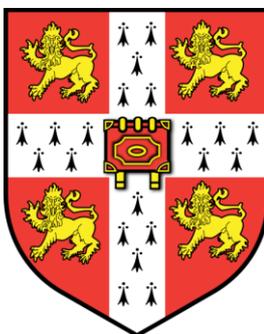


CAUSATION IN THE LAW OF STATE RESPONSIBILITY

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To my parents.

Preface

This dissertation contains the result of my research undertaken at the Faculty of Law of the University of Cambridge in pursuance of the degree of Doctor of Philosophy. This research would not have been possible without the support of the W. M. Tapp Studentship of Gonville & Caius College and the Cambridge Home and EU Scholarship Scheme. I am very grateful for the indispensable help I received from these funding bodies.

Dr Michael Waibel supervised my research during the years leading up to the completion of this thesis. His constant availability, flexibility, openness and the always thought-provoking supervision meetings with him were far more than any research student could ever wish for. I am wholly indebted for his relentless support and for his trust in my project from the beginning. His supervision was not only a *conditio sine qua non*, but literally the *causa proxima* of the completion of my project on causation. I recall expecting high supervision standards upon my arrival to Cambridge in 2013, but working with Michael surpassed them all, by far.

Professor Zachary Douglas and Professor André Nollkaemper kindly agreed to examine this thesis. I am greatly thankful for the opportunity to engage with two distinguished scholars of State responsibility, for their invaluable comments, highly needed criticism, and the time they dedicated to the close and very detailed scrutiny of my work.

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In the age of multidisciplinary research, consulting only fellow lawyers falls short of the expected course of conduct. I was lucky to have a truly extraordinary economist by my side during the years of my research. However, to Judit I am not only indebted for her stellar analytical mindset, dissecting my text mercilessly on a regular basis, but more importantly for her wonderful presence in my life.

I dedicate this thesis to my parents. It is an exorbitant understatement to say that I am blessed with the best parents of the world. The past and the forthcoming decades have been and will be insufficient to thank you enough times for everything you do for me. Dedicating this thesis to you is only a minor contribution I can offer. Köszönöm.

I consulted international conventions, case law, various codification projects of customary international law and academic contributions in preparing the present dissertation. I hereby declare that unless otherwise indicated, the arguments and conclusions presented below are my own, just as are any mistakes remaining therein.

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of

Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length.

Dávid M Pusztai

Causation in the law of State responsibility

Abstract

Causation has, at the very minimum, two functions in legal responsibility regimes. First, there is no responsibility without a conduct with causal consequences, making causation a condition of responsibility. Second, causation determines and delimits the extent of liability.

The first claim of this study is that the decision of the International Law Commission to construct a responsibility regime unconditional on damage did not result in the exclusion of causation from the conditions of responsibility. There are at least two signs demonstrating that the attempt to exclude responsibility-grounding causation from State responsibility did not hold ground in practice. *First*, there is abundant case law pre- and postdating the codification of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), confirming that responsibility-grounding causation exists in international law. *Second*, notwithstanding the denial of ARSIWA and its commentaries, reading between the lines reveals that several concepts of State responsibility are of a causal nature and their application inevitably implies a causal inquiry.

There are two interrelated explanations for this. *First*, at the heart of the system of State responsibility lies the concept of the ‘internationally wrongful act’. I argue that the law of State responsibility lacks a coherent action theory. In particular, a causal theory of action would explain several anomalies visible in the case law. The *second* explanation rests on approaching causation in the law of international responsibility as a general principle of law. The prevailing view in the case law and the academic contributions is that causation and, more specifically, certain standards of causation are general principles of law. In making the second claim of this thesis, I will argue that this is only partially true. Causation is a general principle in as much as the *existence* of a causal link is a condition of responsibility and one possible condition of delimiting liability. ARSIWA therefore runs contrary to this general principle. However, the authorities arguing for a specific test of causation, be it directness, proximity, foreseeability or other tests, do not have a substantial basis to do so.

What remains, as an empirical and inductive method in line with Article 38 (1) d) of the ICJ Statute, is to distil the actual practice of international courts and tribunals. My third claim is that there is merit in this exercise and it is possible to identify recurring solutions to recurring problems of causation. This study is the second one to conduct this survey and analysis of the case law, following the footsteps of Brigitte Stern, updating and complementing her otherwise exhaustive and authoritative text on the subject. The thesis concludes with a list of the distilled principles and postulates on respective problems of causation, in particular on the applicability and the limits of the ‘but for’ test, the applicable standard of remoteness, multiple causation and contributory negligence.

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Introduction and method

Causation is a complex and intricate problem in philosophy, science and social sciences alike.¹ It is a concept of paramount importance in allocating and delimiting legal responsibility.² If law lacks a doctrine of causation, it is unable to determine the consequences of illegal actions and omissions. Without the concept of causation, the remedial function of law might collapse. Yet, given its complexities, causation has been troubling legal scholarship and practice for centuries.³ Very often even the proposition that there is a law of causation is put in question and determinations on causality are labelled policy or value judgments.⁴

International law is no exception. The law of international responsibility, despite all its complexities, successfully reached a crystallization point after the completion of the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA').⁵ ARSIWA set out the rules governing the consequences of illegal State actions and omissions and it became one of the most important authoritative texts in international law. Although it achieved considerable success in clarifying and resolving a great number of difficult conceptual problems, ARSIWA does not include secondary rules on causation. The Commentary to ARSIWA admits that the International Law Commission (ILC) saw no merit in coming up with a single formula on causation and echoes that policy determinations should form the basis of determinations of causation.⁶

¹ D Hume, *Enquiries concerning Human Understanding and Concerning the Principles of Morals* (1751); B Russell, 'On the Notion of Cause', (1912-1913) 13 *Proceedings of the Aristotelian Society* 1; J Mackie, *The Cement of the Universe: a Study of Causation* (1974); C R Hitchcock, 'Causation: Philosophy of Science' in D Borcher (ed), *The Encyclopedia of Philosophy. Vol II* (2006) 103.

² L Green, *The Rationale of Proximate Cause* (1927), at 132; R W Wright – I Puppe, 'Causation: Linguistic, Philosophical, Legal and Economic', (2016) 91 *Chicago-Kent Law Review* 461 ['Wright – Puppe'], at 461.

³ J Stapleton, 'Choosing What We Mean by Causation in the Law', (2008) 73 *Missouri Law Review* 433, at 455-480.

⁴ H L A Hart – T Honoré, *Causation in the Law* (2nd ed) (1985), at 102 ['Hart – Honoré']; S Alexandrov – J Robbins, 'Proximate Causation in International Investment Disputes' in K Sauvart (ed), *Yearbook of International Investment Law and Policy 2008/2009* (2009) 317, at 319.

⁵ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *ILC Ybk* (2001)/II 31 ['ARSIWA Commentaries'].

⁶ ARSIWA Commentaries, Commentary to Article 31, para. 10.

The contribution of international legal scholarship was equally limited, especially in comparison with the attention the topic received from tort lawyers or criminal lawyers. As one commentator aptly puts it, causation is “at the vanishing point” in the literature.⁷ There has only been a single treatise aiming at a comprehensive treatment of the subject: Professor Brigitte Stern’s doctoral dissertation, *Le préjudice dans la théorie de la responsabilité internationale*.⁸ In addition to Stern’s book, a small number of authors contributed with sporadic articles and chapters to the topic and they did so mainly in the first half of the 20th century.⁹

This study aims to fill, at least partially, this lacuna. Its discussion of international case law shows that legal practice is encountering recurring difficulties when faced with complex questions of causation.

First, the practitioner is often unsure *when* to ask the question of causation. Is it the first question for an international lawyer to ask when an injury occurs? Or the last question to address when a breach of international law is in contention? Should causation always be examined or only in specific cases? *Second*, even if this first problem is overcome, the international lawyer often still hesitates *how* to solve the issue of causation in front of her. Is there a causal nexus between the conduct of the State and the injury despite a number of intervening events? Is there a causal nexus between the contribution of the State to an event

⁷ V Tumonis, ‘The Complications of Conciliatory Judicial Reasoning: Causation Standards and Underlying Policies of State Responsibility’, (2011) 11 *Baltic Y B Int’l L* 135 [‘Tumonis’], at 137.

⁸ B Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973) [‘Stern’].

⁹ H Yntema, ‘Treaties with Germany and Compensation for War Damage’, (1924) 24 *Colum LR* 134; A Hauriou, ‘Les dommages indirects dans les arbitrages internationaux’, (1924) 31 *RGDIP* 203; G Salvioli, ‘La responsabilité des états et la fixation des dommages et intérêts par les tribunaux internationaux’, (1929) 28 *Recueil des Cours* 231; J Personnaz, *La réparation du préjudice en droit international public* (1938); J G De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* (1939), at 230 *et seqq*; M M Whiteman, *Damages In International Law* (Vol 3, 1943) [‘Whiteman’], 1765 *et seqq*; B Cheng, *General Principles of Law as Applied by international Courts and Tribunals* (Grotius reprint, 1987) [‘Cheng’], 241 *et seqq*; M Straus, ‘Causation as an element of State responsibility’, (1984) 16 *Law & Pol’y Int’l Bus.* 893; T Becker, *Terrorism and the State. Rethinking the Rules of State Responsibility* (2006) [‘Becker’]; Tumonis; J Crawford, *State Responsibility: the General Part* (2013), at 492-503 [‘Crawford 2013’]; L Castellanos-Jankiewicz, ‘Causation and International State Responsibility’, (2012) *ACIL Research Paper No. 2012-07* (SHARES Series); P d’Argent, ‘Reparation, Cessation, Assurances and Guarantees of Non-Repetition’, in A Nollkaemper and I Plakokefalos, *Principles of Shared Responsibility in International Law* (2014) 208, at 222-232; I Plakokefalos, ‘Causation in the Law of State Responsibility and the Problem of Overdetermination: in Search of Clarity’, (2015) 26 *EJIL* 471 [‘Plakokefalos’].

that, in all likelihood, would have happened anyway due to other factors? The “*when*” and the “*how*” are equally difficult unresolved questions and they are thus in the focus of this study.

There are two main questions guiding the inquiry:

- i. What is the systemic role and function of causation in the law of international responsibility?
- ii. What is the substantive threshold of causation determining whether a certain event is a causal consequence of an internationally wrongful act?

These are doctrinal questions aiming at the *de lege lata* analysis of the law and the restatement of the applicable principles. They are not asking what *should* be the international law of causation and they are not adopting a legal policy angle to analyse causation. The reason of this choice is that, currently, international legal scholarship does not even have a nuanced understanding of the law. It is therefore an inevitable first step to unearth the actual contours of the practice. Not rejecting the utility of a policy oriented research of causation, the primary objective is to state the law in the first place. These questions are prerequisites of any further research concerning causation in the law of international responsibility.

A further methodological starting point is that this study takes the framework of ARSIWA for granted. There are efforts in legal academia to move beyond this framework and several authors promote a paradigm shift.¹⁰ It is a welcome development, because ARSIWA does not even claim to offer a solution for all issues surrounding State responsibility.¹¹ At the same time, it would be artificial for any study on international responsibility to simply start from scratch and to question the work of the ILC at the outset. States turn to ARSIWA, courts and tribunals turn to ARSIWA, practitioners use ARSIWA. Counsel in the hope of making a persuasive argument on State responsibility invoke ARSIWA as the alpha and omega of their pleadings. Legal academics might be inclined to question the corpus itself, but this study does not. It highlights problems with ARSIWA and it expressly aims to make up for some of its shortcomings. But it does accept the paradigm it provides for the system of international responsibility.

¹⁰ A Nollkaemper – D Jacobs, ‘Shared Responsibility in International Law: a Conceptual Framework’, (2013) 34 *MIJIL* 359.

¹¹ ARSIWA, Article 56.

This study follows the “inductive method” of international law advocated by Schwarzenberger.¹² This inductive method rests on the collection and the survey of the case law. The sporadic discussions of causation in academic literature (such as works by Whiteman, Cheng or Stern cited above) followed this method and their results visibly influenced subsequent practice. It is impossible to provide any meaningful discussion of causation without first updating and complementing the wealth of legal raw material gathered in these works.

The assumption that case law will reveal the most about causation is not self-explanatory. Why not treaty practice or State practice? This research could not identify any treaty setting out substantive solutions to the “when” and the “how” problems introduced above. Treaties covering issues of reparations do not dedicate detailed provisions to matters of causation. For example, the Convention on International Liability for Damage Caused by State Objects of 1972, containing a detailed set of rules on compensable damages, merely refers to the rules of international law concerning causation.¹³ At best, they put a temporal limitation on the covered scope of damages.¹⁴ The *travaux* of international instruments purportedly dedicated to reparations are equally unhelpful.¹⁵ No “*opinio iuris*” or “State practice” manifested itself specifically regarding causation in the comments and submissions of States leading up to ARSIWA.¹⁶ Argentina criticised the draft for failing to account for causation, the United Kingdom stressed that the “complex question of causation” should not be addressed in the Articles, but beyond such remarks States took no position on the matter.¹⁷

Causation comes to the forefront when an illegal conduct is in contention. Authoritative statements of the law are likely in such situations either on behalf of the interested parties or

¹² G Schwarzenberger, *The Inductive Approach to International Law* (1965).

¹³ Convention on International Liability for Damage Caused by State Objects of 1972, 961 UNTS 187, Article XII.

¹⁴ See the discussion of peace treaty provisions in P d’Argent, *Le réparations de guerre en droit international public: la responsabilité internationale des États à l’épreuve de la guerre* (2002) [‘d’Argent’], at 646-648.

¹⁵ See e.g., the Final report submitted by Mr. Theo van Boven, Special Rapporteur, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms” (E/CN.4/Sub.2/1993/8, 2 July 1993) to the UN Commission on Human Rights (paras. 40-49), eventually culminating in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 of 16 December 2005, and the exchange of views by States (General Assembly, Summary records of meetings Nos. 22, 29, 37 and 39 held in the Third Committee from 24 October to 10 November 2005 (A/C.3/60/SR.22, A/C.3/60/SR.29, A/C.3/60/SR.37 and A/C.3/60/SR.39).

¹⁶ Comments and observations received from Governments, Doc A/CN.4/488 and Add. 1–3, at 144-148.

¹⁷ Comments and observations received from Governments, Doc A/CN.4/515 and Add.1–3, at 58.

on behalf the dispute settlement body. Agreed settlements might crystallize some principles important for State responsibility, but they will not reveal much about the details of individual causality problems. From a text of a lump sum settlement, it would be impossible to discern whether an agreed amount confirms a causal nexus between wrong and damage. The International Court of Justice (ICJ) confirmed the limited impact of such settlements on customary international law in *Barcelona Traction*.¹⁸ Case law, in as much as it purportedly reflects general rules of State responsibility, will be more revealing.

Chapter I discusses the systemic role and function of causation in international law and starts by setting out the position of ARSIWA. ARSIWA and its commentaries retained a limited role for causation and excluded it from the constitutive conditions of international responsibility. Chapter I contrasts this framework with the actual practice of international courts and arbitral tribunals to demonstrate that the case law pre- and postdating ARSIWA suggests that causation has some role to play as a condition of responsibility. With this empirical observation as a background, recourse will be made to comparative legal scholarship and legal theory to understand why causation appears to be an indispensable responsibility-grounding concept. The inductive method has to be combined at this stage with a comparative legal method, because ARSIWA's core building blocks (such as the notion of 'wrongful act' or 'attribution') are not *sui generis* concepts, but they root in a common tradition of legal thinking.

Hence, the outlook to this legal tradition and to the reflections of jurisprudence is useful in **Chapter II**. The chapter draws on the works of legal philosophers engaged with action theory to argue that the law of international responsibility lacks a developed theory of action. Most of the conceptual problems surrounding causation and its relationship with attribution stem from the missing theoretical foundation for the concept of the 'internationally wrongful act' itself. A 'causal theory of action' is proposed to address this deficiency.

There is a further reason warranting a comparative legal approach. Causation is invoked, in the case law and in the literature alike, as a 'general principle of law'.¹⁹ The assumption of such statements is that principles common to the legal systems of the world are used and applied

¹⁸ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, 3, at 40*. For a critical comment defending the significance of treaty practice see R Lillich – B Watson, *International Claims: Their Settlement by Lump Sum Agreements* (1975), at 43.

¹⁹ See references *infra*, at 94-96.

when difficult questions of causation arise. **Chapter III** assesses the claim that causation is a general principle of law and attempts to discern, on the basis of comparative legal scholarship, the similar or at least analogous solutions offered by some of the main legal systems to recurring problems of causation. In addition, Chapter III looks at the main schools of legal thought addressing the universally prevalent problems of causation.

Chapters IV and V discuss the substantive law of causation in the context of remedies. ARSIWA defined the requirement of causation as a condition of the duty to provide reparation, but it does not provide any substantive guidance on specific problems of causation. Chapter IV restates the principles applicable to determine whether a legally relevant causal link connects the internationally wrongful act with a given injury. Chapter V turns to more difficult scenarios of multiple causation and contributory negligence. The aim of these chapters is to distil the principles applied in the case law. The assumption underlying this research was that there is merit in looking for commonalities in the practice of international courts and tribunals.

The scope of the survey is limited to three branches of international law: international investment law, international human rights law and certain mass claims settlements. These are frequently litigated areas of law and their contribution to the case law is significant.²⁰ It is customary to start the discussion of State responsibility from “the old cases” and the “founding fathers”. However, this thesis intends to depart from this tradition. The case law predating the 1970’s is reassessed only to a limited extent, to contrast them with recent developments. This restriction on the scope of the inquiry is warranted not only by space constraints, but also because Professor Brigitte Stern has authoritatively collected and analysed the earlier cases. Her conclusions will often form the basis of the substantive discussion, but there would have been no merit in merely replicating her comprehensive work and reciting the cases covered therein. The objective of the present project is rather to provide a more up to date account.

Chapters IV and V, again, combine an inductive and deductive method in the analysis. The chapters are inductive and empirical in the sense that they analyse the case law to derive abstract and generally applicable principles. At the same time, they are deductive and dogmatic in the sense that the doctrines and concepts followed in the case law have their roots in domestic

²⁰ On the question whether this jurisprudence could, in principle, develop the general rules of State responsibility, see the introduction to Chapter IV.

legal traditions and their established inherent logic. For example, the problems concerning ‘but for’ causation are not unique to international law. They might arise in international law in an unprecedented context, but the problems themselves are not novel. The analysis of the practice will be deductive in that the applications of these principles are scrutinized with their origins in mind. This methodology will reveal the ways in which international courts and tribunals, apply, misapply or alter these concepts for the purposes of international law. The Conclusion completes the thesis with a taxonomy of postulates on the substantive problems of causation.

Before embarking on the substantial discussion, a further disclaimer is necessary. Chapters IV and V, discussing the function of causation in the context of reparation, address *only* causation. They do not engage with damages in general, quantification of damages or distinctions between various types of injuries. These chapters assume that a certain event is already qualified as an injury, loss or damage and they thus focus on a subsequent question: whether such an injury, loss or damage is a causal consequence of an internationally wrongful act. Certainly, in some cases causation and the identification of an injury are very difficult to conceptually separate. For example, it is often not possible determine whether a loss of revenue occurred without assessing simultaneously what revenues would have been possible “but for” an internationally wrongful act. Much depends on what an injured party wishes to identify as a head of damage, and this choice might have implications on the subsequent question of causation. Therefore, it is inevitable to touch on these closely related issues of damages to a certain extent.

This thesis, in addition to providing a comprehensive theoretical treatment of causation in the law of State responsibility, reflecting on most recent practice, aims to function as a useful guide for the practitioner too. At the same time, it does not offer a singular formula to tackle the “*when*” and the “*how*”. These issues trouble all legal systems despite their lengthy history of codification, adjudication and scholarship. The law of causation in international law is primitive and will remain primitive for many years to come. However, there is solid ground to be optimistic. A critical mass of research has provided the foundation for clarifying many, similarly problematic aspects of the law of international responsibility, such as circumstances precluding wrongfulness or the consequences of the wrongful act. This work was written in the hope to be an ingredient necessary for an eventually forthcoming crystallization of the international law of causation.

Chapter I

State responsibility without causation

1. Introduction

This chapter discusses the systemic role and function of causation in the law of State responsibility. The question is whether causation, in addition to its uncontroversial role in the law of reparations, has a responsibility-grounding function in international law. This chapter scrutinizes the solution ARSIWA offers to this question, i.e., ARSIWA's answer to the “*when*” problem: when, at which stage is it appropriate to conduct a causation analysis in assessing a claim of State responsibility? Is causation relevant at all before we turn to reparations?

First, the chapter briefly describes the exclusion of causation from the constitutive elements of State responsibility in the ARSIWA framework.

Second, the chapter demonstrates that this solution did not hold ground in practice, because the concept of attribution tends to be conflated with causation. It is not clear whether the case law supports causation-based attribution or causation emerges as a substitute of attribution, but causation certainly appears to be a responsibility-triggering condition in several cases. Most of these cases question the prevalence of the ARSIWA Article 8 attribution test, i.e., the test of ‘effective control’.

Third, confronted with the foregoing observations, the chapter revisits the authorities predating the decision to codify causation-free rules of attribution. The chapter argues that the causation-free attribution rules are at odds with the case law predating the codification of ARSIWA. The authorities cited in support of ARSIWA Article 8 do not actually support the substance of the rule. At the same time, there is considerable support in the early cases for causation, as a responsibility-grounding concept. Chapter II will then turn to the theoretical explanation for these developments and a possible reconciliation of the practice with ARSIWA.

2. Constructing responsibility without causation

Causation has, at the very minimum, two functions in legal responsibility systems. *First*, causation is one of the triggering conditions of responsibility. *Second*, causation delimits the extent of liability and distinguishes compensable consequences from non-compensable ones.²¹ Although this duality is virtually universal,²² it was German legal literature that designed specific labels to these concepts: *haftungsbegründende Kausalität* stands for responsibility-grounding causation, whereas *haftungsausfüllende Kausalität* points to liability-delimiting causation.

International law appears to be an exception. The law of international responsibility, as systematized and codified in the Articles on the Responsibility of States for Internationally Wrongful Acts and the Articles on the Responsibility of International Organizations ('ARIO'), dispenses with the notion of *haftungsbegründende Kausalität*, at least as a transsubstantive secondary rule. Causation retains merely its *haftungsausfüllende* function.

The ILC introduced the distinction of primary and secondary norms as a general structure limiting the scope of its mandate concerning the codification of the law of State responsibility.²³ The distinction informed the work of the Commission on causation too. The Commission choose to discard "damage" as a condition of State responsibility.²⁴ Whether the occurrence of an injury or damages was a condition of breach was said to be a matter for primary rules and, in any event, the violation of international legal rules *per se* was regarded as the causation of injury.²⁵ The implication of this determination was that causation fell to be the matter for primary rules too. If damage is not a condition of responsibility as a default rule of State responsibility, as the ILC determined, causation of such damage could not be a condition either.

²¹ Hart – Honoré, at 84-85; S Steel, *Proof of Causation in Tort Law* (2015), at 35. This is not to say that there cannot be liability unconditional on causation (such as vicarious liability), nor that other concepts are not equally relevant for the same purposes (such as the fault of the wrongdoer).

²² Cf E Matsumoto, 'Tort Law in Japan' in M Bussani – A J Sebok, *Comparative Tort Law: Global Perspectives* (2015) 359, at 369; A B bin Mohamad, 'Islamic Tort Law' in M Bussani – A J Sebok, *Comparative Tort Law: Global Perspectives* (2015) 441, at 445-456, 461.

²³ B Graefrath, 'Responsibility and damages caused: relationship between responsibility and damages', (1984) 185 *Recueil des Cours* 9, at 20-21.

²⁴ Crawford 2013, at 54-60.

²⁵ *Id.*

As we shall see below, this not necessarily so. *Haftungsbegründende Kausalität* does not inevitably imply the occurrence of damages, merely of *results*. According to the framework of ARSIWA, the only remaining conditions of responsibility are (i) a conduct contrary to an international obligation of the State that is (ii) attributable to the State. The assumption of ARSIWA is that causation could be a requirement under the “international obligation” rubric of this scheme, but it does not influence otherwise the abstract conditions of State responsibility.

In any event, the significance of causality was therefore confined to the *consequences* of responsibility (*haftungsausfüllende Kausalität*). Even in that context, the ILC reinforced the decisive role of the underlying primary obligation: “In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.”²⁶

Judge Crawford explains the position of the Commission in further details as follows: “As with national law, it seems likely that different tests for remoteness may be appropriate for different obligations or in different contexts, having regard to the interests sought to be protected by the primary rule.”²⁷ Brownlie agreed: “There is an intrinsic connection between the particular rules of substantive law and the mode which is to govern problems of remoteness and measure of damages.”²⁸

Accordingly, the ILC appears to have considered the causal inquiry mainly in the context of reparations and it attributed a significant, if not exclusive relevance to the content of the primary norm of international law in question and to the context of the application of the particular primary norm. At the same time, reference to causation appears in the commentaries to the rules on attribution²⁹ and in the context of responsibility of a State in connection with the act of another State.³⁰

²⁶ ARSIWA Commentaries, at 93, commentary to Art 31, para 10.

²⁷ J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (2002), at 31. In the same vein see recently Crawford 2013, at 493 *et seqq.*

²⁸ I Brownlie, *System of the Law of Nations. State responsibility. Part I* (1983) [‘Brownlie’], at 224.

²⁹ “The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality.” ARSIWA Commentaries, at 38-39, commentary to Attribution of Conduct to a State, para 4.

³⁰ “Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of

Stern claims that the ILC's work did in fact depart from the state of customary international law at the beginning of its work and not only codified but effectively intended to alter the law of State responsibility, including its core structure. She explains: "It is common knowledge that international responsibility was traditionally founded on three pillars: an internationally wrongful act, injury and a causal link between the two."³¹ Barboza identifies the same three pillars: "In the classic treatment of the subject, there were, however, three pillars of State responsibility, [...] the wrongful act of the State; the injury; and the causality relation between them. The causality relation being a mere bridge, the other two were the remaining substantive elements."³²

It is indeed difficult to identify what international law meant by State responsibility before. For instance, in Cheng's classic treatise on general principles we read: "It will be seen that the commission of an act in violation of law gives rise to immediate responsibility, involving a legal obligation to make reparation for all the prejudicial consequences caused to others by the act. This is the proper meaning of responsibility in law."³³ Thus, according to Cheng, although causation is not a *condition* of responsibility, it gives meaning to the *content* of responsibility. What responsibility meant for him was a duty to repair the injury caused, a duty obviously depending on and delimited by causality. Similar understanding of causation is mirrored in the work of Guggenheim. For him, causation works as a concept delimiting the content of responsibility.³⁴ On the other hand, other commentators agree with Stern and Barboza and even suggest that the ILC did not conduct a proper examination of contemporary international case law.³⁵

the assisting, directing or coercing State." ARSIWA Commentaries, at 65, commentary to the chapter on the Responsibility of a State in connection with the act of another State, para 8.

³¹ B Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', in M Ragazzi (ed), *International Responsibility today: Essays in Memory of Oscar Schachter* (2005) 93, at 94.

³² J Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility', in M Ragazzi (ed), *International Responsibility today: Essays in Memory of Oscar Schachter* (2005), at 7.

³³ Cheng, at 166.

³⁴ "Wie im Landesrecht zwischen dem verursachenden Ereignis und dem Eintritt des Schadens die Beziehung von Ursache und Wirkung bestehen muss, nämlich das sogenannte Kausalzusammenhang, so stellt sich das gleiche Problem auch in Völkerrecht. Die Haftung des Subjekts, dem die Verletzung zugerechnet wird, bedarf nämlich einer Begrenzung." P Guggenheim, *Lehrbuch des Völkerrechts, unter Berücksichtigung der internationalen und schweizerischen Praxis* (1951), Bd II, at 573-574.

³⁵ See e.g. M Straus, 'Causation as an element of State responsibility', (1984) 16 *Law & Pol'y Int'l Bus.* 893.

One consequence of this decision was that the International Law Commission had to separate the topic of damages caused by *lawful* activities from the question of State responsibility.³⁶ Since damage was not a condition of State responsibility any more, the rules of State responsibility addressed only *unlawfully caused damages*, while harm caused by lawful activities *per se* became the study of the “international liability” project. International liability was thus meant to be liability solely on the basis of “causation”, in the absence of wrongfulness. This distinction between responsibility and liability became heavily criticized and Brownlie wrote that it was “fundamentally misconceived”.³⁷ Brownlie’s view was that in such cases it is the primary obligation, which provides that *harm* renders the conduct illegal. Despite these critical voices, the Commission’s work on international liability continued for several years and eventually resulted in two elaborate set of draft articles on primary duties of prevention and principles of civil liability.³⁸

This chapter argues that notwithstanding the attempt of the International Law Commission to exclude causation from the conditions of State responsibility, attribution of conduct is often coloured by causal inquires in the practice of international courts and tribunals.

The attribution of private conduct to the State is an evergreen topic in the law of State responsibility. In particular, the notorious test of ‘effective control’ has been dividing courts, tribunals and commentators for the last three decades. Ever since its introduction by the International Court of Justice in *Nicaragua*, the test has been widely discussed and debated.³⁹ The increasing involvement of private entities in activities traditionally exercised by States has

³⁶ R Higgins, *Problems and Process: International Law and How We Use It* (2000), at 164-165; A Boyle, ‘Liability for Injurious Consequences of Acts Not Prohibited by International Law’ in J Crawford *et al* (eds), *The Law of International Responsibility* (2010) 95; UNGA Resolution 3071 (XXVIII).

³⁷ Brownlie, at 49-50.

³⁸ Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., UN Doc. A/56/10, 146-70 (Dec. 12, 2001); Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, Report of the ILC, 58th Session, 2006, A/61/10, 101–182.

³⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, ICJ Rep 1986, 14 [*‘Nicaragua’*], at 65-65, para. 115. For some of the academic reactions see in particular A 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’ (2001) 76 *BYBIL* 255 [*‘de Hoogh’*]; A Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, (2007) 18 *EJIL* 649 [*‘Cassese’*]; S Talmon, ‘The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities’, (2009) *University of Oxford Legal Research Paper Series*, Paper No 16/2009 [Talmon].

further reinforced interest in the topic.⁴⁰ Activities of private military contractors⁴¹, the conduct of public and private enterprises *vis-à-vis* foreigners,⁴² cyber-attacks⁴³ and international terrorism⁴⁴ are usually identified as the primary challenges for the law of attribution. The rules of attributing private conduct to the State under the effective control test pose a high threshold, which, the argument goes, makes it practically impossible to establish State responsibility in most cases.⁴⁵

This chapter does not subscribe to any sides in the discussion whether ‘under-attribution’ is a problem from a legal policy point of view. It does, however, demonstrate that there is a clearly observable pattern in the practice of some international courts and tribunals (mainly, but not exclusively investment tribunals), slowly, but certainly departing from the strict approach of the ICJ. In loosening up the effective control test, these cases are the first steps towards a causation-based reconsideration of State responsibility.

The chapter first scrutinizes the case law of international investment tribunals to demonstrate how arbitrators increasingly frame and apply the test of attribution by conducting a causality analysis. Although less systematically, traces of such an approach are identifiable in the

⁴⁰ R Wolfrum, ‘State Responsibility for Private Actors: an Old Problem of Renewed Relevance’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 423.

⁴¹ H Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (2011), 80; L Cameron and V Chetail, *Privatizing War. Private Military and Security Companies under Public International Law* (2013), 134.

⁴² N Gallus, ‘State Enterprises as Organs of State and BIT Claims’, (2006) 7 *Journal of World Investment & Trade* 761; R McCorquodale and P Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’, (2007) 70 *MLR* 598; M Feit, ‘Responsibility of the State under International Law for the Breach of Contract Committed by a State-Owned Entity’, (2010) 28 *Berkeley Journal of International Law* 142; V Tzevelekos, ‘In Search of Alternative Solutions: Can the State of Origin be Held Internationally Responsible for Investors’ Human Rights Abuses which are not Attributable to it?’ (2010) 35 *Brooklyn Journal of International Law* 155; A Badia, *Piercing the Veil of State Enterprises in International Arbitration* (2014).

⁴³ J Kulesza, ‘State Responsibility for Cyber-Attacks on International Peace and Security’ (2009) 29 *PYBIL* 139; S J Shackelford and R B Andres, ‘State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem’, (2011) 42 *Georgetown Journal of International Law* 971; P Margulies, ‘Sovereignty and Cyber Attacks: Technology’s Challenge to the Law of State Responsibility’, (2013) 14 *Melbourne Journal of International Law* 496.

⁴⁴ Becker; R P Barnidge, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (2008); K Mohan, ‘Terrorism and Asymmetric Warfare: State Responsibility for the acts of Non-State Entities –Nicaragua, Tadic, and Beyond’, (2008) 8 *JIIIS* 211; V-J Proulx, *Transnational Terrorism and State Accountability. A New Theory of Prevention* (2012).

⁴⁵ *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award of 6 November 2008, para. 173. The Award describes the test as a “very demanding” one.

practice of other courts and tribunals too. Second, the recent trends are compared and contrasted with the pre-*Nicaragua* rules of attribution. In light of the early arbitral jurisprudence, it emerges that the approach taken in recent cases is not novel at all. The effective control test had very questionable grounds in judicial and arbitral practice before *Nicaragua* and the most recent reconsideration of the test is in line with the earlier cases.

3. 'Effective control' or causal connection?

3.1 The 'effective control' test

The rules of attribution determine what qualifies as an act of State for the purposes of State responsibility.⁴⁶ Robert Ago, the ILC's second Rapporteur in its colossal codification project of State responsibility, described attribution as a 'legal connecting operation', a necessary legal instrument due to the State's inherent incapability to act as a physical person.⁴⁷ The customary international law of attribution is codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO).⁴⁸

The default rule is that the conduct of private actors is not attributable to the State.⁴⁹ Article 8 ARSIWA codifies a notable exception:

⁴⁶ ARSIWA Commentaries. The question does not arise solely with State responsibility. Other branches of international law have their respective rules on attribution too. L Condorelli and C Kress, 'The Rules of Attribution: General Considerations', in J Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 221, at 222-223; Y Cheng, 'Attribution, Causation and Responsibility of International Organizations', in D Sarooshi (ed), *Remedies and Responsibility for the Actions of International Organizations* (2014) 39 ['Y Cheng'], at 49-52.

⁴⁷ Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur — The internationally wrongful act of the State, source of international responsibility, *ILC Ybk* (1971)/II, 199, at 217-218.

⁴⁸ International Law Commission's Articles on the Responsibility of International Organizations, 2011 G.A. Res. 66/100, Annex, U.N. Doc. A/RES/66/100/Annex (hereinafter ARIO).

⁴⁹ ARSIWA Commentaries, at 38; O de Frouville, 'Attribution of Conduct to the State: Private Individuals', in J Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 257 ['de Frouville'], at 261-263.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.⁵⁰

In *Bosnia Genocide*, the ICJ equated this test with the test of ‘effective control’, originally introduced in *Nicaragua*.⁵¹ The high evidentiary threshold of the test is apparent from the words of the Court:

First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.⁵²

Hence, what the test requires is specific direction or instruction regarding the particular operation during which the act complained of took place or the actual exercise of effective control *in concreto* (without specifying how exactly such an exercise is conceivable other than by instructions or direction). In terms of evidence, this will typically necessitate the production of documents or any record verifying the existence and receipt of such instructions or orders.⁵³

‘Effective control’ is also a test of attribution under the ARIIO, in a different context:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.⁵⁴

⁵⁰ ARSIWA, Article 8.

⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, ICJ Rep 2007, 43 [‘*Bosnia Genocide*’], at 207-208, paras. 398-399.

⁵² *Id.*, para. 400.

⁵³ L Schicho, ‘Attribution and State Entities: Diverging Approaches in Investment Arbitration’, (2011) 12 *Journal of World Investment & Trade* 283 [‘Schicho’], at 288; K E Boon, ‘Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines’, (2014) 15 *Melbourne Journal of International Law* 330 [‘Boon’], at 347.

⁵⁴ ARIIO, Article 7.

Here, effective control over the conduct of organs or agents of other subjects of international law determines whether conduct qualifies as that of the international organization.⁵⁵ As Boon rightly points out, the question here “is not if conduct is attributable but rather to which entity it should be attributed: the international organization or the state.”⁵⁶

The ICJ is not the only international court or tribunal confronted with the problem ‘effective control’ was designed to tackle. The alternative tests suggested by the International Criminal Tribunal for the Former Yugoslavia (ICTY) or by the European Court of Human Rights (ECtHR) are thoroughly discussed elsewhere and this is not the place to assess the history of the conflicting jurisprudence.⁵⁷ These courts introduced their alternative tests for slightly different purposes: the overall control test of the ICTY was necessary to determine whether an armed conflict was international for the purposes of international humanitarian law, whereas the effective overall control test was used to interpret the jurisdictional criteria under the European Convention on Human Rights. It is a common feature of these tests that they are least stringent than the effective control test, in as much as they do not require that the State controls the actual wrongful conduct in question. At the end of the day, the ICJ was adamant in insisting on the prevalence of ‘effective control’ as the decisive test.⁵⁸

3.2. Causation-based attribution

3.2.1 *International investment law*

Other tribunals, without rejecting at least nominally the application of the test, seemingly went down a different route. International investment law provides such an example. In the cases of *AMTO v Ukraine*, *Ascom v Kazakhstan*, *Bosh v Ukraine* and *Bayindir v Pakistan* tribunals introduced a causation-based model of imputing responsibility to the State, notwithstanding that attribution fell short of a rigid understanding of the effective control test.

⁵⁵ See the comments at *infra* in the context of *Nuhanović*.

⁵⁶ Boon, at 354.

⁵⁷ de Hoogh; Cassese; Talmon; de Frouville; Boon.

⁵⁸ *Bosnia Genocide*, at 209-2011, paras. 403-407.

AMTO was concerned *inter alia* with non-payments of certain debts by Energoatom, a State owned entity in Ukraine.⁵⁹ The Claimant argued that Energoatom's failure to pay its outstanding debt owed to the investor's subsidiary (EYUM-10) had engaged the responsibility of Ukraine. The Tribunal assessed the status of Energoatom, a State company, and concluded that either the exercise of *puissance public* or acting 'on the instructions of, or under the direction or control of, the State in carrying out the conduct', i.e., acting under effective control would establish attribution.⁶⁰ In other words, ARSIWA Article 5 or Article 8 were the theoretically available avenues of attribution. The Claimant argued that Energoatom's failure to provide debt payments was the result of the State's deficient funding of the company. The Tribunal's exercise was evidently an inquiry into the causal link between Energoatom's conduct and the State, as the following excerpt demonstrates:

Failure to actively ensure adequate funding of Energoatom's operations may have negative implications, but it is not of the importance to elevate it to the nature of an international breach. There is insufficient evidence to establish the reasons for the funding difficulties of Energoatom and the selection of the creditors it would pay, within the limits of its financial capability. There are no specific decisions of Ukraine demonstrated to have caused the non-payment of EYUM-10's debts. Further, the Claimant has not established any discriminatory intent on the part of the Ukraine against either the Claimant or EYUM-10. The Arbitral Tribunal finds that *the chain of causation for the non-payment of EYUM-10's debt goes no further than Energoatom*. The decisions not to pay EYUM-10, and to resist enforcement in bankruptcy proceedings were decisions taken by Energoatom. These decisions did not involve *puissance publique* and it has not been shown that they were made on the instructions of, or under the direction or control of Ukraine.⁶¹

There are two possible interpretations of the Tribunal's words. *First*, it is arguable that non-attribution *followed from* the absence of a causal link so that *a contrario* a causal link would have established attribution. *Second*, the alternative reading is that even though there could be no attribution of Energoatom's conduct under the *puissance publique* test or the effective control test, if there had been a proof of causal link, Ukraine would have been responsible for the causal consequences of its own conduct, including Energoatom's failure to pay. Either way, the bottom line is that if the non-payment of the debts had been the *consequence* of the State's

⁵⁹ *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008, para. 27.

⁶⁰ *Id.*, para. 102

⁶¹ *Id.*, para. 108 (emphasis added).

conduct, either on the account of causation or on the account of attribution, Ukraine's responsibility would have stood.

In *Ascom v Kazakhstan* the Claimant was negotiating refinancing arrangements for its investment when the Interfax press agency published a report alleging illegal conduct on behalf of the investor.⁶² The reports seriously damaged the reputation of the investor in the middle of the negotiations.⁶³ The Claimant argued that the report was attributable to the Government due to its reliance on governmental sources reporting of the Government's consideration of the illegalities. The Tribunal held that there was no need to show that the publication of the report was instructed by the Government:

Even if Claimants have not shown that the Republic was in any way involved in the publication of the INTERFAX item, it is obvious and not disputed by Respondent, that it was Respondent's actions starting in October 2008 *that caused the publication*.⁶⁴

Much like in *AMTO*, it is not clear whether that causal link actually makes the report *attributable* to the Respondent. However, it is clear that such a causal link is sufficient to establish Kazakhstan's responsibility.

In *Bosh v Ukraine* the claimant contended that the termination of its contract with a university amounted to the expropriation of its investment in Ukraine, including its contractual rights and shareholding in its local subsidiary.⁶⁵ For certain aspects of its claim, Bosh argued that the conduct of the university itself was attributable to Ukraine under ARSIWA Article 5 (and failed).⁶⁶ As regards expropriation, Bosh merely asserted that the conduct of the General Control and Revision Office (CRO) of the Ukraine Ministry of Finance was expropriatory, because in a letter it "effectively ordered senior University officials to immediately terminate [the contract]."⁶⁷ If this had been the case, arguably a claim for attribution under Article 8 would have stood. Interestingly, however, it was never argued. Instead, the Claimant attempted

⁶² *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Kazakhstan*, SCC Case No. 116/2010, Award of 19 December 2013, paras. 348-349.

⁶³ *Id.*, paras. 1409-1411.

⁶⁴ *Id.*, para. 1411 (emphasis added).

⁶⁵ *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 98.

⁶⁶ *Id.*, para. 163.

⁶⁷ *Id.*, para. 196.

to show that the letter of the authorities caused, through the university, the alleged impact amounting to expropriation. In reaching a decision on the matter, the Tribunal expressly referred to causation: “the Claimants must establish that the effect of the CRO’s conduct was an interference that *caused* a substantial deprivation of the Claimants’ rights under the 2003 Contract.”⁶⁸ The Tribunal ultimately rejected the Claimant’s position, having interpreted the text of the letter as being a recommendation rather than a direction.⁶⁹

In applying ARSIWA Article 8, the *Bayindir v Pakistan* Tribunal expressed its doubts regarding the suitability of the test to international economic law disputes:

Finally, the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.⁷⁰

In the case at hand, however, it was satisfied that the specific conduct complained of was specifically approved by the State.⁷¹ Schicho reads the decision as providing for attribution on the basis that the State would have been able to *prevent* the conduct in question.⁷² This reading would add *Bayindir* to the line of cases discussed above.⁷³

⁶⁸ *Id.*, para. 218 (emphasis added).

⁶⁹ *Id.*, para. 219.

⁷⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 130.

⁷¹ *Id.*, para. 125.

⁷² Schicho, at 293.

⁷³ Other tribunals, not following a causation-based approach, had to come up with alternative solutions to grasp similar factual situations. In *Yukos v Russia* the attributability of Rosneft’s conduct was the question before the Tribunal. There were several actions of Rosneft the Claimant complained of. The Tribunal found, with the exception of one of those actions that “it would be difficult, if not impossible, to prove that Rosneft in so acting, did so at the instructions or direction, or under the control of the Russian State.” Having recognized this difficulty, the Tribunal continued to infer from the fact that the threshold of attribution was met regarding one action that *all* actions must have taken place under the direction of Russia: “It does not necessarily follow from the foregoing that the actions of Rosneft [...] are attributable to Russia. Yet it may well be that in taking those actions, Rosneft did so at the sub rosa direction of the Russian State, at the direction of senior officers of President Putin’s entourage who concurrently ran Rosneft. In the view of the Tribunal, it may reasonably be concluded that Rosneft was so directed. Or, if not, that it was not because it did not need to be; Rosneft was such a creature of President Putin’s entourage that it reflexively implemented his policies”.⁷³ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 June 2014, para. 1469. The Tribunal

3.2.2 *The Court of Appeal of the Hague*

In addition to these recent decisions of international investment tribunals, other courts also turned their attention to causation. The Dutch Court of Appeal of The Hague applied the effective control test more recently in *Nuhanović*.⁷⁴ The ‘effective control’ test invoked in this case was not the Article 8 test under ARSIWA, but the Article 7 test under ARIO,⁷⁵ since the question was whether the conduct is attributable to the Netherlands (as opposed or in addition to the UN). Whether the ‘effective control’ language in Article 7 ARIO was designed to reflect the terminology of *Nicaragua* and *Bosnia Genocide* is not entirely clear from the *travaux* of ARIO,⁷⁶ but some authors insist that it is the case.⁷⁷ Dannenbaum, whose work the Dutch decisions expressly invoke, argues against equating the two tests.⁷⁸ In any event, Crawford

eventually disregarded the lack of direct evidence on attribution and, it is respectfully submitted, applied a conceptually unclear *sui generis* notion of imputation. Unlike in the cases mentioned above, no reference is made to causality here.

⁷⁴ *Nuhanović v The Netherlands*, Court of Appeal of The Hague, 5 July 2011, reported in 153 *ILR* 467 [*Nuhanović*] (upheld on appeal by the Supreme Court of The Netherlands in 2013, *The Netherlands v Nuhanović*, Supreme Court of the Netherlands, 12/03324, 6 September 2013). On this case see A Nollkaemper, ‘Dual Attribution. Liability of the Netherlands for Conduct of Dutchbat in Srebrenica’, (2011) 9 *JICJ* 1143; B Boutin, ‘Responsibility of the Netherlands for the Acts of Dutchbat in Nuhanović and Mustafić: the Continuous Quest for a Tangible Meaning for ‘Effective Control’ in the Context of Peacekeeping’ (2012) 25 *LJIL* 521 [*Boutin*]; C Bakker, ‘Dual Attribution of Acts Committed by a UN Peacekeeping Force: An Emerging Norm of Customary International Law? The Dutch Supreme Court’s Judgments in Nuhanović and Mustafić’, (2013) 23 *IYBIL* 287 [*Bakker*].

⁷⁵ ARIO, Article 7.

⁷⁶ Summary record of the 2810th meeting, *ILC Ybk* (2004)/I, at 137, para. 15: “As for the “effective control” criterion, the [Drafting] Committee had decided to retain the term, although it had wondered whether it had the same meaning in the draft article as in the case concerning *Military and Paramilitary Activities in and against Nicaragua* or in the *Tadic* case. It had agreed, however, that the question should be covered in the commentary and not in the text of the draft articles.” (emphasis in original). Eventually, the commentary did not cover this problem to any extent.

⁷⁷ K M Larsen, ‘Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test’, (2008) 19 *EJIL* 509, at 514-515; T Dannenbaum, ‘Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers’, (2010) 51 *Harvard International Law Journal* 113, at 141; P Pustorino, ‘The Control Criterion between Responsibility of States and Responsibility of International Organizations’, in R Virzo and I Ingravallo (eds.), *Evolutions in the Law of International Organizations* (2015) 406, at 411-412. In contrast, Montejo summarizes the various contexts in which the notion emerged, with more emphasis on the novelty of the test in ARIO Article 7. Nonetheless, Montejo also mentions that ‘Article 7 [...] finds its origin in articles 6 and 8 of the earlier articles on State responsibility.’ B Montejo, ‘The Notion of ‘Effective Control’ under the Articles on the Responsibility of International Organizations’, in M Ragazzi (ed), *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie* (2013) 389, at 390, 402-403.

⁷⁸ T Dannenbaum, ‘Killings at Srebrenica, Effective, and the Power to Prevent Unlawful Conduct’, (2012) 61 *ICLQ* 713, at 723

confirms that “[i]n one respect at least their influence is clear, in that effective control must be assessed from the point of view of the particular act in question.”⁷⁹

The Court held that the conduct could be attributed to the Netherlands, if the Netherlands “was able to prevent that” conduct.⁸⁰ Importantly, it is not the conduct of the authorities in a position to prevent the wrongful what is attributed, but the conduct of those groups directly, the wrongful action of whom could have been prevented by the Netherlands. Boutin rightly concludes that “[w]hen asking whether the state had had ‘the power to prevent the alleged conduct’, the Court in effect determined that the conduct was caused by the state.”⁸¹ In brief, the Dutch Court of Appeal turned the effective control test into a test of causation.⁸² Boon reads the judgment the same way.⁸³

3.2.3 *International human rights law*

A similar test was applied by the Inter-American Court of Human Rights (IACtHR) in the *Mapiripán Massacre Case*. The Court held that the State’s responsibility could be established for the actions of private individuals if the State was or should have been in a position to prevent those actions.⁸⁴ The Court found that based on an analysis of the facts acknowledged by the State, it clearly follows that “the behavior of its own agents and that of the members of the paramilitary groups are attributable to the State insofar as they in fact acted in a situation and in areas that were under the control of the State.”⁸⁵ In reaching this conclusion, the Court asserted that but for the omissions of State authorities, the wrongful act could not have taken place.⁸⁶ In other words, the Court’s conclusion rested on a causal connection between the omission and the private conduct.

⁷⁹ Crawford 2013, at 203-204.

⁸⁰ *Nuhanović*, at 489.

⁸¹ Boutin, at 531. Other cases applying the test are briefly discussed by Bakker, see Bakker.

⁸² It was upheld on appeal, without explicit approval in this respect by the Supreme Court, see Boon, at 333.

⁸³ Boon also concludes that “[u]nder this conception, responsibility is linked to causation.” Boon, at 369.

⁸⁴ *Case of the Mapiripán Massacre v Colombia*, IACtHR, Judgment (Merits, Reparations and Costs) September 15, 2005, paras. 112-123.

⁸⁵ *Id.*, para. 120.

⁸⁶ *Id.*

The Court pointed out that its reasoning and its disregard of a rigid reading of attribution rules is based on a *lex specialis* under the Inter-American Convention on Human Rights (IACHR).⁸⁷ Still, it is submitted that this judgment is reasonably understood as a judicial attempt to reconsider the interpretation of ARSIWA Article 8 in light of an approach based on causation.⁸⁸ The Court reiterated the applicability of attribution on similar grounds in the *Pubelo Bello Massacre Case*, in *Valle Jaramillo et al. v Colombia* and in *Perozo et al. v Venezuela*.⁸⁹

The practice of the European Court of Human Rights also shows some traces of a causation-based approach. Crawford described the effective overall control test of the Court as belonging to the “*shadowland*” between attribution and causation.⁹⁰ It is an accurate label to the reasoning in *Loizidou*. The Court cited the Respondent’s position in support of its findings on as follows:

[T]he respondent Government have acknowledged that the applicant’s loss of control of her property the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the [Turkish Republic of Northern Cyprus].⁹¹

The Court concluded that Turkey exercised jurisdiction over the territory of Northern Cyprus due to its effective overall control of the territory of Northern Cyprus.⁹²

In *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* the Court looked at the causes of the failure of State owned entities to pay their debts to hold the State responsible for such failure to pay. The Court found

⁸⁷ *Id.*, para. 107. The Court relied on Article 55 of the ARSIWA. It is difficult to find the textual basis in the Convention for such a *lex specialis* rule of attribution.

⁸⁸ Hakimi, discussing other cases, refers to the practice of ‘collapsing’ attribution and obligations to protect. M. Hakimi, ‘State Bystander Responsibility’, (2010) 21 *EJIL* 341, at 354.

⁸⁹ *Case of the Pubelo Bello Massacre*, IACtHR, Judgment (Merits, Reparations and Costs) of January 31, 2006, para. 140; *Case of Valle Jaramillo et al. v Colombia*, IACtHR, Judgment (Merits, Reparations and Costs) of November 27, 2008, para. 92; *Case of Perozo et al. v Venezuela*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of January 28, 2009, paras. 120-121. In these rulings the Court sometimes mentions “attribution of responsibility” instead or in addition to attribution of acts or specific conduct. It is unclear whether this distinction is a conscious one, or the Court uses the phrases as synonyms.

⁹⁰ First report on State responsibility, by Mr. James Crawford, UN. Doc. A/CN.4/490/Add.5, 22 July 1998, para. 211.

⁹¹ *Loizidou v Turkey*, ECtHR, Judgment (Preliminary Objections) of 23 March 1995, para. 63.

⁹² *Id.*, para. 64.

that the State's disposal of the assets of the State owned entities resulted in the lack of their resources to meet their obligations.⁹³ This approach clearly mirrors the one in *AMTO v Ukraine*.

In *El-Masri v Macedonia*, the Court heard a claim against Macedonia⁹⁴ by the victim of CIA agents. El-Masri was put in custody at the Skopje airport by Macedonian authorities and, immediately, handed over the CIA agents. The Court held as follows:

The Court must firstly assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State. In this connection it emphasises that the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention *for acts performed by foreign officials* on its territory with the acquiescence or connivance of its authorities.⁹⁵

This departs from the traditional approach of the Court, because Macedonia was not held responsible for its own conduct in relation to the conduct of foreign officials.⁹⁶ It was responsible *for the acts* of such foreign officials. In the ARSIWA framework this could be possible by virtue of attribution of conduct under Article 6 (the case of transferred agents) or Article 5 (the *de facto* exercise of *puissance publique* by non-State actors), but the Court chose a different path. Macedonia was responsible *for the acts*, because “its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring”. A similar approach was taken in the subsequent cases of *Al-Nashiri v Poland*, *Husayn (Abu Zubaydah) v Poland* and *Nasr v Egypt*.⁹⁷ Jackson understands these cases as mimicking the approach to attribution of conduct of the

⁹³ *Ališić and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, ECtHR, Judgment (Merits and Just Satisfaction) of 16 July 2014, paras. 115-117.

⁹⁴ The Former Yugoslav Republic of Macedonia, hereinafter Macedonia.

⁹⁵ *El-Masri v The Former Yugoslav Republic of Macedonia*, ECtHR, Judgment (Merits and Just Satisfaction) of 13 December 2012, para. 206 (emphasis added).

⁹⁶ A Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’, *EJIL:Talk!* blog post, 24 December 2012 (last accessed 29 September 2016)

⁹⁷ *Al Nashiri v Poland*, ECtHR, Judgment (Merits and Just Satisfaction) of 24 July 2014, paras. 452, 517; *Husayn (Abu Zubaydah) v Poland*, ECtHR, Judgment (Merits and Just Satisfaction) of 24 July 2014, paras. 449, 512; *Nasr and Ghali v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 23 February 2016, para. 241.

IACtHR,⁹⁸ but Nollkaemper rightly remarks that the Court carefully avoided this phrase. Instead, it spoke of “imputation” and “attribution of responsibility”.⁹⁹

3.2.4 Causation-based responsibility and doctrine

It is a striking trend, especially if one considers the ILC’s admitted purpose of excluding causality from the framework of attribution. The International Law Commission underlined on multiple occasions that attribution is a normative exercise and is neither based on natural causality¹⁰⁰ nor on the ‘mere recognition of a link of factual causality.’¹⁰¹ Robert Ago, the Rapporteur originally introducing the framework of attribution that eventually found its way into the final text, insisted that attribution ‘as such has nothing to do with a link of natural causality or with a link of “material” or “psychological” character.’¹⁰² Crawford, explaining his proposal for the final version of this article, recalled that the language of ARSIWA Article 8 was designed to exclude natural causality from the scope of attribution.¹⁰³

Nonetheless, several authors suggested reconsideration of this traditional approach. Tal Becker in his 2006 book was the first to comprehensively develop this approach,¹⁰⁴ despite some antecedents.¹⁰⁵ Becker’s couched his alternative to the traditional attribution rules as a *de lege ferenda* proposal in the context of State-sponsored terrorism. Becker submits that there is no reason to restrict the application of such a general principle only to the *consequences* of such responsibility.¹⁰⁶ Importantly, however, he does not propose to get rid of or to substitute the traditional tests of attribution. Attribution of the conduct launching the chain of events resulting in an internationally wrongful conduct is necessary, but it has to be complemented by a causality analysis.¹⁰⁷ Causality, therefore, does not determine the persons or groups of persons, whose conduct could be attributed to State, but it helps understanding private actions as mere

⁹⁸ M Jackson, *Complicity in International Law* (2015) [‘Jackson’], at 194.

⁹⁹ A Nollkaemper, ‘The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?’, *EJIL:Talk!* blog post, 24 December 2012 (last accessed 29 September 2016)

¹⁰⁰ Report of the ILC to the GA, *ILC Ybk* (1973)/II, at 181, contending that “[t]here are no activities of the State which can be called “its own” from the point of view of factual causality.”

¹⁰¹ ARSIWA Commentaries, at 38-39.

¹⁰² Third report of the Special Rapporteur, Mr. Roberto Ago, *ILC Ybk* (1971)/II(1), 199, at 218.

¹⁰³ Summary record of the 2555th meeting, *ILC Ybk* (1998)/I, at 246.

¹⁰⁴ Becker, at 285-330.

¹⁰⁵ M Straus, ‘Causation as an Element of State Responsibility’, (1984) 16 *Law & Policy in International Business* 893; D Caron, ‘Attribution Issues in State Responsibility: Remarks’, (1990) 84 *Am. Soc’y Int’l L.* 51, at 65.

¹⁰⁶ Becker, at 326-327.

¹⁰⁷ *Id.*, at 325.

elements in a chain of causation. The chain of causation, in turn, is determinative of the *scope of responsibility*. Becker's addition to the grammar of State responsibility is this latter phrase. If a State *causes* acts of terrorism, he argues, even if such acts are perpetrated by non-State actors, the State is responsible *for* terrorism on the basis of causation, and not only for the conduct of its own agents. We will revisit Becker's theory and the ways in which his approach makes a difference in practice later.¹⁰⁸

A series of recent publications demonstrate that causation and attribution is of increasingly intense academic interest. Yifeng Cheng argued in favour of a causation-based reconsideration of the responsibility of States and international organizations.¹⁰⁹ D'Aspremont posited that that causality is implicit in the notion of attribution.¹¹⁰ In contrast, Fry and Gattini concluded that causation might be relevant for the notion of 'breach', but not as a component of attribution.¹¹¹ Dupuy wrote that the rules on attribution represent a special type of causation themselves.¹¹² Bederman and Castellanos-Jankiewicz described attribution as a substitute of causation as opposed to domestic systems of responsibility.¹¹³ Plakokefalos rejects the application of causation for the purposes of attribution as an artificial conceptual solution.¹¹⁴ Kulesza or Tzevelekos considers that the demonstration of a causal link between the attributable act and the "event" or "wrongful result" constituting a breach is necessary.¹¹⁵ The comments and approaches are diverse, but there is at least one common denominator: the relationship between attribution and causation is not as clear as the ILC and its distinguished Rapporteurs suggested. To the contrary, doctrinal clarity is still manifestly lacking.

¹⁰⁸ See *infra*, Chapter II, Section 6.1.

¹⁰⁹ Y Cheng.

¹¹⁰ J D'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', (2012) 9 *International Organizations Law Review* 15, at 21.

¹¹¹ A Gattini, 'Breach of International Obligations', in A Nollkaemper and I Plakokefalos, *Principles of Shared Responsibility in International Law* (2014) 25, at 28-31; J D Fry, 'Attribution of Responsibility' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (2014) 98 ['Fry 2014'], at 102.

¹¹² P-M Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (1976), at 247.

¹¹³ D J Bederman, 'Contributory Fault and State responsibility', (1990) 30 *Virginia Journal of International Law* 335 ['Bederman'], at 347; L Castellanos-Jankiewicz, 'Causation and International State Responsibility', (2012) *ACIL Research Paper No. 2012-07* (SHARES Series), at 26;.

¹¹⁴ I Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: in Search of Clarity', (2015) 26 *EJIL* 471, at 479.

¹¹⁵ J Kulesza, *Due Diligence in International Law* (2016), at 151; V P Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility', (2015) *Michigan Journal of International Law* 129, at 154

As the following section shows, the problem of distinguishing attribution from causation may seem novel, but it is not. A number of cases from the late 19th century and the early 20th century reveal that a causation-based approach was not a far-fetched idea before the ICJ's and the ILC's restrictive understanding of attribution took over.

4. Imputation of private conduct and the pre-*Nicaragua* jurisprudence

Given that the ARSIWA framework has not gained full recognition in practice, it is now necessary to understand whether the ARSIWA framework accurately reflects at least earlier authorities. A brief survey of the older cases, including some invoked by the ARSIWA Commentary itself, reveals that causation and attribution (or imputation in the older terminology) are related concepts.

The text of the ARSIWA Commentary refers to a number of early cases in support of Article 8.¹¹⁶ *Zafiro* is one of the authorities cited in support.¹¹⁷ However, a careful reading of this award reveals that, far from supporting what is now codified in Article 8, *Zafiro* highlights a far more flexible test of attribution. The question in *Zafiro* was whether the USA was responsible for damages caused by the crew of a merchant ship, supplying the US navy. The Tribunal held that the decisive question had not been whether the conduct of the crew itself was attributable to the State, but whether the State official in command provided proper supervision over their conduct.¹¹⁸ Meron referred to *Zafiro* as a case confirming that 'a State may be responsible for wrongful acts, even of entirely private character, committed by its officials, if it has failed to exercise proper care and diligence in the prevention of such acts.'¹¹⁹ It is possible to go even further. *Zafiro* does not merely confirm that the wrongful acts were committed by officials in private capacity. They could equally have been private persons, it is not the decisive factor for

¹¹⁶ ARSIWA Commentaries, at 47.

