

THE INTERNATIONAL
LAW COMMISSION'S ARTICLES
ON STATE RESPONSIBILITY

Introduction, Text and Commentaries

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the time-frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.²⁵³ Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.²⁵⁴ The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.²⁵⁵ Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.²⁵⁶

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

253 See above, article 13 and commentary, especially para. (2).

254 *Blake v. Guatemala, Inter-Am.Ct.H.R., Series C, No. 36* (1998), para. 67.

255 *Papamichalopoulos v. Greece, E.C.H.R., Series A, No. 260-B* (1993).

256 *Loizidou v. Turkey, Merits, E.C.H.R. Reports 1996-VI*, p. 2216.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.²⁵⁷ It has been repeatedly referred to by the International Court and by other international tribunals. For example in the *Diplomatic and Consular Staff* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".²⁵⁸

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The Arbitral Tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

"Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."²⁵⁹

The Tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.²⁶⁰

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of Protocol 1 to the Convention, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.²⁶¹

(10) In *Loizidou v. Turkey*,²⁶² similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant

257 H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of the International Court of Justice.

258 *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 38, para. 80. See also p. 38, para. 80. See also p. 37, para. 78.

259 *Rainbow Warrior (New Zealand/France), R.I.A.A.*, vol. XX, p. 217 (1990), at p. 264, para. 101.

260 *Ibid.*, at pp. 265-266, paras 105-106. But see the dissenting opinion of Sir Kenneth Keith, *ibid.*, pp. 279-284.

261 *Papamichalopoulos and Others v. Greece, E.C.H.R., Series A, No. 260-B* (1993).

262 *Loizidou v. Turkey, Merits, E.C.H.R. Reports 1996-VI*, p. 2216.

is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable [to the wrongful act] as a proximate cause",⁴⁸⁸ or to damage which is "too indirect, remote, and uncertain to be appraised",⁴⁸⁹ or to "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.⁴⁹⁰ Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,⁴⁹¹ in others "foreseeability"⁴⁹² or "proximity".⁴⁹³ But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.⁴⁹⁴ In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international

488 See United States-Germany Mixed Claims Commission, *Administrative Decision No. II, R.I.A.A.*, vol. VII, p. 23 (1923), at p. 30. See also *Dix, R.I.A.A.*, vol. IX, p. 119 (1902), at p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978: *I.L.M.*, vol. 18 (1979), p. 907, para. 23.

489 See the *Trail Smelter* arbitration, *R.I.A.A.*, vol. III, p. 1905 (1938, 1941), at p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", *R.G.D.I.P.*, vol. 31 (1924), p. 209 citing the "*Alabama*" arbitration as the most striking application of the rule excluding "indirect" damage.

490 Security Council resolution 687 (1991), para. 16. This was a Chapter VII resolution, but it is expressed to reflect Iraq's liability "under international law . . . as a result of its unlawful invasion and occupation of Kuwait". The United Nations Compensation Commission and the Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under para. 16. See e.g. *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)*, 14 April 1994, S/AC.26/1994/1, reproduced in *I.L.R.*, vol. 109, p. 127; approved by Governing Council Decision 20, 26 May 1994, S/AC.26/Dec.20, reproduced in *I.L.R.*, vol. 109, p. 622; *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, 15 November 1996, S/AC.26/1996/5/Annex, paras. 66-86; reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 506-511; approved by Governing Council Decision 40, 17 December 1996 S/AC.26/Dec.40, reproduced in *I.L.R.*, vol. 109, p. 669.

491 As in Security Council resolution 687 (1991), para. 16.

492 See, e.g., the "*Naulilaa*" case (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa (Portugal v. Germany)*), *R.I.A.A.*, vol. II, p. 1011 (1928), at p. 1031.

493 For comparative reviews of issues of causation and remoteness see, e.g. H.L.A. Hart & A.M. Honoré, *Causation in the Law* (2nd edn.) (Oxford, Clarendon Press, 1985); A.M. Honoré, "Causation and Remoteness of Damage", in A. Tunc, (ed.), *International Encyclopedia of Comparative Law*, (Tübingen, Mohr, 1983) vol. XI, Part 1, chap. VII, p. 156; K. Zwiergert and H. Kötz, *Introduction to Comparative Law* (3rd edn.) (trans. J.A. Weir) (Oxford, Clarendon Press, 1998), pp. 601-627 (esp. p. 609ff.); B.S. Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* (3rd edn.) (Oxford, Clarendon Press, 1997), pp. 95-108, with many references to the literature.

494 See e.g. the decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America (Cases A15 (IV) and A24)*, (1996) 32 *Iran-U.S.C.T.R.*, 115.

obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".⁴⁹⁵ The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.⁴⁹⁶ The point was clearly made in this sense by the International Court in the *Gabčíkovo-Nagymaros Project* case:

"Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that 'It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.' It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act."⁴⁹⁷

(12) Often two separate factors combine to cause damage. In the *Diplomatic and Consular Staff case*,⁴⁹⁸ the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel case*,⁴⁹⁹ the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,⁵⁰⁰ except in

495 P. S. Atiyah, *An Introduction to the Law of Contract* (5th edn) (Oxford, Clarendon Press, 1995), p. 466.

496 In the *Well Blowout Control Claim*, a Panel of the United Nations Compensation Commission noted that "under the general principles of international law relating to mitigation of damages . . . the Claimant was not only permitted but indeed obligated to take reasonable steps to . . . mitigate the loss, damage or injury being caused": *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, 15 November 1996, S/AC.26/1996/5/Annex, para. 54; reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 502-503.

497 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 55, para. 80.

498 *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports 1980*, p. 3, at pp. 29-32.

499 *Corfu Channel, Merits*, *I.C.J. Reports 1949*, p. 4, at pp. 17-18, 22-23.

500 This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause . . . In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable".