Suing China over COVID-19: International and Malaysian Perspectives

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Abstract
COVID-19 had far-reaching economic and social consequences which stunned the rate of globalisation. The emergence of COVID-19 within China and the Chinese government's failure to promptly and transparently provide needed information to the international community raises the question whether the Chinese government and/or its officials could be held civilly or criminally liable under international law or domestic law. In the United States, several individuals, small businesses and States have filed a total of at least 14 different suits against China (and affiliated entities and officials) based on its perceived culpability in causing the pandemic. This article explores which court has the competence and jurisdiction to deal with the international responsibility of the Chinese government. This article discusses four possible scenarios under both national courts and international forums for a lawsuit against China. Specifically, the author also analyses the Malaysian position on the possible legal actions against China.

Keywords: International law, sovereign immunity, COVID-19, liability, Foreign Sovereign Immunity Act, arbitration, China, Malaysian perspective.

1. Introduction

COVID-19 changed everything. Efforts to prevent and contain the spread of the virus have caused the world to change. COVID-19 had far-reaching economic and social consequences which stunned the rate of globalisation. The COVID-19 pandemic has caused a near standstill in the global economic activity and a financial crisis with yet unforeseen consequences. World economies are in shambles, but when the dust settles fingers will be pointed and responsibility strictly apportioned. One would be able to foresee the issue of China's legal liability for the COVID-19 outbreak. In particular, a $20 trillion lawsuit has been filed against Chinese authorities in the U.S. over the coronavirus outbreak. American lawyer Larry Klayman and his advocacy group Freedom Watch along with Texas company Buzz Photos have filed a USD 20 trillion lawsuit against the Chinese government, Chinese army,

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the Wuhan Institute of Virology, Director of Wuhan Institute of Virology Shi Zhengli and Chinese Army's Major General Chen Wei.[314]

Under the immense human and economic loss caused by the COVID-19 pandemic, do they have any basis for filing a lawsuit? With the current state of international law, is the claimant State required to prove negligence or breach of an international legal duty to receive any compensation from China?

According to the fundamental principles of international law, a State breaches its international responsibility when it violates international obligations or intentionally commits a wrongful act. Thus, the claimant State should prove that China has violated its international obligations. In this case, only an internationally wrongful act such as the breach of an international treaty or the violation of another State's territory will be taken into consideration. With regards to the pandemic, China has not breached any general legal duty or obligation. The subsequent question is which court has the competence and jurisdiction to deal with the international responsibility of the Chinese government. There are four possible scenarios for a lawsuit against China.

2. National Courts

First of all, a lawsuit can be brought in the national courts. At least twelve class-action lawsuits have been filed against the Chinese government and governmental departments in the federal U.S. courts. The lawsuits are concerned with COVID-19 related losses, death and injuries. It is possible to file a class action against a country and an analogy can be drawn to Libya that faced a class-action lawsuit for the 1988 Pan Am bombing over Lockerbie, and they eventually paid U.S. 1.5 billion to the American victims' families.[315] Nevertheless, law professor Stephen L. Carter from Yale University and several other jurists question the legal liability of these COVID-19 related class-action suits since it is hard to prove and there is no basis for the American courts to have jurisdiction. Professor Carter explains that nation-states are immune from such lawsuits.[316]

In accordance with the principles of international law, the national courts are not competent to entertain an international dispute between States. As mentioned above, the individual complaints in domestic courts have no legal basis. Hence, China can invoke its immunity from such jurisdiction. In a case where any local court made a judicial decision in this matter and ordered compensation from China, that decision would not be enforceable.

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[314] *Buzz Photo v People's Republic of Chin*a, No. 3:20-cv-656 (N.D. Tex. Mar. 17, 2020).

[315] n/a, 'Libya pays $1.5 billion to settle terrorism claims', *CNN* (United States, 31 October 2008) <https://edition.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html> accessed 6 May 2021.

