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STATE OBLIGATIONS UNDER PUBLIC INTERNATIONAL LAW DURING PANDEMICS

*Michaela S. Halpern**

INTRODUCTION

In the increasingly internationalized society, the world is experiencing the effect individuals can have on one another and the need to help others in the international community—despite geography. While its origins are still under speculation, the 2019 novel coronavirus, or COVID-19, infiltrated the human population through a handful of individuals and—within a matter of weeks—became one of the worst emergencies the world has seen.¹ COVID-19 has become a disaster not only in the sense that almost no country has remained unaffected, and no sector has been left untouched but also in that COVID-19 is both a biological and economic disaster.² Unlike previous armed conflicts or global economic recessions, the COVID-19 pandemic is presently targeting every human being—regardless of their age, race, gender, or nationality.³

This Article contemplates whether there are obligations during a pandemic to prevent and contain disease or to help other countries. As a starting point, we look to Articles 1, 2, 55, and 56 of the United Nations Charter and the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-Operation Among States, which both provide a duty among nations to “cooperate.”⁴ What countries debate, however, is whether this duty is a binding obligation under customary international law or whether it is merely an objective of the United Nations. The United States has time and time again

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¹ See, e.g., Graham Readfearn, *How did coronavirus start and where did it come from? Was it really Wuhan's animal market?*, GUARDIAN (Apr. 14, 2020), <https://www.theguardian.com/world/2020/apr/15/how-did-the-coronavirus-start-where-did-it-come-from-how-did-it-spread-humans-was-it-really-bats-pangolins-wuhan-animal-market>; *FAQ: COVID-19 (coronavirus disease 2019)*, MIT MEDICAL, <https://medical.mit.edu/faqs/COVID-19#faq-2> (last updated Apr. 7, 2020).

² See Bryan Walsh, *Covid-19: The history of pandemics*, BBC: FUTURE (Mar. 25, 2020), <https://www.bbc.com/future/article/20200325-covid-19-the-history-of-pandemics>.

³ *Id.*

⁴ Olha Bozhehnko, *More on Public International Law and Infectious Diseases: Foundations of the Obligation to Report Epidemic Outbreaks*, EUR. J. INT'L L.: TALK! (August 15, 2019), <https://www.ejiltalk.org/more-on-public-international-law-and-infectious-diseases-foundations-of-the-obligation-to-report-epidemic-outbreaks/>.

taken it upon themselves to fight wars on behalf of other countries.⁵ Why should infectious diseases be any different? One of the few uncontroversial legal philosophies is the idea that—generally speaking—it is morally wrong to harm another human being. What is more controversial is whether it is morally wrong not to perform an act that could save another human being—an omission.⁶ In other words, while it would be morally wrong if a human intentionally spread COVID-19 to another human, is it wrong for a human not to take action that would help prevent the disease from spreading? These questions are at the root of a greater question.

With this in mind, this Article seeks to answer a pressing question: do countries have obligations under public international law to prevent and contain disease and to help other countries during pandemics? COVID-19 has become an international pandemic that has affected every country and threatened a global economic collapse. Although “pandemics do not respect international borders,” a well-developed field of international health law does not exist.⁷ Therefore, we look to other avenues. For example, International Human Rights (“IHR”) law recognizes a right to health and contains obligations for States that apply in situations such as the COVID-19 pandemic. Unfortunately, IHR lacks sufficient enforcement mechanisms. On the other hand, pandemics can be analogous to war.⁸ Therefore, other wartime norms may help States better cooperate on an international level. Examining these possibilities, this Article examines whether there are obligations under public international law for preventing pandemics or facilitating international cooperation to address pandemics. Accordingly, the Article proceeds in two parts. First, it looks at IHR law. Second, it looks at varying wartime norms. If pandemics do not respect borders, then why should our defenses? Pandemics are a global threat, and the world cannot defeat them without international cooperation. Given the

⁵ See, e.g., Farhad Manjoo, *We Really Must Stop Starting Wars*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/opinion/iran-war-us.html>; Stephen M. Walt, *Is America Addicted to War?*, FOREIGN POL’Y (APR. 4, 2011), <https://foreignpolicy.com/2011/04/04/is-america-addicted-to-war/>.

