
The Law of State Responsibility and the Covid-19 Pandemic

Meagan Wong, Lecturer, School of Law and Human Rights Centre [DOI: 10.5526/xgeg-xs42_040]

I. Introduction

The Covid-19 pandemic has raised questions of international responsibility of States; in particular, whether States can be internationally responsible for the failure to prevent and the spread of the outbreak internally and externally across international borders;¹ and other matters pertaining to international health law.² Also, as highlighted in earlier contributions in this publication, the Covid-19 pandemic raises tensions and questions in domestic and international law. These draw to light questions of State responsibility for acts – or omissions – by States for various conduct that may come into question. This is particularly so when States are unable to perform obligations owed under international law to other States, international organizations or individuals, as a result of their domestic policies and actions to deal with the Covid-19 pandemic.

This contribution provides an overview of the rules of international law concerning the responsibility of States for their international wrongful acts, and how these rules are relevant in the Covid-19 pandemic. The international law of State responsibility, as formulated by the International Law Commission in the 2001 Articles on the responsibility of States for internationally wrongful acts (“2001 ILC Articles”),³ depicts the general conditions under international law for a State to be responsible for wrongful acts and the legal consequences that flow by operation of law. These general conditions are understood as the secondary rules of State responsibility, which result from the breach of primary rules, i.e. rules of customary international law or treaty law that provide international obligations on States.

With regard to primary rules, States have very different obligations under various international legal frameworks which play an especially significant role during the pandemic, e.g., international health law; international human rights law; international refugee law; international investment law; international trade law; international environmental law and international water law. Thus, this contribution does not look at the primary rules, of which there are many under the aforementioned legal frameworks, and some have been examined in detail elsewhere in this publication; but rather focuses on the secondary rules under international law that apply when a State has acted in breach of any obligation arising from one or more of these primary rules.

¹ Article 2, International Health Regulations 2005.

² Pedro A. Villarreal, ‘Covid-19 Symposium: “Can they really do that?” States’ Obligations under the International Health Regulations in Light of Covid-19 (Part I),’ 31 March 20, available at: <http://opiniojuris.org/2020/03/31/covid-19-symposium-can-they-really-do-that-states-obligations-under-the-international-health-regulations-in-light-of-covid-19-part-i/>.

³ ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on the work of its 53rd session’ (23 April-1 June and 2 July-10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 [2001 ILC Articles].

This contribution will be structured as follows:

(i) the general principles of State responsibility that govern the concept of an internationally wrongful act of a State will be explained. Within this analytical framework, the complexities of various factual situations that pertain to the Covid-19 pandemic will be drawn out. As will be elaborated upon, the attribution of conduct to a State and the finding of a breach of an international obligation cannot be established in the abstract, but needs to be characterised on the basis of factual situations that arise.

(ii) Due to the unprecedented and extraordinary nature of the Covid-19 pandemic, it is relevant to examine whether States may rely on circumstances precluding wrongfulness as a defence so to speak for not complying with their international obligations in times of the Covid-19 pandemic. Three grounds appear plausible: *force majeure*, distress and necessity.

(iii) In the event that there is a breach of an international obligation, plausible – or not so plausible - inter-State claims may arise. In light of these developments, the content (or substance) of State responsibility will be discussed from the premise that international responsibility flows from the breach of the international obligation and that a new legal relationship arises from the internationally wrongful act. The legal consequences of an internationally wrongful act give rise to an obligation on the responsible State to cease the wrongful conduct, and make full reparation for the injury caused by the international wrongful act.

(iv) Lastly, the practical aspects of the invocation of the responsibility of a state will be explained in the context of who is entitled to bring a claim. Ultimately, as will be shown, forms of invocation vary, and will depend on the circumstances surrounding the internationally wrongful conduct and available fora.

