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## STATE AND INDIVIDUAL ACCOUNTABILITY FOR THE MANUFACTURE AND SPREAD OF COVID-19: OPTIONS UNDER INTERNATIONAL LAW

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### **Abstract**

This contribution seeks to initiate a debate on both state responsibility and individual criminal accountability relating to the manufacture, transfer and spread of COVID-19. The paper explores two possible scenarios where COVID-19 may have emanated from: an act of nature or artificial sources. It then focuses more attention on the latter, assuming that its origin and/or initial act of spreading may have resulted from deliberate or negligent actions, thereby attracting accountability under international law. The trending accusations and counter-accusations between the United States of America (the US) and China on the manufacture of COVID-19 inform this inference. More so, reference is made to the allegations of collusion between the World Health Organisation (WHO) and China in the virus' initial stage that contributed to its spread. As such, it is important for investigations to be conducted with the aim of bringing the individuals responsible for the manufacture and who were deliberate, negligent or complicit in the spread of COVID-19 to account. This chapter, thus seeks to establish that the events related to the manufacture, transfer or spread of COVID-19 fulfil the threshold of state responsibility or crimes against humanity and genocide within the competent jurisdiction of the International Criminal Court (ICC). The chapter also seeks to establish the most appropriate forum, both at the international and national levels, for prosecuting those implicated in these crimes.

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# 1 Introduction

International crimes derive their original conception from the 1600s prosecution of the crime of piracy, and the 1800s prosecution of slavery and slave trade.<sup>1</sup> The perpetrators of these crimes were considered *hostis humani generis*, the ‘enemy of all mankind’.<sup>2</sup> The latter was founded on the belief that there exists ‘a community of nations and peoples whose values and interest needed to be protected’.<sup>3</sup> Those who violated these norms became the enemies of mankind and therefore deserved to be punished.

The alleged manufacture or transfer and spread of COVID-19 has had a devastating global impact. At the time of writing, official records indicated that 684 million people had contracted the disease and out of this number 6.83 million people had died.<sup>4</sup> This chapter makes a fundamental assumption that COVID-19 may not be an act of nature to which no form of accountability attaches. Rather, it hypothetically establishes that its origin and or initial act of spreading is likely to have resulted from a deliberate or negligent act of state(s), institutions and individuals in order to establish the framework to discuss possible state responsibility or individual criminal responsibility under international law. If established, the chapter argues that the states or individuals responsible for the manufacture, transfer or spread of COVID-19 would have violated the norms of international law and thus deserve to be held to account in appropriate fora. Therefore, responsibility, where attributed to the state or an individual(s) may relate to the ‘manufacture’ or ‘transfer’ or ‘spread’ of COVID-19. This forms the central focus of this chapter.

However, this chapter does not touch on the aspect of finding the specific state, or individuals or institution to be held accountable. Instead,

1 MC Bassiouni ‘Sources and subjects’ in C Bassiouni (ed) *International Criminal Law* 3 ed Vol 1 (2008) at 130; MC Bassiouni ‘Sources and theories of international criminal law’ in C Bassiouni (ed) *International Criminal Law* 2 ed (1999) at 83; J Garson ‘Commentary on handcuffs or papers: Universal jurisdiction for crimes of jus cogens, or is there another route?’ (2007) 2 *Journal of International Law and Policy* 4; K Coombes ‘Universal jurisdiction: A means to end impunity or a threat to international relations?’ (2011) 43 *The George Washington International Law Review* 427; D Hoover ‘Universal jurisdiction not so universal: Time to delegate to the International Criminal Court’ (2011-20012) 8 *Eyes on the ICC* 79.

2 A Sammons ‘The under-theorization of universal jurisdiction: Implications for legitimacy on trials of war criminals by national courts’ (2003) 21 *Berkeley Journal of International Law* 126.

3 Bassiouni ‘Sources and subjects’ (n 1) 130.

4 Worldometer ‘COVID-19 coronavirus pandemic’ <https://www.worldometers.info/coronavirus/> (accessed 17 September 2021).

it initiates the individual criminal accountability debate by making an argument that the events related to the manufacture, transfer or spread of COVID-19 amount to crimes against humanity and genocide within the competence of the International Criminal Court (ICC). It also examines the most viable forum for prosecuting these individuals under international law.

To the extent that it discusses state responsibility, the arguments and counter-arguments between the United States (US) and China are used to demonstrate the potential role of the state(s) involvement in the manufacture of COVID-19. Thus, necessitating a discussion on state accountability. Concerning allegations of the World Health Organisation's (WHO) institutional complicity, this requires investigations into WHO's elaborate decision-making process in declaring a global public health emergency, which is beyond the scope of this paper.

The paper is divided into three substantive sections. The first section contextualises the facts on the emergence and initial spread of COVID-19. In particular, it establishes the arguments traded among the US, China and the WHO on accusations and counter accusations of the manufacture and or negligence and 'collusion' in the initial spread of the virus. The second section makes the argument that the events relating to the manufacture, transfer or spread of COVID-19 fulfils the threshold of state responsibility, crimes against humanity and or genocide. The third section establishes the most appropriate forum for prosecution. The final section draws a conclusion and makes recommendations on the way forward.

## **2 Facts on the emergence and spread of COVID-19**

COVID-19's origin has fuelled arguments between the US and China who accuse each other for having manufactured the virus.<sup>5</sup> On one hand, China accuses the US for introducing the virus on its territory as an act of bioterrorism.<sup>6</sup> Conversely, the then-American president, Donald Trump, persistently asserted that the virus was 'made in China'<sup>7</sup> and allegedly manufactured at the Wuhan Virology Institute. The fact that the outbreak occurred near Wuhan's most sophisticated bioweapons laboratory,

5 L Kuo 'American coronavirus: China pushes propaganda casting doubt of virus origin' *The Guardian* 12 March 2020 <https://www.theguardian.com/world/2020/mar/12/conspiracy-theory-that-coronavirus-originated-in-us-gaining-traction-in-china> (accessed 15 December 2020).

6 R Kelifeld 'Do authoritarian or democratic countries handle pandemic better?' <https://carnegieendowment.org/2020/03/31/do-authoritarian-or-democratic-countries-handle-pandemics-better-pub-81404> (accessed 8 December 2020).

7 As above.

coupled with the Chinese Ministry of Science and Technology directives ‘on strengthening biosecurity management in microbiology labs that handle advanced viruses like the novel coronavirus’<sup>8</sup> have convinced some scientists and experts that the virus may have accidentally escaped into the atmosphere.<sup>9</sup> While the COVID-19 virus’ origin remains contested, there is the underlying possibility that the virus may have been manufactured and was, therefore, not an act of nature. This controversy necessitates solidarity among the global community to ensure further investigations and appropriate accountability measures imposed on the state(s) and individuals involved in the virus’ manufacture, or transfer or initial act of spreading. For example, if investigations establish negligence or deliberate conduct in the manner in which China dealt with the virus in its initial stages and also for its alleged ‘collusion’ with WHO in a way that undermined early efforts to curb the virus, then the state and individuals involved must be held to account.

