The International Law Gaze: Covid-19 and the Excuse of Necessity in International Law

Dr Alberto Alvarez-Jimenez. University of Waikato

The community of States have an instrument to deal with some legal expressions of the pandemic: violations of international law obligations caused by measures adopted to fight it. This tool, not the only one, is the state of necessity, a customary norm. It excuses States whose decisions are contrary to international law, either in this pandemic or in another major crisis.

Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC's Articles) embodies the customary rule. It provides as follows:

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 means 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 State 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 precludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity. (International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts at 6–7. General Assembly Resolution 56/83. 20 January 2002)

The customary rule is meant to be particularly useful at times of severe crises. It is not the first instrument at the disposal of States in the current pandemic. There are others. First, States may agree on a subsequent agreement to deal with the disruption, and challenges caused by Covid-19.(See Penelope Ridings 'Managing the Impact of COVID-19 in Western and Central Pacific Fisheries: Balancing Protection of Peoples with Resource Conservation through International Law' (May 2020) ANZSIL Perspective. <https://anzsilperspective.com/managing-the-impact-of-covid-19-in-western-and-central-pacific-fisheries-balancing-protection-of-peoples-with-resource-conservation-through-international-law/>). Second, bilateral, regional or multilateral treaties may contemplate specific provisions applicable in the event of crises, which would cover Covid-19. The treaty exception provides the solution to the challenges of compliance with the treaty prompted by Covid-19. There is, in principle, no need to rely on the customary rule of necessity.

Notwithstanding the role the customary rule of necessity may play at this time, the current health and economic crises caused by the pandemic are unprecedented events in their complexity. The scientific uncertainties and controversies, the internal political clashes are just examples. This art makes use of Covid-19 to improve the understanding of the necessity excuse. However, this paper does not deal with all of art 25 requirements. It explores the one that has proven to be a significant obstacle in the past: lack of substantial contribution by the State invoking the customary rule under art 25(2)(b).

THE REQUIREMENT OF STATES' LACK OF SUBSTANTIAL CONTRIBUTION IN RECENT INTERNATIONAL ADJUDICATION

Argentina's 2001 economic collapse prompted litigation by foreign investors affected by the measures the country took to deal with it. Multiple times, Argentina invoked art 25 to excuse violations of international investment agreements. Several tribunals have rejected the invocation of this customary defence because of Argentina's substantial contribution to the situation of necessity.

When assessing art 25(2)(b), tribunals embarked on a detailed assessment of Argentina's macro-economic policies, many of them put in place as a result of stand-by agreements with the International Monetary Fund (IMF). The tribunals also examined the negative impact that the Asian and Brazilian crises of the end of the 1990s had on the Argentinian economy. In sum, the tribunals paid little deference to Argentina's policies and decisions when they rejected the customary defence.

EXPLORATIONS ON STATE CONTRIBUTIONS AND COVID-19

A decision on the requirement comprises an identification of actions and omissions that constitute State contribution, preceding an assessment to determine if they are substantial.

Covid-19 and States reactions to the unknown

On the assessment of States' decisions when facing unknown circumstances, the Independent Evaluation Office (IEO) of the IMF expressed the following, when it evaluated Argentina's

economic policies and the IMF's role after the crisis (International Monetary Fund. Independent Evaluation Office 'Evaluation Report. The IMF and Argentina, 1991 – 2001' (2004) at 8 [IEO, 'The IMF and Argentina'] <https://www.imf.org/external/np/ieo/2004/arg/eng/pdf/report.pdf>):

> Any evaluation necessarily benefits from hindsight. While hindsight can be useful in drawing lessons for the future, in evaluating the past, and especially in determining accountability, it must be kept in mind that much of what we know now may not have been known to those who had to make the relevant decisions.

This statement is relevant to evaluate States' initial omissions given the reality that Covid-19 was totally unknown, appeared unexpectedly and its potential impact was uncertain. For instance, at the end of March 2020, the WHO indicated that: "There is still much to discover about the disease and its impact in different contexts." (World Health Organization 'Critical Preparedness, Readiness and Response Actions for COVID-19 Interim Guidance' (March 22, 2020) at 1 <https://apps.who.int/iris/bitstream/handle/10665/331511/Critical%20preparedness%20readiness%20and%20response%20actions%20COVID-10%202020-03-22_FINAL-eng.pdf?sequence=1&isAllowed=y>.

