

The Law of International Responsibility

Edited by

JAMES CRAWFORD

ALAIN PELLET

SIMON OLLESON

Assistant Editor

KATE PARLETT

OXFORD
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Chapter 27

DURATION OF THE BREACH

JEAN SALMON

1 The instantaneous, or rather the completed, act	384
2 The continuing act	386
3 The international obligation to prevent a given event	390
4 The composite or global act of the State	391
5 The complex act of the State	393
<i>Further reading</i>	395

Under article 2 of the ILC Articles on State Responsibility:

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

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

What is the moment when—all the constitutive elements of a wrongful act being assembled—the breach begins? When does the breach end? When these moments are determined, the duration of the breach can be defined, as can the time of the perpetration of the wrongful act.

The practical consequences of these questions on the implementation of responsibility are numerous. Indeed, the determination of the time of perpetration of the wrongful act may be relevant to determine:

- the moment when diplomatic protection can be exercised;
- the time when prejudice must be taken into consideration for reparation;
- the potential jurisdiction of a court when such jurisdiction is only established for disputes or acts previous or subsequent to a specific date, or which have occurred during a defined period;
- the existence or persistence of the national character of a claim at a given time;
- the possible application of a statutory limitation period to an action in relation to a determined wrongful act (for example, extinctive prescription); and
- the admissibility of an action, if it must be brought within a certain time after the occurrence of the wrongful act.

Moreover, what happens when the conduct that constitutes the wrongful act is prolonged and only occurs in part during the time that the obligation of the State is in force?

The ILC envisaged different categories of acts in this regard: the instantaneous act (or rather the completed act); the continuing act; the international obligation to prevent a given event; the composed (or composite or global act); and the so-called complex act. We will look at each of these in turn.

1 The instantaneous, or rather the completed, act

The instantaneous act is fixed at a certain moment in time. It is an act whose existence does not go beyond the point of its accomplishment. Sometimes this is called 'immediate delict'. The Commission gives the following acts as examples: the act by which a State uses anti-aircraft defence units to shoot down an aircraft lawfully flying over its territory; the torpedo boat of a belligerent State sinking a neutral ship; the police of one State killing or wounding the representative of another State.¹ One could add the situation where the border of a State is violated by military forces or police which is followed by an immediate retreat by these forces. In such a case, the wrongful act occurs at the moment of the act and does not exist beyond that moment.

The instantaneous act occurs when its conditions for existence are fulfilled and at that moment it constitutes a wrongful act. By definition, it ceases to exist at the expiration of the relatively brief time period that is necessary for its accomplishment. However instantaneous it may be, this type of act still requires a certain time of perpetration. This is without doubt the reason why the text of the ILC has avoided the adjective 'instantaneous' in its successive versions. In the text of the articles provisionally adopted on first reading a negative formulation was selected ('act not extending in time'):

Article 24

Moment and duration of the breach of an International obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.²

Article 14 as finally adopted also uses a negative formulation:

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

The new formulation is shorter than the previous one. The two definitions both contrast the instantaneous act and the continuous act and distinguish the instantaneous act with enduring effects from the continuing act. We will discuss later the consequences of this distinction.

The concept of the instantaneous or immediate act has often been applied in the international case law. Thus, in *Phosphates of Morocco*³ the French government had accepted the compulsory jurisdiction of the Court by a declaration of the 25 April 1931, for 'any disputes that may arise after the ratification . . . with regard to situations or facts

¹ Commentary to draft art 24, para 6, Report of the ILC, 30th Session, *ILC Yearbook 1978*, Vol II(2), 1, 87.

² Report of the ILC, 51st Session, *ILC Yearbook 1996*, Vol II(2), 61.

