



Research Article

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Is All Fair in Distancing Human Rights from Customary International Law Rule on State of Necessity?

Dmitry V. Krasikov

*PhD, Chair, International Law Department,
Saratov State Law Academy, Saratov, Russia;
Senior Research Fellow,
Institute of Scientific Information for Social Sciences of the
Russian Academy of Sciences (INION RAN), Moscow, Russia
Corresponding Author*

Nadezhda N. Lipkina

*PhD, Assistant Professor,
International Law Department,
Saratov State Law Academy,
Saratov, Russia*

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Abstract

The international human rights law theory and practice traditionally follow the path of distancing human rights from the state of necessity under general international law. The existence of derogation clauses contained in major human rights treaties excludes the possibility for States parties to invoke the customary rule on necessity to excuse non-compliance with the obligations under such treaties (the narrow distancing approach). Presently, a broader distancing approach, covering human rights obligations outside the treaties' derogation regimes, is evolving employing certain alternative grounds for departure from human rights obligations. The article argues that the way the broader distancing approach evolves raises doubts as to its conformity with its intrinsic rationale. To address this concern a due account should be taken of the pro homine reasoning for distancing human rights from the state of necessity. The present paper is a part of a larger project "Circumstances precluding wrongfulness of conduct: the analysis of functional role and applicability parameters in the framework of International Human Rights Law" supported by the Russian Foundation for Basic Research (RFBR Grant No. 18-011-00660).

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1. Introduction

State of necessity has acquired a reputation of being one of the most controversial circumstances precluding wrongfulness of conduct of States under international law. The way it is enshrined in art. 25 of the 2001 International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (ILCA) reflects a highly stringent test for the necessity defense but still does not eliminate all doubts concerning its clarity (Brownlie 2003, p. 448) and customary nature (Boed 2000,

p. 43; Desierto 2012, p. 11; Sloane 2012, p. 471). However, it enjoys support from the international judiciary, and commentators take note of its revival in modern international law (El Ouali 2012, pp. 31–32).

Obviously, human rights could have become one of the internationally protected values most vulnerable to the potential operation of the state of necessity since it is not unusual for a State to find itself induced to interfere within human rights in times of emergency (Labardini 2009, p. 128). Nevertheless, the theory and practice of international human rights (IHR) law traditionally follow the path of distancing human rights from the state of necessity and avoid their direct clashing. Although there is considerable amount of literature carefully reviewing the necessity doctrine under general international law (GIL) and the derogation standards under IHR treaties, quite a limited number of authors address the issue of relationships between these normative frameworks. Among those who contributed significantly to the discussion on the matter are Cedric Ryngaert (makes a thorough investigation of the issues of invocation of necessity as a ground to excuse non-compliance with IHR obligations and of using the necessity defense to protect the human rights-related values in his “*State Responsibility, Necessity and Human Rights*”) (Ryngaert 2010, pp. 79–98), Roman Boed (comments on the practical and theoretical implications of the necessity concept for the human rights field in the “*State of Necessity as a Justification for Internationally Wrongful Conduct*”) (Boed 2000, pp. 1–43), Diane A. Desierto (discusses the states of emergency in IHR treaties in the context of necessity in the “*Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*”) (Desierto 2012, pp. 237–281).

Indeed, the existence of derogation clauses included into some human rights treaties is generally recognized as excluding the possibility for a State party to invoke the customary rule on necessity to excuse non-compliance with the obligations under such treaties. Since the treaty regimes are the main domain of operation of IHR obligations and since the major human rights treaties contain derogation clauses, the latter’s effect provide for a certain degree of human rights’ distancing from the customary rule on necessity and satisfy, to an extent, the rationale behind this rule for the area of human rights. This approach can be labelled as a “narrow distancing approach”, covering human rights obligations contained in the treaties with derogation clauses.

However, the treaty derogation concept only fragmentarily impacts the area of relationships between IHR obligations and state of necessity: it leaves untouched obligations contained in those treaties that omit derogation clauses as well as customary rules on human rights. In order to address this gap, the doctrine and practice in the human rights field have taken the path of searching for alternative tools capable of keeping the state of necessity rule away from human rights (broader distancing approach).

