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## Chapter 24

### ACTIONS AND OMISSIONS

Franck Latty

“*Qui peut et n’empesche, pesche*”, Loysel.<sup>1</sup>  
He who can but does not prevent, sins.

This adage of pre-revolutionary French law has its equivalent, *mutatis mutandis*, in all systems of law. Even if, as a matter of international law there is no requirement of fault in order to engage international responsibility, the violation by an international legal person of one or more of its obligations may arise just as easily from passivity as from a positive course of action: international legal persons are responsible both for their actions and their omissions insofar as they constitute internationally wrongful acts.

This principle has been repeated at length on many occasions; in the award in *Case concerning the Acquisition of Polish Nationality*, the arbitrator identified an obligation on the State “to refrain from all illegal acts, whether by the *positive actions* of its authorities, or by *omission* or by a refusal to lend assistance or to do justice”.<sup>2</sup> In *Corfu Channel*, the International Court clearly distinguished the wrongful acts of the United Kingdom from the equally wrongful omissions of Albania, whilst Judge Winiarski made clear in his dissenting opinion that:

“In international law, every State is responsible for an unlawful act, if it has committed that act, or has failed to take the necessary steps to prevent an unlawful act, or has omitted to take the necessary steps to detect and punish the authors of an unlawful act. Each of these *omissions* involves a State’s responsibility in international law, just like the *commission* of the act itself.”<sup>3</sup>

**\*\*\*356\*\*\***

The Iran-US Claims Tribunal has also applied the principle, holding that “the Government of Iran is responsible, by virtue of its acts and omissions”,<sup>4</sup> while the Inter-American Court of Human Rights has stated that “a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions...”<sup>5</sup> A number of awards in investment protection arbitrations have made reference to the principle,<sup>6</sup> which is accepted also as a matter of Community law<sup>7</sup> in which there is

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<sup>1</sup> H. Roland, L. Boyer, *Adages du droit français* (4<sup>e</sup> éd.)(Litec, Paris, 1999), 736.

<sup>2</sup> (1924) 1 *R.I.A.A* 401, 425 (emphasis added).

<sup>3</sup> *Corfu Channel, Merits, ICJ Reports 1949*, p. 4, 52 (dissenting opinion of Judge Winiarski) (emphasis added).

<sup>4</sup> *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran and others*, (1984) 6 *Iran-U.S. C.T.R.* 219, 225.

<sup>5</sup> *Velásquez Rodríguez v. Honduras, Merits, Inter-Am.Ct.H.R., Series C, No. 4* (1988), para. 170; see also para. 164.

<sup>6</sup> See e.g. *CME Czech Republic BV v Czech Republic*, (2001) 9 ICSID Reports 121, 236 (para. 605); *Eureko BV v. Republic of Poland*, (2005) 12 ICSID Reports 331, 373 (paras. 186-189).

even a specific remedy provided for a failure to act by Community institutions.<sup>8</sup> This overview is obviously not exhaustive, but it highlights the continued vigour of the principle, which has been noted by both academic writers and in private codification drafts.<sup>9</sup> The ILC was therefore able to codify as article 2 of its Articles the rule that an internationally wrongful act results from “conduct consisting of an action or an omission”, which is attributable to the State and which constitutes a breach of one of its international obligations.

The notions of action and omission give form to, and puts some meat on the bones of, the notion of the “internationally wrongful *act*”, a notion which was deliberately left skeletal. While internationally wrongful acts and omissions in international law may be relatively easy to define, the dividing line between the two categories is sometimes difficult to identify (section 1). However, the consequences attached to the distinction for the purposes of the regime of international responsibility are in any case relatively limited (section 2).

## **1 The action/omission distinction.**

### **(a) Definition of internationally wrongful actions and omissions in international law**

An “action” of a State or any other subject of international law is to be understood as meaning any conduct or positive act which is attributable to it. The wrongful character of such an action derives from the obligation to refrain from particular conduct, generally phrased as a prohibition, imposed by public international law. The unlawfully wrongful action is therefore the violation of a primary obligation “not to do”.

