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**COVID-19 AND THE POPULIST GOVERNMENTS  
APPROACH TO PANDEMIC MANAGEMENT: A NUANCED  
ANALYSIS**

*Fozia Nazir Lone<sup>†</sup>*

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**ABSTRACT**

*This article addresses international law discourse in the post-COVID-19 era. The first part engages with questions about China, its liability, and the complex legal discourse on causation. The present position of the WHO is that COVID-19 is a zoonotic virus like SARS. The nature of the spillover event remains unclear, but the first human case was identified at some point in Wuhan, China, in December 2019. For the reasons outlined in Part I, the scholarly consensus has been that claims against China appear unjustifiable. The two case studies in Part II demonstrate the factors involved in local pandemic management in two major countries, the United Kingdom and India. Part III*

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*discusses the issues of multiple causes and overdetermination, discourse on international law, and the resumption of progress.*

#### INTRODUCTION

The new Coronavirus outbreak began in Wuhan, China and has now spread to practically every country. This unprecedented abnormality has shown the incompetence and unpreparedness of states in addressing macro-level severe health crises.<sup>1</sup> Substantial death tolls and high infection rates among populations worldwide, irrespective of nationality, have demonstrated the inadequacy of state and international authority-led health measures. Thus far, the pandemic has posed an unprecedented collective threat to people's right to life and health. The wide-ranging measures put in place by state governments to combat the virus's spread have altered daily life in ways that were inconceivable at the start of 2020. Besides national responsibilities in dealing with the crisis, questions about the COVID-19 pandemic's origin and spread have led to much international discourse. This article focuses on two aspects of legal responses: (1) the claims of liability against China and its unjustifiability; and (2) the broader issues related to the international health legal regime and whether it sufficiently and effectively addressed the global health crisis.

As seen in other pandemic crises, several states have been concerned about COVID-19's origin and source. COVID-19 is mostly thought to have escaped, either unintentionally or deliberately, from a laboratory in Wuhan, central China, where the virus was initially discovered.<sup>2</sup> The proponents of this view and speculation around it point to a large biological research facility, the Wuhan Institute of Virology

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2. Amy Maxmen & Smriti Mallapaty, *The COVID lab-leak hypothesis: what scientists do and don't know*, NATURE (June 8, 2021), <https://www.nature.com/articles/d41586-021-01529-3>.

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(WIV), which has been researching coronaviruses in bats for over a decade.<sup>3</sup> While many studies have examined the social vulnerability exacerbated by the virus and its impact spatially and globally, less attention has been paid to underscore the liability of states for causing and worsening the outbreak. Since early 2020, questions have been raised about China's liability for the COVID-19 outbreak. In January 2021, World Health Organization (WHO) investigators arrived in Wuhan to inquire into the origins of the virus.<sup>4</sup> Published in late March, their report did not determine the origin of the virus conclusively, explaining that it was a zoonotic virus like Severe Acute Respiratory Syndrome (SARS) which was transmitted via an undetermined spillover event (from animals to humans).<sup>5</sup> The first human case was identified in December 2019 in Wuhan.<sup>6</sup>

Addressing the United Nations in mid-July 2021, Tedros Adhanom Ghebreyesus, the Director-General of the WHO, stated that China had not cooperated sufficiently: "one of the challenges is...access to raw data, especially the data at the start of the pandemic, the raw data was not shared."<sup>7</sup> He called for better Chinese cooperation in

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3. *Covid Origin: Why the Wuhan Lab-Leak Theory is Being Taken Seriously*, BBC (Mar. 1, 2023), <https://www.bbc.com/news/world-asia-china-57268111>.

4. ASSOCIATED PRESS, *China: WHO Inspectors Arrive in Wuhan to Probe COVID-19 Origins*, EURONEWS (Jan. 14, 2021), <https://www.euronews.com/2021/01/14/china-who-inspectors-arrive-in-wuhan-to-probe-covid-19-origins>.

5. *WHO-convened Global Study of Origins of SARS-CoV-2: China Part 14 January-10 February 2021 Joint Report*, WORLD HEALTH ORG. 9, 108 (noting that the genomic sequence of COVID-19 showed "high homology" to the coronavirus that caused SARS in 2002-2004. Conclusion 1 states, "Sampling of wildlife across China has been conducted but not samples were positive for SARS-CoV-2." Conclusion 2 states, "All the product samples retrieved during the outbreak investigation tested negative for the SARS-CoV-2 nucleic acid.") [hereinafter WHO Joint Report].

6. *Novel Coronavirus (2019-nCoV): Situation Report*, WORLD HEALTH ORGANIZATION 1 (Jan. 21, 2020), <https://www.who.int/docs/default-source/coronavirus/situation-reports/20200121-sitrep-1-2019-ncov.pdf> [hereinafter Situation Report].

7. *China should provide raw data on pandemic's origins - WHO's Tedros*, REUTERS (Jul. 16, 2021), <https://www.reuters.com/business/healthcare-pharmaceuticals/china-should-provide-raw-data-pandemics-origins-whos-tedros-2021-07-15/>

the ongoing COVID-19 probe: “we need information, direct information on what the situation of these labs was before, at the start of the pandemic.”<sup>8</sup> Ghebreyesus’ statements have further fueled the dubious position, even as he claimed further cooperation in identifying the virus’s origin.

When the Wuhan Municipal Health Commission issued an alarm on December 31, 2019, the Chinese Center for Disease Control and Prevention (China CDC) dispatched a fast response team to Wuhan, and the WHO was notified without delay.<sup>9</sup> Such an approach indicates that China, in good faith, took the immediate reasonable actions given the grave situation. Experts like Matthew Kavanagh of the O’Neill Institute for Global and National Health Law, Georgetown University, advocated for a measured approach in early May 2021: “We may not know the true source of this virus for years, if ever. In the meantime we need a stronger, more capable WHO, not one disabled by being caught in great power conflict.”<sup>10</sup>

This article approaches legal discourse about the pandemic on two levels. First, it takes on the issue of causation in potential claims of liability, including the problem of overdetermination. Then, considering the two case studies, it addresses broader questions in international health law.<sup>11</sup> While the issues relating to causation would render individual claims unjustifiable, the restored consensus on international health law and the WHO shows that progress has been resumed.

A fundamental problem for a litigant in this area is that governments have policies and practices relating to health that need to be

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8. *Id.*

9. The Novel Coronavirus Pneumonia Emergency Response Epidemiology Team, *Vital Surveillances: The Epidemiological Characteristics of an Outbreak of 2019 Novel Coronavirus Diseases (COVID-19) — China, 2020*, 2 CHINA CDC WEEKLY 113, 113 (2020).

10. O’Neill Inst. for Nat’l and Glob. Health Law, *Statement from Matthew Kavanagh on WHO’s COVID Origins Report*, GEORGETOWN L. (Mar. 29, 2021), <https://oneill.law.georgetown.edu/press/statement-from-matthew-kavanagh-on-whos-covid-origins-report/>.

11. Brigit Toebes, *International health law: an emerging field of public international law*, INDIAN J. OF INT’L L. (Apr. 6, 2016), <https://link.springer.com/article/10.1007/s40901-016-0020-9>.

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standardized internationally. The WHO reporting duties under the 2005 International Health Regulations are only relevant to the original question of whether China reported the initial risk promptly.<sup>12</sup> There has been discourse on the core legal obligations of states to provide primary healthcare articulated in General Comment 14 on the right to health by the Committee on Economic, Social and Cultural Rights in 2000.<sup>13</sup> Still, this Comment is regarded as soft law. Given the complexities involved, it is likely that the responsibility for damage caused by the virus outbreak is not justiciable as a matter of tortious liability.

The two case studies in Part II relate to questions of overdetermination raised in Part I; questions about the moral responsibility of rulers; failures in global and domestic governance that led to the spread of the virus; and concepts related to universalism and international health law discussed in Part III. Through the two case studies, the article will show precisely how there is a near consensus of opinions in Britain and India as to why and how their domestic structures are the immediate cause of the aggravation of the COVID-19 crisis, given that the only thing known about the disease was that it is highly infectious. It is essential to identify who has the disease and to instruct such persons to quarantine away from uninfected people. Both countries have, in different ways, failed to do this.

The third part of the article addresses the return to the broad international consensus on rights and protections, universalism, and the progress that was made and resumed in the geopolitical approaches to global health security. This part includes examining the rights to health and life issues per the International Covenant on Civil and Political Rights (ICCPR),<sup>14</sup> the International Convention on Economic,

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12. *International Health Regulations (2005) Third Edition*, WORLD HEALTH ORG. art. 13 (“Each State Party shall develop, strengthen, and maintain . . . the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.”) [hereinafter IHR (2005)].

13. Comm. on Econ. Soc. and Cultural Rts., Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4, at 14-15 (Aug. 11, 2000) [hereinafter CESCR Gen. Comment 14].

14. See Int’l Covenant on Civ. and Pol. Rts. Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

Social, and Cultural Rights (ICESCR),<sup>15</sup> and the resumption of progress under international health law overall.

### I. PANDEMIC, CAUSATION AND QUESTION OF LIABILITY

Scientists studying coronaviruses issued a warning in 2007 as the “presence of a large reservoir of SARS-CoV, like viruses in horseshoe bats . . . is a time bomb. The possibility of the re-emergence of SARS and other novel viruses . . . should not be ignored.”<sup>16</sup> David M. Morens and others have systematically and chronologically portrayed the origin and expansion of COVID-19.<sup>17</sup> They pointed out that until recently, nothing was known about coronaviruses.<sup>18</sup> There was little interest in studying these ubiquitous cold viruses. SARS-CoV, a heretofore unrecognized  $\beta$ -coronavirus, first appeared eighteen years ago.<sup>19</sup> According to a Johns Hopkins University report on August 9, 2021, after its initial emergence in Wuhan, the coronavirus had expanded globally and affected 202,755,872, taking the lives of at least 4,294,601 people.<sup>20</sup> In 2016, a novel bat-origin coronavirus was discovered in China, causing a new epizootic disease in pigs known as Swine Acute Diarrhea Syndrome Coronavirus (SADS-CoV).<sup>21</sup> COVID-19 was recently identified, at least as early as late November 2019, and became the fatal bat virus-associated human illness

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15. See Int’l Covenant on Econ. Soc. and Cultural Rts., Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

16. Vincent C. C. Cheng, Susanna K. P. Lau, Patrick C. Y. Woo & Kwok Yung Yuen, *Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Reemerging Infection*, 20 CLINICAL MICROBIOLOGY REV. 660, 683 (2007).

17. See David M. Morens, et al., *The Origin of COVID-19 and Why It Matters*, 103 AM. J. OF TROPICAL MED. AND HYGIENE 955 (Jul. 22, 2020).

18. *Id.* at 956.

19. *Id.* at 955.

20. *Covid Map: Coronavirus cases, deaths, vaccinations by country*, BBC NEWS (Aug. 11, 2021), <https://www.bbc.com/news/world-51235105>.

21. Morens et al., *supra* note 17, at 956.

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emergence, a first in 18 years, as well as the fourth bat virus–associated mammalian emergence.<sup>22</sup>

Breach of obligation derived from international conventions and customary international laws raises the question of state responsibility, which is recognized as an established discourse of international law.<sup>23</sup> The notion of international responsibility can be viewed as a transitional stage, a coliseum between internal state sovereignty on the one hand and the ultimate objective of pragmatically viable enforcement of international law principles, particularly with coercion, on the other hand.<sup>24</sup> The vast majority of authors concur that the introduction of state responsibility serves to ensure reparations for damages caused by a wrongful act because its only legal recourse was to impose a secondary obligation on the responsible state to compensate for the tortious consequences of the wrongful act.<sup>25</sup> The rapid spread of COVID-19 in the first half of 2020, as well as responses from states and other parties, raise serious legal issues.

Specifying two necessary conditions to commit the wrongful act leading to state responsibility, the International Law Commission (ILC) posited the sanctity and seriousness of inter-state relations that are also applicable to non-state actors.<sup>26</sup> The ILC Article explicates: “[T]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international

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22. Yongshi Yang et al., *The deadly coronaviruses: The 2003 SARS pandemic and the 2020 novel coronavirus epidemic in China*, J. OF AUTOIMMUNITY (Mar. 3, 2020).

23. Int’l L. Comm’n, *Rep. on the Work of its Fifty-Third Session*, U.N. Doc. A/56/10, at ch. 4 (2001).

24. Mika Dimitrovska, *The Concept of International Responsibility of State in the International Public Law System*, J. OF LIBERTY AND INT’L AFFS. 1 (2015).

25. Pierre-Marie Dupuy, *The International Law of States Responsibility: Revolution or Evolution*, 11 MICH. J. INT’L L. 105, 105-06 (1989).

26. Int’l L. Comm’n, *Rep. on the Work of its Fifty-Third Session*, U.N. Doc. A/66/10, at ch. 1 (2011); see *Tulip Real Est. & Dev. Neth. B.V. v. Republic of Turk.*, ICSID Case No. Arb/11/28, Decision on Annulment, ¶ 183-84 (Dec. 30, 2014); *Chief Damian Onwuham v. Fed. Republic of Nigeria*, Case No. ECW/CCJ/APP/13/14, Judgment, at 24-25 (July 3, 2018).



obligation of the State.”<sup>27</sup> In the COVID-19 pandemic, western states and their allies are, without hesitation, condemning China for originating the virus and not controlling its transmission across the world. The aspect of China’s responsibility, if it needs to be established, shall be amplified within the ambit and scale of state responsibility under international law. However, concerns about the failure of protection under an international regime, particularly the WHO, have increased.<sup>28</sup> Determining the question of state responsibility or responsibility of non-state actors implies three aspects that are the central premises of this research. Among them, one question probes China’s responsibility under traditional state responsibility. Another deals with states’ response to the COVID-19 pandemic in accordance with the 2005 International Health Regulations. The final question is related to the overall competence of the WHO in terms of its legal regime, which is supposed to deal with the pandemic.

In his recent work, Martins Paparinskis presented the responsibility of states according to the traditional content and debate proceeded in international law.<sup>29</sup> Maysa Bydoon and Omar Alotain have similarly discussed the violation of state responsibility considering the WHO’s International Health Regulations and Constitution.<sup>30</sup> But the cases have not been studied meticulously to justify their claims. On the other hand, Creutz has argued for China’s responsibility. Creutz accuses China of breaching the international legal framework given by WHO.<sup>31</sup> However, her argument’s symbiosis could hardly reach the objective analysis in determining a state’s responsibility. The associated responsibility of states and the failure of the international health

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27. Int’l L. Comm’n, *supra* note 23, at 26.

28. See Lee Jones & Shahar Hameiri, *Explaining the failure of global health governance during COVID-19*, 98(6) Int’l Affs. 2057 (2022)

29. See Martins Paparinskis, *COVID-19 Claims and the Law of International Responsibility*, 11 J. INT’L HUMAN. LEGAL STUD. 311, 313 (2020).

30. Maysa S Bydoon & Omar F Alotain, *State Responsibility and COVID-19*, J. OF ARTS & HUMAN. 62, 62 (2021).

31. Katka Creutz, *China’s Responsibility for the COVID-19 Pandemic: An International Law Perspective* 4 (Finnis Inst. of Int’l Aff., Working Paper No. 115, 2020) (“China allegedly hid reports of the outbreak for days or even weeks . . . not only was China passive . . . it also undertook measures to cover up the disease”).

regime have not been objectively analyzed throughout her work. Therefore, a gap remains that requires a critical understanding of the positional responses of states, including China, and the international institutions accountable for the global health crisis, especially the WHO and its legal framework.

