



Online Forum

“Can States Take Action against China for the Global Spread of COVID 19”

14-11-2020 Saturday (4.00-5.30 pm)
[Zoom Video Conference]

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(Panelist)

(1) Is China's Delay to notify WHO about COVID 19 a Breach of International Law?

Relevant law: International Health Regulations

What is IHR?

- The 2005 revised [International Health Regulations \(IHRs\)](#), adopted by the World Health Assembly in Geneva, 23 May 2005, **entered into force 15 June 2007** (2509 *United Nations Treaty Series* 79)'
- The only existing treaty obligations that directly relate to the prevention and control of infectious diseases
- Legally [binding on 196 States and Territories](#), **including China**.

Art 6: Obligation to notify and to share information

1. 'Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. ... 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'.
2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event.

Art 7: Obligation to share Information

If a State Party has (evidence of an unexpected or unusual public health event within its territory,... which may constitute) a public health emergency of international concern, it shall provide to WHO all relevant public health information.

ANNEX 2 (IHR)

Decision Instrument for the Assessment and Notification [Simplified version]

- **Assessment by national surveillance system** of any event of potential international public health concern
- Is the public health impact of the event serious?

Yes

- Is there a significant risk of international spread?

Yes

- Event shall be notified to WHO under the IHR.

Time Line: Sequence of Events

8 December

- A WHO document reports that **the first case of COVID 19 was recorded in Wuhan** on 8 Dec.
- Private sources claimed that it might be earlier than that, while Chinese Govt. argued that it started in end of Dec.

31 December

- **China Reports the outbreak to WHO**; linked to Huanan Sea Food Whole Sale Market, Wuhan; **as yet no clear evidence of human to human transmission.**

14 January

- WHO epidemiologist says that COVID 19 shows limited HTH.
- WHO then says it is a “misunderstanding” and says **there is no evidence of HTH, citing Chinese health officials.**

18 January

- **Public Banquet attended by 40,000 guests** in one Wuhan district; **soon followed by numerous viral infections.**

Time Line: Sequence of Events

22-23 January

- Wuhan put under lockdown.

23 January

- IHR Emergency Committee of the WHO meets. It notes that HTH has been observed, but defers decision to declare a public health emergency of international concern (PHEIC).

28 January

- Xi Jinping meets DG of WHO. The State media reports: “The Chinese government has released information about the epidemic in a timely, open, transparent and responsible manner.”

30 January

- WHO officially declares the outbreak as a public health emergency of international concern (PHEIC).

11 March

- WHO declares a Global Pandemic.

Analysis

Culpability

- Based on available information, a time lag in reporting may extend from a few days to up to three weeks.
- Researchers calculation: intervention by Chinese authorities one week earlier could have decreased the number of cases by 66%.
- China, therefore, has acted in breach of its obligation under IHR to report to WHO within 24 hours and to share information with WHO – despite a firm rejection of such charges by the PRC government and Chinese international law experts.

Mitigating factors

- It is not that IHR requires to report within 24 hours exactly from day 1 of the outbreak. The Annex 2 of IHR allows the State time for the assessment of seriousness of the outbreak and risk of international spread.
- As the facts relating to the pandemic are debatable, more objective fact-finding by an independent and impartial body would be necessary so that responsibility could be assessed credibly.

Analysis

- If the facts are proven, China has breached its international legal obligations under Articles 6 and 7 of the IHR.
- This breach of obligations is attributable to China, as the municipal and provincial authorities of Wuhan are part of the Executive organ (State organ) of China under Article 4 of the ILC's Articles on Responsibility of States 2001.
- As the two elements of an internationally wrongful act are fulfilled, China could be responsible under international law for its failure to timely report to and share information soon enough with the WHO about the seriousness and risk of COVID 19.

Could China rely on force majeure as a defence?

Art 23: Force majeure (French: superior force)

1. The wrongfulness... is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
 2. Paragraph 1 does not apply if:
 - (a) the situation of force majeure is due... to the conduct of the State invoking it.
- ➡ Could force majeure be claimed by China for excluding its wrongfulness in the case of COVID-19?

Could China rely on force majeure?

