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# The Coronavirus Blame Game: The Emergence of Pandemic Lawfare

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## ABSTRACT

In keeping with a historical tendency to name, and implicitly attribute blame for public health threats and emergencies, COVID-19 has become the "China Virus". This has led to the emergence of what this paper describes as pandemic lawfare, primarily directed against the People's Republic of China. The staggering costs occasioned by public health lockdowns, restrictions on business and social activities have seen a proliferation of such calls to arms. Reconceptualising pandemics through the lens of legal liability can be seen to be a tactical measure framed around concepts of lawfare. Doing so accords human and institutional blame to otherwise natural transmissions of a pathogen. The practice of pandemic lawfare, through which public fora and institutions are used to attribute blame and seek compensation, promises to be a lasting legacy of the COVID-19 virus. In doing so, it promises to challenge and undermine the principle of sovereign immunity accepted in international relations, resorting to a rule-based order of international health regulations.


**Keywords:** China; COVID-19; legal liability; pandemic lawfare

IN DEBATES ABOUT PANDEMIC responsibility, the field of law has been consulted and drawn upon to continue conflict, in an adjustment of Carl von Clausewitz's dictum, with legal means. Such hostilities, as it were, are conducted through a country's legal institutions and quasi-legal fora, making use of jurisprudence and regulations to attain strategic goals. Law constitutes "the new politics", what Siri Gloppen and Asuncion Lera St. Clair see as a field "expanding in social and political significance, not least in the contexts where other governance structures are weak" (2012: 899). The practice of using law in that way has been described as lawfare, though the word itself, as has been noted, has a curious career (Werner, 2010). During the years of the George W. Bush administration, it became a pejorative, a form of activity viewed with suspicion as potentially undermining liberal democracies. The neoconservative adoption of lawfare as a term was done to discredit any resort to law and procedure that might advance nefarious, underhanded goals, provocatively described by the US Department of Defence as a "strategy of the weak, using international fora, judicial processes and terrorism" (Werner, 2010: 62). The Lawfare Project notes that negative sting in describing lawfare as "the use of law as a weapon of war, or more specifically, the abuse of the law and legal systems for strategic political or military ends" (Werner, 2010: 62). As Werner argues, "The meanings of terms such as 'lawfare are not set in stone, but rather, evolve through their use in different social practices" (Werner, 2010: 62).

Now, the shoe is on the other foot, with those very same instrumentalised principles being used to target China for being the cause of the novel coronavirus, otherwise known as COVID-19.[1] Lawfare has become the mechanism by which transborder grievances can be contested and litigated and in the absence of an international public health body with compensation or investigative powers. It has become the means by which politicians in the West, pri-

1 For a discussion on its contested origins, see Bryner, 2020.

marily the United States and Britain, can appeal to international and domestic mechanisms to seek compensation for charges of Chinese guilt. In doing so, they appeal to various regulatory frameworks that traditional neoconservatives have shunned: the rule-based order; the role international bodies such as the World Health Organization (WHO) play, and the use of traditional courts to accept that the People's Republic of China (PRC) can be sued in domestic courts. Along the way, exhortations have been made that challenge central tenets of the international legal system, including the principle of sovereign immunity and its correlative, sovereign equality.

