

RESPONSIBILITY OF THE STATE “UNIVERSAL PERSPECTIVE”

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Abstract

In this article the authors seem to describe each and every aspect of the international responsibility of the various members' states of the international community. It aims to answer each and every question regarding what is international responsibility, how such international responsibility arises and what are those circumstances where in spite of breach of international responsibility, states are not held responsible. The whole article is written in the light of Draft Articles On International Responsibility of the States for Internationally Wrongful Acts, 2001 and its implications in light of various international cases and in the conclusion the authors seem to suggest the very unique solution of common domestic legislation that will automatically make the members of the international community responsible for their Internationally Wrongful Acts through their own domestic laws.

1. INTERNATIONAL RESPONSIBILITY OF THE STATE

Every civilized state of the International Community has its own powers, sovereignty and control over its municipal laws, that means internal affairs of the State shall not be interfered by International Law. But what will happen if the municipal law is to be governed on the guest of the nations, and there arises a conflict between the States. Sometimes, it may happen that natives of one state reside in that of the other state among the international community, for holidays or for the purpose of trade and commerce or as an ambassador of that another state. Such natives are considered as 'aliens' or 'foreigners' by that another state. These aliens also enjoy certain rights in that another state, and at the same time they have to observe the municipal law of that another state, and have certain duties as well. Every State is required to protect the interest of the aliens as per International Law.

Failure to observe such obligations imposed by the rules framed by the international community entails State Liability. As per Article I of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, "Every International wrongful act of the state entails the international responsibility of the State."¹ It is the responsibility of every State to take care of the legal rights of the aliens and compensate them, if any damage is caused to them. State responsibility may arise directly or indirectly. This article makes an attempt to scrutinize in brief

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¹ General Assembly Resolution. 12 – 11 – 2001,

the responsibility of States for International Wrongs in the light of Draft Articles of International Law Commission, 2001.

1.1 Direct and Indirect Responsibility

Oppenheim draws a distinction between direct and indirect responsibility. According to him, Direct or Original responsibility is one which arises in the consequence of the wrongful act committed or authorized by the government of the State, whereas Indirect or Vicarious responsibility arises in consequence of the unauthorized acts committed by the agents of the State, or its Nationals, and of the aliens living within the territory of that State. According to Brownlie, this distinction between the two categories of State responsibilities, may lead different legal consequences, but basic concept remains the same. He feels the use of the term “vicarious responsibility”, in respect of State Responsibility is erroneous.²

As per General Assembly Resolution in 2001, “When conduct consisting of an act or omission of a State is attributable to the State under International Law, and constitutes a breach of International Obligation, it becomes an internationally wrongful act of the State.”³The rudiments of internationally wrongful act or omission are governed by International Law and not by Municipal Law. An act or omission portrayed to be wrongful by International Law is not affected by the portrayal of the same act as lawful by international law and policies of that State.⁴

1.2 Ascription of State Responsibility

Today one can regard state responsibility as general Principle of law, a concomitant of substantive rules and of the supposition that act or omission can be categorized as illegal by reference to the rules of International law establishing rights and duties.⁵Articles 4 to 11 of the Draft Articles of the International Law Commission deals with the structures and functionalities of a State, whose acts may lead to the dawn of the acts for international responsibility. It includes ‘the three organs’ of the state, its citizen and all other authorized agents or officials acting under

² Ian Brownlie, *Principles of Public International Law* (2003), Ed.6, 422.

³Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, 2001, Art. 2.

⁴ Ibid, Art. 3.

⁵ Ian Brownlie, *Principles of Public International Law* (2008), Ed.7, 434.

direction or control of the state. Even in case of mutiny within the State, the new government has to carry out its international obligations.

When the act of the state is not in parlance to the international obligations, results in breach of the same and leads to the dawn of international responsibility. Such Breach is prospective and does not operate prospectively.⁶ A state is also responsible for abatement or coercion. Thus, comforting another state for committing wrongful act or coercing it amounts to an international wrong and adhere the abettor or coercer State with responsibility.⁷

1.3 Exceptions to State Responsibility

Exceptions to State Responsibility are construed in Article 22 to Article 27 of the Draft Articles under the heading, “Circumstances Precluding Wrongfulness”, which enumerates all those acts, which can be exempted from liability, if are done with the consent of members of International Community, to the extent of that consent, done for the purpose of self-defense in conformity with UN Charter or done due to *force majeure* or in distress or necessity are also exempted with certain restrictions. The privilege will not be available unless that act is the only possible means to protect the interest against a grave or eminent peril and does not seriously impairs the essential interest of the State or State towards which the obligation exists, or of the international community as a whole. There is no exemption where a state has not followed *jus cogens* of general international law.⁸ Article 22 exempts from international responsibility covered by vengeance. Such avenging measures designated as countermeasures are also exposed to certain limitations listed from Article 49 to Article 54 of the Draft Articles. Article 50 list situations where countermeasures shall not affect obligations, which includes the obligation to refrain from the threat, or use of force as provided in the UN charter, obligations for protection of human rights, obligations of humanitarian character prohibiting reprisal, and other obligations under absolute norms of general international law shall not be affected by countermeasures, and such

⁶ Ibid, Art. 12-15.

