The Basis of International Responsibility and its Elements Towards Illegal Actions in International Law

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Abstract

This study discusses international responsibility for illegal actions and its governing principles. It is based on the refusal of governments to accept responsibility of the harm they caused to other countries as a result of their illegal actions. It is also based on the absent of clear guidelines and principles that could be used to determine the nature of responsible for such actions. The objective of this study is to explain the nature of responsibility of the countries that cause harms to other countries. It also aims at explaining the principles governing this responsibility. This study uses analysis approach methodology in order to analyze theories which determine the scope of this international responsibility. This study concludes that countries that violate or refuse to commit themselves to international laws will have to abide to laws accepted by the international communities and the countries being violated will have full right to demand compensation from their aggressors.

Keyword: International Responsibility, Staff Responsibility, International Law, Compensation.

PREFACE:

An individual in this existence is fundamentally a social being, towards whom all regulations and laws are directed to ensure their freedom in compatible with the freedom of others. Consequently, we find that all laws delineate specific rules governing human behavior in the exercise of their freedom, within the scope of their awareness, understanding, and choice, as well as accountability if they deviate from these rules through actions or inaction. The law prescribes penalties for such deviations, grounded in justice. The violation of individual freedom constitutes an oppression that necessitates accountability within the limits of the prescribed punishment. This punishment takes into consideration the degree of freedom and choice available to the perpetrator at the time of committing the crime. The punishment determined by society serves to defend itself against both the criminal and the crime itself, aiming to ensure the survival and safety of the community.

This punitive method manifests in various forms, depending on the nature of responsibility whether complete, partial, or non-existent. It may take the form of deterrence, rehabilitation, or eradication based on the offender.

The concept of responsibility has existed since ancient times, whether derived from the notion of retribution as the objective of punishment or from achieving a penalty aimed at a social goal. It is inconceivable to leave individuals without rules to guide their actions, regulate their behavior, and delineate what is permissible and prohibited.

In reality, the idea of responsibility is an ancient one, recognized by the Greeks, Romans, and Persians, extending its scope to include animals and inanimate objects,[1] in addition to humans. In contrast, Islamic law has established that there is no responsibility attributed to anyone other than humans, a consensus reached by scholars. Therefore, any harm caused by an animal is deemed negligible unless it results from the negligence or carelessness of its owner. In such cases, liability for the harmful act falls upon the owner, based on the principle of "vicarious liability," which is consistent with modern legal rulings. In contemporary times, criminal liability is acknowledged only in relation to living human beings.

The evolution of national communities in recent centuries has led to a distinction between the physical body of the individual and their financial liability in the realm of punishment. Consequently, a distinction has emerged between two types of legal rules: one of such significance and danger that it necessitates imposing penalties on the body or freedom of the individual violating the rule (criminal liability), and another that suffices, in cases of violation, to impose penalties on the financial liability of the violator (civil liability)[2]. Thus, a differentiation has arisen in modern internal legal systems between criminal and civil liability, and international responsibility is also divided into two types:

1. International Responsibility: It shall be direct when a state breaches one of its international obligations; in this case, the state is held accountable for unlawful acts committed by its internal bodies, employees, or representatives, which directly belongs to it in according to the provisions of international law[3]. This form is considered the natural manifestation of international responsibility.

2. International Responsibility: it shall be indirect when a state bears responsibility for unlawful acts committed by another state, assuming that such responsibility is predicated upon a special legal relationship between the two states. An example includes the responsibility of a federal state for unlawful acts committed by its constituent states, the responsibility of protecting states for the actions of the protected state that violate international law, and the responsibility of the administering or mandatory state for unlawful acts committed by the states under its mandate or guardianship[4].

Basis and Elements of International Responsibility in International Law:

Historically, it is established that international responsibility in Europe during the Middle Ages was collective responsibility based on the presumed solidarity among all individuals forming the community from which a harmful act was committed by one of its members. The usual method for obtaining compensation involved the victim seeking assistance from the

[1] Abdul Salam, A.(1971). Contraindications criminal responsibility. Cairo: Arab Organization for Education, Culture and Science, pp 14-15.

[2] Mohammad, S. A, (1995). The origins of public international law. ed 7, part II: International base. Alexandria: Dar University Press, pp 351.

[3] Salah, A. (1998). The right of recovery in international law. Cairo, pp 189-193.

[4] Badria, A. A, (1987). International law in time of peace and war, and its application to the State of Kuwait, pp 218-282.

relevant authorities in their own state to secure what was known as a "letter of reprisal." This system of letters of reprisal remained in effect throughout European countries until the late of seventeenth century, when it was abandoned under the influence of Islamic teachings, which adhere to the principle of individual responsibility, preventing any individual from being held accountable for a sin not committed[5], as it is stipulated in the holy Quran: "No bearer of burdens shall bear the burden of another."

