Revista JURÍDICA PORTUCALENSE

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IJP PORTUCALENSE INSTITUTE FOR LEGAL RESEARCH

FCT Fundação para a Ciência e a Tecnologia
MINISTÉRIO DA EDUCAÇÃO E CIÊNCIA

N.º Especial | UNIVERSIDADE PORTUCALENSE | Porto | 2021

https://doi.org/10.34625/10.34625/issn.2183-2705(ne)2021

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DOI: https://doi.org/10.34625/issn.2183-2705(ne)2021.ic-03

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Right to Health and Obligation of Prompt Notification: Possible China's International Responsibility in Relation to Covid-19

Direito à saúde e notificação compulsória imediata: possível responsabilidade internacional da China em relação à Covid-19

Marco ARGENTINI[1]

ABSTRACT: The international community has raised criticisms regarding the lack of adequate information provided by the Chinese government in the early stages of the Covid-19 pandemic, concerning the risks related to the outbreak and the means to prevent its spread. This contribution focuses on the international obligations that China potentially breached due to such an omission, addressing three of them, the obligations arising from Article 12 of the International Covenant on Economic, Social and Cultural Rights (on the right to health), Article 63 of the World Health Organization Constitution and Article 6 of the International Health Regulations (both imposing prompt notification duties). While it does not seem problematic to attribute these omissions to China, the latter could hardly be sued before an international tribunal due to legal and political evaluations, mainly because to the absence of a declaration of acceptance of international jurisdiction by China.
KEYWORD: International Responsibility; Covid-19; China; Prompt notification; International Adjudication.

RESUMO: A comunidade internacional fez críticas à falta de informação adequada fornecida pelo governo chinês no estágio inicial da pandemia Covid-19 sobre os riscos relacionados ao surto e os meios para prevenir sua propagação. Esta contribuição tem por foco analisar as obrigações internacionais que a China potencialmente violou devido a tal omissão, abordando três delas, a saber: as obrigações decorrentes do Artigo 12 do Pacto Internacional dos Direitos Econômicos, Sociais e Culturais (sobre o direito à saúde); Artigo 63 da Constituição da Organização Mundial da Saúde; e, o Artigo 6 do Regulamento Sanitário Internacional (ambos impondo deveres de notificação imediata). Embora não pareça problemático atribuir tais omissões à China, dificilmente a China poderá ser processada perante um tribunal internacional devido a avaliações jurídicas e políticas, principalmente em função da ausência de uma declaração de termo de aceite por parte deste país em relação à jurisdição internacional.
PALAVRAS-CHAVE: Responsabilidade internacional; Covid-19; China; Notificação compulsória imediata; adjudicação internacional.

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1. Introduction

One of the main criticisms raised in the international community about China's conduct in addressing Covid-19[2] concerns its failure to promptly notify the occurrence of the unusual sanitary event related to the pandemic. Such conduct resulted in Chinese people not realizing the magnitude of the pandemic and the challenges posed by the virus clearly.

This contribution focuses on the different sources of international responsibility of China for having failed to promptly share with the international community – and, particularly, the World Health Organization (WHO) – the relevant data to prevent and limit the spread of Covid-19. Such a responsibility would arise from the Chinese authorities' breach, by omission, of international obligations requiring a State to notify information which is necessary for the protection of public health[3].

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[2] Covid-19, whose denomination derives from the name of the virus family 'Corona Virus Disease', is originated by the new Coronavirus 2019-nCoV, then renamed Sars-CoV-2.

