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Existence, breach and responses to the breach of state responsibility: A critical analysis

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Abstract

Had there been only one man on earth, the idea of right, between individuals or between individual and the state, would have no existence because, the conception as to right of one entity presupposes the existence of at least another entity possessed of the capacity to hold right. The more entities with the capacity to hold right, the more potentiality to have breach of such right and thus giving rise to responsibility. Because of the very reason that a state is a part of the world with limited territory and population, it is less difficult to determine the existence and breach of responsibility of a person within a state than the determination of the existence and breach of responsibility of a person in international plane where the territory and population is hundred or thousand times bigger. International responsibility, mostly attributable to state, like responsibility under a national law, arises from the breach of a legal interest or legal right of one subject of international law by another. Unlike national law, absence of an international legislative body for international law leads the states to set up the standards of conduct for each of the subjects of international law in the form of mostly bilateral and multilateral treaties. Standard of conduct for an international legal person also originates from the customary laws developed from various forms of state practices. If there is any right, there must be violation of right and stressing the need for some mechanisms responding to the violation or breaches of such rights. Unlike national law, again, in international law there is no adjudicating body having jurisdiction to settle disputes of all of its subjects in each and every matter. None can ignore that in every country, most prevalently in the developing countries, powerful and influential persons are not so easy to be brought to book by existing mechanisms as it is in case of powerless general people. Since international law is nothing but law with wide applicability, it may not also be uncommon that powerful states will strive to take the advantage of the mechanisms provided for responding to the breaches of international obligation. Critical analysis of the responding of the creation, breach and specially responding mechanisms to international law is of emerging necessity. Perhaps it is inherent weakness of the international law itself that it does not provide for such an effective responding mechanism to the breaches of international obligation as we find it in domestic law. This article aims at making a comprehensive and critical analysis of the character, forms and conditions of international responsibility, breach of it and responses to such breach. In addition to the procedural rules of creation of responsibility for violation of international obligation, procedural and substantive rules for some particular cases of international responsibility will also be discussed here.

Keywords: International, Responsibility, Wrongful act, State, Breach, Attributability and responding to breach.

1. Law of State responsibility: The principles of international state responsibility have, recently, become the subject of extensive interest of International Law Commission (ILC). Although, originally ILC started studying this area of international law in 1956 but it was 2001 when it produced the final draft Articles.[1] It should, however, be noted that ILC draft Articles on state responsibility are concerned with the general principles only and do not deal with any specific case of state responsibility. Law of state responsibility is originally of customary international law and unlike state immunity it was almost exclusively an area of international law developed by state practice. The law of state responsibility has, in its most part, been articulated through the work of ILC in three[2] basic texts. Numerous examples of state practice are found to the ILC Articles on state responsibility. The work of ILC has been followed closely by states and such work, being essentially a codification of customary international law, is a good indication of what the international law is on the subject.[3] Over the years international courts and tribunals cited ILC draft Articles and final draft Articles are quite influential with international courts and tribunals in spite of not being turned into a new convention.[4] Apart from the work of ILC, case laws, both of PCIJ, ICJ and Mixed Claims Commissions, have also much contribution in the development of the law on state responsibility. Iran-US Claims Tribunal that dealt with claims arising out of breakdown in their relations in 1979 may be a good example in this regard.[5]

The work of ILC will not, however, have overriding effect on *lex specialis*. The Articles are residual in the sense that they have no application where the conditions of an international wrongful act or the content or implementation of the international responsibility of a state are governed by any special rules of international law.[6] Commentary No. 4 to ILC Article 55 on state responsibility makes it clear that 'special rules of international law' will include a treaty as well. Since

[1] Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.
[2] Articles on Responsibility of Sates for Internationally Wrongful Acts 2001, Articles on Diplomatic Protection 2006, Articles on Responsibility of International Organizations 2011.
[3] Anthony Aust, *Handbook of International Law* (2nd Edn, Cambridge University Press 2010) 377.
[4] Ibid.
[5] Martin Dixon, *Textbook on International Law* (7th Edn, Oxford University Press 2013) 253.
[6] ARSIWA (n 1) Article 55.

generally the powerful states enjoy, in practice, more bargaining power to enter into a treaty, the responsibility of a powerful state may be avoided by reference to this provision.