The Universalist approach to international law signifies applying common standards to protect everyone. The Universalist approach requires good local, regional, and global governance. It is well articulated in the founding principles of the Universal Declaration of Human Rights (UDHR) as well as other human rights treaties.<sup>32</sup> Under Article 2 of the ICCPR, protecting human rights is framed as a positive obligation for states.<sup>33</sup> Article 6 of the ICCPR states, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>34</sup> Likewise, Article 12 of the International Convention on Economic, Social and Cultural Rights (ICESCR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>35</sup> This article identifies some measures a state should take “to achieve the full realization of this right.”<sup>36</sup> Furthermore, other conventions; customary laws; regional agreements; and international, regional, and domestic case law affirm the right to life and health in a myriad of ways.<sup>37</sup> As

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32. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (“the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world...”). [hereinafter UDHR].

33. ICCPR, *supra* note 14, art. 2(2) (“each State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant”).

34. *Id.* art. 6(1).

35. ICESCR, *supra* note 15, art. 12(1).

36. *Id.* art. 12(2)(a)-(d) (including steps necessary for the reduction of stillbirth-rate and infant mortality; improvement of hygiene; prevention, treatment, and control of diseases; and the creation of conditions that would ensure access to medical services).

37. See generally Lawrence O Gostin, et al., *The legal determinants of health: harnessing the power of law for global health and sustainable development*, 393 LANCET. 1857 (2019); 393(10183).

per General Comment 14, any person or group whose right to health is violated is entitled to remedies: “National ombudsmen, human rights commissions, consumer forums, patients’ rights associations or similar institutions should address violations of the right to health.”<sup>38</sup>

As a general matter, should there be grounds for a claim related to state responsibility, the issue of causation would likely be described as follows: causation is the connection between acts/omissions and outcomes. As stated, the approach to causation under international law has been described as “directly analogous to the framework of general tort law” in that it applies to the establishment of a breach and the assessment of damages.<sup>39</sup> In terms of state responsibility, issues of causal nexus can be raised through primary rules; secondary rules; and adjudicatory processes.<sup>40</sup>

International law literature has generally reviewed the matter of causation as it relates to establishing damages, but it also applies to the earlier matter of determining a breach.<sup>41</sup> Establishing factual causation is the first step, where a causal relationship between an act/omission and the alleged harm must be demonstrated.<sup>42</sup> Then, the defendant’s scope of responsibility (relating to remoteness, foreseeability and other factors) must be clarified to establish the consequences of the harmful act they are responsible for.<sup>43</sup>

Regarding establishing factual causation, much rests on the actual dispute between the parties. A standard legal test is the “but-for” or sine-qua-non-test: without the act or omission of the defendant, would the harmful outcome have occurred?<sup>44</sup> It has been used by various international courts but has also drawn criticism, particularly concerning

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38. CESCR Gen. Comment 14, *supra* note 13, at 20.

39. Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Over Determination: In Search of Clarity*, THE EUROPEAN J. OF INT’L L. 471, 476 (2015).

40. *Id.* at 474.

41. *Id.* at 476.

42. *Id.* at 475.

43. *Id.*

44. *Id.* at 476-77.

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overdetermination, which refers to a multiplicity of causes contributing to a harmful outcome.<sup>45</sup> As outlined by Plakokefalos, causation is an issue that lacks clarity in international law.<sup>46</sup> The three categories of overdetermination, as outlined by Brocklecker-Stern, are: (1) cumulative causation (two or more causes, where one alone could not have caused the alleged damage); (2) complementary/concurrent causation (two or more causes occurring at the same time lead to one damage); (3) parallel/preemptive causation (where the causes preempt/affect each other).<sup>47</sup> The “but-for”/sine qua non test has limitations regarding complementary/concurrent causation, parallel/preemptive causation, and omissions.<sup>48</sup>

In the present COVID-19 outbreak, it is unknown what grounds of liability can be attributed to China, as any attempt to establish factual causation would be overwhelmed by over-determination. While COVID-19 continues to spread around the globe and governments demonstrate that they are woefully unprepared to deal with an outbreak of this magnitude, the blame game has overheated with a coronavirus “war of words” between the U.S. and China, which has tainted international efforts to respond to the COVID-19 outbreak.<sup>49</sup> Judging from cases filed in the United States against China, if there are grounds for legal action at all, it would be tortious, on the basis that one legal actor’s action has caused another’s injury.<sup>50</sup> Causation is an area where

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45. *Id.* at 477.

46. *Id.* at 475.

47. Brigitte Bollecker-Stern, *La Préjudice dans la théorie de la responsabilité internationale* (Paris: A. Pedone, 1973), at 267.

48. Plakokefalos, *supra* note 39, at 473; Hillel David, et al., *Proving causation where the but for test is unworkable*, 30 *ADVOC. Q.* 216, 222 (2005)

49. Nong Hong et al., *U.S.-China Relations in the Age of COVID-19: Politics, Polemics and Pandemic Response Measures A collection of individual analyses on the history and impacts of the coronavirus pandemic*, Institute of China-America Studies (Sept. 3, 2020), <https://chinaus-icas.org/research/u-s-china-relations-in-the-age-of-covid-19-politics-polemics-and-pandemic-response-measures/>.

50. Robert E. Boone III & Simren K. Gill, *Chinese Government Sued in Multiple Class Actions by U.S. Citizens and Businesses*, Lexology (Apr. 1, 2020), <https://www.lexology.com/library/detail.aspx?g=2b206bed-7edf-493e-a9f3-d4a5a1afa311>; see generally Class Action Complaint, *Alters et al. v. People’s*

tort law is “directly analogous” to international law.<sup>51</sup> This is an issue of causation concerning a disease about which nothing was known other than the fact that it is very infectious among humans, meaning that it is likely to spread to any country in a globalized world. Furthermore, there would be numerous new intervening causes (*novus actus interveniens*) before a plaintiff or group of plaintiffs acquires the virus. What adds to the complications is that legally different approaches would be adopted to determine whether the new intervening causes were unforeseeable, intentional, or negligent. The precise cause of the damage the disease will do to victims is also not predictable. Information is only known at a statistical level in the aggregate.

Viewing the spread of COVID-19 from the perspective of tort law involves examining the several causes that led to its spread. One needs to consider multiple independent causes, simultaneous cases, and consecutive events, including the new intervening acts that led to the spread of the virus.<sup>52</sup> The liability for ‘starting’ the pandemic under the tort principles of causation would be satisfied only on scientific evidence.<sup>53</sup> Due to evidential difficulties,<sup>54</sup> it is impossible to prove on the balance of probabilities whether a Chinese breach caused COVID-19 to spread or made a material contribution to its proliferation. After proving causation, one needs to make sure the damage caused by COVID-19 is not too remote. Even when it is patent that the defendant’s conduct caused the claimant’s loss, the question remains

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*Republic of China et al.*, No. 1:20-cv-21108-UU (S.D. Fla. 2020); *Bella Vista LLC et al. v. The People’s Republic of China et al.*, No. 2:2020-CV-00574 (D. Nev. 2020); *Borque CPA’s and Advisors Inc., et al. v. The People’s Republic of China, et al.*, No. 8:20-CV-00597 (C.D. Cal. 2020).

51. Plakokefalos, *supra* note 40, at 476.

52. See *McGhee v. Nat’l Coal Bd.* [1973] 1 W.L.R. 1, 14 (UK); *Wilsher v. Essex Area Health Auth.* [1988] AC 1074 (UK); *Fairchild v. Glenhaven Funeral Serv. Ltd.* [2003] 1 AC 32 (UK).

53. Ronen Perry, *Who Should Be Liable for the COVID-19 Outbreak?* 58 HARV. J. ON LEGIS. 253, 309 (2021); Arez Mohammed Sediq Othman, *Tort Liability Resulted from Negligence in Infectious Diseases under the Iraqi Legal System: Coronavirus (COVID-19) as an Example*, 5 SCI. J. OF CIHAN UNIV.–SULAIMANIYA 114, 122 (2021).

54. See Situation Report *supra* note 6.

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whether the defendant should be held responsible for all the consequences flowing from the wrongdoing.<sup>55</sup>

The aspect of the tortious claims of other countries against China for the economic loss caused by the coronavirus outbreak, and its prospect, can also be apprehended through the *Pride Case*.<sup>56</sup> There, when the defendants' premises were the root of an outbreak of foot and mouth disease, the claimants sought damages for lost business.<sup>57</sup> A faulty drain had allowed the foot and mouth disease (FMD) virus to escape from their premises.<sup>58</sup> Economic loss accounted for a large portion of the damage claimed.<sup>59</sup> The number of people who would have been included within the purview of the claimant's duty of care was far too large.<sup>60</sup> In addition, the losses were too remote.<sup>61</sup> The plaintiffs had no realistic chance of succeeding.<sup>62</sup> Hence, the case was dismissed.<sup>63</sup> Plaintiffs must show that there was a breach of duty of care and, more importantly, that the loss and the breach of duty are not too remotely connected.

International legal scholarship has discussed assertions regarding China's state responsibility related to COVID-19.<sup>64</sup> As stated above,

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55. Michael A. Jones et al., *Clerk and Lindsell on Torts* 2-06 (21st ed. 2014); See generally, Fozia N. Lone, *Tort Law in Hong Kong* 1-4 (Wolters Kluwer, Alphen aan den Rijn, Netherlands, 2016); Fozia N. Lone, *Hong Kong Tort Law: Texts, Cases, and Ordinances* (LexisNexis, 2014), at Ch. 4.

56. *D. Pride & Partners v. Inst. for Animal Health* [2009] EWHA 685.

57. *Id.* ¶ 2, 4.

58. *Id.* ¶ 42.

59. *Id.* ¶ 54.

60. See *Id.* ¶ 119.

61. *Id.* ¶ 102.

62. *Id.* ¶ 138.

63. *Id.* ¶ 139.

64. See Michael Aondona Chiangi, et al., *State Responsibility in the Wake of COVID-19 Pandemic: International Health Law and Human Rights Obligations of China*, 9(2) PORT HARCOURT L. J. 162 (2020); Talia Danielle Sturkie, *Must China Pay? How Claims against China for COVID-19 Reveal Flaws in the International Legal System That Make Accountability Impractical*, 11 PA. STATE. J.L. & INT'L AFF.. 218 (2023); IPSHITA CHATURVEDI, CHINA'S STATE

according to the WHO's latest findings, the origin of the virus is likely zoonotic, with a spillover to humans, potentially through a second animal source.<sup>65</sup> Reflecting through an analysis on the SARS epidemic, Chaturvedi has demonstrated that, presently, allegations of violations of state responsibility have not been made out.<sup>66</sup> However, as indicated by Lucas Bergkamp, this issue is up for debate.<sup>67</sup>

For a tort law perspective, *Caparo Indus. v. Dickman* is instructive of the common law approach, with tests of foreseeability, proximity, and whether it is fair and reasonable to impose such a duty.<sup>68</sup> These would be difficult to satisfy, being entirely dependent on local conditions. Following the pattern of adjudication in the *Fairchild Case*,<sup>69</sup> the House of Lords ruled that if a claimant could meet the burden of proof that an employer contributed considerably to the asbestos exposure (cause of the loss) and, therefore, materially increased the likelihood of the claimant contracting cancer (loss), he would be able to seek compensation.<sup>70</sup> The problem with the "but for" test in this type of case, according to the House of Lords, is that it would essentially make the employer's responsibility unenforceable: causation could never be demonstrated based on current scientific knowledge.<sup>71</sup> This warranted deviating from the standard rule of causation.

While assessing the ILC Draft Articles, Chaturvedi points out that even if the provisions of the state's responsibility on the wrongful act

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RESPONSIBILITY FOR THE GLOBAL SPREAD OF COVID-19: AN INTERNATIONAL LAW PERSPECTIVE (Observer Rsch. Found. Iss. 373 2023).

65. WHO, *Coronavirus Disease 2019 (COVID-19) Situation Report -94* (Apr. 23, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf>.

66. IPSHITA CHATURVEDI, CHINA'S STATE RESPONSIBILITY FOR THE GLOBAL SPREAD OF COVID-19: AN INTERNATIONAL LAW PERSPECTIVE (Observer Rsch. Found. Iss. 373 2023).

67. See Lucas Bergkamp, *State Liability for Failure to Control the COVID-19 Epidemic: International and Dutch Law*, 11 EUR. J. OF RISK REGUL. 343 (2020).

68. *Caparo Indus. Ltd. v Dickman* [1990] 2 AC 605 (UK).

69. *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] 3 W.L.R. 89 (UK).

70. See *Barker v. Saint Gobain Pipelines Plc* [2004] EWCA Civ 545 (UK).

71. *Fairchild v Glenhaven Funeral Services Ltd.* [2002] 3 W.L.R. 89, ¶9 (UK).

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were codified and applicable, the emphasis on attribution and causation (rather than an obligation to cooperate) would leave them ineffective in addressing the consequences of the pandemic.<sup>72</sup> Given the state's all-encompassing role in epidemic prevention, an omission in performing the duty of care in this area will likely be attributed to the state. Nations have a duty under international law to collaborate with other states and to safeguard other states against detrimental conduct committed by individuals under their authority.<sup>73</sup> In this connection, even if the proposed articles of the ILC are used as a basis for determining China's guilt in the current case, holding China legally responsible would be extremely difficult. The articles ask for proving the case beyond a reasonable doubt; otherwise, it would not meet the condition of 'attributability' retained in Article 2 of ILC's Draft Articles.<sup>74</sup>

In terms of linking whatever wrongful act/omission and harm in the present case, it would likely fail due to severe problems with factual causation and terms of policies adopted regarding the scope of responsibility. Internationally, the ICJ's fairly restrictive approach in the dicta in *Kivalina v ExxonMobil Corp.* shows that, in the present case, linking acts/omissions by China to damage at the domestic level in another country seems unlikely as a matter of both factual causation and in consideration of the scope of responsibility.<sup>75</sup> In that case, a native Alaskan tribe sued various oil, coal, and power companies for monetary damages.<sup>76</sup> They contended that due to the emissions from these industries, the residents of Kivalina would have to relocate because their lives and livelihoods had been affected.<sup>77</sup>

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72. CHATURVEDI, *supra* note 66, at 6.

73. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Perm. Ct. Arb. 1938 & 1941).

74. CHATURVEDI, *supra* note 66, at 5.

75. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012).

76. *Id.* at 853.

77. *Id.* at 868.



While questions are pending regarding WHO's 2005 International Health Regulations,<sup>78</sup> the international law analysis relating to SARS shows there does not seem to have been an internationally wrongful act.<sup>79</sup> This leads to the question of whether the rule applies to created harm or to specific behaviors that are harmful. The response has a variety of ramifications. The nature of the action is irrelevant if the harm is forbidden from any source or activity. If, on the other hand, state accountability is contingent on whether a particular activity is permitted or forbidden, the issue of how to handle the acts not proscribed by international law must be addressed. Generally, allegations about the origins of the virus from animals in wet markets and questions about China being slow to share information about the epidemic would not, even if borne out, amount to an internationally wrongful act as there is no international legal obligation that would have been breached.<sup>80</sup>

## II. CASE STUDIES

In assessing overdetermination, breaks in chains of causation, and remoteness under tortious or analogous principles, the impact of governance/leadership holds substantial weight. This position concerns legal liability and broad international law/relations. The case studies cover the period from around January 2020, when the world started taking active steps to mitigate the spread of the virus, until mid-2021. The case studies help to understand leadership's impact and contextualize the international law and relations discourse on the right to life and health in Part III.

### A. *Case Study: Britain*

For Britain, there is cross-party and cross-profession consensus that the most likely causes of the disease spread (and tens of thousands

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78. *International Health Regulations (2005) Second Edition*, WORLD HEALTH ORG. (2008).

79. David Fidler, *SARS and International Law*, AM. SOC'Y OF INT'L L. (Apr. 5, 2003), <https://www.asil.org/insights/volume/8/issue/7/sars-and-international-law>.

