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NEW DISEASES CALL FOR . . . ARCHAIC RESPONSES?
VIOLATING HUMAN RIGHTS IN THE SANITARY
CORDON OF WUHAN

Madeline Young

Abstract

Public health measures in response to pandemics and human rights law are both complementary and antithetical. Human rights law both requires public health measures during pandemics through the International Covenant on Economic Social and Cultural Rights (“ICESCR”) and limits such measures through the International Covenant on Civil and Political Rights (“ICCPR”). However, during pandemics States tend to impermissibly derogate from the ICCPR in favor of the ICESCR. One public health measure, in particular, the sanitary cordon, is nearly always violative of the ICCPR as being unjustifiably restrictive compared to reasonably available alternatives.

This article discusses the concurrent development of public health policy and human rights law, focusing on the sanitary cordon, an archaic public health measure that has remarkably continued unscathed from the fourteenth century through the twenty-first century. This article serves to evaluate the legality of cordons and other public health measures used throughout history, culminating in the largest sanitary cordon in recorded history in Wuhan, China during the COVID-19 pandemic. Although China does not subscribe to the universal theory of human rights, the Wuhan cordon nevertheless violated human rights laws, leaving an accountability gap. Considering the moral underpinnings of human rights law, China’s actions beg the question of how “universal” human rights are when consistent State practice seemingly delegitimizes them.

The first section details the history of the sanitary cordon and distinguishes it from quarantine, another common response to epidemics. The second section analyzes human right implications by historical uses of sanitary cordons, with a focus on the right to health, freedom of movement, freedom of association, and the prohibition on discrimination. The final section analyzes the largest sanitary cordon in history in Wuhan, China in response to the COVID-19 pandemic and explores the relationship between a universal theory of human rights and State accountability.

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Introduction

On January 23, 2020, China enacted the most expansive public health measure in recorded history as a response to the COVID-19 pandemic. At 2:00 am the government of China gave notice, and at 10:00 am the city of Wuhan and its 11 million inhabitants were locked down under a police-enforced sanitary cordon. This lockdown lasted 76 days. The cordon of Wuhan may be viewed as an applaudable public health measure that helped stem the spread of COVID-19 across China and across the world; however, it may also be viewed as a draconian measure, implemented without scientific justification as a result of medical uncertainty and fear of the unknown. Both views can be true. However, it is crucial to recall that human rights do not simply exist in time of peace and stability. Human rights continue to exist during wars, during political instability, and during public health crises. Governmental response in pandemics and epidemics must be evaluated not solely by their efficacy as a policy measure, but also within the context of international human rights law. While some may regard China's cordon of

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Wuhan as a wise policy decision, this public health measure is not compatible with universal human rights.

Public health measures and their relationship to international human rights law are simultaneously complimentary and antithetical. International human rights seek to maximize rights of the individual, while public health measures seek to maximize the health of the overall population. Thus, while human rights require public health measures to promote the health of individuals, public health measures often require permissible derogations or limitations on other human rights, particularly the right to movement and freedom of association. Human rights law allows both limitations of certain rights and broad derogations of rights only when measures of proportionality and necessity are met. One public health measure in particular raises a number of human rights issues, the sanitary cordon. The sanitary cordon is among the most archaic public health measures, which almost inevitably impairs the essence of the human right at issue. A sanitary cordon distinguishable from “quarantine” measures. While quarantine targets individuals presumed to carry a disease, or who have had contact with a person who carries the disease, sanitary cordons target a geographical area, without any individualized determination on whether the individuals in the area carry or have had contact with the disease. Given the numerous alternative public health options, including individualized quarantine, a large-scale sanitary cordon rarely, if ever, meets the necessary standards for a permissible limitation and derogation of human rights law.

This paper will discuss the intersection between sanitary cordons and their human rights implications beginning in the fourteenth century leading up to the cordon of Wuhan—the largest sanitary cordon in recorded history. Additionally, this paper considers the development of human rights law, and how State non-compliance in times of public health crisis serves to delegitimize the theory of Universal Human Rights. Part I discusses epidemics and the violation of human rights through sanitary cordons. A review of the development of public health measures in relation to such epidemics will serve to provide context for evaluating modern-day public health measures. The sanitary cordon, developed in the fourteenth century, has remarkably endured public health reforms and continues to be implemented in the twenty-first century. While human rights did not exist as we know them during earlier pandemics, they have since developed and impact every State through various conventions and binding customary international law. Human rights impacted during epidemics provide a framework for evaluating the legality of public health measures.

Part II consists of historical case studies of the use of sanitary cordons emphasizing the human rights impacted in each case. The primary human rights issues focused on in this paper include the right to health, freedom of movement, freedom of association, and the prohibition against discrimination. Part II seeks to analyze public health measures of earlier epidemics and pandemics in light of modern-day human rights standards. Case studies beginning in the 14th century and continuing through current day illustrate the close relationship between public health and human rights as both progressed through history, including the

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concurrent development of human rights and international public health regulations.

Part III focuses on a modern case study of the sanitary cordon of Wuhan. The case study looks in depth at the COVID-19 pandemic and the measures China adopted in Wuhan and the Hubei province in January 2020. Although human rights have been established in the international community by 2020, China remains reluctant to submit itself to many standards either codified into treaties and covenants or accepted customs by the international community at large. China's attenuated history with human rights provides context for its aggressive public health measures, culminating in the largest sanitary cordon in recorded history. Regardless of whether China subscribes to human rights law, the sanitary cordon of Wuhan far surpassed any permissible limitations on human rights. Through a study of China, this paper attempts to reconcile how universal human rights can exist within the harsh reality of perpetual State non-compliance, particularly in situations of public health emergencies.

I. Epidemics and the Violation of Human Rights Through the Sanitary Cordon

Public health decisions in epidemic control and human rights are intrinsically connected. While public health considerations are essentially utilitarian, human rights are deontological, which can put public health and human rights at odds.¹ Health policies can either promote or violate human rights through their design or implementation.² One public health measure in particular has been criticized through centuries for its emphasis on utility for the larger population at the expense of those impacted – the *cordon sanitaire* (or sanitary cordon). A sanitary cordon is a large-scale quarantine effort, which seeks to quarantine an entire geographical area without any individualized analysis for those living within that area. The following part will review the history of State public health response to epidemics, the use of the sanitary cordon, and human rights implications arising from public health decisions.

A. How States React to Epidemics

State practice in response to epidemics has undergone massive practical and theoretical changes since the Black Death in the mid-1300s. Public health measures established in medieval Europe were aimed at the management of social order.³ At the time, the primary goal of health legislation was to control the mobility of the underclass thereby promoting social stability and protecting the

¹ *Deontological ethics*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/deontological-ethics>. (last visited May 21, 2020), (Deontological ethics place an emphasis on moral imperatives, without consideration of the overall consequences of the action itself).

² *25 Questions and Answers on Health and Human Rights* WORLD HEALTH ORGANIZATION (2002), <https://www.who.int/hhr/information/25%20Questions%20and%20Answers%20on%20Health%20and%20Human%20Rights.pdf>.

³ DOROTHY PORTER, *HEALTH, CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES* 37 (1999).

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political status quo.⁴ Traditional methods of disease control thus were directed at decreasing mobility. Methods included travel restrictions based on origin location as well as traveler status (*i.e.*, merchants, minorities, and other unpopular groups), restrictions on public gatherings, and establishment of a sanitary cordon either by natural barriers or by military enforcement.⁵ Governments supported these physical restrictions based on the contagion theories at the time, which first supposed disease was spread by polluted air, but then transitioned to a person-to-person contagion model.⁶

As a consequence of industrialization in the nineteenth century, epidemics began to occur with more frequency.⁷ However, the accepted and previously successful public health measure of quarantine and isolation did not prove effective to control nineteenth century diseases such as cholera.⁸ As a result, controversy raged through the 1800s between contagionists and anti-contagionists.⁹ When Yellow Fever appeared in Europe, both Spain and France immediately implemented quarantine restrictions along their borders.¹⁰ Anti-contagionists persuaded quarantine authorities in both States of the anti-contagious nature of Yellow Fever, resulting in both States ultimately eliminating quarantine regulations.¹¹ By the 1840s, anti-contagionist views dramatically reduced the use of quarantine regulations used to combat cholera.¹² Additionally, feudal public health measures such as establishing sanitary cordons with military enforcement, closing public meeting places, and sealing off cities, were politically impossible to implement in the post-revolution European political environment.¹³ These restrictive measures that were considered commonplace in feudal Europe, were rejected by radicalized nineteenth century ideals.¹⁴ Moving away from quarantines, States began a sanitary reform which focused on clean provision of water, effective sewage, and waste removal.¹⁵ States focused on preventative medicine aimed at reducing chronic disease. Socialized health and sanitary measures evolved, resulting in healthier living conditions for predisposed segments of the population, such as the city-dwelling poor.¹⁶

⁴ *Id.*

⁵ See generally, Eugenia Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19 *EMERGING INFECTIOUS DISEASES* 254, 255 (2013).

⁶ In the 1500s, the popular consensus about mechanisms of contagion switched from polluted air causing spread to person-to-person contact, although actual epidemiology of disease was not known until the late 1800s to early 1900s. PORTER, *supra* note 3, at 33-34.

⁷ *Id.* at 77.

⁸ *Id.* at 79.

⁹ *Id.* at 81.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 82.

¹⁴ *Id.*

¹⁵ *Id.* at 86.

¹⁶ *Id.* at 280.

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In addition to individual State practice, international efforts were made to combat disease. International-led efforts began in the mid-1800s with the first International Sanitary Conference in 1851.¹⁷ Nine additional conferences occurred in the nineteenth century, all of which failed to reach any tangible results, largely due to the disagreements in disease epidemiology common during this time period.¹⁸ International Sanitary Conferences continued into the early 1900s, eventually leading to the creation of the office international *d'hygiène publique*, the first international health organization.¹⁹ These efforts laid groundwork for the creation of the World Health Organization (“WHO”) in 1948.²⁰ In 1951, the WHO promulgated its first infectious disease prevention regulations: the International Sanitary Regulations.²¹ The International Sanitary Regulations only addressed cholera, plague, relapsing fever, smallpox, typhus, and yellow fever.²² In 1969 the WHO promulgated replacement regulations, the International Health Regulations (“IHR”), which were intended to cover a broader ranges of disease, this was later revised in 2005 as a response to the global SARS outbreak and is the current legally binding instrument regarding public health and disease prevention.²³

The IHR provides drastically different disease control mechanisms then those that were used in feudal Europe and through the eighteenth century. The SARS pandemic in 2003 highlighted the need to convert from a system of halting disease at national borders to a system which halts disease at its source.²⁴ IHR epidemic control regulations include such measures as reviewing travel history in affected areas, requiring vaccination, placing suspected affected persons under public health observation, implementing quarantine or isolation on affected persons, refusing entry of affected persons or refusing entry of unaffected persons to affected areas, and implementing exit screenings and restrictions on persons leaving from affected areas.²⁵ The IHR emphasizes a need for “case-by-case” considerations which promotes the least restrictive, individualized measures to achieve public health objectives.²⁶ As a result, modern quarantines differ significantly from feudal quarantines. While feudal quarantines were based on a number of

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ NORMAN HOWARD-JONES, THE SCIENTIFIC BACKGROUND OF THE INTERNATIONAL SANITARY CONFERENCES 1851-1938, 9 (1974).

²⁰ *Id.*

²¹ DAVID HAGEN, INTRODUCTION TO PANDEMIC INFLUENZA: CASE STUDY 1: PORT HEALTH AND INTERNATIONAL HEALTH REGULATIONS 195 (Jonathan Van-Tam & Chloe Sellwood eds., 2010).

²² *Id.*

²³ NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, GLOBAL HEALTH AND THE FUTURE ROLE OF THE UNITED STATES 60 (2017).

²⁴ *Id.*

²⁵ World Health Assembly: International Health Regulations, art. 18, 2509 U.N.T.S 79, (May 23, 2005) (hereinafter “IHR”).

²⁶ IHR, *supra* 25, at art. 23.

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factors unrelated to a person's actual health or likelihood of carrying disease,²⁷ modern quarantines are only recommended in those circumstances where the individual himself is affected or has been in contact with an affected person.

B. The Sanitary Cordon

Quarantines, and thus also sanitary cordons, are a type of nonpharmaceutical interventions States implement during times of public health crisis.²⁸ Quarantine restricts the movement of asymptomatic persons with possible exposure to a communicable disease.²⁹ This differs from isolation, which restricts the movement of known infected persons for the period of communicability.³⁰ Because quarantine directly involves those who are not infected, it is among the most aggressive and controversial measures of controlling disease outbreak.³¹ As previously discussed, quarantine is not a new health measure. While quarantine gained popularity in the time of the Black Plague, its historical antecedents can date back to the Old Testament, which mentioned quarantined with regard to leprosy.³²

Quarantine as a public health measure was a result of scientific uncertainty on disease epidemiology.³³ In the times of the Black Death, quarantine lasted for forty-days, which bore no relation to the incubation period of the disease.³⁴ The use of quarantine became less common in twentieth century due to increased understanding of disease communicability.³⁵ Such measures have not been used on a large scale in the twentieth and twenty-first century until SARS in 2003, Ebola in 2014, and COVID-19 in 2020.³⁶ In each case, quarantine measures reflected medical uncertainty about the epidemiology and spread of the diseases. While public health measures have grown through history, modern epidemics illustrate an age-old pattern where unknown medical countermeasures result in fear and extremely restrictive health measures which go beyond what is necessary or appropriate to control the disease.³⁷

Even more controversial than an individual quarantine is the sanitary cordon, which limits the entry of every person into or out of a specific geographic area to

²⁷ See, e.g., PORTER, *supra* note 3, at 34 (explaining how when plague appeared in Soncino Italy, all travelers were banned from entering Milan); Tognotti, *supra* note 5, at 256 (explaining how prostitutes and beggars were considered carriers of disease and regulations hindered their movements on this basis).

²⁸ Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 232 (2015); Howard Markel et al., *Nonpharmaceutical Interventions Implemented by US Cities During the 1918-1919 Influenza Pandemic*, JAMA (2007).

²⁹ Rothstein, *supra* note 28, at 227.

³⁰ *Id.*

³¹ *Id.* at 232.

³² *Id.* at 229 (citing *Leviticus* 14:4).

³³ *Id.* at 233.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 228.

³⁷ *Id.* at 234.

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prevent the spread of disease.³⁸ Sanitary cordons were common during the era of Black Death and continued to be used through the early 1900s with typhus.³⁹ Unlike an individual quarantine, the sanitary cordon applies regardless of an individual's likelihood of infection. Traditionally the sanitary cordon was implemented to prevent introduction of disease into a healthy population. For example, the island nation Majorca set up a sanitary cordon around its borders during the nineteenth century to prevent introduction of cholera from Europe.⁴⁰ However, a sanitary cordon may also be established to seal off the borders of an area which is infected in order to prevent those from inside the area from transmitting the disease to non-infected areas (a reverse sanitary cordon).⁴¹ This particularly controversial variety of sanitary cordon was implemented in China during SARS, in Liberia during Ebola, and most recently (and most aggressively) in the Hubei province of China during COVID-19.⁴²

Large-scale sanitary cordons are typically a gross overreach from public health authorities and have resulted in increased human rights implications. For example, Sierra Leone, as a response to the 2014 Ebola outbreak, imposed an area-wide sanitary cordon covering one-fourth of the country, affecting over a million people.⁴³ This can properly be viewed as a sacrifice of the few (the residents cordoned in Sierra Leone) for the benefit of the many (the global community). The sanitary cordon in Sierra Leone served to multiply the number of Ebola cases. Ebola spread throughout the cordoned area of Sierra Leone due to a lack of hospital beds, ambulances, and safe burial practices.⁴⁴ By the end of 2014, Sierra Leone had a documented total of 9,446 cases of Ebola and 2,758 deaths, more than any other country.⁴⁵

Historical case studies during the early plague and cholera outbreaks show the efficacy of sanitary cordons to prevent introduction of disease to an uninfected area. During the plague, a sanitary cordon set up in Austria coincided with no major outbreaks in Austrian territory, although this was potentially coincidental.⁴⁶ During the cholera epidemic, Sardinia was the only Italian region untouched by cholera as a result of a sanitary cordon guarded by armed men.⁴⁷

³⁸ *Id.* at 235.

³⁹ Donald McNeil, Jr., *Using a Tactic Unseen in a Century, Countries Cordon Off Ebola-Racked Areas*, N.Y. TIMES (Aug. 12, 2014), <https://www.nytimes.com/2014/08/13/science/using-a-tactic-unseen-in-a-century-countries-cordon-off-ebola-racked-areas.html#:~:text=the%20Ebola%20outbreak%20in%20West,no%20one%20is%20allowed%20out>.

⁴⁰ Pere Salas-Vives & Joana-Maria Pujadas-Mora, *Cordons Sanitaires and the Rationalisation Process in Southern Europe (Nineteenth-Century Majorca)*, 62 MED. HIST. 314, 318 (2018).

⁴¹ Rothstein, *supra* note 28, at 235.

⁴² *Id.*

⁴³ *Id.* at 252.

⁴⁴ *Id.*

⁴⁵ WORLD HEALTH ORGANIZATION, *Ebola Response Roadmap Situation Report*, (Dec 31, 2014), https://apps.who.int/iris/bitstream/handle/10665/146763/roadmapsitrepre_31Dec14_eng.pdf?sequence=1.

⁴⁶ Gunter E. Rothenberg, *The Austrian Sanitary Cordon and the Control of the Bubonic Plague: 1710-1871*, 28 J. OF THE HIST. OF MED. AND ALLIED SCI. 15, 23 (1973).

⁴⁷ Tognotti, *supra* note 5, at 256.

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Additionally, the sanitary cordon in Majorca led to only five occurrences of epidemics in the region during the nineteenth century, and even in those cases, only parts of the island were affected.⁴⁸ Although sanitary cordons have historically proved effective at decreasing the spread of disease, health experts do not recommend them when less intrusive measures exist. Dr. Martin Cetron, Director of the CDC's Division of Global Migration and Quarantine and Dr. Julius Landwirth of Yale's Interdisciplinary Center for Bioethics stated, "principles of modern quarantine and social distancing limit [sanitary cordon] use to situations involving highly dangerous and contagious diseases and when resources are readily available to implement and maintain the measures."⁴⁹ Dr. Cetron and Dr. Landwirth recommend social distancing measures such as closing schools and limiting public gatherings before implementing a sanitary cordon.⁵⁰ Furthermore, even when sanitary cordons are used, health officials must be prepared to ensure that those cordoned are not placed at an increased risk by virtue of their sanitary cordon.⁵¹ While historical anecdotes support the theory that sanitary cordons are effective in preventing spread into an uninfected area, it is unclear whether sanitary cordons are effective to prevent transmission of the disease out of a cordoned infected area when the disease has already left the borders.

C. Human Rights During Epidemics

The WHO requires that "all Network responses will proceed with full respect for ethical standards, human rights, national and local laws, cultural sensitivities and traditions."⁵² Quarantines, of all the social distancing measures, are the most intrusive upon individual liberty.⁵³ In addition to restricting individual liberties, one study during SARS showed significant psychological effects of quarantining.⁵⁴ The study showed high prevalence of psychological distress, finding 28.9% of the quarantined respondents displayed symptoms of PTSD (higher for respondents under longer quarantines) and 31.2% of the quarantined respondents displayed symptoms of depression.⁵⁵ Thus, the sanitary cordon, as more controversial form of quarantine, raises human rights and ethical considerations.

Human rights laws provide a framework for striking a balance between human rights and necessary State action to mitigate the effects of epidemics. Failure to act in response to an epidemic itself may be a violation of human rights law. Thus, the balance of each defined right in the International Bill of Rights along

⁴⁸ Salas-Vives, *supra* note 40, at 332.

⁴⁹ Tognotti, *supra* note 5, at 257 (citing Martin Cetron & Julius Landwirth, *Public Health and Ethical Considerations in Planning for Quarantine*, 78 *YALE J. BIOLOGY & MED.* 325, 326 (2005)).

⁵⁰ Cetron & Landwirth, *supra* note 49.

⁵¹ *Id.*

⁵² WORLD HEALTH ORGANIZATION, *Guiding Principles for International Outbreak Alert and Response*, www.who.int/csr/outbreaknetwork/guidingprinciples/en/ [http://perma.cc/99HV-4R79].

⁵³ Rothstein, *supra* note 28, at 236.

⁵⁴ Laura Hawryluck *et al.*, *SARS Control and Psychological Effects of Quarantine*, Toronto, Canada, 10 *EMERGING INFECTIOUS DISEASES* 1206, 1206 (2004).

⁵⁵ *Id.*

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with any permitted limitation or derogation for public health must be analyzed. The International Bill of Rights is composed of the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).⁵⁶ While other human rights treaties exist, these are the most relevant human rights impacted by public health measures.

1. *Universal Declaration of Human Rights*

The United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948.⁵⁷ The UDHR is widely regarded as the foundation of international human rights law.⁵⁸ While the UDHR itself is not legally binding, it has been translated into law in the form of treaties, customary international law, general principles, and through regional agreements and domestic law.⁵⁹ Today, every state is bound by at least one multilateral convention concerning human rights.⁶⁰ Additionally, the widespread application of principles from the UDHR provide support that some provisions of the UDHR have evolved into international custom. A minority of scholars suggest the UDHR in totality has evolved into customary international law,⁶¹ but almost all scholars would agree that portions of the UDHR are now customary international law due to its widespread and constant recognition.⁶² The UDHR declares human rights as universal, to be enjoyed by all people regardless of nationality.⁶³ The topics covered include a variety of negative and affirmative rights.⁶⁴

⁵⁶ *Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (June 1996), <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> [hereinafter OHCHR].

⁵⁷ *Id.*

⁵⁸ *Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html>.

⁵⁹ *Id.*

⁶⁰ *Status of Ratification*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (last visited Dec. 6, 2020) (illustrating that the majority of States are parties to five or more international human rights treaties with the exception of Bhutan, Niue, Palau, Tonga, and Tuvalu, which each have at least one treaty ratified, but less than five).

⁶¹ Hurst Hannum, *The UDHR in National and International Law*, 3 HEALTH AND HUM. RTS. 144, 148 (1998); see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25:287 GA. J. INT'L & COMP. L. 287, 324 (1995) (suggesting the first twenty-one articles of the UDHR are customary international law).

⁶² Hannum, *supra* note 61; see also A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 27 (3d ed. 1989) (“The impact of the Universal Declaration has probably exceeded its authors’ most sanguine expectations, while its constant and widespread recognition means that many of its principles can now be regarded as part of customary law.”).

⁶³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁶⁴ *Id.*

2. *International Covenant on Civil and Political Rights*

Borne from the UDHR was the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While the UDHR itself is not binding, both the ICCPR and ICESCR are international treaties, binding upon its State parties. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976.⁶⁵ As of mid-2020, 173 States are parties to the ICCPR.⁶⁶ Notable States which have not ratified the ICCPR include China, Saudi Arabia, Singapore, South Sudan and the United Arab Emirates.⁶⁷ The ICCPR codifies negative rights of the people to be free from arbitrary government intrusion.⁶⁸ Many of these rights were explicitly included in the UDHR.⁶⁹ The ICCPR includes the right to life, freedom of religion, freedom of speech, freedom of assembly and due process rights.⁷⁰

Some provisions of the ICCPR include limitation clauses, which allow the right to be limited by regulations which are “necessary to protect. . . [public] health.”⁷¹ General comments written by the Human Rights Committee provide guidelines for restrictions on specific Articles. For example, Comment 27 on the Freedom of Movement also provides guidelines for lawful restrictions on the right to freedom of movement.⁷² Restrictions must be provided by law, must be necessary in a democratic society for the protection of public health, and must be consistent with all other rights recognized in the ICCPR.⁷³ The General Comment emphasizes that the restrictions must not only be permissible, but must be *necessary* to protect the goal of public health.⁷⁴ Additionally, restrictive measures must be proportionate, in that they are appropriate to achieve the protective function and the least intrusive option to protect that function.⁷⁵

Article 4 of the ICCPR also expressly permits derogation of some rights in situations of public emergency and for the protection of public health. Article 4 provides:

⁶⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁶⁶ *Status of Ratification of the International Covenant on Civil and Political Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://indicators.ohchr.org/>.

⁶⁷ *Id.*

⁶⁸ Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”*, 16 IND. J. GLOBAL LEGAL STUD. 437, 440 (2009).

⁶⁹ UDHR, *supra* note 63, art. 3-21. Note that many of the articles of the UDHR suggested to have evolved into customary international law are the same rights granted in the ICCPR. See Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, *supra* note 60, at 324.

⁷⁰ ICCPR, *supra* note 65, at art.12.

⁷¹ *Id.*

⁷² U.N. Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999) [hereinafter *General Comment 27*].

⁷³ *Id.* at 11.

⁷⁴ *Id.* at 14.

⁷⁵ *Id.*

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“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”⁷⁶

Article 4 expresses that derogation of certain articles is not permitted even in the case of public emergency.⁷⁷ No derogation is permitted on the right to life, the right to be free of torture and inhuman treatment, the right to be free from slavery and the right to freedom of thought and religion.⁷⁸

Two guiding sources on further defining Article 4 of the ICCPR are the Siracusa Principles and case law from human rights tribunals.⁷⁹ The Siracusa Principles are a set of non-binding principles created by a group of non-governmental organizations in 1985, designed to provide guidance on the Article 4 the ICCPR.⁸⁰ Article 4 limitations on ICCPR rights must meet the standards of (1) legality, (2) in furtherance of a legitimate object of general interest (here, public health), (3) strict necessity, (4) least intrusive means applied, and (5) restriction is based on scientific evidence.⁸¹ For public health objectives, the Siracusa Principles state that limiting measures must be “specifically aimed at preventing disease or injury or providing care for the sick and injured.”⁸²

The European Court of Human Rights (“ECHR”) typically rules on the European Convention of Human Rights rather than the ICCPR, but provides useful guidance because the language of the European Convention is substantially similar to the language of the ICCPR.⁸³ The ECHR has defined “public emergency” to mean one that is (1) actual or imminent, (2) its effects involve the whole nation, (3) the continuance of organized life of the community must be threatened, and (4) the crisis must be exception in that the normal restrictions

⁷⁶ ICCPR, *supra* note 65, art. 4.

⁷⁷ *Id.* at art. 4 (“No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”).

⁷⁸ *Id.* at arts. 6 - 8, 18(3) (While the right to freedom of thought and religion may not be derogated by Article 4’s public emergency exception, derogation is permitted under Article 18(2) which states, “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”).

⁷⁹ K.W. Todrys et al., *Failing Siracusa: Government’s Obligations to Find the Least Restrictive Options for Tuberculosis Control*, 3 PUB. HEALTH ACTION 7, 7 (2013).

⁸⁰ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1985 AM. ASS’N. FOR INT’L COMM’N OF JURISTS [hereinafter *Siracusa Principles*].

⁸¹ WHO *Guidance on Human Rights and Involuntary Detention for xdr-tb Control*, WORLD HEALTH ORGANIZATION (Jan. 24, 2007), https://www.who.int/tb/features_archive/involuntary_treatment/en/.

⁸² *Siracusa Principles*, *supra* note 80, at 25.

⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221

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permitted by the Convention for the maintenance of public health are plainly inadequate.⁸⁴ *Lawless v. Ireland*, a foundational case defining the European Convention's Article 15 (the ICCPR's Article 4 counterpart), held that public emergency includes only "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community."⁸⁵ A declaration of public emergency is typically self-judging and great deference is given to national authorities' assessment on whether such situation exists.⁸⁶ However, the court will rule on whether States have gone beyond the "extent strictly required by the exigencies."⁸⁷ Two important judicial limitations courts have imposed on the utility of the derogation provision are: (1) the crisis must not be regional, but must impact the whole population,⁸⁸ and (2) the crisis should be so exceptional that normal measures permitted by the convention for maintenance of public health are plainly inadequate.⁸⁹ In accordance with the ECHR's rulings, the Human Rights Committee's General Comment 29 on derogations during a state of emergency states that "the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (Article 12) or freedom of assembly (Article 21) is generally sufficient during such situations and *no derogations from the provisions in question would be justified by the exigencies of the situation* [emphasis added]."⁹⁰ Therefore, Article 4 general derogations for public emergency are not permissible to derogate from Articles of the ICCPR which include limitation provisions.

3. *International Covenant on Economic, Social and Cultural Rights*

While the ICCPR codifies negative rights enumerated in the UDHR, the International Covenant on Economic, Social and Cultural Rights codifies affirmative rights. The ICESCR was adopted by the United Nations General Assembly at the same time the ICCPR was adopted, on December 16, 1966, but did not enter into force until January 3, 1976.⁹¹ The ICESCR, like the ICCPR is widely followed. As of mid-2020, 171 States are parties to the ICESCR.⁹² Many of the States which have not ratified the ICESCR are the same States which have not ratified

⁸⁴ The ECHR defines "public emergency" in the context of the European Convention on Human Rights rather than the ICCPR, but the language in both derogation provisions is identical. *See* The Greek Case, 3321/67 Eur. Ct. H.R. 1, § 153.

⁸⁵ Case of *Lawless v. Ireland* (No. 3) 332/52 (A/3), 1 Eur. Ct. H.R. 15, § 28.

⁸⁶ Case of *Ireland v. The United Kingdom*, 5310/71 Eur. Ct. H.R. 1, § 207.

⁸⁷ *E.g., Id.*; *Lawless v. Ireland*, *supra* note 85, at § 36-38.

⁸⁸ *Id.* at § 205 (a crisis impacting six out of twenty-six counties was sufficient to create a public emergency); Case of *Aksoy v. Turkey*, 21987/93 Eur. Ct. H.R. 1, § 70 (the extent and impact of terrorist activity in South-East Turkey was sufficient to create a public emergency).

⁸⁹ The Greek Case, *supra* note 84.

⁹⁰ U.N. Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11 ¶ 5 (Aug. 31, 2001) [hereinafter *General Comment 29*].

⁹¹ ICCPR, *supra* note 65.

⁹² *Status of Ratification of the International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Sept. 29, 2020), <https://indicators.ohchr.org/>.

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the ICCPR.⁹³ As a notable exception, China *is* a party to the ICESCR but has not yet ratified the ICCPR, while the reverse is true for the United States.⁹⁴ Affirmative rights in the ICESCR include the right to health, education and an adequate standard of living, along with labor rights.⁹⁵ Specifically related to human rights during an epidemic, Article 12 articulates the right to enjoy the “highest attainable standard of physical and mental health,” and provides that States should take necessary steps for “the prevention, treatment and control of epidemic, endemic, occupational and other diseases.”⁹⁶

Unlike the ICCPR, the ICESCR contains no express provision permitting derogation in situations of public emergency or in order to protect the public health. Article 4 of the ICESCR includes generalized language which permits States to subject limitations on ICESCR rights only so far as the laws are compatible with the nature of the rights and “solely for the purpose of promoting the general welfare in a democratic society.”⁹⁷ In previous global emergencies, the UN Office of the High Commissioner for Human Rights has provided specific criteria to assess the lawfulness of measures which contravene the goals of the ICESCR.⁹⁸ However the Office has not issued criteria in relation to global epidemic measures.⁹⁹ Without updated criteria, States may only rely on Article 4 of the ICESCR, which has an inherently high threshold and is not self-judging.¹⁰⁰

II. Historical Categorization of Human Rights Impacted by Sanitary Cordon

While public health programs may violate human rights, they are also *required* by human rights law to further the right to health. The right to health was first articulated in the preamble to the World Health Organization Constitution in 1946, which states “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”¹⁰¹ In 1948, the Universal Declaration of Human Rights (“UDHR”) recognized the right to health, stating in

⁹³ *Id.*

⁹⁴ China signed the ICESCR in 1997 and ratified it in 2001, while it signed the ICCPR in 1998 but has yet to ratify it. The United States signed the ICCPR in 1977 and ratified it in 1992, while it signed the ICESCR in 1977 but has yet to ratify it. *Id.*

⁹⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁹⁶ *Id.* at art. 12.

⁹⁷ *Id.* at art. 4.

⁹⁸ See *Report on Austerity Measures and Economic and Social Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2013), https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf.

⁹⁹ Diane Desierto, *Calibrating Human Rights and Necessity in a Global Public Health Emergency: Revive the UN OHCHR's ICESCR Compliance Criteria*, EJIL:TALK! (Mar. 26, 2020), <https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/>.

¹⁰⁰ *Id.*

¹⁰¹ Constitution of the World Health Organization, Jul. 22, 1946, 14 U.N.T.S. 185.

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Article 25 that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including. . . medical care.”¹⁰² Less than twenty years later in 1966, Article 12 of the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) codified the right to health, recognizing “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁰³ Article 12(2) provides steps to be taken by State parties, including steps necessary to prevent, treat and control an epidemic.¹⁰⁴ The right to health may not be limited except by the provisions of Article 4 of the ICESCR, which permits limitations on the rights only to the extent the limitations would promote the general welfare in a democratic society.¹⁰⁵ General Comment 14 regarding the right to the highest attainable standard of health emphasizes that limitations on the right to health provided in Article 4 must be (1) in accordance with the law (including international human rights standards), (2) compatible with the nature of the rights in the ICESCR, (3) in the interest of a legitimate aim, (4) strictly necessary for the promotion of the general welfare in a democratic society, and (5) proportional, and (6) the least restrictive means.¹⁰⁶

The right to health often triumphs over other human rights due the permissible limitations of human rights for the purpose of public health. However, General Comment 14 states that Article 2 of the ICESCR, relating to the right against discrimination, may not be limited in pursuance of the right to health.¹⁰⁷ In contrast, the right to freedom of movement and freedom of association and assembly may be subject to restrictions for public health reasons. However, these restrictions must meet the requirements set forth in their respective articles.¹⁰⁸ When a State declares a public emergency, general, non-article specific derogations of the International Covenant on Civil and Political Rights (“ICCPR”) are permitted.¹⁰⁹ Article 4 derogations must meet even more restrictive requirements than the article-specific limitations, although need not be expressly for the purpose of advancing public health objectives. However, Article 4 is limited to derogate only from rights which do not contain their own limitation provision. The use of sanitary cordon is potentially supported by the right to health but does so at an unjustifiable expense of other human rights. Below is an analysis of the freedom of movement, freedom of association, and prohibition against discrimination and

¹⁰² UDHR, *supra* note 63, art. 25.

¹⁰³ ICESCR, *supra* note 95, art. 12(1).

¹⁰⁴ *Id.* at art. 12(2)(c).

¹⁰⁵ *Id.* at art. 4.

¹⁰⁶ U.N. Committee on Economic, Social and Cultural Rights, *CESCR* General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc., E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment 14*].

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *Emergency Measures and COVID-19: Guidance*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Apr. 27, 2020), https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.

¹⁰⁹ *Id.*

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how historical uses of quarantine and sanitary cordons have violated, or in few cases been in compliance with, each.

A. Freedom of Movement

Freedom of Movement was initially announced in the UDHR and was subsequently codified in the ICCPR.¹¹⁰ Article 13 of UDHR provides that “everyone has the freedom of movement and residence within the borders of each state” and “everyone has the right to leave any country, including his own, and return to his country.”¹¹¹ Similarly, Article 12 of ICCPR provides that “everyone lawfully within the territory of a State shall, within that territory, have the right to *liberty of movement* [emphasis added] and freedom to choose his residence”, and “everyone shall be free to leave any country including his own.”¹¹² Article 12 of the ICCPR permits limitations on the right to freedom of movement for public health purposes, therefore Article 12 may not be limited by Article 4 by virtue of having its own limitation clause.¹¹³ Article 12(3) allows for limitations which are (1) proscribed by law, (2) necessary to protect public health, and (3) are consistent with other rights recognized in the ICCPR.¹¹⁴

The European Court on Human Rights requires limitations on the freedom of movement to be justified and proportionate from the outset and throughout its duration.¹¹⁵ In *Vlasov and Benyash v. Russia*, the ECHR stated that a rigid and automatic limitation, without an individualized assessment for each applicant, could not be reconciled with the obligation to ensure the restriction was justified and proportionate.¹¹⁶ The Human Rights Committee General Comment 27 provides that restrictions must be necessary and proportionate to achieve their protective function.¹¹⁷ The ECHR defines “necessary” to mean the measure corresponds to a pressing social need that is proportional to a legitimate aim.¹¹⁸ A legitimate aim is one that is named in the limitation clause (*i.e.* public order and public health).¹¹⁹ In the case of an epidemic, a pressing social need and legitimate aim are both met. However, establishing proportionality is more difficult. General Comment 27 further clarifies that to meet the principle of propor-

¹¹⁰ While the ICCPR has 167 parties, some argue that States which are not parties to the ICCPR are nevertheless bound to the freedom of movement announced in the UDHR as a result of the formation of customary international law. See Hannum, *supra* note 61, at 148.

¹¹¹ UDHR, *supra* note 63, at art. 13.

¹¹² ICCPR, *supra* note 65, at art. 13(1)-(2).

¹¹³ *E.g.*, General Comment 29, *supra* note 90; The Greek Case, *supra* note 84.

¹¹⁴ ICCPR *supra* note 65, at art. 12(3), (“The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant”).

¹¹⁵ Case of *Vlasov and Benyash v. Russia*, 51279/09 Eur. Ct. H.R. 1, § 32.

¹¹⁶ *Id.* at § 35-36; *see also* Case of *Stamose v. Bulgaria*, 29713/05 Eur. Ct. H.R. 1, § 34 (“the Court cannot consider such a blanket and indiscriminate measure to be proportionate”).

¹¹⁷ General Comment 27, *supra* note 72, at 14.

¹¹⁸ *W. v. the United Kingdom*, 9749/82 Eur. Ct. H.R. 1, § 60.

¹¹⁹ *Id.* at 61.

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tionality, measures must be the least intrusive option available.¹²⁰ *Glor v. Switzerland* similarly required that there be “no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.”¹²¹ Large scale sanitary cordons rarely, if ever, meet the least intrusive standard present both in case law and in commentary to the right. As discussed earlier, individual quarantines are *always* a less intrusive option because individual quarantines take individual risk into consideration.

1. Early Epidemics: Plague and Cholera

Sanitary cordons always implicate the right to freedom of movement. During the plague epidemics in the 1300s, sanitary cordons were imposed by armed guards along transit routes and at access points to cities.¹²² Some cities prevented strangers from entering the city borders, particularly strangers who they deemed be high risk (such as merchants and minorities).¹²³ When the plague appeared in Soncino, Lombardy in 1398, travelers from Soncino were banned from entering Milan.¹²⁴ The ruler of Milan also created a sanitary cordon using River of Adda as a natural barrier to stop all travelers at bridges and ports.¹²⁵

Sanitary cordons are more often created to keep disease *out* of a geographic area, but in some cases, they are also be used to keep disease *in*, preventing further spread. In 1665, plague hit the village of Eyam in the United Kingdom. As a response, the religious officials in the village drew a sanitary cordon along the outskirt where no Eyam resident was allowed to leave and no traveler allowed into the village.¹²⁶ As a result of this sanitary cordon, thousands of lives were saved in the surrounding area, but an estimated 25-75% of the total population of Eyam died from the plague.¹²⁷

The historical trend of restricting the freedom of movement as a first-response method to public health crises continued in the 1800s as cholera spread around Europe. In 1836, health officials in Naples prevented the free movement of transients such as prostitutes and beggars, who were believed to be carriers of disease.¹²⁸ The island nation of Majorca installed a military cordon sanitaire in 1849 to prevent European travelers from bringing cholera to the island.¹²⁹ However, the use of quarantine and sanitary cordons decreased in the mid-to-late 1800s as international preventative authorities evolved to place primary focus on sanitary

¹²⁰ *General Comment 27*, *supra* note 72, at 14.

¹²¹ Case of *Glor v. Switzerland*, 13444/04 Eur. Ct. H.R. 1, § 94.

¹²² Tognotti, *supra* note 5.

¹²³ *Id.*

¹²⁴ PORTER, *supra* note 3, at 34.

¹²⁵ *Id.*

¹²⁶ David McKenna, *Eyam Plague: The Village of the damned*, BBC News (Nov. 5, 2016), <https://www.bbc.com/news/uk-england-35064071>.

¹²⁷ *Id.* (260 Eyam residents were reported to have died due to the plague, while the total population of Eyam was estimated to be between 350 and 800 people before the plague struck).

¹²⁸ Tognotti, *supra* note 5.

¹²⁹ Salas-Vives & Pajudas-Mora, *supra* note 40.

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surveillance and preventative measures of disinfection and isolation for only the sick.¹³⁰

While the foundational human rights documents did not exist during the early epidemics discussed, it is clear that the actions restricting freedom of movement implemented in these times would be a violation of current human rights law because they were discriminatory, not in pursuit of a legitimate aim, and not the least restrictive option available. Article 2 of the ICCPR explicitly provides that freedom of movement may not be restricted on the basis of social status, national origin, religion, or race.¹³¹ Public health responses to the plague and cholera both involved prohibited discriminations, including discrimination on religion and race (namely Jewish minorities) and social status (prostitutes, merchants, and beggars). As discussed earlier, sanitary cordons were used during the plague, and attempted in the early years of cholera, explicitly to decrease mobility of the under-class and to advance the interests of the elite.¹³² Limitations to the right to movement require the measure to be proportionate to a legitimate aim.¹³³ While maintaining public health is a legitimate aim, decreasing mobility of the under-class is not. Additionally, sanitary cordons were often used as a first response to outbreak despite failing to meet the requirement of being the least intrusive measure. Other measures such as timed quarantines (traditionally of forty days during the plague-era) are less intrusive on the freedom of movement and should have been the first public health response before more aggressive policies like the sanitary cordon.¹³⁴

The village of Eyam is a unique example, properly viewed as a reverse sanitary cordon, where there was a sacrifice of the few to benefit the many. Human rights law may have not existed in the 1600s, but today this sacrifice would be examined with regards to the ICESCR right to health. While the sanitary cordon may have saved thousands of surrounding villagers, the death toll of 25 to 75 percent of Eyam's population to achieve this goal would be a direct violation of the Eyam villagers' right to health. We see a parallel situation in the 2019-2020 COVID-19 epidemic with the sacrifice of Wuhan China, which will be discussed in Part III in relation to modern human rights laws.

Public health officials in the 1918 influenza epidemic utilized sanitary cordons less frequently than in previous epidemics. However, some smaller-scale cordons took place. For example, the city of Gunnison, Colorado, implemented a protective sanitary cordon around the entire county.¹³⁵ Unlike earlier measures, residents of Gunnison were permitted to leave the county freely, and individuals

¹³⁰ Anne Hardy, *Cholera, Quarantine and the English Preventive System, 1850-1895*, 37 *MED. HIST.* 250, 251 (1993).

¹³¹ ICCPR, *supra* note 65, at art. 2.

¹³² PORTER, *supra* note 3.

¹³³ *W. v. the United Kingdom*, *supra* note 118.

¹³⁴ Tognotti, *supra* note 5.

¹³⁵ *1918 Influenza Escape Communities: Gunnison*, CENTER FOR THE HISTORY OF MEDICINE AT THE UNIVERSITY OF MICHIGAN, <http://chm.med.umich.edu/research/1918-influenza-escape-communities/gunnison/>.

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who wished to enter were free to do so as long as they submitted to quarantine.¹³⁶ American Samoa likewise implemented a sanitary cordon, using the Pacific Ocean as a natural barrier, and refused entry to international travelers.¹³⁷ All ships arriving in the main point of Pago Pago were quarantined, and leaders created a blockade for any small-boat traffic traversing the international boundary channel from Western Samoa, which had been infected.¹³⁸ As a result of quarantine efforts, the 1918 influenza never made it to the population of American Samoa.¹³⁹ Both protective sanitary cordons would not be permissible under modern human rights law. Neither were proportionate to the aim of maintaining public health, which is evidenced by the exceedingly sparse use of sanitary cordons in other areas of the world.

2. *Twenty-First Century Epidemics: SARS and Ebola*

While quarantine use subsided in the nineteenth and twentieth centuries, the use of quarantine returned to general public health practice during the 2003 SARS epidemic. China responded to SARS by installing police-enforced sanitary cordons around buildings and organized road checkpoints.¹⁴⁰ Some Chinese village-level governments imposed severe punishments for those who violated quarantine measures, including the death penalty.¹⁴¹ Canada is another notable country which instituted quarantine measures in response to SARS. Toronto public health authorities quarantined approximately 100 people per each confirmed SARS case, which was at least twenty-five times more people than was appropriate as discussed below.¹⁴²

By the SARS epidemic in 2003, the International Bill of Rights had been in existence for close to forty years. China's police-enforced cordons of buildings was consistent with human rights law. In contrast to previous sanitary cordons, China's response to SARS was targeted to what was strictly necessary. For example, Chinese authorities quarantined Block E of Amoy Gardens, an apartment complex, for ten days in response to 64 SARS cases registered from that housing

¹³⁶ *Id.*

¹³⁷ Peter Oliver Okin, *The Yellow Flag of Quarantine: An Analysis of the Historical and Prospective Impacts of Socio-Legal Controls Over Contagion*, Graduate Theses and Dissertations 211-215 (2012), <https://scholarcommons.usf.edu/etd/4190>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Tognotti, *supra* note 5.

¹⁴¹ See e.g., *Id.*; *China threatens Sars death penalty*, BBC NEWS (May 15, 2003), <http://news.bbc.co.uk/2/hi/asia-pacific/3030069.stm>; *China Threatens the Death Penalty for Deliberately Spreading SARS*, L.A. TIMES (May 16, 2003), <https://www.latimes.com/archives/la-xpm-2003-may-16-fg-sars16-story.html>; Sutirtho Patranobis, *SARS throwback: Anyone hiding, spreading virus could face death in China*, HINDUSTAN TIMES (Feb 5, 2020), <https://www.hindustantimes.com/world-news/sars-throwback-anyone-hiding-spreading-virus-could-face-death-in-china/story-3Nlp7TY12uizDIS5MDJ6CI.html>.

¹⁴² Richard Schabas, *Severe acute respiratory syndrome: Did quarantine help?*, 15 CAN. J. INFECTIOUS DISEASES MED. MICROBIOLOGY 204 (2004).

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block.¹⁴³ The quarantine was a harsh limitation the freedom of movement of the individuals living in Block E but was necessary to pursue the legitimate aim of protecting public health due to the large outbreak in that housing block. The quarantine was also limited to only Block E, and for only ten days. Unlike the limitation in *Vlasov and Benyash v. Russia*, the cordon of Block E was based on an individualized assessment rather than an overly expansive and automatically applied rule.¹⁴⁴ Additionally, the cordon was the least restrictive option available because it was limited only to residents of Block E, who may reasonably have been believed to have had direct contact with the disease given the close proximity of apartments. The cordon was also carried in a non-arbitrary way, devoid of any discrimination. These measures evidence an effective sanitary cordon which was limited to what was strictly necessary and to what was the least restrictive means. The key to the legality of this sanitary cordon was its small-scale application, to a targeted apartment block rather than a large geographic scale.

However, the death penalty as a punishment implemented as punishment for violating quarantine measures in some Chinese villages briefly mentioned above may be in violation of Article 6 of the ICCPR, which provides that “no one shall be arbitrarily deprived of his life” and the death penalty “may be imposed only for the most serious crimes.”¹⁴⁵ It is possible that the use of the death penalty for violating quarantine would be an impermissible violation of human rights. Article 6 of the ICCPR contains no limitation provision, and Article 4 of the ICCPR, which allows derogation in time of public emergency, explicitly excludes Article 6 from the scope of permissible derogation.¹⁴⁶ Furthermore, the Second Optional Protocol to the ICCPR, which was adopted and proclaimed by General Assembly resolution in 1989, serves to abolish the death penalty for member States.¹⁴⁷ It is relevant to note that at 2003, China had neither ratified the ICCPR nor signed or ratified the Second Optional Protocol to the ICCPR.¹⁴⁸

In contrast, the Canadian quarantine is more questionable as it relates to human rights. Canada ratified the ICCPR in 1976, and thus is bound by the right to freedom of movement and its permissible limitations found in Article 12. Quarantine generally is permissible under Canadian law under the Canadian federal Quarantine Act and Quarantine Regulations, which list certain dangerous diseases quarantine officers may detain.¹⁴⁹ In June 2003, the Canadian government amended the Quarantine Regulations to include SARS and provided appro-

¹⁴³ Thomas Crampton, *As SARS rages, Hong Kong orders a quarantine*, N.Y. TIMES (Apr 1, 2003), <https://www.nytimes.com/2003/04/01/news/as-sars-rages-hong-kong-orders-a-quarantine.html>.

¹⁴⁴ *Vlasov and Benyash v. Russia*, *supra* note 115.

¹⁴⁵ ICCPR, *supra* note 65, at art. 6(1)-(2).

¹⁴⁶ *Id.* at art. 4(2) (No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision”).

¹⁴⁷ Second Optional Protocol to The International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, A/RES/44/128.

¹⁴⁸ As of December 2020, China had still not ratified the ICCPR nor signed or ratified the Second Optional Protocol to the ICCPR.

¹⁴⁹ Nola M. Ries, *Quarantine and the Law: The 2003 SARS Experience in Canada (A New Disease Calls on Old Public Health Tools)*, 43 ALBERTA L. REV. 529, 534 (2005).

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priate notice to the World Health Organization (“WHO”) of the updated regulation, which meets the requirement of Article 12(3) to be proscribed by law.¹⁵⁰ Additionally, there is no evidence the quarantine was imposed in a discriminatory manner¹⁵¹ or any other manner that would implicate other rights recognized in the ICCPR, which meets the requirement that limitations be consistent with other rights. However, Article 12(3) also requires the measure taken to be necessary to protect public health. Necessity requires a pressing social need and measures that are proportionate to a legitimate aim.¹⁵² The emergence of SARS is clearly a pressing social need, and the measures taken were in furtherance in public health, a legitimate aim. However, the quarantine regulations, although less restrictive than a sanitary cordon, nevertheless failed to meet limitation requirements of Article 12(3). Studies show that the amount of people quarantined could have been far more than necessary, which would defeat any finding of proportionality. One study explains that the SARS quarantine in Toronto was both inefficient and ineffective due to its scale.¹⁵³ Toronto health authorities quarantined 100 people per each confirmed SARS case, compared to only 12 people per each SARS case in Beijing.¹⁵⁴ The Toronto quarantine could have been less restrictive and more effective by quarantining only those who had contact with an “actively ill SARS patient.”¹⁵⁵

The importance of necessity is better understood when considering the impact these restrictions have on individuals. A Toronto study showed that every respondent experienced a sense of isolation due to the lack of physical contact with family members and other members of society.¹⁵⁶ The study found that “confinement within the home or between work and home, not being able to see friends, and not being able to shop for basic necessities of everyday life. . . enhanced their feeling of distance from the outside world.”¹⁵⁷ While it may be easy to consider human rights simply in black and white terms of meeting (or not meeting) standards set forth in treaties, recalling the ethical imperatives and considerations that lead to development of human rights treaties to begin with must be preserved in any discussion regarding limitations of human rights for the so-called “greater good.”

The most recent, and until COVID-19, most drastic sanitary cordon in recorded history was implemented in response to the 2014 West African Ebola Virus Disease (Ebola). On July 31, Guinea, Liberia and Sierra Leone announced a sanitary cordon of an area which contained more than 70% of the world’s Ebola

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 533.

¹⁵² *W. v. the United Kingdom*, *supra* note 118.

¹⁵³ Schabas, *supra* note 142.

¹⁵⁴ *Id.*

¹⁵⁵ *Efficiency of Quarantine During an Epidemic of Severe Acute Respiratory Syndrome – Beijing, China, 2003*, CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) (Oct 31, 2003), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5243a2.htm>.

¹⁵⁶ Ries, *supra* note 149, at 540.

¹⁵⁷ Mark Bernstein, *Sars and Ethics*, 7 HOSPITAL Q. 38, 38 (2003).

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cases.¹⁵⁸ Additionally, on August 24, 2014, the government of Liberia imposed a sanitary cordon on the West Point section of Monrovia.¹⁵⁹ The sanitary cordon in West Point was enforced by barbed wire and wooden barricades, effectively containing 70,000 people.¹⁶⁰ People living in the slum of West Point rioted, leading to the death of a teenager, who was shot and killed by troops enforcing the sanitary cordon.¹⁶¹ Travel restrictions in both sanitary cordons produced a humanitarian crisis resulting from disruption of food transportation and lack of appropriate health care.¹⁶² Bintu Sannoh, a victim of the Sierra Leone Ebola quarantine elaborated that young girls were forced to sneak out of their quarantine to sleep with men in exchange for food.¹⁶³ Sannoh expressed that the Ebola pandemic was worse than war, stating:

“For me, the worst is quarantine: it means prison. . . There is no war but men with guns and uniforms stand outside the homes of your friends. One day, there were soldiers outside my own house. . . Like most in Kenema, we are poor and hardly ever have more than a few days of food in the house – then you are suddenly trapped for 21 days.”¹⁶⁴

These cordons were a gross violation of human rights in a misguided, utilitarian effort to spare the global community. Like the Eyam plague sanitary cordon, the measures taken in Western Africa aimed to keep the infection in a geographic area, rather than to keep the disease out of its borders. As a result, both the Eyam plague sanitary cordon and the sanitary cordon in Western Africa resulted in increased infection rates in the quarantined area.¹⁶⁵ However, even more egregious than in Eyam, the sacrifice of the cordoned off African slums potentially resulted in a higher overall global level of Ebola.¹⁶⁶ While neighboring locals may have been “saved” from the ravages of Ebola, the quarantined areas suffered 28,600 cases and over 11,000 deaths.¹⁶⁷

Although none of Guinea, Sierra Leone and Liberia are parties to the African Court on Human and Peoples’ Rights, all are parties to the ICCPR, and are thus bound to Article 12 regarding freedom of movement. The primary concerns with

¹⁵⁸ See e.g., *Ebola-hit African states seal off outbreak epicentre*, MEDICAL XPRESS (Aug 1, 2014), <https://medicalxpress.com/news/2014-08-ebola-hit-african-states-outbreak-epicentre.html>; Baltazar Espinoza et al., *Mobility restrictions for the control of epidemics: When do they work?*, 15 PLOS ONE 1, 1 (2020).