Before engaging in the present inquiry, a point of clarification must be made from the outset that the international law of State responsibility provides default rules for determining the existence and consequences of internationally wrongful acts. These rules are expressed in customary law so are applicable generally, whether or not the particular instrument refers to them, but are also mostly dispositive, so can be suspended by *lex specialis* (special or more precise law) in particular instruments and institutions.⁴ For example, the World Trade Organization's dispute settlement mechanism partly replaces rules on implementation, by substituting countermeasures with treaty-based suspension of concessions; and partly replaces rules on reparation, by removing the possibility to claim compensation. In some international tribunals, issues governed by the law of State responsibility will be articulated in a substantially similar manner but without relying on their technical terminology; the treatment of rules on attribution in some of the case law of the European Court of Human Rights is one example.⁵ In short, State responsibility has potentially very broad coverage but may sometimes be under-appreciated by specialists in particular fields of international law, either because of *lex specialis* or the development of specialist terminology.

⁴ Article 55, 2001 ILC Articles, *ibid*. See also, Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law,' (2006) 17(3) *Eur J Intl L* 483.

⁵ James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights,' in Anne van Aaken and Iulia Motoc (eds) *The European Convention on Human Rights and General International Law*., Online Journal (Oxford University Press, 2018) 178.

II. The Internationally Wrongful Act of a State

Article 1 of the 2001 ILC Articles stipulates: 'Every internationally wrongful act of a State entails the international responsibility of that State.' This is the underlying premise of the law of State responsibility, for which the remainder of the 2001 ILC Articles follows from.⁶ Thus, in the context of the Covid-19 pandemic, every internationally wrongful act of a State would entail international responsibility.

Perhaps the most obvious point of departure when discussing State responsibility and the Covid-19 pandemic, without apportioning blame,⁷ would be questioning whether State(s) could be held internationally responsible for not preventing the spread of the virus outbreak internally or externally beyond their borders.⁸ To adopt a black-letter analytical framework premised on the 2001 ILC Articles, the inquiry would need to formulate the aforementioned conduct of a State as an internationally wrongful act. Accordingly, Article 2 of the ILC Articles stipulates:

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.

Thus, on a general level, conduct in relation to not preventing,⁹ protecting against, controlling,¹⁰ the spread of the virus internally or externally would have to be identified in line with the nomenclature of 'an act' or an 'omission' depending on the primary rule in question.¹¹

⁶ ILC Commentary to Article 1, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two (hereinafter "ILC Commentary") 32.

⁷ See Commentary to Article 2, ILC Commentary.

⁸ Gian Luca Burci, 'The outbreak of the Covid-19 Coronavirus: are the International Health Regulations fit for purpose' 27 February 2020, available at <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>; Caroline Foster, 'Justified Border Closures do not violate the International Health Regulations 2005' 11 June 2020, available at <https://www.ejiltalk.org/justified-border-closures-do-not-violate-the-international-health-regulations-2005/>.

⁹ See the three Part entry by Antonio Coco and Talita de Souza Dias on due diligence and Covid-19: Part I: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak, 24 March 2020, available at: <https://www.ejiltalk.org/part-i-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>; Part II: Due Diligence and COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak; 25 March 2020, available at: <https://www.ejiltalk.org/part-ii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>; Part III: Due diligence and COVID-19: States' Duties to prevent and halt the Coronavirus outbreak, 25 March 2020, available at: <https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak/>. See also, their co-authored paper in this publication.

¹⁰ Article 2, International Health Regulations (2005).

¹¹ In the Corfu Channel case, the Court observed that the laying of the minefield which caused the explosions 'could not have been accomplished without the knowledge of the Albanian government' and [...] 'the obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them.' It further observed that Albania neither notified the existence of the minefield, nor warned the British warships of the imminent danger and held that 'nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania,' Corfu Channel case, Judgment of April 9th,

A point can be made here about the aforementioned general principles of State responsibility in relation to the determination of an international wrongful act of a State: that the meaning and content of these secondary rules cannot be interpreted in their abstract, but rather the inquiry shifts towards the application of these rules, i.e. whether a particular set of facts can amount to conduct that is an act or omission attributable to the State and that would constitute a breach of an international obligation.

