

“DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW: SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC UNDER INTERNATIONAL OR STATE LAW?”

*Channa Weiss**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. OUTBREAK 3

III. PRECEDENT 4

IV. IHR 5

V. WHO 7

VI. VIENNA TREATY CONVENTION 7

VII. ICJ 9

VIII. STATE INJURY 10

IX. ADVISORY OPINION..... 11

X. CIVIL SUIT..... 12

XI. CONCLUSION..... 13

I. INTRODUCTION

The Coronavirus Disease 2019 (“COVID-19”) pandemic hurled the 21st century into unprecedented turmoil, killing hundreds of thousands, affecting the health of millions, and leveling the global economy. Following the initial outbreak, it spread unchecked, not discriminating against race, class, or country. COVID-19 demonstrated the crucial necessity for strong international cooperation in attaining global public health and safety objectives, that domestic law and policy responses are inadequate to enforce, and preventing global detriment that occurs when policies are not followed.

* Channa Weiss is an international law and human rights attorney based in Los Angeles, CA who is of counsel to several NGO organizations and law firms. She holds a J.D. and MBA degree.

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UNT DALLAS L. REV. ON THE CUSP, FALL 2020

According to figures compiled by John Hopkins University, as of September 2020, the pandemic has killed over 200,000 Americans and infected more than seven million people in the United States (U.S.).¹ The Henry Jackson Society, a British think-tank, estimates that the quantum of damages of the pandemic is upward of \$5.7 trillion for the U.S., Canada, France, Germany, Japan, Italy, and the United Kingdom (U.K.) alone.²

Article 6 of the International Health Regulations (IHR) requires states to provide timely and accurate information to the World Health Organization (WHO) “within 24 hours of assess[ing] . . . public health information.”³ The first recorded case of COVID-19 was on November 17, 2019 in the Wuhan province of China, however, the Chinese authorities failed to report it to the WHO until the end of December.⁴ China is one of the 196 signatories to the IHR that obligate states to follow protocol in managing potential pandemics.⁵

There were numerous violations of the IHR in response to COVID-19. A state is in breach of its international obligation when it takes actions inconsistent with the Charter of the United Nations (U.N.) and the WHO.⁶ China’s censorship of the COVID-19 pandemic violated its obligation of Article 6 and Article 7 of the IHR, which prevented the Director-General from declaring a public health emergency of international concern (PHEIC) sooner before COVID-19 became a global pandemic.⁷

An epidemiological study by researchers at Worldpop, a population mapping group at the University of Southampton, concluded that had China adhered to its IHR obligations either one, two, or three weeks sooner, there would

¹ Coronavirus Resource Center, *COVID-19 United States Cases by County*, Tracking, U.S. Map, JOHNS HOPKINS UNIV. AND MED., <https://coronavirus.jhu.edu/us-map> (last visited Oct. 2, 2020).

² Matthew Henderson et al., *Coronavirus Compensation? Assessing China’s Potential Culpability and Avenues of Legal Response*, THE HENRY JACKSON SOC’Y, Apr. 5, 2020, <https://www.henryjacksonsociety.org/publications/coronaviruscompensation/>.

³ WHO, *International Health Regulations* (2d. ed 2005), art. 6, http://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=67DAC5BDF849A34F3E1DEB9A962A1CEB?sequence=1 [hereinafter Int’l Health Reguls.].

⁴ Josephine Ma, *Coronavirus: China’s First Confirmed COVID-19 Case Traced Back to November 17*, SOUTH CHINA MORNING POST (Mar. 13, 2020, 8:00 AM), <https://www.scmp.com/print/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back>; *Pneumonia of Unknown Cause – China*, WHO (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/>.

⁵ *State Parties to the International Health Regulations (2005)*, WHO (2005), https://www.who.int/ihr/legal_issues/states_parties/en/ (last visited Oct. 30, 2020).

⁶ Int’l Health Reguls., *supra* note 3, at art. 3.

⁷ *Id.*

have been, respectively, 66%, 86% or 95% fewer cases of infection, and the spread of the disease would have been confined to a local level.⁸

The COVID-19 pandemic demonstrated that consequences of obfuscation are catastrophic for the international community. Should China be held responsible by law for the enormous loss and suffering reverberating around the globe due to its misfeasance?

