

**International Responsibility for violation of the due diligence
obligation to
prevent the spread of Coronavirus**

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Abstract

In response to serious consequences resulting from the new type of the Coronavirus or COVID-19 disease (the Coronavirus), several States have sought to find out the source of the virus and whether there was any State that facilitated intentionally or accidentally the spread of the virus. In this case, the issue of international responsibility might be invoked against this State.

This article seeks to answer this question: To what extent can a State be held responsible under international law for the spread of the Coronavirus? In order to answer this question, this article will examine the legal framework of the due diligence obligation to prevent the spread of the Coronavirus and the hypothesis of violation of this obligation in light of rules of State Responsibility.

In this article, the researcher argues that determining the responsibility of one State for violating its due diligence obligation to prevent the spread of Coronavirus is a challenging process, because of the nature of due diligence obligations generally, as well as the force majeure as one of the grounds precluding State Responsibility.

Keywords: State Responsibility; Coronavirus; obligation; due diligence

1. INTRODUCTION

As Coronavirus has spread to 114 countries, the World Health Organization (WHO) declared on 11 March 2020 that Coronavirus became a global pandemic.¹ Coronavirus has caused a painful loss of lives over the world, reaching more than 4 million people until the writing of this paper.² It also generated a social disruption within the communities and a severe economic recession, which affected giant commercial companies and States as a whole.

Mike Pompeo, the former Secretary of State of the United States, has declared in a press conference that China failed to undertake its responsibility for preventing the spread of

Coronavirus in the world.³ Thereafter, the media reported recently that India failed to prevent the spread of the mutated strain of the Coronavirus.⁴ Following these declarations and reports, the issue of international responsibility of States for the spread of the Coronavirus has been surfaced.

Many authors have written - after the Corona epidemic - about the substantive international obligations imposed on States in the field of health care.⁵ However, this paper will specifically focus more on the due diligence obligation to prevent the spread of Coronavirus, and how this obligation can be employed by a State - in the case of failure - to invoke the responsibility of another State.

Someone may inquire as to whether the due diligence obligation to prevent Coronavirus spreading extends extraterritorially. In its commentary on Article 29 Vienna Convention on the Law of Treaties, which states that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory", the International Law Commission (ILC) pointed out that this provision is not intended to exclude a possible extraterritorial application of treaties,⁶ and the human rights treaties can be a good illustration of such treaties. There will be discussed elsewhere in this paper how some of the legal basis for the obligation to prevent the spread of Coronavirus can be based on human rights conventions, that have extraterritorial application. The International Court of Justice (ICJ) and the European Court of Human Rights (ECHR) accepted positive extraterritorial obligations in their case law.⁷ In addition, case law that supports the due diligence obligation to prevent the spread of epidemics, such as the Coronavirus – as will be listed later – constitutes, from another hand, evidence of extraterritorial human rights application. It seems that the state's responsibility to fulfil and protect a person's human rights abroad comes from its power, or ability to positively influence a person's human rights situation abroad.⁸ It can be said that the due diligence obligation to prevent the spread of Coronavirus is not only applied within the territory of a State but is also subjected to extraterritorial application. Consequently, the State is principally required to adopt measures to prevent the spread of the Coronavirus within and out of its territory according to extraterritorial human rights application. If the State failed to adopt the necessary measures to prevent the spread of the Coronavirus, it would be responsible for the spread of the Coronavirus beyond its territory, regardless of who is responsible for causing this harm, whether a governmental sector or private entity.

Another question that can arise in this context is: how to assess whether the State has already met its obligation to prevent the spread of Coronavirus? Answering this question is crucial because it represents an essential element within State Responsibility. In fact, in many areas of international law, there is no uniform standard of conduct expected of States or international organisations in discharging their obligations and thus this reveals the importance of the due diligence concept.⁹ Moreover, the obligation of prevention has largely been viewed as an obligation of due diligence, namely, best efforts and that all reasonable or necessary measures are taken, to prevent a given event from occurring.¹⁰ Based on this, the researcher in this paper has adopted the standard of due diligence in order to assess the extent of compliance with the obligation to prevent the spread of Coronavirus. In other words, the obligation to prevent the spread of Coronavirus will be classified in this paper as a due diligence obligation. Nevertheless, the researcher in this paper argues that it is difficult to invoke the responsibility of a State for the

violation of the due diligence obligation to prevent the spread of Coronavirus, due to two reasons that will be illustrated later.

