



FUNCTIONAL SEPARATION OF PRIMARY AND SECONDARY RULES IN INTERNATIONAL LAW: THE REALITY OF TWO STEP APPROACH

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Abstract

This research examined the nature of the functional division existing between primary and secondary rules in the current International Law when determining international liability. The discussion of this study figures out the degree of success that the International Law Commission (ILC) attained with the adoption of the Article for Responsibility of States for Internationally Wrongful Acts (ARSIWA) which reaffirms the distinction between primary and secondary rules in International Law. As a whole, the discussion of the research concerned two objectives to achieve. The first objective of the research is to elaborate on actual facts that affect maintaining the distinction between primary and secondary rules when determining the international responsibility of states as a two-step process. The secondary objective is to ascertain whether the conceptual autonomy proposed by the ILC between the primary and secondary rules has led to significant barriers and complexities in governing International Law. Based on its findings, this research revealed that there are specific criteria that overlap with the autonomous function of primary and secondary rules, especially the precondition of the legal capacity of an international actor, defences of circumstances precluding wrongfulness, and the trend of application of the "*lex specialis*" notion in determining responsibility in International Law. In the discussion, the research exemplifies the pragmatic statutes of the functioning of independent or autonomous functions between primary and secondary rules to determine liability in International Law based on several case laws decided by the International Court of Justice (ICJ) and other primary and secondary sources. Finally, this research argues that the distinction between primary and secondary rules **prima facie** exists but has paved the way for creating uncertainties in international jurisdictions in practical application due to the unrealistic precondition of international legal capacity and other residual criteria. To achieve the research objectives, the researcher uses a relevant theoretical framework and adopts a qualitative research methodology that is fundamentally library-based and primarily based on an extensive literature review.

Key words; primary rules, secondary rules, Article for Responsibility of States for Internationally Wrongful Acts (ARSIWA), legal capacity, *lex specialis*



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1. INTRODUCTION

The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) at the United Nations General Assembly (UNGA) resolution 56/83 in 2001. It defines an act of a state as internationally wrongful if it is considered to have been violated as well as the consequences of that violation. According to the ideology of ARSIWA, all substantive rules to be adhered to by states in international law are considered primary rules, including those enclosed in treaty or convention obligations as specified by the 1969 Vienna Convention on the Law of Treaties (VCLT). Secondary rules embedded in ARSIWA itself are activated only if primary rules are being violated. Generally, secondary norms presuppose the existence of primary rules (Crawford, 2002). In fact, the genesis of this duty codified in ARSIWA stems from a state's commission of a wrongful act; specifically, an act or omission by the state that has violated its international duties towards another state (Milanovic, 2020). Thus, this codification extricably establishes the distinction between primary and secondary rules in determining state responsibility as an independent two-step approach. The most important fact of International Law, however, is that when determining the consequences of state responsibility based on secondary rules, that application is limited to only those states and international organisations that are conceptually capable of directly violating International Law due to the international legal capacity doctrine. In reality, not all international problems fit into the context of state action by state actors (Vidmar, 2016). Hence, this research aimed to find out whether the application of a divisional approach in primary and secondary rules is realistic when ascertaining state responsibility in the contemporary International Law regime, as expected by the ILC in ARSIWA.

2. METHODOLOGY

This is a library-based, qualitative research that is largely based on an extensive evaluation of the literature. Existing international legislative enactments, international conventions and judicial decisions are employed as primary sources. Secondary sources for conducting research include text books, journal articles and websites. The objective of the research is futuristic and exploratory and both theoretical and applied in nature. This study employed a doctrinal method to discover policy explanations that may be used to advocate for constitutional recognition and International Law implementation.

