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## State Responsibility and COVID 19

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### ABSTRACT

The subject of several aspects of the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) and State responsibility is regarded as a major area of interest in terms of the fact that the original epidemic quickly turned into a pandemic, which the World Health Organization (WHO) declared in March 2020, due to the virus capacity of easy and fast mode transmission from person to person.

This Article seeks to determine whether States in light of international law might have violated the 2005 WHO International Health Regulations, and the WHO Constitution itself. If so, the possibility to hold States accountable for not performing the required protective measurements that are needed to prevent the spread of the COVID 19.

**Keywords:** International responsibility, COVID 19, internationally wrongful act, responsibility of international organizations.

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### 1. Introduction

Any breach of obligations under international conventions and customary international law raises the issue of responsibility. This Article discusses whether States in light of international law might have violated the 2005 WHO International Health Regulations, and the WHO Constitution itself. Moreover, this article analyses the possibility to hold States accountable for not performing the required protective measurements that are needed to prevent the spread of the COVID 19. Also, the role of the International Court of Justice would play a significant part in regards to international responsibility.

### 2. Methodology

Both primary and secondary sources are used in the recognition of the Responsibility of States for Internationally Wrongful Acts and Obligations under WHO Constitution and Regulations. In this sense, the descriptive and analytical method is approached in order to shed lights on the main objectives of this article.

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### 3. The responsibility of States

#### 3.1 The responsibility of States for Internationally Wrongful Acts

Under Article 2 of the Responsibility of States for Internationally Wrongful Acts, the elements of an internationally wrongful act of a State embodied in the case that an internationally wrongful act of a State conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State<sup>3</sup>.

In this regard, it is correctly maintained that ‘the essential characteristic of responsibility hinges upon certain basic factors: first, the existence of an international legal obligation in force between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the State responsible; and finally, that loss or damage has resulted from the unlawful act or omission’.<sup>4</sup>

Furthermore, Article 12 of the Responsibility of States for Internationally Wrongful Acts Existence of a breach of an international obligation there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Notably, Article 22 of the Responsibility of States for Internationally Wrongful Acts determined the countermeasures in respect of an internationally wrongful act as stated that “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three”

In addition, Article 23 of the Responsibility of States for Internationally Wrongful Acts in terms of Force majeure stated that:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.

#### 3.2 Obligations under WHO Constitution and International Health Regulations

The States Parties to the WHO Constitution declare, in conformity with the Charter of the United Nations, that the principles stated in this constitution are basic to the happiness, harmonious relations and security of all peoples.<sup>5</sup>

Also, public health is described and outlined in the International Health Regulations – IHR, approved by the WHO in 2005 and in force since June 15, 2007. It is correctly maintained that “These Regulations are an international standard (treaty) that binds 196 countries, including all WHO Member States. Their objective is to prevent and avoid serious health problems that cross borders and harm a

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<sup>3</sup> [http://www.oas.org/dil/esp/xxxvii\\_curso\\_the\\_ilcs\\_leonardo\\_nemer.pdf](http://www.oas.org/dil/esp/xxxvii_curso_the_ilcs_leonardo_nemer.pdf)

<sup>4</sup> Shaw, MN., *International Law*, Cambridge: University of Cambridge Press, Fifth edition, 2003, p. 696. See also Meagan Wong, ‘The Law of State Responsibility and the COVID-19 Pandemic’ in Carla Ferstman and Andrew Fagan (eds), *COVID-19, Law and Human Rights: Essex Dialogues* (30 June 2020), International Law Commission’s Articles on the responsibility of international organizations, *Yearbook of the International Law Commission: Volume II: Part Two* (2011) UN Doc A/CN.4/SER.A/2011/Add. 1 (Part 2) 40 art 3, Commentary 3, and David Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority’ (2002) 96 *AJIL*.

<sup>5</sup> Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger. Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development. The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health. Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

large part of the world population. Hence its importance as a management norm for international health protection principles, which, ultimately, encompass global (sensu lato) human rights issues”.<sup>6</sup>

Moreover, IHR is especially intended to address public health problems such as the pandemic from the new coronavirus.<sup>7</sup>

Article 75 of the WHO Constitution states:

“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 conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement”.

Under the terms of Article 62 of the WHO Constitution, the duty to “report annually on the action taken with respect to recommendations made to it by the Organization and with respect to conventions, agreements and regulations”.

Article 21 of the WHO Constitution expressly gives the Health Assembly authority to adopt regulations sanitary and quarantine measures and other procedures designed to prevent the international spread of diseases.

Moreover, the WHO Constitution recognized that Article 22 Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.

Article 64 deals with providing reports, and stipulates that:

Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.<sup>8</sup>

Article 6 of the IHR of WHO Constitution established that 1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA. 2. 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 public health emergency of international concern.

Article 7 of IHR of WHO states that Information-sharing during unexpected or unusual public health events If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.<sup>9</sup>

Under the above mentioned articles stated in WHO constitution and health regulations every State has the obligation to inform the WHO of anomalous situations that have occurred in their territories related to human health.

<sup>6</sup> VALERIO DE OLIVEIRA MAZZUOLI, International Responsibility of States for Transnational Epidemics and Pandemics: the case of COVID-19 from the People’s Republic of China, p6. available at [file:///C:/Users/PC/Downloads/SSRN-id3584944%20\(1\).pdf](file:///C:/Users/PC/Downloads/SSRN-id3584944%20(1).pdf)

<sup>7</sup> <https://internationallaw.blog/2020/05/15/state-responsibility-and-covid-19-bringing-china-to-the-international-court-of-justice/>

<sup>8</sup> As it stated that “Article 21 The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce , CONSTITUTION OF THE WORLD HEALTH ORGANIZATION available at [https://www.who.int/governance/eb/who\\_constitution\\_en.pdf](https://www.who.int/governance/eb/who_constitution_en.pdf)

<sup>9</sup> INTERNATIONAL HEALTH REGULATIONS (2005) available at <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=1FD446DFBDAC5C7E37C780DE387C0574?sequence=1>

Having established that the state is under an obligation to act in accordance with the WHO constitution provisions and general international law, the breaches of the state obligations could give rise to international responsibility. Where a State or third party suffers damage by virtue of wrongful acts that is based on such evidently insufficient preventive procedures, the “injured Member State will be entitled to invoke the responsibility of the state itself or as any breach of obligations under international conventions and customary international law raises the issue of responsibility.

#### 4. Conclusion

The logical consequence of any breach of the above mentioned obligations, is to establish international responsibility. However, to establish such a sequence, it is worth mentioning that States can use of the Force Majeure in order to exclude any wrongful acts. Article 23<sup>10</sup> has formulated grounds for this as stated that:

“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”.

Notably, the International Court of Justice would play a significant part in regards to international responsibility. Article 75 of the WHO Constitution provides for the Court’s jurisdiction.

In order to recourse to the International Court of Justice, the basic principle is respect for the sovereignty of states. However if a state has made a violation of the above mentioned international obligations, the parties of the WHO under Article 75 of the WHO Constitution refer to the International Court of Justice in conformity with the Statute of the Court 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 conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement”.

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<sup>10</sup> Article 23 of Draft Articles on State Responsibility