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**ARTICLE**  
**CORONAVIRUS AND THE RESURGENCE OF SINOPHOBIA**

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CORONAVIRUS AND THE RESURGENCE OF SINOPHOBIA<sup>1</sup>

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*Abstract*

*With the outbreak of the coronavirus, the world has witnessed an increase in anti-Chinese sentiment, resulting from racially discriminatory policies undertaken by state governments to combat the spread of disease. States must nonetheless recall that the right to non-discrimination is a non-derogable right, one that is protected even in times of heightened anxiety. States must not impose restrictions that would contribute to the ongoing xenophobia, which is in blatant violation of human rights. Accordingly, this paper will explore and analyze the various government responses that have been undertaken in response to the coronavirus infection and will conclude with recommendations on how best to ensure compliance with the human rights framework during this time.*

## I. INTRODUCTION

Amid coronavirus fears, the world has witnessed an increase in, not only the number of coronavirus-caused infections but also, pandemic-fuelled racism. Unfortunately, this is not the first time where a disease was connected to xenophobia. There are many accounts of blaming ‘the other,’ such that “fearmongering and blame are almost a natural part of infectious disease endemics.”<sup>2</sup> Historically, the Jews were blamed for the Black Plague as homosexuals and Haitians were blamed for HIV.<sup>3</sup> More recently, the 2009 H1N1 outbreak also known as swine flu was linked to racial discrimination of Mexicans, while people of African descent were blamed for the 2014 Ebola outbreak.<sup>4</sup>

<sup>1</sup> This article was initially written and finalized on March 3, 2020, and it was subsequently revised to include recent events. At the time this article was written, the coronavirus was recognized as a public health emergency. During this time, States had enacted travel bans despite recommendations by the World Health Organization not to do so. Since then, the coronavirus situation has escalated into the pandemic that exists today.

<sup>2</sup> Brian Alexander, *Amid Swine Flu Outbreak, Racism Goes Viral*, NBC NEWS (May 1, 2009, 12:46 PM), [http://www.nbcnews.com/id/30467300/ns/health-cold\\_and\\_flu/t/amid-swine-flu-outbreak-racism-goes-viral/#.Xl1-dJMzZ1N](http://www.nbcnews.com/id/30467300/ns/health-cold_and_flu/t/amid-swine-flu-outbreak-racism-goes-viral/#.Xl1-dJMzZ1N) (last visited Apr. 21, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> Jasmine Aguilera, *Xenophobia “Is A Pre-Existing Condition.” How Harmful Stereotypes and Racism are Spreading Around the Coronavirus*, TIME (Feb. 3, 2020, 11:13 AM), <https://time.com/5775716/xenophobia-racism-stereotypes-coronavirus/> (last visited Apr. 21, 2020).

The latest victims of disease-fuelled racism are those of Asian descent, occurring in the midst of coronavirus outbreaks, which is said to have been first discovered in the city of Wuhan in China.<sup>5</sup> People have witnessed a rise in violence and abuse throughout much of the world due to fears stemming from the coronavirus. In addition to racial slurs and being turned away from private restaurants, Chinese citizens living abroad have been turned away by health practitioners as well, despite the fact that these citizens have not been to China in months, all for fear of being infected with the virus.<sup>6</sup> This has led those of Asian descent other than Chinese to indicate to others that they are not from China but that they come from another Asian country, thereby distancing themselves from Chinese, all due to fears that they too will be discriminated against in the wake of the coronavirus. The disease, however, is not the real culprit of xenophobia. Rather, it uncovers the already-existing prejudices people hold, which are worsened by ignorance and society's need for victim-blaming during a time of heightened anxiety.

As the disease spreads, alongside xenophobia, so too does the potential for violations of human rights. Equipped with fear and panic, justifications for limitations on human rights, especially as it relates to racial discrimination, may be apparent. Tedros Ghebreyesus, director general of the World Health Organization, stated: "The greatest enemy we face is not the virus itself; it is the stigma that turns us against each other."<sup>7</sup> States must recall their international law obligations and continue to perform them. Thus, public health emergencies cannot be used as an excuse to justify extreme measures that encroach on human rights. It is for this reason that governments have used the current pandemic as an excuse for their extreme measures. At the same time, individuals of Asian-descent as well as those who are mistakenly thought to be of Asian-descent have been violently attacked and subjected to much abuse all over the world at the hands of individual actors as well.<sup>8</sup> States must take steps so as to ensure their protection in addition to ensuring that State action does not, in itself, contribute to the abuse. Accordingly, this paper aims to shed light on the racial discrimination that this pandemic gives rise to, during this time of urgency, and will conclude with recommendations

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<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *id.*; Imanuel Marcus, *Germany: Chinese Student Discriminated Because of Coronavirus*, BERLIN SPECTATOR (Feb. 22, 2020), <https://berlinspectator.com/2020/02/21/germany-chinese-student-discriminated-because-of-coronavirus/> (last visited Apr. 21, 2020).

<sup>7</sup> Megan Specia, *In Europe, Fear Spreads Faster Than the Coronavirus Itself*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/18/world/europe/coronavirus-stigma-europe.html> (last visited Apr. 21, 2020).

<sup>8</sup> See, e.g., *The Coronavirus Spreads Racism Against — and Among — Ethnic Chinese*, ECONOMIST (Feb. 17, 2020), <https://www.economist.com/china/2020/02/17/the-coronavirus-spreads-racism-against-and-among-ethnic-chinese> (last visited April 21, 2020); Kelly Kasulis, *Coronavirus Brings out Anti-Chinese Sentiment in South Korea*, AL JAZEERA (Feb. 22, 2020), <https://www.aljazeera.com/news/2020/02/coronavirus-brings-anti-chinese-sentiment-south-korea-200221094732254.html> (last visited Apr. 21, 2020).

on how best to ensure compliance with human rights, and stop the prevalence of racism, during this time.

To accomplish the objective set out, Part II will discuss the means by which Chinese have been historically excluded, to prove that the racism that is currently felt by Chinese is deeply tied to historic roots. Part III provides for the violations of international law obligations that are at issue, namely the right to be free from racial discrimination, as well as the rights of privacy and freedom of movement, amid coronavirus fears, using six States from different geographical regions as examples: (a) Australia, (b) South Korea, (c) Russia, (d) Israel, (e) the United States, and (f) Italy. Thus, in addition to racial discrimination, Part III will also touch upon other violations of human rights that State governments are susceptible to commit in the wake of infectious disease outbreaks. Part IV discusses the potential role of international organizations, namely the Security Council and the World Health Organization, concluding with appropriate recommendations that States may elect to adopt. Finally, Part V concludes the discussion with a call to ensuring respect for the human rights framework during this time.

## II. IN LIGHT OF THE CORONAVIRUS

Racism is not a symptom of the coronavirus or any other disease. Rather, the coronavirus situation magnifies the deep-rooted sentiments that already persists in society.<sup>9</sup> Asians have historically been discriminated against in all parts of the world. An early example is the United States Chinese Exclusion Act of 1882.<sup>10</sup> The United States Supreme Court upheld the Exclusion Act, which prevented Chinese laborers from entering the United States, at a time when U.S. citizens were concerned about the competition in the job market, due to the influx of Chinese immigrants.<sup>11</sup> The Exclusion Act was upheld, despite the fact that it conflicted with international treaties that were in effect between China and the United States at the time.<sup>12</sup> While the Exclusion Act has been met with regret, it has resulted in a domino effect, paving the way for similar exclusion policies that have been observed worldwide, including in Australia.<sup>13</sup>

Accordingly, in 1901, the government of Australia passed the Immigration Restriction Act, which is also known as the White Australia

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<sup>9</sup> See Jason Faulkner et al., *Evolved Disease-Avoidance Mechanisms and Contemporary Xenophobic Attitudes*, 7(4) GROUP PROCESSES & INTERGROUP REL. 333, 333 (2004).

<sup>10</sup> Lauri Kai, *Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions*, 59(6) WM. & MARY L. REV. 2617, 2619 (2018); RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 30-31 (Vincent Chetail & Céline Bauloz eds., 2015).

<sup>11</sup> Kai, *supra* note 10, at 2619, 2620.

