Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 14(63) No. 2 – 2021
https://doi.org/10.31926/but.ssl.2020.14.63.2.27

THE COMPLEXITY OF THE INTERNATIONAL LIABILITY OF STATES

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Abstract: *The international liability of states does not have a consensual regulation, it is based on the perpetration by the state of an act that can be considered illegal, consisting in the violation of an international obligation, and in order to engage the international liability of states, it must be analyzed, in each concrete case, if the constitutive elements of the liability are met, starting with the existence or not of an international obligation for the state in question, but not in a normative framework as strict as in the case of the international criminal liability of individuals.*

Key words: *state, liability, sovereignty, conduct, obligation*

Contemporary international law consists of principles and legal norms created on the basis of the agreement of will between states in order to regulate the relations between them.

Through its processes and legal forms of creation and development, international law is a right of relations between states, an interstate law, formed on the basis of the will of the states expressed through specific legal means. States are those that create international law but, at the same time, along with other international entities, are also its recipients ensuring compliance and the implementation of its rules.

In carrying out its international activity, each state exercises its foreign policy corresponding to its main interests and goals, pursuing the creation of favourable conditions for the achievement of the main goals and directions of its external politics.

In this respect, it must be emphasized that in the international relations, different positions, sometimes even opposite, and interests of the states are met and confronted, a fact that is also manifested in the process or formation and application of international law.

The state is considered the primordial subject, originating in relation to other entities, having a personality of international law recognized by the states; it is at the same time a universal subject as it exercises its rights and assumes its obligations in any field of international relations.

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The international personality of the state is a direct consequence of the fact that it is an independent political entity which occupies a central place and has a major significance in international relations. The political and legal basis of its status as a subject of international law is represented by state sovereignty.

The sovereignty enjoyed by states does not allow them to violate the norms and principles of international law, or to harm the interests of other states, meaning that they will be liable for their illicit acts or deeds as well as for those which, although not illicit, prejudice other states.

International liability is a basic institution of public international law; it is the fundamental condition for the existence of a rule of law, either at the international level of the states or in the international community.

The international liability contributes to the achievement of international legality to guarantee the international legal order, to the establishing of international relations and to the development of cooperation between states and nations.

The institution of liability, within the contemporary international law, fulfils particularly important functions. From this point of view, violations of the rules of international law, especially those related to ensuring international peace and security, have particularly serious consequences.

At the same time, due to the accentuated development of science and technology, the states carry out activities that, even if within the limits of international law, present a high degree of danger, being able to cause important damages to other states or their citizens.

It is required to remember that, even since 1927, the Permanent Court of International Justice stated in a resolution that "It is a principle of international law that the violation of an engagement entails an obligation to make restoration in an appropriate manner." (Niciu, 1993, p.115).

The international liability of states constitutes a fundamental institution of public international law, characterized by complexity that is not analysed from the perspective of criteria and conditions specific to the legal institution of liability in domestic law and is one of the mechanisms of public order of international law (Moldovan, 2017, p.269).

In the structure of public international law, the legal institution of liability occupies an important place and is the object of study both for the specialized doctrine and also for international bodies and states. Liability is a complex institution with many uncertain or controversial elements that distinguish it from the institution of liability in domestic law, over which it does not overlap neither in meaning nor from the perspective of content and authors.

Under the public international law the liability may belong to the states, individuals, or international intergovernmental organizations. This chapter will focus on the analysis of the content and constituent elements of the international liability of states and on the liability of individuals, which takes place within the division of public international law called international criminal law and whose main characteristics and legal basis were presented in the introductory part of this work.

A distinction must be made between the characteristics and content of international liability with regards to states and to the individuals, primarily because in

matters of liability reference is often made to acts of the same name (such as, for example, genocide). In addition, in some cases, for acts of particular gravity, the term "international crimes" is used both with reference to states and to individuals, but these circumstances are not such as to justify the idea that states and individuals are responsible internationally for the same acts and under the same forms.

To illustrate, the first international document that defined genocide (1948, Convention) and described it as the worst international wrongful act and a crime under international law is the 1948 (Moldovan, 2017, p.270).

Convention on the Prevention and Punishment of the Crime of Genocide, which contains obligations for contracting states to prevent and sanction acts of genocide and, in this regard, to provide in their domestic law sanctions for persons accused of committing acts of genocide.

The fact that the International Court of Justice resolved the request regarding the Bosnian (ibidem, p.270) genocide in 2007, genocide being the most serious international crime, by analysing the provisions of the 1948 Convention regarding the prevention and repression of the crime of genocide and the conditions for incurring international liability of states, is not capable of asserting the existence of international criminal liability of states.

In this concern, the International Court of Justice has established a violation of the international obligation of the former Yugoslav Republic under the 1948 Convention to prevent acts of genocide committed during the Srebrenica massacre.

What must be emphasized is that beyond the use of the same terms, with the same meaning, in the case of certain illicit acts, the legal basis and the legal nature of the international liability of states and individuals are different.

