

# The conundrum of corona virus (covid-19) and possible lawsuits against china for an internationally wrongly act

## Abstract

The Corona Virus also known as COVID 19 pandemic is threatening the world and having devastating impacts on the economy, social, education and environment spheres of human lives. At the time of this undertaking, thousands of lives have already been lost, including frontlines medical care personnel, doctors, scientists and artists. Livelihoods have been negatively impacted because of many restrictions, including lockdown, social distancing, and wearing of facial masks imposed by governments worldwide. Loss of Jobs and closing of schools, universities, and churches as well as other community events, such wedding and games have jeopardised the enjoyment of fundamental human rights. Particularly, the right to life, right to health, the right to association and assembly, right to adequate food, right to education, freedom of movement and right to family life, where husbands are forcibly quarantined separately with their wives. Such impacts are said to continue until the end of the year and no signs on how the social fabric which is destroyed by the impacts of the pandemic will be rebuild. While predictable economic challenges are expected, including great decline and financial deficit worldwide, any legal scholars will be more concerned on investigating on faults as a result of an action or omission for which many lives are affected. Thus, while countries worldwide are more preoccupied in responding to the pandemic and are required to ensure respect and compliance with people human rights, failure of which may result in countries engaging their responsibilities for violations of people rights and be subjected to make reparations, this paper anticipates the need to depict the internationally wrongful act of China as the epicentre of the pandemic and in the affirmative the paper anticipates the legal consequences arising from such an wrongful act. It is one thing to establish an internationally wrongful act and another to hypothesise on such possibility. The later exercise is the focus of the paper while the former can only be done by a court of law.

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## Introduction

When dealing with the pandemic of corona virus, many international, regional and national organisations, private or intergovernmental have made several statements urging countries worldwide to protect the inherent dignity of all peoples,<sup>1</sup> to respect minimum core obligations enshrined in international and national laws, and to devote their available resources for the realisation of peoples' human rights.<sup>2</sup> Failing which, states will be found in violation of their international obligations and will be required to make reparations. This is because the pandemic of corona virus has caught many, if not all countries by surprise thus the question on the true origin of the virus. For the *commun de mortel*, the origin story of corona virus seems well fixed and originated in late 2019 from someone at the world-famous Huanan seafood market in Wuhan was infected with a virus from an animal. Stock footage of pangolins a scaly mammal that looks like an anteater have made it on to news

<sup>1</sup>See International Covenant on Economic, social and Cultural rights. (Preamble).

<sup>2</sup>Community of Economic, Social and Cultural Rights, General Comment No8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights. Art 2 (1) of and 15 of the international Covenant on Economic, social and Cultural rights (international cooperation).

bulletins, suggesting this animal was the staging post for the virus before it spreads to humans.

The rest on how the virus spread from that first cluster in the capital of China's Hubei province to a pandemic that has killed about thousands of people so far is part of an awful history which is set for further inquiries that scientists are trying hard to unravel, including which species passed it to a human. They're trying hard because knowing how a pandemic starts or originated may help defined the appropriate methods of stopping it. Likewise understanding the breadth of species this virus can infect is important as it helps us narrow down where it might have come from.<sup>3</sup> However, the focus of this undertaking is not to speculate on the origin of the pandemic rather to hypothesise on the internationally wrongful act of the country of origin, once scientists have determined with precision the origin. Bearing in mind that an internationally wrongful act call for the duty to make reparation, this undertaking assumes how the country responsible for the origin of the pandemic is bound by virtue of international customary and conventional law to provide appropriate remedies because of its internationally wrongful act.

<sup>3</sup>Prof Stephen Turner, head of the department of microbiology at Melbourne's Monash University.

