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**Seventh report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (continued)**

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# STATE RESPONSIBILITY

(Agenda item 2)

DOCUMENT A/CN.4/307 and Add.1 and 2\*

Seventh report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

*The internationally wrongful act of the State, source of international responsibility (continued\*\*)*

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## ABBREVIATIONS

GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
<i>I.C.J. Pleadings</i>	<i>I.C.J. Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	<i>I.C.J. Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
P.C.I.J.	Permanent Court of International Justice
<i>P.C.I.J., Series A</i>	<i>P.C.I.J., Collection of Judgments</i>
<i>P.C.I.J., Series A/B</i>	<i>P.C.I.J., Judgments, Orders and Advisory Opinions</i>
<i>P.C.I.J., Series C</i>	<i>P.C.I.J., Pleadings, Oral Statements and Documents</i>

\* Incorporating document A/CN.4/307/Add.2/Corr.1.

\*\* The present report is a continuation of the sixth report on State responsibility, submitted by the Special Rapporteur to the Commission at its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3).

## EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

## CHAPTER III

*Breach of an international obligation (continued<sup>1</sup>)*

## 8. BREACH OF AN OBLIGATION TO PREVENT AN EVENT

1. In order to complete the study of the possible effect of the distinctive characteristics of the various kinds of international obligations on the determination of the conditions of their breach, one last aspect must be taken into consideration. In the multi-form framework of the obligations placed on States by general international law or treaties, it is easy to distinguish a well-characterized category, namely, that of obligations whose specific object is to prevent the occurrence of certain events which might unduly harm foreign States or their representatives and nationals. It is then a question of deciding what conditions must be present for there to be a breach of an obligation in this category.

2. In order to answer the question thus raised, it is necessary to bear in mind the terms of the hypothesis to which we are referring. The event in question may, in certain cases, have its direct and natural cause in an action of State organs. That is the case, for example, with regard to the destruction of a hospital or a protected cultural asset, due to a lack of precaution during the bombardment of other objectives in enemy territory. The cases most often referred to are, however, those where the natural cause of the event is not a State action but the event is nevertheless caused by the failure of State organs to prevent it. An attack by private persons on a foreign embassy or consulate, the massacre of foreigners by a hostile mob, and so on, are classic examples of this. It goes without saying that the preventive action required of the State consists essentially of surveillance and vigilance with a view to preventing this event, in so far as it is materially possible.

3. It thus seems clear that, in order to be able to establish the breach of an obligation in this category, two conditions are required: the event to be prevented must have occurred, and it must have been made possible by a lack of vigilance on the part of State organs. Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event has not actually occurred, and the same is true where the feared event has occurred

but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach.

4. The hypothesis which we are now considering specifically has already been mentioned in the second<sup>2</sup> and third<sup>3</sup> reports of the Special Rapporteur on State responsibility. It was also considered by the Commission itself at its twenty-second<sup>4</sup> and twenty-fifth sessions.<sup>5</sup> The opportunity arose during the definition of the constituent elements of an internationally wrongful act in general. After having established that (a) conduct attributable to the State under international law and (b) the breach by that conduct of an international obligation incumbent on the State are the two essential constituent elements of an internationally wrongful act, the Commission considered whether a third distinct constituent element should not sometimes be added to the two others, namely, the occurrence, as a result of the State's conduct, of an injurious event or, more simply, "damage". In that connexion, the Commission emphasized the difference between two different types of situation. It did not fail to point out that, in certain cases,<sup>6</sup> "the conduct as such is itself sufficient to constitute a breach of an international obligation incumbent upon the State". However, the Commission added that in other cases "the situation is different". To give an example, it recalled that:

For a State to be said to have failed in its duty to protect the premises of a foreign embassy against injurious acts of third parties, it is not sufficient to show that the State was negligent in not providing adequate police protection; some injurious event must have also taken place as a result of that negligence, such as damage by hostile demonstrators or an attack on the embassy premises by private individuals.

<sup>2</sup> *Yearbook ... 1970*, vol. II, p. 194, document A/CN.4/233, paras. 50-52.

<sup>3</sup> *Yearbook ... 1971*, vol. II (Part One), pp. 222-223, document A/CN.4/246 and Add.1-3, paras. 70-72.

<sup>4</sup> *Yearbook ... 1970*, vol. II, p. 308, document A/8010/Rev.1, para. 80.

<sup>5</sup> *Yearbook ... 1973*, vol. II, pp. 182-183, document A/9010/Rev. 1, chap. II, sect B, draft articles on State responsibility, article 3, para. (11) of the commentary.

<sup>6</sup> "... for example, failure by the State's legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact, or refusal by a coastal State to permit innocent passage through its territorial waters in peacetime to ships of another State ..." (*Ibid.*)

<sup>1</sup> For the beginning of chapter III (sections 1-7), see *Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1-2, and *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1-3.

In a case of that kind, and, the Commission added: "in general in cases where the purpose of the international obligation is precisely to prevent the occurrence of certain injurious events":

Negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an *external event*,\* one of those events which the State should specifically have endeavoured to prevent.

The Commission then sought to eliminate any possible ambiguity regarding the relationship of such an event to the constituent elements of an internationally wrongful act by emphasizing that:

Even if, in some cases, it has to be concluded that there is no internationally wrongful act so long as a particular external event has not occurred, that does not imply that the two conditions for the existence of an internationally wrongful act—conduct attributable to the State and breach by that conduct of an international obligation—are no longer sufficient by themselves. If there is no internationally wrongful act so long as the event has not occurred, the reason is that until then the State's conduct has not resulted in the breach of an international obligation. It is really the objective element of the internationally wrongful act that is missing. In other words, *the occurrence of an external event is a condition for the breach of an international obligation*,\* and not a new element which has to be combined with the breach for there to be a wrongful act.<sup>7</sup>

The Commission then decided therefore to deal with the question as we are now doing—within the framework of problems relating to the objective element of the internationally wrongful act.

5. The Special Rapporteur and the Commission reverted to the question when examining more particularly the possibility of considering the conduct of private persons as an act of the State. On that occasion, the Commission stated that, if it was true—and it subsequently verified that such a conclusion was justified—that injurious conduct on the part of private persons is not as such attributable to that State, it must be concluded that such conduct constitutes only an *event external* to the act of the State.

This does not mean that such an event would not affect the determination of the State's responsibility. On the contrary, ... it could be a condition for the existence of such responsibility by acting from outside as a catalyst for the wrongfulness of the conduct of the State organs in the case under consideration. For example, if the international obligation of the State consists of seeing to it that foreign States or their nationals are not attacked by private persons, a breach of that obligation occurs only if an attack is actually committed. But it would not, in any case, constitute a condition for attributing to the State the conduct of its organs; there would be no doubt about such attribution even without the external event. What would depend on the external event in question would be the possibility of considering the act of the

State, in the case in point, as constituting a completed breach of an international obligation, and hence as being a source of international responsibility.<sup>8</sup>

6. Having reviewed these precedents regarding the positions already indirectly adopted by the Commission, the views expressed by Governments on this subject will now be considered.

7. None of the points in the request for information addressed to States by the Preparatory Committee of the Conference for the Codification of International Law, held at The Hague in 1930, asked Governments directly and explicitly to state whether, in their opinion, international responsibility could be placed on the State for the breach of an obligation to prevent a given event, so long as that event had not occurred. Nevertheless, the Committee did not ignore the question. On the contrary, it had itself replied to the question by the way in which it had presented the so-called problem of State responsibility for "damage" caused by private persons. As we have pointed out, injurious action by private persons is something different from and alien to the conduct of State organs; to be precise, it is an external event which could occur because preventive action by the State apparatus was lacking. The request for information took it for granted that the event represented by the act committed by private persons to the detriment of foreigners must have actually occurred in order for the responsibility of the State for lack of prevention on the part of its organs to be involved. Point VII (a) of the request for information was worded as follows:

Circumstances in which the acts of private persons causing damage to the person or property of a foreigner in the territory of a State may be the occasion of liability on the part of the State, and grounds on which such liability arises, if it does arise:

(a) Failure on the part of the State authorities to do what is in their power to preserve order and prevent crime, or to confer reasonable protection on the person or property of a foreigner.<sup>9</sup>

By this statement, the Committee demonstrated its conviction that any failure to provide "reasonable" prevention on the part of the State organs entrusted with that task could not be taken into consideration as a source of international responsibility except "on the occasion" of acts by a private person committed to the detriment of a foreigner. The existence of a breach by the State of its international obligation would therefore depend on the presence of two conditions: lack of prevention on the part of State organs, and the occurrence, within this framework, of the event constituted by the injurious act of the private person. A review of the replies sent in by

<sup>7</sup> *Ibid.* In the same connexion, see G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 349:

"... anche in questi casi il fatto illecito è costituito soltanto dalla condotta del soggetto; l'evento non è un elemento del fatto illecito, ma è semplicemente una circostanza che permette di considerare la condotta tenuta in concreto del soggetto come rientrante nel novero di quelle che sono vietate dalla norma."

"... in these cases too, the wrongful act consists solely of the conduct of the subject; the event is not an element of the wrongful act, but simply a circumstance which makes it possible to consider the actual conduct of the subject as one of the types of conduct prohibited by the rule."]

<sup>8</sup> *Yearbook ... 1975*, vol. II, p. 72, document A/10010/Rev.1, foot-note 100. See also *ibid.*, p. 54, document A/10010/Rev.1, chap. II, sect. B, article 11, para. 33 of the commentary. The Special Rapporteur dealt with the same question in his fourth report (*Yearbook ... 1972*, vol. II, p. 97, document A/CN.4/264 and Add. 1, para. 65; *ibid.*, p. 123, para. 141; and p. 126, para. 145).

<sup>9</sup> League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, *Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners* (C.75/M.69.1929.V), p. 93.

Governments does not reveal the slightest reservation concerning the opinion on the basis of which the Committee drew its conclusions.<sup>10</sup> The same is true of the replies to point IX of the request for information, which extended the question put in point VII to the hypothetical case of damage caused to foreigners by "persons engaged in insurrections or riots, or through mob violence".<sup>11</sup>

8. In the two hypothetical cases considered under points VII and IX, the authors of the request for information raised the question of the possibility of attributing to a State the breach of its preventive obligations only in relation to the case where occasion for it had arisen as a result of the occurrence of an injurious event which the State organs had neglected to prevent. However, there is another point in which the request did not expressly mention such an "occasion". Point V, No. 1 (c) was worded as follows:

Does the State become responsible in the following circumstances, and, if so, on what grounds does liability rest:

...

(c) Failure to exercise due diligence to protect individuals, more particularly those in respect of whom a special obligation of protection is recognised—for example: persons invested with a public character recognised by the State?<sup>12</sup>

There was thus no mention here of "acts of a private person" constituting the condition for the existence of international responsibility in the event of lack of prevention on the part of State organs. Consequently, the adoption of an explicit position, in its reply, by a Government which had actually studied the matter in depth is all the more interesting. The Austrian Government comments that:

It is obvious that mere failure to exercise due diligence in protecting the person of foreigners does not in itself involve the responsibility of the State: such responsibility would arise only if a foreigner suffered injury through the act of a private person.<sup>13</sup>

The Austrian Government thus stresses that the conclusion relating to the case envisaged under the point in question should be equated, under that aspect, with the conclusion valid for the case mentioned under point VII. The replies of other Governments, while not as precise as the Austrian reply, must have been interpreted to the same effect by the Drafting Committee, because, in drafting basis of discussion No. 10, the latter stated:

A State is responsible for *damage suffered*\* by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilised State ...<sup>14</sup>

In other words, the existence of the event, represented by the damage actually caused to a foreigner

having a public character, is expressly indicated, at the same time as the lack of diligence in prevention, as one of the two conditions required in order for the State's breach of its obligation to be established and its responsibility entailed.

9. At the Conference, basis No. 10 formulated by the Drafting Committee was incorporated in new basis No. 10, providing that a State was responsible "for damage caused by a private person to the person or property of a foreigner".<sup>15</sup> The Conference did not have an opportunity to make a definitive pronouncement on the point in question, but it seems beyond doubt that the view generally shared by all the Governments represented was that a State could not be held responsible for the breach of the obligation to prevent an event such as an injurious act by a private person affecting a foreigner, so long as that event had not occurred.

10. The attitude adopted by States in connexion with disputes to which they were parties must now be considered. In judicial precedents and in international practice, cases where the subject of a dispute has been the breach of an international obligation requiring a State to see that certain events do not occur have, as might be expected, been very numerous. Consideration of these cases shows that, where a Government has complained of the breach of an obligation of this specific kind, it has cited an event which actually occurred. The two conditions necessary for the existence of a breach were thus fulfilled. In other words, a State has never asserted that such a breach has been perpetrated on the sole ground of negligence or failure to prevent a purely hypothetical event which did not actually occur.

11. Disputes whose settlement has been entrusted to an international judicial or arbitral tribunal may first be considered. Consideration of these disputes shows that such a tribunal has never been requested to recognize as a breach of an international obligation the mere fact of the non-adoption by the State of measures to prevent a theoretically possible event which did not actually occur. It has always been in the case of events which actually occurred, and in particular in the case of injurious actions by private persons, insurrectional movements, and so forth, that an international tribunal has been asked to conclude that a State has breached its obligation to prevent such an event. To our knowledge, decisions of international tribunals have never affirmed, even indirectly or incidentally,<sup>16</sup> that failure to adopt measures to prevent the occurrence of a possible event sufficed in itself—i.e., without the actual occurrence of such an event—to constitute a breach of the obligation incumbent on the State.

12. It might, of course, be objected that the fact that international judicial or arbitral tribunals have never

<sup>10</sup> *Ibid.*, and League of Nations, *Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to volume III (C.75(a).M.69(a).1929.V)*, pp. 3 and 20.

<sup>11</sup> League of Nations, *Bases of Discussion ... (op. cit.)*, pp. 108 *et seq.*

<sup>12</sup> *Ibid.*, p. 62.

<sup>13</sup> *Ibid.*, p. 63.

<sup>14</sup> *Ibid.*, p. 67.

<sup>15</sup> League of Nations, *Acts of the Conference for the Codification of International Law (The Hague, 13 March–12 April 1930)*, vol. IV, *Minutes of the Third Committee (C.351(c).M.145(c).1930.V)*, p. 143.

<sup>16</sup> They could have done so, for example, when determining the time and duration of the internationally wrongful act.

had occasion to recognize that a State has breached the international obligation to prevent a given event in cases where the event to be prevented did not take place might be due to reasons which, in part at least, deprive it of probative value for our purposes. It might be said that it is difficult to see what interest a State would have in having recourse to a tribunal of this kind in order to establish the existence of a breach which in itself had no serious practical consequences. It might also be said that the use of such a procedure, by reason of its serious nature and lengthiness, hardly seems a suitable means for achieving the rectification—which should be swift in order to be effective—of a situation considered dangerous and where recourse to diplomatic procedure would seem more normal. It must, however, be recognized that the adoption of positions by Governments in the case of disputes settled through the diplomatic channel are the same as those adopted in the case of disputes submitted to judgment or international arbitration.

13. In diplomatic practice, it is only after the occurrence of an event that States have invoked the breach of the obligation to prevent that event. Let us take one of the best-known obligations in the category considered in this section, namely, the obligation to ensure that the premises of a foreign diplomatic mission are not attacked by private persons, insurgents, organs of foreign States and so forth. There is a whole series of cases in which a State has complained of the fact that the authorities of the host State did not take the necessary measures to protect the premises of its mission and in which the complainant State has alleged the existence of an internationally wrongful act giving rise to international responsibility. However, at both the diplomatic level and the arbitral or judicial level, the complaint was made<sup>17</sup> only after the attack by private persons or others had occurred and on the basis of that attack.<sup>18</sup>

<sup>17</sup> This does not mean that a State could not, in anticipation, have sent a communication to the State to which its mission was accredited, for example, to draw its attention to the fact that the number of police assigned to protect the mission seemed insufficient to ensure its safety. A communication of this type does not constitute a complaint concerning an internationally wrongful act and does not allege international responsibility on the part of the State to which it is addressed.

<sup>18</sup> See, for example, the attitude adopted by the State which considered itself injured in the cases of the *Romanian Legation at Berne* (1955), the *Hungarian Legation at Berne* (1958), the *United States Embassy in Moscow* (1964 and 1965) and the *USSR Embassy at Peking* (1966), all of which are cited in the fourth report on State responsibility (*Yearbook ... 1972*, vol. II, pp. 118 *et seq.*, document A/CN.4/264 and Add.1., paras 130–133).

See also the cases of the United States Embassy in T'ai-pei (1957) (M. Whiteman, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1967), vol. VIII, pp. 747 *et seq.*); the Belgian Embassy in Cairo (1961) (*Revue générale de droit international public* (Paris) 3rd Series, vol. XXXII, N° 3 (July–Sept. 1961), pp. 579 *et seq.* and *Revue belge de droit international* (Brussels, 1966), vol. II, No. 2, pp. 505 *et seq.*); the Yugoslav Trade Mission at Bad Godesberg (1962) (*Revue générale de droit international public* (Paris), 3rd series, vol. XXXIV, No. 2 (April–June 1963) pp. 361 *et seq.*, and *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 24, No. 4 (October 1964), pp. 681 *et seq.*); and of the USSR Embassy in Washington (1968),

The same is true, moreover, with regard to the attitude of injured States in cases of a breach of the duty to protect the person of a diplomatic agent or other organs of a foreign State from any attack,<sup>19</sup> and also in other cases involving the breach of the obligation to prevent a given event.

