

Chapter 6

State Responsibility

CHAPTER 6: State Responsibility

- The laws of **state responsibility** are the principles governing **when** and **how** a state is held responsible for a breach of an international obligation.

In this chapter students are expected to grasp the following points:

- nature and contents of internationally wrongful acts;
- Attribution as an important point of responsibility;
- Defenses against breach of international obligation;
- Consequences of breach; and
- Reparation/remedies for breach of international obligations.

Meaning of state responsibility

- State responsibility is a fundamental principle of international law and it lies on the understanding that states are sovereign and equal. It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. This obligation gives rise to a requirement for reparation.

The nature of State Responsibility

The essential characteristics of responsibility hinges up on certain basic factors:

- I. First the existence of an international legal obligation in force as between two particular states;
 - II. secondly, that there has occurred an act or omission which **violates** that obligation and which is imputable to the state responsible; and
 - III. Finally, **that loss or damage** has resulted from the unlawful or omission.
- These requirements have been made clear in a number of leading cases. One instance is the Spanish Zone of Morocco Claims Case. In this case it is reaffirmed that it is a principle of international law that any breach of an engagement involves an obligation to make reparation.

Article 1

Responsibility of a State for its internationally wrongful acts

- Every internationally **wrongful act** of a State entails the international **responsibility** of that State.

Similarly Article 2 provides that there is an internationally wrongful act of a state when conduct consisting of an action or omission is **attributable** to the state under international law and **constitutes** a breach of an international obligation of the state.

Article 2

Elements of an internationally wrongful act of a State

- There is an internationally wrongful act of a State when conduct consisting of an action or omission:
 - (a) Is attributable to the State under international law; and
 - (b) Constitutes a breach of an international obligation of the State

Existence of a breach of an international obligation

- There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.
- A breach that is of a continuing nature extends over the entire period during which the act continues and remains not in conformity with the international obligation in question, while a breach that consists of a composite act will also extend over the entire period during which the act or omission continues and remains not in conformity with the international obligation. A state assisting another state to commit an internationally wrongful act will also be responsible if it so acted with knowledge of the circumstances and where it would be wrongful if committed by that state.

The Question of Wrongfulness

There are contending theories as to whether responsibility of the state for unlawful acts or omissions is one of **strict liability** or whether it is necessary to show some **fault or intention** on the part of the officials concerned.

- The principle of objective responsibility (the so called 'risk' theory) maintains that the liability of the state is strict. Once an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law to the state suffering the damage irrespective of good or bad faith.
- To be contrasted with this approach is the subjective responsibility concept (the 'fault' theory) which emphasizes that an element of international or negligent conduct on the part of the person concerned is necessary before his state can be rendered liable for any injury caused.

- The relevant cases and academic opinions are divided on this question, although the majority tends towards the strict liability, objective theory of responsibility.
- In the Neer claim in 1926, an American superintendent of a Mexican mine was shot. The USA, on behalf of his widow and daughter, claimed damages because of the careless manner in which the Mexican authorities pursued their investigations. The general claims commission dealing with the manner disallowed the claim, in applying the objective test.
- In the Caire Claim, the French-Mexican claims commission had to consider the case of a French citizen shot by Mexican soldiers for failing to supply them with 5,000 Mexican dollars. Verzijl, the presiding commissioner, held that Mexico was responsible for the injury caused in accordance with the objective responsibility doctrine that is the responsibility for the acts of the officials or organs of a state, which may devolve upon it even in the absence of any “fault” of its own.

- A leading case adopting the subjective approach is the Home Missionary society claim in 1920 between Britain and the United States. In this case, the imposition of a 'hut tax' in the protectorate of Sierra Leone triggered off a local uprising in which society property was damaged and missionaries killed.
- The tribunal dismissed the claim of the society (presented by the US) and noted that it was established in international law that no government was responsible for the acts of rebels where it itself was guilty of no breach of good faith or negligence in suppressing the revolt.
- It should, therefore, be noted that the view expressed in this case is concerned with a specific area of the law, namely the question of state responsibility for the acts of rebels. Whether one can analogize from this generally is open to doubt.

