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Causation and International State Responsibility

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CAUSATION AND INTERNATIONAL STATE RESPONSIBILITY

León Castellanos-Jankiewicz *

SUMMARY

This work studies causation in the law of international State responsibility. It is submitted that the absence of causation as an element of the internationally wrongful act owes more to the structure of international law, than to the inadequateness of causation as a conceptual and legal construct to ascribe international responsibility. The lack of causal analysis for breach owes to the subsidiary role of primary rules in the process of determining the existence of an internationally wrongful act. Primary rules are even less relevant for the determination of reparations, which stem from injury arising from the international wrong. Moreover, international law carries out the attribution of wrongful conduct pursuant to the agency theory, which operates *en lieu* of causation. The absence of causal analysis from the determination of internationally wrongful acts is the result of consistent State practice, based on a clear distinction between the national and international legal orders. International responsibility is not domestic liability writ large; it is international accountability of international actors in the international community. The differences that international responsibility bears with domestic legal orders respond to the legal articulation of an international system of rules, distinct from the legal orders of the sovereign subjects it addresses. Causal analysis is only relevant for the assessment of damage and subsequent reparation of breaches of international law.

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INTRODUCTION

This paper is a study of causation in the law of international State responsibility. In particular, it analyzes causation in the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts under two separate headings. Firstly, the absence of causal analysis in the determination of internationally wrongful acts is described. Secondly, the role of causation in determining reparations for injured States is assessed.

As is customary, the intellectual itinerary followed to complete this paper is reflected in its structure. The research has been undertaken for the Project on Shared Responsibility in International Law (SHARES), at the Amsterdam Center for International Law. Part of the SHARES Project examines the allocation of international responsibilities among multiple States, and seeks to offer new perspectives to understand the heterogeneous nature of international law. The present contribution offers one of those perspectives from the standpoint of causation. The topic is important for SHARES because the law of State Responsibility gives no content to 'shared State responsibility' as a term of art. Instead, the principle of individual attribution of wrongful conduct prevails. It follows that the Articles on State Responsibility recognize the 'responsibility of a State in connection with the act of another State' (Articles 16 to 19), so that the acts of each State are separately sanctioned. Similarly, when several States are responsible for the same internationally wrongful act, Article 47 provides that the responsibility of each State may be invoked in relation to that act, meaning that the acts of each State will give rise to distinct legal injuries.

In short, States cannot be held jointly responsible in law for jointly conducted acts. While it is true that State conduct can always be individualized, and singly attributed, inter-State cooperation may not be easily disentangled. The inability to hold cooperating States jointly or severally responsible for wrongful conduct could be prejudicial to injured States seeking redress.

The law of international State responsibility does not mirror the elements of domestic liabilities. Particularly, damage and fault are not required elements of international State responsibility, pursuant to the objective nature of the internationally wrongful act, which only necessitates a finding of wrongful conduct attributable to a State in order to arise. Nor is a causal assessment of breaches of international law required to attribute conduct to a State, or to establish the international responsibility of a State. The absence of damage, fault and causal analysis in the determination of a wrongful act are explained in relation to the theory of

wrongfulness, the nature of international responsibility and the specificities of the international legal system.

International adjudication and codification throughout the twentieth century privileged an attribution-based theory of responsibility founded on the concept of wrongfulness. Emphasis on wrongfulness as an early element of international responsibility has given support to the theory of the internationally wrongful act. This public outlook of State responsibility for the determination of a breach coexists with causal, contractual relationships emanating from bilateral and multilateral obligations.

Particular emphasis is placed on the notion of wrongfulness and its independence from primary rules to explain the absence of causal analysis from the determination of a breach. Wrongfulness sanctions the violation of the international legal order in which the breached rule is situated. At the same time, it gives the specially injured State a legal interest to obtain reparations, which is distinct from the rights and obligations contained in primary rules governed by customary law and the law of treaties. Viewed thus, wrongfulness creates legal interests whose existence is independent from primary rules, and therefore, causal analysis based on those rules is ruled out. Responsibility arises from a finding of wrongfulness on the basis of secondary rules. Consideration of primary rules is only relevant for the purposes of determining a breach, a process which is itself regulated by international law pursuant to the agency theory.

Despite the absence of causation for the determination of internationally wrongful acts, there is extensive arbitral and State practice addressing causation and reparations. In this sense, causation is primarily a technique used to measure reparations for damage sustained. As pointed out by Honoré, ‘causation in law addresses the need to define the harm for which compensation is to be paid in a tort action.’¹ This means that the damage must amount in law to injury, and ‘must be of a sort which it is the policy of the legal system to compensate, and must be adequately delimited.’²

Causal analysis for reparations was initially undertaken on the basis of direct and indirect causation, which is a predominantly factual test. Direct causation was subsequently

¹ A. M. Honoré, ‘Causation and Remoteness of Damage’ in A. Tunc (ed.), *International Encyclopedia of Comparative Law*, Tübingen: Mohr (1983), para. 1.

² A. M. Honoré, ‘Causation and Remoteness of Damage’, *ibid.*

replaced by proximate cause, which incorporates the subjective elements of foreseeability and cause-in-fact analysis.

Chapter I of the present work outlines the concept of causation and the various theories which describe it. This is followed by a description of how the current system of international responsibility dispensed with causal criteria for the determination of breach in favour of the notion of wrongfulness in Chapter II. The paper retraces the conceptual avenues which led to discarding causation from the equation of international state responsibility. Causal analysis has only been developed in international jurisprudence for the purposes of determining the amount of reparations due arising from an internationally wrongful act. Causal standards and criteria for reparations are discussed in Chapter III.

CHAPTER I

CAUSATION THEORY

In its broadest sense, causation studies the relationships between causes and effects in the state of nature. Causation is an instrument of scientific method which has provided mankind with explanations for the laws of natural phenomena. In the realm of legal science, causation studies the consequences of man's *interventions* in nature, and the relevance of these interventions for the law. Many theories have been advanced to explain this phenomenon and they all combine legal and factual elements of analysis to varying degrees. Moreover, they range from overarching general principles such as foresight and risk to atomistic case-by-case intuitions.³

Theories of causation and remoteness of damage are just that—theories. As such, they constitute logical generalisations of the facts they attempt to describe and are often imprecise and incomplete. These explanatory theories vary throughout domestic legal systems, and respond to the specificities of the societies they emanate from. This point is illustrated by Cardozo when writing about the relativity of legal truths. He noted that what constitutes an explanation depends on what is to be explained, and to some extent, on the interests of the person demanding the explanation.⁴ He thus rightly concludes that equating 'proximate cause' as legal cause is close to meaningless and far away from the legal truth. To him, we must 'pick out the cause which in our judgment ought to be treated as the dominant one with reference, not merely to the event itself, but to the jural consequences that ought to attach to the event.'⁵ From this, we should retain that only legally relevant facts have a place in the net of causation, and the criteria for selecting them are as varied as there are legal rules.

Throughout history, legal science has conceived causal concepts to determine responsibility and its limits. Already, the Romans had roughly distinguished between unlawfulness (*injuria*), fault (*culpa*) and causation as independent elements for the determination of responsibility.⁶ Philosophers of law and society have developed these concepts, and their views are often the starting point for the development of the various

³ H. L. A. Hart and A. M. Honoré, *Causation In the Law*, 2nd ed., Oxford University Press (1985) 131.

⁴ B. N. Cardozo, *The Paradoxes of Legal Science*, New Jersey: Lawbook Exchange (2000) 83-85.

⁵ B. N. Cardozo, *The Paradoxes of Legal Science*, *ibid*, 83.

⁶ M. Kaser, *Das römische Privatrecht*, Munich (1955).

theories. There is general agreement ‘on how to decide whether a defendant’s conduct or the defined event was a condition which played *some* part in bringing about the harm, but there is little agreement on how to determine whether it played a *sufficient* part to count as a “proximate” or “adequate” cause of the harm.’⁷ This contested point has spawned myriad theories of causation, of which none is universally accepted, but two theories have found significant resonance overtime. The adequacy theory, originating in Germany, has spread widely, and the related doctrine of equivalence or necessity has also gained ground. We shall return to these theories after outlining the nature of causation, its functions and elements.

1. Function and Elements of Causation

Most causal theories have a dual function. Firstly, they give an account of the limits of responsibility by singling out the relevant facts to be considered *in law*. Knowledge of these facts helps judges decide whether the tortfeasor’s conduct has caused the harm suffered by the injured party, and whether the damage claimed is proximate to said conduct. Secondly, they suggest ways of fixing the limits of liability for the purposes of reparations. Thus, causal theories can help determine whether an obligation has been breached, and if so, the extent to which the plaintiff is responsible. The starting point of most theories is the presence of causal expressions in the codes or the common law rule.⁸ But there is no clear dividing line between causal theories explaining breach and theories which discuss remoteness of damage, which are usually influenced by other legal or normative policies, such as equity. As a result, some theories are more causal than others. The more factual the theory, the more causal it is; the more normative, the less causal.⁹

According to Honoré, any given theory of causation weighs the following elements to varying degrees: (1) necessity; (2) explanation; (3) probability; (4) the scope of the rule violated and (5) equity. Honoré observes that there has been a gradual departure from the first two notions towards the last three, adding that the most popular view combines the notion of necessity with one or more of the other notions.¹⁰ Necessity has given rise to the equivalence theory, which determines whether the conduct or event determining liability was necessary

⁷ A. M. Honoré, ‘Causation and Remoteness of Damage’ *supra* note 1, para. 20. Emphasis in original.

⁸ A. M. Honoré, ‘Causation and Remoteness of Damage’, *ibid*, para. 44.

⁹ A. M. Honoré, ‘Causation and Remoteness of Damage’, *ibid*, para. 45.

¹⁰ A. M. Honoré, ‘Causation and Remoteness of Damage’ *ibid*, para. 59.

for the production of harm. In the adequacy theory, liability is limited to harm of a type of which the tortfeasor increases the probability. Being the predominant theories of causation, we shall discuss each in turn.

2. The Equivalence Theory of Causation

The crucial question for this theory is whether the conduct or event founding liability was necessary for the production of the harm. In a nutshell, it determines (a) which actions or interventions are attributable to an agent, and (b) whether they are sufficiently relevant to count as causal. Also known as ‘cause-in-fact’, this theory is expressed in three variants. A first group believes the action must in the circumstances be necessary for the outcome (but-for condition). For others, it must form a necessary part of a complex of conditions sufficient for the outcome (necessary element of a sufficient set or NESS). Finally, some describe the required connection in a quantitative mode by requiring that the action be a ‘substantial factor in’ or ‘contribute to’ the outcome.¹¹ All three variants require different intensities of intervention to establish causation. The sliding scale of these variants goes from highest to lowest intervention and can be illustrated thus:

(1) A cause must be a *conditio sine qua non* of the harm. Every *conditio sine qua non* is a cause of the harm which would not have occurred without it. The *conditio sine qua non* variant of the equivalence theory treats each individual condition as a cause, because each condition is necessary for the production of the harm. In that sense, conditions are equivalent (e.g. equally necessary).¹²

(2) A cause must constitute a necessary element within a jointly sufficient set of conditions. Particular causal links are instances of generalisations about the way in which events are connected. This strand advocates for considering a ‘jointly sufficient set of conditions’, a notion coined by John Stuart Mill. The theory draws on John Leslie Mackie’s idea of an INUS condition¹³ (insufficient but non-redundant part of an unnecessary but sufficient condition), and is developed by Hart and Honoré in their famous study of causation by subordinating the necessity requirement to the sufficiency requirement.¹⁴ These scholars

¹¹ A. M. Honoré, ‘Causation in the Law’ in *Stanford Encyclopedia of Philosophy*, 17 November 2010, <<http://plato.stanford.edu/entries/causation-law/>> last visited 15 January 2012, 6.

¹² A. M. Honoré, ‘Causation and Remoteness of Damage’, *supra* note 1, para. 61.

¹³ J. L. Mackie, *The Cement of the Universe: A Study of Causation*, Oxford: Clarendon (1980).

¹⁴ H. L. A. Hart and A. M. Honoré, *Causation in the Law*, *supra* note 3 at 383, 384.

advocate that ‘in a specific situation a casually relevant condition is a necessary element of a set of conditions jointly sufficient for the harmful outcome.’¹⁵ These are labeled as ‘necessary elements of a sufficient set’, or NESS conditions. Causation as a NESS condition has been defined by Wright, according to whom ‘a particular condition was a cause of (contributed to) a specific result if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the result.’¹⁶

(3) Those who reject the but-for and NESS theories simply posit that an agency can cause an outcome to a greater or less extent. To determine this, the doctrine of intervening cause has an important role. For this doctrine, the interventions by third-party actors or by nature break the causal chain that would otherwise have existed between a defendant’s action and harm.¹⁷ This approach is attractive when the sum of various factors (e.g. pollutants) is the cause of harm.¹⁸

3. The Efficiency Theory of Causation

As one of the explanatory theories, the efficiency theory states that not all conditions of harm are causes. It appeals to common sense by distinguishing causes from conditions and is inspired by Aristotle’s notion of efficient cause.¹⁹ Thus, the efficient cause is the condition to which the highest energy attaches. Many conditions can be said to be efficient causes, and according to Mazeaud and Tunc, contributions to harm can determine the apportionment of damages between two tortfeasors or between the plaintiff and the defendant. The efficiency theory may also impose on a tortfeasor a proportionate liability less than liability in solidum.²⁰ Variations of the efficiency theory are the direct consequence theory, the immediate consequence theory and the proximate cause theory.

¹⁵ A. M. Honoré, ‘Causation in the Law’ in *Stanford Encyclopedia of Philosophy*, *supra* note 11 at 7.

¹⁶ A term adopted by R. W. Wright, ‘Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts’ 73 *Iowa Law Review* (1987-1988) 1001-1078 at 1018.

¹⁷ M. S. Moore, ‘The Metaphysics of Causal Intervention’, 88 *California Law Review* (2000) 827-878 at 828.

¹⁸ A. M. Honoré, ‘Causation in the Law’ in *Stanford Encyclopedia of Philosophy*, *supra* note 11 at 6.

¹⁹ Aristotle, *Metaphysics*, I.3.II.

²⁰ H. Mazeaud and A. Tunc, quoted by A. M. Honoré, ‘Causation and Remoteness of Damage’, *supra* note 1, para. 67.

CHAPTER II

CAUSATION AND INTERNATIONAL STATE RESPONSIBILITY

1. Theory and Legacy of the Internationally Wrongful Act

According to the prevailing view reflected in the work of the United Nations International Law Commission ('ILC'), causation is irrelevant to determine the existence of an internationally wrongful act. Moreover, damage is not required for the purposes of attributing wrongful acts to a State. This stands in sharp contrast with domestic legal systems, where damage must amount in law to injury, and 'must be of a sort which it is the policy of the legal system to compensate.'²¹ The reason for this is the theory of the internationally wrongful act, which is primarily concerned with the new legal relationships arising from a determination of State responsibility.

The internationally wrongful act as conceived by its conceptual framers in the ILC does not exclusively address the relationship born from primary rules of international law between the injured and responsible States. Reparations, usually associated with institutions of private law such as torts and liabilities, are but a single consequence of the many legal relationships governed by the law of international responsibility. A key function of the internationally wrongful act is to reinforce the *ordre public international*, and its legal content is more akin to that of a sanction restoring international equilibrium. Obligations of this type are not reciprocal: sanctions arise primarily from wrongful conduct which destabilises the international system of rules and not primarily from failure to observe contractual obligations. Therefore, damage, fault and the accompanying causal analysis to determine breaches of primary rules are not a necessary element of international responsibility, which is mainly concerned with spelling out the secondary rules which will restore the breached legal order. Thus, the public purpose of international responsibility overshadows its elements pertaining to private restorative justice. In sum, the absence of damage, fault and causal analysis are explained through the functions of the overarching concept of 'internationally wrongful act'.