➤ There are two differing views:

(i) **No**. Since COVID 19 was the creation of China, **the situation of force majeure is due to the conduct of China**. [However, this accusation is founded on a conspiracy theory and yet to be substantiated by scientific evidence.]

(ii) **Yes**. How much diligence Chinese government exerted, they could not stop the pandemic as it is an act of god; the **“invisible enemy,”** COVID 19, is a natural phenomenon.

➤ The second view seems logical: **despite breaching the IHR, China would not be able to control a transnational pandemic of such magnitude, given the capacity of the new coronavirus (SARS-CoV-2) to very easily proliferate** by a mere handshake, saliva droplets, sneeze, cough or contact with contaminated surfaces, such as cell phones, tablets, knobs, toys, and computer keyboards.

➤ Therefore, force majeure may be applicable **if proven** that the spread of the pandemic would be beyond the control of China despite how diligent it was.

Conclusion

- As the two elements of an internationally wrongful act are fulfilled, China could be held responsible under international law for the breach of IHR.
- However, China could possibly rely on force majeure as a defence, if proven that the spread of the pandemic would be beyond the control of China despite how diligent it was.

(2) Can Chinese Officials be Taken Action Before the ICC for Alleged Crimes against Humanity?

- One Indian lawyer accused Chinese authorities of crimes against humanity under Article 7(1)(k) of the Rome Statute of the ICC."
- Larry Clayman, an American lawyer, went so far as to accuse that COVID-19 was man-made and created in the Wuhan Institute of Virology as a biological warfare weapon that was designed to target other countries.
- It was reported that he filed a law suit with the ICC against the Chinese government, Chinese army and the Wuhan Institute of Virology. He is seeking \$20 trillion in damages from China.
- Like the Indian lawyer, his main reference was also Art 7(1)(k) of the Rome Statute.

