Precluding Wrongfulness or Responsibility: A Plea for Excuses

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Abstract

The International Law Commission's Draft Articles on State Responsibility propose to characterize wrongful conduct in respect of which there exist exculpatory circumstances as 'not wrongful'. The Commission could have characterized them as wrongful but excused. This paper explores the theoretical differences between those alternatives and, in particular, the distinction between the right of an injured state to waive its entitlement to reparation and the right of an injured state to release other states from their obligation to obey the law. It argues that even if the creation of international legal obligations is, by virtue of the principle of opposability, an essentially bilateral matter, violation of those obligations engages a wider community interest and is not a matter of concern to the law-breaker and the injured state alone. The paper suggests that, as a matter of policy, it would be preferable to regard such conduct as 'wrongful but excused'. That might in practice strengthen the normative pull of rules, and make it easier to deal with situations where third state rights are affected by violations of international law.

The International Law Commission's long-awaited Draft Articles on State Responsibility are the product of an exercise in codification of unusual importance. The Draft Articles are not exhaustive. On many matters, such as the details of self-defence, their provisions must plainly be supplemented by reference to other instruments and to customary international law. They do, however, aspire to be comprehensive. They provide the complete tool kit with which we are to work on and analyse problems of responsibility under international law. Since the responsibility may arise from any international obligation, the effects of the proposed articles would permeate the whole of international law. There have been many criticisms of the Draft Articles, much of it focusing on what many consider to be the ill-judged proposals relating to international crimes, counter-measures and the settlement of disputes. My task does not concern those provisions. Instead, it is limited to Part One, Chapter V of the Draft Articles, which concerns what might loosely be called the 'defences' to responsibility.

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EJIL (1999), Vol. 10 No. 2, 405–411

Indeed, I am not even concerned with all aspects of that chapter. Many important questions, such as the regrettable failure to bring within the scope of the defences conduct undertaken to safeguard the lives or interests of strangers, and the host of difficulties concerning the manner in which (and persons by which) consent to otherwise unlawful acts may be given, are left to one side. My concern is with the small but important question of the nature of the 'defences'.

There is behaviour that is right; and there is behaviour that, though wrong, is understandable and excusable. The distinction between the two is the very stuff of classical tragedy. No dramatist, no novelist would confuse them. No philosopher or theologian would conflate them. Yet the distinction practically disappears in the Draft Articles. The heading of Part One, Chapter V, 'Circumstances Precluding Wrongfulness', announces the Commission's approach to this question in unrepentant majuscules. The 'defences' relate to conduct to which a state has consented (Article 29); legitimate countermeasures in respect of an internationally wrongful act (Article 30); conduct due to irresistible force or unforeseen external events (Article 31); conduct necessary to save one's own life, or that of persons entrusted to one's care (Article 32); conduct warranted by 'necessity' (Article 33); and conduct constituting lawful measures of self-defence (Article 34). I shall, for convenience, refer to all these as 'special circumstances'. In each case the wrongfulness of the specified conduct is 'precluded'. The conduct is, accordingly, not 'wrongful' — not unlawful. This preclusion of wrongfulness I shall refer to as 'exculpation'.

Exculpation is the technique by which the International Law Commission has chosen to deal with the accommodation within the international legal system of values other than that which we might loosely call compliance with international obligations. Rescue from distress, necessity, and so on prevail over compliance with the obligations that, in the ordinary run of things, bind states. Exculpation is, however, not the only way in which such values might be accommodated. Exculpation operates by releasing a state from the obligation in question, so that the conduct incompatible with that obligation is not wrongful in those special circumstances. However, rather than releasing the state from the obligation, we might maintain the obligation in force but excuse the breach of it by the state in the various special circumstances. This option, maintaining the rule in force but excusing the breach, I shall refer to as the 'excusing' or 'excuse' approach.

The options are in fact a little more complex than a simple choice between exculpation and excuse. In relation to a rule of international law (R1) that states 'Do not do *x*', one might distinguish four possible approaches:

(A) The binding force of R1 is removed in advance of the occurrence of the conduct incompatible with R1, so that the conduct is not incompatible with a binding obligation.

(B) R1 is in principle in force at the time of the occurrence of the conduct incompatible with R1, but the conduct occurs in circumstances that 'nullify' (I use that term in a non-technical sense) the binding quality of R1.

(C) R1 is in force at the time that the conduct incompatible with it occurs, and R1 is

in consequence breached, but the 'victim' state waives its entitlement to reparation for that breach.