Surely, the ILC project on responsibility has public and private overtones which coexist and must be distinguished. However the early introduction of 'international wrongfulness' primarily oriented the function of international responsibility towards redressing the

²¹ Honoré, 'Causation and Remoteness of Damage', *supra* note 1, para. 1.

international legal order in which States interact. Reparations to injured States are but one of the consequences of wrongfulness, which is mainly oriented towards the new legal interests created by the internationally wrongful act for the international community.

1.1. Legal Constitution of the Internationally Wrongful Act

The codification of responsibility in the ILC was spearheaded by the Italian jurist Roberto Ago. From 1970 to 1980 he submitted eight reports on State responsibility as Special Rapporteur, the sum of which constitute an encyclopaedic work and near-exhaustive account of theory and practice on the topic. His views on the function of international responsibility as an institution of public order prevailed in the final outcome of the project, concluded in 2001.²²

The crucial element of the approach advanced by Ago is the development of the ‘internationally wrongful act’ theory, pursuant to which a State’s failure to comply with an international obligation constitutes a violation of the international legal order in which that obligation is embedded. This determination leads to new legal relationships for the wrongdoing State, which are governed by the law of international responsibility. These relationships are not governed by the primary rule. Consequently, examining the causal relationship between damage and fault stemming from the primary obligation was unnecessary. The ‘internationally wrongful act’ subsumed the damage sustained by the harmed party and the damage sustained by the international legal order. In other words, ‘[d]amage is implicitly bound up with the anti-legal nature of the act. To violate the rule is indeed always a disturbance of the interest it protects, and thus, of the subjective right of the person whose interest it is.’²³

International lawyers are highly familiar with the term ‘internationally wrongful act’. However, the origins and function of this concept are often overlooked, and its conceptual content has received little attention since its formulation in the first half of the twentieth century. Wrongfulness was the theoretical foundation stone upon which Roberto Ago built the

²² ILC Articles on State Responsibility of States for Internationally Wrongful Acts in *Yearbook of the International Law Commission 2001*, Vol. II (Part Two) 31, annexed to UN Doc. A/RES/56/83 of 12 December 2001. See also J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press (2002). Hereinafter ‘ILC Articles on State Responsibility in *Yearbook...2001*’.

²³ D. Anzilotti, ‘La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers’, 8 *Revue Générale de Droit International Public* (1906) 5-29 at 13.

conceptual edifice of responsibility. His distinction between primary rules as a source of international obligations and secondary norms as a source of international responsibility was a mere corollary his development of wrongfulness. In his words,

‘the conduct attributed to the State must constitute failure by the State to fulfil an international obligation incumbent on it...it should be emphasized that the failure must be defined from the point of view of subjective law, in other words, not as the breach of a rule, but as a violation by a subject of law of the obligation imposed to it by that rule.’²⁴

Ago did not conceive international responsibility as merely sanctioning the breach of specific primary obligations. To him, international responsibility condemns the violation of the international legal order in which the breached rule is nestled. With the notion of wrongfulness, Ago did not primarily seek to redress the injured State. Instead, he sought to restore the international legal order upholding the rights and duties owed among States. Professor Stern has dubbed this approach an ‘objective control of legality’ in the law of international responsibility.²⁵

In sum, Roberto Ago primarily conceived responsibility as a source of new legal relationships which could be potentially invoked by any other State in the international community, rather than as a mere causal and bilateral rapport between injured and responsible States. International responsibility meant,

‘globally, all the forms of new legal relationships which could result in international law from a wrongful act of a State, irrespective of whether they were limited to a relationship between a State which committed the wrongful act and the State directly injured by it or extended to other subjects of international law as well, and irrespective of whether they were centered on the guilty State’s obligation to restore the rights of the injured State and to repair the damage caused, or whether they also involved the faculty of the injured State itself, or of other subjects, of imposing on the guilty State a sanction permitted by international law.’²⁶

²⁴ ILC 1204th Meeting of 1 May 1973, State Responsibility, *Yearbook of the International Law Commission* (hereinafter *Yearbook...*) 1973 vol. I at 19.

²⁵ See B. Stern, ‘The Elements of an Internationally Wrongful Act’ in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility*, Oxford University Press (2010) 193-220 at 194.

²⁶ ILC 1205th Meeting of 14 May 1973, State Responsibility, *Yearbook...1973*, vol. I at 15.

This means that the consequences of an internationally wrongful act acquire an existence independent of the obligation that has been violated.²⁷ For example, claims based on a treaty are not affected by that treaty's expiration or by entry into force of a new treaty on the same subject matter, because 'such claims acquire an existence independent of the treaty whose breach gave rise to them.'²⁸ A new legal interest arises from breach, which is distinct from the legal interest in safeguarding the rights acquired by the primary norm, as well as the right to reparations arising for specially injured States. This legal interest is the basis of claims that the international community can oppose against responsible States.

1.2 'Delict' as a Conceptual Precursor to 'Wrongfulness'

Roberto Ago laid down the basic notions of the internationally wrongful act in his Hague lectures of 1939 entitled *Le délit international*.²⁹ In this early work, he characterises the internationally wrongful act as an international delict, which fulfils the dual function of restoring public order and providing reparation, when applicable. In his introduction, he situates the notion of wrongfulness within a systemic international order:

'Since every legal qualification is meaningless outside a particular legal system, and is necessarily understood within this context, it follows that the character of wrongful acts is essentially related to a particular legal order.'³⁰

He also understood the notion of responsibility within the larger framework of a legal order:

'To fully understand the substantial value [of the notion of legal responsibility], it must be situated in the context of the entire legal order, understood as an organized system of rules, or, more precisely, of judgments which attribute legal value to the facts and situations of social life.'³¹

²⁷ In international adjudication, the declarative engagement of international responsibility without accompanying reparations supports this contention.

²⁸ *Ambatielos Case (Greece v. United Kingdom), Preliminary Objection*, 1952 ICJ Reports 28, Dissenting Opinion of President Sir A. McNair at 63.

²⁹ R. Ago, 'Le délit international', 68 *Recueil des cours* 415 (1939-II).

³⁰ R. Ago, 'Le délit international', *ibid*, 423. Author's translation. The original reads 'Puisqu'aucune qualification juridique n'a de valeur que par rapport à un système, à un ordre juridique particulier, et dans le cadre de celui-ci, il en résulte que la qualité de fait illicite est essentiellement relative à un ordre juridique donné.'

³¹ R. Ago, 'Le délit international', *ibid*, 427. Author's translation. The original reads 'Pour comprendre à fond la valeur substantielle [de la notion de responsabilité juridique], il faut bien la voir dans le cadre de l'ordre

Ago's notion of delict placed sanction and reparation under the same conceptual umbrella. To him, they are both complementary consequences to the violation of international obligations.³² But ultimately, it is the legal order which is protected by the delictual notion. Sanctions are handed down against any legally forbidden conduct and no previously existing synallagmatic relationship is required between the injured and responsible parties for a sanction to arise. On the other hand, reparation presumes the failure to comply with an obligation and seeks to restore the legal relationship to its *status quo ante* as far as possible. This odd mix of civil liability and tort was imbued into the concept of delict, which would later become the 'internationally wrongful act'.

As Special Rapporteur, Ago codified international responsibility to reinforce international legality. His essentially legal definition of responsibility and injury, understood as the violation of subjective rights embedded in a legal order, embodies a collective interest in respecting the normative system of international law.³³ The notion of internationally wrongful act conveys the retributive dimension of responsibility while also safeguarding the interests of specially injured States, and protects the rights of subjects belonging to a legal order which is deprived of a centralised sanctioning mechanism.³⁴ Ultimately, it constitutes the legal articulation of an international system distinct from the legal orders of its sovereign subjects.

Other ILC members agreed that attribution of wrongfulness was an operation undertaken exclusively by international law.³⁵ Causal concepts whose provenance was from national law were thus excluded. The following sections describe the elements of international responsibility according to the ILC, which will be instrumental to understand why causation was not introduced in the equation.

juridique tout entier, dans sa qualité de système organisé de règles, ou, plus exactement, de jugements attribuant une valeur juridique à des faits et à des situations de la vie sociale.'

³² R. Ago, 'Le délit international', *ibid*, 429: 'La sanction, on vient de le dire, a eu un caractère d'affliction : elle est fin pour soi-même : sa fonction unique est de réprimer le tort. La réparation n'a point du tout ce caractère ; elle sert au contraire à permettre au sujet lésé par le tort d'obtenir la restauration de son droit ou du moins une satisfaction par équivalent de ce droit. Cette différence de caractère et de finalité fait que sanction et réparation peuvent aussi subsister l'une à côté de l'autre, comme effets du même délit – ainsi qu'il arrive pour de nombreux délits du droit étatique – sans qu'elles s'excluent réciproquement.'

³³ P.-M. Dupuy, 'L'unité de l'ordre juridique international', 297 *Recueil des cours* 9 (2002) at 359.

³⁴ P.-M. Dupuy, 'L'unité de l'ordre juridique international', *ibid*.

³⁵ Statement made by Bedjaoui in *Yearbook...1973*, vol. I at 24, 25, para. 11.

2. Elements of International State Responsibility: The Overarching Function of Wrongfulness

2.1 Attributable Conduct

Conduct consisting of an action or omission attributable to the State under of international law constitutes the subjective element of State responsibility.³⁶ To determine whether a particular conduct could be qualified as an act of the State, Ago concluded that all that could be attributed to the State were acts of an individual or a group of individuals.³⁷ The State to which an individual's conduct was connected was the State as a person and a subject of law, and not as the State in the sense of a legal order or a system of norms. This was true under the rules of attribution of municipal law, and held in international law.³⁸

Attribution in international State responsibility is the process whereby wrongful conduct is ascribed to a State. Since 'there are no activities of the state which can be called "its own" from the point of view natural causality',³⁹ the theory of attribution has been resorted to, in order to in order to ascribe the conduct of State agents to the State.

For Ago, the primary rule does not play a prominent role in attributing internationally wrongful conduct.⁴⁰ International wrongfulness can only be determined by the international legal system, which singles out the responsible State and sanctions its conduct. Ago's distinction between 'breach of a primary rule' and 'failure to observe an international obligation' supports this conclusion. A mere breach will only involve the legal relationship between wrongdoing and injured States. Conversely, the failure to observe an international legal obligation is qualified by international normativity as an internationally wrongful act. Attribution is thus described as a 'legal connecting operation' between the unfulfilled obligation and the international rules qualifying that situation and not as a causal relationship

³⁶ *Yearbook...1971*, vol. II, Part One at 224.

³⁷ *Yearbook...1971*, *ibid*, 217.

³⁸ *Yearbook...1971*, *ibid*, 218.

³⁹ *Yearbook...1971*, *ibid*, footnote 78.

⁴⁰ The source of the breached obligation, whether customary or conventional, is irrelevant to determine the content of international responsibility. Cf. J. Combacau and D. Alland ' "Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations', 16 *Netherlands Yearbook of International Law* (1985) 81-109 at 84.

between ‘breach of a rule’ and ‘conduct consisting of an action or omission’. In the words of the Special Rapporteur:

‘attribution to the State is necessarily, because of the very nature of the State, a legal connecting operation which as such has nothing to do with a link of natural causality or with a link of “material” or “psychological” character. One can sometimes – but not always – speak of natural causality in reference to the relationship between the action of an individual and the result of that action, but not in reference to the relationship between the person of the State and the action of an individual.’⁴¹

The ILC Articles on State Responsibility have retained this notion in characterising attribution as a normative operation.⁴² Moreover, the Commentary to the Articles make it plain that ‘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.’⁴³

The foregoing conclusion begs the question: how does the international legal order qualify an unfulfilled obligation? More specifically: Which international rules are capable of qualifying the failure to fulfil an international legal obligation as a breach of international law? A partial answer lies in the law of treaties. The principle of *pacta sunt servanda* embodied in the Vienna Convention on the Law of Treaties constitutes the very hinges of international society and is inherently embedded in every legal obligation entered into by a State.⁴⁴ Furthermore, the role of customary international law as a body of rules binding every State also plays a role in fleshing out the expected behaviour of sovereigns in the international system. The ‘legal connecting operation’ to which Ago alluded consists of situating the failure to fulfil an obligation within the broader rules governing international life.⁴⁵ The final

⁴¹ *Yearbook...1971* vol. II, Part One at 218. Footnotes omitted.

⁴² ILC Articles on State Responsibility in *Yearbook...2001*, *supra* note 22 at 39, para. 4.

⁴³ ILC Articles on State Responsibility in *Yearbook...2001*, *ibid* at 38, 39, para. 4

⁴⁴ The principle is also embodied in article 13 of the draft Declaration on Rights and Duties of States, which provided that ‘Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law’, *Yearbook...1949*, vol. I, 287, and in the principle of sovereign equality of States enshrined in the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, pursuant to which ‘Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.’, UN Doc. UNGA Res. 2625 (XXV) of 24 October 1970.

⁴⁵ On attribution as a legal connecting operation, the ILC Commentary provides ‘The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the

rendition of the Articles on State Responsibility confirms the characterisation of an act of a State as internationally wrongful as being governed by international law.

2.2 Breach of an Obligation

The failure to comply with an international legal obligation was characterised by Ago as the objective element of State responsibility.⁴⁶ This element constitutes a ‘failure to comply with an international obligation of the state’.⁴⁷ The final outcome of the Responsibility Articles in 2001 defines the second element with a different wording, namely, as a ‘breach’ of an international obligation of the State. The slight difference between ‘failure to comply with an international obligation’ as used by Ago and the more recently adopted ‘breach’ highlights the restorative function of responsibility vis-à-vis the international legal order.

To some ILC members, the use of the term ‘breach’ was reminiscent of domestic law and restricted the scope of the project. In this vein, Sette-Câmara commended Ago for alluding to a ‘failure to comply with an international obligation’ instead of the ‘breach of a rule’ to describe the second element of responsibility, because the latter arose

‘from a new legal relationship deriving from an objective situation in which an international obligation had not been fulfilled. That nuance was very important, since the majority of cases in which responsibility would be in question would not involve a breach of a rule or norm of international law, but merely failure to carry out an international obligation...The use of terms such as “breach of an international norm” would unduly restrict the field of application of responsibility.’⁴⁸

Similarly, Bartos emphasized that the international legal order was the injured entity when a State fails to comply with an international obligation.⁴⁹ Finally, Castañeda stressed that the process of attribution was a legal operation and not a natural connexion. Thus, ‘the link was

attribution of conduct to the State is necessarily a normative operation.’ Commentary to Article 2, ILC Articles on State Responsibility, *supra* note 22 at 35, para. 6.

⁴⁶ *Yearbook...1971*, vol. II, Part One at 224.

⁴⁷ *Yearbook...1971*, *ibid.*

⁴⁸ *Yearbook...1973*, vol. I at 21.

