Applicability of State Responsibility for Health Emergencies and the Unique Situation of China amid SARS-COV-2

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This work was carried out in collaboration among all authors. All authors read and approved the final manuscript.

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ABSTRACT

This article aims to understand the limitations in enforcing state responsibility on a state of Origin for Trans boundary harm caused by a health emergency by analyzing the factors of force majeure, multiparty involvement, and inability to provide reparations, and the unclear source of the virus as the chief hindrances in prosecuting such states. The authors further explore the various conditions that triggered other PHEICs in history and the consequences and actions taken due to the trans-boundary harm caused. Furthermore, the article also studies the conditions that gave rise to the wet markets and traces the shortcomings in law that hurt the Origin of the virus. After that, the article studies how countries have failed to invoke the state responsibility of trans-boundary harm caused by a PHEIC. Lastly, the article further delves into how Chinese authorities blame both pre and post-outbreak and examine how the global community can negotiate with China for adequate compensation.
Keywords: International health regulations; state responsibility; transboundary harm; PHEIC, outbreak.

1. INTRODUCTION

The primary aim of the revised International Health Regulations, 2020 has always been to aid as a rapid responder to potential public health emergencies of international concern (PHEIC) and act as an effective deterrent by creating a set of responsibilities for any international transboundary harm caused by such outbreaks [1]. IHR, along with allied conventions and international norms, urge a systemic capacity building for global health security to bolster coordination and collaborations between member states to prevent such an occurrence in the future. One of the cornerstones of IHR, Article 5, mandates that all member states must establish Core Capacities as envisioned by its Annexure–I by five years of IHR being operational. Annexure–I contain recommendations for establishing core capacity requirements for surveillance and response for an improved assessment and detection of a future PHEIC. Unfortunately, it has largely remained unsuccessful [2]. Despite coming into force in 2007, IHR is yet to be implemented in more than 60% of the 196 member states parties to it [3]. As of 2014, only 64 states had the requisite core capacities to identify the signs of a probable health emergency and take appropriate action and precautions against the same [4].

2. LITERATURE SURVEY

In the meantime, thirteen years have passed since I was conceived. The world has witnessed several separate PHEIC’s being declared since then – the H1N1 in 2009, which further reappeared with wild polio strain in 2014, Ebola Virus in 2014, in West Africa, Middle East respiratory syndrome corona virus, H7N9 influenza, and at present the SARS-COV-2. One integral factor that unites the PHEICs as mentioned earlier is that they caused significant Trans boundary damage. Countries that failed to meet the objectives mandated by IHR sparked health emergencies, the ramifications of which affected the collective international community. This exposed the fact that conditions prevalent in many nations are not sufficient to tackle a future health emergency and increase the propensity to cause major transnational harm [5].

The Trail Smelter case observed that any event of transboundary harm which culminates in the negative enjoyment of rights against a different state transpires into a situation of state responsibility on the accused state in question. Such a responsibility accrues right from the inception of such action or omission. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts establishes under Article 2, the liability of state responsibility stating that if there is any such event caused by a nation, which constitutes as a breach of international law, all injured states have the right to seek the cessation of the said activity or pursue some form of reparation for damages borne out of it.

Furthermore, Article 1 of Draft Articles on Prevention of Transboundary Harm, 2001 includes such viral outbreaks as activities concerned with the “risk of causing significant transboundary harm through physical consequences.” Additionally, both Article 3 and Article 5 demonstrate how international law views such states with impunity if they had “failed to take all appropriate measures to prevent significant transboundary harm” by not authorizing “appropriate legislative, administrative and other actions, including the establishment of suitable monitoring mechanisms.” Therefore, in no less transparent wording, these Articles affirm that legal opinion would hold any such state liable if they had failed to take any steps to prevent the spread of such outbreaks and to cause “significant” transboundary harm.

Therefore, all countries that are guilty of not establishing the core capacities as mandated by IHR even after the stipulated grace period should ideally be held accountable for a breach of the regulations. This constitutes a violation of existing international obligations. As a consequence of that, any event of transboundary harm resulting out of it should attract the scope of Article 2 of the Draft Articles on State Responsibility. Similarly, any nation that acts in contravention to any other allied provisions of IHR concerning the developments of a potential PHEIC or taking such actions in blatant contravention to the laws as mentioned earlier is liable to be held equally guilty for the same.
3. PROPOSED SYSTEM

3.1 State Responsibility Due to the Transboundary Harm Caused by a Health Emergency

One of the important facets of a medical emergency such as a pandemic is its uniqueness in international law. Unlike other occasions of transboundary harm, no country has ever been prosecuted for its negligence and lack of adherence to international obligations, which might have resulted in the creation of an endemic or a pandemic. There are several reasons why there has been an international consensus in cases against another member state which failed to live up to the obligations:

Firstly, unlike any other form of transboundary harm, which usually involves a particular form of human engineering, health emergencies such as Ebola and H1N1 are incepted out in nature due to coincidental occurrences [6]. Indeed, global warming and climate change, or even human encroachment on animal habitat, might have been a significant factor for the incidence of the said virus. Still, it becomes unfeasible to reflect the same sense of blame on a single member state. This initiates the debate of force majeure in international law as a very likely pretext for bypassing the accusation of such wrongfulness.

