



ANSWERING QUESTIONS ON CHINA'S CORONAVIRUS CULPABILITY USING INTERNATIONAL LAW

BABCOCK UNIVERSITY

BY AGHA-OKO G. CHIMERZIRIM

AGHAOKOGOODNESS@GMAIL.COM

Abstract

The COVID-19 pandemic has engulfed over one hundred countries around the world and for the shortage of a cure; governments were compelled to for the most part depend upon social vaccination measures, as well as internment, isolation and social distancing. This flu-like virus, with origins in China, has caused tremendous distress in terms of health, economic and social upheaval of the international community.

World economies are in shambles, however once mud within the air settles, fingers are going to be pointed and responsibility strictly distributed. Predictably, the problem of China's legal liability for the COVID-19 happening are going to be raised.

Introduction

There is mounting proof, from whistle blowing doctors to official studies that the Chinese government withheld from the world for weeks key data concerning the COVID-19 natural event in Wuhan till it absolutely was too late.

As early as Jan. 2, the Chinese government already knew that a new coronavirus was responsible for a treatment-resistant illness among a rising number of patients, and that it may be transmitted by humans. Yet it chose to keep that under wraps until Jan. 21,¹ when it finally informed the World Health Organization of its true nature. That delay cost many countries time they needed to prevent the deadly contagion from spilling over into their own borders.

2.0. Legal Perspectives

Under the law on state responsibility, China's suppression of crucial information about COVID-19 is a violation of its international obligations under the 2005 International Health Regulations (IHR), a treaty established under the auspices of the W.H.O.²

The treaty was drafted to help the international community combat the spread of infectious diseases. It applies to any illness "that presents or could present significant harm to humans," or to any³ "public health emergency of international concern." The latter refers to any "extraordinary event" that may pose a "public health risk to other States through the international spread of disease" and that may "potentially require a coordinated international response."

⁴Under Article 6 of the treaty, China a member state has the duty to inform the WHO about the viral outbreak within 24 hours of determining its nature. ⁵Article 7 also requires China, after notification, to continue to provide "timely, accurate and sufficiently detailed and available public health information" about it.

Furthermore, a global pandemic does not happen when a novel infectious pathogen emerges, but when, due to a failure to provide public services in regulated food and marketplaces which would prevent the transmission of pathogens and control their movements, it starts spreading, as has been the case in Wuhan. The recklessness shown by Chinese health authorities makes China guilty of Article 7(1) of the Rome Statute, which provides in part that, "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" as mentioned under 'crimes against humanity.'⁶

Article 15 gives authority to the prosecutor's office at the International Criminal Court (ICC)⁷ to conduct proceedings *proprio motu* (on its own initiative) on the basis of information relating to crimes within the jurisdiction of the court. Having said all of this, the jury is out as to whether ICC has any authority over China.

¹<https://www.change.org/p/united-nations-take-china-to-the-icj-for-its-coverup-and-responsibility-for-the-global-pandemic-covid-19>

² <https://www.who.int/ihr/about/en/> accessed on the 10th of October 2020

³Michael Nedelman 'World Health Organisation Declares Coronavirus a Public Health Emergency Of International concern' (January 30, 2020) <https://edition.cnn.com/2020/01/30/health/coronavirus-who-public-health-emergency-international-concern-declaration/index.html> accessed 20th July 2020

⁴ International Health Regulation 2005, article 6

⁵https://www.change.org/p/united-nations-take-china-to-the-icj-for-its-coverup-and-responsibility-for-the-global-pandemic-covid-19?recruited_by_id=ee2a4328-b2b9-42d3-9aac-73c24e123777

⁶ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed on the 10th of October 2020

⁷ The International Criminal Court, established in 2002, seeks to hold to account those guilty of some of the world's worst crimes.