## Conundrum of covid-19

After the Global financial crisis of 2007-2008,<sup>4</sup> the COVID -19 appears the second global crisis which has devastating impacts on the lives of people worldwide. However, as far as questions on its origins are concerned, inquiries on identifying and investigating possible wrongdoings, which may result in establishing legal responsibilities and provide reparation to affected nations is also of a paramount importance. Although the question on the origin of the pandemic is not the main focus of this paper, it does, however set the scene for analysing the question on possible internationally wrongful act. Thus the question on possible internationally wrongful act is apt at the nexus of various other questions which constitute the focus of scientists worldwide.

Until now, there is no objection to the views which portrait the virus emerged from the Wuhan live animal market from an interaction between an animal and a human. Although such views seem not to be conclusive, they do however provide the basis for various researches from epidemiologists to immunologists. To cite but a few, Prof Turner believed most likely that corona virus originates in bats. Like many other scientists, Turner quickly concluded that part of the problem is that the information is only as good as the surveillance and that viruses of this type are circulating all the time in the animal kingdom and virus move around between species as shown recently in a New York zoo, where the virus infected a tiger. This position is partially supported by all scientists. Those in support believe that the virus came from bats but first passed through an intermediary animal in the same way as previous corona virus.<sup>5</sup> In trying to trace the intermediary animal, Turners' opponents believe that the pangolin, which are the most illegally traded mammal in the world but prized for their meat and the claimed medicinal properties of their scales,<sup>6</sup> may be the intermediary animal. However, due to the restrictions on their trading, Wuhan's authorities deliberately omitted to list pangolins on the inventory of items being sold in Wuhan. Such an attitude is really more compelling during this time when the world is required to fight against an unknown enemies and brings to the fore the negation whether the poor pangolin was the species at which it jumped or not.<sup>7</sup> What more, are the challenges posed by lack of clear evidences from China's authorities misleading many scientists from different institutions?

Another leading figure Prof Edward Holmes examined the likely origins of the virus by looking at its genome stressed that the identity of the species that served as an intermediate host for the virus is still uncertain.<sup>8</sup> Unlike Holmes's study, various other studies such as statistical studies looking at a characteristic of the virus that evolved to enable it to latch on to human cells find that many animals, including pangolins, cats, buffalo, cattle, goats, sheep and pigeons were able to develop such characteristics.<sup>9</sup> They reveal that pangolins as an intermediary character altogether, because samples of similar viruses taken from pangolins lacked a chain of amino acids seen in the virus now circulating in humans.

<sup>4</sup>E/C.12/2016/1 Letter from the Chair of the Committee on Economic, Social, and Cultural Rights, dated 16 March 2020 Committee on Economic, social and cultural rights statement on public debt, austerity measures and the international Covenant on Economic, social and Cultural Rights

<sup>5</sup>The 2002 Sars outbreak – moved from horseshoe bats to cat-like civets before infecting humans.

<sup>6</sup>The International Union for Conservation of Nature.

<sup>7</sup>Prof Turner.

<sup>8</sup>Prof Edward Holmes of the University of Sydney, was a co-author on a Nature study twitter.

<sup>9</sup>See [www.science.direct.com/science/article/pii/S12864579203000496](http://www.science.direct.com/science/article/pii/S12864579203000496).

Although not conclusive, those studies tend to suggest a scenario in which a human at the Wuhan market interacted with an animal that carried the virus. That's the only one potential version of the Covid-19 origin story or else a descendent of the virus jumped into humans and then adapted as it was passed from human to human. Here again sceptical views arise from immunologists. Prof Stanley Perlman, a leading immunologist at the University of Iowa and an expert on previous corona virus outbreaks that stemmed from animals does not support the link of corona virus to the Wuhan market. Perlman believes the link to the Wuhan market is coincidental and cannot be ruled out because that possibility seems less likely due to the fact that the genetic material of the virus had been found in the market environment. While admitting that they may be an intermediary animal and that while pangolins may be the possible candidates, they "are not proven to be the key intermediary". Perlman believes in the evolution of virus and argues that any evolution of the virus occurred in the intermediate animal if there was one. But in case of the pandemic there has been no substantial changes in the virus in the three months indicating that the virus is well adapted to humans. Furthermore the same wet markets, where live animals are traded have been cited in previous outbreaks of corona viruses. As it may appears from these analysis, scientists such as immunologists, and epidemiologists are really not sure or cannot accurately tell the origin story of the corona virus now. However what seems to be revealed by all is that there's some sort of connection to the Wuhan market and there were an intermediary animal whether a bat or pangolin exposed to the market that were infected. More prominently, scientists unanimously recognised the danger associated to the uncertainty on the origin of the virus due to lack of clear evidences from the wet market, which they believe need to be clamped down.

