

*Erelsi traust  
framisæleni  
væðingjafnrétti*

# ***Erga omnes* obligations in international environmental law**

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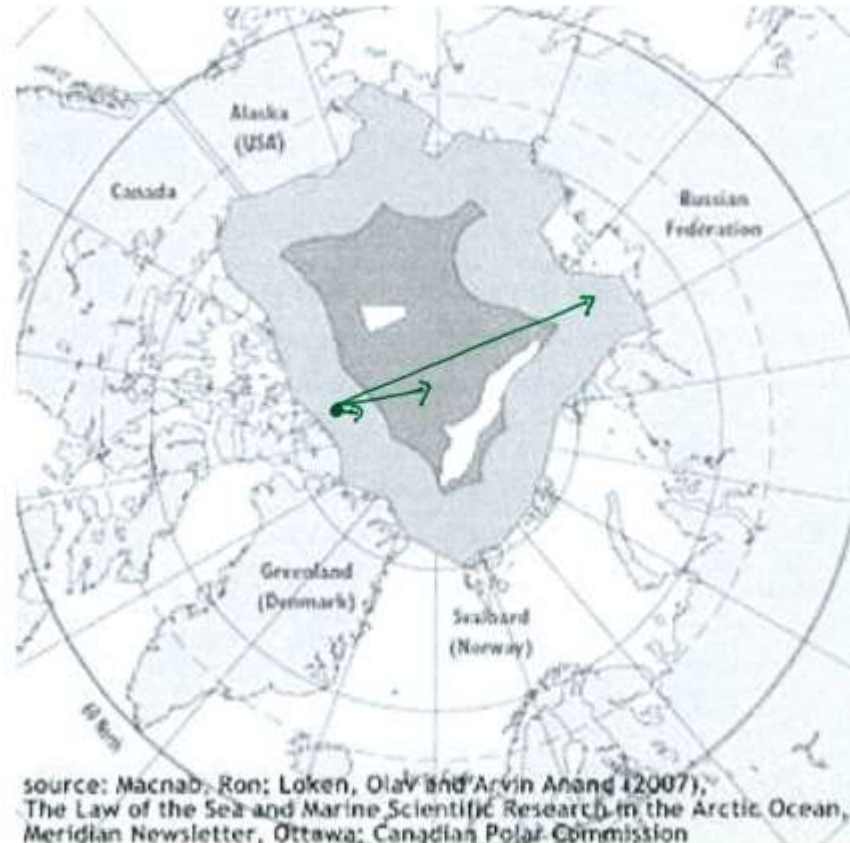


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(c) Macnab, et al, 2007

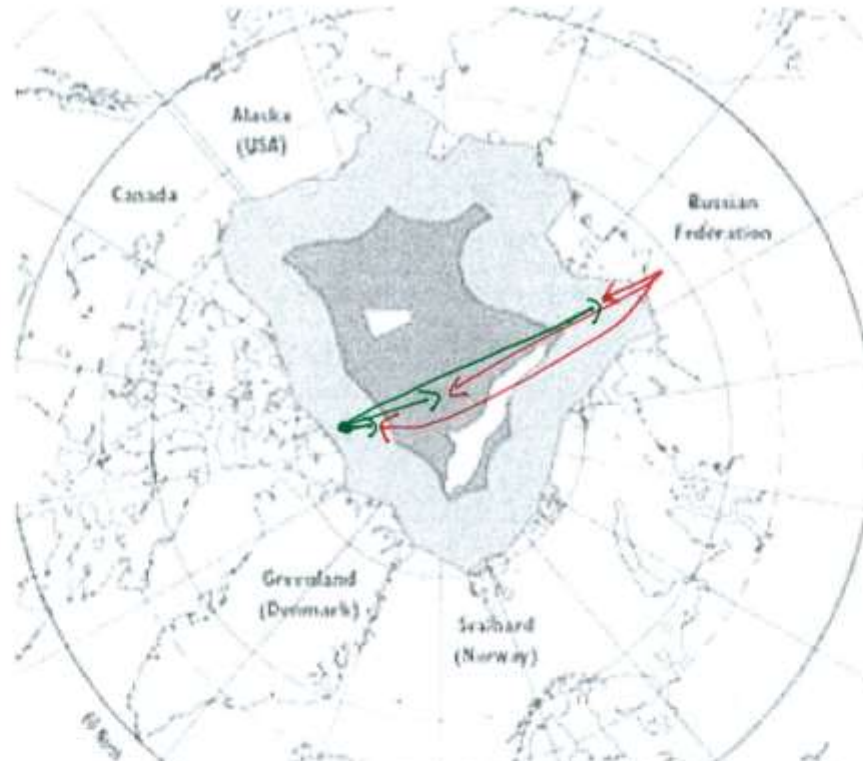
# Hypothetical Marine Pollution



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(c) Macnab, et al, 2007

# Hypothetical Invocation of Resp.



source: Macnab, Ron; Loken, Olav and Arvin Anand (2007),  
The Law of the Sea and Marine Scientific Research in the Arctic Ocean,  
Meridian Newsletter, Ottawa; Canadian Polar Commission