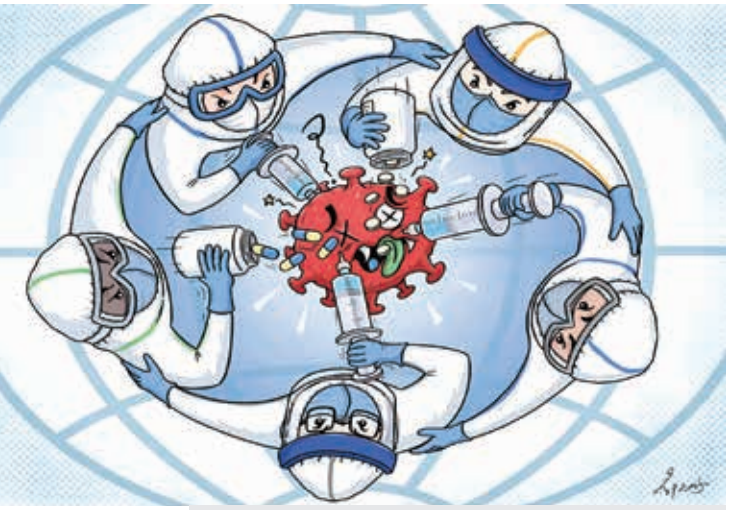
## Blameworthy Diseases

"The beauty of blaming 'China' lies in its ambiguity" (Liu, 2020). This tendency of pandemic blame is not, unlike COVID-19, novel. Disease and infection, as Susan Sontag noted with penetrating clarity, engenders moral turpitude and suggestion (Sontag, 1989). The naming of infections and diseases in terms of geographic and cultural origin is rooted in the language of attribution and moral suggestion. Syphilis was deemed morbus gallicus, or the "French disease" by Italians in the 16th century facing the soldiers of the French monarch Charles VII; the French retorted by referring to it as "the Neapolitan disease". It did not take long for accusations to be directed at the inhabitants of the Iberian Peninsula, given links with the mission of exploration by Christopher Columbus to the Americas (Rumbaut, 1997: 440). The Black Death in Europe also brought upon Europe a range of regulations with a principled purpose: to target the corrupted bodies who were themselves accused of being repositories of degenerate filth. In Florence, for instance, prostitutes and beggars were seen as "sources of pollution in the civic body" (Slack, 1988: 447).

Italian immigrants arriving in the United States in 1916 were accused for being particularly susceptible polio carriers. As Alan Kraut documents, many lived in "tightly concentrated neighbourhoods, and because immigrants were viewed by many as a marginal and potentially subversive influence upon society, the incidence of Italian polio made a dramatic impact upon the imagination of a public already shaken by the virulence of the epidemic and the youth of its victims" (Kraut, 2010).

The H1N1 virus that killed millions in 1918 and 1919 became associated with Spain less for geographically accurate reasons than political convenience. Belligerents during the Great War were keen to restrain discussions about a virus that might sap the morale of fighting forces. Spain, being neutral during the Great War, did not embargo or prevent reports on the virus. When an outbreak took place in Madrid as reported in the city's ABC Newspaper, the illusion of Spanish responsibility was created (Trilla & Daer, 2008).

The last century also saw notable instances of epidemic blameworthiness, fuelled by political motivation. In 1985, the official journal of the Soviet Writers Union, Literaturnaya Gazeta, ran articles arguing that Acquired Immunodeficiency Syndrome (AIDS) was a product of biological work being undertaken at Fort Detrick, Maryland, in collaboration with the Centres of the Disease Control in Atlanta, Georgia (Elkin & Gilman, 1988: 361; Seale, 1986). The political cartoonist for the official broadsheet Pravda, D. Agaeva, was inspired by images that remain relevant as tropes of blame and presumption: a sinister looking scientist, supplying a test tube filled with the AIDS virus – and swastikas – to a US general. Many dead also figure, but as concentration camp victims (Elkin & Gilman, 1988: 361).



China Daily, (2020)

In recent times, the same accusations have been directed at culture, habit and behaviour, notably with Ebola. An argument has been made that populations suffering from such disease also endure judgment in a political and epidemiological sense, assessments that neglect the "power relations" that constitute "an active reinscription – and therefore legitimation – of global health inequities along colonial lines" (Richadson, McGinnis & Frankfurter, 2019: 1).

## Frameworks of Blame

The novel coronavirus has not been spared the lexical game of attribution. Regarding its cause, Australian Senator Malcolm Roberts took up the theme: "Should China pay compensation for unleashing COVID19 on the world?" (Roberts, 2020). The answer is implicit in the question; intention, guilt and causality are assumed. Under the cover of law, a complex natural event has been given an anthropogenic impetus in the service of geopolitics. "The case for Chinese liability for COVID-19's consequences," suggested global health specialist David Fidler, "seems less about international law than how the geopolitical rivalry between the United States and China has shaped the politics of the pandemic" (Fidler, 2020). In the United States it has become the "Chinese virus", a prelude to a range of legal efforts to seek compensation, restitution and retribution (Libby & Rank, 2020). This has prompted counter-accusations from China that the virus was a US creation, a narrative that has been picked up by other countries unsympathetic to Washington's geopolitical agenda (Aarabi, 2020). "It might be," charged China's foreign ministry spokesperson Zhao Lijian, "a US army who brought the academic to Wuhan" (Lijian, 2020). Such accusations have taken root despite the stance taken by such prominent medical journals at The Lancet, which has condemned "conspiracy theories suggesting that COVID-19 does not have a natural origin" (Calisher et al., 2020: 42; Bryner, 2020).

