

CORONAVIRUS COMPENSATION? ASSESSING CHINA'S POTENTIAL CULPABILITY AND AVENUES OF LEGAL RESPONSE

BY MATTHEW HENDERSON, DR ALAN MENDOZA,
DR ANDREW FOXALL, JAMES ROGERS, AND SAM ARMSTRONG



April 2020



Published in 2020 by The Henry Jackson Society

The Henry Jackson Society
Millbank Tower
21-24 Millbank
London SW1P 4QP

Registered charity no. 1140489
Tel: +44 (0)20 7340 4520

www.henryjacksonsociety.org

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By Matthew Henderson, Dr Alan Mendoza, Dr Andrew Foxall, James Rogers, and Sam Armstrong

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People in protective medical masks on background of the Chinese flag – stock illustration. <https://depositphotos.com/337924180/stock-illustration-people-protective-medical-masks-background.html>



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ACKNOWLEDGEMENTS

The authors would like to thank all those who have offered guidance and counsel in the drafting of this paper, many of whom have asked to remain anonymous. In particular, thanks are due to the public international lawyers who provided insight into the realities of international law. Thanks are also due to scholars who agreed to peer review this work at short notice. Finally, thanks are owed to Daniel MacIntyre and George Cook, research assistants at the Henry Jackson Society, for their work in sourcing background information.

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EXECUTIVE SUMMARY

- The COVID-19 outbreak is a global catastrophe of a historic scale. The novel SARS-type virus that emerged in Wuhan, China in November or December 2019 has spread rapidly, due to its very high rate of human-to-human transmission, causing tens of thousands of deaths and significant disruption to the global economy.
- The People's Republic of China (PRC) was bound by international law, in the form of the International Health Regulations (2005), to report timely, accurate and detailed public health information. However, throughout December 2019 and January 2020, the Chinese Communist Party (CCP) – the government of the PRC – failed in its obligations to do this. In fact, it appears at least possible that this was a deliberate act of mendacity.
- As a direct consequence of the CCP's decision to not share information about the initial stages of the outbreak of COVID-19, the disease spread far faster than it would otherwise have done and reactions by countries globally were hampered. It is possible that – had accurate information have been provided at an early juncture – the infection would not have left China.
- Beyond the human cost of this pandemic, governments globally have responded to the virus by taking robust economic measures, with entire nations going into various forms of lockdown. The measures taken by the G7 – the group of the world's major advanced economies – amount to £3.2 trillion (US\$4 trillion).
- In order to preserve the rules-based international system and to protect taxpayers from punitive liabilities, the world should seek to take legal action against the PRC for the breaches of international law and their consequences.

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INTRODUCTION

The world is in crisis. COVID-19, the Coronavirus that began in Wuhan in the People's Republic of China (PRC) in late 2019, had — by 1 April 2020 — claimed more than 43,000 lives.¹ More than 870,000 people have tested positive for the virus, with potentially many times more having gone undiagnosed.² Every continent, except Antarctica, has been affected. COVID-19 is not the first pandemic of the twenty-first century, but it is the deadliest.

The COVID-19 outbreak is first and foremost a human tragedy, but it is also having a significant and growing impact on the global economy. Large-scale quarantines, travel restrictions and social-distancing measures have been introduced in many countries, leading to a fall in consumer and business spending. Speaking on 23 March 2020, Kristalina Georgieva, head of the International Monetary Fund, said that this year the world will face “a recession at least as bad as during the [2008] global financial crisis or worse”.³

This is not China's first experience of a lethal influenza epidemic. COVID-19 is related to the SARS virus which caused an epidemic in China and overseas in 2002-3. The Chinese Communist Party (CCP) attempted to cover up evidence of this for months, resulting in avoidable deaths and disruption at home and abroad. In the aftermath, the World Health Organisation (WHO) strengthened its International Health Regulations (IHR) precisely in order to prevent future cover-ups.

If – during this outbreak – the CCP had fulfilled its obligations under the IHR, much of the current disaster could have been avoided. But it seems that the CCP has not learned the lessons of SARS. Time and again throughout the early stages of the initial outbreak, Chinese authorities lied about the situation. They cracked down on doctors discussing the virus, and some were detained by the police. Even when the Chinese authorities declared the outbreak to the WHO on 31 December 2019, they gave no detail of the evidence they held on human-to-human transmission, and continued to suppress explicit data on this point until they quarantined Wuhan on 23 January 2020, by which time five million locals had been allowed to travel out of the city.

The first case of COVID-19 to appear overseas was registered on 13 January in Thailand; this was a traveller who had just returned from Wuhan. Two Chinese tourists who had arrived in Milan on 23 January were registered as Italy's first cases of COVID-19 on 30 January.⁴ The Chinese authorities falsely stated that there was no human-to-human transmission of the disease. China failed to expeditiously share crucial information about virus transmission with the WHO, the world's global police officer for health, resulting in protracted delay in WHO's decision-making on declaring the risk of a pandemic. One recent study, from the University of Southampton, found that if interventions had “been conducted one week, two weeks or three weeks earlier, cases could have been reduced by 66 percent, 86 percent and 95 percent respectively”.⁵

¹ ‘Globally, authorities have confirmed more than 870,000 cases of the coronavirus and 43,000 deaths’, *BBC News*, 1 April 2020, available at: <https://www.bbc.co.uk/news/uk-51768274>, last visited: 2 April 2020.

² *ibid.*

³ ‘IMF Managing Director Kristalina Georgieva's Statement Following a G20 Ministerial Call on the Coronavirus Emergency’, *International Monetary Fund*, 23 March 2020, available at: <https://www.imf.org/en/News/Articles/2020/03/23/pr2098-imf-managing-director-statement-following-a-g20-ministerial-call-on-the-Coronavirus-emergency>, last visited: 28 March 2020.

⁴ ‘Coronavirus, primi due casi in Italia «Sono due cinesi in vacanza a Roma» Sono arrivati a Milano il 23 gennaio’, *Corriere*, 30 January 2020, available at: https://www.corriere.it/cronache/20_gennaio_30/coronavirus-italia-corona-9d6dc436-4343-11ea-bdc8-faf1f56f19b7.shtml, last visited: 30 March 2020.

⁵ ‘Globally, authorities have confirmed more than 870,000 cases of the coronavirus and 43,000 deaths’, *BBC News*, 1 April 2020, available at: <https://www.bbc.co.uk/news/uk-51768274>, last visited: 2 April 2020.

This paucity of information from China in the initial stages of the outbreak has been lamented around the world. Speaking on BBC's The Andrew Marr Show on 29 March 2020, Michael Gove, Minister for the Cabinet Office, said:

It was the case... that the first case of Coronavirus in China was established in December of last year. But, it was also the case that some of the reporting from China was not clear about the scale, the nature, the infectiousness of this.⁶

Contemporary sources reveal just how significant an effect this lack of information had on the United Kingdom (UK). Box 2, a case study within this report, charts the discussions of the UK's New and Emerging Respiratory Virus Threats Advisory Group through January as the disease spread and the difficulties faced by the committee in establishing the real picture of the disease.

China's behaviour is taken from the authoritarian playbook. The CCP sought to conceal bad news at the top, and to conceal bad news from the outside world. In doing so, Beijing has repeated many of the mistakes it made in 2003, when it obstructed the flow of information around the SARS crisis, and in doing so made the crisis worse. Now, unlike then, China has responded by deploying an advanced and sophisticated disinformation campaign to convince the world that it is not to blame for the crisis, and that instead the world should be grateful for all that China is doing, including a massive campaign on Twitter, where it has tens of thousands of bot accounts at its service.⁷ China has also pulled the wool over the eyes of the WHO. A strong rules-based international system requires robust international institutions.

The truth is that China is responsible for COVID-19 – and if legal claims were brought against Beijing they could amount to trillions of pounds.

This report documents the CCP's negligence in the early stages of the outbreak and analyses how this contributed to the spread of the virus. It then outlines a number of potential legal avenues that states, corporations and individuals could pursue to hold the CCP to account for its actions – including the 2005 International Health Regulations (IHR). Next, the report offers an overview of the cost of the virus to the members of the G7, which represents the world's largest advanced economies. Finally, by way of a conclusion, the report argues that it is vital for the future of the rules-based international system that China is not able to escape the consequences of its actions in response to this pandemic.

⁶ *ibid.*

⁷ 'IMF Managing Director Kristalina Georgieva's Statement Following a G20 Ministerial Call on the Coronavirus Emergency', *International Monetary Fund*, 23 March 2020, available at: <https://www.imf.org/en/News/Articles/2020/03/23/pr2098-imf-managing-director-statement-following-a-g20-ministerial-call-on-the-Coronavirus-emergency>, last visited: 28 March 2020.

Timeline of Key Events

Date	Event
17 November 2019	First record – in unpublished, unconfirmed Chinese government documents seen by the <i>South China Morning Post</i> (SCMP) – of a virus infection matching what is later identified as COVID-19 in a 55-year-old male from Hubei Province. Eight comparable cases are recorded in November, according to SCMP.
1 December	A later report in <i>The Lancet</i> , published by Chinese scientists, states that the first known COVID-19 case is recorded on this date.
8 December	A further patient is recorded with what have become recognisable symptoms. A later World Health Organisation (WHO) document reports that the first case of COVID-19 was recorded on this date.
Mid December	Between 1 and 5 new cases are now being recorded each day, according to unpublished, unconfirmed Chinese government documents seen by the SCMP.
20 December	60 confirmed cases have been reported by this date, according to unpublished, unconfirmed Chinese government documents seen by the SCMP.
27 December	A friend of the now famous deceased COVID-19 ‘whistle-blower’ Dr Li Wenliang later writes that on this date the friend’s own medical department was the first to report the new outbreak to the Wuhan Centre for Disease Control. Another doctor involved in diagnosing cases of the virus on this date later said he had been sure then that the disease would spread from human to human.
	Unpublished, unconfirmed Chinese government documents seen by the SCMP report that 181 cases of infection have now been recorded.
30 December	Dr Li sends a message to his friends about a SARS-like outbreak. He and these friends were later investigated by police, and Li was obliged to sign a pledge not to spread any more “disruptive rumours”. Medical authorities ban staff from publicising the outbreak, and impede efforts to bring existing research into the virus to completion by delaying approval to circulate necessary data.
	Unpublished, unconfirmed Chinese government documents seen by the SCMP report that the total numbers of cases stands at 266.
31 December	China reports the outbreak to the WHO. A low-key public notice by Wuhan health authorities describes a new flu outbreak with 27 cases, 7 of them serious, linked to the Huanan Seafood Wholesale Market, as yet no clear evidence of human to human transmission, and advises people with persistent fever to seek medical help.
	The New Year speech of Xi Jinping, General Secretary of the Chinese Communist Party, makes no reference to the outbreak.
	Xinhua, China’s official state-run news agency, reports that all cases are linked to the Huanan Market in Wuhan and that there is no evidence of human-to-human (HTH) transmission.