<https://www.cfr.org/background/role-international-criminal-court> accessed on the 10th of October, 202

While the common public opinion seeks to drag China to the ICC, this must be done after careful review of the appropriate legal framework, as was the case in an Appeal No. ICC-02/17 OA4, where the prosecutor was allowed to open and conduct an investigation into the actions of U.S. military personnel in Afghanistan, despite the fact that the U.S. was not a member of the ICC.⁸

These regulations are further fortified by Articles 11 and 12 of IHR which requires the W.H.O to share such data, once verified, with other countries so that they can enact precautionary measures.⁹ China is responsible for its public officials who censored doctors about the virus a repeat of its immediate response to the SARS epidemic in 2003, in which, in the words of the Smithsonian magazine, “Chinese apparatchiks initially tried to cover up the epidemic, creating a worldwide scandal.”¹⁰

As it is, the COVID-19 pandemic has already spread to more than 157 countries and regions around the world, with at least 217,247 confirmed cases and 8,784 deaths, causing unprecedented disruptions in the economic, political, and social life of billions of people. Whenever a state commits internationally unlawful conduct, it must pay reparations to the injured parties for the damage they suffered. Thus, China may be liable to pay reparations over its failure to promptly notify the WHO about the outbreak.¹¹

Reparations involve restitution, and where that is no longer possible, the offending state pays compensation “for loss sustained which would not be covered by restitution in kind or payment in place of it”.¹² Such assessment of damages may also come with an award of satisfaction, or a formal apology and an assurance that its unlawful conduct will not be.¹³

A claim for damages requires a causal link between the alleged breach of an international obligation and the damage suffered by the injured states. Under the “sufficiently direct and certain causal nexus test” established by the ICJ in the Bosnian Genocide Case (2007), an injured state must establish from the case as a whole and with a sufficient degree of certainty that the pandemic would have been averted had China complied with its treaty obligations.¹⁴

Article 56 of the IHR (2005) requires an injured state to first explore good offices, mediation, or conciliation, to settle any dispute involving treaty interpretation and application. Failing that, the parties may refer the dispute to the WHO director general.¹⁵

It is alleged that China not only these counts, but also censored, mislead and suppressed information, from the media and WHO, about novel coronavirus and its effects. Moreover, China portrayed COVID-19 as a new form of Pneumonia that could not be transferred from one human to another, which was later admitted by Chinese authorities as otherwise. Collectively, these actions made it difficult for countries around the world to adequately prepare for this deadly virus leading to colossal damages to the health and finances of a nation.¹⁶

⁸ <https://www.jurist.org/commentary/2020/05/abhishek-kumar-china-covid19-responsibility/> accessed on the 8th of October 2020

⁹ Melinda Liu ‘Is China Ground Zero for a Future Pandemic?’ (Smithsonian Magazine, November 2017) <https://www.smithsonianmag.com/science-nature/china-ground-zero-future-pandemic-180965213/> accessed 20th July 2020

¹⁰ Ibid.

¹¹ Simon Denyer ‘State Department tells citizens ‘do not travel’ to China; World Health Organization declares coronavirus outbreak a global health emergency’ (Washington Post, January 31st 2020) https://www.washingtonpost.com/world/asia_pacific/china-coronavirus-live-updates/2020/01/30/1da6ea52-4302-11ea-b5fc-eefa848cde99_story.html accessed 20th July 2020

¹² [https://books.google.com.ng/books?id=YzLLDwAAQBAJ&pg=PA59&ots=OSI_7QclPe&dq=Reparations%20involve%20restitution%2C%20and%20where%20that%20is%20no%20longer%20possible%2C%20the%20offending%20state%20pays%20compensation%20E2%80%9Cfor%20loss%20sustained%20which%20would%20not%20be%20covered%20by%20restitution%20in%20kind%20or%20payment%20in%20place%20of%20it%20E2%80%9D%20\(Chorzow%20Factory%2C%201927\).&pg=PA103#v=twopage&q&f=false](https://books.google.com.ng/books?id=YzLLDwAAQBAJ&pg=PA59&ots=OSI_7QclPe&dq=Reparations%20involve%20restitution%2C%20and%20where%20that%20is%20no%20longer%20possible%2C%20the%20offending%20state%20pays%20compensation%20E2%80%9Cfor%20loss%20sustained%20which%20would%20not%20be%20covered%20by%20restitution%20in%20kind%20or%20payment%20in%20place%20of%20it%20E2%80%9D%20(Chorzow%20Factory%2C%201927).&pg=PA103#v=twopage&q&f=false) accessed on the 8th of October 2020

