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March 22, 2024

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ANNEX 1

THE MYTH AND REALITY OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

By John H. Knox[*]

The dominant story of transboundary environmental impact assessment in international law has the following elements: (1) customary international law prohibits transboundary pollution; (2) according to the classic version of this prohibition, contained in Principle 21 of the 1972 Stockholm Declaration, states must ensure that activities within their territory or under their control do not harm the environment beyond their territory; (3) to ensure that activities within their jurisdiction will not cause transboundary harm, states must assess the potential transboundary effects of the activities; and (4) to that end, states enter into international agreements requiring them to carry out transboundary environmental impact assessment (transboundary EIA) for activities that might cause transboundary harm.

Despite its popularity, this story is not true. It belongs to what Daniel Bodansky has called the "myth system" of international environmental law: a set of ideas that are often considered part of customary international law but do not reflect state practice and, instead, "represent the collective ideals of the international community, which at present have the quality of fictions or half-truths."[1] European and North American countries are adopting regional agreements that provide for transboundary EIA.[2] But these agreements do not require transboundary EIA for all activities that might cause transboundary harm, and they do not link it to any hard substantive prohibition against transboundary harm. In short, these agreements do not much resemble the mythic story of transboundary EIA. At the same time, the agreements are not meaningless. They require EIA for certain types of actions, specify the elements an EIA must include, and provide for significant public participation in the EIA process.

What, then, is going on? If transboundary EIA agreements are not designed to end transboundary pollution in accordance with Principle 21, what are they designed to do? One clue is that the agreements were not written on a clean slate. Most countries in North America and Western Europe have already enacted domestic EIA laws, which are limited in scope and lacking in substantive prohibitions but do contain detailed procedural obligations and provide important avenues for public participation. In large part, the regional EIA agreements reflect these domestic EIA laws. In fact, the main way that the agreements extend beyond the domestic laws is by ensuring that states apply EIA without extraterritorial discrimination—that they take extraterritorial effects into account just as they take domestic effects into account, and that they enable foreign residents to have access to the domestic EIA procedures to the same extent as local residents. Another principle in international environmental law describes exactly this approach: the principle of nondiscrimination,

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[1] Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 (1995).

[2] The most important of these agreements is the Convention on Environmental Impact in a Transboundary Context, Feb. 25, 1991, 30 ILM 800 (1991), known as the Espoo Convention, which is open to member states of the United Nations Economic Commission for Europe (UNECE). The three North American states are close to completing an agreement that would institute transboundary EIA throughout North America. North American Commission for Environmental Cooperation [NAGEC], Draft North American Agreement on Transboundary Environmental Impact Assessment (derestricted Oct. 21, 1997), *at* <http://www.cec.org/pubs_info_resources/law_treat_agree/> [hereinafter Draft North American Agreement].

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which says that countries should apply the same environmental protections to potential harm in other countries that they apply to such harm in their own. Examined closely, each regional transboundary EIA agreement is an application of the principle of nondiscrimination.

The nondiscrimination principle has often been overlooked, cast into shadow by the glow surrounding Principle 21, which is generally considered to be the cornerstone of international environmental law. But Principle 21 suffers from serious weaknesses as a cornerstone of international law, not the least of which is that it does not seem to be a law at all. Perhaps it would be more appropriate to think of it as a capstone that has never been set. Despite limitations of its own, the principle of nondiscrimination may provide a better blueprint for the EIA agreements.

In part I of this article, I describe two stories of transboundary EIA: the mythic view of transboundary EIA as a corollary to Principle 21, and a more mundane view of transboundary EIA as an offshoot of domestic EIA laws. In part II, I show how the two regional agreements on transboundary EIA do not support the mythic view of transboundary EIA and, instead, extend domestic EIA in accordance with the principle of nondiscrimination. I also examine the International Law Commission's draft articles on prevention of transboundary harm,[3] which hew much more closely to the mythic view. In part III, I defend the usefulness of the regional EIA agreements. I conclude with some brief observations on the danger of confusing the myth of Principle 21 with the reality of international law.

I. TWO STORIES OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

Transboundary EIA as a Requirement of Principle 21

One way to look at transboundary EIA is as a logical requirement of Principle 21 of the 1972 Stockholm Declaration, which says:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[4]

Treatises,[5] textbooks,[6] and scholars[7] state that Principle 21 is considered to be customary international law. Indeed, it has been called the cornerstone of international environmental law.[8] But despite the near unanimity on the importance of Principle 21 and the great amount of scholarly attention given to it, its meaning has remained indefinite. The problem does

[3] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities [with commentary], *in* Report of the International Law Commission, Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 370–436, UN Doc. A/56/10 (2001) [hereinafter ILC Draft Articles].

[4] UN Conference on the Human Environment, Stockholm Declaration, June 16, 1972, UN Doc. A/CONF.48/14, princ. 21, 11 ILM 1416 (1972). The nations of the world reaffirmed Principle 21 in only slightly modified form as Principle 2 of the 1992 Rio Declaration. *See* UN Conference on Environment and Development, Rio Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1, princ. 2, 31 ILM 874 (1992). I will follow the usual custom in continuing to refer to the principle as Principle 21 rather than Principle 2. Principle 21 is usually considered to be the most authoritative expression of the principle that states should prevent transboundary harm, but there are other important sources, such as the *Trail Smelter* arbitration. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 & 1941).

[5] ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 130 (1991); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 190 (1995).

[6] DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 321, 345 (1998); EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW MAGRAW, PAUL C. SZASZ, & ROBERT E. HUTZ, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 317 (1998) [hereinafter WEISS ET AL.].

[7] David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?* 29 GA. L. REV. 599, 620 (1995); Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 1990 GER. Y.B. INT'L L. 308, 310.

[8] SANDS, *supra* note 5, at 186; WEISS ET AL., *supra* note 6, at 316.

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not consist in reconciling its two apparently contradictory clauses.[9] The prevailing view is that the responsibility must be read as a limitation on the right—in other words, that states have the right to exploit their own resources *provided that* they ensure that activities within their jurisdiction or control do not harm the environment beyond their territory. Otherwise, the second clause would be a nullity. And, unsurprisingly, negotiators of the language said at the time that they intended the second clause to limit the first.[10] The focus has therefore centered on the second clause, so much so that when scholars refer to Principle 21, they often refer only to the limiting language.

The more difficult issue has been to decide exactly what that language means. What are states required to do with respect to activities within their jurisdiction or control that cause (or might cause) transboundary environmental damage? On its face, the language seems clear: each state must ensure that such activities do not harm the environment outside its territory. Therefore, states must take steps to avoid any such harm, including that committed by private actors, and if harm nevertheless occurs, states must be accountable under traditional notions of state responsibility for the damage. This reading meshes nicely with the language of Principle 21 but has the problem—an uncomfortable one, for a would-be principle of customary international law—that it does not seem to enjoy the necessary support in state practice. As Oscar Schachter has observed, "To say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."[11]

Although some scholars have still argued that all transboundary environmental harm should be presumptively unlawful,[12] the idea that Principle 21 prohibits all transboundary harm has generally been rejected.[13] Instead, most scholars adopt one or both of two limitations. First, they add the term *significant* or *substantial* before *damage*, so that the rule becomes that states should prevent all *significant* or *substantial* transboundary environmental harm from activities under their jurisdiction or control.[14] Second, they construe Principle 21 as reflecting an obligation of performance—*due diligence*—rather than an obligation of result.[15]

[9] *But see* Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1094 (1994) (highlighting contradiction between the sovereign right to exploit resources and the responsibility not to allow transboundary harm).

[10] Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 492 (1973) (citing statement of Canadian delegation that the "principle reflects existing rules of international law, the first element in it stressing the rights of states, 'while the second element made it clear that those rights must be limited or balanced by the responsibility to ensure that the exercise of rights did not result in damage to others' ").

[11] Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 463 (1991); *see also* Bodansky, *supra* note 1, at 110–11 ("Although I am unaware of any systematic empirical study of this issue, transboundary pollution seems much more the rule than the exception in interstate relations. Pollutants continuously travel across most international borders through the air and by rivers and ocean currents."); Schachter, *supra*, at 462 ("On its own terms, [Principle 21] has not become state practice: States generally do not 'ensure that the activities within their jurisdiction do not cause damage' to the environments of others.").

[12] *E.g.*, Sanford E. Gaines, *Taking Responsibility for Transboundary Environmental Effects*, 14 HASTINGS INT'L & COMP. L. REV. 781, 796–97 (1991).

[13] *E.g.*, UN Secretary-General, Rio Declaration on Environment and Development: Application and Implementation, UN Doc. E/CN.17/1997/8, para. 23 [hereinafter Report of the Secretary-General] ("The exact scope and implications of [Rio] principle 2 are not clearly determined yet. Certainly not all instances of transboundary damage resulting from activities within a State's territory can be prevented or are unlawful.").

[14] For examples of *substantial*, see EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (Art. 10) (1987) [hereinafter WCED EXPERTS GROUP]; International Law Association, Rules of International Law Applicable to Transfrontier Pollution, Art. 3(1), *in* 60 ILA, CONFERENCE REPORT (1982). For an example of *significant*, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §601 (1987) [hereinafter RESTATEMENT]. *See also* Kamen Sachariew, *The Definition of Thresholds of Tolerance for Transboundary Environmental Injury Under International Law: Development and Present Status*, 37 NETH. INT'L L. REV. 193, 196 (1990) (concluding that since the Stockholm Conference, "significant" is the most common term "used to describe the threshold of tolerable transboundary environmental harm or interference").

[15] *See, e.g.*, Günther Handl, *National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered*, 26 NAT'L RES. J. 405, 429 (1986). The distinction between the two approaches is not always clear. For example, it is unclear whether the *Restatement* endorses due diligence or a strict obligation of result. RESTATEMENT,

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Although the limitations may be combined in various ways,[16] the majority probably includes both limitations.[17] The result would be to read Principle 21 to require states to undertake due diligence to prevent significant (or substantial) transboundary environmental harm from activities within their jurisdiction or control.

This reading leaves many issues unanswered, because its terms are inherently vague and, in the absence of a system that provides authoritative interpretations of their application to specific cases, are likely to remain so.[18] For example, *substantial* and *significant* may be interchangeable,[19] or *substantial* may refer to a much higher level of harm than *significant*.[20] *Significant* may mean only greater than *de minimis*,[21] or something more. Adding *due diligence* compounds the problem. An obligation of result is relatively easy to apply—if transboundary harm (or *significant* transboundary harm) has occurred, the state has violated its obligation. If not, not. But how does one know if a state has failed to exercise due diligence? Examining whether transboundary harm has occurred does not take one very far, since it is easy to imagine situations in which harm might occur despite the utmost efforts on the part of the state of origin to prevent it, and, conversely, in which harm might not occur despite the failure of a state to undertake any due diligence at all. Moreover, none of these variations (at least, none that has any substance) necessarily comports with state practice—hence Bodansky's treatment of Principle 21 as part of a myth system rather than as a customary law.[22]

The consequences of failing to prevent transboundary environmental harm raise another set of conceptual problems. Normally, the law of state responsibility would suggest that in the event of a violation of the principle (however characterized), the state of origin would be bound to make good any resulting harm to the affected state. Many scholars would undoubtedly support that result.[23] But some scholars, notably those on the International Law Commission, have pursued the possibility that states might be *liable* for transboundary harm even if they comply with their obligations, whatever those might be. That is, if harm results even though states have complied with a due diligence obligation of conduct, they might still be required to make good (be liable for) the resulting harm to the affected state. The ILC approach thus raises the possibility of liability without responsibility.[24]

supra note 14, §601(1) (providing that a state is obliged "to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury," but qualifying the obligation with the phrase "to the extent practicable under the circumstances"); *see also* David D. Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 536 (1989) (analyzing §601(1)).

[16] For example, some areas of conduct might be subject to a strict obligation of result, while others would be subject only to an obligation of due diligence. *See* Alan Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?* 39 INT'L & COMP. L.Q. 1, 14–15 (1990).

[17] Riccardo Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15, 24 (Francesco Francioni & Tullio Scovazzi eds., 1991).

[18] *See Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1508 (1991).

[19] *See* WCED EXPERTS GROUP, *supra* note 14, at 75 (defining "substantial harm" as "harm which is not minor or insignificant").

[20] Gaines, *supra* note 12, at 796 ("[I]n both domestic American usage and international law, the term 'substantial' connotes a magnitude of harm that is a quantum step greater than merely 'not insignificant.'").

[21] RESTATEMENT, *supra* note 14, §601 cmt. *c* ("The word 'significant' excludes minor incidents causing minimal damage.").

[22] Bodansky, *supra* note 1, at 114–16.

[23] *See* RESTATEMENT, *supra* note 14, §§601(3), 602(1). Assessing the amount of compensable damage would raise another complicated set of issues. *Compare* Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AJIL 50, 75 (1975) (material damage, rather than "moral injury," is necessary for state responsibility for transboundary environmental harm), *with* Alfred P. Rubin, *Pollution by Analogy: The* Trail Smelter *Arbitration*, 50 OR. L. REV. 259, 273–74 (1971) (suggesting that state responsibility for transboundary pollution should include intangible injury).

[24] It might be more accurate to call it liability *beyond* responsibility, since the ILC seems to contemplate that breaches of Principle 21 would give rise to state responsibility. *See* Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 61, 76–79 (Alan Boyle & David Freestone eds., 1999).

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In contrast, states' positions sometimes seem to support the idea of responsibility without liability of any kind whatsoever—a non sequitur in international law, although perhaps not in state practice. While paying lip service to Principle 21 in the Stockholm and Rio Declarations, states have avoided saying that violations of that principle necessarily lead to liability of any kind. Principle 22 of the Stockholm Declaration does say that "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[25] But if Principle 21 is truly part of customary international law, Principle 22 should be unnecessary—violations of the obligation contained in Principle 21 should simply give rise to a secondary obligation on states to make good any resulting harm. And states have not exactly rushed to answer the call of Principle 22; it was adopted again in 1992 as Principle 13 of the Rio Declaration, with little change except for the addition of the encouraging words "in an expeditious and more determined manner" between the words "cooperate" and "to develop further."[26] States are obviously not eager to determine the consequences of failure to comply with Principle 21.

There is no reason to think that the international community is close to reconciling the various versions of Principle 21, either with one another or with state practice. Indeed, how such a reconciliation could take place is hard to see. One might imagine that an authoritative source would be the International Court of Justice or an international conference of states, but the opportunity to clarify Principle 21 has been presented to both without success. In its 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ said, "The existence of the general obligation of States to ensure that activities within their jurisdiction and control *respect* the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[27] Although some authorities have cited this language as conclusive support for the proposition that Principle 21 is part of customary international law,[28] the key term "respect" is so vague that it avoids clarifying any of the issues raised above, including which version of Principle 21 the ICJ believes reflects custom. As for states, the Rio Conference had an opportunity to clarify Principle 21 after twenty years of experience with it and settled for adopting it again virtually unchanged.

In contrast to these uncertainties, one area of Principle 21 mythology is relatively certain. Scholars generally agree that Principle 21 should entail three procedural duties. Before undertaking an activity with a risk of (significant) transboundary harm, the state with jurisdiction over the activity should *assess* its potential transboundary effects, *notify* any potentially affected states, and *consult* with them over what to do. Notification and consultation may or may not logically follow from Principle 21. One might imagine that a state could comply with Principle 21 by avoiding all potentially risky activities, and not bother to notify and consult with other states.[29]

As many scholars have noted, however, Principle 21 does seem logically to require assessment of the potential transboundary effects of activities that might cause transboundary harm—that is, transboundary environmental impact assessment.[30] Otherwise, the substantive

[25] Stockholm Declaration, *supra* note 4, princ. 22.

[26] Rio Declaration, *supra* note 4, princ. 13.

[27] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, 241–42, para. 29 (July 8) (emphasis added).

[28] *See* ILC Draft Articles, *supra* note 3, at 378; Report of the Secretary-General, *supra* note 13, para. 23; HUNTER, SALZMAN, & ZAELKE, *supra* note 6, at 348.

[29] *But see* Günther Handl, *The Environment: International Rights and Responsibilities*, 74 ASIL PROC. 223, 224 (1980) (arguing that Principle 21 requires notification and consultation).

[30] *See, e.g.*, ANDRÉ NOLLKAEMPER, THE LEGAL REGIME FOR TRANSBOUNDARY WATER POLLUTION: BETWEEN DISCRETION AND CONSTRAINT 180 (1993); WCED EXPERTS GROUP, *supra* note 14, at 103; Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada–United States Relations: A Survey and Evalu-*

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prohibition on transboundary harm would be largely meaningless, except perhaps as a basis for *post hoc* determination of compensation owed to the affected state. If a state does not know whether an activity might cause transboundary harm, it cannot take steps to avoid the harm. Similarly, assessment is a logical prerequisite for notification and consultation.[31]

The precise relationship of transboundary EIA to Principle 21 depends upon which version of Principle 21 one accepts. Transboundary EIA may enable a state to meet a substantive obligation of result, but failure to perform a transboundary EIA for a particular activity does not in itself indicate that the state has violated the substantive obligation—the activity may not in fact cause any transboundary harm. But if the substantive obligation is to take diligent steps to avoid transboundary harm, transboundary EIA is likely to be one of the steps required. In that case, failure to carry out transboundary EIA could conceivably violate the due diligence requirement itself, even if no harm results. Conversely, a good faith transboundary EIA that concludes that no transboundary harm would result from an activity might help a state to meet its due diligence obligation, even if the activity causes unforeseen harm later.[32]

Either way, according to the prevalent view, the purpose of transboundary EIA is to prevent transboundary pollution, as a corollary to Principle 21. Phoebe Okowa has put this role very clearly:

> The duty to carry out environmental impact assessments, as well as the duties of notification and exchange of information, only make sense if in the end an objection by a notified State is taken into account. In other words, the ultimate goal of such notification and supply of relevant information is to require the State of origin to accommodate the interests of the notified State, and if need be to adopt mitigative strategies for its benefit. The aim in each case is to ensure that the activity is carried out in a manner least harmful to the environment.[33]

Transboundary EIA as an Outgrowth of Domestic EIA

Rather than as a corollary to Principle 21, transboundary EIA may be seen as an outgrowth, or special case, of EIA as it has developed in domestic legal systems.[34] The United

ation of Techniques and Mechanisms, 1986 CAN. Y.B. INT'L L. 247, 303; Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, *in* INTERNATIONAL LAW AND POLLUTION 61, 66–67 (Daniel Barstow Magraw ed., 1991); Handl, *supra* note 29, at 224. Transboundary EIA usually refers to assessment by a state of the extraterritorial effects of activities carried out within its territory, and this article primarily focuses on agreements that concern that type of assessment. Transboundary EIA may also include assessing the effects of activities that are under the state's control but are carried out extraterritorially, for example in global commons areas.