Date	Event
1 January 2020	Huanan Market is closed. 31 biological samples collected that day at the market from the animal sales area are later claimed in state media to contain virus DNA akin to COVID-19.
	Unpublished, unconfirmed Chinese government documents seen by the SCMP report a total of 381 cases.
2 January	41 new cases confirmed on this date at one Wuhan hospital were reported to include 27 patients who had been to the Huanan Market, while the rest had not.
2-16 January	Wuhan authorities maintain that new case numbers have fallen significantly.
	Around this time, the surge begins of visitors to and from Wuhan for New Year celebrations.
6-11 January	Hubei Province CCP holds annual meeting of the Provincial Peoples' Congress.
7 January	State news agency Xinhua reports a meeting of Politburo Standing Committee (PSC) which would have been led by Xi Jinping. Later, in the text of a 3 February speech published on 15 February, Xi states that at this meeting he issued 'requirements' for the control of the outbreak.
9 January	Record of death of a patient from COVID-19 who had earlier infected his wife, demonstrating HTH.
10 January	A Shanghai laboratory completes genome sequencing of the COVID-19 virus; a report of this is passed to WHO.
	Dr Li Wenliang falls ill with COVID-19, caught from one of his patients.
11 January	A Western medical journal later reports 7 other healthcare workers have been infected with virus by this date. Chinese official media refer to one other case of a doctor with the virus.
14 January	WHO epidemiologist says that COVID-19 shows 'limited' HTH.
	WHO then says this is a 'misunderstanding' and issues a tweet saying that there is no evidence of HTH, citing Chinese health officials.
15 January	Caixin (a major media group funded by state-backed and private entities, and one of the PRC's apparently least subservient media voices) reports that one radiologist had himself detected 50 new cases in one Wuhan hospital on this date.
16 January	Wuhan Municipal Health Commission states that the virus may have been spread by HTH.
18 January	Public banquet based on home-made food shared by 40,000 guests in one Wuhan District, soon followed by numerous viral infections.
20 January	Xi Jinping's first public statement on the outbreak, referring to "the need for timely release of information".
22-23 January	Wuhan put under lockdown. The Mayor of Wuhan later says in a public statement (on 26 January) that five million travellers had already left the city by this time.

Date	Event
23 January	The WHO's International Health Regulations (IHR) Emergency Committee meets in Geneva. It notes that HTH has been observed, but defers decision to declare a Public Health Emergency of International Concern (PHEIC). China is asked to collaborate further with WHO on the understanding of the COVID-19 virus's full potential for HTH.
25 January	Beginning of Lunar New Year. The text of speech given by Xi Jinping on 3 February, published on 15 February, indicates that he chaired another PSC on COVID-19 on 25 January, at which he took pains to demonstrate his ongoing concern with the issue. 56 million Hubei residents are now under lockdown.
27 January	Xi Jinping appoints Premier Li Keqiang as head of the COVID-19 task force.
28 January	Xi Jinping meets Tedros Adhanom, Director-General of the WHO. Xi is reported in state media as "personally commanding" the Chinese response to the epidemic. State media also reports that Xi told Tedros that "the Chinese government has released information about the epidemic in a timely, open, transparent and responsible manner".
29-30 January	China's Supreme Court rebukes Wuhan police for suppressing "rumours" about the outbreak.
30 January	Tedros Adhanom chairs a WHO meeting that declares an PHEIC. No reference to Chinese delay and obfuscation.
3 February	Chinese state media begin a propaganda on the merits of the CCP response to the outbreak.
5 February	First public appearance by Xi Jinping, who says that he knew about the outbreak ahead of sounding the alarm.
6 February	Dr Li Wenliang dies of COVID-19 infection complications.
	Professor John Mackenzie, adviser to WHO Emergency Committee, strongly criticises China's failure to share timely information which could have reduced deaths at home and abroad. Tedros Adhanom later shrugs this off, saying that Mackenzie is not on the WHO staff.
7 February	Wave of grief and anger rapidly builds across Chinese social media before succumbing to censorship. The CCP's Internal Discipline Enforcement Agency announces investigation into "complaints by the masses" regarding the persecution of Dr Li.
10 February	Xi Jinping is shown, wearing a facemask, demonstrating command and leadership of anti-COVID-19 activity.
12 February	Sudden surge in reported number of new cases in Hubei (14,840 new confirmed infections in one day) raises more foreign concern about previous under-reporting.
	Hours after new infections are confirmed in Hubei, top provincial and municipal CCP leaders are sacked.
24 February	Buying, selling, and eating of wildlife banned by the Chinese legal authorities.
10 March	As the outbreak begins to decline, Xi Jinping finally visits Wuhan.
11 March	WHO declares a Global Pandemic.

1. CHINA'S NEGLIGENCE AND ITS CONTRIBUTORY ROLE

The COVID-19 pandemic originated in China, and the first government to become aware of it was that run by Chinese Communist Party (CCP). From the outset, the CCP tried to censor attempts by Chinese citizens to identify and publicise the truth concerning the origins, nature and dangers of the virus. Not all of these censorship efforts succeeded, and a considerable body of independent, corroborative data came to light. Though all information in the Chinese official media is subject to CCP control and *prima facie* cannot be trusted, carefully comparing demonstrably factual non-official data with suitably caveated information from official channels makes it possible to construct a coherent, fact-based picture of what actually happened, and hence to allocate responsibility.

The section below adopts this methodology to shed light on four crucial elements in the emergence of COVID-19. These are first, the background to the repeated spread of lethal animal pathogens into the human population in China and beyond; second, the sequence of events at the outset of the epidemic, in which the Hubei and Wuhan authorities played a significant tactical role in hushing it up and allowing it to escalate; third, the interaction between Chinese authorities and the World Health Organization (WHO), leading to further delay and obfuscation when clarity and decisive action were essential; and, finally, the way in which the CCP leadership used all means at its disposal to promote its political agenda instead of supporting the Chinese people and the rest of the world in dealing swiftly with a global threat.

1.1 Disease and the Economy

China's economy has a number of particular features that facilitate the emergence of infectious disease, accelerate its transmission and multiply the scale and range of any potential global outbreaks. At the same time, and despite the high quality of indigenous virology and epidemiology, the CCP's exercise of authoritarian power greatly reduces the chances that lessons from past epidemics will be implemented in a timely and effective manner.

China's population accounts for around one-fifth of the world's total.⁸ This population travels more often and further than ever before in human history. In the last half century, the majority of China has undergone a process of intense urbanisation, with the population shifting from living on the land to living in rapidly expanding cities. The land itself has been polluted and damaged by the abuse of natural resources, industrialisation and the associated destruction of natural ecosystems. Increased wealth has led to greater meat consumption, and intensive livestock farming close to population centres is now the norm. At the same time, traditional demand for exotic animals for food and medicine has rapidly expanded from its original base – which was limited to local and elite demand, and met by hunting – to create a multimillion pound farming industry informally linked to government organs by licensing systems.⁹

⁸ 'Population, total - China, World', *The World Bank*, available at: <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN-1W>, last visited: 28 March 2020.

⁹ Standaert, M., 'Coronavirus closures reveal vast scale of China's secretive wildlife farm industry', *The Guardian*, 25 February 2020, available at: <https://www.theguardian.com/environment/2020/feb/25/Coronavirus-closures-reveal-vast-scale-of-chinas-secretive-wildlife-farm-industry>, last visited: 28 March 2020.

Many animals hunted or farmed for this market, including particularly civets, are hosts for corona-type viruses capable of infecting humans, in some cases lethally.¹⁰ These viruses are in a permanent state of mutation and recombination, so new strains lethal to humans inevitably appear.¹¹ The COVID-19 pandemic has a common genetic origin with the 2003 SARS epidemic, and both are linked biologically to the 2017 Swine Acute Diarrhoea Syndrome (SADS) outbreak among intensively farmed pigs, though this did not transmit to humans. A similar virus that emerged in the poultry sector has evolved and is now capable of bridging to human victims.¹² The movement of live animals carrying highly infectious new pathogens to large, urban, so-called 'wet' markets facilitates the rapid spread of infection among urban consumers and their contacts before vaccines can be developed.

Tourism, festival-related travel and migrant worker movement also increase the risk, scale and spread of human infection by animal-linked pathogens and other types of infectious diseases. Estimates suggest that in 2019 Chinese people made at least 150 million trips overseas and more than six billion domestic journeys.¹³ Peaking around the Lunar New Year, which usually occurs in late January to early February, pre-lockdown domestic travel coinciding with high demand for exotic animal products created an environment in which several key risk factors for infection operated in tandem. Around the same time, thousands of flights from China to every continent facilitated onward transmission of the pathogen, in the case of Italy in likely association with a large diaspora community from Zhejiang, whither the COVID-19 virus rapidly spread from Hubei province.¹⁴ Italy is now in the grip of the worst COVID-19 epidemic outside China. The first two cases registered in Italy, on 29 January, were two Chinese tourists who arrived in Milan on 23 January.¹⁵

The Chinese economy now relies on an estimated 291 million migrant workers,¹⁶ whose lack of access to effective health care makes them particularly vulnerable to infectious diseases.¹⁷ Involved in the 2020 Lunar New Year exodus from workplaces to home towns, these workers were then trapped by the belated lockdown in areas likely to have exposed them to infection by COVID-19 and have only gradually returned to work in hundreds of major conurbations. They may prove to be a factor in any imminent resurgence of COVID-19.

¹⁰ Lui, Q., L. Cao and X. Zhu, 'Major emerging and re-emerging zoonoses in China: a matter of global health and socioeconomic development for 1.3 billion', *International Journal of Infectious Diseases*, 25 (August 2014), pp. 65-72, available at: <https://www.sciencedirect.com/science/article/pii/S1201971214014970>, last visited: 28 March 2020.

¹¹ Hu, B. et al, 'Discovery of a rich gene pool of bat SARS-related coronaviruses provides new insights into the origin of SARS coronavirus', *PLoS Pathogens*, 30 November 2017, available at: <https://journals.plos.org/plospathogens/article?id=10.1371/journal.ppat.1006698>, last visited: 28 March 2020.

¹² Lui, Q., L. Cao and X. Zhu, 'Major emerging and re-emerging zoonoses in China: a matter of global health and socioeconomic development for 1.3 billion', *International Journal of Infectious Diseases*, 25 (August 2014), pp. 65-72, available at: <https://www.sciencedirect.com/science/article/pii/S1201971214014970>, last visited: 28 March 2020.

¹³ '3.08 billion domestic trips made in China in H1 2019', *CGTN*, 3 August 2019, available at: <https://news.cgtn.com/news/2019-08-03/3-08-billion-domestic-trips-made-in-China-in-H1-2019-IRaUOHpCEg/index.html>, last visited: 28 March 2020.

¹⁴ Lau, S. and M. Zuo, 'Stay or go? Tough call for Chinese in Italy as coronavirus crisis hits', *South China Morning Post*, 6 March 2020, available at: <https://www.scmp.com/news/china/society/article/3073987/stay-or-go-tough-call-chinese-italy-coronavirus-crisis-hits>, last visited: 28 March 2020.

¹⁵ 'Coronavirus, primi due casi in Italia «Sono due cinesi in vacanza a Roma» Sono arrivati a Milano il 23 gennaio', *Corriere*, 30 January 2020, available at: https://www.corriere.it/cronache/20_gennaio_30/coronavirus-italia-corona-9d6dc436-4343-11ea-bdc8-faf1f56f19b7.shtml, last visited: 30 March 2020.

¹⁶ Wang, O., 'Coronavirus: more than two thirds of China's migrant labourers not yet back at work', *South China Morning Post*, 18 February 2020, available at: <https://www.scmp.com/economy/china-economy/article/3051175/Coronavirus-more-two-thirds-chinas-migrant-labourers-not-yet>, last visited: 28 March 2020.

¹⁷ Zheng, Y., Y. Ji, C. Chang and M. Liverani, 'The evolution of health policy in China and internal migrants: Continuity, change, and current implementation challenges', *Asia & the Pacific Policy Studies*, 7:1 (January 2020), available at: <https://onlinelibrary.wiley.com/doi/full/10.1002/app5.294>, last visited: 28 March 2020.

