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State Responsibility Practices in Case of Human Rights Violation

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Abstract--- *State responsibility in international law becomes a complex issue even since the mid-twentieth century until today. It is indicated by the absence of binding codification regarding the conception of responsibility of state in international law. Several attempts to codify this convention have been started since 1949 by the International Law Commission (ILC). To date, the final draft recognized is the 2001 ILC Draft which was embraced by the ILC at its fifty-third session, in 2001, and presented to the General Assembly as component of the Commission's report. As a draft, this instrument does not have a legally binding nature. But, international law experts believe that the principles contained are customary international law, especially those relating to states responsibility to human rights violations. This study is normative legal research examining the rules of international law on state responsibilities and human rights. Besides, the novelty of this research is stressing to the practice of state responsibility in factual cases, especially in human rights violation cases. The result of this research is that although the provisions in international law regarding the conception of responsibility of state are still a draft, in practice, several principles in the draft have been implemented by decisions in Regional Human Rights Courts and apply to countries in the regional scope.*

Keywords : *European Court of Human Rights; Human Rights; International Law, State Responsibility*.

I Introduction

The concept of responsibility of the state has a long history since 1949. No doubt, the International Law Commission (ILC) has a crucial role in the advancement of international law in the early days of the UN. It was seen in that year ILC became the motor for drafting international agreements that were important enough to be later codified(The United Nations, 1956) into rules in the form of conventions or other agreed types. In the listing of international agreements to be codified is the international law of treaties, diplomatic law, consular law, law of war, including the law of the responsibility of state. Including the themes of the transnational agreement to be formed, there were fourteen other themes which at that time were the main priorities of the ILC to create an

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international legal order to be more well codified(Rafael Nieto-Navia, 2015). Most of the international agreements run according to plan. Even in the heydays of the UN, several international treaties had become international law and were binding for their State parties. But it is different from the draft international treaties relating to State responsibilities. Because of the tug of war in the state interest, the international agreement on the accountability of the State still seems to be stuck. Therefore, the ILC requested that a concrete step be taken by the UN General Assembly to adopt the resolution form. However, this did not take place until 1953 before the UN General Assembly began to make the ILC request seriously (Rafael Nieto-Navia, 2015).

In its development, in 1963, the ILC decided to create a ten-member sub-commission headed by Roberto Ago, focusing on the "definition of the general rules governing the international responsibility of the State." The Ago report then becomes the starting point for the collation of international law on responsibility of State up to the final statement chaired by James Crawford from Australia. In general, there are two phases of the development of efforts to codify the draft international conventions on State responsibility. The first phase began in 1955 until 1996, and the second phase between 1998 and 2001(James Crawford, 2002). In the first phase, or it can also be called the initial stage, there were three Special Rapporteur chaired by Ago from 1962 to 1979. Then between 1980 and 1986, Special Rapporteur was headed by Riphagen, and from 1987 to 1996, it was chaired by Arangio-Ruiz.

Furthermore, in the second phase is the refinement phase of the previous reports, which began in 1998 to 2001. Initially, the draft underwent several revisions until the completion of the correction. In 2000, the draft was made a report by ILC to the UN General Assembly and given notes by several countries until finally the draft was agreed by the UN General Assembly without voting(J. Crawford, 2001) which is now known as the “articles on responsibility of states for internationally wrongful acts.”

International law has known the concept of responsibility of State, which has been in force and practiced by States for a long time and has become an international custom. This accountability is imposed on the State for its actions because it has violated international obligations. So, when there is an element of the State that breaches international obligations, the State must be responsible for the action. This action includes active and passive. The State elements that can be subject to State attributes, in this case, are the executive, legislative, judiciary bodies, as well as other organs of the State, including the police, military, immigration, and other officials as long as the State represents them. It has also been regulated in the ILC draft (Article 4) (McCorquodale & Simons, 2007). Therefore, when there is a violation of international obligations, both obligations are regulated in a convention and customary international law, conducted by the State both active and passive acts, the State must be responsible for these violations as regulated in international law (McCorquodale & Simons, 2007).

