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ABSTRACT

Sequel to the global emergence of the Coronavirus – officially named COVID-19 and originating from China – which has engulfed over 100 countries; with the loss thousands of lives, livelihoods, and several economic disruptions, this essay seeks to analyse China's culpability for the spread of the virus. The essay examines this culpability under international law and, specifically, through the principle of State responsibility. It also considers the fundamental counterarguments against culpability, especially in the light of the general unwillingness of nations to point fingers. In the end, the author finds that while there are certain elements reflecting China's culpability, the absence of definitive facts impedes a wholesome and air-tight culpability assessment.

Keywords: International Law, State Responsibility, Force Majeure, No Harm Rule

1.0. ASSESSING CHINA'S CULPABILITY THROUGH INTERNATIONAL LAW

Perhaps the most beautiful thing about the law is that it is never silent. When people look back and forth for solutions or ways to seek redress, the law is often always the point of resort. If domestic laws do not have a say, international law will. Consequently, when the embers of Covid-19 are doused, the urge to apportion blames will arise. Already, these urges are surfacing. This is evidenced in the two class-action suits that have been instituted in the US claiming damages in billions from China[1]. Even though this matter is off the limits for domestic laws, such agitations are expected, because where there is an injury, responsibility must exist, and reparations must be discussed.

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[1] S. Prasso, "Lawsuits Against China Escalate Covid-19 Blame Game With US", available at https://www.bloomberg.com/news/articles/2020-05-06/lawsuits-against-china-escalate-covid-19-blame-game-with-u-s (accessed 22 July 2020).

One pronounced principle of international law upon which the culpability of a State – on an infectious disease – can be assessed is the principle of State responsibility. State responsibility posits that a breach of international law by a State entails its international responsibility. As such, when a state is found to have breached its international obligation, such a state becomes liable for reparations accordingly. This fundamental international principle not only avails damages for breaches, but also safeguards the sanctity of international law. Codified in the United Nation's (UN) International Law Commission in 2001 in the Articles on Responsibility of States for Internationally Wrongful Acts[2], this principle is a prime child of international law.

Premised on this, proving the responsibility of a state, which in this instance is China, is grounded on the commission of an internationally wrongful act. To establish this, two requirements have to be satisfied. First, is the conduct in question attributable to the State? And secondly, has there been a breach of the State's international obligation?

2.0. ATTRIBUTION OF THE CONDUCT TO CHINA

For an act – a commission or an omission – to default a State's international obligation, the act must be attributable to such a State. However, since a State is an abstraction which cannot by itself act, the principle of State responsibility has provided a fundamental rule that to establish attribution, there must be a link to the State and not just a factual causality[3]. As such, our obligation is to establish that the conduct is attributable to a State organ acting in its official capacity.

Therefore, for the purpose of determination of responsibility, it is irrelevant whether the organ is legislative, executive, judicial, or any

[2] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

[3] Commentary, Chapter II of the Article on Responsibility of States, para. 4.

other organ at all. Similarly, it is immaterial what the rank of such State organ is. In so far as the State organ acted in its official capacity, the onus shall fall on the State to which the organ belongs. As such, in *Nicaragua* v *United States*[4], the International Court of Justice (ICJ) held that attribution will exist where there is sufficient control and authorization by a State actor. Hence, to determine the attributability of conduct in this instant case, we have to examine how much China's State actors were involved with the virus at its early stage in China.

Provincial and municipal authorities in China were involved with the virus during the early days of the outbreak. This started with the People's Republic of China (PRC) government stating that Wuhan Centre for Disease Control and Prevention was the first to detect unfamiliar pneumonia.[5] The Wuhan Municipal Health Commission would later instruct medical institutions on the treatment of the virus.[6] At the early stage, China tried to keep the world uninformed, as evidenced in the jailing of whistle-blowers. Even the Mayor of Wuhan has admitted to the wrongness of delaying public awareness of the virus.[7] As the crisis intensified, higher levels of government got involved, which is reflected in the National Health Commission of China sending experts to Wuhan to help with the epidemic.[8]

Similarly, Chinese Centre for Disease Control and Prevention together with the Chinese Academy of Medical Sciences worked on identifying the pathogen, while the Wuhan Institute of Virology