¹⁵⁹ Amesh Adalja, *Quarantining an entire Liberian slum to fight Ebola is a recipe for disaster*, WASH. POST (Aug 28, 2014), <https://www.washingtonpost.com/news/to-your-health/wp/2014/08/28/quarantining-an-entire-liberian-slum-to-fight-ebola-is-a-recipe-for-disaster/>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Espinoza, *supra* note 158, at 2.

¹⁶³ Bintu Sannoh, *Ebola has almost gone, but life is still desperate in Sierra Leone*, THE GUARDIAN (Oct 17, 2015), <https://www.theguardian.com/commentisfree/2015/oct/18/sierra-leone-ebola-aftermath-west-help-needed>.

¹⁶⁴ *Id.*

¹⁶⁵ Espinoza, *supra* note 158, at 10.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

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the sanitary cordons enacted in Western Africa during the Ebola pandemic are related to necessity and consistency with other rights in the ICCPR, particularly the right to be free from discrimination on the basis of socioeconomic status.¹⁶⁸ Article 12(3) requires any limitation on the freedom of movement to be necessary to protect public health.¹⁶⁹ The West African Ebola cordon was not necessary to protect public health because it failed to be proportionate as it was not the least intrusive instrument to achieve the desired result.¹⁷⁰ Joseph Amon, health and human rights director at Human Rights Watch stated that a better approach would be to “ensure that people have access to health information and care, and to restrict liberty or movement only if and when absolutely needed and with the protections outlined under international human rights law.”¹⁷¹ The quarantine lead to a humanitarian crisis that potentially exacerbated the public health crisis, as discussed below.¹⁷²

One study conducted using data from the West African Ebola outbreak found that lower relative mobility of people in high risk communities, such as those in the West African Ebola cordons, resulted in *larger* overall epidemic size.¹⁷³ The study found that mobility restrictions in communities with low-risk of infection may be effective in reducing the overall epidemic size, however often at the expense of high-risk communities.¹⁷⁴ When population density is higher in the high-risk community than the low-risk community, then movement from the high-risk to low-risk community is likely to *reduce* the final overall epidemic size, although it may result higher infection levels in the low-risk community.¹⁷⁵ Because the sanitary cordon potentially served to exacerbate the levels of Ebola infections, its limitation on the right to freedom of movement cannot be justified as necessary. Although one could argue that the sanitary cordon protected the public health of individuals outside of the barricades, public health must be viewed holistically and may not impute more human value on one set of people than another. Furthermore, human rights are measured on an individual basis and do not permit excessive limitations even when in pursuit of a noble goal.

The West African Ebola cordons may also be prohibited by Article 12(3) by violating other rights recognized by the ICCPR, namely the right to be free from discrimination.¹⁷⁶ The sanitary cordon imposed in Monrovia is potentially dis-

¹⁶⁸ ICCPR, *supra* note 65, at art. 2. (Socioeconomic status may be considered under “or other status” described in Article 2(1)).

¹⁶⁹ *Id.* at art. 12(3).

¹⁷⁰ Restrictive measures must be the least intrusive instrument to achieve the desired result. Individualized quarantine is always a less restrictive measure available, making the necessity of an area-wide quarantine suspect in nearly every situation. See *General Comment 27, supra* note 72, at 14.

¹⁷¹ *West Africa: Respect Rights in Ebola Response*, HUMAN RIGHTS WATCH (Sep 15, 2014), <https://www.hrw.org/news/2014/09/15/west-africa-respect-rights-ebola-response#>.

¹⁷² Espinoza, *supra* note 158, at 10.

¹⁷³ *Id.* (“Risk of infection” is determined by community attributes that include income, education, health-care access, and cultural practices).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ ICCPR, *supra* note 65, at art. 2.

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criminary on the basis of socioeconomic status. Although the ICCPR does not explicitly protect poverty, it does protect discrimination based on “other status.”¹⁷⁷ Additionally, poverty and discrimination are often intrinsically linked.¹⁷⁸ For example, the United Nations Human Rights Office of the High Commissioner explains that discrimination is both a cause and consequence of poverty and that discrimination on the basis of poverty is widespread and widely tolerated.¹⁷⁹ West Point, the area cordoned, is a slum where the most vulnerable and marginalized groups are among the poorest, including children, women and disabled persons.¹⁸⁰

B. Freedom of Association

A second area of human rights frequently violated by public health measures is freedom of association. Article 20(1) of the UDHR provides that “everyone has the right to freedom of peaceful assembly and association.”¹⁸¹ The ICCPR codified this right in Article 18, which codifies freedom of assembly as it relates to religious functions, Article 21, which codifies the right to peaceful assembly, and Article 22, which codifies freedom of association with others.¹⁸² Each of the three codifications of freedom of association contain a limitation provision, which allows restrictions which the standards of being (1) proscribed by law, (2) necessary in a democratic society, and (3) in the interest of public health. Because each Article contains its own limitation clause, freedom of association may not be limited by Article 4 in cases of public emergency.¹⁸³ Like the freedom of movement, the Human Rights Committee requires restrictions on the right to assembly conform to strict tests of necessity and proportionality.¹⁸⁴ The restriction must be the least intrusive measure available.¹⁸⁵ The ECHR applies the same standards for limitations on the freedom of movement as it does for the freedom

¹⁷⁷ *Id.*

¹⁷⁸ *Discrimination, Inequality, and Poverty – A Human Rights Perspective*, HUMAN RIGHTS WATCH (Jan 11, 2013), <https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective>.

¹⁷⁹ *Guiding Principles on Extreme Poverty and Human Rights*, OHCHR ¶ 18 (Sep 2012).

¹⁸⁰ YMCA Summary Report, *The Ebola Outbreak in Liberia: Young People’s Needs in the West Point Slum*, Y CARE INT’L (Sep. 2014), <http://www.ycareinternational.org/wp-content/uploads/2014/10/The-Ebola-outbreak-in-Liberia-Young-peoples-needs-in-the-West-Point-slum.pdf>.

¹⁸¹ UDHR, *supra* note 63, at art. 20.

¹⁸² ICCPR, *supra* note 65, at art. 18 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or *in community with others and in public* [emphasis added] or private, to manifest his religion or belief in worship, observance, practice and teaching); *see* ICCPR, *supra* 65, at art. 21 (“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of . . . public health.”); ICCPR, *supra* 65, at art. 22 (“Everyone shall have the right to freedom of association with others . . .”).

¹⁸³ *Id.* at art. 4.

¹⁸⁴ UN Human Rights Committee, *CCPR General Comment No. 37 on Article 21 – on Right of peaceful assembly*, CCPR/C/GC/37 (Jul 23, 2020) (hereinafter *General Comment 37*).

¹⁸⁵ *Id.* at ¶ 40.

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of association, including requirements for a pressing need, proportionality, and a legitimate aim.

Mandatory quarantine and implementations of sanitary cordons implicate freedom of association indirectly, as those who are quarantined to their homes are unable to attend *any* public gathering, regardless of whether public gatherings themselves are targets of regulations. The human rights considerations for quarantine and sanitary cordon which indirectly impact freedom of association and assembly are analyzed under a similar framework to that of the freedom of movement discussed above. Prohibiting public gatherings separately from a quarantine was also a public health tool utilized in early epidemics. The legality of these tailored public health measures, which only impact the freedom of association and assembly, must be analyzed separately because restrictions on public gathering are less intrusive than quarantines and sanitary cordons and are more likely to meet the necessity requirement.

1. *Early Epidemics: Plague, Cholera, and Influenzas*

During the plague epidemics of the fifteenth through seventeenth centuries, public health authorities often banned public events in an effort to prevent the spread of disease. In 1493, the public health committee in Florence banned markets, festivals, and processions in the city in addition to posting guards outside the city to prevent travelers from entering.¹⁸⁶ In 1633, health magistrates in Florence once again took action against the freedom of association by preventing religious assemblies.¹⁸⁷ Efforts to prevent religious assembly were met with hostile pushback from church authorities, who believed that only through prayer would the disease abate.¹⁸⁸ For example, local church authorities in Monte Lupo, Florence defied health ordinances by staging a procession of devotion to the crucifix, igniting popular resistance to quarantine efforts.¹⁸⁹ Health authorities justified the measures as necessary to prevent the person-to-person spread of plague. However, the primary goal was to maintain social stability.¹⁹⁰ Civil authorities supported the health authorities in local conflicts with the civilian population and with the church using armed force when necessary.¹⁹¹

Similarly, public health authorities responded to the early threat of cholera in 1831 with plague-era procedures by closing public meeting places.¹⁹² For example, Falun, Sweden banned all gatherings, including private gatherings and gatherings in taverns and inns,¹⁹³ and France proscribed fairs and markets to avoid

¹⁸⁶ PORTER, *supra* note 3, at 36.

¹⁸⁷ *Id.* at 37-38.

¹⁸⁸ *Id.* at 38.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 37.

¹⁹¹ *Id.* at 38.

¹⁹² *Id.* at 87.

¹⁹³ PETER BALDWIN, *CONTAGION AND THE STATE IN EUROPE (1830-1930)* 114 (1999).

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the spread of cholera.¹⁹⁴ However, plague-era methods for controlling disease proved ineffective to control cholera,¹⁹⁵ which was spread through the environment (contaminated water) rather than person-to-person contact (such as air droplets as was the case for the plague).¹⁹⁶ Public health focus switched from mobility restrictions to environmental reform.¹⁹⁷

Influenza, as opposed to cholera, spread through airborne respiratory secretions, which brought back a need for mobility restrictions.¹⁹⁸ The Paris-based office international *d'hygiène publique*, an international health organization established in 1907, published epidemic mitigation techniques for limiting the spread of influenza.¹⁹⁹ Mitigation techniques included municipal bans on public gatherings such as meetings, church services, and theater performances.²⁰⁰ As a result, during the 1918-1919 influenza outbreak, health authorities in major cities in the Western world closed schools, churches, theaters and suspended public gatherings.²⁰¹ Similar public health measures were enacted in Indochina to restrict public gatherings.²⁰²

Although the ICCPR did not enter into force until 1976, public health regulations such as those used in response to the plague, cholera, and influenza would nevertheless be justified under modern human rights law. Articles 18, 21 and 22 permit limitations on the right of assembly and association that are necessary and in the interest of public health.²⁰³ Certainly, preventing large social gatherings in the midst of the plague and influenza, both highly contagious diseases, meets the requirement of a pressing social need. Additionally, restricting public gatherings is significantly less restrictive than a sanitary cordon or forced quarantine, which supports a finding of proportionality. There is no other public health measure to prevent large groups of people from meeting that would be as effective as banning public gatherings in totality. Plague and influenza regulations limiting public gatherings thus meet the requirement of necessity. These regulations also meet

¹⁹⁴ *Id.* at 92.

¹⁹⁵ PORTER, *supra* note 3, at 80.

¹⁹⁶ Silvio Daniel Pitlik, M.D., *COVID-19 Compared to Other Pandemic Diseases*, 11 RAMBAM MAIMONIDES MED. J. (2020); Didier Raoult *et al.*, *Plague: History and contemporary analysis*, 66 J. OF INFECTION 18, 20 (2013).

¹⁹⁷ PORTER, *supra* note 3, at 93.

¹⁹⁸ *Influenza pandemic of 1918-19*, ENCYCLOPÆDIA BRITANNICA (Jul. 7, 2020), <https://www.britannica.com/event/influenza-pandemic-of-1918-1919> (Note that air droplets were also one mechanism through which the plague spread from person-to-person); Raoult, *supra* note 195.

¹⁹⁹ David M. Morens *et al.*, *An Historical Antecedent of Modern Guidelines for Community Pandemic Influenza Mitigation*, 124 PUB. HEALTH REP. 22 (2009).

²⁰⁰ *Id.* at 23.

²⁰¹ For example, Paris authorities postponed a sporting event drawing 10,000 French youths and Italian public health authorities closed schools after the first case of hemorrhagic pneumonia. Tognotti, *supra* note 5.

²⁰² KRISTY WALKER, *THE INFLUENZA PANDEMIC OF 1917 IN SOUTHEAST ASIA*, IN *HISTORIES OF HEALTH IN SOUTHEAST ASIA: PERSPECTIVES ON THE LONG TWENTIETH CENTURY* 61-71 (Tim Harper & Sunsil S. Amrith eds, 2014).

²⁰³ These Articles also require the restriction to be proscribed by law, however the monarchical governing structure in Europe during the plague and cholera make analysis of the proscribed by law requirement beyond the scope of this discussion.

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the requirement of a legitimate aim. The subjective intent of officials implementing plague-restrictions may have been questionable, but the regulation itself is seemingly in the interest of public health and tends to support the administration of public health through limiting spread of disease. Influenza regulations even more than during the plague had no obvious ulterior motive other than preventing the spread of disease pursuant to the recommendations of international health organizations.

While prohibiting gatherings in response to cholera was not as effective, the restriction may nevertheless be considered necessary. The ECHR interprets “necessity in a democratic society” to mean whether the restriction corresponded to a pressing social need, whether it was proportionate to the aim pursued and whether the justifications for the restriction are relevant and sufficient.²⁰⁴ Cholera represented a pressing social need, and limitations on public gathering are proportional because the limitations on freedom of association and assembly are not overly restrictive when balanced against the high social need of preventing the spread of disease. Additionally, justifications supporting the restrictions were relevant and sufficient given the historical context (although in hindsight were misguided). The ECHR requires limitations to be justified and proportionate from the outset and throughout its duration.²⁰⁵ At the time of the cholera public gathering restrictions, the unique epidemiology of cholera was not yet known and all that was known was such restrictions had been effective in the past to control previous epidemics. Once public health officials realized mobility restrictions were not effective to combat cholera, the justification for such restrictions ceased, as did the restrictions themselves.

2. *Twenty-First Century Epidemics: SARS and Ebola*

More recent epidemics also used direct limitations to the freedom of association through social distancing measures. Public health interventions in response to the 2003 SARS epidemic included canceling mass gatherings and closing schools.²⁰⁶ Likewise, during the 2014 West Africa Ebola Virus epidemic, Liberia, Guinea, and Sierra Leone issued emergency declarations which required closures of public spaces, including schools and markets.²⁰⁷ Liberia and Sierra Leone also banned mass gatherings.²⁰⁸ These Ebola measures were widely accepted as appropriate, and were supported by the WHO itself, which recommended States with Ebola transmission postpone mass gatherings.²⁰⁹

²⁰⁴ *Sunday Times v. UK*, App. No. 6538/74, 2 Eur. H.R. Rep. 245, § 62. (1979).

²⁰⁵ *Vlasov and Benyash v. Russia* 51279/09 Eur. Ct. H.R. 1.

²⁰⁶ David M. Bell and World Health Organization Working Group on Prevention of International and Community Transmission of SARS, *Public Health Interventions and SARS Spread, 2003*, 10 *EMERGING INFECTIOUS DISEASES* 1900 (2004).

²⁰⁷ Preeti Emrick *et al.*, *Ebola Virus Disease: international perspective on enhanced health surveillance, disposition of the dead, and their effect on isolation and quarantine practices*, 2 *DISASTER AND MIL. MED.* (2016).

²⁰⁸ *Id.*

²⁰⁹ *Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa*, WORLD HEALTH ORGANIZATION (Aug 8, 2014).

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Both the public gathering limitations imposed during SARS and during Ebola were consistent with human rights obligations. Although the public gathering limitations would typically be in violation of various rights to assembly and association found in the ICCPR, limitations in public health emergencies are permitted. Articles 18, 21 and 22 all permit limitations which are proscribed by law, necessary, and in the interest of public health. Assuming the regulations were legally proscribed, both epidemic responses are permissible limitations. Public gathering limitations were necessary to prevent the spread of SARS and Ebola. To evidence the necessity, the WHO itself recommended such measures. While WHO guidance may not be dispositive to a finding of legality, they reflect a level of international acceptance of the necessity and proportionality of such recommended measures. Additionally, the public gathering limitations were in pursuit of the legitimate aim of public health by seeking to prevent spread of disease.

However, as previously discussed, public health responses to both SARS and Ebola also included quarantine and sanitary cordon, which are *indirect* limitations on the freedom of association and assembly due to restricting movement, thereby making it impossible to assemble. Like Article 12 of the ICCPR, Articles 18, 21 and 22 require necessity and proportionality, defined as the least intrusive restriction available.²¹⁰ As discussed under freedom of movement, sanitary cordons are rarely the least restrictive option available. One alternative option is the public gathering limitations discussed in this section, which are considerably less intrusive on a person's liberty interests. Because other alternatives are widely available to prevent large gatherings, implementation of a sanitary cordon to achieve this goal violates the freedom of association and assembly in the same manner these measures violated the freedom of movement. China's SARS cordon measures were consistent with human rights law because they were limited to what was strictly necessary and what was the least restrictive means to prevent residents of Block E from spreading disease by assembling with others. In contrast, Canada's SARS quarantine was not proportionate to the threat, making the measure a violation of both the right to freedom of movement and the rights to freedom of association and assembly. The West African Ebola sanitary cordons also violated the ICCPR because they were not the least restrictive measure available to achieve the goal of preventing spread by assembly. A better solution in Canada and West Africa would have been to quarantine only those ill or who had contact with someone ill, or to enact public gathering restrictions, both of which are less restrictive and equally effective public health measures.²¹¹

C. Prohibition Against Discrimination

The right against discrimination is also sometimes impacted by public health measures. Article 2 of the UDHR states “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or

²¹⁰ *General Comment 37*, *supra* note 184.

²¹¹ Refer to the Freedom of Movement section for the in-depth analysis on these sanitary cordon measures.

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social origin, property, birth or other status.”²¹² Article 2(1) of the ICCPR and Article 2(2) of the ICESCR codify the right against discrimination on the same terms as the UDHR.²¹³ The ECHR defines “other status” to include only differences based on an “identifiable characteristic.”²¹⁴ The Human Rights Committee recognizes that not every differentiation of treatment will constitute discrimination.²¹⁵ General Comment 18 states that differentiated treatment is permissible “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”²¹⁶ The ECHR explains that treatment has no objective and reasonable justification when it does not pursue a legitimate aim or there is no reasonable relationship of proportionality between means employed and the legitimate aim.²¹⁷ The test for permissible discrimination thus matches the test for limitations on the rights to freedom of movement and freedom of association. To be permissible, discrimination must therefore be (1) not a protected status, or (2) necessary in furtherance of a legitimate aim and proportionate to that aim.

However, some characteristics receive additional protection. Article 4 of the ICCPR expressly prohibits a State’s ability to restrict the right against discrimination on the basis of race, colour, sex, language, religion, or social origin, in time of public emergency.²¹⁸ Any other discrimination provided for in Article 2(1) of the ICCPR (*e.g.* discrimination on the basis of political opinion, property, or other status) may be limited by Article 4 so long as the standards are met for such derogation.²¹⁹ Unlike the ICCPR, the ICESCR does not contain a provision which permits derogations of rights for public emergency. Article 4 of the ICESCR states that limitations on rights codified in the ICESCR must be (1) provided by law, (2) compatible with the nature of the rights, and (3) solely for the purpose of promoting the general welfare in a democratic society.²²⁰ While a declaration of public emergency under Article 4 of the ICCPR is generally self-judging, no such self-judging standards exists in Article 4 of the ICESCR, which creates a higher threshold to meet.²²¹

²¹² UDHR, *supra* note 63, at art. 2.

²¹³ ICCPR, *supra* note 65, at art. 2(1); ICESCR, *supra* note 95, at art. 2(2).

²¹⁴ Molla Sali v. Greece, 20452/14 Eur. Ct. H.R. 1, ¶ 134 (2020).

²¹⁵ UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.9, at ¶ 13 (Nov 10, 1989).

²¹⁶ *Id.*

²¹⁷ Fabris v. France, 2013-I, Eur. Ct. H.R. 381, at ¶ 56.

²¹⁸ ICCPR, *supra* note 65, at art. 4 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”).

²¹⁹ See Section I for a discussion on the Siracusa Principles of limitations on rights in the ICCPR.

²²⁰ ICESCR, *supra* note 95, at art. 4.

²²¹ Desierto, *supra* note 99.

1. *Discrimination on the Basis of Race*

Discriminatory public health measures were particularly common prior to the advent of the International Bill of Human Rights. In the plague era, Jewish people in particular were frequently discriminated against. Christians in eastern Europe considered the plague to be the wrath of god punishing humans for their sin.²²² Throughout Southern France, Spain, Switzerland and southern Germany, Christians blamed Jewish people for the plague and responded by burning hundreds of Jewish neighborhoods as well as imprisoning and torturing Jewish people.²²³ Additionally, sanitary cordons imposed by armed guards prevented Jewish people from entering cities.²²⁴

Racially discriminatory public health measures remained popular into the nineteenth and twentieth centuries.²²⁵ For example, in 1892 four people from a boat which carried many Russian Jewish immigrants to New York City were found to be infected with typhus.²²⁶ New York City health officials ordered quarantine of 1,200 Jewish Russians who happened to live near the four infected.²²⁷ Italian immigrants who arrived on the same boat were detained for a lesser time.²²⁸ To evidence the pervasive xenophobic and antisemitic attitude at the time, the front page of the New York Times stated; “We don’t need this kind of riff-raff on our shores,” referring to the Jewish Russians.²²⁹ In 1900, shortly after the New York City cholera quarantine, other cities in the United States implemented racist public health policies. To combat the spread of bubonic plague in the 1900s, the city of San Francisco prevented all Chinese residents who did not get a plague vaccination from leaving the city.²³⁰

Each of these early public health measures would violate modern-day human rights law. Article 2(1) of the ICCPR and Article 2(2) of the ICESCR prohibit discrimination on the basis of race. Sanitary cordons which refuse entry to Jewish people solely due to their race (or religion) blatantly violate the prohibition against discrimination. There was no legitimate aim which would support treating Jewish people differently than any other race or religion. Without a legitimate aim, there is no need to consider proportionality. However, there was no human rights law in existence in the fourteenth century to hold States accountable for these racially motivated violations.

²²² PORTER, *supra* note 3, at 28-29, 33.

²²³ *Id.* at 33.

²²⁴ Tognotti, *supra* note 5, at 254.

²²⁵ Rothstein, *supra* note 28, at 269.

²²⁶ *Id.*

²²⁷ *Id.*; see also Eleanor Klibanoff, *Awful Moments in Quarantine History: Remember Typhoid Mary?*, NPR (Oct. 30, 2014), <https://www.npr.org/sections/goatsandsoda/2014/10/30/360120406/awful-moments-in-quarantine-history-remember-typhoid-mary>.

²²⁸ HOWARD MARKEL, QUARANTINE! EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMIC OF 1892, 53 (1997).

²²⁹ Klibanoff, *supra* note 227 (quoting MARKEL, *supra* note 228).

²³⁰ Rothstein, *supra* note 28, at 270.

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The disparate treatment between Italians and Jewish Russians and the quarantine of only Chinese in the United States were also clearly based on race. While the ICCPR did not exist in the early 1900s, the United States nevertheless violated human rights delineated in its national constitution. For example, the legislation quarantining Chinese residents in San Francisco expressly only applied to Chinese residents, and as a result was subsequently struck down by American courts as violation of the Equal Protection Clause in the 14th Amendment of the United States Constitution.²³¹ While the quarantine of Jewish Russian immigrants was not tried in court, this discrimination would likely be a violation of the Equal Protection Clause.²³² Additionally, none of these early public health measures would be a justifiable derogation under the ICCPR or ICESCR had either existed at the time. Even if the United States could prove a legitimate aim and not just animus, the measure is not proportional to that aim. There was no reason to believe that Chinese residents or Jewish Russian immigrants were particularly susceptible to disease. The only justification was racial propinquity with a person who had the disease, which bears no relation to a person's actual likelihood of having the disease himself. Furthermore, Article 4 of the ICCPR expressly prevents derogations which discriminate on the ground of race.²³³ Article 4 of the ICESCR only entertains derogations which are solely for the purpose of promoting the general welfare, which racial classifications by their very nature can never be.

Although earlier quarantines were marred with racial discrimination, twenty-first century quarantines have been widely devoid of racial discrimination. This is in part due to the applicability of the principle of non-discrimination set forth in the International Bill of Rights, which is non-derogable on the basis of race. In addition to the International Bill of Rights, various other international agreements relating to public health, such as the Constitution of the WHO, have adopted the principle of non-discrimination.²³⁴ Other public health agreements do not address the principle of non-discrimination, but require scientific justifications, which exists as another reason for racially neutral public health measures. For example, the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) requires that all sanitary measures taken by States which directly or indirectly affect international trade must be based on scientific evidence.²³⁵ Quarantines and sanitary cordons indirectly affect international trade, particularly the travel and tourism industry, and as such

²³¹ *Wong Wai v. Williamson*, 103 F. 1, 6 (C.C.N.D. Cal. 1900); *Jew Ho v. Williamson*, 103 F. 10, 23-24 (C.C.N.D. Cal. 1900).

²³² Presumably, the quarantine of the Russian Jews would not pass the derogation test under the United States Constitutional system, which requires a compelling governmental interest that is narrowly tailored. There is no identifiable reason to treat the Russian Jew immigrants any different than the Italian immigrants who arrived on the same infected ship other than racial animus.

²³³ ICCPR, *supra* note 65, at art. 4.

²³⁴ Constitution of the World Health Organization, *supra* 101<CITE _Ref70582808“>, at 185.

²³⁵ Agreement on the Application of Sanitary and Phytosanitary Measures art. 2, ¶ 2, Apr. 15, 1994, 1867 U.N.T.S. 494 [hereinafter SPS Agreement].

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must be supported by sufficient scientific evidence.²³⁶ Modern public health authorities therefore are bound to more restrictive laws than their predecessors. For example, health authorities in Hong Kong, Shanghai, and Toronto made an effort to use only science-based criteria in making SARS quarantine decisions to stay compliant with antidiscrimination laws.²³⁷

2. *Discrimination on the Basis of Sex*

Discriminatory quarantines on the basis of sex are not nearly as common as those on the basis of race. There are a few incidents where public health authorities discriminated on the basis of sexual orientation, however it is open for debate whether or not sexual orientation is protected by the ICCPR and ICESCR. The ECHR has found that the European Convention on Human Rights, which uses substantially the same language as the ICCPR and the ICESCR, does protect discrimination on the basis of sexual orientation, despite not expressly stating it as a prohibited basis.²³⁸ In the Middle Ages, any sexual acts which were not intended to reproduce were considered amoral sodomy, but homosexuality in particular was harshly punished in Catholic predominated States.²³⁹ During the black plague, health legislation targeted sodomites in particular, among other unpopular groups discussed below.²⁴⁰ A more recent discrimination on the basis of sexual orientation occurred during the AIDS epidemic. In the first years of the AIDS epidemic in the United States, 25 states revised public health statutes to provide conditions under which individuals who engaged in disease-spreading behavior could be quarantined.²⁴¹ However, very few states used mandatory individual quarantine as a means to address recalcitrant behavior by persons infected with HIV.²⁴² One example of such quarantine occurred in Florida, where public health authorities quarantined a HIV-positive teenage boy in a psychiatric ward because his behavior of continuing to visit gay bars was viewed as a threat to public health.²⁴³

While it is unlikely the International Bill of Rights was designed to protect sexual orientation, discrimination on the basis of sexual orientation may nevertheless be considered protected by the prohibition against discrimination on the basis of sex.²⁴⁴ Plague-era restrictions targeting sodomites could potentially be a

²³⁶ Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law and the Public's Health*, 59 ADMIN. L. REV. 121, 169 (2007).

