Commission, *supra* note 89, at 34, ¶ 1.

103. *Id.*

104. *Id.* at 32, ¶ 6.

105. JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 524 (9th ed. 2019).

106. International Law Commission, *supra* note 89, at 35, ¶ 7.

107. *Id.* at 38, ¶ 1 (emphasis supplied).

108. *Id.* at 35, ¶ 6.

109. ARSIWA, *supra* note 97, art. 4.

point of disagreement arises upon who should be deemed “acting” on behalf of the State.¹¹⁰

Who then is “acting” for the State and what are those acts? A state organ is often assumed to be acting on behalf of the State, and its actions are regarded as “act[s] of the State” for which the State is responsible under international law.¹¹¹ That rule is customary in character.¹¹² Article 4 of the ARSIWA is sufficiently broad because it makes no distinction between the nature of the office or function, the rank of the officials, and the hierarchy between government divisions.¹¹³ Tribunals do not make distinctions between and among legislative, executive, and judicial organs.¹¹⁴ In one case, the U.S. was adjudged to be liable for the actions of an American police officer who assaulted the Mexican consul twice, while arresting the latter for carrying a weapon that he was legally allowed to carry.¹¹⁵ A conciliation commission acknowledged that the concept enshrined in Article 4 of the ARSIWA equally applies to central government, as well as regional or local government entities.¹¹⁶

The ARSIWA contains other rules that will be cursorily discussed here. Under Article 5, the conduct of a person or entity that is not an organ of the State but is “empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State[,]” provided that “the person or entity is acting in that capacity in the particular instance.”¹¹⁷ Article 7 further provides that this is still the case even if such person or entity acts in excess of authority or in contravention of instructions.¹¹⁸ Notably, the ARSIWA also contains provisions that may apply

110. See International Law Commission, *supra* note 89, at 35, ¶ 5.

111. *Id.*

112. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 63, 87 (April 29).

113. ARSIWA, *supra* note 97, art. 4.

114. International Law Commission, *supra* note 89, at 41, ¶ 6.

115. Francisco Mallén (United Mexican States) v. U.S.A. (Mex./U.S.), General Claims Commission, 4 R.I.A.A. 173, 177 (1927).

116. International Law Commission, *supra* note 89, at 41, ¶ 8.

117. ARSIWA, *supra* note 97, art. 5.

118. *Id.* art. 7. For applications of this principle, the *Gustave Caire* and *Youmans Claim* cases will be enlightening. *Gustave Caire* (France) v. United Mexican States (Fr./Mex.), Decision, 5 R.I.A.A. 540 (1929) & *Thomas H. Youmans* (U.S.A.) v.

to rebellions, insurrections, and other similar situations in the face of action or government inaction.¹¹⁹

The dividing lines could however be blurry and even murky. It becomes tricky oftentimes, when the conduct emanates from persons or entities, either supposedly or not, “exercising elements of governmental authority[.]”¹²⁰ There had been instances where there existed a “tedious exposition of agency, acts of organs and political subdivisions, and acts of officials within their apparent authority or under color of law.”¹²¹ Actions could either be actions of the State or actions of private persons (which may also be attributed to the State). The issue of assigning international responsibility to States for the actions of a group of people on the territory of another country has likewise become a control issue,¹²² which is applicable to domestic entities.¹²³

International cases have proposed a number of different control tests. In the case of the *Military and Paramilitary Activities in and Against Nicaragua*,¹²⁴ the International Court of Justice (ICJ) proposed two control tests: the so-called “strict control test” or the “agency test,” and the “effective control test.”¹²⁵ The Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia has rendered these as unpersuasive, and instead employed what is

United Mexican States (U.S./Mex.), General Claims Commission, 4 R.I.A.A. 110 (1926).

119. ARSIWA, *supra* note 97, art. 10.

120. *Id.* art. 5.

121. Gordon A. Christenson, Dean Emeritus and Professor Emeritus of Law, University of Cincinnati College of Law, *Attributing Conduct to the State: Is Anything New?*, Remarks at the American Society of International Law Proceedings of the Annual Meeting (Mar. 29, 1990) (transcript available at Richard B. Lillich, et al., *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. 51, 51 (1990)).

122. Elena Laura Álvarez Ortega, The Attribution of International Responsibility to a State for Conduct of Private Individuals Within the Territory of Another State, at 5, available at https://indret.com/wp-content/themes/indret/pdf/1116_es.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/XVM9-HKAZ>].

123. *See id.* at 10.

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

125. *Id.* ¶ 109 & Ortega, *supra* note 122, at 8.

known as the “overall control test.”¹²⁶ Furthermore, the European Court of Human Rights has created a new test called the “effective overall control test.”¹²⁷ Each of the tests has its own criteria and instances when applicable.

More contentiously, what happens if these tests perhaps pertained to inactions? When an international obligation necessitates state action in response to non-state behavior, a State may act through its own independent failure of duty or inaction.¹²⁸ Gordon A. Christenson’s example some 30 years ago is almost portentous today —

Suppose, however, that [the] focus [is on] the question on government *inaction*. If a government, for example, fails to control vigilantes or private death squads, fails to prevent massive pollution of the environment, fails to contain terrorist violence across borders, fails to protect against terrorism or private violence or threats directed against aliens and their property, fails to prevent a massacre of innocent civilians in occupied territory, or fails to prevent massive abuse of human rights in state territory, is such a failure of action state conduct for the purpose of determining the responsibility of the state under international law?¹²⁹

Going to the COVID-19 predicament in relation to the origins debate, can it be truly said that the lab in Wuhan was a state organ? If not, was it acting under the authority of the Chinese government? How about if there were market vendors who let loose a supposed pathogen? And, in relation to the supposed failure of response, how about if there were scientists who — like some say — failed to contain the virus? How about a private person who first contracted the virus from an animal? What if he or she is a government official? The Author does not attempt to sketch out any factual supposition — the origins “investigation,” or at least, debate — is still unfolding. But this does illustrate the complexity of the questions of attribution, and scholars have, time and again, emphasized that tribunals have been reluctant “to attribute conduct to [S]tates from official failure of duty.”¹³⁰ Of course, context and facts, along with evidence, are crucial to laying and resolving the questions of attributability.

126. Prosecutor v. Tadić, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 115-45 (Oct. 2, 1995) & Ortega, *supra* note 122, at 16.

127. Ortega, *supra* note 122, at 28.

128. Christenson, *supra* note 121, at 51.

129. *Id.* at 51-52.

130. *Id.* at 59. See, e.g., *Nicaragua*, 1986 I.C.J. & United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Order, 1981 I.C.J. 45 (May 12).

2. Breach of an International Obligation

After determining whether a conduct is that of a State, the next step in the analysis of the constitutive elements is to determine whether there had been a breach of an international obligation.¹³¹ This is primarily why authors have remarked that the doctrines of state responsibility are not merely secondary rules of international law as they permeate determinations of substantial primary obligations.¹³²

To reiterate, the rule is that when the behavior attributed to a State amounts to that State's failure to comply with the obligation imposed upon it, there is a breach of an international obligation.¹³³ Article 12 of the ARSIWA provides that a State has breached an international obligation when an act of that State, "regardless of its origin or character[,] is not in line with "what is required of it by that obligation."¹³⁴ The wording of the phrase "regardless of its origin" means that the Articles apply to all international obligations, regardless of whether they are established by customary international law, treaty, or a general principle applicable within the international legal order.¹³⁵ An obligation may also arise as a result of a State's unilateral action.¹³⁶

But what is a breach? A breach occurs when the State's conduct is not conforming to the conduct demanded of it.¹³⁷ This means that a breach occurs even if the State is partially compliant with the obligation.¹³⁸ As to the legal obligation, it could be from a treaty, a customary law, or a general principle of law.¹³⁹ There is also "no distinction between contractual and tortious [duty]" in international law.¹⁴⁰

131. International Law Commission, *supra* note 89, at 34, ¶ 1.

132. Special Rapporteur on State Responsibility, *First Report on State Responsibility*, at 6-7, International Law Commission, U.N. Doc. A/CN.4/490 (Apr. 24, May 1, 5, 11, & 26, July 22 & 24, & Aug. 12, 1998).