2. Meaning and conditions for state responsibility: It is a general principle of international law that breach of an obligation by a state creates responsibility of the state concerned and law of state responsibility is concerned with the incidence and consequences of unlawful acts and specifically the forms of reparation for loss caused.[1] Because of historical development of international law and because state is its primary subject, obligations rest and burden of compliance falls on state principally.[2]

2.1 Unlawful act or omission: Generally state responsibility is consisted of an act or omission which is considered to be unlawful and attributability of such act to a state. It is said that 'there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law; and constitutes a breach of an international obligation of the state.'[3] So, responsibility of a state arises if there is any international obligation on the part of a state and violation of such obligation has casual link with the state not otherwise. Again international responsibility of a state is not dependent on whether or not the wrongful act has caused injury which may be relevant for obligation of a state to make reparation. If a state employs its military forces to use unlawful force on a neighboring state it will be responsible as it happened between Iraq and Kuwait. Similarly a state will be liable for not preventing any autonomous forces to use its territory for causing injury to another state. A state will not be responsible for breach of an obligation made subsequent to the act or omission constituting the breach.[4] To be clear if a particular act or omission of a state was not wrongful at the time of commission but so made afterwards it will give rise to international responsibility of that state. Whether or not an act or omission gives rise to responsibility of a state will be judged by relevant international law and responsibility cannot be avoided by pleading the validity of such act or omission under domestic law. Obligations of the responsible state may be owed to one state, two or more states or to the whole international community depending on the nature and content of the obligation and the circumstances in which the obligation is breached.[5] There is also clear indication in the ILC draft Articles on state responsibility that serious breaches of international law i.e., peremptory norms of international law, may trigger the community response.[6] However, dispute as to objective or risk theory[7] and subjective or fault theory[8] as to the commission of an unlawful act or omission giving rise to responsibility is not addressed by ILC. There are some cases[9] which support objective or risk theory and also cases[10] which support subjective or fault theory.

2.2 Attributability of the unlawful act or omission to a state: An international wrongful act or omission to be attributable to a state must be committed by, under the direction, under the authority or control of the state. Unlawful acts, with no connection of state authority or control, of private individuals will not attract the responsibility of the state. As to the attributability of an unlawful act to a state, Articles 4 to 11 of ILC draft Articles in this regard provide the substantive applicable rules. Articles 4 and 8 are proved to be the reflection of existing customary law, in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia & Montenegro* ICJ 2007).[11] In this case:

> The court was faced with the questions of whether the conduct of members of the Bosnian Serb troops under the command of General Mladic forming the army of the Republika Srpska (the VRS), as well as the actions of various paramilitary Serb groups, in relation to the massacre at Srebrenica and other atrocities committed within the territory of Bosnia and Herzegovina were attributable to the federal republic of Yugoslavia (later Serbia and Montenegro).[12]

In the light of ILC Article 5 conduct of the organs of state, executive, judicial or legislative, in whichever forms these conducts are carried out, will be considered to be the considered to be the conduct of state in so far as these organs are employing powers of governmental authority. Even if the organs of the state do anything in violation or in excess of their lawful authority, still the state will be held responsible for such *ultra vires* acts of its organs. It is said that:

[1] J Crawford (ed), *Brownlie's Principles of Public International Law* (8th Edn, Oxford University Press 2012) 540.
[2] M D Evans (ed), *International Law* (4th Edn, Oxford University Press) 444.
[3] ARSIWA (n 1) Article 2.
[4] ARSIWA (n 1) Article 13.
[5] ARSIWA (n 1) Article 33.
[6] ARSIWA (n 1) Article 40.
[7] This theory supposes that breach of an obligation need not be associated with any fault i.e., intent, negligence, recklessness, on the part of the state to give birth to responsibility.
[8] This theory supposes that breach of an obligation *per se* will not create responsibility unless it is associated with some fault on the part of the state.
[9] *Caire Claim Case,* France V. Mexico [1929] 5 RIAA 516.
[10] Asian Agricultural Products Ltd. V. Sri Lanka [1990] ICSID ARB/ 87/3.
[11] Martin Dixon (n 5) 258.
[12] Martin Dixon, McCorquodale and Williams, *Cases & Materials on International Law* (5th Edn, Oxford University Press 2011) 398.

