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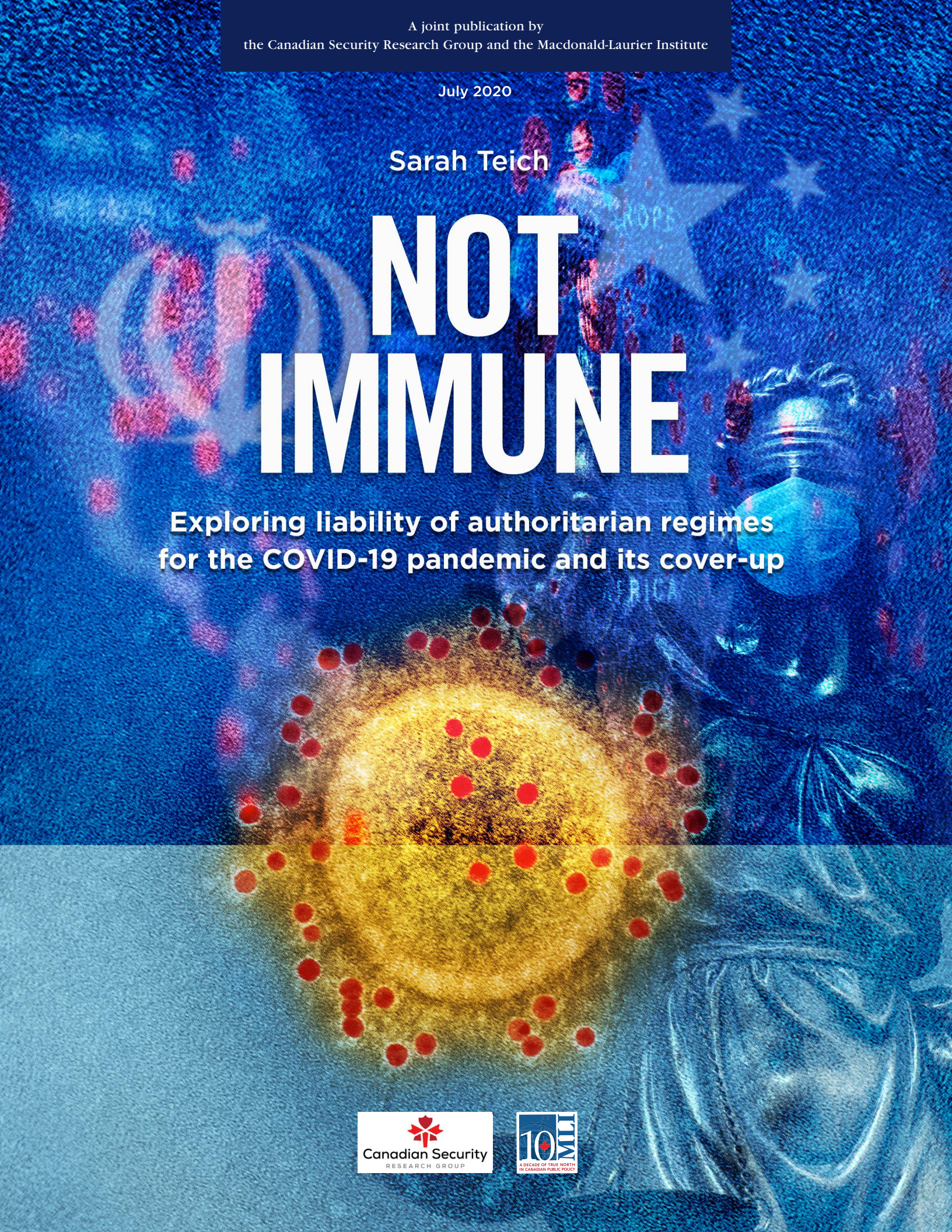
NOT IMMUNE

Exploring liability of authoritarian regimes for the COVID-19 pandemic and its cover-up



Canadian Security RESEARCH GROUP

MLI 10 A DECADE OF TRUE NORTH IN CANADIAN PUBLIC POLICY

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Cover: Renée Depocas (Photos: iStock; Center for Disease Control (virus); Martin Sanchez (map))

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Foreword

by David Matas

This report, *Not Immune: Exploring liability of authoritarian regimes for the COVID-19 pandemic and its cover-up* by Sarah Teich, is a thorough canvassing of the subject matter which the title describes. For anyone who wants to find out what remedies there are, what can be done, this report has answers, lots of them.

Ms. Teich notes that legal liability is less about blame and more about responsibility and compensation. When we are still in the midst of the COVID-19 pandemic, the primary focus is prevention. Legal liability is a form of prevention. With any wrongdoing, the sooner those responsible are held responsible, the greater the deterrent and prevention effect.

Immunity is a licence for repetition. Indeed, the cover-up, denial and fabrication that we saw in Wuhan, Hubei, with the start of COVID-19 is the consequence of the effective immunity of the Chinese Communist Party and Government when it engaged in similar behaviour with the start of Severe Acute Respiratory Syndrome (SARS) in Guangzhou, Guangdong.

There are some situations where liability and prevention may not go hand in hand. The International Air Transport Association (IATA), for instance, has taken the position that the effort to attribute blame for airplane crashes threatens the free reporting of information about what went wrong.

However, that is not a legitimate concern with COVID-19, because cover-up is not a secondary problem here. Cover-up itself is what went wrong; cover-up has been a primary cause of global spread.

As well, sometimes liability is avoided in fragile transition situations. If China or Iran, for instance, were transitioning to democracy and attributing liability to the existing regimes for COVID-19 might undermine that transition, there might be an argument for not attributing liability to present actors in those states. However, that also is not the situation here.

In any case, we do not face a choice between liability determination and no liability determination. The choice is rather structured liability determina-

tion and vigilante liability determination. Without structured liability determination, there are those who will take the issue of liability into their own hands, in an indiscriminate and unfair way. Structured liability determination is the best way of fending off this vigilantism.

The advantage of the analysis Sarah Teich brings to the issue is that it is exactly that; it is structured, organized, balanced, and comprehensive. The report speaks for itself as a stand against blame shifting. The aim of the report is not to direct liability attention to just one actor or set of actors. It looks at justice systems as they should always be considered, with no one above the law and everyone equal before the law.

COVID-19 has brought many changes to our world, some beneficial, most not so much. One change the virus should not bring, a point this report makes just by having been written, is that justice, accountability, responsibility and liability should remain. The report is a useful, important reminder of the value and significance of justice in even the most dramatic, widespread, sweeping calamity.

David Matas *is an international human rights lawyer based in Winnipeg, Manitoba and a Senior Fellow at the Raoul Wallenberg Centre for Human Rights.*

Executive Summary

China and Iran have both come under criticism for their regimes' handling of the COVID-19 pandemic and the massive resulting global harm caused by cover-up and obfuscation when responsible action could have contained the virus.

A number of voices have proposed that these regimes should be held legally (and financially) liable for the spread of COVID-19 around the globe.

In an April report by the Henry Jackson Society, researchers found that measures taken to that point by the G7 countries alone amounted to US$4 trillion – and that was before many of these countries announced additional measures. The report proposed that action be taken to seek compensation for that amount from the Chinese regime.

Although this situation is still developing, there is compelling evidence that both Chinese and Iranian regimes buried evidence of the pandemic in its critical early days, choosing to attempt to maintain power and/or stability at the cost of the health and safety of their own citizens and the global population. They are accused of intentionally underreporting data, concealing the extent of the outbreak from the international community and from their own citizenry, and silencing whistleblowers at the expense of protecting public health.

These allegations are serious. According to the University of Southampton, if interventions had been conducted three weeks earlier, cases could have been reduced by 95 percent – significantly reducing global spread of COVID-19.

This paper makes the case that governments (and in some cases, citizens) have a variety legal avenues that could, and should, be pursued in order to seek accountability from China and Iran for the global spread of COVID-19.

This is less about blame, and more about responsibility. It is also about compensation: who should pay for COVID-19?

As this report shows, the Chinese and Iranian regimes likely breached their international legal obligations in a number of key international agreements, including the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), the World Health Organization's *International Health*

Regulations (IHR), the *Rome Statute of the International Criminal Court*, and the Biological Weapons Convention. For these agreements, possible avenues for accountability include the UN Office of the High Commissioner for Human Rights, the Director-General of the WHO, International Criminal Court, and the UN Security Council, respectively.

No matter the breach, there is also always the potential for utilizing the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA). In China's case, the World Trade Organization (WTO) dispute resolution mechanism may also be utilized to seek accountability for COVID-19. Bilateral investment treaties (BITs) may similarly be used.

Accountability could also be sought in Canadian and US domestic legal systems. Options include: suing China or Iran in domestic courts; seeking accountability from Chinese and Iranian corporations in Canada using the Canadian *Quarantine Act*; imposing economic sanctions on China and Iran using the *Special Economic Measures Act* (SEMA) in Canada and the *International Emergency Economic Powers Act* (IEEPA) in the US; sanctioning officials under the *Magnitsky Acts*; and passing novel legislation to specifically address liability for COVID-19.

A final possible avenue is to hold Chinese officials liable for the spread of COVID-19 from within the domestic Chinese legal system. Chinese actions constitute a breach of China's own laws, and Chinese officials may be in breach of both the *Frontier Health and Quarantine Law of the People's Republic of China* (China's Quarantine Act) and the *Criminal Law of the People's Republic of China* (China's Criminal Code).

In sum, this report expounds on relevant international and domestic laws, and evaluates a variety of avenues of recourse that may be utilized to seek accountability from the Chinese and Iranian regimes. These may be pursued separately, or in tandem, to pressure Chinese and Iranian regimes and work to hold them liable for the trillions of dollars of damages caused by COVID-19.

Sommaire

La Chine et l'Iran ont tous les deux fait l'objet de nombreuses critiques pour la manière dont leurs systèmes nationaux ont géré la pandémie de COVID-19 et les énormes dégâts causés à l'échelle mondiale par les tactiques de camouflage et d'occultation employées, alors que des gestes responsables auraient permis de contenir le virus.

Certaines voix ont proposé que ces régimes soient tenus légalement (et financièrement) responsables de la propagation de la COVID19 à travers le monde.

Dans un rapport publié en avril par la *Henry Jackson Society*, des chercheurs ont estimé que les mesures prises par les pays du G7 pour lutter contre le virus jusqu'à cette date avaient coûté à elles seules 4 000 milliards de dollars – et ce, avant que plusieurs d'entre eux n'annoncent des mesures supplémentaires. Le rapport propose la mise en œuvre d'actions correctives visant à obtenir du régime chinois une indemnité correspondant à cette somme.

Bien que la situation continue d'évoluer, des faits avérés démontrent que la Chine comme l'Iran ont camouflé la situation véritable au cours des premiers jours critiques de la pandémie, ayant choisi de préserver leur pouvoir et leur stabilité au prix de la santé et de la sécurité de leurs propres citoyens et de la population mondiale. Ces régimes sont accusés d'avoir intentionnellement sous-déclaré les données, caché l'étendue de l'éclosion à la communauté internationale et à leurs propres citoyens et fait taire les lanceurs d'alerte au détriment de la protection de la santé publique.

Ces allégations sont graves. Selon l'université de Southampton, si des mesures d'interventions avaient été mises en œuvre trois semaines plus tôt, le nombre de cas d'infection aurait été réduit de 95 p. cent – ce qui aurait considérablement limité la propagation de la COVID19 à travers le monde.

Le présent rapport démontre que les gouvernements (et parfois les citoyens) pourraient et devraient recourir à divers moyens légaux pour que la Chine et l'Iran aient à répondre de leurs actes en matière de propagation de la COVID19 dans le monde.

Il n'est pas ici tellement question de blâme, mais plutôt de responsabilité. Par cela, on entend la nécessité d'une indemnisation : qui paiera pour la COVID19?

Comme le montre ce rapport, les régimes chinois et iranien ont vraisemblablement manqué à leurs obligations légales à l'échelle internationale à l'égard d'un certain nombre d'accords internationaux clés, notamment le *Pacte international relatif aux droits économiques, sociaux et culturels* – PIDESC (ou ICESCR), le *Règlement sanitaire international de l'Organisation mondiale de la Santé* – RSI (ou IHR), le Statut de Rome de la Cour pénale internationale et la Convention sur les armes biologiques. Des recours sont envisageables dans le cadre de chacun de ces accords par l'intermédiaire, respectivement, du Bureau du Haut-Commissariat des Nations Unies aux droits de l'homme, du directeur général de l'Organisation mondiale de la Santé – OMS (ou WHO), de la Cour pénale internationale et du Conseil de sécurité des Nations Unies.

Quelle que soit l'infraction, il est aussi toujours possible de porter une accusation devant la Cour internationale de justice – CIJ (ou ICJ) ou devant la Cour permanente d'arbitrage – CPA (ou PCA). Pour ce qui est de la Chine, on peut demander des comptes par l'intermédiaire des mécanismes de règlement des différends de l'Organisation mondiale du commerce – OMC (ou WTO). On peut aussi faire valoir sa cause dans le cadre des traités bilatéraux sur l'investissement (TBI).

On peut également demander des comptes dans le cadre des systèmes légaux du Canada et des ÉtatsUnis par les moyens suivants : poursuites contre la Chine et l'Iran devant les tribunaux nationaux, recours contre les sociétés chinoises et iraniennes en activité au Canada en vertu de la *Loi sur la mise en quarantaine canadienne*, imposition de sanctions économiques à la Chine et à l'Iran en vertu de la *Loi sur les mesures économiques spéciales* – LMES (ou SEMA) du Canada et de l'*International Emergency Economic Powers Act* (IEEPA) des États-Unis, application de sanctions contre les hauts responsables conformément à la *Loi Magnitsky* ou, encore, adoption d'une nouvelle loi qui porterait précisément sur l'établissement de la responsabilité pour la COVID19.

En dernier recours, pour tenir les représentants chinois responsables de la propagation de la COVID-19, il y aurait peut-être lieu d'en appeler aux tribunaux nationaux chinois. La Chine a violé ses propres lois, de sorte que ses représentants pourraient avoir enfreint à la fois la *Loi sur la santé et la quarantaine aux frontières* de la République populaire de Chine et les lois pénales de ce même pays (Code pénal).

En somme, ce rapport traite des lois internationales et nationales pertinentes et évalue une variété de recours pouvant être utilisés pour demander des comptes aux régimes chinois et iranien. Ces recours pourraient être intentés séparément, ou en parallèle, en vue d'exercer une pression maximale sur ces régimes et de les tenir responsables des milliers de milliards de dollars de dommages causés par la COVID19.

Introduction

Over the past several months, the novel coronavirus and the disease caused by it (COVID-19) have taken the world by storm. The disease originated in Wuhan, the capital of the Hubei Province of the People's Republic of China, and spread quickly to the Middle East, starting with Iran. From there, COVID-19 spread throughout Europe, with early hotspots in Italy and Spain, and throughout North America. As of July 2020, there are more than 12 million confirmed cases of COVID-19 across the globe, with over 540,000 deaths caused by the virus. Beyond the irreparable damage to human life, there are significant consequences to global economic health. In a recent report by the Henry Jackson Society, researchers found that the robust economic measures taken thus far by the G7 countries alone amount to US$4 trillion.[1]

Questions relating to legal liability are increasingly being raised. This is less about blame, and more about responsibility. It is also about compensation: Who should pay for COVID-19? China and Iran, the early hotspots, have both come under criticism for their regimes' handling of the pandemic, with an increasing number of voices opining that these regimes should be held legally (and financially) liable for the spread of COVID-19. Although this situation is still developing, there is compelling evidence that both the Chinese and Iranian regimes buried evidence of the pandemic in its critical early days, intentionally underreporting data, concealing the extent of the outbreak from the international community and from their own citizenry, and silencing whistleblowers at the expense of protecting public health. These cover-ups had significant consequences. According to the University of Southampton, if interventions had been conducted three weeks earlier, cases could have been reduced by 95 percent – significantly reducing global spread of COVID-19.[2]

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1 Matthew Henderson et al., "Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response," Henry Jackson Society, April 5, 2020, http://henryjacksonsociety.org/wp-content/uploads/2020/04/Coronavirus-Compensation.pdf.

2 Shengjie Lai et al., "Effect of Non-pharmaceutical Interventions for Containing the COVID-19 Outbreak in China," *MedRxiv* (13 March 2020), https://www.medrxiv.org/content/10.1101/2020.03.03.20029843v3.full.pdf.

As a consensus is growing that the Chinese and Iranian regimes should be held accountable for the spread of COVID-19, it is increasingly important and relevant to analyse the legal mechanisms through which to do so. This report aims to explore these mechanisms, in a format and language accessible to both field experts and laypersons.

Part I explains the relevant international laws that the Chinese and Iranian regimes may have breached. These are (1) the human right to health, as enshrined in the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR); (2) the World Health Organization's (WHO) *International Health Regulations* (IHR); (3) international criminal law, and in particular, the crimes against humanity that are criminalized in the *Rome Statute of the International Criminal Court*; and (4) the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (Biological Weapons Convention).

> *"A consensus is growing that the Chinese and Iranian regimes should be held accountable for the spread of COVID-19.*

Part II explains select domestic laws relating to infectious diseases and pandemic control in three countries: Canada, the United States, and China. This is to lay the groundwork for the exploration of potential avenues of recourse in domestic legal systems.

Part III outlines the factual framework – allegations levied against the Chinese and Iranian regimes. This part focuses on allegations that the Chinese and Iranian regimes intentionally underreported critical public health data, particularly in the key early days of the outbreak, and silenced whistleblowers.

Finally, Part IV applies the alleged facts to the laws and explores potential avenues of recourse using both international and domestic legal mechanisms. In effect, this part lays out a menu of options through which to hold China and/or Iran accountable for the spread of COVID-19.

Internationally, each distinct breach of international law generates specific avenues of recourse. Breaches of the ICESCR are referred to the Office of the High Commissioner for Human Rights (OHCHR); breaches of the IHR are referred to the WHO or the Health Assembly; breaches of the *Rome Statute* may be investigated at the International Criminal Court (ICC); and breaches of

the Biological Weapons Convention are referred to the UN Security Council (UNSC). No matter the breach, there is also always the potential for utilizing the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA). The World Trade Organization's (WTO) dispute resolution mechanism may also be utilized to seek accountability for COVID-19. Bilateral investment treaties (BITs) may similarly be used.

Accountability could also be sought in Canadian and US domestic legal systems. Options include: suing China or Iran in domestic courts; seeking accountability from Chinese and Iranian corporations in Canada using the Canadian *Quarantine Act*; imposing economic sanctions on China and Iran using the *Special Economic Measures Act* (SEMA) in Canada and the *International Emergency Economic Powers Act* (IEEPA) in the US; sanctioning officials under the *Magnitsky Acts*; and passing novel legislation to specifically address liability for COVID-19. Such novel legislation might follow the proposed *Stop COVID Act* currently in process in the US, or a Magnitsky-style act to specifically sanction the withholding of health information, as recently proposed by Hudson Institute.

The final section under Part IV outlines the potential to hold Chinese officials liable for the spread of COVID-19 from within the domestic Chinese legal system. Chinese actions constitute a breach of China's own laws, and Chinese officials may be in breach of both the *Frontier Health and Quarantine Law of the People's Republic of China* (China's Quarantine Act) and the *Criminal Law of the People's Republic of China* (China's Criminal Code). The same model may be available with respect to Iranian laws, but a consult with an Iranian lawyer is required to assess this option.

In sum, this report expounds on relevant international and domestic laws and evaluates a variety of avenues of recourse that may be utilized to seek accountability from the Chinese and Iranian regimes. These may be pursued separately, or in tandem, to pressure the Chinese and Iranian regimes and work to hold them liable for the trillions of dollars of damages caused by COVID-19.

Key Points

The allegations levied against the Chinese and Iranian regimes are serious. Withholding critical public health information, silencing whistleblowers, delaying containment measures, and sacrificing the health and safety of their citizenry in favour of maintaining power and/or stability – all this is in violation of numerous international and domestic legal obligations. These actions had significant consequences worldwide. There are more than a dozen legal avenues through which our governments (and in some cases, our citizens) can seek accountability from China and Iran for the global spread of COVID-19. These are condensed into 12 key points to take away from the analysis:

1. The Chinese and Iranian regimes likely breached their international legal obligations pursuant to Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), which protects and guarantees the human right to health. These breaches may be referred to the UN Office of the High Commissioner for Human Rights (OHCHR) and, in particular, the special rapporteurs. These breaches may also be brought to the UN Human Rights Council, another human rights body supported by the OHCHR.

2. The Chinese and Iranian regimes likely breached Articles 6, 7, and 44 of the World Health Organization's *International Health Regulations* (IHR). These articles require states parties to notify the WHO promptly, and collaborate with other countries. The Chinese regime may have further breached Article 46. States parties may refer IHR disputes to the director-general of the WHO. A complaint against the WHO itself may be referred to the World Health Assembly.

3. The Chinese and Iranian regimes' withholding of critical health information may fit the definition of a crime against humanity pursuant to Article 7 of the *Rome Statute of the International Criminal Court*. The allegations appear to fit many of the required elements for three specific crimes against humanity offences: the crime against humanity of *murder*, the crime against humanity of *extermination*, and the crime against humanity of *other inhumane acts*. It may be worthwhile for the International Criminal Court to open a preliminary examination into the situation.

4. The Chinese and Iranian regimes may have breached the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*. A state party may lodge a complaint regarding an alleged breach with the UN Security Council. The UN Security Council may then launch an investigation. Canada or the United States could lodge such a complaint with the UN Security Council, although China's veto vote may in effect block this as an option.

> *"Canada could also seek recourse from China for any breaches of the China-Canada bilateral investment treaty.*

5. Canada or the United States may request that the case be referred to the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA). In the likely event that neither China nor Iran provides its consent to utilizing the ICJ or the PCA, Canada or the United States may request that the case be referred to the ICJ for an advisory opinion, which does not require their consent.

6. The Chinese regime's actions may be framed as trade-related, in breach of World Trade Organization (WTO) agreements. Iran is not a WTO member state, and so this mechanism cannot be used to hold the Iranian regime to account. There are a couple of ways in which COVID-19 can be framed as trade-related, and these are discussed in the main body of this report.

7. Canada could also seek recourse from China for any breaches of the China-Canada bilateral investment treaty (BIT). If China is alleged to be in breach of any of the provisions contained in the BIT, and the dispute cannot be settled through diplomatic channels within six months, Canada can request that the dispute be submitted to an ad hoc arbitral tribunal. The involvement of the tribunal at that point is compulsory.

8. Parties in Canada or the United States may sue China or Iran in Canadian and/or US domestic courts. If such a case proceeds, domestic courts can investigate the origin of the virus, make findings of fact, and assess Chinese and Iranian legal culpability. Such courts can ultimately rule that China and/or Iran must compensate victims, and if these foreign states do not pay as required, their assets may be seized, sold, and the proceeds distributed to victims. The primary hurdle to these lawsuits will be to argue that these foreign states are not protected by *sovereign immunity* (the general principle that foreign states should not be subject to domestic jurisdiction). There are a number of exceptions to sovereign immunity,

contained in the Canadian *State Immunity Act* and the US *Foreign Sovereign Immunities Act*. Besides the terrorism exception as it is articulated in the Canadian *State Immunity Act*, none of the existing exceptions are likely to apply. To enable such domestic lawsuits, Canada and/or the United States can pass a bill adding a new, targeted exception to sovereign immunity. Such a bill is already in process in the US (e.g., the *Stop COVID Act*).

9. Chinese and Iranian corporations in Canada may be held accountable under the *Quarantine Act*. The Canadian *Quarantine Act* proscribes (1) hindering or wilfully obstructing a quarantine officer, (2) violations that cause "a risk of imminent death or serious bodily harm to another person," and (3) failure on the part of directors and officers to "take all reasonable care to ensure that the corporation complies with this Act and the regulations." If a Chinese or Iranian corporation in Canada played a role in concealing the extent of the COVID-19 outbreak, this may conceivably be a breach of these obligations. Upon conviction, this can result in a hefty fine and an order for compensation. If the company does not pay, costs may be recovered in court by the seizure of assets.

10 Canadian and US governments may impose economic sanctions on China and Iran. The power to impose economic sanctions is contained in Canada in the *Special Economic Measures Act* (SEMA) and in the US in the *International Emergency Economic Powers Act* (IEEPA).

11. Canadian and US governments may impose sanctions on responsible Chinese and Iranian officials pursuant to their *Magnitsky Acts* (virtually identical in both countries). If Chinese and Iranian officials are sanctioned pursuant to these acts, they may be subject to property-blocking sanctions and travel restrictions. In addition, Canadian and US governments may pass novel legislation to sanction foreign officials who intentionally conceal or distort critical public health information.

12. In addition to pursuing accountability in Canadian and US domestic courts, a domestic suit may be pursued within the Chinese legal system. Domestic levels of corruption within China may, in effect, preclude this possibility, but it is significant to appreciate that even pursuant to China's own domestic legislation, distorting public health data, silencing whistleblowers, and generally de-prioritizing public health are against the law. A variety of domestic Chinese provisions appear to have been breached; for example, Article 409 of the Chinese Criminal Code criminalizes "government work personnel … engaging in the prevention and treatment of infectious diseases, whose serious irresponsibility has resulted in the communication and spread of infectious diseases."

Part I. International Legal Framework

A. THE HUMAN RIGHT TO HEALTH

The right to health is a fundamental part of International Human Rights Law (IHRL). It was first articulated as a human right in the 1946 World Health Organization (WHO) Constitution. The WHO Constitution states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being" and defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[3]

The right to health is mentioned again in the *Universal Declaration of Human Rights* (UDHR; 1948), included as part of the right to an adequate standard of living (Article 25). When the UDHR was split into two covenants, the right to health was included in the International Covenant on Economic, Social, and Cultural Rights (ICESCR; 1966). The right to health as articulated in Article 12 of the ICESCR is still the prevailing articulation. Also relevant is Article 2, which is a general obligation on states parties to take steps to achieve the full realization of rights.

ARTICLE 12

[The Right to Health]

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
    a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
    b. The improvement of all aspects of environmental and industrial hygiene;
    c. *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
    d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness. [emphasis added]

3 Constitution of the World Health Organization, July 22, 1946, at Preamble (entered into force April 7, 1948).

ARTICLE 2

[General Obligation to Take Steps]

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Numerous other human rights treaties have since recognized or made reference to the right to health. A comprehensive review of these instruments is beyond the scope of this paper but can be found on the website of the UN Office of the High Commissioner for Human Rights (OHCHR).[4] It is sufficient for our purposes that the right to health is settled international law. According to the OHCHR, "every State has ratified at least one international human rights treaty recognizing the right to health."[5] The right to health has been incorporated into at least 115 domestic constitutions.[6] The right to health has been referred to by the UN as comprising customary international law in addition to treaty law.[7] This means that it is binding on all states, and not just those states which have ratified the ICESCR or another treaty that recognizes the right to health. Even if one disagrees with that assessment, Canada, China, and the Islamic Republic of Iran are all states parties to the ICESCR, which means they are legally bound by its articles.[8]

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4 UNOHCHR and UNWHO, "The Right to Health: Fact Sheet No. 31," OHCHR and WHO (2008): 1 [hereafter The Right to Health].

5 The Right to Health, 1.

6 The Right to Health, 10.

7 There are multiple sources of international law. One source is international treaties, which create binding legal obligations on the states that ratify them. A second source is customary international law (CIL), which is binding on all states. CIL is evidenced by (a) widespread general practice of states and (b) *opinio juris* (states' belief that this practice is one they are legally obligated to do). In addition to the various treaties that deal with the right to health, the right to health has been characterized as CIL by the United Nations. See The Right to Health, 22.

8 The United States, however, has not ratified the ICESCR.

The Content of the Right to Health

The key aspects of the right to health have been clarified by the Committee on Economic, Social, and Cultural Rights (CESCR), the UN treaty body responsible for monitoring the ICESCR and interpreting its articles. In its General Comment No. 14, the CESCR clarified that the right to health extends beyond access to health care and the building of hospitals – to all those "underlying determinants of health" that help people lead healthy lives. These include:

1. safe drinking water and adequate sanitation;
2. safe food;
3. adequate nutrition and housing;
4. healthy working and environmental conditions;
5. health-related education and information;
6. gender equality.[9]

The above list aptly reflects the reality that international human rights are interdependent and indivisible. The including of the "underlying determinants of health" as part of the right to health demonstrates that the right to health is dependent on and contributes to the realization of many other international human rights, such as the rights to water, food, adequate housing, non-discrimination, privacy, participation, and gender equality.

The right to health also includes certain freedoms and entitlements. It includes the right to be free from non-consensual medical treatment, and to be free from torture and other cruel, inhumane, or degrading treatment. Then, the entitlements include:

1. the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health;
2. the right to prevention, treatment, and *control of diseases*;
3. access to essential medicines;
4. maternal, child, and reproductive health;
5. equal and timely access to basic health services;
6. the provision of health-related education and information;
7. participation of the population in health-related decision-making at the national and community levels.[10]

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9 The Right to Health, 3.

10 The Right to Health, 3-4 (emphasis added).

In its General Comment No. 14, the CESCR clarified the meaning of "control of diseases" as follows:

> States' individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.[11]

State Obligations

The right to health naturally places a variety of obligations on states parties. As the OHCHR articulates, "States have the primary obligation to protect and promote human rights."[12] Appreciating that states may have limited resources, the covenant does not require the right to health to be fully realized immediately, but does require states to immediately take concrete and deliberate steps and "*progressively* achieve the full realization of the right."[13]

As with all human rights, obligations vis-à-vis the right to health fall into three categories: the obligation to *respect*, the obligation to *protect*, and the obligation to *fulfil*. The obligation to *respect* prohibits states from "interfering directly or indirectly with the enjoyment of the right to health"; the obligation to *protect* requires states to "prevent third parties from interfering with article 12 guarantees"; and the obligation to *fulfil* requires states to "adopt appropriate legislative, administrative…and other measures towards the full realization of the right to health."[14] It is the obligation to *fulfil* that requires states to develop a national health plan, ensure the provision of health care, address the underlying determinants of health, ensure that medical staff are well-trained, promote health education and information campaigns, etc.[15]

The precise content of states' obligations is clarified by the CESCR. It is notable that all three obligations explicitly reference the importance of sharing information. First, in order to *fulfil* the obligation to respect the right to health, states "should refrain from…censoring, withholding, or intentionally misrepresenting health-related information." Also relevant under the obligation to respect are the requirements that states refrain from "unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities"; "using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health"; and "limiting access to health services as a punitive measure, e.g. during armed conflicts

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11 UNOHCHR and UNCESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), 22d Sess., UN Doc E/C.12/2000/4 (August 2000) [hereafter UNCESCR].

