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WORK OF ITS FORTY-FIFTH SESSION

CHAPTER IV

STATE RESPONSIBILITY

Addendum

	<u>Page</u>
C. Text of paragraph 2 of article 1 and articles 6, 6 <u>bis</u> , 7, 8, 10 and 10 <u>bis</u> with commentaries thereto, provisionally adopted by the Commission at its forty-fifth session	2
Paragraph 2 of article 1	2
Article 6	2

- C. Text of paragraph 2 of article 1 and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries thereto, provisionally adopted by the Commission at its forty-fifth session

Article 1

...

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

Commentary

...

(5) The fact that, as a result of the internationally wrongful act, a new set of relations is established between the author State and the injured State does not mean that the previous relationship disappears ipso facto. Even if the author State complies with its secondary obligation, it is not automatically relieved of its duty to perform the obligation it has breached. Paragraph 2 states this rule. It does so in the form of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation.

Article 6

Cessation of wrongful conduct

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

Commentary

(1) Article 6 is the first of a series of articles dealing with the new relations which arise from an international delict between the author State and the injured State. As indicated in paragraph (1) of the commentary to article 1 of Part Two, those new relations involve, in the first place, new obligations of the author State and corresponding entitlements of the injured State which are dealt with in articles 6 to 10 bis and may also include new rights of the injured State or States, such as the right to take countermeasures, which is dealt with in articles [11] to [14].

(2) The new obligations of the author State consist in the redress of the situation resulting from the breach of a primary obligation, i.e. an obligation contained in a primary rule. The most frequently invoked of these

new obligations is the obligation to make reparation, dealt with in article 6 bis, which may be discharged in a number of forms as provided in articles 7, 8, 10 and 10 bis. A primary exigency in eliminating the consequences of a wrongful act is, however, to ensure cessation of the wrongful act, i.e. discontinuance of the specific conduct which is in violation of the obligation breached.

(3) The importance of cessation is not always clearly perceived for a variety of reasons. In the first place, an injured State will usually demand positive behaviour on the part of the author State such as liberation of persons or restitution of objects and will do so in the context of a broader claim to reparation for injury rather than in terms of cessation. Secondly, whenever resort is had to a third party settlement procedure, such procedure opens at a time when the commission of the wrongful act (whether instantaneous or more extended in time) has completed its cycle so that the dispute submitted for settlement is in fact necessarily circumscribed to the form or forms of reparation due. 1/ Thirdly, even when the parties appear before an international body at a time when the conduct complained of is still in progress, the claimant State will organize its demands not so much in terms of discontinuance of the wrongful conduct - wrongfulness itself being at that stage controversial - but rather in terms of provisional or conservative measures that the judge may indicate or, possibly, impose upon the allegedly wrongdoing State. 2/ Notwithstanding the noted difficulties of perceptibility of cessation per se, the specific features of the claim to cessation justify the inclusion of a special article on this particular remedy.

1/ This is vividly illustrated by the award rendered in the case concerning the differences between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair (hereafter the Rainbow Warrior case) (United Nations, Reports of International Arbitral Awards, vol. XX, to be issued).

2/ For example, in the case concerning United States Diplomatic and Consular Staff in Tehran, the United States asked the International Court of Justice to indicate the immediate release of the hostages, as a provisional measure, and the Court provided accordingly by order of 15 December 1979 (I.C.J. Reports, 1979, p. 7).

(4) In terms of legal theory, cessation may be ascribed either to the continued normal operation of the "primary" rule of which the previous wrongful conduct constitutes a violation or to the operation of the "secondary" rule coming into play as an effect of the occurrence of the wrongful act. The Commission is of the view that the very distinction between primary and secondary rules is a relative one and that cessation is situated, so to speak, "in between" the two categories of rules. With regard to the former, it operates in the sense of concretizing the primary obligation, the infringement of which by the wrongdoing State is in progress. With regard to the latter, it operates in the sense of affecting - without providing directly for reparation - the quality and quantity of reparation itself and the modalities and conditions of the measures to which the injured State or States, or an international institution, may resort in order to secure reparation.

