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THE FRAMEWORK IN PUBLIC INTERNATIONAL LAW FOR DETERMINING THE RESPONSIBILITY OF THE PEOPLE'S REPUBLIC OF CHINA IN CONNECTION WITH THE COVID-19 PANDEMIC

**Published in the International Business Law Journal
(Sweet & Maxwell, N° 2, 2021)
<https://www.iblj.com/summary.htm?num=3&type=11&year=2021>**

Synthesis

For responsibility to be imputed in public international law to China, it would have to be demonstrated that a Chinese State agency, such as the Wuhan Institute of Virology, willingly or negligently created or introduced COVID-19 into circulation, or that China had acted improperly in planning preventive measures or in the management of the epidemic, such as by failing to fulfil its obligations under the IHR. Even then, complaining States would have to account for their own responsibilities for lack of preparedness as well as for the lethargy and awkwardness of their reactions to the pandemic, which greatly aggravated the pandemic's consequences on their territories. Any Party to the WHO and the IHR might seek to initiate consultations with China and call it to account within that structure. In fact, the WHO itself has saluted China's success in combatting the pandemic and expressed appreciation for the timely communications of China and its general availability under the Rules. The dispute settlement procedures within the WHO and under the IHR do not preclude direct actions by Member States before the ICJ, before which China has not filed reservations that would exclude the Court's jurisdiction over disputes involving epidemics or health issues in general.

1. - Introduction

On December 31, 2019, the Wuhan Municipal Health Commission posted a notice on its website about an outbreak of a viral pneumonia outbreak in the city.¹

By January 18, 2021, 95,179,173 people across some 191 countries were known to have been infected and more than 2,033,641 had died.²

Because of the policies implemented to combat the virus, such as travel bans worldwide, and widespread lockdowns, and in the light of how the outbreak affected activity in the PRC and around the world, the COVID-19 pandemic's global cost, as estimated in October 2020 by the International Monetary Fund, could reach \$ 28 trillion over the next five years.³

The IMF considers that about one third of the economic losses from the disease are direct costs: from loss of life, workplace closures, and quarantines while the remaining two thirds will be indirect, reflecting a loss in consumer confidence and business behavior and tightening financial markets.⁴

Some parties are reported to have begun legal actions, in China as well as abroad, at least before

¹ Xinhua, http://www.xinhuanet.com/english/2020-04/06/c_138951662.htm.

² Johns Hopkins Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>.

³ Kristalina Georgieva Opening Remarks for Annual Meetings Press Conference, October 14, 2020, Washington, D.C., <https://www.imf.org/en/News/Articles/2020/10/14/sp101420-we-must-take-the-right-actions-now>.

⁴ IMF, Potential Impact of the Coronavirus Epidemic: What We Know and What We Can Do, <https://blogs.imf.org/2020/03/04/potential-impact-of-the-coronavirus-epidemic-what-we-know-and-what-we-can-do/>.

the American courts,⁵ to impute liability to the Chinese State in connection with the COVID-19 pandemic, and a few governments have begun to consider how to call China to account for its role in the COVID-19 pandemic.⁶ A novel dimension of these actions might arise from allegations of the assumption by the Communist Party of the direction of the country's fight against COVID-19 to the point of actually supplanting the Chinese State authorities, begging the question whether responsibility might be imputed to the Party, including before national courts as it might qualify for immunities.⁷

As for the private actions before the American courts,⁸ or any other nations' courts for that matter,

⁵ Armada Bronstad, Class Action filed against China over Covid-19 Outbreak, Law.com, March 13, 2020, <https://www.law.com/dailybusinessreview/2020/03/13/class-action-filed-against-china-over-covid-19-outbreak/>.

⁶ Conor Finnegan, US blames China for delayed virus response, but pulls funding from World Health Organization, ABC News, April 23, 2020, <https://abcnews.go.com/Politics/us-blames-china-delayed-virus-response-pulls-funding/story?id=70288063>; One News, Australia joins President Trump's call for inquiry into China's handling of Covid-19, April 19, 2020, <https://www.tvnz.co.nz/one-news/world/australia-joins-president-trumps-call-inquiry-into-chinas-handling-covid-19>.

⁷ Zhiqiong June Wang, Law in crisis: a critical analysis of the role of law in China's fight against COVID-19, Griffith Law Review, July 15, 2020 p. 9-11, <https://doi.org/10.1080/10383441.2020.1790332>.

⁸ In Missouri, the Attorney General has filed a suit: <https://htv-prod-media.s3.amazonaws.com/files/prc-complaint-1587488259.pdf>. A private suit has been filed in Florida: https://www.scribd.com/document/451594535/Class-Action-Lawsuit-Against-China#from_embed?campaign=VigLink&ad_group=xxclxx&source=hp_affiliate&medium=affiliate. In the United Kingdom, a conservative think tank has raised the

they are destined to fail, as foreign governments enjoy sovereign immunity in national courts.⁹ And no individual would have standing to sue China before the International Court of Justice (ICJ).¹⁰ The availability and merits of claims in national law between private parties arising from the Covid-19 epidemic are issues that fall outside the scope of this article.¹¹

prospect of legal action against China,
<https://henryjacksonsociety.org/publications/coronaviruscompensation/>.