12 The Right to Health, 23.

13 The Right to Health, 23.

14 The Right to Health, 25-27.

15 UNCESCR, 7.

in violation of international humanitarian law."[16] Second, the obligation to protect involves the requirement that states "ensure that third parties do not limit people's access to health-related information and services."[17] Third, the obligation to *fulfil* requires that states promote "medical research and health education, as well as information campaigns."[18] More broadly, the obligation to *fulfil* compels states to "undertake actions that create, maintain and restore the health of the population."[19]

Beyond these categories of *respect*, *protect*, and *fulfil*, the CESCR identified a number of core obligations and obligations of comparably high priority. Critically, the high-priority obligations include "prevent, treat and control epidemic and endemic diseases" and "provide education and access to information."[20]

> *"State obligations extend globally, and the right to health imposes concrete international obligations.*

State obligations extend globally, and the right to health imposes concrete international obligations. States are compelled to "respect the enjoyment of the right to health in other countries" as well as their own. They are similarly required to protect the right to health abroad to the best of their abilities, and "prevent third parties from violating the right in other countries, if they are able."[21] The CESCR states that "depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries." The CESCR uses stronger language in reference to emergencies, and emphasizes cooperation and coordination, stating:

> States Parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency. … Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States Par-

16 UNCESCR, 6.
17 UNCESCR, 7.
18 UNCESCR, 7.
19 UNCESCR, 7.
20 UNCESCR, 8.
21 UNCESCR, 7.

> ties have a special responsibility and interest to assist the poorer developing States in this regard. States Parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure.[22]

State Violations

If a state breaches its obligations under Article 12 of the ICESCR, it has violated its international legal obligations to *respect*, *protect*, and/or *fulfil* the human right to health. Violations may occur through direct actions of states, or through an omission or failure of states to take necessary measures. However, it is important to distinguish between inability and unwillingness with respect to taking these measures. Article 2.1 of the ICESCR requires states parties to take the necessary steps "to the maximum of [their] available resources."[23] If a state is "unwilling to use the maximum of its available resources for the realization of the right to health," it is in violation of its international legal obligations.[24]

Violations of the obligation to respect the right to health include state actions or policies that "are likely to result in bodily harm, unnecessary morbidity and preventable mortality."[25] One stated example of such an action or policy is "the deliberate withholding or misrepresentation of information vital to health protection or treatment."[26]

Violations of the obligation to protect the right to health follow from failures of a state to adequately safeguard persons from third-party actions. One example would be a "failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries."[27]

Violations of the obligation to fulfil the right to health follow from failures of a state to take all necessary measures to ensure the realization of the right to health. Examples of such violations include "the failure to adopt or implement a national health policy," "insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups," and "the failure to reduce infant and maternal mortality rates."[28]

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22 UNCESCR, 7-8.

23 International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 UNTS 3 Art. 2.1 (entered into force January 3, 1976) [hereafter ICESCR].

24 UNCESCR, see note 11, 9.

25 UNCESCR, 9.

26 UNCESCR, 9.

27 UNCESCR, 9.

28 UNCESCR, 9.

B. THE WORLD HEALTH ORGANIZATION'S *INTERNATIONAL HEALTH REGULATIONS*

Beyond the right to health as an international human right, all World Health Organization (WHO) member states are legally bound by the WHO's *International Health Regulations* (IHR). The WHO is the international body responsible for "the management of the global regime for the control of the international spread of disease," and the WHO Constitution provides the WHO with the authority to adopt regulations "designed to prevent the international spread of disease."[29] The IHR are one such body of regulations adopted by the WHO. These regulations outline the obligations of WHO member states, and the WHO itself, in global health emergency situations. Pursuant to the WHO Constitution, these regulations that have been adopted by the Health Assembly automatically become legally binding obligations on all WHO member states that do not affirmatively opt out of them within a prescribed period of time.[30]

> *"All World Health Organization (WHO) member states are legally bound by the WHO's* International Health Regulations.

The IHR were significantly revamped following the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak. The WHO published the third edition of the IHR in 2005.

The IHR (2005) are designed to "prevent, protect against, control and provide a public health response to the international spread of disease."[31] Diverging from its previous versions, which covered only specific diseases, the IHR 2005 edition covers "illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans."[32] It also obligates states parties to develop certain minimum public health capacities, and to notify the WHO "of events that may constitute a public health emergency of international concern" according to prescribed criteria.[33] Further, the IHR outline obligations and powers of the WHO itself, such as the ability of the WHO to consider unofficial reports of public health events. Another

29 International Health Regulations, May 23, 2005, 2509 UNTS 79 (entered into force June 15, 2007), 1 [hereafter IHR].

30 IHR.

31 IHR.

32 IHR.

33 IHR.

provision contains the procedures by which the director-general may declare a "public health emergency of international concern," and further provisions establish communication mechanisms for urgent communications between states parties and the WHO.[34]

States' obligations to notify the WHO are expansive, and follow a specific algorithm published in Annex 2 to the IHR. This algorithm requires states to notify the WHO of any disease event that is "unusual or unexpected or may have serious public health impact."[35] There are a number of disease types specifically recorded that automatically fill these criteria and therefore always require notification to the WHO. This list includes "Severe Acute Respiratory Syndrome (SARS)" and "human influenza caused by a new subtype."[36]

Beyond these, Annex 2 compels notification of "any event of potential international public health concern, including those of unknown causes or sources and those involving other events or diseases." Utilizing a flowchart, it is clear that even if an event is not considered "serious" in terms of the public health impact, if it is unusual or unexpected, and there is significant risk of international spread, the WHO must be notified.

Notification and information-sharing obligations are further covered in Articles 6, 7, 44 and 46 of the IHR. Article 6 incorporates Annex 2 by reference. Articles 6-7 outline the obligations of member states to notify and share information with the WHO, while Article 44 outlines (1) the obligations of member states to collaborate with each other, and (2) the obligations of the WHO to collaborate with member states. Article 46 covers obligations of states to facilitate the transport of biological and diagnostic specimens for verification and public health response.

ARTICLE 6

[Notification]

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.
2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information

34 IHR, 1-2.

35 IHR, Annex 2.

36 IHR, Annex 2.

available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.

ARTICLE 7

[Information-sharing during Unexpected or Unusual Public Health Events]

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

ARTICLE 44

[Collaboration and Assistance]

1. States Parties shall undertake to collaborate with each other, to the extent possible, in:
    a. the detection and assessment of, and response to, events as provided under these Regulations;
    b. the provision or facilitation of technical cooperation and logistical support, particularly in the development, strengthening and maintenance of the public health capacities required under these Regulations;
    c. the mobilization of financial resources to facilitate implementation of their obligations under these Regulations; and
    d. the formulation of proposed laws and other legal and administrative provisions for the implementation of these Regulations.
2. WHO shall collaborate with States Parties, upon request, to the extent possible, in:
    a. the evaluation and assessment of their public health capacities in order to facilitate the effective implementation of these Regulations;
    b. the provision or facilitation of technical cooperation and logistical support to States Parties; and
    c. the mobilization of financial resources to support developing countries in building, strengthening and maintaining the capacities provided for in Annex 1.
3. Collaboration under this Article may be implemented through multiple channels, including bilaterally, through regional networks and the WHO regional offices, and through intergovernmental organizations and international bodies.

ARTICLE 46

[Transport and Handling of Biological Substances, Reagents and Materials for Diagnostic Purposes]

States Parties shall, subject to national law and taking into account relevant international guidelines, facilitate the transport, entry, exit, processing and disposal of biological substances and diagnostic specimens, reagents and other diagnostic materials for verification and public health response purposes under these Regulations

Notably, while the United States' acceptance of the IHR was subject to specific reservations and understandings, both Iran and China emphasized their wholehearted support for it. Iran's comments came in the form of an official objection to US reservations. Iran criticized the US for, in effect, "[placing] national interests above the treaty obligations," and emphasized "the universal applicability of the IHR for the protection of all peoples of the world from the international spread of diseases."[37] For its part, China made a statement confirming that the IHR "applies to the entire territory of the People's Republic of China" and outlined its comprehensive efforts to implement its treaty obligations.[38] These stated efforts included (1) implementing its obligations into its domestic statutes, (2) "capacity-building for rapid and effective response to public health hazards" including "technical standards for the surveillance, reporting, assessment, determination and notification of public health emergencies," and (3) "cooperation and exchanges with relevant States Parties on the implementation of the IHR."[39] China further stated that it "endorses and will implement the resolution of the 59th World Health Assembly calling upon its member states to comply immediately, on a voluntary basis, with provisions of the IHR considered relevant to the risk posed by the avian influenza and pandemic influenza."[40] Canada similarly accepted the IHR (2005) with no reservations.

C. INTERNATIONAL CRIMINAL LAW: CRIMES AGAINST HUMANITY

International criminal law is a distinct field that is similarly capable of holding states to account via the prosecution of their high-ranking officials. International criminal law prohibits crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Although international criminal law is an expansive field that has seen several international tribunals and other attempts to enforce the law, the International Criminal Court (ICC) in The Hague, the Netherlands, has the broadest jurisdiction and is most likely to be

37 IHR, Annex 2, 61-62.

38 IHR, Annex 2, 62.

39 Ibid.

40 IHR, Annex 2, 63.

relevant in these circumstances. The ICC is governed by the Rome Statute and is responsible for prosecuting international criminals.

The ICC has specific jurisdictional restraints: It can only investigate crimes that occur in the territory of a state party, or crimes committed by state party nationals. These restraints are in effect unless the court has received a specific declaration by a non-state party accepting jurisdiction or a mandate from the UN Security Council to investigate a specific situation. Then, it can investigate and prosecute the abovementioned international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[41]

In addition to constituting a violation of the right to health, the intentional withholding of health information may constitute a crime against humanity under Article 7(a), (b), and/or (k) of the Rome Statute.[42]

ARTICLE 7

[Crime against Humanity]

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   a. Murder;
   b. Extermination; ...
   k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
   a. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
   b. "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population

The other listed crimes against humanity are less relevant to the subject of this report and so are not discussed in detail in this section. These are: (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any

41 The crime of aggression also has specific jurisdictional constraints that are unlikely to be relevant in this situation.

42 Rome Statute of the International Criminal Court, July 17, 1998, Art. 7 (entered into force July 1, 2002) [hereafter Rome Statute].

identifiable group or collectivity; (i) enforced disappearance of persons; and (j) the crime of apartheid.[43]

The specific elements of the Rome Statute's various crimes against humanity are elaborated upon in the ICC's published "Elements of Crimes" document. Before getting into the specific elements of crimes (a) through (k), this document clarifies that the acts underlying "attack directed against a civilian population" need not constitute a military attack.[44] Then, this document outlines the specific elements of crimes (a) through (k). The elements of crimes (a), (b), and (k) are as follows[45]:

ARTICLE 7 (1) (a)

Crime against Humanity of Murder

1. The perpetrator killed[46] one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

ARTICLE 7 (1) (b)

Crime against Humanity of Extermination

1. The perpetrator killed[47] one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.[48]
2. The conduct constituted, or took place as part of,[49] a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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43 Rome Statute.

44 International Criminal Court, "Elements of Crimes," International Criminal Court (2011), 5 [hereafter ICC].

45 ICC, 5-12.

46 The term "killed" is interchangeable with the term "caused death." This footnote applies to all elements that use either of these concepts.

47 The conduct could be committed by different methods of killing, either directly or indirectly.

48 The infliction of such conditions could include the deprivation of access to food and medicine.

49 The term "as part of" would include the initial conduct in a mass killing.

ARTICLE 7 (1) (k)

Crime against Humanity of Other Inhumane Acts

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.[5050]
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The ICC has generally interpreted Article 7(1)(k) – the crime against humanity of other inhumane acts – as requiring serious violations of basic human rights, as well as the elements listed in the "Elements of Crimes."[51]

In addition, all of these crimes must be committed with the mental element contained in Article 30 of the Rome Statute. This requires that the individual accused of the crime "means to cause that consequence or is aware that it will occur in the ordinary course of events."[52] This awareness of consequences is a high criminal law standard that an ordinary person would be virtually certain that its acts would cause the consequence. Because the ICC determines criminal liability, people may not be found guilty without a high standard of criminal intent.

The intentional withholding or misrepresenting of health information – causing preventable fatalities in the form of a global pandemic – may fit the elements of crime for the above three crimes against humanity. This will be discussed in detail in Part IV.

D. THE PROHIBITION AGAINST THE USE OF BIOLOGICAL WEAPONS

Canada, the United States, China, and Iran are among the 183 states parties to the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (Biological Weapons Convention). The Biological Weapons Convention was intended to "exclude completely the possibility

50 It is understood that "character" refers to the nature and gravity of the act.

51 Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, Decision on Confirmation of Charges, para. 448 (October 14, 2008), icc-cpi.int/CourtRecords/CR2008_05172.pdf.

52 Rome Statute, see note 42, Art. 30.

of bacteriological (biological) agents and toxins being used as weapons."[53] Pursuant to its articles, each state party undertook the following:

> Never in any circumstances to develop, produce, stockpile or otherwise acquire or retain (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[54]

States parties to this convention further undertook to "destroy, or to divert to peaceful purposes" all such existing agents, toxins, weapons, equipment, and means of delivery under their jurisdiction or control.[55]

Article 3 of the convention prohibits states parties from "[transferring] to any recipient whatsoever, directly or indirectly … any of the agents, toxins, weapons, equipment or means of delivery specified in Article 1 of the Convention."[56] It should be noted that Article 10 makes clear that this does not apply to the exchange of materials for peaceful purposes, including for the prevention of diseases.

Article 4 requires all states parties to, "in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article 1 of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere."[57]

Article 5 deals with cooperation, requiring states parties to "consult one another and to cooperate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention."[58] If any state party finds that any other state party is in breach of this convention, Article 6 (1) allows that state to lodge a complaint with the UN Security Council, and Article 6 (2) requires all states parties to cooperate with any consequent UN Security Council investigation.

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53 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, April 10, 1972, Preamble (entered into force March 26, 1975) [hereafter BWC].

54 BWC, Art 1.

55 BWC, Art 2.

56 BWC, Art 3.

57 BWC, Art 4.

58 BWC, Art 5.

Part II. Select Domestic Laws: Canada, United States, and China

International legal instruments such as those outlined above impose a variety of international legal obligations on states. Among those are the obligations to respect, protect, and fulfil the right to health (ICESCR); the obligations to notify the World Health Organization of certain public health events and collaborate with other states in the detection of and response to those events (IHR); the obligations to cooperate with the International Criminal Court (ICC) in the investigation and prosecution of crimes against humanity; and the obligations to destroy or divert for peaceful purposes bacteriological (biological) weapons and means of delivery.

Beyond international legal obligations, states have their own domestic legal frameworks. Sometimes, as in the case of China's public health laws, domestic legal obligations mirror international ones, as a state adjusts its domestic laws to incorporate new international treaty obligations. However, this is not always the case, and states' domestic legal obligations constitute a distinct legal framework through which to analyse potential breaches and avenues of recourse. In this part, some of the relevant domestic laws of Canada, the United States, and China are considered. This part does not attempt to provide a comprehensive summary of these countries' domestic legal structures or laws; rather, it identifies and explains a handful of domestic statutes relevant to pandemic response. Open source searches were conducted for relevant domestic Iranian laws; these searches produced no results.

A. CANADA

The domestic Canadian legislation relevant to pandemic response includes the *Emergencies Act* and the *Quarantine Act*.[59] As of July 2020, Canada has made use of the *Quarantine Act* in response to the spread of COVID-19, but has not yet invoked the *Emergencies Act*, which is considered a measure of last resort. The declaration of a "national emergency" under the *Emergencies Act* requires that the situation "cannot be effectively dealt with under any other law of Canada."[60] Although the *Emergencies Act* has not yet been invoked in response to COVID-19, it is imperative to understand both pieces of legislation, as they together make up Canada's legislative arsenal for pandemic response. The *Special Economic Measures Act* is also reviewed in brief at the end of this section.

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59 The new *COVID-19 Emergency Response Act*, which received Royal Assent in March 2020, is not discussed in this section, as it appears to deal solely with financial action and the provision of financial assistance from government.

60 Emergencies Act, RSC 1985, c. 22 (4th Supp.), s. 3 [hereafter Emergencies Act].

The Emergencies Act

The *Emergencies Act* (1985) authorizes Canada to take special, temporary measures to ensure safety and security during national emergencies. This act is premised on the recognition that the preservation of safety and security are fundamental obligations of government, that the fulfilment of those obligations may be seriously threatened by a national emergency, and that special, temporary measures may be required in order to ensure safety and security during such an emergency.[61]

The *Emergencies Act* defines a "national emergency" as an urgent and critical situation of a temporary nature that cannot be effectively dealt with under any other law of Canada, and that:

> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
>
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada.

The governor in council[62] may declare a national emergency when he or she believes on reasonable grounds that the emergency exists, and that it necessitates the taking of special temporary measures. Any declaration of a national emergency automatically expires after a set period of time, unless it is revoked prior to that time or extended. An emergency declaration may be extended, multiple times, so long as the governor in council believes on reasonable grounds that the emergency situation will continue.

There are four specific types of national emergency under the *Emergencies Act*: public welfare emergencies, public order emergencies, international emergencies, and war emergencies.

i. Public Welfare Emergencies

A public welfare emergency is defined as follows:

> An emergency that is caused by a real or imminent (a) fire, flood, drought, storm, earthquake or other natural phenomenon, (b) *disease in human beings*, animals or plants, or (c) accident or pollution, *and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency*.[63]

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61 Emergencies Act, Preamble.

62 Note that "governor in council" essentially means the federal cabinet. When the cabinet tells the governor in council to do something, he or she does it, or provokes a constitutional crisis.

63 Emergencies Act, s. 5 (emphasis added).

A public welfare emergency declaration will automatically expire after 90 days, unless it is revoked earlier or extended. A declaration may be extended if the governor in council believes that direct effects of the emergency will persist. The extension will automatically last only 90 days, but a declaration may be continued multiple times.

Once a public welfare emergency is declared, the governor in council may make orders or regulations with respect to the following matters that he or she believes, on reasonable grounds, to be necessary in dealing with the emergency:

> (a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;
>
> (b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;
>
> (c) the requisition, use or disposition of property;
>
> (d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;
>
> (e) the regulation of the distribution and availability of essential goods, services, and resources;
>
> (f) the authorization and making of emergency payments;
>
> (g) the establishment of emergency shelters and hospitals;
>
> (h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;
>
> (i) the assessment of damage to the environment and the elimination or alleviation of the damage; and
>
> (j) the imposition [of penalties for contravention of an order or regulation] … of a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.[64]

ii. Public Order Emergencies

A public order emergency is "an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency."[65]

"Threats to the security of Canada" are defined as:

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64 Emergencies Act, s. 8.

65 Emergencies Act, s. 16.

(a) espionage or *sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage*,

(b) *foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person*,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada, but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).[66]

A public order emergency declaration will automatically expire after 30 days, unless it is revoked earlier or extended. A declaration may be extended if the governor in council believes that the effects of the emergency will persist. The extension will automatically last only 30 days, but a declaration may be continued multiple times.

Once a public order emergency is declared, the governor in council may make orders or regulations with respect to the following matters that he or she believes, on reasonable grounds, to be necessary in dealing with the emergency:

(a) the regulation or prohibition of

i. any public assembly that may reasonably be expected to lead to a breach of the peace,

ii. travel to, from or within any specified area, or

iii. the use of specified property;

(b) the designation and securing of protected places;

(c) the assumption of the control, and the restoration and maintenance, of public utilities and services;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and

66 Canadian Security Intelligence Service Act, RSC 1985, c. C-23, s. 2 (emphasis added).

(e) the imposition [of penalties for contravention of an order or regulation] … of a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.[67]

iii. International Emergencies

An international emergency is defined in section 27 as "an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency."[68]

An international emergency declaration will automatically expire after 60 days, unless it is revoked earlier or extended. The extension will automatically last only 60 days, but a declaration may be continued multiple times.

Once an international emergency is declared, the governor in council may make orders or regulations with respect to the following matters that he or she believes, on reasonable grounds, to be necessary in dealing with the emergency:

(a) the control or regulation of any specified industry or service, including the use of equipment, facilities and inventory;

(b) the appropriation, control, forfeiture, use and disposition of property or services;

(c) the authorization and conduct of inquiries in relation to defence contracts or defence supplies … or to hoarding, overcharging, black marketing or fraudulent operations in respect of scarce commodities…;

(d) the authorization of the entry and search of any dwelling-house, premises, conveyance or place, and the search of any person found therein, for anything that may be evidence relevant to any matter that is the subject of an inquiry referred to in paragraph (c), and the seizure and detention of any such thing;

(e) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(f) the designation and securing of protected places;

(g) the regulation or prohibition of travel outside Canada by Canadian citizens or permanent residents … and of admission into Canada of other persons;

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67 Emergencies Act, see note 60, s. 19.

68 Emergencies Act, s. 27.

(h) the removal from Canada of persons, other than

i. Canadian citizens,

ii. permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and

iii. protected persons within the meaning of subsection 95(2) … who are not inadmissible [on grounds of security, human rights violations, or criminality];

(i) the control or regulation of the international aspects of specified financial activities within Canada;

(j) the authorization of expenditures for dealing with an international emergency in excess of any limit set by an Act of Parliament and the setting of a limit on such expenditures;

(k) the authorization of any Minister of the Crown to discharge specified responsibilities respecting the international emergency or to take specified actions of a political, diplomatic or economic nature for dealing with the emergency; and

(l) the imposition [of penalties for contravention of an order or regulation] … of a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.[69]

iv. War Emergencies

A war emergency is defined in section 37 as "war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency."[70]

A war emergency declaration will automatically expire after 120 days, unless it is revoked earlier or extended. The extension will automatically last 120 days, and a declaration may be continued multiple times.

Once a war emergency is declared, the governor in council may make orders or regulations that he or she believes, on reasonable grounds, to be necessary or advisable in dealing with the emergency.[71]

The Quarantine Act

Canada's *Quarantine Act* is specifically targeted to prevent the introduction and spread of infectious diseases. It allows the Canadian minister of health to take comprehensive measures for this purpose, including designating qualified persons as analysts and quarantine officers; establishing quarantine stations and facilities; controlling entry and departure; prohibiting importation of goods; and providing information and collaborating with various bodies

69 Emergencies Act, s. 30.

70 Emergencies Act, s. 37.

71 Emergencies Act, s. 40.

and governments, including foreign entities. The *Quarantine Act* also outlines powers conferred on screening and quarantine officers (including powers to impose isolation and health assessments); duties and obligations on travellers (including the duty to disclose any suspicion of exposure); duties and obligations on individuals and corporations; and various penalties for violations.

The most relevant provisions of the *Quarantine Act* for purposes of this review are (1) the provisions that permit Canadian authorities to collaborate with foreign entities, demonstrating the international nature of the *Quarantine Act*, and (2) the obligations imposed on individuals and corporations to prevent the spread of diseases, and the criminalization of failing to do so. The latter category of provisions may be used to hold foreign corporations accountable for any part they play in the spread of COVID-19 – a possibility that will be discussed in depth in Part IV.

i. Provisions that Permit Canadian Authorities to Collaborate with Foreign Entities

There are multiple provisions in the *Quarantine Act* that relate to international collaboration, including sections 39(1), 56(1), and 56(2). These provisions reinforce that international cooperation is required to prevent the spread of infectious diseases.

Recall from Part I that the international legal instruments reviewed clearly obligate states to work to prevent the spread of infectious disease both within and beyond their own borders. The fact that sections of Canada's *Quarantine Act* relate to international collaboration affirms this obligation from the Canadian domestic perspective, wherein Canada agrees that such obligations extend globally. Sections 39(1), 56(1), and 56(2) are reproduced immediately below.

> **Section 39 (1)** If an environmental health officer has reasonable grounds to believe that a conveyance, its cargo or any other thing on board the conveyance could be the source of a communicable disease, the officer may order the owner or operator of the conveyance or any person using it for the business of carrying persons or cargo to … (f) remove the conveyance and its contents from Canada and present a declaration of health to the appropriate health authorities in the country of destination.
>
> **Section 39 (2)** An environmental health officer who makes an order under paragraph (1)(f) shall immediately report the evidence found on the conveyance and the control measures required to the appropriate authority in the country of destination.
>
> **Section 56 (1)** The Minister [of Health] may disclose confidential business information or personal information obtained under this Act to a department or to an agency of the Government of Canada or of a province, a government or public health authority, whether domestic or foreign, a health practitioner or an international health organization if the Minister has

reasonable grounds to believe that the disclosure is necessary to prevent the spread of a communicable disease or to enable Canada to fulfill its international obligations.

Section 56 (2) The Minister may disclose personal information obtained under this Act to a person engaged in the business of carrying persons or cargo, or to an international transportation organization, if the Minister has reasonable grounds to believe that the person to whom the information relates has or might have a communicable disease, or has recently been in close proximity to a person who has or might have a communicable disease, and that the disclosure is necessary to prevent the spread of the disease.

ii. Obligations Imposed on Individuals and Corporations

There are several obligations imposed on individuals and corporations pursuant to the *Quarantine Act*. These obligations emphasize the importance of co-operation with Canadian governmental authorities in preventing the spread of diseases. For instance, one obligation imposed specifically on travellers is the "duty to disclose": A traveller must disclose to a screening officer or quarantine officer any suspicion that he or she may have been exposed to and infected with disease. There are also duties to comply with any and all regulations; to provide information when requested by screening officers (i.e., to answer questions at the border); to report to a screening officer upon arrival in Canada; and to present to a screening officer immediately prior to departure from Canada. This last duty, interestingly, also exemplifies the international nature of the *Quarantine Act*.[72] That there is a duty to report to screening officers prior to leaving Canada and going to another country reinforces that the stated purpose of the *Quarantine Act*, which is to prevent the spread of infectious disease, is considered by Canada to be a global obligation.

The most relevant obligations on Canadian individuals and corporations are contained within sections 66, 67(1), and 73(2). These are the obligations that may assign liability to individuals and corporations that acted recklessly vis-à-vis the spread of COVID-19. As will be discussed in-depth in Part IV, these sections may be utilized to hold Chinese and Iranian corporations in Canada responsible for any involvement in the spread of COVID-19.

Section 66 states: "No person shall hinder or wilfully obstruct a quarantine officer, a screening officer or an environmental health officer who is carrying out their duties or functions under this Act, or make a false or misleading statement, either orally or in writing, to the officer." Per section 72, a breach of the above obligation is an offence, and the person who contravenes it is liable, if convicted, to a fine of up to $500,000, imprisonment for up to three years, or both.

Subsection 67(1) states: "Every person is guilty of an offence if they cause a risk of imminent death or serious bodily harm to another person while wilfully or recklessly contravening this Act or the regulations." Per subsection 67(2),

72 Quarantine Act, SC 2005, c. 20, s. 13.

every person who commits this offence is liable, if convicted, to a fine of up to $1 million, imprisonment for up to three years, or both.

Section 73(2), the "duty to ensure compliance," states: "Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with this Act and the regulations." Per section 71, a breach of this obligation is an offence, and the person who contravenes it is liable, if convicted, to a fine of up to $750,000, imprisonment for up to six months, or both.

Notably, these dollar maximums have the potential to grow exponentially in any case related to COVID-19. This is because of section 75, which states: "If an offence under this Act is continued on more than one day, the person who committed it is liable to be convicted for a separate offence for each day on which it is continued." In other words, the dollar figures noted above are the maximum fine figures *per day*.

In terms of corporations, officers, directors, and agents of a corporation may be held liable for any of the above offences committed by their corporations. According to section 73(1), "any officer, director or agent" of the corporation who authorized, acquiesced, or participated in the commission of the offence will be found guilty and held liable, whether or not the corporation was even prosecuted or convicted. Further, section 74 dictates that the offence may be established if it was committed by an employee or agent, as follows:

> It is sufficient proof of the offence to establish that it was committed by an employee or agent … of the accused, whether or not the employee or agent … is identified or has been prosecuted for the offence, unless the accused establishes that (a) the offence was committed without the accused's knowledge or consent; and (b) the accused exercised all due diligence to prevent its commission.[73]

Jurisdiction is also flexible, as section 77 states: "An information in respect of an offence under this Act may be tried, determined or adjudged by a summary conviction court *if the defendant is resident or carrying on business within the territorial division of the court, even if the matter of the information did not arise in that territorial division*" [emphasis added]. In other words, if a Chinese or Iranian corporation in Canada is alleged to have breached one of the above three sections of the *Quarantine Act*, it will not matter where in Canada the alleged breach occurred, so long as the corporation carries on business in the province.

In addition to the option for fines and imprisonment as noted above, section 80 of the *Quarantine Act* permits the court to impose a variety of additional orders, including:

> (1) prohibiting the offender from engaging in activity that may result in further offences;

73 Quarantine Act, s. 74.

(2) directing the offender to take any measures that the court considers appropriate to avoid harm to public health or to remedy that harm;

(3) directing the offender to publish facts relating to the offence and an apology;

(4) directing the offender to submit to the Minister of Health any information with respect to the offender's activities that the court considers appropriate;

(5) directing the offender to compensate the Minister for the cost of any remedial or preventative measure taken by the Minister;

(6) directing the offender to perform community service;

(7) directing the offender to pay for conducting research;

(8) requiring the offender to comply with any other conditions that the court considers appropriate.[74]

Pursuant to subsection 80(4), if the court orders the offender to compensate the minister, costs incurred by the minister constitute a debt due to Her Majesty in right of Canada and may be recovered in a court of competent jurisdiction. This means that if the corporation does not pay as ordered, their assets can be seized.