14. The conclusion which, in our opinion, derives quite obviously from the very nature and purpose of certain international obligations is thus fully confirmed in State practice. It is the clear conviction of Governments that, where international law places an obligation on a State to prevent a certain type of event, observance of that obligation can be called in question and the responsibility of the State affirmed only if one of the events which it was the purpose of international law to prevent actually occurs and if a lack of vigilance and prevention on the part of the State under the obligation has also been proved. It is further necessary that, between the conduct of the State in the case in question and the event which has occurred, there should be a link such that the conduct in question may be regarded as one of the *sine qua non* elements of the event. In other words, it must be possible to establish the existence of a certain relationship of causality, at least indirect, between the conduct of State organs and the event; the conduct must have made possible the occurrence of an event which *otherwise* would not have occurred. If, for example, an attack by private persons on an embassy occurred in circumstances which make it possible to establish that it would certainly have succeeded and achieved its ends even if the State could not be accused of any negligence, the necessary link between the actual conduct of the State and the event would be lacking. That State could not be accused of not having acted to prevent an event which would have occurred in any case, whatever the conduct of the State organs.

15. A further point should also be made. The prevention of a certain event is, in the hypothetical cases referred to in this section, the “direct” object of the international obligation. The aim of the obligation is to ensure that, to the extent possible, the State under the obligation prevents the occurrence of the event in question. These obligations should therefore not be confused with others whose “direct” object is the execution as such of a specific State action and which are consequently breached by the mere fact of the non-execution of that action, independently of the indirect effect that such an action might have had with regard to the prevention of the occurrence of certain events. Two instances will serve to illustrate more clearly the difference between the two hypotheses which come to mind. The obligation to see

(*Revue générale de droit international public* (Paris), 3rd series, vol. XXXIX, No. 4 (Oct.–Dec. 1968), pp. 1082 *et seq.*).

<sup>19</sup> The fourth report of the Special Rapporteur gives details concerning the cases of the murder of the Italian members of the Tellini mission (1923), the murder of the Soviet envoy to the Conference, Worowski (1923), and the murder of the member of the Belgian diplomatic mission in Spain, de Borchgrave (1936), and so forth (see *Yearbook ... 1972*, vol. II, pp. 114 *et seq.*, document A/CN.4/264 and Add. 1., paras. 115 *et seq.*).

that the mission of a foreign State or the person of its representatives are not the victims of attacks by private persons or others is the typical case of an obligation to prevent the occurrence of an event. As has been seen, the breach occurs if the State's failure to take preventive action is accompanied by the occurrence of the event which the State had an obligation to prevent and if, as stated, it occurs specifically because of such lack of prevention. Consider, on the other hand, an obligation such as that requiring the State not to tolerate in its territory the organization and training of organizations aiming at subversion in a neighbouring State. Here the direct object of the obligation is not to prevent the occurrence of an attack on or other event injurious to the Government from occurring in the territory of that State. The obligation requires, within the framework of mutual respect between independent sovereign entities, that the State should not allow an organization hostile to a foreign Government to be established within its own frontiers and to engage there in action aimed at overthrowing the latter Government by violence. Although, after the forcible dissolution of an organization of this kind, the attack which the latter might have been able to perpetrate in foreign territory might not occur, that would be only an indirect effect of the execution of the obligation, the direct object of which is, as has just been said, something quite different. It is thus clear that, in this case, there is a breach of the obligation, solely by reason of the fact that the authorities tolerated the establishment of the organization in question in the territory of the State and did not dissolve it as soon as they knew of its existence and its aims. It is thus possible to conclude that this breach exists and to bring out its consequences without depending, as a subsequent condition, on the fact of the subversive organization's having succeeded in carrying out attacks in foreign territory, provoking subversion there and so forth. It is thus clear that it is only in the first of the two hypothetical cases referred to successively that the occurrence of an external event is a condition for recognizing, in the conduct of the State which made it possible, the breach of an international obligation.

16. In internal law, the authors of learned works in a number of countries have given full treatment to the subject of "the offence of allowing an event to occur" (*délit d'événement*) or "the wrongful act of allowing an event to occur" (*fait illicite d'événement*). That has not been the case in international law. It may nevertheless be noted that writers who have been specially aware of the importance of the question also in the field of international legal relations have agreed in recognizing that it would be inadmissible to conclude that there has been a breach of an international obligation requiring a State to take action to prevent the occurrence of certain events as long as the latter have not taken place.<sup>20</sup> Moreover, it

<sup>20</sup> See, for example, R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 447 et seq.; G. Morelli, *op. cit.*, pp. 348 et seq.; P. A. Zannas, *La responsabilité internationale des Etats*

should be borne in mind that, when international jurists wish to give a typical example of an international obligation requiring preventive action on the part of the State, they have always referred to the obligation to prevent injurious conduct on the part of private persons. In so doing, the various writers have generally taken as a starting-point the premise of the existence as a *fait accompli* of damage caused by private persons to a foreign State, its representatives or its nationals. It is in relation to damage actually caused that they pose the question of the cases in which the State could be held responsible. As has been seen,<sup>21</sup> the reply of the overwhelming majority of modern writers is that the State cannot be held responsible except in cases where it has omitted to adopt measures normally likely to prevent private persons from committing injurious acts and where such acts were committed because of that omission. However, those writers who have given particular attention to the question have shown that the act of the private person is the *occasion*,<sup>22</sup> or even the *condition*,<sup>23</sup> on the basis of which the State is deemed to have breached its obligation of prevention and incurred the resultant responsibility. This presentation of the situation is clear proof that, in the view of those writers, it is not a theoretically established failure of prevention which constitutes the State's breach of its obligation in the hypothetical cases envisaged, but the failure of prevention *made concrete* by the actual occurrence of an event which more active vigilance could have prevented and which has been made possible by the lack of it. It is thus certain that the literature of international law upholds the point of view put forward in these pages.

17. On the other hand, no useful elements on the question dealt with in this section can be found in codification drafts on State responsibility. That is because these drafts confine themselves to affirming the existence of an internationally wrongful act and State responsibility where there is a breach of an international obligation by the State, without seeking to determine the conditions for the occurrence of such a breach in the various hypothetical cases.

18. However, in the view of the Special Rapporteur, a definition of the conditions for recognition of the breach of an obligation to prevent a given event cannot be omitted from a draft such as that currently being prepared by the Commission. The special at-

*pour les actes de négligence* (Montreux, Ganguin et Laubscher), 1952, pp. 32 et seq.

<sup>21</sup> *Yearbook ... 1975*, vol. II, pp. 80-81, document A/10010/Rev.1, chap. II, sect. B, article 11, para. (33) of the commentary.

<sup>22</sup> See, for example, C. de Visscher, "La responsabilité des Etats" *Bibliotheca Visseriana* (Leiden, Brill, 1924), vol. II, p. 103; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 63; L. Delbez, "La responsabilité internationale pour crimes commis sur le territoire d'un Etat et dirigés contre la sûreté d'un Etat étranger", *Revue générale de droit international public* (Paris), 3rd series, vol. IV (1930), p. 470.

<sup>23</sup> J. Spiropoulos, *Traité théorique et pratique du droit international public* (Paris, Librairie générale de droit et jurisprudence, 1933), p. 275.

tention devoted hitherto to the establishment, with regard to each kind of international obligation, of the conditions in which their breach occurs, would not permit such an omission. It is, moreover, clear that the definition of the conditions for the occurrence of the breach of an obligation of the type considered in this section may in practice have decisive consequences for the determination, in such cases, of the *tempus commissi delicti*.

19. In the light of the foregoing, the Special Rapporteur proposes the following text for adoption by the Commission:

**Article 23. Breach of an international obligation to prevent a given event**

**There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.**

9. TIME OF THE BREACH OF AN INTERNATIONAL OBLIGATION

20. In its consideration of the questions arising in connexion with the objective element of an internationally wrongful act, the Commission first of all sought to determine the meaning of the expression "breach of an international obligation", as used in article 3 (b) of the draft articles approved by the Commission in first reading.<sup>24</sup> In draft article 16, the Commission therefore defined the basic rule requiring that, in general, in order for a breach of an international obligation to exist, there must be an "act of the State" not in conformity with what is required of it by that obligation. In article 17, the Commission subsequently determined more specifically whether the distinctions to be made between international obligations by reason of their origin do or do not have a bearing on the occurrence of a breach of those obligations and on the responsibility arising therefrom. In article 18, it defined, in relation to the various hypothetical cases which might arise, the meaning and scope of the requirement that the obligation be in force for the State in order for there to be a breach of the obligation in question by that State. Fourthly, the Commission considered the question of the possible bearing of the subject-matter of the obligation breached, and of its more or less essential character for the protection of fundamental interests of the international community, on the characterization of the breach in question and, consequently, on the régime of international responsibility applicable to it. The answer to that question was embodied in article 19. The Commission next sought to define the special conditions which must be met in order for there to be a breach of an international obligation according to the various types of obligation and, in particular, according to whether the obligation requires the State

to adopt a particular course of conduct (art. 20), or the achievement of a specified result (art. 21) and specifically a result concerning the treatment to be accorded to aliens (art. 22). In the same context, in the present report, the Special Rapporteur has sought to establish, in draft article 23,<sup>25</sup> how the breach by a State of an obligation requiring it to prevent a given event can be recognized as having occurred. In order to complete chapter III, it is now necessary to determine, in relation to the various types of international obligation mentioned, the respective "time", of their breach; in particular, it is necessary to determine whether and when the "time" in question is instantaneous or extends over a more or less lengthy period. In other words, we are dealing here with the so-called question of the *tempus commissi delicti*.

21. At first glance, it might seem that the determination of the time of the breach of an international obligation involves no special difficulties and above all that it is a question of verifying facts rather than of applying legal criteria. In fact, however, this determination is easy only in the case of an act of the State not in conformity with what is required of it by an international obligation which begins and ceases to exist at the same moment, that is, in the case of an internationally wrongful act which may be described as an "instantaneous" act.<sup>26</sup> However, the task becomes more complicated and necessarily requires the application of legal rules in the relatively simple case where the conduct adopted by the State which is not in conformity with its international obligation extends over a period of time and assumes, in the terms used in article 18, paragraph 3, a "continuing character". The problem then is to determine whether the *tempus* of an internationally wrongful act of this kind should be defined as the time when that act begins, or the whole period during which it continues to exist. Equally dependent on the application of legal criteria is the task of determining the *tempus commissi delicti* in the case, examined specifically in the preceding section, where, in order for the breach of an international obligation to exist, an external event must occur in addition to negligent conduct on the part of State organs. Indeed, in such cases the choice between the period during which the negligent conduct was adopted and the time at which the event rendered possible by that conduct occurred can only be made in the light of legal principles. Lastly, the determination of the time of the occurrence of the internationally wrongful act will be even more difficult, more important and more clearly linked to the application of rules of law in the various cases where the act in question results from the combined

<sup>25</sup> See para. 19 above.

<sup>26</sup> This does not prevent questions from arising and recourse to legal criteria from becoming necessary when a considerable period separates the time when the act of State organs is committed and the time when the effects according to which it is characterized are produced: for example, when the death of a foreign representative as a result of blows inflicted by members of the local police force, or the collapse of a protected building hit by a bomb dropped by an enemy aircraft, occurs some time after the act which caused it.

<sup>24</sup> For the text of all the draft articles adopted so far by the Commission, see *Yearbook ... 1977*, vol. II (Part Two), pp. 9 *et seq.*, document A/32/10, chap. II, sect. B, subsect. 1.



effect of several actions or omissions on the part of State organs. It should be recalled in this connexion that, in the context of article 18, paragraph 4, mention was made of a "composite" act, that is, a case in which the breach occurred as a result of the combined effect of a series of individual acts, of the repetition by State organs of the same conduct in a plurality of separate cases. There is also the case of the internationally wrongful act termed "complex" in article 18, paragraph 5, where the breach occurs as the result of a succession of acts by different organs in the same single specific situation. In both cases, the problem arises, at the legal level, of determining to which State actions constitutive value should be attributed as regards the internationally wrongful act, for it is on this basis that it will be possible to establish when that act begins and ends.

22. The determination of the time of the breach of an international obligation, and hence of an internationally wrongful act, is of practical importance for various reasons. First, it inevitably has a bearing on another question, which will be dealt with more specifically in the second part of the draft articles, namely, that of determining the extent of the responsibility which international law attaches to an internationally wrongful act and, more particularly, that of determining the amount of reparation payable by the State which committed that act. If, for example, in the case of a "continuing" internationally wrongful act, the time of the breach corresponds not only to the initial moment but to the entire period comprised between the beginning and the end of the conduct which is contrary to an international obligation of the State, it would be logically undeniable that the reparation covers all the injuries caused by the conduct in question during the whole of that period.<sup>27</sup> Similarly, in the case of a "composite" wrongful act, the amount of reparation will vary according to whether the breach is considered as having been committed only at the time of the conduct which, combined with a series of earlier acts, makes it possible, let us say, to attribute to that State an internationally wrongful "practice" as such, or rather as having been committed during the entire period between the first act in the series and the last which rendered the existence of the breach apparent. Likewise, in the case of a "complex" wrongful act, the amount of reparation due will probably differ according to whether the breach is regarded as having been committed only at the time of the conduct which completes the breach, or at the beginning of the "complex" process of that breach or, rather, during the whole of the period starting with the first act which failed to achieve the result required by the international obligation to the last act which made that result definitively unachievable.<sup>28</sup>

<sup>27</sup> See, in this connexion, R. Ago, *loc. cit.*, p. 521.

<sup>28</sup> *Ibid.*, pp. 517 *et seq.* According to P. Reuter ("La responsabilité internationale", *Droit international public* (course), Paris, Les Nouvelles Institutes, 1955-1956, p. 98), in the case of what we have called a "complex" wrongful act, obligation to make reparation for the damage caused from the time of the first act should be admitted, even if it is argued that the breach of the obligation con-

23. The determination of the time of the breach of an international obligation may also have a bearing on the determination of the jurisdiction of an international tribunal with regard to the dispute arising out of that breach. Generally speaking, States accept in advance the jurisdiction of an international tribunal with regard to their disputes only on condition that that jurisdiction be limited and *ratione materiae* and, as regards the point with which we are concerned, *ratione temporis*. Consequently, the agreements concluded by States for this purpose often include a clause limiting the jurisdiction of the judicial or arbitral body in question to disputes concerning "facts" or "situations" *subsequent* to a specific date.<sup>29</sup> Clearly, however, if in the clause in question the

sists solely in the judgement of the last body which renders the achievement of the result required by the obligation definitively impossible; this is so by virtue of the rule that complete reparation must be made for damage. We feel, however, that this rule in itself does not mean that the damage for which "complete" reparation must be made must have been "completely" caused by the breach of an international obligation. The damage resulting from a "complex" internationally wrongful act of the State certainly requires complete reparation, designed to compensate for the injuries caused by all the successive actions or omissions of the State which constituted that act, but this is because all these actions or omissions contribute to the commission of a single breach which, although it is completed and rendered final only by the last was nevertheless initiated by the first. By this first action or omission, the State missed its first opportunity to achieve the result required by an international obligation incumbent on it. If, on the other hand, only the last of the actions or omissions of a State in a specific case proved to conflict with an international obligation, and that had not been true of the previous actions or omissions, only the last would be accounted an internationally wrongful act. It cannot be said in this case that the international legal consequences of that act should include reparation for possible damage attributable to the earlier actions or omissions which were in no way internationally wrongful.

<sup>29</sup> A clause of this kind is included in several bilateral treaties providing for the judicial or arbitral settlement of disputes between the parties, for example, the treaty between Spain and Belgium of 19 July 1927, on which the jurisdiction of the International Court of Justice in the Barcelona Traction Light and Power Company, Limited case was based (*I.C.J. Reports 1964*, pp. 39-40). The General Act for the Pacific Settlement of International Disputes of 26 September 1928 (art. 39) permitted the parties, in acceding to the Act, to exclude from the procedure described in that instrument "Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute" (League of Nations, *Treaty Series*, vol. XCIII, p. 361). A reservation having the same effects was also included in numerous unilateral declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for example, that formulated by France on 25 April 1931, which limited that acceptance to "any disputes arising after ratification... with regard to *situations or facts subsequent to ratification*" (see *P.C.I.J. Series A/B*, No 74, p. 22) and which played an important role in the Phosphates in Morocco case. Currently, a limitation expressed either in these terms or in others which are more or less similar is included in the declaration of acceptance of the compulsory jurisdiction of the International Court of Justice by Belgium (17 June 1958), Canada (7 April 1970), El Salvador (26 November 1973), India (18 September 1974), Israel (17 October 1956), Japan (15 September 1958), Kenya (19 April 1965), Luxembourg (15 September 1930), Malawi (12 December 1966), Mexico (28 October 1947), New Zealand (8 April 1940), the United Kingdom (1 January 1969) and the Sudan (2 January 1958) (see *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1977* (United Nations publication, Sales No. E.78.V.6), pp. 11-24).

