

## IN CHINA'S THREE LINE OF DEFENCE: ADDRESSING THE CORONAVIRUS CLAIMS AGAINST CHINA UNDER INTERNATIONAL LAW

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### Abstract

*The surge of cases of the Coronavirus pandemic have resulted in a rippling impact towards States across the world, increasing mortality rates and causing economic collapse. There have been discussions on whether China, as the epicenter of the virus outbreak, can be held liable for its negligence in domestically containing the virus and as a result, allowing its spread to traverse so viciously across international borders. This paper will identify the many factors that contribute to the spread of the pandemic. It will then highlight the legal challenges in establishing a direct, causal link between China and the spread of the virus for China to be held solely responsible under the regime of international responsibility.*

### Intisari

*Melonjaknya kasus virus corona telah menyebabkan runtuhnya perekonomian global dan meningkatnya angka kematian pada negara-negara di seluruh dunia. Hal ini menyebabkan terjadinya banyak diskusi mengenai tuntutan kepada negara China atas kelalaiannya dalam menangani kasus Corona secara domestik, yang diduga telah mengakibatkan menyebarnya virus secara masif ke banyak negara. Artikel ini akan menitikberatkan pada pembahasan mengenai pembuktian hubungan kausal antara perilaku China dan kontribusinya terhadap penyebaran virus Corona dan juga tantangan hukum lain yang timbul dalam menuntut pertanggungjawaban negara China di bawah ranah hukum internasional.*

**Keyword:** *State responsibility, pandemic, Coronavirus, China, shared responsibility, Monetary Gold principle.*

**Kata Kunci:** *tanggung jawab negara, pandemi, Coronavirus, China, tanggung jawab bersama, prinsip Monetary Gold.*

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## A. Introduction

On December 31, 2019 the World Health Organization [“WHO”] was relayed news regarding a potentially deadly virus of an unknown etiology by government authorities in Wuhan, China.<sup>3</sup> The virus, now broadly known as the Coronavirus, was officially labelled by the WHO as a pandemic in early 2020, after multiple countries witnessed staggering amounts of newly infected persons. At the time of writing, over twenty million people have been infected globally, and more than seven hundred thousand in numerous countries have died.<sup>4</sup>

The severity of the situation has caused legal scholars and politicians to engage in discourse regarding individual State responsibility over a global pandemic. Perhaps one of the most widely heard claims has been voiced by US President Donald Trump, who called for the responsibility of the Chinese government for the Coronavirus pandemic, although the specific type of responsibility has never been detailed.<sup>5</sup> US Senator Lindsey Graham has also stated that his committee will push forward on the amendment of the 1976 Foreign Sovereign Immunities Act, the law that protects foreign countries from lawsuits in US courts.<sup>6</sup> More recently, the European Union has also followed suit and publicly demanded for China’s responsibility.<sup>7</sup>

Furthermore, in the pursuit of responsibility, a number of US states, individuals, and small businesses have also filed a total of 14 lawsuits within the US,<sup>8</sup> and two from other States; one submitted by a group of Nigerian lawyers<sup>9</sup> and another by Argentinean lawyers.<sup>10</sup> Though the trend of submitting lawsuits in national courts have been increasing, legal experts such as Mary Ellen O’Connell, a professor from Notre Dame Law School, have stated that little success were to be expected out of the lawsuits, saying that the “cases filed in US courts need to overcome immunity and prove causation” which is not a simple task.<sup>11</sup> Thus, with more challenges arising with regard to domestic means, the discussion then shifted towards a more plausible avenue; international adjudication.

Under international law, States are provided with more diverse routes. States can choose to undertake dispute mechanisms provided by Bilateral Investment Treaties, international tribunals such as the International Tribunal for the Law of the Sea, or even recourse to the World Trade Organization to initiate proceedings. One judicial organ, however, seems to be favored by legal scholars above all others for this particular case. The International Court of Justice [“ICJ”] appears to best facilitate the adjudication against China.<sup>12</sup> V.O Mazzuoli, one of the many scholars undertaking research on said avenue, has recently found the jurisdictional basis applicable to

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<sup>3</sup> World Health Organization. (2020, January 5). Pneumonia of unknown cause – China.

<sup>4</sup> World Health Organization. (n.d.). WHO Coronavirus Disease (COVID-19) Dashboard.

<sup>5</sup> Schwartz, M. S. (2020, April 18). Trump Warns Of “Consequences” If China Was “Knowingly Responsible” For Outbreak. National Public Radio.

<sup>6</sup> Flatley, D., & Woodhouse, S. (2020, June 24). Graham Backs Letting U.S. Citizens Sue China Over Coronavirus. Bloomberg.

<sup>7</sup> Nicolás, E. S. (2020, June 11). EU: China, Russia responsible for Covid-19 disinformation. EU Observer.

<sup>8</sup> Mirski, S., & Anderson, S. (2020, July 10). What’s in the Many Coronavirus-Related Lawsuits Against China? Lawfare.

<sup>9</sup> Nigerians sue China for \$200B over coronavirus pandemic. (2020, July 7). Anadolu Agency.

<sup>10</sup> 李.缘. (2020, April 29). 全球追责升级 阿根廷律师刑事起诉中共 - 大纪元. Epoch Times.