Before examining this issue in detail, it is necessary to confess that recourse to the international courts and tribunals to invoke the responsibility for one State might be expensive and time-consuming in some cases.¹¹ State Responsibility can therefore be used outside international courts and tribunals, through less formal mechanisms, such as correspondence between governments, or the declarations issued by intergovernmental commissions and human rights treaty bodies to determine the breach of these obligations and then State responsibility for this breach.¹² It can be said that the violation of the due diligence obligation to prevent the spread of Coronavirus is a good illustration of cases of State responsibility that can be invoked out of the formal mechanisms, because of the complexity of this issue from the perspective of State sovereignty that means that a State cannot be forced to appear before an international court without its consent.¹³ Furthermore, it is difficult to obtain the needed evidence that proves the failure of the State to comply with the due diligence obligation to prevent the spread of Coronavirus. For these reasons, Mazzuoli and Fidler believe that it is unlikely that States will raise state responsibility against China because of the COVID-19 pandemic.¹⁴ The legal framework for determining responsibility for violations that arise during epidemics (such as Coronavirus) is primarily governed by human rights law as the primary rules, while the system for assigning the responsibility for epidemics is located under principles of responsibility.¹⁵ In the first section of this study, the researcher will show the legal basis that backs the due diligence obligation to prevent the spread of epidemics, such as the Coronavirus, and then the extent of responsibility for the violation of such obligation will be examined in section two.

1. The legal basis of the due diligence obligation to prevent the spread of epidemics

International law provides currently a comprehensive legal framework in the field of dealing with epidemics and disease outbreaks, which requires essentially from States to prevent their harmful consequences.¹⁶ Many rules of this framework directly or indirectly address the prevention and response to epidemics and take the form of due diligence obligations.¹⁷ On this basis, it can be said that the obligation to prevent the spread of epidemics, such as the Coronavirus can be classified as one of the obligations of due diligence not to cause harm, being one of harm prevention that requires States to adopt precautionary measures in cases of potential transboundary harm, emanating from their territory or jurisdiction and affecting other States or their populations.¹⁸ The due diligence obligation to prevent the spread of epidemics, such as the Coronavirus can be founded on the basis of customary international law and treaties.

1.1. The customary basis of the due diligence obligation to prevent the spread of epidemics

The due diligence obligation to prevent the spread of Coronavirus can be classified as one of the obligations of due diligence not to cause harm. The "harm" can occur when the State fails to act with due diligence, even when this requirement does not appear explicitly within the relevant instrument,¹⁹ and the concept of 'harm' is broad enough to include the consequences of an epidemic outbreak such as Coronavirus.²⁰ It can be said that States are required to adopt the possible measures to prevent transmission of epidemics, such as the Coronavirus to other countries upon becoming aware of its risks or from the moment those risks became expected.²¹

This conclusion can be supported by case law, such as the Alabama Arbitration that took place in Geneva in 1871 to resolve claims made by the United States against Great Britain arising from Britain's conduct as a neutral State during the American Civil War (1861–1865).²² Following the outbreak of war on 13 April 1861, President Lincoln declared a blockade of all ports in the seceding Confederate States. The Confederate states had an urgent need of ships to break this blockade, and for this reason, they sent agents to Europe to buy ships for use as warships against the North. One of these ships was built in Liverpool, and another was built in Birkenhead. Despite the attempted disguise, the American spies found out that these ships were intended for the Confederate service, a fact reported to the US minister in London, Charles Francis Adams, who made urgent representations to the British authorities asking that the vessels be detained. But the foreign secretary replied that there was no evidence to warrant detention, in addition, the vessel sailed before instructions to detain were received. The Liverpool ship sailed for the Azores, where it received its guns, ammunition, captain, crew, and changed its name to Alabama. Alabama sailed all over the world attacking US vessels, of which it burned or sank before it was itself sunk off Cherbourg in June 1864. The United States demanded compensation from Britain for the loss of ships and property caused by Alabama and other vessels, which was estimated at US\$15 million. On 8 May 1871, the Treaty of Washington was established as a basis for a settlement, that provided for Alabama claims to be resolved by an arbitration commission. One of the important rules set out in Article VI was:

"A neutral Government is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use."²³