<sup>12</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>13</sup> Chetail, *supra* note 10, at 31.

policy.<sup>14</sup> This policy, which remained in force until 1958, aimed to restrict the number of non-white migrants moving to Australia, and it was aimed primarily to limit those coming from Asian countries.<sup>15</sup> Under this Act, the immigration officer could ask migrants who enter Australia to take a dictation test, consisting of writing 50 words in any European language, as chosen by the immigration officer.<sup>16</sup> Thus, for example, a Chinese individual could be asked to take the test in French or Italian.<sup>17</sup> Under the Act, then, Asians were set up to fail. After 1909, no individual who took the dictation test passed.<sup>18</sup> Before 1909, very few passed.<sup>19</sup> Consequently, people who failed were subsequently refused entry or deported.<sup>20</sup>

Whereas the aforementioned examples refer to the type of anti-Chinese sentiment resulting in exclusion, due to well-established historic roots, other States have only recently developed sentiment against Chinese. South Korea, for example, has recently witnessed a rise in anti-Chinese sentiment, such that in 2018 a survey conducted in South Korea found that China, but not North Korea, was viewed as “the most threatening country to peace on the Korean peninsula.”<sup>21</sup>

These historical developments all have one thing in common: fear of the Chinese due to their fast-growing population, such that even Russia, in the early 1990s, perceived a sense of insecurity leading to anti-Chinese sentiment as well.<sup>22</sup> In Russia, the large prevalence of Chinese migrants was formulated as the “yellow peril.”<sup>23</sup> Nonetheless, the stigma of being described as the “yellow peril” is no longer unique to Russia, and its widespread usage is well-documented throughout much of the Western world. Thus, the threat of Chinese expansionism has historically been the marker for policies of imperialism and military expansion, and therefore racial discrimination of the Chinese throughout much of the world.<sup>24</sup>

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<sup>14</sup> *The Immigration Restriction Act 1901*, NAA, <https://www.naa.gov.au/explore-collection/immigration-and-citizenship/immigration-restriction-act-1901> (last visited Apr. 21, 2020).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Stephen Thompson, *1901 Immigration Restriction Act*, MIGRATION HERITAGE CTR. (June 2007), <http://www.migrationheritage.nsw.gov.au/exhibition/objectsthroughtime/immigration-restriction-act/index.html>.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> Lee Jeong-ho, *China – Not North Korea — Is Our Biggest Threat to Peace, South Koreans Say*, S. CHINA MORNING POST (Oct. 3, 2018, 3:32 PM), <https://www.scmp.com/news/china/diplomacy/article/2166792/china-not-north-korea-our-biggest-threat-peace-south-koreans> (last visited Apr. 21, 2020).

<sup>22</sup> FRANCK BILLÉ ET AL., *FRONTIER ENCOUNTERS: KNOWLEDGE AND PRACTICE AT THE RUSSIAN, CHINESE AND MONGOLIAN BORDER* 71 (OPEN BOOK PUBLISHERS 2012).

<sup>23</sup> *Id.*, at 84.

<sup>24</sup> Alexander Lukin, *Russia's Image of China and Russian-Chinese Relations*, BROOKINGS (2016), [https://www.brookings.edu/wp-content/uploads/2016/06/lukinwp\\_01.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/lukinwp_01.pdf) (last visited Apr. 21, 2020).

The examples of Chinese exclusion all highlight the prevalence of anti-Chinese racism that has persevered throughout history, such that it should not come as a surprise that the international community is witnessing a revival of Sinophobia, otherwise known as anti-Chinese sentiment. International law, however, prohibits racial discrimination, and an outbreak in disease is not the time to evade these international law obligations.

### III. INTERNATIONAL LAW VIOLATIONS IN RESPONSE TO THE CORONAVIRUS

On January 30, 2020, the Emergency Committee of the World Health Organization (“WHO”) issued an advisory statement, reminding States Parties of their international law obligations under Article 3 of the 2005 International Health Regulations (“IHR”), a legally binding treaty that has achieved universal acceptance.<sup>25</sup> The IHR is the only treaty that is “aimed at controlling the cross-border spread of disease.”<sup>26</sup> Pursuant to Article 3 of the IHR, the WHO cautioned that, in respect to travel measures, States must ensure protection “against actions that promote stigma or discrimination . . .”<sup>27</sup> As such, States are required to ensure that human rights are respected, when conducting measures in response to the coronavirus outbreak. For one, State representatives and the media are cautioned not to refer to the virus, which causes the disease known as COVID-19, short for “coronavirus disease 2019,”<sup>28</sup> as the Wuhan virus.<sup>29</sup> President Trump, for example, has frequently referred to the virus as the “Chinese Virus,” despite warnings not to do so.<sup>30</sup> The WHO has purposely named the illness COVID-19 to ensure that the

<sup>25</sup> *Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, WHO (Jan. 30, 2020), [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\);](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov);) *States Parties to the International Health Regulations (2005)*, WHO, [https://www.who.int/ihr/legal\\_issues/states\\_parties/en/](https://www.who.int/ihr/legal_issues/states_parties/en/) (last visited Apr. 21, 2020).

<sup>26</sup> Alison Agnew, *A Combative Disease: The Ebola Epidemic in International Law*, 39 B.C. INT’L & COMP. L. REV. 97, 103 (2016).

<sup>27</sup> *Statement on the Second Meeting of the International Health Regulations (2005)*, *supra* note 25.

<sup>28</sup> WHO, NOVEL CORONAVIRUS (2019-nCoV) SITUATION REPORT – 22, (Feb. 11, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200211-sitrep-22-ncov.pdf?sfvrsn=fb6d49b1\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200211-sitrep-22-ncov.pdf?sfvrsn=fb6d49b1_2) (last visited Apr. 21, 2020).

<sup>29</sup> Jen Christensen & Meera Senthilingam, *Coronavirus Explained: What You Need to Know*, CNN (Feb. 18, 2020), <https://edition.cnn.com/2020/01/20/health/what-is-coronavirus-explained/index.html>. United States Secretary of State Mike Pompeo has continued to refer to COVID-19 as the Wuhan virus despite pleas from China and world health officials to stop. Bhavian Jaipragas, *Coronavirus: US Secretary of State Mike Pompeo switches disease name to ‘Wuhan virus’ as it spreads in the US*, S. CHINA MORNING POST (Mar. 7, 2020, 4:58 AM), <https://www.scmp.com/news/china/politics/article/3074050/coronaviru-us-secretary-state-mike-pompeos-wuhan-virus> (last visited Apr. 21, 2020).

<sup>30</sup> Katie Rogers et al., *Trump Defends Using “Chinese Virus” Label, Ignoring Growing Criticism*, N.Y. TIMES (Mar. 18, 2020, updated Mar. 19, 2020), <https://www.nytimes.com/2020/03/18/us/politics/china-virus.html> (last visited Apr. 21, 2020).

name “makes no reference to places, animals or people to avoid stigma.”<sup>31</sup> Calling the coronavirus the Wuhan virus, the Chinese virus, or the like results in increased potential for racial discrimination, which is strictly prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).

The ICERD commits all States Parties to eliminate racial discrimination and ensure protection for all individuals, “without distinction as to race, sex, language or religion.”<sup>32</sup> In complying with their international law obligations, States are required to eradicate racial discrimination both in the private and public spectrum.<sup>33</sup> These obligations are guaranteed, not only by the ICERD and other treaties, but are ones that the International Court of Justice has deemed *erga omnes*.<sup>34</sup> Therefore, racial discrimination is a concern to the international community as a whole, and to violate it would constitute a blatant disregard of the principles of the Charter of the United Nations.<sup>35</sup>

Moreover, the Durban Declaration and Programme of Action, while not binding, was adopted by the General Assembly at a conference in Durban, South Africa in 2001 and later reaffirmed in 2011, in part in response to the racism that resulted due to HIV.<sup>36</sup> It urged States to “protect the human rights of victims of racial discrimination . . . who are infected . . . with pandemic diseases such as HIV/AIDS and to take concrete measures . . . to eliminate violence, stigmatization, discrimination, unemployment and other negative consequences arising from these pandemics.”<sup>37</sup> The General Assembly also acknowledged, in that very declaration, that “. . . Asians and people of Asian descent face barriers as a result of social biases and discrimination prevailing in public and private institutions . . .”<sup>38</sup> Thus, it called for “. . . the eradication of all forms of . . . racial discrimination . . . faced by Asians and people of Asian descent.”<sup>39</sup> Still, racism continues to flourish and is

<sup>31</sup> *The Illness Now Has a Name, COVID-19*, N.Y. TIMES (Feb. 19, 2020, updated Mar. 12, 2020), <https://www.nytimes.com/2020/02/11/world/asia/coronavirus-china.html> (last visited Apr. 21, 2020).

