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ENFORCING GLOBAL HEALTH LAW IN DOMESTIC LEGAL SYSTEMS: A CASE STUDY OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

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Abstract

The COVID-19 pandemic has sparked considerable interest in global health law, the scholarship of which, focusing on the global level, typically neglects the careful study of how global health law is enforced in municipal legal systems, without which most global legal and regulatory norms promoting and protecting health remain empty promises, no matter how flawlessly they may have been drafted. This Article contributes to supplying this gap with a detailed case study of global health law as it is enforced in the legal system of the Hong Kong Special Administrative Region, a vibrant common law jurisdiction deeply engaged in global health governance while being part of the People's Republic of China, one of the world's most influential, and certainly most populous, countries. Drawing on the International Health Regulations (2005), the Framework Convention on Tobacco Control, the international right to health, and soft law instruments related to global health as examples of implementation, it is revealed that the enforcement of global health law even in Hong Kong, an economically and legally advanced jurisdiction, is uneven, and too often implicit, a phenomenon that reflects global health law's fragmentation. Global health law, which embodies the collective wisdom and consensus of the international community on health policy, should be taken seriously at the domestic level, although Hong Kong's public health achievements had been more or less attained prior to its domestication of the above-mentioned global health legal instruments. Notwithstanding the usual consequentialness of case law in a common law system, Hong Kong courts have played a marginal role in the domestication of global health law. This state of affairs calls for the development of principles to govern the consistent implementation of global health law in the local legal system, during which the courts can play a constructive role.

I. INTRODUCTION

The coronavirus disease 2019 ("COVID-19") pandemic has generated widespread interest in the law which governs global health,[1] an emerging paradigm that conceives of the world as a community, not just a fragmented collection of sovereign states,[2] and is based on the premise that national borders cannot contain threats to public health.[3] According to Lawrence

[1] *See* Aeyal Gross, *The Past, Present, and Future of Global Health Law Beyond Crisis*, 115 AM. J. INT'L L. 754, 754 (2021).

[2] *See* JENNIFER PRAH RUGER, GLOBAL HEALTH JUSTICE AND GOVERNANCE 219 (2018).

[3] *See* Benjamin Mason Meier et al., *Global Health Law*, *in* PUBLIC HEALTH LAW: CONCEPTS AND CASE STUDIES 169, 169 (Montrece McNeill Ransom & Laura Magaña Valladares eds., 2021).

Gostin, whose scholarship has been instrumental in founding the nascent academic field,[4] global health law encompasses "hard law" such as international treaties and "soft law" like codes of practice agreed by states that "shapes norms, processes, and institutions to attain the highest attainable standard of physical and mental health for the world's population."[5] And yet, global principles "come to life" only when given effect in concrete local settings.[6] To be fully in force, global health law must be heeded not only internationally but also domestically in national legal systems.[7] After all, it is states and territories that hold the primary responsibility for the health of their peoples.[8] Without implementation through municipal law, "which applies within the territorial boundaries of a sovereign state and is legislated by it for that purpose,"[9] global health law is but a lot of unfulfilled promises.

This Article undertakes the previously untried task of furnishing a pilot case study on comparative global health law enforcement in the Hong Kong Special Administrative Region of the People's Republic of China. The choice of this jurisdiction is easily made. Modern-day Hong Kong is a densely populated international financial center set amid swaths of sparsely inhabited rural countryside in its hinterlands, peninsulas, and 262 outlying islands, spanning a total land area of 1,110.18 km^2 and a sea area of 1,644.79 km^2. In 2022 it had a population of about 7.5 million, mostly Chinese, with the rest belonging to hundreds of thousands of diverse ethnicities hailing from every inhabited continent. When the British first occupied Hong Kong Island in 1841, it was one of the unhealthiest, most dangerous settlements on earth, rife with cholera, smallpox, malaria, and measles.[10] By the time it was converted into the first Chinese Special Administrative Region on July 1, 1997, Hong Kong had become a glittering forest of skyscrapers with a gross domestic product per capita higher than the United Kingdom's,[11] boasting one of the world's best public health indicators[12] and most efficient healthcare systems.[13] Its average life expectancy by 2017, twenty years later, ranked top of the world: 87.66 years

[4] *See* Gross, *supra* note 1, at 756.

[5] LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 59 (2014).

[6] *See* Henk Ten Have, *The Universal Declaration on Bioethics and Human Rights as a Landmark in the Development of Global Bioethics*, *in* BIOLAW AND SHARED ETHICAL PRINCIPLES: THE UNIVERSAL DECLARATION ON BIOETHICS AND HUMAN RIGHTS 31, 38 (Cinzia Caporale & Ilja Richard Pavone eds., 2018).

[7] *See* REBECCA M.M. WALLACE & OLGA MARTIN-ORTEGA, INTERNATIONAL LAW 365 (8th ed. 2016).

[8] *See* GOSTIN, *supra* note 5, at 25.

[9] ERIC C. IP, LAW AND JUSTICE IN HONG KONG 19 (3d ed. 2019).

[10] *See* HONG KONG MUSEUM OF MEDICAL SCIENCES SOCIETY, PLAGUE, SARS AND THE STORY OF MEDICINE IN HONG KONG 5 (2006).

[11] *See* PETER E. HAMILTON, MADE IN HONG KONG: TRANSPACIFIC NETWORKS AND A NEW HISTORY OF GLOBALIZATION 1 (2021).

[12] *See* KA-CHE YIP ET AL., HEALTH POLICY AND DISEASE IN COLONIAL AND POST-COLONIAL HONG KONG, 1841-2003, 125 (2016).

[13] *See* Lee J. Miller & Wei Lu, *These Are the Economies with the Most (and Least) Efficient Health Care*, BLOOMBERG (Sep. 19, 2018), https://www.bloomberg.com/news/articles/2018-09-19/u-s-near-bottom-of-health-index-hong-kong-and-singapore-at-top. *See also*, MARK BRITNELL, IN SEARCH OF THE PERFECT HEALTH SYSTEM 31 (2015).

for women (at 87.26 Japan was second) and 81.7 years for men (Switzerland at 81.5 was second).[14]

Hong Kong has been a member of the Regional Committee for the Western Pacific of the World Health Organization ("WHO") since May 1953, after which it became one of a handful of societies to journey from the Third World to the First "without exploiting petroleum or achieving independence from colonial rule."[15] Backed by China, the SAR's former Director of Health, Margaret Chan, served as WHO's Director-General from 2007 to 2017,[16] bringing the experience of Hong Kong's public health system to the global governance of health. The World Justice Project's[17] 2019 Rule of Law Index ranked Hong Kong's common law system 16th out of 126 jurisdictions, according to the four indicators of accountability, just laws, open government, and accessible, impartial dispute resolution.[18] And a study of "public health law coverage" in 33 Western Pacific jurisdictions, published in the same year, ranked it 3rd after Vietnam and South Korea but ahead of Singapore and New Zealand in terms of the comprehensiveness of its legal system's coverage of public health issues like communicable diseases, environmental protection, family health, food safety, health care organisation, medical devices, mental health, oral health, organ transplantation, post-mortem examination, smoking controls, substance abuse, and so on.[19]

This Article conceptually distinguishes between several models of domestic enforcement of global health law that lie on a continuum: (1) explicit hard; (2) implicit hard; (3) mixed; and (4) soft. This Article is organized as follows. Part II illustrates why global health law cannot be found in a single rulebook, nor can it be exhausted by any particular source of law, such as international treaties. Part III begins with hard law or treaties being enforced in the Region through "explicit hard" and "implicit hard" models: the former being the International Health Regulations (2005), which regulates how WHO and nearly 200 states and their territories "collectively address the global spread of disease on the one hand, and avoid unnecessary interference with international traffic and trade on the other hand,"[20] and the latter being the WHO Framework Convention on Tobacco Control, effectuated implicitly by successive anti-smoking laws. Next comes the "mixed" model of enforcement of the international right to health, contained in important treaties such as the Constitution

[14] See *Japan Trails Hong Kong in Latest Life Expectancy Rankings*, THE JAPAN TIMES (Jul. 21, 2018), https://www.japantimes.co.jp/news/2018/07/21/national/japanese-still-near-top-rankings-life-expectancy-2017-figures-show/.

[15] HAMILTON, *supra* note 11, at 1.

[16] *See* S.H. Lee, *Historical Perspectives in Public Health: Experiences from Hong Kong*, *in* ROUTLEDGE HANDBOOK OF GLOBAL PUBLIC HEALTH IN ASIA 5, 18 (Sian M. Griffiths et al. eds., 2014).

[17] The World Justice Project was founded in 2006 as an initiative of the American Bar Association.

[18] *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2019 INSIGHTS 7 (2019).

[19] *See* Y. Lee & S.Y. Kim, *Public Health Law Coverage in Support of the Health-related Sustainable Development Goals (SDGs) Among 33 Western Pacific Countries*, 15 GLOBAL HEALTH 29 (2019).