Did States that waited too long to start responding to Covid-19, and later saw a spread of the virus, substantially contribute to the situation of necessity under art 25(2)(b)? Although the answer will depend on each State's particular circumstances, the IEO's statement is a word of caution: States that did not immediately respond due to the initial uncertainties of Covid-19 can still meet the requirement of art 25(2)(b).

The word of caution should have limits: “wait and see” is one thing, sustained denial of Covid-19 in the face of science and hard realities until it was too late to control it is another. States that fall under the latter, i.e. Mexico, have a harder task to meet the requirement of art 25(2)(b). (See Andy Robinson ‘El Presidente de México Minimiza la Gravedad de la Pandemia’ *La Vanguardia Internacional* (Mexico, 19 March 2020) <https://www.lavanguardia.com/internacional/20200319/474261705184/mexico-amlo-covid-19.html>).

Uncertainties have existed throughout the pandemic and the analysis is also applicable in the event of the emergence of new variants. Their identification is a complex scientific, economic and epidemiologic undertaking not available in every country. (World Health Organization ‘Guidance for Surveillance of SARS-CoV-2 Variants Interim guidance’ 9 August 2021 at 9 <file:///C:/Users/aalvarez/Downloads/WHO-2019-nCoV-surveillance-variants-2021.1-eng.pdf>).

This means that the difficulty in identifying a new variant by the State where it emerges cannot be regarded as a contribution. The same can be said regarding time lags in responding with the adoption of measures to deal with the first identified cases of a more infectious new variant of concern. Identifying that a case is of the new variant takes time, and by then an outbreak may already exist within the community. No State contribution existed in such event.

Controversial science on Covid-19 and lack of state contribution

Some States sought to achieve herd immunity without vaccination early in the pandemic (Sweden), a strategy which the WHO and even some former Swedish health officials did not recommend at the time. (Haley E. Randolph and Luis B. Barreiro 'Herd Immunity: Understanding COVID-19' 2020 52(5) Elsevier Public Health Emergency Collection 19 May 2020) 737–741 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7236739/> accessed 3 October 2021>). This caused negative consequences for Sweden in terms of number of contagious cases and deaths. This is just one example of a policy decision made on the basis of controversial science, and gives rise to a more general question. Did these States that took a misguided policy on science make a significant contribution so they no longer can succeed in meeting art 25(2)(b)? There are two approaches available. Both leave room for scientific controversy, but one is stricter than the other.

The more flexible approach towards scientific controversy is embraced by the International Health Regulations (IHR) and WTO law. Indeed, art 43 of the IHR allows States to adopt measures that achieve higher levels of protection than those recommended by the WHO when these measures are based on scientific principles. There is no need for the principles to be widely accepted. A similar approach is provided for in art 5.1 of the Agreement on Sanitary and Phytosanitary Measures of the World Trade Organization. Elaborating on it, the Appellate Body expressed (Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R adopted 13 February 1998 at [194])

> [I]n most cases, responsible and representative governments tend to base their legislative and administrative measures on 'mainstream' scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the

> basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.

According to this first approach, States can make *and maintain* decisions as long as the policies have scientific basis, even if minoritarian, and regardless of the outcomes they are achieving. The impact of this approach on the assessment under art 25(2)(b) is the following: States that adopted health policies based on divergent scientific principles, such as herd immunity, that later proved to be ineffective to contain Covid-19, did not contribute to the state of necessity.

The second approach to the assessment of States' policies under crisis is the one offered by the IEO. Although the approach refers to the assessment of governments' economic policies, it is also relevant regarding science-based policy (IEO, 'The IMF and Argentina' at 8):

> The behavior of an economy is always subject to uncertainty and uncertainties increase in crises. Decisions taken in the face of uncertainty cannot be judged to represent mistaken judgment ex ante just because they failed to achieve the results envisaged. It is necessary to take a probabilistic approach: were the ex-ante probabilities of success high enough to justify the decision, given the expected benefit of success and the potential costs of an even more aggravated crisis if the strategy eventually failed?

In this sense choosing a scientific approach that proves to be wrong should not per se be a failure to meet art 25(2)(b). However, keeping unchanged a policy, based on a minoritarian scientific view that is not supressing or is not highly likely to supress the given state of necessity, would constitute a State contribution.

