

ENFORCING STRICT LIABILITY UNDER THE PRINCIPLE OF STATE RESPONSIBILITY: AN ARGUMENT FOR FIXING RESPONSIBILITY OF COVID-19

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1. INTRODUCTION

The principle of State responsibility under international law has been recognized by the community of states. The basis of state responsibility lies in the twin principles of state sovereignty and equality of states. International law respects sovereign equality of states, according to which no state can bring any harm or injury to any other state, else it will have to compensate for the harm done and be responsible for its conduct with such other state/s. With regard to the law relating to state responsibility specifically for internationally wrongful acts, it is well established under the Articles, known as “Articles on Responsibility of States for Internationally Wrongful Acts” which were adopted by the International Law Commission (ILC) and later submitted to the General Assembly in 2001. According to these Articles, a state is responsible for every internationally wrongful act which is attributable to the state. Further, State responsibility is invoked when there is a breach of international obligation. The international obligation is the one by which a state is indebted to another state or the community of states either under treaty provisions including the provisions of United Nations charter or under customary international law. Every breach of international obligation would amount to an internationally wrongful act. It would also include any breach of ‘*jus cogens*’ norms.

2. LAW ON RESPONSIBILITY OF STATE

The law on responsibility of a state is recognized by the courts and tribunals, as can be analyzed from the decisions in various cases. In the important case of ‘*Rainbow Warrior Arbitration*’ (1990)¹ between France and New Zealand, the Arbitral Tribunal observed that the law relating to treaties for bringing about international responsibility of state was “relevant, but the legal consequences of a breach of treaty, including the determination of circumstances that may exclude wrongfulness and the appropriate remedies for breach, are subjects that are

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¹ 82 ILR, p. 551.

covered under the customary law of state responsibility”² Therefore, principle of state responsibility is an integral part of treaty-based law as also customary law.

It is important to highlight that to invoke state responsibility, the wrongful act or omission must be proved beyond reasonable doubt for imputing responsibility on a state.³ This was stated by the ‘*Eritrea- Ethiopia Claims Commission*’ that the evidence must be clear and convincing to support the findings for making a state responsible under international law. This ruling lays down the standard to fix responsibility of a state.

There are three essentials for implicating responsibility onto a state: *first*, existence of an international legal obligation- which means that there must be an obligation of a state established under international law; *second*, an unlawful act or omission on the part of a state violating the international legal obligation; and *third*, is the loss or damage resulting from such an act or omission, which means that the loss or damage must be directly attributable to the act or omission by a state violating that obligation under international law. The invoking of state responsibility is followed by certain consequences. Whenever a legal obligation is violated by a state through its unlawful act or omission resulting in damage, that damage must be compensated. This has been reiterated by the world court. In the “*Chorzow Factory (Indemnity)*”⁴ case, the PCIJ observed that, “it is a principle of international law ... that any breach of engagement involves an obligation to make reparation”. Apart from the above observations by the court, the International Law Commission’s (ILC) Articles on State Responsibility also elaborate the requirements for attributing international responsibility to a state. According to Article 3 of the ILC Articles on State Responsibility 2001, “it is international law that determines what constitutes an internationally wrongful act, irrespective of any provisions of municipal law”. Thus, to attract responsibility of a state under the international law, wrongful act or omission that is attributable to a state must breach an international legal obligation of a state. Such an obligation may arise under a treaty/ international convention or customary international law.

3. INTERNATIONAL LIABILITY VIS-A-VIS PRINCIPLE OF STATE RESPONSIBILITY

The terms “responsibility and liability” are distinct. In international law, liability arises if state responsibility is established, that is liability arises as one of the consequences of State responsibility. The responsibility of state is based on the breach of international obligation, that is wrongfulness, even though there may be no harm or injury to a state. But international liability is based on

² Malcolm N. Shaw *International Law*, 6th Edn., Cambridge University Press, 2008, p. 779.

³ Genocide Convention (*Bosnia v. Serbia*) case, ICJ Reports, 2007, para 204 in Malcolm N. Shaw *International Law* 6th Edn. Cambridge University Press, 2008, p. 779.