1.2 The Role of Hubei Authorities in Downplaying the Early Seriousness of the Disease

Censorship and disinformation cloud the record of the crucial early stages of the COVID-19 outbreak before the confirmation that the pathogen was a new virus and before its genome had been analysed. One media account – citing unpublished Chinese government documents – states that the initial case was recorded in Wuhan on 17 November 2019.¹⁸ According to this source, the number of cases rose rapidly, reaching 266 on the last day of December and 381 on the first day of 2020. At this stage the medical authorities withheld authorisation to report the outbreak both internally and to the public, and no defensive action was taken. Meanwhile, it was noted that two-thirds of a sample of victims could be linked to the Huanan Market in Wuhan, which soon became accepted as the likely source of the outbreak. This of course shows that one third were not.¹⁹ Since the market was closed on 1 January, it seems reasonable to infer at least that subsequent cases could well be the result of human-to-human transmission. This issue does not appear to have registered in the WHO's considerations

On 27 December, when – according to the unpublished Chinese government documents – there were 181 cases overall, eminent virologist Dr Zhang Zhixian declared to the health authorities that a new Coronavirus was responsible. She was the first to raise the alarm.²⁰ On 30 December, probably based on Dr Zhang's earlier briefing, Dr Li Wenliang wrote a private note to colleagues referring to a new SARS-like outbreak, for which he was soon afterwards summoned by authorities and obliged to sign an agreement to spread no more disruptive rumours. On 31 December, the Chinese authorities notified the WHO.²¹ On the same day, the Wuhan health authority issued a low-key public notice reporting 27 cases of infection with a type of flu, without clear indications of transmission from human to human, and advising anyone with a persistent fever to seek prompt medical assistance'.²²

At this stage there were clear concerns within the medical community that the disease was being passed from human to human, but this seems not to have been shared with the WHO. The same day, the official Xinhua News Agency tendentiously reported that “all cases found were related to a seafood market, and there were no clear signs of human-to-human transmission”.²³ This statement has since been deleted. As noted above, the suspect market was closed on 1 January. But soon afterwards there was no doubt that the disease was spreading between people. A patient who died on 9 January had already infected his wife, according to data from a 24 January article in the *Lancet*²⁴. Another western journal reported that by 11 January there were seven infected health workers.²⁵ Xinhua reported such a case the same day.²⁶ By this date, the Chinese authorities were, or ought to have been, aware of human-to-human transmission.

¹⁸ Ma, J., 'Coronavirus: China's first confirmed Covid-19 case traced back to November 17', *South China Morning Post*, 13 March 2020, available at: <https://www.scmp.com/news/china/society/article/3074991/Coronavirus-chinas-first-confirmed-COVID-19-case-traced-back>, last visited: 28 March 2020.

¹⁹ 'Wuhan seafood market may not be source of novel virus spreading globally', *Science*, 26 January 2020, available at: <https://www.sciencemag.org/news/2020/01/wuhan-seafood-market-may-not-be-source-novel-virus-spreading-globally>, last visited: 30 March 2020.

²⁰ Li, A. J., 'Coronavirus crisis: How the death of Li Wenliang, a doctor and ordinary citizen, sparked Chinese demands for freedom of speech', *South China Morning Post*, 12 February 2020, available at: <https://www.scmp.com/comment/opinion/article/3049910/Coronavirus-crisis-how-death-li-wenliang-doctor-and-ordinary>, last visited: 28 March 2020.

²¹ 'Pneumonia of unknown cause – China', *World Health Organization*, 5 January 2020, available at: <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>, last visited: 28 March 2020.

²² 'Wuhan Municipal Health Commission's Notice On The Circumstances Of The Outbreak Of Pneumonia In Our City', *Wuhan Municipal Health Commission*, 31 December 2019, available at: <http://wjw.wuhan.gov.cn/front/web/showDetail/2019123108989>, last visited: 30 March 2020.

²³ 'Viral pneumonia cases reported in central China' *Xinhuanet*, 31 December 2019, available at: http://www.xinhuanet.com/english/2019-12/31/c_138669403.htm, last visited: 28 March 2020.

²⁴ <https://www.vox.com/2020/2/10/21124881/coronavirus-outbreak-china-li-wenliang-world-health-organization>

²⁵ Li, 'Coronavirus crisis: How the death of Li Wenliang, a doctor and ordinary citizen, sparked Chinese demands for freedom of speech', *South China Morning Post*, 12 February 2020.

China provided the WHO with the COVID-19 genetic sequence on 10 January, but without comprehensive data on how it was spreading. On 14 January, a WHO official said that there had been “limited” human-to-human transmission. The same day this was withdrawn by the WHO, which said there had been a misunderstanding and that there had been no evidence of this.²⁷ A dinner celebration for several tens of thousands was held in Wuhan on 18 January. A few days later a city district where many of the attendees lived had to be cordoned off.²⁸ Later, the Mayor of Wuhan claimed that the party had gone ahead because human-to-human transmission was then deemed to be “limited”. Xi Jinping did not acknowledge the outbreak until 20 January. Wuhan was put into quarantine on 23 January. Around this time, the WHO decided not to declare a global health emergency, largely because there was no evidence of person-to-person transmission. On 25 January, the Chinese authorities admitted that an asymptomatic patient had infected all her family.²⁹

Thus, potentially since 17 November but certainly since 30 December, China’s authorities knew about the COVID-19 outbreak and did their very best to suppress information about it.

1.3 How the Inaction of the Wuhan and Hubei Governments Allowed the Disease to Spread

When the WHO finally declared an international emergency on 30 January, the disease had already been exported overseas from China. On 26 January, the Mayor of Wuhan admitted on official media that five million people had left Wuhan prior to the imposition of the quarantine.³⁰ He said that his office had withheld information from the public and failed to brief them in a timely manner. On 30 January, Dr Li Wenliang spoke to the New York Times about official failures to disclose essential information about the virus to the public.³¹ He died of COVID-19 infection during the night of 6-7 February. On 31 January, the first two cases of COVID-19 were confirmed in the UK.

It is evident from this sequence of events that the Hubei authorities deliberately understated the severity of the growing epidemic and allowed it to spread unchecked for several weeks, particularly throughout the vital first fortnight of January, by which time it was clearly spreading increasingly rapidly from person to person. The Mayor of Wuhan’s acknowledgement that five million travellers left his city during this major incubation window explains the subsequent spread of the disease inside China and overseas, leading directly to the current pandemic.³² When Xi Jinping sent Premier Li Keqiang to impose a rigorous lockdown in Wuhan and later across Hubei and beyond, the damage had already been done. Whatever delaying effect the China-wide quarantine later had on infection and the death toll within the country, the craven cowardice and defensive secrecy – framed by fear of censure if mistakes were made – displayed by the Hubei provincial government and Wuhan metropolitan government, in combination with inadequate engagement by China’s senior leaders then and previously, led directly to the onset of the COVID-19 pandemic.

²⁶ Kyngé, J., S. Yu and T. Hancock, ‘Coronavirus: the cost of China’s public health cover-up’, *Financial Times*, 6 February 2020, available at: <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441>, last visited: 28 March 2020.

²⁷ *ibid.*

²⁸ Kyngé, J., S. Yu and T. Hancock, ‘Coronavirus: the cost of China’s public health cover-up’, *Financial Times*, 6 February 2020, available at: <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441>, last visited: 28 March 2020.

²⁹ ‘Coronavirus research: Woman with no symptoms infects five people’, *Medical News Today*, 24 February 2020, <https://www.medicalnewstoday.com/articles/coronavirus-research-woman-with-no-symptoms-infects-five-people#Wuhan-to-Anyang>, last visited: 24 February 2020.

³⁰ Fottrell, Q., ‘Mayor of Wuhan, epicentre of coronavirus outbreak, says 5 million people left the city before travel restrictions were imposed’, *MarketWatch*, 28 January 2020, available at: <https://www.marketwatch.com/story/mayor-of-wuhan-epicenter-of-coronavirus-outbreak-says-5-million-people-left-the-city-before-travel-restrictions-were-imposed-2020-01-26>, last visited: 28 March 2020.

³¹ Jian, M., ‘Xi Jinping has buried the truth about coronavirus’, *The Guardian*, 26 February 2020, available at: <https://www.theguardian.com/commentisfree/2020/feb/26/the-reaction-to-the-outbreak-has-revealed-the-unreconstructed-despotism-of-the-chinese-state>, last visited: 28 March 2020.

³² <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441>

Box 1:**The International Health Regulations (2005): What they entail**

The International Health Regulations (IHR) were adopted by the World Health Assembly, the decision-making body of the World Health Organisation (WHO), in 1969. These regulations are “designed to prevent the international spread of disease” by placing obligations on states to prevent highly-transmissible diseases.³³ The IHR were revised in 2005, in response to the 2003 SARS outbreak, and entered into force in 2007.

The IHR consist of ten parts, the second of which concerns information sharing and public health responses to emerging health events. They require that states monitor health events, notify the WHO of unexpected or unusual events, share full information, consult with the WHO, and continue to provide up to date information throughout an incident.³⁴ In particular, Articles Five through Seven, contained within Part II, place particular obligations on states with potential outbreaks.

Article Five requires that states maintain and implement the capacity to monitor “disease or death above expected levels”.³⁵ Details that must be monitored and recorded include “clinical descriptions, laboratory results, sources and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed”.³⁶

Article Six requires that States first notify the WHO any health incident that satisfies a prescribed risk indicator mechanism.³⁷ It then requires the State to provide “timely, accurate and sufficiently detailed public health information available to it” including each of the pieces of information set out in Article 5.³⁸ It also requires States, where necessary, to provide where necessary details about its need for assistance.

Article Seven extends the data-sharing obligations required under Article Six to any circumstances in which a State “has evidence of an unexpected or unusual public health event within its territory... which may constitute a public health emergency of international concern.”³⁹ A “public health emergency of international concern” is earlier defined by Article One as:

an extraordinary event which is determined, as provided in these Regulations:

- (i) to constitute a public health risk to other States through the international spread of disease and
- (ii) to potentially require a coordinated international response.⁴⁰

Put simply, the IHR require a State to monitor and share data related to the spread, severity, and transmission of any pathogens that are potentially transmissible internationally.

³³ International Health Regulations (2005), Foreword.

³⁴ International Health Regulations (2005), Articles 5-12.

³⁵ International Health Regulations (2005), Article 5 and Annex 1.

³⁶ International Health Regulations (2005), Annex 1.

³⁷ International Health Regulations (2005), Article 6

³⁸ Ibid.

³⁹ International Health Regulations (2005), Article 7

⁴⁰ International Health Regulations (2005), Article 1

1.4 Chinese Negligence and the International Health Regulations

The way the CCP authorities reacted to the growing threat shows barely a sign that practical lessons from the 2002-3 SARS outbreak had been learnt. For several months after the SARS outbreak (caused by a pathogen similar and related to COVID-19) began in south China, the CCP tried to hide it, causing the avoidable deaths of hundreds of their citizens, including many medical staff, and culminating in the spread of this highly dangerous disease spread to several other countries. SARS was a new disease, and existing medical responses were immediately seen to be inadequate. But information was not shared and fatal errors were repeated, causing needless loss of life.

China's failure to report the SARS outbreak fully and in a timely manner in 2003 was directly responsible for its spread within the country and overseas. By the time it was contained, the virus had spread to over 8,000 people worldwide and killed almost 800.⁴¹ At this stage, SARS was a new pathogen and not listed among notifiable diseases under the International Health Regulations (IHR). In response, a new set of IHR were implemented in 2005; these were intended to increase the level of reporting detail on an outbreak of disease that WHO member states were obliged to provide. How does China's response in the case of the COVID-19 epidemic match up to current treaty requirements under the IHR?

Following SARS, virology and epidemiology research in China focused in on the coronavirus-SARS group of pathogens, and particularly important investigative work, including cloning, interbreeding different strains of the virus and comparison of their ability to bind to human receptors- in layman's language, to affect humans- was undertaken, including at special laboratories in Wuhan. So after the COVID-19 infection appeared in Wuhan, urgent efforts began to establish what, and how infectious the virus was, with the participation of several of China's most experienced specialists. Worst of all, to the alarm of responsible experts and practitioners, proof of rapid HTH transmission was ignored and deliberately concealed.

In early February 2020 Professor John Mackenzie, an independent member of the WHO's emergency committee, described the Chinese government's approach to reporting the early spread of the epidemic as reprehensible. He said:

there must have been more cases happening that we weren't being told about ... I think there was a period of very poor reporting, or very poor communication ... There was a period there, I think had [Beijing] been a bit stronger earlier on, they might have been able to restrict the number of cases not only in China but also overseas.⁴²

This assessment accords with the unaccountable absence of information from China concerning the rapid spread of infection in the first fortnight of January. When the Chinese record was adjusted retrospectively at the end of this period, a sudden leap in cases was reported. This has been rationalised but not adequately explained. It suggests that earlier statistics had been managed down, which - if true - would constitute a clear and serious breach of China's binding obligations under the IHR.⁴³ The true figures would have supported a conclusion that person-to-person transmission was clearly taking place, which would likely have led to the WHO declaring an international emergency much earlier than it did, perhaps in time to trigger an earlier, transformational campaign to contain the outbreak.