<sup>11</sup> University of Notre Dame. Lawsuits against China, WHO are not the way forward, Notre Dame expert says. (2020, May 27). University of Notre Dame.

<sup>12</sup> Tzeng, P. (2020, April 2). Taking China to the International Court of Justice over COVID-19. EJIL:Talk.

compel a case towards China, which is a clause conferring the ICJ's jurisdiction under Article 75 of the WHO Constitution.<sup>13</sup>

Additionally, under the framework of State responsibility provided by the Articles on Responsibility of States for Internationally Wrongful Acts [“**ARSIWA**”], potential remedies are offered to parties injured by the “wrongful acts” of a State.<sup>14</sup> In this case, as a consequence of China's supposed inaction and negligence during the early stages of the outbreak, which allegedly allowed the global spread of the Coronavirus, States can claim for reparations for the monetary damages that have been incurred because of the Coronavirus.

However, while the discussion regarding the potential claims against China has been detailed and intense, there has been little to no scholarly work regarding the potential legal defences to be brought by China in such events. Accordingly, this article will elaborate on the potential responses to the claims brought against China, utilizing the characterization of obligation in international law and the application of the Monetary Gold principle. In addition, it will also demonstrate the application of the guiding principles of shared responsibility and how it can enhance the enforcement of international cooperation as it fills in the gaps of traditional State responsibility by providing an adequate framework to assess States' liabilities in the unprecedented event of a pandemic.

## **B. Obligation of Conduct**

As a member State to the WHO Constitution and the 2005 International Health Regulations [“**IHR**”], China has the positive obligation to “prevent, protect against, control and provide a public health response to the international spread of disease.”<sup>15</sup> This obligation manifests itself in many forms, one of which is regulated under Articles 6 and 7 of the IHR, where it provides that each member State is required to assess events occurring within their territory and provide timely, accurate and sufficiently detailed public health information regarding the event to the WHO.<sup>16</sup>

This specific article has been utilized as a basis in several scholarship, as the main obligation by which China has been argued to have breached, meaning that China has supposedly conducted an internationally wrongful act and can be sued in the ICJ. The arguments of this claim were first developed as a response to a news article which opined that China had already known of the deadly virus since November, and deliberately withheld information from the WHO, a statement which has not yet been verified for its accuracy until this day.<sup>17</sup>

Upon deeper reflection of the obligations, Article 6 of the IHR provides that each State party shall notify the WHO “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” and “continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event.” The implementation of this specific article after its 2005 alteration has only been done once, and that is during the outbreak of the H1N1 influenza pandemic in 2009. During that time, Mexican authorities began to receive reports of an influenza-like illness in March 2009, however, it was not until mid-April that they began to seek advice from the WHO Pan-

<sup>13</sup> Mazzuoli, V. de Oliviera. (2020b). Is It Possible to Hold China Responsible in the Case of COVID-19? SSRN Electronic Journal, 1–5.

<sup>14</sup> International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts. (2001). UN Doc A/56/83. [“**ARSIWA**”].

<sup>15</sup> World Health Assembly. International Health Regulations 2005. (2006). [“**IHR**”]. Art 2.

<sup>16</sup> IHR, Arts 6 & 7.

<sup>17</sup> Ma, J. (2020, March 14). Coronavirus: China's first confirmed Covid-19 case traced back to November 17. South China Morning Post.

American branch and reported the virus.<sup>18</sup> The WHO later declared the outbreak as a pandemic on June 11, 2009.

Although Mexico's behaviour was not timely, there were never any allegations set out towards the Mexican authorities by the international community for any tardiness in its communication regarding a potential pandemic to the WHO, even though many States were impacted. This was potentially because the obligations set out by Article 6 of the IHR, were understood as an obligation of conduct, rather than an obligation of result or of consequence. Meaning that it requires member States "to employ all means reasonably available to them, so as to prevent [an event] so far as possible"<sup>19</sup> as an act of due diligence in preventing any further outbreaks, and not to obtain a "specific determined result" in completely eradicating or isolating the virus.<sup>20</sup> Moreover, given the nature of viruses, which are constantly mutating and spreading, irrespective of borders or nations, the expectation for States to analyze, confirm, and report evidence of potential PHEICs in 24 hours is simply unfeasible, much less giving responsibility towards States to contain such indiscernible viruses using its own capacity. This furthers the argument that the obligations imposed by the IHR must be obligations of conduct and not of result.

Accordingly, China could also argue that they can not be held liable for responsibility for the Coronavirus pandemic, as based on existing knowledge, China had already submitted reports to the WHO China Country Office on December 31, 2019 when the Chinese government authorities identified the new type of Coronavirus.<sup>21</sup> China had also kept communicating on a daily basis with the WHO and submitted reports of new Coronavirus cases, including the 41 newly diagnosed cases which took place in the city of Wuhan in early January.<sup>22</sup> Moreover, China had also shut Wuhan's borders on the 23rd of January,<sup>23</sup> despite having no recommendations from the WHO regarding the matter, which proves China's willingness to cooperate and take all necessary precautions to isolate the virus in preventing other potential Coronavirus outbreaks outside of Wuhan.

