

UNIT 11. INTERNATIONAL RESPONSIBILITY OF THE STATE

1. General aspects: the institution of international responsibility.
2. International responsibility for wrongful acts.
3. International liability for injurious consequences arising out of acts not prohibited.



GENERAL ASPECTS

- All legal systems: rules and procedures regarding what happens when there is a violation of rules or obligations that cause unlawful damage to third parties.
- IL: system of responsibility (set of "secondary" rules) that applies when a primary rule of international law has been violated. It has a multifaceted character.
- International jurisprudence: validity of the principle of state responsibility for the commission of wrongful acts.
 - PCIJ 1928 judgment in the Chorzow Factory case: "the tribunal notes that it is a principle of international law, and even a general legal concept, that any breach of an obligation entails a duty to make reparation".
 - Principle of the responsibility of states for the breach of an international obligation: central element of the international system, but varying interpretations (classic figure).
 - ILC work of codification.
 - Evolution of law of responsibility: other modalities and regimes (liability for injurious consequences arising out of acts not prohibited under IL). Treaty regimes.
- Ordinary subjects: states themselves (state-to-state relationship).
 - Evolution of IR: governmental international organizations.
 - ICJ Advisory Opinion of 11 April 1949 - capacity of the UN to be the active subject of a claim of international responsibility against a state alleged to be guilty of a violation of international law.
 - ILC codification of rules for IO responsibility.

- Long process:
 - First official attempt: LoN The Hague 1930 codification conference (unsuccessful).
 - UN: ILC Codification agenda
 - ❖ International responsibility since 1949.
 - ✓ State responsibility. In 2001: adoption of draft articles on the "responsibility of states for internationally wrongful acts", which culminated the codification work in this specific area.
 - ✓ International liability. In 2001: adoption of draft articles on "prevention of transboundary harm arising out of hazardous activities", as a necessary background for continuing its work on "international liability for injurious consequences arising out of acts not prohibited by international law" (now renamed "international liability in case of loss from transboundary harm arising out of hazardous activities").
 - ✓ Liability of IO: 2011 draft articles on this topic.

INTERNATIONAL RESPONSIBILITY OF STATES FOR WRONGFUL ACTS

A. General considerations

B. Elements

- *B.1. The subjective element: the act of the state*
- *B.2. The objective element: the breach of an international obligation*

C. Circumstances precluding wrongfulness

D. Consequences of wrongful acts of states

E. Ways to enforce responsibility

A. GENERAL CONSIDERATIONS

- For state responsibility for internationally wrongful acts to arise, two main elements must be present:
 - there must be conduct attributable to the state (subjective element or attribution) and,
 - that conduct must involve the breach of an international obligation owed by the state and thus constitute a wrongful act (objective element or breach).

B. ELEMENTS

B.1. THE SUBJECTIVE ELEMENT: THE ACT OF THE STATE

- Existence of an “act of the state”. Different possibilities
 - Behavior of the state’s organs: organicist orientation of IL
 - Art. 4. Draft articles.
 - Principle of “self-organization” of the state.
 - Irrelevancy of nature of the functions and hierarchical rank.
 - Inclusion of *ultra vires* acts (Art. 7 Draft).
 - Positive presumption of official capacity.
 - ❖ Possibility of empowerment of entities to exercise elements of governmental authority: Art. 5 Draft Code (no formal status). No presumption and need to prove the official capacity.
 - ❖ Organs placed at the disposal of a state by another state: Art. 6 Draft.
 - Behavior of individuals: in principle, NOT attributable to the state.
 - Exceptions:
 - ❖ When private persons are in fact acting on the instructions, or under the direction or control of that state (Article 8).
 - ❖ When private persons exercise de facto powers of public authority in the absence or in default of the official authorities (Article 9).

- ❖ When it is an insurrectional movement that eventually becomes the new government of the state or establishes a new state on part of the territory of a pre-existing state (Article 10).
- ❖ When the state recognizes and adopts the behavior of individuals as its own (Article 11).
- ❖ State organs fail to exercise due diligence to prevent, control, or suppress acts of private individuals that infringe the rights of foreign states (not included in ILC draft).
- International jurisprudence: conditions that must be met in these cases to attribute to the state the actions of private persons:
 - ❖ degree of dependence and control of the state over the actions of private persons,
 - ❖ the recognition, approval, or acceptance of their actions.

B.2. THE OBJECTIVE ELEMENT: BREACH OF AN INTERNATIONAL OBLIGATION

- For the conduct attributable to the state to engage its international responsibility, it is necessary that such conduct constitutes a wrongful act under international law; that it entails “a breach of an international obligation of the State” (art. 12 Draft):
 - Nature of the obligation breached: irrespective of the origin or nature of that obligation.
 - Article 3, "the characterization of the act of a state as internationally wrongful is governed by international law" and is not affected by the characterization of the same act by domestic law.
 - The obligation must be in force for the state at the time the act occurs.
 - Specific provisions for cases of continuing breach and for the "breach consisting of a composite act".
 - Irrelevancy of source of the obligation.
 - Relevancy when the breach affects an obligation that protects the general interests of the international community, which places it in the orbit of peremptory norms or *jus cogens*, generating obligations *erga omnes*.

- Function of resulting damage? The wrongful act may exist without its perpetrator having caused material damage to the injured state. The mere breach of an international obligation already constituted damage, so that it was unnecessary to establish an additional requirement in this respect.
 - Necessary in case the obligation itself requires the damage to occur.
 - Note the distinction between the "injured state" and states other than the injured state (relevant in case of breach of obligations protecting collective interests).
 - Significant influence on the determination of the amount of reparation due.

