COVID-19 Claims and the Law of International Responsibility

Martins Paparinskis*

Abstract
This paper considers the role that the law of international responsibility, both State responsibility and responsibility of international organizations, plays in claims and disputes about COVID-19. It proceeds by examining in turn the rubrics of the internationally wrongful act, content of responsibility, and implementation of responsibility. On most points, blackletter law is perfectly capable of answering the questions raised by claims related to COVID-19. But evolutionary potential inherent in the normal international legal process should also be noted, whether it manifests itself by further strengthening current rules, elaborating vague rules by application, filling gaps in current law by generating new practice or even, exceptionally, revisiting rules currently in force.

Keywords
COVID-19 - State responsibility - responsibility of international organizations – internationally wrongful act – content of responsibility – causality – implementation of responsibility – countermeasures

1. Introduction

The spread of COVID-19 in the first half of 2020 and reactions thereto by States and other actors raise important questions of international law. This is perhaps most obvious for different specialist fields and institutions, where almost every field has something to contribute. Consider the following non-representative examples: sometimes the focus of COVID-19-related arguments is on the manner in which rules and institutions contribute to its suppression, for example in health law[1] and water law.[2] In other instances, as in dispute settlement, the ability to appropriately take into account the pandemic's exceptional character is interrogated.[3] In yet other instances, the importance of not incidentally creating obstacles to suppressing COVID-19 is emphasised, as in

* Reader in Public International Law, University College London. Email: m.paparinskis@ucl.ac.uk. I am grateful to Yanwen Zhang for the help with Chinese sources in footnote 57 and to the journal's anonymous peer reviewers for their constructive criticisms.

1 World Health Organization, 'Coronavirus disease (COVID-19) pandemic' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

2 United Nations Economic Conference for Europe, 'UNECE instruments help countries ensure equitable access to water and sanitation for vulnerable groups – a vital defence against pandemics' (8 May 2020) <https://www.unece.org/info/media/news/environment/2020/covid-19-pandemic-shows-the-importance-of-integrated-approach-to-water-management-and-transboundary-water-cooperation/doc.html>.

3 Where some tribunals have been less willing to extend time-limits than others, cf. *The Estate of Julio Miguel Orlandini-Agreda and Or v Bolivia* (Procedural Order no 7 on Respondent's Request for Suspension of the Time-limit for the Submission of its Statement of Defence) PCA Case no 2018-39, April 10, 2020; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v Myanmar) (Order) [2020] ICJ Rep <https://www.icj-cij.org/files/case-related/178/178-20200518-ORD-01-00-EN.pdf>.

financial law,[4] or, conversely, as in the discussions about derogations in human rights law, the concern is about needlessly eroding legal protections.[5] Finally, sometimes the ability to prevent undesirable conduct in some way related to COVID-19 is at issue, like in human rights,[6] criminal,[7] and humanitarian law.[8] No doubt, readers will be able to point to other and better examples. The modest point that I want to make is that different specialist fields deal with the challenges of COVID-19 very differently, with an eye to peculiarity of drafting of primary rules and availability of international institutions and third-party dispute settlement or review mechanisms.

In short, it is not an easy task to take stock of COVID-19-related developments even within each specialist institution, let alone across whole specialist fields. But it is even more challenging to evaluate the effects of COVID-19 on the generalist vocabulary shared across the specialist islands of the normative ocean of international law, such as actors, sources, and responsibility. In practice, the generalist issues are likely to be framed very differently, depending on whether they arise in an inter-State negotiated dispute or are presented before an investor-State tribunal, a human rights tribunal or review institution, one of the many specialised inter-State dispute settlement mechanisms, or indeed before a domestic court.[9] It is doubtful that the generalist vocabulary of international law would be incapable of articulating claims relating to COVID-19. A flick through the sections on actors, sources, and responsibility in the standard 20th century blackletter text shows how the short century, while expanding enormously the breadth and depth of international

[4] World Bank, COVID 19: Debt Service Suspension Initiative (3 June 2020) <https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative>.

[5] J McBride, 'An Analysis of Covid-19 Responses and ECHR Requirements' (27 March 2020) <http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html>; Human Rights Committee, 'Statement on derogations from the Covenant in connection with the COVID-19 pandemic' UN Doc. CCPR/C/128/2 (30 April 2020).

[6] United Nations, 'Covid-19 and its human rights dimensions' <https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>; Council of Europe, 'Covid-19: Human rights are more important than ever in times of crisis' <https://www.coe.int/en/web/portal/covid-19>; Inter-American Commission of Human Rights, Resolution no 1/2020 'Pandemic and Human Rights in the Americas' (10 April 2020) <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>; ASEAN Intergovernmental Commission on Human Rights, 'Press Release on Coronavirus Disease 2019 (COVID-19) (1 May 2020) <https://aichr.org/news/press-release-on-coronavirus-disease-2019-covid-19-by-the-asean-intergovernmental-commission-on-human-rights-aichr/>; African Union, 'Webinar on Human Rights in Africa in the Context of COVID-19: Examining the role of AU Human Rights Organs in supporting Member States during and after a pandemic' (29 June 2020) <https://au.int/en/pressreleases/20200629/webinar-human-rights-africa-context-covid-19-examining-role-au-human-rights>.

[7] Committee of the Parties of the Convention on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention), 'Advice on the Application of the MEDICRIME Convention in the Context of COVID-19' (8 April 2020) <https://www.coe.int/en/web/medicrime>; Financial Action Task Force, <COVID-19-related Money Laundering and Terrorist Financing: Risks and Policy Responses> (May 2020) <https://www.fatf-gafi.org>.

[8] *The Oxford Statement on the International Law Protections Against Cyber Operations Targeting the Health Care Sector* (21 May 2020) <https://www.elac.ox.ac.uk/>; UN Security Council Res 2532 (2020) UN Doc S/RES/2532 (2020).

