

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

A BACHELOR DEGREE THESIS

EGYPT RESPONSIBILITY TOWARD THE FOREIGNERS AS VICTIMS IN THE CHAOS
SITUATION UNDER THE INTERNATIONAL LAW

This Bachelor Degree Thesis has been approved by the advisor to be submitted in oral



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VICTIMS IN THE CHAOS SITUATION UNDER THE
INTERNATIONAL LAW**

THESIS



**Compiled by:
IFANO RAHADIAN**

04410166
International Law

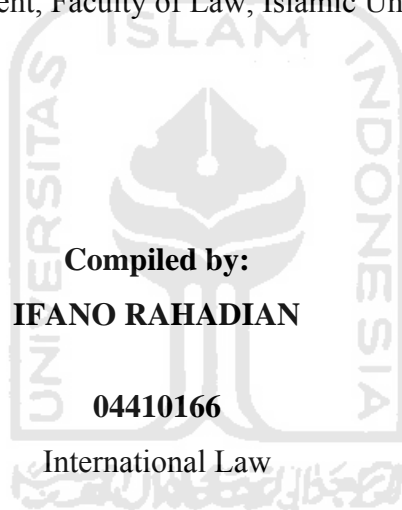
**INTERNATIONAL PROGRAM – FACULTY OF LAW
ISLAMIC UNIVERSITY OF INDONESIA
JOGJAKARTA**

2012

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BACHELOR DEGREE THESIS

Presented as Partial Fulfillment of the Requirements to Obtain the Bachelor Degree in the
International Law Department, Faculty of Law, Islamic University of Indonesia



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Defended before the Board of Examiners

on April 30th, 2012

and declared

ACCEPTABLE

Yogyakarta, April 30th, 2012

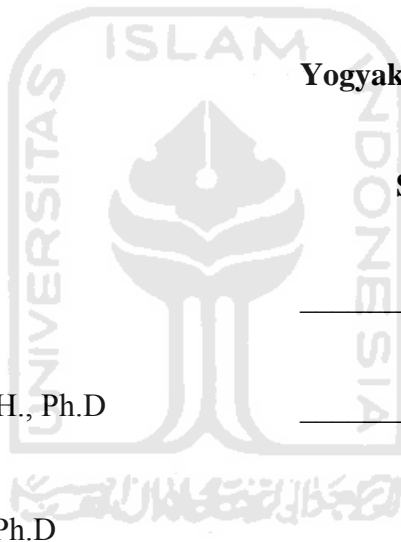
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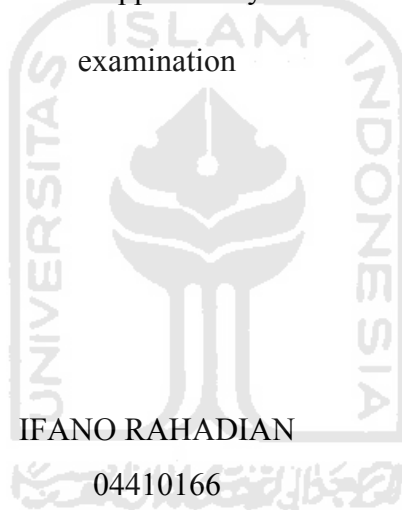
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*Past is experience, present is experiment, and future is expectation.
So, use your experiences in your experiments to achieve your expectations*

اقْرَأْ بِاسْمِ رَبِّكَ الَّذِي خَلَقَ^{96:1)}

خَلَقَ الْإِنْسَانَ مِنْ عَلَقٍ^{96:2)}

اقْرَأْ وَرَبُّكَ الْأَكْرَمُ^{96:3)}

الَّذِي عَلَّمَ بِالْقَلَمِ^{96:4)}

عَلَّمَ الْإِنْسَانَ مَا لَمْ يَعْلَمْ^{96:5)}



I Dedicated This Thesis For:

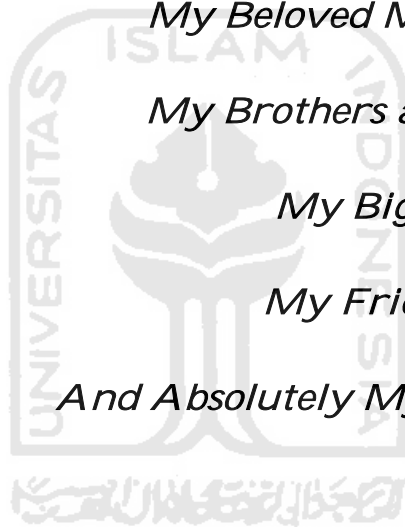
My Beloved MOM and DAD

My Brothers and Sisters

My Big Family

My Friends

And Absolutely My Lovely Wife



ACKNOWLEDGEMENT

Praise to Allah SWT for the completion of this thesis. Without His guidance, help, and blessing, I believe this thesis would have never been completed.

Working on this thesis was a hard time for me. I believe this thesis would never been done without the help, pray, and supports from many people. The thesis titled as Egypt Responsibility Toward the Foreigners as Victims in the Chaos Situation Under the International Law.

My gratitude will be addressed to the persons who are mentioned below. Mr. DR. H. Rusli Muhammad, SH., MH., as the Dean of Faculty of Law Islamic University of Indonesia.

Mrs. Sefriani, SH., M.Hum., as the lecturer of International Law subject, who always encourages me and advises on my thesis over and over. Thank you for being so patient while teaching me how to write this thesis correctly. For all the lecturers of International Program, thank you for all lectures and kindness.

Mr. Drs. Agus Triyanta, MA., MH., Ph.D and Mrs. Dra. Sri Wartini, SH., MH., Ph.D., thank you for attention and nice examination for me.

Mr. Herman Felani Tanjung, as my language advisor, thank you for your correction, I am messed without you.

My family, papa, mama, sisters, brothers, and for my wife. You are the compass that guide me, the inspiration to reach great heights and my comfort when I occasionally falter. Thank you for the amazing patience, your pray over and over, and always encourage me to finish my thesis.

All the students of Islamic University of Indonesia, especially for the member of International Program Law Faculty, best of luck for us.

For those who cannot be aforementioned, my apologize, I give you all my standing ovation. Finally, the writer hopes this thesis will be useful for the goodness.

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EGYPT RESPONSIBILITY TOWARD THE FOREIGNERS AS VICTIMS IN THE CHAOS SITUATION UNDER THE INTERNATIONAL LAW

Ifano Rahadian

ABSTRACT

Egypt hit by chaos since January 25, 2011, the biggest rebellion to the government that ever existed in the history of Egypt. The chaos that occurred in Egypt was initiated in January 2011 in which the consciousness of activists that has been very chaotic situation in Egypt appears. In the period between January 25, 2011 until February 11, 2011, there have been clashes between the demonstrators with Hosni Mubarak supporters, arrests, and looting. Chaos that occurred in Egypt has caused many victims of various parties, both citizens of Egypt and foreigners who are trapped in a situation very tense Egypt. Even some foreign journalists charged with covering the story and the situation there also being a victim.

This research is a normative juridical research with qualitative descriptive method, which describes the situation and conditions associated with the content examined regulations related to the research title. The data of this study emphasizes the secondary data sources as the primary data obtained through the research literature.

From research data after analyzed using qualitative descriptive methods, obtained results that the action should be done by Egypt to protect the foreigner in the chaos situation that is must always protect aliens in order to compensate the entry of foreigners into its territory. If the state fails to do this duty, it is considered as a breaches of international law. Although some countries there is no obligation to receive aliens in a territory, but when they receive it, then they have to perform protective actions against him. In international law a state is responsible for all acts of errors and crimes against foreigners in the country as a rule of state obligations towards the civilian population.

Egypt has failed to meet the responsibility to protect foreigners under international law when chaos occurs. It can be seen from the presence of foreigners, both as journalists and ordinary civilians, who were victims during the unrest in Egypt. Including Imanda Amalia and CNN reporters. Therefore against the Egyptian state could be held accountable to the victims of the foreign citizen as a result of the riots in his country because the Egypt State breach obligations under international law that is negligent in giving protection to foreigners in the country that should be his responsibility.

Key words: State responsibility, foreigners, chaos, international law

CHAPTER I

INTRODUCTION

A. Study Background

Nowadays many people are competing and trying hard to get the science and the degree of university graduation in abroad. In fact, many people are looking for opportunities to work in another country, because the standard of higher salaries and better guarantee of protection systems for workers. Of course, each person selects the destination country for different reason. Usually they choose to go to the developed countries or developing rapidly, and they also adjust to the field of work that they are interested to do.

Likewise, many Muslims want to deepen their Islamic religion knowledge to continue their studies at major universities in Arab countries, which are known to have very good quality of it Islamic religious education. One of the universities which is quite famous and a favorite one is located in Cairo, Egypt. Many Muslims are trying hard to be accepted to get higher education there. Therefore, it is not without reason that many Muslims want to go to study and even to be settled in Egypt. It is also due to rapid advancement of Egypt and the country is able to show to the world that it has the potential to appear more prominent among the other Arab countries. It is

also certainly not inferior to Saudi Arabia in several conditions, especially the political aspects.¹

Undeniably, the Arab Republic of Egypt is the most decisive country in changing the political constellation of the Arab world. History proves that any "political turbulences" in Egypt as what happens currently definitely has the big impact, both economically and politically, to the entire Middle East.²

Egypt is located in the northeast corner of Africa. To the west is bordered by Libya, south by Sudan, the north by the Mediterranean Sea, and in the east with the Gaza Strip, Israel, and the Red Sea. Thus, Egypt's geographical location is strategic because it is on the meeting point of two continents (Asia and Africa), as well as connecting the Mediterranean and Red Sea which is connected by the Suez Canal.³

Egyptian government was always in the spotlight of the world, because of the political power and governance is always a strong influence on other countries. If there are changes of government in turning of the era, it is always in the spotlight of the world. For every changes of an era of government often raises a matter that can cause a political change.⁴

Mubarak said in his speech on Saturday January 29, 2011 that he will not vote and would not promote his son as a presidential candidate in the next

¹ <http://www.kompas.com/>

² Jafar M Sidiq, *Ekonomi Memburuk, MusuhUtama Mubarak*, <http://www.antarane.ws.com/berita/245140/ekonomi-memburuk-musuh-utama-mubarak>. Feb 8th, 2011.

³ *Ibid.*

⁴ Launa, Sip., Mm., *Mesir di Bawah Rezim Mubarak*, <http://www.pewartakabarindonesia.blogspot.com/>. 08-Feb-2011, 11:52:08 WIB.

election, but he will remain in office until elections take place by completing the tasks that must be performed. Mubarak also had to replace all members of his cabinet with new persons. According to Mubarak, none of that can be achieved through a chaotic process, but through dialogue. He also knew that the Egyptian people want him noticed about poverty, employment, and democratic reform, so he promised to reform the social, economic, and political.⁵ This marks the transition process of Mubarak's government that has already begun in Egypt. The transition is expected to be peaceful and without conflict.

However, apparently the protesters showed sense of anger that became increasing after hearing the Mubarak's speech who said that he would not resign and only reform his cabinet. The mass of the anti-Mubarak increasingly claimed to overthrow President Mubarak. Clashes between the mass of anti-Mubarak and pro-Mubarak in Tahrir Square were inevitable.⁶ Vertical conflict, between the protesters who opposed the regime of Mubarak, has been arranged into a horizontal conflict with the pro-regime mass.⁷

⁵*Mubarak Bubarkan Kabinetnya*,
<http://kabarterpercaya.wordpress.com/2011/02/02/mubarak-bubarkan-kabinetnya/>. Feb 2nd, 2011

⁶*Hosni Mubarak Tolak Mundur Massa Pro Pemerintah Serang Demontran*, JPNN-JawaPosGrup,
http://www.jpnn.com/index.php/authentication/phpbb3/flash/201003/images/jpnn_network.php?mib=berita_detail&id=83588. Feb 3rd, 2011.

⁷*Vertikal Ditarik Ke Horizontal*,
<http://kabarterpercaya.wordpress.com/2011/02/03/vertikal-ditarik-ke-horizonal/>. Feb 3rd, 2011.

When the clashes broke out in Tahrir Square, some of Mubarak supporters were caught by the opponents. Most of them are frightened when caught and they cried out for forgiveness. They also claimed that the government had paid people to do demonstration on the streets. Some of the arrested opposition party also turned out to be the police officer in civilian clothes. They were undercover and they joined the pro-Mubarak group.⁸

Chaos that occurred in Egypt has caused many victims of various parties, both citizens of Egypt and foreigners who were trapped in a very tense Egypt situation. Even some foreign journalists who were charged to cover the story and the situation there also became the victims.⁹ One of the news that attracts the attention from Egyptian chaos is the death of a victim named Imanda Amalia. The news reported that Imanda is one of the UN staff to UNWRA (United Nation Relief and Work Agency), who is also a citizen of Indonesia. However, after the validity of the news were tracked and traced, it turns out Imanda is an Australian citizen residing in Perth, and she was just native Indonesia because of his parents' lineage.¹⁰ Imanda was in Egypt in order to be a humanitarian volunteer to help in the evacuation of casualties from the Anti-Mubarak.¹¹

⁸*PRO Mubarak ngamuk, 10 Tewas*, <http://konten.detikpertama.com/pro-mubarak-ngamuk-10-tewas.html>. Feb 4th, 2011.

⁹*15 Warga Riau Dipulangkan dari Mesir*, <http://riaupos.co.id/news/2011/02/15-warga-riau-dipulangkan-dari-mesir/>. Feb 4th, 2011.

¹⁰*WN Australia, Jenazah Imanda Diterbangkan ke Perth*, <http://arsipberita.com/show/wn-australia-jenazah-imanda-diterbangkan-ke-perth-151901.html>. Feb 3rd, 2011.

¹¹*Science Of Universe Minta Maaf Soal Imanda*, <http://arsipberita.com/show/science-of-universe-minta-maaf-soal-imanda-152018.html>. Feb 3rd, 2011.

Some journalists who served on the streets of Cairo also became victims of a mass attack pro-Mubarak. Not just local journalists, but foreign journalists also had been targeted to be attacked by Mubarak supporters. As reported by the CNN news station, a Belgian journalist was detained. Journalists were beaten and accused of being a spy by Mubarak supporters. He was persecuted in downtown Cairo, Choubra. An Egyptian journalist was subject to beatings several hours after the arrest in the Tahrir square. BBC journalist, ABC News, and CNN were also attacked. Among the victims were Anderson Cooper and CNN reporter Hala Gorani. Ahmed Abdullah, Al-Arabiya journalist, was also reported missing for three hours. Editor Abdullah said that his men who were allegedly kidnapped had been found in a condition seriously injured. "We brought him immediately to the hospital for intensive treatment", he said as quoted by AFP. The attack invited international attention. Some groups of international journalists were accused, and the attacks on a number of journalists were conducted by the government. "The Egyptian government is now trying to make a strategy to eliminate the witness for their actions," said the representative of the Committee to Protect Journalists Middle East and Africa Mohamed Abdel Dayem. An attack on the press, continued Dayem, is one way to intimidate the news. The Egyptian government alleged coercion by editing the news. "The attack suffered by journalists today is the deliberate acts of pro-government mass," he regrets. Besides disturbing the press, the government began to intervene in the giant

mobile operator Vodafone. They asked the Egyptian government to sort the messages through the phone during a rally to shake the North African country. The government hopes that Vodafone customers can get text messages that pro-government. However, Vodafone Group PLC in a release stated that it could not meet the demand that the Egyptian government.¹²

The political crisis in Egypt and impasse information led some Indonesian citizens who have family in that country to feel worried. They thought the condition became uncertainty. Their families and their lives in Egypt were threatened by starvation in the very crisis and dangerous situations.¹³

Indonesia President, Susilo Bambang Yudhoyono, asked to Indonesian citizens in Egypt to stay in safe places. If there is no very important purpose, the people of Indonesia advised to stay at home, as one place that is considered safe. It was called by President Yudhoyono in a press conference in Davos, Switzerland, before flying back to Indonesia. SBY was in Switzerland for two days to attend World Economic Forum meeting. On that occasion, Yudhoyono also called for the Egyptian Embassy to release safety notice for Indonesian citizens who are in Egypt. In addition,

¹²Wartawan Jadi Korban, PM Mesir Minta Maaf, <http://www.jambiekspres.co.id/utama/18219-polisi-bayaran-serang-demonstran.html>. Feb 4th, 2011.