¹³ *Stewart v. LaGrand*, 526 U.S. 115 (1999)

¹⁴ Ibid

¹⁵ International Health Regulation 2005, article 56

¹⁶ <https://www.scribd.com/document/217941016/State-Territory> accessed 20th July 2020

¹⁷It is important to note that it is not the first time China is the place of origin for an epidemic or deadly disease. From Asian flu, Hong Kong flu to Swine flu all had China as its epicenter and in the case of SARS, China's exotic wet market was on the radar but China failed to impose restrictions on its billion dollar industry overlooking the threat of a repeated catastrophe. To white-wash the political face, China flouted the rules, time and again and for this, it must be held to account.¹⁸

In addition, the IHR were adopted by the World Health Assembly in 1969 to prevent the international spread of disease by placing an obligation on states to prevent highly transmissible disease.¹⁹ This was updated in 2007 in response to the 2003 SARS outbreak, to which China failed to oblige. China also violated several other articles of the IHR like Article 6²⁰, wherein a state has to notify all events which may constitute a "public health emergency of international concern" within its territory within 24 hours and to inform WHO all relevant public health information under Article 7.²¹

Article 75 further provides that any disagreement concerning the application of the constitution of the WHO shall be referred to the International Court of Justice (ICJ). Reading the above as a holistic whole could cause the ICJ to invoke its contentious authority in the absence of at least any assessment of Chinese duty, omissions, and commissions. We emphasize that this potential finding by the ICJ against China is in no way enforceable against China, but it may nevertheless be the first step towards a substantive legal finding after proper application of the judiciary.

Article 2 of the Draft articles on Responsibilities of States for Internationally Wrongful Act (ARSIWA) 2001, defines 'wrongful acts' as those that are 'attributable to the state' and that 'constitute a breach of an international obligation.' Post the virus release, the responsibility flowed from WIV to local Wuhan authorities to President Xi himself, all being organs of the state of China and hence their conduct is attributable to China.²²

In regards to violation of an international agreement, China failed to comply with its due diligence obligations intentionally by issuing gag orders not disclosing appropriate and timely details, forcing biotech companies to stop research. Due diligence is a principle of good governance which assesses whether a state has done what was reasonably expected of it when it responded to a harm or threat. This norm, which is integrated into numerous principles of traditional and customary international law, applies inter alia to climate, human rights and world

public health.²³ China has not adhered to such laws, which enforce obligations of conduct requiring states to avoid, stop and/or resolve a number of internal or trans-boundary harms, or the danger of them. Furthermore, China also infringed Article 14 of ARSIWA by refusing to exchange details promptly and transparently with the WHO in accordance with the IHR consequently extending its violation over the entire duration during which the act proceeded and remained in non-compliance with international

¹⁷ Beatrice Walton 'Duties Owed: Low-Intensity Cyber Attacks and Liability for Transboundary Torts in International Law' Vol 126 [2017]

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ International Health Regulations. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.

²¹ If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.

²² There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

²³ https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed on the 11th of October 2020

obligations.²⁴ Notably, a Southampton University epidemiological model found out that if China had behaved professionally faster by one, two, or three weeks, the cases would have decreased by 66%, 86%, and 95%, respectively.²⁵

The final and possibly the foremost important piece during this puzzle is – how might China be brought before an international court for its unlawful actions?