3 RESULTS AND DISCUSSION

3.1 primary and secondary rules - two step approach

The distinction between primary and secondary rules was adopted by the ILC in its analysis of state responsibility. As such, the functional roles of primary rules and secondary rules need to be understood within the sphere of state responsibility. Ago (1969) explained that “the distinction between obligations of conduct and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation of state as primary rule and secondary rule”. All substantive norms must be followed by nations in International Law, which are primary rules and are referred to as a state's international obligations, as stated by the Vienna Convention on the Law of Treaties (VCLT) in 1969. The primary rules are then voluminous, reflecting the numerous bilateral and multilateral accords between governments. Secondary rules are



triggered only if primary rules are violated, according to the ILC ideology incorporated in ARSIWA. Then, secondary rules are parsimonious. ARSIWA's secondary rules are divided into four sections with a total of 59 articles. Overall, the notion of AIRSWA reflected that attributing a wrongful conduct to the state function in International Law through the application of primary and secondary rule would be deciding international responsibility in a two-step process. So, wrongfulness is recognised under a primary rule—in this instance, treaty law—and, once established, the law of state responsibility or secondary rules in ARSIWA are applied to decide the consequences of wrongfulness. The primary rules and secondary rules in that sense were expected to connote an independent or autonomous function in International Law when determining state responsibility. As explained later in this research, the principle of determining attribution of a wrongful act to the state party (affirming the wrongdoer) and determining the state's responsibility and consequences thereon has been repeatedly asserted in many judicial determinations based on primary and secondary rule differentiation.

3.2 International legal capacity-pre condition

This part of the research discusses how secondary norms of responsibility do, in fact, harmonize with the concept of legal capacity. Thus, it is shown here how the secondary rules truly functioned, as well as whether or not we can even identify an actor with the legal capacity to violate International Law. As said, primary rules determine which conduct is or is not wrongful, while secondary rules aim to regulate responsibility for wrongfulness. Who can then be held responsible? The answer to the aforementioned question comes directly from VCLT and ARSIWA. According to Article 1 of the VCLT it states: *"the present convention applies to treaties between states"* It implies obligations are created between state parties, and hence only a state's acts may be an internationally unlawful act. Further, as per Article 4 of the ARSIWA, it says: *'the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions [...]*

In the preceding paragraph, the phrases legislative, executive and judicial explain how the entity becomes capable of becoming a state. As a result, having the legal capacity to disobey International Law is regarded as a key factor in attributing state responsibility for wrongful conduct. Furthermore, the aforementioned phrases establish that when any other party carries out actions and omissions on behalf of the state, those acts might be considered as acts of the state if they are attributable to the state and subject to legal capacity. Hence, the core prerequisite for an individual actor's existing legal capacity to ascribe international legal responsibility while adopting the two-step method endured as a result of this. This stance is particularly obvious in the seminal cases ruled by the ICJ, such as *Nicaragua v. United States of America* (1986) and *Hungary v. Slovakia* (1997). In the case of *Nicaragua v. United States*, the court's judgement, at page 14, held that; *"...the US violated international law... by supporting the "contra rebels" in Nicaragua"*.

First, the ICJ determined whether the USA has violated its obligations under customary International Law under Article XIX of the Treaty of Friendship, Commerce and Navigation signed at Managua in 1956. Finally, the court ruled that based on UN obligations and other residual responsibilities, the USA was accountable for significant breaches at Nicaragua and to attribute state responsibility for the alleged violation. The same application of the functional two-step primary and secondary rules approach was again made by the ICJ in the case of *Hungary v. Slovakia* (1997). Even though Slovakia and Hungary signed the Budapest Treaty in 1977 to build a Gabčíkovo-Nagymaros system of locks, the Hungarian Government unilaterally abandoned the project in 1989. The ICJ took a two-step approach to determine state responsibility, and in its decision dated September 25, 1997, the ICJ stated unequivocally that:



“... determining international responsibility is a two-step process whereas, primary rules containing treaty laws determine wrongfulness of the act of state that secondary rules contain law of state responsibility is determined consequences of wrongfulness”