Public international law is replete with such prohibitions, but the clearest examples of the obligations “not to do” are those which are the direct corollaries of the sovereignty of States. In *Military and Paramilitary Activities in and against Nicaragua*,<sup>10</sup> the International Court held that, by various actions (support to the *contras*, armed attacks, overflight of Nicaraguan territory, and the laying of mines), the United States of America had variously acted in breach of its obligations under customary international law “not **\*\*\*357\*\*\*** to intervene in the affairs of another State”, “not to use force against another State” and “not to violate the sovereignty of another State”.<sup>11</sup> Similarly, in *Corfu Channel*, the Court held that “the action of the British Navy” – in carrying out a de-mining operation in Albanian waters without Albania’s consent – “constituted a violation of Albanian sovereignty”.<sup>12</sup>

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<sup>7</sup> See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland; R. v Secretary of State for Transport, ex parte Factortame Ltd and others*, [1996] ECR I-1029.

<sup>8</sup> See Art. 232 (ex-175), EC Treaty.

<sup>9</sup> For the various codification efforts, see the Annex to R. Ago, “First Report on State Responsibility”, *ILC Ybk 1969*, vol. II, 129, 141.

<sup>10</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *ICJ Reports 1986*, p. 6.

<sup>11</sup> *Ibid*, 146-147 (paras. 292(3)-(6)).

<sup>12</sup> *ICJ Reports 1949*, p. 4, 35.

Generally, the prohibitions imposed by international law result from rules creating a particular status or consecrating a right.<sup>13</sup> Further, certain areas of international law are particularly fertile sources for the formation of such obligations “not to do”: there is a proliferation of prohibited conduct in the norms relating to the status of maritime spaces (for example the obligation not to interrupt peaceful maritime commerce found to have been violated in *Military and Paramilitary Activities*),<sup>14</sup> in diplomatic law (e.g. the obligation not to infringe the inviolability of premises of a diplomatic mission),<sup>15</sup> in relation to the issue by an investigating magistrate and subsequent circulation of an arrest warrant in relation to an incumbent Minister of Foreign Affairs,<sup>16</sup> and in the law relating to treatment of foreigners, including rules against arbitrary expulsion,<sup>17</sup> and arbitrary arrest followed by ill-treatment.<sup>18</sup>

Beyond these prohibitions which are binding on States as a matter of customary law, the treaty-making activities of States is a further source of prohibitions. Treaties are the paradigm manner in which States consent to limit the exercise of their competences and to undertake, more or less explicitly, not to do particular things.<sup>19</sup> Any action contrary to these prohibitive provisions contained in treaties clearly would be liable to engage the international responsibility of the State in question.

But the subjects of international law are not responsible only for their actions; their responsibility is engaged just as much by their omissions. As the European Court of Human Rights has observed, “fulfilment of a duty... on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and ‘there is ... no room to distinguish between acts and omissions’....”<sup>20</sup>

*A priori*, omissions are not easy to identify as such, given that, by definition, they are not susceptible to any material concretisation. They correspond to an abstention, an instance of inaction by an international actor; however, in contrast to those two terms, the word “omission” presupposes to a certain extent an obligation to

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<sup>13</sup> C. Dominicé, “Observations sur les droits de l’État victime d’un fait internationalement illicite”, in *L’ordre juridique international entre tradition et innovation* (P.U.F., Paris, 1997), 261, 281.

<sup>14</sup> *ICJ Reports 1986*, p. 6, 147 (para. 292(6)).

<sup>15</sup> G. Perrin, “L’agression contre la légation de Roumanie à Berne et les fondements de la responsabilité internationale dans les délits d’omission”, *R.G.D.I.P.*, 1957, 410, 419.

<sup>16</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *ICJ Reports 2002*, p. 3, 29-30 (paras. 70-71).

<sup>17</sup> *Paquet* (1903) 9 *R.I.A.A.* 323, 325.