[20] KATHRYN H. JACOBSEN, INTRODUCTION TO GLOBAL HEALTH 156 (3d ed. 2019).

of the WHO and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which is not effectuated by any law dedicated to protecting that right, but rather by a laundry list of statutes that are conducive to health in one way or another. This is to be followed by an examination of the "soft" model of enforcement: how, in the field of health, non-binding global "soft" law is domesticated by equally non-binding local soft law. Part IV closes the Article with concluding remarks and a recommendation that a case study like this should be used as a starting point to develop a new field called "comparative global health law."

II. SOURCES OF GLOBAL HEALTH LAW

Global health law is scattered across multifarious sources, often quite untidily. This is partially explained by the fact that global health law was not invented by any particular person or organization in history; rather, it sprang up spontaneously both in formally binding, hard international law like the Constitution of the World Health Organization, International Health Regulations (2005), and the Framework Convention on Tobacco Control, and in soft, formally non-binding, global regulatory rules and standards that come from the WHO and other international institutions involved in global health, like the Food and Agriculture Organization.[21] Besides, legal norms relevant to health are spread throughout branches of public international law characterized as human rights law, humanitarian law, environmental law, investment law, and world trade law.

Hard and soft law may be conceptualized as opposites on a continuum, with such instruments as treaties that contain soft law elements lying in the middle.[22] Hard law typically contains precise legal obligations that can be interpreted by an international adjudicatory body, like the Charter of the United Nations ("UN"), a multilateral treaty binding on all UN member-states, Article 55 of which requires *inter alia* that the UN promotes "solutions of international economic, social, health, and related problems."[23] Today, treaties have become the most visible source of international law, with no less than 55,000 of them having been registered with the United Nations since the end of the Second World War.[24] The profusion of treaty provisions in legal domains formerly regulated solely by the domestic laws of nations and territories, such as environmental protection, financial regulation, and human rights, has raised

[21] *See* Brigit Toebes, *Global Health Law: Defining the Field*, *in* RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 2, 2-3 (Gian Luca Burci & Brigit Toebes eds., 2018).

[22] *See* Hema Nadarajah, *Fewer Treaties, More Soft Law: What Does it Mean for the Arctic and Climate Change?*, 2020 ARCTIC YEARBOOK 1, 4 (2020).

[23] SHARIFAH SEKALALA, SOFT LAW AND GLOBAL HEALTH PROBLEMS: LESSONS FROM RESPONSES TO HIV/AIDS, MALARIA AND TUBERCULOSIS 36 (2017).

[24] *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 1 (3d ed. 2013).

new questions about the "legitimacy and democratic accountability" of international law.[25]

WHO has been reluctant to make treaties among its member-states, focusing instead on non-binding instruments to respond to the challenges of global health, such as the HIV/AIDS epidemic.[26] Soft law in global health, as in other domains where it is increasingly deployed, is an "awkward" subject for traditional international lawyers, some of whom regard it as "neither soft law nor hard law," but "simply not law at all."[27] Soft law stands accused of unaccountability as it is apt to bypass standard democratic, parliamentary processes for approval and acceptance of national legal norms.[28] Its value lies precisely in significantly lower transaction costs for states to negotiate and reach compromises on often controversial matters of international and global cooperation.[29] Mainstream scholars in international law nowadays appear to regard soft law instruments as quasi-legal instruments despite their exerting no binding or penal force upon international actors.[30] Arguably, no universal definition of "soft law" is possible, for it takes the form of anything from recommendations and action plans, like WHO's 1981 International Code of Marketing of Breast-Milk Substitutes, to standards frameworks, of which the most familiar is the Pandemic Influenza Preparedness Framework, endorsed by the World Health Assembly on May 24, 2011, which regulates the sharing of influenza viruses and access to vaccines; to guidelines like the FAO/WHO Codex Alimentarius;[31] to solemn declarations adopted by high-profile UN international conferences like the Stockholm Declaration on Human Environment of 1972, the Millennium Development Goals of 2000, the United Nation Educational, Scientific and Cultural Organization's ("UNESCO") Universal Declaration of Bioethics and Human Rights of 2005, and the Sustainable Development Goals of 2015, announcing norms, principles, commitments, and standards which state and even some non-state actors are expected to adhere to.[32] What is more, the most consequential bioethics instruments, namely the Declaration of Geneva, the Nuremberg Code, the International Code of Medical Ethics, and the World Medical Association's Declaration of Helsinki,

[25] *See* Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems*, *in* COMPARATIVE INTERNATIONAL LAW 209, 214 (Anthea Roberts et al. eds., 2018).

[26] *See* SEKALALA, *supra* note 23, at 12.

[27] Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2011).

[28] *See* Hilary Charlesworth, *Law-making and Sources*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 187, 199 (James Crawford & Martti Koskenniemi eds., 2012).

[29] *See* Geoffrey B. Cockerham & William C. Cockerham, *International Law and Global Health*, *in* LAW AND GLOBAL HEALTH 492, 494 (Michael Freeman et al. eds., 2014).

[30] *See* SEKALALA, *supra* note 23, at 50.

[31] *See* Gian Luca Burci, *Global Health Law: Present and Future*, *in* RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 486, 489 (Gian Luca Burci & Brigit Toebes eds., 2018).

[32] *See* WALLACE & MARTIN-ORTEGA, *supra* note 7, at 31.

are so widely accepted by the scientific community that their status as "mere" soft law is irrelevant.[33]

Although soft law typically eschews the use of force to implement norms,[34] it does not follow that it cannot eventuate in binding normativity,[35] or is unimportant to the work of monitoring and benchmarking in global health.[36] The Universal Declaration of Human Rights ("UDHR") of 1948 is arguably the strongest soft law in existence; Article 28 required all organizations and individuals to promote a "just and social order"[37] in the aftermath of the Second World War. While the UDHR was merely a statement of intent, it became the template for comprehensive, influential, and of course binding treaties,[38] namely the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[39] Soft law also comes from the judicial decisions of international courts. Over 120 international dispute settlement bodies currently exist, many of which have assumed the mantle of "courts" and "tribunals,"[40] though none of them enjoys general compulsory jurisdiction over sovereign states,[41] including the prestigious International Court of Justice, the judicial organ of the United Nations. There are many international judicial bodies with jurisdiction over particular subject matters, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court. And there are specialist courts that deal with specific geographical areas, such as the European Court of Human Rights, the African Court of Human and People's Rights, and the Inter-American Court of Human Rights. However, there is no specialist court to interpret and enforce global health law, nor does the World Health Organization have a judicial organ.

III. ENFORCING GLOBAL HEALTH LAW IN HONG KONG

A. Constitutional Principles Governing Hong Kong's Enforcement of Global Health Law

[33] *See* Ila Richard Pavone, *The Role of Soft Law in Bioethics, in* INTERNATIONAL BIOLAW AND SHARED ETHICAL PRINCIPLES: THE UNIVERSAL DECLARATION BIOETHICS AND HUMAN RIGHTS 99, 104 (Cinzia Caporale & Ilja Richard Pavone eds., 2018).

[34] *See* SEKALALA, *supra* note 23, at 51.

[35] *See* Pavone, *supra* note 33, at 100.

[36] *See* Lawrence O. Gostin et al., *The Legal Determinants of Health: Harnessing the Power of Law for Global Health and Sustainable Development*, 393 LANCET 1857, 1862 (2019).

[37] SEKALALA, *supra* note 23, at 28.

[38] *See id.*, at 96.

[39] *See* WALLACE & MARTIN-ORTEGA, *supra* note 7, at 32.

[40] *See* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 1 (2009).

[41] *See* IAN BROWNLIE & JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 10 (2012).

The Chinese Constitution and Hong Kong Basic Law "jointly form the constitutional basis" of the Hong Kong Special Administrative Region.[42] "In accordance with Article 31 of the Constitution," the Basic Law governs "the systems and policies practised in the Hong Kong Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies,"[43] in conformity with the constitutional principle of "'one country, two systems' under which the people of Hong Kong administer Hong Kong with a high degree of autonomy."[44] The Basic Law enjoins the Central People's Government to act cautiously when extending China's own treaties to the Region: it must be done "in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region."[45] Like so many judgments delivered by Hong Kong courts before and after it, the decision in *Chief Executive v. President of the Legislative Council*,[46] written by Chief Judge of the High Court Andrew Cheung (Chief Justice of the Court of Final Appeal since January 2021), re-affirmed that "where a constitutional requirement under the Basic Law is in issue, even the legislature cannot act contrary to that requirement under the Basic Law"; that "the question of whether that constitutional requirement has been complied with or breached is a matter which it is both the power and responsibility of the courts to decide."[47] Consequently, when public authorities act to enforce the precepts and principles of global health law, or to protect and promote public health, they must keep within the bounds of the Basic Law and the Bill of Rights as mediated by the common law system, which was deliberately left intact after China's resumption of the exercise of sovereignty.