It is also interesting to note that limitations along the same lines

words "facts and situations" is understood as meaning facts giving rise to a legal dispute and, hence, facts which according to one of the parties do not constitute a breach of an international obligation, the determination of the time of that breach may be decisive for the purpose of establishing the jurisdiction of the tribunal in the case concerned. For example, in the case of a "continuing" act that began prior to the date from which the jurisdiction of the tribunal has been accepted, that jurisdiction clearly cannot be recognized if the *tempus* of that wrongful act is taken to be only the moment on which the conduct of the State began, disregarding the fact that that conduct assumed a continuous character. On the other hand, it would seem illogical to deny that jurisdiction if the "continuing" act is considered to have been perpetrated during the whole of the period comprised between the beginning and the end of the conduct of the State. There is no doubt that, for at least part of its existence, the act in question would be an act "subsequent" to the point of departure of the tribunal's jurisdiction. If, on the other hand, the act giving rise to the dispute is a "composite" act and consists, for example, of a "practice" resulting from a series of similar individual acts committed in a number of separate cases, the jurisdiction of the tribunal will be incontestable if the time of the breach is taken to be only the time, subsequent to the crucial date, of the occurrence of the individual acts which, added to those that took place previously, reveal that the conduct of the State taken as a whole has the character of a "practice" and lead to that complex of acts as such being recognized as a breach of an international obligation. The situation would be quite different if the *tempus* of a breach of this nature was taken to be the whole of the period extending from the first to the last of the individual acts constituting the "practice". However, even then, it

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are to be found in certain declarations of acceptance of the jurisdiction of the European Commission of Human Rights with regard to applications submitted by individuals. In its declaration of 14 January 1966, the Government of the United Kingdom recognized that jurisdiction "in relation to any act or decision occurring or any facts or events arising subsequently to the 13th of January, 1966\*" (*Yearbook of the European Convention on Human Rights, 1966*, vol. 9 (The Hague, 1968), p. 8). Similarly, the Italian Government, in its declaration of 20 June 1973, accepted that jurisdiction in relation to "any act or decision occurring or any facts or events arising subsequently to this date\*" [31 July 1973] (*Yearbook of the European Convention on Human Rights, 1973*, vol. 16 (The Hague, 1975), p. 10).

On the other hand, recognition of the jurisdiction of an international tribunal may be limited to facts and situations arising prior to a certain date, although such cases are much more unusual. At the beginning of the Second World War, for example, several States involved in that conflict excluded from the effects of their recognition of the compulsory jurisdiction of the Permanent Court of International Justice, which they had previously accepted, disputes relating to facts and situations arising after the beginning of the war. The declaration of acceptance of the compulsory jurisdiction of the International Court by New Zealand, which is dated 8 April 1940, excludes from that acceptance "Disputes arising out of events occurring at a time when His Majesty's Government in New Zealand were involved in hostilities\*" (*League of Nations, Treaty Series*, vol. CC. p. 492). It is interesting to note that the effects of this declaration were added to those of the preceding declaration, which excluded from the acceptance disputes arising prior to 29 March 1930.

might be questioned whether the fact that some of those individual acts—including precisely those which revealed or at least confirmed the over-all significance of the conduct of the State and its wrongfulness—occurred after the crucial date would not be sufficient grounds for concluding that the "practice" as such existed after that date and thus came within the jurisdiction of the tribunal. Again, the act in connexion with which it was necessary to determine the jurisdiction of the tribunal could be a "complex" act, consisting of a succession of actions or omissions, either by the same organ or, more frequently, different organs, which, one after another, prevented the result required by an international obligation from being achieved in a specific case. The answer to the question whether the tribunal has jurisdiction would then logically be in the affirmative if the time of the breach were taken to be solely that of the conclusive act, subsequent to the crucial date, which gave the breach its final character; on the other hand, the reply would be negative if the time of the breach were taken to be the time of the first action or omission which set in motion the breach process before the crucial date. Lastly, if both these solutions were rejected and if it were assumed that the "complex" act was committed during the whole of the period between the first action or omission and the last, there would be grounds for questioning whether, in this case too, the fact that the breach, although initiated at an earlier stage, was not rendered complete and final until after the crucial date should not mean that the breach should be regarded as an act which continued to exist after that date and that the jurisdiction of the tribunal should therefore be recognized. Here again (as in the case of the "composite" act mentioned above), the answer will depend first of all on the interpretation of the clause of the agreement providing for the limitation of the jurisdiction of the tribunal *ratione temporis*. However, the clause in question will rarely be worded in such a way as to state explicitly, to use the words of Professor Reuter, whether the specific will of the parties to a given agreement was that "acceptance of the optional jurisdiction concerns only *delicts* all elements of which are subsequent to the crucial date" or whether it concerns all those "of which at least one element is subsequent to the date in question".<sup>30,31</sup> Apart from this case, it seems undeniable that, while remaining within the context of the interpretation of the clause, the solution of the intertemporal question concerning jurisdiction must be based on the criteria by which

<sup>30</sup> Reuter, *loc. cit.*, p. 99.

<sup>31</sup> In making their reservations, some States occasionally use a number of terms whose interpretation leaves no doubt as to their intention to exclude from the jurisdiction of the Court any dispute arising not from a "fact" but from any element of a fact occurring prior to the crucial date. For example, India, in its declaration of 18 September 1974, excluded from its acceptance of the jurisdiction of the International Court of Justice "any dispute *the foundations, reasons, facts, causes, origins, definitions, allegations or bases* of which existed prior to this date". However, this example remains an isolated one; in most cases Governments confine themselves to mentioning, in the clauses in which they express their

the time of the internationally wrongful act giving rise to the dispute submitted to the tribunal is determined.<sup>32</sup>

24. The determination of the amount of reparation payable by the perpetrator of an internationally wrongful act and that of the jurisdiction *ratione temporis* of any judicial or arbitral body which may eventually be involved are not the only questions on which the determination of the time and duration of an internationally wrongful act may have a specific bearing. For example, there is the question of the requirement relating to the "national character of a claim", according to which a State is authorized to intervene for the purpose of the diplomatic protection of an individual only if there is a link of nationality between the State and the individual concerned. According to a well-established rule, this link must have existed without interruption from the time of the commission of the internationally wrongful act which injured the individual until the time when the claim is submitted through the diplomatic channel or, where appropriate, the time when an appeal is submitted to an international tribunal. In our view, it stands to reason that, in cases where the breach of an international obligation extends over a period of time, the national link between the victim of the breach and the State which intends to provide diplomatic or judicial protection must have existed without interruption since the beginning of the *tempus* of the commission of the breach. It is therefore not possible to regard as sufficient a link of nationality established subsequently, for example during the last period of the commission of a "continuing" wrongful act, or at the time of the last of the individual acts which, taken together as a series, constitute a "composite" wrongful act, or at the time of the conduct which rendered final a "complex" wrongful act.<sup>33</sup>

(Foot-note 31 continued.)

reservations, the "situations and facts subsequent" to a given date. Unless the intention of the parties is revealed clearly by recourse to other means of interpretation, for example *travaux préparatoires*, it will be necessary to have recourse to the actual concept of "situation and facts", as it may occur in various hypothetical cases, in order to determine the scope of these clauses.

<sup>32</sup> For these reasons we can therefore endorse the remark of Reuter (*loc. cit.*, p. 99) to the effect that the problem raised here is primarily one of interpretation, but not his assertion that concepts such as that of the complex delict do not provide a solution to this problem. Concerning all the problems mentioned here, see also Ago, *loc. cit.*, p. 518.

<sup>33</sup> Reuter (*loc. cit.*, pp. 98 *et seq.*) denies the existence of the relationship which we believe exists between the determination of the *tempus* of a "complex" delict and the determination of the national character of a claim by invoking the fact that the requirement relating to that character goes beyond the conclusive moment of the commission of the wrongful act in question. In our view, however, this writer forgets the essential point, which is not the *dies ad quem* but the *dies a quo* of the commission of the internationally wrongful act. In other words, if it is true that the national character must exist without interruption from the time when the act was committed until the submission of the claim, it necessarily follows that that character exists at the time when the perpetration of the wrongful act ends. But if the act is one of those whose perpetration involves, as Professor Reuter says, a "depth of time", the national character must have already existed previously, namely, during the whole of the period between the beginning and the end of the commission of the act. In our view,

25. As recalled above,<sup>34</sup> the Commission based the provisions of article 18, paragraphs 3 to 5, of the draft articles on a classification of various types of acts of the State which, although different, possess a common feature in that their commission extends over a period of time and can thus give rise to various problems of an intertemporal character. The problem relating specifically to the contemporaneous relationship which must exist between the "force" of an international obligation and the performance by a State of a given act in order for that act to constitute a breach of the obligation in question was considered and solved separately for each of the specific cases examined. To a certain extent, the criteria established to that end can be used to determine those which must now be used to define the time of the occurrence of various types of internationally wrongful acts.<sup>35</sup> Of course, the answer given to the question considered at that time does not provide a complete solution to our current problem. Determining the existence of a breach of an international obligation is one thing, but determining the time of the breach whose existence has been established in another. In other words, the concern for consistency which should guide us in solving problems which are separate but logically characterized by a certain parallelism should prevent us from applying in these two cases contradictory ideas leading to conclusions which are difficult to reconcile. A similar concern for consistency will be required, for the same purposes and within the same limits, in connexion with the solutions adopted in article 21, paragraph 2, and article 22, with regard to the determination of the conditions for the occurrence of a breach of certain international obligations of result,<sup>36</sup> or the solution set forth in article 23 with regard to the conditions for the occurrence of a breach of an obligation requiring the prevention of a given event.

the duration of an internationally wrongful act of this kind undeniably has a bearing on the determination of the date of origin of the national character which must be possessed by the claim originating in the act in question.

<sup>34</sup> See para. 21 above.

<sup>35</sup> When the Special Rapporteur referred in section 3 (Force of the international obligation) to the existence of certain special categories of internationally wrongful acts which could be described as "continuing", "composite" and "complex", he was careful to point out that the distinction between those different concepts would be studied in greater depth in connexion with the fixing of the *tempus commissi delicti* and its consequences (*Yearbook ... 1976*, vol. II (Part One), p. 21, foot-note 101). The relationship and at the same time the difference between the question dealt with in article 18, paragraphs 3, 4 and 5, and the question of determining the *tempus commissi delicti* was mentioned by several members of the Commission during the discussion.

<sup>36</sup> The following example is intended to clarify the ideas we are seeking to express: article 18, paragraph 5, provides that:

"If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period."

It seems clear that the content of this provision makes it rather difficult to envisage a solution which would exclude from the *tem-*

26. As was observed,<sup>37</sup> the determination of the *tempus commissi delicti* of a so-called “instantaneous” act in principle presents no special problems and above all no problems going beyond the simple verification of the circumstances in which certain factual elements occurred. The concept of the “instantaneous wrongful act”, as it emerges from the general theory of internal law, is that of a breach which, as its name indicates, is characterized by the instantaneousness of the conduct of which it consists, and hence that of an offence which ends as soon as it is committed. Frequently cited examples are murder, bodily injury inflicted on an individual, and arson. In the international sphere, examples of “instantaneous” wrongful acts occur when the anti-aircraft defence units of one country shoot down an aircraft lawfully flying over that country’s territory, when the torpedo boat of a belligerent sinks a neutral ship on the high seas, or when the police of one State kill or wound the representative of another State or kidnap an individual in foreign territory. It is not difficult to determine the *tempus* of such “instantaneous” wrongful acts, for they last only for the actual instant during which they are committed. It goes without saying that the duration of an offence of this kind comprises only the time of its execution proper; conceiving the idea, even providing for the conditions that could facilitate its execution, and so on, constitute steps towards the breach, but not its actual commission. The duration of any preparatory activities thus has no bearing on the determination of the *tempus commissi delicti*.

27. Another element which need not be taken into account for the purpose of determining the time of the occurrence of an “instantaneous” internationally wrongful act is its effects or eventual consequences. Blows and injuries inflicted on an alien by members of the police or the army may have lasting effects on his health, his ability to work and his ability to perform his duties; the plundering of a foreign citizen may deprive him of the possession of his property for a certain time or even permanently if no remedial action is taken; the destruction of aircraft or ships

*pus* of the commission of a complex act the action or omission with which that act began. On the other hand, there is no reason why the time of the act in question must be considered as being limited to the duration of that initial action or omission. Article 21, paragraph 2, and article 22 provide that, in the two cases to which those provisions refer, there is a breach of the obligation requiring the achievement of a specified result only if the State fails to achieve that result by other conduct, subsequent to that by which it created an initial situation not in conformity with that result. Thus these articles, too, would be difficult to reconcile with a solution which would be tantamount to excluding that subsequent conduct from the time of the commission of the complex wrongful acts to which they refer, even if it did not make it necessary to consider that *tempus* as limited to that of that conduct. The consequences which flow from a joint consideration of article 18, paragraph 5, and article 21, paragraph 2, of the draft with regard to the determination of the *tempus* of a complex internationally wrongful act were noted by various members of the Commission and are contained in the report of the Commission on its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part Two), p. 29, document A/32/10, chap. II, sect. B, article 21, para. (32) of the commentary, and foot-note 103).

<sup>37</sup> See para. 21 above.

belonging to a neutral State will in the future deprive that State of those means of transport or defence and might even affect the potential of its air force or navy for a long period. The durable character of these effects will be taken into consideration for the purpose of determining the damage for which reparation is to be made, but will have no bearing on the duration of the act which caused them, which will remain an “instantaneous” act. The Commission has already had occasion to touch on this aspect of the problem in its commentary to article 18, always in connexion with the requirement that the “force” of the international obligation and the occurrence of the act which allegedly constitutes a breach of that obligation should be contemporaneous.<sup>38</sup> At that time, the Commission stressed the clear difference between a “continuing wrongful act”, consisting of a breach which, as such, extends over a period of time, and an “instantaneous act producing continuing effects”, consisting specifically of a breach which does not lose its instantaneous character, whatever the nature of its effects. This distinction may be particularly important in connexion with the question, mentioned above,<sup>39</sup> of the jurisdiction *ratione temporis* of an international tribunal. Consideration of the *Phosphates in Morocco* case, another aspect of which has already been analysed by the Commission in its report on its twenty-ninth session,<sup>40</sup> is once again instructive in this connexion. In its description of the terms of the dispute, the Permanent Court of International Justice noted that the Italian Government asserted, as a subsidiary complaint, that the decision of the Department of Mines of 8 January 1925 had deprived the Italian citizen Mr. Tassara of his vested rights and was inconsistent with the international obligations of France. With a view to proving that the case was subject to the jurisdiction of the Court, the applicant Government contended not only that the decision of the Department of Mines had been followed, and completed as an internationally wrongful act, by a denial of justice consummated after the crucial date,<sup>41</sup> but also, in the words of the Court, that

... the dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by a decision of the Department of Mines, was maintained in existence at a period subsequent to the crucial date ...<sup>42</sup>

However, the reasoning on this point in the decision of 14 June 1938—despite a certain lack of clarity, due

<sup>38</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (21) of the commentary. See also for more details *Yearbook ... 1976*, vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1–2, para. 63 and foot-note 103.

<sup>39</sup> See para. 23 above.

<sup>40</sup> See *Yearbook ... 1977*, vol. II (Part Two), pp. 38–40, document A/32/10, chap. II, sect. B, draft articles on State responsibility, article 22, paras. (25)–(28) of the commentary. See also *Yearbook ... 1977*, vol. II (Part One), pp. 28–29, document A/CN.4/302 and Add. 1–3, paras. 66–69.

<sup>41</sup> The analysis of the case by the Commission in its report on its twenty-ninth session concerned this particular aspect of the case.

<sup>42</sup> *P.C.I.J.*, Series A/B, No. 74, p. 28.

primarily to the fact that the two theories of the Italian Government were intermingled—reveals that, according to the Court, the breach of international law, in so far as there really was a breach, consisted of the decision of the Department of Mines of 8 January 1925. According to the Court, it was that decision which had deprived the Italian citizen of the rights which he claimed, and that decision could not be subject to the jurisdiction of the Court, even if its harmful consequences remained in existence up to and beyond the crucial date. Without using precisely these words, the Court thus considered—correctly, it would seem—that the 1925 decision was an “instantaneous act producing continuing effects” rather than a “continuing act” of a lasting nature. The same belief emerges clearly from the separate opinion of Judge Cheng Tien-hsi, which states:

So far as the decision of the Mines Department is concerned, it is right in holding that the dispute has arisen in regard to a fact anterior to the crucial date, because the decision was given in 1925. If it was wrongful, it was a wrong done in 1925. If it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation.<sup>43</sup>

Apart from the decisions of the Permanent Court of International Justice, the Commission has already recalled<sup>44</sup> that the judicial practice of the European Commission of Human Rights has brought out the distinction between an “act producing lasting effects” and an act consisting of a “continuing violation” of an international obligation. According to the European Commission, any act, such as a judicial or arbitral decision, which merely produces lasting effects remains an “instantaneous act”, and its consequences are no more than “simple effects” and not an extension of the commission of the act.