Secondly, in an astounding number of occasions of the transboundary outbreaks, no clear evidence is gathered zeroing on Origin’s state. An interesting example would be the Cholera outbreak in Haiti. It was spread to the Haitian population by United Nations peacekeeping forces from Nepal, who brought the virus strains with them [7]. After an earthquake, the country’s existing health infrastructure, which was already in a dilapidated condition, was unprepared for this emergency. Here, it would be highly unlikely to trace a direct form of attribution on either Haiti for its distraught health infrastructure or Nepal and the United Nations peacekeeping forces for the transboundary spread of Cholera. Thus, the “risk” as mentioned in Article 1 of the Draft Articles on Trans boundary, in cases of such emergencies, is often unknown to the states of Origin and is spread by unprecedented circumstances which were hitherto unexpected [8].

Thirdly, a pandemic such as a corona virus initially proceeds as a PHIEC, gradually becoming endemic, until it finally takes the disastrous shape of its present form. It is important to note that a spread of a pandemic is the culmination of failures of the governing authorities of the origin country in question and numerous international bodies, both intergovernmental and private non-state actors [8]. When the outbreak of Ebola occurred, it intensified into an epidemic due to the makeup of laws and policies present in the country. The International Monetary Fund played a major role via its policy on structural adjustment in increasing the Government’s inadequacy in dealing with the virus, wherein it prioritized macroeconomic stability upon providing loans to countries in Western Africa [9]. This led to a severe crunch in the available budget available for critical sectors such as healthcare and security [9]. Hence, the Democratic Republic of Congo and Sudan were always ill-equipped to face crises such as an epidemic, and it becomes immensely unfair to bring them to trial for due diligence under the microscope of state responsibility. As a result, in most health emergencies, one finds that the outbreak and its consequences might result from several factors, which the country did not foresee.

Lastly, in continuation of the previous point, most nations where such virus originates will not provide the mammoth amount of reparations financially. For instance, the Democratic Republic of Congo requires assistance from the Global North to facilitate its redevelopment of critical infrastructure post-Ebola and not the other way round. A pandemic is equivalent to crises such as wars and economic recession, for it stalls the majority of commerce and hampers major supply chains [10]. Going by the Barcelona Traction case, any such sufferer country is obligated to demand reparation (ICJ Report, 1970). However, the international community, as in the past, would limit their involvement to the condemnation such acts as to demand reparations, as this particular precedent could adversely affect their own country in a future case of a health emergency, and it would force them to follow suit despite playing a very limited role in the transboundary spread of the outbreak. Thus the concept of state responsibility that arises out of transboundary harm in the case of a health emergency, so far, has always evaded the lens of scrutiny of prosecution of a state of Origin.
3.2 SARS-Cov-2: China’s Defense of Force Majeure

Article 23 of the Draft Articles on State responsibility lays down three elements which, if fulfilled, exempt a member state from liability under the incident being influenced by force majeure:

- The act in question must be brought about by an irresistible force or an unforeseen event;
- which is beyond the control of the state concerned; and
- This makes it materially impossible in the circumstances to perform the obligation.

Chinese authorities’ negligence influenced the spread of the virus, and the following are proven:

3.2.1 It was not an irresistible or unforeseen event

In enacted the Law of the People’s Republic on the Protection of Wildlife, where Article 3 of the legislation stated that animals were designated “natural resources” for the optimal use by citizens of China. It gave way for rampant trade of wildlife animals such as civets, snakes, wild bears [10], and even endangered animals such as tigers, pangolins, and rhinoceros the aforementioned wet markets, despite warnings from leading experts about the disastrous consequences of the same. Located in small wire cages piled on top of one another, these shops specialize in dealing with multiple varieties of animals stacked against one another, with turtles and snakes often mixed with wild boars and civets [11]. Furthermore, due to poor hygiene, these animals are under tremendous stress, which leads to the lowering of their immune-competency [12]. Additionally, the fact that the workers eat, drink and even sleep in the vicinity of these cases raises animal to human transmission [13].

