

International liability in the field of climate change, human rights and migration

Karolina Žáková, Věra Honusková

Responsibility and liability

- responsibility for internationally wrongful conduct (i.e. a breach of a valid international obligation attributable to a State),
- liability for harmful consequences (typically environmental damage) arising from activities not prohibited by international law, and
- responsibility in the sense of positive (active, prospective) responsibility, or more precisely, the primary obligation of the state to do something, to ensure something, or to refrain from doing something.

Responsibility for internationally wrongful conduct

- [Draft articles on Responsibility of States for Internationally Wrongful Acts](#) (2001, International Law Commission)

Article 2

Elements of an internationally wrongful act of a State

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.

Attribution of conduct to a State

- Conduct of organs of a State
 - Courts, Parliament, Government...
- Conduct of persons or entities exercising elements of governmental authority
 - carriers, i.e. e.g. bus drivers (?)
 - Carrier's Sanctions Directive (Council Directive 2001/51/EC): *the carrier must take all the necessary measures to ensure that non-EU nationals carried by air or sea, and groups transported overland by coach, have the travel documents required for entry into the Schengen countries*
- Conduct of organs placed at the disposal of a State by another State

Attribution of conduct to a State

- Excess of authority or contravention of instructions
- Conduct directed or controlled by a State
- ...

Breach of an international obligation

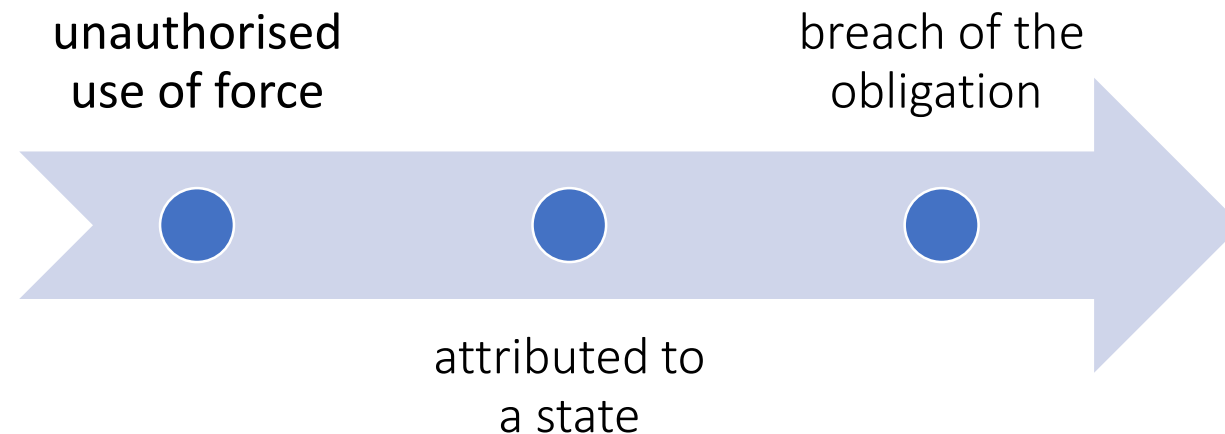
Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Breach of an international obligation

- Breach of any obligation under
 - a convention or
 - a custom
- e.g. prohibition of the use of force (in the sense of prohibition of offensive war)



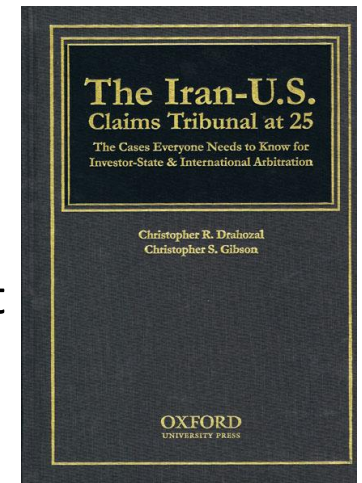
Legal consequences of an internationally wrongful act

- Continued duty of performance
 - continued duty of the responsible State to perform the obligation breached
- Cessation and non-repetition
 - obligation to cease the act, if it is continuing and to offer appropriate assurances and guarantees of non-repetition
- Reparation
 - full reparation – in the form of restitution, compensation and satisfaction, either singly or in combination.