<sup>18</sup> *Chevreau* (1931) 2 *R.I.A.A.* 1113, 1131.

<sup>19</sup> See e.g. Art. 1 of the Antarctic Treaty, Washington, 1 December 1959, 402 UNTS 71, prohibiting all measures of a military nature in the Antarctic; Art. 22 of the Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, which prohibits agents of the accrediting State from entering the premises of a diplomatic mission without the consent of the head of mission; Art. 1 of the Treaty on the Non-Proliferation of Nuclear Weapons, London/Washington/Moscow, 1 July 1968, 729 UNTS 169 by which nuclear-weapon States undertake “not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices...”

<sup>20</sup> *Marckx v Belgium* (App Nos 6833/74), *ECHR, Series A No 31* (1979), 15 (para 31); see also *De Wilde, Ooms et Versyp v Belgium* (App Nos 2832/66, 2835/66, 2899/66), *ECHR Series A No 15* (1972); *Airey v Ireland* (App No 6289/73, *ECHR Series A No 32* (1979), 14 (para 25).

act which has not been fulfilled. It is therefore almost tautological to speak of a “wrongful omission”. **\*\*\*358\*\*\***

Accordingly, an abstention constitutes a (wrongful) omission where some action is required from the international actor; an omission is an abstention consisting of the fact of not doing that which ought to be done.<sup>21</sup> In this regard, the remedy for failure to act in EU law is subject to a requirement “that the institution concerned should be under an obligation to act, so that the alleged failure to act is contrary to the Treaty.”<sup>22</sup> By contrast, in the absence of any primary obligation “to do”, no omission may be complained of. For instance, in *Mohsen Asgari Nazari v. Iran*,<sup>23</sup> the Iran-US Claims Tribunal, having found that there was no obligation to act on Iran in the circumstances, concluded that no omission could be held to its account.<sup>24</sup>

The international legal system contains a multitude of obligations “to do”. They result for the most part from treaty obligations entered into by States.<sup>25</sup> A failure to observe treaty obligations “to do” constitutes an omission which is liable to engage the responsibility of the State in question. In *United States Diplomatic and Consular Staff in Tehran*,<sup>26</sup> the International Court of Justice observed that “the Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion”,<sup>27</sup> and “this inaction of the Iranian Government” constituted a “clear and serious violation” of its obligations under the Vienna Conventions on Diplomatic and Consular Relations.<sup>28</sup>

For its part, customary law creates a large number of duties incumbent on States which are the corollary of their sovereignty, notably the “obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability...”<sup>29</sup> As a consequence, wrongful omissions in international law may be

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<sup>21</sup> See the definition of “omission” in J. Salmon (ed.), *Dictionnaire de droit international public* (Bruylant, Brussels, 2001), 779.

<sup>22</sup> Case T 32/93, *Ladbroke Racing Ltd v. Commission* [1994] ECR I-1015, para. 35.

<sup>23</sup> *Mohsen Asgari Nazari v. Iran*, (1994) 30 *Iran-U.S. C.T.R.* 123.

<sup>24</sup> *Ibid.*, 159.

<sup>25</sup> See for example, Art. 1(2) of the Chemical Weapons Convention, Paris 13 January 1993; 1974 UNTS 316, by which the States Parties undertake to destroy their chemical weapons; Art. 4 of the International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999; UN doc. A/54/109; 39 I.L.M. 270, by which the States Parties undertake to ensure that the offences established by the Convention are punishable under their domestic law. See also the engagement to construct the system of locks at issue in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *ICJ Reports 1997*, p. 7, and L.-A. Sicilianos, “La responsabilité de l’État pour absence de prévention et de répression des crimes internationaux”, in H. Ascensio et al (eds.), *Droit international pénal* (Pedone, Paris, 1999), 115, 116.

<sup>26</sup> *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports 1980*, p. 4.

<sup>27</sup> *Ibid.*, 31 (para. 63).

