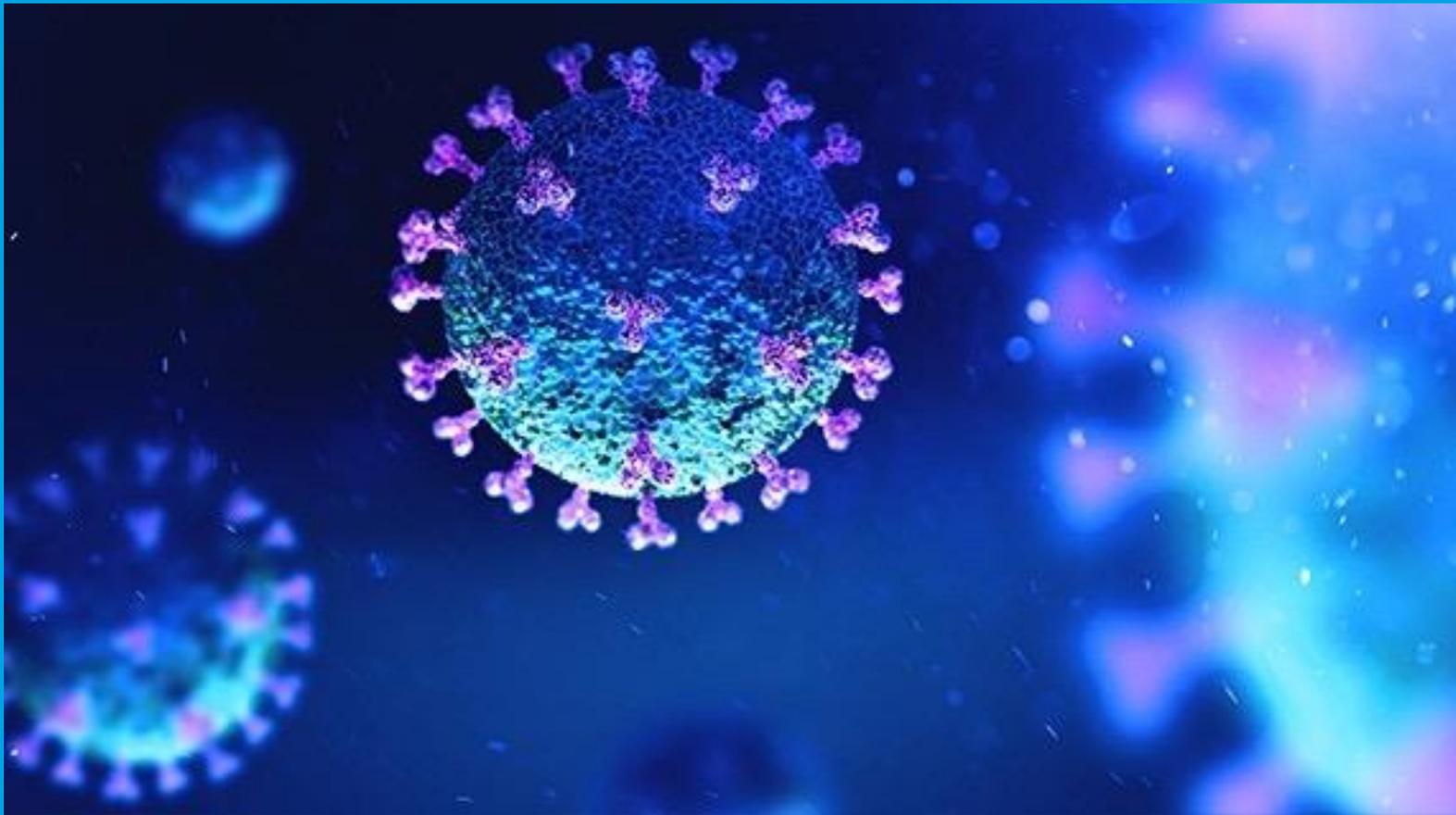


# **Global Health Governance: The Legal Duty of States to Cooperate in the Fight Against Pandemic Disease**

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November 2021



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International and  
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# The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

*Funded by the UK Arts and Humanities Research Council, grant AH/V015214/1*

This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust.

In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations.

This project examines two critical enablers of that trust: good governance and the rule of law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

- (1) International governance frameworks for public health emergencies.
- (2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, courts and police.
- (3) Reforms that may be needed to data governance (national and international) given the scale of personal data sharing that is required.
- (4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

<https://binghamcentre.biicl.org/projects/the-role-of-good-governance-and-the-rule-of-law-in-building-public-trust-in-data-driven-responses-to-public-health-emergencies>

This report forms part of Work Package 1. The author is grateful to colleagues for discussion of earlier drafts, and comments received from Jan van Zyl Smit, Jean-Pierre Gauci and Richard Mackenzie-Gray Scott.

# Global Health Governance: The Legal Duty of States to Cooperate in the Fight Against Pandemic Disease

*The paper outlines the contemporary legal framework of global health focusing on the legal duty of States to cooperate in the surveillance, prevention, and control of epidemic and pandemic disease. The paper examines, in particular, the role of the World Health Organization and other United Nations bodies in fostering cooperation between States in the fight against epidemics and pandemics. It also details the content and nature of States' duty to cooperate under the International Health Regulations – the primary international legal instrument governing the global response to such events.*

## 1. Introduction

Global institutional cooperation for the control of infectious disease began in earnest in the mid-nineteenth century with the convening of the first International Sanitary Conference in 1851 to address the standardisation of quarantine regulations aimed at preventing the importation of cholera, plague, and yellow fever.<sup>1</sup> Some astonishing developments in global health cooperation have occurred since then. These included the negotiation and adoption of the International Sanitary Conventions starting in the 1890s, the creation of the World Health Organization (WHO) in 1948, and later the adoption of the International Health Regulations (IHR) to limit the international spread of disease.<sup>2</sup> The IHR, which are legally binding, were subsequently revised to facilitate international cooperation in the context of public health emergencies of global concern.<sup>3</sup> As this paper explains, the IHR establish a global surveillance and reporting system predicated on a duties of international cooperation: a) the duty to adopt a coordinated approach to surveillance, core health capacities and detection of public health risks; b) the duty to share information and alert the WHO and other States that when a certain risk has been identified; c) the duty to adopt a coordinated response in keeping with the WHO's recommendations on what States should do to prevent, manage, and control the disease; and d) duties regarding the prevention and resolution of disputes when implementing the IHR.

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<sup>1</sup> Norman Howard-Jones, 'The Scientific Background of the International Sanitary Conferences, 1851–1938' (WHO 1975) 9-12 <[https://apps.who.int/iris/bitstream/handle/10665/62873/14549\\_eng.pdf](https://apps.who.int/iris/bitstream/handle/10665/62873/14549_eng.pdf)>; Anastasia Telesetsky, 'International Governance of Global Health Pandemics' (ASIL Insights, 23 March 2020) <[www.asil.org/insights/volume/24/issue/3/international-governance-global-health-pandemics#\\_edn2](http://www.asil.org/insights/volume/24/issue/3/international-governance-global-health-pandemics#_edn2)>.

<sup>2</sup> Adopted for the first time in 1951 as 'International Sanitary Regulations', they covered six quarantinable diseases: cholera, plague, epidemic louse-borne typhus, relapsing fever, smallpox, and yellow fever. They replaced the International Sanitary Regulations of 1892 which did not cover epidemic diseases. The Twenty-Second Assembly (1969) revised and consolidated the International Sanitary Regulations and renamed them into the International Health Regulations (IHR). Following the outbreak of SARS and avian influenza threats in the early 2000s, the WHO Assembly revised the IHR in 2005. The new version entered into force in 2007. For a history of the regulations, see David L Heymann, 'The International Response to the Outbreak of SARS in 2003' (2004) 359 Philosophical Transactions of the Royal Society of London 1127- 1129; David P Fidler, 'The Covid-19 Pandemic, Geopolitics, and International Law' (2020) 11 Journal of International Humanitarian Legal Studies 237-248; Gerald Schatz, 'World Health Organization: Revision of the International Health Regulations' (2005) 44 International Legal Materials 1011.

<sup>3</sup> Lawrence O Gostin, Roojin Habibi, and Benjamin Mason Meier, 'Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats' (2020) 48 The Journal of Law, Medicine & Ethics 376-381.

Yet, implementing the IHR has remained extremely challenging. These challenges have frequently become politically salient. WHO Member States have been criticised for failing to comply with their international law obligations to cooperate, thus undermining the IHR's operational viability.<sup>4</sup> The IHR have come under sustained pressure during the COVID-19 pandemic.<sup>5</sup>

This paper submits that more attention should be paid to the provisions of the IHR which prescribe duties of international cooperation in the surveillance, prevention, and control of epidemic and pandemic disease. The paper identifies legal aspects of international cooperation which must be clarified to better address present and future pandemics. It suggests that more work should be done by States and the WHO to promote better understanding of what the IHR specifically require and offer clarity on the meaning of ambiguous terms concerning duties of inter-State cooperation. Clarity on the content and meaning of the legal provisions which underpin the triggering and implementation of these duties of cooperation is a necessary first step to achieving compliance. As Habibi and others noted:

*Without such clarity, it is impossible for states to know what they are allowed to do under the IHR when the next inevitable infectious disease outbreak occurs and it would be impossible for governments, international institutions, judicial bodies, and the public to judge whether those states are in compliance with their international legal obligations.<sup>6</sup>*

This paper analyses the content and nature of States' duty to cooperate in the surveillance, prevention, and control of epidemic and pandemic disease under the framework established by the IHR. This paper does not analyse all legal frameworks and aspects of international cooperation which are applicable, or potentially applicable, to pandemics.<sup>7</sup> This paper instead discusses the duties of international cooperation under the IHR; the current and emerging dimensions of such cooperation; and the relationship with other international obligations.