²³⁷ Lesley A. Jacobs, *Rights and Quarantine during the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto*, 41 L. & SOC'Y REV. 511, 521-22 (2007).

²³⁸ *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, ¶ 28 (Dec. 12, 1999), <http://hudoc.echr.coe.int/eng?i=001-58404>.

²³⁹ JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 289-91 (1980).

²⁴⁰ PORTER, *supra* note 3, at 36-37.

²⁴¹ Ronald Bayer & Amy Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 AM. J. PUB. HEALTH 1471, 1472 (1993).

²⁴² *Id.* at 1473.

²⁴³ *Id.*

²⁴⁴ *See Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that statute preventing discrimination on basis of "sex" implicitly prevents discrimination on basis of sexual orientation).

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violation on the basis of sex as the same (or substantially similar) sexual acts performed between a man and a woman would be considered procreative and would thus not be sodomy. However, prostitutes, who were predominantly women, were also targeted by these public health restrictions.²⁴⁵ Because both prostitutes and sodomites were targeted, the most reasonable inference is that the plague-era restrictions were designed to discriminate on the basis of sinful activity, which is not a protected basis, rather than sex or sexual orientation. Furthermore, the International Bill of Rights did not exist until several hundred years after the plague had run its course.

Although the International Bill of Rights did not exist during the Middle-Ages, it did exist in the 1980s when the AIDS quarantine restrictions occurred. However, the United States did not become a party to the ICCPR until 1992 and it is unlikely that the rights in the UDHR were considered customary international law in the early 1980s, only four years after the ICCPR and ICESCR entered into force. Regardless of whether the International Bill of Rights protects discrimination on the basis of sexual orientation, and whether the treatment of AIDS and homosexuality in the United States were so intrinsically linked as to make any AIDS regulation indirectly discriminatory towards homosexuals, these quarantines would be a violation of human rights. As discussed above, quarantine necessarily implicates the right to freedom of movement and the rights to freedom of association and assembly. Any limitations on either of these rights must be necessary and proportionate to further the legitimate aim of public health. While preventing the spread of HIV may be a pressing social need and in furtherance of a legitimate goal, a mobility restriction is neither proportionate to that goal nor the least intrusive measure available. HIV is spread through very specific behaviors compared to other epidemics which are airborne.²⁴⁶ Unlike a respiratory disease, HIV cannot be spread by simply being in close proximity to others. Quarantining those who are HIV-positive *only* serves to hinder movement, thereby making it impossible for those individuals to engage in spreading behavior by imprisoning them in their homes.²⁴⁷ Such infringement on personal liberty cannot be justified by public health necessity. This type of quarantine is nothing more than a pretext for illegal detention without any due process procedures as required by Article 9 of the ICCPR.²⁴⁸ Detention in this manner is more appropriately justified under the criminal justice system than in the name of public health.²⁴⁹

²⁴⁵ PORTER, *supra* note 3, at 36; Livia Gershon, *Regulating Sex Work in Medieval Europe*, JSTOR DAILY (May 2, 2019), <https://daily.jstor.org/regulating-sex-work-in-medieval-europe/>.

²⁴⁶ Bayer & Fairchild-Carrino, *supra* note 241, at 1471.

²⁴⁷ *Id.* at 1472. Additionally, such a quarantine hardly meets the definition of “quarantine” because it is imposed on individuals who are known to be infected, which is more akin to isolation.

²⁴⁸ ICCPR, *supra* note 65, at art. 9.

²⁴⁹ Bayer & Fairchild-Carrino, *supra* note 241, at 1472.

3. *Discrimination on the Basis of Poverty*

Discrimination on the basis of poverty is the most common form of discriminatory public health measures. However, analyzing the legality of poverty-related discrimination is more challenging than discrimination based on race or sex because poverty is not an expressly protected class in the International Bill of Rights. Poverty could be protected as an “other status,” because it is an identifiable characteristic, as required by the ECHR, but no cases have explicitly held so.²⁵⁰ Presumably for this reason, modern-day quarantines and other public health measures continue disproportionately impact the poor.

The history of discriminating against the poor in epidemic response measures dates back to the Black Death. During the 1300s plague epidemic, public health measures were designed not to protect the general public, but to manage social order between the elites and the “unpredictable underclass.”²⁵¹ Health legislation was intended to restrict the movement of undesirable members of society, including beggars, ruffians, and others who represented threats to civil order.²⁵² Similar public health measures during the nineteenth century were motivated by a desire to stop political opposition.²⁵³ In 1836 Naples, Italy, public health officials targeted prostitutes and beggars with restrictions designed to hinder free movement.²⁵⁴ If poverty is protected as an “other status,” these restrictions would violate the ICCPR for lack of a legitimate goal. Quelling political opposition and maintaining rigid social stratum are not legitimate goals. These so-called goals would fly in the face of other protected rights in the ICCPR and ICESCR, including the right to political opinion and rights ensuring an adequate standard of living.

While poverty and socioeconomic status are not directly protected under the International Bill of Rights, States must be mindful of the underlying cause of poverty, which may be directly protected. Prohibited racial discrimination and poverty are intrinsically related. In many countries, socially rejected minority groups were legally required to live in designated ghettos.²⁵⁵ In countries where not legally required, many minorities nevertheless were forced to live in special districts because they were unable to afford the costs to live elsewhere.²⁵⁶ Substandard living conditions such as those present in ghettos in turn lead to overcrowding, malnutrition, and the presence of disease-carrying pests.²⁵⁷ One clear example of racially-driven poverty relating to the spread of the disease occurred during the 1890s in Lower East Side Manhattan. Jewish immigrants arriving on ships from Eastern Europe settled the unsanitary and overcrowded Lower East

²⁵⁰ Molla Sali v. Greece, App. No. 20452/14, ¶ 134 (Dec. 19, 2018), <http://hudoc.echr.coe.int/eng?i=001-188985>.

²⁵¹ PORTER, *supra* note 3, at 37.

²⁵² *Id.* at 36-37.

²⁵³ Tognotti, *supra* note 5, at 256.

²⁵⁴ *Id.*

²⁵⁵ Okin, *supra* note 137, at 130.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 130-31.

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side.²⁵⁸ As previously discussed, the public health authorities determined it was Jewish people who were spreading cholera and implemented sanitary cordons around the whole Jewish ghetto.²⁵⁹ It is clear to see how the conditions of poverty here were exacerbated by racial discrimination.

A less visible example of discrimination in public health measures on the basis of poverty is the West Point sanitary cordon discussed earlier. West Point is among the most poverty-stricken slums in Liberia.²⁶⁰ However, the connection between prohibited discriminatory factors and poverty is not present in West Point as it was in the Jewish ghettos. The United Nations Office of the High Commissioner for Human Rights and the WHO acknowledge “the powerlessness, discrimination, inequality and accountability failures that lead to poverty are often politically driven, deeply rooted and not easily remedied.”²⁶¹ In West Point, the most vulnerable and marginalized groups are among the poorest, including children, women, and disabled persons.²⁶²

Regardless of whether poverty is protected from discrimination, States must still act consistently with the right to health provided for in the ICESCR. Because Article 12 of the ICESCR requires the highest attainable standard of physical and mental health for *everyone*, impoverished populations are nevertheless entitled to protection from disease, and may not be sacrificed to benefit the larger population. States may not limit any rights provided for in ICESCR unless such limitation promotes the general welfare and is otherwise compatible with the nature of the rights.²⁶³ Any discrimination based on poverty which forgoes the prevention, treatment or control of disease in impoverished areas, such as sanitary cordons which exacerbate disease levels in the cordoned population, would be incompatible with the right to the highest attainable standard of health, and thus would be a violation of human rights.

III. COVID-19 Quarantine of Wuhan: The Largest Ever Sanitary Cordon

Sanitary cordons survived the Ebola disaster, and reappeared in 2020 in response to the novel COVID-19 pandemic. Chinese government officials implemented the largest sanitary cordon in recorded history, cordoning off Wuhan, a city with a population of 11 million people. Like all previous sanitary cordons, the Wuhan sanitary cordon raised questions about human rights implications and legality. Although China is a party to the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), it is one of the few State that is not a party to the International Covenant on Civil and Political Rights (“ICCPR”).

²⁵⁸ *Id.* at 133

²⁵⁹ *Id.*; Rothstein, *supra* note 28, at 269; Klibanoff, *supra* note 227.

²⁶⁰ Per Liljas, *Liberia’s West Point Slum Reels From the Nightmare of Ebola*, TIME (Aug. 22, 2014), <https://time.com/3158244/liberia-west-point-slum-ebola-disease-quarantine/>.

²⁶¹ Penelope Andrea et al., Off. U.N. High Comm’r Hum. Rts. & WHO, Human Rights, Health and Poverty Reduction Strategies, 5 HEALTH & HUM. RTS. SER. 13 (2008).

²⁶² YMCA Summary Report, *supra* note 180.

²⁶³ ICESCR, *supra* note 95, at art. 4.

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China's unique history with human rights demonstrates a strong preference for economic, social, and cultural rights over civil and political ones. Analyzing China's public health measures in relation to human rights, even those which China does not support, raises questions about the nature of human rights, their ethical underpinnings, and how to hold States accountable for violations.

A. Emergence of the COVID-19 Pandemic

A new virus, SARS-CoV-2, was formally announced on December 31, 2019.²⁶⁴ The government of Wuhan confirmed authorities were treating dozens of cases of the novel respiratory disease, COVID-19, which resulted from the SARS-CoV-2 virus.²⁶⁵ SARS-CoV-2 spread through respiratory droplets, similar to the transmission of previous disease such as the plague, influenza, and SARS.²⁶⁶ The World Health Organization ("WHO") recognized that transmission of COVID-19 was likely where a person had direct physical contact with an infected person, or face-to-face contact with an infected person within one meter and for more than fifteen minutes.²⁶⁷

By January 6, 2020, 59 people in Wuhan were sick with COVID-19.²⁶⁸ Five days later, on January 11, 2020, the first known death from COVID-19 was reported in Wuhan.²⁶⁹ This death was reported only a few days before the Chinese Lunar New Year, where hundreds of millions of people travel across the country.²⁷⁰ Dispersal of COVID-19 from Wuhan was more rapid than other previous respiratory diseases. 262 Chinese cities reported cases of COVID-19 within 28 days, compared to 132 days during the H1N1 pandemic.²⁷¹ Additionally, transmission studies showed exponential growth. One new study, which has not yet been subject to peer review, reported that the number of people each infected individual gave the virus to was between 1.6-2.6 in early to mid-January.²⁷²

Cases began to be reported outside of China on January 20, 2020, including cases in Japan, South Korea, Thailand and the United States.²⁷³ On January 23,

²⁶⁴ Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

²⁶⁵ *Id.*

²⁶⁶ *How Coronavirus Spreads*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Mar. 20, 2021); Pitlik, *supra* note 196; Raoult, *supra* note 196.

²⁶⁷ WHO, CONSIDERATIONS FOR QUARANTINE OF CONTACTS OF COVID-19 CASES: INTERIM GUIDANCE 2, (Aug. 19, 2020), [https://www.who.int/publications-detail-redirect/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-\(covid-19\)](https://www.who.int/publications-detail-redirect/considerations-for-quarantine-of-individuals-in-the-context-of-containment-for-coronavirus-disease-(covid-19)).

²⁶⁸ Sui-Lee Wee & Vivian Wang, *China Grapples With Mystery Pneumonia-Like Illness*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/world/asia/china-SARS-pneumonia-like.html>.

²⁶⁹ Taylor, *supra* note 264.

²⁷⁰ *Id.*

²⁷¹ Huaiyu Tian et al., *An investigation of transmission control measures during the first 50 days of the COVID-19 epidemic in China*, 368 SCI. 638, 639 (2020).

²⁷² Adam J Kucharski et al., *Early dynamics of transmission and control of COVID-19: a mathematical modelling study*, 20 LANCET INFECTIOUS DISEASES 553, 555 - 56 (2020).

²⁷³ Taylor, *supra* note 264.

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2020, the Chinese government imposed a sanitary cordon around the entire city of Wuhan, impacting 11 million residents.²⁷⁴ However, before the sanitary cordon of Wuhan, an estimated seven million people traveled from Wuhan in January.²⁷⁵ On the date the sanitary cordon was enacted, 17 COVID-19 deaths had been recorded, and 570 cases had been reported, including cases in Taiwan, Japan, Thailand, South Korea and the United States.²⁷⁶ One week later, on January 30, 2020, the WHO formally declared COVID-19 a public health emergency of international concern.²⁷⁷

1. Chinese Sanitary Cordon of Wuhan

On January 23, 2020, China instituted the largest sanitary cordon ever attempted in history, quarantining a city of more than 11 million people.²⁷⁸ All flights and passenger train services out of Wuhan stopped and all public transportation shut down.²⁷⁹ Chinese authorities announced the sanitary cordon mere hours before it took effect.²⁸⁰ As a result of little advance warning, the sanitary cordon locked-in not only Wuhan residents, but also anyone who happened to be in the city at the time, including tourists.²⁸¹ The sanitary cordon lasted 76 days, and only lifted after no new COVID-19 deaths were reported in all of China.²⁸²

Quickly after the lockdown announcement, the hashtag “Wuhan is sealed off” (*translated to English*) was a trending topic on Weibo, a Chinese social media website.²⁸³ While many Chinese users were supportive of the lockdown, others, particularly those in Wuhan, were deeply concerned about their fates.²⁸⁴ In addition to sealing off the city with a sanitary cordon, public health authorities implemented personal preventative actions, such as encouraging residents to stay home as much as possible, canceling large public events, closing libraries, museums and workplaces, and extending school holidays to prevent children returning to

²⁷⁴ *Id.*; see also *Coronavirus: Wuhan shuts public transport over outbreak*, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-china-51215348>.

²⁷⁵ Jin Wu et al., *How the Virus Got Out*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/interactive/2020/03/22/world/coronavirus-spread.html>.

²⁷⁶ Taylor, *supra* note 264.

²⁷⁷ *Id.*

²⁷⁸ Michael Levenson, *Scale of China's Wuhan Shutdown Is Believed to Be Without Precedent*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/world/asia/coronavirus-quarantines-history.html>.

²⁷⁹ *Coronavirus: Wuhan shuts public transport over outbreak*, *supra* note 274.

²⁸⁰ Amy Qin & Vivian Wang, *Wuhan, Center of Coronavirus Outbreak, Is Being Cut Off by Chinese Authorities*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/22/world/asia/china-coronavirus-travel.html>.

²⁸¹ Emily Feng & Amy Cheng, *As China's Wuhan Ends Its Long Quarantine, Residents Feel a Mix of Joy and Fear*, NPR (Apr. 8, 2020), <https://www.npr.org/2020/04/08/829574902/as-chinas-wuhan-ends-its-long-quarantine-residents-feel-a-mix-of-joy-and-fear#:~:text=live%20Sessions-,As%20China's%20Wuhan%20Ends%20Its%20Long%20Quarantine%2C%20Residents%20Feel%20A,country%20and%20overwhelmed%20health%20systems>.

²⁸² *Id.*

²⁸³ *Coronavirus: Wuhan shuts public transport over outbreak*, *supra* note 274.

²⁸⁴ Qin & Wang, *supra* note 280.

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school.²⁸⁵ Chinese authorities stated that the measures were necessary to “effectively cut off the transmission of the virus, resolutely curb the spread of the epidemic, and ensure the safety and health of the people.”²⁸⁶

China was not the only State to impose a sanitary cordon in response to COVID-19, as parts of northern Italy were also cordoned.²⁸⁷ One month after Wuhan’s cordon, on February 23, Italian authorities implemented a sanitary cordon around the Lodi and Paduan area in northern Italy.²⁸⁸ These cordons were guarded by mixed patrols of police and armed forces which prevented all people from entering or exiting the so-called “red zones.”²⁸⁹ The sanitary cordons in northern Italy also implicate human rights but in a less extreme manner. The “red zone” cordons lasted for two weeks, as opposed to 76 days, and impacted a total of 55,000 people, as opposed to 11 million.²⁹⁰ Although Italy also implemented questionable sanitary cordons during the COVID-19 pandemic, this paper will focus only on the Wuhan Sanitary Cordon, as the largest cordon in recorded history.

2. Effectiveness of the Wuhan Sanitary Cordon

The WHO breaks public health and social measures in response to COVID-19 into five categories: personal protective measures, environmental measures, surveillance and response measures, physical distancing measures, and international travel related measures.²⁹¹ Surveillance and response measures are implemented by public health authorities and include contact tracing, isolation for the infected, and quarantine for those with contact with the infected.²⁹² Physical distancing measures are also implemented by public health authorities and include limiting size of gatherings, and putting into effect domestic movement restrictions.²⁹³ A sanitary cordon would thus be a combination of a surveillance and response measure and a physical distancing measure.

²⁸⁵ David Cyranoski, *What China’s Coronavirus Response Can Teach the Rest of the World*, NATURE (Mar. 17, 2020), <https://www.nature.com/articles/d41586-020-00741-x#ref-CR3>.

²⁸⁶ Qin & Wang, *supra* note 280.

²⁸⁷ *See Si chiude la “zona rossa”: 43 varchi tra Lodi e Padova presidiati da 500 uomini*, LA STAMPA (Feb. 23, 2020), <https://www.lastampa.it/milano/2020/02/23/news/coronavirus-nessun-blindato-nella-zona-rossa-del-lodigiano-ma-vigilanza-diffusa-dei-carabinieri-e-unita-mobile-coi-medici-dell-arma-1.38506501>.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Rozina Sini, *Coronavirus: Quarantined Inside Italy’s Red Zone*, BBC NEWS (Feb. 28, 2020), <https://www.bbc.com/news/world-europe-51651099>.

²⁹¹ WHO Interim Guidance, *Considerations for Implementing and Adjusting Public Health and Social Measures in the Context of COVID-19*, WORLD HEALTH ORG. (Nov. 4, 2020), <https://www.who.int/publications/i/item/considerations-in-adjusting-public-health-and-social-measures-in-the-context-of-covid-19-interim-guidance>.

²⁹² *Id.*

²⁹³ *Id.*

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WHO guidance recommended all public health and social measures be based on proven effectiveness and an evidence-based assessment.²⁹⁴ The guidance further advised that measures which restrict travel should be based on an additional assessment of transmission levels and health system capacities.²⁹⁵ The WHO only recommended stringent movement restrictions for “Situation Level 4,” the highest level, where there is “uncontrolled epidemic with limited or no additional health system response available, thus requiring extensive measures to avoid overwhelming of health services and substantial excess morbidity and mortality.”²⁹⁶ Stringent movement restrictions even under the highest situation level must be: (1) geographically limited to where needed, (2) time-bound, and (3) aimed to be as short as reasonably possible.²⁹⁷ Furthermore, the WHO, along with other international organizations, released a guide which states that quarantine should only be used on those who have clearly established exposure to an infected person and that mere geographical relation to areas with reported cases is *not* a permissible criteria for quarantine regulations.²⁹⁸ Although the WHO congratulated China on its “unique and unprecedented public health response,” it is clear that the sanitary cordon of Wuhan far exceeds WHO’s recommendations.²⁹⁹ In addition to blatantly violating WHO recommendations, the sanitary cordon of Wuhan’s effectiveness was so marginal that its resulting harm greatly outweighed its benefit.

a. *The Sacrifice of Wuhan Residents*

The reverse sanitary cordon around Wuhan displayed a clear decision to sacrifice of the citizens of Wuhan in favor of the rest of China.³⁰⁰ Similar justifications underpinned the reverse sanitary cordon of Eyam during the plague and West Point during Ebola. Similar to Eyam and West Point, mortality was worse inside of the sanitary cordon than in the rest of the country. On February 25, 2020, mortality rate in Wuhan was around 3%, while the mortality rate in other

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ IASC Interim Guidance, *Public Health and Social Measures for COVID-19 Preparedness and Response in Low Capacity and Humanitarian Settings, Version 1*, INTER-AGENCY STANDING COMM. (May 2020).

²⁹⁹ The guidelines cited were not in existence on January 23, 2020 and, in fact, the WHO did not declare a public health emergency until January 30, 2020. However, these guidelines are useful to refer to when discussing efficacy of the sanitary cordon, particularly in light of WHO purported “support” of China’s measures. See Cyranoski, *supra* note 285.

³⁰⁰ The idea of sacrificing oneself for the national good is deeply engrained in Chinese culture, but nevertheless implicates human rights questions. To evidence this pervasive attitude, one doctor at Third People’s Hospital in Shenzhen stated, “some may say Hubei, [the larger province Wuhan is part of], was sacrificed, but it did effectively stem the spread to elsewhere.” Claire Che *et al.*, *China Sacrifices a Province to Save the World From Coronavirus*, BLOOMBERG NEWS (Feb. 5, 2020), <https://www.bloomberg.com/news/articles/2020-02-05/china-sacrifices-a-province-to-save-the-world-from-coronavirus>.

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Chinese provinces was 0.7%.³⁰¹ One study found a potential association between COVID-19 and health-care resource availability.³⁰² The study associated the higher mortality rate in Wuhan with the insufficiency of health-care resources due to the high levels of infection in the city.³⁰³

News outlets in February, 2020, reported that deliveries from outside of the Hubei province were slowed by the strict quarantine procedures, leading to supply shortages in Hubei hospitals.³⁰⁴ Between January 23 and February 4, 2020, the number of COVID-19 deaths grew exponentially in the Hubei province.³⁰⁵ An assistant professor at the Yale School of Public Health stated that he thought it was likely that preventable deaths from non-COVID-19 related issues could outnumber the lives saved treating COVID-19 patients due to the overcrowding of hospitals.³⁰⁶ For example, the Xinhua news agency reported that more than 400,000 patients with chronic disease in Wuhan were unable to access medicine because of the lockdown.³⁰⁷ Patients who needed more than just medicine, had a challenging time even *getting* to a hospital because authorities stopped all public transportation.³⁰⁸ Reports indicated that some patients in Wuhan had to walk several hours to reach a hospital.³⁰⁹ Those who were able to reach the hospitals were sometimes turned away either for lack of resources available for non-COVID-19 patients or due to bureaucratic rules requiring a negative COVID-19 test prior to treatment (for non-COVID-19 related illness), which was challenging to receive without the patient displaying symptoms.³¹⁰ One Wuhan resident summarized the situation, stating, “I’m willing to accept that we have to stay in Wuhan. . . but the medical care needs to keep up. You can’t tell us we can’t leave, and then give us second-rate medical care.”³¹¹

b. Marginal Effectiveness of the Sanitary Cordon

The extraordinarily high social cost of the sanitary cordon of Wuhan is not outweighed by its marginal effectiveness. Studies before COVID-19 had already

³⁰¹ Yunpeng Ji *et al.*, *Potential Association Between COVID-19 Mortality and Health-Care Resource Availability*, 8 THE LANCET GLOB. HEALTH 480 (Feb. 25, 2020).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Che, *supra* note 300; Ji, *supra* note 301.

³⁰⁵ *Id.*

³⁰⁶ Amy Qin & Sui-Lee Wee, ‘No Way Out’: In China, Coronavirus Takes Toll on Other Patients, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/world/asia/china-coronavirus-cancer.html>.

³⁰⁷ Cai Yang, *Visiting Wuhan Chronic Disease Intensive Disease Drugstore: The pharmacist takes 30,000 boxes of medicines per person per day*, XINHUANET (Feb. 28, 2020), http://www.xinhuanet.com/photo/2020-02/28/c_1125640119.htm.

³⁰⁸ Qin & Wee, *supra* note 306.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ Chris Buckley & Javier C. Hernandez, *China Expands Virus Lockdown, Encircling 35 Million*, N.Y. TIMES (Jan. 25, 2020), <https://www.nytimes.com/2020/01/23/world/asia/china-coronavirus-outbreak.html>.

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found measures other than quarantine to be more effective in preventing spread of respiratory disease.³¹² A 2011 study found use of surgical masks and hand washing as the most consistently effective set of public health measures, when compared to other measures such as screening at entry points, isolation, quarantine, social distancing, and use of personal protection equipment.³¹³

However, some scientists found the Wuhan measures to be effective in preventing the spread of COVID-19.³¹⁴ One study found that Wuhan and other Hubei travel lockdowns averted 71% of cases by February 15, 2020 compared to no border restrictions.³¹⁵ The study does acknowledge however that border control is not likely to *contain* an outbreak, and only serves to delay the spread.³¹⁶ Another study found that the Wuhan lockdown delayed the spread to other Chinese cities by 2.91 days.³¹⁷ This study explained that delay may provide extra time to prepare for the disease, but would not curb transmission once the disease is present.³¹⁸ A third study found that travel restrictions, in tandem with early detection and isolation, helped to prevent the spread of COVID-19 from increasing by 67-fold.³¹⁹ However, the study concluded that improved detection and isolation of cases along with social distancing probably had a greater effect than the travel restrictions.³²⁰ These findings are supported by another study which asserted that travel limitations alone had only a modest effect unless paired with other public health measures.³²¹ Evidence, even when considered in the light most favorable to China, shows the sanitary cordon around Wuhan only modestly delayed the inevitable and unpreventable spread of COVID-19 to other areas of China.³²²

It is relevant to note that these studies predominantly focused on spread within China, not in the international community as a whole. At the time of Wuhan's lockdown, COVID-19 had already been reported in countries outside of China, including in Japan, South Korea, Thailand, and the United States.³²³ None of these States imposed a sanitary cordon to contain the virus. South Korea for example implemented extensive contact tracing measures and mandatory quaran-

³¹² ANGELA MITROPOULOS, PANDEMONIUM: PROLIFERATING BORDER OF CAPITAL AND THE PANDEMIC SWERVE 36 (2020).

³¹³ *Id.*

³¹⁴ Cyranoski, *supra* note 285.

³¹⁵ Chad R. Wells *et al.*, *Impact of International Travel and Border Control Measures on the Global Spread of the Novel 2019 Coronavirus Outbreak*, 117 PNAS 7504, 7505 (2020).

³¹⁶ *Id.*

³¹⁷ Huaiyu Tian *et al.*, *The Impact of Transmission Control Measures During the First 50 Days of the COVID-19 Epidemic in China*, medRxiv preprint, doi: 10.1101/2020.01.30.20019844.

³¹⁸ *Id.*

³¹⁹ Cyranoski, *supra* note 285.

³²⁰ *Id.*

³²¹ Matteo Chinazzi *et al.*, *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, 368 Sci. 395 (2020).

³²² *Id.*

³²³ Taylor, *supra* note 264.

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tine for those with contact to a COVID-19 carrier.³²⁴ As of November, 2020, South Korea's daily confirmed cases had not surpassed the initial 909 daily confirmed cases peak on February 29, 2020.³²⁵ The total number of COVID-19 cases in South Korea was 27,942 with only 487 deaths.³²⁶ In contrast, the Hubei province alone reached a maximum daily confirmed cases of 14,840 on February 13, 2020, had experienced 68,147 total cases, and 4,512 total deaths.³²⁷ South Korea's public health measures, which were considerably less draconian than China's, were over 58% more effective in preventing total spread and over 96% more effective in preventing total COVID-19 deaths.