80. *Id.*

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of deaths)<sup>81</sup> were the failure of the government to act from the end of January until the eventual lockdown on March 23, 2020.<sup>82</sup> Inevitably, factual assertions can only be verified with a judicial inquiry, but three authoritative preliminary investigations may be cited. The National Audit Office report, released in May 2021, dealt with the lack of preparation and other matters.<sup>83</sup> Many components of the government's response lacked a blueprint. Pre-existing pandemic contingency plans, for example, did not include specific preparations for identifying and maintaining a large population that was urged to be shielded.<sup>84</sup> Every week, the National Health Service Test and Trace (NHST&T) produces a huge amount of data that explains COVID-19 progress and tracing performance.<sup>85</sup> Local governments needed access to all the NHST&T data and General Practice Improvement Programme (NGPIP) systems to respond to the epidemic within their respective

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81. The death toll stood at 64,500 by mid-June 2020. See Sarah Young, *The UK Records Around 64,500 Excess Deaths During Pandemic*, ONS Official Says, REUTERS (June 16, 2020), <https://www.reuters.com/article/health-coronavirus-britain-excess-mortal/uk-records-around-64500-excess-deaths-during-pandemic-ons-official-says-idINKBN23N19Z/>; Caelainn Barr, Nicola Davis & Pamela Duncan, *UK Coronavirus deaths pass 100,000 after 1,564 reported in one day: Experts Condemn 'Phenomenal failure of Policy and Practice' in handling of Pandemic*, THE GUARDIAN (Jan. 13, 2021), <https://www.theguardian.com/world/2021/jan/13/uk-coronavirus-deaths-pass-100000#:~:text=UK%20coronavirus%20deaths%20pass%20100%2C000%20after%201%2C564%20reported%20in%20one%20day,-This%20article%20is&text=More%20than%20100%2C000%20people%20have,failure%20of%20policy%20and%20practice%E2%80%9D>.

82. William Keegan, *Johnson is no Machiavelli: His Ruthless Streak Serves Only Himself*, THE GUARDIAN (July 11, 2021), <https://www.theguardian.com/business/2021/jul/11/johnson-is-no-machiavelli-his-ruthless-streak-serves-only-himself>.

83. *Initial Learning From the Government's Response to The COVID-19 Pandemic: Cross-Government*, NAT'L AUDIT OFF. (May 19, 2021), <https://www.nao.org.uk/insights/initial-learning-from-the-governments-response-to-the-covid-19-pandemic/> [hereinafter NAT'L AUDIT OFF.].

84. *Id.* at 12-13.

85. See National Health Service Test and Trace Services, *Weekly Statistics for NHS Test and Trace (England)*, GOV.UK, <https://www.gov.uk/government/collections/nhs-test-and-trace-statistics-england-weekly-reports#full-publication-update-history> (last visited May 28, 2024).

jurisdictions. Thereupon, “shielding” of especially vulnerable individuals was disclosed on March 22, 2020;<sup>86</sup> initially, about 870,000 people were identified as clinically extremely vulnerable (CEV), and about 2,200,000 had been recognized as CEV by early May 2020.<sup>87</sup> A total of 420,000 CEV individuals were identified and contacted by April 12.<sup>88</sup> The delay for hundreds of thousands of CEV people accessing state support was partly due to the difficulty of obtaining sufficient data from various NHS sources.<sup>89</sup>

The first significant report is from the Sunday Times titled *Coronavirus: 38 days when Britain sleepwalked into disaster*.<sup>90</sup> This paper’s investigative journalism is based on crucial insider reports from the Prime Minister’s Office.<sup>91</sup> This can be taken as political analysis coming from the highest-quality conservative newspaper in Britain. Next is the Channel 4 interview with a former chief scientific advisor to the government, Professor Sir David King, on May 29, 2020.<sup>92</sup> He

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86. Clare Herrick, *‘We thank you for your sacrifice’: Clinical vulnerability, shielding and biosociality in the UK’s Covid-19 response*, 18 *BIOsocieties* 218, 223 (2023) (“Johnson announced that, ‘We have come to the stage of our plan...when we have to take special steps to protect the particularly vulnerable. I said the moment would come where we needed to shield those with serious conditions. There are probably about 1.5 million in all’”).

87. *Id.*; Rajeev Syal, *Thousands of clinically vulnerable not reached at start of Covid crisis, watchdog finds*, *THE GUARDIAN* (Feb. 9, 2021), <https://www.theguardian.com/world/2021/feb/10/thousands-of-clinically-vulnerable-not-reached-at-start-of-covid-crisis-watchdog-finds>.

88. Rajeev Syal, *Thousands of clinically vulnerable not reached at start of Covid crisis, watchdog finds*, *THE GUARDIAN* (Feb. 9, 2021), <https://www.theguardian.com/world/2021/feb/10/thousands-of-clinically-vulnerable-not-reached-at-start-of-covid-crisis-watchdog-finds>.

89. *Id.*

90. Jonathan Calvert et al., *Coronavirus: 38 days when Britain sleepwalked into disaster*, *THE SUNDAY TIMES* (Apr. 19, 2020), <https://www.thetimes.co.uk/article/coronavirus-38-days-when-britain-sleepwalked-into-disaster-hq3b9tlgh>.

91. *Id.*

92. Krishnan Guru-Murthy & David King, *40,000 Excess deaths could have been avoided if the government had acted responsibly*, *CHANNEL 4* (May 29, 2020), <https://www.channel4.com/news/40000-excess-deaths-could-have-been-avoided-if-government-had-acted-responsibly-prof-sir-david-king>.

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led a group of scientists critical of the government.<sup>93</sup> Finally, there is an article in the Daily Mail (Britain's highest-circulating newspaper and typically a conservative paper) by Lord Jonathan Sumption, an ex-Supreme Court Judge, titled *These people have no idea what they are doing*.<sup>94</sup> These reports provide political, legal and medical opinions coming from two conservative newspapers and one more radical, if not left-wing, news channel.

In addition, the particular characteristics of British populism which contributed to its mismanagement of the health crisis are rooted in Brexit anti-European nationalism, which upholds a complete rejection of the very idea of professional expertise.<sup>95</sup> These factors have led to government appeals to British 'common sense,' its cult of eccentric anti-authoritarian individualism, which has made the formulation of rules of conduct for its citizens and the methods of enforcement of such standards, especially against the government itself, quite chaotic. The central figure here was Prime Minister Boris Johnson, who fit the characterization of a leader of the *Reckless opportunists: elites at the end of the establishment* as discussed by Aeron Davis, Professor of Political Communication at Goldsmith College.<sup>96</sup> The legal, political, and professional sources mentioned above stressed the vital significance of the missing link among the government personnel. Added to the adverse attitude of the Prime Minister, British political culture was and remains averse to cooperation with European Union countries and the nations vital to the development of the crisis in Britain, Italy, and Spain.

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93. *Id.*

94. Jonathan Sumption, *These People Have No Idea What They're Doing: Ex-Supreme Court judge Lord Jonathan Sumption Gives a Devastating Verdict on Our Political Leaders' Handling of the Crisis*, DAILY MAIL (June 21, 2020), <https://www.dailymail.co.uk/debate/article-8443747/LORD-JONATHAN-SUMPTION-people-no-idea-theyre-doing.html>.

95. Henry Mance, *Britain has had enough of experts, says Gove*, FIN. TIMES (June 4, 2016), <https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>.

96. See AERON DAVIS, RECKLESS OPPORTUNISTS: ELITES AT THE END OF THE ESTABLISHMENT 3 (2018).

Nevertheless, medical and political analysis shows that by the end of January 2020, Britain had sufficient evidence of the COVID-19 danger to go immediately into lockdown with travel bans and complete testing and tracing.<sup>97</sup> By September 2020, there was an emerging consensus that the 2020 COVID-19 had proved to be as fatal in its spread and consequences as the Spanish Flu.<sup>98</sup> Wuhan, China went into lockdown on January 23.<sup>99</sup> As Wuhan went into lockdown, a Cabinet Office Briefing Room (Emergency) Group meeting occurred in Britain; this was not presided over by the Prime Minister.<sup>100</sup> The Group decided there was no cause for concern, and that the risk was low.<sup>101</sup> The legal criticism of this process was that the relationship between medical and scientific expertise, and political power was too close; responsibilities needed to be defined.<sup>102</sup> The Lancet medical journal's

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97. See *COVID-19 and Occupational Impacts*, GOV.UK (Nov. 16, 2022), <https://www.gov.uk/government/publications/covid-19-and-occupational-impacts/covid-19-and-occupational-impacts> (“The first case of COVID-19 documented in the UK was on 31 January 2020...”); see also *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (last visited June 25, 2024), <https://www.cdc.gov/museum/timeline/covid19.html>.

98. See generally Daihai He, et al., *Comparing COVID-19 and the 1918-19 influenza pandemics in the United Kingdom*, 98 INT’L J. OF INFECTIOUS DISEASES 67 (2020); see also Berkeley Lovelace Jr., *Medical historian compares the coronavirus to the 1918 flu pandemic: Both were highly political*, CNBC (Sept. 28, 2020), <https://www.cnbc.com/2020/09/28/comparing-1918-flu-vs-coronavirus.html>.

99. *Wuhan lockdown: A year of China’s fight against the Covid pandemic*, BBC (Jan. 21, 2021), <https://www.bbc.com/news/world-asia-china-55628488>.

100. Zoe Drewett, *Cobra meets to discuss coronavirus as 14 cleared of having disease in UK*, METRO (Jan. 24, 2020), <https://metro.co.uk/2020/01/24/cobra-meets-discuss-coronavirus-nine-brits-wait-test-results-12117869/>.

101. *Id.*; Press Release, Department of Health and Social Care, CMO for England statement on the Wuhan novel coronavirus (Jan. 24, 2020), <https://www.gov.uk/government/news/cmo-for-england-statement-on-the-wuhan-novel-coronavirus>.

102. Jane Croft, *Lord Sumption attacks government over coronavirus restrictions*, FIN. TIMES (Oct. 28, 2020), <https://www.ft.com/content/96674b7a-dfa6-4535-9f75-df8e459593c9>.

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editor repeatedly complained that the closeness of scientific advisors to political power makes the relationship incestuous.<sup>103</sup>

A study from Southampton University showed that one-hundred and ninety-thousand persons had flown into Britain from Wuhan and other high-risk Chinese cities from January 2020 to March 2020.<sup>104</sup> While the WHO declared a public health emergency of international concern on January 30, the first Civil Contingencies Committee (COBRA) meeting that the Prime Minister attended was on March 2, 2020.<sup>105</sup> There is considerable controversy that throughout January 2020, China was frustrating the release of necessary medical evidence about the spread and significance of the COVID-19 outbreak to the WHO.<sup>106</sup> In February and March, tens of thousands of British tourists and businesspeople willingly returned from Spain and Italy: countries with whom Britain had abandoned any idea of collaboration after Brexit Day on January 31, 2020.<sup>107</sup>

Throughout February, when the Prime Minister was on holiday for twelve days, no further preparations were made for a potential epidemic.<sup>108</sup> On top of that, the decision to develop herd immunity by natural infection rather than protecting the population and waiting for herd immunity to be achieved through vaccination, led to severe

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103. RICHARD HORTON, *THE COVID CATASTROPY: WHAT'S GONE WRONG AND HOW TO STOP IT HAPPENING AGAIN* (London John Wiley and Son 2020).

104. Jonathan Calvert et al., *supra* note 90.

105. Press Release, Prime Minister's Office, PM to chair COBR meeting on the coronavirus outbreak (Mar. 2, 2020), <https://www.gov.uk/government/news/pm-to-chair-cobr-meeting-on-the-coronavirus-outbreak>.

106. Associated Press, *China delayed releasing coronavirus info, frustrating WHO*, PBS NEWS (June 2, 2020), <https://www.pbs.org/newshour/health/china-delayed-releasing-coronavirus-info-frustrating-who>.

107. See Holly Ellyatt, *UK formally leaves the European Union and begins Brexit transition period*, CNBC (Jan. 31, 2020), <https://www.cnbc.com/2020/01/31/brexit-day-uk-formally-leaves-the-european-union.html>.

108. Ed Yong, *The U.K.'s Coronavirus 'Herd Immunity' Debacle*, THE ATLANTIC (Mar. 16, 2020),

<https://www.theatlantic.com/health/archive/2020/03/coronavirus-pandemic-herd-immunity-uk-boris-johnson/608065>.

consternation.<sup>109</sup> When the final decision to go into lockdown on March 23 was taken, the virus had already been widespread in the community.<sup>110</sup> The British Government kept prevaricating about necessary precautionary measures.<sup>111</sup> No preparation was made for the sudden total shutdown of the economy, which was a panic reaction to a prediction from a scientific advisor that potentially another 40,000-50,000 people could die.<sup>112</sup> The crisis was accentuated by the government's decision to prioritize the protection of the National Health Service's capacity to manage severely ill patients in Intensive Care Units (ICUs) by disgorging thousands of older patients into unprotected care homes: up to twenty thousand subsequently died.<sup>113</sup> This decision was mainly political as the government wanted to skip liability; they were only responsible for the public health service, not private care homes.

In conclusion, two simple and brutal points can be made. According to the medical expert, Sir David King, with more than a thousand new infections a day and more than a hundred deaths, it was the time to go into lockdown, not come out of it.<sup>114</sup> Lockdown merely suppressed the rate of spread of infection.<sup>115</sup> To come out of lockdown is

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109. Alan McNally, *Backers of 'herd immunity' shouldn't have been allowed near Boris Johnson*, THE GUARDIAN (Dec. 14 2020), <https://www.theguardian.com/commentisfree/2020/dec/14/herd-immunity-boris-johnson-coronavirus>.

110. *Covid-19: 'Poor decisions' to blame for UK death toll, scientists say*, BBC (Jan. 27, 2021), <https://www.bbc.com/news/uk-55820178>.

111. *Id.*

112. *Id.*

113. *Covid-19: Policy to discharge vulnerable patients to care homes was irrational, say judges*, THE BMJ (Apr. 29, 2022), [Covid-19: Policy to discharge vulnerable patients to care homes was irrational, say judges | The BMJ](https://www.bmj.com/content/375:n000001).

114. *COVID-19: It would be 'wise' for govt to delay 21 June lockdown easing, says Sir David King*, SKY NEWS (June 7, 2021),

<https://news.sky.com/video/covid-19-it-would-be-wise-for-govt-to-delay-21-june-lockdown-easing-says-sir-david-king-12326810>.

115. *See David King: Earlier lockdown could have cut deaths to 10,000*, DAILY MAIL (last visited June 26, 2024), <https://www.dailymail.co.uk/video/coronavirus/video-2189770/Video-David-King-Earlier-lockdown-cut-deaths-10-000.html>.

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not a remedy for the disease in the absence of a vaccine.<sup>116</sup> It will merely resurge.<sup>117</sup> This reading of the minutes of the government medical expert committee, Scientific Advisory Group for Emergencies (SAGE), leads to the following legal and constitutional view of Lord Sumption: the government jumped from the so-called commonsensical light-touch advisory approach to a complete lockdown based on a panicky reaction to the public mood, which one would expect from a populist government disdainful of expertise.<sup>118</sup> In the view of political, medical, and legal opinion, the outcome was a disastrous handling of the COVID-19 crisis by people who have no idea what they are doing. By August 2021, 65,000 people had lost their lives,<sup>119</sup> and the economy was seriously damaged.<sup>120</sup>

This was the position in the summer of 2020. By early January 2021, more than 100,000 death had been registered in the UK and by July 2022, more than 200,000 deaths had been recorded in the UK,

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116. See Good Morning Britain, *SAGE Chair Sir David King Calls for England to go Into Full National Lockdown*, YOUTUBE (Dec. 30, 2020), <https://www.youtube.com/watch?v=WtM7QYHwQIA>.

