ORF ISSUE BRIEF

JUNE 2020

ISSUE NO. 373

China's State Responsibility for the Global Spread of COVID-19: An International Law Perspective

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ABSTRACT Three months since the World Health Organization (WHO) declared the outbreak of COVID-19 as a pandemic, the health crisis has wreaked havoc on people's lives and livelihoods across the globe. Can state responsibility be apportioned for the pandemic, under the current international legal system? What would the elements of such responsibility be? This brief explores the concept of "state responsibility" under public international law and examines whether China—ground-zero of the pandemic—can be made legally responsible. The brief studies practical cases to assess how principles of international law have previously been applied with respect to state responsibility.

Attribution: Ipshita Chaturvedi, "China's State Responsibility for the Global Spread of COVID-19: An International Law Perspective," *ORF Issue Brief No. 373*, June 2020, Observer Research Foundation.

ISBN: 978-93-90159-41-3

INTRODUCTION

In the practice of international law, it is generally accepted that the principle of State sovereignty[1] is the most important and is in fact the pillar of international cooperation. In that way, it is far different from a country's domestic law that is binding on its citizens unequivocally. This fundamental aspect of international law guides any attempt to understand "wrongful" acts and their treatment: What happens when an act or omission of one country adversely impacts another sovereign state in the areas of, for instance, the environment or human rights? This question is pertinent in exploring the responsibility of the Chinese state in the rapid spread of the SARS-CoV-2 virus that causes the COVID-19 disease. The pandemic, which broke out from the Chinese city of Wuhan in early 2020, has now spread to more than 190 countries as of the time of writing.[2]

To be sure, the determination of a valid legal response differs in theory and practice. Theoretically, there are several principles of international law that make it incumbent upon States to practice "good neighbourliness."[3] This is expressed in written law (in the manner of treaties and conventions), as well as *opinio juris,*[a] such as judgments from the International Court of Justice (ICJ). To ascertain whether a State can be made legally responsible for acts that do not constitute good neighbourliness, the following questions need to be examined:

What are the accepted legal obligations of a State under international law, particularly under customary law? Have these obligations been practiced by States enough that the set of rules have become *cogens?*[b]

On the basis of these two guiding enquiries, this brief will analyse specific cases to see whether practice echoes theory on the principle of 'state responsibility'. This analysis makes an assumption that, as is generally accepted and supported by evidence from WHO, the SARS-CoV-2 virus did indeed originate in China. The brief answers the two related questions of whether China had an obligation under international law; and if such obligation was breached.

To be sure, other assessments of China's responsibility can be done against the provisions of specific treaties and norms, such as WHO's 2005 International Health Regulations.[4] This brief focuses on the general principles of international law on State Responsibility that are largely derived from environmental and human rights laws.

a Under international law, *Opinio Juris* is a subjective obligation of a State that it is bound to the law in question i.e. that the applicable custom is accepted as law. Opinio Juris coupled with State Practice form the body of customary international law.

b *Jus cogens* is compelling/binding law from which no derogation (or partial suppression) is possible – such as sovereignty and State immunity.

IS CHINA RESPONSIBLE? GUIDING PRINCIPLES OF INTERNATIONAL LAW

The following paragraphs outline certain principles of international law that can be applied to the case of COVID-19 and China's responsibility.

1. The "no harm" principle

The principle of "no harm" constitutes the cornerstone of international environmental law, according to which states must ensure that activities within their jurisdiction do not cause significant cross-boundary damage.[5] This principle has been applied widely, for instance, to transboundary environmental pollution by linking environmental damage to an infringement of human rights to health and life. Perhaps the best description of this is seen in a decision by the ICJ in its advisory opinion in the Legality of the Threat of Nuclear Weapons case:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[6]

