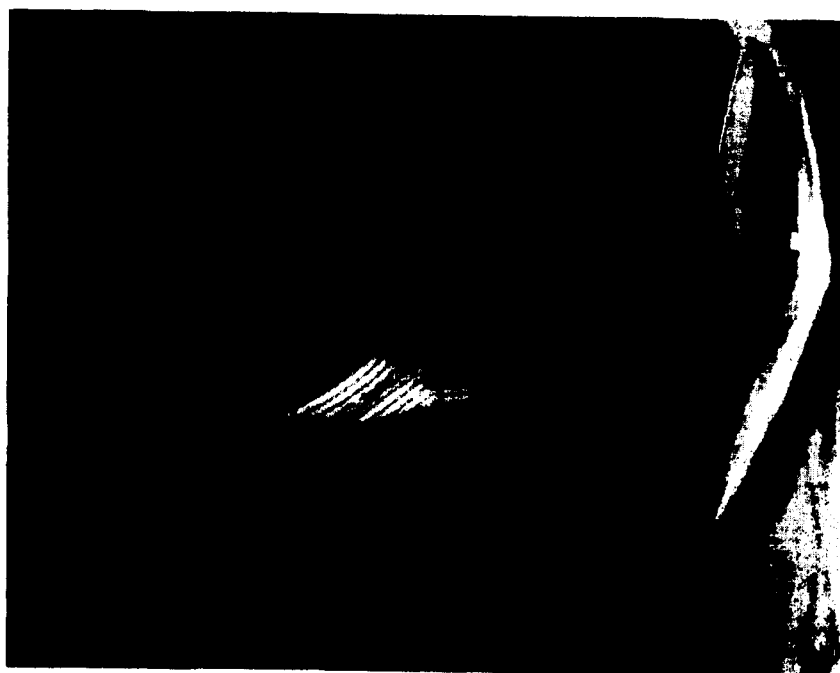


International Responsibility  
Today  
Essays in Memory of  
Oscar Schachter

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## CHAPTER TWENTY-FOUR

THE INTERNATIONAL COURT OF JUSTICE:  
SELECTED ISSUES OF STATE RESPONSIBILITY

Rosalyn Higgins

## 1. INTRODUCTION

Issues of State responsibility have engaged the attention of both the Permanent Court of International Justice and the International Court of Justice (the 'Court'). Every law student knows that the phrase 'State responsibility' in an exam question requires reference to the *Factory at Chorzów* case<sup>1</sup> in the answer. Issues of State responsibility before the Court may be said to have fallen into several broad categories. First, do the actions concerned actually engage the responsibility of the State concerned? Second, if the respondent State is responsible for an international wrong, what is the appropriate remedy? Third, does jurisdiction *ratione materiae* also entail jurisdiction so far as remedies specified in the law of State responsibility are concerned? Fourth—and it is a more recent manifestation—what is the relationship between the law of State responsibility and other applicable substantive law in the particular case? On 10 October 2002, in the Court's judgment in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case,<sup>2</sup> a fifth aspect of the law of State responsibility came very much into focus, namely, what is the place of the law of responsibility in a case principally concerning territorial title.

This essay will touch on each of these themes. Before doing so, there is a general observation to make: since the early 1970s, the periodic findings on State responsibility that the Court has had occasion to make have been pronounced against the background of intermittent work by the International Law Commission on State responsibility,<sup>3</sup> recently culminating, of

<sup>1</sup> *Factory at Chorzów, Jurisdiction*, Judgment, No. 8, 1927, PCIJ, Series A, No. 9; *Factory at Chorzów, Merits*, Judgment No. 138, 1928, PCIJ, Series A, No. 17.

<sup>2</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, Merits, ICJ Reports 2002, 303.

<sup>3</sup> For the text of the articles and a commentary, see Crawford, *The International Law Commission's Article on State Responsibility: Introduction, Text and Commentaries* (2002). See also the earlier work of Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility* (1991).

*Marrasio Report* (ed.), *International Responsibility Today*, 271-286.  
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course, in the final impressive and scholarly push to the articles which were the subject of a General Assembly Resolution adopted on 12 December 2001.<sup>4</sup> Whether there is a symbiotic relationship to be traced is for others to decide.

## 2. ATTRIBUTION OF CONDUCT TO THE STATE

Certain cases have focused on attribution of conduct to the State. On 4 November 1979, the United States Embassy in Tehran was occupied by what the Court termed 'militants'.<sup>5</sup> The United States alleged violations by Iran of both the Consular Convention<sup>6</sup> and the Treaty of Amity of 1955.<sup>7</sup> The Court found that, although the attack on the Embassy and on Consulates the following day 'cannot be considered as in itself imputable to the Iranian State', Iran was however in violation of its *own* obligations under the Diplomatic<sup>8</sup> and Consular Conventions, in particular to take all appropriate steps to protect the premises.<sup>9</sup> In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*,<sup>10</sup> the Court had imposed the test of effective control to determine whether the activities of the *Contras* were attributable to the United States. (This is the test effectively not followed by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.)<sup>11</sup> Another example of this first category of State responsibility issues in the jurisprudence of the Court is to be found in the *Comaraswamy* case.<sup>12</sup> The Court cited the rule enunciated in the then draft articles of the International Law Commission that 'the conduct of any organ of a State must be regarded as an act of that State', and categorized it as a customary rule of international law.<sup>13</sup> It applied the rule to the failure of the Malaysian courts to deal with the immunity issues *in limine litis*, that is, at the outset.

