ESSAY

The Impossibility of Noncontribution

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This essay considers noncontribution under the plea of necessity in international law. It first argues that noncontribution reflects an indeterminate and protean standard. It then contends that its application to the unique factual backdrop of a pandemic yields a virtually impossible standard for States to satisfy, not least because of the undertheorized effect of State conduct in breach of international obligations on noncontribution. As such, if noncontribution collapses in on itself, its role under the plea ought to be revisited.

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I. INTRODUCTION

On occasion, the application of established jurisprudence to highly unique factual circumstances can reveal fault lines. Pandemics uniquely bear on the international legal architecture,[1] not least with regard to State responsibility.[2] Potential breaches of said responsibility, particularly in extraordinary times, raise questions regarding defenses to justify or excuse State conduct. One such defense, necessity under Article 25 of the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ARS"),[3] has particular relevance for State conduct during a pandemic.[4] The ultimate viability of any such defense, however, fundamentally depends on the soundness of its elements.

So-called "noncontribution" under Article 25(2)(b) of ARS precludes a State from invoking the plea of necessity if it has contributed to the very state of necessity in the first place.[5] Noncontribution follows from the general principle that a party should not be able to benefit from its own wrong.[6] Although the soundness of this general principle is not in doubt, its manifestation under Article 25(2)(b) rests atop unstable ground.[7] As applied to the factual backdrop of a pandemic, this essay argues that the jurisprudence on Article 25(2)(b) collapses such that satisfaction of the article is rendered virtually impossible. This instability, as surfaced by its application in the context of pandemics, suggests that Article 25(2)(b) is unsound.

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1. *See* Barrie Sander & Jason Rudall, *Symposium on COVID-19 and International Law: Introduction*, OPINIO JURIS (Mar. 3, 2020), https://opiniojuris.org/2020/03/30/symposium-on-covid-19-and-international-law-introduction/.

2. *See, e.g.*, Peter Tzeng, *Taking China to the International Court of Justice over COVID-19*, EJIL:TALK! (Apr. 2, 2020), https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/.

3. Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) [hereinafter ARS].

4. *See* Nicholas J. Diamond, *Necessity in the Time of Pandemics*, GEO. J. INT'L L. BLOG (May 12, 2020), https://www.law.georgetown.edu/international-law-journal/blog/necessity-in-the-time-of-pandemics/.

5. ARS, *supra* note 3, art. 25(2)(b).

6. *See, e.g.*, Concerning the Factory at Chorzów (Jurisdiction) (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26) ("It is . . . a principle generally accepted in the jurisprudence of international arbitration . . . that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him."); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 388 (May 22, 2007) (underscoring that Article 25(2)(b) reflects the "general principle of law" that a party could not "take[e] legal advantage of its own fault").

7. *Cf.* Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 488 (2012) ("[I]t is not obvious how we should understand contribution under Article 25(2).").

First, this essay briefly considers the history and content of Article 25 of the ARS, emphasizing in particular the indeterminate and protean standard of Article 25(2)(b). Second, it contends that an application of Article 25(2)(b) to the unique factual backdrop of a pandemic yields both further uncertainties and a virtually impossible standard for States to satisfy to sustain the plea of necessity. In particular, this backdrop reveals the undertheorized notion that State conduct in breach of its international obligations may constitute *prima facie* evidence of contribution under Article 25(2)(b). Third, and finally, it concludes that, if Article 25(2)(b) collapses in on itself, it is too heavy of a counterweight to Article 25(1) and is itself unsound.

II. NECESSITY: THEN AND NOW

Early natural law theory viewed States as having certain subjective rights, including the so-called right to self-preservation.[8] This view linked self-preservation and necessity such that any State conduct to preserve the State's very existence would likely be viewed as legitimate.[9] Examples of this classical view focused on an actual threat to the security—and thereby sovereignty—of a State, such as a situation involving the use of force.[10] This "almost natural connection" between self-preservation and necessity, however, has been largely abandoned.[11] Indeed, while revisiting necessity in the latter half of the 20th century, the ILC conceived it broadly as not merely interlinked with the wartime posturing of two States, but as envisioning State responses to a spectrum of catastrophic, albeit exceptional, events.[12]

The contemporary world continues to stretch this understanding of necessity.[13] In particular, the global spread of pathogens, as in pandemics, presents multifaceted threats to State interests. Pandemics pose obvious and severe threats to health. Take the SARS-CoV-2 ("COVID-19") pandemic as an example, which has resulted in over 100 million deaths globally as of

8. *Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago*, U.N. Doc. AICN.4/318/ADD.5-7, *reprinted in* 1980 Y.B. INT'L L. COMM'N vol. II, pt. 1, 13, 16, ¶ 7, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1) [hereinafter Ago Report].