⁷ Ibid, Art. 16-19.

⁸ Ibid, Art. 26.

countermeasures are scaled on doctrine of proportionality. Subjected to certain limitation, even a third state may take the countermeasures for enforcement of an International Obligation.⁹

The draft Articles do not contain any provisions which are related to the aspects of special rules of International Law i.e. responsibilities which are covered by the UN Charter.¹⁰ It merely prescribes the Responsibilities, which are generally predicted as evidence of International Law.¹¹

1.4 Basis of International Responsibility

Accept the responsibilities enumerated by Draft Articles, various Jurists on International Law have opined in their theories, these State Responsibilities from two sides of the same coin of International Law, citing various authorities and incidents. These are:

1.4.1 Risk or Objective responsibility - Theoretically, objective responsibility rests on the doctrine of voluntary act, provided that agency and off-the-cuff acquaintances are recognized, if there is a breach of duty by outcome itself.¹² In *Caire Claim Case (1929)*, The President of Franco-Mexican Claims Commission applied the doctrine of objective responsibility of the state.

1.4.2 Fault or Subjective Responsibility - This theory says that basis of State's responsibility is necessarily tortious and based on fault, requiring either or negligent demeanor on the part of the State before a breach by it of International Obligation is established.¹³

2. CLASSIFICATION OF STATE RESPONSIBILITIES

The responsibility of the States may arise in following cases:

2.1 International delinquencies - These are wrongs which are not arising out of contractual obligations. International delinquencies means a breach of a duty that rest on a member of International Community and is not a breach of completely contractual obligation. In *Youman*

⁹ Ibid, Art. 54 read with Art. 48

¹⁰ Ibid, Art. 55-59

¹¹ Ian Brownlie, Basic Documents in International Law (5thEdn. 2002) 300.

¹² Ian Brownlie, Principles of Public International Law, (6thEdn. 2003) 423.

¹³ Oppenheim's International Law, Vol. I, Part 1 (9thEdn.) 508-509. For details, see, Ian Brownlie, Principle of International Law (6thEdn. 2003) 417-493, Oppenheim's International Law, Vol. I, Part 1 (9thEdn.) 500-554; J.G. Starke, Introduction to International Law (10thEdn.) 293-314.

case¹⁴ the Mexican Government was held responsible for the act of the soldiers, even though they had acted beyond their authority.

2.2 Injuries to aliens- Under the rules of International Law, aliens living in a State have firm limited rights. Municipal Laws of each State should confer certain rights on aliens. Articles 14, 20, 21, 21-A, 23, 24 of Constitution of India are available to citizens as well as aliens.¹⁵ Responsibility of State in case of aliens may arise in following cases:

2.2.1 Act of Private Individual–The citizens as well as aliens living in a State are bound to obey the laws of that State. Starke is of the opinion that where illegal acts are committed by private citizens and not by an organ of the state, the ground for not imputing liability to the State are much stranger, but in such case liability can be imputed on states, as held in *US Embassy case* in Tehran.¹⁶

2.2.2 Act of mob violence –In case of mob violence causing damage to property or aliens, the State is responsible only if it is guilty of breach of good faith or has been negligent in preventing mob violence.

2.2.3 Acts of insurgents –The general rule of non-responsibility rests on the premise that, even in a regime of objective responsibility there must exist a normal capacity to act, and a major internal turmoil is equal to *force majeure*, if such foreign State has recognized the belligerency of the insurgents.¹⁷ Victorious rebel movements are responsible for commissions or omissions by their forces during the course of the conflict. They also became responsible for the illegalities of the previous government.

2.3 Calvo Doctrine – This doctrine is named after Calvo, an Argentinian Jurist. This doctrine is related to contract between State and an alien whereby the latter agrees to resort to local remedies only and not invoke the protection of the state of which it is national and was held to be valid in some cases¹⁸, while in other cases it was not applied.¹⁹

¹⁴ Annual Digest of International Law case, 1925-1926, 223; Starke, International Law (11thEdn.) 275-277.

¹⁵ *See, Rly. Board v. Chandrima Das*, (2000) 2 SCC 465: AIR 2000 SC 988.

¹⁶ *Nicaragua v. United States of America*, 1986 ICJ Rep 14.

¹⁷ Ian Brownlie, Principles of Public International Law (6thEdn. 2003) 437-438.

¹⁸ *North American Dredging Co. case*, ADPIL cases, (1925-1926) Annual Digest Case No. 208.

