

# CHINA'S RESPONSIBILITY FOR THE COVID – 19 PANDEMIC: AN INTERNATIONAL LAW PERSPECTIVE

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*This article focuses on state responsibility elements under international law and analyses legal preconditions for China's responsibility under international law for COVID-19 pandemic management related actions.*

*Šis straipsnis nagrinėja valstybės atsakomybės elementus pagal tarptautinę teisę ir analizuoja teisinės prielaidas Kinijos atsakomybei pagal tarptautinę teisę už COVID-19 pandemijos valdymo veiksmus.*

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## Introduction

Currently, one of the main topic, which has been trending in the whole world, is the novel COVID – 19 disease caused by the SARS-CoV-2 virus. From the moment World Health Organization (hereinafter – WHO) declared a public health emergency of international concern on the 30th of January 2020, till the moment of writing this article, there have been more than 100 million confirmed cases and more than 2 million deaths worldwide (Worldometer, 2021). While states faced difficulties in fighting this disease, some world leaders, mainly, the former president of the United States, Donald Trump, started talking about the responsibility of the People's Republic of China (hereinafter – China), the state where the virus originated from. Donald Trump criticized China for the lack of transparency in providing relevant information about the new infection, specifically, he blamed China for incorrectly claiming that there was no evidence of human-to-human transmission (Trump, 2020 cited Herman, 2020). Even though, these statements were probably made with no intention to take any legal actions, they started

a discussion whether China breached its international obligations and whether there is a possibility for China's responsibility for the COVID – 19 pandemic.

**The purpose of this article** is to analyse a legal path that could be followed in order to determine whether a state is responsible under international law with legal preconditions for China's responsibility for the COVID-19 pandemic. In addition, this article will provide a possible legal framework for the implementation of the legal preconditions for China's responsibility.

**The object of this article** is international law rules applicable to state responsibility and its implementation mechanism in the context of COVID – 19 pandemic situation.

**Originality and relevance of the article** – China's responsibility for the COVID – 19 pandemic under international law is still quite an underresearched topic. There is a lack of scientific articles about this topic. The majority of published articles are media articles or statements made by various politicians. Additionally, it is crucial to mention that there are no articles regarding this topic in Lithuania. Yet, China's responsibility for the COVID-19 pandemic is still one of the most important topics because at the time of writing this article the world is still struggling with this disease, and the question who could be responsible for this crisis cannot be more relevant.

**Research methods applied in the article:**

1. Teleological method is used for trying to determine what intentions state parties had while drafting certain international legal obligations in relation to public health situation management and crisis prevention.
2. Linguistic method is used for trying to explain what provisions of certain international treaties mean and how they should be implemented in practice.
3. Interdisciplinary method is used while researching the contagiousness and the spread rate of COVID-19 disease from an epidemiological perspective.

**Sources** used in this article are, mainly, from various media articles that analysed China's acts or omissions at the time of the COVID – 19 outbreak. One of the most significant sources, which enshrined main principles of state responsibility, was the United Nations International Law Commission work on state responsibility - 2001 Draft articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter – Draft articles or Articles) as well as its respective Commentary. Furthermore, another substantial source was the doctrine of the International Court of Justice (hereinafter – ICJ) and the Permanent Court of International Justice (hereinafter – PCIJ). Research articles about the spread of COVID-19 and its impact on global economy had been additionally used.

## **1. Elements of state responsibility in international law**

One of the main sources that is referred, when state responsibility is examined, is the 2001 Draft articles on the Responsibility of States for Internationally Wrongful Acts by

the International Law Commission (further – Draft articles). While these Draft articles formally do not have a binding character, they widely reflect customary international law<sup>1</sup>. The mentioned Articles are one of the most thorough and comprehensive codification of the rules concerning state responsibility under international law. According to article 1 of Draft articles, every internationally wrongful act of a state entails the international responsibility of that state. Furthermore, article 2 of Draft articles enshrines two most important elements of state responsibility: the subjective element – an act or omission is attributable to the state under international law and the objective element – the conduct of a state constitutes a breach of an international obligation in force for that state at the time of an internationally wrongful act. To find a state responsible under international law these two elements have to be met.

Conduct attribution to the state means that the state in international law is regarded as a single legal person, a unity of various organs and institutions (Commentary of Draft articles, 2001, p. 35). The state operates by the help of its institutions and organs, consequently, an international obligation is breached by actions or omissions of these entities. Therefore, there is a need to establish a link between the institutions, officials and the state. “It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act” (Commentary of Draft articles, 2001, p. 40). In addition, it is important to mention that acting *ultra vires* does not have any impact on conduct attribution to a state, therefore, states cannot avoid international responsibility by relying on their internal laws.

While analysing the objective element, it is important to mention that the international obligation could come either from customary international law or from a treaty provision. An obligation could be breached not only towards a particular state or a group of states, but also additionally towards an international community as a whole. These kinds of obligations in international law are called obligations *erga omnes*. ICJ made a distinction between an obligation arising of a state towards an international community and those arising *vis-à-vis* towards another state. The ICJ stated that obligations *erga omnes*, by their nature, are the concern of all states and that in the view of the importance of the rights involved all states should be considered to have a legal interest in their protection (ICJ judgement in Barcelona Traction, Light and Power Company, Limited case, 1970, para. 33).