117. See *id.*

118. Jane Croft, *Lord Sumption attacks government over coronavirus restrictions*, FIN. TIMES (Oct. 28, 2020), <https://www.ft.com/content/96674b7a-dfa6-4535-9f75-dfbc459593c9>.

119. Carmen Aguilar García & Pamela Duncan, *Twice as many people died with Covid in the UK this summer compared with 2021*, THE GUARDIAN (Aug. 23, 2022), [https://www.theguardian.com/world/2022/aug/23/twice-as-many-people-died-with-covid-in-uk-this-summer-compared-with-2021#:~:text=More%20than%20twice%20as%20many,the%20same%20period%20this%20year.](https://www.theguardian.com/world/2022/aug/23/twice-as-many-people-died-with-covid-in-uk-this-summer-compared-with-2021#:~:text=More%20than%20twice%20as%20many,the%20same%20period%20this%20year.;); see also *Deaths involving COVID-19, England and Wales: deaths occurring in June 2020*, OFF. FOR NAT'L STAT. (July 17, 2020), <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsinvolvingcovid19englandandwales/deathsoccurringinjune2020> (“There were 50,335 deaths involving the coronavirus (COVID-19) that occurred between 1 March and 30 June 2020, registered up to 4 July 2020 in England and Wales; of these, 46,736 had COVID-19 assigned as the underlying cause of death”).

120. See *Coronavirus and the impact on output in the UK economy: June 2020*, OFF. FOR NAT'L STAT. (Aug. 12, 2020), <https://www.ons.gov.uk/economy/grossdomesticproductgdp/articles/coronavirusandtheimpactonoutputintheukeconomy/june2020>.



according to figures from the Office for National Statistics.<sup>121</sup> However, what follows in terms of the official review of government policy and practice still relates primarily to the beginning of the pandemic and its firm rooting in British society—where the question of international legal responsibility must be decided.

This account so far, contemporaneous with the events in the critical period from January to May 2020, can now be supported formally by several High Court Judgments and two Parliamentary Reports, one of which contributed to the resignation of the Prime Minister in July 2022. The latter concerned the Findings of the Second Permanent Secretary into Alleged Gatherings on Government Premises during Covid Restrictions.<sup>122</sup> The Report covered social gatherings within Downing Street between May 2020 and May 2021, concentrating on Christmas 2020 festivities and parties for officials leaving Downing Street.<sup>123</sup> The parties were in flagrant contravention of legally binding COVID regulations and have led to fines being imposed.<sup>124</sup> The Heads of the Government and Cabinet Office and many other senior ministers were involved.<sup>125</sup> Excessive alcohol was consumed, and there was misbehavior towards security and cleaning staff.<sup>126</sup> The Report itself was requested by the Prime Minister, who asked the Cabinet Secretary to conduct an investigation into allegations reported in the media about gatherings on government premises while COVID-19 restrictions

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121. Pamela Duncan & Caelainn Barr, *Number of UK Covid deaths pass 200,000, ONS data shows*, THE GUARDIAN (July 13, 2022), <https://www.theguardian.com/world/2022/jul/13/number-of-uk-covid-deaths-passes-200000-ons-data>.

122. *See Findings of the Second Permanent Secretary Investigation into alleged gatherings on government premises during Covid restriction*, CABINET OFFICE (May 25, 2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1078404/2022-05-25\\_FINAL\\_FINDINGS\\_OF\\_SECOND\\_PERMANENT\\_SECRETARY\\_INTO\\_ALLEGED\\_GATHERINGS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1078404/2022-05-25_FINAL_FINDINGS_OF_SECOND_PERMANENT_SECRETARY_INTO_ALLEGED_GATHERINGS.pdf) [hereinafter *Findings of the Second Permanent Secretary Investigation*]

123. *Id.* at 1-2.

124. *See Id.* at 2.

125. *See Id.* at 5.

126. *Id.* at 16, 36.

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were in effect.<sup>127</sup> These assertions, i.e. whether they constitute ‘lying to Parliament,’ were the subject of deliberation by the Privileges Committee.<sup>128</sup>

The general significance of this Report is laid out in the conclusions. It is clear, according to the Report, that the highest levels of Government responsible for administering the Covid regulations during the life-threatening crisis did not believe that the regulations applied to them and did not provide the confident leadership which could serve as guidance and inspiration for more junior officials and politicians.<sup>129</sup> The social gatherings were attended by leaders of the Government, where large numbers of people acted in contravention of regulations. The public can be dismayed that such conduct took place on such a scale at the very heart of the government. Conclusion No. 8 specifically noted: “The public have the right to expect the very highest standards of behaviour..., and clearly what happened fell well short of this.”<sup>130</sup>

The second recent Parliamentary Report is the House of Commons Public Accounts Committee Report on the Department of Health and Social Care for 2020-21 [hereinafter HC report].<sup>131</sup> The main criticisms of the Government concerned the disregard of legal rules of procurement in obtaining Personal Protective Equipment (PPE) for health workers during the initial stages of the crisis and the consequent colossal loss of public funds.<sup>132</sup> This problem is related to personal, political party-based relations between Government ministers and business interests, which were linked to them, and which needed to be

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127. *Id.* at 1.

128. Alice Lilly, *Privileges Committee investigation into Boris Johnson*, INST. FOR GOV'T (June 15, 2023), <https://www.instituteforgovernment.org.uk/explainer/privileges-committee-investigation-boris-johnson>.

129. Findings of the Second Permanent Secretary Investigation, *supra* note 122, at 36-37.

130. *Id.* at 37.

131. House of Commons Comm. of Pub. Accounts, *Dep't of Health and Soc. Care 2020-21 Annual Rep. and Accounts* (June 10, 2022), <https://committees.parliament.uk/publications/22517/documents/165936/default/> [hereinafter HC Report].

132. *Id.* ¶ 2, 5, 18-19.

qualified in terms of medical background expertise. The sums involved are put at 8.7 billion pounds that the Department of Health and Social Care has written off of the 12 billion pounds it spent on PPE in 2020-21, with 4 billion pounds of PPE not meeting NHS standards and thus were unusable.<sup>133</sup> The most serious Conclusion, No.4 notes: “The Department has regularly failed to follow public spending rules and across the Departmental Group there is a track record of failing to comply with the requirements of Managing Public Money.”<sup>134</sup> The conclusions of the House of Commons Committee have been confirmed in isolated High Court Cases.<sup>135</sup>

Once one considers the most controversial aspect of the Government’s policy, already mentioned in the above press reports, it is important to acknowledge the September 2021 HC Report’s statements on elder care. The September 2021 HC Report concerns the transfer of elderly patients from the hospital into so-called Care Homes without taking precautions for COVID,<sup>136</sup> leading directly to as many as 20,000 deaths in the middle of 2020.<sup>137</sup> In the case of *Gardner v. Sec’y of State For Health and Social Care*, the Plaintiffs argued that their fathers were transferred from hospital to care homes based on policy documents and that the policy’s implementation was unlawful and therefore, subject to review under the common law.<sup>138</sup> A key document was issued on April 2, 2020, where hospital patients who were not showing symptoms of Covid or had tested positive, but were no longer symptomatic, were admitted to care homes, without passing a negative

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133. *Id.* ¶ 1.

134. *Id.* ¶ 4.

135. See *The Queen (on behalf of the Good Law Project) v. The Sec’y of State for Health and Soc. Care* [2022] EWHC 2468 (TCC), ¶¶ 135, 140, 155.

136. House of Commons, Health & Soc. Care & Sci. & Tech. Comms., *Coronavirus: lessons learned to date*, (Sept. 21, 2021), <https://committees.parliament.uk/publications/7496/documents/78687/default/>.

137. See *Covid: Discharging untested patients to care homes ‘unlawful’*, BBC (Apr. 27, 2022), <https://www.bbc.com/news/uk-england-61227709>.

138. *Gardner v. Sec’y of State for Health and Soc. Care* [2022] EWHC 967 (Admin), ¶ 13 (UK).

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Covid test.<sup>139</sup> This decision was taken despite the considerable evidence, recognized by the Government, that asymptomatic patients could carry the infection.<sup>140</sup> Consequently, the Court held that the Secretary of State and others had “simply failed to take into account the highly relevant consideration of the risk to elderly and vulnerable residents from asymptomatic transmission.”<sup>141</sup>

This type of administrative court response to government maladministration can only be piecemeal. On April 2, the Court considered the government decision “irrational” as it failed to consider balancing risks of asymptomatic transmission against the possibility of testing or quarantining.<sup>142</sup> By April 15, the policy was corrected.<sup>143</sup> However, the delay was fatal in the case of these two patients.

The Court was only concerned with the Government’s response to COVID-19 over thirteen days and its effect on particularized individuals. Similarly, there was one success concerning a judicial review of the procurement of health materials by the Government in the case of *The King (on the application of the Good Law Project Limited) v. The Sec’y of State for Health and Social Care*.<sup>144</sup> The issue was already identified by the Public Accounts Committee: failure to follow Regulation 50 of the Procurement Rules and general failure of transparency with respect to the awarding of PPE contracts.<sup>145</sup> The Good Law Project sought a declaration that the Secretary of State had “systematically” disregarded the laws and policy on procurement and transparency<sup>146</sup> (effectively, the conclusion of the House of Commons Public Accounts Committee and the general press review described above of collusion between the Government and its generally unqualified

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139. *Id.* ¶¶ 18-19.

140. *Id.* ¶¶ 287-89.

141. *Id.* ¶ 289.

142. *Id.* ¶ 293.

143. *See Id.* ¶ 126.

144. *The Queen (on behalf of the Good Law Project) v. The Sec’y of State for Health and Soc. Care* [2022] EWHC 2468 (TCC), ¶ 1.

145. *Id.* ¶¶ 2-3.

146. *Id.* ¶¶ 2-3, 71.

“business” friends). However, the judge was not prepared to go so far. He said that “systematically failed” would suggest that the Secretary of State had consciously implemented a system to disregard his duties, which was not demonstrated.<sup>147</sup> Instead, the judge limited himself to something that drew less attention to the chaotic government administration. The Government needed to give the Court complete information on what procurement contracts it approved and with whom.<sup>148</sup> The judge searched for “neutral terms” and wrote the best way to do this was “simply to declare the number and percentage of relevant contracts in respect of which the obligations imposed by [Regulation 50] and the Transparency Policy were breached. That can be done once the corrected figures are available.”<sup>149</sup> Nonetheless, the judgment provides clear evidence of significant administrative shortcomings in the Government’s response to COVID-19 regarding acquiring appropriate medical equipment.

On December 15, 2021, Lady Justice Hallett (retired) was appointed under the 2005 Inquiries Act to review the Government’s preparedness for and response to the Covid-19 pandemic.<sup>150</sup> The Guardian reported on August 22, 2022, that the Government had spent 85 million pounds hiring top law firms to defend it in the coming COVID inquiry despite hearings not starting until 2023.<sup>151</sup> Specifically, according to The Guardian, the Department of Health and Social Care was responsible for sending potentially infected hospital patients into care homes and hiring Pinsent Masons on a £2.2 million legal services contract.<sup>152</sup> The Cabinet Office likewise hired Burges Salmon on a

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147. *Id.* ¶ 123, 155.

148. *Id.* ¶ 140.

149. *Id.* ¶ 155.

150. Toby Helm, *Lady Hallett, the woman who holds Boris Johnson’s political future in her hands*, THE GUARDIAN (May 28, 2023), <https://www.theguardian.com/uk-news/2023/may/28/lady-hallett-boris-johnson-political-future-covid-inquiry-chair>.

151. Robert Booth, *UK Covid inquiry bill already at £85m as government hires top law firms*, THE GUARDIAN (Aug. 22, 2022), <https://www.theguardian.com/uk-news/2022/aug/22/uk-covid-inquiry-bill-already-at-85m-as-government-hires-top-law-firms>.

152. *Id.*

£9.8 million legal services deal.<sup>153</sup> The COVID-19 Bereaved Families for Justice Group complained about this use of public money.<sup>154</sup> At the same time, the inquiry's costs exceeded £100 million, which does not include the funding of representation for bereaved groups, the National Health Service, etc.<sup>155</sup> These all came out of the taxpayer's pocket. It could not be more apparent that the battle over responsibility for the extent of the COVID-19 tragedy in Britain is fought among the British themselves. This case study has also been concerned with the administration at the beginning of the pandemic since it was the critical period in which it was possible to attribute a significant amount of the British Covid-19 tragedy to the Chinese.

### B. *Case Study: India*

There is a virtual consensus that despite having sufficient evidence to take early precautionary measures, there were immediate failings by the Indian central government in its handling of the COVID-19 pandemic.<sup>156</sup> From the beginning of the COVID-19 crisis, high rates of community spread in India were predicted.<sup>157</sup> This is

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153. *Id.*

154. *Id.*

155. *Id.*

156. Hartosh Singh Bal, *How Modi Failed the Pandemic Test*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/opinion/india-modi-coronavirus.html>; Zainab Sikander, *Lockdown to unlocking—Narendra Modi failed every step of the way*, THE PRINT (June 15, 2020), <https://theprint.in/opinion/lockdown-to-unlocking-narendra-modi-failed-every-step-of-the-way/441247/>.

157. Amit Kumar, et al., *Data-driven modelling and prediction of COVID-19 infection in India and correlation analysis of the virus transmission with socio-economic factors*, 14 DIABETES & METABOLIC SYNDROME: CLINICAL RSCH & REVS. 1231, 1231, 1239 (2020); see also Palash Ghosh, Rik Ghosh, & Bibhas Chakraborty, *COVID-19 in India: Statewise Analysis and Prediction*, 6 JMIR PUB. HEALTH & SURVEILLANCE 1, 1, 23 (“We found that 7 [Indian] states...are in the severe category... We labeled the condition of a state as *severe* if we observed a nondecreasing trend in [daily infection rate] values over the last 2 weeks and a near exponential growth in active infected cases...”).

unsurprising due to its high population density,<sup>158</sup> deficient healthcare,<sup>159</sup> and sanitation systems.<sup>160</sup> However, in early March 2020, India's Ministry of Health and Family Welfare (MoHFW) claimed that COVID-19 was not a health emergency in India.<sup>161</sup> People's lives and safety were compromised due to political ambitions. As of 2021, the consensus was that India had to deal with governance issues.<sup>162</sup> On August 5, 2020, India's COVID-19 tally surpassed 1,81,42,718 with 6,91,013 deaths in the country, an underestimate due to limited testing.<sup>163</sup> Despite earlier reports of cases, the Indian government only officially confirmed the first COVID-19 case on January 30, 2020, onward.<sup>164</sup> A recognized and key contributory factor that led

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158. See *Population density (people per sq. km of land area) – India*, WORLD BANK GROUP (last visited July 15, 2024), <https://data.worldbank.org/indicator/EN.POP.DNST?locations=IN>.

159. See Arvind Kasthuri, *Challenges to Healthcare in India – The Five A's*, 43 INDIAN J. COMMUNITY MEDICINE 141 (2018).

160. See *Water, sanitation and hygiene*, UNICEF (last visited July 15, 2024), <https://www.unicef.org/india/what-we-do/water-sanitation-hygiene> (“Sepsis—mainly spread in health facilities—contributes to 15 per cent of the overall neonatal mortality and 11 per cent of maternal deaths. Moreover, the risks do not end there when they are brought home to a community that lacks toilets. In India's schools, reports show that 22 per cent did not have appropriate toilets for girls, 58 per cent of preschools had no toilet at all, and 56 per cent of preschools had no water on the premises”).

161. PTI, *Coronavirus cases rise to 81 in India, govt says COVID-19 not a health emergency*, THE PRINT (Mar. 13, 2020), <https://theprint.in/health/coronavirus-cases-rise-to-81-in-india-govt-says-covid-19-not-a-health-emergency/380819/>.