> The conduct of an organ of a state or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the state under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[1]

So, if a policeman causes injury to a foreign national in excessive exercise of its lawful power, the state of nationality of such policeman will be held liable for such *ultra vires* acts.[2] This rule was applied in a case where Mexican soldiers were directed to protect some US nationals but the soldiers conducted violence against them.[3] Again in *Caire Claim* case[4] it was held that the states liable for all internationally delictual acts committed by its officials, regardless of whether such acted within their limits or exceeded those limits.[5] However, it must be noted that state is not the ultimate determiner of what or which are and are not state organs. In some exceptional cases a particular group may be equated to state organ for the purpose of state responsibility when such group is completely dependent on sate, even if such group is lacking any official status of state organ.[6] But situation becomes complex when government assumes functions of an economic and social character and may not act through its agents rater by delegating governmental functions to some para-state entities.[7] Again the task of attributing the acts of some entities or groups, not having official status as state organ, to the state becomes difficult to prove because of the scarcity of proof as the dependency of such entities or groups on state. The touchstone for attribution in this context is that the person or entity is in fact exercising governmental authority either with or without having such official status.[8]

Although the activities of the individuals will not be, generally, attributable to the state but, in some circumstances, specially, where individuals are working on behalf of a sate, it may be so attributable. For example if the wrongful activities of individuals are not repudiated or the state does not take effective role to prevent or control the wrongful acts of the individuals, it may incur state responsibility for such individual act. The rule was applied in a case where revolutionary guards unlawfully expelled the plaintiff from Iran.[9] It is also maintained by some writer that during or immediately after the revolution, war or foreign occupation, conduct of private persons are attributable to the state on fulfillment of three conditions: exercising governmental authority even if in own initiative; these acts are done in the absence or default of, due to total or partial collapse of state institutions, the official authorities; and the circumstances are such that requires the governmental authority to be carried out by even private individuals.[10]

In the cases of localized riots or mob violence where there is, on the part of responsible state organs, substantial neglect to take reasonable precautionary and preventive measure, amounting to clean indifference or connivance on such acts, may make the state responsible for damages.[11] Though it is difficult to find any modern example of holding a state liable for showing negligence in preventing insurgents, however, Article 10 of ARSIWA provides guideline in respect of attributability of insurrectional or other similar conducts to a state. It is said that:

> The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration, shall be considered an act of the new State under international law.[12]

According Article 10(2) of ARSIWA, if an insurrectional or other movement succeeds in establishing a new state within a pre-existing state, it will be considered to be a new state. Question relating to how such newly created state will be held responsible for its acts of insurgency before becoming a state. This question becomes more difficult to answer when the newly created state, while trying to form a state, has committed breach of an international treaty obligation to which the old state is a party. These questions of state responsibility are not specifically addressed by ARSIWA. Article 11 of ARSIWA contemplates the situation where responsibility of any particular internationally wrongful act is acknowledged by a state and says that in an act cannot be attributed to a state under Articles 4 to 10; nevertheless it can be so attributed if the concerned state acknowledges the responsibility. Question may arise as to what happens if a state aids, supports or coerce commission of an internationally wrongful act within the territory of another state by the later state or insurgents groups working within the later state. These questions are answered in Articles 16 to 18 of ARSIWA. These Articles stipulates that aiding, assisting, directing, coercing or exercising control by one state over the commission of an internationally wrongful act by another state will made the first state liable when such acts of aiding, assisting etc. are committed with the knowledge of the circumstances of wrongfulness and if the act, to which such aid or assistance etc. are given, would be wrongful if committed by the first state. Though it apparently seems that Articles 16 to 18 provides guidelines for responsibility of abettor[13] states, however,