³ *Phosphates in Morocco, Preliminary Objections, 1938, PCIJ, Series A/B, No 74*, p 4, 10.

subsequent to such ratifications'.⁴ It was therefore essential to fix the date of the wrongful act. The decision of the Department of Mines which was disputed by the Italian Government was dated 8 January 1925, which means that it was prior to the critical date of the 25 April 1931. In order to circumvent this difficulty, the Italian government maintained that the breach of the international obligation commenced by the decision of 1925 did not become a perfected breach until the occurrence of certain acts after 1931. The Italian government thus opposed the permanent delict to the immediate delict:

If internationally wrongful acts are taken as a general category, two different types of delicts can be distinguished. There are breaches of the law of peoples, as for example the insult to the flag of a friendly nation, the torpedoing of a neutral vessel, etc. that have an immediate character. When such a breach is completed, that is to say, when it has become perfected, it is exhausted and does not exist as such any more. On the contrary, there are other breaches of international law that are more prolonged in time, so that as soon as they are perfected, in the sense that all constitutive elements are present, they do not cease to exist at this point and continue, identical with themselves, having a permanent character. This is for example the case for a law that is created contrary to the law of the peoples, an abusive seizing of goods, the arrest of a diplomat, etc. The acts of the first category can be classified as immediate international delicts, while the acts in the second category can be given . . . the name of permanent delicts.⁵

In this case, the Court considered—as the French government had proposed⁶—that as far as there was a violation it consisted of the decision of the Department of Mines of 8 January 1925. This decision constituted: a 'violation of international law—a definitive act which would, by itself, directly involve international responsibility'.⁷

The fixing of the wrongful act in time may also be appropriate where a court is not competent to settle disputes after a certain date. In *Mariposa Development Company*⁸ the General Claims Commission only had competence to decide claims for loss or harm suffered before the date the ratification instruments of the Claims Convention between the United States and Panama were exchanged (3 October 1931). The Mariposa Development Company had been deprived of its proprietary title by a decision of the Supreme Court of Panama on 20 October 1931. Undoubtedly, this decision was founded on a law dating from 27 December 1928 which permitted the recovery of public goods held by individuals. But the Commission considered that the mere promulgation of the law did not constitute a breach of international law. Only the decision to deprive the company of its property had this effect. As a consequence, the Commission declared that it had no competence over the matter.

The terminology of instantaneous act/continuous act was adopted by the International Court in *Gabčíkovo-Nagymaros Project*:

It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'.⁹

⁴ Ibid, 22.

⁵ *Phosphates in Morocco, Written Statements, 1938, PCIJ, Series C, No 84*, p 4, 495 (observations and conclusions of the Italian government).

⁶ See the exposé by M Jules Basdevant, acting for the French government, reproduced in A Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, Editions du CRNS, 1962–1963), Vol III, No 896.

⁷ *Phosphates in Morocco, Preliminary Objections, 1938, PCIJ, Series A/B, No 74*, p 4, 28.

⁸ *Mariposa Development Company and Others (United States) v Panama*, 25 June 1933, 6 RIAA 338.

⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, 54 (para 79).

It was also used by the European Court of Human Rights, which distinguished in *Loizidou* a 'continuing situation or an instantaneous act'.¹⁰ Nevertheless, one could consider whether the adjective 'completed' might not be more apt than the adjective 'instantaneous', to contrast it with 'continuing'. This point will be explained in the following Section.

2 The continuing act

The continuing act denotes a single act, constituting a wrongful act, which is prolonged in time. In international practice, the term 'permanent delict' has sometimes been used. Since it is a single act, it differs from the composite or global act which will be discussed in the next section. The continuing act may consist of:

- (a) the maintenance of an illegal situation:
- the maintenance in force of a provision that the State is internationally obliged to repeal: '[T]he maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life';¹¹
 - illegal detention of an official foreign personality: 'The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions';¹²
 - illegitimate occupation of part of the territory of another State;
 - the maintenance of armed contingents on the territory of another State without its consent;
 - the maintenance of colonial domination by force; or
 - the illegal blockade of foreign coasts and ports etc.

- (b) the refusal to carry out an obligation of a continuing character:

- the non-adoption of a measure required by the international obligation:
The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations.¹³

or

- the non-execution of a judgment of an international court etc.

Such acts constitute, at the time of their first appearance, a breach of an international obligation, and the time of their perpetration extends over the whole period in which the conduct is pursued and continues not to be in conformity with the requirements of the international obligation. As it was expressed in the ILC's report in 1976:

¹⁰ *Loizidou v Turkey* (App No 15318/89), *ECHR Reports 1996-VI*, para 40.

¹¹ *Dudgeon v United Kingdom* (App No 7525/76), *ECHR, Series A, No 59* (1981), para 41.