While States causing environmental harm to other States can be brought under the purview of international law via the "no harm" rule, its direct applicability to international human rights law remains suspect.[7] Further, the development of the principle of 'no harm' in international environmental law—and more specifically water law—has been confined to the duty of a State to conduct an Environmental Impact Assessment or consultation with their neighbouring countries. If a State can produce proof of such procedural "cooperation", then any resulting harm becomes irrelevant. Due diligence of States comprises prior assessments of the impacts of the planned interventions. In the three biggest cross-border water cases in recent history[8] where one country was "harmed" by the acts of another, the rule of due-diligence was the applicable test rather than the harm itself. It can be said that in practice, the no-harm principle appears to have translated into a risk mitigation approach – a box-checking tendency to implementing trans-national activities.[9]

There are no precedents to validate the application of the no-harm principle to the case of the COVID-19 pandemic. In the most famous ICJ cases on international water law as discussed above, the case in point was the impacts of hydro projects on a downstream country, whereby the upstream riparian planned an activity that had a direct impact on a co-riparian state. In the ongoing pandemic, there is no such environmentally harmful activity from which a direct impact on human rights of another country could be deduced, even though the end results are the same, if not worse, indeed.

Other examples of the application of the no-harm principle relate to climate change law. That countries continuing to emit large amounts of greenhouse gases (GHGs) cause harm to others is a well-accepted, non-legal statement. Has the no-harm principle been

used effectively to attribute responsibility to large emitters of GHG in order to stop them? Instead of the no-harm principle, the climate change regime has been built on the basis of the principle of "common but differentiated responsibilities". Accordingly, some Western states have accepted a greater moral responsibility as wealthy or "developed" states, but no specific causal responsibility as industrial states[10] that are culpable under international law.

The reason for discussing international law related to climate change and water law is because these are two of the oldest regimes that can provide answers to what happens when the acts of a State negatively impact another. Older precedents give clarity when deciding on newer cases such as that of COVID-19. However, neither climate law nor water law holds a state accountable for damaging acts to other states. Accountability is "soft" in the case of climate change law, and is restricted to procedure in water law.

2. *Obligations* erga omnes

A neglected, if not a forgotten child of international law is an *erga omnes* ("towards all") obligation. When States have an obligation to protect certain rights that are of importance to the international community as a whole, those obligations are *erga omnes*. While *jus cogens* deals with the 'acceptability' of a set of norms in international law, *erga omnes* obligations enumerate the norms themselves. Therefore, *erga omnes* obligations are not necessarily *jus cogens*. However, they could be read together to determine the widely accepted, absolutely non-breachable principles of international governance. In 1969, the Vienna Convention on the Law of Treaties recognised that some rules of international law cannot be derogated from.[11] The drafters mentioned the use of force, slavery, piracy, and genocide as preemptory norms[12] that have since been treated as such.

In determining responsibility, *erga omnes* obligations are a good place to begin to understand what obligations a State has towards the global community that are well-established under international law. For attribution of responsibility in the case of COVID-19–i.e., for the massive loss of lives and livelihoods—there is a need to understand whether China breached any obligation towards the international community, and what kind of obligation it was. Obligations *erga omnes* are the broadest, and at the same time the narrowest principles that could help articulate such a responsibility.

Furthering the Vienna Convention, the ICJ famously enumerated four *erga omnes* obligations: the outlawing of acts of aggression; the outlawing of genocide; protection from slavery; and protection from racial discrimination.[13] Along with these four obligations, international law has seen the emergence of others such as the obligation to respect the principle of self-determination (as in the Case Concerning East Timor[14]), the Advisory Opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory,[15] and the *erga omnes* obligation prohibiting the use of torture which was recognised by the International Criminal Tribunal for Yugoslavia in the Furundzija case.[16]

Normatively, a duty to prevent international harm cannot be said to be an obligation *erga omnes*.

The three basic propositions upon which the contemporary doctrine of State Responsibility rests are the following: (i) responsibility of States is 'breach-based', i.e. triggered by attributable conduct violating international obligations; (ii) that it is 'objective', i.e. not generally dependent on damage, or fault; and (iii) that it gives rise to ensuing duties of cessation and reparation (plus, exceptionally, a duty to provide for guarantees and assurances of non-repetition).[17] It may be surmised that recognised *erga omnes* obligations pertain to aggressive, intentional acts by a State that cause immediate and intentional harm to others. These elements are lacking in the case of COVID-19. It can be safely said that China has not breached any *erga omnes* obligation, since a duty of care to other nations in times of pandemics are not part of this body of international law.