[316] Stephen L. Carter, 'Can China Be Sued Over the Coronavirus?' (*Bloomberg Opinion*, 24 March 2020) <https://www.bloomberg.com/opinion/articles/2020-03-24/can-china-be-sued-over-the-coronavirus> accessed 6 May 2021.

Moreover, the judicial doctrine called “sovereign immunity” or “state immunity” offers foreign governments a protection against prosecution in American courts. In the U.S., the 1976 Foreign Sovereign Immunities Act (FSIA)[317] provides foreign governments with state immunity, that protects the Chinese government or its political subdivisions, departments, and agencies from being sued without its consent in U.S. federal and local courts, except in relation to certain actions relating to commercial activity in the U.S. or acts of terrorism.

On April 21, 2020, the state of Missouri filed a lawsuit in the U.S. District Court for the Eastern District of Missouri against the People’s Republic of China (“PRC” or “China”) and various other parties.[318] The lawsuit seeks damages from the defendants for their role in unleashing the COVID-19 pandemic, an action that, as the state has alleged, roiled the world for the last three months, put millions of people out of work, and killed thousands in the process. Paul J. Larkin Jr. concludes that the events here are not the type of ordinary commercial or tort law claim that the FSIA allows in American courts.[319] Missouri does not claim that it is a party to a broken contract or a commercial deal gone sour. Nor does the state aver that its personnel or residents have been the victim of a simple motor vehicle accident or the distribution of a poorly manufactured consumer device. Even if the defendants committed deceit on an unprecedented scale in responding to the outbreak of COVID-19 in Wuhan and are legally responsible for their actions under Missouri law, the FSIA is unlikely to allow this case to go forward.[320]

The terrorism exception allows certain plaintiffs to sue countries that have supported certain acts of terrorism and have been designated "state sponsors of terror." Until 2008, this exception was subject to the FSIA's general bar on punitive damages. In 2008, Congress moved the terrorism exception to § 1605A of the FSIA, which is not subject to the bar on punitive damages.[321] Additionally, § 1605A(c) created a federal cause of action for U.S. nationals, Armed Forces members, U.S. Government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages.[322] The 2008 amendments also specified that plaintiffs could file new actions for pre-enactment conduct under § 1605A.

In 2008, the FSIA was invoked by Saudi Arabia to preclude a lawsuit filed by families and victims of the September 11 attacks who alleged that the Saudi leaders had indirectly financed al-Qaeda. Congress responded in 2016 by overriding President Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA), amending FSIA and allowing the families' suit against Saudi Arabia to proceed in U.S. courts. In *Opati v Republic of Sudan*, the

[317] The Foreign Sovereign Immunities Act of 1976.
[318] *Missouri ex rel. Schmitt v. People’s Republic of China*, No. 1:20-cv-00099 (E.D. Mo. filed Apr. 21, 2020).
[319] Paul James Larkin, Jr., ‘Suing China Over COVID-19’ (2020) 100 Boston University Law Review Online 91.
[320] Ibid.
[321] 28 U.S.C. § 1605A.
[322] Ibid § 1605A(c).

Supreme Court unanimously ruled in May 2020 that FSIA allowed for punitive damages on cause of action from pre-enactment conduct, in a case related to the 1998 United States embassy bombings.[323]

Klayman, his advocacy group Freedom Watch and Buzz Photos, a Texas company, filed the lawsuit in the US District Court for the Northern District of Texas, alleging that the novel coronavirus was 'designed by China to be a biological weapon of war' and that it was released by China 'accidentally or otherwise.'[324] Two observations are relevant here. First, this might be one of the rare complaints against foreign officials in which the foreign state is the 'real party in interest,' which means that the Foreign Sovereign Immunity Act governs both state and official immunity in this case under the Supreme Court's reasoning in *Samantar v Yousuf*.[325] Although the individual defendants are named as alleged joint tortfeasors, it is unlikely that the plaintiffs are seeking $20 trillion damages from the individual defendants' pockets. Second, and more fundamentally, there is no such thing as 'accidental' terrorism. To qualify for the terrorism exception, plaintiffs must at least establish the existence of "an act of international terrorism in the United States," among other elements.[326] Nevertheless, the lawsuits' bare-bone allegations that the pandemic is a result of a leakage from a Chinese biological weapons facility would neither qualify as an alleged "act of international terrorism" nor an act that occurred in the United States.

