



**IS THERE A DUTY ON STATES TO PREVENT THE SPREAD OF COVID 19 VIRUS?
REFLECTIONS ON THE APPLICABILITY OF INTERNATIONAL LAW PRINCIPLES
ON STATE RESPONSIBILITY**

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INTRODUCTION

The Covid-19 pandemic has changed the world as we know it. Hundreds of millions of people have been infected and several million have died as a result of the virus which is unprecedented in the history of the human kind. Amidst this chaos, States as sovereign entities have the primary obligation of stopping the spread of the virus both within and outside its territorial limits. While transboundary environmental pollution was recognized as imposing liability upon a State found in breach of its international obligations with regard to the protection of the environment, there is a need to engage in a discussion as to how a State should be held responsible for failing to take adequate measures to stop the spread of the virus under international law since the Covid-19 virus has now become a common threat, having a profound impact on the lives of all the people in the world. In general, law relating to State responsibility under international law deals with the responsibility of a State for committing an international wrong either through an action or an omission which may be possible of being attributed to that State. Therefore, it is high time that such an examination as to the responsibility of a State regarding the mitigation and possible stoppage of the spreading of the virus be undertaken and the matter be discussed with reference to the international responsibility which may be attached to Sri Lanka. In the above context, this research endeavors to find out the international law relating to the responsibility of a state in taking mitigatory measures and actions to contain the spread of the Covid 19 virus, in particular outside of its territory.



METHODOLOGY

This research is undertaken using the doctrinal approach by making a critical evaluation of the existing international legal instruments including, treaties, covenants, declarations and other legal instruments dealing with the issue of state responsibility. It also uses secondary sources such as scholarly books and journals which are produced about the topic. This research endeavours to critically reflect on the existing legal norms concerning state responsibility and how such legal norms could be invoked in making states liable for failing to contain the spread of the Covid-19 virus under international law.

RESULTS AND DISCUSSION

State responsibility is a cardinal institution of international law. It results from the general legal personality of every State under international law, and from the fact that States are the principal bearers of international obligations.¹ It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation.² The law of responsibility has been largely articulated through the work of the ILC, here in three texts, the ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ARSIWA), the ILC Articles on Diplomatic Protection of 2006, and the ILC Draft Articles on Responsibility of International Organizations of 2011.³ When it comes to the State responsibility, the ARSIWA is the main international legal instrument one can look into even though it has not been made into an international treaty, as a source of Soft international law, many have referred to its provisions.⁴

The essential characteristics of responsibility hinge upon certain basic factors: first, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible; and, finally, that loss or damage has resulted from the unlawful act or omission. In the *Spanish Zone of Morocco claims*⁵, Judge Huber emphasised that, ‘responsibility is the necessary corollary of a right. All rights of an international character involve international

¹ James Crawford, *State Responsibility: The General Part* (1st Edn, CUP 2013)

² M. Shaw, *International Law* (8th Edn, CUP 2018)

³ J. Crawford, *Brownlie's Principles of International Law* (8th Edn, OUP 2012)

⁴ J. Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading’ [2001] EJIL 963.

⁵ [1923] 2 RIAA, p. 615



responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met’.

According to Paparinskis⁶ these basic principles of international responsibility are applicable to conduct and breach in relation to COVID-19 by States and international organizations in different specialist fields of international law, be they related to trade, human rights, investment, environment, injury to other States, or any other matters. Application of most rules on the internationally wrongful acts to COVID-19 related responsibility claims does not seem to be particularly problematic. Issues of attribution can raise hard questions of proof, particularly when the primary obligation in question calls for prevention and therefore attribution of omissions is at issue. However, on a theoretical base, the existing international legal norms on State Responsibility would be adequate to deal with the issues or responsibility of a State concerning its failure to stop or the mitigation of spreading of the Covid-19 virus. According to Wong⁷, the Covid-19 pandemic has raised questions of international responsibility of States; in particular, whether States can be internationally responsible for the failure to prevent the spread of the outbreak internally and externally across international borders and other matters pertaining to international health law. However, Yee⁸ points out that, there has never been any State practice in pursuing State responsibility for alleged malfeasances in pandemics. Hence It would become somewhat problematic in discussing State liability under the Covid-19 pandemic in the absence of a treaty or well- established principles of Customary International Law regarding the liability of a State concerning the Covid-19 pandemic under International Law.

International responsibility of a State can be recognized as something which imposes an obligation upon a State for a breach of international law. However, the law relating to international responsibility of a State is not well defined either under international treaties or through principles of customary international law (CIL) since States always endeavour to jealously guard their sovereignty, hence failing to come to a common consensus regarding the scope and the ambit of States related to their responsibility under international law. Using a qualitative method by employing the doctrinal approach, this study aims at critically evaluating

⁶ Martins Paparinskis, ‘COVID-19 Claims and the Law of International Responsibility’ [2020] JIHL 1

⁷ M Wong, ‘The Law of State Responsibility and the Covid-19 Pandemic’ in C Ferstman and A Fagan (eds), *Law and Human Rights: Essex Dialogues* (30 June 2020) DOI: 10.5526/xgeg-xs42_040.

⁸ Sienho Yee, ‘To Deal with a New Coronavirus Pandemic: Making Sense of the Lack of Any State Practice in Pursuing State Responsibility for Alleged Malfeasances in a Pandemic—*Lex Specialis* or *Lex Generalis* at Work? [2020] CJIL 237



the current legal status quo regarding the international responsibility of a State in stopping the spread of the Covid-19 virus.

The results reveal that, the existing framework on State responsibility can be found under the International Legal Commissions Draft Articles on State Responsibility (DASR) and through the principles of CIL. In the *Rainbow*⁹ case, the International Court of Justice also emphasized the fact that breach of international law means breach of both treaty and CIL.

When it comes to the international obligations related to eliminating the spread of the virus, it can be linked with the international law obligations arising out of international human rights treaties related to health and international cooperation in particular. Accordingly, where States fail to take measures as required according to the international standards related to eliminating the spread of the virus, it can be argued that such States will fail to fulfill their obligations under international law and hence responsible for their breaches. Further, both regional and international support pertaining to providing aid to those countries in the developing world has to be also looked into since the DASR also provides certain exceptions which a State can plea with regard to failing to perform an obligation which it is required to fulfil under international law. These exceptions include force majeure, distress and necessity.

In the application of the traditional notions of State responsibility in the context of Covid-19 pandemic, responsibility of a State can be invoked for its failure to act in a positive manner or for its omissions concerning a countries international obligation, which may be linked to international human rights law or international health law. According to Article 12 of the DASR, when it come to the origins of the responsibility of a State under international law, it does not matter whether it stems from Treaty law or a principle of Customary International Law, hence once you establish that there is a responsibility, it would be up to that State to find case for breaching such obligation through its acts or omissions.

When it comes to the Sri Lankan context, while the 1978 Constitution fails to provide the proper place of international law in the domestic context, for both Treaty law and principles of Customary International Law, it will still have to be answerable for its international obligations under international law for its international wrongful acts or omissions which may be attributable for it.



CONCLUSION

Therefore, it is concluded that, regarding the responsibility of a state to eliminate the spread of the Covid-19 virus can be identified from the existing legal norms of international law and that such an endeavour must be fulfilled by every state in the world. However, due to the very normative nature of international law and the fragility in implementing and imposing international legal obligations upon the so-called powerful nations may still remain problematic even amidst the Covid-19 pandemic.

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