[31] *See* Phoebe N. Okowa, *Procedural Obligations in International Environmental Agreements*, 1996 BRIT. Y.B. INT'L L. 275, 279.

[32] Okowa states that

> it may be argued that [EIAs] may be a relevant factor in determining whether a State has acted with the requisite degree of diligence in discharging its customary law or treaty-based duty to prevent environmental harm. A State that fails to assess the impact of proposed activities on the territories of other States can hardly claim that it has taken all practicable measures with a view to preventing environmental damage.

Id. at 280 (footnote omitted).

[33] *Id.* at 302 (footnote omitted); *see also* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 96 (1992) ("The object of prior assessment is to enable 'appropriate' measures to be taken to mitigate or prevent pollution before it occurs."); N. A. Robinson, *EIA Abroad: The Comparative and Transnational Experience*, *in* ENVIRONMENTAL ANALYSIS: THE NEPA EXPERIENCE 679, 693 (Stephen G. Hildebrand & Johnnie B. Cannon eds., 1993) ("The EIA is the way to ensure that no state acts in a manner that harms the environment of another state, a guideline that all states are required to adhere to under international law . . .").

[34] The following description of domestic EIA draws generally on several sources, including ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES (Norman Lee & Clive George eds., 2000); 2 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT: ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE: IMPACT AND LIMITATIONS (Judith Petts ed., 1999); UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT (Sun Lin & Lal Kurukulasuriya eds., 1995); CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW (1995).

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ANNEX 2

Center for Oceans Law and Policy
University of Virginia

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

A COMMENTARY

Volume IV

Articles 192 to 278
Final Act, Annex VI

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SECTION 5. INTERNATIONAL RULES AND NATIONAL LEGISLATION TO PREVENT, REDUCE AND CONTROL POLLUTION OF THE MARINE ENVIRONMENT

Article 207

Pollution from land-based sources

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

SOURCES

1. A/AC.138/SC.III/L.39 (WG.2/Paper No. 8/Add.2, paragraphs 1, 2(a) and 3(a)), reproduced in I SBC Report 1973, at 85, 86-88 (Chairman, WG.2).
2. A/AC.138/SC.III/L.43 (1973, mimeo.), article VIII (Norway).
3. A/AC.138/SC.III/L.52/Add.1, Annex 1 (WG.2/Paper No. 15, Section I), reproduced in I SBC Report 1973, at 91, 93 (Chairman, WG.2).
4. A/CONF.62/C.3/L.2 (1974), article 5, paragraph (a), and article 25, III Off. Rec. 245, 247 (Kenya).
5. A/CONF.62/C.3/L.4 (1974), article 1, III Off. Rec. 247 (Greece).
6. A/CONF.62/C.3/L.6 (1974), article 3, paragraph 3(a), and article 7, paragraph 3(a), III Off. Rec. 249, 250 (Canada, Fiji, Ghana, Guyana, Iceland, India, Iran, New Zealand, Philippines and Spain).
7. A/CONF.62/C.3/L.14/Add.1 (1974) (CRP/MP/9 and Add.1, Corr.1 and 2, and Rev.1, Section I, Alternatives A and B), III Off. Rec. 255, 257-58 (Third Committee, Informal Meetings).

article 208. Renumbered 207 in the ICNT/Rev.1 (Source 13), subsequent versions (Sources 14, 15 and 16) merely incorporated changes recommended by the Drafting Committee (Sources 17 to 22), including the rewording of paragraph 3 to read: "States shall endeavour to harmonize their policies in this connection at the appropriate regional level" (Source 17, at 66). It was at this stage also that "or" was substituted for "and" in paragraph 5, in reference to harmful *or* toxic substances.

207.7(a). Paragraph 1 restates and amplifies the obligation enunciated in article 194, paragraph 3(a). It establishes that, with regard to land-based sources of pollution, national laws and regulations shall take into account "internationally agreed rules, standards and recommended practices and procedures." Without formally defining "land-based sources," paragraph 1 amplifies the term by a description *ratione loci* as including "rivers,[4] estuaries, pipelines and outfall structures." Being land-based, the sovereignty of the territorial State is dominant, but this only serves to lead into the approach of Part XII. Clearly, the balance drawn in paragraph 1 is one that favors national measures, and thus enables States to adopt measures which are either more or less stringent than those developed internationally. The phrase "taking into account internationally agreed" rules, etc., is the weakest of the qualifications used to indicate the obligations of States in respect of internationally agreed measures, and it gives expression to the sovereignty of the States concerned over all land-based sources of marine pollution.

207.7(b). Paragraph 2 restates the general obligation of article 194, but against the background of territorial sovereignty it also entails the establishment of a framework within which national measures may diverge from corresponding international measures.

207.7(c). Paragraph 3, on the other hand, is a special application of the obligation of harmonization initially set forth in article 194, paragraph 1. The expression "at the appropriate regional level" also accommodates the territorial sovereignty of States.

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[4] The topic of the law of the non-navigable uses of international watercourses has been on the program of work of the International Law Commission since 1971. Frequent changes of special rapporteur have delayed progress on this work, in which the protection of the environment occupies a central position. This work is notable for the attempts that are being made to coordinate the international law relating to international watercourses with the international law of the sea as regards the prevention, reduction and control of pollution. In 1988 the International Law Commission estimated that over 80% of marine pollution came from land-based sources. Report of the International Law Commission on the work of its fortieth session (A/43/10), Chapter III, para. 133, at 55. As regards the Institute of International Law, see the resolution adopted at the Athens session (1979) on the pollution of rivers and lakes in international law, 58 *Annuaire de l'Institut de Droit International*, t. II, at 196. As regards the International Law Association, see the Helsinki Rules on the uses of waters of international rivers, particularly articles IX to XI. International Law Association, Report of the 52nd Conference (1966), at 478, 494. See also the rules on Marine Pollution of Continental Origin, in the Report of the 55th Conference (1972), at 22-106. Both reproduced in Finnish Branch of the International Law Association, *The Work of the International Law Association on the Law of International Water Resources* (E.J. Manner and V.-M. Metsälampi (eds.)), at 23 and 99 (1988).

207.7(d). Paragraph 4 requires States to endeavor to establish relevant global and regional rules, standards and recommended practices and procedures for dealing with pollution of the marine environment from land-based sources. The cautious language used here also reflects the impact of territorial sovereignty. Here, as elsewhere, the obligation to endeavor must be implemented in good faith.

At present, there are very few internationally agreed rules, standards and recommended practices and procedures regarding land-based sources of pollution of the marine environment, notwithstanding the fact that this source of pollution is the most prevalent. In 1985 UNEP drafted the Montreal Guidelines for the Protection of the Marine Environment Against Pollution from Land-based Sources, as a broad framework for the development of appropriate international agreements; for the moment the guidelines are stated to be of a "recommendatory nature."[5]

States are enjoined to act "especially through competent international organizations or diplomatic conference." The plural term "competent international organizations" in this article (and in the corresponding article 213 on enforcement) recognizes that in dealing with land-based sources of pollution of the marine environment no particular universal or regional international organization has exclusive competence. As knowledge and technology progress, it is becoming increasingly understood that different types of land-based pollution require different functional and legal approaches. In the nature of things, this can implicate different international organizations, both global and regional.

There may be some awkwardness in the English text, "diplomatic conference" standing without an adjacent article, which leaves open the question whether the adjective "competent" applies to the conference also. Comparison with the other languages, however, reveals that what is meant here is any "competent international organization" or "a diplomatic conference" (the former term is not defined in the Convention, but see paras. XII.17 and 18 above). The word "diplomatic" implies that it must be a plenipotentiary conference of the representatives of States (and not a conference composed exclusively of the representatives of international intergovernmental organizations or of independent experts), regardless of the type of instrument it adopts. (On the expression "general diplomatic conference," see para. 211.15(d) below.)

The combination of competent international organization and diplomatic conference allows the necessary flexibility in the machinery (which may be global or regional) through which States can establish widely acceptable and harmonized rules. Furthermore, land-based pollution is particularly susceptible to regional and local regulations, and the diplomatic conference may be a more appropriate forum for this.

The expression "taking into account ... the economic capacity of developing States and their need for economic development" reflects article 194,

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[5] UNEP Publication: Environmental Law Guidelines and Principles No. 7. Reproduced in II AROA 1985-1987, at 655.

which provides that States take measures "in accordance with their capabilities" (see para. 194.10(b) above).

207.7(e). Paragraph 5 restates in greater detail the principle of article 194, paragraph 3(a), regarding "toxic, harmful or noxious substances" (see para. 194.10(j) above.). The change from "harmful *and* noxious" to "harmful *or* noxious," corresponding to article 194, was proposed by the Chairman of the Third Committee and made on the recommendation of the Drafting Committee.[6] It makes the provision applicable to substances which are either toxic, harmful or noxious, and does not restrict its application to substances meeting all three criteria.

[6] See A/CONF.62/L.34 and Add.1 and 2 (1980), Annex, XIV Off. Rec. 185, 186 (Chairman, Third Committee); and A/CONF.62/L.63/Rev.1 (1980), Annex II, section A, ibid. 139, 141 (Drafting Committee).

ANNEX 3

THE INTERNATIONAL BILL OF RIGHTS

The Covenant on Civil and Political Rights

Louis Henkin
Editor

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5

The Right to Life, Physical Integrity, and Liberty

YORAM DINSTEIN

HUMAN RIGHTS aim at promoting and protecting the dignity and integrity of every individual human being. If there are any rights more fundamental than others for achieving that aim, surely they are the rights to life, to physical integrity, and liberty. On these, all other rights depend; without these, other rights have little or no meaning.

The Right to Life

Article 6 of the Covenant on Civil and Political Rights proclaims that every human being has the inherent right to life. The right to life is incontestably the most important of all human rights. Civilized society cannot exist without legal protection of human life. The inviolability or sanctity of life is, perhaps, the most basic value of modern civilization. In the final analysis, if there were no right to life, there would be no point in the other human rights.

Describing the right to life as "inherent" may be questioned on the ground that legal rights never actually inhere in nature; they are always created within the framework of a legal system.[1] Still, the framers of the Covenant apparently regarded human rights as preexisting in a moral order and perhaps even in an immaculate *jus naturale*. Whether they were right or wrong is immaterial; what matters is that the right to life is validated in the Covenant as a legal right. That only this right is characterized by the Covenant as inherent may attest to its primacy and emphasize that it derives from the very fact of a human being's existence. But whether or not one accepts human rights as based on natural law or an antecedent morality, any rights and duties created by

the Covenant are legal rights under international law and must be considered as binding in the international legal system.

The term "inherent" may indicate also that the framers of the Covenant felt that the human right to life is entrenched in customary international law, so that Article 6 is merely declaratory in nature and does not create new international law. Indeed, the right is also recognized in Article 3 of the Universal Declaration of Human Rights,[2] Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[3] and Article 4 of the American Convention on Human Rights.[4] If the right to life is guaranteed under general international law (and it is submitted that such is the case), obviously the right is guaranteed vis-à-vis all states (including those which are not parties to the Covenant). If the right is protected apart from the Covenant, its inclusion in the Covenant is important not only to reaffirm the right but to articulate its content and implications.

Article 6 requires that the right to life be protected by law. That is to say, each state party is obligated to have within its internal legal system a law protecting the right to life. The term "law" is broad: in general, it denotes all strata of the legal order, not only statutes (and constitutions) but also unwritten law and administrative regulations. The inviolability of life is so important, however, that a strict interpretation of "law" is here called for.[5] The international obligation requires that the right to life be protected by higher forms in the legislative hierarchy, by statute or constitutional provision.

What is the ambit of the protection that must be given to the right to life? Unfortunately, Article 6 is not specific.[6] Basically, what it tells us, by way of guidance, is that no one shall be arbitrarily deprived of his life. The emphasis must be both on "deprive" and "arbitrarily." First, deprivation of life means homicide. The right to life is not freedom to live as one wishes.[7] It is not a right to an appropriate standard of living.[8] Of course, a human being needs certain essentials—particularly food, clothing, housing, and medical care—in order to remain alive. These are aspects of the social rights to an adequate standard of living and to health which are recognized in Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights.[9] The human right to life per se, however, is a civil right, and it "does not guarantee any person against death from famine or cold or lack of medical attention."[10]

The right to life, in effect, is the right to be safeguarded against (arbitrary) killing.[11] To be sure, homicide may be carried out through a variety of means, including starving someone, exposing a person to

extreme temperatures or contamination with disease. But, for example, the mere toleration of malnutrition by a state will not be regarded as a violation of the human right to life, whereas purposeful denial of access to food, e.g., to a prisoner, is a different matter. Failure to reduce infant mortality is not within Article 6, while practicing or tolerating infanticide would violate the Article.

Some members of the Human Rights Committee have expressed the view that Article 6 requires the state to take positive measures to ensure the right to life, including steps to reduce the infant mortality rate, prevent industrial accidents, and protect the environment.[12]

Not all deprivation of life constitutes an infringement of the right to life; only a deprivation of life that is "arbitrary." The cardinal question, therefore, is when a deprivation of life may be labeled as arbitrary. The term "arbitrary" (which appears also in Article 9 and elsewhere in the Covenant) is not easy to define. Its use in Article 6 was, indeed, criticized at the time of drafting as "ambiguous and open to several interpretations."[13] There is a conceptual question—to which we shall return—whether any action sanctioned by statute may qualify as arbitrary.[14] There are a number of practical issues regarding deprivation of life.

Is Capital Punishment Permissible?

Article 6 permits the death penalty, although it stipulates that its provisions are not to be invoked to delay or to prevent the abolition of capital punishment by any state party. The article also lays down six limitations on capital punishment: a sentence of death (a) may be imposed only for the most serious crimes; (b) must be in accordance with the law in force at the time of the commission of the crime; (c) must not be contrary to other provisions of the Covenant or to the Genocide Convention;[15] (d) can only be carried out pursuant to a final judgment rendered by a competent court; (e) shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women; and (f) any person condemned to death shall be entitled to seek pardon or commutation of sentence and may be granted amnesty, pardon, or commutation of sentence even without seeking them.

The first limitation raises the question as to what constitutes a most serious crime. It was recognized that "the concept of 'serious crimes' differed from one country to another."[16] Yet no more clearly defined term was found. The second limitation merely reiterates the principle

nulla poena sine lege which is enshrined as a general principle in Article 15 of the Covenant. The reference to other provisions of the Covenant in the third limitation signifies that there must be no discrimination in the imposition of capital punishment on the basis of race, religion, or other irrelevant grounds (as per Article 2(1) of the Covenant), that the imposition of capital punishment must be in accordance with the minimum guarantees of due process of law (spelled out in Articles 14 and 15), and must satisfy other provisions of the Covenant as well. The reference to the Genocide Convention (in Article 6(3)) is designed particularly to condemn and prevent recurrence of the Nazi experience. As pointed out by the Peruvian Delegate to the Third Committee of the General Assembly: "Nazi tribunals had committed the crime of genocide by means of mass death sentences imposed after a travesty of the judicial process."[17] Thus, capital punishment must not serve as a disguise for the implementation of a genocidal policy.

The fourth limitation hinges upon the term "competent court." A suggestion that Article 6 include a requirement that the court be independent was not favored by the framers of the Covenant on the ground that the independence of courts was provided for specially in Article 14(1).[18] The fifth requirement distinguishes between the position of minors and that of pregnant women. The sentence of death cannot be meted out at all for crimes committed by persons below eighteen years of age. The fact that the defendant reaches the age of eighteen before he is convicted or by the time he would be executed would not permit him to be executed. On the other hand, as to a pregnant woman, while the intention of the framers is subject to some doubt,[19] the text actually adopted means that the death sentence cannot be carried out in the period preceding childbirth. Pregnancy, then, only postpones the implementation of a death sentence, presumably with a view to saving the life of an innocent unborn child. The death sentence may be imposed even during pregnancy, and it can be carried out once the baby is delivered or the pregnancy is otherwise terminated.[20]

The sixth and last limitation differentiates between three terms: pardon, commutation of sentence, and amnesty. Pardon means complete release. Commutation of sentence signifies that the sentence of death will be superseded by a lighter sentence (usually of imprisonment). Amnesty is a pardon extended on a collective basis. The framers of the Covenant provided that a person sentenced to death may seek (on his own initiative) only (individual) pardon or commutation of sentence; he may, however, benefit from either, as well as from a general amnesty.[21]

Needless to say, these are all minimal limitations on capital punishment and, as long as this penalty may be resorted to, the human right to life is far from being absolute. It is noteworthy that the European and American conventions also permit capital punishment, although the latter—which is the more advanced instrument in this respect—provides that in countries which have abolished the death penalty, it shall not be reestablished, and that in no case shall capital punishment be inflicted for political offenses or on persons over seventy years of age.