## 2. Past and Present Pandemic Cooperation

### Overview of Pandemic Cooperation

The history of epidemics and pandemics is a crucial starting point to analyse international cooperation in global health governance. Epidemics<sup>8</sup> and pandemics<sup>9</sup> ebb and flow: they come and go over time.

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<sup>4</sup> Lawrence O Gostin and Rebecca Katz, 'The International Health Regulations: The Governing Framework for Global Health Security' (2016) 94(2) *Millbank Quarterly* 264-313; Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014) 114-127.

<sup>5</sup> Allyn L Taylor and Roojin Habibi, 'The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance' (AJIL Insights, 05 June 2020) <<https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>>.

<sup>6</sup> Roojin Habibi et al, 'The Stellenbosch Consensus on Legal National Responses to Public Health Risks' (2020) *International Organizations Law Review* 1-68.

<sup>7</sup> On the obligation of cooperation under international law more broadly, see Rüdiger Wolfrum, 'Cooperation, International Law of' *Max Planck Encyclopedia of Public International Law* (Online Edition, 2010); For a complete list of the key areas of international law applicable to pandemics, see Jean-Pierre Gauci and Richard Mackenzie-Gray Scott, 'International Law Applicable to Public Health Emergencies' (BIICL Report, March 2021); Michael Freeman, Sarah Hawkes, and Belinda Bennett, *Law and Global Health – Current Legal Issues* (Volume 16, Oxford University Press 2014); Gian Luca Burci (ed), *Global Health Law* (International Law Series Volume I, Edward Elgar 2016); Gian Luca Burci and Brigit Toebe (eds), *Research Handbook on Global Health Law* (Edward Elgar 2018); Laurence O Gostin, 'World Health Law: Toward a New Conception of Global Health Governance for the 21st Century' (2005) 5(1) *Yale Journal of Health Policy, Law & Ethics* 413-424; Jennifer Prah Ruger, *Global Health Justice and Governance* (Oxford University Press 2018); Antonio Coco and Talita de Souza Dias, 'Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak' (*EJIL:Talk!*, 24 March 2020) <<https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>>.

<sup>8</sup> An epidemic refers 'to an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that area', US Centres of Disease Control and Prevention, 'Principles of Epidemiology in Public Health Practice' (3rd ed, US Department of Health and Human Services 2012) <<https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html>>; Epidemicity is relative to the usual frequency of the disease in the same area, among the specified population, at the same season of the year, see 'Epidemic' in Miguel Porta (ed) *A Dictionary of Epidemiology* (6th edn, Oxford University Press – Online edition 2016).

<sup>9</sup> A 'pandemic' refers to an epidemic that has spread over several countries or continents, usually affecting a large number of people, US Centres of Disease Control and Prevention (ibid); 'Characteristics of an infectious agent influencing the causation of

COVID-19 is the 'latest leaf on this particular weed in the prosperous garden of medical history'.<sup>10</sup> The COVID-19 pandemic is not the first global pandemic, nor will be the last. The 'Plague of Justinian', the earliest recorded outbreak of the bubonic plague, caused by the bacillus *Yersinia pestis*, struck Constantinople in early 542 AD causing its sharp demographic and economic decline.<sup>11</sup> It is believed to have reduced the Byzantine population by 40-50 percent by the end of the century.<sup>12</sup> The Athenian plague, recorded in Thucydides' 'History of the Peloponnesian War', swept through the overcrowded city-state of Athens in 430–26 BC.<sup>13</sup> The plague claimed the lives of over 25 percent of its population. The 'Black Death' of the 14th century – likely caused by the same pathogen – may have killed 150 million people, claiming up to 60 percent of the European population at the time.<sup>14</sup> Tuberculosis, an airborne infectious lung disease, caused by *Mycobacterium tuberculosis* which originated more than 150 million years ago, 'may have killed more persons than any other microbial pathogen'.<sup>15</sup> The death toll of smallpox was 300 million in the 20th century alone – even though an effective vaccine, the world's first, was found in 1798.<sup>16</sup> Some 50 to 100 million people died in the 1918 H1N1 influenza pandemic – more than the death toll of World War I.<sup>17</sup> A new H1N1 outbreak in 2009 infected over 10 percent of the global population; it is estimated that up to 575,400 people worldwide might have died during the first year the virus circulated.<sup>18</sup>

Thus, epidemics and pandemics recur in human history: plague, cholera, smallpox, malaria, tuberculosis, AIDS/HIV, yellow fever, SARS, influenza, and others. Some are discrete events. Others persist thrusting States, regions, and the world at large into crisis. Much of the way that States and international organisations confront epidemics and pandemics today has been shaped by the experiences of the past.<sup>19</sup> The WHO came into being in 1948. This represented the culmination of international health cooperation efforts which had started almost a century prior.

The First International Sanitary Conference took place in Paris on 23 July 1851.<sup>20</sup> This first Conference aimed to standardise and harmonise quarantine procedures among European States against the spread of cholera, plague, and yellow fever.<sup>21</sup> Fourteen International Sanitary Conferences took place in total. All were stimulated by States' desire to coordinate global efforts and agree on scientific measures to limit the spread of epidemics and pandemics across nations.<sup>22</sup> The seventh conference in Venice in 1892, adopted a convention on maritime quarantine regulations relating to westbound shipping from the East.<sup>23</sup> The eighth conference in Dresden in 1893 and ninth conference in Paris in

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a pandemic include: the agent must be able to infect humans, to cause disease in humans, and to spread easily from human to human', see 'Pandemic' in Miguel Porta (ibid).

<sup>10</sup> Troels Pank Arbøll, 'Epidemics in the Cradle of Civilization' (*Science Nordic*, 3 November 2020) <<https://sciencenordic.com/denmark-epidemic-history/epidemics-in-the-cradle-of-civilization/1758958>>.

<sup>11</sup> According to Stathakopoulos: 'Massive mortality equates a shortage of manpower, expected to be evident in agriculture, the military, and state finances, as a result of limited production and tax revenues... The result was in many cases a vicious circle in which one crisis provoked the next: plague caused mortality, the ensuing manpower shortage brought about the breakdown of production provoking in its turn another crisis', Dionysios Stathakopoulos, 'Crime and Punishment: The Plague in the Byzantine Empire, 541–749' in Lester K Little (ed) *Plague and the End of Antiquity: The Pandemic of 541-750* (Cambridge University Press 2007) 102-103, 115.

<sup>12</sup> Josiah C. Russell, 'That Earlier Plague' (1968) 5(1) *Demography* 174.

<sup>13</sup> Damir Huremović, 'Brief History of Pandemics (Pandemics Throughout History)' in D Huremović (ed), *Psychiatry of Pandemics* (Springer 2019) 7-35.

<sup>14</sup> Huremović, *ibid*.

<sup>15</sup> Thomas M Daniel, 'The History of Tuberculosis' (2006) 100 *Respiratory Medicine* 1862–1870.

<sup>16</sup> Huremović (2019) 7-35.

<sup>17</sup> Huremović, *ibid*.

<sup>18</sup> US Centers for Disease Control and Prevention, '2009 H1N1 Pandemic (H1N1pdm09 virus)' <[www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html](http://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html)>

<sup>19</sup> Hélène De Pooter, 'La Pandémie de Covid-19 Eclairée par L'Histoire de la Coopération Sanitaire Internationale (*The Conversation*, 12 May 2020) <<https://theconversation.com/la-pandemie-de-covid-19-eclairée-par-lhistoire-de-la-coopération-sanitaire-internationale-137461>>; Eugenia Tognotti, 'Lessons from the History of Quarantine, from Plague to Influenza' 2013 19(2) *Emerging Infectious Diseases* 254-259.

<sup>20</sup> WHO, 'Global Health Histories: Origin and Development of Health Cooperation' (WHO 2015); David P Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4(2) *Chinese Journal of International Law* 325-392.

<sup>21</sup> Howard-Jones (1975) 12.

<sup>22</sup> Howard-Jones, *ibid*.

<sup>23</sup> Howard-Jones, *ibid*.

1894 resulted in two additional conventions on cholera.<sup>24</sup> The next conference in Venice in 1897 adopted an international convention on the prevention of the spread of plague. These four conventions were consolidated into a single International Sanitary Convention in 1903 on the prevention and control of plague and cholera.<sup>25</sup>

Outbreaks of typhus fever in Eastern Europe claimed some 3 million lives between 1918 and 1922.<sup>26</sup> These outbreaks renewed impetus for global public health in the League of Nations, the organisation founded following the Paris Peace Conference which concluded World War I.<sup>27</sup> Article 23 (f) of the Covenant of the League of Nations read that 'the Members of the League will endeavour to take steps in matters of international concern for the prevention and control of disease.' Article 25 further provided that the Members of the League agreed to promote 'the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.'<sup>28</sup> Two independent international health organizations were subsequently established in Europe: the Office International d' Hygiène Publique (OIHP) in Paris and the Health Organisation of the League of Nations (LNHO) in Geneva. These two organizations consulted and cooperated with one another and the Pan American Sanitary Organization (PASB) (now the Pan-American Health Organization). Each of these early international health organizations aimed to coordinate and implement 'infectious disease control treaties.'<sup>29</sup>

The UN was established in 1945. Article 1(1) and (3) of the UN Charter sets out a general obligation of international cooperation in maintaining international peace and security and solving international problems of an economic, social, or humanitarian character, including global health issues.<sup>30</sup> On 15 February 1946, the UN Economic and Social Council instructed the UN Secretary-General to convey a Conference to create a specialised UN Agency for global health. A Technical Preparatory Committee met in Paris from 18 March to 5 April 1946 and drew up proposals for the Constitution of the WHO. The International Health Conference in New York City between 19 June and 22 July 1946 drafted the Constitution of the WHO based on these proposals. The WHO Constitution was signed on 22 July 1946 by the vast majority of UN membership at the time.<sup>31</sup>

## The Rise of the WHO in Fostering International Cooperation

The Constitution establishes the WHO as a global organisation in the field of health with extensive responsibilities, including the power to adopt legally binding regulations to prevent the international spread of disease.<sup>32</sup> It expresses WHO's main mission as 'the attainment by all peoples of the highest

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<sup>24</sup> WHO, 'Global Health Histories' (2015).

<sup>25</sup> Ibid.

<sup>26</sup> David Patterson, 'Typhus and its Control in Russia 1870-1940' (1993) 37 *Medical History* 361.

<sup>27</sup> Stephen Morse et al, 'Infectious Disease Emergence: Past, Present, and Future' in D Relman et al (eds) *Microbial Evolution and Co-Adaptation: A Tribute to the Life and Scientific Legacies of Joshua Lederberg* (Forum on Microbial Threats Board on Global Health, National Academies Press 2009) 57; G Fitzgerald, *The Work of the Health Organisation of the League of Nations* (1933) 24(8) *Canadian Public Health Journal* 368-372.

<sup>28</sup> Art 25, League of Nations, Covenant of the League of Nations (28 April 1919).

<sup>29</sup> Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014) 90.

<sup>30</sup> Article 13, UN Charter: 'The General Assembly shall initiate studies and make recommendations for the purpose of... promoting international co-operation in the economic, social, cultural, educational, and **health fields**...' (emphasis added); Article 55, UN Charter: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote... solutions of international economic, social, **health, and related problems**' (emphasis added); Article 57, UN Charter: 'The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, **health, and related fields**...' (emphasis added); Ilona Kickbusch, 'Advancing the Global Health Agenda' (2011) 48(4) *United Nations Chronicle* 37-40; United Nations: *The Global Guardian of Public Health* <<https://www.un.org/en/global-issues/health>>; see also Benjamin Mason Meier, 'The Highest Attainable Standard: The World Health Organization, Global Health Governance, and the Contentious Politics of Human Rights' (PhD Thesis, Columbia University 2009) 8-25 <<https://bmeier.web.unc.edu/wp-content/uploads/sites/700/2018/12/Meier-Dissertation-Final.pdf>>

<sup>31</sup> Meier (2009) 11; Gostin (2014) 90-92.

<sup>32</sup> Articles 21 and 22, Constitution of the World Health Organization (signed 22 July 1946; entered into force 7 April 1948) *Bulletin of the World Health Organization* (2000) 80 (12) 983-84; for a complete account, Gian Luca Burci and Claude-Henri Vignes, *The World Health Organization* (Kluwer Law International 2004).

possible level of health.<sup>33</sup> Human rights are at the heart of this mission: 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition'.<sup>34</sup> Article 2(p) of the Constitution reflects wording in the human rights space by highlighting the crucial aspiration that the health of all peoples is fundamental to the attainment of peace and security and is *dependent upon the fullest cooperation of individuals and States*' (emphasis added).<sup>35</sup>

The WHO Director-General, Halfdan Mahler, and WHO's AIDS Control Programme Director, Jonathan Mann, addressed the UN General Assembly in 1987. For the first time in UN history, a pandemic disease appeared on the UN General Assembly's agenda. This was a turning point. UN General Assembly Resolution 42/8 of 26 October 1987 was the first UN Resolution targeting a specific disease as 'a threat to the attainment of health for all'.<sup>36</sup> It called upon all States to adopt:

*[U]rgent and vigorous globally directed action in the development of epidemiological surveillance, the intensification of research in prevention, control, diagnosis and treatment, including social science research, the training of national health workers and other relevant areas of prevention, control and research.*<sup>37</sup>

The WHO has often stressed that, in the pursuit of global health, international law must be strengthened and implemented fully to improve international cooperation in disease surveillance and the containment of pandemic outbreaks when they occur.<sup>38</sup> Indeed, many important lessons for international cooperation in pandemic situations were drawn from the SARS pandemic, which prompted revisions to the IHR.<sup>39</sup> As Burci explains, the '[revised] IHR of 2005 is the latest version of a long history of international cooperation in the field of global health, particularly concerning the prevention and control of epidemics'.<sup>40</sup> Indeed, the 2005 IHR go far beyond the previous health regulations by taking an 'all hazards approach', applying 'to any illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans'.<sup>41</sup> These revisions were almost universally agreed upon by States.<sup>42</sup> States recognised that greater cooperation and greater transparency were needed to avoid situations where governments tried to cover up domestic outbreaks and act unilaterally, thereby hampering the pace of an internationally coordinated response.<sup>43</sup> Crucially, the IHR are legally binding under Articles 21 and 22 of the WHO Constitution on WHO's 194 Member States.<sup>44</sup>

WHO plays a critical role in defining how the objectives of international cooperation must be achieved in preparing for, responding to, and managing pandemics. Under its Constitution, the WHO has a global

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<sup>33</sup> Constitution of the WHO, *ibid*.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> UN General Assembly Resolution 42/8 'Prevention and Control of Acquired Immune Deficiency Syndrome AIDS' (26 October 1987) <<https://undocs.org/en/A/RES/42/8>> in conjunction with WHA Res 40.26 'Global Strategy for the Prevention and Control of AIDS' (1987).

<sup>37</sup> *Ibid*.

<sup>38</sup> WHO, 'Global health security - Epidemic Alert and Response: Report by the Secretariat' (2 April 2001) <<https://apps.who.int/iris/handle/10665/78718>>; WHO, The World Health Report 2003: Sharing the Future (World Health Organization 2003) <[https://www.who.int/whr/2003/en/whr03\\_en.pdf?ua=1](https://www.who.int/whr/2003/en/whr03_en.pdf?ua=1)>; WHO, 'Implementation of the International Health Regulations (2005): Five-Year Global Strategic Plan to Improve Public Health Preparedness and Response, 2018–2023' WHA 71(15) (71st Session, 26 May 2018) 22–23 <<https://apps.who.int/iris/handle/10665/279699>>.

<sup>39</sup> Fifty-Sixth World Health Assembly (WHA 56.28), 'Revision of the International Health Regulations' (28 May 2003) <[https://apps.who.int/gb/archive/pdf\\_files/WHA56/ea56r28.pdf](https://apps.who.int/gb/archive/pdf_files/WHA56/ea56r28.pdf)>.

<sup>40</sup> BIICL Report, 'COVID-19 and International Law: What Went Wrong and What can we Learn from it? Philippe Sands in conversation with Gian Luca Burci' (16 April 2020) <[https://www.biicl.org/documents/10303\\_covid19\\_and\\_international\\_law\\_16\\_april\\_2020\\_event\\_report.pdf](https://www.biicl.org/documents/10303_covid19_and_international_law_16_april_2020_event_report.pdf)>.

<sup>41</sup> Article 1, IHR.

<sup>42</sup> Adam Ferhani and Simon Rushton, 'The International Health Regulations, COVID-19, and Bordering Practices: Who Gets in, What Gets Out, and Who Gets Rescued?' (2020) 41(3) Contemporary Security Policy 458, 463.

<sup>43</sup> *Ibid*.

<sup>44</sup> Gian Luca Burci and Jakob Quirin, 'Implementation of the International Health Regulations (2005): Recent Developments at the World Health Organization' (*ASIL Insights*, 25 September 2018) <<https://www.asil.org/insights/volume/22/issue/13/implementation-international-health-regulations-2005-recent-developments>>; see also Gian Luca Burci, 'The World Health Organization at 70: Challenges and Adaptation' (2019) 16 International Organizations Law Review 229-241.

mandate to develop hard and soft law rules for coordinating the monitoring, reporting and sharing of scientific information on diseases identified as constituting a public health risk across borders and jurisdictions.<sup>45</sup> The WHO also has a global mandate to ensure the smooth implementation of those rules, through the World Health Assembly (WHA) and the UN General Assembly.<sup>46</sup> Most pertinently, the IHR now set explicit requirements for how States should report possible outbreaks, monitor, manage and control diseases within their borders, and cooperate among themselves and with the WHO to prevent their spread across jurisdictions.<sup>47</sup>

### 3. Duty to Cooperate in the Surveillance, Prevention, and Control of Epidemic and Pandemic Disease

#### General Duty to Cooperate

Under general international law, cooperation describes ‘the coordinated action’ of two or more States or international organisations which takes place under a legal regime and serves a specific objective in situations where the activity of one State cannot achieve the same result.<sup>48</sup> Accordingly, the duty to cooperate means the legal obligation to enter into such coordinated or collaborative action to achieve the envisaged result.<sup>49</sup> A general obligation to cooperate in the maintenance of international peace and security as well as in the solving of international problems of an economic, social, cultural, or humanitarian character is enshrined in Article 1(1) and (3) of the UN Charter and supplemented by the Preamble to the Charter.<sup>50</sup> According to Wolfrum, ‘cooperation’ has to be distinguished from the concept of ‘solidarity’.<sup>51</sup> The latter does not stipulate specific obligations but rather the factual situation of mutual dependence among States and the ‘readiness to co-operate and to accept the resulting costs with the view to fostering common interests or shared values’.<sup>52</sup>

A general duty to cooperate to ensure the realisation of human rights, including the right to health, has been set out in the Friendly Relations Declaration,<sup>53</sup> the Universal Declaration of Human Rights,<sup>54</sup> the Declaration Concerning the Establishment of a New International Economic Order,<sup>55</sup> and the Declaration on the Right to Development.<sup>56</sup> The last of these provides, in particular, that international

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<sup>45</sup> Articles 21 and 22, WHO Constitution; see also Claudio Grossman, ‘Pandemics and International Law: The Need for International Action’ (2021) 24(3) Human Rights Brief 130, 132; Gostin and Katz (2016) 266.

<sup>46</sup> Kent Buse, Lawrence O Gostin, and Eric Friedman, ‘Pathways Towards a Framework Convention on Global Health Political Mobilization for the Human Right to Health’ in M Freeman, S Hawkes, and B Bennett (eds) *Law and Global Health: Current Legal Issues Volume 16* (Oxford University Press 2014) 59.

