
Law-making in complex processes

The World Court and the modern law of State responsibility

CHRISTIAN J. TAMS*

1 Introduction

State responsibility and the International Court of Justice (ICJ) have dominated much of James Crawford's activity during the last two decades. This chapter addresses a question situated at the intersection of these two themes: it evaluates the ICJ's (as well as the Permanent Court of International Justice's (PCIJ)) influence on the law of responsibility and asks to what extent has the current law of responsibility been shaped (or even 'made') by pronouncements of these two 'World Courts'? What has been the relative impact of ICJ and PCIJ – compared to other 'agencies of legal development',¹ and compared to their role in other fields of international law?² These are the two questions on which this chapter seeks to shed some light. As the topic is huge, the treatment is broad-brush rather than nuanced. But as much of our current debate about responsibility is perhaps too granular, it may be defensible to step back and offer some reflections 'from a distance'.

* This chapter, focusing on general questions of State responsibility, was completed before the publication of James Crawford's latest publication on the subject matter. See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013).

¹ The term is borrowed from Hersch Lauterpacht, *The Development of International Law by the International Court of Justice* (London: Stevens, 1958), ch. 1 ('The International Court as an Agency for Developing International Law'); and Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (London: Longmans Green and Company, 1934), 2.

² A recent attempt to provide a comparative account can be found in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013).

The topic has been covered before, and there is no shortage of views. ‘The law of responsibility has always been essentially judge-made’, states Alain Pellet in a recent Festschrift contribution.³ James Crawford admits a little more diversity; according to him, ‘[t]he rules of state responsibility have been derived from cases, from practice, and from often unarticulated instantiations of general legal ideas’.⁴ And of course, though curiously missing from the two quotations, there is the United Nations International Law Commission (ILC), which rightly counts work on State responsibility among its major contributions to the codification and progressive development of international law. All these have contributed in some way to our understanding, and Patrick Daillier is no doubt right to emphasise the ‘interdependence of the various sources of law in the complex process of the formulation of the law on international responsibility’.⁵ But what are the respective roles played by the various ‘sources’ in the ‘complex process’, and where in particular has the PCIJ’s and ICJ’s jurisprudence made a difference? In order to address these questions, it is necessary to, first, demarcate the field of ‘State responsibility’ before tracing and assessing the two Courts’ contributions to it.

2 State responsibility: three levels of normative decisions

The PCIJ’s and ICJ’s influence on the development of the law is best assessed by working backwards: by describing the status quo and then inquiring to what extent it can be traced back to judicial decisions. As the development of international law is no mechanical process, the assessment must always remain tentative, but influence can be gauged by analysing how judicial pronouncements have been received in the subsequent debate: have they become ‘brigh[t] beacons’ guiding arguments and widely referred to, or ‘flicker[ed] and die[d] near-instant deaths’?⁶

³ Alain Pellet, ‘Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues’ in Péter Kovács (ed.), *International Law: A Quiet Strength (Miscellanea in memoriam Géza Herczegh)* (Budapest: Pazmany Press, 2011), 112.

⁴ James Crawford, ‘The International Court of Justice and the Law of State Responsibility’ in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 81.

⁵ Patrick Daillier, ‘The Development of the Law of Responsibility through the Case Law’ in James Crawford, Alain Pellet and Simon Olleson (eds.), *Handbook of International Responsibility* (Oxford University Press, 2010), 38.

⁶ Jan Paulsson, ‘International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law’ in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 13: International Arbitration 2006: Back to Basics?* (The Hague: Kluwer Law International, 2007), 879, 881.

In all that, it helps if the status quo can be identified with reasonable certainty, and in this respect, State responsibility offers distinct advantages. For although much detail remains disputed, most would consider the ILC's Articles on State Responsibility (ASR), adopted after second reading in 2001⁷ and widely referred to in practice and jurisprudence, to be the obvious point of reference. If there exists, even only as a working hypothesis, an agreed status quo, then this is the result of an astonishingly successful exercise in clarifying international law through 'normative accretion': patient work towards consensus, based on the careful study of prior practice and jurisprudence (including that of PCIJ and ICJ), distilled by the Commission into general legal propositions and then affirmed or modified in a fairly inclusive and at times detailed debate. The ILC's text indeed (as James Crawford has observed) 'encode[s] the way in which we think about responsibility'⁸ – but one needs to add that in 'encoding', the ILC has changed and shaped our thinking about the topic.⁹ In fact, so completely have we internalised the ILC's approach that it has become quite a challenge to identify the choices made on the journey towards the ILC's 2001 text. If an attempt is made, perhaps our specific understanding of State responsibility could be described as the result of normative decisions on three levels:

- (i) The *first*, most fundamental, decision concerns the concept of responsibility. Since the fundamental re-orientation of the early 1960s, responsibility has been posited as the key to debates about wrongfulness: a broad concept situated (as Philip Allott has put it) 'between illegality and liability'¹⁰ and encompassing (in the ILC's words) 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and

⁷ ILC Articles on Responsibility of States for Internationally Wrongful Acts, reproduced with commentaries in *ILC Yearbook*, 2(2) (2001), 26. (All future references to the ILC's text are to this source.)

⁸ Crawford, 'The International Court of Justice and the Law of State Responsibility', 81.