[1] ARSIWA (n 1) Article 7.
[2] Martin Dixon (n 5) 258.
[3] US v Mexico [1926] 4 RIAA 110.
[4] *Caire Claim Case* (n 15).
[5] J Crawford (n 7) 549, 550.
[6] Bosnia and Herzegovina v Serbia and Montenegro [2007] ICJ.
[7] J Crawford (n 7) 544.
[8] M D Evans (n 8) 455.
[9] Yeager v Iran [1987] 17 Iran-US CTR 92.
[10] Anthony Aust (n 3) 381.
[11] J Crawford (n 7) 551.
[12] ARSIWA (n 1) Articles 10(1) and 10(2).
[13] Here 'abettor' is used to mean a state which make another state commit internationally wrongful acts by giving aid,

nothing is mentioned as to giving abetment to any entity other than a state and causing internationally wrongful acts happen. Moreover, where commission of an internationally wrongful act by a state creates its responsibility irrespective of any knowledge of wrongfulness but, aiding or assisting to wrongful act by one state to another state makes the first state liable only when there is such knowledge on the part of the earlier state.[1] Creation of such different standard of wrongfulness of an act for principal and abettor state will definitely encourage a state to abet another state in the commission of an internationally wrongful act and subsequently to plea absence of required knowledge. The situation is the worst when, court declares, aiding, assisting or encouraging by state A over the commission of internationally wrongful act by state B is not sufficient to attract responsibility of state A. In the Nicaragua Case,[2] ICJ said mere encouragement, support, supply, training, assisting with planning, financing or organizing the armed group by a state is not enough to establish its responsibility for the acts of armed group rather a degree of direct and effective control is necessary.[3]

2.3 Particular example of state responsibility: Ill-treatment of foreign national by a state, occurring in various forms, may be a common example which gives rise to international responsibility of a state. Such ill-treatment may result from the abuse of foreign nationals in jail custody,[4] misappropriation of property owned by foreign nationals[5] or negligence in punishing persons responsible for attacking foreign nationals.[6] Important question as to the yardstick of measuring the standard of a state's conduct, amounting to internationally wrongful act, to its foreign nationals is still unanswered. Although Montevideo convention[7] has adopted the national standard principle, however, many developed states claim for a minimum international standard. Again, the national standard principle carries with it the risk of abuse, specially, by states where the concept of human rights is yet to be developed. Although, generally it is enough to establish state responsibility that the person injured by one state is a national of another state, however, in the *Nottebohm Case*[8] it was held that existence of a 'genuine link' between the state and the injured national is a prerequisite for making a claim in international law. The requirement of genuine link before exercising the right of diplomatic protection is an absurd argument and such test could mean that an individual or vessel having no actual link with a state which has granted nationality to such individual is without any protection.[9] This question is rather intensified when a company, having its nationality of the country where it has its registered office but has most of the shareholders of different other countries, is maltreated by the state of nationality or by another state. Sometimes the condition of exhaustion of local remedies in getting diplomatic protection for injury to foreign nationals creates complexity as to whether or not the exhaustion of local remedies is a precondition for the existence of state responsibility.

3. Defences or the circumstances precluding the state responsibility: Like national laws, there are provisions of defences for internationally wrongful acts, successful establishment of which is considered to be a good excuse in avoiding international responsibility. Articles 20 to 27 of ARSIWA provide the circumstances when an international wrongful act will be justified. However, no provision of ARSWIA will justify an obligation arising from the breach of a peremptory norms of international law i.e., *jus cogens*.[10] Although a valid consent by a state to an otherwise wrongful act is good defence for state responsibility, however, it should be examined carefully and applied strictly so that it cannot be used for improper purposes. Consent will be defence for against the state consented and therefore it cannot be invoked against some other state as well; if the obligation breached is owed in parallel to more than one state, consent cannot be pleaded with regard to state or states not consented.[11] Lawful measure of self-defence in conformity with the Charter of the United Nations is also recognized as a justification for an international obligation.[12] Article 23 of ARSIWA recognizes *force majeure*[13] as a defence and stipulates that commission of a wrongful act due to *force majeure*, not arising from the conduct of the invoking state, is precluded from responsibility. But states attempt to misinterpret it and thereby avoid its obligation. In *Rainbow Warrior Arbitration* France claimed that the health of its nationals gave rise to the defences of *force majeure* and distress to a claim of state responsibility based on a treaty even though such defences were not considered, in the law of treaties, as reasons for non-performance of the treaty obligation.[14] Distress and necessity are also made as circumstances precluding the responsibility of a state under Articles 24 and 25 of ARSIWA respectively. The possibility of abusing these defences is obvious, in particular for invocation of necessity, and both circumstances are narrowly defined by ILC. State contribution to the situation invoked as a ground of necessity will not preclude the responsibility.[15]

