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The Sword, The Shield, and The Jab: How Nato Can Bypass the UN and World Health Organization to Help Control and Prevent Future Pandemics

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THE SWORD, THE SHIELD, AND THE JAB: HOW NATO CAN BYPASS THE UN AND WORLD HEALTH ORGANIZATION TO HELP CONTROL AND PREVENT FUTURE PANDEMICS

*Aaron Earlywine**

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* Thank you to all my friends up here in Madison, especially those who put up with my typing. Go Badgers!

INTRODUCTION: ROGUE NATIONS AND VIRAL CONTAGIONS

The post-COVID world is one riven with uncertainties and a hyper awareness of disease and pandemic risks. There has been a realization, or perhaps more accurately, a re-realization, that disease is both a national and international affair. There are clearly bad actors on the world stage, and the institutions meant to mitigate risk and provide assistance and effective responses at the international level have proven themselves not up to the task. The World Health Organization (WHO)—the most obvious example of those institutions—has been racked by questionable choices in leadership, execution, and in the most recent global pandemic displayed a deference and partiality to China that bordered on collusion.[1]

WHO is not alone in its ineffective operation. The United Nations (UN) itself, by its very nature and structure, has its hands almost preemptively tied. Indeed, China has a veto power on the United Nations Security Council (UNSC), which makes any substantial action against it or even the most performative of condemnations almost guaranteed to be moot.[2] Consider that Russia exercised its veto in the recent Security Council resolution condemning the annexation of Ukraine states by Putin's forces.[3] Thus, the UN has essentially no meaningful position, positive or negative, on a war that has been almost universally condemned and decried as illegal and near genocidal.

The fraying of the international order and the cooling of relations between many influential countries presents a grave risk of an outbreak going unreported or overlooked. Given Russia's current estrangement from the international community, it seems unlikely that Russia will be particularly cooperative in the future. This raises the potential for a serious lapse or gap in international monitoring, awareness, and

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1. Salvatore Babones, *Yes, Blame WHO for Its Disastrous Coronoavirus Response*, FOREIGN POL'Y MAG. (May 27, 2020), https://foreignpolicy.com/2020/05/27/who-health-china-coronavirus-tedros/.

2. *The UN Security Council,* COUNCIL ON FOREIGN REL. (Feb. 28, 2023), https://www.cfr.org/backgrounder/un-security-council [hereinafter *CFR*].

3. *Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, U.N. NEWS (Sep. 30, 2022), https://news.un.org/en/story/2022/09/1129102.

containment given the potential for the release of virulent and novel, or old viral antagonists, from Siberia's thawing permafrost.[4] Russia could become the new Sick Man of Europe, and by the time the rest of the continent realizes, it might be too late to mount an effective response.

Therefore, in order to more effectively respond to future pandemic risks, and to more effectively incentivize, and if necessary, enforce disease containment, reporting, and management standards, the North Atlantic Treaty Organization (NATO) countries should operate as a block on the international stage, and engage in Preemptive Quarantines, compliant with international norms and laws, where needed. With that in mind, this article will begin with Part I—an examination of COVID-19 and the relevant responses or lack thereof. Part II of this article will analyze existing international obligations related to disease outbreak prevention and management. Part II will also lay out the foundation for a Preemptive Quarantine framework and how NATO could effectuate such a scheme.

I. BACKGROUND: THE ESTABLISHMENT AND COLLAPSE OF WHO AND THE IHR

It is no exaggeration to say that the COVID-19 pandemic and the associated global response will go down as one of the most influential events in modern history. For the current Millennial and Gen-Z generations, COVID-19 has altered and shaped their world, and its ramifications continue to be long reaching and near omnipresent at the personal level.[5] And yet it did not have to be this way. The international structures and norms established to prevent and manage disease and cross-border pandemics failed. This failure was both a passively systemic one, resulting from limitations inherent to governing the international community, and an active if not deliberate failure stemming from corruption and mismanagement.

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4. Robinson Meyer, *The Zombie Diseases of Climate Change*, THE ATLANTIC (Nov. 6, 2017), https://www.theatlantic.com/science/archive/2017/11/the-zombie-diseases-of-climate-change/544274/.

5. *See generally* Caitlin Gilbert & Lindsey Bever, *Gyms, pets and takeout: How the pandemic has shifted daily life*, THE WASH. POST (Mar. 11, 2023), https://www.washingtonpost.com/wellness/interactive/2023/pandemic-changes-daily-life/.

A. The Old Guard and the Old Ways

Quarantine as a word enjoyed a linguistic, political, and vernacular-usage renaissance during the COVID-19 era. Quarantine is only one way to combat diseases, but it is an old and well-established tool with known examples of formal quarantine dating back to the fourteenth century and the Black Death.[6] Specifically, in 1377, the city of Dubrovnik mandated what historians assert were the world's first mandatory public health measures specific to quarantine.[7] The city's council decreed "those who come from plague infested areas shall not enter Dubrovnik or its districts unless they previously spend a month [in isolation] . . . for the purpose of disinfection."[8] It was a decision calculated by more than public health concerns. Indeed, rather than "sacrificing all the economic benefits of exchange, Dubrovnik's elders created a buffer, delaying the arrival of potentially infected people and goods into the city until they were proven safe."[9] The modern world found quarantine to be as relevant and important now as it was for the medieval and likely ancient worlds as well. Yet, the modern world is much faster and more globalized. The Dubrovnik elders contended with diseases that could only move as fast as a ship or horse could carry an infected host. Moreover, the volume of individual travel and intercourse between nations was vastly smaller in 1377 than today, whereby ship, plane, train, or automobile, the world's population crosses borders with regularity and relative ease.

The evolution and growth of the international globalized order did, however, also lead to a recognition of a need for an international health body. Responding to cholera outbreaks across Europe, the first International Sanitary Convention convened in 1851 with the intention of attempting to formalize international cooperation for disease control.[10] Fourteen subsequent conventions from 1851 to 1944 failed to reach a consensus on how best to accomplish this task, but in 1907 an

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6. GEOFF MANAUGH & NICOLA TWILLEY, UNTIL PROVEN SAFE 16-17 (2021).
7. *Id.* at 17.
8. *Id.*
9. *Id.*
10. *See* SARA E. DAVIES, ADAM KAMRADT-SCOTT, & SIMON RUSHTON, DISEASE DIPLOMACY: INTERNATIONAL NORMS AND GLOBAL HEALTH SECURITY 4 (2015).

agreement was reached regarding the need "to establish a new international organization to facilitate data collection and to alert the international community to disease outbreaks."[11] Following the establishment of the WHO in 1948, the International Sanitary Regulations were quickly adopted in 1951.[12] These regulations created a binding "regulatory framework [that required] governments report to the WHO outbreaks of particular infectious diseases and that such information could then be disseminated to other states to allow them to put appropriate measures in place."[13]

The most significant changes to the International Health Regulations (IHR) came after 2005, in response to the Severe Acute Respiratory Syndrome (SARS) outbreak, and specifically in response to the Chinese government's initial cover up.[14] The authors of *Disease Diplomacy* contend that "the adoption of the revised IHR in 2005 represented the formal acceptance by states of new behavioral expectations. . . that most had already adhered to—without any formal requirement to do so— during SARS."[15] In stark contrast to the general noncompliance to and obsolescence of the IHR during the 1980s and 90s, the new IHR signified an emerging "feeling. . . among states that outbreak information was to be shared and that when a government failed to live up to that expectation, other governments could legitimately institute travel and trade measures to contain the outbreak in the place of the affected state."[16]

Specifically, the new Article 6 of the IHR seeks to prevent domestic outbreaks from becoming international pandemics by requiring WHO member states to notify that same agency "of all events which may constitute a public health emergency of

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11. *Id.*
12. *Id.* at 45.
13. *Id.* at 5.
14. *See* David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. OF INT'L L. 325 (2005), https://academic.oup.com/chinesejil/article/4/2/325/490058; *see also China accused of Sars cover-up*, THE GUARDIAN (Apr. 9, 2003), https://www.theguardian.com/world/2003/apr/09/sars.china; *see also* Kelly Ng, *Jiang Yanyong: Whistleblower doctor who exposed China's Sars cover-up dies*, BBC (Mar. 15, 2023), https://www.bbc.com/news/world-asia-china-64960693.
15. Davies, *supra* note 10, at 44-45.
16. *Id.* at 44.

international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events," and ideally within 24 hours.[17] Article 6 (2) implores members "communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed," etc. . .[18] And in the event of a novel strain or unusual development, Article 7 covers such occurrences:

> If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.[19]

Still, the IHR though well-reasoned and comprehensive, has severe limitations and gaps. Notably, the IHR and WHO in general, lack enforcement or punishment mechanisms to compel conformity and adherence to the IHR or to WHO's advice.[20] Even the reporting mechanism itself must deal with the unfortunate reality, as repeatedly demonstrated by past outbreaks, epidemics, and pandemics, "[that] there are risks associated with transparently reporting disease outbreaks, particularly in terms of economic and reputational damage."[21] Legitimate and reasonable measures by other countries can harm the reporting nation both economically, and "certain disease outbreaks (e.g., polio, cholera, plague) can still have a detrimental impact on a

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17. Viti Bansal, *Can China be Held Liable for the COVID-19 Global Pandemic?*, CAMBRIDGE INT'L L. J. BLOG (Aug. 30, 2020), http://cilj.co.uk/2020/08/30/can-china-be-held-liable-for-the-COVID-19-global-pandemic/; WHO, *International Health Regulations* 12 (3d ed. 2005), https://www.who.int/publications/i/item/9789241580496 [*hereinafter* WHO-IHR].

