

STATE RESPONSIBILITY FOR COVID-19 IS CHINA LIABLE

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ABSTRACT: The outbreak of Covid-19 is triggering heated debate on state responsibility of the People's Republic of China among scholars and political leaders. In March 2020 World Health Organization declared Covid-19 a pandemic that can pose a threat to the global health. The current research analyzes the state responsibility issues from public international law perspective. Besides the China's accountability on a violation of 2005 International Health Regulations will be discussed in this work.

KEYWORDS: Covid-19; state responsibility; public international law; internationally wrongful act

INTRODUCTION

The Covid-19 pandemic is giving a rise to economic, social and demographic concerns across the globe. Some authorities argue that due to pandemic People's Republic of China (hereinafter PRC) should bear international legal responsibility for violating the international law on infectious diseases. According to the international legal principles of **state responsibility** PRC have an obligation to pay **compensation** and make full **reparation** for harm caused by Covid-19. (Kraska, J., 2020) In the present case state of Missouri sued Chinese government before US federal courts in order to get compensation for damages caused by Covid-19. The current work will analyze main legal issues of this matter under international law.

The question "whether PRC has **breached an international obligation** under international law?" is very complicated. The notion of "breach on international obligation" defines illicit act or omission. (Crawford, J., 2019) In the history of international law there has not been any practice where a state was responsible for the outbreak of pathogens.

INTERNATIONAL LAW ON INFECTIOUS DISEASE

International treaties on infectious disease do not require the states to pay compensation for

damage due to spread of the virus in another country. The International Health Regulations (hereinafter IHR) (2005) does not have a norm that requires a country to pay a **compensation**. In most treaties there is no provision obliging countries to compensate loss caused by violation of the treaty.

Customary international law provides in Article 31 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter IWA) that a state has an obligation to make **full reparation** for damage beget from internationally wrongful act. However, historically this provision of customary international law has not been applicable to the outbreak of the diseases. Therefore, it is better to consider this practice before accusing PRC for Covid-19.

In practice states are not prone to use customary international law for state responsibility in the context of infectious disease. The treaty obligation to immediately report outbreak of disease encompasses complex political and scientific calculations. In current Covid-19 case some countries and leaders alleged that PRC breached the IHR international obligation to inform World Health Organization (hereinafter WHO) about the incident in Wuhan. The transborder threat of spread of pathogens can occur in any country. The catastrophic influence of pandemic in 1918-19 and H1N1 virus in 2009 originated in some countries. As an example, these incidents generated a tacit understanding among states not to file a lawsuit for disease notification matters. **Reciprocal interest** between countries prevent them from seeking reparation in the similar circumstances.

STATE RESPONSIBILITY

Under the Article 1 of the IWA “every internationally wrongful act of a state entails its international responsibility”. Article 2 states that an act is wrongful when the conduct is attributable to that state under international law and constitutes a breach of an international obligation of that state. Attribution of conduct to a state is determined in Article 4 of the IWA, a conduct of state’s organs of government, its agents, person or entity no matter their level attributable to the state.

State responsibility can be divided into two types: (i) responsibility of the state in front of its own citizens; (ii) responsibility of the state in front of extraterritorial citizens of other country where the act or omission of a particular state influenced other one. The commencement of the Covid-19 in PRC raised discontentment across the globe due to its adverse impact on people’s

lives and economic well-being of the states. Therefore, this dissatisfaction among countries enkindle the concerns about PRC's international responsibility for the world pandemic.

The main reason for the state responsibility is resolving a dispute caused by wrongful act of a state by peaceful means and maintain global security. Therefore, it is victim-oriented and the type of the reparation will be defined by the level of the violation of the international obligation and its following up consequences.

One of the forms of reparation is **restitution** which means restoring the situation as it was before international wrongful act occurred. In well-known *Chorzów Factory Case* in 1928, the Permanent Court of International Justice provided that "reparation must, as far as possible, wipe out all the consequences of the illegal act". However, in the scene of the Covid-19 it is impossible to restitute people's lives. Other forms of reparation such as compensation or satisfaction is might be possible. Nevertheless, it is complication to calculate the value of statistical life of the people, economic loss of the countries and following expenditure. It should be noted that the satisfaction should not be applicable to the present case as it certainly applies to non-material damage to a country.

APPLICATION OF CUSTOMARY INTERNATIONAL LAW

Force majeure

Pursuant to the Article 23(1) of the IWA the wrongful act is considered as **force majeure** when the act is occurred under the pressure of unforeseen event or irresistible force. So that, a state was unable to manage it and performing its international obligations were "materially impossible".

