

Unlawful Act Having a Continuing Character In the Context of State Responsibility

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Received: 13/03/2022

Accepted: 07/12/2021

Abstract

Objective State responsibility is based on two legal aspects; first, committing an internationally unlawful act by a state contrary to an international obligation; and second, the unlawful act is attributable to the State concerned. Specific and concrete damages are not required for the allocation of international responsibility to a State. Given these elements, the present article entitled "Unlawful act having a continuing character in the context of State responsibility" deals with the legal issues concerning the question of a breach of an international obligation that is in a state of continuity since it began from the first place without coming to an end, using the legal analysis based on deduction. Characterization of a State act as being a continuing unlawful act is a very critical matter that has important legal implications and consequences on State responsibility. This work, however, is dealt with in Two Main Sections; while Section One discusses Unlawful Act as the Basis of Objective State Responsibility, Section Two is exclusively devoted to the discussion of the question of the Unlawful Act That Having a Continuing Character. In both sections, many legal issues were raised and dealt with. This work ends, however, with a conclusion that is not merely a summary of the results but also contains an analysis relating to the legal outcomes of characterizing an internationally unlawful act as having a continuing character, and the differences that such characterization makes if compared to the temporary unlawful act, or that having a continuing effect, without the act itself possessing the character of continuity.

Keywords: objective responsibility, internationally wrongful acts, international obligation, internationally continuing unlawful act, instantaneous unlawful act.

الفعل غير المشروع ذو الطابع الاستمراري في إطار

المسؤولية الدولية

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تاريخ القبول: ٢٠٢٢/٠٣/١٣

تاريخ الاستلام: ٢٠٢١/١٢/٠٧

الملخص

تقوم المسؤولية الدولية الموضوعية في القانون الدولي على عنصرين: إتيان الدولة لفعل غير مشروع مخالف للالتزام دولي، ونسبة الفعل غير المشروع دولياً للدولة المعنية. ويناقش هذا البحث الخرق المستمر للالتزام الدولي، في فترة زمنية يبدأ بها خرق الالتزام ويستمر حتى ينتهي، وذلك وفق تحليل قانوني قائم على منهج الاستنباط، وتناول الموضوع في محورين؛ الأول في الفعل غير المشروع بوصفه أساساً للمسؤولية الموضوعية، والثاني في الطبيعة الاستمرارية لذلك الفعل. وخلص إلى نتائج مهمة منها بيان نتائج توصيف الفعل بأنه ذو طابع استمراري، والفوارق التي يحدثها هذا التوصيف على المستوى القانوني إذا ما قورن بالفعل غير المشروع الوقي أو المستمرة نتائجه، دون أن يكون للفعل غير المشروع نفسه طابع الاستمرارية.

الكلمات المفتاحية: المسؤولية الموضوعية، الفعل غير المشروع دولياً، الالتزام الدولي، الفعل غير المشروع ذو الطابع الاستمراري، الفعل غير المشروع الوقي.

Introduction:

The system of State responsibility in international law differs from that of responsibility in municipal law in several aspects, including sources, persons, and the aim of approving the system of responsibility. However, when State responsibility comes at the heart of debate and discussion in this work, reference should be made to two major State responsibility theories concerning the legal bases of such responsibility. In the literature on State responsibility bases, two fundamental theories that dominated the field of international jurisprudence and judicial practice have provided are subjective responsibility and objective responsibility. Both theories on the bases of State responsibility arise from the question of whether the state responsibility can be based on fault “*Faute* or *Culpa*”⁽¹⁾ (subjective responsibility) or on the commission of an unlawful act (objective responsibility). Complexities, as well as difficulties concerning the application of subjective responsibility based on fault theory, provided the need for an alternative approach, namely objective responsibility that is based on the commission of an internationally unlawful act, which is our concern in this article, that is a very mechanical application of international law. It is completely different in its basis from that subjective responsibility, which is based on fault (*Culpa*). Accordingly, it is a strict one: merely a breach of an international obligation by a State is enough to make it responsible to the party suffering damage, irrespective of its will or of any good or bad faith, or whether the author acts within or outside the limits of its competence.

In the light of objective responsibility that is based on an *Internationally Unlawful act* regardless of its nature, a call should be made to the basic principle underlying the whole system of State responsibility nowadays, which is that “a breach of international law

(1) The term *culpa* or fault is mainly used to describe “types of blameworthiness based upon reasonable foreseeability, or foresight without desire of consequences” Brownlie Ian, *System of the Law of Nations: State Responsibility* (Clarendon Press, Oxford 1983), P45. There are three levels of blameworthiness: *Culpa Lata*, which represents gross neglect verging on the deliberate or reckless conduct; *Culpa Lavis*, which represents a fault that is less than the first; and finally, *Culpa levissima* (venial fault) is an instance of the last blame. In each instance of blameworthiness, the degree or severity of the fault depends on the author’s act itself. This basic notion of fault is widely practiced in international law.