18. *WHO-IHR, supra* note 17, at *12.*

19. *Id.*

20. Davies, *supra* note 10, at 125.

21. *Id.* at 118.

country's reputation and standing, even if no other government responds with disproportionate trade and travel measures."[22]

Without these enforcement mechanisms, and with self-interested motives potentially leading to subversion of the IHR and best practice, the international court system would appear to be a measure of last resort. The 1938 Trail Smelter case offers an example of international law and arbitration in work—and therefore stands in contrast to the situation faced by individuals and nations in the context of disease. In 1938, the United States sued Canada over air pollution and fumes emitting from a smelter close to the border which the US claimed had done damage to both resources, infrastructure, and individuals.[23] The case and the arbitration documents included fourteen articles clearly establishing the Tribunal's power and clearly enunciating each nation's agreement to abide by the Tribunal's authority and decision.[24] The remainder of the case itself is rather unremarkable, except for its description of the rights and duties states owe to each other. "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction," the Tribunal declared, suggesting "this right (sovereignty) excludes. . . not only the usurpation and exercise of sovereign rights (of another State). . . but also, an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants."[25] Still, despite such grandiose ideas, the crucial aspect of this case is its tangibility and directness. Canada and its agents caused a tangible, measurable, and isolated injury to the US and its agents or nationals. This injury was assessed, valued, and a remedy or injunction was issued. Moreover, for the case to even exist required both states to agree to the jurisdiction and legitimacy of the Tribunal and its decisions.

Disease related court or legal actions, certainly at the international level, do not fall into this easy mold. There is an indirectness, randomness, and a scale that does not translate well to a court case. Moreover, holding a nation accountable for

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22. *Id.*

23. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1907-10 (Perm. Ct. Arb. 1941).

24. *See generally id.*

25. *Id.* at 1963.

its mismanagement and obfuscation is essentially impossible due to the doctrine of sovereign immunity—"a principle of customary international law, by virtue of which one sovereign state cannot be sued before the courts of another sovereign state without its consent."[26] This is a principle the US itself has adhered to as well, since 1976 with the Foreign Sovereign Immunities Act, which would in most cases prevent another government from being sued in a US court.[27]

Following the COVID-19 pandemic, lawsuits of various types and of various allegations—from violating provisions of the International Health Regulations, to endangering humanity, to committing acts against humanity—have been filed or proposed against China, specifically through the International Court of Justice and the Permanent Court of Arbitration.[28] These will all likely fail in their current form and means. The simple truth of the matter is that unless a nation wants to take responsibility or is inclined to subject itself to potentially damning and costly decisions at the hands of third parties, recompense in such a circumstance will be near impossible to obtain through the international legal system. This lack of an enforcement mechanism from most relevant agencies and angles certainly undermines the usefulness and viability of the IHR when confronted with willful noncompliance, as will be outlined below. Moreover, WHO itself has also been undermined, to disastrous results for the world health apparatus.

B. WHO('s) to Blame?

China's handling of COVID-19 in its initial stages objectively left much to be desired, and the Chinese Communist Party's (CCP) reluctance to share information in a timely and forthcoming manner proved detrimental to an effective response. It is well documented during the onset of COVID-19,

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26. Bansal, *supra* note 17.

27. *Foreign Sovereign Immunities Act*, THOMSON REUTERS PRAC. L., https://uk.practicallaw.thomsonreuters.com/2-502-5645?transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Sep. 26, 2023).

28. William Julie et. al., *Covid-19: potential legal actions against China*, INT'L BAR ASS'N https://www.ibanet.org/article/D1B023C0-4033-4197-B68D-C11301478271 (last visited Sep. 26, 2023).

Chinese authorities spent critical time denying, delaying, and finger pointing.[29] It jailed or censored medical professionals who attempted to alert the international, or even local community about the novel virus—forcing one prominent whistleblower to sign a letter claiming "he had made 'false comments.'"[30] Indeed this is a pattern for China, whose obfuscation and obstructionism during the SARS epidemic prompted the adoption of the new and current set of IHR and the aforementioned Article 6.[31]

The *New York Times'* investigation into the early stages of COVID-19 found the "[Chinese] government's initial handling of the epidemic allowed the virus to gain a tenacious hold. At critical moments, officials chose to put secrecy and order ahead of openly confronting the growing crisis to avoid public alarm and political embarrassment."[32] Damning examples include China announcing that there had been no new cases of COVID-19 between January fifth and seventeenth when hindsight and later investigation revealed that the outbreak was rampant in the city of Wuhan during that time.[33] Only by mid-February did China disclose that 1,700 healthcare workers were infected.[34] "Such information," writes James Kraska for *War on the Rocks,* was essential to ascertain the vulnerability of medical workers

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29. Annie Sparrow, *The Chinese Government's Cover-Up Killed Health Care Workers Worldwide*, FOREIGN POL'Y MAG. (Mar. 18, 2021, 2:26 PM), https://foreignpolicy.com/2021/03/18/china-covid-19-killed-health-care-workers-worldwide/; Shawn Yuan, *Inside the Early Days of Chin's Coronavirus Cover-up*, WIRED (May 1, 2020, 7:00 AM) https://www.wired.com/story/inside-the-early-days-of-chinas-coronavirus-coverup/.

30. James Kraska, *China is Legally Responsible For COVID-19 Damage and Claims Could Be In The Trillions,* WAR ON THE ROCKS (Mar. 23, 2020), https://warontherocks.com/2020/03/china-is-legally-responsible-for-COVID-19-damage-and-claims-could-be-in-the-trillions/.

31. *See id.*

32. Chris Buckely & Steven Lee Myers, *As New Coronavirus Spread, China's Old Habits Delayed Fight*, N.Y. TIMES (Feb. 1, 2020), https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage.

33. Salvatore Babones, *Yes, Blame WHO for Its Disastrous Coronoavirus Response,* FOREIGN POL'Y MAG. (May 27, 2020), https://foreignpolicy.com/2020/05/27/who-health-china-coronavirus-tedros/.

34. Kraska, s*upra* note 30.

and to "[understand] transmission patterns and to devise strategies to contain the virus."[35]

But China alone cannot take all the responsibility of the botched international response. Who else is to blame? Well. . . WHO. Because of either corruption, influence peddling, or incompetence, WHO officials applauded China for its openness and its response when in fact China was repeatedly delaying information, rejecting assistance from WHO, or flat out lying to the international community.[36] Indeed, WHO often perpetuated those same lies or half-truths. For instance, on January 12, using information it had gleaned from Chinese officials, "WHO assured the world… that there was "no clear evidence of human to human transmission.'"[37] Many countries followed WHO's advice and guidance. This led to lax travel restrictions and reopening procedures, followed by far-too-late closures once those countries realized WHO did not know what it was talking about.[38] Many of these vulnerable countries were also poor nations with "insufficient public health infrastructure and [a] dependen[ce] on the support of international organizations."[39]

Tedros Adhanom Ghebreyesys, the WHO Director-General and the beneficiary of a well-documented Chinese influence campaign, exemplifies the degradation in the organization's effectiveness and non-partisan legitimacy.[40] Writing for *Foreign Policy Magazine*, Salvatore Babones, an adjunct scholar at the Center for Independent Studies in Sydney, addresses Tedros' errors. Babones decries, "as late as Feb. 26, Tedros gave a speech in which, beggaring belief, he claimed that 'we are not witnessing sustained and intensive community transmission of this virus, and we are not witnessing large-scale severe disease or death.'"[41] Meanwhile, on the same day, his own organization declared that COVID-19 posed a high risk to the whole world, and simultaneously confirmed 81,109 coronavirus cases and

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35. *Id.*
36. *See id.*
37. Babones, *supra* note 33.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

2,762 deaths across thirty-eight countries.[42] Three days later WHO once again continued to "advise against the application of travel or trade restrictions to countries experiencing COVID-19 outbreaks."[43] This contradictory and certainly medically dubious stance was part of a larger trend from Tedros and his organization. Earlier in February of 2020, Tedros praised the Chinese response, claiming "[if] it weren't for China, the number of cases outside China would have been very much higher," and he called on countries to reverse their travel bans and restrictions as he feared these would "have the effect of increasing fear and stigma, with little public health benefit."[44] In summation, Babones notes that "WHO has been accused of acting as China's accomplice in initially suppressing information about the coronavirus, with Tedros repeatedly lauding China's 'transparency' when Beijing had hid information about the virus's origins, infectiousness, spread, and deadliness for more than a month."[45]