133. International Law Commission, *supra* note 89, at 54, ¶ 2.

134. ARSIWA, *supra* note 97, art. 12.

135. International Law Commission, *supra* note 89, at 55, ¶ 3.

136. *Id.* See also *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253 (Dec. 20).

137. ARSIWA, *supra* note 97, art. 12.

138. International Law Commission, *supra* note 89, at 55, ¶ 2.

139. *Id.* at 55, ¶ 2.

140. *Id.* at 55, ¶ 5.

That conduct could “consist of actions or omissions.”¹⁴¹ Thus, inaction or failure to perform an obligation imposed on a State by treaty or customary law constitutes conduct.¹⁴² Albania’s failure to warn third countries of the presence of landmines in its territorial waters, despite knowing their existence, is a well-known example in *Corfu Channel*.¹⁴³ Albania’s inaction resulted in property damage and death, and the ICJ determined that it was Albania’s responsibility to compensate the victims.¹⁴⁴

Now, could a State’s inability to warn the world about the existence of a virus in a timely manner, in violation of international law obligations, be a cause for compensation? This is literally the million-dollar question. It should be remembered that in *United States Diplomatic and Consular Staff in Tehran*,¹⁴⁵ the ICJ held that while the Iranian militants’ occupation of the U.S. Embassy and their capture of its diplomatic and consular staff could not be directly attributed to Iran, the latter may still be held responsible when it did nothing to prevent the attack.¹⁴⁶

Thus, even if the virus were not directly attributable to a State, as it comes from nature, could one say that the State’s failure to prevent the “attack” of the virus translates into responsibility? Alas, when deciding whether an obligation has been breached, the substantive obligation itself, its specific phrasing and meaning, all of which come clearly within the scope of the primary rules of international law, must first be taken into account.¹⁴⁷ On the other hand, the concepts and distinctions relating to state responsibility are designed to give a framework for that consideration, and to that degree, they can be valuable.¹⁴⁸

For obvious reasons, one should not readily jump to unwarranted conclusions, as state responsibility engages *questions of law and fact*, and there are *other rules* in the ARSIWA that deserve consideration depending on attendant facts. The problem being faced now though is that much of the

141. *Id.* at 35, ¶ 4.

142. *Id.*

143. The Corfu Channel Case, Merits, Judgment, 1949 I.C.J. 4, 22-23 (April 9).

144. *Id.* at 36.

145. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Jurisdiction and Admissibility, Judgment, 1980 I.C.J. 3 (May 24).

146. *Id.* ¶¶ 17 & 95 (5).

147. Special Rapporteur on State Responsibility, *supra* note 132, at 6.

148. *Id.*

factual questions around the origins of the pandemic have yet to be determined, or if already determined, have been put to question.

Apart from the attribution criteria, the ARSIWA also provides for defenses that preclude the wrongfulness of state behavior, consequences for States that violate international obligations, as well as countermeasures.¹⁴⁹ While the question of fault is not entirely irrelevant to the law of state responsibility, “it is not a requirement for responsibility.”¹⁵⁰ These need to be taken into consideration in a question that concerns state responsibility for the pandemic.

To complicate matters even further, the doctrine of state responsibility engages questions of invocation.¹⁵¹ For this Article’s purposes, it should be recalled that individuals — largely considered objects of international law — are generally barred from instituting claims in world courts where the disputes are between and among States and those with international legal personality.¹⁵² The ARSIWA presents a complex regime around who may invoke the articles as to who an injured State is and who a non-injured State is, and standing — both in local and international courts and tribunals — could be contentious depending on the applicable jurisdictional rules.¹⁵³ Where to file a claim is also fraught with complicated legal questions.¹⁵⁴

B. The International Health Regulations

The emphasis on preventing the transmission of infectious illnesses across borders came about after the spread of such diseases, which was a result of the enormous rise of international trade brought about by colonial expansion in the second half of the 19th century.¹⁵⁵ Due to the development of steamship and railroad technology, as well as increased and rapid global commerce and travel, infectious diseases, such as cholera, yellow fever, and the bubonic

149. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 98–99 (2012).

150. ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION 22 (2017).

151. International Law Commission, *supra* note 89, at 22, ¶ 49.

152. *Cf.* Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT’L L. 798, 811 (2002).

153. *See* Weiss, *supra* note 152, at 807.

154. *Id.* at 808.

155. Antoine de Bengy Puyvallée & Sonja Kittelsen, “*Disease Knows No Borders*”: *Pandemics and the Politics of Global Health Security*, in PANDEMICS, PUBLICS, AND POLITICS: STAGING RESPONSES TO PUBLIC HEALTH CRISES 59, 61 (Kristian Bjørkdahl & Benedicte Carlsen eds., 2018).

plague, diffused from their traditional endemic areas in colonies and impoverished countries to economically advanced nations in various parts of the world.¹⁵⁶

The international community resorted to multilateralism to stop the spread of diseases.¹⁵⁷ The overarching purpose of the early international conferences was to devise strategies for destroying diseases that spread at the source.¹⁵⁸ In response to cholera, for example, the French government convened the first International Sanitary Conference in 1851¹⁵⁹ to discuss the establishment of a uniform system of maritime quarantine as a line of defense “between Western Europe and ‘the East[,]’” as well as the formation of a “network of medical officers, researchers, and diplomats to debate the methods and materials to be used” in disinfecting ships and ports.¹⁶⁰ Subsequent conferences resulted in cholera and plague accords, the creation of a permanent international health bureau, and after the First World War, the bureau worked with the Health Organization that the League of Nations established.¹⁶¹

The creation of the World Health Organization (WHO) represents a special moment in the drive towards cooperation in the face of global health risks.¹⁶² States adopted the Constitution of the WHO in 1946,¹⁶³ which entered into force in 1948.¹⁶⁴ The World Health Assembly (WHA) is empowered by Article 21 of the WHO Constitution to enact regulations

156. MARCOS CUETO, ET AL., *THE WORLD HEALTH ORGANIZATION: A HISTORY* 10 (2019).

157. *Id.* at 11.

158. *Id.* (citing THE GOVERNMENT OF THE UNITED STATES, PROCEEDINGS OF THE INTERNATIONAL SANITARY CONFERENCE PROVIDED FOR BY JOINT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES 177 (1881)).

159. CUETO, ET AL., *supra* note 156, at 10.

160. *Id.* at 11.

161. See WORLD HEALTH ORGANIZATION, *THE FIRST TEN YEARS OF THE WORLD HEALTH ORGANIZATION* 21-27 (1958).

162. *Id.* at 38.

163. Constitution of the World Health Organization, *signed* July 22, 1946, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

164. United Nations, Constitution of the World Health Organization, *available at* https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IX-1&chapter=9&lang=en (last accessed Jan. 30, 2022) [<https://perma.cc/EVS2-GD7U>].

intended to limit the international spread of illnesses.¹⁶⁵ These regulations are binding on all WHO Member States pursuant to Article 22 of the Constitution.¹⁶⁶

The International Health Regulations of 2005, popularly known as “IHR,” serves as the primary international legal instrument devoted to the prevention and control of infectious diseases.¹⁶⁷ This present document is the culmination of decades of negotiations and international cooperation aimed at establishing a global health system that strikes a balance between the need to protect people’s right to life and health and the State’s interest in trade and travel.¹⁶⁸ It traces its origins from the International Sanitary Regulations of 1951,¹⁶⁹ which had gone through revisions, and now covers almost “all public health risks ... that might affect human health, irrespective of the source.”¹⁷⁰ The regulations, as a document, binds all WHO Member-States, save for those who “notify the Director-General of rejection or reservations” within a specific time.¹⁷¹ The IHR has been revised several times.¹⁷²

As to its purpose and scope, the IHR aims to “prevent, protect against, control[,] and [respond]” to the worldwide spread of illness in methods that are commensurate with and limited to public health hazards, and that avoid undue interference with international travel and commerce.¹⁷³ Article 3 of the IHR requires that these responses be implemented “with full respect for the

165. WHO Constitution, *supra* note 163, art. 21.

166. *Id.* art. 22.

167. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 2.

168. *Foreword* to WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS I (2d ed. 2005).

169. *Id.* & International Sanitary Regulations, *adopted* May 25, 1951, 175 U.N.T.S. 214.

170. World Health Organization Regional Office for the Eastern Mediterranean, Background: International Health Regulations, *available at* <http://www.emro.who.int/international-health-regulations/about/background.html> (last accessed Jan. 30, 2022) [<https://perma.cc/4UKF-DKCF>].

171. WHO Constitution, *supra* note 163, art. 22.

172. The current revised Regulations were adopted on May 23, 2005 and entered into force on June 15, 2007. Prior to this, the first adoption of the IHR was in 1969 before it was subsequently amended in 1973, and substantially revised in 1995. World Health Organization Regional Office for the Eastern Mediterranean, *supra* note 170.

173. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 2.

dignity, human rights[,] and fundamental freedoms of persons.”¹⁷⁴ Responses should be “guided by the goal of [] universal application for the protection of all people of the world from the international spread of disease.”¹⁷⁵

There are many provisions of the IHR that are relevant to the current pandemic and the controversies surrounding it in relation to the obligations of States. In a non-comprehensive manner, the most notable ones are outlined below —

Article 4. Responsible authorities

1. Each State Party shall designate or establish a National IHR Focal Point and the authorities responsible within its respective jurisdiction for the implementation of health measures under these Regulations.
2. National IHR Focal Points shall be accessible at all times for communications with the WHO IHR Contact Points provided for in paragraph 3 of this Article. The functions of National IHR Focal Points shall include:
 - (a) sending to WHO IHR Contact Points, on behalf of the State Party concerned, urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12; and
 - (b) disseminating information to, and consolidating input from, relevant sectors of the administration of the State Party concerned, including those responsible for surveillance and reporting, points of entry, public health services, clinics and hospitals and other government departments.
3. WHO shall designate IHR Contact Points, which shall be accessible at all times for communications with National IHR Focal Points. WHO IHR Contact Points shall send urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12, to the National IHR Focal Point of the States Parties concerned. WHO IHR Contact Points may be designated by WHO at the headquarters or at the regional level of the Organization.

States Parties shall provide WHO with contact details of their National IHR Focal Point and WHO shall provide States Parties with contact details of WHO IHR Contact Points. These contact details shall be continuously updated and annually confirmed. WHO shall make available to all States Parties the contact details of National IHR Focal Points it receives pursuant to this Article.

¹⁷⁴*Id.* art. 3 (1).

¹⁷⁵*Id.* art. 3 (3).

...

Article 5. Surveillance

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to detect, assess, notify and report events in accordance with these Regulations, as specified in Annex 1.

...

Article 6. Notification

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.
2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.

Article 7. Information-sharing during unexpected or unusual public health events

If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.

Article 8. Consultation

In the case of events occurring within its territory not requiring notification as provided in Article 6, in particular those events for which there is insufficient information available to complete the decision instrument, a State Party may nevertheless keep WHO advised thereof through the National IHR Focal Point and consult with WHO on appropriate health measures. Such communications shall be treated in accordance with paragraphs 2 to 4 of Article 11. The State Party in whose

territory the event has occurred may request WHO assistance to assess any epidemiological evidence obtained by that State Party.

Article 9. Other reports

1. WHO may take into account reports from sources other than notifications or consultations and shall assess these reports according to established epidemiological principles and then communicate information on the event to the State Party in whose territory the event is allegedly occurring. Before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10. To this end, WHO shall make the information received available to the States Parties and only where it is duly justified may WHO maintain the confidentiality of the source. This information will be used in accordance with the procedure set forth in Article 11.
2. States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk identified outside their territory that may cause international disease spread, as manifested by exported or imported:
 - (a) human cases;
 - (b) vectors which carry infection or contamination; or
 - (c) goods that are contaminated.

Article 10. Verification

1. WHO shall request, in accordance with Article 9, verification from a State Party of reports from sources other than notifications or consultations of events which may constitute a public health emergency of international concern allegedly occurring in the State's territory. In such cases, WHO shall inform the State Party concerned regarding the reports it is seeking to verify.
2. Pursuant to the foregoing paragraph and to Article 9, each State Party, when requested by WHO, shall verify and provide:
 - (a) within 24 hours, an initial reply to, or acknowledgement of, the request from WHO;
 - (b) within 24 hours, available public health information on the status of events referred to in WHO's request; and
 - (c) information to WHO in the context of an assessment under Article 6, including relevant information as described in that Article.

3. When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.
4. If the State Party does not accept the offer of collaboration, WHO may, when justified by the magnitude of the public health risk, share with other States Parties the information available to it, whilst encouraging the State Party to accept the offer of collaboration by WHO, taking into account the views of the State Party concerned.

...

Article 13. Public health response

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern as set out in Annex 1. WHO shall publish, in consultation with Member States, guidelines to support States Parties in the development of public health response capacities.¹⁷⁶

In general, the IHR provides that national health measures “shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.”¹⁷⁷ Additional health measures may be instituted by a State, subject to the provisions, requirements, and limitations in the IHR.¹⁷⁸ States should also “collaborate with each other,”¹⁷⁹ and the WHO should collaborate with States.¹⁸⁰ Lastly, there is also a regime for the treatment of personal data¹⁸¹ as well as the “[t]ransport and handling of biological

176. *Id.* arts. 4; 5 (1); 6-10; & 13 (1).

177. *Id.* art. 42.

178. *Id.* art. 43.

179. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 44 (1).

180. *Id.* art. 44 (2).

181. *Id.* art. 45.

substances, reagents, and materials for diagnostic purposes” that need to be complied with.¹⁸²

The IHR similarly contains an elaborate system of specific rules governing the response of States. This includes prescribing different capacities for the various levels of the response. Part V of the IHR is on the measures.¹⁸³ The general provisions cover those relating to “[h]ealth measures on arrival and departure[.]”¹⁸⁴ There are also special provisions for conveyance operators;¹⁸⁵ ships and aircraft in transit;¹⁸⁶ civilian lorries, trains, and coaches in transit,¹⁸⁷ and the like. Special provisions for travelers;¹⁸⁸ goods, containers, and container loading areas are also provided.¹⁸⁹ Finally, health documents, including those on vaccine certificates and health declarations, are covered,¹⁹⁰ as well as charges for the health measures.¹⁹¹ Other provisions and annexes of the IHR may be relevant, depending on the specific issue and the factual milieu surrounding a legal question.

Of all the rules abovementioned in the recent iteration of the IHR, the Author takes the position that the most important set of innovative provisions therein pertain to the State’s health system along a public health response. Lessons learned from the Severe Acute Respiratory Syndrome (SARS) have led the WHO to reform the IHR in 2005,¹⁹² which now calls for improved national health systems, “greater interstate cooperation” in the area of improving primary health care, as well as enhanced surveillance to track threats to public health, no matter where they may come from — “not only to specific diseases[.]”¹⁹³ The threat of global health risks necessitates States to have strong core health systems, whether or not they are controlled by the

182. *Id.* art. 46.

183. *Id.* pt. V.

184. *Id.* art. 23.

185. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 24.

186. *Id.* art. 25.

187. *Id.* art. 26.

188. *Id.* arts. 30-32.

189. *Id.* arts. 33-34.

190. *Id.* arts. 35-39.

191. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, arts. 40-41.

192. *Id.* at 3.

193. José E. Alvarez, *The WHO in the Age of the Coronavirus*, 114 AM. J. INT’L L. 578, 580 (2020).

government, in order to prevent, treat, and recover from pandemic shock.¹⁹⁴ Chronic diseases make individuals increasingly exposed to new and deadly health threats, requiring universal health care access.¹⁹⁵ The IHR also emphasizes that emerging illnesses need forms of partnership much broader than border security.¹⁹⁶ This lesson is being (re-)learned today where there are uneven health capacities across different States and across different localities within the same State.