[3] See MARRELLA, F. – *La Cina deve risarcire i danni transnazionali da Covid-19? Orizzonti ad Oriente*. In *SIDIBlog* (17 May 2020), available at http://www.sidiblog.org/2020/05/17/la-cina-deve-risarcire-i-danni-transnazionali-da-covid-19-orizzonti-ad-oriente/. The international responsibility of China for not having shared information on the virus with the international community does not exclude other potential sources of responsibility for internationally wrongful act. First, the US President D. Trump and the US Secretary of State M. Pompeo supposed that the virus had originated in a laboratory in Wuhan, as reporter by The New York Times, *Pompeo Ties Coronavirus to China Lab, Despite Spy Agencies' Uncertainty* (3 May 2020), available at https://www.nytimes.com/2020/05/03/us/politics/coronavirus-pompeo-wuhan-china-lab.html; The Guardian, *Mike Pompeo: 'enormous evidence' coronavirus came from Chinese lab* (3 May 2020), available at https://www.theguardian.com/world/2020/may/03/mike-pompeo-donald-trump-coronavirus-chinese-laboratory; on that, see MARRELLA, F., *supra* this note. Second, the containment measures adopted by several States in order to stop the spread of Covid-19 may give rise to claims in the fields of human rights and international investments. On the former, see COCO, A. and DE SOUZA DIAS, T. – *Part I: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak*. In *EJIL:Talk!* (24 March 2020), available at https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/; COCO, A. and DE SOUZA DIAS, T. – *Part II: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak*. In *EJIL:Talk!* (25 March 2020), available at https://www.ejiltalk.org/part-ii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/; COCO, A. and DE SOUZA DIAS, T. – *Part III: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak*. In *EJIL:Talk!*, (25 March 2020), available at https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/; DELLA MORTE, G. – *La tempesta perfetta Covid-19, deroghe alla protezione dei dati personali ed esigenze di sorveglianza di massa*. In *SIDIBlog* (30 March 2020), available at http://www.sidiblog.org/2020/03/30/la-tempesta-perfetta-covid-19-deroghe-alla-protezione-dei-dati-personali-ed-esigenze-di-sorveglianza-di-massa/; DZEHTSIAROU, K. – *COVID-19 and the European Convention on Human Rights*. In *Strasbourg Observers* (27 March 2020), available at https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/#more-4563; FARNELLI, G.M. – *Proporzionalità ed emergenza sanitaria da COVID-19 nei parametri CEDU*. In *La Comunità Internazionale*, 2020, 97 – 117; MCGREGOR, L. –

In order to identify this international responsibility, two elements are needed: the breach of an international obligation and the attribution to the State respectively. According to international customary law, as reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[4], to determine the international responsibility of China on the matter in hand, two requirements are to be met: *a*) a conduct – in the form of an act or an omission – in breach of an international obligation, without circumstances precluding wrongfulness; *b*) the attribution of such a conduct to the State[5].

After these introductory remarks, the *second* paragraph highlights briefly the main factual circumstances related to Covid-19 and its spread over China and

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Contact-tracing Apps and Human Rights. In *Ejil:Talk!* (30 April 2020), available at https://www.ejiltalk.org/contact-tracing-apps-and-human-rights/; PALMA, A.J. – *Pandemia e diritti umani: l'Italia e lo stato di eccezione al tempo del Coronavirus*. In *Ordine internazionale e diritti umani*, 2020, 303-329; PONTA, A. – *Human Rights Law in the Time of the Coronavirus*. In *ASIL Insights* (20 April 2020) available at https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus; SANDER, B. and BELLI, L. – *COVID-19 Symposium: COVID- 19, Cyber Surveillance Normalisation and Human Rights Law*. In *OpinioJuris* (1 April 2020, available at http://opiniojuris.org/2020/ 04/01/covid-19-symposium-covid-19-cyber-surveillance-normalisation-and-human-rights-law/; SOMMARIO, E. – *Misure di contrasto all'epidemia e diritti umani, fra limitazioni ordinarie e deroghe*. In *SIDIBlog* (27 March 2020), available at http://www. sidiblog.org/2020/03/27/misure-di-contrasto-allepidemia-e-diritti-umani-fra-limitazioni-ordinarie-e-deroghe/; SPADARO, A. – *Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?*. In *EJIL:Talk!* (16 March 2020), available at https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/; ZGHIBARTA, P. – *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19*. In *EJIL:Talk!* (11 April 2020), available at https://www.ejiltalk.org/the-whos-the-whats-and-the-whys-of-the-derogations-from-the-echr-amid-covid-19/; see also ARGENTINI, M. – *"Fase 1' di contrasto al Covid-19, ordinamento italiano e tutela dei diritti umani alla luce della CEDU Freedom*. In *Security & Justice: European Legal Studies*, 2020, vol. 2, 153-180. On the latter see BENEDETTELLI, M. – *Could COVID- 19 emergency measures give rise to investment claims? First reflections from Italy*. In *Global Arbitration Review* (26 March 2020), available at https://globalarbitrationreview.com/article/ 1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy; BOHMER, L. – *Changes to Mexico's electricity regulation in light of pandemic prompt threats of investment arbitration claims*. In *IAReporter* (18 May 2020), available at https://www-iareporter-com.ezproxy.unibo.it/articles/changes-to-mexicos-electricity-regulation -in-light-of-pandemic-prompt-threats-of-investment-arbitration-claims/; HAILES, O. – *Epidemic Sovereignty? Contesting investment treaty claims arising from coronavirus measures*. In *EJIL:Talk!* (27 March 2020), available at https://www.ejiltalk.org/epidemic-sovereignty-contesting-investment-treaty-claims-arising-from- coronavirus-measures/; RICCI, A.D. – *Corsi e ricorsi | Gli investitori stranieri potrebbero fare causa agli Stati che hanno attivato misure d'emergenza anti covid*. In *Linkiesta* (20 May 2020), available at https://www.linkiesta.it/2020/05/coronavirus-pandemia-investitori-stranieri/.