The simple truth is, even generously recognizing competing demands and the information gap inherent to international issues, WHO is simply not very good at its job. COVID-19 is not first time in recent memory that WHO failed the international community by incompetently propagating demonstrably false information and thereby hampering response efforts. For example, in their September 2022 *Washington Post* article, Nina Schwalbe and Elliot Hannon noted that "Ugandan President Yoweri Museveni downplayed reports of new Ebola cases in his country. . . The World Health Organization corroborated the autocrat's confidence, affirming that the government had acted quickly and had the capacity to halt the virus. Within weeks… the outbreak grew into a crisis."[46]

WHO's recent acquiescence to China and its repeated failures in the twenty-first century have undermined its credibility, and

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. Nina Schwalbe & Elliot Hannon, *We Need a Pandemic Treaty- But it Must Hold Nations Accountable*, The WASH. POST (Dec. 5, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/12/05/pandemic-treaty-accord-who-independent-monitoring/.

likely its ability to function and manage future outbreaks and health crises effectively. Such failures have been its Achilles' heel since its inception. The organization has always walked a thin line as "[o]ne false move by the WHO in either failing to provide information and guidance in a timely fashion or in making recommendations that later prove to be incorrect or based on unsubstantiated evidence, could undermine member state's faith in the entire global health security regime."[47] Through capture or capitulation, WHO has cast itself as unreliable and ineffective.[48] Meanwhile, the IHR are unenforceable under piecemeal soft law mechanisms.[49] One country declaring travel restrictions or instigating a trade war places little pressure, political or otherwise, on nations as large and influential as China, Russia, or even the US and western European powers.

The purpose of this diatribe is not to beat an infected horse and recast blame on known bad actors. Rather, it is to drive home the malicious self-preservation of the CCP, and the incompetence and thralldom of WHO—and to show how these international actors, in tandem or not, created cascading effects that left the rest of the world unawares and vulnerable. Neither one is a reliable and consistent actor on the international stage. And that fact is a threatening one given their preeminence and relative positions. China itself faces great risk for new viral outbreaks, perhaps foisted upon the nation simply by unlucky random chance, but in any event its handling of past outbreaks should give outside observers pause.[50] China might one day be a responsible and more altruistic actor. But at the moment it is not. Meanwhile, the thawing of the global permafrost, especially in places such as Siberia, poses a risk for new outbreak of

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47. Davies, *supra* note 10, at 124.

48. Schwalbe & Hannon, *supra* note 46.

49. Catalina Jaramillo, *'WHO Has No Authority to Dictate U.S. Health Policy'*, FACTCHECK.ORG (May 25, 2022), https://www.factcheck.org/2022/05/scicheck-who-has-no-authority-to-dictate-u-s-health-policy/.

50. Nick R. Smith, *China's rapid urbanization will make another pandemic more likely*, THE WASH. POST (Mar. 31, 2021) https://www.washingtonpost.com/outlook/2021/03/31/who-report-pandemic-china-cities/.

potentially novel diseases, or greater exposure to old foes such as anthrax.[51]

C. Insecurity and the Council

There is a systemic issue at play in the UN's general setup that prevents logical and consistent enforcement actions. One of the primary issues preventing any nation from directly holding China responsible now or for future conduct, aside from sovereign immunity, is the immunity offered by its position on the United Nations Security Council (UNSC).[52] All permanent members—China, the US, the United Kingdom, France, and Russia— possess veto powers.[53] Chapter VI of the UN Charter allows for states to file a complaint with the UNSC based on findings that another state has acted in breach of obligations under international law, such as the Biological Weapons Convention.[54] Even if the complainant reaches the high burden of evidence required to validate a claim, the UNSC is not "empowered by the UN Charter to take action against violators."[55] If the UNSC did find that the violative conduct created a situation that could lead to international tensions, it may only recommend "'appropriate procedures or methods of adjustment' to the States under the Chapter VI of the UN Charter," with more assertive and potentially binding measures

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51. Robinson Meyer, *The Zombie Diseases of Climate Change*, THE ATLANTIC (Nov. 6, 2017), https://www.theatlantic.com/science/archive/2017/11/the-zombie-diseases-of-climate-change/544274/; *see also* Alec Luhn, *Siberian Child Dies After Climate Change Thaws an Anthrax-Infected Reindeer*, WIRED (Aug., 8, 2016 5:38 PM), https://www.wired.com/2016/08/child-dead-climate-change-thawed-anthrax-infected-reindeer/.

52. The Security Council is tasked with maintaining international peace and security. It has fifteen members, with ten rotating and five being permanent. It is a principal organ of the United Nations and can determined UN membership, as well as issue binding resolutions. *See broadly* United Nations Charter (found at https://www.un.org/en/about-us/un-charter/full-text).

53. *Voting System*, U. N. SECURITY COUNCIL, https://www.un.org/securitycouncil/content/voting-system (last visited Feb. 5, 2023).

54. U.N. Charter art. 35, para 1.

55. Bansal, *supra* note 17 ("each complaint must contain 'all possible evidence' confirming its validity.").

held in reserve for issues that need resolving to "to maintain or restore international peace and security."[56]

The real issue is not the limitations imposed on the UNSC by the UN Charter. Chapter VII of the Charter does empower the Council to levy sanctions and use force.[57] The real issue is the limitations the UNSC imposes on itself. Referring to a hypothetical violation of international law it is unlikely that say, the Netherlands, acting alone, can find appropriate procedures and methods of adjustment that might impact China in a meaningful manner. Individual and smaller nations likely need the heft of the UN and the UNSC specifically in order to demand, enforce, and realize any recompense for violations that harm them. Nevertheless, it is unlikely that any complaint brought before the UNSC would ever reach such a stage.[58] Any Permanent Member of the Security Council against whom a claim is brought will simply veto any concession or attempt by the four other members to offer a recommendation on the complainant's findings.[59] Attempting to use the powers afforded to the UNSC against any Permanent Member, or any nation they intended to shield, is a fool's gambit.[60] Specific to this analysis, it should be noted that "Russia has been the most frequent user of the veto, blocking 152 resolutions since the Security Council's founding, as of February 2023," while "China has used the veto more frequently in recent years."[61] It is almost certain that any claim involving a member of the UNSC is ultimately a non-starter.

Even taking the veto power out of the equation offers little chance of recourse. The UNSC can find that a non-permanent member party has been exposed to danger or harmed because of international violations. In the case of an established violation, parties can be obligated through the UN Charter to provide

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56. *Id.; See also* CFR, *supra* note 2.

57. *See* CFR, *supra* note 2.

58. Bansal, supra note 17 ("this [veto] power may be misused to protect violations of treaties.").

59. *CFR*, *supra* note 2 ("Other critics include advocates of R2P, who say the veto gives undue deference to the political interests of the P5.").

60. *Id.* ("Relations worsened further after the Russian invasion of Ukraine in 2022, and Russia has used its veto power to prevent several Security Council resolutions condemning the conflict.").

61. *See id.*

assistance and relief.[62] Only on finding, however, that the situation created by the violation can lead to international tensions can the UNSC recommend "appropriate procedures or methods of adjustment" to the states under the Chapter VI of the UN Charter.[63] But the recommendation ends short of action. So too, statements by the President of the UNSC and even decisions of the wider Council may not be binding.[64] In most instances, assistance and relief are optional obligations, paradoxically, and they can "be refused without incurring the charge of non-compliance."[65]

Ultimately, WHO and the current international health community under the UN framework are unable to enforce the IHR. Violations of the IHR subsequently go unpunished at worst or are met with strong condemnations and harsh letters. Violations are not met with tangible and meaningful compensation and renumerations, or at least collectible ones for the nations and people affected by the negligence—willful, gross, or otherwise—of bad actors.

II. ANALYSIS I: MULTIPLE WAYS TO VAX A CAT: ESTABLISHING A BASIS FOR NATO HEALTH LEGITIMACY

The failures of WHO and the international health community are in part an extension of the general limitations and realities of international law and relations, especially within the UN. The purpose of this section is to broadly address possible means by which NATO can take a lead and legitimate role in world health—and essentially bypass UN gridlock, self-interest, and dysfunction by fulfilling this role within accepted practices and norms established and previously promulgated by the UN itself. There is precedent and indeed a duty for NATO to take on such a mantle of responsibility, and by remaining within established practice and norms, NATO can ensure its actions retain legal legitimacy in the face of likely lambasting by nations who are self-interestedly hostile to NATO interests and influence.

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62. *See* Jozef Goldblat, *The Biological Weapons Convention- An Overview*, INT'L COMM. OF THE RED CROSS (Jun. 30, 1997), https://www.icrc.org/en/doc/resources/documents/article/other/57jnpa.htm.

63. U.N. Charter art. 36, ¶ 1.

64. *See* Goldblat, *supra* note 62.