¹¹⁷ *D Earnshaw and Others (Great Britain) v United States (Zafiro Case)*, (1925) 6 RIAA 160.

¹¹⁸ *Id.*, at 163.

¹¹⁹ T Meron, 'International Responsibility of States for Unauthorized Acts of Their Officials', (1957) 33 *BYBIL* 85, at 106.

the Tribunal. *Culpa in vigilando* was crucial for the purposes of imputing responsibility, much like in *Nuhanović*.

Seeking support for its approach, the *Zafiro* Tribunal referred to the earlier decisions in *Jeanneaud*, *Porter* and *Dunbar & Belknap*. These early authorities suggested that the responsibility of the State depended on whether higher officials exercised adequate control or supervision over lower officials or subordinates.¹²⁰ The test was whether the higher officials took proper steps to *prevent* the acts of lower officials resulting in damage or to prevent the damage itself.¹²¹ In contrast to the current legal framework, according to which the position of the State organ in the hierarchy of State administration is irrelevant for the purposes of attribution,¹²² in the early 20th century scholars and tribunals often disagreed on this point. For instance, Edwin Borchard, one of the first American scholars providing a comprehensive treatment of State responsibility,¹²³ insisted that “only the higher officials of the state are its “organs” making the state responsible.”¹²⁴ This view had considerable support in the case law at the time, although subsequently the position was clearly rejected.¹²⁵

One particularly clear example on this point is *Bensley*. In *Bensley*, the Commissioners¹²⁶ held that “[i]t would be an extraordinary position to assume under the law of nations that a government is liable to afford an indemnity for every injury which may result from the illegal or irregular acts of any of its subordinate municipal officers.”¹²⁷ What the Commissioners labelled ‘extraordinary’ in *Bensley*, is the default rule today, and not the exception.¹²⁸

¹²⁰ *Jeanneaud*, 3 Moore, International Arbitrations (1880) 3001; *Porter*, 3 Moore, International Arbitrations (1868) 2998; *Dunbar & Belknap*, 3 Moore, International Arbitrations (1868) 2998. A similar test was applied in *Apure*, see *Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v Venezuela (the steamer Apure case)*, opinions of the Commissioners (1855), 29 RIAA 240, at 243-245.

¹²¹ Obviously, from the perspective of international law, the internal constitutional structure of the state is a fact, but that fact is still a fact of a legal nature.

¹²² I Brownlie, *System of the Law of Nations: State Responsibility. Part I* (1983), at 134.

¹²³ Crawford 2013, at 24.

¹²⁴ E Borchard, ‘Theoretical Aspects of the International Responsibility of States’, (1923) 1 *ZaöRV* 223, at 232.

¹²⁵ He also influenced the Harvard Codification, Harvard Law School, *Research in International Law, II, Responsibility of States* (1929), reprinted in (1929) *AJIL Special Supp.* 133.

¹²⁶ Of the American and Mexican Claims Commission.

¹²⁷ *Bensley*, 3 Moore, International Arbitrations (1850) 3017.

¹²⁸ ARSIWA, Article 7.

Stephens is another case cited in support of Article 8.¹²⁹ Similarly to *Zafiro*, this Award merely shows that in the particular case lower (*de facto*) officials were acting in the presence of superior officials. The tribunal stressed that “[r]esponsibility of a country for acts of soldiers in cases like the present one, *in the presence and under the order of a superior*, is not doubtful.”¹³⁰ The emphasis is, again, on the absence or deficiency of supervision over the conduct complained of. No mention is made of direction or specific instructions.

The *Ousset Claim* from the jurisprudence of the Franco-Italian Conciliation Commission is also of interest. In *Ousset*, the property of a French national was first sequestered in Italy, then put under an official receivership during World War II and in this period was administered by a syndic, a private individual. The question was whether the conduct of the syndic could trigger Italy’s responsibility. Rejecting the Italian defense of non-attribution, the Commission held:

The Italian Government was responsible for the measure of *sindicato*, seeing that it was effectively applied by the syndic, de Bernardis. If the latter overstepped his mandate of control, the Italian Government should be held responsible; having appointed de Bernardis, *it should have supervised him*.¹³¹

The approach to imputation presented in the foregoing cases is very close to the ‘due diligence’ standard applied in case of purely private wrongdoings.¹³² In case of damages caused by private individuals, two competing theories influenced the legal discourse and the practice in the early 20th century: the theory of State complicity and the theory of the separate wrongdoing of the State in relation to the private action. Under the former theory, the State, by failing to take adequate steps in preventing or punishing the illegal act of the private individual, became complicit in the private conduct.¹³³ Under the latter theory, which eventually prevailed, the State is held responsible for its own omission in preventing or punishing the illegal act, and not

¹²⁹ *Charles S. Stephens and Bowman Stephens (U.S.A.) v United Mexican States*, (1927) 4 RIAA 265.

¹³⁰ *Id.*, at 267.

¹³¹ *Ousset Claim*, 22 ILR (1955) 312 at 314 (emphasis added). The conduct of the syndic *per se* is not attributed to the State in recent investment arbitration jurisprudence, see *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, paras 248-254.

¹³² Hessbruegge studied the development of the concepts of attribution and due diligence in parallel exhaustively. J A Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’, (2004) 36 *New York University Journal of International Law and Policy* 265. See also R Pisillo-Mazzechi, ‘The Due Diligence Rule and the Nature of International Responsibility’, (1992) 35 *GYBIL* 9.

¹³³ J L Brierly, ‘The Theory of Implied State Complicity in International Claims’, (1928) 9 *BYBIL* 42 [‘Brierly’]; *Poggioli Case*, (1903) 10 RIAA 669.

for being complicit in the act itself.¹³⁴ What happens in this case is not the attribution of the private action, since the omission is the conduct of State organs and a private action is only the consequence of such an omission.¹³⁵

Ago rightly pointed out that the State's responsibility in the latter case inevitably rests on a causal relationship between its omission, the private act and the damages caused by the private act.¹³⁶ According to his view (the *catalysis theory*),¹³⁷ the State's responsibility depends on an external event (i.e., the occurrence of the actual private action and the damages) and a link of causation between not only the private act and the damages, but the omission of the State, the private act and the damages. The flipside is that a valid defense on behalf of the State could be to claim that irrespective of its omission, the damages would have been suffered.¹³⁸

It is possible to view the early cases as examples of the due diligence standard applied to *de facto* subordinates or officials, where the legal standing of the latter is not entirely clear. Alternatively, it is possible to view them as proper examples of attributing private conduct to the State, as the ILC suggests. If the latter approach is taken, we respectfully submit that they should not be cited in support of what is now codified in Article 8 ARSIWA and the 'effective control test'. If anything, these early decisions are valid authorities for a causation-based approach to the reconceptualization *or* supplementation *or* substitution of attribution.

In the context of attributing conduct of State corporations to the State, the ILC also sought support in the practice of the Iran-US Claims Tribunal. *Flexi-Van Leasing Inc. v Iran* is another pro-causation case among such authorities.¹³⁹ The case concerned non-payment of certain debts owed to the claimant under lease agreements relating to transport equipment. The claimants asserted that this conduct resulted in the expropriation of their contractual rights. The contractual partners of the claimants were undertakings which became State controlled after they had concluded their contracts with the claimants. This development *per se* did not make the conduct of those undertakings attributable to the State.¹⁴⁰ Hence, the Tribunal went on and

¹³⁴ D Anzilotti, *Cours de droit international* (1929), at 491; *Janes Case (US v Mexico)*, (1926) 4 RIAA 82.

¹³⁵ Some authors and cases labelled this type of responsibility 'indirect', see A Verdroß, *Völkerrecht* (1964), at 393; *B. E. Chattin v United Mexican States*, (1927) 4 RIAA 282, at 285-286.

¹³⁶ R Ago, 'Le délit international', (1938) 68 *Recueil des Cours* 415, at 447-448, 503.

¹³⁷ De Frouville, at 277.

¹³⁸ See further *infra*, Chapter II, Section 5.1.

¹³⁹ *Flexi-Van Leasing INC v Iran*, Award, IUSCT Case No. 36 (259-36-1), 13 October 1986, 12 Iran-USCTR 335.

¹⁴⁰ *Id.*, at 349.

examined whether the undertakings acted under the ‘orders, directives, recommendations or instructions’ of the State.¹⁴¹ This language indeed mirrors a conservative application of the ‘effective control’ test.¹⁴² At the same time, the Tribunal described this required relationship between the contract breach and State conduct as one of causation, just like Judge Holtzmann did in his dissent (finding such a causal link).¹⁴³

Robert Ago introduced the first draft of ARSIWA Article 8 in 1971.¹⁴⁴ The original proposal did not specify direction or instruction as the decisive criterion, it merely stated that the private person should ‘in fact act on behalf of the State’. This was a considerable departure from any previous codification attempt and an extension of the concept of attribution, as a member of the Commission noted during the discussion of draft Article 8.¹⁴⁵ Ago did not define at the time what ‘acting on behalf of the State’ entails and which factual criteria should be met to attribute such conduct to the State.¹⁴⁶ This formulation was maintained even as late as the 1996 version of the Articles, without further explanation. The only remark in the commentary was that in this case the private persons carried out certain tasks ‘at the instigation’ of State organs.¹⁴⁷

It is understandable that Ago could not transpose the traditional understanding directly into the innovative framework he developed. By eliminating ‘harm’ from the abstract conditions of international responsibility, the focus shifted to the wrongful conduct from the actual

¹⁴¹ *Id.*

¹⁴² ARSIWA, Article 8.

¹⁴³ *Flexi-Van Leasing*, at 351-352, 361. It must be noted that the causality language appears in the Award in the context of the claim for the contractual breach and not for expropriation. It could be argued that in this context the Tribunal was not applying the rules of attribution under international law, but merely contract law, but the Award blurs the distinction between the issue of contract breach and the issue of expropriation for the purposes of imputing the particular conduct to the State. There is no indication that different considerations would apply to the different claims in this respect.

¹⁴⁴ Third report of the Special Rapporteur, Mr. Roberto Ago, *ILC Ybk (1971)/II(1)* 199, at 262.

¹⁴⁵ See the comment from Alfredo Martínez Moreno: Summary record of the 1259th meeting, *ILC Ybk (1974)/I*, at 37.

¹⁴⁶ He called these entities “de facto officials”, a terminology which might lead to some confusion following the ICJ’s more recent judgment in *Bosnia Genocide*, using a very similar label for a fundamentally different concept. See Summary record of the 1258th meeting, *ILC Ybk, (1974)/I*, at 32. *Cf Bosnia Genocide*, at 205, para. 393. The brief explanation provided by Ago and the ILC at the time is summarized by Savarese. E Savarese, ‘Issues of Attribution to States of Private Acts: Between the Concept of De Facto Organs and Complicity’, in (2005) 15 *IYBIL* 111 [‘Savarese’], at 112-115.

¹⁴⁷ Provisional Draft Articles on State Responsibility with Commentaries, 1996, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf (last accessed: 9 April 2015), at 34.

consequence and the causal link between the wrongful conduct and the damages remained relevant only for the purposes of compensation.

To sum up, there are plenty of arbitral and judicial pronouncements confirming that looking at State responsibility through the lenses of causation is not a futile exercise. To the opposite, judges and arbitrators keep returning to the utilization of this concept, notwithstanding the firm position adopted the ARSIWA, purportedly excluding causation from the framework of attribution. To what extent and within what limits causation could be useful is briefly discussed in the next chapter below.

5. Conclusions

The jurisprudence of international courts and tribunals confirms that responsibility-grounding causation exists in international law. This was the case before ARSIWA and this remained the case even in the era influenced by the ARSIWA paradigm. In particular, attribution of the conduct of private actors often turns into a causal inquiry. The case law did not put forward a justification for this approach and, it is submitted, such a justification is necessary as long as ARSIWA is purportedly regarded as the authoritative statement of custom on attribution. The next Chapter covers the possible explanations for the survival of *haftungsbegründende Kausalität* and attempts to lay out a theoretical foundation explaining the case law.

Chapter II

Causal responsibility in international law

1. Introduction

Chapter I demonstrated that the decision of the International Law Commission to exclude causation from the constitutive pillars of international responsibility did not hold ground in

practice. There are several possible explanations for this, ranging from arguments about a fragmented law of international responsibility to an allegedly emerging new test of complicity-based attribution. All of these possible approaches have their respective merits, but, as we will see, there are considerable weaknesses in their explanations too.

This chapter sets forth a further possible solution. Drawing on the works of legal philosophers engaged with action theory, it argues that the law of international responsibility lacks a developed theory of action. Most of the conceptual problems surrounding causation and its relationship with attribution stem from the missing theoretical foundation for the concept of the ‘internationally wrongful act’ itself. A ‘causal theory of action’ is proposed to address this deficiency.

2. Resurrecting *haftungsbegründende Kausalität*

There are several possible ways of reconciling the ILC’s framework and the old-new approach to causation-based imputation.

First, it is arguable that certain *lex specialis* regimes of State responsibility retained damage as a condition of responsibility. It follows that causation remains a condition of responsibility too. A similar argument is that attribution based on causality could be a *lex specialis* attribution rule in international investment law and international human rights law.

Second, the International Court of Justice left open the question whether “effective control” under the ARSIWA Article 8 test could be exercised in any form other than those of instructions, direction or control. It is arguable that causation-based attribution serves as a further example of “effective control”.

Third, the examples of causation-based responsibility might be applications of the underlying primary norm. The ILC’s abandoned framework of a typology of international obligations is revisited in this context.

Fourth, some authors contend that there is a new, emerging test of attribution based on some form of *accessorial* or *complicit* conduct in the performance of an act.

Fifth, it is submitted that the solution could lie in a better understanding of the concept of an *act*. The highlighted cases demonstrate the need for an international legal theory of action. The normative constructions of action theory reveal that the determination of whether a potentially responsibility-triggering act was *performed* is inherently a causal inquiry. This section addresses the first three options, and the next section turns to the remaining two.

As regards the *first option*, Douglas suggested that damage remained a condition of responsibility in the *lex specialis* regime of investor-State disputes and in human rights instruments.¹⁴⁸ He relies on the pronouncement in *Merrill & Ring Forestry LP v Canada* that “a finding of liability without a finding of damage would be difficult to explain in the context of investment law arbitration and would indeed be contrary to some of its fundamental tenets”.¹⁴⁹

This position is contested. Paparinskis demonstrated that investment tribunals do not dispense with the basic framework of Part I of ARSIWA.¹⁵⁰ There are also examples of arbitral awards establishing responsibility without actual demonstration of damage.¹⁵¹ The practice of the European Court of Human Rights confirms that State responsibility is possible without proving the existence of material damage and the causal link between the wrongful conduct and the damage.¹⁵² A further problem with the *lex specialis* argument is that several tribunals are consistent in grounding their approach to questions of attribution on the ILC’s framework. With the exception of the Inter-American system, the authorities discussed above do not refer to *lex specialis* notions of attribution.¹⁵³

¹⁴⁸ Z Douglas, ‘International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed’ (2014) 63 *ICLQ* 867, at 893.

¹⁴⁹ *Merrill & Ring Forestry LP v Canada*, Award of 31 March 2010, UNCITRAL, para. 245

¹⁵⁰ M Paparinskis, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’, (2013) 24 *EJIL* 617, at 629.

¹⁵¹ *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 807; *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013, paras. 281-288.

¹⁵² *Družstevní záložna Pria and Others v the Czech Republic*, ECtHR, Judgment (Just Satisfaction) of 21 January 2010, para. 10. At the same time, the Inter-American system treats damage or harm as a condition of responsibility: R Rivier, ‘Responsibility for Violations of Human Rights Obligations: Inter-American Mechanisms’, in J Crawford *et al.* (eds), *The Law of International Responsibility* (2010), 740, at 747.

¹⁵³ And the choice of the Inter-American Court to frame its attribution test in terms of *lex specialis* is questionable.

A *second* possibility is to find some room for causation-based attribution *within* the effective control test, as suggested in *Nuhanović*. Indeed, the International Court of Justice left open the possibility that attribution is possible by the ‘actual exercise’ of effective control, as an alternative of attribution based on instructions or direction.¹⁵⁴ It could be that causing private entities to act in a certain way would qualify as the ‘actual exercise’ of effective control.

One obvious counterargument is that causation-based attribution under the ‘actual exercise’ heading could leave the rules on attribution based on instructions or directions redundant by permitting a more flexible threshold. This would especially be the case if the private conduct occasioned by a State omission was attributed to the State. Such an approach would stand at odds with ICJ’s otherwise very restrictive reading of the effective control test. One may argue that *some* form of causation could meet the ‘actual exercise’ threshold of the test, but this cannot be true for all the examples discussed above.

Third, another possible and more persuasive view could be to explain these judicial phenomena with reference to the type and nature of the underlying primary obligation.

The ILC’s Draft Articles retained a much discussed and criticized typology of obligations of conduct, obligations of result and obligations of prevention until Crawford proposed to eliminate these concepts from the Draft.¹⁵⁵ In his view (and in the view of commentators and States he refers to) these provisions unnecessarily imported questions of primary rules into the field of State responsibility.¹⁵⁶

Only obligations of conduct required the performance of specific conduct from the State. In contrast, obligations of result or obligations of prevention did not specify the means the State has to implement in order to achieve a certain result or prevent a certain event.¹⁵⁷ This distinction was heavily criticized, because it was said not to properly apply the notions of

¹⁵⁴ *Bosnia Genocide*, para 400.

¹⁵⁵ For an overview see C P Economides, ‘Content of the Obligation: Obligations of Means and Obligations of Result’ in J Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 371 [‘Economides’], 374-376.

¹⁵⁶ Second report on State responsibility by Mr. James Crawford, UN. Doc. A/CN.4/498, 13 March 1999, para. 90. For a criticism of Crawford’s understanding of Ago’s classification of obligations as a matter of primary norms, see A Marchesi, ‘The Distinction between Obligations of Conduct and Obligations of Result following its Deletion from the Draft Articles on State Responsibility’, in *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz*, Vol II (2004) 827 [‘Marchesi’], at 842.

¹⁵⁷ Economides, at 375-376.

traditional norm typology, purportedly derived from domestic legal systems.¹⁵⁸ This chapter does not wish to reexamine all the pros and cons of keeping or rejecting the distinction or the terminology followed by the ILC.¹⁵⁹ However, there is at least one aspect of the distinction that might help us conceptualize a causation-based notion of State responsibility.

The history of the ILC's work reveals that Ago, in introducing the original proposals for the distinction, recognized the role of causation in case of obligations not specifying the means of performance. The first reference to such specific obligations is found in Ago's proposal to define the conditions of an internationally wrongful act:

An internationally wrongful act exists where:

- (a) Conduct consisting of an action or omission is imputed to a State under international law; and
- (b) Such conduct, in itself or as a direct or indirect cause of an external event, constitutes a failure to carry out an international obligation of the State.¹⁶⁰

Ago's view was that material injury can be an 'external event' and whether such an external event is required in addition to an imputable wrongful conduct to trigger State responsibility ultimately depends on the substantive rules in question.¹⁶¹ Unfortunately, he never explained the concepts of 'direct or indirect' causes, nor did the ILC discuss them.

Ago's proposal to include the quoted passage among the general principles on State responsibility was rejected outright by several members, for various reasons. Sir Humphrey Waldock commented that Ago had put 'undue emphasis' on the material consequences of the wrongful act and challenged the examples Ago had given for such external events. Waldock rejected Ago's example of a deliberate failure to protect an embassy, as State conduct not giving rise to international responsibility without prejudice actually taking place.¹⁶² Constantin

¹⁵⁸ *Id.* See also P-M Dupuy, 'Reviewing the Difficulties of Codification: on Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10 *EJIL* 371. Wolfrum recently pointed out further difficulties of ascertaining which rubric a certain norm would fall into. See further R Wolfrum, 'Obligation of Result versus Obligation of Conduct: some Thoughts about the Implementation of International Obligations', in M Arsanjani *et al.* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010) 363, at 378-381.

¹⁵⁹ For such a thorough discussion see Marchesi.

¹⁶⁰ Second report on State responsibility, by Mr. Robert Ago, *ILC Ybk* (1970)/II 177, para. 55 (emphasis added).

¹⁶¹ *Id.*, para. 53.

¹⁶² Summary record of the 1076th meeting, *ILC Ybk* (1970)/I 187, para. 29.

Eustathiades argued that this distinction does not serve any useful purpose at the level of general principles and, if relevant at all, it has to be addressed at subsequent stages or in particular articles dealing with more detailed problems.¹⁶³

Ago continued accordingly by eliminating the reference to external event caused directly or indirectly by State conduct from the conditions of responsibility.¹⁶⁴ Later on, however, he reintroduced the concept in his sixth report by distinguishing between obligations of means, obligations of results and obligations of prevention.¹⁶⁵ His new formulation was the following: “There is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.”¹⁶⁶ In this new formulation Ago did not refer to causation any more or at least not explicitly. Ago considered the classic cases of diligent treatment and protection of aliens as falling within this category.¹⁶⁷

Ago, in response to several comments, explained that he had not intended to codify a rule on absolute responsibility. He clarified his position by stating that “two conditions had to be fulfilled: the event to be prevented must have occurred and it must have been made possible by lack of vigilance on the part of the State.”¹⁶⁸ This is why the Drafting Committee adopted finally the following text:

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.¹⁶⁹

Gattini, having reviewed the ILC’s abandoned distinctions, explains accurately as follows:

Taking the obligations of means, it is clear that if Ago was right, in order to hold a state responsible, it would be sufficient to demonstrate that it did not use the tools

¹⁶³ *Id.*, para. 43.

¹⁶⁴ Third report on State responsibility, by Mr. Robert Ago, *ILC Ybk* (1971)/II 199, para. 75.

¹⁶⁵ Sixth report on State responsibility, by Mr. Robert Ago *ILC Ybk* (1977)/II 3.

¹⁶⁶ *Id.*, at 8 (emphasis added).

¹⁶⁷ *Id.*, at 9.

¹⁶⁸ Summary record of the 1477th meeting, *ILC Ybk* (1978)/I 9, at 10, para. 4 (emphasis added).

¹⁶⁹ Draft articles on State responsibility. Text adopted by the Drafting Committee: articles 23-27 and title of chapter IV of the draft, *ILC Ybk* (1978)/I, at 206 (emphasis added). Wolf stresses that the rule would require the proof of a causal connection between the result and the State’s failure to prevent. J Wolf, ‘Zurechnungsfragen bei Handlungen von Privatpersonen’, (1985) 45 *ZaöRV* 232 [‘Wolf’], at 258.

that the norm imposed upon it to use – for instance, the adoption of a domestic statute – regardless of the fact of whether other subjects could be held responsible for the harmful outcome as well, as a consequence of a breach of whatever other rule. In a way, the question of causality would be superseded by the mere ascertainment of the failure of the State.¹⁷⁰

Gattini then contrasts this with the example of obligations of endeavour (which are traditionally understood by the expression of ‘obligations of means’ in domestic legal systems, highlighting the difficulties with the ILC’s terminology), which implies notions of causality.

Not disputing the validity of the foregoing conclusions, several difficulties remain with treating examples of causation-based responsibility as mere consequences flowing from the substantive content or the type of primary obligations. The first problem with such an approach is that the cases discussed above do not present the issue as one of interpretation of the substantive obligation. The courts and tribunals frame their analysis as a matter of State responsibility. That most of these decisions discuss attribution first, before even turning to the examination of the substantive obligation in question, reinforces this point.¹⁷¹

Even if we were to accept the exclusive role of primary norms concerning the necessity of a causality inquiry, in practice it would leave open the question when such a requirement could be read into the primary obligation. As Crawford notes, the application of the classification itself is very difficult, because “obligations of conduct and result do not present a dichotomy but rather a spectrum.”¹⁷² As we shall see below in the next section, one might take a step even further: there is neither a dichotomy, nor a spectrum, because in a sense *all* international obligations could be conceptualised as obligations of result.

Further, assuming that the dichotomy exists and it is relevant, it is dubious whether principles governing the interpretation of substantive obligations are the proper keys to ascertain whether a specific primary obligation allows for responsibility based on causation. In the recent past,

¹⁷⁰ A Gattini, ‘Breach of International Obligations’, in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law. An Appraisal of the State of Art* (2014) 25, at 36.

¹⁷¹ *Limited Liability Company Amto v Ukraine*, para. 108; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, paras. 128-130; *El-Masri v Macedonia*, para. 206 (“The Court must *first* assess whether the treatment suffered by the applicant at Skopje Airport at the hands of the special CIA rendition team is imputable to the respondent State.” [emphasis added]).

¹⁷² Crawford 2013, at 223.

the ICJ and the International Tribunal for the Law of the Sea (ITLOS) had to ascertain whether a specific primary norm implies a causal connection between State conduct and a certain result.

To recall, in *Bosnia Genocide* the ICJ rejected Serbia's responsibility for the commission of genocide, given that the attribution criteria of the 'effective control' test were not met.¹⁷³ Having done so, the ICJ went on to examine Serbia's responsibility for its failure to *prevent* genocide. The ICJ found Serbia responsible, emphasizing that to trigger Serbia's responsibility only two conditions had to be demonstrated: conduct falling short of preventive obligations and the actual genocide.¹⁷⁴ Strikingly, for the purposes of responsibility, the ICJ did not require a demonstration of a causal link between the two.¹⁷⁵

A contrast to this approach is the way the ITLOS construed Article 139 (2) of the United Nations Convention on the Law of the Sea (UNCLOS). Said provision sets out a preventive obligation, without, however, expressly requiring a causal link between the State's failure in fulfilling its preventive obligations and the actual occurrence of the harmful outcome. The Tribunal, without going into much detail on treaty interpretation and with emphasis on the alignment of its pronouncements with the general customary international law of State responsibility, insisted that it is necessary to establish a causal link. The Tribunal held:

The second sentence of article 139, paragraph 2, of the Convention does not mention this causal link. It refers only to a causal link between the activity of the sponsored contractor and the consequent damage. Nevertheless, the Chamber is of the view that, in order for the sponsoring State's liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor.¹⁷⁶

¹⁷³ *Bosnia Genocide*, at 213, para. 413.

¹⁷⁴ *Id.*, at 225-226, para. 438.

¹⁷⁵ *Id.*, at 221, para. 430. It is noteworthy that the ICJ identified such an obligation as an *obligation of conduct* as opposed to an *obligation of prevention*, as Ago's approach would have suggested. Then, as a third and final step, for the purposes of reparation it examined whether there was a causal link between Serbia's failure to prevent the genocide and the actual occurrence of the genocide. Since this was not proven, the ICJ refused to award compensation. *Bosnia Genocide*, at 233-234, para. 462. For a criticism of the ICJ's treatment of causation see A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 *EJIL* 695, at 707-712. At the stage of reparations, however, causation was decisive and the lack of an established causal link between the "failure to prevent" and the harm suffered led to the rejection of a claim for compensation. For a critical comment on this, see A Nollkaemper, 'Failures to Protect in International Law' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 437, at 458-459.

¹⁷⁶ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, ITLOS Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, para. 181.

While it is perfectly possible that preventive obligations under the Genocide Convention warrant a different interpretation than preventive obligations under the UNCLOS, it is not clear which principle of treaty interpretation led to the application of the causality threshold in one case and to its rejection in the other.

One further possible solution could lie in a more sophisticated action theory in international law. The necessity of this development is particularly apparent in light of the ongoing academic debate concerning an allegedly emerging State complicity test of attribution. The next section traces the development of this discourse to argue that the underdevelopment of an action theory of State responsibility lies at the heart of the conceptual difficulties outlined above.

3. From quasi-accessorial liability to an action theory in international law

3.1 Complicity, causation and attribution

Holding one responsible as a result of the conduct of another is a well-established and centuries old possibility in the major legal systems of the world.¹⁷⁷ There are convincing arguments that the development of accessorial liability in domestic legal systems rested on some forms of causal connection between the conduct of the accessory and the conduct actually breaching the applicable prescription.¹⁷⁸ For instance, Robinson writes in one of the most significant articles on accessorial liability under US criminal law that “[d]espite the variety of the rules and doctrines employed to impose liability, in each instance [...] the defendant causally contributes to satisfaction of the objective elements of the offense by another.”¹⁷⁹ Robinson quotes the classic piece by Sayre on the development of vicarious liability in tort under common law to note that “[a] similar theory of causal responsibility has supported the rules governing vicarious liability and the liability of officials within an organization.”¹⁸⁰

The idea that attribution rules under State responsibility should mimic notions of accessorial liability or complicity under domestic law was already a hot topic in the early 20th century, and is receiving revitalized support today.¹⁸¹ For instance, Savarese or Amoroso, reflecting on some of the cases discussed above, and the shortcomings of the system of international responsibility, submitted that complicity is emerging as a new test of attributing private conduct to the State.¹⁸² Amoroso provides a different account of the practice of the IACtHR, the ECtHR and a few

¹⁷⁷ R Knütel, ‘Die Haftung für Hilfspersonen im Römischen Recht’, (1983) 100 *Zeitschrift der SavignyStiftung für Rechtsgeschichte* 340; D Johnston, ‘Limiting Liability: Roman Law and the Civil Law Tradition’ (1995) (70) *Chicago-Kent Law Review* 1515; A Földi, *A másért való felelősség a római jogban* [Responsibility for Others in Roman Law, in Hungarian] (2004).

¹⁷⁸ P K Ryu, ‘Causation in Criminal Law’, (1958) 106 *University of Pennsylvania Law Review* 773, at 774 and the references at fn 8.

¹⁷⁹ P H Robinson, ‘Imputed Criminal Liability’, (1984) 93 *Yale L J* 609, at 634-635.

¹⁸⁰ F Sayre, ‘Criminal Responsibility for the Acts of Another’, (1930) 43 *Harvard L Rev* 689, at 702.

¹⁸¹ Brierly.

¹⁸² Savarese; D Amoroso, ‘Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law. *Leiden Journal of International Law*’, (2011) 24 *LJIL* 989.

early arbitral awards, but the bulk of the argument rests on the practice of US courts in applying attribution under the Alien Tort Statute.¹⁸³ Savarese grounds his argument in the practice of the ICTY, the *travaux* of ARSIWA, US jurisprudence under the Foreign Sovereign Immunities Act and UN practice.¹⁸⁴

In response, de Frouville and Jackson stress that the complicity theory of imputation should be rejected. The very idea of a State, being a subject of international law and being bound by international legal norms, becoming complicit in an act of a private individual or entity, subject to domestic legal systems, is logically problematic.¹⁸⁵ The notion of complicity presupposes the existence of the wrongful conduct in the first place, which is not conceivable (as a default rule) in cases of private actors.¹⁸⁶ Jackson submits that the better approach to prohibit complicity is to ensure that specific primary norms cover forms of participation. He also takes issue with the actual case law on new forms of attribution in the Inter-American system.¹⁸⁷

Without attempting to settle the debate for good, what the promoters of complicity-based attribution rightly realize is that States are indeed held responsible for conduct that would otherwise not meet the classic tests of attribution. It is, however, a step too far to suggest that this should necessarily be a matter of attribution of *conduct*. Even under domestic law, from where the purported analogy of complicity would come, avenues of accessorial liability are not necessarily rules of *attributing conduct*, but only of *attributing responsibility*.¹⁸⁸ A rule on attribution of conduct determines whose conduct a given act or omission is, which, in itself, is neither necessary, nor sufficient for the purposes of establishing responsibility. In contrast, a rule on attribution of responsibility reveals who bears responsibility.¹⁸⁹ Nobody would argue, for instance, that the conduct of the perpetrator qualifies as the conduct of the accomplice, which would be precisely the result of complicity based attribution of conduct. Complicity is

¹⁸³ *Id.*, at 994-1005.

¹⁸⁴ Savarese, at 116-130. The wealth of materials presented by the authors is impressive, although the present writer does not share every aspect of their interpretation of such practice. For instance, Savarese's interpretation of UN practice as an argument in favor for a complicity-based 'full responsibility' is far reaching and lacks textual basis, see *id.*, at 121-126.

¹⁸⁵ De Frouville, at 277; Jackson, at 200.

¹⁸⁶ Savarese's response is, in essence, that a legal fiction can be applied regarding the material wrongfulness of the underlying private conduct. Savarese, at 132-133.

¹⁸⁷ Jackson, at 195-200.

¹⁸⁸ On the relevance of the distinction in international law see Fry.

¹⁸⁹ Fry explains how attribution of responsibility can in certain cases determine responsibility without relying on the concept of attributing conduct. *Id.*, at 104-105.

a derivative form of liability, but it is not a rule on attribution of conduct.¹⁹⁰ This is even more obvious in monistic systems of criminal liability, which do not even distinguish between accessories and principal perpetrators.¹⁹¹

3.2 Acting through others

At the same time, domestic legal systems do provide examples that acting in breach of an obligation *through* the conduct of others might result in responsibility as a *principal* and not as a form of accessory liability. These are not rules on attribution of conduct or attribution on responsibility *per se*. They are definitions of what qualifies as a *commission of a crime* or *performance of an act*, irrespective of the substantial prohibition. In such situations, it is recognized that the actual conduct performed by the wrongdoer *encompasses* the conduct of another in completing the wrong.

German criminal law is known to be the source of the “dominion over the crime” theory (*Tatherrschaft*).¹⁹² The theory, first systematized in Claus Roxin’s works, provides that one having dominion over the perpetration of an offence could be held liable as a principal perpetrator, notwithstanding that the actual direct physical perpetration of the offence *stricto sensu* is carried out by someone else.¹⁹³ Roxin’s agenda was to construct a conceptual framework to establish principal liability for perpetrators using organized power structures (such as an army) to commit crimes, while not necessarily acting directly, in the face of the lessons of the crimes committed during World War II.

¹⁹⁰ Further, even if complicity is accepted as a ground for attribution, there is no authority to the effect that complicity *without* a causal connection could establish responsibility. Complicity can take many forms and a strict causality requirement is not necessarily the ingredient of this notion. Yet, most of the examples of ‘complicity’ cited by Amoroso and Savarese are employing causation-based notions of complicity, making the understanding of causality an inevitable prerequisite of addressing complicity in any event. Admittedly, Savarese also refers to the example of US practice stating that the ‘causal relevance of such State support [...] need not to be proved.’ Savarese, at 131.

¹⁹¹ B Swart, ‘Modes of International Criminal Liability’, in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (2009) 83, at 87.

¹⁹² T Weigend, ‘Germany’, in K Heller – M Dubber, *The Handbook of Comparative Criminal Law* (2011) 252, at 265-267.

¹⁹³ *Id.*; C Roxin, *Täterschaft und Tatherrschaft* (De Gruyter 2015).

The International Criminal Court adopted this approach in recognizing ‘control over the crime’ as a possible form of perpetration.¹⁹⁴ Several authors suggest that the requisite factual link between the principal perpetrator controlling the crime and the commission of the offence is one of causality. Keiler’s explanation reveals the causal component of this form of liability: “[w]ithout their [i.e., the principal perpetrators’] involvement the crime would possibly have been never committed or would have taken a completely different shape.”¹⁹⁵ Gadirov also confirms that the “key to understanding the ICC’s indirect perpetration test is that it artificially explains away the role of final perpetrators, and stresses the relevance of causal contribution of superiors.”¹⁹⁶ The exact threshold of causality is a matter of controversy, but the point is made: the factual link underpinning the indirect perpetrator’s status as *a principal* wrongdoer is some form of causality.

As Jackson explains, *Tatherrschaft* establishes *principal liability*.¹⁹⁷ *Tatherrschaft* is a way of acting contrary to a legal requirement as a perpetrator, even if others are involved in the performance of the act too. It is not a rule of attribution of conduct, but a rule of attribution of responsibility.¹⁹⁸ The concept does not answer whether the conduct of one qualifies as the conduct of another. It simply defines the *way in which* the perpetrator performs the act and breaches the rule. The significance of this doctrine for the present purposes is that it dispenses with the idea that a perpetrator of an act is necessarily one whose “hands” are directly involved in the perpetration. Conversely, *Tatherrschaft* rests on the assumption that the commission of an act *through* others is possible and does not put in question of the integrity of the commission of the act.

Even before the ICC embraced this form of perpetration, there were signs in the practice of the ICTY and the ICTR that the concept of perpetration is reconcilable with acting through others. In *Seromba* the ICTR Appeals Chamber convicted the defendant for the commission of international crimes, notwithstanding that all the actual physical actions completing the *actus*

¹⁹⁴ *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/06, 29 January 2007, para. 339. For an overview of the Court’s case law and approach, see J D Ohlin *et al*, ‘Assessing the Control Theory’ (2013) 26 *LJIL* 725.

¹⁹⁵ J Keiler, ‘Towards a European Concept of Participation in Crime’, in A Klip (ed), *Substantive Criminal Law of the European Union* (2011) 173, at 189-190.

¹⁹⁶ J Gadirov, ‘Causal Responsibility in International Criminal Law’, (2015) 15 *ICLR* 970, at 981.

¹⁹⁷ Jackson, at 21.

¹⁹⁸ *The Prosecutor v Mathieu Ngudjolo Chui*, Concurring Opinion of Judge Christine Van den Wyngaert, Pre-Trial Chamber, ICC-01/04-02/12, 8 December 2012, para. 59.

reus were carried out by another person under his influence.¹⁹⁹ Seromba was a priest, who instructed the driver of a bulldozer to demolish a church where people were seeking shelter. In *Stakić*, the ICTY Trial Chambers attempted to introduce the ‘control over the crime’ theory directly, but it was rejected by the Appeals Chamber.²⁰⁰ One way or another, these authorities confirm that the idea of commission *through* others is not alien to the practice of international criminal law.

There are similar solutions in tort law and delictual liability systems. Under common law, there is principal liability in cases of ‘casual delegation’.²⁰¹ In *Brooke v Bool* Salter J. referred to the doctrine that “control over the enterprise” establishes liability for tort, even if the damage was caused by someone else than the defendant.²⁰² Carty’s survey of the case law reveals that primary liability in the law of joint tortfeasance is recognized, notwithstanding that the act constituting the tort includes the conduct of another.²⁰³ Gilliker’s study on the comparative law of vicarious liability confirms that primary liability for tort is possible and distinguishable from vicarious liability, when the tort is committed through the conduct of others.²⁰⁴ In their seminal treatise on causation, Hart and Honoré concluded that third party conduct could become an intermediary step in the chain of causation in committing the wrong in cases they call “interpersonal transactions”.²⁰⁵

In fact, under some circumstances, even ARSIWA appears to embrace the idea that the commission of an internationally wrongful act does not necessarily exclude the involvement, maybe even indispensable involvement, of others in the commission of the act. Article 47 (1) of ARSIWA plainly envisages that several States could be responsible for the “same internationally wrongful act.” Crawford comments on the applicability of the Article as follows: “What is required for each state’s responsibility in cases of concerted conduct is that its contribution to the joint action is attributable to it and amounts to *an element of the unlawful act*.”²⁰⁶ Accordingly, the contributing State is responsible for the *entire* act, notwithstanding

¹⁹⁹ *Prosecutor v Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008 (Appeals Chamber), para. 182.

²⁰⁰ *Prosecutor v Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, paras. 468-498; *Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, para. 62.

²⁰¹ P H Winfield, *A Text-Book of the Law of Tort* (1950), at 121.

²⁰² *Brooke v Bool* [1928] 2 KB 578.

²⁰³ H Carty, ‘Joint Tortfeasance and Assistance Liability’ (1999) 19 *Legal Studies* 489

²⁰⁴ P Gilliker, *Vicarious Liability in Tort: a Comparative Perspective* (2010)

²⁰⁵ Hart – Honoré, at 363-376.

²⁰⁶ Crawford 2013, at 335.

that it performed only an *element of the act*. *A fortiori*, it must be equally possible that the performance of the *entire* act involves conduct of others.

Nollkaemper and Jacobs criticized the “same” language in Article 47 (1) (and the similar provision in Article 48 ARIO). They argue that it is underinclusive, because it fails to address the situation when a single harmful outcome results from multiple wrongful acts.²⁰⁷ It is a valid point. In such cases we are in the terrain of *haftungsausfüllende Kausalität*, concurrent causation and the *consequences* of responsibility, which Article 47 (1) was not designed to tackle. We shall return to such problems in Chapter V.

3.3 The causal theory of action

How is it possible that an ‘act’ of one encapsulates the causally connected conduct of another? Is it not paradoxical that the act of one is a mere ingredient of the act of another? To answer these dilemmas, the very notion of ‘act’ deserves a closer scrutiny. Philosophers and, in particular, legal philosophers, have extensively studied the notion of ‘act’. The primary focus of these enquires is the role and function of an “act” for the purposes of responsibility (moral and / or legal) and the nature of human actions.²⁰⁸ We turn to these works for two reasons. *First*, to find justification for the proposition that acting *through* another is possible. *Second*, to understand what role causation could play in this process.

Several action theorists describe the concept of ‘act’ as an inherently causal notion. An ‘act’, at least for legal purposes (but also arguably in a broader, metaphysical sense), is, according to this view, a causal process, because an act is a causal sequence of some state of volition, some conduct and a certain consequence.²⁰⁹ An act without consequences is no act in the first place. In setting out his conception of ‘act’ in his seminal treatise on criminal law, Glanville Williams provided the following explanation:

²⁰⁷ A Nollkaemper – D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, (2013) 34 *MJIL* 359, at 396.

²⁰⁸ T O’Connor – C Sandis, *A Companion to the Philosophy of Action* (2010).

²⁰⁹ J Austin, *Lectures in Jurisprudence* (1863), 81-85; A R White, *The Philosophy of Action* (1968), at 5.

An “act” both in law and in ordinary speech has indeed three branches, but they are as follows: (a) a willed movement (or omission) (b) certain surrounding circumstances (including past facts) (c) certain consequences. To take a simple illustration, we commonly speak of the act of shooting, but shooting is much more than muscular contraction. It involves the fact that the finger is on the trigger of a gun (concomitant circumstance), and the consequence that a bullet leaves the gun.²¹⁰

From German criminal law, a similar and equally significant definition is Liszt’s. For him, an “act” is “*die auf menschliches Wollen zurückführbare Bewirkung einer Veränderung in der Außenwelt*”.²¹¹ Accordingly, when legal prohibitions identify prohibited acts, the prohibited acts could be circumscribed along the same lines. In a nutshell, *to act is to cause*.

Williams’ claim that law and “ordinary speech” concurs in this conceptualization of acts needs some clarification. Ordinary speech does not have a uniform notion. For example, the act of ‘killing’ will indeed refer to a whole causal sequence, from deciding to pull the trigger, through pulling the trigger until the bullet reaches the victim and results in deadly injuries. In contrast, the notion of ‘act’ might merely refer only to pulling the trigger, but not to the subsequent development of the causal process.

One commentator explains as follows:

Strictly speaking, the only acts (properly so called) are, in the words of Austin, “those bodily movements which immediately follow our desires of them.” But every act in that sense is followed by consequences. If A shoots B, A’s only acts, strictly speaking, are the bodily movements whereby the rifle is raised and the trigger is pressed, yet in ordinary language all the immediate consequences are spoken of as his acts. Even unintended consequences (e.g., if he misses B and hits C) are spoken of as his acts and it does not seem possible to draw any clear dividing line between an act and its consequences unless the word act is confined, as is done by Austin, to bodily movements.²¹²

This is an important duality of meaning to keep in mind. In the analysis to follow, by ‘act’ we mean the broader concept, because, as it is submitted, (international) law adopts such usage too. In the context of *Tatherrschaft* in international criminal law, Jain stressed that “‘act’ here

²¹⁰ G Williams, *Criminal Law: the General Part* (1961), at 16.

²¹¹ F von Liszt, *Lehrbuch des deutschen Strafrechts* (1891), at 128.

²¹² Aquarius [E F Watermeyer], ‘Causation and Legal Responsibility’, (1962) 62 *South African Law Journal* 126, at 127.

must be taken to mean the entire series of events leading to the fulfillment of the result of the elements of the offense.”²¹³

Michael M Moore explains the way in which the complex action descriptions of the *actus reus* in criminal law set out the prohibited conduct. In his view, such descriptions inevitably imply a causal inquiry:

All complex action descriptions can be replaced by an equivalent description of: (1) a basic act; (2) a set of circumstances in the presence of which the doing of that basic act is forbidden; and (3) a set of consequences which, if they follow from the basic act, make the doing of that basic act forbidden.²¹⁴

It cannot be maintained that only acts in breach of obligations specifying a specific result or “external event” imply a causal connection, while the breaches of conduct obligations do not. Moore demonstrates the unsustainability of such a position as follows:

It is commonly said that there are no ‘result elements’ (ie, no causal requirements) for crimes such as burglary, rape, theft, kidnapping, defacing public property, or drunk driving. Yet there plainly are causal requirements to such offenses. Rape is done only when the perpetrator by his bodily movements causes penetration; burglary, when he causes a breaking and entering; theft, when he causes movement—‘asportation’—of the thing stolen; kidnapping, when he causes confinement and movement of the person kidnapped; defacing, when he causes marks constituting defacement to appear on public property; drunk driving, when he causes a car to be in the motion while he is drunk; etc. [...] To be guilty as such a principal is to act in such a way as to cause some legally prohibited state of affairs.²¹⁵

Moore calls his theory the “concurrency theory”, because it states that a wrongful act is always a concurrence of a basic act, circumstances and consequences. The concurrency theory of action develops Jeremy Bentham’s and John Austin’s earlier action theories. It is by no means uncontested. The bulk of the criticism addresses Moore’s claim that causative actions are

²¹³ N Jain, ‘Developing a New Structural Framework for Parties to an International Crime: Toward a Capacious Concept of Principalship’, (2010) 104 *ASIL Proceedings* 261.

²¹⁴ M M Moore, *Acts and Crime: The Philosophy of Actions and its Implications for Criminal Law* (2010), at 191.

²¹⁵ M M Moore, *Causation and Responsibility: Essays in Law, Morals and Metaphysics* (2009), at 282. For Moore, the proposition that “to act is to cause” is important, because he argues that *causation* is the foundation of legal responsibility. The fact that actions are inevitably causal sequences combined with the recognition of an act requirement in legal responsibility regimes merely reinforces that responsibility attaches to causation.

conditions of criminal responsibility.²¹⁶ This debate ties into the border doctrinal discourse on whether there is an *act* requirement in criminal law at all. We need not dwell on these points any further here, because the question is not whether an *act* is always a condition of State responsibility. Under ARSIWA, an omission can qualify as an internationally wrongful act, which does not necessarily mean that an omission is an ‘act’ *stricto sensu*. The question this chapter poses is whether in as much as a “State act” forms the basis of responsibility in a given case, such an act is an inevitably causal notion or not. Conversely, the further question is whether international legal prohibitions of State acts necessarily imply a causal inquiry.

Gardner’s critique of Moore’s concurrence theory targets his claim about all wrongful acts being causal in nature and it deserves therefore scrutiny. He argues that “non-proxiable” wrongs, such as rape, are non-causal, because they could not be redefined by their result without encountering logical fallacies.²¹⁷ Saying that rape equals to “causing penetration” is not helpful without understanding what “penetration” means in the first place. This will then result in a circular inquiry, because the concurrence theory will merely repeat that penetration is “causing penetration”. Gardner concedes that the concurrence theory is useful when acts such as moving a table are described: the “table moves” as a consequence of the action “causing the table to move” is understandable without first understanding what we mean by “moving the table”.²¹⁸ “Penetration”, however, as a result of “causing penetration” is not understandable without first understanding what we mean by “penetrating”.

This is not the place to settle this controversy. It is not clear to this author whether the circularity described by Gardner rebuts the claim that the act of rape is causal in nature. It appears to be merely a sign that the linguistic tools are more limited to describe certain results than others. ‘But for’ the act of penetration, the victim would not have been penetrated. This seems sufficient to defend Moore’s claim.

Moore’s theory aimed to describe wrongful acts prohibited by rules of criminal law, while Gardner was referring to criminal law and torts. It is true that international legal obligations are less frequently formulated as “complex action descriptions” akin to substantive criminal law

²¹⁶ D N Husak, ‘The Alleged Act Requirement in Criminal Law’, in J Deigh – D Dolinko (eds), *The Oxford Handbook of the Philosophy of International Law* (2011) 108, at 110-112.

²¹⁷ J Gardner, ‘Moore on Complicity and Causality’ (2008) 156 *University of Pennsylvania Law Review* 432.

²¹⁸ *Id.*, at 433.

prohibitions or specific torts such as inducing contract breach. However, the determination of a breach is logically impossible without discerning in an interpretative exercise whether a given primary norm prohibits a certain State conduct. When faced with the claim that a certain State conduct is not in accordance with the obligations of the State under international law, the substantive obligation has to be construed to ascertain whether it can be read as a prohibition of the State conduct in question. Arriving at a *Tatbestand* is necessary, in criminal law, in tort law²¹⁹ and in international law equally.

As of now, there is no equivalent of a well-developed “action theory” (*Handlungslehre*) in the law of international responsibility. In discussing the notion of breach, ARSIWA and its commentaries do not go into too much details, nor did the concept receive much more attention during the ILC’s work. ARSIWA emphasize the decisive role of the substantive norm, distinguish between acts and omissions and cover a number of provisions on the temporal aspect of the breach and composite wrongful acts.²²⁰ There is virtually no doctrine on the possible *modes* of breach or an independent theory of acts, beyond the traditional distinction between acts and omissions. Below, I set out a possible way of further developing the rather unsophisticated “action theory” of international law.

4. Applying a causal concept of State action

Just as the act of a subject of domestic liability systems is a concept covering an entire causal sequence, the act of the State could be approached along the same lines in the law of State responsibility. To understand how a concept would work in practice, it is useful as a starting point to recall Bassiouni’s position that “[t]o any international obligation corresponds a state of fact”.²²¹ Thus, an international obligation is breached when a certain actual state of affairs occurs, contrary to what the obligation envisaged. This understanding of the notion of *breach* is also reflected in Article 36(2) c) of the Statute of the International Court of Justice, which

²¹⁹ P Hellwege – P Wittig, ‘Delictual and Criminal Liability in Germany’ in M Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (2015) 123, at 144-145.

²²⁰ ARSIWA Commentaries, at 54-55.

²²¹ C M Bassiouni, ‘The Nationalization of the Suez Canal and the Illicit Act in International Law’ (1965) 14 *DePaul L Rev* 258, at 258.

confers jurisdiction on the Court (assuming that other conditions are fulfilled) to adjudicate disputes about the “the existence of any fact which, if established, would constitute a breach of an international obligation.”

These definitions suggest that the assessment of a breach is, briefly, a comparison of an *existing fact* with a *prescribed fact*. While determining the latter is a matter of interpretation, determining whether an *existing fact* is, in principle, susceptible of qualifying as a breach, is not. International law has two options. It accepts either that *any fact* is, in principle, susceptible of qualifying as a breach, or it has to isolate *certain categories of facts* susceptible of qualifying as a breach from other facts not susceptible of qualifying as such. In fact, ARSIWA offers the latter solution when it requires that an *act or omission* took place. It is thus not *every fact*, but only a *fact qualifying as an act or omission* that can constitute a breach.²²²

Consequently, in the assessment of a breach, the first task is to determine whether the facts at hand reveal that an *act or omission* took place. Even before we get to the question of attribution (which asks *whose* an act is), the identification of this causal process (*i.e.*, *what* the act is) is necessary.

This determination is likely to start with the identification of the “consequence aspect” of the act in the first place: the “alteration in the world” that the action brought about. The next question is whether the State (*i.e.*, actors, the conduct of whom is attributable to the State) created the existing state of affairs or not. Again, to frame the inquiry in line with Williams’ and Moore’s approach, the question is whether the ‘consequence aspect’ is ‘caused’ by the State. To take an example, if a State has an obligation not to hamper innocent passage of foreign ships in the territorial sea (qualified as a conduct obligation by an early version of the Commentary),²²³ a discernible prohibited State act would be:

- i. the hampering of innocent passage (“the consequence”)
- ii. caused by an unspecified basic State act (“basic act”)

²²² This dilemma is not peculiar to international law. See, for instance, the discussion of facts versus acts as conditions of liability in civil law by Larenz: K Larenz, *Vertrag und Unrecht. Vol 2* (1937), at 10-11.

²²³ Report of the International Law Commission on the work of its twenty-fifth session, 7 May - 13 July 1973, Official Records of the General Assembly, Twenty-eighth session, Supplement No. 10, *ILC Ybk 1973/II* 161, at 182.

- iii. under circumstances when such hampering is not permitted (“circumstance”).

The claim here is that whatever State act we examine in light of a given prohibition, this will be inevitably a causal process labelled as ‘State act’. A prohibited ‘State act’ will always correspond to Williams’ scheme outlined above as a unity of act + circumstances + consequences.

The remaining step is to query whether the involvement of some third party in this causal sequence inevitably excludes that the entire process is viewed as a single ‘State act’. Is there a difference between the mechanics of a gun completing the causal action of killing and the actions of a private military contractor caused by the conduct of State authorities, completing the act of human rights violations? Whether a causal chain is broken by the conduct of another may depend on a number of factors, but as a matter of principle, such conduct does not inevitably negate a causal connection.²²⁴ To the contrary, we have seen several examples of principal responsibility for indirectly authored wrongs.

The sequence of establishing a breach does not start with interpreting *in abstracto* the primary obligation, but with the identification of the facts susceptible of qualifying as an ‘internationally wrongful act’, which, in turn, presupposes that they are susceptible of qualifying as an ‘act’ in the first place. As an early version of the Commentary explained the sequence of the steps in the ILC’s framework, “it is necessary to determine whether State conduct exists before it can be determined whether or not it constitutes a breach of an international obligation.”²²⁵ *A fortiori*, it is necessary to determine whether an *act* exists before qualifying such an act as a State act. The important recognition at this stage is that an act is rightly viewed as a causal sequence *per se* and the elements of such a causal chain might very well involve the conduct of individuals or entities other than the agents of the State.

Once an act susceptible of qualifying as a breach is identified and such act was attributed to the State, the final step is to contrast the actual act with the prescribed or prohibited act. It is here when the primary obligation finally enters the stage, and this is the point beyond which a general discussion of State responsibility cannot comment further. However, by this time the

²²⁴ H L A Hart – T Honoré, at 363, 371-372.

²²⁵ Report of the International Law Commission on the work of its twenty-fifth session, 7 May - 13 July 1973, Official Records of the General Assembly, Twenty-eighth session, Supplement No. 10, *ILC Ybk 1973/II* 161, at 184.

international lawyer should already have identified an *act* or omission and tested such acts or omissions on the attribution yardstick. Accordingly, the international lawyer should already have reached some preliminary conclusions on causation by the time she first encounters the primary obligation.

Christenson takes issue with this logical sequence, because, his argument goes, it cannot apply to omissions. Christenson writes that the ILC “assumes that State conduct can be defined without reference to duty. If a State may act by doing nothing [...] it is impossible to say State action exists without reference to the substantive duty.”²²⁶

Wolf’s more nuanced views are preferable, who further distinguishes between *actual omissions* and *normative omissions*.²²⁷ By normative omissions Wolf means situations without the specific omission of an actually identifiable State agent, i.e., ‘State omissions’ as such. For instance, the State’s failure to discharge its vigilance obligations in a certain part of its territory would be a normative omission. According to Wolf, the ILC’s distinction between the notions of attribution and breach, as two distinct and independent conditions of State responsibility, cannot be maintained in cases of normative omissions. Whether a normative omission took place cannot be ascertained without first determining whether the State had an obligation to establish and activate its apparatus in a certain case, because nobody actually committed an ‘actual’ omission.

These are important points. The proposition this thesis advances is not concerned with the dilemma whether a causal theory of *acts* can describe omissions too and the analysis here is confined to *acts stricto sensu*. However, the essence of an omission is the absence of a prescribed *act*. The prescribed *act* will be, again, just as much a causal phenomenon as all other acts discussed in this section. Whether a State “committed an omission” depends on whether the State should have performed a prescribed “trinity” of a basic act with requisite consequences under defined circumstances, according to the underlying primary obligation.

²²⁶ G A Christenson, ‘The Doctrine of Attribution in State Responsibility’ in R Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (1983) 321, at 325-326. See also G A Christenson, ‘Attributing Acts of Omission to a State’ (1990) 12 *MJIL* 312.

²²⁷ To apply the present framework, in cases of normative omissions, the emphasis would be much more on *causation* than on attribution. Wolf, at 234-236.

To sum up, there is no need to solve the attribution vs causation dilemma or to query whether attribution is conceivable as a causal concept. Even if attribution is not, the concept of ‘act’ inherently is. Plakokefalos, to rebut the proposition that attribution and causation go hand in hand, writes that it is “artificial” to distinguish between an “event” contrary to international law that the State conduct causes and the act of the State itself.²²⁸ Plakokefalos’ view might be accurate in as much as attribution is concerned. However, it is respectfully submitted that if anything would be really artificial, it was a causation-free conception of an “act of the State”.

It cannot be stressed enough that this sequence of the analysis, as a default rule, should not depend on the type or the structure of the primary obligations. This logic applies with equal force to obligations of conduct. For example, Ago cites the prohibition to enter diplomatic premises as an obligation of conduct.²²⁹ Yet, the ‘internationally wrongful act’ breaching such a prohibition plainly *is* a causal process, analogous to Moore’s causal description of ‘burglary’ cited above. The consequence aspect of such a conduct is that diplomatic premises are entered as a result of a ‘movement’ by State agents. Causation is thus an inevitable constitutive pillar of the very notion of ‘act’ and, consequently, of ‘internationally wrongful act’ too.

In any event, it is still not be a reason to reject a *causal conception of State action*, possibly involving non-State conduct, as a default approach to State acts under the law of State responsibility, just because some international obligations are “breachable” only by “direct perpetration”. After all, there are international obligations where certain forms of attribution are inconceivable (*e.g.*, obligations incumbent on specific national authorities), but this does not put in question the significance and utility of attribution rules as secondary rules of international law. Action theory and the modes of commission or perpetration belong to the general part in liability systems. International law is no different. Just as rules on the distinction between acts and omissions and on the temporal aspect of breach are rightfully codified as transsubstantive norms of State responsibility, the recognition of an autonomous and causal concept of a State act is equally necessary.

Without this concept, the rules of attribution will operate restrictively. Rules of attribution might suggest that once attribution of the conduct of an entity fails, there is no room for

²²⁸ Plakokefalos, at 479. See also Fry, at 102.

²²⁹ Sixth report on State responsibility by Mr. Roberto Ago, *ILC Ybk 1977/II*(1) 3, para. 10.

responsibility.²³⁰ In the model outlined this is not necessarily so. Given that a State has multiple ways of *performing an act*, attribution is not the last question. It has to be assessed if the otherwise non-attributable conduct is merely the “consequence aspect” of an act performed by a State agent. This is a necessary question, but ARSIWA do not require to ask it. Equally, however, there is nothing in the ILC framework either which would preclude the application of the foregoing principles.

5. The causal concept of State action in ARSIWA

ARSIWA itself implicitly embraces a causal theory of State action in some of its articles. In particular, this section discusses the articles on coercion and *force majeure*, with a brief outlook to the commentary on aid and assistance. Unless these articles are read with a causal theory of action in mind, they will appear paradoxical and *prima facie* contrary to the core structure of ARSIWA.

5.1 *Cas fortuit*

The often overlooked provision of ARSIWA on *cas fortuit* highlights that the causal nature of ‘State act’ was, at least impliedly, codified by the ILC. Article 23 is entitled “*force majeure*”, but its provisions also cover *fortuitous* event (*cas fortuit*) as a circumstance precluding wrongfulness:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an *unforeseen event, beyond the*

²³⁰ *Bosnia Genocide*, at 213, para. 413; *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award of 30 November 2011, paras. 8.1.18-8.1.19; *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 7.110-7.123. See also Becker’s arguments against the restrictive ‘agency paradigm’, Becker, at 257-261.

control of the State, making it materially impossible in the circumstances to perform the obligation.²³¹

As Paddeu noted, eventually the ILC chose to use the umbrella term of *force majeure* both to “irresistible forces” and to “unforeseen events”.²³² Without discarding this choice, for the purposes of this analysis, we distinguish the latter as a “fortuitous event.”

The UN Secretariat prepared a comprehensive study on *force majeure* and fortuitous event to assist the work of the ILC.²³³ This study demonstrated that a fortuitous event is not necessarily irresistible. It is typically some unforeseeable human conduct.²³⁴ The attributes such an event has (based on the final text) is that it is “unforeseen”, it is “beyond the control” of the State and the State act in question is “due to” it.

What these concepts mean is left entirely without discussion in the commentaries. The “due to” language indicates that a causal inquiry is inherent in the concept. The relationship between *force majeure* and causation is apparent from the case law predating ARSIWA too. In *Lighthouses Arbitration* one of the claims concerned property requisitioned by Greece that could not be returned in its original form due to the bombardment by Turkish forces.²³⁵ The tribunal pointed out that “*un lien de causalité*” is required between the wrongful act and the damages, which was broken by a *force majeure* event, namely, the bombardment.²³⁶ Similarly, in *French Company of Venezuelan Railroads*, Venezuela successfully argued that non-payment of its debt was due to *force majeure* on account of war.²³⁷

²³¹ ARSIWA, Article 23 (emphasis added).

