

**WHEN INDIFFERENCE BECOMES DEADLY: STATE
RESPONSIBILITY UNDER INTERNATIONAL LAW DURING
THE COVID-19 PANDEMIC**

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I. INTRODUCTION

In early 2020, while the streets of Rio de Janeiro were recovering from the festivities of Carnival,¹ Brazilians infected with the novel coronavirus² flew back from Europe, unknowingly setting the stage for the disaster to come.³ By late March of 2020,⁴ the majority of countries in Latin America had implemented swift measures to combat the arrival of the virus, such

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1. *See What Is Carnival Without You?*, RIOCARNAVAL.ORG, <https://www.riocarnaval.org/rio-carnival/what-is> [<https://perma.cc/C4RZ-USNA>] (last visited Mar. 3, 2022).

2. Throughout this Note, “coronavirus,” “COVID-19,” “COVID,” and “the virus” will all refer to the Coronavirus disease which originated in December of 2019. *See generally Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG., <https://www.who.int/health-topics/coronavirus> [<https://perma.cc/2V48-JYRM>] (last visited Mar. 3, 2022) and Roni Caryn Rabin, *First Patient with Wuhan Coronavirus Is Identified in the U.S.*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html> [<https://perma.cc/N9W7-MV89>].

3. *See* Ernesto Londoño & Flávia Milhorance, *Brazil Passes 500,000 Covid Deaths, a Tragedy with No Sign of Letup*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/world/americas/brazil-500000-covid-deaths.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/JCM8-EQML>].

4. *See generally* Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [<https://perma.cc/3NY4-L3GW>].

as restricted borders, cancelled flights, and mandatory quarantines.⁵ The United Nations World Tourism Organization (UNWTO) published a report in April stating that 96% of all states⁶ worldwide had introduced travel restrictions in response to COVID-19.⁷ However, the president of Brazil, Jair Bolsonaro, remained stubbornly dismissive of any recommendations to enforce such measures.⁸ He labeled the virus as a “measly cold” that did not call for the “hysteria” surrounding it and stated that if he fell ill, he could quickly recover, citing his “athletic history.”⁹ By April 30, 2020, the global average of new coronavirus cases had reached 79,359 per day.¹⁰ During this time, Bolsonaro went as far as to insist that an anti-malaria pill, unverified in both its effectiveness and safety, could cure any of the thousands of individuals who had fallen ill.¹¹ His actions and words were met with disdain by both the people of Brazil and the global community.¹²

5. See Ernesto Londoño et al., *As Latin America Shuts Down to Fight Virus, Brazil and Mexico Are Holdouts*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/world/americas/coronavirus-brasil-mexico.html?searchResultPosition=93> [[https://Perma.cc/X5V3-HLYJ](https://perma.cc/X5V3-HLYJ)]; see also Leticia Casado & Anatoly Kurmanaev, *U.S. Bans Flights From Brazil, Where Pandemic Is Raging*, N.Y. TIMES (last updated June 18, 2020), <https://www.nytimes.com/2020/05/24/world/Americas/brazil-us-coronavirus-travel-ban.html?searchResultPosition=62> [<https://perma.cc/N4H5-92DT>].

6. Throughout this note, “states” will be used to refer to states under international law, as defined by Article 1 of the Montevideo Convention. See Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (“the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states”).

7. UNTWO Secretary-General stated that the impact of COVID-19 on travel and tourism has been “like no other event before in history.” *COVID-19 Restrictions “Unprecedented” in History of International Travel*, I.C.E.F. MONITOR (Apr. 27, 2020), <https://monitor.icef.com/2020/04/covid-19-restrictions-unprecedented-in-history-of-international-travel/> [<https://perma.cc/7ELP-97NS>].

8. See Ernesto Londoño et al., *Bolsonaro, Isolated and Defiant, Dismisses Coronavirus Threat to Brazil*, N.Y. TIMES (last updated June 18, 2020), <https://www.nytimes.com/2020/04/01/world/americas/brazil-bolsonaro-coronavirus.html> [<https://perma.cc/V3AP-FZGU>]; see also Tom Phillips, *Bolsonaro Says He “Wouldn’t Feel Anything” if Infected with Covid-19 and Attacks State Lockdowns*, GUARDIAN (Mar. 24, 2020), <https://www.theguardian.com/world/2020/mar/25/bolsonaro-brazil-wouldnt-feel-anything-covid-19-attack-state-lockdowns> [<https://perma.cc/496P-GYRN>].

9. Phillips, *supra* note 8.

10. See *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/world/covid-cases.html> [<https://perma.cc/KE6L-TYXV>] (last visited Mar. 3, 2022).

11. See Londoño et al., *Bolsonaro*, *supra* note 8.

12. See *id.*

As the situation continued to escalate, COVID-19 deaths in Brazil rose to nearly 500 in a single day in early May.¹³ In response, Bolsonaro said, “So what? I’m sorry. What do you want me to do?”¹⁴ Soon after, Brazil’s health minister, Nelson Teich, resigned after only four weeks in the position.¹⁵ At that point, the virus was killing more than 800 Brazilians per day.¹⁶ Bolsonaro’s catastrophic failures in curtailing the pandemic’s effects soon led to a health and political crisis in the country.¹⁷ As people called for Bolsonaro’s impeachment, economists and consultants warned foreign investors and businesses to avoid taking any risks with Brazil, stating that an economic crisis could follow.¹⁸ By June of 2020, the country’s total death toll had reached 36,000, hospitals were overflowing their capacity, and some cities had to utilize mass graves as the death rate grew higher.¹⁹ In the midst of this tragedy, the Brazilian health ministry shut down and wiped clean the country’s coronavirus statistics website, removing all information on how many people the virus had infected or killed.²⁰ Brazilian Supreme Court Justice Gilmar Mendes called this manipulation of statistics “a tactic of totalitarian regimes.”²¹ Meanwhile, the already existing political chasm between supporters of Bolsonaro and those who fervently opposed him continued to widen as Brazil fell further into a socioeconomic catastrophe.²²

A year later, in the summer of 2021, Brazil had suffered thirteen percent of the world’s coronavirus fatalities.²³ Experts stated that if Brazil

13. See Frances Robles et al., *As Coronavirus Deaths Spike, Brazil’s Leader Says, “So What?”: Live Updates*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/04/29/world/coronavirus-news.html?searchResultPosition=109> [https://perma.cc/K834-6GS9].

14. See *id.*

15. Teich was an oncologist with no political background who became health minister after President Bolsonaro fired Luiz Henrique Mandetta, the former health minister. See Ernesto Londoño, *Another Health Minister in Brazil Exits Amid Chaotic Coronavirus Response*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/world/americas/brazil-health-minister-bolsonaro.html?searchResultPosition=65> [https://perma.cc/EN6F-CEU4].