(obligation) by a State entails its international responsibility”. This fundamental general principle has been recognized by International Law Commission (ILC)⁽¹⁾ and applied by international courts and tribunals throughout the history of State responsibility in international law. For instance, the Permanent Court of International Justice (PCIJ) in the *Chorzow Factory Case (1928)* strictly applied the said principle treating it as a very well recognized general principle of international law, stating that “*The Court observes that it is a principle of international law, and a general conception of law, that any breach of an engagement involves an obligation to make reparation.... reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself*”⁽²⁾.

Taking into account the internationally wrongful act as the only basis of objective State responsibility, it should be said that in order to characterize an unlawful act as such certain criteria have to be obtained; first, the act has to be attributed to a State; and second, the essence of the unlawful act has to be a breach of an international obligation valid for the State at the time, regardless of its origin or source. On this framework of principles concerning an internationally unlawful act, the argument of this article was based on subjecting an internationally unlawful act that has a continuing character to specific analysis. In this context, quite an extensive work has to be carried out on the nature of the unlawful act to distinguish the act that has a continuing character from another unlawful act lacking that character, which can be described as instantaneous. Nevertheless, many questions relating to the subject of this article has to be addressed and faced, including; the essence of the unlawful act, nature and source of the obligation breached; nature of rules violated, effects of the breach, and above all, the legal consequences of describing an act of a State as an unlawful act as having a continuing character. Such discussion, however, might contribute to the development of international law concerning State responsibility.

(1) Article 1 of ILC Draft on State responsibility (2001) “Every internationally unlawful act of a State entails the international responsibility of that State” the text of the article is available at www.legal.un.org.

(2) PCIJ Reports, *Chorzow Factory Case (1928)*, (*Germany, Poland*) *Merits (PCIJ Ser A(1928) No. 17*.

This study was conducted in accordance with a methodology that uses legal analysis based on the deduction, which involves consultation with many primary sources of international law. Given the scope and objectives of this article, it is organized into two main sections covering its subject. While section one discusses the notion of an unlawful act as the basis of objective responsibility regardless of its nature, section two focuses on the unlawful act that has a continuing character. This article ends with a conclusion containing the main findings in dealing with the subject of this article.

1. Unlawful Act is the Basis of Objective Responsibility

State responsibility based on a commission of an internationally unlawful act is a mechanical application of international law. It is completely different in its basis from subjective responsibility, which is based on fault or *Culpa*. Accordingly, it is a strict one: merely a breach of an international obligation by a State is enough to make it responsible to the party suffering damage, irrespective of its will or of any good or bad faith, or whether the author acts within or outside the limits of its competence ⁽¹⁾. Of the two theories of state responsibility, most practices of international law place more emphasis on objective State responsibility based on the commission of the unlawful act than on subjective one based on fault ⁽²⁾. The International Law Commission (ILC) in its work on State responsibility supports this approach stating that “*Every internationally wrongful act of a State entails the international responsibility of that State*” ⁽³⁾.

(1) Show M, International Law (Grotius Publications Ltd, Cambridge University Press, 8th ed (1998), P593. See also Brownlie, System of the Law of Nations, *Op Cit*, PP 38-39. For the proper meaning of the term (Unlawful Act) which should differ from other concepts or notions that are of major importance, such as (international Delinquency) and (Prejudicial Act) See the Individual Opinion of Judge Alvarez in Corfu Channel Case (1949), ICJ Reports (1949), P 45.

(2) Show M, International Law, *Op Cit*, P593. For more applications of the objective responsibility on the law of treaties and international law of human rights see Gonzalo S de Tagle, The Objective International Responsibility of states in the Inter-American Human Rights System, Mexican Law Review, 2015, pp119-121. Available at www.scilo.org.mx.

(3) Article 1 of the ILC Draft on State responsibility of 2001 (UN Docs, 2005), available at www.legal.un.org.

1.1 Nature and Source of Objective Responsibility

The establishment of State responsibility upon the breach of an international obligation (unlawful act) is widely accepted and supported by international practice, including jurisprudence and judicial decisions. For instance, Italian Judge Anzelotti, who was one of the most figures of this approach, defined State responsibility as “*only violation to an obligation imposed by international law is enough to establish State Liability*”⁽¹⁾.

In treaty law, probably the oldest provision concerning the establishment of State responsibility on the breach of an international obligation can be found in the VI Hague Convention of 1907, concerning the customs and laws of warfare. Article 3 of this convention states that “*The belligerent Party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces*”⁽²⁾.

The International Law Commission in its work on State responsibility formulated the articles on its conviction that the commission of an internationally wrongful act imputable to the author is the only condition to be met for the establishment of State responsibility. Thus, there are two essential elements that constitute an internationally wrongful act which is *per se* the basis of State responsibility⁽³⁾. These two elements are:

- 1) *Subjective element*, which constitutes misconduct that must be imputable to the State as a subject of international law; and
- 2) *Objective element*, which means that the state “has failed to fulfill an international obligation incumbent on it”⁽⁴⁾.

(1) Dawi, A, State Responsibility (HSC, 1984), p85.

