

IS CHINA TO BLAME FOR COVID-19?†

Melanie Ngo††

TABLE OF CONTENTS

INTRODUCTION	71
I. EARLY ACTIONS IN CHINA LEADING TO THE PANDEMIC	71
II. INTERNATIONAL HEALTH REGULATIONS LAW.....	72
III. ARTICLE 6 OF IHR	74
IV. UNITED STATES' RESPONSE.....	77
A. <i>The Commercial Activity Exception</i>	78
B. <i>The Territorial Tort Exception</i>	78
V. LEGISLATION INTRODUCED TO ALLOW LITIGATION OF FOREIGN STATES	79
CONCLUSION & LOOKING FORWARD	80

INTRODUCTION

As the vaccination for SARS-CoV-2 is distributed to thousands of front-line workers, long-term care facilities, and eventually ordinary individuals, many are left reflecting on the public health crisis. The United States has the highest number of COVID-19 cases and deaths in the world¹ and some blame China for the pandemic.

I. EARLY ACTIONS IN CHINA LEADING TO THE PANDEMIC

According to the World Health Organization (WHO), the first known exposure of COVID-19 allegedly occurred at one seafood market in Wuhan, China.² Some may feel that China is responsible for the spread of the virus, as the Chinese government's initial reports seemed to downplay the infectivity and severity of the novel virus. Dr. Li Wenliang, one of the first Wuhan doctors to recognize the coronavirus outbreak,

† This is an honorable mention essay for an interprofessional writing competition held by the *Syracuse Law Review*. To accommodate various professional fields, the citations are a blend of APA and Bluebook style formats. Sources and details have not been independently verified by *Syracuse Law Review* and *Syracuse Law Review* did not complete a peer review of the study or of the conclusions drawn by the authors.

†† Medical student, SUNY Upstate College of Medicine, Syracuse, NY

1. Pettersson, H., Manley, B., & Hernandez, S. (2021, February 5). Tracking coronavirus' global spread. *CNN Health*. <https://edition.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/>.

2. See Buckley, C., & Myers, S. L. (2020, February 1). As New Coronavirus Spread, China's Old Habits Delayed Fight. *New York Times*.

warned his fellow doctors of a virus similar to severe acute respiratory syndrome (SARS) on December 30, 2019. The message was shared to others outside his group as well. The day after, national authorities alerted the WHO of an outbreak. However, the Wuhan Public Security Bureau made him sign a statement several days later that denounced his warning and accused him of disturbing public order through the spread of false claims.³ While officials sought to stifle concerns of an outbreak, the Wuhan Health Commission, in turn, announced that the mysterious pneumonia from an unknown cause was “preventable and controllable,” and focused on managing the narrative. Not wanting to report bad news to the annual January 2020 People’s Congresses—meetings where the Communist Party can discuss policy—the governor of Wuhan, Zhou Xianwang, left out reports of a novel virus. Meanwhile, doctors at a top city hospital received official orders banning the use of “viral pneumonia” on radiology image reports. With the suppression of public disclosure, Wuhan proceeded normally to its massive provincial Party congress potluck with 40,000 families, which likely contributed to the spread of the virus. Furthermore, Hubei did not instate screening until January 14, 2020.⁴ Ultimately, the Wuhan government was negligent in curbing the virus long enough for its constituents to become complacent and ill-prepared for an epidemic. The United States and the world subsequently felt the blow of the epidemic-turned pandemic.

II. INTERNATIONAL HEALTH REGULATIONS LAW

China is a member state of WHO; thus, they abide by the international regulations set by the WHO. The International Health Regulations (IHR), revised in 2005, is of particular importance in guiding efforts to contain public health crises. The document is legally-binding and sets the onus of reporting international public health crises quickly and accurately to the WHO on the affected country.⁵

The IHR was first adopted by the World Health Assembly in 1969 from the International Sanitary Regulations of 1951, its predecessor. The 1969 version of the law only applied to six “quarantinable” diseases – cholera, plague, yellow fever, smallpox, relapsing fever and typhus – and was further amended in 1973 and 1981 to only include yellow fever,

3. Green, A. (2020). Li Wenliang. *The Lancet*, 395(10225). [https://doi.org/10.1016/S0140-6736\(20\)30382-2](https://doi.org/10.1016/S0140-6736(20)30382-2).