⁹ In American law, the leading case is the Supreme Court's judgment in the case of *Schooner Exchange v McFadden*, 11 U.S. 7 Cranch 116 116 (1812), <https://supreme.justia.com/cases/federal/us/11/116/>. Where a State has contracted with a foreign private party in connection with commercial activities, not for a public purpose, and where a State includes in a contract with a foreign private party an express submission to a foreign law and to the jurisdiction of foreign courts or arbitration tribunals, such private parties would have standing to sue the State before such courts or tribunals. But, in the COVID-19 case, there is no suggestion of claims by foreign enterprises against China for violations of international health laws, though there will no doubt be many involving Chinese State-Owned Entities and government agencies with foreign private parties the performance of which will have been suspended giving rise debates about their justification on the basis of the COVID-19 pandemic. Stephen L. Carter, *No, China Can't Be Sued Over Coronavirus*, Bloomberg, March 23, 2020, <https://www.bloomberg.com/opinion/articles/2020-03-24/can-china-be-sued-over-the-coronavirus>.

¹⁰ Statute of the International Court of Justice, article 34(1), <https://www.icj-cij.org/en/statute>.

¹¹ With respect to that question, there is an abundance of literature, see for instance, Paul Giles and Julian Berenholtz, *Ebola outbreak: Is it a force majeure event?* Eversheds, London, August 18, 2014, <https://www.eversheds-sutherland.com/documents/services/construction/Ebola%20article.pdf>.

The questions then arise whether there are grounds in law to impute State responsibility to China for its role in the spread of the pandemic and whether there is evidence to support any such claims.

The focus of this article is on the first question, namely on the framework in public international law governing State responsibility in relation with epidemics.

Whether China failed in the implementation of any of its duties is a question of fact, involving technical and scientific qualifications for their resolution. Since the exact circumstances in which the COVID-19 epidemic broke out and spread in its early stages remain a matter of controversy, and considering also that the World Health Organization (WHO) is conducting investigations on these questions and will in due course release a report of its conclusions,¹² the application of the legal rules set down below to the specific case of COVID-29 is left for future study.¹³

¹² Washington Post, China's Xi backs international investigation into covid origins, May 18, 2020, https://www.washingtonpost.com/world/asia_pacific/chinas-xi-backs-who-led-review-of-covid-19-outbreak-proposes-aid-for-developing-world/2020/05/18/911a1544-98df-11ea-ad79-eef7cd734641_story.html.

¹³ In the meantime, it may be noted that, according to the Second Progress Report of the Independent Panel for Pandemic Preparedness and Response for the WHO Executive Board, released on January 18, 2021, "there is evidence from Wuhan that locally available, commercial, next-generation-sequencing conducted in late-December 2019 provided the first suggestion that a novel virus may be responsible for the clinically observed cases of pneumonia of unknown origin" and it is "clear that public health measures could have been applied more forcefully by local and national health authorities in China in January". This Panel emphasized that it is "not conducting a forensic inquiry into the origins of the virus or seeking to

China occupies a special place in matters of epidemics as, of the five last influenza epidemics in the past century, China has been at the origin of three: the "Asian flu" in 1957, the "Hong Kong flu" in 1968 and "Russian flu" in 1977,¹⁴ the first two of which led to some three million deaths worldwide.

In addition, a deadly 1997 bird flu outbreak in Hong Kong fatally infected at least 18 people in Hong Kong; the outbreak is believed to have originated among fowl raised in Southern mainland China.¹⁵

And, in 2003 the Severe Acute Respiratory Syndrome (SARS) epidemic, which killed 774 people, nearly all of them in mainland China, was traced to palm civets sold as exotic meat in Southern Chinese food markets.¹⁶

It also bears mentioning that the novel influenza H1N1 virus, which emerged and was detected first in the United States in 2009, spread quickly around the world killing some 151,700 - 575,400 people during its first year of circulation.¹⁷

pinpoint the spillover event when it moved from animal to human hosts".¹³ That task, as well as the complete assessment of the origins and of the propagation, as well as of the roles of the WHO and governments will be addressed in the context of a "global study" currently being conducted by the WHO

¹⁴ The other two were the "Spanish flu" in 1918 and the "2009 H1N1 Pandemic" in 2009,
<https://www.ncbi.nlm.nih.gov/pubmed/30180422>.

¹⁵ René Snacken, Alan P. Kendal†, Lars R. Haaheim†, and John M. Wood, The Next Influenza Pandemic: Lessons from Hong Kong, 1997, EIDS Journal, CDC, Volume 5, Number 2–April 1999,
https://wwwnc.cdc.gov/eid/article/5/2/99-0202_article.

¹⁶ Rich Gladstone, Coronavirus Outbreak Risks Reviving Stigma for China, New York Times, February 10, 2020,
<https://www.nytimes.com/2020/02/10/world/asia/china-epidemics-coronavirus.html>.

¹⁷ Centers for Disease Control and Prevention, 2009 H1N1 Pandemic (H1N1pdm09 virus),

But none of those epidemics gave rise to claims of State responsibility pursued in public international law.

Every internationally wrongful act of a State entails its international responsibility.¹⁸ Such wrongful acts include violations of general principles of public international law (2.), and violations of obligations specifically undertaken vis-à-vis other States. (3.).¹⁹

A defendant State may invoke as an excuse for failures to perform any of such obligations the defense of force majeure subject to the satisfaction of certain conditions (4.).

Victim States assume responsibility for their own conduct that aggravates harm caused illegally by another State (5.)

2. - General principles of public international law

According to the rules of territorial sovereignty, any physical action making itself felt

<https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html>.

¹⁸ Article 1 of the International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001,

https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; and the following cases: Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28. See also S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29.