<sup>28</sup> *Ibid.*, 32 (para. 67). See also, for example, the arbitral award in *Rainbow Warrior* (1990) 20 *R.I.A.A.* 215 which held that a number of omissions by France violated a treaty with New Zealand; the report of the Panel in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Panel of 5 September 1997, WTO doc. WT/DS50/R, para. 7.43, which held that India had failed to take the action necessary to implement its treaty obligations; or, in Community law, the condemnation of a State whose Parliament does not transpose a Directive within the time foreseen: Case 39/72 *Commission v. Italy* [1973] ECR 101.

<sup>29</sup> *Island of Palmas*, (1928) 2 *R.I.A.A.* 829, 839.

found in particular in relation to failure to comply with obligations of due diligence, as is illustrated by *Corfu Channel*. The Court there held that Albania had failed to warn the British warships of the existence of a minefield: “nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.”<sup>30</sup> **\*\*\*359\*\*\*** Similarly, in its 2007 judgment in *Application of the Convention for the Prevention and Punishment of the Crime of Genocide*,<sup>31</sup> the International Court held that Serbia, by its omissions, had violated its obligation to prevent the genocide at Srebrenica, after having made clear that the obligation was one of conduct, and that in the assessment of compliance with that obligation the notion of “due diligence was “of crucial importance”.<sup>32</sup>

### **(b) Relevance of the distinction**

For Brigitte Stern the distinction between action and omission “does not seem to be particularly important, given that any obligation may be expressed both positively and negatively.”<sup>33</sup> International decisions occasionally distinguish wrongful actions from omissions; as noted above, in *Corfu Channel*, Albania’s responsibility was based on its omissions, while the actions of the United Kingdom were declared to be internationally wrongful. Similarly, the decision in the *Rainbow Warrior* established the responsibility of France on the one hand on the basis of positive actions (the repatriation of Captain Prieur from the island of Hao), and on the other on the basis of failures to act (“by not endeavouring in good faith to obtain [...] New Zealand’s consent to Captain Prieur’s leaving the island of Hao”; “by failing to order the return of Captain Prieur to the island of Hao”).<sup>34</sup> The International Court held that Uganda violated its obligations under international human rights law and international humanitarian law, as a result of the fact that it had “incited an ethnic conflict” (action) and had “failed to take measures to put an end to such conflict” (omission).<sup>35</sup>

One aspect of the judgment of the Court in *Application of the Genocide Convention* illustrates the subtleties, ignored by the Court in its disposal of the case, which the distinction can generate. While distinguishing between complicity in genocide and the violation of the obligation of prevention, the Court affirmed somewhat simplistically that “complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission.”<sup>36</sup> Such a categorical affirmation leaves room for some scepticism; the possibility of commission by omission, a concept “which is well-known in domestic

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<sup>30</sup> *ICJ Reports 1949*, p. 4, 23.

<sup>31</sup> *Application of the Convention for the Prevention and Punishment of the Crime of Genocide, Merits (Bosnia-Herzegovina v. Serbia and Montenegro)*, ICJ, judgment of 26 February 2007.

<sup>32</sup> *Ibid.*, para. 430.

<sup>33</sup> “Responsabilité internationale”, in *Répertoire de droit international* (2<sup>nd</sup> ed.) (Dalloz, Paris, 2004), vol. III, para. 62.

<sup>34</sup> *Rainbow Warrior* (1990) 20 *R.I.A.A.* 215, 264 (para. 101)

<sup>35</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *ICJ Reports 2005*, p. 168, 280 (para. 345(3)).