[4] INTERNATIONAL LAW COMMISSION – *Draft articles on Responsibility of States for International Wrongful Acts* (2001), available, with Commentaries, at https://legal.un.org/ilc/texts/instruments/english/commentaries/ 9_6_2001.pdf.

[5] See, *inter alia*, TREVES, T. – *Diritto Internazionale. Problemi fondamentali*, Milano, 2005, 478; CRAWFORD, J. – *Brownlie's Principles of Public International Law*, Oxford, 2012 (8th ed.), 543; CRAWFORD, J. – *State Responsibility. The General Part*, Cambridge, 2013, 49; CASSESE, A. – *Diritto internazionale*, Bologna, 2017 (3rd ed.), 368; TANZI, A. – *Introduzione al diritto internazionale contemporaneo*, Padova, 2019 (6th ed.), 391.

globally. In the *third* paragraph, the «breach» element is addressed, highlighting three international obligations that China may have potentially breached. The *fourth* paragraph briefly addresses the issue of the attribution of the conduct to China. Finally, the *fifth* paragraph analyses the potential consequences of an internationally wrongful act perpetrated by Chinese authorities regarding Covid-19.

2. Factual background

On December 31st 2019, the Wuhan Municipal Commission reported the first cases of the new Coronavirus to the WHO [6]. One month later, on January 30th 2020, after the second meeting of WHO's Emergency Committee, Covid-19 was declared by the WHO's Director-General (DG) to constitute a «Public Health Emergency of International Concern» (PHEIC)[7]. According to WHO's International Health Regulations (2005)[8] (IHR), a PHEIC is «an extraordinary event which is determined, as provided in these Regulations: (*i*) to constitute a public health risk to other States through the international spread of disease and (*ii*) to potentially require a coordinated international response»[9]. Once an outbreak has been classified as a PHEIC, the DG is entitled to provide non-binding temporary recommendations[10]. These, in the case of Covid-19, have been addressed to China, other States and the international community as a whole.

For what concerns the obligation to share information on Covid-19, the DG recommended that China «implement a comprehensive risk communication

[6] World Health Organization, *Timeline of WHO's response to COVID-19*, available at https://www.who.int/news/item/29-06-2020-covidtimeline.

[7] World Health Organization, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, 30 January 2020, available at https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[8] *International Health Regulations (2005)*, 2008, 2nd ed.; see, *inter alia*, NEGRI, S. – *Salute pubblica, sicurezza e diritti umani nel diritto internazionale*, Torino, 2018, 119. The obligations arising from the IHR are specifically addressed *infra*, para. 3(c); see also NEGRI, S. – *Communicable disease control*. In BURCI, G.L. and, TOEBES, B. (Eds.), *Research Handbook on Global Health Law*, Cheltenham, 2018, 273-302.