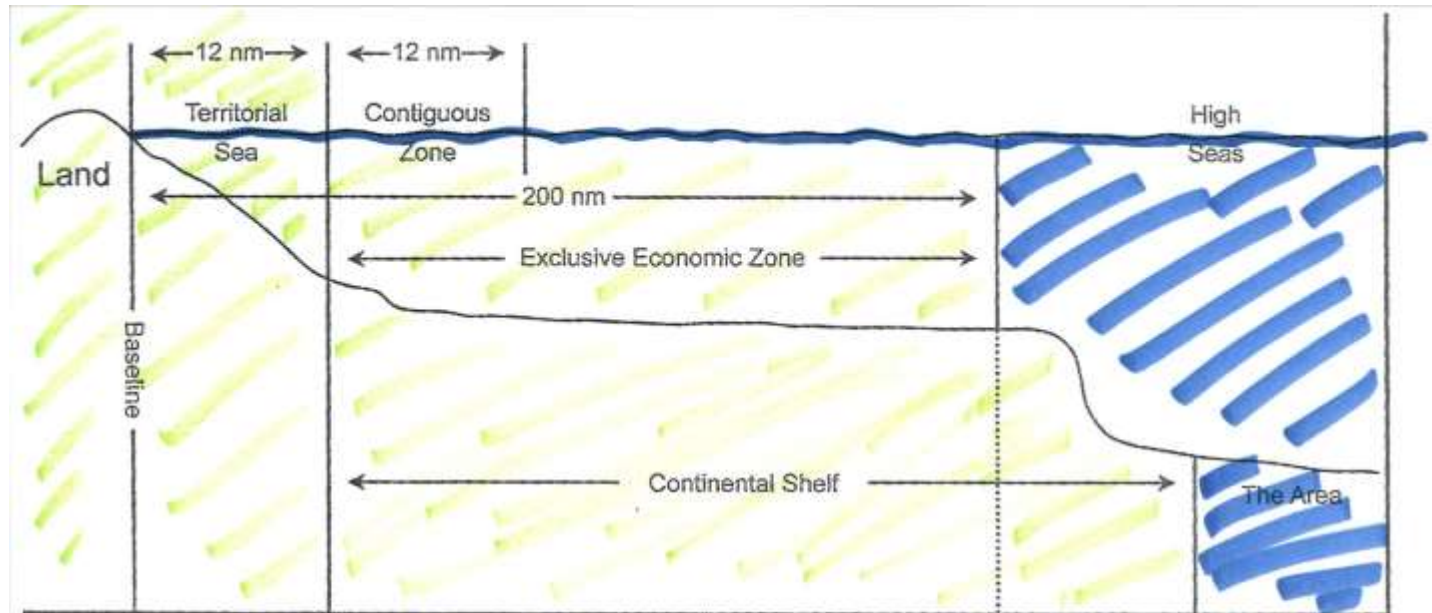


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# Resource Rights (UNCLOS)