28. At the beginning of this section,<sup>45</sup> it was also noted that, in addition to wrongful acts characterized as “instantaneous”, there are others which extend over a period of time as such, and not only as a result of the effects they produce: these acts may therefore be called “continuing wrongful acts”. In internal law, the concept of “continuing delict” (expressed in terminology which varies according to language and legal system) is commonly used to define precisely those acts which extend—remaining identical—over a more or less lengthy period of time, such as illegal restraint, unlawful possession of the property of others, receiving stolen property, illegal possession of weapons, and so on. In international law, the same concept is applicable to many acts: maintenance in force of provisions incompatible with the provisions of a treaty, failure to adopt legislative or other measures required by a treaty, unlawful detention of a foreign official, unlawful occupation of part of the territory of another State, the maintenance of armed contingents in another State without its consent, the unlawful blockading of foreign coasts or ports, and

so on.<sup>46</sup> In this connexion, the Commission has already considered the specific problem—which it solved in article 18, paragraph 3—of expressing, in connexion with an act in this category, the general requirement that the “force” of an international obligation and the performance of an act of the State not in conformity with that obligation should be simultaneous in order for a breach of the latter to exist. The Commission solved the problem by formulating the principle that there is a breach of the obligation with which the “continuing” act is not in conformity when that act takes place, at least partly, while the obligation is in force with regard to the State which performs the act.<sup>47</sup> By not requiring specifically that this simultaneity should exist at the time when the continuing act begins, and requiring only that it should exist at any time during the performance of the act, the Commission also implicitly took a position with regard to the general problem with which we are now concerned, namely, that of determining the time of the occurrence of a continuing internationally wrongful act. In defining the rule as it did in article 18, paragraph 3, it expressed its belief that the *tempus commissi delicti* of a continuing act performance comprises the whole of the period during which it was committed, from the beginning to the end. The Commission’s current task is thus facilitated for, as has been said, a simple concern for consistency

<sup>46</sup> In the “Observations and submissions” which it submitted to the Permanent Court of International Justice on 15 July 1937 in connexion with the Phosphates in Morocco case, the Italian Government expressed itself thus:

“If we take the general category of internationally wrongful acts, we can distinguish therein two different types of delicts. On the one hand, there are breaches of international law, for example an insult to the flag of a friendly nation, the torpedoing of a neutral ship, and so on, which are immediate in character. When such a breach is accomplished, that is, when it has become complete, it is then exhausted and no longer exists as such. On the other hand, there are other breaches of international law which extend over a period of time, so that when they have become complete, in the sense that all their constituent elements are present, they do not thereby cease to exist but continue, remaining identical with a permanent character. This is true, for example, of the enactment of a law contrary to international law, the unlawful seizure of property belonging to an alien, the arrest of a diplomat and so on. ... In considering the typical case of a State which neglects to bring its internal legislation into harmony with the obligations imposed by treaties, Mr. Triepel expresses himself very precisely as follows: ‘If at a given time States are internationally obliged to have rules of law with a given content, the State which already has such laws is breaching its obligation if it repeals them and fails to re-enact them, whereas the State which does not yet have such laws breaches its obligation merely by not introducing them: both States thus commit ... a *délit permanent international* (*völkerrechtliches Dauerdelikt*) [*permanent international delict*]’ (see Triepel, *Völkerrecht und Landesrecht*, Leipzig, 1899, p. 288).” (*P.C.I.J.*, Series C, No. 84, p. 494).

It should be noted that the French legal term corresponding to the German term *völkerrechtliches Dauerdelikt* is “*délit continu*” (*continuing delict*) rather than “*délit permanent*” (*permanent delict*).

<sup>47</sup> In so doing, the Commission took as a basis the recent judicial practice of the European Commission of Human Rights (de Becker case and others). See *Yearbook of the International Law Commission*, 1976, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (21) of the commentary and foot-note 436); and *ibid.*, vol II (Part One), p. 22, document A/CN.4/291 and Add. 1–2, para. 63.

<sup>43</sup> *Ibid.*, p. 36.

<sup>44</sup> See the references in foot-note 38 above.

<sup>45</sup> See para. 21 above.

should prevent the Commission from contradicting, in its formulation of a general principle, the idea which rightly guided it in its consideration of a particular aspect of what is basically a single problem. Moreover, from the standpoint of legal logic, there would be no justification for departing or deviating in any way from the position which the Commission has adopted thus far regarding the question under consideration.

29. Furthermore, such a course would not seem to be justified by respect for the ideas put forward in international practice. In the "Observations and submissions" which it submitted to the Permanent Court of International Justice on 15 July 1937 in the *Phosphates in Morocco* case, the Italian Government contended that, in the case of "permanent" (continuing) internationally wrongful acts, the time of the wrongful act necessarily consisted of "the whole of the period comprised between its beginning and its completion". The Government added:

Moreover, even if one considers the legal concept of the permanent delict in the internal legal order, one generally finds that the legislation, practice and doctrine of States accept the principle that the permanent or durable offence is considered as being committed throughout the duration of the offence itself, and that the *time of the delict* in the case of a *permanent delict* ... should be taken to be the entire period during which that delict occurred.<sup>48</sup>

The Court, in its aforementioned decision of 14 June 1938, in no way contested the general principle thus formulated by the Italian Government. Although the majority of the Court rejected the Italian claim, it did so because it considered the use of those concepts by the applicant in the case under consideration to be unfounded. The judges making up the majority considered that the acts invoked by the Italian Government did not have the character which the latter attributed to them and rejected the contention that one could, on the basis of the terms of the clause limiting *ratione temporis* the acceptance of compulsory jurisdiction by France, consider as subsequent to the crucial date acts which, although extending over a period of time, originated in measures taken prior to that date.

30. Nevertheless, we feel that some of the statements made by the majority of the Court are open to criticism. We noted above<sup>49</sup> that, among the acts invoked by the Italian Government, the one which it mentioned in its subsidiary complaint—namely, the negative decision taken in 1925 by the Department of Mines with regard to the claim presented by Mr. Tassara—was undoubtedly an instantaneous act producing continuing effects rather than a continuing act *stricto sensu*. We very much doubt, however, whether the same can be said of the situation invoked in the main complaint, namely, the monopoly of the Moroccan phosphates established by the *dahirs* [decrees] of 27 January and 21 August 1920. In our view, that constitutes a typical case of a "continuing act": a legislative situation regarded as contrary to the international obligations of the country which

created it and which, while it began before the crucial date, continued to exist thereafter and to create a situation which remained both current and internationally wrongful. The Court should perhaps have observed that, far from being subsidiary, the real complaint of the Italian Government throughout the case concerned the refusal of the Department of Mines to acknowledge the licences of Mr. Tassara and that the "monopolization" of the Moroccan phosphates constituted rather the background to the Italian argument, on which was superimposed the eviction of the Italian citizen, which constituted a genuine independent complaint and was the source of the dispute between the two countries. The Court could also have added that the only injury actually caused to an Italian citizen by the legislative régime of the monopolization of the Moroccan phosphates was that suffered by Mr. Tassara as a result of the 1925 decision of the Department of Mines, so that necessarily we always return to that decision and its date, which antedates the acceptance of compulsory jurisdiction. However, instead of basing its reasoning on these grounds, the majority of the Court chose to reason as follows:

What the Italian Government refers to as the 'monopolization of the Moroccan phosphates' has been consistently presented by that Government as a régime instituted by the dahirs of 1920, which, by reserving to the Maghzen the right to prospect for and to work phosphates, have established a monopoly contrary to the international obligations of Morocco and of France. It contends that this régime, being still in operation, constitutes a situation subsequent to the crucial date, and that this situation therefore falls within the Court's compulsory jurisdiction.

The Court cannot accept this view. The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; and, from the point of view of the criticism directed against it, cannot be considered separately from the legislation of which it is the result. The alleged inconsistency of the monopoly régime with the international obligations of Morocco and of France is a reproach which applies first and foremost to the dahirs of 1920 establishing the monopoly. If, by establishing the monopoly, Morocco and France violated the treaty régime of the General Act of Algeciras of April 7th, 1906, and of the Franco-German Convention of November 4th, 1911, that violation is the outcome of the dahirs of 1920. In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction. ...<sup>50</sup>

We feel that the majority of the Court did not take a correct view when, as a result of this reasoning, which is in the final analysis somewhat ambiguous, it in fact regarded the monopoly régime of the phosphates as a simple lasting consequence of certain allegedly instantaneous acts, that is, the legislative acts of 1920. Whether real or not, the international wrongfulness of the monopoly alleged by the applicant Government concerned the existence and maintenance of that régime and not solely the acts which instituted it. The normative situation not in conformity with international requirements merely began with the adoption of the 1920 *dahirs*

<sup>48</sup> *P.C.I.J.*, Series C, No. 84, pp. 494–495.

<sup>49</sup> Para. 27.

<sup>50</sup> *P.C.I.J.*, Series A/B, No. 74, pp. 25–26.

and continued unchanged after that crucial date. That point was clearly appreciated by Judge Cheng Tien-hsi, who, in his separate opinion, sought precisely to stress that, in the case of the phosphates monopoly instituted in Morocco in 1920, the question of determining the "time" of the wrongful act should receive an answer quite different from that which he himself had given regarding the 1925 decision of the Department of Mines. He expressed himself in the following terms:

But the same cannot apply to the question of the monopoly. For the monopoly, though instituted by the dahir of 1920, is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir that first created it remains in force. The case of the monopoly is not at all the same as the case where an injured party has not obtained satisfaction for an alleged injury, which would be a case like the decision of 1925; *nor is it merely the consequences of an illicit act\**, which would mean that the wrong was completed once for all at a given moment. ... it is therefore ... not enough to say that it is a legal position resulting from the legislation of 1920 or that it cannot be considered separately from the legislation of which it is the result; for the essence of the dispute is a complaint against what the Applicant has repeatedly maintained to be the 'continuing and permanent' state of things at variance with foreign rights, rather than the mere fact of its creation,\*... For these reasons, I am of the opinion that the monopoly is not a situation or fact anterior to the crucial date and, in consequence, whatever may be the merits of the claim, the dispute concerning it is not outside the jurisdiction of the Court.<sup>51</sup>

31. With regard to the interpretation of the terms of the clause limiting *ratione temporis* the acceptance of compulsory jurisdiction by the respondent Government, the reasoning of the majority of the Court is equally perplexing. This reasoning was formulated as follows:

In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute ... The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.<sup>52</sup>

While endeavouring not to, the majority of the Court thus interpreted the clause in question very restrictively. It considered that, under its terms, the respondent Government had intended to limit its accept-

ance of the jurisdiction to disputes related to situations and facts which were not only subsequent to the crucial date but contained only elements subsequent to that date, situations and facts of which nothing existed previously. If there had really been proof of such an intention on the part of the respondent Government, it would then have been possible to regard as outside the Court's jurisdiction any dispute arising out of a "continuing" act if such act had begun before the crucial date and subsequently continued to exist in the same form.<sup>53</sup> However, it is by no means certain that the terms of the French declaration justify the interpretation given by the majority of the Court. Those terms merely limited the acceptance of the jurisdiction to disputes concerning situations or facts subsequent to the date of that acceptance. In our view, the term "subsequent" to a given date applies to any situation or fact which exists as a situation or fact after the date in question and not only a situation or fact which only began to exist subsequent to that date. Judge van Eysinga seems to have recognized this when, in his dissenting opinion, he protested against the "attempt to restrict the scope of the French declaration" by reading into its text "something that it does not contain" and when he stressed that "a dispute 'which arises with regard to situations subsequent to a given date' is something different from a dispute the causal facts of which are subsequent to that date".<sup>54</sup> Once again, however, it is to Judge Cheng Tien-hsi that we owe the most pertinent comments:

It must be remembered that the material words of the French declaration are 'situations or facts subsequent to this ratification', which does not mean quite the same thing as 'situations or facts created after the ratification'. Consequently a situation or fact existing after the crucial date is no less a situation or fact subsequent, although it may have existed also before that date.<sup>55</sup>

32. At all events, and whatever might have been the relative value of the opposing theories in the *Phosphates in Morocco* case, we think that we can confirm, taking up again the line of argument initiated above,<sup>56</sup> that even the opinion expressed by the majority of the Court in no way contradicts the deductions which we believe should be made from the very nature of an act in the category under consideration with regard to the determination of its *tempus commissi delicti*. The fact that this majority led to the rejection of the application of the Italian Government, which was, precisely, based on the "persistence" after the crucial date of a situation which, in its view, constituted a "continuing" internationally wrongful act, in no way disproves our deductions. On the contrary, what we regard as the arbitrary assimilation of a "continuing" act to an "instantaneous" act that nevertheless produces continuing effects and the interpretation (in our view far too restrictive) of the clause limiting the acceptance of compulsory

<sup>51</sup> *Ibid.*, pp. 36-37.

<sup>52</sup> *Ibid.*, pp. 23-24.

<sup>53</sup> See the comments on this subject in the final part of para. 23 above.

<sup>54</sup> *P.C.I.J.*, Series A/B, No. 74, p. 35.

<sup>55</sup> *Ibid.*, p. 37.

<sup>56</sup> See para. 29 above.

jurisdiction by the French Government seem to us to show that without that assimilation and that interpretation the majority would not have felt authorized to deny the competence of the Court in the case in question. It may be noted, in conclusion, that the judgment at no point implies that those who formulated it were opposed to the idea that the duration of an act recognized uncontestedly as a "continuing" act covers the whole period between its beginning and its end.

33. More recently, it has been mainly the European Commission of Human Rights which has had to distinguish between "instantaneous" wrongful acts and "continuing" wrongful acts in order to establish its competence with regard to certain disputes. As mentioned above,<sup>57</sup> the United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>58</sup> of any act or decision or any fact or event occurring after 13 January 1966. With regard to intertemporal cases, the European Commission has evidently adopted different solutions according to the type of acts brought before it. With regard to a "continuing" wrongful act which occurred partly before the crucial date and partly after, it has declared itself competent with regard to the second part of the "act". The Commission has thus recognized that the duration of a "continuing" wrongful act extends beyond the initial time of its perpetration.

In the partial decision of 16 December 1966 in the case of *K. H. de Courcy v. United Kingdom*, for example, the Commission, referring to the applicant's complaint that he was kept in solitary confinement for 20 out of 24 hours over a period of 10 months, commented that:

... even if the said period of ten months was in part subsequent to 13th January, 1966, the conditions of the solitary confinement described do not constitute a violation of the rights and freedoms set forth in the Convention ... it follows that this part of the Application is manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.<sup>59</sup>

Setting aside the substance of the matter, what retains our attention is that the Commission implicitly admitted that the conduct of the State erroneously considered wrongful by the applicant (solitary confinement), although it began before the crucial date, extended beyond that date, so that the Commission deemed itself competent in principle to judge the possible incompatibility of that conduct, for the second part of its duration, with the obligations laid down by the Convention. In the case of *Roy and Alice Fletcher v. United Kingdom*, the applicants complained that, *inter alia*, contrary to the provisions of article 6 of the Convention, they were not brought to trial within a reasonable time. In the de-

cision handed down on 19 December 1967 in this case, the Commission rejected the application on the following grounds:

*Whereas*, with regard to the Applicants' complaints that they were not tried within a reasonable time on the count of arson which was left on the file at the conclusion of their trial in 1961, it is to be observed that, insofar as the complaint relates to the period before 14th January, 1966, under the terms of the United Kingdom's declaration of that date recognising the Commission's competence to accept petitions under Article 25 of the Convention, the United Kingdom only recognises the Commission's competence to accept petitions so far as they relate to acts or decisions, facts or events occurring or arising after 13th January, 1966; whereas it follows that an examination of this part of the Application is outside the competence of the Commission *ratione temporis*;

*Whereas*, moreover, in regard to the period after 13th January, 1966, an examination of this complaint as it has been submitted, including an examination made *ex officio*, does not disclose any appearance of a violation of the rights and freedoms set forth in the Convention and in particular in Article 6.<sup>60</sup>

Thus, in this case also, the Commission recognized its competence to judge the possible incompatibility with the provisions of the Convention of the part of the "continuing" act (failure to bring the applicants to trial), which was subsequent to the crucial date.<sup>61</sup> Underlying these different decisions, there is quite clearly the conviction that a "continuing" internationally wrongful act is an act whose existence extends unchanged in time and whose duration includes the whole period between its beginning and its end. That is the same conviction which has appeared in other well-known decisions of the European Commission of Human Rights (for example, the *de Becker* case, etc.), where it was recognized that certain acts which originated prior to the date of the entry into force of the Convention could, nevertheless, in view of their "continuing" character, since they extended beyond the date in question, constitute violations of the said Convention and thus justify the receivability of applications relating to that "continuing situation".<sup>62</sup>

34. In writings of international law it was, as already mentioned, H. Triepel who was the first, in 1899, to formulate the concept of the "continuing" wrongful act with the consequences deriving from it with regard to the time of the occurrence of this type of act.<sup>63</sup> This concept was subsequently taken up again in various general studies on State responsibility.<sup>64</sup> The question of the *tempus commissi delicti* of the "continuing" internationally wrongful act has,

<sup>60</sup> Council of Europe, European Commission of Human Rights *Collection of Decisions* (Strasbourg), No. 25 (May 1968), p. 86.

<sup>61</sup> M. A. Eissen ("Les réserves *ratione temporis* à la reconnaissance du droit de recours individuel, *Les clauses facultatives de la Convention européenne des droits de l'homme* (Bari, Levante, 1974), p. 94, foot-note 38) cites other unpublished decisions tending in the same direction.

<sup>62</sup> See the references given above in foot-note 47.

<sup>63</sup> H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289.

<sup>64</sup> See, for example, Decencière-Ferrandière, *op. cit.*, p. 93; Ago, *loc. cit.*, pp. 518 *et seq.*, B. Graefrath, E. Oeser, P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 60-61.

<sup>57</sup> See foot-note 29 above.

<sup>58</sup> In force for the United Kingdom since 3 September 1953.

<sup>59</sup> *Yearbook of the European Convention on Human Rights, 1967* (The Hague, 1969) vol. 10, p. 382.



moreover, been considered in works on the interpretation of the formula "situations or facts prior to a given date", used in some declarations of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice,<sup>65</sup> or the interpretation of similar formulas contained in the British and Italian declarations of acceptance of the competence of the European Commission of Human Rights with regard to individual applications.<sup>66</sup> All these writers explicitly or implicitly agree in recognizing that the "time" and the "duration" of a continuing wrongful act or a continuing wrongful situation extend beyond the initial time of the occurrence of such act or situation and end only at the final moment of such occurrence.