The Basis of International Responsibility

International legal scholars have differed in determining the basis of international responsibility, leading to two main theories:

1. The Theory of Fault:

Hugo Grotius was the first to introduce the concept of fault in international law[6]. He argues that international law does not recognize an individual's obligation based solely on the actions of others unless they themselves have erred. The international community, like any other group, is only held responsible for the actions of its members if fault or negligence can be attributed to them. Grotius establishes state responsibility on the basis of complicity, whether due to negligence in preventing the wrongful act or allowing the perpetrator to escape punishment.

Grotius's view is based on Roman ideas that establish responsibility based on fault. Fault has become, with some modifications and exceptions, the foundation of international responsibility in modern national laws. Till the end of the 19th century, fault was the accepted basis for international responsibility.

The theory of fault has its merits, particularly when discussing state responsibility in cases where individuals are also involved in wrongful acts. It is likely that the persistence of the theory of fault arose as a reaction to the German theory of collective responsibility, which holds that the community is collectively accountable for harm caused by one of its members. The theory of fault does not impose responsibility unless the perpetrator has committed a fault, such as negligence, fraud, or cheating. Thus, it undermines the German claim that justifies acts of retaliation based on collective responsibility for harm inflicted on another state or its nationals[7].

According to this theory, international responsibility only arises if the state has committed a fault that harms other states. This means that any event giving rise to international responsibility must not only be unlawful but must also constitute a fault, such as negligence, cheating or fraud. However, the researcher believes that international responsibility should not be founded solely on fault; rather, a state can be held responsible for actions that cause harm even if no fault has been committed. In other words, responsibility arises from the relationship between state activity and the harmful act.

[5] Jafar, A. S, (1986). The principles of public international law. Ed 2, Cairo: Dar al-Arab renaissance.
[6] Abdulaziz, M. S. (1973). Public International Law. Cairo: Dar al-Arab Renaissance., pp 385.
[7] Mohammad, S. A, (1995). The origins of public international law. ed 7, part II: International base. Alexandria: Dar University Press, pp 468.

2. The Risk Theory and Objective Responsibility:

"ANZILOTTI" has proposed a theory that dismisses all psychological and personal aspects, establishing international responsibility on an objective standard, which contradicts traditional international law. He asserts that “it suffices for the state to be the objective cause of a violation of international law for its responsibility to arise.” Thus, "ANZILOTTI implies that it is unnecessary to seek intent to determine the extent of the state's culpability. This theory bases state responsibility merely on the causal relationship between the state’s actions and the act that violates international law. It constitutes a form of objective liability, grounded in the notion of guarantee[8]. Hence, the bad faith of a public official or their intention to harm is not a condition for establishing responsibility, although it may help attribute the act to the state.

In fact, this theory is one of the closest to the realities of contemporary international life; therefore, it enjoys considerable support among international legal scholars, as well as from prominent jurists, decisions of international courts, particularly the International Court of Justice, and the views of state representatives at international law codification conferences[9].

When evaluating the objective theory, it is noted that, despite its validity, it has been criticized for being overly broad. It establishes responsibility based on an absolute guarantee for the injured party, irrespective of any fault on the part of the state, and thus does not align with many situations in international society that still base responsibility on state errors[10].

Regarding the risk theory or liability for harm, it is worth to be mentioned that a new trend has emerged in general international law advocating for the possibility of international responsibility if a state engages in conduct that poses exceptional risks resulting in harm to another state, even if the act itself is lawful. Proponents of this trend cite examples of lawful activities with exceptional risks, such as various forms of nuclear activity and aerospace endeavors, including the launch of rockets, satellites, and space ships[11].

After reviewing the aforementioned theories regarding their validity as a basis for international responsibility, it can be concluded that the reality of international relations today, amidst rapid advancements in communication and the significant technological leaps experienced globally, indicates that none of these theories cannot stand alone to serve as a universal standard for international responsibility. While the theory of fault, despite its limitations and criticisms, remains a foundational element of international responsibility in numerous cases especially concerning the proof of breaches of international obligations when due diligence is required it appears that although the objective theory is currently the most established and widely supported[12], this does not negate the potential applicability of the theory of fault in certain circumstances, as well as the risk theory and bearing consequences .

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[8] Badria, A. A, (1987). International law in time of peace and war, and its application to the State of Kuwait, pp 286.