(2) Roberts & Guelff, Documents on the Laws of War (Clarendon Press, Oxford 1928), P46.

(3) See on this point: UN, Yearbook of International Law Commission (YBILC) (1970), Vol II, Doc. A/CN.4/Ser.A11970/Add.1 (para.1) (UN, NY, 1970) P187.

(4) Article 2 of the ILC (2001) entitled 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*

These two elements are well recognized by international jurisprudence and judicial practice as the bases for an unlawful act that itself is the basis of international responsibility. Evidence can be found in the works of many jurists such as Anzilotti, Levin, and others ⁽¹⁾. Anzilotti, for example, pointed out that:

“Responsibility arises from the wrongful of the right of another and generates to make reparation in so far as it is attributable to a subject which acts, that is, imputable to it. The word imputability being taken in the general meaning of a link between the wrongful act or omission and its author” ⁽²⁾.

Levin also noted that: *“For international responsibility to exist, two elements must be present an objective element, the violation of a norm of international law which causes injury; and a subjective element, the imputation of that violation to a State or to another subject of international law”* ⁽³⁾.

The two necessary said elements of the unlawful act were also tested by the PCIJ on the occasion of the *1938 Phosphate in Morocco Case* ⁽⁴⁾. In the words of the Court, State responsibility can exist if *“an act is being attributable to the State and described as contrary to the treaty right of another State”* ⁽⁵⁾.

1.2 Examining the Two Required Elements

For a complete understanding of objective responsibility based on the breach of an international obligation, it is instructive to examine the following two significant elements individually.

the State”. ILC Draft on State Responsibility (2001) available at www.legal.un.org

- (1) Such as Amerasinghe and Jimenez de Arechaga. For their opinions see YBILC (2001), PP187-188.
- (2) See the original text of this quotation in Italian and its translation into English by the UN at the YBILC, *Ibid*, P187.
- (3) See the original text of this quotation in French and its translation into English by the UN at the YBILC, *Ibid*.
- (4) PCIJ Reports (1938), *Phosphates in Morocco Case* (Italy v. France) Series A/B, Nos 70-80, No.47.
- (5) *Ibid*. P 28.

1.2.1 Objective Element (*An Internationally Unlawful Act*)

The unlawfulness of the act should be judged according to international law regardless of its lawfulness in the municipal law of a State. This characterization of an act of State as *internationally wrongful* is presented in Article 3 entitled *Characterization of an act of a State as internationally wrongful* which stated that “*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same acts as lawful by internal law*”⁽¹⁾.

On this basis, it is sufficient to say in order to describe an international act as unlawful, it should be committed contrary to an international obligation regardless of the origin or source of such obligation, whether it is a treaty, custom, or general principle of law as an example. It is also to note that such international obligation in question should be in force for the State bound by it at the time the act occurs⁽²⁾.

Article 12 of the ILC Draft concerning the breach of an international obligation upheld that the origin of the international obligation breached is irrelevant. No matter whether the origin is based on any sources provided in Article 38 of the ICJ statute⁽³⁾ stated that:

“*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*”⁽⁴⁾.

International Judicial Practice evidenced the rule stated in Article 12 on many occasions such as in the *Rainbow Warrior Case* (1990)

(1) ILC Draft on State Responsibility of 2001 available at www.legal.un.org.

(2) Article 13 of the ILC Draft of 2001 entitled *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”.
Ibid.

(3) See Article 38 of the ICJ statute at www.legal.un.org.

(4) Article 12 of the ILC Draft (*Existence of a breach of an international obligation*)
OP Cit.

between France and New Zealand ⁽¹⁾. The *Rainbow warrior* vessel, which belongs to the Green Peace Movement was destroyed and sunk in the New Zealand harbor of Auckland in July 1985 by the French agents guarding the French nuclear testing center in the Pacific ⁽²⁾. Such an incident resulted in the death of one member of the crew who held Dutch nationality. Two members of the French security, Major Mafart, and Captain Prieur were arrested in New Zealand, found guilty of having committed a crime, and sentenced by the court of New Zealand to ten years imprisonment. While acknowledging responsibility, The French Government requested the immediate release of the two prisoners. However, New Zealand rejected the demand. The UN Secretary-General at the time was asked to mediate by the two disputed parties, who agreed in advance that his ruling will be binding ⁽³⁾. In his ruling in 1986 ⁽⁴⁾, the Secretary-General of the UN provided, *inter alia*, for French compensation to New Zealand, and for the transfer of the two French prisoners to the French military base in the Pacific for three years of custody ⁽⁵⁾. The two governments concerned concluded an agreement in the form of an exchange of letters on July, the 9th of 1986 for the implementation of the ruling ⁽⁶⁾. Under the terms of the first agreement, the two French agents were “to be transferred to a French military facility on the Island of Hao for a period not less than three years. They will be prohibited from leaving the Island for any reason, except with the mutual consent of the two governments” ⁽⁷⁾. Their actual transfer took place on 23 July 1986. However, due to certain circumstances, they were sent back to France in May 1988 without

(1) International Law Reports (ILR), (Grotius Publications Ltd, Cambridge 1991) Vol 82, P500.

