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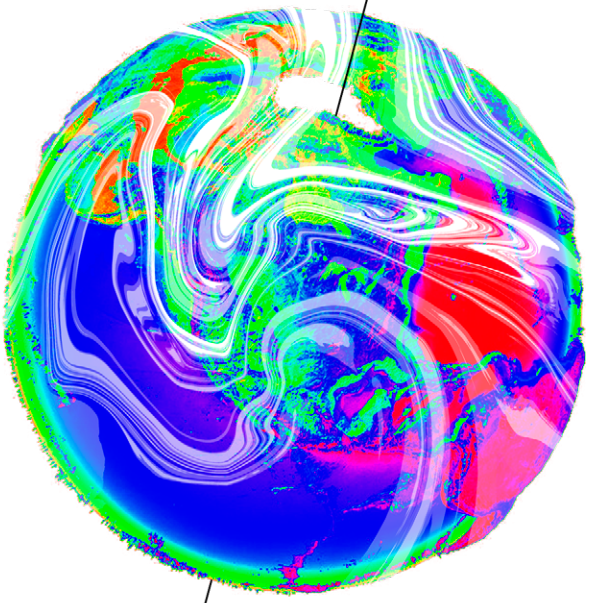
GA Sixth Committee
(LEGAL)

Expert's report



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Responsibility of States for internationally wrongful acts.

Contents

Introduction

Responsibility under international law is a legal institution based on customary international law. It governs in which cases a state is held responsible for a breach of an international obligation and which consequences this state will face. Nowadays it is more or less codified due to the International Law Commission efforts.

In the first half of the 20th century the issue of responsibility of States was not developed enough and attracted interest of the League of Nations. Responsibility of States was also one of the main topics of the unsuccessful conference in The Hague (1930).

In 1948, the United Nations General Assembly established the International Law Commission. Responsibility of States was chosen from the very beginning of the Commission's work as one of the most significant issues. It has been developed at the cost of years of research and discussions. ILC's special rapporteurs submitted a lot of reports on the matter. The first one – F.V.Garcia Amador – presented 6 reports on State responsibility for injuries to aliens and their property and general aspects of responsibility. R.Ago stated that it was important to focus on the definition of the general rules governing the international responsibility of the State. The main contribution to the research made by the third special rapporteur (W.Riphagen) was the definition of "injured State". G.Arangio-Ruiz compiled materials on reparation, countermeasures, consequences of "international crimes" and dispute settlement.

On the basis of the reports a draft of Articles on responsibility of States for internationally wrongful acts was written. On 12 December 2001 the resolution 56/83 was adopted by the General Assembly on the report of the Sixth Committee. The text of the Articles was annexed to the resolution. The General Assembly commended the Articles to the attention of Governments, without prejudice to their future adoption. The Articles have been widely applied in practice (for instance, they have already been cited by the International Court of Justice) but there is no convention or another appropriate form of consolidation and the question has remained open.

General information

Any internationally wrongful act of a subject of international law gives rise to international responsibility. Its basis is conduct consisting of an action or omission which is attributable to the State under international law; and constitutes a breach of an international obligation of the State.1

The characterization of an act of a State as wrongful is determined by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.[2] This provision is enshrined in the Vienna Convention on the Law of Treaties (1969) and multiple judgements of the International Court of Justice. For instance, in the Alabama Case.

In practice, wrongful act commits not a State itself but its relevant bodies and authorities. The conduct of any State body is considered an act of the State (regardless of whether the body exercises legislative, executive, judicial or other functions).

Moreover, there are several grave crimes which are called "serious breaches of obligations under peremptory norms of general international law". These are crimes against humanity, military crimes, genocide, racism, etc.

