This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

8 Judge Géza Herczegh – The First Hungarian at the International Court of Justice

Peter Tomka[*]

Abstract

Géza Herczegh was a Hungarian academic, justice of the Hungarian Constitutional Court and judge of the International Court of Justice (ICJ). In this paper, which commemorates the 90th anniversary of Géza Herczegh's birth, his successor at the ICJ, Judge Peter Tomka, offers his reflections on Herczegh's time at the Court. While they had only limited interaction, Judge Tomka recalls his encounters with Herczegh, both before and after Herczegh's election to the ICJ. Additionally, Judge Tomka reviews Herczegh's legacy at the ICJ, considering both the occasions when Herczegh wrote separately from the Court and his reputation amongst people familiar with the ICJ as a dedicated and open-minded judge interested in finding areas of consensus.

8.1 Introduction

I did not work with the late Judge Géza Herczegh at the International Court of Justice (ICJ). I succeeded him on the bench of the World Court when he retired, after almost ten years of dedicated service in the principal judicial organ of the UN, on 5 February 2003. However, I did have opportunities to meet him, both before his election to the Court and while he exercised his highest judicial function.

* Peter Tomka: Member of the ICJ since 6 February 2003 (re-elected as from 6 February 2012), Vice-President of the ICJ from 6 February 2009 until 5 February 2012; President of the ICJ from 6 February 2012 until 5 February 2015.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

8.2 Promotion and Dissemination of International Humanitarian Law

Our first encounter occurred in November 1986 in Prague. He came to a seminar on international humanitarian law, the third one[1] in the series organized since 1984 jointly by the International Institute of Humanitarian Law based in San Remo, Italy, led at that time by Professor Jovica Patrnogić, and the International Committee of the Red Cross (ICRC), in the then socialist countries of the Eastern bloc. Who could then have envisaged that in a few years' time, the implementation of international humanitarian law would become so topical in the context of the Balkan wars resulting from the break-up of former Yugoslavia. Professor Géza Herczegh (as he then was) was a natural choice for the organizers of the seminar to speak at the event. He was a well-respected authority in this field of international law, having actively participated at the 'Diplomatic Conference on the protection of victims of armed conflict', held in Geneva in 1974-1977, which adopted the two Additional Protocols to the Geneva Conventions. Professor Herczegh also published (in English) a monograph 'Development of International Humanitarian Law',[2] analyzing the normative achievements of the Geneva Conference in the larger context of the historical development of the rules designed to protect victims of war. The ICRC was interested not only in the dissemination of international humanitarian law but also in increasing the number of States Parties to the two Additional Protocols. While socialist countries, members of the Warsaw Pact, signed these instruments, none had ratified them. The reason was obvious: the Soviet Union had been heavily involved in the Afghan War from late 1979 until February 1989. It was only after the withdrawal of Soviet troops from Afghanistan that gradually Warsaw Pact countries ratified the Additional Protocols; Hungary did so on 12 April 1989 as the first country of the bloc, followed by Bulgaria on 26 September 1989 and three days later by the Soviet Union itself.

8.3 Professor Herczegh's Election to the International Court of Justice

The next encounter, although not personal, came in 1993. Having led the Slovak legal team at the negotiations with Hungarian experts (Dr. Király, Dr. Szénási and Professor Valki) on a Special Agreement for submission of the dispute concerning the Gabčíkovo-Nagymaros Project, which was finalized in early February 1993 in Budapest, I returned to my diplomatic post as Deputy Permanent Representative of Slovakia, newly admitted to the United Nations

1 The second seminar was held in 1985 in Budapest.
2 Géza Herczegh, *Development of International Humanitarian Law*, Akadémiai, Budapest 1984, 240 p.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

on 19 January 1993. The Special Agreement was signed on 7 April 1993 in Brussels. It was subject to ratification which was to be completed within a short period of time.[3] Hungary and Slovakia were on their way to The Hague, where the 15 Members of the Court would have to adjudicate their dispute. However, on 14 January 1993, Judge Manfred Lachs from Poland passed away, after almost 26 years on the ICJ, then the longest serving judge.[4] The vacancy was to be filled by election, which the Security Council set for 10 May 1993 in accordance with Article 14 of the Statue of the ICJ. The newly elected Member of the Court was to complete the very short remainder of the late Judge Lachs's term of office which was to expire on 5 February 1994. The seat was traditionally considered as belonging to the Eastern European Group, although seats in the Court are not formally distributed between the UN regional groups. Judge Lachs's predecessor was another distinguished Polish lawyer, Professor Bohdan Winiarski, who served on the Court from its inception on 6 February 1946 for twenty-one years until 5 February 1967, when he retired.