As mentioned in my introduction, different primary rules under various legal frameworks under international law govern different conduct. Thus, it is likely that different obligations are called into question and when determining whether there is a breach of an international obligation, the principal focus should be on the primary obligation concerned. Pursuant to Article 12 of the 2001 ILC Articles, a breach of an international obligation exists '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.' Accordingly, the law of State responsibility does not differentiate between treaty law or customary international law and is not concerned with the origin of the obligation breached.

Drawing upon a more specific context, allegations have been made that China has acted in breach of obligations under the International Health Regulations (2005), an internationally binding agreement between 196 countries including all members of the World Health Organization (WHO); particularly Article 6 (notification) and Article 7 (information-sharing during unexpected or unusual public health events).¹² Not wanting to comment here on the validity of these allegations, the point I wish to elucidate is that these are specific obligations which speak to obligations to notify and share information respectively. These primary rules differ from other primary rules that may also be applicable in the context of conduct to not prevent the spread of the virus outbreak internally or externally, e.g. the no-harm rule in a transboundary context and the concomitant obligation of due diligence that stems from this primary rule;¹³ or obligations in relation to conditions of detention;¹⁴ or port denials and restrictions.¹⁵ Thus, the point is that State responsibility for acts or omissions that amount to conduct that did not prevent or contain the virus outbreak need to be determined on a rule by rule basis in accordance

1949: ICJ Reports 1949, p.4, at p.22 and 23. Also, in the Consular Staff in Tehran case, the Court held that the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.', United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p.3, at para.63.

¹² See Peter Tzeng, 'Taking China to the International Court of Justice over Covid-19,' 2 April 2020, available at: <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>.

¹³ Attila Tanzi, 'State liability' in Max Planck Encyclopedia of Public International Law, para.3; see also the earlier contribution by Antonio Coco and Talita de Souza Dias in this publication on 'Cyber due diligence in public health crises'.

¹⁴ For example, see the earlier contribution by Carla Ferstman in this publication on 'Detention and pandemic exceptionality.'

¹⁵ See Alina Miron, 'Port Denials and Restrictions in Times of pandemic: Did International Law lose its North Star', 20 April 2020, available at <https://www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/>.

to whether the conduct is attributable to the State under international law and constitutes a breach of the obligation arising from the primary rule in question.

Another aspect which merits further consideration pertains to the internal measures and restrictions in relation to responding to the Covid-19 pandemic, i.e. broadly speaking, lockdowns which entail severe restrictions of movement and retail trade. Indeed, “lockdown” measures raise discussion as to their legality under domestic law;¹⁶ but in any event, Article 3 of the 2001 ILC Articles is clear that when determining a breach of an international obligation by a State, the characterisation ‘of an act of a State as internationally wrongful is governed by international law.’¹⁷ Thus, if the conduct in question is lawful under domestic law, this does not affect the characterisation under international law that the act is internationally unlawful.¹⁸ However, what may affect the characterisation is the nature of the primary rule itself as some primary rules have restrictions or derogations,¹⁹ e.g. Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights.²⁰ Thus, when determining whether there is a breach of an international obligation the principal focus should be on the content of the primary obligation concerned.

Whilst continuing down the inquiry pertaining to internal measures imposed by States in dealing with the Covid-19 pandemic, it may be of particular interest to think about the structural and capacity-building measures,²¹ and strategies of States in providing a public health response to Covid-19,²² and also the standards and decisions of States within the sphere of domestic health law.²³ Obviously, infrastructure for capacity-building, as well as healthcare systems differ in every State, and whether States commit an internationally wrongful act in this regard is dependent on the primary rule in question which applies. Here, the Commentary to Article 2 of the 2001 ILC Articles may be helpful that there is no general rule pertaining to standards for breach of an obligation:

whether they involve some degree of fault, culpability or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any

¹⁶ See Jeff King, ‘The Lockdown is Lawful’, 1 April 2020, available at <https://ukconstitutionallaw.org/2020/04/01/jeff-king-the-lockdown-is-lawful/>; Jeff King ‘The Lockdown is Lawful: Part II’, available at: <https://ukconstitutionallaw.org/2020/04/02/jeff-king-the-lockdown-is-lawful-part-ii/>.