According to media reports, on 17 November 2019, the first COVID-19 case was reported in China.<sup>10</sup> Yet, China did not officially report the first COVID-19 case until 8 December 2019.<sup>11</sup> As a state party to the WHO Constitution,<sup>12</sup> this contravened China’s obligation. State parties to the WHO Constitution are obligated to constantly assess events in their territory and alert the WHO within 24 hours of all unusual public health events that constitute a Public Health Emergency of International Concern (PHEIC).<sup>13</sup> This notification should be timely, continuous and detailed enough to give accurate and sufficient information. Where possible, the notification should comprise of

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

- 8 SW Mosher ‘Don’t buy China’s story: The coronavirus may have leaked from a lab’ *New York Post* 22 February 2020 <https://nypost.com/2020/02/22/dont-buy-chinas-story-the-coronavirus-may-have-leaked-from-a-lab/> (accessed 9 December 2020).
- 9 ‘Complaint before the ICC - Crimes against Humanity and Genocide by Development of Outlawed Biological Warfare Weapons by the People’s Republic of China’ (4 April 2020) paras 47-48 <http://zimlil.org/zw/blog/200330-Complaint%20Before%20the%20International%20Criminal%20Court%20.pdf.pdf> (accessed 9 December 2020).
- 10 H Davidson ‘First COVID-19 case happened in November, China government records show-report’ *The Guardian* 13 March 2020 <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report> (accessed 23 September 2020).
- 11 As above.
- 12 Alphabetical List of WHO Member States [https://www.who.int/choice/demography/by\\_country/en/](https://www.who.int/choice/demography/by_country/en/) (accessed 25 September 2020).
- 13 Articles 6 & 7 of the WHO *International Health Regulations* 3rd ed (2005) (IHR).

measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.<sup>14</sup>

Relying on the information received from a state, the WHO then conducts independent verification and assessment to establish whether the risk constitutes a PHEIC thus, necessitating a coordinated international response.<sup>15</sup>

China officially acknowledged the outbreak of COVID-19 almost one month after the first case was reported. This evinces the claim that China violated its obligation to report within 24 hours of an outbreak. Yet, on several occasions, the WHO relied on the Chinese government's position on different aspects that may have misled countries on how to deal with the virus. Later, the WHO often shifted positions and announced contrary stances, thereby implying that the previous statements were merely borrowed from the Chinese government without WHO's independent verification and assessment as the law required. For instance, the Chinese government's announcement that it had discovered that human-to-human transmission of the virus was impossible,<sup>16</sup> was disproved via claims that while Taiwan had alerted the WHO that human-to-human transmission of the virus was possible in December 2019, the WHO failed to alert countries.<sup>17</sup>

In the meantime, the Chinese government was accused of a series of cover-ups, including destruction of laboratory evidence, conducting of arbitrary arrests and disappearance and unexplained death of doctors and experts who raised alarm, all aimed at hiding the outbreak's magnitude.<sup>18</sup> China's authoritarian government was harshly criticised for censoring

14 Article 6(2) of the IHR.

15 Article 11 of the IHR

16 B Baumann 'WHO's senior advisor had an astonishing response when asked about Taiwan' *TownHall* 28 March 2020 <https://townhall.com/tipsheet/bethbaumann/2020/03/28/watch-whos-senior-advisor-hangs-up-on-a-reporter-for-asking-about-taiwan-n2565899> (accessed 9 December 2020).

17 B Baumann 'Taiwan: We tried to warn WHO about the Wuhan coronavirus' *Townhall* 21 March 2020 <https://townhall.com/tipsheet/bethbaumann/2020/03/21/taiwan-we-tried-warning-who-about-the-wuhan-coronavirus-n2565422> (accessed 9 December 2020).

18 B Baumann 'Australian Reporter Rita Panahi takes the WHO, Chinese regime to task over coronavirus lies' *Townhall* 28 March 2020 <https://townhall.com/tipsheet/bethbaumann/2020/03/28/australian-reporter-rita-panahi-takes-the-chinese-regime-to-task-over-the-spread-of-the-wuhan-coronavirus-n2565898> (accessed 9 December 2020).

and suppressing information in the pandemic's initial stages.<sup>19</sup> This vital information could have helped contain the virus. A University of Southampton study, which implicates China's responsibility for the virus's initial spread, argues that China's early intervention<sup>20</sup> would have reduced COVID-19's spread by up to 95 per cent.<sup>21</sup> Yet, despite the first case having been reported on 17 November 2019,<sup>22</sup> the WHO did not declare that COVID-19 was a public health risk of international concern until 30 January 2020.<sup>23</sup> Four months later, on 17 March 2020, the WHO declared the crisis to be a global pandemic.<sup>24</sup>

To some commentators, this period of time demonstrated WHO's laxity in delivering its mandate. However, it is the shifting of positions based on unverified information and how it handled the pandemic in its initial stages that earned the WHO the most criticism. According to its rules, upon receiving such information, the WHO should consult with and verify from the State Party in whose territory the event is occurring, then make the information received available to other State Parties.<sup>25</sup> The obligation to share information with State Parties under this provision is not equivalent to declaring that an event is a PHEIC. Thus, the WHO failed to discharge the duty to share crucial information with State Parties, a duty that perhaps could have curtailed the virus's destruction.

- 19 Davidson (n 10); L Kuo 'Coronavirus: Wuhan doctors speak out against authorities' *The Guardian* 11 March 2020 <https://www.theguardian.com/world/2020/mar/11/coronavirus-wuhan-doctor-ai-fen-speaks-out-against-authorities> (accessed 9 December 2020).
- 20 Early intervention in this context means that China should have accepted the medical reports on the magnitude of the outbreak and took early steps towards isolation, contact tracing, and treatment as happened in the previous instances of SARS.
- 21 University of Southampton 'Early and combined interventions crucial in tackling COVID-19 spread in China' (11 March 2020) <https://www.southampton.ac.uk/news/2020/03/covid-19-china.page> (accessed 23 September 2020); See also MedRxiv 'Effect of non-pharmaceutical interventions for containing the COVID-19 outbreak in China' <https://www.medrxiv.org/content/10.1101/2020.03.03.20029843v2> (accessed 23 September 2020).
- 22 Davidson (n 10).
- 23 WHO Bulletin 'Novel coronavirus (COVID-19)' [https://www.who.int/bulletin/online\\_first/COVID-19/en/](https://www.who.int/bulletin/online_first/COVID-19/en/) (accessed 17 December 2020).
- 24 WHO 'WHO Director-General's opening remarks at the media briefing on COVID-19' (11 March 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed 23 September 2020).
- 25 Article 9 of WHO International Health Regulations (IHR Rules).

Arguably, the WHO's laxity, coupled with the misinformation that characterised China's notification of the WHO demonstrates that the WHO's negligence contributed to COVID-19's rapid spread.<sup>26</sup> Hitherto, one has to consider that the WHO is a political institution whose legitimacy is dependent on Member States. As such, in executing its mandate, it has to ensure that it maintains a delicate political balance between sustaining diplomacy with the State Party on whose territory the event is occurring and maintaining neutrality with all other State Parties. However, this does not imply that WHO cannot be held accountable for any misconduct.<sup>27</sup>

Yet, the COVID-19 pandemic is not without antecedents. Despite its inherent contextual differences, the HIV and AIDS pandemic offer some comparative examples on how the WHO has previously performed, in response to emergencies. In the HIV and AIDS epidemic's initial stages, the WHO launched international surveillance in order to assess the global HIV and AIDs situation,<sup>28</sup> without necessarily relying on information from specific countries, for example the US, which by then had reported the largest number of persons infected with the condition.<sup>29</sup> The WHO also constantly received statistics from states on the disease's spread and research findings from different institutions.<sup>30</sup> It shared the information publicly without fear of losing political legitimacy with the countries from whom the information had been received. Nonetheless, one must also appreciate the WHO's elaborate decision-making process and the different contextual facts inherent in the two pandemics. Unlike COVID-19, whose potential drastic effects are instant, HIV and AIDs usually takes a little bit longer. Further, while the HIV and AIDS pandemic was initially reported in more democratic countries where a free flow of information exists, COVID-19 was initially reported in a country with authoritarian rule.