(5) Irrespective of whether, in theoretical terms, cessation falls outside the realm of the legal consequences of a wrongful act stricto sensu, its practical usefulness justifies that it be the subject of a separate provision in the present draft articles. Cessation is of far greater relevance within the international legal system - given the inorganic structure of inter-State society and the role of States in the making, modification and abrogation of rules - than within the legal systems of national societies. Its function is to put an end to a violation of international law which is in progress and to safeguard the continued validity and effectiveness of the infringed primary rule which may suffer in the long run from the continuation of the violation. The rule on cessation thus protects not only the interest of the injured State or States but also the interests of the international community in the preservation of, and reliance on, the rule of law. It should be recalled in this connection that cessation is the remedy which is most frequently resorted to by organs of international organizations, particularly the General Assembly and the Security Council of the United Nations, in the presence of the most serious breaches of international law.

(6) Another reason for devoting a separate article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as restitutio in integrum. None of the difficulties which may hinder or prevent restitution in kind is such as to affect the obligation to cease the wrongful conduct. This is an inescapable consequence of the fact

that the difficulties or impossibility which may partly or totally affect restitution (or any other form of reparation) concern reparative measures which can only follow the accomplished wrongful act, namely the consummated violation of the primary rule. Cessation is not and should not be subject to such supervening odds because its purpose is precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act in time and space. Unless the primary rule itself is modified or ceases to exist and unless the wrongful conduct is condoned at some stage by supervening circumstances that exclude wrongfulness, the obligation to discontinue the wrongful conduct must stand unlimited. Any limitation of such a basic obligation would call into question the binding force of the primary rules themselves and endanger the validity, certainty and effectiveness of international legal relations.

(7) As indicated above, cessation is often considered in more or less close connection with restitution in kind or other forms of reparation. Yet cessation is not part of reparation. It is targeted towards the wrongful conduct per se, irrespective of its consequences. Cessation could be described as future oriented, in other words, implying future compliance with a primary rule of international law, whereas reparation whose function, as defined by the Permanent Court of International Justice, in the Chorzow Factory case, ^{3/} is to "wipe out all the consequences", for the relations between the author State and the injured State, of the factual and legal effects of a violation of an international obligation of the former vis-à-vis the latter is oriented towards a past infringement of the primary rule.

(8) The difficulty in isolating cessation from reparation is compounded by the fact that in practice the result of cessation may be indistinguishable from that of one specific form of reparation, namely restitution in kind. Reference is made here to cases involving the liberation of persons or the restitution of objects or premises. Such measures are often cited as examples of reparation in the form of restitution in kind. In fact, they aim at stopping the breach. What is demanded is the return to the attitude required by law, the cessation of the wrongful conduct. Indeed, the situations in which actions such as those referred to have been claimed and eventually carried out belong to the category of wrongful acts having a continuing

^{3/} P.C.I.J., Series A, No. 17, Judgement of 13 September 1928, p. 47.

character which are still in progress at the moment at which the injured State claims one or more remedies. It follows that the actions claimed seem to respond to a problem of cessation. It should be stressed, however, that this does not exclude the possibility that the same action may at the same time also constitute reparation in kind. In the case, for instance, of an object illegally detained, restitution in kind consists in the giving back of the object to its legitimate owner but such a measure, surely a matter of reparation, also includes cessation of the wrongful act. ^{4/} The presence of cessation per se - as a distinct remedy to a continuing violation - is even more evident in cases of wrongful detention of nationals of the injured State. The fact that detained entities are human beings, injured by their unlawful treatment in their physical and psychic integrity, in their personal liberty and dignity (in addition to their mere economic, productive activity) makes their release morally and legally more evidently an urgent question of cessation of the violation. This exigency prevails in a sense over any form of reparation. ^{5/}

(9) In a factual sense, cessation is a normal stage of any wrongful act, whatever its duration. It is obvious, however, that the only hypothesis under which cessation presents an interest that goes beyond the dynamics of the wrongful act is the case of a wrongful act having a continuing character.

^{4/} Of significance, in that respect, is the claim of Greece in the Forests in Central Rhodopia case. The forests having been annexed by Bulgaria, Greece claimed rights of ownership and use acquired prior to the annexation, which it considered to be as unlawful as the possession of the forests. However, the Greek claim was formulated not in terms of a return to the original lawful situation but in terms of restitutio in integrum, namely as a form of reparation (United Nations Reports of International Arbitral Awards, vol. III (Sales No. 1949.V.2), p. 1407).