¹² *United States Diplomatic and Consular Staff in Tehran, Judgment*, *ICJ Reports 1980*, p 3, 35 (para 76).

¹³ *Ibid*, 37 (para 78).

There will be a breach of the obligation with which the act is in conflict in so far as, at least for a certain period, the act of the State and the obligation incumbent on it are contemporaneous, and the breach will, of course, occur during that period only.¹⁴

The 1996 first reading articles stress this simultaneity in draft article 18(3):

If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

This article and its paragraph 3—which was incidentally also valid for an instantaneous act which takes some time before it is completed—was fortunately simplified in article 13 as finally adopted:

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

The European Commission of Human Rights has highlighted the importance of the continuing act in the *De Becker* case.¹⁵ The applicant complained that following a sentence in 1947 he had been the victim of a full denial of his rights, including the right to exercise his profession as a journalist and writer. This denial breached, according to him, the right to the freedom of expression recognized under article 10 of the Convention. The defendant Belgian government objected that the act which was the cause of the situation predated the coming into force of the Convention. But the Commission held that it could examine the issue if the grievance of the applicant was related to acts that 'although prior in origin to the date on which the Convention came into force in respect of the respondent Government, might constitute a continuing violation of the Convention extending after that date'.¹⁶ The Commission observed that, for the period following the entry into force of the Convention, the applicant was placed in a continuing situation because of which he claimed to be the victim of a breach of his freedom of expression, as guaranteed by article 10 of the Convention, and that the application was consequently admissible in so far as it related to a continuing situation.

The European Commission of Human Rights has also applied the concept of the continuing act in relation to the fact that the recognition of the competence of the Commission for individual applications by the United Kingdom was limited to all acts, decisions, facts or events which occurred after 13 January 1966. Where an unlawful 'continuing' act has occurred partly before and partly after the critical date, it declared its competence for the second part of the act. This was for example the case in its decision in *Courcy v United Kingdom*.¹⁷ In its decision in *Roy and Alice Fletcher v United Kingdom*¹⁸ the Commission rejected the application on the basis that it did not have competence *ratione temporis* for

¹⁴ Commentary to draft art 18, para 21, Report of the ILC, 28th Session, *ILC Yearbook 1976*, Vol II(2), 93.

¹⁵ *De Becker v Belgium* (App No 214/56), European Commission of Human Rights, Decision on admissibility, 9 June 1956, (1958–1959) *Yearbook of the European Convention on Human Rights* 215.

¹⁶ *Ibid.*, 232.

¹⁷ *Courcy v United Kingdom*, European Commission of Human Rights, Decision on admissibility, 16 December 1966, (1967) *Yearbook of the European Commission of Human Rights* 383.

¹⁸ *Roy and Alice Fletcher v United Kingdom*, European Commission on Human Rights (App No 3034/67), Decision on admissibility, 19 December 1967.

the part of the act prior to 13 January 1966 and for the absence of the appearance of a violation of rights and freedoms stated in the Convention for the period after the critical date. The European Court of Human Rights has invoked the 'continuing situation, which still obtains at the present time' in *Papamichalopoulos v Greece*¹⁹ and in *Agrotexim and others v Greece*.²⁰

Determining the issue whether a delict has or has not a continuing character plays an important role as far as the obligation of cessation is concerned. Under article 41 of the first reading draft of 1966:

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

The text eventually adopted maintained the same idea in a more simple form:

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) to cease that act, if it is continuing;
- (b) . . .

Thus cessation is no longer applicable to an instantaneous or completed delict, while for a continuous delict it is required as long as it the breach is continuing. In *United States Diplomatic and Consular Staff in Tehran* the ICJ highlighted that:

Paragraphs 1 and 3 of that Article [22 of the 1961 Vienna Convention on Diplomatic Relations] have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent . . . [T]hey constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent . . . [T]he Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention.²¹

On the other hand, the obligation of cessation is extinguished when the conduct ceases to constitute an internationally wrongful act. This was highlighted in the arbitral award in *Rainbow Warrior*.²² France maintained that '[f]or cessation to take place, there must be illegal behavior of a continuous nature which persists up to the day when the remedy is applied'.²³ The Tribunal, having accepted—rightly or not—that the obligation of repatriation had been extinguished on 22 July 1989, at the expiration of a three-year time limit, considered that the conditions to order cessation were no longer fulfilled in the case:

Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force. The recent jurisprudence of the International Court of Justice confirms that an order for

¹⁹ *Papamichalopoulos v Greece* (App No 14556/89), ECHR, Series A, No 260-B (1993), para 40.