⁴ PCIJ, Series A, No. 17, 1928, p. 29.

appreciable harm or injurious consequence arising out of the act or omission by the state. A state is held internationally liable if it fails to abate the harm. Therefore, liability arises to repair the material damage. "The liability of a state does not come from the fault or the wrongfulness of the act but by the injurious consequences suffered".⁵ The liability arises when the harm is caused *whereas* in case of state responsibility, there is an absence of injury requirement. In other words, a state may be held liable for injury caused to another state even though it might have been caused in the exercise of its legitimate vested right e.g. peaceful nuclear explosion, the effects of which may travel to the environment of neighbouring state making it unfit for human habitation. Thus, liability is based on responsibility for harm alone and is subjected to very limited exceptions.

The international liability of a state is further developing into strict liability through various regional conventions. Strict liability arises even when there is no-fault (also called no-fault liability) of the state. Under various municipal jurisdictions like in India, the principle of strict liability has further evolved into principle of absolute liability under which there are no exceptions.

The liability of a state is set on various theories: first is the no-fault liability (risk theory) and second is the liability for fault (fault theory) which is grounded on negligence of a duty to take care. The first theory (i.e. risk theory) fixes liability on a state for unlawful act or omission. This is a principle of strict liability i.e. even if there is no-fault but the wrongfulness exists. The second theory which is based on fault of the state, brings in the responsibility of the state when the act or omission on the part of the state manifests negligent behaviour. The negligent behaviour arises out of duty to act in a particular way and when the duty is ignored, it gives rise to liability based on fault of the state. Thus, liability under fault theory is based on negligence (*culpa*). Another liability that arises as part of fault theory is based on *intention* that may be attributed to the officials concerned. The act or omission is attributable to a state when it is conducted by the organs of the state, and it may also be attributed to a state, in certain cases, when they are conducted by non-state actors. The famous case of Trail Smelter arbitration manifestly demonstrates as to how non state actors, in this case a mining company on one side (and farmers community on the other side which suffered damages), was responsible for transnational dispute eventually being litigated between two federal governments. The ILC Articles on State Responsibility are clear so far as the liability of a state is concerned, for its conduct which is based on the fault theory.

According to the chapter V of the "Articles on State Responsibility",⁶ state responsibility is excluded under certain circumstances. The exceptions include- "valid consent by a state, acts amounting to self-defence, counter-measures in respect of internationally wrongful act, *force majeure* which results in an

⁵ Sompong Sucharitkul, "State Responsibility and International Liability under International Law" 18 *Loyola of Los Angeles International & Comparative Law Journal* 821 (1996).

⁶ Arts. 20–27, under Ch. V of the Articles on State Responsibility.

unforeseen event that is beyond the control of the State and thus making it materially impossible in the circumstances to perform the obligation, distress, necessity and compliance with peremptory norms". The principle of state responsibility can be invoked by the injured state individually or by a group of states when the obligation is towards the entire international community. According to Article 46 of the ILC Articles, "where many states are injured by the same unlawful act of a state, each state may separately invoke the responsibility". Article 48 further entails that, "a state not being an injured state may also invoke responsibility of another state if the obligation is owed to a group of states and it is for the protection of a collective interest of the group, or if the obligation breached is owed to the international community as a whole". Responsibility of a state may not be invoked, "if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim",⁷ which are the exceptions as highlighted above.

4. PRINCIPLE OF STRICT AND ABSOLUTE LIABILITY UNDER DOMESTIC LAW

There are many municipal systems that recognize in their domestic jurisdiction, a principle of liability which is a no-fault liability under the law of torts commonly called the rule/ principle of strict liability. The principle of strict liability is well established under the national jurisdictions and it holds a party responsible for their acts without having to prove negligence or fault. For instance, if a party is involved in ultra-hazardous activities, it can be held liable when someone gets injured or harmed because of the same. The ultra-hazardous activities form a separate category in which a higher form of the principle of strict liability operates i.e. absolute liability. The definition of what would constitute ultra-hazardous activity is unclear, but the classification can be taken to revolve around some serious consequences that are likely to come out of any damage that results, rather than upon the likelihood of pollution occurring from the activity in question.⁸ It could also include using explosives, keeping wild animals or making defective products. The emphasis is upon the significant risk of severe transnational damage by that activity. The party or the defendant may be held liable if any other person gets injured because of the said ultra-hazardous activity, even if the defendant took necessary precautions and followed safety requirements, hence known as the no-fault liability. In an important case of *Rylands v. Fletcher* (1868), the principle of strict liability was recognized in which case the defendant was held liable even though he did not know of the shaft which burst in his premises, thereby flooding the plaintiff's adjoining coal mines despite the defendant not being negligent in that case. The three essentials for the application of the rule are- "(1) Dangerous thing, (2) Escape of the dangerous thing, and (3) Non-natural use of land". The

⁷ Malcolm N. Shaw *International Law* 6th Edn. Cambridge University Press, 2008, p. 799.