⁹ A quick glance at Ian Brownlie's *System of the Law of Nations: State Responsibility*, 1st edn (Oxford University Press, 1983) is sufficient to illustrate the point. Published barely three decades ago, the work – with its detailed exposition of causes of action, its focus on remedies and on protest etc. – feels very much 'out of sync' with contemporary understanding. The same is true for Philip Allott's 'State Responsibility and the Unmaking of International Law', *Harvard International Law Journal*, 29 (1988), 1 – notwithstanding his fantastic description of the ILC's approach ('generalizing about the effect of unlawful acts without talking too much about any particular wrongful acts', 7). Rereading these (and other) works is useful as it illustrates alternative approaches to responsibility. And at the same time, one appreciates how decisively international law has moved on.

¹⁰ Allott, 'State Responsibility and the Unmaking of International Law', 6 (his footnote 18).

the legal consequences which flow therefrom'.¹¹ The concept is astonishingly ambitious in its scope of application (governing all forms of wrongfulness across the board, from 'minor breaches of a bilateral treaty... to the invasion of Belgium'¹²); and remarkable also in presuming that the international law of responsibility should be unitary, forgoing principled distinctions based on sources¹³ or gravity.¹⁴

- (ii) Key organising principles operationalising the broad notion of responsibility comprise the *second level* of normative decisions. They concern the substantive understanding of 'responsibility' as well as the ILC's delimitation between general aspects of the international regime (addressed in the ILC's text) and special rules. Among these organising principles, the following stand out:
- International responsibility is an objective concept (generally not dependent on fault or damage) and autonomous from domestic law. Responsibility is the result of conduct of persons/entities acting (or failing to act) for a State.
 - Responsibility as a general concept covers forms of 'ancillary conduct' (notably complicity in the unlawful conduct of another State) as well as in a limited number of circumstances precluding the wrongfulness of conduct.

¹¹ See para. 1 of the ILC's Introductory Commentary to the Articles on State Responsibility. Not expressly mentioned is the fact that the ASR should also set out modalities governing the invocation of responsibility. A remark by Rosalyn Higgins, made before the completion of even the first reading, captures the scope of the project very well: 'One can now begin to see why a topic that should on the face of it take one summer's work has taken forty years. It has been interpreted to cover not only issues of attributability to the state, but also the entire substantive law of obligations, and the entirety of international law relating to compensation'; see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995), 148.

¹² Crawford, 'The International Court of Justice and the Law of State Responsibility', 76.

¹³ See commentary to Art. 12 ASR, para. 5: 'there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*'.

¹⁴ See Part II, Chapter 3 (comprising Arts. 40, 41 ASR) for the ILC's attempt to rescue some form of 'special regime' for particularly egregious breaches. As the introductory commentary to that chapter (para. 7) makes clear, the chapter spells out certain special consequences, without reflecting a categorical distinction between 'classes' of breaches. This is in contrast to the Commission's initial scheme which – in draft Art. 19 of the first reading text – had divided wrongful conduct into two classes, viz. 'crimes' and 'delicts'. The appropriateness and usefulness of that categorical distinction have been much discussed: for a summary see James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), Introduction, 16–20.

- Wrongful conduct gives rise to general duties of cessation and reparation (as ‘the new legal relations that arise from the commission . . . of an internationally wrongful act’¹⁵) which seek to ensure a return to lawfulness and a re-establishment of the situation affected by the breach. Any attempt to enforce these duties must comply with certain general conditions governing the invocation of responsibility (the establishment of a ‘title’ to respond; prior notification, etc.).
 - While applying to wrongful conduct across the board (irrespective of the nature of the ‘victim’), the general law of responsibility only covers consequences of wrongfulness, and modalities of invocation, as between States.
- (iii) Specific rules spelling out these organising principles make up the *third level* of normative decisions determining the current regime of State responsibility. This third level is typically reflected in the specific provisions of the ILC’s text which give concrete meaning to the ‘second level’ principles. This is done, for example, by listing grounds of attribution¹⁶ and circumstances precluding wrongfulness,¹⁷ by formulating forms of reparation,¹⁸ by spelling out the potential ‘titles’ permitting a State to invoke another State’s responsibility¹⁹ and so on. Many of these specific rules existed long before the ILC began its work on responsibility, but it is within that framework that we now perceive them.

3 Shaping the modern law of State responsibility

Even from this briefest, and no doubt schematic, sketch, it is clear that the making of the modern law of responsibility was a ‘complex process’²⁰ involving different actors, and different levels of co-ordination. The subsequent sections trace the different roles played by the PCIJ and the ICJ, distinguishing between the different levels of decisions outlined above. However, before assessing the influence of the PCIJ and ICJ, it seems important to note that not all aspects of the contemporary regime of responsibility are ‘essentially judge-made’.²¹

¹⁵ ASR, Introductory commentary, para. 3(f).

¹⁶ Arts. 4–11 ASR. ¹⁷ Arts. 20–7 ASR.

¹⁸ Arts. 31–9 ASR, as well as (for the special consequences triggered by serious breaches of *jus cogens* norms) Arts. 40–1.

¹⁹ See Arts. 42 and 48 ASR.

²⁰ Daillier, ‘The Development of the Law of Responsibility through the Case Law’.

²¹ Cf. above n. 2.