Two candidates were nominated for election: Professor Géza Herczegh, then Vice-President of the Constitutional Court of Hungary, and Professor Krzysztof Skubiszewski, then since 1989 the first non-communist Foreign Minister of Poland after World War II. It was not easy to predict the outcome of the election. Certainly, Foreign Minister Professor Skubiszewski was much better known internationally, in particular in the UN.[5] On the other hand, Hungary was at that time a non-permanent Member of the Security Council and was represented by a highly respected top diplomat, Ambassador André Erdős. Judges of the Court are elected by the General Assembly and the Security Council, both main organs of the UN voting concurrently. A candidate who obtains an absolute majority of votes in both organs is declared elected.[6] I followed the forthcoming election with a particular interest knowing that within a couple of months the dispute between Hungary and Slovakia should be submitted to the Court. Saturday, 8 May, just two days prior to the election, I met by chance the young Polish Ambassador, Dr. Zbigniew Włosowicz in Central Park on his roller skates. He informed me that he had received instructions from Minister Skubiszewski to withdraw his candidature for election to the Court. I was caught by surprise. Zbigniew explained to me that Professor Skubiszewski had been asked by President Wałęsa to stay on as Foreign Minster as he was considered to be a pillar, having served as Foreign Minister under four Prime Ministers, in the rather shaky Government

3 The instruments of ratification were exchanged on 28 June 1993 and the Special Agreement was notified jointly by Hungary and Slovakia to the Registrar of the ICJ on 2 July 1993, thus instituting the proceedings before the Court.

4 Subsequently, his record was surpassed by Judge Shigeru Oda from Japan who served three full terms, between 6 February 1976 and 5 February 2003. He retired from the Bench the same day as Judge Herczegh.

5 Professor Skubiszewski was nominated for election by eight national groups in the Permanent Court of Arbitration in accordance with Article 4(1), of the Statute of the ICJ. Professor Herczegh received four nominations.

6 Article 10(1) of the Statute of the ICJ.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

of Prime Minister Hanna Suchocka. A month later, in June 1993, the Polish Parliament passed a vote of no-confidence by a majority of one vote. The Government fell. Wałęsa dissolved the Parliament and new elections were held. The Socialists came back to power and formed a coalition Government with the agrarian Polish People's Party. Professor Skubiszewski was not re-appointed as Foreign Minister.

Professor Herczegh remained, following the withdrawal of Minister Skubiszewski's candidature, the only candidate and on 10 May 1993 he was elected to the Court, having received all 15 votes in the Security Council and 129 votes in the General Assembly.[7] He assumed office immediately upon his election. I faced the question of how to report the outcome back to Bratislava. I decided to keep it low key. I sent a report only to the UN Department and the International Law Department of Slovakia's Foreign Ministry. I was afraid that it would be difficult to explain to politicians that we should complete the ratification procedure of the Special Agreement and submit the dispute with Hungary jointly to the Court, whose Members now included a Hungarian national. I was not sure that they would be persuaded that Slovakia was entitled, under Article 31(2) of the Statute of the ICJ, to appoint a Judge *ad hoc*.[8] Nor could they have been reassured by the fact that Judge Herczegh was born in Southeastern Slovakia, then in 1928 part of Czechoslovakia, in a small town that the Hungarian minority living there (in fact constituting the majority of its citizens) calls Nagykapos, while Slovaks call it Veľké Kapušany. Although he moved with his mother, when he was around four, to Southern Hungary, the fact remains that he was the first ever Judge of the ICJ born in Slovakia.[9]