On July 30, 2020, the Senate Judiciary Committee approved the Civil Justice for Victims of China-Originated Viral Infectious Diseases (COVID) Act, which would amend the Foreign Sovereign Immunities Act to permit lawsuits against China for claims related to the coronavirus. Nevertheless, Shira Anderson and Sean Mirski argue that the Bill is unlikely to become law -especially considering the makeup of the newly elected Congress.[327] They have argued that although the Bill is likely to fail on the Senate floor, the committee's approval sends a powerful message; at least some members of Congress are willing to risk diplomatic blowback in order to take action that they understand as holding China accountable.[328]

Therefore, domestic laws, barring all its other benefits, are unsuited for this task for the principle of sovereign immunity, which prevents local courts from ruling on the acts of foreign governments. Sovereign immunity is not a favour courts do for foreign regimes. It is an act of reciprocity, a peace treaty resting on a shared understanding. So broad is the

[323] 590 U.S. ___(2020).
[324] *Buzz Photo* (n 314).
[325] 130 S. Ct. 2278 (2010).
[326] 28 U.S.C. § 1605B; *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d 631, 642 (S.D.N.Y. 2018)
[327] Shira Anderson and Sean Mirski, 'An Update on the Coronavirus-Related Lawsuits Against China' (*Lawfare*, 22 January 2021) <https://www.lawfareblog.com/update-coronavirus-related-lawsuits-against-china-0> accessed 6 May 2021.
[328] Shira Anderson and Sean Mirski, 'How Can China Respond to the Coronavirus-Related Lawsuits Against It?' (*Lawfare*, 3 September 2020) <https://www.lawfareblog.com/how-can-china-respond-coronavirus-related-lawsuits-against-it>accessed 6 May 2021.

traditional doctrine that a British court held in 1894 that even if a foreign ruler moves into one's country, takes on an assumed name and conceals his true position and enters into a contract, a lawsuit against him for breach is still barred.[329]

For the lack of enforceability, we must redirect our attention to supranational legal frameworks for remedies and solutions to this precarious inquiry. Unlike national courts, China would not be protected by sovereign immunity before an international court.

3. International Health Regulations 2005

After the spread of SARS in 2003, the World Health Organization (WHO) adopted an International Health Regulation (IHR) by making member countries accountable to counter such global pandemic. Article 6 mandates each member country to " ... 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."[330] Further, Article 7 goes on to state that if a country " ... 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."[331] These regulations are further fortified by Articles 11 and 12 of IHR which requires the WHO to share such verified data with other countries so that they can enact precautionary measures.[332]

Some alleged that China not only failed on both counts, but also censored, misled and suppressed information from the media and the WHO, about novel coronavirus and its effects. Moreover, China portrayed COVID-19 as a new form of Pneumonia that could not be transferred from one human to another, which was later admitted by Chinese authorities as otherwise. Research published on 29 January 2020 in the New England Journal of Medicine indicated that, among officially confirmed cases, human-to-human transmission may have started in mid-December 2019,[333] and the delay of disclosure on the results until January 20, rather than earlier in January, brought criticism of health authorities. Collectively, these actions made it difficult for countries around the world to adequately prepare for this deadly virus leading to colossal damages to economy and public health.