II. OUTBREAK

On November 17, 2019, authorities in Wuhan recorded the first coronavirus case, describing it as a pneumonia-causing virus.⁹ On December 27, Dr. Zhang Zhixian of the Hubei Provincial Hospital conveyed the discovery of a new coronavirus to Chinese health authorities.¹⁰ Three days later, Dr. Li Wenliang circulated a private note to colleagues which referred to a new fast-spreading, severe acute respiratory syndrome, matching the profile for a novel disease for which the IHR were designed.¹¹ The Chinese government immediately reprimanded Dr. Wenliang for spreading disruptive rumors; he succumbed to the virus in early February.¹²

The Chinese government reported the outbreak to the WHO on December 31, 2019.¹³ Health authorities were aware that approximately 30% of the infected patients had no connection to the Huanan Seafood Wholesale Market where the virus ostensibly originated from animal consumption.¹⁴ However, the initial report failed to reveal the crucial detail of the virus's capacity to spread via human to human transmission.¹⁵

⁸ *Early and Combined Interventions Crucial in Tackling COVID-19 Spread in China*, UNIV. OF SOUTHAMPTON (Mar. 11, 2020), <https://www.southampton.ac.uk/news/2020/03/covid-19-china.page>.

⁹ Ma, *supra* note 4.

¹⁰ Yao Yuan et al., *Xinhua Headlines: Chinese Doctor Recalls First Encounter with Mysterious Virus*, XINHUANET (Apr. 4, 2020, 7:40 PM), http://www.xinhuanet.com/english/2020-04/16/c_138982435.htm.

¹¹ Jonathan Cheng, *In China, Anger Simmers Over Coronavirus Doctor's Death*, WALL ST. J. (Feb. 7, 2020, 2:26 PM), <https://www.wsj.com/articles/in-china-anger-simmers-over-coronavirus-doctors-death-11581061065>.

¹² *Id.*

¹³ *Pneumonia of Unknown Cause*, *supra* note 4.

¹⁴ Jason Beaubien, *Why They're Called 'Wet Markets' – And What Health Risks They Might Pose*, NPR (Jan. 31, 2020, 9:12 AM), <https://www.npr.org/sections/goatsandsoda/2020/01/31/800975655/why-theyre-called-wet-markets-and-what-health-risks-they-might-pose>.

¹⁵ Dr. Tedros Adhanom Ghebreyesus, Director-General, WHO, Opening Remarks at Media Briefing (Mar. 11, 2020).

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

On January 30, the Director-General of the WHO declared a PHEIC.¹⁶ On March 11, 2020, the WHO declared it a pandemic.¹⁷ Transcripts of China's Politburo Standing Committee indicated that authorities were aware of the virus and its deadly potential far earlier than they let on.¹⁸ Xi Jinping, described as the most authoritarian Chinese leader since Mao Tse Tung, did not release information about the deadly outbreak, allowing it to run rampant.¹⁹ In February 2020, the Committee made a rare admission of "shortcomings and deficiencies" in the country's response and called for improvement in China's "national emergency management system and [...] [China's] abilities in handling urgent and dangerous tasks."²⁰ The refusal and neglect to report the fully known potential of the novel virus resulted in harrowing consequences that reverberated across the world and indicated a breach of China's obligations under the IHR as a signatory to the WHO.

III. PRECEDENT

Attributing responsibility and culpability for the pandemic is pressing in light of the existence of significant precedent. In 2002, SARS spread from the Guangdong province of China, affecting 29 regions by 2003 and causing 774 fatalities.²¹ It took Chinese authorities over two months from diagnosing the first case of SARS in November of 2002 to notify the World Health Organization.²²

Doctor Jiang Yanyong from People's Liberation Army General Hospital No. 301 turned to the Chinese media to reconcile hospital statistics of the illness with the official data, which was inconsistent with reality.²³ Yanyong's statement was leaked to the international press and resulted in the resignation of the health minister and the mayor of Beijing.²⁴ He was enjoined from communicating with the press and placed under police scrutiny.²⁵

¹⁶ Dr. Tedros Adhanom Ghebreyesus, Director-General, WHO, Statement on IHR Emergency Committee: Novel Coronavirus (Jan. 30, 2020); Int'l Health Reguls. (defining PHEIC as a "serious, unusual or unexpected [event]; [that] carries implications for public health beyond the affected State's national border; [which] require[s] immediate international action).

¹⁷ Dr. Tedros Adhanom Ghebreyesus, *supra* note 15.

¹⁸ Xi Jinping, President, *Speech During a Meeting of the Standing Committee of the Political Bureau of the CPC Central Committee*, CHINESE COMMUNIST PARTY NEWS (Feb. 16, 2020), <http://cpc.people.com.cn/n1/2020/0216/c64094-31589177.html>.