As one may observe, over the years, on separate occasions, the presence of wet markets in China [16] has time and again reminded the world that it is the dot that connected the epidemiology of several outbreaks. Asian flu 1957 (H2N2), Hong Kong flu 1968 (H3N2), H5N1 Flu in Hong Kong – all were caused by reassortants containing gene segments of both avian and human influenza viruses, stressing how these wet markets remain a crucial factor in the propagation of the same. Post the H5N1 flu outbreak in 1997, a similar outcry for stricter regulation. Still, China took a softer stance against such opposition and ordered a specific set of changes to minimize the potential outbreak in the future, such as the complete removal of quails (which acted as the major source of transmissions) and a mandatory cleaning day per month (Perez). Despite this, the H5N1 virus reappeared in 2001 and was shortly followed by SARS in 2003, and the place is looked at as the most likely source for Covid-19 [14]. These wet markets were primarily operational in pursuit of the Chinese Government’s goal of lifting people from poverty. Keeping aside the socio-economic intentions, China was very much aware of the nature of eco-hazard these markets posed in the multiple brushes it had over the years, which rules out any such future event as “unforeseen” [15].

3.2.2 The state allowed the existing operation of such wet markets and further flouted obligations towards the collective international community’s health

Post the aftermath of the SARS epidemic, due to an over-pouring criticism from WHO and other parts of the international community, the wet-markets were recognized as severely precarious zones for any prospective animal to human virus transmissions. Therefore, the outcome was largely bludgeoned upon the wildlife industry when the Chinese Government banned it. However, the revocation of trade lasted only for a matter of months, and the lobbying power of the profitable $140 billion dollar industry resulted in the exemption of fifty animal transmissions. Therefore, the outcome was largely bludgeoned upon the wildlife industry when the Chinese Government banned it. However, the revocation of trade lasted only for a matter of months, and the lobbying power of the profitable $140 billion dollar industry resulted in the exemption of fifty such wildlife animals for being sold in the markets. Meanwhile, China further flouted the international pressure by allowing products of “banned” wildlife animals to be sold as tonics – often labeled as sex-enhancers, medicines and strengthening food, etc. [17].

Thus, China’s actions went against the basic principle of IHR to not promote any activity that has the potential to endanger the health of its citizens. By acting in such a manner, China also violated the International Convention on Economic, Social, and Cultural Rights, which enforces the state to take all precautions to help prevent and control an epidemic disease by preserving certain basic social, cultural, and economic rights of its citizens, including their right to health and safety. By promoting economic gains in this situation, the state overlooked its core obligations of proving the
essential levels of health care. Unlike previous Ebola, which had unknown origins, here we can observe a systemic structure in place that helps facilitate such inter-species viral transmissions under the nose of authorities. China was aware of the “significant” harm such wet markets posed on the states’ functioning and can be held complicit in allowing the same functioning.

3.2.3 Prevailing circumstances led to the Origin of the virus in China

Further, a study on amino-acid sequences in corona virus S proteins indicated that pangolins possessed similar kinds of S-proteins as was present in the corona virus. These smuggled pangolins are of extreme value in China’s predominantly wet markets and sold for food and medicinal purposes. Furthermore, as reported by the Chinese Centre for Disease Control and Prevention, the virus samples were isolated from 33 of the 585 samples collected from Wuhan’s wet market in China between January 1 and January 12, 2020 [18]. Out of those 33 samples, 31 of them were collected from the western end of the market, where all the booths for exotic wildlife were located. Thus, these circumstances lead to a probable reason to believe that the corona virus did originate in Wuhan's wet market [19].

4. METHODOLOGY

4.1 Attribution of Conduct to the State of China

In the next stage, it is essential to delineate that the transboundary harm of the virus was primarily caused owing to China's negligence and lack of adherence to international obligations:

4.2 Violations of International Health IHR

Article 22 of the WHO Constitution states that "IHR adopted according to Article 21 shall come into force for all Members after due notice has been given." This indicates that the moment IHR became a part of codified law, all WHO members, including China, became bound by it. Therefore, any act or omission in contravention to IHR in force is in direct contravention to the binding law, resulting in a scope of state responsibility on China's failure to meet its requisite obligations.

In furtherance of the same, several reports state that China was slow in sharing reports with WHO about the extent of the virus and therefore violated Article 6 and Article 7 of IHR. In December, China started as early as it had no proof that indicated signs of any “human to human transmission of the virus.” Still, over two-thirds of the patients had never been to the Wuhan wet-market raising serious concerns about the credibility of the information shared [20]. Also, an epidemiological model released by Southampton University exhibited that if China had acted by IHR and shared the information with WHO, and the international community at large, by one, two, or three weeks, before the declaration of a formal lockdown, the cases would have decreased by 66%, 86%, and 95%, respectively [21].