⁴⁹ *Yearbook...1973*, *ibid.*, 25 at para. 24.

not that which connected cause and effect but, like all legal links, that which connected means and ends.’⁵⁰

The distinction between the consequences of breaching an international obligation and a finding of international responsibility was subsequently retained by Special Rapporteur Crawford, as evidenced in his Third Report:

‘There is thus clear distinction between action taken within the framework of the law of treaties (as codified in the Vienna Convention), and conduct raising questions of State responsibility (which are excluded from the Vienna Convention). The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on a treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply Vienna Convention rules as to the materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the Draft articles as to proportionality etc, in dealing with countermeasures.’⁵¹

Whereas the breach of an international obligation destabilises a perfect synallagmatic legal relationship between tortfeasor and defendant, the failure to observe the breached obligation generates an internationally wrongful act, for which the wrongdoer is answerable to the international community through a set of new legal relationships created by the existence of a wrongful act. A finding of wrongfulness allows the law of responsibility to deploy its legal effects. Causation is superfluous in this process because of the operation of ‘wrongfulness’ in the determination of responsibility. Wrongfulness subsumes damage, thus rendering the causal relationship between damage and breach a superfluous one for the determination of international responsibility.

2.3 The Irrelevance of Damage and Fault

Ago considered that damage or injury was not a necessary requirement for a finding of international responsibility. In his view, there were internationally wrongful acts which did

⁵⁰ *Yearbook...1973, ibid*, 26 at para. 27.

⁵¹ J. Crawford, Special Rapporteur, Third Report on State Responsibility, 18 July 2000, UN Doc. A/CN.4/507/Add.3, para 325, in *Yearbook...2000*, vol. II, Part 1 at 3.

not result in injury, and while it was true that every failure to fulfil an obligation entailed injury, then the element of injury was already covered by the failure to fulfil the obligation.⁵² Moreover, damage as a third element of the existence of State responsibility had only been relevant when the subject had been confused with that of injury to individual aliens.⁵³ Finally, economic injury as an element of damage ‘was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens...the economic injury, if any, sustained by the injured State may be taken into consideration, inter alia, for the purpose of determining the amount of reparation, but is not a prerequisite for the determination that an internationally wrongful act has been committed.’⁵⁴

In private law, any act causing damage involves the responsibility of the person committing the act, and requires reparation to be made. In international law, a wrongful act entails the responsibility of the State, but reparation does not automatically follow. As noted by Brownlie, ‘the idea of reparation...tends to give too restrictive a view of the legal interests protected [by the law of state responsibility]. The duty to pay compensation is a normal consequence of responsibility, but is not conterminous with it.’⁵⁵ This is due to the public law overtones given by Roberto Ago to the content of responsibility, as expounded by Bilge, who stated that it was impossible to dissociate the internationally wrongful act from injury, thus concluding that damage could not be regarded as the third element of responsibility. As a corollary, causation plays no part in the determination of responsibility.⁵⁶ This does not preclude causal analysis in the determination of reparations, as established in ILC Articles on responsibility at their present state, and which will be reviewed in detail under the heading of Chapter III.

⁵² *Yearbook...1973, supra* note 48, at 20.

⁵³ *Yearbook...1973, ibid.*

⁵⁴ *Yearbook...1971, supra* note 46 at 224. T.O. Elias coincided with this analysis. He was of the view that economic damage ‘was not strictly relevant to the topic of State responsibility. Mere failure to comply with an international obligation involved an injury to the State to which the obligation was due.’ *Yearbook...1973, supra* note 48 at 21. According to Mr. Ushakov, there was no responsibility without injury. Injury, however, should not be interpreted in the narrow sense of ‘material injury’, as in internal law, since injury in international law could also be political or moral. *Yearbook...1973, supra* note 48 at 12, para. 40.

⁵⁵ I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press (2003) 421.

⁵⁶ *Yearbook...1973, supra* note 48 at 25, para. 19.

In the ILC's view, the determination of international responsibility gives priority to the new legal relationships between the wrongdoing State and the international community, among which reparation to the injured State is but a single aspect. Conceived thus, international responsibility does not follow a chained sequence of causal actions and reactions. Instead, it is conceived as a broad net.

3. The Objective Nature of International Responsibility

Contemporary scholarship has encountered difficulties in describing the nature of international responsibility. Whether it has a predominantly public or private purpose has been subject to debate.⁵⁷ Similar exchanges have enquired upon its civil, penal or sui generis nature.⁵⁸ However, Ago unquestionably infused a public order composite into the content of international responsibility during the codification effort.⁵⁹ In this vein, 'liability thus has a normative dimension, as much as a reparatory one, as its primary aim is to sanction the breach of law. Accordingly, it appears as an instrument intended to safeguard international legality'.⁶⁰ Viewed thus, the theory of responsibility is a unity of civil, penal and international components.⁶¹

Professor James Crawford was the last Special Rapporteur on State Responsibility. Under his stewardship, the ILC drew the curtain on the topic, resulting in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the Commission in

⁵⁷ C. Chinkin, 'A Critique of the Public/Private Dimension', 10 *European Journal of International Law* (1999) 387-395.

⁵⁸ Barboza characterizes it as 'international' responsibility, J. Barboza, 'State Crimes: A Decaffeinated Coffee' in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab*, Leiden: Nijhoff (2001) 357-375; Combacau as 'civil' responsibility, J. Combacau and S. Sur, *Droit international public*, 3rd ed., Paris: Montchrestien (1997) 517. For Wyler it contains civil and penal elements, E. Wyler, 'From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law' 13 *European Journal of International Law* (2002) 1147-1160. Brownlie refers to 'objective responsibility', I. Brownlie, *Principles of Public International Law*, *supra* note 55 at 423. P. Weil conceives international responsibility as the broadest sanctioning mechanism of international normativity, 'Le droit international en quête de son identité' 237 *Recueil des cours* 9 (1992-VI) at 314.

⁵⁹ P.-M. Dupuy, 'L'unité de l'ordre juridique international', *supra* note 33 at 357.

⁶⁰ P.-M. Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' 3 *European Journal of International Law* (1992) 139-148 at 146.

⁶¹ P.-M. Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States' *ibid* at 147.

2001.⁶² Crawford has also acknowledged the predominantly public character of State responsibility thus:

‘It is said that these articles embody a “very traditional” Western concept of the state and of the public sector, that this fails to take into account the interpretation of public and private spheres, and that it reinforces the ideological preference for the public sphere which is discriminatory, in effect if not intent. To a large extent, that is a criticism of the whole system of international law and indeed of the structure of thought and practice which sustains the state system.’⁶³

As it is, private conduct is not in principle attributable to the State.⁶⁴ This public outlook has permeated into the articles on State responsibility to this day.

Professor Crawford used the term ‘objective responsibility’ to indicate that the rules of international responsibility are governed by international law.⁶⁵ This might appear tautological but is far from redundant in light of the object and purpose of the internationally wrongful act as conceived by Ago in his delictual theory. Here, the law of international responsibility operates separately from the consequences of violating substantive rights laid down in primary rules:

‘Responsibility is “objective” in the sense that it is governed by international law, but the requirements for responsibility vary from one primary rule to another. If the primary rule requires fault (of a particular character) or damage (of a particular kind) then they do, if not, then not. Seen in this light, the long-standing argument about fault might seem to be a false debate; but whether or not this is so, it is not a debate into which the ILC is compelled to enter, at a general level, in relation to this topic.’⁶⁶

Viewed thus, the commission of an internationally wrongful act unravels on two separate levels. Firstly, the legal regime of the breached primary obligation will spell out the

⁶² The General Assembly ‘took note’ of the Articles in UN Doc. A/RES/56/83 of 12 December 2001. See ILC Articles on State Responsibility, *supra* note 22.

⁶³ J. Crawford, ‘Revising the Draft Articles on State Responsibility’ 10 *European Journal of International Law* (1999) 435-460 at 439.

⁶⁴ R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press (1994) 153.

⁶⁵ J. Crawford, ‘Revising the Draft Articles on State Responsibility’, *supra* note 63 at 438.

⁶⁶ J. Crawford, ‘Revising the Draft Articles on State Responsibility’, *supra* note 63, *ibid.*

consequences of non compliance. But primary rules alone are insufficient to determine the consequences of their breach, which needs to be assessed in the context of the internationally wrongful act. Primary rules rarely spell out the consequences of their breach, and in such instances, injured States are entitled to redress on the basis of wrongfulness and the law of State responsibility. On a secondary level, the rules of responsibility will govern the new legal relationships arising from the internationally wrongful act, including the relationship between the wrongdoing State and any injured State, and the specially injured one, e.g. countermeasures, cessation, reparation, restitution, satisfaction and compensation. It is important to note that both operations can take place simultaneously. They will be addressed in turn.

3.1 Legal Consequences arising from Breach: Two Types of Legal Interest

Wrongfulness has a dual function in the system of international responsibility. It is the source of legal interest for reparations of specially injured States, on the one hand, and the basis of claims that the international community as a whole opposes against responsible States, on the other. This goes to show the delicate balance struck between public and private interests permeating the Articles on International State Responsibility.

On a first level, wrongfulness gives the specially injured State a legal interest to obtain reparations, which is distinct from the rights and obligations contained in primary rules governed by customary law and the law of treaties. Wrongfulness creates legal interests for injured States whose existence is independent from primary rules.

The second level belongs to the consequences envisaged in the regime of international responsibility, which are ‘consecutive’ to the violation of a primary norm.⁶⁷ Wrongfulness sanctions the violation of the international legal order in which the breached rule is nestled, giving rise to a the legal interest of States other than the specially injured State. The existence of an internationally wrongful act creates new legal relationships between the wrongdoing and injured States, reinforcing the international public order and transcending the interests of specially injured States. Ultimately, the finding of an internationally wrongful act restores legality within the international community. The articles which address these relationships are contained in Part II of the Articles on State Responsibility. Many have been highly

⁶⁷ J. Combacau and D. Alland ‘ “Primary” and “Secondary” Rules in the Law of State Responsibility: Categorizing International Obligations’, *supra* note 40 at 81.

controversial, especially the notion of ‘injured state’ and the obligations ‘owed to the international community as a whole’. However, these debates are outside the scope of this study.

Finally, we must consider the obligations of the specially injured State in protecting the rights contained in primary rules, and the means of doing so are largely left to the discretion of the injured State. International responsibility is not directly concerned with the form in which the wrongdoing State is brought to compliance at the level of primary rules, although express provisions could be applicable thereby or by virtue of *lex specialis*. This is the main reason why damages and causal analysis are not elements of the internationally wrongful act. Analysing the nature of the breached primary rule is necessary for the purposes of attribution and determination of responsibility. But once the determination is made, the primary rule is left behind, and the rules of responsibility are placed in the drivers’ seat to determine the consequences of the breach born from the internationally wrongful act. The fact that the distinction between obligation of conduct and obligations of result was discarded from the project of State responsibility attests to the limited role of the legal relationships contained in primary rules in the law of international responsibility. The Commentary to Article 29 dealing with the continued duty of performance affirms the distinction between consequences arising from the commission of an internationally wrongful act and consequences arising from the breach of an international obligation. At paragraph 2, it states:

‘As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two [dealing with the content of the international responsibility of the State] to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby from the duty to perform the obligation breached.’

In light of this passage, we must distinguish the consequences of a breach flowing from the primary obligation at issue from the obligations arising on the basis of the international responsibility of the State, e.g. the obligation to make reparation, continued duty of performance, cessation and non-repetition.

3.2 Inadequateness of Causal Assessments for Breaches of International Law

Causation is a requirement of liability for damage in many legal systems for the purposes of determining the extent of reparations. Causation is distinct from a cause for action, to which a plaintiff is entitled by virtue of a legal right, established in a legal rule. Plaintiffs in tort law need only invoke the allegedly breached rule in order to have access to justice. The assertion of a legal interest accompanied by the factual elements indicating the breach of a rule and ensuing damage suffice to determine the admissibility of a claim before a competent jurisdiction. The assessment of a causal relationship between the breach and subsequent damages is a question left for merits, provided responsibility is established. Therefore, the causal relationship between a breach and damage does not afford a procedural opportunity or access to justice, but is concerned with the substantive analysis of fact and law in merits. Thus, the International Court of Justice has stated that, for the purposes of establishing its jurisdiction, ‘the facts and situations it must take into consideration are those with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its “real cause” rather than those which are the source of the claimed rights’.⁶⁸ In this passage, the Court focused on the critical date upon which a dispute arose for the purposes of establishing its jurisdiction *ratione temporis* and dismissed the causally relevant facts preceding this date to determine the birth of the dispute, and consequently, its jurisdiction. Similarly, a state seeking to intervene as a non-party to proceedings before the Court ‘does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected’.⁶⁹

As such, causation plays an important role in determining the limits of the alleged prejudice in law and the extent of damages thereby incurred. As noted by two acute observers, causal notions ‘raise questions of fact which are conveniently submitted to the judgment of a jury or other trier of fact.’⁷⁰ Thus, proof of causation is not a required test for the

⁶⁸ *Jurisdictional Immunities of the State (Germany v Italy), Counter Claim, Order*, 2010 ICJ Reports, para. 23. See also *Right of Passage over Indian Territory (Portugal v India), Merits, Judgment*, 1960 ICJ Reports 35 and *Case Concerning Certain Property (Liechtenstein v Germany), Preliminary Objections, Judgment*, 2005 ICJ Reports 6, para. 44.

⁶⁹ *Territorial and Maritime Dispute (Nicaragua v Colombia), Application to Intervene by Costa Rica, Judgment*, 2011 ICJ Reports, paras. 26 and 37; *Jurisdictional Immunities of the State (Germany v Italy), Application of the Hellenic Republic for Permission to Intervene, Order*, 2011 ICJ Reports, paras. 22, 23.

⁷⁰ H. L. A. Hart and A. M. Honoré, *Causation In the Law*, *supra* note 3 at 132.

determination of a breach of international law and certainly does not constitute a prerequisite for the assessment of jurisdiction: the analysis of alleged facts-in-law is a matter of merits.

4. Beyond Causation: The Structure of the International Legal System

The above sections have described the allocation of international responsibility through attribution of wrongful conduct. It has been emphasised that a State is held responsible vis-à-vis the international legal order, in addition to its obligation of repairing any damage caused by injury. We have also recalled that the law of international responsibility imbues damage and fault into the notion of wrongfulness: because of the public law overtones of the law of responsibility, it is unnecessary to prove damage and fault for a finding of breach, and consequently, causal analysis to determine breaches is not relevant in international law. These principles are legally sound in explaining the absence of causal elements in the determination of responsibility, if we bear in mind that they are all the product of consistent State practice and have been identified, recognised, and codified by the ILC in the Articles on Responsibility of States. However, they fail to explain why the elementary principle of causation was not transposed from domestic analogies into the system of responsibility. Why was causation bypassed? The simple answer to this question is that the international legal order is structurally distinct from the domestic legal orders of States. Therefore, it is worth examining the very structure of the system of international rules in which the law of responsibility is embedded.

There are two main observations related to the structure of international normativity further explaining the absence of causal analysis for breach of an international obligation: the agency theory and the functional distinctions arising between the domestic and international legal orders.⁷¹

Firstly, the agency theory has been developed as a way of determining conduct attributable to a State. In large part, the agency theory is a substitute for causal analysis because it sets out the categories of agents which engage the responsibility of the State. Secondly, the classical conceptual paradigm distinguishing the functions of domestic law from those of international law has entered the normative content of international responsibility, rendering causation unnecessary for the international law of responsibility to

⁷¹ Not to be equated to the dualist theory of international law, as will be discussed in light of Triepel's contributions below.

fulfil its purpose. The agency theory and the allocation of competences between domestic and international law for the preservation of the international legal order delimit the international responsibility of States en lieu of causation. In tandem, these paradigms have set the interactive limits between domestic legal orders and international law vis-à-vis international responsibility. Let us consider these two distinct but complementary matters in turn.