The IEO's approach to policy controversy differs from the one of the IHR and the Appellate Body. The element of probability of success exists in the former but not in the latter. The latter requires only scientific evidence. As long as the policy has a scientific basis, the State is on safe legal ground. The IEO's approach is not that generous. A State can put in place a policy that has a controversial scientific basis, but it will face consequences if it does not reconsider its decision once it becomes evident the probability of success no longer exists.

The IEO's approach is what the scientific community expects policy makers to do. A prominent scientist may guide this analysis Venki Ramakrishnan, 'Everyone Wants to 'Follow the Science'. But We Can't Waste Time on Blame' *The Guardian* (London, May 2020) <https://www.theguardian.com/world/2020/may/24/everyone-wants-to-follow-the-science-but-we-cant-waste-time-on-blame>):

> The most important thing in the middle of a crisis is to constantly review what we are doing against the evidence. If we find we have followed a wrong path, we cannot waste precious time squabbling and apportioning blame. …
>
> Instead, when new evidence suggests that we should do something differently or better, both the government and scientists need to acknowledge this, explain why we need to change policy, and change tack accordingly. I think the public will understand that what may, in retrospect, appear to have been poor decisions were made with the best intentions based on what was known at the time – as long as they are recognised and corrected as soon as possible.

The next question is what of the two approaches fits the nature of art 25 better? Both art 43 of the IHR and art 5.1 of the SPS Agreement give States regulatory space and the Appellate Body's interpretation is consistent with this nature. art 25 is, on the contrary, an exception that should be interpreted narrowly, as the International Court of Justice pointed out. In this sense, given its stricter nature, the IEO's approach fits the nature of art 25 better, without being too intrusive. The fact that the IEO's approach also coincides with what the scientific community expects when engaging with governments, makes this approach sound policy as well.

In sum, in the context of art 25(2)(b), scientific mistakes related to Covid-19 can be made. However, it is important to correct them without much delay for a State not to make a contribution. The other side of this conclusion is that the aggravation of the crisis prompted by public measures based on the wrong science that were later corrected, should not count for the purpose of the requirement.

Inconsistency of measures across different levels of government

The pandemic showed the limitless variety of institutional configurations of States. The national State has not been by any means the only actor adopting measures. Subnational entities have also been heavily involved in many countries. Federal and local governments have clashed on the way to respond to Covid-19. The U.S. and Brazil are prominent examples. (See Ingrid Soares and Augusto Fernandes 'Como a 'Guerra' entre Bolsonaro e Governadores Pode Ferir o Brasil' *Estado de Minas* (Belo Horizonte, 17 May 1 2020) <https://www.em.com.br/app/noticia/politica/2020/05/17/interna_politica,1148039/amp.html>). The discord has been related to, for instance, if or when to implement mandatory lockdowns or the right timing of their relaxation. There have also been different approaches between local governments within the same State: some imposing tighter restrictions than others. The result has sometimes been the spread of the virus and the aggravation of the crisis.

The question is, will a country facing this situation make a contribution under art 25(2)(b)? The answer will depend on the specific facts. However, some elements of the analysis are the following. Crises in general are not often a time for political or inter-governmental harmony. The assessment of conflicting policies in this event under the said precept must acknowledge this reality. These conflicting views should not per se constitute a State contribution. It is the persistence of this discord in the face of mounting hospitalizations and deaths that could constitute a contribution, when it has aggravated the crisis. In effect, actions or omissions of territorial units can be attributed to the State, as art 4.1 of the ILCAST indicates, and can equally constitute State contributions under art 25(2)(b). Therefore, a State in these circumstances could have contributed to the situation of necessity.

The additional consequence is that the negative impact on the pandemic caused by the discord that is considered normal given the critical circumstances—and before it reaches the degree of persistent—would not count as a State contribution.

When would a discord begin to be categorized as persistent, and therefore as a State contribution? Hard rules of a specific number of weeks or months after the emergence of the virus or an outbreak are out of the question. The matter should be decided on a case-by-case basis.

