Chapter I

INVOCATION OF THE RESPONSIBILITY OF A STATE

Commentary

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, *i.e.* with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[1915] [664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles , which was the subject of the decision

[1915] [664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

in the *S.S. "Wimbledon"* case.[1916] 665 It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, *i.e.* to apply as a *lex specialis*.

[1916] 665 Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (footnote [28] 34 above).

Article 42. Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[1917] [666] or even the taking of countermeasures. In order to take such steps, *i.e.* to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, *e.g.* a right of action specifically conferred by a treaty,[1918] [667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

[1917] [666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[1918] [667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, *e.g.* under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[1919] [668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "interdependent" obligation.[1920] [669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to subparagraph (*a*) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily

---

[1919] [668] Cf. the 1969 Vienna Convention, art. 73.

[1920] [669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, *e.g.* of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[1921] [670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[1922] [671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to "'bundles' of bilateral relations".[1923] [672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over

---

[1921] [670] Cf. the 1969 Vienna Convention, art. 36.

[1922] [671] See, *e.g.*, Article 59 of the Statute of ICJ.

[1923] [672] See, *e.g.*, K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL*, 1988*, vol. 59, p. 151, at pp. 154–155.

the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[1924] 673

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) Subparagraph (*b*) deals with injury arising from violations of collective obligations, *i.e.* obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (*b*) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a

[1924] 673 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 41–43, paras. 89 and 92.

State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (*b*) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[1925] [674] a nuclear free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel, in considering the European Communities argument according to which the United States had "no legal right or interest" in the case (given that its banana production was minimal and its banana exports were nil, and therefore it

[1925] [674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

had not suffered any nullification or impairment of WTO benefits in respect of trade in bananas as required by article 3.3. and 3.7 of the WTO Dispute Settlement Understanding), considered that a WTO member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO agreement were each sufficient to establish a right to pursue a WTO dispute settlement proceeding. The panel was of the view that this result was consistent with decisions of international tribunals: in a footnote,[1926] [210] it referred to relevant findings by the Permanent Court of International Justice and the International Court of Justice, as well as to paragraph 2 (*e*) and (*f*) of draft article 40 adopted by the International Law Commission on first reading.[1927] [211]

[A/62/62, para. 118]

[1926] [210] WTO, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/MEX, WT/DS27/R/USA, WT/DS27/R/GTM and WT/DS27/R/HND, 22 May 1997, para. 7.50, footnote 361.

[1927] [211] Draft article 40, paragraph 2 (*e*) and (*f*) adopted on first reading were amended and incorporated respectively in article 42(*b*) and article 48, paragraph 1 (*a*), finally adopted in 2001. The complete text of draft article 40 adopted on first reading is reproduced in footnote [2017] 221 below.

Article 43. Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of PartTwo.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[1928] [675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, *etc.* Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[1929][676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

[1928] [675] See article 48, paragraph (3), and commentary.

[1929] [676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 253, para. 31.

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [1930] 677

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [1931] 678

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, paragraph 2 (*a*) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Paragraph 2 (*b*) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[1932] 679 or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[1933] 680 Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States

---

[1930] 677 *Ibid*., p. 254, para. 35.

[1931] 678 *Ibid*., pp. 254–255, para. 36.

[1932] 679 As PCIJ noted in the *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[1933] 680 In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures*, Order of 29 July 1991, *I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* referred to the commentary to article 43 in support of the view that "the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution".[1934] [230]

[A/71/80, para. 154]

International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles. The International Court of Justice further observed that "[t]he Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified".[1935] [241]

[A/74/83, p. 41]

[1934] [230] See footnote [320] 46 above, footnote 264.

[1935] [241] ICJ, Judgment, 5 October 2016, para. 42.

Article 44. Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[1936] [681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (*a*) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[1937] [682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[1938] [683]

[1936] [681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[1937] [682] *Mavrommatis* (footnote [800] 236 above), p. 12.

[1938] [683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1. [Editor's Note: the Commission subsequently adopted the draft articles on diplomatic protection, in 2006; see *Yearbook … 2006*, vol. II (Part Two), para. 49.]