<sup>4</sup> Resolution of the United Nations General Assembly on the Responsibility of States for Internationally Wrongful Acts (adopted on 12 December 2001): (A/RES/56/83).

<sup>5</sup> *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, 3, at 12 para. 17.

<sup>6</sup> Vienna Convention on Consular Relations, 596 UNTS 261. The Convention, done at Vienna on 24 April 1963, entered into force on 19 March 1967.

<sup>7</sup> Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, 284 UNTS 93. The Treaty, done at Tehran on 15 August 1955, entered into force on 16 June 1957.

<sup>8</sup> Vienna Convention on Diplomatic Relations, 500 UNTS 95. The Convention, done at Vienna on 18 April 1961, entered into force on 24 April 1964.

<sup>9</sup> ICJ Reports 1980, 3, at 29-30 especially para. 61.

<sup>10</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, at 65 (para. 113); see also 62 para. 109.

<sup>11</sup> *Prosecutor v. Dusho Tadić* (Appeals Chamber—[ICTY]), Judgment (15 July 1999), paras. 115-45, <<http://www.un.org/icty>>.

<sup>12</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62.

<sup>13</sup> *Ibid.*, 87 para. 62.

In the *Avena* case<sup>14</sup> issues of classical attributability arose in several different ways. There remained unresolved the problem highlighted by the Court in the earlier case of *LaGrand*,<sup>15</sup> relating to the procedural default rule. By virtue of this domestic law rule a defendant who could have raised, but failed to raise, a legal issue at trial will usually not be permitted to raise it on appeal or in a petition for a writ of *habeas corpus*. The Court had in the *LaGrand* case stated that, while the rule did not violate the Vienna Convention on Consular Relations, a problem arose when it operated to prevent a detained individual from challenging conviction and/or sentence in circumstances where the competent national authorities themselves had failed to comply with their obligations to notify the individual of his rights under Article 36 of the Vienna Convention.<sup>16</sup> In the *Avena* case the Court noted that this rule had not been revised. At the same time, some United States courts, implicitly appreciating that what they did in applying United States law engaged the international responsibility of the United States, had after the *LaGrand* ruling of the International Court found ways of avoiding the application of the procedural default rule in the problematic circumstances described above.<sup>17</sup>

The Court also had occasion to make clear that, although the notification of consular authorities, as envisaged under Article 36(1)(b) of the Convention on Consular Relations, was performed by persons whose conduct might be attributable to the United States (as public officials), this did not of itself comply with the specific requirements of Article 36(1)(b), which required such notification to be made by the detaining authorities.<sup>18</sup>

Particularly interesting contentions relating to attributability of responsibility have arisen in the cases concerning *Legality of Use of Force*, brought by Serbia and Montenegro<sup>19</sup> against various States which, as members of NATO, participated in the bombing of Kosovo in 1999. In the hearing on provisional measures, Canada had already advanced the contention that a State was not responsible for actions taken by an international organization of which it was a member.<sup>20</sup> This aspect was further developed during the oral hearings on preliminary objections and admissibility, especially by the applicant and by Portugal.

<sup>14</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 12.

<sup>15</sup> *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, at 497-8, paras. 90-1.

<sup>16</sup> *Ibid.*, 497 para. 90.

<sup>17</sup> *Avena*, Judgment, para. 113. And see *Meady v. Schumig*, United States District Court, N.D. Illinois, Eastern Division, 2002, U.S. Dist. Lexis 17996, Sept. 24, 2002.

<sup>18</sup> See, for example, *Comarbas*, Case No. 6 (notification by Court appointed interpreter); *Roya*, Case No. 34 (notification by District Attorney); *Loza*, Case No. 32 (notification by Ohio prosecutors); *Avena*, Judgment, paras. 95-6.

<sup>19</sup> Originally commenced in 1999 by the former Federal Republic of Yugoslavia, now Serbia and Montenegro.

<sup>20</sup> ICJ Pleadings, *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Provisional Measures.

Serbia and Montenegro accepted the conclusion of the provisional report prepared for the *Institut de Droit International*, namely 'that, by reference to accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties'.<sup>21</sup> However, in the view of Serbia and Montenegro, this case was not about such a principle—it was about the responsibility of States for their own acts. To this end, Serbia and Montenegro sought to show that Article 5 of the North Atlantic Treaty,<sup>22</sup> and statements made by various of the respondent governments at the time of the military action in Kosovo, made clear that the pertinent decisions were being made by national governments. Thus, in Serbia and Montenegro's view, the responsibility was theirs alone. Portugal, also basing itself on the conclusion of the *Institut* report cited by Serbia and Montenegro, contended that 'even where there is a relationship of agency, or leadership and control by one or more of the members, the organization does not cease to be responsible'. Counsel for Portugal, making an interesting linkage back to the jurisdictional questions being dealt with by the Court, then added:

In any event, and from the perspective of the *Monetary Gold* principle, there should always be a preliminary ruling on the responsibility of the international organization... on the question whether the acts are attributable thereto as a preliminary indication of the possible responsibility of member States without NATO having consented to jurisdiction.<sup>23</sup>

In the *Oil Platforms* case the Court had before it an allegation by the United States that one of its flag vessels, the Sea Isle City, had been hit by a missile fired by Iranian forces,<sup>24</sup> and a response by Iran that the missile in question had been fired by Iraq.<sup>25</sup> The Court chose to deal with the attribution issue through the route of proof as regards evidence. Thus it stated that it 'does not have to attribute responsibility for firing the missile that struck the Sea Isle City, on the basis of a balance of evidence, either to Iran or to Iraq; if at the end of the day the evidence is insufficient to establish that the mis-

CR/99/27 (12 May 1999), <<http://www.icj-cij.org>>. This special question of responsibility is not addressed by the International Law Commission's draft articles on State responsibility. Neither Article 5 (conduct of persons or entities exercising elements of governmental authority) nor Article 8 (conduct directed or controlled by a State) covers the topic.