⁶ See, e.g., W. Jonathan Cardi, *Reconstructing Foreseeability*, 45 B.C. L. R. 921 (2005); Lauren Coleman, *Thou Shalt Not Kill; But Needst Not Strive Officially to Keep Alive: A Study into the Debate Surrounding Euthanasia and Assisted Suicide*, 3 N.E. L. REV. 113 (2015).

⁷ Sara Davies, *National Security and Pandemics*, UN CHRONICLE (Mar. 7, 2020), <https://www.un.org/en/chronicle/article/national-security-and-pandemics>; Brigit Toebes, *International Health Law: an Emerging Field of Public International Law*, 55 INDIAN J. INT’L L. 299, 299 (2015).

⁸ See Alex Dymoke, *In defence of war metaphors in the Covid-19 conflict*, TIMES (Apr. 17, 2020), <https://www.thetimes.co.uk/article/in-defence-of-war-metaphors-in-the-covid-19-conflict-k8l08nngv>. *But see* Alissa Wilkinson, *Pandemics are not wars*, VOX (Apr. 15, 2020), <https://www.vox.com/culture/2020/4/15/21193679/coronavirus-pandemic-war-metaphor-ecology-microbiome>.

technology of the modern world, a failure in one State to contain a threat puts the rest of the world in danger.⁹

I. THROUGH INTERNATIONAL HUMAN RIGHTS

The right to health is enshrined in many human rights instruments, including the 1948 Universal Declaration on Human Rights Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹⁰

Additionally, it is found in the 1966 International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) Article 12:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
....
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases[.]¹¹

Accordingly, this Part is split into two sections: first, Section A examines a State’s possibilities under ICESCR; second, Section B moves to the International Health Regulations of 2005.

A. *Through the 1966 International Covenant on Economic, Social, and Cultural Rights*

The ICESCR points to the universal right of a standard of health, a standard achieved through “prevention, treatment and control” of threatening diseases.¹²

⁹ Davies, *supra* note 7; Alex Ward, *World leaders who denied the coronavirus’s danger made us all less safe*, VOX (Mar. 30, 2020), <https://www.vox.com/2020/3/30/21195469/coronavirus-usa-china-brazil-mexico-spain-italy-iran>.

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

¹¹ International Covenant on Economic, Social and Cultural Rights art. 12, ¶ 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

¹² *Id.*

The United Nations Committee on Economic, Social, and Cultural Rights (“CESCR”) Commentary on Article 12 of the ICESCR clarifies that this requires “the creation of a system of urgent medical care in cases of...epidemics...and the provision of disaster relief and humanitarian assistance in emergency situations.”¹³ Thus, States that have signed the ICESCR have agreed to provide relief during epidemics by creating systems and giving assistance. Paragraph 33 of the CESCR Commentary on Article 12 of the ICESCR details that the right to health has three sub-categories of obligation: (1) respect, in the sense that States cannot interfere with the right to health; (2) protect, in the sense that States must protect this right from third party interference; and (3) fulfil, in the sense that States must take whatever steps necessary (legislative, budgetary, judicial, etc.) to facilitate the right to health.¹⁴ The Office of the United Nations High Commissioner for Human Rights (“OHCHR”) clarifies that violating the obligation to respect means taking actions that “are likely to result in bodily harm, unnecessary morbidity, and preventable mortality.”¹⁵ An example currently breached during the COVID-19 crisis is deliberately withholding or misrepresenting information needed to protect the health and treatment.¹⁶

Moreover, countries should not be able to force older people to die or deny them healthcare for the sake of economic stability. Violating the obligation to protect from third parties includes not discouraging the production of certain products, not discouraging the observance of harmful medical practices or failure to regulate activities of corporations that violate the right to health.¹⁷ For example, States should pass laws criminalizing particular behavior during pandemics such as price gouging of essential medical supplies and medication. Finally, the OHCHR clarifies that violating the obligation to fulfill includes misallocation of public resources in such a way to prevent the right to health of specific individuals or groups, “failure to monitor the realization of the right to health” or failure to ensure equitable distribution of health resources.¹⁸ One way to follow the obligation is for States to “direct[] the efforts of business entities towards the fulfilment of Covenant rights.”¹⁹ For example, as the United States

¹³ U.N. CESCR, 22nd Sess. ¶ 16, U.N. Doc. E/C.12/200/4 (Aug. 11, 2000).