65. *Id.*

A. Microbialpolitik and the Realistic Way Forward

It is becoming clear that WHO has either learned the wrong lessons from the COVID-19 pandemic or learned very little at all.[66] Recently headlines trumpeted a new pandemic accord focused on "efforts to update the International Health Regulations. . . [with] [a] total of 307 amendments to the [IHR] . . . in response to challenges posed by the COVID-19 pandemic."[67] Responding to Twitter alarmists and a growing amount of online disinformation suggesting that the US had signed away its sovereignty to WHO, the State Department and the Department of Health and Human Services released a statement on March 8th 2023, maintaining:

> Any accord resulting from these negotiations would be designed to increase the transparency and effectiveness of cooperation among nations during global pandemics and would in no way empower the World Health Organization or any other international body to impose, direct, or oversee national actions.[68]

Of course, that is to a degree part of the problem. Brian Abramson, a professor of vaccine law at Florida International University, in a fact check article meant to quash concerns about the US ceding authority to the WHO via this new accord, suggests, "[m]ost of the provisions are aspirational, rather than obligatory, and promote goals that the [US] would already be pursuing irrespective of the treaty."[69] To summarize—more of the same. The new accord seems poised to lack identification and

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66. *See* Schwalbe & Hannon, *supra* note 46.

67. *WHO: Nations Step Closer to Global Guidelines on Pandemics, Disease Outbreaks*, U.N. NEWS (Feb. 25, 2023), https://news.un.org/en/story/2023/02/1133897.

68. Press Release, Dep't of Health and Hum. Serv., Joint Update by the Department of State and the Department of Health and Human Services on Negotiations Toward a Pandemic Accord (Mar. 8, 2023) (https://www.hhs.gov/about/news/2023/03/08/joint-update-by-the-department-of-state-and-the-department-of-hhs-on-negotiations-toward-a-pandemic-accord.html).

69. Sudiksha Kochi, *Fact Check: False Claim that Pandemic Accord Gives WHO Control Over US Pandemic Policies,* USA TODAY (Feb. 23, 2023, 6:44 PM), https://www.usatoday.com/story/news/factcheck/2023/02/23/fact-check-false-claim-us-sovereignty-and-who-accord/11313805002/.

regulation of actions that exacerbate and engender pandemics and their spread and like before the IHR remains unenforceable in a meaningful and effective manner.[70] The UN is simply not the proper body.

Therefore, for humanitarian purposes, NATO should act to uphold and enforce the IHR, and live up to the responsibility to protect afforded to sovereign nations, and which will be explained later.[71] That other nations—i.e. China and Russia, amongst other states whose interests generally do not align with that of NATO members, will not welcome this semi-unilateral health regulation and influence garnering is a geopolitical inevitability. For its own interests and that of its citizens, however, NATO must engage in *Microbialpolitik*—a term coined by David P. Fidler in 1998.[72] Fidler broadly described this term as "product of two dynamics: (1) the impact infectious disease [has] on international relations, and (2) the impact the structure and dynamics of international relations has on infectious ideas and their control."[73] *Microbialpolitik,*is clearly very much a derivative of realpolitik, and is in many ways hostile to or at least bitterly disappointed in the failures of international bodies in dealing with disease and encouraging cooperation or harmonization.[74] The structures in place at the broad international level are simply not enough to counteract bad actors and unfortunate circumstances. "Although the principle of State responsibility is relevant to IHR violations, their relevance is largely theoretical because," as Fidler surmises, "to my knowledge, no WHO Member State has ever resorted to the principle of State responsibility after a violation of the IHR."[75]

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70. *See* Kerry Cullinan, *Draft Pandemic Accord Neglects Prevention, Particularly 'Zoonotic Spillover'*, HEALTH POL'Y WATCH (Feb. 15, 2023), https://healthpolicy-watch.news/pandemic-accord-neglects-zoonotic-spillover/.

71. *See CFR*, *supra* note 2.

72. *See* David P. Fidler, *Microbialpolitik: Infectious Disease and International Relations,* 14 AM. U. INT'L. L. REV. 1, 1-53 (1998).

73. DAVID P. FIDLER, INTERNATIONAL LAW AND INFECTIOUS DISEASE 19 (Ian Brownlie eds., 1999).

74. "Realpolitik thus suggests a pragmatic, no-nonsense view and a disregard for ethical considerations. In diplomacy it is often associated with relentless, though realistic, pursuit of the national interest." (*See* full definition at https://www.britannica.com/topic/realpolitik).

75. Fidler, *supra* note 73, at 106-107.

But conditions and convergent interests matter, and hope is not a forlorn folly. In 1851 conditions were such that European states began to cooperate on international disease matters because of "quarantine measures burdening trade and economic power, and. . . [a] fear of cholera."[76] The recent economic fallout from COVID-19 and the generalized fear of that particular disease as well as the ones that could follow, might provide similar conditions that encourage cooperation yet again. But the current slate of international organizations and bodies will not suffice on their own. Rather, "a realist analysis of *microbialpolitik* would stress the role that great powers played in fostering international health co-operation and the international law relating to infectious diseases."[77] International bodies and their various organs are not inherently impotent, nor is the concept of international law merely a liberal fantasy.

Rather, *microbialpolitik* realists would point to the "imprint of a hegemonic State or hegemonic group of states pressing its/their interests and power," as the mechanism that gives these international legal regimes and schemes their weight and a means or tactic reason for others to comply.[78] Indeed, "[s]uccessive U.S. administrations have argued that humanitarian intervention can be legitimate with the backing of regional organizations or 'coalitions of the willing.'"[79] Critics may decry NATO pushing its own interests onto the world as Machiavellian and unfair, or dishonest. Stanley Hoffman, the French political scientist, laments the splitting of hairs and best-worst measures approach.[80] But he recognizes, "[t]he stateman's difficulty is that he must play the game of the international competition. . . [h]e ought not to give up the hope of a future world community, but he cannot act as if it already existed."[81] A better, safer world is possible, but it requires using the tools and

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76. *Id.* at 19.
77. *Id.* at 296.
78. *Id.*
79. *CFR*, *supra* note 2.
80. *See generally* Stanley Hoffman, *Rousseau on War and Peace*, 57 AM. POL. SCI. REV. 317 (1963).
81. *Id.* at 333.

forces available—of which NATO is a sufficient and fairly altruistic one.

B. Of Vetoes and Viruses: Bypassing UN Gridlock

Meaningful enforcement actions, under the current model, would likely start with the UNSC and as shown are therefore essentially nonstarters depending on the whims of the permanent members. Still, even with its hands somewhat tied, there is useful precedent of the UNSC taking a leading and preventive role against disease, from which NATO can copy.

The Charter of the United Nations established the overarching responsibility of the UNSC "for maintaining international peace and security."[82] NATO's own signing and ratification less than four years later made "clear that the UN Charter is the framework within which the Alliance operates," and "[i]n the Treaty, Allies reaffirm their faith in the purposes and principles of the Charter and commit themselves to the peaceful resolution of conflicts."[83] The year 2014 coincided with the outbreak of Ebola in West Africa.[84] In a landmark and heretofore unprecedented move, the UNSC issued Resolution 2177/2014, which "qualified an infectious disease as a 'threat to international peace and security' according to Article 39 of the UN Charter."[85] At the time, the UNSC was responding to a situation very similar to what occurred in 2020. Ilja Richard Pavone, a visiting scholar at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, summarized the situation and its unmistakable parallels—excluding the UNSC's intervention:

> The global health governance architecture, based on the leading role of the World Health Organization… was heavily challenged by the 2014 Ebola Outbreak in West Africa. Many states (partially or completely) ignored the Temporary

82. *Relations with the United Nations*, N. ATL. TREATY ORG. (Sep. 26 2022), https://www.nato.int/cps/en/natohq/topics_50321.htm#:~:text.

83. *Id.*

84. *2014-2016 Ebola Outbreak in West Africa*, CENTER FOR DISEASE CONTROL AND PREVENTION (Mar. 8, 2019), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak.