(3) Subparagraph (*b*) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[1939] [684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[1940] [685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[1941] [686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[1942] [687]

[1939] [684] *ELSI* (footnote [144] 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959,* p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, *e.g.*, C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote [1085] 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, *e.g.*, A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[1940] [685] *ELSI* (footnote [144] 85 above), p. 46, para. 59.

[1941] [686] *Ibid*., p. 48, para. 63.

[1942] [687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514. (See footnote [1938] 683 above.)

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France

In its 1978 award, the arbitral tribunal established to hear the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, to decide on France's allegation according to which the United States was required, before resorting to arbitration, to wait until the United States company (Pan American World Airways) that considered itself injured had exhausted the local remedies available under French law, referred to the principles appearing in draft article 22, as provisionally adopted by the International Law Commission.[1943] [212] It considered that it was "significant" that the said provision:

> establishes the requirement of exhaustion of local remedies only in relation to an obligation of "result", which obligation "allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State", and which is an obligation "concerning the treatment of aliens". Leaving aside the choice made in this draft article between the qualification of the rule of exhaustion of local remedies as one of "procedure" or one of "substance"—a matter which the Tribunal considers irrelevant for the present case—it is clear that the juridical character of the *rules* of international law to be applied in the present case is fundamentally different from that of the rules referred to in the draft article just cited. Indeed, under article I of the Air Service Agreement, "[t]he Contracting Parties grant *to each other* the rights specified in the Annex hereto … " (emphasis added), and sections I and II of the annex both mention "the right to conduct air transport services by one or more air carriers of French [United States] nationality designated by the latter country … " as a right granted by one *Government* to the other *Government*. Furthermore, it is obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of the Parties being the admission of such conduct rather than an obligation requiring a "result" to be achieved, let alone one allowing an "equivalent result" to be achieved by conduct subsequent to the refusal of such admission. For the purposes of the issue under discussion, there is a substantial difference between, on the one hand, an obligation of a State to grant to aliens admitted to its territory a treatment corresponding to certain standards, and, on the other hand, an obligation of a State to admit the conduct of air transport services to, from and over its territory. In the latter case, owing to the very nature of international air transport services, there is no substitute for actually permitting the operation of such service, which could normally be regarded as providing an "equivalent result".[1944] [213]

[1943] [212] This provision was amended and incorporated in article 44(*b*) finally adopted by the ILC in 2001. The text of draft article 22 provisionally adopted was as follows:

> Article 22
> Exhaustion of local remedies
>
> When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1944] [213] Award, 9 December 1978, para. 31, reproduced in UNRIAA, vol. XVIII [(Sales No. E/F.80.V.7), pp. 431–432.

On this basis, the arbitral tribunal thus found that its decision should not be postponed until such time as the company had exhausted local remedies.

[A/62/62, para. 119]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal invoked draft article 22, as adopted by the International Law Commission on first reading,[1945] [214] in the context of determining whether the rule that local remedies must be exhausted was applicable in the said case:

> As stated in article 22 of the draft articles on State responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens … ". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.[1946] [215]

[A/62/62, para. 120]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in support of its finding that

> where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding … because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations … that are in dispute,

referred to draft article 22 adopted by the International Law Commission on first reading and the commentary thereto.[1947] [216]

[A/62/62, para. 121]

[1945] [214] The text of that draft article was identical to that of draft article 22 provisionally adopted by the International Law Commission. (See footnote [1943] 212 above.)

[1946] [215] See footnote [1096] 159 above, para. 98.

[1947] [216] ICSID, *Maffezini* v. *Kingdom of Spain*, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 29 and footnote 5, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 12.