4. Griffiths, J. (2020, January 29). Is Wuhan’s mayor being set up to be the fall guy for the virus outbreak? *CNN*.

5. See WHO. (2005). *Health Regulations Third Edition (2005)*.

2021]

Is China to Blame for COVID-19?

73

plague, and cholera.⁶ However, resurgences in cholera in parts of South America in 1991, plague in India in 1994, and Ebola in Zaire in 1995 drove the 48th World Health Assembly to further revise the IHR to adjust its narrow disease coverage.⁷ While the WHO spent several years drafting the new IHR, the SARS outbreak of 2003 from China struck and amplified the urgency to revise the draft. When the revised IHR of 2005 was released, many member states implemented the new regulations ahead of the official effect date in June 15, 2007, legitimizing the document's renewed importance.⁸

The purposes of the revisions are stated as “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”

To better monitor international public health, the IHR included the following summary of revisions:

- (a) a scope not limited to any specific disease or manner of transmission, but covering “illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans”;
- (b) State Party obligations to develop certain minimum core public health capacities;
- (c) obligations on States Parties to notify WHO of events that may constitute a public health emergency of international concern according to defined criteria;
- (d) provisions authorizing WHO to take into consideration unofficial reports of public health events and to obtain verification from States Parties concerning such events;
- (e) procedures for the determination by the Director-General of a “public health emergency of international concern” and issuance of corresponding temporary recommendations, after taking into account the views of an Emergency Committee;
- (f) protection of the human rights of persons and travellers; and

6. See *Frequently Asked Questions About the International Health Regulations (2005)*. (n.d.); See WHO, *supra* note 5.

7. See *Frequently Asked Questions, supra* note 6.

8. *Id.*

(g) the establishment of National IHR Focal Points and WHO IHR Contact Points for urgent communications between States Parties and WHO.⁹

Furthermore, Article 3 of the IHR (2005) requires member states to implement their own legislation to uphold the regulation's goals, putting the onus of responsibility to monitor the emergence of public health crises on countries. If a country detects a possible health risk, it has a duty to report disease information to the WHO in accordance with Article 6, which specifies the State government's duty to provide sufficient data and details of the public health event. This includes "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" as well as any obstacles and assistance needed.¹⁰ Subsequently, the WHO will offer its support to the country.¹¹ Article 7 exists to reinforce Article 6 by mandating the release of relevant public health information to the WHO in case of a concerning health event.¹²

III. ARTICLE 6 OF IHR

China fulfilled its duty to Article 6 of the IHR when they notified WHO of the novel outbreak on December 31, 2019, but may have only done so as Dr. Li's warning of a possible new SARS was shared outside his group of fellow doctors the day before.¹³ China has an obligation to share their knowledge on COVID-19 as it is discovered and researched. The official announcement the government released to the public on January 1, 2020 denied the possibility of human-to-human transmission—portraying optimism and surety despite the lack of data to support this assertion.¹⁴

In China's defense, virologist Dr. Zheng-Li Shi and her team had begun studying the novel virus and traced its origins to bats. Her team submitted the virus's genetic sequence to GenBank, a public database for genome sequences, which was ready for scientists worldwide to use on January 7, 2020.¹⁵ In addition, the WHO was allowed to conduct a field

9. See WHO, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. See Buckley, C., & Myers, S. L., *supra* note 2.

14. *Id.*

15. See Wu, F., Zhao, S., Yu, B., Chen, Y. M., Wang, W., Song, Z. G., Hu, Y., Tao, Z. W., Tian, J. H., Pei, Y. Y., Yuan, M. L., Zhang, Y. L., Dai, F. H., Liu, Y., Wang, Q. M., Zheng, J. J., Xu, L., Holmes, E. C., & Zhang, Y. Z. (2020). A new coronavirus associated with human respiratory

2021]

Is China to Blame for COVID-19?