26 Paragraphs 68-74 of 'Complaint before the ICC (Treaty of Rome, Art. 15.1 and 53) in the matter of Crimes against Humanity and Genocide by development of outlawed biological warfare weapons by the People's Republic of China' <http://zimlil.org/zw/blog/200330-Complaint%20Before%20the%20International%20Criminal%20Court%20.pdf.pdf> (accessed 23 September 2020).

27 'Acquired immunodeficiency syndrome – An assessment of the present situation in the world: Memorandum from a WHO Meeting' (1984) 62 *Bulletin of the World Health Organisation* 419 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536320/> (accessed 16 December 2020); 'A timeline of HIV and AIDs' *HIV.gov* <https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline> (accessed 16 December 2020).

28 As above.

29 By the end of 1981, the US had reported a total of 337 cases of persons with severe immune deficiency. See 'A timeline of HIV and AIDs's' (n 27).

30 See generally 'History of HIV and AIDs: Overview' [https://www.avert.org/professionals/history-hiv-aids/overview#footnote5\\_ut61b3j](https://www.avert.org/professionals/history-hiv-aids/overview#footnote5_ut61b3j) (accessed 16 December 2020).

Overall, the WHO has tried to dispense its mandate objectively. However, the highly politicised environment within which it operates as well as the different democratic levels of the countries that constitute its State Parties has limited its ability to realise this objective. Yet, as a political entity, the WHO's legitimacy remains at the mercy of its member states.

### **3 The origin, transfer and spread of COVID-19 vs state and individual accountability threshold**

#### **3.1 State accountability for the origin, transfer and spread of COVID-19**

China's failure to exercise due diligence when the first COVID-19 case was reported later contributed to the virus spreading globally – the adverse effects of which continue to unfold, which outrightly violates both conventional and customary international law. Its failure to act quickly and diligently was not only negligent but also a blatant violation of WHO's International Health Regulations (IHR),<sup>31</sup> that consequently resulted in uncontrolled spread of COVID-19. This negligence should attract some form of state responsibility. Similarly, the international community of states must take steps to ensure that the alleged involvement of China and the US in the manufacture of the virus is investigated and the state(s) found responsible are held accountable.

State responsibility can be established on the basis of acts or omissions that amount to deliberate or negligent spread of biological or chemical agents. COVID-19 can be designated as a biological weapon that could potentially threaten international peace and security.<sup>32</sup> Indeed, speaking on the relationship between the impact of conflicts and COVID-19's spread, the UN Security Council has acknowledged that the 'unprecedented extent of the COVID-19 is likely to endanger the maintenance of international peace and security',<sup>33</sup> thereby necessitating global solidarity in combating the virus.<sup>34</sup>

31 These regulations were first adopted in 1969 and last revised in 2005. According to the WHO Constitution, these regulations create obligations for WHO member states.

32 While the circumstances surrounding COVID-19's development remain contested, the arguments seem to suggest that the virus may have been developed for use as a weapon for biological warfare. Biological weapons are 'microorganisms like virus, bacteria, fungi, or other toxins that are produced and released deliberately to cause disease and death in humans, animals or plants'. They fall within the category of weapons classified as weapons of mass destruction. see, WHO 'Biological weapons' [https://www.who.int/health-topics/biological-weapons#tab=tab\\_1](https://www.who.int/health-topics/biological-weapons#tab=tab_1) (accessed 25 September 2020).

33 UN Security Council, Resolution 2532 (2020) adopted by the Security Council on 1 July 2020, UN Doc S/RES/2532 (2020).

34 Resolution 2532 (n 33); UN General Assembly, Resolution 74/270. Global solidarity

A state is held accountable under international law for violating its international obligations when the state is responsible for the act or omission constituting the breach.<sup>35</sup> An act or omission is attributed to the state when a state agency carries out the act or is responsible for the omission<sup>36</sup> or persons exercising government authority or persons acting under the direction of the state or private persons whose activities have been adopted by the state carry out the breach.<sup>37</sup> This implies that for any state to be subjected to any accountability measures for manufacturing or spreading COVID-19, it has to be established that the persons involved were acting under the authority or directions of the relevant state or if they were private entities, their governments had adopted their activities or that the respective governments failed to exercise due diligence to stop the act or omission.<sup>38</sup> Ultimately, the act or the omission in question must be attributed to the state itself. Historically, a state's primary responsibility is 'to compensate or make reparations for injuries suffered by nationals of other states'.<sup>39</sup> Any country found to have deliberately manufactured COVID-19 must therefore make good reparations to victims who are its nationals and those from other nationals.

### 3.1.1 Reparations

The state(s) responsible for an internationally wrongful act is obligated to make full reparations for the injury caused.<sup>40</sup> Such injury could either take the form of material or moral damage resulting from the wrongful act.<sup>41</sup> COVID-19's possible 'manufacture' and negligent or deliberate spread has had devastating consequences and caused both economic and moral

to fight the coronavirus disease 2019 (COVID-19), 3 April 2020, UN Doc A/RES/74/270 (2020).

35 Article 2 of the Responsibility of States for Internationally Wrongful Acts, 2001.

36 *The Salvador Commercial Case* (1902) RIAA Vol XV 467

37 Article 5 & 8 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. See *The Home Missionary Society Claim* (1920) RIAA, Vol VI 44; *Pulp Mills on the River Uruguay Case* [2010] ICJ Reports 14, para 197. The Court attributed private conduct to the state in the case of a state failure to exercise due diligence in anticipating and preventing the private persons acts from breaching the state's international obligation. Where the private acts are spontaneous, the state still has the responsibility to exercise continuing due diligence by restoring the status quo, if possible and holding the respective individuals accountable under the law and e-assure other states the non-repetition of the acts/omission.

38 See *The Home Missionary Society Claim* (1920) RIAA, Vol VI 44; *Pulp Mills on the River Uruguay Case* [2010] ICJ Reports 14, para 197.

39 S Sucharitkul 'State responsibility and international liability under international law' (1996)18 *Loyola of Los Angeles International and Comparative Law Journal* 823.

40 Article 31(1) of the Draft Articles on State Responsibility.

41 Article 31(2) of the Draft Articles on State Responsibility.

damage to the globe. Accordingly, any reparation could be in the form of economic restitution<sup>42</sup> of the affected states, or compensation<sup>43</sup> of the victims of COVID-19 – where the damage cannot be cured by restitution – or satisfaction, where the damage cannot be cured by both restitution and compensation.<sup>44</sup> Acknowledgement of the wrong, acts of apology or any acts of modality are examples of satisfaction.<sup>45</sup> Thus, any accountability measure taken against the responsible state(s) must ensure full reparation measures. Additionally, injured states may also seek orders of cessation<sup>46</sup> of any biological or chemical processes that lead to or are related to the ‘manufacture’ of COVID-19, where this may still be continuing.<sup>47</sup>

### 3.1.2 UN Charter-based measures

The UNGA and UNSC play a role under the UN Charter-based measures for holding UN agencies or bodies or any state accountable for violating international peace and security. Yet, neither the UNGA nor the UNSC has discussed accountability for either the ‘manufacture’ or spread of COVID-19.<sup>48</sup> The UNSC has merely pointed out the potential nature of COVID-19 to threaten international peace and security.<sup>49</sup> In spite of that, there is no doubt that the alleged manufacture and subsequent spread of COVID-19 shattered international peace and security. For instance, the world suffered a complete lockdown of its economy, social relations, international travels for several months due to the insecurity that exposure to COVID-19 poses. Further, the death of more than 6 million people in

42 Article 35 of the Draft Articles on State Responsibility.

43 Article 36 of the Draft Articles on State Responsibility.

44 Article 37 of the Draft Articles on State Responsibility. For further reading on reparations see Reports of the International arbitral awards, Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair (*the Rainbow Warrior case*), Vol XX (30 April 1990) para 111-123.