162. Arundhati Roy, *After the lockdown, we need a reckoning*, FIN. TIMES (May 24, 2020), <https://www.ft.com/content/442546c6-9c10-11ea-adb1-529f96d8a00b>.

163. The Hindu Net Desk, *Coronavirus India lockdown Day 134 updates | August 5, 2020*, THE HINDU (August 5, 2020), <https://www.thehindu.com/news/national/india-coronavirus-lockdown-august-5-2020-live-updates/article32273443.ece>. See also Priyanka Pulla, *'The epidemic is growing very rapidly': Indian government adviser fears coronavirus crisis will worsen*, NATURE (June 26, 2020), <https://www.nature.com/articles/d41586-020-01865-w>.

164. Ministry of Health and Family Welfare, *Update on Novel Coronavirus: One Positive Case Reported in Kerala*, <https://pib.gov.in/PressReleaseframePage.aspx?PRID=1601095>; Vidya Krishnan, *The Callousness of India's COVID-19 Response*, THE ATLANTIC (Mar. 27, 2020),

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to the poor handling of the COVID-19 crisis in India is the ideology of the ruling party—the Bharatiya Janata Party (BJP)—a right-wing, populist, and Hindu nationalist party led by Prime Minister Narendra Modi.<sup>165</sup> In line with nationalist policy,<sup>166</sup> the first community guidelines were issued by the Ministry of Ayurveda, Yoga & Naturopathy, Unani, Siddha, Sowa Rigpa and Homoeopathy in January, which gave recommendations for native remedies.<sup>167</sup> This approach was not based on scientific evidence and was completely divorced from the reality of the pandemic. Travel restrictions did not come into effect until March 2020, and even then, the quarantine facilities faced severe criticism.<sup>168</sup>

On March 17, 2020, in response to questions about the call from the WHO to “test . . . every suspected case,” the head of the Indian Council of Medical Research (ICMR) stated that this was not necessary in India.<sup>169</sup> In any case, there was limited preparation for testing by March.<sup>170</sup> In April, the Supreme Court intervened in the matter of

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<https://www.theatlantic.com/international/archive/2020/03/india-coronavirus-covid19-narendra-modi/608896/>.

165. Bishwajit Bhattacharyya, *For the Third Time in Four Years, Modi’s Knee-Jerk Decision-Making Has Cost India Dear*, THE WIRE (May 26, 2020), <https://thewire.in/government/for-thr-third-time-in-four-years-modis-knee-jerk-decision-making-has-cost-india-dear>.

166. Neena Bhandari, *Is Ayurveda the Key to Universal Healthcare in India?* BMJ (May 28, 2015), <http://www.nordicintegrativemedicine.com/wp-content/uploads/2015/05/Ayurveda-in-India.pdf>.

167. PIB, *Advisory for Coronavirus: Homoeopathy for Prevention of Coronavirus Infections - Unani Medicines Useful in Symptomatic Management of Coronavirus Infection* (Jan. 29, 2020),

<https://pib.gov.in/PressReleasePage.aspx?PRID=1600895>.

168. Sushmita Pathak & Lauren Frayer, *Quarantined In India: No Soap, Dirty Toilets, Not Enough Coronavirus Tests*, NPR (Mar. 25, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/25/821431916/quarantined-in-india-no-soap-dirty-toilets-not-enough-coronavirus-tests>.

169. Rakesh Sood, *India’s lead time against coronavirus is fast eroding. We need more than Sainyam and Sankalp*, THEPRINT (Mar. 22, 2020), <https://the-print.in/opinion/indias-lead-time-against-coronavirus-is-fast-eroding-we-need-more-than-sainyam-and-sankalp/385797/>.

170. Vasudevan Sridharan, *Coronavirus: Doctors Slam India’s Limited Testing as Fears of Community Spread Grow*, SCMP (Mar. 18, 2020),



testing for the underprivileged, but implementation was hampered due to the slow sourcing of testing kits.<sup>171</sup>

On March 24, 2020, Prime Minister Modi officially responded to the crisis by ordering 1.3 billion people to stay home under his “Janaata-Curfew.”<sup>172</sup> People were given only four hours to prepare for an extended lockdown.<sup>173</sup> This late and mismanaged lockdown caused tremendous hardship for migrant workers as factories and workplaces were shut down.<sup>174</sup> Many died in heart-wrenching and ghastly conditions while walking back home without transportation.<sup>175</sup> Ultimately, the extended lockdown was abandoned without adequate planning for the next stage.<sup>176</sup> Experts predicted that due to the erratic lockdown,

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<https://www.scmp.com/week-asia/health-environment/article/3075806/coronavirus-Doctors-slam-indias-limited-testing-fears>.

171. Samarth Bansal, Aman Sethi & Nikhila Henry, *Test Kit Shortage: ICMR's Crucial Mistakes Wasted India's Lockdown*, HUFFINGTON POST INDIA (May 3, 2020), [https://www.huffingtonpost.in/entry/icmr-mistakes-waste-india-lockdown-covid-test-kit-shortage\\_in\\_5eae2dabc5b69a795518cd39](https://www.huffingtonpost.in/entry/icmr-mistakes-waste-india-lockdown-covid-test-kit-shortage_in_5eae2dabc5b69a795518cd39).

172. PBI Delhi, *PM calls for complete lockdown of entire nation for 21 days*, PRESS INFO. BUREAU (Mar. 24, 2020) <https://pib.gov.in/PressReleasePage.aspx?PRID=1608009>.

173. Jeffrey Gettleman & Kai Schultz, *Modi Orders 3-Week Total Lockdown for All 1.3 Billion Indians*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html>.

174. Aritra Ghosh, Srijita Nundy & Tapas K. Mallick, *How India is dealing with COVID-19 pandemic*, 1 SENSORS INT'L 1, 4 (2020); see generally Anindita Adhikari et al., *Manufactured Maladies: Lives and Livelihoods of Migrant Workers During COVID-19 Lockdown in India*, 63 INDIAN J. OF LABOUR ECON. 969 (2020).

175. Mohit Rao, *Over 10 agonizing days, this migrant worker walked and hitchhiked 1,250 miles home. India's lockdown left him no choice*, CNN WORLD (May 31, 2020), <https://www.cnn.com/2020/05/30/asia/india-migrant-journey-intl-hnk/index.html>.

176. *Abandoning lockdown, India's coronavirus cases may reach 800,000 in a month: Study*, THE TIMES OF INDIA (June 16, 2020), [http://timesofindia.indiatimes.com/articleshow/76397273.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.indiatimes.com/articleshow/76397273.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

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migrant workers would miss their harvest season, which would impact their food security and trigger a hunger crisis.<sup>177</sup>

It is clear that India, which has one of the lowest per capita spending on healthcare in the world, was not equipped to cope with the pandemic.<sup>178</sup> The National Disaster Response Force (NDRF), headed by the Director General of the Armed Forces, had warned of a large-scale biological pandemic for over a decade and had proposed a plan to deal with it, but it was neglected and undermined by bureaucratic resistance which increased under the present government.<sup>179</sup> The Modi government's response has been described as a "knee-jerk,"<sup>180</sup> which contradicted the ICMR's official data.<sup>181</sup> The upsurge of nationalism in India during COVID-19 was both socially directed and politically charged, drawing condemnation from international scholars.<sup>182</sup> Muslims in India, under the BJP government, faced targeted violence after the health ministry repeatedly blamed an Islamic seminary for spreading the

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177. Archanah Masih, *Hunger is a real problem*, REDIFF (Apr. 3, 2020), <https://www.rediff.com/news/interview/coronavirus-in-india-hunger-is-a-real-problem/20200407.htm>.

178. Swagata Yadavar, *India's per capita expenditure on healthcare among lowest in the world; govt spends as little as Rs 3 per day on each citizen*, FIRSTPOST (June 21, 2018), <https://www.firstpost.com/india/indias-per-capita-expenditure-on-healthcare-among-lowest-in-the-world-govt-spends-as-little-as-rs-3-per-day-on-each-citizen-4559761.html>.

179. Praveen Swami, *Twelve Years Ago, India Drew up Plans to Deal with Massive Pandemic. Then, Bureaucrats Sabotaged Them*, NEWS 18 (Apr. 8, 2020), <https://www.news18.com/news/india/twelve-years-ago-india-drew-up-plans-to-deal-with-massive-pandemic-then-bureaucrats-sabotaged-them-2569059.html>.

180. CHITHIRA VIJOYKUMAR & TANISHA RANJIT, *VIRUS DETECTED: A PROFILE OF INDIA'S EMERGENT ECOSYSTEM OF NETWORKED TECHNOLOGIES TO TACKLE COVID-19* 77 (Internet Democracy Project, 2021).

181. *Covid-19: ICMR rejects reports that said over 15% people in hotspots infected, says study not final*, SCROLL (June, 9 2020), <https://scroll.in/latest/964183/covid-19-icmr-rejects-reports-that-said-over-15-%20People-in-hotspots-infected-says-study-not-final>.

182. K. S. KOMIREDDI, *MALEVOLENT REPUBLIC: A SHORT HISTORY OF THE NEW INDIA* (2019); *90 UK Scholars Condemn 'Crackdown on Dissent' During India's COVID-19 Lockdown*, WIRE (May 8, 2020), <https://thewire.in/rights/covid-19-lockdown-dissent-crackdown-uk-scholars>.

coronavirus.<sup>183</sup> There are reports of hospitals that refused to admit COVID-19 Muslim patients, which resulted in their death.<sup>184</sup> Likewise, on May 18, 2020, coordinated with the policy of unilaterally abrogating the special status of disputed Jammu and Kashmir (J&K) in August 2019, the BJP introduced a new domicile law for J&K, which experts say was devised to change the demographics of the Muslim-majority region.<sup>185</sup>

As of June 30, 2020, 7,237 COVID-19 cases and ninety-five deaths were recorded in India's sole Muslim majority state, the internationally disputed territory of Jammu and Kashmir (J&K), where the virus rapidly spread.<sup>186</sup> People's access to protective equipment and medical supplies, such as oxygen and drugs, was also limited there.<sup>187</sup> During the pandemic, the Modi government continued to limit internet services in J&K and prevented Kashmiris from having "full access to health and safety related information" which could have saved lives.<sup>188</sup>

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183. Jeffrey Gettleman, Kai Schultz & Suhasini Raj, *In India, Coronavirus Fans Religious Hatred*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/world/asia/india-coronavirus-muslims-bigotry.html>.

184. Times News Network, *Delhi University professor dies, kin say denied bed by hospitals*, TIMES OF INDIA (June 11, 2020), <https://timesofindia.indiatimes.com/city/delhi/delhi-university-professor-dies-kin-say-denied-bed-by-hospitals/articleshow/76323464.cms>.

185. Mirza Saaib Bég, *J&K's New Domicile Order: Disenfranchising Kashmiris, One Step at a Time*, WIRE (May 30, 2020), <https://thewire.in/rights/kashmir-domicile-law>.

186. Manzoor ul-Hassan, *Elderly Shopian man dies of Covid, 5 more employees at DC Shopian office test positive*, KASHMIR READER, (Jun. 30, 2020), <https://kashmirreader.com/2020/06/30/elderly-shopian-man-dies-of-covid-5-more-employees-at-dc-shopian-office-test-positive/>

187. Muneeb Yousuf & Rouf Bhat, *Securitising Health: India silences frontline health workers*, THE CARAVAN (Apr. 24, 2020), <https://caravanmagazine.in/health/securitising-health-india-silences-frontline-health-workers-in-kashmir-amid-covid-19>; Adil Rashid, *Kashmir's ill-equipped health system and government's push for tourism led to a COVID crisis*, THE CARAVAN (May 31, 2020), <https://caravanmagazine.in/health/kashmirs-ill-equipped-health-system-and-indias-push-for-tourism-led-to-a-covid-crisis>.

188. *Mitigate risks of Covid-19 for Jammu and Kashmir by immediately restoring full access to internet services*, AMNESTY INT'L (May 19, 2020),

Overall, India's response to COVID-19 was lagging and muddled, with a disconnect between the spread of the virus and the mistaken reassuring messages from the highest level of government. There were delays in adopting measures against the virus; overlooking long standing structural problems; disregarding warnings about preparation for pandemics; using fake news and fabricating crusades to undermine evidence-based approaches;<sup>189</sup> and the adoption of a method that replaced the basic tenets of good governance with nationalist dogma denying scientific evidence.<sup>190</sup>

### C. *Preliminary Deductions*

Britain failed miserably in its pandemic response compared to other developed countries' practices. Despite having the money, tools, and resources to respond as well as anyone, it had a higher mortality rate than any other European country within the first twenty-six weeks.<sup>191</sup> Although Britain was not alone in failing to prevent mass casualties—nearly every country on the continent suffered terrible losses—the awful reality spelt out in the numbers cannot be ignored. Instead of confining the sickness to one location; COVID-19 spread across the country. Britain failed to close its borders promptly; discontinued contact tracing too soon; set goals that were not met; created ineffective government initiatives; and managed to many of the most senior officials in charge of the pandemic response, including the Prime Minister, be less functional.<sup>192</sup> The British government made

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<https://www.amnesty.org/en/latest/news/2020/03/mitigate-risks-of-covid-19-for-jammu-and-kashmir-by-immediately-restoring-full-access-to-internet-services/>.

189. Syeda Zainab Akbar et al., *Temporal patterns in COVID-19 related digital misinformation in India*, UMich (Apr. 16, 2020), <https://joyojeet.people.si.umich.edu/?p=511>.

190. Jonathan A. Lass & Miranda Booth, *Are populist leaders a liability during COVID-19?*, THE CONVERSATION (Apr. 8, 2020), <https://theconversation.com/are-populist-leaders-a-liability-during-covid-19-135431>.

191. Gareth Iacobucci, *Covid-19: UK had one of Europe's highest excess death rates in under 65s last year*, 372 BRIT. Med. J. 1, 1 (2021).

192. Rhiannon Frowde, Edward S. Dove & Graeme T. Laurie, *Fail to Prepare and you Prepare to Fail: the Human Rights Consequences of the UK Government's Inaction during the COVID-19 Pandemic*, 12 ASIAN BIOETHICS REV. 459, 461, 463-

poor decisions based on poor consultation and weak data provided by poor testing, with the unavoidable outcome that it suffered losses more than almost all its counterparts.<sup>193</sup>

According to critical authorities and specialists involved in the pandemic response, too much of Britain's essential infrastructure failed when the crisis struck.<sup>194</sup> Expert advisory panels were found to be too slow and ponderous, with insufficient dissenting voices; crisis-response cells could not cope and had to be bypassed; the Cabinet Office broke under strain,<sup>195</sup> and the NHS needed more basic data-sharing capabilities.<sup>196</sup> Authorities could not encounter the sudden demand for mass testing, the Foreign Office could not get people home quickly, the Department of Health could not design a functional contact-tracing app, and the government could not procure critical pandemic equipment adequately.<sup>197</sup> Furthermore, when private experts provided information on COVID-19 and the measures to be adopted, the government ignored them.<sup>198</sup> Britain's indifferent attitude towards adjusting the emergency medical services to align with other European nations escalated the crisis following Brexit.

In India, the federal government of Prime Minister Narendra Modi did not assist Indian states in dealing with the pandemic's

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65 (2020); *see also* Findings of the Second Permanent Secretary Investigation, *supra* note 122, at 36-37.

193. *Id.* at 460; Iacobucci, *supra* note 191, at 1; *Failures on border measures in March increased scale and pace of Covid-19 pandemic - Committee finds*, UK PARLIAMENT (Aug. 5, 2020) <https://committees.parliament.uk/work/184/home-office-preparedness-for-covid19-coronavirus/news/114861/failures-on-border-measures-in-march-increased-scale-and-pace-of-covid19-pandemic-committee-finds/>

194. *See* Frowde, *supra* note 192, at 462-63, 466.