The Human Rights Committee, in dealing with reports of states submitted under Article 40, has consistently supported the Covenant's commitment to the eventual elimination of the death penalty. Members warmly praised countries which reported having already done so, either formally or through disuse.[22] Other countries were pressed for details on which crimes were punishable by death and how frequently death sentences were carried out. The prevailing view was that the "most serious crimes" requirement should be read restrictively. Several times committee members expressed doubt whether crimes against property warranted the death sentence. For example, it was suggested that its application in cases of misuse of public funds constituted an excessively broad interpretation.[23] Use of the death penalty to punish "crimes against the economy" was also considered questionable.[24] Its imposition for nonviolent or political offenses (e.g., double membership in political parties) was singled out for special condemnation.[25]

Is Deprivation of Human Life Permissible in the Course of Administrative Police Action?

Article 6 ignores this important subject. In the course of its drafting, proposals were made to specify circumstances in which the taking of life would not be deemed a violation of human rights, such as (a) killing by police or other officials in self-defense or in defense of another; (b) death resulting from action lawfully taken to suppress insurrection, rebellion or riots; (c) killing in an attempt to effect lawful arrest or to prevent the escape of a person in lawful custody.[26] There was, however, opposition to any such enumeration. It was explained that "a clause providing that no one should be deprived of his life 'arbitrarily' would indicate that the right was not absolute and obviate the necessity of setting out the possible exceptions in detail."[27] By contrast, Article 2 of the European Convention explicitly states that deprivation of life shall not be regarded as contravening the article when it results from a use of force which was absolutely necessary (a) in defense of any person

from unlawful violence; (b) to effect a lawful arrest or to prevent the escape of a person lawfully detained; or (c) in action lawfully taken for the purpose of quelling a riot or insurrection. In light of the *travaux préparatoires* of the Covenant, these instances of deprivation of life can probably be considered as not "arbitrary" and therefore permissible under Article 6.[28] Members of the Human Rights Committee, however, have raised questions about the use of deadly force by authorities (e.g., by the police to quell disturbances) and expressed the view that its use should be restricted. In particular, police immunity for deaths arising from the suppression of certain crimes was considered "difficult to reconcile with Article 6."[29]

Is Article 6 Violated If the State Fails to Prevent the Killing of One Individual by Another?

In principle, the obligations under the Covenant with respect to international human rights are incurred only by states and their organs acting within the scope of, or at least in connection with, their official functions.[30] Hence, the duty corresponding to the human right to life devolves only on persons exercising public authority and not on private individuals.[31] On the other hand, it may be argued that the state must at least exercise due diligence to prevent intentional deprivation of the life of one individual by another, as well as to apprehend murderers and to prosecute them in order to deter future takings of life.[32] The question came up in the course of the drafting of Article 6, and "while the view was expressed that the article should concern itself only with protection of the individual from unwarranted actions by the State, the majority thought that States should be called upon to protect human life against unwarranted actions by public authorities as well as by private."[33]

The majority view seems to be corroborated by the formulation of Article 2(1) according to which contracting parties undertake not only "to respect" but also "to ensure" to all individuals within their territories and subject to their jurisdiction, the various rights recognized in the Covenant, including, of course, the right to life. That would seem to require that the state make certain that private individuals, too, do not interfere with the enjoyment of the right to life by other individuals. This would be particularly true of mass murders. Whereas an ordinary act of murder often cannot be prevented by state officials even with due diligence on their part, the state is expected to take exceptional precaution when there is a threat of riot, mob action, or incitement

against minority groups. On the other hand, it is doubtful whether due diligence, say, to cut down fatalities by preventing traffic offenses and prosecuting reckless drivers, is legally required by the undertaking to respect and ensure the right to life.[34]

Is War Forbidden as a Corollary of the Right to Life?

It has been argued that inasmuch as human lives are destroyed on a vast scale in time of war, engaging in war is an infringement of the human right to life. But as a matter of law this contention is untenable. War, assuredly, is prohibited under modern international law and constitutes an international crime.[35] But the duty of every state to refrain from war confers rights on other states and implies no rights for individual human beings. If that were not the case, it would be difficult to comprehend the two exceptions to the interdiction of war under international law—self-defense and collective security—since life is taken not only in (unlawful and criminal) wars of aggression but also in (permissible) wars of self-defense. Moreover, if the proscription of war by international law were based on, or corresponded to, the human right to life, not only interstate wars but also intrastate wars should have been disallowed. In fact, international law (as distinct from national constitutional law) does not forbid rebellions and internal conflicts, irrespective of the number of human lives lost in them.[36]

Is Euthanasia Permissible?

Article 6 does not address itself to this subject, nor, for that matter, do other human rights instruments. Evidently, the right to life is guaranteed to all human beings without exception, including the incurably sick, congenitally deformed children, senile men and women, the insane, etc. The judgment of the International Military Tribunal at Nuremberg condemned the annihilation of hundreds of thousands of "useless eaters" by Nazi Germany in the course of the Second World War.[37] The Covenant surely forbids systematic homicide by public authorities, even if carried out in order to relieve the society of the economic and social burden of maintaining hospitals, sanatoriums, asylums, etc.

The crux of the matter is voluntary euthanasia, consisting of "mercy killing" of one individual, who may demand "the release of death from helpless and hopeless pain,"[38] by another (usually, a physician or a relative of the deceased). Legally speaking, assuming that Article 6 re-

quires the state to outlaw and prevent private homicide, the gist of the question is, "how far the consent of the victim may negate what would otherwise be a violation" of the right to life; i.e., whether waiver of the right to life is permissible.[39] Mercy killing upon the victim's request is "hardly distinguishable from assistance in suicide."[40] A legal system which penalizes attempted suicide will not condone euthanasia. But even if attempted suicide by itself is not a crime, euthanasia raises the specter of potential abuse. It is all too easy to kill "undesirables" under the guise of mercy. Several members of the Human Rights Committee felt that euthanasia was inconsistent with the Covenant. Particularly criticized was one state which had a statute mitigating the penalty for homicide when mercy was the motive.[41] If a state is permitted to excuse euthanasia, it is indispensable to assure that the consent is authentic and to set the precise form in which waiver of the right to life must be expressed to be valid. Euthanasia practiced by state officials is especially suspect and would require particularly rigorous safeguards.

Related issues have come to the fore in recent years due to the advances in modern medicine. There have been debates about the lengths to which one must go to keep a person alive through sophisticated means, and the allocation of scarce resources to save life; even the concept and definition of life and death itself have been debated. Several kinds of problems with different dimensions have arisen. First, at what point may a person be pronounced dead, so that doctors may proceed to remove a vital organ (e.g., the heart) and transplant it to another person's body?[42] Second, some medical resources, such as dialysis treatment for kidney failures, are scarce and their allocation saves certain individuals while dooming others;[43] what are the permissible standards for selection consistent with the right to life? Third, if a person is lingering in what doctors declare to be an irreversibly "vegetative" state and the vital processes of the body can only be sustained through specialized technological procedures, is it permitted to discontinue artificial life-support measures? This may be seen as euthanasia by omission.[44] The question came up before the Supreme Court of New Jersey in 1976 in the celebrated *Quinlan* case.[45] It was decided that, as a matter of domestic law, if there is no reasonable possibility of a person ever emerging from a comatose condition to a cognitive state, life-preserving systems may be withdrawn.[46] It is a plausible interpretation of the Covenant, too, that when life becomes an indignity endured without autonomy and awareness, death may be permitted to take its natural course.[47]

Does Abortion Impinge upon the Human Right to Life?

Is prenatal life protected by law, and when does the human right to life begin? Article 4 of the American Convention responds to this query expressly by stipulating that the right to life exists, "in general, from the moment of conception."[48] If the fetus has a right to life from the moment of conception, abortion is tantamount to murder and the state is obligated to protect the fetus against a prospective mother who desires to destroy it. But an attempt to introduce the words "from the moment of conception" into Article 6 of the Covenant failed.[49] That suggests that at least during most of pregnancy—until "the point at which the fetus becomes 'viable', that is, potentially able to live outside the mother's womb, albeit with artificial aid"[50]—the only human rights that have to be taken into account are those of the woman.[51] If the right of the fetus to life is not recognized, one may even speak about the human right of the woman to abortion.[52]

These and other issues concerning the right to life will have to be resolved in the application of the Covenant so that the human right to life will achieve its full development.

Physical Integrity

Freedom from Torture and Degradation

Article 7 of the Covenant forbids (a) torture; (b) cruel, inhuman, or degrading treatment or punishment; and (c) medical or scientific experimentation without free consent. The fundamental freedom from torture and degradation is also enshrined in Article 5 of the Universal Declaration of Human Rights,[53] Article 3 of the European Convention,[54] and Article 5 of the American Convention.[55] The Covenant alone includes in this freedom the right not to be subjected to medical or scientific experimentation without free consent.

The prohibition of torture may be regarded as an integral part of customary international law, and it may even have acquired the lineament of a peremptory norm of general international law, i.e., *jus cogens*.[56] There is no definition of the term "torture" in Article 7 or in other instruments. Such a definition (which, while not legally binding, is entitled to great weight) appears in Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and

Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the General Assembly in 1975.[57] The article reads:

> 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.[58]

The key elements of this definition are beyond dispute. First, torture may be either a mode of punishment (for instance, drawing and quartering) or a form of treatment having other purposes. Second, the reason motivating torture—inducing confessions, eliciting information, instilling fear (in the victim or another person) or even sheer sadism—is immaterial. Third, torture may be either physical or mental.[59] What is less clear is whether the term "torture" has a subjective element as applied to the individual, i.e., whether the victim's particular tolerance to pain may be a determining factor in establishing whether a specific act amounts to torture.[60]

Whatever the constituent elements of torture are, the term must be distinguished from cruel, inhuman or degrading treatment and punishment. As the European Court of Human Rights ruled in the *Northern Ireland* case (1978): "This distinction derives principally from a difference in the intensity of the suffering inflicted."[61] That is, the expression torture attaches a "a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[62] On that basis the Court reached the conclusion that certain techniques for interrogation in depth (sometimes called "disorientation" or "sensory deprivation") used by the British security forces in Northern Ireland in 1971[63] amounted to inhuman and degrading treatment but not to torture.[64]

The European Court of Human Rights also held in the *Tyrer* case (1978), that the level of suffering which justifies the use of the term "inhuman" is higher than that which warrants the adjective "degrading."[65] There seems to be, then, a scale of aggravation in suffering which commences with degradation, mounts to inhumanity and ultimately attains the level of torture. It is not quite clear what level of

suffering inflicted merits the label "cruel," but presumably it is somewhere between inhuman conduct and torture.

A further distinction is made between degrading (as well as cruel or inhuman) treatment, on the one hand, and degrading (as well as cruel or inhuman) punishment, on the other.

A degrading treatment must be both degrading and treatment. It was observed in the course of drafting Article 7 that the word "treatment" should not apply to degrading situations which might be due to general economic and social factors.[66] Thus, "treatment" must be a specific act (or omission) perpetrated deliberately with a view to humiliating the victim. What acts are to be considered degrading is less easy to answer. There is some authority for the proposition that under certain circumstances illicit discrimination may by itself amount to degrading treatment.[67] The following practices also appear to deserve being subsumed under the heading of degrading treatment:

—Committing a sane person to a mental institution for psychiatric treatment because he holds certain nonconformist political views[68]
—Compelling new immigrants to go through demeaning procedures such as "virginity tests"
—Admitting a foreign laborer (*Gastarbeiter*) into a country for a prolonged period of time on condition that he does not bring his family with him.

Punishment presumably means punishment imposed by a court following conviction for crime. There is no consensus as to what judicial punishment can be branded cruel, inhuman, or degrading. In a sense, the mere fact of being convicted and subjected to judicial punishment is itself humiliating and degrading. But as the European Court stated in the *Tyrer* case, it "would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is 'degrading.' "[69] Some further criteria must be used depending "on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution."[70]

Moreover, as the Court pointed out, "A punishment does not lose its degrading character just because it is . . . an effective deterrent or aid to crime control."[71] A punishment may also be cruel even though no cruelty is intended: as Bion said more than two millennia ago, though boys throw stones at frogs in sport, the frogs do not die in sport but in earnest.[72]

One school of thought maintains that capital punishment does not comport with human dignity and should be categorized as cruel and inhuman punishment.[73] Yet, as we have seen, this punishment is in fact permitted (subject to some exceptions) under Article 6. On the other hand, if the death penalty involves torture or a lingering death—if there is more to it than "the mere extinguishment of life"—it is cruel and inhuman.[74] It is submitted that public execution, which is still a frequent occurrence in some Arab and African countries, is a degrading punishment. A degrading punishment which may be regarded as irrefutably illegal under Article 7 is putting a person in the pillory and exposing him to public ridicule (as was common in days past). It must not be concluded, however, that publicity is the only relevant factor in assessing whether a punishment is degrading. As the Court in the *Tyrer* case emphasized, a punishment may be degrading even in the absence of publicity.[75] The Court, faced with a case of whipping inflicted privately as a punishment on a male juvenile under the penal law of the Isle of Man (a dependency of the British crown with its own legal system), ruled that judicial corporal punishment was degrading punishment.[76]

The position is less clear in respect of certain other judicial punishments such as solitary confinement or even life imprisonment. It is at least arguable that these two are inhuman punishments, although it is difficult to accept that life imprisonment is barred by the Covenant if capital punishment is permitted.

Medical and scientific experiments raise a number of questions, mostly in regard to circumstances which may vitiate consent. The clause banning experimentation in the absence of free consent was introduced into Article 7 in order "to prevent the recurrence of atrocities such as those committed in concentration camps during the Second World War."[77] The so-called experimentations carried out by the Nazis on inmates of concentration camps subjected the latter to, inter alia, poisons, epidemics, freezing conditions, and extremely high altitudes.[78] Such outrages can be regarded as outright torture, in which case consent is not an issue: torture, unlike medical or scientific experimentation, is unlawful even if the victim (say, for masochistic reasons) agreed to be subjected to it. With genuine medical and scientific experiments, however, free consent is the central issue. If a scientist allows himself to be infected with a microbe, or exposes himself of his own free will to radiation, with a view to advancing human knowledge, the element of consent is the touchstone of legality.[79] Still, there are problems concerning people (e.g., prisoners) who are placed in such a position that

their consent to be exposed to risks through experimentation may be taken with a grain of salt.[80] Edmond Cahn speaks about the "engineering of consent" by exploiting the condition of necessitous men.[81] On the other hand, there are instances of unimpeachable experiments performed on a massive scale without seeking the consent of the persons concerned, for example, the addition of fluoride to the water supply on an experimental basis.[82] Perhaps there is room for the notion of constructive consent in such circumstances. The words "in particular" which link the two sentences of Article 7 were designed by the framers of the Covenant to make it clear that only experiments which come within the range of inhuman treatment are forbidden whereas legitimate scientific or medical practices are not hindered.[83]

Liberty

Freedom from Slavery and Forced Labor

Article 8 of the Covenant proclaims the fundamental freedom from slavery and forced labor. This human right is also enunciated in Article 4 of the Universal Declaration of Human Rights,[84] Article 4 of the European Convention,[85] and Article 6 of the American Convention.[86] There is also a series of conventions dealing with the subject: the 1926 Slavery Convention,[87] the 1930 ILO Convention (No. 29) concerning Forced or Compulsory Labor,[88] the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;[89] and the 1957 ILO Convention (No. 105) concerning the Abolition of Forced Labor.[90]

Article 8 prohibits slavery, the slave trade, servitude, and forced or compulsory labor. None of these expressions is defined in the article. The common denominator of slavery, slave trade, and servitude—as distinct from forced or compulsory labor—is that they are forbidden irrespective of the consent of the person concerned. A proposal to insert the adjective "involuntary" before the word "servitude" was opposed for this very reason: servitude (like slavery and slave trade) is prohibited in any form, whether involuntary or not, and no person may "contract himself into bondage."[91] The term "slavery" is technical and limited in scope, inasmuch as it implies ownership as chattel by another person and "the destruction of the juridical personality."[92] "Slave trade" is also an expression that should be strictly construed. A proposal to substitute for it "trade in human beings" (a phrase covering traffic in

women for sexual exploitation as well as slaves) was not accepted.[93] "Servitude" is a broader term "covering indirect and concealed forms of slavery."[94] It seems to include, though it is not limited to, peonage and serfdom.[95]

The expression "forced or compulsory labour" is defined in Article 2 of the 1930 ILO Convention in the following terms (subject to five exceptions enumerated in the Article): "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[96] Yet this definition was not considered by the framers of the Article as "entirely satisfactory for inclusion in the covenant."[97]

Article 8 expressly states that the prohibition of forced or compulsory labor does not preclude (a) the performance of hard labor as a punishment concomitant with imprisonment pursuant to a sentence by a competent court; (b) any other work or service normally required of a person who is under detention in consequence of a lawful order of a court (or during conditional release from such detention); (c) any service of a military character (as well as national service required by law of conscientious objectors); (d) any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (e) any work or service which forms part of normal civil obligations.