45 Article 37(2) of the Draft Articles on State Responsibility.

46 Article 48(2)(a) of the Draft Articles on State Responsibility.

47 An order of cessation of the wrongful act is only relevant if the wrongful act is still continuing at the time of the judicial pronouncement. See *The United States Diplomatic and Consular Staff in Teheran Case* ICJ Reports (1979) 21, paras 38-41, and (1980) para 95, No 1; *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua* ICJ Reports (1984) 187, and (1986) para 292, p 149.

48 So far, the UNGA has only adopted two resolutions on solidarity in the global fight of COVID-19, UN General Assembly, Resolution 74/270 (n 34); and UN General Assembly, Resolution 74/274. International cooperation to ensure global access to medicines, vaccines and medical equipment to face COVID-19, 21 April 2021, UN Doc A/RES/74/274 (2021).

49 Security Council Resolution 2532 (n 33).

less than three years and the isolation or hospitalisation of almost 500 million others in constrained health facilities robs people around the world of the peace needed for daily life. Had the UNSC made a determination in accordance with article 39 of the UN Charter that the manufacture and subsequent spread of COVID-19 threatened international peace and security, it would have provided a basis for the Council to hold the relevant states accountable either through peaceful settlement of the dispute or through its enforcement mechanisms. Regarding the latter, the Council can resolve the issue either through sanctions or military intervention.<sup>50</sup> In light of the realities surrounding biological warfare whose combatants are invisible, military intervention is not a viable option in. This leaves the UN Security Council with the single option of sanctions against the offending state.

The UN Charter has a wide sanctions regime which includes economic, transport, communication and diplomatic relations.<sup>51</sup> Noting that imposing sanctions is a highly sensitive political issue and the fact that there is a high possibility that one or more of the permanent 5 might be implicated in the COVID-19 virus' manufacture or initial spread, one cannot rule out the possibility of the veto compromising this process.<sup>52</sup> The possibility of this politics playing out in accountability efforts of states involved in the COVID-19 virus's manufacture and initial spread is not remote. However, practice evidences that where the UN Security Council has failed to act because of a veto, the UNGA has appropriated the responsibility to make 'recommendations to Members for collective measures,' including on the use of force.<sup>53</sup> Given the probability of a veto, the UNGA ought to seize the opportunity to make the decision on state accountability for COVID-19.

50 Article 41 & 42 of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (UN Charter).

51 Article 41 of the UN Charter.

52 For example, China and Russia vetoed a UN Security Council attempt to adopt a resolution imposing sanctions on Syria following increased widespread and systematic violation of human rights by the Syrian authorities, UN General Assembly, Resolution 67/262: The situation in the Syrian Arab Republic, 4 June 2013, UN Doc A/RES/67/262 (2013) <https://www.un.org/press/en/2012/sc10714.doc.htm> (accessed 17 June 2020); the UN Security Council also failed to discuss the matter when the plot to assassinate the Ambassador of Saudi Arabia to the United States of America was disrupted, UN General Assembly, Resolution 66/12: Terrorist attacks on internationally protected persons, 2 February 2012, UN Doc A/RES/66/12 (2012).

53 UN General Assembly Resolution 377(V): 'Uniting for peace', 3 November 1950, UN Doc A/RES/377(V) A (1950), part A, para 1.

The fact that the UN Security Council has never determined that COVID-19's adverse impacts are a threat to international peace and security undermines the effectiveness of its enforcement powers to adequately hold the responsible state(s) accountable under the UN Charter-based system. Alternatively, any UN Charter member state aggrieved by the virus's production and initial negligent acts or collusion between China and the WHO, that contributed to the rapid global spread of the virus, may initiate any peaceful settlement mechanisms with the states involved. These mechanisms include a referral of the matter to the International Court of Justice (ICJ) independent of the UN Security Council. In the latter's case, the ultimate goal will be reparations for the victims of COVID-19 who are nationals from the affected states.

Thus, the ICJ offers another accountability option under the Charter-based system. Yet this Court is wrought with inherent weaknesses and challenges that pose potential threat to effective state accountability for COVID-19. For instance, the ICJ does not have compulsory jurisdiction over disputes involving its member states. It is only but one of the measures provided under the Charter for pacific settlement of disputes.<sup>54</sup> Moreover, parties to the dispute must be states<sup>55</sup> that are signatories to the UN Charter and must voluntarily consent to submit the case to the Court.<sup>56</sup> If the trending accusations and counteraccusations on the manufacture and spread of COVID-19 between the US and China is anything to go by, the possibility that state(s) alleged to have manufactured or deliberately spread COVID-19 may refuse to voluntarily subject themselves to the ICJ's jurisdiction, in the absence of a standing declaration under article 36 of the ICJ Statute, cannot be under-written. Yet, the unabated state referral of cases to the court, coupled with a satisfactory record of states enforcing

54 Article 33(1) of the UN Charter.

55 Article 34 of the United Nations, Statute of the International Court of Justice, 18 April 1946 (ICJ Statute).

56 Article 38(2) of the ICJ Statute; *Mavrommatis Palestine Concessions, Judgment of 30 August 1924*, PCIJ Series A No 2, at 16. In this case the Court underscored the fact that it could only exercise its jurisdiction where state consent has been given. This was further emphasised in *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)* Judgment of June 15th 1954, ICJ Reports 1954, at 32. There are three main ways a state can give consent to the Courts' jurisdiction. First, through the making of declarations under article 36(2) and (5) of the ICJ Statute. Second, under compromissory clauses under international treaties. It should be noted that both the BWC and the CWC do not expressly provide the ICJ as a mechanism for dispute settlement. This leaves the accountability options for COVID-19 with the option of declarations or through the conclusion of special agreement called the compromise or the *forum prorogatum* as the forms of expressing state consent to submit the matter to the jurisdiction of the Court.

the court's decisions<sup>57</sup> evidence the fact that the ICJ is a viable option of holding the responsible states accountable for the virus' manufacture and spread. In any event, if the relevant state(s) fail to adhere to the court's decision, the court may refer the matter to the UN Security Council which can call into action its enforcement mechanisms under chapter VII of the Charter.

Besides the Court, state parties to the UN Charter, in consultation with the offending state(s), may also explore negotiation, enquiry, mediation, conciliation, arbitration, resort to regional agencies or other peaceful means acceptable among them.<sup>58</sup>

### **3.2 Individual accountability: The production, transfer or spread of COVID-19 as international crimes**

The Rome Statute of the International Criminal Court (Rome Statute) deals with individual criminal responsibility. The Rome Statute's status as an accountability measure is only triggered when an international crime is committed. One of the central concerns relating to this mode of accountability is whether the COVID-19 virus' fabrication, spread and impact fulfil the threshold of any of the international crime requirements listed under the Rome statute. This paper argues that the circumstances surrounding COVID-19's manufacture, spread and impact fit the crimes against humanity and genocide criteria under the Rome Statute. The following sub-sections delve into these two international crimes and how the manufacture, or transfer or impact of COVID-19 fulfils their threshold under the Rome Statute.