¹⁹ International customs are also a source of law such that a State could be pursued for violations thereof, but the case at hand depends more on general principles.

within the territory of a State from a source situated in the territory of another State (physical interference) is prohibited. Accordingly, any harm suffered on the territory of one State the physical origin of which is located in the territory of another State may be considered to give rise to responsibility in public international law

The leading case on the point is the Trail Smelter case decided by an *ad hoc* international tribunal.²⁰ A Canadian company had built a lead and zinc smelting plant at Trail British Columbia, about ten miles North of the State of Washington in the United States. Large quantities of sulphur dioxide were emitted from the plant and flowed down the Columbia River allegedly causing damage to land and other property in Washington State.

In finding in favor of the United States, the Tribunal ruled that:

under principles of international law ... No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

In 2013, the ICJ reaffirmed the rule stated in its Advisory Opinion in the case of the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,²¹ recalling that the principles of sovereignty and territorial integrity require that

The existence of the general obligation of States to ensure that activities

²⁰ Canadian-United States International Joint Commission, Arbitral Tribunal, 1938 and 1941, UN Reports of International Arbitral Awards, vol. 3, p. 1905.

²¹ ICJ Reports 1996 (I), p. 241-242, para. 29.

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".²²

Thus, if it were to be ascertained that any Chinese State agency had created the COVID-19 virus and introduced it into circulation among the public, then China's responsibility for the propagation of the disease onto the territories of other States would justify imputation to China of responsibility.

A State responsible for illegally causing harm to another State must re-establish the situation which existed before the wrongful act was committed. If this cannot be achieved by restitution, or where that is not possible or sufficient, by compensation for any financially assessable damage including loss of profits insofar as it is established.²³

3. - China's obligations under treaties

Beyond the possibility of imputing State liability for spreading epidemics as a violation of sovereign rights to the integrity of territory, such

²² Certain activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua, and Certain activities carried out by Costa Rica in the Border Area (Nicaragua v Costa Rica), December 16, 2015, <https://www.icj-cij.org/files/case-related/152/152-20151216-JUD-01-00-EN.pdf>; the passage cited is extracted from the ICJ's order in this case rendered on December 123, 2013 at para. 19.

²³ Article 35, ILC, Responsibility of States for Internationally Wrongful Acts, supra, note 18. The State in the wrong must give the wronged State satisfaction, which may take the form of an apology, Dexin Tia, U.S. and NATO Apologies for the Chinese Embassy Bombing: A Categorical Analysis, International Journal of Communication 1 (2007), 360-376, <https://ijoc.org/index.php/ijoc/article/view/74>.

liability might also follow from violations by China of its obligations subscribed under treaties.

The case of the Factory at Chorzow established that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".²⁴

3.1. - Under the Charter of the United Nations (UN)

Under articles 55 and 56 of the UN Charter, Member States are obligated "to take joint and separate action in co-operation with the Organization" to promote "solutions of international economic, social, health, and related problems".²⁵

Had the Security Council intervened in relation with the Covid-19 pandemic, as it did in connection with the Ebola pandemic that broke out in West Africa in 2013, it might have required that China implement measures to avoid "threats to international peace and security".

However, in the case of the Covid-19 pandemic, the Security Council has been unable even to agree on a resolution to express solidarity with affected nations. The main stumbling block seems to have been the inability of Security Council members to agree on

²⁴ Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.

²⁵ Signed in San Francisco on June 26, 1945, [https://www.un.org/en/sections/un-charter/un-charter-full-text/#:~:text=%20UN%20Charter%20%28full%20text%29%20%201%20WE,CHAPTER%20II%3A%20MEMBERSHIP.%20The%20original%20Members...%20More%20. For a development of this line of argument, see Charlotte Steinorth, The Security Council's Response to the Ebola Crisis: A Step Forward or Backwards in the Realization of the Right to Health?, Blog of the European Journal of International Law, March 2, 2017, <https://www.ejiltalk.org/the-security-councils-response-to-the-ebola-crisis-a-step-forward-or-backwards-in-the-realization-of-the-right-to-health/>.](https://www.un.org/en/sections/un-charter/un-charter-full-text/#:~:text=%20UN%20Charter%20%28full%20text%29%20%201%20WE,CHAPTER%20II%3A%20MEMBERSHIP.%20The%20original%20Members...%20More%20.)

a designation for the disease, the American government insisting on one that would have tied the disease to China, and the latter, predictably, rejecting any such approach.²⁶ On April 2, 2020, the General Assembly adopted a resolution highlighting the importance of global solidarity to combat the COVID-19 pandemic.²⁷

3.2. - Under the International Covenant on Economic, Social, and Cultural Rights (ICESCR)

Article 12 of the ICESCR²⁸ guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and specifies governmental obligations in relation with “prevention, treatment and control of epidemic, endemic, occupational and other diseases”.²⁹

As China ratified the Covenant on March 2, 2001, it is obligated by these provisions.³⁰

²⁶ International Peace and Security, and Pandemics: Security Council Precedents and Options : What's In Blue, July 20, 2020, <https://www.whatsinblue.org/2020/04/international-peace-and-security-and-the-covid-19-pandemic-security-council-precedents-and-options.php>

²⁷ The Resolution called for “intensified international cooperation to contain, mitigate and defeat the pandemic”, *idem*.

²⁸ The Covenant was signed in New York on December 16, 1966 and it entered into effect on January 3, 1976, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en#7.

²⁹ Signed in San Francisco on June 26, 1945, https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf.

³⁰ UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec.

