

LEGAL OPINION:

Does China Can Be Sued for The Global Pandemic?

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Nowadays, the world still continues to fight and to eradicate the severe global pandemic. The saga of COVID-19 has always to be the trending headlines and hot topic to be addressed. Per may 2020, this pandemic has continued to take over all segment of international matters, from global economy until the health crisis. As the impact, almost every international communities had impacted by this pandemic. Many countries had published the urgent policies to boldly anticipate the spreading of COVID-19 instead imposed the travel bans and also declared the lockdowns. The COVID-19 is already spread to the entire world and affected over six million and leaving over the three hundred thousand people have died. The fatality rate is still being increased and seems doesn't have significant good move.

As the data collected by Jakarta Post, it stated that more than 217.000 people have died due to the virus and the pandemic's global cost range from US\$ 2 Trillion to US\$ 4.1 Trillion or -2.3 to -4.8 of global gross domestic product (Jakarta Post, 2020). As the COVID-19 pandemic has destroyed the global economy and china's failure to adequately address the situation has been criticized by several countries. Some countries have a plan to sue China for causing financial problems and a health crisis in their territories. Those reason as the form of legitimate of general sentiment seems to be that China and their government is at fault and it is mandatory should pay for China had done. In other side, some countries have alternate response instead to condemn China and others have contemplated lawsuits. Countries like the USA, India, UK and Nigeria have blamed China for failing to take precautionary measures to stop virus spreading globally. This point will raise big question and complicated nexus: is it possible to sue china for COVID-19 global pandemics?". Meanwhile, there are some assumption and allegation that cover up by China during the early stages of the Virus' Progression, which led to its mass proliferation, is sparking debates all over the world. In this context, various countries, governments and even NGOs are claiming that the China should be held liable (Choudhury and Garg, 2020).

This legal opinion will be constructed on the current issues and chronological basis of following facts: 1. Chinese authorities have chosen denial, censorship and bluster during the early stages of the virus progression rather than the transparency that might save lives. 2 The China government blocked the COVID agenda at the United Nations Security Council (UNSC). 3. The China's regime transmission of patently false information has made matter worse. 4. In addition, China has deliberately gives incorrect data to WHO.

1. China Satisfied Wrongful Act Under Article 1, 2, 4 and 14 of the Draft Articles on Responsibilities of States for Internationally Wrongful Acts (ARSIWA), 2001.

The Norm of State Responsibility are codified under the Draft Articles on the Responsibility of States for Wrongful Acts (hereinafter abbreviate as "ARSIWA"). Article 1 of the ARSIWA stated that states are responsible for "internationally wrongful act". Article 2 of the ARSIWA 2001, defines 'wrongful act' as actions that are 'attributable to the state' and that 'constitute a breach of/violations of international obligations'. Article 4 of ARSIWA mentioned that "the act may be addressed or attribute to the states if it done through the legislative, judicial, or executives branches of government. As mentioned bellow, after the virus spread and releases, the responsibility flowed from the Wuhan Authorities to the President of China. All of them were the organs of China's Government and hence their conduct is attributable to China as State. The other fact also can be support with arguments: "there are some assumption and allegation that cover up by China during the early stages of the Virus' Progression".

In regard to violations of international agreement, China toward their regime failed to comply with its due diligence intentionally by issuing silencing orders that did not reveal precise and timely details, forcing biotech companies to stop research (Kumar, 2020). Due diligence is a principle of good governance that assesses whether a country has done what was reasonably expected when it responded to danger or threat. This norm, which is integrated into various principles of traditional and customary international law, applies, inter alia, to climate, human rights and the health of the world community. China has not complied with such laws, which impose behavioral obligations that require countries to avoid, stop and / or resolve a number of internal or cross-border hazards, or hazards from them.

In addition, China also violates Article 14 of ARSIWA by refusing to exchange details with WHO quickly and transparently in accordance with the IHR so that it extends violations

for the duration of the action and still does not fulfil international obligations. In particular, the University of Southampton's epidemiological model found that if China behaved more quickly professionally in one, two, or three weeks, these cases would decrease by 66%, 86%, and 95%, respectively (Southampton University, 2020).

2. China Violates Article 6 and 7 of the International Health Regulations

International Health Regulations ('IHR') is an international agreement that binds all 194 WHO countries (WHO, 2020). These legal instruments were adopted by The World Health Assembly in 1969 to prevent the international spread of disease by placing an obligation on states to prevent highly transmissible disease. In other word, it has primary aim to make the member countries to report disease outbreaks quickly and transparently. IHR requires a country to establish a State IHR Focal Point based on Article 4 for the implementation of regulations, timely notification of disease outbreaks, and other obligations. Article 5 requires a country to develop its core capacity to detect, assess, notify and report on events under the IHR. The Ministry of Health in China is designated as the focal point, while China also ensures that its public health capacity meets IHR requirements. Therefore, China has the infrastructure to respond to the COVID-19 outbreak more efficiently, under its main obligations at the IHR.

