



Tanulmányok 6.

INTERNATIONAL LAW – A QUIET STRENGTH

*

LE DROIT INTERNATIONAL.
UNE FORCE TRANQUILLE

(Miscellanea in memoriam Géza Herczegh)

edited by
PÉTER KOVÁCS

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SOME REMARKS ON THE RECENT CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE ON RESPONSIBILITY ISSUES

ALAIN PELLET¹

I had intellectual contacts with Géza Herczegh long before he became a Judge in the ICJ. Both of us wrote our doctoral thesis on the same topic: general principles of law. His book², published in 1969, immediately stroke me as a rigorous piece of research, written in a purely scientific mind, quite impervious to the political and ideological pressure – quite an exception among Eastern countries scholars at the time. We met once or twice before he was elected at the World Court in 1993, a position where he confirmed his independence and intellectual rigour and honesty, as others testify in the present book.

Experienced both as a professor and a judge, he did not let his roles as University professor and judge get in the way of each other and, as a judge, he usually abstained to develop general theories and his rare declarations³ were concise. His only long dissent was appended – quite understandably⁴ – to the

¹ Professor at the University Paris Ouest, Nanterre-La Défense; Member and former Chairman of the International Law Commission, Associé de l'Institut de Droit international. (The author is most indebted to Alina Miron, researcher at the Centre de Droit international de Nanterre, for her assistance in searching the ICJ's case-law and establishing the English text of this study.)

² GÉZA HERCZEGH: *General Principles of Law and the International Legal Order*. Collection Series in Foreign Languages by the Institute for Legal and Administrative Science of the Hungarian Academy of Sciences, Budapest: MTA, 1969. 129.

³ ICJ, Judgment, 27 February 1998, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Declaration of Judge Herczegh. Reports 1998, 51–53; ICJ, Judgment, 16 March 2001, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Declaration of Judge Herczegh. Reports 2001, 216.; ICJ, Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Declaration of Judge Herczegh, Reports 2002, 472–473.

⁴ Maybe because the undersigned was Counsel for Slovakia in that case, he still finds the construction and the implementation of Variant C legally justified, in spite of Judge Herczegh's vigorously argued reasoning: by its behaviour, Hungary had made the implementation of the (still in force) 1977 Treaty impossible.

1997 Judgment in the case concerning the *Gabčíkovo–Nagymaros Project*.

Although he observed “that in reality one does not often see ‘pure’ or unequivocal cases, in the sense that they require only one single abstract type of legal settlement or solution” and warned that “[m]ore often than not, the legal situation in which the parties find themselves falls within the ambit of several rules of international law at the same time”⁵, the distinguished Judge globally adopted the Hungarian case. But he did so with moderation and restraint, calling for “a balance, admittedly hard to achieve, between the interests of the upstream and the down-stream countries, and [...] harmonious progress in enhancement of the natural resources would be carefully organized to prevent the long-term disadvantages from outweighing the immediate advantages.”⁶

In that moderate but firm dissent, Judge Herczegh mainly tackled issues related to the law of the international responsibility of States. And, since a striking feature of the case-law of the Court in the two last decades is the growing place taken by responsibility cases⁷, this tribute paid to the distinguished Judge is an occasion to briefly evaluate the position taken by the World Court in this respect.

Although Judge Herczegh had never been a member of the ILC, like the Court itself⁸, he largely based his dissenting reasoning on the ILC Articles, which it used not less than five times. It is therefore appropriate to stress more particularly the use (and non-use) made by the Court of the Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts.

* * *

The law of international responsibility of the State has always been essentially judge-made. First, the arbitral tribunals established at the end of the 19th and the beginning of the 20th centuries that settled its bases, in particular on the occasion of disputes opposing European States or the United States of America to Latin American States, summoned to fulfil their international obligations and defending the foreign interests endangered by the recurrent revolutions and the instability reigning at the time in the sub-continent. Then, the Permanent Court

⁵ ICJ, judgment, 25 September 1997, *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Dissenting Opinion of Judge Herczegh, Reports 1997, 197.

⁶ *Ibid.* 189.

⁷ Out of the twenty-five judgments given by the Court in the period 2001–2010, eleven were based upon, mainly or accessorially, responsibility issues. Out of the thirteen cases now on the Court’s General List, ten contain conclusions relating to responsibility.

⁸ In its 1997 Judgment, the Court mentioned eight times the ILC Articles or their commentaries: paras. 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

laid them down in condensate turn of phrases that are nowadays the vulgate of the law of responsibility. Finally, the ILC, in its 2001 Articles, took largely note of this judge-made law without calling into question its fundamentals, nevertheless filling in some of its gaps and dissipating some of its uncertainties, while adding a prudent and still welcome flavour of progressive development.

