

Date of expedition:14/10/2018 Date Acceptance:15/12/2018

ATTRIBUTION'S ISSUES IN STATE INTERNATIONAL RESPONSIBILITY ORDER

مسائل الإسناد في إطار المسؤولية الدولية للدولة

د.مرسلي عبد الحق

Dr MORSLI Abdelhak

morsliabdelhak@gmail.com

المركز الجامعي لتامنغست

Tamanrasset University Center

Abstract:

Attribution issue in the sphere of responsibility in general and in connection with the public international law in particular, is one of the most important and controversial legal problem, because the attribution is transformed from a physical person to moral international subject, which has not the mean to express its will to act without human being intervention. According to the legal international doctrine and jurisprudence and the efforts of international law commission ILC, the State is responsible for the acts of its agents, citizens and other state if they acts on its behalf.

Key words:

International responsibility, attribution, wrongful acts, responsibility of State of powers, revolution and internal conflicts

المخلص:

تعد مسألة الإسناد في موضوع المسؤولية عموما والمسؤولية الدولية ذات الصلة بالقانون الدولي العام وفروعه المختلفة على وجه الخصوص من بين أهم العناصر الأكثر تعقيدا بالنظر إلى تحول الإسناد القانوني من شخص طبيعي إلى شخص معنوي دولي يترجم إرادته بتصرفات قد تسبب ضررا لشخص دولي آخر. وبناء على اجتهاد الفقه والقضاء الدوليين وفي محاولة لتأطير هذه المسألة ولو بالاختلاف أحيانا وبعد جهود كبيرة للجنة القانون الدولي توصلت إلى وضع مشروع اتفاقية تجسد ما أثبتته الممارسة القضائية التي تنتظر حاليا التفعيل من طرف الدول. ويقتضي تناول هذا الموضوع التطرق إلى أهم الحالات التي يسند فيها فعل الشخص الطبيعي أو الهيئة إلى الدولة، بحيث تختلف

الأحكام في حالة الحرب بوضعياتها القانونية المتغيرة، وكذلك في حالة التبعية ونقص
السيادة.

الكلمات المفتاحية: المسؤولية الدولية، الإسناد، العمل غير المشروع، مسؤولية سلطات
الدولة، الثورة والنزاعات الداخلية.

Introduction:

International law, like all the other branches of law, saves the observation of its binding rules by its international subjects through legal sanctions, which are based on the international responsibility system, “ the rules underlying the principles of international law, transform otherwise admonitory precepts into legal norms and in this sense may also be described as sanctions of international law...”⁽¹⁾; International State responsibility is the other side that relates to domestic administrative responsibility of State ruling by internal law and settled by national jurisdictions.

The ramification of international relationships and interstates activities and the development of the legal rules running the rights and duties of public international subjects; i.e. States, international organizations, liberation movements, and exceptionally human beings, leads to intense debates and conflicts about the responsibility of the prime subject which is the State.

State, in the framework of international responsibility, is not necessary a mere international entity including population permanently establishing in a determined territory governed by sovereign political power, but there are cases where States are complex, colonized, intervene in the domestic affairs of other States, even commit a wrongful act on foreign territory.

The international State responsibility for its powers is often discussed especially when one of them by its agents or bodies violates an international law rule causing a prejudice to an international subject, albeit powers in particular the judicial and the parliament, are independent . This theme cannot be tackled without defining cases and details of attribution relating to wrongful conducts in which States arise enormous questions, shortly we ask: when does the State incur international responsibility with regard to its agents and bodies acts?

A- International attribution rules on acts of State:

State as moral abstract is legal entity that can't accomplish its tasks without involving physical personalities, thus, State includes several powers and bodies which practice the public authority. In this context if the State agent or body committed a wrongful act, will the State be held responsible for it? Under international law there are some rules providing cases when the wrongful act is attributable to the State or not. Imputability is the transfer of attribution of an act really accomplished by an agent or a body or power to a State according to public international law provisions. The link between the State and the person actually committing the wrongful conduct is very important⁽²⁾.

Doctrine usually calls this act imputed as "act of State", the internal legal order is delegated by the international law to determine its representatives, organs and individuals, which perform the States acts.⁽³⁾ Nevertheless the acts imputation remains beyond of the national legal order; it is a matter of international responsibility system.