Although treaties enjoy the full force of international law between states, they will not necessarily be deemed directly binding inside each and every municipal legal system. Without oversimplification, it may be said that the two dominant approaches to the national legal status of treaties are dualism and monism. In many common law jurisdictions, otherwise applicable international treaties are unenforceable in domestic courts unless domesticated by local enactment. This is the principle of dualism. Monist jurisdictions accept norms

[42] *See* Quanguo Renmin Daibiao Dahui Guanyu Wanshan Xianggang Tebie Xingzhengqu Xuanjü Zhidu de Jueding (全国人民代表大会关于完善香港特别行政区选举制度的决定) [Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Mar. 11, 2021, effective Mar. 11, 2021), CLI.1.353557 (Chinalawinfo).

[43] Xianggang Tebie Xingzhengqu Jiben Fa (香港特别行政区基本法) [Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective Jul. 1, 1997), art. 11(1), CLI.1.4655 (Chinalawinfo).

[44] Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region, *supra* note 42.

[45] Basic Law of the Hong Kong Special Administrative Region, *supra* note 43, art. 153(1).

[46] *See* Chief Executive v. President of the Legislative Council, [2017] 1 H.K.L.R.D. 460 (C.A.).

[47] *Id.*, at 471.

of international law as intrinsic to domestic law, requiring no domestic legislation to implement them. Most of these are civil law jurisdictions: France, Germany, Japan, the Netherlands, Portugal, Russia, and so on.[48] The Constitution of the People's Republic of China does not settle the domestic legal status of international treaties, either in the Chinese mainland or in the Special Administrative Regions.[49] There are conflicting scholarly opinions on whether ratified treaty obligations, especially World Trade Organization ("WTO") norms, enjoy the same status as national laws or primary legislation in the Chinese legal system, as well as inconsistent judicial decisions pertaining to the enforcement of China's treaty obligations.[50] The prevalent attitude appears to be that treaties may be given force only after being domesticated by national legislation that converts them into municipal law, or authorizes their direct application.[51] The role of courts in enforcing international treaties will remain marginal for the foreseeable future;[52] an attitude that always contributes to the unpredictability and fragmentation of treaty law in the Chinese legal system, in the teeth of escalating globalization.[53]

The Basic Law offers no explicit or general guidance on the status of international treaties, mandating neither monism nor dualism. Given the "principle of continuity"[54] underlying numerous provisions of the Basic Law, the courts have adopted a dualist policy that is consistent with the legal tradition of this former British-occupied territory, which, prior to July 1, 1997, upheld dualism just like Australia, Canada, India, New Zealand and the United Kingdom.[55] The dualist approach, as the Judicial Committee of the Privy Council ruled in *Attorney-General for Canada v. Attorney-General for Ontario*,[56] is premised on the solicitude to vindicate parliamentary sovereignty and its checks and balances upon the royal prerogative, forestalling the executive authorities to unilaterally alter the law under color of treaties that could be directly enforceable in municipal law.[57] Dualism thinks of domestic law and international law as two separate legal spheres that have little to do with each other absent domestication.[58] The dualist approach in force in the Region was much more recently summed up by the Hong Kong Court of Final

[48] *See* ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 7 (2012).

[49] *See* W.P. Lung, *International Law before the Courts of the Hong Kong Special Administrative Region of the People's Republic of China–Twenty Tears On*, 9 ASIAN J. INT'L L. 10, 14 (2019).

[50] *See* ALBERT H.Y. CHEN, AN INTRODUCTION TO THE CHINESE LEGAL SYSTEM 155 (5th ed. 2019).

[51] *See* Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 322 (2009).

[52] *See* Congyan Cai, *International Law in Chinese Courts during the Rise of China*, 110 AM. J. INT'L L. 269, 287 (2017).

[53] *See id.*, at 272.

[54] Kwok Cheuk Kin v. Director of Lands, [2021] H.K.C.F.A. 38, ¶44.

[55] *See* NOLLKAEMPER, *supra* note 48, at 78.

[56] *See* Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326.

[57] *See* STEPHEN HALL, FOUNDATIONS OF INTERNATIONAL LAW 218 (3rd ed. 2016).

[58] *See* JAN KLABBERS, INTERNATIONAL LAW 289 (2013).

Appeal in *GA v. Director of Immigration*[59] in the following words: "where it is said that a particular Convention or a provision of that Convention has been incorporated into domestic legislation, it is important to analyze that piece of domestic legislation to see whether it has actually done so and to what extent. This becomes then largely a matter of statutory construction."[60]

B. Explicit Hard Enforcement: IHR (2005)

The enforcement of the International Health Regulations (2005) ("IHR (2005)") in Hong Kong is a paradigmatic case of strong domestic enforcement of global health law. The IHR (2005) harks back to the sanitary conferences held in Europe between 1851 and 1926 to prevent the spread of cholera, without international shipping and trade grinding to a halt.[61] In 1951, the World Health Assembly, the legislative branch of WHO, adopted the International Sanitary Regulations ("ISR"), a forerunner of the International Health Regulations of 1969 targeting six "quarantinable diseases," including smallpox. Three decades later, that number had been reduced to three only: yellow fever, plague, and cholera. The 2002-2003 global outbreak of severe acute respiratory syndrome ("SARS"), and the spread of both human (H3N2) and avian (H5N1) influenza a year later triggered a major overhaul of the International Health Regulations of 1969, culminating in the adoption of the IHR (2005) by the World Health Assembly in May 2005. The IHR (2005) mandates the building of surveillance capacity and the sharing of information about and coordinated responses to influenza, viral fevers, and infectious diseases of potentially international public health concern.[62] It obligates member states to implement these Regulations "with full respect for the dignity, human rights and fundamental freedoms of persons"[63] while recognizing that states still have "the sovereign right to legislate and to implement legislation in pursuance of their health policies" in the process of "uphold[ing] the purpose of [IHR (2005)],"[64] namely, "to prevent, protest against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade."[65]

Notably, each state party is obligated to notify WHO "by the most efficient means of communication available […] of all events which may constitute a public health emergency of international concern within its territory,"[66] defined as "an extraordinary event" that "constitute[s] a public health risk to

[59] *See* GA v. Director of Immigration, [2014] 17 H.K.C.F.A.R. 60.
[60] *Id.*, at 100.
[61] *See* Stefania Negri, *Communicable Disease Control*, *in* RESEARCH HANDBOOK ON GLOBAL HEALTH LAW 2, 265, 269 (Gian Luca Burci & Brigit Toebes eds., 2018).
[62] *See* JACOBSEN, *supra* note 20, at 156.
[63] International Health Regulations (2005), art. 3(1).
[64] *Id.*, art. 1(4).
[65] *Id.*, art. 2.
[66] *Id.*, art. 6(1).

other States through the international spread of disease" and "potentially require[s] a coordinated international response."[67] Annex I, Article 6(g), further obligates states parties "to establish, operate and maintain a national public health emergency response plan, including the creation of multi-disciplinary/multisectoral teams to respond to events that may constitute a public health emergency of international concern." The adoption of the IHR (2005) as the sole internationally binding legal instrument governing the reporting of disease outbreaks and the prevention of their spread worldwide was in many ways a watershed in disease surveillance and response.[68]

Consider how IHR (2005) is enforced in the Hong Kong legal system. Articles 8 and 18 of the Basic Law *inter alia* designate "the common law, rules of equity, ordinances, subordinate legislation and customary law" to be formal sources of law in the Region. The "hardest" among these, in the sense of trumping inconsistent rules of common law and equity, older Ordinances, subsidiary legislation, and Chinese law and custom, but subject to the Basic Law, is the Ordinance, or statute law, which refers to primary legislation enacted by the Legislative Council and receiving the Chief Executive's assent.[69] At the level of international law, IHR (2005) applies to China as a WHO member state. Accordingly, Government of the Region in its 2007 statement invited the Hong Kong Legislative Council to repeal the Quarantine and Prevention of Disease Ordinance (Cap.141) enacted in 1936 and "[t]o amend and consolidate the law relating to quarantine and the prevention of disease among human beings" according to its Long Title in favor of a new Prevention and Control of Disease Ordinance (Cap.599) ("PCDO"), stating that "[IHR (2005)] have been extended to Hong Kong pursuant to Article 153 of the Basic Law"; thus, "we need to update our legal framework to strengthen the monitoring of and to impose control measures on cross-boundary conveyances, points of entry (including the airport and ports) and travelers to ensure our ability to comply with IHR (2005), especially during disease outbreaks."[70]

Right after IHR (2005) entered into force in June 2007, the PCDO came into force in July 2008 "to provide for the control and prevention of disease among human beings; to prevent the introduction into, the spread in, and the transmission from Hong Kong of any disease, source of disease or contamination; *to apply relevant measures of the International Health Regulations promulgated by the World Health Organization*; and to provide for connected purposes."[71] The PCDO does not spell out any obligation of the Region to respect human rights and freedoms, as in the IHR (2005), but arguably this is

[67] *Id.*, art. 1.