(D) R1 is in force at the time that the conduct incompatible with it occurs, and R1 is in consequence breached, but the 'victim' state is deprived of its entitlement to reparation for that breach by the operation of a rule of law.

Let me explain each of these in more detail.

Option (A) appears to be an uncontroversial case. If the binding force of (R1) ('Do not do *x*') is removed, there is no duty not to do *x*, so that doing *x* is not unlawful and no international responsibility can arise from it. In a legal system based upon consent, the binding force of a rule may be removed by the consent of the states concerned. So, it is said, in international law (and *jus cogens* apart) the prior consent of a state to certain conduct, *x*, precludes the wrongfulness of that conduct.

The argument appears axiomatic. There is, however, an objection to it. The argument assumes that the law is an essentially bilateral matter, of concern only to the state that is the actor, and the state that is, as it were, 'acted upon' — the 'victim' state. But one might object that, although the victim may be entitled to release the actor from the obligation to make reparation to the victim, the victim may not release the actor from the obligation to obey the law. In municipal systems, it is true, one may in general vary one's rights and duties by contract: but one may not modify the rules of public law or criminal law in that way. The 'public' character of that law ensures that it prevails over private arrangements made in the exercise of individual autonomy. So, in this context, to opt for exculpation as the consequence of the prior consent of the state is to prefer a 'private' law model of international law to a 'public law' model; and that is undesirable because it would arrest the development of the international legal system.

That objection might be said to have been anticipated and accommodated by the International Law Commission, which has made clear that prior consent cannot exculpate conduct incompatible with a rule of *jus cogens*. In this sense, *jus cogens* represents the category of 'international public law'. I do not believe that *jus cogens* either has or, at the present time, is intended to have, this character: it is nowhere near being sufficiently comprehensive in its claimed coverage, let alone in its accepted reach. In any event, regardless of the limits that international law currently imposes upon the right of states to contract out of its provisions, that contracting out can only be effective if done in advance of the conduct in question. The ILC has recognized this, by requiring that consent should be given in advance.[1] Consent given after the event can be no more than a 'waiver of the right to assert responsibility and the claims arising therefrom': the wrongfulness of the prior act remains.[2]

There may be some doubts as to the wisdom of allowing states to contract out of rules of law, subject only to the exception in favour of *jus cogens*; but Option A is at

[1] See the Secretariat Document 97–02583 (January 1997), *Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading*, [hereinafter, Doc. 97–02583], at 215.

[2] *Ibid*, at 216.

least coherent, straightforward and consistent with the traditional consensualist view of international law.

Option B is more problematic. There are at least two ways in which we might explain it. First, we might say that the obligation, 'Do not do *x*' is a defeasible obligation. The obligation exists and the conduct is *prima facie* in breach of it; but if a 'special circumstances' plea is raised we will recognize that in this instance the obligation does not apply. Or, to put this first explanation in slightly different terms, we might say that the obligation R1 is, strictly, not 'do not do *x*', but rather 'do not do *x* unless . . . [special circumstances exist]'. It is not clear to me which of these is correct, or whether the difference between them is of any real significance.[3] In either event, on this approach the conduct *x* is, in the special circumstances, not incompatible with R1 as properly articulated. This situation may be assimilated to Option A.

A second and rather different explanation of Option B is to say that we are in fact dealing not with one, but with three, rules. R1 says 'do not do *x*'. Rule R2 says 'if special circumstances exist, you may do *y*', where *y* includes *x*. A third rule, R3, says that R2 prevails over R1. In this case, if the conduct *x* occurs, R1 continues to impose its demands. It still binds. But it is, by virtue of R3, trumped by R2. The combined effect of R2 and R3 is to exculpate the conduct *x*. On this explanation, Option B might operate either (i) in relation to some specific substantive rules but not others, or (ii) generally, in relation to all substantive rules (except any that are so formulated as to exclude the application of Option B). Many lawyers would say that the 'right' of ships in distress to enter foreign ports and internal waters is an instance of (i); and, of course, the Draft Articles propose provisions of kind (ii).