4.1 The Agency Theory

The agency theory emerged as a way of attributing conduct to a State. It is recognised by the Articles on State Responsibility in Chapter II, Part One, which sets out the different circumstances under which the conduct of an agent engages the responsibility of the State. The establishment of agency is a prerequisite for attribution of wrongful conduct to a State. Whereas the agency theory selects the factual elements to be considered in the determination (indeed, the causation) of a wrongful act, the functional distinction between domestic and international law enables the international legal order to deploy legal consequences when these facts amount to wrongfulness. It is indeed a special phenomenon, whereby the agency test appears to delve into the domestic sphere of States, if ever so slightly, to assess whether international responsibility is engaged.

Overtime, sovereigns have found the need to determine which persons engage their international responsibility. Constant judicial practice has established that agents acting with the explicit or ostensible authority of the State engage its international responsibility. Conversely, States may lay claims on behalf of their wronged agents. Already in 1854, Britain stated her right to claim compensation on behalf of a British agent thus:

‘The principle of International Law—that an individual doing a hostile act authorised or ratified by the government of which he is a member cannot be held individually answerable as a private trespasser or Malefactor, but that *the act becomes one for which the State to which he belongs is in such case alone responsible*, is a principle too well established to be now controverted’.⁷²

The State is certainly not an abstract notion, and the Permanent Court of International Justice (‘PCIJ’) has rightly pointed out that ‘States can only act by and through their agents and

⁷² Report dated 20 November 1854 by Mr Hannen, Agent for British Claims under the Anglo-American Claims Commission established under the Convention of 8 February 1853. F. O. 83. 2209. Cited by R. Y. Jennings, ‘The *Caroline* and *McLeod* Cases’, 32 *American Journal of International Law* (1938) 82-99 at 97. Emphasis added.

representatives.’⁷³ Thus, the agency theory holds that a violation of international law by organs of the State, entities under its employment or ostensibly acting with its authority, will be attributed to that State, and engage its international responsibility. Arbitral practice has relied on this reasoning in the *Youmans* case, decided by the Mexican-US General Claims Commission of 1926, where the opening of fire by Mexican troops upon American citizens engaged the responsibility of the Mexican Government. The Tribunal stated:

‘It seems almost needless to remark that such conduct on the part of soldiers...on the plainest principles of international law and independent of [the] treaty stipulations between the two nations...renders the Government in whose service they are employed, justly liable to the government of the men [whose lives were lost].’⁷⁴

The same conclusion was reached in the *Caire* case, where yet another instance of unlawful execution on the part of Mexican forces rendered the Mexican Government responsible towards France.⁷⁵ This led Professor Higgins to affirm that ‘from the perspective of the outside, all organs and servants of the state are ‘the state’’.⁷⁶ She adds that armed forces are an emanation of the State, and this very fact makes it unnecessary to show fault or malice on its part.⁷⁷ States, of course, cannot be ‘caught’ *in flagrante delicto*. But with the agency theory, this seems to be almost the case.

These principles are found in Chapter II, Part One of the ILC Articles on State Responsibility dealing with attribution of conduct to a State,⁷⁸ whereby ‘the general rule is that the only conduct attributed to the State at the international level is that of the organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.’⁷⁹ Of course, in determining what constitutes an organ of the State for the purposes of international responsibility, ‘the internal law and practice of each State are of prime importance...But while the State remains free to determine its internal

⁷³ *German Settlers in Poland, Advisory Opinion*, PCIJ Series B, No. 6, 10 September 1923 at 22.

⁷⁴ *Thomas H. Youmans (USA) v. United Mexican States*, 23 November 1926, IV RIAA 110.

⁷⁵ *Estate of Jean-Baptiste Caire (France) v. United Mexican States*, 7 June 1929, V RIAA 516.

⁷⁶ R. Higgins, *Problems and Process: International Law and How we Use It*, *supra* note 64 at 151.

⁷⁷ R. Higgins, *Problems and Process: International Law and How we Use It*, *ibid*, 150.

⁷⁸ ILC Articles on State Responsibility, Articles 4 to 11.

⁷⁹ ILC Articles on State Responsibility in *Yearbook...2001*, introductory commentary to Chapter II of Part One on ‘Attribution of Conduct to a State’ at 38, para. 2.

structure and functions through its own law and practice, international law has a distinct role.’⁸⁰ This role consists in attributing conduct to the State as a subject of international law and not as a subject of internal law.⁸¹ Consequently, States may not allude to their internal subdivisions or their internal legal order to justify a breach of international law.⁸²

The legal rules pertaining to agency, codified in Articles 4 to 11 of the Articles on State Responsibility, act as international rules of recognition by evaluating the composition of domestic legal orders. But as the ILC Commentary makes plain, the role of domestic law is extremely limited in establishing agency, and in any case, the rules validating the domestic characterisation of what constitutes an ‘agent’ come from international law. Moreover, the Articles on State Responsibility will sometimes override domestic law by holding a State responsible for conduct undertaken by an agent not recognised as such by the State, pursuant to Article 9 dealing with conduct carried out in the absence or default of official authorities. In sum, a State ‘cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.’⁸³ The dominance of international law in characterising agency has also been stressed by the ILC:

‘...it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”.’⁸⁴

The Commentary goes on to say that in these cases, while powers of an entity will be relevant to its classification as an organ, ‘internal law will not itself perform the task of classification.’⁸⁵

⁸⁰ ILC Articles on State Responsibility in *Yearbook...2001*, *ibid*, at 39, para. 6.

⁸¹ ILC Articles on State Responsibility in *Yearbook...2001*, *ibid*, at 39, para. 7.

⁸² *LaGrand (Germany v United States of America)*, *Order, Provisional Measures*, 1999 ICJ Reports 9 at 16, para. 28.

⁸³ ILC Articles on State Responsibility in *Yearbook...2001*, Commentary to Article 4, ‘Conduct of organs of a State’ at 42, para. 11.

⁸⁴ ILC Articles on State Responsibility in *Yearbook...2001*, Commentary to Article 4, *ibid*.

⁸⁵ ILC Articles on State Responsibility in *Yearbook...2001*, Commentary to Article 4, *ibid*.

In sum, international rules establishing agency pave the way for attribution of conduct to a State under international law. If a particular national entity fits the definition of what legally constitutes a ‘State agent’, attribution may ensue. This is fully in line with the ILC’s characterisation of attribution as a normative operation, based on criteria determined by international law and not on the mere recognition of factual causality.⁸⁶ This is how the agency test delimits the responsibility of states without causal analysis. The differentiated functions of the national and international legal orders reinforce this delimitation. They are considered in what follows.

4.2 The Specificity of International and Domestic Legal Systems

The former observations lay it plain that the attribution of responsibility in the international legal order functions differently from that of the domestic legal orders composing it. But we have said little about how domestic and international law interact in making these delimitations. This Section demonstrates that a clear systematic distinction between the national and international legal orders shows that they fulfil distinct but complementary roles in the establishment of international responsibility. This ‘division of labour’ has allowed international law to retain its specificity and independence from domestic law as a system of rules, leading to the redundancy of causal– or damage-based determinations of responsibility under international law. It would be incorrect to say that causation and damage have been ‘excluded’ from the determination of responsibility. In truth, they never have been included. The structure of international law and its interaction with domestic law renders causation a superfluous matter. The question which causation seeks to answer—‘who caused a breach?’—is peremptorily found in the legal relationships (and indeed, strong legal presumptions) already existing between domestic and international law. This Section will broach upon these legal relationships, which are inherent to the modern system of sovereign and equal States.

4.2.1 Anzilotti: Dualism and the Distinctiveness of International Law

The process of determining a breach and attributing wrongful conduct will almost always call for a joint analysis of domestic and international law. Indeed, we have inherited many an examination of the relationship between national and international law, and this

⁸⁶ See *supra*, Section II.2.1 and ILC Articles on State Responsibility in *Yearbook...2001* at 38, 39, para. 4.

important interaction continues to be addressed today.⁸⁷ Thus, it is legitimate to ask ourselves how this relationship affects the system of international responsibility, and enquire whether it further enables us to understand the absence of causation from that system. This question has been seldom explored, although many a discussion has been spent to explain the relationship between national and international rules, yielding two main theories: monism and dualism. We are not directly concerned here with the debate surrounding these theories. Suffice it to mention that States providing for the direct application of international law in their legal orders, say, through a constitutional disposition, are considered monist, whereas States where international law is not self-executing have been labelled dualist. Dualist states, and dualist theories, require national law to provide for the *mise en oeuvre* of international obligations. An example of this is the United Kingdom Human Rights Act of 1998, which enacted the European Convention on Human Rights⁸⁸ into British law.

The forgers of the international responsibility theory were dualists, for the most part because this theoretical trend prevailed at the time, much like contemporary international lawyers are confronted with the competing theories of fragmentation and universalism. Among the dualists, the Italian jurist Dionisio Anzilotti⁸⁹ had significant influence in Continental Europe through a seminal article on State responsibility for injury to aliens⁹⁰ and his international law course book.⁹¹ In this book, he considered the national and international legal orders to be fundamentally distinct:

‘From the principle that each norm is a legal norm only within the system of which it is part, one may draw the clear separation of international law and municipal law as far as the binding character of the respective norms: international norms only apply in the

⁸⁷ A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press (2011).

⁸⁸ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, *ETS* No. 5.

⁸⁹ Dionisio Anzilotti (1869-1950), professor of international law at Rome University, sat on the first bench of the Permanent Court of International Justice and became its President in 1928. On Anzilotti’s life and works see the symposium dedicated to him in 3 *European Journal of International Law* (1992) 100-62, entitled *The European Tradition of International Law: Dionisio Anzilotti*.

⁹⁰ D. Anzilotti, ‘La responsabilité internationale des états à raison des dommages soufferts par des étrangers’, *supra* note 23 at 5. Hereinafter ‘La responsabilité internationale des états’.

⁹¹ D. Anzilotti, *Corso di diritto internazionale (ad uso degli studenti dell’Università di Roma) (Textbook on international law)*, Rome: Atheneum (1928). References here are made to the Third Edition (1955) Padova: CEDAM. Hereinafter ‘*Corso*’.

relation between subjects of international law, while municipal norms do so within the State system to which they belong.’⁹²

Thus, Anzilotti parted the national and international legal orders as Moses did the Red Sea by analysing the legal effects displayed by a given rule. To him, certain rules have effects on the national plane, whereas others will have consequences for the international legal system. Today, this effects-based theory would provide a very primitive understanding of the interaction between national and international law.⁹³ But it was quite innovative in 1928 because Anzilotti’s affirmation necessitates the existence of an international legal order, understood as a body of rules independent from domestic jurisdictions. Moreover, one need also conceptualise a community of sovereign States abiding by those rules. At the very outset of his influential article published in the first issue of the *Revue Générale*, Anzilotti portrayed international law as ‘a body of legal rules *exclusively concerned* with the conduct of States in their mutual relations’⁹⁴ Interestingly, this statement is supported with a footnote reference to Heinrich Triepel and his *Völkerrecht und Landesrecht* (1899), to whom we shall turn later. In classifying rules as domestic or international using their legal effects as a parameter, it follows that each category fulfils a distinct function. Thus, to Anzilotti, it is the function of international law to define internationally wrongful conduct and attribute it as such.

Anzilotti was also a renowned private international lawyer. To him, private international law did not essentially embody the same rules of its public counterpart.⁹⁵ This enabled him to separately consider conflict of laws rules, which regulate the relationships between national legal regimes,⁹⁶ and the effects of domestic law in the international legal order, leading him to the following conclusion in 1925:

⁹² D. Anzilotti, *Corso* at 56. Cited and translated by G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’ 3 *European Journal of International Law* (1992) 123-138 at 137.

⁹³ Indeed, the late Lord Bingham of Cornhill remarked that ‘although international law comprises a distinct and recognizable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so.’ T. Bingham, *The Rule of Law*, London: Penguin (2011) 110.

⁹⁴ D. Anzilotti, ‘La responsabilité internationale des états’, 5. Emphasis added.

⁹⁵ G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’, *supra* note 92, *ibid.*

⁹⁶ Such as the recognition of foreign judgments on the basis of comity. See D. Anzilotti, *Corso di diritto internazionale privato* (1925) cited by G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’, *supra* note 92 at 137. Gaja indicates at footnote 62 that this textbook is incomplete.

‘From the principle that a norm is legal only if and in so far as it belongs to a specific legal system, it follows that the foreign norm is as such a mere fact, which is lacking in that practical value of which...the legal character of a norm consists.’⁹⁷

Professor Gaja notes that the language in this passage is similar to the famous obiter dictum adopted the following year by the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*, asserting that nothing prevented it from giving judgment on whether or not Poland’s law was in conformity with its obligations towards Germany under the Geneva Convention:

‘From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.’⁹⁸

Anzilotti never claimed authorship of the passage, but the similarities with his views are evident. His dualist influence in the Permanent Court arguably forwarded the development of international law by detaching it from domestic legal analogies and private international law.⁹⁹

4.2.2 Triepel and the Functional Independence of International Law

Anzilotti’s dualist premise was not an original one and had been influenced by German scholars. Among them, Heinrich Triepel¹⁰⁰ had discussed the dualist doctrine in his chef d’oeuvre, *Landesrecht und Völkerrecht – International Law and Domestic Law* – published in 1899.¹⁰¹ Triepel built his theoretical premises on the work of other authors, as every scientist

⁹⁷ D. Anzilotti, *Corso di diritto internazionale privato* (1925), *ibid*, 57.

⁹⁸ *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, *Merits, Judgment*, PCIJ Series A No. 7, 25 May 1926, at 19.

⁹⁹ The study of analogies between private law and public international law received the attention of Sir Hersch Lauterpacht (1897-1960). See H. Lauterpacht, *Private Law Sources and Analogies of International Law: with special reference to international arbitration*, London: Longmans Green (1927).

¹⁰⁰ Heinrich Triepel (1868-1946) was a German jurist and professor of the University of Berlin from 1913 to 1935. He studied law in Freiburg-im-Breisgau (1886) and Leipzig, where he obtained a doctorate. Incidentally, another renowned German international lawyer, Lassa Oppenheim (1858-1919), completed his habilitation in Freiburg-im-Breisgau around that time before he departed to the United Kingdom in 1895.