It is also crucial to mention that any violation of an international obligation causes international responsibility. As it was stated in the Rainbow Warrior arbitration “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation” (Case concerning the difference between

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<sup>1</sup> Frequently these Draft articles are referred to by the ICJ, e.g in Gabčíkovo-Nagymaros project or Armed Activities in the Territory of the Congo cases.

New Zealand and France..., 1990, para. 75). The tribunal has concluded that in international law there is no distinction between contractual or tortious responsibility as well as no distinction between civil or criminal responsibility like it is in internal law of various states. Consequently, general principles of state responsibility could be equally applied in a breach of international obligation regardless of its origin. This principle is established in the article 1 of Draft articles, where it is stated that “[e]very internationally wrongful act of a State entails the international responsibility of that State”. Taken into the consideration that there are no distinctions regarding international obligations by their importance in general international law, this article will not differentiate international obligations by their greater or lesser significance.

Occasionally, it is declared that without the objective and subjective elements another element should exist for a state responsibility to arise, in particular – damage. In the Rainbow Warrior arbitration, the French Government opposed the New Zealand’s claim on the ground that such a claim ignored “a central element the damage”. New Zealand answered to the French objection by contending that it was confirmed by the International Law Commission draft on State Responsibility that damage was not a precondition for responsibility (Case concerning the difference between New Zealand and France..., 1990, para. 108). Although, the doctrinal controversy between the parties over whether damage was or was not a precondition for responsibility became moot, because there was legal and moral damage in that case, yet, it showed that there was no general rule in that regard. Whether such element was required depended on the content of primary obligation (Commentary of Draft articles, 2001, p. 36).

Together with main elements of state responsibility, circumstances precluding wrongfulness should be analysed as well, because if there was a possibility of at least one circumstance that could preclude wrongfulness, even a well-founded claim for a breach of international obligation would be invalid. Draft articles present six circumstances that could preclude wrongfulness of an act. These circumstances are – consent, self-defense, countermeasure, *force majeure*, distress, necessity. Considering our topic the relevant circumstances would be *force majeure* and state of necessity. These circumstances will be analysed in the further parts of this article.

## **2. Elements of state responsibility in China’s actions related to COVID-19 management**

### **2.1 Examination of the objective element**

Taken into consideration that it is too early to form customary international law rules in our situation, the main attention in searching for the objective element should be paid to obligations, arising from international treaties that bound China at the time of the COVID-19 outbreak. The primary international treaty, which should be addressed,

is the 2005 International Health Regulations (hereinafter – IHR). The IHR entered into force for China on June 15 2007. China made a declaration under IHR that repeated the binding character of this document and stated that IHR “applies to the entire territory of the People’s Republic of China, including the Hong Kong Special Administrative Region, the Macau Special Administrative Region and the Taiwan Province” (English translation of China’s declaration under IHR, 2005). Therefore, obligations embedded in IHR would apply to China in full.

Prior to the commencement of the analysis of obligations that are embedded in this treaty, it is important to specify the significance of this legal document. According to IHR article 2 the purpose and the scope of this international treaty is to “prevent, protect against, control and provide a public health response to the international spread of disease”. It could be agreed that all states should have a legal interest in the prevention of an international spread of a disease or, at least, the mitigation of potential damage. Overall, 196 states are parties to the IHR and they surely have that kind of legal interest in the protection of these rights. Consequently, it could be stated that the obligations embedded in this treaty are obligations *erga omnes*. Therefore, all states could be entitled to invoke the responsibility of a breaching party. In addition, the existence of damage is not needed in order to constitute a breach of these obligations, because the purpose of this treaty is, firstly, to prevent an international spread of diseases without waiting for damage to occur.

The main obligations, that are relevant in our topic, are embedded in article 6 of IHR which stated that “[e]ach State Party shall notify WHO... 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”. Moreover, the second part of this article declared that following a notification parties would communicate with 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”. Therefore, it is possible to differentiate two obligations that should be analysed. The first one demands to notify WHO, within 24 hours, about an outbreak of a disease and the other obliges the party to communicate with WHO timely, by presenting an accurate and detailed information about the notified event.

Before analysing China’s conduct in the light of the mentioned obligations, it is crucial to clarify when the 24 hour period of notification starts. Article 6 paragraph 1 of IHR states that notification should be done within 24 hours of assessment of public health information. The state should assess this information by applying a specific algorithm contained in the Annex 2 of IHR. This algorithm establishes four decision-making criteria to assess the public health event. These criteria are – the seriousness of the event’s public health impact, unusual or unexpected nature of the event, the risk of

international disease spread, and the risk that travel or trade restrictions can be imposed by other countries. If a public health event meets, at least, one of the presented criteria, then, it should be assessed for notification within 48 hours from the moment the state party becomes aware of it at the national level. Moreover, if the assessed event meets two or more criteria, then, it should be notified to WHO within 24 hours (WHO Guidance for the Use of Annex 2 of the IHR, 2005, p. 14).