4.3 Conduct of State Authorities violates Draft Articles on State Responsibility

Additionally, Article 4 and Article 5 of the Draft Articles on State Responsibility further throw light upon the attribution owing to the failure of state responsibility enshrined on the state and its organs, which represents protanto of the Government, and whose actions are a departure from the existing international norms, be it executive, legislative, judicial or otherwise. Upon the breakout of the virus, China's organs acted ultra vires by releasing falsified data to the outside world about the extent of the virus and imposing gag orders on doctors and journalists who wished to raise their concerns about the fatality of the virus. The consequence of such an act promoted the spread of the virus worldwide, as trade and tourism industries continued unfettered with infected human hosts carrying the virus worldwide. Such an act of negligence shifts the Chinese authorities’ burden to deny whether efficient steps were taken to control the virus's spread not only in China.
minimize the risk of the outbreak. By previous this principle of good faith, China also acts against Paragraph 2 of Article 2 of the United Nations Charter. It refuses to share vital information with the international community at an earlier stage of the virus [22].

5. RESULTS AND DISCUSSION

5.1 International Action against China

In the present instance, to try China on account of state responsibility, both the ICJ and the ICC have jurisdiction over these claims.

Based on the violations of IHR, the WHO Constitution, under Article 75 provides that, “Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice” In the past, the ICJ has stated that the jurisdictional clause such as this fails to include a claim arising out of any obligations falling under general international law. However, the wordings of the article indicates that it empowers the WHO to transfer "disputes" to the ICJ as well as encompass any question regarding the application of the Constitution, highlight that the ICJ can take cognizance of the matter if the WHO is willing to pursue such a legal route.

Similarly, given the extent of the transboundary harm, Article 15 of the Rome Statute provides the prosecutor’s office at the ICC to conduct proceedings if the prosecutor can prove that China’s actions and omissions qualify as a crime against humanity under Article 7(1) of the Rome Statute, as was applied in the Appeal No. ICC-02/17 QA4. (The Office of Prosecutor had conducted investigations into the actions of US military personnel in Afghanistan even when US was not a member of the ICC) Moreover, Article 48 of the Draft Articles on State Responsibility empowers any state to appeal for cessation or reparations for any violations mentioned above [22]. However, it is important to note that China, like it has done previously in the South China Sea islands case, would not approve of the decision reached, treating as "only as a piece of paper, i.e., unenforceable. However, it seems unfeasible to expect China to heed any requests for compensation for all life and commerce losses due to the corona virus. It is well within their rights to highlight several governments’ incompetency in the implementation of lockdowns in their respective countries. The current status quo of conventional laws is inadequate to identify and prosecute a single actor responsible for a pandemic.

This leads us to bypass the international organizations and aim for individual stakes against certain bodies for the immediate harm caused by such negligence of health norms. For instance, several countries' contracts were terminated by the Chinese state instead of the virus's force majeure [23]. This also includes the supply of essential commodities such as masks and sanitizers, as China is its global production hub. Countries like France, the USA and any other nation can rescind the reasons and negotiate better deals, which compensate them adequately for their losses. Draconian economic sanctions against China are unfeasible for the whole world, and even the US is not immune from it.

Similarly, many smaller nations which owe billions of dollars to China owing to several infrastructure projects it finances can formally use China’s card of force majeure as an excuse to write off loans [24]. In reality, this is the only form of reparation that can be foreseen given the prevalent political status quo. However, greater emphasis can be laid on the cessation of the wet markets, mandating China to acknowledge the colossal range of transboundary harm it possessed [25]. Additionally, countries can seek this opportunity to establish more transparent National Focal Points that would allow the proper implementation of core capacities, preventing a future pandemic [26].

6. CONCLUSION

In conclusion, in a moment of global crisis, although China is admittedly in the wrong, it would be counterproductive to indulge in a prosecution that would eventually be a stalemate. Hence, greater emphasis is required to establish stronger frameworks to detect such outbreaks and provide more autonomy and funding to WHO is operate without border restrictions in the pursuit of its prevention. There needs to be more compliance with IHR, affording it the same status as its sister nuclear or a bio-chemical convention. Any future non-compliance can attract the same level of sanctions as the world afforded North Korea for nuclear testing and Syria for unauthorized use of chemical weapons. Furthermore, the Global North needs to establish proper funding for adequate healthcare facilities in the South and agree to
undertake higher obligations to combat environmental concerns. Therefore, this calls for an immediate need to develop policies to benefit all states’ common interests to prevent such highly infectious diseases from occurring again.

CONSENT

It is not applicable.

ETHICAL APPROVAL

Ethical approval taken from Symbiosis law school, Pune, Maharashtra, India

COMPETING INTERESTS

Authors have declared that no competing interests exist.

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