

THE APPLICATION OF THE GENERAL PROVISIONS OF STATE RESPONSIBILITY ON TREATIES THAT CONTAIN SECONDARY RULES, AND TREATIES THAT SET UP THEIR OWN COMPLIANCE MECHANISMS

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ABSTRACT

This paper examines the complex relationship between the general provisions of state responsibility and treaties that contain their own secondary rules or compliance mechanisms. It explores whether and to what extent the general rules of international responsibility, as articulated by the International Law Commission, apply to treaties that already regulate performance, monitoring, and enforcement internally. The study distinguishes between primary rules—which establish substantive obligations of states—and secondary rules, which determine the consequences of breaches and facilitate implementation. By analyzing examples such as the European Union treaties, human rights conventions, and environmental agreements, the paper demonstrates how treaties increasingly incorporate self-contained regimes to ensure compliance and dispute resolution. Nevertheless, these specialized mechanisms do not entirely preclude the application of the general law of state responsibility, except in cases of express exclusion or normative conflict. The research concludes that while secondary provisions enhance treaty performance and promote accountability, they operate in a complementary—not exclusionary—relationship with the broader framework of international responsibility. Strengthening such integration can improve the coherence and enforceability of international legal obligations in contemporary treaty practice.

1. INTRODUCTION

Treaties have a complex nature and can be categorized into different types. In order not to make vast generalizations, but rather narrow down certain specific instances and situations as it pertains to different types of treaties, it is important to consider treaties that set up their own compliance mechanisms, since the law of state responsibility on its own is a set of secondary rules aimed at enforcing compliance and consequences for non-compliance of treaty obligations. It will be difficult to touch on how the law of state responsibility, affect every type of treaty because of the complexities of international treaties and the ever changing nature of contemporary international law. However, since the improvement of compliance is the important aim of this work it is equally important that it pays attention to those treaties that have included their own rules on compliance and performance.

Therefore, in this work analyzes treaties that contain specific provisions on secondary rules, particularly treaties that set up their own compliance mechanisms. Since these treaties typically already have their own secondary rules, as it concerns the responsibility of state parties as it pertains to performance, and also consequences for non- performance, it would be gainful to find out to what extent those treaties exclude the general applications or provisions of the law of state responsibility. It is important to know if the laws of international responsibility as a “non codified” body of regulations can even be applied to these kinds of treaties, and to what extent. If they cannot be applied, what role do the laws of international responsibility then play in the execution of these treaties, (if any), or if there are alternatives to enforce responsibility for the possible non-performance of these treaties apart from the treaties themselves and does the law of international responsibility come to play if such a treaty is breached?

Furthermore, a treaty and all its part can only be enforced when such a treaty is in force, but, the law of state responsibility is not stated to be limited to treaties that are in force or not in force, however, it is when a treaty is in force, that it's legally binding. Therefore, what happens to a treaty with its own separate compliance mechanisms when such a treaty is not yet actively in force and is till being only provisionally applied? Does the law of international responsibility come to play if such a treaty is breached? The rules on state responsibility by themselves are regarded as secondary rules not within a treaty but nonetheless one with a general applicability across many different areas of international law. So, does the law of state responsibility apply by default in the absence of any displacing special rule?

2. DEFINITION AND NATURE OF SECONDARY RULES

What are secondary rules? The body of law that come from the principles and objectives of treaties is called secondary rules. Secondary rules include regulations, directives, decisions, recommendations, and opinions. In international treaties, primary rules directly govern conduct and behavior of member states and are directly related to the rights and obligations of the parties to the treaties.¹ Secondary rules on the other hand tend to further regulate the primary norms. Secondary rules determine whether the primary rules of international law have been violated.²

The influx of secondary rules became apparent when the primary rules meant to regulate the international legal order were not always simply able to do that. The secondary rules were then getting added to the provisions of international treaties to strengthen the treaty in general. The International Law Commission, in its analysis of State Responsibility, adopted the distinction between primary and secondary norms. The attempts to better understand what secondary rules are, stemmed from the multitude and diversity of primary norms after the creation of the United Nations in 1945. However, the primary norms weren't always able to necessarily create order, but instead sometimes conflicted each other. As a result, the primary norms were backed up with secondary rules, which were more flexible and also helped with a better application of the primary norms.

Since then, many treaties have also gone ahead to include secondary provisions which shine more light or further interpret the primary norms embedded in those treaties. The secondary rules can take various forms, or even relate specifically to different parts of the primary norms. For example, specific provisions in most treaties will identify when it becomes legally binding, how compliance will be monitored and measured, how other nations may accede to the treaty, how and whether the treaty may be amended or modified, and how and when the treaty will terminate, and so on.

