

Role of International Organisations, State Responsibility and the Case against China

By Ankit Malhotra, student, Jindal Global Law School, India.

Coronavirus or COVID-19 not only overturned everyday life, but also forced us to remodel the very structure on which our civilization functions. The United Nations (hereinafter referred to as 'U.N.') and more particularly World Health Organisation (hereinafter referred to as 'WHO') have emerged as vital organisations dedicated towards curbing and preventing the spread of coronavirus and ensuring proper supply of medicines and other essential commodities during these critical times. The role of States has also become crucial in aspects of governance amid such an extraordinary situation that humanity finds itself in. Apart from general requirements of safety standards, many Conventions and Treaties provide for provisions which call for the role of the Government and global cooperation during an international health emergency. The UN Charter under Articles 1,2,55 and 56 and the 1970 Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States stresses States to cooperate during such extraordinary situations. Further, Article 25 of the 1948 Universal Declaration of Human Rights provides for the Right of People to have a healthy life and the duty on the State to protect this Right. In addition to it, the 1966 International Covenant on Economic, Social, and Cultural Rights under Article 12 lists duties of the participating States to ensure that the people should have the highest standards of health. Additionally, the Convention stresses upon the "prevention, treatment, and control of epidemic, endemic, occupational and other diseases".¹ Furthermore, the UN Committee on Economic, Social, and Cultural Rights under the 1966 Convention urged for "the creation of a system of urgent medical care in cases of epidemics and the provision of disaster relief and humanitarian assistance in emergencies."²

Role of World Health Organisation

The WHO emerged as a vital organisation dedicated towards curbing and preventing the spread of coronavirus and ensuring proper supply of medicines and other essential commodities during these critical times. The International Health Regulation, 2005 (IHR) created by the WHO

¹ International Covenant on Economic, Social and Cultural Rights art. 12, ¶ 2, December 16, 1966, 993 U.N.T.S. 3.

² U.N. C.E.S.C.R., 22nd Sess. ¶ 16, U.N. Doc. E/C.12/200/4 (August 11, 2000).

imposes a duty on the States to continuously monitor the health of its citizens and to report to the WHO about any health issue which can soon become a public health issue. At present, this Regulation is binding on 196 states and regulates the conduct of states before and during the outbreak of infectious diseases like COVID-19. The Regulation was framed with an aim “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade”³.

Furthermore, Article 6 of the IHR puts an obligation on each State to access and monitor the health issues taking place within its territory and report to WHO within 24 hours of every health issue which may have the potential of becoming an international health emergency. Moreover, Article 7 bestows an obligation upon a State to report to the WHO if it collects or come across of any evidence regarding public health event of international concern taking place within its territory. The provisions of IHR are mandatory in nature and the States are bound to pay obedience to them. Failure to do so will certainly invite penalties in the form of sanctions and penalties. Olha Bozehnko writes on the States’ responsibility to report outbreaks⁴ and the IHR (Art. 6) establish the reporting duty, *i.e.* the obligation of states to assess events occurring within their territories using a special decision-making instrument attached to the IHR and timely notify the WHO of all events which may constitute a public health emergency of international concern.

The duty of state co-operation under general international law and the specific obligation of reporting epidemic outbreaks share an obvious fundamental similarity: both pursue the same objective – addressing issues that transcend national borders and are beyond sovereign control. Although individual states are responsible for preserving public health in their territories, their efforts may be rendered meaningless without international co-operation. In the WHO’s words, “health is a shared responsibility, involving equitable access to essential care and collective defense against transnational threats”. This finding, however, considerably loses in value due to the legal nature of the duty to co-operate. So, should it be founded upon the duty to co-

³ World Health Organisation, International Health Regulation (2005) 3rd Edition, available at <<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=571A416D79BA24BE767C1B1A23389728?sequence=1>> (Last accessed on 29 November 2020; 18:13 pm).

⁴ Olha Bozehnko, ‘More on Public International Law and Infectious Diseases: Foundations of the Obligation to Report Epidemic Outbreaks’ (2019) Eur. J. Int’l L.: Talk!, <<https://www.ejiltalk.org/more-on-public-international-law-and-infectious-diseases-foundations-of-the-obligation-to-report-epidemic-outbreaks/>> last accessed 28 November 2020.

operate, the obligation to report epidemic outbreaks will end up being no more enforceable than the latter. Still, there is a chance of enhancing the enforceability by putting the duty of co-operation into a specific context. The UN Committee on Economic, Social and Cultural Rights (CESCR) considers the obligation under Art.2(1) to be founded upon and corresponding to the respective provisions of the UNC and well-established principles of international law. Besides, within the ICESCR, this obligation, under Article 12, clearly relates to the protection of public health.

However, even if the duty to co-operate under the ICESCR might be specified and narrowed in the field of public health (yielding *inter alia* the obligation to report infectious outbreaks), the enforceability will still be problematic as is the case for all obligations of conduct. An argument is made that applying the duty of co-operation to the field of public health is futile as states differ greatly in abilities and resources and cannot be expected to achieve any uniform standards. Indeed, states refusing to report an epidemic outbreak would hardly be brought to an international responsibility for breaching the obligation to co-operate. But for the IHR, the international legal regime of disease control would face a real and a very practical gap.