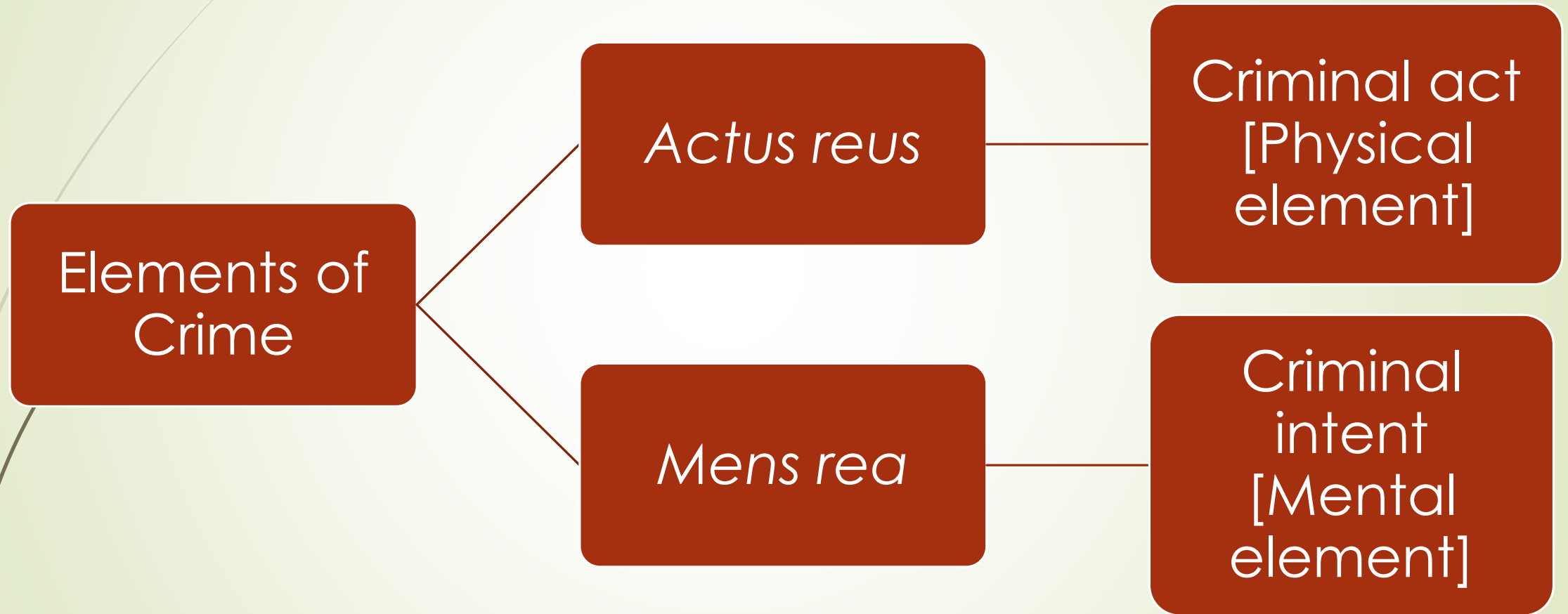
Relevant law

Crimes against Humanity: Art 7(1) of the Rome Statute

Article 7

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: ...
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
 - (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - It requires the State to actively promotes or encourages such an attack against a civilian population.

Two forms of elements of crime



Elements of crime for Art 7(1)(k)

Actus Reus

- The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

[Multiple commission of acts against any civilian population in furtherance of a State policy to commit such attack [Art 7(2)(a)]

Mens rea

- The perpetrator was **aware of the factual circumstances** that established the character of the act.
- The perpetrator **knew** that the conduct was part of or **intended** the conduct to be **part of a widespread or systematic attack directed against a civilian population**.

Analysis

Factual analysis

First of all, the facts:

- Rumors have been surfacing on social media regarding the use of COVID-19 as a bioweapon by China. However, all these rumors lack scientific evidence to support this conspiracy theory.
- "Scientists have strong evidence coronavirus originated naturally. *Nothing suggests the virus was "man-made,"* experts say. [ABC news]
- "There's no reason to believe this was made in a lab," Dr. Robert Shafer, professor of Infectious Diseases at Stanford Medical School.
- "**Who actually benefits from making this coronavirus and deliberately releasing it in China? No one.** How does China or the United States or anyone else actually benefit from the covid-19 pandemic? They don't. **This is a natural event. Not a man-made plague.**" **Dan Kaszeta:** a specialist in chemical and biological defense, with a 30-year service in the U.S. Army, the Pentagon, the White House, and the U.S. Secret Service.

Legal analysis

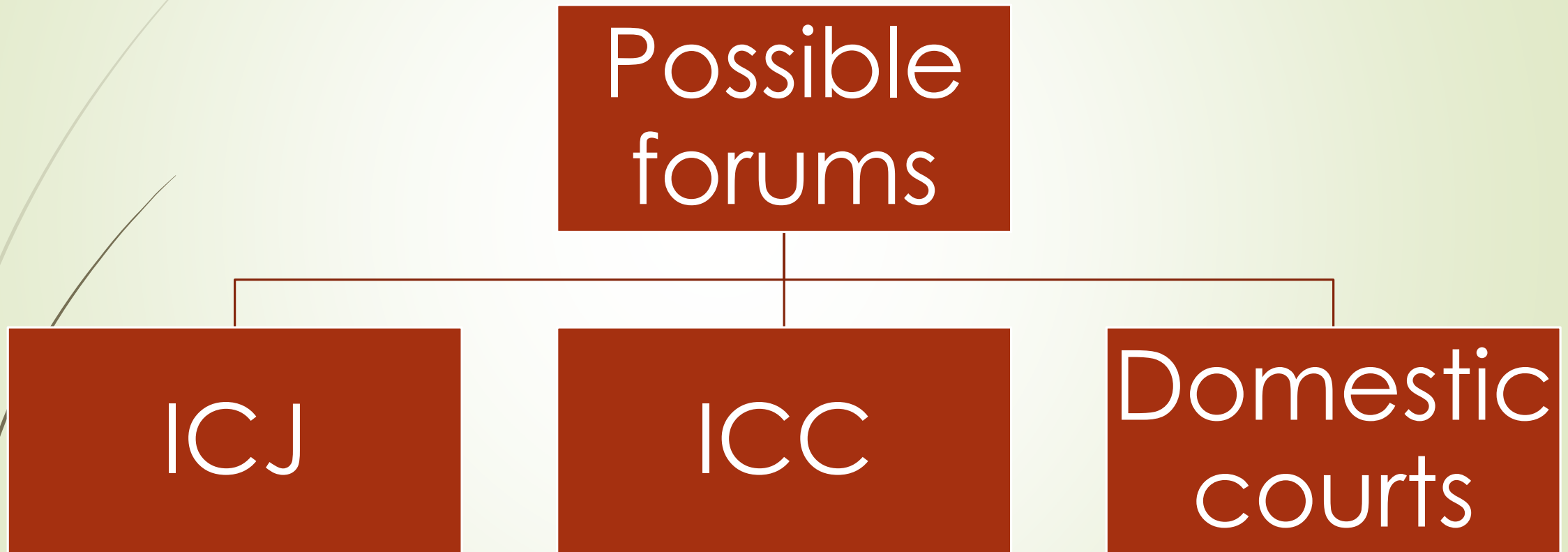
Secondly, the law: the elements are not fulfilled.