[9] Article 1.1.

[10] According to the IHR, a *temporary recommendation* is a «non-binding advice issued by WHO pursuant to Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, so as to prevent or reduce the international spread of disease and minimize interference with international traffic» (Article 1.1).

strategy to regularly inform the population on the evolution of the outbreak, the prevention and protection measures for the population, and the response measures taken for its containment»[11].

It bears noting that Wuhan's local authorities later admitted that some cases had already been detected before the first cases being notified to the WHO. In a TV interview held on January 27th, the Mayor of Wuhan, i.e. the municipality at the epicentre of the outbreak, acknowledged that Chinese government had not promptly reported either the relevant data to identify the virus or proper information on the threats posed by the latter, neither internally nor to the international community[12]. Many people from Wuhan also complained that local authorities had failed to provide adequate information on the risks related to the epidemic[13] and on possible tools to prevent its spread. Furthermore, according to press leaks[14], the Chinese authorities had put more than two hundred patients under medical surveillance who had contracted the new Coronavirus since November 17th 2019 (when the first person was admitted to the hospital)[15].

Such delay in promptly notifying relevant sanitary information would be in contrast with a number of international obligations. Among them, this paper focuses on three, arising from the International Covenant on Economic, Social

[11] World Health Organization, *supra* note 6. The DG also asked China to «[e]nhance public health measures for containment of the current outbreak; [e]nsure the resilience of the health system and protect the health workforce; [e]nhance surveillance and active case finding across China; [c]ollaborate with WHO and partners to conduct investigations to understand the epidemiology and the evolution of this outbreak and measures to contain it; [s]hare relevant data on human cases; [c]ontinue to identify the zoonotic source of the outbreak, and particularly the potential for circulation with WHO as soon as it becomes available; [c]onduct exit screening at international airports and ports, with the aim of early detection of symptomatic travelers for further evaluation and treatment, while minimizing interference with international traffic».

[12] The Guardian, *China coronavirus: mayor of Wuhan admits mistakes* (27 January 2020), available at https://www.theguardian.com/science/2020/jan/27/china-coronavirus-who-to-hold-special-meeting-in-beijing-as-death-toll-jumps.

[13] On March 11th 2020, Covid-19 has been declared by the WHO Director-General as a «pandemic»; see World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020* (11 March 2020), available at https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[14] South China Morning Post, Coronavirus: China's first confirmed Covid-19 case traced back to November 17 (13 March 2020), available at https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back.

[15] Several sources also reported that the reports of medical staff members involved in the first phase of the emergency had been subjected to censorship; see, *inter alia*, The Guardian, *Coronavirus: Wuhan doctor speaks out against authorities* (11 March 2011), https://www.theguardian.com/world/2020/mar/11/ coronavirus-wuhan-doctor-ai-fen-speaks-out-against-authorities.

and Cultural Rights[16] (ICESCR), the International Health Regulations (2005)[17] and the WHO Constitution[18].

3. International obligations potentially breached

Article 12 of the International Covenant on Economic, Social and Cultural Rights

The ICESCR, ratified by China in 2001, imposes international obligations to States in order for them to implement the right to health. Article 12 of the Covenant stipulates that «[t]he States Parties […] recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health». According to the following paragraph, «[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for [*inter alia*, the] prevention, treatment and control of epidemic, endemic, occupational and other diseases»[19].

It is worth emphasizing that the Committee on Economic, Social and Cultural Rights (CESCR) addressed the interpretation of Article 12 ICESCR in General Comment no. 14[20]. In particular, having regards to what is relevant to determine if States are required to notify information on epidemics, the CESCR interpreted Article 12.2(c) as including

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[16] *International Covenant on Economic, Social and Cultural Rights*, signed in New York on 16 December 1966, ratified by China on 27 March 2001; see, *inter alia*, SAUL, B., KINLEY, D. and MOWBRAY, J. – *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials*, Oxford, 2014.

[17] *Supra* note 7.