Although the philosophy of distancing human rights from the state of necessity under GIL *per se* is justified from the standpoint of *pro homine* and pro-State reasoning, the way the broader distancing approach is evolving raises doubts as to its conformity with its intrinsic rationale for distancing. The tendencies of multiplication and simplification of grounds for departure from human rights obligations disrupt the balance within that rationale and are contrary to the real purpose of preventing the customary necessity from finding its way into the human rights field. Based on the analysis and comparison of international judicial and doctrinal views, as well as on the study of the relationships between the state of necessity under GIL and the international human rights law from a historical perspective, the present paper argues that the broader distancing approach should take due account of the *pro homine* reasons underlying its rationale, and failure to do so will amount to creating a regime that avoids necessity to expand the legitimate grounds for departure.

The rest of the article proceeds in four sections. Section 2 briefly describes the limitations inherent to the rule on state of necessity in the human rights context. Section 3 discusses the narrow distancing approach, its grounds, limits and rationale. Section 4 deals with the examples of forms taken by the broader distancing approach and addresses the problem of balancing within its rationale. Section 5 concludes.

2. Limitations Inherent to the ILC Articles Rule on State of Necessity: A Human Rights Context

Although the language of art. 25 of the ILC Articles is on its face indifferent to particular types of substantial obligations subject to departure in circumstances satisfying the state of necessity conditions, its provisions substantially limit the possibility to invoke this ground for precluding wrongfulness of interferences into human rights guaranteed under international law.

First, according to art. 25 (1)(b), “Necessity may not be invoked <...> unless the act <...> does not seriously impair an essential interest <...> of the international community as a whole”. The notion of essential interest of the “international community as a whole” undoubtedly covers fundamental human rights and in fact was included into the final draft of the ILC Articles not least to address human rights concerns (Ryngaert 2010, p. 81). However, this does not mean that IHR obligations enjoy a kind of “immunity” from the state of necessity. Even putting aside doubts as to whether the whole spectrum of internationally guaranteed rights has acquired the *erga omnes* character (Koji 2001, p. 936; De Wet 2013, p. 4) and fully fits into the concept of essential interests of “the international community as a whole”, the condition of a serious impairment clearly implies something more than a regular interference within the relevant interest. Although it is unquestionable that at least gross and massive violations of human rights do fall within the exception under art. 25(1)(b), it is also clear that not *every* instance of violation of *every* human right is covered by it.

Second and analogously, the *jus cogens* exception (art. 26 of the ILC Articles) from the state of necessity rule, does exclude a possibility for a state to justify violations of those human rights guarantees that have acquired a status of peremptory norms of GIL (*jus cogens*), but covers only limited set of human rights obligations (D’Amato 1990, pp. 1–2).

Thus, both the provisions of art. 25(1)(b) and of art. 26 of the ILC Articles while not allowing a State to escape from international responsibility for most dangerous human rights abuses, leave untouched a wide area of human rights obligations and their potential violations.

The third limitation derives its source from the provision of art. 25(2)(a) of the ILC Articles, which precludes relying on necessity by a State if “the international obligation in question excludes the possibility of invoking necessity”. This criterion holds the most influence on the current doctrinal and practical vision of the relationships between the state of necessity under GIL and the international human rights law, which can be characterized as a distancing approach. In general terms it can be described as varying from a presumption of total inapplicability of the necessity defense under GIL within the area of IHR, to an assumption of extremely limited relevance of this defense to human rights obligations and only in highly exceptional circumstances. In its narrow incarnation this approach rests on the effects of the treaty concept of derogation, and its broader dimension extends to the entire field of IHR law employing some alternative tools with the alleged effect of excluding the possibility for a State to invoke the necessity defense.