[9] Ahmed, A& Omar. A. B. (1990). The mediator in public international law: a comparative study with interest the position of the Kingdom of Saudi Arabia. Alexandria: Foundation Youth League, pp 526.

[10] Mohamed, T. G. (1973). The general provisions in the law of nations: the law of peace. ed 1, Alexandria: Plant Knowledge, pp 876-885.

[11] Mohammad, S. A, (1995). The origins of public international law. ed 7, part II: International base. Alexandria: Dar University Press, pp 367.

[12] Abdulaziz, M. S. (1973). Public International Law. Cairo: Dar al-Arab Renaissance, pp 385.

The researcher believes that the foundation of international responsibility should be built on the principles of solidarity and complementarily among these theories. In other words, all should be considered collectively, as taking the theory of fault in isolation may lead to inconsistencies. For instance, if a state commits an error against another state but that erroneous act does not result in harm, can the state be held responsible for a wrongful act that caused no damage? Similarly, if we consider the objective theory in isolation, and a state violates an international law rule causing harm to another state, but it is established that the state did not err, will the state be held liable for the resulting damage? The answer lies in considering both theories together; for a state to be held accountable for unlawful acts against another state, its actions must be wrongful and in violation of international law by violation upon one of its rules.

Elements of International Responsibility:

International responsibility is based on three elements: the attribution of the act to the state; the act being internationally unlawful; and the existence of damage.

Attribution of the Act to the State:

It is insufficient to claim of the existence of responsibility that an act is harmful; i.e. unlawful, the act must also be attributed to a state. In domestic legislation, the law requires that the act be assigned to an individual for responsibility to arise against him[13].

It is worth to be mentioned that it is not enough for the action to be attributed to a state; the state must possess full sovereignty and capacity. A state that is part of a federal entity cannot be held responsible for its actions, as it is no longer a subject of public international law; rather, the federal state is responsible for its actions. A state with limited sovereignty is not held accountable for its actions, as it does not exercise the rights of a fully capable state; instead, responsibility lies with the protecting or administering state. Thus, the act must be attributed to an independent state with full capacity or sovereignty. This means that a state is accountable for the actions of its three branches of government (legislative, executive, and judicial) and, in some instances, for the actions of ordinary individuals or public officials as follows:

State Responsibility for Its Three Branches:

1. Responsibility for Legislative authority:

When the legislative authority enacts a law within the limits defined by the state's constitution, that law is effective and binding on those subject to its provisions within the state's territory. However, international law views laws enacted by a state's legislative authority as actions that express the will of that state, or as manifestations of its activity. If these laws contravene international obligations or violate them, they are considered unlawful acts committed by the state, and the state is thus internationally responsible for them. An example of this is the enactment of domestic legislation that expropriates foreign property without providing adequate compensation[14]. The state's responsibility is not confined to laws that violate international law; it extends to its constitutional provisions, which are often

[13] Ahmed, A& Omar. A. B. (1990). The mediator in public international law: a comparative study with interest the position of the Kingdom of Saudi Arabia. Alexandria: Foundation Youth League, pp 527 – 528.

[14] Hamid, S& Aisha, S& Salah. A. (1971). General international law. ed 4, Cairo: Dar al-Arab Renaissance, pp 309.

established by a national constituent assembly, if they conflict, in whole or in part, with the state's obligations under international law. Just as international responsibility arises from the enactment of laws by the legislative authority that contravene international obligations, it also arises when the legislative authority fails to enact necessary legislation, if such enactment is required by the state's international commitments. In this case, the state's international responsibility is also invoked.

The researcher believes that the state is responsible for all internationally unlawful actions emanating from its legislative authority, whether the act or action is positive, such as enacting laws that contradict international obligations, or negative, such as failing to enact necessary laws to fulfill the state's international obligations. For instance, if Parliament refrains from approving legislation that must be enacted to implement a specific treaty, or fails to approve necessary financial credits for the fulfillment of the state's obligations at the international field.

2. Responsibility for Judicial Actions:

States are held accountable for actions taken by their judicial authority under the following circumstances:

In the event that a court of a given state issues a ruling that contravenes the state's international obligations, such as subjecting a diplomatic representative to its jurisdiction, or if the state's jurisdiction is delineated in an international treaty and the courts refuse to adhere to that treaty, or if the courts neglect to apply international law or misapply it. An example of this is the denial of justice to foreigners, which can manifest in the following ways:

- Denying foreigners the right to access the courts or preventing them from defending their rights.
- A clear deficiency in judicial procedures or guarantees, such as when a court refuses to adjudicate a foreigner's claim, or when there is excessive delay in judicial proceedings, or conversely, if a foreigner is tried hastily, impairing their right to defense[15], or tried by a court established specifically for that purpose, lacking adequate defense guarantees, or if the judgment in favor of the foreigner is not enforced.
- The court's judgment exhibiting gross injustice, as when national court rulings are driven by animosity towards foreigners and a desire to harm them.
- Additionally, denying justice for some to view actions that, while not issued by the state's courts, are related to the distribution of justice, such as imposing penalties on a foreigner without trial, or the failure to prosecute those responsible for crimes committed against a foreigner, or their evasion of punishment.