¹⁴ *Id.* ¶ 33.

¹⁵ *Id.* ¶ 50.

¹⁶ See Talita de Souza Dias & Antonio Coco, *Part I: Due Diligence and COVID-19: States’ Duties to Prevent and Halt the Coronavirus Outbreak*, EUR. J. INT’L L.: TALK! (Mar 24, 2020) <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>.

¹⁷ U.N. CESCR, 22nd Sess. ¶ 51, U.N. Doc. E/C.12/200/4 (Aug. 11, 2000).

¹⁸ *Id.* ¶ 52.

¹⁹ U.N. CESCR, 61st Sess. ¶ 24, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

did in activating the Defense Production Act to require General Motors to make ventilators.²⁰

As a United Nations Human Rights body established under the Economic and Social Council in 1985, the mandate of the CESCR is to monitor whether States are upholding their obligations under the ICESCR.²¹ Part of this monitoring includes requiring countries to submit reports on the status of their economic, social and cultural situation, but these reports need only be submitted every five years, and failure to report means the CESCR must find other ways of determining the situation in that country.²² The result is a CESCR report revealing the situation in that country, pointing to areas of concern and making recommendations.²³ The Optional Protocol to the ICESCR provides individual persons the opportunity to present complaints to the CESCR alleging violations of economic, social, and cultural rights.²⁴ However, the country must be a signatory to the Optional Protocol, and so far, only twenty-four States are party to the Optional Protocol, twenty-five States have signed the Optional Protocol, and one hundred and forty-nine States have taken no action at all with regards to the Optional Protocol.²⁵ Therefore, while the ICESCR does arguably provide an obligation on countries to prevent and contain infectious diseases within its country, there are no other real penalties for violating the ICESCR.

B. Through the International Health Regulations of 2005

The first Article of the United Nations Charter declares one of the purposes of the United Nations “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character[.]”²⁶ The World Health Organization (“WHO”) is a United Nations agency established in 1948 with the World Health Assembly currently involving

²⁰ See Maegan Vazquez et al., *Trump invokes Defense Production Act to require GM to make ventilators*, CNN (Mar 27, 2020) <https://www.cnn.com/2020/03/27/politics/general-motors-ventilators-defense-production-act/index.html>.

²¹ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Monitoring the economic, social and cultural rights*, <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> (last visited March 26, 2020).

²² See *id.*; ICESCR, *supra* note 11, at art. 16, 17; *Human Rights Enforcement Mechanisms of the United Nations*, ESCR-NET, <https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations> (last visited March 26, 2020).

²³ *Id.*

²⁴ *What is the OP-ICESCR?*, ESCR-NET, <https://www.escr-net.org/ngo-coalition-op-icescr/what-op-icescr> (last visited Mar. 26, 2020).

²⁵ See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://indicators.ohchr.org/> (last visited Mar. 26, 2020).

²⁶ U.N. Charter art 1, ¶ 3.

one hundred and ninety-four countries.²⁷ The WHO can create binding laws; however, it has not utilized this power effectively. To date, there have been only three “hard” law instruments created by the WHO: the Framework Convention on Tobacco Control, the International Health Regulations (“IHR”) of 2005, and the Nomenclature Regulations require member States to use up-to-date versions of the International Classification of Diseases.²⁸ Reporting is a simple and effective method to prevent and contain a pandemic.²⁹ Unfortunately, States are not sufficiently adhering to this, especially not promptly.³⁰ Some scholars believe that the ICESCR creates a core obligation, mainly, to report epidemic outbreaks; however, the ICESCR does not have a reliable enforcement mechanism.³¹ The IHR may provide more hope. The IHR requires members to monitor the public health of their citizens, and Article 6 imposes a duty on signatory States to report to the WHO all events that can be an international public health concern.³² As of today, the IHR is legally binding on one hundred and ninety-six States, and the obligation on monitoring and reporting were required to be implemented by States no later than five years after they sign the IHR.³³ This means that for most States, this deadline has already passed. Implementing this obligation is clarified in Annex 1 to the IHR, including immediately reporting essential information and having a national public health response plan to emergencies that are put into operation and continually maintained.³⁴ As for international cooperation, Article 44 lays out an obligation to collaborate with other States to “detect, assess and respond to public health emergencies; develop, strengthen and maintain public health capacity; and mobilize financial resources.”³⁵ The WHO is the best body to be a central

²⁷ *History*, WORLD HEALTH ORGANIZATION, <https://www.who.int/about/who-we-are/history> (last visited Mar. 26, 2020).

