*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

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[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

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[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.

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[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

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[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-

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[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]]

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[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.]