²⁰ *Agrotexim and others v Greece* (App No 14807/89), ECHR, Series A, No 330-A (1995) paras 57–58.

²¹ *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, p 3, 37 (para 77).

²² *Difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, 20 RIAA 215.

²³ *Ibid*, 269 (para 112).

the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.²⁴

In reality it may be asked—if the existence of the obligation of cessation appears as the true criterion to distinguish a continuing act from an act which is not continuing—whether it is not preferable to abandon the classification of ‘instantaneous’ in favour of ‘completed’ to characterize an act which is not continuing. A breach which has lasted a considerable time but which has ceased is no longer a continuing act. It is completed. Under these conditions it is difficult to speak of an instantaneous act.

The theory of the continuing act serves to facilitate succession in the area of international responsibility, where the successor State, by act or omission, pursues the same breach of international law.²⁵

We have seen that the ILC attempts not to confuse the ‘continuing act’ with the ‘instantaneous act with continuing effects’ or ‘enduring effects’. In this sense, the act of shooting and harming a person at a certain moment in breach of a norm of international law is an instantaneous act. Nevertheless, the harm suffered (suffering, disability) may have a continuing character. On the other hand, a sequestration is a continuing act so long as it lasts. The distinction is difficult. In its 1976 report, the examples given by ILC for instantaneous acts with continuing effects are debatable. The act of confiscation, in the view of the ILC, is realized by an act that constitutes an instantaneous delict, but with enduring effects. It also cites the kidnapping of a person by the organs of a State on the territory of another State. It cannot be said that these two examples are particularly convincing. One comes to different conclusions depending on whether the act of the author or the breached right of the victim is considered. Why can a confiscation not be ended by returning the property in question to the owner? Why can the delict of kidnapping not be ended by liberating the kidnapped person?

Another way of apprehending the question is to start from the point of view that the continuous delict is one that can be terminated, in relation to which an action of cessation can be introduced. The ILC, seemingly better informed, mentions in the Commentary to its article 14 that the Inter-American Court of Human Rights has interpreted the forced or involuntary disappearance as a continuing wrongful act as long as the fate of the victim is not known.²⁶ On the other hand, the question may be more controversial where expropriation is at issue. In *Loizidou v Turkey*,²⁷ the European Court of Human Rights decided not to consider an expropriation effected by constitutional reform of the Government of Northern Cyprus as an instantaneous act, basing itself not on the characteristics of the act of expropriation itself, but on the inopposability of the acts which emanated from a government which is not recognized. The existence of *restitutio in integrum* in the modes of reparation does not facilitate the distinction in respect of the obligation of cessation either.

²⁴ Ibid, 264, references omitted.

²⁵ See *Affaire relative à la concession des phares de l'empire Ottoman*, 24/27 July 1956, 12 RIAA 155, 198. See Chapter 21.

²⁶ ASRSIWA, Commentary to art 14, para 4, citing *Blake v Guatemala, Inter-Am Ct HR, Series C, No 36* (1998), 24 (para 67).

²⁷ *Loizidou v Turkey* (App No 15318/89), ECHR Reports 1996-VI.

To cover the theory of the continuing act, the ILC included draft article 25(1) in the first reading text:

Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

...

The article as finally adopted provides:

Article 14

Extension in time of the breach of an international obligation

...

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3 The international obligation to prevent a given event

An obligation to prevent a given event is characterized by the fact that the State must take all reasonable or necessary measures to avoid the occurrence of an exterior event, an act of man or of nature, and as such external to actions of the State. Sometimes this is called 'event delict'. The degree of vigilance required varies according to the primary obligation and the circumstances of the case. The occurrence of the event is the *sine qua non* condition for the existence of the breach of the obligation. But there must also exist a direct causal link between the occurrence of the event and the conduct of the State organs. There is only a breach provided that two conditions are fulfilled: occurrence of the event and behaviour of the State which has not been appropriate.