¹³WNI Terancam Kelaparan, <http://konten.detikpertama.com/wni-terancam-kelaparan.html>. Feb 1st, 2011.

Yudhoyono also expressed concern over the casualties in the political chaos in Egypt and hoped the situation soon calmed down.¹⁴

Indonesian Parliament asked the Egyptian President Hosni Mubarak to accept the aspirations of his people who claimed him to fall down from his Presidency position. If President Mubarak remains in power, the conflict between anti-government people with pro-government will continue to occur, which would cause many casualties, which are not good for the humanity.¹⁵

The news continues to be expressed from the government of Egypt is that the actual state of Egyptian chaos happening at this time did cause adverse impact to the lives of people who were there. Egyptian state residents and foreigners are still in a stable condition and safe. Therefore, for now there is nothing to worry about, because the Egyptian government and the military will continue to protect its citizens. Nevertheless, it turns out that there is very much different and contradictory. The situation there is very tense and apprehensive. In fact, it almost impossible to be said safely.¹⁶

A good government should pay attention to the demands of the people, because the existence of government is to protect people, not vice versa. If there is an effort from the other state that still wants Mubarak remains in power with the help of all power, because it involves foreign

¹⁴*Imbauan SBY*, <http://konten.detikpertama.com/wni-terancam-kelaparan.html>. Feb 1st, 2011.

¹⁵*DPR Minta Presiden Mubarak Legowo*, http://www.bipnewsroom.info/?_link=loadnews.php&newsid=71564. Feb 4th, 2011.

¹⁶*Kami Teteskan Air Mata di BumiKinanah*, <http://luar-negeri.kompasiana.com/2011/02/08/kami-teteskan-air-mata-di-bumi-kinanah/>. Feb 8th, 2011.

interests mainly Israel and the United States (U.S.). It is obviously not conducive circumstances.¹⁷

Regarding the democracy, the Egyptian leader should have more attention to the condition of the people who already live miserably and his people wanted the change and reform in that country. Supposedly, Mubarak to realize that power has limits and it is the right time that he must realize to immediately offer the office of President of Egypt is based on people's choices. Definitely, the Egyptian government should have a clear responsibility to protect civilians, including their right to life, and freedom of assembly and freedom of expression.¹⁸

While on the other hand, there is something problem that is often ignored in the certain issues, which is the responsibility of the state toward foreign people who were living in the country. In this case, there are two problems, first how the Egyptian state's responsibility toward foreign nationals living in Egypt at the time of Egyptian chaos occurred, and the second is how about this problem related to the international law perspective. This is often not noticed by the local government where the chaos occurred while known these cases intersect with human rights and as a form of state responsibility.¹⁹

¹⁷ Anis Matta: *Sebaiknya Mubarak Mundur Dari Kekuasaannya*, <http://www.seruu.com/index.php/2011020639658/utama/nasional/>. Feb 6th, 2011.

¹⁸ *Ibid.*

¹⁹ "Tanggung Jawab Negara (*State Responsibility*)", <http://mznugie.blogspot.com/2011/04/tanggung-jawab-negara.html>, July 20th 2011.

In this Egypt case, manifestation of State responsibility by notifying the parties that concerned through their state representatives to immediately appeal their citizens not to visit Egypt during the riots. By law, the State will take responsibility, if there are still foreign nationals visiting the country that are experiencing unrest and damage, at least if there is threat to life and property. The responsibility in question here is responsibility for the losses, but it does not eliminate the responsibility of the State as a whole to protect its interests in foreign countries, both its citizens and its assets and take immediate measures to tackle the unrest. The conflict in Egypt is associated using the legal principles of state responsibility, namely that "Any country that violates or condone violations occurred in the sovereign borders of the country should be held accountable, lest it becomes a failed state for failing to show responsibility". Each state has full sovereignty within the borders. Sovereignty is attached along with the authority in the field of legislation or the drafting of legislation, administration, or implementation of the government and the judicial or court. That is why; a state must prove to the international responsibility for any violations of the international dimension is performed by any party in the territory.²⁰

²⁰*Ibid.*

B. Problem Statement

1. What action should be done by Egypt to protect the foreigner in the chaos situation?
2. Has Egypt fulfilled the responsibilities to protect foreigners under international law when the chaos happen?

C. Research Objectives

1. To analyze deeply the actions that the State have done to protect foreigners living in the country in a situation of chaos under international law.
2. To analyze deeply the actions of Egypt in the face of chaos and Egypt have done its responsibility to protect foreigners under international law when chaos.

D. Research Advantages

Whenever those objectives above are successfully fulfilled, thus this research will give contributions or advantages in aspects:

1. Theoretical Advantages

The result of this research is expected to give contribution to science and especially to international law, about the Egypt's responsibility toward foreign nationals living in its country when the chaos happens related to the international law perspective.

2. Practical Advantages

The result of this research is expected to give valuable inputs for related parties in order to implement a policy about state responsibility toward foreigners as victims in the chaos situation whether nationally or internationally.

E. Definition of Technical Terms

These are several terminologies used in this thesis. These terms will further explained in order to make the analysis clearer and help the reader to understand easily:

1. *State Responsibility*:

The basic principle of “state responsibility” in international law provides that any state that violates its international obligations must be held accountable for its acts. More concretely, the notion of state responsibility means that states, which do not respect their international duties, are responsible to immediately stop their illegal actions, and make reparations to the injured.²¹This term is almost equal to state accountability.

Accountability is about a revenge obligation to redeem him from someone who has been in the hollow of an adverse action (injury), both

²¹<http://www.diakonia.se/sa/node.asp?node=1857>

conducted by the first-mentioned person or by something that is under his control.²² Accountability concerning the state will be about on what grounds and in circumstances of how the state can consider to have committed a wrong act internationally.²³

2. **Foreigners (aliens):**

In law, an alien is a person in a country who is not a citizen of that country.²⁴

3. **Victim:**

A person harmed by a crime, tort, or other wrong.²⁵The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution 40/34 of the UN General Assembly, 1985) defined the notion of “victims” as being “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States”. The text also provides for access to justice and fair treatment, for restitution and compensation,

²²Yudha Bhakti Ardhiwisastra, *Hukum Internasional: Bunga Rampai*, Alumni, Bandung, 2003, p. 1.

²³*Ibid.*, p 4.

²⁴<http://dictionary.law.com/Default.aspx?typed=alien&type=1>

²⁵Garner, Black’s Law Dictionary, eight edition, Thomson west, (2004), 1598.

and for the right to receive the necessary assistance during the proceedings.²⁶

4. **Chaos:**

Chaos can be defined disorder. Another definition of chaos can mean.²⁷

- a. state of extreme confusion and disorder
- b. the formless and disordered state of matter before the creation of the cosmos
- c. (Greek mythology) the most ancient of gods; the personification of the infinity of space preceding creation of the universe
- d. (physics) a dynamical system that is extremely sensitive to its initial conditions
- e. An empty, immeasurable space; a yawning chasm.

5. **International Law:**

International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:²⁸

- a. the rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individual, and
- b. The rules of law relating to individuals and non-states so far as the

²⁶ “The Victim’s Status in International Criminal Trials”, in <http://www.trial-ch.org/en/resources/international-law/the-victims-statuts-in-international-criminal-trials.html>, accessed on 6 August 2011.

²⁷“Definisi *chaos*”, dalam <http://www.artikata.com/arti-31607-chaos.html>, accessed on 6 August 2011.

²⁸Alina Kaczorowska, *Textbook: Public International Law*, London, Old Balley Press, (2002) 7.

rights or duties of such individuals and non-states entities are the concern of the international community.

F. Conceptual Framework

The principle of state sovereignty in international relationship very dominant. That one sovereign state is not subject to any other sovereign country. International law already provides that in the sovereignty-related in it an obligation to not abuse the sovereignty of people, goods, and act which is in its territorial area. Therefore, a state can be held liable for the actions or negligence that against the law.²⁹

State Responsibility is the principle of international law which regulating the emergence of a country's accountability to other countries that have been codified and adopted by International Law Commission on the ILC Draft Articles on State Responsibility, ILC's 53rd Session, Geneva, 2001.³⁰

In general, terms state responsibility comprises two elements: an unlawful act, which is imputable to the state. Necessarily, responsibility may be avoided if the state is able to raise a valid defense. If not, the consequence of responsibility is a liability to make reparation. It should also be noted that according to ILC, "damage" is not a precondition of international responsibility. In other words, for responsibility to arise is enough that there

²⁹Sefriani, *Hukum Internasional: Suatu Pengantar*, Ed. 1, -1. Jakarta: RajawaliPers, 2010, 265.

³⁰Arifin P. Soeriaatmadja, *Keuangan Publik dalam Perspektif Hukum* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005) 128. <http://zonahukum.blogspot.com/2011/03/imunitas-negara-pada-private-acts.html>

has been an internationally unlawful act attributable to the state. The “injured state” does not have to prove that it suffered any particular harm before it can fix the delinquent state with responsibility. Violation of an international obligation is “damage” in itself. Of course, in most practical example, the claimant state will be alleging actual damage and this is certainly true in the majority of the cases concerning foreign nationals considered below.³¹The term reparation is then forwarded to the payment of compensation and restitution of the value of compensation for damages.³²

Actually, foreign nationals living also regulated by international law in many chapters. Because the simple definition of foreign nationals term recognized as a peoples or individuals meaning. Whereas, the contents of subjects of international law, two of which are states and individuals.³³

The problems of state responsibility toward foreign nationals with the broken rights and obligations usually direct into the international law system. International Law Commission as a basic fundamental principle, divide unlawful acts into two categories: delicts (civil wrongs) and international crimes.³⁴

State responsibility in international law is essentially backed the idea that no single country can enjoy their rights without respecting the rights of

³¹ M. Dixon, *Textbook on International Law*, Blackstone Press Limited, fourth edition, (2000) 232.

³² Ian Brownlie, *Principles of Public International Law*, Oxford: Clarendon Press, (1992) 458.

³³ Martin Dixon dan Robert McCorquodale, *Cases and Materials on International Law*, New York: Oxford University Press, (2003) 403.

³⁴ M. Dixon, *Textbook on International Law*, Blackstone Press Limited, fourth edition, (2000) 234.

other countries. Any violation of other countries must lead the country to rehabilitate it or equally accountable.³⁵ This is actually a common thing in the legal system in which the violation of legally binding obligations will come to responsibility for the delinquent.³⁶

In international law recognized the existence of two kinds of rules, primary rules, and secondary rules. Primary rules is a set of rules that define rights and obligations of the state as stipulated in the form of treaties, customary law or other instruments. As for secondary rules is a set of rules that define how and what legal consequences if the primary rules were violated by the state. Secondary rules are called the law of state responsibility (the law of state responsibility).³⁷

G. Research Method

1. Research Object

The objects of this research are State Responsibility towards the foreign nationals living in their country in the chaos situation under the International Law.

2. Legal Material

a. Primary Legal Material

Information collected from international convention and agreement, acts, decrees, documents, especially international law

³⁵Hingorani, *Modern International Law*, second edition, (1984) 241.

³⁶ Martin Dixon, *Textbook on International Law*, Blackstone Press Limited, fourth edition, (2000) 231.

³⁷ Mohamad Mova Al' Afghani, "Kewajiban Swedia Untuk Melakukan Due Diligence Terhadap Permasalahan Hasan Tiro", article of *workshop on International Legal Process*, Ibis Hotel, July 25-26, 2003.

sources, Draft Article International Law Commission, The Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live and additional legal sources related to the State Responsibility principle.

b. Secondary Legal Material

Information collected from books, thesis, magazines, newspapers, law journals etc, related to primary sources, and can help to analyze and understand the primary sources in conjunction with the State Responsibility principle.

c. Tertiary Legal Material

Sources to support writing this research, such as: Encyclopedia, Law dictionary and English-Indonesia dictionary.

3. Technique in Collecting Legal Material

Technique in collecting information in this research is conducted by library research or a research or study towards literature and documentary.

a. Literature study

Examining journals, result of legal researches, and literatures related to the State Responsibility principle.

b. Documentary Study

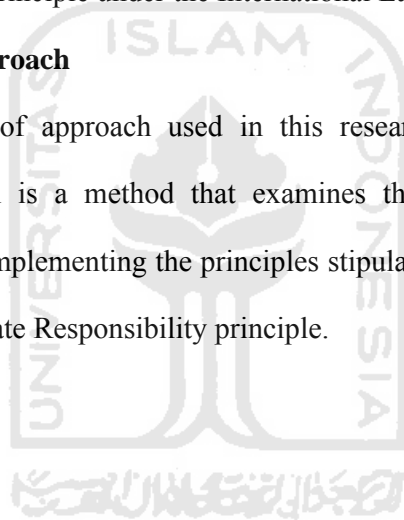
Examining legal documents such as international treaties or agreements, acts, decrees and other documents related to the State Responsibility principle under the International Law perspective.

4. Technique of Analysis

Legal material analysis is conducted by means of qualitative and deductive method. This is carried out by observing relevant facts and then relates them with legal problems. In addition to that, the method is carried out by laying down facts or issues to be examined, after that, they will be systematically explored by using the basis of legal theories and general principle agreements or regulation related to the State Responsibility principle under the International Law perspective.

5. Method of Approach

Method of approach used in this research is legal normative approach which is a method that examines the consistency and the compliance in implementing the principles stipulated in international law related to the State Responsibility principle.



CHAPTER II

STATE RESPONSIBILITY IN INTERNATIONAL LAW PERSPECTIVE

A. General Issues of State Responsibility

1. State as a Subject of International Law

As we know, the subject of international law includes:

- a. Country;
- b. International Organizations;
- c. International Red Cross;
- d. Holy See or the Vatican;
- e. Liberation Organization or the Nations who are fighting for their rights;
- f. Trust territories;
- g. Belligerent;
- h. Individuals.³⁸

Among the several subjects of international law as described above, the following discussion of the material is limited only as subjects of international law, states, and individuals as subjects of international law.

