



COVID-19 PANDEMIC: AN EVALUATION OF CHINA'S STATE RESPONSIBILITY UNDER INTERNATIONAL LAW

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Abstract

The world we have today has become a stage where almost all its actors are grappling with a common enemy – Coronavirus or COVID-19. The COVID-19 pandemic has taken a huge toll on international relations and has caused unprecedented disruptions in the economic, political and social lives of people across the globe, with over 56 million confirmed COVID-19 cases and 1,355,769 related deaths as at the time of writing. This wide scale of damage has raised the question of China’s responsibility and potential liability under international law for its role in the spread of the virus, and has also led to repeated calls for reparations to affected countries. This paper attempts to explore the concept of “State Responsibility” under public international law and examines whether China can be made culpable for its failure to prevent the spread of the outbreak internally and externally across international borders.

Keywords: COVID-19, International Law, State Responsibility, Reparations

1.0 Introduction

The COVID-19 pandemic has become the most significant global health crisis of this age and the greatest challenge the world has faced since World War II.¹ Since its emergence in Wuhan, China, in December 2019, the virus has spread across the continent except Antarctica, killing and affecting the lives of millions of people.² As the health toll increases, the economic damage becomes evident and represents the largest economic shock the world has experienced in decades.³ This global economic downturn has raised several recurring questions about China's legal responsibility for its role in the spread of the virus across international borders.

The concept of 'state responsibility' was widely discussed during the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003, particularly due to the 'secretive and uncooperative manner' with which the Chinese government responded to that same epidemic.⁴ The same allegations have been made against China with respect to the coronavirus pandemic. Throughout the early stages of the initial outbreak, the Chinese government allegedly withheld information about the true nature of the disease and lied about the situation. Not only did Chinese authorities hide reports of the outbreak for weeks,⁵ they cracked down on doctors discussing the virus and some were detained by the police.⁶ Even when the Chinese government declared the outbreak to the World Health Organization (WHO) on 31 December 2019, they gave no detail on the evidence they held on human-to-human transmission until they quarantined Wuhan on 23 January 2020 when five million locals had been allowed to travel out of the city.⁷

This paper is geared to x-ray the culpability of China under international law for its contributory role in the spread of the COVID-19 pandemic. It attempts to answer the two related questions of whether China had an obligation under international law; and if such obligation was breached. Following the introduction, the rest of this paper has the following structure. China's culpability under international law is assessed in Section 2. The nature of reparations from China is covered in Section 3. The jurisdictional basis for holding China accountable is addressed in Section 4. This paper is concluded in Section 5.

2.0 China's Culpability for Covid-19 under International Law

Recurring questions about China's legal accountability for the coronavirus pandemic have been raised and strategies to seek economic reparations will have to be devised.⁸ Since domestic law is unsuited for this because of the doctrine of sovereign immunity which excludes sovereign states from being subject to the jurisdiction of foreign courts, there is need to look at international legal frameworks for answers.

¹ United Nations Development Programme, 'Humanity needs leadership and solidarity to defeat the coronavirus' < www.undp.org/content/undp/en/home/coronavirus.html > accessed 21 July 2020.

² Worldometer, 'COVID-19 CORONAVIRUS PANDEMIC' (24 July 2020) < www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1 ? > accessed 24 July 2020.

³ The World Bank, 'The Global Economic Outlook During the COVID-19 Pandemic: A Changed World' (8 June 2020) < www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world > accessed 21 July 2020.

⁴ Katja Creutz, 'China's Responsibility for the COVID-19 Pandemic' < www.fiia.fi/wp-content/uploads/2020/06/wp115_chinas-responsibility-for-the-covid-19-pandemic.pdf > accessed 21 July 2020.

⁵ The Associated Press, 'China delayed Releasing coronavirus info, frustrating WHO' (3 June 2020) < <https://apnews.com/3c061794970661042b18d5aeaaded9fae> > accessed 21 July 2020.

⁶ M. Henderson, A. Mendoza, A. Foxall, J. Rogers & S. Armstrong, 'CORONAVIRUS COMPENSATION? ASSESSING CHINA'S POTENTIAL CULPABILITY AND AVENUES OF LEGAL RESPONSE' < <https://henryjacksonsociety.org/wp-content/uploads/2020/04/Coronavirus-Compensation.pdf> > accessed 21 July 2020.