²³² F Paddeu, ‘A Genealogy of *Force Majeure* in International Law’, (2012) 83 *BYIL* 1, at 20.

²³³ *Force majeure* and “fortuitous event” as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine—Study prepared by the Secretariat. *ILC Ybk*, (1978)/II 61.

²³⁴ See e.g. the discussion at *id.*, at 174 *et seqq.*

²³⁵ *Affaire relative à la concession des phares de l’Empire ottoman (Grèce, France)*, (1956) 12 RIAA 155, at 219-220.

²³⁶ *Id.*, at 220.

²³⁷ *French Company of Venezuelan Railroads Case*, (1905) 10 UNRIAA 285, at 327. Waibel, having examined this and similar cases, concludes that “Force majeure could in principle excuse the payment of financial obligations for the duration of force majeure.” M Waibel, *Sovereign Defaults before International Courts and Tribunals* (2011), at 95. See also F Paddeu, ‘A Genealogy of *Force Majeure* in International Law’, (2012) 83 *BYIL* 1, at 43-45.

The *travaux of ARSIWA* reveal that Robert Ago's catalysis theory and the concept of a fortuitous event are directly related. Ago, introducing the concept of *cas fortuit*, explained this special relationship between the two concepts as follows:

Where the obligation is to ensure that an event due to another does not occur [i.e., an obligation of prevention], what may be "fortuitous" is the occurrence of the event itself. In other words, the obviously unexpected and unforeseeable nature of such an event gives its possible occurrence the appearance of a fortuitous event, and it is that which may have made it impossible for the State organs to realize that their conduct might have been such as not to have the effect of preventing the event as the obligation required.²³⁸

Ago referred to the *Saint Albans Raid Case*, which concerned the operations of the Confederate Army launched from the territory of Canada into US territory during the American Civil War in 1864. The US claim against Canada for its failure to prevent the operations was rejected, because the operation was carried out in carefully planned secrecy, so that Canada could not have foreseen it. Thus, the fortuitous event was the operation itself. *Saint Albans Raid* is one of the authorities cited in the ARSIWA Commentaries to Article 23.²³⁹

In practice, this means that a State could raise a valid defense, as a circumstance precluding wrongfulness, if a link of foreseeability is missing between its failure to comply with an obligation to prevent a given event and the actual occurrence of such an event or if the event is "due to" (i.e., caused by) an intervening unforeseeable event.

In *Bosnia Genocide*, the ICJ addressed such an argument and rejected it. In principle, the ICJ made clear that it is no defense for the failure to comply with the obligation to prevent genocide that genocide would have happened anyway, because it would have been caused by other events not controllable by the party obligated to prevent:

On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent,

²³⁸ Eighth report on State responsibility, by Mr. Robert Ago, *ILC Ybk* (1979)/II 3, para. 145.

²³⁹ *Saint Albans Raid case*, Moore, *History and Digest*, vol. IV, 4042 (1873)

might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.²⁴⁰

Under Article 23, if the event (in this case the occurrence of genocide) was a result of a non-attributable conduct of private groups, which was *unforeseen* and which the State could not have prevented, the State cannot be responsible. In this case Serbia did not formulate its defense under Article 23, but in our view such a defense, based on notions of causality and foreseeability, is possible.

Ago thus understood a fortuitous event as an event possibly breaking the causal connection between the wrongful act and the external event. Riphagen interpreted the concept along the same lines.²⁴¹ To recall, one of the conditions triggering Article 23 is that the “act” should be “due to *force majeure*”. If we accept Ago’s proposition (and there appears to be no reason not to do so) that the fortuitous event could cause merely the “external event” and not the entirety of the act, it follows that what Article 23 means by the expression “act is due to” is an entire causal sequence and not merely the “basic act” causing the external event.

Admittedly, Ago’s reference to the “external event” was mirroring his approach to the classification of obligations. As discussed above, in his understanding certain obligations could not be breached without an “external event” caused by the State triggering responsibility. One way to reconcile Ago’s position on fortuitous event with Article 23 would be to construe the “act is due to language” as if it provided that “external event caused by the act is due to *force majeure*”. However, this interpretation is paradoxical. How can an “external event caused by the act” be “due to *force majeure*” at the same time? The only way to reconcile the “act due to” language is to acknowledge that concept of ‘act’ refers to a *causal sequence*, the entire sequence of which qualifies as the ‘act’. A fortuitous event could be an event *interrupting* the causal sequence constituting the State act. In addition, Article 23 gives a further answer to the

²⁴⁰ *Bosnia Genocide*, para. 430. It is noteworthy that the ICJ identified such an obligation as an *obligation of conduct* as opposed to an *obligation of prevention*, as Ago’s approach would have suggested.

²⁴¹ Second report on the content, forms and degrees of international responsibility (Part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur, *ILC Ybk* (1981)/II 79, at 93, fn 72: “[T]o the extent that the element of “hazard”, breaking the chain between conduct and result, takes the form of “force majeure and fortuitous event” (art. 31 of the draft articles), there may be a “circumstance precluding wrongfulness” in the sense of part 1 of the draft, which deals with the origin of State responsibility rather than the content of State responsibility.”

question what sort of private conduct would interrupt the causal sequence. The answer given by Article 23 is a test of *foreseeability*.

It is now obvious that there are two variants of *force majeure*. The first is an event *preceding and causing* the very beginning of the causal sequence constituting the “State act”. This would be the case, for example, if a *force majeure* condition forces State agents to cross the border of another State without the consent of the latter. The second variant is the *Saint Albans Raid* scenario, when the *force majeure* event disrupts the causal sequence of the State act. This variant of *force majeure* excludes the unity of a State act, which would otherwise be incompatible with an international obligation. To sum up, *force majeure*, as codified by the ILC and as interpreted by Ago and Riphagen, implies that a causal concept of State action is underlying ARSIWA.

5.2 Coercion

Similar considerations apply to the codification of coercion. Article 18 of ARSIWA sets out the applicable rules in the following terms:

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) the coercing State does so with knowledge of the circumstances of the act.

The “but for” language immediately rings a bell for the common lawyer. Indeed, Crawford notes that Article 18 “introduces a test of causation, namely that the act must have been unlawful vis-à-vis the coerced state but for the fact of coercion.”²⁴² This sentence led to some controversy in the academic commentary. Fry criticized the drafting of Article 18 for several reasons, one of them being an alleged confusion between factual and legal causation. The “but for” language, Fry argued, indicates a test of factual causality (determining whether A was

²⁴² Crawford 2013, at 421.

necessary for B to happen), whereas the substance of Article 18 addresses “legal causation” (determining whether B is a legally relevant consequence of A).²⁴³ Plakokefalos goes further to assert that the ‘but for’ language here is not indicative of causation at all.²⁴⁴

Crawford’s view is preferable and it signals causally conceptualized State actions. Article 18 speaks of a State act, the qualification of which depends on the way it is *caused*. If it is caused by coercion, it is not wrongful (but it is still an act!). If it is not caused by coercion, *i.e.*, if its cause is something else than coercion, it is wrongful. Fry refuses to accept this as “factual” causation, because, ultimately, what changes depending on the cause of the State act is the legal qualification of the State act. However, Fry overlooks one step of the analysis in making this assertion. As a result of coercion, it is not only the legal qualification, but the *act* itself that is altered. A coercion-caused State action is *not* the same act as a non-coercion-caused State action. What changes is not the *legal qualification* of the action as either wrongful or lawful. The change lies in the *legal identification* of the action in question. A State action *caused* by coercion is not the same State act as a *non-coerced* State act. Implied in this distinction is that the State act is a causal sequence itself and different causal attributes result in a different act.

Fry makes a further point. In his view, Article 18 dispenses with the very idea that internationally wrongful act is the condition of responsibility, because, due to the ‘but for’ language, there is *no* internationally wrongful act. The ARSIWA commentary underscores that the coercing State is not committing the coerced wrongful act.²⁴⁵ At the same time, the act of the State is not “wrongful” given the fact of the coercion. There is merit in Fry’s observation of this paradox, but, for the present purposes, the coerced act is still an act and, in addition, a causally conceptualized act, even if not an internationally wrongful one *per se*. On a last note, Article 18 seems to incorporate even the “circumstance” element of the causal action theory in paragraph (b), requiring the awareness of the coercing State of the circumstances of the coerced act.

²⁴³ J D Fry, ‘Coercion, Causation and the Fictional Elements of Indirect State Responsibility’, (2007) 40 *Vanderbilt Journal of Transnational Law* 611, at 631-638.

²⁴⁴ Plakokefalos, at 480.

²⁴⁵ ARSIWA Commentaries, commentary to Art 18, para. 1.

5.3 Aid or assistance

The Commentary to Article 16 also reveals a causally conceptualized notion of State acts. Article 16 covers the “aid and assistance” provided by a one State to another to commit an internationally wrongful act. Nollkaemper and Jacobs argue that aid and assistance *per se* is an internationally wrongful act and is *not* the *same internationally wrongful act* as the aided and assisted act.²⁴⁶ This is true in some cases, but it might not be true for others. The Commentary to ARSIWA Article 16 makes clear that aid and assistance could be the performance of one of the *elements* of the internationally wrongful act:

[W]here the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.

It follows that (i) there are “elements” of the wrongful act, (ii) which are causal conditions of the “occurrence” of the act and (iii) that the responsible State does not have to perform *all* elements of the wrongful act, because the assisting or aiding State can do so without *disrupting* the unity of the internationally wrongful act. Ad (ii), it appears that in this variant of assistance, the causal link meets a *conditio sine qua non* threshold: but for the assistance, there is no wrongful act. Aust argues against such a reading of Article 16, because the assistance being a but for cause could mean that “it is more likely to assume that an independent responsibility of the assisting State would arise in the form of the main authorship of the wrongful act.”²⁴⁷ We share Aust’s concern, but his solution suits squarely within the causal action theory proposed here.

5.4 Conclusions

²⁴⁶ A Nollkaemper – D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’, (2013) 34 *MJIL* 359, at 402.

²⁴⁷ H P Aust, *Complicity and the Law of State Responsibility* (2011), at 213.

As the foregoing survey demonstrates, the non-conceptualisation of State acts makes the interpretation of several Articles troublesome. Nedeski and Nollkaemper, having reviewed Chapter IV of Part 1 of ARSIWA, concluded that

[w]hile the ILC could construe responsibility for own wrongful acts without relying on causation and injury (and even this was not without problems), this was much more problematic for the category dealing with responsibility in connection with acts of others.²⁴⁸

They note that Chapter IV struggles with reconciling responsibility for the act of another with the axiomatic starting point that the State is responsible for its *own* wrongful act. This led to a change in the approach under ARIO, where the triggering condition of responsibility is not “the” wrongful act of the international organization, but “an” internationally wrongful act.²⁴⁹

The tension underlying Chapter IV of ARSIWA stems from Ago’s purported dichotomy that a State is either responsible from its own act *or* for an act of another. The foregoing examples demonstrate that Ago’s dichotomy breaks down within ARSIWA itself, in Articles 16, 18, 23 (and the previously discussed Article 47) alike. The conception of actions these articles mirror is a complex one. Acts envisaged here are not singular moments clearly and exclusively attributable to someone, but sequences, causal processes that are possibly interfered with by others or partially performed by others.

6. The implications of a causal theory of State action

There remain two, interrelated questions:

- i. What difference does a causal action theory make in practice concerning the consequences of responsibility?
- ii. What is the remaining relevance of the Article 8 test of attribution?

²⁴⁸ N Nedeski – A Nollkaemper, ‘Responsibility of International Organizations ‘in connection with acts of States’, (2012) 9 *IOLR* 33, at 47.

²⁴⁹ *Id.*, at 43.

6.1 The implications for the consequences of responsibility

Does a causal theory of action bring any difference in practice? Is it not immaterial whether a claim is for compensation of damages *caused* by an illegal State act *through* private actors or for compensation for damages *caused* by an illegal State act *consisting of a causal sequence including the conduct of private actors*?

Before answering this question, Becker's theory on the *scope of responsibility* should be recalled. Becker, as we briefly covered above, outlined a theory in which State responsibility has an identifiable and circumscribable *scope*, determined by considerations of causation. Becker argued in favour of a reconceptualization of State responsibility, at least in the context of State-sponsored terrorism, warranted by the shortcomings of the "agency paradigm" of attribution. He argued that it is not satisfactory to hold States responsible for the failure to prevent terrorism, if the conduct of the terrorists is causally connected to the State harbouring them.²⁵⁰

Becker proposed a four steps test to define the scope of State responsibility:

- i. A test of attribution, determining whether a conduct qualifies as State conduct;
- ii. A "legal test", determining whether the attributed conduct qualifies as a breach;
- iii. A "causal test", determining the *scope of responsibility*;
- iv. A "policy test", determining whether non-causal considerations should inform the extent of the *scope of responsibility*.²⁵¹

It is apparent from Becker's test that he also overlooked the very first, preliminary step of establishing responsibility: whether a conduct exists in the first place.

²⁵⁰ Becker, at 325.

²⁵¹ *Id.*

Becker understood that this concept does not necessarily make a difference in the State's financial liability flowing from its responsibility. After all, whether the State pays compensation for damages *caused* by its omission to prevent acts of terrorism or for damages caused by terrorism is immaterial, as long as the act of terrorism does not fracture the causal connection between the original omission and the damages. However, financial liability is not the only consequence of the State's wrongful act. State responsibility could potentially entail a wider range of consequences, such as cessation, countermeasures, in certain cases even self-defence.²⁵² It is indeed relevant whether a countermeasure should be proportionate with the State's omission or the terrorist act itself. Becker's analysis is sound and applies with equal force to the causal action theory outlined here. However, there are three further points to keep in mind in this respect.

First, Becker's argument was published before he could have reflected on the developments in *Bosnia Genocide*. As discussed briefly above, in *Bosnia Genocide* the ICJ did not award financial compensation because, notwithstanding that it found breach, the causal link between the breach and the consequence of the breach was not demonstrated.²⁵³ The breach was Serbia's failure to prevent genocide, which the ICJ framed as a best effort obligation. The alleged consequence was the perpetration of genocide by non-State actors.

Becker's theory would not make a difference here. As long as attribution of the perpetrators' conduct to the State is missing, the next question for Becker is whether the perpetration could fall within the *scope of responsibility* on the basis of a causal link between the failure to prevent and the perpetration. Determining the *scope of responsibility* is thus, at least for the purposes of financial liability, not different from determining the *scope of the duty to provide reparation*. This is a question of *haftungsausfüllende Kausalität*.

A causal action theory has a different consequence, because it is not permissible to leap from the non-attribution of the perpetration to the assessment of the duty to prevent. Under the model suggested here, it is not possible to leave the examination of causation to the stage of reparations for the wrongful failure to prevent genocide. Instead, having concluded that attribution of the direct perpetrators' conduct could not be established, the next step should

²⁵² Becker, at 323.

²⁵³ *Bosnia Genocide*, para. 430; See also A Nollkaemper, 'Failures to Protect in International Law' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 437, at 458-459.

have been to assess whether there is *another possible act* of which the perpetrators' conduct was either the "consequence" aspect or an intermediary element of the causal link between the "basic act" and the "consequence aspect". Not only the direct perpetration could qualify as an 'act' in the first place. The causation of such perpetration by the State machinery *as such* could amount to a "State act" (the phrase 'act' being, again, broadly understood).

The question of attribution does not arise until after an *act* susceptible of attribution and of qualifying as a breach has been identified. If an act is identified, but then the attribution test fails, the next question should be whether there is *another act* potentially avoiding our attention. Again, a causation of genocide through private actors could be such an act *per se*, which then would have to face a second "attribution attempt". We are thus still at the stage of *haftungsbegründende Kausalität*.

Second, in contrast to Becker's theory, which leaves the notion of the "internationally wrongful act" unaltered, the causal action theory focuses on a refined understanding of what precisely the act is; when it begins and when it ends; and, primarily, what consequences flow from it. Chapter IV discusses the problems surrounding but for causation and remoteness in the law of State responsibility. It shows that a satisfactory definition of the internationally wrongful act can be of paramount importance to delimit the scope of liability.

Most importantly, the *Chorzów* standard of "wiping out" all the consequences of the illegal act requires the construction of a hypothetical counterfactual scenario without a wrongful act. The construction of the counterfactual presupposes a precise identification of the wrongful act in the first place. To take the example of *AMTO* or *Ališić*, if the illegal State conduct is the deprivation of a State entity of funds, the counterfactual queries what would have been the injury "but for" such deprivation. It is possible in such a case that the State entity would not have covered its outstanding debts, notwithstanding that it would have had the requisite funds at its disposal. On the other hand, if the illegal State conduct is *causing the State entity not to honour its obligations*, the counterfactual would be that the State entity *honours* its obligations. It is therefore necessary to define the wrongful act as precisely as possible and to distinguish the *consequences* of the wrongful act from the *consequence aspect* of the act itself.

6.2 The implications for attribution and effective control

The Article 8 test of attribution would retain its relevance, because it addresses a fundamentally different question, namely, that of who qualifies as the agent of the State for the purposes of a specific conduct. Article 8 incorporates two actions. The first is the instruction or the exercise of direction or effective control over a course of conduct. On this action depends the applicability of Article 8. Article 8 does *not* require that the State entity issuing the instruction or exercising direction or effective control is acting *per se* in breach of an international obligation. It is sufficient for the purposes of responsibility that the attributed conduct of the instructed / directed / controlled entity violates the international obligation when carrying out the instruction or while being under exercised effective control or direction. In contrast, applying the causal theory of action to State acts, the entirety of the process is contrasted against the international obligation and not only the conduct of the non-State actors at the end of the chain.

For example, if a State instructed private actors to guard a State facility and such actors committed actions contrary to the requirements of human rights conventions during the defence of the State facilities, the State would remain liable, irrespective of the fact that the instruction *per se* is not contrary to human rights, nor did it envisage future human rights violations. Milanović, discussing the *Bosnia Genocide Case* and Article 8, concludes that State instructing the actors committing genocide do not have to possess genocidal intent as a condition of State responsibility for genocide:

[I]t is not necessary for genocidal intent to be attributed to a state in any special way, as the issue of fault is a matter of primary rules. Genocidal intent must be shown only in relation to the actual perpetrators of genocide.²⁵⁴

Milanović is correct. Attribution rests on *instructing, directing or effectively controlling* the course of conduct during which the alleged internationally wrongful act takes place. It is only this latter act, and not the entire process of instructing, directing or controlling, which will be assessed in light of the primary rules.

²⁵⁴ M Milanović, 'State Responsibility for Genocide', (2006) 17 *EJIL* 553, at 574

At the same time, if the factual link between the State and the private actors fell short of the Article 8 requirements, it could still serve as the basis for regarding the entire process as a single State act. For example, if private actors protect a State facility against a riot, committing human rights violations, and the State provides essential logistical support (such as giving them access to military equipment, without which the actions would not be possible), the State conduct becomes a causally determinative factor in the human rights abuses, but it still falls short of the Article 8 requirements. In this case, the State might be regarded as the author of the human rights abuses by causing the *prohibited state of affairs of human rights abuses* through enabling private actors to act. In such a case, not only the private act would be scrutinized and contrasted with the international obligation, but the conduct of State authorities *causing* the private actions as such. To return to Milanović's analysis, the State authorities' intent *would be* a condition of State responsibility as long as it is required by the human rights obligations, because the attributed conduct is not the private conduct, but the State action of causing human rights violations through private perpetrators.

It should be clear from the foregoing that the difficulty is to determine when the private action would be such that it breaks the causal link between the "basic act" and the "consequence aspect". The cases (re)introducing a *haftungsbegründende Kausalität* test to establish responsibility, discussed in the previous chapter, are not particularly helpful either. Among the decisions invoking causation to establish responsibility, only one spells out a *specific test* of causation to apply: *Nuhanović*. To recall, the *Nuhanović* test of effective control was, as Dannenbaum put it, a test of "preventive control".²⁵⁵ Attribution in this case happened under ARIO. Dannenbaum argues that the ARIO test of effective control is different from the ARSIWA test of effective control, because the ARIO test determines to whom an attributable act is attributed on the assumption that it is certainly attributable to at least one subject, whereas the ARSIWA test tells us whether an act is attributable at all in the first place. As we have seen, this is a contested issue.

However, even if we accept Dannenbaum's position, while the *Nuhanović* variant of effective control could not be useful for the purposes of *attribution of an act*, it might be useful for the present purposes. The preventive control test is the following: was the State entity in a position

²⁵⁵ T Dannenbaum, 'Public Power and Preventive Responsibility: Attributing the Wrongs of International Joint Ventures', in A Nollkaemper *et al.* (eds), *Distribution of Responsibilities in International Law* (2015) 192, at 200.

to prevent the conduct of the private actors, had it intended to? It is apparent that the test is similar to the *Tatherrschaft* concept of dominion over the act. In a nutshell: as long as it is the State determining whether, when and how the internationally wrongful act occurs, the State enjoys dominion over the act.

It is important to note that the application of such a test to define a State act would not automatically trigger responsibility. The act would still have to be attributed and *then* contrasted against the international obligation. An act performed by the “exercise of preventive control over third parties” may or may not be prohibited eventually by the international obligation.

7. Conclusions

Although the ‘internationally wrongful act’ is the central concept of the law of international responsibility, it has been undertheorized. The implied assumption of ARSIWA and the general approach to the concept of ‘act’ appears to be that an ‘act’ is the direct, physical perpetration of a circumscribable conduct. An outlook to domestic legal traditions and the work of action theorists revealed that ‘act’ is a complex notion and is not a self-explanatory term. In particular, it is possible to describe actions as causal sequences, consisting of a basic act in certain circumstances with identifiable consequences.

It is submitted that a developed action theory has broad implications of the law of international responsibility. *First*, it explains why *haftungsbegründende Kausalität* seems to have survived the ILC’s attempt to dispose of it and why several concepts of ARSIWA imply such causal inquiries. *Second*, it explains why the involvement of non-State actors in international wrongs does not exclude that an entire sequence of events constitutes the internationally wrongful act, encapsulating *prima facie* non-State conduct too or even the conduct of other subjects of international law. *Qui facit per alium, facit per se*. *Third*, it explains why the analysis of *haftungsbegründende Kausalität* in the case law appears to be unrelated to the content of underlying primary obligation or to the structure of the primary obligation. Actions prohibited by obligations of means, results or prevention fit the causal theory of action alike.

The theory set forth above is admittedly a first step towards a dedicated action theory in international law. The discussion revolving around *haftungsbegründende Kausalität* are indicators that an action theory has been missing, but it is not the only indicator. The problems of shared responsibility, complicity of States or the idea of international liability for the consequences of lawful activities could equally benefit from an independent theory of action in international law, not to mention issues beyond the realm of international responsibility.

Chapter III

Causation as a general principle of law

1. Introduction

The prevailing view is that causation and, more specifically, certain standards of causation are general principles of law. The assumption behind such statements is that there are principles common to most legal systems. It is important to verify this assumption. If principles of causation are general principles, they qualify as a source of international law.²⁵⁶ If there are such general principles, they will be primary sources to consult to solve the “*when*” and the “*how*” problems in the focus of this study. General principles of causation could clarify the function of causation in the system of responsibility. They could equally provide help in solving difficult substantive problems of causation. Accordingly, the quest is for general principles of law, before turning to subsidiary sources. This quest appears to be promising at first sight. There is an abundance of authorities presenting and purportedly addressing issues of causation by invoking with apparent ease “general principles of law.” However, a closer look will unearth the differences between legal traditions, often overlooked in the case law.

The starting point is the axiomatic *dictum* of the Permanent Court of Justice. The PCIJ famously held in *Chorzów Factory* that “[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”²⁵⁷ The Court further added that

[t]he essential principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed.²⁵⁸

²⁵⁶ Statute of the International Court of Justice, Article 38; A Pellet, ‘Article 38’ in A Zimmerman et al. (eds), *The Statute of the International Court of Justice* (2012) 731, at 832 *et seq.*

²⁵⁷ *Factory at Chorzów, Germany v Poland*, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, at 29.

²⁵⁸ *Id.*, at 47.

The following rule follows from these findings, as a matter of plain logic: it is an “essential principle” or at least part of the “essential principle” of the “general conception” of responsibility that a condition of the responsible State’s duty to provide reparation is that the illegal act has “consequences” and that the consequences of the illegal act can be defined in comparison with a hypothetical counterfactual. Accordingly, causation determines (i) whether the State has a duty to provide reparation and (ii) which consequences such a reparation should cover. The Court’s pronouncement even suggested a specific test of causation, one which we examine in more detail, namely, that of “but for” causality, as a threshold of the principle of full or integral reparation. The construction of the hypothetical counterfactual rests on *assuming away* the illegal act and speculating on an alternative scenario without such illegal act. Expressed in this postulate is, most importantly, that causation is a *general principle of law*.

Along the same lines, a series of further authorities declared the concept of causation or some specific substantive standard of causation a general principle of law. The US-Germany Mixed Claims Commission in its *Administrative Decision II* introduced the “the familiar rule of proximate cause” as “a rule of general application both in private and public law” applicable to international claims.²⁵⁹ As Cheng notes, the Commission applied the standard even to a case of conventionally assumed responsibility to determine the extent of the liability flowing from such assumption.²⁶⁰

In the *Joint Report on the Samoan Claims* (prepared by commissioners following an award confirming the international responsibility of the UK and US for military operations at Apia),²⁶¹ the Commissioners submitted that, in the absence of international authorities, the rules established in “the continual litigation of the Courts of our respective countries” are to be followed.²⁶² They added that they had “no ground for thinking that the rules obtaining in foreign countries are different”.²⁶³ Following such introduction, they put forward a test of

²⁵⁹ *Administrative Decision II*, US/Germany Mixed Claims Commission, (1923) 7 RIAA 23, at 29.

²⁶⁰ Cheng, at 245-246. This again confirms our methodological starting point that the case law is more likely to influence treaty practice than the other way around (cf the Introduction).

²⁶¹ Reported in Whiteman, at 1779-1780

²⁶² *Id.*

²⁶³ *Id.*

reasonable foreseeability to delimit the scope of compensable damages. In the *Dix Case* international law was said to mirror municipal law concerning the remoteness of damages.²⁶⁴

The general principle emphasis appears in more recent practice too. In *Woodward-Clyde Consultants v Iran* the Iran-US Tribunal cited *China Navigation* to the effect that “it is a well known principle of the law of damages that *causa proxima non remota inspicitur*”.²⁶⁵ One panel of the United Nations Compensation Commission concluded that the test of directness, set forth in the governing instruments of the Commission, are “in accordance with the general principles of international law.”²⁶⁶ The *Amco v Indonesia I* Tribunal stated that “the requirement of foreseeability is met practically everywhere.”²⁶⁷ Judge Simma in his Dissent to the *Oil Platforms* judgment argued that the concept of multiple tortfeasors is a “general principle of law.”²⁶⁸

The curious outlier in this sequence of authorities is the Eritrea-Ethiopia Claims Commission, which decided that the rule of proximate causation is not a general principle of law or a rule of customary international law.²⁶⁹ Yet, a few lines later the Commission ended up reinforcing proximate causation and “disciplining” the test with reasonable foreseeability, without further ado.²⁷⁰

Except this latter finding there is a considerable effort in the practice of international courts and tribunals to ground their findings on matters of causation in general principles or common features of domestic legal systems. The impression emerging from the survey of the cases mentioned is that courts, tribunals and other bodies prefer to justify their approach by reference to general principles more than by merely reciting previous authorities. It is therefore necessary to test their assumption: are there general principles of causation? To paraphrase Schwarzenberger, it is high time for the international lawyer to “succour his colleagues in the

²⁶⁴ *Dix Case*, (1903-1905) 9 RIAA 119, at 121.

²⁶⁵ *Woodward-Clyde Consultants v Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 67 (73-67-3), 2 September 1983, Section 2, final paragraph.

²⁶⁶ UNCC, *Well Blowout Control Claim*, para. 96.

²⁶⁷ *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits of 20 November 1984, 89 *ILR* 405, para. 268.

²⁶⁸ *Oil Platforms (Iran v USA)*, *ICJ Rep* 2003, 161, at 354 (Separate Opinion of Judge Simma).

²⁶⁹ Eritrea-Ethiopia Claims Commission, Decision No. 7, 27 July 2007, para. 8.

²⁷⁰ *Id.*, para. 13.

field of comparative law”.²⁷¹ This is the goal of the present chapter. The scope of this survey is limited to the usually studied major legal systems of the world. However, even this narrow scope will demonstrate that there are far too many divergences between the legal traditions for an even remotely uniform treatment of causation, revealing the superficiality of the “general principles” paradigm prevailing in the case law.

The first purpose of the present chapter is therefore to examine whether the various standards of causality operating within the main legal systems of the world show any common denominator.

The second purpose is to properly understand the context and the content of these standards. Irrespective of the question whether general principles of causation exist, the extensive use of traditionally domestic legal concepts by international tribunals (“proximity”, “foreseeability”, “remoteness”, “directness”) cannot be denied. The case law uses, invokes, applies and interprets these concepts. Understanding the roots and original meaning of these notions is indispensable before turning the examination of the case law.

Without aiming to draw a complete and detailed picture of causation, the chapter focuses on prominent legal systems representing common and civil law jurisdictions: the Anglo-American common law, France and Germany. In each case, the *function* and the *standards* of causation will be examined. Causation belongs to the most controversial legal problems in every legal system. It is often difficult to ascertain the law as it stands and any attempt to comprehensively discuss the various approaches towards causation is futile. Within the constraints of the present chapter it is only possible to provide an admittedly simplified introduction and highlight the concepts providing foundation for the work of international tribunals and courts.

In addition to this comparative survey, the chapter briefly reflects on the common heritage of legal thinking about causation. Legal philosophy has been reflecting on causation and the various conceptual difficulties discussed hereunder from the perspective of municipal legal systems. The legal philosophy of causation made a regrettably minor impact on the actual

²⁷¹ Cheng, at xii (foreword by Schwarzenberger). See also A Roberts *et al.*, ‘Comparative International Law: Framing the Field’ (2015) 109 *AJIL* 468, at 470: “comparative law methods may be relevant in identifying the existence and content of international law.”

practice, but the significance of its findings cannot be overemphasized. It is therefore necessary to include a brief account before diving in the peculiarities of international case law.

2. Causation in Anglo-American law

Causation is a fundamental concept in tort law, criminal law and to a lesser extent in contract law. The basic principles were developed in tort law and criminal law was a heavy borrower.²⁷²

Causal connection is relevant for the *existence* of liability and it also determines the *extent* of liability.²⁷³ As regards the *existence* of liability, causality is one of the constitutive element of torts (*e.g.* the tort of negligence or the tort of assault) and crimes (*e.g.* manslaughter). As regards the *extent* of liability, causality principles determine which damages are sufficiently linked to the wrongful conduct to give rise to the obligation to compensate them.²⁷⁴ Causation also serves as the basis of the defense of contributory negligence.²⁷⁵

The doctrine traditionally maintained a distinction between the two steps of the causal inquiry: the *factual* test of causation and the *legal* test of causation.²⁷⁶ The distinction itself is a matter of permanent controversy, but still guides doctrine and case law alike.²⁷⁷ Hart and Honoré (while rejecting the factual – legal labels) explain the bifurcation of the causal inquiry as follows: “The first [aspect of the causal relation] is that a cause is in some sense necessary for the production of the consequence: the second is that the cause of an event is in some way distinguishable from other factors, which are, in the same sense, necessary.”²⁷⁸ While courts

²⁷² M Moore, ‘Causation in the Criminal Law’, in J Deigh – D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011) 168, at 169.

²⁷³ Hart – Honoré, at 79.

²⁷⁴ S Steel, ‘Causation in Tort Law and Criminal Law: Unity or Divergence’, in M Dyson (ed), *Unravelling Tort and Crime* (2014) 239 [‘Steel 2014’], at 239-241.

²⁷⁵ *Id.*

²⁷⁶ M Moore, ‘Causation in the Criminal Law’, in J Deigh – D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011) 168, at 170; S F Deakin – A Johnston – B Markesinis, *Markesinis’ and Deakin’s Tort Law* (2012), at 218-219 [‘Deakin’]; E Witjens, ‘Considering Causation in Criminal Law’, 78 *JCL* (2014) 164, at 170.

²⁷⁷ J Stapleton, ‘Factual Causation’, 38 *Federal Law Review* (2010) 467.

²⁷⁸ Hart – Honoré, at 104

are reluctant to discuss these elements always in a structurally clear and sequential manner, the logical process of the causal inquiry rests on these distinct steps.

The factual test of causation asks whether the conduct in question is a *necessary* condition of the result, the damage or injury. The question is whether ‘but for’ the conduct in question, the outcome would have happened in a hypothetical counterfactual scenario.²⁷⁹ As Glanville Williams points out, the test is not designed to give a final answer to the question of causation, it serves a partial purpose only.²⁸⁰ The only real function of this test is to determine which facts are irrelevant for the rest of the causality inquiry, *i.e.* which facts are causally unconnected to the detrimental result, damage or injury.

For instance, if A gives a pill to B, who suffers from headache, without providing information about its proper use and B poisons himself by consuming it, A’s action is undoubtedly a *conditio sine qua non* of B’s injury. This, however, does not reveal anything about liability, which could depend on various other factors. B’s headache was similarly a *sine qua non* condition of the final outcome, but, again, this does not necessarily influence questions of liability. Necessary conditions of a certain event could be traced back into the past indefinitely. This is not the point and it is not the function of the test. The function is to determine what was *not* the *conditio sine qua non* of a certain event. If it is demonstrated that B would have equally consumed A’s pill even after having listened to A’s instructions, A’s act is not even a *sine qua non* and deemed a causally irrelevant fact. There are cases quantifying the likelihood the plaintiff has to prove in order to establish but for causality at 50%.²⁸¹

Before turning to the *second* step of the causal inquiry, it must be noted that the but for test is known to suffer from certain rarely occurring, but still serious inadequacies. In exceptional scenarios, the test results in logical fallacies or fails to provide a straightforward answer.

It could be that it is impossible to assess whether the conduct was a but for cause of the outcome. This is the case if multiple wrongdoers cause deadly injuries and each of the injuries would have been enough to result in death. It could be that the two injuries happen at the same time, but it is also possible that the second attack merely accelerates the impact of the first one. In such cases the but for tests would release wrongdoers from liability because of someone

²⁷⁹ *R v White* [1910] 2 KB 124.

²⁸⁰ G Williams, ‘Causation in the Law’, (1961) 19 *Cambridge Law Journal* 62, at 64.

²⁸¹ *Stinson v England*, 633 N.E.2d 532, 536 [1994]

else's wrongdoing and *vice versa*. If A and B simultaneously shoot C in the head, neither cause is the *causa sine qua non*. Doctrine calls this situation *circular causation*,²⁸² *alternative liability*²⁸³ or *overdetermination*.²⁸⁴ A similar problem arises if it is impossible to establish from an evidentiary standpoint which one of the two attacks resulted in the particular injury (e.g., the defendant suffers two shots, one blinds him, the other merely injures his head, but it is impossible to establish which attack originated from which defendant).

The but for analysis is similarly futile if there are multiple possible counterfactuals and it is impossible to specify a particular one. If the wrongful conduct is driving without a license, possible counterfactuals include not driving without a license or driving with a proper license. If the wrongful conduct is providing pills without proper warning to the risks of consumption, the counterfactual could be that the pill is not provided or that it is provided with proper warning. These are cases of *indeterminacy* or *dependency* causation.²⁸⁵

One possible solution to such problems is to focus on the dangerous aspect of the conduct and modify that aspect for the purposes of constructing a counterfactual (e.g., in case of driving with high speed without reins and an expired license, the counterfactual should be driving with lower speed without reins and an expired license and not driving with high speed without reins but a valid license). Another principle is to "characterize the defendant's breach in the way that is most favourable to the defendants."²⁸⁶ The but for test is rejected in cases of concerted actions (e.g. when a group of people keeps throwing stones at a window, all of them could be held liable for causing the injury, while only one particular stone hit the window).²⁸⁷

When the but for test proves to be unworkable, the alternative test is that of *material contribution* (tort law), *substantial* or *significant contribution* (criminal law). Under this test, the plaintiff has to prove on a balance of probabilities that the defendant's conduct materially contributed to the injury.²⁸⁸ Steel gives the following definition: "D materially contributes to

²⁸² E S Knutsen, 'Clarifying Causation in Tort', (2010) 33 *Dalhousie Law Journal* 150 [Knutsen], at 163.

²⁸³ D W Robertson, 'Causation in the Restatement (Third) of Torts: Three Arguable Mistakes', (2009) 44 *Wake Forest Law Review* 1007, at 1015.

²⁸⁴ Steel 2014, at 243.

²⁸⁵ Knutsen, at 164; Steel 2014, at 242.

²⁸⁶ N J McBride – R Bagshaw, *Tort Law* (2008), at 536.

²⁸⁷ *Shinn v Allen*, 984 S.W.2d 308 (1998).

²⁸⁸ *R v Pagett* (1983) 76 Cr App R 279.

C's damage if and only if D's wrongful conduct played a more than minimal role in a mechanism which was causally sufficient for the claimant's damage."²⁸⁹

Scientific uncertainty can also result in the inapplicability of the but for test. In *Fairchild*, due to the limitations of medical science it was impossible to establish which cause resulted in mesothelioma and the House of Lords introduced a test of *materially increased risk*. The introduction of this test and the possible scope of its application remains a controversial matter in English literature.²⁹⁰

If the *factual* causation test is met, the *second* question of the causal inquiry is whether there is any reason *not* to treat this cause as the *proximate* or legal cause of the injury, so that the injury would become too *remote*. In general, two competing and often complementary principles govern this second question: the test of reasonable foreseeability and the notion of *novus actus interveniens*.

The concept of foreseeability has a dual role in the law of torts, more precisely, in the tort of negligence. *First*, foreseeability of injury is the necessary condition of a breach of the *duty of care*. *Second*, foreseeability delimits the scope of responsibility. The two meanings of foreseeability are different. For the purposes of breach, reasonable foreseeability of injury in *general* is the condition; for the purposes of causation, foreseeability has to be more specific. There is, however, significant controversy among judges and academics alike, what *exactly* has to be foreseeable. Some argue that the reasonable foreseeability of the *type* of harm is sufficient,²⁹¹ while others consider that the *exact occurrence* of the injury, *the class of the*

²⁸⁹ S Steel, 'Causation in English Tort Law: Still Wrong After All These Years', (2012) 31 *University of Queensland Law Journal* 243, at fn 3.

²⁹⁰ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. For a critical comment see S Steel, 'Causation in English Tort Law: Still Wrong After All These Years', (2012) 31 *University of Queensland Law Journal* 243. Steel argues that the proper approach to and understanding of the new test would be to treat it as a new rule of evidence, shifting the burden of proof to the defendant to rebut but for causality (or casuation based on the material contribution test) once it is established that a materially increased risk is the result of defendant's conduct. See also Deakin, at 225 *et seqq*.

²⁹¹ For instance, in *Hughes v Lord Advocate* it was foreseeable that a lamp can cause burns and it did not make a difference that in the particular case the lamp caused it in a highly unusual and unforeseeable way. *Hughes v Lord Advocate* [1963] AC 837. Further see D G Owen, 'Figuring Foreseeability', (2009) 44 *Wake Forest Law Review* 1277, at 1298.

plaintiff and the *extent* of the injury also have to be foreseeable.²⁹² The case law is diverse on this point and here is not the place to settle these debates.

Foreseeability has been subject to criticism. Hart and Honoré, who insisted on deriving principles strictly on common sense causal grounds, rejected foreseeability mainly because it cannot properly address the problem of *ulterior harm*, *i.e.* injuries which are not reasonably foreseeable at the time of the wrongdoing but become reasonably foreseeable as the causal process evolves and for which recovery is clearly allowed in certain cases (*e.g.*, the case of a car hitting the wall as a result of the negligent conduct, which results in falling bricks from the wall 20 minutes later when the vehicle is removed, hitting pedestrians standing nearby).²⁹³ They are more open to accept the usefulness of foreseeability not as a concept to *delimit* but to *extend* the scope of liability if otherwise (solely on causal principles) the chain of causation would be broken (*e.g.* the cases of occasioning harm by omissions, when the direct cause of the injury is the voluntary conduct of a third party, but this voluntary intervention was a foreseeable consequence of the initial wrongful omission).²⁹⁴

Commentators and judges questioned the use of foreseeability *beyond* the law of negligence. Foreseeability could be the applicable test, the argument goes, only because the breach of the duty of care is assessed in light of foreseeable injuries in the first place. It was held in *Howes v Hansen* that “the doctrine of foreseeability, although a recognized doctrine where ordinary negligence in tort is involved, has no part in the concept of strict liability in tort.”²⁹⁵ Accordingly, if there is no underlying duty of care, there is no room for the application of the foreseeability test for the purposes of causation. This is the case for instance in the law of strict product liability or strict liability for hazardous activities.²⁹⁶ Lord Hoffmann put great emphasis on this limited use of the foreseeability test in *Empress*, which was a case of pollution in violation of the Water Resources Act:

The true common sense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and

²⁹² For various references see J W Card, ‘Purging Foreseeability’, (2005) 58 *Vanderbilt Law Review* 739, at 748.

²⁹³ Hart – Honoré, at 234-248.

²⁹⁴ *Id.*, at 256, 260.

²⁹⁵ *Howes v Hansen*, 56 Wis. 2d 247 (1972). 201 N.W.2d 825.

²⁹⁶ T V Dahl, ‘Strict Product Liability: The Irrelevance of Foreseeability and Related Negligence Concepts’, 14 (1978) *Tulsa Law Review* 338.

extraordinary. Of course an act or event which is in general terms a normal fact of life may also have been foreseeable in the circumstances of the particular case, but the latter is not necessary for the purposes of liability. There is nothing extraordinary or abnormal about leaky pipes or lagoons as such: these things happen, even if the particular defendant could not reasonably have foreseen that it would happen to him.²⁹⁷

Lord Hoffmann is a strong proponent of the ‘*scope of duty*’ test (in contractual and tort disputes as well), which rejects the idea of a single standard of causation irrespective of the purpose and reason of the underlying duty.²⁹⁸ This test mirrors the German *Normzwecklehre* or *Schutzzwecklehre* and will be examined in that context in more detail.

The foreseeability test, as introduced in *The Wagon Wound*,²⁹⁹ was a departure from the *directness* test of *Re Polemis*, a case from 1921.³⁰⁰ The directness test excluded any reference to reasonable foreseeability and rested solely on the examination of direct and unbroken links between each and every element of the causal chain. At the time of *Re Polemis*, a general duty of care was not recognized in English law and this could be one explanation why it became one of the most unpopular cases following the recognition of such a duty in *Donough v Stevenson*.³⁰¹

In contract law, a test of the parties’ contemplation delimits the scope of liability for breaches. The test is similar to the test of foreseeability, but instead of merely asking whether the harm was reasonably foreseeable at the time of breach, it asks whether the loss was or should have been reasonably contemplated by the *parties* (as opposed to a reasonable person in general) at the time of *the contract’s formation* (and not the breach) as a “serious possibility”, considering the “ordinary course of things” and “any special knowledge which the defendant had at that point”.³⁰² This test is more specific than the general test of foreseeability and is said to be less generous to claimants than the tort test. One explanation could be that tort victims do not

²⁹⁷ *Empress Car Company (Abertillery) Ltd* [1998] UKHL 5.

²⁹⁸ L Hoffmann, ‘Causation’, (2005) 21 *Law Quarterly Review* 592; *South Australia Asset Management Corp v York Montague Ltd* and *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1996] UKHL 10.

²⁹⁹ *The Wagon Mound* (No. 1) [1961] UKPC.

³⁰⁰ *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560.

³⁰¹ M Davies, ‘The Road from Morocco: Polemis through Donough to No-Fault’, (1982) 45 *MLR* 534.

³⁰² N Andrews, *Contract Law* (2011), at 556. This is the so-called *Hadley v Baxendale* test. *Hadley v Baxendale* (1854), 9. Exch 341.

willingly enter into contractual obligations and expose themselves to risk of contract breaches.³⁰³

In a nutshell, the origins, the context and the limited use of foreseeability *within* common law is an important point to keep in mind when considering the possible transposition of the test to the international law of responsibility. This is particularly true if one considers the discussion on whether the nature of international responsibility is closer to *contractual liability* or *delictual* or *tortious* liability.³⁰⁴

The “risk theory”, followed by the Restatement (3rd) of Torts in the USA, is an alternative standard which could be equally applicable in cases of strict liability. In Hart’s and Honoré’s words, the theory generalizes the foreseeability theory by providing that “liability should extend but also be restricted to those types of harm the chance or risk of which formed the reason or a reason for the imposition of liability.”³⁰⁵ The test of the Restatement is whether the harms “result from the risks that made the actor’s conduct tortious.”³⁰⁶

The other (complementary and alternative) approach is what Steel labels the “causation conception”, focusing on the causal chain itself.³⁰⁷ This test asks whether once the but for test (or the material contribution test) is met, there is any factor which would break the chain of causation. A simplified summary of the test is the following: a *novus actus interveniens* or *superseding cause* could be either an abnormal natural event or a voluntary, free, intentional, informed (cumulative conditions) or grossly negligent conduct of a third party.³⁰⁸ The term “voluntary” has to be interpreted narrowly. For example, if the voluntary decision is necessary to avoid an impending danger resulting from the original conduct, the action is not voluntary *stricto sensu*.

If the purpose of defendant’s duty was precisely to prevent such interventions, the intervention cannot break the causal chain, such as in cases of occasioning harm by not preventing others

³⁰³ *Id.*, at 558-559.

³⁰⁴ J Verhoven, ‘The Law of Responsibility and the Law of Treaties’, in Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 105, 105-106.

³⁰⁵ Hart – Honoré, at 256.

³⁰⁶ Restatement (3rd) of Torts, Section 29.

³⁰⁷ Steel 2014, at 247.

³⁰⁸ *Id.*, at 246-247, 257-258.

to cause it.³⁰⁹ Merely negligent actions or omissions generally do not break the causal chain, with the exception of multiple sequential negligent actions. This test is not entirely independent from the foreseeability test, given that the notion of abnormality involves some inquiry into foreseeability.

The doctrinal treatment of the subject tends to single out certain recurring causal problems, such as concurrent causes, causation by omissions, causation by inducement, the pre-emptive causes scenarios or the causal aspects of contributory negligence. This didactic structure will inform the treatment of international case law and their domestic legal origin is highlighted, when necessary.

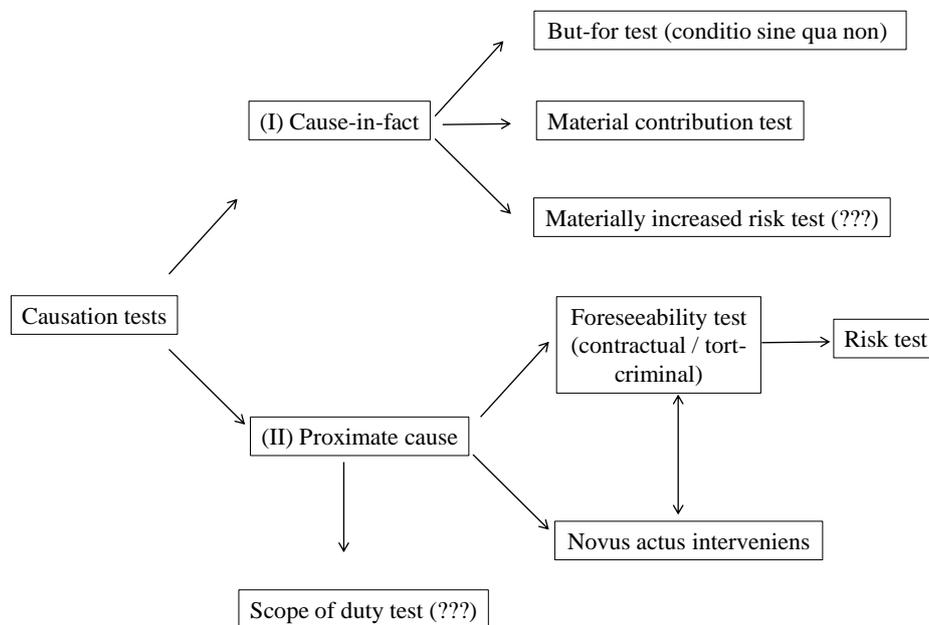


Figure 1: The common law of causation

³⁰⁹ Hart – Honoré, at 256.

3. Causation in French law

In comparison with common law and German law, French legal doctrine dedicated much less attention to causation and French jurisprudence was less open to even this modest academic influence.³¹⁰ The approach French writers usually take is therefore to discuss *theories* and *practice* under different headings. We are now interested mainly in the *lege lata* of France and the focus is on the practice of courts in introducing the basic principles of the French approach.

Causation is a condition of the *existence* of liability (contractual, delictual and for certain offences in criminal liability) and of the *extent* of liability (contractual and delictual).³¹¹ The applicable standards of causation are, however, very different in these various branches of law.

In civil law, Articles 1147 and 1382 of the *Code Civil* define causation as a condition of liability, without determining any particular standard or test of causation. Article 1151 of the *Code Civil* sets out the basic principle that only *direct and immediate* consequences of a contractual breach shall be compensated.³¹² This is a provision on contractual liability, but the case law extended its application to delictual liability too.³¹³ The two questions French courts have to address are the establishment of a causal chain and the exclusion of non-direct and non-immediate consequences from such a chain.

Although there is no textual basis to this effect, the courts apply the theory of the *equivalence of conditions* (*équivalence des conditions*) to establish the causal chain, *i.e.*, the *sine qua non* theory.³¹⁴ Just as the but for test in the common law world, the decisive question here is whether the consequence would have happened in the absence of the fault in question. For long, French law has been very liberal and generous in the application of the *sine qua non* threshold.³¹⁵ For instance, even if the fault only aggravates an injury, which would have happened anyway,

³¹⁰ C van Dam, *European Tort Law* (2007), at 319.

³¹¹ R Merle – A Vitu, *Traité de droit criminel: Problèmes généraux de la science criminelle: droit pénal général. Tome I* (1978), at 681-682 [‘Merle – Vitu’]; J Ghestin – J Viney – P Jourdain, *Les conditions de la responsabilité* (2006) [‘Ghestin’], at 252.

³¹² Code Civil, Article 1151: “Dans le cas même où l’inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l’égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l’inexécution de la convention.”

³¹³ J Ghestin, at 252.

³¹⁴ *Id.*, at 255-256; W Van Gerven – J Levere – P Larouche, *Tort Law* (2000) [‘Van Gerven’], at 419.

³¹⁵ *Id.*

courts are ready to accept that the test is met. It is also indifferent if there are several *sine qua non* faults resulting in a certain injury: all of the contributors are liable *in solidum*. Unlike common law, French law does not introduce alternative approaches to tackle logical fallacies resulting from the application of the *sine qua non* test. Instead, it uses the test in a very liberal fashion and puts more emphasis on the assessment of the gravity of fault.³¹⁶ This approach is not unchallenged and there has been a slow shift towards the theory of *adequate causation* and/or the *explanatory theory*, at least in certain cases.³¹⁷

In brief, the theory of *adequate causation* (originally elaborated by German lawyers and further addressed below)³¹⁸ provides that B is a causal consequence of A if the occurrence of A, according to the normal course of events, objectively makes the occurrence of B probable. Discussion of this approach often conflates it with another one, the *explanatory theory*, which asks whether the fault can *explain* the damage. As Dejean de la Batie writes:

When a series of intermediate steps intervened between the initial conduct and the damage, continuity presupposes not only that each of these steps somehow suffers from a deficiency, but also that such deficiency can be at least partially explained by the deficiency which affected the previous step, all the way down to the initial conduct that was itself wrong.³¹⁹

For instance, if a vehicle is stolen as a result of the negligence of the owner and the thief, in possession of some explosives, in escaping from the scene, drives the vehicle too fast, resulting in an accident and an explosion, the owner's omission is a *sine qua non* condition, but the test of *explanatory* causation would fail. The owner's negligence would not explain that the thief possessed explosives and it would not explain the explosion either.

There are attempts to outline the scope of application of these alternative theories. One explanation is that if there is an apparent asymmetry between the gravity of *faults*, different considerations of causation should apply and only the *most adequate* cause could be identified as the legally relevant cause.³²⁰ Another approach is to connect the concept of *adequate* or *explanatory* cause to the notion of temporal proximity: If the adequate cause is significantly

³¹⁶ J Carbonnier , *Droit civil. Les obligations* (1994) ['Carbonnier'], at 397.

³¹⁷ *Id.*, at 396-397.

³¹⁸ See Section 4 below.

³¹⁹ Cited and translated in Van Gerven, at 419.

³²⁰ *Id.*, at 420.

closer in time to the injury than the original fault, the causal chain is broken.³²¹ Yet another explanation is that if the irregular internal defect of a tool, an instrument is the adequate cause of the damage (such as the internal defect of a vehicle would be in the aforementioned case), the causal chain between the fault and the harm is broken.³²²

French law is said to generally reject the *scope of duty* or *Normzweck* theories, which would ask whether the underlying obligation was designed to prevent the particular harm (the French doctrine calls this theory *relativité acquilienne*).³²³ However, there have been a few cases where it is hard to establish whether French courts impliedly followed this theory or applied the adequate cause / explanatory approach. For example, if someone's employment in violation of certain labour standard was a *sine qua non* condition of an accident, it depended on the nature of the underlying rule whether there was a causal link between the breach and the injury. If the underlying provision was a prohibition on the employment of a foreigner, no causal link was established, but if the provision was on working hours and the accident happened after permissible working hours, the causal nexus was established.³²⁴ This example highlights the importance of the substantive obligation in contention for the purposes of finding the appropriate counterfactual.

The French doctrine of foreseeability (*previsibilité*) has a limited application and this is where contractual and delictual liability part ways. Article 1150 of the *Code Civil* provides that the debtor is not liable for unforeseen damages caused by his contractual breach, unless the breach was intentional. Again, the applicable standard of causation is dependent on the nature of the fault. Foreseeability of the damage is measured in light of the time of the conclusion of the contract and the standard is that of a *bonus et diligens pater familias*. The test of foreseeability has no similar application in delictual liability, irrespective of the gravity of culpability. The justification of this is that contractual partners willingly assume certain risks and *only* certain risks when entering into a contract, while victims of delictual wrongdoings do not enjoy the

³²¹ Ghestin, at 261-262.

³²² *Id.*; F Terré – P Simler – Y Lequette, *Droit civil. Les obligations* (2002) [‘Terré’], at 816.

³²³ G Viney, ‘Tort Liability’, in G A Bermann – E Picard (eds), *Introduction to French Law* (2008) 238, at 248.

³²⁴ Ghestin, at 263.

same freedom.³²⁵ Still, some, commenting on the test of adequate causality, equate it with the test of reasonable foreseeability, but this view is rejected by the majority of writers.³²⁶

As regards the question of what has to be foreseeable, French case law posits that if the injury is of an unforeseeable value, compensation is provided only for a foreseeable value. The classic example is that of a postman negligently dropping a parcel with a very expansive vase inside, the extent of liability will not be determined based on the actual pecuniary loss.³²⁷ The precise components of the damage do not have to be foreseeable either.³²⁸

Foreseeability plays a much more limited role as an element of the *defense* of *cause étrangère*, in contractual and delictual liability alike: the external cause of the injury has to be *unforeseeable*, unavoidable and is of an external origin to the defendant.³²⁹

Whichever of the foregoing approaches one accepts, the requirement of *directness* delimits the scope of liability under French contractual and delictual law. French case law did not come up with precise criteria to distinguish direct and immediate causal consequences from indirect ones and in certain cases judges accepted the existence of a causal connection with apparently indirect damages too. The proposition that judicial discretion plays the primary role in the evaluation of causal chains applies foremost to the issue of directness.³³⁰ If commentators agree on anything, it is that there is controversy in the case law and that it is very difficult to discern a general pattern of assessment.

The fact that damages are sequential does not necessarily make them indirect, if each and every item of damage follows directly from the previous one. French courts may accept liability if several years elapse between an accident and the development of subsequent complications. This is true even if there is some external factor contributing to the subsequent damage. If the victim remains the same, even his voluntary conduct is insufficient to break the causal

³²⁵ Terré, at 541; B Nicholas, *The French Law of Contract* (1992), at 228.

³²⁶ B Winiger et al. (eds), *Digest of European Tort Law. Essential Cases on Natural Causation* (2007) [‘Winiger’], at 26.

³²⁷ Carbonnier, at 307.

³²⁸ *Id.*

³²⁹ Terré, at 756.

³³⁰ Carbonnier, at 301.

connection (for example, if the victim decides to leave her job), unless there is a further fault of at least equal gravity in the chain of causation.³³¹

A textbook example on the outer limits of damages is the case of *Chardin et autres c. Mme veuve Garnier*.³³² In this case the victim remained handicapped following an accident. Years later she was unable to escape from her bed when fire threatened her life and she died. Without much explanation, the *Cour de Cassation* held that the lower court erred when it considered this damage direct. The court put emphasis on the fact that the accident happened years later. In his comment, Professor Dejean de la Batie concluded that the explanatory theory could apply to the question of directness as well.³³³ The fire, which was a *sine qua non* element and an adequate cause in the chain of causation, could not be *explained* by the original accident.

We can summarise somewhat superficially the French civil law of causation as follows: the applicable standard is that of a flexibly and liberally understood *conditio sine qua non*, with the correction of the adequate causality *and/or* explanatory approaches in certain circumstances (such as presence of multiple wrongdoers with manifestly different gravity of fault; temporal proximity of a more adequate cause; where the breach of the underlying duty cannot *explain* the injury; when the inherent defect of a tool is the reason of the injury, *etc.*). The criterion of directness delimits liability, but this term is vague and often applied liberally. The identity of the victim excludes indirectness, unless there is a temporally much closer *adequate* cause, not explained by previous elements of the causal chain. Foreseeability is not applicable to delictual liability, it is however a strong limitation on liability for negligent contractual breaches.

French criminal law departs in many ways from the approach of civil law. Causation is not a general condition of liability in French criminal law, only in case of certain specific offences, typically committed negligently.³³⁴ French criminal courts are traditionally very liberal in accepting *sine qua non* causation,³³⁵ but in a limited number of cases the adequate causality theory influences their practice.³³⁶ Merle comments that the practice of courts is often so liberal

³³¹ Ghestin, at 266.; From the case law see *X. v Gan*, Cass civ 2e, 3 October 1990.

³³² *Chardin et autres c Mme veuve Garnier*, Cass. civ. 2e, 8 février 1989, *La Semaine Juridique Edition Générale* n° 38, 19 Septembre 1990, II 21544.

³³³ *Id.*

³³⁴ G Stefani – G Levasseur – B Bouloc, *Droit pénal général* (1984), at 245.

³³⁵ *Id.*

³³⁶ J R Spencer – M A Brajeux, ‘Criminal Liability for Negligence’, (2010) 59 *ICLQ* 1 [‘Spencer – Brajeux’], at 12.

that they are satisfied with the presence of a contributing factor which constitutes a criminal fault.³³⁷

Unlike civil law, criminal law does not set out a requirement of *directness*.³³⁸ The only exception was introduced recently, in cases of non-intentional offences. It is possible to discern a definition of what is *not* direct causality from this legislation, but the scope of its application is generally limited.³³⁹ Indirect causation under this framework is *occasioning* harm by creating or contributing to a situation that permits the realization of the harm or by failing to take measures permitting the avoidance of the harm.³⁴⁰

4. Causation in German law

German academics provided the most extensive treatment of the topic of causation. Theories elaborated in the 19th century found their way into the practice of German courts and, in particular, the case law of the *Bundesgerichtshof*. The German terminology often speaks of *Zurechnung* instead of *Kausalität*, which would translate as ‘imputation’ (notably, international law literature in Germany uses the same term for attribution in the law of international responsibility). This shows that German law treats the problem of causation as essentially a normative question.

In civil law, the requirement causation follows from the general provision of the *Bürgerliches Gesetzbuch* [BGB] on the reparation of damages (Section 249, applicable to the entirety of the law of obligations), and from the specific provisions on delictual liability (Section 832 and several subsequent sections on various forms of delictual liability).

³³⁷ See also Merle – Vitu, at 687-688.

³³⁸ *Id.*, at 688.

³³⁹ Spencer – Brajeux, at 14-15.

³⁴⁰ *Code pénal*, Article 121-3: “Dans le cas prévu par l’alinéa qui précède, les personnes physiques qui n’ont pas causé directement le dommage, mais qui ont créé ou contribué à créer la situation qui a permis la réalisation du dommage ou qui n’ont pas pris les mesures permettant de l’éviter, sont responsables pénalement s’il est établi qu’elles ont, soit violé de façon manifestement délibérée une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement, soit commis une faute caractérisée et qui exposait autrui à un risque d’une particulière gravité qu’elles ne pouvaient ignorer.”