(2) *Ibid.*

(3) ILR (1987), Vol 74, P 264.

(4) See the text of the ruling of the UN Secretary-General, *Ibid.*, P256.

(5) *Ibid.*, P272.

(6) Such agreement includes: (a) A letter from the ambassador of New Zealand in Paris to the Prime Minister of France, 9 July 1986 (Reparations and Release of Marfat and Prieur), (b) A letter from the ambassador of New Zealand in Paris to the Prime Minister of France, 9 July 1986 (Trade Issue), and (c) A letter from the ambassador of New Zealand in Paris to the Prime Minister of France, 9 July 1986 (Arbitration agreement), ILR (1987) Vol 74, PP 274-277.

(7) *Ibid.*, P 275.

completing the term nor with the consent of New Zealand. Accordingly, under the terms of the third agreement (arbitration clause) between the two countries, the matter was taken to Arbitration Tribunal. New Zealand argued that France breached the treaty obligation, whereas France argued that only the law of state responsibility is relevant and that the circumstances of force majeure and distress excluded her from being responsible. The Arbitration Tribunal decided that:

“The legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for a breach, are subjects that belong to the customary law of state responsibility. The reason is that the general principles of international law concerning State responsibility are usually applicable in the case of treaty obligation since in the international law field there is no distinction between contractual and torturous responsibility, so any violation by a State of any obligation, of whatever origin gives rise to State responsibility and consequently, to the duty of reoperation”⁽¹⁾.

Based on the decision of this arbitration tribunal, France was made liable. Taken together, this decision of the Arbitration Tribunal and the ILC Draft, it is clear that a breach of an international obligation exists;

1. When an act of a State is not in conformity with what is required of it by that obligation⁽²⁾,
2. Whatever the source of that international obligation⁽³⁾; and Whatever the form of the breach whether it is a positive or negative action(omission)⁽⁴⁾.

In this context, it is useful to recall that the ICJ in the *Corfu Channel Case* of 1949 explicitly affirmed state responsibility for the wrongful act in the form of omission. In its ruling, the ICJ stated that “*The*

(1) The French-New Zealand Arbitration Tribunal, 30 April of 1990 (ILR, Vol 82 1990), P501.

(2) Article 12 of the ILC Draft on State responsibility, *Op Cit*.

(3) Article 12 of the ILC Draft entitled *Existence of a breach of an international obligation* stated that: 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, *Ibid*.

4) Article 2 of the ILC Draft, *Ibid*

obligations incumbent upon Albanian authorities consisted of notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warship of the imminent danger to which minefield exposed them” ⁽¹⁾. The ICJ also noted that Albania: *“Neither notified the existence of the minefield nor warned the British warships of the danger they were approaching...these grave omissions involve the international responsibility of Albania”* ⁽²⁾.

3. Whether that obligation which has been breached requires the adoption of a particular course of conduct, or requiring the achievement of a specific result, or to prevent a given event, and above all, and;
4. That obligation should be valid in time and force for a State. obligations not yet in force have no legal effect ⁽³⁾.

The concept of State responsibility in international law is completely different from its conception in municipal law in many aspects. In the latter, for instance, damage or loss suffered by the injured party is an adequate element to bring up liability even in the absence of fault or unlawful act. By contrast, in international law, responsibility is based either on fault or the commission of an unlawful act, and the damage or injuries as a consequence of such an act plays an important role in determining the amount of reparation to be made, but definitely not an element for giving rise to State Responsibility ⁽⁴⁾. Thus, a State is responsible without having caused any damage as long as a breach of an international obligation exists. The breach itself is considered to be injury caused. This concept was based on the principle that: *“Every violation of a right is an injury”*. The extent of the material injury caused may be a decisive factor in determining the amount of the

(1) ICJ Reports (1949) *Corfu Channel Case, Op Cit*, P22.

(2) *Ibid*, PP22-23.

3) Article 13 of the ILC Draft, *Ibid*.

(4) Yearbook of the International Law Commission (1970), Vol II, *Op Cit*, PP 194-195.

reparation to be made, but it is of no assistance in establishing whether a subjective right of another State has been violated⁽¹⁾.

Not only is the concept of responsibility in international law and municipal law different, but the function of responsibility in the two legal systems is also at variance. In municipal law, for example, a distinction has been made between contractual and tortious liability, while international law makes no reference to such differentiation. This is so because the function of responsibility in the former system is oriented towards the allocation of damage, while the function of responsibility in the latter system is oriented towards “*securing and enforcing the fulfillment of international obligations, so re-establish the balance in international relations that was disturbed by the breach of an international obligation*”⁽²⁾. Moreover, the ILC draft in article 3, did not list resulting damage as one of the elements to be required for an unlawful act⁽³⁾.

Obviously is only the violation itself of an international obligation by the State which is required for establishing State responsibility. The ILC clearly defined the essential elements of State responsibility, namely conduct constituting any action or omission is attributable to the State under international law⁽⁴⁾. However, this violation of international law that is characterized as an unlawful act regardless of its nature must be formally imputable to the agent.

