THE ONCE AND FUTURE LAW OF STATE RESPONSIBILITY

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ABSTRACT

The current (once) international law of State responsibility is shaped by the International Law Commission’s articles on responsibility of States for internationally wrongful acts, generally endorsed in State and judicial practice as consonant with custom. This article makes the case that the global pandemic and associated practice may affect foundational elements of the (future) law of State responsibility. It outlines the contours of systemic grain of possible developments by reference to the tension between bilateralism and community interests in international law.

I. INTRODUCTION

Can the COVID-19 global pandemic (“Pandemic”) affect foundational elements of the international legal order, in particular the generalist vocabulary of State responsibility? Two considerations frame the inquiry. On the one hand, the claim should not be lightly entertained that the Pandemic alters the foundations of international law. Plagues have been part of its

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social and legal fabric\(^1\) as relatable metaphors\(^2\) and normal subjects of incidental regulation since the classic texts.\(^3\) The general point is that the foundational layers of international law are remarkably stable, capable of accommodating fundamental shifts in politics and institutions.\(^4\) On the other hand, some shifts have indeed changed the foundations of the international legal order. World War One and Versailles gave international law a strong nudge towards multilateralism\(^5\) and a self-conception of normative completeness;\(^6\) World War Two and San Francisco expanded the range of actors and specialist fields;\(^7\)

\(^1\) An early writer on reprisals may have been a victim himself, R. Joseph Schork and John P. McCall, *A Lament on the Death of John of Legnano*, 19 STUDIES RENAISSANCE 180 (1972).


\(^3\) EMMERICH DE VATTTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 180 (1872) (“if [a vessel in distress] is infected with the plague, the owner of the port [that it seeks to enter] may fire upon it and beat it off”).


decolonisation remade the law of treaties and further strengthened community interests; and the end of the Cold War endorsed a shared conception of State responsibility, further re-calibrating the law in a more multilateral direction. To be sure, international law is not (just) a discipline of crisis, and not every crisis will shake its foundations. But neither should the possibility be excluded that a global, universal, and urgent crisis of the Pandemic’s quality could tilt them.

The paper addresses the Pandemic and State responsibility, adopting the tension between bilateralism and communitarian considerations as its analytical perspective. It proceeds in

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three stages. Section II introduces the modern law of State responsibility, suggesting that the Pandemic has opened a law-making window for its change. Sections III and IV set out parallel arguments for its shift in, respectively, communitarian and bilateralist direction. The paper makes two basic claims. First, the law of responsibility may be significantly affected by the Pandemic and reactions thereto by the international community. Secondly, whether this reading of the tea leaves of practice proves correct is ultimately less important than the changing terms of the inquiry. Discussion of State responsibility of the last two decades, mainly by reference to persuasiveness and application of the International Law Commission’s (“ILC”) 2001 articles on responsibility of States for internationally wrongful acts (“ILC Articles”),¹³ may be replaced by an examination of fundamental systemic issues¹⁴ of the kind last properly entertained at the turn of the century, in a legal order set to very different mood music.¹⁵


II. THE ONCE LAW OF STATE RESPONSIBILITY

Can the future of State responsibility hold anything but further re-entrenchment of the ILC Articles through routine invocation by States and application by tribunals? The ILC Articles exercise a powerful influence over the international legal process. The UN General Assembly has repeatedly acknowledged their importance and usefulness, noting in 2019 “that a growing number of decisions of international courts, tribunals and other bodies refer to the articles.”\(^{16}\) Indeed, 163 decisions by international tribunals between 2001 and 2016 referred to the ILC Articles,\(^ {17}\) with a further 86 cases by early 2019,\(^ {18}\) and further more since then.\(^ {19}\) Not every

\(^{16}\) GA Res. 74/180 (Dec. 18, 2019) paras. 1, 4.

\(^{17}\) UNSG, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, UN Doc. 71/80/Add.1 (June 20, 2017) paras. 5, 6.

\(^{18}\) UNSG, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, UN Doc. 74/83 (Apr. 23, 2019) para. 5.

actor agrees with everything, as shown by criticisms in the Sixth Committee’s 2019 session of *erga omnes* claims by China and Iran and of the silence on special circumstances of small island developing States by Micronesia. But the arch of the legal process bends towards positivising the ILC work. To take the example of *AJIL* authors, the most insightful critic of the ILC’s project nonetheless applied it with only slight hesitation as an arbitrator, and the sharpest argument against a particular rule had no effect on State and judicial practice.