The difference between hard labor as a punishment (a) and service normally required of a person under detention (b) is that the former pertains to a specific punishment of "hard labor" to which a competent court expressly sentences a convicted person, whereas the latter covers ordinary prison work which all persons under detention may be required to perform.[98] Even when hard labor is imposed by a court of law, however, the hardship entailed must be within reason. As for service normally required of a person under detention, the adverb "normally" is used with a view to providing "a safeguard against arbitrary decisions by prison authorities."[99] Regarding service of a military character, as well as national service required by law of conscientious objectors (c), the question arises whether conscientious objectors are entitled to be compensated with pay equal to that received by soldiers. Proposals to deal with the subject in Article 8 failed.[100] Services exacted in times of emergency (d) do not present a problem. But what is meant by "normal civil obligations" (e)? It is noteworthy that in the case of *Iverson v. Norway* (1963), the European Commission of Human Rights refused to view the obligatory public service of a Norwegian dentist assigned (by law) for one year to a remote area in the northlands as unlawful forced labor.[101]

Another important question is whether a state may impose a general duty to work by penalizing a so-called parasitic way of life (in the style of the USSR).[102] In my opinion, such legislation must be viewed as an infringement on human rights. Every person enjoys a right to work under Article 6 of the International Covenant on economic, Social, and Cultural Rights[103] (and various other instruments). But there is no obligation to work. An "anti-parasite" law collides head-on with the prohibition of forced labor.

On the other hand, if a person does not wish to work and the state (without penalizing his conduct) withholds relief from him, this purely financial pressure does not amount to compulsion.[104] Moreover, if abstention from work is coupled with other factors, it may amount to vagrancy. Article 5(1)(e) of the European Convention expressly permits the detention of vagrants.[105] In the *Vagrancy* cases (1971), the European Court of Human Rights pointed out that the Convention does not define the term "vagrant."[106] The Court examined a definition contained in the Belgian Criminal Code, under which "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession."[107] There are three cumulative conditions in this definition, and the Court held that it is reconcilable with the usual meaning of the term "vagrant."[108] Thus, a person who merely has no regular trade or profession cannot be regarded as a vagrant and if detained on that ground alone, the state would be in violation of Article 8 of the Covenant.

The Right to Liberty and Security

Article 9 of the Covenant sets forth the right to liberty and security of the person. This right is confirmed in Article 3 of the Universal Declaration of Human Rights (together with the right to life), Article 5 of the European Convention,[109] and Article 7 of the American Convention.[110]

The term "right to liberty"—which may be paraphrased as the "freedom of freedom"—sounds like an abstract slogan. But it implies physical freedom and encompasses the very concrete and specific freedom from arbitrary arrest and detention, a right which is as critical as any, and too commonly dishonored in our time.

Every society uses criminal law and institutions to maintain order and justice, as well as to protect the rights of others. The procedures and sanctions of the criminal process, however, impinge on the freedom of the individual charged with and convicted of crime (and in

extreme cases take his life). Such invasions of freedom are justified because they are necessary to protect society, but they are justified only if and to the extent that they are indeed necessary. The criminal process, however, is subject to failures and abuses, which are among the greatest threats to human rights, particularly to the rights to life and liberty.

Protection against inadequacies of the criminal process is a principal concern of international human rights. It is the subject of several articles in the Covenant and of a separate essay in this volume (see essay 6). In this essay, the emphasis is on one crucial aspect of that protection: the protection against arbitrary arrest and detention. Too often, in too many societies, individuals are arrested and detained without proper cause, not as part of the criminal process but in situations where the criminal law has no legitimate place.

Article 9 of the Universal Declaration [111] deals with freedom from arbitrary arrest, detention, or exile as an independent human right, separate from the right to liberty in Article 3. Article 9 of the Covenant, however, brings the freedom from arbitrary arrest or detention (though not the freedom from arbitrary exile) within the bounds of the right to liberty, as do Article 5 of the European Convention and Article 7 of the American Convention. Article 9 of the Covenant spells out this freedom as follows: "(1) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Once more we encounter a reference in the Covenant (an international legal instrument) to the national legal system. The generic term "law" in its ordinary use embraces not only statutory enactments but also subordinate legislation and even unwritten ("common") law.[112] The European Court of Human Rights held in the *Golder* case (1975), that such subordinate forms of legislation may fulfill the condition "in accordance with the law," which appears in the European Convention in a different context.[113] In yet another frame of reference, the Court observed in the *Sunday Times* case (1979) that the word "law" in the expression "prescribed by law" covers "not only statute but also unwritten law." The Court added that any other interpretation would strike at the very roots of the legal system of a common-law state.[114] Still, the Court ruled that a law must be (a) adequately accessible to all citizens; and (b) formulated with sufficient precision to enable the citizen to regulate his conduct.[115] The citizen, in the Court's words, "must be able—if need be with appropriate advice—to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[116] The principle governing restrictions of human

rights, according to this judgment, is "the principle of legal certainty," though the Court stressed that absolute certainty is unattainable and, indeed, that excessive rigidity is undesirable.[117]

Generally speaking, the requirement that both the grounds for detention and the procedure leading to it must be "established by law" emphasizes the need to promulgate ground rules and to circumscribe the freedom of action of public officials. Not every policeman (or other state functionary) is entitled to decide at his discretion, and on his own responsibility, who can be arrested, why and how. The Permanent Court of International Justice pointed out in its Advisory Opinion in the *Danzig Decrees* case (1935) that "the principle that fundamental rights may not be restricted except by law" does not necessarily exclude the use of discretion in applying the law.[118] But the Court went on to say that there are some cases in which the discretionary powers left to a public authority are so wide that they exceed acceptable limits.[119] That statement has important implications for Article 9 of the Covenant, too.

A major question is whether the requirement that grounds and procedures of detention be established by law exhausts the injunction against arbitrary arrest and detention. This brings to the fore the meaning of the pivotal term "arbitrary." Several opinions were expressed on this issue in the process of drafting Article 9. According to one school of thought, "arbitrary" is synonymous with "illegal" or "contrary to the national legislation."[120] In other words, an arrest is arbitrary only if it is not sanctioned by law: any detention carried out under the imprimatur of law is by definition nonarbitrary and therefore permissible. On the other hand, it was argued that "arbitrary" means "unjust" and that all legislation must "conform to the principle of justice."[121] This was the position of the American Delegation in the Third Committee of the General Assembly: "Arbitrary arrest or detention implied an arrest or detention which was incompatible with the principles of justice or with the dignity of the human person irrespective of whether it had been carried out in conformity with the law."[122]

The allusion to "justice" in this context may have referred to the principle in traditional international law that a state is responsible for a "denial of justice" to a national of another state. In essence, the question is whether there exists an objective international minimum standard so that a law incompatible with it may be declared in contravention of human rights. The prevailing and better view is that Article 9 imports such an international minimum standard,[123] although proposals listing the possible grounds on which deprivation of liberty may be justified

were rejected by the framers of the article.[124] As the European Court of Human Rights held in the *Winterwerp* case (1979): "In a democratic society subscribing to the rule of law . . . no detention that is arbitrary can ever be regarded as 'lawful.' "[125] It is manifestly the purpose of the Covenant to protect individuals from despotic legislation and to establish that deprivations of liberty, such as occurred under the Nazi regime, are not consistent with human rights merely because they were prescribed by national law.[126] The duties corresponding to international human rights are incurred by states. If states are free to determine the scope of their own obligations, international human rights are liable to become empty shells. Only an international minimum standard which operates independently of the vagaries of national legal systems can effectively protect human rights. The idea that no one can be subjected to arbitrary arrest or detention was imported into Article 9 of the Covenant from Article 9 of the Universal Declaration. A study of the drafting of the earlier document supports the conclusion that the intent of the framers of the original clause was to bring national legislation into line with an international minimum standard.[127]

While the content of a minimum international standard cannot be defined or enumerated, one form of arbitrariness is surely within the prohibition of Article 9—when the law permitting detention is a *lex specialis* applicable solely to John Doe und not to others. Article 9 implies that the law governing detention must be of general applicability. The arrest of a given person on legal grounds fitting only the specific occasion is arbitrary—notwithstanding the form of law supporting it—because it is capricious.

Of course, what is or is not arbitrary may depend on the context and circumstances. For example, the European Court of Human Rights pronounced in the *Engel* case (1976) that members of the armed forces are also entitled not to be dispossessed of their liberty in an arbitrary fashion.[128] Still, disciplinary penalties which would be deemed a deprivation of liberty if applied to a civilian may be permissible when imposed on a serviceman.[129]

Article 9(2) provides: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

This right is applicable in the legitimate criminal process and expresses rights to which even those properly charged are entitled (see essay 6). But it is also designed to ensure against the abuse of the criminal process. The goal is to avoid a Kafkaesque world in which people find themselves deprived of their liberty without even knowing why.

A distinction is drawn, however, between giving reasons for arrest and informing the person of the charges against him. Reasons for arrest must be given at the time a person is arrested. The competent authorities are then given "sufficient time to prepare a detailed brief of the charges," although the period should be as short as possible.[130] Charges are, of course, more formal in character, although there is no requirement that they be imparted in writing.[131]

Article 9(3) provides in part: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."

There are two parts to this right. First, the freedom of action of the executive branch of government is circumscribed. A temporary administrative detention is permissible—if authorized by law—but the detainee must be brought promptly before the judiciary. The term "promptly" is not defined, but obviously it is a matter of hours or days rather than weeks or months. The European Court of Human Rights held in the *Lawless* case (1961) that administrative detention without bringing the detainee before a judicial authority is in contravention of this human right, even if its purpose is the prevention of future offenses rather than the punishment of past ones.[132]

What is the meaning of the term "other officer authorized by law to exercise judicial power"? The question arose before the European Court of Human Rights in the *Schiesser* case (1979).[133] The Court ruled that there is "a certain analogy" between such an officer and a judge, though the term "officer" has a wider meaning.[134] The exercise of judicial power "is not necessarily confined to adjudicating on legal disputes" and the officer may be an official in the public prosecutor's department.[135] Nonetheless, the Court reached the conclusion that the officer could not conceivably exercise judicial power if he does not enjoy independence from the executive and the parties.[136] In addition, the person arrested must appear before the officer who must also review "the circumstances militating for or against detention" on the basis of legal criteria.[137]

Second, once the detainee is charged, his detention may be extended (by order of a judge) on remand, although he must be brought to trial within a reasonable time. What is "reasonable time" in the context? The expression has created difficulties under the European Convention on Human Rights.[138] The European Court of Human Rights, in the *Wemhoff* case (1968), interpreted the phrase "shall be entitled to trial within a reasonable time" (which appears both in the European Con-

vention and in Article 9 of the Covenant) as relating "to the whole of the proceedings before the court, not just their beginning."[139] It is not enough that trial begin within a reasonable time, but conviction by a court of first instance or acquittal and release must also be within a reasonable time. In the *Stögmuller* case (1969), the European Court indicated that it is not feasible to translate reasonable time "into a fixed number of days, weeks, months, or years."[140] In the *Wemhoff* case it held: "The reasonableness of an accused person's continued detention must be assessed in each case according to its special features."[141]

The Court declined to endorse the European Commission's set of seven general criteria for assessing the length of the detention imposed, preferring to rely on the specific circumstances of each case and on the reasons given by the national authorities for prolonging detention.[142] Accordingly, the Court reached different conclusions in two judgments pertaining to lengthy periods of detention delivered on the same day. In the *Wemhoff* case, the Court found that a period of three and a half years of preverdict detention was not unreasonable considering the exceptional complexity of the investigation.[143] But in the *Neumeister* case, the Court pronounced that a period of two years of detention on remand constituted a violation of human rights.[144]

Article 9(3) continues: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

This unusual formulation, couched in negative rather than affirmative terms, is tied in with the overall requirement in Article 9(1) that detention not be "arbitrary." It is clear that release from custody pending trial (subject to guarantees of appearance) may not be denied arbitrarily. On the other hand, there is no absolute right to such release. Applying similar provisions, the European Court has confirmed that there are three acceptable grounds for continued detention and refusal of release.[145] These are:

1. Danger of flight: if there is reason to fear that the accused will abscond because of the severity of the sentence which the accused may expect in the event of conviction;[146] or because of his character, his morals, his home, his occupation, his assets, his family ties, and all kinds of links with the country in which he is prosecuted;[147] or even because of the accused's particular distaste of detention.[148]
2. Suppression of evidence: if there is reason to fear that evidence

will be destroyed, especially as a result of the accused communicating with persons who might be involved.[149]

3. Repetition of the offense: if the accused is charged with a serious offense and there is danger that, should he be released, he would repeat it[150] or commit other offenses.[151]

The guarantees that may be required for release from custody (when granted) may vary from one country to another, and they do not necessarily have to be "of a purely financial character."[152] Yet bail is probably the most common guarantee. The forms of bail are manifold, but the common purpose is to secure the presence of the accused at his trial "by the threat that nonappearance will entail the forfeiture by the accused or some other person of a specified sum of money."[153] In practice, release from custody may be improperly denied not merely by refusal without reason to grant bail, but also by setting it at an excessively high figure. Justice Douglas of the Supreme Court of the United States stated the case lucidly: "The presumption that a man is innocent until proven guilty is in effect circumvented if a man is imprisoned, pending trial, because he cannot raise bail."[154]

Indeed, an indigent defendant who loses his freedom because he cannot provide bail may also lose the opportunity to investigate his case and to earn money he may need to press his case properly.[155] Consequently, the method of calculating bail is of crucial importance. The European Court held in the *Neumeister* case, that the purpose of the calculation of bail is to ensure the presence of the accused at his trial.[156] Assessment of bail on the basis of extraneous considerations (such as the amount of the loss resulting from the offense imputed to the accused which the accused may be called upon to make good) is therefore a violation of the individual's rights.[157] The amount of bail must be assessed principally by reference to the accused, his assets, and his relationship with any guarantors that he may have, so that the prospect of loss to the guarantors will act as a sufficient deterrent to dispel any wish to abscond.[158]

Article 9(4) provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

As the the European Court of Human Rights held in the *Vagrancy* cases (1971), the purpose of this provision is to assure that detainees have the right to judicial review of the lawfulness of their arrest.[159] Hence, the right is limited to instances in which the decision depriving

a person of his liberty is taken by an administrative body.[160] If the decision is made by a court in the first instance, the supervision required is already incorporated in that decision and the state need not make available to the person concerned a second judicial review.[161] For this purpose an authority is judicial in nature if it provides the fundamental guarantees of judicial procedures.[162] In the *Winterwerp* case, the Court added that it is essential that the detainee should have an "opportunity to be heard either in person, or where necessary, through some form of representation."[163]

The technique used to enable a detainee to get the necessary judicial supervision of the lawfulness of his arrest depends on the internal legal system. In common-law countries, it will usually take the form of habeas corpus proceedings, but a specific reference to habeas corpus, which had appeared in early drafts of Article 9, was deleted.[164] What ultimately counts is not the specific technique but assured access to a court.

Article 9(5) provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

This is a very important check on the wide powers of the executive to keep a person in detention pending trial. When the executive errs or abuses its powers, it must indemnify the victim for the wrongful deprivation of his liberty. The amount of compensation may take into account not only material but also "moral" damage to the victim.[165] The right of action for compensation apparently lies only against the state as a legal person: a proposal to insert in the article "a right of action against any individual who by his malicious or grossly negligent conduct directly caused the unlawful arrest or detention" was defeated.[166]

Freedom from Imprisonment for Inability to Fulfill Contractual Obligations

Article 11 of the Covenant lays down the rule that "no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." This right is also recognized in Article 1 of Protocol 4 to the European Convention,[167] and in Article 7(7) of the American Convention,[168] although it is not mentioned in the Universal Declaration.

The American Convention clarifies that this principle does not apply to nonfulfillment of duties of support (i.e., maintenance, alimony, and so on). This was also conceded by the framers of the Covenant, who "agreed that Article 11 did not cover crimes committed through the

non-fulfillment of obligations of public interest, which were imposed by statute or court order, such as the payment of maintenance allowances."[169] Thus, the article does not preclude imprisonment for failure to pay judgment debts for damages.[170] Moreover, if a debtor has the financial means to fulfill his contractual obligation but refuses to carry out his undertaking, he is not protected by Article 11.[171] This is the implication of the clause "merely on the ground of inability": a person who is able but unwilling to fulfill contractual obligations may be punished by imprisonment.[172]

An attempt was made in the course of drafting Article 11 to restrict its scope even further to "inability to pay a contractual debt," but this was not accepted.[173] The article therefore covers any contractual obligation, namely, the payment of debts, performance of services, or the delivery of goods.[174]

Conclusion

The rights to life, physical liberty, and integrity are all (in the taxonomy of the Covenant) civil rights. As such, their roots are derived from time-honored traditions of modern civilization. Some have become generally accepted norms of customary international law, at least in their broad outlines.

It is noteworthy that whereas Article 4 permits contracting parties (under certain conditions) to take measures derogating from their obligations under the Covenant in time of public emergency which threatens the life of the nation (see essay 3), no such derogation is permitted from Articles 6, 7, 8 (paragraphs 1 and 2), and 11. That is to say, the rights to life, freedom from torture and degradation, freedom from slavery and servitude, and freedom from imprisonment due to inability to fulfill contractual obligations cannot be suspended even in time of international or internal armed conflict. In the first three instances this is so because of the quintessential nature of the rights: war or no war, emergency or no emergency, summary executions, torture, and slavery are outlawed. In fact, the temptation to perpetrate atrocities increases in time of war, when the enemy is denigrated in the public mind until it assumes a subhuman semblance; all the more reason to ensure that governments do not yield to that temptation. On the other hand, freedom from imprisonment for inability to fulfill contractual obligations is probably not subject to derogation for the paradoxical reason that it has only a marginal significance and is simply irrelevant to the crisis. Free-

dom from forced labor and the right to liberty and security are subject to derogation because they are, to the contrary, both significant and germane to the conduct of hostilities on the front and to the exigencies of the situation in the rear.