According to data presented by the WHO, China notified WHO about the appearance of a new disease on December 31, 2019 (WHO Timeline statement, 2020). Although there is no unanimous agreement when the first case could have been recorded, some sources declared that the first case was traced back to November 17, 2019 and at the end of 2019 Chinese authorities had identified, at least, 266 infection cases (South Morning Post, 2020 cited Davidson, 2020). While other sources asserted that the symptom onset date of the first patient identified was December 1 (Huang *et al.*, 2020, p. 500). Even if we relied on the information that the first case was identified on December 1st, we could agree that from the moment the first cases of unusual and unknown disease were detected, China should have assessed this public health event as necessary for notification to WHO. There is a high probability that the assessment would have showed that there were 2 or more criteria established in Annex 2 of IHR. This disease was unusual and unexpected, because it was caused by an undetected novel coronavirus and this public health event could have been serious, if 266 infection cases were identified before the notification to WHO. Nevertheless, public health event could have been serious even if no or very few human cases have, yet, been identified, because the event occurred in a high population density, in the city of Wuhan (WHO Guidance for the Use of Annex 2 of the IHR, 2005, p. 16).

The mentioned sources impose that China's conduct at the beginning of an outbreak could not have been in conformity with a duty to inform WHO within 24 hours of assessment of public health information. It is possible that the essential information will be provided when the work of the independent commission of WHO will be finished. It is important to mention that the members of the commission declared that the purpose of their work in China was not to find a responsible country, but rather to understand: when the virus began circulating and whether or not it originated in Wuhan in order to prevent future outbreaks (Leendertz, 2020 cited BBC News, 2020). Yet, the acquired information could be valuable in ensuring that China should have known about the emergence of a highly contagious virus and, therefore, should have assessed the situation and later informed WHO in accordance with IHR. This could have been the reason that China tried to deny and delay the access to its territory for WHO experts (Hernández, 2021). In this context, it is useful to mention the article 5 paragraph 1 of IHR that states: "[e]ach State Party shall develop, strengthen and maintain... the capacity to detect, assess, notify and report events in accordance with these Regulations, as specified in Annex 1". Therefore, China should have had, at the

time of the outbreak, the capacity to detect public health events and evaluate them for notification to WHO<sup>2</sup>. Consequently, China could have known about the ongoing public health situation in its territory.

Finally, the significance of the timely notification should also be stressed. Kurcharski's and others' research concluded that in locations with similar transmission potential to Wuhan in early January, once there were, at least, four independently introduced cases, accordingly, there was more than 50 percent chance the infection would establish within that population (Kucharski *et al.*, 2020, p. 553). Southampton university found out that if interventions in China "could have been conducted one week, two weeks, or three weeks earlier, cases could have been reduced by 66 percent, 86 percent and 95 percent respectively – significantly limiting the geographical spread of the disease" (study conducted in Southampton university, 2020). This shows that it was crucial to inform as soon as possible about the outbreak, because there was still hope of containing the international spread of this disease.

It is additionally important to assess if there was a breach of obligation that required to communicate promptly with WHO providing accurate and detailed information about the notified event. One source stated that China delayed to warn the public of a likely pandemic for 6 key days from January 14 to January 20 (The Associated Press, 2020). On January 14 the head of China's National Health Commission Ma Xiaowei in a confidential teleconference with provincial health officials laid out a grim assessment of the situation. He stated that the epidemic situation was severe and complex and would likely to develop into a major public health event (The Associated Press, 2020). On January 15 the head of China's Central Disease Control Center Li Qun declared on Chinese state television that by their latest understandings the risk of sustained human-to-human transmission was low (The Associated Press, 2020). As we know, Chinese government informed that human-to-human transmission was detected only on January 20 (Wang, Moritsugu, 2020). We could additionally mention that two expert teams were dispatched from Beijing to Wuhan on January 6 and January 8 and, yet, these expert teams did not find any evidence of human-to-human transmission (The Associated Press, 2020). Their findings were rather strange because at the time of their visit medical workers in hospitals and other individuals that had no contact to Huanan Seafood Market<sup>3</sup>, started falling ill. One of the most known doctors of Wuhan Central Hospital, Li Wenliang, raised an alarm of a potentially contagious disease that had many similarities to the SARS virus on December 30, 2019. Four days later he was summoned to the Public Security Bureau, where he was demanded to sign a letter, which stated he was making false statements and by

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<sup>2</sup> The minimal requirements of detection, reporting and notification established in the Annex 1 of IHR will be analysed in the further part of this article.