There are three reasons why a qualified challenge of the continuation of current practice is more than contrarianism. First, the Pandemic is peculiar in its universal, immediate, grave, and broadly shared character. This increases the likelihood that much practice will emerge (“widespread”) from a variety of actors (“representative”) and will be broadly similar

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21 *Id.*, paras. 17, 58.

22 *Id.*, para. 66.


24 Cf. David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AJIL 857 (2002); Cargill, Incorporated v. Mexico, paras. 381-2, 420 (ICSID Additional Facility Case No. ARB(AF)/05/2, Sept. 18, 2009).

(“consistent”), thus making it “general” in the technical sense required to identify custom.26 Secondly, many of the rules likely to come under pressure are based not on consolidated practice but inferences from general principles, systemic logic, and tolerance by States. It is not a criticism of the ILC Articles – most alternatives proposed are even more problematic.27 But rules of this sort, an excellent recipe for gradual adoption in State and judicial practice in normal times,28 are vulnerable to being superseded by concerted spurts of contrary practice in extraordinary ones. The third point relates to the forum. Every three years, most recently in 2019, the General Assembly considers the future of the ILC Articles. States are at stalemate;29 and there are good reasons for arguing against treatification,30 beyond the pragmatic suspicion about multilateral treaty fatigue.31 But the decision “to further examine … the question on a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles” in 2022 provides States with a

26 Int’l L. Comm’n, Conclusions on identification of customary international law, in REPORT 2018 UN Doc. A/73/10 119, Conclusion 8(1). Cf. the plausible expectation of consistency with tension between investment-importing and exporting, or coastal and flag States, id., Commentary 4.

27 EDF International SA and Ors v. Argentina, para. 319 (ICSID Case No. ARB/03/23, Feb. 5, 2016).

28 Compilation 2019, supra note 18.


30 Paddeu To Convene or Not to Convene?, supra note 20, at 120-123.

deadline for reflecting on whether to become more assertive as law-makers and adjust the law of responsibility to the (post-)Pandemic world.32

III. THE FUTURE OF COMMUNITARIAN STATE RESPONSIBILITY

Discussion of communitarianism is complicated by the fuzziness of the legal and sociological concepts employed.33 “It is not easy to establish when an interest acquires the dimension of a general interest”,34 particularly when it is furthered through classically bilateral rules.35 Broadly, however, the communitarian perspective relates to legal rules that move beyond the model of a relationship solely between the injured and responsible State,36 conceptualised in traditional tort law terms of rectification of wrongful violation of private rights.37 This section will consider four areas of State responsibility where a communitarian shift would go with the systemic grain.


34 Gaja, supra note 12, at 21.

35 Villalpando The Legal Dimension, supra note 12, at 395.

36 See Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1970 ICJ REP. 3, para. 33 (Feb. 5) (obligations erga omnes elaborated by contrast with bilateralist investment protection).

First, the basis of responsibility seems agnostic on bilateralism and multilateralism. It is trite law nowadays that responsibility arises out of an internationally wrongful act. But the historical move “from Anzilloti to Ago” in the conceptualisation of responsibility as based on breach, rather than injury, was communitarian in its revolutionary implications. The perspective shifted from the bilaterialist focus on the injured (injury/damage) or responsible (fault) actors to the community interest in compliance with even bilateral obligations. Thorny questions of whether parties to multilateral obligations and non-State beneficiaries are “injured” by the breach were cleverly side-stepped, leaving space for developing communitarian primary rules involving diverse actors. The routine and widespread invocation of responsibility in relation to the Pandemic, including in respect of such obligations implicating the general interest as human rights, reinforces the openness of international law towards its communitarian potential.

38 ILC Articles, supra note 13, at Art. 2, Part One Chapters II, III; Legal Consequences of the Separation of the Chagos Archipelagos from Mauritius in 1965, Advisory Opinion, 2019 ICJ REP. 95, para. 77 (Feb. 25).


40 JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 54-60 (2013).


The second stratum of rules relates to shared responsibility. Rules on attribution by acknowledgment and invocation in cases of plurality of responsible actors may address to some extent the allocation of shared responsibility in relation to the Pandemic. But many claims will turn on rules regarding aid or assistance between different actors, currently expressed in custom-reflecting terms in Article 16 of the ILC Articles:

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.