<sup>47</sup> Adam Kamradt-Scott, *Managing Global Health Security: The World Health Organization and Disease Outbreak Control* (Palgrave Macmillan 2015) 102–108; Gostin, Habibi, and Meier (2020) 376–381.

<sup>48</sup> Rüdiger Wolfrum, ‘Cooperation, International Law of’ Max Planck Encyclopedia of Public International Law (Online Edition, 2010); see also Anne Peters, ‘International Dispute Settlement: A Network of Cooperational Duties’ *European Journal of International Law* (2003) 14(1) 1–34.

<sup>49</sup> Wolfrum (ibid); Eyal Benvenisti ‘The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic’ (2020) 114(4) *American Journal of International Law* 588, 591.

<sup>50</sup> Article 1(1) and (3), UN Charter; The promotion and maintenance of international peace and security requires the continuous and positive cooperation among States with respect to a series of goals of an economic, social, cultural, or humanitarian character, Rüdiger Wolfrum, ‘Ch.I Purposes and Principles, Article 1’ in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary Volume I* (3rd edn, Oxford University Press 2012).

<sup>51</sup> Wolfrum (2010).

<sup>52</sup> Wolfrum (ibid); see also UN General Assembly Res 59/193 on the ‘Promotion of a Democratic and Equitable International Order’ which defines ‘solidarity’ as ‘a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most’; For a complete analysis, see Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer 2009).

<sup>53</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Annex to GA Res 2625 (XXV) of 24 October 1970; The Friendly Relations Declaration was confirmed to be customary international law in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 202.

<sup>54</sup> UN General Assembly Resolution 217 A of 10 December 1948.

<sup>55</sup> UN General Assembly Resolution 3201 of 1 May 1974.

<sup>56</sup> UN General Assembly Resolution 41/128 of 4 December 1986; UN General Assembly Resolution 3281 (XXIX), Charter of Economic Rights and Duties of States (1974) (1975) 69 *American Journal of International Law* 484; See also Article 2, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966; entered into force 3 January 1976); The particularity of the Covenant is that the right to the ‘highest attainable standard of physical and mental health’ at the same

cooperation in the fight against infectious disease should create a context in which States acknowledge that they must build a public community of health for all and act in accordance with these obligations.<sup>57</sup> UN General Assembly Resolution 46/182 concerning humanitarian coordination in emergency situations, including health emergencies, further recognises that ‘international cooperation to address emergency situations and to strengthen the response capacity of affected countries is of great importance’.<sup>58</sup> Cooperation should be provided ‘in accordance with international law and national laws.’<sup>59</sup> In 2014, the UN Security Council unanimously adopted a historic resolution calling the Ebola pandemic a threat to international peace and stability and calling for ‘urgent coordinated action’ to effectively implement the IHR.<sup>60</sup>

The 2016 International Law Commission (ILC) ‘Draft Articles on the Protection of Persons in the Event of Disasters’ set out a general duty of cooperation in the event of ‘a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress ... thereby seriously disrupting the functioning of society’.<sup>61</sup> Under the ILC Draft Articles, the affected State and assisting actors have a general duty to ‘cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors’.<sup>62</sup> Specific forms of cooperation listed by the ILC Draft Articles include ‘humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.’<sup>63</sup> Under the Draft Articles, the duty of cooperation is also expanded to disaster risk reduction activities, an area expressly covered by Draft Article 9 which identifies the obligation for ‘each State... [to] reduce the risk of disasters by taking appropriate measures...’, thus, requiring States to act at the international and domestic level ‘to prevent, mitigate, and prepare for disasters’.<sup>64</sup> Although the ILC Draft Articles and commentaries do not specifically mention pandemics, the COVID-19 pandemic could well fit the broad definition of ‘disaster’ outlined in Draft Article 3 being a ‘calamitous event or series of events’, ‘resulting in widespread loss of life, great human suffering and distress’ and ‘causing serious disruption of the functioning of society’.<sup>65</sup>

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time is considered a human right and a means to realise the full implementation of human rights; The UN Committee on Economic, Social and Cultural Rights ‘General Comment No 3: The Nature of States Parties Obligations’ (1991) ESCOR Supp 3, at 83 refers to international co-operation as an obligation of all States, so does UNGA Resolution S-24/2 of 1 July 2000 (‘Further Initiatives for Social Development’ UN Doc A/RES/S-24/2); The same approach is reflected in UN General Assembly Declaration on International Economic Co-operation, in particular the Revitalization of Economic Growth and Development of the Developing Countries of 1 May 1990 (UN Doc. A/RES/S-18/3); GA Res. 49/97 on Strengthening International Organizations in the Area of Multilateral Trade of 19 Dec. 1994 (UN Doc. A/RES/49/97).

<sup>57</sup> R. St. J. MacDonald, ‘Solidarity in the Practice and Discourse of Public International Law’ (1996) 8(2) *Pace International Law Review* 259, 263-268.

<sup>58</sup> UN General Assembly Resolution 46/182 of 19 December 1991; see also Seventy-Third WHA Resolution A73/CONF./1 Rev.1 ‘COVID-19 Response’ (18 May 2020): ‘Recalling resolution 46/182 of 19 December 1991 on the strengthening of the coordination of emergency humanitarian assistance... coordination and collaboration required at all levels of governance across organizations and sectors, including civil society and the private sector, required to have an efficient and coordinated public health response to the pandemic, leaving no-one behind...’; see also Judith Bueno de Mesquita, Anuj Kapilashrami, and Benjamin Mason Meier, ‘Human Rights Dimensions of the COVID-19 Pandemic Background Paper 11’ (13 October 2020) 3: ‘The obligation to realise the right to health and other economic, social and cultural rights requires international assistance and cooperation. These international obligations carry implications across a range of policy and legal fields, including for equitable global distribution of vaccines, treatment and equipment and broader support to address the socioeconomic consequences of the pandemic.’ <<https://theindependentpanel.org/wp-content/uploads/2021/05/Background-paper-11-Human-rights.pdf>>.

<sup>59</sup> UN General Assembly Resolution 46/182 of 19 December 1991 (ibid).

<sup>60</sup> UN Security Resolution 2177 (2014) [on Outbreak of the Ebola virus in, and its Impact on, West Africa] of 18 September 2014; for a discussion, Maurizio Arcari, Paolo Palchetti, Gian Luca Burci, and Louis Balmond, ‘The Security Council as a Global “Health-Keeper”? Resolution 2177 (2014) and Ebola as a Threat to the Peace’ (Questions of International Law, 23 December 2014) <<http://www.qil-qdi.org/security-council-global-health-keeper-resolution-2177-2014-ebola-threat-peace/>>.

<sup>61</sup> International Law Commission (ILC), ‘Draft Articles on the Protection of Persons in the Event of Disasters’ (2016) <[https://legal.un.org/ilc/texts/instruments/english/commentaries/6\\_3\\_2016.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/6_3_2016.pdf)>; United Nations, ‘Sendai Framework for Disaster Risk Reduction 2015-2030’, adopted by all UN Member States in March 2015 <<https://www.preventionweb.net/publications/view/43291>>; Giulio Bartolini, ‘The Draft Articles on “The Protection of Persons in the Event of Disasters”: Towards a Flagship Treaty?’ (*EJIL:Talk!*, 2 December 2016) <[www.ejiltalk.org/the-draft-articles-on-the-protection-of-persons-in-the-event-of-disasters-towards-a-flagship-treaty/](http://www.ejiltalk.org/the-draft-articles-on-the-protection-of-persons-in-the-event-of-disasters-towards-a-flagship-treaty/)>; Rana Moustafa Essawy, ‘The Legal Duty to Cooperate amid COVID-19: A Missed Opportunity?’ (*EJIL:Talk!*, 22 April 2020) <[www.ejiltalk.org/the-legal-duty-to-cooperate-amid-covid-19-a-missed-opportunity/](http://www.ejiltalk.org/the-legal-duty-to-cooperate-amid-covid-19-a-missed-opportunity/)>.

<sup>62</sup> Article 7, ILC Draft Articles on the Protection of Persons in the Event of Disasters (2016).

<sup>63</sup> Article 8, ibid.

<sup>64</sup> Article 8, ibid.

<sup>65</sup> Article 3, ibid; Alp Ozturk, ‘Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak’ (*ASIL Insights*, 24 April 2020) <[www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles](http://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles)>.

Therefore, the ILC Draft Articles can serve as a useful reference point for the general duty of States to cooperate in the event of a pandemic.

## **Duty to Cooperate under the International Health Regulations**

In the fight against pandemic disease, States are under a general, but context-bound, obligation 'to collaborate actively with each other and WHO in accordance with the relevant provisions of the International Health Regulations (2005), so as to ensure their effective implementation'.<sup>66</sup> The IHR creates a context for meaningful cooperation that reinforces the broader idea of global solidarity by setting out specific procedural duties of cooperation 'to prevent, protect against, control and provide a public health response to the international spread of disease'.<sup>67</sup> These procedural duties of cooperation under the IHR take three main forms: a) cooperation in developing the required public health capacities and reporting on IHR implementation; b) cooperation in reporting public health threats of international concern together with subsequent obligations to inform and respond to follow-up requests for public health data; and c) cooperation in settling disputes arising under the IHR. These are discussed in turn.