Each member state of the European Union has its own laws, but the EU law takes precedence in some circumstances. The EU treaties such as the 1957 treaty of Rome,³ the Lisbon treaty⁴ etc. contain primary rules, while secondary rules are enacted under the treaties, taking various forms and can be legislative or non-legislative. In the framework of the European Union, actions are taken based on what is agreed upon in treaties between the member states. Treaties in this case are the primary rules upon which the union is operated. They lay down the objectives, duties and responsibility of the European Union and its member countries. The body of law that comes from the principles and objectives of the treaties is known as secondary law; and includes regulations, directives, decisions, recommendations and opinions. So, apart from primary rules, treaties also include these secondary rules, which are expressed in various forms. In the European union, secondary rules may include:

Regulations

Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.

¹ THE CONCEPT OF LAW, H.L.A. HART, Oxford: Oxford University Press, 1961. (2d ed. 1994), Pp 81.

² Ku, Charlotte and Diehl, Paul, The Primary Effects of Secondary Rules: Institutions and Multilevel Governance (January 1, 2016). THE RULE OF LAW IN AN ERA OF MULTI-LEVEL GOVERNANCE AND GLOBAL LEGAL PLURALISM, Monika Heupel & Theresa Reinold, eds., Palgrave, 2016, Forthcoming, Texas A&M University School of Law Legal Studies Research Paper No. 16-27, Available at SSRN: <https://ssrn.com/abstract=2726072>, p 10

³ Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957.298 U.N.T.S. 11.

⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European community, Dec. 13,2007,2007 O.J. (C 306) 1.

Directives

Directives require EU countries to achieve a certain result, but leave them free to choose how to do so. EU countries must adopt measures to incorporate them into national law (transpose) in order to achieve the objectives set by the directive. National authorities must communicate these measures to the European Commission.

Decisions

A decision shall be binding in its entirety. A decision that specifies those to whom it is addressed shall be binding only on them.

Recommendations

Recommendations allow the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. They have no binding force.

Opinions

An 'opinion' is an instrument that allows the EU institutions to make a statement, without imposing any legal obligation on the subject of the opinion. An opinion has no binding force.

Delegated acts

Delegated acts are legally binding acts that enable the Commission to supplement or amend non-essential parts of EU legislative acts, for example, in order to define detailed measures. The Commission adopts the delegated act and if Parliament and Council have no objections, it enters into force.

Implementing acts

Implementing acts are legally binding acts that enable the Commission – under the supervision of committees consisting of EU countries' representatives – to set conditions that ensure that EU laws are applied uniformly.

The law of treaties, which is the primary regulator of treaty relations, does not necessarily include many provisions regulating the performance of treaties and consequences for non-performance. The law of state responsibility as we have established tend to step in when there has been an internationally wrongful act, which in this case is a breach of treaty. However, the specific nature of treaties with secondary rules and compliance regimes differentiates these kinds of treaties from others, as they already contain provisions that the law of state responsibility is cut out to regulate.

Advantages and disadvantages of secondary rules in international treaties.

One problem that may arise out of the dual application of primary and secondary norms is that of conflict. States cannot use domestic laws in such a way that they further violate the provisions of international law, or even include in treaties provisions stemming from domestic jurisdictions, which violate the general principle of international law, or go against the object and purpose for which the treaties were established in the first place. With these in mind, we must be mindful that secondary rules in treaties do not violate the norms of general international law and that even if they do differ, such variations are not of such gravity as to risk the efficacy of international law.

As it concerns treaties, we see this problem erupt in practice. States have been known to sometime make attempts to circumvent the binding effects of treaties, the maxim *pacta sunt servanda*, resulting in treaty reservations and selective compliance, which has introduced a negative trend at an avoidance of legally binding obligations. This means secondary rules may have the tendency to cause selective compliance or the acceptance of full legal responsibility.

On the more positive side, secondary norms have contributed to the promotion of the importance of non-state actors in international law. For example, private persons, non-governmental organizations are now more often encountered in the implementation of human right treaties, and individuals can be responsible for war crimes in times of armed conflict, mainly because these human right treaties often contain secondary rules on monitoring, compliance, sanctions, responsibility, etc.

Therefore, it appears that secondary rules generally have a general positive effect on the performance of international obligations. For example, if a treaty contains secondary rules on monitoring of the performance of obligations,⁵ those rules will serve to monitor the performance of obligations of multiple parties to the treaty. This might turn out to be less cumbersome and less expensive for each individual party to the treaty. Also, Since it's the same breach of law that violates the rights of several states, the defaulting state might come under the pressure of abiding by the rules of state responsibility.

Furthermore, some secondary rules may create for treaties their own dispute resolution mechanisms or special bodies to deal with violations of the provisions of the treaty.⁶ This usually means that the enforcement systems of those treaties are common to all the parties to the treaty and also uniform. Consequently, this may induce the parties to streamline the rules of state responsibility to focus on that specific area of international law which said treaty regulate, and utilize the most appropriate ways to solve disputes.