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1 56/83 Resolution of the General Assembly, Annex
2 56/83 Resolution of the General Assembly, Annex

Brief review of key provisions of the Articles

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Chapter V of the Articles establishes 6 circumstances precluding the wrongfulness of conduct. These are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), force majeure (art. 23), distress (art. 24) and necessity (art. 25). These circumstances cannot come into conflict with a peremptory norm of general international law. The circumstances precluding wrongfulness don't terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by the International Court in the Gabčkovo-Nagymaros Project case[3].

Consent

In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State. In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid".

Self-defence

The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the UN Charter preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.

Countermeasures

Proportional and unilateral non-forcible measures which an injured state may take in response to another state's wrongful act so as to induce that state to cease its conduct, to make reparation and to offer assurances and guarantees of non-repetition.

There are several preconditions and conditions that should be fulfilled.
The former is that before the taking of countermeasures, the injured state must call upon the injury-causing state to fulfill its obligations and also must notify that state of any decision to take countermeasures while offering to negotiate and settle. The conditions are: where the wrongful acts are ceased or the matter is 'pending' before a court or tribunal with powers to take binding decisions, then countermeasures should not be taken. Countermeasures should also be terminated as soon as the responsible state has complied with its obligations of cessations and reparations. The countermeasure must be reversible.

Force majeure

An act, normally in violation of international law obligations, may be excused if the act was:

- "due to an irresistible force or to an unseen external event"
- "beyond its control"
- "which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation".[4]

Distress

Applies to a factual situation of extreme peril, usually involving ships or aircrafts under difficult weather conditions, mechanical failure, or other circumstances.

This defense is closely related with

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3 http://www.eydner.org/dokumente/darsiwa_comm_e.pdf

4 56/83 Resolution of the General Assembly, article 23

force majeure, except that conformity to its obligations is actually possible for the state although it would result in a loss of lives. Incursions into foreign territory in order to save lives may be excused by the defense of distress.

Necessity

The only way a State can safeguard an essential interest threatened by a grave and imminent peril is not to perform some other international obligation of lesser weight or urgency.

The defense of necessity does not apply if:

- the state acting in violation of its international obligations caused the situation of "necessity";
- the international obligation which the state is in breach of is a peremptory norm of international law (in particular, prohibitions on acts of aggression);
- the defense of necessity is precluded by the terms of an applicable instrument. (Human rights treaties, for instance, often preclude necessity as a defense).

Forms (content) of responsibility of States

INTANGIBLE (IMMATERIAL) RESPONSIBILITY

Satisfaction

Satisfaction is a particular form of reparation in the law of State responsibility which is deemed to repair immaterial damages. It can consist of "an acknowledgement of the breach, an expression of regret, a formal apology", punishment of guilty minor officials, etc.

Reprisals (in contrast to retortions)

Reprisals are retaliatory actions of an affected State.

Collective measures

(on the grounds of the UNSC decisions).

MATERIAL RESPONSIBILITY

Restitution

Restitution is a restoring of the situation that existed prior to the wrongful act (it can be return of material assets).

Compensation

Compensation is a reparation in form of payment.

Substitution

Substitution is a handover of the objects tantamount to those lost to an affected subject.

In the Articles it is also specified that there are the obligations of cessation, non-repetition and reparation.

The implementation of the international responsibility of a state

The forms of implementation are enshrined in the 3d part of the Articles. These are invocation and countermeasures. “Countermeasures” is among the most debated issues related to the responsibility of States. Countermeasures are unilateral measures adopted by an injured State in response to the breach of its rights by the wrongful act of a wrongdoing State that “affect the rights of the target State and are aimed at inducing it to provide cessation or reparations to the injured State”[5].

5 http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1020

Examples of internationally wrongful acts

Unfortunately, despite the existence of international law and responsibility for wrongful acts, some countries have continued and continue to violate the basic tenets of international law.

For example, in early 60es, American monopolies seized the best oil fields in Libya, accounting for more than 90% of the country’s total oil production. In 1962, the revenues of American oil companies in Libya amounted to more than 50 million pounds, while the contributions to the treasury of the Libyan state did not exceed 7 million pounds.