Furthermore, States like the United States, which implemented very few national public health measures, illustrate the irrelevance of simply delaying local transmission by a few days when applied to a global scale. As of November 13, 2020, the United States had 10,637,418 total cases and 242,861 total deaths, despite the implementation of travel restrictions on direct flights from China effective on February 2, 2020.³²⁸ Even if Wuhan's sanitary cordon was effective to slow the spread of the disease in China, it was entirely ineffective in slowing the spread of COVID-19 globally once it had been introduced.

B. China's Relationship With Human Rights and the Legality of the Sanitary Cordon of Wuhan

China has had a tremulous relationship with human rights law. Human rights were built the ideological foundation that "the *inherent dignity* [emphasis added] 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."³²⁹ Originally announced in the Universal Declaration of Human Rights ("UDHR") in 1948, the concept of universal human rights likewise emanated through the ICCPR and the ICESCR.³³⁰ Human rights under a universalist theory attach at birth by virtue of being human, without regard to country of origin, social status, or any other characteristic.³³¹ Universalism is supported by natural law and Descartes' theory of

³²⁴ Alexander Klimburg *et al.*, *Pandemic Mitigation in the Digital Age*, THE HAGUE CTR. FOR STRATEGIC STU. & THE AUSTRIAN INST. FOR EUR. AND SEC. POL'Y. (2020).

³²⁵ *Emerging COVID-19 Success Story: South Korea Learned the Lessons of MERS*, EXEMPLARS IN GLOB. HEALTH (Jun. 30, 2020), <https://ourworldindata.org/covid-exemplar-south-korea>.

³²⁶ *Novel Coronavirus (COVID-19) Cases*, JOHN HOPKINS U. CTR. FOR SYS. SCI. AND ENG'G (Nov. 11, 2020).

³²⁷ *Id.*

³²⁸ *Covid in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>; *See also* Steve Eder *et al.*, *430,000 People Have Traveled From China to U.S. Since Coronavirus Surfaced*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/us/coronavirus-china-travel-restrictions.html>.

³²⁹ UDHR, *supra* note 63, at Preamble.

³³⁰ Similar language is also present in the ICESCR and ICCPR, which state "recognizing that these rights derive from the *inherent dignity* of the human person" (emphasis added). ICCPR Preamble; ICESCR Preamble.

³³¹ Adaora Osondu-Oti, *China and Africa: Human Rights Perspective*, 41 AFRICA DEV. 49, 56 (2016).

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rationalism.³³² Natural law seemingly provides the most support for universalism as a body of unwavering moral principles, including the inalienable rights granted to all humans, that stem from divinity itself.³³³ Divine-created law is of the highest order, and thus trump all human-made law to the extent these laws are incompatible with natural law.³³⁴ Descartes' theory of rationalism supports individually held human rights as a result of the unique ability of humans to think rationally and logically rather than from divine origins of humans.³³⁵

Although the International Bill of Human Rights is based on universalist principles, these principles are not accepted by all States, including State parties. The primary critics are cultural relativists, who believe the imposition of universal human rights is a form of Western imperialism.³³⁶ Cultural relativists claim universal human rights are impossible in a world with diverse moral codes, religions, and cultures.³³⁷ In direct opposition to the theory of rationalism, the theory of cognitive relativism believes that truth has no objective standard, and depends on a number of factors.³³⁸ Some relativists further argue that morality depends on social construct, which varies from culture to culture.³³⁹ Others argue situational relativism, where universal rights cannot possibly exist when right and wrong depends on the situational context and cannot be preemptory.³⁴⁰

China is a predominant supporter of cultural relativism as it relates to human rights.³⁴¹ Despite Chang Peng-Chun, a Chinese diplomat and Confucian scholar, having a central role in drafting the UDHR, China routinely refuses to recognize the universality of human rights.³⁴² Prior to 2006, China prominently promoted the idea that universal rights were an impermissible form of Western imperialism. The night before the 1993 UN Conference on Human Rights, China along with a group of Asian nations adopted the Bangkok Declaration, which urged the international community to consider cultural differences when considering human rights.³⁴³ At the conference itself, a delegation led by China, Syria and Iran challenged universal human rights as being another form of Western imperialism, which fails to consider historical and economic development and cultural differences among developing nations.³⁴⁴

³³² *Id.* at 57.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 58.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² SONYA SCEATS WITH SHUAN BRESLIN, CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 1, 8 (2012).

³⁴³ Osondu-Oti *supra* note 331, at 58.

³⁴⁴ *Id.*

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Although China has become a party to a number of human rights conventions, it is clear that China nevertheless views human rights as aspirational goals rather than strictly legal principles.³⁴⁵ China argues that human rights should be implemented according to each State's social and economic conditions.³⁴⁶ In a recent white paper, China reiterated its aspirational view of human rights, stating:

“Different nations have different tasks and take different approaches to ensure human rights, because they differ in terms of stage of development, economy, culture and society. . . There is no universally applicable model, and human rights can only advance in the context of national conditions and people's needs.”³⁴⁷

One relevant cultural consideration is China's political and social collectivism. Collective and social interests are not only viewed with deference in the Chinese society but are considered predominant over individual interests.³⁴⁸

Human rights are considered as a subsidiary foreign policy concern, which are managed in the context of China's overall interests, including economic growth, preservation of China's political system, and defense of territorial integrity.³⁴⁹ Sovereignty is of paramount concern. China views sovereignty as the basis for which all human rights can be granted, because without a sovereign, human rights cannot be protected.³⁵⁰ Public order is therefore viewed as critically important to protect the sovereign, even at the expense of human rights.³⁵¹ The importance placed on sovereignty is reflected in China's frequent invocation of the principle of non-interference when responding to human rights violations committed by other States and also when challenging legitimacy of criticisms on China's own human rights violations.³⁵² China's role in human rights committees has largely been to further its views of human rights, and shield itself from international criticism.³⁵³

After supporting the creation of the Human Rights Council, China has repeatedly called for the Council to reconsider what China views as an unbalanced focus on civil and political rights compared to the economic, social, and cultural rights.³⁵⁴ China maintains that economic rights should be given higher import

³⁴⁵ SCEATS & BRESLIN, *supra* note 342.

³⁴⁶ *Id.*

³⁴⁷ THE STATE COUNCIL INFO. OFF. OF CHINA, SEEKING HAPPINESS FOR PEOPLE: 70 YEARS OF PROGRESS ON HUMAN RIGHTS IN CHINA (2019).

³⁴⁸ SCEATS & BRESLIN, *supra* note 342, at 9.

³⁴⁹ *Id.* at 1.

³⁵⁰ *Id.* at 7.

³⁵¹ *Id.* at 9.

³⁵² *Id.* at 45.

³⁵³ *Id.* at 4 (China used its position on the UN Security Council to defeat resolutions criticizing China's domestic human rights record after the 1989 Tiananmen Square protests).

³⁵⁴ SCEATS & BRESLIN, *supra* note 342, at 23; CHINESE MISSION, WIN-WIN COOPERATION FOR THE COMMON CAUSE OF HUMAN RIGHTS (MAR. 1, 2018) (“the right to development and economic, social, and cultural rights deserve greater attention”).

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than civil and political rights.³⁵⁵ In 1991, China published a white paper stating, “It is a simple truth that, for any country or nation, the right to subsistence is the most important of all human rights, without which the other rights are out of question.”³⁵⁶

1. *Economic, Social and Cultural Rights*

Given China’s collectivist views, combined with its stated preference for economic rights over political rights, it is unsurprising China is only a party to the ICESCR and not the ICCPR. Although China signed both the ICESCR and the ICCPR in 1997 and 1998 respectively, China only ratified the ICESCR, which it did in 2001.³⁵⁷ Article 12 of the ICESCR explicitly provides a right to health.³⁵⁸ China’s sanitary cordon of Wuhan was enacted to further the collective health of the Chinese population. In addition to imposing a sanitary cordon, public health officials also implemented screening and contact tracing, cancelled large public events and mass gatherings, and encouraged individuals to stay home to the extent possible.³⁵⁹ While the decision to impose a sanitary cordon may have exacerbated the situation in Wuhan, there is no evidence such a result was intended. Public health authorities showed dedication to preventing, treating, and controlling the epidemic, all of which are necessary under Article 12.³⁶⁰ China’s decision to enact the world’s largest sanitary cordon was yet another example of China placing paramount importance on economic, social, and cultural rights over individual freedoms, such as those in the ICCPR.

2. *Civil and Political Rights*

Because China has not ratified the ICCPR, China is not considered a party to the ICCPR and is not bound to its terms. However, by virtue of its signature, China has an obligation to refrain from acts which would defeat the object and purpose of the ICCPR unless and until China makes it clear that it does not intend to become party to the treaty, which it has not yet done.³⁶¹ The Human Rights Committee has stated the purpose and object of the ICCPR is to create legally binding standards for human rights.³⁶² Acts which offend peremptory

³⁵⁵ Osondu-Oti *supra* note 331, at 61.

³⁵⁶ INFORMATION OFFICE OF THE STATE COUNCIL OF CHINA, THE RIGHT TO SUBSISTENCE – THE FOREMOST HUMAN RIGHT THE CHINESE PEOPLE LONG FIGHT FOR (1991), <http://www.china.org.cn/e-white/7/index.htm>.

³⁵⁷ SCEATS & BRESLIN, *supra* note 342, at 5.

³⁵⁸ ICESCR, *supra* note 95, at 12(1).

³⁵⁹ Cyranoski, *supra* note 285.

³⁶⁰ ICESCR, *supra* note 95, at 12(2)(c).

³⁶¹ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (China has been a party to the Vienna Convention on the Laws of Treaties since 1997).

³⁶² U.N. Human Rights Comm., *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, ¶ 9 (Nov. 4, 1994) [hereinafter *General Comment 24*].

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norms would be considered incompatible with the object and the purpose of the covenant.³⁶³

It could be argued that China's unwavering claim that human rights cannot be "one-size-fits all" is in itself an act that defeats both the object and purpose of the ICCPR because the stated purpose of the ICCPR is to create legally binding standards for human rights, which are by very design "one-size-fits all."³⁶⁴ Furthermore, some scholars believe that China's track-record on civil and political human rights do not reflect any intention to be bound by the ICCPR.³⁶⁵ In 2019 alone, one human rights report found significant human rights violations in China, including arbitrary killings, forced disappearances, torture, arbitrary interference with privacy, interference with right of assembly and association, restrictions on religious freedoms, and number of other blatant violations of the ICCPR.³⁶⁶ The international community urges China to take some kind of action, and China remains under intense pressure to ratify the ICCPR from various NGOs.³⁶⁷ On the opposite end of the spectrum is law professor and lifetime member of the Council on Foreign Relations, Margaret Lewis, who has called for China to un-sign the ICCPR in light of worsening conditions for social and political rights in China since its signature.³⁶⁸

Regardless of whether China's actions violate its duty not to contravene the object and purpose of the ICCPR, China is not bound to any of the ICCPR's substantive terms. There is thus a challenge holding China liable for any civil or political human right violations. The UDHR may provide one mechanism for holding China liable through customary international law as the UDHR protects many of the same rights as the ICCPR. International opinion regarding whether the UDHR is customary law, and if so, which provisions are customary, is mixed.³⁶⁹ A minority of scholars believe the entire UDHR has evolved into customary law, while others believe that the first 21 articles have.³⁷⁰ Several States

³⁶³ *General Comment 24*, *supra* note 362, at ¶ 8 ("States may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language.").

³⁶⁴ See e.g., CHINESE MISSION, *supra* note 356; See THE STATE COUNCIL INFO. OFF. OF CHINA, *supra* note <CITE_Ref70585745">.

³⁶⁵ E.g., Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil & Political Rights*, 53 VAND. J. OF TRANSNAT'L L. 131 (2020).

³⁶⁶ U.S. DEP'T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS & LAB., CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2019 HUMAN RIGHTS REPORT, <https://www.state.gov/wp-content/uploads/2020/03/CHINA-INCLUSIVE-2019-HUMAN-RIGHTS-REPORT.pdf>.

³⁶⁷ Lewis, *supra* note 365 (PEN International, Reporters Without Borders, and Front Line Defenders have all called upon China to ratify the ICCPR).

³⁶⁸ *Id.*

³⁶⁹ See generally Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, 66 INT'L. L. ASS'N REP. CONF. 525 (1994).

³⁷⁰ Hannum, *supra* note 61, at 147.

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have concluded that some provisions of the UDHR are customary law, but have been unwilling to specify which.³⁷¹ There are also States which don't consider *any* part of the UDHR customary and instead view the rights therein binding only insofar as they are in other international covenants.³⁷² Freedom of movement, freedom of association and assembly, and prohibition on discrimination are all rights granted in both the ICCPR and the UDHR. Unlike its historical antecedents, the Wuhan sanitary cordon did not discriminate on any protected basis. Although the cordon did not violate the prohibition on discrimination, it did violate the freedom of movement and freedom of association and assembly when analyzed under the ICCPR.

a. *Freedom of Movement*

The sanitary cordon of Wuhan, like any sanitary cordon, necessarily implicates the right to freedom of movement. Both the ICCPR and the UDHR include provisions relating to freedom of movement. Article 12 of the ICCPR and Article 13 of the UDHR provide that every person lawfully within a State has the right to liberty of movement.³⁷³ China's sanitary cordon around Wuhan impeded the freedom of movement for 11 million residents.³⁷⁴ 11 million people were unable to exercise their right to leave the city for a staggering 76 days.³⁷⁵ The right to freedom of movement may be limited to protect public health, but restrictions on the right under the ICCPR must be necessary and proportionate.³⁷⁶ Proportionality is defined by both the ECHR and the Human Rights Committee to require the least intrusive measure available.³⁷⁷ While it would be unfair to hold China to *post hoc* scientific evidence which showed that the Wuhan sanitary cordon was ineffective at containing an outbreak once the disease had left the city, there was ample evidence that other public health measures would be more effective long before COVID-19. Studies showing that other public health measures, such as hand washing and mask wearing, are more effective than quarantine had been in existence for almost ten years at the time China implemented the cordon.³⁷⁸ Because quarantine measures had already been found less effective than other public health measures, such a large-scale sanitary cordon could hardly be considered the least intrusive instrument to prevent the spread of the disease.

³⁷¹ Comm. On the Enforcement of Human Rights Law, *supra* note 369, at 523-524 (such States include Denmark, Guyana, Switzerland, Austria, New Zealand, Jordan, and Japan).

³⁷² *Id.* at 543.

³⁷³ ICCPR, *supra* note 64, at 12; UDHR, *supra* note 62, at 13.

³⁷⁴ *Coronavirus: Wuhan shuts public transport over outbreak*, *supra* note 273.

³⁷⁵ Feng & Cheng *supra* note 281

³⁷⁶ ICCPR, *supra* note 64, at art. 12(3); *General Comment 27* *supra* note 71, at 14.

³⁷⁷ *General Comment 27*, *supra* note 71, at 14; *Glor v. Switz.*, App. No. 13444/04 (Apr. 30, 2009).

³⁷⁸ MITROPOULOS *supra* note 312, at 36.

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b. Freedom of Association and Assembly

A sanitary cordon also necessarily implicates the freedom of association and assembly, particularly when coupled with other social distancing measures and cancellations of public gatherings. The cordon alone tangentially impacts freedom of association and assembly in-so-far as association and assembly take place out of the perimeters of the city. Article 20(1) of the UDHR and Articles 18, 21 and 22 of the ICCPR address various aspects of freedom of association and assembly.³⁷⁹ Like the freedom of movement, the ICCPR allows limitations in each of these articles which are necessary and proportionate. As with the freedom of movement, the sanitary cordon fails to meet the principle of proportionality because to other, less intrusive, measures being more effective at halting the spread of disease. However, the other social distancing measures and cancellations of public gatherings that accompanied the sanitary cordon would be justified. Social distancing measures served the legitimate aim of public health and corresponded to a pressing social need, as required by the ECHR. Additionally, as discussed with historical case studies involving the freedom of association and assembly, there is no less intrusive means to prevent the spread of disease than social distancing orders. The World Health Organization recognized the necessity of limiting social gatherings to prevent the spread of COVID-19 even for States with low risk of community transmission.³⁸⁰ In comparison, the WHO recognized stringent movement restrictions only for an entirely uncontrolled epidemic, and even then the measures are advised to be geographically limited and aimed to be as short as possible.³⁸¹ The social distancing measures put in place in Wuhan other than the mass sanitary cordon were more appropriate public health responses which were both less intrusive and legally permissible.

3. China's Legal Responsibility

Although the sanitary cordon of Wuhan appears to violate the ICCPR, China is bound to neither the rights provided for in the ICCPR nor the ICCPR's standards for limitation or derogation of those rights. There is debate whether China would be liable for a violation of the UDHR's right to freedom of movement and freedom of association and assembly under a theory of customary international law. Freedom of movement and freedom of association may be customary law, although this is not a uniform opinion.³⁸² However, both rights are derogable under relevant treaty regimes, which would counter any claim that these rights are non-derogable under customary law.

The history of public health measures in response to pandemics, dating back to the 14th century, shows that States have a long record of imposing sanitary cor-

³⁷⁹ UDHR, *supra* note 62, at art. 20; ICCPR, *supra* note 64, at art. 18, 21-22 (under art. 18 regarding freedom of assembly as it relates to religion; art. 21 regarding the right to peaceful assembly; art. 22 regarding freedom of association).

³⁸⁰ WHO Interim Guidance *supra* note 291.

³⁸¹ *Id.*

³⁸² See e.g., Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, *supra* note 60, at 148; ROBERTSON, *supra* note 61.

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dons to control the spread of disease.³⁸³ While these practices began before the advent of the UDHR, they have continued through the 21st century with the SARS and Ebola pandemics.³⁸⁴ Furthermore, several States along with the World Health Organization openly congratulated China's public health measures.³⁸⁵ The ongoing State practice of implementing sanitary cordons (although admittedly none as large as the cordon of Wuhan) coupled with international praise China received for enacting such a measure both support a finding that no such customary international law exists. In contrast, the principle of non-discrimination *is* largely accepted to have formed into a peremptory norm of customary international law, but the sanitary cordon of Wuhan did not discriminate on any prohibited bases.³⁸⁶ Therefore, it is unlikely that China can be held legally responsible for any violations of civil in political rights through the sanitary cordon of Wuhan.

When a State clearly violates human rights, but no remedy exists, the question of how to hold States responsible for human rights violations, particularly when the State refuses to be bound to human rights law, must be asked. There are two options: put insurmountable pressure on the State to submit itself to human rights norms, or do not hold them accountable at all. Neither option is ideal. The first option could disrupt peace in the international community, potentially leading to war and greater violations of human rights. The second option requires admitting that human rights are only as "universal" as the most repressive regime believes them to be.³⁸⁷

³⁸³ See PORTER, *supra* note 3, at 36-38, 80-87.

³⁸⁴ See *e.g.*, Tognotti, *supra* note 5; Adalja, *supra* note 158.

³⁸⁵ Cyranoski, *supra* note 285.

³⁸⁶ MALCOM N. SHAW, INTERNATIONAL LAW 275 (6th ed. 2008); OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY, 64-68 (3d ed. 2019).

³⁸⁷ This statement is not referring to China as the "most repressive regime," but rather is general commentary on the choice between using coercive measures or force to enforce human rights or looking the other way. For example, inaction in response to the genocide in Rwanda in 1994 and Bosnia in 1995 implicitly chose the second option, where victims were left to wonder what human rights they possessed if not the right to life.

CHINA'S CRIMES AGAINST HUMANITY UPON THE UYGHUR
PEOPLE UNDER THE ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT

Alex Fox

Abstract

China's campaign of atrocities against its Uyghur minority is among the most pressing current human rights issues. The Chinese government has targeted Uyghurs within its borders and those who have sought refuge elsewhere; with upwards of a million Uyghurs being apprehended and confined within a network of concentration camps where many are then subjected to torture and forced labor. The conditions of these camps make the detained Uyghurs especially vulnerable to contagious disease, including COVID-19, due to the cramped cells, lack of medical resources and generally dire conditions. China has also pressured numerous other governments to repatriate Uyghurs who fled the country.

As the crimes against humanity and genocide continue, Uyghur advocacy groups have sought justice through the International Criminal Court ("ICC" or "Court"). While the Court ordinarily only has jurisdiction over member-States of the Rome Statute of the International Criminal Court ("Rome Statute"), it clarified in 2019 that it could extend jurisdiction to non-State Parties that committed offenses within the borders of State Parties. As China is not a State Party to the Rome Statute, it is generally not subject to the Court's jurisdiction. The Uyghur advocacy groups argue a workaround the jurisdictional issue, and rely instead upon China's repatriation of Uyghur people through unlawful arrests in and forced deportation from Cambodia and Tajikistan, both of which are State Parties to the Rome Statute.

In December 2020, the Chief Prosecutor for the Court announced the decision to withhold any investigation into the alleged crimes until further evidence is submitted. This decision allowed the Court to launch an investigation because the crimes of forcible transfer and deportation were committed at least in part on the territory of a State Party, Bangladesh. Should the Uyghur advocacy groups provide sufficient evidence, the Court could rely on its 2019 landmark decision to extend jurisdiction over the Rohingya crisis in Myanmar, a non-State Party. In the Uyghur's case, evidence of forcible transfer and deportation from Cambodia and Tajikistan could provide a similar basis for the International Criminal Court to extend jurisdiction over China. Without the Court's involvement, the Uyghurs have few alternative means of justice.

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I. Introduction

The Chinese Communist Party has launched a targeted campaign against the Uyghur¹ population and members of other Turkic Muslim minority groups within Xinjiang, China as well as those who had already fled persecution; forcing them back into Xinjiang.² Survivors, human rights organizations, journalists, scholars and states have documented countless human rights abuses against the Uyghur people including: coercive population control methods, forced labor, arbitrary detention in internment camps, torture, physical and sexual abuse, mass surveillance, family separation, and repression of cultural and religious expression.³ The Chinese government has attempted to justify these alleged abuses under the pre-

¹ The Editors of Encyclopedia Britannica, *Uyghur*, ENCYCLOPEDIA BRITANNICA (2020), <https://www.britannica.com/topic/Uyghur> (last visited Dec 3, 2020). Uyghur can also be spelled as Weiwu'er, Uygur or Uighur.

² U.S. Department of State, *The Chinese Communist Party's Human Rights Abuses in Xinjiang*, <https://www.state.gov/ccpabuses> (last visited Oct. 9, 2020); Emily Rauhala, *New Evidence Emerges of China Forcing Muslims into 'Reeducation' Camps*, THE WASH. POST (Aug. 10, 2018), https://www.washingtonpost.com/world/asia_pacific/new-evidence-emerges-that-china-is-forcing-muslims-into-reeducation-camps/2018/08/10/1d6d2f64-8dce-11e8-9b0d-749fb254bc3d_story.html.

³ *Id.*

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text of fighting against ethnic separatism, religious extremism and violent terrorism;⁴ however, many human rights organizations have found this insufficient.

A. The Complaint Filed with the International Criminal Court

On July 6, 2020, the East Turkistan Government in Exile and the East Turkistan National Awakening Movement jointly submitted a complaint to the Office of the Prosecutor (“OTP”) at the International Criminal Court (“ICC” or “Court”) against the Chinese government, alleging that Chinese officials engaged in crimes against humanity and genocide against the Uyghur minority of China.⁵ The complaint identifies over thirty Chinese officials who were allegedly involved in this campaign, including President Xi Jinping, public governors and top officials of the People’s Liberation Army.⁶ Their alleged crimes, which are all detailed in the complaint, include forced sterilization, forcible transfer and separation of children from their families, organ harvesting and other repressive measures.⁷

The ICC, established by the Rome Statute of the International Criminal Court (“The Rome Statute”), is mandated to end impunity for the perpetrators of genocide, crimes against humanity, war crimes, and crimes of aggression.⁸ State Parties to the Rome Statute are subject to its jurisdiction;⁹ however, the United Nations Security Council may refer cases alleging crimes against humanity to the ICC from non-State Parties, thereby granting jurisdiction for that specific case.¹⁰ China is not a party to the ICC, and it therefore not subject to the Courts jurisdiction.¹¹ Additionally, China is one of the five permanent members of the UNSC, and as such, has the power to veto any “substantive” resolution or referral to the ICC.¹² Due to this limitation, Uyghur advocacy groups and attorneys have at-

⁴ *Id.*; Austin Ramzy & Chris Buckley, ‘Absolutely No Mercy’: Leaked Files Expose How China Organized Mass Detentions of Muslims, THE N.Y. TIMES (Nov. 16, 2019), <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>.

⁵ Press Release, Etge, *Uyghur Genocide and Crimes Against Humanity: Credible Evidence submitted to ICC for the first time asking for investigation of Chinese officials East Turkistan Government in Exile*, <https://east-turkistan.net/press-release-uyghur-genocide-and-crimes-against-humanity-credible-evidence-submitted-to-icc-for-the-first-time-asking-for-investigation-of-chinese-officials/> (last visited Sep. 12, 2020) [hereinafter Press Release].

⁶ *Id.*

⁷ *Id.*

⁸ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁹ *Id.*

¹⁰ Louise Arbour, *The Relationship Between the ICC and the UN Security Council*, 20 Global Governance: A Review of Multilateralism and International Organizations 195–201, 195 (2014); Jess Kyle, *The New Legal Reality: Peace, Punishment, and Security Council Referrals to the ICC*, 25 Transnat’l L. & Contemp. Probs. 109, 109–10 (2015).

¹¹ Dan Zhu, *The Complementarity Regime of the International Criminal Court: Concerns of China*, 41 U. PA. J. Int’l L. 177 (2019) [hereinafter Zhu]; Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW AND CONTEMP. PROBS. 67–118, 68, 76 (2001).

¹² *The UN Security Council*, COUNCIL ON FOREIGN RELATIONS (Sept. 16, 2020), <https://www.cfr.org/backgrounder/un-security-council>.

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tempted to bring the case under the ICC's jurisdiction through other means. They found their workaround when the ICC clarified in 2018 and 2019 that the Court may exercise jurisdiction over international crimes against humanity when part of the criminal conduct takes place on the territory of a signatory party.¹³ The complaint argued that the deportation of Uyghur people from Tajikistan and Cambodia into Xinjiang, where they were then detained and subjected to international crimes, provided a basis for the Court's jurisdiction because both Tajikistan and Cambodia are signatories to the Rome Statute.¹⁴

On December 14, 2020, the OTP Chief prosecutor, Fatou Bensouda, announced the Court's decision not to pursue an investigation of the crimes alleged in the complaint.¹⁵ Bensouda stated that the office found "no basis to proceed at this time" due to insufficient evidence showing that Chinese officials had committed crimes over which the court had jurisdiction, noting that the alleged abuses had "been committed solely by nationals of China within the territory of China."¹⁶ The decision did not exclude the possibility that the Uyghur groups present more evidence of the alleged crimes, upon which the OTP could decide to launch an investigation.¹⁷

This comment will address the ICC's decision and jurisdiction over China and the Uyghur crisis. Part II briefly summarizes the historical and recent treatment of Uyghur people in China. Part III focuses on the jurisdiction of the ICC and its landmark decision in the case of the Rohingya crisis in Myanmar. Part IV addresses the basis for the Court's jurisdiction over China based on the Rohingya decision. Finally, part V discusses the implications of the Court's dismissal of the Uyghur complaint and provides alternative means by which the Uyghur people may seek justice.