In this framework, rules of international responsibility find their sources according to general provisions of public international law i.e provided in article 38 of international court of justice statute which defines this matter and determines public international law rules sources in treaties, costumes and general principles of law recognized by civilized nations. However the international regulation of attribution in the scope of States responsibility needs till now days to reach a binding treaty ratified by the major part of international powers and which is fit with international practice in doctrine and in jurisprudence provisions.

Whereas the international law commission adopted several draft articles about this matter and it splits the topic to four drafts treaties, the most important one is about State responsibility on wrongful act to which frequently we will refer in this paper.

1- State responsibility for wrongful act of legislative and judicial power:

The draft articles of international law commission about State international responsibility for wrongful act provides” the conduct of any State organ will be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the State organization, and whatever its character as an organ of the central government or of territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The State is responsible for all acts performed by its parliament, it may be act or omission, if that contravene State international engagements, for instance the legislative power neglects the adoption of such law which is Stated as obligation according to a treaty; or this power votes a law in contrary with State international obligations⁽⁴⁾.

For the judicial power, there is no problem with courts independence and the trust in courts judgments because that is an internal matter of State domestic affair, the international law can't preclude the State responsibility if it pledges that the act is performed by an independent power.

2- State responsibility for wrongful act of executive power:

It should be noticed that two cases must be distinguished relating to the kind of State international responsibility of executive power:

a- *The intra vires*: if the agent behave according to the legal State authorization i.e. *intra vires*, in this case the State is internationally responsible for the prejudice caused regardless the internal State laws.

The international subject incurs international responsibility for the wrongful act committed by the person or group of persons exercises effectively some powers, competences or public authorities in the case of lack or insufficiency public powers, and in the framework of such circumstances which called fact functionary.

Thus, the State is internationally responsible for act of public and private persons and bodies that, under domestic law, exercise some public power competences; even if they are not part of governmental bodies or officials; provided that they act in that capacity during this commission. International wrongful act

committed by a person or group entails State international responsibility if that is in view of State orders, instructions or control, even if they are not public agents or bodies.

b- Ultra vires: if the executive power representative acts without authorization or out of his competences or contravene the State orders and instructions, *ultra vires*, it should distinguish two assumptions:

First case: the civil servant commits the wrongful act in connection with his missions and functions: in accordance with the dominant doctrine and jurisprudence, the State is responsible for the prejudice caused, because on the one hand, it chooses and trains wrongly its agents, and on the other hand, the question of internal competence and instructions is a domestic affair, out of public international law framework.

The international law commission draft articles states that: “the conduct of an organ of a State or of a person or entity empowered to exercise some element 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 this exceeds its authority or contravenes instructions.”⁽⁵⁾

Among the most known cases which confirm this practice the Greenland case between Denmark and Norway, after that the Norwegian foreign affairs minister declares the recognition of his State of the sovereignty of Denmark on Greenland isle, because of the Norwegian withdrawal, Denmark bring a lawsuit against Norway, the PCIJ decided in 1933 that Norwegian minister represent his State in foreign affairs and his declaration of recognition is a part of his competence so it bound his State which incurs international responsibility⁽⁶⁾.

Second case: if the official commits the wrongful act out of his missions and in no connection with his work, and behaves personally; As a general rule the State doesn't incur the international responsibility and that takes the judgment of none governmental nationals, in which the State, as a general principle, is not responsible unless it doesn't apply due diligence measures before and after the wrongful act commission; before by preventing

and forbidding it, and after by punishing the actors and giving reparation for injuries.

B- International responsibility in the case of insurrection and revolution:

a- During internal insurrection, the State is not responsible except in case of negligence. Wrongful conducts committed by individuals in demonstration, violence and troubles is considered as responsible for the conducts of its private nationals.⁽⁷⁾

The State incurs international responsibility for the acts injures other foreigner State or nationals on condition that it does not take due diligence procedures before the insurrection and security measures to separate or settle down the violation and prevent aggression and protect targeted persons and after, the State takes prosecution and punishment measures⁽⁸⁾.