[4] *Nicaragua* v *United States*, Judgment on Jurisdiction and Admissibility, ICJ GL No 70, [1984] ICJ Rep 392, ICGJ 111 (ICJ 1984), 26 November 1984.
[5] Xinhua, "China Publishes Timeline on COVID-19 Information Sharing, Int'l Cooperation", available at http://www.xinhuanet.com/english/2020-04/06/c_138951662.htm accessed (23 July 2020).
[6] *Ibid*.
[7] The Guardian Online, "China Coronavirus: Mayor of Wuhan Admits Mistakes", available at https://www.theguardian.com/science/2020/jan/27/china-coronavirus-who-to-hold-special-meeting-in-beijing-as-death-toll-jumps (accessed 23 July 2020).
[8] W. Xiongjun, "What Roles do Chinese Medical and Health Experts Play in Public Decision-Making?", available at https://covid-19.chinadaily.com.cn/a/202005/11/WS5eb8a00ca310a8b241154a0a.html (accessed 23 July 2020).

developed testing kits for the coronavirus.[9] Later on, President Xi Jin Ping would address the nation and give useful instructions on the epidemic.[10] Flowing from above, it is clear that all actors that handled the virus outbreak are State organs and their acts or omissions are *prima facie* attributable to China.

Notably however, China has a complex State structure which becomes relevant in the discourse of attribution. According to Article 30 of China's constitution,[11] the country is divided into provinces, autonomous regions, and municipalities under the central government. These units are then divided into sub-units which includes, among others, entities such as cities. However, the complex structure of the China state does not displace the fact that international law on state responsibility holds that all State organs share inseparable unity for the purpose of culpability. This inferred unity, which binds State organs together and prevents the allocation of blames, is a long-settled debate under the auspices of State responsibility.

3.0. THE BREACH OF AN INTERNATIONALLY BINDING OBLIGATION

The principle of State responsibility holds that for a cause to arise, there must not only be an attribution of conduct, but also a breach of an internationally binding obligation. To determine this, there are different avenues opened up for exploration. These include the "no harm rule", "right to health" under international law, and "the duty to share information" under global health law. However, there is no logical incentive to tread the path of the first two avenues.

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[9] Newswire, "The Wuhan Institute of Virology's Vital Role in Fighting Covid-19", available at https://www.newswire.ca/news-releases/the-wuhan-institute-of-virology-s-vital-role-in-fighting-covid-19-819473379.html (accessed 23 July 2020).

[10] The Associated Press, "China did not Warn the Public of Likely Pandemic for 6 Key Days", available at https://apnews.com/68a9e1b91de4ffc166acd6012d82c2f9 (accessed 23 July 2020).

[11] Constitution of the People's Republic of China (full text after amendment on 14 March 2004), available at http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm (accessed 11 January 2021).

On the one hand, the "no harm rule" is predominantly a cornerstone of international environmental law, thereby making it inapplicable to COVID-19, since the virus is strictly an infectious disease transferred from human to human. On the other hand, "right to health" under international law requires states to ensure the "prevention, treatment and control of epidemic, endemic, occupational and other diseases" and create conditions to assure "medical service and medical attention in the event of sickness."[12] This – in assessing the instant culpability for COVID-19 – is a potentially futile path, given that it can be easily satisfied. There is no definite metric to assess compliance and even when a country fails on prevention, it can be availed of responsibility in so far as it assures medical service and attention. This then leaves us with the "duty to share information", the most viable avenue, which in fact has welcomed several arguments from scholars in bringing China to the books.

The "duty to share information" did not sprout out of the blues. Its roots are found in the 2005 revised International Health Regulations (IHRs)[13] adopted by World Health Assembly and binding on 196 states of which China is included. The IHRs were in response to the lessons learnt during the Severe Acute Respiratory Syndrome (SARs) epidemic and, in a bid to prevent such reoccurrence, their purpose is geared towards preventing the international spread of diseases and providing a timely public health response.[14] While they formed as a response to the SARs virus, their applicability is not limited to any specific disease; rather, they attend to "the continued evolution of diseases".[15] It is this clause that conveniently welcomes COVID-19 under the ambits of IHRs and consequently imposing certain

[12] B. Mason, "Realizing the Right to Health Must be the Foundation of Covid-19 Responses", available at https://www.universal-rights.org/by-invitation/realizing-the-right-to-health-must-be-the-foundation-of-the-covid-19-response/ (accessed 23 July 2020).