¹⁹ *Coronavirus: China Admits 'Shortcomings and Deficiencies'*, BBC NEWS (Feb. 4, 2020), <https://www.bbc.com/news/world-asia-china-51362336>.

²⁰ *Id.*

²¹ *Summary of Probable SARS Cases with Onset of Illness from 1 November 2002 to 31 July 2003*, WHO, https://www.who.int/csr/sars/country/table2004_04_21/en/ (last visited Oct. 1, 2020).

²² *Update 95 - SARS: Chronology of a Serial Killer*, WHO, https://www.who.int/csr/don/2003_07_04/en/ (last visited Oct. 1, 2020).

²³ Philip P. Pan, *Chinese Pressure Dissident Physician*, WASH. POST FOREIGN SERV. (July 5, 2004), <https://www.washingtonpost.com/wp-dyn/articles/A28014-2004Jul4.html>.

²⁴ *Id.*

²⁵ *Id.*

China's delay in reporting SARS hampered adequate preparation by other states. According to medical authorities, human loss could have been avoided had China not suppressed vital health information for several weeks.²⁶ The maladministered SARS epidemic was one factor that led the WHO to revise the IHR in 2005.²⁷

IV. IHR

In light of unfettered growth in population and globalization, the 58th World Health Assembly established and approved the revised International Health Regulations in 2005.²⁸ IHR are an instrument intended to be the legally binding system for protecting people worldwide from the global spread of the disease.²⁹ It provides states with obligations and responsibilities to prevent and control public health response to international health crises.³⁰

While the current iteration of the IHR were agreed upon in 2005, they originate with the International Sanitary Conference in Paris in 1851, culminating in the International Sanitary Convention in 1892.³¹ This was one of the “earliest concerted efforts of international powers to combat European cholera outbreaks under a unified framework.”³² The International Sanitary Regulations were “adopted by Member States of the newly-founded WHO in 1951 [to further these principles], [and were] later revised and renamed as the International Health Regulations in 1969.”³³

The IHR of 1969 “focused on six major diseases, including cholera, plague, yellow fever, smallpox, relapsing fever, and typhus.”³⁴ The SARS outbreak and the AIDS epidemic prompted major revisions in 2005.³⁵ The 2005 revisions also broadened the IHR's scope to encompass biological, chemical, nuclear, and zoonotic threats.³⁶ The 2005 IHR revisions recommended best practices for international traffic at points of entry reflecting modern globalized traffic and

²⁶ Tom Christensen & Martin Painter, *The Politics of SARS—Rational Responses or Ambiguity, Symbols and Chaos?* 23 POL'Y AND SOC'Y 18 (2004).

²⁷ *International Health Regulations (IHR)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/globalhealth/healthprotection/ghs/ihr/index.html> (last visited Oct. 1, 2020).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Frequently Asked Questions About the International Health Regulations (2005)*, WHO, <https://www.who.int/ihr/about/faq/en/> (last visited Oct. 1, 2020).

³² Lauren Tonti, *The International Health Regulations: The Past and the Present, But What Future?*, HARVARD INT'L L. J., <https://harvardilj.org/2020/04/the-international-health-regulations-the-past-and-the-present-but-what-future/> (last visited Oct. 2, 2020).

³³ *International Health Regulations (IHR)*, *supra* note 27.

³⁴ Tonti, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

trade.³⁷ The revisions increased the WHO's investigational capacities and encouraged the observance of human rights in protecting public health.³⁸

Article 6 of the IHR obligates states to notify the WHO within 24 hours of “all events that might constitute a public health emergency of international concern.”³⁹ Article 6 of the IHR is a concrete obligation to which compliance can be attested to in a practical, immediate form. China violated Article 6 by not notifying the WHO of a public health emergency expediently, an infraction exacerbated by its concealment of the gravity of the situation. Censored, delayed, or deficient information is not merely unfortunate, but it is a reckless, malicious, and litigious legal issue.

Article 7 imposes an obligation upon states to share unexpected or unusual incidents related to public health irrespective of origin or source.⁴⁰ China failed Article 7's mandate of “[i]nformation-sharing during unexpected or unusual public health events,”⁴¹ and the WHO's prescription in Article 64 to provide timely “statistical and epidemiological reports.”⁴² Even after disclosing the existence of COVID-19, China did not inform the WHO about the alarming level of its spread domestically.

The Article 3 Principles of the IHR states that: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.”⁴³

While China did not violate the IHR by not following its recommended protocols, it violated IHR Articles 6 and 7 by not reporting relevant information to the WHO in a timely and transparent manner. It is this egregious infraction that China as a WHO member state is responsible for because it was the catalyst for the damage around the world.