The dominant international doctrine due that to the force majeure as a circumstance precluding wrongfulness if the act is due to the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State making it materially impossible in circumstance to perform the obligation.

b- During revolution and civil war:

The act may be accomplished by State as well as by rebels, so we present these two cases:

1- Acts committed by the State during the fighting:

The necessity and the force majeure preclude the State responsibility for damages incurred by other State or foreigners, due to military operations, bombarding, raids, air attacks... against insurrection forces in order to eradicate and neutralize them, but two conditions must be taken into consideration⁽⁹⁾:

- *First*: compliance with international humanitarian law rules, notably which relates to discrimination between military and civil targets, avoiding useless damages and proportionality principle, and others provisions included in international conventions and custom of armed conflicts and humanitarian international law⁽¹⁰⁾.

- *Second*: the State abstains to target persons or interests only because they are foreigners and not nationals i.e. it attacks intentionally other State interests.

2- Revolutionary's acts:

The responsibility question of rebel's wrongful conducts is remarkably complicated; it must be examined from two angles:

Firstly: Success and failure of rebels:

1- In case the revolution succeeds and obtains the power on whole or the part of the State territory, the new government incurs retroactively the international responsibility for wrongful acts committed during the war by the their revolutionaries, especially vis-à-vis the States which recognize the revolution before its arrival to power.

The international law commission draft articles establish that providing "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.

The conduct of a insurrectional or other trouble, 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 a new State under international law."⁽¹¹⁾

2- In case the revolution is defeated, as a general rule, the State is not considered internationally responsible because, on one hand, they are beyond its effective and permanent control and power; on the other hand the revolution constitutes a force majeure of which the State itself is victim. As exception the defeated rebels incur the international responsibility in two cases:

First, whether the State commits a negligence in fighting the revolutionaries and in diligence to protect of foreign interests.

Second, neglect the prosecution and punishment and forgiving the rebels because that may be qualified as a recognition or consent for its crimes.

Secondly: Recognizing the revolution.

To recognize the existence of revolution effects, by several ways, in international affairs:

1-State revolutionaries recognition: if the State of the rebels give them the quality of fighter under armed conflicts international law, that leads to applying on them the humanitarian international law provisions included especially in the 1949 Geneva international conventions, in this case the State is not responsible for wrongful

rebels acts because this quality gives them rights and charges them with duties under international law.⁽¹²⁾

If the revolution succeeds the revolutionaries will be bound to repair the damages which are caused by them during the war, and if it defeats the State will incur the international responsibility for their conducts. Furthermore, in the scission movement, the State can ask the rebels to repair prejudice which it incurred during the fighting from wrongful acts committed by them.

If the State doesn't recognize the revolution, it is not responsible for the wrongful acts committed by rebels, unless it considers them as its nationals.

2- Victim State recognition: if the State which incurs the prejudice cannot ask the reparation from the revolutionaries' State for the acts of rebels because it accepts before the separation between the State and rebels, but if the revolution succeeds the new State is obliged to repair damages suffered by the recognizing State because this is the ultimate solution.

C- State International responsibility for wrongful acts committed by other State:

The State may take part in wrongful acts executed by other State in several forms: aid, assistance, direction, control or dependence:

1- Aid and assistance to another State in doing international wrongful act:

According to draft articles of international law commission the "State which helps or assists another State in the commission of internationally wrongful acts by the latter is internationally responsible for doing so if:

a – that State does so with knowledge of the circumstances of the internationally wrongful act;

b – and the act would be internationally wrongful if committed by that State"⁽¹³⁾

Noting that many international conventions relating notably to human rights incriminate and prohibit the fact of aid the States in the violation of the their provisions. In this context, there are several forms and aspects of aids, for instance supplying a State by weapons and ammunitions to commit crimes against it people, genocide or opening the State's territory to invade or aggress

against a neighbor State, or consolidating colonial, discriminatory and dictator regimes by arms and finance.

2-International responsibility for direction and control exercised over the commission of an internationally wrongful act:

The ILC draft articles on State responsibility stipulate that “ a State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: - that State does so with knowledge of the circumstances of the internationally wrongful act; and – the act would be internationally wrongful if committed by that State”⁽¹⁴⁾.

On other hand, the draft articles includes that:“ a State which coerces another State to commit an act is internationally responsible for that act if : - the act would but, for the coercion, be an internationally wrongful act of the coerced State ; and – the coercing State does so with knowledge of the circumstances of the act”⁽¹⁵⁾.

Some commentaries note that this article involves important ambiguities notably about what is meant by being under a State direction or control for purposes of article 8, it lacks precision⁽¹⁶⁾.

