
Accountability

Accountability: A Discussion

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The discussants considered the different framings of accountability and legal responsibility and how these related to a range of contexts brought about by Covid-19. However, because of the limitations of existing frameworks of legal responsibility, it was recognized that it will not always be possible for them to link to the various contexts and factual scenarios which arise from Covid-19; necessarily, there will be gaps.

Legal responsibility is a narrower subset of what is a much wider or diffuse understanding of accountability, the latter concept including also notions of political or moral blame. There is often a wish to find some kind of moral or political blame for what one or more actors did or did not do, or to recognise formally that what was done was insufficient or failed in some way to respond effectively to individuals' or groups' needs or rights. Often it will be difficult for frameworks of legal responsibility to respond to these calls for accountability.

State responsibility as a legal concept is not about blame. It's focus is on the breach of an international obligation; if a breach is determined, a new legal relationship emerges which results in an obligation to cease the wrongful act and make full reparations for injury caused by the internationally wrongful act. Furthermore, as a secondary rule of international law, state responsibility is fully dependent on whether what can be considered a primary rule, has been breached. Thus, the process of determining and apportioning state responsibility says little about the underlying breach of the primary rules which will be situation specific, and is not about apportionment of blame, though determinations of legal responsibility will inevitably still carry some moral apportionment of right and wrong, at least from the perspective of public perceptions.

Similarly, criminal law, and international criminal law in particular is quite restricted in its ability to address the various contexts arising from states' and other actors' responses to Covid-19. This is because of the narrow set of acts or omissions which may be understood to fall within the definitions of crimes, but also because of the need for some personal culpability, in most if not all, instances.

The discussants considered some of contexts arising from Covid-19, to illustrate these points, but also to think through some potential openings for responsibility, for further exploration. For example, several of the papers in the collection explore what has been recognised as a truism – that Covid-19 discriminates; individuals from certain communities are more likely to contract the disease and have a lower likelihood of surviving it, because of the social determinants of health. The policies behind the responses to the pandemic may also exacerbate these social determinants of health and indeed some of these appear to sacrifice the weakest in society. There is a need to consider how this impacts on responsibility.

Thus, if Covid-19 discriminates, do states' and others' actions and in-actions (or under-actions) have implications for legal responsibility? International law does not cater well for this type of scenario. There are a number of ways in which responsibility can be argued,

though none of these are easy arguments to make or foolproof. For instance, some of the subordinate forms of criminal responsibility such as aiding or abetting or complicity (before even arriving at superior responsibility) aid in assisting to capture some aspects of the factual contexts relevant to Covid-19 health responses. However, there will still remain challenges with respect to individual culpability and the degree to which the actions and omissions fit within the narrow definitions for international crimes.

Also, one might consider how Covid-19 may exacerbate international crimes which are already taking place. For instance, in Syria, the ongoing attacks against health workers and hospitals may constitute a war crime. If these are done with the knowledge of the pandemic and the risks to local populations, the Covid-19 facts may extenuate the crimes even though there may not have been a specific intention to spread Covid-19; further spread of Covid-19 impacting on the health and lives of local populations was however the natural and necessary outcome of the attacks. Thus, there could be an argument to be made about responsibility which may derive from the act of continuing the attacks with the knowledge of the pandemic.

In general, the point was made that international law does not deal well with widely diffused impacts, particularly where there are multiple actors acting in parallel, though not necessarily in a coordinated fashion. Perhaps one area which merits further exploration is the framing used by the UN Guiding Principles on Business and Human Rights recognize that businesses owe responsibility for the harms they “cause or contribute to”. The Guiding Principles do not clarify what this phrase “cause or contribute to” means, however the early interpretations suggest that one can contribute to a harm even if what one is doing is not in itself illegal, so long as the act is going to further the crimes of others. The Guiding Principles do not set out a framework for criminal responsibility; they are more concerned with a corporate or similar standard of responsibility. Nevertheless, the Guiding Principles may be helpful in thinking through how principles of responsibility that concern a multitude of actors can be conceived of.