35. A few brief considerations suffice with regard to the question of the *tempus commissi delicti* of an internationally wrongful act where such act constitutes the breach of an obligation to prevent an event. In section 8 of this chapter, we showed that the occurrence of an internationally wrongful act of allowing an event to occur called for the combination of two conditions: that the event to be prevented should occur and that its occurrence should be made possible by a lack of prevention on the part of certain State organs. The need for the combination of these two conditions is reflected in the text of article 23. That being so, the question which concerns us might be couched in the form of an alternative: should one take, as the time of the occurrence of an internationally wrongful act of this kind, the time at which the event took place or should one include in this time of occurrence the period—short or long and at all events necessarily prior—during which the State organs adopted the negligent conduct which subsequently made the occurrence of the event possible? The answer might give rise to not inconsiderable consequences with regard to the determination of the time of the occurrence of the breach. If the first solution were adopted, the internationally wrongful act of allowing an event to occur would be assimilated, from the viewpoint of occurrence, to an instantaneous act and the "duration" of the event would not normally exceed that of an act in this category. If, on the other hand, the second solution were adopted, the act of allowing an event to occur might sometimes be assimilable, from the angle which interests us, to a continuing act.

36. In actuality, the choice between the two solutions (in so far as there are two solutions in the case which concerns us) cannot be made without first considering the question from the correct viewpoint. In order to do so, it is essential to have clearly in mind the characteristics of the occurrence of a "wrongful act of allowing an event to occur" and the way in

which the two conditions for its occurrence are inter-related. Let us recall what is stated above:

... in order to be able to establish the breach of an obligation in this category, two conditions are required: the event to be prevented must have occurred, and it must have been made possible by a lack of vigilance on the part of State organs. Clearly, a State cannot be alleged to have breached its obligation to prevent a given event so long as the event has not actually occurred, and the same is true where the feared event has occurred but cannot be ascribed to a lack of foresight on the part of certain State organs. In other words, *neither the occurrence of the event without there having been any negligence on the part of State organs nor such negligence without the occurrence of any event in itself constitutes a breach of the international obligation. Only the combination of these two elements permits the conclusion that there has been such a breach.*<sup>67</sup>

An internationally wrongful act of allowing an event to occur is thus different from a wrongful act which occurs progressively in time through a succession of distinct State actions or omissions, of which the first begin, in a given case, the breach of an international obligation and the others complete its occurrence. The obligation which a State breaches by an act of allowing an event to occur is not an obligation requiring the adoption of any specific measure but an obligation to prevent, in so far as is humanly possible, the occurrence of a given event. Before the event occurs, the conduct of the State is thus neither an entirely completed wrongful act nor the beginning of a wrongful act on which the event confers a definitive character. It is the unforeseen occurrence of the event and its combination with the conduct of the State which determines the wrongfulness of that conduct, rather like a catalyst which, when placed in contact with a given substance, provokes a reaction in the latter.

37. That being so, it seems clear that, seen in the light of the true nature of an internationally wrongful act of allowing an event to occur, the question of the *tempus commissi delicti* of an act of this kind becomes clearer. Finally there is no alternative left, because the question can be answered in only one way. In no way can one consider the occurrence of such an act as beginning before the time at which the event, by occurring, determines the wrongfulness of the conduct of the State which did not prevent it when it could have done. True, the event itself may appear as something purely instantaneous or something relatively durable. However, the distinction between these two possibilities, apart from being apparently devoid of practical consequences, cannot in any case affect the problem under consideration. The "time" of the internationally wrongful act of allowing an event to occur is the time when the event in question occurs, because it is at that very time that the obligation to prevent its occurrence is breached by the State.<sup>68</sup>

<sup>65</sup> See for example, J. Fischer Williams, "The optional clause (the British signature and reservations)", *British Year Book of International Law*, 1930 (London), vol. 11, pp. 74-75; R. Montagna, "La limitazione *ratione temporis* della giurisdizione internazionale obbligatoria", *Scritti giuridici in onore di Santi Romano* (Padua, CEDAM, 1940), vol. III, pp. 130 et seq.

<sup>66</sup> See, for example, Eissen, *loc. cit.*, pp. 94-95.

<sup>67</sup> Para. 3.

<sup>68</sup> We might imagine the case where the event—for example, the occupation of a foreign embassy by a group of terrorists—occurs without the local State being liable to reproach, but where this State becomes guilty subsequently of inertia in the face of such an occupation. In such a case, the State would be committing a

38. In its commentary to article 18, paragraph 4, of the draft articles,<sup>69</sup> the Commission took into consideration another category of acts whose occurrence also extends over a period of time in order, as in the case of the other paragraphs of the same article, to determine the operation, with regard to this particular kind of act, of the general requirement of simultaneity in time between the occurrence of the act of the State and the "force" for the State of the obligation in question. The acts to which we refer are those for which the Commission adopted the term "composite", in order to convey the idea that it was a question of State acts, each of which was composed of a plurality of separate specific acts relating to separate specific cases but all necessary for the fulfilment of the conditions for the breach of a specific international obligation. As the Special rapporteur also pointed out in his fifth report on State responsibility,<sup>70</sup> the separate acts which, in the aggregate, would constitute a breach of an international obligation may, severally, be internationally lawful. It is also possible, and even frequent, for each of them to be itself an internationally wrongful act, but wrongful, let us note, in relation to an international obligation other than that which determines the wrongfulness of the act as a whole.<sup>71</sup> In the final analysis, consequently, the distinctive common characteristic of a State act of the type under consideration is that it should comprise a sequence of actions—which, taken separately, may be lawful or unlawful—which are interrelated by having the same intention, content and effects, while relating, as we have just said, to different specific cases.

39. It is by no means difficult to formulate hypotheses concerning the object of the international obligation which the "composite" act may breach. It may be, for example, that State A has undertaken, by a treaty on establishment and economic co-operation, to permit in general terms participation by nationals of State B in the exploitation of certain of its own mineral, agricultural or marine resources and that, in execution of this obligation, a number of concessions have been granted to individuals or corporations belonging to State B. Let us suppose that, subsequently, one of these concessions is expropriated for specific motives. Such expropriation may in itself be internationally irreproachable, having been carried out with due regard for the international rules relating to the expropriation of foreign prop-

erty. It may also be internationally wrongful, either on the basis of a conventional obligation whereby, for example, the two States are bound not to expropriate assets belonging to their respective nationals, or on the basis of a customary obligation, for example, because of lack of adequate compensation. However, the expropriation does not in itself constitute a breach by State A of its obligation to permit generally participation by nationals of State B in the exploitation of its own economic resources. If, on the other hand, the first expropriation is followed by a whole series of others, the total effect of which is actually to reduce such participation to nil, the aggregate measures thus taken clearly constitute a breach of the obligation which State A has assumed by concluding with State B the treaty on establishment and economic co-operation. In other words, State A is then merely achieving by a plurality of separate acts, forming as a whole a "composite" act, the same internationally wrongful objective which it would have achieved by a "single" legislative or other act, excluding in general the nationals of State B from the exercise of any economic exploitation activity in its territory.<sup>72</sup>

40. Another example, actually the one most frequently cited in attempts to explain the concept of a "composite" internationally wrongful act, is furnished by the breach of an obligation prohibiting the State to which it applies from adopting a "discriminatory practice" with regard to the access of aliens from a specific country to the exercise of an activity or profession. Where such a prohibition exists, the isolated rejection of an application submitted by one national of the said country cannot in itself be

breach of an international obligation, but the obligation breached would not be the obligation to prevent the occurrence of the event. We would then no longer be faced with a wrongful act of allowing an event to occur, which is a hypothesis necessarily linked to the "occurrence" of the event.

<sup>69</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 93, document A/31/10, chap. III, sect. B, article 18, para. (22) of the commentary.

<sup>70</sup> *Ibid.*, vol. II (Part One), p. 22, document A/CN.4/291 and Add. 1-2, para. 65.

<sup>71</sup> The Special Rapporteur referred to this hypothesis in his 1939 course on "Le délit international" (*loc. cit.*, p. 523), commenting that to the plurality of State actions there then corresponds "a plurality of delicts, a plurality of breaches of an international obligation different from that breached by the aggregate act".

<sup>72</sup> See again Ago, *loc. cit.*, pp. 522 *et seq.* In the Phosphates in Morocco case, the Italian Government had given a description of the complaint made by it under the head of "the monopolization of Moroccan phosphates for the benefit of France", which, from certain aspects, could be compared to the description which we are giving here of a "composite" internationally wrongful act. It had spoken, in that regard, of an "offence resulting from the union of several successive breaches interlinked by the same felonious intention and aimed at the gradual achievement of the same programme" (observations and submissions of the Italian Government, *P.C.I.J.*, Series C, No. 84, p. 488). Later, in its further observations, it had presented the case as that of a "single" act, but one deriving its intrinsic character from the "combined result" of a series of breaches (*ibid.*, pp. 851 *et seq.*). In order to define that type of act, the Italian Government had invoked the concept of "continuing" offence, borrowed from the criminal law of certain countries, to which the French Government had objected that a concept of criminal law was inapplicable in the interpretation of a conventional provision of international law (*ibid.*, pp. 720 *et seq.*). Not adopting any position on the question of principle, the Court, in its decision, denied the existence in fact of the links alleged to exist by the Italian Government between some of the elements which that Government wished to include in the aggregate single act of "monopolization". However, despite the similarities of form already noted, it is easy to see that the parallel is purely apparent. The fact that the Italian Government considered each of the elements composing the "single" act termed "monopolization of Moroccan phosphates" as a breach of the same rule of law breached by the said single act makes it impossible to consider the case referred to by the Italian Government as corresponding to the concept of a "composite" internationally wrongful act as we understand and define it in this report. This conclusion is reinforced by a consideration of the nature of the links which, according to the applicant, existed between those elements.

considered a breach of the prohibition.<sup>73</sup> If, however, applications submitted by nationals of that country are systematically rejected by the State authorities in a whole series of cases, the rejections taken as a whole definitely constitute the discriminatory "practice" which it had been the intention to prevent and thus clearly conflict with what is required of the State by the obligation. Furthermore, in its commentary to article 18, paragraph 4, the Commission has already drawn attention to the fact that, in the practice of the United Nations Economic and Social Council, consistent violation of human rights and fundamental freedoms has come to be established as an offence in itself, distinct from the offence constituted by an isolated violation of those rights and freedoms.<sup>74</sup> The concept of a composite internationally wrongful act is thus applicable in this context also.

41. How is the problem of the determination of the *tempus commissi delicti* to be resolved with regard to an act falling within the category whose distinctive characteristics we have just defined? In this regard, referring to the considerations set forth above,<sup>75</sup> we deem it essential to emphasize above all that the time when the existence of a "composite" internationally wrongful act is revealed and the time to which, once it is revealed, its actual existence must be backdated must not be confused. What makes it possible to discern the presence of a "composite" act is clearly not the first individual act of the series which it will subsequently be seen to have inaugurated. It is after a whole series of individual acts of the same kind that the "composite" act will be revealed; one of these acts will make it apparent that what is involved is not merely an accidental succession of isolated acts but an aggregate act which as such merits a separate definition.<sup>76</sup> It is clear that, once the existence of this "other" act is revealed, the aggregate of individual acts constituting it, since its commencement, are thereby affected. For example, as soon as it is re-

<sup>73</sup> Such a rejection may, on the other hand, in itself constitute a breach of another international obligation—in the case where, for example, the State in question is linked to the State of origin of the person in question by a treaty requiring that nationals of the latter State be allowed to exercise a specific activity or profession on a footing of full equality with nationals of the former State.

<sup>74</sup> See *Yearbook ... 1976*, vol. II (Part Two), p. 94, document A/31/10, foot-note 438.

<sup>75</sup> See para. 23 above.

<sup>76</sup> It is precisely this circumstance which, as we said in paragraph 23, seemed to us decisive for the purpose of answering the specific question of the establishment *ratione temporis* of the jurisdiction of an international tribunal. We shall confirm here the conclusion which we reached on this point: if the interpretation of the clause limiting the jurisdiction of the tribunal in time led us to consider this jurisdiction as limited solely to those acts of which "all the elements" were subsequent to the crucial date, a composite internationally wrongful act would not be within the jurisdiction of the tribunal unless the whole series of acts were subsequent to that date. But if, on the contrary, this restrictive interpretation is not necessitated by an explicit text on the subject, we think that, so long as the duration of a composite internationally wrongful act overlaps with the crucial date, the date of the individual act which revealed both the existence and the wrongfulness of the composite act should be taken as decisive for this specific purpose. The jurisdiction of the tribunal would thus have to be accepted so long as the conduct in question took place after the crucial date.

vealed that, by a succession of individual expropriation measures, the State is achieving the global exclusion of aliens from the exercise of a specific activity or that, by a series of specific cases of discrimination, the State is engaging in a real discriminatory "practice", such exclusion or such practice are deemed to have begun with the first measure of the first case in the series. Otherwise, one would arrive at the absurd result of recognizing, for example, the existence of a practice in a single action. We should add—and this very important—that, if subsequently similar actions were to be added to the already established series, the "composite" act would automatically be augmented by all those individual subsequent acts. We therefore conclude without any possible hesitation that a composite internationally wrongful act extends in time from the first of the successive State acts composing it up to the last act added to it. At first glance, it might be thought that a reservation or restriction should be made to that conclusion by reason of article 18, paragraph 4, which specifies, with regard to our hypothesis, the general requirement of contemporaneity between the "force" of an international obligation and the occurrence of a breach of that obligation. In the case where the obligation in question entered into force after the beginning of a specific series of individual State acts or ceased to be in force before the end of the series, this provision indicates that only the individual acts occurring while the international obligation prohibiting the said composite act is in force for the State can be taken into consideration for the constitution of a "composite" internationally wrongful act. In actuality, that is a question of specification and not a derogation from or restriction on the principle set forth above. It is true that the *tempus commissi delicti* of a composite act can be measured only by taking account of the individual acts occurring while the international obligation in question is in force for the State which committed them. However, that is for the very simple reason that, when an obligation is not in force for a specific State, there cannot be, with regard to the obligation in question, any possible wrongful act on the part of that State and thus no possible contribution by this State, by any action, to the formation of a "composite" internationally wrongful act. The conclusion that the *tempus commissi delicti* of a composite internationally wrongful act corresponds to the whole period elapsing between the first and the last of the individual State acts which contribute to the formation of this aggregate internationally wrongful act admits of no reservation or exception.

42. In order to conclude this examination of the different types of internationally wrongful act whose commission is not immediate but extends over periods of time that may be extremely lengthy (thereby giving rise to difficulties in respect of the determination of the *tempus commissi delicti*), one last category of State acts remains to be considered. We have characterized these acts as "complex", as this adjective seems to convey most aptly their characteristic feature, namely, that of being constituted by a suc-

cession of actions or omissions by the same organ or, more frequently, by different organs, all of which, however, relate to a single case. This category of State acts is certainly not a new element in the context of the Commission's study of the problems of international responsibility. Two of its aspects have been dealt with in the articles already approved. In article 18, paragraph 5, the Commission defined, as it had in previous paragraphs for other types of internationally wrongful act, the criterion which "adapts" to the specific character of a "complex" act the general principle requiring that the "force" of the international obligation in question and the commission of the State acts which are alleged to be a breach of that obligation should be contemporaneous. The commission then set forth in article 21, paragraph 2, and article 22 rules for determining the existence of an internationally wrongful act constituted by a "complex" act of the State. These rules highlight the particular importance that this concept assumes when one seeks to explain the way in which the breach of certain obligations commonly found in certain sectors of international law occurs, namely, the obligations that require the State to achieve, by the means of its choice, a specified result, and which accord it, in addition to this initial choice, the right to redress, by the adoption of new means, any improper situation to which the means initially employed may have given rise in a particular case, so as to achieve in a second stage the internationally required result—or at least an equivalent result. It is with special reference to these already established points that we drew attention<sup>77</sup> to the necessity of ensuring that the solutions adopted in spheres having in common the presence of a temporal factor do not appear to be in conflict, and also the necessity of not confusing the separate issues resolved in the aforementioned articles and the subject-matter of the article we now intend to formulate.

43. The fundamental hypothesis of a "complex" internationally wrongful act is therefore that of an offence which, having commenced or been set in train by the action or omission of a State organ through its failure at the outset to achieve, in a specific case, the result required by an international obligation, is then completed and brought to an end by further actions, sometimes by the same organ but more often by other organs, relating to the same case at a subsequent time. In other words, the "complex" internationally wrongful act is the aggregate of all the actions or omissions by State organs at successive stages in a given case—each of which actions or omissions could have ensured the internationally required result but failed to do so. We have already given specific examples of such acts, and others could be added: acquittal at all the successive jurisdictional levels of the perpetrators of a crime against the representative of a foreign Government; denial of justice for a foreign national as a result of an aggregate of decisions handed down by the whole gamut of ju-

dicial authorities approached; breach, in a given case, of a conventional obligation regarding the treatment to be accorded to the nationals of a particular country, or to nationals of a particular ethnic origin, as a result of the joint effect of successive acts by organs belonging to different branches of the State power; and so forth. Thus, it is in respect of acts structured in this way that we raise the question how to determine, specifically in relation to such acts, the *tempus commissi delicti*, the time at which the international offence was committed.