(a) The ILC's 'master plan'

While the PCIJ and ICJ were influential in shaping general principles of responsibility and specific rules implementing them (the second and third levels of normative decisions mentioned in the preceding section), it is important to note that the conceptual decision to think of responsibility as an overarching category comprising the general conditions for, and consequences flowing from, wrongful conduct was taken by the ILC. Unlike other changes of direction in the law, the crucial decision can indeed be traced with relative precision: in 1963, having failed to agree on a regime of State responsibility for injuries to aliens, the Commission decided to change tack – in a rare attempt to bring a project ‘back to life’²² by moving from the specific to the general/abstract. After some debate, a subcommittee was set up to study ways of rescuing the Commission’s work on the topic proposed to ‘give priority to the codification of general rules governing the international responsibility of States.’²³ In retrospect, it seems clear that on the journey towards the current law of responsibility, this was the decisive fork in the road, and the Commission’s subsequent endorsement of the subcommittee’s recommendation – and its appointment of Roberto Ago, the key figure in the subcommittee’s deliberations, as Special Rapporteur – was to change the legal landscape. For it was in the Commission’s engagement with Ago’s reports that, for better or worse, the contemporary notion of responsibility took shape, was ‘encoded’.²⁴ And while many of the specific rules (level 3) and some of the organising principles (level 2) would be revisited at a later stage, the strategic decision to understand responsibility as the crucial concept ‘between illegality and liability’²⁵ would stand. In that respect, developments since the early 1960s have followed the ILC’s ‘master plan’.

(b) Foundational decisions by the PCIJ

But of course, the Commission did not decide out of the blue to embark on its most ambitious codification project. In its subcommittee, the view

²² Allott, ‘State Responsibility and the Unmaking of International Law’, 7. In James Crawford’s words, ‘Ago recognised that propositions about state responsibility would, curiously, be more stable than substantive rules, which are liable to change’ in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 6.

²³ As summarised in Roberto Ago, ‘First Report on State Responsibility’, *ILC Yearbook*, 2 (1969), 125, 139. The subcommittee’s deliberations, summarised by Roberto Ago, and the working papers submitted to it, are reproduced in *ILC Yearbook*, 2 (1963), 227.

²⁴ See above n. 8.

²⁵ Allott, ‘State Responsibility and the Unmaking of International Law’, 6 (his footnote 18).

prevailed that responsibility could be approached from a general angle as questions of attribution, or consequences, were governed by common principles. Trying to persuade the ILC subcommittee to move away from the study of responsibility in particular areas (such as the treatment of aliens), Mustafa Kamil Yasseen suggested that ‘the first step must be to define the general theory of responsibility. *That theory exists.*’²⁶ Not everyone agreed at the time; hence the continued attraction of ‘going (or staying) sectoral.’²⁷ But Yasseen’s view – that ‘[a general theory of responsibility] exists’ and awaits codification, which the subcommittee adopted – certainly seemed plausible. In fact, with the benefit of hindsight, one wonders why it took so long to emerge: the trees were there; it was time to think of the forest.

In distilling general principles of responsibility (from which a ‘general theory’ could be deduced), the Permanent Court was highly influential. Alongside scholarship²⁸ and diplomatic and arbitral practice, its jurisprudence had established a number of fundamental propositions, on which the codification effort (embarked upon in the 1960s) would draw. Three of them stand out:

First, a string of PCIJ decisions had affirmed the autonomy of international responsibility from domestic laws. In fact, it may well be the principle most frequently affirmed by the Permanent Court. This is true for its two ‘variations’: (i) violations of constitutional law do not render conduct *internationally* wrongful;²⁹ and (ii) compliance with domestic

²⁶ Working Paper, reproduced in *ILC Yearbook*, 2 (1963), 251. The statement continued: ‘[C]ertain principles have a general scope transcending the particular case [i.e. field, CJT] of responsibility to which they are applied. State responsibility should therefore be considered as a whole.’

²⁷ In the subcommittee, this approach was, for example, favoured by Jiménez de Aréchaga and Modesto Paredes: see their working papers, reproduced in *ILC Yearbook*, 2 (1963), 237 and 244.

²⁸ In an annex to his working paper submitted in 1963 (*ILC Yearbook*, 2 (1963), 254), Ago listed a wealth of relevant works. Yet as Brownlie, *System of the Law of Nations: State Responsibility I*, 7 and 8, notes, much of the literature did not discuss State responsibility as a general concept: ‘[m]uch of the literature of the nineteenth century continued to ignore the issues of responsibility of states as such’, whereas literature in the ‘formative period (1898–1930) was varied’ and focused on special issues, notably injury to aliens. As Brownlie goes on to note, some of the twentieth-century classics of British scholarship like Brierly’s *Law of Nations* ‘contain[ed] no discussion of state responsibility as a category’ (*System of the Law of Nations: State Responsibility I*, 2) (which remains true for the most recent edition prepared by Clapham). One should add that where State responsibility was discussed as a category, the treatment often remained focused on injuries to aliens.