So in the above cases, two parties involved in the issue are states with legal capacity, both were bound by an obligation under two treaties, and on both occasions facts inferred that an international obligation codified in a treaty had been violated. As such, the theoretical approach is well within the scope of following a two-step approach separately in the application of the primary obligation of the treaty and the directives of the ARSIWA to apply to attribute state responsibility as the ICJ rightly did in its ruling. However, it cannot be expected that breaches of every international act involve state parties and wrongdoers having the legal capacity to breach. Hence, this research questioned: can all treaty violations be expected only from state actors? Moreover, the next core issue left to decide after each International Law violation is: are all actors in every legal context capable of causing factual harm? Are all actors presumed to have legal capacity, as expected by the secondary rules of ARSIWA, to be held legally responsible for their own conduct?

In fact, this complexity was experienced later in the jurisprudence of the case of *Prosecutor v. Tadić* (1997) at the International Criminal Tribunal in Yugoslavia (ICTY). In this case, Tadić was not criminally liable under Article 2 of the ICTY. Further, conflict in the Prijedor region, where Tadić was involved in supporting Serbs, was *prima facie* internal. The appeals chamber of the tribunal therefore had to determine whether the conflict was international or not, as claimed by the prosecution (Sassòli and Olson, 2000). Further tribunal concerns: in International Humanitarian Law, the identity of the actors determines the applicable law (Vidmar, 2016). How could the ICTY identify lex in Tadić without resorting to the rules of attribution? Only then did it become clear what international crimes Duško Tadić could have committed. Professor Cassese was a judge in that chamber and admitted later that no rules of International Humanitarian Law were of assistance for such a determination; therefore, the tribunal explicitly decided to rely upon ARSIWA (Cassese, 2007). Thus, it was very clear that in the last Tadić case, the court directly sought the answers from the law of state responsibility or secondary rules embedded in Article 8 of ARSIWA without referring to customary or primary rules. Hence, the ruling of the Tadić judgement infers that the ICTY has ignored the customary two-step approach to determining state responsibility which follows primary and secondary rule application. As a result, it is presumed that maintaining a separation between primary and secondary rules may exist only in a normative sense and not in practice.

This situation has lately come to light again following the downing of Flight MH-17 in Ukraine on July 17, 2014, by rebel groups opposed to the Ukrainian Government. The majority accused Russia of being responsible for the incident. The fact that Russia sponsored the rebel groups was widely known (Gibney, 2015). Pursuant to that incident, four Russians are already the subject of an ICC arrest warrant but have not been arrested as yet. However, before holding the state responsible, it is important to attribute wrongful acts violating primary rules to Russia after confirming the suspects' legal capacity (Gibney, 2015). Until such time, wrongfulness does not constitute Russia's downing of Flight MH-17 as an internationally wrongful act. So, this is a major lacuna observed in the law on the distinction between primary and secondary rule approaches when it happens to apply actors' legal capacity in dubious ways.

The two examples of recent International Law discussed above demonstrate how secondary rules, which govern international responsibility in primary rule obligations, overlap with the requirement of the legal capacity of the actor involved in the breach because state responsibility can only be assigned if the actor has the legal capacity to violate International Law. As a consequence, it is clear that the two separate approaches for primary and secondary rules in determining state responsibility are complicated and impractical.



