

Comments on Wally Siewert's Paper

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Wally Siewert undertakes a careful and well-thought out exposition of an important problem in international human rights law interpretation and adjudication, namely what principles should inform the interpretation of international human rights law obligations of states by supranational human rights courts. Wally first introduces us to the messy jurisprudence of the European Court of Human Rights in the *Lawless v. Ireland* and *Denmark and others v. Greece* cases. These cases address how the European Court of Human Rights attributes responsibility to states for Convention rights violations when they declare a state of emergency. He then evaluates two positions that emerge in the case law –the objective standard and the good faith standard - to assess declarations of states of emergency and provides an argument for interpreting derogation decisions of states from human rights protections by employing the objective standard. Alongside its careful analysis, this paper is important for its timeliness. The role of supranational human rights courts in the context democratic states with established rule of law traditions is a subject of current public debate. Very recently, Lord Hoffman, a senior member of the British Supreme Court, made a forceful argument that human rights law was a good idea, but that supranational courts interpreting them was not (See <http://news.bbc.co.uk/1/hi/uk/7982785.stm>).

I would like to make one general comment and three specific comments concerning the way in which the central argument unfolds in this paper. By way of a general comment, it would be helpful to locate European human rights supranationalism and its understanding of declarations of states of emergency within the context from which it emanates. The Convention rights and the ways in which these rights have been interpreted by the former Commission and the European Court of Human Rights have to be understood against the background of a number of liberal democratic states with domestically entrenched rule of law traditions that have consented to an oversight of their decisions in agreement with each other. The European Court of Human Rights provides a secondary review of the performance of states and sees domestic institutions (parliaments, governments and domestic courts) as primary agents of human rights implementation. Even though the Court has expanded its jurisdiction across much larger group of countries in the 1990, the principle of secondary degree supervision has persisted, save in cases of serious breakdown of domestic judicial protections. It is for this reason that the notion of precedent does not sit comfortably with the European Court of Human Rights. The Court sets standards not precedents and it is not bound by its previous case law in dealing with individual applications across the 47 member-states of the Council of Europe.

Now, let me return to three more specific questions and/or issues that I think would need to be addressed further in this paper. These specific points all talk to the same concern that the paper does not present the case for good-faith standard in assessing the state of emergencies in its best light. From the more general to the more specific these issues are:

1. Whether the very idea of focussing on actual situations is the correct test to attribute state responsibility;
2. Whether any version of the good faith test is less stringent than the objective standard test;

3. Whether a supranational human rights court of the kind of the ECtHR is the appropriate institution to carry out the objective standard test.

Point 1, I think, requires Wally to consider whether the blame for a human rights violation depends upon a judgment of whether a state in question satisfies the objective conditions on being responsible. This is a point of discussion in theories of responsibility and to hold the view that the practice of holding an agent responsible rests upon a theoretical judgment of them being responsible is a particular view, which collapses questions of permissibility and responsibility into each other. As Scanlon has recently argued in *Moral Dimensions: Permissibility, Meaning, Blame* (2008) questions of permissibility come into play when an agent is trying to decide what to do. When, on the other hand, we ask questions about what an agent did in the past and what this means, we are asking a different type of moral question about responsibility and this would require a different story than the question of permissibility itself. In the latter question, reasons for actions and appropriate ways of assessing such reasons play a more central role than the assessment of facts based on some objective (and pre-reflective) standard. This distinction, therefore, does not necessarily hinge on who the agent is (i.e. a civilian, a police, a corporate entity), but on the type of moral question asked.

Point 2 concerns the implicit assertion that Wally is making that the objective standard test is more stringent than the good-faith test and that this counts as a reason for supporting the objective standard test. It is not straightforward why this may be the case. The question of whether a state had the right kind of reasons to detain a person for longer than two days in the light of the evidence it had before itself is a demanding one. States have to provide not only relevant, but also sufficient reasons for their actions and the inadequacy of these reasons based on what was known at the time. This is a stringent test. It requires an analysis of the relevant evidence and the fit between the evidence, the reasons provided and the rights limiting action taken by the state. The argument that states as institutional actors with a range of institutional duties need to be held publicly accountable for their decisions/actions is a powerful and convincing argument. I also agree that the civilian v. police v. state analogy has important shortcomings because of the distinctive features a state possesses and the normative relationship it has with individuals under its jurisdiction. It does not, however, follow that looking at reasons for decisions/actions does not adequately hold states into account.

Point 3 concerns the arguments in favour of margin of appreciation as a principled doctrine in order to delineate the relationship between democratic states with rule of law and supranational human rights courts. This doctrine is based on the distinction raised in point 1 between what an agent has to do in order to act morally and what another has to do to establish the responsibility of the former. This distinction, I think, makes better sense of what the European Court of Human Rights says: that it does not put itself in the shoes of domestic institutions. I think one can go a step further and say that this is a necessary move by supranational human rights courts in order to respect some other important values such as respect for deliberative processes on deeply divisive issues, and respect for the integrity of just domestic laws.

I share Wally's final concerns about the necessity to combat overly powerful governments curbing individual rights and freedoms under the guise of threats of violent attacks and the need for putting breaks on domestic institutions, however democratic or lawful. I would, however, would like his eloquently discussed paper to consider the good faith standard in its best light and the significance of the moral and conceptual distinction between permissibility and responsibility in the work of the European Court of Human Rights.