[9] R Bundy, 'The Practice of International Law' (2020) 406 Recueil des Cours 13.

law[10] and changing everything else from empires to jazz, did little to these rubrics between 1905 and 1992.[11] Nevertheless, there is no time better than a global crisis to revisit the solidity of generalist underpinnings of the international legal order. In this paper, I propose to reflect on how claims about COVID-19 are shaped by and will in turn shape the law of international responsibility.[12]

Secondary rules of responsibility apply to breaches of primary rules of any content, and very different primary rules may play a role in claims regarding COVID-19, as the examples in the first paragraph of this section suggest.[13] It would be too hasty to discuss in detail particular claims before the precise legal framing and evidentiary basis are available, since assumptions and prescriptions on the basis of incomplete information are likely not to age well (although I will refer to some claims by the US as illustrations).[14] Instead, consider the following hypotheticals for a flavour of COVID-19-related responsibility issues: did Dreamland, where COVID-19 originated, breach its customary obligations not to injure Elfwood, where the pandemic spread, treaty obligations to notify international organizations, and human rights obligations within its territory and extraterritorially, particularly regarding right to life? Is Dreamland responsible for an international organization's failed efforts to act within its mandate in suppressing the pandemic due to untimely information provided and Dreamland's political influence in the organization? Is Bentwood responsible for spreading the pandemic by permitting the land passage of affected Dreamland's nationals and permitting transfer flights to Elfwood? Is Dreamland responsible for breach of human rights to life and health when its Foreign Office's Twitter account retweets or likes a tweet by Elfwood's President, calling COVID-19 fake news and encouraging people to attend choral singing? Can Dreamland's breach of human rights obligations and rules on non-injury of other States be excused by the exceptional and unpredictable character of the Pandemic? Must Dreamland, where the Pandemic originated, compensate all damages caused by the Pandemic to all States? Is it relevant that Elfwood's conduct was a contributing factor, failing to suppress the transit of super-spreaders, or that the particular injury to Brentwood was

[10] T Treves, 'The Expansion of International Law' (2015) 398 Hague Recueil 19.
[11] Cf. L Oppenheim, *International Law:* (Volume I: Peace, Longmans, Green, and co. 1905); R Jennings and A Watts, *Oppenheim's International Law* (9th ed, Volume I: Peace, Longman 1992). But see R Higgins and Ors, *Oppenheim's International Law: United Nations* (Oxford University Press, 2007).
[12] See also this important contribution, M Wong, 'The Law of State Responsibility and the Covid-19 Pandemic' in C Ferstman and A Fagan (eds), *Law and Human Rights: Essex Dialogues* (30 June 2020) DOI: 10.5526/xgeg-xs42_040.
[13] I use the terminology of primary and secondary rules in the sense accepted in international law of State responsibility, which is not entirely like the distinction drawn by HLA Hart, A Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 EJIL 993, 116-120.
[14] I refer to 'claims' since that is how State responsibility is likely to be operationalised in practice, without departing from the technical position, further discussed in Section II, that responsibility arises out of a breach of an international obligation and not the presentation of a claim by the injured actor.

exacerbated by its political dysfunction? If Dreamland has to provide reparation in the form of a multi-billion-dollar compensation, is it relevant that it could pay that compensation only by reassigning funds allocated for basic public goods? Can Elfwood bring a claim against Dankmire regarding its breaches of obligations regarding Bentwood, and recover compensation? What measures can Brentwood take to encourage Dreamland to comply with its obligations of providing reparations, gently or less gently?

In line with the tripartite structure of the 2001 International Law Commission's (ILC) Articles on responsibility of States for internationally wrongful acts (2001 ILC Articles),[15] I will consider in turn the internationally wrongful act (Section II), content of responsibility (Section III), and implementation of responsibility (Section IV). The focus of this paper is on the nuts and bolts of the legal order, which will frame and organise claims related to COVID-19.[16] My main claim is that blackletter law is capable of answering most questions raised in these disputes – but also that evolutionary potential inherent in the normal international legal process should not be underappreciated, whether it manifests itself by further strengthening current rules, elaborating vague rules by application, filling gaps in current law by generating new practice or even, exceptionally, revisiting rules currently in force.[17] In short, international lawyers should take full advantage of the sophisticated framework of reasoning already provided by current law but also not be amiss of the manner in which (mis)application of international law in these strange times in turn shapes the applicable rules.

2. Internationally wrongful act

The starting point of the law of international responsibility is that every internationally wrongful act of an actor entails international responsibility of that actor. To give an example from a recent advisory opinion of the International Court of Justice (ICJ):

> having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United

[15] International Law Commission's Articles on responsibility of States for internationally wrongful acts, *Yearbook of the International Law Commission*, 2001, Vol II (Part Two), UN Doc A/CN.4/SER.A/2011/Add. 1 (Part 2) 26.
[16] For a discussion of longer-term systemic shifts in the law of State responsibility, see M Paparinskis, 'The Once and Future Law of State Responsibility' (2020) 114(4) AJIL (forthcoming).
[17] J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Recueil des Cours 19, 21-22 (2013); ibid.

> Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.[18]

The same proposition applies to responsibility of international organizations.[19] The custom-reflecting Article 2 of the 2001 ILC Articles spells out the starting point in terms of the two sufficient and necessary criteria for an internationally wrongful act, applicable to responsibility incurred in inter-State relations,[20] as well as invoked directly by non-State actors:[21]

> There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[22]

The same proposition also applies to conduct and breach by international organizations.[23] These basic principles of international responsibility are applicable to conduct and breach in relation to COVID-19 by States and international organizations in different specialist fields of international law, be they related to trade, human rights, investment, environment, injury to other States, or any other matters.

