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COVID 19 and Liability of China under International Law

T. Nishit

ABSTRACT

The pandemic of COVID-19 can be considered as a war against humanity as almost all the countries are affected by it with the number of cases over 6 million and deaths over three hundred thousand. The origin of the disease was traced to the wet markets of the city of Wuhan in China but the actual mode of transmission of disease to humans is still unknown. As the disease originated in China, the world community started blaming them for the huge loss caused, both humanitarian and economic. The International Council of Jurists, a professional global body of jurists consisting of senior legal practitioners, has moved United Nations Human Rights Council (UNHRC) seeking compensation from China. We can also witness displeasure against China in social media with posts like 'boycott Chinese goods', 'boycott China software in a week and hardware in an year', etc. The question that has to be considered is whether China is responsible for reparations under international law for the pandemic. This paper discusses the International Health Regulations, 2005 of WHO which has to be followed by the countries during health emergencies, state responsibility under customary international law and also law of reparation to determine the grounds under which a state has to make reparations to the victims.

INTRODUCTION

The International Council of Jurists, a professional global body of jurists consisting of senior legal practitioners, has moved United Nations Human Rights Council (UNHRC) seeking compensation from China as *reparations* for "serious physical, psychological, economic and social harm" caused to member nations due to Covid-19.[1] The first question that needs to be answered is whether China owes any responsibility towards international community under the Law of Reparation.

Reparation means 'the action of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged.' The origin of reparation can be traced back to Hague Convention of 1907 with respect to Laws and Customs of War on Land.[2] However, the obligation to make reparation has been extended beyond war crimes and it now includes any wrongful act, i.e., any violation of an obligation under international law. It is also pertinent to note that obligation to make reparations arises automatically as a consequence of an unlawful act and there is no need to spell out such obligation in conventions.[3] Reparations can be done in many ways, including restitution, compensation or satisfaction.[4]

The argument made against China is that they have violated Articles 6 and 7 of International Health Regulations (IHR) of 2005 and Responsibility of States for Internationally Wrongful Acts adopted by the United Nations General Assembly in 2001.[5] This paper discusses the development of International Health Regulations of 2005 which is the international treaty concerning pandemics and also treaty obligations under customary international law to determine the responsibility of China for COVID-19 outbreak.

INTERNATIONAL HEALTH REGULATIONS, 2005

In May 2005, World Health Organization (WHO) revised International Health Regulations (IHR) of 1969 and these regulations are legally binding on the member nations. The previous regulations f 1969 are applicable only to cholera, yellow fever and TB. The reason for revision of the regulations is due to SARS epidemic of 2002-03 and heightened need of international cooperation.[6]

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[1] "London-based International Council of Jurists urges UNHRC to impose 'exemplary damages' on China for spreading coronavirus", The Hindu, April 4 2020, available at https://www.thehindu.com/news/international/icj-seeks-unhrc-to-impose-exemplary-damages-on-china-for-spreading-coronavirus/article31258056.ece

[2] Emanuela-Chiara Gillard, *Reparation for violations of International Humanitarian Law*, IRRC, Vol. 85, Sept 2003,

[3] Ibid.

[4] Articles 31 to 34, Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001

[5] Akshita Saxena, *"Grave Offences Against Humanity": International Council of Jurists Move UNHRC Against China Seeking COVID-19 Reparations,* available at https://www.livelaw.in/top-stories/grave-offences-against-humanity-international-council-of-jurists-move-unhrc-against-china-seeking-covid-19-reparations-read-complaint-154744

[6] WHO, International Health Regulations 2005: Guidance For National Policy-Makers And Partners 3 (2005).