Although China has admitted its initial missteps and underestimation of public risks, it had quickly acted to inform the WHO and scientists in the United States soon after. China's Global Times said, "This miscalculation did not hinder the communication between Chinese

[329] *Mighell v Sultan of Johore* [1894] 1 QB 149.
[330] International Health Regulations 2005, Article 6.
[331] Ibid, Article 7.
[332] International Health Regulations 2005, Articles 11 and 12.
[333] Qun Li, Xuhua Guan, Peng Wu, et al, 'Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia' (2020) 382 New England Journal of Medicine 1199.

and foreign scientists. All data were sent out, including a thesis by Chinese scholars in international academic journals ... ".[334] On 20th January 2020, China made public its findings on human-to-human transmissions. Global Times argued, "At the global level, the time lost could have been compensated by taking resolute measures. This was especially true for those countries far from China."[335]

4. International Court of Justice

In order to resolve the legal dispute, a lawsuit could be brought in the International Court of Justice (ICJ). The ICJ is one of the principal judicial bodies of the United Nations (UN) for settling disputes between States. For a court to be competent for settling this claim, the court must obtain the consent of the adverse countries to resolve their differences. Since neither China nor the United States recognizes the jurisdiction of the court, the ICJ has no competence to render a judicial decision for this possible lawsuit.

Some jurists think that it is not worth bringing an action against China in the ICJ.[336] The ICJ can only exercise its jurisdiction when a State has given its consent, which is not the case. The reason why consent is important is because the international legal system operates on state sovereignty which is recognised in the UN Charter.[337] Alexander and others are of the opinion that rendering an advisory opinion of the ICJ could offer a safer and more advantageous option. Consent from the disputant parties is not necessary for invoking the advisory jurisdiction of the ICJ.[338] Even though an advisory opinion from the ICJ is not legally binding, it could nevertheless help to set a precedent for the international community which would help to regulate the conduct of states. This would aid states to participate proactively in the fruitful functioning of the United Nations system, says Alexander.[339]

Alternatively, the third option is that a State could contemplate filing a lawsuit against China before the Permanent Court of Arbitration (PCA), for having endangered the world population and hurt the international economy by its poor management of the COVID-19 pandemic, on the basis of a violation of the WHO International Health Regulations.

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[334] Global Times, 'Bild editor sells soul attacking China's virus record: Global Times editorial' *Global Times* (Beijing, 20 April 2020) <https://www.globaltimes.cn/content/1186214.shtml>accessed 6 May 2021.
[335] Ibid.
[336] Guo Shuai, 'Don't bother suing China for COVID-19 before the ICJ' *China Daily* (Beijing, 9 April 2020) <https://www.chinadaily.com.cn/a/202004/09/WS5e8ec46aa3105d50a3d15041.html> accessed 6 May 2021.
[337] United Nations Charter, Chapter I, Article 2(1).
[338] Atul Alexander, 'Gauging the Advisory Jurisdiction of the International Court of Justice in the Face of COVID-19' (*Jurist*, 6 April 2020) <https://www.jurist.org/commentary/2020/04/atul-alexander-icj-covid/> accessed 6 May 2021.
[339] Ibid.

5. The Permanent Court of Arbitration

The PCA, established by treaty in 1899, is an intergovernmental organisation providing services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organisations, and private parties. The PCA's functions are not limited to arbitration; they also include providing support in other forms of peaceful resolution of international disputes, including mediation, conciliation, and other forms of alternative dispute resolution.

The cases dealt with by the PCA span a range of legal issues involving territorial and maritime boundaries, sovereignty, human rights, international investment, and international and regional trade. Similarly for the ICJ, the PCA is competent to entertain a dispute only if the states concerned have accepted its jurisdiction.