Notwithstanding the wide acceptance of the basic principles discussed in this paper, many questions remain regarding concrete issues of interpretation. It is to be hoped that elements of doubt and ambiguity will disappear in the years ahead and that the practice of states will redefine the exact scope of these fundamental freedoms in the largeness of spirit they demand.

ANNEX 4

CAUSATION IN THE LAW

BY

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AND

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without fraud or fault on the part of their respective masters. For, clearly, if the master of the right ship was at fault in allowing it to be lost, plaintiff's goods would in any case have been lost by someone's wrongful act and he is entitled, in that situation, to claim that he has been wrongfully deprived of an economic opportunity.

The second difficulty is to distinguish genuine cases of alternative causation from cases where the wrongful aspect of defendant's act is causally irrelevant. When an unlicensed driver drives carefully but is involved in an accident, we say that the wrongful aspect of his conduct, not having a licence, was causally irrelevant.[27] How do we know this? We have to consider in what respects, if any, the other conditions present would have been altered had defendant had a licence.[28] Since defendant drove carefully, having a licence would have made no relevant difference to the course of events. Hence not having a licence is causally irrelevant. On similar reasoning it has been held, in German criminal law, that a chemist was not liable for negligent killing by renewing a phosphorus prescription without consulting the doctor, since the doctor would probably have continued the phosphorus treatment,[29] if consulted. So, too, the owner of a factory was not liable for negligently killing certain employees who died of anthrax when the statutory precautions which he did not take would probably not have eliminated the anthrax bacilli.[30] No doubt there is room for argument as to what should here count as a relevant difference in the causal process. Suppose it could be proved that the precautions would have eliminated some of the bacilli which entered the bodies of the deceased workers. The matter is clearly one of degree, allowing the court some discretion.[31] If compliance with the law would merely have eliminated some of the bacilli, leaving enough to kill, the law would not inquire, even if it were possible to determine, whether numerically the same bacilli would have entered the victims' bodies at precisely the same time. Generally speaking, perhaps, if lawful conduct would have resulted in a qualitatively similar process, very close in time and space to the

[27] At any rate this is the preferable view. Above, pp. 210–11.

[28] This is what the Germans call the procedure of 'substitution' in contrast with the procedure of 'elimination'. After much controversy the former was decisively upheld in *RGSt* 63 (1930), 392. (Accused rode bicycle without light; deceased collided with another unlighted cyclist and was killed: trial court held wrong in denying causal connection. It ought to have asked whether, if accused had had a light, deceased would have seen the other cyclist. Accused was acquitted of negligent killing on another ground).

[29] *RGSt* 15 (1886), 151.

[30] *RGSt* 63 (1929), 211.

[31] Becht and Miller, op. cit., pp. 28, 31, 187, who advocate 'equating' injuries, i.e. treating them as identical and denying causal connection, when not to do so would intuitively lead to a wrong conclusion.

actual course of events, this will be enough to show that the wrongful conduct was not the 'cause'.[32] Conversely, if compliance with the law would have substituted a causal process either qualitatively different or differing in more than insignificant spatial or temporal respects, defendant or accused would properly be held to have caused the harm in question and should be liable subject to the point about compensation for loss of economic opportunities mentioned above. But when a doctor negligently administered cocaine instead of novocaine and the patient died, a German court held that it was a good defence on a criminal charge of negligent killing that the novocaine would probably have caused death.[33] The causal processes associated with the operation of the two drugs being presumably qualitatively different, this decision cannot, on strict causal principles, be supported.

One final consideration needs to be borne in mind. A court is likely to require some evidence that compliance with the law would have led to substantially the same harm before it will leave the issue to the jury.[34]

In such anomalous cases there are weighty considerations in favour of decisions either way. Perhaps, in general, liability is likely to be affirmed where criminal responsibility is based on the idea of causing harm, and to be denied where the notion of 'increasing the risk' is taken as the basis of responsibility. The idea of 'causing harm' involves close attention to the precise manner of the upshot, whereas the risk theory does not.

32 *Goldblatt* v. *Tabacco* (1949) 299 NY 663, 87 NE 2d 58 (car parked two feet over line was projected another fifty feet and so killed decedent; wrongful parking not proximate cause of death): *Tennessee Trailways* v. *Ervin* (1969) SE 2d 733 (bus going at reasonable 65 rather than 73 m.p.h. would not have avoided accident); *Utzinger* v. *U.S.* (1970) 423 F. 2d 485 (if no projecting rails, speedboat would have run into tree and suffered comparable harm).

33 *HRR* 1930, no. 2034 (RG).

34 *Berry* v. *Borough of Sugar Notch* (1899) 43 Atl. 240 (Pa.); but equally the jury must have some evidence to support a finding that it would not: *Texas & Pacific R.* v. *McCleary* (1967) 418 SW 2d 494.

XV

EVIDENCE AND PROCEDURE

IN this chapter we deal with certain questions of evidence and procedure as they touch those issues which may, in the broadest sense be termed 'causal'. How are such issues settled? What is involved in proving the presence of 'causal connection' between a wrongful act and harm? Here some of the difficulties arise because of the variety of types of causal connection, others from the ambiguities of the expression 'burden of proof', which is used in the formulation of a wide range of issues, procedural and evidentiary, others again from the interplay of questions of proof and principles of legal policy.

I. EVIDENCE ON CAUSAL ISSUES

How causal connection is to be proved is not a question to which writers on evidence have devoted much attention. Wigmore is, of course, an exception. The second volume of his treatise contains a detailed analysis of the topic. This is a valuable pioneering effort but it would not be profitable to attempt to criticize Wigmore's arguments in detail because they fail to take account of certain important distinctions which we have expounded elsewhere in this book. The first is the distinction between particular causal statements on the one hand and, on the other, (*a*) those causal apophthegms which summarize in a form convenient for use in everyday life what experience has shown often to be the cause or consequence of an event of a given type, and (*b*) highly specific generalizations specifying a cause and concomitant conditions believed to be invariably followed by a consequence of a given type, such as Mill thought were implied by and required for the defence of particular causal statements. Instead of recognizing these distinctions Wigmore wavers uncertainly between a Mill-like view of causation[1] and the view that causal statements are reducible to statements of probability. Thus, he insists that causal processes are identified by Mill's principles of inductive logic and says that 'stated in its broadest form the notion of cause and effect is merely that of invariable sequence', yet immediately afterwards advances the inconsistent view that 'an

[1] *Treatise on Evidence* (3rd edn.), s. 446.

that he acted voluntarily in our narrow sense, e.g. if he threw himself under the wheels of a car, no further explanation of the harm is needed. But why should plaintiff in the ordinary case negative his own responsibility before appealing to the fact that, as harm of this sort is usually caused by negligence, it probably was so caused on this occasion?

II. PROCEDURAL EFFECT OF EVIDENCE ADDUCED

Great confusion surrounds the terminology used in discussing the procedural effect of evidence given by the parties.[72] When we speak of the burden of proof being on one party or shifting to the other we may mean one of two types of 'burden' which correspond to two different problems that may arise in a case. The first is the problem whether an issue of fact should be submitted to the trier of fact as one on which he must form a judgment or whether, in view of the conclusive character of the evidence or its lack, only one view is possible. The second is a problem which arises only when it is decided that there is evidence on which the trier of fact is entitled to form a view. The judge must then direct the jury or direct himself, if he is sitting without a jury, on the question which side has the task of persuading the tribunal of fact on the issue in question.

The first sense of 'burden of proof', which is relevant to the first of these problems, is the burden of adducing enough evidence to prevent the issue being withdrawn from or not put to the jury or a directed verdict given. Thus, in a civil case in which the plaintiff alleges negligence, the issue of negligence will not be put to the jury unless evidence has been adduced on which they can reasonably find that defendant was negligent. Again, on a charge of homicide, the issue of provocation will not be put to the jury unless evidence has been adduced by accused or elicited from the prosecution witnesses on which they might reasonably find in favour of accused on that issue. This 'evidentiary' burden does not shift but, on any given issue, it may or may not have been discharged; for, at a given stage, either there is sufficient evidence for the issue to go before the jury, or it is for one of the parties to adduce such evidence.

A different though closely related type of 'burden' is the burden of proof in the sense of the need to persuade the tribunal of fact of the truth of a proposition with the appropriate degree of cogency. This is the only 'burden of proof' which need be mentioned to a jury since, *ex hypothesi*, if the burden of adducing evidence is not satisfied the case is withdrawn from or not put before the jury or a directed

[72] Cross, *Evidence*, p. 86.

verdict is given. On whom, then, does the burden of proving causal connection lie? It is for the plaintiff or prosecution in most cases to persuade the tribunal of fact of the existence of causal connection between wrongful act and harm. It is theoretically possible and, according to one view, sometimes actually the case in civil law that, when plaintiff has given evidence of special cogency, the burden of persuasion then shifts to defendant who is bound affirmatively to prove the absence of causal connection, with the appropriate degree of cogency, viz. on a balance of probabilities.

The two types of burden may most easily be distinguished thus: when *A* has the evidentiary burden, *B* is entitled to have the issue withdrawn from or not put before the tribunal of fact or a directed verdict given unless *A* discharges it: when *A* has the burden of persuasion *B* is entitled to succeed unless the evidence is sufficiently cogent to persuade the tribunal of fact on a balance of probabilities or beyond a reasonable doubt as the case may be of the truth of *A*'s contention. In the case of a persuasive burden there will be, corresponding to the burden on *A*, a presumption in favour of *B*.

Many writers also use the expression 'burden of proof' to characterize the position, e.g. on a criminal charge when, the prosecution having adduced evidence on which the jury could convict, accused is in jeopardy unless he adduces evidence throwing doubt on the case for the prosecution. Such writers also speak of this as an evidential burden, though clearly it should be distinguished from the sense of evidential burden explained above, since failure to discharge the burden in this third sense does not result in the exclusion of any issue from the jury. The same writers also use the word 'presumption' in a corresponding sense. It may be questioned whether it is necessary to employ 'burden of proof' and 'presumption' in this sense in order to describe the judicial process. Would it not suffice to say that accused or defendant runs a risk that the issue will be decided against him unless he throws doubt on the evidence so far adduced? The risk may, of course, be a great one in a case where a reasonable man would come to a conclusion adverse to him, and in such a case he runs the risk that the judge's direction will clearly indicate the conclusion to which he thinks the jury ought to come.

The burden of adducing evidence of causal connection normally rests on plaintiff at the beginning of a civil case. Occasionally causal connection between defendant's conduct and the harm may be admitted on the pleadings. In the ordinary case the burden rests on plaintiff until he has adduced enough evidence to prevent the issue being withdrawn from the jury, and a verdict entered for defendant

at the close of plaintiff's case on the ground that there is no evidence of causal connection.[73] Thereafter neither party has a burden of adducing evidence, though defendant may be in jeopardy unless he presents further evidence which throws doubt on plaintiff's case. This will be the position if such matters as *novus actus interveniens* or the loss attributable to a pre-existing condition of the plaintiff are treated as part of the single causal issue which is already before the jury. If however, such matters are treated as raising separate issues, the 'evidentiary' burden in relation to them will be on the defendant. Thus, the evidentiary burden of showing that plaintiff suffered from a disability or susceptibility before he was injured by defendant's wrong, so that, though causal connection is not negatived, damages should be reduced on that account, rests on defendant.[74] How much evidence he must adduce is another matter; it does not affect the incidence of the burden.

The burden of persuading the court or jury of the existence of causal connection rests on the plaintiff or prosecutor at the beginning of a case. If in a civil case the plaintiff claims damages for several items of harm, he must show that each is causally connected with defendant's wrongful conduct.[75] In a criminal case, at least in English law, it never shifts. In civil law it sometimes does so. 'Shifting' means that defendant must prove the contradictory of plaintiff's contention. We now examine some of the exceptional cases in which the burden of adducing evidence or of persuading the tribunal of fact is said in the appropriate sense to 'shift'. Usually the court does not state what type of burden it has in mind.

(i) The California court has decided that, when two defendants acting independently have each been proved negligent and harm has occurred which is clearly the consequence of the negligence of only one of them, but the evidence does not establish which, 'a requirement that the burden of proof [of causal connection] be shifted to defendants becomes manifest'.[76] This means that the persuasive burden is shifted; defendant must prove that his act was not the cause of the harm.

In *Summers* v. *Tice*[77] both defendants negligently fired at the same time at a quail and plaintiff was struck in the eye by a shot from one of the guns, it being impossible to establish which. A judgment against both defendants was upheld.

[73] *Deutsch* v. *Connecticut Co.* (1923) 98 Conn. 482, 119 Atl. 891.
[74] *Watts* v. *Rake* (1960) 108 CLR 158; *Sayers* v. *Perrin* [1966] QLR 89.
[75] *Edwards* v. *Hourigan* [1968] QR 202; *Negretto* v. *Sayers* [1963] SASR 313.
[76] *Summers* v. *Tice* (1948) 33 Cal. 2d 80, 199 P. 2d 1, 4, *per* Carter J.
[77] Approved in *Cook* v. *Lewis* [1952] 1 DLR 1, 18, *per* Cartwright J.

We must distinguish the case where defendants are acting in concert[78] and one has clearly caused the harm; here the other is responsible not for having caused the harm but on the special ground that he engaged in a common venture with the first.[79]

The principle involved seems reasonable when both or all the defendants against whom it operates are shown to have been at fault on the occasion in question, and the doubt merely concerns which of them caused the harm. For it is fairer that the burden of identification be borne by the wrongdoers rather than their victim when it is their multiplicity alone which precludes the latter from identifying the responsible culprit.[80] In *Sindell* v. *Abbott Laboratories*,[81] however, the California court extended the principle to a case in which defendants were not shown to have been at fault but only to have had a substantial share in the market for the sale of the product which injured plaintiffs. Children whose mothers during pregnancy had taken a certain drug, not then known to be dangerous, later developed cancerous growths as a result. Though they could not show which firms had manufactured the particular samples of the drug taken by their mothers, it was held that they could recover, on the basis of strict products liability, against those firms which individually or together had at that time a substantial share of the California market in the drug. Though it remains open in theory for a firm to show that its product did not cause the harm in the individual case, in practice it could not do so. Hence in effect the court dispenses with the need to prove fault and causal connection and instead treats the manufacturers of the drug as collectively insuring, in proportion to the market share of each, those who suffer harm after using the drug. As Richardson J. points out in his dissent,[82] this is a radical departure from traditional conceptions of tort law, with their emphasis on the matching of plaintiffs and defendants.

(ii) A variant of the last view, supported by Rand J. in the Supreme Court of Canada, is that the burden is shifted if plaintiff shows that defendant was negligent and that either he or another has caused the harm and defendant 'by confusing his act with environmental conditions . . . has in effect destroyed the victim's power of proof'.[83] This probably also refers to a persuasive burden.

[78] *Oliver* v. *Miles* (1926) 144 Mis. 852, 110 So. 666, 50 ALR 357.

[79] Above, p. 325.

[80] Fleming, *Torts*, p. 301.

[81] (1980) 163 Cal. Rep. 132, 607 P. 2d 924; cf. *Bichler* v. *Eli Lilly* (1981) 436 NYS 2d 625; (1980) 94 *Harv. LR* 668.

[82] *Sindell* v. *Abbott Laboratories* (1980) 607 P. 2d 924, 939.

[83] *Cook* v. *Lewis* [1952] 1 DLR 1, 4; *Woodward* v. *Begbie* [1962] Ont. R. 60, 31 DLR 2d 22; cf. *Saint-Pierre* v. *McCarthy* [1957] QR 421; *Gardiner* v. *National Bank Carriers* (1962) 310 F. 2d 284; *Haft* v. *Lone Palm Hotel* (1970) 478 P. 2d 465 (lifeguard if present at pool might have been able to establish how deceased drowned); *contra*: *Matthews* v. *McLaren* (1969) 4 DLR 3d 557, 566 and see E. R. Alexander (1972) 22 *U. Toro. LJ* 98; E. J. Weinrib (1975) 38 *MLR* 518, 525.

But the argument is in any case a weak one,[84] since it is no wrong to another to make it difficult for him to prove a case and, if such a category of wrongdoing were to be introduced, it would constitute an arbitrary form of strict liability, since defendant could often not know in advance whether his conduct was likely in the outcome to present difficulties of proof to a potential victim.

(iii) When the evidence makes it more likely than not that one or other of two defendants has been guilty of negligence causing the harm but does not make it clear which, the California court has again ruled that the (persuasive) burden is on each defendant to disprove negligence and causal connection between his own conduct and the harm.

In *Ybarra* v. *Spangard*[85] plaintiff suffered a shoulder injury during an operation for appendicitis. He joined as defendants the diagnostician, surgeon, anaesthetist, owner of the hospital, and two nurses. One or more of them was clearly responsible and it was held that their control of the things which might have harmed plaintiff 'places upon them the burden of initial explanation', a phrase which may mean either that a persuasive burden rests on each of them or perhaps merely that they are in jeopardy on the issues of negligence and causal connection.

Whether the burden is shifted on such facts has not been decided in English law, but Denning LJ has by different reasoning reached a view similar to that of the California court,[86] while McNair J. was of the opposite opinion.[87]

(iv) These last cases raise the question whether *res ipsa loquitur* in general shifts the persuasive burden of proof. There are certainly statements by courts and writers suggesting that the burden of persuasion shifts,[88] but a closer examination often raises a doubt whether the burden of persuasion is really meant or whether the effect is merely that defendant is in jeopardy since there is evidence on which the trier of fact may and indeed reasonably ought to find against him on the issues of negligence and causal connection.