Other limits on operation of state of necessity include the provisions of art. 25(2)(b) (“necessity may not be invoked by a State as a ground for precluding wrongfulness if... the State has contributed to the situation of necessity”) and art. 55 (“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”) of the ILC Articles. Since the former limitation is indifferent to international obligations subject to departure, it has no specific implications for the human rights area. As to the “special rules” clause, sometimes the distancing approach under consideration is presented in terms of the *lex specialis* exception (Desierto 2012, pp. 252, 266), although it may appear problematic to consider primary norms (contained, *inter alia*, in the treaty derogation clauses) as *lex specialis* vis-à-vis secondary rules of GIL on state responsibility (Gourgourinis 2011, pp. 1025–1026).

3. The Narrow Distancing Approach

3.1 The treaty concept of derogation, its effects and limits

Derogation clauses, contained in the leading IHR treaties, allow the State parties to depart from obligations therein, in certain emergency situations, though subject to strict requirements. Such clauses are included into the 1966 International Covenant on Civil and Political Rights (ICCPR) (art. 4), the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (art. 15), the 1969 American Convention on Human Rights (art. 27), the 1996 European Social Charter (Revised) (art. F), the 1995 CIS Convention on Human Rights and Fundamental Freedoms (art. 35), the 2004 Arab Charter on Human Rights (art. 4). The purpose of such clauses “is the protection of a (democratic) public order (community, state and its institutions) in situations of exceptional threat, and/or the restoration of this order” (Müller 2009, p. 592).

The content of the derogation rules in different treaties has certain peculiarities, but generally “they establish a similar legal framework” (Labardini 2009, p. 129), and the following common key principles of derogation can be inferred: the principle of exceptional threat, the principle of non-derogability of certain rights, the principle of non-discrimination, and the principle, according to which, the rights may only be derogated from to the extent strictly required by the exigencies of the situation (Müller 2009, pp. 561–563). Most of these treaties also provide for temporality of the derogation measures, require their conformity with other international obligations, and warrant proclamation of such measures and notification of the depositaries on them.

The presence of a derogation clause in a treaty is generally considered as excluding the possibility for a State to invoke state of necessity under GIL to escape international responsibility for non-fulfilment of obligations contained in that treaty (Binder 2008, p. 18; Loof 2010, p. 39).

This effect can be seen as the one of art. 25(2) of the ILC Articles (“necessity may not be invoked by a State as a ground for precluding wrongfulness if... the international obligation in question excludes the possibility of invoking necessity”). Since the treaties’ derogation clauses lay down rules for States conduct in times of emergency, they do so as to exclude applicability of relevant customary rules (Binder 2008, p. 18). Alternatively, or in addition, the derogation clauses’ effect of excluding reliance on state of necessity can be explained as a corollary of the *lex specialis* exception under art. 55 of the ILC Articles but as it was noted above this can be problematic. It should be noted, however, that the International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* did not take a chance to express its position on the issue of relationships between the state of necessity as recognized in customary international law and the human rights treaties’ derogation clauses.

Nevertheless, the existence of derogation clauses contained in a number of human rights treaties have only limited impact on the whole area of relationships between the IHR law and the state of necessity. First, not all the human rights treaties contain special rules on derogation. Second, the treaty nature of those instruments that contain such rules, places inherent limitations on their effects: not all States are parties to these treaties (and to the same treaties) there is a possibility for a State to make reservations to a treaty or to denounce it, and, as a rule, the human rights treaties do not cover international actors other than states. And finally, it is impossible to predict to what extent the effect of the derogation clauses to exclude the state of necessity will always be upheld by fora other than the IHR bodies (by other international courts and tribunals or by national judiciary) and even by these bodies (Desierto 2012, p. 240).

Thus, the treaties’ derogation clauses endow the IHR obligations with a kind of “immunity” from the state of necessity, but only with a fragmentary one. By themselves they do not create a universal framework capable of substituting the necessity defense or keeping it completely out of the IHR law.