85. ILJA RICHARD PAVONE, THE GOVERNANCE OF DISEASE OUTBREAKS 301 (Leonie Vierck et. al., eds., 2017).

> Recommendations issued by WHO, and the weakness of the International Health Regulations… became visible, given the lack of an enforcement mechanism. Therefore, in light of the failure of the IHR to provide an adequate and early response to the epidemic, the United Nations Security Council acted as a "Global Health Keeper" and heavily questioned the central role of WHO in dealing with health emergencies.[86]

In leading the ultimately successful response to the Ebola outbreak, the UNSC was rather cautious. Indeed, in its arsenal, but unused, was Article 41 which would have imposed quarantine and other measures on affected nations, and Article 42, "which would have implied the authorization to measures requiring the use of armed forces."[87] The reaction and the "securitization policy implemented by the Security Council in the Ebola Crisis" likely stemmed from the fact that none of the Big Five were themselves implicated in the outbreak nor did they feel attacked by international responses.[88] Such a resolution would almost certainly not have passed had it been brought up in more recent years, and likely will be vetoed in the future in any matter involving one of the Big Five.[89] This is concerning given that "joint efforts by the Security Council in a strict and successful cooperation with WHO and other international and regional organizations resulted in the defeat of the disease in the most affected countries."[90] Compare this to the lackadaisical and misinformed response by WHO to the 2022 Ebola outbreak mentioned earlier; the outcomes and processes are black and white in their dichotomy.[91]

More broadly and not specifically related to disease, the UNSC is also endowed with various tools to maintain international peace and security. As mentioned, Article 41 of the UN Charter affords sanctioning provisions to the UNSC.[92] In the post-Cold War period, the UNSC has exhibited surprising bipartisanship

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86. *Id.* at 302.
87. *Id.* at 316.
88. *See id.* at 326 (the Big Five being the permanent members of the UN Security Council).
89. *See CFR*, *supra* note 2.
90. Pavone, *supra* note 85, at 302-303.
91. *See* Schwalbe & Hannon, *supra* note 46.
92. *See CFR*, *supra* note 2.

in its use of these sanctioning powers.[93] According to the Council on Foreign Relations (CFR), "[a]s of 2023, fourteen Security Council sanctions regimes, listing more than six hundred individuals and nearly three hundred entities, are in place."[94] These sanctions, which have evolved to become more specific than broad comprehensive embargos, "target discrete economic and political matters and specific individuals deemed threats to international security," and include "[a]rms embargoes, travel bans, asset freezes, and import/export bans on individual goods."[95] Still, given the gridlock that has historically plagued the UNSC, especially during times of heightened tensions between its members, another group or international organization is needed to step up and be the Global Health Keeper. Fortunately, the three of the permanent members of the UNSC—the US, Great Britain, and France—all happen to belong to such an organization.[96]

NATO has previously contemplated biological threats, albeit in a more military fashion.[97] In the current context, NATO would be required to lean into the humanitarian, economic, global security, and human rights aspects of disease control. This approach is not outside the realm of thought. Readiness for deliberate bioweapon attacks have recently given way to the recognition that "new and re-emerging infectious disease could pose a rising global health threat and could have a negative impact on US and global security," and the same calculation applies to US NATO allies.[98] Indeed, the realm of interests that can be threatened has broadened, and it is no longer just the state that "needs protection but the individuals and their health. . . according to the emerging concept of Human Security which considers 'security' as something more than the defense of territory by an armed attack."[99]

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93. *See id.*
94. *Id.*
95. *Id.*
96. *See id.*
97. *See Boosting NATO Resilience to Biological Threats*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, https://www.centerforhealthsecurity.org/our-work/Center-projects/boosting-NATO-resilience.html (last visited Nov. 19, 2022).
98. Pavone, *supra* note 85, at 309.
99. *Id.* at 305.

The Responsibility to Protect (R2P) can be a useful concept in advocating for NATO's usurpation of the mandate of the Global Health Keeper. Following humanitarian disasters in the 1990s, the International Commission on Intervention and State Sovereignty promulgated the R2P, declaring that

> [S]tates [have] positive responsibilities for their population's welfare, and to assist each other. Consequently, the primary responsibility for the protection of its people rested first and foremost with the State itself. However, a 'residual responsibility' also [lies] with the broader community of states, which [is] 'activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities.[100]

Therefore NATO would be well within established practice and duties to its multinational citizens in readopting and repurposing Resolution 2177 to attain the resolution's three primary goals in a future outbreak:

> (1) to answer in an appropriate manner to the humanitarian emergency caused by the spread of the virus, and (2) to prevent a further aggravation and a wider diffusion of the disease, (3) while limiting side effects. . . that. . . might impact political, social, economic and humanitarian spheres, not just on a local scale but potentially extending to a regional or even global level.[101]

The R2P is admittedly a response to genocide and ethnic cleaning, and therefore its focus remains in those realms.[102] Still, the overlaps between a deliberate culling of a population with government programs, and the negligence or collapse of a government that leads to catastrophic outbreaks of disease that kill the same population, are at some point different means to the same end. Therefore, "given that massive violations of human rights fall within the category of Human Security" and

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100. *Responsibility to Protect*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESP. TO PROTECT, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml (last visited Nov. 19, 2022) [hereinafter R2P].

101. Pavone, *supra* note 85, at 321.

102. R2P, *supra* note 100, "Following the atrocities committed in the 1990s in the Balkans and Rwanda… the international community engaged in a serious debate on how to react to gross and systematic violations of human rights."

health itself is within the concept of Human Security, there is sufficient basis for states to act against outbreaks on the authority and duty of R2P.[103]

Furthermore, R2P also foresees the issue of international compliance, forced or otherwise, in its Three Pillar Strategy.[104] Pillar One focuses on the duties owed by a state to its own citizens.[105] Pillar Two, critically, is the commitment of states to assist—through capacity building—other states that are willing, but weak and unable, to uphold their Pillar One responsibilities."[106] Finally, Pillar Three concerns the duty of the international community to "react when a state is manifestly failing to provide such protection," and to "to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter."[107] Critically, the R2P was adopted by all UN Members in 2005.[108] The CFR, a respected and longstanding think-tank, suggests that "[t]he emergence of the responsibility to protect (R2P) in the early 2000s appeared to justify the use of force outside Security Council authorization by qualifying the principle of noninterference in sovereign affairs."[109] The CFR's analysis went further, stating that under the R2P doctrine "when a state 'manifestly fails' to uphold its responsibilities, coercive measures should be collectively taken."[110] The R2P has already been implemented on the international stage in dramatic fashion with "NATO's seventy-eight-day air war in Kosovo [being] the most-cited case in arguing for the legitimacy of humanitarian interventions that lack Security Council authorization."[111]

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103. *See* Pavone, *supra* note 85, at 321.
104. *Id.* at 322.
105. *See id.*
106. *Id.*
107. *Id.*; *About R2P*, GLOB. CTR. FOR THE RESP. TO PROTECT (Mar. 25, 2016), [https://web.archive.org/web/20160325135645/http://www.globalr2p.org/about_r2p]
108. *2005 World Summit Outcome*, U. N. (Sep.29 2005), [https://web.archive.org/web/20050929095839/http://www.un.org/summit2005/presskit/fact_sheet.pdf].
109. *CFR*, *supra* note 2.
110. *See id.*
111. *See id.*

Therefore, given its mimicry of the UN Charter, the influence of the R2P doctrine, and in compliance with international norms of sanctions, embargos and the like—NATO, as an international organization and as individual states, has precedent to make, sustain, and enforce resolutions and actions specifically related to outbreaks. In doing so, NATO would be acting within preestablished roles normally taken by the UNSC and would be invoking duties of protection to its member citizens that are well recognized in the international community. NATO does not have to be antagonistic in this role. In encouraging harmonization of medical standards and protocols, NATO can rely on Pillar Two of the R2P—building capacity and providing assistance to willing nations that are unable to effectuate such standards and protocols alone. In a Pillar Three situation, NATO can act where the UNSC cannot, and stay within that realm of authority. Hypothetically, this kind of action could start with a proposal by a Big Five nation regarding an outbreak, a pandemic response, or another topically relevant international disease issue. Upon a stonewalling veto from Russia or China, here guaranteed just for assumption's sake, the remaining Big Three would then act as NATO members rather than UN members, and invoke Article 41 which holds:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[112]

In propagating subsequent actions such as quarantines, travel restrictions, or sanctions, NATO would contend that it is executing powers already vested in its principal members by their status as Permanent Members of the Security Council—and possibly those vested in NATO members who are themselves temporary members of the Security Council at the time.

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112. U.N. Charter art. 42, para 1.

III. ANALYSIS II: A "PREEMPTIVE QUARANTINE" A DAY KEEPS INTERNATIONAL ADVERSARIES AT BAY

As of the writing of this section, the US, amongst many other countries, has mandated negative pre-flight COVID tests for Chinese nationals before entering the American interior, given China's recent outbreaks.[113] Tedros Adhanom Ghebreyesus of WHO, suggests "it is understandable that some countries are taking steps they believe will protect their own citizens."[114] Still, Yasmin Tayag of *The Atlantic* laments, and cites to Chinese officials doing the same, that the various restrictions, requirements, and in some cases outright bans, are more politically motivated than earnest attempts to further combat the spread of COVID-19.[115] There is likely some validity to that statement, however China is and has been playing geopolitical hardball, and is therefore inviting the same.[116] Its leaders have clearly refused to change course or to make amends for past failures.[117] Indeed, they are doubling down on exactly the same irresponsible tactics and decisions that exacerbated this pandemic and ones before it.[118] Only this time it appears that the international community is less inclined to give the CCP and

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113. *See* Rachel Cheung, *COVID is Running Rampant in China, But Experts Say Travel Restrictions Are Pointless,* VICE (Jan. 9, 2023, 4:23 AM), https://www.vice.com/en/article/wxn9wx/china-travel-restrictions-COVID.