Application of most rules on the internationally wrongful act to COVID-19-related responsibility claims does not seem to me to particularly problematic. Issues of attribution can raise hard questions of proof, particularly when the primary obligation in question calls for prevention and therefore attribution of omissions is at issue. But in legal terms these questions have clear answers. Under the customary law of both State responsibility and responsibility of international organizations, conduct of organs and agents, whether acts or omissions, will be attributable to the respective actors.[24] The same point applies to questions of breach. Whether COVID-19 'could

---

[18] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 [177]; UN General Assembly Res 73/295 'Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965' (24 May 2019) UN Doc A/RES/73/295 [2(c)]; also 2001 ILC Articles (n 15) Art 1.

[19] International Law Commission's Articles on the responsibility of international organizations, *Yearbook of the International Law Commission*, 2011, Vol II (Part Two), UN Doc A/CN.4/SER.A/2011/Add. 1 (Part 2) 40 Art 3, Commentary 3; *Hon. Dr. Margaret Zziwa v Secretary General of the East African Community*, EACJ, Appeal no 2 of 2017, Judgment, 25 May 2018, in Report of the Secretary General, 'Responsibility of international organizations: Compilation of decisions of international courts and tribunals' (24 April 2020) UN Doc A/75/80 [11].

[20] *Chagos* (n 18) [177].

[21] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (Decision on Annulment), ICSID Case no ARB/11/28, 30 December 2015 [183]-[4]; *Chief Damian Onwuham and Others v. Federal Republic of Nigeria and Imo State Government,* ECOWAS Case no ECW/CCJ/JUD/22/18, Judgment, 3 July 2018, 24–25.

[22] 2001 ILC Articles (n 15) Art 2.

[23] 2011 ILC Articles (n 29) Art 4, Commentary 2.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 [385]; 2011 ILC Articles (n 20) Art 6; *Hon Dr Margaret Zziwa* (n 19) [14]. Attributability of omissions is a customary rule, 2001 ILC Articles (n 15) Art 2, Commentary 4; 2011 ILC Articles (n 19) Art 4.

have been stopped at the source. It could have been stopped quickly and it wouldn't have spread all over the world'[25] raises hard questions about facts as well as content of primary rules – is there a specific customary rule addressed at obligations to supress pandemics? Can a rule be particularised from the State's general 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'[26] or formulated by analogy with the arguably distinct obligation to prevent significant transboundary harm, particularly developed in environmental law?[27] Can the dissatisfaction with (for some) insufficiently active performance of functions by an international organization – e.g. that it has 'failed in its mission' – be articulated in the technical terms of an obligation binding between the organization and the State?[28] And the character of obligation and breach may well have implications for the form of reparation and actors entitled to invoke responsibility.[29] But in terms of the wrongful act itself, the answer is provided by the basic blackletter proposition that a breach is conduct not in conformity with what the primary rule in force at the time may require, be the obligation reflective of a peremptory norm of general international law (*jus cogens*) or included in a trivial and unpublished bilateral treaty of no interest to anybody beyond its Parties.[30]

Two narrower points may, however, raise harder questions. The first relates to the much-debated topic of responsibility shared between numerous international actors,[31] perhaps alluded to in the criticism by the US of the relationship between the World Health Organization (WHO) and China.[32] To the surprise of some, ICJ found in 2007 that the 2001 ILC Articles reflected custom on the topic of aid and assistance.[33] Assuming that this finding is still accurate, two further questions arise. First, do the same standards apply to relations between States and international

[25] 'Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing' (27 April 2020) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-33/>.
[26] *Corfu Channel case (UK v Albania)* (Judgment) [1949] ICJ Rep 4, 22.
[27] International Law Commission's Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook of the International Law Commission*, 2006, Vol II (Part Two), UN Doc A/CN.4/SER.A/2006/Add. 1 (Part 2) 58.
[28] 'Secretary Michael R. Pompeo At a Press Availability' (29 April 2020) <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-4/>.
[29] 2001 ILC Articles (n 15) Part Two Chapter III, Arts 48, 54.
[30] *Chagos* (n 18) [148]-[161].
[31] A Nollkaemper (general ed), *Shared Responsibility in International Law* (CUP) <https://www.cambridge.org/core/series/shared-responsibility-in-international-law/060616B980C7DEF09BD280D00F78556F>.
[32] See the letter attached to @realDonaldTrump (9 May 2020) <https://twitter.com/realDonaldTrump/status/1262577580718395393?s=20>.
[33] *Bosnian Genocide* (n 24) [420]; 2001 ILC Articles (n 15) Art 16 ('A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State').

organizations, where practice is (even) more limited?[34] Secondly, can the requirement in paragraph (b) for the primary rule(s) with the same content to be binding both on acting and adding actors be satisfied, particularly where alleged breaches – failure of a State to prevent and notify, and failure of an international organization to properly carry out its functions – seem very different in character? On these points, as on many others regarding international organizations, the now-emerging practice could have significant effect.[35] It is therefore important that relevant actors, particularly those who are weighing in on current developments, appreciate how the determination and application of current law shapes future rules (whether one expresses the point in a living or a dead language).[36]

The second point may be put more briskly. If none of the safety valves expressed within primary rules (e.g. vague rules that take into account exceptional circumstances in application, qualifications articulated within obligations, or exceptions) can contain the wrongfulness of conduct, is there any other legal argument available?[37] In particular, could the extraordinary tension be resolved by invocation of circumstances precluding wrongfulness, with necessity as the most obvious but not the only example?[38] 'In principle, unfortunately never in practice' is the track record of invocation

[34] 2011 ILC Articles (n 19) Art 14, Commentary 1; Art 58.