The Special Economic Measures Act

The *Special Economic Measures Act* (SEMA) may provide a distinct domestic tool to hold China and/or Iran accountable for the spread of COVID-19. SEMA allows for the imposition of special economic measures on foreign states in four specific circumstances; pursuant to subsection 4(1.1), if any of these circumstances are met, a foreign state can be sanctioned.[75] The circumstances are as follows:

(a) an international organization or association of states, of which Canada is a member [for example, the United Nations], has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign state;

(b) a grave breach of international peace and security has occurred and that has resulted in or is likely to result in a serious international crisis;

(c) gross and systematic human rights violations have been committed in a foreign state; or

74 The items in this list are paraphrased and do not constitute the complete list under section 80 of the *Quarantine Act*.

75 Special Economic Measures Act, SC 1992, c. 17, s. 4 [hereafter SEMA].

(d) a national of a foreign state who is either a foreign public official, or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption … which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government.[76]

If any one of the above four circumstances apply, the governor in council may:

(1) by order, cause property situated in Canada to be seized, frozen or sequestrated if such property is held by or on behalf of (a) a foreign state, (b) any person in that foreign state, or (c) a national of that foreign state who does not ordinarily reside in Canada;

(2) make orders or regulations with respect to the restriction or prohibition of any of the following activities, as the Governor in Council considers necessary:

a. any dealing by any person in Canada or Canadian outside Canada in any property wherever situated held by or on behalf of that foreign state, any person in that state, or a national of that state who does not ordinarily reside in Canada;

b. exportation, sale, supply or shipment by any person in Canada or Canadian outside Canada of any goods wherever situated to that foreign state or person in that state, or any other dealing by any person in Canada or Canadian outside Canada in any goods destined for that foreign state or person in that state;

c. transfer, provision or communication by any person in Canada or Canadian outside Canada of any technical data to that foreign state or person in that state;

d. importation, purchase, acquisition or shipment by any person in Canada or Canadian outside Canada of any goods that are exported, supplied or shipped from that foreign state after a date specified in the order or regulation, or any other dealing by any person in Canada or Canadian outside Canada in such goods;

e. the provision or acquisition by any person in Canada or Canadian outside Canada of financial services or any other services to, from or for the benefit of or on the direction or order of that foreign state or any person in that state;

f. the docking in that foreign state of ships registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

76 SEMA.

g. the landing in that foreign state of aircraft registered in Canada or operated in connection with a Canadian air service licence;

h. the docking in or passage through Canada by ships registered in that foreign state or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of that foreign state or a person in that state;

i. the landing in or flight over Canada by aircraft registered in that foreign state or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of that foreign state or any person in that state.[77]

Section 8 of SEMA makes it an offence to wilfully contravene or fail to comply with any order or regulation made under section 4. In the case of a contravention, the offender is liable, on summary conviction, to a fine of up to $25,000, imprisonment for up to one year, or both. On indictment, that person is liable to imprisonment for up to five years.

Various countries have been sanctioned since the passage of SEMA in 1992. These include Libya, Myanmar, North Korea, Iran, Nicaragua, Russia, South Sudan, Syria, Ukraine, Venezuela, and Zimbabwe. The sanctions on Libya were imposed to implement United Nations resolutions.[78] Other foreign states, such as Iran, were sanctioned when the governor in council formed the opinion "that the situation in Iran constitutes a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis."[79]

B. UNITED STATES

Per the Tenth Amendment of the United States Constitution, most public health authority in the United States is at the state level.[80] Despite this, the United States federal government has broad powers to curb the spread of infectious diseases. The US president has the power to declare a national emergency with nearly none of the same constraints as in Canada's *Emergencies Act*. The president and the Public Health Service (which delegates its day-to-day operations to the Centres for Disease Control and Prevention) have a large degree of authority to take concrete measures in their efforts to control infectious diseases.

There are three foundational emergency framework statutes in the United States: the *National Emergencies Act* (1976; NEA), the *Robert T. Stafford Di-*

77 SEMA.

78 Regulations Implementing the United Nations Resolutions and Imposing Special Economic Measures on Libya, SOR/2011-51.

79 Special Economic Measures (Iran) Regulations, SOR/2010-165, Preamble [hereafter SEM Iran Regulations].

80 Note that US states have their own quarantine and isolation laws, a review of which is beyond the scope of this report. This section will discuss only federal powers and legislation.

saster Relief and Emergency Assistance Act (1988; Stafford Act), and the *Public Health Service Act* (1944; PHSA). All three frameworks have now been invoked in relation to the spread of COVID-19. The secretary of health and human services (HHS) declared a public health emergency pursuant to section 319 of the PHSA on January 31, 2020, and President Donald Trump declared an emergency pursuant to both the NEA (sections 201 and 301) and the *Stafford Act* on March 13, 2020.[81]

The National Emergencies Act

The US *National Emergencies Act* (50 USC § 1601 et seq.) is one act that provides the US president with the power to declare a national emergency. These powers are set in sections 201 and 301.

> **Section 201 (a)** With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.
>
> **(b)** Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this Act. No law enacted after the date of enactment of this Act shall supersede this title unless it does so in specific terms, referring to this title, and declaring that the new law supersedes the provisions of this title.
>
> **Section 301** When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

The remaining provisions of the NEA are more procedural in nature. This is largely due to the specific political context in which the NEA was enacted in 1976. Prior to the introduction of the NEA, there were hundreds of US laws, some dating back over 500 years, that provided the US president with a va-

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81 US Department of Health and Human Services, "Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus," HHS News Release, January 31, 2020, htttp://hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html [hereafter HHS, "Secretary Azar"]; The National Emergencies Act, 50 USC 1601-1651, Proclamation (March 13, 2020), http://whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ [hereafter NEA Proclamation]; *Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act*, White House, March 13, 2020, http://whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/ [hereafter Trump].

riety of emergency powers.[82] There was little regulation of this power: The US system trusted the president, as the country's commander in chief, to utilize emergency powers reasonably. The NEA was enacted to counterbalance that; it was designed to act as an umbrella statute, governing national emergencies and providing for increased oversight of presidential declarations of emergency.[83] The full title of the NEA articulates this role: It is "an Act to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future emergencies."[84]

Despite this purpose, many of these old emergency authorities are still available to the president for use in declarations of national emergency pursuant to the NEA. According to a recent study by the Brennan Center for Justice at New York University (NYU) School of Law, there are 123 statutory powers that become available to the US president when he or she declares a national emergency.[85] Many are outdated, and most (67 percent, according to the Brennan Center) have never been invoked. A handful of the available statutes are used frequently.[86] For instance, the *International Emergency Economic Powers Act* (IEEPA) has reportedly been invoked almost yearly and with almost every national emergency ever declared under the NEA.[87] The IEEPA allows the US government to freeze assets and block transactions in which a foreign national has an interest.[88]

Despite its apparent intentions, the NEA has not seemed to curb presidential use of emergency declarations at all.[89] This is evident from some of the trends of national emergencies, as well as from the language of the NEA itself. For example, Title I of the NEA, "Terminating Existing Declared Emergencies," declares prior emergencies be terminated two years from the date of the NEA's enactment. However, three categories of exceptions are then outlined; in addition, the president still has the power to declare that a prior emergency be continued.

Title II, "Declarations of Future National Emergencies," encompasses section 201 (above) and section 202. Section 201, which provides the president with

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82 Brennan Center for Justice at New York University School of Law, "A Guide to Emergency Powers and Their Use," September 4, 2019, http://brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf.

83 Charlie Savage, "Trump Declared an Emergency Over Coronavirus. Here's What It Can Do," *New York Times*, March 13, 2020, http://nytimes.com/2020/03/13/us/politics/coronavirus-national-emergency.html; Andrew Rudalevige, "Trump Declared Two Different Kinds of Emergencies for COVID-19. There Might Soon Be 52," *Washington Post*, March 14, 2020, http://washingtonpost.com/politics/2020/03/14/trump-declared-two-different-kinds-emergencies-covid-19-there-might-soon-be-52/.

84 The National Emergencies Act, 50 USC § 1601-1651, Title [hereafter NEA].

85 Brennan Center for Justice.

86 Brennan Center for Justice.

87 Brennan Center for Justice.

88 Brennan Center for Justice.

89 Brennan Center for Justice; Rudalevige, see note 83.

the power to declare a national emergency, imposes few statutory limitations on such a declaration. Then, section 202(a) provides that "any national emergency declared by the President in accordance with this title shall terminate if (1) Congress terminates the emergency by concurrent resolution; or (2) the President issues a proclamation terminating the emergency."[90] Notably, the US president has veto power in Congress, which explains why President Donald Trump's declared emergency over the southern border wall is still in play, despite Congress' vote to terminate it. This veto may be overridden by a two-thirds vote of both houses of Congress. Section 202(b) requires Congress to re-evaluate national emergencies every six months and consider termination; section 202(c) requires a presidential declaration of termination to be considered by the House; and section 202(d) states that a national emergency declared by the president (that has not otherwise been terminated) shall automatically terminate on the anniversary of the declaration, unless the president, within 90 days of the anniversary date, publishes a notice of continuation in the Federal Register and transmits that notice to Congress. Again, these are not stringent accountability safeguards, given the president's veto powers and his statutory powers to continue national emergencies under section 202 of the NEA. In fact, national emergencies are routinely continued, multiple times – the Brennan Center study mentioned above found that the average duration of declared emergencies is 9.6 years.[91]

Title III of the NEA, "Exercise of Emergency Powers and Authorities," which contains only section 301, is reproduced above (p. 43). This section reiterates the extensive powers of the US president to declare a national emergency, noting only one limitation: that he or she must specify which emergency powers are to be used.

Title IV, "Accountability and Reporting Requirements of the President," outlines three reporting requirements on the US president. Pursuant to section 401(a), when the president declares a national emergency, he or she must keep files of all of his/her "significant orders," including executive orders and proclamations, and each executive agency must maintain files of all rules and regulations.[92] Pursuant to section 401(b), the president must "promptly" transmit to Congress "all such significant orders," including executive orders, and rules and regulations.[93] Lastly, pursuant to section 401(c), when the president declares a national emergency, he or she must transmit to Congress – within 90 days after the end of each six-month period after such a declaration – a report on total expenditures attributable to the emergency that were incurred by the US government during that period. The president must also transmit a final report on such expenditures within 90 days after the termination of the national emergency.

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90 NEA, see note 84, § 202.

91 Brennan Center for Justice, see note 83.

92 NEA, see note 84, § 401(a).

93 NEA, § 401(b).

In the context of COVID-19, President Donald Trump's proclamation of an emergency under sections 201 and 301 of the NEA came on March 13, 2020, with an effective date of March 1, 2020.[94] Pursuant to the requirements in section 301 of the NEA, Trump specified the emergency authority he was invoking, stating the following:

> The Secretary of HHS [Health and Human Services] may exercise the authority under section 1135 of the SSA [Social Security Act] to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the COVID-19 outbreak.[95]

This emergency authority to permit the secretary of the HHS to waive or modify Medicare, etc. can only be invoked if both a public health emergency has been declared pursuant to the PHSA (which occurred in January 2020, as discussed below) and an emergency has been declared pursuant to either the NEA or the *Stafford Act*.[96] This is one interconnection between the NEA, the Stafford Act, and the PHSA relevant to COVID-19.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act

The *Robert T. Stafford Disaster Relief and Emergency Assistance Act* (42 USC 5121-5207) is the second emergency framework statute through which the US president can declare an emergency and unlock relevant powers. The Stafford Act, enacted in 1988, is an amended version of the former *Disaster Relief Act*. Referencing this reworking, its full title is "An Act to amend the *Disaster Relief Act* of 1974 to provide for more effective assistance in response to major disasters and emergencies, and for other purposes."[97] The *Stafford Act* has most frequently been used in response to natural disasters such as hurricanes and winter storms, but it has also been used in the past in response to public health emergencies.[98]

There are two types of presidential declarations available under the *Stafford Act*. Section 401 permits the president to declare a *major disaster*, and section 501 permits the president to declare an *emergency*. The major difference between the two designations is financial: A *major disaster*

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94 NEA Proclamation, see note 81.

95 NEA Proclamation.

96 US Department of Health and Human Services, "Public Health Emergency Declaration Q&As," September 5, 2019, http://phe.gov/Preparedness/legal/Pages/phe-qa.aspx#faq3.

97 The *Robert T. Stafford Disaster Relief and Emergency Assistance Act*, 42 USC § 5121-5207, Title [hereafter The Stafford Act].

98 Congressional Research Service, "Stafford Act Declarations 1953-2016: Trends, Analyses, and Implications for Congress," August 28, 2017, http://everycrsreport.com/files/20170828_R42702_5c578b70adb0586f36ed3817c42aef87ded9c746.pdf.

declaration is considered more serious and, as a result, unlocks more resources for US states.

In relation to COVID-19, *major disaster* declarations are now in effect for all 50 states. President Donald Trump first declared a nationwide emergency on March 13, 2020, pursuant to section 501(b) of the *Stafford Act*, and in the same declaration, encouraged all state governors to request a presidential declaration of a *major disaster*.[99] Evidently they did, and by April 11, 2020, major disaster declarations, pursuant to section 401, were in effect for all 50 states.

i. Declaration Procedures: Emergencies and Major Disasters

As noted, there are two available presidential declarations in the *Stafford Act*. Emergency declaration procedures are contained in section 501, and major disaster declaration procedures are contained in section 401. Definitions for each term are in section 103.

Both types of declarations traditionally come at the request of a state governor. For a major disaster declaration, a governor's request is required; the US president cannot declare a major disaster unilaterally. For an emergency declaration, the US president may act unilaterally in particular circumstances. Pursuant to section 501(b), the president may declare an emergency, without a governor's request, if the president determines that "an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority."[100] This unilateral power to declare an emergency under section 501(b) was the provision used by President Donald Trump to declare a nationwide emergency under the *Stafford Act* for COVID-19.

MAJOR DISASTER	EMERGENCY
Section 103 (c) "Major disaster" means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.	**Section 103 (b)** "Emergency" means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

99 Trump, see note 81.

100 The Stafford Act, see note 97, § 501(b).

MAJOR DISASTER	EMERGENCY
Section 401 All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to major disaster assistance under this Act, the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan. The Governor shall furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this Act. Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists.	**Section 501 (a) [Route 1 – Governor Request]** All requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to emergency assistance under this Act, the Governor shall take appropriate action under State law and direct execution of the State's emergency plan. The Governor shall furnish information describing the State and local efforts and resources which have been or will be used to alleviate the emergency, and will define the type and extent of Federal aid required. Based upon such Governor's request, the President may declare that an emergency exists. **Section 501 (b) [Route 2 – Unilateral Declaration]** The President may exercise any authority vested in him by section 502 or section 503 with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President's determination may be made without regard to subsection (a).

ii. Implications of a Declaration: Available Powers and Resources

Once either declaration is made under the *Stafford Act*, the Federal Emergency Management Agency (FEMA) can assist state and local governments in responding to the emergency or disaster. A variety of emergency powers become available, listed in sections 402-421 for major disasters and sections

502-503 for emergencies. These powers are in large part meant to provide financial assistance – a *Stafford Act* declaration enables the government to tap into an account reportedly containing over US$40 billion.[101]

MAJOR DISASTER	EMERGENCY
Section 402. General Federal Assistance. In any major disaster, the President may -	**Section 502. Federal Emergency Assistance.** In any emergency, the President may -
(1) Direct any Federal agency... to utilize its authorities and the resources granted to it under Federal law... in support of State and local assistance efforts	(1) Direct any Federal agency ... to utilize its authorities and the resources granted to it under Federal law ... in support of State and local assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe
(2) Coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments	(2) Coordinate all disaster relief assistance (including voluntary assistance) provided by Federal agencies, private organizations, and State and local governments
(3) Provide technical and advisory assistance to affected State and local governments for - (A) the performance of essential community services; (B) issuance of warnings of risks and hazards; (C) public health and safety information...; (D) provision of health and safety measures; and (E) management, control, and reduction of immediate threats to public health and safety	(3) Provide technical and advisory assistance to affected State and local governments for - (A) the performance of essential community services; (B) issuance of warnings of risks or hazards; (C) public health and safety information...; (D) provision of health and safety measures; and (E) management, control, and reduction of immediate threats to public health and safety
(4) Assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.	(4) Provide emergency assistance through Federal agencies
	(5) Remove debris...
	(6) Provide temporary housing assistance in accordance with section 408
	(7) Assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance.

101 Savage, see note 83.

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Some of the additional powers under this section relate to: repair, restoration, replacement of facilities (section 406); temporary housing assistance (section 408); individual and family grants (section 411); food coupons and distribution (section 412); relocation assistance (section 414); crisis counselling assistance (section 416); and loans (section 417).	**Section 503. Amount of Assistance.** (b) Limit on amount of assistance. (1) In general. Except as provided in paragraph (2), total assistance provided under this title for a single emergency shall not exceed $5,000,000 (2) Additional assistance. The limitation described in paragraph (1) may be exceeded when the President determines that - (A) continued emergency assistance is immediately required; (B) there is a continuing and immediate risk to lives, property, public health or safety; and (C) necessary assistance will not otherwise be provided on a timely basis (3) Report. Whenever the limitation described in paragraph (1) is exceeded, the President shall report to the Congress on the nature and extent of emergency assistance requirements and shall propose additional legislation if necessary.

iii. Route to Liability: Party Liability under the *Stafford Act*

Under subsection 317(a) of the *Stafford Act*, the US may recover costs from parties who "intentionally [cause] a condition for which Federal assistance is provided … as a result of a declaration of a major disaster or emergency."[102] The full subsection reads as follows:

> Any person who intentionally causes a condition for which Federal assistance is provided under this Act or under any other Federal law as a result of a declaration of a major disaster or emergency under this Act shall be liable to the United States for the reasonable costs incurred by the United States in responding to such disaster or emergency to the extent that such costs are attributable to the intentional act or omission of such person which caused such condition. Such action for reasonable costs shall be brought in an appropriate United States district court.[103]

There is a caveat contained in subsection 317(b): "A person shall not be liable under this section for costs incurred by the US as a result of actions taken or omitted by such person in the course of rendering care or assistance in response to a major disaster or emergency."[104]

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102 The Stafford Act, see note 97, § 317(a).

103 The Stafford Act, § 317(a).

104 The Stafford Act, § 317(b).

This section of the *Stafford Act* may ground liability for COVID-19 in US courts in certain circumstances. Unlike Canada's *Quarantine Act*, this section probably cannot extend to corporations, since it requires individual intent. However, it may be possible to utilize this section to hold individuals within corporations to account, if the conditions for "piercing the corporate veil" are present.

The Public Health Service Act

The *Public Health Service Act* (42 USC c. 6A § 201 et seq.) is the third emergency framework statute through which the US may declare and respond to a public health emergency. The PHSA in its entirety contains many public health-related provisions and frameworks, but only a handful of sections (out of the 1739-page document[105]) are relevant to public health emergencies and infectious disease control. The relevant sections of the PHSA include sections 319 and 361-369. Section 319 covers public health emergencies and declaration procedure; sections 361-369 relate to quarantine and inspection. There are also a handful of executive orders and federal regulations enacted pursuant to these PHSA sections that are relevant, including Parts 70-71 of the *Code of Federal Regulations* (CFR), Executive Order 13295 of April 4, 2003, and Executive Order 13375 of April 1, 2005. Parts 70-71 of the CFR relate to interstate quarantine and foreign quarantine, respectively, while the two executive orders outline a specific list of quarantinable communicable diseases.

i. Declaration of a Public Health Emergency

The secretary of health and human services (HHS) may declare a public health emergency pursuant to section 319 of the PHSA. This was the first emergency declaration procedure to be used by the United States in relation to COVID-19, and was declared by Secretary Alex M. Azar II on January 31, 2020.[106]

Section 319 permits the secretary to declare a public health emergency (PHE) if "the Secretary determines, after consultation with such public health officials as may be necessary, that (1) a disease or disorder presents a public health emergency; or (2) a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists."[107] A PHE terminates "after 90 days, or when the Secretary declares that the emergency no longer exists, unless renewed by the Secretary."[108]

Once a PHE is declared, broad powers become available to the secretary in order to respond. Following their declaration, the secretary "may take such

105 The Public Health Service Act, 42 USC c. 6A, § 201 [hereafter PHSA].

106 HHS, "Secretary Azar", see note 81.

107 PHSA, see note 105, § 319(a).

108 Ibid.; US Department of Health and Human Services, "Legal Authority of the Secretary" (5 September 2019), http://phe.gov/Preparedness/support/secauthority/Pages/default.aspx#no-phe [hereafter HHS, "Legal Authority"].

action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder."[109]

The secretary may also use the Public Health Emergency Fund, a specially designated fund in the Treasury, to conduct a variety of activities in response to a PHE, specifically[110]:

1. facilitating coordination between and among Federal, State, local, Tribal, and territorial entities and public and private health care entities… (including communication of such entities with relevant international entities, as applicable)

2. making grants, providing for awards, entering into contracts, and conducting supportive investigations…

3. facilitating and accelerating, as applicable, advanced research and development of security countermeasures, qualified countermeasures, or qualified pandemic or epidemic products, that are applicable to the public health emergency…

4. strengthening biosurveillance capabilities and laboratory capacity to identify, collect, and analyze information…

5. supporting initial emergency operations and assets related to preparation and deployment of intermittent disaster response personnel…

6. carrying out other activities, as the Secretary determines applicable and appropriate.[111]

Additional powers become available when both a PHE is declared pursuant to section 319 of the PHSA and an emergency or disaster is declared pursuant to either the NEA or the *Stafford Act*. These combined powers include the ability to temporarily waive Medicare, Medicaid, and State Children's Health Insurance programs pursuant to section 1135 of the *Social Security Act*, and the power to waive privacy rule sanctions and penalties under the *Health Insurance Portability and Accountability Act* (HIPAA).[112] President Donald Trump specified in his COVID-19 emergency declaration that he was authorizing the secretary to utilize these powers.[113]

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109 Ibid.

110 Note that the Public Health Emergency Fund is similarly available for use by the secretary if "the Secretary determines there is the significant *potential* for a public health emergency" (emphasis added); PHSA, s. 319(b)(1).

111 PHSA, see note 105, s. 319(b)(2).

112 HHS, "Legal Authority", see note 108.

113 NEA Proclamation, see note 81.

ii. Quarantine and Inspection Powers

Sections 361-369, Parts 70-71 of the *Code of Federal Regulations* (CFR), Executive Order 13295 of April 4, 2003, and Executive Order 13375 of April 1, 2005 – all relate to the secretary's quarantine and inspection powers. These federal powers are limited to preventing the spread of communicable diseases into the country from foreign states, or across state lines. Section 361 authorizes the surgeon general to make and enforce regulations; Parts 70-71 of the CFR are those regulations that were enacted pursuant to section 361; and the two noted executive orders specify which communicable diseases are quarantinable. Sections 362-369 contain additional provisions, related to: suspension of entries and imports from designated places (section 362), special powers in times of war (section 363), quarantine stations (section 364), certain duties of consular and other officers (section 365), bills of health (section 366), civil air navigation and civil aircraft (section 367), penalties (section 368), and administration of oaths (section 369).

Sections 361-369 of the PHSA. Subsection 361(a) specifically authorizes the surgeon general, with the approval of the secretary, to make and enforce regulations "as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[114] Subsections 361(b)-(e) elaborate on what regulations are permitted. Subsection 361(b) emphasizes that any detention powers conferred by regulations must be limited to preventing the spread of disease. Subsection 361(b) further contains a directive to specify, by executive order, which diseases are quarantinable. Subsections (c)-(d) emphasize that the federal quarantine power is limited to foreign and interstate situations. Subsection (e) relates to potential conflicts with state quarantine laws.

Sections 362-369 contain additional provisions, beyond the power to make regulations. Section 362 relates to the suspension of entries and imports from designated places; section 363 outlines special powers in times of war; section 364 relates to quarantine stations; section 365 outlines duties of consular and other officers; section 366 covers bills of health; section 367 authorizes the surgeon general to make regulations regarding civil air navigation and aircraft; section 368 outlines penalties; and section 369 authorizes medical quarantine officers to administer oaths. Of these, only sections 362, 364, 365, and 368 are relevant for purposes of this review. It is noteworthy that section 366 is effectively cancelled out by section 71.11 of the foreign quarantine regulations.[115]

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114 PHSA, see note 105, s. 361(a).

115 Section 366 of the PHSA states: "Except as otherwise prescribed in regulations, any vessel at any foreign port or place clearing or departing for any port or place in a State or possession shall be required to obtain … a bill of health." However, section 71.11 of the foreign quarantine regulations states: "A carrier at any foreign port clearing or departing for any US port shall not be required to obtain or deliver a bill of health."

Section 361. Power to Make Regulations

(a) The Surgeon General, with the approval of the Secretary is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

(b) Regulations prescribed under this section shall not provide for the apprehension, detention, or conditional release of individuals except for the purpose of preventing the introduction, transmission, or spread of such communicable diseases as may be specified from time to time in Executive orders of the President upon the recommendation of the Secretary, in consultation with the Surgeon General.

(c) Except as provided in subsection (d), regulations prescribed under this section, insofar as they provide for the apprehension, detention, examination, or conditional release of individuals, shall be applicable only to individuals coming into a State or possession from a foreign country or a possession.

(d) (1) Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State. Such regulations may provide that if upon examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary. For purposes of this subsection, the term "State" includes, in addition to the several States, only the District of Columbia.

(2) For purposes of this subsection, the term ''qualifying stage'', with respect to a communicable disease, means that such disease— (A) is in a communicable stage; or (B) is in a pre-communicable stage, if the disease would be likely to cause a public health emergency if transmitted to other individuals.

(e) Nothing in this section or section 363, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 363.

Section 362. Suspension of Entries and Imports

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required … the Surgeon General … shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places … and for such period of time as he may deem necessary for such purpose.

Section 364. Quarantine Stations

(a) … the Surgeon General shall control, direct, and manage all U.S. quarantine stations, grounds, and anchorages, designate their boundaries, and designate the quarantine officers to be in charge thereof. With the approval of the President he shall from time to time select suitable sites for and establish such additional stations, grounds, and anchorages in the States … as in his judgment are necessary to prevent the introduction of communicable diseases…

Section 365. Certain Duties of Consular and Other Officers

(a) Any consular or medical officer of the United States, designated for such purpose by the Secretary, shall make reports to the Surgeon General, on such forms and at such intervals as the Surgeon General may prescribe, of the health conditions at the port or place at which such officer is stationed.

(b) It shall be the duty of the customs officers and of Coast Guard officers to aid in the enforcement of quarantine rules and regulations

Section 368. Penalties

(a) Any person who violates any regulation prescribed under section 361, 362 … or who enters or departs from the limits of any quarantine station … in disregard of quarantine rules … shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

(b) Any vessel which violates section 366, or any regulations thereunder or under section 364, or which enters within or departs from the limits of any quarantine station … in disregard of the quarantine rules … shall forfeit to the United States not more than $5,000, the amount to be determined by the court, which shall be a lien on such vessel…

Parts 70-71 of the Code of Federal Regulations. Parts 70-71 of the *Code of Federal Regulations* (CFR) were enacted pursuant to the power to make regulations contained in section 361 of the PHSA. Part 70 relates to interstate quarantine, and Part 71 to foreign quarantine.

Both parts confer wide-ranging powers on the director of the Centers for Disease Control and Prevention (CDC) to prevent the spread of disease. Chief among these is the power to medically examine, quarantine, and/or isolate individuals for the purpose of preventing the spread of quarantinable communicable diseases. Under foreign quarantine regulations, this applies to travellers entering the United States, and under interstate quarantine regulations, this applies in the event of interstate travel and/or inadequate local control. In addition to conferring a variety of powers on the CDC, both sets of regulations confer obligations on the individual and penalize breaches of the regulations with significant penalties.[116] Some of the relevant provisions of both sets of regulations are reproduced in the tables below.

Part 70 – Interstate Quarantine[117]

POWERS CONFERRED ON THE CDC

70.2 Measures in the event of inadequate local control

> Whenever the Director of the CDC determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary...

70.6 Apprehension and detention of persons with quarantinable communicable diseases

> (a) The Director may authorize the apprehension, medical examination, quarantine, isolation, or conditional release of any individual for the purpose of preventing the introduction, transmission, and spread of quarantinable communicable diseases, as specified by Executive Order, based upon a finding that:
>
> (1) The individual is reasonably believed to be infected with a quarantinable communicable disease in a qualifying stage and is moving or about to move from a State into another State; or

116 The penalties for breaches are identical for both sets of regulations. Breaches by individuals may result in one year in jail and/or a fine, the maximum of which is US$100,000 if the violation does not result in a death, or US$250,000 if the violation does result in a death. Breaches by organizations are subject to a maximum fine of US$200,000 per event if the violation does not result in a death, or US$500,000 per event if the violation does result in a death. See: Public Health, 42 CFR, Part 70 – Interstate Quarantine – at s. 70.18 and Part 71 – Foreign Quarantine – at s. 71.2.

117 Public Health, 42 CFR 70.

(2) The individual is reasonably believed to be infected with a quarantinable communicable disease in a qualifying stage and constitutes a probable source of infection to other individuals who may be moving from a State into another State.

70.9 Vaccination clinics

(a) The Director may establish vaccination clinics, through contract or otherwise, authorized to administer vaccines and/or other prophylaxis.