### Internationally wrongful act and the duty to make reparation under international law

It is very alarming that several months after the outbreak of the pandemic scientists are still speculating about the origin of corona virus. Hopefully in a near future these adaptations would enable scientists to determine with accuracy the origin to enable the pandemic to take off and produce a sufficiently large cluster of cases to trigger the surveillance system that detected it. Until such a time and in the absence of a clear statement from China revealing or providing clear evidences to allow scientists to trace the origin of the pandemic and in the absence of China disputing the allegations on a supposedly infected market and without sufficient evidences demonstrating china due diligence in dealing with the virus, particularly china's *bona fide* to stop the spread of the pandemic, various questions arise on whether China may engages its international responsibility because of an internationally wrongful act. Subsequent questions on why the international community is unobtrusive before China wrongful act and whether or not legal actions against China for an internationally wrongful act: omission or failure to apply due diligence are conceivable.

The basis of such actions are found in the Draft articles on Responsibility of States for Internationally Wrongful Acts.<sup>10</sup> Article 1 provides that: "Every internationally wrongful act of a state entails the international responsibility of that state." There is an internationally wrongful act of a State when conduct consisting of an action or omission: is attributable to the State under international law or when such an action or omission constitute a breach of an international

<sup>10</sup>Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, Official Records of General Assembly, Fifty-sixth session, Supplement N0 10(A/56/10), Chp.IV.E.1.

obligation of the state.<sup>11</sup> This is a long standing general rule of State responsibility for internationally wrongful act, where a state is responsible for the actions or omissions of its organs. This rule has now been part of the customary international law since its expression in the 1907 Hague Convention (IV) and Additional Protocol I to Geneva Convention that a State is responsible for “all acts committed by persons forming part of its armed forces”.<sup>12</sup> More prominently, is that the four Geneva Conventions specify that state responsibility for actions or omissions of any of its entities such as executive, legislative and judiciary, exist in addition to the requirement to pursue individuals for individual criminal responsibility for gross violation of human rights. What appears to be clear in this context is that state responsibility for actions or omissions of its organs does not exempt individuals who have committed those wrongful acts to respond or engage their individual criminal responsibility. In other words if a state is punished for what its organs have done, those individuals who were responsible for state responsibility cannot be exempted. While customary international law may refer to acts committed by armed forces, many other treaties more generally deal with gross human right violations, war crimes, crime against humanity, and genocide.

What more evidences the international community will require to ascertain the crime against humanity committed by China’s organs or Chinese entity (laboratory or market). A market place constitutes a public space on which state exercise elements of its power, thus belong to state. Whether corona virus originated from a market or a laboratory, which both belong to the Chinese authorities, any wrongdoings will be attributed to China under the general rule of state responsibility for an internationally wrongful act. This is because it is undisputable that those entities we reem powered to exercise elements of government authority and in case where they exceed their authority or contravened instructions, they engage state responsibility.<sup>13</sup> If a state can be responsible for the actions of its organs, person or entity acting in that capacity, a State can also be responsible for the omission of its organs, a person or entity failing to act in that capacity.