[35] See the generally sceptical view of the US, shared to at least some extent in many quarters: 'We reiterate our view, particularly in light of the scarcity of practice in this area, that many of the rules contained in the [2011] Draft Articles fall into the category of progressive development rather than codification of the law, a point that the General Commentary introducing the Draft Articles expressly recognizes. Indeed, we agree with the Commission's assessment that the provisions of the present Draft Articles do not reflect the current law in this area to the same degree as the corresponding provisions on state responsibility. This is an important assessment to keep in mind when considering whether these Draft Articles—many of which contain similar or identical phrasing to the corresponding Articles on State responsibility—adequately reflect the differences between international organizations and states', Remarks of the US (Simonoff) to the Sixth Committee (13 October 2017) in CD Guymon (ed), *Digest of United States Practice in International Law 2017* (Office of the Legal Adviser United States Department of State) 292 <https://www.state.gov/wp-content/uploads/2019/04/2017-Digest-of-United-States-Practice-in-International-Law.pdf>. But note practice since 2011, e.g. international judicial practice referring to the 2011 ILC Articles in Report of the Secretary General, 'Responsibility of international organizations: Compilation of decisions of international courts and tribunals' (26 April 2017) UN Doc A/72/81; Compilation 2020 (n 19), and practice generated by particular disputes with international organizations, e.g. regarding responsibility of the UN for the cholera outbreak in Haiti, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 August 2016) UN Doc A/71/367; 'UN inaction denies justice for Haiti cholera victims, say UN experts' (30 April 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25851&LangID=E>.

[36] Modern technologies that officials increasingly use for expressing their views on topics of international law, such as Twitter, have not obviously changed the normal standards of the international legal process, which already call for reduction of the weight to be given to practice of a particular State in case of internal inconsistency, International Law Commission's Conclusions on identification of customary international law, *Report of the International Law Commission: Seventieth session (30 April–1 June and 2 July–10 August 2018),* UN Doc A/73/10 12 Conclusion 7(2). As to the effect of technologies on legal process, Mendelson's inaugural lecture has aged well, M Mendelson, 'Practice, Propaganda and Principle in International Law' (1989) 42 Current L Problems 1.

[37] On the concept and its boundaries, see L Bartels and F Paddeu (eds), *Exceptions in International Law* (Oxford University Press 2020).

[38] See also *force majeure,* distress, 2001 ILC Articles (n 15) Arts 23, 24.

over the last two decades of the rule on necessity reflected in Article 25 of the 2001 ILC Articles.[39] There is no obvious reason to query the leading modern author's[40] scepticism about the likely success of circumstances precluding wrongfulness in defence of potential COVID-19 claims.[41] (Whether the decisions emanating from the Argentinean investor-State arbitrations are a valuable subsidiary means for determination of necessity is a different matter.[42]) Indeed, the first public decision by an international tribunal to consider invocation of *force majeure* regarding COVID-19 is in line with the scepticism.[43]

A more interesting question is whether, once the law-making dust has settled, rules such as custom purportedly reflected in Article 25 will still be good law. If States do invoke necessity on a widespread basis and in a manner clearly departing from the 2001 ILC Articles – and, more importantly, do not challenge that invocation by other actors[44] – the relevant community could plausibly perceive the long list of cumulative criteria in Article 25 to be too restrictive. For example, should 'the only way' in Article 25(1)(a) be replaced by 'no other reasonable way' from the provision on distress in Article 24(1)? Is there a real need for the long list of cumulative criteria, provided that the 'grave and imminent peril' standard in Article 25(1)(a) is satisfied? How strictly, if at all, should the criterion of non-contribution in Article 25(2)(b) be applied? Should necessity be moved to the category of circumstances precluding wrongfulness that do not call for compensation?[45] Or, conversely, is the (impossibly) narrowly circumscribed Article 25 just the right

[39] Note the pedantic point about the distinction in wording between the first (1996) and the second reading of the 2001 ILC Articles, and that the from the second reading, only Article 25(1) has been applied by the ICJ as customary, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136 [140].

[40] F Paddeu, *Justification and Excuse in International Law* (CUP 2018).

[41] F Paddeu and F Jephcott, 'COVID-19 and Defences in the Law of State Responsibility: Part II' (17 March 2020) <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>.

[42] For a (minority) view that casts significant doubt on their value due to, variously, precise rationale of decisions, quality of reasoning, severity of criticism in review institutions and legal writings, and unrepresentativeness, particularly of the earlier decisions, see M Paparinskis, 'Circumstances Precluding Wrongfulness in International Investment Law' (2016) 31 ICSID Review – Foreign Investment Law Journal 484, 497-499.

[43] The respondent State in an investment arbitration requested an extension for the filing of its written briefs, and relied on *force majeure* in law of treaties and State responsibility as excusing a breach of obligation to arbitrate in good faith. The Tribunal found that it did 'not need to rule or opine on the existence or not of *force majeure* as a legal matter' because '[t]he question here relates to the filing of a written submission' and 'the proceeding can move forward, albeit with some delay, in a socially responsible manner by adapting to the new reality of communicating remotely', *The Estate of Julio Miguel Orlandini-Agreda* (n 3) [10], [37]-[40]. The brevity of discussion leaves open two possible readings. On one reading, the obligation not to undermine arbitral proceedings necessarily entails the obligation of the (participating) State party to fulfil the procedural deadlines. On another reading, it is not obvious that *force majeure* under either primary or secondary rules needed to be invoked in the technical sense at all, since responsibility for conduct in dispute settlement is usually limited to cases of gravest misconduct that plainly were not an issue in this decision, e.g. *Libananco Holdings Co. Limited v Turkey,* ICSID Case no ARB/06/8, Decision on Preliminary Issues, 23 June 2008 [78]-[80]; *Croatia/Slovenia,* PCA Case no 2012-04, Partial Award, 30 June 2016 [175], [208].