There is a significant difference between alternatives (i) and (ii). First, (i) allows the *scope* of R2 to be determined by state practice, as in the case of any other rule of customary law. Because it is not a simple disapplication of R1, there is no reason why conduct *x* and *y* should be coextensive. It is necessary only that *y* be broad enough in its extent to serve the purposes of the rule. Secondly, alternative (i) allows the possibility of a rule corresponding to R2 existing in relation to some substantive obligations, but not to others. Distress, for instance, might excuse breaches of some (non-*jus cogens*) rules of law, but not of other (non-*jus cogens*) rules. International law could therefore develop different degrees of liability. Some rules might involve strict liability or absolute liability; others might not. True, the Draft Articles could provide for the application of any *lex specialis.*[4] This could preserve existing variations in the degrees of liability. But the blanket exculpation of special circumstances would apply to all existing rules in respect of which there is no *lex specialis*, and would therefore at least impede the development of different degrees of liability.

[3] Though it does at least raise the question of the nature of the relationship between the rule of law itself and the articulation of the rule of law. Are articulations of rules in essence descriptions of them, so that we have a certain freedom to choose between alternative descriptions? Or is the rule of law inseparable from its articulation?

[4] Draft Article 37 applies only to Part Two of the Draft Articles, not to Part One. Further, its phrasing would render its application to Part One awkward. It refers to the 'consequences of an internationally wrongful act'; but the acts here considered are, *ex hypothesi*, not wrongful.

It should be possible already to see why, even if one were to accept that it is desirable to exculpate rather than to excuse wrongful conduct, one might prefer not to follow the ILC approach of blanket exculpation, but rather to allow a case-by-case development. I return to this possibility briefly at the end of this short paper; but first I must deal with Options C and D.

Option C, like Option A, is not controversial. It is plain that a state may waive its entitlement to reparation for what remains, despite the waiver of this entitlement, an unlawful act.

As Option C corresponds to Option A (doing for reparation what Option A does for the basic obligation), so Option D corresponds broadly to Option B. Again, there are two possible variants: (i) the disentitlement to reparation applies in relation to some, but not necessarily all, substantive rules of international law; (ii) the disentitlement applies in a blanket fashion to all substantive rules of international law. I return to this point briefly below. But here I am concerned with a more fundamental point. States may prefer to excuse wrongful conduct rather than to exculpate it.

There are several reasons why this might be so. First, breaches of international law are not of concern only to the (government of the) victim state. Even if the *creation* of obligations is an essentially bilateral matter, the *violation* of those obligations is not.

This is true at the level of general principle. Pervasive and helpful as the contractual model of international law may be, one must be careful to observe the limits of its usefulness. The model was, broadly speaking, designed to affirm the sovereignty of states: rules cannot be imposed upon states against their will. Law-*making* is, on this view, properly consensual, and the bilateral nexus of consent is the heart of the explanation of any obligation owed by one state to another. But it by no means necessarily follows that, once states have made rules or undertaken obligations, the violation of those rules or obligations is also an essentially bilateral matter.

International law has no 'public law'. *Jus cogens* apart, the public order of international law consists simply in the observance of consensual pacts. There is a clear public interest in the observance of those pacts and the maintenance of that order. One has only to reflect on the public interest in a municipal community regulated entirely by contracts among its members, lacking a core structure of public or criminal law, to appreciate the fundamental nature of that interest. In such circumstances, individuals may be regarded as free to control and dispose of their own interests in the system; but they have no right to control or dispose of the community interest. In the present context, this point translates into the view that it is permissible for a victim to waive a right to reparation, but not to release the actor from the obligation to obey the law: a victim state may excuse, but not exculpate.

This point may sound rather vague and abstract; but I think it is important. The exculpation of conduct on the grounds of consent, distress and so on may impede the development of international law towards a public order.

There is an empirical question corresponding to this theoretical observation. Rules of law are intended to influence conduct, and to do so in a particular way that serves the aims of the rule. Different formulations of the rule may have different degrees of success in securing compliance with the aims of the rule. For example, one might

impose a strict speed limit but give the authorities the discretion not to prosecute, say, a driver who breaks the speed limit in order to take an emergency patient to hospital. Alternatively, one might prescribe a speed limit but make the obligation to obey the limit subject to a qualification allowing drivers to break the speed limit in cases of necessity. Both save the emergency driver from conviction for breaking the law; but it is entirely possible that the second approach leads in practice to much wider disregard of the speed limit than does the first. International lawyers rarely trouble themselves over such empirical questions; but they should be matters of real concern. There is a real question whether exculpation may weaken the pull to compliance exercised by a rule to a greater extent than excuse would.