Rothwell & Stephens, 2010

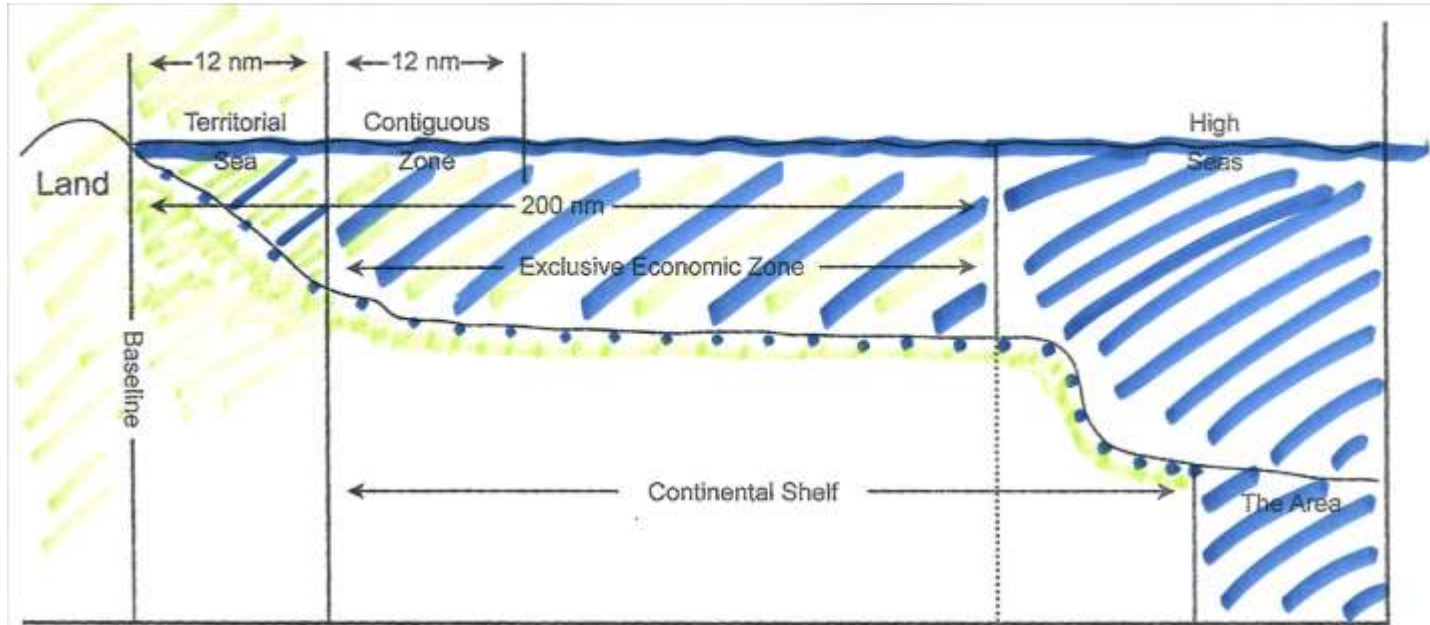
(c) Rothwell and Stephens, 2010



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Coastal State  
All Other States

# Environmental Interests



Rothwell & Stephens, 2010

(c) Rothwell and Stephens, 2010

## Coastal State's Rights Environmental Interests Part XII



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# Rare Species



*Arctic Species of Narcomedusa* (disc. 2002)  
Photo (c) National Geographic, 2005



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# State Responsibility

Primary Rules: the rules about what States may and may not do.

Secondary Rules: consequences if primary rules violated (Law of State Responsibility)

- Attribution
- Defences (circumstances precluding wrongfulness)
- Legal consequences (new obligations created by breach)
- **Invocation of responsibility**
- Countermeasures





# Primary and Secondary Norms (Roberto Ago)

*It is one thing to define a rule and the content of the obligation it imposes and another to determine whether that obligation has been violated and what should be the consequences of the violation. Only the second aspect comes within the sphere of responsibility proper. Roberto Ago, 1970 Yearbook, p178, para. 7*



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*Cf* Hart: primary and secondary rules. NOT the same distinction

# The Wrongful Act

## *Article 2*

### *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.



# The Wrongful Act

## *Article 12*

### *Existence of a breach of an international obligation*

*There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*



# What is an 'interest'?

'Legal interest'

Articles 42 & 48 ILC Articles on  
State Resp (2001)



# Article 42 (ILC Articles SR)

*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 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 further performance of the obligation.*