195. *See infra pp.* 22, 25-26.

196. *Id.*

197. Tom McTague, *How the Pandemic Revealed Britain's National Illness*, THE ATLANTIC (Aug. 12, 2020), <https://www.theatlantic.com/international/archive/2020/08/why-britain-failed-coronavirus-pandemic/615166/>.

198. Paul Cairney, *The UK Government's COVID-19 Policy: What Does "Guided by the Science" Mean in Practice?*, 3 FRONTIERS IN POL. SCI. 1, 1 (2021).

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aftermath.<sup>199</sup> In India, the sanctity of data has been eroded, and numbers have been concealed.<sup>200</sup> States are overburdened, and the federal government refused to provide funds to states to tackle the pandemic.<sup>201</sup> The government and their conservative ally claimed that the virus would be removed if some unscientific, superstitious measures were taken.<sup>202</sup> The repeated calls of scientists, civil society, and political opposition have been reportedly ignored.<sup>203</sup> The inadequacy of healthcare in India has been exposed due to the pandemic.<sup>204</sup> The government compromised the necessary measures to combat the pandemic because of its electoral and political agendas.

The case studies of Britain and India demonstrate that governmental failures led to the spread of COVID-19. Clearly, given such multi-level failures and multi-causes situations, China's duty of care cannot arise because it is not demonstrable that Chinese lack of care caused direct injury to the person or property of any person within or outside of China or put their life or property under any foreseeable risk. On the contrary, the government of Britain used radical policies

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199. See Amy Kazmin, Benjamin Parkin & Jyotsna Singh, *How India's Covid-19 crisis diminished Narendra Modi*, FIN. TIMES (May 13, 2021), <https://www.ft.com/content/dcc6a9eb-b28f-40c3-84ee-6aa053d87e05>.

200. See Soutik Biswas, *Why India's real toll may never be known*, BBC (May 6, 2022), <https://www.bbc.com/news/world-asia-india-60981318>; see generally Varun Vasudevan, Abeynaya Gnanasekaran, Varsha Sankar, Siddarath A. Vasudevan & James Zou, *Disparity in the quality of COVID-19 data reporting across India*, 21 BMC PUB. HEALTH 1 (2021).

201.

202. Megha Kapoor et al., *Impact of COVID-19 on healthcare system in India: A systemic review*, 23 J. OF PUB. HEALTH RSCH. 1 (2023).

203. Devjyot Ghosal & Krishna N. Das, *EXCLUSIVE Scientists say India Government ignored warnings amid coronavirus surge*, REUTERS (Apr. 30, 2021), <https://www.reuters.com/world/asia-pacific/exclusive-scientists-say-india-government-ignored-warnings-amid-coronavirus-2021-05-01/>.

204. Nirav Nimavat et al., *COVID-19 pandemic effects on the distribution of healthcare services in India: A systemic review*, 11 WORLD J. OF VIROLOGY 186, 187 (2022).

such as ‘herd immunity’ by natural infection (as opposed to herd immunity by vaccination).<sup>205</sup>

Furthermore, concerning jurisdictions that took proper actions, it would be unlikely that claims for pure economic loss could be sustained, given that these needed to be standardized. The judicial proposition of Lord Wilberforce has guided such an option as he investigated two criteria in considering the case of economic loss in a tortious wrong.<sup>206</sup> He emphasized:

First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or [neighborhood] such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.<sup>207</sup>

Even so, the pure economic damage is only sometimes recoverable. In most cases, a claim in the tort of negligence is made for one of two reasons. First, the claimant has been harmed. This harm has monetary ramifications, i.e., a loss of profit. However, there are situations when losses occur that are not caused by harm but are simply losses. Lord Denning MR firmly espoused the “policy-oriented approach” in *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, and believed that assessing the connection in hand was better.<sup>208</sup> Denning

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205. See Holly Ellyatt, *Lawmakers slam UK’s Covid response, say ‘herd immunity’ strategy a public health failure*, CNBC (Oct. 12, 2021), <https://www.cnbc.com/2021/10/12/uks-herd-immunity-covid-strategy-a-public-health-failure-inquiry.html#:~:text=The%20report%2C%20which%20examined%20the,hesitation%20to%20lock%20down%20the>.

206. *Anns v. Merton London Bureau Council* (1977) ABC.L.R. 05/12, ¶ 16 (UK).

207. *Id.*

208. *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* (1973) 1 Q.B. 27 at ¶ 16, 20 (UK).

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believed in seeing whether, as a matter of policy, the economic loss should be recoverable.<sup>209</sup> Under this test, the plaintiff could claim for economic losses incurred due to physical damage, but not for purely economic losses.<sup>210</sup> This distinction, though, was deemed illogical, and recovery was ultimately allowed because the defendant reasonably anticipated the plaintiff's economic loss.<sup>211</sup> However, on appeal by the plaintiff, the policy consideration was reversed in *McLoughlin v. O'Brian*, where the court held that policy considerations should not "inhibit a decision" in the plaintiff's favor.<sup>212</sup> Lord Roskill illustrated the departure from policy consideration to the principal position in *Junior Books Ltd v. Veitchi Co Ltd*.<sup>213</sup>

although it cannot be denied that policy considerations have from time to time been allowed to play their part... in the tort of negligence since it first developed as it were in its own right in the course of the last century,... yet today I think its scope is best determined by considerations of principle rather than of policy.<sup>214</sup>

Nevertheless, economic loss in a tortious claim, irrespective of policy or principle orientation, requires the following factors: (1) identifying an injury, (2) establishing a causal link, (3) remoteness of damages, and, (4) overall decisions of policy.<sup>215</sup>

From the international health law perspective, the primary responsibility falls on states, both under the International Health Regulations and International Human Rights law more broadly (including civil and political rights, such as the right to life, under Article 6 of the

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209. *Id.* ¶ 20.

210. *Id.* ¶ 24.

211. *Id.* ¶ 45, 49, 58, 61, 62.

212. *McLoughlin v. O'Brian* [1983] 1 AC 410 at 411 (UK).

213. *Junior Books Ltd. v. Veitchi Co. Ltd.* [1982] ABC.L.R. 07/15 ¶ 17 (UK).

214. *Id.*

215. See generally *Spartan Steel* [1972] ABC.L.R. 06/22 (UK); *Junior Books Ltd* [1982] ABC.L.R. 07/15 (UK); *Hedley Byrne & Co Ltd. v. Heller and Partners Ltd.* [1964] 1 AC 465 (UK).



ICCPR).<sup>216</sup> Key components of the good governance process were identified as: participation, the rule of law, transparency, responsiveness, equity, effectiveness and efficiency, and accountability.<sup>217</sup> Critical legal scholar Suze Wilson developed a model of good pandemic mitigation/management based on her analysis of the handling of the virus by the government in New Zealand.<sup>218</sup> The government took decisive actions based on a previously existing Influenza pandemic plan with a phased implementation and adopted a ‘precautionary approach’ building community mobilization and trust.<sup>219</sup>

To be fair, New Zealand had advantages: it is an island nation with low population density and an established government healthcare system.<sup>220</sup> However, the decisive actions taken result from Jacinta Ardern’s leadership, and are marked by a policy commitment to an identity for New Zealand that places a high value on human life and kindness.<sup>221</sup>

According to Wilson, a good practice framework based on the New Zealand experience involves leaders who are led by those with the expertise to guide on the issues involved, with community

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216. IHR (2005)], *supra* note 12, art. 13 (“Each State Party shall develop, strengthen, and maintain . . . the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.”); ICCPR, *supra* note 14, art. 6(1) (“Every human being has the inherent right to life”).

217. JOCELYN R. HERMOSO & DIANE RESPALL, GOVERNANCE FOR SUSTAINABLE HUMAN DEVELOPMENT: AN INTEGRATED PAPER ON THE HIGHLIGHTS OF FOUR REGIONAL CONSULTATIONS ON GOVERNANCE FOR SUSTAINABLE HUMAN DEVELOPMENT 9, 18, 81 (Cmty. Org., Training, & Rsch. Advoc. Inst., 1997).

218. *See generally* Suze Wilson, *Pandemic Leadership: Lessons from New Zealand’s approach to COVID-19*, 16 LEADERSHIP 261 (2020).

219. Amanda Kvalsvig & Michael G. Baker, *How Aotearoa New Zealand rapidly revised its Covid-19 response strategy: lessons for the next pandemic plan*, 51 J. OF THE ROYAL SOC’Y OF N.Z. 143 (2021).

220. Ami Gunia, *Why New Zealand’s Coronavirus Elimination Strategy is Unlikely to Work in Most Other Places*, TIMES (Apr. 28, 2020), <https://time.com/5824042/new-zealand-coronavirus-elimination/>.

221. *Coronavirus: How New Zealand relied on science and empathy*, BBC (Apr. 20, 2020), <https://www.bbc.com/news/world-asia-52344299>.

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mobilization and harm minimization that follows accordingly: education and clear messaging on pandemic-related issues such as testing, contact tracing, adequate PPE acquisition, and other measures as needed.<sup>222</sup> The standard aims of “COVID-zero” jurisdictions involve thorough testing, medically supervised isolation for all cases away from home, contact tracing, quarantine measures and, logistical coordination based on promoting scientific consensus on the best measures to protect the population.<sup>223</sup> The arrival of vaccines changed the approach to pandemic management for countries that aimed for zero and those that did not.<sup>224</sup> The UK’s success in logistically coordinating the distribution of vaccinations led to vaccinating a high degree of the population.<sup>225</sup> That said, there were ongoing concerns because of the decision to drop mandatory pandemic control measures in late July 2021.<sup>226</sup>

India’s preliminary decisions to donate vaccines and not focus on local vaccinations, combined with some lapses in pandemic management, led to a difficult period. However, in late March 2020, India temporarily banned Covishield vaccine exports and focused on local immunization.<sup>227</sup> While this drew a degree of international criticism due to the inability to provide promised vaccines to other countries, the head of the Serum Institute called for understanding, given the

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222. Wilson, *supra* note 218, at 285-86.

223. Tafadzwa Dzinamarira & Grant Murewanhema, *Public Health Management of the COVID-19 Pandemic in Australia: The Role of the Morrison Government*, 19 INT’L J. OF ENV’T RSCH. & PUB. HEALTH 1 (2022).

224. Cliff Buddle, *There must be a middle way between the virus extremes*, SCMP (July 10, 2021) <https://www.scmp.com/article/3140639/there-must-be-middle-way-between-virus-extremes>.

225. Mark Landler & Benjamin Mueller, *Vaccine Rollout gives U.K. a rare win in the pandemic*, N.Y. TIMES (Jan. 29, 2021) <https://www.nytimes.com/2021/01/29/world/europe/covid-vaccine-uk.html>.

226. Buddle, *supra* note 224.

227. Cinja Nadana Koller et al., *Addressing Different Needs: The Challenges Faced by India as the Largest Vaccine Manufacturer While Conducting the World’s Biggest COVID-19 Vaccination Campaign*, 2 EPIDEMIOLOGIA 454, 456 (2021).

emergent needs of the local Indian population, which depended on the Serum Institute for about 95% of the local vaccine supply.<sup>228</sup>

The case studies from the UK and India show the impact of leadership in all these elements, as well as the failures of checks and balances on the executive. They raise fundamental questions regarding policy prioritization for public health and safety. For the discourse on causation, they demonstrate the overwhelming impact of domestic decision-making on pandemic management. Legal claims regarding state responsibility for the virus's origin or other such measures are unlikely to be justiciable for myriad issues, including the need for more clarity on applicable substantive law and the complexity of the factual situation.

### III. NUANCED ANALYSIS ON INTERNATIONAL APPROACHES TO PANDEMICS—THE MORAL RESPONSIBILITY OF RULERS AND HUMAN RIGHTS AS PRINCIPLES OF GOOD GOVERNANCE

This section looks at both the national and international law approaches to the right to health and life and the resumption of progress at a global level. The required national approach will be drawn here based on the case studies in the last part, along with a plethora of examples of good governance of states during the pandemic. This analysis overall will provide essential guidance on the measures that state governments adopted. On the other hand, the international law approach of recourse will advance the responsibilities of state governments, as coined herewith as 'moral causation' based on the liability derived from the transgression of fundamental human rights related to the COVID-19 pandemic.

Due to its intensity, immediacy, and intricacy, the COVID-19 pandemic has exposed flaws in institutional competencies usually thought necessary for crises. Public trust and political legitimacy are at the heart of institutional capacity's functionality, particularly during

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228. See Emily Schmall & Karan Deep Singh, *India and Its Vaccine Maker Stumble Over Their Pandemic Promises*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/world/india-serum-institute-covid19.html>.

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a crisis whose resolution is contingent upon individual conduct.<sup>229</sup> For coordinated action that addresses a problem within the area of public policy and law, collective approaches are required. These encompass, but also go beyond, the concepts of good governance and collective action, which refer to the ability of non-government and non-profit organizations.

By August 2021, COVID-19 affected nearly all countries worldwide and more than 210 million people.<sup>230</sup> It put governments in a position of extreme uncertainty, forcing them to make severe trade-offs to address the accompanying socio-economic health. In response to COVID-19, national and sub-national governments of states are supposed to act fast using a universal and place-based approach to policy responses and enacting national and sub-national initiatives. While the content of the actions adopted by the seven Member States examined in this article is generally comparable, the legal and policy settings in which they were implemented are not.<sup>231</sup> A consensus on global practices of the state is required to ensure a successful response to COVID-19.

As our analysis suggests, most eastern or western state governments responded slowly to the pandemic. Initially, they ignored the outbreak and tried to avoid panic by stating many things. On the one hand, the death toll rose; on the other hand, governments expressed their concerns about being unable to overcome the tragic situation. At the beginning of the outbreak, when governments were required to address the issue of emergency measures, they needed to be prepared more and could not take effective action accordingly. In addition, there have been no credible risk evaluations, models, scenarios, or cost-benefit analyses of potential policy actions published in the states that

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229. See Kris Hartley & Darryl S.L. Jarvis, *Policymaking in a low-trust state: legitimacy, state capacity, and responses to COVID-19 in Hong Kong*, 39 *POL'Y & Soc'y* 403, 403 (2020).

230. WHO, *COVID-19 dashboard*, WORLD HEALTH ORGANIZATION, <https://data.who.int/dashboards/covid19/cases?n=c> (last visited Aug. 24, 2021).

231. Krisztina Binder et al., *States of emergency in response to the coronavirus: Situation in certain Member States*, EUR. PARL. RSCH. SERV. (COM PE 649.408).

have been affected.<sup>232</sup> Despite such failure, governments did not disclose important information that could reveal the fatal effect of the virus. Instead of prioritizing the pandemic, governments focused on traditional governmental issues.<sup>233</sup> These isolated or unsuccessfully attended areas brings the author to understand elements required for handling the crisis, namely the importance of safety assessments; crisis management plans; effective crisis response; recovery plan; learning and mitigation plans.<sup>234</sup> These leadership qualities were demonstrated in countries like New Zealand, South Korea, Vietnam, etc. that handled the crisis the best.<sup>235</sup> These qualities reflect good governance and show that human rights principles are essentially a part of sound governance principles. State governments should focus on preventing the mortality rate from increasing by being equipped well in all aspects, quickly and efficiently, to respond to the casualties. Every state must have a comprehensive plan that considers some fundamental factors, like the severity of the illness and the rate of deaths, transmissibility of the virus, probability of spreading the infection spatially, people's vulnerability to the overall impact of the pandemic (including economic losses), availability of preventive measures and resources, and of course, the recommendations of the WHO.

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232. Argyrios Altiparmakis et al., *Pandemic politics: policy evaluations of government responses to COVID-19*, 44 W. EUR. POL. 1159, 1159-60 (2021).