Our earlier discussion of *res ipsa loquitur* made it clear that the maxim is merely a form of the argument that a particular sort of

[84] B. Hogan, '*Cook* v. *Lewis* Re-examined', (1961) 24 *MLR* 331.

[85] (1944) 25 Cal. 2d 486, 154 P. 2d 687.

[86] *Roe* v. *Minister of Health* [1954] 2 QB 66, 82.

[87] [1954] 2 QB 66; cf. *Nesterczuk* v. *Mortimore* (1965) 115 CLR 140; *Maher-Smith* v. *Gaw* [1969] VR 371; *Hillyer* v. *St. Bart's Hospital* [1909] 2 KB 820, 827; *Macdonald* v. *Pottinger* [1953] NZLR 196.

[88] Phipson, *Evidence* (12th edn. 1976), s. 116. Best, *Evidence*, 12th edn., p. 285 (not mentioning *res ipsa loquitur* but citing *Byrne* v. *Boadle* (1863) 2 H. & C. 722); *Scott* v. *London & St. Katherine Docks Co.* (1865) 3 H. & C. 596, 600 *per* Blackburn J. 'Is not the fact of the accident evidence to call upon the defendants to prove that there was no negligence?'

contingency probably caused harm because, more often than not, harm of that sort is so caused. One view of its procedural effect is that it merely exposes defendant to the risk of a finding of negligence causally connnected with the harm to plaintiff if he fails to throw doubt on or explain away plaintiff's evidence. Although it has occasionally been decided in England that a defendant in a *res ipsa loquitur* case has the persuasive burden[89] of disproving negligence and causal connection, Prosser's explanation of these decisions may well be historically correct;[90] sometimes the relation between the parties is such, as when plaintiff is being carried by defendant for reward,[91] that the burden of disproving negligence and causal connection is a matter of law placed on defendant from the beginning. Dicta of some English judges[92] that *res ipsa loquitur* shifts the 'burden of proof' may mean either that defendant is in jeopardy unless he adduces evidence throwing doubt on plaintiff's case, or that he must prove the absence of negligence to be more likely than not:[93] the latter view now apparently prevails,[94] no doubt because, with the disuse of jury trials in civil cases, a permissible inference tends to be treated as a mandatory one. On the other hand in countries in which juries are still common, the former view is often preferred.[95]

(v) The (persuasive) burden of proving contributory negligence is on defendant; so is the burden of proving unreasonable failure on plaintiff's part to avoid the consequences of wrong.[96] These issues of course involve proof of causal connection between the plaintiff's conduct and the harm.

In some instances other than the foregoing it has been said that a presumption of causal connection arises. This expression may either mean that the persuasive burden rests on the party against whom the presumption operates or that that party is in jeopardy on the

89 *Angus* v. *London, Tilbury & Southend R. Co.* (1906) 22 TLR 222.

90 *Selected Topics*, p. 305.

91 *Christie* v. *Griggs* (1809) 2 Camp. 79; 170 ER 1088; cf. *Travers & Sons Ltd.* v. *Cooper* [1915] 1 KB 73 (bailment of goods).

92 Lords Simon and Simonds in *Woods* v. *Duncan* [1946] AC 401, 419, 439. In this case Lieut. Woods was held to have proved that he was not negligent. Cf. *Heywood* v. *A.G.*, [1956] NZLR, 668, 680. *Moore* v. *Fox* [1956] 1 QB 612. *Barkway* v. *South Wales Transport Co.* [1948] 2 All ER 460.

93 *Ballard* v. *North British R. Co.* [1923] SC (HL) 43, 54; *The Kite* [1933] P. 154; *The Mulbera* [1937] P. 82. *Rolland Paper Co.* v. *C.N.R.* (1957) 11 DLR 2d 754.

94 *Barkway* v. *South Wales Transport Co.* [1948] 2 All ER 460. *Moore* v. *Fox* [1956] 1 QB 612; *Henderson* v. *Jenkins* [1970] AC 282; *Ludgate* v. *Lovett* [1969] 1 WLR 1016. The reason is that, the evidence being undisputed, it cannot properly be disbelieved.

95 *Nominal Defendant* v. *Haslbauer* (1967) 117 CLR 448; *Government Insurance* v. *Fredrichberg* (1968) 118 CLR 403; *Temple* v. *Terrace Co.* (1966) 57 DLR 2d 631; *Rolland Paper* v. *C.N.R.* (1958) 13 DLR 2d 662; *Hawke's Bay Motor* v. *Russell* [1972] NZLR 542.

96 *Wakelin* v. *L.S.W.R.* (1886) 12 App. Cas. 41, 47; Williams, *Joint Torts*, p. 387; *Caswell* v. *Powell Duffryn Collieries* [1940] AC 152, 172, 183; *Hercules Textile Mills* v. *K. & H. Textile Engineers* [1955] VLR 310.

issue in question unless he throws doubt on the existing evidence in favour of his opponent. These we now discuss.

(vi) The Illinois court has held that on a charge of homicide 'when the State has shown the existence, through the act of the accused, of a sufficient cause of death, the death is presumed to have resulted from such act, unless it appears that death was caused by a supervening act disconnected from any act of the defendant'.[97] This presumption, if it merely means that the jury are entitled to and reasonably might find adversely to accused unless the prosecution evidence is subsequently shaken or explained away, seems reasonable, even on a criminal charge, if the act proved was sufficient to cause the harm and defendant's contention is merely that some other cause accelerated the harm. But if treated as throwing a persuasive burden on accused it is inconsistent, for English law, with the principle underlying the decision in *Woolmington* v. *D.P.P.*[98] According to this the persuasive burden is not shifted even when the prosecution adduces strong and unchallenged evidence on a particular issue.[99]

(vii) It is said that in Admiralty law, when a ship damaged in a collision is subsequently lost, there is a presumption that the loss was occasioned by the collision.[1]

(viii) When a defendant alleges an alternative cause, viz. that if he had complied with the law plaintiff would have suffered the same or substantially similar harm, that issue will be left to the jury only if there is some evidence to support the allegation.[2]

(ix) According to Glanville Williams, who distinguishes between 'scientific' and 'legal' cause, the former corresponding roughly to our 'necessary condition', 'once the causal nexus is scientifically established between the defendant's act and the plaintiff's damage, the presumption should be that no event has interposed to make the damage too remote in law. The burden of rebutting this presumption would then rest on the defendant.'[3] This view, of course, stems from the author's general theory of causation: if accepted it would have far-reaching consequences. Thus, suppose in an action under the Fatal Accidents Acts it is proved that *B* negligently injured *A*, and that *A* was taken to hospital, given an anaesthetic, and died under the anaesthetic. On Williams's view, his dependants need only show that but for injury he would not have been given the anaesthetic; they need not show that the anaesthetic was a reasonable one to

97 *People* v. *Meyers* (1946), 392 Ill. 355, 64 NE 2d 531, 533.
98 [1935] AC 462.
99 'Malice' in that case; but the principle is of general application.
1 *The San Onofre* [1922] P. 243, 251, *per* Scrutton LJ; *The City of Lincoln* (1889) 15 PD 15.
2 *Berry* v. *Borough of Sugar Notch* (1899) 43 Atl. 240 (Pa.).
3 *Joint Torts*, p. 242.

ANNEX 5

THE LAW OF TORTS

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Volume 1
Chapters 1–18

PRACTITIONER TREATISE SERIES®

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Annex 5

tion, for Dennis' conduct surely is one of the causes in fact of Penny's harm. We can see that by asking whether Penny would have been harmed if Dennis had properly disposed of the meat. Penny would not have been, so Dennis's conduct is one cause in fact. The question whether Dennis should escape liability, then, is about the appropriate scope of Dennis' liability, whether Dennis' conduct is important enough to justify imposing liability. Or you could say it is about the legal *significance* of causation, rather than the existence of causation. This kind of question is usually tested by asking whether the general type of harm, or sometimes the intervening force that brought it about, was foreseeable.[6]

The chief reason to mention the scope of liability or proximate cause issue in a chapter on cause in fact is that in judging cause in fact issues, it is important to understand that a finding of causation does not determine liability. The plaintiff must not only prove negligence and causation but also must persuade the judge and jury that liability is morally and practically justified. Whenever this point is forgotten, the tendency is to build moral and practical judgments into the cause in fact question. Those judgments are important, but the law has separate places for them. The causation in fact issue is difficult enough without importing difficulties from proximate cause analysis.

Topic B. Tests of Causation

§ 168. The But-For Test of Cause in Fact

The but-for test. In the great mass of cases, courts apply a but-for test to determine whether the defendant's conduct was a cause in fact of the plaintiff's harm, although there are some important exceptions.[1] Under the but-for test, the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred.[2] The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm.[3] The negative part of the but-for test must sometimes be qualified but it is applied in many, many cases as a routine matter. The but-for test requires the plaintiff to persuade the trier that different, non-negligent conduct by the defendant would have avoided harm to the plaintiff.

6. See §§ 187–189 and Chapter 10 generally. *Some* type of harm must be foreseeable, else the defendant is not negligent at all. The problem, whether denominated as one of proximate cause or as one about the scope of duty, arises when the plaintiff suffers a harm that is arguably quite different in its nature from the kind of harm that was foreseeable.

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1. § 175–179.

2. E.g., Hagen v. Texaco Refining and Marketing, Inc., 526 N.W.2d 531 (Iowa 1995) ("that a defendant's conduct was a substantial factor in producing the damages and the damages would not have occurred except for the defendant's conduct").

3. More technically expressed, the plaintiff must persuade the trier that she would not have suffered the harm had the defendant acted otherwise and if she fails to persuade the trier, the trier must find that the defendant's conduct was not a cause in fact.

Meeting the but-for test. In most cases, causation seems obvious and presents no obstacle to the plaintiff. The defendant negligently crashes his airplane into the plaintiff's apartment. The defendant's conduct is a but-for cause of the harm done to the apartment; but-for his negligent piloting, the apartment would have remained standing.

Failing the but-for test. In a number of cases, however, the but-for test of cause in fact puts the plaintiff out of court, even though the defendant is clearly negligent. For example, suppose a product manufacturer is negligent in failing to provide an adequate warning in the owner's manual for an automobile that could start a fire. If the plaintiff admits that he never read the owner's manual at all, the manufacturer's failure to provide it is not a but-for cause of the fire started by the car; an unread warning would have changed nothing.[4] In one case[5] the plaintiff was squatting behind a car. The owner backed up without looking in the rear-view mirror and ran over the plaintiff. The problem was that the owner would not have seen the plaintiff by looking in the rear view mirror. Perhaps the most common way to look at such a case is to say that the driver's negligent conduct was not a but-for cause of the plaintiff's harm. Had the driver looked, she would have seen nothing and would have proceeded to back up. The same injury would have resulted. In an analytically very similar case, a sailor fell overboard and sank like a stone. The ship carried a defective lifeboat and the rescue attempt was futile. But even a good lifeboat would have been of no assistance because the sailor was lost immediately.[6] Although courts could look at these cases in other ways,[7] most judges probably feel that the most straightforward analysis disposes of the claim on cause in fact/but-for grounds.

Multiple causes. Nothing is the result of a single cause in fact. The but-for test does not say otherwise. A special problem with multiple causes arises and requires a different test of causation when either of two causes standing alone would suffice to cause the plaintiff's injury,[8] but it is by no means true that the but-for test reduces everything to a single cause. In fact there are always many causes that meet the but-for

4. Bloxom v. Bloxom, 512 So.2d 839 (La. 1987).

5. Jordan v. Jordan, 220 Va. 160, 257 S.E.2d 761 (1979).

6. Ford v. Trident Fisheries Co., 232 Mass. 400, 122 N.E. 389 (1919). However, rescue at sea cases now show a different spirit, demanding that the vessel maximize the sailor's chances and holding it liable for failure to do so. See 179 below.

7. An alternative analysis is to say that the defendant's conduct IS a cause in fact of the plaintiff's harm. In this analysis, the driver would escape liability, if at all, on the ground that the driver's negligence was not a proximate or legal cause of the harm, because the risk created by not checking the rear view mirror was only a risk of harms that could have been avoided by checking the mirror, not a risk of running over a squatter too low to be seen. In terms of formulation, debate boils down to a question whether you focus on the defendant's "conduct" or on the "negligent segment of the defendant's conduct" as a cause in fact. See Thode, The Indefensible Use of the Hypothetical Case to Determine Cause in Fact, 46 Tex. L. Rev. 423 (1968); JAMES HENDERSON, A DEFENSE OF THE USE OF THE HYPOTHETICAL CASE TO RESOLVE THE CAUSATION ISSUE, 47 TEX. L. REV. 183 (1969) AND THODE, A REPLY TO THE DEFENSE, 47 TEX. L. REV. 1344 (1969). THE PROXIMATE CAUSE APPROACH IS INTELLECTUALLY PLAUSIBLE ENOUGH, BUT IT MAY TAKE ANALYSIS ON A ROUND ABOUT TRIP BACK TO THE SAME FUNDAMENTAL POINT THAT CAN OFTEN BE HANDLED DIRECTLY UNDER THE BUT-FOR TEST.

8. § 170.

test, some represented by negligent conduct, some not. A negligently fells a tree; to get around it, B walks out into the street; C, driving a car, hits his brake to avoid running into C; D, a passenger, is thrown into the windshield. As a pure matter of cause in fact the conduct of A, B, and C are all causes in fact. Without A's conduct, none of this would have occurred and the same can be said of the conduct of the others. If A or C escape liability, it will not be on the ground that they are not causes in fact. The but-for test shows that they are all causes in fact, and if liability is avoided, it will be on an entirely different ground.

§ 169. The Hypothetical Alternative Case in But-for Analysis

The but-for test of causation can be applied only by comparing what happened with a hypothetical alternative. What would have happened if the defendant had *not* been negligent? Would the plaintiff have been injured in the same way even if the defendant had not been negligent? If so, then the defendant's negligent conduct is not a cause in fact of the harm. The hypothetical alternative never occurred, so any comparison of the hypothetical to the events that actually occurred is only a construction of the intellect and often a speculative one at that, not a fact at all. It is nonetheless a construction required by the rule.

Sometimes judges conclude that they cannot know whether reasonable, non-negligent conduct by the defendant would have avoided injury or not, and hence that the plaintiff has failed to sustain her burden of proof.[1] At other times, judges believe they know that reasonable care by the defendant would not have aided the plaintiff. In *Salinetro v. Nystrom*,[2] the plaintiff, who had been in an automobile accident, presented herself to the doctor for x-rays of her lower back and abdominal area. According to the plaintiff, the doctor negligently failed to ask whether she was pregnant. Later, learning that x-rays might have injured her fetus, she terminated her pregnancy and brought suit for negligence. The cause in fact problem arose because at the time the x-rays were taken, the plaintiff did not know she was pregnant. So the court thought it knew what the hypothetical alternative scenario would have been. It thought that the doctor would have asked the plaintiff "Are you pregnant?" and she would have said "No." That meant the x-rays would have been taken anyway, with the same result. So in the court's view, the doctor's negligent failure to ask was not a but-for cause of the harm.

If the court was right in its vision of the hypothetical alternative, then the *Salinetro* decision is right. But its imagined alternative is not the only plausible one for two kinds of reasons. First, the doctor could have avoided negligent conduct in quite a number of ways. For instance, he might have posted signs or handed patients an explanatory pamphlet,

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1. Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69 (3d Cir.1996) (defendant negligently attached too few non-slip strips in its bathtub, but plaintiff could not prove added strips would have prevented fall).

2. 341 So.2d 1059 (Fla.App. 1977).

Annex 5

ANNEX 6

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

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consequence of *that act* must have been the loss, damage, or injury suffered . . . This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. 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. But the law cannot consider . . . the 'causes of causes and their impulsions one on another.' Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. 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." [5]

" The use of the term [indirect damages] to describe a particular class of claims is inapt, inaccurate and ambiguous. 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." [6]

It is only true to say that in the majority of cases, in which the epithets " direct " and " indirect " are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with " proximate " and " remote." [7] The

[5] *Dec. & Op.*, p. 5, at pp. 12–13. Italics of the Commission.

[6] Germ.-U.S. M.C.C. (1922): *War Risk Insurance Premium Claims* (1923), *ibid.*, p. 33, at p. 58.

[7] *Cf. e.g.*, Spanish Zone of Morocco Claims (1923): Claim 25: *Rzini-Beni Madan, Cattle* (1924), 2 UNRIAA, p. 615, at pp. 696–697. The *Rapporteur* considered that a *lucrum cessans* which was " alien " to the act complained of, in other words, had no causal relation therewith, was certainly included in the notion of " indirect or consequential damages " disclaimed by the British representative. In this very case, the *Rapporteur* clearly indicated, however, that he was guided by the principle of integral reparation, of putting the claimant back " in the same position he would have found himself " had the act complained of not been committed (*ibid.*). See also Claim I: *Rzini-Tetuan, Orchards* (1924), *ibid.*, at pp. 651–659. Having held that it was the claimant

decisions of the Portugo-German Arbitral Tribunal (1919) and the German-United States Mixed Claims Commission (1922) categorically show, however, that "indirect damage"—in the strict sense of the term—cannot as a group be excluded from reparation.[8] Moreover, they show that it is "a rule of general application both in private and public law," equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss.

who had voluntarily renounced the pursuit of his cultivation, the *Rapporteur* said that the immediate cause of the loss of a harvest was this decision freely taken, which could only have been the mediate consequence of the alleged insecurity in the district. This distinction between mediate and immediate causality is, in substance, the same as the distinction between proximate and remote causality made by the Germ.-U.S. M.C.C. (1922) and the Portugo-German Arbitral Tribunal. With regard to *lucrum cessans*, the *Rapporteur* also indicated in the same case that it would not be excluded as indirect or consequential damages if it were shown to have "serious chances" of being achieved. The Mex.-U.S. Cl.Com. (1868) in the *Rice Case* (4 *Int.Arb.*, p. 3248) seemed to regard "consequential damages" as meaning *lucrum cessans*. Although differing in terminology from the *Rapporteur*, the *Rice Case* was in substantial agreement with him. It allowed damages for loss arising from "the direct and habitual lawful pursuit of gain, or the fairly certain profit of the injured person, or the profit of an enterprise judiciously planned according to custom and business," and disallowed expectancies from "a mere device of speculation, however probable its success would have been or may appear to the projector" (p. 3248). But the sole Arbitrator in the *Whaling and Sealing Claims*: *The Cape Horn Pigeon Case* (1902), while in substantial agreement with the above cases, refused to call a fairly certain *lucrum cessans* an indirect or consequential damage. He said: "In this case, it is not a matter of *indirect* damage, but of direct damage, the amount of which ought to be assessed" (U.S.F.R. (1902), Appendix I, p. 467, at p. 471. (Transl.) Italics of the Tribunal). See *infra*, pp. 247–248.

