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THE CONCEPT OF A 'CONTINUING VIOLATION'  
OF AN INTERNATIONAL OBLIGATION: SELECTED  
PROBLEMS\*

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For legal purposes, the most useful way to define a continuing violation is in descriptive terms, i.e. on the basis of its distinguishing features. The definition would then read as follows: *a continuing violation is the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuance in time of that breach.*

A study of this concept does not involve the usual examination of the substantive rules of international law restricting the conduct of States. Instead, it focuses on the procedural and substantive consequences of having breached such norms. At first sight these consequences seem to be of minimal and technical importance only. The objective of this article, however, is to prove that these technicalities are of vital importance: in many cases they determine whether or not a substantive norm can be enforced against a State.

As will be discussed in section 2, to distinguish continuing from instantaneous violations will be crucial in the application of time limits and jurisdictional limitation clauses *ratione temporis*; it will determine the applicable law and influence areas such as reparation and enforcement. However, before examining these practical consequences, it will be necessary to enter the more abstract and, at first sight, purely academic discussion of how to distinguish these violations (section 1). Some tentative suggestions will be put forward to facilitate this task.

Special attention will be devoted to the continuing violations caused by an act of a State against one or more individuals. It will be argued that in some instances these violations should be subject to specifically tailored rules.

As in any attempt to establish the rules of international law related to a particular concept, Article 38(1) of the Statute of the International Court of Justice (ICJ), which sums up the sources of international law, has to be kept in mind. With respect to the concept of a continuing violation, it will become clear that 'general principles of law' (Article

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problem (section 2.2). In a final section, some other practical consequences of having established a continuing violation will be summarized.

2.1. *Determination of the competence of an international tribunal: the admissibility problem*

In order to establish the competence of each court or tribunal, national or international, certain conditions *ratione temporis* have to be fulfilled. These conditions generally fall within the questions to be determined, namely:

(1) has the claim been introduced within the prescribed time limits, i.e. within the period of time allowed to elapse between the alleged breach (or some other specific date) and the introduction of the claim? (section 2.1.1).

(2) especially applicable to international tribunals, does the present claim concern a dispute, or 'acts' or 'situations' giving rise to a dispute, which occurred subsequent to the date mentioned in the clause limiting the jurisdiction of the court or tribunal *ratione temporis*? (section 2.1.2).

What then are the rules to be applied if these time-related restrictions come into play in a case where a continuing violation has been established?

2.1.1. *Time-limits*

2.1.1.1. *Explicit time limits versus extinctive prescription*

The first set of time-related restrictions, the so-called time limits, can be activated in two instances:<sup>40</sup> firstly, where time limits are explicitly inserted in the legal instrument or provision conferring jurisdiction on the tribunal. An example in international law is the six months' period to be observed after the exhaustion of domestic remedies in Article 26 of the European Convention on Human Rights. In domestic law, one can mention the two and three months' time limit to be observed in procedures for judicial review in, respectively, Belgian and European Community law,<sup>41</sup> and English law.<sup>42</sup> These time limits are created at the discretion of the legislature.

A second category of time limits emerges in the operation of the rules of general international law related to the doctrine of extinctive prescription. According to this doctrine the right of a State (or individual) to

<sup>40</sup> See King, 'Prescription of Claims in International Law', this *Year Book*, 15 (1934), pp. 82-97, and Brownlie, *op. cit.* above (n. 33), pp. 504-5.

<sup>41</sup> Article 19, *Coordinated Statutes on the Council of State*; Article 173(5), Treaty on European Union.

<sup>42</sup> Order 53, rule 4(1), of the rules of the Supreme Court.

invoke responsibility for an internationally wrongful act committed against it by another State, may lapse by prescription even if no explicit time limit has been provided. This concept of prescription relates to substance and aims at justice in every case. A recent example falling under this category can be found in the case concerning *Certain Phosphate Lands in Nauru (Preliminary Objections)*, where the Court recognized the principle of extinctive prescription, but rejected Australia's objection that Nauru's claim was inadmissible on the ground that it had not been submitted within a 'reasonable time'.<sup>43</sup>

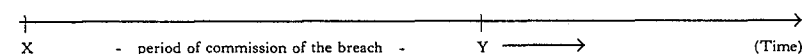
As these two categories show, lapse of time may operate to defeat claims in two distinct ways: it may operate as a defence in itself (as in the first category) or as part of a more general defence, such as waiver or estoppel, where lapse of time is said to operate by way of acquiescence (as in the second category).

2.1.1.2. *Principles to be applied in case of a continuing violation*

Even though it is necessary to keep in mind the distinction made above, the principles to be applied in case of a continuing violation are generally the same. In that event, both categories give rise to two types of cases: firstly, cases where the breach still continues at the time of the proceedings; secondly, cases where the breach has ceased to exist before that date.

\**The principle.* The general principle is that a claim can only be inadmissible on the ground of lapse of time *once the breach has ceased to exist*, that being the earliest date from which any time limit can possibly start to run (see figure 6.1).

FIGURE 6.1. TIME LIMITS IN GENERAL



Y = first day time limit can possibly start to run

In this respect the case law under Article 26 of the European Convention is particularly instructive. According to this provision, the Commission may only deal with a matter after all domestic remedies have been exhausted and 'within a period of six months from the date on which the final decision was taken'. Applying this Article in the *De Becker* case the Commission decided that:

when the Commission receives an application concerning . . . a permanent state of affairs . . . the problem of the six months period [within which the application has to be filed] specified in Article 26 can arise only after this state of affairs *has ceased to exist*; whereas in the circumstances, it is exactly as though

<sup>43</sup> *ICJ Reports*, 1992, p. 240, at p.253.