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Outcomes of Internationally Wrongful Acts and COVID-19 Pandemic

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ABSTRACT: It is one of the basic principles of international law that the state that makes an act contrary to international law must compensate for the damage arising from this act. Accordingly, when an international commitment has been breached, it is a principle of international law to adequately remedy it; therefore, reparation is a mandatory complement condition in the execution of a contract, without it being written in this contract. The core legal consequences for the responsible state on the commission of an internationally wrongful act are twofold: to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. Injury includes any material or moral damage, emerged as a result of an internationally wrongful act of a state. "The general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears." "In particular, all states in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible state in maintaining the situation so created." This study focuses on the actual situation that emerged during the COVID-19 pandemic process by examining the issue of international tort and its consequences.

KEYWORDS: Internationally Wrongful Acts, COVID-19 Pandemic, State Responsibility, Cessation, Reparation, Restitution, International Compensation

Introduction

It is one of the basic principles of international law that the state that makes an act contrary to international law must compensate for the damage arising from this act. Accordingly, when an international commitment has been breached, it is a principle of international law to adequately remedy it; therefore, reparation is a mandatory complement condition in the execution of a contract, without it being written in this contract. The core legal consequences for the responsible state on the commission of an internationally wrongful act are twofold: to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act (Verma 2017, 161). Injury includes any material or moral damage, emerged as a result of an internationally wrongful act of a state.

Generally, loss is a concept that is not only about economic interests, but also about moral interests. Indeed, the claim that the existence of harm is a necessary element for an act contrary to international law is usually due to the concept of "harm" being used in this sense. Here it is possible to conclude; "any breach of an obligation towards another State involves some kind of 'injury 'to that other State" Therefore, in an act contrary to international law, there is inevitable damage naturally, also in the event of a breach of an international obligation.

In the liability law, in order for the liability for compensation to arise, a loss must have occurred as a result of an unlawful act in tort, the occurrence of a typical danger in the responsibility of danger, or the violation of the objective due diligence obligation in the usual cause. Because there is no legal responsibility where there is no harm (Eren 1998, 487). The element of harm under the responsibility of the state has been one of the most important issues that the international community has focused on. This issue can be explained by the progressive

development of international law according to the emerging needs of the international community.

Every internationally wrongful act has some legal consequences, these consequences are aimed at the restoration of the legal relationship that has been threatened or impaired by the breach. The obligation continues to bind the responsible state. Therefore, the state remains obliged to perform the obligation in question. In this respect, Article 29 states "the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears" (Article 29, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 88).

"In particular, all states in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible state in maintaining the situation so created. In this respect, Article 40 states general framework of the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law" (Article 40, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 112). In addition to that, Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40 (Article 40, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 113-114).

Cessation and Non-repetition

The first requirement in eliminating the consequences of the wrongful conduct is the cessation of that conduct. Reparation in many cases may not be the central issue in a dispute between states related to responsibility. In the case of the COVID-19 pandemic, the Chinese government firstly warned WHO about the emergence of a new type of coronavirus. This could be accepted as the cessation of a wrongful act for China. Because spreading of the pandemic from China to all over the world was the main issue. "The state responsible for the internationally wrongful act is under an obligation:

a) To cease that act, if it is continuing;

b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require" (Article 30, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 88).

In fact, Cessation means often points to the downside of future performance and is about ending wrongful conduct, in the contrary, assurances and guarantees serve as a preventive function and refers to as a positive aspect of future performance. "In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is an action or an omission … since there may be cessation consisting in abstaining from certain actions" (Article 30, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 88).

Putting an end to the ongoing violation means starting to act as required by the obligation, which means only beginning to comply with the obligation. Therefore, the duty to comply with the obligation will be fulfilled in this way. As long as this is not done, no assurance can be given that the second method described in Article 30 will not be repeated.

The "emphasis on the rule of law as the basis for cessation also entails practical consequences. First, cessation is not at the option of the injured state; the violation must cease, even if the injured state does not demand it. Second, cessation is not subject to the limits of proportionality, which the articles impose on restitution and other forms of reparation.

Compliance with the norm must be restored. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law" (Shelton 2002, 840).