16. See *id.*

17. See *id.*

18. See *id.*

19. See Vanessa Barbara, *Brazil Is in Coronavirus Free Fall*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/opinion/brazil-coronavirus-bolsonaro.html?searchResultPosition=51> [https://perma.cc/P82K-BPSH].

20. See Ernesto Londoño, *Furious Backlash in Brazil After Ministry Withholds Coronavirus Data*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/world/americas/brazil-coronavirus-statistics.html?searchResultPosition=52> [https://perma.cc/6HRD-TARS].

21. See *id.*

22. See *id.*

23. See Londoño & Milhorange, *supra* note 3.

continued with the same patterns in its attempts to contain the virus, “it could create the ideal breeding ground for new and even more deadly variants,”²⁴ such as the P.1 variant that emerged in Brazil in early 2021²⁵ and later made its way worldwide, spreading fast with its high transmissibility and reinfection rates.²⁶

In stark contrast to Brazil’s failures regarding the pandemic, other Latin American states implemented strict restrictions to maintain control. Throughout 2020, Argentina had some of the continent’s most rigid coronavirus restrictions.²⁷ A group of Argentinian scientists urged for the government to close the land border with Brazil, stating that “it’s so important to impose travel restrictions straight away because once contagions start to rise it will be too late.”²⁸ It wasn’t until October of 2021 that Argentina finally allowed Brazilian citizens to visit the country without requiring a mandatory quarantine.²⁹ By all accounts, the government of Argentina did everything in their power to act “swiftly and decisively” following reports of the first coronavirus cases, as they implemented border closures, school closures, testing facilities, and contact tracing.³⁰ According to the World Health Organization (WHO),

24. Monica Malta, *Political Neglect of Covid-19 and the Public Health Consequences in Brazil: The High Costs of Science Denial*, 35 *ECLINICALMEDICINE* 100878 (2021), <https://doi.org/10.1016/j.eclinm.2021.100878> [<https://perma.cc/2JZR-A9KV>].

25. See Michael Le Page & Matt Hambly, *Gamma Covid-19 Variant (P.1)*, *NEW SCIENTIST* (Sep. 8, 2021), <https://www.newscientist.com/definition/brazil-covid-19-variant-p-1> [<https://perma.cc/25SM-J339>].

26. See Robert Glatter, *P.1 Variant, Dominant Strain in Brazil, Reported in New York*, *FORBES* (Mar. 21, 2021, 11:02 PM), <https://www.forbes.com/sites/robertglatter/2021/03/21/p1-variant-dominant-strain-in-brazil-reported-in-new-york/?sh=1f2a70a71883> [<https://perma.cc/N4RR-D8H2>].

27. See Ignacio Portes, *Argentina Lifts Most Covid Restrictions*, *BRAZILIAN REPORT* (Sep. 21, 2021, 10:22 AM), <https://brazilian.report/liveblog/2021/09/21/argentina-lifts-covid-restrictions/#argentina-lifts-covid-restrictions> [<https://perma.cc/Y7MZ-23CS>].

However, these strict measures did not mean that Argentina was able to completely avoid the harms of the pandemic. See Gustavo Ribeiro & Lucas Berti, *World’s Longest Lockdown Didn’t Avoid a Coronavirus Disaster in Argentina*, *BRAZILIAN REPORT* (Sep. 26, 2020, 12:02 PM), <https://brazilian.report/latin-america/2020/09/26/world-longest-lockdown-avoid-coronavirus-disaster-argentina> [<https://perma.cc/QA3Q-MYV9>].

28. See Tom Phillips et al., *“The Heart Of Darkness”: Neighbors Shun Brazil Over Covid Response*, *GUARDIAN* (Mar. 30, 2021, 9:08 AM), <https://www.theguardian.com/global-development/2021/mar/30/neighbors-shun-brazil-covid-response-bolsonaro> [<https://perma.cc/A2G3-9666>].

29. See Ignacio Portes, *Brazilians Set to Flock to Argentina Amid Reopening*, *BRAZILIAN REPORT* (Sep. 23, 2021, 11:39 AM), <https://brazilian.report/liveblog/2021/09/23/tourists-argentina-amid-reopening> [<https://perma.cc/F27B-7KGN>].

30. See WORLD HEALTH ORG., *COVID 19: WHO’S ACTION IN COUNTRIES: ARGENTINA 1* (2020), https://www.who.int/docs/default-source/coronaviruse/country-case-studies/argentina-c19-case-study-20-may.pdf?sfvrsn=a638d5d4_3 [<https://perma.cc/SX2P-BYMM>].

Argentina's response to COVID-19 involved strong leadership, effective communications and community engagement, and enhancement of social protection measures, all of which allowed the country to stay ahead of the curve early in the pandemic.³¹

Brazil's coronavirus response was widely opposed and criticized by other Latin American countries as well.³² The government of Peru reacted quickly to the pandemic with "swift and efficient measures," all in juxtaposition to Brazil's "chaotic" response.³³ Peru, along with Colombia and Argentina, banned flights to Brazil.³⁴ In Venezuela, a lockdown was enforced in response to the P.1 variant.³⁵ It was widely recognized that due to Bolsonaro's failure to act, Brazil had become a threat to the region.³⁶ At the same time, Uruguay's government rushed to create an "epidemiological shield" against the P.1 variant.³⁷ In March of 2021, the World Health Organization admitted that the situation in Brazil was impacting its neighboring states.³⁸

States like Argentina, Peru, Colombia, Venezuela, and Uruguay were all concerned that an infected Brazilian citizen would cross over their borders and cause the spread of the virus or one of its dangerous variants.³⁹ This Note will explore the question of whether these states, all reasonably diligent in their efforts to slow the virus' spread, could have a legal claim against blatantly negligent states like Brazil.⁴⁰ The nature of this claim

31. *See id.* at 2–3.

32. *See* Phillips et al., *supra* note 28.

33. *See* Anatoly Kurmanaev et al., *Latin America's Outbreaks Now Rival Europe's. But Its Options Are Worse.*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/world/americas/latin-america-virus-death.html> [<https://perma.cc/H4T2-Y2CE>].

34. Phillips et al., *supra* note 28.

35. *Id.*; *see also* Glatter, *supra* note 26 (discussing the severity and characteristics of the P.1 variant, which was first found in Brazil).