²⁹ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, PCIJ, Series A/B, No. 44, 24–5; *SS Lotus (France v. Turkey)*, Judgment No. 9, 7 September 1927, PCIJ, Series A, No. 10, 24.

law cannot justify violations of international law.³⁰ As regards the latter, more important, variation, the judgment in the *Polish Nationals* case contains the quintessential formulation; in it, the PCIJ affirmed that ‘a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force’.³¹ Seventy years later, that principle would be affirmed, with due reference to the PCIJ’s formative jurisprudence, in Article 3 of the ILC’s text.³²

Secondly, the PCIJ’s jurisprudence could be read to foreshadow the emergence of responsibility as a separate notion ‘between illegality and liability’ – a notion the relevance of which failed to convince Allott.³³ In *Phosphates in Morocco*, the Court referred to attribution and illegality as the two key conditions³⁴ and noted that where these conditions were met, ‘international responsibility would be established immediately as between the two States’.³⁵ While this paved the way for appreciating responsibility as a notion combining conditions for, and consequences of, wrongfulness, the reference to ‘two States’ betrayed a bilateralist mindset³⁶ that

³⁰ In addition to the statement made in *Polish Nations* (referred to in the next footnote) see e.g. SS ‘Wimbledon’ (*United Kingdom v. Germany*), Judgment, 17 August 1923, PCIJ, Series A, No. 1, 29–30; *Greco-Bulgarian ‘Communities’*, Advisory Opinion, 31 August 1930, PCIJ, Series B, No. 17, 32; *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, PCIJ, Series A/B, No. 46, 167.

³¹ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 24.

³² Art. 3 ASR provides as follows: ‘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.’

³³ See above n. 10.

³⁴ It did so in the context of an alleged breach of treaty, stating that the purportedly wrongful conduct had to be ‘attributable to the State and described as contrary to the treaty right of another State’: *Phosphates in Morocco (Italy v. France)*, Judgment, 14 June 1938, PCIJ Series A/B, No. 74, 28.

³⁵ *Ibid.*

³⁶ For alternative approaches contrast the PCIJ’s decisions in the SS ‘Wimbledon’ (*United Kingdom v. Germany*), 20 (accepting a broad right of standing of applicant States that had ‘a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags’); and *Interpretation of Statute of Memel Territory (UK, France, Italy and Japan v. Lithuania)*, Order of 24 June 1932, PCIJ Series A/B, No. 47 and No. 49 (recognising the standing of applicants whose ‘only interest [was] to see that the Convention to which they are Parties is carried out by Lithuania’ – as put by the British agent: see PCIJ, Series C, No. 59, 173). As the brief references suggest, the PCIJ could be surprisingly modern in determining whether claimant States had standing *in judicio*. In his separate opinion in the 1962 judgment in *South West Africa*, Judge Jessup drew on the PCIJ’s jurisprudence to argue (persuasively)

reduced responsibility to reciprocal relations involving rights of claimants and corresponding duties of respondents – a restriction which haunts debates to this day.³⁷ Moreover, the Court's State-centred interpretation of diplomatic protection claims – by which a State was 'in reality asserting its own rights'³⁸ – would add a further restriction of lasting impact.³⁹

Thirdly, in a much-cited passage, the PCIJ would formulate, in a general way, the most important automatic consequence 'immediately arising'⁴⁰ from responsibility. In *Factory*, it noted that a breach of international law 'involves an obligation to make reparation'; this was said to be 'a principle of international law, and even a general conception of law'.⁴¹ In a later passage of the same case, the PCIJ then explored the content of the obligation:

[to] wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.⁴²

that '[i]nternational law has long recognised that States may have legal interests in matters which do not affect their financial, economic, or other "material", or, say, "physical" or "tangible" interests' (*South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, 21 December 1962, ICJ Reports (1962), 425). The 1966 judgment in the same cases unfortunately would come to overshadow the PCIJ's earlier and more nuanced approach to legal standing. For more on these aspects see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005, rev. pbck edn 2010), 69–79.

³⁷ For details see e.g. Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Yoram Dinstein and Mala Tabory (eds.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1989), 821; James Crawford, 'Responsibilities for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Wrongful Acts' in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011), 221. The author's own view is set out in Tams, *Enforcing Obligations Erga Omnes in International Law*.

³⁸ *Mavrommatis Palestine Concessions (Greece v. Britain)*, Judgment, 30 August 1924, PCIJ Series A, No. 2 (1924), 12.

³⁹ As diplomatic protection was subsequently 'spun off' into a separate topic (related to, but independent from, the modern notion of responsibility), the matter is not pursued in detail here. For a recent analysis see Kate Parlett, 'Diplomatic Protection and the International Court of Justice' in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 87.

⁴⁰ Cf. above n. 35.

⁴¹ *Factory at Chorzów (Germany v. Poland)* (Merits), Judgment, 13 September 1928, PCIJ Series A, No. 17 (1928), 29.

⁴² *Ibid.*, 47. This was said to be an 'essential principle contained in the actual notion of an illegal act'.

This was followed by a statement on the relationship between two potential forms of reparation:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴³

The impact of these statements has been no less than remarkable. Hardly supported by argument, they have become cornerstones of the regime of consequences of responsibility: relied upon to support the existence of a general duty to make reparation⁴⁴ and the primacy of restitution over compensation.

Taken together, the three instances show the remarkable role of the PCIJ in preparing the ground for the emergence, and gradual formulation, of the modern law of State responsibility between the 1960s and 2001. The PCIJ was not the architect of the modern notion – as a judicial body deciding specific cases it had limited powers to design broad normative frameworks. However, the PCIJ's jurisprudence (partly drawing on earlier arbitral practice, partly relying on 'conceptualist reasoning')⁴⁵ recognised a number of important general principles that shape or influence the law of responsibility to this day and that, in the terminology introduced above, form part of the 'second level' of normative decisions.

⁴³ *Ibid.*

⁴⁴ See e.g. para. 1 of the ILC's commentary to Art. 31 ASR: 'The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case.' As regards the primacy of restitution, the ILC's commentary pragmatically emphasises that '[o]f the various forms of reparation, compensation is perhaps the most commonly sought in international practice' (commentary to Art. 36, para 2). But Art. 36 ASR does accept (in the words of para. 3 of the commentary) 'primacy as a matter of legal principle'.

⁴⁵ The point was recently made by Akbar Rasulov: '[A]s even the briefest scrutiny of its case-law can confirm, the Court throughout its twenty-year career remained a very committed practitioner of conceptualist reasoning': it would identify, without much argument, the alleged 'objective meaning' of a principle and 'deduce from this principle by way of "objective" legal reasoning an entire juridical regime with numerous details and complicated normative and remedial structures'. See Akbar Rasulov, 'The Doctrine of Sources in the Discourse of the Permanent Court of International Justice' in Christian J. Tams and Malgosia Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice* (Leiden: Brill, 2013), 308–9.

(c) *The ICJ's continuing relevance*

The ICJ's work has been influential, too, but its impact has typically been at a different level. At least for the last four decades,⁴⁶ the World Court has decided responsibility cases against the backdrop of the ILC's work. And quite clearly, this has affected its impact on legal development.

(i) Operating within the ILC's master plan

With respect to the 'level' of normative decisions, the emergence on the scene of an ambitious Law Commission had a constraining influence: as the ILC's 'master plan' for responsibility began to unfold and as it was translated into the different organising principles of responsibility summarised in the preceding section (thus 'encod[ing] the way we think about responsibility'),⁴⁷ other actors were no longer as free to roam. This affected many potential agencies of legal development, including scholarship,⁴⁸ and also the ICJ. Rather than 'discovering' general principles of responsibility (which then would be drawn upon by others, as the PCIJ had done), the ICJ, from the 1970s onwards, operated within the ILC's framework. Its impact became more specific: in the terminology used in the preceding section, one might say it typically shifted to the (third) level of specific rules of responsibility.

(ii) 'Normative ping pong': the ILC and ICJ in concert

This shift should not be taken to mean that the ICJ became 'less powerful', or less influential; if anything, the reverse is true. In addressing specific normative propositions through its case law, the ICJ was highly influential, and the list of provisions of the ILC's text that in one way or the other owe their existence or formulation to some form of ICJ pronouncement is long. Of course, operating within the ILC's 'master plan', the ICJ would not single-handedly create new law but work in tandem with the ILC. However, over the years, the two institutions seemed

⁴⁶ As regards early ICJ pronouncements preceding the ILC's reconceptualisation see notably *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949), 4 and 244. The *Reparations* opinion (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949), 171) sets the stage for the subsequent development of a regime of responsibility of international organisations (ARIO 2011); as it does not concern State responsibility, it is left aside here.

⁴⁷ See above n. 8.

⁴⁸ See above n. 9 for comment on two alternative visions of responsibility that would be left to one side as the ILC's approach became dominant.

to develop an almost symbiotic relationship as ‘partners in law-making’. The degree and character of the Court’s influence within that symbiotic relationship vary, but three categories can be conveniently distinguished.

First, a number of ICJ cases raised ‘responsibility issues’ that were fairly novel and would be taken up in the ILC’s work. Two examples may serve to illustrate the point.

In *Tehran Hostages*, the Court had to assess to what extent essentially ‘private conduct’ – the occupation of the US embassy by students and militants – was attributable to a State that, while not actively participating, endorsed it, and exploited it for its own purposes. In the view of the Court, approval, endorsement and ‘exploitation’ were sufficient to turn a private act into an attributable public act:

The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.⁴⁹

The ILC’s subsequent work essentially ‘acknowledged and adopted’ the ICJ’s position: the *Hostages* case having been decided only in Ago’s final year on the Commission, the matter would not be considered until the second reading when Special Rapporteur Crawford recommended⁵⁰ the addition of a provision inspired by the Court’s judgment (while also indicating that it should be construed narrowly).⁵¹ In line with that, Article 11 of the 2001 ASR effectively translates the ICJ’s approach into a rule of attribution.

While it had a more chequered history, the famous ‘*erga omnes dictum*’ from the *Barcelona Traction* case is another ICJ pronouncement that would, over time, morph into a provision of the modern law of responsibility. For a while, the Court’s unnecessarily cryptic statement that

⁴⁹ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980), 3, 35, para. 74.

⁵⁰ See James Crawford, ‘First Report on State Responsibility’, UN Doc. A/CN.4/490, Add. 5, paras. 281–6. In addition to the *Hostages* case, reliance was placed on the *Lighthouses* award, which had considered a similar situation in the context of State succession (*Lighthouses Arbitration (France v. Greece)* (18 April 1956), Reports of International Arbitral Awards, vol. 12, 155).