Article 6 (1) of International Health Regulations (IHR) states that: *“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”*

According to Article 6 (1) of the IHR, a state party is required to notify WHO of all events within its territory, which can constitute the Public Health Emergency of International Concern ("PHEIC"). PHEIC is defined as 'extraordinary events determined, as regulated in this Regulation: (i) to pose a public health risk to other countries through the spread of international diseases and (ii) to potentially require a coordinated international response.' This must be done within 24 hours after the assessment of public health information.

Article 6 (2) of International Health Regulations states that:

“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.”

According to Article 6 (2), a country is bound to communicate 'timely, accurate and detailed' information about public health emergencies after they notify WHO based on paragraph (1). This information includes the number of cases and deaths, factors influencing its spread, and support needed in responding to emergencies. However, China failed to comply with the same thing.

Article 7 of The IHR states that:

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. [SEP]

Based on Article 7 of the IHR, relating to information sharing, a country is obliged to provide WHO "all relevant public health information" during 'unusual public health events'. Despite these provisions, China refuses to share information about infections in Among health workers who are very important to understand the pattern of transmission, despite repeated requests from WHO, this information is also important for formulating a 'readiness plan' around the world. This relevant community 'until mid-February, China also violated Article 7 of the IHR.

As explained bellow, we can conclude that China also violates Article 6, where a country must notify all events that may be "public health emergencies of international concern" within its territory in 24 hours and to inform WHO of all relevant public health information based on Article 7.

In other part, we can be alleged that China also violates the Article 63 this convention:

“Each 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”

this scenario can be elaborated on the fact that Chinese doctors required assistance in treating the epidemic during the initial stages. However, the Chinese government rejected any overseas intervention and refused to entertain a Centre for Disease Control and Prevention (‘CDC’) team for investigation. Moreover, China also hold back the publications on doctor’s finding about possibility the new viruses and the number of health workers affected by the virus and also China appalled to the WHO to trust transmission from human to human does not occur.

3. China Violates the Principle of Transboundary Harm Under International Law Commission (ILC) draft on Transboundary Harm.

The principle of Transboundary Harm mandates that a state party is to ensure that the activities carried out within its jurisdiction does not harm the environment and territory of other states. Article 1 of the ILC Draft on Transboundary Harm provides that the provision is to apply to activities that are not prohibited by International law and involve a risk of causing ‘significant’ transboundary harm. For a transboundary harm to claim to prevail, the components of causation of the harm, severity of the harm and the movement of the harm from the territory of one state to another, must be established. Causation implies a direct link between the activity and harm occurred and severity refers to the significance of harm caused (Choudhury and Garg, 2020).

As reflected in the 'Trail Smelter Arbitration' as a base case in contemporary international law. The arbitration panel announced two revolutionary legal concepts relating to cross-border damage in its award. First, that no country has the right to use or require its territory to endanger the territory of other people or the property or people in it. Second, that polluting countries must compensate for losses caused by pollution activities in their own territories. Canada was finally forced to pay US compensation.

In this present case, linked in with the condition of “*Trail smelter Case*”, we can figure out into the status quo in Wuhan Territory during the virus has founded. The market activity carried out in the Wuhan (Chinese territory) was the trade of exotic wildlife species through their various wet-markets. Previous virus outbreaks have been caused due to human contact with live animals or their consumption. This activity continues and simultaneously without any health standardization instead the governments has never come up with any regulations. This condition allows viruses to jump from animals into humans. This is clearly evidence as the

mechanism of the virus could have potentially reached human from those animals into spreading outside China territory and became the global pandemics.

In the end of May 2020, it recorded the virus has infected 5.968.963 people and caused 365.797 people have died (Johns Hopkins Coronavirus Resources Centre, 2020). One of the requirements to show transboundary harm is there necessarily must be a movement harm. This condition describes the clear the evident from the fact that the virus, which initially started in China, has now spread over the countries and territories (Choudhury and Garg, 2020). Therefore, this satisfies all the necessary components of transboundary harm and hence, China is liable.

4. China Violates Article 7 (1) of the ICC

Some countries genuine believe that The China's action caused this global pandemic as a crime. Recently, pleas were filed before The ICC by individuals form both the United States and India. Those countries believe that the ICC is the appropriate the forum to ascertain China's responsibility for this global pandemic (Sanyal and Bhargava, 2020).