### **a) Cooperation in Developing Core Capacities and Reporting on Implementation**

The IHR recognise the importance of international cooperation to detect, assess, and respond to public health threats. It also emphasises the role of international cooperation in providing or facilitating technical and logistical support for developing, strengthening, and maintaining States' public health capacities. Article 44 of the IHR requires States Parties to cooperate in developing and maintaining 'core capacity requirements'.<sup>68</sup> The IHR core capacities are those required to detect, assess, notify and report events and to respond to public health risks and emergencies of national and international concern, as stipulated in Articles 5 and 13 and Annex 1 of the IHR.<sup>69</sup> The concept of core capacities embraces an 'upstream' public health strategy to prevent and contain outbreaks at their source.<sup>70</sup> The IHR lays down obligations for States to strengthen national public health capacities and improve global health security. States retain sovereign authority to develop national health legislation, but such domestic laws 'should uphold the purpose' of the IHR, thus reinforcing international commitments.<sup>71</sup>

Gostin and Katz explain that the WHO and higher-income States Parties must cooperate in providing technical and financial assistance to States which need to develop or strengthen their core capacity requirements for surveillance and responding to public health threats.<sup>72</sup> Under Article 44(2), 'WHO shall collaborate with States Parties in...the mobilization of financial resources to support developing countries in building, strengthening and maintaining the capacities provided for in Annex 1.'<sup>73</sup> The nature of the duty of cooperation is expressed in imperative terms, such as that Parties 'shall collaborate with each other or 'shall' give assistance etc. However, Article 44 qualifies the entire obligation of cooperation by stating that States Parties 'shall undertake to collaborate with each other' and 'shall collaborate with States Parties, upon request' only '*to the extent possible*' (emphasis added). This formulation indicates that there may be some discretion left to States in determining when cooperation is or is not indeed 'possible'.<sup>74</sup> States must seek to develop IHR core capacities and, 'to

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<sup>66</sup> Para 5, Resolution of the Fifty-Eighth WHA, repr in IHR (2005) at p 3.

<sup>67</sup> IHR (2005) at p 1; 'Consistent throughout all versions of the IHR is the recognition that infectious diseases require international cooperation to prevent their spread across borders', Margherita M Cinà et al, 'The Stellenbosch Consensus on the International Legal Obligation to Collaborate and Assist in Addressing Pandemics: Clarifying Article 44 of the International Health Regulations' (2020) *International Organizations Law Review* 1; United Nations, 'Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of Covid-19' (March 2020) <<https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf>>.

<sup>68</sup> Article 44, IHR.

<sup>69</sup> Articles 5, 13 and Annex 1, IHR.

<sup>70</sup> Article 44, IHR; Gostin and Katz (2016) 264, 270.

<sup>71</sup> Article 44, IHR; Gostin, Habibi, and Meier (2020) 376, 377-378.

<sup>72</sup> Gostin and Katz (2016) 264, 270.

<sup>73</sup> Article 44(2), IHR.

<sup>74</sup> Remarks by Gian Luca Burci, 'International Law Association (ILA) Panel Discussion of the Global Health Law Committee', held online on 10 December 2020 (79th ILA Biennial Conference, Kyoto 2020); see also Thomas Mulder: 'Article 44 compels states to collaborate "to the extent possible", but does not offer any details beyond this general duty. This silence does not match the real-world challenges that come with global pandemics. Leaving aside issues like the distribution of vaccines, the COVID-19 pandemic has shown that international assistance is crucial to provide relief to persons in urgent need', Thomas Mulder, 'Beyond the International Health Regulations: The Role of International Disaster Response Law in the Global Pandemic Response' (*Blog*

the extent possible', assist other States in need as well as report to the WHO on their IHR implementation and compliance with IHR measures.<sup>75</sup> Gostin and Katz note that in 2014, 'only 64 States Parties reported meeting core capacities, while 48 failed to even respond to the WHO'.<sup>76</sup> Moreover, every WHO IHR Review Committee and all the major Commissions on Global Health Security have demanded that States Parties should assist other States in strengthening core capacities. Yet, international assistance has remained limited.<sup>77</sup>

Article 44 does not define the level of cooperation envisaged.<sup>78</sup> Rather, it lists categories of actors with whom the cooperation could take place to ensure States' core capacities to prevent, detect, and respond to public health threats.<sup>79</sup> Under Article 44(3): 'Collaboration under this Article may be implemented through multiple channels, including bilaterally, through regional networks and the WHO regional offices, and through intergovernmental organizations and international bodies'.<sup>80</sup> The article does not specify the 'intergovernmental organizations and international bodies' with which WHO and States are expected to cooperate and coordinate their activities. According to Habibi and others, 'it is logical in light of the IHR's purpose to expect that an international organization or body that is issuing information on responses to public health risks be competent to do so...'.<sup>81</sup> Indeed, WHA Resolution 58.3, an agreement made by all States Parties in connection with the conclusion of the 2005 IHR, provides a non-exhaustive list of organisations which may qualify as 'competent' intergovernmental organizations or international bodies. These include, but are not limited to: the United Nations, the International Labour Organization, the Food and Agriculture Organization, the International Atomic Energy Agency, the International Civil Aviation Organization, the International Maritime Organization, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, the International Air Transport Association, the International Shipping Federation, and the *Office International des Epizootie*.<sup>82</sup>

#### **b) Cooperation in Notifying Public Health Emergency Risks and Follow-up Action**

The IHR also call for robust information sharing through reporting of potential 'Public Health Emergencies of International Concern' (PHEICs). Article 1 defines a PHEIC as 'an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response'. PHEIC-related obligations of cooperation are tailored with reference to a specific context, namely the need to give early notice to the WHO of any events which may constitute a public health threat. Thus, the goal of the duty to cooperate here is the timely notification of such events and timely sharing of associated information.

The IHR specify the forms and procedures which notification and information-sharing obligations of States and the WHO may take when responding to PHEICs. Article 6, for instance, requires States to assess events occurring within their territory and within 24 hours report any event which may constitute a PHEIC as well as any health measures implemented in response to such event. Following such notification, States must continue to communicate to WHO timely, accurate and sufficiently detailed public health information on the notified event. Article 6(2) highlights some of the types of public health information which must be promptly shared with the WHO, 'including' laboratory results, source and type of the risk, number of cases and deaths, and conditions affecting the spread of the disease.<sup>83</sup> However, the list is not meant to be exhaustive but merely illustrate the principal data that must be

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of the *International Law Association*, Australian Branch, 1 Oct 2021) <<https://ilareporter.org.au/2021/10/beyond-the-international-health-regulations-the-role-of-international-disaster-response-law-in-the-global-pandemic-response-thomas-mulder/>>.

<sup>75</sup> Article 54; Annex I (2), IHR.

<sup>76</sup> Figure 5, Gostin and Katz (2016) 277.

<sup>77</sup> Table 1, Gostin and Katz (ibid) 278.

<sup>78</sup> 'Despite the importance of this need and its encapsulation in Article 44 of the IHR, there is little legal guidance available to countries to better understand the precise nature and nuances of their collaboration obligations', Cinà et al (2020) 1.

<sup>79</sup> See, for instance, Tran Dac Phu et al, 'Strengthening Global Health Security Capacity—Vietnam Demonstration Project' (2013) 63(4) *Morbidity and Mortality Weekly Report* 77-80.

<sup>80</sup> Article 44(3), IHR.

<sup>81</sup> Habibi et al (2020) 25-26.

<sup>82</sup> Fifty-Eighth WHA, 'Revision of the International Health Regulations' at para 4.

<sup>83</sup> Art 6(2), IHR.

shared by States as part of their duty to cooperate under the IHR.<sup>84</sup> The non-exhaustive nature of the list is emphasised by the use of the word ‘including’.<sup>85</sup> Even when insufficient information is available, Article 8 stipulates that States must keep the WHO advised and consult with the WHO on appropriate health measures to respond to the public health risk.

Article 11(1) of the IHR provides that the WHO should communicate information to other States Parties that might help them in preventing similar incidents.<sup>86</sup> WHO must also ‘offer to collaborate’ with the States concerned and with other standard-setting organisations to mobilise international assistance. Such international assistance should aim to support the national authorities in conducting and coordinating on-site assessments. The State concerned, however, is not under an explicit obligation to accept this offer.<sup>87</sup>

Based upon information received from both State and non-State sources, including media and other unofficial sources, the WHO Director-General has the ultimate authority to determine whether an event constitutes a PHEIC.<sup>88</sup> In determining whether to declare a PHEIC, the Director-General shall consider: (a) information provided by the State Party; (b) the decision instrument; (c) the advice of the Emergency Committee, which the Director-General also has sole discretion to convene; (d) scientific principles and evidence; and (e) a risk assessment regarding human health, international spread, and interference with international traffic.<sup>89</sup> Upon determining that a PHEIC is occurring, the WHO Director-General will issue recommendations describing health control measures States Parties should consider taking depending on the severity of the international risk. States Parties ‘should...to the extent possible’ support and adhere to the WHO’s recommendations and take meaningful action to collaborate.<sup>90</sup> Hathaway and others have suggested that ‘the regulations do not define what this collaboration means in practice’, and pose the question whether States are merely ‘urged’ to do this, or obliged ‘to the extent possible’ to do so.<sup>91</sup> While the wording ‘to the extent possible’ can be interpreted as providing some discretion as how this obligation to collaborate is to be fulfilled, the term ‘*should*’ supports an understanding that States are bound by the mandatory obligations ‘to achieve at least a certain level of collaboration necessary to achieve the object and purpose of the IHR’.<sup>92</sup> Nevertheless, as Cinà and others have counselled, while the IHR does not create an ‘unlimited flexibility’ for States Parties and WHO to determine the nature of their obligations, ordinary meaning interpretation ‘does not allow us to decipher the exact limits of this flexibility’.<sup>93</sup>

Article 43(1) of the IHR provides that States could depart from the WHO’s recommendations by adopting so-called ‘additional health measures’.<sup>94</sup> Article 43 (1) and (2) of the IHR stipulate that States may do so only if such ‘additional health measures’ achieve the same or greater levels of health protection than recommendations issued by the WHO and only if certain conditions are met and the health measure is reported to the WHO.<sup>95</sup> The use of the prescriptive ‘*shall*’ in Article 43(2) (as opposed to ‘*may*’) indicates that the exercise of determining whether an additional health measure should be adopted is a mandatory requirement for States.<sup>96</sup> Indeed, when adopting additional health measures that ‘significantly interfere with international traffic’, States are legally required to provide to the WHO the public health rationale together with ‘sufficient’ scientific justifications and evidence supporting these

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<sup>84</sup> Gostin and Katz note that although important disease data such as biological materials and genetic sequencing data are not explicitly referred to, one could interpret Article 6(2) to encompass this data, Gostin and Katz (2016) 264, 289.