[44] 2018 ILC Conclusions (n 36) Conclusions 2, 3, 6(2), 8, 10(2).

[45] Cf. 2001 ILC Articles (n 15) Art 25 with Arts 24(1), 27(b).

fit for a rule of this character, which would otherwise pull on the thread unravelling the entire international juridical fabric?[46] While the prospect may be intellectually tantalising, two considerations are likely to stimmy the evolutionary potential. First, there will be significant differences of framing between fields that provide for exceptions and derogations within primary rules (human rights, trade law), fields having a mixed record with providing and interpreting such exceptions (investment law), and fields usually not resolving disputes through adjudication. Such differences may affect the degree to which practice is 'consistent', which is necessary for the practice to count as 'general'.[47] Secondly, despite David Caron's famous warning about undue influence attributed to the 2001 ILC Articles by adjudicators,[48] echoed by some States more recently,[49] international tribunals still tend to take the (judicially endorsed) 2001 ILC Articles as the starting point.[50] It remains to be seen whether even significant trends in State practice would be immediately appreciated and accommodated in the curial setting.[51]

3. Content of international responsibility

On 27 April 2020, the US President Donald Trump made the following remarks as part of the press briefing:

> Q Following up on Charlie's question on making China — holding them responsible — Germany sent a bill to China for 130 billion dollars in — excuse me, 130 billion euros for the damages caused by the coronavirus. Would your administration look at doing the same?
> THE PRESIDENT: Well, we can do something much easier than that. We have ways of doing things a lot easier than that. But Germany is looking at things and we're looking at things. And we're talking about a lot more money than Germany is talking about.
> Yeah, please go ahead.
> Q Mr. President —
> THE PRESIDENT: We haven't determined the final amount yet.

[46] P Allot, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harvard J Int'l L 1, 16-21.
[47] 2018 ILC Conclusions (n 36) Conclusion 8(1).
[48] D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857.
[49] Summary records of the 13th meeting of the UNGA Sixth Committee (15 October 2019) UN Doc A/C.6/74/SR.13 [19]-[20] ('there remained a significant number of articles on which States' views diverged, or for which there was insufficient or insufficiently uniform State practice, for such a determination [that articles reflected customary law] to be made. … Although her delegation held the Commission's outputs in the highest regard, it had noticed, in some academic writings and judgments, a certain lack of clarity as to the legal force and status of some of those outputs. On occasion, they had been relied upon as an articulation of international law without a full consideration of whether they were sufficiently underpinned by State practice and *opinio juris*. It was therefore important to ensure that international law continued to be properly formulated and developed in accordance with well-established principles.') (Dickson on behalf of the UK).
[50] Report of the Secretary General, 'Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts and tribunals' (23 April 2019) UN Doc A/74/83, with earlier compilations referred to at [2].
[51] For one possible avenue for articulating States' positions, see Report of the Secretary General, 'Responsibility of States for internationally wrongful acts: Comments and information received from governments' (12 July 2019) UN Doc A/74/156.

> Q Thank you, Mr. President.
> THE PRESIDENT: It's very substantial. If you take a look at the world — I mean, this is worldwide damage. This is damage to the U.S., but this is damage to the world.[52]

Press remarks are not a pleading before an international tribunal or a formal position refined by multiple pairs of eyes in a foreign ministry, and it would be wrong to scrutinise it by reference to technical jargon or paragraph numbers. But President Trump's observation provides an opportunity to reflect upon the technical elements of a valid compensation claim. It seems to me that mundane and technical questions of proof, injury, causality, and loss are likely to be very important in practice.[53] Details would, of course, depend upon the factual circumstances and legal framing but three questions provide a good starting point: first, is there an internationally wrongful act in the first place? Secondly, is the injury caused by the internationally wrongful act? Thirdly, are there other reasons that can affect compensation in either direction? I will consider these questions in turn.

Is there an internationally wrongful act in the first place? Recall that, as discussed in the previous section, modern international law conceptualises the wrongful act as the basis for international responsibility, which also includes rules on content of responsibility such as compensation.[54] (Primary rules may themselves provide for obligations analogous to reparations, e.g. compensation in investment, human rights, or environmental law, but that relates to a conceptually different issue.) A wrongful act necessarily requires the breach of an obligation, and for practical purposes of determining reparations it is important to identify *what* breach that is: some breaches may be subject to particular (judicial) mechanisms or be easier to demonstrate as causing injury. At least in the discussion regarding responsibility for (failing to supress) the spread of COVID-19, it is important to be clear whether the primary rule allegedly breached relates to failure to prevent the spread or failure to inform about the spread, which will have different content, possibly also different source and structure, may be owed to different actors, and subject to different mechanisms of dispute settlement and enforcement.

Secondly, is the injury caused by the internationally wrongful act? Custom imposes an obligation on States to make full reparation caused by the wrongful act.[55] As the ILC explained, 'the subject

[52] Remarks (n 25).
[53] *The* Duzgit Integrity *(Malta v São Tomé and Príncipe)*, PCA Case no 2014-07, Award on Reparation, 18 December 2019 <https://pcacases.com/web/sendAttach/6654> [57], [64].
[54] 2001 ILC Articles (n 15) Art 29.
[55] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) [2018] ICJ Rep 15 [30].

matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act'.[56] The question of causality is key for evaluating a claim of the kind suggested by President Trump.[57] It seems to me that three separate aspects of causality may arise here. The first question is general: to quote from a recent ICJ judgment, is 'there … a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant'?[58] In COVID-19 claims, that legal standard has to be weighed by reference to the apparently long chain of events, with many acts and omissions by various actors standing between the wrongful act and injury. The second question relates to a particular aspect of the first: is the chain of causality broken by the injured actor's own conduct being the proximate cause of their damage?[59] The third question is narrower in scope: even if an obligation is breached, is the injury caused by *that* breach? The ICJ practice provides examples of claims where procedural obligations or obligations of prevention were found to have been breached but no compensation was awarded because the injury had not been caused by those breaches.[60]