Tedros Adhanom dismissed Mackenzie's comments, noting that he "couldn't say they hid or they didn't ... Even if China hides it, I don't think the cases would be prevented from

⁴¹ Wilder-Smith, A., Chiew, C., and Lee, V., 'Can we contain the COVID-19 outbreak with the same measures as for SARS?' *The Lancet*, available at: [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30129-8/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30129-8/fulltext), last visited: 30 March 2020.

⁴² Kynge, Yu and Hancock, 'Coronavirus: the cost of China's public health cover-up', *Financial Times*, 6 February 2020.

⁴³ *ibid.*

crossing the borders to other countries.” He said that the current number of cases overseas was “very small”. A review might at some future date be undertaken “to see if something was hidden or not”.⁴⁴

A WHO mission team visited China from 16 to 24 February 2020 to investigate the outbreak and the Chinese response, as they acknowledged, seven weeks after the outbreak started. Their report is publicly available and makes salutary reading.⁴⁵ On return, comments to media were universally positive. A senior WHO official who had been on the mission told the press that the Chinese authorities had adopted a “rigorous” approach, saying: “They know what they are doing and they are really, really good at it.”⁴⁶ Dr Bruce Aylward, leader of the mission, commented to reporters:

the Chinese government is to be congratulated for the extraordinary measures it has taken to contain the outbreak ... We would have seen many more cases outside China by now, and probable deaths, if it were not for the government’s efforts and the progress they have made to protect their own people and the people of the world. The speed with which China detected the outbreak, isolated the virus, sequenced the genome and shared it with the WHO and the world is really very impressive, and beyond words. So is China’s commitment to transparency.⁴⁷

The 40-page mission report makes not a single reference to the IHR or to China’s obligations to comply with IHR norms.⁴⁸ In the same vein as Dr Aylward’s comments above, the report is effusively positive and congratulatory throughout. Comments on information transfer and gaps include neither concerns nor complaints of any kind. Subsequent events have challenged the WHO’s positive interpretation of how the Chinese authorities handled the outbreak, but the official position of the WHO in this regard does not seem to have altered. There may at some future date be an opportunity to inquire into what has at times appeared to be a marked predisposition on the part of the current WHO leadership to extol the CCP’s virtues and ignore its palpable errors.⁴⁹

As the evidence and Professor Mackenzie’s criticism shows, a case that China was in breach of its IHR commitments can be made, but at this stage the international body responsible for enforcing the IHR – the WHO – has given no indication of an intention to do so. The material presented in this paper, drawing on extensive data from China, shows that both the Wuhan government and the central authorities deliberately misrepresented the nature, scale and risk of the emerging epidemic at the crucial early stages, while themselves issuing official apologies addressing some of these failings on local and national media. As a result, the virus was not contained, was spread abroad and has caused a pandemic. If the IHR were designed to prevent such an eventuality and the WHO’s role is to ensure that this happens, neither seems fit for purpose.

⁴⁴ Ravelo, J. L., ‘Tedros addresses criticism against China coronavirus response’, *Devex*, 6 February 2020, available at: <https://www.devex.com/news/tedros-addresses-criticism-against-china-Coronavirus-response-96518>, last visited: 28 March 2020.

⁴⁵ ‘Report of the WHO–China Joint Mission on Coronavirus Disease 2019 (COVID-19)’, 16-24 February 2020, available at: <https://www.who.int/docs/default-source/Coronaviruse/who-china-joint-mission-on-COVID-19-final-report.pdf>, last visited: 28 March 2020.

⁴⁶ Bollyky, T. J. and V. Gupta, ‘What the World Can Learn From China’s Experience with Coronavirus’, *Foreign Affairs*, 2 March 2020, available at: <https://www.foreignaffairs.com/articles/china/2020-03-02/what-world-can-learn-chinas-experience-Coronavirus>, last visited: 28 March 2020.

⁴⁷ Belluz, J., ‘China hid the severity of its coronavirus outbreak and muzzled whistleblowers – because it can’, *Vox*, 10 February 2020, available at: <https://www.vox.com/2020/2/10/21124881/Coronavirus-outbreak-china-li-wenliang-world-health-organization>, last visited: 28 March 2020.

⁴⁸ ‘Report of the WHO–China Joint Mission on Coronavirus Disease 2019 (COVID-19)’, 16-24 February 2020.

⁴⁹ ‘Fighting the Coronavirus Pandemic: China’s Influence at the World Health Organization’, *Institut Montaigne*, 23 March 2020, available at: <https://www.institutmontaigne.org/en/blog/fighting-Coronavirus-pandemic-chinas-influence-world-health-organization>, last visited: 28 March 2020.

Box 2:**Case study: how missing medical data hampered the UK response**

The effect of the early inadequate and inaccurate information released by the CCP was keenly felt during the early reaction and preparation of the UK.

The first official response to the emergence of COVID-19 came in an extraordinary meeting of the New and Emerging Respiratory Virus Threats Advisory Group (NERVTAG), convened at the request of the Department of Health and Social Care (DHSC) on 13 January 2020.⁵⁰ NERVTAG is a body tasked with advising the Government on the development of its response to prospective outbreaks. The DHSC relied on advice from NERVTAG in order to make changes to public health advice and equipment guidance for the NHS. While NERVTAG's meetings are by no means representative of Government thinking, their public minutes are nevertheless a useful indication.

At the time of NERVTAG's first meeting, NERVTAG was acting on WHO reports. These reports were based on Chinese data which said, at that point, there were no cases of medics contracting the diseases; there had been 41 cases of COVID-19 between 8 December 2019 and 2 January 2020; and, there has been no additional cases since 3 January 2020.⁵¹ All of this was untrue.

The reports shared with NERVTAG stated there "has been no 'significant' human to human transmission", although members of the Group did note that this implied there may have been some evidence of limited human to human transmission. Yet, "based on current available information" available, NERVTAG concluded that "the risk to the UK population is considered: Very Low".⁵² Accordingly, the Group recommended no changes to UK border policy on screening or travel advice to British nationals.

When the NERVTAG met again a fortnight later on 21 January, the picture was markedly different: "the reported number of confirmed global cases had increased to 283, with 279 in mainland China".⁵³ Crucially it was noted that "human to human transmission had now been reported overnight, including 15 healthcare workers".⁵⁴ Yet, the minutes record that members noted "these HCW cases are thought to be due to a single superspreading event in a neurosurgical unit, with no PPE [personal protective equipment] worn by HCWs [healthcare workers] or other patients".⁵⁵ Nevertheless, it was acknowledged that human-to-human transmission was occurring, even if there was much uncertainty as to how transmissible the disease was.

The most significant uncertainty appeared to concern a WHO modelling discussion "on whether this was a zoonotic outbreak with some human to human transmission, or a seeded outbreak from zoonotic reservoir but with self-sustaining human transmission". The latter was true and - by this stage - well known in China. NERVTAG, however, noted that "it was concluded by the WHO modelling group that the currently available data did not make it possible to distinguish between the two scenarios".

⁵⁰ Public Health England, Minutes of the NERVTAG Wuhan Novel Coronavirus Meeting: 13 January 2020.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Public Health England, Minutes of the NERVTAG Wuhan Novel Coronavirus Meeting: 21 January 2020.

⁵⁴ Ibid.

⁵⁵ Ibid.

At this juncture, NERVTAG recommended that the risk to UK population indicator be raised from 'very low' to 'low'. Nevertheless, border screening was opposed by the committee.

By 28 January, when NERVTAG reconvened, the situation was far bleaker. At the meeting it was now recognised based on the WHO Emergency Committee meeting of 22 January 2020 – that human-to-human transmission was occurring with an average spread of 1.4-3.1 new infections per person, depending on the model.⁵⁶ Even at this late stage, however, NERVTAG commented that there “was a large amount of data” from China where provincial information was not available.⁵⁷

The committee met two days later on 30 January; the same day, the WHO declared an international emergency.⁵⁸ It is clear that the NERVTAG was still not satisfied with information from China. The minutes record that “members noted that the case definition being used in China may not be diagnosing milder cases”.⁵⁹ The following day, the first two UK cases would be confirmed.

For the entirety of January, and in the immediate run up to the emergence of the disease in the UK, the record reflects that the UK's response was being hampered by inadequate, erroneous and absent data. This was data that – under the IHRs – ought to have been shared globally as soon as it was received.

1.5 The Role of China's Leadership in the Early-stage Cover-up of COVID-19

The standard response by the CCP leadership to a major disaster is to let local government take the initial blame. The picture of activity focused in Wuhan described above fits with this – to a degree.

The Wuhan authorities should have been aware of what was happening by late December, when experts reported on internal channels an outbreak of a new viral infection. News of the outbreak was passed to the WHO on 31 December, but nothing was publicised in Wuhan. In the first three weeks of January, as the unacknowledged epidemic began to spread, the Mayor and his team temporised, aware of a dreadful problem but persevering with the annual Provincial Peoples' Congress meeting and issuing thousands of tickets for holiday entertainments. Unaware of the danger, hundreds of thousands of travellers flooded into the province for the coming New Year holiday.

Meanwhile, at a secure laboratory in Shanghai, the COVID-19 genome was sequenced – in secret – as the daily tally of new cases rapidly increased. This establishment was later forced to close for releasing its data without official clearance. One of the new victims was Dr Li Wenliang. Details of the spread were withheld from the public, as well as from the WHO. In the first two weeks of January it was even reported officially that the number of new cases had gone down to 41.⁶⁰ The impression was deliberately created that the measures taken to

⁵⁶ Public Health England, Minutes of the NERVTAG Wuhan Novel Coronavirus Meeting: 28 January 2020.

⁵⁷ Ibid.

⁵⁸ Public Health England, Minutes of the NERVTAG Wuhan Novel Coronavirus Meeting: 30 January 2020.

⁵⁹ Ibid.

⁶⁰ Garrett, L., 'How China's Incompetence Endangered the World', FP, 15 February 2020, available at: <https://foreignpolicy.com/2020/02/15/coronavirus-xi-jinping-chinas-incompetence-endangered-the-world/>, last visited: 28 March 2020.

control the outbreak had worked.⁶¹ But, at the same time, a Beijing-based media company reported that one radiologist in Wuhan had personally detected 50 new cases in one day.⁶² Another source refers to a public warning on 18 January that the virus was passing from person to person.⁶³ That night an annual mass banquet took place in Wuhan's Baibuting district for 40,000 guests, many of whom were soon in quarantine.⁶⁴

But this is not the whole story. In Beijing on 7 January, the CCP's main theoretical journal, *Qiushi* ('Seeking Facts'), began to publish timelines of Xi's engagement with efforts to contain the outbreak.⁶⁵ Though this was not mentioned at the time, a transcript of a speech by Xi on 3 February referred to a statement he had made on 7 January, at a meeting of the CCP Politburo standing Committee, when he had "issued requirements for the prevention and control of the new Coronavirus".⁶⁶

On 20 January, Zhong Nanshan, a scientist famous for his expertise on SARS, announced on state television that the COVID-19 virus could be passed from human to human.⁶⁷ The same day, Xi made his first public statement on the crisis. According to Xinhua, the state news agency, he stressed "the need for the timely release of information" to the public to ensure social stability for an auspicious and peaceful New Year holiday.⁶⁸ The two tourists who became Italy's first COVID-19 cases left China on 22 January, reaching Milan the next day.⁶⁹ On 25 January, Lunar New Year's Day, Xi is reported to have chaired a meeting of the seven-man CCP Politburo Standing Committee, the summit of power in China. He later referred to this meeting in his 3 February speech which was published in great detail, most unusually, on 15 February.⁷⁰ Xi reportedly said that he had given orders on fighting the epidemic at a meeting on 7 January and had personally ordered the imposition of quarantine on Wuhan on 22 January.