[18] *Constitution of the World Health Organization*, signed in New York on 22 July 1946, into force for China since 7 April 1948. Another possible source of international responsibility for China may emerge from the obligations arising from the Convention on International Civil Aviation (also known as the Chicago Convention). Article 14 of the Convention stipulates that «[e]ach contracting State agrees to take effective measures to prevent the spread by means of air navigation of […] communicable diseases […] and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft». In particular, as highlighted by ABEYRATNE with reference to the transmission of SARS outbreak by means of commercial air carriage, the main obligation of States under the Chicago Convention is to «ensure that the outbreak of any communicable disease is notified in a manner that would benefit the world and help prevent the spread of the disease across national boundaries»; see ABEYRATNE, R. – *International Responsibility in Preventing the Spread of Communicable Diseases through Air Carriage - The SARS Crisis*. In *Transportation Law Journal*, 2002, vol. 30, no. 1, 53-80.

[19] See SAUL, B., KINLEY, D. and MOWBRAY, J., *supra* note 15, 977-1083. On the right to health, see also TOBIN, J. – *The Right to Health in International Law*, Oxford, 2012.

[20] COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS – *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 14 (2000)*, UN Doc. E/C.12/2000/4 (11 August 2000).

> [T]he creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States' individual and joint e prima Colar 1fforts to, inter alia, make available relevant technologies, *using and improving epidemiological surveillance and data collection on a disaggregated basis*, the implementation or enhancement of immunization programmes and other strategies of infectious disease control[21].

The CECR also identified a number of core obligations originating from Article 12, including the adoption and implementation of both «a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population», which «shall be devised, and periodically reviewed, on the basis of a participatory and transparent process»[22], as well as «measures to prevent, treat and control epidemic and endemic diseases»[23].

This interpretation of the right to health entails an epidemic reporting duty for States, as it requires the latter to use and improve epidemiological surveillance and data collection[24]. Notably, a systematic interpretation which considers State obligations arising from both the ICESCR and the IHR[25] and which aims at achieving the full realization of the right to health would require States to share with the WHO and other States information on every unusual sanitary event[26].

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[21] *Ibid.*, para. 16 (emphasis added). See NEGRI, S. – *Communicable disease control*, *supra* note 7, 296; BOZHENKO, O. – *More on Public International Law and Infectious Diseases: Foundations of the Obligation to Report Epidemic Outbreaks*. In *EJIL:Talk!* (15 August 2019), available at https://www.ejiltalk.org/more-on-public-international-law-and-infectious-diseases-foundations-of-the-obligation-to-report-epidemic-outbreaks/.

[22] COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 19, para. 43(f).

[23] *Ibid.*, para. 44(c).

[24] See BOZHENKO, O., *supra* note 20: «[a]ssuming states were not bound to timely share information on infectious disease emergencies, "potential hazards" could hardly be prevented through an "effective medical care system", obviously depriving the respective part of Art.12 of the ICESCR of its *raison d'etre*».

[25] See *infra*, para. 3(c).

[26] See VILLAREAL, P.A. – *Public International Law and the 2018-2019 Ebola Outbreak in the Democratic Republic of Congo*. In *EJIL:Talk!* (1 August 2019), available at https://www.ejiltalk.org/public-international-law-and-the-2018-2019-ebola-outbreak-in-the-democratic-republic-of-congo/: «Given how the IHR are the specialized instrument in this subject matter, cross-referencing its contents with those of the Covenant in question makes sense. PHEIC declarations could thus be seen jointly with the commitment of states to provide international assistance». In particular, according to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, signed in Vienna on 23 May 1969 into force since 27 January 1980, in

Furthermore, the same conclusion could be reached arguing from the obligation to co-operate, enshrined in Article 2 of the ICESCR, «with a view to achieving progressively the full realization of the rights recognized in the present Covenant». In this perspective, the duty to co-operate on an international level would call States to report and notify data on communicable diseases.

It is also worth noting that the General Comment distinguishes, «[i]n determining which actions or omissions amount to a violation of the right to health, […] the inability from the unwillingness of a State party to comply with its obligations under article 12». The unwillingness to comply with such norms makes the State in breach of its obligations under the ICESCR, and an internationally wrongful act may thus be configured[27].