With regard to health issues, China, as one of the 122 Member States of the PCA is bound by the WHO International Health Regulations adopted on 23 May 2005. These impose several obligations on the WHO Member States in the event of a public health emergency of international concern. The Regulations stipulate, in Article 56 section 3, that any dispute between states regarding their application or interpretation may be settled through arbitration under the auspices of the PCA:

> A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States*[340] applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.[341]

Nevertheless, the same article, in its section 4, specifies that, "Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organisations or established under any international agreement."[342] Therefore, a state alleging a violation of the WHO 2005 International Health Regulations by China in its

[340] PCA, 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States' <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf> accessed 6 May 2021.
[341] International Health Regulations 2005, Article 56 section 3.
[342] Ibid, Article 56 section 4.

management of the COVID-19 crisis could invite it to settle their dispute through the arbitration of the PCA, but China could refuse.

Essentially, the PCA issues binding decisions but has no enforcement power. The issue of compliance of international law, including decisions of international courts and tribunals, has always been viewed as one of the most striking weaknesses of the international legal system. This limitation is partly explained by the lack of enforcement mechanisms under international law that is comparable to those under domestic law. Like for the ICJ, the implementation of PCA's decisions relies on the voluntary execution by the states. We shall then examine precedents where a powerful State defies a decision rendered by an international court or tribunal.

In *Nicaragua v United States*,[343] the ICJ held that the United States had violated both treaty law and customary international law by supporting the Contra rebels, and ordered the United States to refrain from all such acts and make reparation to Nicaragua. Faced with the United States' non-appearance in the merits phase of the case and subsequent rejection of the judgment, Nicaragua brought the issue of enforcement to the UN Security Council pursuant to Article 94 of the UN Charter.[344] This course of action unsurprisingly failed to gain any success due to the United States' veto power as a permanent member of the UN Security Council. Nicaragua then turned to the UN General Assembly (UNGA), at which it managed to persuade the UNGA to pass four resolutions requesting the U.S. to comply with the judgment.[345] While on the surface, these resolutions did not change the rhetoric that the U.S. was pursuing, it did draw public attention to the U.S.' behaviour and put pressure on Washington to adjust its foreign policies. For instance, its strategy to resort to the Security Council and General Assembly had the effect of securing publicity for the issue, which helped convince the U.S. Congress to cut off aid to the Contras in 1988. The United States subsequently lifted its trade embargo against Nicaragua in 1990 and provided the new government of Violeta Chamorro with a significant aid package. Thus, U.S. non-compliance notwithstanding, Nicaragua's initiation of the case and its subsequent strategy eventually helped secure its intended outcome.

As opposed to the ICJ, the PCA is not a UN body, so it cannot even rely on the eventual assistance of the UN Security Council. Thus, a state which would not recognise the PCA jurisdiction may refuse to implement its rulings. For example, in 2013 the Republic of the Philippines brought a case against the People's Republic of China concerning a territory

[343] (1986) I.C.J. 14.

[344] Article 94(2) of the UN Charter says, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

[345] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) 197-211.

dispute in the South China Sea. The PCA declared it had jurisdiction over the case, but China declared that it would not participate in the arbitration. On 12 July 2016, the Court ruled in favour of the Philippines, but China rejected the ruling.[346]

It is submitted that since China is one of the big fives like the United States, China may defy a court or arbitral tribunal's decisions even if China were found liable for the COVID-19 outbreak as shown in the cases of *Nicaragua v United States* and *The South China Sea Arbitration*. Looking at these precedents, the question is then: what are the options that may be available for claimant states, even in the face of China's defiance of the arbitral award, to enforce the arbitral award? Dr. Lan Nguyen argues that the arbitral award could be considered to have impact and not 'just a piece of paper'. She suggests that putting a spotlight on the situation at global forums such as the UNGA could be an option to draw attention to activities which are inconsistent with the legal order established by the award.[347] Vietnam took a measure of a similar nature after the deployment of the Chinese oil rig Haiyang Shiyou 981 in 2014 near the Paracels. Vietnam sent various letters to the UN Secretary General requesting the content of the letters that Vietnam had sent to China condemning the Chinese activities in the Vietnamese EEZ and extended continental shelf be circulated in the sixty-eighth session of the UNGA.[348]