70.10 Public health prevention measures to detect communicable disease

(a) The Director may conduct public health prevention measures at U.S. airports, seaports, railway stations, bus terminals, and other locations where individuals may gather to engage in interstate travel, through non-invasive procedures determined appropriate by the Director to detect the presence of communicable diseases.

(b) As part of the public health prevention measures, the Director may require individuals to provide contact information such as U.S. and foreign addresses, telephone numbers, email addresses, and other contact information, as well as information concerning their intended destination, health status, known or possible exposure history, and travel history.

70.12 Medical examinations

(a) The Director may require an individual to undergo a medical examination as part of a Federal order for quarantine, isolation, or conditional release for a quarantinable communicable disease.

...

(d) Individuals reasonably believed to be infected based on the results of a medical examination may be isolated, or if such results are inconclusive or unavailable, individuals may be quarantined or conditionally released in accordance with this part.

OBLIGATION IMPOSED ON INDIVIDUALS

70.3 All communicable diseases

A person who has a communicable disease in the communicable period shall not travel from one State or possession to another without a permit from the health officer of the State, possession, or locality of destination, if such permit is required under the law applicable to the place of destination. Stop-overs other than those necessary for transportation connections shall be considered as places of destination.

70.4 Report of disease

The master of any vessel or person in charge of any conveyance engaged in interstate traffic, on which a case or suspected case of a communicable disease develops shall, as soon as practicable, notify the local health authority at the next port of call, station, or stop, and shall take such measures to prevent the spread of the disease as the local health authority directs.

70.5 Requirements relating to travelers under a Federal order of isolation, quarantine, or conditional release

(a) The following provisions are applicable to any individual under a Federal order of isolation, quarantine, or conditional release with regard to a quarantinable communicable disease...:

(1) Except as specified under the terms of a Federal conditional release order, no such individual shall travel in interstate traffic ... without a written travel permit issued by the Director.

[subsections (2)-(5) outline procedure for requesting a permit].

(b) Operator of any conveyance operating in interstate traffic shall not:

(1) Accept for transportation any individual whom the operator knows, or reasonably should know, to be under a Federal order of isolation, quarantine, or conditional release, unless such an individual presents a permit issued by the Director...

(2) Transport any individual whom the operator knows, or reasonably should know, to be under a Federal order of isolation, quarantine, or conditional release in violation of any of the terms or conditions prescribed in the travel permit...

(c) Whenever a conveyance operating in interstate traffic transports an individual under a Federal order or travel permit, the Director may require that the operator of the conveyance submit the conveyance to inspection, sanitary measures, and other measures, as the Director deems necessary to prevent possible spread of communicable disease.

[Subsections (d)-(f) outline additional scenarios where these obligations apply to individuals: upon the request of a state or local health authority; if the director makes a determination under section 70.2 of inadequate local control.]

[Subsection (g) states that the director may exempt individuals and non-public conveyances, such as ambulances or private vehicles, from the requirements of this section.]

70.7 Responsibility with respect to minors, wards, and patients

A parent, guardian, physician, nurse, or other such person shall not transport, or procure or furnish transportation for any minor child or ward, patient or other such person who is in the communicable period of a communicable disease...

70.8 Members of military and naval forces

The provisions of 70.3, 70.4, 70.5, 70.7, and this section shall not apply to members of the military or naval forces, and medical care or hospital beneficiaries of the Army, Navy, Veterans' Administration, or Public Health Service, when traveling under competent orders: Provided, That in the case of persons otherwise subject to the provisions of 70.5 the authority authorizing the travel requires precautions to prevent the possible transmission of infection to others during the travel period.

70.11 Report of death or illness onboard aircraft operated by an airline

(a) The pilot in command of an aircraft … who is conducting a commercial passenger flight in interstate traffic under a regular schedule shall report as soon as practicable to the Director the occurrence onboard of any deaths or the presence of ill persons among passengers or crew and take such measures as the Director may direct to prevent the potential spread of the communicable disease…

Other sections of the interstate quarantine regulations impose obligations on the CDC. Section 70.6(b) requires the director of the CDC to "arrange for adequate food and water, appropriate accommodation, appropriate medical treatment, and means of necessary communication" for persons apprehended, quarantined, or isolated. Section 70.13 permits the director to authorize payment for the care and treatment of persons subject to medical examination, quarantine, isolation, and conditional release. Pursuant to section 70.14, any order authorizing quarantine, isolation, or conditional release must contain specific pieces of information, as outlined in this section, and the order must be (a) in writing, (b) signed by the director, (c) served within 72 hours (as specified in the section), and (d) translated as needed. Pursuant to section 70.15, any such order must be reassessed within 72 hours; and pursuant to section 70.16, any such order must undergo a second, medical review, if requested. Finally, section 70.17 states that an individual subject to a federal public health order shall be served with a copy of his or her administrative record, upon request.

Part 71 –Foreign Quarantine[118]

POWERS CONFERRED ON THE CDC

71.20 Public health prevention measures to detect communicable disease

(a) The Director may conduct public health prevention measures, at U.S. ports of entry or other locations, through non-invasive procedures … to detect the potential presence of communicable diseases.

(b) As part of the public health prevention measures, the Director may require individuals to provide contact information such as U.S. and foreign addresses, telephone numbers, email addresses, and other contact information, as well as information concerning their intended destination, health status, known or possible exposure history, and travel history.

71.31 General provisions

(a) Upon arrival at a U.S. port, a carrier will not undergo inspection unless the Director determines that a failure to inspect will present a threat of introduction of communicable diseases into the United States, as may exist when the carrier has on board individual(s) reportable in

118 Public Health, 42 CFR 71.

accordance with 71.21 or meets the circumstances described in 71.42. Carriers not subject to inspection under this section will be subject to sanitary inspection under 71.41.

(b) The Director may require detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease.

71.32 Persons, carriers, and things

(a) Whenever the Director has reason to believe that any arriving person is infected with or has been exposed to any of the communicable diseases listed in an Executive Order … he/she may isolate, quarantine, or place the person under surveillance and may order disinfection or disinfestation, fumigation, as he/she considers necessary to prevent the introduction, transmission or spread of the listed communicable diseases. …

(b) Whenever the Director has reason to believe that any arriving carrier or article or thing on board the carrier is or may be infected or contaminated with a communicable disease, he/she may require detention, disinfection, disinfestation, fumigation, or other related measures respecting the carrier or article or thing as he/she considers necessary to prevent the introduction, transmission, or spread of communicable diseases.

71.33 Persons: Isolation and surveillance

(b) The Director may require isolation … whenever the Director considers the risk of transmission of infection to be exceptionally serious.

71.36 Medical examinations

(a) The Director may require that an individual arriving into the United States undergo a medical examination as part of a Federal order for quarantine, isolation, or conditional release.

…

(d) Individuals reasonably believed to be infected, based on the results of a medical examination, may be isolated, or if such results are inconclusive or unavailable, individuals may be quarantined or conditionally released in accordance with this part.

71.40 Prohibiting the introduction of persons from designated foreign countries and places into the United States

(a) The Director may prohibit the introduction into the United States of persons from designated foreign countries (or one or more political subdivisions and regions thereof) or places, only for such period of time that the Director deems necessary for the public health, by issuing an order in which the Director determines that:

(1) By reason of the existence of any communicable disease in a foreign country (or one or more political subdivisions or regions thereof) or place there is serious danger of the introduction of such communicable disease into the United States; and

(2) This danger is so increased by the introduction of persons from such country (or one or more political subdivisions or regions thereof) or place that a suspension of the introduction of such persons into the United States is required in the interest of the public health.

(b) ... serious danger of the introduction of such communicable disease into the United States means the potential for introduction of vectors ... even if persons or property in the United States are already infected or contaminated with the communicable disease...

...

(f) This section shall not apply to U.S. citizens and lawful permanent residents.

71.41 General provisions

Carriers arriving at a U.S. port from a foreign area shall be subject to a sanitary inspection to determine whether there exists rodent, insect, or other vermin infestation, contaminated food or water, or other insanitary conditions requiring measures for the prevention of the introduction, transmission, or spread of communicable disease.

71.42 Disinfection of imports

When the cargo manifest of a carrier lists articles which may require disinfection under the provisions of this part, the Director shall disinfect them on board or request the appropriate customs officer to keep the articles separated from the other cargo pending appropriate disposition.

71.48 Carriers in intercoastal and interstate traffic

Carriers, on an international voyage, which are in traffic between U.S. ports, shall be subject to inspection as described in 71.31 and 71.41 when there occurs on board, among passengers or crew, any death, or any ill person, or when illness is suspected to be caused by insanitary conditions.

71.63 Suspension of entry of animals, articles, or things from designated foreign countries and places into the United States

(a) The Director may suspend the entry into the United States of animals, articles, or things from designated foreign countries (including political subdivisions and regions thereof) or places whenever the Director determines that such an action is necessary to protect the public health and upon a finding that:

(1) There exists in a foreign country (including one or more political subdivisions and regions thereof) or place a communicable disease the introduction, transmission, or spread of which would threaten the public health of the United States; and

(2) The entry of imports from that country or place increases the risk that the communicable disease may be introduced, transmitted, or spread into the United States.

71.4 Requirements relating to the transmission of airline passenger, crew, and flight information for public health purposes

(*Paraphrased summary*) Any airline with a flight arriving into the United States, including any intermediate stops between the flight's origin and final destination, must provide specific information to the director for passengers or crew who, as determined by the director, may be at risk of exposure to a communicable disease. The airline must provide the 17 pieces of information enumerated in subsection (b), to the extent that such data are already available and maintained by the airline, and at a minimum, must collect and provide to the director the five pieces of information enumerated in subsection (e): full name, address in the US, primary and secondary phone numbers, email. This information must be provided within 24 hours of an order by the director.

71.5 Requirements relating to the transmission of vessel information…

(*Paraphrased summary*) The operator of any vessel carrying 13 or more passengers (excluding crew) and which is not a ferry must provide specific information to the director for passengers or crew who, as determined by the director, may be at risk of exposure to a communicable disease. The airline must provide the 17 pieces of information enumerated in subsection (b), to the extent that such data are already in the operator's possession, within 24 hours of an order by the director.

71.21 Report of death or illness

(a) The master of a ship destined for a U.S. port shall report immediately to the quarantine station at or nearest the port at which the ship will arrive, the occurrence, on board, of any death or any ill person among passengers or crew (including those who have disembarked or have been removed) during the 15-day period preceding the date of expected arrival or during the period since departure from a U.S. port (whichever period of time is shorter).

(b) The commander of an aircraft destined for a U.S. airport shall report immediately to the quarantine station at or nearest the airport at which the aircraft will arrive, the occurrence, on board, of any death or ill person among passengers or crew.

71.33 Persons: Isolation and surveillance

(c) Every person who is placed under surveillance by authority of this subpart shall, during the period of surveillance:

(1) Give information relative to his/her health and his/her intended destination and submit to surveillance, including electronic and internet-based monitoring as required by the Director or by the State or local health department … and report for such medical examinations as may be required;

(2) Inform the Director prior to departing the United States or prior to traveling to any address other than that stated as the intended destination.

71.35 Report of death or illness on carrier...

The master of any carrier at a U.S. port shall report immediately to the quarantine station at or nearest the port the occurrence, on board, of any death or any ill person among passengers or crew.

Similar to the interstate quarantine regulations, the foreign quarantine regulations also impose certain obligations on the CDC. Section 71.33(a) requires the director of the CDC to "arrange for adequate food and water, appropriate accommodation, appropriate medical treatment, and means of necessary communication" for persons apprehended, quarantined, or isolated.[119] Section 71.30 permits the director to authorize payment for the care and treatment of persons subject to medical examination, quarantine, isolation, and conditional release. Pursuant to section 71.37, any order authorizing quarantine, isolation, or conditional release must contain specific pieces of information, as outlined in this section, and the order must be (a) in writing, (b) signed by the director, (c) served within 72 hours (as specified in the section), and (d) translated as needed. Pursuant to section 71.38, any such order must be reassessed within 72 hours; and pursuant to section 71.39, any such order must undergo a second, medical review, if requested. Finally, section 71.29 states that an individual subject to a federal public health order shall be served with a copy of his or her administrative record, upon request.

Executive Orders 13295 and 13375. Executive Orders 13295 (of April 4, 2003) and 13375 (of April 1, 2005) – enacted pursuant to section 361(b) of the PHSA – specify which diseases constitute quarantinable communicable diseases. The first order, Executive Order 13295 of April 4, 2003, specifically includes Severe Acute Respiratory Syndrome (SARS) on its list.[120] It also provides that "the Secretary, in the Secretary's discretion, shall determine whether a particular condition constitutes a communicable disease of the type specified in … this order."[121] In other words: in case of ambiguity, the secretary decides. Two years later, Executive Order 13375 of April 1, 2005, revised the prior list to also include "influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic."[122]

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119 Public Health, s. 71.33(a).

120 Revised List of Quarantinable Communicable Diseases, Exec. Order No. 13295 (April 4, 2003), 3 CFR (2004), http://www.govinfo.gov/content/pkg/CFR-2004-title3-vol1/pdf/CFR-2004-title3-vol1-eo13295.pdf.

121 Ibid., s. 2.

122 Amendment to Executive Order 13295 Relating to Certain Influenza Viruses and Quarantinable Communicable Diseases, Exec. Order No. 13375 (April 1, 2005), 3 CFR (2006), http://www.govinfo.gov/content/pkg/CFR-2006-title3-vol1/pdf/CFR-2006-title3-vol1-eo13375.pdf.

C. CHINA

While this document does not purport to comprehensively review Chinese law, there are a couple of publicly available Chinese legal documents relevant to pandemic control that merit some review. These are (1) the *Frontier Health and Quarantine Law of the People's Republic of China*, and (2) the *Criminal Law of the People's Republic of China* (China's Criminal Code).

The Frontier Health and Quarantine Law of the People's Republic of China

The *Frontier Health and Quarantine Law of the People's Republic of China* (1986) is split into six chapters: Chapter I contains the general provisions; Chapter II relates to quarantine and inspection; Chapter III covers the monitoring of infectious diseases; Chapter IV relates to health supervision; Chapter V outlines legal liability; and Chapter VI contains supplementary provisions. Altogether there are 28 articles contained in this legislation.

Chapter I starts by stating the law's purpose: "to prevent infectious diseases from spreading into or out of the country, to carry out frontier health and quarantine inspection and *to protect human health*" (Article 1).[123] Article 2 provides for the setup of "frontier health and quarantine offices" at ports of entry that are meant to carry out the quarantining and monitoring of infectious diseases. Article 3 defines infectious diseases.[124] Article 4 provides that "persons, conveyances and transport equipment, as well as articles such as baggage, goods and postal parcels that may transmit quarantinable infectious diseases" must "undergo quarantine inspection upon entering or exiting the country."[125] Article 5 covers inter-agency reporting requirements, and additionally states that "messages exchanged between the People's Republic of China and foreign countries on the epidemic situation of infectious diseases shall be handled by the health administration department." Article 6 allows for borders to be blockaded in the event that an infectious disease is prevalent abroad or within China.[126]

Chapter II covers quarantine inspections. The first several articles of this chapter provide that persons and conveyances are subject to quarantine inspection upon entering China (Article 7) and upon exiting China (Article 8); that foreign ships or airborne vehicles must report to the nearest frontier health and quarantine office upon arrival in China (Article 9); and that the operator of a conveyance must report to the nearest frontier health and quarantine office in the event of disease or death due to unidentified cause (Article 10).[127] Article 11 mandates that the frontier health and quarantine

123 The Frontier Health and Quarantine Law of the People's Republic of China, Order 46, 1986, 18th Meeting, Art. 1 (emphasis added).

124 Frontier Health and Quarantine Law, Arts. 2-3.

125 Frontier Health and Quarantine Law, Art. 4.

126 Frontier Health and Quarantine Law, Arts. 5-6.

127 Frontier Health and Quarantine Law, Arts. 7-10.

office issue a certificate for entry or exit to conveyances that are cleared of contamination.[128] Article 12 mandates isolation for persons with or suspected of having a quarantinable infectious disease. It further mandates that those who die of a quarantinable infectious disease must be cremated.[129] Lastly, Articles 13 and 14 provide that conveyances and articles that are contaminated or came from an area where a disease is epidemic are to be disinfected.[130]

Chapter III contains Articles 15-17. Article 15 obligates frontier health and quarantine offices to "monitor persons on entry or exit for quarantinable infectious diseases and … take necessary preventive and control measures."[131] Article 16 permits frontier health and quarantine offices to "require persons on entry or exit to complete a health declaration form" and produce various relevant health documentation.[132] Article 17 permits frontier health and quarantine offices to take a variety of actions with respect to persons that are being monitored, including keeping them for inspection.[133]

Chapter IV contains Articles 18 and 19 and covers health supervision over ports and conveyances. Specifically, these articles provide that frontier health and quarantine offices, and frontier port health supervisors, are to exercise health supervision over sanitary conditions at frontier ports and conveyances entering and exiting the ports.[134]

Chapter V contains Articles 20-23 and covers legal liability. Articles 20 and 21 empower the frontier health and quarantine offices to warn, fine, or file a lawsuit on individuals and/or units that have violated the provisions of the law.[135] Article 22 provides that "if a quarantinable infectious disease is caused to spread or is in great danger of being spread as a result of a violation of the provisions of this Law, criminal responsibility shall be investigated in accordance with Article 178 of the Criminal Law of the People's Republic of China."[136] Article 23 mandates frontier health and quarantine office personnel to perform duties faithfully, enforce this law impartially, and conduct quarantine inspections promptly. It further clarifies that such personnel are not immune from potential liability, stating that "those who violate the law or are derelict in their duties shall be given disciplinary sanctions; where circumstances are serious enough to constitute a crime, criminal responsibility shall be investigated."[137]

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128 Frontier Health and Quarantine Law, Art. 11.
129 Frontier Health and Quarantine Law, Art. 12.
130 Frontier Health and Quarantine Law, Arts. 13-14.
131 Frontier Health and Quarantine Law, Art. 15.
132 Frontier Health and Quarantine Law, Art. 16.
133 Frontier Health and Quarantine Law, Art. 17.
134 Frontier Health and Quarantine Law, Arts. 18-19.
135 Frontier Health and Quarantine Law, Arts. 20-21.
136 Frontier Health and Quarantine Law, Art. 22.
137 Frontier Health and Quarantine Law, Art. 23.

Chapter VI contains a variety of supplementary provisions; only Article 24 is relevant for purposes of this review. Article 24 states: "Where the provisions of this Law differ from those of international treaties on health and quarantine that China has concluded or joined, the provisions of such international treaties shall prevail, with the exception of the treaty clauses on which the People's Republic of China has declared reservations."[138] This article effectively incorporates – and gives precedence to – all international legal treaties on health and quarantine to which China has acceded. These include the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR; 1966) and the WHO's *International Health Regulations* (IHR; 2005). Recall that China did not declare any reservations regarding the IHR or regarding Article 12 of the ICESCR (the Right to Health).

Much of the language above makes clear that China considers the spread of diseases beyond Chinese borders to be part of its public health responsibility. This can be seen in the emphasis on protecting human health (Article 1); the mandatory inspections of persons and vehicles departing China for other countries (Articles 4, 8, 11, 15, and 16); and the provision that allows for blocking of borders if disease is within China (Article 6). The inclusion in Article 5 of procedures to be followed in communicating with foreign countries suggests that the People's Republic of China considers that such communication may be required on issues of health care. Lastly, the imposition of liability in the event that a disease is caused to spread (Article 22) and the imposition of liability on personnel that are "derelict in their duties" (Article 23) speak to the importance placed within China on the containment of infectious diseases. This is further supported by the incorporation of international treaty obligations in the supplementary provisions (Article 24).

The Criminal Law of the People's Republic of China

The *Criminal Law of the People's Republic of China*[139] contains a number of offences that may apply to domestic COVID-19-related prosecutions within China. Article 22 of the *Frontier Health and Quarantine Law of the People's Republic of China* makes reference to one such provision – Article 178 of the Criminal Law. The Criminal Law must have been amended in the interim, because Article 178 now relates to the forgery or alteration of treasury bonds. The criminalization of causing the spread of infectious diseases is now contained in Articles 332 and 409 of the Criminal Law. Articles 143, 144, 335, and 413 are also relevant.

138 Frontier Health and Quarantine Law, Art. 24.

139 The Criminal Law of the People's Republic of China, 1997, Arts. 143, 144, 332, 335, 409, 413.

ARTICLE 143

[Producing, Selling Nonhygienic Food]

Whoever produces, sells foods that do not conform with hygienic standards which sufficiently gives rise to food poisoning accidents or other severe food-originated diseases is to be sentenced to not more than three years of fixed-term imprisonment and may in addition or exclusively be sentenced to a fine of not less than 50% and not more than 200% of the sale amount; when causing serious harm to human health, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment…; when the circumstances are particularly serious, to be not less than seven years of fixed-term imprisonment or life imprisonment.

ARTICLE 144

[Producing, Selling Nonhygienic Food]

Whoever produces, sells foods that are mixed with poisonous or harmful non-food materials or knowingly sells such things is to be sentenced to not more than five years of fixed-term imprisonment or criminal detention and may in addition or exclusively be sentenced to a fine of not less than 50% and not more than 200% of the sale amount; when causing serious food poisoning accidents or other serious food-originated diseases and giving rise to serious harm to human health, the sentence is to be not less than five years and not more than 10 years of fixed-term imprisonment …; when causing death or particularly harm to human health, is to be punished in accordance with Article 141 of the law.

ARTICLE 332

[Breaching National Border Health and Quarantine Regulations]

Whoever violates national border health and quarantine regulations, causing the spread of quarantined contagious diseases or a serious danger of spreading them, is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention, and may in addition or exclusively be sentenced to a fine.

A unit which violates the crime of the preceding paragraph shall be sentenced to a fine, and principal personnel directly responsible to the unit and other personnel with direct responsibility shall be penalized in accordance with the stipulations of the preceding paragraph.

ARTICLE 335

[Medical Personnel]

Medical personnel who fail seriously to carry out their responsibility, causing the death of patients or serious harm to the health of patients shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention.

ARTICLE 409

[Government Work Personnel – Serious Irresponsibility]

Government work personnel of public health administrative departments engaging in the prevention and treatment of infectious diseases, whose serious irresponsibility has resulted in the communication and spread of infectious diseases, shall – in cases of a serious nature – be punished with imprisonment or criminal detention of less than three years.

ARTICLE 413

[Quarantine Personnel – Forging Results]

Quarantine personnel with animal and plant quarantine organs, who practice favoritism and malpractice in forging quarantine results, shall be punished with imprisonment or criminal detention of less than five years; or – in cases with serious consequences – with imprisonment of over five years and less than 10 years.

Part III. Factual Framework – Chinese and Iranian Response to COVID-19

As early hotspots for COVID-19, both China and Iran have come under criticism for their handling of the pandemic. China in particular is facing multiple lawsuits that seek to hold them responsible for damages caused by the spread of the virus.[140] Although Chinese governmental representatives (such as the Chinese ambassador to London) maintain that no cover-up occurred,[141] there is a considerable consensus that the Chinese regime vastly underplayed and mismanaged the novel coronavirus, leading to enormous consequences worldwide.[142]

A recent study out of the University of Southampton in the UK found that "if interventions in [China] could have been conducted one week, two weeks, or three weeks earlier, cases could have been reduced by 66 percent, 86 percent and 95 percent respectively – significantly limiting the geographical spread of the disease."[143] This is particularly significant as there seem to be well-documented sources showing that China's cover-up of COVID-19 lasted several weeks (see below). Although there are fewer reports and studies regarding the Iranian response, it is fairly clear that the Iranian regime also engaged in a COVID-19 cover-up – and likely continues to do so.

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140 See e.g. Missouri lawsuit against China launched in US federal court (launched by Missouri Attorney General Eric Schmitt); Mississippi lawsuit, announced by Mississippi Attorney General Lynn Fitch; class-action lawsuit from Florida, run by US attorney Matthew T. Moore; and Israel class-action lawsuit run by Shurat HaDin.

141 Guy Faulconbridge and Kylie MacLellan, "There Was No China Cover-up of Coronavirus, Chinese Envoy Says," *Reuters*, April 23, 2020, http://reuters.com/article/us-health-coronavirus-china-unitedstates/there-was-no-china-cover-up-of-coronavirus-chinese-envoy-says-idUSKCN2251VL.

142 See e.g. Kurt M. Campbell and Rush Doshi, "The Coronavirus Could Reshape Global Order," *Foreign Affairs*, March 18, 2020, http://foreignaffairs.com/articles/china/2020-03-18/coronavirus-could-reshape-global-order; Shadi Hamid, "China Is Avoiding Blame by Trolling the World," *Atlantic*, March 19, 2020, http://theatlantic.com/ideas/archive/2020/03/china-trolling-world-and-avoiding-blame/608332/; Nicholas Kristof, "'I Cannot Remain Silent'," *New York Times*, February 15, 2020, http://nytimes.com/2020/02/15/opinion/sunday/china-coronavirus.html; Chris Buckley and Steven Lee Myers, "As New Coronavirus Spread, China's Old Habits Delayed Fight," *New York Times*, February 7, 2020, http://nytimes.com/2020/02/01/world/asia/china-coronavirus.html; Sen. Marco Rubio, "Coronavirus: More Proof China Is Unfit for Global Role," *Real Clear Politics*, February 19, 2020, http://realclearpolitics.com/articles/2020/02/19/coronavirus_more_proof_china_is_unfit_for_global_role.html; Hal Brands, "China Fails the Leadership Test on Coronavirus," Bloomberg, February 27, 2020, http://bloomberg.com/opinion/articles/2020-02-27/coronavirus-china-fails-the-global-leadership-test; Marcus Kolga, "When Will the Chinese Government Be Held Accountable for the Spread of Coronavirus?," *MacLean's*, March 17, 2020, http://macleans.ca/opinion/when-will-china-be-held-accountable-for-coronavirus/.

143 Lai et al., see note 2.

Beyond the irreparable damage to human life, there have already been significant, demonstrated consequences to nation states' economic health. In a recent report by the Henry Jackson Society, researchers find that the robust economic measures taken by the G7 countries alone amounted to US$4 trillion as of April 2020.[144] By May 2020, over $80 billion was owed to Canada alone to compensate for its immediate spending in response to the crisis, and projections at that time expected Canada's share to expand to over $146 billion. As of July 8, 2020, this estimate has soared, and the projected deficit for the 2020-2021 fiscal year is now a whopping $343 billion.[145]

This part reviews sources that address timelines and cover-ups of COVID-19 by both China and Iran. It is important to emphasize, especially in this era of widespread misinformation, that these are still only allegations. This is also a still-evolving situation, and the information may change. It is premature to present anything on this topic as undeniable or objective truth. A thorough and independent investigation, by a proper investigative body, must still be undertaken to discern what transpired. Additionally, it must be emphasized that Chinese or Iranian government actions are not those of the Chinese or Iranian people. We all must remain vigilant and guard against scapegoating whole ethnic or national groups and conflating regimes with the people they govern.

A. CHINESE GOVERNMENT RESPONSE TO COVID-19

The information available on China's COVID-19 response suggests a number of things. First, China delayed reporting to the WHO and to other nation states on the existence of the virus and then on the extent of the spread. Second, China focused its initial efforts on silencing whistleblowers as opposed to protecting its citizens and those around the world. Third, China continues to choose concealment and underreporting over public health and accountability.

The delay in reporting, and consequent underreporting, is implied by comparing official reported accounts of the virus with those of Chinese whistleblowers. Based on the reported accounts of whistleblowers in Wuhan, China, the novel coronavirus appears to have emerged in late November or early December 2019, as reported by both *Foreign Affairs* and *MacLean's*.[146] By mid- to late December 2019, it appears the threat of the virus was evident and that human-to-human transmission was clearly occurring.[147] As reported by the *New*

144 Henderson et al., see note 1.

145 Henderson et al.; Errol Patrick Mendes, Marcus Kolga, and Sarah Teich, "China Was in Violation of International Health Regulations. What Do We Do Now?," *MacLean's*, May 3, 2020, http://macleans.ca/opinion/china-was-in-violation-of-international-health-regulations-what-do-we-do-now/ ; John Paul Tasker, "Ottawa to post $343B deficit as spending hits levels not seen since Second World War," *CBC News*, July 8, 2020, https://www.cbc.ca/news/politics/bill-morneau-fiscal-update-budget-deficit-1.5641864.

146 Campbell and Doshi, see note 142; Kolga, see note 142.

147 Buckley and Lee Myers, see note 142.

York Times, Lu Xiaohong, head of gastroenterology at City Hospital No. 5, told *China Youth Daily* that by December 25, 2019, she was aware that the disease was spreading among medical workers.[148] In contrast: on December 31, 2019, the WHO office in China picked up a media statement on the website of the Wuhan Municipal Commission in China detailing "viral pneumonia" cases in Wuhan. After the WHO repeatedly requested more information, Chinese officials responded on January 3, 2020 by providing information on the "cluster of cases of 'viral pneumonia of unknown cause' identified in Wuhan," with no evidence of human-to-human transmission.[149] It was not until January 20, 2020 – almost one month after Lu Xiaohong reported that human-to-human transmission was evident – that China's National Health Commission publicly confirmed human-to-human transmission of COVID-19.[150]

Then, there is a multitude of evidence that China silenced whistleblowers who tried to sound alarm bells in the early days of COVID-19 in China – like the well-known Dr. Li Wenliang, who tragically died of COVID-19 in early February 2020. According to the *New York Times*, Dr. Li tried to warn his medical school classmates when "a mysterious illness" had infected seven patients and a doctor.[151] Chinese officials from the health authority reportedly apprehended Dr. Li in the middle of the night, demanded to know why he shared the information, and compelled him to sign a statement that he had engaged in "illegal behaviour."[152] Dr. Li was one of at least eight medical doctors who tried to warn others; all eight were denounced on national television programs as rumourmongers.[153] In contrast to this seemingly comprehensive and prompt approach to whistleblowers, it took Chinese authorities several weeks to secure travel across Wuhan. By the time that travel was stopped on January 23, 2020, mayor Zhou Xianwang divulged "that more than 5 million people had already left Wuhan" – thereby spreading COVID-19 across China and the globe.[154]

The concealment and underreporting by the Chinese regime appear to be ongoing. According to the *New York Times*, Beijing law professor Xu Zhangrun wrote an essay as recently as February 2020 criticizing the Chinese regime's response to COVID-19.[155] The piece was immediately banned, and Xu was suspended and put under investigation.[156] He reported he was "questioned for one and a half

148 Buckley and Lee Myers.

149 World Health Organization, "Timeline of WHO's response to COVID-19," *WHO Statement*, June 30, 2020, https://www.who.int/news-room/detail/29-06-2020-covidtimeline.