<sup>21</sup> See the author's 'Provisional Report (August 1993)' ('The Legal Consequences for Member States of the Non-Fulfillment by International Organizations of their Obligations Towards Third Parties'), 66 *Journal of International Law* (1995), i, 373–420, at 413, para. 113.

<sup>22</sup> The Treaty, done at Washington, D.C., on 4 April 1949, entered into force on 24 August 1949. Its text is at 34 *UNTS* 243.

<sup>23</sup> M. Miguel Galvão Teles, Oral Pleadings in *Legality of the Use of Force (Serbia and Montenegro v. Portugal)*, 22 April 2004 at 11:45 a.m., Verbatim Record CR 2004/18, 20, para. 4.7 (original in French), <<http://www.icj-cij.org>>.

<sup>24</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Merits*, *Judgment 6 November 2003*, ICJ Reports 2003, 161, at 185, paras. 48–50.

<sup>25</sup> *Ibid.*, 188, para. 55.

sile was fired by Iran, then the necessary burden of proof has not been discharged by the United States'.<sup>26</sup> Here 'attribution' was used in the lay sense—that is to say, it was a question of 'who (which State) did it', and should thus assume responsibility. However, the question of 'attribution of conduct to a State'<sup>27</sup> is different, in that the questions being asked are not questions of evidence or burden of proof, but rather whether the unlawful conduct was carried out by an organ of State,<sup>28</sup> or by entities exercising elements of governmental authority,<sup>29</sup> or by persons involved in an insurrection movement whose conduct is adopted by the State as its own.<sup>30</sup>

It was equally the case that, when the Court was dealing, in the same litigation, with the mining of the *USS Samuel B. Roberts*, the term 'responsibility' was again used<sup>31</sup> in the sense of 'the State that performed the act', no more and no less.

### 3. THE RELATIONSHIP OF STATE RESPONSIBILITY TO THE JURISDICTIONAL BASIS FOR THE DISPUTE

Everyone knows the celebrated *dichotomy* of the Permanent Court in the *Factory at Chorzów* case that 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.<sup>32</sup> What is less well recalled is that in that case the Permanent Court also stated, in a phrase later alluded to in the following statement in the *LaGrand* case:

where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.<sup>33</sup>

Nonetheless, the point was pleaded again by the United States in the *LaGrand* case,<sup>34</sup> where it contended that the Court's jurisdiction flowed only from the Consular Convention, whereas the guarantees and assurances of non-repetition sought by Germany lay in the law of State responsibility. The Court again

<sup>26</sup> *Ibid.*, 189, para. 57.

<sup>27</sup> This is the title of Chapter II of Part One of the draft articles on State responsibility, adopted by the International Law Commission in 2001. The text of the draft articles is available as an extract from the Report of the International Law Commission on the work of its Fifty-third Session, *Gen. Ass. Off. Rec., Fifty-sixth Session*, Supp. No. 10 (Doc.A/56/10).

<sup>28</sup> *Ibid.*, Article 4.

<sup>29</sup> *Ibid.*, Article 5.

<sup>30</sup> *Ibid.*, Articles 10 and 11.

<sup>31</sup> ICJ Reports 2003, 161, at 195, para. 71.

<sup>32</sup> *Factory at Chorzów*, *Merits*, 29.

<sup>33</sup> *LaGrand (Germany v. United States of America)*, *Judgment*, ICJ Reports 2001, 466, at para. 48 citing *Factory at Chorzów*, *Jurisidiction*, 22.

<sup>34</sup> *Ibid.*

confirmed that no separate basis of jurisdiction was required for it to consider the appropriate remedy for a particular breach of the Consular Convention.

#### 4. THE RELATIONSHIP OF STATE RESPONSIBILITY TO SUBSTANTIVE LAW

The third category of case—the *substantive* (as opposed to jurisdictional) relationship between an applicable norm and the law of State responsibility—was very much in play in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case.<sup>35</sup> There the question arose whether a treaty may lawfully be terminated or suspended *only* through application of the substantive rules governing the law of treaties; or whether the State responsibility provisions on non-wrongfulness of conduct (for example, a state of necessity)<sup>36</sup> also excuse termination or suspension of a treaty. If these questions received no clear answer from the Court in that case, nor do they from the International Law Commission in its draft articles. The matter is still open.<sup>37</sup>

In the General Assembly, on 20 October 2003, Israel described 'the fence' that it was building as 'a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter'. It observed that Security Council resolutions 'have clearly recognized the right of States to use force in self-defence against terrorist attacks' and stated that it must 'therefore surely recognize the right to use non-forcible measures to that end'.<sup>38</sup> This opened the door to counsel appearing in the Advisory Opinion case on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* to fashion their arguments on self-defence within the parameters of the law of State responsibility generally and of countermeasures specifically. The Court simply ruled that Article 51 concerns an inherent right of self-defence in case of armed attack by one State against another State,<sup>39</sup> and added: 'However, Israel does not claim that the attacks against it are imputable to a foreign State'.<sup>40</sup> The present writer doubted the pertinence—or the realism—of this observation, observ-

<sup>35</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7.  
<sup>36</sup> See Chapter V of Part One of the Commission's draft articles dealing with 'Circumstances precluding wrongfulness'.