[13] Geneva, 23 May 2005, in force 15 June 2007, 2509 United Nations Treaty Series 79.

[14] World Health Organization (WHO), "International Health Regulations", available at https://www.who.int/publications/i/item/9789241580410 (accessed 11 January 2021), Article. 2

[15] *Ibid.*

responsibilities on China. The argument against China lies in the timely notification of infectious diseases, as provided in article 6 of IHRs that States are, within twenty-four hours, required to notify World Health Organization (WHO) of public health information within its territory that may constitute international public health emergency, using the most efficient means of communications. This imposes a duty to communicate transparently and comprehensively with WHO on the infectious disease, which not only includes early communication, but also details such as laboratory tests, case numbers, death tolls, and health measures put in place.[16] The question here then is whether China satisfied the obligation of early notification through the most effective means.

In the early days of COVID-19, it would appear that China defaulted in her IHRs obligation on the 24-hour period of notification. The first case of strange pneumonia was identified by local Wuhan health authorities on 8 December 2019, which would later turn out to be COVID-19.[17] In fact, certain reports suggest that this outcome may have happened weeks before.[18] However, the PRC government maintained that the first Covid-19 case was in late December. Regardless, whether early or late December, China did not notify WHO Country Office of the infectious disease until 31 December 2019.[19]

Asides a delayed notification, the Chinese government also appeared to have suppressed information in the early days of the virus breakout. This includes silencing Li Wenliang's alarm on the virus and the detainment of several journalists and medical practitioners who tried

[16] *Ibid*.
[17] M. Henderson et al., "Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response", available at https://henryjacksonsociety.org/publications/coronaviruscompensation/ (accessed 11 January 2021).
[18] C. Huang et al., "Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China" (2020) 395(10223) *The Lancet*, pp. 497-506. Available at https://doi.org/10.1016/S0140-6736(20)30183-5 (accessed 11 January 2021).
[19] *Supra* n 5.

to break the news and raise awareness.[20] Also, the Wuhan Municipal Health Commission wrongly claimed on 31 December that there was no human to human transmission of the virus and also described the virus as seasonal flu which is preventable and controllable.[21] Consequently, China waited till 14 February 2020 before notifying the WHO of the 1,700 persons who were already positive of the virus.[22] Regardless of the motives that could have guided China's suppression of information and distortion of facts – even if such motive arises from the uncertainty of the virus nature – China was obligated to have fostered an early, effective, and transparent communication as required under international law. If this had happened, researchers posit that the number of cases could have ostensibly been reduced by 66%. The obligation of China in the instant case was echoed by the ICJ in the *Corfu Chanel Case (1949)*[23], where the Court held that states shall not knowingly allow their territory to be used for acts contrary to the rights of the other States. Simply put, China is under an obligation that individuals within its territory do not cause harm to the rights of the other States, but this appears to have been breached by China not only delaying public awareness, but also providing distorted facts at the virus' early stages.

4.0. THE MURKY WATERS OF ASSESSING CHINA'S CULPABILITY UNDER INTERNATIONAL LAW

The fundamental problem impeding the assessment of China's culpability is the controversial nature of facts surrounding the pandemic – and this is expected, given the uncertainty around COVID-19 just like any other infectious disease. The PRC government and Chinese law experts have firmly rejected claims that the country

[20] S. Sarkar, "Liability of China for Covid19 Outbreak, State Responsibility, and Jurisdictional Challenges", available at https://moderndiplomacy.eu/2020/04/13/liability-of-china-for-covid19-outbreak-state-responsibility-and-jurisdictional-challenges/ (accessed 23 July 2020).
[21] *Ibid.*
[22] *Ibid.*
[23] *Corfu Channel Case* (*United Kingdom* v *Albania*); *Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, available at: https://www.refworld.org/cases,ICJ,402398c84.html
(accessed 24 July 2020).

breached her IHR obligations.[24] The absence of definitive fact-finding – owing to the newness of the disease and the general unwillingness of States to pursue international sanctions on disease outbreak – strongly prevents the taking of a definitive stance on China's culpability, despite the fact that the country appears culpable.