Whereas it accepts to assess the customary character of such and such provision of the Articles – to which it makes sparing references, depending on the cases, the Court rightly considers unnecessary to make an appreciation of their customary character as a whole.⁹ Up to now¹⁰, the Court has had only one occasion to take position on the steps forward that constitute the Articles 33, 40 and 41¹¹, 42, 48 and 54 which root the concept of international community into the law of responsibility and trigger some consequences therefrom¹². On the other side, it considered that the following Articles are *lex lata*:

- Article 4 (“Conduct of organs of a State”)¹³,
- Article 5 (“Conduct of persons or entities exercising elements of governmental authority”)¹⁴ ;
- Article 8 (“Conduct directed or controlled by a State”)¹⁵ ;
- Article 14, paragraph 3 (obligation of prevention)¹⁶ ;
- Article 16 (“Aid or assistance in the commission of an internationally wrongful act”)¹⁷ ;
- Article 25 (“Necessity”)¹⁸ ;

⁹ ICJ, judgment, 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Merits*, para. 414.

¹⁰ The present study takes into account the decisions posterior to the adoption of the ILC Articles (2001) till the date of its drafting (December 2010).

¹¹ Without mentioning them, the Court echoed them nonetheless in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; see *infra*, fn. 108.

¹² *Ibid.*

¹³ ICJ, judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reports 2005*, p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, paras. 385 et 388.

¹⁴ *Armed Activities on the Territory of the Congo*, *ibid.*, p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *ibid.*, para. 414 .

¹⁵ *Armed Activities on the Territory of the Congo*, *ibid.* p. 226, para. 160 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *ibid.*, paras. 398–407.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *ibid.* para. 431.

¹⁷ *Ibid.* para. 420.

¹⁸ ICJ, advisory opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Reports 2004*, p. 195, para. 140.

- Article 31 (“Reparation”)¹⁹ ;
- Article 36 (“Compensation”)²⁰ ;
- Article 45 (“Loss of the right to invoke responsibility”)²¹ ;
- Article 58 (“Individual responsibility”)²².

While applying these provisions, the Court gave interesting details on their interpretation and scope, in particular on the system of international responsibility and on the concept of international wrongful act (A), on the attribution of such an act to the State (B) and on the content and implementation of the responsibility (C).

A. The system of the international responsibility and the notion of internationally wrongful act

Though the Court never took up the question from a doctrinal point of view, it indirectly confirmed that a State entails its international responsibility when a conduct attributable to it under international law constitutes the violation of one of its international obligations²³ – without paying attention at this stage to whether or not such an internationally wrongful conduct had caused damage to the Applicant State.²⁴

Thus, in the *Genocide* case, the Court had first established that the massacres committed in the Srebrenica region were constitutive of the crime of genocide in the meaning of the 1948 Convention (the objective element), then, in order to “ascertain whether the international responsibility of the Respondent can have been incurred” in relation to those facts, it wondered whether “the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility” specifying that “this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable [...] to

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 460.

²⁰ *Ibid.*

²¹ *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 266, para. 293.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 173.

²³ Cf. Art. 2 of the ILC Articles.

²⁴ The exclusion of damage as one of the constituent elements of State responsibility is one of Ago’s essential contribution. (see Ch. Dominicé, “The International Responsibility of States for Breach of Multilateral Obligations”, *E.J.I.L.*, 1999, vol. 10, n° 2, pp. 359–360; or A. PELLET : Les articles de la C.D.I. sur la responsabilité de l’État pour fait internationalement suite – et fin? *A.F.D.I.* 2002. pp. 1–23.

the Respondent”²⁵. In the same vein, in the *Armed Activities* case, the Court had started by verifying the reality of the facts Uganda was accused of, qualifying them afterwards as “massive human rights violations and grave breaches of international humanitarian law”²⁶, and only afterwards did the Court turn to the question « as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda »²⁷.

Unsurprisingly, the Court put on the same level the breaches of conventional²⁸ and customary²⁹ obligations, thus confirming the irrelevance of the origin or the nature of the obligations violated.³⁰ It equally confirmed that a State could not take shelter under domestic rules in order to exonerate itself of its international responsibility. In the *Pulp Mills* case, the Court considered that Uruguay was responsible for the violations of its obligations of notification under the 1975 Statute of the Uruguay River and noted that “by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute”. Surprisingly in this context, instead of referring to the principle enshrined in Article 3 of the ILC Articles,³¹ the Court insisted that Uruguay had in this way “disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’”³²; by doing so, the Court creates a confusion between the respective spheres of the law of treaties and of the law of State responsibility, confusion

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, para. 379.

²⁶ *Armed Activities on the Territory of the Congo*, supra fn. 12, p. 239, para. 207.

²⁷ *Ibid.* p. 242, para. 213. See also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra fn. 17, p. 197, para. 147.