<sup>37</sup> See the views of Crawford that, '[u]nless otherwise provided, they [the ILC non-wrongfulness of conduct provisions] apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty . . . or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists'. (Crawford, *The International Law Commission's Articles*, 160). Crawford notes this point was emphasised by the Court in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. (Ibid.)

<sup>38</sup> A/ES/10/PV. 21, 6.  
<sup>39</sup> Para. 139 of the advisory opinion, the text of which is electronically available at <<http://www.icj-cij.org>>. The writer's disagreement with this finding may be seen in her Separate Opinion at para. 33.  
<sup>40</sup> Ibid.

ing that '[t]he question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians'.<sup>41</sup>

The Court then squarely looked at the same subject matter as a matter of State responsibility, and considered whether Israel could rely on a state of necessity that would preclude the wrongfulness of the construction of the wall. It put the following interesting question (reminiscent of, even if not identical to, the issue it had been faced with in the *Gabčíkovo-Nagymaros* case, described above). Having observed that the applicable humanitarian law conventions contain their own derogation or qualification clauses to deal with exceptional circumstances, it then asked

whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.<sup>42</sup>

Again, the Court did not answer the question of principle, satisfying itself with observing that Article 25 of the International Law Commission's draft required a state of necessity to be 'the only way for a State to safeguard an essential interest against a grave and imminent peril'.<sup>43</sup> And the Court thought that the construction of the wall along the route chosen did not meet that test.

#### 5. STATE RESPONSIBILITY AND THE DESIGNATION OF APPROPRIATE REMEDIES FOR A BREACH

A difficult issue is whether the law of State responsibility identifies, in a comprehensive manner, available remedies for a breach of an international obligation or whether the appropriate remedy must always be located in the primary obligation itself. In the *LaGrand* case, brought by Germany against the United States to the International Court, the issue came in the following form:<sup>44</sup> by what test is it determined whether a primary obligation carries with it its own required consequence for responsibility for violation, thus precluding a tribunal from fashioning its own remedy within the framework of what is laid out in Part Two of the Commission's draft articles?

The United States suggested that the test was to look at the practice under the primary obligation concerned to see what the parties intended. Concerning the Vienna Convention on Consular Relations, the United States argued, the usual

<sup>41</sup> Ibid., Separate Opinion, para. 34.

<sup>42</sup> Ibid., para. 140.

<sup>43</sup> Ibid.

<sup>44</sup> The ensuing four paragraphs draw on some elements in the essay written by the author in the forthcoming volume edited by Crawford and Pellet, *Paris X: *Annuaire/LACIL Handbook on the Law of International Responsibility**. The remaining uncertainties in the Commission's articles are elaborated further in this essay.

practice was simply an apology after violation.<sup>45</sup> This approach leads one to comment on the sampling technique for deployment of violations and remedies: unless the character of the violation of the norm is explained in each and every case with some precision, it cannot be seen exactly what type of violation of the primary obligation is occasioning which remedy. The length of time that passed before notification, its relationship to the trial process and, indeed, whether a person detained without notification was or was not released before trial, are all relevant variables. Moreover, the examples of apology in the indicated practice under the Vienna Convention on Consular Relations were not examples arising in situations comparable to the situation of the *LaGrand* case.

As the Court said, in some circumstances an apology might indeed suffice to provide reparation for the injury caused by a violation of the primary obligation. But:

an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.<sup>46</sup>

The Court thus saw no remedy required as the sole remedy by virtue of the primary obligation itself. It saw rather a primary obligation under a treaty and a remedy which it, having competence over the entirety of the problem, was free to fashion to meet the particular exigencies. Naturally, that distinction would have to be exercised within the parameters of remedies that were cognizable under the law of State responsibility.

In fact, the Court had to fashion, because of its substantive findings in the case, a remedy for a violation of the rights of Germany and a remedy for a violation of the individual rights it found were held by *LaGrand* by virtue of Article 36 of the Convention. It fashioned remedies that were both efficacious in terms of meeting the purpose of Article 36 and non-intrusive so far as United States criminal law was concerned.<sup>47</sup>

In the *Avena* case, the remedy that the Court had itself designated in *LaGrand*—review and reconsideration of conviction and sentence by the United States courts in cases where there had been a breach of Article 36, paragraph 1, of the Vienna Convention—<sup>48</sup> needed further analysis. The Court needed to make crystal clear that the review and reconsideration that it had specified were not

<sup>45</sup> At the same time, the United States contended that the remedy of apology was 'political and not legal'. Assurances of non-repetition, in the view of the United States were 'exceptional even as a non-legal undertaking in State practice'. *LaGrand (Germany v. United States of America)*, Judgment, para. 19.

<sup>46</sup> *Ibid.*, para. 123.

<sup>47</sup> See para. 128 (the *dispositif*).