²⁸ *See generally* Kelley Lee, *Civil Society Organizations and the Functions of Global Health Governance: What Role within Intergovernmental Organizations?*, 3 GLOBAL HEALTH GOVERNANCE 1 (2010).

²⁹ *See, e.g.*, Jin Wu, Allison McCann, Josh Katz, & Elian Peltier, *40,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html> (last updated Apr. 27, 2020).

³⁰ *Id.*

³¹ *See, e.g.*, LAWRENCE GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH LAW IN THE AIDS PANDEMIC 29 (1997); DAVID FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASES 193 (1999).

³² WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (3rd ed. 2005) [hereinafter IHR].

³³ *States Parties*, WORLD HEALTH ORGANIZATION, https://www.who.int/ihr/legal_issues/states_parties/en/ (last visited Apr. 1, 2020); IHR, *supra* note 30, at art. 5, 6.

³⁴ IHR, *supra* note 30, at art. 6 §§ 4(b), 5(b), 6.

³⁵ Talita de Souza Dias & Antonio Coco, *Part II: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak*, EUR. J. INT'L L. TALK! (Mar 25, 2020), https://www.ejiltalk.org/part-ii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/?fbclid=IwAR025am_-ISrYf-32ZNA94LL87IYAaFWnqi1v82m89gp_KaJeRaKqzYXPYU.

authority over pandemics that cross borders and the IHR does provide requirements for States to both prevent and contain the pandemic within their own borders and to help the international community both through the obligation to collaborate, but most importantly through the reporting requirements. However, as the WHO has explained, the IHR does not have “an enforcement mechanism per se” but instead relies on the consequences of “peer pressure and public knowledge” to hold States to their obligations.³⁶

This Article proposes sanctions as a method of enforcement of the IHR and the ICESCR. The European Union can impose sanctions as part of the Common Foreign and Security Policy, and countries can impose sanctions independently within their jurisdictions.³⁷ However, to prevent and contain pandemics, an international approach is necessary. The WHO, together with the CESC, should provide for sanctions at the United Nations level by the Security Council under Article 41 of the United Nations Charter for violations of the IHR obligations.³⁸ Sanctions can provide strong deterrents and punishments without resorting to the use of force.³⁹ Although some view sanctions as challenging to enforce and with a “spotty track record,” to this day, they appear to be one of the more serious threats in international diplomacy short of using force.⁴⁰ Particularly in today’s global economy, “international trade is essential for the economic survival and development of nearly all countries.”⁴¹ One of the problems with the effectiveness of sanctions is the need to distinguish between human rights capable of international enforcement (basic human rights) from political rights.⁴² Obligations to prevent and contain infectious diseases is not a political right, it is part of the basic human right to health, and there is not as

³⁶ *IHR FAQs*, WORLD HEALTH ORGANIZATION, <https://www.who.int/ihr/about/faq/en/> (last visited Mar. 26, 2020).

³⁷ See e.g., *Sanctions Guidelines – update*, SEC (2018) 5664/18 (May 4, 2018); *What are Economic Sanctions?*, COUNCIL ON FOREIGN RELATIONS (Aug 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions>.

³⁸ *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, UNITED NATIONS SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/actions> (last visited Mar. 27, 2020).

³⁹ *What are Economic Sanctions?*, COUNCIL ON FOREIGN RELATIONS, (Aug 12, 2019), <https://www.cfr.org/backgrounder/what-are-economic-sanctions>.

⁴⁰ See *id.*; Georg Menz, *The Governance of Migration Beyond the State*, in HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF GOVERNANCE 392 (Anthony Payne et al. eds., 2014); see also Andrew Mack & Asif Khan, *The Efficacy of UN Sanctions*, 31 SECURITY DIALOGUE 279 (2000); *UN Sanctions a Mixed Record*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/un-sanctions-mixed-record> (last visited Apr. 1, 2020).

⁴¹ Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. INT’L L. R. 1, 2 (1996).