150 Se Young Lee and Kate Kelland, "China Confirms Human-to-Human Transmission of New Coronavirus: Xinhua," *Reuters*, January 20, 2020, http://reuters.com/article/us-china-health-pneumonia-commission/china-confirms-human-to-human-transmission-of-new-coronavirus-xinhua-idUSKBN1ZJ1SB.

151 Buckley and Lee Myers.

152 Buckley and Lee Myers.

153 Kristof, see note 142.

154 Hamid, see note 142.

155 Buckley and Lee Myers, see note 142.

156 Buckley and Lee Myers.

hours" and fears he "could end up in prison," and was later detained on July 6, 2020.[157] Regarding ongoing underreporting, a *Bloomberg* article from April 2020, which pointedly reads in the present tense, describes a new classified White House report prepared by the US intelligence community that concludes, "China has concealed the extent of the coronavirus outbreak in its country, underreporting both total cases and deaths it's suffered from the disease."[158] Officials, who reportedly asked Bloomberg not to be identified, said that "China's public reporting on cases and deaths is intentionally incomplete"; two of the officials said the White House report finds that "China's numbers are fake."[159]

The Chinese regime was put on notice, repeatedly and as far back as 13 years ago, that such a novel virus could emerge in China and become a pandemic. Chinese experts warned in March 2019 that it was "highly likely that future SARS- or MERS-like coronavirus outbreaks will originate from bats, and there is an increased probability that this will occur in China."[160] In a 2007 journal article, infectious disease specialists state: "The presence of a large reservoir of SARS-CoV-like viruses in horseshoe bats, together with the culture of eating exotic mammals in southern China, is a time bomb. The possibility of the re-emergence of SARS and other novel viruses from animals or laboratories and therefore the need for preparedness should not be ignored."[161]

This would not be the first time the Chinese regime mishandled an outbreak. China mismanaged SARS in the early 2000s.[162] In a separate case, China concealed an AIDS outbreak that was "spread by government-backed blood collection efforts."[163] In the latter case, China's response was "not to help those infected but to punish doctor whistle-blowers" – many people died.[164]

Some excerpts from relevant media sources are reproduced below; emphasis is added throughout.

Foreign Affairs

> "The virus was *first detected in November 2019* in the city of Wuhan, but *officials didn't disclose it for months and even punished the doctors who*

157 Chris Buckley, "A Chinese Law Professor Criticized Xi. Now He's Been Suspended," *New York Times*, March 26, 2019, http://nytimes.com/2019/03/26/world/asia/chinese-law-professor-xi.html and Chris Buckley, "Seized by the Police, an Outspoken Chinese Professor Sees Fears Come True," *New York Times*, July 6, 2020, https://www.nytimes.com/2020/07/06/world/asia/china-detains-xu-zhangrun-critic.html.

158 Nick Wadhams and Jennifer Jacobs, "China Concealed Extent of Virus Outbreak, US Intelligence Says," *Bloomberg*, April 1, 2020, http://bloomberg.com/news/articles/2020-04-01/china-concealed-extent-of-virus-outbreak-u-s-intelligence-says.

159 Wadhams and Jacobs.

160 Yi Fan et al., "Bat Coronaviruses in China," *Viruses* 11, no. 3 (2019): 210.

161 Vincent C. C. Cheng et al., "Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Reemerging Infection," *Clinical Microbiology Reviews* 20, no. 4 (2007).

162 Henderson et al., see note 1; Kristof, see note 142.

163 Kristof.

164 Kristof.

first reported it, squandering precious time and delaying by at least five weeks measures that would educate the public, halt travel, and enable widespread testing. Even as the full scale of the crisis emerged, *Beijing tightly controlled information, shunned assistance from the CDC, limited World Health Organization travel to Wuhan, likely undercounted infections and deaths, and repeatedly altered the criteria for registering new COVID-19 cases* – perhaps in a deliberate effort to manipulate the official number of cases."[165]

The Atlantic

"The evidence of China's deliberate cover-up of the coronavirus outbreak in Wuhan is a *matter of public record*. In *suppressing information about the virus,* doing little to contain it, and allowing it to spread unchecked in the crucial early days and weeks, the regime imperiled not only its own country and its own citizens but also the more than 100 nations now facing their own potentially devastating outbreaks. More perniciously, *the Chinese government censored and detained those brave doctors and whistleblowers* who attempted to sound the alarm and warn their fellow citizens."[166]

The New York Times

"[CCP] instinctively organized *a cover-up, ordering police to crack down* on eight doctors accused of trying to alert others… National television programs repeatedly denounced the doctors as rumormongers. One… Li Wenliang, caught the virus and died – causing public outrage."[167]

The New York Times

"Officials chose to put secrecy and order ahead of openly confronting the growing crisis. … A reconstruction of the crucial *seven weeks between the appearance of the first symptoms in early December and the government's decision to lock down the city* … points to decisions that delayed a concerted public health offensive. In those weeks, the *authorities silenced doctors* and others for raising red flags. They played down the dangers. … Their reluctance to go public, in part, played to political motivations as local officials prepared for their annual congresses in January. Even as cases climbed, officials declared repeatedly that there had likely been no more infections."[168]

US Senator Marco Rubio

"The Chinese Communist Party has no interest in becoming a responsible global power. … The party's *blatant mishandling* of the Wuhan coronavirus should alleviate any doubt. In December, the [Communist] Chinese Party's

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165 Campbell and Doshi, see note 142 (emphasis added)

166 Hamid, see note 142 (emphasis added)

167 Kristof (emphasis added)

168 Buckley and Lee Myers, see note 142 (emphasis added).

(CCP) propaganda machine reportedly tried to tamp down initial concerns raised by medical professionals in Wuhan. *It accused Li Wenliang,* the doctor who initially tried to inform colleagues about the coronavirus originating in Wuhan and its ability to spread from person to person, *of 'inciting panic' and 'spreading rumors'* – until he himself tragically contracted the virus and died. *The CCP also withheld live virus samples* from the international medical community for weeks. … Many suspect that the *CCP continues to downplay the spread* … underreporting infections and deaths, especially given the shortages of test kits and the communications blackout. … *Beijing pressured its fellow BRICS (Brazil, Russia, India, China, and South Africa) nations to issue supportive public statements, and it has bullied others not to take preventive measures. It even objected to the [WHO] sharing information with Taiwan*."[169]

Bloomberg

"During the critical early phase of the current crisis, China unapologetically placed regime stability above the prompt coordination and transparency necessary to keep an epidemic from turning into a pandemic. *Its obsession with squeezing Taiwan out* of all international forums – including the WHO – impeded global cooperation and information-sharing. *China's diffidence toward even receiving foreign assistance* from the U.S. Centers for Disease Control, perhaps for fear of revealing its own errors in handling the crisis, bodes ill for its willingness to provide leadership on other global challenges in the future. Not least, *Beijing has threatened to punish countries that restrict travel to and from China*, and it has displayed a penchant for secrecy and obfuscation that makes good global governance that much more challenging."[170]

MacLean's

"During the initial coronavirus outbreak, authorities in Wuhan stated that there was *'no clear evidence of human-to-human transmission.' Yet, as first noted in a January study in* The Lancet, *more than a third of patients had no connections to the Wuhan food market, and people started to become ill weeks before the government would admit. … By lying about the virus's initial spread, including by not acknowledging human-to-human transmission when it was quite clearly happening, and by prioritizing political stability over human health, China's actions directly led to the massive spread of the virus.* The first case of the virus likely occurred in mid-November 2019. While identifying a novel virus of course takes time, Taiwan identified the outbreak and banned flights from Hubei before the end of 2019. By comparison, before China finally acknowledged the gravity of the situation in late January, some five million people left Hubei, allowing the disease to spread throughout China and the world."[171]

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169 Rubio, see note 142 (emphasis added).

170 Brands, see note 142 (emphasis added).

171 Kolga, see note 142 (emphasis added).

B. IRANIAN GOVERNMENT RESPONSE TO COVID-19

Iran was one of the first epicentres of the global outbreak of COVID-19 outside of China. According to reports by the *Wall Street Journal*, Iranian officials traced the origins of their outbreak to the city of Qom, where Iran's critical economic link with China is centred.[172] According to Iranian health officials, COVID-19 likely arrived in Iran through Chinese workers stationed in Qom, or through an unidentified Iranian businessman who travelled from Qom to China via an indirect flight. Once COVID-19 was introduced into Qom, a city of approximately one million people, it spread quickly throughout the country.[173]

The Iranian spread likely bears some responsibility as well for the global spread of COVID-19, as many of the first cases in various cities across the globe are linked to Iranian travel.[174] The first confirmed case of COVID-19 in New York City was a health care worker who had recently travelled to Iran; one of the first cases in New Zealand came from a family that had recently travelled to Iran; and several of the first Canadian cases of COVID-19 – in Ontario, Quebec, and British Columbia – are linked to travel to and from Iran.[175] Despite garnering less press than China, there is growing recognition that the Iranian regime is responsible. As early as February 2020, Alex Ward of *Vox* stated: "Iran is arguably now the second major center and culprit – behind China – of a crisis looking more and more like a pandemic."[176] By the end of March 2020, *Foreign Policy* stated:

> It's indisputable that Iran, a country of around 83 million people, is one of the pandemic's epicenters. … Responsibility mainly lies with Tehran's botched response, details of which are only now starting to come to light. There are growing indications that the Iranian government knew about the outbreak even as it avoided doing anything to stop it – or even informing the public about it.[177]

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172 Benoit Faucon, Sune Engel Rasmussen, and Jeremy Page, "Strategic Partnership with China Lies at Root of Iran's Coronavirus Outbreak," *Wall Street Journa*l, March 11, 2020, http://wsj.com/articles/irans-strategic-partnership-with-china-lies-at-root-of-its-coronavirus-outbreak-11583940683.

173 Faucon et al.

174 Negar Mojtahedi, "With COVID-19 in Iran Reaching Canada, Expert Warns Outbreak Will Only Escalate," *Global News*, March 1, 2020, http://globalnews.ca/news/6616283/covid-19-iran-connections-expert/; Noam Blum, "How Iran Became a Global Vector of Infection for COVID-19," *Tablet*, March 13, 2020, http://tabletmag.com/sections/israel-middle-east/articles/iran-coronavirus-covid-19.

175 Mojtahedi; Blum.

176 Alex Ward, "Why Iran's Coronavirus Outbreak May Be Worse Than You Think," *Vox*, February 26, 2020, http:// vox.com/2020/2/26/21153438/coronavirus-iran-outbreak-pandemic.

177 Maysam Behravesh, "The Untold Story of How Iran Botched the Coronavirus Pandemic," *Foreign Policy*, March 24, 2020, http://foreignpolicy.com/2020/03/24/how-iran-botched-coronavirus-pandemic-response/.

There is growing consensus that the Iranian regime underreported health data, concealed the extent of its COVID-19 outbreak, and attempted to silence whistleblowers at the expense of protecting the public health – mishandling their response and enabling global spread of COVID-19.

According to official Iranian statistics, the first COVID-19 case in Iran appeared on February 19, 2020.[178] By March 9, 2020, the country reported 6566 COVID-19 cases, or approximately one in every 12,000 Iranians.[179] By March 26, 2020, the country reported 27,017 COVID-19 cases.[180] By April 8, 2020, the country reported 62,000 COVID-19 cases.[181] By April 25, 2020, Iranian officials reported 89,328 COVID-19 cases, with almost 5650 fatalities.[182]

The above official figures are widely believed to be drastic underreports, especially in the crucial early weeks of the outbreak. On March 18, when official statistics would have claimed there were fewer than 27,000 cases in the country, Iranian health ministry spokesperson, Kianush Jahanpur, tweeted: "Every 10 minutes one person dies from the coronavirus and some 50 people become infected with the virus every hour in Iran" (translation by Reuters).[183] Similar early reports by Iranian health officials claimed that the actual figures are "definitely" higher than official Iranian regime counts.[184] On March 17, WHO acting regional emergency director, Rick Brennan, stated that Iran's actual case count could be five times higher than Iranian official statistics.[185]

The following analogy described in *The Atlantic* is apt:

> You are standing before a huge barrel of apples. You can't see the apples, but you can reach in and pick them out. Most are delicious, but a very small number of them are rotten – just about one in 12,000, your friend assures you. You reach in blindly and miraculously pick

178 Graeme Wood, "Iran Has Far More Coronavirus Cases Than It Is Letting On," *Atlantic*, March 9, 2020, http://theatlantic.com/ideas/archive/2020/03/irans-coronavirus-problem-lot-worse-it-seems/607663/.

179 Wood.

180 "Iran Government Grossly Under-Reporting Coronavirus Cases, Deaths: Radio Farda," *Arab News*, March 26, 2020, http://arabnews.com/node/1647701/middle-east.

181 Maryam Sinaiee, "WHO Official Says Coronavirus Numbers May Be Flattening in Iran," *Radio Farda*, April 8, 2020, http://en.radiofarda.com/a/who-official-says-coronavirs-numbers-may-be-flattening-in-iran/30541467.html.

182 "Iran's COVID-19 Death Toll Rises by 76 to 5,650 amid Fears of 'Fresh Outbreak'," *Channel News Asia*, April 25, 2020, http://channelnewsasia.com/news/world/covid-19-coronavirus-iran-apr-25-death-toll-12676894.

183 Behravesh, see note 177; Justine Coleman, "Health Official: One Person Dying Every 10 Minutes from Coronavirus in Iran," The Hill, March 19, 2020, http://thehill.com/policy/healthcare/public-global-health/488389-health-official-iran-every-10-minutes-one-person-dies-coronavirus; Parisa Hafezi, "In Iran, Every 10 Minutes One Person Dies from the Coronavirus – Health Official," Reuters, March 19, 2020, http://uk.reuters.com/article/uk-health-coronavirus-iran-death/in-iran-every-10-minutes-one-person-dies-from-the-coronavirus-health-official-idUKKBN2161YU.

184 Behravesh.

185 Behravesh.

> out a rotten apple. You reach in again and withdraw a whole heaping bushel of apples, maybe 50 in all. Most are good, but when you look closely you see them: one, two, three, four more rotten apples. One rotten apple is an amazing coincidence. Five means your barrel has lots of rotting apples in it and your friend was lying to you.[186]

By March 2020, when Iran had reported only approximately one in 12,000 cases of COVID-19 nationwide, many Iranian politicians had caught COVID-19. On February 28, when Iran had reported only approximately 400 cases, Vice President Masoumeh Ebtekar announced she had caught COVID-19.[187] Shortly thereafter, it was revealed that three other politicians had been infected and died from COVID-19: Mohammad Mirmohammadi, a member of a senior advisory council to Iran's supreme leader; Hossein Sheikholeslam, a former high-level diplomat; and Hadi Khosrowshahi, another former high-level diplomat.[188] Others were revealed to have been infected as well. On March 3, 2020, Iran's deputy Speaker of Parliament, Abdul Reza Misri, reportedly announced that 23 out of Iran's 290 members of Parliament, or approximately 7.9%, had tested positive for COVID-19.[189] Also on March 3, it was reported that Reza Rahmani, Iranian minister of industry, was infected with COVID-19 and hospitalized in an intensive care unit in Tehran.[190] On March 7, it was reported that infected member of Parliament Fatemeh Rahbar died from COVID-19, making her the nation's seventh political figure and first member of Parliament, to die from the virus.[191] As *The Atlantic*'s Graeme Wood notes: "That's a lot of tainted apples."[192] As relayed, 7.9 percent of Iranian members of Parliament had contracted COVID-19 by March 3, 2020. If that rate of infection were applied to Iran's total population, that would mean there were actually *6.4 million cases of COVID-19 infection in Iran by March 3, 2020*.[193] Politicians may not be a representative sample, but it is compelling that this estimated statistic is dramatically higher than the official figure of the time – only 6566 cases of COVID-19 were reported by March 9, 2020.

There have been further attempts to estimate the actual figures of COVID-19 in Iran. According to research compiled by the University of Toronto's Ashleigh

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186 Wood, see note 178.

187 Wood.

188 Wood.

189 Ramin Mostaghim, "8% of Iran's Parliament Has Tested Positive for Coronavirus, Official Says," *CNN*, March 3, 2020, http://edition.cnn.com/asia/live-news/coronavirus-outbreak-03-03-20-intl-hnk/h_13306122baecfcaa123a7ca59478d0d6.

190 Yaghoub Fazeli, "Iranian Minister of Industry Reza Rahmani Has Coronavirus: Reports," *Al Arabiya* English, March 3, 2020, http://english.alarabiya.net/en/News/middle-east/2020/03/04/Iranian-Minister-of-Industry-Reza-Rahmani-has-coronavirus-Reports-.html.

191 Arsalan Shahla and Thomas Buckley, "Iranian Lawmaker Dies of Coronavirus as Infections Spread," *Bloomberg*, March 7, 2020, http://bloomberg.com/news/articles/2020-03-07/iranian-lawmaker-dies-of-coronavirus-as-infections-spread.

192 Wood, see note 178.

193 Wood.

Tuite, Iran likely had *18,300 COVID-19 cases by February 23, 2020*.[194] This figure was estimated based on "known exported case counts and air travel links between Iran and other counties," assessing "interconnectivity between Iran and other countries using International Air Transport Association (IATA) data."[195] To compare, Iranian official figures reported only 43 cases by February 23, 2020.[196] If true, this is an underreporting of over 42,458%.

The Atlantic similarly presented a variety of possible figures, for various periods of time. For instance, China evacuated 311 Chinese citizens out of Tehran on March 4-5, 2020, brought them back to China's Gansu province – and 11 of the passengers tested positive for COVID-19 upon arrival.[197] This is a rate of 3.5 percent. As *The Atlantic* noted, "If Chinese people in Iran got the disease at the same rate as Iranians, that suggests … a total of 5.7 *million at the time of the flight* [March 4-5, 2020]."[198] According to researcher Ashleigh Tuite, analysing flights in this manner actually underestimates the total number of cases.[199]

These sky-high figure estimations are consistent with certain actions reportedly taken by the Iranian regime, such as digging massive burial pits in Qom as early as February 21, 2020.[200] These burial pits were reportedly so vast they were visible from space.[201]

Naturally, accurate figures of this sort are nearly impossible to pinpoint – politicians may not be a representative sample, and rate of infections may not be uniform across the country. Once again, though, disparities this large between official and estimated figures suggest that underreporting took place, at least for those first several weeks. This was perhaps done so as to not suppress voter turnout at the February 21, 2020, election. Iran reportedly communicated to its people "that the United States had hyped COVID-19 to suppress turnout, and Tehran vowed to punish anyone spreading rumors about a serious epidemic."[202]

In addition to underreporting, the Iranian regime seems to have generally mismanaged the COVID-19 outbreak. Unlike the Chinese regime, which did eventually lock down Wuhan, the Iranian regime never agreed to a total lockdown of Qom. In fact, as recently as March 8, Iranian lawmakers requested a quarantine of Tehran, Qom, and other infected cities, and their request was

194 Ashleigh R. Tuite et al., "Estimation of COVID-2019 Burden and Potential for International Dissemination of Infection from Iran," M*edRxiv* (25 February 2020), https://www.medrxiv.org/content/10.1101/2020.02.24.20027375v1.full.pdf.

195 Tuite et al.

196 Tuite et al.

197 Wood, see note 178.

198 Wood (emphasis added).

199 Wood.

200 Blum, see note 174.

201 Erin Cunningham and Dalton Bennett, "Coronavirus Burial Pits So Vast They're Visible from Space," *Washington Post*, March 12, 2020, http://washingtonpost.com/graphics/2020/world/iran-coronavirus-outbreak-graves/.

202 Cunningham and Bennett.

denied.[203] Instead, the focus of the Iranian regime appears, like that of the Chinese regime, to have been on silencing medical professionals. On March 3, 2020, the *New York Times* reported, based on telephone interviews and text messages with Iranian doctors and nurses, that "overwhelmed doctors and nurses say they have been warned by security forces to keep quiet" and that "security agents stationed in each hospital had forbidden staff members from disclosing any information about shortages, patients or fatalities related to coronavirus."[204] According to a "prominent pathologist in Tehran," "laboratory staff members testing for the coronavirus were told that they had been threatened with interrogation and arrest if they provided information to the news media."[205] According to "a nurse in a northwest Iranian city," the security service warned her via a letter that sharing information about COVID-19 patients would be "public fear mongering," "[a] threat to national security," and would be "swiftly dealt with by a disciplinary committee."[206]

> *"In addition to underreporting, the Iranian regime seems to have generally mismanaged the COVID-19 outbreak.*

This seemingly unscrupulous Iranian response to COVID-19 was recently the subject of a joint public letter that a group of 21 Nobel laureates addressed to United Nations Secretary-General Antonio Guterres. In the letter, the Nobel laureates urged Guterres to consider the "urgent catastrophe" in Iran.[207] It further stated the following:

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203 Sanaz Alasti, "The Iranian Legal Response to Covid-19: A Constitutional Analysis of Coronavirus Lockdown," *Verfassungsblog*, April 24, 2020, https://verfassungsblog.de/the-iranian-legal-response-to-covid-19-a-constitutional-analysis-of-coronavirus-lockdown/.

204 Farnaz Fassihi and David D. Kirkpatrick, "Iran's Coronavirus Response: Pride, Paranoia, Secrecy, Chaos," *New York Times*, March 3, 2020, http://nytimes.com/2020/03/03/world/middleeast/coronavirus-iran.html.

205 Fassihi and Kirkpatrick.

206 Fassihi and Kirkpatrick.

207 Mansoureh Galestan, "21 Nobel Laureates Condemn Iran Regime's Cover-up Over Coronavirus Outbreak, Calling It a Crime Against Humanity," *NCRI*, March 22, 2020, http://ncr-iran.org/en/news/nobel-laureates-condemn-iran-regimes-cover-up-over-coronavirus-outbreak-calling-it-a-crime-against-humanity/; Benjamin Weinthal, "21 Nobel Laureates Blast Iran for Allowing Spread of Coronavirus, Cover-Up," *Jerusalem Post*, March 29, 2020, http://jpost.com/international/21-nobel-laureates-blast-iran-for-allowing-spread-of-coranavirus-cover-up-622617; Christopher Carbone, "21 Nobel Laureates Condemn Iran over Coronavirus Outbreak Secrecy," *Fox News*, March 26, 2020, https://www.foxnews.com/science/21-nobel-laureates-condemn-iran-over-coronavirus-outbreak-secrecy.

> There are various reports that indicate that the clerical dictatorship ruling Iran has engaged in a cover-up, preventing the free flow of crucial information about the spread of coronavirus in that country. It covered up the truth in support of its political motives and agenda, including its intention to draw as many people out as possible so they attend its sham parliamentary elections and the anniversary of the 1979 revolution, which included street marches. As a result of the regime's inaction, there has been a serious lack of preventive measures to control and ward off the spread of the novel coronavirus in Iran. For example, according to experts, the initial epicenter of the virus outbreak, the central city of Qom, was not quarantined, due to the regime's parochial political considerations. As a result of all this, COVID-19 has aggressively spread death and infections across Iran. … The situation of prisoners, particularly political prisoners, is dire. According to reports by prisoners, a number of them have contracted the virus. …
>
> Just as was the case with the 1,500 killed in a matter of a few days by the suppressive forces of the Islamic Revolutionary Guard Corps (IRGC) during the November 2019 uprising, the primary party responsible for the growing deaths in Iran as a result of the coronavirus is none other than the clerical regime. …
>
> We are asking for your urgent intervention in the situation that is unfolding in Iran, as a means of preventing the further expansion of this catastrophe. We request that, with the help of the international community, all of the medical resources and treatment be taken out of IRGC's control and instead be allocated to treatment and prevention efforts that can halt further spread of the coronavirus. Through your office, we ask the World Health Organization and human rights organizations to visit Iranian prisons and take steps to save the lives and protect the health of prisoners in order to prevent another massacre.[208]

The fact that a group of Nobel laureates expressed concern about the Iranian response to COVID-19 lends greater weight to the allegations referenced. These represent compelling suggestions that the Iranian regime holds some responsibility for the global spread of COVID-19 and the consequent millions of confirmed cases worldwide. Both the Iranian and Chinese response must be properly investigated in light of the legal instruments summarized above.

208 Ibid.

Part IV. Application and Enforceability: Potential Avenues of Recourse

As noted in Part III, it is premature to present the factual framework above as objectively true. The Chinese regime has denied all allegations of cover-up, and the Iranian regime has not admitted to any wrongdoing. A thorough and independent investigation, by a proper investigative body, must be undertaken. However, given the multitude of evidence, the analyses under this part will proceed under the assumption that the allegations as described above are all true.

Assuming that the Chinese and Iranian regimes did, in fact, underreport data and conceal the extent of the COVID-19 outbreak from the international community and from their own citizenry, and assuming that these regimes did, in fact, focus their attention on silencing whistleblowers at the expense of protecting public health and containing the spread of disease, this is a clear breach of various international legal instruments. These actions constitute a clear breach of Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and a clear breach of Articles 6-7, 44, and 46 of the WHO's *International Health Regulations* (IHR). These actions may also constitute a crime against humanity pursuant to Article 7 of the *Rome Statute*. Finally, the actions of both regimes, and particularly the Chinese regime, might arguably be contrary to the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (Biological Weapons Convention). With each of these international legal breaches come potential avenues of recourse in the international arena. Breaches of the ICESCR may be referred to the Office of the High Commissioner for Human Rights (OHCHR); breaches of the IHR may be referred to the WHO and/or the Health Assembly; breaches of the *Rome Statute* may be investigated at the International Criminal Court (ICC); and breaches of the Biological Weapons Convention may be referred to the UN Security Council (UNSC). Finally, there is the potential for utilizing the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), the World Trade Organization (WTO), and/or bilateral investment treaties (BITs).

Accountability may also be sought in domestic courts – including in Canada, the United States, and China.[209] In order to sue China or Iran in Canadian or United States courts, the general principle of sovereign immunity must be overcome. This principle posits that foreign states are immune from the jurisdiction of domestic courts with limited exception. The existing

209 Note that this is not to preclude the possibility of utilizing other domestic legal systems, such as those of the United Kingdom, Australia, and New Zealand; only that this present report focuses on Canada and United States.

exceptions that might apply are (1) the harm exception (foreign states do not have immunity for death, injury, or property damage that occurs in the US or Canada, as the case may be); (2) the terrorism exception (foreign states do not have immunity for harm caused by sponsorship of terrorism); and (3) the commercial activity exception (foreign states do not have immunity for commercial activity). These three possible exceptions have been cited in the current efforts to seek compensation from the Chinese regime in US courts. As an alternative to using these pre-existing exceptions, Canada and/or the United States may pass a bill to add a new, targeted exception to sovereign immunity. Such a bill is already in process in the US and may be required to enable these domestic lawsuits. Besides the possibility of launching a suit domestically against China or Iran, there are other possible avenues of recourse using Canadian and United States' domestic law. These include seeking accountability from Chinese and/or Iranian corporations under Canada's *Quarantine Act*; imposing sanctions on China and/or Iran under the *Special Economic Measures Act* (SEMA) in Canada and/or the *International Emergency Economic Powers Act* (IEEPA) in the US; and sanctioning individual officials under the *Magnitsky Acts*. In addition, Canada and/or the United States may pass novel legislation to specifically sanction the withholding of health information. Such sanctioning legislation may be called the *Doctor Li Wenliang* Act.

In terms of potential avenues of recourse using Chinese domestic law, a domestic suit within China may be initiated against Chinese officials for breaches of the *Frontier Health and Quarantine Law of the People's Republic of China* (China's Quarantine Act) and/or the *Criminal Law of the People's Republic of China* (China's Criminal Code). This is complicated by the untrustworthiness of the Chinese legal system, but is still pertinent to the ensuing legal discussion.

In sum, these are the potential avenues of recourse that will be discussed in this part:

1. lodging a complaint with the Office of the High Commissioner for Human Rights (OHCHR);
2. lodging a complaint with the World Health Organization (WHO) and/or the Health Assembly;
3. referring the situation to the International Criminal Court (ICC);
4. lodging a complaint with the UN Security Council (UNSC);
5. submitting the case to the International Court of Justice (ICJ);
6. submitting the case to the Permanent Court of Arbitration (PCA);
7. utilizing the World Trade Organization (WTO) dispute resolution mechanism;
8. seeking compensation through bilateral investment treaties (BITs);

9. lodging a domestic suit against China and/or Iran in Canada and/or the United States with reference to existing exceptions to sovereign immunity;
10. passing a bill to add a new targeted exception to sovereign immunity (Canada and the US);
11. seeking accountability from Chinese and/or Iranian corporations in Canada using Canada's *Quarantine Act*;
12. sanctioning the Chinese and/or Iranian regimes using the *Special Economic Measures Act* (SEMA) in Canada and/or the *International Emergency Economic Powers Act* (IEEPA) in the US;
13. listing Chinese and/or Iranian officials under the *Magnitsky Acts* (Canada and the US);
14. passing legislation to sanction the withholding of health information (*Doctor Li Wenliang Act*) in Canada and the US;
15. initiating a domestic suit in China against Chinese officials for breaches of Chinese law.