<sup>48</sup> ICJ Reports 2001, 466, at 513-14, para. 125. 'Review and Reconsideration' could be viewed either as a reiteration of a primary obligation, or as a remedy for breach.

by reference to United States constitutional law, but by reference to the obligations under the Consular Convention.<sup>49</sup> There also arose the interesting question whether such review and reconsideration had to be by a court of law, or whether it could occur in the context of the clemency procedures. This latter question was far from easy, because of the special role that the clemency procedure plays in the United States criminal justice system, and the Court's response was nuanced and detailed.<sup>50</sup>

In fact, broader remedies had been sought by Germany. In its Application to the Court in the *LaGrand* case, Germany asked that 'the United States should provide Germany with a guarantee of non-repetition of the illegal acts'.<sup>51</sup> What was in the Application formulated as a guarantee was in Germany's fourth submission termed 'an assurance that it [the United States] will not repeat its unlawful acts'. Elsewhere, Germany referred to 'assurances and guarantees of non-repetition'.<sup>52</sup> No particular distinction was made in the oral pleadings.

It would seem that neither *LaGrand* nor the adopted draft articles of the International Law Commission fully resolve all the difficulties associated with assurances and guarantees.

In the draft articles, the question of assurances and guarantees is ultimately located in Part Two, under the heading of 'Cessation and Non-Repetition'. The Commentary states that '[t]here are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation' and also notes that sometimes it may seem almost 'indistinguishable from restitution'.<sup>53</sup> The practical problems associated with the characteristics of assurances and guarantees also merit mention. As the Special Rapporteur says, these remedies have the 'characteristics of being future-looking' and concerned with 'other potential breaches'.<sup>54</sup>

This raises, it seems to me, major evidentiary problems for a court, which is told not that a specific violation of an 'obligation' is continuing ('continuing breach'), but rather that a breach has occurred in the past and it is highly likely more such breaches will occur.

But what evidence is sufficient to show this? From whom should it emanate? By when, in the timetable of the litigation, should it be produced and to what tests of examination should it be subjected? Must it relate to the nationals of the applicant State in the case in issue? And can all of this be 'piggy-backed' on to the initial case in which the applicant claims an unsatisfied violation against itself and its national?

<sup>49</sup> *Avena, Judgment*, para. 139.

<sup>50</sup> *Ibid.*, paras. 138-43.

<sup>51</sup> *Ibid.*, para. 10.

<sup>52</sup> *Ibid.*, para. 118.

<sup>53</sup> Report of the International Law Commission on the Work of its Fifty-third Session, *Gen. Ass. Off. Recs., Fifty-sixth Session, Supp. No. 10 (Doc.A/56/10)*, 218, paras. 6; and 7.

<sup>54</sup> *Ibid.*, 219, para. 9.

The problems of jurisdiction, of quality of evidence, and of sound administration of judicial proceedings, suggest to this writer that assurances and guarantees should be approached with the greatest caution.

The Court had to come back to this question in the *Avena* case. In its eighth submission, Mexico asked the Court to adjudge and declare:

[t]hat the United States of America shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36(1) and to ensure compliance with Article 36(2).<sup>55</sup>

The view of Mexico was that the failure of the United States authorities, and the continuing examples of violations of Article 36(1) of the Vienna Convention on Consular Relations, together make such remedies necessary. The Court, while acknowledging there were a substantial number of cases of non-compliance with Consular Convention obligations, nonetheless noted that the United States had been making considerable efforts, through particular programmes, to implement the obligations incumbent upon it under Article 36(1), and, further, that it did not perceive a general pattern of violation. Moreover, an assurance of non-repetition would not be ordered, for the same reasons as already indicated in the *LaGrand* case—namely, that 'no State could give such a guarantee'.<sup>56</sup> The requests for these remedies were therefore denied.<sup>57</sup>

In the *Cameroon v. Nigeria* case, the Court had also declined to order guarantees of non-repetition, albeit for different reasons. The case had concerned territorial title. Each side had claimed that its military was lawfully present in the Bakassi Peninsula. With the clarification by the Court of where title lay, the Court was not prepared to 'envisage a situation where either Party, after withdrawing its military and police forces and administration from the other's territory, would fail to respect the territorial sovereignty of that Party'.<sup>58</sup>

The Court also rejected Mexico's submission in the *Avena* case that the appropriate remedy for a conviction against the background of a violation of Article 36(1) of the Vienna Convention was annulment. It claimed that this met the *restitutio in integrum* entitlement enunciated in the *Chorzów Factory* case.<sup>59</sup> Further, Mexico claimed annulment of illegal acts was the normal remedy. In that regard, it cited the judgment of the Court in the *Arrest Warrant* case<sup>60</sup> in which the Court ordered the cancellation of the arrest warrant issued by the Belgian judiciary. But, the Court explained, the two cases were not the same:

<sup>55</sup> *Avena*, Judgment, para. 14.

<sup>56</sup> ICJ Reports 2001, 466, at 512-13, para. 124.

<sup>57</sup> *Avena*, Judgment, para. 130.

<sup>58</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment, 303, at 452, para. 318.

<sup>59</sup> *Factory at Chorzów*, Merits, 47.

<sup>60</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment 14 February 2002, ICJ Reports 2002, 3.

However . . . [in the *Arrest Warrant*] case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act 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 (*I.C.J. Reports 2002*, p. 33). By contrast, in the present [*Avena*] case, it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.<sup>61</sup>

It was therefore not to be presumed that partial or total annulment of conviction or sentence was the appropriate remedy.