According to WHO, International Health Regulations are "an international legal instrument that is binding on 194 countries across the globe, including all the Member States of WHO. Their aim is to help the international community to prevent and respond to acute public health risks that have the potential to cross borders and threaten people worldwide…. Timely and open reporting of public health events will help make the world more secure."[7]

The main aim of IHR is to have a better global communication regarding public health concerns. The WHO anticipated such communication to be foundation of its revised IHR and stated "The IHR are being revised and will require each Member State to ensure it has a minimum core capacity to detect, report and respond to public health emergencies of international concern."[8] Aspiring to ensure improved public health communication on a global level, the new IHR require that each country "designate or establish a National IHR Focal Point" to implement the IHR and that the Focal Point be "accessible at all times" to communicate with the WHO.[9]

It is also provided under Articles 6 and 7 that if there is any situation in a member nation which may become a public health emergency of international concern, the state parties have to provide timely information to WHO. Articles 6(1) and 7 of IHR are as follows-

> Article 6(1) - *Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, 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 in accordance with the decision instrument, as well as any health measure implemented in response to those events.*
>
> Article 7- *If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.*[10]

IHRs also contain dispute settlement provision under Article 56. Article 56 (1) provides that "*In the event of a dispute between two or more States Parties concerning the interpretation or application of these Regulations, the States Parties concerned shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation. Failure to reach agreement shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it.*"[11] It

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[7] WHO, *What Are the International Health Regulations?*, Available at http://www.who.int/features/qa/39/en/index.html

[8] WHO, Outbreak Response, Including Severe Acute Respiratory Syndrome (SARS), Influenza and Revision of the International Health Regulations, 55th Sess., Sept. 13-17, 2004, Provisional Agenda Item at 1, WPR/RC 5515 (Aug. 4, 2004).

[9] International Health Regulations (2005), May 23, 2005.

[10] Ibid

[11] Ibid.

is pertinent to note that disputes relating to interpretation and application of law of the regulations are also considered but not *failure to comply*.

Also, IHRs are criticized to be ineffective because "the success of timely identification of global public health risks turns largely on member states' compliance with the Regulations."[12] The state parties have been suppressing the information regarding outbreak of any disease as it may cause economic loss due to restrictions on trade and tourism.[13] To date, WHO has had little ability to compel states to comply with its Regulations and nothing in WHO's Constitution provides for formal sanctions against non-compliant states, even for non-compliance with legally-binding resolutions.[14] Thus, state responsibility to determine failure to comply with the provisions should be determined outside IHRs and this can be found in customary International law.

STATE RESPONSIBILITY UNDER CUSTOMARY INTERNATIONAL LAW

OBLIGATION UNDER BILATERAL TREATY

It is a general principle of international law that a breach of an international obligation would make the concerned state liable. In short, law of responsibility is concerned with actions and consequences of an unlawful act and also reparations for the loss caused. Reparation is considered as a part of obligation and in Factory at Chorz (Jurisdiction) case, the Permanent Court stated that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[15]

A breach of an obligation generally results in liability of the state, as mentioned above and such breach can be in the form of a positive act or an omission. The question as to whether an omission of a duty would result in international responsibility was held in the affirmative by the International Court of Justice in the Corfu Channel case.[16] It was held that "these grave *omissions* involve the international responsibility of Albania [which] is responsible under international law for the

[12] Joshua D. Reader, Note, *The Case Against China: Establishing International Liability for China's Response to the 2002-2003 SARS Epidemic*, 19 COLUM. J. ASIAN L. 519, 522 (2006).
[13] David Bishop, *Lessons from SARS: Why the WHO Must Provide Greater Economic Incentives for Countries to Comply with International Health Regulations*, 36 GEO. J. INT'L L. 1173.
(2005)
[14] David P. Fidler, *Return of the Fourth Horseman: Emerging Infectious Diseases and International Law*, 81 MINN. L. REV. 771 (1997).
[15] (1927) PCIJ Ser A No 9, 21.
[16] Corfu Channel (UK v Albania), ICJ Reports 1949 p 4, 23.

explosions which occurred…and for the damage and loss of human life which resulted from them"[17]

The objective responsibility of a state under breach of an international treaty is based on the doctrine of voluntary act, which means that the breach of duty can be determined by the result alone. It is the responsibility for the acts committed by the officials of the state and which they are bound to perform, despite fault of their part.[18] This means that the intention of the state regarding breach of the obligation is not considered. Thus, "the objective responsibility of a state dictates the irrelevance of intention to harm as a condition of responsibility."[19]

The question as to whether negligence of state can be a reason to determine responsibility of the state, known as doctrine of culpa, has not reached unanimity. Although doctrine of culpa is not a general condition for responsibility, it has been applied to situations like loss caused due to individuals not employed by state, trespassers, etc. The question of knowledge is considered to determine breach of obligation in these cases.[20] The author of this paper feels that this doctrine should also be extended to acts which cause inexplicable harm to large section of international community.