**Conspiracy narratives about COVID-19 being engineered and then deployed also supplied the momentum for broader accusations, contributing to a pandemic demonology.**

Conspiracy narratives about COVID-19 being engineered and then deployed also supplied the momentum for broader accusations, contributing to a pandemic demonology. A leading proponent in this game of attribution has been US President Donald Trump. On March 16, Trump tweeted about the US "supporting those industries, like Airlines and others, that are particularly affected by the Chinese Virus" (Trump, 2020). When asked as to why he insisted on naming it such, he was blunt. "Because it comes from China. That's why. It's not racist at all. I want to be accurate" (Fallows, 2020). US Secretary of State Mike Pompeo preferred the term

"Wuhan virus", giving a sense of locality and specificity, while also underlining the element of dissembling on the part of the PRC. "The mere fact that we don't know the answer – that China hasn't shared the answers – I think is very, very telling" (AP News Agency, 2020). For Pompeo, the proximity of the wet market where the virus is said to have originated, and that of a virology institute, was also telling, a potential conspiratorial thread linking motive with malfeasance. "We know that there is the Wuhan Institute of Virology just a handful of miles from where the wet market was" (AP News Agency, 2020).

In late April, Pompeo showed even greater conviction in building upon the lab-engineered thesis, contradicting the position taken by the US Office of the Director of National Intelligence. "The best experts so far seem to think it was man-made. I have no reason to disbelieve that at this point" (Pompeo, 2020). The Intelligence Community's position, outlined in an ODNI statement, had a rather different assessment of that expertise, accepting that COVID-19 had Chinese geographical origins while concurring "with the wide scientific consensus" that it was "not manmade or genetically modified." The Intelligence Community would continue "rigorously" examining information and intelligence on "whether the outbreak began through contact with infected animals or if it was the result of an accident at a laboratory in Wuhan" (Office of the Director of National Intelligence, 2020).

In March, Missouri Republican Senator Josh Hawley and New York Republican Representative Elise Stefanik, introduced a bicameral resolution demanding a "full, international investigation" into the origins of COVID-19.[2] The point was a moot one, as the culprit was already assumed. The resolution found "that the Government of the People's Republic of China should be held accountable for the impact, of its decision to hide the emergence and spread of COVID-19, on the lives and livelihoods of the people of the United States and other nations." In a manner defiant of Chinese sovereignty, the resolution also wished any such investigation to be led by public health officials drawn from the US and "other affected nations".

## Delegitimising Sovereignty

The most conspicuous element of pandemic lawfare in Congress came in efforts to delegitimise the juridical nature of Chinese sovereignty. Not only was the PRC to be investigated with a pre-determined goal of identifying guilt, it was to be stripped of customary immunities in US courts. Various proposed bills served to repudiate the principle of sovereign equality in international law, one that accepts the premise that all states are equal in a juridical sense, in spite of asymmetrical realities in military power, economy and demography (United Nations Charter, Article 2(1); Anson, 2016). "The equality of States," as the jurist Hans Kelsen formulated, "is frequently explained as a consequence of or as implied by their sovereignty" (Kelsen, 2000:34). The principle is further developed in the UN Declaration on Friendly Relations and Cooperation among States: "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature" (United Nations, 1970).

2 US Senate Resolution Supporting an international investigation into the handling by the Government of the People's Republic of China of COVID-19 and the impact of handing COVID-19 in that manner on the people of the United Sates and other nations, 116th Congress, 2d session, available at: https://www.hawley.senate.gov/sites/default/files/2020-03/Hawley-China-Coronavirus-Resolution.pdf

**In Congress, a challenge to the merits of the FSIA, urging both an investigation and an easing of litigation barriers for state institutions and private citizens, coalesced around ideas of pandemic liability.**

Axiomatic in recognising such equality is the principle of sovereignty immunity sparing a State's officials from legal action in the courts of another country. As the noted English case of the Queen's Bench *Mighell v Sultan of Johore* (1894) reasoned, a sovereign could never waive immunity except through submitting to the jurisdiction of the court "by appearance to a writ" (Mighell v Sultan of Johore, 1984). The US equivalent of a sovereign's protection from suit is to be found in the Foreign Immunities Act of 1976 which, in the words of a United States Court of Appeals decision, "protects foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery" (*Rubin v Islamic Republic of Iran,* 2011: 795).

