The Nature of International Responsibility of States in the Contemporary World Arena

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***Abstract*— The subject of state responsibility occupies a central place in international law. Its basic principle, now well established, provides that every internationally wrongful act entails the responsibility of the state. One of the most controversial problems regarding the international responsibility of the state for wrongful acts concerns the nature of such responsibility. The present paper examines the nature of state responsibility for international wrongful acts under existing international law. It takes the view that the International Law Commission (ILC), in its Draft Articles on State Responsibility can be applied in case of breach of any international obligations by states because there is no international convention regarding state responsibility on the international plane. Finally, the study concludes that the identification of the nature of the state responsibility seems to be much more complicated since ILC's Articles do not explicitly address the issue of whether responsibility of state for wrongful act or omission is strict liability (objective theory) or there must be some fault (subjective theory) in the conduct of state in order to hold responsibility; customary international law to some extent does not help in filling the gap exists in ILC's Draft Articles on state responsibility with regard to objective and subjective theories because it supports both theories.**

***Index Terms*— International Law, State Responsibility, Attributability, Wrongful Acts; International Obligations.**

I. INTRODUCTION

It is realistic in any legal system that breach of a legally binding obligation involves responsibility. On the international plane, state responsibility is a fundamental principle of international law and its rules illustrate the circumstance in which a state will be liable for the violation of international obligation. It provides that once state commits an international wrongful act against other states, international responsibility is established between the two; this also gives rise to a requirement for reparation (Dixon, 2007, p.242). The fundamental characteristics of international responsibility depend on certain basic factors: first, the existence of international legal obligations, second, wrongful acts or omissions which violates that obligation and which are imputable to the state responsible (Shaw, 2008, p.781). In recent years, the principles of state responsibility have been a matter of wide study by International Law Commission. In 1948, the United Nations established the International Law Commission (ILC) as a step for achieving the United Nation Charter mandate of "encouraging the progressive development of international law and its codification" (UN Charter Article 3 (a); G.A Res.174(II), 1947). The ILC had been attempting since 1953 in order to codify the law of state responsibility and finally succeeded, with James Crawford as the special Rapporteur, when the UN General assembly adopted revised Draft Articles on 12 December 2001 by GA Resolution 56/83. The basic rule is spelt out in Article (1) "every international wrongful act of state entails international responsibility of that state" (Article 1 of International Law Commission's Articles on state responsibility, 2001). Thus, as a basic principle of state responsibility, the international responsibility of state occurs for the breach of any international obligations.

There are contending theories as whether responsibility of state for wrongful act or omission is strict liability (objective theory); or whether it is necessary to show some fault or negligence by state in its behavior in order to be responsible (subjective theory). In other words, is liability strict or there must be negligence or recklessness in the conduct of state officials in order to held responsibility. The principle of objective (risk) theory states that once breach of obligation is established the state will be responsible regardless of any fault (Dixon, 2007, p. 245), while the subjective (fault) theory requires a state to be negligent or reckless in its behavior in order to be responsible. However, this issue is not addressed by ILC and customary international law is not to some extent a solution to the gap exists in ILC's Draft Articles on state responsibility in regard with objective and subjective theories because it offers support to both theories and cases such as Caire Claim (Caire Claim (France v. Mexico), [1929] 5 RIAA 516) and Neer Claim (Neer claim, [1926] 4 RIAA 60) support objective theory while another cases such as Sri Lanka v. APPL (Sri Lanka v. AAPL [1991] 30 ILM 577) and Corfu channel case (Corfu channel case (UK v. Albania)[1949] ICJ Rep, p.4) support subjective theory. This study, firstly, examines the

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general principles of state responsibility by examining elements of international wrongful act, and explores the concept of Ultra vires acts. Secondly, it discusses the two theories of international responsibility namely, objective (risk) and subjective (fault) theory. Finally, it explains the existence of a general rule for state responsibility and a preferable rule between these two theories.

II. General principles of state responsibility

It is intrinsic in every legal system that violation of a legally binding obligation involves responsibility; in this respect international law is not different from municipal law.

State responsibility is a fundamental institution of international law. It results from the general legal personality of every state under international law, and from the fact that states are the principal bearers of international obligations.

Today, responsibility can be considered as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal with reference to the norms establishing rights and duties (Brownlie, 2008, p. 434). Furthermore, the general principles of international law concerning state responsibility are equally applicable in the case of breach of treaty obligation since in the international law domain there is no distinction between contractual and tortious responsibility. Therefore any violation of international obligations by states, whatever origin gives rise to state responsibility (Susan Breau, 2016, p. 63). In the Gabcikovo-Nagymaros Project case, Hungary and Czechoslovakia signed a treaty for the construction of dams and other projects along the Danube River that bordered both nations. Czechoslovakia began work on damming the river in its territory when Hungary stopped working on the project and negotiation could not resolve the matter which led Hungary to terminate the treaty. Therefore the case brought to the International Court of Justice which reaffirmed a point that "a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the state which proceeded to it, is to be made under the law of state responsibility" (ICJ Reports, 1997 pp.7, 38;116 ILR, P.1).

The responsibility of states can only be engaged for breaches of international law, i.e. for conduct which is internationally wrongful because it involves some violation of an international obligation applicable to and binding on the state. However, when the internationally wrongful act constitutes a serious breach by the state of an obligation arising under jus cogens norms, the breach may require further consequence not for the responsible state only but for other states (Crawford , 2002, p. 192). All states in such cases are under a duty to co-operate to bring the breach to an end, not to recognize as lawful the situation created by the breach. International responsibility of states entails a state to make reparation when it fails to comply via an act or omission attributable to the state, with an obligation under international law. Enclitic in this straightforward statement is many unsettled issues, including the standard of care owed, the nature of attributable acts giving rise to liability and the scope and nature of reparation (Shelton, 1990, p. 93). In addition, the term of reparation is sometimes used narrowly in the sense of money damage. More ordinarily, it refers to the whole range of remedies available for breach of an international obligation.