### **C. Application to the Monetary Gold Principle**

While States are adamant that China should be responsible for the global outbreak, there are many factors other than China's response that have played into the spread of the virus, such as other States' missteps and inactions. This means that their conducts have to be taken into consideration in attributing the legal injury to China. However, in accordance with the indispensable third party rule, the ICJ will not proceed with claims brought against a State if it "implicates another State that has not consented to the Court's jurisdiction,"<sup>24</sup> with the said State's conduct constituting the very subject-matter of the proceedings before the Court.<sup>25</sup>

This principle is illustrated in the renowned *Monetary Gold Removed from Rome in 1943* case, the ICJ was asked to decide to which State, either Italy or the United Kingdom, a quantity of monetary

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<sup>18</sup> Smith, G. J. D., et al. (2009). Origins and evolutionary genomics of the 2009 swine-origin H1N1 influenza A epidemic. *Nature*, 459(7250), 1122–1125.

<sup>19</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro). (2007) Merits. I.C.J Rep. 43, para. 430.

<sup>20</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. (2010). Advisory Opinion, I.T.L.O.S. Case No. 17, para. 110.

<sup>21</sup> Wuhan Municipal Health Commission (ed.). (2019, December 31). "武汉市卫健委关于当前我市肺炎疫情的情况通报".

<sup>22</sup> *Ibid.*

<sup>23</sup> World Health Organization. (2020, January 23). Novel Coronavirus (2019-nCoV) Situation Report (No. 3).

<sup>24</sup> Tams, C., Berster, L., & Schiffbauer, B. (2014). *Convention on the Prevention and Punishment of the Crime of Genocide*. Munich, Germany: C.H. Beck/Nomos/Hart, p. 306.

<sup>25</sup> *Ibid.*

gold removed from Rome by Germany in 1943 should be delivered to.<sup>26</sup> The Court concluded that in order to decide on this submission, it would have to determine whether Albania had committed any wrongful act against Italy and whether there was any compensation that would be needed to be paid to Italy.<sup>27</sup> Because Albania's legal interests form the "subject matter" of the claim, Albania would be needed to be part of the proceedings and thus in that case, the Court would not be able to decide on such legal issue without the inclusion of Albania.<sup>28</sup> The Court therefore declares itself unable to rule on a question which may affect Albania, as a third State not part of the proceedings, and specifically, that it cannot rule on the rights and obligations of Albania.<sup>29</sup>

Parallel to this case, the Court would not be able to rule on China's liability because in order for the Court to invoke State responsibility and grant reparation, the Court would have to make further assessments on other States that had potentially taken part in failing to take necessary measures to prevent the harmful outcome.

To understand the Court's inability to adjudicate such cases would be to answer the question of reparation in this context when trying to establish State responsibility. If the US, for instance, were to institute this proceeding against China, the US would have to establish that there is a failure to act on its international obligations by the government of China and how this omission constitutes a breach of China's international obligations under international law pursuant to ARSIWA.<sup>30</sup>

It is then vital to identify the issue of causality where the injury to the US must have been caused by the internationally wrongful act of China toward the US.<sup>31</sup> So even if there exists an obligation of consequence, which would be very unlikely, the US has to prove that the casualties or infected persons in other countries have a direct causal relationship with China. This threshold of causality needed to claim for reparation is illustrated in the *Costa Rica v. Nicaragua* case, where there has to be a "direct and causal nexus between the wrongful act and the injury suffered."<sup>32</sup> Therefore, the Court must not only determine the existence of any damage, but also whether there exists a direct and certain causal link between such damage and China's activities.<sup>33</sup>

There are two elements to identify a sufficient causal link between the damage and China's omission,<sup>34</sup> which are first, a factual causation and second, a legal causation. If both accumulative elements are fulfilled, China would be obliged to make reparations for the injury caused by the internationally wrongful act.<sup>35</sup>

### **1. Factual Causation**

Because the basis of China's responsibility derives from its failure to respond immediately towards the virus outbreak, failing to act on its legal obligation, suggesting that the conduct has resulted in

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<sup>26</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France)*. (1954). Judgment, Preliminary Question, I.C.J Rep. 19, p. 6.

<sup>27</sup> *Ibid.*, pp. 16-17.

<sup>28</sup> International Court of Justice. (2017, October 27). Speech by H.E. Mr. Ronny Abraham, President of the International Court of Justice, before the Sixth Committee of the General Assembly, p. 6.

<sup>29</sup> *Ibid.*, p. 5

<sup>30</sup> ARSIWA, Art. 2.

<sup>31</sup> Gattini, A. (2007). Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. *European Journal of International Law*, 18(4), 695–713, p. 708.

<sup>32</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. (2018). Judgment, Question of Compensation, I.C.J Rep. 15, p. 5.

<sup>33</sup> *Ibid.*, p. 4.

<sup>34</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia*. (2015). Award, I.C.S.I.D Case No. ARB/06/2, para. 382.