Since 25 January, Xi had said, the outbreak had been his greatest concern. Despite this, on 27 January Xi made his deputy, Premier Li Keqiang, responsible for the campaign against COVID-19. Xi again spoke of his personal commitment to dealing with the epidemic to Tedros Adhanom when they met on 28 January. Adhanom's comments on China's handling of the crisis under Xi's supervision were, as usual in his approach to China, elaborately complimentary.⁷¹

⁶¹ Garrett, L., 'How China's Incompetence Endangered the World', *Foreign Policy*, 15 February 2020, available at: <https://foreignpolicy.com/2020/02/15/coronavirus-xi-jinping-chinas-incompetence-endangered-the-world/>, last visited: 30 March 2020.

⁶² Kyngé, Yu and Hancock, 'Coronavirus: the cost of China's public health cover-up', *Financial Times*, 6 February 2020.

⁶³ Belluz, 'China hid the severity of its coronavirus outbreak and muzzled whistleblowers - because it can', *Vox*, 10 February 2020

⁶⁴ Kyngé, Yu and Hancock, 'Coronavirus: the cost of China's public health cover-up', *Financial Times*, 6 February 2020.

⁶⁵ 'Xi Details Early Hands-On Approach in Virus Fight, Risking Anger', *Bloomberg*, 15 February 2020, available at: <https://www.bloomberg.com/news/articles/2020-02-15/xi-details-hands-on-approach-in-virus-fight-from-early-january>, last visited: 28 March 2020.

⁶⁶ Griffiths, J., 'Did Xi Jinping know about the coronavirus outbreak earlier than first suggested?', *CNN*, 17 February 2020, available at: <https://edition.cnn.com/2020/02/17/asia/china-coronavirus-xi-jinping-intl-hnk/index.html>, last visited: 28 March 2020.

⁶⁷ Kyngé, Yu and Hancock, 'Coronavirus: the cost of China's public health cover-up', *Financial Times*, 6 February 2020.

⁶⁸ 'Xi orders resolute efforts to curb virus spread', *Xinhuanet*, 20 January 2020, available at: http://www.xinhuanet.com/english/2020-01/20/c_138721535.htm, last visited: 28 March 2020.

⁶⁹ 'Coronavirus, primi due casi in Italia «Sono due cinesi in vacanza a Roma» Sono arrivati a Milano il 23 gennaio', *Corriere*, 30 January 2020, available at: https://www.corriere.it/cronache/20_gennaio_30/coronavirus-italia-corona-9d6dc436-4343-11ea-bdc8-faff56f19b7.shtml, last visited: 30 March 2020.

⁷⁰ 'Xi Details Early Hands-On Approach in Virus Fight, Risking Anger', *Bloomberg*, 15 February 2020.

⁷¹ 'Xi Jinping meets with visiting World Health Organization (WHO) Director-General Tedros Adhanom Ghebreyesus', *Ministry of Foreign Affairs of the People's Republic of China*, 29 January 2020, available at: https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1737014.shtml, last visited: 28 March 2020.

The body of evidence concerning the interplay between the CCP's top leadership and the provincial and municipal party and governments of Hubei is relatively sparse. Extensive commentary in secondary sources typically interprets what happened as an initial phase of clumsy local repression to stop bad news escalating up the chain of command (a standard phenomenon under China's authoritarian system) followed by a lurch into crisis and disarray resolved by a senior visitor (Premier Li Keqiang) and a dramatic attempt to bolt the stable doors via a draconian lockdown, too late in Hubei but arguably more effective where fewer victims of infection had been free to travel and spread the epidemic.

However, the suggestion that, on 7 January, Xi was in charge of a highest-level meeting and explicitly took command of the campaign appears to conflict with the above interpretation. Since this report cannot have been issued without Xi's approval, it shows that Xi is prepared to be seen to carry responsibility for the conduct of the CCP response from very near the start of the outbreak, which includes a period when millions of unwitting people were allowed to surge in and out of the centre of a nascent epidemic and many were infected, who later left to spread the disease across China and, soon after, the world.

At the least, this underscores a simple and crucial point: the CCP could have taken timely steps to contain the spread of the virus, but, for reasons that may never be clear, it wittingly failed to do so. As such, the CCP bears full responsibility for the consequences.

2. LEGAL AVENUES TO HOLD CHINA TO ACCOUNT

The Peoples' Republic of China (PRC) has long sought to eschew legal accountability for its actions. It is not unique in this respect. Like other authoritarian states, the PRC abides by laws and treaties when Beijing believes that it is in its interests to do so, and ignores them when it is not. However, the reality of the rules-based international order is that even a State as averse to the rule of law as China has engendered a series of potential liabilities. These potential legal avenues fall into two broad categories. The first are available within the world's system of international justice. The second exist within the domestic courts of other nations.

Blanket exemptions to these avenues of action are substantive. Sovereign immunity, or the principle that sovereign states should not be subject to jurisdiction of foreign courts in non-commercial matters, is a longstanding one. In the UK, it dates back to the acts of supremacy in the sixteenth century, if not earlier still. Likewise, some members of the international community have held firmly to the principle that they will not make themselves subject to proceedings in international courts and have carefully avoided clauses in treaties that would have this effect. Yet, with decades of growth of international law, routes may have emerged to hold the PRC to account.

This section sets out avenues that could exist to file disputes against the PRC (or actors close to it) for its role in the COVID-19 pandemic. It is not for this chapter to assess the prospects for any such claim - nor does it seek to do so. Such prospects would depend on questions of jurisdiction and admissibility of claims, as well as the legal and factual merits of the case. The purpose here is to outline some of the legal routes that should be explored by nations, corporations, and individuals injured by the COVID-19 outbreak.

2.1 International Law

International law offers a series of potential remedies to parties injured by the "wrongful acts" of a state.⁷² Such legal exercises fall into two main categories: adversarial and inquisitorial. Adversarial routes would see litigation with the aim of securing compensation or redress from the Chinese State. Inquisitorial routes would be exercises of fact-finding which would not carry a settlement of damages but could attribute blame.

2.1.1 International Health Regulations

Of the forms of international law in existence, measures relating to the spread of infectious diseases are some of the most established. The international community has long recognised that, with respect to infectious diseases, the actions of one state may have material implications on another. As such, a body of law, inferring duties on nations to restrict the spread of diseases, began in 1892 with the International Sanitary Convention.⁷³

Today, as Box 1 shows, global health law is almost entirely a product of the IHR (2005).⁷⁴ As well as conveying duties and rights upon the WHO, the IHR convey duties on states to act to prevent the spread of infectious diseases. The IHR contain within them a mechanism for the settlement of disputes, in the form of Article 56. This sets out the relevant procedure in

⁷² 'International Law Commission, Articles on State Responsibility', *ICRC Law*, available at: <https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility>, last visited: 28 March 2020.

⁷³ 'Global Health Histories: Origin and development of health cooperation', *World Health Organization*, available at: https://www.who.int/global_health_histories/background/en/, last visited: 28 March 2020.

⁷⁴ International Health Regulations (2005), Article 58. Members of the Pan American Health Organization are also subject to the provisions of the Pan American Sanitary Code, which confers further requirements.

the event of a “dispute between two or more States Parties concerning the interpretation or application of these Regulations”.⁷⁵

In the first instance, states agree to seek “to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation”.⁷⁶ In the event that states are unable to settle disputes through this mechanism, they may agree to refer the dispute to the Director-General for resolution. A state may, at any point, declare that it accepts arbitration (subject to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States) to be binding. Such a case is yet to be litigated, so it is unclear whether the WHO would conduct such an arbitration itself or refer it to the Permanent Court of Arbitration in The Hague. In any event, a State Party is not bound to accept any arbitration as binding without a unilateral declaration that it does so.⁷⁷

While levelling a claim of dispute under the IHR would be unprecedented, there is an initial framework for bringing suit within the structures of the WHO. This would be a readily accessible avenue for states bringing complaints in relation to the handling of the COVID-19 pandemic. In the first instance, an injured party would need to notify the State Party that it contends has breached the Regulations of a dispute before escalating it to the Director-General of the WHO and seeking compulsory arbitration.

Also of note is Section 5 of Article 56, which affords a vehicle to resolve disputes between member states and the WHO. States that have a dispute with the WHO that concerns the “interpretation or application of these Regulations” can refer matters to the Health Assembly. A state could therefore refer the WHO’s response, statements and decision making to the Health Assembly. All 194 members of the WHO are members of the Health Assembly.

2.1.2 International Court of Justice and Permanent Court of Arbitration

All members of the United Nations, by virtue of Chapter XIV of the UN Charter, are also members of the International Court of Justice (ICJ).⁷⁸

The ICJ is the principle judicial organ of the UN.⁷⁹ Seventy-four states have unilaterally declared that they accept the jurisdiction of the Court as compulsory.⁸⁰ Such a declaration means that these nations accept the Court’s jurisdiction in international disputes with other such states automatically. The list of states who have accepted this jurisdiction include five of the G7’s members. The US and France have made no such declaration. Nor has China.

Avenues of litigation conceivably open to states at the ICJ are those listed on the Treaties section of the ICJ website.⁸¹ In such instances, China could reject the jurisdiction of the Court. Nevertheless, such a claim could be filed and it would be for China to accept or reject the Court’s jurisdiction. Such a speculative case is known as ‘forum prorogatum’.

⁷⁵ International Health Regulations (2005), Article 56 (1).

⁷⁶ *ibid.*

⁷⁷ International Health Regulations (2005), Article 56 (3).

⁷⁸ ‘Chapter XXI: The International Court of Justice’, *United Nations*, available at: <https://www.un.org/en/sections/un-charter/chapter-xiv/index.html>, last visited: 28 March 2020.

⁷⁹ ‘The Court’, International Court of Justice, available at: <https://www.icj-cij.org/en/court>, last visited: 28 March 2020.

⁸⁰ ‘Declarations recognizing the jurisdiction of the Court as compulsory’, *International Court of Justice*, available at: <https://www.icj-cij.org/en/declarations>, last visited: 28 March 2020.

⁸¹ <https://www.icj-cij.org/en/treaties>

China's conduct in the initial stages of the Covid-19 outbreak violated – as outlined in Box 1 – the IHR, in particular Articles 5, 6, and 7. While Article 56 of the IHR provides a dispute settlement mechanism, it does so only in the event that China consents. One way around the issue of obtaining China's consent could be to bring a case to the ICJ through Article 75 of the World Health Organization's Constitution.⁸² This Article provides: "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice...".⁸³

The Permanent Court of Arbitration (PCA), a body that emerged from the 1899 Hague Peace Conference, is another avenue for settling legal disputes between nations.⁸⁴ The rules of the PCA require that notice of a potential claim is transmitted to the Court authorities and to the opposing party. The rules specify that such a notice must include:

- (a) A demand that the dispute be referred to arbitration;
- (b) The names and contact details of the parties;
- (c) Identification of the arbitration agreement that is invoked;
- (d) Identification of any rule, decision, agreement, contract, convention, treaty, constituent instrument of an organization or agency, or relationship out of, or in relation to which, the dispute arises;
- (e) A brief description of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.⁸⁵

The PCA applies similar principles to the ICJ on jurisdiction in that it requires all the parties to settle a dispute under these rules.⁸⁶ Unlike the ICJ, however, the PCA effectively manages disputes that are brought to it by parties. In this sense, the PCA serves as a secretariat that facilitates ad hoc arbitrations that take place under its aegis.

2.1.3 World Trade Organization

The World Trade Organisation (WTO) is an intergovernmental organisation principally concerned with the regulation of international trade. It governs rules that contain within them a system of dispute resolution mechanisms. This system is used comparatively frequently compared to other global systems, with 595 disputes having been brought to the WTO since 1995.⁸⁷ The system is relatively expedient, with the WTO estimating an average case length of one year and three months.⁸⁸ The WTO utilises an organ called the Dispute Settlement Body in order to resolve disputes. Any member state may bring cases to the WTO.