State as one of the subjects of international law and is the main subject of international law. State as well subjects of international law are

³⁸I Wayan Parthiana, *Pengantar Hukum Internasional*, Mandar Maju, Bandung, 1990, p. 59.

reviewed historically and factually. Historically, the first is the subject of international law at the beginning of the birth and growth of international law are states.

The role of states as subjects of international law is also increasingly dominant over time because the bulk of international relations can bear the principles and norm of international law by the countries. Traditional elements of a State contained in Article 1 Montevideo (Pan American) Convention on Rights and Duties of State of 1933.³⁹ Article reads as follows:

The State as person of international law should possess the following qualification:

- a. A permanent population
- b. A defined territory
- c. A government; and
- d. A capacity to enter into relations with other State.

The elements above are also suggested by Oppenheim Lauterpacht. Here is his description of each of these elements:

- a. There must be people. What is meant by the people that set humans of both sexes who live together so that a society, although they may originate from different ancestry, beliefs or different or have different skin. Important condition for this element is that the public should be well-organized (organized population). Because it is difficult to imagine, a country with a well-organized government "live" side by side with disorganized society.
- b. There should be areas where people reside. People who live around from one region to another (a wandering people) not including the state, but it does not matter whether the area is inhabited by a permanent large or small, can also consist of

³⁹Huala Adolf, *Aspek Aspek Negara Dalam Hukum Internasional*, Rajawali Pers, Jakarta, 1991, p. 2.

only one city alone, as is the city state. Not questioned also, whether the whole region is inhabited or not.

- c. There should be a government, namely a person or persons who represent the people, and ruled the country according to law. A society that anarchistic not including the state. In one of his writing, Lauterpacht stated that the existence of this element, namely the government, is a key condition for the existence of a state. If the government was then legally or in fact, a puppet state or satellite state of a country other than the state cannot be classified as a state.
- d. The ability to conduct relations with other countries. Oppenheim-Lauterpacht use another phrase for this fourth element, namely by using the phrase "the government must be sovereign" (sovereign). What is meant by a sovereign government is the supreme authority independent from the influence of some other power on earth. Sovereignty in the strict sense means full independence, either inside or outside the boundaries of the country.⁴⁰

Among the elements of the state are in fact elements of the ability to conduct relations with other countries is less important, because the state may be able to stand without the ability to conduct relations with other countries, so that is also called non-physical elements. Regarding the ability to make contact with other countries is something to do with the recognition of both national and international law recognizes the power and authority.⁴¹

The ability to conduct relations with other countries is intended in the juridical sense that is because the laws punish both national and international law recognizes the power and authority. As for the statement regarding the criteria or the measure of the ability to conduct

⁴⁰Oppenheim-Lauterpacht, *International Law: A Treatise* vol 1: Peace, 8th edition, Longmans, 1976, p. 118; quoted from Huala Adolf, *Ibid*, p. 3.

⁴¹*Ibid*, p. 7.

relations with other countries, there is no clear and definite terms. In connection with the recognition "of a country recognized de jure, while other countries recognize a de facto, is an exception only and is incredible".⁴²

According J.G. Starke, elements or requirements such as those mentioned above is the most important in terms of international law. The above characteristics also distinguish the states with units smaller as members of the federation or protectorate, which does not handle its own foreign affairs and not recognized by other countries as an independent member of the international community. Even international law itself may be regarded as the largest part consists of the legal relationship between state and nation.⁴³

Sovereignty is owned by a state indicates that a country is independent or not subject to the power of other countries. However, this cannot mean that sovereignty is no limit, or as not limited at all. Restrictions alone is the law, either national law or international law. Based on its sovereignty, then can be lowered right, power or authority of states to regulate the issue internally and externally. In other words, that is derived from its sovereignty or jurisdiction of the state of birth. By rights, power and authority or with the jurisdiction of a state could

⁴²J.G. Starke, *Pengantar Hukum Internasional, 10th edition, Sinar Grafika, Jakarta, 2000,* (J.G. Starke I) p. 458.

⁴³*Ibid.*

regulate in greater detail and the obvious problems it faces, so manifest what the objectives of the country. In view of the international law of State also has rights and obligations. Rights and obligations of States contained in the 1933 Montevideo Convention on the rights and obligations of States by Latin American countries, as well as in the draft Declaration on the rights and obligations of States prepared by the UN commission of international law on the date of 1949.

The design was made in order to be approved by the UN General Assembly. In the draft, the principles concerning the rights and obligations are as follows:⁴⁴

- a. The rights of State:
 1. right to liberty
 2. The right to exercise jurisdiction on the territory, people and objects that are in its territory.
 3. the right to obtain legal status similar to other States
 4. The right to exercise self-defense or collective.
- b. State obligations
 1. obligation not to intervene against the problems that occurred in another State
 2. obligation not to move the civil unrest in other countries
 3. obligation to treat all people residing in its territory with due regard to human rights
 4. obligation to maintain its territory in order not to endanger international peace and security
 5. obligation to settle disputes peacefully
 6. obligation not to use force or threats of weapons
 7. obligation not to petrify the implementation of article 9 above
 8. obligation not to recognize the territories acquired by violence

⁴⁴Huala Adolf, *Op. cit.*, p. 37.

9. obligation to implement international obligations in good faith, and
10. Obligation to conduct relations with other States in accordance with international law.

Meanwhile, according to observations J.G. Starke, examples of rights (authority) that carried a State that is:

- a. power to regulate its domestic problems
- b. power to receive and expel foreigners
- c. have the right to diplomatic immunity and other overseas
- d. have jurisdiction of criminal acts committed in the territory

Examples of States' obligations:

- a. The obligation not to interfere with the sovereignty of other States
- b. The obligation to prevent its citizens committing a violation of the independence of another State or territory
- c. The obligation not to interfere in the affairs of another State.⁴⁵

2. Individual as subjects of International Law

Individuals as subjects of international law known since the onset of World War I based on the peace treaty, in accordance with that put forward by Chairul Anwar as follows:

Individuals generally implicated indirectly in international law. Individual's relationship with international law is usually done through the state in which the individual is a citizen. Individuals are granted the right to file claims arising from the Peace Treaty of World War I, on the various courts are established based on the peace treaty.⁴⁶

⁴⁵J.G. Starke, *Introduction to International Law*, London, Butterworths, 9th edition, 1986 (J.G. Starke II), p. 96.

⁴⁶Chairul Anwar, *Hukum Internasional, Pengantar Hukum Bangsa Bangsa*, Djambatan, Jakarta, 1989, p. 29.

If the notice Chairul Anwar above description shows that individuals as subjects of international law is the development of the country as the subject of international law. This is apparent from the phrase "international law view of individual relationships is usually done through the state in which the individual is a citizen". As individuals have the right to file claims, arising from the peace agreement in the courts established based on international agreements. The position of individuals as subjects of international law is a further development of the country as the subject of international law. Individual as the developer states as subjects of international law in line with that put forward by I Wayan Parthiana as follows:

The position of individuals as subjects of international law is now no doubt. Its position at the beginning of the growth of international law, the individual merely as a subject of national laws while the subject of international law is even one country. It is argued that, individual acts only in an international level if it has to get permission or approval from their own country. Therefore, in fact, this opinion, state it is the truth that is the subject of international law. Now, individuals within certain limits are not able to act independently to perform legal acts on behalf of and for it. Similarly, individuals can be burdened with international obligations and directly liable for his actions in the international level that are contrary to international law.⁴⁷

When considering the views I Wayan Parthiana above relating to individuals as subjects of international law relating to the emergence of the principles and norms of international law that gives rights and obligations of burden directly to individuals. This means that the

⁴⁷I Wayan Parthiana, *op.cit.*, p. 91.

affiliated individuals as subjects of law only within certain limits, in example when the acts in breach of international law.

Recognition of individuals as subjects of international law applies to all individuals, without distinction of origin, religion, color, etc., have the rights and obligations of the same rights. Regarding equal treatment of the rights and obligations of this fundamental in the outline I Wayan Parthiana argued that in essence is an affirmation of the personality of the individuals as legal subjects, both subjects of national law and international law subjects. Especially because the issue of the rights and obligations of human rights is universal without recognizing the limits of national territory.⁴⁸

Individuals as subjects of international law can not only claim to court, but also as the party may be prosecuted on the grounds have committed acts breach international law. This is consistent with that put forward by Chairul Anwar as follows:

Nevertheless, although in general the state is seen as bearers of rights and obligations in international law, sometimes individual can be regarded as subjects of international law in various ways. Pirates have long been known to commit crimes against international law and is punishable by any country.⁴⁹

Individuals can become parties to put forward in court based on breach of international law more and more occurred after World War II as the party of war crimes, crimes against peace, war and humanitarian

⁴⁸Ibid., p. 92

⁴⁹Chairul Anwar, *loc.cit.*

law, according to the following: "After World War II, criminals war of the Axis countries prosecuted and tried by the International Military Tribunal, on grounds that they have committed crimes against peace, war and humanitarian law and breach of international law".⁵⁰ Countries shaft that meant that the countries directly involved in a dispute in this case Italy, Japan, Germany. Against the perpetrators of these war crimes, which is authorized to judge the International Military Tribunal based in Neurenburg formed by the allies. Between Admiral Doentizt of Germany, General Yamashita of Japan.

If the notice of the above seems seen that individuals can be held accountable based on breach of international law. Accountability imposed on individuals who commit these acts violated international law by the consideration that crimes against international law committed by many individuals, so that by punishing the individual, the provisions of international law can be implemented.

Recognition of the rights and obligations of human rights more attention after explicitly formulated rights and obligations of human rights in the form of declarations and international conventions as a private individual placing an international position increasingly robust. For more details regarding the recognition of human rights, the opinion by I Wayan Parthiana stated as follows: "Much more has been

⁵⁰Ibid., p. 29.

formulated expressly with the rights and obligations of human in declarations and international conventions, the position of individual growing as an international private firm".⁵¹

I Wayan Parthiana opinion above is emphasized by Masyur Effendi as follows: "If the individual issues with the rights can be approached through international law first, because individuals is recognized as subjects of international law and national law too, so it has the rights, obligations and specific responsibilities".⁵²

Article 5 of the World Declaration on Human Rights provides that "No one else may nevertheless abuse or treated cruelly, by not considering the humanitarian or legal road or humiliating treatment ".

Individual responsibility in international law of human rights violations are resolved through the International Court of Justice. This happened that International Military Tribunal convened in Nurenburg West Germany and in Tokyo Japan in 1946 directly asked to individual responsibility the leaders of Germany and Japan as the party accused of waging World War II. They have been accused of committing war crimes and crimes against humanity.⁵³ It can be used as evidence that the individual in his capacity as war criminals and crimes against humanity

⁵¹I Wayan Parthiana, loc. Cit.

⁵²Ibid., p. 92 – 93.

⁵³Ibid.

accountable for its actions, which is a breach of the principles and norms of international law.

3. State Responsibility

The state's responsibility ultimately will touch the essential problem of the country that is the sovereignty, if a country's sovereignty implemented not limited in performing the functions of his country. The limitation should be made in order to international order (the relationship between states) are not disturbed. For this purpose, international law has laid the basic foundations of the state's obligation in order to live peacefully in an orderly system. Because the issue of state responsibility on the one hand touches something that is essential and on the other hand the increasing intensity of relations between states has resulted in rules relating to the responsibility of countries today are still in the process of evolving to look for a solid shape.⁵⁴

Responsibility is "obligation to redeem him from someone who has been in the hollow of an adverse action (injury), both conducted by the first-mentioned person or by something that is under his control."⁵⁵ Responsibility concerning the state about on what grounds and

3. ⁵⁴Yudha Bhakti Ardhiwisastra, *Hukum Internasional Bunga Rampai*, Bandung, p

⁵⁵*Ibid.*, p 1.

in circumstances of how the state can consider to have committed to wrong act internationally.⁵⁶

In connection with the discussion of state responsibility that is associated with the fault theory, there are two theories in the international law doctrine to discuss whether the state or negligence is absolute or whether it is necessary to prove fault or intention and the will of the act of an officer or agent of the state. The first theory, the theory called the theory of objective or risk. According to this theory, state responsibility is absolute (strict). According to this theory, when an officer or agent of the state have committed acts that resulted in harm to others, the state is responsible under international law without a proven whether such action is carried out with the intention of good or evil. The second theory is the theory or the theory of subjective errors. According to this theory, the responsibility of the state is determined by the element of negligence (Dolus) or negligence (culpa) on the officer or agent of the country concerned.⁵⁷

State responsibility stipulated in international standards (although in a specific offense, an international standard can be termed a national standard) and it relies on international law as to whether and the extent to which the act or omission of a particular country is considered valid or invalid. If the actor omission of a country as measured by those standards

⁵⁶*Ibid.*, p 4.

⁵⁷Huala Adolf, *op.cit.*, p. 187.

declared invalid, then the responsibility of the state will not arise. For example, the state authority to reject foreign nationals into the country for some reason. A foreigner cannot sue the state's responsibility towards the country that rejected them. Similarly, if international law recognizes the jurisdiction of a state's action, then there is no breach of obligations that give rise to state responsibility.

State responsibility that should be accountable to a party should be differentiated from the notion of "liability" as an obligation to compensate or repair any damage that occurs. Responsibility should not always fall along with giving compensation and to rehabilitate legally should be accountable as a legal obligation that is the actions must appropriate by the law.

State responsibility closely related with basic rights and obligations of the state. Anyway, keep in touch with the right over its natural resources in addition relates to the principles of international law regarding the friendship and cooperation. Permanent International Court of Justice stated that, accountability is the principle state in international law so that in case of breach of duty resulted in the birth of the obligation to hold (improvement) in a reasonable and adequate.⁵⁸

The state will be responsible internationally for violations only if the offense was committed. State responsibility arises when the

⁵⁸Yudha Bhakti Ardhiwisastra, op cit, p. 6.

relationship proves as emphasized by the International Law Commission.⁵⁹ Attribution an act of negligence to the state as an international person is a demanding implementation is within the scope of international law. This is in contrast with the parallel implementation can, but not a necessity, take place according to international law".

In determining the onset of state responsibility, the investigation goes as follows:

- 1). First, is necessary to determine whether the organ or state officials who are guilty of acts or omissions of relevant it has or does not have the authority based on national laws relating, in addition to cases where a specific instruction from a superior officer has done instrumental.
- 2). Stated that if organs or officials of these countries have such authority, then the other issues that must be investigated is whether the breach of that obligation can be linked or not, so that the country concerned is responsible under international law.
- 3). If it is believed that the organ or officials of these countries have no such authority in the local law, so that such measures are actually *ultra vires*, then there is no linkage responsibility.⁶⁰

Violations of the rights of other states require state actors to make improvements so that a country may not be able to enjoy their rights without recognizing or respecting the rights of other countries. Where international obligations are violated to the detriment of another party, it gives birth to state responsibility. State accountability measures related to the internationally discredited, bounded by the principles of international

⁵⁹J.G. Starke, *op.cit*, I, p. 405.

⁶⁰*Ibid*, p. 406.

law regarding the extent to which the country is considered unlawful.⁶¹ If a country violates the obligations stipulated by international law, against him liable to indemnify.⁶²

International crime is all act against international law that breach of international obligations that are essential to the protection of fundamental interests of the international community, which breach is recognized as a crime by society.