3.2 Justification of the narrow distancing approach: interplay of the *pro homine* and *pro-State* reasoning

The narrow distancing approach originates from the reasoning underlying inclusion of derogation clauses into some prominent IHR treaties. Most notably, explaining the relevant treaties' derogation regimes, commentators point at the drafters' intent "to prevent arbitrary derogations... on the plea of the well-known, but dangerous, doctrine of necessity" (Castberg 1974, p. 165) and perceive the derogation clauses as offering "substantive and procedural advantages over alternative[s]" (Neuman 2016, p. 31) since "[t]he importance of the interests involved (human rights) requires a detailed and sophisticated derogation regime" (Binder 2008, p. 11). It is also argued that the derogation regime "can provide more determinate rights-focused standards, subject to international oversight" (Neuman 2016, p. 31) and that "[t]he drafters of these treaties envisioned that international restrictions on derogations, together with international notification and monitoring mechanisms, would limit rights suspensions during emergencies" (Hafner-Burton 2011, p. 673). Besides, derogation clauses "can provide *ex ante* certainty regarding a list of rights from which derogation is not permitted" (Neuman 2016, p. 29). Generally, the derogation regimes are considered as contributing "to a stronger protection of human rights" (Ryngaert 2010, p. 88) and as minimizing "[human rights] violations during emergencies" (Hafner-Burton 2011, p. 673).

Briefly, this reasoning may be labelled as a *pro homine* line of the rationale behind the derogation clauses and can be structured as follows. First, such clauses provide for clarity on the grounds of legitimate departure in times of emergencies (*the clarity reason*); second, they enshrine human rights-specific guarantees (*the rights-specific reason*); third, special derogation clauses in the relevant treaties allow to keep the State parties' conduct in extreme circumstances under international control (*the control reason*); and fourth, these clauses stipulate non-derogable rights (*the non-derogable rights reason*).

It should be noted that the derogation regimes' rationale can be also seen as including a somewhat *pro-State* justification based on the assumption of it being unreasonable and unrealistic to expect States' compliance with any IHR obligations in any circumstances. G.L. Neuman considers the merit of a derogation mechanism "in relation to the alternative responses to emergencies" and argues that "[a]pplication of the normal standards creates opposing risks: either the *state will be unable to respond adequately to the emergency* <...> or the interpreters of the treaty will be driven to accommodate necessary measures by distorting the interpretation of the right" (Neuman 2016, p. 28). In addition, the inclusion of derogation clauses into human rights treaties is considered as one of the means of encouraging their ratification "by choosing text that permits flexibility in compliance" (Weissbrodt, Fitzpatrick & Newman 2009, p. 73).

In fact, the logic of the *pro homine* reasoning is usually relied upon to justify the narrow distancing approach – the treaties' derogation clauses' effect of excluding the possibility for a State party to invoke the customary state of necessity defense to excuse its departure from obligations under the respective treaties (Neuman 2016, p. 28; Binder 2008, p. 19). In contrast, the *pro-State* justification does not serve for this purpose: if not take into account the dichotomy of primary and secondary international rules, the *pro-State* reason for derogation stands by and large for the same as the rationale behind the customary necessity defense.

4. The Broader Distancing Approach

4.1 Theory and practice in search of alternative grounds for departure from human rights obligations

The rationale underlying necessity "concerns the protection of superior interests" (Paddeu 2018, p. 338). This logic may and in fact do necessitate departures from human rights obligations that is evidenced by including derogation clauses into some leading human rights treaties and by the actual practice of their States parties' derogations in times of emergency. However, the seeds of human

rights distancing from state of necessity are so deeply rooted that, against the backdrop of fragmentariness of the derogation clauses' overall effect for the whole area of human rights, the doctrine and practice consider it more appropriate to elaborate alternative tools of justifying departures from human rights obligations than to let the necessity under GIL play any meaningful role in the area.