<sup>32</sup> International Convention on the Elimination of All Forms of Racial Discrimination Preamble, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>33</sup> U.N. HIGH COMM’R FOR HUMAN RIGHTS, DEVELOPING NATIONAL ACTION PLANS AGAINST RACIAL DISCRIMINATION, at 1, U.N. Doc. HR/PUB/13/3, U.N. Sales. No. E.13.XIV.3 (2014).

<sup>34</sup> *Id.*, at 1; Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 337, ¶ 33, 34 (Feb. 5).

<sup>35</sup> DEVELOPING NATIONAL ACTION PLANS AGAINST RACIAL DISCRIMINATION, *supra* note 33, at 23.

<sup>36</sup> G.A. Res. A/66/L.2 (Sept. 16, 2011); U.N. HIGH COMM’R FOR HUMAN RIGHTS, WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE: DECLARATION AND PROGRAMME OF ACTION, at 23 [hereinafter WORLD CONFERENCE AGAINST RACISM]; *General Assembly Adopts Declaration Intended to Mobilize Political Support for Ending All Forms of Racial Discrimination, Related Intolerance*, UN (Sept. 22, 2011), <https://www.un.org/press/en/2011/ga11149.doc.htm>; *10th Anniversary of the Durban Declaration and Programme of Action, General Assembly High-level Meeting*, UN (Sept. 2011), <https://www.un.org/en/ga/durbanmeeting2011/>.

<sup>37</sup> WORLD CONFERENCE AGAINST RACISM, *supra* note 36, at 48.

<sup>38</sup> *Id.*, at 22.

<sup>39</sup> *Id.*

exacerbated during periods of tension. During the Ebola outbreak, African Americans were vilified to such an extent that many criticized those who walked among the public after returning from West Africa.<sup>40</sup> For example, President Trump, who was at the time a private citizen, tweeted that: “The Ebola doctor who just flew to N.Y. from West Africa and went on the subway, bowling and dining is a very SELFISH man — should have known!”<sup>41</sup> People should not be stigmatized in the wake of the disease. Those who are stigmatized are less likely to seek healthcare.<sup>42</sup> State governments are therefore under a responsibility to ensure protection of their citizens in such circumstances, in compliance with the ICERD.

In addition, Article 43 of the IHR, while allowing States Parties to impose health measures in times of public health emergencies, prohibits measures that are “more restrictive of international traffic and . . . more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.”<sup>43</sup> In accordance with the WHO’s technical guidance in response to the coronavirus, reasonable alternatives could include patient management, risk communication and community engagement, surveillance, and detection of ill travellers at airports and ground crossings.<sup>44</sup>

Yet, State governments, in rushing to contain the pandemic, are imposing measures that range from reasonable to unjustifiably infringing. For the most part, it makes sense to limit travel to and from China, where the virus was first discovered, for those individuals who have actually been infected with the coronavirus, despite recommendations by the WHO that States should not impose travel restrictions at all.<sup>45</sup> However, governments are taking extreme measures that encroach on human rights values, which, in turn, causes racism to flourish. Thus far, a number of States have imposed unnecessary restrictions on travel, including border closures, overreaching entry or exit bans, and flight suspensions, mostly with respect to travel to and from and

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<sup>40</sup> See Melissa Chan, *This Doctor Was Vilified After Contracting Ebola. Now He Sees History Repeating Itself with Coronavirus*, TIME (Feb. 4, 2020), <https://time.com/5777541/coronavirus-craig-spencer-ebola-doctor/> (last visited Apr. 21, 2020).

<sup>41</sup> @realDonaldTrump, Twitter (Oct. 24, 2014, 4:09 PM), <https://twitter.com/realDonaldTrump/status/525635174877630464> (last visited Apr. 21, 2020).

<sup>42</sup> Chan, *supra* note 40.

<sup>43</sup> International Health Regulations, art. 43 (2005), available at <https://www.who.int/ihr/publications/9789241596664/en/>.

<sup>44</sup> *Coronavirus Disease (COVID-19) Technical Guidance*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance> (last visited Apr. 21, 2020).

<sup>45</sup> See *Q&A How to Protect Yourself When Travelling during the Coronavirus (COVID-2019) Outbreak*, VIMEO (March 2020), <https://vimeo.com/395461670>; *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, WHO (Feb. 29, 2020), [https://www.who.int/ith/2019-nCoV\\_advice\\_for\\_international\\_traffic-rev/en/](https://www.who.int/ith/2019-nCoV_advice_for_international_traffic-rev/en/) [hereinafter: *Updated WHO recommendations for international traffic*] (last visited Apr. 21, 2020).



transiting through China.<sup>46</sup> Almost all States Parties to the IHR have imposed travel restrictions of varying degrees. The United States has imposed inconsistent travel restrictions, which appear to be “politically motivated,” since the ban on European States, for example, affects Schengen countries but not the United Kingdom, and it does not apply to American citizens and permanent residents.<sup>47</sup> Yet, President Trump has been referring to the coronavirus as merely a flu.<sup>48</sup> Thus, it appears that the travel bans imposed by the United States against the entire Schengen area are rooted in its prejudices towards Europe. Other States have also imposed varying forms of travel restrictions. Australia, for example, banned foreign nationals from traveling to Australia from China as well as from Iran.<sup>49</sup> India suspended all existing visas, previously issued to individuals from China.<sup>50</sup> Thus, travel restrictions that are imposed against entire countries in response to the virus exceed that which may be necessary to limit the spread of disease. In addition, at this point, the virus is already transferring from individual to individual within countries that have imposed such travel bans at very high rates. Thus, the continued use of travel bans would be of no use to eliminate the spread of disease. Travel bans, therefore, may be useful temporarily to limit the spread of disease in countries that are essentially without any patients who have the virus. Otherwise, once the virus is within a country’s borders, further travel restrictions may only slow down the inevitable spread of disease. Travel restrictions that are discriminatory by nature should not be allowed. New Zealand, for example, has imposed a complete travel ban on foreigners in China and Iran, but has only imposed self-isolation for other travellers.<sup>51</sup> Yet, at that time, countries in Europe were also badly affected, including, for example, Italy and Spain, but these countries did not face similar

<sup>46</sup> Samantha Kiernan & Madeleine DeVita, *Travel Restrictions on China due to COVID-19*, THINK GLOBAL HEALTH (Apr. 6, 2020), <https://www.thinkglobalhealth.org/article/travel-restrictions-china-due-covid-19> (last visited Apr. 21, 2020).

<sup>47</sup> Silvia Amaro, *Trump’s Travel Ban on Many European Countries is “Politically Motivated,” Analysts Say*, CNBC (Mar. 13, 2020), <https://www.cnbc.com/2020/03/13/trump-travel-ban-on-europe-is-politically-motivated-analysts-say.html>.

<sup>48</sup> Charlie Campbell, *‘What Is He Afraid Of?’ Trump’s European Travel Ban Prompts Scorn in China*, TIME (Mar. 13, 2020), <https://www.cnbc.com/2020/03/13/trump-travel-ban-on-europe-is-politically-motivated-analysts-say.html> (last visited Apr. 21, 2020).

<sup>49</sup> *COVID-19 (Novel Coronavirus) and Australian Visas*, DEP’T HOME AFF. (Feb. 29, 2020), <https://www.homeaffairs.gov.au/news-media/current-alerts/novel-coronavirus>. Iran has the highest number of corona deaths outside China. Sinéad Baker et al., *The coronavirus death toll has surpassed 3,000, with more than 89,000 infected. The US has reported 6 deaths. Here’s everything we know*, BUS. INSIDER (Apr. 2, 2020), <https://www.businessinsider.com/china-virus-everything-we-know-deadly-2019-ncov-wuhan-spread-2020-1#cases-have-been-confirmed-in-at-least-69-countries-beyond-china-4>.