[68] *See* SARA E. DAVIES, CONTAINING CONTAGION: THE POLITICS OF DISEASE OUTBREAKS IN SOUTHEAST ASIA 160 (2019).

[69] *See* IP, *supra* note 9, at 92.

[70] Food and Health Bureau, *Legislative Council Brief: Prevention and Control of Disease Bill*, FHCR 4/3231/96, Dec. 2007, https://www.legco.gov.hk/yr07-08/english/bills/brief/b16_brf.pdf.

[71] Prevention and Control of Disease Ordinance, (2008) Cap.599 (H.K.), Long Title [emphasis added].

implicit in the Ordinance, as, prior to its enactment, the Government of Hong Kong had promulgated that "a person aggrieved by the decision of a health officer can seek remedy through the court by applying for judicial review or a writ of habeas corpus, or bringing proceedings for a violation of his right to liberty and security of person pursuant to the Hong Kong Bill of Rights Ordinance."[72]

Sections 7(1)(a) and (b) of the Ordinance empower the Secretary for Health to make regulations in pursuance of the PCDO mandate. Section 8(1) provides, "[o]n any occasion which the Chief Executive in Council considers to be an occasion of a public health emergency, he may make regulations (the regulation) for the purposes of preventing, combating or alleviating the effects of the public health emergency and protecting public health." The Hong Kong Court of Final Appeal describes this power in *obiter dicta* as "wide-ranging":[73] the Ordinance defines a public health emergency as "the occurrence of or the imminent threat of a disease, an epidemic or a pandemic"; "the occurrence of a novel, or highly infectious, agent or matter"; or "the widespread exposure or the imminent threat of widespread exposure of human beings to an infectious agent" that "has a high probability of causing a large number of deaths in the population or a large number of serious disabilities (whether or not long-term) in the population."[74] Section 9(1) empowers the Director of Health to "prescribe any measure to be applied in the light of any temporary recommenddation made by WHO pursuant to articles 15, 17 and 18 of the International Health Regulations."

The IHR (2005), and the global health legal order it belongs to, was severely tested by COVID-19.[75] On January 8, 2020 a "severe respiratory disease associated with a novel infectious agent" was inserted into Schedule 1 of the PCDO, in addition to acute poliomyelitis, food poisoning, Japanese encephalitis, meningococcal infection (invasive), and Zika Virus infection. On February 8, 2020 Hong Kong became one of the first jurisdictions in the world to declare COVID-19 a public health emergency when the Chief Executive in Council promulgated two Public Health Emergency Regulations pursuant to PCDO, Section 8. Both Regulations were subjected to the negative vetting procedure which required them to be laid on the table of the Legislative Council, which in theory could have vetoed them by way of "negative vetting" within the duration prescribed by Section 34 of the Interpretation and General Clauses Ordinance (Cap.1). They were subject as well to judicial review in the

[72] Bills Committee on Prevention and Control of Disease Bill, *Paper for the House Committee Meeting on 16 May 2008*, LC Paper No. CB(2)1912/07-0, May 2008, https://www.legco.gov.hk/yr07-08/english/hc/papers/hc0516cb2-1912-e.pdf.

[73] New World Harbourview Hotel Co Ltd and Others v. Ace Insurance Ltd and Others, [2012] 15 H.K.C.F.A.R. 120, 131.

[74] Prevention and Control of Disease Ordinance, *supra* note 71, § 8(5).

[75] *See* Lawrence O. Gostin et al., *Has Global Health Law Risen to Meet the COVID-19 Challenge? Revisiting the International Health Regulations to Prepare for Future Threats*, 48 J. L., MED. & ETHICS 376, 376 (2020).

High Court. In *Horsfield Leslie Grant v. Chief Executive of HKSAR*,[76] the Court of First Instance of the High Court rejected the application for habeas corpus of returnees from South Africa who challenged the lawfulness of their detention in quarantine under the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation (Cap.599E), a Public Health Emergency Regulation made under PCDO. The Court found constitutional the restriction on the applicants' rights to liberty and personal security under Article 28 of the Basic Law, Article 5 of the Bill of Rights, and the common law right against arbitrary detention, on grounds *inter alia* that the burden imposed was not unacceptably harsh. In laying out its decision, the Court cited the principle that, to be recognized as valid, a public health emergency measure must (1) "serve[] the legitimate aim of protection of public health"; (2) be "rationally connected with the advancement of that aim"; (3) be not "manifestly without reasonable foundation"; and (4) "strike[] a reasonable balance between (i) the societal benefits of the encroachment, namely, protection of public health in Hong Kong, which I consider to be a matter of paramount importance in the current COVID-19 pandemic, and (ii) the restriction of the Applicants' liberty," such that it should not impose "an unacceptably harsh burden on the Applicants."[77]

The IHR (2005) is being implemented in domestic soft law, too. A 2020 Preparedness and Response Plan for Novel Infectious Disease of Public Health Significance ("PRPNIDPHS") provides for a three-tier response system in paragraph 27: "All relevant Government bureaux and departments are advised to draw up contingency plans in response to novel infection to ensure co-ordinated responses and essential services in the Government and in major business sectors"; and "[Health Bureau] and [Department of Health] will also ensure legislation and communication mechanisms are put in place to ensure smooth responses under the International Health Regulations (2005)." Curiously, neither WHO's Global Influenza Surveillance and Response System nor the PIP Framework, endorsed by the World Health Assembly in May 2011, was mentioned in the PRPNIDPHS, their similar titles notwithstanding.

Even though IHR (2005) is the strongest instance of domesticating global health law in the Region's hard and soft law, it was never incorporated *verbatim* into any of Hong Kong's statutes, not even the PCDO. The upshot is that many of IHR (2005)'s core principles, such as the protection of human rights and avoidance of unnecessary interference with international traffic, have to be "read between the lines" or else discovered from other sources, such as the common law, which is steadily accumulating case law relating to the PCDO and its subsidiary legislation in the midst of the COVID-19 pandemic. The basis for a healthier world is robust domestic health systems, constructed primarily upon domestic public health law, not global health law.[78] Before and during

[76] *See* Horsfield Leslie Grant v. Chief Executive of HKSAR, [2020] H.K.C.F.I. 903.
[77] *Id.*, ¶36.
[78] *See* LAWRENCE O. GOSTIN, GLOBAL HEALTH SECURITY: A BLUEPRINT FOR THE FUTURE 11 (2021).

the current pandemic, many jurisdictions across the globe have not been able to comply with the IHR (2005)'s demands to step up public health capacities including a health workforce, medical countermeasures, surveillance, and laboratories.[79] This stands in sharp contrast with provisions of the PCDO, enacted over a decade prior to the outbreak of the current pandemic, which empower the Secretary for Health to, for instance, regulate the handling of infectious agents in laboratories,[80] and the mandatory reporting of serious incidents relating to infectious or toxic agents,[81] through subsidiary legislation such as the Prevention and Control of Disease Regulation (Cap.599A). It can be said that, until the suspension of most of the Region's "Zero-COVID" measures in late 2022 and early 2023, the IHR (2005) was little more than a supplement to the Region's own initiative to enhance its public health capacities, not its direct cause.

C. Implicit Hard Enforcement: Framework Convention on Tobacco Control

The adoption of the Framework Convention on Tobacco Control ("FCTC") of 2003 was the first time that the World Health Assembly had exercised its treaty-making power under the WHO Constitution.[82] The FCTC is an outlier in WHO's legislative history.[83] No comparable Framework Convention on Global Health or on Alcohol Regulation has ever been adopted in the same time frame.[84] The overarching objective of the FCTC is set out in Article 3: "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke." Article 4(1) obligates states parties to inform people about "the health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke" and to craft "effective legislative, executive, administrative or other measures" to "protect all persons from exposure to tobacco smoke." Article 5(2)(b) obligates states parties to "adopt and implement effective legislative, executive, administrative and/or other measures […] for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke." As of 2015, 70% of states parties had implemented its provisions,[85] despite their considerable ambiguities, the lack of resources to developing countries for enforcement, a militant

[79] *Id.*

[80] Prevention and Control of Disease Ordinance, *supra* note 71, § 7(2)(r).

[81] *See id.*, § 7(2)(t).

[82] *See* GEOFFREY B. COCKERHAM, GLOBAL GOVERNANCE AND PUBLIC HEALTH: OBSTACLES AND OPPORTUNITIES 42 (2018).

[83] *See* Eric C. Ip, *The Constitutional Economics of the World Health Organization*, 16 HEALTH ECON. POL'Y & L. 325, 332 (2021).