As an example of breach of international obligations arising from Article 12, the CESCR mentioned «the deliberate withholding or misrepresentation of information vital to health protection or treatment»[28], which might correspond to the Chinese authorities' conduct.

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the interpretation of a treaty, «[t]here shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties»; see TANZI, A., *supra* note 4, 351; TREVES, T., *supra* note 4, 384; CRAWFORD, J. – *Brownlie's Principles of Public International Law*, *supra* note 4, 382; DÖRR, O. – *Article 31*. In DÖRR, O. AND SCHMALENBACH, K. (Eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Osnabrück-Salisburgo, 2018 (2nd ed.), 557-616, 582; LINDERFALK, U. – *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Dordrecht, 2007. The provision of Article 31(3)(c) has fostered the debate on the so-called «fragmentation» of international law; see INTERNATIONAL LAW COMMISSION – *Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law* (2006), available at https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, para. 410-480.

[27] COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 19, para. 47: «[i]n determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. *A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12*. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non compliance with the core obligations set out in paragraph 43 above, which are non-derogable» (emphasis added).

[28] *Ibid.,* para. 50. This behaviour would breach the so-called «obligations to respect» arising from Article 12 ICESCR.

Article 63 of the WHO Constitution

The failure to notify data on unusual sanitary events could also be in breach of the international obligations arising from the WHO Constitution. In particular, Article 63 stipulates that «[e]ach Member shall communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned». It has been noted that Article 63 may have been breached by China in two different ways[29]. *First*, local and national authorities' failure to promptly share the data on the contagion among medical staff may have led WHO's experts to believe that the virus was not transmissible between humans. *Second*, Chinese authorities presumably censored confidential documents on the actual number of asymptomatic carriers of Covid-19, which constitutes indeed a critical element to assess the magnitude of the infection[30].

Article 75 of the WHO Constitution states that «[a]ny 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». This mean of dispute settlement represents, most probably, the only instrument for suing China before the International Court of Justice without China's consent.

Whereas it seems uncontroversial that China delayed in sharing the above-mentioned documents (and eventually failed to do that), it may be argued that the obligation to share with the WHO «official reports and statistics pertaining to health» refers to documents officially «published» within the State. The only interpretation that would allow such a claim to be well-grounded is to consider these documents as «published» in so far as they have been posted by Chinese doctors on their social accounts (and notwithstanding that such posts were later censored). This interpretation is unlikely to reflect «the ordinary meaning to be given to the terms» of Article 63 of the WHO Constitution[31]. For

[29] TZENG, P. – *Taking China to the International Court of Justice over Covid-19*. In *EJIL:Talk!* (2 April 2020), available at https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/.
[30] *Ibid.*
[31] *Vienna Convention on the Law of Treaties*, *supra* note 25, Article 31(1).

these reasons, the conduct of Chinese authorities would hardly be considered in breach of Article 63 of the obligation in hand[32].

Article 6 of the International Health Regulations

The IHR are a legally binding instrument of conventional nature adopted within the WHO, stipulating rules and procedures on epidemic surveillance and public health threats which are compulsory for WHO's Member States[33].

Article 6 of the IHR requires «[e]ach State Party [to] notify WHO, by the most efficient means of communication available […] 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»[34]. Furthermore, Article 7 provides that «[i]f a State Party has evidence of an unexpected or unusual public health event within its territory […] which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information».

Therefore, we may see an obligation of notification and an obligation of information, which appear to have been breached by China.

4. Attribution to China

The second step to determine if an internationally wrongful act occurred concerns the attribution of the wrongfulness to a State. Article 4 ARSIWA states that «[t]he conduct of any State organ shall be considered an act of that State under international law», with express reference, among others, to bodies

[32] TZENG identifies three more potential claims arising from the WHO Constitution, under Articles 12 and 22, 37 and 64 respectively, as well as a potential breach of Article 18 of the Vienna Convention on the Law of Treaties, in as much as China might have defeated the object and purpose of the Constitution of the WHO. The Author ends his analysis by acknowledging that «[a]ssuming that [these claims] had some merit, one would still need to identify a State willing to sue China before the International Court of Justice, which, of course, is not an easy task».