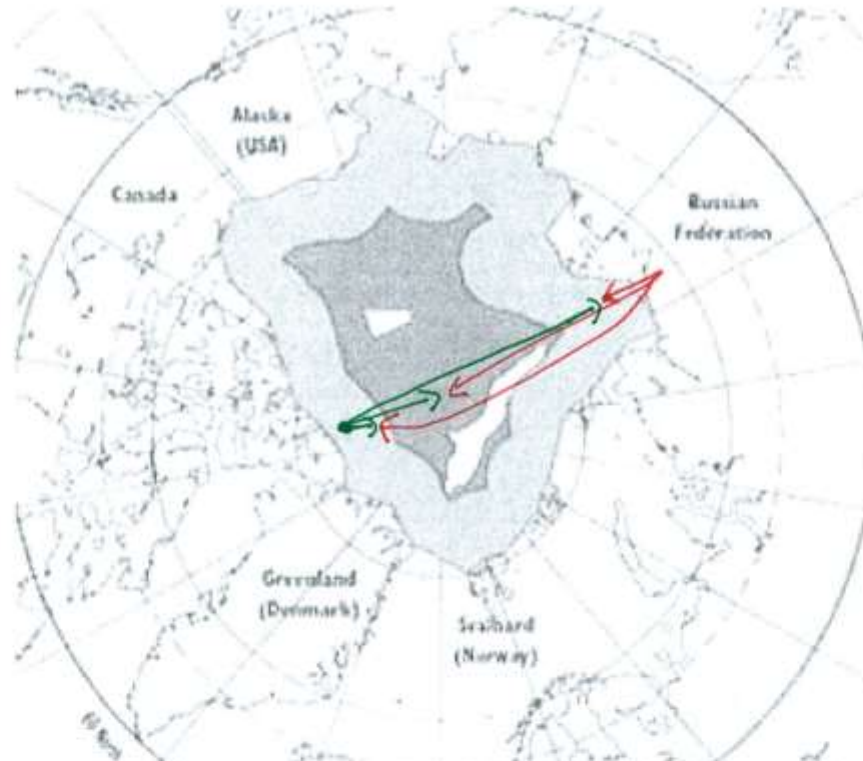


# Article 48 (ILC Articles SR)

- (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.*



# Hypothetical Invocation of Resp.



source: Macnab, Ron; Loken, Olav and Arvin Anand (2007),  
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# Norms *erga omnes* and environmental law

- **Material Account** (importance of norms, *e.g. Barcelona Traction dicta*)
- **Structural Account** (logical character: norms which are not bilateral or bilateralisable)



Photo (c) National Geographic, 1997



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# Material Account:

Based on recognition of *importance* of norms:  
*In 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* (Barcelona Traction).

State practice to date: only human rights/humanitarian norms



Christian Tams, U Glasgow



## Giorgio Gaja: structural account

*On the logical plane, in the absence of such provision, the responsible State could avoid fulfilling any obligation of reparation when there is no injured State. No State would in fact be able to invoke the responsibility of the wrongdoing State. In the case of heavy pollution of the high seas or unlawful harm to the ozone layer, the responsible State would have an obligation of reparation that would not be owed to any other State and would therefore remain theoretical. This would also imply that the obligation not to pollute the high seas and not to cause harm to the ozone layer would also be theoretical, for they could easily be breached without consequences (2010).*



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# SDC Adv Op Case 17

*Each State Party [to UNCLOS] 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 (para 180).*



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Manganese Nodules. Photo (c) Abramax 2009

## Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*)

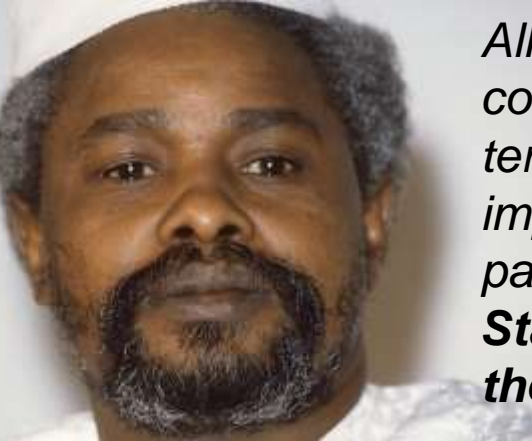


Photo:  
Dominique  
Faget / AFP

*All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. **All the States parties “have a legal interest” in the protection of the rights involved.** (para 68)*

*The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. **If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes.** (para 69)*



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## *Whaling in the Antarctic*



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Photo (c) Jonas Fr. Thorsteinsson, 2006



# How to invoke responsibility?

- Formal Dispute Settlement
- Countermeasures



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# Conclusions for IEL

*Wrongful act* is adequate for standing  
No need to prove *damage* or *causal link*.  
(Remember Article 2)

→ climate change





# Wrongful Acts

## *Article 12*

### *Existence of a breach of an international obligation*

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.



# Sheila Watt Cloutier & ICC v United States (IntAmCommHRs)

Sheila Watt-Cloutier led petition on behalf of  
Canadian and Alaskan Inuit



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# Watt Cloutier, et al v United States

*The impacts of climate change, caused by acts and omissions by the United States, violate the Inuit's fundamental human rights protected by the American Declaration of the Rights and Duties of Man and other international instruments. These include their rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home (petition, p14).*



# Advisory Opinion or Contentious Proceedings?



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Photo: public domain

# *Erga omnes* and the climate

- Still need to be a *State*
- Don't need to be “injured”
- Hence don't need to prove *damage* or *causal link*
- Judicial settlement (subject to *Monetary Gold* principle)
- Countermeasures





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Thank you  
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