Another case that supports the customary nature of the due diligence obligation to prevent the spread of epidemics is the 1923 Tellini case.²⁴ Tellini was a member of an Italian delegation sent by the League of Nations to survey the disputed border between Greece and Albania. He was shot and killed. The League of Nations created a special committee to address the legal issues raised by the accident. Although the committee refused to attribute the action to the Greek, it declared that the host State could be responsible in like circumstances if it neglected to take all the reasonable measures for the prevention of the crime, arrest and bring the criminals into justice. Trail Smelter 1941 is another example in this regard.²⁵ The Trail Smelter located in British Columbia since 1906, was owned and operated by a Canadian company. The fumes emitted from Trail Smelter caused damage to plant life, forest trees and soil across the border in Washington State in the United States between 1925 and 1937. The United States sued Canada

over this, and the arbitration commission determined that States have a responsibility to protect other States from the harmful acts of individuals within their jurisdiction.

A number of ICJ judgments also contributed to prove that due diligence is required to prevent the spread of epidemics such as Coronavirus. For instance, the ICJ stated in the Corfu Channel judgment that “it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²⁶ In the same context, the ICJ in the 2010 Pulp Mills judgment clarified what may be required by a State to fulfil its obligations of prevention and due diligence.²⁷ The ICJ decided that “a State is thus obliged to use all of the means at its disposal in order to avoid activities that take place in its territory, or any area under its jurisdiction, causing significant damage to the environment of another State”.²⁸

Recently, the Permanent Court of Arbitration in the 2016 South China Sea case has supported the due diligence obligation to prevent the spread of epidemics. In this case, the Philippines claimed that China violated its obligations of due diligence under the United Nations Convention on the Law of the Sea by supporting unlawful fishing, including endangered species in the Philippines's Exclusive Economic Zone.²⁹ The court concluded that China had breached its obligation of due diligence to prevent the Chinese-flagged vessels from the harmful fishing practices in the Philippines's Exclusive Economic Zone.³⁰

Finally and away from case law, Principle 21 of the 1971 Stockholm Declaration refers to the obligation of due diligence not to cause harm by imposing an obligation on States to ensure that “activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”³¹ The 2001 Draft Articles on the Prevention of Transboundary Harm, adopted by the International Law Commission has explicitly referred in Article 3 to an obligation imposed on States to “take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.” The obligation in this article is applicable to activities that involve a risk of causing significant transboundary harm,³² such as the spreading of epidemics. Therefore, States are required to adopt “all appropriate measures” that may include legislative and administrative measures, as well as other action necessary for enforcing the laws, administrative decisions and policies addressed,³³ for example, to medical labs, hospitals, hotels and flight airlines to prevent the spread of epidemics, such as Coronavirus to other States.

It can be concluded that the due diligence obligation to prevent the spread of epidemics, such as Coronavirus has a legal basis in case law as a due diligence obligation on States not to cause harm to other States. The 1971 Stockholm Declaration and the 2001 Draft Articles on the Prevention of Transboundary Harm can be considered as a part of the customary basis that contributes to boosting the due diligence obligation to prevent the spread of epidemics, such as Coronavirus.

1.2. The conventional basis of the due diligence obligation to prevent the spread of epidemics

The legal framework for addressing pandemics is spread across varied legal systems.³⁴ In the field of human rights conventions, rights to life and health are the most relevant in this aspect,

particularly, public and private acts and omissions in the healthcare sector might be an essential reason for violation of these rights. In the context of these rights, human rights conventions impose on States parties the obligation to protect, by which States are required to prevent third parties from violating the rights of life and health. Based on this, the Human Rights Committee in the General Comment No. 36 stated that the obligation imposed on States to protect life requires them to adopt appropriate measures to address the general conditions in society that may give rise to direct threats to life, including the diseases threatening the life, such as AIDS, malaria,³⁵ and Coronavirus can be another case of point. To be more specific, the State is obligated to prevent third parties from the spread of the Coronavirus beyond its territory.

This conclusion is compatible with Bonnitcha and McCorquodale who determine that due diligence obligations are only relevant to the obligation to protect human rights from interference by third parties.³⁶ Nevertheless, it can be argued that due diligence obligations, such as the due diligence obligation to prevent the spread of epidemics fall also within the scope of the obligation to fulfil human rights. In particular, the human rights conventions do impose a positive duty upon States parties, which means that they should take the necessary measures to facilitate the individual's enjoyment of lives and health when they are on the territory of the State or under its jurisdiction.³⁷ Further details, the due diligence obligation to prevent the spread of epidemics is also relevant to the obligation to fulfil since the State itself is required not to spread epidemics, such as Coronavirus beyond its territory, by adopting the necessary measures.