¹⁷ Article 3, 2001 ILC Articles (n. 3).

¹⁸ Ibid.

¹⁹ See, Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

²⁰ See Alessandra Spadaro, ‘Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?’, 16 March 2020, <https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/>; Mariel Morales Antoniazzi and Silvia Steininger, ‘How to protect human rights in times of Corona? Lessons from the Inter-American Human Rights Systems’, 1 May 2020, available at: <https://www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/>.

²¹ See Giulio Bartolini, ‘Are you ready for a Pandemic? The International Health Regulations Put to the Test of Their ‘Core Capacity Requirements’, 1 June 2020, available at: <https://www.ejiltalk.org/are-you-ready-for-a-pandemic-the-international-health-regulations-put-to-the-test-of-their-core-capacity-requirements/>.

²² Lorna McGregor, ‘Contact-tracing Apps and Human Rights’, 30 April 2020, available at <https://www.ejiltalk.org/contact-tracing-apps-and-human-rights/>.

²³ For example, see the earlier contribution by Sabine Michalowski in this publication, ‘The use of age as a triage criterion.’

presumption in this regard as between the possible standards. Establishing there is a matter for the interpretation and application of the primary rules engaged in the given case.²⁴

III. Circumstances Precluding Wrongfulness

Under the law of State responsibility, there are circumstances that a State may plead to preclude the wrongfulness of conduct that would otherwise be a breach of the international obligations of the State concerned.²⁵ In a manner of speaking, this would provide a “defence” against a claim for the breach of an international obligation. According to the ILC Commentary, ‘they do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.’²⁶ Three circumstances have been identified as being potentially relevant:²⁷ *force majeure*, distress and necessity. Before examining each respective circumstance in more detail, three points can be made from the outset. First, whether or not a circumstance precluding wrongfulness may apply, is dependent on the nature of the primary rule, e.g. some obligations under human rights treaties which are subject to derogations may exclude the plea of necessity. Second, the ILC had drafted these circumstances to have a high threshold in the sense that it would not be easy for States to rely on them to preclude wrongfulness for conduct which would ordinarily be in breach of an international obligation. Third, the relevance or appropriateness of these circumstances would depend on each State for the particular obligation concerned. There is no “blanket” circumstance that would apply to all States for all the breach of all international obligations during the Covid-19 pandemic.

With regard to *force majeure*, Article 23 stipulates:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring.²⁸

It would appear that *force majeure* strikes at the capacity for States to do something, i.e. emphasis on “materially impossible” in the circumstances for the State to perform the obligation. States who are unable to comply with their international obligations during the Covid-19 pandemic would have to prove the material impossibility of performance. Further,

²⁴ Commentary to Article 2, ILC Commentary (n. 6), p.35.

²⁵ Note that Article 26 stipulates: ‘Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.’

²⁶ Commentary to Chapter V, ILC Commentary (n. 6), p. 71.

²⁷ Federica Paddeu and Freya Jephcott, ‘Covid-19 and Defences in the Law of State Responsibility: Part I’, 17 March 2020, available at <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/>.

²⁸ Paddeu and Jephcott have identified five criteria for a successful claim for *force majeure*: A successful claim of *force majeure* must fulfill 5 conditions: (i) there must be an unforeseen event or an irresistible force (the ‘triggering event’); (ii) the event or force must be beyond the control of the State; (iii) the event must make it ‘materially’ impossible to perform an obligation; (iv) the State must not have contributed to the situation; and (v) the State must not have assumed the risk of the situation occurring. Each of these will be assessed in turn, except for (v) which is likely to depend on the specific language of particular treaty commitments. Ibid.

according to the ILC Commentary to Article 23, force majeure differs from a situation of distress or necessity because 'the conduct of the State involved which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.'²⁹ It is likely that the failure of performance by a State of an international obligation as a result of restrictive measures or a nation-wide lockdown is not involuntary.