All acts against international law is an international delict. In the State of accountability in outline can be divided into:

- 1). Responsibility tort (dialectal liability)
- 2). Liability for breach of agreement (contractual liability)
- 3). Exclusion of State responsibility for violations of the agreement.⁶³

Every citizen must still be protected wherever they are. State to protect its citizens from the poor treatment of foreign countries and is demanding compensation because of the doctrine of State responsibility, which in it is "the demands of nationality". Although the issue of State responsibility is often associated with the wrong actions or omissions committed by one State against another State,⁶⁴ later developments showed that the factor of intent from the perpetrator of the violation is no longer an essential element for the birth of a responsibility.

⁶¹Yudha Bhakti Ardhiwisastra, *op.cit.*, p. 8.

⁶²*Ibid.*

⁶³Huala Adolf, *op.cit.* p. 180-185.

⁶⁴Yhuda Bhakti Ardhiwisastra, *loc.cit.*

Regarding the responsibility of the State are also regulated in the Draft Articles on State Responsibility Adopted by the International Law Commission. In the case of violations of human rights or foreign civilians, according to article 1 of the Draft International Law Commission put forward "Each act of breach of international law by a country lead to international responsibility of the State concerned".

A country can be said to have committed acts violating international law according to article 3 of the Draft International Law Commission if:

- (a). the act or action regarding the State under international law;
- and
- (b). The action raises a breach of international obligations of the State concerned.

Against violations by states against civilians, Article 45 (10) Draft International Law Commission put forward as follows:

1. Countries which suffers from the State must obtain the fulfillment of international law violators for damages because of his actions, if and to the extent necessary to provide full repair.
2. Fulfillment may be one or more of the following:
 - a. an apology;
 - b. nominal damages;
 - c. in violation of State rights of patients, the compensation reflects the gravity of the offense;
 - d. in cases where violations of international law emerge as a serious error officer or officers or criminal acts of private parties, disciplinary action against or penalty imposed on such officer, is responsible

3. The right to obtain compliance with the State that does not mean to justify the error that the State action violates international law.

Concerning the delimitation of responsibilities between the limits of differentiated responsibilities of states internationally and nationally. Limits of responsibility specified by Starke as follows:

- a. Violations of the obligation or omission by a country that resulted in liability.
Violations or negligence on the last institution must be a breach or neglect of a principle of International Law. No state liability for violations of national law alone. Not useful argued that the events that give rise to liability is governed by national law, then there is no violation of national law, just as long as the principles of international law has been violated.
- b. Power (authority) state agency that mistake.
State cannot defend them by arguing that the agency made a mistake that has exceeded its authority or no authority under national law. If International Law says that the country was responsible for the International Law applies, even though according to the National Law agency was not authorized.

B. Element of State Responsibility (ILC Draft 2001)

State Responsibility is a fundamental principle of international law arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states. According to the principle of State Responsibility whenever a state breaches any obligation under international law or commits an internationally wrongful act against another state which causes damage, a new legal relationship arises between the party committing the wrongful act and the party injured thereby. The state committing the internationally wrongful act thus owes certain new obligations or becomes responsible to the party injured

owing to the commission of the act.⁶⁵

In general, terms, state responsibility comprises two elements:⁶⁶

1. Can be attributed to the state under international law;
2. Breach of an international obligation.

Necessarily, responsibility may be avoided if the state is able to raise a valid defense. If not, the consequence of responsibility is a liability to make reparation. In most practical examples, the claimant state will be alleging actual damage and this is certainly true in the majority of the cases concerning foreign nationals considered below:⁶⁷

1. An illegal act

It is axiomatic that whether an act of a state gives rise to responsibility is to be judged according to international law. As Article 4 of the Draft Articles makes clear, an 'act of a state may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law'. This is simply yet another example of the rule that conduct in international law is judged by international rules. Consequently, international responsibility cannot be avoided by pleading that the disputed actions were lawful in national law.⁶⁸

2. Attributability

⁶⁵Malcom N. Shaw, *International Law*, Cambridge University Press, Cambridge, 1997, p. 541.

⁶⁶Sefriani, *Hukum Internasional Suatu Pengantar*, Rajawali Pers, Jakarta, 2010, p. 269.

⁶⁷Martin Dixon, *Text Book On International Law*, Black Stones Press Limited, London, 2000, p. 232.

⁶⁸*Ibid*, p. 232.

In order for a state to be fixed with responsibility, not only must there be an unlawful act or omission, but that unlawful act or omission must be attributable to the state. It must be an unlawful act of the state itself and not of some private individuals acting for themselves. In the simple case, as where a state refuses to honor a treaty commitment, there may be no doubt that the act is an 'act of the state'. However, in cases where the acts complained of are committed by specific individuals or organs within the state, it is essential to know whether they are acting (or are treated as acting) on behalf of the state so as to give rise to international responsibility. If they are not, then no breach of international law has occurred.⁶⁹

Articles 5 to 15 of the ILC Draft deal with the question of attributability and, on the whole, they reflect existing customary law. These articles explain whether an act or omission perpetrated by organs or individuals is to be attributed to the state is a matter of international law. While international law may well use rules of national law to help make this decision (such as those national rules defining the status of individuals or organs); the final determination is for the international system. It is perfectly possible, therefore, for an act to be attributable to the state in international law, even though in national law it would not be so regarded.

According to the attributability concept, the state acting on an

⁶⁹*Ibid*, p. 235.

international level by individuals, so that countries can be considered responsible for it must be proven that individual actions can be attributed to the state. Therefore to be attributed to the state, in general, must be proven that individuals who commit violations have official status understate domestic legal system, both the central government (including legislative and judicial) or in its territorial units for example, federal state like the United States.⁷⁰

In the phosphate and Morocco Case, stated that “the act being attributable to the State and described as contrary to the treaty right(s) of another State”.⁷¹ This element can also be found in the Dickson Car Wheel Company case, issued in July 1931 by the Mexico-United States General Claims Commission established by the Convention on 8 September 1923, where the conditions necessary for a country to claim the international responsibility is the fact That an unlawful international act be imputed to it, that is, that there exists a violation of a duty imposed by an international juridical standard.⁷²

In order for an action can be categorized as an internationally wrongful act, then it must be attributable to the state and must be possible

⁷⁰“Imunitas Negara Pada Private Acts”,
<http://zonahukum.blogspot.com/2011/03/imunitas-negara-pada-private-acts.html>, July 22nd 2011.

⁷¹*Phosphates in Morocco case (Preliminary Objections)*, 14 June 1938 (P.C.I.J., Series A/B, No. 74, p. 28). (Italics supplied by the Commission.),
<http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

⁷² United Nations. *Reports of international Arbitral Awards*, vol. IV, *op. cit.*, p. 678. (Italics supplied by the Commission.),
<http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

that both the action and omission in question can be considered as an "act of the State". The state is a real organized entity, but to recognize reality should also be noted that the State is unable to perform physical actions. Therefore, considered the "act of the State" can only be good through acts of physical action or omission by a human or human group.⁷³

According to the ILC,⁷⁴ discuss the attribution to the state, as a legal subject is to discuss the state as a subject of international law, not national law. Attribution rather than the action to the state with the aim of proving the existence of internationally wrongful act by the state can only be done according to the rules of international law, the process of embedding or omission to the subject of international law in order to draw conclusions from it in area of international legal relations cannot be done within the framework of international law other than themselves.⁷⁵

Draft article 5 provides that organs of action under national law of a country is an organ of state is considered as an act of the country. If the law of the country itself determines that the said organ is an organ of state, then international law can take the same position. Conversely, if the domestic law of the country does not treat the organ as part of the country, does not automatically follow that the action of organs cannot be attributed to the

⁷³ States can act only by and through their agents and representatives." (*Case of Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion No. 6, Series B. No. 6, p. 22)

⁷⁴ Yearbook of international Law 1973, vol. 11, hal. 179-184.

⁷⁵ J. G. Starke. *loc. cit.*, pp. 106-107. Kelsen juga berpendapat bahwa penentuan apakah individu merupakan 'agen' dari Negara harus diselesaikan menurut hukum nasional. (H. Kelsen, *Principles of International Law* (New York, Rinehart, 1952), p. 117).

state. National law does not have a determining effect in this context: the attribution is the problem of international law. United Kingdom also observed that the principles developed in the context of state immunity is not directly applicable in the context of State responsibility. United Kingdom Government, in his observations, expecting that the International Law Commission will clarify these points in Commentary, and consider whether changes in the draft articles considered necessary.⁷⁶

Basically, the state is not responsible for the actions of individuals, unless they are in fact acting on behalf of state or government authority carrying out the elements when the absence of government officials. However, individual actions can also be accompanied by some action or omission that are attributable to the state. According to Akehurst act or omission it may be six forms, namely:⁷⁷

- a. Provoke an individual to attack foreigners,
- b. failed to provide reasonable care (due diligence) to prevent harmful foreign individuals,
- c. apparent failure to punish individuals,
- d. failure to provide access to justice for citizens of foreign countries (denial of Justice),

⁷⁶United Kingdom Government, Draft Articles On State Responsibility Comments By The United Kingdom Government, Foreign And Commonwealth Office January 1998, para 5, <http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

⁷⁷Peter Malanczuck. Akehurst, *Modern Introduction to International Law*, Routledge, NY, 1997, p. 259, <http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

- e. the advantage over individual actions (such as saving individual booty),
- f. Affirming and supporting the actions of individuals are real.

3. Reparation

It is axiomatic that breach of an international obligation gives rise to a secondary obligation to make reparation for that breach and this principle has been incorporated into the ILC's Draft Articles, Part II. It was recognized explicitly in the Chorzow Factory Case (Merits) (Germany v Poland) (1928). PCIJ Ser. A No. 17. In fact, reparation can take many forms. It may, for example, consist of apology (The I'm Alone (Canada v US) 3 RIAA 1609), restitution of the property unlawfully taken (Temple of Preah Vihear Case 1962 ICJ Rep 6) restitution in kind (Texaco v Libya (1977) 53 ILR 389) or any combination thereof. By far the commonest form of reparation is monetary compensation for the injury suffered. This may be calculated by reference to the actual value of the damage done or property lost and it may also include an element of lost profits, as discussed (although not awarded on the facts) in the Amoco Finance Case 15 Iran-US CTR 189 (1987). In The Lusitania Claims 7 RIAA 32, the Court assessed the compensation due to the United States by reference to the loss suffered by the claimants as a result of the deaths of their relatives when The Lusitania was sunk in 1914.⁷⁸

⁷⁸Martin Dixon, *Op.cit.*, p. 240.

4. Other consequences of a breach of an international obligation

Apart from the obvious right of a state to seek reparation for injury suffered (see above), the question arises whether any other consequences follow from a breach of an international obligation. This is an issue that has been vexing the ILC for some time and it has caused considerable debate among its members. Among many questions, two issues are of especial interest. First, although the ILC has now adopted individual Articles dealing with specific remedies (e.g., restitution of property taken, cessation and non-repetition of unlawful activity, compensation, satisfaction), some members (and states) do not accept that a simple list (exclusive or otherwise) encapsulates adequately the variety of rights, remedies and counter-measures which may be claimed or employed by the 'victim' state as a result of a breach of an international obligation which they are owed. This is more than a difference of style or emphasis for there is a fear that if a potential treaty on state responsibility were too prescriptive, it would choke the development of existing remedies and may prevent the emergence of new ones. Secondly, the ILC is torn over whether the consequences of a state committing an 'international crime' should be different from the consequences of a state committing a 'mere' delict. This is part of the wider debate surrounding ILC Draft Article 19.⁷⁹

⁷⁹*Ibid*, p. 240-241.

5. Defenses

As in national law, it is not every prima facie breach of a legal obligation that gives rise to legal responsibility. International law recognizes that the state may have a valid defense to a charge of unlawful conduct. In the ILC rubric, these are known as 'circumstances precluding wrongfulness', which suggests that the matters considered below prevent responsibility from ever arising, as opposed to providing the state with a defense once responsibility is otherwise made out.⁸⁰

Articles 29-34 of the ILC Draft Articles list a number of 'circumstances precluding wrongfulness'. These include: the consent of the potential victim state to the commission of an otherwise unlawful act, except in cases of rules of jus cogens (Art. 29); situations where the act complained of was a legitimate counter-measure to an internationally wrongful act of the complaining state (Art. 30); force majeure or unforeseen event making it materially impossible to fulfill the international obligation which is violated (Art. 31); cases where the perpetrator of the allegedly unlawful act was in a situation of extreme distress where no other means was available to save his life or that of persons entrusted to him (Art. 32); a narrow ground of state necessity (Art. 33 and see the Danube Dam Case⁸¹); and lawful self-defense (Art.

⁸⁰*Ibid*, p. 241.

⁸¹Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, Fordham Environmental Law Journal, 2002, Introduction, vol 13/375

34). Recently, in the Rainbow Warrior Case, an arbitral tribunal suggested that these general defenses could be raised in all cases where it is alleged that a state has violated international law, even if the source of the obligation binding the state is a treaty, and even if the particular defenses of the law of treaties are not available. Furthermore, in considering the French defenses of force majeure and distress, the tribunal relied heavily on ILC Dr. Arts 31 and 32, suggesting that these now represent customary law, as does Art. 33 on necessity following the Danube Dam Case. In the end, France was only partially successful in raising these defenses. The claim that the breach of treaty was force majeure was dismissed, as that concept was applicable only where circumstances made the performance of an international obligation impossible, not where circumstances made it more difficult. The defense of distress was more sympathetically received, with the tribunal making it clear that it was applicable in cases of a serious threat to life or the integrity of a state organ where that resulted in a situation of extreme urgency and emergency. On the facts, it was made out in part.⁸²

The jurisprudence of the Rainbow Warrior Case has now been confirmed by the ICJ itself in the Danube Dam Case. The Court confirmed that the 'defenses' of the law of state responsibility are applicable to breaches of all international obligations and specifically are

⁸²Martin Dixon, *Op.cit.*, p. 241

in addition to those that might arise under the rubric of the law of treaties if it is a treaty that has been violated. The Court explains that 'treaty defenses' determine the initial validity of a treaty whereas 'responsibility defenses' determine the consequences if a valid treaty is broken. This is superficially attractive, and it is no doubt correct that the availability of defenses should not be determined by the type of international obligation that has been violated. However, the Court's explanation does suppose that a state's conduct can be dissected into conduct relating to treaty validity (treaty defenses) and conduct relating to performance (responsibility defenses), but in reality this may be difficult to achieve. Indeed, as the Dam Case illustrates, the availability of any defense will depend on the Court's interpretation of the extent of the obligation that may have been broken, the standard of performance required from the alleged malefactor and the peculiar facts surrounding the alleged breach. It is straightforward and each case is unique.⁸³

C. Applicant of State Responsibility (ILC Draft 2001)

As noted, Draft articles on Responsibility of States for internationally Wrongful Acts bring many new developments for the law of state responsibility in international law. This new development, especially regarding who can sue the state's responsibility.

⁸³*Ibid*, p. 241-242.