6. International Criminal Law Framework

The fourth option is the United Nations Security Council (UNSC) which has the power under the International Criminal Court's (ICC) Rome Statute to refer cases to the ICC or adapt a resolution against China based on its " ... primary responsibility for the maintenance of international peace and security." Many nations of the world have long sought a mechanism for more effectively prosecuting international criminal law violators. For decades, the UNSC has been the most viable vehicle given the sway held by the most powerful countries and the ability to impose meaningful sanctions. Chapter VII of the United Nations Charter authorizes the UNSC to " ... maintain or restore international peace and security."[349] However, United Nations proceedings generally are not criminal in nature, but diplomatic. Moreover, with factions at the UN and the U.S., U.K., France, China, and Russia all hold

[346] Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*<https://pca-cpa.org/en/cases/7/> accessed 6 May 2021. See also Tom Phillips, Oliver Holmes and Owen Bowcott, 'Beijing rejects tribunal's ruling in South China Sea case' *The Guardian* (London, 12 July 2016) <www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> accessed 6 May 2021.

[347] Lan Nguyen, 'The South China Sea Arbitral Award: Not 'Just a Piece of Paper''(*Maritime Issues*, 7 August 2019)
<http://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html#_edn1> accessed 1 June 2021.

[348] United Nations, 'Submission in Compliance with the Deposit Obligations Pursuant to The United Nations Convention on the Law of the Sea (UNCLOS)' (*United Nations,* 8 October 2020) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm> accessed 1 June 2021.

[349] United Nations Charter, Chapter VII, Article 39.

vetoes as the five full-time members of the UNSC, enforcement becomes extremely difficult in light of the different interests and rivalries among those countries and their allies.

Due to the challenges with imposing accountability for criminal behaviour internationally, nations, through the United Nations General Assembly, sought and achieved ratification of the controversial Rome Statute establishing the International Criminal Court ('ICC'), which was adopted in July of 1998 and went into effect in July of 2002.[350] The ICC's jurisdiction is even more limited than international criminal law in general, as the court has jurisdiction over only 4 categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[351] As with international criminal law generally, the ICC only has " ... jurisdiction over natural persons."[352]

The ICC's jurisdiction is further limited by the fact that several major nation-states do not recognise its jurisdiction - including both China and the United States. China has neither signed nor ratified the Rome Statute,[353] which means that it is not subject to the ICC's jurisdiction.[354] Similarly, although the United States originally signed the Rome Statute, it later informed the United Nations that it does not intend to become a party to the treaty, and the United States Senate has never ratified the Rome Statute.[355]

Therefore, there are significant impediments to imposing criminal liability under international law for China's response to COVID-19. Even assuming that an appropriate individual could be identified and then found liable, none of the acts currently recognized as criminal under international law would likely cover China's activities. 'Genocide' only covers a discrete list of acts, all of which must be "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[356] Despite China may have acted negligently - even recklessly with disregard for human life - by failing to crack down on wet markets, failing to adequately regulate laboratories studying dangerous pathogens, and acting slowly to respond to and notify the public about COVID-19 - it does not seem that it engaged in those actions with intent to destroy any specific group of people.

'Crimes against humanity' only encompasses a list of specific actions, all of which must be " ... committed as part of a widespread or systematic attack directed against any civilian population."[357] Hence, without further evidence, it does not seem that allowing lax security standards to persist at dangerous laboratories, allowing wet markets to thrive and wreak

[350] Rome Statute of the International Criminal Court.
[351] Ibid, Article 5.
[352] Rome Statute of the International Criminal Court, Article 25 § 1.
[353] Assembly of the State Parties of the International Criminal Court, 'State Parties to the Rome Statute: Chronological List' (*International Criminal Court*) <https://bit.ly/39UDWP7> accessed 6 May 2021.
[354] Rome Statute of the International Criminal Court, Article 11.
[355] *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010) at 119-20 n.16 (describing this history).
[356] Rome Statute of the International Criminal Court, Article 6.
[357] Ibid, Article 7 § 1.

havoc, or even suppressing information would constitute a widespread or systematic attack directed against a civilian population.