75

visit to Wuhan on January 20, 2021 to January 21, 2021 to collaborate on the virus response. They discovered that human-to-human transmission was possible and received local health authorities' approval of public health measures such as hand washing, respiratory hygiene, food safety, and social distancing.¹⁶ The field visit also yielded China's release of primers and probes used for real time reverse transcriptase polymerase chain reaction (RT-PCR), biological reagents used for COVID-19 test kits.¹⁷ The WHO's field visit summary was overall positive and demonstrated active collaboration with the Chinese government, which illustrate China's adherence to the IHR.

Although China made efforts to inform the WHO, CNN received and authenticated leaked reports from China that suggested underreporting of COVID-19 cases. On February 20, 2020, the leaked documents showed 5,918 new cases—5 tested positive, 2,345 confirmed, 1,796 suspected, and 1,772 clinically diagnosed. Nevertheless, Hubei officials reported 3,911 new COVID-19 cases—2,097 confirmed and 1,814 clinically diagnosed, only two-thirds of the total after leaving out suspected cases. Dr. Yanzhong Huang, a senior fellow for global health at the Council on Foreign Relations and an expert on Chinese public health, explain that the numbers officially reported to the world were conservative and should have included suspected cases. Vanderbilt Professor of Infectious Disease, Dr. William Schaffner, believed that China intentionally minimized the scale of the virus by announcing fewer cases. This is further exemplified as China, again, underreported the total amount of COVID-19 deaths on March 7, 2020: 2,986 versus the 3,456 deaths in the leaked documents. The continuous downplay of the outbreak could be a reason why China and other countries were not fully prepared to take drastic measures to contain the spread of COVID-19. Dr. Huang states that most people believed or imprudently hoped that the novel virus would be as contained as SARS was in 2003.¹⁸

A counterargument is that the discrepancy in reporting could be due to a disorganized bureaucracy. The difference in case disclosure may reflect the chaos of mobilizing government officials and fear of reporting information that runs contrary to the official narrative. Dr. Dali Yang, professor of Political Science at the University of Chicago who has

disease in China. *Nature*, 579(7798), 265–269.
<https://www.ncbi.nlm.nih.gov/nucore/MN908947.3>.

16. See Mission summary: WHO Field Visit to Wuhan, China 20-21 January 2020. (2020).

17. *Id.*

18. See Walsh, N. P. (2020, December 1). The Wuhan files. *CNN*.
<https://www.cnn.com/2020/11/30/asia/wuhan-china-covid-intl/index.html>.

extensively studied COVID-19,¹⁹ believes the disorganization was due to an overwhelmed medical system, a problem that Western nations later faced when their COVID-19 cases also climbed sharply. Compounding this, Hubei's Centers for Disease Control claimed to be chronically underfunded. For example, when Italy's total cases jumped to 10,149 on March 11, 2020, the Atlantic reported on the lack of ventilators and hospital beds that forced doctors and nurses to perform wartime triage.²⁰ New York City's hospitals also reached capacity by April 2020, necessitating the opening of a 68-bed field hospital—10 of which were ICU beds.²¹ In addition, the massive Chinese bureaucracy itself contributed to the muddled virus response.