ILC Draft 2001 about the responsibility of the state consists of four parts and 59 chapters. First about, The Internationally wrongful act of a state, second about Content of the International Responsibility of a State, third about The implementation of the International Responsibility of a State, and four about General Provision.⁸⁴The fourth section describes:⁸⁵

1. the breach of an international obligation gives rise to a new legal regime, with its own distinctive set of legal duties and rights. The object of the articles is to set forth these rules, together with the rules governing the conversion from the normal regime of international law to the new regime of state responsibility. Ago characterized both types of rules as “secondary” rules, which differ in kind from the “primary” rules of obligation establishing particular standards of conduct (e.g., do not use force without Security Council authorization, except in self-defense; do not take property without adequate compensation; do not cause significant transboundary pollution). Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation.
2. the secondary rules of state responsibility, encompassing all types of international obligations regardless of their source, subject matter, or

⁸⁴Draft articles on Responsibility of States for Internationally Wrongful Acts, ILC, 2001.

⁸⁵Daniel Bodansky and John R. Crook, “Symposium: The ILC’s State Responsibility Articles Introduction And Overview”, <http://www.asil.org/ajil/ilcsymp1.pdf>, August 7th 2011.

importance to the international community. They apply to both acts and omissions, to treaty obligations and customary norms, to breaches of bilateral as well as multilateral obligations, and to the whole gamut of particular subject areas, human rights law, environmental law, humanitarian law, economic law, the law of the sea, and so forth.

One of new development much under the spotlight regarding who can sue the state's responsibility set out in the third part The implementation of the International Responsibility of a State, especially on chapter 1 about Invocation of the responsibility of a State.

When the classical international law only entitles the aggrieved state to sue only the state's responsibility, ILC Draft 2001 about the state's responsibility to distinguish between *injured states* which provided for in Article 42 and *non-injured states*.

More Draft Article 42 provides that,

A state is entitled as injured state to invoke the responsibility of another State if the obligation breached is owed to:

1. that state individually; or
2. a group of states including that state, or the international community as a whole, and the breach of the obligation:
 - a. specially affects that state or
 - b. Is of such a character as readily to change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation

Article 42 is similar to Article 60 of the Vienna Convention 1969 on international agreements, relating to material breaches of treaties. Article 42,

paragraph a specifies that a country harmed when there are violations of individual duty. This can occur in various bilateral agreements, unilateral commitment such a commitment not to use certain types of weapons, do not take fish in certain zones, the general provisions of international law that bear certain obligations between the two countries as the relationship between riparian state in international watercourse, or multilateral agreements also bear certain obligations to each other.⁸⁶

As for paragraph b applies in the case of a country affected by breach of international legal obligations by other parties. Examples for this qualification is a breach of The Treaty on the Limited Test Ban Treaty or The Prohibition on Sovereign Territorial Claims in the Treaty on Antarctica.⁸⁷

From what is stated above, we see that the definition of injured states in Article 42 is a narrow sense, meaning not as wide as in the case of Barcelona, as stated earlier.

An Injured State requesting the responsibility of another country to tell his demands on the country so that country to stop the action infraction if it is still on going. The Injured State may also include in its claim of recovery (reparation) what is required of state offenders. *The Injured State* may also include in its claim of recovery (reparation) what is required of state offenders.⁸⁸

⁸⁶ Edit Browns Weiss, Sefriani, *Hukum Internasional Suatu Pengantar*, Rajawali Pers, Jakarta, 2010, p. 275.

⁸⁷ *Ibid*, p. 276.

⁸⁸ Article 43 Draft ILC, 2001.

State responsibility cannot be requested if:⁸⁹

1. the claim is not brought in accordance with any applicable rule relating to the nationality of claims
2. the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not exhausted

The responsibility of the state cannot be requested also if:⁹⁰

1. The injured state has validly waived the claim
2. The injured states is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim

Furthermore, if Article 42 regulates the injured then Article 48 states specifically regulate the invocation of responsibility by a state other than an injured state. Article 48 Draft ILC sets as follows:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - a. the obligation breached is owed to a group of States including that State is established for the protection of a collective interest of the group; or
 - b. the obligation breached is owed to the international community as a whole
2. Any state entitled to invoke responsibility under paragraph 1 may claim from the responsible State
 - a. Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - b. Performance of the obligation of the reparation in accordance with the preceding articles, in the interest of the injured State or the beneficiaries of the obligation breached
3. The requirement for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

⁸⁹ Article 44 Draft ILC, 2001.

⁹⁰ Article 45 Draft ILC, 2001.

Based on Article 48 states other than injured states can file a liability claim in another country in two respects:⁹¹

- a. obligations are breached owned a group of countries, including countries that filed the suit, set for the protection of the interests of the group;
- b. obligations are breached owned by the completely international community.

D. ILC Status

ILC Draft is not binding in international law as an instrument because it has not been established as a legal product. However, the binding strength of the ILC Draft is not seen from its form as an instrument, but from its contents. ILC Draft can be binding as customary international law.⁹²

There are two views on how the legal instrument should ILC. According to the first view, the ILC draft on State responsibility better formalized in international treaties, as well as the Vienna Convention on the Law of Treaties. The first reason is, if the States do not become party to the convention, it will remain bound as customary international law. Second, the work of the ILC over the years are eligible to be a law making text. According to the second view, the ILC draft on state responsibility is more suitable to serve as the UN General Assembly Resolution, with reasons:⁹³

1. The need for flexibility in the development of the law;

⁹¹*Ibid*, p. 277.

⁹²Martin Dixon, *Op.cit.*, p. 231.

⁹³Setiawan Y. Sabungan, "Atribusi Tanggung Jawab Terhadap Negara", <http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

2. Doubt that States have an interest to adopt an international agreement made when the ILC draft convention;
3. Worries that the ILC Draft that has successfully approved by the ILC after years conference will decodification the convention negotiation process, thus losing the essence of his legal theory.

Crawford more inclined towards the adoption of the ILC Draft text by the UN General Assembly Resolution, because according to him, unlike any other draft, the ILC Draft on State Responsibility can be *droit acquis* without having formalized in the form of conventions. Countries, courts, and international law experts will refer to the ILC draft regardless of its status, as it will be the authoritative text in the field of State Responsibility. ILC Draft has been frequently cited and used in international disputes, although its status is only a draft. Process and application support for these individuals will continue, and developed with the adoption by the UN General Assembly Resolution.⁹⁴

E. Various of State Responsibility under the International Law

1. In times of peace and chaos

In peace and chaos situation, to explain the responsibilities of the State can be used theories as follows:

- a. Against Foreign Persons and Foreign-Owned Property

⁹⁴James Crawford, *Fourth Report on State Responsibility*, International Law Commission (ILC) Doc. A/CN.4/517, ILC, 2000.

Countries have the right and obligation to provide protection to citizens who are abroad. The existence of the rights and obligations are in practice often lead to conflicts of interest between countries. On one side of the country of origin foreign citizens (home state) would like to provide maximum protection to citizens who are abroad. On the other side of the country where foreigners are located (host state) are looking to implement its territorial jurisdiction, to protect the interests of his country also potentially affected by the actions of foreigners in the country, without interference from any foreign party.

In practice, countries ill-treatment against foreigners could lead to state responsibility. Ill-treatment in question is as follows:⁹⁵

- 1). Denial of justice;
- 2). Foreign take overs of property unlawfully;
- 3). Failure to punish someone who should be responsible for attacks aimed at foreigners;
- 4). Direct loss caused by the action state organs.

Standards concerning the right to treat strangers in a country often debated among minimum international standard with national standards. Minimum international standards desired by the group of developed countries are always concerned citizens are treated poorly

⁹⁵Sefriani, *Hukum Internasional Suatu Pengantar*, Rajawali Pers, Jakarta, 2010, p. 283.

in developing countries and underdeveloped because the government in these countries many of which are often poorly treated its own citizens. Developed countries want their citizens are treated according to minimum international standards regardless of how a country treats its own citizens. When minimum standards are not met then it would appear an international responsibility. Standard meaning here is not only legal standards, but also in terms of law enforcement standard that is effective protection under the law international.⁹⁶ The national standard is what these developing countries and neglected who want equality of treatment between citizens themselves to foreigners by the national treatment standard. Foreigners are not eligible according to these groups are demanding more national dare given to citizens themselves. The presence of foreign nationals voluntarily consequences in a country subject to availability and receive local law. Territorial state is responsible only if there is discrimination by local residents. The principle of minimum international standards in view of developing countries will only be used as a means to intervene in the policy of developing countries. To counteract this intervention, Carlos Calvo, an expert from Latin America proposes a doctrine that became known as the Calvo doctrine. This doctrine asserts that aliens are

⁹⁶N.A Maryan Green, *International Law of Peace*, MacDonald and Evana, London, 1982, 2nd edition, p. 213.

only entitled to be treated as local citizens and therefore to demand he must use means that are available in the country (exhaustion of local remedies) and not allowed to ask the country to intervene.⁹⁷

The efforts to resolve differences between the supporters of national and international standards of treatment towards foreigners proposed by Garcia Amador in his report on international responsibility to the International Law Commission in 1956. Amador argues that the two approaches boils down to one common ground that is in the concept of an international complaint against the Human Rights is essential. To that end he formulated two principles of treatment of people or foreigners. First, foreigners shall enjoy the rights and guarantees the same with concerned citizens, the intention should be not less than the fundamental human rights are recognized and defined in international law. Second, the international responsibility would lead if the human rights / fundamental is in fringed.⁹⁸

Concerning nationalization or expropriation is often done by the government of a country against foreign ownership to incur losses on their foreign common law it is illegal except when: done by providing compensation to the prompt, adequate effective. As for

⁹⁷*Ibid.*

⁹⁸Yearbook of International Law, 1957, Vol II, p 104, 112-113, was quoted by Shaw in K.M Rhona Smith et al, *op.cit*, p 81-82.

the Starke nationalization was an act of legitimate sovereign state as long as there compliant compensation according customary international law and done in the public interest and there is no discrimination. The next two General Assembly Resolution 3201 in the GA Res 1974 Declaration on establishment of a new international economic order and GA Res 3281 (XXIX) Charter of Economic Rights & Duties of States, nationalization is valid as long as it provides appropriate compensation corresponding national laws. In practice the nationalization issue is solved through bilateral and multilateral agreements that contain guarantees of homework the host state not to nationalize foreign holdings in their area. Examples of these agreements such as bilateral investment guarantee agreement committed the Government of Indonesia with Japan or with the countries of origin other investors.

b. Against Public Debt

According to Starke there are three theories that explain how the creditor facing a debtor does not fulfill the obligation to pay its debts.⁹⁹ The first theory is given by Lord Palmerstone at the beginning of international development, which states that failure to

⁹⁹J.G. Starke, *op.cit.*, p. 292.

pay state debt entitles creditors to the party to take the steps he felt necessary to force debtor parties implement their obligations. The move is meant according to Lord Palmerston's diplomatic and military action violence. However, along with the development of international law which forbid the use of violence then the second theory put forward Drago, Minister of Foreign Affairs of Argentina, in 1902, the problem of state debt settlement can only be done through diplomatic and legal channels. Further development or third theory, which is followed today, there are no specific provisions or methods of how a debtor nation to pay its debts. Obligations relating to debts of debt or countries with obligations arising from other international agreements.¹⁰⁰

c. On Space Activities

Activity space is considered as high-risk activity, so the state will always be held liable absolute or strict liability principle against any losses that arise and the activity on the surface of the earth and in air space. This means the absolute responsibility of the aggrieved party does not need to prove where the fault of the defendant cause of the loss. The principle of strict liability is applied with the idea will be very difficult for plaintiffs to prove where the fault loss makers, given the activity of space is a high-tech activity

¹⁰⁰*Ibid.*

that is very difficult to understand by a nonprofessional. Absolute responsibility also means that the country is considered to know and should know the space for all activities that occur on its territory, whoever is the perpetrator, the state itself, or private parties. However, if losses arise in space then the principle of responsibility that there is a principle based on fault or fault-based liability. Thus, the plaintiff must prove the defendant's fault location for a successful lawsuit. This principle is applied with the consideration that the losses that occur in space, surely befall those who are economically and the technology equivalent of the defendant, because the plaintiff also has an object in space anyway, so it is not difficult for the plaintiff to prove the defendant's fault location.¹⁰¹

2. In Arm Conflict Situations

In situations of conflict that give rise to State responsibility, can be used State Responsibility in Humanitarian Law. Humanitarian law is also called the law of armed conflict is a refinement of the meaning of the term war. Use of the term-armed conflict occurs due to aggravation of the situation because people try to stop using the term war in order not to be regarded as an aggressor. Distinguishing humanitarian law of armed conflict into the national armed conflicts and non-international armed conflicts. Humanitarian law is not meant to forbid the war, because from

¹⁰¹Sefriani, *Op.cit.*, p. 288.

the standpoint of humanitarian war is a reality that cannot be avoided. Humanitarian law tried to arrange for a war can be conducted with due regard to humanitarian principles. In other words, humanitarian law to humanize the war.¹⁰²

One of the important principles of humanitarian law is the principle of protection.¹⁰³ From this principle and developed the principle of distinction in order to be effective protective function. The principle of distinction is a principle that distinguishes or divides the population into two groups, namely non-combatants and combatants. Combatants are people who actively participated in war activities. Being non-combatants are civilians who do not participate in war activities.¹⁰⁴

The purpose of humanitarian law formulated by the United Nations is to:¹⁰⁵

- a. To protect people who are not involved or are no longer engaged in a feud (hostilities), like the people who were injured, stranded ship, prisoners of war, and civilians.
- b. To limit the effect of violence in war in order to achieve these goals conflict.

Given there are basic principles of humanitarian law and the rules regarding restrictions on the use of violence in situations of armed

¹⁰² J.G. Starke, *Op.cit.*, p. 547.

¹⁰³ ArlinaPermanasari, *Pengantar Hukum Humaniter*, ICRC, Jakarta, 1999, p. 3.

¹⁰⁴ Haryomataram GPH, *Hukum Humaniter*, CV. Rajawali, Jakarta, 1984, p. 64.

¹⁰⁵ *Ibid*, p. 11.

conflict. So that civilians who fall into non-combatant groups can be protected by law.

F. Exception for State Responsibility

There are several reasons that could be used the state to defend themselves or escape the accountability demands of foreigners, as follows:

1. Application of Sanction under International Law

Despite the use of violence against another country, but the country can escape the demands of accountability when the use of violence that is within the framework of sanctions for breach of international law that made foreigners. Chapter VII of the UN Charter is the legal basis that allows the use of violence are collectively on behalf of the United Nations to a country to stop breaches of international law committed the country.¹⁰⁶

2. Force Majeure

Countries can also use this exception to free themselves from foreign parties accountable when something happens or adverse events that foreigners outside the country and indeed the prediction cannot be predicted earlier no deliberate, and the state has no power to prevent or avoid it. In the case of The Gill, the home of a British citizen living in Mexico devastated by the attack suddenly and unexpectedly by a group

¹⁰⁶*Ibid.*

of anti-government forces in Mexico. Commission formed to handle this case concluded that the absence of prevention is not caused by negligence of Mexico, but because it is not the possibility to take action in the face of an act which is the sudden.¹⁰⁷ For other examples can be pointed out for example country A makes a contract with the state B to complete the building project at a particular time according to mutual agreement. Too bad it happened before the project submission devastating natural disasters that cause damage to the project. A state failed to fulfill its promise submit the project according to the time that has been promised. However, based on the doctrine of force majeure country A is justified to request the suspension of delivery without any liability claims due to late submission of that.¹⁰⁸

3. State Necessity

The third argument states that can be used to liberate themselves from accountability is the existence of state necessity, the interests of the state of emergency and essential implemented to minimize losses that would occur. The doctrine of state necessity is often rather difficult to distinguish by force majeure. However, in general the state necessity, the country had no other choice, what state is the only way the country can do to save essential interest against a very big danger, as long as other

¹⁰⁷Huala Adolf, *Op. cit.*, p. 186.