Following his election, Judge Herczegh had to move to The Hague quickly, where he was welcomed by Sir Robert Jennings, the then President of the Court. He started on 14 June 1993 and sat on the Bench for a month of hearings in the *Territorial Dispute* case between Chad and Libya.[10] The judgment, the first one in which Judge Herczegh participated, was almost unanimous; only Judge *ad hoc* Sette-Camara, appointed by Libya, dissented. When he came to the Court, Judge Herczegh was not able to enjoy a proper judicial vacation in summer 1993. A few days after the hearings in the *Territorial Dispute* case were closed, the Court received, on 27 July 1993, the second request of Bosnia and Herzegovina for the indication of provisional measures in the *Genocide* case. The Court was reconvened for hearings on 25 and 26 August and issued a new Order on provisional measures on

7 See UN documents A/47/PV.103 and S/PV.3209.

8 Slovakia availed itself of this right and appointed in 1994 as Judge *ad hoc* Professor Skubiszewski who in the meantime had become President of the Iran-United States Claims Tribunal, based in The Hague.

9 In 2000 he was joined on the Court by Professor Thomas Buergenthal, a US national, who was born in 1934 in Ľubochňa, which is located in Slovakia at the foot of the Veľké Fatra Mountains.

10 *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, 1994 ICJ Reports 6, para. 16. The hearings were held between 14 June and 14 July 1993.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

13 September 1993.[11] The very first procedural Order in which he was involved was a simple one, time-limits for filing a reply and a rejoinder in the *Certain Phosphate Lands in Nauru* case.[12]

8.4 Judge Herczegh's Re-Election to the International Court of Justice

Hardly elected, Judge Herczegh had to be nominated for re-election as his mandate was to expire on 5 February 1994. The election was scheduled for 10 November 1993. This time Judge Herczegh faced competition for the so-called Eastern European seat. Three other candidates from Central and Eastern Europe were nominated: Professor Skubiszewski from Poland, who was no longer Foreign Minister, Professor Volodymyr Vassylenko from Ukraine and Professor Alexander Yankov from Bulgaria. Géza Herczegh was elected by the Security Council already in the first ballot, having received 13 votes. In the General Assembly, he was from the start of voting leading among these four candidates with 76 votes, but he received the required absolute majority only in the third ballot when 111 states voted for him.[13]

8.5 Site Visit by the Court in Slovakia and Hungary

My final encounter with him came during the *Gabčíkovo-Nagymaros Project* case. While during the hearings the Judges keep their distance from agents, counsel and advocates,[14] in the *Gabčíkovo-Nagymaros Project* case, the situation was rather different. On 16 June 1995, a few days before filing a reply in the case, which was due by 20 June, I sent as Agent of Slovakia a letter to the President of the Court (Judge Bedjaoui at that moment) asking the Court

> "to be so good as to implement its powers under Article 66 of the Rules of Court and to decide to visit the locality to which the case concerning the *Gabčíkovo-*

11 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, 1993 ICJ Reports, p. 325. The first Order on Provisional Measures in this case was issued by the Court on 8 April 1993, *see* 1993 ICJ Reports, p. 3, in which, of course, Géza Herczegh did not participate, as he was not yet a Member of the Court.

12 *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), Order of 25 June 1993, 1993 ICJ Reports, p. 316.

13 See UN documents A/48/PV.51, A/48/PV.52, A/48/PV.53 and S/PV.3309.

14 The only occasion for a short social conversation is at the reception the Court offers to the Parties during the hearings on the merits.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

> *Nagymaros Project* relates, and there to exercise its functions with regard to the obtaining of evidence."

The meeting with the President of the Court was scheduled for 30 June 1995. The Court, therefore, invited the Agent of Hungary to offer any comments his Government might wish to make. Dr. Szénási, in his letter of 28 June 1995, informed the Court that if the Court

> "should decide that a visit to the various areas affected by the Project (or, more precisely, affected by variant C) would be useful, Hungary would be pleased to co-operate in organizing such a visit."