⁵¹ See para. 6 of the ILC’s commentary to Art. 11 ASR, explaining that, while the ICJ had spoken of ‘approval’ and ‘endorsement’, ‘as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it’; instead an official ‘adoption’ was required.

particularly important obligations should be owed 'towards the international community as a whole' would be relied upon to support the existence of 'international crimes' as a separate category of wrongful conduct. From the mid-1990s onwards, when 'crimes' fell out of fashion, the more mundane (but still ambitious) idea of 'public interest enforcement' persisted: pursuant to Article 48(1)(b) of the ILC's 2001 text, any State 'is entitled to invoke the responsibility of another State . . . if the obligation breached is owed to the international community as a whole'. As the commentary acknowledges, this really 'intends to give effect to the statement by the ICJ in the *Barcelona Traction* case . . . that . . . "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in th[e] protection . . . of obligations *erga omnes*'".⁵²

Secondly, the ICJ has not always put forward propositions that the ILC has then taken up. As often, the order has been reversed, with the ICJ stabilising ILC provisions whose fate was, prior to the ICJ's *imprimatur*, at best uncertain. The gradual recognition of a defence of necessity is probably the most prominent example: adopted by the Commission in 1980 and featuring as draft Article 33 of the 1996 text, the provision was received cautiously as it seemed to invite abuse. The arbitral award in the *Rainbow Warrior* reflected the persisting doubts. The ILC's work, noted the tribunal sceptically, 'allegedly authorizes a State to take unlawful action invoking a state of necessity'; however this was considered 'controversial'.⁵³ In retrospect, it seems to have been the ICJ's *Gabčíkovo Nagymaros* judgment that settled matters.⁵⁴ Without too much concern, and referring to draft Article 33, the Court recognised:

that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.⁵⁵

This endorsement was enough to ensure the relatively smooth passage of the provision during the second reading. Since 2001, of course, Article 25 of the ILC's text has been much in demand: investment arbitration

⁵² Commentary to Art. 48 ASR, para. 8, citing *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase), ICJ Reports (1970), 3, 32, para. 33.

⁵³ *Rainbow Warrior Arbitration (New Zealand v. France)* (30 April 1990), Reports of International Arbitration Awards, vol. XX (1990), 254.

⁵⁴ As put by James Crawford ('The International Court of Justice and the Law of State Responsibility', 80–1): 'At the time when the Court dealt with the argument of necessity, it was very much an open question whether it would be accepted.'

⁵⁵ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997), 40, para. 51.

of the last decade would not have been the same without it and while many questions remain (including whether it should apply to the Argentinean crisis of 2001), it now seems beyond doubt that international law recognises a defence of necessity.

Since the completion of the ILC's project, the ICJ has continued to lend its authority to some of the more ambitious provisions of the 2001 text. Article 41, spelling out special consequences of serious breaches of *jus cogens* rules (highly controversial at the time), was in essence applied in the *Wall* opinion, even if without reference to the ILC's text.⁵⁶ And three years later, in the *Genocide* case, the Court explicitly referred to Article 16 of the ILC's text, which – in one of the more remarkable instances of legal development – proposed a general rule against complicity in State responsibility.⁵⁷ The ICJ not only confirmed the provision in the most casual fashion,⁵⁸ but even extended it to a setting involving not two States, but one non-State entity and one State. And judging from the subsequent response, the combination of ILC provision and ICJ endorsement seems to have redrawn the map of shared responsibility.⁵⁹

Finally, the ICJ's influence can also be felt at a more granular level: in many instances, ICJ pronouncements delivered clarity regarding the scope of provisions that everyone agreed would feature in the ILC's text but which required some clarification. The eventual formulation of the ILC's provisions on countermeasures provides an illustration: while many of the crucial questions had been addressed beforehand, the ICJ's *Gabčíkovo Nagymaros* judgment usefully added precision, for example by clarifying the relationship between countermeasures and treaty-law responses based on Article 60 of the Vienna Convention on the Law of Treaties (VCLT) or by introducing the notion of a 'commensurate' response.⁶⁰ Whereas

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004), 199–200, paras. 154–9.

⁵⁷ Art. 16 ASR provides as follows: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.'

⁵⁸ *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007), 217, para. 420.

⁵⁹ Many aspects are explored by SHARES, the research project on shared responsibility in international law, available at www.sharesproject.nl/.

⁶⁰ *Gabčíkovo-Nagymaros Project*, 55–7, paras. 82–7. For the ILC's reception of the judgment see e.g. commentary to Art. 49 ASR, paras. 2, 4 and Art. 51, para. 4; for a detailed comment on Art. 60 VCLT (including on the provision's relationship to countermeasures) see Bruno Simma and Christian J. Tams, 'Article 60' in Olivier Corten and Pierre Klein (eds.), *The*

this increased clarity, the ICJ's impact in other fields was more decisive. In relation to Article 8 of the ILC's text – governing the attribution of private conduct directed and/or controlled by a State – both the ICJ and ILC were robust in defending the relatively restrictive construction of that rule, as shaped by the *Nicaragua* case,⁶¹ against the International Criminal Court for the Former Yugoslavia's (ICTY) more lenient *Tadić* test.⁶² As the matter has been discussed in detail elsewhere,⁶³ it is sufficient to refer to the ICJ's judgment in the (*Bosnian*) *Genocide* case, in which – without much substantive argument, and despite the Court's willingness to take on board the ICTY's approach to issues of international criminal law – the *Tadić* test was dismissed out of hand.⁶⁴ As a result, it would seem far-fetched today to suggest that overall control is sufficient to justify attribution of private conduct – faced with dissent the ILC-ICJ has struck back.