¹⁰¹ H. Triepel, *Landesrecht und Völkerrecht*, Leipzig: C.L. Hirschfeld (1899). The present work cites *Droit International et Droit Interne*, translated by René Brunet, Paris: Pédone (1920) reprinted in *Droit International et Droit Interne*, Collection Les Introuvables, Éditions Panthéon Assas (2010), hereinafter *Droit International et Droit Interne*. Triepel offered a restatement of these views at the inaugural session of the Hague Academy of International Law: ‘Les rapports entre droit interne et droit international’, 1 *Recueil*

has done, but he was the first to advance that the legal authority of international law should not rest upon the constraining power of sovereign States.¹⁰² He argued that the international and domestic legal orders are distinct, and demonstrated the specificity of international law in a twofold fashion. Firstly, by examining the nature of the relationships it addresses, and secondly, by the enquiring upon the nature of its sources. Triepel was not an avowed dualist, and dualism is merely the logical consequence of his theory, later developed by authors like Anzilotti.¹⁰³ The contribution of *Landesrecht und Völkerrecht* was to demonstrate that the content of international law was not subordinate to domestic law. Triepel did not undertake his study on the basis of legal norms. Instead, his thesis focused on the legal relationships (*Rechtsverhältnisse*) characterising public international law. Domestic law and international law were not to deal with the same objects, and international law must only be applied to the relationships arising among coordinated States.¹⁰⁴

For Triepel, the dualist (or pluralist) theory of international law is a mere corollary to his principal thesis, namely, that domestic law and international law cannot be assimilated into one another with the same legal instruments. He stresses that an international treaty and the national instrument enacting that treaty may be identical *ratione materiae*, but exist on a different legal basis. Naturally, the two legal orders are not functionally divorced, and Triepel readily acknowledged important interactions between them, describing the entry of international law into domestic systems.

Paradoxically, Triepel's lasting legacy does not lie in his contribution to explaining the complex interaction between domestic and international law, and his oeuvre has been often glossed over as purporting dualism. But his novel handling of international law as a functionally independent and authoritative body of rules makes him a pioneer of his time, and prompted deeper inquiries into the nature of international law qua law by true masters.¹⁰⁵

des cours 77 (1923). Triepel lectured in The Hague that year alongside great international lawyers: A. Weiss lectured on competence of tribunals as regards foreign states, A. Rolin gave a course on extradition, Lord Phillimore taught the fundamental rights and obligations of States and L. Strisower discussed extraterritoriality and its main applications.

¹⁰² H. Triepel, *Droit International et Droit Interne, avant-propos* by Olivier Beaud, XIX.

¹⁰³ No reference is made in the table of contents or the alphabetical index to dualism or a dualist theory of international law.

¹⁰⁴ H. Triepel, *Droit International et Droit Interne, avant-propos* by Olivier Beaud, XX.

¹⁰⁵ See *inter alia* H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public' 14 *Recueil des cours* 227 (1926-IV); J. L. Brierly, 'Le fondement du caractère obligatoire du droit international' 23 *Recueil des cours* 463 (1928-III); H. Lauterpacht, *The Function of Law in the International Community*,

Considering this important intellectual heritage and inheritance, it is curious that international lawyers today still struggle to justify the legal quality of their science.¹⁰⁶ For the purposes of our study, however, it is important to retain Triepel's conception of the dualist theory, which he describes thus:

'This thesis...merely states that every international rule is incapable of adopting the content of a domestic legal rule, let alone a domestic law, because of its international origin...The content of an internal legal rule is not generally amenable to a rule of international law. What we generally call the appropriation of public international law by the State through legislation...can by no means be conceived as a simple translation of a public international law rule into internal law.'¹⁰⁷

This understanding led Triepel to a statement of principle with its accompanying exception. According to the principle, the appropriation of international law by a national legal order is not identically reproduced *ratione materiae*, but 'reproduced under a modified form'.¹⁰⁸ Exceptionally, however, a domestic legal order will effectuate a 'pure reception' of an international norm, e.g. it will identically reproduce the norm of public international law in domestic law. Even in the latter case, we are in the presence of an intervening act of 'reception, meaning the creation of a new right, of a distinct right, whose content is the only resemblance to the original [international] norm, but which comes from a different source...The source of internal law must act through its own devices, in order to appropriate itself of the right created by public international law'.¹⁰⁹ In other words, a domestic enactment

Oxford: Clarendon (1933); R. Quadri, 'Le fondement du caractère obligatoire du droit international public' 80 *Recueil des cours* 579 (1952-I); R. Ago, 'Science juridique et droit international' 90 *Recueil des cours* 851 (1956-II).

¹⁰⁶ For a description of these anxieties, see G. Simpson 'On the Magic Mountain: Teaching International Law', 10 *European Journal of International Law* (1999) 70-92 at 71, which admonishes reluctant international lawyers. For a recent inquiry into the scientific attributes of international and European law, see M. Hesselink, 'A European Legal Method? On European Private Law and Scientific Method', 15 *European Law Journal* (2009) 20.

¹⁰⁷ H. Triepel, *Droit International et Droit Interne*, *supra* note 101 at 111. Our translation. *Pari passu*, we should distinguish Triepel's dualist theory from George Scelle's theory of *dédoublement fonctionnel*, which is based on the premise of a hierarchy of legal orders conforming the world community. For Scelle, international law overrides national law and he adopts a Kelsenian outlook in this regard. For Triepel, they fulfill distinct, if complementary functions. See A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law' 1 *European Journal of International Law* (1990) 210-231.

¹⁰⁸ H. Triepel, *Droit International et Droit Interne*, *supra* note 101 at 111.

¹⁰⁹ H. Triepel, *Droit International et Droit Interne*, *supra* note 101, *ibid*. Our translation. The original reads: 'il y a une réception, c'est-à-dire la création d'un droit nouveau, d'un droit autre, à savoir d'un droit dont le

of international law will usually render two rules of identical content: one national and one international. But their source is distinct, as is their function.

An example from these conclusions can briefly be drawn from the law of treaties, taken from Lord McNair's authoritative manual on the subject.¹¹⁰ If a treaty has been duly made part of municipal law, and if the courts fail to give effect to it, not from bad faith or wilful disregard, but from an error of interpretation made in good faith: does it follow that the government will be internationally responsible without a domestic finding of wrongfulness? McNair answers positively and forcefully:

'Leaving out of account cases in which a government may be *justified* in breaking a treaty (e.g. where the treaty has already been broken by the other party) the position is believed to be that a State is always responsible for a breach of its treaties, and it is immaterial in what particular way the breach has arisen. Given that a State is under a certain treaty obligation, the only question is: has that obligation been fulfilled? If it has not, then there is responsibility, and it is immaterial whether the breach has arisen from an error in good faith by the courts in interpreting the law giving effect to the treaty, or in any other way.'¹¹¹

What McNair suggests is that international law sanctions the breach of a treaty provision, even when international non-compliance derives from ostensibly lawful conduct in the domestic sphere. Examples of this abound in investment arbitration. A foreign investor's property may be lawfully expropriated by the host State, in observance of all procedural and judicial rights guaranteed by the law of the host State. But in international law, expropriation must fulfil certain conditions for it to be lawful. Breaches of international law and breaches of internal law require distinct wrongful conduct. This was formulated by a Chamber of the International Court of Justice ('ICJ') in the *ELSI* case:

'Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and

contenu seul est semblable, mais qui sort d'une autre source...la source du droit interne doit agir par elle-même, pour faire en quelque sorte sien le droit créé par la source du droit international public.'

¹¹⁰ Lord A. D. McNair, *The Law of Treaties*, Oxford: Clarendon (1961), 1986 reissue.

¹¹¹ Lord A. D. McNair, *The Law of Treaties*, *ibid* at 335.

what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.¹¹²

From this, the Chamber drew the following:

‘the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise...Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.’¹¹³

This brings us back to Triepel’s observation that international law cannot be assumed into domestic law. Two important consequences stem from this statement. The first is that international law and domestic law have their own, distinct, legal standards and thresholds in the determination of wrongfulness. The second is that the law of international responsibility has developed in such a way as to dispose of causal concepts.

¹¹² *Elettronica Sicula S.p.A. (ELSI)*, (*United States of America v Italy*), *Judgment*, 1989 ICJ Reports 15 at 51, para. 73.

¹¹³ *Elettronica Sicula S.p.A. (ELSI)*, (*United States of America v Italy*), *ibid* at 74, para. 124.

CHAPTER III

CAUSATION AND REPARATIONS

Causal analysis will often depend on the legal qualification of the facts given by a particular tribunal. The Aristotelian idea of concrete justice permeates the study of causation because of the flexible character of the criteria involved. Despite the uncertainty, causal analysis has guiding principles and techniques. True, its application changes on a case by case basis, but this happens to every legal rule when confronted with reality. Sir Hersch Lauterpacht noted that arbitral tribunals adjudicating over damages before the establishment of the Permanent Court of International Justice exhibited ‘a pronounced degree of vacillation and inconclusiveness’¹¹⁴ when measuring the quantum of reparations. This 1868 opinion of the Mexico-US Claims Commission in the *Emilio Roberts Case*, illustrates his point:

‘It is much more difficult for us to fix the amount of the claim, in a reasonable manner, than to give judgment about the justice of the same claim. Claimants almost always exaggerate enormously, and try to present the facts in the light most favourable to themselves, without paying great respect to the truth. The authorities having in charge the collection of the defensive evidence, very seldom pay attention to the estimate of damages and use all their efforts in contradicting the principle of the claim. For this reason, we, the Commissioners, are compelled to proceed solely by simple conjectures and inferences, drawn from the very few facts we have before us, and to make a very ample use of the discretionary power which pertains to our office.’¹¹⁵

The codification of damages in international State responsibility was first attempted by the League of Nations during the 1930 Hague Conference for the Codification of International Law. The Committee of Experts for the Progressive Development of International Law was the main organ in charge of the work.¹¹⁶ The Conference sought the conclusion of a

¹¹⁴ H. Lauterpacht, *The Development of International Law by the International Court*, London: Stevens and Sons (1958), Grotius Publications reprint (1982) 17.

¹¹⁵ Memorial and Opinion, docket 594, MS., U.S. Department of State. Quoted from B. Cheng, *General Principles of Law as Applied to International Courts and Tribunals*, Cambridge University Press (1953), reprinted in Cambridge: Grotius Publications (2006) 239, footnote 18.

¹¹⁶ J. Sette-Câmara, ‘The International Law Commission: Discourse on Method’ in *Le droit international à l’heure de sa codification : études en l’honneur de Roberto Ago*, Vol. I, Milano, Giuffrè (1987) 467-502 at 471. Also known as the ‘Committee of the Seventeen’, it was created by the League of Nations Council. The initial membership was composed of Mr Hammarskjöld as Chairman (Sweden), Prof Diena (Italy), Prof Brierly (Great Britain), Mr Fromageot (France), G. Guerrero (Salvador), B. Loder (Netherlands), V. Barbosa

convention on ‘Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners’¹¹⁷ but failed, partly due to lack of consensus on the issue of reparations. Article 3 of the draft Convention read:

‘The international responsibility of a state imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation.’¹¹⁸

Mr Politis from Greece sought to limit reparations to ‘the exact measure that the damage arises from the incidents constituting the failure to comply with the international obligation.’¹¹⁹ His proposal was rejected because it omitted all reference to the measurement and determination of damages, a subject whose development was thought should be left to international tribunals.¹²⁰ In the end, the Committee on State responsibility, chaired by Basdevant, failed to reach the required consensus despite having extensive arbitral jurisprudence to guide its efforts. In explaining these shortcomings, Manley O. Hudson observed that ‘this jurisprudence is not known or is not understood in the same way in all countries’ and ‘its authority is not universally acknowledged in the same degree.’¹²¹

To date, a basic principle has been retained. Essentially, reparation must be commensurate with the injury received: ‘It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the

de Magalhaes (Portugal), A. Mastny (Czechoslovakia), M. Matsuda (Japan), S. Rundstein (Poland), Prof Shücking (Germany), J. León Suarez (Argentina), C. de Visscher (Belgium), C. Wang (China), G. Wickersham (US), a Spanish legal adviser and a legal expert in ‘Moslem Law’. See Resolution Adopted by the Council of the League of Nations on 12 December 1924 in Appendix 7, 41 *American Journal of International Law* (1947) 104.

¹¹⁷ J. Sette-Câmara, ‘The International Law Commission: Discourse on Method’, *ibid* at 473.

¹¹⁸ E. Borchard, ‘“Responsibility of States” at the Hague Codification Conference’ 24 *American Journal of International Law* (1930) 517-540 at 522.

¹¹⁹ E. Borchard, ‘“Responsibility of States” at the Hague Codification Conference’, *ibid* at 524.

¹²⁰ Moreover, it raised the question whether there was ‘damage caused to an injured foreigner or his next of kin, if he were killed, because the state fails to punish the guilty offender.’ E. Borchard, ‘“Responsibility of States” at the Hague Codification Conference’, *ibid*.

¹²¹ M. O. Hudson, ‘The First Conference for the Codification of International Law’ 24 *American Journal of International Law* (1930) 447-466 at 459.

law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received.’¹²²

Causation indicates the reparations a State must provide upon the commission of an internationally wrongful act. The ILC relies on certain principles and standards to define the required causal relationship. However, tribunals often invoke the same causal principles and reach very different outcomes. One author has remarked that ‘it is not the principles alone that matter, but also the doctrinal approach to their application and especially the ways in which various principles relate to each other.’¹²³ We should consider these ideas when examining the role of causation in determining reparations for the internationally wrongful act of a State.

1. Causation and Reparations in International Law

The general principle of reparation for wrongful conduct is codified by Article 31 of the ILC Articles on State Responsibility. It states that ‘[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’¹²⁴ This principle has been derived from the practice of the ICJ and its predecessor, the PCIJ. In the *SS Wimbledon* case, the PCIJ held that, once it was determined that an obligation had been violated, the State responsible for the loss occasioned by the violation must compensate for it.¹²⁵ In the *Chorzów Factory* case, the principle of integral reparation was enunciated thus:

‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.’¹²⁶

¹²² *Lusitania Cases*, 1 November 1923, German-United States Mixed Claims Commission, VII *RIAA* 32.

¹²³ The author then quotes Justice Oliver Wendell Holmes: ‘[N]o case can be settled by general propositions...I will admit any general proposition you like and decide the case either way.’ E. Paasivirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes*, Helsinki: Lakimiesliiton Kustannus (1990) 302, at footnote 65.

¹²⁴ ILC Articles on State Responsibility in *Yearbook...2001* at 91, Article 31(1).

¹²⁵ *S. S. Wimbledon (United Kingdom v Germany)* PCIJ, Series A, No. 1, 17 August 1923, 3 at 30: ‘The Court having arrived at the conclusion that the respondent, Germany, wrongfully refused passage through the Canal to the vessel “Wimbledon”, that country is responsible for the loss occasioned by this refusal, and must compensate the French government, acting on behalf of the Company known as “Les Affréteurs réunis”, which sustained the loss.’

¹²⁶ *Factory at Chorzów (Germany v Poland), Merits*, 1928, PCIJ, Series A, No. 17, 13 September 1928 at 47.

The general obligation to provide reparation arises when the international responsibility of a State is established. It is not contingent upon an invocation by other States or entities. Rather, it arises ipso facto from a determination of responsibility.¹²⁷ The obligation to provide full reparation is contained in Article 31 of the ARSIWA:

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act.

The commentary confirms that the general obligation of reparation is a corollary of a State's responsibility, i.e. 'as an obligation of the responsible State resulting from breach, rather than as a right of an injured State or States.'¹²⁸ This principle, as articulated by the Articles on State Responsibility, has been affirmed by the ICJ as a principle of customary international law in the *Bosnian Genocide case*.¹²⁹

It is telling that no reference is made to primary rules in the text of Article 31. The ILC has purposefully defined the obligation to make reparations on the basis of injury. Subsidiarily, primary rules may indicate an additional element of damage or fault, and reparations will correspond in amount and degree if the requirements are met at the time of breach. An alternative approach to reparations suggests a more prominent role for primary rules to determine reparations, but the ILC opted for defining reparations in direct relationship to injury arising from the internationally wrongful act, leaving a minor role to primary obligations.