1.2.2 Subjective Element (*Imputability*)

According to the objective State responsibility, a state can be responsible only for the wrongful act imputable to it as a subject of international law. This includes acts that occur through its principal and non-principal organs, officials, and organs. Chapter II entitled *Attribution of Conduct To A State* of the ILC Draft covered the question of imputability⁽⁵⁾, which can be briefly reviewed as follows: Attribution to the State of the conduct of its organs (Art.4); the question of the

(1) *Ibid*, P195.

(2) Graefrath B, *Responsibility and Damages Caused: Relationship between Responsibility and Damages, Recueil des Cours* (1984) Vol II, No.185, P9.

(3) Article 3 of the ILC Draft, *Op Cit*.

(4) Articles 2 and 3 of the ILC Draft, *Ibid*.

(5) Articles (4-11) at the ILC Draft, *Ibid*.

irrelevance of the position of the organ in the organization of the State; attribution to the State of the conduct of other entities empowered to exercise elements of governmental authorities (Art.5); attribution to the State of the conduct of persons acting in fact on behalf of the State (Art.8); the question of attribution to the State of the conduct of the organs placed at its disposal by another State (Art.6); attribution to the State of the conduct of the organs acting outside their competence or contrary to instructions concerning their activity(Art.7) and finally Article 11 informs on the conduct of acknowledged and adopted by a State as its own.

Generally speaking, what is meant by stipulating the *imputability* is no more than a link between the wrongful act and the author, which must be a State, but physically a state is incapable of conduct; in fact, States “*can act only by and through their agents and representatives*”⁽¹⁾

However, while discussing the question of imputability, it seems to be useful to clarify some points in this regard. **First**, it is necessary to remove any ambiguity between *imputability* and *causality* even though both terms present the same function which is the link or connection between the action and the author. Anzilotti, in his work on the topic, explained that: “*Legal imputation is thus clearly distinguishable from the causal relationship; an act is legally deemed to be that of a subject of law not because it has been committed or willed by that subject in the physiological or phycological sense of those words, but because it is attributed to him by a rule of law*”⁽²⁾. Thus, it is clear that there is no activity of that state which can be called its own. From this simple fact, “*it is sometimes possible to speak of natural causality, in reference to the relationship between the action of an individual and the result of that action, but not to the relationship between the person of the State and the action of an individual*”⁽³⁾. **Second**, the imputation of an individual act to the State as an internationally wrongful act should only

(1) Permanent Court of International Justice (PCIJ) Reports (1923), Series B, No.6, (advisory Opinion No.6 given by the Court on 10 September 1923, Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland) P3, Para 22.

(2) YBILC (1970) Vol II, *Op Cit*, P 190. [UN General Secretariat translation].

(3) *Ibid*.

be in accordance to international law ⁽¹⁾. Such characterization as such “is not affected by the catheterization of the act as unlawful by internal law” ⁽²⁾.

The main assumptions of the subjective element of the objective theory of State responsibility permit the imputability to the agent on the basis that an unlawful act was committed without the need to ascertain intention.

2. Unlawful Act Having a Continuing Character

Under this title, the notion of the internationally unlawful act having a continuing character as well as the judicial practice will be under consideration.

2.1 The Notion of a Continuous Wrongful Act

There are two types of unlawful acts regarding the time of its commission or omission as the case may be. One is described as “*instantaneous action*” which happens in a specific moment such as killing or shooting down a civilian aircraft. The other is classified as “*an act having a continuing character*” that extends for a period of time. An example of this is the unlawful occupation of part of the territory of another country, unlawful detention of foreign officials, or the maintenance of the effect of law incompatible with treaty obligations of the State ⁽³⁾. This distinction between the two types of the unlawful acts is very well emphasized in Article 14 of the ILC Draft entitled “*Extension in time of the breach of an international obligation*”, which stated that:

- “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.*
2. *The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which*

1) *Ibid.*

(2) Article 3 of the ILC Draft (2001), *Op Cit.*

(3) The notion of a continuing wrongful act is common to many municipal legal systems. In municipal criminal law systems, as an example, the conception of crimes having a continuing character exists. This act is usually called *delit continuu* such as illegal possession of weapons, and illegal occupying of others' property.

the act continues and remains not in conformity with the international obligation.

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”* ⁽¹⁾.

This Article made a distinction between *breaches not extending in time* and *continuing wrongful acts* in its paragraphs (1) and (2) respectively. In each of these cases, however, the said article “takes into account the question of the continuance in force of the obligation breached” ⁽²⁾.

Defining an internationally unlawful act having a *continuing character* should be done “*in relation to the breach of an international obligation on one hand and to the time duration of such breach which extends over the entire period during which the act continues and remains not in conformity with the international obligation*” ⁽³⁾. Article 13 entitled *international obligation in force for a State* should not be isolated from this discussion, since declared that the obligation breached should be in force at the time the act occurs: “*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*”. Therefore, there are two essential points are to be said in this regard: **First**, the breach of an international obligation by a continuing act occurs at the moment when the action begins; **Second**, the time of the commission of the unlawful act is “in no way limited to the moment at which the action begins, but extends over the whole period during which the action takes place and continues to be contrary to the requirements of international obligation” ⁽⁴⁾.