Finally, it may be noted that, although advisory opinions must not be contentious cases in disguise, the Court has not hesitated, in such cases, where findings of illegal conduct have occurred, to indicate the appropriate remedies.<sup>62</sup> Here the concepts of 'legal consequences' (the formula used in the questions put to the Court) and of remedies virtually merge. Of course, because there is no 'applicant', no 'remedy' for the wrong done to an applicant may be sought. But the 'legal consequence' of unlawful conduct is still that it be reversed and/or<sup>63</sup> reparations paid.<sup>64</sup> Indeed, such 'legal consequences'—and here lies the distinction with remedies in contentious cases—may even be incumbent upon third parties.<sup>65</sup>

#### 6. REQUESTS FOR SEPARATE FINDINGS OF STATE RESPONSIBILITY AS A CONSEQUENCE OF FINDINGS OF ILLEGAL CONDUCT<sup>66</sup>

In the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* case, the Court was faced with requests that it should make findings in the field of State responsibility.<sup>67</sup> The foundation of these requests developed and

<sup>61</sup> *Avena*, Judgment, para. 123.

<sup>62</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 58, para. 133; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 163.

<sup>63</sup> The continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory. ICJ Reports 1971, 16, at 58, para. 133.

<sup>64</sup> Israel . . . is under an obligation to cease forthwith the works of construction . . . to dismantle forthwith the structure . . . and to repeal or render ineffective all legislative and regulatory acts relating thereto; 'Israel is under an obligation to make reparation for all damage caused by the construction of the wall'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 163.

<sup>65</sup> ICJ Reports 1971, 16, at 58, para. 133-2; and 3: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 163cc.

<sup>66</sup> The ensuing paragraphs draw on the author's, 'Issues of State Responsibility before the International Court of Justice', Fitzmaurice M. and Surooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 1-9.

<sup>67</sup> The Pleadings and the Applications are electronically available at <http://www.icj-cij.org>.



changed through the Application, Additional Application, and Final Submissions. And they were somewhat unusual requests, because they assumed particular findings that the Court was not in terms asked to make. Let me explain each of these observations.

At issue in the case was title to the Bakassi Peninsula in the south, the location of the international boundary in Lake Chad in the north, and the correct line on the long land boundary in between.

In its Application, Cameroon did *not* ask the Court to adjudge and declare that Nigeria had invaded the Bakassi Peninsula and in so doing had violated Article 2(4) of the Charter. Rather, Cameroon asked the Court to adjudge and declare that Bakassi belonged to Cameroon. It did ask the Court to find that, by the use of force and by military occupation, Nigeria was violating obligations incumbent on it.

Cameroon asked the Court to find that these 'internationally unlawful acts . . . involve the responsibility of Nigeria'. (In fairness, the French text says that 'la responsabilité du Nigeria est engagée par . . .')<sup>66</sup>

Further grounds of Nigerian responsibility were invoked. The Court was also asked to find that Nigeria was in violation of the 'fundamental principle' of *uti possidetis juris*<sup>67</sup>—a principle that is usually advanced as a legal reason for an argued-for outcome, rather than characterized as an international obligation the violation of which 'involves' international legal responsibility. And in another clause the Court was asked to adjudge and declare that Nigeria must immediately and unconditionally withdraw from Nigeria—understandable as a *consequence* of a finding of title, but in Cameroon's Application this stated duty *itself* was among the numbered clauses characterized as 'an internationally unlawful act' that 'involved' the responsibility of Nigeria.<sup>68</sup>

In the Additional Application by Cameroon, comparable requests were made in respect of a disputed area on the bed of Lake Chad—namely that sovereignty belonged to Cameroon,<sup>69</sup> that Nigeria had violated *uti possidetis juris*,<sup>70</sup> that occupation was illegal,<sup>71</sup> and that Nigeria had the duty to withdraw<sup>72</sup> and that *all* these were internationally unlawful acts involving Nigerian responsibility.<sup>73</sup>

The Court was asked to 'specify definitively' the frontier from Lake Chad to the sea because of 'repeated incursions of Nigerian groups and armed forces . . . all along the frontier'.<sup>74</sup> Although no claim that Nigeria's responsi-

bility was engaged was initially made in respect of this long land frontier, by the time of Cameroon's Reply these alleged incursions were included among the 'internationally wrongful acts . . . [that] engage the responsibility of Nigeria'. So the formulation of the responsibility requests put to the Court was somewhat complex and decidedly unusual.

Nigeria entered Counter Claims, particularly as regards Bakassi and the land frontier, and in turn asked the Court to 'adjudge and declare that Cameroon bears responsibility to Nigeria in respect of those claims'.<sup>75</sup> It should finally be explained that both Cameroon and Nigeria, in respect of these claims, envisaged possible further hearings to determine the question of reparations due.

These Claims and Counter Claims raised many questions for the Court. Let me start with the most fundamental.

## 7. CLAIMS OF STATE RESPONSIBILITY IN TERRITORIAL DISPUTES

What place do claims of State responsibility have in cases brought to determine legal title to territory? Looking back over cases whose main object was to determine title to territory, one can see that separate and distinct findings of State responsibility are not usual. It has not been regarded as necessary, either by the parties concerned or indeed by the Court, to have a 'stepping stone' of formal findings that the respondent State's 'responsibility is engaged'. Generally, States have felt it sufficient to ask for findings of law and then to ask that the Court find, as a consequence of a finding of violation of legal obligation, that certain remedies must follow (whether compensation or otherwise). This is the clear practice in, for example, the following cases: *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*;<sup>76</sup> *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*;<sup>77</sup> *Minquiers and Ecréhous*;<sup>78</sup> *Norwegian Fisheries*;<sup>79</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*<sup>80</sup> (where Libya had been in occupation for 14 years); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*<sup>81</sup> (even though Qatar claimed that Bahrain had 'seized territory'); *Kasikili/Sedudu Island (Botswana/Namibia)*;<sup>82</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*<sup>83</sup> (although the provisional measures order had referred to 'grave incidents'

<sup>75</sup> Counter-Memorial of Nigeria, 83+5, Submissions of Nigeria, para. 7.