The major lacuna is the jurisdiction of the International Court of Justice (ICJ). Cases are referred to the ICJ once consensus between disputing parties has been established, and taking into account past records China has been resistant to their authority and may continue on the path of resistance.²⁶

An unconventional way to circumventing the jurisdictional issue would be – to invoke the provision that empowers an organization to refer disputes to the ICJ.²⁷ Article 75 of WHO's Constitution gives the Organization the right to refer matters to ICJ for advisory purposes. China's failure to disclose information and disseminate data about the coronavirus during its preliminary stages coupled with its willful negligence in regulating wildlife invariably triggers a breach of the treaty. Though experimental and untested, this route offers a glimmer of hope for invoking the jurisdiction of the ICJ to assess Chinese liability and hold them accountable for losses caused to the international community at large. While ICJ's opinion is not directly enforceable, they do provide an authoritative assessment of legal liability around which governments can synchronize their political response by way of seizure of Chinese assets or imposing trade sanctions.²⁸

Conclusion

China, being Asia's largest economy, holds an influential place in world politics today. This, however, shall not be construed as a means to assume absolute power and continue flouting rules of the International Health Regulations issued by W.H.O. Measures available to the affected countries are by no means simple. Each requires considerable international collaboration, cooperation and resolves to implement, particularly considering China's towering economic influence. It is evident that China is the originator of the pandemic, but it will be an onerous task to classify its action and response as advertent, willful or a case of gross negligence in its greed to progress a lucrative, yet hazardous billion dollar industry.

The government of China is in breach of international law and human rights and is consequently single-handedly responsible for the COVID-19 global health crisis. It must be held accountable and brought to justice at the ICJ for the health crisis it caused, which now affects every single person all over the world, who have never even been to China, as a result of China's negligence, severe censorship of the truth regarding the virus, and breach of international protocol. No matter how rich or powerful a state is, it shouldn't be immune to the international justice system.

²⁴ ... The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

²⁵ Early and combined interventions crucial in tackling Covid-19 spread in China. <https://www.southampton.ac.uk/news/2020/03/covid-19-china.page> accessed on the 10th of October 2020

²⁶ Vanshaj Jain ' Can China be brought before an international court over Covid Pandemic? Yes' (The Print, Friday July 24th 2020) <https://theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218/> accessed 24th July 2020

²⁷ Vanshaj Jain ' Can China be brought before an international court over Covid Pandemic? Yes' (The Print, Friday July 24th 2020) <https://theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218/> accessed 24th July 2020

REFERENCES

- <https://www.change.org/p/united-nations-take-china-to-the-icj-for-its-coverup-and-responsibility-for-the-global-pandemic-covid-19>
- Michael Nedelman 'World Health Organisation declares coronavirus a public health emergency of international concern' (January 30, 2020) <https://edition.cnn.com/2020/01/30/health/coronavirus-who-public-health-emergency-international-concern-declaration/index.html> accessed 20th July 2020
- https://www.change.org/p/united-nations-take-china-to-the-icj-for-its-coverup-and-responsibility-for-the-global-pandemic-covid-19?recruited_by_id=ee2a4328-b2b9-42d3-9aac-73c24e123777
- Melinda Liu 'Is China Ground Zero for a Future Pandemic?' (Smithsonian Magazine, November 2017) <https://www.smithsonianmag.com/science-nature/china-ground-zero-future-pandemic-180965213/> accessed 20th July 2020
- Simon Denyer 'State Department tells citizens 'do not travel' to China; World Health Organization declares coronavirus outbreak a global health emergency' (Washington Post, January 31st 2020) https://www.washingtonpost.com/world/asia_pacific/china-coronavirus-live-updates/2020/01/30/1da6ea52-4302-11ea-b5fc-eefa848cde99_story.html accessed 20th July 2020
- <https://www.scribd.com/document/217941016/State-Territory> accessed 20th July 2020
- Vanshaj Jain ' Can China be brought before an international court over Covid Pandemic? Yes' (The Print, Friday July 24th 2020) <https://theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218/>