With regard to the legal nature of the two types of international liability, it should be emphasized that the international liability of states is predominantly of customary nature, while international criminal liability derives from international treaties, given that legal acts have been adopted in particular, which comprehensively and exhaustively define the facts for which individuals may be liable for committing international crimes, by applying the principle *nullum crimen sine lege* (which has the value of a general principle of law).

The international liability of states does not have a consensual regulation, it is based on the perpetration by the state of an act that can be considered illegal, consisting in the violation of an international obligation, and in order to engage the international liability of states, it must be analysed, in each concrete case, if the constitutive elements of the liability are met, starting with the existence or not of an international obligation for the state in question but not in a normative framework as strict as in the case of the international criminal liability of individuals.

The reason for this situation and the distinction between the two types of international liability may be the exceptional nature of the liability of the individual, but which can be engaged, in principle, only after expressing the agreement of will of states expressed in an international treaty defining the respective illegal acts and establishing the jurisdictional mechanisms for their sanctioning.

Under the international law, the liability of the states is based on the rule that any breach of an obligation under a rule of international law entails the liability of the perpetrator of the breach and his obligation to repair the damage caused (Miga-Beșteliu, 2014, p.27).

In this regard, the Permanent Court of International Justice ruled in the Factory ar Chorzow (in the judgment of jurisdiction in 1927) (Moldovan, 2017, p.270). „It is a principle of the international law that the violation of a commitment (of a convention) entails the obligation of repairing (compensating) in an appropriate form. Therefore, the reparation is the indispensable completion of non-compliance with a convention and it is not necessary for it to be mentioned in the convention itself."

The international liability of states represents at the same time a fundamental institution of customary international law and a general principle of law within the meaning of the provisions of art. 38 (p. 1 lit. c) of the Statute of the International Court of Justice.

Also, the mechanism for incurring the international liability of states is applicable both in case of violations of the principles of general international law and of the obligations derived from international treaties. The process of incurring the international responsibility of the state is closely linked to the procedure of international claims, to the mechanisms for the peaceful settlement of international disputes and to the issue of establishing compensations for the violation of international obligations.

The legal nature of international liability is not based on the notion of tortious liability under domestic law, but is related both to the violation of an international treaty and to the violation of an international obligation that may be of a customary nature.

In general, it is considered that the international responsibility of the state can have two forms - liability for illegal facts or acts (contrary to international law); liability for prejudicial consequences produced by acts not prohibited by international (Năstase, Aurescu, 2015, p.354) law or for abuse of right(Moldovan, 2017, p.272). The second category includes those situations generated by the gravity of the consequences of activities carried out by the state as a result of technical progress, which are not prohibited by international law, but which can cause damage to the environment and the population (activities such as those related to the processing of chemicals, the production of nuclear energy, launching objects into outer space.

The notion of international liability of states which makes the subject of analysis of this section should not be confused with other situations in which the states appear as part of a litigious legal report, in the sense of considering that all situations in which the states appear are cases of entrainment of international liability for illicit acts, according to the rules which will be further developed in the content of this section.

Therefore, it is imposed to make a series of distinctions and clarifications regarding the disputes in which states appear as parties, in order to avoid confusion with other institutions or legal mechanisms of public international law.

Not all cases of breach of an obligation by a state open the way for the exercise of its international liability, even if there may be incidents, at least partially, of public international rules. This is the case of commercial disputes brought before the national courts, derived from commercial transactions concluded between states, which will not

be settled according to the rules of public international law. However, the rules of public international law shall determine the existence and extent of the immunity from jurisdiction or enforcement of the state seized before foreign national courts.

Referral to an international court by a state with a claim made against another state does not in all cases amount to the existence of a case for establishing the international liability of states, but may involve the interpretation of an international treaty and the establishment, depending on the result of the interpretation of some obligations in charge of the states or the clarification of the sovereignty over a territory or the delimitation of the maritime areas between riparian states.

The recent development and evolution of public international law has led to a change in the institution of international liability of states, in the sense that in the present it no longer concerns exclusively a disputed legal relation between states (in which a state claims a violation of an international obligation by another state before an international jurisdiction), but the notion has acquired new dimensions following the creation of the possibility for individuals to refer to international jurisdictional bodies with complaints or requests directed against the states in which they invoke the violation of certain international obligations assumed by them.

This category includes the jurisdictional mechanisms established in the field of protection at regional level, of fundamental rights and freedoms. In this regard, it may be mentioned the case of individual complaints that particulars may make against the states part of the European Convention on Human Rights, before the European Court of Human Rights or similar courts on the American continent (Inter-American Court of Human Rights) and the African continent (Court of Human and Peoples' Rights).

Another example is the arbitral tribunals established within international organizations, which individuals can address, in contradiction with the states.

In this regard, it can be mentioned in the matter of protection of foreign direct investments the Washington arbitral tribunal within ICSID that settles disputes related to foreign direct investment or the fact that in the matter of international trade - within the World Trade Organization (WTO), one of the main activities is the settlement of disputes if a government of a member state considers that another member's government has violated an agreement or commitment which has been made within the Organization.