International arbitral tribunal (under the ICSID Additional Facility Rules)

The Loewen Group, Inc. and Raymond L. Loewen v. *United States*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 NAFTA to hear *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States* case, in examining the argument of the respondent that "State responsibility only arises when there is final action by the State's judicial system as a whole", referred to article 44 finally adopted by the International Law Commission in 2001:

> The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission draft articles on State responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law … Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula Spa (ELSI) United States* v. *Italy* (1989) ICJ 15 at para. 50.[1948] [217]

[A/62/62, para. 122]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sàrl, and others v. *Uruguay*

The arbitral tribunal in *Philip Morris Brands Sàrl, and others* v. *Uruguay* noted that "[t]he reference [by the claimants] to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1949] [231]

[A/71/80, para. 155]

Permanent Court of Arbitration (under UNCITRAL Rules)

ST-AD GmbH v. *Republic of Bulgaria*

In *ST-AD GmbH* v. *Republic of Bulgaria*, the arbitral tribunal relied on, *inter alia*, article 44, subparagraph (*b*), in support of the view that "the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ".[1950] [232] Specifically, the tribunal noted that the article "refers to the exhaustion of any 'available and effective local remedy'".[1951] [233]

[A/71/80, para. 156]

[1948] [217] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 149, footnote 12, reproduced in *ILM*, vol. 42, 2003, p. 835 (citing *ELSI*, see footnote [144] 85 above.).

[1949] [231] ICSID, Case No. ARB/10/7 (formerly *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013, para. 135.

[1950] [232] PCA, Case No. 2011–06, Award on Jurisdiction, 18 July 2013, para. 365.

[1951] [233] *Ibid*., footnote 395.

[International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* between *Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice cited the commentary to article 44 of the State responsibility articles to "reject the [respondent's] view that notice or prior negotiations are required" in accordance with article 43 of the State responsibility articles …[1952] 241

[A/74/83, p. 41]]

International arbitral tribunal (under the ICSID Convention)

Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. *Oriental Republic of Uruguay*

The arbitral tribunal in *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay* noted that "[t]he reference [by the claimants] to article 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[1953] 243

[A/74/83, p. 41]

Permanent Court of Arbitration (under UNCITRAL Rules)

Bank Melli Iran and Bank Saderat Iran v. *Kingdom of Bahrain*

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain* cited article 44, subparagraph (*b*), and the commentary thereto, and indicted that the exhaustion of local remedies was not a requirement to bring arbitral claims. The tribunal noted the explanation in the commentary that the provision is

> not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the condition for the admissibility of cases brought before such courts or tribunals. Rather, [it] define[s] the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States.[1954] 227

[A/77/74, p. 37]

[1952] [241 ICJ, Judgment, 5 October 2016, para. 42.]

[1953] 243 ICSID, Case No. ARB/10/7, Award, 8 July 2016, para. 135.

[1954] 227 See footnote [1407] 157 above, paras. 516–518 and 526.

Article 45. Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (*a*) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[1955] [688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[1956] [689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independ-

---

[1955] [688] *Russian Indemnity* (footnote [1014] 354 above), p. 446.

[1956] [689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

ence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[1957] 690

In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[1958] 691

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (*b*) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in *Certain Phosphate Lands in Nauru*, in the following passage:

The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[1959] 692

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[1960] 693

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, *e.g.* as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[1961] 694 In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not

---

[1957] 690 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 247, para. 13.

[1958] 691 *Ibid*., p. 250, para. 20.

[1959] 692 *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[1960] 693 *LaGrand*, *Provisional Measures* (footnote [150] 91 above) and *LaGrand, Judgment* (footnote [236] 119 above), at pp. 486–487, paras. 53–57.

[1961] 694 See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini*, *ibid*., vol. X (Sales No. 60.V.4), p. 551 (1903).

establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[1962] 695

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years, has been laid down.[1963] 696 The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[1964] 697 Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[1965] 698 None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[1966] 699 It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (*e.g.* before an international tribunal) will not usually be regarded as rendering it inadmissible.[1967] 700 Thus, in *Certain Phosphate Lands in Nauru*, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[1968] 701 In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[1969] 702

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any preju-

---

[1962] 695 See, *e.g.*, *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote [1961] 694 above), pp. 386–387.