#### ***3.2.1 The production, transfer and spread of COVID-19 as crimes against humanity***

As noted above, identified perpetrators should first be charged with crimes against humanity if investigations establish that COVID-19 was manufactured and deliberately or negligently released to cause death and intense human suffering. This would constitute murder, which is one of the acts that could constitute a crime against humanity<sup>59</sup> and crimes against

57 *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation, Judgment, ICJ Reports 2012, at 324; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010 (II), at 692, para 165, subpara (2). In all these cases, the Courts decisions were complied with within months after delivery of the judgments.

58 Article 33(1) of the UN Charter.

59 Article 7(1)(a) of the UN General Assembly, Rome Statute of the International

humanity of other inhumane acts if ‘committed as part of a widespread or systematic attack directed’.<sup>60</sup> While for murder as constituting a crime against humanity it has to be established that one or more persons were killed,<sup>61</sup> for crimes against humanity of inhumane acts it has to be established that ‘the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act’.<sup>62</sup> In both instances, it must be demonstrated that the acts were committed as part of a widespread or systematic attack directed against civilian population and that the perpetrator knew or intended their conduct to be part of the widespread or systematic attack against civilians.<sup>63</sup>

The blurry distinction inherent in the notion of ‘widespread or systematic’ nature of crimes against humanity does not escape our discussion. While the International Criminal Tribunal of Rwanda (ICTR) limits the definition of ‘widespread’ to numbers,<sup>64</sup> or ‘massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’,<sup>65</sup> the ICC has consistently defined ‘widespread’ as referring to ‘the large-scale nature of the attack’,<sup>66</sup> and ‘the number of targeted persons’.<sup>67</sup> On the other hand, the ICC associates ‘systematic’ to the ‘organised nature of the acts of violence’<sup>68</sup> or ‘a pattern of repeated conduct or the recurring or continuous perpetration of inter-linked, non-random acts’.<sup>69</sup> Systematic ‘reflects the organized nature of the acts of violence’.<sup>70</sup> It is ‘a pattern of conduct or the methodological plan’.<sup>71</sup> It is the non-accidental repetition of these acts that demonstrates their systematic nature. It should be noted that contrary to

Criminal Court (last amended 2010), 17 July 1998, ISBN 92-9227-227-6 (Rome Statute).

60 Article 7(1)(k) of the Rome Statute.

61 Article 7(1)(a) ICIJ, Elements of Crimes, ISBN 92-9227-232-2 (2011) (Elements of Crimes).

62 Article 7(1)(k) of the Elements of Crime.

63 Article 7(1) of the Rome Statute & Elements of Crime.

64 *Prosecutor v Akayesu* Case ICTR-96-4-T, Judgment (1998), para 580.

65 *Prosecutor v Akayesu* (n 64); *Prosecutor v Kayishema*, Case ICTR-95-1-T, (1999) 123.

66 *Prosecutor v Germain Katanga*, Judgment, ICC-01/04-01/07, (Judgment pursuant to article 24 of the Statute) 7 March 2014, paras 1098 & 1123; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, para 83.

67 *Prosecutor v Germain Katanga* (n 66) para 1123.

68 *Prosecutor v Germain Katanga* (n 66) para 1098.

69 *Prosecutor v Germain Katanga* (n 66) para 1113.

70 *Prosecutor v Germain Katanga* (n 66) para 1123.

71 ME Badar ‘From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity’ (2004) 5 *San Diego International Law Journal* 111.

the ICTR and some scholars who define systematic as being synonymous to the existence of a policy or plan,<sup>72</sup> the ICC has maintained that the existence of a policy is not the defining feature of 'systematic' nor is a policy synonymous to systematic.<sup>73</sup>

The practice of the tribunals in distinguishing between the two aspects seems pretty clear. The global spread of COVID-19 as a biological weapon fit within the definitions of widespread and systematic. While the circumstances surrounding the development of COVID-19 remains contested, the trending arguments suggest the possible intention for its development to be that of use as a biological weapon in warfare. Besides, the empirical facts of the devastating impacts of COVID-19 to humans on the globe attest to the underlying purpose for which the virus may have been manufactured to deliberately cause disease and death to humans.

Thus, the highly infectious nature of the virus which triggered its large-scale spread illustrates that COVID-19 is widespread. More so, the non-accidental pattern in which the virus transmits demonstrates that its architects intended to create a highly infectious virus, thus, fulfilling the systematic requirement. Yet, the potential for the two notions overlapping in practice cannot be ignored. The fact that an attack is widespread could in itself evidence its systematic nature.<sup>74</sup> For instance, the large-scale global spread of COVID-19 illustrates the non-accidental repeat pattern the responsible parties intended. Yet, the alternative nature of 'widespread or systematic' remains a settled matter of customary law.<sup>75</sup> Here, the prosecution is required to choose and prove the existence of at least one of the two has been fulfilled.<sup>76</sup>

Another essential element of crimes against humanity is that of 'attack'. While the International Criminal Tribunal of the former Yugoslavia (ICTY) limited definition of 'attack' to armed conflict,<sup>77</sup> the

72 S Chesterman 'An altogether different order: Defining the elements of crimes against humanity' (2000) 10 *Duke Journal of Comparative and International Law* 307 at 314-315; the ICTR in *Kayishema case* (n 65) para 580, defined systematic as referring to 'carried out pursuant to a preconceived plan or policy'.

73 *Prosecutor v Germain Katanga* (n 66) para 1111.

74 *Prosecutor v Jelisić*, Case IT-95-10-T, Judgment of 14 December 1999 para 53.

75 Chesterman (n 72) 313; the *Prosecutor v Mile Mskic, Miroslav, and Veselin Ijivan-anin*, Case IT-95-13-R61, (ICTY 3 April 1996) (also referred to as *Vukovar Hospital Decision*) para 30; *Prosecutor v Tadić*, Case IT-94-1-T (ICTY 7 May 1997) 646-48; *Prosecutor v Tadić*, Case No IT-94-1-A, (ICTY 15 July 1999) para 271.

76 Badar (n 71) 109.

77 Article 3 Statute of the International Criminal Tribunal for Rwanda; *Akayesu case* (n 64)581.

ICTR and the ICC has maintained that an ‘attack’, as a component of crimes against humanity, is not necessarily equivalent to a military attack.<sup>78</sup> In *Akayesu*, it was underscored that an attack could also be non-violent in nature.<sup>79</sup> Thus, any

course of conduct involving the commission of multiple acts, referred to in paragraph 1, against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack<sup>80</sup>

qualifies as a crime against humanity.

This flexible definition of what amounts to an ‘attack’ accommodates biological inventions of mass destruction such as the COVID-19 virus. In the absence of a military-like attack, COVID-19’s infectious nature which enables it to spread rapidly, cause death and intense human suffering suffices as proof of an attack. The ICC has interpreted the ‘course of conduct’ in this context to mean ‘an operation or a series of actions directed against a civilian population’ as opposed to a single isolated act.<sup>81</sup> This does not mean that a single act causing suffering of a magnitude like COVID-19 has done does not fall within the ICC’s jurisdiction. Instead, it implies that an isolated act can amount to crimes against humanity if it is committed as part of a policy or plan.<sup>82</sup> The ICC has observed that ‘a single event may well constitute an attack ... provided that the other elements of that article are met’.<sup>83</sup>

The course of conduct must be carried out ‘pursuant to or in furtherance of a state or organizational policy’. This implies that the prosecution must establish that the said course of conduct, in particular, the manufacture and spread of COVID-19, was done in furtherance of a state or organizational policy. The policy must express a state or organisation’s intention to carry out an attack against a civilian population.<sup>84</sup> A state or organisation’s failure to take appropriate action, which in turn encourages the attack, can also evidence an implementation of the policy to cause

78 *Akayesu Case* (n 64) para 581; *Prosecutor v Jean Pierre Bemba Gombo* ICC-01/05-01/08 (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute) 15 June 2009, para 75; *Prosecutor v Germain Katanga* (n 66) para 1102.