233. Weekly Statistics for NHS Test and Trace (England), UK HEALTH & SEC. AGENCY, <https://www.gov.uk/government/collections/nhs-test-and-trace-statistics-england-weekly-reports#full-publication-update-history> (last visited May 28, 2024).

234. See Wilson, *supra* note 218, at 284, 288; Chatzipanagiotou Paraskevi & Eirene Katsarou, *Crisis Management, School Leadership in Disruptive Times and the Recovery of Schools in the Post COVID-19 Era: A Systematic Literature Review*, 13 EDUC. SCI. 1, 3-6 (2023); Ian I. Mitroff, *Crisis Management and Environmentalism: A Natural Fit*, 36 Cal. Mgmt. Rev. 101 (1994); Lynn Perry Wooten & Erika Hayes James, *Linking Crisis Management and Leadership Competencies: The Role of Human Resource Development*, 10 ADVANCES IN DEV. HUM. RES. 352, 353-56, 367-71, 373-74 (2008); Antonio Arturo Fernandez & Graham Paul Shaw, *Academic Leadership in a Time of Crisis: The Coronavirus and COVID-19*, 14 J. OF LEADERSHIP STUD. 39, 40 (2020).

235. A.S. Bhalla, *Leadership Challenges and the COVID-19 Pandemic*, 299 OBSERVER RSCH. FOUND. 1, 14, 25-30 (2021).

States need to take preventive measures to control infection rates. In line with recent reports, it is increasingly evident that global vaccine coordination must be part of effective governance for disease prevention and treatment.<sup>236</sup> The present situation shows the need to prioritize the right to healthcare, combat corruption and mismanagement, and address irregular privatization and social inequities. This position on governance is now well supported by the Independent Panel for Pandemic Preparedness and Response (IPPPR) report<sup>237</sup> and the UK National Audit Office governance report,<sup>238</sup> both released in May 2021. Importantly, these necessitate the population's willing involvement and the program's well-functioning management. The central government can take institutional and governmental measures to enable and complement activities in sectors, agencies, and lower levels of government.<sup>239</sup> The central government focuses on actions that can be taken via altering institutional and governmental arrangements in support of such policies, rather than on specific policy responses such as approaches to testing, quarantining, or fiscal stimulus.<sup>240</sup>

#### A. *International law approach to the right to life and health*

In international law, beyond the duty to notify under the 2005 International Health Regulations, the primary responsibility for pandemic management (i.e., mitigation of the impact on the health and lives of individuals) falls on individual governments, per Articles 2 and 6 of the ICCPR, and Article 12 of the ICESCR.<sup>241</sup> These duties

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236. See Emanuele Blasioli, et al., *Vaccine Allocation and Distribution: A Review with a Focus on Quantitative Methodologies and Application to Equity, Hesitancy, and COVID-19 Pandemic*, 4 *Operations Rsch. F.* 1, 14-15, 26 (2021).

237. See IPPPR, *COVID-19: Make it the Last Pandemic* (May 2021), at 35, 45, <https://theindependentpanel.org/mainreport/>.

238. See NAT'L AUDIT OFF., *supra* note 83, at 6-7, 14, 17, 37-39.

239. See *Governance & Institutions: Covid-19 Response Resources*, WORLD BANK GRP, <https://www.worldbank.org/en/topic/governance/brief/governance-institutions-covid-19-response-resources> (last visited May 29, 2024).

240. *Id.*

241. ICCPR, *supra* note 14, art. 2(2), 6 (“[E]ach State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant. . . [E]very human has the inherent right to life. This right

can be described as the moral responsibility of rulers, and the failures in this regard provide matter to understand the moral causation of the impact of the pandemic.<sup>242</sup> The article described the traditional international response to health as focused on limiting the spread of infectious disease. The Committee on Economic, Social and Cultural Rights describes health as “a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”<sup>243</sup>

It has long been understood that the spread of infectious diseases is a form of health security threat.<sup>244</sup> Protection from the spread of infectious diseases traditionally forms part of the health-related tasks of national governments.<sup>245</sup> Under international human rights law, Article 12 of the ICESCR refers to the duty of states to take measures for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases.”<sup>246</sup> This duty was first recognized by the WHO.<sup>247</sup> This recognition later inspired the right to health for all in various documents such as the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), the Standard Minimum Rules for Treatment of Prisoners, . the Convention on the Rights of Persons with

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shall be protected by law”); ICESCR, *supra* note 15, 12 (“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”).

242. Fozia Nazir Lone, *Indian Leadership Responses to the COVID-19 Pandemic: An International Law Perspective* (June 8, 2021) (unpublished manuscript) (presented at 2021 China-Europe Seminar on Human Rights).

243. CESCR Gen. Comment 14, *supra* note 14, ¶ 1.

244. SOPHIE HARMAN, *GLOBAL HEALTH GOVERNANCE* (Routledge 2012).

245. *See* CESCR Gen. Comment 14, *supra* note 14, ¶ 36.

246. ICESCR, *supra* note 15, art. 12(2)(c).

247. WHO Const. pmb1. (“Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures”).

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Disabilities, and the right to health of indigenous and tribal people pronounced in ILO Convention No. 169.<sup>248</sup>

The above international legal instrumentalization for the right to health of people from various categories suggests its significance. Of course, its importance has increased during the pandemic as COVID-19 was unprecedented in the last two centuries. General Comment 14 recognizes a right to healthcare services.<sup>249</sup> The guiding principles that apply to all health-related services include “availability, accessibility, acceptability” and quality of health services.<sup>250</sup> There is a set of core legal obligations that have to be met as a minimum standard, partly defined by the WHO’s Primary Healthcare Strategy recalling the Alma-Ata Declaration of 1978.<sup>251</sup> The Alma-Ata Declaration on

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248. ICESCR, *supra* note 15, art. 12 (“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”); Convention on the Elimination of All Forms of Discrimination against Women, art. 12(1), Dec. 16, 1966, 1249 U.N.T.S. 13 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care...to ensure, on a basis of equality . . . access to health care services”) [hereinafter CEDAW]; Convention on the Rights of the Child, art. 24(1), Nov. 20, 1989, 1577 U.N.T.S. 3 (“States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services”); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 28, July 1, 2003, 2220 U.N.T.S. 3 (“shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health”); United Nations Standard Minimum Rules for the Treatment of Prisoners, G.A. Res. 70/175 at 8 (Dec. 17, 2015) (“provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community . . . without discrimination on the grounds of their legal status”); Convention on the Rights of Persons with Disabilities, art. 25, Dec. 12, 2006, 2515 U.N.T.S. 3 (“States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination”); Indigenous and Tribal Peoples Convention, art. 25 1957 (No. 169) (“Governments shall ensure that adequate health services are made available”).

249. CESCR Gen. Comment 14, *supra* note 14, ¶ 12(a).

250. *Id.* ¶ 35.

251. See INTERNATIONAL CONFERENCE ON PRIMARY HEALTH CARE, ALMA-ATA: TWENTY-FIFTH ANNIVERSARY, WORLD HEALTH ORG. (2003).



Primary Health Care was adopted by the WHO in 1978, and it set the goal of delivering primary healthcare to everyone by the year 2000.<sup>252</sup>

Undeniably, the irreparable loss of lives and the economy due to the COVID-19 pandemic has accounted for the violation of international laws and guidelines on the right to health and medical care across different categories. State governments mainly failed to implement measures to protect the right to life and health that were legally promulgated in national laws and ratified in international laws.

### B. *Universalism and Global Governance*

The Universalist approach to international law means applying common standards to protect every human being which requires good local, regional, and global governance. This is articulated in foundational statements of principles, such as the UDHR, and is a positive obligation under Article 2 of the ICCPR and the equivalent Article 12 of the ICESCR.<sup>253</sup>

A pandemic in a globalized world shows the nexus between state-level and international responses. When faced with a pandemic that does not respect artificial boundaries/barriers, governance protects everyone's right to life in a globalized world. It also demonstrates that international human rights norms should be adopted on such occasions as they are good governance principles.

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252. Declaration of Alma-Ata, Int'l Conf. on Primary Health Care, Declaration V, X, Sept. 1978 ("The International Conference on Primary Health Care calls for urgent and effective national and international action to develop and implement primary health care throughout the world").

253. ICCPR, *supra* note 14, art. 2(2) ("each State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant"); ICESCR, *supra* note 15, art. 12, 23 ("the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...The States Parties...agree that international action for achievement of the rights recognized in the present Covenant includes such methods as the conclusion of the conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study"); UDHR, *supra* note 32, pmb. ("the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world").

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In terms of the consensus developing on global governance, the belief in the new millennium was that the world was on a path toward better pandemic preparedness. This was demonstrated by the efforts to curb H1N1 in 2009 and the efforts of the U.S. in 2014, during the Ebola outbreak, when the U.S. government intervened through their funding and efforts in establishing a National Security Council to mitigate the crisis.<sup>254</sup> Also, in 2014, the Security Council passed Resolution 2177,<sup>255</sup> which was in the tradition of Resolutions 1308<sup>256</sup> and 1983<sup>257</sup> on the HIV/AIDs epidemic and called for international collaboration. For the first time, the UNSC declared a disease outbreak a “threat to international peace and security,” and referred to the duty of Member States, particularly in terms of using the global framework to fight the virus.<sup>258</sup>

1. *Right to life and health: substantive international law approach*

On a fundamental Universalist level, protecting basic human rights means serving humanity through good governance. This involves institutions implementing best practices in accordance with the rule of law and natural law principles which can fulfill the state obligations listed under Article 2 of the ICCPR. In essence, as stated in the commentary to Article 12 of ICESCR, “[h]ealth is a fundamental human right indispensable for the exercise of other human rights.”<sup>259</sup> Therefore, the universal application of international norms requires good leadership. This was seen in New Zealand, South Korea,

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254. Theodore J. Witek, Jr. & Robert Schwartz, *The Evolution of Vigilance and Its Atrophy Preceding the COVID-19 Global Pandemic*, 10 FRONTIERS IN PUB. HEALTH 1, 4 (2022).

255. S.C. Res. 2177 (Sept. 18, 2014).

256. S.C. Res. 1308 (July 17, 2000).

257. S.C. Res. 1983 (June 7, 2011).

258. S.C. Res. 2177 (Sept. 18, 2014) (“Determining that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security”).

259. CESCR Gen. Comment 14, *supra* note 14, ¶ 1.

Australia, China, Hong Kong SAR, Japan and beyond.<sup>260</sup> The Chinese response involved cooperation with the WHO before January 2020, in the process of locking down their 11th largest city by January 23, 2020, as noted in the recent Independent Panel for Pandemic Preparedness and Response authoritative timeline.<sup>261</sup>

As a codification of natural law principles, Article 2 of the ICCPR was an attempt to universalize the idea that no state is above the law.<sup>262</sup> It imposes basic standards. The process of the Nuremberg trials was also in aid of this, showing both the substantive and procedural implications of natural justice principles.<sup>263</sup> The agreement on these shows the understanding that principles of equality and common human dignity need to be basic common standards to form the basis of mutual respect and the protection of individuals. Article 2 of the ICCPR makes it clear that the primary responsibility for the implementation of human rights falls on the state.<sup>264</sup> In elucidating the primary duties owed by the state to its citizens, human rights principles are essentially good governance principles. Considering the cause of widespread COVID-19 in India and elsewhere, it is now evident that vaccines must be used for good governance. This entails protecting people rather than pursuing contentious zero-sum rhetoric. Good governance, genuine multilateralism, and mutual support can prevent further catastrophes.

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260. Mingming Ma, Shun Wang, & Fengyu Wu, *COVID-19 Prevalence and Well-being: Lessons from East Asia*, in WORLD HAPPINESS REP. 59, 59, 85 (John Helliwell et al. eds., 2021).

261. See IPPR, *COVID-19: Make it the Last Pandemic* (May 2021), at 35, 45, <https://theindependentpanel.org/mainreport/>.

262. ICCPR, *supra* note 15, art. 2(2) (“each State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant.”)

263. Ian Cobain, *Britain Favoured Execution over Nuremberg Trials for Nazi Leaders*, THE GUARDIAN (Oct. 26, 2012), <https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders>.

264. ICCPR, *supra* note 15, art. 2(2) (“each State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant.”)

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This article identifies some measures a state should take to realize this obligation. As per General Comment 14 of Committee on Economic, Social and Cultural Rights (CESCR), any person or group whose right to health is violated is entitled to remedies: “[n]ational ombudsmen, human rights commissions, consumer forums, patients’ rights associations or similar institutions should address violations of the right to health.”<sup>265</sup>

2. *The progress resumed after the New Atlantic Charter of June 10, 2021*

Writing in 2016, Brigit Toebes summarized the progress made in international health law.<sup>266</sup> The broad umbrella of discourse classified under international health law by Toebes allows for an integrated approach to this emergent field of public international law.<sup>267</sup> Sources include legally binding instruments (e.g. The 2005 International Health Regulations);<sup>268</sup> legally binding norms<sup>269</sup> (right to health and other human rights norms); authoritative yet non-binding instruments (WHO recommendations; general comments under human rights law); standards in other branches of international law (e.g. international humanitarian law; international environmental law); and those that have an indirect bearing (e.g. Trade Related Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO)).

During the COVID-19 crisis, President Trump suspended World Health Organization (WHO) funding<sup>270</sup> and later terminated the

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265. CESCR Gen. Comment 14, *supra* note 14, ¶ 59.

266. *See generally* Brigit Toebes, *International health law: an emerging field of public international law*, 55 INDIAN J. OF INT’L L. 299 (2016).

267. *See Id.*

268. *See* IHR (2005), *supra* note 13.

269. *See e.g. Novartis AG v. Union of India*, MANU/SC/0281/2013 [65], ¶¶ 64-65 (Sup. Ct. India 2013) (noting that the Doha Declaration “effectively reflected and addressed the deep disquiet of the developing and the least developed countries regarding their obligation under TRIPS to grant patent protection for pharmaceutical ... products and the likelihood of its highly adverse consequence on public-health”).

270. Lauren Fedor & Katrina Mason, *Trump Suspends Funding to World Health Organization*, FINANCIAL TIMES (Apr. 15, 2020), <https://www.ft.com/content/693f49e8-b8a9-4ed3-9d4a-cdfb591fefce>.

United States' membership.<sup>271</sup> Meanwhile, President Xi Jinping's opening speech at the 73rd World Health Assembly on May 18, 2020, called for solid global governance to deal with a pandemic.<sup>272</sup> On June 7, 2020, the Chinese State Council Information Office released a White Paper titled *Fighting COVID-19: China in Action* which demonstrates its commitment to information sharing and giving a model for how other countries can respond to pandemics.<sup>273</sup> The White Paper sets out how China addressed the pandemic and affirmed its commitment to the future global project. It addressed and validated the aim of "[b]uilding an efficient and sustainable global public health system for the benefit of all humanity."<sup>274</sup> The Chinese effort has been in line with UNSC Resolution 2177,<sup>275</sup> which further recalled UNSC Resolution 2176<sup>276</sup> Resolution 2177 recognized global health as a matter of international peace and security; recognized the effect of virus outbreaks on development, peace, and political and security climates; welcomed efforts of countries to work together (in that case, the Mano River Union Extraordinary Summit); emphasized the leadership of international institutions, particularly the WHO; and proposed individual measures as contributions.<sup>277</sup>

Professor Kenneth Rogoff, Public Policy and Professor of Economics at Harvard University, warned that no country will survive deglobalization, referencing the conditions that led to WWII.<sup>278</sup> Harold

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

272. *Full text: Speech by President Xi Jinping at opening of 73rd Health Assembly*, XINHUANET (May, 18 2020).