<sup>35</sup> ARSIWA, Art. 31.

an omission. The law sees omissions as a potential source of responsibility.<sup>36</sup> The Necessary Element of a Sufficient Set [“**NESS**”] offers a test nuanced for such cases of omission because it shifts its focus not on whether the wrongful act was *the* cause of the harmful outcome, but whether it was a cause of said outcome.<sup>37</sup>

The injured State would need to prove that the failure to act on China’s obligations under the 2005 IHR and/or the WHO Constitution is one of the several causes, if not the underlying cause,<sup>38</sup> that led to the spread of the Coronavirus and injured the State in whichever way the State claims for—such as the loss of lives of their people<sup>39</sup> or economic repercussions.<sup>40</sup> For instance, the US would have to prove that the Coronavirus spread in its territory due China’s lack of initiative to notify the WHO, and thus delayed warnings for other States to limit or even prohibit international travel as part of their immediate response. The US could argue that this causal link has been fulfilled, supported by reports stating that the beginning of the spread of the Coronavirus began with a traveller who arrived in the region from Wuhan on January 15, 2020 which would be around the time that the US received its first reports of victims of the Coronavirus.<sup>41</sup>

## 2. *Legal Causation*

The second element operates to limit liability, imposing parameters of the direct or proximate cause test.<sup>42</sup> This test would only be fulfilled if the injury inflicted was proximately caused by China’s omission,<sup>43</sup> rendering China liable whether the act operated directly by China or through an indirect channel.<sup>44</sup> However, where the causal connection between the act and the loss is broken, tangled, and remote that it cannot be traced, China would not be deemed liable.<sup>45</sup>

This prong of the causal link may be an even harder challenge to prove due to the many factors involved in the spread of the virus in an injured State that may not necessarily be as a proximate consequence of China’s wrongful act, but the conduct or omission of many different States too remote to be traced back to China. The people in the US may, for instance, be affected by people that travelled from another State besides China and it was a result of said State’s non-compliance of international health laws and regulations that caused the damage to the US. In this way, China would not necessarily be the one responsible for the loss of lives in the US. Because of the different factors involved, the Court would not be able to rule on the claim as the application of the Monetary Gold principle would hinder the assessment of a causal link between the damage and the acts of other States besides China.

## D. Multiplicity of International Actors

With a huge transboundary issue such as a pandemic, the abovementioned “other factors” that have affected the spread of the Coronavirus would mean considering multiple international actors’ involvement at different stages of the chain reaction. International actors that have obligations

<sup>36</sup> Plakocefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. *European Journal of International Law*, 26(2), 471–492, p. 477.

<sup>37</sup> K. Joachim and S. Tania, (2020). Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Content, *Indian Journal of Arbitration Law* 8(2), 83–86, p. 87.

<sup>38</sup> Elettronica Sicula S.p.A. (United States of America v. Italy). (1989). Judgment, I.C.J. Rep. 15, p. 62.

<sup>39</sup> S.S. Lotus, (France v. Turkey). (1927). Judgment, P.C.I.J. Series A No.10, p. 5

<sup>40</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). (2005) Judgment, Merits, I.C.J. Rep. 168, para. 181.

<sup>41</sup> Baker, M. (2020, June 1). When Did the Coronavirus Arrive in the U.S.? Here’s a Review of the Evidence. *The New York Times*.

<sup>42</sup> Joachim and Tania, *supra* note 37, p. 88.

<sup>43</sup> Plakocefalos, *supra* note 36, p. 488.

<sup>44</sup> War-Risk Insurance Premium Claims, (United States v. Germany). (1923). Award, R.I.A.A 33, p. 55.

<sup>45</sup> *Ibid*.

towards other subjects of international law would not only be limited to only States, but include international organizations as well, and in this context, it is the WHO.

### **1. Other States**

Recent findings have suggested that the Coronavirus was already circulating in several other countries apart from China during the initial 2019 outbreaks, such as in France,<sup>46</sup> Italy,<sup>47</sup> and Brazil.<sup>48</sup> It would be unjust to burden China with the sole responsibility of not containing the virus, especially considering the fact that only China had notified the WHO of the emergence of a potentially lethal PHEIC in early January and closed off the borders of Wuhan. Other States that have been alleged to have the virus within their borders at that exact same time should have taken precautionary measures to protect their own territories. Therefore, another defence which could be utilized would be the attribution of the injuries suffered by the applicant to its own failure to act in a timely manner.

In February, the WHO urged all States worldwide that “uncompromising and rigorous measures such as extremely proactive surveillance to immediately detect cases, very rapid diagnosis and immediate case isolation, rigorous tracking and quarantine of close contacts, and an exceptionally high degree of population understanding and acceptance” were the only measures sufficient to fight off the human-to-human transmission.<sup>49</sup>

This should have prompted States to quickly adapt in the face of the emerging pandemic. However, very few States have taken this warning seriously, wary of the significant economic impact it may impose on their respective countries. For instance, the Indonesian Government did not acknowledge the Coronavirus to exist within Indonesian borders, arguing that the virus could not survive in tropical climates, until early March when it finally admitted that the government had withheld information to avoid panic and decided to act accordingly to respond to the disease.<sup>50</sup>

The reason for this was largely due to the concern of halting trade, investment, and tourism.<sup>51</sup> Economic priority was a significant factor of denial of the Coronavirus in its early stages amongst developed countries as well. This is evident in Italy where instead of declaring state emergency lockdowns at the earliest opportunity, the response to the warnings from scientists were politicians making gestures such as engaging in public handshaking in Milan in order to convey the message that the economy should not be compromised.<sup>52</sup>

In the end, States became subjected to the consequences of their own inactions due to their own failure to grasp the severity of the circumstance.