Limited response due to lack of economic resources and art 25(2)(b)

Covid-19 has spread and aggravated the crisis because of a lack of economic and/or human resources which prevented States timely proper implementation and execution of appropriate health policies. Was there a substantial contribution? The benefit of art 25 is available to all

States regardless of their economic wealth. This is particularly true of Covid-19 whose disproportionate impact on low income, middle income, and developing countries has been explicitly recognized by the World Health Assembly since the early months of the pandemic. (See Seventy-Third World Health Assembly 'Covid-19 Response' SWHA73.1 19 May 2020 at preambular [1]. <https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_R1-en.pdf> accessed 6 October 2021>)

Therefore, States that implemented appropriate health policies but were not successful in responding to Covid-19, and for this reason had to preserve measures for longer period of time, should still meet the requirement of art 25(2)(b). This is particularly evident when, for instance, Covid-19 spread to community transmission due to incomplete testing and contact tracing programs owing to lack of economic or human resources. (See Sheldon Campbell and Randi Hutter Epstein 'Why Are Coronavirus Tests so Difficult to Produce?' BBC Future 23 April 2020 <https://www.bbc.com/future/article/20200422-why-are-coronavirus-tests-so-difficult-to-produce>). The due diligence argument is equally valid here: States that diligently used the resources at their disposal to respond to Covid-19, but failed to contain it, did not make a substantial contribution to the health crisis under art 25 for this reason alone.

The same applies to limited access to vaccines due to scarce economic resources. Such access has been uneven. While wealthy countries have secured doses that exceed well their populations, less wealthy nations and low income countries have not been able to vaccinate important segments of their public. Unquestionably, no State contribution exists for those nations unable to vaccinate their populations due to limited access to vaccines, as long as the State in question proves best efforts in rolling out its programme.

An exception may exist when the distribution of vaccines is carried out under corruption, such as nepotism and favouritism. (See the Luke Taylor ‘Covid-19: Vaccine Corruption Allegations Spark Protests across Brazil’ Bmj 6 July 2021 <https://www.bmj.com/content/374/bmj.n1724>). Nonetheless, other elements will have to be considered, i.e. the scale of the corruption as a percentage of the vaccination program, before a State contribution can be declared.

The fact that limited responses due to lack of economic resources should not be regarded as a State contribution does not mean that States with limited resources could never make a contribution to the public health emergency. This could be the case when the action or omission is unrelated to budgetary constraints, such as denial of the pandemic, minimization of the new dangers posed by variants, or incoherent measures between national and sub-national organs.

State Contribution in the Event of Persistence of the Pandemic due to Population’s Resistance

The major role of private individuals in the prevention, mitigation or expansion of any pandemic is evident. The legal question to ask in the context of the customary rule of necessity is whether the persistence of the virus due to private behaviour could count as a State contribution. The answer is negative under art 8 of the ILC’s Articles. States are not, in principle, internationally responsible for actions or omissions of private individuals. The impact in the public health crisis created by the said private behaviour should not be regarded as a State contribution.

Private behaviour that constitutes state contribution

Article 8 of the ILC's Articles sets the exceptions in which private behaviour can be attributed to States. For this situation to occur, the ILC requires "the existence of a real link between the person or group performing the act and the State machinery." (See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, (2001) at 47). Some of these exceptions have occurred during Covid-19.

The ICJ, the International Criminal Tribunal for the Former Yugoslavia and the ILC have dealt with the notion of private actions under the control or direction of a State mostly in the context of international or non-international armed conflict. However, the concepts have application beyond these circumstances.

The spread of the pandemic due to a significant number of minor private violations of lockdown measures deserves an analysis. Is this behaviour entirely private? Not always. There can be a link between the private behaviour and the State machinery that makes the former attributable to the latter and, under certain circumstances, a State contribution.

Indeed, this type of private behaviour is contrary to a public regulation. The private behaviour can then be prevented through law enforcement and as, a result, a State has control over the behaviour. In this regard, the private action is evidence of a State's omission in the exercise of its power to control the behaviour. This is not to say that the omission will always constitute a State contribution to the public health crisis.

Indeed, perfection cannot be the standard regarding enforcement of lockdown regulation or any other in particular events. There cannot be a police officer behind every citizen to ensure

compliance with pandemic movement restrictions. On the other hand, States enjoy discretion to make decisions on the allocation of resources to this end, which will depend on the needs for law enforcement in other public order areas. The combined effect of these two factors is that some private behaviour simply cannot be prevented and their impact on the spread of the virus cannot be attributed to a State under art 25(2)(b).