One particular example of such efforts is the reflection on the legitimate grounds for departure from international obligations under those human rights treaties that omit derogation clauses. Among the treaties of this type – the 1966 International Covenant on Social, Economic and Cultural Rights (ICESCR), the 1981 African Charter on Human and Peoples' rights (the African Charter), the 1985 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and some others. While some of them generate non-derogable regimes (as does the latter), thus excluding the possibility for a State-party to invoke the state of necessity under GIL, others, like the ICSECR and the African Charter, do not, as evidenced by the nature of most of the rights guaranteed by these treaties and by the relevant limitations clauses – rules (general or specific) on legitimate interference into the rights. Whereas the former category of treaties does not raise doubts as to the impossibility of legitimate departure from obligations contained therein (including any circumstances of emergency), the implications of the absence of derogation clauses in the treaties of the latter group are not clear enough and are subject to debate (Müller 2009, p. 566–569; Cowell 2013, p. 150–156).

Apart from rare voices in favor of the (strictly limited) possibility for a State party to invoke state of necessity in the context of the treaties without derogation clauses (Ouguergouz 2003, p. 477), commentators and adjudicators propose some alternative ways to construe the absence of such clauses and to deal with it when assessing the States parties' conduct in times of emergency. The first way is to see the treaties' general and specific limitation clauses as already covering the emergency concerns and thus not allowing States parties to interfere into the guaranteed rights above the level of limitation standards even in times of war or other threats to the life of a nation. Such is the position of the African Commission on Human and Peoples' Rights (expressed in the *Media Rights Agenda and Others v. Nigeria*). Another way to accommodate an opportunity for a State to depart from such treaties' obligations in extreme circumstances is to argue the existence of a customary rule on derogation in IHR law (ibid., p. 438). And the final (and the least defensible) option is to consider the nature of obligations enshrined in the treaties that miss derogation clauses as flexible enough to give a State party a sufficient degree of freedom as to their implementation (ibid., p. 427).

The second example is the scholarly attempt to find a right of powerful international actors other than states to derogate from their IHR obligations. For instance, S. Bilgic argues that “[i]f states can derogate from IHRL to safeguard domestic security... the [UN Security] Council should enjoy the same latitude to safeguard international peace and security. Since the Council *does not intend* to exceed its capacity, and since derogation enables the Council to remain within that capacity, if a Resolution generates norm conflict, I argue to presume that the Council has derogated from its IHRL obligations. Accordingly, to determine whether a Resolution is *ultra vires*, one must examine whether the Council's presumed derogation is lawful» (Bilgic, 2019). The author does not reflect on the source of the “derogation presumption” and advocates its existence referring to the possession of right to derogate by States (ibid.).

Another example of an approach alternative to derogation and still avoiding touching upon the state of necessity under customary international law concerns application of IHR law rules “in the light of the relevant provisions of international humanitarian law”. In the *Hassan v. the United Kingdom* the ECtHR basically found the derogation scheme of the ECHR inapplicable since the provisions of its art. 5 could somehow be interpreted as permitting exercise of the powers that are broader than those reflected in its text. Although this is not an example of departure *stricto sensu*, the ECtHR's position *de facto* relaxes the derogation requirements of art. 15 of the ECHR.

All the three examples concern the type of circumstances that on its face corresponds to that covered by the rationale of state of necessity: there is an essential interest requiring protection and to

this end necessitating departure (or quasi-departure in the case of the ECtHR) from fulfilling certain international obligations. Nevertheless, the scholarly and adjudicative reflections on the assessment of the relevant international actors' conduct in these circumstances zealously avoid employing necessity under GIL.

4.2 Justification of the broader distancing approach: a change of balance within the rationale?

The broader distancing approach has grown out of the narrow one, but the reasoning behind the latter, which basically rests on certain presumed advantages of including derogation clauses into human rights treaties, looks somewhat different if assessed as a rationale for the former one which is heading towards an autonomous and comprehensive regime of departure from international obligations within the IHR law. For the purpose of such assessment, two additional factors should be taken into account, namely the current developments in the status of the state of necessity rule under GIL, and the way the broader distancing approach is evolving.