9. Roman Boed, State of Necessity as a Justification for Internationally Wrongful Conduct, 3 YALE HUM. RTS. & DEV. L.J. 1, 4 (2000).

10. *See, e.g.*, R. Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82 (1938).

11. Ago Report, *supra* note 8, ¶7.

12. *See* ARS, *supra* note 3, cmt., ¶ 2 (stating that "[t]he plea of necessity is exceptional in a number of respects.").

13. *See* Sloane, *supra* note 7, at 448 ("Recently, the number, nature, and scope of potentially catastrophic, or even existential, threats have increased.").

February 2021.[14] Recent prior pandemics, such as the H1N1 pandemic in 2009–10, resulted in as many as approximately 400,000 deaths globally.[15]

Such figures, though staggering, do not fully capture how negative health outcomes, as accelerated during a pandemic, cascade across the socioeconomic and political dimensions of society.[16] In particular, pandemics can precipitate significant economic contractions.[17] More narrowly, they can cripple entire industries, triggering governmental bailouts.[18] They can also interfere with fundamental rights including, *inter alia*, voting,[19] travel,[20] assembly,[21] and due process.[22] Altogether, pandemics pose an unprecedented confluence of substantial threats to State interests, suggesting a further stretching of necessity vis-à-vis its origins.

III. THE PLEA OF NECESSITY UNDER ARS

As context, the plea of necessity under Article 25 of ARS has four prongs. First, under Article 25(1)(a), the State's act must "safeguard an essential interest against a grave and imminent peril."[23] While some tribunals have set a high threshold, weighing whether the situation giving rise to the challenged measures "compromised the very existence of the State and its independence,"[24] most have set a lower threshold such that "any danger

14. *WHO Coronavirus Disease (COVID-19) Dashboard*, https://covid19.who.int/ (last visited July 12, 2020).

15. *Past pandemics*, http://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics (last visited May 27, 2020).

16. *See generally* World Health Organization, Commission on Social Determinants of Health, Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health (2008), https://apps.who.int/iris/bitstream/handle/10665/43943/9789241563703_eng.pdf?sequence=1.

17. *See, e.g.*, Stephanie Segal & Dylan Gerstel, *The Global Economic Impacts of COVID-19*, CTR. FOR STRATEGIC & INT'L STUDIES (Mar. 10, 2020), https://www.csis.org/analysis/global-economic-impacts-covid-19.

18. *See, e.g.*, Alan Rappeport & Niraj Chokshi, *Crippled Airline Industry to Get $25 Billion Bailout, Part of It as Loans*, N.Y. TIMES, Apr. 29, 2020, https://www.nytimes.com/2020/04/14/business/coronavirus-airlines-bailout-treasury-department.html.

19. *See, e.g.*, Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES, May 25, 2020, https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html?searchResultPosition=8.

20. *See, e.g.*, GIBSON DUNN, The Constitutional Consequences of Governmental Responses to COVID-19: The Right to Travel and the Dormant Commerce Clause (May 1, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/05/the-constitutional-consequences-of-governmental-responses-to-covid-19-the-right-to-travel-and-the-dormant-commerce-clause.pdf.

21. *See, e.g.*, United Nations, Human Rights, Office of the High Commissioner, *COVID-19 restrictions should not stop freedom of assembly and association, says UN expert* (Apr. 14, 2020), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25792&LangID=E.

22. *See, e.g.*, Lawrence O. Gostin et al., *Presidential Powers and Response to COVID-19*, 323 J. AM. MED. ASS'N 1547 (2020).

23. ARS, *supra* note 3, art. 25(1)(a).

24. *See, e.g.*, Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 348 (Sept. 28, 2007).

seriously compromising its internal or external situation" qualifies.[25] Second, also under Article 25(1)(a), the States' act must be the "only way" to protect an essential interest.[26] Both the ILC[27] and ICJ[28] have considered the mere availability of other means, regardless of cost or convenience, as precluding the plea.