OBLIGATION UNDER MULTILATERAL TREATY

A multilateral obligation is a legal duty on a state to be answerable before international community. It is considered as an absolute obligation as the breach of such obligation affects all the states. Multilateral obligations extend both to international treaties as well as customary rules of international law.[21]

Every obligation laid down in a multilateral treaty cannot be said to be multilateral as the obligation in such treaties extends only between two states at dispute. For instance, breach of a duty mentioned in a treaty on extradition affects only one nation and not the entire international community. Multilateral obligations generally rise in case of those obligations which are considered to be affecting humans at large under customary international law (international humanitarian law). Even there are other treaty systems which provide multilateral obligations though not recognized by customary law (international labour law). However, it is the intrinsic value of the obligation which determines whether such obligation should be considered as binding on the international community.[22]

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[17] Ibid.
[18] International Court of Justice in Caire (1929) 5 RIAA 516..
[19] James R Crawford, Brownlie's Principles of Public International Law (2010).
[20] Corfu Channel (UK v Albania), ICJ Reports 1949 p 4
[21] Christian Dominice, *The International Responsibility of States for Breach of Multilateral Obligations*, EJIL (1999), Vol. 10, No. 2, pg 353.
[22] Ibid.

There is no distinction of criterion regarding breach of bilateral and multilateral treaties. A multilateral obligation is breached under same circumstances as any international obligation whatsoever. The only element to determine the obligation of a state is the intrinsic value of obligation and the extent of harm done.[23]

RESPONSIBILITY OF CHINA

It was argued that China caused delay in sharing the information as the first case was reported in mid-November of 2019 and the information was shared to the international community in January, 2020 and thereby violating Articles 6 and 7 of International Health Regulations, 2005.[24] As mentioned above, the criterion to determine the breach of a bilateral and international community are the same. The moot question now is whether the omission of sharing information to the international community by China regarding the spread of COVID-19 amounts to negligence.

As has been mentioned above, China conveyed the information regarding novel coronavirus to the WHO approximately one and half month from the inception of first case. This can be compared with H1N1 influenza which appeared in Mexico in March 2009. Mexico made the initial notification of sharing information with the WHO under Article 6 of IHR in April, i.e., one month after the first case was reported. This was considered as success of IHR because of 'timely reporting' of information to the WHO and it was stated that, "the creation of National IHR Focal Points enabled rapid communication between WHO and the entire global community, and guaranteed that proper authorities were notified and that information was shared with appropriate policy makers and responders. If only for this reason, the IHR can be deemed a success."[25] It can be stated by considering this analogy that China was not negligent in conveying information to WHO.

REPARATIONS UNDER INTERNATIONAL LAW

The root of reparation law can be found in the principle of corrective justice derived from private law of torts and delicts which aims to "re-establishing equality between the injured party and perpetrator rather than about ensuring fairness."[26] Thus, remedy under private law is to return the victim to status quo ante by providing him the things which he has lost. These private law principles have been adopted in International law whereby a state is under an obligation to make reparations to the injured party as stated in Chorzow Factory case that "as far as possible, wipe-

[23] Ibid.
[24] Supra, note 5.
[25] Rebecca Katz, *Use of Revised International Health Regulations During Influenza A (HINI) Epidemic, 2009*, 15 Emerging Infectious Diseases 1165 (2009).
[26] D.D. Raphael, Concepts of Justice, (Oxford University Press 2003)

out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed? It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[27] However, reparation is considered to be limited in justice as it cannot undo the harm caused to the victims but it is intended to 'promote justice by redress.'[28] As stated earlier that reparation is about returning back to status quo ante, it is impossible to return the victims of torture, sexual violence or death to original position. Judge Cancado Trindade suggests, "Reparation cannot efface a violation, but it can rather avoid the negative consequences of the wrongful act."[29]

Reparations under International Law are guided by UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG) of 2005. Principle III of UNBPG provides that reparation has to done for "Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law."[30] It is important to determine the victims in a reparation process as to narrow down to only those individuals who have suffered harm and this is determined in Principle III which states that victims are those who have "individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions *that constitute gross violations of international human rights law, or serious violations of international humanitarian law*."[31] Thus, UNBPG is limited to victims of serious violations of international humanitarian law and gross violation of human rights.