3. ILC's Draft Articles on State Responsibility

In 2001, the International Law Commission (ILC) adopted a complete text of the Articles on Responsibility of States for Internationally Wrongful Act.[18] Even though well-received and cited habitually by the ICJ, the ILC draft articles by themselves are not enough to invoke the responsibility of any State. Be that as it may, even if the draft articles are used as a basis for considering China's responsibility in the current case, it can be said that it will be extremely difficult to hold China legally responsible. According to the Draft Articles, every internationally wrongful act of a State entails the international responsibility of that State (Art 1).

Article 2 states that an internationally wrongful act must:

- be attributable to the state under international law; and
- constitute a breach of an international obligation of the state

'Attributability' means that it is proved beyond reasonable doubt that the act/omission of a State caused the wrongful event. In climate change law, for example, causation has been a long-standing issue: in current jurisprudence, states cannot be made responsible for emissions because it is difficult to show the direct causal link between climate change-related disasters and emissions by a particular State. International action on climate change adaptation—consisting mainly of aid projects with a focus on certain environmental issues—contrasts sharply with the restorative obligations of a State responsible for an internationally wrongful act.[19] The objective of mitigating climate change through "quantified emission limitation and reduction commitments" differs in terminology and substance from the obligation of a state responsible for a continuing internationally wrongful act to "cease that act".[20] In that way, an obligation of a state to not emit GHG because it causes

harm in the form of global warming cannot be, as such, proved under international law.

Even if the ILC succeeded in codifying the Articles on State Responsibility, the requirement of attribution and causation, rather than focusing on the duty of a State to cooperate would not resolve the issue of addressing the human costs of the spread of COVID-19. The lack of a detailed understanding of what state obligations should be, will bring the discussion to *erga omnes* and will keep international law restricted to intentional and aggressive breaches rather than insidious ones, such as the current pandemic.

The ILC also has draft articles on the prevention of transboundary harm from hazardous activities.[21] This brings the analysis to the question of whether the rule relates to the harm caused, or to specific activities which *would cause* harm. The answer entails different consequences particularly in the case of China's responsibility. If the harm itself from whatever source or activity is prohibited, then the nature of the activity is irrelevant. If, on the other hand, State responsibility depends on whether a specific activity is allowed or prohibited, then the question of how to deal with activities not prohibited by international law has to be addressed. Accordingly, assuming that the virus came from bats or pangolins,[22] is wildlife trade a hazardous activity under international law? If it is not, then the ILC articles on transboundary harm would not apply *prima facie*.

If the no-harm rule is not about whether or not the relevant activity as such is unlawful, but whether or not the home State has done everything in its means to avoid causing transboundary harm, then the approach by the ILC seems to be fundamentally misconceived and, to a certain extent, superfluous.[23] What is more, it waters down the no-harm principle, which should be strengthened instead. In the words of Rosalyn Higgins,[24] former President of the ICJ, "If what is required for something to fall within the law of State responsibility is an internationally wrongful act, then what is internationally wrongful is allowing the harm to occur."

Therefore, it is important that the international community understand the different facets of available principles so that legal processes may be strengthened. This can be done by (i) advancing the no-harm rule by focusing on the harm rather than the activity; and (ii) articulating and advancing *erga omnes* obligations to include the no-harm principle.