<sup>50</sup> *Travel advisory*, INDIA MINISTRY HEALTH FAM. WELFARE (Feb. 5, 2020), <https://www.mohfw.gov.in/pdf/TravelAdvisory5thMarch.pdf> (last visited Apr. 21, 2020).

<sup>51</sup> Gill Bonnett, *China and Iran Travel Ban ‘Unlawful Discrimination’, Says Immigration Advisor*, RNZ (Mar. 19, 2020), <https://www.rnz.co.nz/news/national/412111/china-and-iran-travel-ban-unlawful-discrimination-says-immigration-advisor> (last visited Apr. 21, 2020).

restrictions.<sup>52</sup> In that case, the travel restrictions taken are a blatant violation of the IHR and the prohibition against non-discrimination. In addition, when imposing any measures that would combat the spread of disease, the measure taken must be the least restrictive means to protect the health of the public. Ultimately, such decisions on whether a travel restriction is discriminatory or not rests with national and regional human rights tribunals and commissions, as well as the Committee on the Elimination of Racial Discrimination and other relevant UN-bodies, and the analysis and concluding decision will necessarily depend on the circumstances of each case.<sup>53</sup>

Nonetheless, if travel restrictions are found to be so patently discriminatory, which some most certainly are, States are contributing to the hatred stemming from the racism that is felt across the entire international community. Unequipped with proper knowledge, by engaging in such harsh actions against China, alleged perpetrators of hate crimes against the Chinese and those who look like Chinese are left to believe that their views of the Chinese are warranted. In order to combat this, States must take measures and act in compliance with their international law obligations, so as to provide a proper environment, one that does not allow violence to flourish. The situations in Australia, South Korea, Russia, Israel, the United States, and Italy, while not unique and not limited to these States, will illustrate ways in which State responses to counter disease outbreaks could and has resulted in racist-fuelled attacks against citizens. Discriminatory State action that infringes on the human rights of citizens during a pandemic-fuelled crisis results in individual abuse against citizens as well, as has been demonstrated by the attacks against the Chinese all over the world. Thus, States must take care so as not to violate human rights during this time of urgency. The circumstances in the aforementioned States are therefore worthy of discussion, as they are representative of the actions taken by many States in order to contain the spread of COVID-19 and consist of a mix of States that are less as well as more heavily affected by the coronavirus. Italy and the United States, for example, have witnessed fast-growing rates of the coronavirus with a high number of deaths when compared to other States. Thus, this paper will look at government responses from all affected countries, including both less-affected and heavily-affected States. In addition, the States chosen for a more comprehensive discussion reflect the diverse measures that States have taken in response to the coronavirus infection.

#### A. *Australia*

Australia has quarantined more than 600 Australians arriving from Wuhan, of which more than 140 are children, on a remote island, in a

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

detention centre used to detain immigrants suspected of violating immigration policies, for 14 days,<sup>54</sup> the maximum number of days it takes for coronavirus symptoms to appear.<sup>55</sup> Being quarantined on this remote island was a required condition, set out by the government, for Australians in China seeking an assisted departure.<sup>56</sup>

Chinese Australians have expressed concern that the degree of treatment provided to them by their government has been less than adequate potentially due to the fact that they are Chinese Australians and not Caucasian Australians.<sup>57</sup> Others have iterated that it is better to stay in Wuhan than to be sent to an island previously used to detain immigrants, and being sent to a remote island is described as being “even more unpredictable.”<sup>58</sup> In accordance with Article 43 of the IHR, Australia should have imposed other reasonable alternatives, such that those arriving from China could have been taken to hospitals within the mainland, rather than to a remote island. This also raises questions as to the adequacy of medical healthcare on the island. Sentiments by Chinese Australians that this would not have been the case if the issue involved Caucasian Australians proves the culture of racism that the government is tacitly contributing to. Incorporating exclusionary and dehumanizing mechanisms against certain groups will lead to the shunning of outsiders, in turn provoking others into racist-fuelled tactics against those viewed as the other, as a response to fear.

Take, for example, the *Herald Sun*, an Australian newspaper. The Herald Sun published a piece on January 29, 2020, entitled: “Chinese virus (sic) pandamonium,” replacing the word pandemonium with pandamonium, thus alluding to China’s native pandas.<sup>59</sup> Referring to the virus as Chinese contributes to making Chinese-Australians a target for discrimination and raises the potential for racial profiling.<sup>60</sup> In addition, in January 2020, a man died outside a restaurant in Chinatown, Australia, after bystanders refused to perform CPR due to fears of him potentially being infected with the

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<sup>54</sup> *Coronavirus: More than 200 Australians Flown Home After 14-Day Quarantine*, BBC (Feb. 17, 2020), <https://www.bbc.com/news/world-australia-51538711> (last visited Apr. 21, 2020).

<sup>55</sup> Eleanor A. Roy & Ben Doherty, *Australian Coronavirus Evacuees to be Quarantined on Christmas Island*, GUARDIAN (Jan. 29, 2020), <https://www.theguardian.com/world/2020/jan/29/australian-coronavirus-evacuees-to-be-quarantined-on-christmas-island> (last visited Apr. 21, 2020).

<sup>56</sup> Rachel Pannett & Mike Cherny, *Australia’s Coronavirus Evacuation Plan: A Tiny Island 1,000 Miles Away*, WALL STREET J. (Jan. 29, 2020, 5:55 AM), <https://www.wsj.com/articles/australias-coronavirus-evacuation-plan-a-tiny-island-1-000-miles-away-11580295354> (last visited Apr. 21, 2020).

<sup>57</sup> *Australia Coronavirus: Evacuees Criticise Christmas Island Quarantine Plan*, BBC (Jan. 31, 2020), <https://www.bbc.com/news/world-australia-51317760> (last visited Apr. 21, 2020).

<sup>58</sup> *Id.*

<sup>59</sup> Iris Zhao, *Coronavirus Has Sparked Racist Attacks on Asians in Australia – Including Me*, ABC NEWS AUSTRALIA (Feb. 1, 2020, 12:40 AM), <https://www.abc.net.au/news/2020-02-01/coronavirus-has-sparked-racist-attacks-on-asian-australians/11918962> (last visited Apr. 21, 2020).

<sup>60</sup> *Id.*

coronavirus.<sup>61</sup> The stigma associated with the coronavirus is not only dangerous but also a blatant disregard for the respect of individuals' right to live free from any discrimination, whether public or private. Thus, Australia should take measures to ensure that discrimination against Chinese Australians is put to an end.

### B. South Korea

The Chinese in South Korea are not treated any better than their Australian counterparts. South Korean restaurants, for example, have posted signs, prohibiting Chinese customers from entering.<sup>62</sup> Japan, and Vietnam have also banned Chinese customers from entering restaurants.<sup>63</sup> While not stemming from government action, these private actions are nonetheless covered by treaties protecting against racial discrimination. Accordingly, the Committee on the Elimination of Racial Discrimination found that the non-discrimination principle is not limited to public acts, but States parties are also required to take measures that would "address racial discrimination 'by any persons, group or organization.'"<sup>64</sup> South Korea has been a State Party to the Convention on the Elimination of All Forms of Racial Discrimination ("CEDAW") since December 5, 1978, and it has accepted the Convention without any reservation.<sup>65</sup> As such, South Korea must take measures to eradicate any form of discrimination against the Chinese in private businesses, including restaurants. Such measures must necessarily include the punishment of private business owners who attempt to discriminate against Chinese individuals in relation to the disease outbreak.

Even if no claim for human rights violations may be made in this regard, it could be reasonably deduced that South Korea's tightening of penalties for those who break quarantine rules could lead to further provocations of racism-fuelled tactics.<sup>66</sup> South Korean legislatures have imposed possible jail time for potential coronavirus patients who break quarantine.<sup>67</sup> Patients who

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<sup>61</sup> Frank Chung, *Bystanders 'Feared Coronavirus' After Man Collapsed outside Chinatown Restaurant*, NEWS AUSTRALIA (Jan. 30, 2020, 2:05 PM), <https://www.news.com.au/lifestyle/health/health-problems/bystanders-feared-coronavirus-after-man-collapsed-outside-chinatown-restaurant/news-story/4b1c6810fd911ec3f4f2b568b3695e10> (last visited Apr. 21, 2020).