Article 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes an obligation on States parties to recognize the right of everyone to the enjoyment of the highest standard of physical and mental health. For this purpose, the States parties are required to take the necessary measures for the prevention, treatment and control of diseases and epidemics,³⁸ such as Coronavirus. In addition, the Committee on Economic, Social and Cultural Rights has decided that “ States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries.”³⁹

It can be said that the human rights framework mentioned above reflects the due diligence obligation to prevent the spread of epidemics that requires positive measures on the part of a State to prevent the spread of the Coronavirus.

Another important framework for addressing epidemics is the 2005 International Health Regulations (IHR). These regulations have been adopted under Article 21 of the WHO constitution that states that the Health Assembly shall have authority to adopt regulations concerning rules and procedures aiming to prevent the international spread of disease. At the same time, Article 22 of the WHO constitution provides in relevant part that “[r]egulations adopted pursuant to Article 21 shall come into force for all Members.” This means that the IHR is legally binding to all States members of the WHO.⁴⁰ These regulations aim to prevent, protect against, control and provide health response to the international spread of disease, in ways that achieve the balance between the risks of public health and the necessary interference with international traffic and trade.⁴¹ It can be said that the IHR was specifically designed to address public health issues such as the pandemic caused by the new Coronavirus.⁴²

It should be noted that the IHR only addresses States, not corporations and other non-governmental actors,⁴³ and therefore States are required, on the one hand, to fulfil their obligation of due diligence to prevent the spread of Coronavirus through the adoption of the necessary

measures. Generally, States should adopt first and foremost administrative and enforcement measures that include guaranteeing access to food, water, medicines and other objects indispensable to survival.⁴⁴ States are also required under these regulations to adopt and develop better functioning health systems to detect disease, surveil, report, verify, and respond, among others.⁴⁵ States responsible for testing labs should utilize the recourses gained from those activities and have the primary responsibility for preventing any viruses that may be caused harmful consequences.⁴⁶ It is necessary to adopt emergency health measures, emergency response operations, and emergency management plans,⁴⁷ and establishment field hospitals, which may all help to protect patients' lives and prevent the spread of the Coronavirus. States must establish 'prevention and education programmes for behaviour-related health concerns,⁴⁸ such as those call individuals for hand-washing, social distancing and staying at home. Measures of surveillance, monitoring and notification are necessary for complying with the due diligence obligation to prevent the spread of Coronavirus. For instance, States must also share all public health information concerning (Coronavirus) with the WHO, and notify the latter within 24 hours of any health measure which the State has already adopted in response to a 'public health emergency of international concern.'⁴⁹

On the other hand, States are required with due diligence to monitor the activities of private actors that may affect the rights to life and health. As a part of this process, States are, for example, expected to adopt a wide range of regulations, administrative and enforcement measures that prevent private actors from engaging in activities that might result in the transmission of epidemics, such as the Coronavirus, to other States. States must adopt regulations and enforcement measures that ensure entities and companies in charge of international transport and travel comply with the health measures recommended by the WHO.⁵⁰

2. State responsibility for the violation of the due diligence obligation to prevent the spread of the Coronavirus

The principle of State Responsibility is one of the indisputable principles of international law that was developed mainly by case law. The 2001 Draft Articles on State Responsibility for Internationally Wrongful Acts (the Draft Articles on State Responsibility) represents the core text on the topic of State Responsibility. Although the Draft Articles on State Responsibility is not a treaty, and thus not binding for States, it does reflect the international customary law of State responsibility, based on the case law and state practice.

According to the Draft Articles on State Responsibility, 'every internationally wrongful act of a State entails the international responsibility of that State.'⁵¹ There must be two elements in place to establish an internationally wrongful act. The first element is an action or omission that constitutes a breach of an international obligation of a State.⁵² The second element is that this action or omission must be attributed to the State under international law.⁵³

Under Article 12 of the Draft Articles on State Responsibility, 'there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'⁵⁴ This means that the source of the obligation can be a treaty, a custom or any other source of international law. The textual

interpretation of this article suggests that a failure by a State to comply with the obligation of the due diligence obligation to prevent the spread of Coronavirus constitutes a breach of this obligation. As such, the State could be responsible under international law if it failed to adopt the necessary measures - mentioned above – that reflect the due diligence obligation to prevent the spread of Coronavirus.