44. The question of the *tempus commissi delicti* of a "complex" internationally wrongful act—and also, as we have seen, of a "continuing" act<sup>78</sup>—arose in the *Phosphates in Morocco* case. However, the aspects of this case which are of interest in relation to the question now under consideration have already been analysed by the Commission in the part of its commentary to article 22 concerning the determination of the existence of the breach of an international obligation of result in the specific case in which the recognition of such breach is subject to the condition that the individuals benefiting from the obligation must have first exhausted internal remedies without avail.<sup>79</sup> It will therefore suffice to summarize the essential facts of the case and to dwell on certain points which have a particular bearing on the question under consideration.

45. In this case, the Italian Government maintained, though as a subsidiary complaint, that the Italian company *Miniere e Fosfati* was being dispossessed of its vested rights<sup>80</sup>—a dispossession which, it claimed, resulted from the decision of the Department of Mines of 8 January 1925 and the denial of justice which had followed it, in breach of the obligation incumbent on France to respect those rights. According to the applicant Government, this constituted an internationally wrongful act, which had unquestionably been initiated by the 1925 decision, but which did not become complete and final until the acts in 1931 and 1933, by which the French Government had refused to make available to the Italian nationals concerned effective means of redress against the disputed decision,<sup>81</sup> and it was therefore a standard case of a "complex" internationally wrongful act. Here is what the applicant Government had to say in its written observations concerning the intertemporal aspects of the breaches of obligations of result effected by the acts described above:

... It is only when there is, as a final result, a failure to fulfil these obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute. In this case, the international obligations incumbent on the protecting Power in regard to the treatment to be accorded to the company *Miniere e Fosfati* as an

<sup>78</sup> See above, paras. 29–32.

<sup>79</sup> See *Yearbook ... 1977*, vol. II (Part Two), pp. 38–39, document A/32/10, chap. II, sect. B, article 22, paras. (25) to (27) of the commentary.

<sup>80</sup> *P.C.I.J.*, Series A/B, No. 74, p. 27.

<sup>81</sup> See the observations and submissions of the Italian Government, 15 July 1937 (*P.C.I.J.*, Series C, No. 84, p. 493).

<sup>77</sup> See para. 25 above.

Italian national did not require that they should be fulfilled exclusively by certain organs. These obligations prescribed, in particular, that this company should share effectively in the profits yielded by the mining concessions; but there was as yet no decisive evidence that such a result had been set aside by the Department of Mines. ... So long as a possibility of redressing the situation in accordance with these obligations existed—and if there had been a serious intention in this respect, no opportunity would have been more favourable than that of a revision of the decision of the Department of Mines by the highest authority of the Protectorate—there was no ground for stating that there had occurred a complete and final internationally wrongful act, giving rise to the international responsibility of the State, and creating an international dispute.<sup>82</sup>

And in its oral pleadings it added:

... It was not until 28 January 1933 that the protecting State declared that it did not intend to take any measures to achieve the effect required by international law and that it wished to take advantage of the opportunity furnished by its own judicial law to make final the dispossession of the Italian nationals. It was at that precise moment, therefore, that the breach of conventional law was actually accomplished; it was at that precise moment that the final breach of the obligation to allow the Italian nationals to benefit from the concessions régime was actually accomplished.<sup>83</sup>

Naturally, the thesis thus developed enabled the Italian Government to maintain that the offence constituted by a succession of acts extending over the years 1925–1933 and becoming final in 1933 was to be regarded in the aggregate as an act “subsequent” to the date on which France accepted the compulsory jurisdiction of the Court. It seemed to the Italian Government absurd to state “that the Court could not hear a dispute concerning an internationally wrongful act which had been completed in 1933, merely because one of its constituent elements existed prior to the crucial date”.<sup>84</sup>

46. It is characteristic that, confronted by this argument, neither the respondent Government nor the Court itself voiced objections to the fundamental thesis developed by the applicant Government.<sup>85</sup> In the final analysis, what the French Government<sup>86</sup> and also the Court<sup>87</sup> contested with well-sustained arguments was that, by employing that fundamental thesis, it was possible, in that case, to overcome the objection regarding the Court’s lack of jurisdiction *ratione temporis*. The gist of the Court’s argument was that the refusal in 1933 to grant the request to make available an extraordinary means of redress—in view of the lack of judicial organization—was not a denial of justice which could be considered as an ad-

ditional element of the act giving rise to the dispute but merely a refusal to settle in a certain way a dispute arising from an already “complete” breach of international law. Mr. Basdevant, the French Government agent, had shrewdly perceived that it would be difficult to exclude completely the possibility that “the wrongful act referred to the Court” might have been “constituted by the 1925 decision of the Department of Mines and the denial of justice, taken together”. He therefore chose to assert that the denial of justice, if denial of justice there had been, was also prior to France’s acceptance of the compulsory jurisdiction and dated back to the time of the vain efforts made by the Italian national injured by the decision of the Department of Mines to have that decision revised, and that consequently the alleged lack of judicial organization as regards means of redress was also prior to the crucial date.

47. There is certainly no reason for us to discuss here the merits of the Court’s decision in this case. As far as the subject-matter of our study is concerned, we can even take these merits for granted. In concluding the consideration of this decision, it suffices to indicate that the decision merely denied that the case could be fitted into the theoretical framework contemplated by the applicant Government. As regards the positions of the parties, it seems pertinent to note: (a) that, in this important judicial case, the applicant openly asserted, in regard to the definition of concepts, the existence of a category of internationally wrongful acts constituted by a succession of separate State acts relating to the same case, all of which taken together, however, contributed to the commission of the offence, and that it therefore explicitly and systematically discarded the possibility of considering as the *tempus commissi delicti* of a wrongful act of this type the sole moment of the initial action or omission of the series; (b) that, by virtue of the position which it adopted, the respondent, far from raising a theoretical objection to the principles espoused by the applicant, agreed to reason on the basis of cases in which a breach of an international obligation might occur “at more than one moment”. The respondent probably would not have done so had it believed that the “moment” of an internationally wrongful act must in all cases be taken to mean exclusively the moment of the initial conduct of the State in the matter.

48. In order to reflect an opinion of indirect interest for our subject, we may also mention some of the decisions of the European Commission of Human Rights. We have stated that the United Kingdom recognized the Commission’s competence with respect to individual applications relating to any act or decision occurring or any facts or events arising subsequently to 13th January, 1966, and that a similar reservation was made by Italy.<sup>88</sup> Unfortunately, only part of the decisions of this Commission has been published; it is not therefore always possible to know the European Commission’s attitude towards appli-

<sup>82</sup> Further observations of the Italian Government, 21 February 1938 (*ibid.*, p. 850).

<sup>83</sup> Statement by counsel for the Italian Government, session of 12 May 1938 (*ibid.*, No. 85, pp. 1232 *et seq.*)

<sup>84</sup> *Ibid.*, p. 1233. See also the rejoinder of 16 May 1938 (*ibid.*, p. 1334).

<sup>85</sup> This important fact has already been emphasized in the Commission’s commentary to article 22 (*Yearbook ... 1977*, vol. II (Part Two), p. 39, document A/32/10, chap. II, sect. B, article 22, para. (28) of the commentary).

<sup>86</sup> See especially the oral pleading of 5 May 1938 of the agent of the French Government (*P.C.I.J.*, Series C, No. 85, pp. 1048 *et seq.*).

<sup>87</sup> *P.C.I.J.*, Series A/B, No. 74, p. 22.

<sup>88</sup> See foot-note 29 above.

cations directed against an act or a decision prior to the crucial date, but in respect of which the internal remedies were not exhausted until after that date. However, we know of two published decisions which shed some light on the attitude possibly adopted by the Commission in this respect. The first relates to a case in which the applicant complained about the procedure followed by the State organs of the United Kingdom with regard to the expropriation of property belonging to her and claimed that she had not received adequate compensation.<sup>89</sup> The decision to expropriate was taken prior to the crucial date, whereas the last of the decisions handed down in this case was subsequent thereto. As the Commission held that the application was inadmissible, it might at first be thought to subscribe to the idea that the *tempus* of the wrongful act alleged by the applicant was the moment of expropriation. But this is not the case: the decision that the application could not be entertained was based on grounds other than the existence of the United Kingdom's reservation *ratione temporis*. The effect of this reservation on the case was simply not taken into consideration. This being so, there is sound justification for believing that, but for the other reasons on which the European Commission's decision in this case was founded, the fact that the final decisions handed down in the case were subsequent to the crucial date would have sufficed for the Commission to recognize its competence from the intertemporal standpoint. The second decision also concerned a claim relating to the amount of compensation granted for expropriation.<sup>90</sup> The applicant claimed that the last of the decisions by the United Kingdom authorities in the case (and the one which, in her opinion, should be considered as final) was subsequent to the crucial date. The discussion centred on whether the final decision in the case was actually the one alleged by the applicant or the one indicated by the Government, which was prior to the crucial date. The Commission endorsed the Government's opinion in this respect and, on that basis, declared that it had no competence *ratione temporis* with respect to the claim. Thus, in this case, too, one may assume that the Commission would have recognized itself competent if it had held, like the applicant, that the final decision in the case was a decision rendered after the crucial date.<sup>91</sup> Without resorting to conjecture, it may

be noted that the important point is that the European Commission considered that the date to be taken into account for the purpose of determining whether an act was prior or subsequent to the crucial date was not the date of the initial State conduct in the case—in this instance, that of the act of expropriation—but that of the decision embodying the final ruling on the applicant's appeals.

49. The findings which have derived from an attentive study of the scant material of relevance provided by international judicial decisions are thus in no way in conflict with those which are dictated mainly—as we have said—by juridical logic and the desire to be consistent with the position already adopted towards questions which have links with the problem currently under consideration. We can now, therefore, formulate our conclusions regarding the determination of the *tempus commissi delicti* of the category of acts which we have just considered, the last of the three categories which present the characteristic feature of acts whose time of commission extends beyond their beginning. It seems to us out of the question to consider as the “time” of commission of a complex internationally wrongful act the sole moment of the initial conduct of the State authority in the case, namely that which, as we have repeatedly stated, opened the *iter* of the breach but did not close it. The subsequent conduct of the said authority and of other higher authorities in the same case must be taken into consideration for the same reason, including the final conduct which set the seal on the breach of the international obligation. At the same time, it would clearly be equally inadmissible only to take account, for the purposes indicated, of this final conduct, and to overlook the conduct which preceded it, beginning, of course, with the initial conduct, which at the outset defined the actual character of the breach and which, to a large extent, determined its injurious consequences. Our conclusion about the “time” of an offence defined as a “complex” internationally wrongful act and characterized by a succession of separate State actions or omissions contributing to its occurrence has affinities with the conclusion which we have already given in respect of an offence characterized as a “composite” internationally wrongful act.<sup>92</sup> The breach of an international

<sup>89</sup> Decision of 4 February 1970, application No. 3651/68 (Council of Europe, European Commission of Human Rights, *Collection of Decisions* (Strasbourg), No. 31 (August 1970), pp. 72 *et seq.*).

<sup>90</sup> Decision of 14 December 1970, application No. 4430/70 (*ibid.*, No. 37 (October 1971), pp. 112 *et seq.*).

<sup>91</sup> We know of no published decisions referring to Italy's reservation to its declaration accepting the competence of the European Commission of Human Rights. It may nevertheless be of interest to refer in this respect to the work of G. Sacerdoti, “Epuisement préalable des recours internes et réserve *ratione temporis* dans la déclaration italienne d'acceptation du droit de requête individuelle”, *Les clauses facultatives de la Convention européenne des droits de l'homme* (Bari, Levante, 1974), pp. 133 *et seq.* We have reservations concerning this writer's ideas on the general scope of the rule of the exhaustion of internal remedies, as set forth in

article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but it is worth noting that, on the question of the breach of an international obligation by judicial organs, the writer considers there is no breach of an international obligation, and consequently no genesis of international responsibility, until the highest internal jurisdiction has delivered a verdict in which it confirms the disputed judgements of the lower authorities. The internationally wrongful act is then seen as a “complex” act and the breach must be regarded, according to Mr. Sacerdoti, as subsequent to the crucial date if the final decision itself is subsequent, even though the decision of the lower authority constituting a miscarriage of justice is prior to that date (*ibid.*, p. 145).

<sup>92</sup> With regard to the effect of this conclusion on the determination of the jurisdiction *ratione temporis* of an international tribunal with respect to a dispute arising from a complex internationally wrongful act whose occurrence allegedly overlaps with the crucial date, it is sufficient for us to refer to the considerations set forth above (see final part of para. 23).

obligation constituted by a "complex" internationally wrongful act extends over the entire period between the action or omission which initiated the breach and that which completed it.

50. This last conclusion completes the series of conclusions which it was our duty to draw in regard to the determination of the time of the breach of an international obligation for each of the separate hypothetical cases of wrongful acts which may occur in international legal life. The Special Rapporteur considers that it now remains for him to propose to the Commission the following definition of the rule relating to the question considered in this section.

*Article 24. Time of the breach  
of an international obligation*

1. If a breach of an international obligation is constituted by an instantaneous act, the time of the breach is represented by the moment at which the act occurred, even if the effects of the act continue subsequently.

2. If a breach of an international obligation is constituted by an act having a continuing character, the time of the breach extends over the entire period during which the act subsists and remains in conflict with the international obligation.

3. If a breach of an international obligation is constituted by a failure to prevent an event from occurring, although prevention would have been possible, the time of the breach is represented by the moment of the occurrence of the event.

4. If a breach of an international obligation is constituted by an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach extends over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation.

5. If a breach of an international obligation is constituted by a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case, the time of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

## CHAPTER IV

### Implication of a State in the internationally wrongful act of another State

#### INTRODUCTION

51. The possibility that a State—or a subject of international law other than a State—may in some way or other be implicated in an internationally wrongful act of another State—or of another subject of international law—was first mentioned in the Special Rapporteur's third report.<sup>93</sup> It was then announced, though in very general terms, that the particular problems liable to arise in a case of this kind would

be specifically examined when examination of the subjective element (chapter II) and objective element (chapter III) of the internationally wrongful act had been concluded and the establishment of the rules relating to determination of the general conditions for the existence of such an act of the State had thus been completed. Similar statements appeared in the reports of the Commission on its twenty-fifth<sup>94</sup> and twenty-sixth<sup>95</sup> sessions. More specifically, in its report on its twenty-seventh session, the Commission stated that when the essential questions relating to the subjective element (chapter II) and the objective element (chapter III) of the internationally wrongful act had been settled, the problems raised by the possible implication of other States in the internationally wrongful act of a given State would remain to be considered in chapter IV. In that connexion, reference was made to the notions of incitement, assistance and complicity, and to those relating to what is generally called "indirect responsibility".<sup>96</sup> The same expectations are expressed in the Commission's reports on its twenty-eighth<sup>97</sup> and twenty-ninth<sup>98</sup> sessions. The time has therefore come to devote some attention to the special situations mentioned in the passages cited.

52. The cases to be considered can be divided into two conceptually different categories. In the first are the cases in which the existence of an internationally wrongful act unquestionably committed by a State, attributable to it as such and without the slightest doubt involving its international responsibility, is accompanied by the existence of participation by another State, or by another subject of international law, in the commission by the first State of its own act. The characteristic element of this case is, precisely, the link between the conduct in fact adopted by a State—which, in isolation, may not in certain cases be internationally wrongful in any way—and the act committed by another State, the wrongfulness of which, on the other hand, is established. The problem which then arises is to establish whether such participation does not become tainted with international wrongfulness by the mere fact of being contributory to the commission of an internationally wrongful act by another State. Consequently, the question also arises whether such participation should not cause the participating State to bear some share of the international responsibility of the other State or, in any case, also to incur international responsibility itself.<sup>99</sup>

<sup>94</sup> *Yearbook ... 1973*, vol. II, pp. 171–172, document A/9010/Rev. I, para. 51.

<sup>95</sup> *Yearbook ... 1974*, vol. II (Part One), p. 275, document A/9610/Rev. I, para. 120.

<sup>96</sup> *Yearbook ... 1975*, vol. II, p. 59, document A/10010/Rev. I, para. 50.

<sup>97</sup> *Yearbook ... 1976*, vol. II (Part Two), pp. 71–72, document A/31/10, para. 72.

<sup>98</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 9, document A/32/10, para. 29.

<sup>99</sup> It need hardly be said that, if the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obli-

<sup>93</sup> *Yearbook ... 1971*, vol. II (Part One), p. 205, document A/CN.4/246 and Add. 1–3, para. 29.

53. The second category, on the other hand, contains cases distinguished by another characteristic. Here, the point to be considered is not the part which may in fact be played by a State in the independent commission of an internationally wrongful act by another State, but the existence of a particular relationship between two States. The decisive element is the existence of a situation, in law or in fact, entailing grave limitation of the freedom of decision and action of one of the States to the advantage of the other, either permanently or only on the specific occasion of the commission of the wrongful act in question. The question which then arises is whether the acts committed by the first State, in certain conditions, in breach of its international obligations, should not, from the standpoint of their legal consequences, be treated as if they were acts of the second State. In other words, it is necessary to determine whether the price of the situation established in favour of the second State is not to make that State indirectly responsible, at the international level, for the wrongful act constituted by the actions in question, in place of the State which committed them.

