

HAZARDOUS ACTIVITIES, SMALL STATES AND THE RISK OF REPARATION

Arctic Ocean Oil and Gas Exploration and Legal Liability

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Research Question

In the event of a major accident, how can a very small State, such as an independent Greenland or Iceland, make reparation? Are very small States granted a degree of leeway in this respect that is not available to larger or otherwise wealthy States?



Principle of “Full Reparation”

...reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

(Factory at Chorzów, p47)



ITLOS Seabed Disputes Chamber 2011

On the deep seabed, contractors and the Authority bear “responsibility or liability for any damage arising out of wrongful acts in the conduct of [their] operations.... Liability in every case shall be for the actual amount of damage.” (UNCLOS Annex III, article 22)

Seabed Dispute Chamber held that this unlimited liability applied *mutatis mutandis* to responsible States irrespective of any apparent ability to pay.
(*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, International Tribunal for the Law of the Sea: Seabed Disputes Chamber Case No. 17 (Advisory Opinion) February 1, 2011, para 195).



Limits to reparation in general?

In no case shall reparation result in depriving the population of a State of its own means of subsistence.
(ILC Draft Article 42(3) 1996)



Hierarchy of Reparation

- Restitution
- Compensation
- Satisfaction



Limits to restitution in kind?

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;*
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.*

(ILC Articles, 2nd reading, 2001, article 35)



Limits to restitution in kind? (1996 reading)

Restitution only required if it...

*(b) would not involve a breach of an obligation arising from a **peremptory norm** of general international law;*

*(d) would not **seriously jeopardize the political independence or economic stability** of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind. (ILC Draft Article 43(d) 1996)*



Limits to compensation?

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

(ILC Articles, 2nd reading, 2001, article 36)



Limits to Satisfaction

- 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.*
- 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.*
- 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.*

(ILC Articles, 2nd reading, 2001, article 37)



Primary Rules

Peremptory norms

- Right of peoples to self-determination
- Right of peoples to their own resources
- Right of peoples not to be deprived of means of subsistence (eg, ICCPR and ICESCR article 1; *East Timor*)

Human rights treaties

- Education
- Highest attainable standards of health
- Continuous improvement in living conditions (ICESCR)
- Free and fair elections
- Fair trial (ICCPR)



Secondary Rules

Defence of „necessity“ to refuse payment of claim

Defence of „impossibility“ to pay claim

Enforcement options limited (countermeasures)

Countermeasures *shall not affect obligations for the protection of fundamental human rights.* (ILC Articles State Responsibility 2nd reading, 2001, article 50(1)(b)).



Eritrea-Ethiopia Claims Commission

Huge awards of compensation by their nature would require large diversions of national resources from the paying country – and its citizens needing health care, education and other public services – to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected populations in determining amounts sought as post-war reparations.

... the Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious injury to its population if such damages were paid. It thus considered whether it was necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs.

(Eritrea Damages Final Award, 2009, paras 21-22)



Iraq-UN Claims Commission

UN Security Resolution 687 (1991)

Full reparation

BUT flexibility over timetable of repayments

- Followed act of aggression and violation of *ius cogens* (little international sympathy for Iraq)
- Arranged by UN Security Council (3 of 5 permanent members were belligerents on winning coalition)
- Functioning and productive oil industry (therefore income against which to hold claims)



Resolution?

- States should exercise *due diligence* to evade claims
- In cases of *responsibility*, obligation to make *full reparation*
- Restitution (immediate) may be *impossible* for a very small State;
- Very small State may enjoy flexibility over *mode* or *timescale* for compensation and satisfaction



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THANK YOU
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