THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

Mt. Abu - May 1969

INTERNATIONAL TORTS - PROBLEMS AND PROSPECTS

by

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I

To be general in expression, it can be said that law exists in the society for the preservation of rights and the enforcement of obligations. In other words, law is an obligatory rule of conduct - the conduct which the subjects of the community should conform to. The prescribed conduct in the society is nothing but what a member of that community should not do and what he is supposed to do. Thus, obligations and duties in a society or community form the entire basis of the legal system. A person who does not perform his duty is a wrongdoer in law. With gradual changes in the political set ups of the communities, the difference between the private wrong and the public wrong came to be known to the juridical world. Against whom the wrong has been committed the community or some private person or persons came to be recognized as the determining factor in the categorization of wrongs.[1]

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1. According to A.R.Radcliffe - Brown: "In any society a deed is a public delict if its occurrence normally leads to an organized or regular procedure by the whole community...which results in the fixing of responsibility upon some person within the community and the infliction by the community of some hurt or punishment upon the responsible person.... In the procedure of a law of private delicts a person...that has suffered some injury, loss or damage by infringement of recognized rights appeals to a constituted judicial authority, who declares some other person...within the community to be responsible and rules that the defendant shall give satisfaction to the plaintiff, such satisfaction frequently taking the form of the payment of an indemnity or damages." (Encyclopardia of Social Sciences, Vols. IX-X, pp 202-03).

In due course of time, the private wrongs, or the civil wrongs acquired the little of 'torts'. The concept of tortious liability is popularly understood in the context of municipal law in relations between individual and individual and between individual and the state. The known areas of tortious liability continue to be those in which there is a breach of a duty by an individual to the detriment of another or by the state or the government causing damage or injury to the subject of the state.

With the development of international legal system, a body of rules emerged for the purpose of regulating the relations of states inter se. The customary and conventional rules of international law have established certain rights and duties of International Persons which are the basis of the law of international community. A breach of duty primarily fixed by the law of nations arouses liability for the damage or injury suffered by another international person or the subjects of that international person on whose behalf if can bring an international claim.2

The concept of international responsibility of states came to be regarded as a consequence of the breach or non-performance of an international obligation whereby the state is under a duty to make reparation for the injury caused. In this sense, the term responsibility, came to be identified with the 'liability' under municipal law. The categorization of liability into 'criminal' and 'civil' in municipal law is also to be found in international law where the breach of certain obligations are considered punishable as distinct from those in which reparation only would suffice. Thus, the breaches of the obligations and duties imposed on International Persons by international

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2. Anzilotti (quoted in the yearbook of the International Law, 1956 Vol.II, p. 181) has expressed the idea of state responsibility in the following words:

> "When a wrongful act-by which is meant as a rule, the violation of an international right-is committed, the consequence is that a new relationship comes into existence, in law, between the state to which the act is imputable and the state with respect to which there exists an unperformed obligation. This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of states, can attribute to the wrongful act...."

law are responsible for the development of two very significant branches of international law-the International Tort Law, and the International Criminal Law.

II

According to Professor Schwarzenberger[3] the rules on international responsibility can be reduced to two propositions:

1. The breach of any international obligation constitutes an illegal act or international tort, and

2. The commission of an international tort involves the duty to make reparation.

These propositions summarize the content of the international law of torts. According to Schwarzenberger five aspects of international torts need examination:(a) the meaning of breach of an international obligation, (b) the legal interest of the claimant, (c) the identity of the tortfeasor; (d) the requirement of fault, and (e) the forms of reparation. These certainly are the fields of study also in the municipal law of torts. Yet there are certain problems which require special attention of an international lawyer. The rules of international customary law relating to liability in matters of tort for damage to the persons and property of foreigners and failure to maintain the accepted international standard in respect of the treatment of aliens are well established and there is considerable doctrine and state practice in that regard. Besides these traditional areas of tortious liability of international persons, new problems have emerged as a result of the new economic, scientific and technological developments in the international community. The duties and obligations of members towards one another in an underdeveloped community are not many and varied. As the society grows more and more complex, the areas of conflict become multiple and new obligations

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3. In 'A Manual of International Law' (Fifth edition) at page 173.

and duties emerge.[4] The breaches of these duties will result in new types of international torts.[5] For these the 'traditional diplomatic procedures of protest, demands for satisfaction, and claims cannot be of avail.'[6] Further, the development of international organizations has also contributed to the development of the international law of torts. The important problems like the legal status of the international organizations to be a claimant for the injuries suffered by persons in their service at the hands of third persons[7] and the question of the tortious liability of international organization and institutions for damage or injury to others. The task before an international lawyer in the field of international torts is not so much of enumeration of possible and existing types of international

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4. Jenks, C.W. Observes:
"Apart from such traditional branches of the law as liability in matters of tort for damage to the persons and property of foreigners and failure to maintain the accepted international standard in respect of the treatment of aliens, a new series of vistas are opening up as the result of contemporary economic and technological developments." (Common Law of Mankind - at page 158).