This observation also applies to the question of the return to compliance. Draft Article 36(2) asserts the continuing duty of a state committing a wrongful act to perform the obligation that it has breached. The same should, surely, be demanded of a state whose act is 'not wrongful' because of the operation of one of the exculpatory defences.

A second reason also concerns the limitations of the bilateral approach to international wrongs. Suppose, for instance, that a ship in distress because of defective steering equipment enters a foreign port and, in doing so, collides with a wharf, because of the same defect in the steering equipment. It is easy to see that the distress should operate so as to excuse the entry, if there is no right to enter, and even to excuse a breach of a positive prohibition on entry. But why should the owner of the wharf not be entitled to compensation for the damage caused? Why should the right to enter in distress have the effect of implying a right (or a liberty) to cause damage in this way? But if the entry was 'not wrongful', because the distress precluded its wrongfulness, on what basis could compensation be recovered? Of course, there are ways in which compensation could be awarded. Draft Article 35 provides that the preclusion of the wrongfulness of an act 'does not prejudge [*sic*][5] any question that may arise in regard to compensation for damage caused by that act'. Since such acts are by definition not wrongful, it appears that compensation in such cases would have to be sought in the form of compensation for injurious consequences arising out of acts not prohibited by international law. The 'injurious consequences' regime is, however, not in place, and it appears to be developing into a limited project essentially confined to environmental law. There is, therefore, a purely practical reason for preferring the 'excuse' approach. If, instead of exculpating, one chooses an approach based on excuse, the entry would remain wrongful, and one would look to state practice to establish the scope of the excuse. On this basis there is no difficulty in accepting an entitlement to compensation for damage caused by conduct in special circumstances:[6] it is simply said that the

[5] It might have been better to say 'does not prejudice'. Concepts such as unjust enrichment might also be developed so as to provide a rational basis for the award of compensation in such circumstances.

[6] With the exception of self-defence (Draft Article 34), which, it will be noted, is excluded from the scope of Draft Article 35. It is indeed hard to see why if state A defends itself against attack by state B, it should compensate state B for any damage caused by the exercise of its right of self-defence. Damage caused to a third state is quite a different matter.

excuse does not reach so far, and does not excuse wrongs that are not necessarily implicated in the entry itself.[7]

Now change the facts slightly. Suppose that the ship entering in distress is a warship that collides with a third state warship anchored in the foreign port. The port state may waive its right to reparation for damage to the wharf; but does that mean that the third state cannot claim for the collision damage? Here again, if the entry is exculpated rather than excused, it is difficult to handle that question. If the entry remains unlawful, rather than having its wrongfulness precluded, waiver of a claim by the port state would clearly not affect any third state claims.

This is an instance of third-party rights (or perhaps third-party interests) being affected by conduct in special circumstances. Other examples can be imagined. What of the position of an individual on board a ship entering a port in distress? Is he lawfully or unlawfully in the state? The answer may have a bearing on rights or duties under international law and municipal law concerning, for instance, asylum. Or take the case of an insurer whose liability ceases if the insured engages in an unlawful activity. Is entry in distress to be judged lawful or unlawful? Such cases exemplify the fact that wrongfulness is not an issue touching only the interests of actor and victim; and states may well prefer to take the view that what is *prima facie* wrongful cannot be made lawful by agreement between the actor and the victim alone. They illustrate the kind of circumstances in which excuse might be thought preferable to exculpation. (There is, of course, no reason why particular instances of exculpation, such as a specific right to enter ports in distress, should not arise in the ordinary way as a result of state practice.)

I am not suggesting that the 'exculpation' approach proposed by the ILC is wrong in law. It is defensible and coherent. It does, however, have its drawbacks, as I have tried to show. My plea is to restore the flexibility of response to states, allowing them to decide on a case-by-case basis whether to follow the exculpation or the excuse approach, rather than imposing one blanket solution. It would, in my view, be preferable for this reason, among others,[8] for the text to provide simply that the Draft Articles apply without prejudice to the operation of the rules of international law concerning consent, countermeasures, *force majeure*, distress, necessity and self-defence.

[7] This is, indeed, the position adopted in state practice: see, e.g., *Cushin and Lewis v. R.*, *Annual Digest and Reports of Public International Law Cases*, 1933–34, case no. 87; the *Kate A. Hoff* case, (1929), 4 *UNRIAA* 444.

[8] See the points made in the various comments of governments on the Draft Articles, published on the Internet at <http://www.law.cam.ac.uk/RCIL/ILCSR/Statresp.htm>.