36. Phillips et al., *supra* note 28.

37. *Id.*

38. *Id.*

39. *Id.*

40. The duties of states in the "fight" against COVID-19 has been a debated topic in significant scholarship circles. *See* Marco Longobardo, *The Duties of Occupying Powers in Relation to the Fight against Covid-19*, EJIL:TALK!: BLOG OF THE EUROPEAN J. OF INT'L L. (Apr. 8, 2020), <https://www.ejiltalk.org/the-duties-of-occupying-powers-in-relation-to-the-fight-against-covid-19/> [<https://perma.cc/63T6-CE9B>]. Furthermore, another subject of contention has been the broad issue of what rights states have to enact strict border closures and other preventative measures. *See generally* Salvo Nicolosi, *Non-Refoulement During a Health Emergency*, EJIL:TALK!: BLOG OF THE EUROPEAN J. OF INT'L L. (May 14, 2020), <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency> [<https://perma.cc/A38F-ACMD>] (questioning whether COVID-19 can affect the scope of states' obligations relating to access to asylum procedures and to other fundamental rights) and Alessandra Spadaro, *Do the Containment Measures Taken by Italy in Relation to COVID-*

concerns the concept of state responsibility. Under international law, state responsibility provides that “whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of [this] international obligation gives rise to a requirement for reparation.”⁴¹ Continuing to use Latin America as an example, in order to bring this claim, the states would first have to attribute the transmission of the virus to Brazil. This is a question of attribution; it asks whether Brazil can be held responsible for the actions of—and harm caused by—the COVID-infected individual within the other Latin American states.⁴² The states would then need to show that Brazil’s failure to mitigate the spread caused the infection in the second state. This is a question of causation; it asks what the degree of involvement must be in order for Brazil to be held responsible for actions of its private citizens on the territory of other states.⁴³

This Note argues that a state adversely affected by another state’s failure to prevent and mitigate COVID-19 could have a legal claim against that other state, even if it was the act of a private individual that resulted in the adverse effect. Part II provides a brief overview of subjects under international law, state responsibility under international law, and definitions of causation within the context of international law. Part III

19 Comply with Human Rights Law?, EJIL:TALK!: BLOG OF THE EUROPEAN J. OF INT’L L. (Mar. 16, 2020), <https://www.ejiltalk.org/do-the-containment-measures-taken-by-italy-in-relation-to-covid-19-comply-with-human-rights-law/> [https://perma.cc/F5NF-2SXR] (inquiring about the compatibility of containment measures taken by the Italian government in response to COVID-19 with Italy’s obligations under international human rights law).

41. MALCOLM N. SHAW, *INTERNATIONAL LAW* 694 (5th ed. 2003); *see generally* Silvia Borelli, *State Responsibility in International Law*, OXFORD BIBLIOGRAPHIES (June 27, 2017), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0031.xml> [https://perma.cc/GZ7F-MQEY] (“The law of state responsibility plays a central role in international law, functioning as a general law of wrongs that governs when an international obligation is breached, the consequences that flow from a breach, and who is able to invoke those consequences (and how)”).

42. The concept of attribution in the scope of state responsibility has been researched before—most notably in the case of armed conflicts. *See, e.g.*, Remy Jorritsma, *Emerging Voices: The Role of Attribution Rules Under the Law of State Responsibility in Classifying Situations of Armed Conflict*, OPINIOJURIS (Aug. 17, 2015), <http://opiniojuris.org/2015/08/17/emerging-voices-the-role-of-attribution-rules-under-the-law-of-state-responsibility-in-classifying-situations-of-armed-conflict> [https://perma.cc/39NQ-JWKA].

43. The issue of causation in international law has been most commonly covered in the scope of state responsibility for acts of war and terrorism. *See, e.g.*, Azin Tadjdini, *Inviting a Wolf to the Table: The 2020 US-Taliban Agreement and Questions of State Responsibility*, EJIL:TALK!: BLOG OF THE EUROPEAN J. OF INT’L L. (Sept. 6, 2021), <https://www.ejiltalk.org/inviting-a-wolf-to-the-table-the-2020-us-taliban-agreement-and-questions-of-state-responsibility> [https://perma.cc/Y93Z-FDA9].

analyzes attribution of the actions of private citizens to their state of origin within the COVID-19 pandemic and ultimately argues that states owe a duty to each other to prevent the spread of COVID-19, assuming that all the factors of state responsibility and causation are met. Part IV concludes with a brief overview of the Note and a discussion of possible counterarguments.

II. BACKGROUND

A. United Nations Draft Articles on State Responsibility

Customary international law is based on the practice of states and *opinio juris*, defined as the belief that “certain conduct is required or permitted under international law.”⁴⁴ However, because customary international law is often unwritten, it can lack both precision and certainty.⁴⁵ To alleviate some of these ambiguities, institutions such as the International Law Commission (ILC)⁴⁶ are responsible for the codification⁴⁷ of international law.⁴⁸ At times, the ILC concludes its codifications through the creation of a convention, such as the Vienna Convention on the Law of Treaties.⁴⁹ However, not all of the ILC’s codifications result in the creation of a convention.⁵⁰ Instead, any foundational work completed in preparation for a codification conference⁵¹ may remain in its original form as “articles.”⁵² While these articles may not be on equal footing as their convention counterparts, they

44. See RÜDIGER WOLFRUM, SOURCES OF INTERNATIONAL LAW ¶ 25 (Max Planck Encyc. of Int’l L. ed., 2011).

45. See SIR ARTHUR WATTS ET AL., CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW ¶ 2 (Max Planck Encyc. of Int’l L. ed., 2021).

46. See generally PEMMARAJU SREENIVASA RAO, INTERNATIONAL LAW COMMISSION (ILC) (Max Planck Encyc. of Int’l L. ed., 2017) and *International Law Commission*, UNITED NATIONS OFF. OF LEGAL AFFS., <https://legal.un.org/ilc> [<https://perma.cc/PAZ5-4BZ4>] (last visited Mar. 6, 2022).

47. Codification “connotes the more precise articulation of rules of international law in fields where there has already been extensive practice leading to the emergence of customary rules.” WATTS ET AL., *supra* note 45, ¶ 3. This is to be distinguished from “progressive development” which “connotes the development of rules on subjects not yet regulated by international law or where the law is insufficiently developed.” *Id.* Both of these functions are performed through the International Law Commission. *Id.*

48. See *id.*

49. See *id.* ¶ 17, 34; see also Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

50. See WATTS ET AL., *supra* note 45, ¶ 34.

51. See *id.* ¶ 30.

52. See *id.* ¶ 34.

may still be viewed as the “codification of international law” and therefore an “authoritative statement of the law.”⁵³

The Draft Articles on Responsibility of States for Internationally Wrongful Acts⁵⁴ are an example of a set of articles not transformed into a convention but nevertheless widely accepted as proper codification of international law.⁵⁵ The ILC adopted these Draft Articles in August of 2001, and months later, a general assembly resolution⁵⁶ acclaimed them to state governments.⁵⁷ The International Court of Justice (ICJ)⁵⁸ has implicitly acknowledged other articles drafted by the ILC in, for example, the case concerning the Gabčíkovo–Nagymaros Project.⁵⁹ The ILC has explained firsthand that the value of the Commission’s determination regarding the existence—or nonexistence—of a rule of customary international law flows from three sources: first, from the ILC’s “unique mandate” to promote the “progressive development of international law and its codification;” second, from the thorough consideration the ILC takes towards state practices and *opinio juris*; and third, from the close relationship the ILC has with states.⁶⁰ The weight given to these determinations depends on various factors, such as “the sources relied upon by the Commission, the stage reached in its work, and above all upon States’ reception of its output.”⁶¹

Given the importance of the ILC within the international community and the recognition of the Draft Articles by the ICJ, the Draft Articles carry significant weight despite their existence as articles rather than a

53. *See id.*

54. Int’l L. Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles], https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [<https://perma.cc/2XZX-DN4V>].