However, this conclusion rests on the assumption that a reasonable enforcement of the health and movement regulation is carried out by the State. Otherwise, widespread unlawful private behaviour that can be prevented by the State can be deemed to be under its control and, then, constitute a contribution to the situation of necessity.

Does the assessment of lack of contribution include positive Actions at controlling the virus?

Covid-19 has shown that States might have made contributions to the situation of necessity but that they also may take other positive actions that help others control or mitigate the national and global health risk. There are few examples. The U.S government played a key role in the process of development of the vaccines available today (See See Chad P. Bown and Thomas J. Bollyky 'How COVID-19 vaccine supply chains emerged in the midst of a pandemic' Working Paper 21-12 August 2021 Peterson Institute for Institutional Economics at 33 – 34 [Bown and Bollyky, 'COVID-19 vaccine supply chains'] <https://www.piie.com/publications/working-papers/how-covid-19-vaccine-supply-chains-emerged-midst-pandemic>). The United States, China and the European Union have become large donors of vaccines. Mexico, which was dismissive of Covid-19 in the early months, has later granted migrant populations access to vaccines. (See Gobierno de Mexico 'Personas Migrantes en Territorio Mexicano también recibirán Vacuna contra COVID-19' 21 February 2021 <https://www.gob.mx/salud/prensa/079-personas-migrantes-en-territorio-mexicano-tambien-recibiran-vacuna-contra-covid-19>) Finally, New Zealand agreed to delayed delivery of vaccines for the benefit of more affected countries.

These actions prompt a novel question about how to frame them in the assessment of lack of contribution under the customary rule.

(i) Could these actions prevent the existence of a particular State contribution? or

(ii) Could they be a mitigating factor in the sense that a State contribution could not reach the level of substantial thanks to these positive actions?

By positive actions the present author means actions that are not mandated by international law. Actions that are mandated should not count since the given State has already consented to perform them.

Apparently, the requirement of the customary rule demands an assessment of only the State actions or omissions that have contributed to the situation of necessity. Also, the norm does not include the possibility of mitigation through positive acts. These seem to be artificial arguments that may lead to absurd results.

In effect, New Zealand's positive actions may guide the analysis to answer the first question. The decision made the country vulnerable in the event of an outbreak. An opposition political party made the point. (See ACT New Zealand 'We Were Slow to Secure Vaccines and Now We're Exposed' 7 April 2021 <https://www.scoop.co.nz/stories/PA2104/S00035/we-were-slow-to-secure-vaccines-and-now-were-exposed.htm>). When Delta arrived the vaccination rate was low, and this was a factor that led to a strict national lockdown of several weeks. Leaving aside the issues that New Zealand did not invoke the customary rule the abstract question is; whether the vulnerability could constitute a State contribution to the situation of necessity created by the outbreak.

The answer should be negative. A vulnerability that is the result of a previous positive action that later on becomes a factor in the expansion of the emergency should not count as a State contribution. The vulnerability was created by a positive, gracious action, and good faith would prevent the existence of a State contribution in such an event.

On the other hand, the United States' support for the development of the vaccines in record time can be a useful example of a general analysis to illustrate what positive actions should not count. Due to the initial American support which made vaccines possible, they have been acquired by, and distributed in many countries. While it is true that such support has been key, this action was originally made under the 'America First' policy, and destined mainly to American population. Self-motivated actions that later created benefits for other States should not constitute a positive action mitigating a State contribution.

The fact that some positive actions do not count under the customary rule certainly does not mean that such actions are not important. They can play a major role in early phases of dispute settlement. For instance, due to these actions a State which is in receipt of the benefit of vaccine donations, may decide not to bring a claim against the State that carried out the actions. In this event, the impact of the positive actions in inter-State disputes would be even more profound than that suggested here.

IN A NUTSHELL

The experience of the Covid-19 pandemic can be useful to explore several dimensions of the excuse of necessity in customary international law. This article focuses on one requirement: lack of substantial State contribution. Specifically, the piece assesses four phenomena relevant to the purpose of this requisite: scientific uncertainty, major disagreement among different

levels of governments, lack of economic resources, private behaviour under the control of States, and positive actions allowing other States to mitigate the impact of the pandemic.