- ➡ **Actus reus:** There appears to be no evidence at all that there was multiple commission of acts and The acts were committed in furtherance of a State policy. [no widespread and systematic attack against any civilian population].
- ➡ **Mens rea:** Again there is no evidence that the Chinese government had knowledge or intention to use COVID 19 virus as a biological weapon against America or any other State in the world. The criminal intent is lacking.

Conclusion

- Larry's application is merely a communication by an individual to the ICC for alleged crime. That is all. The Prosecutor would most probably treat this like other thousands and thousands of communications flown into the court.
- There is no way that the prosecutor will consider to proceed with this type of communication, which lacks legal standing, legal substance, and most importantly concrete scientific evidence.

(3) What are the available forums to bring an action against China?



International Court of Justice, The Hague, Palace of Justice



Jurisdiction of the ICJ

Jurisdiction of the ICJ

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graph LR; A[Jurisdiction of the ICJ] --- B[Contentious Jurisdiction]; A --- C[Advisory jurisdiction]
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Contentious Jurisdiction

Only States may be parties in contentious cases

Advisory jurisdiction

International organizations may request advisory opinions

Contentious Jurisdiction

Consent is the basis of Court's jurisdiction

States give consent in three ways

By a special agreement
(*compromis*)

By a compromissory clause in a treaty

By a unilateral declaration

'Consent' is the basis of the Court's jurisdiction

Article 36 [Statute of the ICJ]

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. ...
 - The phrase "all cases which the parties refer to it": the word "parties" is in the plural, and implies that all the parties to the dispute must agree that the dispute should be referred to the Court.
 - Thus it is crystal clear that no State can forcefully bring China to the ICJ without its consent.

Without the consent of China, no case can be brought to the ICJ or to arbitration (PCA) for violation of the IHR

- Since Article 56(3) of the IHR stipulates that any dispute between states regarding their application or interpretation can be settled through arbitration under the auspices of the Permanent Court of Arbitration (PCA), a State could submit such a dispute to the PCA, but only with the agreement of China. (Arbitration is consensual).
- A dispute alleging a violation of the IHR could also be submitted to the ICJ with a special agreement of China.
- Without the consent of China, therefore, no case can be brought to either the ICJ or to arbitration (through PCA).
- However, there is a compromissory clause in Art 75 of the Constitution of the WHO providing that parties shall submit their disputes to the ICJ. China is a party and bound by the Constitution but the problem is that the dispute must relate to the application and interpretation of the WHO Constitution and not a violation of the IHR.

International Criminal Court (ICC)



Jurisdiction of the ICC

Personal jurisdiction (*jurisdiction ratione personae*)

Art 25: Individual criminal responsibility

- (1) The Court shall have jurisdiction over natural persons (human beings).
- This is the main difference between the ICJ and ICC.
 - The ICJ is only meant for States and only sovereign States can be parties in cases before the ICJ.
 - The ICC is meant for natural persons (human beings) who committed heinous international crimes.