[1963] 696 In some cases time limits are laid down for specific categories of claims arising under specific treaties (*e.g.* the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (*e.g.* in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[1964] 697 Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[1965] 698 C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (footnote [1085] 409 above), vol. 3, p. 1105, at p. 1107.

[1966] 699 A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes [777] 230 and [779] 232 above), see, *e.g. Gentini* (footnote [1961] 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23 , p. 306, at pp. 314–317 (1956).

[1967] 700 For statements of the distinction between notice of claim and commencement of proceedings, see, *e.g.* R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[1968] 701 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 250, para. 20.

[1969] 702 *Tagliaferro* (footnote [1962] 695 above), p. 593.

dice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[1970] 703

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. *Uganda)*

In its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the Court invoked its own previous case law and the commentary of the International Law Commission to article 45, as finally adopted in 2001, in relation to the argument, made by the Democratic Republic of the Congo, that Uganda had waived whatever claims it might have had against the Democratic Republic of the Congo as a result of actions or inaction of the Mobutu regime:

> The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247–250, paras. 12–21). Similarly, the International Law Commission, in its commentary on article 45 of the draft articles on responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" ([*Yearbook of the International Law Commission, 2001,* vol. II (Part Two)], para. 77). In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu regime.[1971] 218

[A/62/62, para. 123]

World Trade Organization Appellate Body

Peru—Additional Duty on Imports of Certain Agricultural Products

The Appellate Body in *Peru—Additional Duty on Imports of Certain Agricultural Products* indicated that "there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention".[1972] 234

[A/71/80, para. 157]

[1970] 703 See article 39 and commentary.

[1971] 218 ICJ, Judgment, 19 December 2005, para. 293.

[1972] 234 See also footnote [977] 126, para. 5.105 (as restated in paras. 5.118 and 6.4).

International Tribunal for the Law of the Sea

M/V "Norstar" (Panama/Italy)

In *M/V "Norstar" (Panama/Italy)*, the International Tribunal for the Law of the Sea relied on the commentary to article 45 of the State responsibility articles to find "that Panama has not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible"[1973] [244] and to "rejec[t] the objection raised by Italy based on extinctive prescription".[1974] [245]

[A/74/83, p. 41]

International arbitral tribunal (under the ICSID Convention)

Salini Impregilo S.p.A. v. *Argentine Republic*

The arbitral tribunal deciding on jurisdiction and admissibility of the claim in *Salini Impregilo S.p.A.* v. *Argentine Republic* noted with regard to "extinctive prescription as a matter of international law" that:

> this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The ILC rejected the idea that lapse of time alone might entail the loss of a claim. Rather, Article 45(*b*) specifies that the 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.[1975] [246]

Having regard to all circumstances, the arbitral tribunal concluded that "the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription".[1976] [247]

[A/74/83, p. 41]

[1973] [244] ITLOS, Preliminary Objections, Judgment of 4 November 2016, paras. 310 and 313.

[1974] [245] *Ibid.*, para. 314.

[1975] [246] ICSID, Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, para. 85.

[1976] [247] *Ibid.*, para. 91.

Article 46. Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[1977] [704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[1978] [705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[1979] [706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than

---

[1977] [704] *S.S. "Wimbledon"* (footnote [28] 34 above), p. 20.

[1978] [705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959,* p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (footnote [1033] 363 above), p. 106.

[1979] [706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote [738] 196 above), pp. 256 and 460, respectively.

one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[1980] [707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[1981] [708]

[1980] [707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (footnote [1058] 382 above), p. 1432.

[1981] [708] *Reparation for Injuries* (footnote [32] 38 above), p. 186.

Article 47. Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, *e.g.* a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[1982] [709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[1983] [710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[1984] [711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[1985] [712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in

---

[1982] [709] See article 17 and commentary.

[1983] [710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote [1258] 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[1984] [711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[1985] [712] See footnote [777] 230 above.

Monetary Gold,[1986] [713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia. [1987] [714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[1988] [715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[1989] [716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects . Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[1990] [717]

[1986] [713] See footnote [917] 286 above. See also paragraph (11) of the commentary to article 16.

[1987] [714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), pp. 258–259, para. 48.