Two critical issues will be discussed in this article regarding the responsibility of the State and human rights violations: first, whether human rights violations can be categorized as violations of international obligations so that this has implications for the State's accountability for its actions towards international obligations. The second is how the implementation of the concept of responsibility of State contained in the draft article in practice through court decisions, particularly in the European Court of Human Rights. These two questions will become a significant limitation in this study so that the discussion in this article remains focused on the problem to be answered in this study.

II Literature Review

The author acknowledges that this article on State responsibility and human rights has been discussed by several law scientists such as Annie Bird. He wrote an article entitled "Third State Responsibility for Human Rights Violations," which focused on the differences between the Injured States and the Third States that suffered losses due to a human rights breach. The results of her research stated that the Draft Article by ILC also accommodated the legal interests of third countries or countries that were not directly affected by a human rights violation in connection with the peremptory norm and commitments of a country with regard to the international society. However, she also stated that the developments accommodated by the draft ILC article still left controversy, and it was still open for further discussion (Bird, 2010).

In addition to Bird's research, there is quite a new study that discusses in full the matter of human rights responsibilities entitled “A Theory of Human Rights Accountability and Emergency Law: Bringing in Historical Institutionalism.” This work is written by Moira Katherine Lynch, where she focuses her research more on the association between emergency law and government responsibility for human rights infringements, which occurred in her jurisdiction. She argues that making emergency laws in a country that is in a state of crisis is not new. She compared the situation in Sri Lanka and Northern Ireland, where the country with emergency reasons to avoid their accountability for the execution of human rights requirements in their territory for decades. She turned to the present mainstream findings that sought to uphold the responsibility of State, where the state is in an emergency. Instead, she focuses his research on the obstacles that occur in a country to fulfill human rights responsibilities. She concluded that the leading cause of state obstacles to implementing human rights responsibilities in emergencies in their territory depends on the political situation of a country, the level of rules issued, and the opportunity to conduct a judicial review of the regulations issued (Lynch, 2015).

Although there have been works that deal with the responsibilities of the State, most of the existing writings only discuss the historical provisions of State accountability and international law concerning State accountability. What distinguishes this paper from other current works is the implementation of the principle of state accountability, which has become a custom of international law and how it is implemented in the realm of practice such as in a human rights court.

III Methodology

The outlook used in this research is the normative (Soekanto, 2013) or doctrinal (Bambang Sunggono, 1997) legal research, which is a study that not only examines the laws and regulations (das sollen) that apply but also looks at how these laws and regulations implemented in courts. In this study, the rules to be examined are UN General Assembly Resolutions, International Conventions on Human Rights, and Court Decisions related to responsibility of State and Human Rights. Furthermore, the instrument is analyzed descriptive-analytically using qualitative data analysis, which then sought to solve the problem(Restu Kartiko Widi, 2010).

The objective of this research is to ascertain whether the provisions contained in the source of international law, particularly conventional international law, are implemented in practice, or there are still gaps between the rule of law with practice in the field.

IV Results and Findings

4.1. Human Rights Breach as A Infringement of International Agreement

There is quite a crucial debate about the concept of "wrongful act" in the ILC draft. The idea developed by Roberto Ago in defining State responsibility is based on the concept of violating international obligations. So when there is a breach of international agreements, then the abuse is a global responsibility. The idea of Ago here emphasizes the action of the "wrongful act," which is an act of error that results in the responsibility of the State, regardless of whether the action causes harm to other countries or not. The problem is how when a country's activity is not a wrongful act and is carried out with care, but it causes harm to other countries. In this case, ILC also considers the concept of "harm" that results from an action rather than the concept of "wrongful act"(Rosenstock, 2002). However, in the end, the idea developed by Ago is later refined by James Crawford. He reaffirms that "every internationally wrongful act of a State entails the international responsibility of that state," which in this case means that when an action is not "wrongful act," the State is not liable for the action. He argues that the concept of injured in the sense of "harm, material or moral suffered by victim" with the concept of legal injured is different. In the context of international relations, it is what determines whether a person feels harmed or not for an action causing violation of an international agreement of a State in the country, not the individual who feels the loss(James Crawford, 2002). Therefore, in practice proving legally that "injured" happened is the right of the State, not the individual who feels it. Thus Crawford still maintains the concept of "wrongful act" by the State, which measures whether there is a violation or not. There are simply two elements of an action that can be categorized as a "wrongful act." First is the operation was carried out by the State, and the other is the act is a infringement of international obligations where violations are interpreted as actions that are not in accordance with what is required by these obligations(James Crawford, 1999).