⁴² *Id.* at 3.

much of a perception of “unmerited intrusions into [...] domestic policies” because not adhering to one’s obligations under the IHR impacts not only one’s own country but the entire international community.⁴³

The problem in the human rights context is enforcement. Many countries simply do not have the resources to adhere to the requirements laid out in these human rights instruments, and many who do not want to for fear of discrimination, economic distress, and “being tainted.”⁴⁴ If States are held accountable, and countries work together to enforce the obligation of reporting data, perhaps with the possibility of sanctions, pandemics can be prevented. Sharing information, especially early on, can help countries around the world prepare to contain and treat the disease.

II. STATES’ WARTIME NORMS

United States President George W. Bush forever changed the world when he declared a new type of warfare, the idea that one could go to war against a concept—the war on terror.⁴⁵ Nearly two decades later, in giving his address to the nation, Israeli Prime Minister Benjamin Netanyahu said that we are at war with the novel coronavirus, COVID-19.⁴⁶ Although humans have envisioned wars against non-humans, such as aliens, or robots, the reality is the first non-human war is one humankind has fought before and will fight again—infectious diseases.⁴⁷ It is an enemy that attacks our physical bodies, our medical staff have spent time preparing and practicing (conducting “military drills” if you will) for protecting us at the front lines, we put up physical barriers to try to evade it, and we create and utilize weapons to destroy it.⁴⁸ United States President Donald Trump enacted a wartime law, the Defense Production Act, to attempt to boost medical supply production, considering that Trump “sees the country on

⁴³ *Id.*

⁴⁴ *What are Economic Sanctions?*, COUNCIL ON FOREIGN RELATIONS, (Aug 12, 2019), <https://www.cfr.org/background/what-are-economic-sanctions>.

⁴⁵ *See generally* Melvyn P. Leffler, *Think Again: Bush’s Foreign Policy*, FOREIGN POL’Y (Oct. 23, 2009), <https://foreignpolicy.com/2009/10/23/think-again-bushs-foreign-policy/>.

⁴⁶ Maayan Jaffe-Hoffman, *Is Benjamin Netanyahu telling the whole truth about coronavirus in Israel?*, JERUSALEM POST (Mar. 23, 2020), <https://www.jpost.com/israel-news/coronavirus-netanyahus-game-of-two-truths-and-a-lie-621926>.

⁴⁷ *See generally* H. G. WELLS, WAR OF THE WORLDS (1898), PIERRE BOULLE, LA PLANÈTE DES SINGES (1963) (known as Planet of the Apes in the US), KAREL ČAPEK, R.U.R.: ROSSUMOVĚ UNIVERZÁLNÍ ROBOTI (1920) (introducing the word “robot” to the English language).

⁴⁸ *See Dymoke, supra note 7. But see Wilkinson, supra note 7.*

wartime footing and himself as a wartime president amid the coronavirus crisis.”⁴⁹

When a war is declared, a different set of rules apply. International Humanitarian Law (“IHL,” or “Law of War”) applies, as the name suggests, only in situations of armed conflict, and it should remain so.⁵⁰ IHL is necessary to manage the relationship between States, international organizations, civilians, to name a few examples, in times of armed conflict.⁵¹ IHL regulates when the use of force is permitted, and what conditions are required, how to treat prisoners of war, and how to protect civilians from the side effects. A war against a disease is not an armed conflict in this sense. There will be no prisoners of war, no risk of destroying cultural sites, and no unintended civilian deaths in the crossfire; every single human is a “civilian” in this war. This is perhaps the only circumstance in which every single human being is on the same side. Thus, even though this is a “war,” turning to the Law of War could cause more problems as States can quickly expand and abuse its use. The reason the “war on terror” is controversial is that it is always risky to provide more opportunities to widen the ambit of concentrated power and the exceptions to the prohibition on the use of force. Declaring a “war on infectious diseases” should not give way to allow one state to use force on another simply because they feel the latter State is not effectively controlling the disease.

However, there are similar “wartime” responsibilities and obligations that can be turned to, short of IHL. In most countries, a “state of emergency” means the executive branch holds much broader power.⁵² Funding is not only allocated differently, but different rights receive lesser priority, such as the right to privacy or, especially in the case of a virus, the freedom of assembly. For example, if California declares a state of emergency, the governor is allowed “have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California [.]”⁵³

⁴⁹ Vazquez et al., *supra* note 19.