<sup>85</sup> Article 6(1), IHR.

<sup>86</sup> Article 11(1), IHR.

<sup>87</sup> Article 11, 13 and 14, IHR.

<sup>88</sup> Articles 48 and 12(1)-(4), IHR; PHEIC declarations have been issued by the WHO six times to control the international spread of infectious disease: these are polio, Zika, Influenza H1N1, Ebola (in West Africa and then in the Congo), and most recently COVID-19, see Gostin, Habibi, and Meier (2020) 376, 377-378.

<sup>89</sup> Articles 10 and 12(4), IHR.

<sup>90</sup> Articles 13(5), 15 and 49, IHR.

<sup>91</sup> Hathaway et al (2021) 75.

<sup>92</sup> Cinà et al (2020) 23.

<sup>93</sup> Cinà et al (ibid) 24.

<sup>94</sup> Article 43, IHR.

<sup>95</sup> Article 43(1), IHR; for a complete account, Habibi et al (2020) 1, 19-68; Hathaway et al (2021) 1-70.

<sup>96</sup> Habibi et al (2020) 22.

measures.<sup>97</sup> The text is vague about the minimum level of scientific evidence and/or information which may be deemed 'sufficient' for the purposes of this requirement. Yet, States are obliged to use the least restrictive measures which will provide an appropriate level of health protection, that is to say measures that are no more intrusive or invasive to persons, and no more restrictive of international traffic, than reasonably available alternatives.<sup>98</sup> According to Habibi and others, there must be 'a rational and proportional connection between the legitimate aim that the additional health measure is seeking to address and the scientific evidence underpinning the decision to implement the health measure'.<sup>99</sup> In its 5-Year Global Strategic Plan (2018-2023), the WHA emphasised that State Parties' compliance with the IHR in relation to additional health measures is a 'critical element for the optimal functioning of the global alert and response system'.<sup>100</sup>

Contrary to the letter and objective of the IHR as a whole and Article 43 in particular, unilateral and uncoordinated border closures, travel restrictions, and export controls on essential medical technologies have been widely imposed by States during the COVID-19 pandemic.<sup>101</sup> Ferhani and Rushton note that, during the COVID-19 pandemic, the majority of States Parties moved quickly to impose health measures involving various forms of travel and trade restrictions contrary to the WHO's formal recommendations.<sup>102</sup> Only a small proportion of these States formally notified the WHO in accordance with IHR requirements.<sup>103</sup> Several scholars have strongly criticised States' unilateral practices as being ineffective and in direct breach of the States' duty to cooperate in good faith in the implementation of the IHR.<sup>104</sup> Such scholars argue that unilateral travel bans and export controls during pandemic outbreaks have 'limited effectiveness';<sup>105</sup> such restrictions 'exaggerate pre-existing global inequalities';<sup>106</sup> and that preventing disease 'is inextricably linked to international cooperation'.<sup>107</sup>

The duty to cooperate in the context of PHEIC involves a sustained practice of timely, consistent, and accurate information-sharing and consultation for both the notifying State and the WHO as well as other possibly affected States and international standard-setting bodies. However, the formulation of certain IHR provisions, discussed above, leaves open the possibility of differing interpretations about the exact level and type of cooperation required from each State Party and the degree of State discretion in discharging their duty to cooperate under the IHR.<sup>108</sup> These interpretative gaps could weaken the collective ability of States and the WHO to respond effectively to a health crisis in a coordinated manner.

### **c) Cooperation in Settling Disputes under the International Health Regulations**

The duty of States Parties to cooperate is also evident in the IHR's provisions concerning the settlement of disputes arising from interpreting or applying the IHR. This duty is set out in Article 56 of the IHR.<sup>109</sup> States are obliged to consult and cooperate to settle any dispute between them via diplomatic means before submitting a dispute to the WHO Director-General or some institutional dispute settlement

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<sup>97</sup> Article 43(2) (a) - (c), IHR; 'The additional health measures must be "evidence-based" and that the provision of a public health rationale is not a mere formality but rather a mandatory requirement which must be "adequate"', Habibi et al (2020) 14-29, 43-44.

<sup>98</sup> Article 43(1); Habibi et al (ibid).

<sup>99</sup> Habibi et al (ibid) 24.

<sup>100</sup> Seventy-First WHA, 'Implementation of the International Health Regulations (2005): Five-Year Global Strategic Plan to Improve Public Health Preparedness and Response, 2018-2023' (21-26 May 2018) 73 <[https://apps.who.int/gb/ebwha/pdf\\_files/WHA71-REC1/A71\\_2018\\_REC1-en.pdf#page=1](https://apps.who.int/gb/ebwha/pdf_files/WHA71-REC1/A71_2018_REC1-en.pdf#page=1)>

<sup>101</sup> Evenett notes that 'As of 21 March 2020, a total of 54 governments have implemented some type of export curb on medical supplies and medicines associated with the COVID-19 pandemic', Simon J Evenett, 'Tackling Coronavirus: The Trade Policy Dimension' (Global Trade Alert Report 51, 2020) 5 <<https://www.globaltradealert.org/reports/51>>; Habibi et al (2020) 14-29; Meier, Habibi, and Yang (2020) 1436.

<sup>102</sup> Ferhani and Rushton (2020) 458, 465-467.

<sup>103</sup> Ibid.

<sup>104</sup> Gian Luca Burci, 'The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations fit for Purpose?' (*EJIL:Talk!*, 27 February 2020) <<https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>>.

<sup>105</sup> Ana Ip Mateus et al, 'Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: A Systematic Review' (2014) 92(12) *Bulletin of the World Health Organization* 868, 873.

<sup>106</sup> Ferhani and Rushton (2020) 458, 470.

<sup>107</sup> Meier, Habibi, and Yang (2020) 1436.

<sup>108</sup> See for example Articles 13(5) and 44(1), IHR.

<sup>109</sup> Article 56, IHR.

mechanism, such as arbitration.<sup>110</sup> Thus, States Parties must cooperate to avoid escalation once a dispute has arisen and, throughout the dispute settlement process, cooperate with the body to which the dispute has been submitted. Such cooperation involves action taken at various stages: first, cooperation during negotiations or other diplomatic means of the parties' choice; second, cooperation after the submission of the dispute to the WHO Director-General; and, third, cooperation with the arbitration body, should the parties choose to have recourse to arbitration.

Diplomatic negotiations are a mandatory first step before the dispute is submitted to the WHO Director-General or other institutional forms of dispute settlement. The phrasing of Article 56 poses the question of how to determine when this mandatory first step is exhausted. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice (PCIJ) set a low threshold, by finding 'that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one ... No general and absolute rule can be laid down in this respect.'<sup>111</sup> The PCIJ held that:

*Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation.*<sup>112</sup>

Similarly, the International Tribunal for the Law of the Sea (ITLOS) adopted, in the recent *Mauritius v Maldives* case, a flexible interpretation of diplomatic negotiation as a precondition to adjudication. It found that, in situations in which 'no agreement can be reached', one party can rightly conclude unilaterally that the possibilities of diplomatic settlement have been exhausted.<sup>113</sup> In such instances, the resort to institutional procedures 'is not only justified but also an obligation of the States concerned'.<sup>114</sup> Therefore, any form of concrete action towards diplomatic settlement, as stipulated in Article 56(1) of the IHR, would be sufficient to trigger a unilateral submission to the WHO Director-General if negotiations appear to have reached an impasse.<sup>115</sup> However, the States concerned must consent to have recourse to arbitration. So far, no State has opted for arbitration under the IHR.<sup>116</sup>

## 4. Cooperation under the International Health Regulations During the COVID-19 Pandemic

The IHR have shown weaknesses and experienced challenges in shaping the coordinated response of States and even the WHO itself to the COVID-19 pandemic.<sup>117</sup> For instance, it has been claimed that China took too long to notify the WHO on first identifying the novel coronavirus, although the length of this delay remains unclear.<sup>118</sup> After being notified of the outbreak, a full month elapsed before the WHO

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<sup>110</sup> Ibid.

<sup>111</sup> *Mavrommatis Palestine Concessions Case (Greece v UK)* [1924] PCIJ (Ser A) No 2, 13-15; This was confirmed by the ICJ in the *South West Africa Case (Ethiopia and Liberia v South Africa)* ICJ Reports (1962) 319, 344-345 and subsequent international jurisprudence; see Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 445-446.

<sup>112</sup> *Mavrommatis*, ibid.

<sup>113</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives)* (Preliminary Objections Judgment of 28 January 2021) paras 288-293; *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (Provisional Measures Order of 27 August 1999) (1999) 38 International Legal Materials 1624, paras 56-60; *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (Award on Jurisdiction and Admissibility of 4 August 2000) (2000) 39 International Legal Materials 1359, 1389.

<sup>114</sup> *Mauritius v Maldives* (ibid) para 292.

<sup>115</sup> Kolb (2013) 445-446.

<sup>116</sup> BIICL Report, 'COVID-19 and International Law' (16 April 2020).

<sup>117</sup> Kumanan Wilson, Sam Halabi, and Lawrence O Gostin, 'The International Health Regulations (2005), the Threat of Populism and the COVID-19 Pandemic' (2000) 16(70) *Globalization and Health* 1-4; Taylor and Habibi (2020); Oona A Hathaway et al, 'The Covid-19 Pandemic and International Law' (2021) 54 *Cornell International Law Journal* 1, 68; Mesquita, Kapilashrami, and Meier (2020) 26.