II. Background

China often considers itself to be a "culturally homogenous nation-state" composed of the Han-Chinese ethnic majority,¹⁸ disregarding its numerous ethnic minorities who generally inhabit regions of China that were incorporated into

¹³ Press Release, INT'L CRIM. CT, ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh (Sept. 6, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1403> [hereinafter *ICC Pre-Trial Chamber Press Release*]; *Q&A: The International Criminal Court and the United States*, Human Rights Watch (Sept. 2, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

¹⁴ Press Release, *supra* at note 5.

¹⁵ *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Oct. 9, 2020) [hereinafter *How the Court Works*]; The Off. of the Prosecutor, *Report on Preliminary Examination Activities 2020*, 18-20, <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Dec. 14, 2020). [hereinafter *Report on Preliminary Examination Activities 2020*].

¹⁶ *Id.*

¹⁷ Javier C. Hernández, *I.C.C. Won't Investigate China's Detention of Muslims*, THE N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/world/asia/icc-china-uyghur-muslim.html>.

¹⁸ Michael Clarke, *Ethnic Separatism in the People's Republic of China History, Causes and Contemporary Challenges*, 12 EUR. J. OF E. ASIAN STUD. 109-133, 110 (2013); Barry Sautman, *Scaling Back Minority Rights: The Debate about China's Ethnic Policies*, 46 STAN. J. INT'L L. 51, 53-4 (2010).

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Chinese territory in the seventeenth and eighteenth centuries.¹⁹ One of these ethnic minorities, the Uyghurs, is a largely Muslim Turkic ethnic group who have lived in the far northwest region of modern China for centuries.²⁰ Official figures released by Chinese authorities place the population of Uyghurs within the Xinjiang region to be just over 11 million, comprising approximately half of the total regional population.²¹ In 1945 the Uyghur minority attempted to secede from China and establish the East Turkestan Republic;²² however, the People's Liberation Army, the military force of the Chinese Communist Party ("CCP"), regained control over the Xinjiang region after WWII.²³ In 1955, the Xinjiang Uyghur Autonomous Region ("XUAR") was established and eventually recognized under the Law of the People's Republic of China on Regional National Autonomy in 1984.²⁴ Despite its name, the Uyghur people residing in the XUAR are far from autonomous.

A. History of the Majority Treatment of the Uyghur Minority

Under the rule of Mao Zedong, the country was focused on reducing the economic and social divide in the Marxist-Leninist class struggle between the Han majority and ethnic minorities, including the Uyghurs.²⁵ The government introduced work programs such as the Xinjiang Production and Construction Corps ("XPCC"), which used "military manpower for economic and infrastructural development" and the Great Leap Forward strategy, targeting minorities "so as to achieve their assimilation with the Han."²⁶ Mao's successor, Deng Xiaoping, led the CCP to encourage Han migration into these regions in order to dilute the population of the ethnic minority located there.²⁷ Under Hu Jintao, as a response to the rising fear of terrorism following the September 11, 2001 attacks,²⁸ China

¹⁹ MORRIS ROSSABI, *A HISTORY OF CHINA* 371 (John Wiley & Sons, Inc., 2014); Peter C. Perdue, *Military Mobilization in Seventeenth and Eighteenth-Century China, Russia, and Mongolia*, 30 *MOD. ASIAN STUD.* 757-793, 761 (1996).

²⁰ Ciara Finnegan, *The Uyghur Minority in China: A Case Study of Cultural Genocide, Minority Rights and the Insufficiency of the International Legal Framework in Preventing State-Imposed Extinction*, 9 *LAWS - MAYNOOTH UNIVERSITY* 1, 6 (2020).

²¹ BBC News, *The Uighurs and the Chinese state: A long history of discord* (Mar. 26, 2020), <https://www.bbc.com/news/world-asia-china-22278037>; Lindsay Maizland, *China's Repression of Uighurs in Xinjiang*, Council on Foreign Relations (Mar. 1, 2020), <https://www.cfr.org/backgrounder/chinas-repression-uighurs-xinjiang>.

²² Matthew D. Moneyhon, *China's Great Western Development Project in Xinjiang: Economic Palliative, or Political Trojan Horse*, 31 *DENV. J. INT'L L. & POL'Y* 491, 498 (2003).

²³ Bai Guimei, *The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities*, 3 *CHINESE J.L OF INT'L L.* 441, 450-453 (2004) (explaining post WWII, China experienced a shift in political control including the rise of the Chinese communist party, CCP, and the establishment of XUAR).

²⁴ *Id.*

²⁵ Clarke, *supra* note 18, at 121.

²⁶ *Id.* at 119.

²⁷ *Id.* at 121.; Angel Difan Chu, *The "Clash of Civilizations" Between Muslims and the Han Within China*, NATO ASS'N OF CAN. (Jan. 26, 2015), <http://natoassociation.ca/the-clash-of-civilizations-between-muslims-and-the-han-within-china>

²⁸ *Id.* at 123.

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implemented its “Strike Hard”²⁹ campaign with special force in Xinjiang arguing that its efforts to quash any Uyghur separatist inclinations aligned with the United States’ worldwide “war on terror.”³⁰ The goal of the campaign was to “hit at enemy forces, purify society and educate the masses.”³¹

The CCP continued to utilize this fear under Xi Jiang to justify repressive policies against the minorities in Xinjiang,³² using a meeting with President Bush in October 2001 to rally international support for quelling Muslim separatists in Xinjiang.³³ With international backing, China broadened its systematic persecution of the Uyghur population in the following decades, enforcing mass arrests in the region, banning Muslims from observance of Ramadan,³⁴ and confining at least one million Uyghur and non-Han Muslims into internment camps.³⁵

B. Counter-Terrorism Policies

In 2015, a new National Security Law was passed by the National People’s Congress which aimed to stifle internal threats, including the activities of the Uyghur population.³⁶

Article 3 of the new National Security Law defines ‘terrorism’ in such a broad manner that activities which fall within the scope of legitimate religious practices in other jurisdictions would otherwise rendered as criminal acts under this legislation.³⁷ The National Security Law came under the scrutiny of the UN High Commissioner, Zeid Ra’ad Al Hussein, due to its lack of specificity which left “the door wide open to further restrictions of the rights and freedoms of Chinese citizens, and to even tighter control of civil society by the Chinese authorities than there is already.”³⁸

²⁹ Dana Carver Boehm, *China’s Failed War on Terror: Fanning the Flames of Uighur Separatist Violence*, 2 BERKELEY J. OF MIDDLE EASTERN & ISLAMIC L. 61–124, 63 (2009).

³⁰ *Id.* at 64.

³¹ Willy Wo-Lap Lam, *China launches ‘suppression’ campaign in Xinjiang*, CNN (Oct. 25, 2001), <https://edition.cnn.com/2001/WORLD/asiapcf/east/10/25/china.willylam/>.

³² *Id.*

³³ Robin Wright & Edwin Chen, *Bush Says China Backs War on Terror*, L.A. TIMES (Oct. 18, 2001), <https://www.latimes.com/la-101901bush-story.html>

³⁴ BBC, *China Bans Xinjiang Officials from Observing Ramadan Fast* (July 2, 2014), <https://www.bbc.com/news/world-asia-china-28123267>.

³⁵ Nick Cumming-Bruce, *U.N. Panel Confronts China over Reports that It Holds a Million Uighurs in Camps*, THE N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/world/asia/china-xinjiang-un-uighurs.html>; Gene A. Bunin, *Xinjiang’s Hui Muslims Were Swept into Camps Alongside Uighurs*, FOREIGN POL’Y (Feb. 10, 2020, 10:29 AM), <https://foreignpolicy.com/2020/02/10/internment-detention-xinjiang-hui-muslims-swept-into-camps-alongside-uighur>.

³⁶ National Security Law of the People’s Republic of China (promulgated by Ministry of National Defence of the People’s Republic of China, effective 1 July 2015).

³⁷ *Id.* at art 2.; Enshen Li, *China’s New Counterterrorism Legal Framework in the Post-2001 Era*, 19 NEW CRIM. L. REV. 344–381, 381 (2016).

³⁸ *UN human rights chief says China’s new security law is too broad, too vague*, OHCHR (July 7, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16210&LangID=E>.

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C. The Detention of Uyghurs and COVID-19

A large part of the Chinese effort to maintain control over the Uyghurs and other ethnic minorities has involved “reeducation” camps,³⁹ primarily in the Xinjiang region, where people have been subject to mass arbitrary detention and torture.⁴⁰ The United States has reported that since April 2017, Chinese authorities have detained at least eight-hundred thousand, and possibly more than two million, Uyghurs and minority members in internment camps for indefinite periods of time.⁴¹ Uyghurs have been detained for a variety of reasons from attending services at mosques⁴² and having more than three children;⁴³ however, many of the detained Uyghur people have not been charged with crimes and have no ability to take legal action challenging their detentions.⁴⁴

Many human rights advocacy groups have voiced concerns over the potential impact of COVID-19 on this detained population.⁴⁵ However, with the Chinese government implemented media blackout, there is little information about the number of cases and deaths related to COVID-19 in the Xinjiang region.⁴⁶ Detention centers shown on Chinese state television appear to have dorms with six to eight beds, while previously detained people have reported overcrowded cells with as many as sixty people per cell, poor sanitary conditions and inadequate food and clothing, and mistreatment.⁴⁷ Densely populated facilities such as the Xinjiang centers, where restrictive conditions limit the detainees’ abilities to engage in social distancing or hygiene practices, have been shown to amplify the spread of infectious diseases including COVID-19.⁴⁸ While the COVID-19 pandemic’s impact on the Uyghurs and other detained people in Xinjiang is publicly

³⁹ *China: “Where are they?” Time for Answers About Mass Detentions in the Xinjiang Uighur Autonomous Region*, AMNESTY INT’L (Sept. 24, 2018), <https://www.amnesty.org/en/documents/asa17/9113/2018/en/> (last visited Mar 10, 2021).

⁴⁰ *China: Massive Crackdown in Muslim Region*, HUMAN RIGHTS WATCH (Sept. 9, 2018), <https://www.hrw.org/news/2018/09/09/china-massive-crackdown-muslim-region> (last visited Mar. 10, 2021).

⁴¹ Hearing, *Foreign Relations Subcommittee: The China Challenge, Part 3: Democracy, Human Rights, and the Rule of Law*, U.S. SENATE COMM. ON FOREIGN REL. (2018), <https://www.foreign.senate.gov/hearings/the-china-challenge-part-3-democracy-human-rights-and-the-rule-of-law-12042018> (last visited Mar. 19, 2021).

⁴² Lindsay Maizland, *China’s Repression of Uyghurs in Xinjiang*, Council on Foreign Relations (Mar. 1, 2021), <https://www.cfr.org/backgrounder/chinas-repression-uyghurs-xinjiang>.

⁴³ Austin Ramzy, *How China Tracked Detainees and Their Families*, THE N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/02/17/world/asia/china-reeducation-camps-leaked.html>.

⁴⁴ Maizland, *supra* note 42.

⁴⁵ *Id.*; Eeman Talha, *COVID-19 and the Plight of the Uighur Community in China*, HUMAN RIGHTS PULSE (July 14, 2020), <https://www.humanrightspulse.com/mastercontentblog/covid-19-and-the-plight-of-the-uighur-community-in-china>.

⁴⁶ *Id.* (State officials deemed the number of infected Uyghurs in the Xinjiang province a state secret).

⁴⁷ John Sudworth, *China Uyghurs: A model’s video gives a rare glimpse inside internment*, BBC News (Aug. 4, 2020), <https://www.bbc.com/news/world-asia-china-53650246>.

⁴⁸ *Prevention and control of COVID-19 in prisons and other places of detention*, WORLD HEALTH ORG. (2021), <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/publications-and-technical-guidance/vulnerable-populations/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention> (last visited Mar 20, 2021).

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unknown, given the information available, it is clear the virus has only exacerbated the vulnerable conditions to which these people have been subjected.

D. Deportation of Uyghur Minority Members from Cambodia and Tajikistan

Those Uyghurs who have sought asylum in, or emigrated to other countries have, on multiple occasions, been subject to forced deportation back to China.⁴⁹ The complaint filed with the ICC relied upon the deportation of Uyghur people from Cambodia and Tajikistan to establish the Court's jurisdiction; although, those are not the only countries to have unlawfully deported Uyghur refugees.⁵⁰ In 2009, the Cambodian government forced twenty Uyghur people, including two children, back to China.⁵¹ Following the deportation, then-Chinese Vice President Xi Jinping made a short visit to Cambodia with a pledge of \$1.2 billion in aid to Cambodian Prime Minister Hun Sen's government.⁵²

Turkey has historically offered refuge to the Uyghurs, and is home to one of the largest populations of Uyghur people outside of China, with Turkish officials having condemned the Uyghur internment camps in Xinjiang.⁵³ However, recent economic pressure from China has resulted in the deportation of at least four Uyghur people from Turkey via Tajikistan to China in 2019.⁵⁴ Extradition through Tajikistan was made possible through the Tajik-Chinese agreement on the mutual extradition of suspected and convicted felons, agreed upon in 2015.⁵⁵ In December 2020, China announced the ratification of an extradition treaty with Turkey for the purpose of the timely return of certain refugees and Muslim

⁴⁹ "Eradicating Ideological Viruses", HUMAN RIGHTS WATCH (2020), <https://www.hrw.org/report/2018/09/09/eradicating-ideological-viruses/chinas-campaign-repression-against-xinjiangs> [hereinafter "Eradicating Ideological Viruses"].

⁵⁰ *China: Forcibly Returned Uighur Asylum Seekers At Risk*, HUMAN RIGHTS WATCH (Dec. 22, 2009), <https://www.hrw.org/news/2009/12/22/china-forcibly-returned-uyghur-asylum-seekers-risk> (last visited Nov 5, 2020).

⁵¹ Aun Chhengpor, *ICC Prosecutor Says Cambodia's Uyghur Deportation Insufficient to Initiate Investigation*, VOA (Dec. 17, 2020), <https://www.voacambodia.com/a/icc-prosecutor-says-cambodia-uyghur-deportation-insufficient-to-initiate-investigation/5703104.html>; Seth Mydans, *After Expelling Uighurs, Cambodia Approves Chinese Investments*, THE N.Y. TIMES (Dec. 21, 2009), <https://www.nytimes.com/2009/12/22/world/asia/22cambodia.html>.

⁵² *Id.*

⁵³ Joanna Kakissis, *'I Thought It Would Be Safe': Uighurs In Turkey Now Fear China's Long Arm*, NPR (Mar. 13, 2020), <https://www.npr.org/2020/03/13/800118582/i-thought-it-would-be-safe-uyghurs-in-turkey-now-fear-china-s-long-arm>; Shannon Tiezzi, *Why Is Turkey Breaking Its Silence on China's Uyghurs?*, THE DIPLOMAT (Feb. 12, 2019), <https://thediplomat.com/2019/02/why-is-turkey-breaking-its-silence-on-chinas-uyghurs/>.

⁵⁴ *Uyghur Mother, Daughters Deported to China From Turkey*, RADIO FREE ASIA (Aug. 9, 2019), <https://www.rfa.org/english/news/uyghur/deportation-08092019171834.html>; Carlotta Gall, *They Built a Homeland Far From China's Grip. Now They're Afraid*, THE N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/world/asia/xinjiang-turkey-china-muslims-fear.html>.

⁵⁵ *Tajik Lawmakers Back Tajik-Chinese Extradition Deal*, RADIO FREE EUROPE / RADIO LIBERTY (May 20, 2015), <https://www.rferl.org/a/china-tajikistan-extradition-deal/27027076.html>.

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Uyghurs suspected of “terrorism,” which will likely eliminate the need for Turkey to deport Uyghur people through Tajikistan.⁵⁶

Egypt, Bulgaria, India and the United Arab Emirates, among others, have also detained and deported Uyghur people at the request of the Chinese government.⁵⁷ In July 2017, Egyptian authorities arrested at least sixty-two Uyghurs who were living in Egypt without informing them of the grounds for their detention and denying access to lawyers and family members.⁵⁸ At least twenty were deported back to China.⁵⁹ Since 2014, Thailand has complied with the Chinese governments requests to hold and deport large groups of Uyghur people back to China.⁶⁰

III. Discussion

A. The Scope and Legality of the Rome Statute of the International Criminal Court

1. Structure

The Rome Statute is the diplomatic treaty that established the ICC in July 1998.⁶¹ Initially, one hundred states adopted the statute while China joined the United States, Iraq, Libya, Yemen, Qatar and Israel in opposition to the statute.⁶² The ICC was the first permanent international court established with the main goal of addressing the impunity of offenders who commit the most severe crimes that victimize the international community as a whole.⁶³ As of 2020, one-hundred twenty three countries are State Parties to the Rome Statute, having ratified and signed the original law, thereby agreeing to support the ICC's efforts and goals.⁶⁴

As an intergovernmental organization and tribunal, the ICC possesses treaty-making power, the right to entertain diplomatic relations, and active and passive

⁵⁶ *China announces ratification of extradition treaty with Turkey*, FRANCE 24 (Dec. 28, 2020), <https://www.france24.com/en/asia-pacific/20201228-china-announces-ratification-of-extradition-treaty-with-turkey>.

⁵⁷ “Eradicating Ideological Viruses”, *supra* note 49.

⁵⁸ Egypt: Don't Deport Uyghurs to China, Human Rights Watch (July 8, 2017), <https://www.hrw.org/news/2017/07/07/egypt-dont-deport-uyghurs-china>.

⁵⁹ “Eradicating Ideological Viruses”, *supra* note 49.

⁶⁰ Edward Wong & Poypiti Amatatham, *Ignoring Protests, Thailand Deports About 100 Uighurs Back to China*, THE N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/world/asia/thailand-deports-uyghur-migrants-to-china.html>.

⁶¹ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999).

⁶² ICC: The U.S. and the ICCHRW (n.d.), <https://www.hrw.org/legacy/campaigns/icc/us.htm>.

⁶³ Ahmed Isau, *The International Criminal Court (ICC): Jurisdictional Basis and Status*, 6 NNAMDI AZIKIWE U. J. INT'L L. & JURIS. 34, 37 (2015).

⁶⁴ The States Parties to the Rome Statute, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 26, 2020).

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international responsibility.⁶⁵ The Rome Statute is based on a cooperative relationship at a national and international level, relying on regular contact between the Court and States.⁶⁶ The Court has responsibility over acts committed by and against nationals of member-States.⁶⁷

The Rome Statute provides that the jurisdiction of the ICC shall be complementary to States Parties' national criminal courts or tribunals' jurisdictions.⁶⁸ Under the Rome Statute's complementarity principle, the ICC is intended to be a "court of last resort", investigating and prosecuting only where national courts or tribunals are unwilling or unable to prosecute.⁶⁹ Thus, primary responsibility for prosecuting crimes of international concern falls on the national criminal courts or tribunals, while the ICC provides certain standards to be met with regards to the crimes listed in its Article 5.⁷⁰ So long as a national criminal court is able and willing to investigate and prosecute the matter which has come to the ICC's attention, the ICC does not have jurisdiction.⁷¹

Generally, international law is not bound to a system of precedent comparable to that which exists in common law systems.⁷² The ICC, or any other international tribunal, is not bound by its own previous decisions or those of other courts and tribunals.⁷³ Unique to international tribunals, Article 21 of the Rome Statute specifically provides the applicable law for the Court.⁷⁴ Under its hierarchy, the Court must first apply the Rome Statute to the case at hand.⁷⁵ Should the Rome Statute fail to address the issue, and the issue fall under the crimes outlined in Article 5, the Court must turn to the Elements of Crimes—an adopted document that elaborates on the crimes described in the Rome Statute.⁷⁶ The Court must also look to its Rules of Procedure and Evidence.⁷⁷ If the Rome Statute, the

⁶⁵ Sascha Rolf Lüder, *The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice*, 84 REVUE INTERNATIONALE DE LA CROIX-ROUGE/INTERNATIONAL REVIEW OF THE RED CROSS, 79-80, 83 (2002).

⁶⁶ Rome Statute, *supra* note 8, at art. 86-87; *What is Complementarity? National courts, the ICC and the Struggle Against Impunity*, THE INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/sites/default/files/subsites/complementarity-iccl> (last visited Jan. 2, 2021).

⁶⁷ Lüder, *supra* note 65, at 83.

⁶⁸ *How the Court Works*, *supra* note 15.

⁶⁹ Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N.: U.N. CHRONICLE, <https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (last visited Nov. 7, 2020).

⁷⁰ *How the Court Works*, *supra* note 15.

⁷¹ *Id.*

⁷² Statute of the International Court of Justice, June 26, 1945, 59 Stat. 105, 33 U.N.T.S. 933.

⁷³ Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT'L LAW J. 71, 73 (2017), <https://harvardilj.org/wp-content/uploads/sites/15/Greenwood-Formatted.pdf>.

⁷⁴ Rome Statute, *supra* note 8, art. 21(1)(a).

⁷⁵ *Id.*

⁷⁶ The Elements of Crimes of the Int'l Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

⁷⁷ The Rules of Procedure and Evidence of the Int'l Criminal Court, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000).

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Elements of Crimes and the Rules of Procedure and Evidence do not adequately address an issue, Article 21(1)(b) requires the Court to apply applicable treaties and principles of international law.⁷⁸ Finally, if still unresolved, the Court must turn to a third category of law, the “general principles of law derived by the Court from national laws of legal systems of the world including the national laws of States that would normally exercise jurisdiction over the crime.”⁷⁹

Relevant to Uyghur's argument that the Court extend jurisdiction over China, the Rome Statute expressly permits the Court to utilize its own prior rulings in decision making.⁸⁰ On various occasions, the ICC has also referred to decisions of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) on substantive law.⁸¹

2. *Subject-Matter and Territorial Jurisdiction*

The definition of crimes over which the ICC has jurisdiction, reflects widely accepted international norms based on existing treaties on international humanitarian law and customary international law.⁸² Article 5(1) of the Rome Statute provides that the jurisdiction of the ICC be limited to the most serious crimes of concern to the international community as a whole.⁸³

Article 5 of the Rome Statute also grants the ICC jurisdiction over the four main crimes mentioned above: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.⁸⁴ The Rome Statute broadly defines crimes against humanity in its Article 7,⁸⁵ with crimes against humanity must be committed pursuant to a widespread or systematic attack.⁸⁶ The list of acts that constitute crimes against humanity includes extermination, enslavement and deportation or forcible transfer, amongst others.⁸⁷

Generally, the Court can only exercise jurisdiction in cases where the accused is a national of a state party, the alleged crime took place on the territory of a

⁷⁸ Rome Statute, *supra* note 8, art. 21(1)(b).

⁷⁹ *Id.* at Art. 21(1)(c); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. OF INT'L LAW 543, 550 (2010).

⁸⁰ Rome Statute, *supra* note 8, art. 21(1)(c).

⁸¹ VOLKER NERLICH, *THE STATUS OF ICTY AND ICTR PRECEDENT IN PROCEEDINGS BEFORE THE ICC: THE EMERGING PRACTICE OF THE INT'L CRIM. CT.* 305 (Carston Stahn & Göran Sluiter eds., 2009).

⁸² Isau, *supra* note 63, at 40.

⁸³ Rome Statute, *supra* note 8, art. 5.

⁸⁴ *Id.*

⁸⁵ U.N. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Crimes Against Humanity*, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> (last visited Dec 9, 2020).

⁸⁶ Rome Statute, *supra* note 8, art. 7(1).

⁸⁷ *Id.* art. 7(1)(a-k) (listing the acts that constitute crimes against humanity, such as murder, extermination, enslavement, deportation or forcible transfer, severe arbitrary deprivation of liberty, torture, persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, amongst other acts).

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state party, or a situation is referred to the Court by the UNSC.⁸⁸ Under specific circumstances, the ICC will exercise jurisdiction over nationals of non-party States.⁸⁹ The ICC may try nationals of non-party States in situations referred to the ICC Prosecutor by a State party⁹⁰ or by the UNSC.⁹¹ The ICC may rely on territorial jurisdiction when non-party state nationals within the territory of a Party State commit a crime enumerated in Article 5 of the Rome Statute.⁹²

B. ICC Investigation into Myanmar's Alleged Crimes Against Rohingya Population

In 2019, the ICC's Pre-Trial Chamber made a historic decision to extend jurisdiction over the Rohingya crisis in Myanmar and Bangladesh.⁹³ The Rohingya are a minority ethnic group, the majority of whom are Muslim, who have primarily resided in Myanmar's Rakhine state along the southern border of Bangladesh.⁹⁴ Despite residing in Myanmar for generations, the government in Myanmar categorizes the Rohingya people as illegal immigrants.⁹⁵ After many violent interactions between the Rohingya and majority Rakhine population, a group of Rohingya fighters calling itself the Arakan Rohingya Salvation Army ("ARSA")⁹⁶ staged attacks on border posts in 2016, killing nine border officers and four soldiers.⁹⁷ Following this attack, Myanmar's military, officially known as the Tatmadaw, launched a crackdown, involving human rights violations against the Rohingya people, including unlawful killings, arbitrary arrests, and the rape and sexual assault of women and girls.⁹⁸ The United Nations ("UN") launched an investigation into these attacks, finding that the Tatmadaw had explicitly told the Rohingya people to "Go to Bangladesh," and threatened to torch

⁸⁸ *Id.* art. 13.

⁸⁹ *Id.*

⁹⁰ *Id.* art. 13(a).

⁹¹ *Id.* art. 13(b).

⁹² *Id.* art. 12(2)(a).

⁹³ Carlos E. Gomez, *The International Criminal Court's Decision on the Rohingya Crisis: The Need for A Critical Redefinition of Trans-Border Jurisdiction to Address Human Rights*, 50 CAL. W. INT'L L.J. 177, 184-85 (2019).

⁹⁴ *Who are the Rohingya and why are they fleeing Myanmar?*, AMNESTY INT'L (Sept. 7, 2017, 3:18 PM), <https://www.amnesty.org/en/latest/news/2017/09/who-are-the-rohingya-and-why-are-they-fleeing-myanmar/>.

⁹⁵ *Id.*

⁹⁶ *The Rohingya: Tracking the history of today's refugee crisis*, NEW HUMANITARIAN (Aug. 24, 2020), <https://www.thenewhumanitarian.org/in-depth/myanmar-rohingya-refugee-crisis-humanitarian-aid-bangladesh>.

⁹⁷ *China announces ratification of extradition treaty with Turkey*, *supra* note 56.