^{5/} The predominant exigency of cessation over that of reparation in the case of wrongful apprehension, detention or imprisonment of human beings seems to emerge clearly in the United States Diplomatic and Consular Staff in Tehran case, the ICJ, after declaring that the conduct of Iran constituted a continuing wrongful act at the time of application, decided that the Government of that State

"must immediately terminate the unlawful detention of ... United States nationals now held hostage in Iran, and must immediately release each and everyone and entrust them to the protecting Power ..."

(I.C.J. Reports 1980, pp. 44-45).

(10) The Commission considered the definition of a wrongful act having a continuing character in connection with article 18, paragraph 3, and articles 25 and 26 of Part One. Instances of a continuing wrongful act are provided in paragraph (21) of the commentary to article 18 as follows:

"The maintenance in force of a law which the State is internationally required to repeal or, conversely, failure to pass a law which it is internationally required to enact; unjustified occupation of a territory of another State; unlawful blockade of foreign coasts or ports, etc."

In the same context, the Commission also referred to the de Becker case in which the European Commission on Human Rights held that the loss of the right to work as a journalist as a result of a judgement which had preceded the entry into force of the European Convention on Human Rights constituted a continuing violation with respect to which the claimant rightly considered himself to be the victim of a violation of his freedom of expression under article 10 of the Convention. The European Commission on Human Rights declared the application admissible to the extent to which the situation complained of continued to exist in the period subsequent to the entry into force of the Convention.

(11) The example of wrongful non-enactment or non-abrogation of internal legislation referred to by the Commission has also been cited in doctrine. 6/ Other examples mentioned by writers include the arrest of a diplomat.

6/ According to Triepel, "if at a given moment, States are under an international obligation to have rules of law of a specific content, the State which already has such rules is failing in its duty if it abolishes them and does not reinstate them whereas a State which does not yet have such rules is failing in its duty simply by not instituting them but both States are committing ... a 'völkerrechtliches 'Dauerdelikt''" (H. Triepel, Völkerrecht und Landesrecht (Leipzig, 1899, p. 289)).

Ago specifies for his part that "the basic element of the distinction" between instantaneous and continuing wrongful acts "lies in the instantaneous or permanent nature of the action", so that one could distinguish between "wrongful acts in which the objective elements of a conduct that conflicted with one of the State's international obligations is immediate in nature" and "other violations of an international obligation which have a continuing character, the result being that when they become complete with all their constituent elements realized, they do not thereby cease to exist; rather they continue in identical form and become permanent (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. 519-521).

(12) Closely connected with the condition of the continuing character of the wrongful act is the condition that the violated rule is still in force at the time when cessation is sought. In this connection, the Arbitral Tribunal in the Rainbow Warrior case stated the following:

"The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.

"Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.

"The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (The United States Diplomatic and Consular Staff in Teheran Case, I.C.J. Reports, 1979, p. 21, paras. 38 to 41, and ibid., 1980, para. 95, No. 1; The Case Concerning Military and Paramilitary Activities in and Against Nicaragua, I.C.J. Reports, 1984, p. 187, and ibid., 1986, para. 292, p. 149).

"If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued." 7/

(13) With regard to the timing of any claim for cessation on the part of the injured State or States, it is obvious that no such claim could be lawfully put forward unless the wrongful conduct had begun, namely unless the threshold of unlawfulness had been crossed by an allegedly wrongdoing State's conduct. A distinction should particularly be drawn between a State's conduct that "completes" a wrongful act (whether instantaneous or extended in time) and the State's conduct that precedes such conduct and does not qualify as a wrongful act. It should also be taken into consideration, on the other hand, that, unlike wrongful acts of national law, the wrongful act of a State is quite often - and probably in most cases - the result of a concatenation of a number of individual actions or omissions which, however legally distinct in terms of

7/ Loc. cit. (footnote 1 above).

municipal law, constitutes one compact whole so to speak from the point of view of international law. In particular, a legislative act whose provisions might open the way to the commission by a State of a wrongful act may not actually lead to such a result because it is not followed by the administrative or judicial action "ordered by the legislator". Conversely, a legislative act which would per se be in conformity with the necessity of ensuring compliance by a State with its international obligations might prove insufficient because it is not (or is wrongly) applied by administrative or judicial organs. This complexity of most internationally wrongful acts is particularly obvious in the frequently occurring cases in which the initial steps leading to the commission of a wrongful act by a State are represented by an act of a private party or an act of subordinate organs, further steps by State organs being indispensable for an internationally wrongful act to be "perfect". 8/ This suggests that if it is true that a claim for cessation is admissible as a matter of right (or faculté) only from the moment at which the conduct of the author State has attained the threshold prior to which it is not, and after which it became, a wrongful act, situations are conceivable in which an initiative of the prospectively injured State might be considered useful and not unlawful. Indeed, in the presence of conduct of another State which manifestly appears to constitute the initial phase of a course of action (or omission) likely to lead to a wrongful act, the State could, with all the necessary precaution, take the appropriate steps, with due respect for the principle of non-intervention in the other party's domestic affairs, to suggest in an amicable manner an adjustment of the former State's conduct which might avert liability.