[84] *See* Suwit Wibulpolprasert & Mushtaque Chowdhury, *World Health Organization: Overhaul or Dismantle?*, 106 AM. J. PUB. HEALTH 1910, 1911 (2016)

[85] *See* HEATHER WIPFLI, THE GLOBAL WAR ON TOBACCO: MAPPING THE WORLD'S FIRST PUBLIC HEALTH TREATY 181 (2015).

tobacco industry, WTO cases against tobacco control measures in Australia and Uruguay,[86] and a United States-led campaign against WHO for overstepping its mandate.[87] And of course, no World Health Court arbitrates disputes arising from FCTC.[88]

The hardness of enforcing the FCTC as Hong Kong law is nonetheless softer than the IHR (2005), in that no statute has been enacted to give coercive effect to it. In *JMTM Inc v. Registrar of Trade Marks*,[89] the Court of First Instance of the High Court noted that "[the] Smoking (Public Health) Ordinance, Cap.371 first came into effect in the year 1982, but then the most recent amendments Ordinance 21 of 2006 came as a result of WHO Framework Convention to Tobacco Control 2005; and to be exact, it came from the Geneva Extract Article 11."[90] At the time of writing, however, the FCTC has yet to be mentioned even in the Smoking (Public Health) Ordinance. Though not formally enforced, its spirit is being rigorously, if informally effected through a "multipronged approach—comprising legislation and enforcement, taxation, publicity and education, as well as smoking cessation services— [that] has gradually reduced the smoking prevalence."[91] In 2011 the Food and Health Bureau, renamed "Health Bureau" in July 2022, said that its tobacco control policy "has full regard to the provisions of FCTC," and that the Region has an "international obligation to continue to take steps to strengthen tobacco control and address this public health epidemic."[92]

The Smoking (Public Health) Ordinance (Cap.371) is the flagship tobacco control legislation, enacted 23 years before FCTC. It provides rules governing public smoking restrictions; the packaging and labelling of tobacco products; advertising, promotion and sponsorship; and sales of tobacco to minors. It is then enforced through several Smoking (Public Health) Regulations. Since 2006, the year FCTC was extended to Hong Kong, tobacco control has been escalated through new statutes. In July 2008, through the Fixed Penalty (Smoking Offences) Ordinance (Cap.600), the Legislative Council enacted a fixed penalty of HKD1,500,000 for anyone who violates the smoking ban in Section 7(1) of the Smoking (Public Health) Ordinance. Smoking is prohibited in all indoor areas of workplaces and public venues, including restaurants and bars, as well as certain outdoor areas, such as around beaches, leisure facilities, schools, and public transport facilities. In March 2016, the smoking ban was

[86] *See* Lawrence O. Gostin & Devi Sridhar, *Global Health and the Law*, 370 NEW ENG. J. MED. 1732 (2014).

[87] *See* SHARIFAH SEKALALA, SOFT LAW AND GLOBAL HEALTH PROBLEMS: LESSONS FROM RESPONSES TO HIV/AIDS, MALARIA, AND TUBERCULOSIS (2017).

[88] *See* JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW (2017).

[89] *See* JMTM Inc. v. Registrar of Trade Marks, [2008] H.K.E.C. 2132 (C.F.I.).

[90] *Id.*, ¶2.

[91] Jeff P.M. Lee, *Tobacco Control Policy in Hong Kong*, 22 HONG KONG MED. J. 96 (2016).

[92] Food and Health Bureau, *Legislative Council Brief: Dutiable Commodities Ordinance (Chapter 109) Dutiable Commodities (Amendment) Bill 2011*, FHCR1/4041/05, Apr. 6, 2011, https://www.legco.gov.hk/yr10-11/english/bills/brief/b25_brf.pdf.

extended to 8 tunnel bus interchanges.[93] FCTC Article 6 encourages states parties to use price and tax measures to reduce the demand for tobacco. This approach was buttressed by the Dutiable Commodities Ordinance (Cap.109) by which tobacco became a commodity liable to duty according to relevant requirements.

The FCTC was designed for traditional tobacco products and is not necessarily apt for regulating electronic cigarettes and other new tobacco products. In 2010 the Conference of the Parties acknowledged the "regulatory gap" that e-cigarettes pose.[94] Invented in 2003, e-cigarettes do not burn or use tobacco, but function by heating a so-called "e-liquid" typically containing propylene glycol or vegetable glycerin, water, flavoring and nicotine[95] to create a vapor for users to inhale. This is called "vaping." In October 2021 the Legislative Council enacted what the anti-smoking lobby perceived as a long overdue Smoking (Public Health) (Amendment) Ordinance (No. 39 of 2021) whose purpose, according to its Long Title, is "to prohibit the import, manufacture or sale, or use in certain places, of prescribed alternative smoking products; to restrict the giving, possession, advertising or promotion of the products; and to make related and miscellaneous amendments to the Ordinance and related legislation." Schedule 7 lists as "alternative smoking product" not only "specified plant material rolled up in any material, in a form that is capable of immediate use for imitating conventional smoking," but also any device, other than a waterpipe, capable of "generating an aerosol from any substance that is not tobacco or a dangerous drug, other than by means of lighting the substance directly; and use[d] for imitating conventional smoking"; or of "generating an aerosol from tobacco, other than by means of lighting the tobacco directly; and use[d] for smoking." The maximum punishment for violating this statute is 6 months' imprisonment and a HKD50,000 fine.

Hong Kong legislation has thus exceeded the reach of the FCTC, even in the name of enforcing it, albeit without meaningfully naming it in any of its provisions. The many weaknesses of the FCTC are evidenced by the continually escalating death rate. More than a decade after it entered into force, about 7 million people died from tobacco use, compared to the 3 million deaths in 1994.[96] Given its entanglement in manifold compliance and accountability challenges,[97] domestication of the FCTC did not likely cause Hong Kong's

[93] *See* FOOD AND HEALTH BUREAU & DEPARTMENT OF HEALTH, TOWARDS 2025: STRATEGY AND ACTION PLAN TO PREVENT AND CONTROL NON-COMMUNICABLE DISEASES IN HONG KONG 61 (2018).

[94] *See* Kevin Oliver, *Regulations Are a Drag: The WHO Framework Convention on Tobacco Control and Its Potential Application to Electronic Cigarettes*, 16 CHI. J. INT'L L. 185 (2015).

[95] *See* Research Office, Legislative Council Secretariat, *Information Note: Regulation of E-Cigarettes and Heated Tobacco Products in Selected Places*, IN11/17-18, https://www.legco.gov.hk/research-publications/english/1718in11-regulation-of-e-cigarettes-and-heated-tobacco-products-in-selected-places-20180614-e.pdf.

[96] *See* Kelley Lee, *The Politics of Global Tobacco Control*, *in* THE OXFORD HANDBOOK OF GLOBAL HEALTH POLITICS 661, 661 (Colin McInnes et al. eds., 2020).

[97] *See* GOSTIN, *supra* note 5, at 215.

sound performance in tobacco control. The FCTC can at most be regarded as a reinforcer of the Region's own drive to outlaw smoking. However, the significance of the FCTC as an embodiment of "a paradigmatic shift in thinking about global tobacco control that parallels a change in global development policy toward a broad, integrated, and multifaceted framework"[98] should not be denied. The FCTC can be regarded, from an administrative law perspective, as a "relevant consideration" that public health policymakers and decision-makers are obligated to take into account as they exercise their discretion.[99] Should they fail to do so, the courts would be entitled to quash their decisions pursuant to legal provisions such as Article 35(2) of the Basic Law.[100]

D. Mixed Enforcement: The International Right to Health

Although framed as an international right, the right to health has not received as much statutory attention in Hong Kong as the IHR (2005) or FCTC. Health is commonly described as a fundamental right which preconditions other rights' existence.[101] At the international level, human rights derivative of the promotion and protection of health are codified in the WHO Constitution, ICESCR, and the Convention on the Rights of Persons with Disabilities.[102] The World Health Organization was instituted in New York on July 22, 1946, when representatives of 61 states, 51 of them members of the newly established United Nations, signed its Constitution at the concluding session of the International Health Conference.[103] This Constitution is a multilateral treaty and also the WHO's founding document. British rule entailed Hong Kong in it and it remained in force in the Hong Kong Special Administrative Region after the resumption of Chinese sovereignty. The Preamble boldly proclaims the following principles: "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity." Also affirmed is that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

The International Covenant on Economic, Social and Cultural Rights in Article 12(1) singles out health among the minimum preconditions of an adequate standing of living, so as to "recognize the right of everyone to the

[98] PRAH RUGER, GLOBAL HEALTH JUSTICE AND GOVERNANCE 264 (2018).

[99] *See* Eric C. Ip, *Law, Virtue, and Public Health Powers*, 14 PUB. HEALTH ETHICS 148 (2021).