No doubt, the IHR is best tailored for the purpose. However, several alternative sources of the same duty make it more compelling as well as widen the institutional tools for making the duty operational. Given the current (and, actually, everlasting) uncertainties of WHO's mandate and powers, including the field of disease control, this would be a meaningful achievement. On the other hand, given that the credibility and efficiency of the IHR are frequently challenged and considering current global health-related concerns, one be better equipped with a "fall back option".

State Responsibility under International Law

States are bound to comply with obligations under international law. These obligations are based on the principle of international comity in furtherance of maintenance of safety, security and peace in the global sphere. Failure to comply with obligations from treaties and conventions, may invite sanctions and liability to pay damages. There are various theories regarding the outbreak of Corona virus in Wuhan province of China. But the issue remains what is the responsibility of China under the International law for this outbreak and China withholding the fact of such virus from the entire world. The law on responsibility of states, a cardinal element of international law provides the law regarding the obligations of the states

under international law and the penalties and liabilities in case a state fails to comply with such obligations. The “Articles on the Responsibility of States for Internationally Wrongful Acts, 2001” (hereinafter referred to as ‘ARISWA’).

This imposes an international responsibility on every State for its international wrongful act. Article 2 enshrines the essential elements together constituting an international wrongful act. There are mainly two crucial elements u/A 2, firstly, the conduct must be such that it can be attributed to the State under international law, and secondly, the conduct must be such that it violates an international legal obligation which is in force at that time for that particular state which has been alleged of committing such international wrongful act. The PCIJ in the *Phosphates in Morocco*⁵ Case and Mexico-United States General Claims Commission in the *Dickson Car Wheel Company*⁶ case held that, “the condition required for a State to incur international responsibility is “that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”.

Article 3 of the ARISWA provides for the characterization of an act of a State as internationally wrongful. It states that, (1) unless an act does not violate an international obligation, it cannot be characterised as an international wrongful act, and (2) a state cannot claim that such act is not an international wrongful act because it is lawful under its internal law. Further under the ARISWA, an international wrongful act can committed both by act as well as an illegal omission. Additionally, the responsibility of such State comprises of making full reparation for the injury caused by such international wrongful act. The term ‘injury’ has been a wide interpretation here, i.e. the damage caused by such injury can be both physical as well as mental. Further, Article 34 of ARISWA states that reparation may include satisfaction, restitution, compensation or a combination of these three. Moreover, Article 8 of ARISWA lays down provisions for conduct directed or controlled by a State. Under this article, the conduct of an individual or an entity can be attributed to State if there exists a relationship of either direction or control between such individual or entity and State. There has to be real link between the two. Such private act of the individual or entity constituting an international wrongful act under the International law, should be either directed by the State or controlled

⁵ *Phosphates in Morocco, Judgment*, 1938, P.C.I.J., Series A/B, No. 74, p.28.

⁶ *Dickson Car Wheel Company (USA) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951. V.I.), p.669, at p.678 (1931).

by the State. If these conditions are fulfilled, the State is bound to assume responsibility for such international wrongful act under the International law.

Further, Article 11 of ARISWA lays down the provisions regarding the “conduct acknowledged and adopted by a State as its own”. This article states that a state assume responsibility of an international act which could not be attributed to the State at the time of its commission, but it becomes attributed to State due to its subsequent recognition and acknowledgment by the State. Therefore, Article 11 provides how a State can be made responsible for an international wrongful act committed by a private individual or entity. This article brings out the exact law to make China responsible for the outbreak of COVID-19 developed by a particular laboratory in the Wuhan province of China. In addition to the ARISWA, the “International Health Regulation, 2005” (hereinafter referred to as ‘IHR’) is an international place in place regulating the conduct of the states before and during the outbreak of infectious diseases like COVID-19 in contemporary times. The regulation was framed with an aim “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade”⁷. Further Article 6⁸ of the IHR puts an obligation on each State to access and monitor the health issues taking place within its territory and report to WHO within 24 hours of every health issue which may have the potential of becoming an international health emergency. Moreover, Article 7 puts an obligation upon a State to report to the WHO if it collects or come across of any evidence regarding public health event of international concern taking place within its territory. The provisions of IHR are mandatory in nature and the States are bound to pay obedience to them. Failure to do so will certainly invite penalties in the form of sanctions and penalties.

Conclusion

China has deliberately ignored the above international obligation by not reporting to WHO, in a timely manner, about the sudden increase in cases of pneumonia in the Wuhan province

⁷ World Health Organisation, International Health Regulation (2005) 3rd Edition, available at <<https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=571A416D79BA24BE767C1B1A23389728?sequence=1>> (Last accessed on 29 November 2020; 18:13 pm).

⁸ *Id*, Art. 6.

having symptoms similar to “Severe Acute Respiratory Syndrome Coronavirus (SARS-COV)”, a type of Coronavirus. It also broke out in China in 2002 and took a toll of many lives across 32 countries. China totally failed to comply with Article 6 of the IHR which makes it mandatory to inform the WHO about events related to public health which may become an international health concern. The first case of COVID-19 was reported in China in December, 2019, but the Chinese government deliberately withheld the information of it from the WHO and it soon came out to be a biggest public health disaster one could imagine after the Spanish Flu which took place nearly a century ago. These malicious acts of China call out for imposing liability on China under the international law.