There are also situations where a state has violated an obligation on a series of occasions, implying the possibility of further repetitions. Cessation and the offer of assurances and guarantees of non-repetition by the responsible state are particularly important where there is a threat of repetition. In certain circumstances, like pandemic, the responsible state must offer appropriate assurances and guarantees of non-repetition to the state or states to which the obligation is owed. Therefore, the non- repetition guarantee deals with potential violations and focuses on prevention rather than reparation. Although the guarantee of non-repetition can be seen as a form of satisfaction, it is more appropriate to consider the guarantee of non-repetition in terms of the repair and continuation of the legal relationship affected by the violation. This obligation is future-oriented and, in the context of Article 48 of the Final Text, is also related to states other than the directly damaged state. The guarantee of non-repetition is about turning to legality rather than compensation for damage, together with the obligation to stop (Nollkaemper 2009, 546).

Concerning COVID-19 pandemic, China should give guarantee non-repetition of similar acts in the future. In order to provide assurance that an ongoing violation will not be repeated, it is necessary to end the violation first and to start to comply with the obligation. However, when it comes to China and infectious disease, it is not very convincing to comply with the guarantee to be given in this case. Because, considering that infectious diseases such as SARS and MERS, which have occurred in the last 20 years, originated from China and spread to many parts of the world and caused the death of thousands of people. In the next period, there is absolutely no guarantee that no other virus will emerge from China after the new type of corona virus. This situation is in fact not acceptable to other states. At this point, it requires the international community to take a more serious and decisive stance regarding possible epidemics that may originate from China. It should not be forgotten that any state suffers economic and political losses due to an event caused by its negligence or fault, or that this situation affects the national interests of other states is incompatible with international law and universal principles.

Reparation

The content of new obligations that automatically arise when States take an international act of wrongdoing falls under State responsibility law. In practice, it is possible to say that the reparation is more than an indicator of goodwill. Reparation is the most common consequence of state responsibility.

The reparation duty of the responsible state against the directly damaged state is an element of the classical legal responsibility of international law, in classical legal liability; the redress is only between the damaged state and the damaging state. However, sometimes this could be between damaging state and global world as in the COVID-19 pandemic.

In this respect, the responsible state is obliged to make full reparation for the consequences of its breach, especially where actual harm or damage has occurred, provided it is not too remote or indirect.

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" (Jankiewicz 2012, 88).

"Rather than relying on the primary obligation, the Statute defines reparations as arising from the breach of an international obligation. The ILC followed the same approach and defines the obligation to make reparations in relation to the injury sustained and not pursuant to primary

rules, as made clear by Paragraph 2 of Article 31. The Commentary expounds that this formulation 'makes clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from the wrongful act. The obligation to make reparation arises from injury, and the obligations contained in the breached primary rule are to be viewed as 'other consequences' derived from the wrongful act. This definition of injury gives a potential legal interest to States which are affected by the internationally wrongful act, but do not have the standing to invoke the primary rule that has been breached. It also implies that States other than the specially injured State can claim reparations qua injured States, pursuant to Articles 42 and 48. In sum, the Articles on State Responsibility circumscribe injury primarily within the damage caused by the internationally wrongful act itself, without referring to the primary obligation breached" (Jankiewicz 2012, 44).

Regarding reparation, it is the general principle that all losses arising from the violation should be recovered. Therefore, the remedy must be proportional to the severity of the violation. "In addition, the obligations of cessation and reparation do not depend upon a complaint being brought by an injured State. In all instances, the duty to perform the obligation breached remains; the mere fact of a violation does not terminate a treaty nor discontinue any obligation imposed by general international law. Instead, the first duty is to cease the wrongful conduct. Second, the responsible State is under an obligation to make full reparation for (the injury caused) by the internationally wrongful act. Injury can be material or moral" (Shelton n.d., http://www.corteidh.or.cr/tablas/r30119.pdf).

"Article 32 adds that the responsible state cannot invoke its own law as a basis for failing to provide reparations. The commentary indicates that full reparation means that the responsible state is obliged to wipe out all the consequences of the illegal act by providing one or more forms of reparation as set forth in Chapter II. The forms of reparation, listed in Article 34 and discussed more fully below, are restitution, compensation, and satisfaction, either singly or in combination, accompanied in appropriate cases by interest."

Concerning COVID-19 pandemic, China, which seems responsible for the formation of this pandemic and its spread to the whole world, needs to repair the damages that other states and their citizens have caused. However, considering the statements from China, the Chinese government does not bear the economic damages and loss of life. Whereas, "in any event, reparation is the "indispensable complement" of a failure to apply a convention; it is a duty of the wrong-doing state and not a right of the injured party, and it is a duty that arises automatically upon the commission of a wrongful act.