<sup>3</sup> The place where the virus might have originated from.

that, severely, disturbed social order (Hegarty, 2020). He was not the only individual that was accused of making “false statements”, because other eight individuals were additionally punished and imprisoned for spreading rumors (Tardáguila, Chen, 2020). While there were a lot of signals at the beginning of an outbreak that proved human-to-human transmission existed Chinese authorities delayed a significant time to notify other states and WHO. This conduct could not have been in conformity with the obligation which demanded to notify timely about the type of the risk and conditions affecting the spread of a disease.

So far, we have mentioned various sources, which argued about China’s delay in providing the relevant information, in addition, it is significant to mention the doubts concerning the fact that provided information was accurate arisen. One source stated that they had received and verified the authenticity of leaked internal documents from Hubei’s Provincial Central for Disease Control and Prevention (Walsh, 2020). These documents showed that the total amount of newly confirmed cases on February 10 was 5918, while on that day only 2478 new cases were announced publicly. Similarly, on February 17 internal documents showed that there were 196 deaths on that day, while only 93 deaths were announced caused by the COVID-19 infection (Walsh, 2020). This shows that some provided data might not have been as accurate as it was declared. If this was the case, then, the obligation which required following the notification of the event to provide accurate information about the cases and deaths had been breached.

In conclusion, the analysis of China’s conduct at the beginning of COVID-19 outbreak revealed that this conduct could not have been in conformity with IHR requirements. Firstly, there was an omission from China in notifying about the unexpected and unusual disease outbreak to WHO according to IHR article 6 paragraph 1 within 24 hours of assessment of the situation. Moreover, the action of delaying to provide relevant information or in providing inaccurate information, about the notified event, could not have been in conformity with the IHR article 6 paragraph 2 obligation.

## 2.2 Examination of the subjective element

Thus far, China’s international obligations were analysed and it was concluded that certain actions and omissions of Chinese institutions could not have been in conformity with these obligations. Therefore, there is a need to examine if these actions and omissions could be attributed to the state in question.

First and foremost, it is crucial to mention that China stated that the Ministry of Health was designated as China’s National Focal Point (English translation of China’s declaration under IHR, 2005). It meant that the Ministry of Health was responsible for notifying WHO about the emergence of a new disease according to the article 6 of IHR. Since this treaty entered into force, the Ministry of Health had dissolved its functions



were integrated into the National Health Commission. Therefore, the National Health Commission should have reported about the outbreak of this disease.

The first entities that encountered this disease were local hospitals in Wuhan. Yu and Li stated that in early December 2019 these hospitals reported unexplained pneumonia cases to the Wuhan Municipal Health Department. This department provided an official explanation that “the disease was preventable and controllable, and there was no need to panic” (Yu, Li 2021, p. 348). According to the timeline published by China on December 31, 2019 the National Health Commission got involved in the situation and sent an expert team to Wuhan to guide epidemic response and conduct on-site investigations (Xinhua, 2020). Therefore, the National Health Commission was definitely involved in the management of the outbreak, yet the question, which is left unanswered, is when exactly this institution was informed, because a lot of sources declared that the first cases were detected in early December or even sometime in November 2019.

In this context, it is crucial to mention the core capacity requirements for surveillance and response established in IHR Annex 1A. IHR Annex 1A establishes the minimal requirements that should be met in order to detect, report and notify about the disease outbreaks.

There are three levels of public health event detection. The first one is the local community level and/or primary public health response level. Their capacity includes the detection of events involving disease or death above expected levels and information reporting to other governmental institutions. The second intermediate public health response level has to assess reported events immediately and, if it found urgent, to report all essential information to the national level. The criteria for urgent events include serious public health impact and/or unusual or unexpected nature with high potential for spread. Finally, the national level should have the capacity to assess all reports of urgent events within 48 hours and, if these events confirm, at least, two criteria established in Annex 2, then, notify WHO within 24 hours.

The party of IHR according to article 5 should have the capacity to detect disease outbreaks in its territory according to Annex 1 requirements. Therefore, China should have had at the beginning of an outbreak the capacity to detect the unusual and potentially dangerous infection and assess it for notification. If local hospitals detected this unusual disease and reported in to governmental institutions, then these institutions should have responded to the situation – reported it to higher authorities, and these authorities should have assessed the event and notified WHO about it. Consequently, China could have known about the ongoing situation and the omissions of its institutions could be attributed to China.

Finally, there are no doubts that the actions of Chinese institutions, following the notification in delaying to provide the relevant information about the conditions affecting the spread of disease or providing inaccurate information about the cases and deaths, could be attributed to China.

In summary, the analysis of China's institutions, which had been involved in the management of an outbreak, allowed to conclude that the subjective element was satisfied.

### **3. Circumstances that could preclude wrongfulness of China's conduct**

The analysis of objective and subjective element allowed to conclude that China committed a wrongful act at the time of dealing with the disease outbreak. But for a state responsibility to arise it is not enough to determine these elements, it is additionally needed to ascertain if there are no circumstances that could preclude wrongfulness of such an act.