A. INTERNATIONAL MECHANISMS

Office of the High Commissioner for Human Rights – Complaints Mechanisms

Recall that the right to health is a fundamental part of International Human Rights Law (IHRL) enshrined in Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR). Section 2(c) of Article 12 specifically obligates states parties to take steps necessary for "the prevention, treatment and control of epidemic, endemic, occupational and other diseases," and Article 2 obligates states parties to "take steps, individually and through international assistance and co-operation … [to achieve] the full realization of [all] the rights recognized."[210] China, Iran, and Canada are all states parties to the ICESCR.

Looking to the clarifying comments made by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 14, it is clear that China and Iran both breached their obligations pursuant to the ICESCR. According to the CESCR, states parties are obligated, among other things, to (a) prevent, treat, and control epidemic and endemic diseases; (b) refrain from censoring, withholding, or intentionally misrepresenting health-related information; (c) provide education and access to information; (d) refrain from using or testing nuclear, biological, or chemical weapons if such testing results in the release of substances harmful to human health; (e) refrain from limiting access to health services as a punitive measure; and (f) generally "undertake actions that create, maintain and restore the health of

210 ICESCR, see note 23, Arts. 2 and 12.

the population."[211] Critically, the CESCR clarified that these state obligations extend globally.[212]

Beyond the allegations in Part III that China and Iran withheld information and de-prioritized public health – in clear breach of obligations (a), (b), (c), and (f) above – China allegedly threatened to limit access to health supplies as a punitive measure, which would be a violation of obligation (e) as well.[213] An article in China's state-run media agency allegedly stated that "if China retaliates against the United States at this time … it will also announce strategic control over medical products and ban exports to the United States. Then the United States will be caught in the ocean of new coronaviruses."[214]

Additionally, there is growing concern that COVID-19 did not arise naturally out of the wet market in Wuhan, as originally thought, but rather was accidentally released from the local infectious disease lab.[215] In late March 2020, the US Defense Intelligence Agency reportedly revised its original assessment as to the origin of COVID-19 to reflect this possibility.[216] Whereas in January it "judged that the outbreak probably occurred naturally," the US is now including the possibility that COVID-19 emerged "accidentally" as a result of "unsafe laboratory practices."[217] If true, this could be yet another Article 12 breach – see obligation (d) noted above.

Having established that Chinese and Iranian regime actions likely constituted a breach of Article 12 of the ICESCR, our discussion moves to avenues of recourse. In general, it is the Office of the High Commissioner for Human Rights (OHCHR) that monitors implementation (and breaches) of international human rights treaties. There are a variety of mechanisms through which to lodge a complaint with the relevant bodies of the OHCHR.

Primarily, it is *human rights treaty bodies* that monitor states parties' compliance with various international human rights treaties. Most of these bodies are empowered to receive complaints about breaches. The treaty body that is responsible for monitoring compliance with the ICESCR is the CESCR. Unfortunately, the CESCR is only permitted to receive and consider complaints of ICESCR breaches by states parties *when the state party in question is also a state party to the Optional Protocol to the ICESCR* (OP-ICESCR). This is be-

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211 UNCESCR, see note 11.

212 UNCESCR, 7-8.

213 Andrew Buncombe, "US and China in War of Words as Beijing Threatens to Halt Supply of Medicine Amid Coronavirus Crisis," *Independent*, March 13, 2020, http://independent.co.uk/news/world/americas/us-politics/coronavirus-china-us-drugs-trump-rubio-china-virus-xinhua-hell-epidemic-a9400811.html.

214 Buncombe.

215 See e.g. Fred Guterl, Naveed Jamali, and Tom O'Connor, "The Controversial Experiments and Wuhan Lab Suspected of Starting the Coronavirus Pandemic," *Newsweek*, April 27, 2020, http://newsweek.com/controversial-wuhan-lab-experiments-that-may-have-started-coronavirus-pandemic-1500503.

216 Guterl et al.

217 Guterl et al.

cause the OP-ICESCR effectively functions as a state party's acceptance of the CESCR's powers to review their alleged breaches. Although China and Iran are states parties to the ICESCR, neither is a state party to the OP-ICESCR. As a result, the CESCR will not receive or consider complaints regarding Chinese or Iranian breaches of Article 12.

Other international human rights treaties are monitored by distinct human rights treaty bodies. If these other treaty bodies are able to receive complaints regarding China or Iran, one might theoretically attempt to reframe Chinese and/or Iranian actions as a breach of another international human rights instrument. However, this exercise is unnecessary, as there is no human rights treaty body empowered to receive a complaint about China or Iran. For the treaty bodies monitoring the *Convention Against Torture* (CAT), the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED), and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), China and/or Iran would have had to make a specific declaration recognizing the competence of the treaty body to receive and consider complaints. Neither state did that. For the treaty bodies monitoring the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), *the Convention on the Rights of Persons with Disabilities* (CRPD), and the *Convention on the Rights of the Child* (CRC), China and/or Iran would have had to ratify an Optional Protocol, similar to the OP-ICESCR. Again, neither China nor Iran did that. Consequently, there is no possibility to lodge complaints with any of the human rights treaty bodies regarding Chinese and/or Iranian breaches.

However, complaints of human rights breaches may also be lodged with a number of applicable special rapporteur(s) on human rights – another human rights body supported by the OHCHR. Special rapporteurs are international human rights law experts, charged with investigating specific mandates (some thematic, some country-specific) and working to remedy human rights breaches globally. They publish findings, liaise with domestic governments, and collaborate with other UN bodies, including the UN Security Council, to fight for the implementation of international human rights standards. Unlike findings of some of the human rights treaty bodies, special rapporteurs' findings and recommendations are not binding on states parties, but they still serve to levy international pressure. The applicable special rapporteurs in this case to whom a complaint may be lodged are:

1. Special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment;

2. Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;

3. Special rapporteur on the situation of human rights defenders;

4. Special rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes;

5. Independent expert on human rights and international solidarity;

6. Special rapporteur on the situation of human rights in the Islamic Republic of Iran.

To lodge a complaint with one of the special rapporteurs, one need only specify (1) the alleged victim(s); (2) the alleged perpetrator(s) of the violation; (3) the person(s) or organization(s) submitting the communication; (4) the date, place, and detailed description of the circumstances of the violation; and (5) the informed consent of the alleged victim(s), or of a close relative or legal representative, to submit the complaint.[218]

Communications to one of the thematic special rapporteurs (1-5 above) may be sent via use of the online form (https://spsubmission.ohchr.org/), email (urgent-action@ohchr.org), fax (+41 22 917 90 06), or postal mail (OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland).[219]

Communications to the special rapporteur on the situation of human rights in the Islamic Republic of Iran may be sent directly to the current mandate holder, Javaid Rehman, at sr-iran@ohchr.org.[220]

Alternatively, complaints can be lodged with the UN Human Rights Council. The UN Human Rights Council is a separate entity from the OHCHR, although the OHCHR provides support and follow-up.[221] Any individual, group, or non-governmental organization can submit a complaint to the UN Human Rights Council.[222] A complaint may be lodged against any State member of the UN.[223] There are seven criteria for admissibility:

1. The complaint must be in writing, in one of the six UN official languages (English, French, Arabic, Chinese, Russian or Spanish);

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218 UNOHCHR, "Individual Complaints", United Nations Human Rights Office of the High Commissioner, https://ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx.

219 Ibid.

220 UNOHCHR, "Country Mandates", United Nations Human Rights Office of the High Commissioner, https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en.

221 UNOHCHR, "Human Rights Bodies", United Nations Human Rights Office of the High Commissioner, https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

222 UNHRC, "Frequently asked questions", United Nations Human Rights Office of the High Commissioner, https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx.

223 Ibid.

2. It must contain a description of the relevant facts, including the names of the alleged victims, dates, and location, and contain as much detail as possible without exceeding 15 pages;
3. It must not be manifestly politically motivated ;
4. It must not be exclusively based on reports disseminated by mass media;
5. It is not already being dealt with by a special procedure, a treaty body or other UN or similar regional complaints procedure in the field of human rights;
6. Domestic remedies must have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged;
7. It must not use language that is abusive or insulting.[224]

Communications to the UN Human Rights Council may be sent by email (CP@ohchr.org), fax (41 22) 917 90 11), or postal mail (Complaint Procedure Unit, Human Rights Council Branch, Office of the United Nations High Commissioner for Human Rights, United Nations Office at Geneva, CH-1211 Geneva 10, Switzerland).[225] The complaint form can be found here: https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx.

Beyond receiving complaints, the UN Human Rights Council can pass a condemnatory resolution or establish a commission of inquiry.[226] In addition, any country can deliver an oral statement to the UN Human Rights Council, whether that country is a member of the council or not.[227]

World Health Organization – Complaints Mechanisms

The WHO *International Health Regulations* (IHR) present another possible avenue of recourse for holding China and/or Iran accountable for the spread of COVID-19. The IHR are legally binding on China, Iran, Canada, and the US, and it is evident that both China and Iran breached several of its provisions. Both China and Iran likely breached Articles 6, 7, and 44, which relate to notification and information-sharing, and China may have additionally breached Article 46, which relates to transport and processing of biological substances for public health response purposes.

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224 Ibid.

225 UNHRC, "Human Rights Council Complaint Procedure", United Nations Human Rights Office of the High Commissioner, https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx.

226 David Matas and Irwin Cotler, "Legal Steps Must Be Taken Against China for Initial Inaction," Policy Options, May 25, 2020, https://policyoptions.irpp.org/magazines/may-2020/legal-steps-must-be-taken-against-china-for-initial-inaction/ [hereafter Matas and Cotler]

227 Ibid.

Articles 6 and 7 obligate states parties to notify and share information with the WHO. Article 6 requires states parties to "assess events occurring within its territory" and notify the WHO within 24 hours if the event "may constitute a public health emergency of international concern within its territory."[228] Per Annex 2, notification is required for events that are "unusual or unexpected or may have serious public health impact," which automatically comprises a variety of diseases including SARS and "human influenza caused by a new subtype."[229] The state party must "continue to communicate to WHO timely, accurate and sufficiently detailed public health information."[230] Article 7 further requires states parties to provide the WHO with "all relevant public health information" in the event of "an unexpected or unusual public health event … which may constitute a public health emergency of international concern."[231]

Article 44 obligates states parties to "collaborate with each other, to the extent possible, in … the detection and assessment of, and response to, events as provided under these Regulations."[232]

Finally, Article 46 obligates states to "facilitate the transport, entry, exit, processing and disposal of biological substances and diagnostic specimens, reagents and other diagnostic materials for verification and public health response purposes under these Regulations."[233]

By underreporting and concealing information, China and Iran violated their obligations to share information pursuant to Articles 6, 7, and 44 of the IHR. Further, and specifically regarding China, the allegations that the "CCP withheld live virus samples from the international medical community for weeks"[234] may constitute a breach of Article 46.

In terms of avenues for recourse, Article 56 of the IHR, reproduced below, governs the settlement of disputes. Article 56 provides that, if negotiation, "or any other peaceful means," fails, the "States Parties concerned may agree to refer the dispute to the Director-General [of the WHO], who shall make every effort to settle it."[235] In the event that states parties have a dispute to lodge against the WHO itself, "the matter shall be submitted to the Health Assembly."[236]

In addition, Article 56 articulates that states parties may accept arbitration in accordance with the Permanent Court of Arbitration (PCA), or "resort to the dispute settlement mechanisms of other intergovernmental organizations"

228 IHR, see note 29, Art. 6.
229 IHR, Art. 2.
230 IHR, Art. 6.
231 IHR, Art. 7.
232 IHR, Art. 44.
233 IHR, Art. 46.
234 Rubio, see note 142.
235 IHR, see note 29, Art. 56.
236 Ibid.

to the extent that they are applicable.[237] This clarifies that other international mechanisms that are generally available to settle breaches of international law (such as the PCA and the ICJ, discussed below) continue to be available.

None of these enumerated options under Article 56 are compulsory. Canada or the US may refer the breaches to the director-general of the WHO, but neither China nor Iran will be held accountable unless they agree to the director-general settling the dispute.

Using the PCA for breaches of the IHR is similarly non-compulsory; this is discussed in more detail below. Subsection (3) of Article 56 could have resulted in the PCA being compulsory for IHR breaches – but the states parties concerned would have had to make a declaration to this effect pursuant to subsection (3). As of July 2020, not one state party to the IHR has made such a declaration.

ARTICLE 56

1. In the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it.
2. In the event that the dispute is not settled by the means described under paragraph 1 of this Article, the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it.
3. A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. … The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.
4. Nothing in these Regulations shall impair the rights of States Parties under any international agreement … to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.
5. In the event of a dispute between WHO and one or more States Parties concerning the interpretation or application of these Regulations, the matter shall be submitted to the Health Assembly.

237 Ibid.

Beyond the IHR, the 73rd World Health Assembly, held in May 2020, creates further obligations on WHO member states in the context of the COVID-19 pandemic. The resolution calls on WHO member states to ensure "respect for human rights and fundamental freedoms"; "provide the population with reliable and comprehensive information on COVID-19"; and "provide WHO with timely, accurate, and sufficiently detailed public health information related to the COVID-19 pandemic, as required by the [IHR]."[238]

Promisingly, the 73rd World Health Assembly also calls on the director-general to launch an investigation, and report back on implementation:

> to initiate, at the earliest appropriate moment … a stepwise process of impartial, independent and comprehensive evaluation … to review experience gained and lessons learned from the WHO-coordinated international health response to COVID-19 – including (i) the effectiveness of the mechanisms at WHO's disposal; (ii) the functioning of the International Health Regulations (2005) and the status of implementation of the relevant recommendations of previous IHR Review Committees; (iii) WHO's contribution to United Nations-wide efforts; and (iv) the actions of WHO and their timelines pertaining to the COVID-19 pandemic – and to make recommendations to improve capacity for global pandemic prevention, preparedness, and response, including through strengthening, as appropriate, the WHO Health Emergencies Programme.[239]

International Criminal Court

Chinese and Iranian responses to COVID-19 may constitute a crime against humanity under Article 7 of the *Rome Statut*e, exposing Chinese and Iranian officials to possible prosecution at the International Criminal Court (ICC). There are two hurdles: First, does the ICC have jurisdiction to investigate such a case, given that neither China nor Iran is a state party to the Rome Statute? Second, can the regimes' response to COVID-19 satisfy the definitional criteria of any of the crimes against humanity?

The ICC has specific jurisdictional constraints. It can only investigate crimes that occur in the territory of a state party, or crimes committed by state party nationals, unless the ICC has received a specific declaration by a non-state party accepting jurisdiction or a mandate from the UN Security Council to investigate a specific situation. Neither China nor Iran is a state party to the ICC, and it is unlikely that either would file a specific declaration with the ICC that it accepts its jurisdiction to investigate its actions related to COVID-19. It is also unlikely that a UN Security Council mandate would occur, as China would almost certainly veto such a move. So, in order for the ICC to have jurisdiction, the crimes would have to be framed as having occurred in the territories

238 Seventy-Third World Health Assembly, WHA73.1, May 19, 2020, https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf.

239 Ibid.

of states parties. This should be possible: COVID-19 is a borderless, global phenomenon, and Chinese and Iranian concealment of information occurred everywhere. If China concealed crucial health information from Canada, for instance, why should such a crime be framed as having occurred in China over Canada? The concealment arguably occurred in Canada as well, which would mean the ICC has jurisdiction to open an investigation. That being said, this is a novel situation, and it is unclear how the ICC would rule on this preliminary jurisdictional question.

The ICC grappled with a similar question in 2018 in the context of the alleged deportation of members of the Rohingya people from Myanmar (not a state party) to Bangladesh (a state party).[240] Pre-Trial Chamber I ultimately held that the Court had jurisdiction to proceed.[241] The Chamber concluded that "the Court may assert jurisdiction … if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party of the Statute."[242] Among other factors, the Chamber considered that "the inherently transboundary nature of the crime of deportation further confirms this interpretation"[243] – a feature that is similarly present in the context of pandemic spread.

Assuming the ICC accepts jurisdiction, the next question they would consider is whether Chinese and/or Iranian actions might constitute a crime against humanity. Three possible crimes against humanity may apply: Article 7(a), which outlines the crime against humanity of *murder*; Article 7(b), which outlines the crime against humanity of *extermination*; and Article 7(k), which outlines the crime against humanity of *other inhumane acts*. The Chinese and Iranian regimes' covering up of critical health information and general mismanagement of COVID-19 arguably fit the required elements of all three of these crimes, with the criminal intent elements presenting the primary difficulty at this juncture.

The first two required elements are common to all three crimes against humanity. The first required element is that the conduct must have been "committed as part of a widespread or systematic attack directed against a civilian population."[244] Per Article 7(2) of the *Rome Statute*, the "widespread or systematic attack" need not be a military attack. Given this, it may be argued that the deliberate withholding and misrepresentation of health information constitutes a "widespread or systematic attack directed against a civilian population." The second required element, also common to all three crimes against humanity, is that the person(s) charged with the crime must have known "the

240 Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", para. 1 (September 6, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF.

241 Ibid at para. 72.

242 Ibid.

243 Ibid at para. 71.

244 ICC, see note 44.

conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."[245] This requirement will need to be evaluated in a fact-specific manner, based on the particular person(s) charged with the crime.

Regarding the crime against humanity of murder, there is one additional required element: that the person(s) charged must have "killed one or more persons" – and the term "killed" here is considered interchangeable with the term "caused death."[246] In the case of COVID-19, it should be evident that the intentional withholding of health information caused many civilian deaths. The harder question is whether they intended to cause those deaths. As indicated above, each crime under the *Rome Statute* also comes with a requirement of criminal intent. For crimes of murder, accused persons must either mean to kill the victims or know with virtual certainty that they will die. This level of intent may be difficult to establish in the context of COVID-19, and further information will be required to ascertain Chinese and Iranian officials' level of knowledge and intent.

"The intentional withholding of health information caused many civilian deaths. The harder question is whether they intended to cause those deaths.

Regarding the crime against humanity of extermination, the person(s) charged must have "killed [or caused the death of] one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population." The ICC specifically states that "the infliction of such conditions could include the deprivation of access to food and medicine." Then, the conduct must have "constituted, or took place as part of, a mass killing of members of a civilian population." The ICC specified again that the term "part of" includes "the initial conduct in a mass killing." Both of these specific elements fit the case of COVID-19. The withholding of health information, the punishing of doctors who tried to warn their fellow citizens, and the general de-prioritizing of public health arguably inflicted life conditions that resulted in many deaths – 540,000 and counting, as of July 2020. The greater difficulty, again, may be proving criminal intent. Persons accused of the crime against humanity of extermination must be found to have intended to kill mass numbers of people or to know with virtual certainty that mass numbers of people would die as a result of their actions.

245 ICC.

246 ICC.

Regarding the crime against humanity of other inhumane acts, the person(s) charged must have "inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act." The act must have been "of a character similar to any other act referred to in article 7, paragraph 1, of the Statute," with "character" referring to the nature and gravity of the act. The person(s) charged with this crime must have been "aware of the factual circumstances that established the character of the act." The great suffering must constitute serious violations of established human rights. In the context of COVID-19, any officials that intentionally withheld health information, and thereby caused or contributed to the COVID-19 pandemic, clearly caused great suffering and serious injury worldwide. Based on the scale of fatalities, and the multi-trillion-dollar economic losses,[247] such an act could certainly be considered "of a character similar." As discussed, the right to health is an established human right. The challenge here, again, will likely be the high level of criminal intent required. The particular person(s) charged would have to (1) be aware of the factual circumstances that established the character of the act, and (2) intend to cause great suffering or know with virtual certainty that great suffering would occur as a result of his/her actions.

Due to the high standard of criminal intent that is required under these sections, and the potential jurisdictional issues, it might be a challenge to hold Chinese or Iranian officials criminally responsible under the Rome Statute. However, it is noteworthy that Chinese and Iranian actions appear to fit many of the required elements of three distinct crimes against humanity. As information continues to emerge regarding the origins of COVID-19, and specifically regarding the intent of Chinese and Iranian officials in the early days of the pandemic, the possibility of criminal responsibility pursuant to these sections of the *Rome Statute* should be kept in mind as a potential avenue of recourse. It may be worthwhile for the Office of the Prosecutor at the ICC to open a preliminary examination to investigate these questions. The prosecutor may launch an examination on her own initiative or at the request of a state party (such as Canada).

A Brief Note on Universal Jurisdiction for Crimes Against Humanity

The International Criminal Court is not the only body that may prosecute individuals for crimes against humanity. Many countries can prosecute individuals in their domestic legal systems for crimes against humanity and other *jus cogens* norms,[248] even when there is no link between the activity and the state. In other words, there exists universal jurisdiction for crimes against humanity that enables such crimes to be tried anywhere.

The exercise of universal jurisdiction depends on the particulars of each country's domestic legislation. In Canada, the *Crimes Against Humanity and*

247 Henderson et al., see note 1.

248 *Jus cogens* norms are norms that are fundamental in international law; these are the norms from which no derogation is permitted. *Jus cogens* norms include slavery, piracy, torture, crimes against humanity, war crimes, and genocide.

War Crimes Act permits Canadian courts to prosecute crimes against humanity, genocide and war crimes that occurred outside of Canada. The definitions used track those in the *Rome Statute*. In contrast, the US does not have any such legislation enacted.

The principle of universal jurisdiction is complex and controversial. On the one hand, its aim is laudible, as it assists institutions like the ICC in closing the impunity gap. On the other hand, there are real and valid concerns that the exercise of universal jurisdiction may be politically motivated, and that its applicability across states is varied and confusing, since its exercise in any particular state depends on that state's domestic laws. Moreover, at least in the Canadian context, the individual to be charged would have to be a citizen, resident, or at least a visitor; and heads of state and other high-ranking officials are immune from domestic criminal jurisdiction in any event (they are "internationally protected persons" under section 2 of the Canadian Criminal Code, and enjoy common-law personal immunity in international law).

United Nations Security Council

Both the Chinese and Iranian regimes may also have breached the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (Biological Weapons Convention).

Article 1 of the Biological Weapons Convention requires states parties to "never in any circumstances … develop, produce, stockpile or otherwise acquire or retain … biological agents, or toxins … of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes."[249] Article 3 prohibits states parties from "[transferring] to any recipient whatsoever, directly or indirectly … any of the agents, toxins, weapons, equipment or means of delivery specified in Article 1."[250] Article 4 requires states parties to "take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention" of the biological agents specified in Article 1.[251] Finally, Article 5 requires states parties to "consult one another and to cooperate in solving any problems which may arise."[252] China, Iran, Canada, and the US are states parties to this convention, and so are bound by its articles.

If further investigations reveal that COVID-19 was developed in a Chinese laboratory, this would seem to be a clear breach of the obligation in Article 1 to "never … develop biological agents" (unless the Chinese regime could argue that the development in such types and quantities was justified as having a peaceful purpose).[253]

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249 BWC, see note 53, Art 1.

250 BWC, Art 3.

251 BWC, Art 4.

252 BWC, Art 5.

253 BWC, Art 1.

Even if investigations confirm the original presumption that COVID-19 originated naturally, it may still be possible to argue that China and Iran breached Articles 3, 4, and 5 of the Biological Weapons Convention. This argument would, of course, be weaker, but one might still posit that the withholding of crucial public health information, thereby increasing and accelerating global spread of COVID-19, constituted a contravention of these articles. After all, COVID-19 was indirectly transferred to a variety of recipients (Article 3); these states did not take the necessary measures "to prohibit and prevent the … stockpiling" (Article 4); and these states did not "consult one another and … cooperate" (Article 5). Moreover, "biological agent" has been defined under the convention to mean any organism, "either natural or genetically modified which can cause death, disease and/or incapacit[y]".[254]

As David Matas and former Canadian Minister of Justice Irwin Cotler recently put it (when analyzing this issue concurrently): "Repressing or misrepresenting information about the virus, detaining health practitioners who seek to sound the alarm, and arguing publicly against global travel restrictions, are forms of retention of the virus that have harmed global peace and security."[255]

Article 6 of the Biological Weapons Convention addresses breaches. Pursuant to Article 6(1), if a state party finds that another state party is in breach of the convention, that state may lodge a complaint with the UN Security Council. Article 6(2) then requires all states parties to cooperate with any consequent UN Security Council investigation.[256] Since China, Iran, Canada, and the US are all states parties, Canada and/or the US can lodge a complaint with the UN Security Council. If the UN Security Council then opens an investigation, China and Iran would be required to cooperate.

Politically, because of China's veto power with the UN Security Council, this might only be feasible to address alleged breaches by the Iranian regime of the Biological Weapons Convention.

International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It is located in The Hague, the Netherlands. It was established by the United Nations Charter in June 1945 and began working in 1946. The role of the ICJ is to settle international legal disputes between states.

The ICJ is another potential avenue of recourse to hold China and/or Iran liable for damages caused by COVID-19. This is not related to any one specific

254 Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, BWC/AD HOC GROUP/L.64, Outcome of discussions by the Friend of the Chair on Definitions of Terms and Objective Criteria, para. 2 (October 11, 1999), https://www.unog.ch/bwcdocuments/1999-09-AHG16/BWC_AHG_L.64.pdf; Matas and Cotler.

255 Matas and Cotler.

256 BWC, Art 6.

breach of international law; the ICJ is simply one dispute resolution mechanism that is always available for use by nation states.

Unfortunately, the ICJ cannot make a binding ruling unless both states parties agree that the ICJ shall settle the dispute. In other words: China and/or Iran would have to agree to submit the legal case to the ICJ in order for the ICJ to make a legally binding ruling on the alleged breaches of international law.

An alternative option that does not require China's and/or Iran's assent is to seek an advisory opinion from the ICJ. The ICJ is entitled to provide advisory opinions on legal questions referred to it by authorized United Nations organs and agencies. An advisory opinion is not binding, but it does often carry persuasive weight. For example, following the ICJ's advisory opinion, "Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory" (Adv. Op., 2004), referred to it by the United Nations General Assembly, Israeli courts that were overseeing the construction directed the Israeli government to adjust the direction due to concerns about constitutionality. Although Israel was clear that it did not accept the ICJ's decision, they did still change course. Seeking an advisory opinion from the ICJ on Chinese and/or Iranian liability for the spread of COVID-19 may push those regimes to provide compensation, or at least come to the negotiating table.

> *"The ICJ is another potential avenue of recourse to hold China and/or Iran liable for damages caused by COVID-19.*

Permanent Court of Arbitration

Similarly, the Permanent Court of Arbitration (PCA) is another avenue of recourse that is not related to any one breach of international law. The PCA is another dispute resolution mechanism that is always available to settle international disputes between states. Where the ICJ is the primary judicial organ in the international legal arena, the PCA is the primary arbitral organ. Unlike the ICJ, the PCA is independent from the United Nations system.

The PCA is often incorporated into modern treaties, whereby a clause in the treaty will state that the parties agree to resolve disputes at the PCA and accept its rulings as binding. Unfortunately, none of the international legal instruments reviewed above did that. The *International Health Regulations* (IHR) went only halfway, by providing states parties with the *option* of mandating use of the PCA. Recall that Article 56, subsection (3), of the IHR, permits states parties to file a declaration with the director-general of the WHO, stating that it accepts the PCA as the mandatory dispute resolution mechanism of the IHR. Perhaps unsurprisingly, no state voluntarily filed such a declaration.

As a consequence, the PCA may be used to settle legal disputes arising out of COVID-19, but only if both parties agree. If neither China nor Iran agrees to arbitration at the PCA, arbitration will not proceed.

In addition to arbitration, the PCA conducts commissions of inquiry. These are similar in effect to the ICJ's advisory opinions. However, unlike the ICJ advisory opinions, PCA commissions of inquiry also require the consent of both parties to proceed. So, in short, the PCA is an available avenue of recourse to address international legal disputes arising out of COVID-19 – but only if China and/or Iran agree.

World Trade Organization – Dispute Resolution Mechanism

The World Trade Organization (WTO) is an international organization that deals principally with the rules of trade between nations. It operates a global system of trade rules, acts as a forum for negotiating trade agreements, and settles trade disputes between WTO member states.[257]

The WTO dispute resolution mechanism is efficient and highly active. Approximately 595 disputes have been brought to the WTO, with over 350 rulings issued since 1995.[258] The WTO dispute resolution mechanism is open to all of its member states. A dispute may be brought under the WTO when a member state believes that another member state is "violating an agreement or a commitment that it has made in the WTO."[259]

A recent report by the Henry Jackson Society raised the possibility that the WTO might be amenable to hearing a dispute related to COVID-19, if a regime's actions can be framed as a "deviation from its obligations under the WTO."[260] The Henry Jackson Society noted that the WTO's dispute resolution mechanism has been used to settle disputes that are not strictly trade-related.[261] For instance, the WTO is presently considering disputes related to the ongoing hostilities between Qatar and other Gulf states as they relate to certain trade issues.[262] Iran is not a WTO member state, but China is, so the WTO may be utilized to hold China liable for damages caused by COVID-19 – if Chinese regime actions can be framed as constituting a breach of its WTO obligations.

There is a great deal of overlap and interplay between trade and health. The WHO and the WTO secretariat published a joint study on this subject almost 20 years ago, and the interrelationship has only grown in importance with the evolution of globalization.[263]

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257 WTO, "The WTO," World Trade Organization, https://wto.org/english/thewto_e/thewto_e.htm.