The Court decided that such a visit may facilitate its task in the case at hand and, having received the Protocol and Agreed Minutes signed by the Parties, outlining the program, dates and details of the visit, adopted an Order for that purpose.[15] The visit took place between 1 and 4 April 1997: two days in Slovakia, two days in Hungary. It provided an opportunity to the Judges not only to see the main structures of the Gabčíkovo part of the Project and the areas along the Danube where the installations were planned under the 1977 Treaty between Hungary and Czechoslovakia on the joint construction and operation of the Gabčíkovo-Nagymaros System of Locks, but also an opportunity for agents of both Parties and two counsel of each Party, accompanying the Members of the Court, to engage in a little bit less formal conversation with the Judges. With protective helmets we walked together in the hydropower station at Gabčíkovo and we inspected the dyke at Čunovo. We had lunch together in Gabčíkovo and in the evening in Bratislava, Judges could have chosen either to go the Slovak National Theatre for a performance of Tchaikovsky's Eugene Onegin or to a typical Slovak restaurant on Koliba Hill with an open fireplace and live gypsy music. After two days in Slovakia we travelled by two buses to Hungary. This was, however, in the pre-Schengen era. We were stopped at the boundary and were not allowed to continue. The 'problem' was that the Vice-President of the Court, Judge Weeramantry from Sri Lanka, was travelling with his Sri Lankan passport and the Hungarian border police did not wish to allow him to enter Hungary despite the fact that he was travelling on an official mission with the principal judicial organ of the UN. Ambassador Szénási

15 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Order of 5 February 1997, 1997 ICJ Reports, p. 3. For more about the site visit, *see* Mohammed Bedjaoui, 'La descente sur les lieux dans la pratique de la Cour internationale et de sa devancière', *in* Gerhard Hafner *et al.* (eds.), *Liber Amicorum of Professor Ignaz Seidl-Hohenveldern*, Kluwer, The Hague, 1998, pp. 1-23; Peter Tomka & Samuel S. Wordsworth, 'The First Site Visit of the International Court of Justice in the Fulfilment of its Judicial Function', *American Journal of International Law*, Vol. 92, Issue 1, 1998, pp. 133-140; Frances Meadows, 'The First Site Visit by the International Court of Justice', *Leiden Journal of International Law*, Vol. 11, Issue 3, 1998, pp. 603-608.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

spent more than one hour on the telephone with Budapest, his blood pressure visibly going up. Finally, somebody in Budapest ordered the border police in Rajka to allow the Court to enter Hungary. This, of course, delayed the whole program for the third day of the "site inspection". The accompanying spouses went to see a monastery in Pannonhalma, while Judges, having been re-seated into several smaller minibuses, went to see the branches of the Danube river and inundation polders. They had also an opportunity to taste local Hungarian cuisine in a small restaurant, Platán Borozó in Dunaremete near Mosonmagyaróvár. We stayed overnight in a hilltop hotel in Visegrád, having the opportunity to admire in the morning the scenery of the area. The Court and the accompanying persons then continued to Budapest. Judge Herczegh was quietly observing the places we had visited. When we entered Budapest, Professor Alexandre-Charles (Károly) Kiss, who studied in Budapest, but then emigrated to France, acted as a sort of 'tour guide', pointing to different historical and cultural monuments. He was visibly emotionally moved when, as we were passing along St. Stephen's Basilica, he talked about the first King of Hungary, Stephen I, and the holy relic of his right-hand displayed in the Basilica. Later that afternoon, Prime Minister Gyula Horn offered a reception in honor of the Court in the majestic Parliament Building, clearly to reciprocate the reception hosted by the Slovak Prime Minister three days earlier in the Primate's Palace in Bratislava.

The case was not an easy one for Judge Herczegh. He disagreed with the majority of the findings of the Court and appended to the Judgment his only – rather long – 28-page dissenting opinion[16] in almost ten years of service in the Peace Palace. He voted seven times against the findings of the Court, once as a lone dissenter, and twice with the majority.

8.6 Judicial Work of Judge Herczegh

Although he spoke both languages of the Court, Judge Herczegh wrote his confidential Notes[17] and occasional declarations and his only dissenting opinion attached to the Court's decisions in French, which he learned in the French Grammar School in Gödöllő.

16 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, 1997 ICJ Reports, pp. 176-203, Dissenting Opinion of Judge Herczegh.