The head of China's National Health Commission mentioned that political considerations and social stability were key priorities at that time leading-up to China's two biggest political meetings in March (The Associated Press, 2020). One of the arguments that could be used is that Chinese authorities wanted to safeguard an essential interest of the state, e.g. economical, social or political stability, and that there was a situation of necessity. While these interests could be essential, wrongfulness of such an act could not be precluded, because the failure to notify the international community about the dangerous disease would seriously impair the essential interest of the international community in preventing international spread of diseases. China's essential interest would be less important compared with the interest of the international community. Therefore, this ground for precluding wrongfulness could not be implemented, because it would not be in conformity with Draft articles article 25 paragraph 1 (b) requirement.

In addition, the argument that there was a *force majeure* situation could be used. This ground for precluding wrongfulness of an act could not be implemented, because an irresistible force, the unexpected emergence of a contagious virus, did not make it materially impossible to inform WHO about this event or to communicate promptly after the event had been notified. Moreover, China induced the situation in question, because it did not respond adequately at the beginning of an outbreak. Consequently, *force majeure* ground could not be adopted, because it would not be in conformity with Draft articles article 23 requirements.

## **4. Implementation of state responsibility**

### **4.1 Different legal frameworks for invoking China's responsibility**

As we concluded in the previous parts that legal preconditions for China's responsibility exist, we stumbled upon a problem of a lack of compulsory jurisdiction of the

ICJ. International law has some peculiarities that differentiate it from the internal legal systems of various states. In international law, no court could have compulsory jurisdiction on every occasion. Therefore, we need to examine the potential grounds for the jurisdiction of the main judicial body of the United Nations – ICJ.

But before turning to ICJ related legal framework, we need to analyse the dispute settlement mechanism provided by the IHR. In the article 56 of IHR, it is established that when there is a dispute between two or more states this disagreement, regarding IHR, should be, in the first instance settled through negotiations, good offices, mediation, conciliation, or other peaceful means. If states fail to reach an agreement, then they may agree to refer this dispute to the Director-General of WHO. Although there is a possibility to settle disputes based on IHR, the concerned states need to enter into the negotiations in good faith, without their acceptance the dispute cannot be solved. Consequently, it is naive to expect that China will enter into negotiations voluntarily and the need to look for more effective legal mechanism that could be invoked arises immediately.

Ground for the ICJ jurisdiction could be found in the WHO Constitution. Article 75 of WHO Constitution declares that any dispute arising from the interpretation or application of this Constitution, which is not settled by negotiation or by the Health Assembly, will be referred to the ICJ. Taking into account that this ground for the ICJ jurisdiction was invoked before, but the party failed to demonstrate how that dispute was linked to the interpretation or application of WHO Constitution (ICJ case of *Armed Activities in the Territory of the Congo*, 2002, para. 99), it is needed to establish a link between the interpretation or application of WHO Constitution and the IHR.

It is declared that a potential link between IHR and WHO Constitution could be found in articles 63 and 64 of WHO Constitution (Creutz, 2020, p. 12). Article 63 of WHO Constitution states that “[e]ach Member shall communicate promptly to the Organization important laws, regulations.” The IHR is an essentially important WHO document, a regulation adopted by the Health Assembly (Bartolini, 2021, p. 234). Therefore, parties are obliged to communicate promptly with IHR. Moreover, a link between IHR and the Constitution could be found in article 64 of WHO Constitution, which obliges each party to “provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.” The IHR obligations were, in fact, determined by the Health Assembly. Consequently, ICJ could have a ground for jurisdiction to examine China’s responsibility question based on WHO Constitution provisions.

Additional legal framework for invoking China’s responsibility could be found in ICJ advisory opinion. By this special procedure, ICJ gives legal advice for an institution that requested an opinion. This legal advice could declare if a state breached its international obligations, e.g. ICJ in advisory opinion stated that Israel breached its obligation to respect Palestinian people’s right to self-determination by constructing a wall in

the occupied Palestinian territory (ICJ advisory opinion in *Legal Consequences of the Construction of the Wall...*, 2004, para. 149). Consequently, an authorized institution could request ICJ an advisory opinion about China's responsibility for the COVID-19 outbreak. Considering that some authors were questioning the binding legal nature of IHR given the lack of enforcement and compliance monitoring mechanisms (Burci, 2020), this opinion would be of crucial importance in clarifying that there could have been a breach of IHR obligations. The question which could be asked to the ICJ: could the IHR obligations be breached by the negligent conduct of China at the beginning of an outbreak?

There are two most appropriate entities that could request ICJ an advisory opinion about the mentioned question, which is the United Nations General Assembly or the WHO. The General Assembly according to article 96 (a) of the Charter of the United Nations has the right to request the ICJ to give an advisory opinion on any legal question, no other requirements are needed.

The situation differs slightly when we talk about the possibility for WHO to request an opinion. The ICJ distinguished three requirements, which needed to be met, for a Court to have jurisdiction to answer a question from a specialized agency – the specialized agency must be duly authorized to request such an opinion, the opinion requested must be on a legal question and the question arising must be within the scope of activities of that agency (ICJ advisory opinion in *Legality of the Use by a State of Nuclear Weapons...*, 1996, para. 10).