55. *See* WATTS ET AL., *supra* note 45, ¶ 34.

56. *See* G.A. Res. 56/83, ¶ 1–4 (Jan. 28, 2002), <https://www.refworld.org/docid/3da44ad10.html> [<https://perma.cc/7D5G-A4YV>].

57. *See* SHAW, *supra* note 41, at 796.

58. “The International Court of Justice, which has its seat in The Hague, is the principal judicial organ of the United Nations.” *See generally International Court of Justice*, INT’L CT. OF JUST. <https://www.icj-cij.org/en> [<https://perma.cc/W9MA-E9XC>] (last visited Mar. 6, 2022).

59. *See generally* Gabčíkovo–Nagymaros Project (Hung. /Slovak.), 1997 I.C.J. 7 ¶¶ 47, 50–54, 57, 79, 83 (Sep. 25); *see also* Gabčíkovo–Nagymaros Project (Hungary/Slovakia), INT’L CT. OF JUST. <https://www.icj-cij.org/en/case/92> [<https://perma.cc/DJ6X-7BK8>] (last visited Mar. 6, 2022).

60. *See* WATTS ET AL., *supra* note 45, ¶ 34; *see also* Int’l Law Comm’n, Rep. on Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, at 142–43 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf [<https://perma.cc/WZK3-8ZJL>].

61. *See* WATTS ET AL., *supra* note 45, ¶ 34.

convention.⁶² The Draft Articles are not a treaty, the practice of states, nor *opinio juris*.⁶³ Instead, the ILC has accepted the “special place” these Draft Articles occupy.⁶⁴ Accordingly, the ICJ has not hesitated to cite the Draft Articles when necessary and appropriate.⁶⁵ Throughout this Note, the Draft Articles will be paramount in addressing questions of state responsibility. The Articles consist of three main parts: Part I defines the internationally wrongful act of a state; Part II looks into the breach of an international obligation, and Part III deals with dispute settlement and the enforcement of state responsibility.⁶⁶ Each of these parts contains labeled chapters that contain articles with the ILC’s commentary.⁶⁷

State responsibility, as the ILC defines it, requires a few basic factors: (1) an “international legal obligation,” (2) attribution, and (3) causation.⁶⁸ First, there must be an existence of an “international legal obligation” between Brazil and whichever state decides to bring forth a claim.⁶⁹ Second, the COVID-infected Brazilian individual must have acted in a way that violates that obligation and is attributable to the state of Brazil.⁷⁰ Finally, the other state must prove that any harm faced during the course of the pandemic or afterwards partially resulted from the act of that individual.⁷¹ Can Brazil itself be held responsible for the acts of harm caused by COVID-infected nationals who, by their own free will, venture outside its borders? This requires a brief explanation of subjects under international law and what it means to be an “actor.”

B. Subjects Under International Law

In any legal system, whether it be domestic or international, certain entities are considered “legal persons” and possess duties and rights that are enforceable under law.⁷² Defining these entities under international law looks a bit different than it does under domestic law.⁷³ This is partially because the international community is composed of a wide and diverse range of participants including states; international, regional, and non-governmental organizations; public and private companies; and

62. *See id.*

63. *See id.* at ¶ 43.

64. *See id.*

65. *See id.*

66. *See SHAW, supra* note 41, at 696; *see generally* Draft Articles, *supra* note 54.

67. *See generally* Draft Articles, *supra* note 54.

68. SHAW, *supra* note 41, at 696.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.* at 175.

73. *See id.* at 176.

individuals.⁷⁴ Put simply, according to the traditional view, only states are subjects of and bound by international law.⁷⁵ Within the international legal system, the “state” is a real and organized entity; it is considered a “legal person” with complete authority to “act.”⁷⁶ However, states cannot act as themselves.⁷⁷ This means that anything defined as an “act of the state” must involve an “action or omission by a human being or group.”⁷⁸ For example, under international law, Brazil is a “legal person” with the complete authority to “act.”⁷⁹ In order for Brazil to commit an “act,” an “action or omission by a human being or group” must occur.⁸⁰

An “action” of a state is often easier to identify than an “omission.”⁸¹ This Note is concerned with the *action* of a private individual that results in harm due to the *omission* of the state in its obligation to act and successfully mitigate the pandemic.

Certain ICJ cases illustrate this concept more clearly. For example, the *Corfu Channel Case*⁸² arose out of a dispute following the explosions of mines that damaged British warships on Albanian waters.⁸³ The ICJ held that the fact that Albania “knew, or must have known,” about the existence of the mines in the waters and did nothing to warn other states of their existence was enough to hold Albania responsible for the incident.⁸⁴ Similarly, the ICJ issued a judgment on the *United States Diplomatic and Consular Staff in Tehran* after militants took hostages at the United States Embassy in Tehran, Iran.⁸⁵ The ICJ held Iran responsible, citing the “‘inaction’ of its authorities which ‘failed to take appropriate steps’ in circumstances where such steps were evidently called for.”⁸⁶

The key phrase here is “in circumstances where such steps were evidently called for.”⁸⁷ Due to its international obligations as legal

74. See *id.*

75. See Ernst Schneeberger, *The Responsibility of the Individual Under International Law*, 35 GEO. L. J. 481 (1947); see also CHRISTIAN WALTER, SUBJECTS OF INTERNATIONAL LAW ¶ 1 (Max Planck Encyc. of Int’l L. ed., 2007).

76. See Draft Articles, *supra* note 54, ¶ 5, at 35.

77. *Id.*

78. *Id.*

79. See *id.*

80. See *id.*; see also *German Settlers in Poland*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6 at 22 (Sept. 10) (“[s]tates can act only by and through their agents and representatives.”).

81. See Draft Articles, *supra* note 54, ¶ 4, at 35.

82. See *Corfu Channel (U.K./Alb.)*, Judgment, 1949 I.C.J. 5 (Apr. 9).

83. *Id.* at 10.

84. See Draft Articles, *supra* note 54, ¶ 4.

85. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. 3, 5 ¶ 1 (May 24).