Article 16 and the analogous rule in the ILC work on responsibility of international organizations, both based to a significant extent on inferences from sparse and peculiar practice, may be challenged on three points by the Pandemic. First, is there a requirement of fault on the part of the aiding actor? Article 16(a) speaks of “knowledge”, and communitarian interests may either caution against a permissive standard that could discourage international

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43 ILC Articles, supra note 13, at Arts. 11, 48. Governmental tweets are attributable as conduct of organs, thus retweets may count as acknowledgment, Saudi Arabia—IP, supra note 19, at para. 7.161.


cooperation or insist on the public good of maximising opportunities for reparation to injured actors, a scarce resource in the patchily judicialized international order.\(^\text{46}\) Secondly, is the double-obligation requirement in Article 16(b) correct and desirable? Some doubt it,\(^\text{47}\) and the involvement in Pandemic-related claims of States bound by different regional instruments and by international organizations, rarely bound by the same obligations as States (e.g. to prevent the use of one’s territory or not to act outside the organization’s competence), is likely to generate practice challenging the rule. Thirdly, does the rule on aid apply to omissions, particularly failure to provide information? The apparently negative answer is likely to be challenged by claims alleging supportive omissions.\(^\text{48}\) In short, the law of shared responsibility complicates easy dichotomies between bilateralist and communitarian interests, although the remedial perspective lent by the Pandemic is likely to favour the general interest in maximising the opportunities for reparation.\(^\text{49}\)

The third body of rules pertains to the content of responsibility, and raises two issues of multilateral significance. The first is the legal relevance of the capacity of the responsible actor, be it a State or an international organization, to make reparation by full compensation. The ILC Articles address the concern “that the principle of full reparation may lead to

\(^{46}\) Vladyslav Lanovoy, *Complicity in an Internationally Wrongful Act*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* 134, 150-156 (André Nollkaemper & Ilias Plakokefalos eds., 2014); *JACKSON, supra* note 13, at 159-161.

\(^{47}\) *JACKSON, id.*, at 162-171.

\(^{48}\) *Bosnia Genocide, supra* note 44, at paras. 420, 432.

disproportionate and even crippling requirements [for] the responsible State” and conclude that, in the context of compensation, the concern is addressed by the exclusion of indirect and remote damage – but, by necessary implication, not of “crippling” damage. Special Rapporteur James Crawford’s position that concerns over crippling compensation were exaggerated did not persuade everybody, and may seem even less attractive after recent multi-billion-dollar awards against developing States. Pandemic-related practice could seek to challenge the bilateralist focus on the interests of the injured actor in favour of the community interest in not crippling basic functions of States and international

50 ILC Articles, supra note 13, at Art. 34, Commentary 5; also Art. 31(1); followed regarding international organizations, 2011 ILC Articles, supra note 45, at Art. 31, Commentary 4, Art. 34, Commentary 1, Art. 40, Commentary 4.


52 YBILC, Vol II, Pt. 1 (2011), UN Doc A/CN.4/SER.A/2011/Add. 1 (Part 1) 95 para. 74 (“WHO … criticised the principle [of full compensation because it] ‘could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources’”); Duzgit Integrity, supra note 19, para. 26 (Kateka) (“The main concern [of some members of the ILC] was the potentially crippling effect of compensation payments [on the developing countries]”).

53 ConoccoPhillips Petrozuata BV and Ors v Venezuela (ICSID Case no ARB/07/30, March 8, 2019); Tethyan Copper Company Pty Limited v Pakistan (ICSID Case no ARB/12/1, July 12, 2019).
organizations. The second issue relates to aggravated responsibility for serious breaches of obligations under peremptory norms of general international law (jus cogens). The magnitude of the Pandemic and its impact on the life and health of individuals and the viability of organized polities suggests a possibility of creative application of the accepted rules on jus cogens. The obligation not to render assistance in the maintenance of situations created by serious breaches of jus cogens could be operationalised through international (non-)co-operation, for example regarding actors spreading or not suppressing the Pandemic, and the obligation to co-operate through lawful means to bring an end to such breaches could at a minimum discourage efforts to undermine relevant international institutions.

Implementation of responsibility raises the clearest multilateral issues. The uneven distribution of consent to adjudicators and the pragmatic unwillingness to articulate claims in


55 ILC Articles, supra note 13, at Part Two Chapter III.

56 E.g. right of self-determination, Int’l L. Commission, Draft conclusions on peremptory norms of general international law (jus cogens), in REPORT 2019 UN Doc. A/74/10 142, Annex (h), Commentary 12.