C. CIRCUMSTANCES PRECLUDING WRONGFULNESS

- Exceptional circumstances precluding the wrongfulness of a state's conduct:
 - Eliminate the responsibility of the state.
 - Eliminate the wrongfulness of the state's conduct.
- 2001 ILC Draft:
 - Consent of the affected state (Art. 20 draft): states have the right to authorize conduct which, in the absence of such authorization, would be unlawful.
 - Requirements: (i) effective (real); (ii) authentic (appropriate organ); (iii) valid (not error, fraud, corruption, or coercion); (iv) expressed prior to the commission; (v) act in the limit of consent; and (vi) not possible in the case of peremptory norms of general international law.
 - Problematic principle: highly political nature of the situations.
 - Self-defense.
 - Countermeasures: a conduct, which is not in conformity with an international obligation incumbent upon it, may be considered as a valid countermeasure taken in response to an unlawful act of another state.
 - Force majeure, extreme danger, and state of necessity: Obligation is materially impossible (force majeure or unforeseeable event - Art. 24), or its non-performance is justified by superior reasons (extreme danger - Art. 25 and state of necessity - Art. 26).

D. CONSEQUENCES OF THE WRONGFUL ACTS OF A STATE

- Commission of a wrongful act by a state generates for its perpetrator a series of consequences aimed at:
 - restoring the violated legality; and
 - repairing the damage caused.
- Perpetrator: new obligations that may exist in relation to another state, to several states, or to the international community.
 - Continuity of the obligation, cessation, and non-repetition.
 - Reparation: different forms
 - Restitution (full restitution: *reparatio in integrum*)
 - Compensation (by way of equivalence).
 - Satisfaction (different manners).
- Particularities in cases of *ius cogens* norms: sanction in case of "flagrant or systematic" breach of the obligation by the responsible state.

E. WAYS TO ENFORCE RESPONSIBILITY

➤ Claim or international responsibility:

- Art. 42 a state is considered injured if:
 - the obligation breached is owed to that state individually.
 - the breach is owed to a group of states of which that state is a member. It must: (i) especially affect it; or (ii) radically alter its situation with respect to the further performance of the obligation.
 - the obligation breached is owed by the international community as a whole. It must: (i) especially affect it; or (ii) radically alter its situation with respect to the further performance of the obligation.
- Other states not considered injured: cases of collective obligations with limits of Art. 48 draft:
 - If the obligation breached is owed to a group of states of which it forms part.
 - If the obligation breached was established for the protection of collective interest.
 - If the obligation breached is owed to the IC: can only claim cessation and guarantee of non-repetition. The claim for reparation only in benefit of the injured state.

- Procedural requirements: notification to state.
 - Cases of diplomatic protection: requirements for admissibility (nationality, exhaustion, etc.).
- Countermeasures: Art. 49-52 draft.
 - Only by injured state against responsible state.
 - Purpose: induce it to comply with the obligations.
 - Temporary in nature (cease when the situation ends or stops), proportionate to injury suffered.
 - Shall not affect certain obligations (*ius cogens*: threat or use of force, protection of HR, obligations under humanitarian law, other obligations from peremptory norms).
 - Procedural conditions: prior notice; notification of decision to take countermeasures and offer to negotiate.
- Settlement of disputes: peaceful means of settlement. Necessary if the obligation itself requires the damage to occur.

INTERNATIONAL LIABILITY FOR INJURIOUS
CONSEQUENCES ARISING OUT OF ACTS NOT
PROHIBITED BY INTERNATIONAL LAW

- 1978 ILC: state responsibility "for the harmful consequences of non-prohibited acts", separate treatment.
- Basis and characters:
 - Based on necessity/convenience of repairing damage (liability).
 - Emergence: activities of a particular and dangerous nature could cause considerable damages to third parties in the event of accidents. Extraordinary guarantee to ensure compensation when damage affects other states or areas beyond national jurisdiction (transboundary damage).
 - Typical activities: space activities; the use of nuclear energy; the mass transport of hydrocarbons; or the production and use of genetically modified organisms (transgenics).
 - Activities generally carried out by individuals in the context of industrial or commercial activities, but whose consequences can have catastrophic transboundary effects that particularly affect human health and the environment.
 - The states that authorize or control these dangerous activities must make a commitment to repair the resulting damage.
 - Considerations of prevention and guarantee is a principle of justice and equity: no state should pay for damage resulting from extraordinary risks created by another state in its own interest.

- This tends to establish a compensatory balance: establishment of a stricter liability regime, which obliges the state to repair, in any case, the transboundary damage resulting from such activities.
- Characters:
 - Responds to an effect of mere material causation, there being only a demonstrable link between the activities carried out by the state, or under its authority, and the harmful transboundary result.
 - "Absolute" character excludes consideration of possible grounds for exoneration, such as the absence of malice or fault.
 - The resulting damage must be transboundary in scope, a concept that includes not only damage caused to other states, but also damage affecting "areas beyond their jurisdiction" (global commons) - the preservation of which is of equal interest to all states.
- Reception in IL:
 - Case law: Trail Smelter arbitral award of 1941.
 - Diplomatic resolution. Soviet Cosmos 954 Satellite accident (1979).
 - Conventional law.
 - Still an exceptional occurrence and does not seem to be applicable unless it is provided for in a treaty or convention establishing it.

- Codification work: one of the most complex topics on the agenda of the International Law Commission and still far from presenting precise legal contours in both terminological and legal terms.
 - 1978: liability for injurious consequences arising out of acts not prohibited by IL.
 - Decision about defining first primary rules on the prevention of transboundary harm arising out of hazardous activities.
 - 2001: Draft "Prevention of Transboundary Harm from Hazardous Activities", adopted by the General Assembly in 2007.
 - 2006: "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities".
 - Present: continues to work on this topic under the title "prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm".



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