Broadly speaking, China is clearly not a Party in the Rome Statute, and it is absolutely unlikely that China will agree to the jurisdiction of the ICC in this case. In addition, it can prove to be a useless task to show that Chinese behavior occurs in the territory of a State Party. As such, it means that the ICC is not empowered to exercise jurisdiction or hear any issues that accuse the criminal responsibility of Chinese officials. For this reason, the ICC previously stated that it did not have jurisdiction over complaints against Chinese President Xi Jinping.

Alternatively, there is a still possibility concept to challenge the China's action with the Article 7 (1) of the ICC. A global pandemic does not occur when new infectious pathogens emerge, but when, due to failure to provide public services in regulated food and markets that will prevent the transmission of pathogens and control their movements, they begin to spread, as they have already. the case in Wuhan. Carelessness shown by the Chinese health authorities makes China guilt's of Article 7 (1) of the ICC in accordance with the eleventh act, namely, "other inhumane acts of similar character intentionally causing great suffering, or serious injury to the body or mental or physical health" as stated in 'crimes against humanity'.

Moreover, on Article 15 authorizes and has granted the prosecutor of the ICC to carry out the *proprio motu* process (on its own initiative) based on information relating to crime within the court's jurisdiction. All this has been said, the jury came out whether the ICC has authority over China. While joint public opinion seeks to drag China to the ICC, this must be

done after careful review of an appropriate legal framework, as in Appeal No. ICC-02/17 OA4, where prosecutors are allowed to open and investigate the actions of US military personnel in Afghanistan, despite the fact that the US is not a member of the ICC.

5. Is It Possible ‘to sue’ China?

A. Both of ICC and ICJ Has No Strong Jurisdiction

In spectrum of ICC’s Jurisdictional regime, the trial should be run out between the prosecutor versus the individual who’s committed the extraordinary crimes as stipulated on Rome Statue. In this point, it can be submitted that the ICC is concerned and punishing individuals (not states) who commit crimes against international law. As stipulated by The Nuremberg Tribunal in 1946 stated that “*Crimes Against international law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced*”. In this context, it would be face the complicated challenge in matters who’s the right individual can be possibly to identify to take bears of burden and perpetrated the crime itself. Moreover, this catastrophic point would be difficult to decide and to choose the master of mind of the crimes. In addition, as mentioned above that China is not member of ICC and it seems big obstacle to addressed the global pandemic case.

ICC jurisdiction could be held by two methods, through the contentious case and advisory opinions. Both of methods are not easy and require quite complex requirements. As an example, for the contentious case, it should get “green light” or approval by both parties (applicant and Defendant) except there is an examination test based on required jurisdiction of defendant. In other side, advisory opinion should be granted and supported by general Assembly of United Nations, otherwise it can be assumed that the initiator (General Assembly) should requires the majority of support to represent or repay to ICJ. If we relate to the present case, it is less possibility to take china into ICJ with voluntary movement.

Article 75 further states that any disagreements regarding the adoption of the WHO constitution must be referred to the International Court of Justice (ICJ). Reading the above as a holistic whole can cause the ICJ to appeal to its controversial authority in the absence of at least an assessment of Chinese duties, omissions, and commissions. It can be emphasized that the potential findings by the ICJ on China cannot be upheld at all against China, but in any case, it may be the first step towards finding substantive law after the application of appropriate justice.

B. Sovereign Immunity Principle is Strong Big Barrier

A principle developed in the early days of the British kings that "the King cannot do wrong", called the Sovereign immunity principle, prevents its government or political subdivisions, departments and agencies from being sued in civil or criminal litigation. In the current practice, the principle means that no country can be sued without its consent in domestic and international courts. This means that China needs to agree to have litigation filed against it before it could be sued (Muhamad Zulfikar Rakhmat, 2020). That's because of the Foreign Immunity Principle, which stands as a "Strong Barrier" to suing a foreign state, including a 'political sub-division' or 'instrumentality' of a foreign government. Those principle warns the state that a "foreign states hall be immune from the jurisdiction of the courts of the states".

As delivered by Natalie Klein, a law professor at the University of New South Wales, argues, if China chooses to disagree or crises not to consent, which is the most likely choice, there will be no case against it (Natalie Klein, 2020).

Conclusion

in consider of the points above, it can be drawn a very clear conclusion that it is not easy to bring a COVID case to an international court. this matter requires and must be supported by strong and convincing legal facts. On the one hand, the polemic to take China to an international court is certain to be full of politics and consideration of China's position as a developed country as well as one of the biggest economy in this world.