⁷ *ibid.*

⁸ Vanshay Jain, 'Can China be brought before an international court over Covid pandemic? Yes' (*ThePrint*, 9 April 2020) < www.google.com/amp/s/theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218/%3famp > accessed 21 July 2020.

2.1 International Law on Infectious Diseases

The International Health Regulations (IHR) of 2005 governs global health law on an international scale. According to Article 6 of the regulations,⁹ a State has to notify the WHO within 24 hours about events constituting a 'public health emergency' within its territory. Article 7 further obligates a State to share all relevant information concerning the crisis with the WHO on a continuing basis.¹⁰ Based on these provisions, many have argued that China violated international law by delaying its reporting to the WHO for more than a month. By late December 2019, there were more than 250 cases of coronavirus in Wuhan¹¹ and there was a warning from Li Wenliang, an ophthalmologist, at the Wuhan Central Hospital, who revealed the information online.¹² When China eventually made a report to the WHO, it notified the latter about "several cases of unusual pneumonia in Wuhan", but said there was no clear evidence of human to human transmission.¹³ However, this cannot be true because based on the reports,¹⁴ more than one-third of the patients had no history of visiting the Wuhan food market. Accordingly, by violating Articles 6 and 7 of the IHR, it is argued that China has a case to answer to the international community.

2.2 Draft Articles on State Responsibility

2.3 According to the ILC Draft Articles on State Responsibility,¹⁵ in order for an act or omission to be considered internationally wrongful, two constituent elements must be met; First, the act or omission must be attributable to the State; and second, the act or omission must constitute a breach of an international obligation.¹⁶

2.2.1. The Attribution of the Chinese Government

The aim of attribution is to establish that the act considered as internationally wrongfully emanates from a State for the purpose of responsibility.¹⁷ The law of state responsibility lays down certain number of rules for the purpose of deciding when the acts of natural or legal persons constitute an 'act' of the State.¹⁸ Conduct by state organs is always attributable to a State, whereas conduct of private individuals is not, unless a sufficient link between these individuals and the State can be established.¹⁹ It has been argued that imputation in the coronavirus case seems less problematic than the question of whether a breach has occurred or not.²⁰

⁹ World Health Assembly, *International health regulations (2005)*, Geneva, 23 May 2005, in force 15 June 2007, 2509 UNTS 79, Article 6 (1) < <http://apps.who.int/iris/bitstream/10665/246107/1/9789241580496-eng.pdf?ua=1> > accessed 22 July 2020.

¹⁰ *ibid*, Article 7.

¹¹ Devashish Giri, 'Responsibility of China for the Spread of COVID-19: Can China Be Asked to Make Reparations?' < www.jurist.org/commentary/2020/04/devashish-giri-china-covid19-reparations/ > accessed 22 July 2020.

¹² Stephanie Hegarty, 'The Chinese doctor who tried to warn others about coronavirus' (BBC NEWS) www.google.com/amp/s/www.bbc.com/news/amp/world-asia-china-51364382 > accessed 22 July 2020.

¹³ World Health Organization, 'Timeline of WHO's response to COVID-19' (30 June 2020) < www.who.int/news-room/detail/29-06-2020-covidtimeline > accessed 22 July 2020.

¹⁴ Jon Cohen, 'Wuhan seafood market may not be the source of novel virus spreading globally' < www.sciencemag.org/news/2020/01/wuhan-seafood-market-may-not-be-source-novel-virus-spreading-globally > accessed 22 July 2020; Sahar Esfandiari, 'A new report indicates that the deadly Chinese coronavirus may not actually have originated at a wet market in Wuhan' < www.google.com/amp/s/www.businessinsider.com/wuhan-coronavirus-may-not-have-originated-from-wet-market-2020-1%3famp > accessed 22 July 2020.

¹⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10) < https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf > accessed 22 July 2020.

¹⁶ *ibid*, Article 2 (a) (b).

¹⁷ W. Theeuwen, 'Attribution for the purposes of State responsibility' available at <

https://puc.overheid.nl/mrt/doc/PUC_248325_11/1/#:~:text=The%20purpose%20of%20attribution%20is,or%20otherwise%20of%20that%20conduct > accessed 23 July 2020.

¹⁸ Creutz (n 4).

¹⁹ Theeuwen (n 17).

²⁰ Creutz (n 4).