### **2. International Organizations**

States are not the only international actors to have been accused of contributing to the vicious spread of the disease. The WHO has been in the center of these allegations due to its negligence in not investigating into serious concerns about the nature of the virus. The WHO should be held

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<sup>46</sup> Czaja, M. (2020, May 7). Coronavirus : un premier cas dès le mois de novembre en Alsace. France Bleu.

<sup>47</sup> Kelland, K. (2020, June 19). Italy sewage study suggests COVID-19 was there in December 2019. Reuters.

<sup>48</sup> Fongaro, G., et al. (2020). SARS-CoV-2 in human sewage in Santa Catalina, Brazil, November 2019. MedRxiv, 1–9.

<sup>49</sup> World Health Organization. (2020, February 24). Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19).

<sup>50</sup> Post, T. J. (2020, April 9). Indonesia was in denial over coronavirus. Now it may be facing a looming disaster. The Jakarta Post.

<sup>51</sup> *Ibid.*

<sup>52</sup> Pisano, G. P., Sadun, R., & Sadini, M. (2020, August 14). Lessons from Italy’s Response to Coronavirus. Harvard Business Review.

internationally responsible for violating its obligations. As discussed in the *Reparations* case,<sup>53</sup> the capacity for an international organization to carry out its rights and obligations was due to its international personality conferred from its members. Similarly, there exists in the WHO Constitution an explicit referral to the legal capacity and privileges and immunities<sup>54</sup> to be determined by the WHO with consultation from the Secretary-General of the UN and concluded between the State members of the WHO.<sup>55</sup>

It is argued by Mark Eccleston-Turner and Scarlett McArdle that the WHO has the obligation to declare a PHEIC in a timely manner due to the obligatory “shall” used in the stipulation of the IHR. A reference was made to the 2014 Ebola epidemic, where the WHO did not declare the epidemic as a PHEIC until a little bit over six weeks after the warning came from Medecins Sans Frontieres that the epidemic was a situation that was “out of control.”<sup>56</sup>

Similarly, the WHO only declared the Coronavirus as a PHEIC on the 30th of January 2020.<sup>57</sup> This was a month after Chinese officials provided information to the WHO on the “viral pneumonia of unknown cause” in Wuhan not possessing the character of being a human-to-human transmitted disease. Although the WHO has reacted faster with Coronavirus than it did with Ebola, it still has violated its legal obligation to provide necessary aid upon the request or acceptance of Governments<sup>58</sup> when WHO disregarded alerts from Taiwanese health officials at the end of December about the risk of human-to-human transmission of the new virus.<sup>59</sup>

When Taiwan wrote to the WHO to request more information about the disease’s potential to pass between humans, Taiwan did not receive any response regarding the concern nor did the WHO act to share information with other member States.<sup>60</sup> The WHO, under its Constitution, is guided by the principle that in order to adhere to its objective of attaining the highest possible level of health by all people,<sup>61</sup> it should communicate all public health information to other State parties to enable them to appropriately respond to a public health risk.<sup>62</sup> Although Taiwan is not a member State to the WHO,<sup>63</sup> information given by Taiwan regarding the possibility of the Coronavirus being a human-to-human transmitted disease should be considered, investigated, and alerted to all other State parties provided the severity of the repercussions should it be provided to be true. Anything outside the confines of this obligation would be a violation of international law.

### **E. Shared Responsibility**

Independent responsibility sets the limitation of attaining a just outcome by holding responsible the respondent parties involved.<sup>64</sup> Notwithstanding the ICJ’s inability to proceed with the case due to the application of the Monetary Gold principle, the Court formulated an exception to this principle which stipulates the concurrent or joint responsibility for a wrongful act by different States, or even

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<sup>53</sup> *Reparations for Injuries Suffered in the Service of the United Nations*. (1949). Advisory Opinion, I.C.J Rep. 174, p. 179.

<sup>54</sup> Eccleston-Turner, M., & McArdle, S. (2020). *The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak*. *Infectious Diseases in the New Millennium*, 89–109, p. 95.

<sup>55</sup> World Health Assembly. *Constitution of the World Health Organization*. (1946). [“WHO Constitution”]. Art. 68.

<sup>56</sup> Eccleston, *supra* note 54.

<sup>57</sup> World Health Organization. (2020, April 27). Archived: WHO Timeline - COVID-19.

<sup>58</sup> WHO Constitution, Art. 2.

<sup>59</sup> Riordan, P. (2020, March 20). Taiwan says WHO failed to act on coronavirus transmission warning. *Financial Times*.

<sup>60</sup> Chan, W. (2020, April 7). The WHO Ignores Taiwan. *The World Pays the Price*. *The Nation*.

<sup>61</sup> WHO Constitution, Art. 1.

<sup>62</sup> *Ibid.*, Art. 11.

<sup>63</sup> Chen, Y. J., & Cohen, J. A. (2020, April 9). Why Does the WHO Exclude Taiwan? *Council on Foreign Relations*.