17 Under Article 4 of the Resolution concerning the Internal Judicial Practice of the Court, adopted on 12 April 1976, each judge has to prepare a written note expressing his/her views on a case under deliberation indicating, in particular, his/her tentative views on the factual and legal issues involved in the case and his/her tentative conclusion as to the correct disposal of the case.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

Herczegh joined the Court in the period when its docket started to grow, and its judicial activities intensified. He sat in the period of almost ten years, between 10 May 1993 and 5 February 2003 in 32 cases, 29 contentious matters and 3 advisory proceedings.[18]

In the Court, he was – as his colleague Judge (and later President) Higgins put it – "a voice of moderation", who approached cases "with a totally open mind" and sought "consensus where possible".[19] As she aptly characterized him: "He preferred the identification of common ground to the doctrinal battlefield."[20] He participated in the delivery of twenty judgments, three advisory opinions and eighteen orders on requests for the indication of provisional measures.[21]

This approach is reflected in the fact that he wrote separately rather sporadically. In addition to his already mentioned longer dissenting opinion in the *Gabčíkovo-Nagymaros Project*,[22] Judge Herczegh authored only five short declarations which in total do not exceed 9 pages.

For the first time, after having been in the Court for three years, he "spoke from the Bench" separately in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*. This opinion, requested by the General Assembly of the UN in December 1994, was a challenging issue for the Court. Although the opinion is not particularly long, some forty pages, including seven pages describing the procedural history, it took almost eight months from the closing of the hearing for the Court to deliver its opinion. No doubt the Court was engaged in lengthy internal discussions. The key pronouncement that

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law"

---

18 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, 1996 ICJ Reports, p. 66; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Reports, p. 226 and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, 1999 ICJ Reports, p. 62.

19 Rosalyn Higgins, 'Géza Herczegh – Our Colleague and Friend at the International Court of Justice', *in* Péter Kovács (ed.), *International Law – A Quiet Strength / Le droit international, une force tranquille*, Pázmány Press, Budapest, 2011, pp. 21-22.

20 Id. p. 22.

21 Ten of these orders were rendered by the Court in the *Legality of Use of Force* cases brought by Yugoslavia (Serbia and Montenegro) against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, United Kingdom and the United States.

22 For an analysis of this opinion *see* James Crawford, 'In dubio pro natura: The Dissent of Judge Herczegh', *in* Kovács 2011, pp. 251-269. Professor Crawford (as he then was) acted as lead counsel for Hungary in the *Gabčíkovo-Nagymaros Project* case.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

was adopted only by the President's casting vote,[23] the Court being equally divided (seven to seven).[24] This conclusion was, however, qualified by the Court when it stated:

> "However, in view of the current state of international law, and of the elements of facts at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[25]

Judge Herczegh supported the Court's conclusion. All fourteen Judges sitting in the case[26] attached to the Opinion either a declaration or a separate or dissenting opinion. Judge Herczegh penned a two-page declaration, the second most succinct; only Judge Shi from China was more economical in his style. Judge Herczegh touched on several points. He thought that since, according to Article 9 of the Statute of the Court, the principal legal systems of the world should be represented in the Court

> "[i]t is inevitable […] that differences of theoretical approach will arise between the Members concerning the characteristic features of the system of international law […], the presence or absence of gaps in this system, and the resolution of possible conflicts between its rules."[27]

In his view "[t]he diversity of these conceptions [of international law within the Court] prevented the Court from finding a more complete solution and therefore a more satisfactory result."[28] He was convinced that it was possible to formulate a more specific reply to the General Assembly's request, one less burdened with uncertainty and reticence. He argued that

> "[i]n the fields where certain acts are not totally and universally prohibited 'as such', the application of general principles of law makes it possible to regulate the behaviour of subjects of the international legal order, obliging or authorizing

23 This was the second occasion when the President had to exercise his power of using a casting vote, the first one occurred in 1966 in *South West Africa* cases, *see* 1966 ICJ Reports, p. 51, para. 100.

24 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Reports, p. 226, para. 105(2)E. Those voting in favor were: President Bedjaoui, Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin and Ferrari Bravo. Those voting against were: Vice-President Schwebel, Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins.

25 Id., emphasis added.

26 The fifteenth seat had been vacant following the passing of Judge Andrés Aguilar Mawdsley from Venezuela on 24 October 1995, just six days before the opening of the hearing in the advisory proceedings.

27 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Reports, Declaration of Judge Herczegh, p. 275.