⁸² Tzeng, P. 'Taking China to the International Court of Justice over COVID-19', *EJIL:Talks!*, 2 April 2020, available at: <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>, last accessed: 2 April 2020

⁸³ 'Constitution of the World Health Organisation', October 2006, available at: https://www.who.int/governance/eb/who_constitution_en.pdf, last accessed: 2 April 2020.

⁸⁴ 'History', *Permanent Court of Arbitration*, available at: <https://pca-cpa.org/en/about/introduction/history/>, last visited: 28 March 2020.

⁸⁵ 'Permanent Court of Arbitration: Arbitration Rules 2012', *Permanent Court of Arbitration*, available at: <https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf>, last visited: 28 March 2020.

⁸⁶ *ibid.*

⁸⁷ 'Dispute Settlement', *World Trade Organization*, available at: https://wto.org/english/tratop_e/dispu_e/dispu_e.htm, last visited: 28 March 2020.

⁸⁸ 'Understanding the WTO: Settling Disputes', *World Trade Organization*, available at: https://wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, last visited: 28 March 2020.

In the past, the WTO's dispute resolution mechanism has been used as a vehicle to raise disputes that are not strictly trade related. A series of disputes have been filed at the WTO related to the ongoing hostilities between Qatar and the other Gulf states.⁸⁹ This has led to claims – notably from the US – that the WTO has engaged in judicial overreach.⁹⁰ It might be possible, therefore, for a case to be brought to the WTO that in its handling of the COVID-19 outbreak, China deviated from its obligations under the WTO.

2.1.4 Bilateral Investment Treaties

Other avenues of binding dispute resolution to which China is subject are those created by Bilateral Investment Treaties (BITs). BITs are bilateral agreements made by nations in order to facilitate mutual investment. Many of them contain compulsory dispute resolution mechanisms.⁹¹ The OECD estimates that 93% of agreements contain such mechanisms. China is a party to some 108 BITs that are currently in force. The nations with whom it has such a treaty include the UK (1988), Italy (1985), Japan (1988), Canada (2012), Germany (2003), France (2007), Australia (1988) and New Zealand (1988).⁹² China has no BIT with the United States.

China's BIT with the UK contains a dispute resolution mechanism both for disputes of an inter-state nature and for those between the nationals of one party and the respective state.⁹³ While the exact procedures vary between forms of litigation, in both cases a form of international arbitration in line with Arbitration Rules of the United Nations Commission on International Trade Law is required. The treaty includes provisions against preferential treatment for domestic entities and requires compensation for destruction inflicted by states.

In the past, litigation under BITs has resulted in very large settlements, including a £38 billion (\$50 billion) judgement against Russia.⁹⁴ It has also been used as a strategy in matters not necessarily anticipated by their respective drafters. In order to make use of such a treaty with respect to the COVID-19 outbreak, any prospective plaintiff would first need to establish either damage by the state such that it is precluded by the Treaty language or that Chinese firms had – without good cause – preferential treatment to them.

One UK firm, JSP, has claimed that two factories it owns were “requisitioned by the government to make disposable RPE [respiratory protection equipment] for Chinese government agencies”.⁹⁵

⁸⁹ “Dispute Settlement: DS567: Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights”, *World Trade Organization*, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm, last visited: 28 March 2020. See also, “Dispute Settlement: DS576: Qatar – Certain measures concerning goods from the United Arab Emirates”, *World Trade Organization*, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds576_e.htm, last visited: 28 March 2020.

⁹⁰ “Statements by the United States at the Meeting of the WTO Dispute Settlement Body”, 28 October 2019, available at: https://geneva.usmission.gov/wp-content/uploads/sites/290/Oct28.DSB_Stmt_as-deliv.fin_public.pdf, last visited: 28 March 2020.

⁹¹ “Dispute settlement provisions in international investment agreements: A large sample survey”, OECD, 2012, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf>, last visited: 28 March 2020.

⁹² “Bilateral Investment Treaties (BITs)”, Investment Policy Hub, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>, last visited: 28 March 2020.

⁹³ “Agreement between the Government of the United Kingdom and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments”, 15 May 1986, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/793/download>, last visited: 28 March 2020.

⁹⁴ “Dutch court backs \$50bn Yukos claim against Russia”, *BBC News*, 18 February 2020, available at: <https://www.bbc.co.uk/news/world-europe-51547011>, last visited: 30 March 2020.

⁹⁵ “Downing Street says China faces a ‘reckoning’ over their handling of coronavirus and risks becoming a ‘pariah state’ as Boris Johnson faces pressure to scrap the Huawei deal”, *Mail on Sunday*, 28 March 2020, available at: <https://www.dailymail.co.uk/news/article-8163767/Downing-Street-says-China-faces-reckoning-coronavirus.html>, last visited 29 March 2020.

2.1.5 United Nations Convention on the Law of the Sea (UNCLOS)

A cornerstone of international peace and security, the United Nations Convention on the Law of the Sea (UNCLOS) was signed in 1982. UNCLOS provides a neutral mechanism to regulate the world's maritime resources. It has 168 Parties and 157 Signatories, meaning that most members of the UN is subject to it.⁹⁶ This includes China, which signed the Convention in 1982 and ratified it in 1996. Part XV of UNCLOS contains a dispute settlement system, which provides for the establishment of an International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals. To date, there have been 29 cases submitted to ITLOS⁹⁷ and 13 tribunals that sat under the aegis of the PCA.⁹⁸

One of these 42 cases involved China. It was brought by the Philippines in 2013 through an arbitral tribunal and concerned the legality of China's "nine-dash line" concept in the South China Sea. This refers to an undefined and ambiguous demarcation line that China uses to make claims for its sovereignty over major parts of the South China Sea. The Philippines made 15 submissions to the arbitral tribunal, and in February 2013 China declared that it would not participate in the process. Nevertheless, in October 2015 the arbitral tribunal ruled that it had jurisdiction over the case, and it took up seven of the Philippines' submissions. On 12 July 2016, the arbitral tribunal published a clear and binding ruling in favour of the Philippines. China refused to recognise the decision and refuses to abide by it.

Although China is unlikely to take any notice of any ruling made through UNCLOS, it offers a possible route to draw attention to China's negligence. Prospective Plaintiffs would need to argue China's failures in responding to COVID-19 breached some aspect of maritime law as expressed in the Convention.

2.1.6 Commissions of Inquiry and Advisory Opinions

Both the PCA and the ICJ have procedures for conducting proceedings designed to establish facts and to clarify the law without making orders for restitution.

In the case of the ICJ, proceedings are limited to findings of law. Article 96 of the UN Charter enables both the Security Council and the General Assembly to "request the International Court of Justice to give an advisory opinion on any legal question".⁹⁹ While China has veto powers at the UN Security Council, it does not possess the power to block UN General Assembly resolutions. Similarly, other UN bodies may refer matters to the ICJ for an advisory opinion. A legal opinion does not necessarily lend itself to the resolution of a dispute as potentially complex as the PRC's response to COVID-19, but some potentially constructive options exist. A referral premised upon accepted facts to the ICJ, for example, could be made to ascertain whether a breach of international law had occurred.

The options at the PCA are more limited. The Court is empowered to conduct "Commissions of Inquiry" in cases where a dispute exists between states but one or more party does not accept an arbitration. However, like an arbitration, a Commission of Inquiry requires the consent of both parties in order to commence. Hence, China could not be brought before a Commission of Inquiry unless it decided to participate, which seems unlikely.

⁹⁶ '6. United Nations Convention on the Law of the Sea', *United Nations Treaty Collection*, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, last visited: 28 March 2020.

⁹⁷ 'List of Cases', *International Tribunal for the Law of the Sea*, available at: <https://www.itlos.org/cases/list-of-cases/>, last visited: 28 March 2020.

⁹⁸ 'United Nations Convention on the Law of the Sea', *Permanent Court of Arbitration*, available at <https://pca-cpa.org/en/services/arbitration-services/unclos/>, last visited: 28 March 2020.

⁹⁹ 'Chapter XIV: The International Court of Justice' *United Nations*, available at: <https://www.un.org/en/sections/un-charter/chapter-xiv/index.html>, last visited: 28 March 2020.

2.2 Domestic Law

Avenues exist in domestic law, including in China. Outside China, however, potential legal remedies are severely hampered by the principle of Sovereign Immunity. However, that principle, which could once have been said to be an impenetrable barrier, has evolved over recent decades.¹⁰⁰

2.2.1 Chinese Courts

China's authoritarian system means that litigation that runs against the interests of the ruling elite is rarely successful. However, a small number of cases have been brought in which individuals and groups have sought to take action against state bodies in pursuit of healthcare outcomes. The Global Health and Human Rights Database, an index of health litigation cases maintained by Lawyers Collective and the O'Neill Institute for National and Global Health Law at Georgetown University, lists four cases in which individuals have brought such claims.¹⁰¹

The most comparable case was brought before the Hong Kong Special Administrative Region Court of First Instance in 2007. Here, the Clean Air Foundation Ltd brought suit against the government of the HKSAR for failure to adequately improve air quality. The claimants argued that the government's alleged failure breached both Hong Kong Basic Law and the "Right to Life" under the ICESCR. While the case was dismissed, the Court did rule that:

it was arguable that the right to life as provided for in Article 28 of the Basic Law and Article 2 of the Bill of Rights could extend to air pollution and impose a governmental duty to combat air pollution. Similarly, the Court held that it was arguable that the provision for the right to health in Article 12 of the ICESCR could create the same governmental duty.¹⁰²

Accordingly, there is precedent for bringing suit against the HKSAR – an ostensibly semi-autonomous branch of the Chinese State – in the Hong Kong courts for a breach of health rights derived from international law. This precedent could form the backbone of a claim made in the Hong Kong courts.

The Global Health and Human Rights Database lists three further cases that took place on the Chinese mainland in which claimants filed claims against state bodies. Two refer to claims related to contaminated blood in which claimants or relatives contracted HIV or Hepatitis C from blood supplied by state healthcare facilities. In both cases, courts ruled against the claimants either in part or in full.¹⁰³ A further case related to a matter of contract law relating to fertilisation treatment. In that case, the claimants successfully argued that the hospital breached the contract but were unsuccessful in securing large damages.¹⁰⁴

¹⁰⁰ Lord Lloyd-Jones, 'Forty Years On: State Immunity and the State Immunity Act 1978', *British Institute of International and Comparative Law Grotius Lecture, Goodenough College, London*, 18 October 2018, available at: <https://www.supremecourt.uk/docs/speech-181018.pdf>, last visited: 28 March 2020.

¹⁰¹ 'China', *Global Health and Human Rights Database*, available at: <https://www.globalhealthrights.org/category/asia/china/>, last visited: 28 March 2020.

¹⁰² 'Clean Air Foundation LTD and Another v. The Government of the HKSAR', *Global Health and Human Rights Database*, 2007, available at: <https://www.globalhealthrights.org/asia/clean-air-foundation-ltd-and-another-v-the-government-of-the-hksar/>, last visited: 28 March 2020. 'Wu Zhongze, et al. v. Shanghai Institute of Biological Products [WZZ等诉上海生物制品研究所人身损害赔偿案]', *Global Health and Human Rights Database*, available at: <https://www.globalhealthrights.org/asia/wu-zhongze-et-al-v-shanghai-institute-of-biological-products/>, last visited: 28 March 2020. See also,

¹⁰³ 'KZM v. Shanghai Institute of Biological Products [KZM诉上海生物制品研究所人身损害赔偿案]', *Global Health and Human Rights Database*, available at: <https://www.globalhealthrights.org/asia/kzm-v-shanghai-institute-of-biological-products/>, last visited: 28 March 2020.