When COVID-19 spread abroad and initial deaths were reported, Beijing officials dispatched an epidemiologist, Dr. Zhong Nanshan, to assess the situation in Wuhan on January 18, 2020. The situation was previously worsening due to failure to mention an outbreak at the Party Congresses and a government-hosted 40,000-family potluck in the few weeks prior. After Dr. Zhong's arrival, the Wuhan government began to acknowledge the seriousness of the situation: the disease was made a priority at the Hubei Province Health Conference. On January 20, 2020, China's President Xi Jinping publicly commented and delivered orders to contain the virus. As a result, Wuhan canceled tourism and closed city borders. Governor Zhou took responsibility for delaying public disclosure of the virus but defended his actions, stating that he was not able to make prior official announcements of the virus due to Article 23 of the Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases.²² Article 23 states that officials may not disclose an epidemic to the public without direct authorization from the Central Government. Conversely, Article 22 of the Law states that reporting of public health crises from lower tiers of government must not be delayed.²³ Zhou held the responsibility to divulge Dr. Li's warnings as soon as the disease was detected, but instead chose to silence him and other whistleblowers. Transcripts obtained from an internal Communist Party speech revealed that President Xi knew about and was leading COVID-19 containment efforts since January 7, 2020 and only commented publicly two weeks later. This interval is criticized for

19. See Dali Yang: *William Claude Reavis Professor. (n.d.)*. University of Chicago.

20. See Mounk, Y. (2020, March 11). The Extraordinary Decisions Facing Italian Doctors. *The Atlantic*.

21. See Fink, S. (2020, April 15). Treating Coronavirus in a Central Park 'Hot Zone.' *New York Times*.

22. See Law of the People's Republic of China on the Prevention and Treatment of Infectious Diseases, Pub. L. No. 15 (1989); See Buckley, C., & Myers, S. L., *supra* note 2.

23. *Id.*

2021]

Is China to Blame for COVID-19?

77

allowing the virus to infiltrate other countries.²⁴ Although being the first country to fall ill to COVID-19 has obvious growing pains and challenges, China explicitly broke Article 6 of the IHR when they failed to report accurate numbers on multiple accounts.

According to the WHO, the SARS 2003 outbreak's resolution taught governments and global organizations the importance of transparency to prepare countries for preventative policies. In contrast, the Wuhan Public Security Bureau attempted to silence Dr. Li with his original warning of a SARS-like virus outbreak in December 2019 and erroneously reassured that the virus was not transmissible between humans. These instances are notable examples of minimizing the impact of the virus, creating a pattern of dishonesty with the goal of maintaining an image of strength. The intent of the IHR is clearly stated: to prevent, protect against, control and provide a public health response to the international spread of disease that is commensurate with restricted public health risks.²⁵ Though Chinese scientists were the first to release the genetic sequence of COVID-19 and RT-PCR primers and probes for test kits, an argument can be made to show Chinese officials proactively undermined the IHR, and thus put hard-hit countries at greater risk. However, the WHO ultimately does not have the power to hold China accountable for its actions.²⁶

IV. UNITED STATES' RESPONSE

China's early actions to curb the pandemic have been highly criticized in the United States. There are a growing number of lawsuits filed in the U.S. federal courts against the Chinese government to hold them accountable for deaths and financial damages. The states of Missouri and Mississippi filed lawsuits alleging that China intentionally misled the world about the severity of the COVID-19 outbreak, silenced doctors who tried to warn the public, and hoarded crucial medical supplies.²⁷ Missouri's specific complaint was

[d]uring the critical weeks of the initial outbreak, Chinese authorities deceived the public, suppressed crucial information, arrested whistleblowers, denied human-to-human transmission in the face of mounting evidence, destroyed critical medical research, permitted millions of people to be exposed to the virus, and even hoarded personal

24. See Griffiths, J., *supra* note 4.

25. See Health Regulations, *supra* note 5.

26. See *Frequently Asked Questions*, *supra* note 6.

27. See Elsea, J. (2020). Foreign Sovereign Immunity and COVID-19 Lawsuits Against China.

protective equipment—thus causing a global pandemic that was unnecessary and preventable.”²⁸

Lawsuits may be filed, but the Chinese government is protected under the Foreign Sovereign Immunities Act (FSIA) of 1976.²⁹ The law protects foreign governments from litigation—a mutual benefit that is reciprocally extended to the United States. Two exceptions to the FSIA that will be discussed are the Commercial Activity Exception³⁰ and the Territorial Tort Exception.