On the other hand, according to the Human Rights Committee of the UN, human rights treaties are for the benefit of persons within their jurisdiction.³¹

This conclusion is reinforced in the case of the ICESCR by article 2 of its Optional protocol providing that communications may be submitted to a committee created to hear complaints by or on behalf of "individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party".³²

There is a substantial literature promoting the existence of a "human rights-based" right to health in public international law independent of such rights as consecrated in the ICESCR. Most of the proponents of such a right define its elements as "availability, accessibility, acceptability, and quality".³³ A minority would add as an element to such a right "international assistance and cooperation".³⁴

³¹ Human Rights Committee, General Comment No. 24, Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in relation to Declarations under Article 41 of the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.6. 1994 para. 8.

³² The Protocol was signed on December 10, 2008 and entered into force on, May 5, 2013. China is not party to the Protocol
https://treaties.un.org/pages/ViewDetails.aspx?src=TR&EATY&mt_dsg_no=IV-3-a&chapter=41.

³³ Gruskin S., Bogecho D., Ferguson L. "'Rights-based approaches' to health policies and programs: Articulations, ambiguities, and assessment," *Journal of Public Health Policy*. 2010;31(2):129-145.

³⁴ Paul Hunt, *Interpreting the International Right to Health in a Human Rights-Based Approach to Health*, *Health Human Rights Journal*, 2016 December 18 (2), 109-130,
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5394996/>

In any event, the regulations adopted under the auspices of the WHO as detailed below set down a set of norms governing international assistance and cooperation with respect to pandemics. By application of the rule *lex specialis derogate legi generali*, those specific norms would prevail over any more general norms that might be induced from human rights principles.³⁵

3.3. - Norms under the aegis of the WHO

An additional ground for imputing responsibility to a State would be its violations of its commitments made under the *aegis* of the WHO.

International health law has mostly been adopted within the WHO, a UN affiliated organization, which was established in 1947 and now comprises 194 Member countries, including China.

While the WHO has been criticized for its role in the management of the Covid-19 pandemic,³⁶ the merits of those criticisms are not treated in the context of this article.

3.3.1. - The WHO's structure and functioning

The functions of the WHO are essentially to assist and to promote health standards and norms, to advise the governments of Member States on health policies, to provide administrative and technical services such as in relation with epidemics. It furnishes "appropriate technical assistance and, in

³⁵ Sheeran S., *The relationship of international human rights law and general international law: a hermeneutic constraint, or pushing the boundaries?*, in: Sheeran S., Rodley N., editors. *Routledge handbook on international human rights law*, Routledge, London, 2013. p. 83.

³⁶ See for instance, Joshua Busby, Karen A. Grépin and Jeremy Youde, *Ebola: Implications For Global Health Governance*, *Global Health Governance*, April 2015, 2016, <https://blogs.shu.edu/ghg/2016/04/25/ebola-implications-for-global-health-governance/>.

emergencies, necessary aid upon the request or acceptance of governments".³⁷

The WHO takes the initiative in proposing normative texts to its members for adoption either as conventions³⁸ or as regulations,³⁹ in particular the International Health Regulations (the IHR) discussed below.⁴⁰ The WHO also makes "recommendations" to Member States.⁴¹

³⁷ Article 2 of the Constitution of the WHO, <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1>.

³⁸ The WHO succeeded in negotiating its first convention in 2003, that is the Framework Convention on Tobacco Control.

³⁹ Articles 2(k), 19 and 21 of the Constitution of the WHO-.

⁴⁰ WHO,

<https://www.who.int/ihr/publications/9789241580496/en/>. The Pandemic Influenza Preparedness Framework (PIPF), adopted on May 24, 2011, is of tangential interest in that it concerns "influenza viruses", which designation does not, according to the WHO, include COVID-19 (WHO, Q1A: Similarities and differences – COVID-19 and influenza, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-similarities-and-differences-covid-19-and-influenza?gclid=Cj0KCQjwzN71BRCOARIsAF8pjfhvS9NbwVTBQ_X604ZT0652H0-dLTNf-

[KAjm10tNNdQBeysPZIixgwaAgApEALw_wcB](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-similarities-and-differences-covid-19-and-influenza?gclid=Cj0KCQjwzN71BRCOARIsAF8pjfhvS9NbwVTBQ_X604ZT0652H0-dLTNf-KAjm10tNNdQBeysPZIixgwaAgApEALw_wcB)). The adoption of the PIPF arose from Indonesia's refusal to share samples of influenza A (H5N1) with the WHO. The country invoked its sovereign right to control matters connected to the outbreak of the disease on its territory while being concerned that it might not receive a fair share of the benefits of scientific discoveries derived from the virus samples.⁴⁰

⁴¹ Articles 2(k) and 23 of the Constitution of the WHO. For instance, Part III of the IHR covers recommendations. Whether they are binding on Member States is ambiguous. According to the ordinary meaning of the word, a recommendation would not be binding; on the other hand, under article 62 of the

The WHO's decision-making bodies are the World Health Assembly and the Executive Board. The Assembly is attended by delegations from all WHO Member States. Its main functions are to decide the WHO's policies and appoint the Executive Board and its Director-General.⁴² The Board has 34 technically qualified members and its main functions are to implement the decisions and policies of the Health Assembly, and advise it and generally to facilitate its work.⁴³

The obligations of Member States are to file annual reports with the WHO on their progress in improving the health of their people,⁴⁴ and in implementing recommendations of the Organization and conventions, agreements and regulations,⁴⁵ to communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published locally,⁴⁶ to provide statistical and epidemiological reports as determined by the Health Assembly,⁴⁷ and to transmit upon the request of the Board such additional information pertaining to health as may be practicable.⁴⁸

The Health Assembly may suspend the voting rights of Member States and withhold services if they do not fulfil their financial obligations,⁴⁹ but otherwise the WHO has no powers to sanction Member States for any violations of their commitments or of applicable international health norms.