86. See Draft Articles, *supra* note 54, ¶ 4, at 35.

87. See *id.*

entities,⁸⁸ Albania was “called” to warn the international community about the existence of mines in its waters, and it failed to do so.⁸⁹ Iran was “called” to stop Iranian militants from occupying the United States embassy, and it failed to do so.⁹⁰ Similarly, this Note will argue that states like Brazil were “called” to mitigate the pandemic’s effects within its borders to prevent harm to other states and failed to do so. This is where the COVID-infected private individual comes into the picture.⁹¹ Traditionally, the conduct of private individuals is not directly attributable to states.⁹² However, there are circumstances that can break this general principle.⁹³ Article 8 of the Draft Articles outlines two of these circumstances: (1) private individuals that are acting out on state instructions, and (2) private persons acting under state direction or control.⁹⁴

The first factor is not applicable within this analysis; COVID-19 infected individuals crossing state lines and causing harm are not acting out on state instructions for them to do so. The second factor, however, is more general and can relate to more complex issues, such as the one addressed in this Note.⁹⁵ The Draft Articles provide that under this second factor, “conduct will be attributable to the State only if [the state] *directed* or *controlled* the specific operation and the conduct complained of was an *integral part* of that operation.”⁹⁶ The ICJ applied this degree of control in the *Military and Paramilitary Activities in and Against Nicaragua* case,⁹⁷ where the issue was whether the wrongful conduct of Nicaraguan rebels, the “contras,” whom the United States government supported, was attributable to the United States.⁹⁸ The ICJ implemented a high threshold for determining control, stating that because they could not prove that the U.S. had direct control of the operations during which the alleged violations occurred, the conduct was not attributable to the United States.⁹⁹

88. “The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations . . . [i]n international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others.” *Id.* ¶¶ 7–8, at 35.

89. *See generally* Corfu Channel (U.K. /Alb.), Judgment 1949 I.C.J. 5, 23 (Apr. 9).

90. *See* U.S. v. Iran, 1980 I.C.J. ¶¶ 63, 67, at 31–32.

91. *See* Draft Articles, *supra* note 54, ¶ 5, at 35.

92. *Id.* ¶ 1, at 47.

93. *Id.*

94. *Id.*

95. *See id.* ¶ 3, at 47.

96. *Id.* (emphasis added).

97. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

98. *See id.* at 20–22; Draft Articles, *supra* note 54, ¶ 4, at 47.

99. *See* *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115.

Therefore, although the U.S. supported the contras, “a general situation of dependence and support” was not enough to attribute their conduct to the state.¹⁰⁰

One international tribunal in the case of *Prosecutor v. Duško Tadić*¹⁰¹ stated that the threshold of this control can vary according to the factual circumstances of each case.¹⁰² The tribunal argued that consistent application of the *Nicaragua* “effective control” test would make it too easy for states to disassociate themselves from an individual’s unlawful conduct if there was no direct control involved.¹⁰³ For example, in the *Consular Staff in Tehran* case,¹⁰⁴ Iranian individuals were not acting on behalf of the state of Iran when they violated international law, nor had they received any direction or encouragement from Iran to perform such an act.¹⁰⁵ Nevertheless, the ICJ considered the fact that Iran had endorsed and approved of the conduct *after* it had occurred and attributed the conduct to Iran under a lower threshold of control.¹⁰⁶ Cases in which private individuals were allegedly *engaged* by a state to perform acts contrary to international law on the territory of another state should require proof of state instruction or direct control.¹⁰⁷ International law cannot attribute conduct of that nature to the state citing only “generic authority over the individual.”¹⁰⁸ However, applying this high threshold in every circumstance would allow states to hide behind a lack of direct control in order to renounce international responsibility.¹⁰⁹

If the analysis of relevant case law shows that actions taken by the COVID-infected national are imputable¹¹⁰ to the state, any harm caused

100. Draft Articles, *supra* note 54, ¶ 4, at 47.

101. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [<https://perma.cc/36TQ-7VC4>].

102. See Draft Articles, *supra* note 54, ¶ 5, at 48. “The principles of international law concerning the attribution to States of acts performed by private individuals are *not* based on rigid and uniform criteria.” *Tadić*, Case No. IT-94-1-A ¶ 117, at 47 (emphasis added).

103. *Tadić*, Case No. IT-94-1-A, ¶ 117, at 47–48.

104. See *U.S. v. Iran*, 1980 I.C.J..

105. See *Tadić*, Case No. IT-94-1-A, ¶ 133 at 56–57.

106. See *id.*

107. “[F]or instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage.” *Id.* ¶ 118, at 48.

108. See *id.*

109. See *id.* ¶ 123, at 51.

110. As used in legal phrases, this word means *attributed vicariously*; that is, an act, fact, or quality is said to be “imputed” to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he is responsible. *Imputed*, BLACK’S LAW DICTIONARY (6th ed. 1990) (emphasis added).

must have stemmed directly from the act of the individual, and in turn, the failure of the state to prevent it. This requires discussion of causation under international law.

C. Degree of Involvement Required for State Responsibility

The simplest way to understand the role of causation in state responsibility is to look at its function within international environmental law.¹¹¹ There is a wide range of environmental problems that can lead to legal disputes. One example is pollution, which can be atmospheric or water-based.¹¹² Issues with pollution usually arise when pollution generated in one state has a direct impact upon other states.¹¹³ For example, when chemicals from factories rise to form acids, the wind carries them until they eventually fall as acid rain, many miles away from where they originated.¹¹⁴ The *Trail Smelter Arbitration*¹¹⁵ concerned a dispute between Canada and the United States after pollution from a Canadian smelter¹¹⁶ damaged trees and crops on the American side of the border.¹¹⁷ How could the United States prove that it was Canada's sulfur dioxide pollution that led to the harm?¹¹⁸

To determine whether the damage was in fact caused by the Canadian smelter, the tribunal first used evidence to examine whether an actual injury existed.¹¹⁹ It then considered the cause of the injury, which it resolved in two parts: first, by finding “the actual causing factor” and second, by determining “the manner in which the causing factor has operated.”¹²⁰ The tribunal used a variety of scientific evidence to conclude that Canada was responsible under international law for the conduct of the smelter.¹²¹ It stated that:

[U]nder the principles of international law . . . no State has the right to use or permit the use of its territory in such

111. See SHAW, *supra* note 41, at 760.

112. See *id.* at 754.

113. See *id.*

114. See *id.*

115. See *Trail Smelter Case (U.S. v. Canada)*, 3 R.I.A.A. Awards 1905 (1941), https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf [<https://perma.cc/8U4S-AP52>].

116. A smelter is an establishment for smelting, which is the process of melting or fusing a substance with an accompanying chemical change in order to separate the metal. *Smelt*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

117. See SHAW, *supra* note 41, at 761.

118. See *id.*

119. See *Trail Smelter Case (U.S. v. Canada)*, 3 R.I.A.A. 1905, 1920 (1941).

120. *Id.* at 1920–21.