³⁷ Julie E. Fischer et al., *The International Health Regulations (2005): Surveillance and Response in an Era of Globalization*. STIMSON CTR., (June 1, 2011) https://www.jstor.org/stable/resrep10843#metadata_info_tab_contents.

³⁸ *Id.*

³⁹ Guénaél Rodier, Allison Greenspan, James Hughes, & David Heymann, *Global Public Health Security*, EMERGING INFECTIONS DISEASES (Oct. 13, 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2851539/#R15>.

⁴⁰ *Revision of the International Health Regulations*, WHO 8, 17 (2005), <https://www.who.int/csr/ihr/WHA58-en.pdf>.

⁴¹ *Id.*

⁴² *Id.* at 15.

⁴³ WHO, *Revision of the International Health Regulations*, at art. 3, WHA56.28 (May 23, 2005), https://apps.who.int/gb/ebwha/pdf_files/WHA58/A58_4-en.pdf.

V. WHO

The WHO was established by the U.N. in 1948 as the sole international legal instrument to establish multilateral efforts to combat infectious diseases. Article 1 of the WHO Constitution defines its objective as “the attainment by all peoples of the highest possible level of health.”⁴⁴ The WHO is vested with broad legal authority to provide a framework for global healthcare and serve as a platform for coordinating international response. International cooperation is essential in the determination and treatment of a pandemic, as well as worldwide dissemination of advances in scientific knowledge and healthcare technology.

Article 19 of the WHO Constitution specifies that the World Health Assembly, its legislative body, composed of all of its member states, “shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization.”⁴⁵ Article 21 of the WHO Constitution provides the World Health Assembly the power to establish regulations like the IHR.⁴⁶

Article 37 of the WHO Constitution mandates that member states respect “the exclusively international character of the Director-General and the staff and not to seek to influence them.”⁴⁷ The WHO’s Director-General Dr. Tedros Adhanom Ghebreyesus blatantly failed to independently investigate China’s reports and ignored Taiwan healthcare officials who informed the WHO of the virus’s capacity for human-to-human transmission. The WHO’s eagerness to loyally parrot China’s official statements has been perceived as loyalty to the Chinese government.⁴⁸ China’s influence on the WHO, and the world body’s complicity, violates Article 37.⁴⁹

The WHO is an international treaty, and its responsibilities are grounded in its constitution and in the United Nations Charter. Article 55 of the Charter describes the objectives that the U.N. has pledged to promote among its members, including solutions to international economic, social, health, and related problems. As the U.N.’s specialized agency, with the constitutional directive to act as “directing and co-ordinating authority on international health work”, the WHO has the cardinal responsibility to fulfill the aims of the Charter.⁵⁰

VI. VIENNA TREATY CONVENTION

The IHR is a legally binding instrument approved on the basis of Article 21 of the Constitution of the WHO. This provision allows the WHO to issue binding

⁴⁴ CONST. OF THE WHO, art. 75, July 22, 1948, 14 U.N.T.S. 185 [hereinafter WHO Constitution].

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ *Id.* at 10.

⁴⁸ *World Health Coronavirus Disinformation*, WALL ST. J.: OPINION (Apr. 5, 2020, 5:28 PM), <https://www.wsj.com/articles/world-health-coronavirus-disinformation-11586122093>.

⁴⁹ *See id.*

⁵⁰ *Id.* at 2.

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

regulations in the field of, inter alia, “procedures designed to prevent the international spread of disease.”⁵¹ Under Article 22 of the WHO Constitution, no additional ratification procedure is required, and member states are bound by the mandates of the treaty. The jurisprudential enforceability of the IHR is determined by applying the interpretive framework of the Vienna Convention on the Law of Treaties.⁵²

The Vienna Convention (“VTC”) on the Law of Treaties was signed on May 23, 1969 and enacted January 27, 1980.⁵³ It codifies the bedrock of contemporary international law and is utilized as a mechanism by states to facilitate multilateral cooperation. The VTC affirms that “every state possesses the capacity to conclude treaties,” and encompasses all written instruments concluded between states to establish obligations among themselves.⁵⁴

Article 26 of the Vienna Convention sets forth the basic legal principle of the observance of treaties, *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed in good faith.”⁵⁵ Article 31 of the Vienna Convention codifies the principles of good faith.⁵⁶ As stated in the Lancet, “[e]ffective global governance is not possible when countries cannot depend on each other to comply with international agreements.”⁵⁷