<sup>118</sup> Tom Mitchell, Sun Yu, Xinning Liu, and Michael Peel, 'China and Covid-19: What Went Wrong in Wuhan?' (*Financial Times*, 17 October 2020) <<https://www.ft.com/content/82574e3d-1633-48ad-8afb-71ebb3fe3dee>>; Sylvia Mathews Burwell et al, 'Improving Pandemic Preparedness: Lessons From COVID-19' Independent Task Force Report No 78 (*Council of Foreign*

declared a public health emergency. Many scholars believe that the WHO should have acted faster.<sup>119</sup> Subsequently, many States acted contrary to provisions of the IHR by implementing unilateral border closures, strict citizenship requirements for international travel, stringent export controls, and other repressive measures which directly contravened the WHO's recommendations.<sup>120</sup> Restrictions on exports of protective equipment and changes to tariffs resulted in supply disruptions and retaliation by other States 'beyond the spirit and objective of IHR.'<sup>121</sup> The Peterson Institute for International Economics pointed to the irrationality of those unilateral, excessive and uncoordinated sets of restrictions.<sup>122</sup> Despite WHO's calls for maximum international cooperation to ensure global access to medicines and medical equipment, competition for protective equipment shifted to competition for COVID-19 vaccines.<sup>123</sup> This led to a 'breakdown of global cooperation and the marginalization of the WHO and the IHR'.<sup>124</sup> According to Cinà and others, despite the inclusion of specific cooperation obligations in the legally binding IHR, 'most countries have not collaborated to the extent necessary, in particular, for achieving the minimum core public health capacities in every country'.<sup>125</sup>

On 2 April 2020, the UN General Assembly, almost a year and a half into the COVID-19 outbreak, unanimously adopted a resolution calling for 'intensified international cooperation to contain, mitigate and defeat the pandemic'.<sup>126</sup> The G20 pledged to fully cooperate by taking all necessary health measures to contain the disease and protect peoples' lives 'including through supporting the full implementation of the WHO International Health Regulations (IHR 2005)'.<sup>127</sup> A Pew Research Center survey of 14,276 people across 14 advanced economy nations, conducted in 2020, showed robust public support for the idea that 'greater international cooperation' could have greatly reduced the adverse effects of COVID-19, both nationally and internationally.<sup>128</sup> In its Resolution 2532 of 1 July 2020, the UN Security Council re-emphasised the view that combating the Covid-19 'requires greater national, regional and international cooperation and solidarity, and a coordinated, inclusive, comprehensive and global international response with the United Nations playing a key coordinating role'.<sup>129</sup>

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*Relations*, 2020) <<https://www.cfr.org/report/pandemic-preparedness-lessons-COVID-19/findings/>>; 'Estimates of the time to most recent common ancestor (from literature and re-analysis) suggest that virus transmission or circulation date might be recent, in late 2019', see World Health Organisation, 'WHO-Convended Global Study of Origins of SARS-CoV-2: China Part' (Joint WHO-China Study 14 January-10 February 2021) <[www.who.int/publications/i/item/who-convended-global-study-of-origins-of-sars-cov-2-china-part](http://www.who.int/publications/i/item/who-convended-global-study-of-origins-of-sars-cov-2-china-part)>; Javier C Hernández and James Gorman, 'Virus Origins Remain Unclear in W.H.O.-China Inquiry' (*New York Times*, 29 March 2021) <[www.nytimes.com/2021/03/29/world/asia/china-virus-who-report.html](http://www.nytimes.com/2021/03/29/world/asia/china-virus-who-report.html)>.

<sup>119</sup> BIICL Report, 'COVID-19 and International Law' (16 April 2020).

<sup>120</sup> Benjamin Mason Meier, Roojin Habibi and Y Tony Yang, 'Travel Restrictions Violate International Law (2020) 367 *Science* 1436; Ferhani and Rushton (2020) 458-477; Doug Saunders, 'Why Travel Bans Fail to Stop Pandemics: Hasty Border Closures Invite Chaos—and Can Seed New Outbreaks' (*Foreign Affairs*, 15 April 2020) <<https://www.foreignaffairs.com/articles/canada/2020-05-15/why-travel-bans-fail-stop-pandemics>>; Jeremy Youde, 'How "Medical Nationalism" Is Undermining the Fight Against the Coronavirus Pandemic' (*World Politics Review*, 23 March 2020) <<https://www.worldpoliticsreview.com/articles/28623/how-medical-nationalism-is-undermining-the-fight-against-the-coronavirus-pandemic>>.

<sup>121</sup> BIICL Report, 'COVID-19 and International Law' (16 April 2020) 8.

<sup>122</sup> Peterson Institute for International Economics, 'How the G20 Can Hasten Recovery from COVID-19' (PIIE BR 20- 1, April 2020) 33; Barbara J von Tigerstrom, Sam Halabi, and Kumanan Wilson, 'The International Health Regulations (2005) and the Re-Establishment of International Travel Amidst the COVID-19 Pandemic' (2020) *Journal of Travel and Medicine* 1-4; The Economist, 'Modelling Covid-19's Death Toll' (*The Economist*, 15 May 2021) <<https://www.economist.com/briefing/2021/05/15/there-have-been-7m-13m-excess-deaths-worldwide-during-the-pandemic>>.

<sup>123</sup> Remarks by Nilüfer Oral, 'Covid-19: Cross-Sectoral Linkages and Public International Law' (Webinar Co-organised by the NUS Centre for International Law and the Singapore Branch of the International Law Association, 4 February 2021) <<https://cil.nus.edu.sg/podcasts/covid-19-cross-sectoral-linkages-and-public-international-law/>>.

<sup>124</sup> Taylor and Habibi (2020).

<sup>125</sup> Cinà et al (2020) 7.

<sup>126</sup> UN General Assembly Resolution 74/270 of 2 April 2020 'Global Solidarity to Fight the Coronavirus Disease 2019 (COVID-19)'.

<sup>127</sup> G20 Leaders Summit, 'Statement on COVID-19' (26 March 2020) <<https://www.gov.uk/government/news/g20-leaders-summit-statement-on-covid-19-26-march-2020>>; 'Some 50 World Leaders Call for Post-Pandemic Cooperation' (*The Jakarta Post*, 29 March 2020) <<https://www.thejakartapost.com/news/2020/05/29/some-50-world-leaders-call-for-post-pandemic-cooperation.html>>.

<sup>128</sup> Pew Research Centre, 'International Cooperation Welcomed Across 14 Advanced Economies' (September 2021) <<https://www.pewresearch.org/global/2020/09/21/international-cooperation-welcomed-across-14-advanced-economies/>>.

<sup>129</sup> UN Security Council Resolution 2532 (1 July 2020).

## 5. Concluding Remarks

International cooperation is essential in preparing for, responding to, and managing pandemic threats in a globalised world where no State, or border, can control the spread of disease on its own.<sup>130</sup> As Gostin and Meier put it, 'In this interconnected world, no country acting alone can stem health hazards that go beyond national borders.'<sup>131</sup> The IHR were formulated during an epoch of optimism in global institutional cooperation.<sup>132</sup> Several pandemic outbreaks have occurred since the IHR's adoption. Each pandemic prompted opportunities for reflection, review, and improvement. The IHR establish a global surveillance and reporting system predicated on several kinds of international cooperation: a) cooperation in developing the required public health capacities and reporting on IHR implementation; b) cooperation in reporting public health threats of international concern together with subsequent obligations to inform and respond to follow-up requests for public health data; and c) cooperation regarding the prevention and resolution of disputes when implementing the IHR. Yet, the advent of the COVID-19 pandemic has tested the legal foundations of the IHR and has renewed concerns over the fragility of the global health system in addressing pandemics.<sup>133</sup>

The duty of international cooperation in global health is not a discretionary activity or mere aspiration. It instead encompasses a set of legally binding obligations, within and beyond the IHR framework. Aside from legality, the value of meaningful, good-faith, international cooperation in the fight against pandemic disease is both pragmatic and practical: it is fundamentally based on the simple pattern of the epidemiologic curve.<sup>134</sup> The more robust a national health system is, the more rapidly it can detect a novel health event of concern. The more rapidly national health authorities detect a novel health event of concern, the faster they can notify the WHO. Once lodged, timely, accurate and complete epidemiological information enables the WHO to shape an early effective coordinated response. Coordinated responses based on accurate and complete epidemiological evidence can reduce the impact in terms of human life and economic loss.<sup>135</sup> It scarcely needs to be said that the IHR cannot effectively serve their objectives unless States fully comply with their duty of cooperation by strictly following the letter and spirit of the IHR and related obligations under international law. However, without clear guidance, the specific contours of international cooperation have been left to State interpretation.<sup>136</sup>

COVID-19 was the first pandemic caused by a coronavirus despite an international agreement specifically designed to stop such pandemics.<sup>137</sup> Before and during the COVID-19 pandemic, many States may have acted in breach of their duty of cooperation in several ways.<sup>138</sup> Claims that States breached the IHR have led commentators to suggest that the international law of state responsibility requires these States to compensate other affected States for the damage the pandemic has caused because of their internationally wrongful acts.<sup>139</sup> Other commentators have considered the defences which States may rely upon in respect of non-performance of their international obligations under the

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<sup>130</sup> Klaus Dodds, *Border Wars* (Ebury Press 2021) 'Chapter 9: Viral Borders' 219-239.

<sup>131</sup> Lawrence O Gostin and Benjamin Mason Meier, 'Introducing Global Health Law' (2019) 47 *The Journal of Law, Medicine & Ethics* 788-793.

<sup>132</sup> De Pooter (2020); Kumanan Wilson, Sam Halabi, and Lawrence O Gostin, 'The International Health Regulations (2005), the Threat of Populism and the COVID-19 Pandemic' (2020) 16(70) *Globalization and Health* 1.

<sup>133</sup> Taylor and Habibi (2020); Fidler (2020) 237-248; Gostin, Habibi, and Meier (2020) 376.

<sup>134</sup> Gostin and Katz (2016) 264, 279-280.