In this case, it is clear that the existence of "losses as a result" is not a substantive thing for an action "wrongful act." Furthermore, Allain Pellet said that the absence of the "injured/harm" factor was a significant advancement of international law from the old theory to the contemporary theory of "wrongful act." The existence of two elements, namely “breach and attribution,” is enough to say that an internationally wrongful act can hold the State accountable for its actions either by omission or by commission. It clearly emphasizes that the condition of "injured" has no role at all, except in cases where it requires reparation or compensation(Ajeti, 2020) so that the injured state must exist because the amount of restitution depends on how much "injured" is experienced(Sánchez de Tagle, 2015).

It is also supported by Lawson, who states that basically, the general principle of State responsibility is any action that is not justified in international law (universally wrongful acts of a state) where the activity is carried out by the State. The action contains an element of violation of international obligations. Then who can be categorized as a State or at least represent the State in this case so that the actions can be delegated to the State? In practice, this State act can be divided into three groups namely: State organs(Nurhidayatuloh et. al., 2019), entities other than State organs (other entities), and individuals (private individuals)(Rick Lawson, 1998).

As stated above, one of the issues of concern in this study is that if the State can be held responsible for "wrongful act" measures against international obligations, is the issue of human rights breach also a violation to international obligations?

It is well known that the principle of state accountability arises when a violation of international agreements is exist. Then whether these international obligations include obligations to fulfill, to safeguard, to respect, to encourage, and to enhance human rights issues, even though this is also regulated in international law(Nurhidayatuloh et al., 2020), to be specific, it also needs to be viewed from the human rights legal system that applies to the region of each country. As within the inter-American legal system regarding human rights that international obligation arises in the context of human rights requiring certain damages or violations of human rights(Sánchez de Tagle, 2015). Likewise, in the human rights system in Europe, State obligations in the implementation of human rights include positive and negative obligations. It is also clearly regulated in the European Human Rights Convention (ECHR)(Klatt, 2011) and also in several decisions in the European Court of Human Rights (ECtHR) (The European Court of Human Rights, 2003).

"Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights (...) or in terms of an interference by a public authority (...), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."

In this decision, it is clear that ECtHR also reaffirmed that the State in the issue of human rights has both kinds of obligations. The positive obligations of the State in fulfilling human rights include actions which must be taken to guarantee individual rights by the state reasonably and appropriately.

On top of the two regional human rights systems, namely European and inter-American court, the general draft of the ILC only regulates a violation of certain international obligations having legal consequences. It includes severe violations of the peremptory norm or violations to the universal tenets of law, wherein the per peremptory norm is also regulated about severe human rights infringements such as ethnic cleansing, slavery and racial prejudice (Bird, 2010). Therefore, after several studies on international obligations addressed to the State in several regional human rights systems, it is found that human rights are also included in international obligations, which are the responsibility of the State. Thus, in this context, human rights violations can be categorized as violations of international obligations. So this has implications for the State's responsibility for its actions; both those actions are active or passive to international obligations.

4.2. The Implementation of States Responsibility in Practice

As mentioned in the previous sub-section, that the responsibility of State for infringements of human rights is part of the responsibility of State for infringements of international agreements. This principle has been applied and practiced by States so that it can be said that the responsibility of this State is component of traditional international law. It is reaffirmed in the ILC Draft Articles, which declares that the state obligation in international law is divided into two first provisions are "primary" rules, and the second is "secondary" rules. "Primary" rules include specific regulations governing the obligations of the State, and also human rights rules governing the safeguard of freedom of expression. In addition, the "secondary" rules, according to the draft, are rules relating to deciding the legal outcomes of not fulfilling commitments performed by the State (Rick Lawson, 1998).