258 WTO, "Dispute Settlement," World Trade Organization, https://wto.org/english/tratop_e/dispu_e/dispu_e.htm.

259 WTO, "Dispute Settlement."

260 Henderson et al., see note 1.

261 Henderson et al.

262 Henderson et al.

263 World Health Organization and World Trade Organization, "WTO Agreements and

The primary purpose of the WTO is "to open trade for the benefit of all."[264] At the same time, the WTO recognizes that human health is "important in the highest degree" and recognizes that WTO member states may subordinate trade-related considerations in favour of the public health.[265] At the extreme, public health crises can result in extreme forms of lockdowns, which effectively shut down international trade for a temporary period of time. The WTO recognizes this, and WTO agreements explicitly allow member states to restrict open trade for public health reasons – so long as the public health measures do not "unnecessarily restrict trade."[266] In addition, the fundamental principles of WTO agreements – namely, non-discrimination and national treatment – continue to apply. Even in a public health crisis, countries cannot discriminate between their trading partners unless there is evidence on which to base unequal restrictions. In addition, countries must treat imported and locally produced goods equally, in terms of competitive opportunities within the importing country's market.[267]

Applying these principles to COVID-19, a dispute may be filed with the WTO's Dispute Settlement Body (DSB) if China breached either of the key principles above with respect to its trading partners. If China discriminated between its trading partners, permitting trade with some nations and not with others, without corresponding evidence of differing risk levels, a dispute may be filed alleging China was in breach of the principle of non-discrimination, which is a key feature in multiple WTO agreements. Similarly, if China discriminated between locally produced and imported products in terms of competitive opportunities afforded within Chinese markets, a dispute may be filed alleging China was in breach of the principle of national treatment. Additionally, there are several WTO agreements that each contain their own requirements. A dispute may be filed with the WTO if China allegedly breached any of its obligations pursuant to WTO agreements. These will have to be considered in an in-depth and fact-specific manner with regards to Chinese trade actions throughout the pandemic.

Alternatively, or in tandem, a more general framing can be made with regards to China's COVID-19 response. The overarching principle of trade obligations vis-à-vis public health is that trade may be restrained for public health reasons so long as this does not "unnecessarily restrict trade." Perhaps the argument can be made that it is because of China's cover-up that other nations had to impose such strict public health measures that had the effect of severely restraining trade. This is the inverse of the traditional argument, but it may be effective in its simplicity. The present public health measures in place

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Public Health: A Joint Study by the WHO and WTO Secretariat," WHO and WTO, August 22, 2002, https://apps.who.int/iris/bitstream/handle/10665/42535/a76636.pdf [hereafter WHO and WTO].

264 WTO, "The WTO," see note 257.

265 WHO and WTO.

266 WHO and WTO.

267 WHO and WTO.

throughout much of the Western world, which severely restrict international trade, would have been unnecessary if the Chinese regime had been transparent and responsible in the early days of COVID-19. In effect, the actions and omissions of the Chinese regime forced Canada and the United States (and others) to institute these strict measures that have had significant, highly damaging effects on international trade.

> *"The argument can be made that it is because of China's cover-up that other nations had to impose such strict public health measures.*

Bilateral Investment Treaties

The Henry Jackson Society raised the alternative possibility that bilateral investment treaties (BITs) could be used to seek compensation from the Chinese regime.[268] BITs are bilateral agreements, entered into by two states, to facilitate mutual investment. Many BITs contain mandatory mechanisms for the settlement of disputes.[269] Iran does not have a BIT with Canada, the United States, the United Kingdom, or Australia. China has BITs with Canada, the United Kingdom, and Australia, but not with the United States. These agreements may enable Canada, the United Kingdom, and Australia to seek compensation from China, if it can be demonstrated that the Chinese regime breached the applicable BIT.

The BIT between China and Canada obligates each country to "encourage investors" and to admit such investments in accordance with its laws (Article 3); accord to covered investments "fair and equitable treatment and full protection and security, in accordance with international law" (Article 4); "accord to investors of the other contracting party no less favourable treatment" than it accords to other investors (Articles 5 and 6); and permit all transfers related to an investment to be made "freely and without delay" (Article 12).[270] In addition, covered investments cannot be "expropriated, nationalized or subjected to measures having an effect equivalent to expropriation or nationalization in the territory of the other contracting party" – except for a public purpose, in a non-discriminatory manner, and against

268 Henderson et al., see note 1.

269 Henderson et al.

270 Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Canada-China, September 9, 2012, Can. TS 2014 No. 26 (entered into force October 1, 2014).

fair market value compensation.[271] If an investor of one contracting party suffers losses "owing to war, a state of national emergency, insurrection, riot or other similar event," the other contracting party must treat such investors no less favourably with respect to compensation than it treats its own investors or investors of another country.[272] Pursuant to this agreement, if China is alleged to be in breach of any of the above provisions, and the dispute cannot be settled through diplomatic channels within six months, Canada can request that the dispute be submitted to an ad hoc arbitral tribunal.[273] The involvement of the tribunal at this point is compulsory, and China will be held liable by any ruling made regarding compensation for damages.[274]

The BIT between China and the United Kingdom similarly obligates each country to "encourage and create favourable conditions" for the nationals and companies of the other contracting party for investment in its territory (Article 2); treat the other's investments no less favourably as compared to investments of its own nationals or nationals of any third state (Article 3); and permit the other's nationals and companies to transfer investments and returns freely (Article 6).[275] In addition, investments cannot be "expropriated, nationalized or subjected to measures having effect equivalent to expropriation or nationalization" – except for a public purpose and against reasonable (fair market value) compensation.[276] If an investor of one contracting party suffers losses "owing to war or other armed conflict, revolution, a state of national emergency, revolt, or riot," the other contracting party must treat such investors no less favourably with respect to compensation than it treats investors of another country.[277] Pursuant to this agreement, if China is alleged to be in breach of any of the above provisions, and the dispute cannot be settled through diplomatic channels within six months, the United Kingdom can request that the dispute be submitted to international arbitration. International arbitration is compulsory, and China will be held liable by any ruling made regarding compensation.[278]

The BIT between China and Australia is again similar. This BIT obligates each country to "encourage and promote" and admit investments in its territory by nationals of the other contracting party (Article 2); accord to these investments "fair and equitable treatment" and "protection and security" (Article 3); treat the other's investments no less favourably than

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271 Ibid., Art. 10.

272 Ibid., Art. 11.

273 Ibid., Art. 15.

274 Ibid.

275 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China, United Kingdom-China, May 15, 1986, 1462 UNTS 255 (entered into force May 15, 1986).

276 Ibid., Art. 5.

277 Ibid., Art. 4.

278 Ibid., Art. 7.

investments by nationals of any third state (Article 3); and permit transfers freely and without undue delay (Article 10).[279] In addition, covered investments cannot be subject to "expropriation or nationalization or other measures having a similar effect" – unless the measures are in the public interest, are non-discriminatory, and against reasonable (market value) compensation.[280] If an investor of one contracting party suffers losses in the territory of the other contracting party "owing to war or other armed conflict, insurrection, revolt, or other similar events," the other contracting party must treat such investors no less favourably than it treats investors of another country.[281] Pursuant to this agreement, if Australia alleges that China breached its obligations, and the dispute cannot be settled through diplomatic channels within 60 days, Australia can request that the dispute be submitted to international arbitration. The ruling made by the arbitral tribunal will be binding on both parties.[282]

There is overlap between these three covered BITs and the WTO agreements described in the previous section. This overlap may allow for multiple avenues of recourse for similar arguments. For instance, if Canada, the United Kingdom, or Australia were to allege that the Chinese regime discriminated against their foreign corporations in China and treated them less favourably, this may be brought before the WTO dispute resolution mechanism (as a breach of the key principles of non-discrimination and/or national treatment), as well as before mandatory international arbitration pursuant to the respective BITs.

B. DOMESTIC RECOURSE – CANADA AND THE UNITED STATES

Domestic Suit Against China and/or Iran – Exceptions to Sovereign Immunity

Accountability may also be sought in domestic courts, including in Canada and the United States, through the filing of civil lawsuits against the Chinese and/or Iranian governments. If Canadian or US courts find that these foreign regimes are liable and must provide compensation for damages caused by COVID-19, their foreign assets may be seized, then sold, and the proceeds may be distributed to those who have incurred losses. In this sense, China and/or Iran may be compelled to provide compensation without their assent, which demonstrates a significant advantage compared to many of the international mechanisms outlined in the sections above.

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279 Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, Australia-China, July 11, 1988, 1514 UNTS 65 (entered into force July 11, 1988).

280 Ibid., Art. 8.

281 Ibid., Art. 9.

282 Ibid., Art. 13, Annex B.

The major hurdle to advancing these lawsuits is overcoming the general principle of sovereign immunity. This is the principle that foreign states are, generally speaking, immune from the jurisdiction of domestic courts. No foreign state can be sued in domestic courts in Canada or the United States, unless the situation fits one of the specific, limited exceptions articulated in Canada's *State Immunity Act* or the United States' *Foreign Sovereign Immunities Act*. Note that these acts are almost identical in the exceptions they each permit, and so they are discussed conjointly in this section.

The three exceptions to sovereign immunity that may apply to the present case of COVID-19 are:

1. The harm exception (foreign states do not have immunity for death, injury, or property damage that occurs in the US or Canada, as the case may be);

2. The terrorism exception (foreign states do not have immunity for harm caused by sponsorship of terrorism);

3. The commercial activity exception (foreign states do not have immunity for commercial activity).

A number of domestic lawsuits have now been filed in United States courts against the Chinese regime, seeking damages caused by the spread of COVID-19. These include: a lawsuit launched in US Federal Court by Missouri Attorney General Eric Schmitt; a class-action lawsuit from Florida run by US attorney Matthew T. Moore; a Mississippi lawsuit announced by Mississippi Attorney General Lynn Fitch; and a class-action lawsuit run by Israeli law group Shurat HaDin. All above-noted domestic lawsuits posit that one or more of the limited exceptions to sovereign immunity apply in the case of COVID-19 and China.

This section will evaluate each of the possible three exceptions in turn, in both Canada and the United States, and in relation to both China and Iran. If even one of the three exceptions to sovereign immunity applies, China and Iran will not be immune from the jurisdiction of Canadian and United States' courts, and China and Iran can thereby be held accountable in these domestic courts.

i. The Harm Exception

Pursuant to section 6 of Canada's *State Immunity Act*, "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

1. any death or personal or bodily injury, or
2. any damage to or loss of property that occurs in Canada."[283]

Similarly, 28 USC 1605 (the US *Foreign Sovereign Immunities Act*) provides:

283 State Immunity Act, RSC 1985, c. S-18, s. 6.

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which … 1605(a)(5) money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> (a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[284]

Case law in both Canada and the United States has held that the harm exception only applies when the acts causing injury or damage occurred domestically. This will present the major challenge to invoking this exception in the context of COVID-19.

The Supreme Court of Canada has held that the harm exception to sovereign immunity "does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada."[285] Similarly, US courts have found in several cases that the act that causes the harm must occur in the United States.[286] It cannot be an act that occurs in another country and causes effects in the United States.

This feature of the harm exception makes it unlikely to apply to the lawsuits regarding Chinese or Iranian response to COVID-19. It will be difficult to counter the argument that Chinese and Iranian concealment of COVID-19 occurred in China and Iran, respectively. Similar to the argument raised in the International Criminal Court (ICC) section above, it may be possible to argue that because COVID-19 is a global, borderless phenomenon, concealment of outbreaks occurred everywhere, all at once. However, unlike ICC jurisdiction, the harm exception to sovereign immunity has been interpreted fairly restrictively in Canadian and US courts, and this argument is unlikely to hold in either jurisdiction. In addition, claims for harm must meet the tort law requirement that the action "proximately caused" the injury,

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284 Foreign Sovereign Immunities Act, 28 USC § 1605(a)(5) (1976) [hereafter FSIA].

285 Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, at para. 73.

286 Argentine Republic v Amerada Hess Shipping Corp, 488 US 428, 439 (1989); Jerez v. Republic of Cuba, 964 F. Supp. (2d) 52, No. 09-466 (RWR), 2013 WL 4578999, at *2–3 (DDC 29 August 2013); Doe I v. State of Israel, 400 F. Supp. (2d) 86, 108 (DDC 2005); O'Bryan v. Holy See, 556 F. (3d) 361, 382 (6th Cir. 2009); Frolova v. Union of Soviet Socialist Republics, 761 F. (2d) 370, 379 (7th Cir. 1985); see also David P. Stewart, "The Foreign Sovereign Immunities Act: A Guide for Judges," Federal Judicial Center, 2013, http://fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf.

which may be difficult to prove in the context of COVID-19.[287] So, even if it can be framed that the act occurred in Canada or the United States, the causation requirement may present an insurmountable challenge.

ii. The Terrorism Exception

The terrorism exception is a newer exception to sovereign immunity. It was added to Canada's *State Immunity Act* in 2012 following the passage of the *Justice for Victims of Terrorism Act* (JVTA), and the United States' *Justice Against Sponsors of Terrorism Act* (JASTA) similarly amended the United States' sovereign immunity rules in 2016.

Following the enactment of the JVTA in Canada, section 6.1 of the *State Immunity Act* now provides that:

> 1) A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.
>
> 2) The Governor in Council may, by order, establish a list on which the Governor in Council may, at any time, set out the name of a foreign state if, on the recommendation of the Minister of Foreign Affairs made after consulting with the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that the foreign state supported or supports terrorism. …
>
> 11) Where a court of competent jurisdiction has determined that a foreign state, set out on the list in (2), has supported terrorism, that foreign state is also not immune from the jurisdiction of a court in proceedings against it that relate to terrorist activity by the state.[288]

In short, if a foreign state is listed in Canada as a state supporter of terrorism, that state may be sued in Canadian courts for proceedings related to its terrorist activity or support of such activity.

The United States' terrorism exception enacted under the US *Justice Against Sponsors of Terrorism Act* (JASTA) is slightly different. JASTA provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by –

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287 *Doe v. Holy See*, 434 F. Supp. (2d) 925, 948 (D. Or. 2006), aff'd in part, rev'd in part, 557 F. (3d) 1066 (9th Cir. 2009), cert. denied sub nom. *Holy See v. Doe*, 130 S. Ct. 3497 (mem.) (2010); *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1417 (DDC 1983).

288 *State Immunity Act*, see note 283, s. 6.1.

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.[289]

In other words, a US national may sue a foreign state in US courts for its support of international terrorism that resulted in injury or damage in the United States. Unlike in Canadian law, the foreign state does not need to be a listed state supporter of terrorism.

"International terrorism" in JASTA is defined as meaning "activities that –

A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."[290]

In the Canadian legal context, "terrorist activity" is defined in the Canadian Criminal Code as an act or omission, in or outside Canada, that fulfils the following two requirements:

1. It is committed (A) in whole or in part for a political, religious, or ideological purpose, objective, or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government, or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada.

2. It intentionally (A) causes death or serious bodily harm to a person by the use of violence; (B) endangers a person's life; (C) causes a serious risk to the health or safety of the public or any segment of the public; (D) causes substantial property damage, whether to public or private

289 *Justice Against Sponsors of Terrorism Act*, Pub. L. No. 114–222, 130 Stat. 852 s. 3 (codified at 18 USCA § 2333, 28 USCA § 1605B, amending the Anti-Terrorism Act and FSIA, respectively) (2016) [hereafter JASTA].

290 JASTA, § 2331.

> property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A)-(C); or (E) causes serious interference with or serious disruption of an essential service, facility, or system, whether public or private, other than as a result of advocacy, protest, dissent, or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A)-(C).[291]

Withholding health information and thereby endangering human life may be considered terrorist activity under the Canadian legislation, but it is unlikely to fit the required US criteria for international terrorism, making a suit under the terrorism exception in US courts unlikely to succeed.

In particular, the US definition of "international terrorism" requires that the activity "appear … intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." None of these possibilities appear to be present in Chinese or Iranian response to COVID-19.

The Canadian definition is slightly wider, and Chinese and Iranian behaviour may fit the requirements. In keeping with the Canadian definitional requirements, Chinese and Iranian actions appear to have been (1) committed in part for a political purpose; (2) with the intention of compelling governments and international organizations to refrain from doing an act (China and Iran arguably downplayed health information so that governments and international organizations would not hold them accountable for the pandemic, would not limit trade, etc); and (3) intentionally endangered lives.

The second requirement in Canada for the terrorism exception to hold is that the foreign state must be listed as a state supporter of terrorism. Iran is on this list; China is not. Therefore, the Iranian regime's withholding of critical public health information may ground a domestic suit using the terrorism exception in Canada – sometimes called "a JVTA suit." However, China would have to be added to the Canadian list of state supporters of terrorism for such a suit to be possible against the Chinese regime.

It should be noted that Iranian state assets in Canada have already been seized to satisfy other JVTA judgments against Iran. Iran may not have further assets in Canada that can be seized in the event of a COVID-19-related lawsuit. This is not to say that such a suit would be pointless – there is arguably intrinsic value in obtaining a court ruling, and lawsuits may still be a useful tool as part of a larger pressure campaign. However, the ability to actually seize Iranian assets in these cases may be limited, and this should be taken into account prior to the launch of any JVTA suit against the Iranian regime.

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291 *Criminal Code*, RSC 1985, c. C-46, s. 83.01.

iii. The Commercial Activity Exception

Pursuant to section 5 of the Canadian *State Immunity Act*, "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."[292] Per section 2, "commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character."[293]

The US *Foreign Sovereign Immunities Act* provides for a similar exception, stating as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which … the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[294]

Commercial activity is defined in the US legislation as meaning "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[295]

The rationale behind the commercial activity exception is that a government should not be immune from jurisdiction for actions that a private actor is empowered to take – in other words, commercial activity. The difficulty in utilizing this exception tends to be discerning whether an activity is commercial or political, as many government actions can be construed as both (for example, think of a government engaging in a construction contract or tender). In settling this, courts across Commonwealth systems have typically held that one must look to the nature of the transaction and not the purpose or underlying motivation. This interpretation of the exception is the current law in the US, whereas Canadian courts look to "the entire context," which includes both the nature of the transaction and the purpose of the activity.[296]

With respect to COVID-19, it would likely be a challenge to frame Chinese and/or Iranian actions as constituting commercial activity in either Canadian or US courts. It is difficult to classify any transaction related to COVID-19 as commercial in nature. It is difficult to even discern what the transaction was

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292 *State Immunity Act*, see note 283, s. 5.

293 *State Immunity Act*, s. 2.

294 FSIA, see note 268, § 1605(a)(2).

295 28 USC 1603; reproduced in *Kuwait Airways Corp v. Iraq*, 2010 SCC 40, at para 26 [hereafter Kuwait Airways].

296 *Kuwait Airways*, see note 295, at para 31; *Re* Canada Labour Code, [1992] 2 SCR 50, at paras. 27-28.

in the case of COVID-19. The transaction could be the withholding of public health information, the failure in the case of China to properly regulate the wet market in Wuhan, or the silencing of whistleblowers. None of these are commercial in nature. Neither the Chinese nor the Iranian regime was relying on power that a private actor possesses – failing the original legal test upon which this exception to sovereign immunity was first philosophized.[297] The purpose of the transaction might be commercial if one frames those actions as stemming from a motivation to protect economy and trade relationships; but that is also a political motivation. With the flexibility of the Canadian approach, the commercial activity exception may have a slightly stronger chance to hold in Canadian courts, but in any circumstance, using it would likely be a significant challenge.

iv. One Additional Route of Exception in Canada

Section 15 of the Canadian *State Immunity Act* outlines an additional exception that may be relevant in the case of COVID-19:

> The Governor in Council may, on the recommendation of the Minister of Foreign Affairs, by order restrict any immunity or privileges under this Act *in relation to a foreign state where, in the opinion of the Governor in Council, the immunity or privileges exceed those accorded by the law of that state*.[298]

In other words, if China or Iran would not have protected Canada from the jurisdiction of their domestic courts, then in similar situations Canada is not obliged to protect them. This is consistent with the principle of reciprocity in international law. If Canada would not have been afforded immunity in this situation from China or Iran, Canada may restrict their immunity reciprocally. Considering the possibility of utilizing this exception with respect to China and Iran will require consultations with qualified Chinese and Iranian lawyers, respectively.

Bill to Add New Targeted Exception to Sovereign Immunity

Given the clear limitations to using existing exceptions to sovereign immunity – especially in the US, where none seem available – an alternative route may be to amend the Canadian *State Immunity Act* and/or the US *Foreign Sovereign Immunities Act* to specifically restrict state immunity for the intentional or reckless spread of infectious diseases. Such a move is in keeping with the general trend in international law toward more restrictive state immunity.[299]

The US government has already raised this possibility. US Senators Marsha Blackburn and Martha McSally have proposed a bill, called the "*Stop COVID Act of 2020*," that would amend the US *Foreign Sovereign Immunities Act* to

297 *I Congreso del Partido*, [1983] UKHL 244, AC 244, 262C.

298 *State Immunity Act*, see note 283, s. 15.

299 *Kuwait Airways*, see note 295, at para. 13.

"establish an exception to jurisdictional immunity for a foreign state that [intentionally or unintentionally] discharges a biological weapon, and for other purposes."[300] The precise wording of their proposed exception is as follows:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case where such foreign state is alleged, whether intentionally or unintentionally, to have discharged a biological agent, as defined in section 178 of title 18, and such discharge results in the bodily injury, death, or damage to property of a national of the United States.[301]

Adding a targeted, additional exception to sovereign immunity would mean that instead of trying to fit the case of COVID-19 into pre-existing exceptions, there would be an exception geared specifically for this scenario. This was done following 9/11 with the *Justice for Victims of Terrorism Act* (JVTA) in Canada and the *Justice Against Sponsors of Terrorism Act* (JASTA) in the US. This can be done again following COVID-19. The legislation already proposed in the US can be easily adapted to the contours of Canadian jurisprudence. Such legislation would enable lawsuits against China and Iran to proceed in Canadian and US domestic courts.

It is important to recall that these available exceptions to sovereign immunity will not result in US or Canadian courts immediately requiring foreign governments to compensate victims. These exceptions simply enable such courts to hear the case, and investigate the origin of the virus and Chinese and Iranian culpability. US and Canadian courts will only make rulings for compensation if it corresponds with their factual findings. As clarified in Part III, the allegations of Chinese and Iranian cover-up are still just allegations. From a legal perspective, allegations are only transformed into facts once a proper investigative body has considered all sides and made factual findings on which to ground liability. Essentially, these exceptions to sovereign immunity enable US and Canadian courts to be one such proper investigative body.

In addition, there may be other hurdles and negative impacts to consider. As discussed, the requirements of causation, combined with the evidentiary difficulties of hearing a case that occurred abroad, may present difficulties once the domestic court is hearing the case. Enforcing judgment may also present difficulties if there are limited assets available to seize. Finally, there may be unintended negative consequences, such as the Chinese regime retaliating by restricting sovereign immunity in their domestic system. This may lead to lawsuits against Canada and/or the US in China, which may result in the seizure of our assets abroad. These risks will have to be carefully considered before the *Stop COVID Act* (and any analogous Canadian version) is passed.

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300 *Stop COVID Act* of 2020, Bill S _, 116th Cong. (2020). As of July 2020, there are now multiple proposals to this effect, by various US senators, each seeking to restrict sovereign immunity for COVID-19-related lawsuits. The wording in each differs slightly.

301 *Stop COVID Act*, s. 2.

Seeking accountability from Chinese and/or Iranian Corporations in Canada – Canadian Quarantine Act

The Canadian *Quarantine Act* imposes a number of legal obligations on individuals and corporations in Canada. Three such legal obligations may be utilized to hold Chinese and/or Iranian corporations responsible. Pursuant to section 66 of the *Quarantine Act*, "no person shall hinder or wilfully obstruct a quarantine officer, a screening officer or an environmental health officer who is carrying out their duties or functions under this Act, or make a false or misleading statement, either orally or in writing, to the officer." Pursuant to subsection 67(1), "every person is guilty of an offence if they cause a risk of imminent death or serious bodily harm to another person while wilfully or recklessly contravening this Act or the regulations." Lastly, pursuant to section 73(2), "every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with this Act and the regulations."[302] If any Chinese or Iranian corporation in Canada played a role in concealing the true extent of the COVID-19 outbreak, this could conceivably be a breach of all three of the above obligations. Concealing the true nature and extent of a pandemic could be considered as "hindering" officers pursuant to section 66, to "cause a risk of imminent death or serious bodily harm" pursuant to section 67(1), and to fail to "take all reasonable care" pursuant to section 73(2).

Any breach of these three legal obligations can ground liability. Per section 72 of the *Quarantine Act*, a breach of section 66 is an offence, and the person who contravenes it is liable to a fine of up to $500,000, imprisonment for up to three years, or both. Per subsection 67(2), any person who commits the offence in section 67(1) is liable to a fine of up to $1 million, imprisonment for up to three years, or both. Per section 71, a breach of the obligation contained in section 73(2) is an offence, and the person who contravenes it is liable to a fine of up to $750,000, imprisonment for up to six months, or both.[303] The above maximum fines grow exponentially if the offence is continued on more than one day. Pursuant to section 75, "if an offence under this Act is continued on more than one day, the person who committed it is liable to be convicted for a separate offence for each day on which it is continued."[304] So, for example, if a Chinese or Iranian corporation in Canada deliberately concealed information about the pandemic for 30 days, thereby causing "a risk of imminent death or serious bodily harm" in violation of section 67(1), that corporation would be liable to a fine of up to $1 million per day – meaning, $30 million total.

Beyond fines and imprisonment, section 80 of the *Quarantine Act* permits the court to impose a variety of additional orders, including (a) prohibiting the offender from engaging in activity that may result in further offences; (b)

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302 *Quarantine Act*, see note 73, s. 66, 67(1), and 73(2).

303 *Quarantine Act*, s. 72, 67(2), and 71.

304 *Quarantine Act*, s. 75.

directing the offender to submit to the minister of health any information with respect to the offender's activities that the court considers appropriate; (c) directing the offender to compensate the minister, in whole or in part, for the cost of any remedial or preventative measure; and (d) directing the offender to pay an amount that the court considers appropriate for the purpose of conducting research. Pursuant to subsection 80(4), if the court orders the offender to compensate the minister, costs incurred by the minister constitute a debt and may be recovered in court by the seizure of assets.[305] These sections further increase the potential for compensation in the case of a COVID-19 suit. Continuing the earlier example of a corporation concealing information for 30 days and being liable for $30 million in fines, section 80 allows the court to order that, beyond the $30 million, the corporation must also compensate the minister for actions taken in response to the spread of COVID-19. This could total billions of dollars. Pursuant to subsection 80(4), it may be recovered by the seizure of the corporation's assets in court.

> *The* Quarantine Act *may enable significant compensation to be obtained from Chinese and Iranian corporations.*

Pursuant to sections 73(1) and 74, liability can be easily extended to officers, directors, agents, and employers. Pursuant to section 73(1), "if a corporation commits an offence … any officer, director or agent … of the corporation who [authorized, acquiesced in] or participated in the commission of the offence is … guilty of the offence … whether or not the corporation has been prosecuted or convicted."[306] Pursuant to section 74, "it is sufficient proof of the offence to establish that it was committed by an employee or agent or mandatory of the accused, whether or not the employee or agent or mandatory is identified or has been prosecuted."[307] This means that in the above example, any officers and directors of the corporation who were complicit could be held responsible. In addition, an employer may be held responsible for the actions of their employees.

Essentially, these sections of the *Quarantine Act* may enable significant compensation to be obtained from Chinese and Iranian corporations in Canada, and from their directors and officers. To ground liability, the specific corporation must conduct business in Canada, and have played a role in the spread of COVID-19 such that its actions constituted a breach of one of the sections outlined above. One easy example of a Chinese corporation that

305 Quarantine Act, s. 72.

306 Quarantine Act, s. 73(1).

307 Quarantine Act, s. 74.

conducts business in Canada is Huawei Technologies Co., Ltd. As for the second question, addressing any specific corporation's culpability under the *Quarantine Act* will require a fulsome investigation, which is beyond the capabilities and scope of this report. However, it is not difficult to imagine that directors or officers of Huawei Technologies Co., Ltd., concealed evidence about the COVID-19 outbreak, and that this could ground a breach of sections 66, 67(1), and 73(2).

Unlike many of the other avenues of recourse discussed in this part, the provisions of Canada's *Quarantine Act* cannot enable China or Iran, as foreign states, to be held liable at the national level. However, the act's possibility of yielding significant amounts of compensation from corporations, and the additional pressure this might place on the Chinese and Iranian regimes might enable cooperation and acceptance of responsibility for the global spread of COVID-19.

In addition to the availability of these charges under the *Quarantine Act*, it may be possible for private parties to launch a civil lawsuit against these corporations in Canada, seeking damages. Although a breach of a criminal or regulatory provision (such as those contained in the *Quarantine Act*) does not, in and of itself, give rise also to a civil right of action,[308] the fact that these obligations and duties exist may be used to buttress an otherwise extant civil cause of action such as negligence.[309]

Of course, the provisions of the Canadian *State Immunity Act* would continue to apply to any such civil lawsuit. Similar to civil lawsuits against foreign states, state-owned corporations may be immune from Canadian civil jurisdiction. This is because the definition of "foreign state" in section 2 of the *State Immunity Act* includes "any agency of the foreign state," which in turn is defined as including "any legal entity that is an organ of the foreign state but that is separate from the foreign state," including state-owned corporations. Many important corporations in China and Iran are owned or controlled by the state. This is not to say that all state-owned corporations would be immune from civil lawsuits; it would depend on the precise degree of state control in each particular case (as well as the applicability of the listed exceptions to state immunity). Note also that Canada's *State Immunity Act* does not apply to criminal proceedings or proceedings in the nature of criminal proceedings – only civil.

Economic Sanctions Against China and/or Iran

Another option available to both Canadian and US governments is the imposition of economic sanctions on the Chinese and/or Iranian regimes. Under Canadian law, this may be accomplished pursuant to the *Special Economic Measures Act* (SEMA), and under US law, the *International Emergency Economic Powers Act* (IEEPA).

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308 *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205.

309 *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at para. 44.

SEMA allows for the imposition of economic sanctions on foreign states in four specific circumstances:

> 1. an international organization or association of states, of which Canada is a member [for example, the United Nations], has made a decision or a recommendation or adopted a resolution calling on its members to take economic measures against a foreign state;
>
> 2. a grave breach of international peace and security has occurred and that has resulted in or is likely to result in a serious international crisis;
>
> 3. gross and systematic human rights violations have been committed in a foreign state; or
>
> 4. a national of a foreign state who is either a foreign public official, or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption … which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government.[310]

If any one of the above four circumstances apply, the governor in council may order that property situated in Canada be seized, frozen, or sequestrated, if such property belongs to the foreign state, any person in that state, or a national of that state who does not ordinarily reside in Canada. The governor in council may also restrict or prohibit dealing with the foreign state in a variety of ways, including restricting or prohibiting Canadians (or persons in Canada) from dealing in property held by nationals of that foreign state.