⁹⁸ *Id.*

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their homes and murder them if they failed to comply.⁹⁹ Since 2017, an estimated seven-hundred forty-five thousand Rohingya people have fled to Bangladesh.¹⁰⁰

On April 9, 2018, Chief Prosecutor Bensouda requested that the ICC's Pre-Trial Chamber assess whether the Court had jurisdiction to investigate the crimes against humanity, specifically deportation, occurring in Myanmar against the Rohingya minority.¹⁰¹ Myanmar is not a State Party to the Rome Statute; however, Bangladesh ratified the Statute in 2010.¹⁰² The ICC's limited jurisdiction presented several challenges to the court in determining whether it could assert jurisdiction over the Rohingya conflict.¹⁰³ Because the UNSC had not referred the deportation to the ICC, a State Party national had not committed the crime due to the fact Myanmar is not a State Party to the Rome Statute, and Myanmar's non-Party status prevented the court from extending its jurisdiction based on territory, the court needed to justify its jurisdiction by proving that the crime of deportation had occurred inside a State Party's territory.¹⁰⁴ The UN report was used to provide evidence that the Tatmadaw violated Article 7(1)(d) of the Rome Statute, which prohibits "deportation or forcible transfer of the population" as a crime against humanity.¹⁰⁵ Under Article 7(1)(d) Elements of the Crimes, the perpetrator must unlawfully deport to "another State" by expulsion or coercion persons lawfully present in the area from which they were driven as part of a widespread or systematic attack against the civilian population the nature of which the perpetrator was aware.¹⁰⁶

On November 14, 2019, the ICC's Pre-Trial Chamber III authorized the OTP to open an investigation of the alleged crimes committed within the ICC's jurisdiction against the Rohingya people from Myanmar.¹⁰⁷ The Chamber found that there was a reasonable basis to believe Myanmar may have committed widespread and systematic acts of violence involving the crimes against humanity of deportation across the Myanmar-Bangladesh border and persecution on the grounds of ethnicity and religion against the Rohingya population.¹⁰⁸ Conse-

⁹⁹ *Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh*, 13-24 September 2017, RELIEF WEB (Oct. 11, 2017), <https://reliefweb.int/report/myanmar/mission-report-ohchr-rapid-response-mission-cox-s-bazar-bangladesh-13-24-september>.

¹⁰⁰ *Rohingya Refugee Crisis*, OCHA (Aug. 29, 2018), <https://www.unocha.org/rohingya-refugee-crisis>.

¹⁰¹ Application Under Regulation 46(3), Case No. ICC-RoC46(3)-01-18, Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶ 1 (Apr. 9, 2018), [https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46\(3\)-01/18-1](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-RoC46(3)-01/18-1) [hereinafter Prosecutor's Request].

¹⁰² *Id.*

¹⁰³ Gomez, *supra* note 93, at 186; Rome Statute, *supra* note 8, art. 5.

¹⁰⁴ *Id.* at 185-86.

¹⁰⁵ Geoff Curfman, *ICC Jurisdiction and the Rohingya Crisis in Myanmar*, JUST SECURITY (Jan. 9, 2018), <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/> (last visited Oct 31, 2020).

¹⁰⁶ Rome Statute, *supra* note 8, art. 7(1)(d).

¹⁰⁷ Press Release, INT'L CRIM. CT., ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar (Nov. 14, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=PR1495> (last visited Oct. 31, 2020).

¹⁰⁸ *Id.*

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quently, the Pre-Trial Chamber III authorized the commencement of an investigation into crimes related to the Rohingya crisis in Myanmar.¹⁰⁹ The Chamber further found that the Court's rationale with regard to deportation could be applied to other crimes that fall within the Court's jurisdiction, giving the OTP jurisdiction to consider other crimes against humanity that may have been committed against the Rohingya, outside of the alleged deportations.¹¹⁰

The Rohingya case expanded the court's jurisdiction by allowing for a cross-border extension of the continuing crimes doctrine, which grants the ICC authority over sustained offenses that occur partly within the borders of an ICC member state, even if those offenses also take place within the territory of a non-member state.¹¹¹

IV. Analysis

A. Application of the ICC's Rohingya Decision to the Uyghur Crisis

The ICC's extension of jurisdiction over Myanmar with regards to the Rohingya crisis provides a basis for the Court to investigate China's deportation and treatment of the Uyghur people. By demonstrating that it will not prosecute these issues in its national courts, China has opened the door to ICC jurisdiction.¹¹² Although the ICC is not bound by its prior decisions, Article 21 of the Rome Statute permits the Court to utilize its prior rulings in its decision-making.¹¹³ The Uyghur advocacy groups and attorneys have argued the Court apply the Myanmar decisions reasoning to their case.¹¹⁴ While neither China nor Myanmar are signatories to the Rome Statute,¹¹⁵ the crimes committed against both religious and ethnic minorities can be prosecuted because part of the alleged crimes concern signatory countries.¹¹⁶

Both the Rohingya and the Uyghur conflicts share four characteristics central to the ICC's reasoning in its decision regarding the Rohingya crisis. These shared

¹⁰⁹ *Id.* The investigation is limited to all crimes, including any future crime, within the jurisdiction of the Court, that are allegedly committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State accepting the ICC jurisdiction, it is sufficiently linked to the situation as described in the present decision, and it was allegedly committed on or after the date of entry into force of the Rome Statute for Bangladesh or other relevant State Party.

¹¹⁰ ICC Pre-Trial Chamber Press Release, *supra* note 13.

¹¹¹ Sarah Freuden, Commentary, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute"* (Int'l Crim. Ct.), 58 INT'L LEGAL MATERIALS, 120–159 (2019); Gomez, *supra* note 93, at 184.

¹¹² Marlise Simons, *Uighur Exiles Push for Court Case Accusing China of Genocide*, THE N. Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/world/asia/china-xinjiang-uyghur-court.html> (last visited Jan. 2, 2021); *How the Court Works*, *supra* note 15.

¹¹³ Rome Statute, *supra* note 8, art. 21(1)(c).

¹¹⁴ Simons, *supra* note 112.

¹¹⁵ The States Parties to the Rome Statute, Int'l Crim. Ct., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 2, 2021).

¹¹⁶ Rayhan Asat, *China and Myanmar Face Uighurs and Rohingya that are Fighting Back After Years of Oppression*, NBC UNIVERSAL NEWS GROUP (2020), <https://www.nbcnews.com/think/opinion/china-myanmar-face-uyghurs-rohingya-are-fighting-back-after-years-ncna1240259> (last visited Jan. 2, 2021).

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characteristics include: the affected party is a State Party to the Rome Statute or has accepted the ICC's jurisdiction; the crimes committed are crimes that the ICC has jurisdiction over; at least one element of the crimes committed within a State Party's territory was committed by a non-State Party; and the crime contains a trans-border element or has a trans-border effect.¹¹⁷ In the Uyghur's case, the affected parties are Tajikistan and Cambodia—both countries that have accepted ICC jurisdiction.¹¹⁸ Pursuant to Articles 5 and 7 of the Rome Statute, China's alleged crimes are those of which the ICC has jurisdiction over.¹¹⁹ At least one element of China's alleged crimes of deportation and forcible transfer took place within Tajikistan and Cambodia's territory at the request of the Chinese government.¹²⁰ Finally, as the Uyghur people were unlawfully forced across borders, China's alleged crimes contain the trans-border element needed for the Court's jurisdiction.¹²¹

The Court's Rohingya decision may also provide a basis for the Court to investigate other crimes the Chinese government has subjected Uyghurs and other minorities to. In their Rohingya decision, the Pre-Trial Chamber III found that the Court's rationale regarding the illegal deportations could be extended to other crimes that fell within the Court's jurisdiction.¹²² If the ICC were to open an investigation surrounding the forcible deportations of Uyghur people from Cambodia and Tajikistan, the Court may be able to investigate the allegations of unlawful detention, torture, physical and sexual abuse committed against the Uyghurs, amongst the other alleged crimes.

In the case Uyghur advocacy groups present sufficient evidence that demonstrates the accused Chinese officials' conduct of forcible transfers and deportations, the ICC may rely upon its Rohingya decision to extend jurisdiction to the Uyghur case before the Court.

B. The OTP December 2020 Decision on the Uyghur Crisis

On December 14, after a review of the complaint, the OTP released its decision on the Uyghur crisis and submitted evidence.¹²³ The Office determined there was no basis to open an investigation, but left the door open to launching one in the future, provided there was sufficient evidence supporting the claim of crimes committed on State Party territories.¹²⁴ The OTP has confirmed that it has re-

¹¹⁷ Gomez, *supra* note 93, at 184-87.

¹¹⁸ Isau, *supra* note 63.

¹¹⁹ Rome Statute, *supra* note 8, art. 5, 7(1); *The Chinese Communist Party's Human Rights Abuses in Xinjiang*, *supra* note 2.

¹²⁰ Press Release, *supra* note 5.

¹²¹ *Id.*

¹²² ICC Pre-Trial Chamber Press Release, *supra* note 13.

¹²³ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 18-19.

¹²⁴ *Id.* at 20.

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ceived request for reconsideration pursuant to Article 15(6) on the basis of new facts or evidence.¹²⁵

In making its decision, the Office supported its decision with the *Naletilić et al.* case held at ICTY.¹²⁶ In *Naletilić*, the Trial Chamber concluded the forced removal of Bosnian Muslim civilians from their homes and subsequent transfer to a detention center failed to constitute unlawful transfer as a crime under the ICTY Statute.¹²⁷ The ICTY Trial Chamber distinguished the motive behind the detention and forcible transfer, finding that “even though the persons [. . .] were moved from one place to another against their free will [. . .] [t]hey were apprehended and arrested *in order to be detained and not in order to be transferred.*”¹²⁸ The OTP found this distinction relevant to the Uyghur’s forcible transfers on the part of China, stating that the accused Chinese officials’ conduct may have acted as a precursor to the alleged crimes committed on Chinese territory, but the conduct occurring on the Cambodian and Tajikistani territories failed to fulfil the elements of the crime of deportation under article 7(1)(d) of the Rome Statute.¹²⁹

The Uyghur advocacy groups and attorneys bringing the claim must provide further evidence showing the accused Chinese officials’ motive to forcibly transfer the Uyghur people in countries such as Cambodia and Tajikistan. The Uyghur groups must defend their claim by arguing the Chinese officials acted with the intention of deportation of the Uyghur people, and not solely with the intention of the Uyghur people’s detention.

V. Proposal

A. The OTP’s Decision and its Impact on the Uyghur People

The decision to open an investigation would allow the Court to bring charges and prosecute those responsible for the crimes committed against the Uyghur people.¹³⁰ Working in unison with international bodies and global powers, the Court could effectively end China’s brutal ongoing campaign of genocide.¹³¹ In the event the ICC declines to investigate China’s alleged crimes regarding the Uyghur and other Turkic minority groups, those detained and tortured will con-

¹²⁵ Ewelina U. Ochab, *International Criminal Court Will Not Take Further the Case of The Uyghurs*, FORBES (Dec. 15, 2020, 03:52 AM), <https://www.forbes.com/sites/ewelinaochab/2020/12/15/international-criminal-court-will-not-take-further-the-case-of-the-uyghurs/?sh=6aa503bd2fe3> (last visited Jan. 2, 2021).

¹²⁶ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 20.

¹²⁷ *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-T, Judgment, ¶ 535-537 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003) (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Report on Preliminary Examination Activities 2020*, *supra* note 15, at 20.

¹³⁰ Alina Rizvi, *Uighur Crisis Highlights Flawed Structure of UN Security Council*, JURIST (2020), <https://www.jurist.org/commentary/2020/07/alina-rizvi-unscc-reform-uighurs/> (last visited Jan. 1, 2021).

¹³¹ Beth Van Schaack, *Policy Options in Response to Crimes Against Humanity and Potential Genocide in Xinjiang*, JUST SECURITY (2020), <https://www.justsecurity.org/72168/policy-options-in-response-to-crimes-against-humanity-and-potential-genocide-in-xinjiang/> (last visited Jan. 3, 2021).

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tinue to be subjected to crimes against humanity and genocide at the hands of the Chinese government with one fewer means of justice.

Upwards of a million Uyghurs have been apprehended and confined within a network of concentration camps, where many are subjected to torture and forced labor.¹³² Those not detained are under near constant surveillance and subject to collections of personal biometric data.¹³³ The Chinese government continues its effort to forcibly sterilize Uyghur women in order to permanently alter the regional demographics.¹³⁴ Journalists and advocacy groups continue to discover evidence of China's plans to build more detention centers for its non-Han ethnic groups.¹³⁵ Without the international intervention of the ICC, few global powers have the capacity and means to prosecute those responsible or effectively influence the Chinese government to end its brutal campaign against the Uyghurs.

B. Alternative Means of Justice for the Uyghur People

Any effective international response to China's treatment of the Uyghurs will require a combination of unilateral and multilateral measures. The United States and similarly situated states need to respond in coalition to this crisis. A non-exhaustive list of measures addressing the situation in Xinjiang should include economic sanctions, humanitarian assistance for victims, and enforcement of UN treaties China has ratified.¹³⁶

Providing humanitarian relief to survivors must be a priority for large, global powers and non-governmental organizations. The United States may be able to work with states bordering China and others that have granted asylum to Uyghur refugees in an effort to provide support and services to victims. Efforts must also be made to prevent the forcible deportation of Uyghurs back to China.¹³⁷ As China is a party to the 1951 Refugee Convention and continues to violate its express principle of non-refoulement, the United Nations High Commissioner for Refugees may have grounds to provide protection and humanitarian assistance to Uyghur refugees.¹³⁸

¹³² Matt Rivers, Max Foster & James Griffiths, *Disturbing video shows hundreds of blindfolded prisoners in Xinjiang*, CNN (2019), <https://www.cnn.com/2019/10/06/asia/china-xinjiang-video-intl-hnk/index.html> (last visited Jan. 2, 2021); Philip Wen & Olzhas Auyezov, *Tracking China's Muslim Gulag*, REUTERS (Nov. 29, 2018), <https://www.reuters.com/investigates/special-report/muslims-camps-china/>.

¹³³ Mercy A. Kuo, *Uyghur Biodata Collection in China*, THE DIPLOMAT (Dec. 28, 2017), <https://thediplomat.com/2017/12/uyghur-biodata-collection-in-china/> (last visited Jan. 2, 2021).

¹³⁴ Lisa Reinsberg, *China's Forced Sterilization of Uyghur Women Violates Clear International Law*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71615/chinas-forced-sterilization-of-uyghur-women-violates-clear-international-law/> (last visited Jan. 1, 2021).

¹³⁵ Nathan Ruser, *Exploring Xinjiang's Detention System*, THE XINJIANG DATA PROJECT (2020), <https://xjdp.aspi.org.au/explainers/exploring-xinjiangs-detention-facilities/> (last visited Jan. 2, 2021).

¹³⁶ Van Schaack, *supra* note 131.

¹³⁷ *Id.*

¹³⁸ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, U.N. High Comm'r for Refugees, <https://www.unhcr.org/en-au/3b73b0d63.pdf> (last visited Jan. 2, 2021).

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China's discriminative and violent policies violate the Universal Declaration of Human Rights,¹³⁹ the International Covenant on Economic, Social and Cultural Rights,¹⁴⁰ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴¹ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁴² all of which China has signed and ratified.¹⁴³ While none of these treaties or conventions has an individual complaint mechanism with jurisdiction over China, China may be subject to periodic reviews by treaty bodies.¹⁴⁴ Periodic reviews, however, are not likely going to effectively address the crimes committed by the Chinese government. Without the force of the ICC, efforts addressing the Uyghur crisis may be more rooted in victim assistance and support rather than prosecution of the accused Chinese officials.

VI. Conclusion

China's on-going and brutal campaign against the Uyghur and non-Han ethnic minorities warrants international intervention. In addition to the deportations of Uyghurs, the current situation for Uyghur's in China is dire. Upwards of a million have been apprehended and confined within a network of concentration camps, where many are subjected to torture and forced labor. These detention facilities place the detainees at huge risk of contracting COVID-19, only exacerbating the vulnerable conditions Uyghur and non-Han people are facing. The evidence of the forcible transfer and deportation of Uyghur refugees from Cambodia and Tajikistan provides sufficient evidence for the ICC to extend jurisdiction over China, regardless of its State Party status. A formal investigation into the alleged crimes, in conjunction with economic sanctions and humanitarian aid, may be effective in ending the campaign.

Speaking at a virtual information event on the ICC complaint, the East Turkistan Government in Exile Prime Minister, Salih Hudayar, said, "For over 71 years China has been engaging in a campaign of colonization, genocide and occupation in East Turkistan and this is the first time in our history that we have sought to seek justice through international law and international institutions. [. . .] [W]e urge governments across the world to support our case at the ICC and recognize China's atrocities against Uyghurs and other Turkic peoples as a genocide."¹⁴⁵ The international community must come together to oppose the revival of con-

¹³⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948), at 71.

¹⁴⁰ Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁴¹ Int'l Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

¹⁴² Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁴³ Van Schaack, *supra* note 131.

¹⁴⁴ *Id.*

¹⁴⁵ Webinar: How the ICC Can Investigate and Prosecute Chinese Officials for Genocide Against Uyghurs And Other Turkic People, (East Turkistan Nat'l Awakening Movement 2020), <https://nationalawakening.org/webinar-how-the-icc-can-investigate-and-prosecute-chinese-officials-for-genocide-against-uyghurs-and-other-turkic-people/> (last visited Jan. 2, 2021).

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centration camps, forced sterilization, persecution of ethnic or religious groups, and crimes against humanity. These atrocities merit a resolute and immediate global response.

COVID-19 AND EXPORT RESTRICTIONS: THE CASE FOR FREE TRADE

Jack Quirk

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I. Introduction

The world economy is dependent on international trade.¹ Although there are variations in trade laws among different countries, most nations follow the trade norms set forth by the General Agreement on Tariffs and Trade (“GATT”) along with the World Trade Organization (“WTO”).² In fact, over 164 trading countries are now a part of the WTO.³ Both GATT and the WTO have been big players in creating the familiar concept of globalization;⁴ they have worked to significantly reduce tariffs and many nontariff trade barriers.⁵ Even more than 95% of interna-

¹ Kimberly Amadeo, *International Trade: Pros, Cons, and Effect on the Economy*, THE BALANCE (MAY 19, 2021), <https://www.thebalance.com/international-trade-pros-cons-effect-on-economy-3305579> (last updated Feb. 17, 2021).

² *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 6, 2021) [hereinafter *The GATT Years*].

³ *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 6, 2021).

⁴ ALICE LANDAU, REDRAWING THE GLOBAL ECONOMY 79-108 (2001).

⁵ *General Agreement on Tariffs and Trade*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/General-Agreement-on-Tariffs-and-Trade>.

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tional trade is now covered by WTO agreements.⁶ Nevertheless, while GATT and the WTO are built around the framework of free trade, there are exceptions.⁷

In the early months of 2020, the Coronavirus disease 2019 (“COVID-19”) swept the world.⁸ In a panic, the United States (“US”) enacted trade restrictions on many pieces of medical gear needed to fight the COVID-19 pandemic.⁹ Countries from around the world followed suit and imposed temporary export restrictions of their own in order to mitigate potential shortages of key supplies.¹⁰ Export bans accounted for over 90% of trade restrictions that were imposed due to the pandemic.¹¹ These protectionist measures, however, were not done without controversy.

This article will address whether COVID-19 exportation restrictions are justifiable under international trade law. This article will then address whether COVID-19 should be used as a basis to impose limits on trade exports if countries consider it a priority to safeguard the lives of its own citizens first. It will further address the repercussions that these restrictions have had on the world and on developing nations. Lastly, this article will argue how trade liberalization should remain preferential despite the ongoing pandemic.

II. Background

A. Tariffs and Globalization

High tariffs were historically implemented to protect infant industries, while generating revenue for the federal government.¹² After the end of World War I, the “United States continued to embrace the high tariffs that had characterized its trade policy since the Civil War.”¹³ In 1922, in order to provide protection for American farmers, Congress enacted the Fordney-McCumber Tariff Act, one of the most punitive protectionist tariffs passed in U.S. history,¹⁴ raising the average import tax to roughly 40%.¹⁵

⁶ *Introduction and Summary*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm (last visited Mar. 22, 2021).

⁷ *Article XX General Exceptions*, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf (last visited Jan. 6, 2021).

⁸ See Yen-Chin Liu et al., *COVID-19: The First Documented Coronavirus Pandemic in History*, 43 *BIOMEDICAL J.* 328-33 (2020).

⁹ Chad Brown, *COVID-19: Trump’s Curbs on Exports of Medical Gear Put Americans and Others at Risk*, THE PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Apr. 9, 2020, 2:15 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/covid-19-trumps-curbs-exports-medical-gear-put-americans-and>.

¹⁰ CHRISTOPHER CASEY & CATHLEEN CIMINO-ISAACS, CONG. RSCH. SERV., IF11551, *EXPORT RESTRICTIONS IN RESPONSE TO THE COVID-19 PANDEMIC* (2020).

¹¹ *Id.*

¹² *Protectionism in the Interwar Period*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/protectionism> (last visited Jan. 6, 2021) [hereinafter *Protectionism*].

¹³ *Id.*

¹⁴ *Smoot-Hawley Tariff Act*, BRITANNICA, <https://www.britannica.com/topic/Smoot-Hawley-Tariff-Act> (last visited Jan. 6, 2021) [hereinafter *Smoot-Hawley*].

¹⁵ *Id.*

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In 1930, in response to the stock market crash, protectionism gained even more strength. Calls to raise tariffs in all sectors of the economy became prevalent.¹⁶ Consequently, Congress passed the Smoot-Hawley Tariff Act (“Smoot-Hawley”), which further raised import duties to protect American businesses and farmers.¹⁷ Over 1,000 economists urged President Herbert Hoover (“Hoover”) to veto the high tariff legislation.¹⁸ Hoover ignored their pleas and signed the bill into law; tariffs radically increased once more.¹⁹ Unsurprisingly, foreign governments retaliated, and European imports and exports fell drastically.²⁰ The depression worsened for US workers and farmers despite promises of prosperity from high Smoot-Hawley tariffs.²¹ Fortunately, Smoot-Hawley marked the end of high tariffs in 20th century American trade policy.²² To this day, they are a reminder of the dangers of protectionism.²³

Near the end of the Second World War, the modern era of globalization and free trade emerged.²⁴ These concepts can be traced back to the 1944 Bretton Woods Conference.²⁵ After a global depression and two world wars, the Bretton Woods Conference sought to create a world economy that would create and foster world peace.²⁶ This idea centered around economic interdependence.²⁷ Put simply, cooperation between nations would surely result in prosperity and peace.²⁸ If nation states were highly trade dependent on each other, war between nations would be less likely;²⁹ this idea prompted the eventual creation of GATT.³⁰

GATT implemented tariff cuts and served as a temporary governing body for commercial relations among its participants.³¹ Under GATT, multilateral trade was characterized by reciprocity, non-discrimination, and predictable trade.³² GATT members agreed to liberalize their own trade in return for comparable

¹⁶ *Protectionism*, *supra* note 12.

¹⁷ *Smoot-Hawley*, *supra* note 14.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Protectionism*, *supra* note 12.

²³ *Id.*

²⁴ Peter Vanham, *A Brief History of Globalization*, WORLD ECONOMIC FORUM (Jan. 17, 2019), <https://www.weforum.org/agenda/2019/01/how-globalization-4-0-fits-into-the-history-of-globalization>.

²⁵ *Bretton Woods-GATT, 1941–1947*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/bretton-woods> (last visited Jan. 6, 2020) [hereinafter *Bretton Woods*].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Bretton Woods*, *supra* note 25.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² KAMAL MALHOTRA & UNITED NATIONS DEVELOPMENT PROGRAMME, *MAKING GLOBAL TRADE WORK FOR PEOPLE* 52 (2012).

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commitments from other countries.³³ Accordingly, this framework gave member nations an incentive to increase their own trading commitments.³⁴ In addition, GATT members were all given most favored nation status (“MFN”), which meant that members were not permitted to discriminate between any trading partners.³⁵ Further, in order to make trade more predictable, GATT encouraged members to reduce tariffs through trade negotiations and eliminate non-tariff trade barriers altogether.³⁶ GATT even laid out special provisions for developing countries which provided them greater flexibility when it came to developing trade policies.³⁷

GATT provided initial rules for world trade and oversaw some of the highest growth rates seen in international trade.³⁸ From its signing until the late 1970s, global gross domestic product (“GDP”) grew nearly 70% per year.³⁹ Eventually, this growth started to wane, and further discussions surrounding GATT followed.⁴⁰

In the late 1980s, world leaders and economists came together in Uruguay for another round of GATT negotiations.⁴¹ This time, negotiations were focused on global efficiency, rather than world peace and economic interdependence.⁴² It was decided that GATT could better serve global trade expansion if it became a formal organization;⁴³ from these negotiations the WTO was established.⁴⁴ As an international arena, the WTO provides member nations with the opportunity to address all types of international trade issues and concerns.⁴⁵ It oversees the implantation of trade agreements and provides dispute settlement mechanisms.⁴⁶

Essentially, these frameworks encourage countries to specialize in what they can most efficiently produce with the least number of resources.⁴⁷ This, in turn, would promote economic growth on a global scale and lower prices of goods and

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Bretton Woods*, *supra* note 25.

³⁹ *The GATT Years*, *supra* note 2.

⁴⁰ *Id.*

⁴¹ *The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 6, 2021).

⁴² *The WTO Can . . . Contribute to Peace and Stability*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm (last visited Jan. 6, 2021).

⁴³ Susan Ariel Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, ECON. HIST. ASS’N, <https://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/> (last visited Jan. 6, 2021).

⁴⁴ *The GATT Years*, *supra* note 2.

⁴⁵ *What Is the WTO?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Jan. 6, 2021).

⁴⁶ *Id.*

⁴⁷ See *Comparative Advantage and the Benefits of Trade*, THE LIBRARY OF ECON. AND LIBERTY, <https://www.econlib.org/library/Topics/College/comparativeadvantage.html> (last visited Jan. 6, 2021) [hereinafter *Comparative Advantage*].

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services around the world.⁴⁸ This framework was established under the theory that each country should produce only what they can produce efficiently and sell within a reasonable price.⁴⁹

B. The COVID-19 Pandemic

In late December 2019, an infectious respiratory disease, now namely known as COVID-19, emerged from Wuhan, China.⁵⁰ By the end of January, China imposed aggressive lockdowns to help contain the spread of the virus; however, these efforts by this point were too little too late.⁵¹ COVID-19 spread rapidly through the rest of the world, and the World Health Organization (“WHO”) ultimately declared a global health emergency.⁵² Countries around the globe were in disarray, trying and struggling to best contain this overwhelming disease. Over 39 million cases have now been reported worldwide now, and the WHO estimates that more than 800 million people may have been infected by this virus.⁵³ This disease has now killed over 1.1 million people globally.⁵⁴ In the US, alone, there have been over 20 million reported cases of COVID-19 and over 300,000 deaths.⁵⁵

C. Global Trade Restrictions

As COVID-19 continued to sweep the world, and with very inconsistent information spreading, many countries began to panic.⁵⁶ COVID-19 presented the world with an unprecedented global health challenge.⁵⁷ Accordingly, many countries began to implement measures to reduce the spread of COVID-19.⁵⁸ These measures, unfortunately, shut down large portions of the world economy.⁵⁹ As the world saw an extraordinarily high demand for medical products, many na-

⁴⁸ *Stronger Open Trade Policies Enable Economic Growth for All*, THE WORLD BANK (Apr. 3, 2018), <https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all> [hereinafter *Open Trade*].