<sup>62</sup> The Associated Press, *'No Entry for Chinese:' Fears of Coronavirus Trigger anti-China Sentiment Worldwide*, HAARETZ (Feb. 2, 2020, 9:02 PM), <https://www.haaretz.com/world-news/no-entry-for-chinese-fears-of-coronavirus-trigger-anti-china-sentiment-worldwide-1.8479070> (last visited Apr. 21, 2020).

<sup>63</sup> *Id.*

<sup>64</sup> U.N. OHCHR, *supra* note 33, at 31.

<sup>65</sup> International Convention on the Elimination of All Forms of Racial Discrimination Declarations and Reservations, U.N. T. S. 195, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#EndDec) (last visited Apr. 21, 2020).

<sup>66</sup> Yosuke Onchi, *South Korea Imposes Jail Time for Breaking Coronavirus Quarantine*, NIKKEI ASIAN REV. (Feb. 27, 2020), <https://asia.nikkei.com/Spotlight/Coronavirus/South-Korea-imposes-jail-time-for-breaking-coronavirus-quarantine> (last visited Apr. 21, 2020).

<sup>67</sup> *Id.*

attempt to deliberately break quarantine may face up to one year in prison or a fine of 10 million won, which amounts to \$8,200.<sup>68</sup> That is in addition to banning entry for foreign nationals of affected areas.<sup>69</sup> Again, such government responses could set the tone for racist overtones, which can be used to stir violence stemming from racial discrimination.

Furthermore, the right to privacy is most certainly at issue, since South Korea has tracked the whereabouts of patients infected with the coronavirus, logging all the locations that these patients have visited in the few days leading up to having been infected with the virus.<sup>70</sup> This track record has been made public on the Ministry of Health and Welfare website, for those who might have come into contact with the patients to view.<sup>71</sup> In creating this online travel log, authorities have sifted “through credit-card records, CCTV footage, mobile-phone location services, public-transport cards and immigration records . . . ”<sup>72</sup> While the patients’ names are not revealed, patients cannot opt out should they not want their information publicized on the Ministry of Health and Welfare website.<sup>73</sup> Accordingly, the tracking of patients’ whereabouts and subsequently disseminating them on a government website for all to see is too invasive and not at all necessary to limit the spread of the coronavirus. South Korea is therefore in violation of the human right to privacy, which is protected by Article 17 of the ICCPR, which states: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>74</sup> South Korea, which is a State Party to the ICCPR, has accepted Article 17 without any reservation.<sup>75</sup> While derogation from Article 17 is allowed in times of public emergencies, such derogation cannot exceed that which is necessary to achieve the government’s objective and the measure taken cannot discriminate on the basis of, *inter alia*, race or origin.<sup>76</sup> South Korea’s measures far exceed that which is necessary to achieve the goal of containing the spread of the coronavirus. Instead, such actions help to promote a culture of racial discrimination. As such, South Korea is required to

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Jeong Eun-Young, *South Korea Tracks Virus Patients’ Travels – and Publishes Them Online*, WALL STREET J. (Feb. 16, 2020, 8:43 AM), <https://www.wsj.com/articles/south-korea-tracks-virus-patients-travels-and-publishes-them-online-11581858000> (last visited Apr. 21, 2020).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR].

<sup>75</sup> See Status of International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited April 21, 2020).

<sup>76</sup> ICCPR, *supra* note 74, at art. 4(3).

take down patients' information from the government website and act in compliance with its international law obligations.

### C. *Russia*

Russia, like many other States, has imposed travel bans on Chinese nationals attempting to enter the country.<sup>77</sup> More recently, however, it has imposed stricter requirements, with public transportation system inspections being carried out by the authorities "to ensure that all foreigners, including Chinese, have adhered to the requirement of self-isolation for at least 14 days after arrival."<sup>78</sup> In Moscow, officials have "ordered police raids of hotels, dormitories, apartment buildings and businesses to track down the shrinking number of Chinese people remaining in the city."<sup>79</sup> Such tactics stand in direct contrast to the right to freedom of movement, one that is guaranteed by Article 12 of the ICCPR, which states: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."<sup>80</sup> The Russian Federation is a Party to the ICCPR and has made no reservations to Article 12.<sup>81</sup> It has, however, temporarily derogated from Article 12 during a state of emergency in the 1990s, at a time when Russia was experiencing a "frequency of terrorist acts and widespread disorder . . ."<sup>82</sup> The current public health situation cannot be characterized as such. Thus, while derogation from Article 12 is allowed in times of public emergency, the measures taken in response must not be "inconsistent with [States'] other obligations under international law and [must not] involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin."<sup>83</sup> Since the measure taken by Russia discriminates against those of Asian descent, this derogation would contravene that which is allowed by the ICCPR and is therefore a violation of international law.

Moscow officials have also authorized "the use of facial recognition technology to find those suspected of evading a 14-day self-quarantine period upon their arrival in Russia."<sup>84</sup> Facial recognition is considered so harmful that, in May 2019, the United Nations Special Rapporteur on freedom of

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<sup>77</sup> Tommy Yang, *Russia May Become First Country to Deport Chinese Nationals in Response to Coronavirus*, L.A. TIMES (Feb. 28, 2020, 12:28 PM), <https://www.latimes.com/world-nation/story/2020-02-28/russian-entry-ban-on-chinese-nationals-has-some-seeing-red>.

<sup>78</sup> *Id.*

<sup>79</sup> Associated Press, *Chinese Targeted in Russia Raids as Coronavirus Fears Spread*, S. CHINA MORNING POST (Feb. 23, 2020, 4:10 PM), <https://www.scmp.com/news/world/russia-central-asia/article/3051964/chinese-targeted-russia-raids-coronavirus-fears>.

<sup>80</sup> ICCPR, *supra* note 74, at art. 12.

<sup>81</sup> See Status of International Covenant on Civil and Political Rights, *supra* note 75.

<sup>82</sup> *Id.*

<sup>83</sup> ICCPR, *supra* note 74, at art. 4(3).

<sup>84</sup> Associated Press, *supra* note 79.

opinion and expression David Kaye called for a moratorium “until rigorous human rights safeguards are put in place to regulate such practices and guarantee that Governments and non-State actors use the tools in legitimate ways.”<sup>85</sup> This is due to the possibility that surveillance through facial recognition can interfere with human rights, especially given the fact that they profile individuals based on their ethnicity, race, or national origin, which can therefore result in unlawful discrimination.<sup>86</sup> The use of facial recognition is therefore too intrusive, and it is a clear violation of the right to privacy,<sup>87</sup> which is protected, not only by Article 23 of the Constitution of the Russian Federation but also, by international human rights law.<sup>88</sup> As with the Chinese in South Korea, Article 17 of the ICCPR would protect the right to privacy of the Chinese in Russia as well.<sup>89</sup> Russia has made no reservations with respect to Article 17 and, as previously mentioned, while derogation to Article 17 is allowed the derogation at issue would be prohibited since facial recognition technology is used to locate those of Asian descent, therefore being *prima facie* discriminatory.<sup>90</sup> Thus, where the Russians have a constitutional claim against the use of facial recognition within Russia, foreigners in Russia have a valid international law claim against it as well.

In addition to encroachments on the right to privacy, Russia now “plans to deport foreigners who violate quarantine orders.”<sup>91</sup> At the time of writing, Russia is planning to deport 88 foreigners for violating the orders.<sup>92</sup> If it does follow through with the deportation plans, Russia will become the first country to deport foreigners due to the coronavirus.<sup>93</sup> The measures taken by Russia are a flagrant use of racial profiling and are too harsh, exemplifying the discriminatory measures that are being undertaken in response to the disease outbreak.

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<sup>85</sup> Special Rapporteur on the Promotion and Prot. of the Right to Freedom of Op. and Expression, *Surveillance and Human Rights - Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/41/35 (May 28, 2019).

<sup>86</sup> *See id.*

<sup>87</sup> *See* Yana Welinder, *A Face Tells More than a Thousand Posts: Developing Face Recognition Privacy in Social Networks*, 26(1) HARV. J. L. TECH. 166, 166-67 (2012); Sharon Nakar & Dov Greenbaum, *Now You See Me, Now You Still Do: Facial Recognition Technology and the Growing Lack of Privacy*, 23 B.U.J. SCI. TECH. L. 88, 101 (2017).