In fact, in Article 31 of the Draft Articles obligation of reparation is stipulated as the general consequence accompanying the responsibility of the State. As such, the obligation to repair does not arise from a right granted to the Victim State, but directly from responsibility. In other words, this obligation is defined not through the victim State, but through the responsible State, because it is a direct result of the responsibility and occurs spontaneously as a consequence accompanying the responsibility. As such, when the tort is committed by the breach of an obligation to more than one State, the difficulties that may arise from harming only one or several States are overcome. Thus, even before the affected State or States act and request repair, the automatic obligation to repair is legally obliged the underlying principle is that reparation must restore the **status quo ante** (the previous or last contested state before the current state). "Reparation should, insofar as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (Erkiner 2010, 207). In other words, According to international law, China must fulfill its liability for the tort it has committed the damage it has done to all states and citizens affected by the COVID-19 pandemic.

Article 35 has adopted the narrower definition, which has the advantages of focusing on the factual situation assessment rather than the hypothetical situation that would have occurred

had the tort had not occurred. As can be clearly seen in the article on compensation, the narrow definition adopted by article 35 sought to be completed with compensation in order to completely compensate the damage caused. Nevertheless, what is most in line with the general principles is the obligation of the responsible state to eliminate all material and legal consequences of tort by reestablishing the situation that would have existed if the tort had not been committed.

Restitution

Restitution related to the re-establishment of the situation, as far as possible, which had existed prior to the commission of the internationally wrongful act. "Law and economics analysis may question the primacy of restitution on grounds of efficiency, and, indeed, compensation might be more utilitarian than restitution in many cases. The logic behind restitution appears grounded in other values, however, such as the equality of states. Restitution avoids forced sales whereby a wealthy state can pay to obtain and keep a benefit, territory, or resource that could not be obtained by a poor state through similar (illegal) means. The more extensive burden of restitution might also act as a deterrent, for example in environmental cases, where remediation or restoration of the damaged milieu usually costs much more than compensation for financially assessable harm" (Shelton 2002, 844). The injured state has the authority to request a return from the state that committed an international tort in a way that restores the situation before the wrongful act was committed. Restitution;

- ✓ If not financially impossible,
- ✓ Does not involve the breach of the obligation arising from the mandatory norm of international law,
- ✓ If the benefit to be obtained by the damaged state from returning the compensation to its former state does not create a disproportionate burden
- ✓ If the exact return is not achieved, the damaged state is similarly unaffected, while the wrongdoing must seriously endanger the economic stability or political independence of the state (Ertuğrul 2011, 190-191).

Concerning these conditions above, the restitution seems very difficult reparation form about COVID-19 pandemic because how can China restitute other states financial and political loss and how can bring back more than 1 million dead people and how can restore to world to old form before new type corona virus.

In fact, Restitution is particularly important in cases of mandatory violations and ongoing violations. In this respect, at the very beginning of the pandemic process, the delay of the Chinese administration to notify the World Health Organization of the epidemic and the subsequent notification can be considered in this context. For example, the unlawful addition of land by a state to its country, the occupying state's withdrawal of the occupying forces, and the invalidity of the order that unjustly gained territory can be seen as a suspension or an end to the wrongdoing rather than returning the former state.

Compensation

Compensation is intended only to indemnify quantifiable losses suffered by the injured state. For this reason, compensation is perhaps the most common in international practice. In the event that compensation is not provided or when the consequences of the damage caused are not completely eliminated, the state that caused the damage due to the wrongful act is obliged to pay to the injured state and its citizens the financially calculable compensation including the loss of profit. The basic requirement of compensation is that it should cover any financially assessable damage flowing from the breach

The "commentary makes clear that the obligation of full reparation excludes exemplary or punitive damages or other awards that would extend beyond remedying the actual harm suffered as a result of the wrongful act. The stated goal of full reparations raises numerous problems of

determining the **financially assessable damage**, including loss of profits, which are discussed in connection with Article 36, on compensation. Overall, however, it can be said that terms like 'full reparation' and 'make the injured party whole' do not facilitate decision making by tribunals or claims practice of parties because they are too general to provide practical guidance." (Shelton n.d., http://www.corteidh.or.cr/tablas/r30119.pdf).

"Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character."(Article 36, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 99) Compensation is normally a matter of negotiation. There are no established principles for calculating the sum to be paid. In many cases though, the quantification of damage is only approximate. In other cases such as those involving loss of property (e.g., expropriation), the damage is assessable in the context of market price, including even the loss of profits, and therefore it may become compensable. The qualification "financially assessable" excludes compensation for non-material damage (referred to as "moral damage"), for example, the affront or injury caused by a violation of rights not associated with actual damage to property or persons. International tribunals have been reluctant to grant exemplary or punitive damages. (Verma 2017, 163)

The scope of the compensation is usually "replacement costs for destroyed property, costs of repairing damaged property, and lost profits are all discussed, as are the kinds of harm that are more difficult to measure financially, such as loss of life, arbitrary detention and other personal injury, and environmental damage" (Shelton n.d., http://www.corteidh.or.cr/tablas/r30119.pdf).

Although it is accepted as the basic principle for restitution, it is not possible or insufficient compensation for most of the time, making the most preferred form of expense. Even if restitution is materially possible or does not constitute an excessive burden due to the principle of proportionality, the damaged states often prefer compensation. In addition, compensation plays a role in filling this gap in cases where reinstatement cannot provide full compensation.

Concerning the COVID-19 pandemic, the compensation seems better way to recover loss of injured states and its nationals. However, especially the difficulty and complexity of detecting the damage in developing economies and the determination of the amount of compensation to be determined is one of the biggest obstacles. In addition, the real obstacle to overcome is whether China will accept its flaws in the pandemic process and accept to pay compensation. Considering past experiences and current discourses of China, it is possible to say that it will ignore the compensation demands from other countries and have no intention of taking responsibility for this epidemic. On the other hand, the amount of compensation to be paid will be quite high under current conditions. Considering the amount of states and citizens damaged by the pandemic, it is possible to say that this amount is already at the level of trillion dollars.

Satisfaction

Satisfaction is the remedy for those injuries that are not financially assessable but amount to an affront to the state. "These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the state concerned." (Article 37, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 106) "Satisfaction may consist of an acknowledgment of the breach, an expression of regret or apology, or 'another appropriate modality' that is neither disproportionate nor "humiliating" to the responsible state." (Shelton 2002, 848)

Satisfaction is also available for the injury that is sometimes described as "non-material injury". In many cases, an authoritative finding or declaration of the wrongfulness of the act by international courts and tribunals has been held to be sufficient satisfaction. Though a "declaration by a competent court or tribunal may be treated as a form of satisfaction in a given

case, such declarations are not intrinsically associated with the remedy of satisfaction. Regret or apologies by the responsible state is also a form of satisfaction" (Verma 2017, 164). Article 31 of the Draft Articles draws general framework of satisfaction in three sections

1) "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation
2) Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality
3) Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible state" (Article 37, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 105).

Article 37 is divided into three paragraphs, each showing a separate dimension of satisfaction. The first paragraph shows the type of damage assumed and the legal character of satisfaction. The second paragraph enumerated some forms of satisfaction. The third paragraph restricts the said liability for its unreasonable forms. Pecuniary or non-pecuniary damage arising from international tort can normally be valued economically in order to be subject to compensation. However, for the satisfaction of damages that humiliate a state, there is no financial appraisal of the damage. These damages are mostly symbolic in nature. These are also called non-material damages.

There are many instances where satisfaction is desired when a state's international tort causes non-material damage to another state: (Bozkurt, Kütükçü, and Poyraz 2003, 283). These examples include

- ✓ Deliberate attacks on heads of state or government, representatives of embassies, consulates or other protected persons or their buildings
- ✓ Annexes or violation of territorial integrity and sovereignty by attacking planes, insulting state symbols such as flags. (Article 37, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, 105).

It is stated in Article 37/2 that satisfaction can consist of acknowledgment of the violation, a statement of repentance, an official apology or other appropriate forms. Appropriate forms of satisfaction are not previously stated and will be determined by the specific situation. The absence of an international rule of law regarding the content and scope of satisfaction required a decision by the injured party or unilaterally or by the arbitral authorities. (Hagy 1986, 185) Saluting the flag of the state that has been damaged morally and the administrative and legal sanctions of the state official who caused the damage are seen as a form of satisfaction in practice. (Bozkurt, Kütükçü, and Poyraz 2003, 283) Also, in Germany, the obligation to include the Jewish genocide in school textbooks or to make a program on the relevant genocide on state televisions can be given as examples (Doğan 2008, 237).

Although the trend towards satisfaction in practice differs from materially compensatory forms of compensation such as compensation or restitution, this distinction is not absolute. Although the satisfaction is not of a criminal nature, the existence of preventing or deterring the occurrence of tort is not denied.