28 Id.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

> them, as the case may be, to act or to refrain from acting in one way or another."[29]

He was convinced that "[t]he fundamental principles of international humanitarian law […] categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons" and that "[i]nternational humanitarian law does not recognize any exceptions to these principles".[30] Next, he doubted the wisdom of the Court's dealing with the question of armed reprisals, as it did so only briefly, thus encouraging "hasty and unjustified interpretations."[31] He further pointed to the role of the General Assembly, under Article 13 of the UN Charter, to encourage progressive development of international law and its codification. He believed that

> "[t]he transformation, by means of codification, of the general principles of law and customary rules into treaty rules might remove some of the weaknesses inherent in customary law and could certainly help to put an end to the [controversies] which led up to the request for an opinion. […] as to the legality or illegality of the threat or use of nuclear weapons, pending complete nuclear disarmament under strict and effective international control."[32]

It may be added that his appeal was followed by the General Assembly which convened in 2017 a negotiation which led, on 7 July 2017, to the adoption of the Treaty on the Prohibition of Nuclear Weapons. It was more of an exercise of progressive development of international law than its codification *stricto sensu*. One has, however, to note, that many States, including all States Members of NATO (except the Netherlands, which was the only country to vote against the adoption of the text of the Treaty[33]), decided not to participate in these negotiations. As long as NATO doctrine is based on nuclear deterrence, it is unlikely that the noble goal of nuclear disarmament supported by Judge Herczegh will be achieved any time soon.

In 1998, Judge Herczegh wrote two declarations in the two almost identical *Lockerbie* cases. In the case which involved Libya and the United Kingdom, he explained in his three-page declaration why he voted against certain parts of the *dispositif* of the Court's Judgment

29 Id., emphasis added. This was a retour for Judge Herczegh to the concept of general principles of law; he wrote many years earlier a monograph entitled *General Principles of Law and the International Legal Order*, Akadémiai, Budapest, 1969, 129 p.

30 Id., Declaration of Judge Herczegh.

31 Id.

32 Id. p. 276.

33 The text of the Treaty was adopted by 122 votes against one (the Netherlands) with one abstention (Singapore).

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

on preliminary objections. In paragraph 2, the Court rejected the United Kingdom's objection to admissibility on the grounds that adoption of Security Council resolutions 748 (1992) and 883 (1993) after the filing of the application rendered Libya's application without object.[34] The Court accordingly found that Libya's application was admissible.[35] The Court's reasoning was based on the proposition that events subsequent to the filing of the application were not relevant to admissibility because admissibility is to be assessed as of the date of filing.[36] Judge Herczegh considered this decision to be overly formalistic.[37] He recalled the Court's judgments in *Northern Cameroons* and *Nuclear Tests*, where the Court did dismiss applications as without object, and characterized the Court's decision in *Lockerbie* as "quite alien to [its] jurisprudence".[38]

The United Kingdom also asked the Court to dismiss Libya's application because, apart from admissibility, the intervening Security Council resolutions rendered Libya's application without object.[39] In paragraph 3 of the operative clause of its judgment, the Court declared that this objection did not have an exclusively preliminary character.[40] Disagreeing with this determination, Judge Herczegh drew a distinction between whether an objection affects the enjoyment of rights and the existence or content of the rights, considering the latter was not affected by the question of whether the rights and obligations of the parties were superseded by the Security Council resolutions rather than still governed by the Montreal Convention.[41] As deciding on the United Kingdom's objection would not require inquiry into the interpretation or application of the Montreal Convention, Judge Herczegh considered it to have a preliminary character.[42] Moreover, and consistently with his view on admissibility, he considered that the Court should have upheld the United Kingdom's objection.[43]

In his declaration in the *Lockerbie* case opposing Libya and the United States, Judge Herczegh referred the reader to the text of his declaration in the case against the United Kingdom.[44] This style in economy provided an example worthy to be followed by some

34 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya *v.* United Kingdom), Preliminary Objections, Judgment of 27 February 1998, 1998 ICJ Reports, p. 30, para. 53(2)(a).
35 Id. para. 52(2)(b).
36 Id. pp. 25-26, paras. 43-44.
37 Id. p. 52, Declaration of Judge Herczegh.
38 Id.
39 Id. para. 46.
40 Id. pp. 30-31, para. 52(3).
41 Id. pp. 52-53.
42 Id.
43 Id. p. 53.
44 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya *v.* United States of America), Preliminary Objections, Judgment of 27 February 1998, 1998 ICJ Reports, Declaration, p. 143.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

Judges who write extensively on multiple occasions on the same issues. In these two cases, he was in fact a dissenter, as he would have dismissed these applications as being without object.