States responsibility becomes more complex as the result of development which has affected international society. In international legal order, state responsibility is the necessary corollary of the law itself (Crawford, Pellet and Olleson, 2010, p. 4), if any attempt is made to deny the concept of state responsibility because of its conflict with the concept of sovereignty, there is no meaning to the existence of international law. Holding states responsible for breaches of international obligations can play an important role in maintaining respect for international law, confirm the validity of fundamental international norms relating to peace and security, and can prevent the escalation of threats to international security by promoting the reconciliation of the relevant states and restoring confidence in a continuing relationship (Kimberley, 2011, p. 2).

A consequence of binding legal obligation is a legal responsibility for violation of that obligation. In recent years, the principles of state responsibility have been the subject of much work by the International Law Commission (ILC) that produced a set of Draft Articles on state responsibility (Dixon, 2007, p. 242). The final Draft consists of 59 Articles in four parts: part one, the international wrongful act, sets out the essential requirement for international responsibility to be incurred; part two, content of the international responsibility of state, deals with the legal consequence for the responsible state for any international wrongful act especially in relation to cessation and reparation; part three include the implementation of the international responsibility of state and part four deal with the general provision applicable to the Articles as a whole (Wallace, and Martin-Ortega, 2009, p. 195).The Draft Articles are products of almost forty years work by ILC, guided by a series of special rapporteurs, F.V Garcia Amador (1955-1961), Roberto Ago (1963-1979), Willem Riphagen (1979-1986) Gaetano Arangio-Ruiz (1987-1996) and James Crawford (1997-2001) (Crawford , 2002, p. 4). At it is 2477th meeting on 15 May 1997, the commission established a working Group (consist of J. Crawford, I. Brownlie, J. Dugard, J. Kateka and C. Yamada) on state responsibility to address matters in relation to the second reading of the topic. There was a suggested timetable of work in order to facilitate the work of group in designing the commission's work plan for the quinquennium. Consequently, since 1997 much work has been done to reshape the original scheme and in 2001 the final Draft was adopted by the ILC on second reading. The draft articles reflect the gradual development of international law regarding state responsibility. The draft articles constitute not only an important contribution to the development of legal rules regarding state responsibility but they are also very significant for safeguarding international

relations and maintaining the stability and healthy development of the international legal order (Xinmin, 2008, p. 563). They have attracted wide attention from all governments and international judicial organs. Quite a number of states have already begun to use them as guidance in solving problems regarding state responsibility (Xinmin, 2008, p. 564). Additionally, the Permanent International Court of Justice, International Court of Justice and some regional judicial institution have referred to the articles as a basis for their decision-making.

Article (1) of ILC stated the general principle of state responsibility which declared by Permanent Court of International Justice (PCIJ) in Chrozow factory case (Chrozow factory case (Portugal v. Germany) [1928] P.C.I.J., Ser A, No 17). In this case the question before the court was whether Poland can be made liable for such violation of an international agreement. After the First World War due to a bipartite agreement between Germany and Poland; Germany agreed to transfer the control of Upper Silesia area to Poland. On an agreement that Poland would not forfeit any property of Germany, but thereafter Poland forfeited two of German Companies situated at that area. Therefore the court stated that "every international wrongful act of state entails international responsibility of that state" (Article 1 of International Law Commission's Articles on state responsibility 2001). Furthermore, the PCIJ applied this principle which sets out in Article (1) of ILC in a number of cases, for instance the Phosphates in Morocco case (Phosphates in Morocco, Preliminary Objections [1938] P.C.I.J., Ser A/B, No 74, p.10). This case was about certain alleged rights of Italian citizens to explore phosphate deposits in the then-French protectorate of Morocco (Protectorates and the Protected States). The court asserted that when state commits an international wrongful act against another state, international responsibility is established instantly as between the two states (Crawford, 2002, p. 77). Moreover, in the Spanish Zone of Morocco claims, Spain and Great Britain concluded an agreement on 35 claims of British subjects and British protected against Spain for damage caused between 1913 and 1921 in the Spanish Zone of Morocco (Protected Persons; Protectorates and Protected States), mainly as a result of the uprisings of the tribes, the Spanish military operations and the construction of infrastructures. The claims concerned compensation for the seizure of land, destruction of houses, hedges, gardens and loss of crops, looting of livestock and goods. In this case Judge Huber emphasized that "responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not meet" (RIAA, p.615 (1923); 2AD, p.157). The International Court of Justice (ICJ) also referred to this principle in the advisory opinion relating to reparation for injuries (Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Reports, p.174) suffered in the service of the United Nation, in which it stated that "refusal to execute a treaty obligation involves international responsibility" (I.C.J Reports [1949] p.228). Thus Article (1) of the ILC is supplemented by Draft Article (2) which provides that the international wrongful act of state exist when these elements are achieved:

- When conduct consists of an action or omission is attributable to the state under international law.
- Constitutes a breach of international obligation of the state.