Another notable aspect concerns surveillance. Simply put, the notification requirement and the resulting timely action that the IHR requires will be for naught if there were no requirement of surveillance of diseases. State failure to inform the WHO of disease outbreaks had been due to a lack of a robust disease monitoring system, which is not capable of identifying outbreaks of illnesses in a timely fashion.¹⁹⁷

Notwithstanding the IHR's advances, the present international legal framework for dealing with the epidemic has received a lot of flak. Although the revised IHR is claimed to be adequate as a framework in responding to the COVID-19 pandemic, the reality is actually the opposite when contrasted with the law that is in place.¹⁹⁸ The devastation caused by COVID-19 demonstrates the utter inadequacy of the global health system.¹⁹⁹ The IHR's concentration on risk occurrences via evaluations renders useless any assertion that COVID-19 was manufactured or escaped from a Wuhan lab.²⁰⁰ Whether a virus was intentionally created or not has no bearing on the need to inform and to react to such risk situations.²⁰¹ To add insult to injury, the obligation to establish fundamental health capabilities is underfunded and there are no "name and shame" mechanisms to compel compliance.²⁰²

Some authors are raising structural concerns over the IHR, among other criticisms. The IHR, which is the only binding international agreement on global public health with 193 Contracting States, recognizes the fragmented

194. *Id.*

195. *Id.* at 580-81.

196. *Id.* at 581.

197. DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 65 (1999).

198. "But comparing the virus on the ground to the law on the books yields a rosy picture at odds with the state of world." Alvarez, *supra* note 193, at 579.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 583.

character of international law and the diverse authorities of other international bodies — but it ends there.²⁰³ It may have been useful in dealing with traditional illness outbreaks like SARS in the early 2000s, according to this view, but it may not have been efficient in dealing with novel pandemics like COVID-19.²⁰⁴

Another important claim is that the IHR impedes the WHO's coordinating role and hampers cooperation — restricting the ability of the WHO leadership to respond quickly to non-cooperative governments,²⁰⁵ thus limiting the WHO Director-General's authority. “[D]eveloped states wanted ... greater access to non-state-based information about impending health risks[,] but limited authority” for the Director-General to question state-imposed protective measures; while “developing countries insisted that the WHO remain dependent on [their own] information” and demanded greater accountability from trade-blocking states.²⁰⁶ Thus, in a sense, the amended IHR undercut the WHO's core information-sharing role, and the WHO's ability to gather independent information from sources other than the afflicted state government.²⁰⁷

With all these provisions in the IHR, various concerns have arisen, particularly with regard to the origins of the pandemic and the States' responses to it. To illustrate, if one looks at Article 6 of the IHR, China is required to notify the WHO through the National IHR Focal Point, and “within 24 hours of [the] assessment of public health information, of [any] event[that] may constitute a public health emergency of international concern within its territory[.]”²⁰⁸ Following a notification, it must continue to provide WHO with “timely, accurate, and sufficiently detailed public health information” about the notified event, including, where possible, “case definitions, laboratory results, [the] source and type of risk, [the] number of cases and deaths,” etc.²⁰⁹

203. Jaemin Lee, *IHR 2005 in the Coronavirus Pandemic: A Need for a New Instrument to Overcome Fragmentation?*, 24 AM. SOC'Y. INT'L L. 169 (2020).

204. *Id.*

205. Eyal Benvenisti, *The WHO — Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 AM. J. INT'L L. 558, 596 (2020).

206. *Id.* at 595 (emphases supplied).

207. *Id.* at 595–96.

208. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 6 (1).

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

Therefore, one of the concerns that has to be answered right now is whether China provided timely notice upon its assessment of public health information relating to the COVID-19 virus. One other potentially relevant provision is Article 7 on information sharing in the event of an unexpected or unusual public health event, which provides in part that if a “State [] has evidence of an unexpected [and] unusual public health event within its territory” that could be of international concern, it is required to share this information with other States.²¹⁰ State governments should notify WHO as soon as possible if such an occurrence occurs.²¹¹ Hence, it may be asked if China shared information with other States in such manner.

C. International Human Rights Law

The COVID-19 crisis is also a “human rights crisis” — a crisis of the human person.²¹² Humans ultimately pay the costs related to the pandemic; some even with their own lives. COVID-19 is a test of civilizations, governments, communities, and people alike.²¹³ Cohesion and collaboration are needed to combat the virus and reduce the unexpected consequences of efforts taken to stop the spread of COVID-19.²¹⁴ Nevertheless, in order to successfully respond to and recover from the pandemic, public health response and recovery must be based on respect for human rights across the board — civil and political rights, as well as economic, social, and cultural rights²¹⁵ — including developmental rights.²¹⁶

210. *Id.* art. 7.

211. *Id.* arts. 7 & 6 (1).

212. Statement by António Guterres, U.N. Secretary-General, *We Are All in this Together: Human Rights and COVID-19 Response and Recovery* (Apr. 23, 2020) (available at <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and> (last accessed Jan. 30, 2022) [<https://perma.cc/FL36-L2TV>]).

213. Office of the United Nations High Commissioner for Human Rights, COVID-19 Guidance (May 13, 2020), at 1, available at https://www.ohchr.org/sites/default/files/Documents/Events/COVID-19_Guidance.pdf (last accessed Jan. 30, 2022) [<https://perma.cc/2VAS-QAWD>].

214. See Donna Sedgwick, et al., *The Role of Collaboration in Complying with COVID-19 Health Protective Behaviors: A Cross-National Study*, 54 ADMINISTRATION & SOC'Y 29, 36 (2021).

215. Office of the United Nations High Commissioner for Human Rights, *supra* note 213, at 1.

216. Sarah Joseph, COVID-19 and Human Rights: Past, Present and Future (Griffith Law School Research Paper No. 20-3), at 1, available at

A lot of rights are affected by the pandemic due to the interrelated and interdependent nature of these rights.²¹⁷ Scholars have endeavored to deconstruct the rights that may be affected depending on the so-called cycle of the crisis or on the particular rights-based question that is at issue. From a cycle-of-the-crisis analysis —

Firstly, a greater degree of freedom of expression and freedom of information in China at the dawn of the crisis in ‘the past’ may have prevented its snowballing within China and across the world. Secondly, in the ‘present’ stage of the crisis, States are navigating different ways of containing the virus: numerous human rights are being restricted including rights regarding assembly, association, detention, movement, employment, and of access to scarce health resources. Many (though not all) of those restrictions may be justified and therefore in compliance with human rights, though calibration will likely be needed as we learn more about the virus and how it is spread. Finally, the ‘future’ development of a vaccine will usher in new human rights conundrums, including questions regarding the rights of those upon whom candidate vaccines are tested, and the rights of everyone to access what could be the most anticipated medical innovation in history.²¹⁸

The UN Office of the High Commissioner for Human Rights (OHCHR) has also adopted this cycle-of-the-crisis approach in its description of the different rights affected in different facets of the COVID-19 crisis — from access to health care, emergency measures, and up to specific sectoral rights.²¹⁹

From a question-specific approach, scholars have delved into various questions, such as border restrictions and the limitations on mobility.²²⁰ In this latter question, the right that may be affected is the freedom of movement and

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574491 (last accessed Jan. 30, 2022) [<https://perma.cc/4DA3-CV3M>].

217. *Id.* at 8.

218. *Id.* at 10–11. Indeed, in the now “future” cycle, the “rights to health, life, and equitable access to the benefits of technology” are relevant. See Sarah Joseph & Gregory J. Dore, Vaccine Apartheid: A Human Rights Analysis of COVID-19 Vaccine Inequity, at 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3876848 (last accessed Jan. 30, 2022) [<https://perma.cc/EN7Y-8FMY>].