Subject-matter jurisdiction (*Jurisdiction ratione materiae*)

**Most serious crimes of
concern to the
international
community as a whole**

The Crime of Genocide

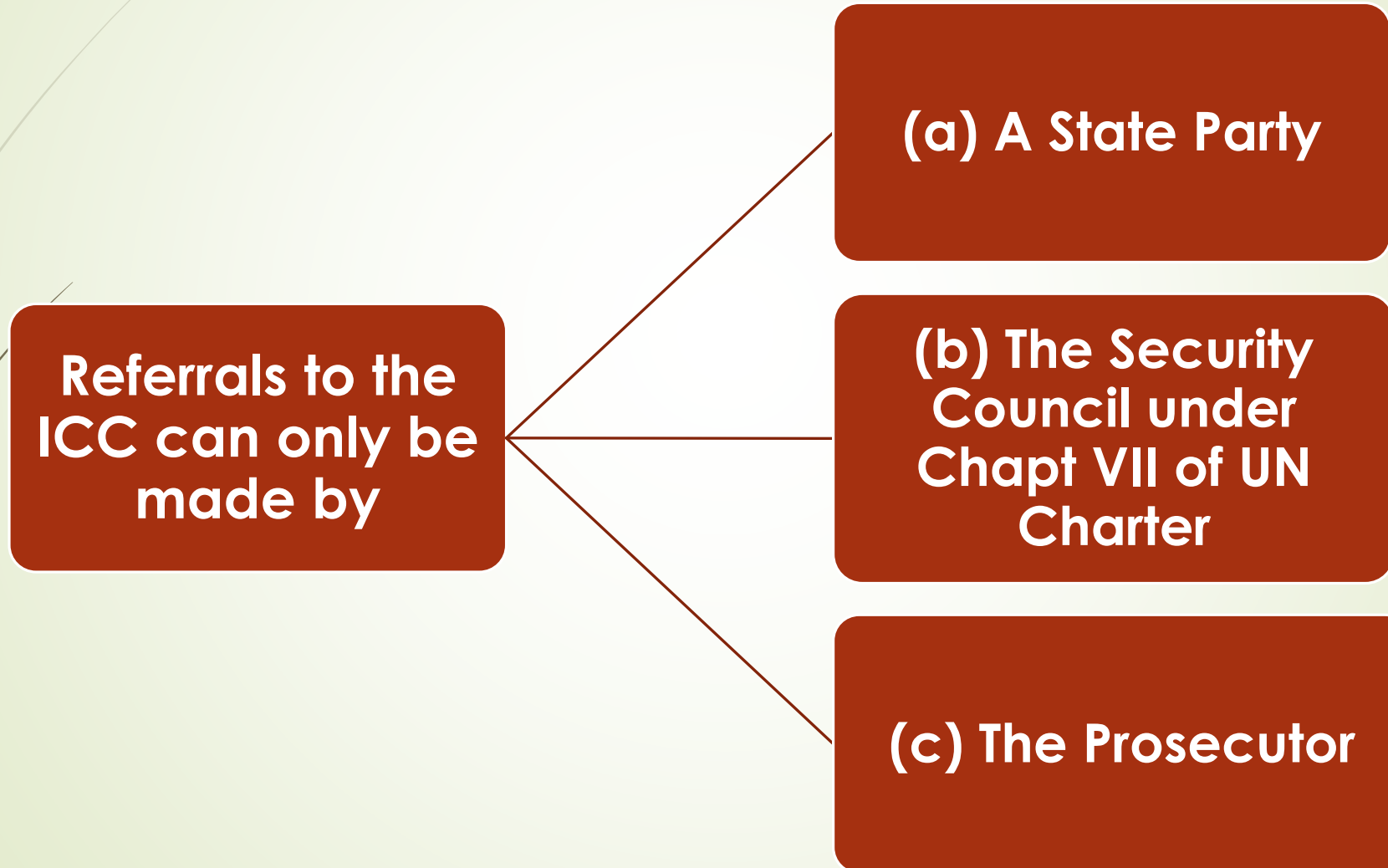
Crimes against Humanity

War Crimes

The Crime of Aggression

Pre-Conditions to the exercise of jurisdiction

Who can refer a case to the ICC (Art 13)



Analysis and Conclusion

1. *Actus reus* and *mens rea* for the crime against humanity are not fulfilled. The ICC has no subject-matter jurisdiction over the alleged use of COVID 19 as bioweapon.
2. Larry, as a private person, has no right under Art 13 of the Rome Statute to refer a case to the ICC. (No right of referral).
3. The ICC Prosecutor will treat his application as just a 'communication', among thousands of similar communications by people and groups of people and nothing more.