According to this Article, state responsibility requires two elements: international wrongful act or omission which is imputable (attributable) to that state. These two elements prescribed by Permanent Court of International Justice in the Phosphates in Morocco case (Phosphates in Morocco, Preliminary Objections [1938] P.C.I.J., Ser A/B, No 74, p.10), the court clearly associated the creation of international responsibility with the presence of an "act being attributable to the state and described as a contrary to the treaty rights of another state" (Phosphates in Morocco, Preliminary Objections [1938] P.C.I.J., Ser A/B, No 74, p.28). Furthermore, the International Court of Justice has also referred to these elements in US Diplomatic and Consular Staff in Tehran case (United States Diplomatic and Consular Staff in Tehran [1980], I.C.J. Reports, p.3); it illustrates that "to establish responsibility of Iran first, it must be determined how far the acts are imputable to the Iranian state. Secondly, it must be considered their compatibility or incompatibility with the obligation of Iran under conventions or under any other rules of international law that may be applicable" (United States Diplomatic and Consular Staff in Tehran [1980], I.C.J. Reports, at p.29, para.56). Thus to establish the existence of international responsibility, these elements must be achieved. In some cases, however, the respondent state may claim that it is justified in its non-performance, for example, because it was acting in self-defense or was subject to a situation of force majeure (Desierto, 2012, p. 49). In international law, such defenses or excuses are termed circumstances precluding wrongfulness. They will be a matter for the respondent state to assert and prove not for the claimant state to negative.

III. IMPUTABILITY (ATTRIBUTABILITY)

In order to state to be responsible, the wrongful act or omission must be attributable to that state. The rules of attribution specify the actors whose conduct may engage the international responsibility of the state for breaches of international obligations. Imputability is a legal fiction which assimilates the acts or omission of the state officials or organs to the state itself (Wallace and Martin-Ortega, 2009, p. 199) that become liable for damage resulting to the persons or their property. An example of state responsibility was indicated by the ICJ in Nicaragua vs. USA case (Nicaragua v. United States [1986] I.C.J Repots, p.14; 76 ILR, p.349), the issue was used of force against another state whereby USA was accused for violation of public international law by supporting rebellions against Nicaragua government, and mining Nicaragua's harbors. The court decided that U.S should bear an international responsibility because customary international law obliges state not to use force against another state. In addition the ICJ founded that "acts attributable to the USA included the laying

of mines in Nicaragua territorial waters and certain attacks on Nicaragua ports, oil installation and naval base by its agents" (I.C.J Reports [1986] para.48-51 and 146-9; 76 ILR, pp.382, 480). In international law the general rule is that conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation, or control of those organs, that is, as agents of the state. This basic rule of imputability sets out in Article 4 of ILC " the conduct of any state organ shall be considered an act of that state under international law, whether the organ exercise legislative, executive, judicial or any other function" (Article 4 of International Law Commission's Articles on state responsibility 2001). This Article makes state responsible for the act of all its organs such as police and army that acted under the direction, instigation or control of those organs (Stephan Wittich, 2002, p. 893). This reflects the customary law position that a state is liable for the actions of its agents and servants whatever their particular status. In the Rainbow Warrior Arbitration case (Rainbow Warrior Arbitration case (New Zealand vs. France) [1990]82 ILR 499), the French government was liable for their clandestine service in blowing up the Greenpeace ship because the government admitted its responsibility for destruction by agents of ministry of defense of the Vessel Rainbow Warrior in Auckland harbor (D. Evans, 2010, p. 452). In other words, the French government admitted that the explosives had been planted on the ship by agents of the directorate general of external security acting on orders received. As a result, New Zealand sought and received an apology and compensation for the violation of its sovereignty (Bianchi, 2004, p. 22).

On the other hand, private acts do not engage the state's responsibility, although the state may in certain circumstances be liable for its failure to prevent those acts, or to take action to punish the individuals responsible. In the Noyes Case in 1933, where the United States brought a claim on behalf of its national for injuries he sustained at the hands of a drunken mob in Panama. The tribunal affirmed that no state responsibility could arise from the private conduct. Panama could only be held responsible for its authorities own behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order to prevent crimes or to prosecute and punish criminals (Walter A Noyes case (US v. Panama) (1993) 6 RIAA 308). On the fact of the case, such wrongful act on the part of Panama had not been specifically established (Becker, 2006, p.26).

Furthermore, the acts of state organs are still imputable to the state even if they act outside municipal law (Ultra vires acts). In other words, if a state organ or official acts outside the sphere of competence granted to them does not mean that state will not be responsible (Dixon, 2007, p. 248). The ILC in Article 7 provides that "the conduct of any organ state or entity empowered to exercise 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 it exceeds its authority or contravenes instruction" (Article 7 of International Law Commission's Articles on state responsibility 2001). This Article makes an idea clear that the conduct of a state organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the state even if the organ or entity acted in excess of authority or contrary to instructions. This Article was applied in some cases such as Youmans Claim (Youmans Claim (U.S vs. Mexico) [1926] 4 RIAA 110). In this case, Mexican soldiers were ordered to protect threatened American citizens in Mexico City, instead joined the riot during which the American were killed, the arbitrator decided that Mexico was liable for soldiers acts even though they had exceeded their powers (Wheatley, S , 1996, p. 95). In Southern Pacific Properties (Middle East) Ltd vs. Egypt case, where Southern Pacific entered to contract with Egypt to develop land for tourism around the sites of the Pyramids at Giza. There was considerable opposition in Egypt; because of the possibility of disturbance of undiscovered antiquities Egyptian authorities withdrew Southern Pacific's permission to develop the site. Southern Pacific claimed compensation and damages. The dispute to be decided fell according to international legal principles because the contract provided for arbitration by the International Centre for the settlement of investment disputes. In this case, Egypt could not avoid responsibility by pleading that the acts of government officials were null and void under Egyptian law. Therefore, the court reasoned concerning acts that exceeded the authority of the officials performing them: If such unauthorized or ultra vires acts could not be ascribed to the state, all state responsibility would be rendered illusory. For this reason, the practice of states has conclusively established the international responsibility for unlawful acts of state organs, even when it is accomplished outside the limits of their competence and contrary to domestic law (Southern Pacific Properties (Middle East) Ltd v. the Arab Republic of Egypt case, (1993) ILM 933.). Similarly, in In the Union Bridge Company case (Union Bridge Company case, (1924) 6 RIAA, p.138; 2AD, p.170), a British official of the Cape Government Railway mistakenly appropriated neutral property during the Boer War. It was held that there was still liability despite the honest mistake and the lack of intention on the part of the authorities to appropriate the material in question. The key was that the action was within the general scope of duty of the official. In the Sandline International Inc . vs. the independent state of Papua Guinea case; the dispute arose from breach of contract for the supply of military and security services to a UK firm by Papua New Guinea (Jean Ho, 2018, p. 82). The tribunal emphasized that "it is a clearly established principle of international law that acts of a state will be regarded as such even if they are ultra vires or unlawful under the internal law of the state, their institutions, officials or employees of the state acts or omissions when they purport to act in their capacity as organs of the state are regarded internationally as those of the state even though they contravene the internal law of the state" (Sandline International Inc . vs. the independent state of Papua Guinea case (1998)117 ILR, PP. 552, 561).