5. Starke has illustrated certain new and expected types of international torts:
"Another important matter which will have incidence on the developing law of state responsibility is the extent to which the states are or may become involved in the control of ultra-hazardious activities, e.g. nuclear experiments, the development of nuclear energy, space exploration, and the "sonic boom" or "sonic bang" of new types of aircraft."
(An Introduction to International Law, Sixth edition, at p. 254).

6. Starke - An Introduction to International Law, sixth edition, at page 254.

7. The International court of Justice has held in 'Advisory opinion on Reparation for Injuries suffered in the service of the United Nations' (I.C.J.Reports, 1949, page 174,) that an international institution, as distinct from a state, is entitled to espouse the claim of one of its officials against a state for damage or injury suffered.-

responsibilities and liabilities, as of finding out the basis and structure of the new rules of law. The real question to be studied is as to whether the concept of municipal law of liability and the national solutions with serve the purpose of the international law in this field. The municipal law of tortious liability is based on the general obligation not to inflict unlawful harm on one is neighbour and this obligation rests partly on liability for fault, including negligence, and partly on absolute liability for dangerous things.

'Fault' and International Torts:

The requirement of fault or the condition of malice or culpable negligence plays a dominant role in the determination of tortious liability under municipal law. There has been a controversy regarding the requirementof fault in international torts.[8] The controversy arises out of the distinction between the objectivity or the subjectivity of the act of omission in question. The question arises as to whether a state which has broken an obligation without a guilty intent or negligence can be considered to have committed a tort? It has been accepted by the majority of the writers that fault cannot be made a compulsory requisite of tortious liability of states.[9] The International court of Justice considered

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8. Alf Ross: "Whereas in the theory of civil law it is agreed that the normal basis of responsibility is determined by the culpa rule it is highly controversial whether the same applies to international law. The current doctrine since Grotius holds that culpability in International Law too is normally indispensable to responsibility. But recently various author .....have maintained that this is an unwarranted transference to International Law of the rules of civil law."
(A Text-Book of International Law, at page 256).

9. Starke, J.G.: "A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to state responsibility. Few rules in treaties imposing duties an states contain anything expressly in terms relating to malice or culpable negligence, and breaches of those treaties may without more involve the responsibility of a party."
(An introduction to International Law, page 269-sixth edition)

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this aspect of the problem in the Corfu Channel (Merits) Case in the year 1949.[10] The court in this case held Albania internationally responsible in view of the omissions on the part of Albanian authorities to take steps to prevent disaster. The court presumed knowledge on the part of Albania of the laying of minefield in the channel on the basis of the facts of that case. Even when Albania had knowledge of mine-laying it did not take the minimum care to warm the ships of the mines. This omission was construed by the court as 'fault' in holding Albania responsible. In this manner the court recognized the requirement of 'fault' in international responsibility, at least, in cases of omissions. According to Professor Schwarzenberger:

> "... the Corfu Channel Case is less comclusively in support of a general doctrine of culpability than may appear on the surface. It is merely concerned with an unlawful omission. A subject of international law is responsible only for its own unlawful omissions. These presuppose a duty to act. Whether this exists depends on the concrete circumstances of each case. Thus, in cases of omission, knowledge of the circumstances is indispensable and, to this extent, it is reasonable to insist on evidence of this subjective element."[11]

.... Alf Ross: "It is probably right to say that International law as a main rule makes the culpa rule the basis of responsibility, though it does not acquire the same practical importance as in civil law, partly because many of the norms of international law are formal norms of competence in which the question of quilt in most cases falls into the background; partly because in international relations due diligence must be strictly demanded so that responsibility is often taken for granted without any special discussion of the question of culpability." (A Test-Book of International Law, at pages 257-58).

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Schwarzenberger: "Actually, attempts at hard and fast distinctions between objective and subjective responsibility are little more than doctrinal over generalisation." ('A manual of international law' at page 180, Fifth edition.)