(4) Do You Think Domestic Lawsuits like What is Happening in the US Could be Successful?

- In March 2020, Larry Klayman filed a \$20 Trillion Dollar class action lawsuit against China in the District court in Texas.
- In the same month, another a class action was filed in US District Court in Florida, by residents of Miami-Dade County.
- In April 2020, Missouri Attorney General Eric Schmitt filed a lawsuit against China in the US District Court of Missouri, seeking 'billions of dollars' in damages for the medical and economic toll of Covid-19.
- Nevertheless, these lawsuits have very little chance of succeeding, as sovereign States are as a rule immune from jurisdiction of domestic courts.

Relevant law: State (Sovereign) Immunity

- Why should States be given immunity? Mainly due to the doctrine of “sovereign equality of States”.
- *Par in parem non habet imperium*—“An equal has no power over an equal”.
- States are sovereign and they are equals. Therefore, it is impossible for one sovereign State to exercise authority (*by means of its legal system*) over another sovereign State.
- This is an established rule of customary IL. It has also been reaffirmed in a number of international conventions and national legislation, including Foreign Sovereign Immunities Act (FSIA) 1976 in the US.

Foreign Sovereign Immunities Act 1976

The United States of America

The general rule: § 1604.

Immunity of a foreign State from jurisdiction

... [A] foreign state shall be immune from the jurisdiction of the courts of the United States ...except as provided in sections 1605....

Exception: § 1605.

A foreign state shall not be immune from the jurisdiction of courts of the United States ;

in which the action is based upon a commercial activity carried on in the United States by the foreign state; ...

Analysis

The Washington Post, April 24, 2020:

- **Leading Republicans** are **demanding that China be made to pay financially** for the spread of coronavirus that brought the U.S. economy to a near halt and costing the federal government trillions of dollars in emergency spending.
- Key lawmakers **want President Trump to cancel the \$1 trillion-plus U.S. debt to China.**
- **A Republican Senator and a Republican Congressman** proposed **a Bill to amend the Foreign Sovereign Immunities Act (FSIA)** in order to authorise suits against China over Covid-19.

The question is: Will the bill be passed?

The answer is: very unlikely; it is due to two reasons:

- (1) The **recent election results could have changed the legal and political scenario**; will the Democratic government follow the current stance of the Republicans?
- (2) Such a drastic amendment would be **a blatant violation of an established rule of international law**, which is the **foundation stone of the contemporary international relations.**

The following is taken from an article written by Chinese International law scholars on US lawsuits Published in China Daily



**Lawsuits An Attempt to
Cover US Failure.**

[Courtesy of China
Daily, 06-07-2020]

Conclusion

- In criminal proceedings, a foreign State or government is absolutely immune from the jurisdiction of domestic courts.
- In civil proceedings, a foreign State or government is immune if it is not involved in commercial activities.
- In the current state of the law, domestic lawsuits have very little chance of succeeding.



**(5) If China Could be held Responsible, What
Type of Reparation Would be the Most
Appropriate one to be claimed?**



The general rule for Reparation:

Art 31 of the ILC's Articles on State Responsibility 2001

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

- Art 31(1): to make “full reparation” in the *Factory at Chorzów* sense.
- Art 31(2) emphasizes the requirement of a causal link between the internationally wrongful act and the injury.
- This causal link will exclude damage which is “too indirect or remote.” The doctrine of “remoteness of damage.”

Three forms of Reparation [Art 34]



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graph LR; A[Forms of reparation] --- B[Restitution]; A --- C[Compensation]; A --- D[Satisfaction];
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**Forms of
reparation**

Restitution

Compensation

Satisfaction

Three forms of reparation

Restitution

- to **re-establish the situation** which existed **before the wrongful act was committed**, provided and to the extent that restitution is not materially impossible.