Article 2 of the Draft article laid down principle on which states’ internationally wrongful act may result: from an action or omission.<sup>14</sup> This is obvious when the organs, a person or entities are under obligation to act in order to prevent or punish a crime and fail to do so. In the British Claims in the Spanish Zone of Morocco case, Max Huber the arbitrator argues that a State that fails to exercise due diligence in preventing or punishing the unlawful actions could be held responsible for such failure.<sup>15</sup> In the same vein, the Inter- American Court of Human Rights affirmed that a State would be responsible for actions of its armed forces (organs, a person or entities) if it did not seriously investigate acts that violated an individual’s rights.<sup>16</sup>

Whether China has conducted a throughout investigate or not, whether China has exercised due diligence in preventing the pandemic or not, whether China through its organs, a person or entities contravened the instructions in getting in contact with any

intermediary animal affected with the virus or not, the internationally wrongful act of China cannot be avoidable.

The principle of international responsibility for an internationally wrongful act of a State as provided under the Draft articles applies whether the wrongful act is attributable under international law and whether the wrongful act constitute a breach of an international obligation of the state.<sup>17</sup> While these two elements of an internationally wrongful act emanate from different sources, namely customary international law<sup>18</sup> and conventional international law, they cannot be taken collectively before a state to be found responsible. Likewise, state may be responsible for an action or omission, not for both. More prominently, the principle of state responsibility for an internationally wrongful is governed by international law and not by national law.<sup>19</sup> This means, an act may be lawful under national law but not as such under international law.

Subsequently, conventional international law also recognised state responsibility in case of a breach of its international obligation. “There is a breach of 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.”<sup>20</sup> Likely China may be found responsible for the breach of an international obligation by virtue of conventional law obligations. In this context, the principle of state responsibility alludes to the fact a state responsibility for the breach of an international obligation may extends over the entire period during which the act continue and remains not in conformity with the international obligation. This is obvious when the violation of the obligation continue over time and that a state fails to prevent or stop the continued violations.<sup>21</sup>

More interesting in the discussion above is that international law on state responsibility for an internationally wrongful act makes it a serious or grave violations when the breach of such an obligation arise from a peremptory norm of general international law. Such norms form part of *jus cogens* norms which involve an obligation *erga omnes* and allow no derogations.<sup>22</sup> If it is revealed that the violation is from an

<sup>17</sup>Article 1 of the Draft Articles.

<sup>18</sup>See Rules 149. A state is responsible for violations of international humanitarian law attributable to it, including violations committed by its organs, including its armed forces; b) violations committed by persons or entities it empowered to exercise elements of governmental authority; c) violations committed by persons or groups acting in fact on its instructions or under its direction or control; and D) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

<sup>19</sup>Article 3 of the Draft Articles.

<sup>20</sup>Article 12 of the draft articles.

<sup>21</sup>Article 14 Draft articles.

<sup>22</sup>Ian brownlie, principles of public international law 512-15 (3d ed. 1979); see also hersh lauterpacht, international law 113 (ElihuLauterpacht ed., 1970); george schwarzenberger, international law and order 5 (1971); gordon a. Christenson, *jus cogens: guarding interests fundamental to international society*, 28 *va. J. Int’l l.* 585 (1988); karen parker & al. *Supra* note 40. Other commentators have also noted that the function of peremptory norms in the context of international law has not been adequately addressed: peremptory norms of international law (*jus cogens*) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the international law commission and the vienna conference on the law of treaties, it may be surprising that attention has not been greater. At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger “theoretical explosion” in international legal studies. N.g. onuf& richard k. Birney, *peremptory norms of international law: their source, function and future*, 4 *denver j. Int’l l. & pol’y* 187 (1973).

<sup>11</sup>Rules 149 on state responsibility for violation of International Humanitarian Law.

<sup>12</sup>Articles 3 and 91 of the Hague convention and Additional Protocol I to the Geneva Conventions.

<sup>13</sup>Article 7 of the draft articles.

<sup>14</sup>See article 2 of the Draft Articles.