⁴⁹ *Comparative Advantage*, *supra* note 47.

⁵⁰ *Pneumonia of Unknown Cause – China*, WORLD HEALTH ORG. (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

⁵¹ Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 22, 2020, 10:55 AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>.

⁵² *Id.*

⁵³ Henrik Pettersson et al., *Tracking Coronavirus' Global Spread*, CNN, <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (last updated Apr. 19, 2021); *Covid-19 Updates: One in 10 Worldwide May Have Had Virus, WHO Says*, BBC NEWS (Oct. 5, 2020), <https://www.bbc.com/news/world-54422023>.

⁵⁴ *Id.*

⁵⁵ *United States COVID-19 Cases and Deaths by State*, CENTER FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/> (last visited Jan. 6, 2021).

⁵⁶ See generally Liu et al., *supra* note 8 (discussing the onset of the pandemic).

⁵⁷ *Export Prohibitions and Restrictions*, WORLD TRADE ORG., 1 (Apr. 23, 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 3.

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tions turned towards export prohibitions and restrictions in order to alleviate shortages of supplies on a national level.⁶⁰

By the end of summer 2020, nearly 90 countries had enacted similar export restrictions.⁶¹ Since the onset on the pandemic, countries from around the world have taken close to 200 public health and public health related actions that ban or limit exports on certain products.⁶² Some analysts argue that international export restrictions surged after China implemented many of their own in early 2020.⁶³ China's domestic prioritization essentially fueled personal protective equipment ("PPE") shortages around the world and thus prompted further global restrictions.⁶⁴

The US, for example, enacted trade restrictions on many pieces of medical gear needed to fight the COVID-19 pandemic.⁶⁵ Under the Defense Production Act ("DPA"), President Trump restricted exports of respirators, surgical masks, and hospital gloves.⁶⁶ Under his direction, the US Federal Emergency Management Agency ("FEMA") limited many American exports of personal protective equipment.⁶⁷ More countries followed suit and imposed temporary export restrictions of their own in order to mitigate potential shortages of their key supplies.⁶⁸

Roughly 80 countries, including 46 WTO members, introduced export restrictions.⁶⁹ While most restrictions were considered temporary, export bans accounted for over 90% of trade restrictions that were imposed due to the pandemic.⁷⁰ The products that these restrictions covered varied country to country, but most of them included medical supplies, medical equipment, and food.⁷¹

III. Discussion

A. Medical Imports and Exports on a Global Scale

This pandemic has brought a great deal of attention to global trade – especially to medical products that are used for medical testing, treatment, and prevention.⁷²

⁶⁰ *Id.*

⁶¹ *COVID-19: Measures Affecting Trade in Goods*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm (last updated Mar. 26, 2021).

⁶² *Id.*

⁶³ *Export Controls and Export Bans over the Course of the Covid-19 Pandemic*, WORLD TRADE ORG., 2 (Apr. 29, 2020), https://www.wto.org/english/tratop_e/covid19_e/bdi_covid19_e.pdf [hereinafter *Export Controls*].

⁶⁴ *Id.*

⁶⁵ Brown, *supra* note 9.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CASEY & CIMINO-ISAACS, *supra* note 10.

⁶⁹ *Export Prohibitions and Restrictions*, *supra* note 57, at 1.

⁷⁰ CASEY & CIMINO-ISAACS, *supra* note 10.

⁷¹ *Export Prohibitions and Restrictions*, *supra* note 57, at 1.

⁷² *Trade in Medical Goods in the Context of Tackling COVID-19*, WORLD TRADE ORG., 1 (Apr. 3, 2020), https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf [hereinafter *Trade in Medical Goods*].

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Medical products constitute roughly 5% of total global trade, and in 2019 alone, medical product imports surpassed 1 trillion dollars.⁷³

The US, Germany, and China represent that top three importers for medical products.⁷⁴ In recent years, though, the US has become the largest importer of medical products – its share of world medical products accounting for 19% of total world imports in 2019.⁷⁵ US medical imports come primarily from Ireland, Germany, Switzerland, China, and Mexico.⁷⁶ German medical imports, on the other hand, primarily come from other European countries and the US.⁷⁷ Meanwhile, China's medical imports come primarily from Germany and the US.⁷⁸ Medical exports, on the other hand, predominantly come from Germany, the US, and Switzerland.⁷⁹ However, China is the top exporter of face masks.⁸⁰ More than half the world's respirators, on the other side, are exported primarily from Singapore, the US, the Netherlands, and China combined.⁸¹

Similar to other industries, international trade has facilitated an interdependence on PPE around the world, with countries depends on global value chains and international trade for medical products.⁸² Unfortunately, as COVID-19 worsened, a growing number of states enacted export prohibitions and restrictions of these products.⁸³

B. Export Restrictions

As COVID-19 continued to spread around the world, more governments began to adopt measures in order to reduce the exports of medical supplies and equipment.⁸⁴ Some states embraced explicit export bans on medical products, while others curbed exports via more subtle measures.⁸⁵

In early April of 2020, China enacted strict export controls on various medical products; these included face masks, protective suits, thermometers, ventilators, as well as COVID-19 testing kits.⁸⁶ All exports of these products had to be accompanied with proof of registration with China's National Medical Products Administration ("NMPA").⁸⁷ In addition, China added an export prohibition

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Trade in Medical Goods, supra* note 72, at 4.

⁷⁸ *Id.*

⁷⁹ *Id.* at 5.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Export Prohibitions and Restrictions, supra* note 57, at 3.

⁸³ *Id.*

⁸⁴ Simon J. Evenett, *Tackling Covid-19 Together, the Trade Policy Dimension*, GLOBAL TRADE ALERT, 2 (Mar. 23, 2020), <https://www.globaltradealert.org/reports/download/51>.

⁸⁵ *Id.* at 5.

⁸⁶ *Export Controls, supra* note 63, at 3.

⁸⁷ *Id.*

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which only allowed exports of these medical products upon authorization.⁸⁸ These additional layers of certification, inspection, and authorization acted as more export “hoops” to jump through.⁸⁹

In the US, the Federal Emergency Management Agency (“FEMA”) issued a temporary ban on certain personal protective equipment exports.⁹⁰ These restrictions were placed on respirators, respiratory filters, surgical face masks, and protective medical gloves.⁹¹ As a result of the ban, these medical products could not be exported without FEMA permits.⁹² These restrictions applied to roughly \$1.1 billion of US exports.⁹³

Even the European Union (“EU”), the so called “champion of open markets,” enacted their share of export prohibitions.⁹⁴ In the early months of the pandemic, the EU made all personal protective equipment exports subject to authorization and prohibited their exportation without license.⁹⁵ Similarly, the United Kingdom (“UK”) enacted export prohibitions on over 80 types of vital drugs in order to prevent medicinal shortages.⁹⁶ The UK also mandated licenses for any exports of personal protective equipment to countries outside the EU or European Free Trade Association.⁹⁷

Furthermore, India placed export restrictions on vitamins, pharmaceutical raw materials, ventilators, and anti-malarial medicines.⁹⁸ Indonesia announced temporary export bans on sanitizers, face masks, and certain types of medical equipment.⁹⁹ Ukraine enacted quantitative restrictions on personal protective equipment exports such as masks, disinfectants, protective suits, and gloves.¹⁰⁰

⁸⁸ *COVID-19 Temporary Trade Measures*, INT’L TRADE CTR., <https://macmap.org/covid19> (last updated Dec. 7, 2020) [hereinafter INT’L TRADE CTR].

⁸⁹ *Id.*

⁹⁰ *Export Allocation Rule of Medical Supplies and Equipment for COVID-19*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/fact-sheet/allocation-rule-personal-protective-equipment-exports> (last updated May 23, 2021) [hereinafter FEMA].

⁹¹ *Id.*

⁹² *Export Controls*, *supra* note 63.

⁹³ CASEY & CIMINO-ISAACS, *supra* note 10.

⁹⁴ *Export Controls*, *supra* note 63.

⁹⁵ *Id.*

⁹⁶ INT’L TRADE CTR, *supra* note 88.

⁹⁷ *Id.*

⁹⁸ *Export Controls*, *supra* note 63, at 3; PTI, *WTO Asks Members to Share Information on Trade Measures Related to COVID-19*, FINANCIAL EXPRESS (Mar. 25, 2020, 4:48 PM), <https://www.financialexpress.com/economy/wto-asks-members-to-share-information-on-trade-measures-related-to-covid-19/1909190/>.

⁹⁹ Reuters Staff, *Indonesia to Ban Face Mask Exports to Ensure Domestic Supply*, REUTERS (Mar. 13, 2020, 12:04 AM), <https://www.reuters.com/article/us-health-coronavirus-indonesia-masks/indonesia-to-ban-face-mask-exports-to-ensure-domestic-supply-idUSKBN2100JB>.

¹⁰⁰ *Export Controls*, *supra* note 63, at 3.

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Serbia, too, closed its borders and enacted export restrictions on various medicinal products.¹⁰¹

Supporters claim that these prohibitive measures were necessary to prioritize domestic demands.¹⁰² Critics argue, however, that export restrictions not only harm international trade, but pose an extremely detrimental domino effect on nations that rely on international PPE. In fact, such export restrictions have already caused shortages of such products in countries looking to purchase them.¹⁰³

IV. Analysis

A. WTO Compliance

While the WTO generally does not permit export restrictions, GATT does provide exceptions to this generally accepted framework.¹⁰⁴ Article XI:2 of GATT provides the first exception.¹⁰⁵ This article allows temporary export prohibitions or restrictions “to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”¹⁰⁶ The second exception is set forth by GATT Article XX(b), which allows for any measures that are “necessary to protect human, animal or plant life or health.”¹⁰⁷ GATT Article XXI(b) provides the last exception, which allows member states to take actions “which it considers necessary for the protection of its essential security interests” in times of international emergencies.¹⁰⁸

As to the first exception, export restrictions seem to be justified under GATT Article XI:2.¹⁰⁹ In the case of *China – Raw Materials*,¹¹⁰ a critical shortage was defined as “deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.”¹¹¹ With the current pandemic, the WTO Appellate Body’s interpretation of Article XI:2 appears to stipulate that WTO Members do in fact have the authority to restrict necessary exports of food and medical supplies in order to

¹⁰¹ Iana Dreyer, *EU External Border and Air Freight: Next Medical Supply Chain Flash Point?*, BORDERLEX (Mar. 23, 2020), <https://borderlex.net/2020/03/24/eu-external-border-and-air-freight-next-medical-supply-chain-flash-point/>.

¹⁰² *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use*, 85 Fed. Reg. 20195 (Apr. 7, 2020) (to be codified at 44 C.F.R. pt. 328).

¹⁰³ Ignacio Carreño et al., *The Implications of the Covid-19 Pandemic on Trade*, 2020 EUR. J. RISK REG. 1-9, at 4.

¹⁰⁴ *Export Prohibitions and Restrictions*, *supra* note 57, at 3-4.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *WTO Analytical Index, GATT 1994 – Article XI*, WORLD TRADE ORG., 1, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_oth.pdf (last visited Jan. 6, 2021).

¹⁰⁷ WORLD TRADE ORG. *Article XX General Exceptions*, *supra* note 7.

¹⁰⁸ *Article XXI Security Exceptions*, WORLD TRADE ORG., 1 (last visited April 18, 2021).

¹⁰⁹ *Export Prohibitions and Restrictions*, *supra* note 57, at 4.

¹¹⁰ See Appellate Body Report, *China–Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted Jan. 30, 2012).

¹¹¹ *Id.* ¶ 324.

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prevent critical shortages.¹¹² In fact, as demand for medical products and equipment soared, many nation members turned toward export prohibitions and restrictions in order to mitigate supply shortages of products they deemed necessary.¹¹³

Regarding the second exception articulated in Article XX(b), export restrictions put into place to protect human, animal, or plant life or health appear to be in accord with WTO obligations and rules, so long as they are not applied in a discriminatory manner or are disguised restrictions on international trade.¹¹⁴ In short, indiscriminate export restrictions on medical products are indeed in accordance with WTO law.

The last exception in GATT Article XXI(b) regarding national security, however, does not come across as a justifiable exception for export trade restrictions.¹¹⁵ While the pandemic undoubtedly plays into a member state's national security interests, the WTO typically does not equate health emergencies as those justifiable in international relations.¹¹⁶ Accordingly, national security concerns do not justify any of these export restrictions.

It must be said, while export restrictions may be in accordance with WTO law and obligations, in no way does that imply such restrictions are ultimately useful tools in fighting the COVID-19 pandemic.

B. Impact on Global Trade

While perhaps compliant with WTO obligations, the WTO nevertheless argues these prohibitive export restrictions hurt global value chains.¹¹⁷ The concept of global value chains refers to international production sharing—a process in which production activities are broken down and carried out by different countries.¹¹⁸ From a product's conception to its end use, the design, production, and distribution stages may all be divided among multiple firms across many geographic spaces.¹¹⁹

Due to the fact production processes for many items around the world are so integrated into global value chains, export restrictions essentially fuel shortages.¹²⁰ No country in the world can produce all the products it needs for medical care; nor can a single country produce all the necessary intermediate

¹¹² Joost Pauwelyn, *Export Restrictions in Times of Pandemic: Options and Limits Under International Trade Agreements*, SSRN, 6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579965 (last updated May 8, 2020).

¹¹³ *Export Prohibitions and Restrictions*, *supra* note 57, at 3.

¹¹⁴ *Id.* at 4.

¹¹⁵ Carreño et al., *supra* note 103, at 6-7.

¹¹⁶ *Id.*

¹¹⁷ *Export Controls*, *supra* note 63, at 1.

¹¹⁸ Adnan Seric & Yee Siong Tong, *What Are Global Value Chains and Why Do They Matter?*, INDUSTRIAL ANALYTICS PLATFORM (Aug. 2019), <https://iap.unido.org/articles/what-are-global-value-chains-and-why-do-they-matter>.

¹¹⁹ *Id.*

¹²⁰ *Export Controls*, *supra* note 63, at 1.

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products.¹²¹ While countries enacted export prohibitions in an effort to mitigate critical shortages, these restrictions did just the opposite.¹²² If a myriad of countries are prohibiting the exportation of medical goods, then no country will have all the medical products needed to fight the pandemic.¹²³

For example, while the EU manufactures a large amount of medical devices and medicines, it is still very dependent on a myriad of imports that are necessary for medical care, such as pharmaceutical raw materials, generic drugs, and protective equipment.¹²⁴ In 2019, the EU imported roughly 17.6 billion US dollars worth of personal protective equipment.¹²⁵ Correspondingly, when other countries impose export prohibitions and restrictions, despite its medical manufacturing capabilities the EU ends up worse off.¹²⁶

The COVID-19 pandemic has highlighted the world's need for global value chains. Responding effectively and efficiently to the COVID-19 pandemic undoubtedly requires an increase in global medical supply production, and well-functioning global value chains are needed to do just that.¹²⁷ As world production increases and becomes available, international trade will be of the utmost importance when it comes to moving needed supplies from where it is abundant to where it is lacking.¹²⁸ This is especially important during global pandemics where a disease peaks in different locations at different times.¹²⁹ Global efficiency is highly dependent on these international global value supply chains.¹³⁰

Export restrictions, however, risk hindering the required supply response that the world needs—especially when it comes to much needed medical equipment.¹³¹ These export restrictions have created a ripple effect through the world economy.¹³² Even Economists argue initial export restrictions may lead to retaliatory measures by other countries, which may also be comparable export restrictions.¹³³ This, in turn, disrupts international supply chains, cuts countries off from essential supplies, and ultimately further dampens the global economy.¹³⁴

While countries may be imposing limits on trade exports in order to curb vital medical shortages and thus, safeguard the lives of its own citizens, doing so is disadvantageous as no country alone can successfully produce all the medical

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 4.

¹²⁶ *Id.*

¹²⁷ *Export Prohibitions and Restrictions*, *supra* note 57.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Bengt Söderlund, *The Impact of Travel Restrictions on Trade During the COVID-19 Pandemic*, Vox EU (Nov. 4, 2020), <https://voxeu.org/article/impact-travel-restrictions-trade-during-covid-19>.

¹³¹ *Export Prohibitions and Restrictions*, *supra* note 57.

¹³² *Export Controls*, *supra* note 63, at 1.

¹³³ *Id.* at 4.

¹³⁴ *Id.*

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equipment needed. In reality, these measures do the opposite. They disrupt supply chains and decrease total production, which in turn leads to essential product shortages in areas that need them the most.¹³⁵ Other nations consequently counter these restrictions with ones of their own, which only exacerbates the global crisis at hand.¹³⁶

C. Impact on the United States

The US is no exception to the detrimental effect of protectionism and export restrictions. In fact, President Trump's restrictive curb on medical gear exports put Americans and other countries at higher risk. The reason is simple: the US relies extensively on the importation of PPE.¹³⁷ The US imported \$4.7 billion of other PPE, which included face shields, protective garments, hand sanitizer, protective goggles, and headwear.¹³⁸ Ventilators, X-ray equipment, thermometers, and other such PPE made up another \$12.6 billion of US imports.¹³⁹

Aside from finished medical products, inputs needed to manufacture medical gear are just as much impacted by export restrictions. For example, US companies use Canadian pulp to produce protective garments.¹⁴⁰ Put plainly, export restrictions on medical gear conversely put US medical imports at risk as well.

As a plethora of countries followed suit in implementing medical export restrictions of their own, critics point out the impact of these restrictions will harm not only those who are enacting the restriction, but also smaller countries who depend and rely on foreign medical goods.¹⁴¹

D. Impact on Developing Nations

For many patients who contract severe cases of COVID-19, access to medical products, ventilators in particular, is a matter of life and death.¹⁴² Global export bans on medical ventilators deprives numerous developing nations of these products; many global value chains provide the parts for ventilator producers.¹⁴³ Ac-

¹³⁵ *IMF and WTO Heads Call for Lifting Trade Restrictions on Medical Supplies and Food*, WORLD TRADE ORG. (Apr. 24, 2020), https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.htm [hereinafter *Lifting Trade Restrictions*].

¹³⁶ *Id.*

¹³⁷ Brown, *supra* note 9.

¹³⁸ *FAQs on Shortages of Surgical Masks and Gowns During the COVID-19 Pandemic*, FOOD AND DRUG ADMIN., <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/faqs-shortages-surgical-masks-and-gowns-during-covid-19-pandemic> (last visited Jan. 6, 2021).

¹³⁹ Brown, *supra* note 9; Sarah Kliff et al., *There Aren't Enough Ventilators to Cope with the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html> (last updated Mar. 26, 2020).

¹⁴⁰ Chris Bush, *Nanaimo's Harmac Mill Works to Fill Doubled Pulp Order for Medical Masks and Gowns*, VANCOUVER ISLAND FREE DAILY (Mar. 24, 2020), <https://www.vancouverislandfreedaily.com/business/nanaimos-harmac-mill-works-to-fill-doubled-order-for-medical-masks-and-gowns/>.

¹⁴¹ Brown, *supra* note 9.

¹⁴² Evenett, *supra* note 84, at 6.

¹⁴³ *Id.*

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cordingly, export restrictions on these items stalls production of ventilators which, in turn, denies foreign buyers and citizens of these much-needed items.¹⁴⁴

In analyzing trade data, the United Nations (“UN”) revealed that in 2018, only 25 states exported more than \$10 million of medical ventilators.¹⁴⁵ Of those, only one was a Latin American country, and none were from Africa, the Middle East, or South Asia.¹⁴⁶ Thus, when top ventilator exporters curb or restrict ventilator shipments, a large portion of the world’s population are then denied access to these much needed products—especially during a pandemic.¹⁴⁷

Many countries in Latin America and the Caribbean are highly dependent on US medical equipment.¹⁴⁸ Jamaica, for example, imports a majority of their respirators, gloves, and masks from the US.¹⁴⁹ Many developing nations do not even have the ability to increase their local production of medical gear. Therefore, depriving these countries of even one of these products could seriously hamper the effectiveness of their medical response to COVID-19.¹⁵⁰

In addition, the EU’s export restrictions on certain medical products could very well have compromised the healthcare systems in developing nations in Eastern Europe and sub-Saharan Africa—many of which rely heavily on the EU for medical supplies.¹⁵¹ For example, Cape Verde, a small island nation in the Atlantic, imports over 90% of its medical gloves and face shields from the EU.¹⁵² EU restrictions could consequently limit medical supplies and in turn, the quality of care available to those on the island. Even where one medical product is lacking or unable to be sourced, effective medical care could very well be jeopardized.¹⁵³

Industrial countries have long pushed developing countries to open up their markets to foreign imports.¹⁵⁴ This has created a system in which developing countries come to heavily rely on foreign imports, especially on medical equipment.¹⁵⁵ Thus, for many developing countries, restrictive export policies threaten to eliminate their access to global markets for medical product imports right when they need it most.¹⁵⁶

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Brown, *supra* note 9.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Chad Brown, *EU Limits on Medical Exports Leave Many Poor Countries Vulnerable to COVID-19*, THE PETERSON INST. FOR INT’L ECON. (Mar. 25, 2020), <https://www.piie.com/research/piie-charts/eu-limits-medical-exports-leave-many-poor-countries-vulnerable-covid-19> [hereinafter *EU Limits*].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Chad Brown, *EU Limits on Medical Gear Exports Put Poor Countries and Europeans at Risk*, THE PETERSON INST. FOR INT’L ECON. (Mar. 19, 2020), <https://www.piie.com/blogs/trade-and-investment-policy-watch/eu-limits-medical-gear-exports-put-poor-countries-and> [hereinafter *COVID Repercussions*].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

V. Proposal

A. The Case for Free Trade – Even During a Pandemic

Integration into the global economy has long been tied to economic growth, development, and poverty reduction.¹⁵⁷ Studies have even shown that open global trade policies are needed for continuous economic growth.¹⁵⁸ In fact, in terms of increasing living standards, no country has achieved great success in the last few decades without being open to global trade.¹⁵⁹ It has even enabled many developing countries to establish their own competitive advantages, especially in the realm of product manufacturing.¹⁶⁰

Essentially, the free trade framework encourages countries around the world to specialize in what they are able to produce with the least amount of resources.¹⁶¹ This, in turn, promotes economic growth on a global scale and lowers the price of goods and services around the world.¹⁶² After all, no country alone can produce all of the goods it needs at a reasonable price.¹⁶³ This is particularly applicable to medical products.

The success that coincides with free trade does not disappear with the onset of a global emergency. Given the COVID-19 pandemic, liberalized trade is essential to save lives. There is a well-defined need to keep trade flowing in order to ensure the supply of essential medical products is properly produced and distributed throughout the world. This, however, will require cooperation between all nations. Keeping trade open and flowing requires the market to keep supplying essential goods and requires countries to avoid export restrictions.¹⁶⁴ Easing trade tensions and restrictions is particularly crucial.

A number of nations issued statements urging that states keep trade lines open. For instance, Australia, Brunei Darussalam, Canada, Chile, the Republic of the Union of Myanmar, New Zealand, and Singapore issued a joint statement outlining their commitment to maintaining open and connected supply chains.¹⁶⁵ These countries recognized the importance of removing restrictions on essential goods, especially on medical supplies, in order to support the viability of global supply

¹⁵⁷ IMF Staff, *Global Trade Liberalization and the Developing Countries*, INT'L MONETARY FUND (Nov. 2001), <https://www.imf.org/external/np/exr/ib/2001/110801.htm> [hereinafter *Trade Liberalization*].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Comparative Advantage*, *supra* note 47.

¹⁶² *Open Trade*, *supra* note 48.

¹⁶³ *Comparative Advantage*, *supra* note 47.

¹⁶⁴ *COVID-19 and International Trade: Issues and Actions*, ORG. FOR ECON. CO-OPERATION AND DEV. (June 12, 2020), <https://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/> [hereinafter *OECD*].

¹⁶⁵ *Joint Ministerial Statement by Australia, Brunei Darussalam, Canada, Chile, the Republic of the Union of Myanmar, New Zealand and Singapore Affirming Commitment to Ensuring Supply Chain Connectivity Amidst the COVID-19 Situation*, GOV'T OF CANADA (Mar. 25, 2020), <https://www.international.gc.ca/gac-amc/news-nouvelles/2020-03-25-joint-ministerial-statement-declaration-ministerielle-commune.aspx?lang=eng>.

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chains.¹⁶⁶ Despite the uncertainty associated with the pandemic, countries need to unite to keep trade flowing. Protectionism has consistently proven to be a costly failure, and a global pandemic is not the time for a shift toward isolationist measures.¹⁶⁷

As COVID-19 rages on, nations would do well to first increase global trade transparency.¹⁶⁸ Global transparency is crucial in structuring sound national policies while simultaneously keeping international trade flowing.¹⁶⁹ That said, countries would do best to honor their commitments to the WTO by properly reporting all COVID-19 related trade measures taken.¹⁷⁰

In addition, nations should opt for global cooperation in making sure global supply chains are not disrupted—particularly as it regards the many medical products needed to fight off disease.¹⁷¹ Opening trade of essential medical supplies means removing trade barriers, including tariffs and export prohibitions.¹⁷² It means expediting any necessary certification procedures and enhancing trade facilitation to maintain the flow of goods between countries.¹⁷³

States need to properly plan beyond the immediate. There is a serious need to increase the overall supply of essential medicinal products globally, and nations should urgently work together to boost capacity and production, rather than implementing any kind of restrictions. In essence, this means prioritizing free trade. Nations are undoubtedly concerned with wanting to protect their own citizens, but the effect these restrictions have on other countries, and in turn, the global containment efforts, can be extremely detrimental.¹⁷⁴

Transparency, global cooperation, and liberalized trade are essential to build an effective global supply of medical gear needed to fight the COVID-19 pandemic. Export restrictions on essential goods, such as medical equipment, should be removed and free trade embraced. Nations need to work together in order to increase medical supplies, not restrict it.

VI. Conclusion

Export restrictions can have ripple effects throughout the global economy. While they may be deemed justifiable under WTO obligations, COVID-19 should not be used as a basis to impose limits on trade exports—even if countries consider it a priority to safeguard the lives of its own citizens. In the short term, export restrictions may result in increased domestic availability of medical prod-

¹⁶⁶ *Id.*

¹⁶⁷ Scott Lincicome, *The Case for Free Trade*, NATIONAL REV. (May 2, 2019, 1:24 PM), <https://www.nationalreview.com/magazine/2019/05/20/the-case-for-free-trade/>.

¹⁶⁸ *OECD*, *supra* note 164.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

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ucts. On the contrary, however, export restrictions ultimately reduce total global supply; limiting the availability of medical products on both a domestic, as well as international, level. In addition, developing countries are severely affected by restrictive measures placed on PPE. As many have limited manufacturing capacities, they rely on industrial nations for many medical products. In the aggregate, export restrictions are counterproductive.¹⁷⁵ What makes sense in a single emergency can be disastrous during a global crisis.¹⁷⁶ These ideas considered, free trade should be embraced and remain preferential for the global good. After all, a global pandemic requires a global response.

¹⁷⁵ *Lifting Trade Restrictions*, *supra* note 135.

¹⁷⁶ *Id.*