Moreover, Article 8 of the ILC Draft Articles states that the conduct of a person or group of persons shall be considered as an act of state under international law if the person or group of persons is in fact acting on the instructions of, or under the

direction or control of, that state in carrying out the conduct. This provision was also considered in the case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro). The ICJ held that the 'overall control' test was not appropriate for state responsibility and that the test under customary law was reflected in article 8 whereby a state would be responsible for the acts of persons or groups (neither state organs nor equated with such organs) where an organ of the state gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed" (Bosnia and Herzegovina vs. Serbia and Montenegro (2007) ICJ, Report, paras. 403-406). In other words, the court noted that it was not necessary to show complete dependence of the group, they pointed out that it was necessary to show that the individuals were under the effective control of the state or acting on its instructions. This was essentially a question of fact and the court reached the conclusion that attributability to the state was not established in that case despite the opposite view being taken in the Yugoslav war crimes tribunal (Dixon, 2007, p. 250).

The general principles according to the ILC Articles is that the conduct of person or group of persons can not be attributable to the state under international law if that person or group of person not acting on behalf of the state. In other words private individuals are not regarded as state organs so that the state is not responsible for their acts, but the state may incur primary responsibility because of violation of some other international obligation or because of failing to exercise the control necessary to prevent such acts (Dixon, 2007, p. 252). The first world court case to use the ILC Articles codification in supporting a verdict of an attribution issue was the United States Diplomatic and Consular Staff in Tehran case (US Diplomatic and Consular Staff in Tehran case (United States Diplomatic and Consular Staff in Tehran [1980], I.C.J. Reports, p.3) brought by the United States against Iran which is related to storming by Iranian students of the U.S Embassy in Tehran on 4 November 1979. Under customary international law the wider question of state responsibility was also at issue. The question was whether the attack by the students could be attributed to the Iranian government. The customary international law position is extensively codified in the ILC Articles on responsibility of state for international wrongful acts 2001. The judgment in this case associates to the Article 9 and 11 of the ILC. Article 9 stated "conduct carried out in the absence or default of the official authorities" (Article 9 of International Law Commission's Articles on state responsibility 2001). Article 11 is illustrated "conduct acknowledged and adopted by a state as its own" (Article 11 of International Law Commission's Articles on state responsibility 2001). The ICJ found that "the students include, the present Iranian president, Mahmoud Ahmadinejad, when they executed their attack on the embassy, did not have any form of official status as recognized agent of Iranian state" (United States Diplomatic and Consular Staff in Tehran [1980], I.C.J. Reports, at para.58), therefore, according to the ICJ court the conduct of students which involved attack and storming the embassy could not be imputable to Iranian state on that basis (Cassese, 2005, p.250). However, the court found that the Iranian government failed in its own duty to take any appropriate steps as required by international law to protect the Embassy, staff and archives of US mission against attack by the militants. This inaction constituted clear and serious violation of the Iran' obligation as reflected in the Article 9 of the ILC. In addition, a seal of official government approval was set out by a decree issued on 17 November 1979 by the Iranian ruler Ayatollah Khomeini. The students, including Mahmoud Ahmadinejad, were received at official function and allegedly received medals. The ICJ found that the students now became agents of the Iranian state for whose acts Iran was internationally responsible and this situation is reflected in the Article 11 of ILC.

IV. Breach of International Obligation

The responsibility of states for any internationally wrongful conduct is covered under the category of state responsibility. In other words, under international law states can be held responsible for the violations of international law that can be attributed to them. Thus state responsibility is engaged whenever a state breaches an international obligation by which it is bound. Consequently, international responsibility cannot be avoided by pleading that disputed actions were lawful in domestic law. In other words, it is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of national law. Accordingly, the national law was held to be of primary applicability with respect to unlawful acts in accordance with domestic law no international law (Elisabeth Kjos, 2013, p. 174). As the tribunal held in Noble Ventures, Inc vs. Romania case "It is a well-established rule of general international law that in normal circumstances breaches of a contract by the state does not give rise to direct international responsibility on the part of the state . This derives from the clear distinction between municipal law on the one hand and international law on the other" (Noble Ventures, Inc vs. Romania case, ICSID (2005), ARB/01/11, para.53). Regarding violation of an international obligation, what is considered to be a breach of international law by a state, depends entirely on what its international obligations actually are (Onita 2013, p. 1503). An international obligation of a state may derive from general principles of law, conventions or international custom.

The second element of an international responsibility of state is that the conduct attributable to the state should constitute a breach of an international obligation of the state, whatever the nature of the obligation breached, whether it imposed by international treaties or customary international law (Cassese, 2005, p.251). The conduct which is contributable to state may consist of actions or omission, in other word responsibility of state can arise from either an act or omission.