- In the Corfu Channel case, the International Court appeared to lean towards the fault theory by saying that:
- It can not be concluded from the mere fact of the control exercised by a state over its territory and waters that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.

Immutability/Attribution

- Before a state can be held responsible for any action, it is necessary to prove a **causal connection** between the injury and an official act or omission attributable to the state alleged to be in breach of its obligations.
- This has become an increasingly significant contemporary issue, as non-state actors such as Al Qaeda, multinational corporations, and non-governmental organizations play greater international roles, and as governments privatize some traditional functions.
- The state is responsible for all actions of its officials and organs, even if the organ or official is formally independent and even if the organ or official is acting *ultra vires*. A state may be held responsible for actions of "private" individuals that are, in fact, controlled by the state.

Article 5

Conduct of persons or entities exercising elements of governmental authority

- The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 7

Excess of authority or contravention of instructions

- The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

- The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.
- Where there is a breakdown of normal governmental authority and control, such as in so-called "failed states", the actions of those acting as the "government" in a de facto sense will be acts of the state. The acts of an "insurrectional or other movement that becomes the new government of an existing state or succeeds in establishing a new state" can also be attributed to the state. This is also the case where a state acknowledges and adopts the conduct of private persons as its own.

Article 9

Conduct carried out in the absence or default of the official authorities

- The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

- 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
- 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration, shall be considered an act of the new State under international law.
- 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as *its own*

- Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

- State responsibility covers many fields. It includes unlawful acts or omissions directly committed by the state and directly affecting other states: for instance, the breach of a treaty, the violation of the territory of another state, or damage to state property. An example of the latter heading is provided by the incident in 1955 when Bulgarian fighter planes shot down an Israeli civil aircraft of its state airline. Another example of state responsibility is illustrated by the Nicaragua case, where the international court of Justice found that acts imputable to the US included the laying of mines in Nicaraguan internal or territorial waters and certain attacks on Nicaraguan ports, oil installations and a naval base by its agents.

- The doctrine depends on the link that exists between the state and the person or persons actually committing the unlawful act or omission. The state as an abstract legal entity can not, of course, in reality 'act' itself. It can only do so through authorized officials and representatives. The state is not responsible under international law for all acts performed by its nationals.
- Since the state is responsible only for acts of its servants that are imputable or attributable to it, it becomes necessary to examine the concept of Imputability (also termed attribution). Imputability is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien.

- Article 4 of the ILC Draft Articles provides that the conduct of any state organ (including any person or entity having that status in accordance with the internal law of the state) shall be considered as an act of the state concerned under international law where the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the state and whatever its character as an organ of the central government or of a territorial unit of the state.

- The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.
- This provision is intended *inter alia* to cover the situation of privatized corporation which retain certain public or regulatory functions. Examples of the application of this article might include the conduct of private security firms authorized to act as prison guards or where private or state-owned airlines exercise certain immigration controls or with regard to a rail way company to which certain police powers have been granted.

State Control and Responsibility

- Article 8 of Draft Article of the International Law Commission provides:
- *The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.*

Consequences of Breach and Reparation

- The breach of an international obligation entails two types of legal consequences.
- **Firstly**, it creates new obligations for the breaching state, principally, **duties of cessation and non-repetition** (Article 30), and a **duty to make full reparation** (Article 31). Article 33(1) characterizes these secondary obligations as being owed to other states or to the international community as a whole.
- Second, the articles create new **rights for injured states**, principally, the right to invoke responsibility (Articles 42 and 48) and a limited right to take **countermeasures** (Articles 49-53). These rights, however, are heavily state-centered and do not deal with how state responsibility is to be implemented if the holder of the right is an individual or an organization.

- If illegal actions are continuing, the state has a ***duty to cease***. [Art. 30]
The state also has ***duties to make reparation***, which could involve restitution, compensation, or satisfaction. Remedies will be dependent on the particular forum, such as the United Nations, International Court of Justice, World Trade Organization, International Tribunal for the Law of the Sea, International Criminal Court.