Thirdly, are there other reasons that can affect compensation caused by the wrongful act in either direction? Five possible arguments come to mind, which with a nod to the late and lamented Ennio Morricone may be divided into the (two) good, (two) bad, and (one) ambiguous. The first bad legal argument is punitive damages, overwhelmingly rejected by States and international tribunals: '[c]ompensation should not … have a punitive or exemplary character', sayeth, rightly, the ICJ.[61] Similarly, an injured State 'is not … entitled to be put in a better position than that in which it would have been absent such unlawful conduct' by an award leading to a windfall. [62] The second bad legal argument, at least in the eyes of the ILC,[63] is a limitation of full compensation so as not cripple the responsible actor. The 2001 ILC Articles as well as the 2011 ILC Articles on

---

[56] 2001 ILC Articles (n 15) Article 31, Commentary 9.

[57] 黄惠康，'借疫情污名化中国，于法不容' 人民日报（2020年4月24日）(H. Huang, 'Stigmatising China for the epidemic: lack of a legal basis' *People's Daily* (24 April 2020)) <http://paper.people.com.cn/rmrb/html/2020-04/24/nw.D110000renmrb_20200424_2-16.htm>.

[58] *Certain Activities* Compensation (n 55) [32].

[59] *Ahmadou Sadio Diallo (Guinea v DRC)* (Compensation) [2012] ICJ Rep 324 [31].

[60] For the first point, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 [276]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665 [226]. For the second (more controversial) point, *Bosnian Genocide* (n 25) [461]-[462].

[61] *Certain Activities* Compensation (n 55) [31]. But see Separate Opinion of Judge Cançado Trindade 61 [19] ('distinctly from what the ICJ states …, I sustain that reparations — including compensation — *can and do have an exemplary character*') (emphasis in the original).

[62] *The* Arctic Sunrise *Arbitration (the Netherlands v Russia)* (Compensation) (2017) 32 RIAA 317 [49].

[63] M Paparinskis, 'The Case against Crippling Compensation in International Law of State Responsibility' (2020) Modern L Rev <https://doi.org/10.1111/1468-2230.12562>.

responsibility of international organization take the view that exclusion of indirect and remote damages is a sufficient expression of the principle of proportionality for compensation;[64] the effect on the responsible actor is, by their lights, not a legal concern of the secondary rules.[65] The ambiguous argument relates to injury by concurrent conduct, for example by conduct by a number of States (or international organizations) leading to the same injury.[66] On one view, explicitly taken by the ILC, concurrency does not affect obligations to provide full reparation.[67] On another view, suggested more obliquely by the ICJ, 'particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes'.[68] The two good legal arguments are mitigation and contribution, the latter of which does not obviously fit the factual pattern of claims about COVID-19.[69] As to mitigation, the Full Iran-United States Claims Tribunal recently noted that '[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided'.[70] A lay observer's reading of newspaper reports suggests some scope for mitigating acts that States as well as other affected actors could have undertaken. In short, causality, concurrency, and mitigation are the principles on which claims are going to turn.

---

[64] 2001 ILC Articles (n 15) Arts 31(1), 34, Commentary 5; followed in 2011 ILC Articles (n 19) Art 31, Commentary 4, Art 34, Commentary 1. Article 40 of the 2011 ILC Articles only reminds the reader of obligations of financing under the rules of the relevant organizations, Article 40(2), Commentary 4.

[65] Much to the concern of international organizations themselves: 'WHO, in the comments it submitted together with a group of other organizations, criticised the principle set forth in draft article 30 [2011 ILC Articles (n 12) Art 31] that a responsible international organization is required to make "full reparation for the injury caused by the internationally wrongful act". The reason given is that the principle "could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources"', *Yearbook of the International Law Commission*, 2011, Vol II (Part One), UN Doc A/CN.4/SER.A/2011/Add. 1 (Part 1) 95 [74]. Whether or not these submissions fall within the rubric of 'certain cases [where] the practice of international organizations also contributes to the formation, or expression, of rules of customary international law', they are helpful because of 'indirect role [played] by stimulating or recording the practice and acceptance as law (*opinio juris*)', 2018 ILC Conclusions (n 36) Conclusion 4(2), (3), Commentary 8.

[66] Hypothetical: Must Dreamland, where the Pandemic originated, compensate all damages caused by the Pandemic to all States? Is it relevant that Elfwood's conduct was a contributing factor, failing to suppress or even encouraging the transit of super-spreaders?

[67] 2001 ILC Articles (n 15) Art 31, Commentaries 12-13.

[68] *Certain Activities* Compensation (n 55) [34]. The Court did introduce the passage by reference to 'cases of alleged environmental damage' but later in the judgment the Court confirms that its approach 'is consistent with the principles of international law governing the consequences of internationally wrongful acts', [41].

[69] 2001 ILC Articles (n 15) Art 39 ('In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought'). In recent dispute settlement practice, contribution to injury has been applied to situations where the claimant, be that a State or a non-State actor, has in some sense initiated or contributed to the chain of events that led to the wrongful act, see cases summarised in *Copper Mesa Mining Corporation v Ecuador,* PCA Case no 2012-2, Award, 15 March 2016 [6.91]-[6.102]. While much turns on the content of primary rules and framing of the claim, concerns about preparedness and competence of injured States in suppressing the spread of COVID-19 are more naturally treated as relating to mitigation, see text at the next footnote.