<sup>36</sup> *Application of the Convention for the Prevention and Punishment of the Crime of Genocide, Merits (Bosnia-Herzegovina v. Serbia and Montenegro)*, ICJ, judgment of 26 February 2007, para. 432.

law”,<sup>37</sup> should in particular be borne in mind. For example, should not a State which permits transit of its territory of armed groups, being aware of their genocidal intention, be recognised as complicit in their acts as a result of its knowing failure to act? **\*\*\*360\*\*\***

In other situations, a single internationally wrongful act may result from a combination of action(s) and omission(s). In its Commentaries, the ILC referred to article 4 of the Hague Convention (VIII) of 19 October 1907 Relative to the Laying of Automatic Submarine Contact Mines,<sup>38</sup> which foresees the responsibility of a neutral Power which places automatic contact mines off its coast *and* which omits to give the required notice to other States Parties.<sup>39</sup> The notion of composite acts embodied in article 15 of the Articles on State Responsibility also blurs the distinction between action and omission given that the internationally wrongful act may result from a combination of the two. In addition, a failure to comply with an obligation of due diligence may be the consequence of a combination of failures to act (e.g. the absence of intervention by the police) and positive acts (e.g. a judicial decision), which permits the conclusion that the State has not complied the obligations incumbent on it as a well-governed State.

Further, a wrongful omission may in the end be caused by a positive act. Accordingly, a State taking *insufficient* measures to prevent a genocide, or less dramatically, in order to prevent a nuisance caused to its neighbour, fails to comply with its obligations. Its responsibility may be engaged by the failure to take appropriate measures, although the measures in fact taken, even if not adequate, form a positive act. The same is true of actions different from those required by the obligation breached. In these two cases, there is an omission by action, with the result that the distinction between the two notions is relatively fragile. In the end, as Ago observed, the difference between the two types of delict is not a material difference but a legal one.<sup>40</sup> Rather than speaking of internationally wrongful acts or omissions, greater clarity is achieved if one talks of violations of obligations “to do” or “not to do”, to distinguish between “passive obligations by which a State prohibits itself from acting, and positive obligations by which it obliges itself to act”.<sup>41</sup>

The responsibility of a subject of international law may therefore be engaged by reason of a violation of its international obligations, both *in commitendo* as well as *in omittendo*. For this reason, in French the term “*fait* internationalement illicite” is to be preferred to “*acte* internationalement illicite”, given that the latter does not include omissions, as is made clear by the Commentary to Article 1 of the Articles; however, the Commentray highlights the absence of any equivalent in English of the term “*fait*” in French, and the Commission therefore opted for maintenance of the term “internationally wrongful *act*”.<sup>42</sup> It is now necessary to examine the consequences

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<sup>37</sup> Ph. Weckel, “L’arrêt sur le génocide: le souffle de 1951 n’a pas transporté la Cour” (2007) 111 *R.G.D.I.P.* 305, 327.

<sup>38</sup> J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (OUP, New York, 1920), vol. 1, 643.

<sup>39</sup> Commentary to Article 2, paragraph (4), note 67.

<sup>40</sup> R. Ago, “Le délit international” (1939-II) 68 *Recueil des Cours* 415, 501.

<sup>41</sup> P. Reuter, *Droit international public* (6<sup>th</sup> edn, P.U.F., Paris, 1983), 253.

<sup>42</sup> See Commentary to Article 1, paragraph (8).

attached to the distinction between acts and omissions in the regime of international responsibility.

## 2 The consequences of the action/omission distinction

### (a) The limited consequence of the distinction

The regime applicable to acts giving rise to international responsibility attributes few consequences to whether the act in question is an action or an omission. As international case-law reveals, the rules governing attribution of conduct and breach of an \*\*\*361\*\*\* international obligation remain the same. The assimilation of the two notions is fully justified: the maintenance of order in any society (the “*statique sociale*” in the words of Comte) results just as much from obligations to act as from those requiring abstention from its subjects. As a result, a failure to comply (the “dynamic” element) with any obligation causes the same disruption, and the normal balance of things is just as much affected by an action as by an omission. The engagement of international responsibility rests not so much on the active or passive nature of the conduct constituting a breach as on the existence of the breach itself.