The German approach to causation is *bifurcated*, in two ways. *First*, German civil law distinguishes between the dual roles of causation in *establishing* (*haftungsbegründende Kausalität*) and in *delimiting* (*haftungsausfüllende Kausalität*) liability.³⁴¹ The former is understood as a causal link between the conduct and the violation of the legally protected *Rechtsgüter* (life, health, property or other legally protected right), or, as one author puts it, “between the conduct of the defendant and the result which leads to liability”.³⁴² There is some disagreement on the definition of the latter variant of causation. A commentary to the BGB defines it as the causal link between the violation of the *Rechtsgüter* and the actual damages,³⁴³ while others define it as the causal link between the conduct of the defendant and “the items of damage”.³⁴⁴

Second, German law also distinguishes the two steps of the causal inquiry, in a similar fashion to common law. The first is to identify whether a certain action or inaction is a *condition* of the result, and the second is to distinguish between legally relevant causes and mere conditions.³⁴⁵

The *conditio sine qua non* test is the starting point of German law too (*Äquivalenztheorie*).³⁴⁶ The BGB provides that “[a] person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.”³⁴⁷ Markesinis and Unberath note that German doctrine and jurisprudence went deeper than other legal traditions in discovering the contours of this test and there are several ways in which courts apply the principle.³⁴⁸ The general approach is to assume away the conduct in question to determine whether the outcome would have been the same in its absence (test of *elimination*). It most cases this method works, but, for example, in cases of omissions it does not, since if one eliminates the “omission”, it is necessary to substitute it with an action. If the particular

³⁴¹ B Markesinis – H Unberath, *The German Law of Torts: a Comparative Treatise* (2002) [‘Markesinis – Unberath’], at 103; G Spindler – O Rieckers, *Tort Law in Germany* (2011) [‘Spindler – Rieckers’], at 115.

³⁴² Van Gerven, at 396.

³⁴³ H G Bamberger – H Roth (eds), *Kommentar zum Bürgerlichen Gesetzbuch* (2003) [‘Bamberger – Roth’], at 770; P Bassenge *et al.*, *Bürgerliches Gesetzbuch* (1994) [‘Bassange’], at 280.

³⁴⁴ Van Gerven, at 397.

³⁴⁵ Markesinis – Unberath, at 103.

³⁴⁶ Spindler – Rieckers, at 115; *BGHZ* 2, 138. Note, however, that there are some who distinguish between *conditio sine qua non* and the *Äquivalenztheorie*. See for instance, U Murmann, ‘Problems of Causation with regard to (Potential) Actions of Multiple Protagonists’, (2014) 12 *JICJ* 283.

³⁴⁷ *BGB*, Section 249. Translation from http://www.gesetze-im-internet.de/englisch_bgb/ (Last accessed 20 October 2014).

³⁴⁸ Markesinis – Unberath, at 103-104.

omission was a failure to prevent the action of someone else, it would be necessary to speculate what would have happened, had the action been taken. This exercise requires the hypothetical *total substitution* of the facts.³⁴⁹ German literature also points out that this test is less useful if there is substantial scientific uncertainty about how exactly a certain event causes another. A particularly difficult problem is when even such a test of substitution demonstrates that the compliance with the underlying duty would have equally caused the damage.³⁵⁰

German law, similarly to common law and French law, turns to additional tests beyond the *sine qua non* test to select and isolate legally relevant causes from irrelevant ones. There are two, equally accepted tests governing the practice of the tribunals.

The theory of adequate causation (which, as we have seen, is accepted to a certain extent also in France) was introduced in the works of German jurists like von Kries, Rümelin and Träeger.³⁵¹ Having reviewed and synthesised their work, the *Bundesgerichtshof* provided the following definition of this test:

A circumstance is an adequate condition of a consequence where it has not inconsiderably increased the objective probability of a consequence of the type which occurred. Consideration shall be given to (a) all the circumstances of the case recognizable to the optimal observer and (b) any further circumstances known to the person creating the condition. The assessment is to be made in the light of the sum of all knowledge and experience available at the time of the assessment.³⁵²

As one comment writes, this is a test of an *ex post* defined *objective prognosis*,³⁵³ *i.e.*, it is not a question of foreseeability.³⁵⁴ It is based on all the available information that an “optimal observer” would have known, plus what the actual person performing the conduct knew in reality. The test is designed to exclude causal consequences which are highly improbable occurrences in light of these circumstances. If, however, the outcome itself fulfils the test, but the way in which it comes about is highly irregular or unlikely, adequate causality is

³⁴⁹ *Id.*, at 104.

³⁵⁰ Winiger, at 16-17.

³⁵¹ J von Kries, *Die Prinzipien der Wahrscheinlichkeitsrechnung* (1886); M Rümelin, *Die Verwendung der Causalbegriffe in Straf- und Zivilrecht* (1990); L Träger, *Der Kausalbegriff im Straf- und Zivilrecht* (1904).

³⁵² BGHZ 3, 261, translated and cited in C von Bar, *The Common European Law of Torts. Vol. 2. Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences* (2000) [‘Von Bar’], at 439, fn 23.

³⁵³ Bamberger – Roth, at 771.

³⁵⁴ Bassenge, at 281.

established.³⁵⁵ Adequate causality is no limitation in cases of intentional wrongdoing, highlighting that German law is not indifferent regarding the nature of the fault in relation to causality either.³⁵⁶

German courts recognize the limits of adequate causality. One example to demonstrate the “inadequacy” of adequate causation is the case of a driver, whose accident requires the temporal closure of a lane. The other impatient drivers begin circumventing the stopped vehicle and cause damage to the pavement nearby. The question is whether the driver, causing the accident, is responsible for the damage to the pavement.³⁵⁷ Adequate causation would say yes. It is not improbable, having regard to the normal course of events, that there would be impatient drivers driving around the vehicle. Still, German law turns to another theory to delimit the liability of the wrongdoer, namely, the *Normzwecklehre* (the scope of duty test).

According to this doctrine, the protective purpose of the underlying duty has to be interpreted in order to determine whether the duty was designed to prevent the actual damage.³⁵⁸ To cite the above example, the question would be whether the traffic rules breached by the driver were designed to prevent damage caused by other impatient drivers to the pavement. This example shows that the application of the test is not without difficulties either. It could be reasonably concluded that damage to the pavement is a type of damage which traffic regulations are usually designed to avoid. Should we stop there or inquire further and ask whether the prevention of this type of damage *caused* in a specific way (by the impatient fellow drivers) should be also the purpose of the rule? German courts applied the test in this latter sense, but this is not without criticism among commentators.³⁵⁹

The doctrine is now firmly established in the case law of German courts.³⁶⁰ It applies to contractual liability and delictual liability equally. In contractual cases the purpose and protective aim of the contractual provisions delimit the scope of compensable damages. Its application in delictual liability is more complex. The general provisions of the BGB on

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Van Gerven, at 403, citing BGHZ 58, 162.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ F-J Säcker – R Rixecker, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band II* (2006) [‘Säcker – Rixecker’], at 327.

delictual liability provide that liability stems either from negligent or intentional causation of injury (Section 823 (1)) or, even without fault, from causing damage by the breach of a statute (Section 823 (2)). The application of the *Normzwecklehre* is generally accepted under Section 823 (2), which rests on the breach of a specific duty. In contrast, Section 823 (1) is much more general, without reference to a specific statute. In this case German courts inquiry into the purpose of Section 823 (1) itself. For instance, compensation of costs incurred in a criminal investigation following the accident, falling under Section 823 (1), was rejected on the basis of the *Normzwecklehre*, because the purpose of this rule is not to prevent expenditures arising in the course of a criminal proceedings, the risk of which everybody has to undertake, irrespective of accidents.³⁶¹ It appears that the application of the *Normzwecklehre* could result in rejecting claims for consequential damages. One comment suggests that the solution is to exclude not all damages which the legislator did not “think of”, but only those which it would have wanted to exclude, had it thought of them.³⁶² The *Normzwecklehre* might give some content to the position the ILC took in codifying the law of reparation in international law, given that the content of the primary norm is said to be decisive in identifying the proper applicable standard of causation in a given case.

There is no separate doctrine for the *novus actus* problem. The interruption of the causal chain has to be examined in light of the theories of adequate causation and the *Normzwecklehre*.³⁶³

German criminal law applies different standards. Causation is relevant only for *Erfolgsdelikte*,³⁶⁴ *i.e.*, offenses that require the causation of a specific result, such as death or injury. Criminal courts apply the *sine qua non* test. The test is used liberally and the criminal conduct does not have to be necessarily the main cause of the result.³⁶⁵ In contrast to civil law, German criminal law pays more attention to the actual understanding of the cause and effect relationship in operation. It is not sufficient to “assume away” the conduct, it is also necessary to understand why and how exactly the conduct is necessary for the result (doctrine of *gesetzmäßige Bedingung*).³⁶⁶

³⁶¹ BGHZ 27, 127.

³⁶² Säcker – Rixecker, at 328.

³⁶³ *Id.*

³⁶⁴ A Schönke *et al.*, *Strafgesetzbuch: Kommentar* (2001) [‘Schönke’], at 171.

³⁶⁵ *Id.*, at 171 *et seqq.*

³⁶⁶ *Id.*, at 173-174.

In addition to causation, German criminal law requires *objective attribution* (*objektive Zurechnung*) of the result to the perpetrator; at least there appears to be an academic consensus to this effect, with somewhat inconsistent approaches in the case law.³⁶⁷ The criterion of objective attribution is that the conduct must have created the risk of the wrongful result and the actual result must be the materialization of this risk.³⁶⁸ Thus, the additional filter on the *sine qua non* test is not *adequate causation* or the *Normzwecklehre*, but *objektive Zurechnung* in German criminal law.

5. The common heritage of legal thinking about causation

Explaining causation and solving the difficulties encountered by all legal systems has been a popular subject of research in legal philosophy. To conclude our discussion on the general principles of law, a brief overview of the most important views is necessary. The way we think about causation will greatly depend on our general theory about the rationale or philosophical basis of liability. For the moral philosopher, the question will be whether causation *per se* reflects any underlying moral principle.³⁶⁹ If a liability regime is an instrument of corrective justice, causation will be the necessary yardstick to identify and measure the wrong to be corrected.³⁷⁰ Among the advocates of corrective justice, there will be a sharp difference between the supporters of the “fault-in-the-doing” and the ‘human agency’ paradigms. The former focuses on the blameable action and causation is only a subsequent step concerned with the consequences of otherwise blameable conduct. The latter treats causation as the very essence

³⁶⁷ M Dubber – T Hörnle, *Criminal Law: a Comparative Approach* (2014), at 301; J G Stewart ‘Ten Reasons for Adopting a Universal Concept of Participation in Atrocity’, in E van Sliedregt (ed), *Pluralism in International Criminal Law* (2014) 320, at 336.

³⁶⁸ *Id.*; Schönke, at 180-181.

³⁶⁹ C Schroeder, ‘Causation, Compensation and Moral Responsibility’ in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1997) 347 [‘Schroeder’], at 353-356; C Sartorio, ‘Causation and Ethics’ in H Beebe *et al.* (eds), *The Oxford Handbook of Causation* (2009) 575.

³⁷⁰ J L Coleman, ‘Tort Law and the Demands of Corrective Justice’, (1991-1992) 67 *Indiana Law Journal* 349, at 350.

of human action. Since it is through causation that humans shape their surroundings, human actions cannot be attributed legal significance without some conception of causation.³⁷¹

On the other hand, if a system of efficiency is envisaged, as is the case in the argument of the law and economics school, the question of causation will be secondary to the efficient allocation of costs in a given case.³⁷² The compensability of an injury will not depend on causation, but on whether providing compensation would incentivise an efficient resource allocation. Causation will not tell us whether imposing liability for a loss is efficient, because, as Coase and Calabresi argued, an accident is always caused by the tortfeasor and the victim. The ascription of liability is not a question of causation, but it should be decided with a view to promote the most efficient cost allocation. This causal scepticism leads to the conclusion that the function of a liability rule is to deter from risk enhancing conduct by imposing liability for the conduct increasing the risk, irrespective of the causal consequences. This liability would not necessarily be a duty to provide compensation. Instead, it could be a fine imposed on the ground of risk-enhancing, to be redistributed later to the victims of such risk-enhancing activities.³⁷³

Posner and Sykes suggested to transpose an efficiency-based system of responsibility to international law.³⁷⁴ Such an approach would substantially recalibrate the regime of international responsibility, since most of the consequences international law attaches to international wrongs are not justified by considerations of efficiency. For instance, Posner and Sykes find the application of certain countermeasures acceptable, even if they are not lawful, as long as they promote an efficient resolution of the dispute.³⁷⁵

The example of the law and economics approach illustrates that there are several crucial and irreconcilable dividing lines between the various schools of causation theorists. The first of those lines distinguish those who argue that there is in fact no causal inquiry, just a plain legal policy judgment, in the law from those who argue in favour of a law of causation. Green pointed

³⁷¹ Schroeder, at 353-356.

³⁷² R H Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law & Economics* 1; G Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts', (1961) 70 *Yale L.J.* 499.

³⁷³ *Id.*

³⁷⁴ E A Posner – A O Sykes, 'Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance" and Related Issues', (2011-2012) 110 *Michigan Law Review* 244.

³⁷⁵ *Id.*, at 270.

out that judicial pronouncements on causality are not factual assessments, but legal normative operations, attributing responsibility for a certain wrong based on normative considerations.³⁷⁶ He argued therefore for the distinction of a factual exercise from a subsequent normative determination. Keeton wrote that labels such as “foreseeability” or “directness” are no more than disguises for policy judgments, without actual content.³⁷⁷

Nonetheless, the majority of the writers acknowledge that there is more to causation than a policy judgment. The prevailing view is that causation is a corollary of necessity. The philosophical foundations of this approach were set out in David Lewis’ paper on *Causation*.³⁷⁸ According to this account, in order to determine whether A is the cause of B, the comparison with another, possible world, the *counterfactual*, is needed, in which A is absent. A causal nexus is determined by a counterfactual dependence. If in the counterfactual world B is absent, A is a cause of B. This understanding of a causal relation is reflected in each of the studied legal systems of world. The underlying assumption of this approach is that we are able to construct this counterfactual world and we are able to speculate whether the absence of A results in the absence of B. In order to do that, we will need an understanding of the *causal law* connecting B and A. The counterfactual rests on a hypothesis and not an observation. It is a prediction of how things would have evolved, without the possibility to actually experiment whether such a hypothetical evolution is realistic. Without having an understanding, or at least an assumption of the causal law governing this alternative universe (which is purportedly identical to the law governing the actual universe), such a hypothesis or prediction is impossible. Consequently, the core assumption of the counterfactual dependence approach is that there are causal laws and such causal laws are observable. Causation is thus the operation of such laws.³⁷⁹ The assumptions that laws govern causal processes is far from being self-explanatory and it has been the subject of one of the most important theoretical debates in the history of causation theories. Hume argued that causation is merely a perception, flowing from our observations of previous patterns of regularity. It was John Stuart Mill who introduced the

³⁷⁶ L Green, *The Causal Relation Issue in Negligence Law*, (1962) 60 *Michigan Law Review* 543, at 545-546, 561;

³⁷⁷ W Keeton, *Prosser and Keeton on the Law of Torts* (5th ed 1984), at 273.

³⁷⁸ D Lewis, ‘Causation’, (1973) 70 *The Journal of Philosophy* 556.

³⁷⁹ Wright – Puppe, at 466-468.

idea of causal laws, existing irrespectively of the observer, and enabling the observer to predict the evolution of causal sequences.³⁸⁰

In a different context, but the assumption of an objectively existing link between events is the foundation of the school of *adequate causation*. Von Kries identified *probability* as the central notion of causation.³⁸¹ For him, A is a cause of B, if A is a necessary condition of B *and* A increases the objective probability of B. The aspect of objective probability is the expression of the intrinsic relationship between event A and event B. Again, determining the probability of B if A occurs will depend on our previous observations and experiments. In order to usefully rely on such previous observations, the theory of adequate causation requires that A and B are generalized so that they become comparable with other, previously occurred sequences, the events of which belong to the same general categories. For example, dropping an egg from the third floor to concrete objectively increases the probability of the egg breaking. Event A here belongs to the general category of ‘dropping an egg’ and the further particulars will not be significant for the purposes of the comparison.

The paradigm of necessity is contested by others. As we have seen in the discussion of the breakdown of the ‘but for’ test, overdetermined causes defeat the necessity approach. The solutions of domestic legal systems did not satisfy legal philosophers and they attempted to come up with better formulae than ambiguous labels such as ‘material contribution’. The most influential of these approaches today is Wright’s NESS test.³⁸² Under the NESS test, a condition that is a necessary element in a sufficient set of conditions for an event to occur, is regarded as a cause of that event. The explanatory strength of this test is that it resolves overdetermination. Suppose A, B and C occur and D happens. A, B and C are overdetermined causes if D would have happened equally if A, B occurred, but C did not; or if B and C occurred, but A did not, or if A and C occurred, but B did not. The solution of the NESS test is that as long as a cause is part of one of these sufficient combination of conditions (AB, BC or AC), the event is regarded as a cause.

³⁸⁰ *Id.*

³⁸¹ J von Kries, *Principien der Wahrscheinlichkeitsrechnung* (1886).

³⁸² R W Wright, ‘Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts’, (1988) 73 *Iowa L R* 1001.

Wright's test further developed the work of Herbert Hart and Tony Honoré, who wrote the most important treatise on causation in the history of legal thinking.³⁸³ Hart and Honoré represent a further dividing line among legal scholars. They refuse the proposition that causation in the law should draw on causation in metaphysics or science. At the same time, they reject the legal policy argument as well and express a commitment to identify a genuine doctrine of causation in the law. Hart's and Honoré's theory provided a theory of causation which is derived from "common sense" principles informing our everyday thinking about causal relationships.³⁸⁴ One of their most important postulates derived from common sense principles was the definition of intervening events fracturing the causal connection. In their view, deliberate, voluntary acts *or* abnormal contingencies will break the causal chain (subject to certain exceptions, such as when the purpose of the breached prescription is the prevention of such events).³⁸⁵ Equally important was their thesis that a common sense understanding of causation includes *interpersonal transactions, i.e.*, causing an event is as possibly by causing another to cause the event.³⁸⁶

This very brief survey was meant to flag up the seemingly endless differences prevailing in legal academia about even the basics of causation. As long as the necessity of the causal inquiry itself is a subject of controversy, it should come as no surprise that the international law of causation is an equally problematic topic. In addition, the functions of the international legal system are much contested. Deriving an international law of causation from the philosophical foundations of the system of international responsibility would be even more hopeless than accomplishing the same as a tort or criminal lawyer. The opposite is a better question: What are the characteristics of the international law of causation? How does it operate and what results does it bear out? Once we have an understanding of the actual landscape of causation in the case law of State responsibility, we might have more chance to understand the foundations of the system. Induction, and not deduction is therefore the path we take.

³⁸³ Hart – Honoré.

³⁸⁴ *Id.*, at 86.

³⁸⁵ *Id.*, at 256

³⁸⁶ *Id.*, at 363-376.

6. Conclusions

The foregoing is a very short summary of the fundamentals of the law of causation in three principal legal systems of the world, yet it suffices to formulate some firm conclusions. Although the various tests and standards of these systems might produce similar results in most of the cases, there are very few matters of principle on which they agree.

The view that major western legal systems rely on the concept of causation is confirmed by this overview.³⁸⁷ All of them applies this concept to *establish* liability and to *delimit* liability, although German doctrine is the only one to expressly recognize this dual function and attach distinct labels to them. All of them agree that *fault* and *causation* are not entirely distinct issues and the former should inform the latter. All of them accept in principle the test of *conditio sine qua non*. All of them recognize the shortcomings of this test and attempts to find alternative solutions or corrections. And this is where the common denominators end. Arguably, there are at least traces of the *scope of duty* test in all legal systems, but this is a very controversial matter, mostly in French law.

Even within the individual legal systems there are significant differences among the tests followed in cases of contractual, delictual and criminal liability and even within these subsystems of liability the landscape tends to be controversial and sometimes outright confusing. Wherever one looks, the law is far from clearly settled. These three examples demonstrate that while the necessity of a causal inquiry in the law of responsibility is most probably a general principle, there is no general *standard* of causation which could be invoked in international law based on its universal recognition.

Still, international courts and tribunals have been confronted with the problem and they must have turned to some legal tradition or doctrinal approach to find answers. In examining their practice, the foregoing discussion should be kept in mind, especially when evaluating the vocabulary of the judgments and awards. The words *proximity*, *directness* or *foreseeability* do not mean much without adding context. As we have seen, the concept of causation itself and

³⁸⁷ Von Bar, at 435. For non-Western countries see e.g. E Matsumoto, 'Tort Law in Japan' in M Bussani – A J Sebok, *Comparative Tort Law: Global Perspectives* (2015) 359, at 369; A B bin Mohamad, 'Islamic Tort Law' in M Bussani – A J Sebok, *Comparative Tort Law: Global Perspectives* (2015) 441, at 445-456, 461.

the various substantive standards have a well-defined systemic role in domestic legal systems, they are closely linked to and dependent on other ingredients of the liability regimes (such as *fault*) and none of them enjoys a universal and unchallenged position within the legal systems themselves. These contextual limitations must inform the treatment of the subject in international law. Hence, the necessary comparison must not only be between “causation in international law” and “causation in domestic law”, but also between the “context of causation in international law” and the “context of causation in domestic law.” For example, this should mean that the distinction between primary and secondary rules in international law, a context without a strictly equivalent structure in (at least the examined) domestic legal systems, must have an implication on the concept and standard(s) of causation in international law.³⁸⁸ The same applies for the consideration of the fact that the question of *fault* is now eliminated from the “general part” of State responsibility. This must have implications on whatever position one takes on causality, given that the two concepts are, as we have seen, far from being independent.

There is a further common feature of the examined legal systems. All of them developed significantly during the last century. Causation tests became more sophisticated and nuanced. The early cases law on causation in international law, which then became points of reference for subsequent disputes as we will see, found their roots in a different and simpler system of legal concepts. It is right to ask whether international law has kept up with the development of the more recent past, especially because the same problems forcing domestic systems to reconsider traditional approaches arise similarly in international law (e.g. difficulties for the claimants to demonstrate the requisite causal link in certain circumstances).

Having rejected the idea that a general principle of a particular causation standard exists, the foregoing considerations will inform our treatment of international case law with a view to identify and define some patterns or principles followed by international courts and tribunals.

³⁸⁸ This is not to say that the distinction between substantive duties and the consequences of breach in such duties is not important in domestic legal systems.

Chapter IV

The causal link and reparation: The governing principles

1. Introduction

The present chapter turns to the practice of international courts and tribunals and attempts to identify common patterns in the treatment of causality problems. It focuses on several, more frequently litigated branches of international law, namely international investment law, international human rights law and a number of mass claims processes. Having concluded in Chapter III that the ‘general principles’ approach has limits, the quest for an international law of causation is left to the subsidiary sources of international law. If there is an international law of causation, the (subsidiary) sources to identify it could be mainly the jurisprudence of international courts and tribunals.

To date the most extensive analysis of the case law was Professor Brigitte Stern’s seminal work in 1973, *La préjudice dans la théorie de la responsabilité internationale*.³⁸⁹ Stern followed an inductive method. Instead of starting from axiomatic grounds, she looked first at the practice to derive the contours of the standards and principles of causation.³⁹⁰ This thesis adopts this method. At the same time, this is not an uncritical, merely descriptive exercise. The practice keeps utilizing notions of legal theory, domestic tort and criminal law. It is necessary to flag up the problems with the terminology and the application of these concepts, should there be any. Yet, the primary objective is to look at how tribunals tackled similar causality problems, irrespective of the vocabulary they used.

The choice of these specific dispute settlement frameworks might need explanation to understand how they could help in formulating or deriving principles of causality useful for general international law. State responsibility vis-à-vis private parties is often considered to be

³⁸⁹ B Stern, *La préjudice dans la théorie de la responsabilité internationale* (1973).

³⁹⁰ *Id.*, at 9-13.

lex specialis.³⁹¹ James Crawford writes that “the ILC articles make no attempt to regulate the question of breach between a state and a private party such as a foreign investor”.³⁹²

There are also more specific claims that State responsibility under investment protection rules differs from general rules in as much as damage is a condition of responsibility.³⁹³ Douglas writes that “[t]he general principles of state responsibility for international wrongs cannot be presumed [...] to apply without qualification to the invocation by a non-state actor of a state’s liability for breach of a treaty obligation [...]”.³⁹⁴ Likewise, some posit that the practice of human rights bodies is to be considered in light of the special regime of State responsibility they apply.³⁹⁵

This thesis does not attempt to examine the veracity of these positions in general. It does, however, demonstrate that investment tribunals and human rights courts heavily rely on the ILC’s work and interpret the provisions of ARSIWA relevant to causation (arguably because they do not have much else to turn to).³⁹⁶

As regards the conditions and the standard of reparation, among them that of causality, the case law of these bodies can be traced back to *Chorzów Factory*.³⁹⁷ The European Court of Human

³⁹¹ On *lex specialis*, see ARSIWA Article 55.

³⁹² J Crawford, ‘Investment Arbitration and the ILC Articles on State Responsibility’, (2010) 27 *ICSID Review*, 127, at 130.

³⁹³ Z Douglas, ‘International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed’, (2013) 63 *ICLQ* 867, at 893.

³⁹⁴ Z Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 *BYBIL* 151, at 186.

³⁹⁵ O Ichim, *Just Satisfaction under the European Convention on Human Rights* (2014), at 21.

³⁹⁶ Shelton stressed the significance ARSIWA may carry in promoting a consistent jurisprudence of remedies owed to non-State actors. D Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility’, (2002) 96 *AJIL* 833, at 834. To the same effect in the investment law context, see S Wittich, ‘Shared Responsibility in International Investment Law’, *SHARES Research Paper* 103 (2016), at 8 (available at: <http://www.sharesproject.nl/wp-content/uploads/2016/05/103-Wittich-Practice-vol.-2016.pdf>, last accessed 30 September 2016).

³⁹⁷ According to Judge Costa, “[i]t is generally recognised that the basis of the just satisfaction rule resides in the principle of general international law which prescribes that a State responsible for having, by act or omission, injured a party, must provide that party with adequate reparation...”. J-P Costa, ‘The Provision of Compensation under Article 41 of the European Convention on Human Rights’, in D Fairgrieve *et al.* (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) 3, at 3-4; To the same effect see F Vanneste, *Relationship between International Human Rights Law and General International Law: Assessing the Specialty Claims of International Human Rights Law* (PhD Thesis, KU Leuven, 2010), at 508-522 (available at <https://lirias.kuleuven.be/bitstream/123456789/233805/1/Relationship+between+general+international+law+and+human+rights+law.pdf>, last accessed 21 September 2016).

Rights often refers to the *Chorzów Factory* standard,³⁹⁸ while the Inter-American Court of Human Rights expressly recognizes the alignment of compensation standards with the customary rules of State responsibility.³⁹⁹ In its first ruling on reparations, the African Court of Human and People's Rights ('ACtHPR') also applied the same standard.⁴⁰⁰ The practice of various UN human rights bodies also mirrors the language of the PCIJ.⁴⁰¹ *Chorzów Factory* was the point of reference of the Iran-US Claims Tribunal,⁴⁰² the United Nations Compensation Commission⁴⁰³ and the Eritrea-Ethiopia Claims Commission.⁴⁰⁴

After all, Crawford himself fine-tuned his above remark by pointing out that "there is a presumption against the creation of wholly self-contained regimes in the field of reparation, and it is the case that each of the bodies [...] has been influenced to a greater or lesser degree by the standard of reparation under general international law."⁴⁰⁵ Accordingly, it is reasonable to assume that these bodies conceive their own jurisprudence as reflecting the state of law in accordance with the generally applicable principles. Whatever they conclude about causality represents a subsidiary source of international law.⁴⁰⁶ In any event, the approach and practice of these bodies could be a useful guide for other courts and tribunals as well, just as it could serve as an ingredient of the comparative analysis within the framework of this project.

The focus in this and the next chapter is on the cases law from 1980-2015. By contrast, this work does not reexamine the international arbitral and judicial practice predating the 1970's.

³⁹⁸ *Cyprus v Turkey*, ECtHR, Judgment (Just Satisfaction) of 12 May 2014, paras. 40-42; *Guiso-Gallisay v Italy*, ECtHR, Judgment (just satisfaction) of 22 December 2014, para. 60.

³⁹⁹ *Case of Aloeboetoe et al. v Suriname*, IACtHR, Judgment of 4 December 1991 (Merits), paras. 42-53; *Case of YATAMA v Nicaragua*, IACtHR, Judgment of 23 June 2005, para. 231; *Case of Ivcher Bronstein v Peru*, IACtHR, Judgment of 6 February 2001, para. 177.

⁴⁰⁰ *Mtikila and others v Tanzania*, ACtHPR, Reparations, 28 February 2014, para. 29; See also *Zongo and others v Burkina Faso*, ACtHPR, Reparations, 5 June 2015.

⁴⁰¹ *L.R. and others v Slovakia*, Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005), para. 12.

⁴⁰² *Tippetts v TAMS-AFFA*, Award, IUSCT Case No. 7 (141-7-2), 22 June 1984, at fn 2.

⁴⁰³ UNCC, Third Instalment of F3 Claims, 26 June 2003, para. 133.

⁴⁰⁴ *Eritrea's Damages*, Eritrea-Ethiopia Claims Commission [EECC], Final Award, 28 April 2008, paras. 24-26.

⁴⁰⁵ Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, Document A/CN.4/507 and Add. 1-4*, para. 157. Simma and Pulkowski also concluded that the Convention system is by no means a self-contained regime for the purposes of State responsibility. B Simma – D Pulkowski, 'Leges speciales and Self-Contained Regimes', in J Crawford *et al* (eds), *The Law of International Responsibility* (2010) 139, at 158-168

⁴⁰⁶ Merrills concludes that "it cannot be assumed *a priori* that pronouncements on [State responsibility] by the European Court are without wider significance". J G Merrills, *The Development of International Law by the European Court of Human Rights* (1995), at 21.

The International Law Commission and Professor Stern have completed that exercise. A short explanation of their conclusions and the overview of the sporadic literature on the matter precedes each section. Then, we test and contrast the conclusions and propositions formulated therein against the actual landscape of subsequent developments.

This chapter lays out the general framework and the governing principles of causation. Then, the next chapter discusses the recurring problems of multiple causation, contributory negligence and mitigation.

2. The history of the doctrine

The International Law Commission reviewed the pertinent cases during the codification of ARSIWA. In particular, the reports of *Francisco v García-Amador* and Gaetano Arangio-Ruiz dedicated some pages to this problem.⁴⁰⁷ Arangio-Ruiz relied extensively on Brigitte Stern's work too.

As it emerges from the early case law forming the basis of the codification, most authorities endorsed the view that only 'proximate causation' matters for the purposes of responsibility. To determine whether State conduct was the legally relevant cause of a certain injury, courts and tribunals queried whether such conduct was the 'proximate cause' of the injury. Obviously, the label of proximity is in itself unhelpful without further elucidation of its substance. There were two substantive tests emerging from the early cases: (i) the 'normality' test and (ii) the 'foreseeability' test.

First, the most often cited formulation of the 'normality' test, also called the 'objective' test, is the definition given by the US/Germany Mixed Claims Commission in its *Administrative Decision II*: "It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can

⁴⁰⁷ Sixth Report on International Responsibility by Mr. F.V. Garcia Amador, Special Rapporteur, *ILC Ybk* (1961)/II 1, paras. 159-162; Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, *ILC Ybk* (1989)/II 1, paras. 37-43.

be clearly, unmistakably, and definitely traced, link by link, to Germany's act."⁴⁰⁸ The Commission's emphasis on the irrelevance of the length of the causal chain was adopted in response to the argument that international law does not recognize 'indirect damages'.⁴⁰⁹

The *Alabama* decision was usually cited in support of this proposition.⁴¹⁰ In *Alabama* the extent of Great Britain's liability was in contention. The US claimed compensation from Great Britain for the violation of the latter of its obligations under the law of neutrality during the Civil War. Among other submissions, the US advanced claims against Great Britain for insurance payments and further war expenses. Labelling these damages "indirect", the Tribunal held that they "do not constitute, upon the principles of international law [...] good foundation for an award of compensation."⁴¹¹ Lauterpacht noted that this finding has been "consistently disregarded by international practice", as a proposition contrary to general principles and explained only by the historical circumstances of the arbitration.⁴¹²

Academic commentary equally disagreed on the significance of the award. Yntema pointed out that in a sense all damages resulting from Great Britain's "lax enforcement" of its neutrality obligations were indirect.⁴¹³ Another comment questions whether the rejection of "indirect damages" in principle is a correct reading of the decision, or such damages were rejected only

⁴⁰⁸ *Administrative Decision II*, US/Germany Mixed Claims Commission, (1923) 7 RIAA 23, at 29-30. Cited in B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 245-246; Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth session, Supplement No. 10, at 69; G Dannemann, *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention* (1994) ['Dannemann'], at 139; M F di Rattalma – T Treves, *The United Nations Compensation Commission: a Handbook* (1999), at 21-22; P N Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2000), at 180-182; Eritrea-Ethiopia Claims Commission, Decision No. 7, 27 July 2007, para. 14; S Alexandrov – J Robbins, 'Proximate Causation in International Investment Disputes' in K Sauvart (ed), *Yearbook of International Investment Law and Policy 2008/2009* (2009) 317, at 326; B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (2011), at 171; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011, para. 166; V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper – I Plakokefalos, *Shared Responsibility in International Law: an Appraisal of the State of Art* (2014) 134, at 164-165; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Memorial of Nicaragua on Reparations, 29 March 1988, para. 277.

⁴⁰⁹ Stern, at 204-211.

⁴¹⁰ *Alabama Arbitration*, Moore, *International Arbitrations*, Vol I, at 646, 658.

⁴¹¹ *Id.*, at 646.

⁴¹² H Lauterpacht, *International Law. Collected Papers. Vol 2. The Law of Peace. Part I. International Law in General* (1975), at 122. A different decision could have risked Great Britain stepping back from the arbitration.

⁴¹³ H Yntema, 'Treaties with Germany and Compensation for War Damage', (1924) 24 *Colum LR* 134, at 150-151. See also A Hauriou, 'Les dommages indirects dans les arbitrages internationaux', (1924) 31 *RGDIP* 203, at 211-213.

because the requisite causal link could not be demonstrated.⁴¹⁴

The notion of ‘indirect damages’ itself was an unclear one. It could have been a synonym for *lucrum cessans* in some cases, for the complete absence of the causal link in others or merely an expression indicating the limits of the jurisdiction of the forum to award certain damages.⁴¹⁵

The US/Germany Mixed Claims Commission sought to step beyond this terminological and doctrinal ambiguity by clarifying the applicable test of causation. It held accordingly that “the distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful and should have no place in international law.”⁴¹⁶

The Commission further elaborated on its own test in the *Life-Insurance Claims*. In this case, compensation was claimed from Germany for certain losses suffered by US insurers. The insurers had to pay following “killings” committed by Germany, pursuant to the respective insurance contracts in place. The question before the Commission was whether the expenses of the insurers are compensable damages “caused” by Germany’s acts. The Commission’s words are frequently cited, but usually out of context, it is therefore necessary to read the full citation:

The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no wise connected. These contract obligations formed no part of any life that was taken. They did not inhere in it. They were quite outside and apart from it. They did not operate on or affect it. In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany’s act in taking the lives, and hence not attributable to that act as a proximate cause.⁴¹⁷

As is apparent from the full quote, it is not entirely clear whether the Commission was

⁴¹⁴ A G de Lapradelle – N Politis, *Recueil des arbitrages internationaux*, Tom 2, at 977. For the coverage of the entire academic debate, see Stern, 204-211.

⁴¹⁵ C Eagleton, *The Responsibility of States in International Law* (1928), at 200-202; C Gray *Judicial Remedies in International Law* (1990), at 22-24; Dannemann, at 137-140.

⁴¹⁶ *United States Steel Products Company (United States) v Germany, Costa Rica Union Mining Company (United States) v Germany, and South Porto Rico Sugar Company (United States) v Germany (War-Risk Insurance Premium Claims)*, US/Germany Mixed Claims Commission (1923), 7 RIAA 44, at 62-63.

⁴¹⁷ *Life-Insurance Claims*, US/Germany Mixed Claims Commission (1924), 7 RIAA 91, at 113.

formulating here a general test of remoteness or a solution for a variant of concurrent causation, where the combined effect of concurrent causes produces the harm, but in isolation the causes would not produce any harm. The Commission identifies the existence of the insurance contracts as the cause of the injury, which is a cause entirely extraneous to Germany's conduct. Given the strong emphasis on the existence of this extraneous cause, one wonders whether the Commission intended to address concurrent causation. At the same time, the Commission queried whether the accelerated maturity of the insurance contracts was a "natural and normal consequence" of Germany's conduct, implying that a proximate consequence would be a "natural and normal consequence". Notwithstanding the ambiguity of Commission's approach, Cheng's survey of further cases adopting the "natural and normal consequence threshold" confirms that this was one of the preferred tests at the time.⁴¹⁸

The other approach, called "subjective" by Cheng, is the test of "foreseeability". The usually cited corresponding excerpt of the *Nauliaa Award* is the following:⁴¹⁹

*Et, en effet, il ne serait pas équitable de laisser à la charge de la victime les dommages que l'auteur de l'acte illicite initial a prévus et peut-être même voulus, sous le seul prétexte que, dans la chaîne qui les relie à son acte, il y a des anneaux intermédiaires. Mais par contre tout le monde est d'accord que, si même on abandonne le principe rigoureux que seuls les dommages directs donnent droit à réparation, on n'en doit pas moins nécessairement exclure, sous peine d'aboutir à une extension inadmissible de la responsabilité, les dommages qui ne se rattachent à l'acte initial que par un enchaînement imprévu de circonstances exceptionnelles et qui n'ont pu se produire que grâce au concours de causes étrangères à l'auteur et échappant à toute prévision de sa part.*⁴²⁰

This test, like the one of the US/German Mixed Claims Commission, presents difficulties. In the second half of the quoted paragraph the Tribunal referred to a "*causes étrangères à l'auteur*". Under French law, this phrase refers to a cause extraneous to the defendant, such as *force majeure*.⁴²¹ On the other hand, the test of foreseeability is supposed to gauge/capture the extent to which the evolution of a causal process was foreseeable. A consequence can be unforeseeable, while still not being a "*cause étrangère*". Again, it is not clear whether the

⁴¹⁸ *Maninat*, (1905) 10 RIAA 55, at 81; *Antippa*, (1926) 7 TAM 23, at 28.

⁴¹⁹ See references *supra* concerning *Administrative Decision II*.

⁴²⁰ *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, (1928) 2 RIAA 1011, at 1031.

⁴²¹ C van Daam, *European Tort Law* (OUP 2013), at 320.

Commission was concerned with alternative causes or only with the remoteness of the damages. To further muddy the waters, the Tribunal then referred to the practice of the US/German Mixed Claims Commission in support of its view that “*les arbitres [...] n’ont pas hésité à refuser toute indemnité du chef de préjudices qui, bien qu’en relation de causalité avec les actes commis par l’Allemagne, dérivait en même temps d’autres causes plus rapprochées*”. These “*autres causes*” cannot be “*causes étrangères*”, because if they were, the resulting damages could not have remained at the same time “*en relation de causalité avec les actes commis par l’Allemagne*”.

It is submitted that there are several possible interpretations of the *Naulilaa Award*:

- i. Unforeseeable consequences or “*causes étrangères*” negate the causal connection between conduct and injuries.
- ii. Unforeseeable “*causes étrangères*” negate the causal connection between conduct and injuries (*a contrario* foreseeable “*causes étrangères*” do not).
- iii. Unforeseeable consequences negate the causal connection and the existence concurrent causes exempt the State from liability.
- iv. Unforeseeable concurrent causes exempt the State from liability.

Naulilaa revolved around the consequences of unlawful German reprisals in the Portuguese colony of Angola. Germany attacked several Portuguese fortresses in Angola, as a reprisal following the murder of some German officials. After the German attacks, an indigenous rebellion started against Portuguese forces. The question was whether the damages resulting from the rebellion were causal consequences of the German reprisals. The Tribunal found that the uprising was such that author of the wrongful act “*devait prévoir comme conséquence nécessaire de ses opérations militaires.*”⁴²² This is a clear application of the “unforeseeable consequence” threshold, and it appears to support option i. or option iii. above.

It is regrettable that isolated sentences from *Administrative Decision II, Life-Insurance Claims* and *Naulilaa* were arguably the most influential authorities on causation in international law

⁴²² *Responsabilité de l’Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne)*, (1930) 2 RIAA 1035, at 1075.

informing academic commentary and the work of the International Law Commission.⁴²³ Be it as it may, the case law surveyed by the rapporteurs, Cheng and Stern confirmed that these were the two main schools of thought.⁴²⁴ Arangio-Ruiz wrote that the two tests are not distinct in substance, because a “normal and natural” consequence would be a “foreseeable” consequence.⁴²⁵ This is not necessarily so. *Naulilaa* is a good example, because a local uprising is not necessarily a “normal and natural” consequence, but it can be a foreseeable consequence depending on the circumstances at hand. The best way to summarise the doctrine is that a State’s responsibility to remedy injuries extended to normal or natural or foreseeable consequences of the wrongful act.

Somewhat surprisingly, the International Law Commission eventually decided to reject any of these formulas in its draft. Garcia-Amador himself, reaching the foregoing conclusions, submitted a draft merely referring to the necessity of an “uninterrupted causal link”, mirroring the *Administrative Decision II* language.⁴²⁶ The Drafting Committee dropped this formulation following the discussions in the Commission with a promise to elaborate on causation in the commentaries.⁴²⁷ At the end of the process, the Commentaries did not fulfil this promise and merely noted that the applicable standard of causation is highly dependent on the underlying primary obligation: “the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.”⁴²⁸

This approach originates in Riphagen’s work, who preceded Arangio-Ruiz as the ILC’s Rapporteur on State Responsibility. Riphagen stressed at the beginning of his work on the content of international responsibility the crucial but at the same time limited role of causation in determining the content of this obligation:

The obligation "to wipe out all the consequences of the illegal act" is, as it were, mitigated by the notion of "proximate" or "effective" causality. Indeed, in the factual chain of events connecting a particular conduct to a particular result, there may be "extraneous links" which cannot but influence the decision as to the amount

⁴²³ Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, *ILC Ybk* (1989)/II, paras. 37-43.

⁴²⁴ Foreseeability was already applied as early as 1876 in the *De Rejon Case*. See M W Whiteman, *Damages in International Law* (Vol I, 1937), at 421.

⁴²⁵ *Id.*, para. 39.

⁴²⁶ *Id.*, para. 191.

⁴²⁷ Summary record of the 2288th meeting, *ILC Ybk* (1992)/I 214, para. 42.

⁴²⁸ ARSIWA Commentaries, commentary to Art 31.

of damages (if any) to be paid. Such extraneous links are, on the one hand, the element of "hazard", and, on the other hand, the element of "intentions" of the author State. While the former element tends to limit the extent of consequences taken into account in determining the amount of damages to be paid, the latter element tends to increase this extent, and thereby, the amount of damages.⁴²⁹

He concluded that the content of the primary rule is decisive in assessing these "extraneous links." He contrasted "factual causality" with "effective causality" and the assessment of the latter in his view should be influenced *e.g.* by considerations of fault. In Riphagen's view "the primary rule may, so to speak, extend the chain of events and take into account [...] the actual capacity of the obliged State [...] to prevent (or to create) the situation which the primary rule wishes to avoid (or to attain)".⁴³⁰ This approach puts a strong emphasis on the content of the primary rule, as does the final version of the commentaries.

Riphagen's approach ultimately prevailed. There are two problems with this outcome. First, before the ILC adopted this view, there was not a single authority supporting the view that the standard of causation (in the context of remedies) was dependent on the international obligation. Second, the ILC's Commentary did not provide any theoretical basis for its position. Riphagen's justification for his approach was that fault informs the extent of liability. Given that fault is a matter of primary norms, causation is inherently linked to the substance of the primary obligation too.⁴³¹ Riphagen did not cite any authority on this point the Commentary does not repeat his arguments. It merely summarizes the case law as follows:

In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity". But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.

This paragraph creates the impression that it was impossible to systematize or make some broader sense of the case law. It also contrasts "foreseeability" with "proximity", as if they were mutually exclusive terms. It is understandable that at a certain point the codification process had to move forward without being stuck at the elusive problem of causation.

⁴²⁹ Second report on the content, forms and degrees of international responsibility (Part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur, *ILC Ybk* (1981)/II 79, paras. 108-109.

⁴³⁰ *Id.*, para. 111.

⁴³¹ *Id.*, paras. 110-112.

However, the Commission had at its disposal a more extensive and useful summary of the case law and at least some more elaborate reflection on those results could have been helpful in the Commentary.

This chapter seeks to fulfil the lacunae in ARSIWA and the Commentary by updating the analysis of the case law. *First*, a separate heading is dedicated to the issue of the *conditio sine qua non*, which Arangio-Ruiz, García Amador and Stern largely neglected. *Second*, the test of remoteness and the actual meaning of proximate causality is analysed in more detail. The next chapter turns to more complex issues of multiple causation. The separation of multiple causation from problems of remoteness is incomplete, as we shall see. This structure follows the sparse international legal literature which addresses multiple causation separately from remoteness.

3. The but for test in international investment law

The case law in each subsection is examined along three main questions:

- i. Whether the applicability of the test is confirmed;
- ii. How the case law addresses the problem of the counterfactual;
- iii. How courts and tribunals deal with specific difficulties arising in the application of the test.

The case law of investment tribunals confirms that but for causation is generally accepted as the starting point of the causal inquiry. Tribunals insist that the wrongful conduct of the State shall be a condition of the damage and this could be demonstrated by proving that the damage would not have happened in the absence of the wrongful conduct. The but for test thus requires the construction of a hypothetical counterfactual.⁴³² This section discusses the pertinent cases confirming the applicability of the test, on the difficulties arising out of the counterfactual analysis and on the limits of the test.

⁴³² See above, Chapter III.

3.1 Constructing the counterfactual

A good example highlighting all the intricacies of applying the but for standard is *Chevron v Ecuador*. The investor claimed compensation for the breach of a BIT provision requiring from the host State the provision of “effective means” of asserting claims and enforcing rights arising out of investments.⁴³³ According to the Claimant, the delay of Ecuadorian courts in disposing of the claims related to Chevron’s investment breached the BIT and caused damage. Ecuador’s argument was that even in the absence of such delay (but for the delay), the outcome of domestic proceedings would have been unfavourable for the Claimant and hence, it would have resulted in the same damages.⁴³⁴ The actual outcome of certain disputes during the arbitration, in which Ecuadorian courts rejected the claims, supported Ecuador’s argument.

The Tribunal held that the investor had to prove that but for the delay it was more *likely* to win the cases.⁴³⁵ This, not unlike in domestic cases, introduces an element of likelihood in the assessment of the hypothetical counterfactual. The Tribunal attributed limited value as a matter of evidence to the actual outcome of domestic proceedings.⁴³⁶ It held that a claim for procedural delay (or irregularities) is different in this respect than a claim relating to the wrongfulness of the actual domestic judgments would be. In the words of the Tribunal, “this is a different test of causation from that which would apply to the evaluation of other substantive bases for State responsibility on the basis of a domestic court’s actions.”⁴³⁷ It is an important point, because it confirms that the *cause of action*, *i.e.*, indirectly the *primary norm invoked*, informs the applicable test of causation.

This seems to confirm the position under ARSIWA that a uniform standard of causation is impossible due to the great variety of primary obligations. However, the subsequent sentences

⁴³³ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 10 March 2010, para. 167.

⁴³⁴ *Id.*, para. 374.

⁴³⁵ *Id.*, para. 375.

⁴³⁶ For a critique see L Y Fortier, ‘Investor-State Tribunals and National Courts: A Harmony of Spheres?’ in D D Caron *et al.* (eds), *Practising Virtue. Inside International Arbitration* (2015) 292.

⁴³⁷ *Id.*, para. 376.

of the decision clarify the role of the primary obligation. The Tribunal pointed out that if the claim was on a different basis, such as a denial of justice, the construction of the counterfactual would be different and the actual outcome would be given more weight. Accordingly, the primary norm is important, because the counterfactual is a hypothesis assuming a *lawful* course of conduct. It will be the primary obligation determining the *wrongful aspect* of the State conduct that is to be assumed away in the counterfactual. In this sense the but for test can never be independent from the primary obligation, but that does not exclude the possibility of abstract principles informing its application.

The Tribunal went on to examine the likelihood of an impartial, fair and competent Ecuadorian Tribunal deciding in favor of the Claimants. Notwithstanding the actual decisions, the Tribunal held that the Claimant was more likely than not to succeed at the time the breach occurred. This was sufficient for causation. Importantly, the Tribunal rejected Ecuador's argument that the likelihood of winning the domestic cases should be reflected in the amount of compensation as a discount rate. It recalled its earlier finding that *likelihood* is a matter of causation. Once causation is established, compensation is due under the general applicable principles.⁴³⁸ Judge Higgins in her Hague lectures mentioned this factual scenario a traditional dilemma of international law, thus, the significance of the case cannot be overemphasized.⁴³⁹

In comparison with other tribunals, the *Chevron* Tribunal was more ready to engage in a thorough examination of the counterfactual. Tribunals often stop once they establish that the host State acted in an improper manner or conducted a procedure not in accordance with international standards. They typically do not entertain the further question of what would have happened, if the host State had followed the adequate procedures. For example, in *Gold Reserve v Venezuela* the Tribunal only established how Venezuela's sudden termination of the concessions granted to the investor resulted in damages, ignoring the question what would have happened if the termination of the concessions happened properly.⁴⁴⁰ Similarly, in *Rumeli v Kazakhstan*, the Tribunal did not address the Respondent's arguments to that effect.⁴⁴¹

⁴³⁸ *Id.*, para. 381.

⁴³⁹ R Higgins, *Problems and Process: International Law and How We Use It* (1995), at 10.

⁴⁴⁰ *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, para. 662.

⁴⁴¹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 751. Kazakhstan argued that "if the Tribunal finds either that

The *Fuchs v Georgia* Tribunal was confronted with Georgia's argument on but for causation and the hypothetical counterfactual. Georgia contended that the investor would not have been able to complete and operate its project even if its rights remained unaffected.⁴⁴² The Tribunal rejected this argument.⁴⁴³ At the same time, the Tribunal's own counterfactual analysis on the basis of the evidence produced confirmed that the investor would have sold its rights anyway, instead of making use of them in completion of the project. The Tribunal's findings on causation had implications for the valuation date. Contrary to the usual practice, for this Tribunal the question was *not* what the value of the investment would have been on the date of the award, but what its value would have been had the investor sold its rights.⁴⁴⁴ To summarize the conclusions from *Fuchs v Georgia*, it appears that to *establish* causation, the details of the counterfactual do not have to be precisely outlined, but to *quantify* the damages, it might be necessary. If, in light of the factual record it is likely that the investor would have sold its investment, it would impact the valuation, in particular its date.

Another example on the difficulties of the counterfactual hypothesis is *Occidental v Ecuador*. In *Occidental* the parties disagreed about the proper construction of the counterfactual. The dispute arose out of the State's cancellation of contractual arrangements with *Occidental's* subsidiary by termination decrees. However, the State subsequently adopted additional legislation and the parties disagreed on whether those acts should be considered also for the purposes of the counterfactual analysis. The Claimant was convinced that the additional legislative measures are wrongful and should be disregarded in assessing the but for scenario. In contrast, the Respondent argued that those acts should be considered in both scenarios, since any hypothetical willing buyer would be aware of those measures. The Tribunal subscribed to the Claimant's approach, because it found the measures illegal.⁴⁴⁵

EDF v Argentina posed the opposite question, *i.e.*, whether subsequent measures beneficial for the investor should be considered in the counterfactual. The case demonstrates the link of but

the cancellation of the Investment Contract was substantively valid or that other valid substantive grounds for its cancellation existed, the causal nexus between the alleged procedural defects and the losses allegedly suffered would not be present."

⁴⁴² *Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/07/15, Award of 3 March 2010, paras. 456-458.

⁴⁴³ *Id.*, para. 465.

⁴⁴⁴ *Id.*, paras. 516-517.

⁴⁴⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 537-547.

for causation with contributory negligence. EDF divested before those measures were adopted and the question was whether their existence should be considered in the counterfactual scenario. The Tribunal decided that the investor should have arranged contractual guarantees to benefit from such eventual future measures when selling the shares and it ultimately rejected the argument that those measures should inform the counterfactual analysis.⁴⁴⁶

What the *EDF* Tribunal did not examine (either because the parties did not raise the argument or because it did not find it important) is whether the divestment decision could be regarded merely as a straightforward causal consequence of the State's wrongful act. If this was the case, there would be no reason to consider the subsequent beneficial measures in the counterfactual. The best way to describe the outcome in causal terms is to identify the investor's failure to secure contractual possibilities of benefiting from tariff increases as a break in the chain of causation between the State's wrongful conduct and the damages.

Lemire v Ukraine also confirms the applicability of the but for test. In addition, it does so in a particularly difficult context of public tendering. The Tribunal had to assess what would have been the outcome of public tenders absent Ukraine's wrongful allocation of frequency rights without tendering. Despite that such an inquiry inevitably involves much speculation, the Claimant succeeded in demonstrating that its financial status and market position would have enabled it to win a portion of the tenders but for Ukraine's actions.⁴⁴⁷

3.2 The limits of the but for test

The *Amco v Indonesia* case shows how an investment tribunal recognized the conceptual limits of but for causation. In *Amco v Indonesia I*, one of the wrongful acts was Indonesia's revocation of the investor's license to operate the investment (it was wrongful under international law,

⁴⁴⁶ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012, paras. 1308-1310.

⁴⁴⁷ *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award of 28 March 2011, paras. 201, 207-208.

because it violated the principle of *pacta sunt servanda* and the principle of *acquired rights*).⁴⁴⁸ Indonesia argued that by the time it revoked the license, a domestic court had already been reviewing the legality of the contractual arrangements forming the basis of the investment. In Indonesia's view, the court's decision would have terminated the investment even in the absence of its decision to revoke the license. The Tribunal refused to engage in this hypothetical analysis.⁴⁴⁹ It pointed out that the revocation itself would have been *sufficient* reason for the courts to decide against the investor in any event. Further, even if other reasons might have led to the same outcome, those would have been *equivalent* or *concurrent* causes, which should not exculpate the host State. In contrast to *Occidental v Ecuador* discussed above, it was immaterial for the Tribunal whether those equivalent or alternative causes were lawful or not.⁴⁵⁰

In the resubmitted case, the *Amco II* Tribunal went down a different route. It identified *denial of justice* as the internationally wrongful conduct.⁴⁵¹ Then, it did not even consider the hypothetical counterfactual scenario advanced by Indonesia and labelled it too speculative.⁴⁵²

MTD v Chile also shows the difficulties of constructing the counterfactual. In *MTD* State authorities encouraged the investor to carry out its investment, while it was already apparent that the project is against local urban policy.⁴⁵³ The Tribunal decided that MTD cannot claim compensation for those expenses which emerged before the State made the unsubstantiated approval of the project.⁴⁵⁴ The reasoning confirms that the Tribunal conducted a but for analysis and concluded that those costs are ineligible for compensation, because they would not have been returned in any event. They were made without reliance on State commitments and local policies would not have permitted recouping them in any event.

This approach suffers from conceptual problems. The Tribunal's analysis of the counterfactual was based on the hypothetical elimination of the *wrongful* conduct. However, what the Tribunal

⁴⁴⁸ *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits of 20 November 1984, 89 *ILR* 405, *Amco v Indonesia I*, paras. 248-250.

⁴⁴⁹ *Id.*, para. 261.

⁴⁵⁰ Further cases on the inapplicability of the 'but for' test in similar situations are discussed in the next chapter.

⁴⁵¹ *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award of 5 June 1990, 89 *ILR* 552, paras. 121-139.

⁴⁵² *Id.*, para. 172.

⁴⁵³ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 166.

⁴⁵⁴ *Id.*, para. 240

failed to recognize is that the wrongful conduct was not necessarily the inducement of the investment in itself. The wrongfulness resulted from the *inconsistency* of State action, which is necessarily a *composite act*.⁴⁵⁵ If the wrongfulness results from the State's left arm saying A and its right arm saying B, it is not necessarily correct to assume away only the left arm's conduct to construct the counterfactual. If the other part of the composite act was assumed away (the implementation of urban policies), the investor would have been able to carry out its investment pursuant to the original approval. This, in turn, would have resulted in an entirely different damages assessment. In light of the factual record it was arguably more reasonable to assume away only the negligent approval of the project and not the more general urban policies, but in that case the Tribunal should have identified the wrongfulness not as deriving from *inconsistency*, but from the negligent approval of the project only in itself.

In conclusion, investment tribunals are unanimous in applying a but for threshold, but their sensitivity and care in rigorously examining the counterfactual varies. Much of this difficulty stems from the difficulties of quantification, as opposed from causation. They sometimes struggle with precisely defining the wrongful act to be eliminated in the counterfactual scenario. In general, they are ready and willing to engage in speculative analyses, unlike human rights bodies as we shall see below. Investment tribunals do recognize the limits of the but for test and turn to further notions, discussed in the analysis to ensue.

4. The but for test in international human rights law

4.1 The applicability of the but for test

The practice of the European Court of Human Rights [ECtHR] confirms the applicability of the but for threshold. In most cases the ECtHR examines the existence of a “clear” causal link. With this phrase the ECtHR often conflates what common law would distinguish as factual and

⁴⁵⁵ *Id.*, para. 163: “What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government vis-à-vis the same investor even when the legal framework of the country provides for a mechanism to coordinate.”

legal causation. It does not separate the *sine qua non* question from that of remoteness. There are further examples of inadequate vocabulary in the ECtHR's judgments. For instance, in *Paulet v UK*, it described the absence of but for causation as the absence of a "proximate causal link", which is very misleading.⁴⁵⁶ In *Storck v Germany* the ECtHR confused the *existence of a causal link* with the *existence of damage* in rejecting the applicant's claim for losing revenues stemming from a profession it would have chosen in the absence of the State's wrongful interference.⁴⁵⁷ When examining the ECtHR's practice, it is thus preferable to look beyond the brief and often inappropriate phrases used by the Court. The proper analysis of the factual circumstances, in as much as detailed in the judgments, is more revealing regarding the ECtHR's thinking about causation. A last preliminary remark when it comes to the assessment of the ECtHR's practice is that due care is warranted when looking for specific principles. Justice Wildhaber, former President of the ECtHR described the ECtHRs' ill-preparedness to address complex issues of compensation, such as valuation. According to him, "[t]his has led the Court to have frequent recourse to the notion of equitable assessment and this approach has made it even more difficult to extract clear criteria from the case-law."⁴⁵⁸

These remarks are no less relevant in understanding the approach taken by the Inter-American Court of Human Rights [IACtHR]. The IACtHR's terminology is less diverse, as it merely refers to the existence of a causal nexus as a condition of reparations, in particular, compensation.⁴⁵⁹ Occasionally there is reference to the necessity of a direct causal link.⁴⁶⁰ The African Court of Human and People's Rights invoked the notion of "direct causal link" in its first ruling on reparation, without further elaborating on what the standard would entail.⁴⁶¹

⁴⁵⁶ *Paulet v the United Kingdom*, ECtHR, Judgment of 13 May 2014, para. 73.

⁴⁵⁷ *Storck v Germany*, ECtHR, Judgment (Merits and Just Satisfaction) of 16 June 2005, para. 176.

⁴⁵⁸ L Wildhaber, 'Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights', (2003) 3 *Baltic Yearbook of International Law* 1, at 6.

⁴⁵⁹ *Case of Bamaca Velasquez v Guatemala*, IACtHR, Judgment of February 22, 2002, para. 43; *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, IACtHR, Judgment of June 27, 2012, para. 281.

⁴⁶⁰ *Case of Liakat Ali Alibux v Suriname*, IACtHR, Judgment of January 30, 2014, para. 154. Note, however, that there is some ambiguity even here, since the Spanish version does not refer to "directness" as opposed to the English one. See also *Case of Cantoral-Huamani and García-Santa Cruz v Peru*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of July 10, para. 184. Judge Cancado Trindade hinted at the necessity of a "clear and ineluctable" causal link as the requirement in his dissent in *Trujillo Oroza. Case of Trujillo Oroza v Bolivia*, IACtHR, Separate Opinion of Judge Cançado Trindade, February 27, 2002, para. 11.

⁴⁶¹ *Mtikila and others v Tanzania*, ACHPR, Reparations, 28 February 2014, para. 30.