Third, under Article 25(1)(b), the State's act must "not seriously impair an essential interest of the State . . . towards which the obligation exists, or of the international community as a whole."[29] Although States generally have a significant interest in the well-being of their citizens, the interests of "a small number" of investors of a State has been held to not qualify as an essential interest.[30] Fourth, and finally, under Article 25(2), the plea would be precluded if "the international obligation in question excludes the possibility of invoking necessity"[31] or "[t]he state has contributed to the situation of necessity."[32]

IV. NONCONTRIBUTION UNDER ARTICLE 25(2)(B)

According to the ILC, for State conduct to preclude the plea of necessity under Article 25(2)(b), it "must be sufficiently substantial and not merely incidental or peripheral."[33] This open-textured language leaves considerable interpretative latitude to the tribunal.[34] Likewise, it may disadvantage States because "it will be the rare case in which the invoking state has not contributed to the situation to *some* extent."[35] As such, Article 25(2)(b) might be viewed as a counterweight to the more permissive standard under

25. *E.g.*, LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 251 (Oct. 3, 2006).

26. ARS, *supra* note 3, art. 25(1)(a).

27. *See id.* art. 25, cmt., ¶ 15 ("The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.").

28. *See* Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. Rep. 7, ¶ 56 (Sept. 25); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 140 (July 9).

29. ARS, *supra* note 3, art. 25(1)(b).

30. Impreglio S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶ 354 (June 21, 2011).

31. ARS, *supra* note 3, art. 25(2)(a).

32. *Id.* art. 25(2)(b).

33. *Id.* art. 25, cmt., ¶ 20.

34. *Cf.* Sloane, *supra* note 7, at 489 (arguing that "[t]his abstract statement offers little additional guidance").

35. *Id.* at 488 (emphasis original); *see* Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and* Force Majeure, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 491-92 (Peter Muchlinski et al. eds., 2008) ("In most situations, a government will have made some contribution to the economic situation extant in the country.").

Articles 25(1), thereby reflecting the stated intent of the ILC to narrowly define the plea of necessity *in toto*.[36]

A. Case Law

Article 25(2)(b) has been considered by tribunals in both State-State and investor-State disputes alike. In *Gabčíkovo*, which the ILC addresses in its commentary,[37] the ICJ identified several actions taken by Hungary that "had helped, by act or omission" to cause the state of necessity.[38] Here, the Court "infer[red]" from certain facts the conclusion that Hungary could not satisfy then-Article 33(2)(c)[39].[40] In pertinent part, the Court held that the parties were aware of the environmental risks associated with the hydroelectric dam project at the time of concluding the applicable treaty in 1977.[41] As such, Hungary could not then later protest that implementation of that treaty would have significant environmental consequences, not least when it had accelerated project works shortly before abandoning the project altogether.[42] However, the connection that the Court makes between its ambiguous interpretation of then-Article 33(2)(c)—that Hungary "had helped, by act or omission"—and what it infers from the facts is not altogether clear, especially where weighed against the "sufficiently substantial" standard later articulated by the ILC. Indeed, the Court inferred Hungary's *understanding* of the risks of the project, which Hungary disputed,[43] absent explicit connection with the standard in then-Article 33(2)(c).

Several investor-State disputes have likewise considered Article 25(2)(b), many of which originate from the Argentine economic crisis[44]. Of the

36. *See* ARS, *supra* note 3, art. 25, cmt., ¶ 20 (underscoring that, alongside Article 25(2)(a), "necessity needs to be more narrowly confined").

37. *See id.* art. 25, cmt., ¶¶ 11, 15–16, 20.

38. *Gabčíkovo*, *supra* note 28, ¶ 57.

39. Then-Article 33(2)(c) is substantially the same as Article 25(2)(b), although there are differences between Article 33 and Article 25 generally. *See* Draft Articles on State Responsibility, *Report of the International Law Commission on the work of its thirty-second session*, U.N. Doc. A/35/10, *reprinted in* 1980 Y.B. INT'L L. COMM'N vol. II, pt. 2, 1, 34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2); *see also* Sarah Heathcote, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 495 (James Crawford et al. eds., 2010) (describing the substantive amendments that Article 25 made to Article 33).

40. *Gabčíkovo*, *supra* note 28, ¶ 57.

41. *Id.*

42. *Id.*

43. *See id.*, ¶ 56 (noting that Hungary had asserted in a report by the ad hoc Committee of the Hungarian Academy of Sciences that "the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period").