3- International responsibility for the act of dependent State:

Under international law the dependent State means State without sovereignty or with incomplete sovereignty or being under protection, colonization or other status in which the State is dependent to another one. It is established in international law that full sovereignty constitutes a sine qua none condition for claiming against a State, so the protector State incurs the international responsibility for the acts committed by the protected or colonized State.

The federal States are excluded from this obligation in this context because they have the sovereignty of the central State in international law which incurs the international responsibility of all wrongful acts fulfilled by one of its territorial units.⁽¹⁷⁾

Conclusion:

The international law undoubtedly is in need of a binding international responsibility legal order, but absolutely not of the ambiguous customary system in place, notably relating to the

executive power, having the great part of competences and abilities. So it is a must for the world community to sign the draft articles about the international responsibility, wrongful or hazardous acts, and preparing the international sphere to make more and more modifications in the applicable rules about international responsibility.

On the other hand, it is sure that the field of international responsibility is the most complicated one in the international law affairs, because it is qualified as the rule measuring the efficiency and the observation of international norms. In addition, the complex situation about internal conflicts and non international war makes more difficulties for applying general international responsibility rules that necessarily obliges the States to open a wide debate about this very important topic.

The draft articles prepared by the international law commission is an important work reflecting the new vision of international public law norm-making because it took in account the new international order, including different ideologies and interests other than western world.

The settlement of State responsibility legal system leads necessary to concluding enormous conflict in the sphere of international relationships, especially under the United Nations charter and the commitment of the world powers.

References:

- 1- Charles Rousseau, Droit international public, édition Dalloz, 1976, Paris.
- 2- Daniel Bodansky and John Crook, The ILC State responsibility articles, introduction and overview, the American journal of international law, volume 96, 202.
- 3- Dominique Carreau, Droit international, éditions A PEDONE, Paris, 1986.
- 4- Georg Schwarzenberger, A manual of international law, Fifth edition, Stevens and sons limited, London, 1967.
- 5- Hans Kelsen, Principles of international law, Second edition, Holt, Rinehart and Winston, 1967, USA.
- 6 -ILC State responsibility draft articles, ILC State responsibility draft articles, Text adopted by the Commission at its fifty-third

session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4/ United Nations-2005.

http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

7- Malcolm N. Shaw, International Law, Fifth Edition, Cambridge University Press, 2006.

8- NGUYEN QUOC DINH, Doit international public, librairie générale de droit et de jurisprudence, Paris, 1975.

9- Patrick Dumberry, New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement, The European Journal of International Law Vol. 17 no.3, 2006

-
- (1) - Georg Schwarzenberger, A manual of international law, Fifth edition, Stevens and sons limited, London, 1967, p 173.
 - (2)- Malcolm N. Shaw, International Law, Fifth Edition, Cambridge University Press, 2006,
p 701
 - (3) - Hans Kelsen, Principles of international law, Second edition, Holt, Rinehart and Winston, 1967, USA, p 197.
 - (4) - See the sentence on Chorzow factory case in 1928.
 - (5) - According to article 7 of ILC State responsibility draft articles, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4/ United Nations- 2005.

http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

- (6)- The sentence includes: “concerning the question if the Norwegian constitution authorizes the foreign affairs minister to do this kind of declaration, this matter doesn’t interest the government of Denmark”.
- (7)- Dominique Carreau, *Droit international*, éditions A Pedone, Paris, 1986, p 406.
- (8)- The international jurisprudence confirm that rule through several cases such as American citizen “Nouis” case in 1933, “Tirianon” case in 1949 and American hostage in Tehran case.
- (9)- Charles Rousseau, *Droit international public*, édition Dalloz, 1976, Paris, p126.
- (10)- See NGUYEN QUOC DINH, *Doit international public*, librairie générale de droit et de jurisprudence, Paris, 1975, p 637.
- (11) - Cf. article 10 of ILC State responsibility draft articles.
- (12)- See Patrick Dumberry, *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, *The European Journal of International Law* Vol. 17 no.3, 2006, p 605
- (13) - See article 16 of ILC State responsibility draft articles.
- (14) - Article 17 of ILC State responsibility draft articles.
- (15)- Article 18 of ILC State responsibility draft articles.
- (16)- Daniel Bodansky and John Crook, *The ILC State responsibility articles, introduction and overview*, the American journal of international law, volume 96, 202, p783.
- (17) - See article 4 of The ILC State responsibility draft articles.