Distress under Article 24 stipulates:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if: (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the act in question is likely to create a comparable or greater peril.³⁰

According to the Commentary to Article 24, distress may only be invoked where 'a State agent has acted to save his or her own life or where there exists a special relationship between the state organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.'³¹ It is difficult to imagine how States would be able to establish there is a special relationship between the State organ or agent that committed the breach of an international obligation and persons in danger (presumably the entire human population within the State).

This brings the analysis to Article 25:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril;
 - and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.³²

According to the ILC Commentary to Article 25, 'the term "necessity" is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other

²⁹ Commentary to Article 23, ILC Commentary (n. 6), p.76.

³⁰ Paddeu and Jephcott suggest the following criteria for a successful claim of distress: the State would need to prove that: (i) threat to life; (ii) a special relationship between the State organ and the persons in question; (iii) that there was no other reasonable way to deal with the threat; (iv) that it did not contribute to the situation; and (v) that the measures were proportionate.' 'Federica Paddeu and Frey Jephcott, 'Covid-19 and Defences in the Law of State Responsibility: Part II', 17 March 2020, available at: <https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/>.

³¹ Commentary to Article 24, ILC Commentary (n. 6), p. 80.

³² Paddeu and Jephcott (n. 30) suggest the following criteria for a successful claim of necessity: the State would need to prove that: (i) threat to life; (ii) a special relationship between the State organ and the persons in question; (iii) that there was no other reasonable way to deal with the threat; (iv) that it did not contribute to the situation; and (v) that the measures were proportionate.

international obligation of lesser weight or urgency.³³ It is also stated that necessity ‘arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.’³⁴ States wishing to rely on the plea of necessity would thus have to prove that the obligation in breach was irreconcilably incompatible with an essential interest. This is likely to be very difficult, as intended by the drafters.

In a similar vein to the preceding analysis, whether a State can make a successful plea of *force majeure*, distress or necessity needs to be determined in accordance with whether a particular set of facts that arise from the circumstances surrounding the primary rule can fit into the content of the respective secondary rules of State responsibility.

IV. Content of International Responsibility

Upon the finding of an internationally wrongful act by a State – the next point of inquiry, which may find increasing relevance in the Covid-19 pandemic landscape, is one of legal consequences under the regime of State responsibility.³⁵ Indeed, under the black-letter nomenclature of the 2001 ILC Articles, the content (or substance) of international responsibility is the new legal relationship that arises upon the commission by a State of an internationally wrongful act. State responsibility also extends towards breaches of international law where the primary beneficiary of the obligation breached is an individual or an entity other than a State.³⁶ There is also a plurality aspect to the content of State responsibility in accordance with Article 33 that ‘the obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.’

Although there may be an inclination to understand reparations for an internationally wrongful act as entitlement for damages from the injured State (or individual or other entity) for the wrongful conduct,³⁷ the regime of State responsibility situates legal consequences as obligations that arise from the breach of an international obligation. Stemming from the breach of an international obligation, the core legal consequences under the regime of State responsibility are the obligations of the responsible State to cease the wrongful conduct (Article 30) and to make full reparation for the injury caused by the internationally wrongful act (Article 31). It should be emphasised that these are new obligations that stem by operation of law from the breach of an international obligation; and thus reparations are not an entitlement by the injured State, individual or entity but rather an obligation from the wrongdoing State to make full reparation.

³³ Commentary to Article 25, ILC Commentary (n. 6), p. 80.

³⁴ Ibid.

³⁵ This is not to say that a State may not face legal consequences of conduct which is internationally wrongful outside of State responsibility, e.g. under the law of treaties framework. See ILC Commentary (n. 6), p.86.

³⁶ Article 33, 2001 ILC Articles (n. 3).

³⁷ Helen Davidson and Alison Rourke, ‘Trump says China could have stopped Covid-19 and suggests US will seek damages’, *The Guardian*, 28 April 2020; Tim Walker, ‘First thing: Trump’s latest coronavirus take – sue China’, *The Guardian*, 28 April 2020.