<sup>15</sup>See Arbitral Tribunal, British Claims in the Spanish Zone of Morocco case, Arbitral award, 1 May 1925 Reprinted in Reports of International Arbitral Awards, Vol II , United nations, New York, 1949 Section III , P 642-646.

<sup>16</sup>Inter- American Court of Human Rights, Velasquez Rodriguez case, Judgement of July 29, 1998. 28, ILM 294.

obligation arising from *jus cogens* norms, such a state shall cooperate to bring to an end through lawful means the wrongful act.

There are however few exceptions or circumstances which may preclude wrongfulness of state act. These include valid consent from other states to allow the commission of the wrongful act, self-defence or when the commission of the wrongful act is lawful as required by the United Nations Charter, when the wrongful act constitute a countermeasures in respect of an internationally wrongful act, or when the wrongful act is due to *force majeure* that is irresistible, unforeseen events or beyond the control of the state. Since the focus of the paper is not to establish the wrongfulness of the act by China, although a determining factor for possible international responsibility, such a determination can only be done by a court of law, this paper only hypothesis on such possibilities. Thus, if established by a court of law, China will be called to make reparation for the damage caused to the international community (humankind), whether individually or collectively.<sup>23</sup>

### Consequence of an internationally wrongful act

After the human holocaust during WWII, the international community as a whole pledged “never again”. This global commitment may have been sincere, however has proved elusive and troubling when the world continue to lose millions of lives not only because of wars but also because of the COVID-19 as well as its associated socio-economic and environmental impacts which the world will have to bear indefinitely. While the world community pledged “never again” and reaffirmed “faith in fundamental human rights, in the dignity and worth of the human person”, such a commitment which tends to achieve peace cannot be fulfilled without addressing victims’ needs and without providing wounded nations with a sense of closure.<sup>24</sup> A more everlasting peace should be built on accountability which may be achieved whether by establishing the truth of what occurred in China, punishing those most directly responsible for human suffering, or and perhaps more importantly offering redress to victims worldwide.

The later seems unexplored chiefly because, international criminal law as well as its enforcement mechanism (accountability) focuses on international criminal law of inter-state cooperation rather than establishing a specific international enforcement mechanism. Such a specific international enforcement mechanism should be rooted on the world commitment to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

Compliance with international obligations is now illusive as the practice of states evidences that, more often than not, impunity has been allowed for states obligations arising from both customary international and conventional law. Particularly, *jus cogens* obligations as well as conventional law obligations have been far from being universally recognized and applied, and the duties to respect, ensure respect, promote and fulfil rights enshrined even when it arises out of specific treaty obligations is more inchoate than established. A wrongful act of a state is not without consequences. The international responsibility of a State which a rise from an internationally wrongful act involves legal consequences. Firstly the state responsible for the internationally wrongful act is under obligation to cease the wrongful act, if it is continuing and secondly the state is under obligation to offer appropriate assurance and guarantees of non- repetition, if

circumstances so required. In retrospect, wet markets in China had link with previous outbreak of corona virus and the COVID-19 can only be a demonstration that no obligations to cease and to offer guarantee or assurances of non-repetition were lay on China from the continuing violations. Subsequent to the above obligations, an internationally wrongful act of a state entails full reparation for the injury caused by the internationally wrongful act.<sup>25</sup> While injury may include any damages, whether material or moral, reparation may take various forms, including restitution, compensation and satisfaction, either singly or in combination. Thus and as purported above China’s responsibility arising from an internationally wrongful act provide the grounds for reparation as an effective remedy to the millions of victims worldwide who have suffered harms or continue to suffer the harm of the pandemic.