¹⁰⁴ 'Zheng Xuefeng and Chen Guoqing v. People's Hospital of Jiangsu Province [郑雪峰、陈国青诉江苏省人民医院医疗服务合同纠纷案]', *Global Health and Human Rights Database*, available at: <https://www.globalhealthrights.org/asia/zheng-xuefeng-and-chen-guoqing-v-people-s-hospital-of-jiangsu-province/>, last visited: 28 March 2020.

2.2.2 English and Welsh Courts

In the UK, sovereign immunity is dictated by the State Immunity Act (1978). The Act affords broad privileges to states but, crucially, contains eight exemptions in addition to submitting legal proceedings. These are: commercial transactions and contracts to be performed in the UK; personal injuries and damage to property caused by an act or omission in the UK; ownership, possession and use of property in the UK; patents, trademarks and similar UK intellectual property; membership of UK-based corporate bodies; and maritime law.¹⁰⁵ These exemptions are similar to those in other jurisdictions, including Australia.¹⁰⁶

A case that addresses matters related to commercial transactions and contracts to be performed in the UK or indeed acts in the UK (including potentially disinformation) that led to personal injury or damage may be justiciable within the UK courts.

In the absence of such an exemption, the PRC would first need to submit to the jurisdiction of the UK Courts by written agreement. Prior to the issuing of any claim, in the absence of any statutory exemption, any prospective plaintiff would have to write to the Chinese Ministry of State to seek a waiver.

There has been some European litigation, notably at the European Court of Human Rights, that suggests that the extent to which sovereign immunity has been applied in the English courts is incompatible with Article 6 rights under the European Convention on Human Rights. There are noted disputes as to the extent of the States Immunity Act (1978) and its extent in precluding the right to a fair trial, as Lord Lloyd-Jones remarked in 2018.¹⁰⁷

2.2.3 US Federal Courts

US Federal Courts have long been used by individuals and corporations as a legal avenue to uphold the international rules-based order. COVID-19 is no different.

On 13 March, a class action lawsuit challenging the Chinese government's handling of the COVID-19 outbreak was filed at the US District Court for the Southern District of Florida.¹⁰⁸ The lawsuit has been brought initially by five plaintiffs, who argue that the Chinese government's mishandling of the Coronavirus outbreak contributed – at least in part – to it becoming a pandemic. This, they argue, has had a negative impact on the United States' economy, and otherwise caused “widespread injuries and damages”.¹⁰⁹

The plaintiffs have filed claims against the PRC; the National Health Commission of the PRC; the Ministry of Emergency Management of the PRC; the Ministry of Civil Affairs of the PRC; the People's Government of Hubei Province; and the People's Government of City of Wuhan, China. It is these governmental bodies, the lawsuit argues, that were in charge of overseeing the response to the Coronavirus pandemic at both national and regional level.

¹⁰⁵ 'State Immunity Act 1978', *legislation.gov.uk*, available at: <http://www.legislation.gov.uk/ukpga/1978/33>, last visited: 28 March 2020.

¹⁰⁶ 'Foreign States Immunities Act 1985', *Federal Register of Legislation*, available at: <https://www.legislation.gov.au/Details/C2016C00947>, last visited: 28 March 2020.

¹⁰⁷ Lloyd-Jones, 'Forty Years On', 18 October 2018.

¹⁰⁸ 'Class Action Complaint', *United States District Court Southern District of Florida*, available at: <https://images.law.com/contrib/content/uploads/documents/392/85094/Coronavirus-China-class-action.pdf>, last visited: 28 March 2020.

¹⁰⁹ *ibid*, p. 8.

The lawsuit suggests a number of reasons for the outbreak, including the widely discredited theory that COVID-19 was developed at a biological weapons laboratory, but it does not argue that the outbreak started one way or another, or that one country or another was responsible for the spread of the outbreak. Instead, the lawsuit simply argues that the Chinese government did not handle the initial outbreak correctly. This mishandling, the lawsuit claims, is why the outbreak is now a pandemic.

The lawsuit alleges that the Chinese government:

acting from their own economic self-interest and looking to protect their place as a super-power, failed to report the outbreak as quickly as they could have; underreported cases; and failed to contain the outbreak despite knowing the seriousness of the situation.¹¹⁰

The obvious issue, as noted above, is that the government of China is protected by the doctrine of sovereign immunity, which the US took to be absolute in 1952. This led to the Foreign Sovereign Immunities Act (FSIA) being passed in 1976. The Florida lawsuit attempts to get around this by asserting that an exception applies within the FSIA for commercial activities.

The FSIA's parameters were amended in 2016, when the Justice Against Sponsors of Terrorism Act (JASTA) was passed, which narrows the scope of the legal doctrine of foreign sovereign immunity.¹¹¹ Specifically, the Act allows the court jurisdiction over foreign powers in actions brought for injury in the US caused by an act of terrorism.

This has allowed some victims of the 9/11 terrorist attacks and families of victims to bring a lawsuit in the Southern District of New York against Saudi Arabia and the Saudi High Commission for relief in Bosnia and Herzegovina for – allegedly – “directly and knowingly assist[ing] the hijackers and plotters who carried out the attacks”. The lawsuit was initially brought in 2003 but was dismissed because of sovereign immunity. The plaintiffs appealed, and during their appeal JASTA was adopted. The case was remanded to the district court to consider Saudi Arabia's immunity in light of the new legislation,¹¹² and in 2018 a judge denied Saudi Arabia's motion to dismiss the lawsuit. The case is ongoing.

In much the same way as FSIA was amended in 2016, the exemptions contained within the Act could be further expanded by Congress so as to cover further forms of liability, which could apply in the case of Covid-19. Lawmakers who seek to develop mechanisms to hold China judicially responsible could seek to introduce new legislation for this purpose. They could also revisit the US reservation to the IHRs to remove any obstacle to the Regulations being used in pursuit of judicially enforceable private rights.

An additional note is that the principle of sovereign immunity applies only to the State. If there were to be non-State or State-linked bodies in China who acted in a manner that could engage a claim in a domestic court, avenues for domestic claims may arise.

¹¹⁰ *ibid.*

¹¹¹ 'Justice Against Sponsors of Terrorism Act', *US Government*, available at: <https://www.govinfo.gov/content/pkg/PLAW-114publ222/pdf/PLAW-114publ222.pdf>, last visited: 28 March 2020.

¹¹² 'Consolidated Complaint', *United States District Court Southern District of New York*, available at: <https://static1.squarespace.com/static/57fbbfa88419c2de35c1639d/t/58d03556ff7c50abde86720f/1490040171270/Ashton-v-KSA-2017.pdf>, last visited: 28 March 2020.

2.3 Key Points

A number of potential legal avenues are conceivably open to both states and individuals to seek compensation for damages wrought by wrongful acts in the spread of COVID-19. This section has identified at least ten of these. They are:

1. A dispute brought to the WHO that China has breached its obligations under the IHR.
2. Claims made at the International Court of Justice.
3. Disputes opened at the Permanent Court of Arbitration.
4. Actions brought under Bilateral Investment Treaties by individuals, corporations or States.
5. Actions taken under the United Nations Convention on the Law of the Sea to either arbitration or the International Tribunal.
6. Action taken under WTO rules.
7. Claims brought before the Hong Kong Courts that the actions of state bodies breached rights under the ICESCR.
8. Claims brought in the US Federal Courts against the Chinese State that fit an exemption within the FSIA.
9. Claims brought in the US Federal Courts against commercial entities linked to the Chinese State.
10. Claims brought in the English courts against commercial entities linked to the Chinese State.

In addition, should China be unwilling to submit to international justice and other avenues, both ICJ advisory opinions and PCA Commissions of Inquiry offer opportunities to determine facts and apportion blame.

3. THE ECONOMIC COST OF CHINA'S NEGLIGENCE

While China's regime's negligence has resulted – and will continue to result – in the significant loss of human life, the economic costs are also likely to be significant. According to the Organisation for Economic Cooperation and Development (OECD), global economic growth is expected to decline as a result of the broader impact of Coronavirus.¹¹³ Some countries are predicted to enter recession during the second quarter of 2020 and to experience no growth or even recession during 2020. As Table 1 shows, Italy and Japan are expected to be hit the hardest, with annual projected growth rates of -0.4% and -0.2%, respectively, for 2020.¹¹⁴ Consequently, the OECD has warned governments around the world to “act swiftly and forcefully to overcome the COVID-19 and its economic impact”.¹¹⁵

Table 1:
OECD Economic Forecasts for China and the G7 in 2020, October 2019 v. March 2020

Country	October 2019 forecast for 2020	March 2020 forecast for 2020	Reduction
China	4.9%	4.1%	-0.8%
Canada	1.3%	1.0%	-0.3%
France	0.9%	0.6%	-0.3%
Germany	0.3%	0.2%	-0.1%
Italy	0.0%	-0.4%	-0.4%
Japan	0.2%	-0.2%	-0.4%
United Kingdom	0.8%	0.6%	-0.2%
United States	1.9%	1.8%	-0.1%

COVID-19 will not only undermine global economic growth, but it will also force the governments of major advanced economies – such as those of the G7 – to take robust economic measures to overcome the human and economic cost of the contagion. As the world's major advanced economies shut down and entire nations go into various forms of lockdown, measures to provide enhanced social security will have been required. While these measures are far from complete, initial steps have been taken, with the majority having been put in place during the third week of March 2020.

On 18 March 2020, the government of Justin Trudeau in Canada outlined its economic response to COVID-19. This package includes more than £47.9 billion (CAN\$82 billion) in direct measures in support of Canada's healthcare and social security system, with an additional £291.8 billion (CAN\$500 billion) pledged in loan guarantees and other financial support.¹¹⁶ To put this in perspective, Canada's Gross National Income (GNI) amounted to £1.3 trillion (CAN\$2.2 trillion) in 2018.¹¹⁷

¹¹³ 'Coronavirus: The world economy at risk', *Organisation for Economic Cooperation and Development*, March 2020, available at: <https://www.oecd-ilibrary.org/docserver/7969896b-en.pdf>, last visited: 28 March 2020.

¹¹⁴ *ibid.*, p. 2.

¹¹⁵ *ibid.*

¹¹⁶ 'Prime Minister announces more support for workers and businesses through Canada's COVID-19 Economic Response Plan', *Government of Canada*, 18 March 2020, available at: <https://pm.gc.ca/en/news/news-releases/2020/03/18/prime-minister-announces-more-support-workers-and-businesses-through>, last visited: 28 March 2020.

¹¹⁷ 'GNI (current LCU) – Canada', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=CA>, last visited: 28 March 2020.

In France, President Emmanuel Macron pledged more than £272.9 billion (€300 billion) in financial assistance to help underwrite loan guarantees on 16 March 2020. This was followed a day later, on 17 March, by an announcement by Bruno Le Maire, the Finance Minister, that the French treasury would provide an additional £40.9 billion (€45 billion) in direct assistance to France's health and social security systems.¹¹⁸ In 2018, France's GNI was £2.2 trillion (€2.4 trillion).¹¹⁹

Germany, under Chancellor Angela Merkel, approved a national response to COVID-19 in late March 2020. After a fortnight of speculation, the German government "launched the largest assistance package in the history of the Federal Republic".¹²⁰ On 25 and 26 March 2020, the German Parliament approved a package that included £44.8 billion (€50 billion) of support for micro businesses and self-employed persons; £54.9 billion (€61.3 billion) (with an additional £4.5 billion (€5 billion) from health insurance providers) to cover healthcare; up to £736.3 billion (€822 billion) in support of loan programmes; £89.6 billion (€100 billion) to protect large companies from foreign takeovers; £89.6 billion (€100 billion) to refinance loan programmes that have already been adopted; and £6.7 billion (€7.5 billion) to allow self-employed persons to access basic benefits for jobseekers.¹²¹

Italy, hit hardest globally in terms of the death rate from COVID-19, announced a broad rescue package on 19 March 2020.¹²² The Italian Ministry of Finance's initial response is worth £22.7 billion (€25 billion), which includes £2.9 billion (€3.2 billion) to cover health and civil protection, £9.4 billion (€10.3 billion) in social security, £1.5 billion (€1.6 billion) for tax incentives, and £4.6 billion (€5.1 billion) to pump up to £318.3 billion (€350 billion) of liquidity to help businesses and households.¹²³ In 2018, Italy's GNI was £1.6 trillion (€1.8 trillion).¹²⁴

The government of Japan has yet to announce its formal package of measures, but they are expected to run into trillions of yen, with £113.4 billion (¥15 trillion) of direct measures and a further £113.4 billion (¥15 trillion) of indirect measures, such as loan guarantees.¹²⁵ Japan will take a particularly heavy hit in 2020 because it was due to host the 2020 Olympic Games in Tokyo, which have been postponed until Summer 2021.¹²⁶ Japan is unlikely to

¹¹⁸ Braun, E., 'France injects billions into stimulus plan amid coronavirus chaos', *Politico*, 21 March 2020, available at: <https://www.politico.eu/article/france-injects-billions-into-stimulus-plan-amid-Coronavirus-chaos-bruno-le-maire-economic-catastrophe/>, last visited: 28 March 2020.