In Congress, a challenge to the merits of the FSIA, urging both an investigation and an easing of litigation barriers for state institutions and private citizens, coalesced around ideas of pandemic liability. China's conduct vis-à-vis COVID-19 was deemed exceptional to decades of accepted jurisprudence. The inspiration for paring back the principle of sovereign immunity was drawn from the Justice Against Sponsors of Terrorism Act (JASTA), an act which deterritorialised the commission of torts contributing to a terrorist attack carried out on US territory (JASTA, 2016: section 3). Both Senators Josh Hawley (R-Missouri) and Tom Cotton (R-Arkansas) resorted to this particularly controversial precedent as a model with which to frame exceptions to the FSIA. Hawley's Justice for Victims of COVID-19 Act would remove sovereign immunity while creating "a private right of action against the CCP for reckless actions like silencing whistleblowers and withholding critical information about COVID-19" (Hawley, 2020). Cotton, along with his House counterpart Representative Dan Crenshaw (R-Texas) proposed a bill with ideological specificity, avoiding any overt reference to country and preferring, instead, to target the political apparatus. "This Act," went the bill's short title, "may be cited as the 'Holding the Chinese Community Party Accountable for Infection Americans Act of 2020" (Cotton, 2020). To that end, the United States Code would be amended to create a civil action "against a foreign state for deliberate concealment or distortion of information with respect to an international public health emergency, and for other purposes." The bill did not exclude the executive from reviewing private suits: the Secretary of State could stay proceedings but only if it was certified that the US was "engaged in good faith discussions with the foreign state defendant, or any other defendant, with respect to the resolution of the claim against such a defendant" (Cotton, 2020: 6).

Other legislative proposals have been more aggressive, insisting upon generous compensation. Accepting the bio-engineered thesis, Tennessee Senator Marsha Blackburn proposed a bill to amend the FSIA by establishing "an exception to jurisdictional immunity for a foreign state that discharges a biological weapon". Her proposed bill was duly titled the "Stop China-Originated Viral Infectious Diseases Act of 2020" or the "Stop COVID Act of 2020" (Blackburn, 2020). The rationale for the bill was outlined in an interview with Charlie Kirk, president of

the conservative group Turning Point USA, an encounter notable for the accusation that China was part of "the new axis of evil". Cause and culprit barely warranted a challenge. "We know they caused the COVID virus. They did this by hiding information by lying about what is happening. They were not transparent. They would not give us the viral sample to work from." She then makes the leap, obfuscating motive, design and carelessness. "It most likely started in one of their labs. And China is now trying to say, 'Oh, it was not one of us', when there has been concern about those labs expressed going back to 2014" (Martin, 2020).

## Pandemic Lawfare Suits

Legal interest in seeking compensation from China via legal fora has stirred in several countries. "When all this will be over, and perhaps even before," warned the Italian sociologist Massimo Introvigne, "the CCP may find itself attacked by an enemy its mighty military power will not be able to stop, aggressive Western lawyers" (Introvigne, 2020). These efforts have varied in scale, from small, private suits for loss of income to state-sanctioned actions against the PRC and is various entities. In Italy, a ski resort hotel in the Dolomites presented a subpoena to the court of Belluno seeking compensation from the PRC's health ministry for loss of business earnings, notably the period March 18-22, when it was fully booked for the Alpine Ski World Cup (Oggi Treviso, 2020). In the words of legal representative Marco Vignola, "The early and sudden closure led to disastrous consequences, including the dismissal of all staff and the cancellation of contracts with suppliers" (Bowcott & Giffrida, 2020).

**A few of these cases are worth mentioning, not so much because of their prospects of success, but because of their underlying assumptions about China's culpability vis-à-vis the virus.**

A clutch of legal actions have also been filed in the United States against the PRC and its various entities. In the course of a few months, six suits were filed in US federal courts. These have varied from individual business owners to the actions of state attorneys (*Bella Vista LLC v The People's Republic of China et al.,* 2020; *Logan Alters,et al. v People's Republic of China, et al.,* 2020). All run the formidably imposing barrier of sovereign immunity, one that remains despite current Congressional efforts to undermine it. All, to some extent, make the argument that China's malfeasant conduct vis-à-vis COVID-19 has ostensibly waived such a protective assertion (Carter, 2020).

A few of these cases are worth mentioning, not so much because of their prospects of success, but because of their underlying assumptions about China's culpability vis-à-vis the virus. Their overall purpose is also galvanic in nature and, to that end, a paragon example of lawfare as practice: to encourage political representatives to diminish and qualify the immunity principle by giving US citizens standing to sue foreign states for damage arising from pandemics (Johnson, 2020).

In March, a class action complaint was lodged in United States District Court of the Southern District of Florida "for damages suffered as a result of the Coronavirus epidemic" (*Logan Alters,et al. v People's Republic of China, et al.,* 2020). The accusation: that China and its various arms of government "knew that COVID-19

was dangerous and capable of causing a pandemic, yet slowly acted, proverbially put their head in the sand, and/or covered it up for their own economic self-interest". Such conduct had caused "incalculable harm" and injury "and will continue to cause personal injuries and deaths, as well as other damages". The Florida class action suit attempts to sidestep the obstacle of sovereign immunity by claiming an exception for commercial activities and for death and harm "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 or her employment" (*Logan Alters,et al. v People's Republic of China, et al.,* 2020).