Such actions of the imperialist powers that limit the right of underdeveloped countries to freely dispose of their natural wealth and resources in the national interest are illegal, violating the principle of sovereignty and territorial supremacy. The 7th session of the General Assembly in resolution 626 (VII), entitled “The right to free exploitation of natural resources and resources”, noted that “the right of peoples to freely dispose of their natural wealth and resources and freely exploit them is their inherent sovereign right and is consistent with the purposes and principles of the Charter of the UN.”

This is not the only example of violation of the principles of the UN Charter. On the part of the United States, 5 basic principles of international law were violated in relation to Libya:

- the principle of non-use of force and the threat of force;
- the principle of resolving international disputes by peaceful means;
- the principle of non-interference in matters falling within the internal competence of the States;
- the principle of territorial integrity of states;
- the principle of respect of human

rights and fundamental freedoms. The United States also violated the principle of respect of human rights and fundamental freedoms, as it violated the right to life of people living in Libya.

Breaking of the basic principles of international law casts doubt on the very existence of international law itself. As a verdict, another UN Security Council resolution addressed to Libya. Resolution No. 1973 introduced new sanctions against Libya and reinforced the old ones introduced by Resolution No. 19709. of international law in the new resolution are manifested: First, the new resolution established the "duty of a ceasefire." However, it was not specified who should stop the fire. Usually such a requirement refers to "all parties" of the conflict. However, in resolution 1973, there is no such clarification. In this situation, this means referring only to the authorities of the country.

A particularly dangerous point of the resolution is the granting of the right to take "all necessary measures" to protect civilians. However, it is not specified who is given such a right. Perhaps this right is granted to "any interested member states". Such a formulation does not exclude the use of armed force, including aerial bombardment. So, resolution 1973 formally "authorized" any UN member state to use it if it is deemed necessary. Paragraph 6 of Resolution 1973 establishes a ban on air flights over the territory of Libya10. And paragraph 7 allows all states to "take all necessary measures" to ensure this prohibition. However, the previous Resolution No. 1970, adopted on February 26, also directly violated all conceivable norms and principles of international law. All this suggests that UN Security Council Resolutions No. 1970 and No. 1973 were adopted with big violations of international law.

Conclusion

The topic of responsibility of States for internationally wrongful acts is regarded as one of the major areas of interest in the development of international law. Despite the years of work, there are still some issues for consideration.

Such definitions as "damage", "injury" and the invocation of responsibility are to be clarified. "Countermeasures" remains a difficult and contentious issue as well. It has been a controversial aspect since the very beginning of the research on the matter.

There also can be inaccuracy in wordings, repetitions, ambiguity and so on.

Ultimately, the challenge before our committee is to align the Articles on responsibility of States for internationally wrongful acts with the relevant situation in the world, all the international customs, the ICJ's rulings, etc.; to improve the Articles so that they could be adopted in form of the Convention and recognized by the world community at a higher level.

Annex

Brief history of codification:

1930: unsuccessful conference in The Hague

1948: creation of the ILC

1956: the beginning of the work of the Special Rapporteur F.V.Garcia Amador (Cuba)

1962: the beginning of the work of the Special Rapporteur R.Ago (Italy)

1980: the beginning of the work of the Special Rapporteur W.Riphagen (Netherlands)

1988: the beginning of the work of the Special Rapporteur G.Arangio-Ruiz (Italy)

1997: the beginning of the work of the Special Rapporteur J.Crawford

1998 – 2000: 59 articles adopted. Commentaries completed

2001: GA took note of articles, annexed to resolution, commended to governments without prejudice to future adoption as treaty text

2004: again commended to governments

2007: commended to governments, to further examine question of convention on responsibility of States for internationally wrongful acts, other appropriate action on basis of Articles

2010: similar as above

Sources

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Sixth Committee (Legal) — 68th session, summery of the work

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