Having understood what secondary rules are and how they differ from primary rules, it is important to consider and understand how treaties that contain rules on responsibility exclude or include the application of the rules of responsibility. Treaties generally can be categorized into different types using different parameters. Referring to international treaties and agreements, state responsibility mostly pertains to performance or non-performance of a treaty obligation. This means that whatever they case may be, when it comes treaty, we discuss and consider the application of state responsibility to a treaty when we consider if the said treaty is being performed or non performed. "Wrongful acts" and breaches of treaties will often happen during the treaty implementation stage. The rules of state responsibility will now be a secondary rule that is applied to a primary rule which in this case in the treaty. If the treaty contains its own compliance mechanisms however, this means both primary rules and secondary rules are contained in one regulation. The question is do the rules of state responsibility still apply to this kind of treaty if the treaty already contains the provisions of the rules of state responsibility itself, how do the rules of state responsibility apply and to what extent.

The Vienna Convention on the Law of Treaties (VCLT) expresses that treaty relations should be regulated by the provisions enshrined in the same instrument except a specific treaty says otherwise or provides its own specific provisions that differs from the VCLT.⁷ So, to what extent do these kinds of treaties that contain specific provisions on compliance include or exclude the application of the rules of state responsibility.

The first point to note is that secondary provisions are more common in certain types of treaties such as human right treaties, environmental treaties and disarmament treaties, etc. This may be because these kinds of treaties do not necessarily contain reciprocal obligations, but are for the communal interests of the world at large. However, secondary provisions in treaties, particularly those that further compliance of treaty obligations do exist, and if they are applicable to some treaties, they could be valuable to other kinds of treaties in one way or the other. Secondary rules present themselves in a way, that they are different from the provisions that directly specify or create the legal obligations, rights and duties aimed towards the direct objective the treaty might be trying to fulfill. They instead further elucidate or expatiate on the primary rules of the treaty, with more practical mechanisms towards a satisfactory performance of the treaty.

Conclusively, It turns out secondary rules regardless of their classifications have a general goal and their work is intertwined. A secondary provision possessing a monitoring function might achieve both a monitoring function as well as a dispute resolution function for example. For instance, Fact checking in the context of arms control might be a monitoring secondary provision, while such fact checking takes place through verification procedures,⁸ which could be a compliance mechanism on its own. In the event that there are worries about non-

⁵ 1979 Convention on the Elimination of All forms of Discrimination Against Women, United Nations, Treaty Series, vol. 1249, p. 13, Art. 17

⁶ Anais Kedgley Laidlaw and Shaun Kang, 'The Dispute Settlement Mechanisms in Major Multilateral Treaties' NUS Centre for International Law Working Paper 18/02 (October 2018) <<https://cil.nus.edu.sg/publication/the-dispute-settlement-mechanisms-in-major-multilateral-treaties/>> accessed 29 November 2023.

⁷ THE CONCEPT OF LAW, H.L.A. HART, Oxford: Oxford University Press, 1961. (2d ed. 1994), Pp 81

⁸ Marauhn, Thilo, and Andreas Zimmermann. 2007. "Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law". In *Making Treaties Work: Human Rights, Environment and Arms Control*, edited by Geir Ulfstein. pp. 243–72. <https://doi.org/10.1017/CBO9780511494345.012>. p. 260.

compliance, the treaty itself should logically provide some sort of dispute resolution process as the first step towards enforcement.⁹

3. CONCLUSIONS

Treaties may contain secondary provisions that aim to help distribute liability, or responsibility for breach of the provisions of the treaty. This does not however, annul the application of the secondary rules of state responsibility on these kinds of treaties, except there is a conflict. Treaties represent primary rules, capable of creating rights and obligations, but the rules of state responsibility are secondary rules. The application of the rules of state responsibility to treaties that have room for secondary provisions on responsibility are applicable only so far as the parties to the treaties allow and to the extent that the rules of state responsibility being applied are provisions of customary international law. Whatever the case may be, the most important advantage is the fact that, state responsibility is being applied one way or the other.

Treaties have a variety of disincentives and incentives to include secondary provisions; these are often outlined in later judgments made by the body that has the role to ensure those provisions according to the treaty. These incentives normally include includes capacity building, in-country assistance, technical assessment, a verification mission, providing advice, and trade suspension, dispute resolution instructions, monitoring mechanisms among others.

It should become a more common practice for states to go the extra mile in the protection of treaty law. For example Treaty bodies should be mandated to establish noncompliance reaction methods in future decisions, even though they are not required to be included in the language of the treaty itself. Generally, compliance procedures included in a treaty can help with the implementation of legally enforceable duties and the advancement of common objectives. The language of the treaty should set up the basic structure for compliance and give the governing body extensive authority to make judgments in the future that will simplify compliance processes and address issues that are found.

Ultimately, as indicated above, secondary provisions that facilitate the responsibility of breach of treaty obligations do not complete eradicate the need for the secondary rules of state responsibility.

⁹ Ibid