Compensation

- to compensate for the damage caused by the wrongful act.
- shall cover any financially assessable damage.

Satisfaction

- Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

Restitution: not possible

- The law recognizes **restitution** as a primary form of **reparation**. As stated in the famous *Chorzów Factory Case*.
- Nevertheless, **restitution is not always possible**. If people have died (as is the case with Covid-19) their lives cannot be restored, and other forms of reparation are needed.
- This entails **compensation or satisfaction, or a combination thereof**. It is always up to the claimant state to specify the redress it seeks.

How about compensation?

- It has been argued that China has a duty to compensate for the losses caused by the coronavirus pandemic. The combined economic losses seem immeasurable with estimations rising up to **4 trillion USD or even more**.
- Such high compensation has never been awarded and it seems unlikely that any international court would impose such a compensation duty upon a single state **due to its debilitating effect**.
- There are also a number of factors that militate against compensation claim.

The view that China is not necessary to pay compensation as its breach is in the nature of 'omission'

- One commentator posits that China is not necessary to pay compensation, by referring to (criticized) *Bosnian Genocide Case*.
- In that case, the ICJ's found that while *Serbia* was legally responsible for not having prevented genocide, *it did not have the duty to compensate*. The Court reasoning seems to suggest that 'omissions may create situations that enable harmful events, but they do not cause them'.
- Applying the same logic to China's responsibility, the commentator argues that *it could exonerate China from providing compensation*, as wrongful conduct was merely an omission and no Chinese action directly caused the spread of COVID 19.

The better view: Compensation, even if awarded, would be much less than claimed

Mitigation of damage

- ▶ the actions of the injured state themselves may mitigate the level of reparation, and hence compensation claims.
- ▶ Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury: often expressed in terms of a “duty to mitigate.”
- ▶ ‘Duty to mitigate’ was clearly expressed by the ICJ in the *Gabčíkovo-Nagymaros Case*. The actions of all other states in their responses to Covid-19 are thus also significant.

Mitigation of damage

- The ILC's commentary on Art 31 of Articles on State Responsibility 2001

“A failure to mitigate by the injured party may preclude recovery to that extent.”

- [*The WBC claim*, Report of 15 November 1996]

A UNCC panel noted that “under the general principles of international law ... the Claimant was ... indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused.”

- *Gabčíkovo-Nagymaros Project case*,

Duty to mitigate

- “An injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.”

Contribution to the injury by the injured State

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State....