⁸ *Id.*, at 887.

exceptions include- “the Act of God, Consent of the Plaintiff, Act of Third Party, Statutory Authority and Plaintiff’s own fault”.

Similar to the principle of strict liability is the rule/ principle of Absolute Liability, in which there are no exceptions as are provided under the rule of strict liability. The principle of absolute liability emerged in India in the case of *M.C. Mehta v. Union of India*,⁹ also known as Oleum Gas Leak case. In this case a writ petition was filed by an activist lawyer, Mr. M.C. Mehta, for closure of Shriram Industries which was manufacturing hazardous substances. One of the units of this industry was in the close knit, densely populated area in Delhi. There was a leakage of oleum gas out of this industry from its unit causing one death and several other injuries. Because it was engaged in manufacturing hazardous substances, the court realized the need to recognize the rule of absolute liability. The new rule of absolute liability was similar to that of strict liability but without any exceptions. This was followed by another judgment in the case of *Union Carbide Corporation v. Union of India*, popularly known as the Bhopal Gas Leak case. In this case, the toxic gas- methyl isocyanate leaked from the pesticide manufacturing plant of the Union Carbide Corporation located in Bhopal, Madhya Pradesh. This leakage caused death of approximately 4000 people in Bhopal and incapacitated nearly 1.5 lakh people. The Supreme Court held that even if the corporation took all the precautions which were necessary for preventing such an outbreak, the responsibility still lies with the corporation. This decision further recognized the principle of absolute liability for all damages and casualties caused by hazardous substances/activities. The rule of absolute liability was applied in India, in the case of Uphaar cinema fire tragedy of 1997 and also Vizag gas leak in 2020. The justification for establishment of this principle of absolute liability emerged out of two points- first, the enterprise which is involved in dangerous activities has a social obligation to compensate people suffering due to their activities and second, the enterprise alone has the power and resources to invent and install safeguards against such hazards and dangers.

5. INVOKING STRICT LIABILITY UNDER INTERNATIONAL LAW

In International law, the rule of strict liability implies liability of a state even though there is no fault of a state. The rule of strict liability has certain exceptions too but they are limited as compared to those that are mentioned in the ILC Articles on State responsibility. The international law recognized this principle of state responsibility based on strict liability to some extent, in a land-mark case of *Trail Smelter*, wherein the liability of Canada was established for the harm caused by the non-state actor, into the territory of US. The principle recognized was the liability of a state for trans-border harm and polluter pays.

⁹ (1987) 1 SCC 395 : AIR 1987 SC 1086.

The origin of liability can be traced to Roman Law as per the latin maxim- "*sic utere tuo ut alienum non laedas*" which means "use your property in such a way as not to harm others".¹⁰ This reflects the principle of liability based on "restrictive enjoyment of property and regulated use of proprietary rights which is subject to the avoidance of harm to one's neighbours".¹¹ The principle of strict liability is recognized under various international conventions which deals with activities that are considered dangerous or new. For example, the "Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies" have provisions dealing with state responsibility as well as strict liability. Article VI of the Convention provides that the States Parties bear "international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities". The "Convention on International Liability for Damage Caused by Space Objects" is another international convention that recognizes strict liability of a launching state. According to the provisions of this convention, "a launching State is liable to pay compensation for damage caused by its space object". The exemption from strict liability is granted if a launching State establishes that "the damage has resulted from another's gross negligence or from its intentional act or omission".

The principle of strict liability is also recognized under various regional treaties. An important convention in this regard is the "Lugano Convention on Civil Liability for Damages Resulting from the Exercise of Activities Dangerous for the Environment" of 1993. In the definition clause of the Convention, dangerous activity has been defined as:

"... one or more of the following activities provided that it is performed professionally, including activities conducted by public authorities:

- a) the production, handling, storage, use or discharge of one or more dangerous substances or any operation of a similar nature dealing with such substances;
- b) the production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with one or more:
 - i genetically modified organisms which as a result of the properties of the organism, the genetic modification and the conditions under which the operation is exercised, pose a significant risk for man, the environment or property;

¹⁰ *Black's Law Dictionary* 1380 (6th Edn., 1990).