(1) Article 14 of the ILC Draft (2001) “*Responsibility of States for Internationally Wrongful Acts*” *Op Cit*.

(2) YBILC (commentary on Article 14). Available at www.legal.un.org. P59.

(3) *Ibid*.

(4) *Ibid*.

It is important to note that in order to describe a State's unlawful act as *having a continuing character*, it should continue "to exist as such, and not merely in its effects and consequences" ⁽¹⁾. This means that differentiation has to be clear between the unlawful act that *has a continuing character* on one hand, and the act that has a *continuing effect* on the other. While in the former, the breach of obligation extends over a period of time, in the latter, the breach of obligation happens instantaneously, but only its effects or consequences extend over time.

This point has been explained by the ILC stating that "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 that 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*" ⁽²⁾.

Therefore, the extension of the effects or consequences of an act having a continuing character does not mean that such an act is continuous. In many cases, the unlawful act that is described as continuous can cease or come to an end, but its effects or consequences may be extended or lasted for a long time. For example, the impairment or disability of a person that arises from an earlier unlawful act of torture may continue even though the act of torture itself has ceased. Such extension of effects or consequences might be a question of great relevance for reparation and compensation, but definitely "They do not, however, entail that the breach itself is a continuing one" ⁽³⁾.

The Arbitral Tribunal of the *Rainbow Warrior Case (1990)* between France and New Zealand, referred to such distinction between *instantaneous* and *continuous* wrongful acts, then comes to an important conclusion containing the implication of such distinction declaring that:

(1) YBILC (1978), Vol II, Part II, Doc. A/CN.4/Ser.A/1978/Add.1 (Part II) P90.

(2) YBILC (2001), ILC Commentary on Article 14, P60

3 *Ibid.*

“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 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.”⁽¹⁾

Such distinction between *continuing* and *instantaneous* internationally unlawful acts is of great importance as it has a great significant impact on many legal issues such as the amount of compensation, jurisdiction of the courts, and the scope of international liability. **First**, Regarding the question of the amount of compensation, the time period of the state of illegality due to the continuing wrongful act will have a decisive impact on the estimation of the amount of compensation for damage arising from the continuing illegality of the act from its beginning to its end. In this regard, and to the distinction between instantaneous and continuing wrongful acts, a point which has been clearly emphasized in the decision of the *Rainbow Warrior Arbitration Case*, which states that: “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”⁽²⁾. **Second**, in respect of the issue of jurisdiction, the notion of continuing wrongful acts has also been applied by international courts, tribunals, and legal commissions for establishing their jurisdiction in many cases. It has been referred to frequently in relation to questions of jurisdiction, in particular in situations in which the conduct alleged to constitute an internationally wrongful act occurs before the entry into force of the

(1) Reports of International Arbitral Awards: *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States*, *Op Cit*, PP 263-64. Available at the UN Docs, www.legal.un.org.

(2) *Rainbow Warrior Case* (New Zealand/France), Reports of International Arbitral Awards, *Op Cit*, P 263-64.

relevant obligation. This is so as the ILC put it whitely “because the jurisdiction of the judicial body may be limited to events occurring after the respondent State became a party to the relevant Treaty or Protocol and accepted the right of individual petition” ⁽¹⁾. An application of this can be found in the *Case of Papamichalopoulos and Others v. Greece* before the ECHR concerning a seizure of property not involving formal expropriation that occurred years ago (since 1967) before Greece recognized the Court’s competence. The European Court of Human Rights put it clear 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” ⁽²⁾. Another application can be also found in the *NAFTA Case of Mondev International Ltd. V USA*, ⁽³⁾. The Tribunal referred to Article 14 of the 2001 ILC Draft on State Responsibility in dealing with the claimant’s argument that conduct before the entry into force of NAFTA had violated of the international minimum standard, and would therefore “have violated the substantive standards of protection contained in Article 1105 NAFTA if NAFTA had been in force at the time. As a result, the Claimant argued, there was a continuing situation such that, when NAFTA did enter into force, the United States was under an obligation to remedy the situation, and its failure to do so had breached Article 1105”. In dealing with those arguments, the Tribunal made express reference to Article 14(1) of the Articles, noting that:

“Both parties accepted that the dispute as such arose before NAFTA’s entry into force and that NAFTA is not retrospective in effect.

(1) ILC comments on Article 14 of its Draft Articles on State responsibility (2001).

(2) European Court of Human Rights, *Case of Papamichalopoulos and Others v. Greece*, (Application no. 14556/89) (Application no. 14556/89) Judgement of 24 June 1993, pp11-15.