However, given the lack of any concrete acts, the operation of the rules of attribution of conduct in relation to omissions operates at a greater level of abstraction. In the absence of a positive act, necessarily performed by an actor, the operation of the rules of attribution in relation to omission can only operate by means of identifying the obligation breached, and therefore, the subject by which it is owed. In addition, the distinction can be seen as having a certain effect in relation to questions of causation. According to Ago, “whilst in relation to actions it is simply a case of establishing whether a natural relationship of cause and effect exists linking the action of the actor and the event, in relation to delicts by omission it is necessary to decide whether the occurrence of the action required in the concrete case of the actor could have prevented the event.”<sup>43</sup> The ILC noted in its Commentaries that “it may be difficult to isolate an ‘omission’ from the surrounding circumstances which are relevant to the determination of responsibility.”<sup>44</sup> Obligations requiring positive action are however more contingent than obligations imposing prohibitions; according to the circumstances, a more or less strong reaction by way of “appropriate steps”<sup>45</sup> may be required. The finding of the existence of an unlawful omission is therefore more difficult than a similar finding in relation to a positive action, since it requires a detailed examination of the facts of the case.

Certain authors (in particular Schoen and Strupp)<sup>46</sup> attempted to establish a distinction based on the notion of fault: in this conception, in contrast to a wrongful positive action, a wrongful omission is not capable of engaging a State’s responsibility except where the State is at fault. However, this analysis is undermined by the current state of international law, since it is well-established that there is no general requirement of any specific intention in order for there to be a breach of an

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<sup>43</sup> R. Ago, “Le délit international” (1939-II) 68 *Recueil des Cours* 415, 503.

<sup>44</sup> Commentary to Article 2, paragraph (4).

<sup>45</sup> *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p. 4, 31 (para. 63).

<sup>46</sup> Cited by D. Anzilotti, *Cours de droit international* (French trans., Editions Panthéon-Assas, Paris, 1999), 502; see also R. Ago, “Le délit international” (1939-II) 68 *Recueil des Cours* 415, 484; L.-A. Sicilianos, “La responsabilité de l’État pour absence de prévention et de répression des crimes internationaux”, in H. Ascensio et al (eds.), *Droit international pénal* (Pedone, Paris, 1999), 115, 121.



international obligation. That approach is fully justified, if only because, although it might be possible to identify an intention from positive act, proof of the intentional nature of omission would often be very difficult.

What is important is therefore not to qualify conduct as an action or omission, but to evaluate it in the light of the obligations binding on the subject of international law. An internationally wrongful act is the result of a failure to comply with an obligation which is attributable to the entity bound by the obligation in question, and not of the active or passive character of that lack of performance. As concerns the source of international responsibility, the action/omission dichotomy therefore has few consequences; however, the distinction is of some use in relation to the content of that responsibility. \*\*\*362\*\*\*

**(b) Use of the distinction as regards the content of international responsibility**

Prior even to the question of reparation, the first obligation deriving from responsibility for an internationally wrongful act is that to put an end to the wrongful conduct if it has not already ceased. In this regard, as well as in the context of *restitutio in integrum* the implementation of which is sometimes difficult in practice, the distinction between action and omission has a certain relevance. Of course, the cessation of an internationally wrongful act may be relevant to both actions and omissions, “since there may be cessation consisting in abstaining from certain actions”.<sup>47</sup> All the same, “*restitutio in integrum* is [...] the normal sanction for non-performance of contractual obligations”,<sup>48</sup> and it matters little whether the obligations in question are obligations of positive action or obligations requiring abstention. However, depending on whether the internationally wrongful act is the result of a positive action or an omission, the content of the obligation of cessation of the wrongful conduct and the obligation to restore (or not) the situation to its previous state will depend on the content of the primary obligation.<sup>49</sup>

In cases of omission, the continuing obligations of cessation of the wrongful act and the wiping out, where possible, of the consequences of the violation, have the same content as the obligation breached: the international actor is required to act, and the same action remains required of it. In *United State Diplomatic and Consular Staff in Tehran*, the International Court, having found that Iran had by omission breached its obligations, held that it was required to “immediately terminate the unlawful detention of the [...] United States nationals now held hostage in Iran”.<sup>50</sup> The obligations of Iran therefore remained exactly the same as those contained in the primary obligation requiring it to act.