A reading of the *Lacaze Case* (1864) (*loc.cit.*, *supra*, p. 241, note 2) and the *Mallén Case* (1927) (Mex.-U.S. G.C.C. (1923) *Op. of Com. 1927*, p. 254, §§ 13, 14), cited by the Commission in the *Venable Case* (1927) will show that what the Mex.-U.S. G.C.C. (1923) had in mind was also the effectiveness of the causation rather than its immediacy or mediacy.

Cf. also Fran.-Ven. M.C.C. (1902): *Pieri Dominique et Cie* (1905), Ralston's *Report*, p. 185, at p. 206: "There can be no allowance for any losses accruing to the claimant in the sale of his houses, such losses not being the direct and approximate result of any cause of which the respondent Government has responsibility, and it is only for such results that indemnity can be awarded." *Direct*, *approximate*, *efficient*, *proximate* are, indeed, often used in this connection synonymously.

However, proximate damages cannot be identified either with *damnum emergens* or "necessary" or "inevitable" damages, even *grosso modo*, as seems to have been assumed by Ecer in I.C.J.: *Corfu Channel Case* (Compensation) (1949), *I.C.J. Reports 1949*, p. 244, at p. 254.

[8] For a discussion of *The Alabama Case* (1872) which adopted a contrary solution see Germ.-U.S. M.C.C. (1922): *War Risk Insurance Premium Claims* (1923), *Dec. & Op.*, p. 33, at pp. 48 *et seq.*, under "*The Alabama Claims decisions considered and applied.*"

Hence the maxim: *In jure causa proxima non remota inspicitur.* Even in cases of "assumed responsibility," with which the German-United States Mixed Claims Commission (1922) was concerned, derogation from this principle is not to be presumed.[9]

In an age when the very principle of causation has been challenged by philosophers, it would seem that the Umpire of the German-United States Mixed Claims Commission (1922) purposely used the phrase "in legal contemplation" when invoking the principle of proximate causality. This principle is a legal nexus of cause and effect and it is necessary to elucidate what is the proper criterion for determining proximate causality in legal contemplation.

It is possible to discern in international judicial decisions the use of two criteria to determine proximate causality, the one objective the other subjective.

The objective criterion, *i.e.*, that the consequences should be normal, seems to be the criterion favoured by the German-United States Mixed Claims Commission (1922). In its decision in the *Life Insurance Claims* (1924), the Commission had to deal with claims of life insurance companies for losses suffered by them through the accelerated maturity of their policies resulting from premature deaths caused by acts of Germany. Speaking of the rules which should govern reparation for injuries causing death, the Commission first recalled the rule of proximate causality which it had laid down in *Administrative Decision No. II* (1923) and then said:—

"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 expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents 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*. The usages, customs, and laws of civilised

[9] See Germ.-U.S. M.C.C. (1922): *War Risk Insurance Premium Claims* (1923), *Dec. & Op.*, p. 33.

Also Rum.-Hung. M.A.T.: *Beligradeanu Case* (1928), 8 T.A.M., p. 967, at p. 971.

Greco-Germ. M.A.T.: *Antippa (The Spyros) Case* (1926), 7 T.A.M., p. 23, at p. 28. U.S.A.: Brit. Cl.Arb. (1927): *The Lisman* (1937), 3 UNRIAA, p. 1767, at p. 1792.

countries have long recognised losses of this character as proximate results of injuries causing death. . . .

" 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* [italics of the Commission] 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. 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.*" [10]

The contrast in which the German-United States Mixed Claims Commission (1922) placed these two types of consequence brings out with great clarity what the Commission meant by proximate cause in legal contemplation. If a loss is a normal consequence of an act, it is attributable to the act as a proximate cause. If a loss is not the normal and natural consequence of an act, it is not attributable to the act as a proximate cause.[11] As to what constitutes a normal and natural consequence of an act,

[10] *Dec. & Op.*, p. 103, at pp. 133–4. Italics added.

[11] See also, *e.g. id.*: *Beha Case* (1928), *Dec. & Op.*, p. 901. Claims on behalf of American holders of insurance policies who failed to obtain the full amount of their insurance claims because of the insolvency of the Norske Lloyd Insurance Co., Ltd., due to the destruction by Germany of property insured by it belonging to other than American nationals. Held: " 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* consequences 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-owned property insured by this Norwegian insurer which resulted in its insolvency *cannot, in legal contemplation, 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 " (pp. 902–3).

For other illustrations of the distinction between the proximate and the remote consequences of an act, see *id.*: *Eisenbach Brothers & Co.* (1925), *Dec. & Op.*, p. 267. The sinking of a ship is the proximate consequence of the planting of a mine. *Id.*: *Neilson (The Mohegan) Case* (1926), *Dec. & Op.*, p. 670. Chased by a submarine, a merchantman strained its engines. The damage is the proximate consequence of the act of the submarine. See also *id.*: *Order of May 7, 1925, Announcing Rules applicable to Debts, Bank Deposits, Bonds, etc.*, *Dec. & Op.*, p. 854.

ANNEX 7

II.—PROTOCOLS OF THE CONFERENCES OF THE ARBITRATORS.

PROTOCOL I.

Record of the proceedings of the tribunal of arbitration under the provisions of the treaty between the United States of America and Her Britannic Majesty, concluded on the 8th of May, A. D. 1871, at the first conference held at Geneva in Switzerland, on the fifteenth day of December, in the year of our Lord one thousand eight hundred and seventy-one.

The conference was convened at the Hôtel de Ville at Geneva, in compliance with notices from Mr. J. C. Bancroft Davis, agent of the United States, and Lord Tenterden, agent of Her Britannic Majesty, in the form following:

Organization and delivery of cases.

The undersigned having been appointed agent of the United States to attend the tribunal of arbitration abont to be convened at Geneva under the provisions of the treaty between the United States and Great Britain of the 8th of May last, has the honor to acquaint Count Sclopis that it is proposed by the Government of the United States that the first meeting of the tribunal should be held at Geneva, if not inconvenient to the arbitrators, on the 15th instant.

J. C. BANCROFT DAVIS.

The arbitrators who were present and produced their respective powers, which were examined and found to be in good and due form, were: Charles Francis Adams, esquire, the arbitrator named by the President of the United States of America; the Right Honorable Sir Alexander Cockburn, the Lord Chief Justice of England, the arbitrator named by Her Britannic Majesty; his excellency Count Sclopis, the arbitrator named by His Majesty the King of Italy; Mr. Jacques Stæmpfli, the arbitrator named by the President of the Swiss Confederation, and his excellency the Baron d'Itajubá, the arbitrator named by His Majesty the Emperor of Brazil.

J. C. Bancroft Davis, Esquire, attended the conference as the agent of the United States; the Right Honorable Lord Tenterden attended as the agent of Her Britannic Majesty.

Mr. Adams proposed that Count Sclopis, as being the arbitrator named by the power first mentioned in the treaty after Great Britain and the United States, should preside over the labors of the tribunal.

The proposal was seconded by Sir Alexander Cockburn, and was unanimously adopted, and Count Sclopis, having expressed his acknowledgments, assumed the presidency.

On the proposal of Count Sclopis the tribunal of arbitration requested the arbitrator named by the President of the Swiss Confederation to recommend some suitable person to act as the secretary of the tribunal.

The Swiss arbitrator named M. Alexandre Favrot as a suitable person, and M. Alexandre Favrot was thereupon appointed by the tribunal of arbitration to act as its secretary during the conferences, and entered upon the duties of that office.

Mr. J. C. Bancroft Davis then presented in duplicate, to each of the arbitrators and to the agent of Great Britain, the printed case of the United

ceived from Mr. Bancroft Davis the information that he was prepared to communicate to the tribunal the action authorized by his Government respecting the declaration made by the arbitrators at the last conference.

Count Sclopis added that, being desirous of advancing the work of the tribunal, he had, therefore, convoked the conference this day, instead of Wednesday, the day to which the adjournment had been made.

Mr. Bancroft Davis stated as follows:

The declaration made by the tribunal, individually and collectively, respecting the claims presented by the United States for the award of the tribunal for—1st. "The losses in the transfer of the American commercial marine to the British flag;" 2d. "The enhanced payments of insurance;" and 3d. "The prolongation of the war and the addition of a large sum to the cost of the war and the suppression of the rebellion," is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.

The agent of the United States is authorized to say that, consequently, the above-mentioned claims will not be further insisted upon before the tribunal by the United States, and may be excluded from all consideration in any award that may be made.

Lord Tenterden then said:

I will inform my government of the declaration made by the arbitrators on the 19th instant, and of the statement now made by the agent of the United States, and request their instructions.

The conference was then adjourned to Thursday, the 27th instant, at 11 o'clock in the morning.

FREDERICK SCLOPIS.
J. C. BANCROFT DAVIS.
TENTERDEN.
ALEX. FAVROT, *Secretary.*

PROTOCOL VII.

Record of the proceedings of the tribunal of arbitration at the seventh conference, held at Geneva, in Switzerland, on the 27th of June, 1872.

The conference was held pursuant to adjournment. All the arbitrators were present.

Decision made official. British argument filed. Sir R. Palmer moves for reargument. Motion denied.

Mr. J. C. Bancroft Davis and Lord Tenterden attended the conference as agents of the United States and Her Britannic, Majesty, respectively.

The protocol of the last conference was read and approved, and was signed by the president and secretary of the tribunal, and the agents of the two governments.

Count Sclopis, as president of the tribunal, inquired whether Lord Tenterden had received the instructions from his government for which he had said that he would apply at the last conference.

Lord Tenterden then read the following statement:

"The undersigned, agent of Her Britannic Majesty, is authorized by Her Majesty's government to state that Her Majesty's government find in the communication on the part of the arbitrators, recorded in the protocol of their proceedings of the 19th instant, nothing to which they cannot assent, consistently with the view of the interpretation and effect of the treaty of Washington hitherto maintained by them; and being informed of the statement made on the 25th instant by the agent of the United States, that the several claims particularly mentioned in that statement will not be further insisted upon before the tribunal by the United States, and may be excluded

from all consideration in any award that may be made; and assuming that the arbitrators will, upon such statement, think fit now to declare that the said several claims are, and from henceforth will be, wholly excluded from their consideration, and will embody such declaration in their protocol of this day's proceedings; they have instructed the undersigned, upon this being done, to request leave to withdraw the application made by him to the tribunal on the 15th instant for such an adjournment as might enable a supplementary convention to be concluded and ratified between the high contracting parties; and to request leave to deliver the printed argument, now in the hands of the undersigned, which has been prepared on the part of Her Britannic Majesty's government under the fifth article of the treaty with reference to the other claims, to the consideration of which by the tribunal no exception has been taken on the part of Her Majesty's government.

"TENTERDEN."

Mr. Bancroft Davis said that he made no objection to the granting of the request made by Lord Tenterden to be permitted to withdraw his application for an adjournment, and to file the argument of Her Britannic Majesty's government.

Count Sclopis, on behalf of all the arbitrators, then declared that the said several claims for indirect losses mentioned in the statement made by the agent of the United States on the 25th instant and referred to in the statement just made by the agent of Her Britannic Majesty, are, and from henceforth shall be, wholly excluded from the consideration of the tribunal, and directed the secretary to embody this declaration in the protocol of this day's proceedings.

He at the same time informed Lord Tenterden that the tribunal assented to his request for leave to withdraw his application for a prolonged adjournment, and also to his request for leave to deliver the printed argument which had been prepared on the part of Her Britannic Majesty's government.

Lord Tenterden then presented copies of the argument in duplicate to each of the arbitrators and to the agent of the United States.

Count Sclopis stated that the tribunal no longer desired the proceedings to be considered confidential so far as publication of them by the United States and British governments is concerned.

He then proceeded to read an address as follows:

MESSIEURS: Au moment où le nœud qui menaçait d'entraver pour longtemps encore l'exécution du traité de Washington vient d'être si heureusement tranché, à l'heure où nos travaux vont prendre un cours libre et régulier, permettez-moi de vous dire, messieurs et très-honorés collègues, combien j'apprécie l'honneur de siéger avec vous dans ce tribunal d'arbitrage, sur lequel sont fixés aujourd'hui les regards du monde civilisé.

Laissez-moi ensuite vous exprimer tout ce que j'éprouve de reconnaissance pour la marque flatteuse de confiance qu'il vous a plu de m'accorder en m'appelant à occuper ce fauteuil.

Je comprends parfaitement tout le prix de cette distinction si peu méritée; mais je comprends mieux encore le besoin que j'aurai d'être soutenu par le concours de vos lumières, et par l'appui de votre indulgence dans l'exercice des fonctions que vous m'avez confiées. Ce sera à vous que je le devrai, si je ne vais pas paraître trop au-dessous de ma tâche.

La réunion de ce tribunal d'arbitrage signale, à elle seule, une nouvelle direction imprimée aux idees qui gouvernent la politique des nations les plus avancées sur la voie de la civilisation.

Nous sommes arrivés à une époque où, dans les sphères les plus élevées de la politique, l'esprit de modération et le sentiment d'équité commencent partout à prévaloir sur les tendances des vieilles routines d'un arbitraire insolent ou d'une indifférence coupable. Diminuer les occasions de faire la guerre, atténuer les malheurs qu'elle traîne à sa suite, placer les intérêts de l'humanité au-dessus de ceux de la politique, voilà l'œuvre vers laquelle se dirigent toutes les grandes intelligences, tous les cœurs haut placés. Aussi avec quel bonheur n'a-t-on pas salué le vœu si noblement exprimé par le congrès de Paris en 1856, que les états entre lesquels s'élèverait un dissentiment sérieux, avant d'en appeler aux armes, eussent recours, en tant que les circonstances l'admettraient, aux bons offices des puissances amies! Que de bons effets n'avait-on pas à attendre de la déclaration de ce même congrès concernant l'abolition de la course, et le respect de la propriété privée? Enfin nous ne saurions oublier ici cette convention de Genève, qui

parvint à placer sous la protection spéciale du droit des gens les élans de la charité sur les champs de bataille.

On a bien dû regretter que les vues si droites et si sages du congrès de Paris n'aient pas été promptement secondées par les événements. De cruels démentis ont été donnés aux aspirations des âmes d'élite;[1] mais l'autorité morale des principes proclamés à cette époque ne s'est point affaiblie.

Grâce à l'initiative des hommes d'état qui président aux destinées de l'Amérique et de l'Angleterre, cette idée généreuse commence à porter ses fruits.

Le grand essai de l'application des règles austères et calmes du droit aux questions ardentes de la politique va se faire. L'histoire contemporaine racontera à la postérité que. même dans la chaleur des plus vives récriminations, on a toujours songé des deux côtés de l'Atlantique à tenir ouvertes les voies d'un accommodement acceptable par les amis de la paix et du progrès.

À travers des négociations nécessairement longues, sous l'action des courants variables de l'opinion publique, inévitables chez les gouvernements à base populaire, le but de ces magnanimes efforts ne fut jamais perdu de vue. Personne, certes, ne pouvait en contester l'utilité; mais d'en venir au point d'accepter purement et simplement le système de l'arbitrage, de renoncer à ce privilége, si cher aux ambitions vulgaires, de se faire justice de sa main, voilà ce qui exigeait une rare fermeté de conviction, un dévouement à toute épreuve aux intérêts de l'humanité. Aussi le premier ministre d'Angleterre a-t-il eu raison de parler du traité de Washington dans des termes qui caractérisent à la fois la grandeur et les difficultés de l'entreprise. "Il se peut," disait-il, "que ce soit une espérance trop éclatante pour être réalisée dans ce monde de misères où nous vivons; l'expérience du moins est digne de l'effort. On recherche, s'il est possible, de soumettre ces conflits d'opinion entre deux nations au jugement d'un tribunal de raison, au lieu de l'arbitrage sanglant des armes. L'histoire se souviendra à l'égard des Etats-Unis et du Royaume-Uni que, ayant à vider de sérieux conflits, et se sentant peu disposés de part et d'autre à céder le terrain, ils se sont néanmoins appliqués à assurer la paix, et non-seulement à régler leurs propres conflits, mais aussi à donner un exemple qui sera fécond en bienfaits pour les autres nations."[2]

On a dit que le triomphe d'une idée utile n'est jamais qu'une question de date. Félicitons-nous, messieurs, d'assister à la réalisation d'un dessein qui doit être fécond des meilleurs résultats; espérons qu'il tiendra dans l'avenir tout ce qu'il promet aujourd'hui.

Nous avons entendu ce cri terrible "la force prime le droit:" c'est un défi porté à la civilisation. Nous voyons maintenant la politique s'adresser à la justice, pour ne pas abuser de la force; c'est un hommage que la civilisation doit recevoir avec bonheur.