In other words, the institution of the international responsibility of states does not strictly concern only the relations between states but has also been extended to the legal relations between states and individuals in those areas where international treaties which establish this prerogative have been adopted.

The presentation of these distinctions results in another essential, defining feature of the legal nature of the international responsibility of states: it is not of criminal matter.

Public international law includes regulations that constitute international criminal law, an important part of public international law that experienced a strong evolution and development in the second half of the twentieth century, briefly presented in the introductory part of this paper. It is essential to emphasize and note that the active subject of international criminal liability is exclusively the individual, not the state.

International legal acts that define international crimes also establish mechanisms for sanctioning the perpetrators which are individuals not states, with the aim of repressing and preventing acts considered of particular gravity.

The distinction between international crimes and offenses, contained in the 1996 Draft Articles of the Commission on International Law on the international liability of states, which was abandoned in 1998 and not included in the 2001 Draft Articles, should not be understood as an attempt to codify the criminal form of international state liability.

Currently there are no international conventions regulating the international liability of the state for illicit acts, this legal institution having a customary nature.

The institution of international responsibility was an area of real interest in the development of international law in the first half of the twentieth century, being a topic chosen for codification in the League of Nations and one of the main topics of the 1930 Hague Codification Conference, which failed, however, to adopt a text on this subject (in fact, the Conference only succeeded in adopting a text regarding citizenship).

The UN Commission on International Law has had and continues to have a significant contribution to the development of this difficult institution of international law. The UN Commission on International Law has carried out, since 1949, extensive activities of systematization and codification of the rules on the international engagement of states for illicit acts and has drafted, over time, proposals for articles which it has presented and submitted for debate to the UN General Assembly in this matter (Maxim, 2012, p.11).

The most recent text is the Draft Articles on the International Liability of the State for Illicit Acts, 2001.

The Draft Articles of 2001 contains 59 articles structured in four parts: the first part is called ”Illicit international act of the state” and deals with general principles, imputability of state conduct, violation of an international obligation, state liability in connection with the act of another state, cases that remove the illicit nature of the international act; the second part is entitled "The content of the international liability of states" and it analyses the general principles on this matter, the restoration of damages, the situations that constitute serious violations of international obligations in accordance with the imperative norms of international law; the third part is entitled ”Implementation of the international liability of states” and it analyses the invocation of state liability and the countermeasures that can be taken by the victim state; the fourth part contains the last general provisions of the document.

The purpose of the Draft Articles of 2001 was to systematize, through codification and progressive development, the fundamental rules of the public international law regarding the international liability of states for illicit acts committed at international level.

The Articles of the Project focus on the systematization of the general rules for incurring the liability of states and do not aim to define the content of international obligations, the violation of which is the premise for incurring the international liability of states.

Until now there have been no additions made to the structure or content of the Draft Articles of 2001, practically no progress has been made regarding the regulation of this matter of international law by consensus.

However, there have been activities at international level which took place in this field.

Thus, in 2004 the General Assembly brought the 2001 Draft Articles to the attention of the Member States and requested the Security Council to prepare a compilation of decisions of international courts or other institutions, regarding the Draft Articles.

In 2007 the General Assembly noted the realization of the respective compilation (Moldovan, 2017, p.276). and brought the Draft Articles back to the attention of the Member States, deciding to further examine the issue of a convention on the liability of states for wrongful acts at international level. In 2010 the General Assembly adopted the same position, although some states have requested that a diplomatic conference be held in order to discuss the Draft Articles, while others preferred to maintain the current status, namely that of a document of the International Law Commission approved ad referendum by the General Assembly.

According to the conception of the UN based International Law Commission, expressed in art. 1 of the Draft Articles of 2001, the foundation of the liability of states is the commission of an illicit act. The wording of art. 1 of the Draft Articles of 2001 is relevant because, as also expressed in the Report of the International Law Commission, it states the basic principle that governs the entire institution of international liability of states according to which this is generated by the violation of an international obligation.

In connection with the notion of international obligation, in order to call into question the involvement of the international liability of states, the first condition is that the state in question has an international obligation that has allegedly been breached. A particular example of the interpretation of this concept is given by the International Court of Justice in the Bosnian genocide case regarding the obligation to prevent genocide: „461. The obligation to prevent the commission of the crime of genocide is imposed by the Convention on the Genocide to any Member State (of the Convention) which, in a given situation, has the power to contribute to the restriction, in any measure, of the commission of genocide.

In order to make this finding, the Court does not have to decide whether the acts of genocide in Srebrenica would have taken place anyway, even if the respondent state had acted as it should have and would have used the means at its disposal. This is due to the fact that the obligation to prevent genocide puts the state under the duty to act, which does not depend on the certainty that its action will succeed in preventing the commission of acts of genocide or the probability of this result.

Therefore, it does not result from the above reasoning of the Court the finding of the defendant to be in violation of the obligation to prevent the atrocious suffering caused by the genocide in Srebrenica, which would not have taken place if the violation had not been committed."

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