It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of Article 12 of ILC which defines in the most general terms what constitutes a breach of an international obligation by a state. Article 12 states

that "there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation regardless of its origin". This means that Article 12 applies to all international obligations of states whatever their origin may be, i.e. whatever the particular origin of the obligation concerned. It may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. However, ILC Articles provide the framework for determining whether the consequent obligations of each state have been breached, and with what legal consequences for other states but do not attempt to set out the content and scope of the international obligation breach of which gives rise to responsibility: this is the function of primary rules, whose codification would involve restating most of substantive customary and conventional international law (Crawford, 2013, p. 93).

In addition, international courts and tribunals have treated responsibility as arising for a state by reason of any violation of an obligation imposed by international law. In the Rainbow Warrior case, the tribunal stated that "any violation by a state of any obligation of whatever origin, gives rise to state responsibility and consequently to the duty of reparation" (Rainbow Warrior Arbitration case (New Zealand v. France) [1990]82 ILR, p. 251, para. 75). Similarly, in the Gabcikovo - Nagymaros Project case, ICJ held that "well established that, when a state has committed an internationally wrongful act, it is international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect" (Gabcikovo -Nagymaros Project case , ICJ Reports, 1997 p. 38, para. 47).

Moreover, a state will be liable for use of illegal force by its military force against another state (e.g. Iraq/Kuwait 1990); it also will be responsible if it fails to prohibit autonomous armed groups from using its territory as a base for illegal attacks against another state (Dixon, 2007, p. 245). This duality is affirmed by Article 2 of ILC and by numerous of judicial decisions such us, Janes claim (Janes Claim (US v. Mexico) [1926] 4 RIAA 82) and Asia Agricultural Product AAPL v. Sri Lanka case (Sri Lanka v. AAPL [1991] 30 ILM 577), where Sri Lanka was liable in its own right for failure to exercise due diligence (negligence) in protecting AAPL's property from rebel attacks.

Furthermore, state responsibility can arise from breaches of bilateral obligations or of obligations owed to some states or to the international community as a whole. It can involve the most serious breaches of obligations under peremptory norms of general international law (jus cogens norms). Article 40 provides that "this chapter applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation". Thus the responsible state must have engaged in a serious breach of a rule of jus cogens. According to the Commentary to the ILC Articles on state responsibility, the prohibition of illegal use of force, the prohibition of genocide, human trafficking and the prohibition of racial discrimination are among the norms of jus cogens character (Vidmar, 2012 , p.382). As a result, the ILC Articles on state responsibility adopt the view that breaches of jus cogens are matters of concern for the international community as a whole and, consequently create obligations for all states and not only for the responsible state that breached the international obligation.

There has been a major debate about whether international law requires an element of fault in order a state to be liable or whether liability is strict. Customary international law in this question is not clear and in the form of arbitral and judicial decisions can be found in support of both standpoints (Wallace, and Martin-Ortega, 2009, p. 197). A leading case adopting fault theory is the Home Missionary Society claim (The Home Missionary Society claim[1920] 6 RIAA 42), in this case, arose out of damage caused in rioting provoked by the imposition of a (hut tax) by UK in Sierra Leone (Wheatley, S , 1996, p. 92). The arbitrator decided that the UK was not responsible for the damage to American property as fault had not been shown (Brownlie , 2008, p. 439). In contrast, Caire Claim (Caire Claim (France v. Mexico) [1929] 5 RIAA 42), support strict liability. Caire was French citizen who was killed by a Mexican soldier for failing to supply those 5,000 Mexican dollars. The arbitrator held that Mexico was responsible for this act without need for France to show negligence.

V. THE THEORIES OF STATE RESPONSIBILITY

In legal literature one still encounters many views on the problem of the fault and on the related problem concerning the nature of international responsibility of states.

State responsibility arises from the violation by state of an international obligation. There has been some debate as to whether responsibility of state for wrongful act or omission requires elements of fault or whether responsibility is strict. In deed, the International Law Commission does not distinguish liability based on fault from liability based on strict. In other words, the ILC's Draft Articles on state responsibility leaves open the question of whether element of fault must be established or whether liability can be a strict or objective basis (Hillier, 1998, p.337). The leading case is the Corfu channel case (Corfu channel case (UK vs. Albania) [1949] ICJ Rep, p.4), which is involved damage to British warship sailing through the Corfu channel, an international water way but also within Albania territory. The UK made an application claiming compensation for damage and loss of human lives caused by a mine laid down in Albania waters. The UK argued that Albania had either laid the mines which damaged the warships or had connived in their laying (D. Evans, 2010, p. 457). The court decided that "Albania must have known that the mines had been laid and the danger posed by them, so it was liable under international law for damaged caused and the court ordered Albania to pay UK the compensation" (Corfu channel case (Corfu channel case (UK v. Albania) [1949] ICJ Rep, p.4, at para. 63,67). However, when the judgment is looked at, it can be noted that the court adopts "half way house" approach to the question of subjective (fault) or objective (strict) liability because the court held that Albania liability was based on

failure to warn of known danger to the British ship and this can be argued as an application of objective (risk) theory. In addition, the court found that the lying of the minefield could not have been achieved without knowledge of the Albania government (Corfu channel case (Corfu channel case (UK v. Albania) [1949] ICJ Rep, p.4, at para.21, 22). If Albania had not laid the mines, it knew of them, and had an opportunity, when the Albania coastguards at St George's Point reported the British ships, to warn about the mines, but did not do so, although it was obliged under rules of international law to do that, so Albania was responsible for the damage and loss of human life. However "the inclusion of the word known in the international legal rule would suggest an application of the subjective (fault) theory" (Wheatley, S, 1996, p.93). Therefore, from the judgment it can be noted that the court adopts "half way house" approach to the question of subjective (fault) or objective (strict) liability.

There are two theories as to basis of state responsibility, namely, objective (risk) theory of responsibility and subjective (fault) theory of responsibility.

VI. Objective (risk) theory

According to this theory, a state will be responsible for all consequences of breach of international law which is imputable to that state irrespective of any fault. When violation of international obligation is established a state bears all risk regardless of any fault or intention (Dixon, 2007, p. 245). In this theory a state is strictly liable for all acts of its officials once breach of international obligation has taken place (Kaczorowska, 2010, p. 427) and it can be argued that Article 7 of ILC dealing with attribution where there has been excess of authority or contravention of instruction by an organ of a state similarly adopts strict liability. Furthermore, there are many supporters of the objective theory; Italian jurist Dionisio Anzilotti is the forefront one. He believes that responsibility must always be understood as purely objective in so far as it arises from the violation of the right of another and from imputability, understood as a mere causation link between the wrongful act and the state, independent from any subjective basis of the fault of the actor (Pisillo-Mazzeschi, 1992, p.15). Anzilotti's view has an enormous influence on legal literature and led to the birth of a strong current of "objectivist" authors. Many of these authors noted that the nature of international responsibility of states has been based on the objective theory because of the practical difficulty of proving the fault of the state entity. In addition, these subscribe this theory because they believe that the risk theory encourages agents of the state to ponder the consequences of their actions and it also obviates the heavier burdens that would fall on plaintiffs' shoulders to prove the intention of the state (Zongwe, 2019, p. 200). Some cases support this theory, for example Caire Claim (Caire Claim (France v. Mexico) [1929] 5 RIAA 42). In this case Caire was French national who was killed by Mexican solider for failing to provide them 5,000 Mexican dollars. The arbitrator argued that Mexico was liable for the action without need for France to show negligence (Dixon, McCorquodale, and Williams, 2003, p. 399). In this case also, Verzijl, the presiding commissioner, gave support to the objective responsibility of state, applied "the doctrine of the objective responsibility of the state, that is to say, a responsibility for those acts committed by its officials or its organs, and which they are bound to perform, despite the absence of faute (fault) on their part" (Caire Claim (France v. Mexico) [1929] 5 RIAA 42, at para. 529-531). Similarly, in the Neer claim in 1926, an American superintendent of a Mexican mine was shot. The USA, on behalf of his widow and daughter, claimed damages because of the lackadaisical manner in which the Mexican authorities pursued their investigations. The General Claims Commission dealing with the matter disallowed the claim, in applying the objective theory (Neer Claim (United States v Mexico) (1926) 4 RIAA 60; 3 ILR 213). In addition, in Roberts claim, Harry Roberts was a US citizen, who arrested for murder in Mexico and held by the Mexican police for 19 months. Delays in the prosecution of Roberts were noted by the Mexican government but no action was taken. While in prison, Roberts was also subjected to rude and cruel treatment. The US brought a case on his behalf against Mexico before an arbitral tribunal. The tribunal stated that Mexico was responsible under international law for the injury it caused to Harry Roberts who has detained in poor jail conditions and without the benefit of access to legal counsel (Sunga , 1997, pp. 75-76). Another case is Youmans claim (Youmans Claim (U.S v. Mexico) [1926] 4 RIAA 110), which also support objective theory. In this case, mob in Mexico gathered outside the house of US national. Mexican soldiers were ordered to deal with a violent mob and to protect the house, but instead of protection fired up on it and killed three Americans national inside the house (Harris, D, 2010, p. 429). The Mexican defense that it was not to blame was rejected by General Claim Commission and decided that Mexico was responsible for the act even though the soldiers had exceeded its authority.

Under the concept of objective theory, there are still no general requirements of fault in order to establish a breach of an international obligation (Albers, 2015, p. 88). However, this study supports the content of the objective theory because a general requirement of fault is not imposed by current international law in the contemporary Arena, but it is stressed that the relevant primary obligation remains decisive for the determination of the particular requirements of an act being in non-compliance with this obligation. It is, therefore, possible that particular obligation requires fault, i.e., fault theory, on the part of the person acting on behalf of the state in order to establish an internationally wrongful act.

VII. Subjective (fault) theory

One of the most controversial issues in the field of state responsibility is seen in the question of whether fault constitutes a necessary element of an internationally wrongful act that must be established irrespective of the content of the particular primary obligation. In international law the concept of subjective (fault) theory can be traced as far back as Dutch jurist Hugo Grotius and his followers (Pisillo-Mazzeschi, 1992, p.11). According to this theory, a fault is an essential

requirement of state responsibility that takes a decisive role in every internationally wrongful act. In these cases one must give proof of fault; that is, prove that a wrongful act does not arise when there is no fault of the state.

This theory requires state to be negligent or reckless in its conduct in order to be held responsible. In other word, this theory emphasised some element of fault which is expressed in term of intention to harm (dolus) or negligence on the behavior of the part of person concerned is essential before his state can be rendered responsible for any injury caused (Shaw, 2008, p. 783). A number of cases support subjective (fault) theory such as Srilanka vs. AAPL case (Sri Lanka v. AAPL [1991] 30 ILM 577) and the Home Missionary Society claim (The Home Missionary Society claim [1920] 6 RIAA 42). In Sri Lanka vs. APPL case, Sri Lanka forces destroyed an installation belonging to the company owned by Asia Agriculture Product Ltd. The Sri Lanka force claimed that the installation was used by Tamil Tigger, a secessionist movement in Sri Lanka. The tribunal held that although Sri Lanka was not liable for the act of Tamil Tigger, it was responsible in its own right for failure to exercise due diligence in protecting APPL's property (Dixon, McCorquodale and Williams, 2003, p. 409). Another case is the Home Missionary Society claim (The Home Missionary Society claim [1920] 6 RIAA 42), arose following a rebellion in the UK protector of Sierra Leone. During the activity of rebellion, the property belonging to the Home Missionary Society was destroyed and a number of Missionaries were killed (Hillier, 1998, p. 339). The tribunal dismissed the claim of the Society which was presented by USA and noted that "it is a well established principle of international law that no government can be held responsibility for the act of rebellions bodies of men committed in violation of its authority, where it is itself guilty for no breach of good faith, or of no negligence in suppressing insurrection" (The Home Missionary Society claim [1920] 6 RIAA 42).