However, to determine that the State is internationally responsible for the breach of the due diligence obligation to prevent the spread of Coronavirus, whether, through an act or an omission, this breach must be attributed to that State. In terms of attribution, the responsibility of the States for the breach of obligation of the due diligence obligation to prevent the spread of Coronavirus might be varied, and this will be discussed in subsection (2.1), while the subsection (2.2) will highlight two grounds that might preclude State Responsibility for violation of the due diligence obligation to prevent the spread of Coronavirus.

2.1. Forms of State Responsibility

A State might be responsible for violating the due diligence obligation to prevent the spread of Coronavirus when it has knowledge that the Coronavirus is existed and spread within its territory, and it fails to adopt the necessary measures to prevent the virus from crossing to other States. The State Responsibility for violating due diligence obligation to prevent Coronavirus may be direct or indirect, depending on the link of attribution between the perpetrator and the State.

A State could be held responsible if the action or omission that caused the spread of Coronavirus, was attributed to the State. The main idea of direct State responsibility is finding a link of attribution between a person or an actor who committed the breach, and the State. Articles 4 to 11 of the Draft Articles on State Responsibility outline the links of attribution, but not all of them are applicable to the case of violating the due diligence obligation to prevent Coronavirus spread.

Direct responsibility for violating due diligence obligation to prevent the spread of Coronavirus can attach when the action or omission that caused the spread of Coronavirus, committed by any State agent,⁵⁵ de facto State agent,⁵⁶ or the agent empowered to exercise government authority under the law of that State.⁵⁷ In addition, Article 8 of the Draft articles covers the cases of failure, committed by a person or entity who acts on the instructions, or under the direction or control of the State in preventing the spread of Coronavirus. Finally, the State could be responsible for the spread of Coronavirus if it acknowledged explicitly or implicitly that the conduct of the breach is it's own.⁵⁸

When the Cholera epidemic spread in Haiti in 2010, multiple actors contributed to the spread of the disease, including the Nepalese military, who deployed personnel to Haiti to provide medical screening, but the screening failed to detect Cholera in the deployed troops, causing the spread to the general population.⁵⁹ Additionally, the UN failed to provide sanitary facilities for treating waste at the camp, and it did not have an effective monitoring system over its bases and contractors.⁶⁰ Despite the shared responsibility of these external actors, it has been reported that

the Haitian government also was responsible for the spread of the Cholera epidemic on its territory because its enforcement authorities failed to exercise due diligence and take necessary measures to prevent the harm.⁶¹ As the acts or omissions of enforcement authorities in a State are attributed to the State,⁶² the Haitian government had direct responsibility for this violation.

Mazzuoli decided that the Chinese Center for Disease Control and Prevention has not informed the WHO in the early stage that the Coronavirus started to transmit from a person to person in China and thus the latter violated the due diligence obligation to report "all relevant public health information to WHO" within the 24 hours, as determined by the IHR.⁶³ Mazzuoli attributed the lack of diligence by the Chinese Center for Disease Control and Prevention to the Chinese government, because this Center is a highly technical organization at the national level specializing in controlling and preventing public health diseases.⁶⁴ It may thus be argued that China might be directly responsible for the violation of the due diligence obligation to report to the WHO that was committed by the Chinese Center for Disease Control and Prevention, and such a presumption might be based on Article 4 of the Draft Articles on State Responsibility.

It has been recognised that the obligation not to cause harm, in general, requires positive measures on the part of a State to prevent the violations committed by the private actors.⁶⁵ In the *Corfu* case, the ICJ ruled that every State has an obligation not to allow knowingly its territory to be used for acts that violate the rights of other states.⁶⁶ On this basis, the State could be responsible indirectly for the violations of human rights committed by the private sector if it failed to take reasonable or appropriate measures to prevent such violations. The indirect State Responsibility of the State is a consequence of indirect involvement of the State in a wrongful act, in which there is no attribution link between the actor who committed the wrongful act and the State.⁶⁷ In the 1979 *Hostage's Case*, the ICJ decided that although there is no direct involvement of the Iranian government in the attack of the United States Embassy in Tehran, the Iranian government was indirectly responsible for the attack.⁶⁸ The court established this decision on the basis that the latter failed to take any appropriate steps to protect the embassy, the staff and archives of the United States mission against attack by militants, and to take any steps either to prevent this attack or to stop it before it reached its completion.⁶⁹

When it comes to Coronavirus, it is difficult to hold a State responsible for the spread of Coronavirus in its neighbouring States when the State has no link with actors who caused this harm, such as the Labs or commercial carriers. In this case, the indirect responsibility could be invoked against this State if it failed to comply with the obligation of due diligence to prevent the private actors from the spread of Coronavirus, and the breach of the State will take the form of an omission, whether deliberate or innocent, instead of an act.