[100] Basic Law of the Hong Kong Special Administrative Region, art. 35(2) reads: "Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

[101] *See* Lawrence O Gostin & Benjamin Mason Meier, *Introduction: Global Health and Human Rights*, *in* FOUNDATIONS OF GLOBAL HEALTH AND HUMAN RIGHTS 1, 6 (Lawrence O. Gostin & Benjamin Mason Meier eds., 2020).

[102] *See* Michel Sidibe et al., *The Future of Global Governance for Health: Putting Rights at the Center of Sustainable Development*, *in* FOUNDATIONS OF GLOBAL HEALTH AND HUMAN RIGHTS 87, 91 (Lawrence O. Gostin & Benjamin Mason Meier eds., 2020).

[103] *See* F.A. Calderone, *World Health Organization*, 2 FOOD, DRUG & COSMETICS L. Q. 373 (1947).

enjoyment of the highest attainable standard of physical and mental health." Article 12(2) articulates a right to health much broader than entitlement to health care, declaring that to achieve the highest attainable health standard, attention to disease prevention and a healthful environment are necessary.[104] All this is hedged about by Article 2, however, which states that the right to health is contingent on available resources, rather than on demand.[105] The United Nations Convention on the Rights of Persons with Disabilities (CRPD) entered into force in the People's Republic of China, thus also in Hong Kong, in 2008. Article 25 guarantees "the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability" and obligates states parties to "take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation."

The Basic Law provision most pertinent to the legal force of international treaties inside the Hong Kong legal system is undoubtedly Article 39(1),[106] which declares, "[t]he provisions of the International Covenant on Civil and Political Rights [the ICCPR], the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region." The ICCPR reflects the standpoint of traditional human rights theory, which sees the state as a threat to liberty from which the purpose of human rights is to protect individuals; whereas ICESCR reflects rather the standpoint of rights as entitlements from the state, understanding them as essential for social-economic well-being. Unlike the ICCPR, which was incorporated almost *verbatim* into the Hong Kong Bill of Rights Ordinance (Cap.383) (BORO), no equivalent statute domesticates the ICESCR. The incorporation of ICCPR into Article 8 of BORO made it possible to enforce it in the courts under the common law dualist doctrine. The absence of a like statute domesticating ICESCR has made it impossible to enforce that treaty in Hong Kong's courts in the same way as the ICCPR is enforced.

It is not an overstatement to say that, relative to the Government, "[t]he Hong Kong courts are generally reluctant to recognize ICESCR rights, including the right to health."[107] In *Chan To Foon v. Director of Immigration,*[108] the Court of First Instance of the High Court went so far as to define ICESCR as "an aspirational covenant, not one that creates absolute obligations."[109] This

[104] *See* Lisa Forman, *International Human Rights Law and the Social Determinants of Health*, *in* GLOBAL HEALTH: ETHICAL CHALLENGES 122, 123 (Solomon Benatar & Gillian Brock eds., 2nd ed. 2021).

[105] *See id.*, at 124.

[106] *See* ERIC C. IP, HYBRID CONSTITUTIONALISM: THE POLITICS OF CONSTITUTIONAL REVIEW IN THE CHINESE SPECIAL ADMINISTRATIVE REGIONS 83 (2019).

[107] Edward Lui, *The Right to Health in Hong Kong: Incorporation, Implementation, and Balancing*, *in* ROUTLEDGE HANDBOOK OF GLOBAL HEALTH RIGHTS 155, 165 (Clayton Ó Néill et al. eds., 2021).

[108] *See* Chan To Foon v. Director of Immigration, [2001] 3 H.K.L.R.D. 109 (C.F.I.).

[109] *Id.*, at 132.

ruling drew severe criticism from the Economic and Social Council (ECOSOC), the Committee on Economic, Social and Cultural Rights, the UN body that oversees ICESCR's implementation, that it was "based on a mistaken understanding of the legal obligations arising from [ICESCR]."[110] The Court of Final Appeal in *Comilang Milagros Tecson v. Director of Immigration*[111] rather bluntly stated, "The ICESCR is an international treaty and under the common law dualist principle is not self-executing. […] Unless and until made part of Hong Kong domestic law by legislation, the provisions of such a treaty do not confer or impose any rights or obligations on individual citizens."[112] Finally, the Court of Appeal in *Lubiano Nancy Almorin v. Director of Immigration*[113] reiterated the controversial holding in *Chan To Foon*, namely, "[i]t would not be a task which the Court finds itself institutionally equipped to adjudicate upon due to the aspirational and generic formulation in the ICESCR which addresses interests within the spheres of socio-economic and cultural rights."[114]

Like the ICESCR, the WHO Constitution and CRPD have not been incorporated into domestic legislation; however, we must not jump to the conclusion that the right to health enshrined in these treaties has no bearing whatsoever on the deliberations of the courts. In April 2005 the Secretary for Home Affairs explained to the Legislative Council that there was no need for "a law that would do for the ICESCR what the Hong Kong Bill of Rights Ordinance does for the ICCPR," because "[t]he provisions of the ICESCR are given legal effect through various articles of the Basic Law, through specific statutes, and through the evolving body of case law developed in the courts."[115] In principle, it is possible for ICESCR rights to be incorporated piecemeal in sundry provisions of the Basic Law and various Ordinances,[116] but the absence

[110] Committee on Economic, Social and Cultural Rights, *Concluding Observations: China (Hong Kong)*, ¶16, U.N. Doc. E/C.12/1/Add.58 (May 21, 2001).

[111] *See* Comilang Milagros Tecson v. Director of Immigration, [2019] 22 H.K.C.F.A.R. 59.

[112] *Id.*, at 92.

[113] *See* Lubiano Nancy Almorin v. Director of Immigration, [2020] 5 H.K.L.R.D. 107 (C.A.).

[114] *Id.*, at 135.

[115] Patrick Ho, *LCQ 2: Implementation of the International Covenant on Economic, Social and Cultural Rights in Hong Kong*, CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU (Apr. 6, 2005), https://www.cmab.gov.hk/en/upload/20050406humanq02_e.pdf.

[116] In its 4th report about the implementation of the International Covenant on Economic, Social and Cultural Rights published in February 2020, the Government of the Region identified the following Ordinances implement the right to health enshrined in ICESCR, art.12(1), albeit in a decentralized manner: Mental Health Ordinance (Cap.136); Smoking (Public Health) Ordinance (Cap.371); Occupational Safety and Health Ordinance (Cap.509); and Electronic Health Record Sharing System Ordinance (Cap.625). The Town Planning Ordinance (Cap.131); Public Health and Municipal Services Ordinance (Cap.132); and Air Pollution Control Ordinance (Cap.311); Waste Disposal Ordinance (Cap.354); Water Pollution Control Ordinance (Cap.358); Smoking (Public Health) Ordinance (Cap.371); Road Traffic Ordinance (Cap. 374); Noise Control Ordinance (Cap. 400); Ozone Layer Protection Ordinance (Cap.403); Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap.413); Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap.414); Sewage Services Ordinance (Cap.463); Dumping at Sea Ordinance (Cap.466); Environmental Impact Assessment Ordinance (Cap.499); Hazardous Chemicals Control Ordinance (Cap.595); Product Eco-responsibility Ordinance (Cap.603); Bunker Oil Pollution (Liability and

of a focal statute would make it harder for the courts to enforce a right to health as conceived in the above-mentioned treaties. Litigants have attempted to derive a right to health from Article 28(2) of the Basic Law,[117] and from Article 2(1) of the Bill of Rights,[118] which the United Nations Human Rights Committee has in General Comment No. 2, paragraph 5, interpreted as requiring states, including China, and by extension its Hong Kong Special Administrative Region, "to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." In *Clean Air Foundation Ltd and Another v. Government of the HKSAR,*[119] a non-governmental organization tried to use judicial review to challenge the Government's inaction in combating air pollution, arguing that the Basic Law and/or the Bill of Rights, in the protection of a "right to life" and the "right to health," as provided by Article 12 of the ICESCR, "imposes upon the Government an affirmative duty to protect the residents and the economy of Hong Kong from the known harmful effects of air pollution."[120] The Court of First Instance of the High Court decided that both laws provide for a right to life only in the context of detention, trial, and punishment; the question was "whether, on a purposive interpretation, the constitutional protection can be extended to matters of air pollution control." Yet the Court was prepared to concede that there is "an emerging international jurisprudence to the effect that the right to life may, depending on the circumstances, impose on public authorities an obligation outside of the context of crime and punishment; for example, to provide vaccines in the case of epidemics or to protect against identified environmental hazards such as nuclear waste"; that "it is at least *prima facie* arguable that the constitutional right to life may apply in the circumstances advocated by the applicants; that

Compensation) Ordinance (Cap.605); Buildings Energy Efficiency Ordinance (Cap.610); Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap.611); Food Safety Ordinance (Cap.612) implement the environmental hygiene protection requirements of ICESCR, art. 12(2)(b). The Factories and Industrial Undertakings Ordinance (Cap.59) implements ICESCR, art. 12(2)(c)'s industrial hygiene and prevention of occupational diseases requirements. The Prevention and Control of Disease Ordinance (Cap.599) is the flagship Ordinance on the control of epidemics, also in relation to ICESCR, art.12(2)(c). Ordinances relating to medical services and medical attention under ICESCR, art.12(2)(d), encompass the Hospital Authority Ordinance (Cap.113); Dentists Registration Ordinance (Cap.156); Medical Registration Ordinance (Cap.161); Midwives Registration Ordinance (Cap.162); Nurses Registration Ordinance (Cap.164); Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap.165); Medical Clinics Ordinance (Cap.343); Supplementary Medical Professions Ordinance (Cap.359); Chinese Medicine Ordinance (Cap.549); and Private Healthcare Facilities Ordinance (Cap.633). GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, FOURTH REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 7-8 (2020).