A. The Commercial Activity Exception

The Commercial Activity Exception, which summarized, holds foreign states accountable for their commercial activity with the United States. This exception can be applied if the activity of the foreign state in question is a commercial activity, if the plaintiff’s complaint is connected to the specified commercial activity, and if the commercial activity is tied to the United States. Missouri argues that the Chinese Communist Party and its government entities are not a true foreign state and thus, they are not qualified under FSIA. Furthermore, Missouri states that the commercial activities the Chinese government participates in include operation of a healthcare system, commercial research on viruses by the Wuhan Institute and Chinese Academy of Sciences, operation of traditional and social media platforms for commercial gain, and the production, purchasing, and import and export of medical equipment such as PPE.³¹ Nevertheless, the complaint brought forth is about China’s suppression of information that may have unnecessarily endangered lives—there is no “direct” commercial component.

B. The Territorial Tort Exception

The Territorial Tort Exception, or shortened as the tort exception, allows U.S. citizens to sue foreign governments for money damages [. . .] against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment [. . .]³²

28. Quoted from Elsea, J. (2020). Foreign Sovereign Immunity and COVID-19 Lawsuits Against China.

29. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1332, 1391(f), 1441(d), 1602–1611.

30. See 28 U.S.C. §1605(a)(2).

31. See Elsea, J., *supra* note 27.

32. Quoted from 28 U.S.C. §1605(a)(5).

2021]

Is China to Blame for COVID-19?

79

In essence, United States citizens can litigate a foreign state's actions in the U.S. that are non-commercial if personal injury, death, or damage to loss of property occur in the United States itself. One exception to the tort exception states that claims cannot be based on "the failure to exercise or perform a discretionary function"³³ with *discretionary function* meaning administrative decisions following economic, social, and political policy. Another exception is in claims arising from "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."³⁴

It can be argued that China's actions do not qualify for the tort exception as discretionary functions involve administrative duties based on its own political policies. Furthermore, China's alleged misrepresentation early in the pandemic is specifically not covered under the tort exception. Lastly, Missouri's alleged claims were all performed in China, concluding that the tort exception is not a viable option to pursue litigation against China.³⁵

V. LEGISLATION INTRODUCED TO ALLOW LITIGATION OF FOREIGN STATES

Congress understands that the FSIA is limiting and has introduced several bills to hold China accountable for a possible role in exacerbating the pandemic. These bills were introduced, but none have been implemented at the time of writing this essay.

The Stop China-Originated Viral Infectious Diseases Act of 2020 (H.R. 6444) provides another exception to the FSIA if the foreign government in question "discharged" (undefined in the bill) a biological weapon³⁶ intentionally or unintentionally that results in the bodily injury of a U.S. citizen.³⁷ Moreover, S.B. 3588, a similar bill to H.R. 6444, would strip foreign states of their immunity if they committed

any reckless action or omission (including a conscious disregard of the need to report information promptly or deliberately hiding relevant information) of foreign state [...] that caused or substantially aggravated

33. *Id.*

34. *Id.*

35. *See* Elsea, J., *supra* note 31.

36. Defined in Violence against maritime navigation, 18 U.S.C. §2280(d)(3).

37. *See* Elsea, J., *supra* note 31; *See* Stop China-Originated Viral Infectious Diseases Act, H.R. 6444, 116th Cong. (2020). <https://www.congress.gov/bill/116th-congress/house-bill/6444?s=1&r=12>.

the COVID-19 global pandemic in the United States, regardless of where the action or omission occurred.³⁸

The proposed bill would also allow defendant-owned property in the United States to be seized for judgment payments through the amendment of Title 28, Section 1610, of the U.S. Code. The Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020 (H.R. 6519) proposal would amend the FSIA to allow for money to be collected from China for damages for physical injury or death and economic injury occurring in the United States specifically caused from COVID-19 or concealment of information in regards to COVID-19.³⁹ In another bill, the Compensation for the Victims of State Misrepresentations to the World Health Organization Act of 2020 (H.R. 6524) would introduce an amendment to the non-commercial tort exception of the FSIA, permitting claims for personal injury or death, or damage or loss of property in the United States due to misrepresentations of information relayed to the WHO. However, the law does not remove the tort exception's exclusions pertaining to discretionary actions and misrepresentations.⁴⁰

If the bills are passed, China will be in a position where ignoring lawsuits would result in loss of property in the United States, but agreeing to meet in court would legitimize America's legal power. China most likely would seek to dismiss lawsuits and retaliate by suing the United States for its property or money interests in China. Furthermore, any United States disregard for international law could stain its reputation.⁴¹ Either situation strains relationships between the two countries.