Based on China's timeline report on COVID-19,²¹ the municipal and provincial authorities of the State were directly involved with respect to handling of the outbreak. The local authorities were also involved as they tried to suppress medical professionals and journalists from disclosing any information on COVID-19.²² It is submitted that even if the officials involved may belong to the local or provincial government, a state is unitary in international law,²³ and no differentiation can be sought to be made between provincial and union governments. Thus, responsibility ensues from the local Wuhan authorities to the Chinese central government which are all state organs and whose alleged wrongful acts could be attributable to China under international law.

2.2.2. Breach of China's obligation under international law

The second constituent element to determine state responsibility is that the act or omission of the State must amount to a breach of a binding international obligation. While China's culpability under the provisions of the IHR has been addressed in Section 2.1 of this paper, there are other principles of international law on state responsibility that can be applied to the case of COVID-19. One of these is the "no harm principle" deriving from international environmental law.

The "no harm" principle requires that States must ensure that activities within their jurisdiction do not cause significant Trans boundary damage.²⁴ This principle has been articulated in the Draft Articles on the Prevention of Trans boundary Harm²⁵ and also in a number of international law decisions including *Trail Smelter*,²⁶ *Pulp Mills*,²⁷ *Nuclear Weapons*,²⁸ among others. The question of liability should not only be limited to information sharing but also for the circumstances that led to the creation of the virus.²⁹ During the SARS epidemic in 2003, China's wet markets and wildlife trade industry were found responsible for the outbreak which killed almost 800 people.³⁰ In the following years, experts repeatedly predicted that unless China restricted this industry, similar outbreaks were inevitable.³¹ It is therefore submitted that China's failure to regulate its wet markets can constitute a breach of the "no harm" principle under customary environmental law.

3.0 The Nature of Reparations from China

A breach of an international obligation gives rise to the duty of reparation for the harm caused.³² In the case of

²¹ 'Timeline of China releasing information on COVID-19 and advancing international cooperation in epidemic response' (*Xinhua*) < www.xinhuanet.com/english/2020-04/06/c_138951662.htm > accessed 23 July 2020.

²² Aylin Woodward, 'At least 5 people in China have disappeared, gotten arrested or been silenced after speaking out about the coronavirus – here is what we know about them' < www.google.com/amp/s/www.businessinsider.com/china-coronavirus-whistleblowers-speak-out-vanish-2020-2%3famp > accessed 23 July 2020.

²³ J.M. Sanklecha, 'COVID-19 Outbreak: Can China be Legally Made to Pay 'Damages'?' (*thequint*, 5 April 2020) <

www.google.com/amp/s/www.thequint.com/amp/story/voices%252Fopinion%252Fchina-covid-19-who-responsibility-international-law > accessed 21 July 2020.

²⁴ P. Sands & J. Peel, *Principles of International Environmental Law* (3rd ed., Cambridge University Press 2012) 239.

²⁵ International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN Doc A/RES/56/82 (2001) < <https://cil.nus.edu.sg/wp-content/uploads/2019/02/2001-Draft-Arts-on-Prevention-of-Transboundary-Harm.pdf> > accessed 23 July 2020.

²⁶ *The Trail Smelter Arbitration Case (USA v Canada)* 1941, UN Rep Intl Arb Awards 1905 (1945).

²⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* ICJ Rep 113 (2006).

²⁸ *Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Rep 226.

²⁹ Jain (n 8).

³⁰ Sam Ellis, 'Why new diseases keep appearing in China' < www.vox.com/videos/2020/3/6/21168006/coronavirus-covid19-china-pandemic > accessed 24 July 2020.

³¹ Vincent et al., 'Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Reemerging Infection' < <https://cmr.asm.org/content/cmr/20/4/660.full.pdf> > accessed 23 July 2020.

³² Carla Ferstman, 'Reparations' < www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml?print > accessed 23 July 2020.