In order to invoke force majeure defense, it should be proven that:

- the event was unforeseen or caused by irresistible force;
- was out of the control of the state;
- absence of the state contribution to the event;
- the state did not undertake risk of the incident occurred. (*Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*)

Due to Covid-19 pandemic, many states across the globe announced a state of emergency. At the end of the day it should be noted that outbreak of the Covid-19 was the **force majeure** case pursuant to the international law.

CAN PRC BE SUED FOR DAMAGES CAUSED BY COVID-19?

According to some researchers PRC can be legally responsible for **negligence** and **conducting an internationally wrongful act** as PRC failed to immediately inform WHO after detection of the virus in November 2019. (Kuo, M., 2020) Therefore, it is alleged that PRC breached the obligation under the IHR and International Covenant on Economic, Social and Cultural Rights to report WHO of the incident that poses a public health concern of global level. Moreover, that behavior of mismanaging Covid-19 generated a risk to the global security by violating Chapter VII of the UN Charter 1945.

In the light of the above-mentioned facts, it is stated by some authorities that PRC violated the state responsibility under customary international law by failing to notify WHO. Pursuant to customary international law the states are obliged to make **full reparation** for their internationally wrongful act and pay **compensation** or/and **satisfaction** for material and moral damage. The constitution of the WHO permits to refer a dispute to International Court of Justice. However, it is very challenging and virtually impossible to impose such obligations.

Legal scholars around the world, including leaders like President of the USA Donald Trump, US Secretary of State Mike Pompeo and others raised questions related to the state responsibility of the PRC for the outbreak of the coronavirus. The US state Missouri sued PRC in the US Federal courts for lethality, injury of the people and economic damage caused by the pandemic. However, the principle of **sovereign immunity** does not allow state courts to have a jurisdiction over independent states. (Creutz, K.,2020)

THE OBLIGATION OF THE STATES TO REPORT THE DATA ABOUT INFECTIOUS DISEASE TO WHO

In order to find a state responsible for something, first the act or omission of the state should be found as a breach of binding international obligation. In current case, the behavior of the PRC must violate the regulations of infectious diseases. Some authorities proposed certain grounds to accuse PRC for Covid-19. (Dias, S., & Coco, A., 2020) These grounds are “**duty to share information**” established by IHR, “**no harm rule**” of customary international law, “**right to health**” under international human rights law. (Creutz, K.,2020)

The international treaty 2005 revised IHR imposes obligations to states in order to prevent and control of infectious diseases. IHR obligations also binding on PRC. Under the Article 5 of the IHR, there is an obligation that requires all state parties to maintain “the capacity to detect,

assess, notify and report events”. According to the Article 6 of the IHR “Each State Party shall notify WHO, by the most efficient means of communications available... 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”. Besides, the state is also obliged to “continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event” which includes laboratory findings, number of infected people, death toll, implemented measures and so on. Further Article 7 provides that the state where a public health emergency incident occurred is obliged to provide all transparent information about the happening situation within its territory.

The IHR does not constitute any sanctions for the breach of international obligation. However, the IWA regulates all issues related to state responsibility. The main reason why there is insufficiency of *lex specialis* in the context of infectious disease explained by the tacit understanding among countries on baffling political, scientific and public health related problems.

The Covid-19 outbreak also constitutes the “a public health emergency” event that is subject to the obligations imposed by IHR. The question here is whether PRC reported the virus incident to WHO within 24 hours through effective communication methods. The first official incident of “pneumonia of unknown cause” was recorded on 8 December 2019 by Wuhan health authorities. (Davidson, H., 2020) PRC government declared that the first case was recorded in the “late December”. (*PRC publishes timeline on COVID-19*) According to the available data on 31 December 2019 PRC informed WHO PRC Country Office about incident and kept updating latest situation since then. (Henderson, M., Mendoza, A., et al., 2020) It may seem that PRC failed to report the incident within 24 hours under the IHR, but the international community should carefully scrutinize the sequence of the main events before accusing for the breach of international obligation. The careful evaluation of the facts can assist to make credible conclusions. However, one should not forget that the outbreak of the invisible virus can occur in any country and it is very sophisticated to deal with it at once.

CONCLUSION

In fact, in the world almost all states are suffering from the outbreak of the coronavirus. Throughout the history the state responsibility has not been applied to a state for the outbreak

of epidemics or pandemics. The spread of the virus can virtually happen in any country irrespective of their prevention actions, as it is unpredictable and irresistible event (*force majeure*). Therefore, employing the state responsibility against pathogens is inappropriate. Basing on the scientific facts available at present, the new type of the coronavirus transmitted naturally to a human from wild animals in Wuhan Seafood Market. Moreover, genome of the coronavirus explicitly depicted that the virus naturally occurred rather than manmade. In the light of these evidences, PRC cannot be held legally responsible for Covid-19 outbreak and the principle of sovereign immunity of the states will not allow state of Missouri to sue PRC government in the state court.

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