10. (1949) I.C.J. Reports, page 4.
11. 'A Manual of International Law' (Fifth edition) at page 280.

Whatever may be the controversy, this is definite that any hard and fast requirement of fault, malice, or negligence for holding a state responsible for tort would create difficulties and problems. Many injuries and damages resulting from unlawful acts and breaches of duties would go unredressed if the fault cannot be proved. In the international field where in majority of cases the whole community is affected by a wrong, the responsibility should be absolute.12

III

Newer fields of liability

As pointed out earlier in this paper, the modern, scientific, economic and technological developments in the world have created new obligations on the part of the states. Since states are coming in closer day-to-day contract with each other in field of trade and commerce and undertake explorations in space, conflicts and risks have increased. The nuclear activity by the states has also created new responsibilities. Some such new obligations can be categorized as follows:

1. Obligations arising out of international economic relations.

2. Obligations arising out of nuclear experiments and research.

3. Obligations arising out of activities in space.

Certain questions of fundamental nature arise relating to these new areas of international tortious liability. The primary inquiry has to be made whether the obligations in these fields have established themselves well in the framework of international legal system so that their breach amounts to tort. Another important

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12. Starke enumerales certain areas of strict liability: "In the field of state responsibility for nuclear activities, there has to be ....some form of strict or absolute liability...The safety of the international community cannot be ensured under a system whereby a state would be responsible only if it were proved to be negligent in the management of nuclear fuels and nuclear installations." (An Introduction to International Law, at page 270 (Sixth edition)).

aspect is the practicability of the application of the rules of the private law of torts. Whether special principles of liability are to be established for these entirely new situations is the current problem. Such obligations are obviously different from the traditional ones in as much as the breaches of the former result in greater and severe sufferings to the community. The dangers which a nuclear blast may create or the damage which a mis-launched satellite might cause cannot be underestimated. Hence greater attention required in formulating standards of care and liability in case of non-observance of those standards. Jenks, C.W. has raised these problems in the form of questions:13

> "1. Does international law recognize a liability in tort for harm to one is neighbour resulting from the use of atomic energy in cases such as damage by radioactive fall-our or damage by the disposal of radioactive waste with inadequate precautions?
>
> 2. Is there a similar liability in international law for injury to persons and property under the jurisdiction of other states from the use of space satellites or the disintegration of space installations?
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> 3. Is there a tort of economic disturbance producing repercussions in the economies of other countries paralled to the wide-spread obligations which have now been assumed by states to pursue full employment policies?"

These questions must necessarily be anwered in the affirmative. The community at large must be safefuarded against the dangers inherent in the presen day state activity.

As regards the tort of economic disturbance, it can be said that the obligation which can be presumed on the part of states is to maintain such economic policies within their jurisdiction so as not to impair or adversely affect the economic system of the other countries. This field of liability is yet to develop. The question arises regarding the choice

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13. 'The Common Law of Mankind' at pp. 158-59.

between the principles of fault and absolute disability in this field. It is submitted that the principle of absolute liability will not be accepted in state practice. The liability for tort of economic disturbance should arise only when there is malice or culpable negligence resulting in the damage to the economy of any other state. The reason for this lies in the 'domestic jurisdiction' concept according to which every state is competent within its jurisdiction to pursue any type of economic policy. Although international obligation to maintain full employment is a limitation on the domestic jurisdiction concept, yet only a malicious breach of this international obligation should result in tortious liability since the majority of states in the world are economically under developed.

As regards the tort of nuclear and atomic damage, the position is different. Since the development of atomic and nuclear energy in the world started, there has been constant demand to use it for peaceful purposes and not for the damage or destruction of the world. Efforts are continuing in this direction. The disarmament conferences are held and Nuclear non-proliferation Treaty has been concluded. But the problem of tortious liability of states for nuclear or atomic damage will remain even if the states in practice agree to make peaceful uses of nuclear energy. Even in cases of peaceful uses and experiments of such energy, the risk or injury or damage remains. The state causing the injury should be strictly responsible. In such cases the requirement of fault should not be necessary. The principle of absolute liability should be applied in such cases since the risk involved or the damage caused cannot be underestimated. The simple fact that the state maintains and keeps such risky material on its territory is sufficient to create liability in case such material causes harm to others.14

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14. The rule of strict liability has been thus stated in Tylands v. Fletcher, (1866) L.R. IEX. 265: "....the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