58 Dupuy, supra note 12.
sufficiently formalised terms against powerful States\textsuperscript{59} suggests that the scope of the right to invoke responsibility could be tested, particularly on points that are accepted in principle but rarely applied in practice. What makes a State “specially affected” for the purpose of invocation of responsibility?\textsuperscript{60} Can States invoke responsibility when they are not injured\textsuperscript{61} and, if so, regarding which obligations?\textsuperscript{62} Can such States implement responsibility by means of so-called third-party countermeasures?\textsuperscript{63} The apparent strength of judicial support for

\textsuperscript{59} Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK) 2016 ICJ REP. 833, paras. 44-58 (Oct. 5).
\textsuperscript{60} ILC Articles, \textit{supra} note 13, at Art. 42(b)(i); Obligations, \textit{id.}, para. 44.
\textsuperscript{61} Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) 2012 ICJ REP. 449 para. 68; Myanmar Genocide, \textit{supra} note 22, at para. 41. But note the scepticism of Judges with a professional background in the foreign service of certain States, Questions, \textit{id.}, Separate Opinion of Judge Skotnikov 481 paras. 10-22; Dissenting Opinion of Judge Xue 571 paras. 2-23; Declaration of Judge Donoghue 584 para. 11; Obligations, \textit{id.}, Declaration of Judge Xue 1029 para. 8; Myanmar Genocide, \textit{id.}, Separate Opinion of Vice-President Xue para. 8.
\textsuperscript{62} \textit{Cf.} 2019 ILC Draft Conclusions, \textit{supra} note 56, at Conclusion 17(2) (‘Any State is entitled to invoke the responsibility of another State for a breach of … \textit{jus cogens}’), with the only two examples of application in the ICJ, to a particular criminal cooperation procedure, Questions, \textit{id.}, and perhaps the most-endorsed contemporary peremptory, Myanmar Genocide, \textit{id.}; Annex (b), Commentary 6.
\textsuperscript{63} The ILC left the question open, ILC Articles, \textit{supra} note 13, at Art. 54; 2019 ILC Draft Conclusions, \textit{id.}, Conclusion 19(1), and while legal writings support such a right, MARTIN DAWIDOWICZ, \textsc{third-party countermeasures in international law} (2017), there is
various multilateral positions is not always echoed in State practice. Take, for example, the sceptical note struck by China in the Sixth Committee’s 2019 session:

[D]ifferences in interpretation and major concerns existed among States with respect to the provisions relating to serious breaches of obligations under peremptory norms of general international law, countermeasures and measures taken by States other than an injured State.  

A concerted effort to explicitly operationalise communitarian rules in the practice of the implementation of State responsibility would be an important development.

IV. THE FUTURE OF BILATERALIST STATE RESPONSIBILITY

It seems likely that the law of State responsibility will be pushed towards a re-entrenchment of its bilateral underpinnings, attuned as they are to the interests of the injured State. This section will consider three areas of State responsibility where a bilateralist shift would go with the systemic grain.


64 Supra note 20, at para. 17, also para. 37 (Russia); id.
First, claims, particularly in judicial fora, are likely to raise questions about circumstances precluding wrongfulness such as *force majeure*, necessity and distress.\(^\text{65}\) These circumstances will not be easy to invoke to defend conduct in breach of primary rules in practice, *e.g.* the “only available means” criterion for necessity in light of apparently different approaches adopted by States.\(^\text{66}\) A critical reading of practice in support of the ILC Articles\(^\text{67}\) may suggest that impressive numbers are not always matched by the quality of the reasoning, approval in State and institutional practice, and representativity of the international community.\(^\text{68}\) Concerted practice could attempt to reshape, for example, the rule of necessity around the gravity-of-peril axis, or relax the “only available means” to “reasonable means”, or relax or even drop altogether the qualification as to contribution.\(^\text{69}\) While in some specialist fields like investment law such a development could further the community interest in not beggaring actors in extraordinary circumstances, the broader systemic effect evokes Philip Allot’s memorable warning of the danger posed to the international legal order by an expansive understanding of necessity.\(^\text{70}\)

Secondly, the weight of the argument on calculation and valuation of damages will be borne not by grand questions of principle but the boring small print of evidence, injury,

\(^{65}\) ILC Articles, *supra* note 13, at Arts. 23-25.

\(^{66}\) *See* generally PADDEU JUSTIFICATION, *supra* note 13, Ch 8.