WHO Constitution, Member States are obligated to render account annually with respect to the actions they have taken for their implementation.

⁴² Article 18 of the Constitution of the WHO.

⁴² Article 28 of the Constitution of the WHO.

⁴³ <https://www.who.int/about/who-we-are/history>.

⁴⁴ Article 61 of the Constitution of the WHO.

⁴⁵ Article 62 of the Constitution of the WHO.

⁴⁶ Article 63 of the Constitution of the WHO.

⁴⁷ Article 64 of the Constitution of the WHO.

⁴⁸ Article 65 of the Constitution of the WHO.

⁴⁹ Article 28 of the Constitution of the WHO.

The WHO Constitution provides that any question or dispute relating to interpretation and application of the Constitution may be referred to the ICJ in the absence of a resolution by negotiation or by intervention of the Health Assembly.⁵⁰

3.3.2. - *The International Health Regulations*

The currently applicable IHR, adopted in 2005, entered into effect on June 17, 2007 in the aftermath of the severe acute respiratory syndrome (SARS) outbreak.⁵¹

The aims of the Regulations are to improve the monitoring of international health threats and the coordination of the responses thereto, while avoiding unnecessary interference with traffic and trade. The Regulations govern surveillance and containment of disease within countries, at borders, and in international travel. They cover a broad range of health hazards of international concern, regardless of their origin or source – biologic, chemical, or radio nuclear.

Member States retain “the sovereign right to legislate and to implement legislation in pursuance of their health policies”.⁵²

Under article 5 of the IHR, each Member State undertakes to “develop, strengthen and maintain . . . the capacity to detect, assess, notify and report events” as required.

According to article 6 of the IHR,

⁵⁰ Article 75 of the Constitution of the WHO.

⁵¹ Originally International Sanitary Regulations were adopted in 1951. The IHR were adopted in 1969, and were amended in 1973 and 1981, IHR, Preamble, <https://www.who.int/ihr/publications/9789241580496/en/>.

⁵² Article 2 of the IHR.

Each State Party shall assess events occurring within its territory . . . Each State Party shall notify WHO, by the most efficient means of communication available . . . **within 24 hours** of assessment of public health information, of all events which may constitute a public health emergency of international concern (PHEIC) within its territory . . . as well as any health measure implemented in response to those events. (emphasis added)

Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential PHEIC. (emphasis added)

A "public health emergency" is defined in article 1 of the Regulations as meaning an extraordinary event which

- constitutes a public health risk to other States through the international spread of disease and
- potentially requires a coordinated international response.

Under article 7 of the IHR, when a Member State has evidence of an "unexpected or unusual public health event" within its territory, "irrespective of origin or source", which may constitute a PHEIC, it must communicate to the WHO all relevant public health information and the provisions of article 6 apply in full.

“Unexpected or unusual public health event” is not expressly defined in the IHR.

The WHO may only make the information available to the public if other information about the same event has already become publicly available and there is a need for the dissemination of authoritative and independent information.⁵³

The Director-General has the exclusive power to declare an emergency.⁵⁴ Prior to the COVID-19 pandemic in 2019–20, he had done so only once, namely during the 2009 influenza A (H1N1) pandemic. Prior to doing so, the Director General must consult with the State in question. The decision must be based on an assessment of the risks to human health, of international spread of disease and of interference with international traffic.⁵⁵

At the request of a Member State Party, the WHO will provide it with technical assistance including international teams of experts for on-site assistance.⁵⁶

When requested by the WHO, Member States “should provide, to the extent possible, support to WHO-coordinated response activities”.⁵⁷

Member States must maintain the capacity to respond promptly and effectively to public health risks and PHEICs.⁵⁸

When the Director General declares a PHEIC, he/she may issue temporary and/or standing recommendations including health measures regarding

⁵³ Article 11(4) of the IHR.

⁵⁴ Article 12 of the IHR.

⁵⁵ Article 12 of the IHR. The Director General also consults beforehand with the Emergency Committee consisting of experts that he/she has appointed, articles 48 and 49 of the IHR.

⁵⁶ Article 13(3) and (4) of the IHR.

⁵⁷ Article 13(5) of the IHR.

⁵⁸ Article 13(1) of the IHR.

persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic.⁵⁹

Recommendations should not be more restrictive of international traffic and trade and nor more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.⁶⁰

According to article 42 of the IHR, health measures taken pursuant to the IHR must be initiated and completed without delay, and they must be applied in a transparent and non-discriminatory manner.

If a Member State of the WHO were to engage its responsibility in connection with its commitments within the WHO, then it could be pursued by other Member States in accordance with the WHO dispute resolution procedures.⁶¹

In the event of a dispute between Member States concerning the interpretation or application of the IHR, they must first seek to resolve it through negotiation or any other peaceful means, including good offices, mediation or conciliation.⁶² In the absence of such a resolution, the Member States may agree to refer the dispute to the Director-General, who then makes every effort to settle it.⁶³

Member States may at any time accept compulsory arbitration with regard to disputes concerning the interpretation or application of the IHR to which they are party or with regard to a specific dispute in relation to any other Member State. The arbitration would be conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two States applicable at

⁵⁹ Article 15(1) and (2) of the IHR.

⁶⁰ Article 17 of the IHR.

⁶¹ Article 10 of the IHR.

⁶² Article 56(1) of the IHR.