²⁸ For instance Articles II and III of the 1948 Genocide Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, paras. 231–376 and paras. 377–424) or Article 13 of the Covenant on Civil and Political rights and Article 12, paragraph 4, of the African Charter (ICJ, judgment, 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, paras. 64–74).

²⁹ ICJ, judgment, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Reports 2003, pp. 182–183, para. 42; *Armed Activities on the Territory of the Congo*, supra fn. 12, p. 243, para. 217; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra fn. 17, p. 171, para. 86.

³⁰ Cf. Art. 12 of the ILC Articles. See also, *Gabčíkovo–Nagymaros Project*, supra fn.4, p. 38, para. 47.

³¹ This provision states: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

³² ICJ, judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, para. 121.

of little practical implications, but nonetheless intellectually disturbing, all the more since the Court had warned against it in the *Gabčíkovo-Nagymaros* case³³.

In its two judgments of 2001 and 2004 relating to the application of Article 36 of the Convention on consular relations, the Court seems to put an end to the recurrent uncertainty of whether the mere incompatibility of a domestic law with an international obligation was sufficient to establish State responsibility or if its effective application was necessary for that purpose.³⁴ In the *LaGrand* and *Avena* decisions, the ICJ clearly opted for the second possibility:

« In itself, the rule [of procedural default] does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information ‘without delay’, thus preventing the person from seeking and obtaining consular assistance from the sending State. »³⁵.

The Court thus confirmed the disputable position it had assumed in the *Gabčíkovo-Nagymaros* case where it had dissociated between Slovakia’s responsibility for recourse to the « variant C » and the practical application of this one³⁶.

Another uncertainty to which the recent case-law has put an end concerned the distinction between obligations of conduct and of result. In the 2007 decision, the Court described it in crystal-clear terms:

“[...] it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far

³³ *Gabčíkovo-Nagymaros Project*, *supra* fn. 4, p. 38, para. 47 ; for a similar confusion, ICJ., judgment, 4 June 2008, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Reports 2008*, pp. 222–223, paras. 122 et 124.

³⁴ Ch. DOMINICÉ : Observations sur les droits de l’État victime d’un fait internationalement illicite. In *L’ordre juridique international entre tradition et innovation. Recueil d’études*, P.U.F., 1997, pp. 265–266, in particular fn. 11.

³⁵ ICJ, judgment, 27 June 2001, *LaGrand (Germany v. United States of America)*, *Reports 2001*, p. 497, para. 90 and ICJ, judgment, 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Reports 2004*, p. 56, para. 112.

³⁶ *Gabčíkovo-Nagymaros Project*, *supra* fn. 4, pp. 53–55, **paras. 74–81** et p. 82, para. 155.1.B et C.

as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”³⁷

Equally, in the *Pulp Mills* case, the Court considered that:

“the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river ».³⁸

These clarifications are of some importance, since, in the project adopted on first reading, the ILC had retained, on Ago’s proposition, heterodox definitions of these two categories of obligations,³⁹ that called for harsh criticism from the doctrine.⁴⁰ Consequently, in the final draft, following a suggestion by the Special Rapporteur James Crawford, who doubted the usefulness of the distinction,⁴¹ the Commission gave up mentioning it. In the above passage, the Court returned to a more classical and workable definition of these notions, as they are reflected in civil law systems on which the distinction was based: “in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one’s power to achieve a result, but without ultimate commitment.”⁴²

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, para. 430.

³⁸ *Pulp Mills sur le fleuve Uruguay*, supra fn. 31, para. 187.

³⁹ V. Articles 20 and 21 of the draft in first reading, *YILC* 1977, vol. II, part II, pp. 9–30.

⁴⁰ On this debate, see J. COMBACAU: Obligations de résultat et obligations de comportement – Quelques questions et pas de réponse. In *Le droit international : unité et diversité. Mélanges offerts à Paul Reuter*. Paris: Pedone, 1981. pp. 181–204.; P. M. DUPUY: Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility. *E.J.I.L.* 1999. pp. 371–385.; or A. MARCHESI: *Obblighi di condotta e obblighi di risultato: contributo allo studio degli obblighi internazionali*. Milano: Giuffrè, 2003. pp. X–174.

⁴¹ See his second report, A/CN.4/498, pp. 24–42, paras. 55–92.

⁴² J. CRAWFORD *ibid.* p. 27., para. 57; also, COMBACAU (1981) op. cit. p. 196.