3.3 Circumstances precluding wrongfulness- defenses

The syntax of ARSIWA itself implies that maintaining a conceptual boundary between primary and secondary rules is impractical. As previously said, the role of secondary rules is to analyse the consequences of primary rule violations. However, Articles 20 to 25 of the ARSIWA propose six circumstances precluding wrongfulness that governments might use to justify carrying out their international obligations. Those terms express the act of identifying and ascertaining the wrongfulness of an act against another state in advance (Abass,2004). Indeed, the said task of establishing wrongdoing or obligations falls under primary rules. This situation can be further stated as follows: According to Article 21 of ARSIWA, self-defence is a right of the injured state; however, can states use self-defence against non-state actors and defend themselves in accordance with the ILC Articles? For instance, Taiwan has not yet been recognised as a legal state and would not fall under the purview of Articles 4 to 10 of the ARSIWA. As such, if a Taiwan military ship violates the territory of another state due to purely genuine reasons, such as an unexpected emergency (e.g., a fire explosion), the wrongfulness of the act prima facie exists. In that situation, if a requirement arises for self-defence, in the first instance, such an act would not be legal since self-defence is allowed against a state, and Taiwan is not a state. Therefore, for entities like Taiwan that do not possess legal capacity, the application of primary secondary rule determination is not possible. Hence, determining any liability should have been a unitary process as embedded in Articles 20 to 25. In addition, as per Articles 20 to 25, determining the wrongfulness of an act of state is indeed one of the tasks of primary rules, though it is suggested as a secondary function in ARSIWA. Therefore, the unitary function of both primary and secondary rules by giving defence provisions under circumstances precluding wrongfulness has been acknowledged by ARSIWA itself.

3.4 Operation of “lex specialis”- the trend of unitary approach

In every field of law, the *lex specialis* principle is a device to coordinate and integrate special and general rules to obtain a more complete regulation of a certain matter; hence, an operation of *lex specialis* infers the application of a special rule for an exception to the general law (Pauwelyn,2003). Indeed, the ILC draft on AIRSWA allocated a substantial portion for the *lex specialis* from Articles 55 to 59. The *lex specialis* provisions embodied in those articles ensured the continued relevance of the general rules because they allowed states to create and apply complementary—or even wholly different—rules of state responsibility (Bowring,2009). Here, the ILC observes that the general rules concerning the legal consequences of a breach of International Law are secondary to any particular rules that may have been agreed upon between the parties. Thus, it is obvious that by facilitating *lex specialis* operation in AIRSWA, the honour granted to the attribution of state responsibility through primary and secondary rule mechanisms has already been undermined. The ICJ in its many decisions, orders and advisory opinions has so far refrained from explicitly using the primary/secondary norm terminology and seek the usage of *lex specialis* utilize as principal” in lieu to fill the gap or incapacity in general law rules. In the Advisory opinion of *legality of threat or use of nuclear weapons case* (1969) which the ICJ held that;

"The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".

Further the ICJ in *North Sea continental shelf case (Germany v. Denmark and the Netherlands)* (1969) upheld the application of ‘*lex specialis*’ as follows;

“it is well understood that in practice rules of (general) international law can by agreement be derogated from in particular cases or between particular parties”



Therefore, the use of the *lex specialis* principle in legal interpretation has now become a generally acknowledged norm and a useful strategy for resolving normative disputes between primary and secondary rules. If there are normative disagreements, the *lex specialis* rule can be used to resolve such an antinomy because there is no exact and completely agreed-upon jurisprudence to be employed for the rule of attribution. As a result, it appears that *lex specialis* application has the ability to act outside of the scope of ILC articles. Thus, the overriding character of *lex specialis* implies that there is no longer a need to distinguish between primary and secondary rules and that a unified operation based on a special rule is preferred.

4. CONCLUSIONS

As observed in this research, international adjudication based on the primary and secondary rules concept faces challenges posed by fragmentation due to redundancy in law, especially the notion of determining the legal capacity of actors. In a pragmatic sense, International Law does not concern the sources of the obligations that were breached and considers only the violation and consequences of obligatory rules in the contemporary world. As such, the present practise has led International Law to apply the same rule to ascertain the breach of obligation, whether it is a treaty, customary International Law, or a unilateral declaration of court judgement. Therefore, maintaining a distinction between primary and secondary rules is arbitrary and confusing. This is indeed obvious in situations like determining the international legal capacity of actors in doubt to attribute state responsibility as expected by ARSIWA. Thus, in a practical sense, a unitary approach through maxim *lex specialis* has now become the trend in adjudication of international responsibility rather than falling victim to the confusion of a two-step approach.

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