44. *See* INTERNATIONAL MONETARY FUND, THE IMF AND ARGENTINA 1991-2001 8 (2004), https://www.imf.org/external/np/ieo/2004/arg/eng/pdf/report.pdf (describing the convergence of several economic factors that resulted in a severe economic downturn, marked by a near-20 percent economic contraction in 1998-2002).

numerous investment tribunals that considered Article 25,[45] only two held that Argentina had satisfied Article 25(2)(b). In *LG&E*, the tribunal plainly stated, absent further clarification, that there was "no serious evidence in the record" suggesting that Argentina had contributed to the state of necessity.[46] In *Urbaser*, the tribunal interpreted Article 25(2)(b) to envisage that either the State took action directed towards the matter resulting in the emergency situation or the State "must have known" that the emergency would result from the policymaking decisions of the State.[47] While the tribunal acknowledged that such policymaking decisions "over several years prior" rendered the State vulnerable,[48] it did not find a causal link between this conduct and the state of necessity.[49] In particular, it noted several State investment decisions before the economic crisis that did not demonstrate a recognizable threat of the magnitude of the eventual crisis.[50]

Contrary to *LG&E* and *Urbaser*, several other tribunals have held that Article 25(2)(b) precluded Argentina from invoking the plea of necessity. In *National Grid*, the tribunal acknowledged the interplay between internal and external factors causing the economic crisis but, nonetheless, emphasized the former.[51] Specifically, the tribunal concluded that, in view of Argentina's economic policies in the years preceding the crisis, its conduct had "created a fertile ground for the crisis to develop."[52] Moreover, and uniquely among related disputes, it concluded that Argentina's conduct *during* the crisis further exacerbated its ramifications.[53]

In *Impreglio*, the tribunal referenced *Gabčíkovo*, but broadened the criteria that it had considered to include "whether the conduct be deliberate (*i.e.* intended to bring about the state of necessity) or reckless or negligent, or even caused by a lesser degree of fault."[54] The tribunal reasoned that, per "common sense," Article 25(2)(b) did not require that the conduct be intended or planned, but merely that it followed as a consequence.[55] Moreover, the tribunal specifically considered whether Argentina's conduct was "sufficiently substantial,"[56] as envisioned by the ILC. Although the tribunal acknowledged the role of external factors in causing the economic

45. *See* GEBHARD BÜCHELER, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION 264-80 (2015) (tracing the numerous investment tribunals that have weighed Article 25).

46. *LG&E*, *supra* note 25, ¶ 257.

47. Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 711 (Dec. 8, 2016).

48. *Id.*, ¶ 712.

49. *Id.*, ¶ 714.

50. *Id.*, ¶ 715.

51. Nat'l Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, ¶¶ 259–60 (Nov. 3, 2008).

52. *Id.*, ¶ at 260.

53. *Id.*

54. *Impreglio*, *supra* note 30, ¶356.

55. *Id.*

56. *Id.*, ¶ 357

crisis, it considered Argentina's own economic policies "over several years prior to the crisis" and held that they had contributed to the state of necessity.[57] Indeed, the tribunal identified, *inter alia*, Argentina's "long-term failure to exercise fiscal discipline," the results of which rendered it incapable of coping with external economic shocks that precipitated the crisis.[58]

In *Enron*, the tribunal again acknowledged the interplay between internal and external factors causing the economic crisis.[59] However, it focused particularly on internal factors, the effects of which had compounded "for a decade," to find that Argentina did not satisfy Article 25(2)(b).[60] The decision in *Enron* was, however, annulled and the annulment committee conducted a more rigorous analysis, noting several possible readings of Article 25(2)(b). According to the annulment committee, "the most literal interpretation" of Article 25(2)(b) has the effect of precluding the plea where "there is any causal link . . . no matter how small a contribution . . . regardless of whether or not the State was in any way blameworthy . . . [or] could have in any way foreseen that its conduct would contribution to a situation of necessity."[61] The annulment committee recognized that the tribunal had not adopted this interpretation, but had seemed to rely on a degree of "fault" by Argentina, based largely on the expert opinion of an economist, who had identified several "misguided policies" beginning in the 1990s.[62] As such, it criticized the tribunal for merely applying the expert opinion of economist to answer a question of law,[63] rather than considering what would amount to "fault," such as deliberate versus reckless or negligent State conduct.[64]