The state of Missouri also took it upon itself to commence a federal court lawsuit seeking to hold Beijing and the Chinese Communist Party accountable for COVID-19 and its consequences. The allegations in the lawsuit filed by the state Attorney General Eric Schmitt follow the standard narrative of suppression, evidentiary destruction and concerted cover-up. "During 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 protective equipment – thus causing a global pandemic that was unnecessary and preventable" (The State of Missouri, 2020).

To puncture the veil of sovereign immunity, two exceptions, neither particularly plausible, are cited: the "commercial activity exception" to the FSIA which waives immunity for foreign states when such activity has a direct effect on the US; and the tortious liability exception, which has been read narrowly to only include tortious conduct that has occurred in its entirety within the United States (*In re Terrorist Attacks on Sept. 11, 2001,* 2013: 117). In the wording of the suit, China's COVID-19 conduct constituted "commercial activities" causing "a direct effect in the United States and in the State of Missouri" including operating the healthcare system in Wuhan and China; commercial research on viruses undertaken at the Wuhan Institute and Chinese Academy of Sciences; the use of traditional and social media platforms for commercial profit; and "production, purchasing important and export of medical equipment, such as personal protective equipment ("PPE"), used in COVID-19 efforts" (The State of Missouri, 2020: 9-10). The FSIA non-commercial tort exception was cited as waiving Chinese immunity, as money damages were being sought against "a foreign state for personal injury or death, or damage to or loss of property, occurring in the United Sates" (The State of Missouri, 2020: 10-11).

The way these exceptions have been cited in the context of suing China and its various entities goes someway to understanding the lawfare elements inherent in these actions. In these, China figures as both economic competitor and perpetrator of civil wrongs; a dangerous threat and an authoritarian, negligent power. COVID-19 is reasoned analogously as a product of manufacture and commerce, a point that ties in with the trade war approach of the Trump administration (Wong & Koty, 2020). While acknowledging the thesis about zoonotic transmission from the Wuhan Seafood Market, the State of Missouri's legal action also shows a degree of sympathy for the "emerging theory" that the virus "was released from the Wuhan Institute of Virology, which was studying the virus as part

of a commercial activity" (The State of Missouri, 2020: 12). The virus becomes the equivalent of a dangerous, disruptive export, affecting the global economy and jobs, viewed as a weapon equally if not more significant than industrial espionage and cyber hacking.

## Rule-Based Orders and International Law

China has repeatedly been critiqued, criticised and challenged for contesting what has been asserted as the rule-based international order (Chellaney, 2019). Malcolm Chalmers has suggested the provocation that there is no single "rules-based international system" (Chalmers, 2019). Such a view pairs with the idea that the international system tends towards a degree of anarchy, softened by areas of consensus and state understanding. If there are rules to be laid in any such system, there are done so, as Henry Kissinger states with frankness, by the dominant power "according to its own values" (Kissinger, 1994: 17). Others prefer a more refined version of this blunt formula, referring to the presence of "identification" norms that underpin a global system run by "great power management", with the Concert of Europe of the nineteenth century being a notable example (Zala, 2017; McLaughlin, 2018). To that end, the rules-based order as rhetorically articulated was based on one key assumption: the continuation of US primacy.

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Such primacy tends to be ignored in such publications as Australia's 2016 Defence White Paper, which merely sees such rules as part of "a broad architecture of international governance which has developed since the end of the Second World War." The publication warned that "the rules-based global order" was being placed "under increasing pressure and has shown signs of fragility" (Australian Government Department of Defence, 2016: 45). (Rules-based global order, as a term, is used on 48 occasions in the document.) The term also finds greater currency in British policy positions since 2015. The UK government's 2015 Strategic Defence and Security makes reference to the term no less than 27 times; references to a "rules-based international system" number a mere two in the 2010 National Security Strategy (HM Government, 2015; HM Government, 2010; Chalmers, 2019: 1).

Pandemic politics and statecraft in response to COVID-19 have invariably continued the theme of rules-based criticism, with China showing, according to this argument, the credentials of a putative lawbreaker in the international community. In Britain, a number of veteran Conservative politicians, led by former Deputy Prime Minister Damian Green, penned a letter to Prime Minister Boris Johnson urging him to reconsider the nature of Britain's post-coronavirus China relationship, worried about the "damage to the rules-based system caused by China's non-compliance with international treaties". They spoke of those, "Legally binding international healthcare regulations (that) require states to provide full information on all potential pandemics". China had, it was argued, failed to abide by them, a grave omission that "allowed the disease to spread throughout with extraordinary serious consequences in terms of global health and the economy" (Holloway, 2020).