The counterarguments on China's culpability start with the country's alleged breach of IHRs obligations. To assess whether China has truly breached the obligations, it would be appropriate to consider certain takes of WHO on China's performance. Ever since the virus broke out, senior officials of WHO have repeatedly praised China for her willingness to disclose information with the international community[25] and for "buying the world time".[26] This is not to argue that the WHO decides for other States when the IHR has been breached. However, the import of such praises cannot be overlooked, given the stakeholder status of WHO in health matters, in relation to international law.

It is also notable that State responsibility is grounded on a causal link between the alleged breach and the injury. Regarding this, there is no factual basis to argue that the alleged delay of notification is directly the reason other states are injured. Virus knows no borders and whether or not China had reported a week earlier may not have stopped the virus from spreading. One argument that seems available stems from the researchers who posited that an earlier notification may have reduced the virus spread. This is, however, based on projections. Moreover, following the global awareness of the new virus in January 2020, so many countries – especially in Africa – still left their borders largely unchecked. Serious responses only started

[24] C. Yin, "Experts say it's Groundless to Hold China Accountable for COVID-19", available at http://www.chinadaily.com.cn/a/202006/04/WS5ed832f8a310a8b24115ab5a.html (accessed 11 January 2021).

[25] H. Zhengxin, "Suing China for Covid-19 is not Taking International Law Seriously", available at https://news.cgtn.com/news/2020-04-11/Suing-China-for-COVID-19-is-not-taking-international-law-seriously--PAXE13o8GA/index.html (accessed 24 July 2020).

[26] WHO, "Munich Security Conference", available at https://www.who.int/dg/speeches/detail/munich-security-conference (accessed 15 February 2020).

when the virus began to intensify and ravage economies and human lives. In the light of this, would China be responsible for the sluggish responses of individual sovereign countries? It would be difficult to foreground a causal link between a Nigerian citizen's loss of livelihood and China's failure to curb the virus. These are considerations that cast a huge doubt on the causal link between China's alleged breach and injured States.

In the words of Huo Zengxin, "suing China for Covid-19 is not taking international law seriously". This is largely because the uncertainties surrounding virus breakouts are so enormous that fingers may be best kept to oneself, especially given the fact that virus could break out from any country. Even if, somehow, China is culpable under state responsibility, an escape argument seems to abound under the principle of *force majeure* in international law. In the draft articles of State Responsibility, it is provided that *force majeure* shall exclude the wrongfulness of an act of a State's default of an international obligation, in so far as the occurrence is unforeseen or irresistible, thereby creating circumstances that make it impossible for the country to fulfil her obligation.

To this end, China could argue on the unpredictability and the uncertain nature of the virus and the necessity to ascertain whether or not it was truly a cause for alarm before notifying WHO. The argument would be premised on the fact that COVID-19 came with uncertain circumstances that made it impossible to accurately fulfil the 24-hour notification, which would appear excusable given the novelty of this virus.

5.0. CONCLUSION

Assessing China's culpability is largely premised on accurate fact-finding. Currently, facts are controversial, thereby making responsibilities difficult to apportion. However, even if facts are found and China is found to have breached her international obligations, chances are slim that charges would be pressed or demanded by any State, including the US under President Donald Trump. After all, the

2009 H1N1 Pandemic was first identified in the US[27]. Asides this age-long unwillingness among States not to seek damages, reparation discussions are also impeded by the principle of State sovereignty which forms a pillar of international law. However, since the focus of this essay is culpability assessment, China may appear culpable – even if charging the country to court is a long shot. However, effectively establishing this culpability itself would need to be substantiated with more definitive fact-finding.

[27] A.J. Gibbs, J.S. Armstrong, and J.C. Downie, "From Where did the 2009 'Swine-origin' Influenza A Virus (H1N1) Emerge?", (2009) 6(207) *Virology Journal*. Available at https://dx.doi.org/10.1186%2F1743-422X-6-207 (accessed 11 January 2021).