219. Office of the United Nations High Commissioner for Human Rights, *supra* note 213.

220. *Id.* at 5.

also the right to asylum.²²¹ With regard to vaccines, scholars have questioned the iniquitous situation of access, along with other life-saving medicines.²²² Other specific questions are being asked — and they deserve to be answered.

However, for the purposes of this Article, there will only be a limited discussion on the right to health in order to illustrate that international human rights law is relevant for the determination of the rules in the blame game using the framework of international human rights law.

The right to health is enshrined in the ICESCR.²²³ Article 12 of the ICESCR provides that

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

- (c) The prevention, treatment and control of epidemic, endemic, occupational[,] and other diseases[.]²²⁴

Such right finds expression in other legal instruments. Apart from the ICESCR, other universal treaties on human rights such as the Convention on the Rights of the Child,²²⁵ Convention on the Rights of Persons with Disabilities,²²⁶ International Convention on Protection of the Rights of All

221. *Id. See, e.g.,* Bríd Ní Ghráinne, Covid-19, Border Closures, and International Law, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662218 (last accessed Jan. 30, 2022) [<https://perma.cc/2GCC-AC9K>] & Fernando Dias Simões, *COVID-19 and International Freedom of Movement: A Stranded Human Right?*, 20 YALE J. HEALTH POL'Y L. & ETHICS 362 (2022).

222. See Kevin Bardosh, et al., The Unintended Consequences of COVID-19 Vaccine Policy: Why Mandates, Passports, and Segregated Lockdowns May Cause More Harm than Good, at 13-14, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022798 (last accessed Jan. 30, 2022) [<https://perma.cc/5USL-LMZT>].

223. International Covenant on Economic, Social and Cultural Rights, *supra* note 93, art. 12.

224. *Id.* art. 12 (1) & (2) (c).

225. Convention on the Rights of the Child, *supra* note 94.

226. Convention on the Rights of Persons with Disabilities, *signed* Dec. 13, 2006, 2515 U.N.T.S. 3.

Migrant Workers and Members of their Families,²²⁷ the Convention on the Elimination of All Forms of Discrimination Against Women,²²⁸ as well as other regional instruments, include the right. The 1946 Constitution of the WHO also provides that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic[,] or social condition.”²²⁹ Finally, domestic constitutions also guarantee this right to health, with over 109 countries recognizing the right in their national constitutions.²³⁰

Everyone has a right to the “highest attainable standard of health[.]”²³¹ The United Nations Committee on Economic Social and Cultural Rights (UN CESCR) has said that the right to health has two components: *first*, is the physical health; and *second*, is the mental health.²³² General Comment No. 14 of the UN CESCR discusses the normative content of the right to health.²³³ The freedoms include the “right to control one’s health and body, including sexual and reproductive freedom, [] the right to be free from interference, such as the right to be free from torture, [as well as] non-consensual medical treatment and experimentation.”²³⁴ The entitlements also include the “right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”²³⁵

227. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *signed* Dec. 18, 1990, 2220 U.N.T.S. 3.

228. Convention on the Elimination of All Forms of Discrimination Against Women, *signed* Dec. 18, 1979, 1249 U.N.T.S. 13.

229. WHO Constitution, *supra* note 163, pml.

230. See HERNÁN LUIS FUENZALIDA-PUELMA, ET AL., THE RIGHT TO HEALTH IN THE AMERICAS: A COMPARATIVE CONSTITUTIONAL STUDY (1989), Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1467 (2001), & Alicia Ely Yamin, J.D., MPH, *The Right to Health Under International Law and its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156, 1157 (2005).

231. WHO Constitution, *supra* note 163, pml.

232. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), ¶¶ 1 & 2, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter General Comment No. 14].

233. *Id.* at 2.

234. *Id.* ¶ 8.

235. *Id.*

According to the UN CESCR, the right has four elements:

(a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as [programs], have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods[,] and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs;

(b) *Accessibility*. Health facilities, goods[,] and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

Non-discrimination: health facilities, goods[,] and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds;

Physical accessibility: health facilities, goods[,] and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities;

Economic accessibility (affordability): health facilities, goods[,] and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;

Information accessibility: accessibility includes the right to seek, receive[,] and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality;

(c) *Acceptability*. All health facilities, goods[,] and services must be respectful of medical ethics and culturally appropriate, i.e.,[,] respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and

life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned;

(d) *Quality*. As well as being culturally acceptable, health facilities, goods[,] and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.²³⁶

The UN CESCR has also explained that States must establish a system of urgent medical treatment in circumstances of epidemics and give disaster relief and humanitarian aid in emergency situations.²³⁷ The State's obligation to control diseases also refers to the "State's individual and joint efforts to, *inter alia*, make relevant technologies" available for use, "[improve] epidemiological surveillance[,] and data collection on a disaggregated basis," and implement or enhance the immunization programs and other infectious disease control strategies.²³⁸

Nonetheless, there has been a considerable cross-fertilization between the law of state responsibility and international human rights law. States can and should take advantage of the already existing institutions and of the emerging principles of state responsibility to take up complaints of breaches of human rights and humanitarian norms through diplomatic channels or before international judicial and quasi-judicial bodies, possibly also through mediation and arbitration.

When it comes to IHRL interposed with the law of state responsibility, it has to be remembered that the latter co-exists with international treaty law, in particular, the treaties safeguarding human rights.²³⁹ When the latter, however, constitutes *lex specialis*, or special rules, they take precedence over the former in the event of any discrepancy.²⁴⁰ Further, insofar as the ARSIWA places a strong emphasis on interstate relations, it is of limited use in human rights legislation.²⁴¹ Article 33 of the ARSIWA provides that nothing in the law of state responsibility should preclude any rights arising from a State's international responsibility that would "accrue directly to any person[.]"²⁴²

236. *Id.* ¶ 12.

237. *Id.* ¶ 16.

238. General Comment No. 14, *supra* note 232, ¶ 16.

239. ALSTON & GOODMAN, *supra* note 149, at 99.

240. *Id.*

241. *Id.*

242. *Id.* & ARSIWA, *supra* note 97, art. 33.

Many of the ARSIWA rules, however, are phrased “in terms of an injury to another State and the actions that [S]tates may take in response to” being illegally wounded.²⁴³ In this sense, state responsibility is “flawed” because it is “a law created for states by states within a state-based legal framework[.]”²⁴⁴

For practical purposes, it is thus clear that breaches of international human rights norms could be an anchor to hold a State responsible, especially those in the context of the response to the pandemic, by that State in regard to the human rights of citizens or persons under its control. For instance, questions — such as the legality of lockdowns or other restrictions to curb the pandemic affecting the citizen²⁴⁵ — could be asked. In the current situation where emergencies had been declared the world over, it may be asked if measures instituted comply with the requirements of the permissible derogations of rights under human rights law, in certain cases.²⁴⁶

The invocation of a violation of applicable international human rights law against one State by a citizen of another State *directly* may, however, be problematic, or at least, not as straightforward to answer. Human rights law, by design and theory, ordinarily assumes a directly vertical orientation,²⁴⁷ in that human rights norms form the basis for the obligation of one’s State to the

243. ALSTON & GOODMAN, *supra* note 149, at 99.

244. Valentina Milano, *The International Law of Human Trafficking: At the Forefront of the Convergence Between Transnational Criminal Law and International Human Rights Law?*, in CONVERGENCES AND DIVERGENCES BETWEEN INTERNATIONAL HUMAN RIGHTS, INTERNATIONAL HUMANITARIAN AND INTERNATIONAL CRIMINAL LAW 124 (Paul De Hert, et al. eds., 2018) (citing Robert McCorquodale, *Impact on State Responsibility*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW 254 (Menno T. Kamminga & Martin Scheinin eds., 2009)).

245. See, e.g., Andrew Geddis, *The Legal Basis for the Lockdown May Not Be as Solid as We’ve Been Led to Believe*, available at https://www.lexisnexis.com.au/en/COVID19_NZ/blogs-and-articles/the-legal-basis-for-the-lockdown-may-not-be-as-solid-as-weve-been-led-to-believe (last accessed Jan. 30, 2022) [<https://perma.cc/K5XB-6RH9>].