*(Pikist, 2020)*

Such regulations were first adopted by the World Health Assembly in 1969 to control cholera, plague, yellow fever, smallpox, relapsing fever and typhus. Additions of smallpox, poliomyelitis, SARS, and human influenza caused by a new subtype were made in the 2005 revision (WHO, 2016). Consulting the International Health Regulations reveals various state undertakings, obligating States to develop, strengthen, and maintain public health infrastructure to assist in detecting, monitoring, reporting and notifying the events of the global health crisis. In the event of a public health emergency of international concern (PHEIC), a State is obligated to communicate to the WHO via the National IHR Focal Point all public health-related information and events taking place within its territory within 24 hours of assessment (WHO, 2016).

James Kraska (2020) of the Stockton Centre for International Law at the US Naval War College found Article 6 of the IHR particularly salient. The provision obligates states to provide expedited, timely, accurate, and sufficiently detailed information to the WHO about public health emergencies outlined in the second annexe of the 2005 revision. Transparent information needs to be furnished within 24 hours and collaborative assessment of those risks conducted. "Yet China rejected repeated offers of epidemic investigation assistance from WHO in late January (and the US Centres for Disease Control and Prevention in early February), without explanation". For Kraska (2020), the International Law Commission's Responsibility of States for Internationally Wrongful Acts 2001 offered guidance, notwithstanding their non-binding nature (International Law Commission, 2001). To circumvent this drawback in his argument, Kraska suggested that the restatement, developed with contributions by numerous parties constituted customary international law, thereby binding all states. "Wrongful acts" were those that could be "attributable to the state" and "constitute a breach of an international obligation; such conduct could be attributable if it was an act of the state's executive, legislative or judicial functions of the central government (Kraska, 2020).

Like Kraska, Introvigne makes the point unreservedly: that China's reaction to COVID-19 was itself a violation of the public health order that arose in response to Beijing's handling of SARS in 2002. "It is, indeed, a basis the world created with China in mind." Such language is purposefully directed at China as an outlaw state, with the "world" duly taking stock in creating the International Health Regulations of the WHO. Reference is also made to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. The PRC, Introvigne submits, violated its obligations due under such laws triggering the basis for "full reparation for the injury caused by the internationally wrongful act" in "the form of restitution, compensation and satisfaction" (International Law Commis-

sion, 2001: Article 34; Introvigne, 2020). Article 39 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts is also cited, namely, that, in determining reparation, "account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought" (Introvigne, 2020). While Kraska is rather short on a solid legal basis for Chinese compensation, he suggests exclusion, alienation and estrangement from the international community. The PRC is, effectively, to be marginalised from the international comity of nations.

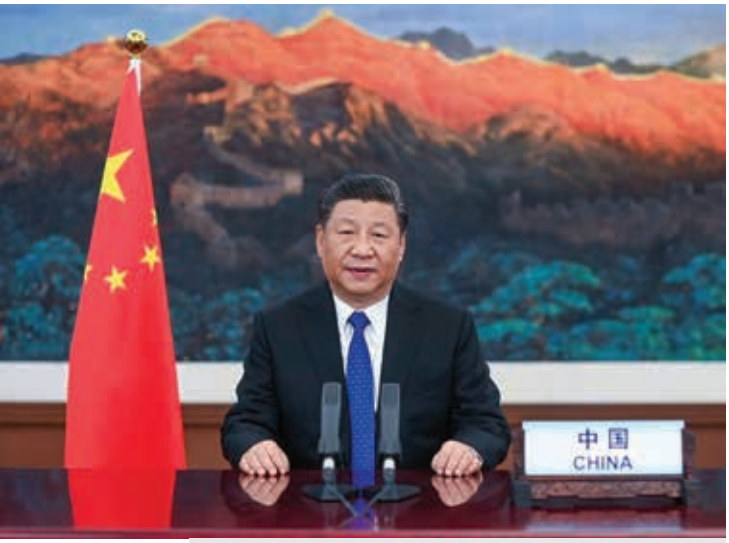
**Arguments favouring compensation for pandemic wrongdoing were also voiced in British quarters.**

Arguments favouring compensation for pandemic wrongdoing were also voiced in British quarters. The neoconservative British-based Henry Jackson Society, while admitting that successful legal actions might be problematic, took an interest in the whole question of PRC liability, putting the claim in a report that China's balance sheet of damages had come in at £3.2 trillion from G7 countries alone (Henderson et al., 2020). The HJS, having accepted Chinese malfeasance and clear responsibility, constantly iterate "the rules-based international system". To preserve that system "and to protect taxpayers from punitive liabilities, the world should seek to take legal action against the PRC for the breaches of international law and their consequences" (Henderson et al., 2020).