4 Taking stock: the substantial impact of PCIJ and ICJ jurisprudence

The preceding considerations, though selective and cursory, suggest that in the complex process of shaping the contemporary law of State responsibility, the PCIJ and ICJ have been highly influential. To call the law of responsibility 'essentially judge-made'⁶⁵ may be an exaggeration; it ignores the ILC's essential role in devising a 'master plan' and in overseeing its gradual implementation. However, both Courts have been pivotal players: the PCIJ in setting the stage, the ICJ as the ILC's 'co-agent' of legal development. In fact, if one were to engage in a comparative exercise and 'rate' the PCIJ's and ICJ's impact on the development of different areas of law,⁶⁶ State responsibility would be in the top flight, alongside the

Vienna Conventions on the Law of Treaties: A Commentary (Oxford University Press, 2011), 1352.

⁶¹ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment, 27 June 1986, ICJ Reports (1986), 62 and 64–5, paras. 109 and 115 (requiring effective control of the specific wrongful acts).

⁶² *Prosecutor v. Tadić*, Case IT-94-1-A (1999), ICTY, Appeals Chamber, Judgment, 15 July 1999, ILM 38 (1999), 1541 *et seq.*

⁶³ See e.g. André J. J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', *British Yearbook of International Law*, 72 (2001), 255.

⁶⁴ *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), 206–11, paras. 396–407.

⁶⁵ Cf. above n. 2.

⁶⁶ For an attempt see Christian J. Tams, 'The ICJ as a "Law-Formative Agency": Summary and Synthesis' in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 377.

law of territory, diplomatic protection (to the extent that it is admitted as an autonomous area of international law) and, perhaps, the law of treaties. On all of these fields, the PCIJ and ICJ, over time, have exercised a substantial influence.

(a) *Some comparative remarks*

With respect to State responsibility, three aspects of this substantial influence stand out.

First, State responsibility has been a permanent feature of the PCIJ and ICJ caseload, and their jurisprudence has been a constant source of influence. The PCIJ's first contentious case (*Wimbledon*) involved questions of responsibility, as did *Corfu Channel*, the case of the ICJ; since then, questions of responsibility have been a regular feature of ICJ proceedings. Of the various branches and sections of public international law, the law of treaties (and perhaps the law of claims, unless it is viewed as part of responsibility) may be the only other with a similarly long-standing record of jurisprudence. Other areas have either come before the Court sporadically⁶⁷ or they have come and gone.⁶⁸ Responsibility has stayed and little suggests that this should change. This does not ensure influence on the development of the law but it is an enabling factor.

Secondly, whereas in many other areas of international law the PCIJ and ICJ have only pronounced on specific issues – such as maritime delimitation within the law of the sea,⁶⁹ or the relationship between human rights and general international law⁷⁰ – the Courts' jurisprudence on questions of responsibility has left footprints all over the field: from general

⁶⁷ This would, for example, be true for many of the substantive areas of international law: as Sir Franklin Berman points out, 'the occasional and adventitious nature of the ICJ's caseload has the almost automatic consequence that the Court is unlikely to be given the opportunity to revisit successively particular areas of substantive international law': 'The International Court of Justice as an "Agent" of Legal Development?' in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 20.

⁶⁸ Proceedings relating to immunity would fall within the first category: the ICJ really only started to get involved in the last decade. Case law on minority rights belongs to the second category; it effectively stopped when the inter-war system of minority protection (in which the PCIJ played a crucial supervisory role) came to an end.

⁶⁹ For an exposition see Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Tams and Sloan, Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), 177.

⁷⁰ See e.g. Bruno Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?' in Christian J. Tams and James Sloan (eds.), *The Development*

principles formulated by the PCIJ to specific rules clarified by the ICJ, few parts of the contemporary law of responsibility have completely escaped judicial scrutiny. Whereas typically the PCIJ and ICJ address specific and selected issues of a given area of law, in the field of responsibility their jurisprudence has been a pervasive factor.

Thirdly, PCIJ and ICJ pronouncements on questions of responsibility have throughout been treated as authoritative. Binding only 'between the parties and in respect of that particular case',⁷¹ PCIJ and ICJ decisions have to persuade to be relevant. And, while generally, the PCIJ and ICJ have been rather successful, persuasion often is a matter of degree: there are (rare) instances in which judgments have been overruled (such as *Lotus*) or deliberately bypassed,⁷² and a number of decisions have remained highly controversial.⁷³ By contrast, the brief survey given above suggests that in the field of responsibility, jurisprudence is indeed accorded 'a truly astonishing deference'.⁷⁴ PCIJ statements continue to be seen as 'the law', and on more than one occasion, the ICJ has been recognised as the supreme arbiter deciding the fate of controversial ILC provisions. Despite the wealth of jurisprudence, and the sensitive character of some of the PCIJ and ICJ cases on questions of responsibility, it is hard to think of any equivalent to *Lotus* or *Fisheries*.⁷⁵ As a general matter, PCIJ and ICJ decisions have been 'bright beacons': rather than 'flicker[ing] and [dying] near-instant deaths',⁷⁶ they have been remarkably persistent.

(b) Three lessons

The development of the modern law of State responsibility in many respects displays unique features. However, it yields a number of general

of International Law by the International Court of Justice (Oxford University Press, 2013), 301.

⁷¹ See Art. 59 of the ICJ Statute.