7. Malaysian Position on the Possible Lawsuits against China

The legal basis, as far as foreign sovereign immunity is concerned, is Section 3 of the Civil Law Act 1956,[358] which applies the common law in Malaysia as ruled in *Village Holdings (1988)*.[359] Malaysia's approach is based on a restrictive immunity rather than an absolute immunity. The relevant statutes among several passed by Parliament to give effect to treaties are:

(i) Diplomatic Privileges (Vienna Convention) Act 1966,[360] as amended in 1999, to give effect to the Vienna Convention on Diplomatic Relations 1961,
(ii) International Organizations (Privileges & Immunity) Act 1992,[361] and
(iii) Consular Relations (Privileges & Immunities) Act 1999.[362]

None of these statutes bar Malaysians from suing a foreign State for alleged tortious acts which caused loss and damages suffered by them. Jurisdictional immunity can be waived voluntarily by a State or consent can be given to the jurisdiction of another state in its lawsuit. And more importantly, jurisdictional immunity is limited to acts of governments and it does not extend to commercial transactions entered by the State sovereign.

The most significant question is, "What if China does not participate in the Malaysian Court proceedings?" This is an open question since no precedent exists to date and in the event China refuses to accept service of the lawsuit and thereby not submitting to the jurisdiction here, a Malaysian Court, most legal practitioners and scholars agree, would not proceed with the suit or pronounce a judgment. However, there are some legal scholars and lawyers who practise international law vehemently argue that some good grounds on the wider public interest litigation exist for judicial intervention by some bold judges at the appellate stage in our judiciary to hear the suit even if the single Judge at High Court level throws it out.

Further, as discussed earlier, Malaysia follows the 'Doctrine of Restrictive Immunity' and not 'Absolute Immunity' of foreign sovereign states, as exemplified by our Supreme Court in *Commonwealth of Australia v Midford (1990).*[363] The key issue in this case was whether Australia was entitled to immunity in respect of the seizure of property by its Customs

[358] Civil Law Act 1956, section 3.
[359] [1988] 2 MLJ 656.
[360] Diplomatic Privileges (Vienna Convention) Act 1966.
[361] International Organizations (Privileges & Immunity) Act 1992.
[362] Consular Relations (Privileges & Immunities) Act 1999.
[363] [1990] 1 MLJ 475.

Officers. The following is the decision of the Supreme Court, delivered by Gunn Chit Tuan SCJ:

> Section 3 of the Civil Law Act only requires any Court in West Malaysia to apply the common law and the rules of equity as administered in England on the 7th day of April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop …. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as The Parlement Belge. That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in The Philippine Admiral was delivered by the Privy Council in November 1975, it was binding authority insofar as our courts are concerned …. When the Trendtex case was decided by the United Kingdom Court of Appeal in 1977 it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision … That is more so in view of the very strong persuasive authority in the Congreso case in which the House of Lords had … unanimously held that the restrictive doctrine applied at common law … We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

Hence, without requiring the intervention of Parliament, the law in Malaysia was brought in line with the major trading nations. Consequently, there is no State Immunity Act here, unlike Singapore which had one enacted in 1979 following the U.K. State Immunity Act of 1978.