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assistance etc.
[1] ARSIWA (n 1) Article 16.
[2] Nicaragua v United Sates of America [1986] 14 ICJ.
[3] Martin Dixon (n 5) 262.
[4] Paraguay v USA [1998] 22 ICJ.
[5] Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic [1979] YCA 177.
[6] United States v Mexico [1927] 4 RIAA 155.
[7] Montevideo Convention on Rights and Duties of States 1933, Article 9.
[8] Liechtenstein v Guatemala [1955] ICJ 4.
[9] Martin Dixon (n 5) 269.
[10] ARSIWA (n 1) Article 26.
[11] M D Evans (n 8) 465.
[12] ARSIWA (n 1) Article 21.
[13] Occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform an obligation.
[14] M Dixon (n 18) 413.
[15] M D Evans (n 8) 466.

4. Content of international responsibility: Existence of an obligation, international or national, is meaningless unless breach of it is followed by some concrete responsibilities. Articles 28 to 34 of ARSIWA set out the consequences arising from the international responsibilities. These responsibilities include cessation and non repetition, reparation in the forms of restitution, compensation and satisfaction. Cessation refers to the fundamental obligation of a state to comply with the international obligation even when it has been breached.[1] It is said that:

> The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached. The State responsible for the internationally wrongful act is under an obligation to cease that act, it is continuing; to offer appropriate assurances and guarantees of non-repetition, if the circumstances so require.[2]

Cessation and resumption of compliance with international obligation has, because of the continuing character of the wrongful act, become the primary demand of an injured state.[3] Article 31, although, speaks for making full reparation for injury, meaning material or moral damage, caused by internationally wrongful act but, it is not possible to determine the moral damage of the injured state. Although, restitution as a form of reparation sounds good in as much as the responsible state is under an obligation to restore the situation that existed prior to the wrongful act, however, due to state's reliance on material impossibility and tendency to ignore the remoteness of damage, it does not always work up to expectation. The failure of reparation by way of restitution paves the way for compensation. But, compensation is possible only for any financially assessable damage including loss of profits.[4] ICJ did not consider financial compensation, for breach of the obligation to prevent genocide, as an appropriate mode of compensation.[5] There being no fixed method of calculating the amount of compensation, states endeavour to reach a consensus on the point and sometimes expropriation of assets intensifies the problem.[6] Sometimes countermeasure is also justified as a consequence of breach of an international obligation by a state. The term 'countermeasure' is used to denote, since its first use by the arbitral tribunal[7], as a non-forcible measures. Countermeasure may also be defined as the temporary non-performance of an international obligation by an injured state towards a responsible state, with a view to compelling or inducing the responsible state cease to its wrongful act and make full reparation.[8] Countermeasure is essentially temporary in nature and there is risk of it being used to punish the responsible state thereby becoming a new breach of international law.[9] Satisfaction as a form of reparation includes formal acknowledgement of beach, showing regret or even formal apology. ICJ recognized formal apology as a mode of satisfaction in *I'm Alone case.*[10] The only obligation put on the states by ILC in case of breach of peremptory norms of international law is taking initiative to make an end to such breach and punitive provisions for the responsible state or states.

5. Responding to the breaches of international responsibility: Responding to the breaches of international obligation, in the ways of settlement of disputes, has various forms. These include diplomatic initiatives, submission of disputes to some quasi-judicial and judicial bodies in the form of negotiation, mediation, conciliation, arbitration. Apart from these, there are some permanent international judicial bodies. Security Council of the United Nations also, at times, play para-judicial role in the settlement of international disputes, mostly connected with international peace and security. Responsibility arising from a particular type of transaction also provides for particular forum for settlement of disputes for example WTO, ITLOS etc.