Arbitrary compliance with international law undermines the whole system. When states become parties to treaties, they explicitly agree to limit their sovereign freedom of action in some respect to achieve mutually agreed-upon goals. By failing to honor its obligations under the WHO and IHR, China was in violation of the good faith principle. While most international treaties do not include instruments to compel parties to comply with legally binding commitments, the IHR includes a dispute resolution mechanism.⁵⁸ IHR Article 56 provides that any question or dispute relating to interpretation and application of the regulations not settled by negotiation shall be submitted to the Director-General of the Health Assembly.⁵⁹ Likewise, Article 75 of the WHO Constitution refers to the International Court of Justice (ICJ) for the settlement of disputes.⁶⁰ It provides that “[a]ny question or dispute concerning the interpretation or application of this

⁵¹ *Id.* at 7.

⁵² Markus Benzing, *International Organizations or Institutions, Secondary Law*, OXFORD PUB. INT’L L., March 2007, at ¶ 21.

⁵³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁴ *Id.* at art. 6.

⁵⁵ *Id.* at art. 26.

⁵⁶ *Id.* at art. 31.

⁵⁷ Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, LANCET, Feb 13, 2020, at 664.

⁵⁸ See Int’l Health Reguls., *supra* note 3, at arts. 43, 56, 75.

⁵⁹ Int’l Health Reguls., *supra* note 3, at art. 56.

⁶⁰ WHO Constitution, *supra* note 44, at art. 75.

Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the [ICJ].”⁶¹

VII. ICJ

The ICJ itself already acknowledged the Court’s jurisdiction in the 2002 Armed Activities case concerning armed activities on the territory of Congo.⁶² Under the protocols of the WHO and IHR, to invoke the jurisdiction of the ICJ, a state must establish the existence of a dispute and satisfy the criterion of negotiation.⁶³

The ICJ applies stringent interpretation to determine the existence of a dispute, referred to as the *non ultra petita* rule, “a doctrine providing that a tribunal should not unnecessarily decide questions of law.”⁶⁴ According to Article 36, paragraph 2 of the ICJ Statute, the court’s jurisdiction extends only to “legal disputes” that arise between states party to the Statute.⁶⁵ Under President Ronald Reagan, the United States withdrew from the court’s compulsory jurisdiction in 1986 after the court ruled it owed Nicaragua war reparations.⁶⁶ While the United States is no longer subject to the ICJ’s broad compulsory jurisdiction, individual treaties may contain clauses that give the ICJ jurisdiction on a treaty-by-treaty basis.⁶⁷ A 2008 study found that the United States was a party to more than 80 international agreements with ICJ clauses.⁶⁸ In September 2020, President Donald Trump announced that the United States would withdraw from the World Health Organization; but, as a one year notice is required, the withdrawal only becomes effective in July 2021.⁶⁹

In the *Marshall Islands* case, the ICJ rejected the argument on this precise question by a vote of nine to seven.⁷⁰ To compel the ICJ to proceed on the merits, states need to demonstrate a dispute regarding China’s compliance with International law.⁷¹ The requirement for negotiation should be readily reconciled.

⁶¹ *Id.*

⁶² Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), 2006 ICJ 219 (Feb 3).

⁶³ See STATUTE OF THE I.C.J., art. 36, ¶ 2, June 26, 1945, art. 38, 59 Stat. 1055, U.S.T.S. 993 [hereinafter I.C.J. Statute]; see also Jadhav (India v. Pakistan), Judgment, 2017 I.C.J. 168 (July 17).

⁶⁴ Aaron X. Fellmeth & Maurice Horwitz, *Guide to Latin in Int’l Law*, OXFORD UNIV. PRESS (last updated 2011), <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1478>.

⁶⁵ I.C.J. Statute, *supra* note 63.

⁶⁶ Norman Kempster, COURT: U.S. Restricts Participation : U.S. Rejects ‘Compulsory’ World Court Jurisdiction, L.A. Times (Oct. 8, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-10-08-mn-15250-story.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Tiaji Salaam-Blyther et al., CONG. RSCH. SERV., R46575, U.S. Withdrawal from the World Health Organization: Process and Implications, at 1 (2020).

⁷⁰ Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Judgment, 2016 I.C.J. 225 (Oct. 5).

⁷¹ I.C.J. Statute, *supra* note 63.

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

In the *Jadhav* case, the ICJ noted that recourse to arbitration is not a prerequisite to approaching the world court.⁷² Drawing from the *Jadhav* reasoning, the ICJ would exempt the negotiation criterion in Article 75 of WHO Constitution.