The concept of State responsibility in the Completion, safeguard, and valuation for human rights is no less important than the material for human rights law itself(Annalisa, Zaidan, Apriandi, Febrian, & Nurhidayatuloh, 2019). It is because the State is a party directly involved in the application of human rights in its jurisdiction.

Even the principle of state responsibility is often forgotten by human rights law experts(Theodor Meron, 1989). In terms of implementing this State's responsibility, Lawson argues that the Court of Human Rights in Europe had constantly employed the tenets contained in the ILC Draft Article concerning responsibility of State without stating directly that the consistent application of these principles originated from the ILC Draft Articles(Rick Lawson, 1998).

Similar to the ILC Draft, in the American Convention, the obligations of the State in fulfilling, respecting and protecting human rights are also divided into two norms, namely "primary" norm, and "secondary" norm. "Primary" norms concern substantive rules regarding international human rights law. It is regulated in Article 1 and 2 of the American Convention. Meanwhile, on the other hand, "secondary" norms talk about general rules of responsibility of State and reparations addressed to the State in fulfilling the State's responsibilities. It is regulated in Articles 62, 63, and 68 of the Convention(Sánchez de Tagle, 2015).

In both Articles of the American Convention, it is stated that:

"(1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination…" and (2) "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

Both Articles of this convention in the inter-American human rights legal system are the main foundation of the State's responsibilities and obligations in the enforcement and assurance of human rights. It is also reaffirmed in the Inter-American Human Rights court ruling in the Velázquez-Rodríguez case (1988) which states that it is an commitment of the State party to defend every right contained in the convention and violation of those rights also means violation to the Article 1 (1) of the Convention(Sánchez de Tagle, 2015).

It can be determined that regional human rights court practices in both Europe and Inter-America state implementing of the concept of State responsibility in practice has been carried out by several Human Rights Courts on regional level both in the Human Rights Conventions in each region and through court decisions especially in the Court of Human Rights in Europe (Nurhidayatuloh & Febrian, 2019) and the Inter-American Court of Human Rights. It also shows that although in practice, both the regional conventions and court decision do not directly refer to the Draft Article, it can be seen that the principle of responsibility of State for human rights infringements is a norm that has been applied internationally and practiced by countries and regional human rights court. Thus, it can be said that this Draft Article has codified the principles of State responsibility, which have become customary international law.

Then, the matter of who can be the representation of the State is also a particular concern of the Draft Article. Therefore, it is also necessary to look at the practices that occur in the regional human rights system in each region. Is there any conceptualizing the "state organs." In the case of the state organs of the European Commission on Human Rights positioning itself in the court case of Ireland against the UK that the responsibility of State can result from the actions of its bodies, officials (agents) and their servants (servants). It is seen in the case at the European Court of Human Rights, which stated that:

"It is inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected."(The European Court of Human Rights, 1978)

In the verdict, it is explained that in practice, the European Court of Human Rights considers that the Officials of a State in a higher position are responsible for the actions carried out by his subordinates and cannot relinquish those responsibilities only because of his inability to ensure that his orders are not carried out by his subordinates. Indirectly this practice is in line with what has been regulated in the principles contained in the ILC Draft (Rick Lawson, 1998).

Secondly, in terms of other entities. It is stated that in practice in the Court of Human Rights in Europe, the responsibility of the State was not only limited to the actions of state organs, but other entities besides state organs could also hold the State responsible for human rights infringements. It is a practice that has occurred in the Van Der Mussele Case against Belgium, where a lawyer files about the obligation of legal assistance free of charge to people who can not afford it. Then on this lawsuit, the Belgian Government responded that the State did not have the authority in this case because the obligation to provide legal assistance to people who could not afford it for free was their professional obligation from advocate organizations (Ordres des Avocats). Therefore the State considers that they are not accountable for any human rights infringements that occur because of the implementation of the rules that arise within the professional organization. However, the Court of Human Rights in Europe argues otherwise that the Belgian State cannot avoid responsibility for the actions of such associations, which are in conflict with the European Human Rights Convention. In its decision, the Panel of Judges of the European Court of Human Rights stated:

"Under the Convention, the commitment to allow free lawful help emerges, in criminal issues, from Article 6 § 3 (c) (6-3-c); in common issues, it now and again comprises one of the methods for guaranteeing a reasonable preliminary as required by Article 6 § 1 (6-1) (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26). This commitment is occupant on every one of the Contracting Parties. The Belgian State - and this was not challenged by the Government - lays the commitment by law on the Ordres des avocats, along these lines propagating a situation of long remaining; under Article 455, first passage, of the Judicial Code, the Councils of the Ordres are to make arrangement for the help of destitute people by setting up Legal Advice and Defense Offices (see section 18 above). As was brought up by the candidate, the Councils have "no prudence as respects the standard itself": enactment "propels them to constrain" individuals from the Bar to guard poverty stricken people". Such an answer can't calm the Belgian State of the duties it would have acquired under the Convention had it decided to work the framework itself."

(The European Court of Human Rights, 1983)

Then the third is the actions carried out by individuals. A famous case related to human rights infringements by the State committed by individuals is the Young, James, and Webster case against the UK, where three British Rail Company workers named Young, James, and Webster refused to join the union. Because of their refusal, the British Rail Company fired the three people. In their lawsuit to the Court of Human Rights in Europe, the three workers said that there had been a violation of their right not to be incorporated in trade union organizations. The

question that arises then is whether the responsibility for dismissal can be imposed on the United Kingdom (The European Court of Human Rights, 1981). In this regard, the Court believes that:

"Under Article 1 (1) of the Convention, each Contracting State "will make sure about to everybody inside [its] locale the rights and opportunities characterized in ... [the] Convention"; thus, if an infringement of one of those rights and opportunities is the consequence of non-recognition of that commitment in the authorization of residential enactment, the duty of the State for that infringement is locked in. In spite of the fact that the proximate reason for the occasions offering ascend to this case was the 1975 understanding between British Rail and the railroad associations, it was the residential law in power at the pertinent time that made legal the treatment of which the candidates whined. The obligation of the respondent State for any resultant penetrate of the Convention is therefore connected on this premise. As needs be, there is no call to look at whether, as the candidates contended, the State may likewise be dependable on the ground that it ought to be viewed as boss or that British Rail was heavily influenced by its."

It should be noted that in this case, the dismissal of these workers cannot be accounted to the State. However, the laws of that State have paved the way for the company to occur. In this incident, the court considered that the British Government lacked legal protection for these workers so that the company was fired(Rick Lawson, 1998).

In some of these cases, it can be concluded that the concept of state organs that represent the State in acts of human rights violations is also vast. In practice, state organs, in some instances, not only include state agents and servants but can also involve other entities even in particular cases, are individuals. It is from these actions that the State can be taken accountable for violations of individual rights that ensue in their respective territories.

V Conclusion

This research discusses the responsibility of State for human rights infringements and the implementation of the concept of State responsibility in practice in human rights courts on regional level in both the European and the Inter-American Court of Human Rights explicitly. It can be assumed that the concept of responsibility of State has been initiated long ago, and ever since 1949, this has become an ILC concern. However, due to significant obstacles and conflicts of interest, the concept of State responsibility has only been completed at the draft level and has become an appendix to the UN General Assembly Resolution. It means that there is only one step left that this draft could develop into international law after passing through the accord of the States parties. Even though reaching an agreement between countries is not easy because the interests of each country become an absolute thing in international relations. However, the achievement of developments up to the 2001 Draft is progress, which should not be underestimated because several essential developments in contemporary international law have become part of the draft.

It is true that the validity of the draft still requires quite a long time because this is waiting for the right momentum so that countries are willing to discuss it intensively. However, the most encouraging thing in the progress of international law is that even though the draft is not yet entered into force, the practice of Inter-

American and European Human Rights Courts show that the concept of responsibility of State for human rights violations has been practiced in each regional human rights law system. Therefore, the 2001 ILC Draft, which is a collation of the concept of responsibility of State, is a concept based on practices that have been carried out by States for a long time. Thus, in the absence of rejection from UN member states concerning the concept of State responsibility in human rights infringements, it can be concluded that this concept is an international customary law, and the ILC Draft is a codification of international customary law that specifically discusses State responsibility.

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