

State Responsibility and Terrorist Activities

Emilia Yustiningrum

*Peneliti Bidang Politik Internasional dan Humanitarian Action di
Pusat Penelitian Politik (P2P) Lembaga Ilmu Pengetahuan Indonesia (LIPI)
(E-mail: em_yustiningrum@yahoo.com)*

ABSTRACT

The Draft Articles on State Responsibility 2001 have been applied on the case of Lockerbie bombing by two Libyan nationals as they have connection with the state organs. As the state responsibility occurs when the international legal obligation belong to the state has been violated, then the conduct of Libyan suspects has been attributed to their state. The United States as an injured state and potential target for the terrorist activities reacted decisively by putting sanction to the state of Libya based on Montreal Convention and UN Security Council Resolution. The legality of the US' actions was based on the Draft Articles on State Responsibility as well as the UN Charter. The paper aims to discuss and highlight the conduct of Libya and the United States and its imputability of the State Responsibility to Libya.

Keywords: *state responsibility, terrorist activities, state organs, Injured state*

Abdelbaset Ali Mohmed Megrahi, a Libyan Intelligence Service agent, was charged guilty on 31 January 2001 because of murdering 259 passengers and crew on board of Pan American World Airways (PanAM) flight PA103 from London Heathrow airport to New York and 11 residents of Lockerbie on 21 December 1988.

He formed a criminal purpose to destroy a civil passenger aircraft and murder the occupants. These include the purchasing on 7 December 1988 of a quantity of clothing and an umbrella in shop premises known as Mary's House at Tower Road, Sliema, Malta; entering Malta on 20 December 1988 at Luqa airport while using a passport with false name of Ahmed Khalifa Abdussamad; residing over night at the Holiday Inn, Tigne Street, Sliema, using this false identity; and placing or causing to be placed on board an aircraft of Air Malta flight KM180 to Frankfurt am Main

Airport on 21 December 1988 a Samsonite suitcase containing said clothing and umbrella and an improvised explosive device containing high performance plastic explosive concealed within a Toshiba RT SF 16 radio cassette recorder and programmed to be detonated by an electronic timer, having tagged the suitcase or caused it to be tagged so as to be carried by aircraft from Frankfurt am Main Airport via London Heathrow airport to New York (High Court of Justiciary 2002).

The charge went on to state that the suitcase was thus carried to Frankfurt am Main Airport and there placed on board an aircraft of PanAM flight PA103 to New York; and that the improvised explosive device detonated and exploded on board the aircraft while in flight near to Lockerbie, whereby the aircraft was destroyed and the wrecked crashed to the ground and the passengers, crew, and residents were killed.

Al Amin Khalifa Fhimah, who had been station manager for Arab Libyan Airlines in Malta therefore knew his way around Luqa airport, provided stolen Air Malta luggage tags for this purpose. The bomb itself was made out of Semtex and triggered by an electronic timing device (supplied and manufactured by a Switzerland company, MEBO AG) and was contained within in a Toshiba RT-SF radio cassette player (The Lockerbie Judgement 2001).

In 1992, concerned over the results of investigations into the terrorist attacks which implicated officials of the Libyan Government, the United Nations Security Council adopted Resolution 731 (1992) by which it deplored the fact that the Libyan Government had not yet responded to the requests to cooperated fully in establishing the responsibility for the terrorist acts (Cassese 2005, 468).

The paper explores, on the basis of the 2001 Draft Articles on State Responsibility, the issue of state responsibility with respect to the State of Libya in as far as the conduct of their citizens are concerned and whether under international law, the State of Libya could rightly be held responsible for the acts of its citizens. The paper further discusses the legality of the United States (US) actions against the State of Libya.

State Responsibility

State responsibility is the responsibility of a state in certain situations. Therefore, it is important to determine when these certain situations occur. Usually these certain situations occur when an international legal obligation that a state has, has been violated. This violation can be an action but also an omission.

The International Law Commission of the United Nations has, after 45 years negotiations, made a proposal for a treaty that refers to state responsibility. It is a proposal, so no binding force yet, but the articles discussed are customary law. Article 1 on Draft Articles on State Responsibility provides definition of state responsibility. A situation invokes state responsibility if the act or omission can be attributed to the state. These are two conditions for state responsibility as provided in Article 2 such as the violation of an international legal obligation and the violation should be attributable to the state. Attribution to the state has several criterions. First, acts or omissions by a state organ can be attributed to the state; organs of the legislative, executive, and legal power. The place of the organ in the state matrix is not relevant as mentioned in Article 4 paragraph 1. Article 3 provides no plea for the binding nature of national laws. However decisive is only if the state organ has been acting in exercise of his duties and therefore has acted in the capacity of organ of the state. Second, a state can transfer its state acts to non-state organizations or individuals as provided in Article 5. The condition of the state act should be in the exercise of that state duty. Third, Article 8 formulates the exception regarding individuals. In principle a state is not responsible for the behaviour and acts of individuals. But if individuals act under direction, control, or on the instruction of a state or state organ and this act or omission leads to a violation of an international legal obligation, the act or omission can also be attributed to the state (Draft Articles on State Responsibility 2001).