Ne nous plaignons pas trop si les questions que nous sommes appelés à résoudre nous arrivent à la suite d'agitations prolongées. Reconnaissons plutôt l'importance des documents qui nous ont été fournis et des raisonnements dont ils ont été accompagnés.

Les longues investigations préparent les meilleures solutions. On navigue plus sûrement sur les rivières qui ont été le mieux sondées.

Le droit des gens a été trop souvent regardé comme un sol mobile, sur lequel, au moment où l'on croit avancer, le pied glisse en arrière. Serait-ce un espoir indiscret que celui de parvenir par nos efforts à rendre ce sol un peu mieux raffermi?

L'objet de nos délibérations demande des études aussi variées que sérieuses. Nous aurons à l'examiner à des points de vue différents. Ce sera tantôt avec la large perception de l'homme d'état, tantôt avec l'œil scrutateur d'un président aux assises, toujours avec un profond sentiment d'équité et avec une impartialité absolue.

Nous nous promettons beaucoup de l'aide empressée des agents des deux puissances qui ont eu recours à ce tribunal; leur haute intelligence et leur zèle éclairé nous sont également connus.

Enfin le tribunal se confie dans l'assistance des conseils des hautes parties présentes à la barre, de ces jurisconsultes éminents dont le nom vaut un éloge. Nous nous attendons qu'ils coopéreront franchement avec nous dans ce qui doit être, non-seulement un acte de bonne justice, mais encore un travail de grande pacification.

Puissions-nous répondre complètement aux louables intentions des puissances qui nous ont honorés de leur choix; puissions-nous remplir, avec l'aide de Dieu, une mission qui mette fin à de longs et pénibles différends; qui, en réglant de graves intérêts, apaise de douloureuses émotions, et qui ne soit pas sans quelque heureuse influence sur le maintien de la paix du monde et les progrès de la civilisation.

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[1] "In the performance of a melancholy duty," dit Sir Robert Phillimore dans la préface à la deuzième édition des *Commentaries upon International Law*, 1871, "I am obliged to close this chronicle of events by the admission that the suggestion contained in the last protocol to the treaty of Paris, 1856, has remained a dead-letter, except perhaps in the case of Luxemburg. Neither of the belligerents in the present horrible war would listen to the suggestion of such an arbitration."

[2] Discours prononcé par Monsieur Gladstone au banquet d'installation du nouveau lord-maire, le 9 novembre 1871.

Vos vœux, très-honorés collègues, s'accorderont sans doute avec les miens pour que l'essai que l'on va faire serve à écarter dans l'avenir les occasions de luttes sanglantes et à raffermir l'empire de la raison.

Dans cette douce prévision, j'aime à rappeler ces paroles du héros de l'Amérique, de George Washington: "S'il y a une vérité fortement établie, c'est qu'il y a ici-bas un lien indissoluble entre les pures maximes d'une politique honnête et magnanime et les solides récompenses de la prospérité et du bonheur public."[1]

Lord Tenterden then stated that Sir Roundell Palmer, Her Britannic Majesty's counsel, had prepared, for the consideration of the tribunal, a statement of certain points of importance, as to which he desires to have an opportunity of submitting to the tribunal further arguments, in answer to those contained in the argument of the United States delivered on the 15th instant; and that Sir Roundell Palmer would now, with the permission of the tribunal, read such statement, of which, with a translation which would be prepared without delay, copies will be delivered to the several arbitrators and to the agent of the United States in the course of the day; and, as the preparation of any further arguments on those, or any other points, will necessarily require some time to be allowed, he begged respectfully to suggest that the counsel on both sides should be informed of the time which the tribunal will be willing to allow, before requiring their further attendance for the purpose of any arguments. If the interval so granted can be extended to the first of August next, it is believed that this will meet the views of the counsel and agents of both parties, and may probably enable the counsel, when again before the tribunal, to discharge their duty in a shorter time than might otherwise be requisite.

Sir Roundell Palmer then read a statement.

Mr. Bancroft Davis then said that upon being furnished with a copy of the paper, now presented on the part of Her Britannic Majesty's counsel, he would lay the same before the counsel of the United States, and would present their views to the tribunal after such consultation.

Count Sclopis then stated that the tribunal had, at the request of the agent of Her Britannic Majesty, granted permission to Sir Roundell Palmer to read the statement requesting the tribunal to authorize him to furnish the arbitrators with further arguments on the points therein specified, and that, with reference to this request, Mr. Adams, as one of the arbitrators, had suggested a preliminary question, viz, whether under the terms of Article V of the treaty of Washington it is competent for the agents or counsel to make requests of this nature, and that the tribunal, after discussion, and having in view the precise terms of the treaty, had decided that the arbitrators alone have the right, if they desire further elucidation with regard to any point, to require a written or printed statement or argument, or oral argument by counsel upon it, under the terms of the said article.

The conference was then adjourned until Friday, the 28th instant, at 11 o'clock a. m.

FREDERICK SCLOPIS.
J. C. BANCROFT DAVIS.
TENTERDEN.
ALEX. FAVROT, *Secretary.*

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[1]Discours prononcé le 30 avril 1789 dans la séance du Sénat américain, lors de la proclamation de Washington à la présidence, et de John Adams à la vice-présidence, des États-Unis.

ANNEX 8

State Responsibility

The General Part

James Crawford

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Annex 8

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15.4 Questions of causation

15.4.1 An expanded rubric

Article 31(1) provides that a state is only under an obligation to make full reparation for injury 'caused' by its internationally wrongful act. The commentary explains that the character of the causal connection required is expressed at this general level on the ground that '[v]arious terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise ... [T]he requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.'[73] The inquiry into whether injury is 'caused' by a wrongful act is not limited to an inquiry into factual causality, which is a necessary but not sufficient condition for reparation. The allocation of injury to a wrongful act is in principle a legal process. The inquiry therefore also includes consideration of whether injury is too 'remote' (or excluded based on criteria variously expressed in terms of lack of 'directness', 'foreseeability' or 'proximity').[74]

The ARSIWA have been criticized for not addressing the requirement of causation in more detail. For example, Stern states:

> [T]he most that can be said is that the ILC is particularly silent on causation. The only assertion is that the injury can only be repaired if it is 'caused by the internationally wrongful act'. Nothing more. It is therefore left to States and judges to give some content to the causal link which is necessary for international responsibility to arise.[75]

The ILC justified the fact that the issue of causal link has not been dealt with by saying that '[t]he need for a causal link was usually stated in primary rules'. Nevertheless, it is clear that this is not the case and that, 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

[73] ARSIWA Commentary, Art. 31, §10.

[74] Ibid. For example, the UNCC held Iraq responsible for 'direct' loss: SC Res. 687 (1991), §16; the tribunal in the *Trail Smelter Case* held certain damage to be 'too indirect, remote, and uncertain': *Trail Smelter Case (United States/Canada)*, (1938 and 1941) 3 RIAA 1905, 1931; the US–Germany Mixed Claims Commission considered whether damage was a 'loss attributable to Germany's act as a proximate cause': Administrative Decision No. 2 (1923) 7 RIAA 23, 30. See further the cases cited in the footnotes to ARSIWA Commentary, Art. 31, §10. For a comparative account see Hart and Honoré, *Causation in the Law* (2nd edn, 1985).

[75] Despite the reference 'to the causal link which is necessary for international responsibility to arise', Stern is discussing the causal link which is necessary between an internationally wrongful act and harm or damage.

rule is breached. It is regrettable that the ILC did not clarify the difficult issues relating to the causal link.[76]

Although the Drafting Committee did state that '[t]he need for a causal link was usually stated in primary rules', the reason the requirement of causation was not elaborated in more detail was because it is not possible to devise more specific criteria that are applicable across the wide range of primary obligations. As the Drafting Committee stated in the sentence immediately before the one quoted by Stern,

> 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.[77]

This is undeniably correct. Shelton recognizes that '[c]ausation is a complex issue in every legal system, where the extent of liability for remote events and the consequences of intervening causes may vary considerably from one area of the law to another'.[78] She adds that:

> A general statement of obligation to make reparation for harm caused masks many difficult legal issues that probably could not be adequately answered by a single set of articles, because the principles are intended to apply to every breach of an international obligation regardless of the source of the obligation or nature of the breach.[79]

The Eritrea–Ethiopia Claims Commission sought to articulate a more specific causation requirement. It concluded:

> [T]he 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.[80]

[76] Stern (2010) 563, 569–70.
[77] ILC Ybk 2000(1), 388. See also Crawford, Third Report, 19; ARSIWA Commentary, Art. 31, §10.
[78] Shelton, (2002) 96 AJIL 833, 846. [79] Ibid., 833 n. 2.
[80] *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, (2007) 26 RIAA 10, 15.

Although containing an additional adjective, the Claims Commission's formulation of the causation requirement does not add anything beyond the meaning of 'caused' elaborated by the ILC in the commentary. The generic character of the Claims Commission's chosen formulation is indicated by the fact that it was able to apply it in relation to all the various violations of international law it had to consider. It seems that the Claims Commission itself attached relatively little importance to its chosen formulation. It acknowledged that 'in many situations, the choice of verbal formula to describe the necessary degree of connection will result in no difference in outcomes',[81] and this is as true of 'proximate cause' as it is of other phrases.

15.4.2 Mitigation of damage and reparation

An integral aspect of causality is the question of mitigation of damage.[82] The commentary explains that '[a]lthough often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility'.[83] It was for this reason that a provision on the issue of mitigation of damage was not included in the ARSIWA, although the issue is addressed in the commentary.[84] The commentary states that 'a failure to mitigate by the injured party may preclude recovery to that extent'.[85] In other words, damage which occurs due to an injured state's failure to act reasonably to mitigate its loss is not 'caused' by the responsible state's wrongful conduct. This is true even for a wholly innocent victim of wrongful conduct.[86] As is stated by the International Court in the *Gabčíkovo-Nagymaros* case,

> Slovakia ... stated that 'It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.'
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[87]

[81] Ibid., 15 (para. 14). [82] Wittich, 'Compensation', (2008) MPEPIL, §20.
[83] ARSIWA Commentary, Art. 31, §11.
[84] ILC Ybk 2000/I, 392 (Chairman of the Drafting Committee).
[85] ARSIWA Commentary, Art. 31, §11. [86] Ibid.
[87] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 55. See also the *Naulilaa* case, in which Portugal's failure to quell an uprising caused by Germany was taken into consideration in determining the extent of the damage in respect of which compensation was due: *Responsabilité de l'Allemagne en raison des actes commis*

The point is that the wrongfulness of conduct is not precluded merely because it is taken for the purpose of mitigating damage. But the Court can be seen to have accepted that the failure of an injured party to mitigate damage may preclude recovery to that extent.[88]

The principle has since been recognized by the Eritrea–Ethiopia Claims Commission. Ethiopia alleged that Eritrea failed to mitigate the damage it suffered as it expended money on a temporary hospital, rather than building a new one from the outset.[89] The Claims Commission rejected this argument on the facts, stating that 'the Commission cannot fault Eritrea for spending ERN 2 million to provide health services urgently needed by a large community'.[90]

15.4.3 *Concurrent causes*

15.4.3.1 The applicable principles

The issue of concurrent causes was raised by Special Rapporteur Arangio-Ruiz. He proposed a provision which read: 'Whenever the damage in question is partly due to causes other than the internationally wrongful act ... the compensation shall be reduced accordingly.'[91] This position was rejected by the Drafting Committee, which stated that 'the wrong-doing State should be liable for all the harm caused, irrespective of the role which external causes might have played in aggravating the harm. In its opinion, that type of situation did not call for a specific provision ... and should simply be covered in the commentary'.[92] Despite this, the Draft Articles Commentary later adopted stated:

> Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases ... to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects ...[93]

postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre (Portugal contre Allemagne), (1930) 2 RIAA 1035, 1076.

[88] Higgins (2010), 540. [89] *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 554.

[90] Ibid., 555. [91] Arangio-Ruiz, Second Report, ILC Ybk 1989/II(1), 56.

[92] ILC Ybk 1992/I, 217 (Chairman of the Drafting Committee). As discussed below, the Drafting Committee did not reject the relevance of the contributory negligence of the injured state: ibid., 217 (Chairman of the Drafting Committee).

[93] Draft Articles Commentary, Art. 44, §13.

The ARSIWA now clearly take the position advocated by the Drafting Committee. The commentary states that '[a]lthough, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes'.[94]

The position taken in the ARSIWA is borne out by the case law,[95] for example the *Corfu Channel* case. That case concerned Albania's failure to warn the United Kingdom of the presence of mines in Albania's territorial waters, which resulted in damage to the United Kingdom's ships. Notwithstanding the fact that the mines had been laid by a third state, the United Kingdom was able to recover the full amount of its claim from Albania.[96] Similarly, when laying down the general principles to govern the recovery of compensation before the UN Compensation Commission, the Governing Council stated that '[w]here, for example, the full extent of the loss, damage or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures.'[97] The position taken in the ARSIWA is consistent with the way the issue of concurrent causes is addressed in national legal systems.[98]

The commentary states that the same 'result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood'.[99] The *Tehran Hostages* case provides an example of the former situation. The International Court held that while the continued occupation of the embassy was attributable to Iran,[100] and Iran was responsible for failing to protect the embassy and its personnel,[101] the students' initial seizure of the premises was not attributable to Iran.[102] But there was no reduction in the reparation due from Iran in the light of the acts of the private individuals. The Court held that 'Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events.'[103]

[94] ARSIWA Commentary, Art. 31, §12. [95] Crawford, Third Report, 19.
[96] *Corfu Channel*, ICJ Rep. 1949 p. 4, 23.
[97] UNCC Governing Council, Decision No. 9, 6 March 1992, UN Doc. S/AC.26/1992/9, §6.
[98] Crawford, Third Report, 20. [99] ARSIWA Commentary, Art. 31, §12.
[100] *United States Diplomatic and Consular Staff in Tehran*, ICJ Rep. 1980, p. 3, 35.
[101] Ibid., 32–3. [102] Ibid., 30. [103] Ibid., 45.

Consideration of a concurrent cause in the form of a natural event can be found in the jurisprudence of the Eritrea–Ethiopia Claims Commission. In relation to Ethiopia's claims concerning internally displaced persons, the Claims Commission held:

> A further complication is that some areas in Tigray were plagued at relevant times both by war and by drought, and both afflictions caused displacement. The evidence did not distinguish between persons who left their homes on account of the war, and those who left for other reasons. However, it was clear that the war was by far the most significant cause of internal displacement, and the Commission has not taken drought into account in seeking to assess the numbers of persons displaced on account of the *jus ad bellum* violation.[104]

This statement is narrower than the position taken by the International Court in the *Corfu Channel* case in that the Claims Commission relied on the fact that the war was not just a cause but the more significant cause of displacement.

There is an exception to the general rule concerning concurrent causes: where an 'identifiable element of injury can properly be allocated to one of several concurrently operating causes alone'.[105] The inability to allocate identifiable elements of injury to particular causes is evident in the examples already mentioned: in the *Corfu Channel* case, the conduct of both Albania and the third state contributed to the same damage, the damage to the United Kingdom's ships; in the *Tehran Hostages* case the simultaneous seizure of the embassy by the private individuals and Iran's failure to protect the embassy contributed to the United States' loss; in the situation considered by the Eritrea–Ethiopia Claims Commission, the individuals in question left their homes due to the effects of both war and drought. But in relation to another claim, the Commission stated:

> Ethiopia occupied Tserona Town for nearly nine of the twelve months between May 31, 2000 and June 2001 when the damage was assessed ... Ethiopia is not liable for damages to the town caused by combat or for looting and stripping of buildings that occurred either before or after its occupation of the town ...
>
> Assessing relative responsibility for the looting and stripping of the town is difficult, not least because some damage resulted from combat operations and its population was absent during the relevant period, including two or three months after Ethiopian forces withdrew. Given this, and considering the evidence as a

[104] *Final Award: Ethiopia's Damages Claims*, (2009) 26 RIAA 631, 733.

[105] ARSIWA Commentary, Art. 31, §13. See also the *Zafiro* case: *Earnshaw v. US*, (1925) 6 RIAA 160, 164–5.

whole, the Commission finds that Ethiopia is liable for seventy-five percent of the damage caused by looting and stripping in Tserona Town.[106]

Here, Ethiopia's conduct and the conduct of private individuals were temporally distinct and caused separate damage.

It is important to note that the issue of concurrent causes is distinct from the issue of a plurality of responsible states (i.e. cases where more than one state is responsible for the same internationally wrongful act), an issue addressed in Article 47.[107]

15.4.3.2 Hard cases

The International Court was confronted with the problem of concurrent causes in the *Bosnian Genocide* case. After finding that Serbia breached its obligation to prevent genocide, the Court stated:

> [The] question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought.[108]

The decision highlights the distinction between causation in the context of a primary obligation and in the context of damages. Before making its finding on causation, the Court stated:

> To make [the finding that Serbia failed to comply with its obligation to prevent genocide], the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because ... the obligation to prevent genocide places a State under a duty to act which is not

[106] *Partial Award: Central Front: Eritrea's Claims 2, 4, 6, 7, 8 & 22*, (2004) 26 RIAA 115, 138–9, 139. Also referred to in *Final Award: Eritrea's Damages Claims*, (2009) 26 RIAA 505, 544.

[107] For a discussion of situations involving a plurality of responsible states as a matter of substance, see Chapter 10. On issues of procedure, see Chapter 20.

[108] *Bosnian Genocide*, ICJ Rep. 2007 p. 43, 234.