In the same vein, the 2007 Judgment brings out important specifications concerning the obligation of prevention – which, on first reading, had been enshrined in a specific provision (Article 23 of the ILC 1996 Draft)⁴³ but was simply mentioned in paragraph 3 of Article 14 of the 2001 Draft. The latter reformulates, in a more nuanced way, the text of former Article 26 relating to the moment and the duration of the obligation to prevent a specific event. In the *Genocide (Bosnia and Herzegovina v. Serbia)*, the Court:

- noted the subsidiary character of the duty to prevent: “it is only if the Court answers the first two questions [namely whether Serbia had committed a genocide or was accomplice to it] in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention” in application of an Article III of the 1948⁴⁴ ;
- appreciated that the obligation of prevention “is not merged in the duty to punish nor can it be regarded as simply a component of that duty”⁴⁵;
- underlined that “[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented”⁴⁶ – which means that, as some States stressed in respect of Article 23 of the ILC Draft in their commentaries on the first reading, this provision pertained to primary (or substantive) rules and therefore could not find a proper place in the draft⁴⁷;
- specified that, since it is an obligation of conduct, , “it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question”⁴⁸; and,
- endorsed the principle expressed by Article 14, paragraph 3, of the 2001 Articles:

“Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of

⁴³ *YILC* 1978, vol. II, part II, 81–85.

⁴⁴ C.I.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 382.

⁴⁵ *Ibid.* para. 427.

⁴⁶ *Ibid.* para. 429.

⁴⁷ See J. Crawford, second report, A/CN.4/498, 39, para. 84; **this seems** to have also been the position of the Special Rapporteur (see *ibid.* 39, para. 90).

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 430.

the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, [...].

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.

However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.⁴⁹

Finally, in the 2007 Judgment on the merits, the Court confirmed the position it had taken in 1996 in the judgment on the *Preliminary Objections*⁵⁰, where it established that individual criminal responsibility is not exclusive of international responsibility of State and that « State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one. »⁵¹

⁴⁹ *Ibid.* para. 431. By twelve votes to three, the Court found that "Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July" (*ibid.* para. 571.5)). Without going back to the *Corfu Channel* or the *Hostages* cases, the Court has considered the obligation to prevent in more recent cases (*Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 231, para. 179; p. 252, para. 246; p. 253, para. 248) or *Pulp Mills*, *supra* fn. 31, paras. 101 or 185.

⁵⁰ ICJ, judgment, 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Preliminary Objections*, Reports 1996, p. 616, para. 32.

⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 182.

Naturally, the recent case-law of the Court confirms that international responsibility can only occur where the circumstances precluding wrongfulness are absent, as chapter V of the ILC Articles established.

In this respect, the 2005 Judgment in the *Armed Activities* case brings forth useful clarifications in respect of consent of the victim in distinguishing between the internationally wrongful act on the one hand and recognition of the necessity to organise an orderly process allowing for this act to cease.⁵² Such a distinction – difficult as it may be in practice – might have an impact upon the analysis of the agreements ending an armed conflict or of the Security Council resolutions drawing consequences from an international wrongful act (including the breach of an obligation under peremptory norms of general international law).

Concerning self-defence, two of the recent judgments considered it thoroughly⁵³; however both of them dealt with it not under the law of State responsibility but on the basis of the UN Charter⁵⁴ – to which self-defence actually belongs, as the author of these lines has constantly underlined, since indeed it constitutes *lex specialis* that has no place in the codification of general international law of responsibility.⁵⁵ In respect to the state of necessity, the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵⁶ the Court, while mentioning Article 25 of the ILC Articles, recalls that the state of necessity can only be invoked if the measures adopted were the only way for the State to safeguard its interests.⁵⁷

Significant as might seem the ICJ's recent contribution to the definition of conducts possibly amounting to internationally wrongful acts, it is in respect to attribution that the Court's input has been the most substantial.

⁵² *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 211, para. 99; in the same decision, the Court recalled that consent has to be deprived of any ambiguity (*ibid.*, p. 199, paras. 50–52; or p. 210, paras. 95–97).

⁵³ *Oil Platforms*, *supra* fn. 28, pp. 180–199, paras. 37–78; and *Armed Activities on the Territory of the Congo*, *supra* fn. 12, pp. 215–223, paras. 112–147.

⁵⁴ *Reports 2003*, p. 183, para. 42; pp. 186–187, para. 51; p. 189, para. 57; pp. 191–192, para. 64; or *Reports 2005*, pp. 221–223, paras. 142–147; and p. 269, para. 304. In all these passages, the Court assessed whether the conditions established in Article 51 of the Charter were fulfilled; in none of them did the Court refer directly or indirectly to Article 21 of the ILC Articles.

⁵⁵ PELLET *op.cit.* fn. 23, p. 6; see also *YILC* 2001, vol. I, p. 99, para. 88.

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17, p. 194, para. 139.

⁵⁷ *Ibid.* pp. 194–195, para. 140.