B. Themes

Several themes emerge from the decisions that have considered Article 25(2)(b). First, the decisions that substantively address Article 25(2)(b) distinctly favor claimants and largely come to "an 'all or nothing' type conclusion" in weighing Article 25(2)(b).[65] *LG&E* and *Urbaser* are the notable exceptions, but with caveats. In *LG&E*, the tribunal did not significantly analyze Article 25(2)(b).[66] It is also distinguishable from other decisions, due to the lack of a provision in the applicable investment treaty

57. *Id.*, ¶ at 358.
58. *Id.*
59. *Enron Corp.*, *supra* note 6, ¶ 311.
60. *Id.*, ¶ 312.
61. Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 387 (July 30, 2010).
62. *Id.*, ¶ 391 (internal quotations omitted).
63. *Id.*, ¶ 393.
64. *Id.*, ¶ 389.
65. Bjorklund, *supra* note 35, at 491.
66. *See id.* (arguing that the tribunal "dismissed too readily the facts").

equivalent to Article XI in the US-Argentina BIT,[67] as well as the fact that the tribunal deemed the burden of proof to rest with the claimants,[68] contrary to the ILC.[69] In *Urbaser*, the tribunal did not necessarily cast the requirements under Article 25(2)(b) in favor of Argentina; instead, it merely weighed certain facts more heavily than others. Coupled with the *Impreglio*, *National Grid*, and *Enron* decisions finding against Argentina under Article 25(2)(b), the manner in which tribunals have interpreted and applied noncontribution would seem to inherently disadvantage States.

Second, tribunals have inconsistently addressed whether Article 25(2)(b) reflects a standard of intention or fault. As example, the tribunal in *Urbaser* interpreted Article 25(2)(b) to reflect that a State "must have known that such crisis and emergency" would result from its policy decisions, which finds some commonality in *Enron*, despite the lack of analysis by the tribunal regarding what it meant by "fault." Conversely, in *Impreglio*, the tribunal instead focused exclusively on the consequences of the State's conduct. Notably, the ILC does not address whether Article 25(2)(b) might envision a standard of intention or fault. Strictly speaking, Article 25(2)(b) does not reflect such a standard; instead, it merely speaks to the significance of the State's conduct, as perhaps best reflected by the approach taken in *Impreglio*. While an objective standard that turns on readily identifiable consequences has the benefit of avoiding uncertain inferences regarding a State's motives or intentions, in the context of Article 25(2)(b), it might unduly disadvantage States, where considered alongside the indeterminate "sufficiently substantial" standard.

Third, in weighing Article 25(2)(b), several tribunals have broadly construed the factual context in which its analysis occurs. The tribunals in *Impreglio*, *National Grid*, and *Enron* each considered State conduct occurring several years prior in weighing whether the State had contributed to the state of necessity. Worryingly, in each instance, the tribunal does not consider whether Article 25(2)(b), in principle, limits the period in which State conduct might be considered relevant for assessing contribution. As such, potentially relevant State conduct is ostensibly limitless. While an analysis of Article 25(2)(b) is inherently fact-specific, no tribunal has considered whether the "sufficiently substantial" standard is implicitly timebound such that the causal chain becomes too attenuated as "sufficiently substantial"

67. Treaty Concerning The Reciprocal Encouragement And Protection Of Investment art. XI, U.S.-Arg., Nov 14, 1991, TIAS 94-1020 ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.").

68. *Nat'l Grid*, *supra* note 51, ¶ 261.

69. *See* James Crawford, Addendum to Second Report on State Responsibility, UN Doc. A.CN.4/498/Add.2, ¶ 351 (Apr. 30, 1999) (explaining that "the onus lies on that State to justify or excuse its conduct").

slides to "merely incidental or peripheral" over a period of time. Indeed, in principle, Article 25(2)(b) licenses tribunals to consider *any* State conduct that it deems relevant, regardless of how many years in the past it occurred.

V. ARTICLE 25(2)(B) AND PANDEMICS

Article 25(2)(b) already reflects an indeterminate and protean standard for a State to satisfy to sustain the plea of necessity. Applied against the factual backdrop of a pandemic, Article 25(2)(b) renders it virtually impossible for a State to sustain the plea, further suggesting fundamental flaws in noncontribution under ARS. This section first considers the types of state conduct that would be applicable during a pandemic, underlining how breach of relevant international human rights obligations could readily constitute contribution. It then considers how the lack of a timeframe within which State conduct is deemed relevant results in an untenable standard for noncontribution.