2.4 Acts of Government Organs, including its Armed forces – According to the rules customary international law, set forth in Article 3 of the 1907 Hague Convention (IV) and also enumerated under Article 91 of Additional Protocol I, that a State is responsible for “all acts committed by persons forming part of its armed forces”.²⁰ This rule is an application of the general rule of State responsibility for internationally wrongful acts, whereby a State is responsible for the behaviour of its organs.²¹ The armed forces are considered to be a State organ, like any other entity of the executive, legislative or judicial branch of government. The application of this general rule of attribution of responsibility to international humanitarian law is reflected in the four Geneva Conventions, which specify that State responsibility exists in addition to the requirement to prosecute individuals for grave breaches.²² The principle that State responsibility exists in addition to individual criminal responsibility is also reaffirmed in the Second Protocol to the Hague Convention for the Protection of Cultural Property.²³ The State is responsible for the acts of its officials and organs causing injury to the aliens. In *Nicaragua case*,²⁴ the ICJ held US responsible for hostile activities against Nicaragua, carried out by its agents.

2.5. Contract with foreigners – As a general rule, the contracts entered into between a State and alien, citizens are governed by the municipal law of the State Party. The state are required to frame such municipal law for governing international agreements.

2.6. Breach of Treaty – In case, if there is breach of any provision treaty, the State responsibility is to compensate the damages, occurred in consequence of such breach.²⁵

2.7. Expropriation of Foreign Property –The emergence of the concept of New Economic Order and the Chapter of Economic Rights and Duties of the States, 1974 also deals with expropriation. Article 1 and 2 of the Charter also deals with treatment of alien property and

¹⁹ EL Oro Mining and Rly. Co. Ltd. case, ACPIIL cases, (1931-1932) Annual Digest Case No. 100.

²⁰Hague Convention (IV), Article 3 (cited in Vol. II. Ch. 42, § 1); Additional Protocol I, Article 91 (adopted by consensus)

²¹Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, 2001, Art. 4.

²² Ibid, Art. 2, First Geneva Convention, Article 51; Second Geneva Convention, Art. 52; Third Geneva Convention, Art. 131; Fourth Geneva Convention, Art. 148.

²³ Ibid, Art. 4, Second Protocol to the Hague Convention for the Protection of Cultural Property, Art. 38.

²⁴*Nicaragua v. United States of America*, 1986 ICJ Rep 14.

²⁵*Chorzow Factory (Indemnity) case*, 1928 PCIJ Collection of Judgments, Series A, No.17, p.29.

foreign investment. The issue of nationalisation, appropriation and transfer of ownership are to be determined by the domestic law of the State.

2.8. Acts of Multinational Corporations– Article 2 of the Economic Charter confers right on each State, *inter alia*, to regulate and supervise the activities of the Multinational or Transnational Corporations within its national jurisdiction and to take measures to ensure that such activities conform with its laws economic and social policies. The greatest example in this scenario is the ‘Bhopal Gas leak case’, where in a US based corporation was directed to pay compensation of \$470 Million (Around ₹3000 crores) in full settlement of all claims and abating all criminal proceedings. The Supreme Court of India in *Charanlal Sahu v. Union of India*²⁶ has made certain recommendations for the legislature and executive in this aspect.

2.9. Acts of Trans-boundary Movement of Hazardous Waste –During 1980s, rigid environmental regulation in industrialized countries led to rise in cost of Hazardous waste disposal, as a result traders started dumping their hazardous waste in developing economies and Eastern Europe, resulting in International outrage. Consequently, Basel Convention was adopted and came into force in 1992. After the process of setting up of frame-work for controlling trans-boundary movement of hazardous waste within a decade (i.e., during 1989-1999), the next decade (i.e., during 2000-2010) has been fully devoted for implementation and enforcement of Convention’s Commitment. In 1999, Protocol of Liability and Compensation was adopted to deal with affairs of accidental spills of Hazardous waste.

CONCLUSION

After the brief analysis of the concept of State Responsibility under International Law in this article, it can be concluded that this international responsibility of States is same as that of the responsibility of the States under municipal laws, which guarantee certain rights to its citizen and on failure of protecting such rights, the liability of the state arises, which can be enforced through domestic laws of that state. But as Austin rightly said the International Law loses its credibility to lack of sanction, different members of International Community, especially the secured ones, interpret these Articles of State Responsibility according to their, whims and wishes. To avoid

²⁶ (1990) 1 SCC 613; AIR 1990 SC 1480

such circumstances, there must be a convention on the 'Enforceability of International Rights through Common Domestic Laws', so that a uniform legal procedure can be developed for enforcement of internationally recognised rights against State, or if said in another way, it must be ensured by every member of the International Community, that the Draft Articles on the Responsibility of the States for Internationally Wrongful Acts, 2001 and adopted as a part and parcel of their domestic legal system.