B. Attribution to a State of an internationally wrongful act

In its 2005 Judgment in the *Armed Activities* case, the Court recalled that, “[a]ccording to a well-established rule of international law, which is of customary character, ‘the conduct of any organ of a State must be regarded as an act of that State’”⁵⁸; however, though Article 4, paragraph 1, of the ILC Articles very clearly expresses this rule⁵⁹, the Court ignored this provision⁶⁰ and chose to make a reference to its own case-law in citing the 1999 Advisory Opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,⁶¹ it is true however that the Court had mentioned in that text that “[t]his rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading”⁶². Moreover, in a previous passage of the same Judgment, the Court has made express references to Articles 4, 5 and 8 of the ILC Articles:

“In the view of the Court, the conduct of the MLC was not that of ‘an organ’ of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua*

⁵⁸ *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 242, para. 213.

⁵⁹ “The conduct of any State organ shall be considered an act of that State under international law...”.

⁶⁰ In the same 2005 Judgment, the Court based itself on the law of armed conflict rather than on Article 7 of the ILC Articles for establishing that the conduct of the organ of a State (its armed forces in that circumstance) was attributable to the State, even if they “acted contrary to the instructions given or exceeded their authority”. It did so despite the fact that the ILC Articles specify this principle, while it can only be implicitly deduced from the texts invoked by the Court: “According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces” (*Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 242, para. 214).

⁶¹ ICJ, Advisory Opinion, 29 April 1999, *Reports* 1999 (I), p. 87, para. 62.

⁶² *Ibid.*

(*Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports* 1986, pp. 62–65, paras. 109–115). »⁶³

Thus the 2005 Judgment not only confirms the scope and positivity of Articles 4 (Conduct of organs of a State), 5 (Conduct of persons or entities exercising elements of governmental authority), 7 (Excess of authority or contravention of instructions) and 8 (Conduct directed or controlled by a State) of the ILC Articles, but also, and in a more general perspective, this decision acknowledges that Chapter II of the 2001 Articles constitutes the normative scale according to which one must assess whether a conduct can be attributable to a State at the international level or not. This is even more apparent in the approach taken by the Court in the 2007 Judgment in the *Genocide* case.

The Court first wondered ‘whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent’; it specified that :

“This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.”⁶⁴

The first step consists of wondering whether the genocide in Srebrenica was committed by an organ of Serbia, in the sense of Article 4 of the ILC Articles – and this is what the Court did in paragraphs 385 to 395 of its Judgment⁶⁵, in harmony with “the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.”⁶⁶

⁶³ *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 226, para. 160.

⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 384.

⁶⁵ This part of the Judgment is entitled: “The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs”.

⁶⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 385.

Having answered that question in the negative, the Court afterwards addressed, in paragraphs 396 to 412, the separate issue if “in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control.”⁶⁷ “On this subject,” the Court added, “the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility.”⁶⁸

The Court took up this opportunity to strongly reassess the relevance of the ‘Nicaragua test’, that the ICTY had had the guts to dispute.⁶⁹ In the 1986 Judgment, the Court had established a particularly stringent criterion that eventually led it to discard any United States responsibility for the acts of the Contras (the counter-revolutionary armed groups in Nicaragua):

“United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself (...) for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁷⁰

Sticking to this position, the Court made a particular rigid application of it in order to reject Serbia’s responsibility, on that account, in the Srebrenica genocide:

- *quite sharply putting the ICTY in its place, the Court observed that this one “was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and*

⁶⁷ Ibid. para. 397.

⁶⁸ Article 8: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

⁶⁹ In the Tribunal’s words “[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.” (Appeals Chamber, Judgment, 15 July 1999, IT-94-1, *Tadić*, para. 117 (italics in the text)).

⁷⁰ ICJ, Judgment, 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Reports 1986, pp. 64–65, para. 115.

- extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction;⁷¹
- any idea of *comitas gentium* thus set aside, the Court further noted that “the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. [...] [T]he ‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility”⁷² ;
 - in the same vein, the Court also bluntly rejected Bosnia’s argument suggesting “not to repudiate but to forget Nicaragua”⁷³ since

*“the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the ‘effective control’ of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) [...]. The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.”⁷⁴*

⁷¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 403.

⁷² *Ibid.* para. 406.

⁷³ CR 2006/8, 3 March 2006, p. 34, para. 63 (A. Pellet).

⁷⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 401.

One could hardly be more explicit: as the “inventor” of the concept of “effective control”, the Court sticks to it and means that the other international jurisdictions that might be in a position to apply it should fully accept it. By the same token, the Court seals the positivity of Article 8 of the ILC Articles, which reflects the Nicaragua test despite the reluctance expressed by some of the ILC members.⁷⁵

The 2007 Judgment goes further than simply confirming the norms contained in the ILC Articles in respect of attribution of internationally wrongful acts, it completes and prolongs them. In particular, following a suggestion made by Bosnia’s Counsel during the pleadings,⁷⁶ the Court introduced the notion of *de facto* organ somewhere in between the institutional criterion of Article 4 of the ILC Articles and the Nicaragua test reflected in Article 8 – and insisted that this criterion was distinct from both.⁷⁷ Resting again on the 1986 *Nicaragua* decision⁷⁸, the Court answered in the positive to the question “whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act.”⁷⁹ But it added that it was necessary, for that purpose, that those “persons, groups or entities act in ‘complete dependence’^[80] on the State, of which they are ultimately merely the instrument.”⁸¹

In the same 2007 Judgment, the Court addressed the issue of complicity.⁸² It mainly based itself upon Article III.e of the 1948 Convention, which constitutes a *lex specialis* in parallel with the general international law of State responsibility. The Court nonetheless appreciated that

⁷⁵ V. *Ann. C.D.I.* 1999, vol. I, p. 286, paras. 92–93.