¹²⁷ 'The obligation to make reparation (and nowadays the other consequences of an internationally wrongful act) is not the 'consequence' of international responsibility. International responsibility *is* the obligation to make reparation'. B. Stern, 'The Elements of an Internationally Wrongful Act' *supra* note 25 at 194. Emphasis in the original.

¹²⁸ ILC Articles on State Responsibility in *Yearbook...2001* at 91, para 4, commentary to Article 31 'Reparation'.

¹²⁹ *Application on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 2007 ICJ Reports 43, paras. 460, 462. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 2002 ICJ Reports 3 at 31-2, para 76; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, 2004 ICJ Reports 12 at 59, para 119; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 2005 ICJ Reports 168 at 257, para 259.

1.1 The Residual Function of Primary Rules

Article 31 is largely silent on the nature of the causal link leading to reparation. This approach was preferred because of the diversity of causal requirements in international law and the role of primary rules in describing their own causal tests. According to the ILC:

‘The Drafting Committee had considered a number of suggestions for qualifying that causal link, but, in the end, it had taken the view that, since the requirements of a causal link were not necessarily the same in relation to every breach of an international obligation, it would not be prudent or even accurate to use a qualifier. The need for a causal link was usually stated in primary rules. It sufficed to state that the injury should be the consequence of the wrongful act.’¹³⁰

Professor Stern regrets the absence of an explicit causal standard in the State Responsibility Articles. She argues that primary rules do not contain causal elements, and ‘even if in certain cases the primary rule gives rise to some causal link problems, it cannot be the same causation as the one which arises when the primary rule is breached.’¹³¹ In this passage, Professor Stern seems to imply that the acts leading to the breach of a rule ↓ giving rise to a claim ↓ can be distinct from acts leading to injury and reparations. There is truth in this assertion, but State responsibility primarily □ arises for a breach of an international obligation...The *consequence* of state responsibility is the liability to make reparation.’¹³²

In a distinct vein, the late Professor Brownlie favoured a broader role for primary obligations in establishing the extent of reparations. He recognized an intrinsic connection between remoteness and the measure of damages, on the one hand, and, on the other, the rules of substance which have been breached: ‘The particular context of a breach of duty, i.e. the nature of the duty itself and the mode of breach, may determine the approach to the question of damages.’¹³³ To him, the principle of restitution should be applied in harmony with the primary obligation, and by reference to the way in which that obligation operated in a

¹³⁰ *Yearbook...2000*, Vol. I, at 388, para. 17.

¹³¹ B. Stern, ‘The Obligation to Make Reparation’ in J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility*, Oxford University Press (2010) 564-571 at 570.

¹³² R. Higgins, *Problems and Process: International Law and How We Use It*, *supra* note 64 at 162.

¹³³ I. Brownlie, *Principles of Public International Law*, *supra* note 55 at 446, 447.

concrete case.¹³⁴ Moreover, ‘much depended on the context of an act. Thus, nationalization in connection with economic restructuring was quite different from expropriation or confiscation that formed part of a policy of racial discrimination or ethnic cleansing.’¹³⁵ Professor Brownlie maintained this position in the fifty-second session of the ILC and expressed doubts as to the appropriateness of restitution as the primary form of reparation because of its rare application and far-reaching implications. He proposed determining the amount of reparations by reference to primary obligations:

‘There was a great deal of uncertainty on the subject [of restitution]. In fact, if primary rules were accorded the practical importance they deserved, there would be no need to determine whether or not restitution was the generally applicable, primary form of reparation. The problem could be solved in another way. It was quite possible to avoid generalities by including some provisos along the lines of “unless the relevant primary rules indicate a different solution”...some cases could be settled by means of a declaration of rights or declaratory judgement by a court without giving rise to restitution as such, as in the case, for example, of a withdrawal from a territory in a territorial dispute.’¹³⁶

In addressing Prof Brownlie’s concerns, the Special Rapporteur said it was ‘obvious that the problem of the relationship between primary rules and secondary rules arose in the field of reparation.’ Secondary rules did not ‘operate’ autonomously and independently of primary rules.¹³⁷ But the Special Rapporteur found difficulties in drawing the appropriate conclusions in the drafting of the Articles themselves and reserved the issue to the Commentary. In what follows, we outline the reasons why primary rules were given a subsidiary role in the assessment of reparations, and explain the importance of injury in determining causation.

1.2 The Prominent Function of Injury

The Commentary does not define the extent of reparations in relation to primary rules, so Professor Brownlie’s approach did not prevail. Instead, the notion of injury, understood as

¹³⁴ Statement by J. Crawford, Special Rapporteur, ILC 2634th Meeting of 8 June 2000, *Yearbook...2000*, vol. I at 173, para. 9.

¹³⁵ Statement by Prof Brownlie, ILC 2637th Meeting of 11 July 2000, *Yearbook...2000, ibid*, at 196, para. 33.

¹³⁶ Statement by Prof Brownlie, ILC 2634th Meeting of 8 June 2000, *Yearbook...2000, ibid*, at 174, para. 19.

¹³⁷ Statement by J. Crawford, Special Rapporteur, ILC 2634th Meeting of 8 June 2000, *Yearbook...2000, ibid*, at 177, para. 54.

including any damage caused by the internationally wrongful act, is of extreme importance to understand the extent of reparations due for the commission of that act.¹³⁸ The causal connection between the injury arising from wrongful conduct and damage sustained (material or moral) will determine the extent of reparations vis-a-vis the law of international responsibility, *but also* this connection will determine the legal relationship between the injury, the primary rule and the consequences arising therefrom. This is because the internationally wrongful act gives an injured State the legal interest to obtain reparations. Of course, the obligation to comply with the primary obligation exists pursuant to good faith and the law of treaties, regardless of the law of State Responsibility. But if the primary obligation does not spell out the consequences of breach, which is often the case, or is silent on reparations, the injured State can claim redress on the basis of the law of State Responsibility.

Article 36 (2) of the PCIJ Statute recognises the close link between the breach of an international obligation and the obligation of reparation as its consequence. This provision was incorporated identically into Article 36 (2) of the ICJ Statute, whereby States parties may recognise as compulsory the Court's jurisdiction, *inter alia*, in all disputes concerning:

- 'c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.'

Rather than relying on the primary obligation, the Statute defines reparations as arising from the breach of an international obligation. The ILC followed the same approach and defines the obligation to make reparations in relation to the injury sustained and not pursuant to primary rules, as made clear by Paragraph 2 of Article 31. The Commentary expounds that this formulation 'makes clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from the wrongful act.'¹³⁹ The obligation to make reparation arises from injury, and the obligations contained in the breached primary rule are to be viewed as 'other consequences' derived from the wrongful act. This definition of injury gives a potential legal interest to States which are affected by the internationally wrongful act, but do not have the standing to invoke the

¹³⁸ ILC Articles on State Responsibility in *Yearbook...2001* at 91, para 5, commentary to Article 31 'Reparation'.

¹³⁹ ILC Articles on State Responsibility in *Yearbook...2001* at 92, para 9, commentary to Article 31 'Reparation'.

primary rule that has been breached. It also implies that States other than the specially injured State can claim reparations *qua* injured States, pursuant to Articles 42 and 48. In sum, the Articles on State Responsibility circumscribe injury primarily within the damage caused by the internationally wrongful act itself, without referring to the primary obligation breached.

The degree of proximity required between injury sustained and the internationally wrongful act is articulated in Paragraph 2 of Article 31:

‘Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.’¹⁴⁰

This formulation intends to clearly limit a State’s responsibility to the damages caused by *its own* wrongful conduct so that, in principle, the wrongdoing State cannot be responsible for the conduct of a second entity aggravating the loss. A State’s obligation to provide reparations is primarily circumscribed to its wrongful conduct. The internationally wrongful act of a State must be the cause of the damages for which reparation is sought. We now turn to the causal relationship required between injury and damage for the obligation to make reparations to arise.

2. Causal Standards for Reparations in International Law

As a preliminary remark, it is important to distinguish between the causes of an internationally wrongful act, and the causes leading to damage. Although these causes may be concurrent, their conflation must be avoided. We are only concerned with the causes of the internationally wrongful act amounting to loss, and not with the causes of the wrongful act itself, which are determined by the process of attribution and reference to primary rules. For example, the Tribunal’s determination in the *Alabama* arbitration stating that indirect losses do not constitute a proper foundation for the award of compensation has nothing to do with the causes of that loss which gave rise to the claim. This leads to the distinction between a cause for action—requiring the evaluation of a claim’s remoteness—and the cause of injury arising from the commission of an internationally wrongful act.¹⁴¹

¹⁴⁰ ILC Articles on State Responsibility in *Yearbook...2001*, at 91.

¹⁴¹ ‘It is impossible to make a legal judgment on the remoteness of a claim unless one has a legal test for remoteness in mind.’ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009) 439.

The ILC Articles on State Responsibility do not contain an explicit causal test. The Commentary to Article 31 acknowledges the difficulties of formulating an overarching principle of causation: ‘In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search of a single verbal formula”’.¹⁴² Moreover, ‘the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.’¹⁴³ After this caveat, in a crucial passage, the Commentary outlines the minimum causal requirements which need to be satisfied to obtain reparations for an internationally wrongful act:

‘The notion of a sufficient causal link that is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any qualifying phrase.’¹⁴⁴

The requirements of sufficiency (‘a sufficient causal link’) and proximity (‘that is not too remote’) emerge from the text as the main yardsticks.¹⁴⁵ To meet the requirement of sufficiency, injury must flow from the wrongful conduct as a matter of course and in natural sequence.¹⁴⁶ In this sense, sufficiency is an objective standard, but can also take subjective connotations, such as the due diligence exercised by the wrongdoer. Pursuant to the proximity requirement, a direct relationship must be established between wrongful conduct and injury to prevent infinite regress towards irrelevant facts and acts. Damages considered ‘too remote’ from a wrongful act cannot in principle be redressed. Moreover, to determine proximity, one must examine whether there are any rules modifying or excluding liability by way if an

¹⁴² ILC Articles on State Responsibility in *Yearbook...2001* at 93, 94, para. 10, citing P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed., Oxford: Clarendon Press (1995) 466.

¹⁴³ ILC Articles on State Responsibility in *Yearbook...2001*, at 93, 94, para. 10.

¹⁴⁴ ILC Articles on State Responsibility in *Yearbook...2001*, *ibid*, para. 10.

¹⁴⁵ As confirmed by the Commentary, ‘causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation.’ ILC Articles on State Responsibility in *Yearbook...2001*, *ibid*, para. 10.

¹⁴⁶ The Merriam-Webster dictionary defines ‘sufficient condition’ as ‘a state of affairs whose existence assures the existence of another state of affairs.’ Merriam-Webster Online Dictionary, <<http://www.merriam-webster.com/dictionary/sufficient+condition?show=0&t=1321901738>> This means that the existence of the wrongful act must be necessary for the existence of the injury. An assessment of this type is factual and could be couched in terms of a but-for condition.

intervening cause¹⁴⁷ or a superseding cause¹⁴⁸ which will ‘cut off’ the causal link. The ILC Commentary acknowledges this by observing that ‘unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.’¹⁴⁹ It follows that damages which are far removed from the wrongful act are less likely to amount to injury in law and cannot give rise to reparations.

The ‘proximity-plus-sufficiency’ causal test adopted by the ILC is comparable to the similar view advanced by Hart and Honoré. To them, causation contains a question of fact and a question of law: First, ‘Would Y have occurred if X had not occurred?’, and second, ‘Is there any principle which precludes the treatment of Y as the consequence of X for legal purposes?’¹⁵⁰ The first limb of this test is similar to a but-for condition. The second limb asks whether the resulting damage is in legal contemplation of the act.¹⁵¹ In other words, the inquiry is whether the facts amount in law to injury. We are reminded here of Cardozo’s assertion that we must ‘pick out the cause which in our judgment ought to be treated as the dominant one with reference, not merely to the event itself, but to the jural consequences that ought to attach to the event.’¹⁵² The ILC test and the one advanced by Hart and Honoré are strikingly similar and can be expressed in the following table:

¹⁴⁷ ‘An event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury.’ B. A. Garner (ed.) *Black’s Law Dictionary*, 3rd Pocket Edition, Minnesota: Thomson West (2006) 90.

¹⁴⁸ ‘An intervening act or force that the law considers sufficient to override the cause for which the original tortfeasor was responsible, thereby exonerating the tortfeasor from liability.’ B. A. Garner, *Black’s Law Dictionary*, *ibid*, at 91.

¹⁴⁹ ILC Articles on State Responsibility in *Yearbook...2001* at 93, para. 13. The Commentary cites the *Zafiro* case, where the Tribunal placed the onus on the responsible State to demonstrate what proportion of the damage was not attributable to its conduct. *D. Earnshaw and others (Great Britain) v United States (Zafiro case)*, 30 November 1925, VI RIAA 160 at 164, 165.

¹⁵⁰ H. L. A. Hart and A. M. Honoré, *Causation In the Law*, *supra* note 3 at 110.

¹⁵¹ The term ‘in legal contemplation’ can have alternative meanings and is examined in Section III.2.2 below with proximate causation.

¹⁵² B. N. Cardozo, *The Paradoxes of Legal Science*, *supra* note 4 at 83-85.

TABLE 1: COMPARISON OF ELEMENTS IN CAUSAL TESTS

Elements of ILC Causal Test	Elements of Hart & Honoré Causal Test
Proximity (objective, factual)	But-for condition (factual)
Sufficiency (objective/subjective)	Damage in legal contemplation of act? (objective/subjective)

Despite their rather straightforward character, the criteria for establishing proximity and sufficiency are controversial. They can be subject to many interpretations, especially because their content was not further qualified by the ILC. International tribunals have not consistently applied any causal test because the specificities of a given case will usually determine the tests employed, along with their variations.

In the vastness of the causal universe, tribunals have rallied around and developed the notion of proximate causation based on the early standard of direct causation used in arbitral practice. Fifty years ago, direct and proximate causation were taken to mean the same thing. Writing in 1953, Professor Cheng concluded that they were synonymous: ‘in the majority of cases, in which the epithets “direct” and “indirect” are applied to describe the circumstances of an unlawful act, they are in fact being used synonymously with “proximate” and “remote.”’¹⁵³ It is submitted that this conclusion no longer holds and has led to confusion. In light of subsequent practice, directness and proximity have been given distinct meanings. Section 2.1 will discuss the direct causation standard and its inadequateness in the aftermath of the First World War. Section 2.2 will present the emergence of proximate causation and its elements of natural sequence and foreseeability. It will be shown that the ILC causation test comprising proximity and sufficiency is readily amenable to proximate causation.

2.1 Direct Causation

Direct causation requires a clear and unbroken link between the wrongful act and the damage arising therefrom. It is immaterial whether parallel or concurrent causes contributed to the damage, although they may exist. By analyzing directness alongside sufficiency, it only matters that the act was an effective cause of the damage. The directness requirement of

¹⁵³ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, *supra* note 115 at 243.

causation is often expressed as *causa proxima non remota inspicitur*, whereby the obligation to provide reparations only extends to acts directly causing the damage.¹⁵⁴ It is often opposed to its contrary, i.e. indirectness.