<sup>76</sup> ICJ Reports 1997, 7.

<sup>77</sup> *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court*, Judgment, ICJ Reports 1973, 49, and *Merits*, Judgment, ICJ Reports 1974, 175.

<sup>78</sup> *Minquiers and Ecréhous*, Judgment, ICJ Reports 1953, 47.

<sup>79</sup> *Norwegian Fisheries*, Judgment, ICJ Reports 1951, 116.

<sup>80</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, 6.

<sup>81</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility*, Judgment 1 July 1994, ICJ Reports 1994, 112; *Jurisdiction and Admissibility*, Judgment 15 February 1995, ICJ Reports 1995, 6; and *Merits*, Judgment 16 March 2001, ICJ Reports 2001, 40.

<sup>82</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, 1043.

<sup>83</sup> *Frontier Dispute*, Judgment, ICJ Reports 1986, 354.

<sup>66</sup> Application, para. 20(c), *Memorial*, 670 (para. 9.1(g)).

<sup>67</sup> Application, para. 20(b).

<sup>68</sup> Application, para. 20(c).

<sup>69</sup> Application Additional to the Application instituting proceedings brought by the Republic of Cameroon, para. 17(a).

<sup>70</sup> *Ibid.*, para. 17(b).

<sup>71</sup> *Ibid.*, para. 17(c).

<sup>72</sup> *Ibid.*, para. 17(d).

<sup>73</sup> *Ibid.*, para. 17(e).

<sup>74</sup> *Ibid.*, para. 17(f).

having occurred); and also in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*,<sup>86</sup> (though Indonesia regarded Malaysia as in illegal occupation of these islands).

All of this is consistent with what the Court said in the *Temple of Preah Vihear* case,<sup>87</sup> when explaining that no separate jurisdictional basis was needed for a finding of restitution. In that case, the Court found that a request for an order of restitution is 'implicit in, and consequential on, the claim of sovereignty itself'.<sup>88</sup>

Neither a separate jurisdictional basis nor a separate finding of the engagement of responsibility is needed for the Court to order a remedy—once it has determined conduct to be illegal.

#### 8. WHEN SHOULD A DISTINCT FINDING ON RESPONSIBILITY BE REQUESTED?

In another recent case, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*,<sup>89</sup> the Court also declined to make a separate finding of 'responsibility'. No such finding was needed for the order that the arrest warrant be withdrawn. The determination that Belgium was not entitled to issue the international arrest warrant was enough. The same has been true in advisory opinion cases. Although the Court was very specific on remedies in both the *Namibia* and the *Wall* advisory opinions, findings of responsibility did not precede the specification of remedies. The findings of unlawful behaviour was enough.<sup>90</sup>

When, then, is it more usual, and perhaps necessary, for a distinct finding on responsibility to be requested? The answer would seem to be in those cases where the violations of obligations are raised as the *central issue*—and sometimes in these cases the *attribution* of unlawful conduct to a government is also a key issue. The obvious example is the *Corfu Channel* case,<sup>91</sup> where attribution of the illegal mine laying was a key element. But even in this category of cases, often concerned with the use of force, the more usual pattern of practice has been to ask for a finding of a breach of a specific obligation and to couple that with a request for compensation or other remedy. The *LaGrand* case;<sup>92</sup> the *Eleftheria Sicala S.p.A. (ELSI)* case;<sup>93</sup> the *Military and Paramilitary Activities in and against*

<sup>86</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application of the Philippines to Intervene, Judgment 23 October 2001, ICJ Report 2001, 575.

<sup>87</sup> *Temple of Preah Vihear*, Merits, Judgment, ICJ Reports 1962, 6.

<sup>88</sup> *Ibid.*, 36.

<sup>89</sup> *Arrest Warrant*, Judgment, para. 75.

<sup>90</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, at 58, para. 133; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 163.

<sup>91</sup> *Corfu Channel*, Merits, Judgment, ICJ Reports 1949, 4.

<sup>92</sup> ICJ Reports 2001, 466.

<sup>93</sup> *Eleftheria Sicala S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, 15.

*Nicaragua* case;<sup>94</sup> the *Nuclear Tests* cases;<sup>95</sup> the pending *Genocide* cases;<sup>96</sup> the *Kosovo* cases;<sup>97</sup> the *Ahmadou Sadio Diallo* case;<sup>98</sup> and the *Oil Platforms* case.<sup>99</sup> are all examples. The focus in these cases is on the *substantive law*, and not on any free-standing finding that State responsibility is incurred as a consequence of such breach.

#### 9. SUMMARY AND CONCLUSION

1. It is not unusual, in cases where the law of obligations is at the centre of things, to ask for findings of illegality and also to ask for compensation or other remedies (or to reserve the right to do so later).
2. Only rarely, even in this category of cases, is a separate finding on responsibility sought—it is usually treated as implicit.
3. The Court has *never yet made a finding* that a State's responsibility is engaged in a case whose main focus is territorial title.