79 *Akayesu Case* (n 64) para 581.

80 Article 7(2)(a) of the Rome Statute.

81 *Prosecutor v Germain Katanga* (n 66) para 1101.

82 *Prosecutor v Tadic* Case IT-94-1-T (ICTY 7 May 1997) para 694; Badar (n 71) 110.

83 *Prosecutor v Germain Katanga* (n 66) para 1101.

84 *Prosecutor v Germain Katanga* (n 66) 1108.

harm.<sup>85</sup> Yet, this policy need not be express, it can be implied from a series of events.<sup>86</sup> It also need not be formally adopted as a state policy – it suffices for an organisation or group to formally adopt it.<sup>87</sup> Ultimately, while the need to prove the attack’s systematic nature and existence of a policy are separate, the two aspects form part of the same transaction because the methodical commission of the proscribed acts has to be linked to a policy or plan.<sup>88</sup> Essentially, any investigations must establish a nexus between the widespread or systematic attack and the acts of suspected accused persons.

Crimes against humanity arise where ‘any civilian population’ is the primary target of an attack.<sup>89</sup> It is undisputed that the civilians were the primary target of the deliberate release of COVID-19 agents. Although non-civilians are also likely to contract the virus, the most affected population are civilian. Therefore, it must have been the manufacturer’s obvious and primary objective to target many civilians with a highly infectious virus that did not discriminate against who it infects.

The final distinguishing feature of crimes against humanity is the requirement of knowledge of the attack. The perpetrator must know or intend their conduct to be part of the systematic civilian attack.<sup>90</sup> This neither requires that an accused person had knowledge of the precise details of the attack and policy nor that the accused subscribed to the state or organization’s criminal design.<sup>91</sup> It suffices that ‘the perpetrator deliberately intended his or her act to form part of the attack against the civilian population’.<sup>92</sup> It must be established that an accused person ‘willingly accepted and knowingly took the risk of participating in the implementation of that context’.<sup>93</sup> Or that the accused person ‘was wilfully

85 *Prosecutor v Germain Katanga* (n 66) 1107.

86 *Prosecutor v Germain Katanga* (n 66) 81 para 203.

87 *Akayesu* (n 64) para 580; Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, U.N.GAOR, 51st Session, Supp No 10 article 18 at 93, UN Doc A/51/1101 (1996), revised by UN Doc A/51/10/Corr.1 (1996).

88 *The Prosecutor v. Tihomir Blaškić* IT-95-14-T, Trial Chamber of the ICTY (2000) 81 para 201.

89 *Prosecutor v Kunarac* Case IT-96-23/1-A, Judgment (12 June 2002) para 85.

90 Article 7(1) of the Rome Statute & Elements of Crime.

91 *Prosecutor v Germain Katanga* (n 66) para 1125.

92 As above.

93 *Prosecutor v Tihomir Blaškić*, IT-95-14-T, Trial Chamber of the ICTY (2000) 81, para 251.

blind to facts, to circumstances that would bring his or her acts within the scope of a crime against humanity'.<sup>94</sup>

Generally, the Rome Statute links the mental element to three instances: the conduct, consequences, and circumstances.<sup>95</sup> Regarding conduct, it must be established that the accused person 'means to engage in the conduct'.<sup>96</sup> The ICC has interpreted this to mean that the Court must ascertain whether 'the suspect deliberately acted or failed to act, without any regard to the expected result of the action taken'.<sup>97</sup> Regarding the consequences, it must be proven that either the accused person 'means to cause that consequence' or 'is aware that it will occur in the ordinary cause of events'.<sup>98</sup> These terminologies have been interpreted to refer to the 'likelihood' or 'possibility' or '[virtual] certainty that that consequence will occur in future'.<sup>99</sup> It has also been referred to as 'oblique intention'.<sup>100</sup> So, an accused person must have known that 'his or her actions will necessarily bring about the consequence in question'.<sup>101</sup> While consequence manifests in the future, a circumstance is in the present. Thus, it must be proven that an accused person was aware that a certain circumstance exists or existed.<sup>102</sup>

### 3.2.2 *The production, transfer and spread of COVID-19 as genocide*

Genocide is the other probable offence under which the individuals responsible for the manufacture and initial spread of COVID-19 could be held accountable. One can be charged with genocide for 'killing members of the group'<sup>103</sup> or 'causing serious bodily or mental harm to members of the group'<sup>104</sup> 'with intent to destroy, in whole or in part, a national, ...[or] racial... group, as such'.<sup>105</sup>

94 *R v Finta* (1994) 1 SCR 701.

95 Article 30(2) of the Rome Statute.

96 As above.

97 *Prosecutor v Germain Katanga* (n 66) para 774.

98 Article 30(2)(b) of the Rome Statute.

99 *Prosecutor v Germain Katanga* (n 66) para 775-776.

100 *Prosecutor v Germain Katanga* (n 66) para 776.

101 *Prosecutor v Germain Katanga* (n 66) para 777.

102 Article 30(3) of the Rome Statute.

103 Article 6(a) of the Rome Statute.

104 Article 6(b) of the Rome Statute.

105 Article 6 of the Rome Statute.

Given that 'killing'<sup>106</sup> or 'causing serious bodily or mental harm' as pertaining to the manufacture or spread of COVID-19 are easily understood, they do not need further definition. These can be established by pointing out the statistics of persons that have died from the virus or those that have suffered serious bodily or mental harm from direct contact with the virus or its impacts. It is the word 'group' embodied in these acts that require some consideration.

According to the Rome Statute, a group denotes '... a national, ethnical, racial or religious group, as such'.<sup>107</sup> While it is true that this list is not exhaustive,<sup>108</sup> one of the questions likely to arise is which group did those responsible target? One scenario is to assume that a true account of who the actual victims of the manufacture and spread of COVID-19 are must be understood within the context of inter-state and intra-state conflicts and developing global economic trends. Therefore, the states involved in the virus' manufacture or negligent spread may have intended 'a certain group of states' to fall victim to the virus. Drawing analogy from numerous intra-state and inter-state conflicts around the world, the quest for economic, political, and cultural dominance underlie most, if not all, of these conflicts.<sup>109</sup> Evidence of countries attacking other countries to subjugate them and control their political and economic power abound.<sup>110</sup> Similarly, this contribution argues that COVID-19, as a biological weapon, could have been developed to target 'a certain group of states' to either dominate their economies, politics, ideologies and cultural lives, to simply subjugate them or to eliminate them from global economies altogether.

The question then is, why was the spread of the virus not limited within the targeted states? Answering this question is likely to be an extremely difficult mission to undertake. However, it can be argued that it would be easier for the virus to spread around the globe and achieve the object for which it was intended. On the question of how the perpetrators themselves would escape the virus' effects, any future investigation must seek to

106 Article 6(a) of the Rome Statute.

107 Article 6 of the Rome Statute.

108 In *Akayesu case*, this has been interpreted as referring to any stable group 'constituted in a permanent fashion and membership of which is determined by birth' as opposed to mobile groups whose membership is determined by individuals commitment to join. *Prosecutor v Akayesu*, Judgment, 2 September 1998, ICTR-96-4-T, Para 511, 516.

109 RC North & N Choucri 'Economic and political factors in international conflicts and integration' (1983) 27 *International Studies Quarterly* 443; GK Brown & F Stewart 'Economic or political causes of conflicts: An overview of some policy implications' CRISE Working Paper 81 (2014).

