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The Due Diligence Rule and the Nature of the International Responsibility of States

By Riccardo Pisillo-Mazzeschi

I. Introduction

One of the most controversial problems regarding the international responsibility of the State for wrongful acts (hereinafter "State responsibility")[1] concerns the nature of such responsibility. One asks whether State responsibility in principle is contingent upon the existence of fault or, *vice versa*, upon the sole existence of conduct attributable to the State and contrary to an international obligation. In the first case we would have in general international law a unitary regime of fault responsibility, and in the second case a unitary regime of objective responsibility. It is also possible to say that in general international law different regimes of responsibility exist, depending on the various categories of wrongful acts or of rules or of obligations.

By fault one usually, but not always,[2] means the particular subjective and psychological attitude of the actor, which consists in either having willfully determined the effect produced by its behavior (malice or *dolus*) or in having failed to take the measures necessary to avoid the injurious event (fault in a strict sense or *culpa*). The regime of fault responsibility usually means that it is the victim of the presumed wrongful act who must prove the fault of the offending State. Instead, in the regime of objective responsibility, responsibility arises as a sole consequence of conduct contrary to an international obligation, but in the case of objective and relative responsibility the State may be exonerated from responsibility by invoking one of the defenses allowed by international law.[3]

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[1] This article is not concerned, except in an indirect way (*see* below, paras. IV.3 and VI.2), with the problem of the so-called international liability for lawful activities. For a treatment of this subject, *see Riccardo Pisillo-Mazzeschi*, "Due Diligence" e responsabilità internazionale degli Stati, Milano 1989, Chap. II.

[2] *See* below, para. II.1.

[3] There is instead absolute and objective responsibility when responsibility not only automatically arises from conduct contrary to an international obligation but also allows no

In light of this, it is evident that the problem of fault takes on not only theoretical but also practical importance. While a regime of fault responsibility serves to limit the possibilities of ascertaining and implementing State responsibility, a regime of objective responsibility serves to extend such possibilities.

It is thus to be regretted that the International Law Commission (ILC), in its Draft Articles on State Responsibility, has up to now neglected to squarely approach the problem of whether fault is a component of the wrongful act.[4] Even the international law literature concerned with the subject, after a long period of lively debate between those supporting fault responsibility and those supporting objective responsibility and after a certain more recent realignment of positions, seems in the last few years to have come to a standstill and lost interest in the problem. This depends, as we shall see,[5] on flaws in the traditional method of study that has nearly always been used in international law literature.

It therefore seems that the time is ripe to open the discussion again and to try a new approach and new solutions to the question of the nature of State responsibility. First, however, we should provide an overview, even if a very concise one, on the various theories existing in the literature.[6]

II. Inadequacy of the Existing Theories on the Nature of State Responsibility

In legal literature one still encounters many views on the problem of fault and on the related problem concerning the nature of State responsibility. At the risk of oversimplification, we can identify three general positions: the group of theories favoring a general regime of fault responsibility, the group of theories favoring a general regime of objective responsibility, and, lastly, the group of "intermediate" or "eclectic" theories, which attempt to reconcile the fault theory with that of objective responsibility.

We will now look at these three positions, with the warning that, within each of these general views, it is possible to trace a variety of sub-theories. However we shall see that none of the existing theories is completely convincing.

defence. On this point, *see*, for all, *Benedetto Conforti*, Diritto internazionale, 3rd ed., Napoli 1987, 346 *et seq.*

[4] Various interpretations in this regard have been given in legal literature. With regard to them, *see Pisillo-Mazzeschi* (note 1), 116-121. Instead, the problem of the role of fault has been dealt with, only for purposes of the consequences of the wrongful act, by Special Rapporteur *Arangio-Ruiz*. *Cf. Gaetano Arangio-Ruiz*, Second Report on State Responsibility (A/CN.4/425 and Add. 1), paras. 162-188; *Id.*, State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, in: Mélanges *Virally*, Paris 1991, 25 *et seq.*

[5] *See* below, paras. II and III.

[6] For a broader overview of these theories, *see Pisillo-Mazzeschi* (note 1), ch. I.

1. Theories Favoring Fault Responsibility

a) "Psychological" Fault

Most of the legal literature favoring the principle of fault holds to a purely subjective-psychological concept of fault. By this, it understands fault as an attitude of the will, a psychological relationship which exists between the specific injury to the right of another and the material author of such injury.

As is known, in international law the concept of subjective fault can be traced as far back as *Grotius* and his followers.[7] However, the modern concept of the theory of psychological fault was developed by *Ago* who, in 1939-40, made the greatest effort to establish a new basis for the notion of fault, after the demolition of *Grotius*'s theory by *Anzilotti* at the beginning of the 20th century.[8] According to *Ago*, psychological fault is an essential requirement for every internationally wrongful act. This conclusion, in view of the failure of any theoretical and abstract criterion to settle the problem of fault, is drawn from international practice. An examination of the practice shows, according to *Ago*, that the fault element is necessary in cases of so-called State responsibility for acts of private persons, in relation to which the lack of diligence (which, for *Ago*, is identified with subjective fault), takes a decisive role. However, international practice, in *Ago*'s view, requires the fault element, even though indirectly, also in cases of so-called responsibility for acts of State organs or officials. In these cases one must give proof of fault *a contrariis*; that is, prove that a wrongful act does not arise when there is no fault of the State. This would be proven by the fact that in certain aspects of international practice the breach of international obligations owing to error, fortuitous event or *force majeure* did not result in responsibility.[9]

[7] These authors had developed the theory of the State's complicity in the wrongful acts of individuals, based on the notions of *patientia* and *receptus*. According to this theory, the State was still identified with the sovereign's person and fault was seen as the subjective fault of the State itself. *See,* for all, *Hugo Grotius,* De Jure Belli ac Pacis Libri tres, Lausannae MDCCLXII, III, C. XVII, XX, I.

[8] *See Roberto Ago*, Le délit international, in: Académie de Droit International, Recueil des Cours (RdC), vol. 68, 1939-II, 419-545, esp. 450-498; *Id.*, La colpa nell'illecito internazionale, in: Scritti giuridici in onore di *S. Romano*, III, Padova 1940, 175 *et seq.* *Ago*'s theory is based on a re-examination of the problem of the organization of the State in international law and of the related problem of attributing to the State as a legal person the acts and the will of the individuals acting for it as organs. This re-examination led *Ago* to clearly refute several theoretical arguments supporting *Anzilotti*'s theory (particularly the view that only domestic law could attribute to the State the wrongful acts of its organs), and to conclude that the fault of the State must always be understood as the fault of its organs, that the psychological fault of the individuals acting as organs may be legally imputed to the State, and that such fault is indeed an indispensable subjective condition for an internationally wrongful act being imputed to the State.

[9] We note that, in this way, *Ago* does not interpret error, fortuitous event and *force majeure* as autonomous defences, but rather brings them back to the unitary concept of "lack of fault".