⁷² The 'reversal' of the *Lotus* holding on port state jurisdiction over collisions on the high seas is the most prominent example of overruling, contrast the *Lotus case* (*SS Lotus (France v. Turkey)*, 27) to Art. 1 of the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Collision ('1952 Brussels Convention') (Brussels, adopted 10 May 1952, entered into force 20 November 1955), 439 UNTS 233. As for bypassing, see e.g. *Fisheries Jurisdiction (UK v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974), 3 and 175: the Court's comments on 'fisheries zones' would not be taken up; the EEZ was too attractive.

⁷³ One need only think of consecutive ICJ pronouncements on the *ius ad bellum*.

⁷⁴ As put by Daniel Patrick O'Connell, *International Law*, 2nd edn, 2 vols. (London: Stevens and Sons, 1970), I, 32.

⁷⁵ See the references above n. 72. ⁷⁶ Cf. above n. 6.

lessons about the role of international courts as ‘law-formative agencies’.⁷⁷ In concluding, three such lessons merit being briefly spelled out.

First, the preceding survey suggests that the impact of PCIJ and ICJ pronouncements on the development of international law in a given area is a natural by-product of their dispute settlement activity. This sounds trite, but it may be worth stressing since much of the scholarship seeks to explain factors accounting for the precedential impact of judicial pronouncements, which is said to depend on the attitude of courts,⁷⁸ on the strength of their reasoning⁷⁹ or on the (essential or *obiter*) character of a particular pronouncement.⁸⁰ Experience in the field of State responsibility does not bear out these distinctions: it includes *ratio* and *dicta*,⁸¹ well-reasoned statements, and mere assertions.⁸² And who could say whether the PCIJ and ICJ, since the 1920s, have been ‘activist’ or ‘restrained’? If the PCIJ and ICJ have been influential players in the development of State responsibility (unlike in other areas of international law), then this would primarily seem to reflect the fact that they have decided responsibility cases for nine decades. The first lesson can be formulated in refreshingly simple terms: ‘The impact of international courts and tribunals on the evolution of international law largely depends upon how many cases are brought before them.’⁸³ This would explain the relatively high influence on the development of State responsibility.

Secondly, the substantial impact of PCIJ and ICJ pronouncements on State responsibility may also reflect the fact that the law of responsibility is particularly receptive to judicial development. It belongs to the core

⁷⁷ The term has been coined by O’Connell, *International Law*, 31.

⁷⁸ Cf. debates about judicial activism: for a recent account see e.g. Daniel Terris, Cesare P. R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (Oxford University Press, 2007), 121.

⁷⁹ See e.g. Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd edn (London: Stevens and Sons, 1957), 32; and similarly O’Connell, *International Law*, 32.

⁸⁰ See e.g. Robert Y. Jennings, ‘The Judiciary, National and International, and the Development of International Law’, *International and Comparative Law Quarterly*, 45 (1996), 6 *et seq.*; Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996), 152–64.

⁸¹ Among the latter, one could mention celebrated *dicta* decreeing the primacy of restitution over compensation (*Factory at Chorzów (Germany v. Poland)*, 47) and ‘discovering’ the concept of obligations *erga omnes* (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* 32–3).

⁸² E.g. there is a remarkable absence of legal argument in the successful rejection, by the ICJ and the ILC, of the ICTY’s *Tadić* approach to attribution.

⁸³ Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), 269.

of general international law, on which the world's 'generalist' court is particularly trusted. It is based on organisational principles that require to be spelled out and applied – which are much better suited to be concretised in dispute settlement processes than, for example, specialised fields of law comprising vast numbers of specific provisions (such as the law of the sea, international humanitarian, or international environmental law). As importantly, as a field of law, State responsibility lacks specialised institutions to administer the application of the law – in the way human rights committees or Meetings of the Parties (MoPs) and Conferences of the Parties (CoPs) 'manage' their respective treaties, moulding them in a process of regular engagement and adaptation. What is more, as has been shown, the ILC, as the key institution overseeing the codification process, seemed to co-operate harmoniously with the Court. Experience in the field of State responsibility thus suggests that, in addition to numbers of cases, the impact of international courts on legal development may depend on the 'make-up' of the field, which can be receptive (such as State responsibility, but also diplomatic protection, or the law of treaties) or not.

Thirdly, the survey highlights how the role of courts as agencies of legal development can change over time. Where the PCIJ could lay down general principles, the ICJ would operate within the parameters of responsibility established by the ILC. Conversely, the ICJ retained an important role, as through its decisions it could engage with normative propositions and confirm or modify the legal status of specific draft articles. This markedly differs from the much more limited role of international courts that only become involved after the completion of a codification exercise – as happened, for instance, with respect to the law of the sea or international humanitarian law. A third lesson to be drawn from this brief survey is that international courts, as agencies of legal development, depend on the right circumstances or 'setting': they are influential during the formative stages of the law and during long-term and on-going codification attempts.

5 Conclusion

The making of the modern law of State responsibility has been a complex and long-standing process. Since the 1960s, the process has been led by the International Law Commission guided by its Special Rapporteurs. If the work – allegedly to be accomplished within a few summer months⁸⁴ – was

⁸⁴ Cf. above n. 11.

eventually completed then it is because, in implementing its 'master plan', the Commission could draw on the work of reliable agencies of legal development. Among these agencies, the PCIJ and ICJ were of crucial importance: their jurisprudence shaped many of the building blocks, and some of the cornerstones, of the eventual edifice. In retrospect, it seems clear that without the jurisprudence of the two World Courts the project could not have been completed.