The researcher asserts that the state is accountable for judgments issued by its courts if these judgments contradict the rules of public international law. In this context, the state cannot invoke the principle of judicial independence, as this principle constitutes an internal rule applicable within the relationship between the judiciary and other state authorities, and foreign states have no bearing on this relationship. Furthermore, in the realm of international

[15] Abdul Karim, A. (1998). To protect victims of armed conflict. Ph.D. thesis, Cairo: Faculty of Law, pp 361.

relations, states encounter one another as units responsible for the actions of their various authorities. Since a foreigner presents before national courts as either a plaintiff or a defendant, in all these cases, the state is liable if there is a breach of an international obligation imposed on it. For instance, if it subjects a diplomatic representative to its jurisdiction, if the state's jurisdiction is defined in international agreements and the courts deviate from these agreements, or if the courts neglect to apply international law or misapply it.

3- Responsibility for Actions of the Executive Authority

International responsibility of the state may arise from both positive and negative actions taken by its executive authority, whether these actions are executed by central or local authorities, or by high-ranking or low-ranking officials. It does not matter whether the action that triggers international responsibility is performed by the head of state, the prime minister, a minister, a police officer, a member of the armed forces, an authority appointed by the state to govern one of its colonies, or one of its diplomatic or consular representatives[16]. What is important is that the act is performed by the official in their capacity as such, whether within the scope of their official duties or beyond it. According to prevailing opinion, a state is held responsible for the actions of its officials that exceed their specialty, based on the principle that the state must choose its officials wisely and bears the consequences of any misjudgment in that selection. Therefore, the state is liable for their negligence.

Acts performed by officials in purely personal capacities, without any relation to their official duties, are treated as actions of ordinary individuals, and the state is held accountable only to the extent of its responsibility for the actions of ordinary individuals[17]. A pertinent question arises regarding the extent of the state's responsibility for acts of ordinary individuals that involve aggression against other states or their nationals?

Originally, a state is not held responsible for the actions of ordinary individuals that constitute aggression against other states or foreign nationals, provided there is no evidence of failure or negligence on the part of the state, such as deficiencies in its regulations or failure to pursue or apprehend the perpetrators.

The same rule applies to the state's international responsibility regarding internal disturbances and acts of violence; the state is not held responsible for acts of violence unless it can be proven that it failed to take the necessary precautions to prevent aggression against foreigners or to pursue and punish the offenders[18]. Similarly, it is agreed in legal doctrine and jurisprudence that a state is not responsible for the actions of insurgents unless it can be demonstrated that it failed to take necessary precautions to prevent or suppress the uprising.

The legal framework governing the actions of insurgents is similar to that which governs ordinary individuals, but lawful acts performed by insurgents are subject to specific regulations in two cases as follows:

[16] Mohammed, A. I. (1983). International responsibility for the implementation of United Nations resolutions. part 1: General theory of international responsibility. Kuwait, pp 524.

[17] Saeed, S. G. (1985). The principle of abuse of right. Cairo: Dar al-‘Arab Thought, pp 536.

[18] Mahmoud, A. D. (1976). Prohibit the use of force in international relation. Master Thesis, Al-Azhar University, pp 97-98.

Recognition of Insurgents as Veterans:

- If a state recognizes combatants as veterans, it is exempt from bearing international responsibility for the actions of these insurgents against other states or their nationals. Conversely, if the state does not recognize them as veterans, it remains responsible for their unlawful acts. However, states that recognize insurgents as veterans are precluded from holding the original state liable for the actions of those insurgents.
- In the event that the revolution succeeds and the insurgents assume power, the revolutionary government then becomes responsible for damages inflicted on foreigners from the onset of the revolution. This is based on the premise that the success of the revolution and the assumption of governance by the insurgents indicates the populace's approval and endorsement of the revolution, thereby attributing the actions of the insurgents to the state from the time the revolution commenced[19].