⁷⁶ CR 2006/9, 6 March 2006, pp. 55–56, paras. 12–14; CR 2006/10, 6 March 2006, p. 21, para. 27; pp. 27–29, paras. 36–42 (L. Condorelli).

⁷⁷ “The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 397; also para. 400).

⁷⁸ *Military and Paramilitary Activities*, *supra* fn. 69, pp. 62–64, paras. 109–115.

⁷⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 391.

⁸⁰ Wording taken from the 1986 *Nicaragua* judgment (*Reports* 1986, p. 63, para. 110).

⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, para. 392.

⁸² *Ibid.* paras. 419–424.

“although ‘complicity’, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the ‘aid or assistance’ furnished by one State for the commission of a wrongful act by another State. In this connection, reference should be made to Article 16 of the ILC’s Articles on State Responsibility, reflecting a customary rule [...]. Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between ‘complicity in genocide’, within the meaning of Article III, paragraph (e), of the Convention, and the ‘aid or assistance’ of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 – setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity.”⁸³

The typology of the hypotheses of attribution of an internationally wrongful act to a State is, in this way, considerably expanded; it results from the Court’s case-law in general, and remarkably from the 2007 Judgment, that a conduct may be attributable to a State for the purposes of responsibility not only if it is that of a State organ, in the meaning of Article 4 of the 2001 ILC Articles, but also if it emanates from an entity found under the ‘complete dependence’ of that State or from a person or group of persons under the control (strictly understood) of that State or again if one of these entities was accomplice of an internationally wrongful act, since the Court assimilated complicity with “aid or assistance” furnished for the commission of a wrongful act.⁸⁴

C. Content and implementation of responsibility

Concerning the content of responsibility, the recent case-law of the ICJ mainly confirms the principles established in Part Two of the ILC Articles, which all the same codify customary principles already well-reflected in previous judgments,

⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* fn. 8, paras. 419–420.

⁸⁴ See CH. DOMINICÉ: Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State. In J. CRAWFORD – A. PELLET – S. OLLESON – K. PARLETT (eds.): *The Law of International Responsibility*. OUP, 2010. pp. 281–289.

with the possible exception of Chapter III dedicated to the serious breaches of obligations under peremptory norms of general international law. The Court recalled in several of its decisions the following principles:

- the principle according to which “‘the breach of an engagement involves an obligation to make reparation in an adequate form’ (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21*)”⁸⁵ ;
- the principle of the variety of the possible forms of reparation “depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury”⁸⁶, which is actually reflected in Article 34 of the 2001 Articles,
- keeping in mind that “[t]he principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’ (*P.C.I.J. Series A, No. 17, p. 47*: see also Article 31 of the ILC’s Articles on State Responsibility).”⁸⁷ ; and
- accordingly, there is priority of the *restitutio in integrum* over all the other possible forms of reparation, as article 36, paragraph 1, of the ILC Articles recalls: “where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both; [...] see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts”⁸⁸;
- the principle that, absent any material damage, the simple finding by the Court of a wrongful act constitutes appropriate satisfaction⁸⁹; or

⁸⁵ *Avena*, supra fn. 34, p. 59, para. 119.

⁸⁶ *Ibid.*; also *Pulp Mills*, supra fn. 31, para. 274.

⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, para. 460 ; also ICJ; Judgment, 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Reports 2002, pp. 31–32, para. 76–77; *Avena*, supra fn. 34, p. 59, para. 119; *Armed Activities on the Territory of the Congo*, supra fn. 12, p. 257, para. 259.

⁸⁸ *Pulp Mills*, supra fn. 31, para. 273 ; also *Gabčikovo-Nagymaros Project*, supra fn. 4 p. 81, para. 152 ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra fn. 17, p. 198, paras. 152–153 ; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, para. 460; also *Diallo*, supra fn. 27, para. 161.

⁸⁹ *Arrest Warrant*, supra fn. 86, p. 31, para. 75; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 8, paras. 463 et 469; *Certain Questions of Mutual Assistance in Criminal Matters*, Reports 2008, p. 245, para. 204 ; *Pulp Mills*, supra fn. 31, para. 269. Article 37 of the ILC Articles does not expressly mention such a possibility (that implies determination by a third of responsibility) but the commentary makes clear that:

- the good sense principle that a State can only be required to cease a wrongful act if the act in question is of a continuous character,⁹⁰ without for the Court to have to expressly state so in the operative part of its judgment.⁹¹

Some judgments give however interesting details concerning the modalities of *restitutio* and of compensation and call for a number of remarks in respect of assurances and guarantees of non-repetition.