114. Yasmin Tayag, *I'm sorry but this COVID Policy is Ridiculous*, THE ATLANTIC (Jan. 6, 2023), https://www.theatlantic.com/health/archive/2023/01/china-COVID-19-travel-policy-restrictions/672668/.

115. *Id.*

116. *See* Nick Marsh, *China Blocks Visas for S Korea and Japan over COVID Restrictions,* BBC (Jan. 10, 2023), https://www.bbc.com/news/world-asia-64220149.

117. *See* Emily Feng, *China's Authorities Are Quietly Rounding Up People Who Protested Against COVID Rules*, NPR (Jan. 11, 2023, 3:43 PM), https://www.npr.org/2023/01/11/1148251868/china-COVID-lockdown-protests-arrests.

118. *See* Simone McCarthy, *China 'Under-Representing' True Impact Of COVID Outbreak, WHO Says*, CNN (Jan. 6, 2023, 1:34 AM), https://www.cnn.com/2023/01/05/china/china-COVID-outbreak-who-data-intl-hnk/index.html; *WHO continues to urge China to share more data amid COVID-19 surge*, U.N. NEWS (Jan. 4, 2023), https://news.un.org/en/story/2023/01/1132167.

its medical apparatus the benefit of the doubt.[119] As the saying goes, "fool the international community once. . ."

Looking to the future, rather than waiting for an outbreak to occur and reacting then, it may be prudent for NATO members to begin a Preemptive Quarantine protocol when nations seriously fail to meet IHR and therefore maximize the risk of an uncontrolled outbreak of disease. The purpose of the Preemptive Quarantine is, as the name might suggest, to preempt the sudden, unchecked, and rapid spread of disease from countries with poorly performing and unreliable medical institutions and practices. It would use international law and norms to allow NATO members, acting as a bloc, to fill the enforcement gap in the IHR.

A. The Sword, the Shield, and the Jab

In outlining the Preemptive Quarantine protocol, it is useful to work backwards. The sword of this program relies on NATO countries acting as a bloc following a pandemic in which the origin nation maximized risk for an outbreak and then failed in its obligations to the international community during the outbreak. NATO would use sanctions, tariffs, and other mechanisms to hold the offending nation accountable, recover from harms and losses, and through the potency of this rectifying protocol, encourage compliance in the first place. This model does require an assumption that NATO countries themselves are upholding their own internal standards. An analysis or examination of NATO's internal politics or how they would resolve disagreements or discrepancies is beyond the scope of this article. For now, we will assume NATO is in agreement, in compliance, and acting as a unified bloc.

Richard Bruns and Nikki Teran, writing for the Johns Hopkins Bloomberg School of Public Health, estimated that the "total harms of COVID-19 to the U.S. are still about $16 trillion (with a range of $10 trillion and $22 trillion)."[120] How to assign

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119. *See* Keith Bradsher et. al., *As Cases Explode, China's Low COVID Death Toll Convinces No One*, N.Y. TIMES (Dec. 23, 2022), https://www.nytimes.com/2022/12/23/world/asia/china-COVID-death-toll.html.

120. Richard Bruns & Nikki Teran, *Weighing the Cost of the Pandemic - Knowing what we know now, how much damage did COVID-19 cause in the*

liability for this damage is outlined well in the previously mentioned Trail Smelter case, as well as subsequent decisions such as *Pulp Mills* and *Costa Rica v. Nicaragua*, which all point to harm prevention being a customary part of international law.[121] Writing for the Yearbook of International Disaster Law, Pedro A. Villarreal finds:

> The negative cross-border impact of human activities is subject to both rules and principles of international law, as recognized by both the ILC in its Draft Articles on Prevention on Transboundary Harm from Hazardous Activities, and by the International Court of Justice (ICJ) in its case law. Behind it lies the consideration that states, as the main rights- and obligation-holders, should refrain not only from conducting acts that will harm other states, but also from knowingly allowing acts in their territories that may be "contrary to the rights of other states" . . . A key consideration is how to infer that a state should have known in advance that a certain act would lead to a specific harmful outcome. Therefore, on the basis of the no-harm rule, states are now subjected to more concrete obligations… in the case of human activities that may have a "significant adverse impact in a transboundary context.[122]

The no-harm rule is firmly ensconced in environmental law and has precedent in that realm on the international stage.[123] The spirit of this rule, if not the ability to enforce it in a court, provides the legal basis for recouping losses incurred during a preventable pandemic.[124] To that end, "the first step in framing

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United States?, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Apr. 21, 2022), https://ifp.org/weighing-the-cost-of-the-pandemic/.

121. Pedro A. Villarreal, *Pandemic Risk and International Law: Laying the Foundations for Proactive State Obligations,* 3 YEARBOOK OF INT'L DISASTER L. ONLINE 154, 169–70 (Feb. 21, 2022), https://brill.com/view/journals/yido/3/1/article-p154_6.xml?language=en.

122. *Id.* at 169.

123. *See id. (citing to ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Merits) ICJ Rep 2010 (I) 56, para. 101).*

124. *Id.* at 171 ("Whereas so far the harm prevention principle has played a role mostly in disputes due to environmental harm, its more general components can be explored for other issues that are transboundary in nature. Proactive perspectives involve states' adoption of measures in the face of activities known to cause harm. The cross-border spread of disease lends itself to this type of scrutiny.")

legal obligations to regulate pandemic risk is to identify existing activities that maximize or enhance the risk of a pandemic event. . . [which would determine what] regulatory options are available, especially with a view to measures taken at the domestic level."[125] The IHR standards as well as those espoused by NATO can serve as the benchmark. Villarreal notes "[s]imilar undertakings exist in the Intergovernmental Panel on Climate Change. Its standards, while not legally binding, contribute to shaping the interpretation of states' obligations. . . They may later be cited as grounds for holding states responsible."[126] The IHR "currently enshrines a reactive approach on the basis of surveillance mechanisms aimed at fostering a rapid response in case a pandemic emerges," and certainly NATO—WHO itself if it so chooses—can promulgate post-outbreak reporting and transparency regulations or standards that serve to contain and climate an outbreak.[127] And following violations of those standards, NATO nations can begin to assign liability to nations for their part in stymieing containment and treatment efforts, and for exacerbating the outbreak and undermining responses to it. The goal is not to punish nations for pandemics, but rather to hold them accountable for exacerbating them. Reducing the overall risk of pandemics and ensuring compliance will be explained further below in the shield function.

Upon the assignment of liability and a determination of the value of damages, renumeration—attributable under international norms to the harm done—can take a variety of forms but the most easily implemented ones might include tariffs on the violating nation's goods until the amount of damages is satisfied. More aggressive and perhaps vindictive approaches might include seizures of assets, or a redirection of foreign aid. How the money is then distributed to the affected NATO nation's citizens or otherwise utilized to mitigate the harm is likely up to the collecting nation and the subject of another comment. With that established, however, it is worth noting that using the concept of Preemptive Quarantine in this manner, as a sword, is both aggressive and not preventative. The

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125. *Id.* at 173.
126. *Id.* at 174.
127. *See id.* at 154.

primary purpose of a NATO health regime should be that of a shield, with the sword used against nations that purposefully flaunt regulation, refuse to cooperate, generally exacerbate an outbreak, and clearly cause one to be more damaging and widespread than necessary. Using such a program as a purely offensive weapon and using it indiscriminately is both unhelpful and short sighted. This NATO health program should not be used solely as a sword to strike at obvious NATO rivals and adversaries. Rather, as discussed it should be used primarily as a shield against stubbornly uncooperative nations and governments, with a clear pattern of resistance to or subversion of international norms and the accompanying health and disease related best practices.

In using a Preemptive Quarantine as a shield, NATO should look to enforce the IHR and best-practices before a pandemic breaks out and harm is done. To that end, one of the first concessions this program must make is that pandemics may occur at random, despite all steps taken to prevent them. As Villareal wisely notes, "[w]hat is key for allocating responsibility would not be whether acts or omissions lead to a pandemic, but rather whether sufficient steps are taken for reducing the risk."[128] Therefore, the goal of a Preemptive Quarantine program should be to steer "state behavior away from practices that are known to increase the likelihood of health hazards."[129] The IHR imposes obligations on UN member nations, but it has no enforcement mechanism, as established. By acting as a bloc, and by acting within the prerogatives afforded to all nations related to disease management and international trade, NATO can incentivize and to a certain degree compel compliance with the IHR, and later perhaps even with NATO preferred standards.

The first and perhaps most glaring issue in the Preemptive Quarantine scheme is that the WHO and the IHR are either silent on or generally adverse to preemptive action. For example, IHR Article 43 "requires States to base decisions to implement additional health measures on scientific principles and scientific evidence, or where scientific evidence is insufficient, on 'information from WHO or other relevant intergovernmental

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128. *Id.* at 175.
129. *Id.*

organizations and international bodies.'"[130] This relatively high evidentiary standard leads to, by many analyses, a definitional rejection of "pre-emptive action to protect public health risks in the absence of scientific evidence of the nature of the public health threat or of the action in question."[131] Moreover, the use of travel restrictions, i.e. a quarantine, in the face of an actual noted health crisis is "only justified under Article 43(1) in a manner that helps achieve 'an appropriate level of health protection.'"[132] Therefore the very namesake action of the program would seem to be at odds with international law or conventions, and would undermine the legitimacy of NATO actions as simply unilateral exercises of power for solely geopolitical gain at worst, and as unnecessary alarmism at best.