China, it is unlikely that the general defenses available under international law, such as force majeure or necessity will apply to preclude it from culpability. Accordingly, the actions of China in withholding information about the coronavirus would arguably attract international responsibility. The consequence of this would inevitably oblige China to make reparations, in the form of compensation for injuries caused by its internationally wrongful act.³³ It has been argued that the nature of reparation would be limited to harm caused due to the delayed reporting, and not damage resulting from delayed public health response in the affected countries to curtail the spread of the virus.³⁴

4.0 The Jurisdictional Basis for Holding China Accountable

When assessing the culpability of China under international law, it is essential to answer the question – “If China’s actions were indeed unlawful, how feasible is it to bring it before an international court?” It is a well-known fundamental principle of international adjudication that the jurisdiction of an international court or tribunal is derived from consent of the participating States. Considering China’s track record of non-participation in international proceedings, as illustrated in the *South China Sea* arbitration,³⁵ it is unlikely that China would consent voluntarily to participate in any proceedings before an international court or tribunal on the issue of the COVID-19.³⁶

It has been suggested that jurisdictional basis can be found in the WHO Constitution.³⁷ Article 75 of the Constitution stipulates that “any question or dispute concerning the interpretation or application of this Constitution...shall be referred to the International Court of Justice”.³⁸ China’s failure to disclose information could fall short of Articles 22 and 64 of the Constitution,³⁹ which mandate enforcement of the IHR and which require the dissemination of data by the government of a State. Although the jurisdictional basis in Article 75 has been invoked before the ICJ in previous proceedings,⁴⁰ there is doubt as to its efficacy when invoked for the purpose of assessing China’s liability. The bleak prospect of enforcing international law against China through judicial means has therefore incurred some scholarly suggestions that recourse should be made to non-judicial means including through “raising the issue diplomatically, either bilaterally or at an appropriate international forum”.⁴¹

5.0 Conclusion

This paper has evaluated China’s culpability under international law and has also attempted to examine the bleak prospects of holding China accountable before an international court or tribunal. There is no doubt that the COVID-19 outbreak has ravaged the global economy, killing and adversely affecting the economic and social lives of millions of people across the globe. If the international community then fails to respond to China’s breach of international law

³³ Sanklecha (n 23).

³⁴ *ibid.*

³⁵ *South China Sea Arbitration, (Philippines v China)* PCA Case No 2013-19.

³⁶ Sanklecha (n 23).

³⁷ United Nations General Assembly, *Constitution of the World Health Organization*, 22 July 1946, 14 UNTS 186 < www.who.int/governance/eb/who_constitution_en.pdf > accessed 23 July 2020.

³⁸ *ibid.*, Article 75.

³⁹ *ibid.*, Article 22 and 64.

⁴⁰ *Armed Activities in the Territory of Congo (New Application 2002) Jurisdiction and Admissibility, Judgement*, ICJ Rep. 2006, p. 6, para 99.

⁴¹ Sanklecha (n 23).

which has resulted in vast global economic damage, it begs the question when it ever will. Considering China's towering economic influence and track record of resisting the authority of international courts and tribunals, it would require Significant international cooperation and solidarity for China to be truly held accountable under international law. However, this is a necessary measure that must be undertaken to prevent a similar catastrophe from striking the world in the decades to come.

REFERENCES

- Aylin Woodward, 'At least 5 people in China have disappeared, gotten arrested or been silenced after speaking out about the coronavirus – here is what we know about them' < www.google.com/amp/s/www.businessinsider.com/china-coronavirus-whistleblowers-speak-out-vanish-2020-2%3famp > accessed 23 July 2020.
- *Armed Activities in the Territory of Congo (New Application 2002) Jurisdiction and Admissibility*, Judgment, ICJ Rep. 2006, p. 6.
- C. Ferstman, 'Reparations' < www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml?print > accessed 23 July 2020.
- Devashish Giri, 'Responsibility of China for the Spread of COVID-19: Can China Be Asked to Make Reparations?' < www.jurist.org/commentary/2020/04/devashish-giri-china-covid19-reparations/ > accessed 22 July 2020.
- J.M. Sanklecha, 'COVID-19 Outbreak: Can China be Legally Made to Pay 'Damages'?' (*thequint*, 5 April 2020) < www.google.com/amp/s/www.thequint.com/amp/story/voices%252Fopinion%252Fchina-covid-19-who-responsibility-international-law > accessed 21 July 2020.
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- Jon Cohen, 'Wuhan seafood market may not be the source of novel virus spreading globally' < www.sciencemag.org/news/2020/01/wuhan-seafood-market-may-not-be-source-novel-virus-spreading-globally > accessed 22 July 2020.
- International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN Doc A/RES/56/82 (2001) < <https://cil.nus.edu.sg/wp-content/uploads/2019/02/2001-Draft-Arts-on-Prevention-of-Transboundary-Harm.pdf> > accessed 23 July 2020.
- International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10) < https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf > accessed 22 July 2020.
- Katja Creutz, 'China's Responsibility for the COVID-19 Pandemic' < www.fiaa.fi/wp-content/uploads/2020/06/wp115_chinas-responsibility-for-the-covid-19-pandemic.pdf > accessed 21 July 2020.
- *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226.
- M. Henderson, A. Mendoza, A. Foxall, J. Rogers & S. Armstrong, 'CORONAVIRUS COMPENSATION? ASSESSING CHINA'S POTENTIAL CULPABILITY AND AVENUES OF LEGAL RESPONSE' < <https://henryjacksonsociety.org/wp-content/uploads/2020/04/Coronavirus-Compensation.pdf> > accessed 21 July 2020.