<sup>64</sup> Nollkaemper, A. (2018). The Duality of Shared Responsibility. *Contemporary Politics*, 24(5), 524–544, p.527.



other actors of international law, does not debar the exercise of the ICJ's jurisdiction under the ambit of shared responsibility.

This claim is further substantiated by the Guiding Principles on Shared Responsibility in International Law [**"Guiding Principles"**], which is considered to be "an interpretative nature" of existing rules of international responsibility reflected in ARSIWA and the Articles on the Responsibility of International Organizations [**"ARIO"**], as the scope of the Guiding Principles applies for both States and international organizations [**"international persons"**].<sup>65</sup> They follow the definition with the rules of the law of international responsibility of ARSIWA and ARIO. Although it is still quite unclear the role of the Guiding Principles due to its novelty, the instrument has been intended to build on the existing rules of the law of international responsibility.<sup>66</sup> The content of the Guiding Principles will give insight of how to impose responsibility on multiple actors before the ICJ.

However, the Guiding Principles only apply in this context when international persons contribute to an indivisible injury of another person.<sup>67</sup> This means that that the injury must be as a result of two or more necessary and sufficient causes by different international persons, otherwise it would not invoke the Guiding Principles. In this case, there is invocation of Principle 4 of the Guiding Principles in which the conducts of international persons result from a situation in which international persons separately commit the internationally wrongful acts, regardless of the fact that the violations were towards different obligations.<sup>68</sup> To pinpoint the conducts that trigger international responsibility, and ask for reparation, the causal test would need to prove the type of contribution that is present in this case.

As opposed to individual contribution where there is one conduct that can be attributable to multiple international persons, and concurrent contributions where each respective conduct is enough to cause the injury,<sup>69</sup> there exists cumulative contributions in this case. This means that the injury is contingent to take place on multiple accumulated internationally wrongful acts. The Arbitral Tribunal in the *Naulilaa* case, which follows Portugal claiming compensation for damage after a German offensive, held that cumulative contributions exist due to the German's offensive that made Portugal redirect its forces as it would not have occurred independently of the aggression.<sup>70</sup>

Similar to this case, China's failure to release information more promptly and accurately would not be sufficient to cause the adverse spread of the disease had the WHO fail to not investigate and declare PHEIC based on Taiwan's warnings, or if other countries decided to exercise a stricter measure at the earlier stages of the outbreak.<sup>71</sup> The failure of many international persons to comply with obligations under the WHO Constitution and/or the IHR can result in the injury.<sup>72</sup> Even though these international actors did not orchestrate these conducts together, their independent acts combined still enabled the global spread of the Coronavirus, and thus creating a chain of events that mutually influence each other's response towards the virus.

This is important to note because arguably, in order for an injured party to receive reparation by the respondents, there needs to be some sliver of divisibility to an extent where a causal link will be strong enough to attribute the damage to the multiple internationally wrongful acts of international persons. This is exemplified in the aforementioned *Naulilaa* case above, where

<sup>65</sup> United Nations, Guiding Principles on Shared Responsibility in International Law. (2019), [**"Guiding Principles"**], Principle 1.

<sup>66</sup> Nollkaemper, A., d'Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N., & Plakokefalos, I. (2020). Guiding Principles on Shared Responsibility in International Law. *European Journal of International Law*, 31(1), 15–72, p.21.

<sup>67</sup> Guiding Principles, Principle 2

<sup>68</sup> Nollkaemper, *supra* note 66, p.34.

<sup>69</sup> *Ibid.*, p. 25.

<sup>70</sup> *Ibid.*, p. 27; The *Naulilaa* Case, (Portugal v. F.R.G.). (1928). Judgment, 1 R.I.A.A 11.

<sup>71</sup> Rocha, R. (2020, June 22). What countries did right and wrong in responding to the pandemic; Oxford University. (2020, March 18). Coronavirus Government Response Tracker. Blavatnik School of Government.

<sup>72</sup> Nollkaemper, *supra* note 66, p.26.

although it is a circumstance of cumulative contribution, it is still identifiable which cause affected Portugal to redirect its forces and the clear cause and effect between German's act of aggression and Portugal's command of forces.

That is not the case here. Where indivisibility is so prominent in a damage that the entire world is facing, and thus connected to many States' conducts, including those of their nationals, it would be impossible to proceed with this case now, or anytime in the near future, especially where the nature of transmission and effects of the Coronavirus are still yet to be certain or founded.

### **Conclusion**

In sum, the challenge of bringing China before the ICJ to take responsibility for the Coronavirus pandemic would be an ambitious effort for *any* State to take on. Besides the applicant's burden of having to prove that China's behaviour towards the initial outbreak was not enough, the unprecedented situation of the case being intricately bound to many variables under the WHO Constitution and the IHR, in which implementation and enforcement have never before been formally questioned, renders the case challenging for the Court to determine whether there is enough evidence that bears direct and causal link to the damage suffered by potential applicants for reparations to be granted.