⁵⁰ International Humanitarian Law is sometimes referred to as the Law of War. See International Committee of the Red Cross, *War and international humanitarian law*, (Oct. 29, 2010) <https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm>.

⁵¹ International Committee of the Red Cross & Inter-Parliamentary Union, INTERNATIONAL HUMANITARIAN LAW: HANDBOOK FOR PARLIAMENTARIANS N^o 25 8 (2016).

⁵² See Le Tian, *What is a ‘state of emergency’?*, CGTN (Apr. 5, 2020), <https://news.cgtn.com/news/2020-04-04/What-is-a-state-of-emergency—PmjpvGAFTi/index.html>.

⁵³ Cal. Gov’t Code § 8627 (West 2020).

A. *Responsibility to Protect*

On an international level, humanitarian intervention is defined as one State (State A) using its military force in another State (State B) to bring an end to human rights violations within the latter State. United Kingdom Prime Minister Tony Blair went into the Iraqi war with the United States under a claim of “humanitarian intervention,” and the United States fought the Vietnam War under the idea of preventing the spread of communism.⁵⁴ State sovereignty encapsulates the historical idea that the “State” is free to do what it wishes within its borders.⁵⁵ Nevertheless, under the theory of humanitarian intervention, even if the human rights violations occurring within State B’s borders has no impact on State A. State A, however, is allowed to act with aggression against State B under the concept of the need to end human suffering around the world and the “responsibility to protect” the international community.⁵⁶ Generally, the responsibility to protect (“R2P”) is used to prevent mass atrocities such as genocide and war crimes, but perhaps it is time to extend it to infectious diseases.⁵⁷

In 2014, in order to assist West Africa in combating the Ebola epidemic, the United States Department of Defense assisted in what became known as “Operation United Assistance.”⁵⁸ As part of this operation, the United States sent thousands of military troops to Liberia to train over one thousand five hundred medical staff, build facilities, and coordinate needed supplies.⁵⁹ Then-President Barack Obama emphasized this responsibility to help because he recognized that:

this is an epidemic that is not just a threat to regional security, it’s a threat to global security if these countries break down, if their economics break down, if people panic. And that has a profound effect on all of us, even if we are not directly contracting the disease.⁶⁰

⁵⁴ See generally Thomas Cushman, *The Human Rights Case for the War in Iraq: A Consequentialist View*, in HUMAN RIGHTS IN THE ‘WAR ON TERROR’ (Richard A. Wilson ed., 2005); Heather Stur, *Why the United States Went to War in Vietnam*, FOREIGN POL’Y RES. INST. (Apr. 28, 2017), <https://www.fpri.org/article/2017/04/united-states-went-war-vietnam/>.

⁵⁵ See generally JOHANNES MATTERN, CONCEPTS OF STATE SOVEREIGNTY AND INTERNATIONAL LAW (1928).

⁵⁶ *Id.*

⁵⁷ See Fred Dews, *What Is the “Responsibility to Protect”?*, BROOKINGS (July 24, 2013), <https://www.brookings.edu/blog/brookings-now/2013/07/24/what-is-the-responsibility-to-protect/>.

⁵⁸ See, e.g., Operation United Assistance, UNITED STATES DEPARTMENT OF DEFENSE, https://archive.defense.gov/home/features/2014/1014_ebola/ (last visited Mar. 26, 2020).

⁵⁹ *Id.*

⁶⁰ President Barack Obama, Remarks by the President on the Ebola Outbreak, (Sep 16, 2014).

One can see it happening today, at the very moment of this writing, with the spread, panic, and economic breakdown from the COVID-19 pandemic.