The central argument made by the organisation hinged upon Beijing's reckless indifference or negligence towards international health provisions. To anchor Chinese liability in international law, the HJS report suggests the norms of international health regulations dating back to the nineteenth century, when the International Sanitary Convention came into being (Henderson et al., 2020: 23). As with Kraska, the HJS makes solemn reference to the IHR 2005, which outlines duties and obligations of the WHO while also conveying those for member states "to prevent the spread of infectious diseases" (Henderson et al., 2020: 23). The PRC was bound "to report timely, accurate and detailed public health information." It failed to do this throughout December 2019 and January 2020. "In fact, it appears at least possible that this was a deliberate act of mendacity." (The authors minimise the importance of those common historical tendencies in decision-making: negligence through error; damage caused by complacency.) The report's central sentiment is resentment: had the detection and sharing of accurate information taken place in good time, "the infection would not have left China" (Henderson et al., 2020: 3). Furthermore, "Inadequate and inaccurate information" from the PRC hampered the UK's formulation of an effective response. Reliance was placed upon World Health Organization reports drawing upon faulty Chinese data claiming, at that point, that "there were no cases of medics contracting the diseases" (Henderson et al., 2020: 19). An argument as also advanced that the PRC had attempted to influence the impartiality of the WHO Director-General through withholding information, providing potentially false information or by not providing information at a critical moment in time might also constitute grounds (Sarkar, 2020).

Cause and accountability in terms of concealment is extended to the politburo itself, with the HJS noting a timeline of President Xi Jinping's engagements with the matter outlined

in the CCP's "main theoretical journal, Quishi ('Seeking Facts')". A transcript of a speech made on February 3, 2020 by Xi referred to a statement made in early January taking note of "requirements for the prevention and control of the new Coronavirus" (Henderson et al., 2020: 21).




*Chinese President Xi Jinping at the 73rd World Health Assembly (WHA) while he promotes global cooperation in the pandemic fight. (Xinhuanet,2020)*

In terms of viable international fora to hear such grievances, options proved thin. The HJS admitted that bringing any dispute based upon the IHR before the WHO would be "unprecedented" but possible. "This would be a readily accessible avenue for states bringing complaints in relation to the handling of COVID-19" (Henderson et al., 2020: 24). The WHO Constitution, via Article 75, also provided a possible avenue for involvement by the International Court of Justice. In its words, "Any question or dispute concerning the interpretation or application of this constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice." This does not preclude the parties in dispute choosing other modes of dispute settlement that could trigger ICJ involvement (International Court of Justice, 2002). The World Health Assembly might itself be bypassed in undertaking ICJ proceedings, provided it satisfied the negotiation condition. But, as has been suggested by Peter Tzeng, a specialist practitioner in public international law, the State in question would have to frame its complaint regarding Chinese conduct "as one concerning the interpretation or application of the WHO Constitution" (Tzeng, 2020).

## Pandemic Lawfare's Pitfalls

A generous body of scepticism has been generated by the pandemic law effort. For instance, using the commercial activity exception, was, according to Joel Trachtman of the Fletcher School at Tufts University, "specious" (Johnson, 2020). Alleged government failures in handling a pandemic could hardly count as a matter of commerce. The jurisprudence on the subject has also pointed to the need to show that economic damage and the linking act must take place on US soil. Ingrid Weurth of Vanderbilt University School of Law is even more specific. "The tortiable activity has to be done in Missouri, not in Wuhan, China." The only genuine way where this could be circumvented would be to pass legislation removing sovereign immunity on tortious and commercial exceptions (Johnson, 2020).

The pandemic lawfare endeavour to undermine sovereign immunity, a cardinal principle of international law and the comity of nations, also echoes debates waged over the passage of the Justice Against Sponsors of Terrorism Act, a bill designed to smoothen the way for legal suits for the families of victims of the 9/11 attacks. It amended the FSIA and the Anti-Terrorism

Act, effectively overruling "judicial constructions of those statutes that had foreclosed lawsuits against Saudi Arabia for its alleged support of the 9/11 attacks" (Daugirdas & Mortenson, 2017: 156). Josh Earnest, White House Press Secretary, articulated the main argument against JASTA, calling sovereign immunity "something that protects the ability of the United States to work closely with countries all around the world. And walking back on that principle would put the United States, our taxpayers and our service members and diplomats at risk" (Earnest, 2016).