121. See *id.* at 1965.

a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹²²

This holding became known as the “*Trail Smelter* principle” or the “no harm” rule,¹²³ emphasizing that the polluter must pay for the harm caused and that states have a duty to prevent transboundary harm.¹²⁴ The ICJ affirmed this rule as constituting a “general obligation of states” in their advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.¹²⁵ The *Trail Smelter* tribunal emphasized that states were free to pollute their own territory within the guidelines of the law, but the moment that pollution crosses over an international border and is of serious consequence, the state has violated international law.¹²⁶

Pollution of a “serious consequence” is pollution that inhibits an individual or group from living a healthy and fulfilling life.¹²⁷ The *Trail Smelter* tribunal focused on the economic losses incurred as a result of the pollution to determine whether it was of serious consequence, but the exact analysis and definition of serious consequence can depend on the circumstances of the case.¹²⁸ “Causality” refers to the link between an act and the damage occurring in a physical environment;¹²⁹ the ILC defines damage as a tangible and physical consequence of an action.¹³⁰ Proving causality between an act (pollution crossing over to the United States from the Canadian smelter) and the damage (damaged trees and crops belonging to American farmers) presents some difficulties, such as:¹³¹ (1) temporal separation, where harm is visible only years after the act took place; (2)

122. *Id.*

123. See SHAW, *supra* note 41, at 761.

124. See Catherine Prunella, *An International Environmental Law Case Study: The Trail Smelter Arbitration*, INT’L POLLUTION ISSUES (Dec. 2014), <https://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration> [<https://perma.cc/B5TX-UNVQ>].

125. See John R. Crook, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, in AM. J. OF INT’L L., RECENT BOOKS ON INT’L L. 395, 395 (Richard B. Bilder, ed., 2020); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, 242 ¶ 29 (July 8).

126. See Prunella, *supra* note 124.

127. See *id.*

128. See *id.*

129. See *id.*

130. See JULIO BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* 11 (David Freestone ed., 2010).

131. See *id.*

multiple overlapping causes, where simultaneous or different acts or causes accumulate leading to harm; and (3) uncertainty, where sufficient or conclusive scientific evidence is missing to link an activity with the occurrence of harm.¹³²

These are important to consider when analyzing the difficulties that arise in attempting to identify a “causal chain” between the act and the damage caused.¹³³ In the situation outlined in this Note, all three difficulties are present. Therefore, causality will be a major issue—and the most difficult requirement to satisfy—in determining Brazil’s liability to other Latin American states.

III. ANALYSIS

As described in Part I of this Note, the government of Brazil, under President Bolsonaro, remained dismissive and unconcerned during both the initial onset of the COVID-19 pandemic and during the virus’ eventual attack on the country’s people and resources.¹³⁴ Other Latin American states, such as Argentina, Peru, Colombia, Venezuela, and Uruguay, all acted reasonably and diligently in their efforts to mitigate the effects of the virus and in turn, took measures in an attempt to prevent Brazil’s outbreak from affecting their populations.¹³⁵ Using this situation as a baseline, the issue presented in this Note is whether these “reasonable” states could have a legal claim against an “unreasonable” state, like Brazil, within the scope of state responsibility.¹³⁶ More specifically, this Note argues that states like Brazil can be held responsible for COVID-infected nationals who, by their own free will, venture outside Brazilian borders and conduct harmful actions or cause damage related to COVID-19.

A. Obligations Under the No Harm Principle

There are three factors that must be fulfilled in order for this argument to stand true.¹³⁷ First, an “international legal obligation” must exist between Brazil and whichever state decides to bring forth a claim.¹³⁸ Second, the infected Brazilian national must have acted in a manner that violates that obligation, and that act must be attributable to the state of

132. *See id.*

133. *See id.*

134. *See supra* notes 1–25 and accompanying text.

135. *See supra* notes 26–36 and accompanying text.

136. *See supra* notes 39–40 and accompanying text.

137. *See supra* notes 65–67 and accompanying text.

138. *See SHAW, supra* note 41, at 696.

Brazil.¹³⁹ Finally, any harm the other states faced during the course of the pandemic or afterwards must have been caused by the actions of that individual.¹⁴⁰

According to Article 12 of the Draft Articles, the breach of an international legal obligation occurs when a state action goes against what the obligation requires of the state, regardless of the obligation's "origin or character."¹⁴¹ The phrase "regardless of its origin" indicates that either customary international law, treaties, or general principles of international law can establish the obligation; Article 12 is of "general application."¹⁴² "[R]egardless of its . . . character" implies that a distinction between different kinds of international obligations¹⁴³ is not relevant when determining whether the obligation has been breached under Article 12.¹⁴⁴ The ICJ affirmed the no-harm principle from the *Trail Smelter* case¹⁴⁵ to constitute the "general obligations of states,"¹⁴⁶ and many consider the case pivotal within international environmental law.¹⁴⁷ It follows that the no-harm principle is a clear "international legal obligation" that states can violate as stated in Article 12.

This obligation is applicable outside the realm of international environmental law. The no-harm principle states that all states have an obligation under international law to use their territory in a manner that does not cause "injury" to other states.¹⁴⁸ In the ICJ's affirmation of the rule in their advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that states have an obligation "to ensure that activities *within their jurisdiction and control* respect the environment of other states" and that this obligation is part of the "corpus of international law *relating to* the environment."¹⁴⁹ Some states in *Use of Nuclear Weapons* argued that international environmental obligations did not apply to nuclear weapons or warfare; the Court disagreed.¹⁵⁰ In this

139. *See id.*

140. *See id.*

141. *See* Draft Articles, *supra* note 54, at 54.

142. *See id.* ¶ 3, at 55.

143. *See id.* ¶ 11, at 56. "[A] distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive, and it does not seem to bear specific or direct consequences as far as the present articles are concerned." *Id.* (footnote omitted).

144. *See id.*

145. *See* *Trail Smelter Case* (U.S. v. Canada), 3 R.I.A.A. 1905 (1941).

146. *See* Crook, *supra* note 125, at 395.

147. *See* Prunella, *supra* note 124.

148. *See* *Trail Smelter Case* (U.S. v. Canada), 3 R.I.A.A. 1905, 1965 (1941).

149. *See* *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ at 242 ¶ 29 (emphasis added).