Direct causation does not indicate the cut-off point at which an act ceases to arise from another, although intervening and superseding causes can effectively interrupt the course of direct causation. But direct causation is usually factual and ill-prepared to address subjective elements of conduct such as due diligence. For example, direct causation does not exclude the liability of a State whose forces have damaged civilian property during an armed conflict, while employing every means available to refrain from targeting that property. To surmount this obstacle, international tribunals have relied on and developed the ‘proximate cause’ test coupled with subjective criteria, such as natural sequence and foreseeability.¹⁵⁵

The issue of directness arose in the *Alabama* claims, where the United States claimed, among others, ‘direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers’¹⁵⁶ resulting from the alleged unneutral conduct of Britain during the American civil war. In a preliminary decision, the arbitrators famously excluded certain losses from the consideration of the Tribunal which were considered too indirect. In its view, indirect losses ‘do not constitute, upon the principles of international law applicable to such cases, good foundation for award of compensation or computation of damages between nations’.¹⁵⁷

The directness test of damage assessment is closely associated with the treaty-based or multilateral reparations schemes established in the aftermath of the two World Wars and Iraq’s invasion of Kuwait in 1990-1991. These sanctions have unilaterally imposed strict

¹⁵⁴ The principle is embodied in the maxim *causa proxima non remota inspicitur*. ‘It is the proximate, not the remote cause that is considered’. According to the *Guide to Latin in International Law*, it is a ‘maxim meaning that a state or person is responsible for those harms that follow in a direct chain of causation from the wrongful act, as opposed to consequences that were remote or not reasonably foreseeable. E.g. ,“ [Previous legal expenses] are damages indirectly consequent to the collision; but it is a well known principle of the law of damages that *causa proxima non remota inspicitur*.” Therefore, legal costs were not awarded. *China Navigation Co., Ltd. (Great Britain) v. United States*, VI RIAA 64, 68 (1921).’, A. X. Fellmeth and M. Horwitz, Oxford University Press (2009) 52.

¹⁵⁵ See Section III.2.2 below.

¹⁵⁶ Case of the United States, Geneva Arbitration, *Papers Relating to the Treaty of Washington*, Vol. I (1872) 185.

¹⁵⁷ J.B. Moore, *History and Digest of the International Arbitrations to which the United States have been a Party* (1928) 646.

liability upon defeated powers for losses occurred during belligerency based on the direct test of causation, and creating a presumption of responsibility. Throughout history, in the view of the Eritrea-Ethiopia Claims Commission, ‘indemnities frequently have been exacted from the losing parties in wars, but this has resulted from the exercise of power by the victor, not the application of the international law of State responsibility.’¹⁵⁸ This type of liability cannot be considered of a judicial nature, and has reduced the credibility of directness as a legal standard to determine causation.

After the First World War, the Treaty of Versailles, required Germany to provide compensation for damage ‘*directly* in consequence of hostilities or of any operations of war’.¹⁵⁹ These were the so-called war guilt and reparations provisions, which ‘reflected a collective judgment by the victorious parties to the First World War that Germany bore responsibility for the initiation and continuation of that war, and authorized a massive program of reparations. However, the history of those provisions makes clear that they were heavily shaped by motives of policy and revenge unrelated to the principles of law.’¹⁶⁰ It is therefore not surprising that several awards rendered in the context of the war-guilt provisions departed from the directness test of causation and opted for proximate causation, in order to limit the extent of Germany’s liability for claims considered too remote, and even frivolous.¹⁶¹

Another well-known instance where direct causation has been adopted is the United Nations Compensation Commission. After the Gulf War, Security Council Resolution 687 confirmed under Chapter VII that ‘Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, 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.’¹⁶² Based on

¹⁵⁸ Eritrea-Ethiopia Claims Commission, Decision No. 7, *Guidance Regarding Jus ad Bellum Liability*, 27 July 2007 at 6, para. 21.

¹⁵⁹ Treaty of Versailles, 28 June 1919, 11 *Martens Nouveau Recueil* (Ser. 3) p. 323, Part VIII, sec. 1, Annex 1, para. 9. Emphasis added.

¹⁶⁰ Eritrea-Ethiopia Claims Commission, Decision No. 7, *supra* note 158 at 6, para. 22.

¹⁶¹ See Section III.2.2 below.

¹⁶² UN Doc. S/RES/687, 3 April 1991, para. 16.

this resolution, the Security Council created the UN Compensation Commission (UNCC).¹⁶³ The UNCC is a subsidiary organ of the Security Council administrated by a Governing Council, a political organ mirroring the membership of the Security Council. The UNCC received approximately 2.7 million claims of which 1.5 million were processed. It completed processing claims in 2005 and has approved \$52.5 billion in awards.¹⁶⁴ However, the UNCC is not a form or arbitration or judicial adjudication, but ‘a system of imposed administration of claims, often in a summary fashion, under which the defendant state (Iraq) has been deprived of any meaningful standing’.¹⁶⁵ We must thereby consider its jurisprudence as outside the scope of our study.

Even before its association with victor’s justice, arbitral practice in the wake of the First World War criticized direct causation as too rigid. Sir Hersch Lauterpacht described it as poor because it rejected the well-recognized principle of private law whereby loss of prospective profits (*lucrum cessans*) can be awarded as damages.¹⁶⁶ Other authors have also criticized the character of direct and indirect damages as ‘unclear’ and ‘of scant utility’.¹⁶⁷ In this context, indirect damages are problematic because they have been used to qualify every and any damage not constituting direct damage.¹⁶⁸ Moreover, Professor Stern cites two instances where the concept of indirect damages has developed two distinct meanings. Firstly, indirect damage has taken to mean ‘indirect responsibility’, thus confusing the attribution of a wrongful act to a subject of law, on the one hand, and the attribution of damage to a given cause, on the other. Here, indirect damage is being defined in relation to the internationally wrongful act, and strictly includes all damages not constituting direct damages, i.e. damages emerging incontestably and without intermediaries from the internationally wrongful act. Second, the term was indiscriminately used by early arbitral tribunals justifying their refusal

¹⁶³ On the basis of UN Doc. S/RES/692, 20 May 1991.

¹⁶⁴ United Nations Compensation Commission website, ‘The UNCC at a Glance’, <<http://www.uncc.ch/ata glance.htm>>. Last visited 15 January 2012.

¹⁶⁵ Akehurst’s *Modern Introduction to International Law* (P. Malanczuk, ed.), 7th Revised Edition, London: Routledge (1997) 399.

¹⁶⁶ Sir H. Lauterpacht, *Private Law Sources and Analogies of International Law*, *supra* note 99 at 219, 220.

¹⁶⁷ C. Eagleton, *The Responsibility of States in International Law*, New York: New York University Press (1928) 199-202; C. Gray, *Judicial Remedies in International Law*, Oxford: Clarendon (1987) 22.

¹⁶⁸ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris : Pedone (1973) 204.

to provide reparation for injury.¹⁶⁹ Understood thus, non-compensable damage has been defined by reference to its consequence: denial of reparations. It includes damages with connections of various degrees to the wrongful act which are always insufficient.¹⁷⁰

In addition to the above observations, doctrine and international judicial practice departed from direct causation because the common law standard of proximate cause provides a more nuanced approach to damage assessment. Importantly, proximate causation has traditionally included the notions of ‘natural sequence’ and ‘foreseeability’ (used alternatively or in tandem), offering a broader range to describe the relationship between an unlawful act and indemnifiable injury. A comparison between the directness and proximity tests can be illustrated thus:

TABLE 2: APPROACHES TO DIRECT CAUSATION AND APPROACHES TO PROXIMATE CAUSATION

Direct causation	Proximate causation
Unbroken sequence (objective approach)	Natural sequence of events (objective approach)
Presumption of attribution (strict liability approach)	Foreseeability/Legal contemplation (subjective approach)
Unbroken sequence + presumption of attribution	Natural sequence + foreseeability

As shown in Table 2, the approach to the relationship between fact and law in proximate causation comprises objective and subjective criteria, unlike the direct causation test. We consider proximate causation in the following section.

2.2. Proximate Causation

Pursuant to the proximate causation test, ‘the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act. These are damages which would normally flow from such an act, or which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to result, as well as all

¹⁶⁹ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, *ibid*, 205.

¹⁷⁰ B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, *ibid*, 209, 210.

intended damages.’¹⁷¹ It emerges from this definition that the elements of proximate causation are, firstly, the existence of a natural sequence between the wrongful act and the damage. Secondly, foreseeability understood as the amount of precaution a State has exercised. Judicial decisions have developed an alternative notion of foreseeability to include ‘foreseeability in legal contemplation’, whereby the wrongdoer, in addition to the exercise of precaution, must reasonably foresee the final consequences and liabilities of his act. Foreseeability *tout court* (in the precautionary sense) should be distinguished from foreseeability in legal contemplation. In the former test, the causal link cannot in principle be established if the wrongdoer was cautious (obligations of means: ‘Was precaution exercised in the steps towards executing obligations in good faith?’). Foreseeability in legal contemplation focuses on the final result of a wrongful act, and can take the form of strict liability if responsibility is established (obligations of result: ‘was the obligation performed?’). Understood thus, proximate causation includes fact-in-law analysis. These criteria are used together or separately, but they are often misapplied.

Proximate causation is amenable to the causal standard adopted by the ILC.¹⁷² This is because the requirements of proximity and sufficiency indicated by the ILC are largely mirrored by the elements of natural sequence and foreseeability contained in proximate causation.

It is generally accepted that the notion of proximate cause has replaced the standards of direct and indirect injury, although we are not convinced that the proximity standard is part of customary international law.¹⁷³ The ILC has been careful not to qualify the measure of foreseeability, predictability or proximity required to make a finding on reparations. This conforms to the specificities of each wrongful act, and the requirements laid down in primary rules, if any, which will indicate whether that rule has been breached or not. Nor can we fully endorse the view that a review of practice related to proximate cause ‘in reality is a matter of rules of policy rather than causation, the only operative rule that can be drawn upon being the

¹⁷¹ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, *supra* note 115 at 253.

¹⁷² ‘The notion of a sufficient causal link that is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any qualifying phrase.’ ILC Articles on State Responsibility in *Yearbook...2001*, Commentary to Article 31, 92, 93 at para. 10.

¹⁷³ As advanced by B. Sabahi, ‘Calculation of Damages in International Investment Law’, in P. Kahn and T. W. Wälde (eds.) *New Aspects of International Investment Law*, Hague Academy of International Law, Leiden: Nijhoff (2007) 553-595 at 579.

“*jus aequum*” rule.’¹⁷⁴ Policy will dictate the formulation of legal rules, but once it is determined that damage amounts in law to injury, the legal system is capable of dealing with the quantum of reparations in legal terms. Jennings and Watts agree with this proposition:

‘there is [not] always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law*’¹⁷⁵

In *Administrative Decision No. II*, the US-German Mixed Claims Commission laid down certain principles to be followed in deciding the cases submitted. In doing so, it explicitly preferred proximity over directness as a test for causation:

‘It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of. 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 be clearly, unmistakably, and definitely traced, link by link, to Germany’s act...All indirect losses are covered, provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed’.¹⁷⁶

The elements of ‘legal contemplation’ and ‘efficient cause’ stand out as accompanying the proximity test, in contrast with the merely sequential character of directness. Further endorsement for the proximity test was given by the fourth Special Rapporteur on State Responsibility, who concluded in his Second Report to the ILC that:

‘practice has kept its distance from the notion of “indirect” damage for the purpose of identifying the demarcation line of idemnifiable injury...Rather than the “directness” of the damage, the criterion is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being

¹⁷⁴ 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: Thirteenth Sokol Colloquium*, New York: Transnational (1995) 207-234 at 233.

¹⁷⁵ R. Y. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edition, London: Longmans (1992) Vol. 1 at 13. Quoted by Judge R. Higgins in her *Dissenting Opinion, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Reports 226 at 592.

¹⁷⁶ *Administrative Decision II*, 1 November 1923, VII RIAA 29.

claimed...an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage his act would cause....it is presumed that the causality link exists whenever the objective requirement of “normality” or the subjective requirement of “predictability” is met.’¹⁷⁷

Normality and foreseeability nearly always coexist, but need not be cumulatively present, according to the Special Rapporteur.¹⁷⁸

The Portugo-German Arbitral Tribunal found that the directness test of causation produced the inequitable result whereby ‘the injured party would bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links.’¹⁷⁹ It further noted that

‘even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by the unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen. Otherwise, there would be an inadmissible extension of responsibility. Thus...[the arbitrators] have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by Germany, also resulted from other and more proximate causes.’¹⁸⁰

In the *War-Risk Insurance Premium Claims*, American nationals brought claims against Germany after the First World War for refund of insurance premiums they obtained against the risks of possible wartime losses. In handing down his decision, the Umpire criticized the directness standard of causation as having no place in international law and preferred the standard of ‘remoteness’, which is anchored on proximity:

¹⁷⁷ G. Arangio-Ruiz, Special Rapporteur, ‘Second Report on State Responsibility’ in *Yearbook...1989*, Vol. II at 12, 13, paras. 36, 37.

¹⁷⁸ G. Arangio-Ruiz, Special Rapporteur ‘Second Report on State Responsibility’, *ibid.*

¹⁷⁹ *Angola Case*, Portugo-German Arbitral Tribunal, Award I, 31 July 1928, II *RIAA* 1011 at 1031.

¹⁸⁰ *Angola Case*, *ibid.*

‘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. The legal concept of the term “indirect” when applied to an act proximately causing a loss is quite distinct from that of the term “remote”. The distinction is important’¹⁸¹

He concluded that ‘Germany can not be held liable for all losses incident to the very exercise of a state of war’ because the risks taken by claimants were ‘in their very nature uncertain, indefinite, indeterminable, and too remote to furnish a solid basis on which to rest a claim.’

More recently, the Eritrea-Ethiopia Claims Commission has developed the proximity test to an important extent, especially in regards to foreseeability, in the context of compensation for liability arising from the armed conflict between those States in 1998-2000. In a preliminary decision on *jus ad bellum* damage assessment standards, the Commission rejected causal formulae based on the notions of ‘reasonableness’ and ‘reasonable connection’ because of their subjectivity, while noting that the concept of causation had not attained the status of a customary rule of international law.¹⁸² The Commission preferred to adopt the notion of proximate cause for the assessment of damages:

‘the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of “proximate cause.” In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable.’¹⁸³

The Commission did not, however, regard the notion of ‘proximate cause’ as reflecting a general principle of law or a rule of customary international law. Both parties ‘viewed the link

¹⁸¹ *War Risk Insurance Premium Claims (United States Steel Products Company (United States) v Germany)*, 1 November 1923, VII RIAA 44 at 62.

¹⁸² Eritrea-Ethiopia Claims Commission, Decision No. 7, *supra* note 158 at 2, para. 8.

¹⁸³ Eritrea-Ethiopia Claims Commission, Decision No. 7, *ibid* at 4, para. 13

between delict and compensable injury as an area in which judgment was required, and where the Commission necessarily exercised a measure of discretion.’¹⁸⁴

2.2.1 Foreseeability

In international law, foreseeability will often constitute the element of a primary rule. Obligations of due diligence and prevention of international crimes can be cited as examples. More recently, foreseeability has gained ground as constituting an independent standard of causal analysis within secondary rules. The foreseeability of conduct was considered in the *Samoan Claims* arbitration,¹⁸⁵ the US-Venezuelan Mixed Claims Commission,¹⁸⁶ the Portugo-German Arbitral Tribunal,¹⁸⁷ and the *Lighthouses* arbitration between France and Greece.¹⁸⁸ In the *Naulilaa* case, the arbitrator did not award damages for injuries that could not have been foreseen:

‘it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred because of a combination of causes alien to the author’s will and not foreseeable on his part.’¹⁸⁹

¹⁸⁴ Eritrea-Ethiopia Claims Commission, Decision No. 7, *ibid* at 2, 3, para. 9.