246. See International Covenant on Civil and Political Rights art. 4, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171. See also American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, at 10–12, available at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (last accessed Jan. 30, 2022) [<https://perma.cc/J7TF-S2K7>].

247. This point was discussed in Chapter II (B) of this Article.

citizen or to the person under the State's control or jurisdiction.²⁴⁸ Exceptionally, extraterritorial obligations may be found to be existing applicable in certain cases.

To recapitulate, there has been a significant amount of cross-fertilization between the laws of state responsibility and international human rights law in recent years. International judicial and quasi-judicial bodies can and should be used by States to bring complaints about violations of human rights and humanitarian norms to the attention of the international community.²⁴⁹ In the words of Theodor Meron, "States can and should take advantage of the already existing institutions[,]"²⁵⁰ as well as the "emerging principles of state responsibility" to bring these complaints.²⁵¹

Aside from the IHR and IHRL, other branches of international law may be applicable to specific instances of questions around state responsibility in the context of the COVID-19 pandemic. It would depend on a case-by-case basis and the attendant facts.

IV. CONTROVERSIES AROUND THE RULES OF THE GAME: SOME REFLECTIONS

While this Article has discussed the possible rules that govern the matter of state responsibility in relation to the COVID-19 pandemic, a number of outstanding and disconcerting questions remain. The Author has sketched some of the most pressing ones. The *first* concerns the applicability of the rules, which relates to the fragmentation of the law, and how it could affect the pursuit of accountability.

The *second* exposes the disagreements around the pro-responsibility and anti-responsibility arguments. While there are arguments to be made on both, if not more sides, many facts remain uncertain around the COVID-19 fiasco. It is not surprising that the scenario draws attention to the apparent deficiencies of the international legal framework when it comes to dealing with problems of accountability in the context of a pandemic. Normative frameworks seem

248. See ARSIWA, *supra* note 97, ch. II.

249. Theodor Meron, Professor of Law, New York University School of Law, *State Responsibility for Violations of Human Rights*, Remarks at a Seminar by American Society of International Law (Apr. 6, 1989) (transcript available at AMERICAN SOCIETY OF INTERNATIONAL LAW, 83 PROCEEDINGS OF THE 115TH ANNUAL MEETING 372 (1989)).

250. *Id.*

251. *Id.*

to be disputed in terms of providing final answers to concerns of state responsibility in a way that is both mutually agreeable and acceptable, as well as effective.

A. Divisions and Dissension with Regard to the Applicability of the Rules

Although many would agree that the doctrine of state responsibility is applicable,²⁵² not all are in agreement as to what all the primary rules of international law govern the different pandemic-related questions. There are unsettling questions around the relationship between the primary and secondary rules of international law.²⁵³ As mentioned, the application of the doctrine of state responsibility is often controversial, and the doctrine is not simply about who is responsible for what kind of breach, but also as to *how* and *why*.

State responsibility is not just about attributability and the breaches of international obligations. How a question is framed, and what is excluded, are also pivotal. Of course, a lot of these will depend on *what* the specific question is — as mentioned, the questions in general engage various vertical and horizontal aspects: *who* are allegedly involved in a given question, *where*, *when*, *how*, *why*, as well as the forum for the application of the rules. Nevertheless, this speaks a lot about the nature of the rules of international law, and reveals that the relationship between its primary and secondary rules are not always straightforward.

To give an example, at one level, scholars propound that the primary rules applicable are not just the rules of the IHR and IHRL. There have been some arguments that the virus' worldwide spread may be regarded as transboundary harm.²⁵⁴ Yet, some claim that it is erroneous to identify international contagion as transboundary harm, and that doing so would pose a serious danger to the individual's status and treatment under international law as a result.²⁵⁵

In the other types of claims having international implications, which are lawsuits made against foreign governments by people and sub-state entities in domestic courts, the rules of sovereign immunity may be also relevant and

252. See Chaturvedi, *supra* note 26.

253. International Law Commission, *supra* note 89, at 31.

254. Sophie Capicchiano Young, *State Responsibility for COVID-19: Does International Contagion Constitute Transboundary Harm?*, 11 ASIAN J. INT'L L. 372, 373 (2021).

255. See *id.* at 373-74.

could be raised during the jurisdictional phase of the trial.²⁵⁶ The Chinese Communist Party (CCP), as well as the Chinese government, has been sued in an attempt to get around this problem.²⁵⁷ The CCP has argued that “China’s [actions] were *de jure gestionis* rather than sovereign in nature[, and as a result, they are] an exception to jurisdictional immunity.”²⁵⁸ Immunity would also be an issue if the one being sued (or at least, declared responsible for a pandemic-related incident) is an international organization such as the WHO, the United Nations, or a regional bloc with international legal personality, likewise the law of international organizations²⁵⁹ — which involves questions of immunity.

At another level, there are disputes as regards the applicability of the norms of the IHR and IHRL themselves. While a question is unique and one set of norms may be directly and exclusively applicable than the other, it is not always the case. For instance, when it comes to direct state responses to curb the spread of the pandemic in a State, both set of norms will have to be considered inasmuch as there are state obligations under the IHR and IHRL that will be engaged. The closure of a State’s border to curb the pandemic, to illustrate, can be both considered a public health response under the IHR’s rules,²⁶⁰ as well as a measure to protect the right to health, including the right to life of the people under IHRL.²⁶¹ Whether the closure of a border is an allowable limitation of freedom of movement,²⁶² whether the State has declared the pandemic as an emergency that threatens the life of a nation, and whether the measure is a proper derogation of rights under each case, are

256. Sarah Heathcote, State Responsibility, International Law and the COVID-19 Crisis (ANU College of Law Research Paper No 21.22), at 4, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3937744 (last accessed Jan. 30, 2022) [<https://perma.cc/NRJ3-TA7G>].

257. *See id.* n. 12 & Complaint–Missouri, *supra* note 81.

258. Heathcote, *supra* note 256, at 4.

259. “The Law of International Organizations will examine the principal issues regarding organizations whose membership is that of states.” University of Minnesota, Law of International Organizations — 6887, *available at* <https://law.umn.edu/course/6887/law-international-organizations> (last accessed Jan. 30, 2022) [<https://perma.cc/ZQ3L-AA3E>].

260. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 13.

261. International Covenant on Economic, Social and Cultural Rights, *supra* note 93, art. 12 & International Covenant on Civil and Political Rights, *supra* note 246, art. 6.

262. Office of the United Nations High Commissioner for Human Rights, *supra* note 213, at 5.

concerns of IHRL.²⁶³ In other words, pandemic-related questions are a situation of the “confluence of the legal regimes.”²⁶⁴

When avenues for accountability are pursued, decision-makers will have to choose which rules of international law are applicable to a given question. The question is: if they were to choose which one is applicable, which of the sets of norms apply to pandemic-related concerns of state responsibility? In the same manner, could they apply the two sets of norms without an issue? It cannot be said that there will be no problem at all if both and/or other regimes of international law are applied altogether to a pandemic-related question of state responsibility. There may be issues of interpretation and “harmonization” or “reconciliation” of the different regimes.²⁶⁵

International law is not as “hierarchical” like most domestic legal systems, which means that numerous different legal frameworks may be applicable to the same topic.²⁶⁶ International law suffers from the virtues and vices of *fragmentation*.²⁶⁷ What is present is a very much divided international law. IHRL, as a regime, also already suffers from the lack of a high degree of consensus about the “core content of many [] human rights norms.”²⁶⁸ Despite the high ratification rates of key human rights treaties and the fact that many of the Universal Declaration of Human Rights²⁶⁹ non-binding provisions already reflect customary international law, several fundamental norms remain debatable.²⁷⁰ Economic, social, and cultural rights — health is one of the social rights — have been particularly contentious due to their economic implications and the greater role governments are assigned.²⁷¹

In this regard, a paramount issue confronts the framework of state responsibility — whether it is useful for achieving accountability or for moving

263. See American Association for the International Commission of Jurists, *supra* note 246, at 10-12.

264. Heathcote, *supra* note 256, at 7.

265. See *id.*

266. See generally Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2002).

267. *Id.*

268. Kristen E. Boon, *The Law of Responsibility: A Response to Fragmentation?*, 25 GLOBAL BUS. & DEV. L.J. 395, 396 (2012).

269. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

270. Boon, *supra* note 268, at 396.

271. *Id.*

on from the “blame game,” together with the primary rules. While the situation presents one of “confluence” of different regimes,²⁷² the ARSIWA is a “unified regime of responsibility, expressing the core ideas of responsibility applicable to the breach of any and all obligations of [S]tates ..., at least in principle.”²⁷³ However, the ARSIWA does not fully regulate state responsibility, and its components are “relevant to a varying degree.”²⁷⁴ While the concept of state responsibility with compensation is broadly understood, the regime for significant violations remains inadequate.²⁷⁵ There are ambiguous problems, including “attribution, collective countermeasures,” and distribution of responsibility among several actors.²⁷⁶ A much more contentious question is whether the doctrine of state responsibility is adequate to address pandemic-related questions. Even positivist scholars of international law have admitted that state responsibility has “remained often insufficient to regulate the new areas.”²⁷⁷

B. Disagreements Around Pro-responsibility and Anti-responsibility Arguments

While there will always be two (or more) sides to a coin in relation to legal questions, this Article will now demonstrate that the debates around responsibility are far from over. The debates may die down at one point or another. But, they are enduring questions, which may be left unresolved in state relations if law reform is not embarked. These legal questions are of varying nature and kind. Until a specific question is posed in relation to a specific set of actors and their actions or inactions before a particular forum (and a decision or award is made or granted), the arguments could swing like a pendulum around the coalescing issues and concerns of the pandemic and state responsibility.

272. Heathcote, *supra* note 256, at 7.

273. Katja Creutz, The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal, *available at* <https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal> (last accessed Jan. 30, 2022) [<https://perma.cc/Q7LN-MQFL>].

274. *Id.*

275. *Id.*

276. *Id.*

277. Koskenniemi & Leino, *supra* note 266, at 561 n. 32 (citing Bruno Simma, *From Bilateralism to Community Interest in International Law*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1994)).

Indeed, a flurry of scholarship has emerged in the wake of COVID-19 and the doctrine of state responsibility. This Article will just name a few claims here based on recent articles and scholarly work. The arguments that have been levelled blaming one State are the most pronounced in claiming that China is responsible for pandemic-related world events.²⁷⁸ China, the State of origin of the virus,²⁷⁹ has obligations under the IHR and is a party to the ICESCR.²⁸⁰ Others are mainly about individual state actions in relation to citizens and other nationals with respect to the normative interaction of international human rights and national responses.

A number of people, as previously mentioned, believe that China failed in its duty to inform the WHO correctly of the true initial status of COVID-19.²⁸¹ China has even been accused of stifling a whistleblower doctor who was reporting on the pandemic's early stages.²⁸² Scholars contend that China's refusal to promptly and honestly communicate information with the WHO is an early and subsequent violation of its legal duties under the IHR.²⁸³ Article 6 of the IHR provides that States should "assess events occurring within its territory by using the decision instrument in Annex 2" of the IHR.²⁸⁴ They should have notified the WHO by "most effective means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which

278. Chapter II (B) of this Article provides a discussion on these arguments.

279. Zhu, et al., *supra* note 74, at 1.

280. United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4 (last accessed Jan. 30, 2022) [<https://perma.cc/XZU9-B38S>].

281. Complaint-Mississippi, *supra* note 81, ¶ 1.

282. Helen Davidson, *Chinese Inquiry Exonerates Coronavirus Whistleblower Doctor*, *GUARDIAN*, Mar. 20, 2020, *available at* <https://www.theguardian.com/world/2020/mar/20/chinese-inquiry-exonerates-coronavirus-whistleblower-doctor-li-wenliang> (last accessed Jan. 30, 2022) [<https://perma.cc/8YTB-7GJU>].

283. Errol Patrick Mendes, et al., *China Was in Violation of International Health Regulations. What Do We Do Now?*, *available at* <https://www.macleans.ca/opinion/china-was-in-violation-of-international-health-regulations-what-do-we-do-now> (last accessed Jan. 30, 2022) [<https://perma.cc/N67Y-AQGS>].

284. INTERNATIONAL HEALTH REGULATIONS, *supra* note 30, art. 6 (1).

may constitute a public health emergency of international concern within its territory in accordance with the decision instrument[.]”²⁸⁵

There is also another possibly relevant article in the IHR: Article 7 on “[i]nformation-sharing during unexpected or unusual public health events.”²⁸⁶ Article 7 provides that

[i]f a State [] has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to [the] WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.²⁸⁷

Thus, it can be seen that there is this requirement for timely notification.²⁸⁸

According to these claims, the alleged (in)action is attributable to China.²⁸⁹ The Chinese President’s actions are attributable to China since he is a member of the Chinese government, which includes local Wuhan authorities.²⁹⁰ Any individual or organization functioning in conformity with national legislation is considered an “organ of the [S]tate.”²⁹¹ It does not matter whether China disavows local authorities’ or state media’s behavior as not necessarily being traceable to the national government, as long as the State acknowledges and adopts that conduct as its own as officials in Beijing did.²⁹²

Because of this, it is claimed that China is legally responsible for its improper conduct and should provide full reparation for the injury caused based on the ARSIWA.²⁹³ It is a fundamental rule of international law, and even a basic understanding of law itself, that every violation entails a duty to

285. *Id.*

286. *Id.* art. 7.

287. *Id.*

288. *Id.* arts. 6 & 7.

289. Complaint–Mississippi, *supra* note 81, ¶ 1.

290. James Kraska, China Is Legally Responsible for Covid-19 Damage and Claims Could Be in the Trillions, *available at* <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions> (last accessed Jan. 30, 2022) [<https://perma.cc/UWW3-2FWD>].

291. *Id.*

292. *Id.*

293. *Id.*

make reparation.²⁹⁴ As far as practicable, reparation must eliminate all of the effects of the unlawful conduct and restore the condition that would have prevailed if the conduct had not been done.²⁹⁵ Even if there is no tangible loss, an order for monetary compensation may be issued for a violation of an international obligation that causes serious moral and legal harm.²⁹⁶

On the other side of the pendulum, there are number of arguments that the Author thinks China could raise as possible defenses. The *first* is the most obvious one: that China did not actually violate any legal obligation. In essence, as stated earlier, every State is liable for an internationally wrongful act.²⁹⁷ This statement under Article 1 is the heart of the matter in the ARSIWA. Accordingly, considering the two elements in Article 2,²⁹⁸ China could argue that it has not really violated any substantial obligation under international law, whether it be in the ICESCR, as far as human rights law is concerned, or in the IHR.

Assuming further that there was some sort of unlawful action or inaction, and such occurred in the territory of China, China could also, in addition, probably further the argument that the Chinese authorities, as state organs of China,²⁹⁹ were not involved at all in the alleged violations of international obligations. China could say that the actions originated from and were caused by private actors (as there is now research supporting the view that the pandemic was not “state-caused”)³⁰⁰ and that China did not commit anything wrong in the process. This defense, however, requires other supporting arguments to strengthen it.

294. The Factory at Chorzów (Claim for Indemnity) (Ger. v. Pol.), Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

295. *Id.* at 47.

296. Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (N.Z./Fr.), Ruling of the Secretary-General, 20 R.I.A.A 215, ¶ 118 (1990).

297. ARSIWA, *supra* note 97, art. 1.

298. *Id.* art. 2.

299. Kraska, *supra* note 290.

300. See Amy Maxmen, Wuhan Market Was Epicentre of Pandemic's Start, Studies Suggest, *available at* <https://www.nature.com/articles/d41586-022-00584-8> (last accessed Jan. 30, 2022) [<https://perma.cc/9JT7-HN4R>].