¹¹ *Supra* note 5.

- ii micro-organisms which as a result of their properties and the conditions under which the operation is exercised pose a significant risk for man, the environment or property, such as those micro-organisms which are pathogenic or which produce toxins;
- c) the operation of an installation or site for the incineration, treatment, handling or recycling of waste, such as those installations or sites specified in Annex II, provided that the quantities involved pose a significant risk for man, the environment or property;
- d) the operation of a site for the permanent deposit of waste”.

It needs to be highlighted here that activities concerning micro-organisms have also been included in the definition of dangerous activity and the convention further provides for the compensation for those who are injured by hazardous activities. The Convention further provides “responsibility on all persons, companies, State and all agencies exercising control over dangerous activities, irrespective of the place of the harm”.¹² The exception to liability is limited to the damage occurring because of “armed conflict, a natural disaster, an intentional act of a third party, a State command, pollution of a level acceptable having regard to the relevant local circumstances, or if the activity was taken for the benefit of the person damaged, to the extent it was reasonable for the latter to be exposed to the risks of the dangerous activity, or if the injured party was at fault”.

This Convention is important to make out a case against the People’s Republic of China from where the novel Corona virus started spreading in 2019 and resulting into a pandemic that the world is facing today. The effects of novel Corona virus have not only been health related, though many people have died attributing the death directly to this new virus, but the effects have been devastating on economy and the people in poor countries who have lost their jobs and livelihood, making them poorer and leaving them to starvation and death.

6. COVID 19 - A CASE FOR INVOKING STATE RESPONSIBILITY AGAINST PEOPLE’S REPUBLIC OF CHINA

Being a regional treaty, the Lugano convention does recognize the principle of strict liability against a state in case of damage that results out of dangerous activities which also includes the danger caused by micro-organisms. Drawing from the treaties and state practise attracting rule of strict liability for the damage caused due to dangerous activities including that of micro-organisms, it becomes imperative to invoke and enforce strict liability as a consequence of state responsibility for the spread of novel Corona virus, which is for causing deaths

¹² Kiss, Alex and Shelton, Dinah L., “Strict Liability in International Environmental Law”, GWU Legal Studies Research Paper No. 345; GWU Law School Public Law Research Paper No. 345.

and health concerns because of the disease on an unprecedented global scale. The corona virus, a micro-organism causes the disease (COVID-19) which is lethal. It has affected day to day lives of thousands of families apart from hitting the global economy, businesses, disruption of world trade and human movements. The states even had to shut their borders because of the pandemic. In view of the unprecedented scale of damage/injury caused to international community, it becomes important to fix the responsibility of a state from where the disease emerged and strict liability imposed under international law for this dangerous activity.

It is a known fact that the novel Corona virus had come out of China's Wuhan city¹³ although its clear origin remains in the realm of probability. Though corona virus is a disease of bats and pangolins but the human transmission of this virus happened in the city of Wuhan in China which then rapidly spread world over resulting in more than 200 states being in lock-down situation. The pandemic affected not only the health, but it also hit the world economy like never before, apart from its effects on society and culture. It has further widened the inequalities in every field of life including economic, employment opportunities, in accessing education, health facilities, so on and so forth.

China steadfastly refuses any possibility of an engineered pandemic, especially through lab-based research. Although China has collaborated with World Health Organization (WHO) to investigate the reasons for origin of COVID-19, it is also a fact that such a collaboration has come only after sustained international pressure and not as a voluntary measure. Furthermore, the current Director-General of WHO himself is in chair due to China's support. There is thus a question mark on the impartiality of the investigative reports. Even assuming the best in favour of China i.e. the spread of corona virus was due to animal/ cold food chain-human interface, still on April 1st, 2020 China re-opened the markets selling bats, pangolins and other wild animals in Wuhan¹⁴ from where the COVID-19 had erupted and subsequently killed over 5,000,000¹⁵ people around the world and infected more than 250,000,000 as on 8th November 2021 with the numbers still increasing every day. In spite of the consequences that the world has seen during the global lock-down and thereafter, China re-opened the wet markets in the year 2020. This amounts to gross negligence and clear abdication of duty to take care. Alternatively, if wet markets were not the reason for spread of corona virus, then the most plausible reason for spread of corona virus is lab engineered version, which finds a support from number of scientists all over the world, especially keeping in view the rapid mutations that the virus is able to manage which, as per

¹³ <<https://www.who.int/publications/i/item/who-convened-global-study-of-origins-of-sars-cov-2-china-part>>.