In this case, the moment of the realization of the breach coincides with the moment of the occurrence of the event which may have an instantaneous character (for example, an attack against an embassy) or a continuous character (for example, certain pollution). As for the duration of the breach, the time of perpetration may not comprise any period prior to the event which must be prevented. On the other hand, if the event has a continuing character, the duration of the breach extends to the moment of the cessation of the event. Thus, Iran had the obligation to prevent the occupation of the embassy of the United States in Tehran; the time of the perpetration of the breach extended over the entire period in which this occupation was pursued.

To cover this case, article 26 of the first reading draft provided:

Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

This text was only partially modified in the text as adopted:

Article 14

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

4 The composite or global act of the State

In its 1976 report the ILC defined a composite act as 'an act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation'.²⁸ The composite act of the State is thus one which, although not consisting of a single conduct, continues in time: it is constituted of a series of individual acts of the State which follow each other, and which all contribute to the realization of the global act in question. The whole, even if it emanates from different organs, presents homogeneity and breaches a certain norm of international law. An example of this type of situation can be found where the wrongful act consists not so much of an isolated act but of a 'practice' or 'policy' which is systematic in character. These could be discriminatory practices or commercially restrictive practices. It is only after a whole series of acts that the composed or global act is constituted. It does not exist until that moment. The European Court of Human Rights has defined a practice which is incompatible with the Convention as 'consist[ing] of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.²⁹

The repetition of wrongful acts in the area that interests us can nevertheless be apprehended in two ways. In a first hypothesis, a wrongful act may repeat itself: there are distinct acts which succeed each other and are breaches of the same nature. *These are simple repeated acts.* These could be a series of violations of the rights of a civil population, or of combatants who are refused the status of prisoners of war, etc. In a second hypothesis, what is wrongful is the whole of the acts which have a global nature, the effect being, if not a change in the character of the breach, at least the conferral of its own identity because of its systematic character. *This is an act which is composed of a series of conducts which constitute a unit because of the pursued intention. This act is as such wrongful.* To determine the existence of a composite act, a second characteristic, other than the multiplicity of conducts, plays a fundamental role for some authors whose opinion we share: it is the element of intent implied by the notion of policy or plan. 'It is the intention to harm the victim State, which is brought up to date through the attack on the rights of its nationals, which provides the jurisdiction (ressort) of wrongfulness, and this intention existed at the beginning of the State conduct'.³⁰

James Crawford, Special Rapporteur of the ILC, insisted on the fact that the composite act must be limited to breaches characterized by an aspect of systematic policy. This intentional element necessarily brings isolated cases together in a communal perspective. It is

²⁸ Commentary to draft art 18, para 22, Report of the ILC, 28th Session, *ILC Yearbook 1976*, Vol II(2), 93.

²⁹ *Ireland v United Kingdom* (App No 5310/71), *ECHR, Series A, No 25* (1978), para 159.

³⁰ E Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), 57.

not enough that there be 'a series of actions or omissions in respect of separate cases'.³¹ For this purpose he cites the example of water quotas which a State is authorized to take from a river. In a situation where the quota is exceeded by different takings which are not linked one to another, then the wrongful act would not be retroactive to the first withdrawal. This position appears to us to be correct. Apart from the case where it is shown that, in the cited example, the excessive withdrawals had a systematic character responding to a deliberate will to breach the treaty engagement, there is no reason to retain the hypothesis of the composed delict in the case of a simple excess of the quantitative limit. Thus, what characterizes the composed delict is, apart from a quantitative aspect, the existence of a motive which unites the whole of the criticized conducts in one determined wrongful act.

Once it is determined that the global character of the conduct constitutes a distinct breach, there are three alternatives:

- the single items of conduct are lawful: it could be imagined that an isolated act of xenophobia or discrimination could escape an international prohibition while a practice of the same act would be prohibited;
- the single items of conduct are lawful and of the same character as the global conduct: this seems to be the case for wrongful conducts that are *also incriminated* as practices, such as slavery, extermination, deportation, forced disappearances, persecution or conduct that is reprehensible in some other way if committed on a large scale;
- the single items of conduct are wrongful and of a different character than the global conduct: this is the case for *apartheid*, genocide, crimes against humanity, ethnic cleansing, etc—all breaches that treat globally delictual conduct (arbitrary arrests, murder, kidnapping, expulsion, etc) by reference to its aggregate or cumulative character.