The 2010 Judgment in the *Pulp Mills* case shows the limits of the priority of *restitutio* over all the other forms of reparation. Considering that “Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.”⁹² Even though the Court does not expressly state it⁹³, it is highly probable that the Judges considered that such a dismantling would constitute a disproportionate burden in comparison with the violation found. “Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it.”⁹⁴

Applying this very same principle in the *Avena* case, the Court rejected Mexico’s claims aiming at a judicial annulment or depriving of the effects of the verdicts and sentences pronounced by the US tribunals against the nationals whose consular rights had not been respected, on the account that

“the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal

“One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal.” (*Report of the International Law Commission on the work of its fifty-third session*, GAOR, 56th session, Supplement n°10 (A/56/10), p. 106, para. 6) of the commentary.)

⁹⁰ Article 30.a) of the ILC Articles.

⁹¹ *Avena*, *supra* fn. 34, p. 68, para. 148 or *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 255, para. 254 ; or 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, para. 148 ; *Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal* in the *Arrest Warrant* case. *supra* fn. 86, p. 88, para. 89.

⁹² *Pulp Mills*, *supra* fn. 31, para. 275.

⁹³ But it does mention Article 35 of the 2001 Articles that excludes restitution when it involves “a burden out of all proportion to the benefit deriving from restitution instead of compensation” (*ibid.* para. 273).

⁹⁴ *Ibid.* para. 274.

proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.”⁹⁵

*The Court pointed to the differences separating that case from the Arrest Warrant case where “the Court found that act [the arrest warrant against the Congolese Ministry of Foreign Affairs] to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (ICJ Reports 2002, p. 33)”.*⁹⁶ Even though in that case the Court cautiously left to Belgium the choice of the means to annul the warrant,⁹⁷ it nonetheless went very far in the direction of an injunction to the State, and some of the Judges expressed legitimate concerns in that respect.⁹⁸

Still in the *Avena* decision, the Court stated that it simply reaffirmed the *LaGrand* solution⁹⁹; such a statement however lacks consistency: the solution it gave in the Judgment of 27 of June 2001 and the Court pretended to be implemented concerned Germany’s assurances of non-repetition¹⁰⁰ whereas, in the Judgment of 31st March 2004, it related to reparation. This confusion highlights the quite artificial character of the distinction operated by the ILC Articles between, on the one side, guarantees and assurances of non-repetition – which appear, together with cessation, in Article 30, and on the other side, restitution, present in Article 35, as one of the possible forms of reparation. Despite the Commission’s explanations¹⁰¹, one may reasonably consider that guarantees of non-repetition, as well as cessation, are indeed forms of reparation and are part respectively of the broader concepts of restitution¹⁰² and of satisfaction.

⁹⁵ *Avena*, *supra* fn. 34, p. 60, para. 122.

⁹⁶ *Ibid.* para. 123.

⁹⁷ *Arrest Warrant*, *supra* fn. 86, p. 32, para. 76.

⁹⁸ *Arrest Warrant*, *Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal*, *ibid.*, p. 88, para. 88.

⁹⁹ *Avena*, *supra* fn. 34, p. 59, paras. 120-121, et p. 62, para. 128.

¹⁰⁰ *LaGrand*, *supra* fn. 34, pp. 513-514, para. 125.

¹⁰¹ *Report of the International Law Commission on the work of its fifty-third session*, *supra* fn. 88, p. 89, para. 7 of the commentary to Article 30.

¹⁰² In the *San Juan River* case, the Court underlined that “the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State.” (*Dispute regarding Navigational and Related Rights*, *supra* fn. 90, para. 149).

Since the Court had, in the *LaGrand* case, the imprudence to show itself receptive to a request for guarantees of non-repetition (as distinct from satisfaction), States have felt encouraged to systematically make such requests, although those ordered or taken note of by the Court actually lacked practical implications. From this point of view, in *LaGrand* and *Avena*, the Court simply took note of "the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b)"¹⁰³ ; and, in the *Armed Activities* case, the Court did not consider necessary to include this conclusion in the *dispositif* and appreciated that "if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law."¹⁰⁴

In two recent decisions, the Court seemed to express some impatience towards these systematic requests for guarantees of non-repetition. In the *San Juan River (I)* and the *Pulp Mills* cases, the Court firmly clarified that:

"while the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.

As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except

¹⁰³ *LaGrand*, *supra* fn. 34, p. 516, para. 128.6; also pp. 512–513, para. 124 ; and *Avena*, *supra* fn. 34, p. 73, para. 153.10 ; also p. 69, para. 150).