<sup>88</sup> *See* KONSTITUTSIYA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 23 (Russ.); ICCPR, *supra* note 74, at art. 17.

<sup>89</sup> ICCPR, *supra* note 74, at art. 17.

<sup>90</sup> *See* Status of International Covenant on Civil and Political Rights, *supra* note 75.

<sup>91</sup> Yang, *supra* note 77.

<sup>92</sup> Tom Balmforth & Gabrielle Tétrault-Farber, *Russia to Deport 88 Foreigners for Violating Coronavirus Quarantine*, Reuters (Feb. 28, 2020, 5:27 PM), <https://www.reuters.com/article/us-china-health-moscow-deportation/russia-to-deport-88-foreigners-for-violating-coronavirus-quarantineidUSKCN20M252>; Andrei Nikerichev, *Coronavirus in Russia: The Latest News*, MOSCOW TIMES (Mar. 2, 2020), <https://www.themoscowtimes.com/2020/03/02/coronavirus-in-russia-the-latest-news-march-2-a69117>.

<sup>93</sup> Yang, *supra* note 77.

#### D. Israel

The government of Israel has imposed some of the strictest restrictions in response to the coronavirus.<sup>94</sup> In addition to banning entry to Israel from China, the Israeli Minister of Interior has banned entry of non-Israelis from Hong Kong, Macau, Thailand, Singapore, South Korea, Japan, and, most recently, Italy.<sup>95</sup> Italy was added to the list after three individuals returning to Israel from Italy tested positive for the disease.<sup>96</sup> By banning individuals from entire countries from entry into Israel because of a mere few individuals is certainly disproportionate to the legitimate government aim to be achieved.

The Israeli Defence Forces has also stated its plans to quarantine about 200 South Koreans, many of whom are tourists, at a military base in Jerusalem, in a joint collaborative effort with the Israeli Ministry of Health and Israel's National Security Council.<sup>97</sup> This has led to a small demonstration, where people have protested the discrimination and isolation that is being felt in the country. Israel is under a duty to comply with its international obligations and must ensure that the measures it takes to contain the virus do not result in discrimination, whether intended or not.<sup>98</sup>

#### E. The United States of America

As previously mentioned, government representatives of the United States have repeatedly referred to the coronavirus as the "Chinese virus," despite the growing criticism and WHO guidance not to do so.<sup>99</sup> The WHO has deliberately named coronavirus as COVID-19, so as to ensure no impending discrimination would occur as a result of tying the virus to a place, nationality, or ethnicity.<sup>100</sup> In addition, the United Nations High Commissioner for Human Rights Michelle Bachelet has called on the Member States to combat the rise of discrimination that has resulted due to the outbreak of the

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<sup>94</sup> Amir Cohen, *Israel Confirms Coronavirus in Man Who Returned from Italy*, REUTERS (Feb. 27, 2020, 2:16 PM), <https://www.reuters.com/article/us-china-health-israel/israel-confirms-coronavirus-in-man-who-returned-from-italy-idUSKCN20L1H9?feedType=RSS&feedName=healthNews> [hereinafter Cohen]; Daniel Estrin, *Israel Takes Strict Approach to Control the Spread of Coronavirus*, NPR (Feb. 26, 2020, 5:05 AM), <https://www.npr.org/2020/02/26/809530231/israel-takes-strict-approach-to-coronavirus-control>.

<sup>95</sup> Cohen, *supra* note 94.

<sup>96</sup> *Id.*

<sup>97</sup> Reuters, *Israel May Quarantine 200 South Korean Visitors in Army Base: Report*, Reuters (Feb. 23, 2020), <https://www.reuters.com/article/us-china-health-southkorea-israel/israel-may-quarantine-200-south-korean-visitors-in-army-base-report-idUSKCN20H0BL>; Dan Williams, *Israel May Quarantine 200 South Korean Visitors in Army Base: Report*, REUTERS (Feb. 23, 2020, 1:38 PM), <https://www.reuters.com/article/us-china-health-southkorea-israel/israel-may-quarantine-200-south-korean-visitors-in-army-base-report-idUSKCN20H0BL> [hereinafter Williams]; *IDF to Quarantine 200 Koreans in Jerusalem Facility over Coronavirus Fears*, I24 NEWS (Feb. 24, 2020, 9:18 PM), <https://www.i24news.tv/en/news/israel/1582452056-idf-to-quarantine-200-koreans-in-jerusalem-military-facility-over-coronavirus-fears>.

<sup>98</sup> Williams, *supra* note 97.

<sup>99</sup> Rogers, *supra* note 30.

<sup>100</sup> *The Illness Now Has a Name*, *supra* note 31.



coronavirus.<sup>101</sup> Yet, President Trump along with other government representatives, including Secretary of State Mike Pompeo,<sup>102</sup> have created a situation, no matter how inadvertent, that allows racism to flourish. Asian Americans now fear going outside, due to the growing number of racist-caused attacks they have witnessed.<sup>103</sup> Many Asian Americans fear wearing the mask outside for fears that, should they wear a mask, they will automatically be assaulted for carrying the disease that has been discriminately linked to them.<sup>104</sup> As such, the actions taken in the United States violate not only the ICERD, but also violate individuals' rights to privacy and freedom of movement.

#### F. Italy

Finally, Italy, which is, as of current, the worst-affected State, having the highest number of deaths due to the coronavirus,<sup>105</sup> has, in addition to travel bans, created movement maps, which uses location data from cell phones to conduct surveillance of citizens "to determine how many people are obeying a government lockdown order and the typical distances they move every day."<sup>106</sup> This infringes on the right to privacy of citizens and can be subject to much abuse in the future, setting a dangerous precedent after the pandemic is over, opening "the doors to more invasive forms of snooping later."<sup>107</sup> Italy is a member of the European Union and, as such, it is subject to, not only international law obligations, but also the General Data Protection Regulation ("GDPR") of the European Union, which protects citizens' private information.<sup>108</sup> Thus, if EU-governments are to track smartphones, this derogation from the right of citizens to withhold private information may only result where the "restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in democratic society

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<sup>101</sup> *Coronavirus: Human Rights Need to be Front and Centre in Response, Says Bachelet*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Mar. 6, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E>.

<sup>102</sup> Jaipragas, *supra* note 29.

<sup>103</sup> Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html>.

<sup>104</sup> *See id.*

<sup>105</sup> *See Coronavirus: Spain's Death Toll Surpasses China's*, BBC (Mar. 25, 2020), <https://www.bbc.com/news/world-europe-52036836>.

<sup>106</sup> Natasha Singer & Choe Sang-Hun, *As Coronavirus Surveillance Escalates, Personal Privacy Plummets*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>.

<sup>107</sup> *Id.*

<sup>108</sup> Douglas Busvine, *EU Privacy Rules No Obstacle to Coronavirus Fight; Smartphone Tracking a No-No*, REUTERS (Mar. 10, 2020), <https://www.reuters.com/article/us-health-coronavirus-privacy-explainer/explainer-eu-privacy-rules-no-obstacle-to-coronavirus-fight-smartphone-tracking-a-no-no-idUSKBN20X1MP>.

to safeguard” an essential security interest.<sup>109</sup> In addition, the legislation must be specific and must limit the scope to that which is necessary in order to safeguard that security interest.<sup>110</sup> Thus, it is highly unlikely that the mass tracking of Italy’s population so as to ensure compliance with its lockdown laws would suffice the strict scrutiny test provided in the GDPR. Italy is not alone in resorting to the use of technology to conduct the mass tracking of peoples’ movements.<sup>111</sup> Nonetheless, States should take care so as not to react with measures in excess of that which is necessary to contain the spread of disease. In imposing such measures, the potential for racial profiling increases, which, in compliance with the ICERD, must be avoided by all States Parties.