When deciding on remedies, the ECtHR applies Article 41 of the European Convention of Human Rights.⁴⁶² The Article speaks of “just satisfaction”, but the ECtHR’s practice and commentary point out that this terminology should not be misleading: what is meant here is not satisfaction as understood by ARSIWA, but the obligation to provide reparation, in the form of compensation.⁴⁶³ Kellner and Durant demonstrated that the *sine qua non* test is a recurring element under the Application of Article 41 of the Convention, irrespective of the particular Article breached.⁴⁶⁴ It is equally clear that the but for threshold is the primary implied starting point of any discussion by the IACtHR when applying the Inter-American Convention on Human Rights.⁴⁶⁵ In stark contrast stands the practice of the ECOWAS Community Court of Justice, which does not seem to insist to any extent on an express analysis of the causal relationship.⁴⁶⁶

Three specific issues deserve further scrutiny in this context, in parallel with the discussion under the investment heading. *First*, whether the but for threshold is always applicable. *Second*, the courts’ approach to and flexibility in constructing the counterfactual. *Third*, the recognition of the limits of the but for test.

First, some argue that the but for test is not *always* applicable. Lord Brown, interpreting the Convention, contrasted the permissibility of a ‘looser test’ of causation under the Convention with the but for test of common law in *Van Colle*:

It also seems to me to explain why a *looser approach to causation* is adopted under the Convention than in English tort law. Whereas the latter requires the Claimant to establish on the balance of probabilities that, but for the Defendant’s negligence, he

⁴⁶² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [ECHR].

⁴⁶³ K Wolfram, ‘Just Satisfaction’ in Art 41 ECHR and Public International Law – Issues of Interpretation and Review of International Materials’ in A Fenyves *et al.* (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2012) 345, at 351-355.

⁴⁶⁴ M Kellner – I C Durant, ‘Causation’ in A Fenyves *et al.* (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2012) 449 [‘Kellner – Durant’], at 457-460.

⁴⁶⁵ See *Case of YATAMA v Nicaragua*, IACtHR, Judgment of June 23, 2005, paras. 239-245 (the Court rejecting a claim for loss of earnings, as those would have been incurred even without the State’s violation of the Convention). *Case of Tristan Donoso v Panama*, IACtHR, Judgment of January 27, 2009, para. 184; *Case of Atala Riffo and Daughters v Chile*, IACtHR, Judgment of February 24, 2012, para. 292.

⁴⁶⁶ *Manneh v Gambia*, ECOWAS Community Court of Justice, Judgment of 5 June 2008; *Hydara and others v Gambia*, ECOWAS Community Court of Justice, Judgment of 10 June 2014.

would not have suffered his claimed loss [...] under the Convention it appears sufficient generally to establish merely that he lost a substantial chance of this.⁴⁶⁷

Lord Brown's language follows the previous High Court and Court of Appeal judgements. These courts rejected the applicability of the but for test in less general terms than Lord Brown, restricting the exceptional causality test to the application of the *Osman* test. To recall, in the landmark judgment of *Osman v UK*, the Strasbourg Court laid down a test to establish the extent and scope of the States' positive obligation to protect the right to life under Article 2. In doing so, the ECtHR held that

where there is an allegation that the authorities have violated their positive obligation to protect the right to life [...] it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴⁶⁸

The UK courts interpreted the language 'might have been' to exclude a rigid application of the but for test of factual causation.⁴⁶⁹ The Strasbourg Court did not expressly adopt this statement on causation, but did not reject it either in *Van Colle v UK*.⁴⁷⁰ It is, however, important to highlight the striking difference between the English and the French version of the *Osman v UK* judgment. The French version of the very same sentence, forming the basis of the 'loose causality test' reads: "*les mesures qui, d'un point de vue raisonnable, auraient sans doute pallié ce risque.* [emphasis added]" Unlike the English version, the French text suggests that it is necessary that the State conduct would have avoided the risk, without doubt. Thus, the reading of *Osman v UK* by UK courts is very questionable. Even more so Lord Brown's approach, extending the flexible approach to the entirety of the Convention's regime. This seems to be reinforced by *Mammadov v Azerbaijan*, where by the time the authorities had a

⁴⁶⁷ *Chief Constable of the Hertfordshire Police v Van Colle (administrator of the estate of GC (deceased)) and another; Smith v Chief Constable of Sussex Police*, [2008] UKHL 50, para. 138 (emphasis added). Varuhas submits that the UK courts' determination and the requirement of the Human Rights Act to utilize the underdeveloped Strasbourg case law on remedies should be changed and the common law principles should be followed instead. J N E Varuhas, *Damages and Human Rights* (2016), at 114.

⁴⁶⁸ *Osman v United Kingdom*, ECtHR, Judgment of 28 October 1998, para. 116.

⁴⁶⁹ *Van Colle (Administrator of the Estate of Van Colle deceased) and another v Chief Constable of Hertfordshire Police*, [2007] EWCA Civ 325, para. 78.

⁴⁷⁰ *Van Colle v The United Kingdom*, ECtHR, Judgment (Merits and just satisfaction) of 13 November 2012.

chance to intervene, the deceased had already suffered life-threatening injuries. This, in itself, was enough for the ECtHR to reject causation, since it found it ‘difficult’ to speculate on the possibility of preventing the death.⁴⁷¹

These controversies notwithstanding, the ECtHR is sometimes less circumspect (at least in as much as its *ratio decidendi* is discernible from the text of the judgment) in applying a but for threshold. In *Militaru v Hungary* the applicant argued that the domestic authorities were responsible for the prolongation of a domestic family law litigation. The ECtHR agreed, noting that the municipal court could have fined the opposing party in the proceedings who was obstructing the litigation, but it did not so.⁴⁷² It did not examine whether the application of fines *could have deterred* the other party from its conduct. In the words of the ECtHR, the “protraction of the case” engaged the responsibility of State, without a strict assessment of but for causation. In the similar case of *P.P. v Poland*, the ECtHR found that the “lapse of time was to a large extent caused by” the State, without further elaborating on whether a but for threshold was met.⁴⁷³

Flexibility can be observed in the practice of the IACtHR. In *Perozo v Venezuela* the IACtHR examined whether statements by public officials amounted to the breach of the State’s preventive obligations in light of eventual actions committed by private individuals. While the IACtHR expressly admitted that there is no reason to conclude that but for these statements the actions would not have taken place, the fact that such statements *contributed* to the exaggeration of hostilities was sufficient to establish the illegality of State conduct.⁴⁷⁴ It was not necessary to examine whether in the absence of such statements the concrete actions would have taken place. However, the IACtHR did not award any compensation.

Importantly, in certain cases the *existence* of such a causal link is presumed unless rebutted. In *Akkuş v Turkey* the ECtHR summarized its case law under Article 2 in the following terms:

[W]here the events in issue lie wholly, or to a large extent, within the exclusive knowledge of the authorities – as in the case of persons in custody under those

⁴⁷¹ *Mammadov v Azerbaijan*, ECtHR, Judgment (Merits and just satisfaction) of 17 December 2009, paras. 116-117.

⁴⁷² *Militaru v Hungary*, ECtHR, Judgment (Merits and just satisfaction) of 12 November 2003, para. 44.

⁴⁷³ *P.P. v Poland*, ECtHR, Judgment (Merits and just satisfaction) of 30 October 2010, para. 93.

⁴⁷⁴ *Case of Perozo et al. v Venezuela*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of January 28, 2009, para. 160.

authorities' control – strong presumptions of fact will arise in respect of injuries and deaths occurring during such detention. Thus, it has found that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [...] The Court considers it legitimate to draw a parallel between the situation of detainees, for whose well-being the State is held responsible, and the situation of persons found injured or dead in an area within the exclusive control of the authorities of the State.⁴⁷⁵

The IACtHR goes even further. In light of the widespread practice of forced disappearances, it does not even require detention to establish the presumption of causality and the existence of damage. It suffices to demonstrate, even only indirectly, that a disappearance of a particular person was linked to the general practice of disappearances tolerated by the State.⁴⁷⁶ One case deviating from the generally flexible approach of the Court is *Gangaram Panday v Suriname*.⁴⁷⁷ As Shelton notes, the Court reduced the damages, because it could establish the causal link only by “inference”, without access to direct evidence. The Court refused to shift the burden of proof to the State to reveal the circumstances of the wrongful detention in contention.⁴⁷⁸

4.2 Constructing the counterfactual

Similar to the issues raised in *Chevron v Ecuador* regarding procedural guarantees, the European Court of Human Rights has been struggling with giving effect to the but for test when claimants allege breaches of procedural rights.⁴⁷⁹ To recall, the problem with assessing the causal consequences of the violation of procedural guarantees lies in the proper construction of the counterfactual scenario. If a procedure is tainted by a procedural error in violation of

⁴⁷⁵ *Akkuş v Turkey*, ECtHR, Judgment (Merits and Just Satisfaction) of 9 July 1997, paras. 211-212.

⁴⁷⁶ *Case of Bamaca Velasquez v Guatemala*, IACtHR, Judgment of February 22, 2002, para. 130. See L Burgogue-Larsen – A Ubeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (2011), at 314.

⁴⁷⁷ *Case of Gangaram Panday v Suriname*, IACtHR (Merits, Reparations and Costs), Judgment of 21 January 1994, paras. 68-71.

⁴⁷⁸ D Shelton, *Remedies in International Human Rights Law* (2015), at 363.

⁴⁷⁹ J A Frowein – W Peukert, *Europäische Menschenrechtskonvention: EMRK-Kommentar* (1996), at 677; L Wildhaber, ‘Article 41 of the European Convention on Human Rights: Just Satisfaction under the European Convention on Human Rights’, 3 *Baltic Yearbook of International Law* (2003) 1, at 8-9; O Ichim, *Just Satisfaction under the European Convention on Human Rights* (2014), at 27.

human rights, one possibility is to assume away the entirety of the procedure, another is to assume away only the irregular element. The majority of the Court's cases follows the latter approach. This results in considerable difficulties for claimants, given that they are required to demonstrate that the procedural irregularity made a difference in the outcome. For instance, if a certain part of the proceedings is unduly prolonged, it would still have to be shown that the eventual outcome of the proceeding was affected by this breach.⁴⁸⁰ The Court underpins its findings by pointing out that it is not for the Court to speculate, substituting domestic courts, on a hypothetical alternative outcome.⁴⁸¹ This evidentiary burden is almost impossible to overcome for claimants. In practice, the ECtHR's difficulty of finding a causal link between the procedural violations and the outcome or the financial consequences of the proceeding is counterbalanced by its flexibility in finding non-pecuniary damages as clear causal consequences of such violations.

In a number of cases the ECtHR recognized a causal link between the "loss of opportunities" and the procedural violation in question. In *P., C. & S. v UK*, where non-pecuniary damages might have been suffered even in the absence of the breach of procedural guarantees in an adoption process, the ECtHR found that the wrongful conduct was a but for cause of the loss of opportunities.⁴⁸² Absence of legal representation is recurring type of procedural breach that results in the recognition of a "loss of opportunity".⁴⁸³ On the other hand, delays in the process or even questionable impartiality of adjudication is not sufficient for the recognition of such an injury and, accordingly, causal connection.⁴⁸⁴ In the recent controversial cases of *Sabeh El Leil v France* and *Cudak v Lithuania*, the ECtHR held that the wrongful denial of access to ECtHR on the account of sovereign immunity caused a loss of real opportunity.⁴⁸⁵ It is very difficult to tell what prompted the Grand Chamber to make its first steps into this more flexible

⁴⁸⁰ *Gaspari v Slovenia*, ECtHR, Judgment (Merits and Just Satisfaction) of 21 July 2009, para. 80 and the cases cited there. See, however, *Artico v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 13 May 1980.

⁴⁸¹ *Id.*

⁴⁸² *P, C and S v United Kingdom*, ECtHR, Judgment (Merits and Just Satisfaction) of 16 July 2002, para. 148.

⁴⁸³ A Garin, 'La perte de chance, un préjudice indemnisable : contribution à une problématique de l'indemnisation du dommage par la Cour européenne des droits de l'homme', in J-F Flauss - E Lambert-Abdelgawad (eds), *La pratique de l'indemnisation par la Cour européenne des droits de l'homme* (2011) 155, at 161.

⁴⁸⁴ *Artico v Italy*; *Nideröst-Huber v Switzerland*, ECtHR, Judgment (Merits and Just Satisfaction) of 18 February 1997, para. 37; *Hood v The United Kingdom*, ECtHR, Judgment (Merits and Just Satisfaction) of 18 February 1999, paras. 84-86.

⁴⁸⁵ *Cudak v Lithuania*, ECtHR, Judgment (Merits and Just Satisfaction) of 23 March 2010, para. 79; *Sabeh El Leil v France*, ECtHR, Judgment (Merits and Just Satisfaction) of 29 June 2011, para.72; see further D J Bederman, 'Sabeh el Leil v France', (2012) 106 *AJIL* 125.

direction, but we do not necessarily share the criticism formulated regarding this shift in the case law.⁴⁸⁶

Shelton further notes that “in cases where the applicant can demonstrate that the arrest and prosecution were unlawful [...] the Court appears more willing to recognize the causal link between the violation and the claim of damages.”⁴⁸⁷

The IACtHR has been less frequently confronted with claims solely based the breach of procedural guarantees. In most cases such procedural claims are only additional to claims of other substantive breaches. When the Court was seized of such a matter, however, it also encountered the same difficulties. In *Alibux v Suriname* the victim claimed damages for the failure of the State to provide adequate review of a criminal conviction. While the claim was upheld, pecuniary compensation was not awarded. The claimant did not demonstrate that a review would have resulted in a different outcome and the criminal conviction *per se* was not wrongful.⁴⁸⁸

There have been a number of suggestions on whether the rigor of the but for test in the procedural context is a problem to begin with, and, if it is, how it could be tackled. Some argue that that the flexibility in awarding non-pecuniary damages is sufficient.⁴⁸⁹ This argument might be correct as a matter of principle, but in terms of actual amounts it cannot be excluded that it results in massive differences. Assuming, for instance, a life sentence of a successful businessman, the ECtHR will award far less in *quantum* on the account of non-pecuniary damages than it could have done for *lucrum cessans*.

Another approach is similar to Ecuador’s argument in *Chevron v Ecuador*, i.e., the reflection of the likelihood of a different outcome in the amount of compensation.⁴⁹⁰ The points discussed in this respect above are equally relevant here to reject this suggestion: likelihood is a matter of causation, not quantification or valuation. Yet another idea is to tackle the problem by reversing the burden of proof.⁴⁹¹ Instead of requiring the claimant to establish but for causation, it would be the State to demonstrate the lack of such a causal connection. There are other

⁴⁸⁶ O Ichim, *Just Satisfaction under the European Convention on Human Rights* (2014), 28

⁴⁸⁷ D Shelton, *Remedies in International Human Rights Law* (2015), at 359 and the cases cited therein.

⁴⁸⁸ *Case of Liakat Ali Alibux v Suriname*, IACtHR, Judgment of 30 January 2014, paras. 154-155.

⁴⁸⁹ For an overview of various possible approaches see Kellner – Durant, at 478-485.

⁴⁹⁰ Dannemann, at 268.

⁴⁹¹ Kellner – Durant, at 489.

examples in the practice of the ECtHR to draw analogy from to support this contention. As discussed, under Article 2 the ECtHR reverses the burden of proving causation in cases where the injured party was in the detention of authorities when suffering injuries.⁴⁹² Still, what justifies the reversal or loosening of the burden of proof in such cases is the manifest difference between the parties in accessing the evidence. It is difficult to see why it would be more burdensome to prove the causal connection in the case of procedural violations for the claimant than for the respondent.

Most recently, Varuhas criticized the restrictive approach of the ECtHR, arguing that damages for human rights violation should align with a “remedial paradigm”. Varuhas argues that the but for logic is misplaced, because the victim of a procedural breach is not in a position to which the law provides an entitlement. Damages should reflect this encumbrance. Non-material damages are suitable to fulfill the function Varuhas expects from the remedial paradigm. However, he adds a further point. He argues that it is incorrect to assume away in a counterfactual analysis the wrongful aspect of the procedural breach. For instance, if someone is held in custody without justification, in Varuhas’ view, the correct question is not to speculate whether justified custody would have been possible. This is so, because human rights obligations are essentially prohibitions of interferences with human rights, subject to narrow exceptions. Thus, the wrong is the interference itself in the first place, and not merely the lack of adequate justification for the interference. The justification is an *excuse* on behalf of the State, in fact a *lex specialis* circumstance precluding wrongfulness. The wrongful act is the interference itself.

Varuhas’ analysis of the human rights obligations is important for the purposes of this study, because it highlights that the precise definition and identification of the wrongful act is inevitable before turning to the *Chorzów* test and the counterfactual analysis. In this respect, one cannot deny the crucial and informative role the primary obligation plays.

This thesis suggests that the foregoing difficulties stem from a misunderstanding of the but for threshold. There is no legal system in the world where but for causation would require 100% certainty. What it requires (and what was adopted eventually in *Chevron v Ecuador* too) is that but for causation is more likely than not. The ECtHR’s doctrine to “refuse to speculate” on the

⁴⁹² *Bazorkina v Russia*, ECtHR, Judgment (Merits and Just Satisfaction) of 27 July 2006, para. 105.

outcome of domestic proceedings stands in the way of adopting this approach. The ECtHR's reluctance signals its caution to avoid the appearance of an appellate body. Still, at least under the most important standards of the Convention, the ECtHR has demonstrated its ability to speculate, if necessary. In *Z and Others v UK* the State was responsible for failing to act in a timely manner to protect children from horrendous abusive treatment by their parents. The State, although it acknowledged its responsibility, argued that it is doubtful whether the children would have suffered the same damages (e.g., inability to perform well in school) even if the State had acted properly. The ECtHR, admitting that "it is not possible with any degree of certainty to draw conclusions as to future difficulties in the employment sphere", awarded pecuniary damages for loss of employment opportunities.⁴⁹³ The impossibility to speculate was held to favor the applicants' claim. The ECtHR must have been influenced by the peculiar circumstances of the case, but as a matter of principle, this case indicates that there is room for speculative assessment of the counterfactual.

As Varuhas' analysis revealed, the construction of the counterfactual is closely dependent on the precise articulation of the wrongful act (see the criticism of *MTD v Chile* above). The wrongful act, and only the wrongful act, has to be assumed away, as determined by the Court beforehand. *Murillo and others v Costa Rica* is an example from the practice of the IACtHR to illustrate the point. The claim concerned the legality of restrictions on artificial fertilization procedures. The Court declared the restrictions wrongful. The State argued that compensation is due only to victims who would not have been able to have children otherwise. In response, the Court pointed out that "that the violations declared above are related to the impediment to exercise a series of rights autonomously [...] and not for being able or unable to have biological children."⁴⁹⁴ Thus, the State's contention did not have merit. *Ticono Estrada v Bolivia* also demonstrates the IACtHR's sensitivity to the proper construction of the counterfactual. In this case, the claim concerned compensation for loss of income, because the victim of the State's measure would have obtained a degree within a few years. The State alleged that the claim should be limited, because the university where the victim had been studying was closed down for a number of years due to political disturbances. The Court accepted this argument, and took

⁴⁹³ *Z And Others v The United Kingdom*, ECtHR, Judgment (Merits and Just Satisfaction) of 10 May 2001, para. 124.

⁴⁹⁴ *Case of Murillo v Costa Rica*, IACtHR, Judgment of November 28, 2012, para. 350.

into account the actual realities in constructing the counterfactual.⁴⁹⁵ This is an important point, since the Court constructed causation in light of the facts as known at the date of the judgment and not as could have been envisaged at the date of the breach, in line with the decision in *Amco II*, discussed above.⁴⁹⁶

4.3 The limits of the but for test

Despite often conflating factual and legal causation, the ECtHR on occasion makes clear that *sine qua non* itself is not a sufficient test without further considerations. The ECtHR confirmed this in the clearest possible terms in *Mastromatteo v Italy* and *Pearson v UK*.⁴⁹⁷ The mere fact that but for the conduct of the State the claimant would not have suffered an injury is not sufficient for the purposes of triggering the responsibility of State. In determining the extent of the State's liability, it is similarly insufficient to establish that a particular loss would not have come about in the counterfactual. In *Iglesias Gil and A.U.I. v Spain* a mother claimed compensation, because she had to give up her job to investigate the whereabouts of her child, the abduction of whom was the consequence of the State's wrongful conduct. While the State conduct was a *sine qua non* condition of the both the abduction and the mother's investigation, this, in itself, was not sufficient for causation.⁴⁹⁸ How the Court distinguishes remote damages from compensable damages is discussed further below.

5. The but for test and mass claims practice

⁴⁹⁵ *Case of Ticona Estrada et al. v Bolivia*, IACtHR, Judgment of November 27, 2008, para. 117, fn 103.

⁴⁹⁶ *Case of Bulacio v Argentina*, IACtHR, Judgment of September 18, 2003, paras. 84-85, where the lack of precise information does not pose a problem for the Court.

⁴⁹⁷ *Mastromatteo v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 24 October 2002, para. 74; *Pearson v United Kingdom*, ECtHR, Decision (Inadmissible) of 13 December 2011, para. 72.

⁴⁹⁸ *Iglesias Gil v Spain* Judgment (Merits and Just Satisfaction) of 29 April 2003, para. 70; See also *Karrer v Romania*, (App. 16965/10), 21 February 2012, para. 59; *Cf Kellner – Durant*, at 470.

Three mass claims settlement processes are revisited from the last four decades. The case law of the Iran-US Claims Tribunal, the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission made significant contributions to the jurisprudence on causation. There have been a number of in-depth studies concerning their pronouncements on causation and damages.⁴⁹⁹ Most of these works were published halfway through the functioning of these bodies. The following sections rely on these analyses, but also discuss cases which academic commentary could not yet process. Before turning to substance, a brief introduction of these bodies is necessary to understand the relevance of their jurisprudence for the general law of State responsibility.

The Iran-US Claims Tribunal was established by the Algiers Accords in 1981, as part of the settlement following the Iran-US hostage crisis.⁵⁰⁰ The Tribunal's jurisdictional portfolio was very diverse. Its workload consisted mainly of contractual disputes, but a significant part of it was concerned with claims based on public international law (inter-State cases, cases on expropriation, interference into property rights and wrongful expulsion of aliens). The Tribunal had considerable freedom to consult a variety of sources to identify the applicable law,⁵⁰¹ among them, customary international law.⁵⁰² In particular, its case law on wrongful expulsion and compensation for expropriation made an invaluable contribution to the law of State

⁴⁹⁹ M Straus, 'Causation as an Element of State Responsibility', (1984) 16 *Law & Policy in International Business* 893; J S Borek, 'Other State Responsibility Issues' in R B Lillich – D B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 301; A Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* (1994) ['Mouri']; N Wühler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission' in R B Lillich (ed), *The United Nations Compensation Commission* (1995) 207 ['Wühler']; A W Rovine, Esq – G Hanessian, Esq, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission' in R B Lillich (ed), *The United Nations Compensation Commission* (1995) 235 ['Rovine – Hanessian']; V Heiskanen, 'The United Nations Compensation Commission', (2002) 296 *Recueil des Cours* 259 ['Heiskanen']; A Gattini, *Le Riparazioni di Guerra nel Diritto Internazionale* (2003), at 429-469 ['Gattini 2003']; L Castagnetti, 'The Damages Awards of the Eritrea-Ethiopia Claims Commission', (2005) 19 *Italian Yearbook of International Law* 279; S D Murphy *et al* (eds), *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013).

⁵⁰⁰ D B Magraw, 'The Tribunal in Jurisprudential Perspective', in R B Lillich – D B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 1, 3-13; Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 *ILM* (1981) 224; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States, 20 *ILM* (1981) 230.

⁵⁰¹ *CMI International, Inc v Iran*, Award, IUSCT Case No. 245 (99-245-2), 27 December 1983, at Section B.1.

⁵⁰² D B Magraw, 'The Tribunal in Jurisprudential Perspective', in R B Lillich – D B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 1, at 23-27.

responsibility.⁵⁰³ In the analysis below, this part of the Tribunal's jurisprudence is under scrutiny. Damages awarded in the context of contractual disputes is assessed only in as much as the Tribunal made reference to the law of State responsibility or to sources of international law. In the majority of contractual disputes the applicable law was municipal law, they are thus ignored in the analysis below.

The United Nations Compensation Commission was established by UN Security Council Resolution 692.⁵⁰⁴ The Commission's role was to ensure that Iraq provides compensation for damages resulting from its invasion and occupation of Kuwait. The Commission was at best a *quasi*-judicial organ, since Iraq's responsibility was already confirmed at the outset by a previous resolution of the UNSC. UNSC Resolution 687 "reaffirmed" Iraq's liability and further provided that Iraq

is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.⁵⁰⁵

Accordingly, the task of the Commission was limited to determine the consequences of such liability and to assess whether particular claims (submitted in a consolidated form) are compensable. The nuances of the Commission's peculiar procedural rules are discussed elsewhere.⁵⁰⁶ For the present discussion the important feature of the Commission's mandate is that sources of the applicable law before the Commission were relevant UNSC Resolutions and, to the extent recourse to them is necessary, rules of international law.⁵⁰⁷

The Eritrea-Ethiopia Claims Commission was established in 2000 by the Algiers Agreement to adjudicate on inter-State claims arising out from the Eritrean-Ethiopian war between 1998

⁵⁰³ J R Crook, 'Applicable Law in International Arbitration: the Iran-U.S. Claims Tribunal Experience', (1989) 83 *AJIL* 278, at 301-303.

⁵⁰⁴ UNSC Resolution 692, 20 May 1991.

⁵⁰⁵ UNSC Resolution 687, 3 April 1991, para. 16.

⁵⁰⁶ R B Lillich (ed), *The United Nations Compensation Commission* (1995); M F di Rattalma – T Treves, *The United Nations Compensation Commission: a Handbook* (1999).

⁵⁰⁷ Article 31, Provisional Rules for Claims Procedure, Annex to Governing Council Decision 10.

and 2000.⁵⁰⁸ The Commission had to apply the law of State responsibility to violations of the law of armed conflicts and “other violations of international law”.⁵⁰⁹

5.1 Iran-US Claims Tribunal

Several cases confirm the applicability of the but for test in the practice of the Tribunal. In *Eastman Kodak* the parties disagreed on whether the insolvency of the claimant’s company was caused by Iran’s unlawful interference. The Tribunal held that but for such interference, Eastman Kodak would not have decided to launch insolvency proceedings.⁵¹⁰ In reaching this conclusion the Tribunal took into consideration the finances of the company directly preceding Iran’s wrongful interference to speculate whether it would have been a reasonable step to request insolvency even in the absence of Iran’s illegal actions.⁵¹¹ In *Tavakoli* the Tribunal took the same approach comparing the financial situation of the company before and after the revolution.⁵¹²

The Tribunal showed readiness to trace back the but for causes of a certain damage *before* the alleged wrongful conduct too. In *Haji-Bagherpour* the claim concerned the destruction of a tanker truck as a result of US rescue operation.⁵¹³ The Tribunal held that the operation was merely a reaction to and consequence of US nationals being held hostages. The but for cause of the damage was not the US operation, but the detention of US nationals.

The reasoning in *Case No. A15 (IV) and A24* and in Judge Johnson’s dissent provides the most elaborate discussion of the but for test in international jurisprudence.⁵¹⁴ The case revolved

⁵⁰⁸ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260

⁵⁰⁹ *Id.*, Article 5.

⁵¹⁰ *Eastman Kodak Company v The Government of Iran*, Final Award, IUSCT Case No. 227 (514-227-3), 1 July 1991, paras. 30, 42.

⁵¹¹ *Id.*, para. 38.

⁵¹² *Vivian Mai Tavakoli, Jamshid David Tavakoli and others v The Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 832 (580-832-3), 23 April 1997, para. 92.

⁵¹³ *K Haji-Bagherpour v The Government of the United States of America*, Award, IUSCT Case No. 428 (23-428-2), 26 January 1983.

⁵¹⁴ *Iran v USA, Case No. A15 (IV) and A24*, Award, 2 July 2014, No. 602-A15(IV)/A24-FT; Separate Opinion of Judge O Thomas Johnson, 2 July 2014, No. 602-A15(IV)/A24-FT [‘Johnson Opinion’]. Gattini refers to an earlier

around the obligation of the US under the Algiers Accords to terminate ongoing legal proceedings against Iran and Iranian state enterprises to enable the settlement of such disputes before the Iran-US Claims Tribunal.⁵¹⁵ The question arose whether the failure by the US to terminate a certain proceeding caused Iran damage, if the underlying claim, initiated by private parties, could have brought in any event in a way compliant with the Accords.

The majority concluded that the proper approach to the but for test was to construct a counterfactual in a way that does not consider what “third parties” might or might not do in a hypothetical alternative scenario.⁵¹⁶ This was the point of disagreement between the majority and Judge Johnson, who insisted that the private parties engaged in the legal proceeding were not “third parties” contrary to their characterization as such by the majority.⁵¹⁷ Their conduct was the very subject matter of the claim. The majority expressly addressed this point and made reference to English and German case law to the effect that “reserve causes” should remain unconsidered. “Reserve causes” are causes that were in fact prevented from making their impact by the actual cause.

It is submitted that the majority approached the question correctly. There was no question that the United States could have stopped the ongoing legal proceedings. The fact that the same private actors could have initiated another, different causal process once the US has stopped their legal action is irrelevant. The Tribunal summarized as follows:

Only if one were to reach the conclusion that both tortious (or obligation-breaching) and non-tortious (or obligation-compliant) conduct of the same person would have led to the same result, one might question that the tortious (or obligation-breaching) conduct was *condicio [sic!] sine qua non* of the loss the claimant seeks to recover.⁵¹⁸

Award rendered in this case in 1998 to argue that the Iran-US Claims Tribunal endorsed the “*Normzwecklehre*” in its jurisprudence, but the present author could not identify any finding to that effect in either of the decisions. Cf A Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18 *EJIL* 695, at 708, fn 65.

⁵¹⁵ Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 *ILM* (1981) 224. General Declaration, General Principle B.

⁵¹⁶ *Iran v USA, Case No. A15 (IV) and A24*, paras. 50-54.

⁵¹⁷ Johnson Opinion, paras. 50-51.

⁵¹⁸ *Iran v USA, Case No. A15 (IV) and A24*, para. 52.

It might be useful to contrast this approach with *Amco I*, where “reserve causes” (called by the *Amco I Tribunal* “parallel” causes) were equally unimportant, even though such causes would have been alternative actions by the *same* party.

In constructing the counterfactual, one recurring issue before the Tribunal was whether the asset valuation in the ‘but for’ scenario should consider the prevailing economic and social conditions following the revolution, irrespective of the specific wrongful conduct in the given case. In *Khosrowshahi* the effects of the revolution were accounted for in the valuation exercise.⁵¹⁹ In *Ebrahimi* one dissent maintained that it was not the case, but it is very difficult to ascertain from the Award whether the criticism in the dissent is justified.⁵²⁰ The *Ebrahimi* majority held that the “threat” of expropriation could not be taken into account when establishing the counterfactual, but it is unclear whether the revolutionary circumstances as such qualify in themselves as a “threat of expropriation”.⁵²¹ In contrast, in *Birnbaum* it was held that “changes in the general political, social, and economic conditions should be considered to the extent they could reasonably have been expected to affect the value of the enterprise’s assets”.⁵²²

In cases of wrongful expulsion claims, the Tribunal sometimes examined the underlying contractual framework of an individual’s employment or company’s business to assess whether ‘but for’ the developments in Iran the continuation of business or employment would have been expected. If the possible termination of contractual relations was envisaged without qualification, the Tribunal required further proof that the dismissal was the result of specific Iranian measures.⁵²³

⁵¹⁹ *Faith Lita Khosrowshahi, Susanne Khosrowshahi and others v The Government of the Islamic Republic of Iran, The Ministry of Industries and Mines, The Alborz Investment Corporation and others*, Final Award, IUSCT Case No. 178 (558-178-2), 30 June 1994, paras. 49-51.

⁵²⁰ *Shahin Shaine Ebrahimi, Cecilia Radene Ebrahimi and others v The Government of the Islamic Republic of Iran*, Separate Opinion of Mohsen Aghahosseini, IUSCT Case Nos. 44, 46 and 47 (560-44/46/47-3), 9 February 1995.

⁵²¹ *Shahin Shaine Ebrahimi, Cecilia Radene Ebrahimi and others v The Government of the Islamic Republic of Iran*, Final Award, IUSCT Case Nos. 44, 46 and 47 (560-44/46/47-3), 12 October 1994, para. 108.

⁵²² *Harold Birnbaum v The Islamic Republic of Iran*, Award, IUSCT Case No. 967 (549-967-2), 6 July 1993, para. 42; See also *Phelps Dodge Corp., et al. v Islamic Republic of Iran*, Final Award, IUSCT Case No. 99 (217-99-2), 19 March 1986, para. 30.

⁵²³ *Jack Rankin v The Islamic Republic of Iran*, Award, IUSCT Case No. 10913 (326-10913-2), 3 November 1987, para. 30; *Kenneth Yeager v The Islamic Republic of Iran*, Partial Award, IUSCT Case No. 10199 (324-10199-1), 2 November 1987, para. 60; *Jimmie B. Leach v The Islamic Republic of Iran*, Award, IUSCT Case No. 12183

Equally relevant was the identification of the victim's original intentions concerning future stay in the country. In *Rankin* the Tribunal rejected the claim, because the claimant could not demonstrate that he would have intended to stay in the country but for Iran's conduct.⁵²⁴

In *Case Nos A3, A8, A9, A14 and B61*, the question was whether the USA caused Iran losses by its refusal to approve the export of Iranian military property. While a vigorous dissent noted the Tribunal's failure to apply the test properly, the Tribunal queried whether the United States would have had the right in any event to deny such exports.⁵²⁵ Confirming that this was the case, the Tribunal rejected the Iranian claim.

The Tribunal was less open to a more relaxed approach to the sine qua non test than human rights courts. As we have seen, in cases concerning preventive obligations, rigorous analysis of counterfactuals is often missing in the human rights case law. Borek notes that a flexible approach to causation combined with preventive obligations would have resulted in a de facto strict liability system for Iran.⁵²⁶ Thus, the Tribunal has very limited jurisprudence on "failure to prevent", "protection of aliens" or due diligence obligations.⁵²⁷ One exception is the *Protiva* case. In *Protiva* the claimant succeeded in demonstrating that the help of Iranian revolutionary authorities was requested to resolve a situation of alleged unlawful interference into property rights. The Tribunal held Iran should have demonstrated the steps it took in response. The claimant was relieved of a heavy burden of proof to demonstrate that but for Iran's conduct it could have retained the exercise of its property rights.⁵²⁸

(440-12183-1), 6 October 1989, para. 19; See in a corporate context *Sylvania Technical Systems Inc. v The Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 64 (180-64-1) 27 June 1985.

⁵²⁴ *Rankin v Iran*; For the relevance of "business intentions", see *The Stanwick Corporation, Stanwick International, Inc. v The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, Award, IUSCT Case No. 66 (467-66-1), 31 January 1990, para. 43.

⁵²⁵ *The Islamic Republic of Iran v The United States of America, Partial Award*, IUSCT Case Nos A3, A8, A9, A14 and B61 (601-A3/A8/A9/A14/B61-FT), 17 July 2009, paras. 167-169; *The Islamic Republic of Iran v The United States of America*, Dissenting Opinion of Mohsen Aghahosseini, IUSCT Case Nos A3, A8, A9, A14 and B61 (601-A3/A8/A9/A14/B61-FT), 20 July 2009, paras. 29-33.

⁵²⁶ Borek, at 320. See also the restrictive approach in *Jahangir Mohtadi, Jila Mohtadi v The Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 271 (573-271-3), 2 December 1996, para. 86.

⁵²⁷ Although in *Gordon Williams* it appears that such a claim would have been possible in principle: *Gordon Williams v Islamic Republic of Iran, Bank Sepah and others*, Award, IUSCT Case No. 187 (342-187-3), 18 December 1987, para. 72.

⁵²⁸ *Edgar Protiva and Eric Protiva v The Government of the Islamic Republic of Iran*, Award, Case No. 316 (566-316-2), 14 July 1995, paras. 67-75.

5.2 United Nations Compensation Commission

The phrase “as a result of” of UNSC Resolution 687 left no doubt that the causal connection between the losses, damages or injuries and Iraq’s wrongful conduct was a necessary condition of Iraq’s duty to provide reparation.⁵²⁹ The threshold such a causal link had to reach was that of directness. It is not clear from the text of the Resolution whether the Security Council considered directness as a default principle under international law. The word “reaffirms” is possibly an implied reference to the previous UN Security Council Resolutions, not necessarily to the generally applicable rules of international law. In turn, UNSC Resolution 674 “reminded” Iraq to its liability under international law, without specifying directness as a threshold.⁵³⁰ The Governing Council of the Commission issued a series of decisions interpreting the underlying UNSC Resolutions and setting out more detailed rules to determine compensability. However, these decisions do not reveal whether they are meant to constitute *lex specialis* or are merely applications of international law.

The Governing Council of the UNCC followed up with a series of decisions interpreting the causality criteria and giving guidance to the panels in charge of making recommendations concerning the respective claims. The Panels of the Commission clarified that in applying the requisite test of causation, they had recourse to the “relevant rules and principles of international law” in addition to the Resolutions.⁵³¹ The Governing Council Decisions on causation were also held to reflect “the general principles of international law.”⁵³²

The decisions of the Governing Council of the Commission and the deliberations of the Panels gave meaning to the test of directness, which will be further examined below. Still, the practice of the Commission provides a series of good examples concerning the applicability and the conceptual limits of the but for test.

⁵²⁹ For the full quotation see *supra* the introduction of Section 5.

⁵³⁰ UNSC Resolution 674, 29 October 1990.

⁵³¹ UNCC, First Instalment of C Claims, 21 December 1994, at 21.

⁵³² UNCC, Well Blowout Control Claim, 18 December 1996, para. 86.

The application of the but for test resulted in the rejection of a claim for the compensation of expenditures incurred by the Kuwait Oil Company by employing firemen to extinguish the fires caused by Iraq's conduct. The Panel noted that there was no indication that these personnel would not have been employed without the invasion:

Considering that the firefighting personnel in question appear to have been regular staff members of KOC, the Panel is of the opinion that the Claimant would have had to make such salary payments even if there had been no invasion.⁵³³

An interesting issue concerning the *sine qua non* test before the UNCC was whether losses that would not have been suffered but for Iraq's invasion should be set off against profits gained as a result of Iraq's invasion. This issue emerged in two contexts. First, the reconstruction works following Iraq's withdrawal provided an opportunity of investment for companies in the region. Second, Iraq's invasion had an impact on the world oil market which resulted in extraordinary profits for a number of companies. But for Iraq's invasion, these profits would not have been available.

The Panels reached divergent views concerning these two scenarios. As regards the first scenario, profits were held to result from a "new enterprise" and the losses suffered "resulted from a decline in work of an essentially different nature from the work undertaken by these claimants in the post-liberation period."⁵³⁴ In an arguably *obiter* statement, the Panel noted that a solution to the contrary would conflict with "traditional principles of mitigation." While the Panel's conclusion might have sound basis in law (or at least legal policy), the reference to mitigation in this context is misplaced. As will be discussed further below, the purpose of the duty to mitigate is the elimination of harmful consequences. The fact that the counterfactual analysis does not disclose losses, but gains, has nothing to do with mitigation. If one fails to mitigate the injuries caused, the consequence is that no compensation is due to the extent the losses could have been mitigated. In contrast, the result of the successful mitigation is that the *costs* of mitigation remain compensable, while the losses only to their mitigated extent. Each of these outcomes presupposes that causation and the existence of losses was determined in the first place, *before* the problem of mitigation even arises. Drawing a conclusion on the counterfactual on the basis of the duty to mitigate upsets this logical sequence. The Panel could

⁵³³ *Id.*, para. 162

⁵³⁴ Third Instalment of E1 Claims, 25 June 1999, paras. 313, 314, 470.

have had other conceptual solutions to underpin its conclusion, such as the maxim of *nullus commodum capere potest de injuria sua propria*.⁵³⁵

A different conclusion was reached in the second scenario. The Panel held that increased profits resulting from the increased crude oil prices should be set off against losses in order to determine the position the claimants “would have been in had Iraq’s invasion of Kuwait not occurred.”⁵³⁶ The difference between the two scenarios is that in the latter case the companies did not launch a “new enterprise” and the profits were reached within the scope of the same activity where the losses were suffered.

The Decisions of the Governing Council, guiding the work of the Panels, did not elaborate expressly on the but for threshold. However, they laid down factual presumptions to facilitate the processing of claims, especially the huge number of smaller claims of private individuals. For example, Decision 1 provides that losses suffered as a result of departure from Kuwait during the period of Iraq’s invasion are compensable, without any query whether such departure would have taken place in any event.⁵³⁷ This should not be read as a rule dispensing with the general principle of but for causality. If anything, this is a rule relieving the most vulnerable claimants for the sake of efficiency and equity from having to prove that the departure was the result of Iraq’s invasion, while maintaining the burden to prove that but for the departure the loss would not have been incurred.⁵³⁸ This is clear from the following ruling of one Panel: “[O]n-going ordinary living expenses which would have been incurred in any event, e.g., normal telephone charges, dental expenses, cable television service, school fees, etc., are not compensable.”⁵³⁹

The Panels understood the limits of the but for test and held that its application, without further considerations of remoteness, is not sufficient. In the *Egyptian Workers’ Claims (Jurisdictional Phase)* one Panel held:

For a direct link to exist, the Panel initially holds that it is not sufficient that a loss would not have occurred had the invasion and occupation not taken place. With such a “but for” test, sometimes also referred to as factual causation, any loss that

⁵³⁵ Cheng, at 149.

⁵³⁶ Sixth Instalment of E1 Claims, 28 September 2001, at 77-79, 217.

⁵³⁷ UNCC Governing Council Decision 1, para. 6.

⁵³⁸ Gattini 2003, at 442.

⁵³⁹ First Installment of C Claims, 21 December 1994, at 78.

could be traced back through a causal chain to the invasion and occupation would be compensable.⁵⁴⁰

This prompted the Commission to find the decisive test of remoteness, as further discussed below in Section 8.2.

5.3 Eritrea-Ethiopia Claims Commission

In the practice of Eritrea-Ethiopia Claims Commission the more sensitive question was not but for causality, but remoteness. Yet, the applicability of the ‘but for’ test emerges from the decision of the Commission on Ethiopia’s damages claim concerning the decline in foreign investment. The Commission held that Ethiopia failed to establish that the “primary” reason of foreign investors to decrease investments was the war launched by Eritrea.⁵⁴¹ In the Commission’s view such decisions could have been shaped by social and economic considerations too. A further example of the application of the ‘but for’ test is the rejection of claims for the lost employment income of Ethiopians leaving Eritrea: “Individual Ethiopians working in Eritrea did not have the assured legal right to remain there permanently, and there was insufficient basis for Ethiopia’s seeming premise that ‘but for’ the war, they would have done so.”⁵⁴²

The Commission’s practice also shows more relaxed approaches to ‘but for’ causation, or at least to burden of proof, in relation to damages claimed for the failure of the occupying power to prevent looting. The Commission held the parties liable for damages to private property under their occupation, without requiring factual evidence about the circumstances of the destruction of such property from the claimant. In the *Eritrea - Western Front* decision, the Commission required the occupying power to “to prove that the damage was caused by others or is otherwise not attributable to” it.⁵⁴³ In *Eritrea – Central Front*, the Commission used even

⁵⁴⁰ *Egyptian Workers’ Claims*, 7 July 1995, 117 *ILR* 196, para. 214. For a comparison of this approach with earlier war claims practice, see d’Argent, at 652.

⁵⁴¹ *Ethiopia’s Damages*, EECC, 17 August 2009, para. 469.

⁵⁴² *Ethiopia’s Damages*, para. 232.

⁵⁴³ *Eritrea – Western Front*, EECC, Partial Award, 19 December 2005, para. 47.

more flexible language, indicating that the mere presence of the occupying power renders it liable for looting, irrespective of specific details of causation:

Whether or not Ethiopian military personnel were directly involved in the looting and stripping of buildings in the town, Ethiopia, as the Occupying Power, was responsible for the maintenance of public order, for respecting private property, and for preventing pillage. Consequently, Ethiopia is liable for permitting the unlawful looting and stripping of buildings in the town during the period of its occupation.⁵⁴⁴

The difference between the two approaches is that the latter would not even leave the occupying power the possibility to prove that it could not have prevented the damages. Similar to the practice of the Inter-American Court and decisions of the European Court of Human Rights, this approach excludes a strict but for test of causality in the case of preventive due diligence obligations. The rationale of this approach, as well as in the practice of other fora, is the excessive burden that proving causation would require from the claimant. It is not clear, however, why at least a theoretical chance to rebut a factual presumption of causation should be denied to the respondent State.

6. Remoteness of damage in international investment law

The previous section confirmed not only the general applicability of the but for test, but also that some damages are not compensable, even if meeting the but for threshold. Distinguishing such damages from compensable ones is the subject of the remaining part of this chapter. What is the legal principle followed to delimit the scope of liability? What distinguishes compensable damages from non-compensable ones, if both are causally connected to the wrongful act under the but for test? These questions are the subjects of the discussion below.

The most important criterion distinguishing compensable damages from non-compensable ones is *foreseeability*.

⁵⁴⁴ *Eritrea – Central Front*, EECC, Partial Award, 28 April 2004, para. 67.

Foreseeability was introduced in *Amco v Indonesia I* as the relevant test. The *Amco I* Tribunal applied this test by expressly recognizing that the underlying dispute was of a *contractual nature*.⁵⁴⁵ As we have seen in Chapter III, in common law and French law the foreseeability test has contractual origins. The principle that the contracting parties' liability could not extend to what they could not have foreseen at the conclusion of the contractual bargain subsequently permeated other layers of liability systems.

The *Amco I* Tribunal held that foreseeability was the applicable test under the applicable law of contract, just as under international law. The Tribunal underpinned this conclusion by stating that "the requirement of foreseeability is met practically everywhere", in all legal systems.⁵⁴⁶ As we have seen in the chapter on domestic law, this assertion is incorrect.⁵⁴⁷ The Tribunal referred to O'Connell's prominent international law treatise, which, however, does not confirm that such a test is the prevailing one under international law.⁵⁴⁸

The *Amco II* Tribunal confirmed that *foreseeability* is the applicable standard, but it put considerably less emphasis on the origins of this principle in contract law. It merely asserted that "the loss must be attributable to the wrongful act and foreseeable".⁵⁴⁹ What the Tribunal meant by attributability in this context is not entirely clear. In any event, foreseeability is presented here as a general test. To recall, whereas in *Amco I* the internationally wrongful act was the termination of contractual arrangements (being contrary to the *pacta sunt servanda* principle and the protection of acquired rights under international law), the *Amco II* Tribunal identified *denial of justice* as the wrongful act. Thus, it confirmed the applicability of the foreseeability test to non-contractual claims too.

The *Amco v Indonesia II* Tribunal examined what *type* of damages could have been anticipated at the conclusion of the contract for the parties and it concluded that *loss of profits* belongs to such head of damages.⁵⁵⁰ Indonesia argued that foreseeability should also determine what *facts* the Tribunal should consider in deciding on *quantum* and it should not take into account factual

⁵⁴⁵ *Amco v Indonesia I*, para. 265.

⁵⁴⁶ *Id.*, para. 268.

⁵⁴⁷ See above, Chapter III.

⁵⁴⁸ D P O'Connell, *International Law (Vol 2)* (1965), at 1117.

⁵⁴⁹ *Amco v Indonesia II*, para. 172; Cf S Ripinsky – K Williams, *Damages in International Investment Law* (2008), at 141-145.

⁵⁵⁰ *Id.*, para. 178.

circumstances influencing the amount of damages which would have been unforeseeable at the time of the conclusion of the contract. The Tribunal disagreed and held that foreseeability “bears on causation rather than quantum”.⁵⁵¹ It then expressly stated that it would take into account facts in quantifying the damages which could not have been anticipated by the parties before (such as unexpectedly changed market conditions).⁵⁵²

Amco v Indonesia I became a point of reference in later investment disputes. In *SD Myers v Canada*,⁵⁵³ *Pope & Talbot v Canada*⁵⁵⁴ or *Thunderbird v Mexico*,⁵⁵⁵ the parties referred to *Amco I* as the authority confirming that foreseeability is the applicable standard of causation in international law. The *SD Myers* Tribunal was the only one to address the question in detail. Notwithstanding that both the investor and the host State relied on the foreseeability test, the Tribunal refused to apply it. In doing so, the Tribunal rightly recognized that the foreseeability test originates in contract law and a contract related dispute was the background of the findings of the *Amco I* Tribunal too.⁵⁵⁶ In contrast, the claim in *SD Myers v Canada* was about an export ban. The Tribunal found that such a claim is more akin to a *tort claim*.⁵⁵⁷

The Tribunal then went on to assert that “focus is on causation, not foreseeability”. It added that “damages recoverable are those that will put the innocent party into the position it would have been in had the interim measure not been passed.”⁵⁵⁸ Needless to say, this “alternative” to foreseeability is not particularly helpful. The Tribunal merely reiterated the applicability of the but for test. However, the concept of foreseeability is necessary in order to *delimit* but for causation, not to substitute it.

Obviously, this leaves open a handful of questions. The first is why *Amco II* was ignored as an authority, which applied foreseeability to a denial of justice claim. One could say that the denial

⁵⁵¹ *Id.*, para. 186.

⁵⁵² *Id.*

⁵⁵³ *S.D. Myers v Canada*, UNCITRAL, Memorial of S.D. Myers (Damages Phase), 1 March 2001, para. 124.

⁵⁵⁴ *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Investor's Statement of Claim (Damages Phase), 15 June 2001, at 17.

⁵⁵⁵ *International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Particularized Statement of Claim of Claimant, 15 August 2003, at 116.

⁵⁵⁶ *S.D. Myers v Canada*, UNCITRAL, Second Partial Award of 21 October 2002, paras. 154-157; Cf S Alexandrov – J Robbins, ‘Proximate Causation in International Investment Disputes’ in K Sauvart (ed), *Yearbook of International Investment Law and Policy 2008/2009* (2009) 317, at 326-330.

⁵⁵⁷ *Id.*, at 159.

⁵⁵⁸ *Id.*

of justice claim was also related to an underlying contractual matter, but *Amco II* could have been at least addressed. Second, if one accepts the proposition of the *SD Myers* Tribunal that foreseeability applies only to *quasi*-contractual disputes, where does this leave international investment law in terms of causation? What would qualify as such a dispute? Disputes in which an investment is a contractual right? Disputes in which a breach or termination of contract is claimed to be a violation of a treaty standard? Contract claims on the basis of an umbrella clause? Contractual disputes where international law is the applicable law? All of these?

The policy reason of the Tribunal to restrict the applicability of the foreseeability test to *quasi* contractual disputes is not novel. In contractual situations the parties willingly assume certain risks and only certain risks when entering into a contract. In contrast, there is no “risk assumption” in *quasi* tortious situations, which the Tribunal found closer the factual circumstances of the case.⁵⁵⁹ On the other hand, one could argue that in many cases it is the investment treaty itself, conferring rights on the investor and constituting an offer to arbitrate by the host State, what makes the investment *quasi* contractual.

The *SD Myers* Tribunal further rejected that the gravity of fault influences the applicable the standard of causation. The investor argued that, in light of the State’s targeting of the specific investor with the export ban, the liability of the State should cover remote damages as well, including unforeseeable and indirect damages.⁵⁶⁰ Such an approach has some merit under most domestic systems of liability. Intentional wrongdoing usually results in broader liability under domestic law.⁵⁶¹ Yet the Tribunal disagreed with this argument. Accepting the host State’s position, it concluded that such an approach would amount to accept *punitive damages* under international law, which would contradict NAFTA.⁵⁶² This solution is problematic. There may or may not be reasons to reject the idea that the gravity of fault should influence causation (such as the recognition of objective responsibility as the general rule in international law), but the admissibility of a claim for *punitive damages* has nothing to do with causation. Punitive damages are called punitive precisely because they are awarded irrespective of the actual causal consequences and they are non-compensatory.⁵⁶³ The investor’s argument was that a different

⁵⁵⁹ See the Tribunal's emphasis on the “innocent” party, para. 159.

⁵⁶⁰ *S.D. Myers v Canada*, para. 149.

⁵⁶¹ See above, Chapter III.

⁵⁶² *S.D. Myers v Canada*, para. 149.

⁵⁶³ N H B Jørgensen, *The Responsibility of States for International Crimes* (2000), at 188 *et seq.*

causality test should apply in case of intentional wrongdoing and not that the requirement of causality as such should be dispensed with. Having rejected all of these suggestions (including the distinction between direct and indirect damages), the Tribunal leaves the reader without further guidance and merely states that damages should not be remote. “Remoteness is the key” according to the Tribunal, but it set out no principle to apply.⁵⁶⁴

In addition to applying the but for test, *Lemire v Ukraine* relied on the test of *foreseeability* to delimit the causal chain. The Tribunal dedicated several paragraphs to set out the theoretical underpinnings of its approach to causation. Relying on Brigitte Stern’s seminal work, it distinguished between *pure* and *transitive* causal links. Foreseeability was the notion it utilized in delimiting the extent to which transitive causal chains give rise to the duty to compensate. The distinction rests on whether there are intermediary elements in the chain of causation. The Tribunal emphasized that causal chains are only exceptionally pure and in most cases consist of several subsequent stages.⁵⁶⁵ In actually applying the foreseeability test, the Tribunal apparently followed a subjective approach and scrutinized the State’s awareness of the investor’s business plans and capabilities before committing the wrongful conduct.⁵⁶⁶ The question was thus not what a typical State in a similar situation could or should have foreseen, but what the actual foreseeable outcome could have been in light of the specific circumstances.

The *Fuchs v Georgia* Tribunal confirmed that foreseeability is the applicable standard.⁵⁶⁷ In this case the Tribunal applied this test to assess the consequences of a decree revoking the concessions granted to the investor. Given that the particular claim was about the absence of compensation for revocation of the investor’s rights, the application of the test did not raise any considerable difficulty. The damage of the investor is obviously a *direct* and *foreseeable* consequence of the absence of compensation for the damage.⁵⁶⁸

The well-known contradicting decisions in *CME v Czech Republic*⁵⁶⁹ and *Lauder v Czech Republic*⁵⁷⁰ disagreed *inter alia* on the question whether a causal link existed between the

⁵⁶⁴ *S.D. Myers v Canada*, paras. 140, 159.

⁵⁶⁵ *Lemire v Ukraine*, paras. 164-167.

⁵⁶⁶ *Id.*, para. 208.

⁵⁶⁷ *Fuchs v Georgia*, para. 469.

⁵⁶⁸ *Id.*

⁵⁶⁹ *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award of 13 September 2001.

⁵⁷⁰ *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award of 3 September 2001.

conduct of the host State and the damage suffered by the investor, and, even if it did, whether the conduct of a private party *broke* that chain of causation. To recall, the investor argued that the host State coerced it to alter its contracts and this alteration made it possible to its business partner to terminate the contract forming the basis of the investment. The question was whether the act of the private party terminating the contract *broke* the chain of causation triggered by the alleged coercion of the State.

The *Lauder* Tribunal refused to accept the wrongfulness of the “coercion”. Nonetheless, it insisted that in any event the direct cause of the termination of the contracts was the decision of the private contractual partner, whose conduct is not attributable to the State. It appeared to put the burden on the investor to prove that the private action was *not* a superseding cause.⁵⁷¹ In contrast, the *CME* Tribunal held that the private party merely made use of the legal opportunity created by the host State’s coercion, resulting in the alteration of the contract. To quote the Tribunal,

[t]he chain of causation was not interrupted due to the fact that the Media Council [the authority of the host State] by its own actions and inactions as regulator of the Czech Republic put Dr. Zelezny [the contractual partner of the investor] in the position to terminate the Service Agreement.⁵⁷²

Douglas suggests that the proper solution in such a case should lie in domestic law and the tribunals should have examined the impact of the State conduct on the contract under domestic law. If such an impact was to enable the investor’s contractual partner to terminate the contract, causation is established. If, to the contrary, the State conduct had no impact on the legality of the termination of the contract, there is no causation.⁵⁷³ An ICC arbitration took place between the investor and its contractual partner. The ICC award provided that the investor should receive compensation, which (in as much as it could be considered *res judicata* on the private law aspects) would indicate that the termination of the contract was illegal.⁵⁷⁴ In turn, this meant that the State did not enable the termination of the contract by its interference, since such a termination turned out to be contrary to the governing law of the contract.

⁵⁷¹ *Id.*, para. 234.

⁵⁷² *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Final Award of 14 March 2003, para. 451.

⁵⁷³ Z Douglas, *The International Law of Investment Claims* (2009), 67-69.

⁵⁷⁴ *Id.*, at 65.

Douglas' criticism is justified. However, it also points to a recurring difficulty in international investment law. In many investment disputes, the wrongful conduct is the alteration or restriction of the investor's rights (or the rights of its investment) under domestic law. Such a modification in itself may not necessarily result directly in damages, but it may enable someone else to make use of the investor's more vulnerable position. If one were to follow the *Lauder* approach and regard such a decision utilizing the altered legal situation as a *novus actus interveniens*, the States would be free to interfere into private legal relationships without incurring any obligation ever to pay compensation. This solution would enable States to circumvent their obligations under international investment law.

The *Lauder* Tribunal formulated one further response to the investor's argument. It held that there was no evidence that the private party would not have acted the same way even in the absence of any State interference.⁵⁷⁵ This point introduces again a but for analysis, which, in principle, is correct. The *Lauder* Tribunal, however, did not conduct its assessment properly. Asserting that the contract would have been terminated even in the absence of the State conduct is not sufficient in itself. The next issue should be to ask whether such a termination would have been lawful or whether the investor would have been able to claim damages from the private party. It is simply inevitable to consider the legal implications of the State's conduct. The question should not be what would have happened without the wrongful State conduct, but what *rights* the investor would have had without the wrongful State interference.

There would have been another approach available for both tribunals. The tribunals could have examined the causal chain between the State's interference and the value of the investment immediately following the interference, instead of engaging in the assessment of the *novus actus*. If the State's interference indeed modified the rights of the investor, that, in itself, must have had an impact on the value of the investment immediately, even without the actual utilization of the changed contractual circumstances by the other party. In such a case, causation would be plainly direct and it would also show the absurdity of treating any logical application of the modified contractual clauses as an intervening cause.

Professors Schreuer and Reinisch submitted an expert opinion in support of the host State's arguments. They took the view that in cases of *concurrent causes*, international law regards the

⁵⁷⁵ *Lauder v Czech Republic*, para. 288.

subsequent cause as the proximate cause.⁵⁷⁶ The Tribunal disagreed, but without a detailed discussion of the expert opinion.⁵⁷⁷ The Tribunal's finding is, it is submitted, the correct one. The proposition that subsequent causes necessarily interrupt causal chains is not supported by authorities, as further explored in the next chapter. There is ambiguity in the language of the expert report and the award itself on whether the issue is one of *novus actus interveniens* or *concurrent causes*. The latter expression is not accurate to describe this factual setting. The causal connection between the act of the private contracting counterparty and the injuries was part of the causal nexus between the wrongful act and the injuries and not a separate, concurrent causal link. Interestingly, in rejecting the position of the Czech Republic's legal experts, the Tribunal also referred to Czech law, which, not surprisingly, has much more sophisticated rules on liability.⁵⁷⁸

The conduct of the injured party could also qualify as an intervening cause, which means that the relationship between the concept of remoteness and the concept of contributory negligence is complex. *Micula v Romania* raised several issues of remoteness and intervening causes. The Tribunal elaborated on the relationship between intervening and concurrent causes in detail, which is further discussed in the next chapter.⁵⁷⁹ One of the disputed points between the parties was whether Romania was liable for tax penalties imposed on the investor. Romania argued that the investor failed to fulfill its tax obligations. In response, the Claimant contended that it lacked the sufficient funds to fulfill those liabilities as a result of Romania's previous wrongful actions harming it. Having assessed the evidence, the Tribunal concluded that it was the business decision of the investor not to allocate its funds to pay taxes, but to alternative purposes. The Tribunal emphasized that a conscious decision to ignore legal obligations under domestic law is one which certainly breaks the chain of causation.⁵⁸⁰ We return to the problem of distinguishing intervening causation by the injured party from contributory negligence in the next chapter.

⁵⁷⁶ *CME v Czech Republic*, UNCITRAL, *Legal Opinion prepared by Christoph Schreuer and August Reinisch*, 20 June 2002, paras. 279-281.

⁵⁷⁷ *CME v Czech Republic Partial Award*, para. 583.

⁵⁷⁸ *CME v Czech Republic Final Award*, paras. 450-452.

⁵⁷⁹ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case No. ARB/05/20, Final Award of 11 December 2013, paras. 923-927.

⁵⁸⁰ *Id.*, paras. 1151-1155.