Various countries have been subject to economic sanctions under SEMA since its passage in 1992. Some states, such as Iran, were sanctioned pursuant to circumstance (2) above, as the governor in council formed the opinion "that the situation in Iran constitutes a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis."[311] This circumstance can likewise apply to the Chinese and Iranian regimes in the context of COVID-19. These regimes' irresponsible actions in the critical early days of COVID-19 are responsible for the current scale of the pandemic worldwide. Recall that a study conducted by the University of Southampton found that if interventions in China had been conducted three weeks earlier, cases could have been reduced by 95 percent.[312] It would not be a stretch for the governor in council to form the opinion that Chinese and Iranian government actions in response to COVID-19 constituted a grave breach of international peace and security.

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310 SEMA, see note 75, s. 4.

311 SEM Iran Regulations, see note 79.

312 Lai et al., see note 2.

Alternatively, circumstance (3) could apply. Chinese and Iranian responses to COVID-19 appear rife with gross and systematic human rights violations. As discussed earlier in this report, China and Iran breached the human right to health as enshrined in the ICESCR. They also silenced whistleblowers, through the use of detention, threats, and enforced disappearances. The only potential hurdle to satisfying circumstance (3) might be to characterize these human rights abuses as "gross and systematic," which has been defined as including "three elements or criteria: time, quality, and quantity," with quality and quantity being most relevant.[313] Still, the underreporting of data, silencing of whistleblowers, and general de-prioritizing of public health that characterized both regimes' responses to COVID-19 should be considered gross and systematic. These actions resulted in huge amounts of fatalities, injuries, and losses, and the sacrificing of public health in this manner is of such a quality that it should be considered a gross violation. As the World Trade Organization (WTO) articulated, human health is "important in the highest degree."[314]

As a third alternative, circumstance (4) might also apply if regime response to COVID-19 could be characterized as corruption. The applicability of this subsection requires further investigation, but it is certainly plausible that Chinese and/or Iranian officials taking such actions were motivated by money or power.

The US power to levy economic sanctions on China and/or Iran is contained within IEEPA. IEEPA is one of approximately 123 statutory powers that become available to the US president when he or she declares a national emergency under the *National Emergencies Act* (NEA).[315] According to a study conducted by the Brennan Center for Justice at NYU School of Law, IEEPA is one of a handful of frequently used available statutes, as most statutory emergency powers are rarely invoked.[316] IEEPA has been invoked almost yearly, and in tandem with almost every national emergency ever declared under NEA.[317]

IEEPA allows the US president, in a situation of national emergency, to take a variety of actions (outlined below) to economically sanction foreign states. Pursuant to sections 1701-1702, these actions may be taken when dealing with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national

313 Geneva Academy of International Humanitarian Law and Human Rights, "What Amounts to 'A Serious Violation of International Human Rights Law'?: An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty," *Academy Briefing* no. 6 (August 2014): 16.

314 WHO and WTO, see note 263.

315 Brennan Center for Justice, see note 82.

316 Brennan Center for Justice.

317 Brennan Center for Justice.

emergency with respect to such threat."[318] The US president may pass regulations to:

> (A) investigate, regulate, or prohibit –
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments that involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities;
>
> (B) investigate, block, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, … any property in which any foreign country or a national thereof has any interest.[319]

Essentially, the US president has the power to order the freezing of assets and blocking of transactions in situations of national emergency.[320] Once a specific set of sanctions has been instituted by the president, it is the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury that administers and enforces the sanctions program.[321]

In the context of COVID-19, a national emergency has already been declared pursuant to NEA. Further, it is clear that the present situation fulfils the requirements outlined in section 1701 that there be an "unusual and extraordinary threat." As such, the US president should be able to pass regulations imposing economic sanctions on China and/or Iran fairly easily.

Targeted Listings Under the Magnitsky Acts

The Canadian *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law) and the US *Global Magnitsky Human Rights Accountability Act* (US *Magnitsky Act*) enable the imposition of sanctions on officials of foreign states who have engaged in significant corruption or gross violations of internationally recognized human rights. The two *Magnitsky Acts* are nearly identical in both (a) the officials that may be sanctioned pursuant to the act and (b) the specific sanctions that are available.[322]

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318 International Emergency Economic Powers Act, 50 USC § 1701 (1977) [hereafter IEEPA].

319 IEEPA, § 1702.

320 Brennan Center for Justice, see note 82.

321 US Department of the Treasury, "Office of Foreign Assets Control – Sanctions Programs and Information," May 4, 2020, https://treasury.gov/resource-center/sanctions/Pages/default.aspx.

322 *Justice for Victims of Corrupt Foreign Officials Act* (*Sergei Magnitsky Law*), SC 2017, c. 21; Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, § 1261-1265, Subtitle F, of the FY17 National Defense Authorization Act (2016) [hereafter Magnitsky Act].

Pursuant to both *Magnitsky Acts*, the following foreign nationals may be subjected to sanctions:

1. foreign nationals responsible for [a] extrajudicial killings, [b] torture or [c] other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek (i) to expose illegal activity carried out by foreign public officials, or (ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms. [Note that the Canadian Sergei Magnitsky Law also enables sanctions for foreign nationals complicit in such violations.]

2. foreign nationals acting as agent of, or on behalf of, a foreign state [note that the US law instead states "foreign person"] in a matter relating to an activity described in point 1 above.

3 foreign public officials, or associates of such officials, responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including bribery, expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, or the transfer of the proceeds of corruption to foreign jurisdictions. [Note that in the US law, only foreign public officials or senior associates of such officials may be sanctioned under this paragraph.]

4. foreign nationals materially assisting, sponsoring, or providing financial, material or technological support for, or goods or services in support of, an activity described in point 3 above.[323]

Both the Canadian Sergei Magnitsky Law and the US *Magnitsky Act* permit the government to impose property-blocking sanctions and travel restrictions on listed individuals.

Under Canada's Sergei Magnitsky Law, the governor in council may "by order, cause to be seized, frozen or sequestrated … any of the foreign national's property situated in Canada."[324] In addition, the governor in council may prohibit "any person in Canada [and] Canadians outside Canada" from:

a. dealing, directly or indirectly, in any property, wherever situated, of the listed foreign national;

b. entering into or facilitating, directly or indirectly, any financial transaction related to a dealing described above;

c. providing or acquiring financial or other related services to, for the benefit of, or on the direction or order of the listed foreign national; and

323 Sergei Magnitsky Law, see note 322, s. 4(2); Magnitsky Act, see note 322, § 1263.

324 Sergei Magnitsky Law, s. 4(1).

d. making available any property, wherever situated, to the listed foreign national or to a person acting on behalf of the listed foreign national.[325]

The Canadian Sergei Magnitsky Law also amended the *Immigration and Refugee Protection Act* (IRPA) to designate these foreign nationals inadmissible to Canada on grounds of human or international rights violations.

The US *Magnitsky Act* likewise allows for property-blocking sanctions and visa sanctions. Pursuant to section 3, "all transactions in all property and interests in property of a foreign person" may be blocked "if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person."[326] In terms of visa sanctions, such foreign persons are inadmissible to the United States, ineligible "to receive a visa to enter the United States or to be admitted to the United States," and "if the individual has been issued a visa or other documentation," such documentation may be revoked in accordance with section 221(i) of the *Immigration and Nationality Act* (8 USC 1201[i]).[327]

Both Canadian and US governments have been hesitant in the past to add Chinese and Iranian officials to their Magnitsky lists. In the context of COVID-19, both Canada and US governments should take this step, and sanction high-ranking officials in both the Chinese and Iranian regimes. The silencing of whistleblowers alone is enough to warrant use of the *Magnitsky Acts*, as this constitutes a "gross violation of internationally recognized human rights" against such persons, pursuant to the definition contained in the US Code.[328]

Governmental hesitation, in the past, to list and sanction Chinese and Iranian officials has been about politics. Hesitation with respect to China is likely due to concerns about damaging vital economic relationships, and hesitation with respect to Iran is likely due to concerns about damaging the potential for future diplomatic relations. These are valid concerns. However, the extremity of our present scenario warrants these listings. To continue to not list corrupt and human-rights-abusing Chinese and Iranian officials would be to politicize the *Magnitsky Acts* to the point of potentially delegitimizing these important pieces of human rights legislation.

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325 Sergei Magnitsky Law, s. 4(1) and 4(3).

326 Magnitsky Act, § 1263.

327 Ibid.

328 "Gross violations of internationally recognized human rights" is defined as "includ[ing] torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person." See 22 USC § 2304(d).

Legislation to Sanction the Withholding of Health Information (Doctor Li Wenliang Act)

In March 2020, Nate Sibley of the Hudson Institute proposed that the US pass novel legislation to sanction the withholding of health information:

> The United States has a Global Magnitsky Act to punish and deter human rights abuses and corruption. We now need a Li Wenliang Act to provide authority for designating senior foreign officials who deliberately conceal or distort vital public health data. This would name and shame those responsible for the outbreak while hopefully deterring others from similarly reckless behavior.[329]

This is an interesting proposal that should be considered by both US and Canadian governments. Although the *Magnitsky Acts* can be utilized in the context of COVID-19, the passing of a novel legislation that specifically sanctions health misinformation would lend greater weight to the magnitude of the crisis. Additionally, although the *Magnitsky Acts* clearly apply to foreign officials who silenced whistleblowers, they may be insufficient to hold to account officials who were engaged only in the distortion of public health data. Both Canadian and US *Magnitsky Acts* only permit sanctioning officials engaged in (1) extrajudicial killings, (2) torture, (3) "gross violations of internationally recognized human rights" committed against whistleblowers or human rights defenders, and (4) significant corruption.[330] It is unclear in the context of COVID-19 whether the distortion of public health information would be considered significant corruption.

Another possibility would be amending the *Magnitsky Acts* to this same effect, to permit the sanctioning of officials who "deliberately conceal or distort vital public health data."[331]

C. DOMESTIC RECOURSE – CHINA

Domestic Suit Against Chinese Officials – Breaches of Chinese Quarantine Act, *Criminal Law*

In addition to pursuing accountability in Canadian and US domestic courts, a domestic suit may be pursued within the Chinese legal system. Domestic levels of corruption within China may, in effect, preclude this possibility – but it is significant to appreciate that even pursuant to China's own domestic legislation, distorting public health data, silencing whistleblowers, and generally de-prioritizing public health are against the law.

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329 Nate Sibley, "Failure to Confront China's Corruption Will Exacerbate Coronavirus Crisis," Hudson Institute, March 20, 2020, http://hudson.org/research/15846-failure-to-confront-china-s-corruption-will-exacerbate-coronavirus-crisis.

330 Sergei Magnitsky Law, see note 322, s. 4(2); Magnitsky Act, see note 322, § 1263.

331 Sibley.

Chinese government officials are likely in breach of the *Frontier Health and Quarantine Law of the People's Republic of China* (China's Quarantine Act) and a handful of provisions in the *Criminal Law of the People's Republic of China* (China's Criminal Code).

i. Breaches of China's Quarantine Act

China's Quarantine Act requires frontier health and quarantine offices to "monitor persons … for quarantinable infectious diseases," "take necessary preventive and control measures," and exercise "health supervision" over the sanitary conditions at frontier ports.[332] Frontier health and quarantine office personnel are required to "perform duties faithfully, enforce this Law impartially, and conduct quarantine inspections promptly."[333] This is in keeping with the law's purpose: "to prevent infectious diseases from spreading … and to protect human health."[334] In accordance with this aim, China's Quarantine Act also incorporates by reference all international legal treaties on health to which China has acceded. Article 24 states that "where the provisions of this Law differ from those of international treaties on health and quarantine that China has concluded or joined, the provisions of such international treaties shall prevail."[335]

Chapter V of China's Quarantine Act outlines legal liability for breaches of this law. Specifically, Article 22 states: "If a quarantinable infectious disease is caused to spread or is in great danger of being spread as a result of a violation of the provisions of this Law, criminal responsibility shall be investigated in accordance with … the Criminal Law of the People's Republic of China."[336] Article 23 furthers: "Those who violate the law or are derelict in their duties shall be given disciplinary sanctions; where circumstances are serious enough to constitute a crime, criminal responsibility shall be investigated."[337]

According to allegations, Chinese officials breached the above provisions. They seemed to have failed to "monitor persons … for quarantinable infectious diseases [and] take necessary preventive and control measures," pursuant to Article 15; they also seemed to have failed to "conduct quarantine inspections promptly," pursuant to Article 23. In addition, they acted in breach of international legal treaties on health – as discussed in detail in previous sections – which may arguably be considered a breach of Chinese domestic law by virtue of the phrasing in Article 24.

Pursuant to Articles 22 and 23, such breaches may enable disciplinary sanctions on Chinese officials. They may also enable investigations into possible criminal liability under China's Criminal Code. Beyond these two avenues

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332 Frontier Health and Quarantine Law, see note 123, Arts. 15-19.

333 Frontier Health and Quarantine Law, Art. 23.

334 Frontier Health and Quarantine Law, Art. 1.

335 Frontier Health and Quarantine Law, Art. 24.

336 Frontier Health and Quarantine Law, Art. 22.

337 Frontier Health and Quarantine Law, Art. 23.

of recourse, further possibilities may be available. Exploring the possibility of launching civil lawsuits against Chinese officials from within China for breaches of China's Quarantine Act will require consultations with a qualified Chinese lawyer.

ii. Criminal Liability – China's Criminal Code

China's Criminal Code contains a number of offences that could ground domestic criminal liability for Chinese officials. For the full table of relevant provisions, see the prior section on Chinese domestic law. For purposes of this section, the most relevant criminal offences are contained in Articles 332, 409, and 413 of China's Criminal Code.

Article 332 criminalizes the violation of "national border health and quarantine regulations," if such violation causes "the spread of quarantined contagious diseases or a serious danger of spreading them."[338] If a unit violates this provision, it shall be sentenced to a fine, and personnel with direct responsibility shall be penalized. Of course, penalizing officials under this section requires that appropriate national border health and quarantine regulations were instituted in the first place. If they were not, Article 409 applies.

Article 409 criminalizes "government work personnel … engaging in the prevention and treatment of infectious diseases, whose serious irresponsibility has resulted in the communication and spread of infectious diseases."[339] This article states that such personnel – "in cases of a serious nature" – shall be punished with imprisonment or criminal detention.[340] This is the primary criminal offence that might apply to Chinese officials for their COVID-19 response.

Article 413 may also be relevant. This article criminalizes "quarantine personnel with animal and plant quarantine organs, who practice favouritism and malpractice in forging quarantine results."[341] This may or may not apply to COVID-19, depending on whether animal and plant quarantine organs were involved.

338 Criminal Law of China, see note 139, Art. 332.

339 Criminal Law of China, Art. 409.

340 Ibid.

341 Criminal Law of China, Art. 413.

Conclusion

The allegations levied against the Chinese and Iranian regimes are serious. Withholding critical public health information, silencing whistleblowers, delaying containment measures, and sacrificing the health and safety of their citizenry in favour of maintaining power and/or stability – all this is in violation of numerous international and domestic legal obligations. These actions had significant consequences worldwide. As noted by the University of Southampton, if interventions had been conducted three weeks earlier, the spread of COVID-19 could have been reduced by 95 percent. In dollar figures, the cost to G7 countries by April 2020 was already *US$4 trillion*. There is a growing consensus that China and Iran should be held responsible.

This report began by describing the relevant international and domestic laws. Understanding these legal contexts is essential in order to properly assess possible avenues of recourse against the Chinese and Iranian regimes. International legal instruments contain binding articulations of the human right to health and frameworks through which to assess the satisfactoriness of coordination and information-sharing in pandemic situations. They also contain mechanisms for settling disputes, although these vary widely in compulsoriness and effectiveness. Domestic legal frameworks govern response at the national level and provide a context through which to appreciate the seriousness of emergency declarations and the procedures by which federal monies are spent.

Ultimately, Part IV of this report ties these points together, and analyses more than a dozen legal avenues through which our governments (and in some cases, our citizens) can seek accountability from China and Iran for the global spread of COVID-19. These are condensed into 12 key points to take away from the analysis:

1. The Chinese and Iranian regimes likely breached their international legal obligations pursuant to **Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR)**, which protects and guarantees the human right to health. The right requires all states parties – including China and Iran – to take steps necessary for "the prevention, treatment and control of epidemic, endemic, occupational and other

diseases." This includes obligations on states parties to "refrain from … censoring, withholding, or intentionally misrepresenting health-related information." These state obligations extend globally. Typically, in the event of an alleged breach of the ICESCR, countries or individuals can lodge a complaint with the Committee on Economic, Social and Cultural Rights (CESCR), the special rapporteur(s) on human rights, or the UN Human Rights Council (UNHRC). In the specific case of Chinese and Iranian breaches, only the special rapporteurs and the UNHRC are options, as neither China nor Iran signed the Optional Protocol that would have empowered the CESCR to hear complaints about them. Unlike the CESCR, the special rapporteur cannot make binding rulings, but may still prove useful to raise the exposure of this issue in the international arena and increase pressure on the Chinese and Iranian regimes to accept responsibility. The UNHRC can hear complaints, pass condemnatory resolutions, or even establish commissions of inquiry (although this may in practice be limited by China's recent appointment to the Council). Both governments and private parties may lodge communications with these human rights bodies. Contact information can be found at page 86-87 of this report.

> *"Canada and the United States may wish to initiate negotiations with China and Iran regarding compensation.*

2. The Chinese and Iranian regimes likely breached **Articles 6, 7, 44, and 46 of the World Health Organization's *International Health Regulations* (IHR)**. Articles 6, 7, and 44 require states parties – including China and Iran – to notify the WHO promptly, and collaborate with other countries, regarding public health events in their territory that are potentially of international concern. Article 46 obligates states parties to facilitate the transport of biological substances for public health response purposes. Chinese and Iranian underreporting and concealment of information is a clear breach of Articles 6, 7, and 44. The allegations that China withheld diagnostic material from the international community would be a further breach of Article 46. Per Article 56 of the IHR, states parties may refer any dispute that cannot be solved by means of negotiation to the director-general of the WHO. If the complaint is against the WHO itself, such a dispute may be referred to the Health Assembly. In the context of COVID-19, then, Canada and the United States may wish to initiate negotiations with China and Iran regarding compensation for their breaches under the IHR. As long as the Chinese and Iranian regimes continue to vehemently deny any wrongdoing, these negotiations may be doomed to fail – but at least that then opens up the possibility of referring the dispute to the director-

general. Alternatively, or in addition, Canada and the United States may wish to consider lodging a complaint against the WHO itself with the Health Assembly, which monitors such complaints under Article 56(5) of the IHR. Private parties may get involved by lobbying their governments to take such actions.

3. It is possible that the Chinese and Iranian regimes' withholding of critical health information could fit the definition of a **crime against humanity pursuant to Article 7 of the *Rome Statute of the International Criminal Court***. The high level of criminal intent that is required for convictions may present a challenge, and further information regarding officials' intent will be required. However, it is noteworthy that the allegations against China and Iran seem to fit many of the required elements for three specific crimes against humanity offences: (a) murder, (b) extermination, and (k) other inhumane acts. As new information continues to emerge relating to the origins of COVID-19, and specifically relating to Chinese and Iranian officials' levels of knowledge and intent, the possibility of criminal responsibility pursuant to these sections of the *Rome Statute* should be kept top-of-mind. It may be worthwhile for the Office of the Prosecutor at the International Criminal Court (ICC) in The Hague to launch a preliminary examination into the situation. Canada can request that the prosecutor open an investigation, although a state party request is not strictly required. The crimes would have to be framed as occurring on the territory of a state party, such as Canada, as neither China nor Iran (nor the United States) is a state party to the *Rome Statute*. Private individuals and organizations may play a role by (1) lobbying their government to make such a request of the prosecutor and/or (2) submitting communications directly to the Information and Evidence Unit of the Office of the Prosecutor. Their contact information may be found at https://www.icc-cpi.int/contact. Crimes against humanity may also be prosecuted in domestic jurisdictions pursuant to the principle of universal jurisdiction – although the exercise of universial jurisdiction is complex and controversial.

4. The Chinese and Iranian regimes may have breached the ***Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction***. This convention requires states parties – including China and Iran – to (1) "never in any circumstances" develop, acquire, or retain biological agents or toxins, (2) never transfer such agents or toxins to "any recipient whatsoever, directly or indirectly," (3) "take any necessary measures" to prohibit and prevent the development, acquisition, or retention of such agents or toxins, and (4) consult with one another and cooperate "in solving any problems which may arise." It may be argued that, by withholding crucial public health information, and thereby causing increased levels of global spread of COVID-19, China and Iran breached the above provisions. COVID-19 was indirectly

transferred to a variety of recipients; neither China nor Iran took the necessary measures to prohibit and prevent development, acquisition, or retention; and neither China nor Iran consulted or cooperated with other states. If COVID-19 originated in a laboratory, this is an even clearer breach of the convention. Pursuant to Article 6 of the convention, a state party may lodge a complaint regarding an alleged breach with the UN Security Council. The UN Security Council may then launch an investigation into the matter. In theory, Canada or the United States could lodge such a complaint with the UN Security Council, and private parties could contribute by lobbying their representatives to take action. However, because China has a veto vote, it is highly unlikely that any complaint will actually result in a fulsome investigation.

5. Canada or the United States may request that the case be referred to **the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA)**. The ICJ and the PCA are judicial and arbitral organs, respectively, that may hear and settle cases – with states' consent – relating to international legal disputes. In the likely event that neither China nor Iran provides its consent to utilizing the ICJ or the PCA, Canada or the United States may request that the case be referred to the ICJ for an advisory opinion. An advisory opinion does not require consent, and it will not be binding on China or Iran. Despite the lack of compulsion, advisory opinions have proved effective in the past to increase pressure on foreign states and push them to adjust their behaviour in accordance with the opinion rendered.

6. The Chinese regime's actions may be framed as trade-related, in breach of **World Trade Organization (WTO) agreements**. Iran is not a WTO member state, and so this mechanism cannot be used to hold the Iranian regime to account. WTO agreements permit member states to restrict open trade for public health reasons – so long as the public health measures do not unnecessarily restrict trade. In addition, the fundamental WTO principles of non-discrimination and national treatment continue to apply in public health crises. Pursuant to these principles, Canada or the United States may file a dispute with the WTO's Dispute Settlement Body (DSB) if China **(1)** breached the principle of non-discrimination by permitting trade with some nations and not others (without evidence of differing risk levels), or **(2)** breached the principle of national treatment by discriminating between locally produced and imported products in terms of competitive opportunities. In addition, a more general framing can be made that it is *because* of China's cover-up that other nations had to impose such strict public health measures that severely restrained trade – in violation of the general principle that public health measures must not unnecessarily restrict trade. This is the inverse of the usual argument, but it rings true – it was the irresponsible actions of the Chinese regime that forced Canada and the United States (and others) to institute strict measures affecting trade.

7. Canada could also seek recourse from China for any breaches of the **China-Canada bilateral investment treaty (BIT)**. This BIT obligates both China and Canada, among other things, to "encourage investors" from the other country and treat them fairly and equitably. It also prohibits each country from expropriating investments in a discriminatory manner or without reasonable compensation. If China is alleged to be in breach of any of the provisions contained in the BIT, and the dispute cannot be settled through diplomatic channels within six months, Canada can request that the dispute be submitted to an ad hoc arbitral tribunal. The involvement of the tribunal at that point will be compulsory. Similar to the WHO mechanism then, in the case of COVID-19, Canada may wish to initiate negotiations with China pursuant to any alleged breaches. This way, the clock starts on the six-month window that can ultimately enable Canada to submit disputes to a compulsory arbitral tribunal. China has similar BITs with both Australia and the United Kingdom, which opens up potential avenues of recourse for these countries as well. China does not have a BIT with the United States, and so the United States cannot seek recourse through this avenue. Iran does not have a BIT with Canada or the United States, and so this mechanism cannot be used to hold the Iranian regime to account.

> *"Domestically, parties in Canada or the United States may sue China or Iran in Canadian and/or US domestic courts.*

8. Domestically, parties in Canada or the United States may **sue China or Iran in Canadian and/or US domestic courts**. If such a case proceeds, our domestic courts can investigate the origin of the virus, make findings of fact, and assess Chinese and Iranian legal culpability. Such courts can ultimately rule that China and/or Iran must compensate victims, and if these foreign states do not pay as required, their assets may be seized and sold, and the proceeds distributed to victims. The primary, initial hurdle to these lawsuits will be to argue that these foreign states are not protected by *sovereign immunity* – the general principle that protects foreign states from the jurisdiction of domestic courts. There are a number of existing exceptions to the general principle of sovereign immunity, but most of them are unlikely to apply. Therefore, to enable domestic lawsuits, it may be prudent for Canada and/or the United States to **pass a bill adding a new, targeted exception to sovereign immunity** – to restrict state immunity specifically in the event of an intentional or unintentional release of a biological agent. Such a bill is already in process in the United States, sponsored by Senators Marsha Blackburn and Martha

McSally. Individuals in the US may get involved by lobbying in favour of the passage of this bill; individuals in Canada may get involved by lobbying the Canadian government to adopt similar legislation. It is important to note that the applicability of any exception to sovereign immunity does not automatically mean that China or Iran will be forced to compensate victims – just that Canadian and US courts will be permitted to make such decisions after a thorough consideration of all of the evidence.

9. **Chinese and Iranian corporations in Canada may be held accountable under the *Quarantine Act*.** The Canadian *Quarantine Act* specifically proscribes "[hindering] or wilfully [obstructing] a quarantine officer, a screening officer or an environmental health officer," and violations that cause "a risk of imminent death or serious bodily harm to another person." It also imposes a duty on directors and officers of a corporation to "take all reasonable care to ensure that the corporation complies with this Act and the regulations," and makes it an offence to breach this duty. If any Chinese or Iranian corporation in Canada played a role in concealing the true extent of the COVID-19 outbreak, this could conceivably be a breach of all three of the above obligations. Upon conviction, this can result in a hefty fine – for example, causing "a risk of imminent death or serious bodily harm" can result in a fine of up to $1 million, *per day*, for the duration of the offence. Above and beyond fines, a Canadian court may order the offending corporation to compensate the minister of health for remedial costs incurred – which may theoretically total billions of dollars. If the company does not pay, such costs may be recovered in court by the seizure of assets.

10. The Canadian and US governments may **impose economic sanctions on the Chinese and Iranian regimes**. The power to economically sanction these regimes is contained in Canada in the *Special Economic Measures Act* (SEMA), and in the US in the *International Emergency Economic Powers Act* (IEEPA). SEMA allows for the imposition of economic sanctions in any of four specific circumstances, at least two of which should clearly apply in the context of COVID-19: "a grave breach of international peace and security" as well as "gross and systematic human rights violations." The US power to levy economic sanctions is intertwined with its emergencies law; the IEEPA may be invoked when a national emergency has been declared. Since this declaration has already occurred, the US president has the power to economically sanction foreign states related to the COVID-19 threat. Private parties can get involved by lobbying their governments to take such actions.

11. The Canadian and US governments may **impose sanctions on responsible Chinese and Iranian officials pursuant to their *Magnitsky Acts*** (virtually identical in both countries). The Canadian *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law) and the US *Global Magnitsky Human Rights Accountability Act* (US *Magnitsky Act*) enable the imposition of sanctions on officials of foreign

states who have engaged in **(1)** significant corruption, **(2)** extrajudicial killings, **(3)** torture, or **(4)** gross violations of internationally recognized human rights committed against whistleblowers or human rights defenders. If Chinese and Iranian officials are sanctioned pursuant to these acts, they may be subject to property-blocking sanctions and travel restrictions. In the context of COVID-19, the silencing of whistleblowers is enough to warrant use of the *Magnitsky Acts*, as this constitutes a "gross violation of internationally recognized human rights" against such persons, pursuant to the definition of "gross violation of internationally recognized human rights" contained in the US Code.[342] Relatedly, in order to enable Magnitsky-style sanctions on officials who distorted public health information, Canadian and US governments may need to **pass novel legislation to sanction foreign officials who intentionally conceal or distort critical public health information** (proposed name: *Doctor Li Wenliang Act*)[343] – or simply **pass a bill amending the *Magnitsky Act* to permit the sanctioning of such foreign officials**, which would have the same effect.

12. In addition to pursuing accountability in Canadian and US domestic courts, **a domestic suit may be pursued within the Chinese legal system**. Domestic levels of corruption within China may, in effect, preclude this possibility, but it is significant to appreciate that even pursuant to China's own domestic legislation, distorting public health data, silencing whistleblowers, and generally de-prioritizing public health are against the law. There are a variety of domestic Chinese provisions that appear to have been breached, but one of the most clear-cut is Article 409 of the Chinese Criminal Code, which criminalizes "government work personnel … engaging in the prevention and treatment of infectious diseases, whose serious irresponsibility has resulted in the communication and spread of infectious diseases."

Many of the above options are limited in some way; some are not compulsory, some are not enforceable, and some are thwarted by China's position on the UN Security Council or influence on other UN bodies. Domestic lawsuits against China or Iran may result in actual compensation only if assets are available to be seized. Despite each option's individual limitations, the list still represents a powerful way to hold the Chinese and Iranian regimes to account through a multiplicity of conjunctive pressures imposed. We refer to Part IV as containing a "menu of options" – but really, these options can (and should) be pursued all at once. A large-scale, coordinated effort should be pursued to seek accountability from China and Iran in both the international and domestic legal arenas. The priority of governments right now is on public health and security, as it should be; but accountability for the pandemic should be our next priority.

342 See note 328 for a definition of "gross violations of internationally recognized human rights."

343 Sibley, see note 329.

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