(3) The Case of *Mondev International Ltd. v United States of America* (ICSID Additional Facility Case No ARB(AF)/99/2), Award of 11 October 2002, British Institute of International and Comparative Law, *The Impact of the ILC,s Articles on Responsibility of States for the Internationally wrongful Acts*, 2022, available at www.biiicl.org. See also Chad D. Hansen, *Mondev International Ltd. v United States of America: A Case Study of the Potential Risks of NAFTA, s Ever-Expanding Arbitration Provision*, *North Carolina Journal of International Law*, Vol 29, No.2, 2003, P351.

They also accepted that in certain circumstances conduct committed before the entry into force of a treaty might continue in effect after that date, with the result that the treaty could provide a basis for determining the wrongfulness of the continuing conduct”⁽¹⁾. As the two parties disagreed, over whether and how the concept of a continuing wrongful act applied to the circumstances of this case, the Tribunal held that “in whatever way the claimant’s other claim of expropriation under Article 1110 NAFTA was framed, the conduct in question had been completed by the relevant date when NAFTA entered into force”⁽²⁾. Then the Tribunal accordingly concluded that “there was no continuing wrongful act in breach (or potentially in breach) of Article 1110 at the date NAFTA entered into force... the conduct in question had been completed before the relevant date, and therefore could not amount to a breach of the applicable standards contained in NAFTA”⁽³⁾. **Third**, concerning the question relating to the scope of state responsibility, the problem of identifying when a wrongful act begins and how long it continues arises frequently and “has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30 of the ILC Draft on State Responsibility”⁽⁴⁾.

2.2 International Practice

The international judicial practice recognized that a breach of an international obligation could be existed by acts having a continuing character. It has been repeatedly referred to by ICJ and by other international tribunals. Three notable cases will be dealt with here to illustrate judicial practice regarding the concept.

2.2.1 Namibia Case (1971)⁽⁵⁾

The Security Council of the UN had resolved that South Africa’s mandate over South-west Africa (Namibia) was terminated, but this had

(1) *The Case of Mondev International Ltd. v United States of America*, *Op Cit*, P117.

(2) *Ibid*.

(3) *Ibid*.

(4) ILC Comments on Article 14 of its Draft on State Responsibility, *Op Cit*, P59.

(5) ICJ Reports (1971), *Advisory Opinion on the Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Namibia Case)*, P1.

been ignored by South Africa. In 1970 the Security Council issued resolution No.276 which considered that the continued presence of South Africa in Namibia was illegal ⁽¹⁾. The UN, therefore, sought an advisory opinion from the ICJ, asking what were the legal consequences for the status of the continued presence of South Africa in Namibia notwithstanding resolution No.276 of 1970. The Court held that South Africa was under an obligation to withdraw its administration from Namibia. In deciding that the presence of South Africa over Namibia *constituted an unlawful act having a continuing character* the Court declared that:

“...South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the territory of Namibia. By maintaining the present illegal situation, and occupying the territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the territory does not release it from its obligations under international law towards other States in respect of the exercise of its powers in relation to this territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States” ⁽²⁾.

The Case of Namibia clearly illustrated that a violation of a State from the time of its occurrence, if it is remained unchecked, constitutes an unlawful act having a continuing character. Such an act is enough for establishing responsibility under international law.

(1) See the UNSC resolution No. 276 of 1970 (the situation in Namibia) in Djonovich, United Nations Resolutions, Series II, Resolutions and Decisions Adopted by the Security Council (Oceana Publications INC/ NY, 1990), Vol VII (1968-1970) PP 49-50.

(2) ICJ Reports (1971), *Namibia Case, Op Cit*, P42.

2.2.2 The Hostages Case (1979)⁽¹⁾

The ICJ in Hostages Case (1979) *Case Concerning US Diplomatic and Consular Staff in Tehran*, expressed its opinion on the nature of the unlawful act of detention of the US diplomatic and consular staff by the protested students to be a continuing breach of international obligations imposed on Iran by the Vienna Conventions of 1961 and 1963 concerning Diplomatic and Consular Relations respectively. The continuing unlawful act began from the moment of the occupation of the American embassy in Tehran on 4 November 1979 and continued for more than six months. The International Court of Justice, based on a detailed examination of the case, found that:

“Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, and Consular rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States” ⁽²⁾.

The Hostages Case further indicated that a violation stands for as long as it takes to receive redress. This means that a State is responsible for its continuing unlawful acts as long as they last.

2.2.3 Rainbow Warrior Case (1990)⁽³⁾

In this case between France and New Zealand, the arbitration tribunal concerning this case takes into account the importance of the distinction made by the ILC between the unlawful act that has a continuing character, and that has been completed⁴. The arbitration involved the failure of France to detain two agents on the French Pacific

(1) ICJ Reports (1980) *Advisory Opinion on the Case Concerning US Diplomatic and Consular Staff in Tehran (Hostages Case)* P1.

(2) *Ibid*, P42.

(3) For the facts of this case, See Chapter One of this work. And for the full text of the arbitration Decision in REPORTS OF INTERNATIONAL ARBITRAL AWARDS RECUEIL DES SENTENCES ARBITRALES: *Case concerning the 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*, Vol XX, PP.215. Available at the UN Docs, www.legal.un.org.