¹⁴ <<https://economictimes.indiatimes.com/news/international/world-news/covid-19-effect-dips-china-reopens-markets-selling-bats-cats-and-dogs/chinas-deadly-wet-markets-are-back/slide-show/ 74925019.cms>>.

¹⁵ <<https://www.worldometers.info/coronavirus/coronavirus-death-toll/>> last accessed on November 9, 2021.

the scientific experts, is unlikely in a naturally occurring virus. In either case, strict liability of People's Republic of China would arise. Wuhan lab is operated and controlled by the Chinese Academy of Sciences which in turn is an instrumentality of the PRC. Not only due to its role in the origin of COVID 19, role of China also calls for enforcement of strict liability against it for failure to disclose timely and proper information regarding the spread of corona virus as a result of which the international community was completely taken off guard.

However, despite the harm that has been caused and China's palpable role in emergence of the deadly virus (whether through state actor or non-state actor), no case for attributing strict liability has been instituted against China till date. The micro-organism spreading COVID-19 is dangerous to human life and in view of the devastation which it has already caused, same amounts to irreparable environmental harm. Even if it is not under any international convention, but as a part of customary international environment law, trans boundary harm to environment is well recognized. As the emergence of corona virus is established to be from Wuhan, it becomes imperative to hold China responsible for its acts. Once responsibility is established, China would be bound by the liability as part of consequence of state responsibility which includes "cessation of the wrongful act, assurances and guarantees of non-repetition and most importantly, reparation", at least to the poor countries. A state after having brought harm to others in the international community because of its conduct cannot be allowed to get away with its fancies after infecting the whole world.¹⁶

Considering the importance of recognizing the principle of trans-boundary harm from hazardous activities, the General Assembly adopted a resolution in 2006 on "Allocation of loss in case of transboundary harm arising out of hazardous activities" and adopted another resolution in 2007 on "Prevention of transboundary harm from hazardous activities". The International Law Commission had earlier compiled its report on allocation of loss in case of transboundary harm caused by hazardous activities. Since China is holding a permanent seat at the Security Council, it must honour the resolution passed by the General Assembly and resultantly, own the responsibility towards the harm caused by the novel COVID-19 across many states. The principle relating to reparation was laid down in *Chorzow Factory case* where the PCIJ observed that "the essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Though restitution will not be possible but compensation can help to some extent in restoring the pre-harm stage, in addition to enabling a new start. It is no secret that there has been a huge health divide between the developed and developing countries in regard to treatment of COVID-19. A large number of

¹⁶ This obligation would be a part of *obligationes erga omnes*, an obligation which a State under international law owes to all alike.

countries continue to remain without vaccinations resulting in a large proportion of global population severely susceptible to infection from corona virus. Effective compensation from China which is a global economic giant, will result in poor countries being able to purchase vaccine for its general population which otherwise remain outside their reach due to patent laws. Though it is impossible for China to compensate the entire world for the economic losses but establishing its responsibility under international law for the wrongful act and obliging it to cease and seeking assurance for non-repetition must be held paramount.

7. CONCLUSION

The need for the international community to recognize and accept the principle of strict liability and bringing about changes in the present treaties to include a situation as that of emergence and spread of COVID-19 which the world had not anticipated, is a must now. Even if it is unacceptable as a treaty by most of the states, the principle can be established as a general principle of law recognized by civilized states, for the court to apply as the third source of international law under Article 38 of Statute of the International Court of Justice. The principle may also be established through the customary international law by invoking the “Lugano Convention on Civil Liability for Damages Resulting from the Exercise of Activities Dangerous for the Environment”, 1993 to hold China responsible and this would add to state practice, thereby accepting the principle of strict liability as part of customary international law. The principle of strict liability has found expression in state practice in cases such as *Trail Smelter*, *Lake Lanoux Arbitration*, the *Corfu Channel* case and *Settlement of Gut Dam Claims* case. It is time that the international community rises together in the pursuit of not only recognizing but also enforcing the principle of strict liability whether under treaty provisions or under customary international law, against the Peoples Republic of China for its gross negligence.