54. The two separate cases described above will be examined separately in the two sections forming this chapter.

#### 1. PARTICIPATION BY A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

55. To establish the rule of international law governing the subject-matter of this section, it is necessary first to delimit the subject itself precisely. It is important to distinguish clearly between the situations to which we mean to refer, and others with which any analogy is only apparent. Previous articles of the present draft have dealt, for example, with different cases in which organs of a State are guilty of internationally reprehensible actions in the territory of another State, but in none of those cases does any kind of "participation" by a State in the internationally wrongful act of another State appear. Moreover, it is also possible to think of cases in which, on one and the same specific occasion, several States have been found to have engaged in conduct not in conformity with an international obligation. There, too, however, there is no question of participation by one of those States in an internationally wrongful act by another.

56. In the first place, it must be pointed out that the case of actions committed in breach of an international obligation by organs of a State operating in the territory of another State, having been "lent", or "placed at the disposal" of, the latter by the State to

which they belong to, is not one of the cases to be considered in this section. The question of the attribution of such actions was settled by the Commission in article 9 of the draft.<sup>100</sup> Now it is established in that article, and emphasized in the commentary to it, that the actions or omissions of foreign organs performing functions in the exercise of the governmental authority of the State at whose disposal they have been placed—when acting under its authority, direction and control—are acts of that State and not of the State to which the organs belong. Such actions or omissions cannot, therefore, constitute "participation" by the latter State in any internationally wrongful act of the former State. Even supposing that, on a certain occasion, the actions of a foreign organ placed at the disposal of a given State converge with those of national organs of that State towards a specific object, there will then be concurrence, in the commission of a possibly wrongful act, of courses of conduct all attributable to the same State, and not assistance from the conduct of one State in the commission of an internationally wrongful act by another.<sup>101</sup>

57. Secondly, it should be remembered that a case of "participation" in the internationally wrongful act of another cannot be found in the fact, or rather the sole fact, that a State failed to take the preventive or repressive measures required of it with respect to actions committed in its territory by an organ of another State to the detriment of the third State. By such failure, the State in question breaches an international obligation incumbent on it, which is quite different from the obligation breached on its territory by the organ of the foreign State. The murder of a foreign Head of State by organs of State A on the territory of State B, and the failure of State B in its duty to adopt the necessary measures to prevent such an act if possible, or in any case to punish its perpetrators, are two different internationally wrongful acts, each the responsibility of a different State. There is, of course, an undeniable link between the two acts—as there may be in other cases as well—but this link is not sufficient to make one of the acts appear as participation in the other. This does not mean that in specific cases there may not also be participation—in the form of "assistance" or "complicity"—of the territorial State in the internationally wrongful act perpetrated on its soil by the foreign State. But there is then an additional element, a separate breach besides mere failure to prevent and punish. As the Commission has previously em-

<sup>100</sup> *Yearbook ... 1974*, vol. II (Part One) p. 286, document A/9610/Rev.1, chap. III, B.2.

<sup>101</sup> If, on the other hand, an organ of a foreign State, while possibly acting in the interest of the State in whose territory it is, acts in the exercise of elements of the governmental authority of the State whose organ it is, and under the authority, direction and control of that State, it is obviously not an organ "placed at the disposal" of another State and its actions or omissions are exclusively attributable to the State to which it belongs. It is only then that the case of participation by the latter State in the commission of an internationally wrongful act by the State in whose interest the organ acted is conceivable.

gation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State.



phasized, that failure, as such, can certainly not be defined as a form of complicity.<sup>102</sup>

58. Thirdly, it must be emphasized that there can be no question of the participation of a State in the internationally wrongful act of another State in cases of parallel attribution of a single course of conduct to several States. This is what happens when the conduct in question was engaged in by an organ common to a plurality of States—a case which is not expressly provided for in the articles in chapter II of the draft, but the solution to which is implicit in them. According to the principles on which those articles are based, the conduct of the common organ can, indeed, only be considered as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will have concurrently committed separate, although identical, internationally wrongful acts. But it is self-evident that the parallel perpetration of identical offences by two or more States is, conceptually, quite a different thing from participation by one of those States in an offence committed by another.

59. Fourthly, the same distinction must be made in regard to identical offences committed in concert—and, generally, at the same time—by two or more States, each acting through its own organs. If, for example, State A and State B, which are allies, make a concerted attack on a third State, each acting through its own military organs, two separate acts of aggression are committed by the two States; the fact that they acted in concert in no way detracts from the correctness of this finding. Thus the case contemplated is totally different from that of “complicity”, or of any other form of “participation” by one of the two States in an act of aggression committed by the other alone.

60. The particulars given in the foregoing paragraphs have made it possible to delimit by elimination the range of situations to be considered in this section. It has been concluded that from this range must be excluded a series of different situations which, although involving the intervention of organs

belonging—or also belonging—to States other than the State supposed to have committed a specific internationally wrongful act, are nevertheless not characterized by any form of “participation” by those other States in the internationally wrongful act in question. It remains to be established positively, still on a preliminary basis, what the subject-matter of the following analysis should be. This subject-matter is the possible participation of a State in the commission of an internationally wrongful act by another State. The object is therefore to establish the aspects by which the existence of such participation is recognized and the conditions in which legal effect and consequences must be attributed to it precisely for this reason. More specifically, we must determine whether or not the circumstance of such participation has the effect of making wrongful, as constituting participation in the internationally wrongful act of another, an act which otherwise would not be considered wrongful, and, if that act itself constitutes a breach of an international obligation, independently of the circumstance of participation, the effect of adding a further internationally wrongful aspect to that already presented by the act without such participation. We must also determine whether there are cases in which such participation in the act of another acquires the same nature and the same characterization as the act participated in, or whether it always retains a separate nature and legal characterization.

61. From the conceptual standpoint, there are, essentially, three cases in which the problem of the existence or non-existence of “participation” by a State in an internationally wrongful act committed by another State may arise: (a) that in which the first State in some way or other advises or incites the second to commit a breach of its international obligation; (b) that in which the first State exerts pressure on the second to make it commit such a breach; and lastly (c) that in which the first State assists the second in the commission of the breach and thus takes an active part in its commission.

62. The first case is that which, in the general theory of internal law, appears under the name of “incitement” to commit an offence. There can be no doubt that, in internal criminal law, certain forms of incitement by one subject to the commission of an offence or a crime by another subject also constitute a criminal offence. In international law, is it permissible to regard as an internationally wrongful act mere incitement by a State, of another State, to commit such an act? In principle, we still believe that the answer to this question must be in the negative.<sup>103</sup> In international practice, of course, protests have been made against States accused, rightly or wrongly, of having incited other States to commit breaches of international obligations to the detriment of third States; but we do not know of any cases in which, at

<sup>102</sup> In its commentary to article 12, the Commission said:

“For the purposes which draft article 12 has to serve, the provisions laid down in its paragraphs 1 and 2 would appear to suffice. The situations envisaged in the article would certainly take on a different aspect if, in the individual case, it were established that there had been assistance or complicity, in the true meaning of these terms, on the part of organs of the territorial State, in the wrongful acts committed by organs of the foreign State. The case might then exhibit either participation by a State in an internationally wrongful situation created by another State or an internationally wrongful act committed jointly by two States. The act committed by organs of the territorial State and attributed to it as a source of responsibility—independently of the acts concurrently attributed to the State to which the foreign organs belong—would then be something other than a mere failure in the duty to protect third States. A case of this kind would present, rather, one of the situations which the Commission proposes to examine under chapter IV of part I of the draft, dealing with the special problems raised by the participation of several States in the same internationally wrongful act.” (*Yearbook ... 1975*, vol. II, p. 86, document A/10010/Rev. I. chap. II, B.2., article 12, para. (15) of the commentary.)

<sup>103</sup> See Ago, *loc. cit.*, pp. 523–524, and, for a recent concurrence in this opinion, Graefrath, Oeser, and Steiniger, *op. cit.*, p. 64.

the juridical level, a State has been alleged to be internationally responsible solely by reason of such incitement. Nor do we know of any cases in which States have agreed to absolve from its responsibility a State which, although it might have been incited by a third State, nevertheless, of its own free will, breached an international obligation binding it to another State. Here, international jurisprudence and practice do not appear to depart from the classical conclusion formulated by the Board of Commissioners set up to distribute the sum allocated by France under the Convention of 4 July 1831 between the United States of America and France, concerning claims relating to measures for the confiscation of American merchandise taken by certain States under the influence of Napoleonic France. The Board refused to attribute to France responsibility for measures taken by States which, like Denmark, had not, at the time, been formally united to the French Empire or placed in a condition of dependence on that Empire, and were thus independent. The fact that the Danish sovereign had taken measures to please the French emperor played no part in the decisions of the Board of Commissioners.<sup>104</sup> The Board considered the Danish Government as solely and fully responsible for the measures taken.

63. It follows from the foregoing that we are referring here to the case of incitement to commit an international offence applied to a sovereign State which is in a position freely to exercise its sovereignty. As regards that case, it should first be noted that the mere fact that a State has been incited by another State to act in a certain way cannot affect the characterization of its actions or the determination of their legal consequences. The decision of a sovereign State to adopt a certain course of conduct is certainly its own decision, even if it has received suggestions and advice from another State, which it was at liberty not to follow. Consequently, if, by virtue of the con-

<sup>104</sup> See *Notes on some of the questions decided by the Board of Commissioners under the Convention with France of the 4th of July 1831* (Philadelphia, 1836), in J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington D.C., U.S. Government Printing Office, 1898), vol. V, pp. 4473 *et seq.* Commissioner Kane noted, in particular, that the claims against Denmark (Holstein and Hamburg cases), unlike those raised with respect to Holland, represented:

"...a train of wrongs unworthy of a State unquestionably sovereign and professing to be free, committed against the citizens of a friendly nation, who had violated no law, and were entitled to protection by every title of hospitality and justice.

"But the question before the Board regarded not Denmark, but France. One cannot be charged with the acts of the other; for neither was dependent. It may be that the conduct of King Frederic was dictated by his anxiety to conciliate the favour of the French Emperor; ... we had nothing to do with his motives or his fears. The act was his own; the Kingdom of Denmark was then, as now, independent ... [its] intervention ... was the voluntary pander to French avidity."

The passage reproduced here is quoted and commented on favourably by C. L. Bouvé, in "Russia's liability in tort for Persia's breach of contract", *American Journal of International Law* (Washington D.C.), vol. 6, No. 2 (April 1912), p. 399, and by Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), p. 279. The American claims against Denmark were satisfactorily settled by the agreement of 28 March 1830 (Moore, *op. cit.*, pp. 4549, *et seq.*).

duct adopted, the State in question has committed an internationally wrongful act, there can be no question of its avoiding or even reducing its responsibility by alleging "incitement" by another State. And neither the State which committed the internationally wrongful act nor the State injured by it can cast all or part of the responsibility for that act on another State which has done no more than encourage or incite the first State to follow a course of conduct it ultimately adopted with complete freedom of decision and choice. We are therefore clearly outside the framework of the situations which will be considered in the next section. Moreover, it is no less certain that neither the practice of inter-State relations nor the works of writers on international law have claimed separate existence for an international responsibility derived specifically from the fact that a State has incited another State to commit an internationally wrongful act to the detriment of a third State. Mere incitement of one State by another to commit an internationally wrongful act does not fulfil the conditions for characterization as "participation" in the act—at least in the legal meaning of that term, which, as we have seen, is an act having, as such, legal effect and consequences. Lastly, it would be wrong, in our view, to yield to the temptation to make unduly facile and arbitrary comparisons between incitement by a sovereign State of another State to commit an internationally wrongful act and the legal concept of "incitement to commit an offence" in internal criminal law. This legal concept has its origin and justification in the psychological motives determining individual conduct, to which the motives of State conduct in international relations cannot be assimilated.

64. Lastly, it may be noted that the conclusions we have just reached would not be altered in any way if we took into consideration the case in which the State incited to commit an internationally wrongful act is no more than a "puppet State" in the hands of the State inciting it to commit an international offence,<sup>105</sup> or even a State placed, for some reason, in a position of dependence on that other State. Of

<sup>105</sup> A typical example of a puppet State was, in its time, the Kingdom of Holland under Napoleon's brother, Louis, from June 1806 to July 1810, when Holland became a part of the French Empire. As Commissioner Kane observed in his commentary, already cited, to the decisions of the United States/France Board of Commissioners:

"... in placing Louis upon the throne his brother had not renounced his control over the affairs of that country. The form of distinct sovereignties was presented to the public eye; but the energies of the Dutch people were directed more than ever to the advancement of the Imperial policy.

"Holland was already a dependant Kingdom and Louis a merely nominal sovereign." (Moore, *op. cit.*, pp. 4473 and 4474).

On this basis, therefore, the Commissioners accepted the Dutch contention that, at the time, Holland had been under the "present Government of France" and recognized the responsibility of France for the confiscation and sale, for the financial gain of France, of all goods brought to Holland in American ships, even though those measures had been taken by the so-called Kingdom of Holland (Bouvé, *op. cit.*, pp. 398–399; Klein, *op. cit.*, pp. 280–281).

(Continued on next page.)

course, in situations like this, it is possible that, in certain circumstances, the dominant State will be called upon to answer for an internationally wrongful act committed by the puppet or dependent State. But, as was pointed out,<sup>106</sup> and as we shall see more particularly in the next section, which is devoted to the examination of questions of responsibility in such situations, it is then the existence of the relationship established between the two States which becomes the decisive factor in this transfer of responsibility

(Foot-note 105 continued.)

There is no need to go so far back, however, for there are several examples of puppet States in more recent times, particularly in the history of the Second World War. In many of the international disputes which arose out of the breach of an international obligation by one of those puppet States or Governments, the State which was the victim of the breach asserted that the resultant responsibility should be attributed not to the State whose organs had in fact acted, but to the State which, in pursuing its policy in regard to a given State, had created there a kind of pseudo-State, which was really no more than its *longa manus*. In this connexion, reference may be made to disputes about international responsibility for acts committed by States or Governments set up in certain territories occupied by Nazi Germany or Fascist Italy. For acts committed by the organs of the Independent State of Croatia, see, for example, the decision in the Dispute between the Postal Administrations of Portugal and Yugoslavia (United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 339 *et seq.*), and the decision of the United States Claims Commission in the Socony Vacuum Oil Co. case (M. Whiteman, *op. cit.* (1963) vol. 2, pp. 767 *et seq.*). For acts committed by organs of the so-called "Italian Social Republic", see, among many others, the Dame Mossé dispute referred to the Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 (United Nations, *Reports of International Arbitral Awards*, vol. XIII (Sales No. 64.V.3), pp. 492, 493 and 495) and the Treves, Fubini and other disputes, referred to the Italian-United States Conciliation Commission, established under the same Treaty of Peace (*ibid.*, vol. XIV, Sales No. 65.V.4) pp. 265, 266, 271, 427 *et seq.*)

In reality, the very idea of "instigation" or "incitement" of one State by another to commit an internationally wrongful act is conceivable, where the instigation or incitement is applied to a puppet State or Government, only in the extremely rare case in which this form of State acts under the same conditions as a State which is genuinely sovereign and free in its decisions. If the puppet State of Government has committed an internationally wrongful act under these conditions, it seems obvious that the act can only be attributed to itself and must give rise to its own international responsibility, however understandable the temptation may be for the injured State, which has difficulty in obtaining satisfaction, to invoke the joint responsibility of the State to which the offending State owes its existence, asserting that any puppet State or Government is by its very nature liable to be "conditioned" by the "advice" and "incitement" of the State that brought it into being.

However, in most cases the situation is different. Sometimes the entity which it is desired to represent as a separate State or Government is, in fact, wholly subject in its actions to the State which created it, as was the Kingdom of Holland to the French Empire. The actions of the organs of the entity in question are then directly attributable to the latter State (A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 390; Klein, *op. cit.*, p. 283), in the same way as those of its own organs, or even those of a local authority, a region, a dependent colonial territory, etc. In other cases, which are the most frequent, the puppet State or Government is really a separate subject of international law but the essential sectors of its activity are subject to a system of control by the State which created it. Any internationally wrongful act committed by its organs is then an act which is attributable to it but which indirectly gives rise to international responsibility of the holder of the power of control, as in the other cases which will be considered in the next section of this chapter.

<sup>106</sup> See para. 53 above.

from one subject to the other, and not the specific circumstance of incitement of one State by another to commit a particular wrongful act. It is obvious that in such situations there will be no question, either, of an international responsibility separate from that generated by the wrongful act, for which the incitement, as such, will engage the responsibility of its author.

65. The conclusions stated in the last two paragraphs therefore seem to be inescapable in the first of the three cases described above,<sup>107</sup> namely, that in which a State goes no further than to incite another State to commit an international offence to the detriment of a third State. But would similar conclusions be justified in the second of those cases—that in which a State accompanies its incitement by pressure or coercion?