⁶³ Article 56(2) of the IHR.

the time of the request for arbitration. The resulting arbitral award would be binding and final.⁶⁴

Still, these provisions are not intended to impair the rights of Member States under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.⁶⁵

From this provision, it might be deduced that the Member States would retain the right to refer any dispute about the IHR to the ICJ, provided that each had submitted to its jurisdiction without filing any reservations with respect to the subject matter of the dispute in question.⁶⁶

3.4. - Protection of wildlife norms

China is party to several treaties dealing with the regulation of wildlife, such as the UN Convention concerning the Protection of the World Cultural and Natural Heritage of 1972⁶⁷ (the Cultural Heritage Convention) as well as the UN Convention on Biological Diversity of 1992 (the Biodiversity Convention).⁶⁸

⁶⁴ Article 56(3) of the IHR.

⁶⁵ Article 56(4) of the IHR.

⁶⁶ Swargodeep Sarkar, *Liability of China for COVID-19 Outbreak, State Responsibility, and Jurisdictional Challenges*, *moderndiplomacy*, April 13, 2020, <https://moderndiplomacy.eu/2020/04/13/liability-of-china-for-covid19-outbreak-state-responsibility-and-jurisdictional-challenges/>.

⁶⁷ China became a party on December 12, 1985, UN Educational, Scientific and Cultural Organization. (UNESCO), <https://whc.unesco.org/en/conventiontext/>.

⁶⁸ China became a party to the Convention on January 5, 1993, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27.

While the conservation obligations assumed by China under these Conventions⁶⁹ might tangentially touch upon the spread of disease, a third Convention to which China is party is more germane to the issues discussed herein.⁷⁰

On April 8, 1981, China became party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷¹

According to its article II, CITES's fundamental purpose is to regulate imports and exports of designated endangered species.⁷²

While the Convention allows that Parties might adopt domestic measures that are stricter than the standards set down in the Convention, including ones regarding the conditions of "taking, possession or transport" of designated species, it does not impose on Party States any obligation to do so.⁷³

⁶⁹ Article 52 of the Cultural heritage Convention, <https://whc.unesco.org/archive/convention-en.pdf>, and Article 8k(k) of the Biodiversity Convention, https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf.

⁷⁰ Article 22-1 of the Biodiversity Convention provides that its provisions "shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity", https://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf.

⁷¹ List of Contracting Parties | CITES, <https://www.cites.org/eng/disc/parties/chronolo.php>.

⁷² CITES home page, <https://www.cites.org/eng/disc/text.php>.

⁷³ Article XIV of the CITES.

In fact, China has adopted measures to implement its CITES obligations with respect to imports and exports of the designated endangered species.⁷⁴

The Secretary General of CITES has congratulated China for its “national legislation, enforcement, capacity building and public awareness” as well as for its “very important and active role in bilateral, regional and international cooperation in the implementation of the Convention”.⁷⁵

On the other hand, China’s regulation of the conditions in which wild animals and endangered species are taken, stored, transported, bought and sold on domestic markets have been widely criticized. As a matter of observation, in addition to the fare typical of markets all around the world, some markets in China offer more exotic items, such as live snakes, guinea pigs, bamboo rats, badgers, hedgehogs, otters, palm civets, even wolf cubs.⁷⁶

The gap between the restraints on international trade in endangered species and the exclusion of domestic trade from the scope of the Convention has created opportunities for finessing strategies.⁷⁷

⁷⁴ Regulations on the Administration of the Import and Export of Endangered Wild Animals and Plants, which were adopted at the 131st Executive Meeting of the State Council on April 12, 2006 and which entered into effect as of September 1, 2006, http://www.fdi.gov.cn/1800000121_39_4525_0_7.html.

⁷⁵ Remarks by John Scanlon, Secretary-General of the CITES, Beijing, April 8, 2011, https://www.cites.org/eng/news/SG/2011/20110408_SG_remarks_China_30th.php.

⁷⁶ Steven Lee Myers, China’s Omnivorous Markets Are in the Eye of a Lethal Outbreak Once Again, NYT, January 20, 2020, <https://www.nytimes.com/2020/01/25/world/asia/china-markets-coronavirus-sars.html>.

⁷⁷ A government-sponsored report released by The Chinese Academy of Engineering in 2017 revealed that the wildlife sector was valued at approximately US \$74 billion, employing at least 14 million people,

China first adopted the Law on the Protection of Wildlife in 1989 and it has been amended several times, most recently in 2018.⁷⁸

The stated purpose of the Law is “protecting wild animals, saving species of wildlife which are rare or near extinction, maintaining biodiversity and ecological balance, and promoting the establishment of ecological civilization”.⁷⁹

The Law identifies two classes of wildlife that are protected by national norms: those which are “rare or near extinction” and “terrestrial wildlife

Adolfo Arranz and Han Huang China's wildlife trade, South. China Morning Post, March 4, 2020, <https://multimedia.scmp.com/infographics/news/china/article/3064927/wildlife-ban/index.html>.

⁷⁸ The Law was adopted at the Fourth Meeting of the Standing Committee of the Seventh National People's Congress (NPC) on November 8, 1988 and promulgated on November 8, 1988; amended on August 28, 2004 at the eleventh Meeting of the Standing Committee of the Tenth NPC, on August 27, 2009 by the Eleventh Session of the Standing Committee of the Tenth NPC, on July 2, 2016, by the Twelfth Session of the Standing Committee of the 10th Session of the NPC and on October 26, 2018 by the Sixth Session of the Standing Committee of the Thirteenth Session of the NPC, https://eia-international.org/wp-content/uploads/WPL-Final-Law_translation_rev-January-2019.pdf.