On February 27, 2020, the WHO identified 38 States that have adopted measures that interfere significantly with international traffic, “ranging from denial of entry of passengers, visa restrictions or quarantine for returning travellers.”<sup>112</sup> This number has since increased to 112.<sup>113</sup> Therefore, States that have imposed travel restrictions should remove them or limit them in light of WHO recommendations. In so doing, States can contribute to the minimization if not eradication of racism that is fuelled by current events. Unfortunately, where States often turn to the Security Council of the United Nations for redress, in this situation, resort to the Security Council will not result in a successful outcome, as the following section will explain. Thus, other recommendations must be taken in light of the current situation that prevents recourse from the Security Council.

#### IV. RECOMMENDATIONS

In turning to appropriate recommendations that States may elect to follow, the Security Council and the WHO recommendations are often a good starting point. The Security Council, of course, becomes a necessary organ for having the ability to make decisions that are binding on all Member States. The WHO is also significant due to it being tasked with regulating and enforcing

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<sup>109</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 23, 2016 O.J. (L119) 1, 46–47.

<sup>110</sup> *Id.*

<sup>111</sup> Many States, including Israel, Iran, Bahrain, South Korea, and Russia, have also utilized surveillance technology to track movements. *See, e.g.,* Gavin Gibbon, *Bahrain Distributing Bracelets to Track Active Cases of Coronavirus*, ARABIAN BUS. (Apr. 5, 2020), <https://www.arabianbusiness.com/healthcare/444361-bahrain-distributing-bracelets-to-track-active-cases-of-coronavirus>.

<sup>112</sup> *Updated WHO recommendations for international traffic*, *supra* note 45.

<sup>113</sup> *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL JAZEERA, <https://www.aljazeera.com/news/2020/03/coronavirus-travel-restrictions-border-shutdowns-country-200318091505922.html> (last visited Apr. 21, 2020).

global health considerations. Whereas the WHO is still at play with respect to the coronavirus, resort to the Security Council may be unlikely in this case.

Under its Chapter VII powers, the United Nations Security Council can act where it has determined there exists a “threat to the peace, breach of the peace, or act of aggression.”<sup>114</sup> The Security Council, consisting of 15 Member States,<sup>115</sup> has five permanent members, consisting of the victors from World War II: the United States, France, the Soviet Union, England, and China.<sup>116</sup> Russia succeeded the seat of the Soviet Union, taking over its seat in the Security Council.<sup>117</sup> The five permanent members have what is known as the veto power.<sup>118</sup> Therefore, a proposal in the Security Council can be blocked from passing, if any one of the five permanent members chooses to exercise its veto power.<sup>119</sup> As such, resolutions are rarely passed in the Security Council where the interests of one of the permanent five, or their allies, are at stake.

In light of public health emergencies, the Security Council has only acted directly with infectious diseases in two situations: the first time in response to the spread of HIV on July 17, 2000,<sup>120</sup> and the second time in response to the Ebola outbreak marking the first time in which the Security Council referred to a disease outbreak as “a threat to international peace and security.”<sup>121</sup> In Resolution 2177, the Security Council called upon all Member States “. . . to lift general travel and border restrictions, imposed as a result of the Ebola outbreak, and that contribute to the further isolation of the affected countries and undermine their efforts to respond to the Ebola outbreak . . . ”<sup>122</sup> The resolution came into effect in light of WHO recommendations to ban blanket travel plans, as such bans are rarely successful.<sup>123</sup> Where travel restrictions may be imposed on those who are infected, it should not go so far as to cover an entire nation or geographic region, because, if such measures are allowed, fear and stigma will follow.<sup>124</sup> In addition, the Security Council called for a return to cross-border travel so that medical personnel could travel to and

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<sup>114</sup> U.N. Charter art. 39.

<sup>115</sup> *United Nations Security Council*, UNITED NATIONS, <https://www.un.org/securitycouncil/> (last visited Mar. 3, 2020).

<sup>116</sup> Michelle D. Smith, *Expanding Permanent Membership in the UN Security Council: Opening a Pandora's Box or Needed Change?*, 12(1) PENN ST. INT'L L. REV. 173, 173 (1993).

<sup>117</sup> *Id.* at 174.

<sup>118</sup> *Id.* at 180.

<sup>119</sup> *See, id.* at 180.

<sup>120</sup> *See, e.g.* S.C. Res. 1308 (July 17, 2000); S.C. Res. 1983 (June 7, 2011).

<sup>121</sup> S.C. Res. 2177 (Sept. 18, 2014); Agnew, *supra* note 26, at 113.

<sup>122</sup> S.C. Res. 2177, *supra* note 121, ¶ 4.

<sup>123</sup> *See* World Health Organization [WHO], *Statement on the 2nd Meeting of the IHR Emergency Committee Regarding the 2014 Ebola Outbreak in West Africa* (Sept. 22, 2014), <https://www.who.int/media/centre/news/statements/2014/ebola-2nd-ihc-meeting/en/>.

<sup>124</sup> *See Updated WHO recommendations for international traffic*, *supra* note 45.

from West Africa to deal with the Ebola crisis.<sup>125</sup> This resolution, while referring to the Ebola situation as a threat to international peace and security, made no reference in the text of the resolution that it was acting under its Chapter VII powers.<sup>126</sup> In any event, Security Council resolutions are always binding on all Member States of the United Nations as, pursuant to Article 25 of the Charter of the United Nations, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>127</sup> Resolution 2177, however, uses wording that has led some scholars to conclude that it was meant to consist merely of recommendations for States to consider and “did not require States to take any particular action.”<sup>128</sup> The resolution was therefore perceived as declaratory and not mandatory.<sup>129</sup> As such, many States continued to enforce their travel restrictions, thereby ignoring the Security Council resolution.<sup>130</sup> Either the States that ignored the Security Council request were in violation of their international law obligations, then, or Resolution 2177 was meant to be regarded as a mere recommendation. The latter is more likely. In fact, some scholars argue that it is due to the resolution’s declaratory nature that the resolution has been able to pass unanimously.<sup>131</sup> Otherwise, if Resolution 2177 were meant to consist of binding obligations, it is speculated that the resolution would have been met with many objections, leading ultimately to its downfall.<sup>132</sup> Thus, Resolution 2177 was not meant to contain a precedent for use in future health concerns. In any event, in light of the coronavirus, if the same language that was used in Resolution 2177 were to be adopted by the Security Council, such a resolution is likely to be disregarded by Member States, as was the case with Resolution 2177. Still, the resolution was successful such that it helped to mobilize the States into cooperative action to help contain the spread of Ebola.<sup>133</sup>

Nonetheless, in the current public health emergency, it is unlikely that the Security Council will pass a resolution calling for the lifting of travel bans. Given the makeup of the Security Council, and the political pressures faced by the western permanent members in light of upcoming elections and increasing populist and anti-immigration voters, it is highly likely that the

<sup>125</sup> Christian Enemark, *Ebola, Disease-Control, and the Security Council: From Securitization to Securing Circulation*, 2(2) J. GLOBAL SECURITY STUD. 137, 139 (2017).

<sup>126</sup> See S.C. Res. 2177, *supra* note 121.

<sup>127</sup> U.N. Charter art. 25.

<sup>128</sup> See Anna Hood, *Ebola: A Threat to the Parameters of a Threat to the Peace?*, 16 MELB. J. INT’L L. 1, 20 (2015).

<sup>129</sup> LEONIE VIERCK ET AL., *THE GOVERNANCE OF DISEASE OUTBREAKS: INTERNATIONAL HEALTH LAW: LESSONS FROM THE EBOLA CRISIS AND BEYOND* 323 (2017).

<sup>130</sup> AMY S. PATTERSON, *AFRICA AND GLOBAL HEALTH GOVERNANCE: DOMESTIC POLITICS AND INTERNATIONAL STRUCTURES* 93–94 (2018).

<sup>131</sup> VIERCK ET AL., *supra* note 129, at 325.

<sup>132</sup> *Id.*

<sup>133</sup> See *id.* at 326.

veto power will come into effect in this case. That is also the case, because of the blanket travel restrictions are currently imposed most strictly by Russia and the United States' ally, Israel. In contrast, Resolution 2177 was placed on the Security Council's agenda, namely due to the close relationship between Liberia and the United States at the time.<sup>134</sup> Subsequently, the United States pushed for the passage of Resolution 2177.<sup>135</sup> Given the current political climate, it is highly unlikely a resolution, let alone one that is binding rather than declaratory, will pass.