110 For example, oil-based conflicts in Iraq, Syria, Nigeria, South Sudan, Ukraine, the East and South China Seas.

establish whether the perpetrators established a protective mechanism, like a vaccine or related method developed to shield themselves from the virus. Thus, ‘group’ within the context of genocide denotes ‘a certain group of states’ as opposed to those involved in the actual manufacture or initial deliberate or negligent spread of the virus.

The *mens rea* element of this crime also requires some detailed analysis. To prove genocide within the context of COVID-19, it must first be established that the accused persons had the general intention to commit the prohibited acts: ‘killing members of the group’ or ‘causing serious bodily or mental harm to members of the group’. Secondly, it has to be established that the accused person carried out the offence with the special ‘intent to destroy, in whole or in part, a national ... [or] racial ... group, as such’. To ‘destroy’ can either be physical or biological. In the absence of a military-like attack, the COVID-19’s deadly nature fulfils the ‘destroy’ requirement. ‘[I]n whole or in part’ denotes a substantial target.<sup>111</sup> The group being targeted must be of a number substantial enough to impact the group as a whole. Several factors are considered when determining whether the target group is substantial. Concerning the manufacture and spread of COVID-19, the area of the perpetrators’ activities and control and the possible extent of their reach;<sup>112</sup> and the size of the targeted part of the group as compared to the group’s overall size<sup>113</sup> are significant indicators. If the targeted part is essential for the groups’ survival, then this is a good indicator of the intention to destroy a substantial part thereof.<sup>114</sup> The COVID-19 virus’ highly infectious nature could only have been intended to either wipe out the ‘targeted states’ or a significant portion thereof. It can be argued that the COVID-19 virus intended to destroy the population of ‘certain other states’ either entirely or substantially. Investigations must, therefore, gather evidence to demonstrate that the perpetrators specifically intended to destroy certain specific nation(s), to fulfil the threshold of the requirement ‘to destroy in “whole or part” of a national group’ in establishing the offence.

111 *Prosecutor v Radislav Krstic* ICTY Appeal Chamber Judgment IT-98-33-A (19 April 2004) para 8; Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, p.89; WA Schabas *Genocide in International Law* (2000) 238; P Drost *The Crime of State Book II, Genocide* (1959) 89.

112 *Prosecutor v Radislav Krstic* (n 111) para 13.

113 *Prosecutor v Radislav Krstic* (n 111) para 12.

114 As above.

### 3.3 The forum for prosecuting COVID-19 related international crimes

Holding individuals responsible for engaging in international crimes is primarily done through prosecution. The individuals responsible for the 'manufacture' or deliberate or negligent release of the COVID-19 virus, can thus be prosecuted for crimes against humanity or genocide. These measures can be pursued at both the international and national levels.

At the international level, as the body with a primary mandate to maintain international peace and security, the UN Security Council has the power to refer the offending state to the ICC.<sup>115</sup> The UN Security Council's practice has been to refer to the ICC both member states and non-member states to the Rome Statute. In the case of non-member states, the ICC has underscored the fact that so long as a state is party to the UN Charter, it suffices to bestow upon it obligations under the Rome Statute, as was the case in Sudan and Libya.<sup>116</sup> The Statute also makes it possible for a non-member state to be hauled before the ICC where the citizens of a member state (or a non-member state which makes a declaration accepting the jurisdiction of the ICC over an identified period of time)<sup>117</sup> are victims of an international crime recognised under the Statute. This implies that in the event the state(s) responsible for the manufacture and initial spread of COVID-19 is not a party to the Rome Statute, the ICC could still conduct investigation and prosecution of the responsible individuals.

Concerning the events relating to COVID-19, the possibility that the UN Security Council might be called upon to refer the situation on the territories of China or the US is not too remote. Given that these two are both permanent members of the UN Security Council, one cannot rule out the possibility of the politics of the veto compromising such a process. The practice of the UN Security Council demonstrates a general trend where the veto power is utilised to frustrate any adverse decision against

115 Article 13(b) of the Rome statute.

116 UNSC Resolution 1593 (2005), adopted at its 5158th meeting, 31 March 2005, UN Doc S/RES/1593 (2005) – referring Sudan to the ICC; United Nations Security Council Resolution 1970, UN Doc S/RES/1970 (2011) – referring Libya to the ICC. With regard to Sudan, the ICC observed that the UN Security Council resolution referring the matter to the Court had the effect to subject Sudan to rights and duties analogous to those of States Parties to the Statute. *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir) ICC-02/05-01/09-302 (6 July 2017) Pre-Trial Chamber II, para 88.

117 Article 12(3) of the Rome Statute.

any of the permanent 5 or their allies.<sup>118</sup> It is almost certain that this politics is likely to play out in relation to any efforts towards individual criminal accountability of persons originating from states implicated in the manufacture and initial spread of COVID-19. However, in the event that the UN Security Council does not act because of a veto, states parties to the Rome Statute or the prosecutor can also refer the states responsible to the ICC for investigation and eventual prosecution of individuals.<sup>119</sup> In the case of the latter two instances, the state being referred to the ICC must not only be party to the Rome Statute but it has to be established that the COVID-19 was manufactured on its territory or the accused persons are nationals of the state.<sup>120</sup>

Prosecuting crimes against humanity and genocide as they relate to COVID-19 at the national level triggers states primary obligation to prosecute under international law. Generally, it is agreed that customary international law prohibits genocide, war crimes, crimes against humanity, and acts of aggression.<sup>121</sup> States' obligation to prosecute arises from its conventional obligation<sup>122</sup>— and in some instances — from customary international law.<sup>123</sup> Yet, while the Genocide Convention limits the basis of prosecution to genocide alone, the Geneva Convention limits the scope of this duty to prosecute grave breaches that occur within the context of

118 For example, China and Russia vetoed a UN Security Council attempt to adopt a resolution imposing sanctions on Syria following increased widespread and systematic violation of human rights by the Syrian authorities, Resolution 67/262 (n 52); the UN Security Council also failed to discuss the matter when the plot to assassinate the Ambassador of Saudi Arabia to the United States of America was disrupted, GA Resolution 66/12 (n 52).

119 Article 13(a) and (c) of the Rome Statute.

120 Article 12(2) of the Rome Statute.

121 T Meron *Human rights and humanitarian norms as customary law* (1989) 210; D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2552; *Prosecutor v Duško Tadić* (Opinion and Judgment) IT-94-1-T (7 May 1997) ICTY Trial Chamber, paras 618-623 on the general history of crimes against humanity; G Mettraux 'Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda' (2002) 43 *Harvard International Law Journal* 244; The Princeton Principles on Universal Jurisdiction, Principle 2(1); C Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (2004) 1 *Eyes on the ICC* 131 at 140.

122 Articles 4 and 6 of the Convention on the Prevention and Suppression of the Crime of Genocide (1948); articles 49 and 54 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949); article 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984).

123 Y Dinstein *International Criminal law* (1985) 225; Orentlicher (n 121) 2552.

an international armed conflict.<sup>124</sup> This implies that this Convention does not envisage the application of the absolute duty to prosecute genocide in relation to biological warfare as is the case with COVID-19. Nonetheless, the Rome Statutes' definition of genocide is not limited to armed conflict in the manner contemplated under the Geneva Convention. Thus, state parties to the Rome Statute can comfortably prosecute crimes against humanity and genocide as it relates to COVID-19 under the principle of universal jurisdiction.