In 2001, Judge Herczegh wrote a one-page declaration in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case. He began by commenting on the difficulty of establishing the delimitation between the continental shelf and EEZ of the parties in view of the facts that relevant maritime features are much larger at low tide than at high tide and that the geographical maps available to the Court were accordingly inconsistent with each other.[45]

Second, Judge Herczegh emphasized the importance of the Court's determination that Bahrain was not entitled to apply the straight baselines method to the Hawar Islands, which were adjudged to belong to Bahrain and are located within a few kilometers of the Qatari west coast.[46] A consequence of this was that the waters around the Hawar Islands are the territorial, rather than internal, waters of Bahrain. Judge Herczegh cited approvingly the Court's specification in point 2(b) of the operative clause of the Judgment that Qatari vessels have a right of innocent passage through this territorial sea under customary international law.[47] This right enables Qatari vessels to navigate along the west coast of Qatar, as the Qatari territorial sea between Qatar and Hawar is too shallow to allow for navigation.[48] Judge Herczegh explained that these statements enabled him to vote in favor of paragraph 6 of the operative part of the judgement,[49] which established the single maritime boundary between the parties.[50]

In *Land and Maritime Boundary between Cameroon and Nigeria*, Judge Herczegh criticized the Court's description of the effect of Article 59 on the rights of Equatorial Guinea and Sao Tome and Principe.[51] In paragraph 238 of its judgment, the Court stated:

> "The Court considers that, in particular in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient. In the present case, Article 59 may not sufficiently protect Equatorial Guinea or Sao Tome and

45 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar *v.* Bahrain), Judgment of 16 March 2001, 2001 ICJ Reports, p. 216.

46 Id.

47 Id.

48 Id.

49 Id.

50 Id. p. 117, para. 252(6).

51 *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *v.* Nigeria: Equatorial Guinea intervening), Judgment of 10 October 2002, 2002 ICJ Reports, p. 472.

This article from Hungarian Yearbook of International Law and European Law is published by Eleven international publishing and made available to anonieme bezoeker

> Principe from the effects – even if only indirect – of a judgment affecting their legal rights."[52]

Judge Herczegh considered this criticism of Article 59 'misplaced'.[53] Rather, he viewed Article 59 as a necessary consequence of the foundation of the Court's jurisdiction on the consent of the parties.[54] The obligation of the Court not to affect the rights of the third states, he recognized, may occasionally pose problems for the Court.[55] This, in his view, explained the inclusion of Article 62 and the possibility of intervention by a third state which considers itself to have a legal interest that may be affected by the Court's decision.[56] He explained that it is for the Court to interpret and apply Article 59 in order to make the protection of third states' rights as effective as possible.[57] Accordingly, Judge Herczegh argued that the quoted texts was an unnecessary remark in the judgment.[58] This two-page declaration was his last piece written separately as Judge of the Court.

Judge Herczegh was a quiet and collegial man who was guided by the interests of the Court, not by promoting his own status. For him, a judgment of the Court was, as his colleague President Guillaume wrote, *"l'œuvre collective des membres de la Cour."*[59] He served on several drafting committees[60] entrusted with the preparation of draft judgments and opinions. As President Higgins notes "his reputation as a perfectionist as regards the accuracy of facts and the law, made him a natural choice."[61]

For his diligent work for almost ten years as Judge of the ICJ Géza Herczegh fully deserves a place in the history of international adjudication.

52 Id. p. 421, para. 238.
53 Id. p. 473.
54 Id. p. 472.
55 Id.
56 Id.
57 Id.
58 Id.
59 Gilbert Guillaume, 'Géza Herczegh – juge à la Cour internationale de Justice', *in* Kovács 2011, p. 17.
60 A drafting committee usually consists of three Members of the Court. They are elected by a secret ballot at the end of Article 5 deliberation. The President of the Court, if he is part of the majority, chairs *ex officio* the drafting committee. The composition of the committee remains confidential.
61 Higgins 2011, p. 22.