¹⁸⁵ The King of Sweden and Norway acting as arbitrator found that the unlawful actions of the British and American authorities ought to have been foreseen, *Samoan Claims (Germany, Great Britain, United States)* 12 October 1902, IX RIAA 23 at 26.

¹⁸⁶ *Irene Roberts Case (United States v Venezuela)*, IX RIAA 204, 1903-1905. A government is responsible for the acts of violence and pillage committed by its troops when under the command of their officers. An award of \$5000, in addition to damage was made for losses that must have been contemplated by the wrongdoers. Lost profits were also awarded on the basis of ‘derangement of plans’ and ‘interference with favourable prospects’, at 208.

¹⁸⁷ ‘The uprising...thus constitutes an injury which the author of the initial act...should have foreseen as a necessary consequence of its military operations.’ *Naulilaa case (Portugal v Germany)*, 31 July 1928, 2 RIAA 1011 at 1031.

¹⁸⁸ *Lighthouses Arbitration, (France/Greece)*, 24/27 July 1956, XII RIAA 155 at 217.

¹⁸⁹ *Naulilaa Case (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal v Germany)*, 31 July 1928, II RIAA 1011 at 1031.

According to the Eritrea-Ethiopia Claims Commission, the element of foreseeability provides some discipline and predictability in assessing proximity, and was given considerable weight in assessing whether particular damages were compensable during that armed conflict.¹⁹⁰ In its Final Award assessing causation for Ethiopia's damages claims,¹⁹¹ the Commission weighed 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 unlawful use of force in May 1998, and recognized that a broader test of foreseeability applied to situations of armed conflict: 'A substantial resort to force is a serious and hazardous matter. A party considering this course is bound to consider matters carefully, weighing the costs and possible bad outcomes, as well as the outcome it seeks. This is particularly so given the uncertainties of armed conflict.'¹⁹² The Commission concluded that Eritrea's use of force in May 1998 proximately caused injury to civilians and damage to civilian property on the Western front of the war:

'Eritrean forces occupied areas on the Western Front that were claimed by Eritrea but previously peacefully administered by Ethiopia, as well as Ethiopian territory that was not in dispute. Given that the purpose of the operation at Badme was to gain control of territory Eritrea regarded as its own, it was, or clearly should have been, foreseeable to Eritrea's leaders that Eritrean forces would seize and occupy the areas involved in the initial attacks, as well as additional areas claimed by Eritrea or that were required to secure and hold territory occupied by Eritrean forces.'¹⁹³

The Commission further noted that Eritrea's leaders had foreseen, or should have foreseen, the possibility of Ethiopian resistance on the Western Front which would result in a substantial conflict. In consequence, it was 'or clearly should have been foreseeable that these military operations would result in Ethiopian civilian casualties and damage to Ethiopian civilian property'.¹⁹⁴ Eritrea was found 'liable to provide compensation for injuries involving Ethiopian civilians and civilian property resulting from the military conflict (a) in the area

¹⁹⁰ Eritrea-Ethiopia Claims Commission, Decision No. 7, *supra* note 168 at 4, para. 14.

¹⁹¹ Eritrea-Ethiopia Claims Commission (*Ethiopia v Eritrea*) Final Award, Ethiopia's Damages Claims, 17 August 2009.

¹⁹² Final Award (*Ethiopia v Eritrea*) Ethiopia's Damages Claims, *ibid*, para. 290.

¹⁹³ Final Award (*Ethiopia v Eritrea*) Ethiopia's Damages Claims, *ibid*, para. 292.

¹⁹⁴ Final Award (*Ethiopia v Eritrea*) Ethiopia's Damages Claims, *ibid*, paras. 293, 294.

including Badme and its environs, and (b) throughout all other areas on the Western Front where Ethiopian forces faced Eritrean forces occupying, or engaging in hostilities within, territory in Ethiopia or peacefully under Ethiopian administration prior to May 1998,¹⁹⁵ Based on these foreseeability assessments, the Commission also found Eritrea liable for damages in the Central and Eastern fronts of the conflict.¹⁹⁶

In assessing Eritrea's damages claims, the Commission concluded in an interesting passage that intent (or fault) was irrelevant when the consequences of wrongful conduct were readily foreseeable. Eritrea had argued that injuries intended by a party are by definition proximately caused, and that the character of damage to civilian infrastructure showed that Ethiopia intended to harm civilians, rendering it liable for the resulting injuries. The Commission noted that where there is widespread unlawful damage to civilian facilities 'it should be reasonably foreseeable to the forces of the offending party that injury will result to protected persons. The challenge lies in assessing the extent of that injury, not in finding the requisite causal connection.'¹⁹⁷ According to this interpretation, the intention of the wrongdoing State is immaterial when unlawful conduct is foreseeable and 'widespread', thus introducing an element of gravity. The causal connection is also presumed, placing the onus on the wrongdoing State to prove the existence of an intervening or concurrent cause.

2.2.2 Natural Sequence

Natural sequence has been described as an objective element of proximate causality.¹⁹⁸ It was applied by the German-United States Mixed Claims Commission in its 1924 decision on the *Life Insurance Claims*. In that case, the life insurance companies claimed losses attributable to the accelerated maturity of their policies resulting from premature deaths caused by Germany. Using the natural sequence variant of proximity, the Commission refused to uphold the insurance companies' claim:

'Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably

¹⁹⁵ Final Award (*Ethiopia v Eritrea*) Ethiopia's Damages Claims, *ibid*, para. 296.

¹⁹⁶ Final Award (*Ethiopia v Eritrea*) Ethiopia's Damages Claims, *ibid*, paras. 298-304.

¹⁹⁷ Eritrea-Ethiopia Claims Commission (*Ethiopia v Eritrea*) Final Award, Eritrea's Damages Claims, 17 August 2009 at 52, para. 214. See also para. 198.

¹⁹⁸ Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, *supra* note 115 at 245.

expect to continue to receive pecuniary contributions from the descendants, suffered losses which, because of the natural relations between the descendants and the members of their families, flowed from Germany's act as a normal consequence thereof, and hence attributable to Germany's act as a proximate cause.'

'But the claims for losses here asserted on behalf of life insurance companies, rest on an entirely different basis. Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence...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.'¹⁹⁹

The payments made by the insurers to the policy's beneficiaries were based on their contractual obligations. Thus, 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.'²⁰⁰ Pursuant to these observations, if a loss is a normal consequence of an act, it is attributable to that act as proximate cause. In the *Beha* case, the same Commission evaluated claims on behalf of American insurance policy holders who failed to collect in full because Norske Lloyd Insurance Co became insolvent due to the destruction by Germany of other assets Norske Lloyd had insured. The Commission found that the inability of the policyholders to collect their money was not a natural and normal consequence of Germany's acts, which moreover, were not in legal contemplation of the losses claimed:

'Assuming the truth of the facts upon which this argument rests, the vice in it is that the inability of these American policyholders to collect from the Norwegian insurer indemnity in full was not the natural and normal consequence of the acts of Germany in destroying property not American-owned which happened to be insured by the same Norwegian insurer...The destruction by Germany of non-American property insured by this Norwegian insurer which resulted in its insolvency cannot, in legal contemplation,

¹⁹⁹ *Provident Mutual Life Insurance Company and Others (United States) v Germany*, 18 September 1924, VII RIAA 91 at 113.

²⁰⁰ *Provident Mutual Life Insurance Company and Others (United States) v Germany*, *ibid.*

be attributed as the proximate cause of damages sustained by American nationals resulting from their inability, because of the insurer's insolvency, to collect full indemnity for the loss of their property not touched by Germany.'²⁰¹

The natural sequence approach to proximate cause has also been applied to claims seeking *lucrum cessans*, whereby the plaintiff asks for compensation for profits he would have collected were it not for the wrongful act. Such was the opinion of Arbitrator T.M.C. Asser in the *Cape Horn Pigeon* case, submitted to him by the United States and Russia in 1900. Asser found that international law recognizes reparations for lost profits if the plaintiff demonstrates that, in the ordinary course of events, he would have made the gains had the event complained of not arisen:

'Considérant que le principe général du droit civil, d'après lequel les dommages-intérêts doivent contenir une indemnité non seulement pour le dommage qu'on a souffert, mais aussi pour le gain dont on a été privé, est également applicable aux litiges internationaux et que, pour pouvoir l'appliquer, il n'est pas nécessaire que le montant du gain dont on se voit privé puisse être fixé avec certitude, mais qu'il suffit de démontrer que dans l'ordre naturel des choses on aurait pu faire un gain dont on se voit privé par le fait qui donne lieu à la réclamation.'²⁰²

On that basis, Asser specified that indirect damages were not being considered. Only direct damages were relevant for awarding compensation. Asser did not directly refer to the proximity test, which was further developed after his 1902 decision, but his early reference to natural sequence is an early contribution to proximity. In the replies to the questionnaire submitted to Governments by the Preparatory Committee of the 1930 Hague Codification Conference, the United States²⁰³ and the Netherlands²⁰⁴ expressed themselves in favor of the natural sequence test.

²⁰¹ *James A. Beha, Superintendent of Insurance of the State of New York, as Liquidator of Norske Lloyd Insurance Company, Limited, for American Policyholders (United States) v Germany*, April 12 1928 ,VIII RIAA 55 at 56.

²⁰² *Cape Horn Pigeon case (United States v Russia)*, 29 November 1902, IX RIAA 63 at 65.

²⁰³ 'Losses of profits, when proved with reasonable certainty and when a causal connection could be established, have been allowed.' See G. Arangio-Ruiz, Special Rapporteur, 'Second Report on State Responsibility', *supra* note 177 at 13, footnote 76.

²⁰⁴ 'Compensation must be given for any damage which can reasonably be regarded as the consequence of the act alleged against the State'. See G. Arangio-Ruiz, 'Second Report on State Responsibility', *ibid*, footnote 75.

2.2.3 Remoteness

As stated by the ILC Commentary, a cause which is ‘too remote’ does not give rise to the responsibility of a State. As the contrary to proximity, remoteness constitutes a criteria excluding liability. The practical distinction between ‘remoteness’ and ‘proximity’ can be of consequence to determine reparations. ‘Proximate’ causes constitute the inner limits of liability, whereas ‘remote’ causes are outside its scope. The principle seems very straightforward: damage arising from proximate causes is judicially compensable, while damage arising from remote causes is not. If the ILC requires a causal link ‘which is not *too* remote’,²⁰⁵ does this imply that a degree of remoteness is tolerated? Can a judge hold a State accountable for an act remotely related to the injury sustained? When does conduct become ‘too remote’? Although subject to different interpretations, this formulation is designed to provide latitude and flexibility in establishing the causal link and extent of liability. It is submitted that it does not altogether exclude some remote causes from the scope of State responsibility.

In yet another one of the *War-Risk Insurance Premium Claims*, the notion of remoteness was discussed. In *Eastern Steamship Lines, Inc. (US) v Germany*, the claimant took out war-risk insurance for his vessels during the period belligerency of the First World War after German submarines sunk the American tugboat *Perth Amboy*. The *Perth* was owned by a third party in which claimant had no interest. After the armistice, *Eastern Steamship* claimed that the German attack on the *Perth Amboy* was ‘the direct and proximate cause of this claimant’s taking out insurance against war perils’, and therefore, ‘the legal connection between the threatened destruction and the insurance [was] completely established’.²⁰⁶ The umpire disagreed. To him, the losses proximately resulting from the German attack were limited to the sinking of the *Perth Amboy*. The obtention of war-risk insurance was incidental to a state of war, and could not be characterized as a loss, damage or injury caused by Germany.²⁰⁷ In illustrating the causal remoteness between the submarine attacks and the taking out of insurance, the Umpire drew the following analogies:

²⁰⁵ ILC Articles on the Responsibility of States in *Yearbook...2001*, commentary to Article 31(1) at 92, 93, para. 10. Emphasis added.

²⁰⁶ *Eastern Steamship Lines, Inc. (US) v Germany (War-Risk Insurance Premium Claim)*, 11 March 1924, VII RIAA 71 at 72.

²⁰⁷ *Eastern Steamship Lines, Inc. (US) v Germany, ibid.*

‘And if the claimant had arranged to handle its business by rail instead of by water, and as a result its masters and crews had been thrown out of employment, would the losses resulting to them have been attributable to Germany’s act as a proximate cause?’

Or suppose the claimant had continued the operation of its water lines but concluded that, in order to maintain its organization and as far as possible protect its passenger business, it would, in addition to protecting its property, insure the lives of its masters, its crews, and its passengers, and also insure against injury to their persons; would the cost of such insurance have been a loss suffered by claimant as the proximate result of Germany’s act?’²⁰⁸

Umpire Parker concluded that, ‘[t]he procuring of this insurance was not Germany’s act but that of the claimant. The resulting expense was incurred not to repair a loss caused by Germany’s act but to provide against what claimant’s president feared Germany might do resulting in loss to it, although these fears were never realized.’²⁰⁹

²⁰⁸ *Eastern Steamship Lines, Inc. (US) v Germany, ibid.*

²⁰⁹ *Eastern Steamship Lines, Inc. (US) v Germany, ibid, 73.*

CONCLUSION

The present structure of international responsibility is based on the premise of individual attribution of wrongfulness. The elements of the internationally wrongful act have proven to be sufficient for the purposes of establishing the responsibility of a State. The conception of attribution at the International Law Commission as a purely normative operation has set aside any factual or causal analysis for the determination of an internationally wrongful act. In addition, the limited reliance of primary rules to spell out the consequences of international responsibility renders any causal analysis based on those rules a redundant one. Finally, the agency theory in international law creates functional presumptions which serve as a substitute of causation.

Causation is only relevant for the determination of reparations in international State responsibility. As we have seen, the test of proximate causation has been preferred in international judicial practice because it incorporates the elements of foreseeability, natural sequence and remoteness to varying degrees. In doing so, the extent of liability may vary.

While we are convinced that the principle of individual State responsibility still holds, it is submitted that some form of shared liability can probably arise in the reparations phase, if a more prominent role is given to primary rules. A more thorough consideration of these rules during the analysis of reparations could render shared forms of responsibility based on those rules, considering that secondary rules give no scope for this situation. Most primary rules do not apportion the liability or responsibility of their subscribers, but the content of the obligation itself could be interpreted in light of the cooperative effort as a reasonable basis for allocating or distributing the obligation to make reparations.

Finally, the originality of the collective dimension embodied in the Articles on State Responsibility for the purposes of shared responsibility should not be underestimated. True, there are no principles of shared State responsibility for the commission of an internationally wrongful act. But the Articles recognize a shared obligation in respecting the international system of rules, particularly in regard to peremptory norms. We can especially cite Article 41, which compels States to cooperate in bringing to an end, through lawful means, any serious breaches of obligations under peremptory norms of international law. Moreover, the international community of States has the collective obligation not recognize such a breach, nor can it render its aid or assistance in maintaining that situation. Shared interests of this nature are the cement of the international community and could prove valuable for

undertaking future research in the context of SHARES. Clearly, the international community has shared obligations which are recognized by the rules of international responsibility. As sovereigns, States are individually accountable. But the collective sense of purpose of the international community is very real, as are the obligations reinforcing it.

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