Today, as compared to the era of the basic human rights treaties drafting, the state of necessity has acquired a more reliable status in international law due to the efforts of the ILC. Not only was the state of necessity rule rehabilitated and substantially clarified as to its content in the ILC's workings on codification of international responsibility (and in the ICJ case-law), but it also became subject to progressive development (Boed 2000, p. 43; Desierto 2012, p. 11; Sloane 2012, p. 471) and the current reading of the rule absorbs the international community's interests concerns arguably including human rights (Villalpando 2010, p. 394).

In the light of these developments the reasoning underlying the distancing approach (even in its narrow sense) becomes less convincing though not inconclusive. *The clarity reason* is weakened by the codified definition of necessity and by the stringent conditions placed on its invocation; the "international community's interests" limitation addresses certain concerns behind *the rights-specific reason*; the rationale of *the non-derogable rights reason* is partly satisfied by excluding the possibility to rely on state of necessity to justify a departure from peremptory norm of GIL. Besides, the ability shown by the IHR treaty bodies to employ external rules of international law (including customary rules) for various purposes (Van Aaken, Motoc & Vassel 2018, p. 19–20), allows to suggest that had the derogation rules been absent from the major human rights treaties, the State parties' potential invocations of the state of necessity rule would not have fully escape international monitoring in the treaties' context. This reduces the significance of *the control reason*.

This is not to say that the developments in the status and content of the necessity rule emasculate the reasoning behind the narrow distancing approach. In the light of the controversies still surrounding the defense of necessity in international law, the *pro homine* advantages of including derogation rules into human rights treaties are not questionable even considering the progress in contemporary reading of necessity. Nevertheless, it is evident that the *pro homine* reasoning for distancing is weakening with the progress in GIL, and the way the broader distancing approach is evolving does not improve the situation.

From the standpoint of *the clarity reason*, the broader distancing approach is not so perfect as the narrow one. The absence of consensus on the coherent regime of departure from human rights obligations outside the treaties with derogation clauses does not advance the clarity of the distancing approach and the significance of this reason for distancing. The scholarly inquiries into the human rights context of international peacekeeping practices reveal "the absence of a derogation model in the cases, most scholarly literature, and general legal discourse" (Sheeran 2016, p. 240). And the innovative ECtHR's approach in the *Hassan v. the United Kingdom* poses issues of clarity even within a treaty derogation regime (Spieker, 2008).

Against the background of *the rights-specific reason*, it is questionable as to whether multiplying and simplifying the grounds for departure from human rights obligations in times of emergencies do adequately correspond to the specificity of the IHR regime, and whether these tendencies are evident of a preferential *pro homine* regime of departure in IHR law compared to the customary necessity

regime. It should also be borne in mind that the discussion on the ways of distancing, alternative to derogation, runs circles around primary rules, whereas the customary rule of necessity is a secondary one and does not preclude wrongfulness *stricto sensu*. To what extent it is politically justified to multiply primary rules for the sake of distancing from secondary norms?

And finally, the relevance and strength of the *control reason* as part of the rationale for the distancing approach is also not beyond the shadow of doubt. The distancing approach neither expands nor deepens the international monitoring capabilities, while may compel relaxing the working derogation schemes (as shown by the ECtHR's *Hassan v. the United Kingdom* case).

As opposed to the *pro homine* reasoning, the pro-State justification retains its strength within the philosophy of the evolving broader approach. The legitimacy of the possibility for different international actors to derogate from IHR obligations outside the treaties' derogation regimes is being justified, *inter alia*, by reference to unreasonableness and impossibility not to depart (Müller 2009, p. 593; Larsen 2012, p. 313). This argument (rightly) relies on the pro-State reason and presume that the absence of a recognized right to derogate would amount to a legal vacuum as to the tools (at least, "coherent and transparent") of judging the States' conduct in times of emergencies. Nevertheless, since such presumption is not so strong in the context of the broader distancing approach as within the narrow one, the former is evolving having in fact a strong pro-State justification but a weaker *pro homine* reasoning. It is arguable that the specificity of the human rights area justifies their distancing from the state of necessity but in the light of the actual development of the distancing approach it looks like the specificity of human rights obligations require more diverse and flexible grounds for departure than those afforded by GIL. Thus, either the balance within the rationale of the distancing approach has changed after the narrow one had provided a politically justified window for human rights to escape the customary rule on necessity, or the actual development of the broader distancing proceeds having a pro-State bias and does not comply with its own rationale with its decent *pro homine* reasoning. Both options are problematic given the value of human rights in the modern world.