Furthermore, applicants also have to demonstrate that the injuries suffered were caused *independently* by the acts committed by China—a challenging task given the far-reaching effects of the Coronavirus and the likelihood of other international persons to have contributed to the injuries. Were there to be found even a minor link that the injuries suffered by the applicant were caused or affected by the conducts of other States not part of the proceeding, the Court would surely renounce the case in accordance with the Monetary Gold principle. Lastly, even if the Court was willing to apply the novel concept of shared responsibility, it would still be difficult to pinpoint which State or international actor has breached which obligation, and the extent of their responsibility for a collective damage.

## BIBLIOGRAPHY

### Books and Journal Articles

Eccleston-Turner, M., & McArdle, S. (2020). *The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak*. *Infectious Diseases in the New Millennium*. Springer. [https://doi.org/10.1007/978-3-030-39819-4\\_5](https://doi.org/10.1007/978-3-030-39819-4_5).

Fongaro, G., et al. (2020). SARS-CoV-2 in human sewage in Santa Catalina, Brazil, November 2019. *MedRxiv*, <https://doi.org/10.1101/2020.06.26.20140731>.

Gattini, A. (2007). Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. *European Journal of International Law*, 18(4), <https://doi.org/10.1093/ejil/chm038>.

K. Joachim and S. Tania, (2020). Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Content, *Indian Journal of Arbitration Law* 8(2). <https://www.lalive.law/wp-content/uploads/2020/04/IJAL-vol-8-No-2-2020-Causation-in-International-Investment-Law.pdf>.

Mazzuoli, V. de Oliviera. (2020). International Responsibility of States for Transnational Epidemics and Pandemics: The Case of COVID-19 from the People's Republic of China. *Revista de Direito Civil Contemporâneo*, <https://doi.org/10.2139/ssrn.3584944>.

Mazzuoli, V. de Oliviera. (2020b). Is It Possible to Hold China Responsible in the Case of COVID-19? *SSRN Electronic Journal*, <https://doi.org/10.2139/ssrn.3597799>.

Nollkaemper, A. (2018). The Duality of Shared Responsibility. *Journal of Contemporary Politics*, 24(5), <https://doi.org/10.1080/13569775.2018.1452107>.

Nollkaemper, A., d'Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N., & Plakokefalos, I. (2020). Guiding Principles on Shared Responsibility in International Law. *European Journal of International Law*, 31(1). <https://doi.org/10.1093/ejil/chaa017>.

Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. *European Journal of International Law*, 26(2), 471–492. <https://doi.org/10.1093/ejil/chv023>.

Smith, G. J. D., et al. (2009). Origins and evolutionary genomics of the 2009 swine-origin H1N1 influenza A epidemic. *Nature*, 459(7250). <https://doi.org/10.1038/nature08182>.

Tams, C., Berster, L., & Schiffbauer, B. (2014). *Convention on the Prevention and Punishment of the Crime of Genocide*. Munich: C.H. Beck/Nomos/Hart. <https://doi.org/10.5771/9783845258911>.

### **Conventions**

International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

World Health Assembly. Constitution of the World Health Organization. (1946).

World Health Assembly. International Health Regulations 2005 (2006).

### **UN Documents**

United Nations, Guiding Principles on Shared Responsibility in International Law. (2019). Retrieved August 10, 2020 from [https://www.un.org/en/ga/sixth/74/pdfs/1\\_november\\_2019\\_Guiding\\_Principles.pdf](https://www.un.org/en/ga/sixth/74/pdfs/1_november_2019_Guiding_Principles.pdf).

### **Jurisprudences**

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro). (2007). Merits, I.C.J Rep. 43.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). (2005) Judgement, Merits, I.C.J Rep. 168.

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). (2018). Judgment, Question of Compensation, I.C.J Rep. 15.

Elektronika Sicula S.p.A. (United States of America v. Italy). (1989). Judgment, I.C.J Rep. 15.

Monetary Gold Removed from Rome in 1943 (Italy v. France). (1954). Judgment, Preliminary Question, I.C.J Rep. 19.

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia. (2015). Award, I.C.S.I.D Case No. ARB/06/2.

Reparations for Injuries Suffered in the Service of the United Nations. (1949). Advisory Opinion, I.C.J Rep. 174.

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. (2010). Advisory Opinion, I.T.L.O.S. Case No. 17.

S.S. Lotus, (France v. Turkey). (1927). Judgment, P.C.I.J. Series A No.10.

The Naulilaa Case, (Portugal v. F.R.G.). (1928). Judgment, 1 R.I.A.A 11.

War-Risk Insurance Premium Claims, (United States v. Germany). (1923). Award, R.I.A.A 33.

### **WHO Documents**

World Health Organization. (2020, April 27). Archived: WHO Timeline - COVID-19.

World Health Organization. (2020, February). Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19) (16-24 February 2020).

World Health Organization. (2020, January 5). Pneumonia of unknown cause – China.

World Health Organization. (2020, January 23). Novel Coronavirus (2019-nCoV) Situation Report (No. 3).

World Health Organization. (n.d.). WHO Coronavirus Disease (COVID-19) Dashboard.

### **Internet Sources**

李.缘. (2020, April 29). 全球追责升级 阿根廷律师刑事起诉中共 - 大纪元. Epoch Times. <https://www.epochtimes.com/gb/20/4/29/n12068906.htm>.