(4) The Articles of the ILC Draft mentioned in the Arbitral Decision are now amalgamated in Article 4 of the ILC Draft of 2001.

Island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal declared that:

*“The International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach .from the breach having a continuing character or extending in time. In the latter case, "the time of the commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation ⁽¹⁾.*

Conclusion:

This article was primarily a study of the internationally unlawful act that has a continuing character in the context of State responsibility. The essential findings of this work are as follows:

1. There are two contending fundamental theories regarding the basis of State responsibility as to whether such responsibility for unlawful acts is strict (objective) or whether it is necessary to show some fault or intention on the part of the State concerned (subjective). The relevant case law and jurisprudence are divided on this question, although the majority tends towards objective responsibility. Thus, for State responsibility to exist, two elements must be obtained; an objective element (breach of a valid international obligation by the State concerned); and a subjective element (imputation of an unlawful act to the State).
2. There are two types of unlawful acts relating to the time of its commission or omission as the case may be. One is described as an “*instantaneous action*” which happens in a specific moment. The other is classified as “*an act having a continuing character*” which

(1) Reports of International Arbitral Awards: Case concerning the 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, Vol XX pp. (UN, 2006) P 263. Available at <https://legal.un.org>.

extends for a period of time. Whatever the nature of the unlawful act, it constitutes a basis of state responsibility. However, the Characterization of an act of a State as internationally wrongful is governed only by international law regardless of its lawfulness in municipal law.

3. The distinction between continuing and instantaneous internationally unlawful acts has a great significant impact on many legal issues such as the amount of compensation, establishing the jurisdiction of the courts, and the scope of international liability.
4. Defining an internationally unlawful act having *a continuing character* should be done in relation to the international obligation breached that it is in force at the time the act occurs and to the time duration of such breach, which extends over the entire period during which the act continues and remains not in conformity with the international obligation.
5. In order to describe a State's unlawful act as *having a continuing character*, it should continue "*to exist as such, and not merely in its effects and consequences*". Therefore, there is a distinction between an unlawful act as having *a continuing character* on one hand, and an act that has a *continuing effect* on the other. While in the former, the breach of obligation extends over a period of time, in the latter, the breach of obligation happens instantaneously, but only its effects or consequences extend over time.
6. The consequences arising from the establishment of an unlawful act having a continuing character committed by a State are: first; the State concerned will be under an obligation to cease that act, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require. ⁽¹⁾. Cessation addresses the existing state

(1) ILC commentary on Article 30 of its draft (2001), *OP Cit*, p. 216; See also James Crawford, *State Responsibility: General Part* (Cambridge University Press, 2013), p. 461. Reparation, however, which, shall take the form of restitution, compensation, and satisfaction, either singly or in combination is to "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*". See the PCIJ Reports (Chorzow Factory Case), Series A, No. 17, 1928, pp. 47–8. See also ICJ

of affairs involving the continuing act, while assurances and guarantees aim to prevent the repetition of the breach and thus are prospective⁽¹⁾. It should be noted here that Cessation is required, not as a means of reparation but as an independent obligation, whenever the obligation in question continues to exist. In addition, cessation “*most frequently arises from the violation of obligations requiring the achievement of a certain result with the State’s own choosing*”⁽²⁾. Cessation is conditional upon two requirements; (1) the wrongful act must be continuing, and (2) the obligation breached must be in force. While the first condition is explicitly provided for in the ILC Draft 2001, the second one might be of particular relevance to a case where, for example, a treaty is terminated as a result of its material breach. In the latter case, the legal consequence of the breach is the treaty termination, and thus there is no need for cessation of the wrongful act⁽³⁾.

With regard to the duty of cessation, the ILC had come up with a significant conclusion that is clear enough for understanding the issue. In this regard, the ICL clearly said that “*such a remedy (together with non-repetition) had equal status with reparation. Treating the two together was thought conducive to a more balanced regime, more attentive to the real concerns of governments in most disputes about responsibility, where reparation is usually not the only issue, and may not be an issue at all*”.⁽⁴⁾

In order for a cessation to arise in litigation, most criteria have to be obtained; First, the wrongful act had to have a *continuing character*.

Reports 1980, (the Hostages Case), *Op Cit*, pp. 3, 45; Articles 31, 32, and 34 of the ILC draft (2001) *Op Cit*.

- (1) On general principles of cessation and reparation see James Crawford, State Responsibility, Max Planck Encyclopedia of Public International law, 2006, p5. Available at www.SpaceLaw-univ.ac.at.
- (2) Karal Zemanck, Responsibility of states, Encyclopedia of Public International Law, Vol IV, 2000, p225.
- (3) Article 60 of the 1969 Vienna Convention on the Law of Treaties (Termination or suspension of the operation of a treaty as a consequence of its breach) is available at www.legal.un.org.
- (4) James Crawford, Articles on Responsibility of States for Internationally Wrongful Acts, UNAVLIL, 2012, P5.

Second, the violated rule must still be in force at the date the order is given⁽¹⁾.

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