⁷⁹ Article 1 of the law, which was adopted at the Fourth Meeting of the Standing Committee of the Seventh NPC on November 8, 1988 and promulgated on November 8, 1988; amended according to the Decision on Amending the Law on the Protection of Wildlife, adopted at the Eleventh Meeting of the Standing Committee of the Tenth NPC, (in official Chinese version: https://eia-international.org/wp-content/uploads/WPL-Final-Law_translation_rev-January-2019.pdf, in, unofficial translation: https://eia-international.org/wp-content/uploads/WPL-Final-Law_translation_rev-January-2019.pdf).

which are of important ecological, scientific or social value ".⁸⁰

The production and trade of wildlife under special State protection and derivative products for use as food are prohibited; the production and trade of wildlife not under special State protection and derivative products without proof of legal origin for use as food are prohibited. The illegal purchase of wildlife under special State protection and the products thereof for use as food is prohibited.⁸¹

The import and export of wildlife and the products thereof protected on the CITES lists as well as the export of wildlife under special State protection and the products thereof require approval of the competent authorities.⁸²

Violations of these provisions are subject to administrative sanctions including fines ranging from RMB 2,000 to RMB 50,000, but they are not as such subject to criminal sanctions.⁸³

Actually, the Chinese government's policy has been to promote the commercial use of wild animals, in particular as a means for poor peasants to increase their income.⁸⁴

Furthermore, the government's list of protected animals as opposed to domestic animals varies over

⁸⁰ Article 2 of the Law on the Protection of Wildlife.

⁸¹ Article 30 of the Law on the Protection of Wildlife.

⁸² Article 35 of the Law on the Protection of Wildlife.

⁸³ Chapter IV of the Law on the Protection of Wildlife.

⁸⁴ In 2018, the State Council is reported to have urged farmers to "accelerate the growth of the farming and watching/display of wild animals", Adolfo Arranz and Han Huang China's wildlife trade, South China Morning Post, March 4, 2020, <https://multimedia.scmp.com/infographics/news/china/article/3064927/wildlife-ban/index.html>.

time. On May 29, 2020, the Ministry of Agriculture and Rural Affairs published a revised list of species which may be bred in captivity. Seventeen traditional species such as chicken and rabbit as well as sixteen "special" species, including spotted deer and ostrich, were included on the list. But bamboo rats, around which a minor industry had arisen in Southern China, were excluded, due no doubt to risks of the spread of disease.⁸⁵

As a result of the Covid-19 outbreak, the Standing Committee of the NPC prohibited, at least temporarily, the eating of the meat of "terrestrial wild animals of significant ecological, scientific, or social value" protected by the State and other terrestrial wild animals, including those bred artificially or in captivity".⁸⁶

⁸⁵ Ministry of Agriculture and Rural Affairs, http://www.moa.gov.cn/gk/tzgg_1/gg/202005/t20200529_6345518.htm. Emily Feng and Amy Cheng, Pandemic Causes China To Ban Breeding Of Bamboo Rats And Other Wild Animals, NPR, June 28, 2020, <https://www.npr.org/sections/goatsandsoda/2020/06/28/883900042/pandemic-causes-china-to-ban-breeding-of-bamboo-rats-and-other-wild-animals?t=1595862204822>.

⁸⁶ The Decision leaves open the possibility of obtaining authorizations for non-food use of such animals, Decision of the Standing Committee of the NPC on a Complete Ban of Illegal Wildlife Trade and the Elimination of the Unhealthy Habit of Indiscriminate Wild Animal Meat Consumption for the Protection of Human Life and Health, which was adopted at the Sixteenth Meeting of the Standing Committee of the Thirteenth NPC on February 24, 2020, <http://www.npc.gov.cn/englishnpc/lawsofthepc/202003/e31e4fac9a9b4df693d0e2340d016dcd.shtml>. Thereafter, the National Forestry and Grassland Administration is reported to have seized 39,000 wild animals and sanctioned more than 350,000 sites such as restaurants and markets where wild animals were traded, Liu Caiyu, National campaign aims to get wild animals off the table, Global Times, February 27, 2020, <https://www.globaltimes.cn/content/1181008.shtml>.

In summary, while China's domestic trade in wildlife has attracted widespread criticism, such activities do not fall askance of its international commitments to prohibit imports and exports of endangered species.

Most importantly, the propagation of the Covid-19 disease beyond China's borders did not arise from the international trade in wildlife, but instead from the movement of people.

Consequently, responsibility for the pandemic cannot be imputed to China on the basis of its commitments under the CITES.

4. - The defense of force majeure

In the event of a claim brought against China for violations of any of its treaty obligations, it could invoke force majeure as a defense.⁸⁷

In its judgement of November 11, 1912 in the Russian Indemnity case, the Permanent Court of Arbitration, ruled that "the exception of force majeure ... may be raised in public international law" and the defense or exception of force majeure is frequently referred to as a "general principle of law".⁸⁸

The qualification of this rule as a general principle of public international law has been widely approved by legal scholars.⁸⁹

⁸⁷ For instance as recognized in article 23, ILC, Responsibility of States for Internationally Wrongful Acts, supra, note 18.

⁸⁸ UN, Reports of International Arbitral Awards, vol. XI (Sales No. 61.V.4), p. 434.

⁸⁹ For instance, E. Jimenez de Aréchaga, International responsibility, Manual of Public International Law, ed. M. Serensen (London, Macmillan, 1968), p. 544 and J. Basdevant, Règles générales du droit de la paix,

For an event to justify the invocation of force majeure in public international law, a State must demonstrate a link of causality between the event and its failure to fulfil the obligation⁹⁰ from which the State claims to be excused⁹¹ and additionally that the event is "irresistible", "unforeseeable", and "external to the party invoking it".⁹²

According to the International Law Commission (ILC),

international doctrine would seem to consider that wars, insurrections, revolutions, riots, mob violence, etc., may be a cause of **force majeure**, as is generally recognized with regard to the forces of nature.⁹³ (emphasis added)

and, citing Oppenheim, the Commission continues:

Recueil des cours de l'Académie de droit international de La Haye, 1936, IV, Paris, Sirey, 1937, vol. 58, p. 555.