- P. Sands & J. Peel, *Principles of International Environmental Law* (3rd ed., Cambridge University Press 2012) 239.
- *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* ICJ Rep 113 (2006).
- Sahar Esfandiari, ‘A new report indicates that the deadly Chinese coronavirus may not actually have originated at a wet market in Wuhan’ < www.google.com/amp/s/www.businessinsider.com/wuhan-coronavirus-may-not-have-originated-from-wet-market-2020-1-%3famp > accessed 22 July 2020.
- Sam Ellis, ‘Why new diseases keep appearing in China’ < www.vox.com/videos/2020/3/6/21168006/coronavirus-covid19-china-pandemic > accessed 24 July 2020.
- *South China Sea Arbitration, (Phillipines v China)* PCA Case No 2013-19.
- Stephanie Hegarty, ‘The Chinese doctor who tried to warn others about coronavirus’ (BBC NEWS) www.google.com/amp/s/www.bbc.com/news/amp/world-asia-china-51364382 > accessed 22 July 2020.
- The Associated Press, ‘China delayed Releasing coronavirus info, frustrating WHO’ (3 June 2020) < <https://apnews.com/3c061794970661042b18d5aeaaed9fae> > accessed 21 July 2020.
- *The Trail Smelter Arbitration Case (USA v Canada)* 1941, UN Rep Intl Arb Awards 1905 (1945).
- The World Bank, ‘The Global Economic Outlook During the COVID-19 Pandemic: A Changed World’ (8 June 2020) < www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world > accessed 21 July 2020.
- ‘Timeline of China releasing information on COVID-19 and advancing international cooperation in epidemic response’ (Xinhua) < www.xinhuanet.com/english/2020-04/06/c_138951662.htm > accessed 23 July 2020.
- United Nations Development Programme, ‘Humanity needs leadership and solidarity to defeat the coronavirus’ < www.undp.org/content/undp/en/home/coronavirus.html > accessed 21 July 2020.
- United Nations General Assembly, *Constitution of the World Health Organization*, 22 July 1946, 14 UNTS 186 < www.who.int/governance/eb/who_constitution_en.pdf > accessed 23 July 2020.
- Vanshay Jain , ‘Can China be brought before an international court over Covid pandemic? Yes’ (*ThePrint*, 9 April 2020) < www.google.com/amp/s/theprint.in/opinion/can-china-be-brought-before-an-international-court-over-covid-pandemic-yes/398218/%3famp > accessed 21 July 2020.
- Vincent et al., ‘Severe Acute Respiratory Syndrome Coronavirus as an Agent of Emerging and Reemerging Infection’ < <https://cmr.asm.org/content/cmr/20/4/660.full.pdf> > accessed 23 July 2020.
- W. Theeuwen, ‘Attribution for the purposes of State responsibility’ available at < https://puc.overheid.nl/mrt/doc/PUC_248325_11/1/#:~:text=The%20purpose%20of%20attribution%20is,or%20otherwise%20of%20that%20conduct > accessed 23 July 2020.
- World Health Assembly, *International health regulations (2005)*, Geneva, 23 May 2005, in force 15 June 2007, 2509 UNTS 79, Article 6 (1) < <http://apps.who.int/iris/bitstream/10665/246107/1/9789241580496-eng.pdf?ua=1> > accessed 22 July 2020.
- Worldometer, ‘COVID-19 CORONAVIRUS PANDEMIC’ (24 July 2020) < www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1? > accessed 24 July 2020.

- World Health Organization, ‘Timeline of WHO's response to COVID-19’ (30 June 2020) < www.who.int/news-room/detail/29-06-2020-covidtimeline > accessed 22 July 2020.