United Nations Secretary General Ban Ki-moon detailed R2P as having three pillars: (1) the responsibility to protect individuals within one's jurisdiction, (2) the responsibility to assist other States in fulfilling (1), and (3) if a state is "manifestly failing" to protect its population, the international community must take "collective action in a timely and decisive manner."⁶¹ Therefore, R2P encompasses both the obligation of a state to protect its citizens and to help others. Although the United Nations Charter prohibits the use of force, pillar (3) provides an exception for protection purposes.⁶²

The International Commission on Intervention and State Sovereignty concluded that "sovereign states have a responsibility to protect their citizens from avoidable catastrophe...but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community."⁶³ A pandemic such as that developed from COVID-19 is a catastrophe. Therefore, one can see that under the concept of the Responsibility to Protect, a country should prevent and contain the pandemic amongst its citizens as well as an obligation to help others in the international community if they are unwilling or unable to do so. In fact, the language from the World Summit Outcome Document need only to add the case of infectious disease pandemics:

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the

⁶¹ U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

⁶² *See id.*

⁶³ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* VIII (2001).

Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁶⁴

Although the international community has accepted R2P since it was adopted at the 2005 United Nations World Summit, its adoption was a non-binding resolution.⁶⁵ At the same time, States do not use R2P in the context of genocide and war crimes as a concept in and of itself but as grounded in international legal documents such as the Genocide Convention as well as the Geneva Conventions and their Additional Protocols.⁶⁶ Additionally, the concept of humanitarian intervention and the R2P as an international norm is still met with many controversies as States see it as an excuse for a strong State to perform acts of aggression or for States to avoid investing money, or troops, in dealing with complex foreign issues.⁶⁷ Nevertheless, in the instance of a pandemic, it is not a complex foreign issue. It is a complex issue that has or certainly will hit home. There is a dilemma with R2P in that it encapsulates the conflict between state sovereignty and human rights.⁶⁸ However, it may be less controversial in the context of a “war” on a disease considering a pandemic, such as COVID-19, impacts the entire globe. Just as after World War II, the limits of national sovereignty were re-examined when human rights violations were present, it is necessary to re-examine state sovereignty when dealing with a global issue such as a health pandemic.⁶⁹

With genocide or crimes against humanity, early warning calls for help are crucial, and if the country affected will not do it, neighboring countries are in the best position to “raise the alarm.”⁷⁰ Similarly, with infectious diseases, the primary country itself should have an obligation to raise the alarm and ask the international community for help. There exists a United Nations Office on Genocide Prevention, and the R2P includes special advisors to monitor countries, looking out for early warning signs of genocide and crimes against humanity and if a risk appears, bring the situation to the Secretary General and

⁶⁴ G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).

⁶⁵ UNITED STATES INSTITUTE OF PEACE ET AL., *THE UNITED STATES AND R2P: FROM WORDS TO ACTION* 3 (2013) [hereinafter USIP R2P Report].

⁶⁶ AUSTRALIAN RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND THE RESPONSIBILITY TO PROTECT: A HANDBOOK* 12 (2011).

⁶⁷ USIP R2P Report, *supra* note 65, at 20.

⁶⁸ See, e.g., Cristina Gabriela Badescu, *The Responsibility to Protect: Sovereignty and Human Rights*, in *HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS* (2010).

⁶⁹ USIP R2P Report, *supra* note 65, at 12.

⁷⁰ *Id.* at 25.

the United Nations Security Council in order to take preventative action.⁷¹ The WHO, as a United Nations body, can develop a similar United Nations office on Pandemic Prevention and the R2P with special advisors whose purpose is to monitor for early warning signs of pandemics.

CONCLUSION

Currently, under public international law, there is not a binding and sufficiently enforceable obligation on States to prevent pandemics within their borders or to help other States contain their pandemics. Nevertheless, as this Article posits, there should be—and there can be. Article 40 of the CESCR Commentary on Article 12 of the ICESCR provides that for diseases that are easily internationally transmittable, every country has a “collective responsibility to address this problem.” Taking a nation-centric viewpoint is simply not feasible in pandemic environments. After all, health “is a shared responsibility, involving equitable access to essential care and collective defense against transnational threats.”⁷² COVID-19 may have started in Wuhan, China, but it became an international pandemic that has affected over one hundred and eighty-five countries in the world, resulting in an unprecedented high unemployment rate and a threat of global economic collapse.⁷³

Under International Human Rights law, the 1966 International Covenant on Economic, Social, and Cultural Rights Article 12 provides an obligation on States to protect, respect, and fulfill the right to health within their borders and the IHR of 2005 obliges signatory States to monitor and report incidents that may be of international health concern. Therefore, under the IHR, an obligation can be seen under public international law for States to both prevent and contain pandemics within their borders as well as to cooperate with the international

⁷¹ *Early Warning*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/early-warning.shtml> (last visited Mar. 26, 2020).