Logical extensions of the IHR's provisions, however, and the WHO's own guidelines and actions provide the necessary foundation to legitimize preemptive action. First, clearly under IHR Article 1's preamble about scientific principles and scientific evidence, and Article 43's similar exhortations, "several factors are omitted as bases of State decision-making, including public perceptions, media characterizations of risk, religious or cultural tenets and socio-political considerations."[133] Yet, this grounding in cold hard scientific data is actually a boon rather than a barrier. Writing for the *International & Comparative Law Quarterly*, Lisa Forman and Roonjin Habibi noted that the previous "variables contrast sharply with science, where risk can be understood in terms of the 'probability that a harmful event will occur, and the severity of its effects.'"[134] The WHO itself has "specifically indicated the permissibility of implementing travel restrictions. . . as long as such measures are risk-based, evidence-based, coherent, proportionate to the public health risk, and, therefore, do not constitute an unnecessary interference with international traffic and

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130. Lisa Forman & Roojin Habibi, *Revisiting The Legality Of Travel Restrictions Under International Law During COVID-19*, 71 INT'L COMPAR. L. Q. 743, 749 (Jul. 25, 2022).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

trade.'"[135] A "risk-based approach to international travel," and the adoption of a precautionary approach "subject to the *principle of proportionality* [emphasis original]" are well within IHR and WHO guidelines.[136] Probability therefore is the crux for the shielding program and the precautionary approach.

Precautionary principles have a strong basis in other international law realms and for health broadly. The 1998 Wingspread Statement outlines the precautionary principle as applicable "when an activity raises the threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully scientifically established."[137] The UN itself, through the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology has also elaborated on the principle, and specifically constructed thresholds for unacceptable harm that would justify precaution:

> When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is:
>
> - threatening to human life or health;
> - serious and effectively irreversible;
> - inequitable to present or future generations; or
> - imposed without adequate consideration of the human rights of those affected.[138]

The precautionary principle indeed ties in well with the obligations states have to protect their citizens and act against outbreaks based on the authority and duty outlined within R2P.[139] Thus, "[i]n the face of incomplete or inconclusive scientific evidence, States may legitimately be motivated to adopt travel restrictions."[140] The probability of harm occurring is a viable basis for action, so long as it is backed up by at least

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135. *Id.* at 752.
136. *Id.* at 752-753.
137. *Id.* at 754.
138. *Id.*
139. Pavone, *supra* note 85, at 321.
140. Forman & Habibi, *supra* note 130.

some information as "the difficult balance between science and values in risk regulation is thrown into sharp relief when full information is unavailable, yet public concern is high."[141]

Preemptive Quarantine should not be used as punishment for an outbreak. Rather it should be used in order to incentivize adherence to best practices and encourage standardization. NATO should be concerned with "devising legal obligations. . . [that steer] state behavior away from practices that are known to increase the likelihood of health hazards."[142] These behaviors would include medical practices and reporting obligations, as well as non-medical "pandemic risk 'maximisers' like wildlife trade."[143] Ultimately, in determining whether a Preemptive Quarantine is needed, the risk reduction obligation should be viewed as results-independent and, "the litmus test for any and all commitments by states in pandemic risk reduction will lie in the implementation of measures at the domestic level."[144] To that end, and as will be expanded upon, it would behoove NATO to act with a certain degree of magnanimity and empathy, as compliance with the IHR and any additional NATO recommendations could prove to be costly, and "will be dependent upon the willingness of national authorities to actually engage in multidimensional processes of compliance, which is by no means a minor burden."[145]

Still, in summation, the shielding aspect of the Preemptive Quarantine model might function broadly as follows: failure to comply with IHR and, in tandem, NATO health regulations, would lead to a tier system of quarantine. The first tier may be as simple as international censure and domestic advisories regarding travel to the uncompliant nation. As mentioned, NATO would identify risk maximizers, in actions or inaction, and encourage these to be rectified or curtailed. NATO should stress the probability factor of outbreaks going unreported or rapidly expanding, and the emergence of novel diseases. Timing would also be a crucial factor as the longer these maximizers go unmitigated, the greater the chance a pandemic of scale and

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141. *Id.*
142. Villarreal, *supra* note 121, at 175.
143. *Id.* at 176.
144. *Id.*
145. *Id.*

novelty occurs. With increasing probability and a lack of commitment to fix the issues, the next tier level might include a ban on certain travel to the malcontent nation, such as a ban on student trips, or requiring proof of vaccines from travelers or merchant shippers from the ostracized nation, or embargos.[146] An exhaustive list here is not necessary, however each tier should in theory turn up the pressure on the noncompliant nation and make noncompliance increasingly expensive and detrimental to their economy, standing, and ability to interact with the international community— and specifically those within the sub-community of NATO. The final tiers would be outright quarantine of the nation within the rights and parameters afforded to NATO members through the interplay of R2P, the UNESCO ethics model, WHO's own guidelines and advice during the most recent pandemic, and through Article 43 of the IHR.

B. Altruism, Investment and Influence

In supporting the shield function of a Preemptive Quarantine program, NATO should look to function much like the WHO itself in supporting the international medical community, through its own NATO Health initiative. NATO's health apparatus should look to generally supplant, if not at very least complement, WHO's own initiatives and activities in a given region.

Article 3 of the NATO Charter focuses on building the resilience of member parties.[147] Gunhild Hoogensen Gjørv, writing for the *NATO Review* suggests that reliance, broadly interpreted, is centered on the "the expectation that each member country is able to resist and recover from a major shock such as a natural disaster, failure of critical infrastructure, or a hybrid or armed attack on the basis of 'their individual and

146. *Embargo*, subsection to *The Practical Guide to Humanitarian Law,* DRS. WITHOUT BORDERS (last visited Jan. 14, 2023), https://guide-humanitarian-law.org/content/article/3/embargo-1/#:~:text=Under%20International%20law%2C%20an%20embargo,of%20behavior%20from%20one%20state.

147. The North Atlantic Treaty art. 3, Apr. 4, 1949*,* NORTH ATL. TREATY ORG. (last visited Jan. 14, 2023) https://www.nato.int/cps/en/natohq/official_texts_17120.htm.

collective capacity.'"[148] He writes further, "[f]raming a pandemic as a security issue does not mean 'it is time to panic,' nor that a pandemic should be equated to a war or a military issue. It is, however, definitely a security issue."[149] Naturally building up NATO's own resilience and making sure all party states are up to spec would be a critical and important internal project. Yet, as the pandemic demonstrated:

> Threats to society today are increasingly generated through non-military or non-violent means. . . Crisis and conflict are part of the same continuum of insecurity, where crisis is an earlier stage of instability and uncertainty before conflict that represents even greater, hostile instability, which can move from a non-violent to violent nature. Much of this continuum represents instabilities that are not strictly military in nature.[150]

The modern pandemic benefits from globalization. Gjørv concludes, "[t]he COVID-19 virus presents a threat to the health, economy and social cohesion of societies on a global level, generating a crisis response."[151] But before a crisis response is necessary, and perhaps to even avoid having to issue such a response, a preemptive aid response might be more effective in the long term on multiple fronts. Consider that, "the Ebola virus that ravaged West Africa did not turn into a pandemic, since the disease could be effectively contained."[152] Resilience and health infrastructure help to contain outbreaks. Where Ebola did spread, "[o]ne of the key determinants. . . was deficient healthcare capacities in the most impacted states, shedding light on the limitations of the IHR (2005)'s obligations to enhance minimum core capacities."[153]

Developing nations are not rivals of NATO, and nor are they always in compliance with IHR standards. The threat of a

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148. Gunhild Hoogensen Gjørv *Coronavirus, invisible threats and preparing for resilience*, NATO REV. (May 20, 2020) https://www.nato.int/docu/review/articles/2020/05/20/coronavirus-invisible-threats-and-preparing-for-resilience.