\(^{69}\) ILC Articles, *supra* note 13, at Art. 25.

causation, and damage.\textsuperscript{71} Blackletter law calls only for reparation for damage for injury \textit{caused} by the wrongful act.\textsuperscript{72} The law on the topic is still governed by the bilateralist assumptions of \textit{Factory at Chorzów} “that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”\textsuperscript{73} State practice regarding the Pandemic is likely to test all the permutations of causality, clarifying uncertainties, fleshing out ambiguities through application, and generally reinforcing the classic bilateralist structure. At what point are different instances of conduct by States, international organizations, and non-State actors, sometimes on their own, sometimes due to combined effect, too remote for a sufficient causal link?\textsuperscript{74} How is the principle of mitigation, dispositive to arguments about the technical incompetence of some injured States, applied?\textsuperscript{75} Is concurrency of factors causing damage irrelevant\textsuperscript{76} or relevant, and how can it be operationalised in practice?\textsuperscript{77} All these

\textsuperscript{71} Pey Casado v. Chile (II), para. 232 (ICSID Case No. ARB/98/2, Sept. 13, 2016).
\textsuperscript{72} ILC Articles, \textit{supra} note 13, at Art. 31, Commentaries 9-10.
\textsuperscript{73} Factory at Chorzów (Germany v. Poland) 1928 PCIJ Ser. A no 17, 29, 47 (Sept. 13). \textit{Cf.} Arthur Ripstein, \textit{As if It Never Happened}, 48 \textsc{William} & \textsc{Mary} \textsc{L Rev} 1957 (2007); Gardner, \textit{supra} note 37.
\textsuperscript{74} ILC Articles, \textit{supra} note 13, at Art. 31, Commentary 10.
\textsuperscript{75} \textit{Id.}, Commentary 11; Iran v. US, Full Tribunal Iran-US Claims Tribunal, paras. 1796-1799 (Award No. 605-A15 (II:A)/A26 (IV)/B43-FT, March 10, 2020).
\textsuperscript{77} Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) 2018 ICJ REP. 15 para. 31 (Feb. 20).
points are vague, unsettled, or both, and crucial for evaluating claims relating to the Pandemic.\textsuperscript{78}

The final bilateralist element of State responsibility is international law at its most archaic, the dystopian schoolyard transposed internationally, namely countermeasures.\textsuperscript{79} Self-help plays to the strength of the more influential actors but puts even them “in the position of potentially being held responsible for violating international law” if they misjudge the situation or their response. The US State Department’s Legal Advisor was plainly right that “countermeasures should not be engaged in lightly.”\textsuperscript{80} The Pandemic will provide an opportunity for relevant actors to express their views on whether the ILC Articles accurately capture the law of countermeasures, or are either too strict or too permissive.\textsuperscript{81} Reactions to claims by the US will carry particular weight because its position is largely in line with the substantive conditions in the ILC Articles, although less so with the procedural ones.\textsuperscript{82}

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\textsuperscript{78} It is less obvious that contribution to injury is particularly relevant to claims regarding the spread of the Pandemic, ILC Articles, \textit{supra} note 13, at Art. 39; Duzgit Integrity, \textit{supra} note 19, at paras. 197-199.

\textsuperscript{79} Allot, \textit{supra} note 70, at 22-24.


\textsuperscript{81} Cf. Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain and Ors v. Qatar), para. 49, (Int’l Ct. Justice, Jul. 14, 2020); \textit{id.}, Separate Opinion of Judge Cançado Trindade.

\textsuperscript{82} Cf. Egan, \textit{supra} note 80; ILC Articles, \textit{supra} note 13, at Arts. 49-53, particularly 52(1)(b), (2)(b).
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Overall, the mood music of these times is withdrawal from international law. It is only to be expected that, with the breakdown of communitarian institutions of enforcement and implementation, the classic fall-back of self-help will come once more to the fore.  

V. CONCLUSION

Will the Pandemic affect the balance of delicately intertwined bilateral and communitarian elements in the law of State responsibility? For some, the apparent dysfunction of international politics makes everyone a Westphalian in the Pandemic, with re-entrenched bilateralism filling the gap of the apparent failure by institutionalised communitarianism. For others, the egoistic dysfunction of some politi
ces may be leading observers to underestimate communitarianism beyond institutional frameworks, a development on the desirability of which reasonable people will disagree.

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84 Lewis Carroll, The Hunting of the Snark (1876) (“for the Snark was a Boojum, you see”) (emphasis in the original).
This paper first argued for the presence of a normative and institutional window for a significant change in the law (Section II). It then considered possible developments in the communitarian (III) and bilateralist directions (IV), concluding that each is consistent with a different aspect of the systemic grain. Of course, to suggest that established rules may be challenged is not exceptional. The international legal process normally operates through gradual change.  

But in a different sense, *exceptional* is precisely what the situation is. The gravity and immediacy of the Pandemic, the likely generality of State practice, and the completeness of possible challenges to the current rules, taken together, constitute a law-making moment inconceivable just six months ago, giving the international community until autumn 2022 to decide whether the law of the ILC Articles is fit for the (post-)Pandemic world.  

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