The request for an advisory opinion by the WHO should satisfy the mentioned requirements. Firstly, WHO could be authorized by the General Assembly to request an advisory opinion according to article 76 of WHO Constitution. Furthermore, the question would be legal, because the essence of this question is state responsibility under international law. Finally, the successful implementation of IHR provisions is relevant to WHO, therefore this question would be within the competence of this specialized agency. Consequently, ICJ could have jurisdiction to answer such a request from WHO.

It is also important to mention that China's consent for such an opinion would not be needed. ICJ stated that "the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion" (ICJ advisory opinion in *Legal Consequences of the Construction of the Wall...*, 2004, para. 47). The only circumstance when this opinion could be incompatible with the Court's judicial character is when such an opinion would circumvent the principle that a state is not obliged to submit its disputes to judicial settlement without its consent. This advisory opinion would not fully resolve the dispute about China's responsibility, because the essence of this opinion would be about the breach of IHR obligations, the questions, regarding reparation forms, would not be analysed. This opinion would put the foundations for further resolution of this dispute, e.g. in WHO provided dispute settlement mechanisms.

As ICJ stated advisory opinions are given to the entities that requested them in order to provide legal answers needed for these requesting organs in their action (ICJ advisory opinion in *Legal Consequences of the Construction of the Wall...*, 2004, para. 60). Although, these organs have the discretion to decide what political decision they will make, yet, they would be in an awkward position if they did not accept the opinion given by the Court (Bustamante, 1929 cited Hambro, 1954, p. 6). The requesting institution could not question the Court's opinion from a legal point of view or disagree with its findings. Consequently, the given opinion of the Court would be of high authority. If the ICJ would declare that China was responsible for its negligent conduct at the time of an outbreak, then, other states would have a basis to invoke China's responsibility.

## 4.2 Reparation issues

When an internationally wrongful act is committed, legal consequences with the duty of reparation arise. The PCIJ established a principle of full reparation. The Court stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (PCIJ *Factory at Chorzów* case, 1928, p. 47). Consequently, it is important to evaluate the possible reparation forms that could be appropriate for a breach of international obligations regarding notification about the outbreaks of diseases.

First and foremost, it is important to mention that COVID-19 pandemic caused tremendous moral and material damage. Moral damage, which could not be assessed in financial terms, consisted of individual pain and suffering from loss of loved ones to this disease, psychological consequences from isolation, strict quarantine requirements. Enormous material damage was done as travel was halted, hotels and restaurants were closed and sports, entertainment events were cancelled. Due to fear and uncertainty global stock market lost about US\$6 trillion in wealth in one week. International Monetary Fund downgraded its growth projection for the global economy, as COVID-19 outbreak gave doubts about the future (Peterson, Thankom, 2020, p. 2). All in all, it is crucial to determine what kind of reparation form could be appropriate, because we could not firmly declare that other states did everything possible to avoid the mentioned damage.

According to the Draft articles, there are three possible reparation forms – restitution, compensation and satisfaction. The main objective of restitution is to re-establish the situation, which existed before the wrongful act was committed. Restitution is only available when it is materially possible to re-establish the situation and if it does not involve burden out of proportion (article 35 of Draft articles). In the case that is being analysed, the damage is caused to the whole world and virtually every state could be considered as an injured state. Overall, the damage is so enormous, that the implementation of restitution would not be appropriate.

Another form of reparation is compensation. Although, there is a possibility to financially assess material damage, yet, there is a lack of causality between a breach of IHR obligation and the caused damage. We could not surely state that if China did everything accordingly to its obligations the pandemic would not happen. ICJ concluded that causal nexus between the violation of the obligation and the caused damage was one of the requirements in order to apply compensation (ICJ case of Application of the Convention..., 2007, para. 462). Consequently, financial compensation would not be an appropriate form of reparation regarding China's responsibility.

Finally, the third form of reparation is satisfaction, which may consist of an acknowledgment of the breach, an expression of regret, a formal apology, or another appropriate modality (article 37 of Draft articles). Assurances or guarantees of non-repetition may additionally amount to a form of satisfaction (Commentary of Draft articles, 2001, p. 106). Consequently, the most realistic form of reparation, which could be applied, would be satisfaction as an acknowledgment of a breach with assurances or guarantees that China would comply with its obligations to notify timely and accurate information about the outbreaks of diseases in the future. This form of reparation would restore and repair the legal relationship affected by the breach between China and the international community and, hopefully, prevent future pandemics.