150. *See id.* ¶ 28, at 241.

opinion, the Court was not referring to the environment as an abstract concept but rather as a representation of the population's quality of life, health, and overall vitality, all of which are under threat with the threat of nuclear weapons.¹⁵¹

A state's obligation to prevent the spread of a novel disease during a pandemic is also directly related to those three factors. One cannot expect that the population of a state, such as Argentina's, that is neighboring another state that has not taken appropriate steps to mitigate a highly contagious and harmful virus, such as Brazil, to maintain any "quality of life."¹⁵² The constant anxiety for the health of the population may reduce any strength or liveliness a community might have held before. Latin American leaders lived in a bubble of constant fear, caution, and apprehension throughout the first year of the pandemic, if not afterwards, due to President Bolsonaro's indifference and failure to cooperate.¹⁵³

This conclusion is especially relevant when considering the *Trail Smelter* tribunal's serious-consequence requirement, defined as pollution that inhibits an individual or group from living a healthy and fulfilling life.¹⁵⁴ The tribunal left the serious-consequence requirement open to interpretation depending on the circumstances of the case. As of March of 2022, the *New York Times* reported nearly 30 million cases of COVID in Brazil.¹⁵⁵ This is a case of serious consequence exactly as the tribunal intended in *Trail Smelter*.¹⁵⁶ The international obligation is clear and definite—Brazil had a duty to act reasonably in response to the pandemic so as not to harm its neighboring states upon their territories. By enforcing virtually no protective measures, Brazil, and other states like it, violated that obligation under the no-harm principle.¹⁵⁷ However, this Note does not merely ask whether states like Brazil can be held accountable for a breach of an international obligation; it asks whether they can be held accountable for their failure to mitigate the pandemic when they were explicitly "called" to do so,¹⁵⁸ allowing their citizens to venture to

151. *See id.* ¶ 29, at 242.

152. *See id.* ¶ 29, at 242.

153. *See supra* notes 27–37 and accompanying text.

154. *See Trail Smelter Case (U.S. v. Canada)*, 3 R.I.A.A. 1905, 1965 (1941).

155. *Tracking Coronavirus in Brazil: Latest Map and Case Count*, N.Y. TIMES (last updated March 7, 2022), <https://www.nytimes.com/interactive/2021/world/brazil-covid-cases.html> [<https://perma.cc/DR9G-JUY4>].

156. *See Prunella, supra* note 124.

157. "There is a breach of an international obligation by a State 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." Draft Articles, *supra* note 54, at 54.

158. *See id.* ¶ 4, at 35.

neighboring states and cause harm upon a foreign territory.¹⁵⁹ This breach is only the first step towards responsibility.

B. Attribution and the Threshold of Effective Control

In the scenario described in this Note, at the onset of the pandemic, a Brazilian individual has come down with the virus due to the high infection rate in the country. Due to little or no testing, regulation, or contact tracing, this individual is easily able to venture into other Latin American states, and the virus continues to spread. Or, to vary the facts slightly, imagine that it's now early 2021 and the P.1 variant has emerged in Brazil. The same situation occurs—except this time, the individual travels to a vulnerable state that has not enforced border restrictions but has taken every other reasonable precaution. There, the variant continues to spread.

It has already been established that Brazil violated an international obligation towards neighboring states in Latin America under either of these two scenarios.¹⁶⁰ However, recall that individuals are not “legal persons” under international law; only states, such as Brazil, are recognized as legal persons.¹⁶¹ Since states cannot act by themselves, the action or omission by an individual or group of individuals constitutes an act of a state, and that action or omission must be attributable to the state.¹⁶² Put simply, in order to hold Brazil accountable for the conduct of the Brazilian individual, that conduct must first be attributed to Brazil under Article 8 of the Draft Articles.

Article 8 outlines the two circumstances in which the conduct of private individuals is attributable to states.¹⁶³ Only the second circumstance is relevant for the scenario presented in this Note: when private persons are acting under state *direction* or *control*.¹⁶⁴ As the tribunal in *Duško Tadić* stated, the threshold and meaning of “state direction or control” depends on the facts of the case.¹⁶⁵ In order to attribute the conduct to Brazil, this Note’s scenario may require an ever lower threshold of control than argued for in *Duško Tadić*, but given the circumstances, this low threshold is both achievable and necessary.

In *Nicaragua*, the ICJ strictly applied the text of Article 8 and held that although the U.S. supported the rebels in Nicaragua, the rebels’

159. *See id.* ¶ 4, at 35.

160. *See* Draft Articles, *supra* note 54, at 54.

161. *See id.* ¶ 5, at 35.

162. *See id.*

163. *See id.* at 47.

164. *See id.*

165. *Tadić*, Case No. IT-94-1-A ¶ 117, at 47–48.

wrongful conduct was not their responsibility because the rebels were not acting directly under the control of the United States.¹⁶⁶ The *Duško Tadić* tribunal disagreed with this analysis. It argued that such an “exclusive and all-embracing test” conflicts with international law and state practices, since such practices intended for states to be held responsible even when a state exercised a lower degree of control than demanded by *Nicaragua*.¹⁶⁷

In order to determine whether an individual’s conduct is attributable to the state, the *Tadić* tribunal argued for an alternative test to *Nicaragua*’s effective-control test.¹⁶⁸ The tribunal acknowledged that it is necessary to first determine whether the state issued specific instructions to the individual regarding the conduct.¹⁶⁹ If not, “alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the state at issue.”¹⁷⁰ In other words, in the case that the high threshold of *Nicaragua* is not applicable to the circumstances, the application of a lower threshold is possible if a state endorses or approves of the unlawful conduct after it has occurred.

This is best illustrated in the *Consular Staff in Tehran* case.¹⁷¹ When Iranian authorities endorsed and approved of the hostage situation at the U.S. embassy in Tehran after it had occurred, the ICJ attributed the actions of those private individuals to Iran, although Iran gave no instruction or motivation regarding such an act before it occurred.¹⁷² The court specifically stated that “[t]he approval given to these facts [of the hostage situation] by the [government of Iran], and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into *acts of that state*.”¹⁷³ Under *Duško Tadić* and *Consular Staff in Tehran*, the recognition and approval of conduct *after* it has occurred, even absent any effective control beforehand, can result in state responsibility.

If a private individual infected with COVID-19, not acting on behalf of Brazil nor Brazil’s instructions, crosses into another Latin American country, that individual’s actions could be attributable to Brazil due to President Bolsonaro’s endorsement of careless behavior regarding the transmission of the virus, even if he endorsed such behavior after the virus had caused harm.

166. See *supra* notes 96–99 and accompanying text.

167. *Tadić*, Case No. IT-94-1-A ¶ 124, at 51.