Potentially there are two solutions for this problem. The first one – is to abandon the policy of distancing outside the treaties' derogation regimes and to give way to the state of necessity defense in the human rights area. This option can be seen as unwelcomed from the standpoint of the *pro homine* reasoning despite its weakening as a part of the rationale for the broader distancing approach. And ironically, it is also the pro-State reason that prevents this from being an efficient solution: it is doubtful that the current reading of the necessity rule reflected in the ILC Articles is capable of satisfying the rationale for the whole spectrum of those States' departures from human rights obligations that are allowed by the treaties' derogation clauses and by the alternative grounds. Thus, this option poses a risk of making the legitimate departure regime ineffective.

Another way to address the problem of the rationale for the broader distancing approach is to uphold the distancing stance but paying due regard to the value of the *pro homine* reasoning and to its balancing with the pro-State justification. In the context of the current developments in the status of the state of necessity rule and of the dynamics of the distancing approach for a broader spectrum of IHR obligations, this calls for abandoning the path of multiplying the grounds for legitimate departure and for focusing on customary derogation rules. First, the human rights treaties that omit derogation clauses should not be construed as not allowing the States parties to derogate in times of emergency from the obligations contained therein and not relating to non-derogable human rights. Equally the provisions of such treaties should not be regarded as somewhat flexible in order to accommodate the possibility of States parties to disregard these as they deem required by the circumstances of emergency. Also, the functions of derogation clauses should not be assigned to the treaties' limitation clauses. An approach more mindful of balancing the reasoning behind the distancing is to develop a customary international standard of derogation from human rights obligations. This will address the clarity concerns. Second, the customary derogation rule should not be read as missing procedural guarantees akin to those forming a part of the treaties' derogation regimes. Such guarantees are central to satisfy the control reason behind the distancing approach.

Third, the customary derogation rule should be placed at the center of the debate on the right of international actors other than States to derogate from their human rights obligations. And lastly, the IHR bodies should bear in mind the *pro homine* reasoning underlying the distancing approach when consider States parties' compliance with the treaties' derogation regimes.

5. Conclusion

At present, in theory and in practice, an approach is being developed that distances human rights from the state of necessity. This approach presumes inapplicability (or very limited applicability) of the customary rule on state of necessity in the area of IHR. It originates in the assumptions on the effects of the human rights treaties' derogation clauses (the narrow distancing approach) and evolves through development of alternative justifications for distancing outside the treaties' derogation regimes (the broader distancing approach).

However, the context of coexistence of the IHR obligations and the state of necessity standard has changed since the era of the main human rights treaties drafting: first, the content of this standard has been clarified and strengthened to address the human rights concerns, and second, the distancing approach has taken the path of multiplication and simplification of grounds for departure from human rights obligations. This undermines the rationale for distancing human rights from the customary necessity rule.

Although the distancing approach is still justified by the *pro homine* and pro-State reasons, the way it is evolving needs to be adjusted to match the proper balance of reasoning within its rationale: the *pro homine* reasoning for distancing should not fade into the background and treated as a tool that once long ago started the distancing process and has become less important today. From a practical perspective, the theses advocated in the present paper call for international human rights bodies to take into consideration the *pro homine* reasoning behind the distancing approach when applying the IHR treaties' derogation clauses or when considering putting efforts into elaborating alternative justifications for States' departures from human rights regimes in emergency contexts. An autonomous and comprehensive regime of departure from international obligations within the IHR law (if it will ever exist) cannot not be less sensitive to human rights than the rules of GIL. The perspective of future research in the area is to focus the discussion on the issue of existence of a customary derogation standard in the human rights field.

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