## Conclusions

1. International responsibility could arise from a breach of any international obligation, regardless of its greater or lesser importance, as long as two crucial elements of state responsibility are found – the objective and subjective element. Meanwhile, additional elements of responsibility such as - damage, are not necessary elements of responsibility, unless such a requirement arises from the content of a primary obligation.
2. The analysis of sources suggests that China's conduct, at the beginning of an outbreak, was not in conformity with IHR obligations. Cases of the COVID-19 disease could have been identified earlier than China reported to WHO. Additionally, there was a lack of cooperation with WHO in providing accurate and detailed data about the ongoing situation.
3. Having in mind the minimal requirements for detection, assessment and notification about the public health events, China could have known about the outbreak of this disease, because prior to the outbreak, it should have had the sufficient infrastructure to detect serious public health events.
4. A ground for China's responsibility for the COVID-19 pandemic could be given by the ICJ advisory opinion, because this opinion could state that China breached IHR obligations by its negligent conduct. Based on this opinion other states could resolve their disputes with China using other dispute settlement mechanisms.

5. The most appropriate form of reparation could be satisfaction as an acknowledgment of a breach with assurances and guarantees of non-repetition. It would restore the legal relationship between China and international community and would, hopefully, prevent future pandemics.

## **Bibliography:**

### **Legal acts:**

1. Charter of the United Nations (1945).
2. Constitution of the World Health Organization (1946). [1948] UNTSer 221; 14 UNTS 185.
3. International Health Regulations (2005). [2007] UNTSer 44861; 2509 UNTS 79.

### **Special literature:**

1. Bartolini, G. (2021). The failure of “core capacities” under the who international health regulations. *International and Comparative Law Quarterly*, 70(1), p. 233-250, <https://doi.org/10.1017/S0020589320000470>
2. Creutz, K. (2020). China’s responsibility for the Covid-19 pandemic: An international law perspective. *FIIA Working Paper 115*, p. 1-14, [interactive]. Access through the internet: [https://www.fiaa.fi/wp-content/uploads/2020/06/wp115\\_chinas-responsibility-for-the-covid-19-pandemic.pdf](https://www.fiaa.fi/wp-content/uploads/2020/06/wp115_chinas-responsibility-for-the-covid-19-pandemic.pdf) [accessed 2021-02-25].
3. Hambro, A. (1954). The Authority of the Advisory Opinions of the International Court of Justice. *The International and Comparative Law Quarterly*, 3(1), p. 2-22, [interactive]. Access through the internet: <https://www.jstor.org/stable/755684?seq=1> [accessed 2021-02-25].
4. Huang, C. *et al.* (2020). Clinical feature of patients infected with 2019 novel coronavirus in Wuhan, China, *The Lancet*, 395(10223), p. 497-506, [https://doi.org/10.1016/S0140-6736\(20\)30183-5](https://doi.org/10.1016/S0140-6736(20)30183-5)
5. International Law Commission. (2001). Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. *Yearbook of the International Law Commission*, 2(2), p. 31-143, [interactive]. Access through the internet: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [accessed 2021-02-25].
6. Kurcharski, A. J. *et al.* (2020). Early dynamics of transmission and control of COVID-19: a mathematical modeling study. *The Lancet Infectious Diseases*, 20(5), p. 553-558, [https://doi.org/10.1016/S1473-3099\(20\)30144-4](https://doi.org/10.1016/S1473-3099(20)30144-4)
7. Peterson, O., Thankom, A. (2020). Spillover of COVID-19: impact on the Global Economy. P. 2-27, [interactive]. Access through the internet: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3562570](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562570) [accessed 2021-02-25].
8. Yu, X., Li, N. (2020). Understanding the beginning of a pandemic: China’s response to the emergence of COVID-19. *Journal of Infection and Public Health*, 14(3), p. 347-352, <https://doi.org/10.1016/j.jiph.2020.12.024>

### Case law:

1. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [ICJ], Judgment, 26 February 2007.
2. *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* [ICJ], Jurisdiction and Admissibility, Judgment, 3 February 2006.
3. *Barcelona Traction, Light and Power Company, Limited, Second Phase* [ICJ], Judgment, 5 February 1970.
4. *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX (Sales No. E/F.93.V.3), Decision, 30 April 1990.
5. *Factory at Chorzów (Claims for Indemnity) (Merits)* [PCIJ], PCIJ Series A, No 17, 13 September 1928.
6. *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [ICJ], Judgment, 27 September 1997.
7. *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* [ICJ], Advisory Opinion, 9 July 2004.
8. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [ICJ], Advisory Opinion, 8 July 1996.

### Other sources:

1. BBC News. (2020). Covid: WHO to investigate virus origins in China's Wuhan. [interactive]. Access through the internet: <https://www.bbc.com/news/world-asia-china-55333200> [accessed 2021-02-25].
2. Burci, G. L. (2020). The Outbreak of COVID-19 Coronavirus: are the International Health Regulations fit for purpose? Blog of the European Journal of International Law, [blog] February 27. Access through the internet: <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/> [accessed 2021-02-25].
3. Davidson, H. (2020). First Covid-19 case happened in November, China government records show – report. *The Guardian*, [interactive]. Access through the internet: <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report> [accessed 2021-02-25].
4. Hegarty, S. (2020). The Chinese doctor who tried to warn others about coronavirus. *BBC News*, [interactive]. Access through the internet: <https://www.bbc.com/news/world-asia-china-51364382#:~:text=Dr%20Li%20Wenliang%2C%20who%20was,his%20condition%20on%20state%20media> [accessed 2021-02-25].
5. Herman, S. (2020). Trump Tells UN to Hold China Accountable for Coronavirus. *Voanews*, [interactive]. Access through the internet: <https://www.voanews.com/usa/trump-tells-un-hold-china-accountable-coronavirus> [accessed 2021-02-25].
6. Hernández, J. C. (2021). Two Members of W.H.O Team on Trail of the Virus Are Denied Entry To China. *The New York Times*, [interactive]. Access through the internet: <https://>