273. *China Believes World to Emerge From COVID-19 Dark Moment: White Paper*, XINHUANET (June 7, 2020), [http://www.xinhuanet.com/english/2020-06/07/c\\_139120448.htm](http://www.xinhuanet.com/english/2020-06/07/c_139120448.htm).

274. FIGHTING COVID-19: CHINA IN ACTION, THE STATE COUNCIL INFO. OFF. OF THE PEOPLE'S REPUBLIC OF CHINA (2020).

275. See S.C. Res. 2177 (Sept. 18, 2014).

276. S.C. Res. 2176 (Sept. 15, 2014).

277. S.C. Res. 2177 (Sept. 18, 2014).

278. See Kenneth Rogoff, *Deglobalisation will hurt growth everywhere*, THE GUARDIAN (June 4, 2020), <https://www.theguardian.com/business/2020/jun/04/deglobalisation-will-hurt-growth-everywhere>.

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James, Princeton economic historian and author of the 2001 book, *The End of Globalization*, showed how an earlier era of global economic and financial integration collapsed under the pressures of unexpected events during the Great Depression of the 1930s.<sup>279</sup> China's State Council White Paper notes this problem: "the upsurge in deglobalization has rendered the global public health system even more vulnerable."<sup>280</sup> Furthermore, China's Ministry of Foreign Affairs has been publishing updates on China's response to COVID-19 both locally and globally.<sup>281</sup> On June 5, 2020, China pledged to support the "WHO, Gavi<sup>282</sup> and similar international organizations [which] contribute to vaccine accessibility and affordability in developing countries and a global community of health for all."<sup>283</sup> Moreover, the Biden administration's re-joining the WHO and reaffirming the commitment of the American leadership is in sharp contrast with the approach adopted by the Trump administration.<sup>284</sup> Finally, the New Atlantic Charter of June

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279. HAROLD JAMES, *THE END OF GLOBALIZATION: LESSONS FROM THE GREAT DEPRESSION* (Harv. Univ. Press 2001).

280. Xinhua, *Full Text: Fighting COVID-19: China in Action*, XINHUANET (June 7, 2020), [http://www.xinhuanet.com/english/2020-06/07/c\\_139120424.htm](http://www.xinhuanet.com/english/2020-06/07/c_139120424.htm).

281. See *The Ministry of Foreign Affairs Holds Briefing on COVID-19 Origin-Tracing for Diplomatic Envoys in China*, MINISTRY OF FOREIGN AFF. OF THE PEOPLE'S REP. OF CHINA (Aug. 13, 2021), [https://www.mfa.gov.cn/eng/wjb\\_663304/zygy\\_663314/gyhd\\_663338/202108/t20210813\\_9168435.html](https://www.mfa.gov.cn/eng/wjb_663304/zygy_663314/gyhd_663338/202108/t20210813_9168435.html).

282. Gavi is an international organization created in 2000 to improve access to new and underused vaccines for children living in the world's poorest countries. See generally GAVI, <https://www.gavi.org> (last visited June 20, 2024).

283. *Donor Profiles: China*, GAVI, <https://www.gavi.org/investing-gavi/funding/donor-profiles/china#:~:text=At%20the%20Global%20Vaccine%20Summit,to%20children%20around%20the%20world> (last visited May 27, 2024).

284. See *FACT SHEET: The Biden Administration's Commitment to Global Health*, THE WHITE HOUSE (Feb. 02, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/02/fact-sheet-the-biden-administrations-commitment-to-global-health/>.

10, 2021, shows the resumption of the overall approach of the US government's support and leadership role in international institutions.<sup>285</sup>

### 3. *Moral responsibility of Rulers*

Passing the leadership test during the pandemic required urgent and honest leadership, recognizing the inevitability of mistakes, and constantly correcting course rather than finding people to blame. Finding leadership that acted quickly, and did not downplay the situation to give reassurances, was difficult. In a way, the Hobbesian idea of leadership and obedience was at play where authority could offer safe and practical guidelines, and where the population followed them, there was better pandemic management and protection of life.<sup>286</sup> As Immanuel Kant explained, even a so-called nation of "devils" could avoid anarchy if they followed the authority of reason and the necessity of laws.<sup>287</sup> Due to the leadership's bad policy decision, people lost the ability to exercise their individual informed choices responsibly, which was detrimental to the public's behavior, and ultimately, the state's pandemic management. On the other hand, the analyses of the conventional security system glorify the realist assertion that the maximization of state power and war is inevitable and the only means to establish domination over others. In other words, the accumulation of power has become an existential condition for the survival of nation-states. However, modern threats such as the COVID-19 crisis cannot be tackled with warfare, and it challenges the sovereignty of the states in an entirely new way.

Hence, in our opinion, moral responsibility is one of the most critical ethical issues that has developed due to the present pandemic. Concerns about potential conflicts between the security of life on the one hand and individual privacy and autonomy, as well as democratic accountability on the other, are raised in the public health context of

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285. See generally *The New Atlantic Charter*, THE WHITE HOUSE (June 10, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/10/the-new-atlantic-charter/>.

286. See generally THOMAS HOBBS, *LEVIATHAN* (Penguin Books 1968) (1651).

287. IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 153-54 (London S. Sonnenschein 1903) (1795).

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COVID-19. We have been pushed into a condition of loneliness by a horrible and cruel sickness. For many of us, this is an impoverished existence, with wonderful moments, pleasure, and devotion in danger. Even though Hobbes promoted the concept of an absolute ruler (“Leviathan”) in the 17th century, his social contract theory has stood the test of time.<sup>288</sup> Authority has significance because it provides us with security. Similarly, when Immanuel Kant argued that even a country of “devils” could avoid anarchy if they followed both the authority of reason and the necessity of laws, he was on the same track.<sup>289</sup> Both Hobbes and Kant argue that the state is crucial. In some ways they are correct; however, this ‘Leviathan’ should not be a repressive authority that we blindly obey. Despite an early “rally behind the flag” impact, many countries are seeing rising levels of disbelief in the Governments’ ability to handle crises and implement cohesive solutions.<sup>290</sup> As a result, compliance with public health regulations has dropped, and there has been a rise in skepticism regarding long-term economic growth. More widely, the pandemic has seen widespread deception, which has harmed people’s understanding and acceptance of science and public policy.<sup>291</sup>

The pandemic has taught the world that averting a crisis requires more than economic strength or individual capacity. A state’s responsibility of protecting people from the disaster of the outbreak is not confined to international doctrines, constitutional rights, or an obligations framework; instead, it also derives from the moral responsibility of a state. In contrast, states cannot ethically evade this issue just by calling the crisis an act of God or a natural disaster. The COVID-19 pandemic was a once-in-a-lifetime event that continues to wreak havoc on the world, with massive, unthinkable socioeconomic consequences. Pandemic prevention, and mitigation efforts in such a crisis,

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288. THOMAS HOBBS, *LEVIATHAN* (Penguin Books 1968) (1651).

289. *See* KANT, *supra* note 269, at 153-154.

290. OECD, *GOVERNMENT AT A GLANCE 206* (OECD Publishing 2021).

291. Alexandre de Figueiredo et al., *Mapping global trends in vaccine confidence and investigation barriers to vaccine uptake: a large-scale retrospective temporal modelling study*, 396/10255 *THE LANCET* 898, 906 (Sept. 10, 2020) (“significant drop in confidence in vaccine importance, safety, effectiveness.”).



necessitate a careful examination of fundamental ethical beliefs and principles, and educated and evidence-based decision-making. Public participation, disease surveillance, medical research, and novel experimental interventions are among the ethical elements that deserve special consideration.<sup>292</sup>

The moral requirements of a duty to treat and plan must consider the rights of healthcare professionals and affected communities.<sup>293</sup> Furthermore, appropriate steps should be taken in terms of resource allocation, action planning, and social distancing.<sup>294</sup> In case of a public health emergency, striking a balance between competing ethical standards, such as the necessity for required actions in the interest of public health without jeopardizing public liberty, becomes challenging. It is argued that individual rights restrictions must be reasonable, equitable, least burdensome, unbiased, fair, and consistent with national and international soft laws or guidelines. Home quarantine orders issued by the government are legitimate and effective when individual needs and freedoms are respected.<sup>295</sup> The distribution of resources should be moral, transparent, and based on scientific facts. The fundamental responsibility in this regard is to support front-line health-care employees, as the whole health-care system is dependent on them.<sup>296</sup>

While waiting for the proper implementation of the 2005 International Health Regulations, adopting a universalist approach to international law is essential, which means applying common standards to protect every human being. This requires good governance at local,

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292. Theodore H. Tulchinsky, *Ethical Issues in Public Health*, 13 CASE STUDIES IN PUB. HEALTH 277, 294-95 (2018).

293. Faouzia Tanveer et al., *Ethics, pandemic and environment; looking at the future of low middle income countries*, 19:182 INT'L J. FOR EQUITY IN HEALTH, at 3 (2020).

294. WHO, *Guidance for managing ethical issues in infectious disease outbreaks* (2016), <https://apps.who.int/iris/handle/10665/250580>.

295. Pengyu Zhu & Xinying Tan, *Is compulsory home quarantine less effective than centralized quarantine in controlling the COVID-19 outbreak? Evidence from Hong Kong*, 74 SUSTAINABLE CITIES & SOC'Y 1, 1, 3-4 (2021).

296. See Lawrence O. Gostin et al., *Responding to COVID-19: How to Navigate a Public Health Emergency Legally and Ethically*, 50 HASTINGS CTR. REP. 8, 8 (2020).

regional, and global levels. It is well articulated in the founding principles of the UDHR as well as other human rights treaties.<sup>297</sup>

Considering the foundations of the right to life/health in the context of the COVID-19 pandemic response, proper coordination between civil services and public health bodies is more effective in controlling the spread of the virus beyond borders. As explained by the critical legal scholar Suze Wilson, New Zealand was prosperous because its approach to the pandemic involved the implementation of influenza protocols with expert-led policymaking.<sup>298</sup> When faced with a pandemic that does not respect artificial boundaries/barriers, governance has a pivotal role in protecting everyone's right to life in a globalized world. It also demonstrates that international human rights norms should be adopted and implemented on such occasions.

Pandemic management is an area where international laws and regulations play a role. Pandemic management is rooted in international law and cooperation. For example, binding agreements on the duties that states owe to their citizens are significant achievements of international law in the post-Second World War context. As discussed, this involves the right to life and healthcare.

## CONCLUSION

As discussed in international legal discourse, claims against China regarding the origins of COVID-19 appear nonjusticiable. Given the diversity of countries and their relative independence from

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297. ICCPR, *supra* note 15, art. 2(2) (“each State Party to the present Covenant undertakes to take the necessary steps . . . to give effect to the rights recognized in the present Covenant”); ICESCR, *supra* note 15, art. 12, 23 (“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...The States Parties...agree that international action for achievement of the rights recognized in the present Covenant includes such methods as the conclusion of the conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study”); UDHR, *supra* note 32, pmb. (“Whereas Member States have pledged themselves to achieve, in cooperation of the United Nations, the promotion of universal respect for and Observance of human rights and fundamental freedoms”).

298. Suze Wilson, *supra* note 218, at 279-80.

one another and the tactics adopted by certain governments that hinder rather than assist efforts to coordinate actions, and adding to this, the relative ignorance of the origin and nature of the disease, it is unlikely for legal actions to be pursued with respect to the pandemic. The inability to pin down legally significant failures of response and causation of the spread of the pandemic means that one cannot define and assign proportions of responsibility between China, as the supposed origin of the pandemic, and those states to which the pandemic spread. The whole tragedy is likely, not justiciable.

As discussed, discourse of pandemic management has turned towards fundamental ethical principles. Natural legal theories cannot be separated from moral and political theories. The natural law roots of the principles that underlie rulers' moral and ethical responsibilities are worth invoking in this context. This practice has been traced back to Vattel.<sup>299</sup> Since then, Koskenniemi writes, "jurists have written about international matters by assuming that the liberal principles of the Enlightenment and their logical corollary, the Rule of Law, could be extended to apply in the organization of international society just as they had been used in the domestic one."<sup>300</sup> The UDHR is a codification of natural law principles—an attempt to universalize the idea that no state is above the law.<sup>301</sup> It imposed basic minimum standards required to uphold human rights. The Nuremberg trials demonstrated the substantive and procedural implications of breaching natural justice principles.<sup>302</sup> It universalized both the idea that nobody, not even a state, is above specific essential basic minimum standards of natural

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299. *See generally*, EMER DE VATTEL, 1 LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉES À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (1758).

300. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 4 (1990). Indeed, these concepts could be traced back even earlier, though they had a much narrower application: in the Institutes, from Roman law, it is stated that "by nature, from the outset, all human beings were born free and equal." J. INST. 1.2.2.

301. UDHR, *supra* note 32, pmb1. ("the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world").

302. Ian Cobain, *supra* note 263.

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law, and that justice must not only be done but be seen to be done. As stated by Richard Norton-Taylor, “[i]t also led to a series of international conventions on the laws of war, genocide, and human rights, and the setting up of the permanent international criminal court in The Hague.”<sup>303</sup> The agreement to these principles demonstrates the understanding that norms of equality and common human dignity must be a required minimum standard for mutual respect and the protection of individuals.

In this article it was demonstrated using the cases of Britain and India that only the leadership that has respect for the ruled, is accountable, has empathy, and considers humanity above everything else, can respond to a pandemic effectively. Although pandemics cannot be avoided, their impact can be considerably lessened. Critical leadership scholar Suze Wilson has developed a good practice framework based on the New Zealand experience.<sup>304</sup> Leaders must be willing to be led by those with relevant expertise, mobilize the community, minimize harm through economic measures, educate the public about all necessary measures, reinforce this messaging through various platforms, and ensure testing, PPE supplies, contact tracing and other measures.<sup>305</sup> As in New Zealand, the South Korean government’s handling of the pandemic has been reflected in positive responses from the population.<sup>306</sup> The relative success of certain nations in tackling the virus spread and finding ways to give their populations access to treatment has global and regional implications for information sharing and procurement mechanisms, and other states have lessons. The long-term geopolitical implications of COVID-19 are equally consequential, especially regarding the United States’ position and China’s global rise.

Since the economic and public health crises continue to wreak havoc on developed and developing countries, internal resources will

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303. *Id.*

304. Suze Wilson, *supra* note 218, at 283-90.

305. *Id.*

306. See Laura Bicker, *South Korea election: Ruling party wins amid coronavirus outbreak*, BBC (Apr. 16, 2020), <https://www.bbc.com/news/world-asia-52304781>.

be stretched, and foreign finance will be sought more aggressively. It will be critical to guarantee that urgent responses to the crisis are implemented and that health systems are consolidated to create resilience to future crises. There are some other areas where a sufficient financial budget will play a significant role, such as a financial safety net. Owing to the global crisis, development cooperation should focus on discovering positive outcomes and practical models, and guaranteeing that funds are not shifted from critical services that require continuous assistance and cannot be abandoned. Development aid requires efforts and resources to combat the crisis' severe effects, and it can act as a spur for additional funding sources. From that perspective, universal governance could be enhanced along with the national governance of each state. The universalist approach insists on implementing international human rights through the due diligence of international organizations and state governments. The global trend is moving towards supporting the role of international institutions, as seen in the New Atlantic Charter of June 2021 by the U.S. and UK.<sup>307</sup> China's efforts align with the U.S. led efforts at the global level during the Obama presidency.<sup>308</sup> In conclusion, the authors believe in the potential for synergies and development in international health law and in advancing the implementation of international human rights norms at the domestic level.

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307. See generally *The New Atlantic Charter*, THE WHITE HOUSE (June 10, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/10/the-new-atlantic-charter/>.

308. See Jin Canrong, *How America's relationship with China changed under Obama*, WORLD ECON. F. (Dec. 14, 2016), <https://www.weforum.org/agenda/2016/12/america-china-relationship/>.