[33] NEGRI, S. – *Salute pubblica, sicurezza e diritti umani nel diritto internazionale*, *supra* note 7, 39.

[34] Article 6.1.

exercising executive functions, «whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or a territorial unit of the State»[35].

This principle has been identified by the International Court of Justice as part of customary international law, in the advisory opinion on the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights[36].

In the case in hand, the omission of prompt notification and comprehensive information about the unusual sanitary event in question by Chinese local and central authorities is clearly attributable to the Chinese government[37].

5. Effects of the breaches in terms of international adjudication

Addressing the consequences of these internationally wrongful acts is a critical task which merges both legal and political evaluations, as well as the core dynamics of international adjudication.

More specifically, which are the adjudicative and diplomatic fora where such alleged international responsibility can be invoked? In the absence of a declaration of acceptance of international jurisdiction by China, the consensual nature of international adjudication entails that China may not be sued before an international court for its breaches of international obligations. This is the reason why some scholars[38] attempted to identify some grounds for compulsory

[35] Commentaries of ARSIWA, *supra* note 3, 40, in particular para. 1: «[p]aragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. *The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf*. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase» (emphasis added). See also CRAWFORD, J. – *State Responsibility*, *supra* note 4, 113.

[36] International Court of Justice, Advisory Opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (29 April 1999), available at https://www.icj-cij.org/public/files/case-related/100/100-19990429-ADV-01-00-EN.pdf, para. 62: «[a]ccording to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that state. This rule […] is of a customary character».

[37] A more complex analysis would have been needed to attribute other kinds of potential breaches to the State, different from the duty to share information addressed by this paper. For instance, in order to assess – as supposed by the US administration (see *supra* note 2) – an international responsibility of China for the origin of Covid-19, it would be necessary to attribute the conduct of the Wuhan laboratory to China.

[38] See TZENG, P., *supra* note 28.

jurisdiction[39]. However, this possibility is unlikely to be implemented for the above-analysed reasons.

For what specifically concerns the breach of an obligation arising from the IHR, it is worth highlighting that any dispute between two or more States on either the interpretation or the application of the IHR must be settled according to Article 56 of the IHR themselves. In particular, if the parties fail to settle the dispute amicably through negotiation or any other peaceful means of their own choice, «the States Parties concerned may agree to refer the dispute to the Director-General, who shall make every effort to settle it». Such a procedure is administered by the office of the DG and has an arbitral nature. Article 56 also stipulates that the States parties to the dispute must give their consent – even preventive – to both such a procedure and the jurisdiction of the DG. It is quite unlikely that China agrees to this arbitral mechanism.

6. Questions that are still open

The considerations of the previous paragraphs give also rise to three different questions, each one requiring a specific in-depth analysis.

First comes the question of whether the laws of international State responsibility and the international adjudication are or not the most suitable normative and institutional frameworks where the matter in point may be appropriately addressed. In this perspective, it may be worth pointing out that, if China accepted the jurisdiction of an international tribunal in abstract terms, there would be no guarantees that States will have the political interest in suing China[40].

Second, on the adjudicative level, since no international inter-State litigation would be possible in this matter for the above-mentioned reasons, the question would be whether litigation may shift on to the private law level. Namely, whether private entities could successfully bring damages claims before domestic courts against China, for economic loss suffered in relation to the consequences of the pandemic. A number of cases are pending before

[39] See *supra*, para. 3(b).
[40] See TZENG, P., *supra* note 28.

domestic courts in a few States, as Italy and the United States, and the judiciaries of other States are likely to be involved soon. Assuming that domestic judges could assert the jurisdiction, as the forum where the damages were suffered, and the sufficient causality link with the alleged negligence of China will also be assessed, the question of the customary rule of sovereign immunity would arise[41].