Nonetheless, even if the Security Council were to pass a resolution in light of the coronavirus, as previously mentioned, this would be unlikely to be viewed as a binding obligation on States and likely to be ignored. Additionally, even if Resolution 2177 were perceived to be binding, scholars speculated that it "failed to address the main human rights issues raised by the disease, such as the discrimination and stigmatization of the persons affected by the virus, the violation of the right to health, the right to food and the right to education, and restrictions to the right of free movement."<sup>136</sup> It was not the disease that led to the Security Council resolution but, rather, the anticipated regional instability that Ebola could and did cause.<sup>137</sup> As such, a Security Council resolution, as of right now, is not probable. Therefore, States must consider their binding human rights obligations, as that will be more effective in combatting stigma and discrimination. Whereas resort to the Security Council is best utilized in situations where regional security is at risk, the human rights framework is best suited to dealing with public health emergencies and is better equipped to dealing with the racial discrimination that may result during outbreaks of infectious disease.<sup>138</sup> Nonetheless, should States contravene their international human rights obligations, and contravening such obligations results in a risk to international peace and security, then the Security Council may prove useful. In other situations, however, human rights law will provide a better response.

As of current, States are imposing measures that violate many human rights, including the right to privacy and the right of freedom of movement, as proven in the previous section. States must take care so as not to contravene obligations set forth in the ICERD, the ICCPR, and other international human rights treaties. While derogation from human rights is allowed, for the most part, measures that are taken to derogate from human rights cannot exceed that which is necessary to achieve the government objective and cannot discriminate based on race or origin. Thus, the right to non-discrimination is one that States cannot derogate from. Measures such as tracking the

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<sup>134</sup> PATTERSON, *supra* note 130, at 101.

<sup>135</sup> *Id.*

<sup>136</sup> VIERCK ET AL., *supra* note 129, at 322.

<sup>137</sup> *Id.*, at 342.

<sup>138</sup> *See id.* at 327.

movement of those of Asian descent and isolating individuals that are not infected with the coronavirus due to their Asian descent or coming from countries that have been infected with the coronavirus are blatantly discriminatory. Imposing such restrictions will only contribute to the xenophobia that is heightened during this time. Thus, imposing travel bans on an entire country would also constitute a violation.<sup>139</sup>

States should consequently adhere to their obligations under the IHR and should give more credence to recommendations by the WHO, a body that is equipped to dealing with infectious disease outbreaks. Therefore, instead of imposing travel bans and exceeding that which is required to contain the outbreak, States need to prevent racism from flourishing by providing accurate information to citizens. Misinformation is dangerous, and government action seemingly excluding people from certain groups only fuels further racism. Travel restrictions promote racial discrimination. More importantly, they do not work. Travel restrictions have been tried throughout all pandemics, including the 2003 SARS outbreak and the 2014 Ebola outbreak. Yet, they were not successful in helping to curb the spread of disease. In both the SARS and Ebola outbreaks, the virus spread even with the imposition of travel restrictions. During the SARS outbreak, the WHO recommended that no travel restrictions be taken.<sup>140</sup> Similarly, during the Ebola outbreak, the WHO noted that “[s]topping the entire world from travelling is not the solution to containing this outbreak of Ebola virus disease,” classifying travel restrictions as “detrimental and ineffective.”<sup>141</sup> Instead of eliminating the spread of disease, the travel restrictions prevent the exchange of medical supplies and knowledge-sharing during a time where supplies and information-sharing become necessary.<sup>142</sup> Travel restrictions would further isolate countries on the negative end of such restrictions, thereby motivating such countries to stop reporting cases due to fear of consequences of border closing and other discriminatory measures.<sup>143</sup> Thus, as a measure of disease control, the exchange of information and the treatment

<sup>139</sup> The author would like to note that, at the time of writing this article, COVID-19 has not yet reached pandemic-status. Nonetheless, the author would also like to note that, even with border closures and travel restrictions, COVID-19 has been able to spread at a very fast rate. As such, travel restrictions may be useful to curb the spread of disease but only for a short period of time and should therefore not be used as a measure to combat the spread of disease.

<sup>140</sup> World Health Organization [WHO], *Summary of WHO Measures Related to International Travel* (June 24, 2003), <https://www.who.int/csr/sars/travelupdate/en/>.

<sup>141</sup> Dr. Isabelle Nuttall, *Ebola Travel: Vigilance, Not Bans*, WORLD HEALTH ORGANIZATION [WHO] (Nov. 5, 2014), <https://www.who.int/mediacentre/commentaries/ebola-travel/en/>.

<sup>142</sup> See, e.g., Deepa Jahagirdar, *Coronavirus and the Cruel Cost of Closing Borders*, THINK GLOBAL HEALTH (Jan. 28, 2020), <https://www.thinkglobalhealth.org/article/coronavirus-and-cruel-cost-closing-borders>.

<sup>143</sup> Dr. Tom Frieden, *CDC Chief: Why I Don't Support a Travel Ban to Combat Ebola Outbreak*, FOX NEWS (Oct. 9, 2014), <https://www.foxnews.com/opinion/cdc-chief-why-i-dont-support-a-travel-ban-to-combat-ebola-outbreak>.

and identification of patients infected with the disease become more useful than the closing down of borders, which may only temporarily help contain the spread of disease.<sup>144</sup>

The WHO has advised States to avoid taking any action that would promote stigma or discrimination and, instead, “should continue to enhance awareness through effective risk communication concerning COVID-19 to the general public, health professionals and policymakers . . .”<sup>145</sup> Thus, education and awareness become vital to counter fears stemming from sudden outbreaks of disease. A good risk communication programme will provide factual information to the public as quickly as possible, so as to manage rumours that may result.<sup>146</sup> This becomes ever so important in the digital age, where social media often becomes a hub for fake news.<sup>147</sup>

## V. CONCLUSION

Disease outbreaks reveal the human rights violations that States can commit in order to combat and stop the spread of disease. Fear can drive people to act in a non-conforming manner, causing much internal disturbance and civil unrest. State governments may either explicitly or implicitly contribute to this civil unrest, by inciting fear among people during times of emergency, such as that which occurs during pandemics. Amid fears of the coronavirus, State government responses have only contributed to the racial discrimination and xenophobia that the international community has witnessed throughout this period in part due to contravention of human rights obligations during this time. Thus, States have obligations under the ICERD as well as other international law treaties to protect against racial discrimination, a non-derogable right.

States should ensure protection of human rights in responding to crises. Thus, human rights obligations do not cease but, rather, they should be provided with heightened protection, during a time where States may derogate from them in manners not provided by law. Thus, the right to be free from racial discrimination must be respected. That is the only way to ensure that human rights obligations will survive after the crisis has ended.

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<sup>144</sup> Professor David L. Heymann, MD, et al., *Global Health Security: The Wider Lessons from the West African Ebola Virus Disease Epidemic*, 385 (9980) LANCET 1884 (May 9, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5856330/>.

<sup>145</sup> *Updated WHO recommendations for international traffic*, *supra* note 45.

<sup>146</sup> World Health Organization [WHO], *Risk Communication and Community Engagement (RCCE) Readiness and Response to the 2019 Novel Coronavirus (2019-nCoV): Interim Guidance* (Jan. 26, 2020), [https://www.who.int/publications-detail/risk-communication-and-community-engagement-readiness-and-initial-response-for-novel-coronaviruses-\(ncov\)](https://www.who.int/publications-detail/risk-communication-and-community-engagement-readiness-and-initial-response-for-novel-coronaviruses-(ncov)).

<sup>147</sup> See Rory Cellan-Jones, *Coronavirus: Fake News Is Spreading Fast*, BBC (Feb. 26, 2020), <https://www.bbc.com/news/technology-51646309>.

By adhering to the human rights framework, and complying with the recommendations of the WHO, State governments can ensure protection of its citizens in the wake of such hysteria. Thus, as the international community prepares for a pandemic, it should also prepare for combatting the xenophobia that comes along with it, along with other violations of human rights. The coronavirus outbreak is not the first and will certainly not be the last infectious disease to cause chaos across the international community. Nonetheless, by continuing to observe international human rights law obligations during infectious disease outbreaks, States will be in a better position to contain the spread of disease and the racial discrimination and other human rights violations that come along with it.