2.2. Grounds for excluding State Responsibility for the violation of the due diligence obligation to prevent the spread of Coronavirus

As shown above, it is well established in international law that States have an obligation to prevent the spread of epidemics, such as the Coronavirus, but invoking responsibility against a

State who violated that obligation is a complex process because of two reasons, that will be discussed below.

2.2.1. The nature of the due diligence obligations

The obligation of 'due diligence' reflects a standard of good governance, assessing whether a State has done what was reasonably expected of it when facing harm or danger.⁷⁰ A due diligence obligation is generally flexible, and it "depends on States' capacity to adopt the necessary and appropriate measures in light of their available technical, human and economic resources."⁷¹ This makes States have a wide margin of discretion, particularly, when they choose appropriate measures which depend on factors such as the capacity of States, imminence and type of harm, available scientific knowledge and compliance with other international obligations.⁷² In the *Wipperman* case, it was stated that no State is responsible for acts of individuals 'as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs."⁷³ However, the term 'reasonable' is difficult to determine and leaves States much discretion in the choice of means. In light of the above and depending on the individual State's assessment of its capacity, the State that takes all reasonable measures to the maximum of its resources, and is still unable to meet its obligations due to causes beyond its control, might not be responsible.⁷⁴

Furthermore, most of the obligations that require the States to prevent the spread of diseases are obligations of conduct and not result, and then they come within the category of the obligation of the due diligence.⁷⁵ Such obligation requires from States to *attempt* to prevent harm or to reduce the risk thereof, to the best of their capacities.⁷⁶ Thus, when it comes to Coronavirus, the State is not obligated to prevent it from spreading or to prevent private actions that cause it, but only to attempt to prevent it with due diligence, without any obligation to achieve a specific result. Therefore, it is not uncommon for States affected by Coronavirus to be unable to invoke the responsibility against the State that failed to prevent the spread of the Coronavirus. In other words, due to the nature of the due diligence obligations, a State that failed to prevent the spread of the Coronavirus and caused harm to other States may deny any form of responsibility.

2.2.2. Force majeure precluding wrongfulness

In the draft ILC Articles on State Responsibility, Article 23 states that an unforeseen event beyond the control of the State can preclude wrongfulness in cases where the act is due to unforeseen circumstances in which it is materially impossible to perform the obligation.⁷⁷ This means that any event invoked by a State as *force majeure* must be "neitherforeseen nor of an easily foreseeable kind",⁷⁸ which make the State is unable to comply with the obligation in question. To put it more simply, the impossibility of performing an obligation may be the result of an unforeseeable event.⁷⁹ For instance, the arbitration commission in the *Gill* case, in which the house of a British national residing in Mexico had been destroyed because of sudden and unforeseen action by the Mexican government opponents, decided that failure to prevent the act

was due not to negligence but to genuine inability to take action in the face of a sudden situation.⁸⁰

In the case of Coronavirus, it is necessary to assess whether the virus is an unforeseen event and beyond the control of a State. As early as the Corona epidemic is underway, there is a possibility that the pandemic might be unforeseen because of the vagueness about the cause of the disease.⁸¹

In addition, the speed transmission of the virus by shaking hands, dropping saliva, sneezing, coughing, and touching contaminated surfaces, such as cell phones, tablets, knobs, toys, and computer keyboards,⁸² would make any State unable to control the virus. The lack of vaccine is another factor that would make the Coronavirus beyond the control of the State. The *force majeure* had been used in cases to preclude the wrongful act when “a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter’s authorization.”⁸³ Consequently, it is not difficult for a State to preclude – on the basis of *force majeure* – its responsibility for the violation of the due diligence obligation to prevent the spread of Coronavirus.