The Act Must Be Internationally illegal:

International legal doctrine agrees that an unlawful act is one that constitutes a violation of international law; it is an act that contravenes the rules of international law, whether treaty-based or customary, or general principles of law. As defined by legal scholar "AJO", it is "the conduct attributed to the state under the law, which takes the form of an act or omission that constitutes a breach of one of its international obligations." The criterion for unlawfulness is an objective international standard, independent of the source of the obligation, because a breach of any international obligation, regardless of its origin, produce international responsibility, regardless to the description of the act under domestic law. Moreover, the means by which a violation of international law is realized, whether through action, inaction, or negligence; what matters is that the state fails to exercise the due diligence required in its jurisdiction.

Damage:

In domestic laws, if an unlawful act occurs without causing damage, international responsibility for compensation does not arise. In international law, criminal responsibility is only present in rare cases, such as in matters of war.

Therefore, the first element of responsibility is damage; if damage is absent, responsibility is also absent. Even if some provisions do not explicitly mention this condition, others require it. For instance, in 1968, a Turkish patrol illegally seized and searched an Italian ship. Turkey acknowledged the illegality of the actions and reprimanded the patrol's commander. However, Italy was not satisfied with mere reprimand and demanded /50,000/ French francs as a due compensation for the shipping company. The arbitration ruling denied the claim for compensation, justifying that the company had not suffered any damage[20].

Types of Damage:

Damage can be classified either in favor of the aggrieved party or the entity that suffered the harm.

[19] Mohammed, H. G. (1967). The principles of public international law. Cairo: Dar al-Arab Renaissance, pp 454-456.

[20] Ghazi, H. S. (2007). Summary of the principles of public international law. ed 1, Oman: House of Culture for Publishing and Distribution, pp 334.

1. **Material Damage:** This refers to any infringement of the material rights of an international legal person or its nationals, resulting in a tangible and evident effect. Examples include the destruction of a ship, the annexation of part of a territory, the destruction of property, the killing of nationals, or causing bodily harm leading to permanent disabilities. It is required that the damage be direct, meaning it must have directly affected the person claiming compensation for the harm suffered. Additionally, material damage can also be a derivative harm affecting other individuals connected or related to the victim[21].

2. **Moral Damage:** This involves any harm to honor, or the international status of a person or its nationals. In other words, it is any infringement on the rights of international persons or their nationals that results in painful but intangible effects. An example of moral damage is when the security forces of one state pursue a fugitive across the borders of a neighboring state. In this case, the first state would be liable for compensating the moral harm resulting from violating the integrity of another state's territory. Moral damage has become compensable in international law, as rulings from the early 20th century, which stated that pain and suffering could not be quantified in monetary terms, have returned to acknowledge the principle of compensation for pure moral damages[22].

Based on the Affected Party

Damage can be classified as direct or indirect[23]. Distinguishing between direct and indirect damage can be challenging, as a single act may lead to a series of subsequent damages. The reality in international arbitration often leads to the non-compensation of indirect damage, as evidenced in the "ALABAMA" case of /1872/. However, a ruling from the German-Portuguese arbitration court in the "NAULILA" case of /1928/ took a bolder and more equitable approach, determining that compensation for indirect damage is required if the perpetrator of the civil crime could foresee the direct and indirect damages resulting from their unlawful act.

The researcher believes that the elements of responsibility should be limited to the first two: the attribution of the act to the state and the unlawfulness of that act. As for the third element concerning damage, it is not necessary, as damage is considered a consequence of the unlawful act and not an essential component of responsibility. A state should be held accountable for an unlawful act merely upon violating a rule of international law, even if no damage has occurred. International law, like domestic law, has fundamental rules that should not be violated.

The most significant results which have been reached are as follows:

1. A breach of an international obligation establishes a legal link between the international legal person that failed to fulfill its obligations and the legal person against whom the breach occurred, obligating the latter to seek compensation from the former.

[21] Soluman, M. (1948). Move right to compensation to the heirs of the victim. Journal of Law and Economics. the number in March, pp 109.

[22] Ahmed, A& Omar. A. B. (1990). The mediator in public international law: a comparative study with interest the position of the Kingdom of Saudi Arabia. Alexandria: Foundation Youth League, pp 546.

[23] Adel, A. A. (2009). General international law. Ed 1, Oman: House of Culture for Publishing and Distribution, pp 290.

2. For international responsibility to arise, damage must be incurred by another party as a result of an act contrary to international law. If no material or moral damage occurs, the state's responsibility does not arise, as damage is considered a component rather than a consequence of responsibility.

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Samir, M. F, (1976). *International liability for damage resulting from the use of nuclear power in time of peace*. Ph.D. thesis. Cairo.

Soluman, M. (1948). Move right to compensation to the heirs of the victim. *Journal of Law and Economics*. the number in March.