[117] Basic Law of the Hong Kong Special Administrative Region, art. 28(2) reads: "No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention, or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited."

[118] Hong Kong Bill of Rights Ordinance (Cap.383), § 8, The Hong Kong Bill of Rights, art. 2, reads: "Every human being has the inherent right to life. This right shall be protected by law."

[119] *See* Clean Air Foundation Ltd and Another v. Government of the HKSAR, [2007] HKEC 1356 (C.F.I.).

[120] *Id.*, ¶16.

is, by imposing some sort of duty on the Government to combat air pollution."[121] The Court proceeded to state, however, that it was in no position to assess the relative merits of government pollution control policy "without shouldering aside the discretion vested in Government."[122]

In theory, a right to health could inform statutory interpretation by judges whose function in the common law is to supply "as close a fit as possible between the policy of [the legislature] and the values of reason, fairness, and the presumption of liberty."[123] In *Yin Xiang Jiang v. Director of Immigration,* the Court of Appeal said that "even though [an international] obligation has not been incorporated into our domestic law, it is nevertheless a factor which authorities ought to take into account when exercising a discretion."[124] In *Hung Chan Wa v. HKSAR,* the same Court held that "where there exist two reasonably possible interpretations of a statutory provision, one consistent with an international obligation or a constitutional requirement, the other inconsistent, then it should be presumed that the Legislature intended the meaning that was consistent."[125] In *Bl v. Director of Immigration*,[126] delivered almost a decade later, the Court of First Instance of the High Court commented on the ICESCR's effect more positively: "Whilst that is so, the aspirational nature of an objective does not diminish its force or applicability to relevant circumstances."[127] *Obiter dicta* like this seemingly point toward a more promising direction for taking the international right to health more seriously at the local level. As a matter of principle at least, nothing forbids the courts to interpret all Ordinances and subsidiary legislation with due regard to the right to health guaranteed by the ICESCR and other international treaties as they apply to the Hong Kong Special Administrative Region. Indeed, it is arguable that this approach is required by Article 39(1) of the Basic Law.[128]

E. Soft Enforcement: Soft Law Instruments

Global health law may be domestically implemented under what may be called the soft enforcement model. Consider the following examples. The right to health, as interpreted by General Comment Number 14 of the Committee on Economic, Social and Cultural Rights, seems to be conceptually related to Universal Health Coverage, a critical component of the Sustainable Development Goals (SDGs) adopted by all 193 UN members in September 2015, which drew on prior soft law instruments like the Rio Declaration of 1992, the Johannesburg Plan of Implementation of 2002, and "The Future We Want"

[121] *Id.*, ¶17.
[122] *Id.*, ¶42.
[123] JOHN LAWS, THE CONSTITUTIONAL BALANCE 57 (2021).
[124] Yin Xiang Jiang v. Director of Immigration, [1994] 2 H.K.L.R. 101, at 106 (C.A.).
[125] Hung Chan Wa v. HKSAR, [2005] 5 H.K.L.R.D. 291, at 352 (C.A.).
[126] *See* Bl v. Director of Immigration, [2014] H.K.E.C. 2054 (C.F.I.).
[127] *Id.*, ¶45.
[128] *See* Michael Ramsden, *Judging Socio-Economic Rights in Hong Kong*, 16 INT'L J. CONST. L. 447, 469 (2018).

statement of the UN Conference on Sustainable Development of 2012.[129] The SDGs cover issues as diverse as poverty, employment, hunger, access to education, gender discrimination, housing, water, sanitation, energy, communications technology, marine pollution, and species loss,[130] embodying "an ambitious and loosely integrated declaration of goals and a complex and fragmented system of global governance."[131] The SDGs were adopted not as hard law, but as part of a UN General Assembly resolution called the 2030 Agenda, which has no enforceability under international law.[132] Enthusiasts believe aspirational norms like the SDGs can be deployed to hold states morally accountable, while skeptics dismiss them as "veneer for failures to achieve meaningful binding multilateral agreements."[133]

SDG 3 aspires to a specific health goal: "Ensure healthy lives and promote well-being for all at all ages." Within this goal are more specific targets like "reduc[ing] by one third premature mortality from non-communicable diseases through prevention and treatment and promot[ing] mental health and well-being."[134] In May 2018, the then-Food and Health Bureau of the Region released its own domestic soft law instrument, "Towards 2025: Strategy and Action Plan to Prevent and Control Non-communicable Diseases in Hong Kong," which cited the SDGs as authority for making the "reduction in premature mortality from [non-communicable diseases]" one of its targets to "achieve sustainable developments in economic growth, social inclusion and environmental protection."[135] The Plan was developed to implement another soft health law instrument, "The WHO Global Action Plan for the Prevention and Control of Non-Communicable Diseases (NCDs) 2013-2020," which in tandem with the SDGs "focus[es] on the reduction of premature mortality as the first goal."[136] In light of this, the Hong Kong Plan sets nine targets to be achieved locally in relation to cardiovascular disease, cancer, chronic respiratory diseases, and diabetes,[137] to enable people to "lead healthy lives"

[129] *See* Steven Bernstein, *The United Nations and the Governance of Sustainable Development Goals, in* GOVERNING THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 213, 216 (Norichika Kanie & Frank Biermann eds., 2017).

[130] *See* Andrew Harmer & Jonathan Kennedy, *Global Health and International Development, in* THE OXFORD HANDBOOK OF GLOBAL HEALTH POLITICS 217, 227 (Colin McInnes et al. eds., 2020).

[131] Arild Underdal & Rakhyun E. Kim, *The Sustainable Development Goals and Multilateral Agreements, in* GOVERNING THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 241, 253 (Norichika Kanie & Frank Biermann eds., 2017).

[132] *See* WALLACE & MARTIN-ORTEGA, *supra* note 7, at 33.

[133] Norichika Kanie et al., *Introduction: Global Governance through Goal Setting, in* GOVERNING THROUGH GOALS: SUSTAINABLE DEVELOPMENT GOALS AS GOVERNANCE INNOVATION 1, 5 (Norichika Kanie & Frank Biermann eds., 2017).

[134] Sustainable Development Goals: Goal 3, Target 3.4.

[135] FOOD AND HEALTH BUREAU & DEPARTMENT OF HEALTH, *supra* note 93, at 4.

[136] Global Burden of Disease Cancer Collaboration, *Global, Regional, and National Cancer Incidence, Mortality, Years of Life Lost, Years Lived With Disability, and Disability-Adjusted Life-Years for 29 Cancer Groups, 1990 to 2017: A Systematic Analysis for the Global Burden of Disease Study*, 5 J.A.M.A. ONCOL. 1749, 1757 (2019).

[137] *See* FOOD AND HEALTH BUREAU & DEPARTMENT OF HEALTH, *supra* note 93, at viii.

and "make healthy choices," to "strengthen health systems for optimal management of NCDs through primary healthcare and universal health coverage" and to "monitor progress of NCD prevention and control actions with clear targets and indicators adapted from the WHO's global monitoring framework."[138]

Consider soft law in another important area of global health. Antimicrobial resistance, defined as the evolutionary process whereby microorganisms like bacteria, fungi, viruses, and parasites adapt to co-exist with antimicrobial drugs like antibiotics, antifungals, antivirals, antimalarials, and anthelmintics.[139] This has led to a healthcare crisis, in reaction to which the World Health Assembly in May 2015 adopted a global action plan on antimicrobial resistance so as to raise public awareness of it, broaden the evidence base through surveillance and research, reduce the incidence of infection through better sanitation and prevention, optimize antimicrobial medicines in human and animal health, promote sustainable investment in new medicines, diagnostic tools, vaccine, and so on.[140] The Hong Kong Strategy and Action Plan on Antimicrobial Resistance ("HKSAPAR") 2017-2022 is a domestic soft law promulgated by the Government in July 2017. It states *inter alia* that the Government will "adopt the principles of WHO Global Action Plan as the main [local] strategies to tackle [anti-microbial resistance] in Hong Kong."[141] Seeing that the "WHO Global Action Plan encourages the use of vaccinations as an important measure in the prevention of infection and [anti-microbial] control," the Government was tasking itself by HKSAPAR to continue to offer "free or subsidise[] seasonal influenza vaccinations for the high-risk population, including children, the elderly, patients with chronic medical problems and healthcare workers."[142] Domestic soft law can have real bite, its unenforceability notwithstanding. For instance, COVID-19 prompted the Chinese authorities at various levels to adopt a soft law obligation to wear a mask outdoors, which though lacking a credible legal basis, has been "generally observed in combating COVID-19."[143]

Despite the lack of "hard" coercion, norms contained in global soft law can be observed to inure as customary international law,[144] the cumulation of uncodified rules of state conduct that bind an individual state at the international level, even when the state has not formally ratified them.[145] This kind of law has an objective and a subjective dimension, and has to be "looked for primarily

[138] *Id.*, at 2.