The issue that responsibility of state is strict or requires some element of fault is not addressed by International Law Commission and customary international law support both theories. In addition cases such as the Caire claim (Caire Claim (France v. Mexico) [1929] 5 RIAA 42), Neer claim (Neer Claim (United States v Mexico) (1926) 4 RIAA 60; 3 ILR 213), and Youmans claim (Youmans Claim (U.S v. Mexico) [1926] 4 RIAA 110), support objective (risk) theory while another cases such as the Home Missionary Society (The Home Missionary Society claim [1920] 6 RIAA 42), Sri Lanka v. AAPL (Sri Lanka vs. AAPL [1991] 30 ILM 577) and possibly Corfu channel case (Corfu channel case (UK vs. Albania) [1949] ICJ Rep, p.4) support the subjective (fault) theory. Furthermore, the Draft Articles of ILC lay down no general rule in that regard and the commentary to the ILC Articles did not concern itself with the objective and subjective theories, also it did not take determinate position on this controversy (Barding, 2006, p. 90). But the commentary to the ILC Articles noted that standards as to objective or subjective theories, fault, negligence or want of due diligence would vary from one context to another depending up on the terms of the primary obligation that is breached (Crawford, 2002, p.82). Ian Brownlie, a British jurist, has argued that the nature of international responsibility of states will depend on the precise nature of the particular obligation in issue and suggests that the discussions of the ILC tend to support this view. He has stated that it must be borne in mind that the rules relating to state responsibility are to be applied in conjunction with other, particularly rules of international law, which prescribe duties in various precise forms (Brownlie, 1983, p. 40). Thus, the relevance of fault and the relative 'strictness' of the obligation will be determined by the content of each rule of international law. It would be pointless to embark on an examination of a question, framed in global terms, whether state responsibility is founded upon fault (ie culpa or dolus) or strict liability.

It is true that certain primary obligation may require fault to be shown in behavior of a state before it will be responsible (Wallace and Martin-Ortega, 2009, p. 197). For example, the Genocide Convention 1948 requires that acts to be committed with intention in order to qualify as genocide. However, the proliferation of state organs has witnessed an increased application of strict liability which at the moment is most widely applied on the basis that any other approach or theory might provide yet another loophole in an already imperfect system of international justice (Dixon, 2007, p. 246). The important point is that different primary rules of international law impose different standard and approach of state responsibility, ranging from fault to strict liability, however it has suggested that there may be no principle or presumption about the place of fault in the connection to any given primary rule, since it depends on the interpretation of that rule in the light of its aims or purpose (Crawford, 1999, p. 438). Finally, in practice as Dixon points out "it may be that the most sensible solution is not to have a general rule at all, but to impose strict liability or require fault according to the subject matter of the obligation broken. Responsibility for violation of rules of jus cogens might be strict but responsibility for violation of commercial treaties might be based on fault" (Dixon, 2007, p. 245). In addition, Brownlie has argued that the nature of responsibility depends on the precise nature of the particular obligation in issue and pointed out that the discussions of the ILC tend to support this view.

It is clear that there is no preferable principle between objective and subjective theories of state responsibility because the cases, the knowledge arbitral, and the judicial decisions can be found in support of both theories. Moreover, this issue is not addressed by ILC and customary international law supports both theories, so in order to impose strict liability or require element of fault it would be according to the subject matter of the obligation broken. In other word, objective and subjective theories of sate responsibility would vary from one context to another depending on the subject matter of obligation that is breached.

CONCLUSIONS

For almost four decades the International Law Commission (ILC) has been working on the subject of state responsibility and finally succeeded, with James Crwaford as Special

Rapporture when the United Nation General Assembly adopted revised Draft Articles in 2001. The rules of state responsibility illustrate the circumstance in which a state is liable for breach of any international obligation. State responsibility has two elements: unlawful act or omission which is attributable to the state whether this act or omission committed by organ of states or individuals who are acting on behalf on that state. Jurisprudence and academic debate have been divided as to whether the responsibility of state for unlawful act or omission require fault or whether international responsibility is strict. In fact, this issue is not addressed by ILC and the Articles do not lay down general rule at all. This means that the Articles of ILC do not distinguish between responsibilities based on fault from responsibility based on strict. In addition, customary international law is not clear on this issue and supports both theories and this is problematic. Furthermore, from the cases and arbitral decisions, it clearly appears that there is no preferable principle between objective (risk) and subjective (fault) theories of state responsibility because some case such as Caire claim (Caire Claim (France vs. Mexico) [1929] 5 RIAA 42), Neer claim (Neer claim [1926] 4 RIAA 60) and Youmans claim (Youmans Claim (U.S vs. Mexico) [1926] 4 RIAA 110), support objective (risk) theory where as another cases such as the Home Missionary Society Claim (The Home Missionary Society claim [1920] 6 RIAA 42), Sri Lanka v. AAPL case (Sri Lanka v. AAPL [1991] 30 ILM 577) and possibly Corfu channel case (Corfu channel case (UK v. Albania) [1949] ICJ Rep, p.4) support the subjective (fault) theory. Thus the knowledge of arbitral and court decisions remains as relevant as in identifying and clarifying the principles and rules of state responsibility.