However, two cases enumerated in Article 23 (2) of the Draft Articles on State Responsibility might weaken or refute force majeure as a basis to preclude State Responsibility for violating the due diligence obligation to prevent Coronavirus spread. An exception is provided in paragraph 2 (a) for cases where the State had “caused or induced the situation”, meaning that the situation of force majeure must be attributable to the State's conduct itself.⁸⁴ In the course of the Coronavirus, a State that does not close the markets of selling of bats (origin of the virus) or stop the wildlife trade in general, cannot invoke the force majeure to preclude its responsibility for the spread of the Coronavirus. It is important to note, however, that the commentary to Article 23 indicates that paragraph (2) (a) cannot be applied in cases where the State unwittingly contributed to the situation of *force majeure*.⁸⁵ This means that State responsibility for the violation of the due diligence obligation to prevent the spread of Coronavirus can still be avoided.

In the second case, a State could not invoke *force majeure* to preclude its responsibility for the violation of the due diligence obligation to prevent the spread of Coronavirus if this State accepted the risk of the occurrence of the *force majeure*, as determined by Article 23 (2) (b).⁸⁶ As the State accepts the risk of a situation as a consequence of its previous conduct or its unilateral act, it is not possible to claim *force majeure* in order to avoid State Responsibility.⁸⁷ For instance, a State that knew that Coronavirus began rapidly spreading from person to person within its territory and took preventive measures only after the virus became pandemic could not invoke *force majeure* to avoid responsibility for the spread of Coronavirus to its neighbours. In this case, the State accepted the initial risk resulting from the Coronavirus. But the commentary to Article 23 states that there must be an unequivocal assumption of risk and it must be aimed at those who owe the obligation.⁸⁸ Consequently, a State can argue that acceptance of the risk was intended to be within its territory and hence the force majeure can still be used as a valid ground to preclude its responsibility for the spread of the Coronavirus.

CONCLUSION

This article has shown the legal framework of the due diligence obligation to prevent the spread of Coronavirus, particularly, the legal basis and measures that must be adopted according to this obligation. The case law, human rights law and the 2005 International Health Regulations support the due diligence obligation to prevent the spread of Coronavirus. In fact, the legal framework of this obligation can be applied to any future pandemics.

It is supposing that a State that fails to comply with the due diligence obligation to prevent the spread of Coronavirus might be directly or indirectly responsible for this violation, depending on whether there is a nexus between the State and the wrongdoer. Nevertheless, this article has argued that it is difficult to prove the responsibility of the State for the violation of the due diligence obligation to prevent the spread of Coronavirus. This is because any due diligence obligation, such as the due diligence obligation to prevent the spread of Coronavirus grants States a margin of discretion and flexibility, by which the violation might not be proved. In addition, the *force majeure* set forth in Article 23 of the Draft Articles on State Responsibility can provide States with a legal basis to preclude the responsibility resulting from the violation of the due diligence obligation to prevent the spread of Coronavirus.

¹ See WHO, online at: <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, accessed 15 April 2020

² *Ibid.*

³ Amanda Macias, 'the world will make China 'pay a price' over coronavirus outbreak, Mike Pompeo says' CMBC. online at: <https://www.cnbc.com/2020/07/15/the-world-will-make-china-pay-a-price-over-coronavirus-outbreak-mike-pompeo-says.html>, accessed 15 December 2020.

⁴ Soutik Biswas, 'Covid-19: How India failed to prevent a deadly second wave' BBC, online at: <https://www.bbc.com/news/world-asia-india-56771766>, accessed 22 April 2021.

⁵ Matiangai Sirleaf, 'Responsibility for Epidemics' 97 Tex L Rev 285(2018); Matiangai Sirleaf, 'Ebola Does Not Fall from the Sky: Structural Violence and International Responsibility' 51 Vand. J. Transnat'l L. (2018): 477; Antonio Coco & Talita de Souza Dias, 'Prevent, Respond, Cooperate: States' Due Diligence Duties vis-à-vis the Covid-19 Pandemic, online at: <https://ssrn.com/abstract=3626627>; Claudio Grossman, 'Pandemics and International Law: The Need for International Action' 24 (3) Human Rights Brief (2021): 1.

⁶ ILC, 'Draft Articles on the Law of Treaties with commentaries 1966' (Yearbook of the International Law Commission, 1966, vol. II) Article 29, paras 4-5.

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- Article 5 of IHR requires States parties to develop, maintain and strengthen ... the capacity to detect, assess, notify and report’ manifestations of diseases or occurrences creating a potential for diseases.
- Article 13 of IHR calls States to develop, strengthen and maintain the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.
- Article 24 of IHR obligates the States parties to adopt all practical measures consistent with the Regulations to ensure that transportation operators comply with the health measures recommended by WHO.

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