[1988] [715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote [779] 232 above) and the settlement agreement (*ibid*.).

[1989] [716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, *e.g.*, annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, *e.g.*, A. Rosas, "Mixed Union—mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[1990] [717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[1991] [718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[1992] [719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (*a*) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[1993] [720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States,

---

[1991] [718] See paragraph 4 of the introductory commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[1992] [719] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 22–23.

[1993] [720] Such a principle was affirmed, for example, by Permanent Court of International Justice in the *Case concerning the Factory at Chorzów, Merits* case (footnote [28] 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also *ibid*., pages 45 and 49.

but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (*b*), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 19 of the Treaty between the French Republic and the United Kingdom of Great Britain and Northern Ireland Concerning the Construction and Operation by Private Concessionaries of a Channel Fixed Link Signed at Canterbury on 12 February 1986 between 1. The Channel Tunnel Group Limited 2. France-Manche S.A. and 1. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République Française (hereinafter the "partial award in the Eurotunnel case")

In its 2007 partial award in the *Eurotunnel* case, the arbitral tribunal constituted to hear the case, in examining the Claimants' thesis of the "joint and several responsibility" of the Respondents (France and the United Kingdom) for the violation of the Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (the "Treaty of Canterbury") and the Concession Agreement that followed, referred to article 47 finally adopted by the International Law Commission in 2001, and the commentary thereto:

173. It is helpful to start with Article 47 of the ILC Articles on State Responsibility, to which all Parties referred in argument … .

174. As the commentary notes:

> The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several or solidary responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.[1994] 12

[A/62/62/Add.1, para. 8]

[1994] 12 Partial Award in the *Eurotunnel* case, paras. 173–174.

Committee on the Rights of the Child

Sacchi et al. v. *Argentina, Brazil, France, Germany and Turkey*

In five cases—*Sacchi et al.* v. *Argentina*,[1995] [228] *Brazil*,[1996] [229] *France*,[1997] [230] *Germany*[1998] [231] and *Turkey*[1999] [232] respectively—concerning the legal implications of climate change, the Committee on the Rights of the Child referred to the commentary to article 47, finding that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location".

[A/77/74, p. 37]

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. *Uganda)*

In its judgment on reparations in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*, the International Court of Justice referred to the commentary to articles 31 and 47, noting that "in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered … . In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors".[2000] [233]

[A/77/74, p. 38]

[1995] [228] *Sacchi et al.* v. *Argentina* (CRC/C/88/D/104/2019), para. 10.10.

[1996] [229] *Sacchi et al.* v. *Brazil* (CRC/C/88/D/105/2019), para. 10.10.

[1997] [230] *Sacchi et al.* v. *France* (CRC/C/88/D/106/2019), para. 10.10.

[1998] [231] *Sacchi et al.* v. *Germany* (CRC/C/88/D/107/2019), para. 9.10.

[1999] [232] *Sacchi et al.* v. *Turkey* (CRC/C/88/D/108/2019), para. 9.10.

[2000] [233] See footnote [1410] 160 above, para. 98.

Article 48. Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[2001] 721 Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

[2001] 721 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

(4) Paragraph 1 refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[2002] 722

(6) Under paragraph 1 (*a*), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", *i.e.* they must apply between a group of States and have been established in some collective interest.[2003] 723 They might concern, for example, the environment or security of a region (*e.g.* a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[2004] 724 But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[2005] 725

[2002] 722 For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[2003] 723 See also paragraph (11) of the commentary to article 42.

[2004] 724 In the *S.S. "Wimbledon"* (footnote [28] 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

[2005] 725 Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

(8) Under paragraph 1 (*b*), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[2006]726 The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[2007] 727 With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[2008] 728 In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[2009] 729

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a

---

[2006] 726 For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[2007] 727 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[2008] 728 *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[2009] 729 See footnote [48] 54 above.

State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[2010] [730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[2011] [731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[2012] [732]

(12) Under paragraph 2 (*a*), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, paragraph 2 (*b*) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[2013] [733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles cannot solve.[2014] [734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph *3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

[2010] [730] *S.S. "Wimbledon"* (footnote [28] 34 above), p. 30.