Is a finding of illegal conduct really the *same* as a request for a finding of responsibility? The answer is yes, and no. Yes, in that findings of illegal conduct and the fashioning of remedies are all, in our modern way of looking at substantive obligations and remedies for breach, 'part of the law of responsibility'. No, in that no separate pleadings, with prolonged excursions into the law of responsibility and the work of the International Law Commission, are needed on this issue. Given the heavy docket of the Court, and the absence of need for a 'stepping stone' between illegality and remedy, this is not unimportant.

As the Court's handling of the responsibility claims in the *Cameron v. Nigeria* case, for the Court it was clear that title to Bakassi belonged to Cameroon. But the evidence presented by Cameroon, which bore the burden of proving

<sup>94</sup> *Military and Paramilitary Activities in and against Nicaragua*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392, and Merits, ICJ Reports 1986, 14.

<sup>95</sup> *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 253; *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, 457.

<sup>96</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, pending; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*, pending.

<sup>97</sup> *Legality of Use of Force (Serbia and Montenegro v. Belgium)*; *Legality of Use of Force (Serbia and Montenegro v. Canada)*; *Legality of Use of Force (Serbia and Montenegro v. France)*; *Legality of Use of Force (Serbia and Montenegro v. Germany)*; *Legality of Use of Force (Serbia and Montenegro v. Italy)*; *Legality of Use of Force (Serbia and Montenegro v. Netherlands)*; *Legality of Use of Force (Serbia and Montenegro v. Portugal)*; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*.

<sup>98</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, pending.

<sup>99</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, 803; *Counter-Claim*, Order 10 March 1998, ICJ Reports 1998, 190; Merits, Judgment 6 November 2003, ICJ Reports 2003, 161, electronically available at <http://www.icj-cij.org>.

where the pleadings of the parties can also be found.

the facts it had alleged, did not allow the Court to form 'a clear and precise picture' of the sequence of events on the ground in Bakassi.<sup>100</sup> Accordingly, the Court rejected Cameroon's claims on responsibility. The responsibility counter-claims by Nigeria in relation to Bakassi were rejected for comparable reasons.<sup>101</sup>

The specification of the long land frontier between Cameroon and Nigeria largely favoured the arguments that had been advanced by Nigeria. The Court was not prepared to deal with Cameroon's request for a responsibility finding in respect of incidents along the land boundary 'as a whole', Cameroon having decided not to deal with them incident by incident. The Court found again that it had not been presented with sufficient evidence to make such a global finding.

The Court found in favour of Cameroon over title to the disputed areas in Lake Chad,<sup>102</sup> but again made no separate responsibility finding. After these findings the Court immediately stated that the parties are under an obligation to withdraw with all expedition from the areas the Court has found not to belong to them; and rejected all other submissions of Cameroon regarding the State responsibility of Nigeria and rejected the Counter Claims of responsibility by Nigeria.

Counsel pondering the formulation of future Applications to the Court will no doubt notice that the voting on these provisions was unanimous.

<sup>100</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Judgment, Merits*, para. 322.

<sup>101</sup> *Ibid.*, para. 324.

<sup>102</sup> The maritime delimitation effected by the Court falls beyond the scope of the theme of this essay.

## CHAPTER TWENTY-FIVE

## REGISTRATION OF FOREIGN JUDGMENTS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE LAW OF INTERNATIONAL RESPONSIBILITY

Laura Picchio Forlani

## 1. INTRODUCTION

The recent Opinions of the Lords of Appeal for judgment in the case *Government of the United States of America (Respondent) v. Barnett and another (Appellants)*<sup>1</sup> denies to the decision in the *Pellegrini* case<sup>2</sup> by the European Court of Human Rights any authority as a precedent. The ground for such a denial is that the decision in question should have been 'dependent on the particular effect' and 'on the particular requirements of the Concordat', rather than on international commitments weighing on Italy under Article 6 of the European Convention on Human Rights.<sup>3</sup>

In the *Pellegrini* judgment, Italy had been found in breach of the European Convention for having registered and executed a judgment of the Roman Rota (the 'ordinary tribunal established by the Roman Pontiff to receive appeals')<sup>4</sup> that had declared the marriage between Ms. Pellegrini and Mr. Gigliozzi null and void. According to the European Court, that judgment resulted from proceedings that had not ensured to Ms. Pellegrini a fair trial within the meaning of Article 6 of the European Convention. The Court was well aware of the fact that the Holy See is not a party to the Convention, but drew from the European Convention a prohibition for the parties to it to cooperate in the execution of a foreign judgment of whatever origin which does not meet the same standards as those ensuing from that article.

The reasoning of the Lords of Appeal, in rejecting any precedential value

<sup>1</sup> [2004] UKHL 37. The text of the Opinions is electronically available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040722/barn-1.htm>>.

<sup>2</sup> *Pellegrini v. Italy: Judgment (Merits and Just Satisfaction)*. The text of the judgment of 20 July 2001, is electronically available at <<http://www.echr.coe.int/>>.

<sup>3</sup> 213 L.N.T.S. 221. The European Convention was adopted on 4 November 1950.

<sup>4</sup> See Canon 1443 of the Code of Canon law for the Latin Church. (An English translation

*Maurizio Ragazzi (ed.), International Responsibility: Today*, 287-295.

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