A. Types of State Conduct

Neither Article 25(2)(b) nor the ILC's commentary indicates the types of conduct that may be deemed to contribute to the state of necessity. Equally, the case law references a range of State conduct, absent any thematic similarities, as relevant in this regard. In the context of a pandemic, the types of State conduct that may be applicable for purposes of Article 25(2)(b) both before and during a pandemic is considerably broad. In particular, State conduct that breaches relevant international obligations would seem to, in principle, evidence contribution, although neither the ILC nor the case law directly addresses this issue.[70] This is especially the case where satisfaction of such obligations is specifically intended to prevent the occurrence of the very state of necessity on which a State seeks to rely. Indeed, a breach of such obligations would appear to be an obvious instance of the general principle that a party should not be able to benefit from its own wrong.

States have numerous international obligations that apply in the context of pandemic preparedness and response efforts. In principle, nothing precludes a tribunal from considering a breach of such obligations to be *prima facie* evidence of contribution. First, the International Health Regulations ("IHR"),[71] a treaty concluded under the auspices of the World

70. Note that, here, the focus is not on *jus cogens*, the breach of which has the effect of precluding the plea of necessity altogether. *See* Ago Report, *supra* note 8, ¶ 16.

71. WORLD HEALTH ORGANIZATION, INTERNATIONAL HEALTH REGULATIONS (2d ed. 2005), https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1 [hereinafter IHR].

Health Organization ("WHO"),[72] imposes various obligations on the WHO's 194 Member States. Several such obligations address preparedness or activities designed to prevent or militate against the ramifications of a pandemic including, *inter alia*: developing, strengthening, and maintaining public health surveillance activities to assess, notify, and report events;[73] notifying the WHO of any events occurring within its territories that may constitute a public health emergency of international concern,[74] and developing, strengthening, and maintaining the capacity to respond to public health risks and emergencies.[75] According to the WHO, States are generally not in compliance with such requirements.[76]

Moreover, the IHR provides for several obligations regarding State responses during a pandemic. To illustrate the ease with which such obligations might be breached, consider State responses to the COVID-19 pandemic.[77] Many States have implemented travel restrictions, which included border shutdowns.[78] Article 43 of the IHR requires that health measures implemented by States must be based on scientific principles, available scientific evidence, and guidance from the WHO,[79] yet evidence indicates that many such travel restrictions are not supported by science or the WHO.[80] A majority of States implementing such travel restrictions have failed to notify the WHO, as required under Article 43.[81] Moreover, whether for measures aimed at travel or otherwise, Article 3 requires that all measures "respect . . . dignity, human rights and fundamental freedoms,"[82] suggesting that overly broad travel restrictions and discriminatory measures are *prima facie* breaches of the fundamental principles of the IHR.[83]

Relatedly, States have numerous human rights obligations on the international plane, such as under the International Covenant on Civil and Political Rights ("ICCPR")[84] and the International Covenant on Economic,

72. *See* World Health Org., Fifty-Eighth World Health Assembly, Third Report of Committee A, W.H.A. Doc. A58/55 (May 23, 2005).

73. IHR, *supra* note 69, art. 5(1).

74. *Id.* art. 6(1); *see id.* at art. 12 (providing for the determination of a public health emergency of international concern).

75. *Id.* art. 13(1).

76. *Health Emergencies*, https://www.who.int/data/gho/data/major-themes/health-emergencies/GHO/health-emergencies (last visited July 12, 2020).

77. *See* Roojin Habibi et al., *Do Not Violate the International Health Regulations during the COVID-19 Outbreak*, 395 LANCET 664 (2020) (describing various breaches of the IHR during the COVID-19 pandemic).

78. *See, e.g.*, Karen Schwartz, *I'm a U.S. Citizen. Where in the World Can I Go?,* N.Y. TIMES, Feb 4, 2020, https://www.nytimes.com/article/coronavirus-travel-restrictions.html.

79. IHR, *supra* note 69, art. 43(2).

80. Habibi et al., *supra* note 77, at 664.

81. IHR, *supra* note 69, arts. 43(3), -(5); *see* Habibi et al., *supra* note 75, at 664.

82. *Id.* art. 3(1).