¹⁰⁸Sefriani, *Op. cit.*, p. 289.

relevant state interests are not threatened by such action.¹⁰⁹ Thus, no element of premeditation, the impact of the loss can be predicted in advance, but the state actors did not have another choice. If action is not done it will lead to greater losses. In the case of the Torey Canyon, Britain was forced to detonate a Liberian tanker spilled oil in UK territorial waters, in order to save the coast of Britain from the pollution continues.¹¹⁰

G. The treatment of foreign nationals

It has been mentioned above that the state's responsibility, arising from an act against international law, either delictual liability or for breach of an agreement (contractual liability). According to Malcolm N. Shaw: The emergence of the state's responsibility is caused by two fundamental factors that can be used as a benchmark that an action can lead to accountability: First, the existence of applicable international obligations between the parties to the second, the existence of an act or silence (omission) which breach of obligations.¹¹¹

Actions that could lead to liability is unlawful: unlawful acts are acts that violate international treaties and violating legal obligations. State action in breach of a treaty and does not perform the duties prescribed by the treaty,

¹⁰⁹Malcom N. Shaw, *Op.cit.*, p. 419, as cited Huala Adolf, *op.cit.*

¹¹⁰Malcom N. Shaw, *Op.cit.*, p. 419.

¹¹¹“Hukum Bisnis Internasional: Aspek Hukum Dalam Bisnis Internasional”, <http://airlangkurniangga.blogspot.com/>, August 2nd 2011.

as well as state actions that cause harm to the state or citizens of other countries.¹¹²

State is responsible for all acts as acts committed by humans, namely the form of illegal actions by agreement (contractual) as well as a criminal offense (delictual). Thus was born the responsibility for the occurrence of something that is "internationally wrongful act", which is a wrongdoing that has international characteristics. The wrong state behavior internationally can also be sued her responsibilities although not resulting in direct losses to third parties. Such responsibilities shall arise if there is a genuine breach of the things that concerns such as protection of rights.¹¹³

Accountability of the state as what legally must be accountable to a party should be differentiated from the notion of "liability" as an obligation to compensate or repair any damage that occurs. Accountability does not necessarily have to fall simultaneously with the giving of compensation and repair the damage. Accountability countries have close links with basic rights and obligations of the state. Responsibility of the State relate well to the right to remain over its natural resources in addition relates to the principles of international law regarding the friendship and cooperation.

The nature of the individual's basic rights and obligations are inherent also in the behavior of states as will be explained below:¹¹⁴

¹¹²*Ibid.*

¹¹³*Ibid.*

¹¹⁴*Ibid.*

1. The existence of a higher mobility in the relations between states as an international living community has its own patterns of behavior that could result in state losses or damage to other countries. Legal basis for state behavior, particularly in matters relating to the exercise of sovereignty as freedom and equality.
2. When this basic obligation breached may lead to the right for other countries to demand it. State behavior even if done within its own territory, but interfere with or harm the rights of other countries can bear the responsibility for him.

To find out who the strangers in a country should be known to anyone including the citizens due to the stranger always dotted on the citizenship of the country of departure. Anyone can be known citizen of the citizenship laws of each State. Meant by foreigners is restricted to citizens of foreign countries, not including persons without citizenship and dual nationality people or more.¹¹⁵

Setting a stranger in international law can be seen from First, the emergence of an increasingly strong belief that human beings regardless of their origin and where else has the right to legal protection and rights must be equal to those enjoyed by nationals. Second, the nexus of the higher mobility among citizens with each other in various fields of human life needs. If an international agreement has provided certain rights to individuals, those

¹¹⁵*Ibid.*

rights must be recognized and have the power behavior in international law. Further understanding of the rights of foreigners of a country is important to maintain and manage relationships and can thus also understand why countries try to realize its citizens abroad to be treated properly in order to live safely and peacefully. Reciprocity between nations needs its nature, the imperative to maintain and manage relationships that benefit so then a common interest.¹¹⁶

Law on foreigners formed:¹¹⁷

1. Through the setting of national laws governing the legal status of foreigners;
2. Derived from the rules of international law that binds the state to provide a specific treatment against foreigners.

Rights and obligations of foreigners according to Article 22 of the Draft Articles on State Responsibility: Manage the efforts of local law describes the rights of foreigners to gain protection from a stranger to get protection from a cause of behavior, the country where, even if the behavior did not constitute result of international obligations and providing the rights and obligations are reciprocal among citizens with foreigners.

Rights and obligations of foreigners, according to Article 7 of the Draft Articles are delivered by special Rapporteur on the fifth session of the ILC in 1999: says that if any international action relating to the treatment

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

received by a country against foreigners, and state actors such action. Take action to restore the original state of a situation as before the offense was carried out on behalf of victims of state citizens who are disadvantaged may request payment of the amount of cents to the situation before the breach of international law.

H. Rights of Foreigners

Setting foreigners in international law arising from the increasingly strong conviction that humans regardless of origin and where the right to legal protection and rights have must be equal to those enjoyed by nationals.

According to Danzig Railway Officials in 1928:¹¹⁸

When a treaty has given certain rights to individuals, these rights must be recognized and have the power law behavior in international.

Furthermore, it is important for a country to maintain and manage such relationships and also understandable why countries trying to keep its citizens abroad to be treated with reasonable in order to live save and secure. Needs of the reciprocal nature between nations, the imperative to maintain and manage relationships so rewarding then a common interest.

Article 7 draft Articles submitted by the special Rapporteur at the fifth session of the ILC in 1999: stated that if any international action relating to the treatment received by a country against foreigners, and state actors such

¹¹⁸Danzig Railway Officials, Airlang Kurniangga, "Hukum Bisnis Internasional: Aspek Hukum Dalam Bisnis Internasional", <http://airlangkurniangga.blogspot.com/>, 2 Agustus 2011.

action. Take action to restore the original state of a situation as before the offense was carried out on behalf of victims of state citizens who are disadvantaged may request payment of the amount of cents to the situation before the violation.¹¹⁹



¹¹⁹*Ibid.*

CHAPTER III

EGYPT RESPONSIBILITIES OF FOREIGNERS WHEN CHAOS

A. State Actions To Protect Foreigners That Should To Do When Chaos Happen

Understanding responsibility is often being hard to explain with precision. Sometimes the responsibilities associated with the necessity to do something. Sometimes associated with the consequences of an act. Many forms of responsibility for causing be hard to formulate in the form of words that are simple and easy to understand. However, when observed further sense of responsibility is always associated with the awareness to make, the willingness to perform and ability to perform.

1. The action taken by the State

In the literature of English law, the term can refer to the responsibility of the term responsibility or liability. In Black's Law Dictionary, the term "responsibility" means the *state of being answerable for an obligation, and includes judgment, skill, ability, and capacity. The obligation to answer for an act done, and to repair or otherwise make restitution for any injury it may have caused.* Meanwhile, the term "liability" is abroad legal term meaning, among others, could mean: - *all character of debts and obligations;* - *an obligation one bound in law or justice to perform;*- *any kind of debt or liability, either absolute or*

contingent, express or implied; - condition of being actually or potentially subject to an obligation; - condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden;- condition which creates a duty to perform an act immediately or in the future.

From the definition above, it can be seen the main essence of "State responsibility" is a matter of rights and obligations of the State on two things, namely:¹²⁰

- a. State responsibility for the foreigners residing in its territory and its assets-assets.
- b. State responsibility in solving domestic problems.

International law commission in its report in 1974 stated; *“the principle that the state is responsible for act and commissions of organs of territorial government entities, such as municipalities, provinces and regions, has long been unequivocally recognized in international judicial decisions and the practice of state”*

The above gives an overview that the State has the responsibility from the central government to local governments of the two things:

- a. Obligations implement various international agreements.

¹²⁰“Tanggung Jawab Negara (*State Responsibility*), <http://mznugie.blogspot.com/2011/04/tanggung-jawab-negara.html>, 2 Agustus 2011.

- b. Obligation to overcome problems that cause harm to breach the subject of international law, the State, individuals, international organizations and national companies and multi-national companies.

International responsibility for negligence, it can be seen from the following statement:

“It may arise of any international wrong or negligent act or omission on the part of state agency toward foreigners within a state’s jurisdiction or foreign territory. This is called delictual liability. It may occur in a number of situation”.¹²¹

From the statement could be interpreted that if there is a violation of international or denial actions or omissions by the State organs to foreign nationals within the jurisdiction of the country is called delict responsibility. State responsibility is required, in case of acts of missions/waiver of the obligation of States against foreign nationals residing in its territory.

2. State does not take any action

State responsibility under international law arises because of the breach of international law. Responsibility is still there despite the country's national law is concerned; the action was not a breach of law. That is because the law in a country with other countries is different. Unlawful conduct in a country not necessarily be a breach of law in another country.

¹²¹“Tanggung Jawab Negara (*State Responsibility*), <http://mznugie.blogspot.com/2011/04/tanggung-jawab-negara.html>, August 2nd 2011.

State responsibility under international law and domestic law is that a country cannot avoid its international responsibility by reason the truth of its national law. In other words, a country cannot make the law of his country as an excuse to avoid accountability established by international law. Reasons that can be used to deny responsibility for the state is a state of emergency and self-defense.¹²²

Responsibility country basis depending on various factors, namely:¹²³

- a. There is an obligation of international law applicable between the two specific countries,
- b. the existence of an act or omission which violates international legal obligations that bear the responsibility of the state,
- c. The damage or loss as result of unlawful acts or omissions. The imposition of liability provided for actions internationally unlawful will depend on the particular circumstances.

Normally the aggrieved nations will seek to sue in order to obtain a recovery for the violation. Efforts are being made for the recovery of breach can be done through diplomatic negotiations and in general will be realized simply by a declaration or a formal apology from the state responsible for such action, or with the guarantee will not repeat the deed. In addition the recovery for infringement may also be a replacement in the form of material because of loss of material and a

¹²² J.G Starke, *Pengantar Hukum Internasional*. Bandung: Justitia Study Group, 1986, p. 403.

¹²³ Malcom N. Shaw *op.cit*, p. 482.

form of matter from the amount of restitution must be brought before an international arbitration tribunal for decision.¹²⁴

In the context of the International Law Commission (ILC), the state is responsible in international law for acts or acts contrary to international obligations the country. International law on state responsibility is international law that originated in customary international law. International law progressed through the practice of states and international court decisions. Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) has been accepted unanimously by the UN General Assembly Resolution A/RES/59/35 (2004), herein after in this thesis is called The Draft ILC.

Broadly speaking set the following article:

a. Internationally wrongful act of a state

The article provides that internationally wrongful act of a state, which gave birth to blame the international responsibility of international obligations. The act is said to be wrong only if (a) based on international law it can be attributed to the country, and (b) gives rise to a breach of an international obligation. However, the article does not provide restrictions as to when a country committed a breach of international law. It was determined through the application of provisions of primary sources (the provisions of

¹²⁴ J.G Starke, *Op.cit.*, p. 329.

international treaties, customary international law, and the sources of international law). The above provisions do not apply to the accountability of international organizations and individual or individuals.¹²⁵

b. Breach of an international obligation

Even if an act can be attributed to a country, to raise the responsibility of the state, the act must be proven is violating an international obligation of the State concerned. To determine whether there is a breach of international obligations, Article determines that it must be determined on a case-by-case basis.¹²⁶

Meanwhile, determined also that the actions of a country are not considered violations of international obligations if the act took place before a country bound by an international obligation.¹²⁷ This is already a principle of international law generally accepted is that an act must be judged according to the law applicable at the time the act occurred, not when the dispute caused by the act (which may have been in place many years after the deed).

c. The deeds attributed to a State (Attribution of conduct to a state)

¹²⁵ Article 1, Article 2, Article 3 of the Draft ILC.

¹²⁶ Article 13-15 of the Draft ILC.

¹²⁷ Article 13 of the Draft ILC.

In case of how an act can be attributed to a country? In general, the provisions applicable in this case is that the only acts of organs of state or government or its officials (the person or entity acting under orders / directives, suggestions, or supervision of the organs) are attributable to the state. These organs include organs of national government, regional, and local governments and the people or entity in any level, nor any person or entity that holds the status as an organ of government under the national law of a country. Also included people who actually act as organs of government even though they are not classified as such by national law the country concerned.¹²⁸

The act which are purely personal actions taken by one, even if the person is an officer of a country, cannot be attributed to a country.¹²⁹ However, acts committed by a person or entity that is not an organ of state but is authorized by national law of a country to carry out the "elements of governmental authority" (elements of governmental authority) will be treated as state action in specific cases if the person or entity was acting in such capacity.¹³⁰ Meanwhile, if the organs of a country is implementing a duty to help other countries, then the act of state organs had to be regarded as an

¹²⁸ Article 4 paragraph (1) and (2) of the Draft ILC.

¹²⁹ Anthony Aust, *op.cit.*, p. 411.

¹³⁰ Article 5 of the Draft ILC.

act of the latter state organs throughout the country to act upon the approval and under the authority, command, and control the state of the latter and to achieve the objectives of the latter country had.¹³¹

Act of state organs, or the person or entity who is authorized to implement the elements of governmental authority, is seen as state action if the state organs, persons or entities acting in that capacity even if they act beyond their authority or violate the order.¹³² This provision is intended to be a country does not shy away from responsibility by saying that the actions taken by its organs it is the act invalid. However, in this case, does not include actions which are purely private acts or deeds,¹³³ but an act that is recognized or appear to be conducted at the organs of the state, person or entity were just carrying out his official functions.

Even the act of a person or group of people who do not constitute government action can be regarded as state action if the person or group of people were acting on orders state or under the direction or supervision of the state.¹³⁴ Thus, a country responsible for the actions of a group of people who, for example, terrorized by order of the country. In addition, an act, which in fact cannot be attributed to a country, would be attributable to the country if that

¹³¹Article 6 of the Draft ILC.

¹³²Article 7 of the Draft ILC.

¹³³Anthony Aust, *Handbook of International Law*, Cambridge University Press, 2005, p. 407-429.

¹³⁴Article 8 of the Draft ILC.

country recognize and accept that action as actions.¹³⁵ However, in this connection, if merely a statement of support expressed by a country is not enough to declare the act is attributed to the country.

d. Circumstances precluding wrongfulness

Certain circumstances, though not affect an international obligation, it can become a justification for the violation of an international obligation, thereby eliminating the error element of the deed. The burden of proof is on countries that want to free themselves from accountability.