This notion of 'globality' can have various consequences:

- the wrongful act falls under the classification of grave breach;
- opening up a recourse: UN ECOSOC Resolution 1503 (XLVIII) adopted on 27 May 1970 on Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms envisages the competence of the Human Rights Commission to study or conduct a survey on 'particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission';³²
- making a claim admissible despite a failure to exhaust local remedies, considering their inefficiency in such a situation.

The draft articles on first reading of 1996 contained two provisions relating to the composite act. On the one hand, draft article 18(4) provided:

If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.³³

³¹ J Crawford, Second Report on State Responsibility, 1999, A/CN.4/498, para 121.

³² United Nations Economic and Social Council, Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, Resolution 1503 (XLVIII), 27 May 1970, para 5.

³³ Report of the ILC, 51st Session, *ILC Yearbook 1996*, Vol II(2), 60.

On the other hand, draft article 25(2) stated:

The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.³⁴

As finally adopted, article 15, entitled 'Breach consisting of a composite act' provides:

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

5 The complex act of the State

The notion of a complex act or delict was introduced into the theory of responsibility by Ago in *Phosphates of Morocco* before the Permanent Court of International Justice. Italy, for whom Ago was counsel, had attempted to include all acts previous to the critical date in one whole, aiming to connect them to the acts subsequent to the critical date and thus to bring them within the compulsory jurisdiction of the Court.

This 'cornering of Moroccan phosphates' is a complex wrongful act, that is at the same time composed of several but different breaches of international law, but that have a more extended scope as a whole, distinct from that of all its constitutive elements . . . Every one of these single wrongful acts thus pursues the progressive attack of the same treaty rules . . . The whole of these acts, that are closely linked by a necessary connection, arising from the same resolution, aiming at the same purpose, represents, from a logical and teleological point of view, only one continuing and progressive internationally wrongful act as far as the practical and legal effects are concerned.³⁵

As we have seen above, this argument was rejected by the PCIJ which considered that the decision of the Department of Mines of 1925 was an immediate act. Ago nevertheless maintained his point of view in his course at the Hague Academy in 1939³⁶ and as Special Rapporteur of the ILC on international responsibility; he succeeded at first in bringing the ILC to accept the concept of the complex act of the State.

From this point of view, a complex act of the State is constituted by a succession of conducts, State act, or omissions which emanate from one or more organs, adopted for a specific case and that, considered as a whole, represent the position of the State in the case in question. The concept of the complex act was linked to a distinction between two types of international obligations: those that a State may only fulfil by using specifically determined means and those that a State may fulfil by freely choosing among a plurality of means which it judges to be the most opportune to achieve a result.³⁷ The ILC saw a

³⁴ Ibid, 61.

³⁵ *Phosphates of Morocco*, Public Sittings and Pleadings, 1938, PCIJ, Series C, No 85, 1234.

³⁶ R Ago, 'Le délit international' (1939-II) 68 *Recueil des cours* 98. ³⁷ See Chapter 26.

typical example of a complex act of the State in obligations which require a State to ensure, by means of its choice, a certain result. The State had the power to correct the improper situation that was potentially caused by resorting to new means in order to achieve the internationally required result or an equivalent result at a later stage.

When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.³⁸

These are some of the examples given by Ago or the ILC:

- denial of justice;³⁹
- the violation of the freedom of establishment by a subsidiary administrative authority where the conduct is confirmed by a higher authority;
- acquittal at all the successive jurisdictional levels of the perpetrators of a crime against the representative of a foreign government;⁴⁰
- the case where the structure of the obligation gives the State the possibility to provide a remedy through new means for the effects of an initial conduct which was opposed to the obligation, in order to achieve the result required by the obligation. In the view of the Special Rapporteur the rule of the exhaustion of local remedies, when considered as a substantive rule, illustrates this possibility;
- situations where the structure of the obligation gives the State the possibility to realize the obligation, not by assuring the result envisaged by the obligation, but an equivalent result, if the first conduct has become impossible to perform: this is the case where an obligation of customary international law which requires the State to exercise vigilance in order to prevent attacks on the person and property of foreigners allows the State to fulfil its obligation by way of compensation. Another example is article 9(1) of the International Covenant of Civil and Political Rights: 'No one shall be subjected to arbitrary arrest or detention', which is completed by article 9(5) which states that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'.⁴¹

For acts of this kind the moment of the fulfilment of the violation is not when the initial conduct is adopted by the State organ, but the moment when a conduct makes the achievement by the State of the result required by the obligation definitely impossible. It is not until this moment that all the constituent elements of the complex act are assembled. On first reading, the ILC thus adopted article 25(3) which stated:

The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.⁴²

³⁸ Draft art 21(2), Report of the ILC, 51st Session, *ILC Yearbook 1996*, Vol II(2), 60.