Under Article 31, once the ICJ decides on the merits, the responsible state is obligated to make full reparation for the injury caused by its wrongful acts.⁷³ ICJ reparation is generally in the form of restitution, compensation, satisfaction, and assurance.⁷⁴ If reparation is not possible or suitable, the injured state is entitled to “restitution, compensation or satisfaction, either singly or in combination.”⁷⁵

Article 94 provides that in a case of nonfulfillment of the obligation under the judgment, any party may recourse to the UN Security Council.⁷⁶ However, as a permanent member of the UN, China could veto any action that the UN Security Council might take that would give effect to the ICJ judgment.⁷⁷

VIII. STATE INJURY

An alternative way to access ICJ jurisdiction under the auspices of international law is state injury. While the WHO Treaty obligates states to that organization, it obligates a country to communicate effectively and transparently with the WHO, not with other countries directly.⁷⁸ A state can claim injury by proving damage and liability directly, irrespective of China’s obligation to the WHO, by demonstrating the extent that China could have limited the damage by complying with its obligations.⁷⁹ In *Corfu Channel*, the ICJ held that “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁸⁰ In the case at hand, China is under an obligation that individuals within its territory do not cause harm to the rights of another state.⁸¹

States are obligated to compensate for injuries caused by its’ intentionally wrongful acts.⁸² In *Bosnian Genocide*, the ICJ stated that an injured state must establish a “sufficiently direct and certain causal nexus” to claim damages.⁸³ The

⁷² *Jadhav* (India v. Pakistan), Judgment, 2017 I.C.J. 168, at 433 (July 17).

⁷³ Responsibility of States for Internationally Wrongful Acts, [2001] 2 Y.B. INT’L L. COMM’N, art. 31, U.N. Doc. A/56/49(Vol. I)/ Corr.4.

⁷⁴ *Id.* at art. 34.

⁷⁵ *Id.* at art. 36.

⁷⁶ U.N. Charter art. 94, ¶ 2.

⁷⁷ *Id.* at art. 27.

⁷⁸ *International Health Regulations (IHR)*, *supra* note 27.

⁷⁹ U.N. Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10, 69 (2001).

⁸⁰ *Corfu Channel*, (United Kingdom v. Albania), Judgment, 1949 I.C.J. 4, at 22 (April 9).

⁸¹ *Id.*

⁸² Responsibility of States for Internationally Wrongful Acts, *supra* note 73, at 31.

⁸³ Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595, ¶ 462 (Feb. 26).

International Law Commission (ILC) clarifies that causation is attributed to “the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.”⁸⁴ Overwhelming circumstantial evidence of malfeasance by Chinese authorities can be sufficient to prove intention.⁸⁵

Customary international law on state responsibility maintains that a state violating international law has “an obligation to make full reparation for the injury caused by the internationally wrong act.”⁸⁶ Although this customary rule has not historically played a discernible role in disease outbreaks and international health cooperation, the ILC generally does not distinguish between application to situations of emergency or different specialist fields.⁸⁷ Furthermore, China’s failure to act can be regarded as evidence of *opinio juris*, expressed in Conclusion 10(3) of the 2018 ILC Conclusions, in that “the circumstances called for some reaction.”⁸⁸

IX. ADVISORY OPINION

A less vigorous way to hold China responsible, and bypass jurisdictional hurdles, is to invoke the advisory jurisdiction of the ICJ.⁸⁹ Under Article 96 of the UN Charter, any specialized agencies within the UN authorized by the UN General Assembly may seek advisory opinions of the ICJ on any legal question arising within the scope of its activities.⁹⁰ The sole criterion for an advisory opinion is that the request is a legal question within the scope of the activities of the requesting organ.⁹¹ Under Article 41, in situations of gravity and urgency, the ICJ can order provisional measures of protection to avoid irreparable harm.⁹²

The COVID-19 pandemic primarily falls under the mandate of public health; therefore, the WHO is qualified to request an advisory opinion. The ICJ itself restricted the WHO’s jurisdiction to the sphere of public health in 1993 when it declined a request by the WHO to provide an advisory opinion on the use of nuclear weapons in war or armed conflict.⁹³ While advisory opinions are not binding on a state, the ICJ could set precedent to a subsequent course of action.⁹⁴ Because an advisory opinion does not require the consent of states, it can offer

⁸⁴ Responsibility of States for Internationally Wrongful Acts, *supra* note 73, at art. 31, cmt. 9.

⁸⁵ Harvard Rsch. in Int’l L., *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. SUPP. 131, 134 (1929).

⁸⁶ Responsibility of States for Internationally Wrongful Acts, *supra* note 73, at art. 31.