THE PRINCIPLE OF 'STATE RESPONSIBILITY': PRACTICAL EXAMPLES

State responsibility is of two kinds: the responsibility of a State towards its own citizens, and the responsibility of a State towards extraterritorial citizens where acts of one State have an impact on citizens of other countries. This brief focuses on the latter, and will therefore not be addressing the case of Urgenda, a leading case in human rights law and climate change.[25]

1. The case of Kivalina: on the difficulty of establishing a causal link

In *Kivalina v ExxonMobil Corp*,[26] a native Alaskan village filed a suit seeking monetary damages from several oil, coal and power companies. Their claim was that because of emissions from these companies, the inhabitants of Kivalina would have to relocate as their lives and livelihoods have been disrupted by the activities of those companies. The Court dismissed the appeal on jurisdictional issues but also ruled that Kivalina could not demonstrate that the companies had caused them injury because the causal link between the injury and the act could not be established. Interestingly, the companies also argued that Kivalina failed to state a claim that is recognisable under international law.[27] The Court went on to affirm the impossibility of determining "which emissions", that is, "emitted by whom and at what time in the last several centuries and at what place in the world" caused "global warming related injuries."

It is usually assumed that the obligations to respect, protect and fulfil human rights have territorial application. This is supposedly inconsistent with the extraterritorial scope of climate policies, with particular regard to mitigation measures, which necessarily have a transboundary effect.[28] An analytical study of the human rights law on climate change and the right to health does not clarify how to attribute responsibility for GHG emissions to specific States.[29] Theoretically, the same could be extended to the current case where it would be highly difficult to establish a direct causal link between an Indian citizen's loss of livelihood because of the lockdown, to China's state responsibility for failing to curb the virus earlier. This problem will be amplified when ascertaining whether a piece of evidence would be accepted by an international court/tribunal as meeting the required standard of proof to establish causation.[30] These are questions to which international law does not have answers, a fact seen in prior experience in international climate change law.

2. Deepwater Horizon oil spill case: on the lack of an international legal response for a disaster that can be attributed to a particular country

The BP Oil Spill in the Gulf of Mexico in 2010[31] remains one of the biggest oil spills in human history. While it is often called an "environmental disaster", the impacts of the spill on human health, life, property and livelihoods are still being seen a decade since the incident. The reparation for damages was within the United States under a mixture of specific clean air and water acts, as well as tort and criminal law. The case saw no international response even though the spill impacted hundreds of people in Mexico, Cuba, Panama and many other countries.

This exposes another problem in the attribution of state responsibility to other countries. When a corporation is responsible for an act or omission that has

adverse extraterritorial implications, what legal framework may be applied? Major oil companies are sprawling transnational behemoths which are regulated by laws in a piecemeal fashion under the authority of many states and countries. There are no mechanisms to address them comprehensively at an international level, and corporate law limits the liability of the parts for one another. These structural concerns are compounded by the critical role that oil plays in the domestic and international economy and state sovereignty over natural resources.[32] The same can be applied in the case of wildlife trade. It appears as if the cost of the oil spill beyond the US was exclusively borne by the victims of the spill, and the Gulf of Mexico itself.

Where private actors conduct an activity causing environmental harm, the issue remains one of the State's duty of control – can this be translated to an international obligation? In this regard, the concept of due diligence – or standard of care – needs to be evoked as a test to evaluate the conduct that is required,[33] something currently undeveloped under international law. The question is, if China does not allow a detailed enquiry to ascertain whether the spread of the virus was an act or an omission of China, could the non-cooperation be legally interpreted as a breach of an obligation? Realistically, China can easily disallow an investigation citing sovereignty as an excuse, which is a much more established principle, if not the spinal cord of international law. This will entirely disband the principles of no-harm, due diligence, and good neighbourliness.

The international legal system is premised on sovereign and equal states making agreements with each other, whether through treaties or under customary international law. Nation-states are the primary subjects and objects of international law, while corporations, despite their transnational reach, have limited international legal personality.[34] This greatly exacerbates the problem of attribution of state responsibility. Also, there is little empirical evidence that State Responsibility for damage has been regarded by States as a positive inducement to prevent acts that cause damages in the first place. One example is the Chernobyl accident,[c] which caused significant harm to a number of Northern European countries, none of which attempted to claim compensation from the Soviet Union. The reasons for this reluctance were partly based on political restraints, but also on legal uncertainty.[35]

CONCLUSION

Vague primary rules, a multiplicity of actors, the different types of damages, and non-linear

c On 26 April 1986, the Chernobyl nuclear power station, located in Ukraine (then part of the Soviet Union) suffered a major accident which was followed by a prolonged release to the atmosphere of large quantities of radioactive substances. This had serious radiological, health and socio-economic consequences for the populations of Ukraine and Russia, as well as other countries in Northern and Eastern Europe.

causation, all pose significant challenges to the traditional law on State responsibility.[36] To advance peace among nations, general norms of international law were adopted to prohibit any conduct of a State that could cause considerable harm to other states, from which international tensions would likely arise.[37] It is, however, debatable how effective those norms have been.