Baker, M. (2020, June 1). When Did the Coronavirus Arrive in the U.S.? Here's a Review of the Evidence. The New York Times. <https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html>. Accessed on August 10, 2020

Chan, W. (2020, April 7). The WHO Ignores Taiwan. The World Pays the Price. The Nation., <https://www.thenation.com/article/world/taiwan-who-coronavirus-china/>. Accessed August 5, 2020.

Chen, Y.-J., & Cohen, J. A. (2020, April 9). Why Does the WHO Exclude Taiwan? Council on Foreign Relations. Retrieved August 6, 2020, from <https://www.cfr.org/in-brief/why-does-who-exclude-taiwan>.

Czaja, M. (2020, May 7). Coronavirus : un premier cas dès le mois de novembre en Alsace. France Bleu. <https://www.francebleu.fr/infos/sante-sciences/coronavirus-un-premier-cas-des-le-mois-de-novembre-en-alsace-1588830642>. Accessed on August 8, 2020

Flatley, D., & Woodhouse, S. (2020, June 24). Graham Backs Letting U.S. Citizens Sue China Over Coronavirus. Bloomberg. <https://www.bloomberg.com/news/articles/2020-06-23/graham-backs-letting-u-s-citizens-sue-china-over-coronavirus>.

Kelland, K. (2020, June 19). Italy sewage study suggests COVID-19 was there in December 2019. Reuters. <https://www.reuters.com/article/us-health-coronavirus-italy-sewage/italy-sewage-study-suggests-covid-19-was-there-in-december-2019-idUSKBN23Q1J9>. Accessed on June 1, 2020. .

Ma, J. (2020, March 14). Coronavirus: China's first confirmed Covid-19 case traced back to November 17. South China Morning Post. <https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back>. Accessed June 6, 2020.

Mirski, S., & Anderson, S. (2020, July 10). What's in the Many Coronavirus-Related Lawsuits Against China? Lawfare. <https://www.lawfareblog.com/whats-many-coronavirus-related-lawsuits-against-china>. Accessed on August 8, 2020.

Nicolás, E. S. (2020, June 11). EU: China, Russia responsible for Covid-19 disinformation. EU Observer. <https://euobserver.com/eu-china/148618>. Accessed on 9, 2020

Nigerians sue China for \$200B over coronavirus pandemic. (2020, July 7). Anadolu Agency. <https://www.aa.com.tr/en/africa/nigerians-sue-china-for-200b-over-coronavirus-pandemic/1902797>. Accessed on August 10, 2020.

Oxford University. (2020, March 18). Coronavirus Government Response Tracker. Blavatnik School of Government. <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>. Accessed on 10, 2020.

Pisano, G. P., Sadun, R., & Sadini, M. (2020, August 14). Lessons from Italy's Response to Coronavirus. Harvard Business Review. <https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus>. Accessed on August 17, 2020.

Post, T. J. (2020, April 9). Indonesia was in denial over coronavirus. Now it may be facing a looming disaster. The Jakarta Post. <https://www.thejakartapost.com/academia/2020/04/09/indonesia-was-in-denial-over-coronavirus-now-it-may-be-facing-a-looming-disaster.html>. Accessed May 24, 2020.

Riordan, P. (2020, March 20). Taiwan says WHO failed to act on coronavirus transmission warning. Financial Times. <https://www.ft.com/content/2a70a02a-644a-11ea-a6cd-df28cc3c6a68>. Accessed on May 24, 2020.

Rocha, R. (2020, June 22). What countries did right and wrong in responding to the pandemic. CBC. <https://www.cbc.ca/news/canada/covid-19-coronavirus-pandemic-countries-response-1.5617898>. Accessed on August 10, 2020.

Schwartz, M. S. (2020, April 18). Trump Warns Of "Consequences" If China Was "Knowingly Responsible" For Outbreak. National Public Radio <https://choice.npr.org/index.html?origin=https://www.npr.org/2020/04/18/837545140/trump-to-hold-briefing-on-coronavirus-developments>. Accessed on August 9, 2020.

Trigt, V. E. (2020, May 12). Could China be Taken to ICJ over COVID-19 Pandemic? | Peace Palace Library. Peace Palace Library. <https://www.peacepalacelibrary.nl/2020/05/could-china-be-taken-to-icj-over-covid-19-pandemic/>. Accessed on May 23, 2020.

Tzeng, P. (2020, April 2). Taking China to the International Court of Justice over COVID-19. EJIL:Talk. <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>. Accessed on May 30, 2020.

University of Notre Dame. Lawsuits against China, WHO are not the way forward, Notre Dame expert says. (2020, May 27). University of Notre Dame. <https://www.newswise.com/articles/lawsuits-against-china-who-are-not-the-way-forward-notre-dame-expert-says>.

Wuhan Municipal Health Commission (ed.). (2019, December 31). "武汉市卫健委关于当前我市肺炎疫情的情况通报, <http://wjw.wuhan.gov.cn/>. Accessed on May 29, 2020

## Others

International Court of Justice. (2017, October 27). Speech by H.E. Mr. Ronny Abraham, President of the International Court of Justice, before the Sixth Committee of the General Assembly. <https://www.icj-cij.org/files/press-releases/0/000-20171027-PRE-01-00-EN.pdf>. Accessed on 29, 2020.