⁸⁷ Int’l Law Comm’n, Draft Conclusions on Identification of Customary International Law, with commentaries, U.N. Doc. A/73/10 (2018).

⁸⁸ *Id.* at 140.

⁸⁹ *Advisory Jurisdiction*, I.C.J., <https://www.icj-cij.org/en/advisory-jurisdiction> (last visited Oct. 24, 2020).

⁹⁰ U.N. Charter art. 96.

⁹¹ *Id.* at 96(b).

⁹² I.C.J. Statute, *supra* note 63, at art. 41.

⁹³ Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 226 (July 8).

⁹⁴ *Advisory Jurisdiction*, *supra* note 89.

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

scope for alternative judicial recourse. Rendering an advisory opinion could assist the United Nations to pass resolutions or sanctions in condemnation of China's reaction to the pandemic.

X. CIVIL SUIT

An alternative recourse already being pursued within the United States is a civil lawsuit against China, as evidenced by at least nine current class actions filed to date in the U.S. federal courts.⁹⁵ The State of Missouri filed the first state claim in a St. Louis federal court seeking to hold the People's Republic of China and the Chinese Communist Party liable for “an appalling campaign of deceit, concealment, misfeasance and inaction by Chinese authorities that unleashed this pandemic.”⁹⁶ Missouri's Attorney General Eric Schmitt stated that Chinese officials “are responsible for the enormous death, suffering and economic losses they inflicted on the world, including Missourians, and they should be held accountable.”⁹⁷

The greatest obstacle to this claim is the Foreign Sovereign Immunity Act of 1976 (FSIA) that prohibits suing a foreign state, including a “political subdivision” or “instrumentality” of a foreign government.⁹⁸ The FSIA states that a “foreign state shall be immune from the jurisdiction of the courts of the United States and of the states.”⁹⁹ There are six exceptions to the FSIA, namely; waiver, commercial acts, expropriations, noncommercial torts, enforcement of arbitral agreements and awards, and state-sponsored terrorism.¹⁰⁰ Courts will promptly dismiss cases that do not fall within the FSIA exceptions.¹⁰¹ Some congressmen are exploring amending the FSIA to strip China of its immunity.¹⁰² Republican

⁹⁵ See, e.g., *Alters v. People's Republic of China*, No. 1:20-cv-21108 (S.D. Fla. Mar. 12, 2020); *Buzz Photo v. People's Republic of China*, No. 3:20-cv-656 (N.D. Tex. Mar. 17, 2020); *Bella Vista LLC v. People's Republic of China*, No. 2:20-cv-574 (D. Nev. Mar. 23, 2020); *Bourque CPA's and Advisors v. People's Republic of China*, No. 8:20-cv-597 (C.D. Cal. Mar. 25, 2020); *Aharon v. Chinese Communist Party*, No. 9:20-cv-80604 (S.D. Fla. Apr. 8, 2020); *Cardiff Prestige Property, Inc. v. People's Republic of China*, No. 8:20-cv-683 (C.D. Cal. Apr. 8, 2020); *Benitez-White v. People's Republic of China*, No. 4:20-cv-1562 (S.D. Tex. May 3, 2020); *Edwards v. People's Republic of China*, No. 2:20-cv-1393 (E.D. La. May 8, 2020).

⁹⁶ Complaint at 2, *Missouri ex rel. Schmitt v. People's Republic of China*, No. 1:20-cv-99 (E.D. Mo. Apr. 21, 2020) [hereinafter Complaint].

⁹⁷ *Id.*

⁹⁸ 28 U.S.C. § 1605.

⁹⁹ *Id.* at § 1604.

¹⁰⁰ *Id.* at § 1605(a).

¹⁰¹ *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983) (“At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.”).

¹⁰² Jacques deLisle, *Pursuing Politics Through Legal Means: U.S. Efforts to Hold China Responsible for COVID-19*, FOREIGN POL'Y RSCH. INST. (May 12, 2020), <https://>

Senators Marsha Blackburn and Martha McSally have introduced legislation that would allow U.S. citizens to file lawsuits against the Chinese Communist Party over the COVID-19 pandemic.¹⁰³ As precedent, they point to the lawsuits filed against Saudi Arabia by families of the victims of the 9/11 attacks.¹⁰⁴

An alternative route around the immunity barrier is to sue the Chinese Communist Party as a separate, independent entity. As the Missouri suit claims, “The Communist Party is not a foreign state or an agency or instrumentality of a foreign state, and is not entitled to any form of sovereign immunity.”¹⁰⁵ While in reality, the Party and the Government are virtually the same, that proposed distinction could be a litigious advantage to subvert the FSIA. Chinese media officials have condemned the lawsuits as politically driven and legally unfeasible.¹⁰⁶ They have further asserted that U.S. courts have no jurisdiction over the Chinese government's actions, based on the principle of sovereign equality under international law.¹⁰⁷

XI. CONCLUSION

There are several challenges deterring countries from pursuing a claim under the auspices of international law, and the probability of Chinese reparation is unlikely.