7. Remoteness of damage in international human rights law

The ECtHR applies the criteria of ‘directness’, ‘clear causal link’ or ‘sufficient causal link’ to delimit the extent of liability.⁵⁸¹ The IACtHR mentions direct or immediate causality as the applicable requirement.⁵⁸² What these phrases mean is, however, never spelled out clearly. In most cases the ECtHR simply declares that a certain type of injury is not connected directly or clearly to the underlying wrongful act, without elaborating on what constitutes a direct or clear causal link. As we will see, the ECtHR’s insistence on a ‘direct causal link’ does not mean that ‘indirect damages’ (*i.e.*, damages caused by direct damages) cannot be compensated, increasing the complexity further. The ECtHR’s corresponding Practice Direction refers to a ‘clear causal link’, pointing out that a merely tenuous connection will not be satisfactory.⁵⁸³ As Dannemann noted, these notions might not be more than labels attached to cases where the ECtHR rejects or accepts the existence of a causal link, but in themselves they do not reveal much about the reasons of a particular decision.⁵⁸⁴

In *Iglesias Gil and A.U.I. v Spain* the Court rejected claims for expenditures and loss of income of parents incurred while looking for their abducted child. In such cases apparently foreseeable damages are held to be too remote, but the Court did not put forward any rationale underpinning its finding.⁵⁸⁵ In cases of wrongful expulsions the ECtHR is similarly reluctant to entertain claims of compensation for expenditures incurred while being expelled, although the expenses are certainly foreseeable.⁵⁸⁶ This contrasts markedly with the case law of the IACtHR. In *Juan Humberto Sanchez v Honduras* or *Caracazo v Venezuela* the loss of income resulting from the

⁵⁸¹ M Kellner – Durant, at 467-471.

⁵⁸² *Case of Alvarez and others v Guatemala*, IACtHR, Judgment of August 19, 2013, para. 307.

⁵⁸³ Practice Direction on Just Satisfaction Claims, at 1 (available at: http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf, last accessed 30 September 2016)

⁵⁸⁴ Dannemann, at 147.

⁵⁸⁵ *Iglesias Gil v Spain*, ECtHR, Judgment (Merits and Just Satisfaction) of 29 April 2003, para. 70; *Karrer v Romania*, ECtHR, Judgment (Merits and Just Satisfaction) of 29 April 2003 of 21 February 2012, para. 59.

⁵⁸⁶ *De Souza Ribeiro v France*, ECtHR, Judgment (Merits and Just Satisfaction) of 13 December 2012, para. 106.

search for disappeared relatives was regarded as a causal consequence of the wrongful conduct.⁵⁸⁷

When claimants' freedom of expression is violated and, as a result, they were required to pay compensation under domestic law to some other person, the ECtHR accepts it as a direct consequence,⁵⁸⁸ except when the damages payment *per se* would not have been a disproportionate restriction.⁵⁸⁹ In *Cumpana Mazare v Romania*, it was held that the financial sanction was not a disproportionate response, but the criminal conviction was, so compensation was due only for the latter and not the former.⁵⁹⁰ In *Balogh v Hungary* the ECtHR rejected the existence of a "direct causal link" between the reduced hearing of the Claimant (caused by a punch during an interrogation) and his inability to find employment. Still, the ECtHR went on to speculate that there must have been some pecuniary loss as a result of reduced hearing and awarded a sum, thereby implying that directness is not always the only criterion.⁵⁹¹

Directness of the causal link between pecuniary damages and the violation of the State's obligation to investigate and provide effective remedies for human rights breaches is another problematic aspect in the case law. In some cases, the claimants are left with the option to demand non-pecuniary damages only, because the causal link is missing between their losses and the failure of the State to guarantee remedies.⁵⁹² The classic cases on the treatment of foreign nationals suggested a different solution. The *Janes* award provides a very persuasive overview of cases equating the injury caused by the failure to investigate and punish with the damage originally caused by the perpetrator.⁵⁹³ The Strasbourg approach departs from this traditional standard of customary international law.

⁵⁸⁷ *Case of the Caracazo v Venezuela*, IACtHR, Judgment (Reparations and Costs) of August 29, 2002, para. 86; *Case of Juan Humberto Sánchez v Honduras*, IACtHR, Judgment of June 7, 2003, para. 166.

⁵⁸⁸ *Nikula v Finland*, ECtHR, Judgment (Merits and Just Satisfaction) of 21 March 2002, para. 63.

⁵⁸⁹ *Cumpana and Mazare v Romania*, ECtHR, Judgment (Merits and Just Satisfaction) of 17 December 2004, paras. 124-130.

⁵⁹⁰ *Cf* Kellner – Durant, at 469.

⁵⁹¹ *Balogh v Hungary*, ECtHR, Judgment (Merits and Just Satisfaction) of 20 July 2004, para. 84.

⁵⁹² *Tekdag v Turkey*, Judgment (Merits and Just Satisfaction) of 15 January 2004; *Sirin Yilmaz v Turkey*, Judgment (Merits and Just Satisfaction) of 29 July 2004; *Tagirova and others v Russia*, Judgment (Merits and Just Satisfaction) of 4 April 2009, para. 121.

⁵⁹³ *Janes Case (US v Mexico)*, (1926) 4 RIAA 82; *Cf Hydera and others v Gambia*, ECOWAS Community Court of Justice, Judgment of 10 June 2014.

In addition, it is problematic from a logical point of view. If the State's conduct falls short of effective investigation, the State thereby *enables* the perpetrator to avoid not only punishment, but also a claim for compensation caused by her or his illegal conduct. Thus, it deprives the claimant from a *loss of opportunity* to pursue a claim against the perpetrator. This causal link is either not considered by the Court or is deemed to be too remote or indirect. The Court departs from its predominant approach in some cases. In *Beker v Turkey*, the Court found a causal link between the State's failure to investigate a death properly and the financial losses suffered by the relatives as a result.⁵⁹⁴

Cantoral-Huamani and García-Santa Cruz v Peru shed some light on what the IACtHR means by 'direct causality'. In this case part of the victim's property was lost or stolen while in the possession of the authorities following a seizure. This was held to be the direct causal consequence of the authorities' conduct.⁵⁹⁵ The IACtHR is more flexible than the US/Mexico General Claims Commission in *Cibich*, which rejected a similar claim in the absence of evidence about the improper precaution of the authorities.⁵⁹⁶ It is safe to say that most domestic legal systems would reject such a claim on the account of a break in the causal chain.⁵⁹⁷

To make things even more complicated, foreseeability also has traces in the case law. Judge Conforti pointed out that in cases of positive obligations the ECtHR expressly adopted the 'foreseeability' threshold to delimit the extent of the State's liability.⁵⁹⁸ In *Mastromatteo v Italy*, the murderers of the applicant's son were on prison leave. The ECtHR rejected the claim, since the State officials could not have foreseen the eventual consequence of releasing the perpetrators. *Mastromatteo* became a point of reference in subsequent cases.⁵⁹⁹ All of those cases are concerned with *establishing* the responsibility of State. Foreseeability is a necessary tool to determine whether the positive obligation has been breached by failing to prevent the specific results.

⁵⁹⁴ *Beker v Turkey*, ECtHR, Judgment (Merits and Just Satisfaction) of 24 March 2009, para. 62. See further the cases referenced therein.

⁵⁹⁵ *Case of Cantoral Huamani and Garcia Santa Cruz v Peru*, IACtHR, Judgment of July 10, 2007, para. 187.

⁵⁹⁶ *Cibich Claim (United States v Mexico)*, (1927) 4 RIAA 57.

⁵⁹⁷ Cf Chapter IV.

⁵⁹⁸ B Conforti, 'Exploring the Strasbourg Case-law: Reflections on State Responsibility for the Breach of Positive Obligations', in M Fitzmaurice and D Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 129

⁵⁹⁹ *Öneryildiz v Turkey*, ECtHR, Judgment (Merits and Just Satisfaction) of 18 June 2002, para. 92; *Vinter and Others v the United Kingdom*, Judgment (Merits and Just Satisfaction) of 9 July 2013, para. 108.

One dissent in *Popov v Moldova* reveals the ambiguous relationship between the standards of directness and foreseeability in the ECtHR's thinking about causation. In *Popov v Moldova*, the State was responsible for failing to enforce an eviction order in favour of the owner of a property for seven years. After seven years, the underlying judgment in favour of the claimant was quashed in light of new facts and new proceedings were opened. Notwithstanding these developments, the ECtHR held the State responsible for violating the right to property by not enforcing a claim confirmed as *res judicata*. It also ordered compensation for the applicant for loss of earnings resulting from the claimant's inability to lease the property. The but for analysis is in itself interesting, because, despite the reopened domestic proceeding, the ECtHR concluded that the failure to enforce caused damage.

Moldovan Judge Pavlovski brought foreseeability into the analysis in his dissent. He, equating the impliedly applied compensation principle to the *Hadley v Baxendale* rule of common law, concluded that *expectation damages* are permissible only if the parties *contemplated* the possible occurrence of such damages, which, in his view, was not the case (he could not see this as a loss of profit claim, since profits were never made before). Judge Pavlovski's analysis of the facts might be questionable, but his dissent at least revealed that foreseeability is *not* a principle guiding the ECtHR's thinking of compensation. We could not identify a single case in the practice of the IACtHR applying the foreseeability standard either.

It is very difficult to identify consistent principles of remoteness in light of the practice outlined above. Indeed, it could very well be artificial to discern any consistent approach to the doctrine of remoteness in the case law of the ECtHR or the IACtHR given the apparent contradictions or the lack of detailed reasoning. Still, there might be two broad principles (elaborated by municipal legal systems) which, at least in a great number of cases, seem to support, or (at least) do not contradict the case law.

The first is the notion of *novus actus*. The ECtHR typically cuts off the causal link if an informed and conscious decision of the claimant or a third party (of which the wrongful conduct might very well be a *conditio sine qua non*) is itself a but for cause of the damage, even if the eventual damage would meet a foreseeability test. This explains the reluctance of the ECtHR to award damages if the claimant's decision to undertake certain expenditures (even if those are reasonable reactions to the State's wrongful conduct) forms the basis of the claim.

A second possible principle is the *Normzweck* theory. The ECtHR or the IACtHR has never pronounced expressly that this theory is applicable to problems of causation. Yet, Dannemann argues that the Strasbourg Court did use the principle as an interpretative tool in determining the scope of substantive provisions of the Convention (for instance in *Osman v UK* when setting out the scope of positive obligations). This, the argument goes, might have implications for the test of causality applied under the provisions so interpreted.⁶⁰⁰ Some of the cases discussed could also be explained by this logic. If the injury is of such a nature that the underlying obligation is not construed as aiming to *prevent* it, it will not be treated as a direct consequence.

Neither of these approaches will reconcile the inconsistency between ECtHR's restrictive approach to remoteness and the generosity of the IACtHR. Both tribunals apply human rights conventions and the latter admittedly follows the jurisprudence of the former in many respects. The issue of remoteness is an exception to this adherence. Revealing why this difference persists between the two bodies would go beyond the scope of the present exercise. Suffice it to say that the IACtHR's approach to remedies has been described as "groundbreaking".⁶⁰¹ This policy-driven approach prompts the IACtHR to overstep the limits flowing from a strict adherence to notions of remoteness.

8. Remoteness of damage in mass claims practice

8.1 Iran-US Claims Tribunal

The Iran-US Claims Tribunal invoked the notion of "proximity" to delimit State liability.⁶⁰² In the odd case of *Hoffland Honey Co*, the Tribunal rejected a claim for compensation of damages caused on US soil by chemicals made of Iranian oil. While the claim itself is very strange, the principle stated by the Tribunal is important. The Tribunal distinguished between 'but for'

⁶⁰⁰ Dannemann, at 157-158. In particular, see the discussion of the *Bock* case.

⁶⁰¹ C Tomuschat, 'Reparation for Victims of Grave Human Rights Violations', (2002) 10 *Tulane Journal of International and Comparative Law* 157, at 164.

⁶⁰² A Mouri, at 217-219.

causes and proximate causes and held that, although the production of Iranian oil was a cause, it was not a proximate cause.⁶⁰³ The Tribunal recalled the *Palgraf* principle of remoteness from US domestic law. The reference to *Palgraf* implies the endorsement of the foreseeability test as the decisive test of proximity.⁶⁰⁴ In the landmark *Palgraf* judgment, a person dropped a package containing fireworks at a rail platform. This was the result of an attempt of the guards on duty to prevent this person from falling. The judgment held that the guards could not have foreseen that the package contained fireworks.

We find an express reference to the test of foreseeability in *Sea-Land Service*.⁶⁰⁵ The Tribunal decided on a contractual claim, but in introducing the test of foreseeability, it invoked international law authorities, such as the *Shufeldt Claim* or Whiteman's Damages. *Shufeldt* was a case concerning the taking of contractual rights by sovereign interference, and the question was whether the loss of profits was in the "contemplation" of the parties as a consequence of a breach.⁶⁰⁶ The section the Tribunal referred to in Whiteman's work deals with the extent and quantification of expected profits, not with foreseeability.

The Iran-US Claims Tribunal followed a different approach in *Eastman Kodak*. To recall, the claim was for compensation suffered as a result of damages suffered following the liquidation of the subsidiary of the claimant. As a result of the liquidation, the liabilities owed by the subsidiary to the claimant became immediately outstanding and, at the same time, the claimant company lost any chance that it would ever recuperate those amounts. The decision to request insolvency was the decision of the company. Nonetheless, since there was an "uninterrupted causal" chain between Iran's conduct and the losses stemming from the liquidation, Iran was held liable.⁶⁰⁷ Dahm's *Völkerrecht* describes this decision as marking a change in the case law

⁶⁰³ *Hoffland Honey Co v National Iranian Oil Co.*, Award, IUSCT Case No. 495 (22-495-3), 26 January 1983.

⁶⁰⁴ *Palsgraf v Long Island R.R. Co.*, Ct. of App. of N.Y., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928)

⁶⁰⁵ *Sea-Land Service, Inc. v The Islamic Republic of Iran, Ports and Shipping Organisation*, Award, IUSCT Case No. 33 (135-33-1), 20 June 1984, at fn 27. Cf V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper – I Plakokefalos, *Shared Responsibility in International Law: an Appraisal of the State of Art* (2014) 134, at 164 fn 163; *Houston Contracting v NIOC*, Award, IUSCT Case No. 173 (378-173-3), 22 July 1988. . However, there is no support for foreseeability in the cases Lanovoy cites from the practice of the Tribunal, since they were concerned with contractual claims, not international law claims.

⁶⁰⁶ S M Schwebel, *Justice in International Law: Selected Writings* (2008), at 432-434.

⁶⁰⁷ *Eastman Kodak Company v The Government of Iran*, Final Award, IUSCT Case No. 227 (514-227-3), 1 July 1991, para. 42.

of the Tribunal in comparison with *Woodward-Clyde Consultants v Iran*.⁶⁰⁸ In *Woodward* the Tribunal, adjudicating on a contractual claim, denied compensation of expenses incurred during collection efforts of an outstanding contractual debt. It is unclear whether there is a contradiction between the two cases. *Eastman Kodak* was concerned with an international law claim and not a contractual claim. Further, in *Eastman Kodak* no claim was put forward for the compensation of collection expenditures.

As we have seen in the chapter on attribution, it is often difficult to distinguish causation from attribution in the case law of the Tribunal. As Professor Caron notes, attribution operated in the practice of the Tribunal as a concept to delimit the scope of State liability to less than what a proximate causation test would have permitted.⁶⁰⁹ He refers to *Short*, where the Tribunal rejected the claim due to the lack of specific evidence on State conduct compelling the claimant to leave Iran.⁶¹⁰ The general conditions of turmoil and the publicly announced anti-American policies were not considered as “proximate” causes, even though they might have been ‘but for’ causes. We could also add to this point claims of lost control over assets following the revolution. In *Schering* and *Otis Elevator* workers’ councils took charge of the companies and allegedly interfered into the property rights of the claimants.⁶¹¹ The Tribunal framed the question at hand as one attribution, instead of examining whether the workers’ councils’ conduct could have been a proximate consequence of Iranian conduct.

8.2 United Nations Compensation Commission

Recall that UNSC Resolution 687 set forth that only “direct” results of Iraq’s international wrongdoing should be compensated. The inclusion of this phrase was necessary to delimit

⁶⁰⁸ G Dahm *et al*, *Völkerrecht* (2002), at 951; *Woodward-Clyde Consultants v Government of the Islamic Republic of Iran*, Award, IUSCT Case No. 67 (73-37-3).

⁶⁰⁹ D Caron, ‘The Basis of Responsibility: Attribution and other Transsubstantive Rules’ in R B Lillich – D B Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 109 [‘Caron 1998’], at 153.

⁶¹⁰ *Id*, at 157. See also *W. Jack Buckamier v The Islamic Republic of Iran*, Award, IUSCT Case No. 941 (528-941-3), 6 March 1992, para. 59.

⁶¹¹ *Schering Corporation v Iran*, Award, IUSCT Case No. 38 (122-38-3), 16 April 1984; *Otis Elevator Co v Iran*, Award, IUSCT Case Non 284 (304-284-2), 29 April 1987.

Iraq's liability by drawing a line of remoteness beyond which compensation is not due, even if there is some form of causal relationship between the invasion and the damages suffered. The phrase was missing from the preceding Resolutions.⁶¹² As Heiskanen writes, "the concept of directness establishes a link between the law applicable before the Commission and the received law of international claims."⁶¹³

Contemporary commentary pointed out that it would be very difficult to attribute an exact meaning to the test of directness without further guidance from the Governing Council.⁶¹⁴ In fact, one drafter of the UNSC Resolution confirmed that the UNSC was not in a position to further fine-tune the concept of directness and it was recognized that it falls for the Commission to further specify the concept.⁶¹⁵ The Governing Council decided that losses suffered in consequence of the following facts qualify as direct losses:

- military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
- departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;
- actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
- the breakdown of civil order in Kuwait or Iraq during that period; or
- hostage-taking or other illegal detention.⁶¹⁶

The Council's non-exclusive definition of this list of causes is in fact a catalogue of events that would *not* break the chain of causation between Iraq's conduct and the damages. In addition, it is also a list a *factual presumptions* concerning certain events that are presumed to be the causal consequences of Iraq's actions. This solution relieved the claimants from proving the

⁶¹² C Brower, 'Richard Lillich and the United Nations Compensation Commission: Goodbye Forever to 'Direct' Versus 'Indirect' Damages', (1997) 38 *Vanderbilt Journal of International Law* 21, at 21-22.

⁶¹³ Heiskanen, at 334.

⁶¹⁴ R J Bettauer, 'Establishment of the United Nations Compensation Commission: the U.S. Government Perspective' in R B Lillich (ed), *The United Nations Compensation Commission* (1995) 29, at 31.

⁶¹⁵ Wühler, at 209.

⁶¹⁶ UNCC Governing Council Decision 7, 16 March 1992, para. 21.

causal connection between these types of events and Iraq's conduct. However, they still had to prove causality between the damages and the listed events.

Some argue that to a certain extent the Governing Council's decision was legislative in nature, because its "case classification" about direct results of Iraq's invasion contradicted international case law and the traditional understanding of directness. Damages caused by the civil unrest in general were traditionally not compensable. Rovine and Hanessian give as example the case law of the Commission of Indemnities following the Boxer Uprising (1899-1901).⁶¹⁷ According to the Commission, damages caused by interrupted business due to the general breakdown of order did not qualify as a "direct consequence", contrary to the approach taken by the Governing Council and the practice of the Panels.⁶¹⁸

A further step putting in doubt the adherence of the UNCC to the traditional concept of "directness" was the decision that damages caused by the "military operations [...] by either side" qualify as direct consequences.⁶¹⁹ Accordingly, damages caused by the allied forces also qualified as such. One Panel held that this approach is in line with the "general principles of international law", but it is very questionable, at least without further qualification.⁶²⁰ Without further qualification this proposition would render the applicability of humanitarian law provisions on compensation futile in the case of lawful interventions, because damages caused during such interventions would be always direct consequences of the initial unlawful act, provoking the lawful intervention. One cannot but agree with the subsequent holding of the Eritrea-Ethiopia Claims Commission that the interpretation of "directness" by the Commission should be "assessed with care and in light of their context".⁶²¹

To explain the rationale of decisions on causation, several commentators hinted at the possibility that under the test of directness the Governing Council and the Panels would in fact

⁶¹⁷ Rovine – Hanessian, at 243. See further Gattini 2003, at 449; G A Christenson, 'The Doctrine of Attribution in State Responsibility' in R Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (1983) 321, at 343.

⁶¹⁸ Whiteman, at 1781. But cf the Denby Report to the Committee of Foreign Affairs, Congressional Edition 5225, 27 February 1908.

⁶¹⁹ UNCC Governing Council Decision 7, para. 21.

⁶²⁰ Well Blowout Control Claim, 18 December 1996, para. 374. Cf the discussion on the Eritrea-Ethiopia Claims Commission practice.

⁶²¹ EECC Decision 7, para. 11

apply a test of reasonable foreseeability.⁶²² Heiskanen notes that damages seemingly at odds with a traditional reading of directness could fit squarely within the test of foreseeability.⁶²³

Foreseeability can explain why third party conduct is not treated as an intervening cause in certain circumstances. For example, foreseeability was the traditional approach resulting in the compensability of damages caused by civil unrest.⁶²⁴ In certain decisions, Panels made their choice of foreseeability as the guiding principle explicit. In discussing the relevance of third party conduct possibly breaking the chain of causation, one Panel held:

Several Claims raise the question of whether an act or decision of the Government of Jordan or of a third party breaks the chain of causation between an asserted loss and Iraq's invasion and occupation of Kuwait, so as to relieve Iraq of liability. The Panel finds that intervening acts or decisions, as a general rule, break the chain of causation and losses resulting therefrom are not compensable. Under generally accepted principles of law, however, an intervening act or decision that is a direct and foreseeable consequence of Iraq's invasion and occupation of Kuwait does not break the chain of causation.⁶²⁵

On this account, Jordan sought compensation for damages resulting from a decline in tourism successfully, notwithstanding that the decision "not to visit" Jordan was an autonomous decision of tourists.⁶²⁶ In contrast, Jordan could not demonstrate that the decision of the US to stop funding training programs for the Jordanian air force was a foreseeable consequence of Iraq's conduct.⁶²⁷

In *Egyptian Workers' Claims*, the hostile conduct of Egypt adopted as a response to Iraq's initial wrongful act did not interrupt the causal chain, because subsequent developments were also foreseeable at the time of the breach. The Commission found that "[p]redictability prevails in judicial practice".⁶²⁸ The Commission analysed in detail the specific circumstances of the breach, in particular the immediate reaction of the international community to Iraq's actions.

⁶²² This was already suggested before the Panels produced the bulk of their jurisprudence, *Rovine – Hanessian*, at 248-249; see also *d'Argent*, at 649.

⁶²³ Heiskanen, at 334-336.

⁶²⁴ Gattini, at 449.

⁶²⁵ First Instalment of F2 Claims, 9 December 1999, para. 38.

⁶²⁶ *Id.*, para. 187.

⁶²⁷ *Id.*, para. 167.

⁶²⁸ *Egyptian Workers' Claims*, 7 July 1995, 117 *ILR* 196, para. 217.

This approach to foreseeability puts more emphasis on the specific factual circumstances as opposed to “general foreseeability” in comparable situations.

The losses claimed arose out of Iraq’s failure to secure payment transfers to Egyptian workers. Iraq argued that the imposition of international sanctions rendered such transfers impossible and thus broke the chain of causation.⁶²⁹ The Commission disagreed and it regarded Iraq’s refusal to pay as a further step in the escalating hostilities between Egypt and Iraq. Such hostilities were in their entirety foreseeable consequences of Iraq’s initial steps and, consequently, they did not break the chain of causation.⁶³⁰ Accordingly, if Iraq’s *own* conduct was the foreseeable consequence of Iraq’s *original wrongful act*, the causal consequences of the later conduct were still compensable under the UNCC’s understanding of remoteness, even if the later conduct was not illegal *per se*.

As we have seen, foreseeability as the decisive threshold of remoteness appears in the practice of most the dispute settlement bodies studied. Still, the actual content of the foreseeability test remains in most cases obscure. Most importantly, the perspective of foreseeability is ambiguous: for whom should be a certain outcome foreseeable? The traditional perspective in domestic law, and, as we have seen, recalled in *Naulilaa*, is that of a reasonable man in the position of the wrongdoer.⁶³¹ In one comment to the practice of the UNCC, Rovine and Hanessian suggest a different understanding of foreseeability. They write:

With respect to claims before the Compensation commission, Iraq must compensate for all losses that *a member of the community of nations* would have or should have reasonable foreseen as resulting from the invasion and occupation of Kuwait.⁶³²

Foreseeability is understood here with the picture of “a member of the community of nations” in mind and not vis-à-vis the ultimate perpetrator of the wrong. This might result in a difference in practice, because the capacity of a State to foresee will always be on a different scale than the means at the disposal of an individual State agent, however reasonable such an agent is.

⁶²⁹ *Id.*, para. 128.

⁶³⁰ *Id.*, paras. 221-222.

⁶³¹ See also the Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, *ILC Ybk* (1989)/II 1, paras. 37-43.

⁶³² Rovine – Hanessian, at 249 (emphasis added).

Another suggestion was put forward by Lady Fox.⁶³³ Fox suggested that the scope of Iraq's responsibility should have depended on the individual primary obligations breached. Iraq was in breach not only of the UN Charter, but a series of international humanitarian law conventions and the rules governing diplomatic and consular relations too. Fox's approach would have been difficult to implement, because it would have required determinations by the UNCC on questions of *responsibility* by identifying the specific primary obligation on a case by case basis. She also noted that it is legitimate to ask whether by breaching the rules on *ius ad bellum* it makes any difference in terms of causation whether additional norms of international humanitarian law were also breached.⁶³⁴ The Eritrea-Ethiopia Claims Commission addressed this point exactly and, for that matter, in line with Fox's views, as we shall see.

8.3 Eritrea-Ethiopia Claims Commission

Before the dispute reached the damages stage, the Commission laid down, as a separate decision, the approach to follow by the parties concerning causation. In Decision 7 the Tribunal reviewed all the historical takes on causation and sided with the test of foreseeability.⁶³⁵

One of the most important issues before the Eritrea-Ethiopia Claims Commission was whether the breach of international obligations related to *ius ad bellum* imply liability for all consequences of such a breach. Ethiopia maintained that by violating the prohibition on the use of force, Eritrea bears responsibility for all damages that would not have taken place 'but for' Eritrea's unlawful conduct. The Commission rejected such an expansive application of the 'but for' test and applied a threshold of foreseeability to draw the outer scope of Eritrea's liability. The definition adopted by the Commission was the following:

⁶³³ H Fox, 'Reparations and State Responsibility: Claims against Iraq Arising out of the Invasion and Occupation of Kuwait', in P Rowe (ed), *The Gulf War 1990-91: International and English Law* (1993) 261.

⁶³⁴ *Id.*, at 283-286.

⁶³⁵ EECC, Decision 7, para. 13.

In assessing causation, the Commission has tried, inter alia, to weigh whether particular consequences were, or should have been, foreseen by Eritrea's leaders in the exercise of reasonable judgment at the time of Eritrea's delict in May 1998.⁶³⁶

Foreseeability here was assessed from the perspective of the actual wrongdoers making the decision in breach of international law obligations.

The Commission stressed that it is impossible to apply a test of foreseeability without regard to the specific substantial obligation involved. According to the Commission, one acting contrary to the prohibition on the use of force should exercise more care in considering the possible consequences than what might be necessary in other cases. As the Commission held, "foreseeability should extend to a broader range of outcomes than might need to be considered in a less momentous situation".⁶³⁷ It is not entirely clear whether it is the substantive obligation in question or the actual factual setting that made the situation "momentous" in the eyes of the Commission, so that a more expansive reading of foreseeability was warranted.

This approach of foreseeability, adopting the perspective of the actual leaders making the decision amount to the wrongful act, might seem to introduce a subjective test, but the case law of the Commission reveals that it is not. Eritrea argued that intended damages are always "proximate". Eritrea advocated this argument in the context of a claim for compensation for losses of medical care. The Commission decided that there was no need to address the point, because humanitarian law specifically aimed to prevent such damages.⁶³⁸ The foreseeability of the harm was assessed in light of the primary obligation breached, and not the *mens rea* of the party committing the breach.

At the same time the Commission introduced the notion of the "gravity of breach" in its analysis. It had to distinguish Eritrea's *ius ad bellum* liability from the Iraq's following the invasion of Kuwait. In the words of the Commission,

the law of State responsibility must maintain a measure of proportion between the character of a delict and the compensation due. Ethiopia strongly urged this principle in a different setting, in claiming huge moral damages, on the ground that Eritrea had committed egregious delicts meriting massive additional compensation. Eritrea's violation of the *jus ad bellum* in May 1998 as found by the Commission

⁶³⁶ *Ethiopia's Damages*, para. 290

⁶³⁷ *Id.*

⁶³⁸ *Eritrea's Damages*, para. 214.

was serious, and had serious consequences. Nevertheless, that violation was different in magnitude and character from the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait.⁶³⁹

There are therefore two sides of the Commission's foreseeability test: one of "normative foreseeability" and one of "fact-specific foreseeability". On the one hand, foreseeability depends on the purpose and nature of the primary norm. On the other hand, the scope of liability should reflect the gravity of the breach in light of the actual factual circumstances of the case. One might say summarily that damages foreseeably caused are damages the occurrence of which could be reasonably anticipated by the wrongdoer in light of the purpose of the primary obligation incumbent on the State and the egregiousness of the precise factual circumstances constituting the breach of such an obligation.

In drawing the outer reach of *ius ad bellum* responsibility, the Commission stressed that the very existence of the *ius in bello* regime signals that there has to be a certain scope of war damages not necessarily falling within the liability of the State breaching *ius ad bellum* norms. If the State was liable for the entirety of damages, *ius in bello* reparation would be rendered futile.⁶⁴⁰

The application of these principles led to compensation for damages caused by landmines laid during the period covered by Eritrea's *ius ad bellum* liability⁶⁴¹ and the costs of internal displacement.⁶⁴² However, the Commission refused to award compensation for the death of prisoners of war without further proof concerning *ius in bello* breaches.⁶⁴³ Ethiopia also submitted claims for losses suffered by Ethiopian's departing Eritrea after Eritrea's ultimate defeat. The Commission did not consider that Eritrea should have foreseen the conduct of such Ethiopians following a hypothetical eventual defeat.⁶⁴⁴

⁶³⁹ *Ethiopia's Damages*, para. 312.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*, para. 391.

⁶⁴² *Id.*, para. 471.

⁶⁴³ *Id.*, para. 431.

⁶⁴⁴ *Id.*, para. 435.

9. Conclusions

There are undeniable differences in the case law concerning some crucial issues, such as the test of remoteness. Still, it is submitted that most of the cases discussed support the following conclusions:

- i. Establishing but for causation is a precondition of the duty to provide reparation, subject to the recognition of its limits regarding remoteness and multiple causation. This approach mirrors domestic legal systems.
- ii. In the context of preventive obligations implying a causal inquiry, human rights bodies sometimes show less sensitivity to a strict application of the but for threshold by applying factual presumptions of but for causation. There are sporadic examples of such flexibility in the practice of the Eritrea-Ethiopia Claims Commission. At the same time, at the level (and only at the level of) breach the ECtHR apparently considers questions of foreseeability of the harm claimed to be the result of the breach of a preventive duty.
- iii. Courts and tribunals vary in their approach to constructing the counterfactual. Investment tribunals, the IACtHR, the Iran-US Claims Tribunal and the United Nations Compensation Commission are more prepared to provide a thorough analysis, whereas the ECtHR as a rule less so. A clear definition the wrongful act and the wrongful aspect of the act, which should be assumed away in the counterfactual to assess the causal consequences, is sometimes missing.
- iv. There is a discrepancy in the case law when it comes to *remoteness*, i.e., to the question where to cut off a causal link established on a but for basis. The vast majority of investment tribunals relied on the test of foreseeability, with the notable exception of *SD Myers*. While the conceptual question marks of the *SD Myers* Tribunal regarding the application of the foreseeability test deserve attention, it is beyond doubt that the prevailing approach is that of foreseeability. On the other hand, foreseeability is very rarely referenced in the otherwise inconsistent case law of human rights bodies. The United Nations Compensation and the Eritrea-Ethiopia Claims Commission interpreted directness and proximate causation respectively as incorporating the foreseeability

standard. The foreseeability threshold applied by the Eritrea-Ethiopia Claims Commission is not the “foreseeability of the reasonable man” threshold, but rather a “foreseeability of the wrongdoer in light of the primary obligation and the specific circumstance” test, vaguely mirroring a *Normszweck* test.

We suggest that this latter approach is the one to follow in the future, for several reasons. The proposed rule is this: notwithstanding that the internationally wrongful conduct is a *conditio sine qua non* of a certain damage, the State has no duty to repair the damage, if the damage could not have been reasonably anticipated by the wrongdoer in light of the purpose of the primary obligation incumbent on the State and the egregiousness of the precise factual circumstances constituting the breach of such an obligation.

There are several reasons to follow this test. *First*, it is reconcilable with the ILC’s choice to adopt Riphagen’s view on the role of the primary norm. If foreseeability is interpreted with a view to the specificities of the breach, it is possible to find an overarching test still preserving the requisite flexibility warranted by the wide variety of obligations. The specifics and the nature of the breach is also relevant in the application of the but for test and the construction of the counterfactual, without undermining the integrity of the principle.

Second, it addresses the policy considerations raised against the test in *SD Myers*, namely that the foreseeability test reflects the nature of the contractual bargain and it should not be transposed to a non-contractual context. If foreseeability is interpreted not as a self-standing threshold, but in relation to the duty in question, the parties’ consent forming the basis of the international obligation is given due consideration. Such a test would be close, but not identical to the *Normszweck* approach gaining increasing support in domestic legal practice and literature. The *Normszwecklehre* presupposes that the compensable scope of damages could be distinguished from the non-compensable scope of damages solely on the basis of a discernible scope of protection of the primary norm, without reference to what was foreseeable in the given circumstances. In contrast, this test has due regard to the specific circumstances of the breach.

Third, it would be in line with the assumption of an “objective” regime of State responsibility. It is not the *mens rea* of the State actor that is relevant, but the objectively discernible purpose of the primary obligation and the factual circumstances.

Fourth, the overwhelming majority of the cases discussed fit the test. This variant of

foreseeability would also be able to account for the few examples of tribunals rejecting claims for plainly foreseeable damages, such as the loss of income of a relative looking for the missing person or the damages caused by lawful countermeasures. If foreseeability is assessed in light of the purpose of the underlying primary obligation, it is not unreasonable to argue that the purpose of a human right violation is not the prevention of the expenses of a relative⁶⁴⁵ or, similarly, that the purpose of the prohibition of the use of force is not the avoidance of countermeasures and their consequences.

There are a number of alternative suggestions to correct or counterbalance the foreseeability test. Okowa, reviewing the early case law and the coexisting tests of “normal consequences” and foreseeability argued that the two tests should operate alongside each other so as to restrict each other.⁶⁴⁶ However, the “normal consequences” test did not survive in the case law of the second half of the 20th century. We could not identify a single application of the test in the practice of the dispute settlement fora scrutinized in this study.

Lefebver offers another approach. Lefebver suggested that remoteness should depend on the nature of intervening acts. Whether an act is intervening will depend on whether the actors’ conduct is a reasonable response to the wrongful act. Lefebver discusses the developments after the Chernobyl disaster and the ongoing discussion in the OECD at the time. Following Chernobyl, Western European States decided to prohibit the consumption of certain agricultural products and the question arose whether the damages thus caused to the agricultural industry are the causal consequences of the Chernobyl disaster for the purposes of international law.⁶⁴⁷ Lefebver notes that the outcome of this discussion was that *reasonable* conduct does not interrupt the causal link. This suggestion has sound basis in domestic legal traditions. However, as we have seen, there are a number of decisions rejecting compensation for damages caused by a reasonable reaction to the original wrongful conduct. Accordingly, a reconceptualised foreseeability test would provide a better solution.

Equipped now with the understanding of the core principles underlying the causal inquiry in the context of remedies, the next chapter turns to the more difficult issues of complex causal

⁶⁴⁵ Cf Dannemann, at 165.

⁶⁴⁶ P N Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (OUP 2000), at 180-182.

⁶⁴⁷ R Lefebver, *Transboundary Environmental Interference and the Origin of State Liability* (1996), at 97-98.

scenarios involving multiple causation.

Chapter V

The causal link and reparation: Multiple causes

1. Setting the scene

The previous chapter examined scenarios where the existence and the actual extent of a causal chain between a specific wrongful conduct and a certain result was in question. This chapter analyses the approach of international courts and tribunals when there are multiple causes in operation, among which only one is the wrongful act of the State.

Two distinct situations are addressed. The first is when a *third* factor concurrently causes losses with the wrongful act. The second is what ARSIWA calls “contribution to the injury”,⁶⁴⁸ when the concurrent cause is the conduct of the injured party. The reason for separating the two issues is the ILC’s choice to make this distinction, for reasons further explained below.

As will be apparent by the end of this chapter, the ILC’s proposition that concurrent causation should not influence the existence or extent of the duty to provide reparation is a simplistic one. This proposition is accurate in certain cases of concurrent causation (but still on different conceptual grounds than those outlined in the Commentary), but it does not necessarily apply to other variants. Brigitte Stern observed as much forty years ago.⁶⁴⁹ As regards contribution to the injury, the ILC’s approach appears to be in line with the case law, although there are serious misunderstandings concerning the proper scope of the application of the doctrine.

The chapter includes the discussion of some cases where the adjudicating body lacked the evidence to precisely assess whether there was concurrent causation. Their inclusion here is necessary, since they stand either for the conclusion that the possible existence of concurrent causes do not influence the determination of damages or for the conclusion that in certain cases legal presumptions apply in favour or against the award of damages.

⁶⁴⁸ ARSIWA, Article 39.

⁶⁴⁹ B Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973), at 297.

It is equally important to distinguish genuine cases of *overdetermination*, indicating the limits of the but for test, from other cases involving multiple causation, but not raising the same problem. To recall the basics from our previous chapter on the general principles of causation, we speak of *overdetermination* when the but for test is unhelpful, due to the presence of another cause. “But for” the internationally wrongful act, another cause would have still caused the damage. In such cases, domestic legal systems sought alternative doctrines of causation.

As discussed in the preceding section on remoteness, the fact that a *cause* is not the sole cause of an injury does not necessarily presuppose concurrent causation. Thus, if the State’s conduct *causes* another event, which in turn causes the harm, the second cause is not a *concurrent cause*, but the causal consequence of the original cause itself. An example would be a State’s failure to exercise its due diligence in preventing a private entity from causing transboundary pollution, as it happened in *Trail Smelter*.⁶⁵⁰ The actual pollution is not the result of multiple, independent causes, but of a single causal chain, involving the original State omission and the subsequent private act. This is to be distinguished from cases of cumulative causation: if the State’s conduct is a *conditio sine qua non* of the fact that another, subsequent cause could make its impact (even if State conduct is not the condition of the subsequent cause itself), the question is whether this latter cause is a superseding / intervening cause.⁶⁵¹

These cases of intervening or superseding causes are illustrated by these following charts:

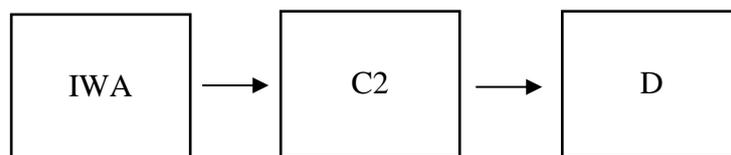


Figure 2: Intervening causation

Here the question is when C2 would break the causal chain between the internationally wrongful act and the damage. The answer lies in the applicable test of remoteness, and not in considerations of concurrent causation. The second variant is a bit more complicated:



⁶⁵⁰ *Trail Smelter case (United States v. Canada)*, 11 RIAA 1493 (1938), 11 RIAA 1493 (1938), 3 RIAA 1905.

⁶⁵¹ For an example, see *infra* the discussion of the *Hidrogradnja Claim*, in Section 5.2.

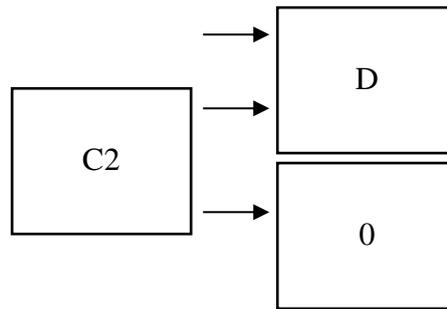


Figure 3: Intervening causation (reverse contributory causation)

In this case the internationally wrongful act could cause the damage on its own, but what happens instead is that the wrongful act, combined with a second cause results in the damage. The internationally wrongful act is a necessary and sufficient cause, while C2 is an unnecessary and insufficient, yet contributing cause. Here the question is whether C2 negates the causal chain, which, again, is a question of remoteness. The reverse situation, where the internationally wrongful act is a contributing, but unnecessary and insufficient cause, is a *genuine overdetermination* scenario (contributory causation, discussed below). These situations were examined under the heading of remoteness, since the question here is whether the second event *breaks* the causal connection between the original cause and the resulting loss.⁶⁵²

In some cases, this distinction is difficult to draw, because it will not be clear whether the second cause is causally related to the first one or not. It is possible that this second cause was itself concurrently caused by the wrongful act and another cause. For example, if an unlawful use of force by state A against state B causes damages to a foreign investor, because state B expropriated its assets following the conduct of state A, it can be difficult to determine whether state B's expropriatory act was itself the causal consequence of the unlawful use of force.

Furthermore, there may be an overtaking cause, precluding the completion of the original causal process and neutralizing the original cause (overtaking causation or pre-emptive causation). In this case the damage could have occurred in a hypothetical counterfactual

⁶⁵² See further Section 5.3.

universe due to another cause, but in the actual universe the alternative cause was pre-empted from making its impact.

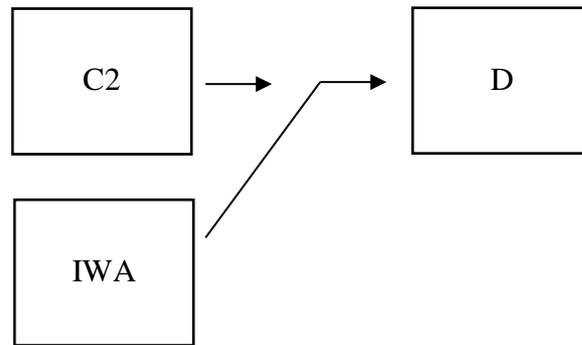


Figure 4: Overtaking causation / pre-emptive causation

A further important distinction is between cases of *complementary causation* (to use Stern’s formulation)⁶⁵³ and cases of *genuine concurrent causation*. Complementary causes are causes that result in an injury which is divisible, even though this might not be apparent at the outset. In such cases the problem is not one of causality, but one of the *divisibility of damage*. Their solution will come down to identifying and quantifying the distinct damages resulting from separate causes.

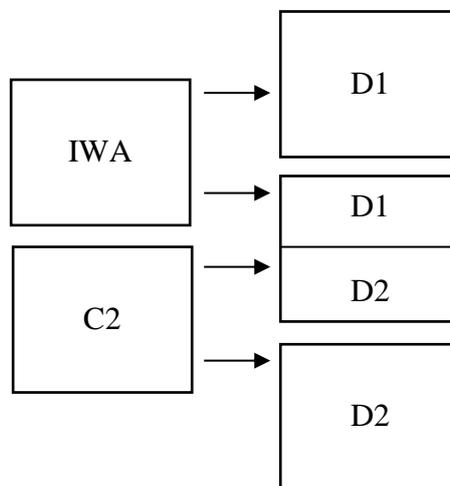


Figure 5: Complementary causation

In contrast, cases of genuine concurrent causation are difficult, because there is a single damage which we cannot attribute to a single cause. As Stern notes, there are two categories of genuine

⁶⁵³ Stern, at 281-292.

concurrent causation. The first is what she calls *parallel causation*, where each cause would have been able to produce the harm in isolation (so C1 causes D, C2 causes D, but the combined presence of C1 and C2 also result in D). The second variant is *cumulative causation*, where none of the causes could have produced the harm in isolation, but they combined effect could (so C1 causes nothing, C2 causes nothing, but the combined presence of C1 and C 2 results in D). Stern's conclusion in the early 70's was that international law treats these two types of causation differently, accepting liability *in solidum* for the latter, but not for the former. As she writes,

[l]a théorie de l'équivalences des conditions permet en cas d'intervention cumulative d'un acte illicite imputable à un Etat et d'un autre fait qui ne lui es pas imputable, de retenir comme seule cause juridique du dommage cause, l'acte illicite et de réclamer par consequent réparation de l'entier dommage à l'Etat en question.

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Accordingly, the “but for” test can resolve cumulative causes. We will return to their specifics later. Cumulative causes are called “contributory causes” in the seminal treatise by Hart and Honoré, whereas “parallel causes” are called additional causes.⁶⁵⁵ In this study we stick to Stern's terminology.

Crawford excludes parallel causes from the scope of concurrent causes, when he defines concurrent causes as follows: “Both are efficient causes of the injury, without which it would not have occurred.”⁶⁵⁶ The relevance of this distinction will be tested in light of the more recent developments of the case law.

⁶⁵⁴ *Id.*, at 297.

⁶⁵⁵ Hart – Honoré, at 205-206.

⁶⁵⁶ Third Report on State Responsibility by Mr James Crawford, *ILC Ybk* (2000) 342, para. 31.

The following charts demonstrate parallel causes and cumulative causes.

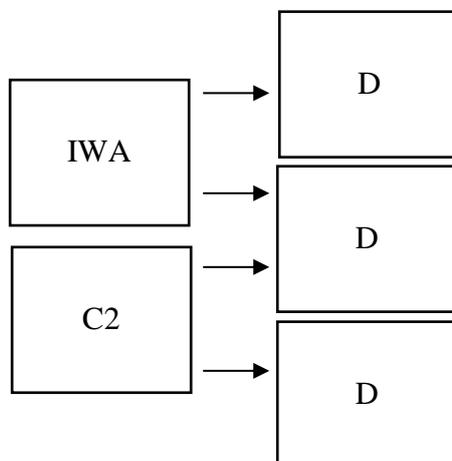


Figure 6: Parallel causation

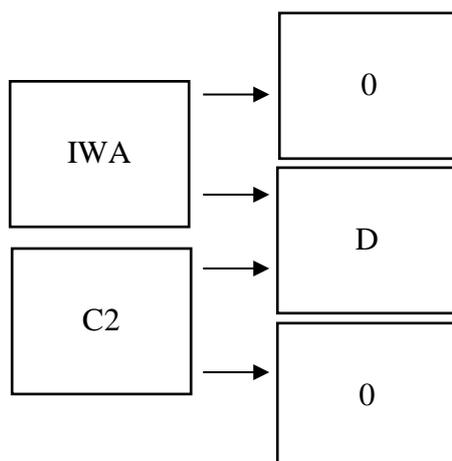


Figure 7: Cumulative causation

The distinction between genuine concurrent causation and complementary causation is not always an easy one. If C1 would cause D1, while C2 would cause D2 in isolation, and the combined effect of their impact (D3) is more than the sum of the isolated damages ($D3 > D1 + D2$), it could be debatable whether we speak of complementary causation or genuine concurrent causation. If it is a problem of complementary causation, the application of the but for test could eliminate the impact of the other cause. For example, if C1 was the internationally

wrongful act and C2 an external factor, the but for principle (enshrined in the *Chorzów* threshold of full reparation) means that the impact of C2 be eliminated to calculate what position the claimant would have been in but for the wrongful act, because D2 would have been caused anyway. The compensation then would be D3-D2. If, however, we treat the extra impact of the combined causes as a concurrently caused damage, then, at least as regards this additional margin, considerations of parallel causation should apply.

Lastly, we refer to the following example:

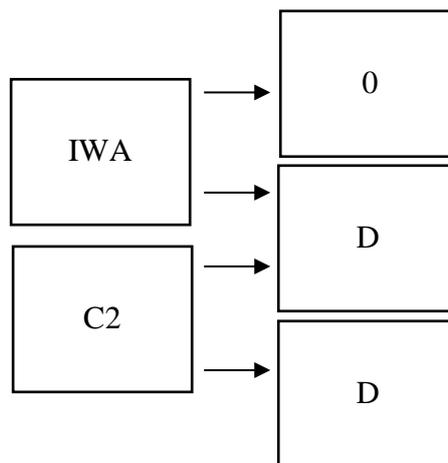


Figure 8: Contributory causation

Addressing this scenario, Stapleton notes that

[a]nother important class of factors that the but for test fails to identify, a class lawyers have tended to ignore, are those that are not only unnecessary but also insufficient for the occurrence of an injury but which in some sense made a contribution to the mechanism by which it occurred.⁶⁵⁷

If the internationally wrongful act is not a necessary condition of a damage, but it is still one of several contributing factors (which, in isolation, might be mere unnecessary contributing factors), the but for test breaks down. This is therefore a variant of genuine concurrent causality which this thesis labels “contributory causation”. An example would be a State’s contribution

⁶⁵⁷ J Stapleton, ‘Unnecessary Causes’, (2013) 129 *LQR* 39, at 42.

to some environmental harm, which would have happened anyway, even without the State's involvement.

For the sake of simplicity, the following expressions are used in the analysis hereunder:

- i. *parallel causation*: if the injury is caused simultaneously by several factors, each of which could have caused the injury in its entirety on its own, rendering the injury counterfactually independent from the internationally wrongful act.
- ii. *cumulative causation*: if the injury is caused by the combination of several factors, none of which could have caused the injury on its own, so that the injury remains counterfactually dependent on all factors.
- iii. *complementary causation*: if the injury is caused by the combination of several factors, each of which could have caused a part of the injury on its own.
- iv. *pre-emptive / overtaking causation*: if the injury is caused by a specific factor, but in a hypothetical counterfactual scenario another cause would have resulted in the same injury, had its effect not been pre-empted.
- v. *contributory causation*: if a factor is neither necessary, nor sufficient for the occurrence of the injury, but it nevertheless made a contribution to its occurrence and it could have theoretically caused the injury as a cumulative cause in a sufficient combination of causes.

The following survey and comparative analysis of the case law seeks answers to the following questions:

- i. How does (if at all) the case law determine whether a case of multiple causation is one of intervening causation (i.e., remoteness), complementary causation, parallel causation or pre-emptive causation? Do these categories explain how courts and tribunals deal with matters of causation?
- ii. What is the legal solution offered for cases of genuine concurrent causation? Is there a threshold test for awarding or rejecting compensation?

The next chapter on contribution to the injury and mitigation of losses will scrutinize how these

considerations apply in cases of contribution to the injury by the injured party.

2. Multiple causation – the traditional approach

The Second Report of Special Rapporteur Arangio-Ruiz discussed “concomitant causes” with the following introduction: “[I]njuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the unlawful act plays a decisive but not exclusive role.”⁶⁵⁸ Beyond this introductory sentence, Arangio-Ruiz did not distinguish between variants of concurrent causation. He quoted extensively the works of Salvioli, Eagleton, Gray, Hauriou, Stern and a few cases to describe the practice. His suggested solution was to isolate the damages caused by the wrongful act from other causes. The draft provision presented to the Commission was the following:

Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.⁶⁵⁹

Arangio-Ruiz treated contributory negligence as a variant of concomitant causation, a choice which the ILC later abandoned, as we shall see. Arangio-Ruiz’s suggestion to isolate the impact of the wrongful act is possible as long as the damage is divisible. Concerning situations where this exercise turns out to be difficult, he quotes Salvioli in a footnote: “*La difficulté dans la discrimination de la partie du dommage à attribuer à l’acte illicite ne pourrait autoriser le juge à repousser purement et simplement la réclamation du lésé.*”⁶⁶⁰ The sole authority cited here was the *Yuille, Shortridge and Co. Case*. This was a clear case of divisible damages.⁶⁶¹ The tribunal identified economic conditions, independent from the State conduct forming the basis of the claim, causing financial losses and isolated those losses from the rest of the

⁶⁵⁸ Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, *ILC Ybk* (1989)/II 1, para. 44.

⁶⁵⁹ *Id.*, at 56.

⁶⁶⁰ *Id.*, at 14, fn 87; G Salvioli, ‘La responsabilité des états et la fixation des dommages et intérêts par les tribunaux internationaux’, (1929) 28 *Recueil des Cours* 231, at 245-246.

⁶⁶¹ *Dispute between Great Britain and Portugal in the case of Yuille, Shortridge & Co.*, (1861) 29 RIAA 57. Cf A Hauriou, ‘Les dommages indirects dans les arbitrages internationaux’, (1924) 31 *RGDIP* 203, at 216.

damages. Beyond this quote, Arangio-Ruiz merely notes the discretion of the courts or tribunals.

Subsequently, Crawford suggested a different and ultimately prevailing approach. According to Crawford, the default rule is that the State is liable *in solidum* for concurrently caused indivisible damages, whereas divisible damages should be divided along the respective causal contributions. It is important to note that Crawford's definition of concurrent causes *excludes* parallel clauses. At the same time, he apparently considered only cumulative causation cases in making his proposal and failed to recognize the conceptual relationship between the question of remoteness and cumulative causation. Crawford's suggestion was accepted and appears in the Commentary. The ILC's approach to concurrent causation (and quoted with approval in principle by several international tribunals) is simple. Unless the State is able to demonstrate divisibility of harm, concurrent causes do not matter: "international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault."⁶⁶²

The ARSIWA Commentary invokes *Corfu Channel* as the decisive authority to support its position on concurrent causes.⁶⁶³ Plakokefalos describes the case as the "classic case of overdetermination".⁶⁶⁴ Yet *Corfu Channel* is not a case of overdetermination. To understand why, we have to revisit the charts comparing cumulative causation with parallel causation:

⁶⁶² ARSIWA Commentaries, at 93.

⁶⁶³ *Id.*

⁶⁶⁴ Plakokefalos, at 484.

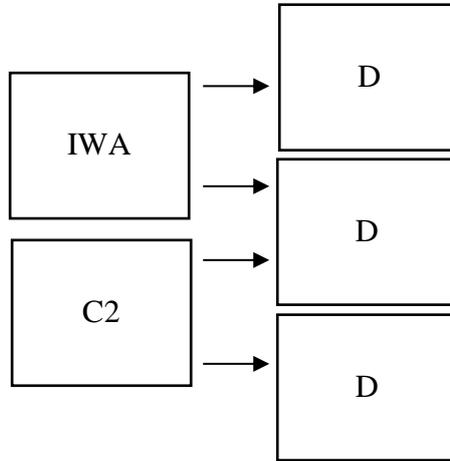


Figure 6: Parallel causation

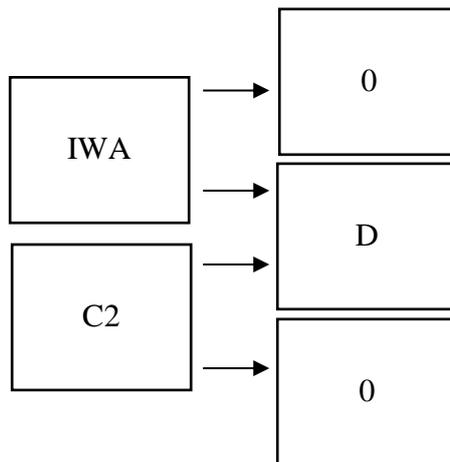


Figure 7: Cumulative causation

Overdetermination is illustrated by the Figure 6 on parallel causation. In such cases, the ‘but for’ test breaks down and an alternative theory of causation is therefore required. By contrast, in cases of cumulative causation, ‘but for’ does not break down. In *Corfu Channel* the first cause was the laying of the mines and the second was the failure to warn the ships. ‘But for’

either of these causes, the damage would not have happened. In Crawford's words, both were "efficient causes, of the injury, without which it would not have occurred."⁶⁶⁵

Crawford introduced *Corfu Channel* as an authority for concurrent causation scenarios in this Third Report.⁶⁶⁶ He starts the corresponding paragraph by defining concurrent causes as "cases (very frequent in practice) where two separate causes combine to produce the injury."⁶⁶⁷ This is correct. Crawford, however, goes then a step too far, because he fails to distinguish cumulative causes from parallel causes and disregards the intrinsic relationship between cumulative causes and the problem of remoteness.

Take the example of State C laying the mines in Albania's water. From State C's perspective, the eventual explosion of the mines is a causal consequence as long as the intermediate step in the causal sequence, Albania's failure to warn about the mines, does not break the causal chain. This is evidently a problem of remoteness, which we have already discussed. From Albania's perspective, its omission is a clear 'but for' condition of the explosion, which would in all likelihood meet any of the remoteness thresholds suggested in the case law. In *Corfu Channel* the only causal problem is whether Albania's conduct is a *novus actus* between the initial minelaying and the eventual explosion.⁶⁶⁸ This question was, regrettably, not before the Court, because State C's conduct did not form subject matter of the claim.⁶⁶⁹ In addition, *Corfu Channel* is a specific variant of cumulative causation. In *Corfu Channel* the second cause of the explosion presupposed the first. The omission to warn about the mines is not even conceivable without laying the mines in the first place. This puts into doubt the assumption that the concurrent causes in *Corfu Channel* were separate. They were in fact stages of the very same causal sequence.

This is equally true for the other leading authority cited in the Commentary, *Tehran Hostages*.

⁶⁶⁵ Third Report on State Responsibility by Mr James Crawford, *ILC Ybk* (2000) 342, para. 31.

⁶⁶⁶ *Corfu Channel case, Judgment of 9 April 1949*, ICJ Rep 1949, 4 (*Corfu Channel*).

⁶⁶⁷ Third Report on State Responsibility by Mr James Crawford, *ILC Ybk* (2000) 342, para. 31.

⁶⁶⁸ Which could have been determined under the generally applicable test of remoteness. See the illuminating discussion by Lanovoy, from the perspective of complicity: V Lanovoy, 'Complicity in an Internationally Wrongful Act' in A Nollkaemper – I Plakokefalos, *Shared Responsibility in International Law: an Appraisal of the State of Art* (2014) 134, at 164-167. Cf P d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (2014) 208, at 225-226.

⁶⁶⁹ *Corfu Channel*, at 15-16.

As the Commentary stresses, “the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.”⁶⁷⁰ However, the “failure to protect” and the detention fall, again, within the same causal sequence and not separate ones. It is the “failure to protect” that enables the captors to keep the hostages under detention and this results eventually in the detention.

Stern’s work could have served as a useful guide for the Commission. She distinguished between *parallel causes*, *complementary causes* and *cumulative causes*. Stern took an inductive standpoint and distilled abstract principles from the solutions offered by the case law preceding her work.⁶⁷¹ As regards cumulative causes and complementary causes, her conclusions are in line with Crawford’s and, accordingly, the eventual position of the International Law Commission. We see no reason to disagree with her understanding of the case law, beyond noting that, much like Crawford, she ignored the relationship between remoteness and cumulative causation.

Unlike the ARSIWA commentary, she took into consideration parallel causes too and avoided the mistake of conflating it with other issues of multiple causation. Based on the case law, she concludes that international law, unlike many domestic legal systems, does not recognize liability in such cases.⁶⁷² This is the only aspect of her analysis which suffers from conceptual mistakes.

Stern’s analysis confuses “parallel causes” with a number of other, logically different problems. *First*, she cites mere applications of the ‘but for’ test apparently not raising any issues of parallel causation, as if they were useful to formulate conclusions on parallel causation. *Second*, she cites cases where the alternative cause arguably already caused damages by the time the wrongful conduct could make its impact. Such cases could be, depending on the circumstances, examples of pre-emptive causation (or overtaking causation) or simple cases applying the but for test.

Stern’s foremost authority on parallel causes is the *Naulilaa Case*, already discussed in Chapter

⁶⁷⁰ ARSIWA Commentaries, at 93; *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Rep 1980, 3, at 31–33.

⁶⁷¹ Stern, at 265–297.

⁶⁷² *Id.*, at 280.

IV.⁶⁷³ In particular, she discusses the claims for particular expenses which the tribunal held to be non-compensable, because they would have been incurred but for the wrongful act of Germany too. For instance, Portugal claimed compensation for an expedition allegedly necessary as a result of Germany's wrongful act, but the evidence revealed that the expedition was decided before Germany committed the act. Stern describes this as a case of parallel causation, along with a few similar cases. This is not a case of parallel causation, but a mere application of the 'but for' test. It would have been a parallel causation case only if it was apparent that the German wrongful conduct would have been, on its own, a sufficient cause, even assuming away the occurrence of the alternative parallel cause (the previous decision on the expedition). It was not so. The arbitral tribunal expressly identified the other, previous cause as *the* cause of the expedition and nothing indicates that it considered Germany's wrongful conduct as an unnecessary, but hypothetically sufficient cause.⁶⁷⁴

Similarly, the *Guillemot-Jacquemin Case* of the France-Italy Conciliation Commission cited in support of Stern's thesis is a simple example of the *conditio sine qua non* test, not parallel causation. In this case, compensation was claimed for the actions of a sequester appointed by Italy during World War II.⁶⁷⁵ The Commission rejected the claim, because the situation complained of was the result of generally applicable Italian legislation and *not* the actions of the sequester. Again, there appears to be no indication that the Commission went beyond the application of the but for test and the construction of a counterfactual scenario.

Stern's reference to the *Carnabatu Case* raises a different problem. In *Carnabatu* a claim for loss of profits following a requisition was rejected, because the good taken would not have produced profits anyway due to the prevailing state of war.⁶⁷⁶ Again, this is arguably not a case of parallel causation, but of pre-emptive causation. The question in this type of situation is how one identifies the exact point in time when the damage occurs. If the state of war had destroyed the prospects of the company before the requisition happened, the latter could not have caused any additional damage. Conversely, if the state of war had triggered a causal link hypothetically resulting in the loss of profits *in the future*, but the requisition occurs before such a future

⁶⁷³ *Id.*, at 278-280.