83. Habibi et al., *supra* note 77, at 664–65.

84. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

Social and Cultural Rights ("ICESCR")[85], which could be relevant for assessing State conduct both before and during a pandemic.[86] Under the ICCPR, several rights are particularly relevant during pandemics including, *inter alia*, life,[87] liberty and security of person,[88] freedom of movement,[89] privacy,[90] association,[91] and nondiscrimination.[92] The ICCPR permits derogation[93] from certain rights[94] during public emergencies, insofar as the measures are necessary, proportionate, and nondiscriminatory,[95] and the State has notified the United Nations.[96] Under the ICESCR, several rights are particularly relevant during pandemics including, *inter alia*, nondiscrimination,[97] adequate standard of living,[98] and health[99].

In principle, tribunals could consider breaches under any of these human rights obligations, either separately or alongside the IHR, as evidence of contribution both: *before* a pandemic, as evidence of improper or inadequate preparedness efforts, suggesting contribution to the resultant state of necessity; and *during* a pandemic, as evidence of improper or inadequate response efforts, suggesting an exacerbation of ongoing risks. Breach of such obligations would directly undermine the human rights-based foundation of preparedness and response efforts under the IHR. Indeed, it is submitted that a State could not successfully argue that it had satisfied its obligations under the IHR if it had breached related obligations arising under the ICCPR or ICESCR.

B. The Timeframe of State Conduct

Neither the ILC nor the case law indicates a timeframe within which State conduct is deemed relevant for purposes of weighing Article 25(2)(b). Indeed, as the case law demonstrates, this timeframe is entirely at the discretion of the tribunal, based on the facts of the dispute, and has

85. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter ICESCR].

86. *See generally COVID-19 and Human Rights: We are All in This Together* (2020), https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf.

87. ICCPR, *supra* note 84, art. 6.

88. *Id.* art. 9.

89. *Id.* art. 12.

90. *Id.* art. 17.

91. *Id.* art. 22.

92. *Id.* art. 26.

93. *Id.* art. 4.

94. *Id.* art. 4(2).

95. *Id.* art. 4(1).

96. *Id.* art. 4(3).

97. ICESCR, *supra* note 85, art. 2(2).

98. *Id.* art. 11.

99. *Id.* art. 12.

encompassed State conduct occurring several years prior that had the effect of—à la *National Grid*—"creat[ing] a fertile ground for the crisis to develop." This already places States in a disadvantageous position, whereby a seemingly unbounded list of State conduct could be considered relevant for weighing Article 25(2)(b). As discussed above, the case law demonstrates that the lack of a standard regarding the timeframe for relevant State conduct typically encumbers State reliance on the plea.

Pandemics only magnify this trend of ambiguity in the case law, rendering it virtually impossible for a State to satisfy Article 25(2)(b). The nature of pandemic preparedness as a multistep process over many years in fact invites a tribunal to likewise interpret relevance under Article 25(2)(b) as not timebound. Pandemic preparedness, done properly, encompasses multiyear activities, which intersect with the abovementioned international obligations, such as: enacting appropriate emergency laws to facilitate response efforts; developing emergency response plans that trigger during a pandemic; and manufacturing, purchasing, and stockpiling medical countermeasures, ranging from personal protective equipment (e.g., gloves, masks) to biological products (e.g., vaccines).[100]

To the extent that any such activities breach obligations arising under the IHR or international human rights instruments, a tribunal could readily—and, in principle, correctly—conclude that Article 25(2)(b) had not been satisfied. Indeed, even the absence of certain such activities could prove fundamentally problematic under the current jurisprudence on Article 25(2)(b). If, as example, a State had failed to take any preparedness steps whatsoever, in contravention to its obligations under the IHR, a tribunal could readily—and, again, in principle, correctly—conclude that the State had willfully ignored a known risk, regardless of how far back in time its inaction could be traced.

VI. CONCLUSION

Necessity has rightly evolved from its beginnings in early natural law theory. Pandemics underscore the complexities of this evolution. This essay has argued that Article 25(2)(b) reflects an inherently indeterminate and protean standard, even though its foundation in the general principle that a party should not be able to benefit from its own wrong is not in doubt. Where applied in the unique factual context of a pandemic, it has argued that Article 25(2)(b) is stretched beyond its limits, rendering it virtually impossible for a State to satisfy. As such, Article 25(2)(b) is too heavy of a counterweight to Article 25(1) and is itself unsound.

100. *See generally* Wendy K. Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341 (2009).