On the other hand, in relation to breaches arising as the result of positive action, the obligation to put an end to the internationally wrongful act and *restitutio in integrum* take the form of obligations having a content different to that of the obligation breached. The violation of the primary obligation requiring that some act

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<sup>47</sup> *Rainbow Warrior* (1990) 20 *R.I.A.A.* 215, 270 (para. 113).

<sup>48</sup> *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic* (1977) 53 *ILR* 389, 507-508 (para. 109).

<sup>49</sup> See also in relation to the subject of *restitutio in integrum*, R. Ago, “Le délit international” (1939-II) 68 *Recueil des Cours* 415, 504-506.

<sup>50</sup> *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports 1980*, p. 4, 44 (para. 95(3)(a)).

not be done produces a new and different obligation to act: the wrongful acts of the United States established in relation to Nicaragua in *Military and Paramilitary Activities* produced a obligation to undertake action, an obligation “immediately to cease [...] all such acts as may constitute breaches of the foregoing legal obligations”.<sup>51</sup> Similarly, the illegality of the construction by Israel of a wall in occupied Palestinian territory produced as a consequence an “obligation to cease forthwith the works of construction of the wall”, to dismantle those parts of the structure which had been built, and to repeal or render ineffective the legislative or regulatory acts adopted with a view to its construction and to the establishment of the associated régime,<sup>52</sup> as well as by way of *restitutio in integrum*, “to return the land, orchards, **\*\*\*363\*\*\*** olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall” to the extent that it was materially possible.<sup>53</sup> In a comparable fashion, in *Arrest Warrant of 11 April 2000*, the wrongful issuing and circulation of an international arrest warrant in relation to the incumbent Congolese Minister of Foreign Affairs, resulted in an obligation for Belgium to “cancel the warrant in question and so inform the authorities to whom it was circulated”.<sup>54</sup> By citing the decision of the Permanent Court of International Justice in *Factory at Chorzów*,<sup>55</sup> the Court indicated that it was acting on the basis of the obligation to restore the state of affairs to the situation pre-existing before the internationally wrongful act, rather than on the basis of the obligation to cease of an internationally wrongful act, and this despite the fact that the interested party had in the meantime ceased to serve as Minister of Foreign Affairs. Several judges nevertheless were of the view that “the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong”.<sup>56</sup>

However this may be, the result is that a positive wrongful action, i.e. the breach of an obligation “not to do”, gives rise to an obligation “to do” (which is accordingly distinct from the primary obligation) as regards the cessation of the wrong and *restitutio in integrum*. Quite apart from its concrete manifestations, the distinction between actions and omissions therefore has a discrete theoretical interest, since it indicates that the obligation to put an end to wrongful conduct is indeed a secondary, rather than a primary obligation.<sup>57</sup>

### Further reading

R. Ago, “Le délit international”, *Recueil des cours*, vol. 68 (1939-II), pp. 500-506)

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<sup>51</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 6, 149 (para. 292(12)).

<sup>52</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, 197-198 (para. 151); see also *ibid.*, 201-202 (para. 163(3)B).

<sup>53</sup> *Ibid.*, 198 (para. 153).

<sup>54</sup> *Arrest Warrant of 11 April 2000*, ICJ Reports 2002, p. 6, 32 (para. 76); see also *ibid.*, 33 (para. 78(3)).

<sup>55</sup> *Ibid.*, 31-32 (para. 76), citing *Factory at Chorzów*, Merits, 1928, PCIJ, Series A No. 17, 47.

<sup>56</sup> *Arrest Warrant of 11 April 2000*, ICJ Reports 2002, p. 6, 90 (para. 89) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal).

<sup>57</sup> Cf. the contrary views of Arangio-Ruiz, “Preliminary Report on State Responsibility”, *ILC Ybk 1988*, vol. II(1), 13 (para. 31), 19 (para. 54); . C. Dominicé, “Observations sur les droits de l’État victime d’un fait internationalement illicite”, in *L’ordre juridique international entre tradition et innovation* (P.U.F., Paris, 1997), 261, 280-284.

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