[2011] [731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment.* (See footnote [2005] 725 above.)

[2012] [732] *Namibia* case (footnote [690] 176 above), p. 56, para. 127.

[2013] [733] See, *e.g.*, the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

[2014] [734] See also paragraphs (3) to (4) of the commentary to article 33.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

European Communities—Regime for the Importation, Sale and Distribution of Bananas

In its 1997 reports on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the WTO panel referred, *inter alia*, to paragraph 2 (*f*) of draft article 40 (Meaning of injured State) adopted by the International Law Commission on first reading. The relevant passage is [summarized on pages 467–468] above.

[A/62/62, para. 124]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber noted that article 29 of the Statute of the Tribunal

> does not create bilateral relations. Article 29 [of the Statute] imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*". By the same token, article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in article 29 (on the manner in which this legal interest can be exercised …).[2015] [219]

In a first footnote accompanying this text, the Appeals Chamber observed:

> As is well known, in the *Barcelona Traction, Power & Light Co.* case, the International Court of Justice mentioned obligations of States "towards the international community as a whole" and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission*, *1992*, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his third report on State responsibility (see *Yearbook … , 1991*, vol. II, Part One, p. 35, para. 121; see also his fourth report, *ibid*., *1992*, vol. II, Part One, p. 34, para. 92).[2016] [220]

In a second footnote, it added, with regard to the obligation under article 29 of the Statute:

> … The fact that the obligation is incumbent on all States while the correlative "legal interest" is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the "injured States" entitled to claim the cessation of any breach of article 29 or to promote the taking of remedial measures. See on this matter article 40 of the draft articles on State responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (*c*): "[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court

---

[2015] [219] International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 26 (footnotes omitted). (See footnote [52] 8 above.)

[2016] [220] *Ibid*., para. 26, footnote 33.

or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right", in *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10).[2017] 221

[A/62/62, para. 125]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber con-

---

[2017] 221 *Ibid*., para. 26, footnote 34. Draft article 40, as adopted on first reading, read as follows:

Article 40

Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(*a*) If the right infringed by the act of a State arises from a bilateral treaty, the other Statezparty to the treaty;

(*b*) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(*c*) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(*d*) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(*e*) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(*f*) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

In the articles finally adopted in 2001, the International Law Commission followed a different approach in which it distinguished, for purposes of invocation of responsibility, the position of the injured State, defined narrowly (article 42), and that of States other than injured State (article 48). The passages of the judgement of the Appeals Chamber reproduced in the text concern the latter category of States and this is the reason why they are reproduced here with reference to article 48.

sidered which subjects were entitled to claim compensation for "damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment".[2018] [198] It expressed the opinion that while,

> [n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim[, it] may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility … .[2019] [199]

[A/68/72, para. 138]

International Court of Justice

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. *United Kingdom and Marshall Islands* v. *India)*

In *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament between Marshall Islands* v. *United Kingdom* and *Marshall Islands* v. *India*, the International Court of Justice stated that "Article 48, paragraph 3, applies that requirement [to give notice of a claim under Article 43 of the State responsibility articles] *mutatis mutandis* to a State other than an injured State which invokes responsibility".[2020] [248]

[A/74/83, p. 42]

[Inter-American Court of Human Rights

The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)

In an advisory opinion concerning the effects of a State's denunciation of the American Convention on Human Rights, the Inter-American Court of Human Rights, in an analysis of *jus cogens* norms, cited articles 40, 41 and 48 and the commentary to article 40, indicating that the obligations contained in article 40 "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values".[2021] [222]

[A/77/74, p. 36]]

[2018] [198] See footnote [12] 10 above, para. 179.

[2019] [199] *Ibid*., para. 180.

[2020] [248] ICJ, Judgment, 5 October 2016, para. 42.

[2021] [[222] IACHR, Series A, No. 26, Advisory Opinion No. OC-26/20, 9 November 2020, paras. 103–104.]