[70] *Iran v US,* IUSCT Case no 604-A15 (II:A)/A26 (IV)/B43-FT, Partial Award, 19 March 2020 [1796]. A broad application of the principle was endorsed by the US-appointed Judges, see Separate Opinions of Judge Brower [18], [59], [72], [78]; Judge Johnson [1]-[37]; Judge Barkett [38]-[49].

4. Implementation of international responsibility

Implementation of international responsibility may be dealt with more briskly than the previous two sections. Most arguments that implicate invocation of international responsibility fall under the customary proposition that responsibility may be invoked by the injured actor, commonly either the actor to which the obligation is individually owed or a specially affected State regarding an obligation owed to a group of international actors.[71] It is tempting to read President's Trump remark, fully quoted in the previous section ('If you take a look at the world — I mean, this is worldwide damage. This is damage to the U.S., but this is damage to the world') as alluding to the (slightly less settled) right of a State other than the injured State to invoke responsibility so as to claim the performance of the obligation in the interests of the injured States or of the beneficiaries of the obligation[72] -- but legal evaluation is best left for a more considered articulation. Rules on plurality of injured and responsible actors, while endlessly fascinating as a topic for academic discussion, are too open-textured to provide much of a practical guidance to decision-makers at the moment.[73]

The clearer arguments regarding implementation have fallen under the rubric on countermeasures, at least in two guises. The discussion is in its early stages as I write these lines, so it seems safest to limit the engagements to recalling the rules and identifying the key questions. Since the US has been predominant in this discussion, it is also helpful to recall its own position expressed in 2016, broadly but not completely in line with the 2001 ILC Articles:[74]

> The customary international law doctrine of countermeasures permits a State that is the victim of an internationally wrongful act of another State to take otherwise unlawful measures against the responsible State in order to cause that State to comply with its international obligations, for example, the obligation to cease its internationally wrongful act.[75] Therefore, as a threshold matter, the availability of countermeasures … requires a

[71] 2001 ILC Articles (n 15) Art 42(1), (2)(a); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) [2020] ICJ Rep [41] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

[72] 2001 ILC Articles (n 15) Art 48(1), (2)(b); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ibid.

[73] 2001 ILC Articles (n 15) Arts 46, 47.

[74] The remarks are made in the particular context of cyberspace but express the US views on general custom, B.J. Egan, 'Remarks on International Law and Stability in Cyberspace' (10 November 2016) in C.D. Guymon (ed), *Digest of United States Practice in International Law 2016* (Office of the Legal Adviser United States Department of State) 815, 822 <https://www.state.gov/wp-content/uploads/2019/05/2016-Digest-United-States.pdf>.

[75] With some terminological differences, in line with 2001 ILC Articles (n 15) Art 49(1)-(2).

prior internationally wrongful act that is attributable to another State.[76] As with all countermeasures, this puts the responding State in the position of potentially being held responsible for violating international law if it turns out that there wasn't actually an internationally wrongful act that triggered the right to take countermeasures, or if the responding State made an inaccurate attribution determination. That is one reason why countermeasures should not be engaged in lightly.

Additionally, under the law of countermeasures, measures undertaken in response to an internationally wrongful act … that is attributable to a State must be directed only at the State responsible for the wrongful act[77] and must meet the principles of necessity and proportionality, including the requirements that a countermeasure must be designed to cause the State to comply with its international obligations—for example, the obligation to cease its internationally wrongful act[78]—and must cease as soon as the offending State begins complying with the obligations in question.[79]

The doctrine of countermeasures also generally requires the injured State to call upon the responsible State to comply with its international obligations before a countermeasure may be taken—in other words, the doctrine generally requires what I will call a "prior demand."[80] The sufficiency of a prior demand should be evaluated on a case-by-case basis in light of the particular circumstances of the situation at hand and the purpose of the requirement, which is to give the responsible State notice of the injured State's claim and an opportunity to respond.[81]

---

[76] Cf. 2001 ILC Articles (n 15) Art 49, Commentary 2 ('A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure').

[77] Cf. ibid Commentary 4 ('A second essential element of countermeasures is that they "must be directed against" a State which has committed an internationally wrongful act … . Countermeasures may not be directed against States other than the responsible State.').

[78] Cf. ibid Art 51 ('Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'). The apparently small difference in wording indicate significant disagreement due the US' 'concern[] that the term "commensurate" may be interpreted incorrectly as to have a narrower meaning than the term "proportional" … the rule of proportionality permits acts that are tailored to induce the wrongdoing state's compliance with its international obligations', 'Draft Articles on State Responsibility: Comments of the Government of the United States of America' (1 March 2001) in S Cummins and DP Stewart (ed), *Digest of United States Practice in International Law 2001* (International Law Institute) 364, 368 <https://2009-2017.state.gov/documents/organization/139600.pdf>.

[79] Cf. ibid Art 52(3)(a) ('Countermeasures … if already taken must be suspended without undue delay if … the internationally wrongful act has ceased').

[80] Cf. ibid Art 52(1)(a) ('Before taking countermeasures, an injured State shall … call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two [content of State responsibility]').

[81] Note the absence of a reference to rules expressed in 2001 ILC Articles (n 9) Art 49(3) ('Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question', although perhaps taken as implicit in Art 52(3)(a)), Art 50 ('Obligations not affected by countermeasures'); Art 52(1)(b) ('Before taking countermeasures, an injured State shall … notify the responsible State of any such decision to take countermeasures and offer to negotiate with that State', although perhaps at least partially implicit in what is described as 'prior demand' in the excerpt), Art 52(3)(b) ('Countermeasures may not be taken, and if already taken must be suspended without undue delay if … the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'). These omissions are in line with the position taken by the US in 2001, describing the rubric of obligations not affected by countermeasures as unnecessary and vague, criticising the rule on suspension of countermeasures when the dispute is submitted to a tribunal, and suggesting that countermeasures may be taken both prior to and during negotiations, '2001 Comments' (n 78) 365-367, 369-371.