It is important to remember through that, even if a state in principle is not responsible for the behaviour and acts of individuals, a state can still by not responding to acts of individuals, invoke its own responsibility. Every state has a kind of obligation to take good care. Under international law this is called due diligence or due care. So despite the fact that an individual, a private person committed an act and he does not have anything to do with the government, this could still lead to state responsibility. It is only possible though if the state does not take due care of the situation. However there are limitations to state responsibility like force majeure, permission of the injured state or self defence as provided in Article 20-24 (Draft Articles on State Responsibility 2001).

Meanwhile, there is indirect form of responsibility for the states that refers to the treatment of citizens of another state that are physically within the boundaries of a state. If a state allows aliens onto its territory, which the state is not obliged to do by the way, that state has an obligation under international law to treat these aliens reasonably.

In the case a citizen of a state that is physically in another state is not being treated reasonably, the first state has the rights to invoke diplomatic protection in regard to this citizen. This is a right that the state has though, not the citizen. The state

was violated in its right, namely to have its citizens treated fairly, and therefore the state can exercise its right.

The Calvo-clause mentions states made aliens sign a clause in which they committed themselves or to call upon diplomatic protection from their own government if they would get into trouble and that they would only use the legal possibilities that are provided for by that country. But this is a right that a state has and therefore a citizen can not resign from this right.

The consequences of state responsibility provide the unlawful part of the state act should be rectified or compensated. The state will have to make sure that the original situation is redressed. With that, it should give, as much as possible, a guarantee that this will not happen again in the future as provided in Article 30. The responsible state is obliged to give full reparation for the situation or act therefore all damages that come from the wrongful act of the state, no matter whether they are material or moral, should be repaired as formulated in Article 31 Paragraph 2. The forms of reparation are: (1) Actual reparation of the original situation or *restituto in integrum* as formulated in Article 35 which the conditions refers to materially possible and proportional, (2) If damage is irreversible then the state should give compensatory compensation or substitute compensation as mentioned in Article 35, (3) Satisfaction should be achieved as formulated in Article 37, only possible though if reparation or compensation is not, or not any more, possible. It needs conditions that it should always be proportional and not take the form of a humiliation of the responsible state. However the extra compensation is always possible (Draft Article on State Responsibility 2001).

The Conduct of Libyan Nationals and the Imputability of State Responsibility on the State of Libya

The law of state responsibility is based on the concept of agency (Verk 2006). States are political abstractions and act not as such but through persons. So the key question is whether the two Libyan suspects acted as agents of their State and if their acts qualify as actions of their State. This could particularly be true in the case of the Libyan nationals who have linkages with their state organs and can be construed to have had authorization to exercise public function and, as a result, represent the State in question (Libya). Since it can be established that their act is indeed attributable to their State, their State can be considered to have themselves committed the act, without further regard to the identity of the persons who actually carried it out.

The Draft Articles on State Responsibility Article 4 (1) declare that the conduct of any State organ shall be considered an act of that State under international law,

whether the organ exercises legislative, executive, judicial, or any other functions, whether position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State (Draft Articles on State Responsibility, 2001). In light the above article, the conduct of the Libyan nationals can be attributed to their states under international law due to the positions they hold in the organizations of their States. Given that both nationals have been linked to the Secret Service agencies of their individual states, it can be concluded that their conduct was directed or controlled by their State. The US can impute state responsibility to Libya as recognized under the International Law (http://www.americansc.org.uk/Online/Forum/Afghanlegality.htm-_edn63#_edn63).

The Draft Articles on State Responsibility Article 8 declare that the conduct of a private actor is considered an act of a 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 (Draft Articles on State Responsibility 2001). The major difficulty involves the link that must be established in order to transform acts of private actors into the acts of *de facto* state agents. The starting point for the examination of such a link is the legendary *Nicaragua case*, the military and paramilitary activities in and against Nicaragua, where the International Court of Justice (ICJ) had to determine whether the US was responsible for the paramilitary *contras* operating in Nicaragua (Gregory Townsend 1997). It was clear from the evidence that the *contras* were a proxy army of the US and could not have existed without its financing and support, but the ICJ still concluded that their acts were not attributable to the US. In this case, the ICJ formulated what has now become the classic “effective control” test for determining the link between states and private actors.

There is one additional, although uncertain and more difficult in the proof, way of linking a private armed group to a state. A terrorist group could be considered to be a *de facto* state **organ** (not an **agent** as discussed above). The Draft Articles on State Responsibility Article 4(1) provide that the conduct of any state organ is considered an act of that state. This concerns first and foremost official state organs, but it is further explained that “an organ includes any person or entity which has the status in accordance with the international law of the state” as provided in the Draft Articles 4(2).