In order to make reparations feasible, it is necessary to narrow down its scope to the most harmful violations of individual or group rights such as extra-judicial killings, forced disappearances, torture and sexual violence.[32] The Truth Commissions of Sierra Leone and Timor Leste which were established to investigate the victims eligible for reparation recommended that reparations must concentrate on the most vulnerable victims like orphans, amputees, widows and victims of sexual violence during armed conflict.[33] Truth and Reconciliation Commission of South Africa Report of 1998 also stated that the victims for reparation should include only those who have suffered harm

[27] Germany v Poland, The Factory at Chorzów (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIII. Docket XIV:I Judgment No. 13, 13 September 1928 ('Chorzów Factory' case)
[28] Principle 15, UN Basic Principles of Reparation of 2005, A/RES/60/147.
[29] Republic of Guinea v. Democratic Republic of the Congo, Compensation Judgment, ICJ Reports (2012) 324
[30] Principle 3, UN Basic Principles of Reparation of 2005, A/RES/60/147
[31] Id.
[32] Luke Moffett, *Transitional Justice and Reparations: Remedying the Past?,* Queen's University Belfast, School of Law Research Paper No. 2015-06.
[33] Truth and Reconciliation Commission of South Africa Report, Volume II, 1998.

due to gross violations of human rights or "an act associated with a political objective for which an amnesty was granted."[34]

The Kenyan Truth, Justice and Reconciliation Commission (TJRC) recommended reparations to include "all victims of extra-judicial killings, sexual violence, torture, forcible transfer, land injustice and historical marginalisation from 1963-2008."[35] In the first case before International Criminal Court against Thomas Lubanga Dyilo of Democratic Republic of Congo, the court held that reparations were to be made for the victims of sexual violence and children used as soldiers in armed conflict.[36] In Ituango Massacre vs. Colombia, the Inter-American Court of Human Rights ordered the Colombian government to make reparations to the victims of murder, torture and forced displacement by the para-military forces. The Equity and Reconciliation Commission of Morocco established in 2004 recommended reparations to those subjected to torture, extrajudicial executions, forced disappearances, illegal detention and sexual violence.[37]

Thus, it can be concluded from the recommendations made by bodies dealing with reparation programmes that in order to make reparation feasible, the victims must include only those who were subjected to gross violations of human rights and international humanitarian law.

[34] Id.
[35] TRJC Report Volume IV, 2013.
[36] The Prosector vs. Thomas Lubanga Dyilo, International Criminal Court, ICC-01/04-01/06.
[37] Luke Moffett, *supra 32*.

CONCLUSION

Outbreak of pandemic in 21st century can cause distressing effects on the international community due to globalization and dilution of national borders. The countries that underwent huge loss, both humanitarian and economic, try to blame the country for the outbreak on charges of breach of international treaty responsibility and negligence. The same happened in case of COVID-19 as we can witness rising cases against China for reparations.

In this paper, the author discussed the provisions of IHR and customary international law and came to the conclusion that China is *not* responsible for the damage caused to the international community. The COVID-19 pandemic arose after geopolitics returned as a prominent feature of international relations over the last decade.[38] We can also come to this conclusion by referring to the silence of attaching responsibility by the international community over H1N1 influenza originated in Mexico and USA in the first decade of 21st century.

Reparations under international law are mostly concerned with serious violations of human rights and humanitarian law which includes torture, murder, forced disappearances & displacement, illegal detention, sexual violation, etc. Harm caused due to a pandemic was never considered by any reparation programmes as spread of it cannot be considered as a violent act of state with an intention to disrupt the world order and thus, China cannot be held to make reparations.

In order to make the global cooperation and compliance more effective regarding pandemics, it is necessary that the structure of WHO must be strengthened and it must be able to provide sanctions for non-compliance. As long as it is dependent on voluntary contributions made by member nations for its survival, WHO will not be able to make bold decisions. Until then, the blame game continues.

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[38] David Fidler, *COVID-19 and International Law: Must China compensate countries for the damage?*, available at https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/