There are also a number of well-established defenses to state responsibility.³⁰¹ The defenses of “*force majeure*, state of necessity, and distress” are perhaps the most significant of the six that are recognized by the ARSIWA.³⁰² China could claim that the pandemic was an unforeseen event or an irresistible force that is beyond its control and that the event made it “materially impossible ... to perform” its obligations under the IHR or IHRL.³⁰³ In mounting this defense of *force majeure*, China has to prove though that it did not contribute to the situation and must not have “assumed the risk of the situation occurring.”³⁰⁴

When it comes to the defense of state of necessity, China could argue that the pandemic is “a situation in which the sole means by which [it] can safeguard an essential interest from a grave and imminent peril is to sacrifice another State’s interest of lesser importance.”³⁰⁵ Scholars have quickly pointed out, however, that obligations such as those included in “human rights treaties[,] which are subject to limitations and derogations,” may preclude relying on the argument of necessity.³⁰⁶

As for distress, China could emphasize that there was no other reasonable way of saving China or the life of its citizens and/or inhabitants than to act the way it did.³⁰⁷ Under this argument, it has to prove that there was threat to life; a special relationship between the state organ and said persons; no other

301. ARSIWA, *supra* note 97, ch. V.

302. *Id.* arts. 23–25 & Federica Paddeu & Freya Jephcott, COVID-19 and Defences in the Law of State Responsibility: Part I, *available at* <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i> (last accessed Jan. 30, 2022) [<https://perma.cc/W8TJ-7U5X>].

303. ARSIWA, *supra* note 97, art. 23.

304. *Id.* Paddeu & Jephcott argue that China could not meet the requirements for a *force majeure* defense, as it “may have difficulty meeting the high threshold to establish that there is a ‘material impossibility’ of performance.” Paddeu & Jephcott, *supra* note 302.

305. Sarah Heathcote, State of Necessity, *available at* <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0025.xml> (last accessed Jan. 30, 2022) [<https://perma.cc/TS5U-GSSL>].

306. Paddeu & Jephcott, *supra* note 302.

307. *See* International Law Commission, *supra* note 89, at 83, ¶ 15.

reasonable way to deal with the threat; it did not contribute to the situation; and that the measures were proportionate.³⁰⁸

Additionally, China could highlight the argument that the burden of proof does not lie with China but with other States to prove that the former in actuality committed something wrong,³⁰⁹ and that those States should be able to prove that any damage was incurred — economic or otherwise. The damage should in fact be caused by China's failure to act, or an action of China that is in violation of an international obligation. Depending on the obtaining circumstances of a legal question, as in the *Trail Smelter Case*,³¹⁰ it may be found that the “damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity.”³¹¹ If that will be the case, “an award of indemnity would be purely speculative.”³¹² Further, it has to be shown that if China had acted in line with its obligations, then the damage could have been prevented.³¹³ To put it another way, the question is “whether there is a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered[.]”³¹⁴ This is known as the “sufficiently direct and certain causal nexus” test.³¹⁵

Nevertheless, it should be added that much of the facts around the origins of and early responses to the pandemic remain disputed.³¹⁶ A live and real legal question could not be answered in the abstract. Facts are needed in disposing issues, especially those that concern state responsibility. It is thus no wonder that there are now proposals to establish an international commission of

308. *Id.* at 80–84.

309. *Id.* at 72, ¶ 8.

310. *Trail Smelter Case* (U.S./Can.), Award, 3 R.I.A.A. 1905 (1941).

311. *Id.* at 1931.

312. *Id.*

313. See Romel Regalado Bagares, *China, International Law, and COVID-19*, INQ., Mar. 22, 2020, available at <https://opinion.inquirer.net/128226/china-international-law-and-covid-19> (last accessed Jan. 30, 2022) [<https://perma.cc/TA4Q-M5UY>].

314. *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Compensation, Judgment, 2018 I.C.J. 15, ¶ 32 (Feb. 2).

315. *Id.*

316. Compare Maxmen, *supra* note 300, with Stephan Lewandowsky, et al., *The Lab-Leak Hypothesis Made It Harder for Scientists to Seek the Truth*, available at <https://www.scientificamerican.com/article/the-lab-leak-hypothesis-made-it-harder-for-scientists-to-seek-the-truth> (last accessed Jan. 30, 2022) [<https://perma.cc/UP9H-Q73A>].

inquiry for COVID-19,³¹⁷ and because a WHO investigation is “unlikely to materialize,”³¹⁸ States could call for an independent scientific investigation headed by a coalition of scientists.³¹⁹

Overall, to say that the situation points to the obvious shortcomings of international law in dealing with accountability issues during a pandemic would be an understatement. State accountability issues engage normative frameworks, which are contested in their ability to provide mutually accepted and acceptable and effective responses to legal questions. With the status quo, it is difficult to definitively determine if China violated international law. However, the issue becomes much more difficult in light of other countries’ conduct and particular WHO measures.³²⁰ The so-called “pandemic politics” has also been molded less by international law than by geopolitics.³²¹ “[S]tate practice has shown little, if any, interest in principles of state responsibility for acts alleged to be legally wrongful with respect to the transboundary movement of pathogens.”³²²

V. CONCLUSION: MOVING FROM BLAME TO ACCOUNTABILITY

This Article has demonstrated, given the present state of things, the inadequacies of international law in providing definitive answers to the most basic of questions that the international community grapples with in relation to COVID-19, as well as state responsibility for the pandemic-related events. Perhaps, it is true that the doctrine of state responsibility under international

317. Michael A. Becker, Do We Need an International Commission of Inquiry for COVID-19? Part II, *available at* <https://www.ejiltalk.org/do-we-need-an-international-commission-of-inquiry-for-covid-19-part-ii> (last accessed Jan. 30, 2022) [<https://perma.cc/6DZ5-5LDA>].

318. Thomas J. Bollyky & Yanzhong Huang, *The Right Way to Investigate the Origins of COVID-19*, FOREIGN AFF., Aug. 12, 2021, *available at* <https://www.foreignaffairs.com/articles/china/2021-08-12/right-way-investigate-origins-covid-19> (last accessed Jan. 30, 2022) [<https://perma.cc/A7TM-NQHH>].

319. *Id.*

320. David Fidler, COVID-19 and International Law: Must China Compensate Countries for the Damage?, *available at* <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations> (last accessed Jan. 30, 2022) [<https://perma.cc/DE86-F6ZJ>].

321. See Argyrios Altiparmakis, et al., *Pandemic Politics: Policy Evaluations of Government Responses to COVID-19*, 44 W. EUR. POL. 1159 (2021).

322. Fidler, *supra* note 320.

law, with reference to the primary rules, is unable to cope with, and regulate such modern questions. Thus, reforms could and should be undertaken to remedy the situation to better respond to future pandemics.

One could not deny that the pandemic poses hard, but novel, questions that should give the readers a pause to reconsider what might be done to better respond to questions of accountability, far from just being an issue of blame. The COVID-19 pandemic has indeed changed the world, affecting billions and infecting millions of people in the world.³²³ It is an ongoing human and state crisis.³²⁴ State responsibility has been designed to be a tool for accountability,³²⁵ not solely for blaming or finding fault; yet States seem to be stuck in the mold of finding blame for the pandemic and the consequences that have flowed from it.³²⁶

A possible way forward is to develop global health law as a primary framework to deal with pandemic-related events in order to assuage fears that the fragmentation of international law could and would thwart accountability efforts. It could be designed to be the *lex specialis*³²⁷ that would apply to pandemic-related international legal questions. This would require the careful and calibrated incorporation of human rights norms and other related customary norms within such a body of law.

Another possibility is the restatement of the law of state responsibility — to better be designed to capture and provide answers to questions relating to pandemic-related events — while maintaining its character in general international law.

323. ILO, FAO, IFAD, & WHO, *supra* note 12.

324. See United Nations Department of Economic and Social Affairs, *supra* note 38.

325. See Weiss, *supra* note 27.

326. See, e.g., Biden, *supra* note 57.

327. ALSTON & GOODMAN, *supra* note 149, at 99.