⁶⁷⁴ *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). Portugal contre Allemagne*, (1930) 2 RIAA 1035, at 1070-1071.

⁶⁷⁵ *Différend Guillemot-Jacquemin*, (1949) 13 RIAA 62.

⁶⁷⁶ *Carnabatu*, 5 TAM 228; Cf A Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', (2002) 13 EJIL 162, at 175-176.

becomes a reality, the latter could be regarded to have pre-empted the causal consequence of the state of war. Lastly, if it could be demonstrated that the causal consequence of the state of war and the requisition make its impact simultaneously, without one pre-empting the other, but at the same time both being sufficient on their own to cause the entirety of the harm, the case is one of parallel causation. Stern did not contemplate these possibilities and the decision in *Carnabatu* leaves the correct understanding open to doubt. To sum up, the claim that parallel causes exclude an entitlement to remedies is, at best, doubtful.

Having reviewed the sparse doctrine on multiple causation, the rest of this chapter surveys more recent case law in search of solutions.

3. Multiple causes in international investment law

3.1 Complementary causation and divisible injuries

As noted above, what distinguishes genuine concurrent causation from complementary causation is the indivisibility of the damage. This is where international investment law presents typically the following analytical problem. In investment disputes damages are usually expressed as a decrease in the value of the investment.⁶⁷⁷ Although there are cases where physical assets are taken or destroyed, most frequently the damage equals to loss of value. Given this approach, it is hardly conceivable that the very *same* loss is caused by different causal factors. All the causes will result in their respective reduction of the value of the investment.

A prominent example is *Duke Energy v Ecuador*. In *Duke Energy*, the Claimant's submission did not distinguish between three causes contributing to the decrease of the return of its investment. Only one cause was held to be a wrongful act and the Tribunal rejected the claims for the rest either on the merits or due to the lack of jurisdiction. The Tribunal considered it to be the Claimant's burden to demonstrate the extent of causal contributions to the decreases in

⁶⁷⁷ S Ripinsky – K Williams, *Damages in International Investment Law* (2008), at 182.

the realized rate of return.⁶⁷⁸ Similar reasons resulted in the rejection of the investor's claim in *Rompetrol v Romania*⁶⁷⁹ and *GAMI Investments v Mexico*.⁶⁸⁰

Under the ILC's approach it is the Respondent's burden to demonstrate that, *first*, the harm is divisible and, *second*, that a divisible part is due to other factors.⁶⁸¹ What is the explanation for the opposite approach in these disputes? The answer is that these cases are not genuine cases of concurrent causation. If cause A decreases the value of the shareholding by X and cause B decreases the same value by Y, it cannot be said that A and B are concurrent causes of X plus Y. It is simply that multiple causal chains result in respective loss of values.

In *Duke Energy v Ecuador*, *GAMI Investments v Mexico* and *Rompetrol v Romania*, the tribunals reached the correct decision. While under the ARSIWA commentary it is the Respondent's burden to demonstrate that a harm is divisible, in the first place it is the Claimant's responsibility to precisely identify the harm and the causal nexus. To quote the Tribunal in *GAMI Investments v Mexico*, "the prejudice must be particularised and quantified."⁶⁸²

One way to do so was amply demonstrated in *Guarachi v Bolivia*, where the parties disagreed on the reasons of the investor's liquidity problems already before the nationalization took place. The Tribunal concluded that it was impossible to attribute these issues to one or the other reason. The way the Tribunal solved the problem is that it factored the liquidity problem into its application of the hypothetical willing buyer test at the quantum stage, by considering that such a buyer would have required an extra risk premium to buy the assets.⁶⁸³

⁶⁷⁸ *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, paras. 479-480.

⁶⁷⁹ *The Rompetrol Group N.V. v Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013, para. 288.

⁶⁸⁰ *Gami Investments, Inc. v The Government of the United Mexican States*, UNCITRAL, Final Award of 15 November 2004, para. 85.

⁶⁸¹ ARSIWA Commentaries, commentary to Article 31, para. 12.

⁶⁸² *GAMI Investments v Mexico*, para. 85.

⁶⁸³ *Guaracachi America, Inc. and Rurelec PLC v The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award of 31 January 2014, paras. 566, 602.

3.2 Cumulative causation and remoteness

AAPL v Sri Lanka is helpful to distinguish remoteness from concurrent causation. The case concerned the destruction of the investor's farm during a counter-insurgency operation by Sri Lankan authorities. The Tribunal expressly noted the lack of evidence on the actual circumstances of the farm's destruction.⁶⁸⁴ It resolved the matter by holding that in any event the authorities were in control of the farm's location when the destruction occurred and they should have been able to prevent it.⁶⁸⁵ Arbitrator Asante dissented and concluded that

the Respondent is being held accountable even if the damage [...] was inflicted by the insurgents or indeed by a third party. Such a doctrine of causation is unwarranted. It seems illogical to hold a government responsible because third parties have taken advantage of the occasion of the Government's legitimate operation to commit unlawful acts.⁶⁸⁶

AAPL v Sri Lanka is a situation of *novus actus*. The question before the Tribunal should have been whether the causal chain triggered by the State's failure to protect the assets of the investor *was broken* by acts of any insurgent action. As a matter of final outcome the majority of the Tribunal got it right: the fact that there were several actors in the causal chain resulting in the destruction of the investment *per se* should not necessarily exclude the responsibility of the State for the damages *in toto*. Still, the Tribunal conducted a superficial causal inquiry. The fact that State authorities are in control of an investment and the fact that they fail to provide adequate protection to the investment does not necessarily mean that whoever "have taken advantage" of the situation could not have broken the causal chain. It is impossible to ascertain it without clarifying the factual details. After all, *AAPL v Sri Lanka* stands for a presumption of causality in cases when the State's failure to protect an asset contributes to the destruction of that asset. The same considerations apply to the *Wena Hotels v Egypt* case.⁶⁸⁷ Wittich

⁶⁸⁴ *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 2009, para. 85.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante of 15 June 1990, para. V(5).

⁶⁸⁷ *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000.

mentions these cases as examples of multiple tortfeasors,⁶⁸⁸ but they are better viewed as illustrations of the problem of remoteness.

In *Micula v Romania* the relationship between multiple causation and remoteness was further clarified. Purportedly applying the ILC's framework on concurrent causation, the Tribunal set out the governing principles as follows: "an intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote."⁶⁸⁹

Scenario (i) refers to complementary causation. If an "intervening event" is a complementary cause, so that the injury itself is divisible, the liability does not extend to the part caused by the "intervening event". Scenario (ii) refers to "intervening causes" disrupting the chain of causation between the damages.

The findings of the *Micula* tribunal are highly relevant, because, as far as the present author is aware, they are the first to clarify that *remoteness* and *cumulative causation* are intertwined concepts. If the State conduct is a necessary, but not sufficient cause, and it is followed by another, necessary cause, the question is whether the subsequent cause *breaks* the causal chain and becomes an exclusive cause. This question is to be answered by whatever remoteness test the tribunal seems fit to apply. Further, it follows *a contrario* from the pronouncements of the Tribunal that if the damages are not divisible and the intervening event does not disrupt the chain of causation, the liability of the State is not reduced or affected: cumulative, contributory and parallel causes trigger the duty to provide reparation. Regrettably, the Tribunal did not make its own contribution to the issue of remoteness, and it did not specify what characteristics an intervening event shall meet so that it breaks a chain of causation between conduct and injury.

The *Micula* problem is the reverse of the *Corfu Channel* scenario, where the wrongful act was the subsequent necessary cause of the harm. To recall, in *Corfu Channel*, from the perspective of the "unknown minelayer", the question would have been whether Albania's conduct was a *novus actus*. This is exactly the situation the *Micula* tribunal addressed.

⁶⁸⁸ S Wittich, 'Joint Tortfeasors in Investment Law', in C Binder *et al.* (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (2009) 708, 713.

⁶⁸⁹ *Micula v Romania*, para. 926.

Some recent investment disputes raised the question whether a State's decision in implementing EU policies or decisions of the European Commission is a cause of the damages suffered by the investor as a result. To frame it in the language of intervening causes, the question is whether the State's conduct breaks the causal chain between the EU's conduct and the damages. The tribunals in *Electrabel v Hungary*⁶⁹⁰ and *EDF v Hungary*⁶⁹¹ came to similar conclusions. The cases concerned Hungary's termination of long-term power purchase contracts, which the Commission declared to constitute illegal State aid. They held that if Hungary is required to implement such decisions, the implementation *per se* does not render it liable. However, in as much as EU law would have enabled Hungary to provide compensation for such damages, but it failed to provide such compensation, Hungary could be liable.⁶⁹² What these decisions leave open is how Hungary's action could have affected the liability of the EU (assuming *arguendo* that the EU committed a wrongful act).

3.3 Parallel causation

A stark contrast to the sophisticated take on multiple causation by the *Micula* Tribunal is *El Paso v Argentina*. One of the disputed points in *El Paso v Argentina* was whether investor's decision to sell its shares in the investment was the result of Argentina's conduct, general economic conditions or merely the investor's own business decision. Argentina argued that the investor's divestment amounted to contributory negligence, because subsequently the investor would have been able to obtain a better price for its assets.

A preliminary point to decide was whether the divestment decision itself was a causal consequence of the State's act, general economic conditions or something else. The Tribunal concluded that several reasons resulted in the divestment decision, but the Argentinian

⁶⁹⁰ *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012.

⁶⁹¹ *EDF International S.A. v Hungary*, UNCITRAL, Award of 4 December 2014 (Award not public at the date of writing, but see the article on IAREporter, 'Intra-EU treaty claims controversy: new decisions and developments in claims brought by EU investors vs. Spain and Hungary' (24 December 2014)).

⁶⁹² *Electrabel v Hungary*, paras. 6.70-6.118.

measures were the “prevailing causes” and “contributory causes”.⁶⁹³ The Tribunal arrived at this conclusion notwithstanding that the investor’s reports provided to US authorities did not specify the State measures as a reason of restructuring and that a global restructuring of the company took place in parallel.⁶⁹⁴ A comparison with other industry actors was important for the Tribunal and their business patterns showed similar reaction to the State measures in question.⁶⁹⁵

The Tribunal asserted that the fact that “no direct automatic link is recognized” should have an impact on the valuation of the damages.⁶⁹⁶ This approach has no basis in the law of State responsibility as codified by the ILC. For the purposes of full reparation what matters is whether there *was* a causal connection. The direct or transitive nature of the causal link should not influence quantification.

This is the approach the Tribunal eventually followed at the quantum stage. It confirmed that the damages estimates by the Claimant can isolate the causation by the State from other causal factors and satisfied itself that in both the actual and but for scenarios the valuation took into consideration the external causes of value loss.⁶⁹⁷ The Tribunal did not follow the correct approach, because it failed to recognize that the divestment decision is *not* a divisible injury and thus, a conventional but for inquiry is unhelpful. *El Paso* was thus a classic overdetermination problem, where but for causation could not help to determine the *conditio sine qua non* of a divestment decision.

In such cases, the construction of the but for analysis should assume away *all* of the concurrent causes. If the divestment was concurrently caused by the wrongful act of the State and other factors, the but for question should not be what would have been the share price in the absence of the wrongful conduct. This hypothetical assumes that the share price would have been relevant, which is not the case in the absence of a divestment. The correct question is what would have been the damage in the absence of the divestment, because the divestment itself is not a divisible event. This was never done.

⁶⁹³ *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, paras. 280, 509, 687.

⁶⁹⁴ *Id.*, paras. 504-505.

⁶⁹⁵ *Id.*, para. 506.

⁶⁹⁶ *Id.*, para. 279.

⁶⁹⁷ *Id.*, para. 686

El Paso v Argentina has another notable aspect. Certain investment treaty rules, such as the standards of expropriation, imply a causal inquiry in order to assess whether a *breach* took place in the first place. The question posed in the previous chapter was whether different standards of causation govern a *breach* than *compensation*. *El Paso v Argentina* confirms that it is the case. The Tribunal rejected *El Paso*'s expropriation claim in light of the factual circumstances outlined above. Since the divestment decision had multiple causes, expropriation was excluded.⁶⁹⁸ This suggests that expropriation is not possible by concurrently causing the loss of the investment, even if the prevailing cause of such a loss is the wrongful conduct of the State.

Argentina initiated annulment proceedings in which it noted the inconsistency of the “sole cause” test and the “prevailing cause” test applied for distinct treaty standards, but this argument was insufficient for the *ad hoc* Committee. Notably, while the Committee did not reject the claim of inconsistency, it noted that inconsistency, even if established, was not necessarily a reason for annulment.⁶⁹⁹ A very similar problem arose in *National Grid v Argentina*, which is discussed below in the context of contribution to the injury.

4. Multiple causes in international human rights law

4.1 Complementary causation and divisible injuries

In *Ilașcu and others v Moldova and Russia* the ECtHR apportioned liability between Moldova and Russia without any considerations of causation, deciding on an “equitable basis”. The case arose out of human rights violations committed in the territory of Transnistria. The claimants initiated proceedings against Moldova and Russia simultaneously. Although the Moldovan government did not have control over Transnistria, its positive obligations to ensure human

⁶⁹⁸ *Id.*, paras. 278-279.

⁶⁹⁹ *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 22 September 2014, paras. 60-61, 167-173.

rights protection extended to even this part of its territory.⁷⁰⁰ At the same time, Russia's "control" over the Transnistrian authorities triggered its responsibility for the human rights breaches. Having held both States responsible, the Court did not isolate their respective causal contributions to the pecuniary losses and made an equitable determination, allocating a smaller portion of the ensuing liability to Moldova and a larger share to Russia.⁷⁰¹

Lanovoy views this case as an example of "oscillating" jurisprudence between apportioning liabilities and *in solidum* liability in international law. In particular, he contrasts the findings of the Court with *Corfu Channel* to point out the inconsistency in practice.⁷⁰² However, *Ilașcu* and *Corfu Channel* can be distinguished. In *Corfu Channel* the injury was plainly indivisible. The explosion of the mines was the discrete and specific consequence of the minelaying and Albania's failure to prevent the explosion by at least warning the ships approaching the mines.

The divisibility of losses in *Ilașcu* is not a straightforward issue. The monetary compensation claim was for loss of income, which, as such, is not necessarily indivisible. Isolating the causal impact of a "failure to prevent" from the causal impact of the direct abuses would have been certainly difficult. At the same time, it is reasonable to assume that Moldova could have eased at least partially the financial difficulties of the victims by discharging its positive obligations. The Court did not speculate on such a hypothetical and decided on an equitable basis, but such a hypothetical could have been possible.

The divisibility of damages is recognized in the practice of the Court also in the context of contributory conduct by the appellant, as further discussed below.⁷⁰³

⁷⁰⁰ *Ilașcu and others v Moldova and Russia*, ECtHR, Judgment (Merits and Just Satisfaction) of 8 July 2004, paras. 336-352.

⁷⁰¹ *Id.*, at para. 489, dispositive part of the Judgment, paras. 20-21.

⁷⁰² V Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016), at 152-153.

⁷⁰³ See Section 9 below.

4.2 Cumulative causation and remoteness

Kellner and Durant refer to *Mascolo v Italy* to argue that the principle of concurrent causality is rejected in the practice of the Court. They describe this case as an authority supporting the contention that only *exclusive* causes result in liability for damages.⁷⁰⁴ The case was one in the series of disputes arising out of the failure of Italian authorities to evict tenants from properties, notwithstanding the issuance of eviction orders. Departing from its previous judgments, the Court held that the State breached the right to the enjoyment of property, but the main cause of the applicant's inability to gain possession of its property was the conduct of the tenant and not of the State.⁷⁰⁵

This is not a case of multiple causation, but a textbook example of a remoteness problem. The question here is whether the tenant's conduct interrupts the causal link between the State omission and the damages caused. This was the way Judge Spielmann and Judge Loucaïdes approached the problem in their dissent in the similar case of *Lo Tofu v Italy*.⁷⁰⁶ Their criticism highlights that the State's omission was *procedural* and *subsequent* to the tenant's conduct, which was decisive for the majority to reject the existence of the causal connection. In response, they write that the tenant's conduct was *subsequent* to the State's inactivity. It is hard to understand why this temporal aspect should be the primary concern. What is in any event clear is that there was a causal connection not only between the State conduct and the damage, but between the State conduct *and* the tenant's conduct. Thus, the case does not reveal much about concurrent causation, only about what the Court treats as an intervening cause.⁷⁰⁷ It is not even a case of cumulative causation, because the tenant's conduct in its entirety is a causal consequence of the State act.

The approach of the Inter-American Court of Human Rights in cases of cumulative causation is observable, for instance, in disappearance cases where the disappearance itself preceded the State's acceptance of the Court's jurisdiction. In such cases the State's subsequent failure

⁷⁰⁴ Kellner – Durant, at 471.

⁷⁰⁵ *Mascolo v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 16 December 2004.

⁷⁰⁶ *Lo Tufu v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 21 April 2004.

⁷⁰⁷ On a further note, it appears that the Court merely applied Article 41 of ECHR, confirming that domestic law provided adequate means of redress to claim compensation for whatever damage is caused by the tenant.

(within the jurisdiction of the Court) and the original disappearance are concurrent causes of the moral damages suffered by the victim's relatives. In the *Case of the Serrano-Cruz Sisters v El Salvador*, the Court considered that the failure to investigate the disappearances (irrespective of whomever was responsible for those and irrespective of the question whether an investigation would have been successful) "prevented the emotional recovery of the next of kin and caused all of them non-pecuniary damage."⁷⁰⁸ In the context of pecuniary damages, the Court emphasized that it cannot rule on the consequences of alleged violations preceding the acceptance of its jurisdiction, yet it awarded compensation to cover the expenditures of "the medicines and care needed to treat the damage to the physical and psychological health of the victims' next of kin."⁷⁰⁹

4.3 Contributory causation

Finogenov v Russia was a case where the extent of the State's contribution to the ultimate damages could not be determined exactly.⁷¹⁰ A non-pecuniary damages claim was submitted to claim compensation for an improperly planned hostage rescue operation. It was clear that the hostage situation was not attributable to the State at the outset. It was, however, equally clear that the improper planning of the rescue operation resulted in damages. The Court found that the State contributed to these injuries, without the need to specify for each and every hostage or victim the extent of such a contribution. In the words of the judgment "[i]t is not possible [...] to establish an individual story for each deceased hostage: where he or she was sitting when the operation began, how seriously he or she was affected by [...] "concomitant factors."⁷¹¹

The Court follows a similar logic in claims concerning diseases caused by pollution. In *Fadeyeva v Russia* and *Ledyayeva and others v Russia* the Court stressed that deterioration of

⁷⁰⁸ *Case of the Serrano-Cruz Sisters v El Salvador*, IACtHR, Judgment (Merits, Reparations and Costs) of March 1, 2005, para. 158.

⁷⁰⁹ *Id.*, para. 152. The same approach is followed in the *Case of the Moiwana Community v Suriname*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of June 15, 2005.

⁷¹⁰ *Finogenov and Others v Russia*, ECtHR, Judgment (Merits and Just Satisfaction) of 20 December 2011.

⁷¹¹ *Id.*, para. 263.

the applicants' health was due to several factors, but the pollution forming the subject matter of the claim was one of them. There was no need to precisely quantify or even examine the hypothetical level of health deterioration in the absence of the pollution.⁷¹² It was sufficient that the pollution contributed to the vulnerability and exposure of the applicants to health risks. The same principle supports the Court's solution in cases concerning health deterioration caused simultaneously by several factors, including State conduct while in detention.⁷¹³

On the other hand, the Court employs a visible threshold which the "contribution" has to reach. A good example from the case law is *Campbell and Cosans v UK*. The case concerned, among other issues, the suspension of a student from school in breach of Convention guarantees. A claim for pecuniary compensation was put forward for loss of revenues resulting from insufficient schooling. The Court, in rejecting the claim, pointed out that even in the absence of the suspension, in light of the prevailing economic conditions, the prospect of the student completing high level studies could have been limited. To recall *verbatim* the Court's ruling:

[I]t has to be recognised that in the current economic situation even many of those who have completed their education and training experience problems in finding employment. The Court therefore concludes that, whilst the suspension may well have contributed to the material difficulties which Jeffrey encountered, it cannot be regarded as the principal cause thereof.⁷¹⁴

The Court insists that the internationally wrongful act is the main or the "principal cause" of the damage. This is also confirmed by the language of the Court's decisions in *Khodorkovsky and Lebedev v Russia*, where the Court concluded that notwithstanding a number of wrongful actions against the claimant, the primary cause of his losses was not the wrongful conduct of the State.⁷¹⁵

In *Scavuzzo Hagar v Switzerland* the question was whether the conduct of police officers while arresting a person under heavy drug influence was causative of the subsequent death of the

⁷¹² *Fadeyeva v Russian Federation*, ECtHR, Judgment (Merits and Just Satisfaction) of 9 June 2005, para. 88; *Ledyeva, Dobrokhotova, Zolotaryeva & Romashina v Russian Federation*, ECtHR, Judgment (Merits and Just Satisfaction) of 26 September 2006, para. 95.

⁷¹³ *Bitiyeva and others v Russia*, ECtHR, Judgment (Merits and Just Satisfaction) of 21 June 2007, para. 99; *Farbtuhs v Latvia*, ECtHR, Judgment (Merits and Just Satisfaction) 2 December 2004.

⁷¹⁴ *Campbell and Cosans v UK*, ECtHR, Judgment (Just Satisfaction) of 22 March 1983, para. 26. On this case see further D Shelton, *Remedies in International Human Rights Law* (2015), at 361.

⁷¹⁵ *Khodorkovsky and Lebedev v Russia*, ECtHR, Judgment (Merits and Just Satisfaction) of 25 July 2013, para. 940.

person. The Court held that the fact that the contribution of the police officers merely worsened or accelerated the situation of person was immaterial.⁷¹⁶ The Court found no breach by the police officers, because they were not required to realize the special vulnerability of the arrested person. Had they done so, however, their conduct, merely ‘worsening’ the situation would have been sufficient to trigger the liability of the State. The same principles were adopted in *Saoud v France*, where the arrested victim suffered from certain preexisting health issues.⁷¹⁷

In *Perozo v Venezuela* the IACtHR examined whether statements by public officials amounted to the breach of the State’s preventive obligations in light of later wrongs committed by private individuals. While the IACtHR expressly admitted that there is no reason to conclude that but for these statements the actions would not have taken place, the fact that such statements *contributed* to the exaggeration of hostilities was sufficient to establish the illegality of State conduct.⁷¹⁸ The Court did not find it necessary to examine whether in the absence of such statements the concrete actions would have taken place. However, the IACtHR did not award any compensation, it merely ordered effective investigation of the resulting incidents.

The flexibility of the IACtHR in addressing cases of multiple causation results also from its generous approach to attribution. Chapter I discussed the Court’s *lex specialis* test of attribution, by attributing private conduct *caused* by State conduct to the State.⁷¹⁹ For the present purposes suffice it to say that the Court finds attribution even if the State conduct was not the sole cause, but merely a contributing cause of a private conduct. In the *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis)* the Court had to determine whether the displacement of local communities was caused by the operation of State troops, paramilitary troops or other factors. The Court concluded that the cause must have been the activity of paramilitary units in the region. Given that there was evidence suggesting some collaboration and cooperation between these units and State troops, the Court was satisfied that the *cause* of the displacement was attributable to the State. In

⁷¹⁶ *Scavuzzo-Hager and others v Switzerland*, ECtHR, Judgment (Merits and Just Satisfaction) of 7 February 2006, paras. 53-69.

⁷¹⁷ *Saoud v France*, ECtHR, Judgment (Merits and Just Satisfaction) of 9 October 2007.

⁷¹⁸ *Case of Perozo et al. v Venezuela*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of January 28, 2009, para. 160.

⁷¹⁹ See Chapter I, section 3.

essence, by accepting a test of contribution for the purposes of attribution, the Court arrived at the same result it would have reached with a flexible multiple causation test.⁷²⁰

4.4 Pre-emptive causation

The *Hirsi Jamaa* incident was an example of a pre-emptive or overtaking causes. The Court was unreceptive to Italy's argument that saving refugees at the high seas and then wrongfully expelling them could not have caused them any damage, because they would have suffered far more serious consequences, even without Italy's intervention.⁷²¹ This hypothetical alternative was pre-empted by Italy intercepting the refugees at the sea. The Court does not engage in any substantive discussion of this argument, but it is plausible to respond to Italy's argument not only by invoking a principle of pre-emptive causes, but by pointing out that the *counterfactual* of Italy's wrongful act was not that the refugees are left helpless at sea, but that Italy helped them.

4.5 Parallel causation

The notorious series of cases arising out of the situation in Northern Cyprus confirms that the Court disregards additional possible causes when determining a causal connection between damages and wrongful conduct. In *Loizidou v Turkey* the dissent of Judge Bernhardt reveals that Turkey's conduct was only one "important factor" in a series of events preventing the claimant to exercise her rights, yet Turkey was held liable *in toto*.⁷²² Bernhardt writes that another factor not considered relevant by the Court was "the existence of the factual border, protected by forces under United Nations command, which makes it impossible for Greek

⁷²⁰ *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis)*, IACtHR, Judgment (Preliminary Objections, Merits, Reparations and Costs) of November 2013, para. 280.

⁷²¹ *Hirsi Jamaa and Others v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 23 February 2012, para. 214.

⁷²² *Loizidou v Turkey*, Dissenting Opinion of Judge Bernhardt Joined by Judge Lopes Rocha.

Cypriots to visit and to stay in their homes and on their property in the northern part of the island.”⁷²³ The extent to which Turkey actually submitted the same argument before the Court is not clear, because the judgment on preliminary objections provides that “it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.”⁷²⁴

5. Multiple causes in mass claims practice

5.1 Iran-US Claims Tribunal

Similar to the practice of investment tribunals, *complementary causation* is distinguished in the practice of the Tribunal. Awards isolated the impact of the State measure from damages resulting from external factors. A particularly difficult problem in this respect was the question whether the losses resulted from the generally turbulent conditions following the Iranian revolution or from specific State measures.

The Tribunal’s valuation of companies distinguished between these impacts. In *Saghi*, the Tribunal held, applying the “hypothetical willing buyer” test, that potential buyers of an asset would have taken into consideration the prevailing conditions in Iran following the revolution. In the particular case, this meant that the company had lost a significant part of its value due to the revolution by the time the State interfered.⁷²⁵ The extent of the State’s liability was restricted to the rest.⁷²⁶

This approach led to the rejection of the claim for compensation in *CBS*.⁷²⁷ The Tribunal found that following the revolution the company could not have been expected to maintain its value.

⁷²³ *Id.*

⁷²⁴ *Loizidou v Turkey* (preliminary objections), para. 63.

⁷²⁵ *James M. Saghi, Michael R. Saghi, and Allan J. Saghi v Iran*, Award, IUSCT Case No. 298 (544-298-2), 22 January 1993, para. 100.

⁷²⁶ See further *Thomas Earl Payne v Iran*, Award, IUSCT Case No. 335 (245-335-2), 8 August 1986, paras. 35-36; *Sola Tiles v Iran*, Award, IUSCT Case No. 317 (298-317-1), 22 April 1987, paras. 63-64.

⁷²⁷ *CBS Inc v Iran et al*, Award, IUSCT Case No. 197 (486-197-2), 28 June 1990.

The company was facing difficulties already before the revolution, but its engagement in the “Western music” business eliminated any prospect of an eventually profitable activity in Iran. Thus, the Tribunal held that “on the date of a possible taking, the CBS Iranian Companies had no value, and that therefore the Tribunal need not determine whether or when they were taken by the Respondents.”⁷²⁸

If the impact of the Iranian revolution (and additional factors) effectively destroyed the value of the company by the time the State measures took place, the State measures could not have aggravated the damages suffered. However, in contrast to *Saghi*, a case of complementary causation, *CBS* presents the question how to distinguish cases of genuine concurrent causation from pre-emptive causation, because each of the causal factors could have destroyed the company on their own. Are these factors parallel causes or is the taking a pre-emptive cause, breaking the causal chain between the revolution and the losses? The question posed by *CBS* is reminiscent of the problem in *Carnabatu*. Stern considered this a simple variant of parallel causation, which is not the case.

The classic textbook example from domestic tort law is the following: a victim consumes poison, subsequent to which the victim is killed by someone else, before the deadly poison could make its impact. Domestic legal systems provide diverse solutions to this problem, but the majority of them treats the second cause as the intervening and pre-emptive cause.⁷²⁹ The answer depends on the identification of the point in time when a damage is supposed to have materialized. It is arguable that the act of poisoning already completes the “tort”, so that the first actor should be held liable and the subsequent causative intervention should not exonerate the first actor. On the other hand, most legal systems treat the poisoning act as an “incomplete” scenario of causation, thus the subsequent intervention interrupts the causal chain. What is striking, however, is that both answers reject the idea that the poisoning example is one of genuine concurrent causality, because the two causative interventions are clearly separated in time and there is only one prevailing causal process.

This aspect of temporality makes the issue particularly intricate from the perspective of asset valuation. Depending on the valuation method of the Tribunal, different considerations should apply. If the company is valued based on its future prospects (for example by applying a DCF

⁷²⁸ *Id.*, para. 53.

⁷²⁹ J Spier (ed), *Unification of Tort Law: Causation* (2000), at 128-129.

methodology), future income (or the lack thereof) is discounted back to assess whether the company had any value.⁷³⁰ Taking such an approach in *CBS*, it was held that the extraneous factors, including the Iranian revolution, destroyed the value of CBS before the taking took place. In contrast, if an asset is valued on the basis of its book value, the taking could be held to have interrupted the causal chain otherwise resulting in identical damages in the long run. At the same time, the absence of future prospects *itself* could necessitate a net asset value approach, which would then result in the second solution. The revolution extinguished the profitability, but it did not necessarily destroy the net asset value, so that the subsequent taking is a supervening cause. To put it briefly, the solution depends on how one defines the damage and its quantification.

The other recurring issue in the practice of the Iran-US Claims Tribunal was the problem of constructive expulsion.⁷³¹ Constructive expulsion occurs when, without adopting a formal measure,

the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and [...] behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility.⁷³²

These cases are all genuine concurrent causality cases, because the question they pose is whether the departure of a foreign national from a State, which is an indivisible consequence, is the consequence of the State conduct, of some other causes or of both. There is a discrete and indivisible event, the departure of the foreign national, and the question revolves around the multitude of causes leading to this event. The disputed factual setting before the Tribunal was typically whether the claimant left the country due to the generally prevailing conditions, the general hostility against Americans or due to the specific conduct of the State leaving no other option but to leave the country.

⁷³⁰ J Barker, 'The Different Forms of Reparation: Compensation' in J Crawford *et al* (eds), *The Law of International Responsibility* (2010) 599, at 607-608.

⁷³¹ For a thorough discussion of the case law, see C N Brower – J D Brueschke, *The Iran-US Claims Tribunal* (1998), at 348-365.

⁷³² *International Technical Products Corporation et al. v Iran et al.*, Award, IUSCT Case No. 302 (186-302-3), 19 August 1985, para. 6.

It is important to distinguish between the Tribunal's approach to causation in establishing *wrongfulness* and its approach to the consequences of expulsion. Similar to expropriation, the prohibition of wrongful expulsion is a primary norm presupposing the occurrence of a specific harm, "being expelled", as a condition of its breach. Thus, causation is a condition of its *breach*. The Tribunal's test on whether the wrongful expulsion took place was criticized as being overly restrictive.⁷³³ As we have seen in the previous chapter, if the Claimant failed to demonstrate meeting the 'but for' threshold, the Tribunal rejected the claim, thereby (impliedly) also declining that parallel causation could result in wrongful expulsion.⁷³⁴ In addition, the Tribunal did not address whether the other, alternative causes (such as the general atmosphere of hostility) were themselves results of State conduct in the first place.⁷³⁵ The bottom-line is that the Tribunal insisted on the State conduct being the exclusive, specified and but for cause of the departure for the purposes of finding a breach.

Leach and *Yeager* reveal the Tribunal's approach to parallel causation in the context of reparations.⁷³⁶ In both cases the Tribunal rejected the claim for compensation for lost income, concluding that the employment relationship of the Claimants would have enabled the employer to terminate their contracts in any event, even without the expulsion.⁷³⁷ Again, this approach amounts to the rejection of parallel causation. The need for specific tests for concurrent causality is precisely the deficiency of the 'but for' logic, but the Tribunal did not go beyond a rigid understanding of the "but for" test.

Iran and the US ultimately concluded a lump sum settlement on the vast majority of outstanding wrongful expulsion claims.⁷³⁸ It was for the US Foreign Claims Settlement Commission to decide on these claims. The practice of the Commission followed the precedents of the Tribunal and its restrictive approach to liability in cases of concurrent causation, leaving aside a few

⁷³³ *Id.*, at 358, 364-365.

⁷³⁴ See Chapter IV, Section 5.1.

⁷³⁵ *Id.*, at 364-365; Caron 1998, at 158-159.

⁷³⁶ *Kenneth P Yeager v Iran*, Partial Award, IUSCT Case No. 10199 (324-10199-1), 2 November 1987; *Jimmie B Leach v Iran*, Award, IUSCT Case No. 12183 (440-12183-1), 6 October 1989.

⁷³⁷ *Kenneth P Yeager v Iran*, Partial Award, IUSCT Case No. 10199 (324-10199-1), 2 November 1987, para. 60; *Jimmie B Leach v Iran*, Award, IUSCT Case No. 12183 (440-12183-1), 6 October 1989, paras. 21-22.

⁷³⁸ *The United States of America, on behalf of U.S. nationals and The Islamic Republic of Iran*, Award on Agreed Terms, IUSCT Case No. 86 (483-86-1), 22 June 1990.

exceptions.⁷³⁹ This restrictive practice is at odds with the ILC's eventual codification, but supports Stern's conclusions on parallel causation.

5.2 United Nations Compensation Commission

The Governing Council of the UNCC made separate decisions on the isolation of damages caused by the trade embargo (UNSC Resolution 661) adopted against Iraq and Iraq's unlawful acts. These decisions can be summarized as follows:

- i. Iraq is not liable for damages that were caused solely by the embargo. Notwithstanding that Iraq's conduct was a *conditio sine qua non* of the embargo, losses caused by the embargo are remote (not "direct") consequences of Iraq's conduct.
- ii. Iraq is liable for losses directly caused by its conduct, which would have been caused by the embargo in any event. According to Decision 15 of the Governing Council, in such cases the embargo and Iraq's invasion are "*parallel causes*".⁷⁴⁰

The first rule is one of *remoteness*, but it also implies that embargo related losses shall be separated from other losses, in as much as the losses are divisible. The Governing Council's decision to deny compensation of exclusively embargo-related losses stands in contrast with the compensability of damages caused by the military actions of the allies in reaction to the illegal actions of Iraq. One Panel expressly noted that "the trade embargo and related measures were a reasonably foreseeable response to Iraq's invasion of Kuwait with the objective of forcing Iraq to vacate Kuwait without resorting to military force".⁷⁴¹ Notwithstanding the

⁷³⁹ R B Lillich – D J Bederman, 'Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims' (1997) 91 *AJIL* 436, at 444-449.

⁷⁴⁰ UNCC Governing Council Decision 9, 6 March 1992, S/AC.26/1992/9, para. 6; UNCC Governing Council Decision 15, 4 January 1993, S/AC.26/1992/15_*/, para. 9.

⁷⁴¹ Fourth Instalment of E2 Claims, 22 March 2000, para. 112.

“reasonable foreseeability” of the embargo, the losses caused by it were not “direct” causes and remained uncompensable.

The second rule is one of *parallel causation* and it is in line with the approach taken by the ILC in that it renders concurrently caused damages compensable. For example, a claim for the costs of a travel agency booking flight tickets on Iraqi Airways for its clients was held to be compensable, “notwithstanding any possible effects of the trade embargo”.⁷⁴² According to another decision, the impossibility of delivering supplies to Iraqi entities was caused by the breakdown of the order resulting from Iraq’s invasion and the trade embargo in parallel, rendering the losses compensable.⁷⁴³

An example of *cumulative causation* was the *Hidrogradnja Claim*. Following Kuwait’s invasion, several companies were forced to evacuate personnel from the region. One of these companies, Hidrogradnja could not dismiss employees returning to Yugoslavia due to the applicable labour law requirements. Thus, ‘but for’ the application of Yugoslavian labour law, Hidrogradnja would not have incurred these costs. The compensation claim was successful.⁷⁴⁴ In this case the combined effect of the two causes is more than what each of them would have been able to produce individually, but the losses are inseparable.

A further example of *cumulative causation* was the claim put forward by liability insurers of British Airways’ arising out of Iraq’s treatment of its passengers. The question was whether the decision of the airline to even land in Kuwait at the time of the impending invasion by Iraq, a but for cause of the damages itself, excluded Iraq’s liability. The Panel examined whether British Airways’ conduct was an “intervening cause” between the invasion and the damages. The Panel rejected this proposition, because those damages were suffered “after” the aircraft landed.⁷⁴⁵ The Panel does not fully clarify the underlying principle, but it appears that if the internationally wrongful act *follows*, and not precedes, the cumulative cause in temporal sequence, it interrupts the causal sequence and is regarded as a sole cause.

One Panel resorted to an irrefutable presumption concerning loss of profits in the seven months following the invasion. However, regarding subsequent losses, the Panel held that “the

⁷⁴² Second Instalment of E2 Claims, 19 March 1999, para. 98.

⁷⁴³ Fourth Instalment of E2 Claims, 22 March 2000, paras. 122-124.

⁷⁴⁴ First Instalment of E3 Claims, 17 December 1998, at paras. 274-282.

⁷⁴⁵ First Instalment of E/F Claims, 15 March 2001, paras. 195-196.

claimants must clearly demonstrate that a “separate and distinct” cause for their inability to resume operations is Iraq’s invasion and occupation of Kuwait”, as opposed to prevailing economic conditions, the trade embargo or their financial difficulties.⁷⁴⁶ It is not clear whether Iraq’s invasion and occupation as a *parallel cause* would satisfy the test of being a “separate and distinct” cause for these purposes.

When the UNCC was confronted with evidentiary difficulties regarding the multiplicity of causes, it factored a “*risk of overstatement*” into the valuation. Such risks of overstatement depended not only on the circumstances, but on the type of damages (for instance, repair costs have inherently lower overstatement risks than loss of profit claims based on projections).⁷⁴⁷ This approach means that in such cases no distinction was made between various types of concurrent causation in practice.

5.3 Eritrea-Ethiopia Claims Commission

Ethiopia claimed compensation for damages which concurrently resulted from the decisions of third parties. Ethiopia argued that the cause of those third party decisions was Eritrea’s use of force and the breach of international law on *ius ad bellum*. Ethiopia claimed compensation for losses of development aid and loans provided by aid donors and lenders and for losses of foreign investments. The Commission made clear that sufficiently clear evidence was missing to uphold these claims, but it further made a number of important pronouncements concerning the relevance of third party conduct: “where the immediate cause of the alleged injury was decisions made by third parties, much more compelling evidence would be required to show that the loss was attributable to Eritrea’s *jus ad bellum* violation.”⁷⁴⁸ This statement is further qualified in a subsequent decision on whether the loss of investments resulted from *ius ad bellum* breaches:

As with the decisions by foreign assistance agencies addressed above, decisions whether or not to invest were made by a myriad of private investors inside and

⁷⁴⁶ First Instalment of E4 Claims, 19 March 1999, para. 184.

⁷⁴⁷ *Id.*, paras. 35, 57.

⁷⁴⁸ *Ethiopia’s Damages*, para. 465.

outside of Ethiopia. Each decision reflected particular facts and considerations unique to the investor. The evidence simply did not show that their behavior, individually or in the aggregate, primarily resulted from Eritrea's actions in May 1998.⁷⁴⁹

The question in these cases is whether a subsequent step in the chain of causation, i.e. the "third party decision" could be regarded as one caused by the wrongful act, notwithstanding that it might have other, concurrent causes too. The Commission does not insist on the exclusivity of the State conduct in causing such decisions, but the requisite threshold is that of "primacy": it has to be shown that the most important factor in such decisions was the State conduct. This test clearly mirrors the approach of the European Court of Human Rights in contributory causation cases.⁷⁵⁰

⁷⁴⁹ *Id.*, para. 469.

⁷⁵⁰ *Cf Khodorkovsky and Lebedev v Russia.*

6. Interim conclusions on multiple causation

The following chart, by way of summary, indicates the various scenarios of multiple causation with the corresponding cases studied above. Some cases involve several problems, which explains their appearance in several columns.

Complementary causation	Cumulative causation	Pre-emptive causation	Parallel causation	Contributory causation
Duke Energy	AAPL	Amco I	Rankin	El Paso
Gami	Micula	Hirsi Jamaa	Yeager	Serrano-Cruz
Rompetrol	EDF	CBS	Leach	Finogenov
Guarachi	Electrabel	Leach	Iraqi Airways	Fadeyeva
Saghi	Mascolo	Yeager	Loizidou	Ledyayeva
Micula	Lo Tufo			Campbell and Cosans
	Hidrogradnja			Khodorkovsy
	British Airways			Perozo
	CME / Lauder			Operation Genesis
				Development Aid

Figure 9: The classification of multiple causation

What emerges from this survey is that there is no single solution for all multiple causation scenarios, but distinctions are necessary. Whenever possible, the divisibility of damages and the isolation of the respective causal connections determines the respective complementary causes. If the internationally wrongful act causes a segment of the divisible damage, the State's duty to provide remedies extends only to such segments. If the damage is not divisible, the but

for test applies. If the internationally wrongful act is causal condition of the damage under the but for test, rules on remoteness determine whether the contribution of a cumulative cause excludes the compensability of the damage. If the but for test breaks down, because it is impossible to tell, either as a matter of doctrinal, normative judgment or as a matter of evidence, which cause was operative under the but for test (parallel causation and contributory causation), case law does not provide a clear cut answer.

Human rights courts award compensation even if the internationally wrongful act was not necessary or even if it is impossible to tell whether it was necessary, assuming that a test of “predominance” of contribution is met. There is a hint in the practice of the Eritrea-Ethiopia Claims Commission to the same effect and there is some support in international investment law for presumptions of causality if the necessary causal link cannot be verified. The UNCC awarded compensation even if Iraq’s conduct was an unnecessary cause of the harm. In contrast, the Iran-US Claims Tribunal did not award compensation for unnecessary causes.

Who got it right: the restrictive interpreters of the but for test, following Stern’s footsteps, or the more generous human rights courts?

This thesis supports the approach of human rights courts. The ARSIWA Commentary rightly notes that most legal systems accept liability in cases of parallel causation. Leaving aside the practice of the Iran-US Claims Tribunal, this emerges from the case law too. There is no risk that the application of a parallel causation threshold falling short of “but for” results in an unjust result. As long as the rules on remoteness are applied and parallel causation is distinguished from *pre-emptive* or *overtaking causation* (such as the *CBS Case*), *in solidum* liability is not overly extensive.

7. Contributory negligence and multiple causation

There are numerous ways to address the injured party’s own wrong when determining the existence and extent of legal liability. Notions like “clean hands”, “aggrieved conduct”, “abuse of rights”, “assumption of risks” or “contributory fault” are tailored to address such

situations.⁷⁵¹ In the context of remedies, ARSIWA dedicates a separate article to the concept of “contribution to the injury”. Article 39 reads as follows:

In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.⁷⁵²

The systemic role of the doctrine in the law of State responsibility is not without controversies.⁷⁵³ In the final text of ARSIWA this remained merely a concept to delimit the extent of reparation. Contributory negligence could have well been considered in the context of breach as well. If the wrongful conduct of the State is a reaction to a previous negligent conduct, the breach itself could be assessed in light of the previous contributory negligence. Bederman provided the most comprehensive treatment of the subject and reviewed the entirety of the early case law (an exercise not repeated within the framework of the present project). He concluded that the ILC’s work failed to recognize the multiple aspects of the concept.⁷⁵⁴ Bederman proposed a scheme in which, depending on the circumstances of the case, contributory fault could function as a bar to admissibility, as a justification or an intervening cause.⁷⁵⁵

Bederman rightly warns that there is more to contributory fault than causation.⁷⁵⁶ This chapter does not aim to comprehensively address the issue from all angles, only the relationship of contributory negligence with causation in international law. It does not discuss cases when no breach is found in light the investor’s preceding conduct. Nor does it address the substantive criteria to distinguish diligent conduct from negligent conduct for the purposes of contributory fault. These questions deserve dedicated treatment and their discussion would inevitably lead to the analysis of substantive obligations, distracting from our focus strictly on causation. Defining and delineating the significance of causation for contributory fault is, however, necessary.

⁷⁵¹ D J Bederman, ‘Contributory Fault and State Responsibility’, (1989-1990) 30 *Virginia Journal of International Law* 335 [‘Bederman’], at 338.

⁷⁵² ARSIWA, Article 39.

⁷⁵³ Crawford 2013, at 500.

⁷⁵⁴ Bederman, at 343, 354, 364.

⁷⁵⁵ *Id.*, at 363.

⁷⁵⁶ *Id.*, at 354.

This relationship of the two concepts at present is unclear. Stern criticized the ILC for treating concurrent causation and contribution to the injury inconsistently.⁷⁵⁷ While, as we have seen above, the default rule under ARSIWA is that concurrent causes do not affect the extent of liability, this is plainly not the case under Article 39. In response, Crawford stressed that “the reason why reparation is reduced in cases of contribution has nothing to do with concurrent causation: it has to do with equity and fairness as between the responsible State and the injured State.”⁷⁵⁸ Bederman writes similarly that “[t]o see contributory fault only as an element of causation ignores powerful equitable concerns.”⁷⁵⁹ Sabahi and Duggal note that applying the concept is inherently a subjective exercise and “its nature defies any mathematical precision.”⁷⁶⁰

Notably, Crawford does not say that contribution to the injury has nothing to do with concurrent causation, only that the *reason of reducing compensation* is unrelated to considerations of causation. Causation and contribution are obviously interconnected. The condition that triggers the applicability of the concept is causal relationship between negligent conduct and the damage. The Commentary to ARSIWA contrasts concurrent causation with contributory fault too.⁷⁶¹ What Crawford must have meant is that notwithstanding the fact that causality is a condition of reducing the extent of reparation due to contribution to the injury, the actual reduction is not dependent on the assessment and evaluation of the causal chain, but rests on equitable grounds. Crawford’s distinction between causation and contribution is a departure from the ILC’s previous approach. In Arangio-Ruiz’ draft, contribution to the injury was an example of concurrent causation.⁷⁶² It was also in line with his view that fault should not have any impact on compensation.⁷⁶³

This chapter argues that much of the uncertainties revolving around the relationship between causation and contribution to the injury could be resolved by understanding the proper scope

⁷⁵⁷ B Stern, ‘The Obligation to Make Reparation’, in J Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 563, at 570.

⁷⁵⁸ Crawford 2013, at 500.

⁷⁵⁹ Bederman, at 354.

⁷⁶⁰ B Sabahi – K Duggal, ‘Occidental Petroleum v Ecuador (2012). Observations on Proportionality, Assessment of Damages and Contributory Fault’ (2013) 28 *ICSID Review* 279, at 289.

⁷⁶¹ ARSIWA Commentaries, at 93.

⁷⁶² Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, *ILC Ybk* (1989)/II 1, para. 51.

⁷⁶³ Summary of 2169th meeting, *ILC Ybk* (1990)/I 148, para. 6.

of this doctrine. The scope of the rule providing for equitable reduction of the due compensation shall be limited to cases which prove to be unresolvable in a satisfactory manner under the application of the *Chorzów* principle and the general rules on causation. If the application of such rules is problematic or if their application results in an “inequitable” outcome, the equitable rule in Article 39 should apply. Contrary to the previous sections discussing the development of the case law, this chapter argues, from a doctrinal starting point and already equipped with the previous restatement of the principles of causation, that a considerable part of the case law errs in applying the doctrine and the conclusions of the authorities are contrary to rules of customary international law, in particular to the *Chorzów* standard and the rules of remoteness.

The doctrinal starting points informing the analysis below are the following:

- i. As discussed in the previous chapter and the previous sections, international law sets forth substantive tests of causation as regards the but for threshold, remoteness and multiple causation.
- ii. The triggering condition of Article 39 ARISWA is that there was a *contribution* by the victim to the injury otherwise *caused* by the internationally wrongful act. As a matter of logic, if there is *no* causal connection between the injury and the internationally wrongful conduct, Article 39 ARSIWA is not triggered.

It is therefore necessary to distinguish cases in which there is no causal connection under the default rules of causation (on but for, remoteness and multiple causes) from cases when there *is* a causal connection, but notwithstanding this nexus the victim’s contribution triggers Article 39. Article 39 should operate as an *exception* to the default rules on causation. If under the default rules a causal nexus is absent, there is no reason to apply Article 39. Article 39 makes sense only if the default rules would *confirm* the existence of a causal link. Regrettably, there is only a single footnote in the ARSIWA Commentaries on this point:

It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible”

State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39.⁷⁶⁴

It is therefore important to distinguish applications of the general requirements of causation from the proper application of Article 39. The aim of this chapter is to make the necessary distinctions and properly outline the scope of contribution to the injury.

The following chart illustrates the variety of the ways in which a contributory conduct could result in damages. The ILC's concept of contribution to the injury is only relevant to some of them, while the rest of these problems could be conveniently resolved differently.

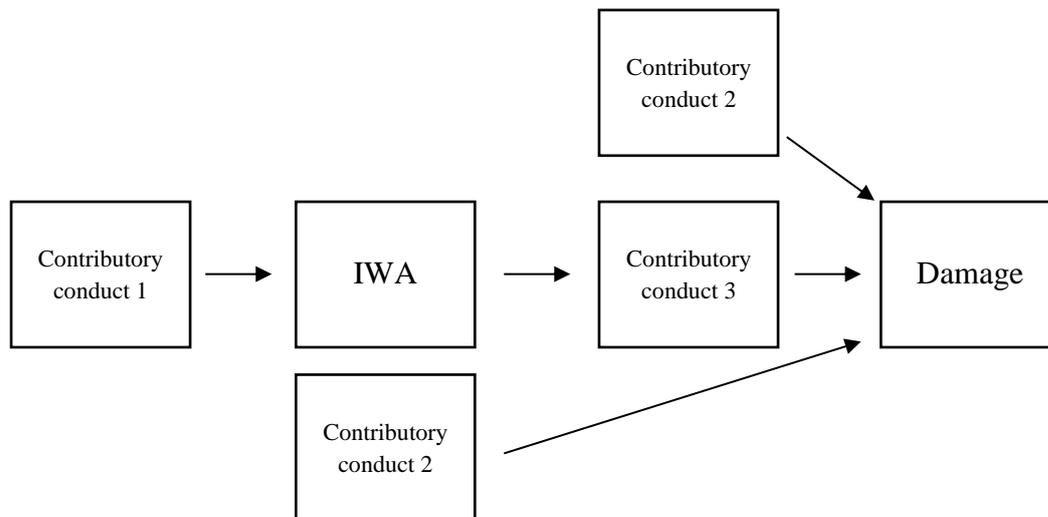


Figure 10: Contributory conduct scenarios

There are at three possible scenarios in terms of causality and temporality:

1. The negligent conduct temporally precedes the wrongful act and is in some sense a cause of the latter;
2. The negligent conduct is not causally connected with the wrongful act, only with the damage. It takes place either before, in parallel with or subsequent to the wrongful act.⁷⁶⁵

⁷⁶⁴ ARSIWA Commentaries, at 110, fn 627. This passage was recently discussed in the Dissenting Opinion of Judge *ad hoc* Sérvulo Correila of ITLOS in *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*.

⁷⁶⁵ Cf *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 July 2014, paras. 1601-1605.

3. The negligent conduct is subsequent to the wrongful act and is caused by the wrongful act, either preceding the damage or subsequent to the occurrence of damages already;

As noted above, in each of these scenarios it is necessary that the very same damage is causally connected with both the wrongful act and the negligent contribution. If this is not the case, the solution depends on the divisibility of damages and not on considerations of causation or contributory fault.

The doctrine of “contribution to the injury”, as codified by Article 39, should apply only to Scenario 2 if the contribution to the injury is either a *parallel cause* or a *cumulative cause* not rendering the injury remote (i.e., it does not break the chain of causation under the rules of remoteness). In other cases, the general rules on remoteness and multiple causation provide a satisfactory solution without the need to use equitable determinations. In the same vein, it applies to Scenario 3 only if the contribution is not too remote under the applicable threshold of remoteness.

On the other hand, “contribution to the injury”, as codified by Article 39, is not applicable to Scenario 2, because Scenario 2 is resolvable by the *Chorzów* principle, as we shall see below. If injuries under Scenario 2 are divisible or they qualify as intervening causes pursuant to the applicable rules of remoteness, Article 39 is not applicable either. Lastly, if the contributory conduct under Scenario 3 breaks the causal chain pursuant to the test of remoteness, Article 39 is equally inapplicable.

8. Contributory negligence in international investment law

Tribunals have been less sophisticated in approaching these matters than they should have been in light of Crawford’s explanation of ARSIWA. They treated contribution to the injury, incorrectly, as a variant of concurrent causation. In *Occidental v Ecuador* the Tribunal had no difficulty in referring to the ILC commentary on concurrent causation and applying the

requirement of divisibility of harm in the context of discussing contribution to the injury.⁷⁶⁶ The *Yukos v Russia* Tribunal also referred to concurrent causation and the divisibility requirement in this context.⁷⁶⁷ However, when deciding on the actual figure of reduced compensation, they did not engage in a detailed analysis of causation, but plainly came to an equitable solution.⁷⁶⁸

8.1 Scenario 1 – contributory conduct “causing” the internationally wrongful act

Occidental and *Yukos* were Scenario 1 cases. A Scenario 1 contribution could influence the assessment of *breach*. If the State act is a reaction to the previous act of the injured party, the wrongfulness of the State act might depend on such previous conduct. However, the fact that wrongful act is a causal consequence of the negligence does not exclude in and of itself the responsibility of the State (for instance, if the State’s reaction to the negligent action is disproportionate, as was the case in *Occidental v Ecuador* or *Yukos v Russia*). What remains an open question is what relevance the initial conduct retains in the context of reparation. Crawford considers that contribution to the injury happens at the “time of the breach” or at the original infliction of the damage.⁷⁶⁹ But what if it happens before the breach? How do we reconcile the principle of full reparation with the idea that an event *before* the wrongful act influences the extent of reparation?

To put it in causal terms, the problem is that the condition of applying the concept of contribution to the injury is a causal link between the contribution and the damage. If the contribution happens before the breach and it causes the breach, we cannot speak of such a link, because the breach itself is the legally relevant cause in the causal relationship. If the act is wrongful under international law, it has to be considered a break in any causal link between the negligent conduct and the subsequent damage. In this case there might be causal relationship between the negligence and the breach, but not between the negligence and the

⁷⁶⁶ *Occidental v Ecuador*, para. 667.

⁷⁶⁷ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 July 2014, para. 1598.

⁷⁶⁸ *Occidental v Ecuador*, para. 687; *Yukos v Russia*, para. 1637.

⁷⁶⁹ Crawford 2013, at 501.

ultimate damage. The reason this problem poses itself uniquely in the law of State responsibility is that damage is eliminated from the constitutive elements as a general rule and it is thus possible to distinguish between the stages of *breach* and *damages* as a default rule. This is typically not the case in domestic legal systems.

Notwithstanding these theoretical hurdles, tribunals applied Article 39 without difficulty to such cases as well. In *Yukos v Russia* or in *Occidental v Ecuador* the negligent conduct of the investor preceded and in a sense *caused* the wrongful act of the State.

The *Occidental* Tribunal first confirmed that the wrongful act of Ecuador (the issuance of a so-called *Caducidad* decree, terminating the contractual relations with the investor's subsidiary) caused the "totality" of the damages.⁷⁷⁰ There was no part of the damages which would be attributable to other causes than the wrongful action of the State. As a second step, however, the Tribunal concludes that but for the previous contractual breaches by the investor's subsidiary, the termination decree would not have been issued.⁷⁷¹ If the wrongful act is the causal consequence of the investor's action and the totality of the damages is caused by the wrongful act, then the question is *not* whether the investor's action is a concurrent cause (as the Award seems to suggest), but whether the wrongful act of the State is an intervening cause in the chain of causation between the original contractual breach and the eventual damages.

It is thus uncertain whether the application of a strictly causation-based notion (or a strict test of causality) of contributory negligence (which is codified in ILC Article 39) to Scenario 1 is possible without ending up in logically paradoxical conclusions. There are four possible solutions to this problem. One is to abandon the idea that legally relevant causal connection between the contributory negligence and the injury is decisive for reducing the extent of reparation and do the latter exercise only on equitable grounds.

The other option is to reject the idea that Article 39 is applicable to Scenario 1 and, instead, recognize another version of contributory negligence with a different or lower threshold (if at all) of causation. The third is to address the Scenario 2 problem within the general 'but for' test of causation and the *Chorzów* principle of reparation. The fourth solution is to discard the relevance of any preceding blamable conduct of the victim for the purposes of reparations. Of

⁷⁷⁰ *Occidental v Ecuador*, para. 681.

⁷⁷¹ *Id.*, para. 683.

these four options, we submit that the third is the appropriate one for the reasons set out below, illustrated through the *Yukos* awards. The three awards of record magnitude have been annulled by the first instance Dutch court (for reasons unrelated to the merits), but the problems presented therein are still useful as a way of illustration.⁷⁷²

Yukos v Russia contrasts with the approach in *Occidental*. In *Yukos*, the Tribunal did not consider the tax avoidance by the investor as a but for cause of Russia's wrongful conduct. The Tribunal held that Russia's reliance on Yukos' previous conduct was merely a pretext to justify its actions. When examining various steps of Yukos' liquidation, the Tribunal emphasized that Russia would have found a way to bankrupt Yukos one way or the other, even if the investor made negligent steps.⁷⁷³ Nonetheless, the abusive conduct of the investor *before* the breach resulted in a substantial reduction of the compensation.⁷⁷⁴ Thus, *Yukos* stands for the proposition that pre-breach negligence does not have to be a *sine qua non* condition of the breach (nor of the damage) to reduce the damages. The Tribunal found an adequate causal link, but this causality threshold was apparently a low one, *Yukos*' negligence merely facilitated its bankruptcy, but it did not cause it *stricto sensu*.

The present author endorses the solution offered in Sadowski's analysis of *Yukos*. He criticizes the tribunal for failing to estimate what a lawful reaction to *Yukos*'s "contributory negligence" would have been on behalf of the State.⁷⁷⁵ Thus, if we assume away the State's wrongful conduct of imposing disproportionate penalties with a view to bankrupt the investor, the next question is what would have happened absent such State measures? This is not an equitable determination, but a careful construction of the counterfactual scenario. There is every reason in such a case to assume that in a hypothetical world, the State would have issued lawful fines and penalties in reaction to the investor's conduct. To use the *Chorzów* formula, *Yukos* would never have been in a position free of injuries, because it would have suffered damages as a result of its own conduct to the extent the State would have been entitled to sanction such conduct.

⁷⁷² *Russia v Yukos et al*, The Hague District Court, Judgment of 20 April 2016. The annulment decision is under appeal as of the date of writing.

⁷⁷³ *Id.*, para. 750.

⁷⁷⁴ *Id.*, para. 1615.

⁷⁷⁵ W Sadowski, 'Yukos and Contributory Fault', (2015) 5 *TDM*, at 26

Elsewhere Sadowski appears to contradict this position when he, referring to Stern, argues that “the traditional position under customary international law that the reaction of the state that is clearly disproportionate to the conduct of an individual, turns into the exclusive cause of the injury.”⁷⁷⁶ He then goes on to conclude as follows:

From a theoretical perspective, the proposition that a disproportionate reaction of the state becomes the exclusive cause of the injury results logically from the principle that there must be a causal link between the conduct of the individual and the injury. In cases of clearly disproportionate actions, the injury results entirely from the excesses of the state - for which the individual is not responsible - rather than from the original blameable conduct of that individual.⁷⁷⁷

What distinguishes this case from the previous is the nature of the harm. If the disproportionate reaction on behalf of the State results in a kind of injury which, at the outset, would not have been possible if the State acted legally and proportionately, Stern suggested that the State conduct qualifies as an exclusive cause and the preceding negligence on behalf of the injured party is immaterial. For example, if the proportionate and lawful reaction to the conduct of the investor would have been a fine, but the State arbitrarily revokes the investor’s license, the State’s entitlement to impose a fine should not inform the assessment of the causal chain and the compensation.

Sadowski’s and Stern’s alternative position (a fourth one) rejects the causal relevance of the victim’s conduct preceding the wrongful act outright, because the latter operates as a *novus actus*. Stern lists a series of authorities to support this position, but such an approach is logically flawed and contradicts the *Chorzów* principle.⁷⁷⁸ This is so, because we cannot arrive at the problem of the causal link between the contributory conduct and the damages *before* we assume away the wrongful act of the State. If we construct a hypothetical counterfactual to determine whether a damage was caused by the State, the contributory conduct remains, while the illegal act is absent. The latter cannot operate as a *novus actus* in the hypothetical scenario. Sadowski and Stern rely on a logical fallacy: you cannot determine the damage which the wrongful act is said to be the “exclusive cause” of, without first *assuming away* the wrongful act.