¹¹⁹ 'GNI (current LCU) - France', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=FR>, last visited: 28 March 2020.

¹²⁰ 'FAQs: Multibillion-euro protective shield for Germany', *Federal Ministry of Finance (Germany)*, 27 March 2020, available at: <https://www.bundesfinanzministerium.de/Content/EN/FAQ/faq-corona.html>, last visited: 28 March 2020.

¹²¹ *ibid.*

¹²² As of 25 March 2020, Italy had reported more than 6,200 deaths from Coronavirus. See: Gulland, A., R. Moynihan and B. Ridly, 'Coronavirus world map: live tracker of reported Covid-19 cases and deaths', *The Telegraph*, 28 March 2020, available at: <https://www.telegraph.co.uk/global-health/science-and-disease/Coronavirus-world-map-live-covid-19/>, last visited: 28 March 2020.

¹²³ 'Protect health, support the economy, preserve employment levels and incomes', *Ministry of the Economy and Finance (Italy)*, 19 March 2020, available at: <http://www.mef.gov.it/en/inevidenza/Protect-health-support-the-economy-preserve-employment-levels-and-incomes-00001/>, last visited: 28 March 2020.

¹²⁴ 'GNI (current LCU) - Italy', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=IT>, last visited: 28 March 2020.

¹²⁵ Kihara, L., 'Japan to spend over \$137 billion as virus hits economy, BOJ eyes more stimulus', *Reuters*, 23 March 2020, available at: <https://uk.reuters.com/article/us-health-Coronavirus-japan-debt/japan-to-spend-over-137-billion-as-virus-hits-economy-boj-eyes-more-stimulus-idUKKBN21A16L>, last visited: 28 March 2020.

¹²⁶ 'Joint statement from the International Olympic Committee and the Tokyo 2020 Organising Committee', *Olympic Games*, 24 March 2020, available at: <https://www.olympic.org/news/joint-statement-from-the-international-olympic-committee-and-the-tokyo-2020-organising-committee>, last visited: 28 March 2020.

recoup the £11 billion (¥1.45 trillion) it has sunk into the games, not least because fewer tourists are expected owing to the global economic fallout caused by the virus.¹²⁷ Japan's GNI was £4.3 trillion (¥ 569.3 trillion) in 2018.¹²⁸

On 11 March 2020, Chancellor Rishi Sunak delivered his budget for 2020, outlining the first £12 billion in support for COVID-19 for the UK. £5 billion was earmarked to cover health and social security, with an additional £7 billion to support business and the economy.¹²⁹ Later, on 17 March 2020, the Chancellor announced that the British government's response would expand by an additional £330 billion in broader support of the economy, particularly in terms of underwriting loan guarantees.¹³⁰ A final package of £9 billion was announced on 26 March 2020 to cover the income of self-employed workers.¹³¹ In 2018, the GNI of the UK stood at £2.1 trillion.¹³²

The US response to COVID-19 has emerged over a series of phases, each designed to provide support to America's health and social security systems. The first and second phases provided £7 billion (US\$8.3 billion) and £84.2 billion (US\$100 billion), respectively, in assistance, while the third phase, the Coronavirus Aid, Relief, and Economic Security Act, approved by the US Senate and US House of Representatives on 25 and 27 March, respectively, provides in excess of £842.1 billion (US\$1 trillion) in fiscal stimulus.¹³³ This third phase, one of the largest in US history, would be broken down into £421 billion (US\$500 billion) in economic impact payments, £252.6 billion (US\$300 billion) in small business interruption loans, £126.3 billion (US\$150 billion) to help industries (e.g. hotels, malls) directly affected by COVID-19 and £42.1 billion (US\$50 billion) in bailouts for airlines.¹³⁴ US GNI was £17.5 trillion (US\$20.8 trillion) in 2018.¹³⁵

While it is far from clear what the final cost of COVID-19 will be, particularly in terms of economic growth, it is possible to calculate the cost of the initial economic responses of the G7 nations. Together, the G7 will spend more than £3.2 trillion (US\$4 trillion) to meet the direct economic cost of COVID-19, including health and social security, as well as underwriting loan guarantees and broader financial support to prevent the global economy from entering a period of deep recession.

¹²⁷ Cancian, D., 'Postponing Olympic Games will deal serious blow to Japanese economy and plunge country into recession, analysts warn', *Newsweek*, 24 March 2020, available at: <https://www.newsweek.com/olympics-games-2020-tokyo-postponed-financial-impact-ioc-1493926>, last visited: 28 March 2020..

¹²⁸ 'GNI (current LCU) - Japan', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=JP>, last visited: 28 March 2020.

¹²⁹ 'Chancellor delivers Budget 2020', *HM Treasury*, 11 March 2020, available at: <https://www.gov.uk/government/news/chancellor-delivers-budget-2020>, last visited: 28 March 2020.

¹³⁰ 'Chancellor announces additional support to protect businesses', *HM Treasury*, available at: <https://www.gov.uk/government/news/chancellor-announces-additional-support-to-protect-businesses>, last visited: 28 March 2020.

¹³¹ Morales, A., L. Meakin and A. Atkinson, 'UK Virus Aid Package Beats Financial Crisis Stimulus', *Bloomberg*, 27 March 2020, available at: <https://www.bloomberg.com/news/articles/2020-03-26/u-k-s-sunak-pledges-coronavirus-support-for-self-employed>, last visited: 27 March 2020.

¹³² 'GNI (current LCU) - United Kingdom', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=GB>, last visited: 28 March 2020.

¹³³ Treene, A., 'The growing coronavirus stimulus packages', *Axios*, 19 March 2020, available at: <https://www.axios.com/Coronavirus-stimulus-packages-compared-7613a16f-56d3-4522-a841-23a82ffcb46.html>, last visited: 28 March 2020.

¹³⁴ Treene, A., 'McConnell releases Phase 3 coronavirus stimulus proposal', *Axios*, 19 March 2020, available at: <https://www.axios.com/mcconnell-Coronavirus-stimulus-bill-4d9aa679-d6a5-446a-a911-bc3b966c5a4e.html>, last visited: 28 March 2020.

¹³⁵ 'GNI (current LCU) - United States', *The World Bank*, 2020, available at: <https://data.worldbank.org/indicator/NY.GNP.MKTP.CN?locations=US>, last visited: 28 March 2020.

And the figure of £3.2 trillion only represents the outlay of the G7, which itself no longer represents the seven largest economies in the world nor all of the countries which have, thus far, been most affected by the outbreak. Other large economies are also likely to be hit hard. Australia and Poland, for example, have announced £29.9 billion (AU\$60.3 billion) and £42.3 billion (zł1212 billion) in economic measures, respectively.¹³⁶ Given how many countries other than the G7 (and Australia and Poland) will be affected by COVID-19, the figure of £3.2 trillion may be eclipsed several times over.

Meanwhile, as Table 1 shows, China is likely to suffer a far smaller reduction in a far higher level of economic growth, despite being the place where COVID-19 started.¹³⁷

¹³⁶ For Australia's measures, see 'Economic Response to the Coronavirus', *Australian Government*, 2020, available at: https://treasury.gov.au/sites/default/files/2020-03/Overview-Economic_Response_to_the_Coronavirus.pdf, last visited: 28 March 2020. For Poland's response, see 'Premier: Tarcza antykryzysowa pomo e przeds biorcom i pracownikom [Prime Minister: The anti-crisis shield will help entrepreneurs and employees]', *Prime Minister of Poland*, available at: <https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-tarcza-antykryzysowa-pomoze-przedsiebiorcom-i-pracownikom.html>, last visited: 28 March 2020.

¹³⁷ 'Coronavirus: The world economy at risk', *OECD*, (2020), available at: <https://www.oecd-ilibrary.org/docserver/7969896b-en.pdf>, last visited: 25 March 2020.

4. CONCLUSION

In a world in which authoritarian states often act with impunity, it is tempting to forget that the rules-based international order places obligations on everyone. The Peoples' Republic of China (PRC) is no exception to this rule. International law – in the form of Treaties, Covenants and Charters – places obligations on China, just as much as it does on the democracies of the West.

It is without doubt that the early reporting of COVID-19 was slower than it might have been. Early cases emerged between mid-November and early December. By 27 December, one Chinese doctor had confirmed that the cause of this infection was a novel Coronavirus. By 11 January, seven health workers had become infected, proving beyond doubt that the disease spreads among humans. It was not until 23 January that Wuhan, the source of the outbreak, was put into quarantine. The day before, a Chinese couple had arrived in Italy, to become that country's first COVID-19 cases. During the run up to the lockdown, five million people – equivalent to a city five times the size of Birmingham – left Wuhan.¹³⁸ Eight days later, the first two cases were identified in the UK.

In prospective pandemic scenarios, rapid reporting matters. To contain a virus, swift action based on accurate information is required. Accordingly, the world instituted the International Health Regulations, which require states to provide prompt, accurate and full accounts of emerging infections. This paper makes a convincing case that, in its early response, Wuhan and Hubei breached these Regulations. It also makes clear that responsibility goes to the top of the regime. Accordingly, it appears more than probable that the CCP's response to COVID-19 was in breach of international law.

The Chinese government's negligence has cost the G7 at least £3.2 trillion (US\$4 trillion) – and the wider world a presently incalculable sum.

While it appears evident that the PRC is in patent breach of international law, and that this breach contributed to the spread of the disease, it does not necessarily follow that China can be easily held to account. China has for many decades fastidiously avoided forms of international jurisdiction. Yet the field of public international law has developed something of an art form of identifying inventive legal avenues to pursue legal accountability.

This paper identifies ten possible legal avenues by which the wider world can pursue China for the damages inflicted by its response (or lack of) to the COVID-19 outbreak. Policymakers may wish to pursue them for two reasons.

First, the costs of responding to this pandemic are vast. They extend far beyond the costs incurred by governments. They will have to – at some point – be repaid, presumably by taxpayers. Given that these costs were incurred – at least in part – as a consequence of wrongful acts by a nation state, many will consider it just that that state pays for the consequences.

The second is that in order for the rules-based international order to mean anything, it must be upheld. Revisionist powers like Russia and China have exploited the world's inability to enforce norms for some time. The COVID-19 outbreak is different, however. Here, the breach of international law has devastated the global economy, killed thousands and changed the lives of millions. If the world does not act in response to this breach of international law, that begs the question when it will.

¹³⁸ 2011 Census.

Taking action would require both courage and global solidarity. China has a record for responding aggressively to threats on the world stage. Consequently, it would be advantageous for any action to carry the support of the widest possible range of claimants, potentially acting under the auspices of an international body. Should this not be possible, nations may be required to stand alone in the defence of the rules-based international order. The battle that would ensue would be nothing, if not historic.

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By Matthew Henderson, Dr Alan Mendoza,
Dr Andrew Foxall, James Rogers,
and Sam Armstrong

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The Henry Jackson Society
Millbank Tower, 21-24 Millbank
London SW1P 4QP, UK

www.henryjacksonsociety.org



April 2020