66. Where a State, in order to make another State commit an internationally wrongful act, has recourse to measures of this kind, it would obviously be difficult to maintain that, like mere "incitement" by persuasion and advice, such measures are legally "neutral" in the eyes of international law. But that is not the point. To find the correct answer to the new question before us, we must first distinguish between the various forms in which the legal wrongfulness of the measures in question may manifest itself. For while some of these forms require attention in the present context, that is not true of others. We should, indeed, run the risk of being diverted from our task if we yielded to the temptation to go into the question whether recourse to coercion or the threat of coercion, or to other forms of pressure, in order to make another State breach its international obligations towards a third State, does or does not, as such, constitute a breach of an international obligation by the first State with respect to the second. On this point there is no doubt that in present-day international law—and by this we mean general international law just as much as the special legal system of the United Nations—coercion *stricto sensu*, including the use or threat of the use of armed force, is considered, save in exceptional cases, to be an international offence of the utmost gravity. Here, indeed, lies the most striking difference between modern international law and that of the beginning of this century. As to the other forms of pressure, in particular economic pressure, it is well known that opinions still differ, some assimilating them quite simply to the internationally prohibited forms of coercion, while others do not see them as internationally wrongful measures, reprehensible though they are. But we must keep clearly in mind that it is in no way incumbent on us to enter into the polemic between the opposing schools of thought on this point, for whatever conclusion we might support, it would have no bearing on the problem we have to set ourselves and to solve. Where we arrived at the conclusion that the taking by State A of certain measures to compel State B to breach its international obligations to State C

<sup>107</sup> See para. 61 above.

was in itself and beyond all doubt internationally wrongful, that would have legal consequences for the relations between A and B. In the most serious cases, it might also conceivably have further consequences for the relations between State A and all the other members of the international community. But that would be of no relevance to our present concern, which is to determine whether recourse to such measures does or does not constitute a form of "participation", by the State taking them, in the breach by the State subjected to the measures of an international obligation binding it to a third State, or, more generally, whether or not the relations between one or the other of the first two States and the third State will be affected by such measures. Solely from the point of view of these relations with the third State, the answer to our question will finally be the same whether the coercion at the origin of the offence against the third State did or did not infringe an international subjective right of the State against which it was exercised.

67. Having set our problem in its proper perspective and excluded from consideration an aspect which must remain foreign to it, it must now be pointed out that coercion—armed force or even economic or some other form of coercion—differs profoundly from mere incitement or instigation. Unlike them, it has the effect of limiting, and sometimes even entirely annihilating, the freedom of choice of the State which, under the coercion, acts in breach of an international obligation to a third State. In this case it certainly cannot be maintained that the State subjected to coercion adopted its conduct towards a third State in the free exercise of its sovereignty. That this is a fact, and indeed a fact which cannot and must not remain without legal consequences, no one can doubt. The question is, however, whether the use of some form of coercion against a State to make it commit an international offence to the detriment of another State must be regarded as a form of participation in the commission of the offence, and be treated as such, or whether it must rather be seen from an entirely different angle.

68. In our view, there should be no doubt about the answer to this question. It would be wrong to say that a State which, in one way or another, applies coercion to another State to make it commit an international offence against a third State, thereby "participates" in the commission of the offence. The commission remains exclusively the act of the State subjected to coercion. The author of the coercion remains entirely foreign to the commission of the offence; it does not carry out any of the actions constituting the offence and gives no aid or concrete assistance in its perpetration. In this sense, therefore, it certainly stops short of what would be real "participation" in the commission of the internationally wrongful act. However, at the same time, its implication in the affair goes well beyond what would constitute participation, for it goes so far as to compel the will of the State it coerces, to the point of constraining it to decide to perpetrate an international

offence which it would not otherwise commit, and obliging it to behave, in the case in point, as a State deprived of its sovereign capacity to take decisions. This, in our opinion, is the determining factor for the purposes of our conclusion. In the case considered, there can be no question of attributing to the State which exercises the coercion a share in the unlawful act committed by another State under the effect of that coercion. That would be justified only if the State in question had taken an active part in performing the act, but, as has just been pointed out, this is not the case. Nor can there be any question of attributing to State A, the coercing State, a separate offence against State C, committed parallel with the internationally wrongful act perpetrated, as a result of the coercion, by State B. In the case in question, State A has not committed against State C any offence separate from that committed by State B. Hence the logical outcome of the situation can only be the same as it inevitably is in the majority of cases in which a State committing an internationally wrongful act is dependent on another State, its will being governed by the will of that State, or, at the least, its freedom of choice being restricted by the control exercised by that other State. Whether this condition of dependence is *de jure* or merely *de facto* in nature, whether it is permanent or purely temporary, or even occasional, makes no difference to our problem. In both the cases, what is important is that the State which committed an international offence did so while its freedom of decision was seriously impaired by another State. The normal consequence of this situation will be dissociation of the subject to which the act generating responsibility is attributed from the subject on which responsibility is laid. In other words, we enter the sphere of responsibility for the act of another.<sup>108</sup>

69. That being so, it appears that the answer to the question put above is self-evident. The case in which one State uses coercion against another to make it breach its international obligation to a third State cannot be defined as a case of "participation" by one State in the commission of an internationally wrongful act by another State. Consequently, this second case does not come within the scope of the provisions of this section either; we shall meet it again, however, among the series of cases of indirect responsibility to which the next section will be devoted.

70. The only real case of "participation" by one State in the commission of an internationally wrongful act by another State is, therefore, the third of those set out above: that in which the first State actively assists the second in the commission of the act.<sup>109</sup> Here, the State in question does not confine itself to inciting another State, by suggestions and advice, to commit an international offence; nor does it resort to coercion to make it do so. By its own

<sup>108</sup> A State which has subjected another State to coercion in order to make it breach its international obligation to a third State cannot escape being called upon to answer internationally for the act committed by the other State under its coercion.

<sup>109</sup> Para. 61.

action, it facilitates the commission of the offence by the other State. Here we enter the sphere of "complicity".

71. It was, moreover, mainly the case of complicity that the members of the Commission<sup>110</sup> and of the Sixth Committee of the General Assembly<sup>111</sup> had in mind when they stressed the need to deal in the present draft with the question of the participation of a State in an internationally wrongful act by another State. One of the examples of complicity most frequently mentioned in the statements of members of the Commission is that of a State placing its territory at the disposal of another State to make it possible, or at least easier, for it to commit an offence against a third State.<sup>112</sup> In this context, reference was made mainly to article 3 (f) of the Definition of Aggression, adopted by the General Assembly in 1974,<sup>113</sup> which includes in the list of acts which qualify as acts of aggression:

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.

Another classic and frequently cited example of complicity is that of a State which supplies another with weapons to attack a third State. It is obvious that complicity in an act of aggression may also take other forms, such as the provision of land, sea or air transport, or even the placing of military or other organs at the disposal of the State preparing to commit aggression for use in the case in point. Furthermore, it is by no means only in the event of an act of aggression by a State that the possibility of complicity on the part of another State may arise. Complicity may, for example, also take the form of the provision of weapons or other supplies to assist another State to commit genocide,<sup>114</sup> to support a ré-

<sup>110</sup> See, for example, the statements made by E. Ustor (*Yearbook ... 1975*, vol. I, p. 44, 1312th meeting, para. 13); P. Reuter (*ibid.*, p. 45, para. 28); N. Ushakov (*ibid.*, p. 47, 1313th meeting, para. 4); M. Bedjaoui (*ibid.*, p. 48, paras. 9 and 10); S. Bilge (*ibid.*, p. 58, 1315th meeting, para. 19).

<sup>111</sup> See for example the statements made at the 1975 session of the General Assembly by the representatives of the German Democratic Republic (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings*, p. 64, 1539th meeting, para. 3), Turkey (*ibid.*, p. 106, 1547th meeting, para. 20), Iran (*ibid.*, p. 112, 1548th meeting, para. 6), Bolivia (*ibid.*, p. 115 para. 30), during the discussion on the report of the International Law Commission.

<sup>112</sup> This example was cited and illustrated by E. Ustor (*Yearbook ... 1975*, vol. I, p. 44, para. 13) and N. Ushakov (*ibid.* p. 47, 1313th meeting, para. 4), as well as by some representatives to the Sixth Committee during the discussion on article 12 of the draft articles and more particularly on the question of acts committed by the organs of a State on the territory of another State (*Official Records of the General Assembly, Thirtieth Session, Sixth Committee, Summary Records of Meetings*, p. 64, 1539th meeting para. 3; p. 77, 1542nd meeting, para. 2; p. 82, 1543rd meeting, para. 13; p. 86, 1544th meeting, para. 4).

<sup>113</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>114</sup> Article III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (United Nations, *Treaty Series*, vol. 278, p. 277), includes "complicity in genocide" in the list of acts punishable under the Convention. It is not specified however, whether complicity by another State in the commission of genocide by a particular Government does or does not come within the terms of this provision.

gime of *apartheid*,<sup>115</sup> or to maintain colonial domination by force, etc. Nor is it true to say that the complicity of another is possible only where the internationally wrongful act in which another State participates is one of those defined in article 19<sup>116</sup> as an "international crime". There may equally well be complicity by another State in the commission of a less typical and less serious offence: providing means for the closure of an international waterway, facilitating the abduction of persons on foreign soil, and assisting in the destruction of property belonging to nationals of a third country, are some of the examples that may be mentioned.

72. Among the various forms of complicity in an internationally wrongful act by another, two separate cases may be defined. The conduct by which one State helps another State to commit an international offence may sometimes in itself constitute a breach of an international obligation, quite independently of participation in the wrongful act of the State to which such conduct lends assistance. This would be the case, for example, if a State Member of the United Nations supplied arms to the Government of the Republic of South Africa in breach of the obligation provided for in Security Council resolution 418 (1977) calling for an embargo on the provision of arms to that country. But for the most part, the conduct in question, taken in isolation, will be an act which is not, as such, of a wrongful character. To supply another State, for example, with raw materials, means of transport and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What concerns us, however, in the present context, is not to know whether the conduct as such does or does not constitute a breach of an international obligation but whether or not the conduct adopted by the State was intended to enable another State to commit an international offence or to make it easier for it to do so. The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity.

73. This conclusion, apart from being logical, is in accordance with the conviction of Governments. This appears to be confirmed, for example, by the reply given in 1958 by the British Secretary of State for Colonial Affairs to a parliamentary question con-

<sup>115</sup> Article III of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted on 30 November 1973 by the General Assembly of the United Nations, (resolution 3068 (XXVIII), annex) provides for the criminal responsibility of individuals—including "representatives of the State"—who conspire in the commission of acts of *apartheid* or who directly co-operate in them. It is, however, open to question whether the complicity of another State in the commission of such acts, or in the pursuance of a policy of *apartheid* by a Government, comes within the terms of the Convention.

<sup>116</sup> See foot-note 24 above.

cerning the supply of arms and military equipment by certain countries to Yemen, which subsequently used them in an attack against Aden. By agreement with the Secretary of State for Foreign Affairs, the Colonial Secretary stated that:

... the policy of Her Majesty's Government has always been to urge restraint in the arms deliveries to the Middle East, but *arms deliveries do not in themselves constitute ground for protest.*\* Her Majesty's Government have, of course reported to the United Nations acts of Yemeni aggression on the frontier and have protested to the Yemeni Government.<sup>117</sup>

The comment by E. Lauterpacht on this reply showed the position taken by the spokesman of the United Kingdom Government invoked conclusions on three points: (a) that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful; (b) that the responsibility for the unlawful use of those arms rests primarily upon the State which receives them; and (c) that these findings do not, however, prevent it being recognized that a State which knowingly supplies arms to another State for the purpose of assisting the latter to act in a manner inconsistent with its international obligations cannot escape responsibility for complicity in such illegal conduct.<sup>118</sup>

Further confirmation of the same conviction is provided by a position taken by the Government of the Federal Republic of Germany the same year. On 15 August 1958, that Government replied to a note of 26 July, from the Government of the Union of Soviet Socialist Republics, which accused the Federal Government of participating in an act of aggression by allowing United States military aircraft to use airfields in German territory in connexion with the American intervention in Lebanon. In its reply, the Federal Government argued that the measures taken by the United States and the United Kingdom in the near East did not constitute an intervention against anyone, but assistance to countries whose independence appeared to be seriously threatened and which had appealed for help. Since, therefore, according to the Federal Government, its allies were not guilty of any aggression in the Near or Middle East, it followed that the accusation made against it (supporting an aggression committed by other States) was unfounded. The Federal Government concluded by giving an assurance that it never had, and never would, allow the territory of the Federal Republic of Germany to be used for the commission of acts of

aggression.<sup>119</sup> Leaving aside its assessment of the actual circumstances of the case, the Federal Government thus showed its conviction, in principle, that the fact that a State placed its own territory at the disposal of another to help it commit an act of aggression would be a form of participation or complicity in the aggression and would thus constitute an internationally wrongful act.

74. We think we have now given a sufficiently accurate idea of what can and should be understood by the "complicity" of one State in the commission of an internationally wrongful act by another State; and we believe we have shown, by examples from recent State practice, that whatever the situation<sup>120</sup> may have been formerly, this notion is now well established in international law. Moreover, the authors of various recent works also give the impression that they incline towards the same conclusion.<sup>121</sup> In any event, we believe we can at least support our position on this point by evoking the intention of progressive development by which, it seems, the international community must necessarily be guided in the matter. This position can be summarized in two points: (a) the conduct of a State, which would not in itself constitute a breach of an international obligation, nevertheless becomes an internationally wrongful act if, through such conduct, the said State becomes an accessory to the commission of an international offence by another State; and (b) any international wrongfulness which may attach to the conduct in question from the outset is supplemented by an additional and separate wrongfulness by reason of the complicity of a State engaging in such conduct in the international offence committed by another State.

75. A further question remains to be settled. Should it be concluded that the act whereby the complicity of one State in the internationally wrongful act of another State is established necessarily partakes of the nature of the latter act? Or, despite the connexion between the act of the accessory and that of, let us say, the protagonist, does the former retain a different identity? Put in concrete terms, should the conduct of a State which provides arms or other means to another State to help it commit aggression or genocide likewise be characterized forthwith as

<sup>119</sup> For the text of the Federal Government's note, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 20, Nos. 2 and 3 (August 1960), pp. 663-664.

<sup>120</sup> In 1939, the Special Rapporteur, describing the situation at that time, was still able to exclude, in principle, from the scope of the rules then in force the idea of complicity in an internationally wrongful act (Ago, *loc. cit.*, p. 523).

<sup>121</sup> This can be said, for example, of I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 443, where he touches on the question of "joint participation in specific actions" and cites as an example the case "where State A supplies planes and other material to State B for unlawful dropping of guerrillas and State B operates the aircraft". See also, by the same author, *International Law and the Use of Force by State A supplies planes and other material to State B for unlawful dropping of guerrillas and State B operates the aircraft". See also pacht and of certain members of the International Law Commission and the Sixth Committee of the General Assembly (footnotes 110 and 111).*

<sup>117</sup> British Institute of International and Comparative Law, *International and Comparative Law Quarterly* (London), vol. 7 (July, 1958), pp. 550-551.

<sup>118</sup> "The Answer appears to proceed on the basis that the supply of arms by one State to another is, in the absence, for example, of any prohibition by the United Nations, quite lawful. In addition, the Answer suggests that the responsibility for the use of those arms—at least in the circumstances referred to in the Answer—must rest primarily upon the State which receives them. There is, however, nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape legal responsibility for complicity in such illegal conduct." (*Ibid.*, p. 551).

aggression or genocide? The answer to this question is not only of theoretical interest; it may be of considerable practical importance, since the consequences which international law attaches to an internationally wrongful act can vary appreciably according to the content of the obligation breached and the characterization of the offence established on this basis. An argument in favour of an affirmative answer could be drawn from the fact that the Definition of Aggression, for example, as we have seen, also treats as an act of aggression the placing by a State of its territory at the disposal of another State, with a view to aggression by the latter against a third State. However, it seems inadmissible to generalize the idea of such equivalence and to extend it beyond cases in which it is specifically provided for in an express provision. Even in such cases, it seems impossible to conclude that the treatment by international law of complicity of any kind in a given act is necessarily the same as its treatment of the act itself. The question can, moreover, only be one of degree, since it depends first and foremost on the extent of the concrete assistance furnished by the accessory to the author of the offence and, hence, on the gravity of the complicity. In any case, it is necessary to guard against the danger of finally diminishing the gravity of a particularly serious internationally wrongful act by unduly enlarging the area in which the existence of such acts is recognized. In conclusion, we consider that as a general rule the fact of participation, in the form of aid or assistance—in short, of complicity—in the commission of a wrongful act by another must remain under international law, as it does under internal law, an act distinct from such participation, which is characterized differently and does not necessarily have the same legal consequences.

76. On the basis of the foregoing considerations it should now be possible to establish the rule of international law which is to regulate the subject-matter examined in this section. After noting the comments and considerations put forward about the various cases in regard to which it was conceptually possible to envisage the idea of “participation”, it seems clearly established that the only real form of “participation” by a State in the commission of an internationally wrongful act by another State is that nor-

mally termed “complicity”. It is therefore specifically to this case that the rule to be established should, in our opinion, refer. We shall take into consideration only the case of complicity of a State in an international offence committed by another State, even though it may well be presumed that the same principles would apply if one of the protagonists were a subject of international law other than a State. It also seems essential to bring out, in the formulation chosen: (a) that in order to become “complicity” in the commission of an internationally wrongful act by another State conduct which consists in giving aid or assistance to another State committing or preparing to commit an international offence must be adopted knowingly and with intent to facilitate the commission of the offence; (b) that the conduct by which the State thus becomes an accessory to the commission by another State of an internationally wrongful act against a third State is characterized as internationally wrongful precisely by reason of participation in an international offence committed by another, and that this is so even if, in other circumstances, such conduct would be internationally lawful; (c) that the internationally wrongful act of the State which becomes an accessory to the international offence of another State must not be confused with this “principal” offence, and that the international responsibility deriving from such an act therefore remains separate from that incurred by the State committing the principal offence, even if that offence was committed with help of facilities granted by the accessory State.

77. In view of the foregoing, we think we can propose the following text to the Commission for adoption:

**Article 25. Complicity of a State in the internationally wrongful act of another State**

**The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of the State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful.**