³⁹ *ILC Yearbook 1977*, Vol I, 247 (para 11).

⁴⁰ Commentary to draft art 25, para 15, Report of the ILC, 30th Session, *ILC Yearbook 1978*, Vol II(2), 94.

⁴¹ 16 December 1966, 999 *UNTS* 171.

⁴² Report of the ILC, 51st Session, *ILC Yearbook 1996*, Vol II(2), 61.

As the ILC stated in its 1978 report:

The time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable.⁴³

The notion of 'act' or 'complex delict' gave rise to fierce criticism by various governments and in the literature, whether viewed from the angle which distinguishes between obligations of conduct and obligations of result, in its relation to the principle of the exhaustion of local remedies, or with regard to the point of departure of the breach of the obligation.⁴⁴ Within the limited framework of this Chapter it is not possible to go into the details of all the criticisms. In summary, for the authors mentioned this was a confused, dangerous, and useless notion. Confused for the reason that it rested on a conception of the distinction between obligations of means and obligations of result which was both artificial and unpractical on the one hand; and on the other hand because it resulted in contradictory consequences between the creation of the obligation and the retroactive character of such creation. It was dangerous since situating the date of the arising of the wrongful act to the last act in the chain delayed to that moment the possibility of maintaining that there was an intertemporal breach of the law and this even in the hypotheses where a first result can no longer be obtained by means of an alternative solution! This theory was particularly pernicious for human rights which would have experienced a serious step backwards had it been maintained. The author of the breach could always violate his obligations provided that he compensated for them.

In the end this notion turned out to be of no use. It did not even have the function of explaining some inherent contradictions in the concept with respect to the rule of the exhaustion of local remedies as a substantive rule, since it was only a petition of principle. All the other situations that were given as examples can be explained in a more satisfactory way by using uncontroversial concepts, such as the composed or global delict, and simple, alternative and conjunctive obligations. Crawford's Second Report expressed his scepticism towards this concept.⁴⁵ In conclusion, following the debates on second reading,⁴⁶ the idea was abandoned, and the text finally adopted no longer contains reference to the controversial notion of the complex act.

Further reading

- L Boisson de Chazournes & V Gowlland-Debbas (eds), *The International System in Quest of Equity and Universality/Lordre juridique international, un système en quête d'équité et d'universalité, Liber amicorum Georges Abi Saab* (The Hague, Kluwer, 2001), 305
 E Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995)

⁴³ Commentary to draft art 25, para 17, Report of the ILC, 30th Session, *ILC Yearbook 1978*, Vol II(2), 95.

⁴⁴ See G Perrin, 'La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international', in *Festschrift für R Bindschedler* (Berne, Stämpfli, 1980), 271; J Salmon, 'Le fait étatique complexe: une notion contestable' (1982) 28 *AFDI* 709; E Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), 90.

⁴⁵ J Crawford, Second Report on State Responsibility, 1999, A/CN.4/498, paras 90 and 125.

⁴⁶ *ILC Yearbook 1999*, Vol I, 275.

- G Perrin, 'La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international', in *Festschrift für R. Bindschedler* (Berne, Stämpfli, 1980), 271
- J Pauwelyn, 'The concept of a "continuing violation" of an international obligation: Selected problems' (1995) 66 *BYIL* 415
- J Salmon, 'Les obligations quantitatives et l'illicéité', in *Liber amicorum Georges Abi Saab* (The Hague, Martinus Nijhoff, 2001), 305
- J Salmon, 'Le fait étatique complexe: une notion contestable' (1982) 28 *AFDI* 709
- E Wyler, 'Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite' (1991) 95 *RGDIP* 881