...here is why it is important to have commitments in contracts or customs.

Example: US Diplomatic and Consular Staff in Tehran

- [United States Diplomatic and Consular Staff in Tehran](#) (United States of America v. Iran), 1980 ([to 2.03](#)) [reparations](#)
- **Article 22 - Vienna Convention on Diplomatic Relations (1961)**
 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.



International liability - for harmful consequences (typically environmental damage)

Stockholm Declaration

(United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm)

Principle 22

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage.

In both cases only a *pactum de contrahendo*, plus soft character of both declarations.

Rio Declaration

(United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992)

Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

International liability - for harmful consequences (typically environmental damage)

International liability for injurious consequences arising out of acts not prohibited by international law – works by ILC

- topic dealt with by the Commission since 1978
- in 1996, a **comprehensive draft of articles prepared by the rapporteur** on a given issue x the Commission was unable to discuss and adopt it
- topic divided into two parts: **prevention of transboundary damage from hazardous activities** (less controversial) and **international liability in case of loss from transboundary harm arising out of hazardous activities** (more controversial)
- **Draft articles on Prevention of Transboundary Harm from Hazardous Activities** adopted by the Commission in 2001
- **Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities** adopted by the Commission in 2006

International liability - for harmful consequences (typically environmental damage)

Basic principles of the original draft of articles prepared by the rapporteur in 1996

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

Article 6. Freedom of action and the limits thereto

States are free to carry on or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 9. Prevention

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

Article 10. Reparation

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles.

International liability - for harmful consequences (typically environmental damage)

Draft **articles** on Prevention of Transboundary Harm from Hazardous Activities (ILC, 2001)

- apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences
- general obligation to „*take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof*“
- specific obligations dealing with prior authorization of dangerous activities, assessment of potential risks, incl. EIAs, notification and consultations with the State likely to be affected, information to the public, emergency preparedness etc.

x has not yet been adopted in the form of a binding instrument

International liability - for harmful consequences (typically environmental damage)

Draft **principles** on the allocation of loss in the case of transboundary harm arising out of hazardous activities (ILC, 2006)

- apply to transboundary damage caused by hazardous activities not prohibited by international law
- damage means „*significant damage caused to persons, property or the environment*“
- encouragement (*should*) of each State to „*take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control*“, including the imposition of liability on the operator
- *Obligation to take certain response measures* upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage
- Obligation to ensure prompt, adequate and effective remedies available in the event of transboundary damage
- encouragement of States to develop specific international regimes

X have not been developed further

International liability - for harmful consequences (typically environmental damage)

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Council of Europe, Lugano, 1993)

- aims to ensure „adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement“
- applies to **dangerous activities** meaning the production, handling, storage, use or discharge of one or more dangerous substances (i.e. substances or preparations which have properties which constitute a significant risk for man, the environment or property) or any operation of a similar nature dealing with such substances + similar operations with GMOs, microorganisms + handling of waste
- provides for **strict liability of operators**, incl. public authorities (→ States), for damage caused by a dangerous activity
- theoretically applicable to damage caused by GHG emissions

x has never (not yet?) entered into force (only 9 signatures, no ratification)

International liability - for harmful consequences (typically environmental damage)

The no-harm principle

= *sic utere tuo ut alienum non laedas* → obligation of States not to cause serious environmental harm

- recognized norm of customary international law (corollary of the principle of equal sovereignty)
- first recognized in the *Trail Smelter* case (1941, arbitral award)
- the precise content of the norm is debated, understood as an obligation of conduct (due diligence), not result
- applicability in the field of climate change?

Liability for damage within the climate law

- dispute between developed and developing countries since the beginning of the UNFCCC negotiations
- no provision on liability in the UNFCCC, the Kyoto Protocol or the Paris Agreement
- Warsaw International Mechanisms for Loss and Damage (COP 19, 2013), <https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage/warsaw-international-mechanism>

"Active responsibility"

- responsibility in the sense of positive (active, prospective) responsibility, or more precisely, the primary obligation of the state to do something, to ensure something, or to refrain from doing something
- In the field of climate change?

Discussion

Discuss the topics from Moodle.

Thank you for your attention!