LaGrand case

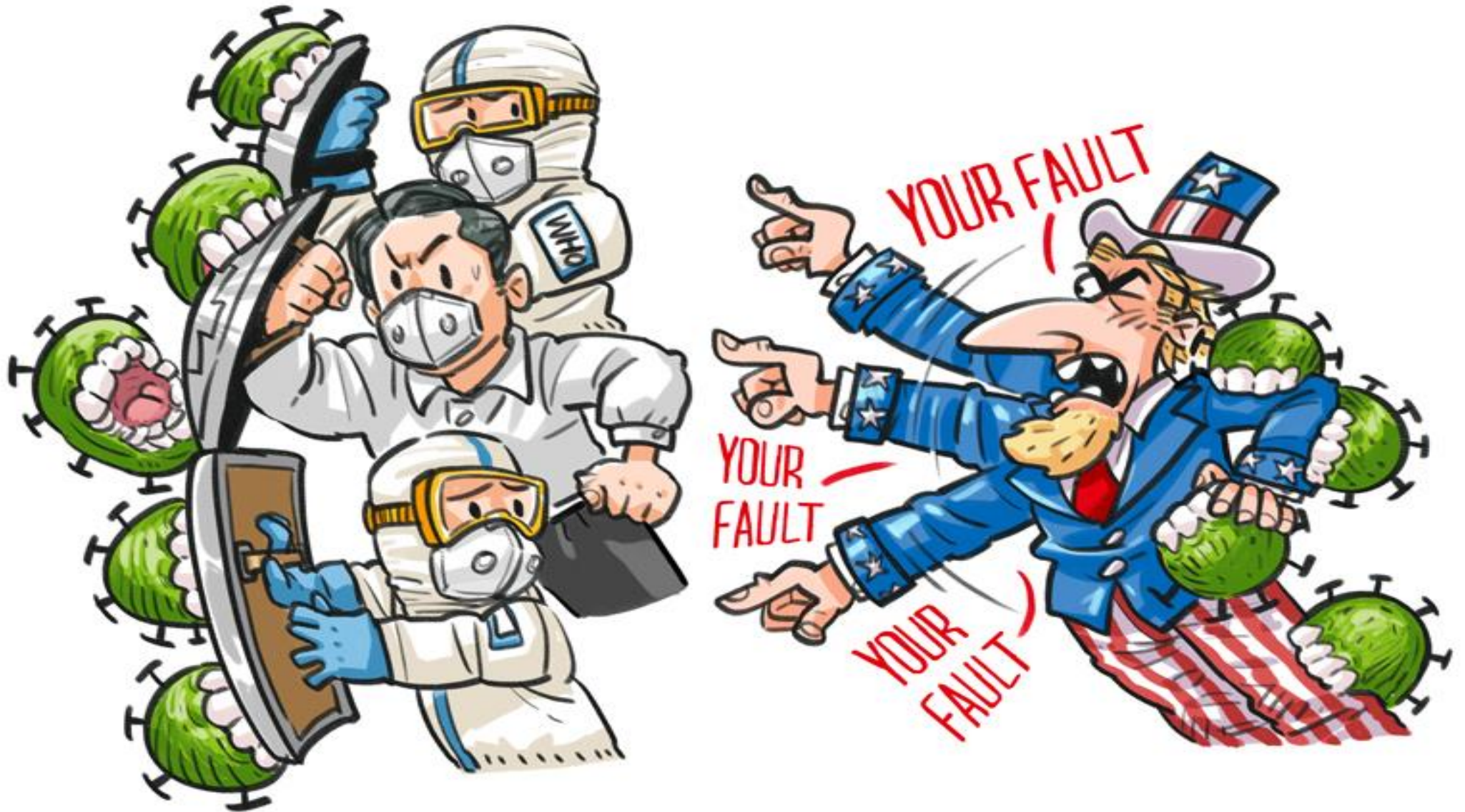
“The conduct of the claimant State could be relevant in determining the form and amount of reparation.”

Contribution to the injury by the injured State

[The case of US: a striking example]

- The reason America is one of the hardest-hit countries by COVID-19: it may not be because of the alleged cover-up of China; more likely, because of the White House's delayed response to the pandemic.
- On January 21, the first coronavirus case was confirmed on U.S. soil.
- On January 23, **Wuhan**, a city of 11 million people, went **under a lockdown**, with **a nationwide battle against the new virus** started. Scared by SARS 17 years ago, **everyone was in a wartime mode**.
- The Western media called the lockdown "excessive" and a move of human rights "violation".
- The Trump administration has spent this period playing down the outbreak. It wasn't until mid-March that the White House started to take this more seriously and announced a national emergency. **Isn't it too little, too late? Who has to be blamed?**

Courtesy of China Daily (25-04-2020)



Satisfaction, a more appropriate reparation

- We have seen that there are problems with compensation claims.
- At the end of the day, should China's responsibility be formally decided upon, it seems more likely that **satisfaction** is the appropriate form of reparation.
- Alternatively, a finding of responsibility before an international court could suffice as reparation, like what the ICJ decided in *Corfu Channel case* in relation to violation of Albanian sovereignty by the British war ships.

Conclusion

- In fact, the COVID accusations are entangled with geopolitical competition between the two Great Powers: US and China, a spillover effect of the bitter Trade War between the two countries.
- For the benefit of the entire mankind, it is advisable not to blame one another at this difficult time or to engage in adversarial legal battle, but to promote “cooperation” among all States to overcome this pandemic.
- We have to fight this natural and invisible enemy with the unity of all mankind.
- This pandemic is like a world war. It will destroy and devastate whatever is dear to us.
- After successfully defeating the pandemic, we need to rebuild the world with the cooperation of all nations.



Thank you
For your kind attention