5.1 Negotiation: There is no set procedure for negotiation and it is up to the concerned parties to settle the terms of it. However, negotiation is the means by which large majority of international disputes are settled.[11] The problem with the negotiation process is whether its outcome will be binding or not is dependent on the parties. But sometimes states may use the threat of legal proceedings for make the outcome binding. Some writer suggests that once the parties enter into the negotiation process voluntarily, it should be binding to proceed on good faith.[12] If negotiation through established machinery proves unproductive, an attempt to break the deadlock can be made by summit discussions between the heads of state or foreign ministers.[13] The Negotiation process, as diplomatic initiative, is of no use in cases of serious disputes leading to severance of diplomatic relation.[14]

5.2 Mediation: Intervention of an independent and neutral state, organization or person between the disputing parties for resolving the dispute is termed as mediation. This is likely to happen where, due to intense level of animosity or other reason,

[1] J Crawford (n 7) 567.
[2] ARSIWA (n 1) Articles 29 and 30.
[3] Anthony Aust (n 3) 385.
[4] J Crawford (n 7) 571.
[5] Bosnia and Herzegovina v Serbia and Montenegro [2007] ICJ.
[6] ILC commentary on Article 36 of ARSIWA, para 7 to 34.
[7] Air Services Agreement case (1978), 54 ILR 303.
[8] Responsibility of States for Internationally Wrongful Acts 2001; Draft Article 49.
[9] M D Evans (n 8) 545, 546.
[10] Canada v United States [1935] 3 RIAA 1609.
[11] Jhon Collier and Vaughan Lowe, *The Settlement of Disputes in International Law Institutions and procedures* (1st Edn, Oxford University Press 1999) 20.
[12] Martin Dixon (n 5) 288.
[13] J.G. Merrills, *International Dispute Settlement* (5th Edn, Cambridge University Press 2011) 9.
[14] Ibid, 21.

there is no scope to settle the dispute by the disputing parties themselves. However, mediation is likely to be unsuccessful if the concerned parties do not make necessary concessions.

5.3 Conciliation: Conciliation has been defined as:

> A method for the settlement of international disputes of any nature according to which a Commission set up by the parties, either on a permanent or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.[1]

So, the process of conciliation combines the process of mediation and inquiry and similarly confronted with the same problems as they are with mediation and inquiry.

5.4 Arbitration: Unlike the diplomatic processes of dispute settlement, arbitration is a legal means of settlement of dispute, over matters to which jurisdiction is given, by persons selected by the parties to the dispute themselves. The treaties, multi-lateral or bilateral, may provide clause of arbitration and method how it will work to settle future dispute. The advantage of this process of dispute resolution lies in that it is comparatively cheaper than judicial settlement and the parties have full choice as to the arbitrators, language and confidentiality of the process.[2] Arbitration has significant limitation when 'states are reluctant to make general commitments to judicial settlement and for much the same reasons often resist the idea of arbitration.'[3] From the view point of enforcement arbitral award, though considered to be binding, is difficult to enforce, in some cases, against the losing party.[4] It cannot also be disregarded that difficulty arises as to the selection of neutral arbitrator and as such frustrating, in some cases, the result of the process. Since an arbitral award is binding but not necessarily final and is capable of being revised, rectified, appealed, interpreted and even nullified by further proceedings, it, sometime, creates more problems than it solves.