¹⁰⁴ *Armed Activities on the Territory of the Congo* *supra* fn. 12, p. 256, para. 257.

in special circumstances [...] to order [assurances and guarantees of non-repetition]."¹⁰⁵

As far as compensation is concerned, it is remarkable that, since the *Corfu Channel* case, the Court no longer had the occasion to fix the appropriate amount, though in several cases, it made a finding on the principle. Until its most recent Judgment given on the 30th of November 2010 in the *Diallo* case, the Court expressed little willingness to incite the Parties to effectively proceed with it. The *Gabčíkovo–Nagymaros* case is symptomatic in this respect: whereas in its 1997 Judgment, the Court found that the Parties were under the mutual obligation to compensate for the damages born out of their respective wrongful acts¹⁰⁶, thirteen years later, the case is still on the General List, absent an agreement between the Parties on the final evaluation of the compensation due or a seisin of the Court, by any of them, in order for it to fix the amounts. Such a situation is insane and it belongs to the Court to make use of its inherent powers and to remove the case from the List if any the Parties has not seised it.

The *Armed Activities* case opposing DRC to Uganda might lead to a similar outcome. Here the Court found that every Party had committed internationally wrongful acts towards the other that engaged its responsibility and called for reparation. In this respect, the Court decided that “failing agreement between the Parties”, the issue was to be settled by the Court¹⁰⁷ in a subsequent phase of the proceedings, without any date being fixed for that purpose. The situation went differently in *Diallo* where the Court established that:

“In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should

¹⁰⁵ *Dispute regarding Navigational and Related Rights*, *supra* fn. 101, para. 150; and *Pulp*, *supra* fn. 31, para. 278. Also C.I.J., Judgment, 10 October 2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Reports 2002, p. 453, para. 321; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*: “There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court [...] considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above [...]. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent’s continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.» (*supra* fn. 8, para. 466).

¹⁰⁶ *Gabčíkovo–Nagymaros Project*, *supra* fn. 4, p. 83, para. 155.2)D.

¹⁰⁷ *Armed Activities on the Territory of the Congo*, *supra* fn. 12, p. 281, para. 345.5) and 6), and p. 282, para. 345.13) et 14).

be limited. Therefore, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings.”¹⁰⁸

Last but not least, one must stress the probably most notable progress (at least symbolically) in the Court’s jurisprudence on responsibility: in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, without expressly referring to Article 41 of the ILC Articles on the particular consequences of a serious breach of an obligation under peremptory norms of general international law, the Court nevertheless confirmed the scope of this debated and fortunately (though prudently) “progressive” provision. Having established serious breaches by Israel of *erga omnes* obligations (obligation to respect the Palestinian people’s right to self-determination and certain humanitarian obligations),

“[g]iven the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.”¹⁰⁹

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¹⁰⁸ *Diallo*, *supra* fn. 27, para. 164. The Applicant State has itself suggested the six month delay.

¹⁰⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* fn. 17, p. 200, paras. 159–160; also p. 202, para. 163.3)D.

By way of conclusion, the present study of the Court's recent case-law on responsibility calls for the following remarks:

- 1° After a long period where the Court was seised of few responsibility cases – it is also true that at the time the Court was only seised of a few cases at all – at present they are on an equal footing with the cases of land or maritime delimitation;¹¹⁰
- 2° generally speaking, and although it does not always expressly state so, the Court applies the rules contained in the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Act, – rules that are in their turn quite largely based upon the Court's own case-law; in consequence, the normative value of these rules is comforted and this confirms, if necessary, that there is no need to 'conventionalize' the ILC's Draft, which fulfils very well its role of guide to State practice and to the case-law of international courts and tribunals;
- 3° Moreover, the general character of the Articles and their non-binding nature allow for them to be completed and adapted to needs and circumstances. As the recent case-law has shown it, the Court fulfils this mission with authority and in a satisfactorily manner.

Mutatis mutandis, what Judge Herczegh wrote about the principle *reservation judicata* embodied in Article 59 of the Statute, can be transposed to the law of international responsibility: these are rules whose potentiality can only be discovered through practice and through the wise exercise by the Court of its judicial function: "[They are not rules] of law which, in [themselves], might be said sufficiently to protect or not to protect a legal interest of a particular country. It is, rather, a [body of rules] which it is for the Court to interpret and apply in such a way that such protection is made as effective as possible."¹¹¹

¹¹⁰ Out of the twenty-five judgments given by the Court in the period 2001-2010, eleven touch upon, mainly or accessorially, responsibility issues. Out of the thirteen cases now on the Court's General List, ten contain conclusions relating to responsibility.

¹¹¹ *Land and Maritime Boundary between Cameroon and Nigeria, Declaration of Judge Herczegh*, *supra* fn 2, p. 473.