(14) Unlike subsequent articles on reparation, article 6 provides for an obligation of the wrongdoing State, in keeping with the Commission's view that cessation is not a form of reparation but rather the object of an obligation stemming from the combination of wrongful conduct in progress and the normative strength of the primary rule of which the wrongful conduct is held

8/ As regards the notion of the "complexity" and "unity" of an internationally wrongful act and, more generally, the notion that a unit of State conduct under international law (action, commission or act of will) is a "factually complex unit" from the point of view of international law, see G. Arangio-Ruiz, "L'Etat dans le sens du droit des gens et la notion du droit international", Österreichische Zeitschrift für öffentliches Recht (Vienna), vol. 26, Nos. 3-4 (May 1975), pp. 311-331.

in breach. Whereas, as far as the various forms of reparation are concerned, the preference for a formulation in terms of rights of the injured State is justified in view of the fact that it is by decision of the injured State that a secondary set of legal relations is set in motion, the situation is different with regard to cessation where, although an initiative on the part of the injured State is both lawful and opportune, the obligation to discontinue the wrongful conduct is to be considered not only existent but in actual operation on the mere strength of the primary rule, quite independently of any representation or claim on the part of the injured State. Article 6 therefore emphasizes the continued, unconditional subjection of the author State to the primary obligation, no claim to respect thereof by the injured State being necessary. It reflects the Commission's view that subjecting the obligation of cessation to a claim by an injured State which may not be in a position to make such a claim or maybe under pressure not to make it would frustrate one of the main functions of cessation, namely securing the discontinuance of a violation of international law which may entail, in addition to obvious direct and specific consequences to the detriment of the injured State, a threat to the very rule infringed by the wrongdoer's unlawful conduct. Given the inorganic structure of inter-State society, the norms of international law developed by States themselves are vulnerable, being exposed to destruction as a result of breaches of those norms by States. The significance of cessation of a wrongful act goes beyond the level of bilateral relations to the level of relations between wrongdoers and all the other States and members of the international community.

(15) In keeping with article 3 of Part One entitled "Elements of an internationally wrongful act of a State", the term "conduct" covers both commissive and omissive wrongful conduct. In the case of commissive wrongful conduct, cessation will consist of the negative obligation to "cease to do" or "to do no longer". In the case of omissive wrongful conduct, cessation will cover the author State's undischarged obligation "to do" or "to do in a certain way". The Commission is aware that the dual sense it thus attributes to the expression "cessation" is not universally accepted in international theory and that, in practice, States will rather demand specific performance of a breached obligation than cessation of non-compliance with an obligation to do. However, omissive wrongful acts may well fall as well as, and perhaps more frequently than, commissive wrongful acts in the category of wrongful

acts having a continuing character. As observed by the arbitral tribunal in the Rainbow Warrior case, cessation is relevant to all unlawful acts extending in time "regardless of whether the conduct of State is an action or an omission ... since there may be cessation consisting in abstaining from certain actions - such as supporting the 'contras' - or consisting in positive conduct such as releasing the United States hostages in Tehran". ^{9/} As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an "obligation to do" is a wrongful act of a continuing character to which cessation should be applicable in isolation as well as in conjunction with one or more of the forms of reparation, and particularly with restitution in kind.

(16) The concluding phrase of the article "without prejudice to the responsibility it has already incurred" makes it clear that compliance with the obligation of cessation in no way exonerates the wrongdoing State from the responsibility it has incurred as a result of the wrongful act prior to such compliance. Cessation does not cancel the legal or factual consequences of the wrongful act. Its target is the wrongful act per se. It consists, so to speak, in the draining of the source of responsibility to the extent that it has not yet, as it were, operated. As such, cessation does not affect the consequences - legal or factual - of the past wrongful conduct.

^{9/} Loc. cit. (footnote 1, above).