[139] *See* LOUISE ACKERS ET AL., ANTI-MICROBIAL RESISTANCE IN GLOBAL PERSPECTIVE 2 (2020).

[140] *See* Margaret Chan, *Foreword*, *in* WORLD HEALTH ASSEMBLY GLOBAL ACTION PLAN ON ANTIMICROBIAL RESISTANCE, vii (World Health Organization ed., 2015).

[141] GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, HONG KONG STRATEGY AND ACTION PLAN ON ANTIMICROBIAL RESISTANCE 2017-2022, 34 (2017).

[142] *Id.*, at 96.

[143] Xiezhong Cheng, *Soft Law in the Prevention and Control of the COVID-19 Pandemic in China: Between Legality Concerns and Limited Participatory Possibilities*, 12 EUR. J. RISK REG. 7, 19 (2021).

[144] *See* Kevin A. Klock, *The Soft Law Alternative to the WHO's Treaty Powers*, 44 GEO. J. INT'L L. 821, 835 (2013).

[145] *See* Verdier & Versteeg, *supra* note 25, at 225.

in the actual practice and *opinio juris* of States."[146] Examples of customary international law bearing on global health law, as identified by the International Court of Justice, include the obligation to respect "the basic rights of the human person, including protection from slavery and racial discrimination,"[147] and not to pollute the environment.[148] And the Universal Declaration of Human Rights or UDHR is one example of soft law inuring as customary international law. Adopted in 1948, it built upon the promise of the UN Charter by specifying "a common standard of achievement for all peoples and all nations," in the words of its Preamble, to promote human rights. Although the UDHR has no force of law, its provisions have been so widely accepted as a matter of principle that they have now been widely understood to have attained the status of customary international law.[149]

In principle, global health soft law, insofar as one finds it customary international law, in respect of which the doctrine of dualism is less strict, may be directly enforced in the common law courts without need of enactment; it automatically becomes a part of the common law. In Hong Kong an exception would arise if customary international law contradicted the Basic Law, applicable Chinese national laws, or local statutes.[150] This doctrine was established by the Judicial Committee of the Privy Council on appeal from Hong Kong in *Chung Chi Cheung v. R.*[151] More recently, in *Comilang Milagros Tecson v. Director of Immigration,*[152] the Hong Kong Court of Appeal restated the doctrine thus: "international customary law has no validity save in so far as its principles are accepted and adopted by our own domestic law; and that on any judicial issue the court would treat a rule of customary international law, once ascertained, as incorporated into the domestic law so far it is not inconsistent with local statute or law finally declared by the court."[153] However, relative to the Government and the Legislative Council, the courts have played a marginal role in the domestication of global health law, including norms relating to health that can be found in the UDHR, the general consequentialness of case law in a common law system notwithstanding. Therefore, it should be concluded that a route to the direct effect in Hong Kong of global health soft law which wends through customary international law would be a weary, unpromising one. The better route would be to deploy Hong Kong soft law to domesticate global health norms.

[146] Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. Rep. 13, ¶27 (Jun. 3).

[147] Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶34 (Feb. 5).

[148] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (Jul. 8).

[149] *See* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 273 (2nd ed. 2008).

[150] *See* Michael Ramsden, *Dualism in the Basic Law: The First 20 Years*, 49 HONG KONG L.J. 239 (2019).

[151] *See* Chung Chi Cheung v. R. [1939] A.C. 160 (PC).

[152] *See* Comilang Milagros Tecson v. Director of Immigration, [2018] 2 H.K.L.R.D. 534 (C.A.).

[153] *Id.*, at 580.

IV. CONCLUDING REMARKS

Global health law, though a nascent field, has been enthusiastically endorsed in not a few quarters of the international community as the world is brought to its knees by the pandemic, as being "crucial to preventing, detecting, and responding to COVID-19."[154] In both hard and soft mode, it has been heralded as able to "provide global institutions with the legal norms to negotiate a shared vision of good governance for global health, collaborate with other organizations across sectors, and align domestic law with global health law [...] [laying] an institutional basis for developing benchmarks, monitoring progress, and enhancing compliance" for "a normative framework for achieving global health" and "a legal basis for human rights in global health."[155] On the other hand, this kind of law can easily be overinvested-in, especially by scholars who lose sight of its implementation on the ground, in municipal legal systems, a scholarly gap that this article aspires partly to close.

This is the first study of global health law's domestic enforcement in the Hong Kong Special Administrative Region of the People's Republic of China, which has some of the best public health and legal indicators in the world. It seems intuitive that domestication in a municipal jurisdiction can enhance the protection, facilitation, and reinforcement of legal norms combating both communicable and non-communicable diseases. That said, Hong Kong's achievements had been pretty much finalized *before* its domestication of the most influential global health instruments, including the International Health Regulations (2005) and the WHO Framework Convention on Tobacco Control, and long before their domestication in the Region. It cannot be said that Hong Kong's public health performance owed much to the domestic enforcement of these or any other sources of global health law. This should nonetheless not be an excuse to deny the importance and relevance of global health law as the legal embodiment of the collective wisdom and consensus of the international community over matters of global public health policy. The better view is that the domestic implementation of global health legal norms is supportive of and conducive to the continual improvement of public health standards. The foregoing proffers a conceptual framework ranging the various methods of domestic enforcement of global health law on a continuum: (1) explicit hard; (2) implicit hard; (3) mixed; and (4) soft. Formal, hard-law international instruments are usually, if not always enforced by equally "hard" domestic instruments, yet even when this is the case, it is not always so explicitly the case. Hard law obligations may be enforced in an entirely decentralized, unsystematic way, mixing hard and soft sources of domestic law in highly patchworked form, as witnessed by the Hong Kong courts' deferential approach to the international right to health. Soft law is a permissive inter-

[154] Gostin et al., *supra* note 75, at 376.

[155] Benjamin Mason Meier et al., *Global Health Law*, *in* PUBLIC HEALTH LAW CONCEPTS AND CASE STUDIES 169, 178 (Montrece McNeill Ransom & Laura Magaña Valladares eds., 2021).

national commitment;[156] global health soft law is often enforced by domestic soft law, but the potential of global soft law transitioning to customary international law may not be dismissed in principle just because it is rare.

Hong Kong is a global hub of successful and unsuccessful transplants of global health law, meriting scholarly attention to the lessons it might afford for other domestic legal systems, especially the rest of China. It is an irony that Hong Kong's common law courts have been relegated to the sidelines of domesticating global health law, pride in its judicial tradition notwithstanding. It was the Chief Executive, Government, and Legislative Council that took the lead in deciding when and how global health law is implemented municipally. This is why the dualism that governs the domestic effect of international treaties, making it hard to assert an enforceable international right to health under the ICESCR in the Hong Kong courts, ends up defaulting the issue to these other branches. The potential of the courts in developing principles to enhance consistency in the implementation of global health law should not be left untapped. As public health law and considerations are bound to be more important than ever in the post-pandemic world, judges should strengthen their own understanding of the most important global health treaties and legal principles, in order for these to be properly enforced in domestic legal systems, whether directly as localized statutes, or indirectly as interpretive aids to statutory construction.

Enter "comparative global health law," as this Article terms it, with reference to the burgeoning field of "comparative international law." [157] Comparative international law sounds like a paradox – what does one compare it to – and, owing to their aspirations to universality, scholars of international law resist approaches that emphasize nations and regions; whilst comparative lawyers tend to ignore the potential of their approach for law of global character.[158] Borrowing from comparative international law, one may define comparative global health law as a nascent field which identifies, analyzes, and explains convergences and divergences in how actors like executives, legislatures, and judiciaries in domestic legal systems "understand, interpret, apply, and approach"[159] global health law, through methods that include, but are not limited to detailed case studies that may be deployed for comparison's sake.

[156] *See* ANDREW T GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 213 (2008).

[157] *See* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L. Q. 57 (2011).

[158] *See* Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467, 467 (2015).

[159] *Id.*, at 469.