For example, the approval of a state over acts committed by other countries that if there is no such consent is an act that the act was to blame.¹³⁶ Similarly, actions performed in the framework of self-defense in accordance with the provisions of the UN Charter.¹³⁷ However, in this connection is important to note that despite the use of armed force (e.g. in the framework of self-defense was) is valid, the responsibility for violations of humanitarian law applicable in armed conflict (jus in bello) or violation of the rights which belong to the non-derogable remain valid.¹³⁸

There are some other things that can liberate a country from the fault, i.e. if the act was done because the state had to (force

¹³⁵Article 11 of the Draft ILC.

¹³⁶Article 20 of the Draft ILC.

¹³⁷Article 21 of the Draft ILC.

¹³⁸Article 22 of the Draft ILC.

majeure), or if the offender has no other choice that makes sense, in a state of distress (distress), in order to save his life or others who under its supervision.¹³⁹ Which can also relieve the state of the error is if the action taken was a necessity (necessity). This could happen in the event of an irreconcilable conflict between the fundamental interests of a country and the country's international obligations. Therefore, the argument of necessity is vulnerable to potential abuse. To avoid abuse of that article to determine that the argument of necessity can only be accepted as long as:

- 1). it is the only action to salvage the essential interests of a country of great and imminent danger (grave and imminent Peril),
- 2). does not cause serious disruption against the essential interests of the state is bound by international obligations or the international community as a whole.¹⁴⁰

Furthermore, the article also asserted that any case cannot liberate a country to violate a norm of international law which is certain (jus cogens, peremptory norms), such as the prohibition of genocide, slavery, aggression, or crimes against humanity.¹⁴¹

- e. The contents of the international responsibility of a country (Content of the international responsibility of a state)

¹³⁹Article 22 of the Draft ILC.

¹⁴⁰Article 25of the Draft ILC.

¹⁴¹Article 26 of the Draft ILC.

When an act is to blame according to international law occurred it gives birth to a new legal relationship between the countries concerned, especially the obligation to make improvements (reparation). The legal consequences of an act, which is blamed by the international law, does not eliminate the necessity to comply with the obligations that have been violated. In other words, breach of an obligation does not eliminate that obligation.¹⁴² Furthermore, Article 30 This article provides that a country which accounted for an act blamed according to international law are required to (a) terminate the deed, (b) offer adequate guarantees or warranties will not repeat the deed.

Countries that accounted for making mistakes under international law obliged to make full repairs for damages caused by the offense. Disadvantages include the material and moral losses. Form or type of repair (reparation) includes restitution (restitution), compensation (compensation), and fulfillment (satisfaction).¹⁴³

Restitution is the act to restore the situation before the violation occurred as long as it is materially impossible or not as long as not a disproportionate burden. Restitution includes only return things before the incident, while further losses is the issue of

¹⁴²Article 29 of the Draft ILC.

¹⁴³Article 34 of the Draft ILC.

compensation.¹⁴⁴ The notion of compensation is that a country is obliged to compensate the losses caused by his actions, which was blamed by international law as long as it does not concern things that have been done either through restitution.¹⁴⁵ Meanwhile, about the fulfillment (satisfaction), Article determines that it is done all the restitution or compensation are not going well or not satisfactory. He may be a confession has violated, excuse, or a formal apology or other means deemed appropriate.¹⁴⁶

f. Retaliation (Countermeasures)

Countries that suffered losses because of what other countries are allowed to engage in retaliation in the form of action does not implement certain international obligations in relations with countries who commit violations, but solely for the purpose for countries who violate the cease violations and perform full repairs.¹⁴⁷ However, retaliation is danger or risk that is if it is proved that the very act of violating the country that originally it was a legitimate act according to international law then the retaliation that is the unauthorized action. In addition, a countermeasure must be distinguished sense of responsibility within the framework of this country and retaliation (reprisal) known in the law applicable in

¹⁴⁴Article 35 of the Draft ILC.

¹⁴⁵Article 36 of the Draft ILC.

¹⁴⁶Article 37 of the Draft ILC.

¹⁴⁷Article 49 of the Draft ILC.

armed conflict or humanitarian law, also different from the act of sanctioning, suspension, or termination of a treaty. Countermeasures are typically occurs in a bilateral context.

B. Egypt Responsibility To Protect Foreigners When Chaos

1. Overview of Cases in Egypt When Chaos Happened

Egypt hit by chaos since January 25, 2011, the biggest rebellion to the government that ever existed in the history of Egypt. Large-scale demonstrations conducted since this past January 25, 2011 beginning with public contempt for the state of the country under the leadership of the president, Hosni Mubarak. Egyptian state perceived the more bawdy chaotic. Mubarak's authoritarian attitude seemed not fixing anything. Even worsen the situation. Food prices soar, unemployment rises, there is no freedom of speech, up to popular anger over corruption is rampant. Over the past 32 years served as head of state, Mubarak alleged to have committed many acts of corruption. Especially considering that his wife had entered the billionaire club since 2000.¹⁴⁸

The chaos that occurred in Egypt was initiated in January 2011 in which the consciousness of activists that has been very chaotic situation in Egypt appears. The activists also invite all the people to go to the streets and doing various activities such as eradication of poverty,

¹⁴⁸“Tragedi Mesir Berdarah 2011”, <http://www.metrotainment.net/2011/5330/tragedi-mesir-berdarah-2011/>, 2 November 2011.

corruption, and overthrow the authoritarian president who has served the past three decades. On January 25, 2011, which is the anniversary of the police, warned the Egyptians took to the streets in the number of times and called it The Day of Anger.¹⁴⁹ Egyptians continued demonstrations until President Hosni Mubarak step down and hand power to the military on February 11, 2011.¹⁵⁰

However, in the period between January 25, 2011 until February 11, 2011, there have been clashes between the demonstrators with Hosni Mubarak supporters, arrests, and looting.¹⁵¹ Chaos that occurred in Egypt has caused many victims of various parties, both citizens of Egypt and foreigners who are trapped in a situation very tense Egypt. Even some foreign journalists charged with covering the story and the situation the real so being a victim.¹⁵² Similarly with Imanda Amalia. Imanda Amalia has been a victim due to the negligence of Egypt to protect foreigners until died.

2. Egyptian Actions To Overcome Chaos

Egypt's policies and treatment of foreigners under international law entered into the order of the Diplomatic and Consular law and Responsibility Law. In this case the State must always protect aliens in

¹⁴⁹ *Ibid.*

¹⁵⁰ "Hosni Mubarak Mengundurkan Diri Sebagai Presiden", <http://arisnb.nulis.web.id/hosni-mubarak-mengundurkan-diri-sebagai-presiden.html>, 2 November 2011.

¹⁵¹ "Bentrok Masih Berlangsung, Polisi Mesir Sita Kamera Reporter CNN", <http://www.republika.co.id/berita/breaking-news/internasional/11/01/28/161332-bentrok-masih-berlangsung-polisi-mesir-sita-kamera-reporter-cnn>, 2 November 2011.

¹⁵² "15 Warga Riau Dipulangkan dari Mesir", <http://riaupos.co.id/news/2011/02/15-warga-riau-dipulangkan-dari-mesir/>. Feb 4th, 2011.

order to compensate the entry of foreigners into its territory. If the state fails to do this duty, it is considered as a breach of international law.¹⁵³ Although some countries there is no obligation to receive aliens in a territory, but when they receive it, then they have to perform protective actions against him.¹⁵⁴ In international law a state is responsible for all acts of errors and crimes against foreigners in the country as a rule of state obligations towards the civilian population.¹⁵⁵

- a. Assault and Hostage Case CNN correspondent in Egypt by Egyptian security forces.

During the world wars, frequent hostage taking committed by the warring nations with different objectives, which generally they do so in order to achieve their goals. In fulfilling these ambitions, sometimes they do it in a very nasty, be it by way of torturing and even killing the hostages, but there is also the perpetrator of just holding it hostage. Then, since the provisions of the Geneva Conventions of 1949, the problem of hostage taking became a ban. Despite the ban on hostage taking, but in practice there are still a country or person who is still doing an act of hostage taking at the

¹⁵³Dinah Shelton, *Remedies in International Human Rights Law*, 1999, Oxford University Press, Inggris, p. 103.

¹⁵⁴Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Roudledge, New York, 1997, p. 256.

¹⁵⁵Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishing, Inggris, 1999, p. 105.

expense provision. For example, cases of assault and hostage CNN reporter who has been happening in Egypt.

b. Egypt State Liability Case Against Hostage CNN reporter

State accountability for international crimes are concerned about the protection of foreign nationals, in this case a lot to do with violations of foreign nationals such as violation of personal or property rights of foreign nationals, denial of justice, undue detention. The case of the above two journalists hostage, including the improper detention, so that it can be said that the case the hostage is a form of international crime.

To determine the presence of state accountability for international crimes, known as the doctrine of loading errors to the state officials (The Doctrine of Immutability abilities or attributes) of this doctrine states that "crimes committed by state officials or persons acting on behalf of the state may be charged to the State". Because of loading it, then the crimes committed by the officers raises accountability country. Inside the imposition of a limit (conditions), not every crime can overload state officials accountable state. Loading can occur when, to meet the requirements "loading" as follows:

- 1). Acts committed by state officials, it is a violation of the obligations established by international law;

2). International law imposes a crime to the country.

To answer whether the hostage-taking against foreign reporters by security forces of Egypt are the responsibility of the governments of Egypt, giving rise to a form of accountability from the government of Egypt to the government that its citizens were taken hostage, then it needs to be further investigated whether the hostage case meets all the elements that exist in Doctrine Imputabilities.

Based on the principle of "the doctrine of imputability" or "attributability", which states that "the crimes committed by state officials or persons acting on behalf of the state may be charged to the state", has the following elements:

1). "Crime"

The definition of crime in this element is an act of the International Crime. Crime in this element is an act of state for international crimes are not a breach of contractual obligations. Breach of certain obligations under international law that binds the country concerning the treatment of foreign nationals, are such as the obligation to protect citizens against the mistreatment of foreign public officials or citizens.¹⁵⁶

¹⁵⁶ J.G Starke, *Pengantar Hukum Internasional*, Bandung: Justitia Study Group, 1986, p. 174.

Does not protect foreigners against the mistreatment of state officials, or citizens, is a violation of international obligations that are not a breach of contractual obligations. In the above case, the CNN reporter gets the mistreatment (held hostage) by the Egyptian security forces. Thus the Egyptian state is not fulfilling its obligations to protect foreign nationals who are against the mistreatment in the area of state officials. Therefore, it is understandable, that in such cases is a form of international crime. Moreover, international law prohibits the existence of an act of assault and hostage taking, i.e. with the Geneva Conventions of 1949; it banned all forms of hostage taking. The presence of the ban on hostage found in:

Articles 3 (1) Geneva Convention I, which states: For this purpose, the following action prohibited, and shall remain prohibited to be done against the people mentioned above at any time and place:

- a). Acts of violence on the soul and body, especially any kind of killing, burial, mutilation, cruel treatment and torture;
- b). Hostage-taking;
- c). Rape upon personal dignity, particularly humiliating and degrading treatment dignity;

d). Punish and execute the death penalty without any prior decision rendered by a court which is formed on a regular basis, which provides all the judicial guarantees which are recognized as necessary by civilized nations.

Article 34 of Geneva Convention IV, stating "the arrest of people to be held hostage prohibited". Article 147 of Geneva Convention IV states that:¹⁵⁷

"There are prohibitions on hostage-taking and hostage-taking is one of grave breaches".

Foreign nationals, who work as a journalist, also received protection from the Geneva Convention III, which governs treatment of prisoners of war. Article 4 of the Convention to determine who the laughing stock of the war or factions which fall in the hands of an opponent is considered as prisoners of war. Article 4 calls the six groups that became Prisoner of War if it falls within the power of the opponent. Relevant for this description is the fourth class.

Section 4 begins with the sentence "Prisoner of War in the sense of this Convention, are the ones who had fallen into the enemy's strength."¹⁵⁸

¹⁵⁷Haryomataram GPH, *Hukum Humaniter*. Jakarta: CV. Rajawali, 1984, p. 75.

¹⁵⁸*Ibid*, p. 79.

The fourth group is defined as follows: The people who accompany the armed forces without actually being members of the army, the war journalists, levaransir supplies, labor union members, or departments are responsible for the welfare of the armed forces, provided that they have received approval from the armed war, which should equip them with an identification card.

Protection against journalists are also governed by Article 79 Protocol I (Additional, 1977) Geneva Convention 1949:¹⁵⁹

- a). Journalists who do a dangerous profession in areas of armed conflict shall be considered "civilian" (civilians) in the sense as defined in Article 50, paragraph 1 of Protocol I.
- b). Journalists are civilians and as such they should be protected under the Convention and this Protocol. Protection is only granted if the reporter does not perform actions that adversely affect their status as a war correspondent assigned to the Armed Forces to the position as stipulated in Article 4 a (4) of the Third Convention.
- c). Journalists can use an ID (identity card) with the same model identification cards that are listed in Annex II of

¹⁵⁹Syahmin A.K., *Hukum Internasional Humaniter 2*, Bandung: Armico, 1985, p. 52.

Protocol I. This identification card must be issued by the Government of the State, where she is a national correspondent or the area he resides or where the tool is reporting that must declare the actual position as a journalist.

1949 Geneva Conventions apply universally, to all countries; both countries are in conflict or countries that are not in conflict with other countries. Thus, the element of "evil" can be fulfilled. Therefore, it can be concluded, that the act of assault and hostage taking committed by Egyptian security forces against the CNN reporter, including an international crime.

2). "What the state officer or person acting on behalf of the state"

It is based on the doctrine in international law that imposes a crime to the country. This doctrine assimilate the actions of state officials with the country that led the country responsible for any loss or damage to property or strangers, is one of the fiction of international law.¹⁶⁰

The background of this doctrine is that the state as an abstract entity which cannot perform real actions. The new state can perform a particular legal action by officials or

¹⁶⁰Huala Adolf, *Aspek Aspek Negara Dalam Hukum Internasional*, Rajawali Pers, Jakarta, 1991, p. 280.

representatives are legitimate representatives. Therefore, it seems here a bond or a close link between the countries with the legal subject (the officials or their representatives) who acts for the state. Bond or link in question is the subject of the law acting in his capacity as an officer or representative of his country.

To determine the presence of state accountability for international crimes was known to the teachings of loading errors to the state officials ("The doctrine of imputability" or "attributability"). This doctrine states that¹⁶¹ "Crimes committed by state officials or persons acting on behalf of the state may be charged to the state". As a result of loading it, then the crimes committed by the officers raises accountability country.

From the above, then the actions of security forces can be borne by the State, so that Egypt can be responsible to the actions of the security forces.

3). "It can be charged to the state"

What is meant in this element, whether the crime (hostage) conducted by the security apparatus can be charged to the country, which can result in state liability. To know this needs to be Based on "loading conditions":

¹⁶¹Sugeng Istanto, *op.cit.*, p. 81.

- a). Acts committed by state officials or persons acting on behalf of the state, is in violation of established international law obligations, and
- b). International law imposes a crime to the country.

Based on the above cases and is associated with "second element" over the crime committed by the security personnel can be charged to his country.