149. *Id.*

150. *Id.*

151. *Id.*

152. Villarreal, *supra* note 121, at 160.

153. *Id.*

Preemptive Quarantine would likely loom large over them, and the fallout of its implementation would be disastrous. Therefore, Preemptive Quarantines should be used judiciously, and the goals of NATO Health should be, to a degree, distinct from the military and territorial integrity goals of the military alliance. Indeed, overly aggressive application of Preemptive Quarantine and accompanying sanctions, tariffs, restrictions, etc., may in fact undermine the standardizing of and compliance with international health regulations. In the past, "feared losses in trade, tourism and reputation disincentivized national governments from reporting disease surveillance information to WHO."[154] For example,

> Peru. . . suffered estimated losses of approximately [$700 million] after its 1991 cholera outbreak given far-reaching trade restrictions imposed on Peruvian imports. Similarly, despite WHO's advice, States reacted to the 1994 plague outbreak in Surat, India with flight cancellations and border closures which more broadly led to "a stigma on India that took months to fade" [and] . . . cost India upwards of [$2 billion].[155]

As mentioned, compliance should be in part judged independent of success, and a willingness and concerted attempt to attain compliance should be viewed favorably. Risk and probability assessment must be tempered by the reality that NATO's bloc actions would have long term and massive impacts on nations to which they are directed, and indiscriminate crackdowns may actually encourage false reporting and papering over gaps rather than honest recognition of inadequacies and issues, which NATO could then assist in rectifying.[156]

Building the resilience of nonaligned nations accomplishes health and geopolitical goals and is a worthy international investment.[157] In 2020, authors John Michlethwait and Adrian Wooldridge penned *The Wake-Up Call: Why The Pandemic Has*

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154. Forman & Habibi, *supra* note 130, at 755.

155. *Id.*

156. *See Partnerships: projecting stability through cooperation,* NORTH ATLANTIC TREATY ORGANIZATION (Dec. 06, 2022), https://www.nato.int/cps/en/natohq/topics_84336.htm.

157. *Coronavirus response: NATO support to Tunisia,* NORTH ATL. TREATY ORG. (Feb. 22, 2021), https://www.nato.int/cps/en/natohq/news_181776.htm.

Exposed The Weakness Of The West, And How To Fix It. The title is itself a fair summary of the book and its arguments. Micklethwait and Wooldridge suggest that "[re]engaging with the global institutions that the United States helped found has to be part of any fightback," observing that "[m]any multilateral bodies are suffering from the same problems of old age as the federal government: bloat, self-obsession, and hypocrisy."[158] Where this commentator differs from Micklethwait and Wooldridge in opinion, is not towards the sentiment of the proposal but rather its focus—WHO is likely beyond saving. Indeed, the authors admit that "China's nationals now head four of the UN's institutions compared with just one American."[159] Why invest money and influence in institutions thoroughly controlled and infiltrated by America's rivals when NATO specifically excludes them and therefore represents a much easier and efficient investment?

This engagement and investment are about bringing the international community into the fold.[160] NATO Health, through its investment and partnerships could "bring the democracies of Asia into the organizations of the West, so that countries like South Korea, Indonesia, and India (not to mention Japan and Australia) are defined by their freedoms, not their location. [Because] [t]he West needs to be expanded, not militarily but as a state of mind."[161] This battle of influence has already been waged through China's economic-investment Belt and Road Initiative in conjunction with vaccines to combat COVID-19 itself, with China hawking or donating its own vaccines and pandemic related supplies throughout Asia, Africa, and the Middle East.[162] It is abundantly clear:

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158. John Micklethwait & Adrian Wooldridge, THE WAKE UP CALL: WHY THE PANDEMIC HAS EXPOSED THE WEAKNESS OF THE WEST, AND HOW TO FIX IT 140-141 (2020).

159. *Id.*

160. *See Coronavirus response: The United States delivers critical financial aid to Afghanistan, Colombia and Mongolia in response to global pandemic,* NORTH ATL. TREATY ORG. (May 7, 2020), https://www.nato.int/cps/en/natohq/news_175638.htm?selectedLocale=en.

161. Micklethwait, *supra* note 158, at 140.

162. *See* Passant Mamdouh Ridwan, *China and US Vaccine Diplomacy in the Middle East and North Africa*, THE DIPLOMAT (Oct. 25, 2022),

> China is using vaccine diplomacy to gain leverage in order to shape the geopolitical landscape to its favor. China was the largest donor of vaccine doses in many developing countries in 2020, when countries needed it most. Its vaccine diplomacy is increasing China's soft power, including in the MENA region, in the long run. Vaccine diplomacy is shaping a new style of China's diplomacy in the developing world, where health cooperation is used as an instrument of achieving its diplomacy goals.[163]

NATO should look to do the same, and indeed is already structured to do so as this engagement with the world community falls within the NATO Charter, and specifically Article 7 which highlights the obligations of UN member parties as well as the, "the primary responsibility of the Security Council for the maintenance of international peace and security."[164] By providing health assistance, shoring up health infrastructure, and overall increasing developing and non-aligned nations' resilience against disease, NATO can both decrease the likelihood of an out-of-control pandemic developing in the first place, while also increasing its soft power and standing across the globe.[165]

CONCLUSION: AFTER-VISIT SUMMARY

For the citizens of biblical Egypt, to those of Medieval Europe, to those of Oran in French Algeria, pandemics and plague struck

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https://thediplomat.com/2022/10/china-and-us-vaccine-diplomacy-in-the-middle-east-and-north-africa/.

163. Christopher Condon et. al., *Yellen Heads to Africa With US Seeking to Counter China's Influence*, BLOOMBERG (Jan. 14, 2023), https://www.nato.int/cps/en/natohq/news_175638.htm?selectedLocale=en; Passant Mamdouh Ridwan, *China and US Vaccine Diplomacy in the Middle East and North Africa*, THE DIPLOMAT (Oct. 25, 2022), https://thediplomat.com/2022/10/china-and-us-vaccine-diplomacy-in-the-middle-east-and-north-africa/.

164. *The North Atlantic Treaty,* NORTH ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_50321.htm#:~:text=NATO's%20North%20Atlantic%20Treaty%20signed,the%20peaceful%20resolution%20of%20conflicts (last visited Jan. 14, 2023).

165. *Military Medical Support,* NORTH ATL. TREATY ORG. (Jun. 02, 2022), https://www.nato.int/cps/en/natohq/topics_49168.htm.

suddenly and out of the blue.[166] And yet in many ways these outbreaks were simply a fact of life and an inevitability even if the limitations on human memory and historiography meant that they seemed like once-in-a-generation events to those who lived through them, if they seemed notable at all.[167] For all our progress, the modern world is no less, and indeed may be even more vulnerable to mass outbreaks due to globalization and the increased rate and speed of travel. As individuals and as a collective humanity, we are not so far removed from our forefathers in outlook and disposition. The COVID-19 pandemic was not a mere aberration. There will be more pandemics in our lifetime, and perhaps even in this decade. Yet, for all our similarities, we have many tools and advantages our forefathers did not. With those advantages, we are in many ways obligated to take preemptive action to better protect our neighbors and wider communities.

To that end, the current international health structure to which we have entrusted this obligation has failed at worst, or at best has proven itself unfit to meet the demands of the task. The UN and the IHR cannot compensate for the failings and deliberate obstruction of various nation states. The WHO itself has been politically captured and is unable to operate as intended, above the fray of geopolitics. These failings and an inability to enforce the IHR, let alone do so consistently and in a nonpartisan manner create and exacerbate vulnerabilities in the global health structure.

That same geopolitical partisanship, however, can prove useful. NATO members have multiple identities, so to speak, and multiple obligations to both international organizations and their own citizens. Using existing international precedent and obligations under the UN framework, NATO members can exert their influence both within the UN and outside of it, to enforce

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166. *See* Albert Camus, *The Plague* 31 (1948) "There have been as many plagues as wars in history; yet always plagues and wars take people equally by surprise."

167. *Id.* at 31-32 ("In this respect our townsfolk were like everybody else, wrapped up in themselves; in other words they were humanists: they disbelieved in pestilences. A pestilence isn't a thing made to man's measure; therefore we tell ourselves that pestilence is a mere bogy of the mind, a bad dream that will pass away.")

the IHR as well as other global health related initiatives and duties. NATO countries can circumvent UN gridlock and obstructionism. By remaining within established and recognized precedent NATO countries can act both legitimately under the current international order, while also acting unilaterally.

NATO members, acting in concert, can exert critical influence and pressure to enforce the IHR and other best practices, to both protect themselves and to disincentivize or penalize noncompliant and rouge nations. NATO members broadly share common interests, geopolitical spheres, and have existing partnerships and working relations. Acting as a bloc NATO can more effectively achieve global health goals than any one nation acting alone. NATO can act both preemptively with the intention of pressuring willfully noncompliant nations to comply with the IHR while limiting its own exposure to their risky behavior, or it can act retroactively and levy sanctions or fines to help affected NATO member recoup the costs other nations' negligence have imposed on them and their citizens. Moreover, NATO as an organization can offer significantly more resources and fund or manage multiple investment and outreach efforts that might prove burdensome to any one nation. In doing so, NATO not only shores up its defenses and resilience against pandemics and global health emergencies, but also continues to compete in critical soft-power and political influence realms. Realism and altruism do not have to be mutually exclusive for NATO to achieve its aims. To paraphrase Camus, we don't know what the future will hold, but we do know that there will be sick people who need curing.[168] NATO might be just what the doctor ordered.

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168. *Id.* at 110 ("I have no idea what's awaiting me, or what will happen when this all ends. For the moment I know this; there are sick people and they need curing. . . I defend them as best I can, that's all.")