Given the difficulties evident in states accepting liability and initiating their own independent individual criminal accountability in relation to COVID-19, this chapter finds it essential to explore the possibility of individual criminal prosecution in foreign national courts.

Customary international law provides two basis upon which a state may prescribe certain conduct to be criminal: under the territorial principle and the extraterritoriality principle.<sup>125</sup> Under the former, a state may prosecute cases committed on its territory regardless of whether it is committed by its nationals or non-nationals.<sup>126</sup> While the territorial

124 Article 2 of the Geneva Conventions I, II, III, and IV.

125 Council of European Union 'AU-EU Expert report on the principle of universal jurisdiction' 12 Doc.8672/1/09/REVI, 16 April 2009 (*AU-EU expert report on the Principle of Universal Jurisdiction*); D Ireland-Piper 'Prosecution of extraterritorial criminal conduct and the abuse of rights doctrine' (2013) 9 *Utrecht Law Review* 72; *SS Lotus (France v Turkey)* 1927 Permanent Court of International Justice (ser A) No 10, at 18-19 (7 Sept). In this case, a French steamer, the *Lotus* and a Turkish steamer, the *Boz Kourt* collided in the high seas leading to the death of 8 Turkish sailors and passengers. Turkey prosecuted and imprisoned the officer in charge of the French vessel, Mr M Demons. The French argued that it was against international law for the domestic courts of Turkey to bestow upon themselves criminal jurisdiction over foreign citizens. French further argued that such jurisdiction belonged exclusively to French courts. Although the court underscored that jurisdiction is generally territorial except by virtue of permissive rule derived from international custom or a convention, it further emphasised that this does not bar a state from exercising jurisdiction in its own territory with respect to acts that have occurred abroad and in which it cannot rely on any permissive rule under international law. In this regard, the court observed that international law gives states a wide measure of discretion which is only limited in certain cases with prohibitive rules. There was however no such principle of international law prohibiting a state from exercising its criminal jurisdiction in the circumstances described above. It should however be noted that the charges in this case was involuntary manslaughter which was not so grave as to attract the exercise of universal jurisdiction. Some scholars like M El Zeidy 'Universal jurisdiction in absentia: Is it a legally valid option for repressing heinous crimes?' (2003) *Oxford University Comparative Law Forum* 4 also support the view that a restrictive rule of international law barring the exercise of absolute universal jurisdiction is lacking; Ireland-Piper (in this note) 76.

126 *AU-EU expert report on the Principle of Universal Jurisdiction*, para 12; Coombes (n 1) 424; Ireland-Piper (n 125) 72.

principle is generally accepted under international law, international customary law supports jurisdiction over extraterritorial acts in limited circumstances: first, under the nationality or active personality principle – where the accused is a national of the state. Second, under the passive personality principle – where the victim is a national of the state; and third, under the protective principle, which vests jurisdiction in a state over extraterritorial acts committed by non-nationals when the state's national interests are threatened.<sup>127</sup> While the territorial principle has inherent limitations in so far as prosecuting international crimes related to COVID-19 is concerned, the extraterritorial principle is permissive enough to allow most states to prosecute the perpetrators as almost every state has had its nationals fall victim to the virus and also in light of the real and potential threats the virus poses to state security, the health sector, economic sector as well as social and cultural sectors.

Yet, despite its controversial nature, the final customary law basis upon which a state can exercise extraterritorial jurisdiction is under the universality principle.<sup>128</sup> Jurisdiction is here derived from the nature of the crime committed regardless of the fact that the crime was committed outside the territory of the state, by and against non-nationals and that the state's interests were not endangered.<sup>129</sup> Some scholars call this practice absolute universal jurisdiction.<sup>130</sup> This is where a state exercises jurisdiction over a matter even against the wishes of the state having territorial jurisdiction.<sup>131</sup> Essentially, 'there is no link of territoriality or

127 *AU-EU expert report on the Principle of Universal Jurisdiction*, para 12; Coombes (n 1) 425; M Chadwick 'Modern developments in universal jurisdiction: Addressing impunity in Tibet and Beyond' (2009) *International Criminal Law Review* 361; Ireland-Piper (n 125) 72-77; L Chenwi 'Universal jurisdiction and South Africa's perspective on the investigation of international crimes' (2014) 131 *The South African Law Journal* 30; LR Brownlee 'Extraterritorial jurisdiction in the United States: American attitudes and practices in the prosecution of Charles "Chuckie" Taylor Jr.' (2010) 9 *Washington University Global Studies Law Review* 335-336; United Nations General Assembly (UNGA) 'The scope and application of the principle of universal jurisdiction: Report of the Secretary-General prepared on the basis of comments and observations of governments' 6th-5th session, A/65/181, 29 July 2010, para 4.

128 *AU-EU expert report on the Principle of Universal Jurisdiction*, para 12; Coombes (n 1) 425; Chadwick (n 127) 361; Ireland-Piper (n 125) 72-77; Chenwi (n 127); Brownlee (n 127) 335-336; United Nations General Assembly (UNGA) (n 127) para 4.

129 Coombes (n 1) 425; N Arajärvi 'Looking back from nowhere: Is there a future for universal jurisdiction over international crimes' (2011) (2011) *Tilburg Law Review* 5 at 6-7.

130 M Inazumi *Universal jurisdiction in modern international law: Expansion of national jurisdiction for prosecuting serious crimes under international law* (2005) 110.

131 A Cassese *International Criminal Law* (2003) 286; Chadwick (n 12) 338; Arajärvi (n 129) 14; C Kreß 'Universal jurisdiction over international crimes and the *Institute de Droit international*' (2006) 4 *Journal of International Criminal Justice* 567.

nationality between the State and the conduct of the offender, nor is the state seeking to protect its security or credit'.<sup>132</sup>

## 4 Conclusion

This chapter has sought to initiate a debate on state accountability and individual criminal accountability relating to the manufacture, transfer and spread of COVID-19. It began by suggesting two likely sources of COVID-19 – either from natural sources or through deliberate or negligent acts of states, institutions and individuals. The work then decided to adopt the second scenario for the sake of developing arguments to determine if and how responsibility could be traced to a particular country under the principle of responsibility of states for internationally wrongful acts or as an international crime which should be attributed to certain individuals. To build on these scenarios the chapter relied on the trending accusations and counter-accusations levelled by the US against China and vice versa on the manufacture of COVID-19 to inform this inference. The work also refers to the claims of possible collusion between the WHO and China in the virus' initial stage that contributed to its spread.

The chapter concludes that the events related to the manufacture, transfer or spread of COVID-19 fulfil the threshold of state responsibility or crimes against humanity and genocide within the competent jurisdiction of the ICC. Yet, the referral mechanisms under the Rome Statute is likely to pose a challenge. While states might be reluctant to refer the implicated states, the chapter also warns against the veto power-politics that could frustrate the referral of these states' situations to the ICC. More so, if the trending arguments is anything to go by, the chapter argues that it will be very difficult for the implicated states to conduct investigations and prosecution of individuals within their own territories. This necessitates the need to explore foreign national prosecutions of the implicated individuals under the principle of universal jurisdiction.

132 *AU-EU expert report on the Principle of Universal Jurisdiction*, para 8; L Reydamas 'Universal Jurisdiction, International and Municipal Legal Perspectives' (2003) 5 as cited in *Palestinian Centre for Human Rights work in the occupied Palestinian territory, The principle and practice of universal jurisdiction* (2010) 15-16; *Princeton Principles on Universal Jurisdiction* (2001), Principle 1(1) [http://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](http://lapa.princeton.edu/hosteddocs/unive_jur.pdf) (accessed 8 March 2010); Arajarvi (n 129) 15.

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