One type of countermeasure publicly discussed relates to removal of sovereign immunity for claims against China in the US courts.[82] In addition to the general standards identified by the US itself in the excerpt above – an anterior wrongful act, 'prior demand', necessity and proportionality, compliance not punishment – it is worth noting that the ICJ has been sceptical about arguments invoking countermeasures to deny immunity in domestic courts,[83] and that it may lead other States to reciprocate with similar denials.[84] The other type of measure that could be related to the countermeasures is the US suspension of funding to the WHO.[85] Internationally wrongful suspension or refusal to pay dues to international organizations[86] has been sometimes conceptualised as countermeasures, memorably by Antonios Tzanakopolous.[87] Beyond general questions on conceptual framing, normative desirability, and applicability to international organizations in general[88] and those within the United Nations system in particular,[89] the same general standards accepted by the US would need to be complied with -- an anterior wrongful act by the WHO, 'prior demand' by the US, necessity and proportionality, compliance not punishment. These criteria are not easy to satisfy in a cumulative manner, even without considering compliance with the seemingly more extensive standards in the 2001 ILC Articles.

5. Conclusion

[82] J Stein, C Leonning, J Dawsey, and G Shih, 'US officials crafting retaliatory actions against China over coronavirus as President Trump fumes' *Washington Post* (30 April 2020).

[83] The case is not precisely on point because the denial took place through courts, rather than legislative or executive decision, which raised additional issues, and Italy did not articulate the 'last resort' argument in the technical terms of countermeasures, but the scepticism for the argument is clear, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 [101]-[103].

[84] 'Further enforcement efforts, including disclosure of Russian assets in the United States, are likely to prompt Russia to take reciprocal measures against U.S. property and to justify such measures by asserting that U.S. courts violated international law first. … following this Court's entry of the interim judgment in September 2015, the Russian government sent a diplomatic note protesting that judgment and warning that any attempts to enforce it would lead to reciprocal countermeasures. … It is possible that Russia might rely on recent legislation to take such steps. In November 2015, Russian President Vladimir Putin signed into law a bill concerning the jurisdictional immunity of foreign states and their property in Russia. Although the bill is generally consistent with the restrictive view of sovereign immunity, as reflected in the FSIA and the U.N. Convention on Jurisdictional Immunities of States and their Property, it contains a provision that permits Russian courts to limit the immunities of a foreign state and that state's property on the basis of reciprocity, depending on the treatment of Russia and Russian property in that foreign state', US statement of interest, *Chabad v. Russian Federation*, No. 1:05-cv- 01548 (3 February 2016), 2016 Digest (n 74) 439, 444.

[85] 'Secretary Michael R. Pompeo At a Press Availability' (29 April 2020) <https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-4/>.

[86] Generally see HG Schermers and NM Blokker, *International Institutional Law* (6th revised ed, Brill Nijhoff 2018) 680-683. Note the distinction between voluntary and compulsory contributions, ibid 688-694, of which only the failure to pay the latter raises questions of wrongfulness, <https://open.who.int/2018-19/budget-and-financing/gpw-overview>.

[87] A Tzanakopoulos, *Disobeying the Security Council* (OUP 2011).

[88] '[W]e again highlight our view that the principles contained in some of the [2011 ILC] Draft Articles—such as those addressing countermeasures and self-defense—likely do not apply generally to international organizations in the same way that they apply to states', Simonoff (n 35) 292.

[89] 2011 ILC Articles (n 19) Art 67.

This paper discussed the role that international responsibility may play in COVID-19 claims, dealing in turn with the rubrics of the internationally wrongful act (Section II), content of responsibility (Section III), and implementation of responsibility (Section IV). It is not easy to discuss such a topic in general terms. Very different questions of wrongfulness, reparations, and implementation arise when claims are made regarding different primary obligations in an inter-State non-judicial setting regarding responsibility of States and international organizations to prevent the spread of pandemic, in human rights tribunals regarding excessive restrictions or failure to protect, or in investment tribunals regarding discriminatory aid. The complexity is not surprising either. General rules of State responsibility usually do not dictate a particular result on their own but strengthen the normative sinews of the international legal order and supplement particular primary rules and (tertiary) institutions. This interaction will continue erate in the era of COVID-19: after all, this is not the first nor, one suspects, the last great crisis faced by the international community. The blackletter customary law will seep into the framing of challenges and defences by States and other participants in the normal manner, shaping characterisation of conduct and being shaped by widespread State practice in turn. That is how it should be; that is how international law usually works.

I want to conclude by putting forward five 'questions to consider' as a frame of reference for evaluating the role played by the law of international responsibility regarding COVID-19 claims. First, which currently accepted rules will be routinely and uncontroversial endorsed by application? Secondly, which vague rules will be developed and clarified through application? Thirdly, will rules be created where no (clear rules) exist at the moment? Fourthly, which, if any, currently existing rules be revisited? Finally, will COVID-19-related developments lead to a systemic shift in the balance between bilateralism and multilateralism in the law of State responsibility?[90] No doubt, some answers will be hard, perhaps even impossible on more than a tentative basis without the benefit of hindsight.[91] But asking the right questions from the very beginning and appreciating the spectrum of possible answers will enhance the appreciation of both the strengths and weaknesses of a crucial element of the international legal order and the pressure points of the international legal process.

[90] S Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (PUF 2005); Paparinskis (n 16).
[91] J Crawford and T Viles, 'International Law on a Given Day' in K Ginther and Ors (eds), *Völkerrecht zwischen normativen Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (Duncker & Humblot 1994).