### Conclusion

State practice has established the rule on state responsibility as a norm of customary international law and a principle of international law. This principle has become a general concept of law that “any breach of an engagement involves an obligation to make reparation”.<sup>26</sup> To recapitulate the Draft articles, reparation is an indispensable attribute of a failure to apply a convention. These well-known international principles that the violation of rights engenders an obligation to make reparation found it meaning in the context of the global crisis created by China and allowing not only states, whether separately or collectively to urge China to stop the violation, ask assurances for non-repetition and claim reparation for the damages caused from its internationally wrongful act but also allow any individual to directly seek reparation from China for an internationally wrongful act. Therefore encouraging such individual motives will provide a mean to achieve criminal justice’s objective. As stated by George Santayana: “a society is condemned to repeat its mistakes if it does learn the lessons of the past, then a reliable record of those mistakes must be established if we wish to prevent their recurrence.” This means accountability for any wrongful act is prerequisite to prevent the re-occurrence of past mistakes of wrongful acts and serve as a way of keeping historical records on which future actions must be based. Likewise, accountability helps to recognise the victims of a crime.

In this context the paper suggests an action before the international Court of Justice (ICJ) against China or criminal action before national courts determining China criminal acts with a view to provide victims redress. Generally, there is a growing determination in international legal and the respective human rights organs to establish more effective ways of holding states accountable for human rights violations.

<sup>25</sup>Article 31 of the Draft articles.

<sup>26</sup>Eichmann case in 1961 Israel’s District court of Jerusalem attributed the wrongful act of the accused to the Germany as its own acts of state; In the reparation payments case in 1963 Germany’s Federal Supreme Court referred to the principle of public international law according to which a state party to a conflict is also responsible for acts committed by its nationals. In the Distomo case in 2003 the same German court affirmed that the responsibility of state for international wrongfully act committed during hostilities “comprises liability for acts of all persons belonging to the armed forces” Netherlands, District Court of Hague, J.T case in 1949 involved a claim for reimbursement of money that had disappeared during the arrest of an individual by Dutch resistance movement during the World War II and was later found to have been taken by the police. The case further evidence of the rule that state are responsible for violations of international humanitarian law committed by state organs. The ICTY in the Furundzija case in 1998 and in its judgement on appeal in the TADIC case in 1999 held that a state is responsible for the behaviour of its armed forces.

<sup>23</sup>Article 46 of the Draft Articles.

<sup>24</sup>Sexual violence in Burundi, Kenya, DRC, Uganda, South Africa in peace time or in time of conflict.

Following the notion in the rules of procedure of the International Court of Justice whereby only governments, and not individuals claimants, have the right to submit cases and the impracticality for the international community as whole to submit a case before the ICJ , unless through a Security Council resolution acting under Chapter VII of the United Nations Charter but also and only when the veto power has been defeated, the paper suggests an individual action from any country to submit a case before the ICJ in determination or requesting a legal opinion determining whether the actions of China amount to an internationally wrongful act or whether China is in violation of its international obligations by allowing the spread of a deadly disease, which continues to take the lives of millions of people worldwide. Such a determination would allow any individual or group of individuals or Non-Governmental Organisations (NGOs) to bring a case before any criminal court or supra national courts for reparation.

However, considering preconditions of supranational human rights regimes, such as prior exhaustion of domestic legal remedies, a lack of independent forums and non-existence of guaranteed principle lending an individual the standing of a claim holder, only a selection of some domestic jurisdictions, including the US because of its well-developed human rights adjudication system for foreign litigants may

initiate a successful civil action against China. The Alien Torts Claims Act (ATCA) a statute from 1789 which had been dormant for nearly 200 years has been used during the past years, where hundred civil liability cases for alleged gross human rights violations were brought against foreign individuals and countries. Human rights adjudication under the ATCA has led to the successful suing of state and non- state instigators of heinous crimes, some highly politicised suits against multi-national corporations for alleged participation in human rights atrocities. Thus US human rights litigation is wide in its scope as individuals have the rights to assert legal actions against not only foreign individuals, judicial persons, and even states for human rights violations.

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## Conflicts of interest

The author declares there are no conflicts of interest.