



UNIVERSITÀ
DI SIENA 1240

FUNDAMENTALS OF INTERNATIONAL LAW

Master's Degree Course in International Sciences (LM-52)

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Topic Five

The Violation of International Law and its Consequences (I)

Possible Reasons of Non-Compliance

- Inadvertence
- Political choice
- Non-correspondence between domestic makers and implementers of IL
- Division of powers

The Regime of International Responsibility

- International responsibility \neq responsibility of a state before foreign domestic courts
- International responsibility may exceptionally apply when the applicant is an individual or a company (e.g. human rights and investment law)
- Unitary regime



The 2001 ILC Draft Articles

- Non-binding, but largely corresponding to customary IL
- Secondary rules
- An internationally wrongful act triggers a legal relationship between the states involved
- No distinction between breaches of conventional and customary IL



An Internationally Wrongful Act

“There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”
ASR, Article 2

- Two constitutive elements: subjective (attribution of conduct) and objective (breach of an obligation)
- Damage and fault are not constitutive elements (except in a few cases)



The Subjective Element: the Organic Link

- Criterion for attributing conducts (States are abstract entities!)
 1. Conduct of any state (*de iure*) organ (Art. 4 ASR)
 2. Conduct of entities that exercise elements of governmental authority, i.e., *de facto* organs (Art. 5 ARS)
- Conduct of *de iure* and *de facto* organs *ultra vires*

The Subjective Element: Other Main Criteria

3. Conduct of a person or group of persons directed or controlled by a State (art. 8 ASR) (ICJ, *Nicaragua v. US*, 1991; ICTY, *Tadic case*, 1999)
4. Conduct of organs placed at the disposal of a state by another state (art. 6)
5. Conduct of private persons or entities acknowledged and adopted by a state as its own (art. 11 ASR) (ICJ, *US v. Iran*, 1980)



The Subjective Element in the Regime of Responsibility of International Organizations

- ILC Draft Articles 2011
- Organic link
- Conduct of an organ of a State or an organ or agent of an IO that is placed at the disposal of another IO (art. 7 ARIO)
- Concept of effective control
- Possibility of dual attribution of conduct



The Objective Element: Basic Features

- Breach of an obligation binding upon the state (or IO)
- Actions or omissions
- Nonexistence of a regime of responsibility for lawful activities



The Objective Element: Circumstances Precluding Wrongfulness

- Consent of the injured state (art. 20)
- Acts of self-help (countermeasures and self-defence) (arts. 21 and 22)
- *Force majeure* (art. 23)
- State of necessity (arts. 24 and 25)
 - For the individual-organ: yes (case of distress)
 - For the state in itself: maybe, but under restrictive terms (Argentinian bonds arbitration cases; ICJ, advisory opinion on the construction of a wall in Palestine, 2004; COVID-19?)