Primarily, states are reluctant to establish any precedent in this area of international law, and therefore, hesitant to claim damages for a breach of IHR obligations. Identifying and reporting novel viruses is inherently difficult, and any state could theoretically find itself the outpost of the next outbreak. Pathogenic threats with the potential for cross-border spread can appear in any country. For example, the H1N1 virus originated in the United States. Holding China responsible would mean that every state would be held liable to the highest standard in reciprocity.

Secondly, neither China nor the United States accept compulsory jurisdiction of the ICJ.¹⁰⁸ In 2016, the Philippines brought an arbitration case against China under the United Nations Convention on the Law of the Seas

www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Complaint at 11.

¹⁰⁶ huaxia, *Commentary: Suing China for Pandemic Damage is Nothing But Political Pandering*, XINHUA (Apr. 30, 2020, 4:16:16 PM), http://www.xinhuanet.com/english/2020-04/30/c_139021210.htm.

¹⁰⁷ *Id.*

¹⁰⁸ Harriet Moynihan, *China's Evolving Approach to International Dispute Settlement*, INT'L L. PROGRAMME 1, 2–3 (Mar. 2017), <https://www.chathamhouse.org/sites/default/files/publications/research/2017-03-29-chinas-evolving-approach-international-dispute-settlement-moynihan-final.pdf>.

DETERMINING CORONAVIRUS LIABILITY UNDER THE RULE OF LAW:
SHOULD CHINA BE HELD LIABLE FOR THE COVID-19 PANDEMIC
UNDER INTERNATIONAL OR STATE LAW?
UNT DALLAS L. REV. ON THE CUSP, FALL 2020

concerning territorial disputes in the South China Sea.¹⁰⁹ China declared it would not participate in the arbitration and simply rejected the court's ruling.¹¹⁰

Finally, while countries can unilaterally submit a dispute between states to the ICJ for resolution, it is nearly impossible to enforce a potential judgment against China. As a permanent member of the United Nations Security Council, China can veto any enforcement action.¹¹¹

However, the legal process can keep the spotlight on the Chinese government's role in the ongoing crisis. The WHO criticized rhetoric stigmatizing China for incensing cultural or racial hatred.¹¹² China can easily escape accountability due to its sheer power and guise of political correctness—strategies that fall neatly in line with its Communist policies.

China has pledged two billion dollars to containment efforts and to remedy the economic fallout from the pandemic.¹¹³ However, a discretionary, arbitrary contribution does not satisfy culpability under the rule of law, and acceding to such discretionary responses can ultimately have catastrophic ramifications. Flagrant disregard for legal requirements frustrates all attempts at global coordination across the spectrum. Justice is not only an issue of compensation for the victims, it also serves as a deterrent from subverting international law obligations.

China's economic growth has increased its political footprint. The country's influence in the UN has strengthened swiftly and significantly, and it currently chairs four main subsidiary organs. International world order calls for equal rights and responsibilities for all states, regardless of size and influence. As China's influence grows, its sense of responsibility and accountability must grow in kind.

¹⁰⁹ In the Matter of the South China Sea Arbitration (Phil. v. China), 2013-19 PCA Case Repository, Award (Perm. Ct. Arb. 2016).

¹¹⁰ Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES (July 12, 2016), <https://nyti.ms/29SRlbp>.

¹¹¹ S. Gozie Ogbodo, *An Overview of Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT'L & COMP. L. 93, 106-7 (2012).

¹¹² *A Guide to Preventing and Addressing Social Stigma Associated with COVID-19*, WHO (Feb. 24, 2020), <https://www.who.int/publications/m/item/a-guide-to-preventing-and-addressing-social-stigma-associated-with-covid-19>.

¹¹³ Stephanie Nebehay & Emma Farge, *U.S. Savages WHO as it Promises Pandemic Review, but China Pledges \$2 Billion*, REUTERS (May 18, 2020, 3:57 AM), <https://www.reuters.com/article/us-health-coronavirus-who/u-s-savages-who-as-it-promises-pandemic-review-but-china-pledges-2-billion-idUSKBN22U111>.