Another significant issue in the proposed lawsuit is that it is based on 'tort' i.e. negligent or wrongful act or acts that caused death, injury losses, damages to another or a body/organization and not on contractual commercial matters, terrorist activities or acts or war. It could be quite correctly concluded that a clear mechanism for lawsuits of this nature or precedents i.e. decided cases are non-existent in Malaysia but a few relevant decided cases here and in the UK, Singapore, Australia and India provide proper guidelines and the means. Kandiah Chelliah argues that the legal maxim " ... the duty of the Court is to give effect to a national law and not international law if there is a real conflict between them ... " becomes applicable.[364] Some of the findings in *Anthony Woo v. Singapore Airlines*[365] and the appeal therefrom in *Civil Aeronautics Administration v. Singapore Airlines*[366] in the

[364] Kandiah Chelliah, 'Can China be sued in a class-action lawsuit over the SARS-COV 2 or COVID-19 pandemic in Malaysia' [2020] 1 LNS(A) lv.
[365] [2003] 3 Sing.L.R. 688 (Singapore High Court).
[366] [2004] SGCA 3.

Singapore Courts under its State Immunity Act 1978, offer some glimmer of hope for death or personal injury claims but it must be noted that Taiwan is not recognised by Singapore as a *de jure* (or *de facto*) State for the purpose of a claim of state immunity.[367]

Unsurprisingly, there would also be internal or governmental objection to such a lawsuit since it disrupts the strong economic, diplomatic and bilateral ties enjoyed by both states all these years. The extraordinary criticism and abuse levelled against Australia which called for an official inquiry into the outbreak, the attack against Bild, and the U.S. lawsuits, are noteworthy instances. Thus, any lawsuit contemplated has to run the gauntlet of a powerful firewall, abuse and heavy criticism. It brings to focus the inherent problems associated with such a venture. It is submitted that Malaysian Judges, unlike their brethren in India, or the U.S. are rather cautious and take the 'strict law' approach, thus judicial activism or adventurism or a liberal approach is frowned upon, what more when a superpower and the world's second largest economy is involved. Essentially, it is quite unlikely that Malaysian High Court will proceed with the suit without the presence of the defendants and hear the plaintiffs' evidence.

8. Conclusion

COVID-19 pandemic has devastated economies, even ones as strong as the United States. It has ruined the lives of millions and will continue to do so in the near future. It has already killed hundreds of thousands of people worldwide, and many more will suffer early deaths further down the road because of unemployment and poverty caused by the pandemic.

Some might argue that we should not blame China as COVID-19 might not originate from China and instead, we should be grateful for China's tremendous humanitarian responses to countries all around the world especially developing countries during this global pandemic. It is undeniable that China's COVID-19 humanitarian aid has included medical supplies, equipment, and personnel; financial assistance; and knowledge-sharing to over 150 countries and international organisations.[368] However, we should bear in mind that financial assistance and other aids cannot extinguish a legitimate cause of action. The author submits that regardless of the origin of COVID-19 and China's humanitarian aid, the Chinese government's failure to promptly and transparently provide much-needed information to the international community still raises the issue of liability.

The questions with regard to legal actions remain: Is it possible for these countries to win the case? What would be a reasonable reaction to the Chinese government? Legally

[367] Ibid.

[368] Jacob Kurtzer, 'China's Humanitarian Aid: Cooperation amidst Competition' (*CSIS*, 17 November 2020) <https://www.csis.org/analysis/chinas-humanitarian-aid-cooperation-amidst-competition> accessed 1 June 2021.

speaking, each type of national or international court/forum has its own jurisdiction, which means that it has the authority to decide specific types of cases. Any individual or government could file a lawsuit against the Chinese government seeking remedies for causing the COVID-19 pandemic. Nevertheless, based on the principles of international law, it seems that there is no national or international court/forum competent to bring a claim against China. This is because there are many obstacles to a successful lawsuit against China in front of domestic or international jurisdictions, to make it accountable for the pandemic and/or its consequences: the questionable jurisdiction of a court over China; the question of the action's legal basis; and, the difficult execution of a potential ruling. Nonetheless, other non-binding mechanisms are possible in order to investigate the issue, such as the recourse to the World Health Assembly. The paper concludes that without China's cooperation, it is extremely unlikely that China will be forced to pay any compensation for the COVID-19 pandemic.

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