The implication of the charges was that the Lockerbie bombing was an act of terrorism ordered by the Libyan state, that is, by Colonel Gadaffi. The assumption was that the bombing was in revenge for the US bombing of Libya from British airbases in 1986 (Verdict 2001).

Conduct of the United States and Its Imputability of State Responsibility on the State of Libya

Based on Montreal Convention 1971 on sabotaging aircraft, the United Nations Security Council adopted Resolution 748 (1992) which among other things decided on a string of sanctions against Libya to be taken by all States. The sanctions included: (1) to deny permission of any aircraft destined to Libya to take off from, land, or overfly their territory; (2) to prohibit the supply of any aircraft or air craft components to Libya; (3) to prohibit any provision to Libya of arms and ammunitions, technical advice, assistance, or training on military matters. The Security Council also set up a Committee responsible for monitoring compliance with decisions on sanction as well as recommending appropriate measures in response to violations (Cassese 2005, 468).

In order to determine the legality of the US' action, it is useful to consider the applicability of Draft Articles on State responsibility Article 21 and Article 51 of the UN Charter to the US argument. Important to note is that the 2001 Draft Articles 59 asserts that "These articles are without prejudice to the Charter of the United Nations". The UN Charter Article 51 stipulates "nothing shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations".

The Draft Article 21 on the other hand states that "the wrongfulness of an act of State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations". Whether the US action is justified under Articles 51 of the United Nations Charter and Article 21 of the 2001 Draft Articles depends on how the Articles are interpreted.

Using a restrictive interpretation it is possible to see how Article 51 applies in relation to the bombing of the State of Libya. Article 51 gives a State the right to repel an attack that is ongoing or imminent as a temporary measure until the UN Security Council can take steps necessary for international peace and security (Michael Mandel 2001 in <http://www.americansc.org.uk/Online/Forum/Afghanlegality.htm> - _edn16#_edn16). So on a restrictive view the right of self-defence may include the right to retaliate once an attack is deemed continuous. This can also be argued on the precinct that the US responded to the third consecutive attack in its territory.

In order to trigger Article 51 of the UN Charter, it is necessary that there be an "armed attack" within the meaning of the Charter. The definition of "armed attack" is broad, as established in the Nicaragua case (ICJ Report 1986), where the ICJ held that the concept covers "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries' and a State's "substantial involvement

therein” (O’Sullivan 2001). So could the attacks on the US by the two suspects satisfy the Nicaragua definition of “armed attack?”.

While the bombing of the US airplane appear to be clearly within the definition of “armed attack” committed by “armed bands” (Kaczorowska 2001), it is also probable to see how the conduct of the two suspects link the state of Libya to their actions. The United Nations International Law Commission (ILC) broadly defines an “organ of state” in the 2001 Draft Articles on State Responsibility, as “... including any person or entity which has the status in accordance with the internal law of the State” (Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts-International Law Commission 2001). It is therefore logical to suggest that the US was a victim of “armed attack” within the meaning of Article 51 of the UN Charter even though its use of force is contrary to the Article 2 (4) of the Charter and the Draft Article 52 (1a) as declare before taking countermeasures, an injured State shall call on the responsible State, in accordance with Article 43 to fulfil its obligation under Part II. However, given that two of the suspects are linked to the Secret Service in their country of origin, it is possible to attribute their conduct to their States as stipulated in Article 4 (1) of the 2001 Draft Articles on State Responsibility.

However, US’ bombing of the military facilities of the State of Libya and subsequent freezing of its assets could be viewed as illegal under the Draft Articles on State Responsibility on the account that it did not endeavour to settle the dispute by peaceful means (as stipulated in Part III) before resorting to counter measures. Furthermore, the US would have not been justified to bomb the State of Libya even if the peaceful recourse would have proved futile since there are other more peaceful countermeasures that it could have resorted to.

Summing up on state responsibility, it is apparent that the US was a victim of terrorist activities in the meaning of Draft Articles on State Responsibility. However, the US’ reaction to repel the attacks by using of excessive force in self-defence came too soon before other meaningful and peaceful measures of resolving impasse had been explored as outlined in part III of the Draft Articles on State Responsibility.

Conclusion

It is completely understandable that the US, as an injured state and a potential target for terrorist activities wanted to react decisively and make sure that such attacks do not happen again. The fight against private armed groups - the so called “war on terrorism” – involves many practical and legal difficulties. However, there is one aspect of it that has a fundamental impact on such a fight as a whole: private

armed groups do not exist in stateless enclaves but always operate from the territory of states. This means, essentially that if the injured state wants to use force, as a matter of self-defence, against the terrorist groups responsible for its attack, it automatically acts also against the state from which that particular group also operates.

But in order to use force lawfully against the host state, the injured state must first demonstrate that the terrorist attack, in at least its consequences, is attributable to the conventional international law. If this is not duly done, the injured state instead commits an internationally wrongful act and is itself liable before the host state.

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