- www.nytimes.com/2021/01/13/world/asia/china-who-wuhan-covid.html [accessed 2021-02-25].
7. Peoples's Republic of China declaration under International Health Regulations. (2007). [interactive]. Access through the internet: <https://www.who.int/ihr/China2007.pdf?ua=1> [accessed 2021-02-25].
  8. Tardáguila, C., Chen S. (2020). China arrested 8 for spreading “hoaxes” about what is now known as coronavirus. What happened to them? *Poynter*, [interactive]. Access through the internet: <https://www.poynter.org/fact-checking/2020/the-2019-coronavirus-virus-lands-in-the-u-s-after-killing-17-and-taking-eight-to-prison/> [accessed 2021-02-25].
  9. The Associated Press. (2020). China didn't warn public of likely pandemic for 6 key days. [interactive]. Access through the internet: <https://apnews.com/article/virus-outbreak-health-ap-top-news-international-news-weekend-reads-68a9e1b91de4ffc166acd6012d82c2f9> [accessed 2021-02-25].
  10. University of Southampton. (2020). Early and combined interventions crucial in tackling Covid-19 spread in China. [interactive]. Access through the internet: <https://www.southampton.ac.uk/news/2020/03/covid-19-china.page> [accessed 2021-02-25].
  11. Walsh, N. P. (2020). The Wuhan files Leaked documents reveal China's mishandling of the early stages of Covid-19. *CNN*, [interactive]. Access through the internet: <https://edition.cnn.com/2020/11/30/asia/wuhan-china-covid-intl/index.html> [accessed 2021-02-25].
  12. Wang, Y., Moritsugu, K. (2020). Human-to-human transmission confirmed in China coronavirus. *The Associated Press*, [interactive]. Access through the internet: <https://apnews.com/article/travel-health-pneumonia-ap-top-news-international-news-14d7dcffa205d9022fa9ea593bb2a8c5> [accessed 2021-02-25].
  13. Worldometer. (2021). [interactive]. Access through the internet: <https://www.worldometers.info/coronavirus/> [accessed 2021-02-25].
  14. WHO Guidance for the Use of Annex 2 of the International Health Regulations (2005). (2008). [interactive]. Access through the internet: [https://www.who.int/ihr/revised\\_annex2\\_guidance.pdf](https://www.who.int/ihr/revised_annex2_guidance.pdf) [accessed 2021-02-25].
  15. WHO Timeline statement. (2020). [interactive]. Access through the internet: <https://www.who.int/news/item/29-06-2020-covidtimeline> [accessed 2021-02-25].
  16. Xinhua. (2020). China publishes timeline on COVID-19 information sharing, int'l cooperation. [interactive]. Access through the internet: [http://www.xinhuanet.com/english/2020-04/06/c\\_138951662.htm](http://www.xinhuanet.com/english/2020-04/06/c_138951662.htm) [accessed 2021-02-25].

## **KINIJOS ATSAKOMYBĖ UŽ COVID-19 PANDEMIJĄ: PER TARPTAUTINĖS TEISĖS PERSPEKTYVĄ**

Santrauka

Šis straipsnis analizuoja vieną iš aktualiausių šių dienų klausimų – Kinijos atsakomybę už COVID-19 pandemiją. Straipsnis pradedamas supažindinant skaitytoją su teoriniais valstybės atsakomybės pagrindais tarptautinėje teisėje. Toliau yra analizuojamos prielaidos Kinijos atsakomybei už šią pandemiją. Tarptautiniai įsipareigojimai, galioję ligos protrūkio metu, lyginami su konkrečiais Kinijos institucijų veiksmais ar neveikimu. Galiausiai straipsnyje yra pateikiamos galimybės spręsti šį klausimą nurodant galimus atsakomybės sprendimo mechanizmus, taip pat, parenkant tinkamiausią atsakomybės rūšį už galimą įsipareigojimų pažeidimą.

## **CHINA'S RESPONSIBILITY FOR THE COVID – 19 PANDEMIC: AN INTERNATIONAL LAW PERSPECTIVE**

Summary

This article analyses one of the most relevant topics these days – China's responsibility for the COVID-19 pandemic. Article begins by introducing the reader to theoretical state responsibility grounds. Further, preconditions for China's responsibility for this pandemic are analysed. International obligations, in force at the time of an outbreak, are compared with specific actions or omissions of Chinese institutions. Finally, article provides the possible ways to resolve China's responsibility question by applying various legal frameworks, additionally selecting the most appropriate form of reparation.