To establish State Responsibility, a State must commit a wrongful act, either consisting of an action or an omission. In other words, the secondary rules on State responsibility (cessation of an act and/or reparations) are applicable only where the conduct of a State constitutes a breach of a primary international obligation.[38] The first point is the nature of the activity itself – did China indulge in an unlawful, hazardous activity that led to the breakout of SARS-CoV-2? Assuming that the virus came from bats or pangolins that were being traded in Wuhan's Huanan market,[39] current international law does not prohibit that activity *per se*.

The next question is whether China did everything in its power to ensure the timely containment of the virus, and if it did not, if that constitutes a breach of an international obligation. In 2002, during the SARS breakout, experts opined that China's reluctance to cooperate and to share information on unusual disease events in Guangdong province contributed to the regional and global spread of the new disease. According to David Fidler, in the case of SARS, China's reluctance to share epidemiological information, and being uncooperative and secretive on data, did not constitute an internationally wrongful act because such behaviour did not breach any international legal obligation on the part of China. China's reluctance to cooperate with public health officials from WHO and other governments may have made the public health threat from SARS worse, but it does not appear to trigger state responsibility under international law.[40]

To bolster international obligations and resultant responsibility, it is necessary to support the no-harm principle which can be widely applied to govern state behaviour. Sadly, the gap between theory and practice in the execution of "do no harm" has been widened by real cases. As discussed earlier, instead of the no-harm principle, the climate change regime has built on the basis on the principle of common but differentiated responsibilities. Accordingly, some Western states have accepted a greater moral responsibility as wealthy or "developed" states, but no specific causal responsibility as industrial states[41] that have caused harm to other countries.

International law has not kept pace with the exponential growth in the inter-dependence of nations. While acts or omissions of one State have immediate and concentrated impacts on others, as witnessed in the COVID-19 pandemic, international legal systems have not simultaneously evolved to address rights and responsibilities arising from these inter-linkages between nations. Therein lies the biggest argument favouring stronger laws and a more egalitarian and binding structure of the international rule of law.

A recent news article in China says that the country will ban wildlife trade but not in the case of Traditional Chinese Medicine;[42] this leaves the world possibly vulnerable to future pandemics. While countries are woven inextricably and intrinsically through trade, society, culture, and travel, rules of attribution of responsibility in cases when one State becomes responsible for a widespread pandemic in other states have been developed so slowly that it amounts to not having developed at all, leaving vested national interests at the helm of international relations.ORF

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ENDNOTES

1 The United Nations General Assembly through resolution 1803 (XVII) of 14 December 1962 declared that, "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned". This is a well established principle of international law.

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3 Article 74 of the United Nations Charter.

4 International Health Regulations (2005) Third Edition, World Health Organization, https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=0BD0822E5E98A844857046C9A57EBB53?sequence=1, last accessed on 18 June 2020.

5 Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 3rd ed, 2012) 239. The Trail Smelter Arbitration was the first ICJ case that ruled on transboundary (air) pollution. In this case the US sought damages from Canada for air pollution caused by Trail Smelter, a Canadian corporation and it was the first case to establish responsibility of States to not cause pollution in other States because of an activity in its territory. See The Trail Smelter Arbitration Case (USA v Canada) 1941, UN Rep Intl Arb Awards 1905 (1949).

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17 Asteriti and Tams, above at 11.

18 For full text see https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

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20 Mayer, "Relevance", 91

21 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, full text at <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf>

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