It can be concluded, that the element "can be charged to the state" can be fulfilled.

To determine whether there is accountability for international crimes, then all the elements that exist in "the doctrine of imputability" or "attributability" and on the "loading conditions" must be fulfilled. Based on the above, all elements are met, so it can be concluded, that "acts of hostage-taking against foreign journalists conducted by the Egyptian security apparatus is the responsibility of the State governments of Egypt, giving rise to a form of accountability from the government of Egypt.

3. Egypt Doing Anything To Protect Action Foreigners When Chaos

Associated with the condition of chaos in Egypt, international law still applies indiscriminately. Mistakes countries (internationally Wrongful Acts) based on international law has its own compensation. In

law, the error is always caused by two kinds of elements, namely the element of intent (Dolus) and the element of negligence / negligence (culpa) and errors always result in compensation which are strung in a legal liability. The actions carried out of Egypt recently to overcome the unrest can be considered to have violated or at least neglect their obligations towards foreigners.

Responsibility is a subject in international law. In this issue, more emphasis on the concept of protection of foreign citizens (aliens) are important but in fact the responsibility is often overlooked by countries that are experiencing problems such as Egypt. When seen from the perspective of international law, all returned to the State which the State must keep responsibility and liability compensation.

Basically, foreigners are entitled to standard treatment as a country of civilians who entered.¹⁶² When this stranger was not satisfied with the treatment because it does not correspond to standard treatment, then this stranger will ask for diplomatic assistance from the embassies of countries of origin or country.¹⁶³ Basis of other laws governing the treatment is standard Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in Which They Live in 1985.¹⁶⁴ In this Declaration mentions any rights of foreigners and what obligations

¹⁶²M.N. Shaw, *International Law*, Cambridge University Press, Inggris, 2003, p. 734.

¹⁶³ Werner Levi, *Contemporary International Law: A Concise Introduction*, Westview Press, Colorado, 1991, p. 168-69.

¹⁶⁴Resolusi Majelis Umum PBB (GA Res. 40/144).

the recipient country against foreigners is as such that is reflected in the chapters 5 and 8 on the rights of foreign citizens in a country and chapter 6 about the prohibition of torture against foreigners.

The influence of Calvo Doctrine¹⁶⁵ and Local Remedies¹⁶⁶ rated as the legal order of international events that are important to the protection of foreigners. The second principle is rated as a form of respect of international law on the authority of national courts of a country. Because foreigners are not right to state regulations impose a country, then taken to the local remedies as a legal action for injury strangers. This is because the country where foreigners are not having sovereignty and jurisdiction over the territory of another country based on international law and the principle of *par in parem non habet imperium*.¹⁶⁷

As also stated in the 1933 Montevideo Convention on Rights and Duties of States under Article 9 which states that foreigners have the

¹⁶⁵*Calvo Doctrine* is a doctrine of a jurist Carlos Calvo and Argentina which prohibits diplomats diplomatic intervention from the country of origin before reaching legal aliens receiving country. Any breach or loss that occurs to the aliens must first be resolved through the state court receiver. This concept is the background *Minimum International Standard for the Treatment of Aliens and Local Remedies Principles*, see Sefriani, *Op.cit.*, p. 285.

¹⁶⁶*Local Remedies* is a principle in international law which has been regarded as a customary international law which if the violation resulted in injury or strangers (aliens), then a country, where the stranger was, according to its legal right to run the court and to second international settings. Local Remedies glorify the principle of comity by the state where the recipient with the intention of prioritizing its legal jurisdiction and also in order for the case not be a problems ticking international doctrine of a jurist Carlos Calvo and Argentina which prohibits diplomats diplomatic intervention from the country of origin before reaching the recipient state law aliens. Any breach or loss that occurs to the aliens must first be resolved through the state court receiver. This concept is the background, see Sefriani, *ibid*.

¹⁶⁷Dennis Patterson, *Op.Cit.*

same status and protection in national law of a country. Based on the doctrine in international law, that when a country 'injured' stranger then tantamount to hurt the country people are coming from.¹⁶⁸

The responsibility of a state in international law it is one thing that is difficult to prove due to lack of practice on international justice and the existence of such a strong political influence. This has become one of the loopholes in international law today. Before a State 'pay' compensation for the international error (internationally Wrongful Acts) background factors as well as intentional (Dolus) and negligence (culpa) have an important role.¹⁶⁹

Egypt, as the country has clearly violated the rules that existed at the ILC Draft on State Responsibility in Article 1 and in particular on article 2. Violation has been committed through acts of security forces acting outside the boundaries resulting in the deaths of foreigners, both ordinary as well as foreigners who work as journalists. Under Article 1, any act of international state error would result in a state responsibility. While in section 2 describes the elements of internationally Wrongful Acts, namely:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

¹⁶⁸Dinah Shelton, *Op.Cit.*, p. 104.

¹⁶⁹Ian Brownlie, *Principles of Public International Law*, Oxford University Press, USA, 2003, p. 424.

- (a). Is attributable to the State under international law; and
- (b). Constitutes a breach of an international obligation of the State.

When Egypt neglect or breach of its obligations as a state, it can be deduced to Internationally Wrongful Acts. This is in line with the doctrine of international law experts, JL Brierly that says that state responsibility is an obligation.

Besides Egypt, which not being the responsibility of foreigners in the country assessed also violated article 31 ILC Draft on State Responsibility which states that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The responsibility of state of Egypt at the time of the riots, among others, by notifying the parties concerned through their respective state representatives to immediately urge citizens not to visit countries that are in conflict.

By law, the State will take responsibility if the existing notice and there are still foreign nationals visiting the country are experiencing unrest and causing damage, at least the threat to life and property. The responsibility in question here is responsibility for the losses, but does not eliminate the responsibility of the State as a whole to protect the

interests of a foreign country, whether citizens or assets, their assets and take immediate measures to tackle the unrest.¹⁷⁰

Based on the description of the provisions contained in the ILC article mentioned above, then the state of Egypt according to the author can be held responsible for victims of the foreign citizen as a result of the riots in his country because the state of Egypt violated the obligation of States in international law that is negligent in providing protection to foreign nationals in the country that should be his responsibility.



¹⁷⁰*Ibid.*

CHAPTER IV

CONCLUSION

C. Conclusion

Based on the description in previous chapters, it can be summed up as follows:

1. The action should be done by Egypt to protect the foreigner in the chaos situation that is must always protect aliens in order to compensate the entry of foreigners into its territory. If the state fails to do his duty, it is considered as a breach of international law. Although there is no obligation to receive aliens in a territory for some countries, when they receive them, then they have to perform protective actions against him. In international law a state is responsible for all acts of errors and crimes against foreigners in the country as a rule of state obligations towards the civilian population.
2. Egypt has failed to meet the responsibility to protect foreigners under international law when chaos occurs. It can be seen from the presence of foreigners, both as journalists and ordinary civilians, who were victims during the unrest in Egypt. Including Imanda Amalia and CNN reporters. Therefore against the Egyptian state could be held accountable to the victims of the foreign citizen as a result of the riots in his country because the Egypt State breach obligations under international law that is

negligent in giving protection to foreigners in the country that should be his responsibility.

D. Recommendation

1. Foreign citizenship, whatever his profession and its interests, should not visit a country in conflict and have issued a "travel warning", by considering the safety for himself.
2. Journalists, who will carry out journalistic duties in the territory of another country, must observe and comply with the provisions of the country in a country where he was at work, especially if the area being served is in conflict. In order to avoid the risk that may endanger the safety for himself. No matter how valuable news value that will be covered, it is advisable for reporters to avoid or distance themselves from areas of high tension or conflict when it is going on.

BIBLIOGRAFI

Books and journals:

- Alina Kaczorowska, Textbook: Public Hukum Internasional, London: Old Balley Press, 2002.
- Arlina Permanasari, *Pengantar Hukum Humaniter*, ICRC, Jakarta, 1999.
- Anthony Aust, *Handbook of International Law*, Cambridge University Press, 2005.
- Chairul Anwar, *Hukum Internasional, Pengantar Hukum Bangsa Bangsa*, Djambatan, Jakarta, 1989.
- Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishing, Inggris, 1999.
- Dinah Shelton, *Remedies in International Human Rights Law*, 1999, Oxtord University Press, Inggris.
- Garner, Black's Law Dictionary, eight edition, Thomson West, 2004.
- G. Fitmaurice, *The Law and Procedure of the International C'ourtof Justice*, Cambridge, 1986, vol. 11..
- Haryomataram GPH, *Hukum Humaniter*. Jakarta: CV.Rajawali, 1984.
- Hingorani, *Modern International Law*, second edition, 1984.
- Huala Adolf, *Aspek Aspek Negara Dalam Hukum Internasional*, Jakarta: Rajawali Pers, 1991.
- Ian Brownlie, *Principles of Public International Law*, Oxford: Clarendon Press, 1992.
- I Wayan Parthiana, *Pengantar Hukum Internasional*, Mandar Maju, Bandung, 1990.
- J. Dugard, "First report on diplomatic protection". A/CN.4/506, 7 March 2000.
- J. Dugard, "Second report on diplomatic protection". A/CN.4/514, 28 February 2001.

J.G Starke, *Pengantar Hukum Internasional*. Bandung: Justitia Study Group, 1986.

Martin Dixon, *Text Book On International Law*, Black Stones Press Limited, London, 2000.

M.N. Shaw, *International Law*, Cambridge University Press, Inggris, 2003.

Mohamad Mova Al'Afghani, "Kewajiban Swedia UNTUK Melakukan Diligence Terhadap Permasalahan Karena Hasan Tiro", artikel lokakarya tentang Proses Hukum Internasional, Hotel Ibis, 25-26 Juli, 2003.

Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Roudledge, New York, 1997.

Sugeng Istanto, *Perlindungan Penduduk Sipil dalam Perlawanan Rakyat Semesta dan Hukum Internasional*. Yogyakarta: Liberty, 1992.

Sefriani, *Hukum Internasional: Suatu Pengantar*, Ed. 1, -1. Jakarta: Rajawali Pers, 2010.

Syahmin A.K., *Hukum Internasional Humaniter 2*, Bandung: Armico, 1985.

Werner Levi, *Contemporary International Law: A Concise Introduction*, Westview Press, Colorado, 1991, p. 168-69.

Website:

Anis Matta: *Sebaiknya Mubarak Mundur Dari Kekuasaannya*, <http://www.seruu.com/index.php/2011020639658/utama/nasional/>. Feb 6th, 2011.

Arifin P. Soeria Atmadja, *Keuangan Publik dalam Perspektif Hukum* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005) 128. <http://zonahukum.blogspot.com/2011/03/imunitas-negara-pada-private-acts.html>

DPR Minta Presiden Mubarak Legowo, http://www.bipnewsroom.info/?_link=loadnews.php&newsid=71564. Feb 4th, 2011.

Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles Introduction And Overview", <http://www.asil.org/ajil/ilcsymp1.pdf>, August 7th 2011.

“Definisi *chaos*”, dalam <http://www.artikata.com/arti-31607-chaos.html>, August 6th, 2011.

Hosni Mubarak Tolak Mundur Massa Pro Pemerintah Serang Demonstran, JPNN-Jawa Pos Grup, http://www.jpnn.com/index.php/authentication/phpbb3/flash/201003/images/jpnn_network.php?mib=berita.detail&id=83588. Feb 3rd, 2011.

“Hukum Bisnis Internasional: Aspek Hukum Dalam Bisnis Internasional”, dalam <http://airlangkurniangga.blogspot.com/>, accessible August 2nd 2011.

Imbauan SBY, <http://konten.detikpertama.com/wni-terancam-kelaparan.html>. Feb 1st, 2011.

Jafar M Sidiq, Ekonomi Memburuk, Musuh Utama Mubarak, <http://www.antaraneews.com/berita/245140/ekonomi-memburuk-musuh-utama-mubarak>. Feb 8th, 2011.

Kami Teteskan Air Mata di Bumi Kinanah, <http://luar-negeri.kompasiana.com/2011/02/08/kami-teteskan-air-mata-di-bumi-kinanah/>. Feb 8th, 2011.

Launa, Sip., Mm., Mesir di Bawah Rezim Mubarak, <http://www.pewartakabarindonesia.blogspot.com/>. 08-Feb-2011, 11:52:08 WIB

Mubarak Bubarkan Kabinetnya, <http://kabarterpercaya.wordpress.com/2011/02/02/mubarak-bubarkan-kabinetnya/>. Feb 2nd, 2011

Oppenheim-Lauterpacht, *International Law: A Treatise* vol 1: Peace, edisi ke-8, Longmans, 1976, h. 118; quoted from Huala Adolf, *Ibid*, p. 3.

PRO Mubarak ngamuk, 10 Tewas, <http://konten.detikpertama.com/pro-mubarak-ngamuk-10-tewas.html>. Feb 4th, 2011.

“Role Of The International Law Commission in The Development of International Law, Fokus On State Responsibility”, at <http://legalsutra.org/805/role-of-the-international-law-commission-in-the-development-of-international-law-focus-on-state-responsibility/>, access July 16th 2011.

Science Of Universe Minta Maaf Soal Imanda, <http://arsipberita.com/show/science-of-universe-minta-maaf-soal-imanda-152018.html>. Feb 3rd, 2011.

Setiawan Y. Sabungan, “Atribusi Tanggung Jawab Terhadap Negara”, <http://www.lontar.ui.ac.id/Atribusi%20Pertanggungjawaban-Literatur>, July 22nd 2011.

“Tanggung Jawab Negara (*State Responsibility*), dalam <http://mznugie.blogspot.com/2011/04/tanggung-jawab-negara.html>, accessible August 2nd 2011.

“The Victim’s Status in International Criminal Trials”, dalam <http://www.trial-ch.org/en/resources/international-law/the-victims-statuts-in-international-criminal-trials.html>, August 6th, 2011.

Vertikal Ditarik Ke Horizontal,
<http://kabar Terpercaya.wordpress.com/2011/02/03/vertikal-ditarik-ke-horizontal/>. Feb 3rd, 2011.

WN Australia, Jenazah Imanda Diterbangkan ke Perth,
<http://arsipberita.com/show/wn-australia-jenazah-imanda-diterbangkan-ke-perth-151901.html>. Feb 3rd, 2011.

Wartawan Jadi Korban, PM Mesir Minta Maaf,
<http://www.jambiekspres.co.id/utama/18219-polisi-bayaran-serang-demonstran.html>. Feb 4th, 2011.

WNI Terancam Kelaparan, <http://konten.detikpertama.com/wni-terancam-kelaparan.html>. Feb 1st, 2011.

15 Warga Riau Dipulangkan dari Mesir, <http://riaupos.co.id/news/2011/02/15-warga-riau-dipulangkan-dari-mesir/>. Feb 4th, 2011.

<http://www.diakonia.se/sa/node.asp?node=1857>

<http://dictionary.law.com/Default.aspx?typed=alien&type=1>

<http://www.thefreedictionary.com/chaos>

<http://www.diakonia.se/sa/node.asp?node=1857>

<http://dictionary.law.com/Default.aspx?typed=alien&type=1>

<http://www.thefreedictionary.com/chaos>

<http://www.kompas.com/>