Concerning COVID-19 pandemic, the satisfaction can be accepted as most reasonable and cheapest way for the China. However, it is possible to say that the Chinese government did not even consider a formal apology, let alone acknowledging the satisfaction method. Of course, not apologizing or taking responsibility for the pandemic will not make China innocent.

It has been argued that the lack of institutions that do not have the ability to execute functions such as punishing and prosecuting crimes committed by states may make it more necessary to apply for mitigating solutions, and this increases the scope of application of satisfaction. Satisfaction was not seen as contrary to state sovereignty, it was considered as a form of taking heart. Limiting the outcome of international tort to restitution or compensation

means ignoring the necessity of some specific solutions for moral, political, and judicial mistakes, which has been one of the points for satisfaction supporters. (Ertuğrul 2011, 69)

Conclusion

The international responsibility of the State may also arise from a breach of bilateral obligations or from a breach of an obligation to more than one State. In fact, responsibility may have arisen from the breach of an obligation to the general of the international community. As in the example of the spread of the Corona virus all over the world, breach of an international obligation can affect the entire international community. A State may exhibit relatively mild torts, as well as much more severe torts than these. "Severe violations of the obligations to the general of the international community" will constitute such grave tort.

In addition, it is an undeniable fact that there is a connection between the actual situation, namely the damage (material and moral damages caused by the corona virus) and the cause. While the breach of an international obligation is necessary for an act contrary to international law, it is not sufficient. An additional condition is necessary to create an automatic link between the state to which the act is attached and the claiming state in terms of responsibility; this is the existence of a damage suffered by the claiming state. Here, the necessity of harm is not part of the primary rules, but is related to secondary rules, as the existence of harm will come to the fore at the diplomatic or judicial level. Therefore, a state will only have liability if another is harmed due to an illegal act. The necessity of the damage derives from the fundamental legal postulate that "no person can bring a case without a legal interest". In this respect, states do not have floating rights to seek redress for any violation or contravention of any other state. (Bal 2006,152)

In this respect, it is obvious that in the corona virus pandemic that affects the whole international community, the Chinese administration is responsible for the damages it has inflicted on other states and its citizens due to the violation of its international obligations, and that this responsibility is obliged to compensate. For example, in the USA, "Missouri's attorney general filed a lawsuit against the Chinese government over its handling of the outbreak, saying China's response led to devastating economic losses for the state. Missouri's lawsuit was filed in a federal court last April by state Attorney General Eric Schmitt, alleging negligence on China's part. The complaint said Missouri and its residents have lost possibly tens of billions of dollars, and it seeks cash compensation. The Chinese government lied to the world about the danger and contagious nature of COVID-19, silenced whistleblowers, and did little to stop the spread of the disease" (Tan 2020). However, "China is bound by international law to report crucial public health information in a timely, accurate and detailed manner. However, it 'failed in its obligations to do this' through December and January in the early stages of the outbreak" (Henderson, Mendoza, Foxall, Rogers, and Armstrong 2020, 16).

It is seen in the official statements that China will not accept responsibility for these claims and that the virus has emerged naturally and has spread to the world outside of its control, and will claim that other states have not taken the necessary precautions even though they warn the world and will defend itself in this way.

In this case, it is possible to say that China rejects those claims will try to ignore the compensation claims and resist the judiciary as much as possible. For instance an official transcript of a regular press briefing of Chinese foreign ministry spokesman Geng Shuang: The lawsuit from Missouri 'has no factual or legal basis' and "it only invites ridicule," The Chinese Government did nothing but warn the World Health Organization and the USA and other relevant countries about the pandemic in an open and transparent manner. "Such a lawsuit is nothing short of frivolous litigation which defies the basic theory of the law," "Based on the principle of sovereign equality prescribed by international law, US courts have no jurisdiction over the sovereign actions taken by Chinese governments of all levels in response to the

pandemic" (Tan 2020). In other words, states have sovereignty free of judgment, so if China does not want to, trial is not possible. Since China will not be a party to this case, even if compensation is awarded, China will not pay it.

However, the international community may need to use economic and security tools to force China to sit on the table by legally claiming the damage caused by the pandemic. In this case, for example, it may be possible to see all states around the world to act together to boycott Chinese goods and to see embargoes and sanctions against China in the coming days. If there is no consensus within the international community on sanctions against China, then any state may suspend its legal obligations to China in order to persuade China to pay compensation. If the world does not act in response to this breach of international obligation the states will have to calculate when the next virus will exit from China. To take action against such wrongful act of state requires not only courage but also global solidarity.

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