President Barack Obama, for his part, urged members of Congress to realise that there already were "ways of addressing state-sponsored terrorism." Lawsuits could be instituted, for instance, against designated sponsors of terrorism. By accepting the premise of JASTA "devastating" consequences would arise for the Department of Defence, service members, those active in foreign affairs and the intelligence communities. "The United States relies on principles of immunity to prevent foreign litigants and foreign courts from second-guessing our counterterrorism operations and other actions that we take everyday" (Obama, n.d.). US foreign policy and security decisions would, as an important consequence, be privatised and become the purview of litigants rather than that of the Executive (Obama, 2016).

JASTA also served to complicate international relationships, even with close partners, exposing them to litigation and, in doing so, limiting "their cooperation on key national security issues, including counterterrorism initiatives, at a crucial time when we are trying to build coalitions, not create divisions" (Obama, 2016). The bill was itself passed with reservations, with Senate Majority Leader Mitch McConnell (R-Ky) claiming that it would have "unintended ramifications". (His initial support for the bill had been given, he subsequently claimed, under a mistaken impression based on material from the White House.) Then Speaker Paul Ryan (R-Wis.) also expressed a view that "some work had to be done to protect our service members overseas from any kind of legal ensnarement that occur, any kind of retribution" (Kim & Everett, 2016).

Most troubling to critics of the pandemic lawfare approach is the risk posed by reciprocal retaliation. US officials face the prospect of the lawfare juggernaut, including those who were rather slipshod in informing the US public about the dangers of the novel coronavirus. Allowing lawsuits against China with Congressional approval could see China, John Bellinger warns, "retaliate by allowing lawsuits against the US government or its officials in China for claiming China had intentionally manufactured COVID-19" (Bellinger, 2020). Rachel Esplin Odell of the Belfer Centre for Science and International Affairs further underlines the dangers posed by targeting PRC officials: "If applied to Chinese officials, such sanctions would likely invite swift retaliation against US officials who themselves dismissed the threat of COVID-19, shared incorrect medical information about it, or spread false theories about its origins, such as the president, vice president, and many governors and members of Congress – including [Senator] Cotton himself" (Odell, 2020).

Odell also warns that using the Draft Articles on State Responsibility in the context of public health, a point enthusiastically advanced by Introvigne and Kraska, is more than mildly treacherous. Disease outbreaks can be unruly things, hard to monitor and track. The customary rule accepting that a state in breach of international law is required "to make full reparation for the injury caused" by that breach has not featured in international health efforts.

The International Law Commission has added a complicating factor: that any reparation would not cover "all consequences flowing from an intentional wrongful act", only injury directly "ascribable to the wrongful act" (International Law Commission, 2001: 92).

The deployment of rules-based arguments and lawfare suits has also encouraged Chinese commentators to revisit historical instances of aggression, seeing such health narratives as an attempt to perpetuate power inequalities. Debates about compensation were hard to divorce from the historical context of humiliation foisted upon China during the Century of Humiliation and the Opium Wars. "Britain and China," suggested The Economist (2017), "see each other through a narcotic haze". As a widely circulated comment on Twitter went: "Cool, great, you just pay us back for the Opium Wars" (Shumei, 2020). President Xi Jinping, in an address in Hong Kong, that last outpost of British Empire, referred to a poisoned legacy that enfeebled a state. "After the Opium War, China has been repeatedly defeated by countries which were smaller and less populous" (Connor, 2017). Such ideas recur in the current observations of the PRC diplomatic corps. Liu Xiaoming, China's ambassador to the UK, saw the legal suits as reminiscent of Europe's colonial wars waged during the 19th century. "Some politicians, some people, want to play at being the world's policemen – this is not the era of gunboat diplomacy, this is not the era when China was a semi-colonial, semi-feudal society" (Bowcott & Giffrida, 2020).

## Conclusion

From Fort Detrick to Wuhan; from the prostitutes of Florence during the Black Death to the sufferers of Ebola in the Democratic of Republic of Congo, blame and forced accountability has been a common theme. Behind pandemic lawfare's thrust in targeting the PRC lies a motive of using public health as a politicised vehicle, one that seeks to contain Chinese power even as it claims to hold it to account. The mechanism for such liability lies in international laws that are portrayed as universally accepted, legitimised by consensus. Legal avenues and fora are being used to pursue traditional power rivalries.

The narrative of pandemic attribution also paves the way, at least in a rhetorical sense, for a grounding of culpability in a manner Ho-fung Hung (2004) regards as parochial and "anti-globalist". In his study of SARS and efforts to combat it, Hung concludes that a coordinated, global response is far better than a national, anti-globalist one. Global cooperation, not blaming fractiousness, is preferable; empowered global institutions are desirable over weak ones (Hung, 2004: 19). In responding to COVID-19, pandemic lawfare has become the weapon of choice for the anti-globalists.

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