168. See *id.* ¶ 137, at 58.

169. See *id.* ¶ 137, at 58–59.

170. See *id.*

171. See *supra* notes 103–108 and accompanying text.

172. See *Tadić*, Case No. IT-94-1-A ¶ 133, at 56–57.

173. See *U.S. v. Iran*, 1980 I.C.J. ¶ 74, at 35 (emphasis added).

Every comment and action taken by President Bolsonaro at the onset of the pandemic signaled that he was not only dismissive of the lives lost, but that he was also indifferent towards border closures, school closures, and any other preventative measures.¹⁷⁴ By the time that Bolsonaro infamously said “[w]hat do you want me to do?” in response to Brazil’s high rate of cases in May of 2020, at least six weeks had passed since the onset of the pandemic.¹⁷⁵ It is likely that during this time, many Brazilian individuals had passed back and forth between other neighboring countries that had not yet enforced strict travel bans. With little to no repercussion or questioning from their president, there were likely many individuals unconcerned with mitigating the spread of the virus. Although President Bolsonaro did not directly give a pat on the back to each individual who, while infected with the virus, traveled irresponsibly, his words essentially did just that.¹⁷⁶ If Bolsonaro had attempted to control the population of Brazil with his influence as president, perhaps he could have saved lives. This is exactly the kind of situation in which customary international law calls for the application of state responsibility,¹⁷⁷ and by liberally applying the *Duško Tadić* threshold of control, such an application becomes possible.

The Draft Articles explicitly state that whether conduct carried out was, in fact, under the control of a state must be determined on a case-by-case basis.¹⁷⁸ Although states like Brazil may not have directly instructed infected individuals to cause harm to neighboring states, the *Duško Tadić* test lowers the high threshold required to establish control, as long as the state acknowledges the wrongful conduct after the fact.

C. Establishing the Causal Chain

Having established that an individual’s conduct may be attributable to the state in a scenario such as that presented in this Note, issues arise when attempting to link the spread of infection in one state to the actions of the individual. There are three general complicating factors for causation under international environmental law: (1) temporal separation, (2) multiple overlapping causes, and (3) uncertainty.¹⁷⁹ First—and this is especially true if the individual was travelling at the beginning of the pandemic—temporal separation may occur, as it may take weeks or

174. See *supra* notes 1–26 and accompanying text.

175. See Robles et al., *supra* note 13.

176. See generally Londoño et al., *As Latin America Shuts Down*, *supra* note 5.

177. See *Tadić*, Case No. IT-94-1-A ¶ 124, at 51.

178. See Draft Articles, *supra* note 54, ¶ 5, at 48.

179. See *supra* notes 130–132 and accompanying text.

months for COVID-19 cases to increase and for the relevant agency to identify the origin.¹⁸⁰ This issue intertwines with the multiple-overlapping-causes issue, as COVID-19 is a highly transmissible virus.¹⁸¹ The third issue of uncertainty, which concerns whether there is insufficient scientific evidence “to link an activity with the occurrence of harm,” is less likely to be relevant in this scenario but may arise when attempting to link the travel of the individual to a rise in infection rates.¹⁸² These issues do not mean that establishing a link is impossible, only that it is a difficult standard to reach.

As noted, the ILC defines damage as a “physical consequence” of an action.¹⁸³ A virus’s effect on the body, effects on the population at large in the form of a pandemic, and its spread are all physical occurrences. Therefore, an outbreak of COVID-19 would certainly be a “physical consequence” of the infected individual’s act of travelling. Causation is the link between the act—travel across state lines from a country failing to mitigate the pandemic—and the damage—causing an outbreak of COVID-19 or one of its variants in another state. The application of *Trail Smelter* can create a causal chain between the act and the damage. First, the “actual causing factor” must be found.¹⁸⁴ The specific evidence of a case can establish this, as in *Trail Smelter*. Second, “the manner in which the causing factor has operated” must be determined.¹⁸⁵

The *Trail Smelter* arbitration utilized a large variety of scientific studies and experiments in determining whether the Canadian smelter actually damaged trees and crops on the other side of the border.¹⁸⁶ However, the determination of an actual-causing factor for an outbreak of COVID-19 in Argentina, Peru, Colombia, Venezuela, or Uruguay may be improbable, since a virus differs greatly from pollution in a localized area. The manner in which the causing factor has operated is also much more difficult to determine for a virus than it is for damage caused by a smelter. Additionally, due to the fact that the scenario presented in this Note is largely hypothetical, no specific evidence or data exists to prove these two factors. However, it is possible to dispute the three complicating factors for causation using international environmental law.

Although temporal separation and multiple overlapping causes can be difficult to overcome in the situation presented in this Note, modern

180. See BARBOZA, *supra* note 130, at 11.

181. See *id.*

182. See *id.*

183. See *id.*

184. See *U.S. v. Canada*, 3 R.I.A.A. at 1921 (1941).

185. See *id.*

186. See SHAW, *supra* note 41, at 761.

international law has evolved towards “loosening” causal links.¹⁸⁷ In fact, international environmental law scholars have expressed frustrations with the “complexities of causation” in their attempts to “construct causal links between individual actions and ecological damage.”¹⁸⁸ This implies that international law is moving towards “networks of liability” that “prioritize the compensation of harm consequent to activities entailing risk.”¹⁸⁹ It is undeniable that Bolsonaro’s indifference caused damage *within* Brazil. Based on the reactions of neighboring states,¹⁹⁰ there were concerns that this damage would spread beyond Brazil’s borders. Surely compensation for the damage done—no matter how small—to reasonable states by unreasonable states should be prioritized over the implementation of a strict chain of causation.

IV. CONCLUSION

The application of state responsibility under international law during the COVID-19 pandemic presents two issues: first, how the actions of an infected individual are attributable to the state; and second, the degree of state involvement needed to establish a causal chain. Article 12 of the Draft Articles and the no-harm principle from the *Trail Smelter* case impose an international legal obligation upon states to act reasonably as to not harm their neighboring states upon their territories.¹⁹¹ Furthermore, the *Duško Tadić* tribunal argued for a lower threshold of control in determining whether an individual’s conduct is attributable to the state.¹⁹² This alternative attribution test is better aligned with customary international law and makes it possible for states like Brazil to face legal repercussions for breach of international legal obligations. When a state mismanages the mitigation and control of the coronavirus pandemic, other states should be able to hold that mismanagement to be the cause of an outbreak on their territory.

On the other hand, establishing a causal chain between the spread of infection in one state to the conduct of an individual from another state presents great challenges.¹⁹³ The study of causation within international environmental law can only support the analysis of this problem to a certain extent, since the spread of a highly contagious virus is very

187. See BARBOZA, *supra* note 130, at 11.

188. See *id.* at 12.

189. *Id.*

190. See *supra* notes 27–31 and accompanying text.

191. See *supra* notes 143–59 and accompanying text.

192. See *supra* notes 168–71 and accompanying text.

193. See *supra* note 189 and accompanying text.

different from the spread of pollution from one clear point to another.¹⁹⁴ However, modern international law is slowly evolving towards loosening the requirements for causation in order to unravel the growing complexities of international environmental law.¹⁹⁵ Future growth in international law may make it possible for states like Argentina, Peru, Colombia, Venezuela, and Uruguay, all reasonably diligent in their efforts to slow the virus' spread, to have a legal claim against blatantly negligent states like Brazil.

194. *See id.*

195. *See supra* notes 190–91 and accompanying text.