⁷⁷⁶ *Id.*, at 23.

⁷⁷⁷ *Id.*, at 23-24.

⁷⁷⁸ Stern, at 320-323.

Whether a wrongful act *interrupts* the causal sequence between a contributory conduct and the injuries suffered is immaterial as long as the effects of the wrongful act has not even been determined in line with the *Chorzów* principles. In brief, the only solution in line with the *Chorzów* rule is to hypothesize the impact of the contributory conduct in a “wrongful act free” counterfactual scenario. Any other case suggesting otherwise is at odds with customary international law.

What Sadowski and Stern rightly detect, however, is that the nature of the injury might be relevant for the purposes of assessing the causal significance of the contributory conduct preceding the wrongful act. Yet, this is not due to the impossibility to construct a hypothetical counterfactual, but depends on the divisibility of the injury. For instance, if the State conduct is a disproportionate fine, the *proportionate* amount of the fine, caused by the contributory conduct as a provoking factor, is clearly distinguishable from the *disproportionate* part of the fine. In such cases the contributory conduct and the wrongful act are *complementary causes* of the divisible injury. Again, there is no need to treat the problem separately from the general approach to cases of multiple causation.

If the injury is indivisible, the problem is more complex. Assume, for example, that the operating license of the investor is revoked. This is then found to be an arbitrary and disproportionate reaction to the investor’s previous conduct, but a fine would have been an adequate reaction. How to measure the difference between the actual damages and the hypothetical damages in the counterfactual? Stern’s and Sadowski’s suggestion is that it is not possible to speculate on a hypothetical alternative damage, if such damages would have been of a different nature. Thus, while it is possible to assume away the disproportionate part of the injury, it is not possible to speculate a *different*, lawfully caused injury the counterfactual. It is submitted that this solution would run contrary to the maxim *nullus commodum capere potest de iniuria sua propria*, because the injured party will be better off after the reparation than she would have ever been.⁷⁷⁹

Chevron v Ecuador raised another possible variant of this scenario with a different causality standard applied. The host State blamed the Claimant for delays in domestic court proceedings

⁷⁷⁹ B Cheng, at 151-158.

(which, as explained above, formed the basis of *Chevron*'s claim).⁷⁸⁰ It insisted that the investor should have pressed the domestic actions more. The Tribunal found that the respondent failed to demonstrate that more procedural activity from the investor would have resulted in prompt or more effective decisions.⁷⁸¹ It follows *a contrario* that the host State could have demonstrated it in principle. It is not enough to show that the investor was negligent, it is necessary to prove that but for such negligence, the outcome would have been different.⁷⁸² According to the *Chevron* tribunal, to determine whether, in the counterfactual scenario, the contributory conduct was causative of the injury, a *second* but for test will be applied to the contributory conduct.

8.2 Scenario 2 – contributory conduct as an independent concurrent cause

Scenario 2 raises different difficulties. A notable case is *MTD v Chile*, where Chile was held responsible for inconsistent actions by its organs. Chilean authorities induced the investor to make an investment, while it was already clear that local regulations would not permit the actual implementation of the project. In awarding damages, the Tribunal took account of the investor's negligent planning, such as its choice of a business partner and its reliance on unsubstantiated assumptions without insisting on adequate contractual safeguards. These mistakes happened before and independently from the State's wrongful act, but were nonetheless considered to have contributed to the injury.⁷⁸³ The decision leaves it unclear whether the damages were divisible. The claim was for the expenses of the failed project, which

⁷⁸⁰ See supra Chapter 4, Section 3.1.

⁷⁸¹ *Chevron v Ecuador*, para. 269.

⁷⁸² *Guarachi v Bolivia* raised a similar issue, where the question was whether the investor's failure to make use of domestic remedies providing provisional measures of protection could have mitigated "the situation". The investor's claim was based on an obligation of Bolivia under the US-Bolivia BIT to provide "effective means" to assert claims and enforce rights. The Tribunal did not have jurisdiction to rule on this matter. *Guarachi v Bolivia*, para. 323.

⁷⁸³ Viñuales points out in commenting on *MTD v Chile* that the concept of contributory negligence could be utilized in reducing the liability of States for breach of investment standards to give effect to environmental considerations. J E Viñuales, *Foreign Investment and the Environment in International Law* (2012), at 128.

were incurred as a result of the failure. The Tribunal made no attempt to distinguish losses that the claimants' diligent planning would have permitted.

In *EDF v Argentina* the State argued that the investor "overbid" when investing, and the payment of excessive amounts resulted in its losses, not Argentina's conduct. The Tribunal emphasized that this cannot impact Argentina's liability, only the extent of the compensation, but in principle the argument of overbidding was acceptable.⁷⁸⁴ Its scrutiny of the record led the Tribunal to conclude that the price was not excessive (the second highest offer was also very close to EDF's), and rejected the claim of contributory negligence.

The *EDF* case presents the problem as one of valuation and not one of causation. In determining the initial asset base for the DCF calculation, the Tribunal looked at the price paid for the assets and assessed whether it reflected the real value of the assets. It follows that imprudent business decisions in completing the investment *before* the initial wrongful act can influence the extent of reparation in two ways. First, either on the account of causal contribution to the injury and, second, by asserting that asset valuation itself reflects imprudent investments. There might be a difference in the consequences of these approaches. If one follows the causality approach and the notion of contribution to the injury, the reduction of reparation (as Crawford argues and as cases like *MTD*, *Occidental* and *Yukos* confirm) happens on equitable grounds. If, however, the mismanagement is presented as a component of valuation, it should influence the actual calculation of *quantum*.

The approach of the *Impregilo v Argentina* Tribunal was different. The Tribunal, having concluded that the profitability of the investment would have been highly questionable even in the absence of any wrongful conduct on behalf of the State, held that

[t]he fact that [the investor] and the [State] have a shared responsibility for the failure of the concession makes it inappropriate to calculate damages on the basis of customary economic parameters such as a cost or asset based method or an income method. Instead, the damages to be paid by the Argentine Republic to compensate for unfair and inequitable treatment should be determined on the basis of a reasonable estimate of the loss that may have been caused to Impregilo. (...) It follows that the compensation to be awarded to Impregilo should be based only on the capital contribution made by Impregilo.⁷⁸⁵

⁷⁸⁴ *EDF v Argentina*, paras. 993, 1225-1226.

⁷⁸⁵ *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award of 21 June 2011, paras. 378, 381.

The difference in approaches to valuation raises a further problem too. If the application of ARSIWA Article 39 is justified by equitable concerns and not by casual ones, the imprudent investor has to pay the price for its actions, even if the value of its investment already reflects such misconduct. If Article 39 is triggered by the existence of a causal connection between the investor's conduct and the damages it suffered, it *has to be* applied even if the damages valuation already identified the correct investment value, reflecting *already* the imprudent business decisions. A DCF analysis (as followed in *EDF*) incorporates the cost of acting imprudently. In contrast, the *Impregilo* approach does not.

Argentina argued that the investor's decision to sell the shares in its investment amounted to contributory negligence and self-inflicted harm, since the value of those shares increased subsequently. The argument is that the investor should not have picked the worst possible time to sell the shares. The Tribunal rejected this contention, expressly refusing to substitute its own business judgment analysis to that of the investor.⁷⁸⁶ This case, just like those discussed under scenario 4 confirm the wide discretion of the investor in conducting business after the wrongful act occurred. In fact, the Tribunal did not even arrive at the analysis of causality; it simply rejected to regard the investor's conduct negligent.

The case also contrasts with *EDF v Argentina*, discussed in the context of but for causation. To recall, in that case it was the investor arguing that the subsequently developing conditions should influence the but for scenario and hence, increase the damages, but the Tribunal rejected the argument. In *National Grid v Argentina*, those subsequent developments were referred to by the host State to argue that the timing of the divestment was inappropriate.

The recent decision in *Copper Mesa v Ecuador* applied the concept of 'contribution to the injury' to sanction the conduct of the investor who, prior to the breach of the State, put its own investment into an unsustainable position.⁷⁸⁷ The claim concerned the failure of the State to protect the investment from violent acts committed by several members of the local population and communities. Even before this breach was committed, the management of the local investment took matters into its own hands and returned violence with violence, antagonizing the population. The Tribunal found that by the time the State committed its own breaches, the

⁷⁸⁶ *National Grid plc v The Argentine Republic*, UNCITRAL, Award of 3 November 2008, para. 273.

⁷⁸⁷ *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No. 2012-2, Award of 15 March 2016, paras. 6.95-6.102.

future of the investment had already been entirely uncertain due to the investor's previous steps. Eventually, damages were reduced by 30%.

Copper Mesa is a good example of an equitable reduction. The Tribunal was unable to either determine what would have happened 'but for' the State's failure to intervene, or whether the investment would have had any future in light of the misconduct of the investor. The contributory conduct and the internationally wrongful act were thus either parallel causes or at least contributory causes of the investment's demise. The Tribunal stressed the difficulties of separating parts of the injury on the basis of their causes.

8.3 Scenario 3 – contributory conduct as an intervening cause

In Scenario 3 type situations one of the typical arguments is that the cause of the damages was the investor's decision to stop its operation or to transfer financial resources from the investment to the parent company. In *Achmea v Slovakia*, the host State opened up its health insurance system for private investment. Following a change in government, Slovakia began to put restrictions on such investments, such as a cap on operating expenses. In response, the investor "hibernated" its operation and stopped expanding its business activities in Slovakia. The first line of State measures complained of started in mid-2007, while the second round only late 2008. The hibernation decision was made in between the two. Slovakia contended that its timing indicates that it had nothing to do with its actions, it was merely a reaction to the economic crisis.⁷⁸⁸

In response, the Tribunal asserted that

the suspension (or "hibernation") of its operations in Slovakia was a reasonable response to that situation, and one that does not break the chain of causation and responsibility in this case. The suspension was a reasonable defensive measure, intended to minimise the risk of further losses.⁷⁸⁹

⁷⁸⁸ *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award of 7 December 2012, paras. 296-297.

⁷⁸⁹ *Id.*, para. 320.

It did so without addressing the detailed arguments of the Respondent on timing, or on potential further reasons prompting the hibernation decision.

Kazakhstan advanced similar arguments in *Ascom v Kazakhstan*. It argued that the Claimant's decision to begin transferring money out from the country caused its financial difficulties and damages. It further argued that the Claimant's internal documents confirmed that it was considering bridge financing even before the allegedly wrongful measures of the host State, demonstrating its financial distress resulting from mismanagement and from employing incompetent personnel. Kazakhstan even pointed to market analysts raising such concerns regarding the management of the investment. The Tribunal concluded that transferring money out from the country was not contribution to the injury if the alternative would be to risk losing it as a consequence of the State's measures (such as a freezing order). To the contrary, it considered this conduct to be a mitigating measure. The Tribunal refused to address the detailed arguments about mismanagement and, with regard to Kazakhstan's reference to the economic crisis and prevailing market conditions, it found that such turbulences were temporary and business would have been back to its normal course within a year in the absence of the host State's wrongful measures.⁷⁹⁰

What these cases show is that once a Tribunal finds that the host State's action caused damages to the investor, the host State usually has a hard time in proving contributory negligence. Stopping investment activities or paying dividends is regarded as a reasonable response and the tribunals do not show much sensitivity to the detailed arguments of the host State on various circumstances possibly influencing the investor. Investors enjoy a wide margin of discretion in determining their own reaction to the wrongful acts and omissions of the host State. Further, even if their conduct might be negligent, the burden is still on the host State to demonstrate that but for their negligence, the damages would have been different.

These cases further demonstrate that what the host State would typically present as contributory negligence, the investor would often consider as fulfilment of the obligation to mitigate. The distinction between the concepts of contributory negligence and the obligation to mitigate is usually drawn based on a temporal difference. According to Crawford and Wittich, contribution to the injury is possible only *before* the injury actually occurred, while the duty to

⁷⁹⁰ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Kazakhstan*, SCC, Award of 19 December 2013, paras. 1452-1458.

mitigate the damages is conceivable only once there are actual damages.⁷⁹¹ Such a clear temporal allocation of the occurrence of damage is often difficult and is not expressly recognized in the case law of the tribunals. One possible explanation is that damages are usually calculated not by isolated examination of various moments of their occurrence, but by employing an overall valuation to compare the actual and the but for scenarios. Technically the value of the investment is immediately changed once the wrongful act occurs. If a State suspends a regulatory pricing framework ensuring a reasonable rate of return, there is no need for the actual returns to decrease to identify the damage. The firm value is immediately affected after the imposition of such a measure. There is in many cases no temporal gap between the adoption of the measure and the damage, which would leave no temporal gap either for the application of the contribution to injury concept as opposed to the problem of mitigation.

Several cases raised the specific issue whether the investor's conduct in the course of forced auctions should influence the compensation. In *Burlington v Ecuador* the investor argued that the price at which the Ecuadorian authorities acquired their assets was too low due to the absence of possible competing bids. In response Ecuador pointed out their absence if due to the investor's threat of future litigation to any potential bidders participating in the auction. The Tribunal accepted this argument.⁷⁹²

The outcome was different in *Yukos v Russia*. Although the Tribunal also agreed that Yukos' warning to potential bidders might have had a deterring effect on interested parties, it concluded that Russia was determined to complete the destruction of Yukos and it would have happened one way or the other in any event.⁷⁹³ The State conduct qualified as a "parallel cause" of the contributory conduct. In light of the factual record it might be a well-established conclusion that Russia had hostile intentions towards the investor were hostile.

The Scenario 3 cases reveal that a 'contribution to the injury' following and causally connected to the breach is very difficult to demonstrate. Given the high threshold of 'negligence', it is

⁷⁹¹ Crawford 2013, at 501; S Wittich, 'Compensation', in R Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008) 499.

⁷⁹² *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Liability of 14 November 2012, para. 477.

⁷⁹³ *Yukos v Russia*, paras. 1020-1023.

arguable that if the conduct of an injured party would qualify as negligent, it would at the same time be a break in the causal link and not merely a contributing factor.

8.4 Conclusions on contributory conduct in international investment law

We can summarise the foregoing analysis scenario by scenario as follows:

Scenario 1: There is a logical and conceptual confusion characterizing the treatment of “pre-breach” contributory conduct. The tribunals make equitable determinations. It is submitted that a rigorous application of the *Chorzów* standard would eliminate these problems and it would also be preferable in light of the increased criticism “equitable” arbitral determinations are subject to.⁷⁹⁴

Scenario 2: If the damage is not divisible and the valuation cannot distinguish the effect of the wrongful act from those of the contributory conduct, equitable principles apply (*Copper Mesa v Ecuador*). However, in most cases it is unnecessary since the adequate choice of the valuation method will take due account of the injured party’s negligence and its immediate impact on the value of its asset (*Impregilo v Argentina*)

Scenario 3: There is a very high threshold for negligence and tribunals routinely reject such claims (*Achmea v Slovakia; Ascom v Kazakhstan*). Assuming that this threshold is met, equitable considerations should apply, but it is more likely in such cases that the contributory conduct breaks the causal chain.

It remains unclear what the requisite test of causation is, applied to the contributory conduct itself. As is apparent, under Scenario 2 *Yukos* is a prominent authority to the effect that the but for test is inappropriate. Although not labelled as such, *Yukos* applied a test what we could call

⁷⁹⁴ I Marboe, ‘Yukos Universal Limited (Isle of Man) vs The Russian Federation. Calculation of Damages in the Yukos Award: Highlighting the Valuation Date, Contributory Fault and Interest’, (2015) 30 *ICSID Review* 326, at 332; S Mullen – E Whitsitt, ‘Quantum, annulment and the requirement to give reasons: analysis and reform’, (2016) 32 *Arbitration International* 59, at 70.

facilitation. The contributory conduct is not a but for cause of the wrongful act, but it facilitated the performance of the latter.

The test in *Chevron* could be read both ways. Either as a strict but for test or a less formal contribution test. The cases discussed under Scenario 2 do not reveal a precisely defined test of causation. The emphasis of the tribunals is on the difficulty of precisely assessing the extent of contribution.⁷⁹⁵ Using the language borrowed from common law jurisprudence, we could say that a test of material contribution is what best fits the approach of these tribunals. Scenario 3, however, reveals a considerably stricter causal analysis. In these cases, tribunals either expressly or impliedly rely on a but for test. The host State, invoking the concept is required to prove but for causality (in addition to other criteria of the contribution to the injury) to demonstrate the difference the investor's conduct made. The actual assessment of the facts, however, rarely arrive at the question of causation, since the host State often fails to prove negligence in the first place.

The sharp difference between the applicable standards under Scenarios 1 and 2 and Scenario 3 is not surprising. A strict test of causation would always fail under the former scenarios, since the wrongful conduct *following* the investor's negligence is always a decisive and dominant element in the chain of causation. Strict but for causality would not function properly in such cases. Under Scenario 2 it would not, because tribunals would be required to construct an entirely hypothetical counterfactual disregarding the actual wrongful conduct of the State and figuring how the State would have reacted in the alternative. Under Scenario 2 the but for test would pose the well-known overdetermination problem. These considerations do not apply to Scenario 3.

⁷⁹⁵ See further Chapter III, Section 2.

9. Contributory negligence in international human rights law

9.1 Scenario 1 - contributory conduct “causing” the internationally wrongful act

The Practice Direction of the European Court of Human Rights on just satisfaction claims under Article 41 of the Convention makes clear that the Court enjoys discretion in rejecting compensation of losses that are at least in part ‘due to’ the applicant’s own fault.⁷⁹⁶ The phrase ‘due to’ indicates that even before reaching a decision on an equitable basis, a causal connection between the losses and the damages has to be shown. Following the interpretation of ARSIWA suggested by Crawford (and discussed above in detail) and mirroring the majority of investment law jurisprudence, causation is relevant to trigger the regime of ‘contributory negligence’, whereas equity is relevant in determining the consequence of contribution in terms of compensation.

The judgments in the *Yukos* cases are good examples to compare and contrast the approach of the Strasbourg Court with international investment tribunals.⁷⁹⁷ While there were some differences in the factual assessment of the applicant’s conduct (in particular, regarding the relevance of the tax avoidance schemes by Yukos), the core logic was the same and Yukos’ conduct preceding the internationally wrongful act was held to be negligent.⁷⁹⁸

Judge Bushev’s partially dissenting opinion (joined partially by Judge Hajiyev) is the most comprehensive doctrinal treatment of contributory negligence in the practice of the Court to date. He addresses the issue under the heading of “*Causation*” in his dissent, noting that the Court refused to distinguish between Yukos’ losses resulting from its own conduct and from the State’s wrongful conduct. While Bushev is right in asserting that the Court’s previous practice confirms the necessity to identify separate causes for separate parts of the damages

⁷⁹⁶ Available at: http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (last accessed: 30 April 2016)

⁷⁹⁷ *OAO Neftyanaya Kompaniya Yukos v Russia*, ECtHR, Judgment (Just Satisfaction) of 31 July 2014; E de Brabandere, ‘Complementarity or Conflict? Contrasting the Yukos-case before the European Court of Human Rights and Investment Tribunals’, (2015) 30(2) *ICSID Review – Foreign Investment Law Journal* 345.

⁷⁹⁸ *Id.*

(such as the findings on just satisfaction in *Immobiliare Saffi v Italy*),⁷⁹⁹ the problem arises when the combined effect of the causes is different than their isolated effect would be, *i.e.*, when the situation becomes one of genuine concurrent causation. For example, if neither cause would have resulted in insolvency, but the combination results in insolvency, the injury will become indivisible. In such a case there is nothing the practice of the Court (not even in the cases cited by Bushev) to suggest that Court should conduct a rigorous cause-and-effect analysis when reducing damages.

For example, in claims for procedural breaches, the Court does not examine the extent to which the applicant's misbehaviour affected the conduct of the proceedings. It merely stresses that it did and, accordingly, reflects this in rejecting or reducing the amount of compensation. In *Stork v Germany* the Court expressly confirmed that the applicant's contribution to the prolongation of the proceedings was small, still it refused to award any compensation after all.⁸⁰⁰

On the other hand, regarding divisible injuries, the decision on just satisfaction itself, contrary to Bushev's remark, is in fact better reasoned in terms of causation than its investment law counterpart. For example, the Court determined damages resulting from disproportionate fines imposed by Russia by speculating an alternative amount of hypothetically proportionate fines.⁸⁰¹

A controversial decision was *Eckle v Germany*. In this case, the Court not only considered the appellant's conduct during the criminal procedure forming the basis of the claim, but also stressed that "it cannot be overlooked that they were charged with serious acts of fraud".⁸⁰² In fact, the Court considered the *crime* triggering the criminal investigation too as a contributory conduct. Dannemann criticised this decision, because the procedural guarantees applicable to criminal proceedings presuppose that a criminal proceeding is underway.⁸⁰³ Since it is precisely the possible commission of a crime that triggers the State's duty to secure procedural rights, it is incorrect to consider such a crime as a contributory conduct. Otherwise the liability of States

⁷⁹⁹ *Immobiliare Saffi v Italy*, ECtHR, Judgment (Merits and Just Satisfaction) of 28 July 1999, para. 79.

⁸⁰⁰ *Stork v Germany*, ECtHR, Judgment (Merits and Just Satisfaction) of 13 July 2006, paras. 43, 50-51. See further Dannemann, at 245-247.

⁸⁰¹ *OAO Neftyanaya Kompaniya Yukos v Russia*, ECtHR, Judgment (Just Satisfaction) of 31 July 2014, at paras. 31-32.

⁸⁰² *Eckle v Germany*, ECtHR, Judgment (Just Satisfaction) of 21 June 1983, para. 24.

⁸⁰³ Dannemann, at 244-245.

would always be diminished in the context of criminal trials. This case highlights the significance of the underlying primary obligation to distinguish “contributory conduct” relevant for the purposes of State responsibility from conduct, which might well be even illegal, but still irrelevant.

In the human rights context, the distinction between pre-breach conduct and post-breach conduct gains peculiar significance. The assumption that the victim can be faulty in a human rights violation is very controversial. Lisa LaPlante examined and compared the practice of the European Court of Human Rights and the Inter-American Court of Human Rights.⁸⁰⁴ She concluded that the former is open to reflect on victims’ conduct, but the Inter-American Court of Human Rights rejects such arguments, even if the victims were actually engaged in egregious conduct.⁸⁰⁵ At least regarding procedural violations the Court appears ready to accept that the victims’ procedural conduct has relevance, as *Casanto v Argentina* shows.⁸⁰⁶ The fault criterion itself is very difficult to meet in the practice of the Strasbourg Court. In brief, even the victim’s willful conduct (such as the conscious rejection of health treatment from the State) could fall short of this threshold in most cases.⁸⁰⁷ In *Lantsov v Russia* the UN Human Rights Committee concluded that the State cannot rely as an excuse on the failure of the detained to ask for or receive any help from the authorities.⁸⁰⁸

An exception to this prevailing practice was the prominent case of *McCann and Others v United Kingdom*. Notwithstanding the Court’s conclusion that the State breached the provision on the right to life, it refused to award compensation, “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar”.⁸⁰⁹ In

⁸⁰⁴ L LaPlante, ‘The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition’, (2007) 23 *Am U Int’l L Rev* 51, at 64-68.

⁸⁰⁵ *Id.*, at 68.

⁸⁰⁶ *Case of Cantos v Argentina*, IACtHR Judgment (Merits, Reparations and Costs) of November 28, 2002, para. 57.

⁸⁰⁷ *Makharadze and Sikharulidze v Georgia*, ECtHR, Judgment (Merits and Just Satisfaction) of 22 November 2011, para. 82; See further *Öneryildiz v Turkey*, ECtHR, Judgment (Merits and Just Satisfaction) of 30 November 2004, paras. 103-106.

⁸⁰⁸ *Lantsova (on behalf of Lantsov) v Russian Federation*, Merits, Communication No 763/1997, UN Doc CCPR/C/74/D/763/1997, (2002) 9 *IHR* 935.

⁸⁰⁹ *McCann and Others v United Kingdom*, ECtHR, Judgment (Merits and Just Satisfaction) of 27 September 1995, para. 219.

general, however, the Court adopts under Article 2 an all or nothing approach. Similar approach is taken under Article 3 (prohibition of torture and inhuman treatment) cases.⁸¹⁰

9.2 Scenarios 2 & 3 – contributory conduct as a concurrent or intervening cause

In contrast to pre-breach contributory conduct of the victim, post-breach negligence or failure to mitigate and prevent further injuries matters greatly in the practice of the ECtHR. In *Beck, Copp and Bazeley v UK* the appellants were dismissed from their employment due to their sexual identity by the State, in breach of the ECHR. Their efforts to seek opportunities of new employment varied greatly and the Court reflected on this differences in its ruling on future losses. However, the Court did not examine the extent to which a mitigation could have diminished the loss of profits. The appellant failing to mitigate received around 15% less on account of loss of revenues than the other appellants.⁸¹¹ Thus, Crawford's and Wittich's position that different considerations apply to the duty to mitigate are more on point in the human right context. There is no duty to "abstain from contributing to" human rights breaches, because such breaches *by definition* cannot be consequences of the victim's conduct. However, there *is* a duty to mitigate the consequences after the occurrence of the breach.

In *Missenjoy v Estonia* the negligence of the appellant qualified as a *novus actus* and severed the causal link between the wrongful act and the injury. The appellant claimed compensation for the decreased value of his vehicles, which were attached in the course of a lengthy civil proceeding. The Court held that the State acted in breach of the Convention on procedural grounds, but noted that Missenjoy failed to appeal specifically the decision attaching his property. This mistake disrupted any causal link the internationally wrongful act might have had with the decreased value of the property.⁸¹²

⁸¹⁰ V Wilcox – O Riss, 'Contributory Negligence' in A Fenyves *et al.* (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2012) 771, at 780-786.

⁸¹¹ *Beck, Copp and Bazeley v the United Kingdom*, ECtHR, Judgment (Merits and Just Satisfaction) of 22 October 2002, paras. 101-102, 109, 113; See also the cases discussed by Dannemann, at 248-249, in particular *Gillow v United Kingdom*, ECtHR, Judgment (Just Satisfaction) of 14 September 1987.

⁸¹² *Missenjoy v Estonia*, ECtHR, Judgment (Merits and Just Satisfaction) of 29 January 2009, at paras. 54-56.

The IACtHR applies a very generous approach in this context too. Even the victims' refusal to accept help offered by the State authorities following the breach does not appear to alter the State's duty to provide reparations.⁸¹³

Thiede and Büyüksagis note that it is very difficult to ascertain whether and to what extent the victim's conduct influences the reduction of eventual damages.⁸¹⁴ For instance, they discuss the Court's reasoning in *Wenerski v Poland*, a case of self-inflicted injuries combined with the State's failure to provide adequate medical care.⁸¹⁵ The Court came up with a figure amounting to ten percent of the original claim. We submit that the only way to assess the extent to which the Court considered the conduct of the victim is a comparison with the general practice in case of similar injuries without contributory conduct on the victim's side. The final amount awarded does not seem to deviate significantly from the general practice in this respect.⁸¹⁶ Thiede and Büyüksagis discuss a number of further, equally unhelpful cases. In *Iversen v Denmark* the Court made express reference to the applicant's conduct, but, again, the extent of its influence on the final award cannot be discerned.⁸¹⁷ Even more puzzling is *Ramanauskas v Lithuania* where the Grand Chamber does not even distinguish between pecuniary and non-pecuniary damages and summarily refers to the diversity of factors influencing the compensation.⁸¹⁸

Contrary to the international investment law context, where non-pecuniary damages are exceptional, in human rights decisions there is a possibility to reflect on the *gravity* of the breach in awarding damages. As Shelton writes, "[t]he degree of wrongfulness of a state's conduct may be a variable in awarding moral damages."⁸¹⁹ Accordingly, the idea that a more serious breach causes more non-pecuniary damages is an accepted one. In turn, qualifying the severity in light of the preceding and contributory conduct of the victim is reasonable. This possibility was confirmed by the ICJ's award of non-pecuniary damages in *Diallo* too.⁸²⁰

⁸¹³ *Case of the Barrios Family v Venezuela*, IACtHR, Judgment (Merits, Reparations and Costs) of 24 November 2011, para. 128.

⁸¹⁴ T Thiede – E Büyüksagis, 'Reduction of Damages' in Fenyves *et al.* (eds)5, *Tort Law in the Jurisprudence of the European Court of Human Rights* (2012) 803, at 803-804.

⁸¹⁵ *Id.*, at 813-834.

⁸¹⁶ *Cf Pilcic v Croatia*, ECtHR, Judgment (Merits and Just Satisfaction) of 17 January 2008.

⁸¹⁷ *Iversen v Denmark*, ECtHR, Judgment (Merits and Just Satisfaction) of 28 September 2006, para. 80.

⁸¹⁸ *Ramanauskas v Lithuania*, ECtHR, Judgment (Merits and Just Satisfaction) of 5 February 2008, para. 80.

⁸¹⁹ D Shelton, *Remedies in International Human Rights* (2015), at 327.

⁸²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, *Compensation, Judgment*, *I.C.J. Reports 2012* 324, paras. 21-25.

To sum up, the success of invoking the doctrine of contributory fault depends almost exclusively on the demonstration of the fault of the victim in the practice of the European Court of Human Rights and it is practically impossible in the practice of the Inter-American Court of Human Rights, because the Court rejects the idea that one can be blamed for the breach *or* the consequences of the breach of her human rights. There is more room to demonstrate such a fault concerning the mitigation of damages and contribution to damages subsequent to the injury. The Strasbourg Court applies the principle of divisible damages and, at least in *Yukos*, separated the causal consequences of the pre-breach contributory conduct from the rest of the damages.

10. Contributory negligence in mass claims settlements

10.1 Iran-US Claims Tribunal

Mouri provided the most extensive survey on “aggrieved conduct” as a defense before the Iran-US Claims Tribunal.⁸²¹ Most of these cases raised the question whether the claimant abandoned her assets before an alleged inference into property rights happened. If such abandonment took place, the claim was rejected. Conversely, if the assets were not abandoned, a finding of responsibility was possible. The decisive issue here was not one of causation, but whether the claimant’s conduct relinquished title over the assets. Mouri noted that in most cases such a claim was not accepted.⁸²²

The finding of an inference into property rights or a taking could not only depend on “title” to the property, but also on its actual economic value. In such cases, the actual causes of a loss of value are dispositive of the claim. As the Tribunal put it in *SEDCO v IMIC*, the taking of an asset without net positive value could not result in any losses.⁸²³ Whether the cause of the absence of any net positive value is the claimant’s conduct or some other cause, such a taking

⁸²¹ Mouri, at 219-229.

⁸²² *Id.*

⁸²³ *SEDCO v IMICO*, Award, IUSCT Case No. 128/129 (419-128/129-2), 30 March 1989, para. 57.

could not give rise to a compensation claim. In *Golpira* the claimant was minority shareholder in a company, the majority of the shares of which were taken over by the Oppressed People's Foundation as a result of Iran's conduct. However, the claimant had not been receiving dividends in the years preceding the taking either.⁸²⁴ Accordingly, such losses were not the consequences of the taking.

In *Tavakoli* the question was whether the company jointly owned by private investors and the State ceased to work due to financial difficulties or as a result of the provisionally prevailing conditions in Iran. This was relevant, because the former cause would have excluded claims based on future profitability, but the latter cause would not have barred such compensation.⁸²⁵ The Tribunal was not satisfied by the mere demonstration that the company stopped working, but it would have required the State (!) to provide further evidence that financial difficulties halted the work.⁸²⁶ This heavy burden on the Respondent was arguably prompted by its ownership in the company.

In these cases, falling under Scenario 2, there does not appear to be any distinction between an "average" concurrent cause and the fact that the claimant caused the harm. The only question is whether a harm was caused by the State conduct or something else.

The Scenario 1 question is whether the claimant's conduct should retain its relevance in determining compensation, notwithstanding that the finding of responsibility is not excluded by such conduct. This issue arose in *Aryeh v Iran*. This case was one of several disputes before the Tribunal concerning the legality of land acquisition by dual Iran-US nationals. Previously, in *Saghi* the Tribunal held that notwithstanding the admissibility of claims by persons possessing "effective" US nationality, the abuse of dual nationality could prevent recovery.⁸²⁷ Again, this is not a matter of causation, but equity: no one should benefit from her own wrong. The end result is not the rejection of State responsibility or the reduction of compensation, but the inadmissibility of the claim.

⁸²⁴ *Ataollah Golpira v Iran*, Award, IUSCT Case No. 211 (32-211-2), para. 4.

⁸²⁵ See the discussion of CBS *supra*, Section 5.1.

⁸²⁶ *Vivian Mai Tavakoli v Iran*, Award, IUSCT Case No. 832 (580-832-2) 23 April 1987, para. 188.

⁸²⁷ *James M. Saghi et al. and The Islamic Republic of Iran*, Award, IUSCT Case No. 298 (544-298-2), 22 January 1993, paras. 45-64.

However, in *Aryeh v Iran* the Tribunal held that the claimant's *use* of its dual nationality did not amount to an *abuse*.⁸²⁸ The claim was admissible and compensation was possible. At the same time, the claimants' conduct remained relevant for the purposes of compensation. Since Iranian law prescribed the sale of "landed properties" by those acquiring foreign nationality, the Tribunal examined what compensation the claimant would have been entitled under Iranian law, assuming that Iran sanctioned his conduct under its own law.⁸²⁹ What the Tribunal did was, in essence, a rigorous application of the "but for" test to determine what Iranian conduct *would have been the lawful reaction to the conduct of the investor*, assuming that the latter conduct fell short of an abuse of law (which would render the entire claim inadmissible).

The Tribunal's decision was subject to a very elaborate dissent by Judge Aghahosseini, but the main disagreement concerned the legal qualification of the claimant's conduct. Aghahosseini denied the possibility that the Claimant's "censurable conduct" could play a role *in addition to a finding of illegal State conduct*:

Under [...] the general rules of international law [...], the unjustifiability of the respondent's action – expropriation, wrongful imprisonment, etc. / is assumed. To show the international law's [sic] antipathy towards the claimant's inequitable conduct, those rules have been devised to entirely reject – to bar – his otherwise meritorious claim.⁸³⁰

Aghahosseini's argument is that there is no room to consider 'censurable conduct' in parallel with a determination that a State is responsible. We can agree with Aghahosseini that claimant's egregious conduct, reaching a certain threshold of egregiousness, may bar the claim. But the question is what happens when the threshold is not met? It is submitted that in such cases the claimant's conduct continues to operate as a normal cause would, which has to be factored into the counterfactual analysis, as already discussed in the investment law section above.⁸³¹ This is the approach impliedly taken by the majority in determining compensation and this is, we submit, the correct approach to take.

⁸²⁸ *Moussa Aryeh v Iran*, Award, IUSCT Case No. 266 (583-266-3), 25 September 1997, para. 62.

⁸²⁹ *Id.*, paras. 84-86.

⁸³⁰ *Moussa Aryeh v Iran*, Award, IUSCT Case No. 266 (583-266-3), 25 September 1997, Section 2.5.5.

⁸³¹ See the discussion *supra* in the context of *Yukos* and *Occidental*.

10.2 The United Nations Compensation Commission

The UNCC, understandably, did not deal with cases when the alleged contributory conduct preceded and provoked the wrongful act, *i.e.*, Iraq's invasion of Kuwait. The illegal use of military force cannot be regarded as a reaction to any previous conduct. If there were pre-existing financial difficulties possibly contributing to the losses caused by Iraq's conduct, independently from the aggression, such causes were treated as "regular" concurrent causes, as discussed above.⁸³²

However, there are numerous cases among the UNCC's decisions about the duty to mitigate (Scenario 3). Governing Council Decisions 9 and 15 made clear that damages which "could reasonably have been avoided" are not compensable. This applied to "all claims."⁸³³ According to a Panel, "*costs* incurred in taking reasonable steps to mitigate the losses" were to be compensated.⁸³⁴ On the other hand, if the alleged "mitigation cost" was in reality the result of a commercial decision in the hopes of restoring operation, compensation was not due.⁸³⁵

Similar to the practice of the Iran-US Claims Tribunal, one issue before the Tribunal was whether the departure of employees from Iraq and the abandonment of the equipment in Iraq affected Iraq's liability for the loss of such tangible assets. This depended on the circumstances of the departure. If the departure was forced, leaving the assets behind was not the consequence of a failure to mitigate. At the same time, even if mitigation could not have been reasonably expected from a departing person or entity, yet mitigation efforts were taken, the cost of efforts to mitigate could still be compensated.⁸³⁶ In contrast, if the departure was "*voluntary*", the duty to mitigate was triggered.⁸³⁷

The Commission's approach to distinguish on a case by case basis between the conditions and circumstances of departure is understandable, but one wonders whether a "*voluntary*" departure

⁸³² First Instalment of E4 Claims, para. 186.

⁸³³ UNCC Governing Council Decision 9, 6 March 1992, S/AC.26/1992/9, para. 6; UNCC Governing Council Decision 15, 4 January 1993, S/AC.26/1992/15_*/, para. 9.

⁸³⁴ Third Instalment of E3 Claims, 18 March 1999, para. 15.

⁸³⁵ First Instalment of E2 Claims, 3 July 1998, para. 210.

⁸³⁶ *Id.*, para. 132.

⁸³⁷ *Id.*, para. 125.

should not exclude a compensation claim in its entirety. The Governing Council decided that departures from Iraq are presumed to be consequences of Iraq's unlawful conduct, but holding that a departure was "*voluntary*" in itself contradicts this presumption at the outset. A better way would have been to assess whether under the specific circumstances of the departure there would have been a reasonable chance to mitigate or not.

Mitsubishi's claim concerned expenses of storing an undelivered line pipe. The delivery became impossible following Iraq's invasion of Kuwait. The question before the UNCC was whether additional expenses of storing the line pipe instead of reselling it were compensable. The Panel held that

one year after Iraq's invasion of Kuwait it should have been clear to Mitsubishi that it would not, within the foreseeable future, become possible to deliver the line pipe to SCOP. At that time, Mitsubishi acquired a duty to mitigate its loss through resales of the line pipe to third parties.⁸³⁸

Accordingly, the storage expenses were limited to the period which should have been enough to resell the line pipes.

The result of this solution is that the "storage expense" damages are divided into a compensable part and a non-compensable part. The question first is whether and (if this first question is answered in the affirmative) when and how the claimant was in a position to avoid the damages. If this is determined, the causal consequence of the failure to mitigate is assessed. The non-compensable part is in essence treated as a "remote damage", which is, although causally connected to the original act too (there would not have been any cost of storage but for Iraq's conduct), is rendered remote due to an intervening cause, Mitsubishi's failure to mitigate (Scenario 3).

10.3 The Eritrea-Ethiopia Claims Commission

The Commission had to decide on multiple claims concerning looting or destruction of properties in war affected areas, where the origin of the harm and the respective contributions

⁸³⁸ Third Instalment of E1 Claims, 25 June 1999, para. 153.

by the conflicting parties were not clear. The general approach of the Commission was to apportion the looting losses to the occupying power depending on the length of the actual occupation.⁸³⁹ Compensation for destroyed buildings were awarded only if it was established that the buildings were intact before the occupation.⁸⁴⁰ Whether the uncompensated looting or destruction was the causal consequence of the opposing party's conduct or some other cause was immaterial.

The reason that the contributory conduct of the parties was less relevant in the Commission's practice was Eritrea's *ius ad bellum* liability, in addition to the parties' *ius in bello* liabilities. This meant that combat damages caused by conduct of either party (!) otherwise in accordance with *ius in bello* could and, to some extent, did fall within the scope of Eritrea's liability, subject to the applicable test of remoteness.⁸⁴¹ Accordingly, the question was not whether Eritrea or Ethiopia contributed to damages caused by the *ius in bello* breach of the other party, but the scope of the damages covered by *ius ad bellum* liability of Eritrea was contrasted against the scope of the damages covered by the *ius in bello* liability of the parties. A *ius in bello* breach always broke the chain of causation between a *ius ad bellum* breach and the damages, while a damage causally connected to the aggrieved conduct of Eritrea was a *ius ad bellum* liability, not a matter of contribution to the injury.⁸⁴²

Ethiopia's contributory conduct was a disputed point concerning the Ethiopian *Port Claims*. Ethiopia claimed compensation for goods which did not reach Ethiopia from the Eritrean port of Assab following the outbreak of the hostilities. Eritrea, in response, contended that the termination of commercial relations and the closure of the border was Ethiopia's decision. Ethiopia's counterargument was that Ethiopia's closure of its border was also a "foreseeable" consequence of Eritrea's *ius ad bellum* breach. The Commission found that Ethiopia appeared to reject the offered transfer of the stranded goods and that launching the war was not the "proximate cause" of these losses.⁸⁴³ The Commission did not elaborate on this point, but there are two possible interpretations. It is possible that termination of commercial relations as such

⁸³⁹ S D Murphy *et al* (eds), *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013), at 195-196.

⁸⁴⁰ *Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22*, EECC, Partial Award, 28 April 2004, para. 63; *Eritrea's Damages*, para. 87.

⁸⁴¹ *Ethiopia's Damages*, at 63-70, 79-86.

⁸⁴² See Chapter IV, Section 8.3.

⁸⁴³ *Ethiopia's Damages*, paras. 444-445.

was a remote consequence pursuant to the general test of remoteness in the Commission's practice. The alternative reading is that what rendered these losses remote was that it was Ethiopia's *own* decision to reject the goods.

As noted in the previous chapter, the Commission arrived at a very carefully circumscribed definition of the *ius ad bellum* breach, with a narrowly construed interpretation of what should have been foreseeable at the moment of the initial attack at Badme, in breach of Article 2(4) of the UN Charter. However, even on this narrow construction, the Commission found that the escalation of the conflict in the strategically important area around Assab, notwithstanding its geographical distance from the first site of the hostilities, could have been foreseeable.⁸⁴⁴ It is therefore reasonable to assume that the closure of the border by Ethiopia was also a foreseeable reaction to such escalation. Consequently, the better reading of this decision is that *notwithstanding* the foreseeability of Ethiopia's conduct, it could have been reasonably anticipated to receive the goods and failing to do so broke the causal connection between the *ius ad bellum* breach and the eventual damages. In brief, similar to the *Mitsubishi Claim* before the UNCC, the failure of the duty to mitigate functions as a *lex specialis* remoteness test, and its implications for compensation could be determined on such grounds.

It is worth comparing this case with the pronouncements of the arbitral tribunal in *Naulilaa*. One of the questions before the Tribunal was the causal significance of Portugal's refusal to negotiate and cooperate with Germany, following Germany's initial wrongful conduct.⁸⁴⁵ The Tribunal found that Portugal's decision reduced Germany's duty to pay compensation, because it was a free decision. At the same time, the Tribunal also noted that Germany's conduct still had a role to play in Portugal's subsequent behaviour and thus it refused to view Portugal's conduct as a break in the chain of causation. The *Naulilaa* case demonstrates that causation is not a binary issue. It is not necessarily the case that causation either exists or is absent. Portugal's conduct was causally influenced by Germany's previous behaviour, but it was still an independent choice. This latter approach is preferable to the findings of the Eritrea-Ethiopia Claims Commission, assuming that a causal influence of the wrongful act on the contributory conduct can be demonstrated.

⁸⁴⁴ *Ethiopia's Damages*, paras. 300-304.

⁸⁴⁵ *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, (1928) 2 RIAA 1011, at 1032.

11. Conclusions

This chapter undertook to answer three questions presented at the beginning. The survey of the case law provides the following answers.

- i. How, if at all, does the case law determine whether a case of multiple causation is one of intervening causation (i.e., remoteness), complementary causation or genuine concurrent causation?

In most investment disputes damages will be divisible. The *Micula* tribunal rightly noted the intrinsic relationship between cumulative causation and remoteness. Parallel causation and contributory causation scenarios do not arise often, but when they occur, we could not identify any case reflecting a good understanding of the problem of overdetermination. Attempts to divide damages in such cases lack a sound legal basis. Pre-empted causes are disregarded in the causal inquiry.

In principle, the divisibility of the damages is recognized by the European Court of Human Rights, yet often without a sufficient, clear reasoning. Human rights courts appear to distinguish between concurrent causation and remoteness. This follows from the clear contrast between compensation rejected in some cases of cumulative and intervening causes, while almost always upheld in contributory causation settings.

Mass claims adjudications do not offer uniform solutions. All of them distinguish complementary causes from overdetermination and recognize the importance of dividing damages whenever possible. However, their approach to overdetermination is varied. The Iran-US Claims Tribunal failed to recognize the problem of overdetermination, but it distinguished pre-empted causes in its jurisprudence. The UNCC distinguished parallel causation from cumulative causation and remoteness and visibly understood the problem of overdetermination. It adopted a *sui generis* solution to uncertain causation by introducing the

concept of the overstatement risk. The Eritrea-Ethiopia Claims Commission's corresponding decisions are not substantial enough to give us a proper understanding of the Commission's approach.

- ii. What is the legal solution offered in cases of genuine concurrent causation? Is there a threshold test for awarding or rejecting compensation?

The practice of investment tribunals in principle promotes the ILC's position on *in solidum* liability for genuine concurrent causation, but they do so by applying the principle in inappropriate circumstances. Similarly, in principle, they promote the ILC's conception of divisibility of damages, but they stretch the doctrine beyond its original scope.

Human rights courts award compensation in contributory causation and parallel causation cases. In the practice of the European Court of Human Rights *in solidum* liability is subject to the threshold test of "primary" or "predominant" contribution.

Mass claims procedures, again, provide a complex picture. The Iran-US Claims Tribunal, not having conceptualized the problem of overdetermination, fails to follow the ILC's approach and rejects compensation in cases of genuine concurrent causation. The UNCC awarded compensation in cases of genuine concurrent causation. The Eritrea-Ethiopia Claims Commissions' limited practice resembles the Strasbourg approach.

- iii. How do these considerations apply in cases of contribution to the injury? Is there a different treatment for contributions to the injury?

Investment law practice is not uniform. In Scenario 1 cases, some investment tribunals misuse the concept of "contribution to the injury" and unnecessarily rely on equitable grounds instead of a rigorous causal analysis in their quantum determinations. At the same time, they also invoke the ARSIWA rules on concurrent causation too as a pertinent provision. In Scenario 2

cases they treat the conduct of the injured party as a complementary cause, if possible. If it is not possible, such as in *Copper Mesa*, they invoke Article 39.

The human rights practice has a very limited added value to the discussion on contributory fault, because the idea that one can be blamed for the breach of her human rights is a very controversial one. At best, this plays a hardly traceable role in awarding non-material damages. In *Yukos*, the European Court of Human Rights addressed Scenario 1 in a more nuanced manner and, instead of equitable determinations, attempted to resolve the issue under general rules on causation. In Scenario 3 cases, the breach of the duty to reasonably mitigate the consequences of the human rights violation severs the causal connection between the injury and the non-mitigated part of the damages.

The mass claims processes show almost uniform understanding that the victim's or the claimant's conduct is best dealt with as an average causal factor, to the extent possible. The *Aryeh Case* of the Iran-US Claims Tribunal is the correct approach to Scenario 1 contributory negligence. In Scenario 3 cases the failure of mitigation severs the causal connection between the injury and the non-mitigated part of the damages.

Chapter VI

Conclusions

Causation is a general, transsubstantive principle in the law State responsibility. Causation permeates determinations of responsibility and delimitations of liability in international law just as much as in municipal legal systems. This study laid out the doctrinal foundations for this prominent role of causation. The initial questions were the “*when*” and the “*how*”: *When* should the international lawyer address causation? *How* should the international lawyer solve specific problems of causation?

The “*when*” dilemma is whether causation is relevant beyond its uncontroversial role in the context of reparation. Is causation a condition of State responsibility? The picture emerging from the case law was clear. The practice of a range of international dispute settlement bodies revealed that attribution and determinations of illegality are coloured by causality inquiries. When faced with the involvement of non-State actors in the wrongdoing, courts and tribunals queried whether the non-State conduct was causally connected to State conduct. This practice stands at odds with the requirements of ARSIWA and its Commentaries, which expressly caution against conflating attribution and causation.

It also became apparent that the recent developments (such as *AMTO v Ukraine* or *El-Masri v Macedonia*) in the case law are not novelties, but they continue the tradition of the case law predating ARSIWA. Even ARSIWA itself seems to embrace causative principles in certain contexts, notwithstanding that breach and attribution of conduct are declared to be the sole conditions of State responsibility. It was therefore necessary to clarify the relationship of causation with notions of breach and attribution. “*When*” was at least partially answered at this stage: in practice, causation is assessed *before* responsibility is established, as if it was, at least in certain cases, a condition of responsibility after all.

Answering “*when*” at this stage raised, however, the problem of “*why*”. Why did and why could responsibility-grounding causation survive the ILC’s declared decision to exclude it from the system of State responsibility? Some seek the answer to this question beyond the terrain of secondary rules and point to the primary obligations. Others see an emerging new test of

attribution in the case law and argue for a lower attribution threshold than the ‘effective control’ test laid down in *Nicaragua* and more recently confirmed in *Bosnia Genocide*.

This thesis set forth an alternative solution. It is incorrect to query whether an act is attributable to the State before identifying the ‘act’ in question in the first place. The underlying assumption of the case law is that a ‘State act’ is an event in which State involvement is exclusive. As soon as a non-State actor is involved, the attention turns to whether the conduct of the non-State actor is attributable to the State on some grounds *or* to whether the State failed in its own conduct to prevent the non-State conduct. Implicit in this logic is that the State actor and the non-State actor cannot be involved in a *single* act. It is an either / or dilemma: it is either a State act to the exclusion of non-State actors, or it is a non-State act, to the exclusion of the State.

This thesis challenges this conception of action. More precisely, the ‘non-conceptualisation’ of actions is challenged. ARSIWA, the case law and legal literature uses the concept of an act as a self-explanatory category. They assume that determining whether a given occurrence is an act or not does not pose any problems. It is an erroneous assumption. Drawing on the traditions of domestic legal systems and the work of legal philosophers engaged with action theory, this thesis argues that ‘act’ is a complex notion and not a self-explanatory term. Acts are not pre-legal expressions. They are phenomena that must possess certain attributes so that a legal regime could qualify them as acts. The first and foremost, yet plainly overlooked condition of State responsibility is not breach or attribution, but that there is an event that international law qualifies as an ‘act’ or ‘omission’. It is a preliminary step before attribution and before the assessment of legality. International law needs an action theory so that the basic characteristics of ‘acts’ are understood and ‘acts’ become distinguishable from ‘non-acts’.

It is possible to conceptualise acts as causal sequences and indeed it is how ‘acts’ are conceptualized by the most prominent legal action theorists today. It follows from such an action theory that performing an act *through* others is possible. The fact that an actor is not exclusively acting with her or his own hands does not exclude the possibility that she or he still performed the act through other means. The qualification of an act as internationally wrongful, of course, always depends on the primary obligation. But the qualification of an event as an act will not.

A developed action theory has broad implications for the law of international responsibility. First, it explains why responsibility-grounding causation survived the ILC's attempt to dispose of it. Second, it settles the attribution versus causation debate. Third, it provides theoretical justification for the proposition that the involvement of private actors in international wrongdoing does not preclude the qualification of such a wrong as an 'internationally wrongful act'.

Having answered the "when" issue, the remaining problem is the "how". How to decide whether a causal link exists between an injury and the internationally wrongful act? What criteria does a link between an act and a loss have to meet to qualify as a causal link for the purposes of State responsibility? The possibility of finding such common principles was doubtful at the outset. The ARSIWA Commentary suggested that overarching rules are not necessarily available and the underlying primary obligations are decisive.

This thesis addressed the problem from two angles. *First*, the claim that 'general principles of law' are helpful sources to consult was addressed, and rebutted. This is a frequent claim and international courts and tribunals prefer to justify their findings on causation with reference to allegedly existing general principles of law. A comparison of three of the chief legal systems of the world, heavily influencing many others, revealed that there are major, irreconcilable differences in principle and practice. Legal systems appear to agree on only a few aspects of causation:

- Causation has, at least, a dual function: it triggers liability and it delimits liability. This is not to say that causation is always necessary to trigger liability, nor that it is always relevant to delimit liability, but causation is a very important concept for both purposes.
- The starting point of a causal inquiry is the 'but for' question: Would the injury have happened 'but for' the act of the wrongdoer? However, 'but for' is not a universal formula, it has its limits, it does not provide a final answer to causality problems and there are situations when its application is misplaced.

Beyond these principles, the particularities are visibly irreconcilable. There is no single formula to determine when a loss, despite being in a but for nexus with the act, is non-compensable. Tests of directness, foreseeability, explanatory causation, adequate causation or the protective purpose of the rule provide different doctrinal and practical solutions. A common approach is

equally missing in cases when ‘but for’ itself breaks down and fails to provide a satisfactory answer.

The *second* attempt to understand the principles of causation in the law of State responsibility was a comparative survey of the case law. The thesis compared and analyzed the practice of investment tribunals, human rights courts and mass claims procedures and it contrasted their findings with the ‘classic’ cases on causation. All these fora identify their approach to reparation as a reflection of the generally applicable *Chorzów* formula. The assumption was therefore that a successful synthesis of their jurisprudence could make a lasting contribution to the crystallization of principles of causation. This exercise could not have been done, however, without scrutinizing the concepts appearing in the case law in light of their origins in domestic legal systems.

A number of previously unrecognized rules could be elucidated this way, which we might call the ten postulates of causation in the law of State responsibility. A brief comment is provided by way of summary under each rule. Admittedly, some of these principles are not uniformly followed in the case law and to that extent they might qualify as a *de lege ferenda* restatement, as opposed to a *de lege lata* account. If the authorities are divided, this will be noted in the comment and explained why the suggested solution is desirable. The terminology addressing variants of multiple causation adopts the definitions introduced in Chapter V.

- i. An injury is not compensable, unless it is counterfactually dependent on the internationally wrongful act, except in the cases of contributory causation and parallel causation (postulate iv. below).

The general applicability of the but for test was clear from the case law and this rule enshrines its importance. At the same time, it recognizes the conceptual limits of the rule and leaves room for exceptions. It also follows from postulate i. that a but for conditionality *per se* is not enough for the compensability of the harm.

- ii. A counterfactual dependence is established, if assuming away the wrongful aspect of the internationally wrongful act provides a counterfactual scenario where the absence of the injury is more likely than its occurrence.

This rule clarifies the nature of the counterfactual inquiry. As we have seen, courts and tribunals do not exercise the same level of care when constructing a counterfactual scenario. The postulate, supported by a number of well-reasoned decisions (such as *Chevron v Ecuador* or *Case No. A15 (IV) and A24* of the Iran-US Claims Tribunal), provides that a *lawful* alternative State conduct is reasonably assumed in a counterfactual world and that counterfactual dependence does not require absolute certainty, only a certain level of likelihood. This position is supported by the domestic legal origins of the but for test and by the unreasonable difficulties a higher threshold of certainty would require. Notwithstanding its almost universal acceptance in practice, legal scholarship has voiced concerns about the adequacy of counterfactual determinations in certain cases, such as human rights obligations.

- iii. For the purposes of counterfactual dependence, hypothetical alternative causes, pre-empted by the actual occurrence of the internationally wrongful act, shall be disregarded.

This postulate confirms the almost uniform approach excluding pre-empted causes from the counterfactual analysis. Pre-empted causes are, as discussed in Chapters IV and V, causes which could *not* make their impact, but which could have made their impact later, but for the occurrence of the internationally wrongful act and the injuries resulting therefrom. The case law revealed that it does not matter that there would have been other causes subsequently resulting in another injury, as long as the actual injury results from the internationally wrongful act. The situation of pre-empted causes has to be distinguished from parallel causes, which actually made their impact in parallel with the internationally wrongful act.

- iv. An indivisible injury might be compensable in its entirety, even if it is not counterfactually dependent on the internationally wrongful act or even if it cannot be determined with certainty whether it is counterfactually dependent on the internationally wrongful act, if the internationally wrongful act contributed to its occurrence and such contribution was major, not marginal (exception to postulate i.).

This rule confirms that exceptions to the but for test are only possible if the injury in question is not divisible (parallel causation and contributory causation). The suggested rule is supported by the jurisprudence of human rights courts, the UNCC and the Eritrea-Ethiopia Claims Commission. It is not supported by the practice of the Iran-US Claims Tribunal, which received

heavy criticism on this account in the literature. The practice of international investment tribunals is not instructive.

There are two main reasons this rule should apply. *First*, all legal systems aim to tackle the problem of overdetermination and it is better to make such an attempt than to incorrectly classify these cases as regular but for scenarios. *Second*, leaving no remedy in parallel and contributory causation could result in manifestly inequitable situations.

- v. An injury is not compensable, even if it is counterfactually dependent on the internationally wrongful act (postulate i.) or even if the internationally wrongful act is one of its parallel or contributory causes in line with postulate iv., if it was not a foreseeable consequence of the internationally wrongful act.

This rule codifies the decisive test of remoteness as the standard of foreseeability. It also provides that postulates i. to iv. do not render an injury compensable without further considerations of remoteness. The standard is supported by the majority of the case law, a notable outlier being human rights jurisprudence. Human rights courts, however, failed to come up with a coherent alternative doctrine of remoteness and most of their pronouncements would fit a reconceptualised foreseeability test, as further detailed in the comment to postulate vi. below.

- vi. Foreseeability shall be determined from the perspective of the wrongdoer with regard to the factual circumstances of the breach, and the nature and purpose of the international obligation violated by the internationally wrongful act.

Postulate vi. codifies the test of foreseeability applied by the Eritrea-Ethiopia Claims Commission and the UNCC. The concept of foreseeability was ill-defined in previous practice, but this formulation of the test fits the majority of the case law on remoteness. In addition, a foreseeability test corrected or constrained by the *Normszweck* approach suits the approach of human rights courts too. In practice, the test provides that foreseeable, and only foreseeable damages shall be compensated, unless the nature and purpose of the international obligations was not to provide protection from the type of injury that actually occurred.

- vii. If postulates i. to vii. do not exclude the compensability of the injury, the injury is compensable, subject to the exception of postulate x.

This rule sums up that a compensable damage has to be foreseeable under postulates v and vi. and the internationally wrongful act must be either its but for cause or its parallel / contributory cause under postulates i. to iv.

- viii. If the internationally wrongful act follows and is performed in reaction to the blameable conduct of the injured party, the compensable part of the injury caused by the internationally wrongful act will be the difference between the injury and the part of the injury that would have been caused by a lawful reaction on behalf of the State to conduct of the injured party in any event, if it can be determined.

This rule is a logical consequence of postulates i. and ii. It is designed to tackle cases when the misconduct or negligent contribution of the injured party to its own injury happens before the internationally wrongful act and the internationally wrongful act is in some sense the consequence of the contribution. International courts and tribunals mistakenly apply Art 39 ARSIWA and make equitable determinations in such cases, whereas the issue could be resolved under the *Chorzów* rule on full reparation and the adequate construction of a counterfactual. The postulate is supported by the *Yukos* decision of the European Court of Human Rights and the *Aryeh Case* of the Iran US Claims Tribunal.

- ix. If the injury would be compensable under postulates iv. to vii, but the blameable conduct of the injured party is a parallel or contributory cause (as defined by postulate iv.) or a foreseeable consequence of the internationally wrongful act (as defined by postulates vi. and vi.), or if the compensable part of the injury cannot be determined under postulate viii., the duty to provide reparation extends only to an equitably reduced amount.

This rule delimits the scope of equitable determinations on the account of contributory negligence. If, pursuant to the default rules of causation, an injury would be compensable (i.e., the contributory act of the injured party does not sever or exclude the causal nexus), there shall be room for equitable considerations. As long as the rules of causation are sufficient to provide a satisfactory solution, equity should remain an instrument of last resort. Leaving aside that this follows from the *Chorzów* principle as a matter of logic, it is also desirable to promote well-reasoned judicial determinations.

- x. With the exception of postulate ix., the conduct of the injured party does not trigger any exception from the application of postulates i. to viii.

This rule reaffirms that the contribution of the injured party shall not be considered as an *exception* to the general rules of causation, unless the latter would unduly reward the negligent injured party by requiring full reparation.

It is submitted that these ten postulates are supported by the majority of the cases discussed. They could help to properly understand, classify and approach cases raising difficult problems of causation. They could help promoting consistency and clarity, which are valuable features of a legal system, especially in a system of responsibility. At the same time, even if they are challenged, they could serve as the basis of any future discussion about causation.

Admittedly, they are not meant to provide a universal formula. Such a universal formula could not be found in far more elaborated legal responsibility regimes either. Causal complexities are numerous and the international legal context does not make them simpler. Further research is therefore not only necessary, but inevitable.

The international legal scholar researching State responsibility is in a far more fortunate situation today than at any point previously. There is a critical mass of jurisprudence and doctrine, providing a previously unprecedented amount of materials to consult, analyse and synthesize. This is an opportunity to clarify some of the persistent gaps in the regime of international responsibility. Causation is one, if not the most significant *lacunae*. This work was written in the hope that in the not too distant future causation will cease to be *terra incognita*, even if it might stay an intricate problem for many years to come.

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