CONCLUSION & LOOKING FORWARD

China allegedly downplayed COVID-19's severity as evidenced by silencing and undermining whistleblowers, underreporting case numbers, and publicly acknowledging the seriousness of the virus only after cases resulting in death arose internationally. One can argue that the leaked documents revealing the extent of China's knowledge on the virus demonstrated intent to misrepresent the pandemic and as a result, caused unnecessary harm to the people of other countries. In China's defense, the country's scientists released the primers and probes necessary for RT-PCR and COVID-19's genetic sequence early in the pandemic.

38. Quoted from Justice for Victims of Coronavirus Act, S. 3588, 116th Cong. (2020).

39. See Holding the Chinese Communist Party Accountable for Infecting Americans Act, H.R. 6519, 116th Cong. (2020).

40. See Compensation for the Victims of State Misrepresentations to the World Health Organization Act, H.R. 6524, 116th Cong. (2020).

41. See Weiss, J. C. (2020, April 29). Can the U.S. sue China for covid-19 damages? Not really. *The Washington Post*.

Furthermore, China's large bureaucracy and underfunded Hubei Centers for Disease Control may have led to a sluggish response as well as inaccuracy in reporting case numbers.

The WHO plays an extensive role in helping countries with public health crises. Article 3 of the IHR puts the onus on member states to monitor and implement legislation aligned with the IHR goals to protect member states from international public health crises. It can be argued that China specifically violated Article 6 and 7 of the IHR, which require countries to provide accurate case and disease information to the WHO. Although the IHR is legally binding to member states, the WHO does not have the power to hold China accountable.

In the United States, Missouri and Mississippi filed lawsuits against China's government based on the Territorial Tort Exception and the Commercial Act Exception of the Foreign Sovereign Immunities Act, which would normally provide immunity from U.S. civil lawsuits against foreign governments. However, the lawsuits do not meet the criteria for exemption and thus are likely to be unsuccessful. Understanding the limitations of the IHR and the FSIA, Congress introduced several new bills that would grant the ability to open civil litigations regarding COVID-19 specifically. At the current time, the proposals have not been implemented at the time of writing.

It may be to the advantage of the United States that these cases are ultimately unsuccessful. Suing a foreign government may have lasting foreign policy implications and may also open the United States to similar lawsuits. A similar scenario, the Justice Against Sponsors of Terrorism Act (JASTA), was passed in 2016 near the 15th anniversary of 9/11 after overriding former President Obama's veto. This allowed 9/11 victims' families to sue members of the Saudi Arabian government for aiding and abetting terrorism despite two investigations in 2004 and 2015 that concluded Saudi Arabia's government was not responsible for the 9/11 terrorist attack.⁴² This caused significant friction between the United States and Saudi Arabian government.⁴³ If proposed bills to hold China accountable for COVID-19 injuries, death, and economic damages are voted into law, they may produce further points of contention between the United States and China. Further investigation into China's decisions during the pandemic, in similar likeness to the investigations into the

42. See Hancock, R. (2018). "Mob-Legislator": JASTA's Addition to the Terrorism Exception to Foreign Sovereign Immunity. *Cornell Law Review*, 103(5), 1293–1328.

43. See Feierstein, G. M. (2016, November 2). JASTA Adds Strain on U.S.-Saudi Relations. *Middle East Institute*.

Saudi Arabian government, will be necessary to gather important evidence to guide out future lawmakers.