<sup>135</sup> *Ibid.*

<sup>136</sup> Comments made by Judith Bueno de Mesquita, 'Webinar: Can a "Pandemic Treaty" Promote Global Health Justice?' (*VerfBlog*, 4 November 2021) at 17'-18' <<https://verfassungsblog.de/webinar-can-a-pandemic-treaty-promote-global-health-justice/>>.

<sup>137</sup> WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

<sup>138</sup> United Nations Security Council, Press Release, 'Secretary-General Highlights "Essential" Failure of International Cooperation, in Address to Security Council Meeting on Post-Coronavirus Global Governance (24 September 2020) <<https://www.un.org/press/en/2020/sc14312.doc.htm>>; Stewart Patrick, 'When the System Fails: COVID-19 and the Costs of Global Dysfunction' (*Foreign Affairs*, July/August 2020) <<https://www.foreignaffairs.com/articles/world/2020-06-09/when-system-fails#author-info>>.

<sup>139</sup> Matthew Henderson et al, 'Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response' (Henry Jackson Society Report, April 2020) <<https://henryjacksonsociety.org/wp-content/uploads/2020/04/Coronavirus-Compensation.pdf>>;

IHR.<sup>140</sup> Resort to the law on state responsibility is an unusual response to an ongoing pandemic. Yet, it does bring to the forefront a perennial challenge of global health cooperation, namely how to coordinate a collective cooperative response and assess compliance under the IHR.<sup>141</sup> Unlike some other international legal instruments, the WHO lacks a system of compliance assessment: a system of coordination between States to avoid excessive unilateral responses in pandemics.<sup>142</sup> Without oversight procedures to review State compliance with the IHR, WHO has limited authority to hold States to account.<sup>143</sup>

In Burci's view, a lesson of the ongoing pandemic is that, in planning and preparing for the next pandemic, 'we need to have at least a consultative mechanism whereby States sit together, compare risk assessment, and agree on a coordinated response, whether it is coordinated by WHO or by somebody else'.<sup>144</sup> At present, there is no single platform for global health dialogue between States, international organisations, and other global health actors, such as partnerships, foundations, businesses, and civil society.<sup>145</sup> Discussing the challenges for promoting international health cooperation, Benvenisti suggests that 'the underlying challenge of improving global health is not one of poor coordination among scientists, nor even one of lack of scientific cooperation, but a lack of political [interstate] cooperation'.<sup>146</sup> He argues that 'thus far, member states have shown no political will to refit the WHO to meet its complex task of securing interstate cooperation'.<sup>147</sup> The WHO Director-General had proposed in 2011 a World Health Forum of multi-stakeholder meetings which would increase effectiveness, coherence, accountability, and compliance reporting under the WHO auspices. States, however, rejected the forum. As Gostin writes 'States put their sovereignty first...everyone desires coordination, but no one wants to be coordinated, national politics drive self-interest, with states resisting externally imposed obligations for funding and action'.<sup>148</sup>

Commentators argue that the time has finally come for States to pay attention to the 'lessons learned' from pandemics to strengthen the IHR and 'to return to the principle of cooperation that undergirds them'.<sup>149</sup> To use a medical metaphor, the first and foremost task for States and the WHO is to make a 'diagnosis' of the legal and regulatory weaknesses which have exacerbated the impact of the COVID-19 pandemic.<sup>150</sup> Given the practical importance of international cooperation in achieving the purpose and objective of the IHR, the present paper strengthens the idea that more work should be done by States and the WHO to promote better understanding of what the IHR specifically require and to offer clarity on the meaning of ambiguous terms, particularly with regard to the precise contours of the duty of cooperation. Improving international health cooperation in the aftermath of the COVID-19 pandemic requires emphasising the applicability of the existing legal duty of cooperation, discussed in the present paper, and dispel possible misinterpretations. Addressing existing ambiguities may require revising the IHR or negotiating a subsequent legal instrument regarding its interpretation, the latter of which could be implemented through a resolution of the World Health Assembly.<sup>151</sup> Scholars have also envisaged

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<sup>140</sup> Federica Paddeu and Freya Jephcott, 'COVID-19 and Defences in the Law of State Responsibility' (*EJIL:Talk!*, 17 & 18 March 2020) <<https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>>.

<sup>141</sup> Gostin and Katz (2016) 264, 290.

<sup>142</sup> Remarks by Gian Luca Burci, 'International Law Association (ILA) Panel Discussion of the Global Health Law Committee', held online on 10 December 2020 (79th ILA Biennial Conference, Kyoto 2020).

<sup>143</sup> Lawrence O Gostin, Benjamin Mason Meier, and Barbara Stocking, 'Developing an Innovative Pandemic Treaty to Advance Global Health Security Global Health Law' (2021) 49 *The Journal of Law, Medicine & Ethics* 503, 505.

<sup>144</sup> BIICL Report, 'COVID-19 and International Law' (16 April 2020) 8.

<sup>145</sup> Gostin (2014) 117-127; Remarks by Steven Solomon (Principal Legal Officer, WHO), 'Covid-19: Cross-Sectoral Linkages and Public International Law' (Webinar Co-organised by the NUS Centre for International Law and the Singapore Branch of the International Law Association, 4 February 2021) <<https://cil.nus.edu.sg/podcasts/covid-19-cross-sectoral-linkages-and-public-international-law/>>.

<sup>146</sup> Benvenisti (2020) 589.

<sup>147</sup> *Ibid* 597.

<sup>148</sup> Gostin (2014) 115.

<sup>149</sup> Hathaway et al (2021) 69; see also Benjamin Mason Meier, Judith Bueno de Mesquita, and Sharifah Sekalala, 'The Pandemic Treaty as a Framework for Global Solidarity: Extraterritorial Human Rights Obligations in Global Health Governance' (*Bill of Health*, 13 Oct 2021) <<https://blog.petrieflom.law.harvard.edu/2021/10/13/pandemic-treaty-extraterritorial-obligations/>>.

<sup>150</sup> States agreed to undertake an 'impartial, independent and comprehensive evaluation' of the global response to the pandemic 'at the earliest appropriate moment', 'Coronavirus: World Health Organization Members Agree Response Probe' (*BBC News*, 19 May 2020) <<https://www.bbc.co.uk/news/world-52726017>>; World Health Assembly, Draft Resolution of 18 May 2020, 'COVID-19 Response' Seventy-Third WHA A73/CONF.1 Rev.1.

<sup>151</sup> Cinà et al (2020) 29; Habibi et al (2020) 67-68; Grossman (2021) 133-134.

the possibility of negotiating and adopting a new international treaty 'to clarify State obligations for pandemic preparedness and response'.<sup>152</sup> Several States and the WHO have endorsed this idea.<sup>153</sup> At the time of writing this paper, the World Health Assembly is convening a special session to consider developing a new convention, agreement or other international instrument on pandemic preparedness and response, a so-called 'pandemic treaty'.<sup>154</sup> Whether this new international law-making effort will be successful or whether a new pandemic treaty will address the key failings in the COVID-19 response, including by providing clearer guidance on the exact level and type of cooperation required from each State Party in pandemic situations, remains to be seen.

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<sup>152</sup> Lawrence O Gostin and Eric A Friedman, 'Towards a Framework Convention on Global Health: A Transformative Agenda for Global Health Justice' (2013) 13 (1) *Yale Journal of Health Policy, Law, and Ethics* 1-76; Gostin, Meier, and Barbara Stocking (2021) 503-508; Ronald Labonté et al, 'A Pandemic Treaty, Revised International Health regulations, or Both?' (2021) 17 (128) *Globalization and Health* 1-8.

<sup>153</sup> United Nations, 'COVID-19 shows why united action is needed for more robust international health architecture' (*UN News*, 30 March 2021) [www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture](http://www.who.int/news-room/commentaries/detail/op-ed---covid-19-shows-why-united-action-is-needed-for-more-robust-international-health-architecture); 'World Leaders Call for New International Treaty to Improve Pandemic Response' (*UN News*, 30 March 2021) <<https://news.un.org/en/story/2021/03/1088652>>; Roojin Habibi et al, 'Reshaping Global Health Law in the Wake of COVID-19 to Uphold Human Rights' (*OpinioJuris*, 1 June 2021) <<http://opiniojuris.org/2021/06/01/reshaping-global-health-law-in-the-wake-of-covid-19-to-uphold-human-rights/>>; Silvia Behrendt and Amrei Müller, 'Why the Rush? A Call for Critical Reflection on the Legal and Human Rights Implications of a Potential new International Treaty on Pandemics' (*EJIL:Talk!*, 29 July 2021) <<https://www.ejiltalk.org/why-the-rush-a-call-for-critical-reflection-on-the-legal-and-human-rights-implications-of-a-potential-new-international-treaty-on-pandemics/>>.

<sup>154</sup> Seventy-Fourth WHA, 'Special session of the World Health Assembly to Consider Developing a WHO Convention, Agreement or other International Instrument on Pandemic Preparedness and Response' (25 May 2021) <[https://apps.who.int/gb/ebwha/pdf\\_files/WHA74/A74\\_ACONF7-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_ACONF7-en.pdf)>; Gian Luca Burci, 'A New Pandemic Treaty, Revised International Health Regulations, or Both? What is the Actual Roadmap?' (*Health Policy Watch*, 2 Oct 2021) <<https://healthpolicy-watch.news/a-new-pandemic-treaty-revised-international-health-regulations-or-both-what-is-the-actual-roadmap/>>; Haik Nikogosian, 'Things you must know to help you make a decision on a Pandemic Treaty' (Graduate Institute Geneva 2021) <<https://www.graduateinstitute.ch/sites/internet/files/2021-09/guide-pandemic-treaty.pdf>>; Manjari Mahajan, 'Casualties of Preparedness: Rethinking the Global Health Security Paradigm' (*Bill of Health*, 3 Nov 2021) <<https://blog.petrieflom.law.harvard.edu/2021/11/03/casualties-of-preparedness-rethinking-the-global-health-security-paradigm/>>.

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