RECOMMENDATIONS

1. The present study recommends that the draft articles of state responsibility should include provisions on the specific meaning of serious breaches of international obligation related to the subject of state responsibility.
2. The United Nations should regulate the nature of the international responsibility of states by enacting an independent article in the UN Charter to prevent states from committing violations of international law and escape from international responsibility under the guise of the concept of the absolute sovereignty of the state and the right of self-defense.
3. It is necessary to determine the nature of the international responsibility of states in international documents and treaties as a new means of applying the rules of international law on the subject, because this approach aims settling long disputes between states peacefully and without accusing of the interfere by the international community in sovereign affairs of the states that have breached international obligations.

REFERENCES

Andrea, B. (2004). *Enforcing International Law Norms Against Terrorism*. Portland Oregon: Hart Publishing.

Barding, R. (2006). 'The Due Diligence Principle under International Law', International Community Law Review, Vol. 8, No.1.

Brownlie, I. (2008). Principle of Public International Law. Oxford University Press.

Brownlie, I. (1983). System of the Law of Nations: State Responsibility: Part I. Oxford University Press.

Bosnia and Herzegovina v Serbia and Montenegro (2007) ICJ, Report, paras. 403-406.

Cassese, A. (2005). International Law. Oxford University Press.

Charter of United Nation 1945.

Convention on the Prevention and Punishment of the crime of Genocide 1948.

Crawford, J. (2002). The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries. Cambridge University Press.

Crawford, J. (1999). 'Revising the Draft Articles on State Responsibility', European Journal of International Law, Vol.10, No.2.

Caire Claim (France v. Mexico) [1929] 5 RIAA 42.

Chrozow factory case (Portugal v. Germany) [1928] P.C.I.J., Ser A, No 17.

Corfu channel case (UK v. Albania) [1949] ICJ Rep, p.4.

Dunia, Z. (2019). International Law in Namibia. Langaa Research & Publishing CIG .

D. Evans, M. (2010). International Law. Oxford University Press.

Dixon, M. (2007). Textbook on International Law. Oxford University Press.

Dixon, M and McCorquodale, R and Williams, S. (2003). International law. Oxford University Press.

Diane A. (2012). Necessity and National Emergency Clauses : Sovereignty in Modern Treaty Interpretation. Boston: Martinus Nijhoff Publisher.

Gabcikovo-Nagymaros Project case [1997] ICJ Reports, pp.7, 38;116 ILR,P.1.

Harris, D. (2010). Cases and Materials on International Law. Sweet & Maxwell.

Hege, K. (2013). Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law. Oxford: Oxford University Press.

Hillier, T. (1998). Sourcebook on Public International law. Cavendish Publishing Limited.

Crawford, J., Alain P. and Simon O. (2010). The Law of International Responsibility. Oxford University Press.

Crawford, J. (2013). State Responsibility: The General Part. Cambridge University Press.

Jan A. (2015). Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea: Existing Rules and the 1999 Liability Protocol to the Basel Convention. Hamburg: Springer.

Janes Claim (US v. Mexico) [1926] 4 RIAA 82

Jean H. (2018). State Responsibility for Breaches of Investment Contracts. Cambridge University Press.

Jure V. (2012). "Explaining the legal effects of recognition", International & Comparative Law Quarterly, Vol. 61, No. 2.

Kaczorowska, A. (2010). Public International Law. Routledge Oxon.

Kimberley N. (2011). State Responsibility for International Terrorism. Oxford University Press.

Lyal S. (1997). The Emerging System of International Criminal Law: Developments in Codification and Implementation. London: Springe.

Noble Ventures, Inc v Romania case, ICSID (2005), ARB/01/11, para.53.

Neer claim [1926] 4 RIAA 60.

Nicaragua v. United States [1986] I.C.J Repots, p.14; ILR, p.39.

Onita D. (2013). Environmental protection, security and armed conflict: a sustainable development perspective. Cheltenham: Edward Elgar Publishing Limited.

Phosphates in Morocco, Preliminary Objections [1938] P.C.I.J., Ser A/B, No 74, p.10.

Riccardo P. (1992). "The Due Diligence Rule and the Nature of the International Responsibility of States", German Yearbook of International Law, Vol.35, No.1.

Rainbow Warrior Arbitration case (New Zealand v. France) [1999]82 ILR 499.

Stephan W. (2002). "The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading", Leiden Journal of International Law, Vol.15, No.4.

Susan B. (2016). The Responsibility to Protect in International Law: An Emerging Paradigm Shift. London: Routledge.

Shaw, M. (2008). International Law. Cambridge University Press.

Shelton, D. (1990). Remedies in international human right law. Oxford University Press.

Spanish Zone of Morocco claim [1923] RIAA, p.615 ; 2AD, p.157.

Sandline International Inc. v. the independent state of Papua Guinea case (1998)117 ILR, PP. 552, 561.

Sri Lanka v. AAPL [1991] 30 ILM 577

Southern Pacific Properties (Middle East) Ltd v. Egypt case,(1993) ILM933.

Tal B. (2006). Terrorism and the State: Rethinking the Rules of State Responsibility. Oxford and Portland Oregon: Hart Publishing.

The International Law Commission's Articles on State Responsibility 2001.

The Home Missionary Society claim (UK v. USA) [1920] 6 RIAA 42.

Tehran [1980], I.C.J. Reports, p.3.

United States Diplomatic and Consular Staff in Union Bridge Company case, (1924) 6 RIAA, p.138; 2AD, p.170.

Wallace, M and Martin-Ortega, O. (2009). International Law. Sweet & Maxwell.

Wheatley, S. (1996). International Law. Blackstone Press Limited.

Xinmin M. (2008). "Statement on Responsibility of States for Internationally Wrongful Acts", Chinese Journal of International Law, Vol. 7, No.2.

Youmans Claim (U.S v. Mexico) [1926] 4 RIAA 110.

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