⁹⁰ The international obligation may arise from any "source" of public international law, such as a treaty, a custom, a general principle, a unilateral act, a decision of an international governmental organization, a judgement of the ICJ, an award of an arbitration tribunal. P. Reuter, *Droit international public*, 4th ed., Paris, Presses universitaires de France, coll. Thémis, 1973, p. 115.

⁹¹ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, p. 228, citing the Permanent Court of International Justice in the cases of the Serbian Loans and the Brazilian Loans (1929), and the rapporteur in the Spanish Zone of Morocco Claims (1924-1925).

⁹² *Supra*, note 90, p. 181.

⁹³ Secretariat Extract from the Yearbook of Survey of State practice, international judicial decisions and doctrine, 1978 Document:A/CN.4/315, vol. II(1), paragraph 548
https://legal.un.org/ilc/documentation/english/a_cn4_315.pdf.

A State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection, riot or public calamity, such as a fire, an **epidemic outbreak of dangerous disease**, and the like.⁹⁴ (emphasis added)

The excuse of force majeure is nuanced in the sense that, "although there can be no responsibility for a pure act of nature, as soon as human action or inaction is involved, the problem of responsibility arises".⁹⁵ Reuter raises the following hypothetical to illustrate the point:

If torrential rains provoke the catastrophic flooding of a river which ravages not only the territory of the State on which the rain fell but also the neighboring country through which the river flows, that State will have no claim to damage-interest. But if the flood is the result less of the rain than of the breaking of a dam, the problem changes. Although there can be no responsibility for a pure act of nature, as soon as human action or inaction is involved, the problem of responsibility appears.

According to Reuter, force majeure may not be invoked

if the impossibility of performance derives from an act attributable to the party invoking it, even if the act in

⁹⁴ International Law: A Treatise, 8th ed. (rev. Lauterpacht), London, Longmans, Green, 1955, vol. I, p. 364.

⁹⁵ Reuter, *supra*, note 90, p. 116.

question does not constitute a violation of an international obligation.⁹⁶

In short, a State would not be held responsible in public international for the occurrence of an epidemic as an act of nature, but its policies, acts and omissions in its prevention, and management of its propagation, in particular toward foreign countries, could engage its responsibility.

5 - On the consequences of contributory negligence

According to the ILC,

In inter-State relations, as under domestic law, there are certain circumstances in which liability may be ruled out. . . Contributory negligence by the injured party is also held to extinguish the total or partial liability of the operator or the acting State in some multilateral conventions.⁹⁷

For instance, the principle of reduced liability in the presence of contributory negligence of the injured part is provided under article 3 of the International Convention on Civil Liability for Bunker Oil Pollution Damage⁹⁸ and under article 7 of the International Convention on Liability and Compensation for Damage in

⁹⁶ Idem.

⁹⁷ International Liability for Injurious Consequences arising out of acts not prohibited by International Law (International Liability in case of loss from transboundary harm arising out of hazardous activities, (Agenda Item 4) Document 1/CN 4/543, N° 446.

⁹⁸ International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) Official Journal L 256, 25/09/2002, p. 0009 – 0016, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22002A0925\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22002A0925(01)).

Connection with the Carriage of Hazardous and Noxious Substances by Sea.⁹⁹

The ILC has approved that contributions to the injury by willful or negligent action or omission of the injured State should be taken into account in determining any due reparations has been approved by.¹⁰⁰

6. - Conclusion

Events surrounding the COVID-19 pandemic have showed the limits of the current law as a regulator of international health.

To carry out any missions on the territory of a Member State, the WHO must obtain the latter's cooperation, which can be withheld at its unqualified discretion for the protection of its sovereignty. A more constraining framework could be adopted by the Member States.

For responsibility to be imputed in public international law to China, it would have to be demonstrated that a Chinese State agency, such as the Wuhan Institute of Virology,¹⁰¹ willingly or negligently created or introduced COVID-19 into circulation, or that China had acted improperly in planning preventive measures or in the management of the epidemic, such as by failing to fulfil its obligations under the IHR.

Even then, complaining States would have to account for their own responsibilities for lack of preparedness as well as for the lethargy and

⁹⁹ May 9, 1996, https://www.hnsconvention.org/wp-content/uploads/2019/04/1996-HNS-Convention_e.pdf.

¹⁰⁰ Article 35, ILC, Responsibility of States for Internationally Wrongful Acts, *supra*, note 18.

¹⁰¹ The Institute was founded in 1956, and put under the administration of the Hubei Commission of Science & Technology in 1970. In June 1978, it was returned to the jurisdiction of the Chinese Academy of Sciences, and it adopted its current title

awkwardness of their reactions to the pandemic, which greatly aggravated the pandemic's consequences on their territories.

Any Party to the WHO and the IHR might seek to initiate consultations with China and call it to account within that structure. In fact, the WHO itself has saluted China's success in combatting the pandemic and expressed appreciation for the timely communications of China and its general availability under the Rules.

The dispute settlement procedures within the WHO and under the IHR do not preclude direct actions by Member States before the ICJ, before which China has not filed reservations that would exclude the Court's jurisdiction over disputes involving epidemics or health issues in general.