

Precluding the Wrongfulness of Derogations of International Human Rights Instruments

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Abstract:

Primary and secondary norms represent complementary systems of governance, one regulating the substantive behaviour of subscribing states and the other imposing consequences upon deviation. Self-contained regimes, those which contain both primary and secondary norms, oust the application of secondary norms accepted as customary by the international community by establishing a higher order of agreement between state parties. Conflict, however, arises when these norms seem to overlap in their substance while remaining technically disjunct in their form. The qualifications contained in derogation and limitation clauses in some international human rights instruments, similarly provide conditions in which a violation would be justified. General international law also prescribes circumstances in which violations do not incur responsibility, considering the state of the breaching party. This paper addresses whether the former precludes the availability of the latter and the difficulty which arises in the absence of such specified derogation and limitation clauses.

1. Introduction

The interaction between the primary rules of international human rights instruments and the secondary rules of state responsibility has always perplexed scholars and representatives of states to international fora alike.¹ On the one hand, most human rights instruments, such as the International Covenant on Civil and Political Rights ('ICCPR'),² contain both derogation and limitation clauses;³ on the other, the regime of state responsibility which

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¹ Math Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (Routledge 2005) 131.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

³ For the ICCPR's derogation clause, see art 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

qualifies certain ‘circumstances precluding wrongfulness’ allows states to excuse themselves from responsibility for internationally wrongful acts.⁴ The conflict here, in essence, arises with the former being primary rules, *i.e.*, rules defining the substantive rights and obligations of member states and the latter being secondary rules, *i.e.*, rules applicable post-violation of international obligations which regulate aspects such as attribution of responsibility,⁵ nature of remedy available,⁶ and, what is most relevant for this discussion, circumstances in which violations may be excused.⁷ Evidently, derogation and limitation clauses under the primary rules describe circumstances, such as public order, national security, and so on, the successful invocation of which would translate to a holding that no violations of international obligations have resulted.

The discussion, thus, boils down to whether the explicit mention of such clauses and the conditions therein, excludes the applicability of the more general and customary defences contained within the law of state responsibility. *Prima facie*, one might take the argument of *lex specialis* and dismiss the discussion in this paper entirely.⁸ However, the applicability of the *lex specialis* doctrine itself may be questioned since the conflict of norms, in this case, is skewed in nature.⁹ Here, one regime determines whether an internationally wrongful act has occurred and the other simply exonerates the wrongfulness of the same. Since these norms activate sequentially, the primary norm must be precisely formulated to disallow the adjudicator to halt herself prematurely. Similarly, the unique facets of international law, such as the overwhelming emphasis on state consent, also places the external tools of treaty interpretation, such as the *travaux*

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

For an example of an ICCPR’s limitation clause, see art 19(3):

Article 19(3): The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

⁴ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Act’ Part I, Chapter V (2001) U.N. Doc. A/56/10 (ARSIWA).

⁵ Ibid, Part I, Chapter II.

⁶ Ibid, Part II, Chapter II.

⁷ Ibid, Part I, Chapter V.

⁸ Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012) 252.

⁹ Anastasios Gourgourinis, ‘General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System’ (2011) 22 *European Journal of International Law* 1025.