The forms of reparation for the injury caused by the internationally wrongful act can take the form of 'restitution, compensation and satisfaction, either singly or in combination.'³⁸ We are reminded that 'blackletter does not call for reparation of any and all consequences flowing from the wrongful act' and that 'it is only damage for injury caused by the wrongful act [...] in breach of the particular primary rule that has to be repaired.'³⁹

In the similar vein as the foregoing analysis on general principles of State responsibility, the content and form of reparation for internationally wrongful conduct during the Covid-19 pandemic would need to be brought out to light through the international process of claims by States depending on the availability of fora.

V. Implementation

The inquiry now takes on a more practical consideration, i.e. the implementation of State responsibility. This refers to how the obligations to make reparations towards a beneficiary of the obligation can be invoked under international law; and who is entitled to claim. The most obvious starting point is that an injured State is entitled pursuant to Article 41 of the 2001 ILC Articles to invoke the responsibility of another State if: (a) the obligation breached is owed to that State individually; or (b) a group of States including that State, or the international community as a whole; and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation. According to the ILC Commentary to Article 42, invocation should be understood as 'taking measures of a relatively formal character for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.'⁴⁰

In practice, Article 43 of the ILC Articles stipulates 'an injured State which invokes the responsibility of another State shall give notice of its claim to that State.' The Commentary to this provision elaborates that 'although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc.'⁴¹ Obviously in practice, invocation would take different forms depending on the States involved and the availability of fora.

A final note is that in the event that the breach of the international obligation has an *erga omnes* character,⁴² Article 48(1) allows a State other than an injured State to invoke responsibility if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. According to Article

³⁸ Article 34, 2001 ILC Articles (n. 3).

³⁹ Martins Paparinskis, 'COVID-19 Symposium: COVID-19 and the foundations of international law', 31 March 2020, available at <http://opiniojuris.org/2020/03/31/covid-19-symposium-covid-19-and-the-foundations-of-international-law/>.

⁴⁰ Commentary to Article 42, ILC Commentary (n. 6), p.117.

⁴¹ Commentary to Article 43, ILC Commentary (n. 6), p.119.

⁴² *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, paras.33-34.

48(2), a State other than an injured State that is entitled to invoke responsibility may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.⁴³ Notably, the invocation of responsibility pertains to the obligation of reparation to the injured State and the beneficiaries of the obligation breached and *not* to the State making the claim.

Suffice to say, these practical steps with regard to invoking the content of responsibility for wrongful conduct committed during the Covid-19 pandemic, i.e. obligations of the responsible State to make full reparations depend on many other factors such as the particular set of facts and circumstances, availability of fora and evidence pertaining to the breach of the international obligation.

VI. Conclusion

This contribution has provided an overview to how the secondary rules of State responsibility apply to internationally wrongful acts by States during the Covid-19 pandemic. I have pointed out that the determination of an internationally wrongful act, i.e. the attribution of conduct to a State and the finding of a breach of an international obligation is entirely premised on the nature of the underlying primary rule. I have also pointed out how the Covid-19 puts forward complex factual situations – of which – there is no simple cut and paste approach of applying the black-letter rules of State responsibility, but rather the inquiry pins on which set of facts and circumstances may amount to a finding of an internationally wrongful act. Likewise, the legal consequences that flow from operation of law for the breach of an international obligation, i.e. forms of reparations, depend on the nature of the primary rule which is breached and the circumstances surrounding the wrongful act; and remain to be seen depending on the availability of judicial process. Be that as it may, it is important to understand that entitlement to a claim is not an entitlement of damages as such, but rather an entitlement to invoke the responsibility of a wrongdoing State, to fulfil its obligations to cease the wrongful conduct (Article 30) and to make full reparation for the injury caused by the internationally wrongful act (Article 31). A legal relationship arises between a wrongdoing State and an injured State (or other beneficiaries of the obligation) which entitles the latter to invoke the international responsibility of the former. Ultimately, claims whether plausible or not so plausible will depend on the primary rule that has been breached. In light of the factual complexity of the Covid-19 pandemic, and the plethora of primary rules of international law that apply to States, it is likely that new and interesting questions of State responsibility will arise during the international process of the application of the black-letter rules in claims to come.

⁴³ See Commentary to Article 48, ILC Commentary (n. 6), p.126-128.