⁷² Mattias Sundholm, *World Health Organization*, UNITED NATIONS OFFICE OF THE SECRETARY-GENERAL’S ENVOY ON YOUTH, <https://www.un.org/youthenvoy/2013/09/who-world-health-organisation/> (last visited Apr. 30, 2020).

⁷³ See, e.g., Coronavirus: A visual guide to the pandemic, BBC (last visited Mar. 26, 2020), <https://www.bbc.com/news/world-51235105>; Jeff Cox, *Coronavirus job losses could total 47 million, unemployment rate may hit 32%, Fed estimates*, CNBC (Mar 30, 2020), <https://www.cnbc.com/2020/03/30/coronavirus-joblosses-could-total-47-million-unemployment-rate-of-32percent-fed-says.html> (explaining how the unemployment rate in the United States is higher than the Great Depression); Ruchir Sharma, *This is How the Coronavirus will Destroy the Economy*, N.Y. TIMES (Mar 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-economy-debt.html>; Yen Nee Lee, *6 charts show the coronavirus impact on the global economy and markets so far*, CNBC (Mar 12, 2020), <https://www.cnbc.com/2020/03/12/coronavirus-impact-on-global-economy-financialmarkets- in-6-charts.html>; Lora Jones et al., *Coronavirus: a visual guide to the economic impact*, BBC (Apr 1, 2020), <https://www.bbc.com/news/business-51706225>.

community to help prevent international spread by fulfilling their reporting requirements. However, enforcement of either the ICESCR or the IHR is tough to achieve. In fact, the deadline for the one hundred and ninety-four countries who signed the IHR in 2007 to ensure they have the capacities and resources to meet the minimum requirements of the IHR was 2012, but less than 20 percent of the States met the deadline.⁷⁴ The WHO has continuously extended the deadlines for countries to adhere to the IHR, and even though it provides for liability of States in breach, the exact penalty is not clear.⁷⁵ While States created the United Nations to enhance cooperation between States, it is still merely an idea, a goal rather than a concrete, legal obligation. The IHR provides a framework for obliging States to prevent and contain infectious diseases within their own countries and to cooperate in order to assist other countries, but the problem is enforcement. As we have seen in practice, States are not adhering to these guidelines. The way forward is to develop an effective enforcement mechanism, such as providing for United Nations Sanctions, and if not, other States are allowed to intervene based on the Responsibility to Protect.

Declaring a “war on COVID-19” or whichever virus presents itself in the future may be an apt classification, but it carries with it a lot of precedential dangers and a gateway for unrestrained power and force. A subset of public international law, the R2P, can provide a basis. The opening letter on the United States Institute of Peace report on the R2P concluded: “our fundamental values require all of us to work responsibly to protect potential victims from the worst that humankind has to offer.”⁷⁶ But perhaps it is time to think of it differently. While the R2P allows countries to protect victims from humankind, R2P is traditionally conducted by acts of force against those aggressors using the military to protect.⁷⁷ Nonetheless, a responsibility to “protect” should not be limited to military intervention. In the context of a non-human enemy, R2P will not be seen as a gateway to initiate human-on-human force but rather, as a responsibility to help: to provide aid, to provide supplies, and above all, to share information with the WHO. States not only hold a responsibility to protect the

⁷⁴ *Achieving compliance with the International Health Regulations by overseas territories of the United Kingdom of Great Britain and Northern Ireland*, WORLD HEALTH ORGANIZATION, <https://www.who.int/bulletin/volumes/92/11/14-137828/en/> (last visited Apr. 1, 2020).

⁷⁵ *IHR Review Committee on second extensions for establishing national public health capacities and on IHR implementation: Questions and Answers*, WORLD HEALTH ORGANIZATION, <https://www.who.int/ihr/qa-ihr-rc-11nov.pdf?ua=1> (last visited Mar. 26, 2020) (describing how the first extension was to 2014 in which only another twenty-one States met the deadline and the second request was for an extension to 2016).

⁷⁶ USIP R2P Report, *supra* note 65, at 3.

⁷⁷ Dews, *supra* note 57.

worst that humankind has to offer but to protect the worst that can be offered to humankind.