5.5 The international Court of Justice: The international court of justice[5] is a principal judicial organ of United Nations. Becoming a party to the ICJ Statute, a state accepts jurisdiction of ICJ over certain matters only not over the matters to which a state is a party unless the state has specifically given jurisdiction in respect of that disputed matter.[6] Inherent limitation of ICJ is that in contentious cases it has jurisdiction over states only not to any other subjects of international law.[7] But certain international organizations may request advisory opinion of ICJ but cannot be party in contentious cases.[8] Consent being the basic condition, unless the parties voluntarily confer jurisdiction, ICJ cannot exercise jurisdiction. Article 36(1) of its Statute says that 'the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.' However, the court will not decline jurisdiction for merely affecting the interest of a third state so far as such interest is not too central to lead the actual matter impossible to be settled between the parties only.[9] To preserve the respective rights of either party, the Court has jurisdiction to indicate any interim or provisional measure or protection.[10] Although the Court is not required to be satisfied about the merits of dispute for indicating any provisional measure but it must be satisfied as to the prospect of the jurisdiction, though not clear to what extent such satisfaction should exist. As regards reservation, automatic or self judging reservation[11] as to Court's jurisdiction becomes a hindrance in the way settlement of a dispute.[12] ICJ also faces the problem of absence of defendant. In *Nicaragua Case*,[13] USA continuously objected jurisdiction and, failing to avoid compulsory jurisdiction, refused to appoint counsel to appear before the Court and argue merits.[14] The decision of the Court in the *South West Africa Case*[15] had a devastating effect of reputation with the developing countries and fewer stated seemed inclined to bring their disputes before it and the court has no cases for a brief period.[16]

Again whatever may be the nature of the dispute if it is considered to be a threat for international peace and security, the Security Council of United Nations will have power, may properly not be judicial in nature, to take initiative for settlement of the disputes. The Security Council may also recommend to disputant parties to adopt any particular method of dispute solution and on failure to refer the dispute to the Council itself. It is also maintained that most of the current mechanisms that

[1] J.G. Merrills (n 54) 58.
[2] Anthony Aust (n 3) 408.
[3] M D Evans (n 8) 573.
[4] Ibid.
[5] It was created by the Statue of International Court of Justice in 1945.
[6] John Collier (n 52) 126.
[7] Statute of International Court of Justice, Article 34.
[8] Ibid, Article 65.
[9] Cameroon v Nigeria [2002] ICJ 303.
[10] Statute of International Court of Justice, Article 41.
[11] Automatic or self judging reservation refers to that a state will determine whether or not a particular dispute is within its domestic court's jurisdiction.
[12] France v Norway [1957] ICJ Rep 9.
[13] Nicaragua v United States of America [1986] 14 ICJ.
[14] Martin Dixon (n 5) 314.
[15] Ethiopia v South Africa and later Liberia v South Arica [1961] ICJ.
[16] M D Evans (n 8) 613, 614.

exist in the UN system are exclusively concerned with personnel matters rather than complaints arising from outside organization.[1]

6. Conclusion: Although it is recognized that the world where we live in at the twenty first century, there is no place of the principle of might is right, however, influence of power in creation of right, responsibility for breach of right and facing the consequence of the breach of such right cannot be ignored altogether. Since all persons natural or artificial in national or international plane do not possess the same power, it is not unlikely that powerful states, though not always, take the advantages of their power in creating and facing the breach of an international obligation. Although International obligations of a state are mostly created by treaty based on the consent of the concerned state, however, frequently the state parties themselves do not wish, for variety of reasons, to provide for creating a binding settlement process of future disputes or provide no or little monitoring or verification of performance.[2] Responsibility of a state which is giving aid or assistance to another state or an armed group within the later state and making the later state or group commit internationally wrongful act is still ambiguous. The degree of ambiguity increased when there is difference of statement stated in ARSIWA Article 16 and the judgment of the *Nicaragua Case* (discussed in note 32 of page 6 of this easy). Provisions should be made creating responsibility, albeit with a varying degree, of every international entity for an internationally wrongful act for committing, aiding, assisting, encouraging, supporting or not preventing having the capacity to prevent, irrespective of the place of occurrence of such wrongful act. All states should come forward, with honest intention of *bonafide* performance of its responsibility, to create dispute settlement process, in whatever form, neutral and independent of any kind of pressure. Steps should be taken to develop and maintain the impartiality of ICJ. Making the states, specially the powerful ones, liable for clear violation of an internationally wrongful act will increase the confidence of world community in neutrality of permanent international judicial bodies.

[1] Duncan French, Matthew Saul and Nigel D White (eds), *International Law and Dispute Settlement New Problems and Techniques* (1st edn, Hart Publishing 2010) 58.
[2] Andrew T. Guzman, 'The Design of International Agreements' (2005) 16 EJIL 579, 587; Para 3.