Space Torts: The state activity in space opened a new era in several spheres. New problems have arisen. The anxiety of international lawyers regarding the applicability of existing international law to space is well known. Apart from other things, the liability of states for torts in space is an important matter. The efforts to formulate principles of liability in space are in progress. In this context the 'Declaration of Legal Principles Governing the Activities of States in the Exploration and use of outer space' unanimously adopted by the General Assembly of the United Nations on December 13, 1963, and the Resolution of the Institute of International Law on the Legal Regime of outer space' adopted unanimously at Brussels on September 11, 1963 are of extreme significance. They have, at least, provided a basis for future development of law and practice and are declaratory of the maximum area of agreement on the subject matter. But nothing short of an international agreement on this aspect will serve the real puspose.[15] The general principle of liability is incorporated in paragraph 8 of the Declaration of Legal Principles:

> "Each state which launches or procures the launching of an object into outer space, and each state from whose territory or facility an object to launched, is internationally liable for damage to a foreign state or to its natural or juridical persons by such object or its component parts on the Earth, in air space, or in outer space."

Further, paragraph 13 of the Resolution of the Institute of International Law lays down the following principle:

> "The state under the authority of which the launching of a space object has taken place shall be liable, irrespective of fault, for any injury, including loss of life, or damage that may result Modalities of application of this principle may be determined by special convention."

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15. /The General Assembly Resolution of December 13, 1963 requests the committee on the Peaceful uses of outer space to arrange for the ppompt preparation of a draft international agreement on liability for damage caused by objects launched into outer space./-Jenks - 'space law' at page 285.

These principles clearly lay down the concept of liability irrespective of fault. The liability of states for injurious activities in space is to be determined without proof of any malice or negligence. Yet Jenks, C.W. has suggested certain exceptions to the principle of absolute liability:

> "1. While no proof of fault by the launcher or a operator should be required, it is proper to have regard in determining the reparation due to any failure by the claimant to show reasonable care.
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> 2. A distinction seems necessary between injury... occurring on the ground or at sea and injury.. occurring in space. Persons on the ground or at sea must be regarded as pursuing their normal avocations; they cannot be presumed to have accepted the risks of activities in space; the same principle applies in respect of property on the ground or at sea. Persons and property in space shere in the risks of activities in space and the principle of strict liability is therefore inapplicable in respect of them."16

These exceptions will be analogous to the principles of contributory negligence and the volenti non fit injuria in the private law of torts. The types torts well-established in municipal laws will gradually find their way in space law and solutions will have to be urgently sought for the new and varied problems that are bound to arise in future.

IV

To conclude, it can be said that the concept of civil responsibility has been strongly well established in international legal system. Whenever a duty is imposed by law, its breach amounts to a wrong causing damage to another person who can claim damages for the redress of injury. In the international community, the concept of duties and obligations of states towards one another developed through state practice and formed a body of customary law imposing such duties and obligations. Obviously, the concepts of state responsibility and International wrongs are not new. With

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16. Jenks, C.W. - 'Space Law', pp. 286-87.

the developments in world society, closer contracts between states and new scientific and technological ventures, newer obligations and duties have been created. Hence, the newer international torts. The main problem in this regard exists in relation to the adoption of municipal law analogies into the domain of international tort law. The general principles of law of torts recognized by civilized nations can be of great help to the international tribunals faced with the cases of international wrongs.

The controversy regarding the choice between 'Fault' and 'Absolute liability' theories is also academic in nature. The private law of torts itself is not certain regarding this choice. In the international field the choice will be guided by the considerations of large scale human suffering and unknown risks involved in nuclear experiments and space proframmes. Moreover, in the international field, no principles of law can establish themselves unless consented to by the member-states of the world community.

It is submitted that in most of the cases only an international agreement will serve the purpose, otherwise the development of law left to customary process might result in great damage to humanity. Such agreements are a necessity, at least in fields of space law and Nuclear activity. The liability in Space Torts and Nuclear Torts are everybody's concern and it is expedient that internationally agreed principles of liability in this field are formulated. In traditional fields of state responsibility for damage to the persons and property of foreigners and failure to maintain the accepted international standards in respect of the treatment of aliens, the customary law is sufficiently well developed and the international standards of action may continue to be improved. An international agreement under the auspices of the United Nations appears to be the only solution to the difficult problem of the international torts and of the principles of liability relating to them.