Third, in the unlikely event that an international court, having jurisdiction over the dispute arising from the facts in hand, found against China, what might the practical consequences of such responsibility be, especially in terms of potential remedies? The question would arise as to which reparation could be awarded. The difficulties in assessing the damage would render the *quantum* of compensation a difficult task[42]. Such an assessment would be all more difficult taking into account the direct or indirect contribution by the affected State to the occurrence of harm invoked to have been suffered. Such form of contributory fault could be found in relation to conduct of negligence in State conducts addressing the epidemic[43]. A possible reparation could consist in satisfaction,

[41] See BIANCO, G. and CHIUSSI CURZI, L. – *Immunità (degli Stati esteri) dal COVID-19: prospettive italiane e statunitensi*. In *Forum di Quaderni Costituzionali*, 2020, no. 3, 9-28; LANZONI, N., *Sulle domande giudiziali proposte contro la Repubblica popolare cinese dinanzi al giudice interno per il risarcimento dei danni causati dalla pandemia da COVID-19*, *Rivista di Diritto Internazionale*, 2021, 210-217; MARRELLA, F., *supra* note 2. More broadly, on sovereign immunity, see also CRAWFORD, J. – *Brownlie's Principles of Public International Law*, *supra* note 4, 488; CASSESE, A., *supra* note 4, 132. On the matter, see the judgment of the International Court of Justice, Judgment on *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (3 February 2012), available at https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf; see, *inter alia*, BORNKAMM, P. – *State Immunity against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*. In *German Law Journal*, 2012, no. 6, 773-782; BARKER, G.C. – *International Court of Justice: Jurisdictional Immunities of the State (Germany v. Italy) Judgment of 3 February 2012*. In *International and Comparative Law Quarterly*, 2013, no. 3, 741-752; NEGRI, S. – *Sovereign Immunity v. Redress for War Crimes: The Judgment of the International Court of Justice in the Case concerning Jurisdictional Immunities of the State (Germany v. Italy)*. In *International Community Law Review*, 2014, no. 1, 123-138; SENDER, O. and WOOD, M. – *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening) (2012)*. In in BJORGE, E. and MILES, C. (Eds.), *Landmark Cases in Public International Law*, Oxford, 2017, 563-584; TANZI, A., *supra* note 4, 521. On the debate among international law scholars on the applicability of sovereign immunity when *jus cogens* norms protecting human rights are concerned, see GAETA, P. – *Immunity of States and State Officials: a Major Stumbling Block to Judicial Scrutiny?*. In CASSESE, A. (Ed.), *Realizing Utopia. The Future of International Law*, Oxford, 2012, 227-238; CASSESE, A., *supra* note 4, 141.

[42] Article 36.2 ARSIWA (*supra* note 3) states that «[t]he compensation shall cover any financially assessable damage including loss of profits insofar as it is established».

[43] *Ibid.*, Article 39: «[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought»; see CRAWFORD, J. – *State Responsibility*, *supra* note 4, 500.

as «an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality»[44] or in a form of restorative justice, the latter originally limited to the scope of international crimes[45].

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[44] ARSIWA (*supra* note 3), Article 37.2; Commentaries of ARSIWA, *supra* note 3, 105: «[t]he rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required». For more practical aspects, see *Ibid.*, 106: «One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal ». See also TREVES, T., *supra* note 4, 545; CRAWFORD, J. – *State Responsibility*, *supra* note 4, 527; for a classical overview of the satisfaction, see also MORELLI, G. – *Nozioni di diritto internazionale*, Milano, 1967 (7th ed.), 357. On the political impact of an international trial against China, see TZENG, P., *supra* note 28: «even if the legal challenge is not successful, pursuing such a case in a public forum like the International Court of Justice could still lead to significant political victories. It is not every day that one comes across violations of international law that are, allegedly, responsible for the deaths of so many people in so many countries».

[45] See SULLO, P. – *Restorative Justice*. In *Max Planck Encyclopedia of Public International Law*, 2120; MENKEL-MEADOW, C. – *Restorative Justice: What is it and Does it Work?*. In *Annual Review of Law and Social Science*, 2007, vol. 3, 161-187.

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Data de submissão do artigo: 09/05/2021

Data de aprovação do artigo: 22/06/2021

Edição e propriedade:

Universidade Portucalense Cooperativa de Ensino Superior, CRL

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